

IN THE MATTER OF THE ONTARIO *LABOUR RELATIONS ACT, 1995*

-and-

IN THE MATTER OF AN ARBITRATION

BETWEEN:

ZEHRS MARKETS INC.,
A Division of Zehrmart Limited

- The Employer

-and-

UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION,
LOCALS 175/633

- The Union

AND IN THE MATTER OF a grievance of Mira Klobucar

Arbitrator: Howard Snow

Appearances:

On behalf of the Employer:

Carole Hoglund	- Counsel
Sharon Hughes	- Senior Manager, Industrial Relations
and others	

On behalf of the Union:

Michael Hancock	- Counsel
Julie Johnston	- Union Representative
Mira Klobucar	- Grievor
Joe Klobucar	- Husband of Grievor

Hearing held November 28, 2005, January 19, February 20, April 24, April 25, May 31, July 27, September 6 and October 16, 2006, in Windsor, Ontario.

AWARD

I. INTRODUCTION

The grievor complained that she had been harassed and then subsequently complained that the Employer had failed to take appropriate steps to deal with her harassment complaint. She asserted that both the harassment and the Employer's failure to deal with the harassment complaint violated the collective agreement and the Ontario *Human Rights Code*. In this arbitration the Union raised the same issues.

The Employer denied that the grievor had been harassed and said it had conducted a proper investigation of the grievor's complaints. The Employer submitted that there was no violation of either the collective agreement or the *Code*.

II. THE FACTS

The grievance under the collective agreement and the complaint under the *Human Rights Code* were heard together in this arbitration hearing.

The grievor, Mira Klobucar, has been employed by Zehrs Markets since 1995. Early in her employment the grievor studied at St. Clair College in Windsor to become a pharmacy technician. In April 2001 she transferred to the Lauzon Parkway store in Windsor to begin work as a pharmacy technician.

October 29, 2004, the grievor filed a grievance giving the nature of the grievance as "harassment." February 10, 2005, the grievor filed a complaint under the *Human Rights Code* in which she also complained of harassment and provided many more details of the alleged harassment.

The grievor and the Union alleged that a staff pharmacist in the store, Bassam Zayat, had harassed the grievor on the basis of age and sex, beginning in 2001. The grievor and the Union also alleged that the Employer did not take appropriate steps to deal with the grievor's harassment complaint.

Mr. Zayat and the Employer denied any harassment.

The pharmacy in the Lauzon store is small and on many shifts the grievor and Mr. Zayat were the only pharmacy employees. The grievor alleged that over the period of two plus years during which they worked together, Mr. Zayat made verbal comments to her, the details of which are provided below, which amounted to harassment on the basis of her age and sex.

The grievor's evidence

The grievor testified that Mr. Zayat first came to the store as a replacement pharmacist in 2001. The grievor testified that soon after Mr. Zayat arrived at the store he harassed her by telling her that he liked his new job and was not going back to his old job but rather intended to stay in the pharmacy. I note that the grievor provided no other details of this incident and no suggestion as to how it amounted to harassment on the basis of either age or sex.

The grievor testified that there was further harassment in February 2002 when Mr. Zayat told her that he might call head office and say bad things about her and that head office would believe him as the Employer needed pharmacists and did not need pharmacy technicians.

The grievor testified that additional harassment took place in April 2002. The grievor testified that Mr. Zayat said to her that the pharmacy technician position was an easy job and that he wanted it for his wife. The grievor testified that Mr. Zayat said that the grievor was

old enough to retire and had a comfortable life, and asked why she should continue to work when his own wife needed a job. The grievor testified that Mr. Zayat said the grievor had a home worth \$200,000 and sufficient money in her RRSP to retire. The grievor asked Mr. Zayat how he knew where she lived and whether he drove around her home in order to investigate. She said that Mr. Zayat did not reply, but that she could tell by his body language that he had driven by her home. This allegation that Mr. Zayat drove near her home was the only allegation of harassing conduct - the remaining allegations related to comments only.

The grievor said that after April 2002 there were numerous incidents of verbal harassment when Mr. Zayat yelled at her in inappropriate ways, putting her down as a person. She said he would find any excuse to yell at her about her job performance and degrade her about her job. She said he was always complaining and putting her down in any way he could.

The grievor testified that the next specific incident occurred some 27 months after the April 2002 events. She testified that in July 2004 Mr. Zayat had yelled at her "What kind of hormones are you taking?" The grievor said she understood that comment to be a reference to menopause and to her age, and that he had earlier asked her what she was doing to remain so youthful, so young looking.

In addition, the grievor testified that September 16, 2004, Mr. Zayat had yelled at her and ordered her to go to another store and pick up medications for the pharmacy. The grievor said she had gone on similar outings in the past but that she refused to go in that instance. She said that Mr. Zayat went to the store manager, Paul Mitchell, to complain about her refusal.

The grievor testified that in September 2004 Mr. Zayat yelled at her, asking why she was not helping on the computer. However, she said that earlier that same day Mr. Zayat had ordered

her to stay off the computer and she was simply doing as he had directed.

The grievor also said that shortly thereafter, while she and Mr. Zayat were working side by side, Mr. Zayat had told her that a “narcotics count always can be arranged,” a comment which she said she understood to be a threat to her. She said that Mr. Zayat said nothing further on this issue but that she had nevertheless taken it as an attempt to intimidate her.

The grievor said that there had been one or two meetings in September and October 2004 where she, the store manager (Mr. Mitchell), Mr Zayat and, the Employer’s pharmacy supervisor (Vipul Patel) had discussed matters relating to the difficulties between herself and Mr. Zayat. She said that she had not reported her concerns described above regarding Mr. Zayat to the Employer but, instead, she had indicated that Mr. Zayat was treating her unfairly, yelling at her, and scolding her. She said that Mr. Zayat brought up her poor job performance. She testified that nothing was solved at the meetings other than that she was to get more computer training.

In her examination in chief the grievor identified her February 10, 2005, *Human Rights Code* complaint and she acknowledged that in her complaint she had deliberately provided incorrect dates for some of the alleged incidents of harassment. The grievor testified that in her *Code* complaint she had knowingly asserted that some of the events had taken place in 2004 when, instead, they had actually occurred in 2002. During her examination by Union counsel she said she had deliberately used the wrong date in her complaint under the *Code* in order to make the events appear to have been more recent. The grievor said that she did this because she understood that the harassment had to have occurred in the last six months in order for a complaint to be considered under the *Code*. As an example, in her *Code* complaint she stated that Mr. Zayat began talking to her in a derogatory manner on August 26, 2004, as compared with her testimony during the hearing which indicated that the derogatory comments began in 2001 or early 2002. She asserted in the *Code* complaint that

it was after August 26, 2004, that Mr. Zayat made comments about wanting her job for his wife, as compared with her testimony at the hearing that these comments had actually happened in April 2002. In addition, the allegation that Mr. Zayat threatened to report the grievor to head office which she testified at the hearing occurred in February 2002 is reported by her in the *Code* complaint as having occurred September 14, 2004.

The grievor testified that she felt she had to take these steps, i.e. falsify her complaint under the *Code*, in order to protect herself because no one would give her any protection.

The grievor agreed that she had been off work for an extended period - October 23, 2004, through March, 2005. The grievor described the reasons why she had been off work in 2004 - 2005. She said that she could not tolerate Mr. Zayat's behaviour any longer and that the thought of going back to work made her physically ill. She said she was discouraged, her blood pressure was up, and she had other medical problems including nausea and vomiting. She said that Mr. Zayat's comment about a narcotics count being arranged had triggered her illness. She said that it then took her several months to regain her strength and to function normally. She returned to work after she transferred to another store in Windsor and she found that store to be a better place to work. The new store had more pharmacy staff and she said she was able to relax. When she returned to work in March 2005 she said she was still in therapy. The grievor said she still had anxiety problems as of the hearing.

The grievor was then cross examined extensively. In her cross examination, the grievor agreed that at an October 8, 2004, meeting with Mr. Zayat, Mr. Mitchell and Mr. Patel, near the end of this lengthy period of alleged harassment, she had stated that her concern about Mr. Zayat was that he was "short" with her and raised his voice with her. She agreed that in that same meeting Mr. Zayat said he had issues regarding the grievor's job performance. The grievor also agreed that Mr. Zayat had said that if he had offended the grievor he was sorry and that he did not intend to offend her. The grievor also agreed that at that meeting

they had discussed issues regarding her use of the computer at work and that she was offered further training with another technician of her choice. She agreed that she and Mr. Zayat were told that they needed to be civil to one another and work together.

The grievor agreed that in the period after the October 8, 2004, meeting there had been no incidents until an issue arose in late October regarding two Tylenol 3 pills. Although the grievor agreed that no one had accused her of anything in relation to the Tylenol, she asserted that the incident had nevertheless caused her to ask Mr. Mitchell (the store manager) to transfer her out of the pharmacy. Mr. Mitchell made arrangements that same day to transfer the grievor within the store. The grievor agreed that Mr. Mitchell had offered her a new position in the store in the Health and Beauty Aids department when she had asked for a new position and she further agreed that she could have set her own hours in that new job.

The grievor agreed that in September 2004 when she had been asked by Mr. Zayat to get medication from another store and had refused to do so, Mr. Mitchell had become involved and that Mr. Mitchell had said that the grievor did not need to get such medications. She agreed that this was the only time she had complained to the store manager about Mr. Zayat and that on this occasion the manager had acted promptly.

The grievor also agreed that in January 2005 she and Julie Johnston, the Union representative, had met at length with Sharon Hughes, the Employer's Senior Manager, Industrial Relations. The grievor agreed that she had wanted to meet with Ms Hughes because all the other persons involved in investigating her complaint had been men. The grievor agreed that Ms Hughes had asked her about any witnesses to the events about which she had complained. However, the grievor said that the real message being given by Ms Hughes was simply that she did not believe the grievor as the grievor did not have any witnesses to any of the incidents. She agreed that Ms Hughes took notes of the meeting. She agreed that the meeting had been a full meeting and many topics had been discussed.

Finally, during her cross examination the grievor indicated that she had never observed Mr. Zayat driving around her house.

I would note that the grievor frequently failed to respond to questions and that many questions had to be asked several times before the grievor would, apparently reluctantly, answer that question. I also note that in many of her answers the grievor expressed her conclusion as though that conclusion was an observable fact. When advised what other witnesses would say when they testified, the grievor frequently responded to the effect that they were not truthful persons.

Finally, I note that the grievor wrote several letters to others within the Employer's organization complaining that she had been harassed and complaining the Employer had failed to respond to her harassment complaint. Those letters uniformly "stretched the truth." For example in her letter to the Employer's general manager in southwestern Ontario, Curtis Warren, she wrote, in part, as follows: "Instead of investigating the matter . . . Mr. Mitchell avoided the problem," "Mr. Mitchell suggested that I transfer stores," "Mr. Mitchell did nothing to stop the harassment," "management has ignored the issue" and "Mr. Mitchell has chosen to avoid taking this matter seriously." A number of her comments were contrary to her own evidence at the hearing.

Bassam Zayat's evidence

Bassam Zayat testified. Mr. Zayat works as a pharmacist for the Employer at the Lauzon Parkway store. He studied pharmacy and lived in the United Arab Emirates before moving to Canada in 1999. He then qualified to work as a pharmacist in Canada. As a staff pharmacist he said he was responsible for the other pharmacy employee(s) on the days he

worked. As a pharmacist he said he was responsible for any errors made by him or by a technician working with him. He testified that he had no problems with the grievor when he started working with her. He said that he had tried to assist her and help her with issues and, in particular, with learning the computer system.

Turning to the grievor's complaints, Mr. Zayat said he did not know where the grievor lived. However, he said that he had seen pictures of the grievor's house which the grievor had shown him at work. He said he did not know the value of the grievor's home and did not know the value of her RRSP. He denied making any comment about driving by the grievor's home, or about the grievor having a comfortable life, or suggesting that the grievor retire.

Mr. Zayat said that his wife had trained as a pharmacist in Syria before he and his wife moved to Canada. Mr. Zayat said his wife was pregnant when they arrived in Windsor and she was not looking for work at that time. She did, however, endeavour to become licensed in Canada to work as a pharmacist and, prior to becoming licenced, she worked as a technician in the same store as he and the grievor worked. Mr. Zayat said that he and his wife were not allowed to work the same shift so that he worked regularly with the grievor and the pharmacy manager regularly worked with his wife.

Mr. Zayat said that he had filled prescriptions for the grievor and he agreed that he could check her full customer profile on the computer system in the store. However, he denied asking the grievor about her hormone medication or about her age.

Mr. Zayat denied threatening to report the grievor to head office as the grievor had asserted, but he acknowledged that he did raise a number of his concerns about the grievor's poor job performance with the grievor. He said he had raised concerns with the grievor, and later with the Employer, about the grievor's poor computer skills, about the need for her to be accurate in filling prescriptions, about the necessity of her ensuring that the customers received their

own medication and not medication intended for someone else, about the requirement to fill a prescription with the correct number of pills, about the need to attend to customers at both ends of the counter, etc. He said that the grievor made many mistakes and he had attempted to obtain additional training for her.

As for the narcotics count allegation, Mr. Zayat said he had never threatened the grievor with a narcotics count. However, he did say that he had attended a company meeting at which there had been a presentation about the value of narcotics “on the street” and about inventory control measures. He said some of the information had been surprising to him and that the next day he had told the grievor about the information he had learned.

With respect to his level of voice when speaking with the grievor, Mr. Zayat said he used a normal level. Mr. Zayat said that he had never observed heads turning when he spoke to the grievor.

With respect to asking the grievor to pick up extra drugs, Mr. Zayat said this had been a normal practice in the pharmacy for several years. When the pharmacy was short of medication, a technician would sometimes obtain additional medication from another store. On September 16, 2004, the day on which the grievor complained, Mr. Zayat agreed that he had asked the grievor to pick up some pills and that she had refused. He said he raised the issue with the store manager, Mr. Mitchell, who told him that it was not part of the grievor’s job to go and get the pills and there was a liability issue. Mr. Zayat said that Mr. Mitchell had gone for the pills. Mr. Zayat said that after this occasion he never again asked the grievor to get pills from another store.

Mr. Zayat said there had been an issue regarding cleanliness in the pharmacy in the late summer of 2004. He said he had become concerned about the level of cleanliness and had spoken to the pharmacy manager. The pharmacy manager advised him that the grievor was

unhappy. Shortly thereafter a meeting was held with the pharmacy supervisor, Mr. Patel. Mr. Zayat said at that meeting there had been discussion of his concerns regarding the grievor's work performance and also of the grievor's concerns regarding him. Mr. Zayat said that the grievor had indicated she did not like Mr. Zayat's way of talking and he said he had apologised to her. As for the grievor's work performance, he said there had been an action plan put in place to assist the grievor. Mr. Zayat said that beginning immediately after the meeting he had attempted to assist the grievor. In general, however, Mr. Zayat said he did not think the meeting helped the situation as the grievor had indicated in the meeting that she did not trust Mr. Zayat nor his wife and the grievor had indicated that things would not get better.

In cross examination, Mr. Zayat said that as a licensed pharmacist he was responsible for the dispensing of drugs, for ensuring that the proper amount of the correct drug was given. He said he was concerned about his license to work as a pharmacist being in jeopardy because of the large number of mistakes which the grievor made in filling prescriptions.

Mr. Zayat said that in August or September 2004 he had advised the grievor that he was going to speak to the pharmacy manager about the number of mistakes she made. He agreed that he was frustrated with the grievor's job performance given the length of time she had worked in he pharmacy. However, while agreeing that he had spoken to the grievor about his concerns regarding her job performance, he denied that in 2002 he had told her he would report her to head office, as the grievor had alleged.

Jerry Martel's evidence

Jerry Martel also testified. Mr. Martel is an Employee Development and Services Manager with the Employer. He testified that he was contacted by the grievor in late summer 2004 and met with her. He said that the grievor raised with him issues about always being asked

to take out the garbage and about Mr. Zayat asking her to do things and about Mr. Zayat's tone of voice. He said that at the end of the meeting he advised the grievor that he would look into the matter and that either he or someone else would get back to her. He said that during the meeting he had learned that the regional pharmacy supervisor, Vipul Patel, had already been involved and so he contacted Mr. Patel. Mr. Martel said that he asked Mr. Patel to deal with the issues and to contact the grievor on his behalf. He said that he later learned that Mr. Patel had not contacted the grievor and so he had contacted the grievor and apologised for not getting back to her.

In cross examination Mr. Martel said that in his meeting with the grievor there had been no suggestion of harassment. He repeated that the issues then had been Mr. Zayat asking the grievor to take out the garbage, and the manner in which he asked her to do other things. He also said that when he spoke to Mr. Patel, Mr. Patel had indicated that the issues were Mr. Zayat's concerns about the grievor's poor job performance and the grievor's concerns around how Mr. Zayat spoke to the grievor.

Paul Mitchell's evidence

Paul Mitchell is the store manager and he also testified. Mr. Mitchell said the total number of staff in his store was approximately 240. He said that the normal pharmacy staff in his store consisted of four persons - a manager who was in the bargaining unit, a pharmacist (Mr. Zayat), and two technicians, of whom the grievor was one. He said the pharmacy manager reports either to him or to the pharmacy supervisor, Mr. Patel, depending on the issue. Mr. Mitchell said he dealt with the basic collective agreement issues and that Mr. Patel dealt with any specialised drug or pharmacy related issues.

As for harassment issues, Mr. Mitchell said that the Employer and Union have a joint policy on workplace harassment and that the store has a large poster titled “Workplace Harassment Standard” displayed in the hallway in the area of the job postings.

Mr. Mitchell said the first time he heard of an issue regarding the grievor was in August 2004. He said he had heard a report from an office clerk that a Union steward had reported to that clerk that there was a sexual harassment issue and management had done nothing about it. Mr. Mitchell said he had previously heard nothing about such an issue and he therefore pursued it with his assistant managers who indicated they knew nothing. He began to follow up with his non-union department managers to see whether they had heard of this, but he then met the Union steward who told him that he was not really sure what the issue was, but that it involved the grievor and Mr. Zayat, and that the steward had assumed it was sexual harassment. Mr. Mitchell said he spoke to the pharmacy manager and was told there had been an issue about garbage but that Mr. Patel and the pharmacy manager had resolved the issue. Mr. Mitchell said he told the pharmacy manager to let him know if he dealt with such an issue in the future.

Mr. Mitchell said that the next incident was in the middle of September 2004 when Mr. Zayat spoke to him about having asked the grievor to get pills from another store and the grievor had refused. Mr. Mitchell said he spoke to the grievor who explained that the last time she had gone for pills she had damaged her car and she was not going again. Mr. Mitchell said he agreed with the grievor, as there were responsibility, liability and safety issues. Mr. Mitchell said he instructed Mr. Zayat not to ask the grievor again and that either he, or an assistant manager, or the floral delivery service, would do it. Mr. Mitchell said that when Mr. Zayat had approached him his demeanour was normal, but that Mr. Zayat was concerned as this medication was a big sale and he did not wish to lose it. Mr. Mitchell said that he spoke to Mr. Patel about this issue and that Mr. Mitchell had personally gone to get the drugs.

Mr. Mitchell testified the next time he was involved was in late September, 2004. Mr. Mitchell said the pharmacy manager spoke to him to advise that the grievor and Mr. Zayat were not getting along. Mr. Mitchell said he felt it was wise to have a meeting to discuss this issue so he contacted Mr. Patel and a meeting was held October 8, 2004. He said that the pharmacy manager came into the store and covered the pharmacy and that he, the grievor, Mr. Patel and Mr. Zayat met. Mr. Mitchell said he started the meeting by asking the grievor and Mr. Zayat to take turns and outline the issues they had with each other. He said that the grievor explained she did not like the way Mr. Zayat spoke to her, that he yelled at her and, in general, she did not like the way he treated her by keeping her off the computer. On the other hand, Mr. Zayat raised his concerns regarding the grievor's job performance. Mr. Mitchell said Mr. Patel became involved and the other three participants discussed pharmacy issues that he did not fully understand. Mr. Mitchell said that Mr. Zayat offered to help the grievor with extra training and that Mr. Patel offered to provide the grievor with additional training with another pharmacy technician with whom the grievor was comfortable working. Mr. Mitchell said that at one point Mr. Zayat apologised to the grievor if he had insulted the grievor or raised his voice, and said he wanted to work together. However, Mr. Mitchell said there appeared to be no "buy-in" from the grievor who did not accept Mr. Zayat's apology and the grievor told Mr. Zayat she did not trust him. Mr. Mitchell said that he had told them that they had to get over this, work together, and be civil and professional.

Mr. Mitchell said that in the October 8 meeting Mr. Patel had indicated that, given the grievor's time in the job, he would have expected her to be further along in terms of knowledge and that was why additional training was offered. Although there was discussion of mistakes, Mr. Mitchell said that the grievor indicated she felt she did not have any performance issues, at least not any serious ones.

After the meeting Mr. Mitchell said that he was not confident that matters would be worked out. He said he had felt Mr. Zayat was sincere in his apology and offer of assistance but, as

the grievor said she did not trust Mr. Zayat, it did not appear that there would be a resolution of the problems.

During the October 8 meeting Mr. Mitchell said the grievor did not raise any of the concerns that she has since raised as constituting the grounds for her harassment complaint, i.e. there was no mention of Mr. Zayat threatening to call head office in 2002, nor Mr. Zayat making comments about the grievor looking young, nor Mr. Zayat making comments about any hormones the grievor was taking, nor Mr. Zayat wanting the grievor's job for his wife, nor Mr. Zayat discussing the value of the grievor's home or RRSP, nor Mr. Zayat making any derogatory or demeaning comments, nor was there any allegation that Mr. Zayat drove near the grievor's home.

Mr. Mitchell said his next involvement was October 18, 2004. He was called to the pharmacy by the manager who advised him that there were two Tylenol 3 pills without a label found in a drawer. The pharmacy manager said he felt he had to report the matter because Tylenol 3 was a narcotic. Mr. Mitchell said he asked the pharmacy manager to do a count to see whether the pharmacy was short of Tylenol 3 and to advise him.

Mr. Mitchell said that when he was leaving the pharmacy October 18, 2004, the pharmacy manager told him that the grievor wanted to speak to him. The grievor then told Mr. Mitchell that she could not work in the pharmacy any longer. She said that Mr. Zayat had threatened to set her up with narcotics and she wanted out.

As for the grievor's request for a transfer to another department, Mr. Mitchell said that for some time the pharmacy employees were doing work in the Health and Beauty Aids department as the pharmacy had not been busy. However, he said he felt that the pharmacy business had increased and the time was right to make a change and he told the grievor he would get back to her on her request to leave the pharmacy. He then made some calls and

got the “green light” to transfer the grievor. By the time he had made all his calls he said the pharmacy manager had reported back to him that the Tylenol 3 count was accurate. Mr. Mitchell then advised the grievor that he could accommodate her request for a transfer and told her she could write her own work schedule. Mr. Mitchell said the grievor replied “he wins again,” referring to Mr. Zayat, but Mr. Mitchell had assured the grievor that the transfer was up to her. Mr. Mitchell noted that, although there were issues with the grievor’s performance, the training discussed in the October 8 meeting had not yet taken place. Mr. Mitchell said he got a transfer sheet and the grievor and he both signed it. However, the grievor never returned to work in the store as she left work on sick leave.

In cross examination, Mr. Mitchell agreed that after hearing the initial rumour of a sexual harassment complaint in August and being advised that the complaint had to do with the garbage as opposed to sexual harassment, he did not follow up with the grievor. He agreed that in the Tylenol 3 incident when the grievor asserted that Mr. Zayat had threatened to arrange a narcotics count, he had spoken about the issue with the pharmacy manager but not with Mr. Zayat.

Sharon Hughes’ evidence

Sharon Hughes testified next. Ms Hughes is the Senior Manager, Industrial Relations, and has been with the Employer since 1984. She deals with employee issues and gives advice to store management, administers collective agreements, deals with grievances, and conducts investigations. She said she does not normally get involved in sexual harassment complaints as they are usually dealt with by the Employee Development and Services Managers. However, she said that she had conducted investigations for the Employer, including ones examining theft and harassment allegations.

Ms Hughes said she first became aware of the grievor when the grievor filed a grievance. She

was not involved with the grievance at that time but was later asked by the Union representative, Julie Johnston, to meet with Ms Johnston and the grievor with no men in attendance. They met January 18, 2005. Ms Hughes said that the grievor had a prepared document which she provided at the meeting. Ms Hughes said she had taken that prepared document, had reviewed it and had then asked the grievor questions arising from the assertions contained in the document. At the hearing Ms Hughes reviewed the prepared notes from the grievor and also reviewed her own notes made at the meeting. Ms Hughes testified that the meeting lasted about two and one half hours. Ms Hughes testified that the grievor did not raise sex or age harassment at that meeting.

Ms Hughes said she spoke to Mr. Zayat, Mr. Patel, Mr. Martel, and Mr. Mitchell after the meeting in order to follow up on the information she had been given and to continue the investigation. She said she made notes of her conversation with Mr. Zayat and at the hearing she identified the notes she made regarding that conversation.

As for the result of her meeting with the grievor and her subsequent investigation, Ms Hughes said she reached the conclusion that there was nothing to substantiate the grievor's claim of harassment.

In cross examination, Ms Hughes was asked whether she had contacted the grievor to inform the grievor about her conclusion that there was nothing to substantiate the harassment claim. Ms Hughes said that she had not done so. As was her custom, Ms Hughes said that after the January meeting and her investigation she had replied to the Union regarding her conclusions. She said she had also reported orally to Curtis Warren, the area general manager. Ms Hughes agreed that she had not spoken to the pharmacy manager during her investigation.

Curtis Warren's evidence

Curtis Warren was the sixth witness. Mr. Warren is the Employer's General Manager for southwestern Ontario. He said he first learned of issues between the grievor and Mr. Zayat in October 2004. He heard of concerns from Mr. Mitchell. He said he was later consulted by Mr. Mitchell about a transfer for the grievor and that he had approved the transfer.

During the winter of 2005 Mr. Warren said he learned of the grievor's letters to the Employer's executive officers making various allegations about the handling of her complaint. He testified that he was upset by the allegations as, contrary to the assertions in the grievor's letters, the complaint had been treated seriously and investigated by the Employer.

In March 2005 Mr. Warren said he had been involved in another meeting to try to find a resolution to the problem and that four options had been discussed. He said the grievor had picked the one involving a transfer to the Malden Road store.

Vipul Patel's evidence

The seventh witness was Vipul Patel. Mr. Patel is the Employer's pharmacy supervisor in southwestern Ontario. He outlined the normal expectations for pharmacy technicians and said that if a person had taken a pharmacy technician course, as had the grievor, the person would be expected to be proficient in three weeks or so.

Mr. Patel said he first heard of issues between the grievor and Mr. Zayat in mid-August 2004 when Mr. Zayat called him to advise of the stress he found in working without reliable technician support. Mr. Patel said Mr. Zayat said he had mentioned his concern to the pharmacy manager and hoped something could be done. Mr. Patel also said that Mr. Zayat had mentioned the grievor in the conversation.

Mr. Patel said he checked when the grievor and Mr. Zayat would both be working and went to the store August 20. Mr. Patel said he met the grievor and Mr. Zayat separately and each complained of the other. The grievor complained of Mr. Zayat's high performance expectations and the way Mr. Zayat delegated tasks, and Mr. Zayat complained of the large number of mistakes the grievor made. Mr. Patel said he then told Mr. Zayat it was "OK" to have performance expectations after two years, but the grievor had concerns about how Mr. Zayat delegated work. Mr. Patel said he told Mr. Zayat to be more pleasant, to use "please," etc. Mr. Patel said Mr. Zayat agreed to do so. Mr. Patel said he spoke to the grievor and asked if she would like more training. The grievor said she would like training and they then discussed the details. Mr. Patel said he asked the grievor to call him if she had further concerns.

Mr. Patel said he followed up by telephone and spoke to the manager. He said he also spoke by phone with both Mr. Zayat and the grievor, each of whom reported that things were quiet.

Mr. Patel said he was next involved in early October and he attended a meeting October 8, 2004. He said he was surprised to be involved in this matter again as he thought the matter had been resolved. In the meeting he said the issues were again discussed and he said he felt Mr. Zayat was willing to meet the grievor half way. With Mr. Zayat's apology and the grievor's additional training, he was hopeful at the end of that meeting that the matter might be resolved.

Mr. Patel said his next and final involvement was his call from Mr. Mitchell later in October about the grievor's possible transfer.

In cross examination, Mr. Patel noted that he had observed the grievor making errors on a prescription when he had arrived for the late August meeting. The grievor had been working at the computer on a prescription and had twice cancelled the process.

Pauline Zwiers' evidence

The eighth and final witness was Pauline Zwiers. Ms Zwiers is the Director of Employee Development Services for both the Employer and Fortinos, a related business. She previously worked in the Employer's Employee Development and Services Department. She said she had been involved in many harassment complaints and had conducted between 100 and 200 investigations.

Ms Zwiers said she became involved in this matter in February 2005 after a letter was received in the executive office. She was asked to look into the matter. Ms Zwiers said she spoke to Ms Hughes (Senior Manager, Industrial Relations), Mr. Mitchell (Store Manager), the pharmacy supervisor before Mr. Patel, Mr. Patel (Pharmacy Supervisor), and Mr. Warren (the area general manager), reviewed notes made by Ms Hughes, Mr. Martel, Mr. Mitchell, and Mr. Patel, and held a meeting in Windsor March 4, 2005. Ms Zwiers said she, Ms Johnston as the Union representative, the grievor, the grievor's husband, Mr. Warren, and a Union steward attended the meeting. After a discussion the Employer provided the grievor with four options to resolve her complaint. The four options were: to go back to her old job at the Lauzon Parkway store pharmacy, to work in housewares in that store, to work in health and beauty aids there, or to transfer to the Malden Road store pharmacy. Although Ms Zwiers said the Employer felt the complaint was not substantiated, the Employer wanted to provide options for the grievor. The grievor sought and was given a period of time to consider her options and she then chose to move to the Malden store.

Ms Zwiers said that her investigation related in large part to how the Employer responded to the complaint. She concluded that the Employer had responded properly to the complaint, had investigated the complaint properly and had reached a reasonable conclusion about it.

III. PROVISIONS OF THE AGREEMENT AND *HUMAN RIGHTS CODE*

The relevant provisions of the parties' 2000-2006 collective agreement are as follows:

ARTICLE 9 - DISCRIMINATION

- 9.01 There shall be no discrimination on account of race, colour, creed, political or religious affiliation, sex, age, marital status or membership in the Union.
- 9.02 The Company and the Union agree that every employee has the right to work in an environment free of harassment. In any harassment investigation, the Company will advise the Union in advance of any investigation and provide a Union Steward/Representative to employees in each meeting. All meetings will be conducted in a private area.

Key sections of the Ontario *Human Rights Code* are as follows:

- 5.(2) Every person who is an employee has a right to freedom from harassment in the workplace by the employer or agent of the employer or by another employee because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, age, record of offences, marital status, family status, or disability.
- 7.(2) Every person who is an employee has a right to freedom from harassment in the workplace because of sex by his or her employer or agent of the employer or by another employee.
- 10.(1) In Part I and in this Part,
...
"harassment" means engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome;
...

IV. UNION POSITION

The Union submitted that I had jurisdiction to deal with both the grievance under the collective agreement and the complaint under the *Human Rights Code*.

The Union noted that Mr. Zayat was in a position of authority over the grievor. The two frequently worked together behind a counter in a small area. The grievor said Mr. Zayat had engaged in a course of conduct and comment that was harassment. The grievor said Mr. Zayat had, for example, indicated that she was old enough and had enough RRSP money that she did not need the job, had asked what type of hormones she was taking, that Mr. Zayat

knew where she lived, that he belittled and berated her, and had advised that a narcotics count could be arranged. On the other hand, Mr. Zayat had denied any harassment.

What was not in dispute were the physical effects - nausea, dizziness, nervousness, depression, etc., suffered by the grievor. These were not symptoms suffered by employees who were happy at work.

The Union said it was more than coincidence that the problems with the grievor's performance arose around the time the grievor was being harassed. Mr. Zayat was making harassing comments and this led to performance concerns. There were no allegations of earlier performance issues.

Credibility is a major issue in this case. Credibility does not mean simply demeanour but whose evidence best fits with the totality of the evidence. The Union said that the grievor's four months off work supported the conclusion that something else was going on, something which the Union asked me to conclude was harassment.

The Union said that the grievor's evidence should be preferred to that of Mr. Zayat. The grievor was emotional, as she was still dealing with what had happened to her. She had testified openly about everything, both the good and the bad, and she had admitted inconsistencies where they existed.

As for the Employer investigation, the Union submitted it had been seriously flawed. For example, Mr. Martel, the Employee Development and Services Officer, got a complaint and met the grievor, but he could not recall anything about the grievor and he either took no notes or, if he took notes, he no longer had them. Moreover, assuming Mr. Martel followed up by discussing the issue with Mr. Patel, Mr. Martel could recall neither how long the discussion took nor whether it was in person. In any event, Mr. Martel did not follow up as he said he

would.

Similarly, the Union criticized the approach followed by Ms Hughes, Senior Manager, Industrial Relations. The Union said that while Ms Hughes met the grievor and Ms Johnston, the Union Representative, for two and a half hours, Ms Hughes' notes indicate that she gave the grievor "the third degree." In contrast, the Union submitted that Mr. Zayat received a free ride - no attempt was made to determine whether, for example, Mr. Zayat knew where the grievor lived, or whether his children attended school in that area. Ms Hughes made no attempt to contact other witnesses who might have observed the incidents about which the grievor complained. As a result of the meeting and her investigation, Ms Hughes concluded the complaint was not well founded, but she prepared no report nor did she discuss her findings or conclusions with the grievor as the Employer policy requires.

Mr. Patel did not do an investigation and the evidence suggested that he favoured Mr. Zayat over the grievor.

Ms Zwiers did not do an independent investigation. She simply reviewed the earlier Employer investigations and found that the Employer's earlier conclusion that the complaint was not substantiated was proper. She did not meet separately with the grievor nor with the Union representative and there was no evidence that she met with the grievor to discuss the outcome of her review.

The Union asked for a finding of harassment and an award of the following remedies:

1. A direction that Mr. Zayat apologize to the grievor and, in so doing, acknowledge that his behaviour was inappropriate and wrong;
2. A direction that Mr. Zayat take a three hour workshop in "managing a diverse workforce and anti-harassment," and a direction that confirmation of the completion of the workshop be placed in Mr. Zayat's personnel file;

3. A direction that Mr. Zayat participate in an anger management program;
4. An award of up to \$1,000 for the grievor's counselling costs;
5. An award of compensation for the grievor's increased costs in commuting between her home and her new work location;
6. A direction that the grievor receive preferential consideration to transfer back into her original pharmacy technician position once Mr. Zayat has left that store; and,
7. Damages in the amount of \$8,000.

In reply to the Employer submission that the grievor's complaint was made in order to damage Mr. Zayat, the Union expressed strong concerns about any such finding. The Union submitted that any such finding would have the effect of deterring other employees from making complaints which they believe to be legitimate and that such an outcome would be unfortunate. The Union asked that my findings be restricted to this case.

The Union relied upon the following authorities: *Weber v. Ontario Hydro* (1995), 125 D.L.R. (4th) 583 (SCC); *Re Clarendon Foundation and Ontario Public Service Employees Union, Local 593* (2000), 91 L.A.C. (4th) 105 (Sarra); *Re Toronto Board of Education and Canadian Union of Public Employees, Local 63* (1997), 65 L.A.C. (4th) 174 (Howe); *Re Prestressed Systems Incorporated and Labourers' International Union of North America, Local 625* (2005), 143 L.A.C. (4th) 340 (Snow); *Re Goodyear Canada Inc. and United Steelworkers of America, Local 189* (2002), 107 L.A.C. (4th) 289 (Goodfellow); *Re Hostess Frito-Lay Company and United Steelworkers of America, Local 4610* (2002), 111 L.A.C. (4th) 76 (Gorsky); and *Re Tenequip Ltd. and Teamsters Canada, Local 419* (2002), 112 L.A.C. (4th) 60 (Newman).

V. POSITION OF THE EMPLOYER

The Employer agreed that I had jurisdiction to deal with both the grievance and the grievor's

complaint under the *Human Rights Code*.

The Employer said the issues were simple. The grievor alleged that Mr. Zayat had harassed her, whereas Mr. Zayat said he did not. The grievor then alleged that she had been wrongfully transferred to another store, whereas the Employer said the grievor had been provided with various options and had chosen to work at the other store. Secondly, the grievor alleged that the Employer had done nothing to protect her, whereas several Employer witnesses said they took action to deal with the allegations but found the allegations were not substantiated and there was nothing from which to protect the grievor.

The Employer noted that the grievor had admitted lying on her *Human Rights Code* complaint. The Employer noted that the grievor alleged that Mr. Zayat had regularly yelled and screamed at her but, in a store with some 240 employees and many customers, not one other person was called to support the grievor's version of events in any of the incidents about which she had complained. There was no explanation as to why no one else had been called as a witness and the Employer suggested the explanation was that the grievor's allegations were untrue and did not happen.

The Employer also noted how this issue had arisen. The store manager, Mr. Mitchell, first heard of this matter when another employee advised him that a Union steward said something was happening between the grievor and Mr. Zayat. The Employer noted also that the allegations of harassment arose only after Mr. Zayat was known to be concerned about the grievor's job performance. The Employer said the grievor responded with these allegations of harassment only after the Employer attempted to address Mr. Zayat's concerns about the grievor's job performance.

The Employer had addressed the allegations of harassment by way of investigation and various Employer officials concluded that the allegations were unsubstantiated and that the

grievor was not entitled to be protected from Mr. Zayat who was trying to deal with difficulties regarding the grievor's work performance.

The Employer then reviewed the many incidents which the grievor referred to in her evidence, or in her various letters, or in her *Human Rights Code* complaint.

The grievor had said that when Mr. Zayat came to the store he had indicated he liked the job and intended to stay. The Employer said that was not evidence of harassment.

The grievor said that after Mr. Zayat came to the store he indicated that he wanted a pharmacy technician job for his wife. Mr. Zayat denied this and the Employer noted that Mr. Zayat's wife is a trained pharmacist who would have no interest in a permanent technician position and was, in any event, pregnant at that time and not looking for work. The Employer asked me to prefer the evidence of Mr. Zayat as the grievor had given clear indication through her own evidence that she lies.

The grievor alleged that Mr. Zayat had said that she was old enough to retire and had a comfortable life and, since his wife needed work, the grievor was asked why she was still working. The Employer noted that Mr. Zayat denied this. Again, the Employer submitted that, given the grievor's acknowledged willingness to lie, I should prefer Mr. Zayat's evidence.

The grievor alleged that Mr. Zayat commented on the value of her home and the value of her RRSP. The Employer noted that Mr. Zayat denied the allegation. In addition, the Employer said that for Mr. Zayat to have known the value of the grievor's home or RRSP, the grievor would have had to have told him. If she did tell him this information and he made a comment in reply, that comment would not amount to harassment.

The grievor alleged that Mr. Zayat drove past her home. Mr. Zayat said he did not know where the grievor lived. When it was suggested to Mr. Zayat that he might have driven past the grievor's home while taking his children to school, he indicated that he did not know where the grievor lived. On the other hand, the Employer noted that the grievor knew details of Mr. Zayat's life and knew, for example, where Mr. Zayat's children attended school. There was no harassment in this.

The grievor said that in February 2002 Mr. Zayat said he would call the Employer's head office and say negative things about the grievor and that he would be believed as he was a pharmacist and she was a technician. Mr. Zayat denied that. The Employer suggested the allegation was nonsense.

The grievor alleged that Mr. Zayat always yelled at her and degraded her as a woman. She provided no details about this other than to say that it was about the job. Mr. Zayat denied yelling. In any event, if it was about the job, it cannot be said to be degrading to the grievor as a woman.

The grievor said that Mr. Zayat had asked her what hormones she was taking and that he had said this in front of another man. The Employer noted that the Union had not called the alleged witness and had provided no explanation for that failure. It had been clear at the hearing that the allegation would be denied and the Union could have brought a supporting witness but did not do so. In addition, the Employer noted that Mr. Zayat denied making the alleged comment and that he could, in any event, have looked up the grievor's prescriptions on the computer as she had her prescriptions filled at the store.

The grievor claimed that Mr. Zayat had asked her what she was doing to stay youthful. Mr. Zayat denied the allegation. Although there was no context for the alleged comment, it would appear that a comment that one looked young would be a compliment and not

harassment.

The grievor complained that in September 2004 Mr. Zayat had asked her to pick up some drugs from another store. Although she had been doing this for some three years, on this occasion she refused. The store manager, Mr. Mitchell, was contacted and Mr. Mitchell agreed with the grievor's position. Mr. Mitchell himself went to pick up the drugs. A request that the grievor do something she had been doing for three years is not evidence of harassment.

The grievor complained that in September 2004 she was ordered by Mr. Zayat to stay away from the computer and, when she did as asked, Mr. Zayat then complained that she was not helping. This was part of the competency issue involving the grievor's work - Mr. Zayat was concerned about the number of mistakes she was making, a point supported by the evidence of Mr. Patel, the pharmacy supervisor. The grievor should have been proficient years before September 2004 and was not proficient. This was not harassment.

The grievor complained that Mr. Zayat said a narcotics count could always be arranged. Although the grievor viewed this as harassment, Mr. Zayat said he had been at a course and was simply informing the grievor of what he had learned, not attempting to threaten her.

The grievor said the Employer did nothing in response to her complaint. On the other hand, there was considerable evidence from Employer witnesses regarding their actions. The Employer reviewed the actions of Employer officials including a meeting with the pharmacy supervisor, Mr. Patel, in August 2004 at which time there was no mention of harassment. In addition the Employee Development Services Officer, Mr. Martel, met with the grievor in the late summer of 2004 at which time no mention was made of any harassment. Another meeting with Mr. Patel, Mr. Mitchell, Mr. Zayat, and the grievor occurred in October 2004, at which point Mr. Zayat's concerns about the grievor's work were discussed but no mention

was made by the grievor about any harassment issues. At that time Mr. Zayat apologised if he had offended the grievor and offered to help. His subsequent actions indicate his offer of help was sincere. Ms Hughes met with the grievor and Ms Johnston, the Union representative, in January for some two and a half hours, reviewed the grievor's concerns and Ms Hughes then conducted a further investigation. Finally, Ms Zwiers conducted another review and she and Mr. Warren met with the grievor in March 2005. Clearly various officials met with the grievor and the Union, reviewed the grievor's concerns and investigated them, and the grievor knew all of this as she had attended each meeting. To allege that the Employer had done nothing was outrageous.

Finally, the grievor alleged that she went off work ill in October 2004 because of Mr. Zayat's harassment. The evidence did not support such a claim.

In summary, the Employer asked that the evidence of the Employer witnesses be preferred to that of the grievor where there was a difference between the grievor's evidence and that of the Employer witnesses. The Employer submitted that the grievor had problems with communication. The grievor alleged a number of things which simply did not stand up - allegations such as Mr. Mitchell was trying "to sweep matters under the rug," or that Ms Hughes had acted in an unprofessional manner in her meeting with the grievor, or that she had been dismissed, etc. In addition, the Employer noted that the grievor had admitted that she had lied in her *Human Rights Code* complaint. The Employer asked for a finding that the grievor was not a credible witness.

The Employer asked that I find the grievor had made a number of allegations, none of which were substantiated, and to find that the allegations had been made in an effort to get rid of Mr. Zayat as the grievor did not like the fact that Mr. Zayat was dealing with the grievor's job performance issues.

Even if the allegations had been made in good faith, the Employer said nothing supported a violation of either the agreement or the *Code*. The grievor's subjective impressions of harassment were insufficient to support a finding of harassment. An objective standard was needed and none of the evidence met an objective standard of harassment.

The Employer asked that the grievance be dismissed.

The Employer then reviewed some of the Union submissions and, in particular, addressed the remedies requested by the Union.

1. As for the apology, the Employer noted that Mr. Zayat had already apologized, indicating that if he had offended the grievor it was not intended. It was clear from Mr. Zayat's evidence that he did not think he had harassed the grievor and, to order him to apologise when he did not believe he had done wrong, was meaningless.
2. The Employer submitted that the remedy of directing that Mr. Zayat attend a diversity and anti-harassment workshop was too general to be appropriate.
3. The Employer opposed the request that Mr. Zayat attend an anger management program and submitted that the grievor's subjective impression that Mr. Zayat had anger management problems was insufficient to support this remedy.
4. As for the money for counselling, the Employer submitted that the counselling was not related to the grievor's work with Mr. Zayat.
5. As for the compensation for increased commuting costs, the Employer noted that the grievor had been offered four options. She chose to work at the new store so that there should be no such compensation for increased commuting costs.
6. As for preference to return to the original Lauzon Parkway store, the grievor chose to go to another store and she should not get any preference to return.
7. Finally, the Employer submitted that the damages claimed were excessive.

The Employer relied upon the following: *Re Cara Operations Ltd. and Teamsters Chemical,*

Energy and Allied Workers' Union, Local 647 (2005), 141 L.A.C. (4th) 266 (Luborsky).

VI. CONCLUSIONS

Jurisdiction

The collective agreement protects employees, including the grievor, from harassment, as does the *Human Rights Code*. The relevant provisions of each are reproduced above. The parties agreed that I have authority under both the collective agreement and the *Code* to resolve the grievor's complaints.

Was there harassment?

The central issue in this case is this - did Mr. Zayat harass the grievor?

The collective agreement does not define harassment but it seems clear the parties intended the same meaning as is specified in the *Code*. In any event, I regard the meaning of harassment as being the same in both the collective agreement and the *Code*.

Before examining the evidence, a few comments on harassment may assist.

Harassment has two parts. First, it involves a course of vexatious, that is disturbing or annoying, comment or conduct. Secondly, that comment or conduct must be known, or ought reasonably to be known, to be unwelcome.

In addition, it is clear that not every course of vexatious comment or conduct, even if it is known to be unwelcome, is prohibited by the *Code* or the collective agreement - harassing comments or conduct must involve one of the specified prohibited grounds. In this case the

grounds were asserted to be age and sex. The *Code* lists both age and sex as prohibited grounds for harassment. The collective agreement lists both age and sex as prohibited grounds for discrimination and it seems clear they were also intended by the parties as prohibited grounds for harassment under the collective agreement.

An example of a course of vexatious comment that is known to be unwelcome but is still not harassment may assist. Assume that an employee, Max, is a dedicated fan of the Toronto Maple Leafs hockey team and that comments about the Leafs' losses and their poor prospects for winning the Stanley Cup are known to be both annoying and unwelcome to Max. Nevertheless, repeated comments by Joe directed to Max about the Leafs' losses or the number of years since the team last won the Cup would not amount to harassment under the *Code* or the collective agreement because those comments do not involve a prohibited ground.

I turn now to the items about which the grievor complained. I note that, although Mr. Zayat acknowledged making a comment of the general nature alleged in some situations, in each instance he denied any harassment.

The grievor complained that Mr. Zayat first harassed her by indicating that he liked his job and he intended to stay in the pharmacy. I accept that Mr. Zayat liked working at the store and wanted to stay and I accept that he indicated that fact to the grievor shortly after he began work there. However, I do not find the comment to be vexatious. I do not think Mr. Zayat knew it was unwelcome, nor can I find that Mr. Zayat should have known this comment was unwelcome. I see no link to the grievor's age or sex. On its own, I conclude that this was not harassment.

The grievor also complained that Mr. Zayat harassed her by telling her that he wanted a pharmacy technician job for his wife. I note that Mr. Zayat's wife did eventually work as a

technician for the Employer. Given that Mr. Zayat's wife was attempting to become licenced to work as a pharmacist in Canada, and given that experience working in English in Canada in a pharmacy as a technician would be of assistance to her in that endeavour, I accept that Mr. Zayat made a comment to the grievor to the effect that he would like his wife to have a technician job. However, I do not accept that Mr. Zayat's comment about his wife's interest in a technician position was linked to his wife taking the grievor's position.

Moreover, I do not find the comment which Mr. Zayat made regarding a technician position for his wife to be vexatious. I do not find that Mr. Zayat knew his comment was unwelcome, nor do I think Mr. Zayat should have known it was unwelcome. I find no link between Mr. Zayat's comment about wanting a technician job for his wife and the grievor's age or sex nor any other prohibited ground of harassment. On its own, this was not harassment.

The grievor similarly complained that she was harassed by comments Mr. Zayat made about her home and about her RRSP, comments related to the grievor retiring. While the grievor brought photographs to work, including photographs taken at her home, and while I accept that Mr. Zayat no doubt made some comment about the photos, I do not conclude that Mr. Zayat made any comment about the grievor having enough money, or an expensive enough home, or enough money in her RRSP and, as a result, suggested that the grievor should retire. Such a comment does not fit with the rest of the evidence and, given Mr. Zayat's clear denial, I conclude that the comment was not as the grievor alleged.

The grievor complained that in 2002 Mr. Zayat harassed her by threatening to contact head office and complain about her. I accept that Mr. Zayat had concerns about the grievor's job performance. It was clear that others working for the Employer felt there was merit to his concerns. I accept that Mr. Zayat took steps to address his concerns. However, I do not find any of the steps he took to be harassment. While comments about poor work performance may very well be both vexatious and unwelcome to the person about whom and to whom

they are made, they do not on their own amount to harassment on a prohibited ground of age or sex. Thus, even assuming that Mr. Zayat advised the grievor in 2002 that he would call head office to complain about her work, I could not find that it was harassment.

But did Mr. Zayat make a comment in 2002 about calling head office and complaining about the grievor? If he had made such a comment in 2002, then I do not think he would have waited two more years until 2004 to pursue his concern about the grievor's poor work performance. The evidence suggested that the first time Mr. Zayat took steps to address his concern was in 2004. On balance, I conclude that Mr. Zayat did not make the comment about calling head office which he was alleged to have made in 2002

The grievor complained that Mr. Zayat harassed her by making many loud and demeaning comments, criticizing her work performance, and putting her down as a person. Although I accept that, over the time they worked together, Mr. Zayat spoke to the grievor about her poor job performance, negative comments about job performance are not on their own harassment. I note that there was no evidence from other witnesses about these allegedly loud and degrading comments and, although the grievor testified that she found the comments to be degrading and I am willing to accept the grievor's evidence that she did feel degraded by these comments, there was not adequate detail in her evidence for me to reach a similar conclusion that they were, by an objective standard, degrading or vexatious. Of greatest importance, I cannot find on the evidence before me that Mr. Zayat's comments about the grievor's job performance issues were comments made on the prohibited grounds of age or sex and any such comments are thus not harassment under the *Code* or agreement.

The grievor alleged that Mr. Zayat harassed her in July 2004 by yelling at her about the type of hormones she was taking. Mr. Zayat denied making any such comment. I prefer Mr. Zayat's evidence. I am unable to conclude that this comment occurred in the way it was alleged by the grievor to have occurred. It is possible that there was a comment about the

grievor's medications, but I conclude that it was not as was alleged, and I cannot conclude that it amounted to harassment.

The grievor also alleged that Mr. Zayat harassed her by making comments about her youthful look. In the several years that the two of them worked together, I accept that Mr. Zayat made one or more comments to the grievor about her looking young or youthful. However, even assuming that the comments were vexatious, there was no evidence that the grievor advised Mr. Zayat that she did not welcome such comments, and I cannot find that the comments were known to be unwelcome. Moreover, I am unable to conclude that Mr. Zayat should have known that his comments were unwelcome. It follows that they would not be harassment.

The grievor alleged that she was harassed September 16, 2004, when Mr. Zayat asked her to pick up medication for the pharmacy from another store. I accept that Mr. Zayat asked the grievor to pick up drugs for the pharmacy many times. The grievor did pick up drugs many times. The last time Mr. Zayat asked the grievor to do so, she refused. The grievor's right to refuse to do this was upheld by Mr. Mitchell, the store manager, and Mr. Zayat did not ask her to do so again. I find no harassment on any basis here.

The grievor complained that Mr. Zayat harassed her by telling her to stay off the computer and then complained when she did as asked. I accept that Mr. Zayat told the grievor to stay off the computer. I do not find that this had anything to do with the grievor's age or sex. Rather I find this had everything to do with Mr. Zayat's frustration with the grievor's job performance. I find no harassment on a prohibited ground here.

Finally, the grievor complained that Mr. Zayat harassed her in October 2004 by saying that a narcotics count could be arranged. I accept that Mr. Zayat made a comment about a narcotics count. However, I do not find that this was intended as a threat to the grievor, nor

that it was a comment based on the grievor's age or sex. I do not think this comment was known to be unwelcome, nor can I conclude that it ought to have been known to be unwelcome. I find no harassment in this comment.

I have concluded that none of the comments, if considered separately, amounted to harassment.

Apart from the comments, the grievor complained of one matter - that Mr. Zayat had harassed her by driving near her home - which might be considered as conduct, rather than comment. On this issue, I note that there was no evidence from any witness that they had seen Mr. Zayat driving near the grievor's home. The grievor herself had never seen Mr. Zayat driving near her home. The sole basis of this allegation of harassment was the grievor's reading of Mr. Zayat's body language after she had asked him a question. On the other hand, Mr. Zayat did not deny driving near the grievor's home, he simply said he did not know where the grievor lived. In my view, the evidence simply does not support a finding that Mr. Zayat drove near the grievor's home.

Even assuming that Mr. Zayat did drive near the grievor's home as the grievor had alleged, although even she said she had not seen him do this and there was no persuasive evidence to support the allegation, I could not find on the evidence before me that it was known by Mr. Zayat to have been unwelcome, nor could I find that Mr. Zayat ought reasonably to have known that driving by the grievor's home was unwelcome. Moreover, I have difficulty in relating this to the grievor's age or sex. As a result I cannot find that it was harassment.

Apart from looking at and evaluating individual incidents, be they comment or conduct, the *Code* directs adjudicators to evaluate the entire pattern of behaviour through the use of the language of "course of vexatious comment or conduct."

Taking all the above comments together I cannot find that, as a whole, they were unwelcome, or ought to have been known to be unwelcome. Mr. Zayat and the grievor worked together many days and when they were working together they were frequently the only two employees working in the pharmacy. I would expect them to have talked with one another about many things over two plus years. I note that before the Employer began to look into Mr. Zayat's concerns about the grievor's job performance, there was no evidence that the grievor had mentioned anything to anyone about any inappropriate comments made to her by Mr. Zayat. While the fact that the grievor apparently made no comment to anyone is obviously not determinative of the matter, that fact does suggest that even the grievor came late to the conclusion that Mr. Zayat's comments were harassment. I do, however, conclude that, even looking at all the comments together, they do not amount to harassment under either the collective agreement or the *Human Rights Code*.

In summary, I find no harassment of the grievor by Mr. Zayat.

In many of the incidents, the evidence amounted to a "she said, he said" dispute. It is therefore necessary to comment briefly on the grievor's and Mr. Zayat's credibility.

I begin by noting the grievor's willingness to lie on her *Human Rights Code* complaint. A person is expected to be honest in a formal document of that type. The grievor was deliberately dishonest. Secondly, I note the grievor's willingness to shape her evidence to her favour both in her letters to the Employer and at the hearing. As for the letters, I included above in the summary of the evidence a number of examples taken from the grievor's letter to Mr. Warren, the area general manager, which were misleading and were contrary to the grievor's own evidence at the hearing. At the hearing, the grievor seemed to be more concerned about the impact of her evidence and where Employer counsel was heading in cross examination, rather than with answering the questions asked. Thirdly, the grievor was not a direct and forthright witness at the hearing. A number of questions had to be repeated

several times before the grievor reluctantly answered.

In a number of instances during her testimony, the grievor stated that other persons observed incidents or overheard Mr. Zayat's comments. However, none of those alleged witnesses to the comments were called to support the grievor's testimony and no reason was offered for their failure to testify.

On the basis of these combined factors, I find that the grievor lacked credibility.

On the other hand, Mr. Zayat answered questions much more directly. There was no evidence that he had lied. At the hearing he was quite forthright in his testimony and, unlike the grievor, he did not appear to evade questions or tailor his evidence to reach a desired outcome. I found Mr. Zayat to be a much more credible witness.

Before concluding on the issue of harassment, I wish to respond to two other submissions.

First, the Union submitted that the evidence of the grievor's illness in the October 2004 - March 2005 period proved that there was harassment. I do not accept this submission. There was no independent medical evidence of the grievor's illness. The only evidence of the illness came from the grievor and I find that she is not a sufficiently knowledgeable, unbiased or credible witness as to persuade me to make any medical finding regarding her illness.

Secondly, the Employer urged me to find that the grievor's conclusion that Mr. Zayat was harassing her was motivated by a desire to get back at Mr. Zayat for having raised concerns about the grievor's job performance issues. Although I have not found any harassment, I am also unable to conclude on the evidence before me that the grievor was motivated by a desire to retaliate in this way.

The Employer response

Given my conclusion that there was no harassment, I now turn to the allegation that the Employer did not properly investigate the matter.

The Employer had a responsibility to provide a workplace for the grievor that was free from harassment. I have found that there was no harassment of the grievor, as had been alleged. Given that finding, I conclude the Employer provided a workplace free from harassment and, in so doing, the Employer fulfilled its responsibility.

However, because the parties devoted considerable time to the issue of the Employer's investigation, I will add two comments.

First, I note that the evidence part of this hearing took eight hearing days. I have great difficulty believing that any Employer investigation would occupy as much time. I thus believe that if the Employer had done the best possible investigation the Employer would have turned up no relevant facts beyond those facts which were led by these two capable counsel during this lengthy hearing. As a result, I conclude that even with the very best investigation the Employer would have reached the same conclusion which it did in fact reach.

Secondly, in my view the Employer did conduct a reasonable investigation. It reached a conclusion that no harassment took place based on its review of the evidence. When pressed, the Employer reviewed the matter on at least two further occasions and, in each instance, it reaffirmed its earlier conclusion. I have found its conclusion was correct. I can find no fault with the Employer's investigation.

Disposition

For the above reasons, both the grievance and the complaint under the *Code* are dismissed.

Dated at London, Ontario this 24th day of January, 2007.

Howard Snow, Arbitrator