

New Biggest Human Rights Damages Case In Alberta



[Oliva, Pascoe, and Strong v Gursoy, 2024 AHRC 45](#) (K Scott) is a shocking human rights decision involving three complainants who were found to have been sexually harassed and retaliated against for filing human rights complaints, among other things.

This case is very important in Alberta because:

1. It contains the highest award of general damages for pain and suffering in Alberta history;
2. It is actually three (3) complainants and more than three complaints in one; and,
3. It provides guidance on the “continuing contravention” exception to the ordinary 1 year human rights limitation
4. It provides guidance on establishing a “retaliation” claim in Alberta

Facts

The following were the facts summarized by the AHRT:

- There were three complainants:
 - Oliva
 - Pascoe
 - Strong
- The respondent was Mr. Gursoy, the director and sole shareholder of TJ Construction Management Ltd. An earlier decision had found that the complaint was allowed to proceed directly against him because he was the transgressor and TJ Construction Management Ltd. was insolvent / bankrupt
- The complainants all alleged that Mr. Gursoy subjected them to [gender based discrimination](#) ([sexual harassment](#)) which resulted in the termination of their employment contrary to Section 7 of the AHRA
- Two of the complainants also alleged that Mr. Gursoy had violated Section 10 of the AHRA when he sued them with a Statement of Claim, allegedly in retaliation for their filing their first human rights complaints against him
- Oliva worked for TJ Construction for a total of about a year, moving up from a marketing position to the General Manager, when she resigned, allegedly due to poor treatment and discrimination. The relevant facts found by the AHRT respecting Oliva were as follows:
 - On one occasion, Oliva had a doctor’s appointment and was a bit upset

- afterwards. Gursoy tried to get her to tell him her medical information and she refused, prompting him to say that she could “fuck off” and leave the company. He later apologized and she stayed. The relevant information was respecting a possibility of getting a hysterectomy, which she later did get
- Gursoy would use sexually suggestive nicknames for her like “baby girl”, “baby”, “Mrs. Gursoy”, “sugar baby”, etc.
 - Gursoy would ask her if her “tits were real” and would comment on her body and what she should wear. She made it clear to him she did not like these comments
 - Gursoy had her arrange “sugar babies” for him to have sexual relationships with
 - Gursoy would sometimes “nuzzle” into Oliva’s neck
 - Gursoy “struck” her backside twice during employment, which was found to have been sexual in nature
 - Gursoy’s actions of a sexual nature were not welcome by Oliva
- Pascoe worked for TJ Construction for about a month as a receptionist and assistant, when she resigned, allegedly due to poor treatment and discrimination. The relevant facts found by the AHRT respecting Pascoe were as follows:
 - Gursoy touched Pascoe’s back and shoulders without her consent, called her sexually suggestive nicknames, and made sexually suggestive remarks about her clothing
 - These actions were sexual in nature
 - There was no evidence that Gursoy could have reasonably understood them as welcome by Pascoe
 - Strong worked for TJ Construction for a little bit less than a year as a receptionist and assistant, when she went on maternity leave. She did not return. The relevant facts found by the AHRT respecting Strong were as follows:
 - Strong started as assistant and was quickly promoted to executive assistant
 - When Gursoy found out she was pregnant, he berated her and said she was no longer “good” for the position of executive assistant
 - She was demoted back to her assistant role and stayed there till maternity leave
 - During her employment, Gursoy touched Strong’s belly, nuzzled her neck, hugged her, and kissed her cheek without her consent.
 - He called her sexually suggestive nicknames
 - He made comments about paying Strong to have his baby “the natural way”, which implied that he would pay her to have sex with him
 - Some of the events complained of by Strong occurred more than 1 year prior to her filing her human rights complaint.

Analysis / Conclusion

The AHRT had little difficulty concluding that Oliva had been sexually harassed, and went on to find that the sexual harassment was at least a factor in her decision to quit her job. Accordingly, it was a termination of employment on the basis of a protected ground, contrary to Section 7 of the AHRA.

The AHRT also found that Gursoy’s demand for medical information from Oliva and then reacting angrily after she refused was discrimination on the basis of physical disability.

The AHRT found that Gursoy sexually harassed Pascoe during her employment and that this led to her resignation, contrary to Section 7 of the AHRA.

The AHRT found that Gursoy had sexually harassed Strong throughout her employment as well.

Before turning to damages, the AHRT dealt with some other issues. The AHRT noted that some of Strong's complained contraventions occurred more than a year prior to her filing her complaint. The AHRT noted that events occurring more than 1 year prior to the filing of a complaint are normally outside of the limitation under the AHRA, but there are important exceptions to this general rule:

[160] [...] With respect to events that occurred prior to [the 1 year mark], two possibilities arise. First, the general rule is that, while the Tribunal cannot find a breach of the [Act](#) in respect of events that occur outside of the relevant limitation period, the Tribunal may nevertheless consider those events as part of the background context in assessing whether discrimination occurred within the relevant limitation period. Second, where the actions complained of are a continuing contravention of the [Act](#) (as opposed to individual breaches), the Tribunal may consider the entire course of conduct, so long as some portion of it falls within the limitation period.

[162] In *Houston v Canadian Natural Resources Limited*, the Tribunal explained the difference between the two possible approaches as turning on whether the matter involved a series of separate but related actions or was an example of multiple, independent complaints. Finding that the events leading to the complainant's dismissal and the termination itself were part of a continuing contravention, the Tribunal summarized the allegations as follows:

The consecutive and related sequence of alleged events were that the complainant disclosed drug use, was placed on leave, had that leave extended by the respondent, was deemed fit to return to work and then had his employment terminated. The alleged occurrences and grounds of discrimination as well as the potential justification for any discrimination, are similar throughout the series of events occurring within a few short months. The underlying facts and parties to the alleged discrimination are the same.

The events are related and any separation into separate claims of discrimination would be artificial and an unnecessarily burdensome process. Including the termination in the Director's process was appropriate.

[...]

[164] [...] Counsel for the Director submitted that Gursoy's inappropriate touching and sexually suggestive remarks were so prevalent during Strong's employment that it created a poisoned work environment that continued up until her last day. The Director cites *Lalwani v ClaimsPro Inc.* wherein the Tribunal adopted Justice Verville's observation in *Bobb v Alberta* that "the hallmark of harassment and a poisoned work environment is an element of persistence or repetition."

Ultimately, the AHRT found that all of the actions Strong complained about, even those occurring more than 1 year prior to the complaint, were properly within the complaint as a "continuing contravention", as follows:

[165] I agree with the Director's assertion that Gursoy persistently and repeatedly subjected Strong to sexual harassment. It is clear Strong took the entirety of the sexual harassment that she experienced into account in deciding not to return to TJCM following her maternity leave. Gursoy's actions (touching Strong without consent, calling her sexually suggestive nicknames, and commenting that she should have his baby) were a continuing contravention of the [Act](#).

Respecting damages on the discrimination complaints, Oliva was awarded **\$75,000** in general damages for pain and suffering plus lost wages, Pascoe was awarded **\$30,000** in general damages plus lost wages, and Strong was awarded **\$50,000** in general damages.

Some of the reasoning respecting the general damages award of **\$75,000** for Oliva was as follows:

[179] Turning to the objective seriousness of Gursoy's conduct, he not only used inappropriate language to harass Oliva, but he also touched her intimately: hugging, kissing, and nuzzling her neck, as well as slapping her backside. While perhaps not as objectively serious as touching her breast, the difference in degree is not substantial. Gursoy's conduct was completely unacceptable and is deserving of serious denunciation.

[180] Additionally, I note that Gursoy's conduct was repeated, frequent, and occurred over several months. Oliva's employer (effectively, Gursoy) took no steps to address this behaviour, and it ultimately led (at least in part) to the termination of her employment.

Some of the reasoning respecting the general damages award of **\$30,000** for Pascoe was as follows:

[192] [...] I note that Pascoe was particularly vulnerable as a single mother who had just returned to the workforce after a 3-year hiatus. I repeat my comments with respect to his treatment of Oliva above. Gursoy's sexualized comments about Pascoe's clothes, repeated use of sexually suggestive nicknames, and his attempts to hug, kiss, and nuzzle her neck without her consent, is reprehensible. It is deserving of significant denunciation.

Some of the reasoning respecting the general damages award of **\$50,000** for Strong was as follows:

[202] The subjective impact on Strong appears to have been comparable to what Pascoe and the complainant in *McCharles* described. Turning to the objective seriousness of Gursoy's conduct, I note that, even more so than Pascoe, Strong was incredibly vulnerable at the time. Her pregnancy made it substantially more difficult for her to quit her job in order to escape Gursoy's sexual harassment. Her inability to remove herself from the situation clearly haunted her during and after her pregnancy.

[203] Additionally, it cannot be overstated how shockingly inappropriate Gursoy's treatment of Strong was. Not only did he call her sexually suggestive nicknames and touch her without consent, he repeatedly propositioned her for sex and talked about taking her baby. His conduct was beyond the pale. It requires strong denunciation.

The AHRT then considered the allegations of retaliation by Oliva and Pascoe, noting that the test for proving retaliation is as follows:

[207] The onus is on a complainant alleging retaliation to prove it on a balance of probabilities. Alberta Court of Appeal has articulated the test for retaliation under the [Act](#) as follows:

I conclude that the test for retaliation is composed of two parts. The first part of

the test involves ascertaining whether there is a link between the alleged conduct and one of the actions enumerated in s. 10(1), in this case the filing of a complaint. Factors such as coincidental timing may be considered in relation to this part of the test, and in most cases, human rights tribunals will be called on to draw inferences of linkage from the proven facts.

The second part of the test involves establishing that the alleged conduct was, at least in part, a deliberate response by the employer to one of the actions enumerated in s. 10(1). It will often be evident from the facts and inferences that establish the first part of the test. A complainant need not show malice on the part of the employer. This part of the test addresses the element of intent that is inherent in the term retaliate and is therefore in keeping with the wording of the statute.

...

Mixed intents will meet the test for retaliation so long as the payback intent forms a part of the substantial reasons for the action. It need not be the dominant intent, but a minor or trivial intent is not enough.

Retaliation also includes post-complaint conduct that is intended to prevent or discourage future complaints of discrimination. For example, in a case where there is no evidence to support the initial allegation of discrimination but the employer dismisses or disciplines the employee because it is annoyed by the employee's complaint. Even though there was no discrimination, retaliation has nevertheless been established.

There were substantial facts and analysis around whether the filing of civil claims by Gursoy was in retaliation for the human rights complaints. Ultimately the AHRT concluded it was in retaliation, and below is some of the key reasoning:

[217] Kemshaw was back working at TJCM for the second time when the 2021 Claim was filed. She recalled Gursoy being "elated, giddy, excited" when the 2021 Claim was filed with the Court. He was hugging everyone at work and telling them he was "going to destroy [the complainants], fuck them over, and bleed them dry." He stated that the complainants couldn't go to court forever.

[...]

[226] Reading the 2020 Claim and the 2021 Claim in concert with Kemshaw's testimony, I conclude that there was a link between the filing of the Discrimination Complaints and the filing of the lawsuits. [...] Most of the facts plead in each refer directly to the filing of human rights complaints and treat the filing of the Discrimination Complaints as an essential component of the wrong-doing alleged.

[227] Additionally, I note a marked lack of temporal connection between the filing of the 2020 Claim and the 2021 Claim and the basis for those claims suggested by Gursoy. [...]

[...]

[229] [...] taking into account Kemshaw's recollection of Gursoy's intentions, as he expressed them to her, I conclude that a substantial reason for the filing of the 2020 Claim and 2021 Claim was to intimidate and upset the complainants and to discourage them from advancing their Discrimination Complaints.

The AHRT concluded that the retaliation claims of Oliva and Pascoe were made out, awarding them **\$25,000 each** in damages in this regard.

My Take

The damages awards against the respondent in this case will be perceived by some as too high, and by some as too low.

In the historical context of [Alberta human rights decisions](#), all of these damages awards are at the high end, and one is the highest in our provincial history (\$75,000).

However, the conduct that was established is extreme. Verbal sexual harassment is serious, but physical sexual harassment is extremely serious and attract high damages. If Oliva and Pascoe's claims were civil lawsuits (i.e. not human rights), they could have pursued constructive dismissal along with aggravated and punitive damages. In that forum, the damages awards might be similar but I think they could easily have been higher as well.

So while these damages awards are certainly high, they are not surprising to me in the context of what happened in this case.

One more comment is necessary here. The respondent Gursoy was self-represented. A lot of his evidence was given little to no weight, in part because of rules of evidence that he failed or refused to follow. It is impossible to say with certainty whether the facts would have turned out better for him if he had legal counsel, but they could hardly have turned out worse.

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The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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