Date Issued: April 20, 2011
File: 5338

Indexed as: Pardy v. Earle and others (No. 4), 2011 BCHRT 101

IN THE MATTER OF THE *HUMAN RIGHTS CODE*
R.S.B.C. 1996, c. 210 (as amended)

AND IN THE MATTER of a complaint before
the British Columbia Human Rights Tribunal

B E T W E E N:

Lorna Pardy

COMPLAINANT

A N D:

Guy Earle, Salam Ismail, and Zesty Food Services Inc.

RESPONDENTS

REASONS FOR DECISION

Tribunal Member:	Murray Geiger-Adams
Counsel for the Complainant:	Devyn Cousineau
Counsel for the Respondent, Guy Earle:	James Millar
On behalf of the Respondents, Salam Ismail and Zesty Food Services Inc.:	Sam Ismail
Dates of Hearing:	March 29-31 and April 9, 2010

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I. The Complaint

[1] In September 2007, Lorna Pardy filed a complaint in which she alleged that the respondents, Guy Earle, Salam Ismail, and Zesty Food Services Inc. ("Zesty") discriminated against her in the provision of a service customarily available to the public, on the basis of her sex and sexual orientation, contrary to s. 8 of the *Human Rights Code* (the "*Code*"). (I refer to Mr. Ismail and Zesty collectively as the "Zesty respondents".)

[2] The heart of Ms. Pardy's allegation is that Mr. Earle directed homophobic and sexist insults at her during the evening of May 22, 2007, when she was a patron, and he was the master-of-ceremonies at an "open mic" comedy show at Zesty Restaurant ("Zesty's), which is owned and operated by the Zesty respondents.

[3] The respondents say that the Tribunal has no jurisdiction to consider the complaint, and in any event, deny that they discriminated.

[4] The procedural history of the complaint is set out in the Tribunal's decision in *Pardy v. Earle and others (No. 3)*, 2010 BCHRT 128 ("*Pardy (No. 3)*"), and need not be repeated here.

[5] This is my decision, after a full hearing, written submissions by all parties, and oral submissions by all parties who chose to participate, and careful, lengthy reflection, on the following issues:

- Does the Tribunal have jurisdiction to hear Ms. Pardy's complaint?
- If the Tribunal has jurisdiction, is the complaint justified?
- If the complaint is justified, to what remedy is Ms. Pardy entitled, and from whom?
- Is either Ms. Pardy or Mr. Earle entitled to costs?

II. The Tribunal

[6] The Tribunal cannot make determinations without giving all parties an opportunity to produce evidence and make legal argument about the case, and without considering both the provisions of the *Code*, and what the Tribunal and the courts have previously decided about its proper interpretation and application in similar circumstances.

[7] The Tribunal's decisions on matters of fact are based on admissible evidence, brought to it by the parties to a complaint, from witnesses with personal knowledge of relevant facts, who testify under a solemn promise to tell the truth, and are subject to cross-examination.

[8] Its decisions on matters of law are based on arguments made by the parties, based on facts proved in evidence, relying on precedents established in previous human rights cases which have been decided by tribunals and courts. The Tribunal's decisions are subject to judicial review, on standards created by the legislature, and applied by the courts.

III. Parties

[9] Ms. Pardy's complaint names Mr. Ismail, Zesty, and Mr. Earle as respondents. The Zesty respondents, who were represented by counsel until shortly before the hearing, did not bring an application to remove Mr. Ismail as a respondent, based on any of the considerations discussed in *Daley v. B.C. (Ministry of Health) and others*, 2006 BCHRT 341, paras. 32-62. There is no evidence that Zesty has the capacity, or has acknowledged a responsibility, to satisfy any remedy the Tribunal might order (*Daley*, para. 60). Ms. Pardy appears to allege that Mr. Ismail personally had the ability to substantially influence the events giving rise to the complaint (*Daley*, para. 61). Ms. Pardy alleges that Mr. Ismail had a measure of personal culpability (*Daley*, para. 62).

[10] None of the parties' evidence provides any information to supplement Mr. Ismail's acknowledgement in cross-examination that he is "the owner of Zesty's". None of the parties' arguments address Mr. Ismail's personal liability, as distinct from that of Zesty, for any discrimination. Where Mr. Ismail and Zesty are both properly respondents to the entirety of the complaint, and where the parties have not distinguished between the acts or omissions alleged against Mr. Ismail and Zesty, it is appropriate to deal with Mr. Ismail and Zesty as a single entity for the purpose of assessing potential liability for any discrimination.

IV. Facts

[11] The following account is drawn from the testimony of the witnesses who appeared at the hearing, either voluntarily at the request of a party, or in obedience to an order to attend issued by the Tribunal at the request of a party. As will be apparent, the evidence of the witnesses conflicts on many points. In resolving those conflicts, and determining whether to accept the

evidence of any witness, in whole or in part, I have adopted and applied the test set out by the B.C. Court of Appeal in *Faryna v. Chorny*, [1952] 2 D.L.R. 354:

> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carries conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.
> (p. 357)

[12] In addition, I have considered the witnesses' motives for testifying, their powers of observation, opportunity for knowledge, judgment and memory, ability to describe clearly what they saw and heard, their relationship to the parties and to each other, the internal consistency of their evidence, and inconsistencies and contradictions in relation to other witnesses' evidence and the documentary record. As in all cases when assessing credibility, I am entitled to accept some, none, or all of a witness' testimony.

[13] At the beginning of the evidence, I made an order excluding witnesses, other than Ms. Pardy and Mr. Ismail, as parties, from the hearing room until they were called to testify. This order was made to prevent one witness from tailoring her or his evidence to match (or refute) that given by previous witnesses, but at the same time to permit the parties, whose interests are directly affected by the complaint, to hear all the evidence. Ms. Pardy testified first, without hearing what the other witnesses would say.

[14] The 11 witnesses who testified, in order of their appearance, were: Lorna Pardy, Eda Ertan (Ms. Pardy's current partner), Carlin Sandor (Ms. Pardy's friend, and a customer of Zesty's), Jeremy Miedzinski (a comedian), Salam Ismail (the proprietor of Zesty's), Mike Wolfe (a comedian), Nick Dacosta (an employee of Zesty's), Marlo Franson (a comedian), Grant Espaniel (a comedian who was a spectator and Zesty's customer, rather than a performer, on the night in question), Nic Roy (a comedian), and Samantha Semczyszyn (a Zesty's employee). With the exception of Ms. Ertan and Mr. Dacosta, all the witnesses were present for part or all of the evening at Zesty's, when the events pivotal to Ms. Pardy's complaint occurred.

[15] Mr. Earle, though a party to the complaint, did not testify. Zoe Broomsgrove, Ms. Pardy's partner at the time the complaint arose, and a customer of Zesty's at that time, did not

testify. I am satisfied that I have sufficient direct evidence from those who testified to determine the facts. Accordingly, I do not have to consider whether to draw adverse inferences from the failure of either Mr. Earle or Ms. Broomsgrove to testify.

[16] In her argument, Ms. Pardy would have me disregard all the evidence of the comedians who testified, and simply accept that given by her witnesses. I agree that there were weaknesses in the comedians' evidence. However, for reasons discussed in detail below, I think that is true of all the witnesses, including Ms. Pardy. Even where I have found reason to approach a witness' evidence with caution, I have often found some of it helpful in understanding or corroborating some of the evidence of others. I have sifted carefully through the evidence of all the witnesses, in an effort to determine as accurately as possible what happened at Zesty's before, during, and after the evening of May 22, 2007.

[17] To facilitate an orderly consideration of the evidence, I have divided events into the following segments:

- Arrangements among Mr. Ismail, Zesty, and Mr. Earle for the open mic nights
- Events at Zesty's on May 22, 2007
    - Ms. Pardy goes to Zesty's
    - On the patio at Zesty's
    - In from the patio
    - Mr. Earle's first comments from the stage
    - The first glass of water
    - Mr. Earle's second comments from the stage
    - The second glass of water and the sunglasses
    - The street outside
- Ms. Pardy's return to Zesty's on May 23, 2007
- Impact on Ms. Pardy of the events of May 22, 2007, and afterwards

[18] In my consideration of each segment of the evidence, I first present and discuss the evidence of the witnesses in the order in which they testified, assessing their general credibility, and identifying those parts of their evidence I do and do not accept, and explaining why. For each segment, I then briefly summarize my factual findings. Although I do not refer to all the evidence of every witness, I have carefully considered it all in reaching my conclusions on the facts.

A. Arrangements among Mr. Ismail, Zesty, and Mr. Earle for the open mic nights

1. Evidence

[19] Salam Ismail is the principal of the respondent Zesty, and the proprietor of Zesty's restaurant. He has been doing business on Commercial Drive since 1997. Mr. Ismail immigrated to Canada form Iraq in about 1993. In Iraq, he was a member of both ethnic and Christian religious minority groups, and experienced discrimination himself.

[20] It appeared to me that Mr. Ismail shaded his evidence somewhat in order to minimize his connection with Mr. Earle, and his own control over the events at Zesty's on May 22, 2007. His evidence in chief was also weakened somewhat by the fact that he frequently was responding to leading questions from his representative, who suggested answers designed to assist his case. With those reservations, I accept Mr. Ismail's evidence as a generally truthful and accurate account of what he did and observed.

[21] Mr. Ismail estimated that 60% of his customers were lesbian or gay. He said that he was always supportive of lesbian and gay people in the Commercial Drive area, and that the restaurant had hosted a lesbian group's comedy show every Saturday for seven years before the events occurred giving rise to Ms. Pardy's complaint. His evidence in this regard was supported by a detailed letter, dated November 27, 2007, signed by Lee Ann Keple and Ardell Brophy-Fitzpatrick, the general manager and producer, respectively, of the Laff Riot Girls, which was, on consent of all parties present at the hearing, admitted into evidence for the truth of its contents. As the letter makes clear, the shows the Laff Riot Girls put on at Zesty's were completely separate from the open mic nights hosted by Mr. Earle and others.

[22] I am satisfied that Mr. Ismail did not, at any time, personally harbour or express prejudice, or have any intention to discriminate against women or lesbians in general, or against Ms. Pardy in particular.

[23] Mr. Ismail testified that, after doing one show as a trial, to which Mr. Earle brought his friends, Mr. Earle approached him to ask if he could host a show every Tuesday night, and Mr. Ismail agreed. He was not sure when this arrangement was first made, or for how long it lasted before May 2007. On each occasion, the restaurant put up a $50 bar tab for all the comedians, not just the host, to share. He never paid Mr. Earle in cash, and did not consider him an employee of the restaurant. On other occasions, others besides Mr. Earle acted as master-of-

ceremonies, under the same arrangement. The comedians sometimes brought their friends to watch the shows. I note that there was uncontradicted evidence that Mr. Espaniel, who did not perform the night of May 22, and his friend Brigitte were both customers that night, and that Mr. Wolfe, who did perform, had a couple of friends there that night.

[24] Zesty's promoted the open mic shows by putting signs on the restaurant doors and in the washrooms. Mr. Ismail thought there was also reference to them on Zesty's website.

[25] Mr. Ismail said that before the events of May 22, 2007, he didn't have much experience dealing with inappropriate behaviour by comedians, and had no policy to communicate to them about their language or their treatment of customers. After those events, he said he did tell them that "Your job will be only on stage", and that they were not to use bad language, or to go over to customers' tables and "pick on them".

[26] Mr. Ismail testified that, within a week after May 22, 2007, and a visit to the restaurant the next day by Ms. Pardy, he called Mr. Earle and told him not to come in as scheduled the following Tuesday to host the open mic night. Mr. Earle was very angry, and told Mr. Ismail that Mr. Ismail "had to" continue with the shows, but Mr. Ismail declined.

[27] In his direct examination, Mr. Ismail testified that he was "trying to encourage young people to come there and improve their talent", and said that he did not make a lot of benefit from it. Then he said that they came late, at 9:30 or 10:00, and brought their friends. In cross-examination, he agreed that was a slow time at the restaurant, but when it was suggested to him that having more people at a slow time was a benefit to the restaurant, he asserted that "lots of times we only see the comedians". To the extent that Mr. Ismail's emphasis, at least, was different between his direct examination and his cross-examination, I prefer the former, which was given when he was less guarded, and before he sought to resist the suggestion that the restaurant was benefitting from putting on the shows.

[28] In his direct examination, Mr. Ismail's representative suggested to Mr. Roy, and Mr. Roy agreed, that Mr. Ismail put on the shows as a favour to comedians. It was then suggested to Mr. Roy that Mr. Ismail was, as part of the community, trying to help them promote their skills. Mr. Roy responded that he didn't know if it was part of any community, and that Mr. Ismail was "just doing it for himself".

[29] When it was again suggested to Mr. Roy that Mr. Ismail was trying to help the comedians, Mr. Roy expressed his understanding that Ms. Ismail met a lot of comedians through these shows, with whom he did other projects. Mr. Wolfe testified to having entered into such an arrangement with Mr. Ismail a year and a half later, under which Mr. Wolfe hosted half a dozen shows. He had a budget from which to pay the comedians performing, and made money from a cover charge. Mr. Roy's and Mr. Wolfe's evidence on this point was not contradicted by any other evidence. For reasons discussed below, I do not accept all of their other evidence, but I do accept it on these points.

[30] Ms. Semczyszyn began working at Zesty's in October 2006, and continued to do so at the time of the hearing. Ms. Semczyszyn testified that she usually looked after the restaurant when Mr. Ismail was not around.

[31] Ms. Semczyszyn was responsive to questions in both direct and cross examination. She readily acknowledged when she was not sure about the details of events. With one important exception, discussed below, I accept Ms. Semczyszyn's evidence as a truthful and generally accurate account of what she observed, not only as to the earlier arrangements between Mr. Ismail and Mr. Earle which led to the latter hosting the open mic night on May 22, 2007, but also as to events that evening.

[32] Ms. Semczyszyn testified that there were no open mic comedy nights at Zesty's between the time when she started working there and the series hosted by Mr. Earle and others beginning in 2007. Before that there were comedy performances by the Laff Riot Girls on Saturdays, and a "Langara comedy college", about which she provided no details.

[33] She witnessed a conversation between Mr. Earle and Mr. Ismail that she estimated took place between February and the early spring of 2007. Mr. Earle approached Mr. Ismail to ask if he could use the stage at Zesty's for an open mic comedy night. Mr. Ismail said "we'll see". Thereafter, Mr. Earle was the main master of ceremonies for a series of open mic nights. On some occasions, when Mr. Earle was not the MC, he would go on as a comic.

[34] According to Ms. Semczyszyn, Mr. Earle was not paid directly for hosting the open mic nights, or for appearing as a comedian at Zesty's. Rather, on each such occasion Zesty's put up three pitchers of beer for approximately six comedians to share. Mr. Earle and the other comedians paid for any additional food or liquor they consumed.

[35] Marlo Franson testified that he became aware of the open mic nights at Zesty's through Grant Espaniel, another comedian. Mr. Espaniel told him about a comedy show at Zesty's, hosted every Tuesday by Mr. Earle, and encouraged him to check it out. He said he attended for four consecutive Tuesdays as a spectator. The fifth time, at the end of February 2007, he sought and obtained Mr. Earle's permission to go on stage and perform, and performed each Tuesday thereafter until the show was stopped in May 2007. On each such occasion, Mr. Earle was the host and master of ceremonies. Given Mr. Franson's interest as a performer, and his more precise recollection, I prefer his evidence to Ms. Semczyszyn's on the question of when the shows began.

[36] Mr. Roy testified that Mr. Earle hosted the comedy shows at Zesty's every Tuesday night for perhaps two or three months, and that he had to talk to Mr. Earle in order to get on stage to perform. For reasons discussed below, I do not accept some of the evidence of Mr. Franson or Mr. Roy, but I do accept their evidence, which did not appear to be a matter of controversy between the parties, on these points.

2. Summary of factual findings: arrangements among Zesty, Mr. Ismail, and Mr. Earle for the open mic nights

[37] After careful consideration of the evidence, I find the following facts. Mr. Earle approached Mr. Ismail in the early spring of 2007, proposing to host an open mic comedy show at Zesty's. After a trial performance, Mr. Ismail agreed. Thereafter, their arrangement was that Mr. Earle (or, in a few cases, another person designated by him) would host the shows, and act as the master of ceremonies.

[38] Mr. Earle determined who would perform, and in what order. He introduced the comedians as they came on stage. The only compensation with a direct monetary value for Mr. Earle or any of the other comedians for their participation was a limited amount of free beer supplied by Zesty's. Otherwise, Mr. Earle and the others remained paying customers of the restaurant, which remained open for other paying customers.

[39] Mr. Ismail permitted Mr. Earle and others to organize these shows as a benefit to the comedians and the community, but he and Zesty also benefitted directly from the arrangements, in that they attracted paying customers, and indirectly, in that they permitted Mr. Ismail to meet people, such as Mr. Wolfe, with whom he later entered into more formal business arrangements.

[40] The Zesty respondents were responsible for advertising the comedy shows on their doors, in their washrooms, and on their website, indicating that the shows were a part of the restaurant's business.

[41] Mr. Ismail's permission was required to begin this series of shows, and he was able, over Mr. Earle's objections, to bring them to an end. Mr. Ismail retained the authority to establish standards for the behaviour and language of the host and performers in relation to Zesty's customers, and to prevent the host and performers from appearing if they breached those standards.

B. Events at Zesty's on May 22, 2007

1. Ms. Pardy goes to Zesty's

(a) Evidence

[42] Ms. Pardy is a woman and a lesbian. These two characteristics are the foundations for her complaint based on sex and sexual orientation, respectively.

[43] In general, I accept Ms. Pardy's evidence as to the events of May 22, 2007, and the subsequent effect of those events on her. She gave her evidence without apparent evasion, and it was generally consistent with both the evidence which I accept from other witnesses, and with the available documentary record. I treat her evidence with caution, however, to the extent that she appeared to be minimizing such things as her own proximity to the stage, or the extent of her own participation in her dealings with Mr. Earle on May 22, and the next day with Mr. Ismail, or on occasions, discussed below, where it conflicted with the weight of reliable evidence from other witnesses, including Ms. Sandor.

[44] On May 22, 2007, Ms. Pardy worked from 6:30 a.m. to 6:30 p.m. She put into evidence both a copy of her work schedule and a letter from her site manager verifying her attendance at work at those times on that date.

[45] When Ms. Pardy left work on May 22, she went home, and prepared to go out. She was in telephone contact with her girlfriend at the time, Zoe Broomsgrove, and their mutual straight friend, Carlin Sandor. They arranged to meet at Zesty's.

[46] As noted, Ms. Broomsgrove did not testify. Ms. Sandor testified that she met Ms. Pardy through Ms. Broomsgrove, and had known Ms. Pardy for approximately four years. She said that in the years since the events giving rise to Ms. Pardy's complaint, they have socialized at most, half a dozen times, as Ms. Pardy and Ms. Broomsgrove broke up a few months later, and she was Ms. Sandor's friend first. Ms. Sandor appeared to give her evidence straightforwardly and candidly, even when, on occasion, it conflicted in its details with that of Ms. Pardy. She did not appear to tailor her evidence at any time to support Ms. Pardy's case.

[47] Ms. Sandor's recollection was sometimes less than precise as to the details or timing of events. She was generally careful to distinguish between her distinct recollections, and her impressions or guesses. When others had more detailed evidence which was supported by other oral or documentary evidence, and consistent with the surrounding circumstances, I have not relied on Ms. Sandor's recollections. With that exception, I accept her evidence as a truthful and generally accurate account of what she witnessed that evening.

[48] Ms. Pardy understood that Ms. Broomsgrove and Ms. Sandor were at Zesty's with other female friends, two of whom left before she arrived, and one who left on her arrival, which she estimated to have been between 9:20 and 9:45 p.m. Ms. Sandor estimated Ms. Pardy's arrival as having occurred about 9:00 or 9:30 p.m.

[49] Ms. Pardy identified a diagram, Exhibit #12, showing the layout of Zesty's. I include a copy of it as Appendix "A", because it may assist in understanding the witnesses' evidence and these reasons. Several other witnesses testified with reference to the diagram. None took issue with its general accuracy, though some noted that it is not to scale.

(b) Summary of factual findings: Ms. Pardy goes to Zesty's

[50] I find that on May 22, 2007, after working until 6:30 p.m. and going home, Ms. Pardy arrived at Zesty's about 9:30 p.m. to meet her girlfriend Ms. Broomsgrove and their friend Ms. Sandor.

2. On the patio at Zesty's

(a) Evidence

[51] Ms. Pardy testified that, when she arrived at Zesty's, Ms. Broomsgrove and Ms. Sandor were on the patio, at the table at the very top left of the diagram, just wrapping up their bill with

the female server, and that the three of them started a new tab with a server named “Brandy”. She put into evidence a copy of the first bill, which she said Ms. Broomsgrove gave her that evening. It appears to show that at 9:17 p.m., a Zesty’s server named “Amanda” rendered a bill for one appetizer, 12 imported beers, and one cider. This is consistent with Ms. Pardy’s evidence about the time of her arrival and the events taking place then. Ms. Sandor corroborated Ms. Pardy’s evidence about the location of their table on the patio.

[52] Ms. Pardy testified she ordered a Corona with no lime. She said that, between then and about 11:00 p.m., she ordered one more Corona, and finished half of it. Ms. Sandor’s guess was that Ms. Pardy consumed a maximum of two to three drinks over the course of the evening, though Ms. Sandor volunteered that she wasn’t keeping track. I accept Ms. Pardy’s more precise evidence, which was supported by detailed evidence of ordering two Corona on the patio, and turning down another after she came inside. Her evidence that she consumed a total of two beers between her arrival, about 9:30 p.m., and her departure, shortly after 11:30 p.m., is uncontradicted by the evidence of any other witness.

[53] I do not accept Mr. Franson’s evidence that Ms. Pardy was at the patio table marked “7” on the diagram, closer to the door and the stage. He and Mr. Roy were in error in testifying that there were two women on the patio, rather than the three identified by Ms. Pardy, Ms. Sandor, and Mr. Espaniel. Mr. Franson was also in error in testifying that Ms. Pardy and the others were brought in from the patio by a male waiter. Ms. Pardy and Ms. Sandor both testified that it was a woman; Ms. Semczyszyn testified that it was Brandy. No other witness testified to the presence of a male waiter at Zesty’s that night.

[54] Ms. Pardy testified that she was unaware before she arrived at the restaurant that there was to be a comedy show that evening, and did not notice a sign outside advertising the open mic night. She said that she later became aware that there were people inside the restaurant, and “put two and two together”. However, she and her friends were not there to see a show, had no intention of coming in to see it, and remained on the patio for approximately 1½ hours after her arrival. She said she didn’t hear any announcement that the show was starting, and Mr. Earle did not come out to the patio at any time to invite patrons there to come inside for the show. Ms. Pardy was not cross-examined on this evidence, and it was corroborated by Ms. Sandor.

(b) Summary of factual findings: On the patio at Zesty's

[55] I find as facts that Ms. Pardy joined Ms. Sandor and Ms. Broomsgrove on the patio at Zesty's at about 9:30 p.m. They were sitting at the table on the very top left of Appendix "A", which was the patio table furthest from the stage.

[56] Ms. Pardy was not aware that Zesty's was putting on an open mic comedy night, was not there to see the show, did not hear any announcement that it was starting or any invitation to attend, stayed on the patio after she became aware that it had started, and only came inside when her server told her that the patio was closing, and conducted her inside.

[57] While on the patio, Ms. Pardy ordered two beers, and consumed only half of the second one.

3. In from the patio

(a) Evidence

[58] Ms. Pardy testified that, at about 11:00 p.m., Brandy came from inside the restaurant to say that the patio was closing, and asked patrons to come inside. As noted, at that point, Ms. Pardy testified that she had finished one Corona, with no lime, ordered when she first arrived, and was about half way through a second. Mr. Wolfe, who was asked in direct examination whether the women were "drunk somehow", testified that he "didn't recall them being intoxicated at all".

[59] Ms. Semczyszyn was working the evening of May 22, 2007, and identified Brandy, who did not testify, as another server working that night. Brandy was new, working her second or third shift.

[60] Ms. Semczyszyn did not refer in her evidence to "Amanda", whose name was on Ms. Sandor's and Ms. Broomsgrove's earlier bill as their server, and who Ms. Pardy identified by name in her evidence. Ms. Pardy's later identification of the server who picked up her broken sunglasses as "Amanda", when the person who did so was undoubtedly Ms. Semczyszyn, leads me to conclude that Ms. Pardy was actually referring to Ms. Semczyszyn as "Amanda". However, no witness explained why the name "Amanda" appeared on Ms. Sandor's and Ms. Broomsgrove's earlier bill, when Ms. Semczyszyn also testified that they were not at one of her

tables. As noted, Ms. Semczyszyn testified that it was she who asked Brandy to bring Ms. Pardy and the others in from the patio.

[61] Though she was present at the restaurant throughout, Ms. Semczyszyn professed not to have seen or heard a series of verbal encounters between Ms. Pardy and Mr. Earle, from the stage or at Ms. Pardy's booth, which every other witness present testified to, though she did not deny that those encounters occurred. I accept Ms. Semczyszyn's evidence that she spent some time on the patio after it closed, stacking tables and chairs, and that she may have spent some time in the non-public areas of the restaurant, and that her full attention was not always on the stage. However, I do not find it believable that she saw and heard none of what occurred between Mr. Earle and Ms. Pardy's group, or, as she testified in cross-examination, that she didn't hear Mr. Earle talk to the women from the stage, didn't see him twice approach their booth, and "doesn't listen to what they say on stage". I infer that she was trying, in support of her employer, Mr. Ismail, to minimize the knowledge or participation of any Zesty's employee in these events. On these points, I prefer the evidence of the other witnesses to the absence of evidence from Ms. Semczyszyn.

[62] Ms. Pardy testified that when she, Ms. Sandor and Ms. Broomsgrove came in from the patio, they sat at booth number "1" on the diagram, which was some distance from the stage. I do not accept this part of Ms. Pardy's evidence. Ms. Sandor testified that it was one of booth "3", or tables "4" or "5", all of which are directly in front of the stage, and definitely not "1". Mr. Miedzinski (who said he was sitting directly behind them), Mr. Wolfe, Mr. Espaniel, Mr. Roy and Ms. Semczyszyn all said they were at "3", the booth closest to the stage.

[63] Though there were frailties in the evidence of all these witnesses, I accept their evidence on this point, as Ms. Sandor was a frequent customer of Zesty's and very familiar with its layout, Ms. Semczyszyn had worked there for some time and could be expected to remember where she served a customer, and Mr. Wolfe and Mr. Espaniel had no apparent reason to misrepresent where they saw her sitting.

[64] Ms. Pardy testified that, once she, Ms. Sandor and Ms. Broomsgrove came inside the restaurant, and she and Ms. Broomsgrove sat down, there was a discussion between Ms. Sandor and Brandy about whether they would have another drink, and whether there were any more Coronas available. "Amanda", the head waitress, went to the back of the restaurant to determine

whether there were, and returned with a case, and said they could order more if they didn't mind drinking them warm. Ms. Pardy did not order another beer, but said, "No thanks; I think I'll finish this one". At this point, Mr. Earle was on stage, Ms. Pardy and Ms. Broomsgrove were sitting together on one side of the booth, and Ms. Sandor was sitting on the other. Brandy and "Amanda" were standing by the booth talking to them about the beer.

[65] Ms. Sandor testified to a similar series of events. She said that when their party came inside, there were approximately 15 people in the restaurant, including the comedians. Her party sat down at the booth, she with her back to the stage, and a waitress came up and asked if they wanted to order another round. She said "we" ordered another Corona, but the waitress was unsure if there were any left in the fridge. Another waitress came up with a case of Corona.

[66] The three customers and two waitresses were talking and laughing back and forth. Ms. Sandor said that they "weren't screaming at each other", or being exceedingly loud, but that there were people on stage talking through a microphone, so her party and the waitresses "had to sort of elevate our voices". She described this as "par for the course of performing in a venue where there was table service", but that it was possible their voices were loud enough to interfere with the performance.

[67] Ms. Semczyszyn testified that after Brandy asked the party in from the patio, Brandy asked her whether the restaurant had any more Corona, as she didn't know where to look. Ms. Semczyszyn remembered bringing Brandy a case from the back, but not from the cooler, and that it wasn't cold enough.

[68] Mr. Wolfe testified that there were about six or eight people in the audience when he first noticed Ms. Pardy and her friends inside the restaurant. He said they were loud, but not unusually so, and that they seemed like friends having fun with each other. He said the noise did interfere with the show, because there were so few people in the audience, anything would be a distraction. Mr. Wolfe made little reference to the presence or activities of Brandy, Amanda, or Ms. Semczyszyn, which leads me to conclude that he was not observing Ms. Pardy and the others closely, and did not have a clear recollection of what was occurring at that time.

[69] Mr. Franson testified that he saw only two women come in from patio table "7", Ms. Pardy and apparently Ms. Broomsgrove, and sit facing the stage at booth "3". He said they engaged in loud talking as they sat down and ordered drinks, but that this "happens at comedy

clubs that are also bars". He said that in such settings, customers order food and drinks and then usually quiet down and watch the show, which was what he said Ms. Pardy and Ms. Broomsgrove did at first.

[70] Based on the evidence of Ms. Pardy and Ms. Sandor, Mr. Franson was mistaken about their location on the patio. As noted, he also misremembered that it was a male waiter who brought Ms. Pardy in from the patio, and did not notice Ms. Sandor at all, even though she was, on most other accounts, present throughout these events. Mr. Franson did not refer to the servers either. However, his evidence about the location and general noise level when Ms. Pardy and her friends came in from the patio is consistent with the evidence of other witnesses, with the surrounding circumstances, and with his experience in comedy clubs serving drinks, and I accept it to that extent.

(b) Summary of factual findings: In from the patio

[71] I find the following facts. At about 11:00 p.m., at Ms. Semczyszyn's request, Brandy brought Ms. Pardy, Ms. Sandor and Ms. Broomsgrove in from the patio, and conducted them to the booth which is marked "3" on the diagram, close to the stage. Ms. Pardy and her friends were, before their arrival on the patio, unaware of the open mic might, had not come to the restaurant to attend it, and did not volunteer to come inside for that purpose. When they became aware that it was in progress, they did not object to being seated near the stage, and they did not immediately leave the restaurant.

[72] Brandy, Ms. Semczyszyn, Ms. Sandor, Ms. Pardy, and Ms. Broomsgrove all then engaged in a fairly noisy discussion of whether the party wanted to order more drinks, whether more Corona was available, and, if so, whether it was cold or warm. Ms. Semczyszyn left the booth during this discussion, returned with a case of beer, and continued the conversation. Ms. Pardy and Ms. Broomsgrove sat down facing the stage; Ms. Sandor had her back to it.

[73] In view of their closeness to the stage, and the relatively small number of other people in the restaurant, this exchange created a short disruption to the amplified open mic performance taking place on the stage. However, the Zesty's staff initiated this exchange, and fully participated in it. The short disruption and level of noise was consistent with the operation of a restaurant which was serving food and beverages to the public, and simultaneously offering a comedy performance to that same public. No witness testified that any of the conversation at the

booth at this point was directed to anyone on the stage, or related to the performance taking place there.

4. Mr. Earle's first comments from the stage

(a) Evidence

[74] With Ms. Pardy and her friends seated, and the conversation with the servers about drinks concluded, Ms. Pardy testified that Ms. Broomsgrove kissed her on the cheek or the face. She said that Mr. Earle, who was then on the stage, pointed to them and said, "Don't mind the inconsiderate dyke table that just walked in." Ms. Sandor testified that Ms. Broomsgrove leaned over to kiss Ms. Pardy on the cheek, and that Mr. Earle said, "Don't mind that inconsiderate dyke table over there. You know lesbians are always ruining it for everybody."

[75] Both Ms. Pardy and Ms. Sandor denied that Ms. Pardy and Ms. Broomsgrove engaged in anything other than a kiss. Ms. Pardy said she was sure that they were not kissing more heavily, that she is a very private person, that to do so would be juvenile, and that that is "just not the way I conduct myself in public." Ms. Sandor said that she was sure Ms. Broomsgrove and Ms. Pardy were not kissing more heavily – that had they done so she would have felt uncomfortable, and would have told them to "get a room or go home".

[76] Both Ms. Pardy and Ms. Sandor denied that they heckled Mr. Earle or said anything to him before his reference to them as the "dyke table". Ms. Sandor said that, besides the conversation among themselves, the only people they had spoken to were the waitresses.

[77] Ms. Pardy testified that, after Mr. Earle's reference to the "inconsiderate dyke table", someone in the audience booed him. He looked at her and said, "Do you have a strap-on? You can take your girlfriend home and fuck her in the ass." She was shocked and embarrassed, and responded with a "boo". Still looking at her, he said, "Are you on the rag; is that why you're being such a fucking cunt?" She said his tone was angry and condescending. Ms. Pardy said that Ms. Sandor then spoke up, and told Mr. Earle that he was being ignorant.

[78] Ms. Sandor testified that, after his reference to the "inconsiderate dyke table", Mr. Earle then started to go on about how he just didn't understand lesbians. He said something, with reference to Ms. Pardy and her friends, about really wanting to be a man. He said that they should "get a strap on and go home and fuck your girlfriend", and that he called them "dykes"

and “cunts”. She perceived that there was a lot of anger behind his comments. She looked around the restaurant, and noticed that no one seemed to be laughing. She said he was not telling jokes, and that it was not possible his remarks were part of a comedy routine. Rather, he was talking to the people at her booth, and directing his insults at them, saying that he guessed that they had “ruined it for everyone”, and referring to them as “stupid cunts” and “stupid dykes”.

[79] Ms. Sandor testified that, after Mr. Earle called them “stupid dykes” and “stupid cunts”, she was the first one who said anything in response, and that other people in the restaurant, including Ms. Pardy and Ms. Broomsgrove, booed. Ms. Sandor said that she told Mr. Earle he wasn’t telling jokes anymore, and that if he looked around, he would see that people were not laughing. She said she remembered using words like “ignorant”, “not funny”, and “nobody’s laughing”. When she called Mr. Earle ignorant, “that was the first communication our table had with him”. Mr. Earle was trying to engage her in conversation, but she wasn’t interested. Contrary to Mr. Miedzinski’s evidence, discussed below, she denied that anyone at their booth yelled insults about Mr. Earle’s mother or his looks.

[80] Mr. Miedzinski testified that when Ms. Pardy and her friends came in from the patio, they were seated at booth “3” immediately in front of him at booth “2”, and that there was a comedian on stage, whose name he could not remember, but who was not Mr. Earle, part way through his act. He estimated that it was three or four minutes before Mr. Earle came on stage as host to introduce the next comic. He said that Mr. Earle told Ms. Pardy’s table to “keep it down”, even though they weren’t really loud then. He said that Mr. Earle then brought Nick Roy onto the stage to perform. Mr. Miedzinski said that “the ladies” were heckling quite loudly when Mr. Roy went on stage, and continued to do so during his set. Shouting things like, “You’re not funny. Get off the stage”.

[81] I do not accept this part of Mr. Miedzinski’s evidence. As discussed below, it is in direct conflict with that of Mr. Roy, who could be expected to remember if the women were loudly heckling him. Further, the weight of the other evidence is that whatever occurred between Mr. Earle and Ms. Pardy and her friends happened shortly after they came in from the patio, the first time after they sat down that Mr. Earle was on stage.

[82] Mr. Miedzinski went on to say that when Mr. Earle came on stage, he told Ms. Pardy and the others that they were ruining the show, and to shut up or leave. They said he wasn’t funny

and to get off the stage. He said they had a "war of words for a good five, ten minutes at least", in which Mr. Earle said, "Fuck off you dumb bitch", and "Why don't you fuck each other with your dildos?" They responded by saying, "fuck you, you ugly loser", and saying his mother should have aborted him when she had the chance.

[83] I do not accept Mr. Miedzinski's evidence that at first Mr. Earle was "professional" in addressing the three women as "hecklers". As will become apparent, no other witness said that the women were heckling at that point, and none of Mr. Earle's words in response to anything they did or said subsequently could fairly be called "professional". Further, I do not accept Mr. Miedzinski's evidence as to the great length of this exchange, or as to its content. No other witness testified that the women said anything like the comments he attributed to them, and Ms. Sandor specifically denied them.

[84] In cross-examination, Mr. Miedzinski agreed that during the evening Mr. Earle called Ms. Pardy and her friends "dykes", "cunts" and "bitches", and that Mr. Earle said each of the following: "Don't mind the inconsiderate dyke table over there", "Don't you have a strap-on you can take your girlfriend home and fuck her in the ass tonight?", and, "Are you on the rag? Is that why you're such a cunt?"

[85] Mr. Miedzinski was called as a witness by Zesty. He was not re-examined about any of these statements. No evidence was led to establish that he had any motive to attribute to Mr. Earle statements that Mr. Earle did not make. He was not simply adopting whatever his cross-examiner suggested to him, as he distinguished between what he remembered, and what he said it was only possible that he heard. In spite of the other errors and frailties in Mr. Miedzinski's other evidence, I accept his evidence about the words Mr. Earle directed at Ms. Pardy, Ms. Broomsgrove, and Ms. Sandor.

[86] Mr. Wolfe testified that when he first noticed Ms. Pardy and her friends inside the restaurant, and he was at or near table "6", they were loud: not in any unusual way, but "like friends having fun with each other". He acknowledged that he had not been taking in the other comedians performing too much, as he was focussing on preparing for his own performance, and that he was "not paying too much attention" to Ms. Pardy and company after they came inside.

[87] Mr. Wolfe testified that Mr. Earle told Ms. Pardy and the others a couple of times to be quiet, and when that didn't work, "he started getting a little nasty". He said that he saw Ms.

Pardy and Ms. Broomsgrove kiss each other "a little bit". He said it was not a kiss on the cheek, and that it "looked like they were making out off and on". In direct examination, he said it was apparent to him that the women had caught Mr. Earle's attention, but he did not remember if Mr. Earle commented on their kissing. Mr. Wolfe said that Mr. Earle saw the women kiss, and characterized his reaction as, "That's what I'm going to go after until you shut up".

[88] Mr. Wolfe testified in chief that he definitely heard Mr. Earle hurling profanity at the women, and that "after awhile" and "eventually", they responded by saying things like "asshole" and "shut up". In cross-examination, he acknowledged that, at unspecified times, he recalled Mr. Earle calling the women "dykes", and that Mr. Earle "probably" or "most likely" also called them "bitches" and "cunts". He agreed that he recalled Mr. Earle saying to the women, "Don't you have a strap-on you can take your girlfriend home and fuck her in the ass with tonight", and that he "likely" heard Mr. Earle say, "Don't mind the inconsiderate dyke table over there", and "Are you on the rag; is that why you're such a cunt?"

[89] Mr. Wolfe said that all these alleged comments, and others made a little later, and detailed below, "kind of ring a bell", but that he "didn't remember the specific ones he said". I do not rely on Mr. Wolfe's evidence for the precise words Mr. Earle used, but it is of some help in determining the tenor of those remarks, and the kind of language Mr. Earle employed, and in corroborating the evidence to similar effect of other witnesses.

[90] Mr. Franson testified that he was standing at the entrance to the restaurant at the corner of booth 1, directly in line with the stage, when the women came in from the patio, and that Mr. Earle was on the stage at the time. Mr. Franson said that Ms. Pardy and Ms. Broomsgrove were being very affectionate with each other. He said that at one point they started kissing, and that they were "really kissing – not a kiss on the cheek", and that both their heads were turned. In cross-examination, he said, with reference to the exchange between Mr. Earle on the one hand, and Ms. Pardy and Ms. Broomsgrove on the other, that he saw them kissing each other, and "that's when it all started".

[91] Mr. Franson testified that Mr. Earle said, "No one wants to watch two ugly lesbians kiss", and that the women started talking back to him and directing comments to the stage. He said he recalled hearing a few swear words, and that Mr. Earle and the women "went back and forth with insults", but that it was hard for him to hear. Mr. Franson did not explain why, if he was sitting

immediately behind the women, and Mr. Earle had a microphone, it was hard for him to hear what they said.

[92] I do not find helpful or believable most of Mr. Franson's evidence as to whether Ms. Pardy and Ms. Broomsgrove exchanged more than a peck on the cheek, what Mr. Earle may have said in response, or whether or how they responded further. I have already referred to mistakes in his evidence, including the number in their party, the gender of the server who brought them in from the patio, and his failure to refer to the entire exchange between the women and the two waitresses.

[93] In addition, and more importantly, when Mr. Franson was cross-examined about the details of what Mr. Earle said to Ms. Pardy and her friends, he explicitly and steadfastly refused to acknowledge that Mr. Earle said anything other than what Mr. Earle admitted to saying in a YouTube video (the transcript of which is Exhibit #11D(i)), which Mr. Franson said he had viewed repeatedly before testifying. Even when directed to answer the question in his cross-examination, Mr. Franson refused to give his own recollection of what Mr. Earle said. I infer that Mr. Franson sought to protect Mr. Earle by refusing to admit recalling that Mr. Earle had used any other words other than ones he had already publicly admitted to using. Those words are discussed in more detail below, as they relate to the second encounter between Mr. Earle on stage, and Ms. Pardy and the other women in the audience. I discuss the alleged impact on Ms. Pardy of publication of the interview below as well.

[94] Mr. Espaniel's evidence was that he remembered the group of three women from the patio, that they sat at booth "3" inside the restaurant, that two sat facing the stage and one with her back to it, and that he did not see the two facing the stage kiss. He did not see them when they first came in from the patio, and said that he did not witness any conflict between Mr. Earle and the women until he left the stage and approached them a little later.

[95] In cross-examination, Mr. Espaniel said he was talking to his friend, Brigitte, at the bar before Mr. Earle left the stage to approach Ms. Pardy, and professed not to recall whether or not Ms. Earle referred to the women as "dykes", "cunts" or bitches". Nevertheless, Mr. Espaniel testified that he later went to Ms. Pardy's booth and told her that she "shouldn't take any of [Mr. Earle's] bullshit". I infer that Mr. Espaniel heard more of Mr. Earle's words than he was prepared to admit, that he sought to protect Mr. Earle, who he described as his friend, and with

whom (along with Mr. Franson and Mr. Roy) he went to another bar later that evening, and that his actual recollection of Mr. Earle's words would not have favoured Mr. Earle.

[96] Mr. Roy, like Mr. Franson, only noticed two women, Ms. Pardy and Ms. Broomsgrove, come in from the patio; he denied having seen Ms. Sandor at all. Against the weight of the rest of the reliable evidence, Mr. Roy was in error in saying that the two women sat with their backs to the stage, and had to turn in their seats to see it. Contrary to Mr. Miedzinski's evidence, Mr. Roy said that while he was on stage with the microphone, he did not notice anyone interrupting the show, and that nothing happened during his set. He did say, without elaboration or explanation, that Ms. Pardy and Ms. Broomsgrove were "making out" while he was on stage.

[97] Mr. Roy testified that, at the end of his set, he left the stage, went to the bar near table "6", and Mr. Earle came back up. Ms. Pardy and Ms. Broomsgrove "made out again", and Mr. Earle said something to them, the content of which Mr. Roy was not sure, which angered them.

[98] Mr. Roy said that it "stopped being a comedy show", and that there followed a series of verbal insults back and forth. He said Mr. Earle was "pretty much being offensive". Though he said in direct examination that he didn't know exactly what Mr. Earle said, he "acted like Michael Richards; instead of using the word 'nigger', he used 'dyke'". He said the "other party" said: "'asshole', 'piece of shit', 'little dick', 'little man', 'fuck you' and 'fuck yourself'". In cross-examination, when it was suggested to Mr. Roy that Mr. Earle had called the women "dykes", he volunteered that Mr. Earle had also called them "cunts", "bitches" and "whores". In response to the question whether this was said in the course of Mr. Earle's act, Mr. Roy said he had not heard "those jokes" from Mr. Earle before, and that, "It wasn't structured jokes, just a reaction".

[99] I do not accept Mr. Roy's evidence attributing these specific comments to the "other party" – presumably Ms. Pardy and her friends. No other witness mentioned any of these comments, and I have given my reasons above for generally accepting Ms. Sandor's account of what they did and did not say, and rejecting Mr. Miedzinski's.

(b) Summary of factual findings: Mr. Earle's first comments from the stage

[100] I find the following facts. When Brandy brought Ms. Pardy, Ms. Broomsgrove and Ms. Sandor in from the patio at approximately 11:00 p.m., and seated them in booth 3, Mr. Roy was

just finishing his comedy set, and soon left the stage. While he was performing, the three women did not heckle, or otherwise disrupt the performance, other than by taking part in the discussion initiated by Brandy about drinks.

[101] Mr. Earle took the stage. He was there to introduce Mr. Wolfe. At that point, the three women had said nothing to him. I do not have the benefit of any evidence from Mr. Earle, but I infer that he had either witnessed the conversation among the three women and the servers before he took the stage, or that it continued after he did so, or both, and that he considered that the noise of their conversation might disrupt the show. Then he saw Ms. Broomsgrove kiss Ms. Pardy.

[102] There was no public display of affection between Ms. Pardy and Ms. Broomsgrove, beyond a kiss – what one often sees in restaurant, bar or club settings between other young couples, lesbian or not. In Mr. Franson's words, "That's when it all started". In Mr. Wolfe's words, Mr. Earle "saw them kiss [and said] 'that's what I'm going to go after until you shut up'".

[103] I conclude from the evidence of Ms. Pardy and Ms. Sandor, corroborated by that of Mr. Miedzinski and Mr. Wolfe, and by the inferences I have drawn from the evidence of Mr. Franson, Mr. Espaniel, and Mr. Roy, that in the next very short while Mr. Earle, from the stage, using a microphone, and in his capacity as host or master-of-ceremonies of the open mic night, said the following words, directed exclusively at Ms. Pardy, Ms. Broomsgrove, and Ms. Sandor, or words to substantially the same effect:

- "Don't mind that inconsiderate dyke table over there. You know lesbians are always ruining it for everybody."
- "Do you have a strap-on? You can take your girlfriend home and fuck her in the ass."
- "Are you on the rag; is that why you're being such a fucking cunt?"
- "Stupid cunts" and "stupid dykes".

[104] I further find that these comments were not made in response to any "heckling" by any of the women. Rather they were a response, generally, to the noise associated with their being moved by Zesty's staff from the patio to their booth, and asked if they wished to order drinks. Mr. Earle's words were a response, specifically, to him seeing Ms. Broomsgrove kiss Ms. Pardy.

[105] I find that all three women, and others present, responded to Mr. Earle's comments by booing him, and that Ms. Sandor engaged him to the extent of calling him "ignorant", saying that

he was not telling jokes anymore, and that he was not funny. I find, on the evidence before me, that no one at Ms. Pardy's booth insulted Mr. Earle's mother or his looks, or swore at him repetitively, or at all.

5. The first glass of water

(a) Evidence

[106] Ms. Pardy testified that, at "probably 7 or 10 after 11", after her booth booed Mr. Earle and Ms. Sandor called him ignorant, he came down from the stage with his eyes locked on her, and walked toward their booth. He put his hands on the table and leaned over her. There were glasses of water on the table. She picked one up and threw the water in Mr. Earle's face, saying, "Don't come near our table." According to her, he screamed in her face, "Why do you have to be such a fucking cunt", and then walked away, dripping wet.

[107] Ms. Pardy testified that Mr. Earle went to the back of the restaurant, and spoke to Mr. Ismail. At that point she had never met Mr. Ismail before, but assumed he was the manager, though she was not sure of that until the next day, when she returned to the restaurant to speak to him about the incidents of May 22.

[108] Ms. Pardy testified that she is 5 feet eight inches and 135 pounds, as she was in 2007. She estimated that Mr. Earle was 6 foot 3 or 4, and over 200 pounds, and said that when standing he was much above her height. She said she threw the water because she felt threatened, and didn't know what he would do or say next. She said she didn't want him anywhere near them, because he was obviously angry, and she was afraid of him. A little later in her evidence, she said she thought throwing the water would "embarrass him and snap him out of whatever rage he was in". She said she could tell he was not coming to apologize.

[109] Ms. Pardy said that there was no one else on stage. After Mr. Earle moved away, another comedian, Mr. Espaniel, came across the room, stuck out his hand to shake hers, and said, "Good for you; that was really out of line".

[110] Ms. Sandor testified that when Mr. Earle left the stage, he started walking toward their booth, making her feel uncomfortable. She said that Mr. Earle appeared very angry, and she was confused why so much anger was directed at the women. She acknowledged in direct examination that she was not afraid for her life, and did not think that Mr. Earle was going to

punch her in the head, but repeated that he seemed very angry, and, given his treatment of her party from the stage, she was concerned he could get more angry.

[111] In her evidence, Ms. Sandor did not always clearly distinguish between the first time Mr. Earle approached their booth, and the second, discussed below. She acknowledged that these events took place three years earlier. When asked in direct examination, with respect to the first time, what Mr. Earle said, she responded that he didn't have much chance to say anything, because, as soon as he got close enough, Ms. Pardy threw the water. He said "something along the lines of bitches", and then went over to where the comics, who she described as his group of friends, were sitting. In her cross examination, Ms. Sandor said Mr. Earle "may have said a few things to us", but that she did not remember exactly what he said.

[112] Ms. Sandor testified that no one from Zesty's stepped in at this point, but that a few people from the audience did come up to their booth and say "that was awful". She was not sure whether this happened after the first time Ms. Pardy threw water on Mr. Earle, or the second, discussed below. I infer that she was remembering at least Mr. Espaniel, who he and Ms. Pardy testified came over to the women after Ms. Pardy threw the first glass of water, and Mr. Wolfe, who he and Ms. Pardy testified approached the women after Ms. Pardy threw the second glass of water.

[113] Although in general Ms. Pardy's recollection of these events was more precise in time and content than Ms. Sandor's, I do not accept Ms. Pardy's evidence that, when Mr. Earle first left the stage and approached their booth, he "screamed" the words Ms. Pardy attributed to him, or used them at all. I am confident that, had he done so, Ms. Sandor would have retained a clear recollection of him doing so, in close proximity to her. I accept Ms. Pardy's evidence that she said, "Don't come near our table", and her evidence and Ms. Sandor's that Mr. Earle said something uncomplimentary, but I am unable to determine whether he spoke before or after Ms. Pardy threw the water at him or spoke to him, or the precise words he used.

[114] Ms. Sandor did not corroborate Ms. Pardy's evidence that, after the first water incident, Mr. Earle went to the back of the restaurant and spoke to Mr. Ismail. Rather, as noted, she said in her evidence in chief that he joined the other comedians, his friends. Unlike Ms. Pardy, Ms. Sandor was very familiar with Mr. Ismail, as she was a frequent customer of Zesty's. In cross-examination, she testified that on this occasion, she remembered seeing him at the beginning of

the night, but didn't think he was there later. She said specifically that when the incident started, she did not see Mr. Ismail.

[115] Mr. Miedzinski added only a little to the evidence with respect to the first glass of water. He testified that, after Mr. Earle left the stage, he walked past the women's booth and said, "Listen, can you please shut the fuck up". They threw water in his face, and he walked away.

[116] Mr. Ismail testified that he saw Ms. Sandor (with whom he was familiar), Ms. Pardy and Ms. Broomsgrove on the patio when he left the restaurant around 10:45 p.m. to go for a walk on Commercial Drive. He estimated that there were perhaps 10 or 15 people in the restaurant, and that he came back about 11:15 or 11:20, when the show was over. He was not cross-examined on this evidence.

[117] I accept Mr. Ismail's evidence about his absence from the restaurant, and Ms. Sandor's evidence that she did not see Mr. Ismail at any time as these events unfolded, and I do not accept Ms. Pardy's evidence to the contrary, or her evidence that immediately after the first water incident Mr. Ismail spoke to Mr. Earle at the back of the restaurant. I do accept that Ms. Pardy saw Mr. Ismail speaking to Mr. Earle, but I find that this occurred at the very end of the evening, as detailed below, and that she was mistaken in remembering that conversation as occurring a few minutes earlier.

[118] Mr. Wolfe did not give any helpful evidence about the first glass of water. In cross-examination, he identified a statement he wrote from memory in March 2010, in which he agreed he stated that Mr. Earle reacted to the first glass of water by saying "Why couldn't you just shut up", and used the words "fuck" and "cunt". However, he was not asked to adopt his written statement, and it was not marked in evidence. Mr. Wolfe testified that he did not recall seeing Mr. Ismail while he was there.

[119] Mr. Franson's evidence about the water was confusing, as he referred to it being thrown the first time while Mr. Wolfe was on stage, and said that he did not see the second time. I do not accept Mr. Franson's evidence about the timing of this event, because no other witness, including Mr. Wolfe, suggested that anything of note happened while Mr. Wolfe was on stage.

[120] Further, in apparent reference to the first water incident, Mr. Franson testified that, after leaving the stage, Mr. Earle walked directly toward Mr. Franson, with his eyes on Mr. Franson

the whole time. As Mr. Earle passed booth "3", water was splashed in his face, but he didn't hesitate, walked straight by, and didn't look at Ms. Pardy.

[121] I do not accept this evidence as credible. It is at odds in its details, and its description of the surrounding circumstances, with the evidence of every other witness who testified to these events, and it is inconsistent with Mr. Franson's own evidence that Mr. Earle had just finished saying that "no one wants to watch two ugly lesbians kiss", and then engaged in an exchange of insults with the people at Ms. Pardy's booth.

[122] When Mr. Franson was asked whether he remembered seeing Mr. Ismail at this time, he said only that Mr. Ismail usually sat in a corner at the back, but that he didn't know what Mr. Ismail may have seen.

[123] As noted, Mr. Espaniel's evidence was that he did not witness the exchange between Mr. Earle on the stage, and Ms. Pardy and the other women. I have already given my reasons for not accepting his denial. He said he first noticed Ms. Pardy and her friends when he saw Mr. Earle approach Ms. Pardy's booth and look over at her. She threw the glass of water in Mr. Earle's face. He said he did not hear any words exchanged, and Mr. Earle left immediately. Mr. Espaniel testified that he then left his place at the bar, and walked over to booth "3". He introduced himself, shook Ms. Pardy's hand, and told her he was glad she threw that glass of water, and that Mr. Earle "probably deserved it". He said Ms. Pardy appeared glad that he was sticking up for her. These comments make no sense, unless Mr. Espaniel was aware of what Mr. Earle had just said from the stage.

[124] When Mr. Espaniel was asked whether he saw Mr. Ismail around at this time, he responded that Mr. Ismail was there in the back, and that Mr. Espaniel told him what had gone on. I infer that Mr. Espaniel was referring to Mr. Ismail's presence at the end of the evening, and that the reason Mr. Espaniel felt it necessary to fill Mr. Ismail in on what had gone on was that Mr. Ismail wasn't present for the altercations between Mr. Earle and Ms. Pardy and her friends.

[125] Mr. Roy did not add any information about the water-throwing, other than to say that he saw Mr. Earle leave the stage, and saw the water thrown, but did not remember what was said at the time, and that Mr. Earle "didn't do anything after that".

[126] Ms. Semczyszyn testified that she didn't remember when Mr. Ismail came back into the restaurant, but that the incident was "for the most part" over when he did. She did not look on any of these events as major problems that she needed to report to him. She was not cross-examined on this evidence. While, for reasons already explained, I do not accept that Ms. Semczyszyn did not witness any of the dealings between Mr. Earle and Ms. Pardy's group, between the time she offered them more Corona and when she saw Mr. Earle break Ms. Pardy's sunglasses, I do accept that her evidence about Mr. Ismail tends to support his evidence that he was not present during these events.

(b) Summary of factual findings: The first glass of water

[127] I find the following facts. Immediately after Mr. Earle's first set of comments to Ms. Pardy and her friends from the stage, he left the stage and angrily approached booth "3" where they were sitting. Ms. Pardy picked up a glass of water from the table and threw it in his face. She said, "Don't come near our table", and he said something uncomplimentary. I am unable to determine what he said, or whether he spoke before or after Ms. Pardy threw the water.

[128] I find that both Ms. Pardy and Ms. Sandor were shocked and stunned by what Mr. Earle had said to them from the stage, and apprehensive about his angry approach to their booth, though not acutely concerned about their physical safety.

6. Mr. Earle's second comments from the stage

(a) Evidence

[129] According to Ms. Pardy, Mr. Earle returned to the stage shortly after the first water incident and took the microphone. He continued to direct comments at her from the stage, saying things like, "Thanks for ruining the evening, fucking dykes, cunts", and "You want to be a man, that's why you're such a fucking asshole". Ms. Broomsgrove spoke up and said he wasn't funny, and he said directly to her, "You're a fat ugly cunt. No man will fuck you; that's why you're a dyke. You fat cunt." He said something to Ms. Pardy about sticking a dick in her mouth to shut her up.

[130] She said that the audience reacted angrily, that people were booing Mr. Earle, and that people pushed their chairs in and left. For her part, she said she felt humiliated, shocked and embarrassed. Physically, she was shaking and sweating, and her ears were ringing. She felt like

she had been assaulted by a targeted attack. She said she didn't leave because she was too shocked, and that she literally could not get up from the booth. At the same time, she said that she "wasn't going to be chased out of there until someone addressed the incident".

[131] At that point, according to Ms. Pardy, Mr. Wolfe took the stage, and tried his best to carry on, but "the show was over". She estimated that he was on stage for perhaps five minutes.

[132] Ms. Sandor testified that when Mr. Earle went back up on the stage, he referred to the water by referring to "those fucking bitches", and that he said of Ms. Pardy, "That bitch threw a glass of water in my face." He pointed at Ms. Broomsgrove and said, "The only reason that one is a lesbian: no guy would ever fuck her, she's so ugly and fat." She remembered him saying, "You guys are on the rag" and "You're such fucking cunts."

[133] In cross-examination, Mr. Miedzinski agreed that during the evening Mr. Earle said each of the following:

- "Thanks for ruining the evening, fucking dyke cunts."
- "You're fat and ugly. That's why no man would want to fuck you, fat cunt dyke."

[134] Mr. Miedzinski said it was possible that Mr. Earle also said, "Do you want to be a man; is that why you're such an asshole?" I have already given my reasons for accepting Mr. Miedzinski's evidence about statements Mr. Earle made to Ms. Pardy and her friends, in spite of my rejection of, or reservations about, his evidence on other points.

[135] Mr. Wolfe first said that he did not recall Mr. Earle saying, "Thanks for ruining the evening, you fucking dyke cunts", and was not sure if Mr. Earle said, "Do you want to be a man? Is that why you're such an asshole?" However, as noted above, when he was asked if Mr. Earle had said, "You're fat and ugly; is that why no man would want to fuck you, fat dyke cunt?", Mr. Wolfe said that this comment, like others put to him, "all kind of ring a bell", but that he did not remember Mr. Earle's specific words. Notably, like Mr. Roy with respect to his own performance, Mr. Wolfe specifically testified that, while he was on stage, he was not interrupted or heckled by anyone.

[136] Mr. Franson said, with reference to the YouTube video of Mr. Earle being interviewed: "I remember watching the video several times. That's exactly what he said". The transcript of the video records Mr. Earle as saying that he said to the women, among other things: "You're fat and ugly. You're not even lesbians. No guy will fuck you. That's why you're with each other.

... Somebody shut her up. Put a cock in her mouth and shut her the fuck up. Which one of you wears the strap-on dildo?" These are the statements that Mr. Franson adopted as "exactly what [Mr. Earle] said."

(b) Summary of factual findings: Mr. Earle's second comments from the stage

[137] I find the following facts. Shortly after Ms. Pardy threw the first glass of water at Mr. Earle, Mr. Earle returned to the stage to finish introducing Mr. Wolfe, and said the following words, directed exclusively at Ms. Pardy, Ms. Broomsgrove, and Ms. Sandor, or words to substantially the same effect:

- "Thanks for ruining the evening, fucking dykes, cunts"
- "You're a fat ugly cunt. No man will fuck you; that's why you're a dyke. You fat cunt."
- "Do you want to be a man; is that why you're such a fucking asshole?"
- "Somebody shut her up. Put a cock in her mouth and shut her the fuck up."

[138] I find that Ms. Broomsgrove said from the audience that he wasn't funny, which is what inspired Mr. Earle to call her a "fat ugly cunt". Others in the audience, including some or all of Ms. Pardy, Ms. Sandor and Ms. Broomsgrove booed. In response either to Ms. Pardy's boos, or something else that she said, Mr. Earle made his "Shut her the fuck up" comment about her, but I am unable to determine what, if anything, she said that persuaded him to say this.

[139] I find that Mr. Ismail was not present in the restaurant when Mr. Earle made either set of comments, when Ms. Pardy threw either glass of water, or when Mr. Earle broke her sunglasses, but returned just after the last of these events. I discuss further his actions on his return below.

7. The second glass of water and the sunglasses

(a) Evidence

[140] Ms. Pardy testified that, after Mr. Wolfe finished his few minutes on stage, he came to her booth and spoke to her. She said he was trying to find out what provoked the whole incident, and she tried to explain to him that Mr. Earle confused their trying to sort out their drink order with disrupting the show. She testified that she made clear to Mr. Wolfe that they were not there to disrupt anyone's show.

[141] Ms. Pardy said that another comedian, named DJ, came over and stuck his hand out, and expressed regrets about what had happened. The lights had come on, and the show was over. Ms. Pardy and her friends were standing. She saw Mr. Earle approaching again. She perceived his advance as a threat. She threw a second glass of water in his face, and said, "I told you, don't come near this table". She denied that she was physically challenging him. She estimated that perhaps 15 to 20 minutes elapsed between the first and second glass of water. Since all that had happened between those two events was that Mr. Earle had returned to the stage to introduce Mr. Wolfe, Wolfe had performed for a very few minutes, and Mr. Earle had again approached Ms. Pardy's booth, I think that the interval was shorter than she remembered.

[142] After Ms. Pardy threw the water, she and the other women stood at the booth for a minute. Her ears started to ring, her hands were sweating, and she was shaking. She described herself as in shock, unable to believe what had happened to her. Other than Mr. Wolfe and DJ, nobody came to ask what was going on.

[143] Ms. Pardy said that she needed to compose herself, and walked toward the washroom, which is shown on the top right corner of Appendix "A", the diagram of the layout of Zesty's. She testified that she passed Mr. Earle and Mr. Ismail talking at the top centre of the diagram, and that Mr. Earle called her a "fucking dyke". Mr. Ismail did nothing. For reasons already explained, I do not accept Ms. Pardy's evidence that Mr. Ismail was present at this point. As explained below, I do accept that Mr. Earle made similar comments to her as she returned from the washroom shortly thereafter, and that, a little later still, she did see Mr. Ismail and Mr. Earle in conversation.

[144] In the washroom, Ms. Pardy cried, and splashed water on her face. She was shaking, and felt afraid and intimidated. When she came out of the washroom, she wanted to avoid Mr. Earle, so she walked along the bar. Mr. Earle came over to her and said, "You had to ruin the show, you fucking stupid dyke, fucking bitch." She said that everyone was watching her, and she was centre stage for everybody. Mr. Earle said, "You want to be a fucking man, don't you?" He reached over, grabbed the sunglasses she was wearing pushed up on her head, broke them, and threw the pieces on the floor. She said her face was blood red, though she did not explain how she could know this. She thought she was going to fall down.

[145] I accept Ms. Pardy's evidence that Mr. Earle made these or similar statements to her at this time. They are consistent with the tenor and content of other comments I have found he directed at her, and they are consistent with the verbal confrontation between them, which, as detailed below, Ms. Sandor, Mr. Wolfe, and Mr. Espaniel saw, but the content of which they said they either could not hear, or did not remember.

[146] Ms. Pardy testified that the waitress "Amanda" came out from the kitchen, walked along the bar, looked at both Ms. Pardy and Mr. Earle, and, without a word to either of them, picked the glasses up from the floor, and then went into the back of the restaurant.

[147] Ms. Pardy said she thought things were out of control, and that nobody was going to help her. She said she then walked past Mr. Earle to her friends, who were standing by their booth talking to some of the comedians. She testified that she said to her friends, "We're leaving here right now; we're not staying here one more minute".

[148] They went outside to the street. She estimated that the time was three or four minutes on either side of 11:30 p.m. I accept this estimate as being approximately accurate, as it accords roughly with the sequence of events testified to by most of the other witnesses, and it is roughly consistent with Mr. Ismail's estimate of when he went for his walk and when he returned.

[149] Ms. Sandor testified that, after Mr. Earle's second round of comments from the stage, he came over to their booth again, and Ms. Pardy threw the second glass of water. Ms. Sandor said that Mr. Earle was "coming over with anger behind him [and] had steam coming out of his ears." She felt very tense. She testified that she didn't remember what was said. Mr. Earle walked away.

[150] In cross-examination Ms. Sandor said that the second time Mr. Earle came over to their booth, he seemed even angrier than the first. He "marched" over, but "didn't get a chance to say what he was going to say", because Ms. Pardy threw the second glass of water. Ms. Sandor, who was seated facing towards the back of the restaurant where Ms. Pardy said she twice saw Mr. Earle talking to Mr. Ismail, and who was familiar with the latter, repeated that she didn't see Mr. Ismail anywhere, and that she had the impression he had left for the evening. This impression was incorrect, but I accept her evidence, in preference to Ms. Pardy's, that he was not present at this time.

[151] The women decided to leave. Ms. Sandor said they were saying things to each other like, "Let's get out of here", "We should have left sooner" and "This is crazy".

[152] Ms. Sandor testified that Ms. Pardy had to use the washroom, which required her to pass the bar. She saw Mr. Earle approach Ms. Pardy on her way to or from the washroom, "yelling right in her face", and said that they were "pointing in each other's faces". She described a "scene by the bar", in which Mr. Earle and Ms. Pardy "had words – sort of an angry discussion", the content of which she could not hear.

[153] Mr. Earle was tall, taller than Ms. Pardy with a medium to skinny build. He was standing over Ms. Pardy, pointing his fingers in her face. Ms. Sandor described Ms. Pardy as standing up against the bar, and being "almost trapped" there by Mr. Earle. Ms. Sandor remembered hoping nobody would get hurt, and worrying that Mr. Earle was going to punch Ms. Pardy, or she was going to punch him. Ms. Pardy was "definitely giving it back to him for sure". Mr. Earle took the sunglasses off Ms. Pardy's head, broke them in half, and threw them on the floor. In cross-examination Ms. Sandor said he threw them at Ms. Pardy. Ms. Pardy came back to their booth; the three women gathered their things and went out the door. Ms. Sandor's time estimates were imprecise, and variable. She did say several times that she thought the women came in from the patio about 11, and left the restaurant before midnight, before closing time, when others were still in the restaurant.

[154] Mr. Ismail testified that when he returned to the restaurant from his walk around 11:15 or 11:20 p.m., the show was over, and nothing was going on. He said that Mr. Espaniel came to him and told him "You missed the scene". Mr. Espaniel seemed to be excited, and thought it was funny that "Someone threw water in Guy Earle's face." Ms. Semczyszyn told him not to worry, that everything was over. Mr. Ismail did not mention, as Mr. Espaniel did in his evidence, Mr. Espaniel asking whether Ms. Pardy was still present, or Mr. Espaniel telling him that she had left.

[155] Mr. Ismail further testified that Mr. Earle then came over, and they sat down together. He asked what happened. Mr. Earle said that Ms. Pardy and her friends were drunk and hassling him, and that they threw water in his face. Before they finished their conversation, Mr. Ismail had to take an overseas phone call. While he was talking, Mr. Earle went outside. Mr. Ismail

did not investigate further, because no one had complained, and Ms. Semczyszyn had told him everything was okay.

[156] Mr. Wolfe testified that, after he finished his final set, while he was at Ms. Pardy's booth apologizing for Mr. Earle, Mr. Earle came up from behind them, looking aggravated. Ms. Pardy was standing beside the booth. She threw the second glass of water at Mr. Earle over her shoulder. Mr. Wolfe did not remember the "verbal back and forth", though he characterized Mr. Earle's attitude in "confronting the table", as being agitated and upset. Mr. Earle said, "You want to see assault?", grabbed the glasses off Ms. Pardy's head and broke them.

[157] To the extent that Mr. Wolfe's evidence suggests that Mr. Earle broke Ms. Pardy's glasses at the booth "very soon after" she threw the second glass of water, I prefer the evidence of Ms. Pardy and Ms. Sandor. All of these events were more salient for them than for any of the comedians, and both of them remember Ms. Pardy going from the table to the washroom between the time Ms. Pardy threw the second glass of water, and the time Mr. Earle broke her sunglasses. Further, the evidence of Ms. Pardy and Ms. Sandor was consistent, in that Ms. Pardy testified to a confrontation at the bar, some distance from the booth, and Ms. Sandor testified to a similar confrontation, that was too far away for her to hear what was said.

[158] Mr. Espaniel testified that Mr. Earle came to the booth a second time, and Ms. Pardy threw another glass of water in his face. Mr. Earle backed off. Ms. Pardy got up from the booth and moved away from it, faced Mr. Earle, and was arguing with him. Mr. Earle was upset, and they were definitely arguing, but Mr. Espaniel said he didn't know if they were swearing. Mr. Earle took her sunglasses off and broke them. Mr. Espaniel's evidence provides some support for that of Ms. Pardy and Ms. Sandor, over that of Mr. Wolfe, in that Mr. Espaniel described a time gap between the water and the sunglasses, and said that Mr. Earle broke the glasses some 15 feet away from the booth. I also accept the evidence of Ms. Pardy, Ms. Sandor, and Mr. Espaniel, that Ms. Pardy was not seated in the booth, but standing beside it, when she threw the second glass of water.

[159] Mr. Espaniel testified that Mr. Ismail was there "in the back", and that Mr. Espaniel told him what had gone on. Mr. Ismail asked if Ms. Pardy was still in the restaurant, and Mr. Espaniel "lied to him and told him she had left". According to Mr. Espaniel, Ms. Pardy was "still there in the restaurant, but I don't know where". I understand Mr. Espaniel to have been

referring to Mr. Ismail being present at the back of the restaurant after Ms. Pardy threw the water and Mr. Earle broke her sunglasses. If Mr. Ismail had been present during the incidents, there would have been no need for Mr. Espaniel to tell him what had just happened.

[160] I do not accept Mr. Espaniel's evidence that Mr. Ismail asked if Ms. Pardy was still there, or that he told Mr. Ismail that Ms. Pardy had left. As noted, Mr. Ismail did not give evidence to this effect. Further, the interior of Zesty's appears to be a relatively small space, and there was not a large number of people present. It would have been readily apparent to Mr. Ismail whether Ms. Pardy was there or not. Finally, Mr. Espaniel did not offer any reason why he would have thought it necessary to lie to Mr. Ismail about Ms. Pardy's absence.

[161] Ms. Semczyszyn testified that she "went inside", presumably from the patio, and saw Mr. Earle break Ms. Pardy's sunglasses. She said she picked them up, and called him over to the bar to ask him what was going on. He told her the women had thrown water in his face. She told him to leave it, and stop whatever's going on. She thought he looked shaken up and frustrated, but that he did not seem threatening when she spoke to him. Ms. Semczyszyn said she didn't report the incident to Mr. Ismail, because she didn't think it was a major problem. She did not mention telling him, as he testified, that everything was okay. She said she announced last call, and "tried to get everyone to get out". Neither she nor any other witness testified as to Zesty's hours, or closing time.

(b) Summary of factual findings: The second glass of water and the sunglasses

[162] I find the following facts. When Mr. Wolfe finished his brief performance, he and DJ both came to Ms. Pardy's booth and expressed regrets about Mr. Earle's behaviour. The lights had come on, and the show had ended. The time was approximately 11:15 p.m.

[163] Ms. Pardy and her friends were standing near their booth, talking to Mr. Wolfe and DJ, when Mr. Earle approached again, agitated and angry. Ms. Pardy threw a second glass of water in his face and said, "I told you not to come near this table", but no other words were exchanged. Mr. Earle left the vicinity of the booth. Ms. Pardy experienced a physical reaction, which included ringing in her ears, sweating, and shaking.

[164] Ms. Pardy walked toward the washroom, and spent a short time there splashing her face, crying and trying to compose herself. When she emerged, as she was passing along the bar,

enroute to her booth in an effort to avoid Mr. Earle, he approached her. He stood over her. In the course of a heated verbal exchange, in which both of them pointed fingers in one another's faces, he said the following to her:

- "You had to ruin the show, you fucking stupid dyke, stupid bitch."
- "You want to be a man, don't you?"

[165] Mr. Earle then reached out, took the sunglasses which were pushed up on Ms. Pardy's head, broke them in half, and threw them on the floor at her feet. Ms. Semczyszyn, who had just come upon the scene, picked up the pieces, but said nothing. Ms. Pardy returned to her booth and her friends. They gathered up their belongings and prepared to leave.

[166] Mr. Ismail returned to the restaurant. Mr. Espaniel told him something about the incidents between Ms. Pardy and Mr. Earle, though I do not have evidence from either Mr. Ismail or Mr. Espaniel as to what precisely he reported.

[167] Mr. Earle approached Mr. Ismail, who asked him what had happened. Ms. Pardy saw them talking. Mr. Earle told Mr. Ismail that Ms. Pardy and her friends were drunk and hassling him, and that they had thrown water in his face. It was not true that the women were drunk. Any hassling they did followed Mr. Earle's comments to all three of them from the stage, and to Ms. Pardy near the bar when he accosted her after her exit from the washroom. Ms. Pardy did twice throw a glass of water in Mr. Earle's face as he approached her booth. Mr. Earle did not tell Mr. Ismail what he had said to Ms. Pardy or the other women.

[168] Before Mr. Ismail and Mr. Earle finished their conversation, Mr. Ismail was called to the phone, and Mr. Earle went out to the street. The time was approximately 11:30 p.m.

8. The street outside

(a) Evidence

[169] Ms. Pardy testified that when she, Ms. Sandor and Ms. Broomsgrove went out to the street, Mr. Earle followed them. Ms. Broomsgrove said he should pay for Ms. Pardy's glasses, and Mr. Earle responded, "You know what? Fuck off". Ms. Pardy did not recall Mr. Earle saying anything else, though she said it was possible he did. She said she did not remember if she said anything to him on the street. She testified that she was so in shock, she just wanted to

get out of there. The three women went to Ms. Broomsgrove's apartment nearby. Ms. Pardy was not cross-examined on any of this evidence.

[170] Ms. Sandor testified that, when she and the other women left the restaurant, she couldn't remember if Mr. Earle was outside already; she didn't think so. She then said that, as they walked out the door, he was standing near the patio, and they had to go by him. She denied that they followed him out onto the street.

[171] As they were walking up the street, there was "a bit of a back and forth", in which Mr. Earle said something about free speech, and she responded, "Hate speech isn't free speech". Ms. Sandor testified that she had to turn around and walk backward while saying this. Ms. Broomsgrove was very upset, as she was struggling with her weight. Ms. Sandor remembered Ms. Pardy comforting Ms. Broomsgrove as they walked in front of her.

[172] Ms. Sandor, Ms. Pardy and Ms. Broomsgrove walked together to Ms. Broomsgrove's house, just up the street. She said it had been scary being attacked in public by a big, angry-looking man, and that they were all a bit shaken up and confused as to why everything had gotten out of hand. Ms. Sandor said she remembered feeling bad for Ms. Broomsgrove, and wanting to comfort her. Ms. Sandor was not cross-examined on any of this evidence.

[173] Mr. Miedzinski testified that after the show he left and went outside. He was not asked any questions about what, if anything, he witnessed there, and he did not volunteer any such information.

[174] Mr. Franson testified in cross-examination that, at the end of the evening, he left to go home. He said he spoke briefly to the same two women he had seen come in from the patio earlier, and that "there didn't seem to be any issues they were concerned about other than the broken sunglasses". Then he said he didn't recall what was said after so many years. Once again, he does not seem to have been aware of Ms. Sandor's presence.

[175] Mr. Espaniel testified that when he went outside, and was in front of Mr. Earle's truck, he saw "two ladies walking across the street". He said they had reached the other side of the street, and then came back around towards Mr. Earle. Mr. Earle and Ms. Broomsgrove were arguing. While they did so, he and Ms. Pardy exchanged names. He told Ms. Pardy she would have to take her girlfriend away, because Mr. Earle would just keep talking. The women left.

[176] Like Mr. Franson, Mr. Espaniel said he saw only Ms. Pardy and Ms. Broomsgrove, but, immediately thereafter in his cross-examination, acknowledged that this was not a major incident in his life, and his memory was a bit foggy. I do not accept Mr. Franson's or Mr. Espaniel's evidence on this point. Ms. Pardy and Ms. Sandor were very clear in their evidence that Ms. Sandor was present, and the latter said she was exchanging comments about free speech and hate speech with Mr. Earle.

[177] Mr. Roy testified that nothing much happened after the incidents in the restaurant. He said that, outside, Mr. Earle and a couple of other comics were arguing with "the two ladies" outside, and that they were "throwing insults at each other".

[178] Ms. Semczyszyn testified that, after she got rid of everybody, "they" were arguing on the street. She testified that the people living upstairs yelled down to "go away", and that she went outside and told "them" to go away. She did not provide any evidence about who was present outside, or what any of them said.

[179] From Ms. Sandor's evidence that she and her friends left before closing time, while other customers were still in the restaurant, and the absence of any evidence from Ms. Pardy, Ms. Sandor, or Ms. Semczyszyn that Ms. Semczyszyn had to tell Ms. Pardy and her friends to leave, I infer that the three women left ahead of at least some of the comedians. However, given the evidence from all the witnesses that Mr. Earle was outside in time to take part in a final verbal exchange with the women, I infer that the comedians left soon after them.

(b) Summary of factual findings: The street outside

[180] I find the following facts. Shortly after 11:30 p.m., Ms. Pardy, Ms. Sandor, Ms. Broomsgrove, Mr. Earle, Mr. Franson, Mr. Espaniel, Mr. Roy, and perhaps Mr. Miedzinski all went outside about the same time.

[181] The three women were together, walking away. Mr. Earle made his comment about free speech, and Ms. Sandor turned to make her comment about hate speech. Ms. Broomsgrove made her comment about paying for Ms. Pardy's sunglasses, and Mr. Earle responded by telling her to "fuck off". There were likely other words exchanged among Ms. Pardy, Mr. Earle, Ms. Sandor and Ms. Broomsgrove, but I cannot determine what they were.

[182] The three women continued on to Ms. Broomsgrove's nearby home. Mr. Earle, Mr. Franson, Mr. Espaniel and Mr. Roy went to a nearby bar.

C. Ms. Pardy's return to Zesty's on May 23, 2007

1. Evidence

[183] Ms. Pardy testified that she called Mr. Ismail from work the next day. She reminded him she had been at Zesty's the night before, and had felt verbally and physically assaulted by a comedian performing on the stage. Mr. Ismail invited her to come down to the restaurant. He told her that he would pay for her sunglasses. He referred to his understanding that she had thrown some water, and said that could have been an assault as well. She agreed to meet with him at the restaurant that evening.

[184] Ms. Pardy went to the restaurant after work, arriving about 7:30 p.m., to find Mr. Ismail talking on the phone. He was the same person she had identified the night before as the owner or manager. Annoyed, she pulled up a seat at the bar.

[185] Unbeknownst to Mr. Ismail, Ms Pardy was carrying a concealed tape recorder, which she had brought from work and started before she entered the restaurant, on which she intended to record their conversation. She explained in her evidence that she decided to make the recording because she didn't trust Mr. Ismail after he failed to "step up" the night before, and she wasn't satisfied with their telephone conversation, in which he tried to minimize the incidents of the previous night. She said she didn't want him to be able to attribute to her anything she didn't say.

[186] Ms. Pardy identified a copy of the tape recording. Mr. Ismail objected to its admissibility on the basis that there was no proof that it was the original tape, and that it could have been "re-edited". After listening to a portion of the tape, in which I was unable to reliably or consistently determine who was speaking or what they were saying, and learning that neither party had made a transcript, I admitted the tape into evidence only for the purpose of assisting me to understand the tone, not the content, of the conversation between Ms. Pardy and Mr. Ismail on May 23, 2007. Even if I had found the contents of the tape admissible, I would have treated it with great caution, in circumstances where only one party knew it was being made, and might have been able to make self-serving or provocative statements designed to create a favourable record.

[187] Ms. Pardy testified that, when Mr. Ismail got off the phone, he asked how she was. After first saying that she was okay, "to be polite", she then said that she was not okay, because she had been assaulted by a comedian on his stage. She asked him how he could let that happen and not step in. She tried to remind him of what had happened. He tried to minimize what had occurred, saying that the comedians made fun of everyone, including him. He insinuated that the incidents had been her fault. Pointing at him, she accused him of doing nothing. She said she was not yelling, but acknowledged that she was agitated. He said, "The way you talk to me, you're not nice; maybe this <u>was</u> your fault." She said she then knew that nobody was going to apologize or take responsibility. He reneged on the offer he had made to pay for the sunglasses. She said she was agitated, "trying to keep it down" and "didn't want to cause a scene". She didn't want to embarrass Mr. Ismail; she just wanted him to "take responsibility".

[188] Ms. Pardy testified that she then stood up, and made an announcement to everyone in the restaurant that Mr. Ismail condoned violence against women, because he did nothing when she was assaulted the night before. She left the restaurant, and said the same thing on the patio. She said that Mr. Ismail followed her out and called her a bitch, and "said a bunch of things to me as well." She denied that she was swearing, as she was taping the conversation. I do not accept Ms. Pardy's evidence that Mr. Ismail called her a "bitch". His use of such a term, even when angry, was inconsistent with any of my observations of his demeanour, or any other account of his behaviour given in evidence by any witness, and was not put to Mr. Ismail or Mr. Dacosta in cross-examination.

[189] Ms. Pardy testified that, later that same day, she reported the events of May 22 at Zesty's to the Vancouver police. An officer interviewed her on May 24; the resulting report was in evidence. The police did not take any further action. The police report does not mention Mr. Ismail's presence during the incidents of May 22.

[190] Mr. Ismail testified that Ms. Pardy telephoned him on May 23. She told him what had happened the previous night. He told her he was sorry, and told her to come to the restaurant and he would pay for her broken glasses. When asked if he "believed what she was complaining about", Mr. Ismail responded: "Yes. I know her friend Carlin; she comes there a lot and brings her friends".

[191] Ms. Pardy came to the restaurant. Mr. Ismail was not specific about the time of day, but said Nick Dacosta was the server behind the bar. Mr. Ismail said he asked her to sit at the bar while he did some work. After he had finished, he went over and asked her to tell him the story. While she was telling him, he said, "I'm so sorry". When he told her he would "pay you", presumably a reference to the glasses, she started getting mad and pointing in his face. She said he was liable for what happened, and she would hold him accountable. She wasn't calm, and started yelling at him. He said she was not talking nicely, and that he told her "it might be your fault". He asked her not to point her finger in his face. She said he had been standing watching, and didn't do anything. He told her he wasn't there. He asked her why she didn't talk to him that night, why she stayed to the end of the show, and why she didn't call the police, if she thought he didn't care.

[192] Mr. Ismail testified that he became very upset, asked Ms. Pardy to leave, and told her to "go do whatever you want". She stood in the middle of the restaurant and started yelling and screaming, telling the customers that the owner of the restaurant was supporting violence against women. She accused him of being biased and discriminating against lesbians and women. She went outside and he went after her because she was yelling. He tried to call the police, but Mr. Dacosta told him to come back and not to worry – that she was only trying to provoke him.

[193] Mr. Dacosta testified that he was working at lunchtime on May 23 when Ms. Pardy came into the restaurant. Given that Ms. Pardy established that she was working until 6:30 that day, and had better reason to remember the day clearly, and that Mr. Ismail did not address the time of her visit, I conclude that Mr. Dacosta is in error about the timing of these events, but that he was present when Ms. Pardy came to the restaurant to talk to Mr. Ismail, and witnessed their conversation.

[194] Mr. Dacosta testified that Ms. Pardy, who he did not know, went straight to the bar where Mr. Ismail was sitting talking on the telephone. Mr. Dacosta was a few feet away. Ms. Pardy seemed quite angry or aggressive to Mr. Dacosta. Mr. Dacosta couldn't remember how the conversation between Ms. Pardy and Mr. Ismail started out. He said she was saying she was angry about what had happened the night before, and that Mr. Ismail said he understood she was upset, and offered to pay for her sunglasses. Mr. Ismail apologized for the behaviour of Mr. Earle. Ms. Pardy wasn't satisfied with having her glasses replaced, or with the apology. She

kept asking Mr. Ismail what he was going to do about it. The conversation became quite heated, with Mr. Ismail on the defensive. Mr. Ismail asked Ms. Pardy why she didn't call the police the night before. Mr. Dacosta testified, contrary to the evidence of both Ms. Pardy and Mr. Ismail, that Mr. Ismail did not tell Ms. Pardy that the incidents the previous night might have been her fault.

[195] Ms. Pardy got up and started yelling, in the presence of customers, that Zesty's was a bad place, and not to eat there. Mr. Ismail wanted to follow her outside, and to call the police. Mr. Dacosta told him just to let it go. Ms. Pardy went outside. He didn't recall if there was anyone on the patio. She was yelling and saying things about the place, which Mr. Dacosta said he only vaguely remembered. She headed south down the sidewalk.

[196] There are only a few material conflicts in the evidence of Ms. Pardy and Mr. Ismail on the events of May 23. Where their evidence conflicts with that of Mr. Dacosta, I prefer theirs, because Mr. Dacosta was mistaken about the time of day, did not remember some things that both of the others agreed happened, and generally had a less clear recollection than them.

2. Summary of factual findings: Ms. Pardy's return to Zesty's on May 23, 2007

[197] Ms. Pardy telephoned Mr. Ismail in the daytime of May 23. She reminded him that she had been in Zesty's the previous evening, and gave him her characterization of the events there, and her reaction to them. She did not allege that he had witnessed those events. He believed her account, was receptive to her concerns, invited her to come down to talk to him, and volunteered to pay for her glasses. Mr. Ismail stated his understanding that Ms. Pardy had thrown water, and said that this might be characterized as an assault.

[198] Ms. Pardy came to the restaurant from her work in the early evening. She brought a tape recorder from work, with which she had decided to surreptitiously record her conversation with Mr. Ismail, and which she activated before she entered the restaurant. Neither Mr. Ismail nor Mr. Dacosta was aware that she was recording them.

[199] Mr. Ismail was on the telephone when Ms. Pardy arrived. She took a seat at the bar. I infer that she was upset about her experience of the evening before, disappointed that Mr. Ismail had suggested in their earlier telephone conversation that, in throwing water, she might have been partly at fault, and impatient that Mr. Ismail was not immediately available. She wanted

Mr. Ismail to acknowledge, take responsibility for, and apologize for the night before. She also wanted him to compensate her for her broken sunglasses. Through the recording, she also wanted to obtain admissions from Mr. Ismail about his responsibility for what she had experienced.

[200] Ms. Pardy was agitated from the beginning of the conversation. Mr. Ismail initially asked Ms. Pardy to tell him what had happened, was conciliatory, apologized, and again offered to pay for her sunglasses. When Mr. Ismail responded to her attempt to tell him that she had been assaulted by a comedian from his stage, by saying that the comedians "made fun" of everyone, she raised her voice, asked him why he had allowed this to happen, accused him of failing to take responsibility for Mr. Earle's actions, and pointed her finger at him.

[201] Ms. Pardy said Mr. Ismail was liable for what had happened, and she would hold him accountable. She said he had been standing watching, and didn't do anything. He told her he wasn't there.

[202] Mr. Ismail reacted negatively to Ms. Pardy's loud and accusatory approach. He also became very upset. He objected to the way she was speaking to him, and suggested that the incidents of the previous night might have been her fault. He asked her why she didn't talk to him that night, why she stayed to the end of the show, and why she didn't call the police, if she thought he didn't care.

[203] When Mr. Ismail asked Ms. Pardy to leave, and told her to "go do whatever you want", she then stood up, and loudly told everyone in the restaurant that Mr. Ismail condoned violence against women, because he did nothing when she was assaulted the night before. She left the restaurant, and repeated the same thing on the patio, before leaving the premises.

[204] Mr. Ismail followed her outside as far as the patio, but Mr. Dacosta persuaded him to let the matter go, and not to call the police. Ms. Pardy did call the police later that day or the next day, and was interviewed by them. The police took no further action.

D. Impact on Ms. Pardy of her experience at Zesty's and later events

[205] If I find that any of the respondents discriminated against Ms. Pardy because of her sex or sexual orientation, one of the remedies she is seeking is that provided for in s. 27(2)(d)(iii) of the

Code: monetary compensation for injury to her dignity, feelings and self respect or to any of them.

[206] The evidence with respect to this claim was of three kinds: evidence from Ms. Pardy as to what she experienced at the time of the events giving rise to her complaint and subsequently; evidence from Ms. Ertan, Ms. Sandor and other witnesses as to their observations of her at the time and subsequently; and medical evidence as to the psychological and physical impact of these events on her.

[207] In order to provide a coherent, largely chronological account of the evidence, I deal here with the evidence of the factual impact on Ms. Pardy of the events raised in the complaint. In doing so, I do not prejudge the answers to any of the legal questions raised by the parties, including the Tribunal's jurisdiction to decide whether the complaint is justified, or, if it has that jurisdiction, whether Ms. Pardy has met the legal tests for proving discrimination.

1. Evidence of impact

[208] I have already referred to some of Ms. Pardy's evidence of the impact on her of events at Zesty's on the evening of May 22, 2007. When Mr. Earle made his first set of comments from the stage, she testified that she was shocked and embarrassed. She said that when Mr. Earle first approached her booth, she felt threatened and afraid.

[209] In cross-examination she repeated that at that time she was "absolutely physically afraid of him", because of his physical size, the things he said, and the way he said them. When asked whether it came to her mind what would happen if she threw water in the face of a man she feared, she said she didn't think like that, and didn't know what he was going to do. She said that she threw the water as a way to get him away from her.

[210] After Mr. Earle's second set of comments, she said she felt humiliated, shocked and embarrassed. She said that she was shaking and sweating, and her ears were ringing. She felt as if Mr. Earle had engaged in a "targeted attack". In cross-examination, she said she threw the second glass of water because she was intimidated and afraid. When questioned as to why she didn't ask the waitress for protection, or ask her where the manager was, she said that the waitress was nowhere to be found, that she didn't see anybody behind the bar. She said she was

in shock about what had happened, and that no waitress or manager stepped in to say, “What’s going on here?”

[211] Ms. Pardy testified that, the second time Mr. Earle approached her booth, she saw his advance as a threat. She denied that she physically challenged him. She said that again her ears started to ring, her hands were sweating, and she was shaking. She said she was in shock, and couldn’t believe what was happening to her. In the washroom, she was crying and shaking. She continued to feel afraid, and felt intimidated.

[212] After Mr. Earle broke her sunglasses, Ms. Pardy said that she thought events were out of control, and that nobody was going to help her. When asked in cross-examination whether she was in shock “all the way to closing time”, she said her shock didn’t just end when she walked out of the restaurant, and that when she testified she was still in shock about the event. She said she didn’t ask Ms. Semczyszyn for help when the latter picked up the broken sunglasses, because she was in shock and terrified.

[213] Outside Zesty’s at the end of the evening, Ms. Pardy said she was in shock and “just wanted to get out of there”. She, Ms. Sandor and Ms. Broomsgrove went back to the latter’s apartment nearby. She said she was angry, but didn’t know what to do or who to talk to. She had a sleepless night before she had to be up at 5:00 a.m. to go home and get ready for work the next morning. Though I accept that Ms. Pardy’s distress continued after she left Zesty’s, I cannot find on the evidence before me that anything that happened outside the restaurant that night added significantly to the impact on her of earlier events. Similarly, I cannot find that anything that happened the next day, when Ms. Pardy spoke to Mr. Ismail, first by telephone and then in person, contributed significantly to the impact on her of her experience the night before.

[214] Ms. Pardy testified that she told Mr. Ismail on the telephone the next day that she felt verbally and physically assaulted by Mr. Earle the night before. She was frustrated that, in her meeting that evening with Mr. Ismail, he seemed to her to minimize the events, and to suggest that they were her fault. After her conversation with him, she said she felt frustrated and angry.

[215] On June 8, 2007, the newspaper Xtra West published an article with the headline, “Lesbians targeted at Zesty’s HOMOPHOBIA / Comedian admits he said ‘some offensive things’”. A copy of the article was marked as an exhibit. In the article, Mr. Earle is quoted as alleging that on May 22, 2007 at Zesty’s, Ms. Pardy and Ms. Broomsgrove came “‘in from

outside and they plop themselves directly in front of the stage, and they start sucking face like no tomorrow' ... 'were doing the standard drunken heckling stuff'". The author of the article says that Mr. Earle "alleges they were drunk and obnoxious". Mr. Ismail is quoted as saying he "remembers seeing the women on the patio 'drinking from 5 until 12 almost'".

[216] Ms. Pardy testified, with little elaboration, that the article frustrated her and made her feel terrible, because it portrayed her in a negative light. She said that her employment was such that she "couldn't be out drinking and misbehaving." She was not cross-examined on this evidence, and I accept it.

[217] On the facts I have found, the statements attributed to Mr. Earle were false, and those attributed to Mr. Ismail were both false and contrary to his own evidence before the Tribunal. However, I have no way of assessing whether Mr. Earle or Mr. Ismail were accurately quoted, and thus no way of assessing whether any of the respondents, even if they discriminated against Ms. Pardy, were responsible for the part publication of this article played in the effect of the discrimination on her. Mr. Ismail was not asked if he made the quoted comment, and neither Mr. Earle nor the author of the article testified.

[218] Similarly, Ms. Pardy put in evidence various other pieces of internet reportage and commentary on her complaint and the events giving rise to it. While I accept her evidence of the distress these publications caused her, I take from the publications themselves no more than that Mr. Earle made himself publicly available for interviews about the case. As noted, he did not testify before the Tribunal under a solemn promise to tell the truth, and any statement he is quoted as making in any of these publications was not subject to cross-examination.

[219] In a different category from the press and internet reports and commentary, is an interview given by Mr. Earle on the "Dave & Chuck Show" on November 18, 2007. As noted, an audio recording of the interview, and a certified transcript of it, were in evidence before me. Ms. Pardy testified that the recording and interview were the audio portion of an item published on YouTube, of which she became aware in February 2008, when a friend called her to say that she should probably take a look at it.

[220] The potential significance of the interview for assessing the impact on Ms. Pardy of events subsequent to May 2007 is that Mr. Earle made public statements about the original incidents, which could have either diminished or exacerbated any effect on Ms. Pardy.

[221] In the interview, Mr. Earle made the following statements, which are reproduced in the order they appear in the transcript of the interview:

> At the end of the night, these two lovely guests came in. They were sitting on the patio for most of the evening getting loaded. They came at the end of the show and sat right up – right in front of the stage and started making out, like tongue tonsil wrestling, two girls. ... The heckling ensued, right?
>
> ...
>
> [T]he lesbians started cutting into me. Fuck you, asshole. Then, you know, I said – you know, I said the offensive, rude words that any hot blooded Canadian asshole would say.
>
> So these girls were in the front row, and they're making out. They said, shut up or fuck you, asshole. I asked them to be quiet. They were intimating that maybe I didn't like them because they were lesbians. Then I broke into it, you – I said, come on, you're fat and ugly. You're not even lesbians. No guy will fuck you. That's why you're with each other. ... Somebody shut her up. Put a cock in her mouth and shut her the fuck up. Which one of you wears the strap-on dildo? Because somebody [indiscernible] is still cock crazy in my book. ... They're jokes, see.
>
> I come off the stage. I go back over. She splashes her drink in my face again. ... She turns to me and does the chesty chesty thing like, you want to go, you want to go. By this point there's a ring of amateur comics around me that are all like, go, go, like, fight, fight, fight, like it's junior high school, schoolyard, kind of fight scene. .... It's like this military lesbian that wants to kill me.
>
> ...
>
> They heckled me. We were all drunk, and I'm an asshole.

[222] On the facts I have found, Mr. Earle's statements in the interview that Ms. Pardy was intoxicated, that her display of affection consisted of more than Ms. Broomsgrove kissing her, that Ms. Pardy and her friends heckled Mr. Earle before he made his first set of comments to them, that Ms. Pardy or the other women initiated any verbal exchange about their sexual orientation, or that Ms. Pardy accosted him as if to invite a physical fight, were all false. Mr. Earle also omitted from his interview account the fact that, before Ms. Pardy or any of the other women said anything to him, he referred to Ms. Pardy as a "fucking cunt", and to all of them as "stupid cunts" and "stupid dykes".

[223] Ms. Pardy testified that when she saw the video, she felt sick, as if she was undergoing the experience all over again. She said she didn't sleep for two or three days after watching it, and that it just kept playing in her mind over and over. She said she couldn't believe the way Mr. Earle painted her in the interview, or that he "tried to brush this off as a light-hearted

comedy". She said that it was devastating to her to experience it all over again, that she became sick to her stomach, she began to shake and sweat, and her ears rang. Physically, she said she felt like she was in the situation all over again.

[224] On July 2, 2008, Ms. Pardy obtained certification from her doctor that she had been unable to work on June 27 because of sleep deprivation and exhaustion. He indicated that she would likely be unable to work from July 15 for medical and legal reasons. Ms. Pardy did not testify, and the document accepted in evidence did not establish, that she missed any other work because of the original events, or any subsequent events related to them. Her remedial claim for wage loss is limited to two days' missed work to attend the hearing.

[225] Ms. Pardy put in evidence a nine-page medical report, dated February 8, 2010, from one of her physicians, Dr. Robert Menzies, who shared her care with a Dr. Elliott. At the hearing, counsel for Ms. Pardy told me that this report was tendered as an expert report, under Rule 33 of the Tribunal's *Rules of Practice and Procedure*. It was provided to the other parties on February 10, 2010. At that time, all the respondents were represented by counsel.

[226] Neither upon receipt of the report, nor at the hearing did any of the respondents object to delivery of the report less than the 60 days before the hearing, as required by Rule 33(2), require Dr. Menzies' attendance at the hearing for cross-examination, as permitted by Rule 33(5), or object to its admissibility. I admitted it in evidence, subject to argument about its meaning, and about the weight it should be given. None of the respondents addressed its meaning or weight in their arguments.

[227] Dr. Menzies has been a general practitioner for 35 years. He obtained his BSc and MD degrees from the University of British Columbia in 1971 and 1974, respectively. He has been a clinical assistant professor in the UBC Faculty of Medicine since 1990. I accept Dr. Menzies' qualifications to give medical opinion evidence, as set out in the CV attached to his report, in accordance with Rule 33(7). I was not provided with any information to contradict Dr. Menzies' report, and although I am not bound to accept his evidence, I have been shown no proper basis for rejecting it. In weighing his evidence, I take into consideration that he is not a specialist, and that his CV does not disclose extensive training or experience in psychiatry. I also take into consideration that his opinion relies on symptoms, not susceptible of objective measurement, reported to him and Dr. Elliott by Ms. Pardy. In this latter connection, I note that the symptoms

Ms. Pardy reported to the doctors are generally consistent with the evidence she gave about the same matters at the hearing, which I accept.

[228] Dr. Menzies reviewed Ms. Pardy's medical file, and relied on it in preparing his report. In his report, he said that Ms. Pardy first saw Dr. Elliott for panic attacks in August 2006. She was prescribed medication for these, and referred to the anxiety clinic at UBC. The panic attacks were "bouts of weakness, breathing changes, heart races and flushing, which increased when she had to deal with people". She was seen later that month and again at the end of October, when she reported a marked decrease in panic attacks, helped by counselling and medication.

[229] Ms. Pardy testified that she suffered from an anxiety disorder before the incidents with Mr. Earle. She said her anxiety related to family issues, which resolved in about March 2007, after which she was much happier. Her condition improved, and her anxiety diminished.

[230] According to Dr. Menzies' report, on May 11, 2007, she "reported that she was much improved [and] had no panic attacks for over 12 weeks". That report was less than two weeks before the events at Zesty's, and provides a baseline against which to assess her later-reported symptoms.

[231] On June 1, 2007, Ms. Pardy returned to Dr. Elliott, and reported the events at Zesty's, including a verbal assault by a comedian after he saw the girlfriends kissing. The brief summary of what was reported to Dr. Elliott includes that Ms. Pardy had had two drinks, that she had thrown water in the comedian's face, and that he had broken her sunglasses after she had gone to the bathroom. She said she was fearful of leaving the house for several days. Dr. Elliott prescribed medication.

[232] On June 11, 2007, Ms. Pardy reported to Dr. Elliott that she was improving. He continued to prescribe medication.

[233] On February 22, 2008, Dr. Menzies first saw Ms. Pardy, and discussed the events at Zesty's the previous May. She said she had experienced anxiety ever since. The night before, she had seen the YouTube video, and had a panic attack, with palpitations and diaphoresis [profuse sweating]. She reported flashbacks and anxiety attacks when dealing with these issues, and a serious diminishment in her sex drive since then. Dr. Menzies continued to prescribe medication for anxiety.

[234] Dr. Elliott saw Ms. Pardy again on February 25, 2008, when she reported a further panic attack on February 20, after finding a video on the computer of the comedian discussing "the case". She saw Dr. Menzies on July 2, 2008 to discuss workplace issues related to her anxiety and other symptoms. When she took a day off work on June 27, 2008, her boss threatened to fire her, and Dr. Menzies provided her with a note saying sleep deprivation and exhaustion had prevented her from working that day.

[235] Through June 2009, Drs. Menzies and Elliott continued to prescribe medication for anxiety and insomnia.

[236] Dr. Menzies last saw Ms. Pardy on June 9, 2009. He talked to her by telephone on February 8, 2010, when she reported that her last nightmare had been three weeks earlier. She reported dreams, including the comedian performing incidents similar to the ones she experienced. She reported recurring panic attacks, shaking, and sweating whenever she discussed the attack with her counsellor, lawyer or friends; the most recent was in September 2009. She said she had received counselling until about February 2009, but since then had relied on the support of friends. As of February, she had been off medication "for a long time" the last prescription recorded in Dr. Menzies' report was in June 2009 for 30 days.

[237] Dr. Menzies stated his diagnoses:

> Ms. Pardy suffers from **Generalized Anxiety Disorder with Panic Attacks aggravated by the event and Post-Traumatic Stress Disorder** (PTSD) caused by the event.
> (emphasis in original)

[238] In support of these diagnoses, Dr. Menzies set out the criteria for anxiety disorders, panic attacks, and post-traumatic stress disorder ("PTSD") from the 2000 (4th ed.) of the American Psychiatric Association's Diagnostic and Statistical Manual ("DSM"), and compared them to the existence, intensity and persistence of Ms. Pardy's observed and reported symptoms.

[239] In her evidence, Ms. Pardy went through the diagnostic criteria from the DSM set out in Dr. Menzies' report, and related them to her symptoms. With respect to panic attacks, she was careful to distinguish between things she had experienced – such as palpitations, sweating, trembling, and shortness of breath, from those she had not – such as choking, chest pain, or fear of losing control or dying. Similarly, with respect to PTSD, she referred to reliving the event

through flashbacks, recurrent nightmares, avoidance of thoughts, feelings and conversations, and strong feelings of distress and helplessness when reminded of her experience.

[240] Independently of my conclusion as to the correctness of Dr. Menzies' diagnosis, I accept that Ms. Pardy experienced these symptoms, and that they were caused by her experience at Zesty's on May 22, 2007.

[241] Dr. Menzies acknowledged that Ms. Pardy had suffered from an anxiety disorder and panic attacks before May 2007. However, he observed that:

> this was gradually stabilized with counselling and medication and she settled in to a satisfactory lifestyle, until the incident. She had been free of attacks and was taking very few medications, until the incident, after which time she could not work and had to take more medications. I believe the she was traumatized by the incident and developed Post Traumatic stress disorder, complete with nightmares and reliving the incident with full emotional overlay.

[242] Key to Dr. Menzies diagnosis of PTSD was his opinion that, using the DSM criteria for PTSD, Ms. Pardy had:

> Experienced, witnessed, or was confronted with an event where there was the threat of or actual death or serious injury. The event may also have involved a threat to the person's physical well-being or the physical well-being of another person.

[243] The basis on which Dr. Menzies said that Ms. Pardy met this criterion was that "the comedian damaged her property in a threatening way in front of her". Both Ms. Pardy's and Ms. Sandor's evidence support the view that this event involved a threat to Ms. Pardy's physical well-being. Ms. Pardy testified that Mr. Earle approached her on her exit from the washroom, as she was trying to avoid him and return to her friends. She said she was "trapped" and "cornered" at the bar by the angry, much larger Mr. Earle, and that she was terrified. Ms. Sandor testified that Mr. Earle was standing over Ms. Pardy, pointing in her face, and that Ms. Sandor was worried that he was going to punch Ms. Pardy (or vice versa). She said that Ms. Pardy was standing up against the bar, and that Ms. Pardy was "almost trapped" by him there.

[244] Mr. Wolfe testified that, while he "wouldn't call [the altercations between Mr. Earle and Ms. Pardy] dangerous", he "might have been worried about a physical fight" after Ms. Pardy tossed the water, and "didn't know if there would be a fight" after Mr. Earle broke her glasses.

[245] Mr. Roy said that Mr. Earle appeared "really angry" after the second glass of water, and just before he broke Mr. Pardy's glasses. He made the general observation that he "didn't see any type of scare tactics". Ms. Semczyszyn said only that she didn't think Mr. Earle seemed threatening when she spoke to him just after he broke Ms. Pardy's glasses. The other witnesses did not address their perceptions of any threat to Ms. Pardy's physical well-being at this time.

[246] I have considered whether Ms. Pardy's behaviour in twice throwing water at Mr. Earle, in participating in the verbal exchange he initiated just before he broke her sunglasses, and in failing to seek help from the staff at Zesty's, supports an inference that she did not in fact fear for her safety at the time. While I do not think throwing water was prudent, or even rational, in the circumstances, as it was unlikely to deter violence from Mr. Earle, and might even have been expected to provoke a violent response, I think it is a matter of normal human experience that people who are frightened do not necessarily behave prudently or rationally. Similarly, while I think Ms. Pardy would have been wiser to alert Ms. Semczyszyn or, on his return, Mr. Ismail, to the circumstances, and ask for their protection or assistance, I do not think her failure to do so means she did not feel threatened; only that she was, as she testified, shocked, distressed and confused.

[247] In all the circumstances, including my earlier findings about the course of events which culminated in the broken sunglasses, I accept that there was a factual foundation for Dr. Menzies' opinion about PTSD in Ms. Pardy's and Ms. Sandor's detailed evidence that Mr. Earle posed a threat to Ms. Pardy's physical well-being when he broke her glasses. I prefer their evidence to Mr. Roy's and Ms. Semczyszyn's rather vague evidence to the contrary.

[248] In the balance of Dr. Menzies' discussion of PTSD, he carefully compared Ms. Pardy's reported symptoms with the DSM criteria. In brief, these criteria involve re-experiencing the traumatic event, avoidance, hyper arousal, persistence of symptoms for more than a month, and a negative impact on the patient's life, interfering with her work and relationships. Where symptoms meeting these criteria were present, he said so. Where they were uncertain or unknown, he said so.

[249] Dr. Menzies concluded:

> She was very symptomatic for a period of time, and then seemed to improve. However she again became very symptomatic before her appearance [at court on the judicial review of a preliminary Tribunal decision in her case], and again when

> she saw the U-tube video, the PTSD flared up again, as did her anxiety and panic attacks. The various actions by the comedian after the incident were traumatic, and caused flare ups of symptoms. Again, these were only controlled with an increase in her medications for a period of time. Gradually with support from her lawyer and friends, her symptoms have improved. This is a classic natural history for repeated PTSD and anxiety disorder with panic attacks.
>
> They are very painful and distressing disorders. They adversely affect the whole person, physical, emotional, recreational, social and professional. They may be prolonged and recurrent.
>
> I believe her prognosis is good with the medical and legal treatment she has received. However there is a high rate of relapse if another (related or unrelated) traumatic event is experienced, such as ongoing contact with the people or place involved, or being exposed to comments or images about the incident. The relapse would likely be more severe and more prolonged with a less traumatic event as a rule.

[250] Ms. Pardy testified that her life changed after the events of May 2007. She became less social, and avoided Commercial Drive. She didn't want to be around the same people, or on the Drive. She isolated herself from situations and places that might bring those events up. She lost interest in some of her activities, such as playing music with friends. She didn't want to open herself up to discussions about those events. She wanted to regain her status as a positive person, but was exhausted by everything. She suffered insomnia, which affected every aspect of her life, including her job, by affecting her ability to concentrate.

[251] In January or February of 2008, Ms. Pardy and Ms. Broomsgrove broke up. Ms. Pardy testified that it was difficult to have any fun in their relationship, because all of their power had been taken from each of them in front of the other. This took their relationship to a low point, and it then fell apart.

[252] Ms. Pardy testified that, about five or six months before the hearing, she started getting better. She became less jumpy, and again felt safe in her home or if she was out.

[253] Ms. Pardy's evidence as to the cause, nature, severity, or duration of her physical and emotional symptoms, their impact on her life, or her gradual recovery was not challenged on cross-examination.

[254] Ms. Ertan was not present at Zesty's in May 2007; rather, her evidence was directed to the impact of that experience on Ms. Pardy. I was favourably impressed by Ms. Ertan as a witness. She was responsive to questions in both direct and cross-examination. She was matter-

of-fact in testifying to her observations of Ms. Pardy's personality and behaviour both before and after May 2007. Her evidence was not seriously challenged in cross-examination. I accept her evidence as a truthful and accurate account of what she observed. I give no weight to any opinions she expressed about a causal connection between events at Zesty's in May 2007, and the changes she observed in Ms. Pardy. That is something I must decide on a consideration of all the evidence.

[255] Ms. Ertan met Ms. Pardy in about 2005 or 2006, when the latter was living with Ms. Broomsgrove. Ms. Ertan testified that Ms. Pardy was her first and best friend when she immigrated to Canada.

[256] Ms. Ertan testified that she spent time with Ms. Pardy and Ms. Broomsgrove when they were a couple. They seemed very good together, and she was not aware of any major problems between them.

[257] Ms. Ertan testified that, before the events of May 2007, Ms. Pardy was a good friend to her, and fun to be around. She was a very private person. She was social, but at the same time, responsible in relation to her job. Ms. Ertan was not aware of Ms. Pardy's prior history of panic attacks.

[258] Ms. Ertan testified that she first learned about events at Zesty's a few days later, when Ms. Pardy telephoned her. A week later they met in person. Ms. Pardy appeared sad, disappointed, and tired. As she told Ms. Ertan the story, she was shaking and sweating.

[259] Ms. Pardy and Ms. Broomsgrove broke up a few months after May 2007. Ms. Ertan attributed their breakup to the events of May 2007.

[260] After the incidents, Ms. Ertan observed Ms. Pardy become isolated. She spent most of her time at home. At times, Ms. Pardy didn't want to see Ms. Ertan or hang out with her other friends. When they did get together at Ms. Ertan's home or her own for coffee, they would quickly start talking about the events of May 2007. Ms. Pardy appeared uncomfortable and anxious. She was shaking and sweating, getting up and walking around. Her moods changed from day to day.

[261] After Ms. Pardy's human rights complaint became public, they talked about the media coverage. Ms. Pardy said that it was scary, and that she hated to see her name on the news,

because all the details about her were portrayed so negatively. When talking about the coverage, she appeared angry and disappointed. Her face was red. She was sweating and cold at the same time, and it was hard to make her comfortable. For a long period, Ms. Pardy resisted taking off her coat and sitting down with Ms. Ertan; she was always ready to go.

[262] Ms. Ertan and Ms. Pardy became romantically involved and moved in together in November 2008. Ms. Ertan said she asked Ms. Pardy to move in, because she knew Ms. Pardy had isolated herself in her apartment, and Ms. Ertan felt she couldn't leave her there.

[263] Ms. Pardy's problems became their problems, because they affected their everyday life. Ms. Pardy continued to appear uncomfortable. Her sleep was disturbed. Ms. Pardy ground her teeth, and woke up in the middle of the night, "as if somebody was watching and following her". When they talked about the May 2007 events, or saw news about them on the internet, Ms. Pardy appeared "down", and shook.

[264] From Ms. Ertan's vantage point, the events at Zesty's and their aftermath were "the biggest and most terrifying things that had happened" to Ms. Pardy. She was not aware of any other circumstance in Ms. Pardy's life that could have caused the changes she observed in Ms. Pardy's personality and behaviour after May 2007. She didn't observe any improvement in Ms. Pardy's condition for eight or nine months after they began living together.

2. Summary of factual findings re impact

[265] After careful consideration of all the evidence, I find as a fact that Mr. Earle's two sets of comments from the stage, his cornering of her and his continued verbal abuse of her by the bar as she returned from the washroom, and his grabbing and breaking of her sunglasses, had a significant and lasting physical and psychological effect on her, as detailed in her evidence and recorded in Dr. Menzies' report. I find that Mr. Earle's actions aggravated her pre-existing condition of generalized anxiety disorder with panic attacks, and caused her PTSD. I find that Mr. Earle's false public statements about Ms. Pardy in the YouTube interview exacerbated and prolonged these effects on her.

V. The Law

A. The *Code*

[266] Ms. Pardy's complaint was brought under s. 8 of the *Code*, which provides in part:

> (1) A person must not, without a *bona fide* and reasonable justification,
>
> (a) deny to a person or class of persons any accommodation, service or facility customarily available to the public, or
>
> (b) discriminate against a person or class of persons regarding any accommodation, service or facility customarily available to the public,
>
> because of the sex [or] sexual orientation … of that person or class of persons.

[267] Section 1 of the *Code* provides that:

> "employment" includes the relationship of master and servant, master and apprentice and principal and agent, if a substantial part of the agent's services relate to the affairs of one principal, and 'employ' has a corresponding meaning[,]

and defines a "person" as including an employer.

[268] Section 44(2) of the *Code* provides:

> (2) An act or thing done or omitted by an employee, officer, director, official or agent of any person within the scope of his or her authority is deemed to be an act or thing done or omitted by that person.

[269] Section 2 of the *Code* provides that "Discrimination in contravention of this Code does not require an intention to contravene this Code".

B. Reconsideration issues

[270] In *Pardy (No. 3)*, the Tribunal referred to five "reconsideration issues", arising from the B.C. Supreme Court's judicial review decision in *Earle v. British Columbia Human Rights Tribunal, Lorna Pardy, Salam Ismail and Zesty Food Services Inc.*, (September 10, 2009), Vancouver S085249 (B.C.S.C.) ("*Earle v. BCHRT*"), on which the Tribunal had previously determined that all parties had standing to make submissions:

a. Was Mr. Earle an agent or employee of Mr. Ismail and/or Zesty;

b. Was Mr. Earle providing a service within the meaning of the *Code*;

c. Should the Tribunal exercise its discretion to consider the issue of whether Mr. Ismail and Zesty were providing a service customarily available to the public;

d. If the Tribunal exercises its discretion to consider the issue, were Mr. Ismail and Zesty providing a service customarily available to the public; and

e. How s. 2(b) *Charter* rights impact the Tribunal's jurisdiction, including under s. 8 of the *Code*. However, pursuant to s. 45 of the *Administrative Tribunals Act*, R.S.B.C. 2004, c. 45, the Tribunal does not have the jurisdiction to determine if Mr. Earle's conduct amounts to protected expression.
(para. 23)

[271] As also noted in *Pardy (No. 3)*:

> At the pre-hearing telephone conference on March 23, 2010, Mr. Earle applied to adjourn the scheduled hearing to deal first with two issues which he characterized as "jurisdictional": whether Mr. Earle was an employee or agent of Zesty or Mr. Ismail; and whether, in the context of this case, s. 8(1) of the *Code* is a justifiable limit on Mr. Earle's *Charter* right to freedom of speech.

[272] In his written argument, Mr. Earle raises these issues under the headings of "volunteer or employee" and "freedom of expression".

[273] In their written argument, the Zesty respondents adopt Mr. Earle's written argument, and also raise the issue of "[w]hether Mr. Earle's actions bring him within the meaning of s. 8(1)(b) of the *Code*. i.e. is it a public service?"

[274] I understand, then, that the respondents raise three issues, which they submit go to the Tribunal's jurisdiction to consider Ms. Pardy's complaint:

- The "freedom of expression issue": Is s. 8 of the *Code* unconstitutional, in that it purports to unjustifiably limit Mr. Earle's *Charter* right to freedom of expression?
- The "service issue": In offering the open mic comedy show, were any or all of the respondents offering a service customarily available to the public?
- The "employee issue": Were Mr. Earle's words and actions undertaken as an employee or agent of the Zesty respondents?

[275] Having exercised my discretion to consider whether the Zesty respondents were offering a service to the public, I will consider these three issues in turn.

1. *Charter* right to freedom of expression

(a) Mr. Earle's argument

[276] Mr. Earle argues that his words and actions were protected expression under s. 2(b) of the *Charter*.

[277] He refers to *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 for the proposition that any expression which conveys or attempts to convey meaning, and even non-violent expression which may be hurtful or humiliating to an individual, is protected by the *Charter*. (I note that I am unable to find any reference in *Irwin Toy* to hurtful or humiliating expression.)

[278] Mr. Earle cites cases such as *R. v. Keegstra*, [1990] 3 S.C.R. 679, and *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892, for the proposition that even hateful expression which incites violence is within the protection of s. 2(b), though he acknowledges that in those cases the courts have determined that legislative infringement of the freedom is justified under s. 1 of the *Charter*.

[279] He asks the Tribunal to declare that s. 8 of the *Code* is of no force or effect because it conflicts with s. 2(b) of the *Charter*.

(b) Zesty respondents' argument

[280] The Zesty respondents acknowledge that s. 45(1) of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 (the "*ATA*") deprives the Tribunal of jurisdiction over constitutional questions related to the *Charter*, and say that *Charter* questions are to be dealt with by stated case to a court. They cite no authority for the latter proposition, and do not refer to the Tribunal's earlier decision on this point in *Pardy (No. 3)*, paras. 85-95.

[281] They submit that the *Charter* prevents the Tribunal from dealing with allegations of discriminatory expression in providing a service to the public under s. 8 of the *Code*. They say the Tribunal can only deal with such expression if a complainant alleges that it violates the "hate speech" provisions of s. 7 of the *Code*. Again, they cite no authority for their argument.

(c) Ms. Pardy's argument

[282] Ms. Pardy argues that the *ATA* deprives the Tribunal of jurisdiction over constitutional questions related to the *Charter*, and says that, as a result, the Tribunal cannot consider whether Mr. Earle's speech was expression protected by s. 2(b) of the *Charter*. She says that is a matter for the courts in a review of the constitutionality of an administrative tribunal's order: *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, and *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825.

[283] She argues that the *Code* was enacted to secure *Charter* rights to equality, and that, as in *Ross* "the respondent must not be permitted to use the *Charter* as an instrument to 'roll back' advances made by [protected groups] against discrimination".

(d) Analysis: *Charter* freedom of expression

[284] As explained in *Pardy (No. 3)*, at paras. 54 and 91-94, s. 45 of the *ATA* deprives the Tribunal of jurisdiction over constitutional issues related to the *Charter*, and makes it clear that the Tribunal has no power to refer a stated case on a *Charter* question to the courts.

[285] The respondents cannot challenge the constitutionality of s. 8 of the *Code* on *Charter* grounds before the Tribunal, as the Tribunal does not have jurisdiction to decide the respondents' *Charter*-based free speech arguments. I reiterate my conclusion in *Pardy (No. 3)* that the Tribunal has no power to state a case on those issues for the B.C. Supreme Court.

[286] In my view, on which I expand below, the Tribunal's jurisdiction to entertain arguments related to freedom of expression arises, if at all, when it decides whether a non-*Charter* claim to free expression is a defence under s. 8(1) of the *Code*, as a "bona fide and reasonable justification" for conduct that would otherwise contravene the *Code*.

2. Service customarily available to the public

(a) Ms. Pardy's argument

[287] Ms. Pardy relies on *HMTQ v. McGrath*, 2009 BCSC 180, para. 110, for the proposition that, in considering whether an activity is a service, the Tribunal should consider both the "true nature of the complaint" and the "nature of the service provided".

[288] Although Ms. Pardy's argument on this point is directed almost entirely to the nature of the service, I understand from her references to the *Code*'s purposes of removing impediments to full and free participation in economic, social, political and cultural life that she seeks to characterize the nature of her complaint as one which alleges that the respondents' actions interfered with such full and free participation on her part.

[289] Ms. Pardy relies on *Nixon v. Vancouver Rape Relief Society*, 2002 BCHRT 1 (rev'd on other grounds, 2003 BCSC 1936; 2005 BCCA 601) and cases cited in it, for the proposition that the *Code*, including the phrase "service customarily available to the public", must be interpreted

in a broad, liberal, and purposive manner that best meets its purposes, as set out in s. 2. The Zesty respondents and Mr. Earle do not disagree with this general proposition.

[290] Ms. Pardy relies on the definition of "service" in *Nixon*, para. 78 and *Okanagan Rainbow Coalition v. City of Kelowna and Gray*, 2000 BCHRT 21, para. 76, respectively as "something of benefit provided to one person by another" and "a benefit to others, or a beneficial or useful act, or an act of helping another".

[291] Ms. Pardy acknowledges that not all services are covered by the *Code*. Those which are "purely private" or "purely social" are beyond the reach of s. 8: *Berg v. University of British Columbia*, [1993] 2 S.C.R. 353, paras. 9 and 32; *Marine Driver Golf Club v. Buntain et al.*, 2007 BCCA 17, paras. 46 and 49.

[292] In this case, Ms. Pardy submits that the "service" involved was "entertainment ... in the broader context of a restaurant serving food and beverages", "services provided by Zesty's related to the provision of food and beverages, and the entertainment which it offered its customers", and "entertainment in a restaurant".

[293] She points to cases, such as *Nixon*, para. 79, which have adopted the view of the courts that a "service" includes, in general, the operation of a restaurant, bar or tavern. She also relies on cases, such as *Rawala v. DeBry Institute of Technology*, (1982) 3 C.H.R.R. D/1057 (cited with approval in *Berg*, para. 49), in which an Ontario Board of Inquiry contemplated that the services of a restaurant in admitting and providing food to its customers could not be separated from its ancillary facilities, such as washrooms. Finally, in this connection, Ms. Pardy relies on *L.(C.) v. Badyal* (1998) 34 C.H.R.R. D/41 (B.C.H.R.T.), in which the Tribunal determined that a pub which offered a karaoke night was providing the service of "entertainment and refreshment" to those who chose to attend, and was thus providing a "service or facility customarily available to the public", within the meaning of the *Code*.

(b) Mr. Earle's argument

[294] Mr. Earle's argument does not address the question whether he, Zesty or Mr. Ismail were providing a service customarily available to the public, within the meaning of s. 8 of the *Code*. He does refer, in passing, to "a service provided by Zesty's and Mr. Ismail, namely food and

beverage services *customarily available to the public*" (emphasis in original), but without any other discussion, or any explanation of the emphasis.

(c) Zesty respondents' argument

[295] The Zesty respondents raise, as one of the "principal issues in this complaint ... [w]hether Mr. Earle's actions bring him within the meaning of s. 8(1)(b) of the *Code* i.e.: is it a public service?".

[296] They say that a restaurant is unquestionably a service customarily available to the public. However, they question whether Mr. Earle's "comedy routine" was part of that service.

[297] The Zesty respondents, like Ms. Pardy, rely on *McGrath*, for the proposition that in defining a "service", the Tribunal must consider both the "true nature of the complaint" and the "nature of the service provided". However, they disagree with her about the content of those considerations in this case.

[298] They also rely on *Berg*, para. 59, for the proposition that, in determining what is a public service, "one must take a principled approach which looks to the relationship created between the service or facility provider and the service or facility used by the particular service or facility".

[299] The Zesty respondents say that, on the standard of *McGrath*, the "true nature of the complaint" is of a heated exchange between a comedian and a patron, who "equally threw insults at each other, and who both assaulted each other".

[300] The Zesty respondents' view of the "nature of the service provided" is less clear. They first say that the "true nature of the service was a public restaurant, and the open mike comedy amateur routine does not fall within a public service". They then say "the service is a comedy show", and that the "nature of the service provided is a comedic performance by an amateur comedian". Finally, they say of events offstage, "[t]his is not a comedic performance which is [part] of a public service."

[301] As I understand their argument, the Zesty respondents make these points on the "service" issue: (1) while their operation of the restaurant was a service customarily available to the public, the provision of an amateur comedy show was not part of that service; (2) the complaint, though framed as one of discriminatory conduct of host to patron, was really one of mutually

insulting and assaultive conduct, unrelated to the provision of a service; and (3) in any event, the interactions between Mr. Earle and Ms. Pardy offstage were not part of the comedy show, and thus not related to provision of a service customarily available to the public.

(d) Analysis: Service customarily available to the public

[302] In my view, for the reasons which follow, Mr. Earle and the Zesty respondents were, in offering entertainment and refreshment to Ms. Pardy and its other patrons, providing a "service ... customarily available to the public" on the evening of May 22, 2007. I discuss below whether Mr. Earle was an employee or agent of the Zesty respondents, so as to make them legally responsible for his actions in doing so.

[303] I do not accept the submission of the Zesty respondents that Ms. Pardy's behaviour, whether or not their characterization of it is accurate on the facts I have found, is relevant to the "nature of the complaint". As stated at the outset, Ms. Pardy's complaint is that Mr. Earle directed homophobic and sexist insults at her in his capacity of host of the comedy show at Zesty's. I consider further below whether that conduct was discriminatory, and, if so, to what remedies Ms. Pardy may be entitled. In that context, her own behaviour may be relevant, but it does not affect the "nature of the complaint" for the purpose of deciding whether she was receiving a service.

[304] I have found as facts that the open mic comedy night was a regular offering at Zesty's, pursuant to a formal arrangement between Mr. Ismail, the principal of Zesty, and Mr. Earle. The Zesty respondents promoted the comedy night through public advertisements, which attracted both performers and other paying customers. The comedy night took place on Zesty's premises, during Zesty's regular business hours. The general public was free to attend.

[305] The Zesty respondents sponsored the comedy night as part of their business, both because it attracted paying customers (including friends of the comedians and the comedians themselves) who might not otherwise have come to the restaurant, and because it enabled those respondents to make contacts in pursuit of future entertainment events, such as Mr. Wolfe's later shows.

[306] The services of restaurant and comedy club provided at Zesty's on the evening of May 22, 2007 were, as contemplated in *Rawala*, and held explicitly in *Badyal*, integrated and

inseparable. They occupied the same space at the same time, and were provided to the same patrons. They were unquestionably customarily available to the public.

[307] I conclude that the services of refreshment and entertainment provided to Ms. Pardy were part of a "service ... customarily available to the public" as that phrase is used in s. 8(1) of the *Code*. Accordingly, the Tribunal has jurisdiction over Ms. Pardy's complaint of discrimination in the provision of that service.

3. Mr. Earle as employee of the Zesty respondents

(a) Ms. Pardy's argument

[308] Ms. Pardy submits that Mr. Earle's status as an employee of the Zesty respondents is significant for two reasons: first, as their employee, he was involved in their provision of a service customarily available to the public; second, the Zesty respondents are liable, under s. 44(2) of the *Code*, for the acts of their employees.

[309] Ms. Pardy says, citing *Berg*, *Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84, and *Nixon*, both at the Tribunal (paras. 52-56) and in the Court of Appeal (para. 18), that "employee", "employer", and "employment" in the *Code* are to be defined in a large and liberal manner which advances the purposes of the *Code*, and in particular that they have broader meanings than those attached to them in employment law.

[310] Ms. Pardy relies on the Tribunal's decision in *Crane v. British Columbia (Ministry of Health Services)*, 2005 BCHRT 361, (rev'd on other grounds, 2007 BCSC 460) as a statement of the applicable principles for determining "employment" in a human rights context. In particular, she points to the factors of "utilization", "control", "financial burden", and "remedial purpose" as among the most important factors in determining whether an employment relationship exists (para. 79).

[311] Ms. Pardy says that the Zesty respondents "utilized" Mr. Earle because they gained a benefit from his hosting of the weekly open mic comedy night. Mr. Earle determined who took the stage. The nights were intended as entertainment for Zesty's patrons. The Zesty respondents also benefitted from networking opportunities, which enabled them to do other projects with other comedians.

[312] Ms. Pardy says that the Zesty respondents "controlled" Mr. Earle, demonstrated by their ability to terminate the relationship with him and prohibiting him from returning to their stage. Mr. Ismail subsequently formulated a policy for the behaviour of comedians performing on his stage.

[313] Ms. Pardy says that the Zesty respondents bore the burden of remunerating Mr. Earle by giving him a bar tab. She relies on the decision in *Randhawa v. Cowick*, [1991] B.C.J. No. 884 (S.C.), in turn citing *Huba v. Schulze & Shaw*, (1962) 37 W.W.R. 241 (Man. C.A.) for the propositions that one can be a "servant" for a single occasion, even though acting gratuitously, and that compensation for such services can take the form of free refreshments.

[314] Ms. Pardy says that there is a remedial purpose in finding that Mr. Earle was an employee of the Zesty respondents, because only they had the ability to prevent and remedy the discrimination alleged in this case, for example by advising its performers in advance what conduct would be unacceptable, by removing Mr. Earle from the stage and the restaurant after his verbal assault on her, and by apologizing or otherwise providing redress to Ms. Pardy.

[315] Applying the factors of "utilization", "control", "financial burden" and "remedial purpose" to the facts of this case, Ms. Pardy submits that Mr. Earle was an "employee" of the Zesty respondents, and that s. 44 of the *Code* makes them liable for his actions towards her.

(b) Mr. Earle's argument

[316] Although Mr. Earle acknowledges, citing *Crane*, that tribunals and courts have expanded the definition of "employment" to further the purposes of the *Code*, he submits that he was not an employee of the Zesty respondents.

[317] Mr. Earle's principal argument is that Mr. Earle was either an "independent contractor" or a "volunteer" rather than an "employee". He cites *Petersen v. Stadnyk*, 2003 BCSC 2012, as a "judgement about an employer's vicarious liability, and liability of a group of volunteer musicians' in an assault case [in which] the court drew a clear line between *hiring* a band and *allowing* a band to play in the premises" (as written). I comment below on the accuracy of this characterization of the case.

[318] As I understand his argument (which at this point does not seem to be about "employment" at all), Mr. Earle submits that, as in *Petersen*, neither he nor the Zesty

respondents could have foreseen that the events of which Ms. Pardy complains would occur that evening, and thus cannot be responsible for them.

[319] Mr. Earle cites *Campbell v. Canada (Minister of National Revenue – M.N.R.),* [2002] T.C.J. No. 466, para. 5, as a case in which a comedian who volunteered to assist other volunteer comics as a master of ceremonies was not an employee or agent of the establishment where they performed. He says that the latter case "directly aligns with Respondent Earle's role at Zesty's Restaurant on the evening in question." Again, I comment below on the accuracy of this characterization of the case.

[320] Mr. Earle distinguishes *Randhawa*, cited by Ms. Pardy, on the basis that he, unlike the volunteer doorman in that case, for whose assault the club was vicariously liable, did not take orders or tickets, or offer direction to the patrons of Zesty's; was not an integral part of Zesty's business; and was not serving Zesty's patrons, but rather was facilitating the development of local amateur comics.

(c) Zesty respondents' argument

[321] The Zesty respondents submit that Mr. Earle was not their employee, but a volunteer.

[322] Like Mr. Earle, they acknowledge the Court's statement in *Crane* about the expanded meaning of "employment" in a human rights context, but say that "[a] comedic performance by a volunteer, who received some free beer, does not create an employment relationship which would saddle the restaurant, or the restaurant owner, with liability under the *Code*".

[323] The Zesty respondents distinguish *Badyal*, relied on by Ms. Pardy, on the basis that in that case, an off-duty manager told the complainant to leave the bar because "fucking dykes are not welcome here", while in the present case, there was only a heated exchange between an amateur comedian and a member of the audience, in which she insulted him, he insulted her, and she then assaulted him twice. These respondents say those facts cannot make Mr. Earle their employee under the *Code*.

(d) Analysis: Mr. Earle as employee of the Zesty respondents

[324] All parties agree that whether Mr. Earle was an "employee" of the Zesty respondents is to be determined with reference to a definition of "employment" which does not depend on

common law (or even other statutory) definitions, and which furthers the purposes of the *Code*. Where they disagree is on whether those terms cover the relationship between Mr. Earle and the Zesty respondents in this case.

(i) Meaning of "employment" and "employee" in the *Code*

[325] In a passage from *Crane* in the B.C. Supreme Court, quoted by all the respondents with the emphasis shown below, the Court said, at para. 152:

> [E]ven where the relationship is unusual or more akin to a contract for services (independent contractor relationship) or to a volunteer-like relationship, courts and tribunals have stretched the meaning of "employment" to ensure that the purposes of human rights legislation are not thwarted in the sense that the targets of discrimination are not left without any remedy. The intent behind such an expansive interpretation is to ensure that the person/entity committing the discrimination does not escape accountability for the discriminatory act by reason of some legalistic technicality based more on form than on substance.

[326] In *Nixon*, the Court of Appeal made it clear that, even in a wide variety of circumstances where the legal relationship in question is, not only in form, but also in substance, different from that of employer and employee at common law, there may still be "employment", not as a matter of stretching the definition, but as a matter of defining it correctly for the purposes of the *Code*:

> It is clear that the term "employment" in s. 13 of the Code has a broader meaning than is ascribed to it in employment law. For example, in Reid v. Vancouver Police Board (2005), 44 B.C.L.R. (4th) 49, 2005 BCCA 418, Lowry J.A. for the majority, referring to Barrie (City) v. Canadian Union of Public Employees, Local 2380 (CUPE), [1991] O.P.E.D. No. 41 (Ont. P.E. Trib.), said at para. 41 that the proper approach required "consideration of factors that are well beyond what traditional common law perceptions of the employer-employee relationship might dictate". In the same spirit, the Federal Court of Appeal has applied a broad meaning to the term "employ" and in Canadian Pacific Ltd. v. Canada (Human Rights Commission), [1991] 1 F.C. 571 (C.A.), 120 N.R. 152, found it to encompass the relationship between Canadian Pacific Ltd. and an employee of a firm with whom Canada Pacific Ltd. contracted for services. As well, in Pannu, Kang and Gill v. Prestige Cab Ltd. (1986), 73 A.R. 166 (C.A.), 31 D.L.R. (4th) 338, the Alberta Court of Appeal interpreted the words "employer", "employee" and "employment" to encompass a relationship between a taxi company and taxi drivers in a fact situation in which the taxi drivers were more in the nature of independent contractors.
> (para. 18)

[327] The respondents do not directly respond to Ms. Pardy's reliance on *Crane* for a list of factors relevant to determining "employment" in a human rights context, nor do their arguments

explain how, from their perspectives, on the facts of this case, the factors of "utilization", "control", "financial burden" and "remedial purpose" should be applied to find that Mr. Earle was not an employee.

[328] In *Crane*, after a review of cases related to the definition of "employment" under the *Code*, the Tribunal distilled and discussed the following relevant factors, which have since been applied by both the Tribunal and the courts, and which I adopt:

> While no one "test" can be developed, there are a number of factors or considerations which may be relevant to the determination of employer status. The most important of these include:
>
> a. "Utilization" – this is the concept discussed in *Pannu*, *Rosin* [*Canada (Attorney General) v. Rosin* (1990), 16 C.H.R.R. D/441 (F.C.A.)] and *Fontaine* [*Canadian Pacific Limited v. Canadian Human Rights Commission and Fontaine*, [1991] 1 F.C. 571] which looks to the question of whether the alleged employer "utilized" or gained some benefit from the employee in question;
>
> b. Control – did the alleged employer exercise control over the employee, whether in relation to the determination of his or her wages or other terms and conditions of employment, or in relation to their work more generally, such as the nature of the work to be performed or questions of discipline and discharge?;
>
> c. Financial burden – did the alleged employer bear the burden of remuneration of the employee?; and
>
> d. Remedial purpose – does the ability to remedy any discrimination lie with the alleged employer? This concept was discussed in *Tulk* [*Newfoundland (Minister of Health and Community Services) v. Tulk* (2002), 42 C.H.R.R. D/225 (N.L.S.C.T.D.)] and *Reid* [*Vancouver (City) v. Reid (No. 2)* (2003), 2003 BCSC 1348; rev'd, but not on this point: *Reid v. Vancouver Police Board*, 2005 BCCA 418] .
>
> (paras. 79-83)

[329] In *Crane*, the reviewing Court overturned the Tribunal's conclusion that the Provincial government was a co-employer of employees of the Commission, but it adopted and applied the Tribunal's statement of the relevant factors (paras. 105-158).

[330] The focus in the case law is on defining "employment" in ways that further the purposes of the *Code*, which are set out in s. 3:

> The purposes of this Code are as follows:
>
> (a) to foster a society in British Columbia in which there are no impediments to full and free participation in the economic, social, political and cultural life of British Columbia;

(b) to promote a climate of understanding and mutual respect where all are equal in dignity and rights;

(c) to prevent discrimination prohibited by this Code;

(d) to identify and eliminate persistent patterns of inequality associated with discrimination prohibited by this Code;

(e) to provide a means of redress for those persons who are discriminated against contrary to this Code.

(ii) Mr. Earle as employee

[331] In the following discussion, I consider the broad purposes of the *Code* in light of the *Crane* factors of utilization, control, financial burden, and remedial purpose, and, for the reasons given, conclude that Mr. Earle was an "employee" of the Zesty respondents, as that term is used in the *Code*.

[332] I find that the Zesty respondents "utilized" Mr. Earle's services. He organized the open mic shows, recruited the comedians who performed, and decided who would go on stage. The Zesty respondents benefitted from being relieved of these tasks. From the fact that they advertised the shows, they also clearly hoped to benefit, and did benefit, when the shows attracted paying customers who would not otherwise have attended at a slow time for the restaurant, and paid for food and drink. As Ms. Pardy argues, and as I have found, the Zesty respondents also benefitted from Mr. Earle's activities by making contacts, such as Mr. Wolfe, to put on future entertainment events at the restaurant.

[333] I find that the Zesty respondents "controlled" the provision of Mr. Earle's services. Without their permission at the outset, he could not have appeared on stage at all. After the events giving rise to the complaint, they were able to end his participation in the shows, over his objection. Their subsequent conduct demonstrated that they could, and later did, set standards for comedians performing at the restaurant.

[334] I find that the Zesty respondents bore the "financial burden", slight as it was in this case, of remunerating his services with free beer. *Randhawa* supports the view that the "slight degree of recompense" of providing free refreshments for a volunteer can solidify a relationship of "master and servant" (let alone a broader relationship of employment for human rights purposes) between the provider and recipient of the refreshments.

[335] I find that there is a remedial purpose in finding Mr. Earle to be an employee of the Zesty respondents. They participated in making the arrangements which permitted Mr. Earle to perform, and setting the conditions under which he did so. They had the opportunity and ability to set behavioural standards for performers. They had the opportunity to monitor the performance, and to intervene if it got out of hand. They had the ability to terminate Mr. Earle's services, and prevent him from performing further. Finally, they had the ability to provide a remedy for Mr. Earle's actions, whether by way of apology, financial compensation, or the institution of policies designed to prevent a recurrence.

[336] I do not understand *Crane* and the cases on which it relies to require that the Zesty respondents be the only entities capable of providing a remedy before Mr. Earle can be found to have been their employee. *Daley* and many other decisions of the Tribunal and the courts under the *Code* have contemplated that, where there is a basis for finding both institutional and individual culpability, both the employer responsible for the acts of its employee and the employee as an individual may be required to remedy any discrimination which has occurred.

[337] Apart from consideration of the *Crane* factors, there is nothing in the other arguments of the respondents which detracts from my conclusion that Mr. Earle was an employee of the Zesty respondents for the purposes of the *Code*.

[338] I do not accept Mr. Earle's attempt to distinguish *Randhawa* from the case before me. In that case, a patron of a social club and bar sued the club and others for assault and negligence after a volunteer doorman pushed the patron down some stairs and injured him during an altercation at the club. The Court held that the club could be vicariously liable, at common law or under the *Occupier's Liability Act*, for the acts of the doorman, because it was in a master and servant relationship with him. However, the Court declined to find the club liable for the plaintiff's injuries, because the "almost freak accident" which caused them was unforeseeable. That does not detract from the Court's finding that the doorman was an employee of the club.

[339] The fact that the volunteer doorman had different duties than Mr. Earle is not a meaningful distinction; each was serving his employer. Further, Mr. Earle's suggestions that he was not an integral part of Zesty's business, and that he was not serving its patrons, are contrary to the facts proved in evidence.

[340] I disagree with Mr. Earle's characterization of *Petersen* as being a "judgment about an employer's vicarious liability, and liability of a group of volunteer musicians' in an assault case [in which] the court drew a clear line between *hiring* a band and *allowing* a band to play in the premises" (as written).

[341] Mr. Petersen was a patron in a restaurant. The restaurant's liquor licence only permitted it to serve alcohol with food. On the evening in question, the restaurant offered, for the first time, entertainment by a blues band. Mr. Petersen alleged that another patron assaulted and injured him. He sued the restaurant under the *Occupier's Liability Act* and in negligence for operating dangerous premises and failing to take reasonable steps to ensure his safety. On a summary trial application, the Court held that the restaurant was not liable for Mr. Petersen's injuries, because, even though it allowed a volunteer band to play and made money from the sale of alcohol, those factors did not alter its character as a family restaurant. Unlike a pub or bar, it was not reasonably foreseeable that a fight would occur. Thus, the restaurant had not failed to meet its duty of care to Mr. Petersen.

[342] Contrary to Mr. Earle's assertions, *Petersen* does not mention vicarious liability, is not about the restaurant's liability as an employer, and has nothing to do with the liability of the musicians. The Court referred to the presence of the band only in the context of finding that it did not increase the patrons' propensity to fight. The Court did not, as argued by Mr. Earle, draw a clear (or any) line between hiring a band and allowing one to play; rather it treated those terms as equivalent. The Court said, at paragraph 63:

> The band was hired on a volunteer basis. It appeared that Winchester's allowed the band to play more as a favour to the band than to draw in patrons who did not normally frequent the establishment.

[343] Mr. Earle does not cite any case in which a person's status as an employee depended on the degree to which an alleged employer could foresee how that person might act in future. I do not find *Petersen* of any assistance in resolving any of the issues before me.

[344] Mr. Earle's reliance on *Campbell* is similarly misplaced. He calls it a case in which "a respondent volunteered his time to assist other volunteer comics in a 'Master of Ceremonies' capacity, but was not deemed an employee, agent, nor an extension of the establishment itself".

[345] Mr. Campbell owned and operated a business called Danceland, which contracted with clients to provide music at events. He hired two individuals as disc jockeys to choose and play

music. The issue in the case was whether they were engaged in pensionable and insurable employment under applicable federal statutes. Mr. Campbell said they were not; that they were independent contractors. The Minister of National Revenue determined that they were employees. The court upheld that determination as correct.

[346] The case does not refer to comics, volunteer or otherwise. The persons whose employment status was in issue were not volunteers; they were paid for their services and compensated for their expenses. Contrary to Mr. Earle's assertion, the Court did determine that those individuals were employees of Mr. Campbell's business. I do not find *Campbell* of any assistance in resolving the issues before me.

[347] Finally, I do not accept the Zesty respondents' attempt to distinguish *Badyal* from the case before me, on the basis that there, an off-duty manager called patrons "fucking dykes" and told them to leave the bar, but here an "amateur comedian" engaged in a "heated exchange" with a patron. Neither Mr. Earle's alleged "amateur" status (which was not in evidence), nor Ms. Pardy's behaviour can be determinative of Mr. Earle's employment status vis-à-vis the Zesty respondents. In any event, their suggestion that the first significant event was Ms. Pardy insulting Mr. Earle is at odds with the facts I have found.

[348] None of the parties specifically addressed the question of whether, if Mr. Earle was an employee of the Zesty respondents, his acts in relation to Ms. Pardy were "within the scope of his ... authority", so as to require the Tribunal to treat them, under s. 44(2) of the *Code* as the acts of the Zesty respondents.

[349] In the absence of any argument on this point, I adopt the reasoning of the Supreme Court of Canada in *Robichaud*, paras. 10-13, as applied by the Tribunal to the interpretation of s. 44(2) in *Badyal*, and *Neale v. Princeton Place Apts. Ltd.*, 2001 BCHRT 6, paras. 70-71.

[350] In *Robichaud*, the Supreme Court of Canada, interpreted the phrase "in the course of employment" broadly to mean "work- or job-related", so as to make an employer responsible for sexual harassment, notwithstanding that the harassment was clearly not "within the confines of the job a person is engaged to do." For a discussion of the imposition of vicarious liability in tort on an employer for the unauthorized actions of an employee who commits a sexual assault see: *Bazley v. Curry*, [1999] 2 S.C.R. 534.

[351] After careful consideration of the parties' arguments, and of the relevant facts and law, I find that Mr. Earle was an "employee" of the Zesty respondents, within the meaning of that term in s. 44(2) of the *Code*, and that his acts are deemed to be their acts for the purpose of considering liability for discrimination under the *Code*.

C. Discrimination

[352] Having determined that Mr. Earle and the Zesty respondents were providing a service customarily available to the public, including Ms. Pardy, and that Mr. Earle was an employee of the Zesty respondents, within the meaning of that term in the *Code*, in providing that service, I now consider whether, on the facts I have found, they discriminated against her regarding that service, because of her sex and sexual orientation, without a *bona fide* and reasonable justification, contrary to s. 8 of the *Code*.

1. Ms. Pardy's argument on discrimination

[353] Ms. Pardy relies on *Armstrong v. British Columbia (Ministry of Health)*, 2010 BCCA 56, para. 21, for the elements she is required to prove in order to establish a *prima facie* case that the respondents discriminated against her:

a. That she falls within one of the enumerated grounds set out in s. 8 of the *Code*;
b. That she experienced adverse treatment in the provision of a service customarily available to the public; and
c. That the enumerated ground was a factor in the adverse treatment.

[354] On the first element, she says that since she is a woman and a lesbian, and since sex and sexual orientation are both protected grounds in s. 8, she belongs to a protected group.

[355] On the second element, she submits that she experienced adverse treatment from Mr. Earle when he singled her out for comments, on and off the stage, directed at her sex and sexual orientation; when he approached her off stage in a physically-aggressive manner; and when he took her sunglasses from her head and broke them.

[356] Ms. Pardy said the adverse treatment from Mr. Earle continued when he used the press to paint her as a drunken heckler, bent on destroying his right to free speech, which had the effect of prolonging the impact on her of the original adverse treatment.

[357] She says that she experienced adverse treatment from Mr. Ismail and Zesty's staff when they did not stop the abuse, identify Mr. Earle's behaviour as unacceptable, investigate, apologize, or do anything else to remedy Mr. Earle's discriminatory treatment.

[358] Ms. Pardy says that, in her conversation the next day with Mr. Ismail, he continued her ordeal by blaming her for Mr. Earle's conduct, and sanctioning that conduct.

[359] On the third element, Ms. Pardy submits that it is beyond dispute that her sex and sexual orientation were factors in her adverse treatment by the respondents. She says that, under s. 2 of the *Code*, no intention to discriminate is required. She points to the fact that the terms Mr. Earle used are terms of abuse specifically directed at women and lesbians, and that this focus continued in her off-stage interactions with Mr. Earle. She says that attacking these key aspects of her identity, to publicly insult and humiliate her, deprived her of her right to participate in society with dignity. She points out that in *Badyal*, para. 30, the Tribunal determined that the term "fucking dyke", used as a pejorative comment directed at a person's sexual orientation, constituted discrimination.

[360] Ms. Pardy says that, as service providers, the respondents had an obligation to provide their customers with "an environment that does not expose them to discriminatory harassment": *North Vancouver School District No. 44 v. Jubran*, 2005 BCCA 21, para. 65.

[361] In total, Ms. Pardy says that the treatment to which the respondents' acts exposed her, based on her sex and sexual orientation, were such as to deprive her of the "climate of mutual respect where all are equal in dignity and rights" which the *Code*, as set out in s. 3, is intended to secure.

[362] Accordingly, Ms. Pardy submits that she has met her burden of proving a *prima facie* case of discrimination.

2. Mr. Earle's argument on discrimination

[363] Mr. Earle accepts that proof of intention is not necessary to prove discrimination. However, he says that "there is no clear definition of discrimination [though c]lues can be found within the purpose of Human Rights legislation". One such "clue" to which he refers is the statement in *Ontario (Human Rights Commission) v. Simpson-Sears Ltd.*, [1985] 2 S.C.R. 536, para. 12, where the Court said:

> The Code aims at the removal of discrimination. This is to state the obvious. Its main approach, however, is not to punish the discriminator, but rather to provide relief for the victims of discrimination. It is the result or the effect of the action complained of which is significant. If it does, in fact, cause discrimination; if its effect is to impose on one person or group of persons obligations, penalties, or restrictive conditions not imposed on other members of the community, it is discriminatory.

[364] Mr. Earle then says that he did not engage in "direct discrimination", as that term is used in *Simpsons-Sears*, para. 18, because he did not create or apply a "practice or rule which on its face creates a distinction between one group and another". He says he did not make his comments from the stage "in order to create a distinction between lesbians and straight patrons of Zesty's". Mr. Earle does not, in this part of his argument, specifically address the second basis of the complaint: alleged discrimination based on sex. I have assumed that he would make the same points in relation to that ground.

[365] Further, Mr. Earle, in distinguishing between "direct discrimination" and "adverse effect discrimination", makes no reference to the Supreme Court of Canada's decision in *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (B.C.G.S.E.U) (Meiorin Grievance)*, [1999] 3 S.C.R. 3, in which the Court specifically disapproved of such a distinction, and adopted a "unified standard".

[366] Mr. Earle submits that, rather than being designed to create a distinction based on sexual orientation, "the comments were directed specifically at the Complainant as part of a comedy show in progress." He goes on:

> [Mr. Earle] might have directed his comments at any patron in the building, and only directed these comments toward the Complainant consequent to her having drawn attention to herself through her distracting actions and the comments she directed towards him as a performer. Any patron of a comedy show expects to draw attention from the stage if he or she chooses to speak up or heckle during a show.

[367] Mr. Earle denies that there was any nexus between his comments and Ms. Pardy's sexual orientation. Rather, he says, the reason he made comments about her sexual orientation:

> was not in order to draw a distinction between homosexual and heterosexual patrons, but because it was the only characteristic made obvious by the Complainant herself. Had the Respondent known of other traits belonging [to] the Complainant, he may have just as readily seized upon those as the basis for his comments. This is standard procedure amongst stand-up comedians.

[368] According to Mr. Earle, “it was his job as host to engage anyone he judged as potentially disruptive, and quiet them.”

[369] Mr. Earle denies that his comments had the effect of imposing a penalty or restrictive condition on Ms. Pardy because, though she “may have felt uncomfortable”, she was “able to remain in the establishment – indeed she opted to remain in the establishment – and to experience the comedy show together with the other patrons present until its conclusion.”

[370] Mr. Earle submits that his conduct did not constitute adverse effect discrimination, as that term is used in *Simpsons-Sears*, para. 18, because, although his comments “may have made some patrons uncomfortable”, they “did not have the effect of denying any group of patrons from taking part and benefitting from the entertainment being offered”.

[371] On these bases, Mr. Earle submits that Ms. Pardy has not made out a *prima facie* case of discrimination.

[372] Mr. Earle does not address his comments to Ms. Pardy off stage, or the circumstances around his breaking of her sunglasses.

[373] In the alternative, Mr. Earle submits that his conduct did not amount to discrimination under the analytical approach employed in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497.

[374] He says that the first stage of the *Law* analysis is to determine whether he drew a distinction between Ms. Pardy and others based on personal characteristics, or failed to take account of her disadvantaged position in Canadian society, resulting in differential treatment.

[375] In conducting the first stage of the analysis, Mr. Earle says that one must first identify an appropriate comparator group. Given that Ms. Pardy’s complaint is based on her sex and sexual orientation, he proposes “male and straight patrons of Zesty’s” as the appropriate comparator group.

[376] While Mr. Earle concedes that his comments “reflected his perception that the Complainant’s behaviour on the evening in question was homosexual”, he explains that “the Respondent [had] no other obvious trait upon which to comment.” He says that, because he had no knowledge of Ms. Pardy’s personal characteristics other than those he could glean from her

behaviour, his comments "were not intended to be, and were not, personally discriminatory in nature".

[377] Mr. Earle submits that there is "no evidence that other women or homosexuals were treated badly by the Respondent that night". Then he says that, while Ms. Pardy "claims to have been singularly targeted ... 'smacking down' a heckler is common practice, and that his on-stage persona treats all audience members equally indelicately". I note that Mr. Earle's argument, including its references to the presence or absence of any evidence, was written and submitted before the Tribunal heard any evidence. None of the evidence from witnesses at the hearing established what is "common practice" in comedy performances, whether Mr. Earle had a distinct "on-stage persona", or how he treated other audience members.

[378] Mr. Earle next appears to concede that his actions "could have created a discriminatory purpose or effect, in a substantive sense" (emphasis added) as contemplated in *Andrews v. Law Society (British Columbia),* [1989] 1 S.C.R. 143, quoted in *Law*, para. 26:

> [Discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society.

[379] I note that the quotation from *Andrews* in para. 26 of *Law* continues with the following passage, not referred to in Mr. Earle's argument:

> Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.

[380] However, Mr. Earle submits that, to find discrimination, it is not enough to find that he created a distinction based on an enumerated ground; he must also have imposed a burden on or withheld a benefit from Ms. Pardy.

[381] Conceding that the purpose of s. 15 of the *Charter*, which was under consideration in *Law and Andrews*, is to "remedy historical ill, prejudices and stereotyping", and that this is also among the purposes of the *Code*, Mr. Earle, without having provided any evidence, nevertheless asserts that:

> A large component of humour and comedy is to use stereotypes in an exaggerated fashion, for the purpose of exposing them and helping the audience to re-examine

> the prejudices and stereotypes that they themselves hold. This is a positive purpose, and its aim is to reduce, rather than increase discrimination and prejudice. When a Court is confronted with live comedic performance, it must be cautious not to create policy that will have a chilling effect upon performers simply because someone in the audience doesn't 'get' the joke.

[382] I comment below on the extent to which this characterization of events at Zesty's is consistent with the evidence before me.

[383] In support of this view of the social purposes of comedy, Mr. Earle relies on a decision of the Canadian Broadcast Standards Council in *Comedy Network re Comedy Now ("Gord Disley")*, [2006] C.B.S.C.D. No. 4. He quotes the Council as stating that "[m]uch modern comedy has a discriminatory edge, taking advantage of the propensity of individuals to find humour in difference. ... The goal of the Human Rights Clause ... is not to ensure purity on the airwaves, it is to protect against harmful speech."

[384] In conclusion on this point, Mr. Earle says that, while his comments "may have been tasteless or offensive to some", they neither reflected a general prejudice towards Ms. Pardy's sex or sexual orientation, nor imposed a burden or withheld a benefit from her. Accordingly, he says that his actions "did not meet the threshold of discrimination under *Law*".

[385] Mr. Earle's argument does not address his comments and actions offstage, including grabbing and breaking Ms. Pardy's sunglasses, or his later public comments.

[386] Mr. Earle does not refer to the provision of s. 8(1) of the *Code* which creates a defence of a "*bona fide* and reasonable justification" to a complaint of discrimination under the *Code*. Rather, he argues that s. 8 is itself contrary to the guarantee of freedom of expression in s. 2(b) of the *Charter*. I have given my reasons for holding that the Tribunal lacks jurisdiction to consider this argument. However, I consider below whether there is any basis for concluding, either that *Charter* values or principles provide a *bona fide* and reasonable justification for Mr. Earle's comments, or that s. 7 of the *Code* is its only restriction on free expression. Accordingly, I summarize the portions of Mr. Earle's submissions which, though made in support of his *Charter* argument, may nevertheless be relevant to these two questions.

[387] Mr. Earle cites *Irwin Toy* and *Keegstra* for the propositions that any activity which conveys or attempts to convey meaning, even hateful expression which incites violence, is protected under s.(2)(b) of the *Charter*, and can only be proscribed under s.1.

[388] While distinguishing *Taylor*, in which the "hate speech" provisions of the *Canadian Human Rights Act* were upheld as a reasonable limit on *Charter* rights to free expression, on the basis that "it focuses on the medium by which the expression is communicated", Mr. Earle reiterates that all expression short of physical violence is protected under s. 2(b), and that any restrictions must be justified under s. 1.

[389] Mr. Earle states that, if the Tribunal decides that Mr. Earle's comments fall under s. 8 of the *Code*, then the Tribunal does not have jurisdiction to perform a s. 1 analysis, and so "must declare s. 8 of the *Code* to be of no force and effect insofar as it conflicts with s. 2(b)".

[390] Alternatively, he says that the Provincial legislature cannot have intended expression protected by the *Charter* to be covered by s. 8 of the *Code*.

3. Zesty respondents' argument on discrimination

[391] Apart from adopting Mr. Earle's submissions, and their submissions on the reconsideration issues dealt with above, the Zesty respondents do not direct any argument to the legal tests for proving discrimination, or to the application of those tests to the facts to determine whether they discriminated against Ms. Pardy, or on whether they had a reasonable justification for any such discrimination.

[392] However, in the course of their submissions on the reconsideration issues, they make a number of points which I think need to be considered on the discrimination issue.

[393] As part of their *Charter* argument, the Zesty respondents submit that considerations of free expression, particularly artistic expression, affect the proper interpretation of s. 8 of the *Code*. As with Mr. Earle's arguments, though I have given my reasons for holding that the Tribunal lacks jurisdiction to consider *Charter* arguments, I consider those parts of their submissions which may be relevant to non-*Charter* issues of free expression in the interpretation of the *Code*.

[394] The Zesty respondents say that s. 7 of the *Code*, rather than s. 8, applies to discriminatory statements, that s. 7 creates a higher test for discrimination, and that the higher test is a recognition of the value of freedom of expression.

[395] They argue that the legislative purpose of s. 8 is to protect public access to services, accommodations and facilities, not to protect persons such as Ms. Pardy from discriminatory statements.

4. Ms. Pardy's reply on discrimination

[396] Because of the anomaly that Mr. Earle's written argument was submitted shortly after the commencement of the hearing, some of Ms. Pardy's "reply" submissions are in her main argument, and some in her reply argument. I consider here those parts of her argument which are responsive to the arguments of Mr. Earle and the Zesty respondents.

[397] Ms. Pardy submits that, through their evidence, if not their arguments, the Zesty respondents suggest that Ms. Pardy's own conduct justified Mr. Earle's response, and thus provided a *bona fide* and reasonable justification for his conduct.

[398] In particular, Ms. Pardy says that the Zesty respondents rely on evidence that Ms. Pardy and her friends were yelling at Mr. Earle and "making out". (I note that I have rejected this evidence, for reasons given above.)

[399] Ms. Pardy submits that, in any event, Mr. Earle's conduct went beyond anything reasonably necessary to accomplish a goal of quelling any disruption to the show. She says that it cannot be consistent with the purposes of the *Code*, to treat either a disruption or a public display of affection as justifying a "crude and public humiliation" of individuals based on their sex and sexual orientation. She says that Mr. Earle could simply have asked the audience to be quiet, or asked a Zesty's staff member to intervene. On this basis alone, she says that any justification defence would fail to meet the requirement, set out in *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868, para. 20 ("*Grismer*"), that a respondent's act be "reasonably necessary to accomplish their purpose or goal".

[400] Ms. Pardy also argues that her later, admitted conduct, including throwing two glasses of water at Mr. Earle, cannot be considered as justifying that part of his conduct which followed those events. She cites *Radek v. Henderson Development (Canada) Ltd.*, [2005] B.C.H.R.T.D. No. 302, as a case in which a complainant's angry response to discriminatory treatment did not justify ejecting her from a mall for causing a disturbance.

[401] Ms. Pardy argues that, given the Tribunal's statutory lack of jurisdiction to consider the *Charter*, Mr. Earle's claim to have been engaged in creative expression justifying his conduct can only be considered in the context of a *bona fide* and reasonable justification, as in *Smith v. Knights of Columbus*, 2005 BCHRT 544.

[402] She cites the test for a BFRJ from *Grismer*, para. 20:

> In order to establish this justification, the defendant must prove that:
>
> (1) it adopted the standard for a purpose or goal that is rationally connected to the function being performed;
>
> (2) it adopted the standard in good faith, in the belief that it is necessary for the fulfillment of the purpose or goal; and
>
> (3) the standard is reasonably necessary to accomplish its purpose or goal, in the sense that the defendant cannot accommodate persons with the characteristics of the claimant without incurring undue hardship.

[403] Ms. Pardy submits that the standard upon which Mr. Earle appears to rely can be articulated as:

> A comedian can target an individual in an audience and use discriminatory words and acts to humiliate them, not as part of his comedic act, both on and off stage.

This is not, of course, the way Mr. Earle frames the standard, because he does not make any explicit argument about whether he had a "standard", or any argument at all about whether any such standard met the *Grismer* test for a BFRJ.

[404] Ms. Pardy then says that this standard is not rationally connected to creative expression in a comedy act, because, as a matter of fact, Mr. Earle's words were not part of a comedy act, but a spontaneous outburst. Rather than being "jokes", they were "derogatory words and insults, said in anger". She says such conduct continued after he left the stage.

[405] Ms. Pardy says that, because Mr. Earle's words were not part of his comedy act or creative expression, but were instead a "targeted and personal attack on a group of individuals", his actions are indistinguishable from, for example, those of a server at Zesty's who treated her in the same fashion.

[406] Ms. Pardy says that Mr. Earle's BFRJ fails at the first stage of the *Grismer* analysis, because his "standard" was not rationally connected to the function he was performing.

[407] Further, Ms. Pardy says that Mr. Earle's standard also fails the second stage of the *Grismer* analysis, because it was not adopted in a good faith belief that it was necessary for the fulfillment of the purpose of creative expression in a comedy act. Rather, she says it was spontaneous, prompted by anger.

[408] Finally on this point, Ms. Pardy says that Mr. Earle's standard fails the third stage of the *Grismer* analysis, because, assuming his goal was to engage in social commentary or comedy, that goal could easily have been attained by telling jokes as part of his act, and refraining from targeting and humiliating her on the basis of her sex and sexual orientation. In the language of *Grismer*, he could have accommodated her without incurring undue hardship.

[409] In her reply to the argument of the Zesty respondents, Ms. Pardy submits that the "publication" provisions in s. 7 of the *Code* have no relevance to this case, which does not deal with a discriminatory publication. She disputes that the jurisprudence developed under s. 7 creates a higher test for discriminatory statements in a service context. She says that discriminatory statements frequently arise in tenancy, employment and service relationships which are governed by the *Code* under s. 10, 13, and 8, respectively, and argues that it is consistent with the *Code*'s purposes to protect against discriminatory statements made in those contexts. Again, she says that there is no case which suggests a higher or different test for determining whether a statement, as opposed to any other act, is discriminatory under those sections.

5. Analysis on discrimination

(a) *Prima facie* case

[410] I hold, based on *Armstrong*, that, in order to prove a *prima facie* case of discrimination, Ms. Pardy must prove that she falls within one of the enumerated grounds under s. 8, that she experienced adverse treatment in the provision of a service customarily available to the public, and that her sex or sexual orientation was a factor in the adverse treatment. I discuss below why it is not necessary to engage, in addition or instead, in the sort of analysis contemplated in *Law*.

[411] There is no dispute that, as a woman and a lesbian, Mr. Pardy is within the enumerated grounds in s. 8. I emphasize that this is because the *Code* protects all persons from

discrimination based on sex or sexual orientation: men and heterosexual persons have equal protection from discrimination based on those characteristics.

[412] I find that Ms. Pardy suffered adverse treatment from the respondents. That adverse treatment consisted of the following conduct:

- Mr. Earle made two sets of comments from the stage at Zesty's, to and about Ms. Pardy and her friends, and recorded above, including referring to them as "fucking cunts", "stupid cunts", "stupid dykes", and "fucking dyke cunts";
- Mr. Earle cornered Ms. Pardy and continued to physically intimidate and verbally abuse her by the bar as she returned from the washroom, including referring to her as "fucking stupid dyke, stupid fucking bitch", and he grabbed and broke her sunglasses;
- The Zesty respondents failed to restrain Mr. Earle, protect Ms. Pardy from his verbal or physical assault, or otherwise take effective steps to remedy his treatment of her.

[413] I do not accept Mr. Earle's submission, as I understand it, that his part in these actions did not amount to adverse treatment, because they did not impose a penalty or restrictive condition on Ms. Pardy, as she "had the option to remain in the establishment". Ms. Pardy was a patron of Zesty's. She was not obliged to choose between being driven from the restaurant, and giving up the right to complain of discrimination.

[414] On the facts I have found, Ms. Pardy has established that the respondents subjected her to "adverse treatment", and has therefore satisfied the second criterion for proving a *prima facie* case of discrimination.

[415] I also accept Ms. Pardy's submission that there was a connection between the adverse treatment, and her sex and sexual orientation. Every one of Mr. Earle's comments on and off the stage was directed specifically to one or both of these two personal characteristics. His actions off the stage were inextricably bound up with the continual references he had made, and was making, to Ms. Pardy's sex and sexual orientation. His comments on YouTube continued to focus on the fact that Ms. Pardy is a lesbian.

[416] I do not accept Mr. Earle's submission that there was no nexus between his comments from the stage and Ms. Pardy's sex or sexual orientation, because he did not make them "<u>in order to</u> draw a distinction between homosexual and heterosexual patrons" (emphasis added). As stated in s. 2 of the *Code*, and acknowledged by Mr. Earle elsewhere in his argument, Ms. Pardy

does not have to prove that the respondents intended to discriminate against her. Even if intention were relevant, I have no evidence from Mr. Earle as to his intentions, and the evidence I do have and accept points overwhelmingly to a direct, intentional connection between Mr. Earle's actions, and Ms. Pardy's sex and sexual orientation.

[417] Finally in this connection, I note that, apart from the Zesty respondents' deemed responsibility for Mr. Earle's actions under s. 44(2) of the *Code*, they are responsible for their own failure to prevent, respond to, or remedy his actions. The Tribunal has accepted, and the courts have agreed, that such acts or omissions, if proven, may constitute adverse treatment related to a prohibited ground, so as to found a *prima facie* case of discrimination: *Kinexus Bioinformatics Corporation v. Asad*, 2010 BCSC 33, paras. 160-61; *Preston v. TRIUMF and others*, 2009 BCHRT 388. I find that they do in this case.

[418] On a full consideration of the facts of this case, the arguments of the parties, and the relevant law, I find that Ms. Pardy has made out a *prima facie* case of discrimination, based on her sex and sexual orientation, against all the respondents.

(b) Bona fide and reasonable justification ("BFRJ")

[419] The respondents point to two possible justifications for their actions: that they were provoked by Ms. Pardy's behaviour, or that it was a consensual conflict between her and Mr. Earle, and that, in Mr. Earle's case, his actions were exercises of free expression.

[420] I reiterate the test from *Grismer*, para. 20, for a BFRJ:

> In order to establish this justification, the defendant must prove that:
>
> (1) it adopted the standard for a purpose or goal that is rationally connected to the function being performed;
>
> (2) it adopted the standard in good faith, in the belief that it is necessary for the fulfillment of the purpose or goal; and
>
> (3) the standard is reasonably necessary to accomplish its purpose or goal, in the sense that the defendant cannot accommodate persons with the characteristics of the claimant without incurring undue hardship.

[421] The respondents did not cast their arguments in terms of the *Grismer* analysis.

[422] I disagree with Ms. Pardy that the "standard" implicitly relied on by Mr. Earle relates to discriminatory words and acts which were not part of his comedy performance. Rather, Mr. Earle argues that he was justified in singling out Ms. Pardy based on her sex and sexual

orientation because "it was his job as host to engage anyone he judged as potentially disruptive, and quiet them."

[423] Applying the *Grismer* test to the standard formulated by Mr. Earle, his justification fails on the facts at each stage of the analysis. None of the respondents tendered any evidence that attacking a patron's sex or sexual orientation from the stage had any rational connection to maintaining order during the show. Further, Mr. Earle's comments off the stage, his physical intimidation of Ms. Pardy near the bar, and his breaking her sunglasses had no possible rational connection to quieting a disruption of the show. By the time Mr. Earle cornered Ms. Pardy, referred to her as "fucking stupid dyke, fucking bitch", and broke her glasses, the show was over.

[424] None of the respondents tendered any evidence that Mr. Earle adopted the "insult to maintain order" standard in good faith, in the belief that it was necessary for that purpose. I have no evidence from Mr. Earle as to his beliefs, or as to the good faith with which he held them.

[425] Finally, none of the respondents tendered any evidence that a standard permitting conduct like Mr. Earle's was reasonably necessary to accomplish the goal of maintaining order, or that abstaining from such insults would have caused undue hardship for them. As Ms. Pardy points out, there were measures available to Mr. Earle, well short of attacking Ms. Pardy's sex and sexual orientation, to accomplish his purpose of ending any disruption, so he has not shown that the standard was reasonably necessary to accomplish its purpose.

[426] The Zesty respondents' submissions that Ms. Pardy provoked Mr. Earle's actions, or at least participated equally in them, are made in the context of their argument that he was not engaged in providing a public service, not that he had a justification under a *Grismer* analysis. I have already considered and rejected the "service" argument. Even if it were possible to articulate a "standard" to which the *Grismer* test could be applied, this attempt at justification would fail on the facts. Ms. Pardy did not provoke or invite Mr. Earle's first attack from the stage, and she was far from an equal participant thereafter. She did not match Mr. Earle's hostile and demeaning insults, engage in physical intimidation of him, or destroy his property. She did throw two glasses of water in his face, but that is a matter best considered as affecting the extent of any remedies to which she may be entitled, rather than as a justification for discriminatory conduct.

[427] Similarly, to the extent that the Zesty respondents argue that they responded appropriately to Ms. Pardy after the events at Zesty's, I think that is not a defence of justification, but also a matter which goes to the extent of any remedy Ms. Pardy may have against them, and I consider it in that context below.

6. *Law* analysis

[428] I am not persuaded that it is necessary or helpful to engage in a separate *Law* analysis. Unlike *Law*, this is a case to be considered under s. 8 of the *Code*, not the equality provisions in s. 15 of the *Charter*.

[429] This is a case involving private actors. In *Armstrong*, paras. 34-38, and other cases decided both before and since, the B.C. Court of Appeal has said that the appropriate analysis is the one drawn from *O'Malley*, to determine whether the complainant has established a *prima facie* case.

[430] Most recently, in *Lavender Housing Co-Operative v. Ford*, 2011 BCCA 114, para. 77, in the context of a discussion about the need for a comparator-group analysis rather than asking whether the complainant had established a *prima facie* case, the Court noted that:

> [I]n *Kemess Mines Ltd. v. International Union of Operating Engineers, Local 115*, 2006 BCCA 58, 54 B.C.L.R. (4th) 252, a case involving a claim of employment-discrimination under s. 13(1)(a) of the *Human Rights Code*, Chief Justice Finch opined that a determination of *prima facie* discrimination is made by considering whether the conduct complained of is that which the *Code* has, by definition, prohibited, and not on a "comparative analysis": para. 30.

[431] Also since this case was argued, the Supreme Court of Canada has reiterated that, even in equality cases under s. 15 of the *Charter*, which necessarily involve governmental action, the proper inquiry is whether an impugned law creates a distinction based on an enumerated or analogous ground, and whether that distinction creates a disadvantage by perpetuating prejudice and stereotyping: *Withler v. Canada (Attorney General)*, 2011 SCC 12, paras. 30 and 61.

[432] Recognizing that in this case it is private conduct in the provision of a service to a member of the public that is impugned, I am satisfied that engaging in that inquiry in the circumstances of this case would not produce a result different than the one I have reached. Mr. Earle's actions explicitly singled out Ms. Pardy based on enumerated grounds, and harmed her by perpetuating prejudice and stereotyping directly related to those grounds.

7. Freedom of expression as a BFRJ

[433] The respondents' principal argument in justification is that, in his actions towards Ms. Pardy, Mr. Earle was exercising his *Charter*-protected freedom of expression. I have given my reasons for holding that the Tribunal cannot consider or give effect to this argument, because of s. 45 of the *Administrative Tribunals Act*.

[434] None of the respondents raise free expression, apart from the *Charter*, as a BFRJ for otherwise discriminatory acts. However, the Tribunal can only consider their claims in this regard as claims of justification under s. 8 of the *Code*. I therefore invited all parties to address in their arguments the extent of the Tribunal's ability to consider *Charter* principles or *Charter* cases in deciding what is a BFRJ under s. 8 of the *Code*.

[435] Mr. Earle suggests that he was "us[ing] stereotypes in an exaggerated fashion, for the purpose of exposing them and helping the audience to re-examine the prejudices and stereotypes that they themselves hold." The Zesty respondents say "[t]his is not a comedic performance [.... it] is immature action of two adults." Ms. Pardy says that Mr. Earle's words, "were not part of a comedy act, but a spontaneous outburst", and that they were "not a part of his comedy act or creative expression, but were instead a 'targeted and personal attack on a group of individuals'". In considering the arguments related to freedom of expression, then, it is important to be clear at the outset about the nature of the expression at issue.

[436] I have found that all of Mr. Earle's actions in relation to Ms. Pardy, other than his remarks in the YouTube video, were undertaken in the provision of entertainment as a service to the public, and that, as he was an employee of the Zesty respondents in providing that service, his acts are deemed to be theirs. I think it follows that he is entitled to whatever enhanced protection there may be for expression which is associated with a comedy performance.

[437] To what extent then, if at all, is the Tribunal, though prohibited by the *ATA* from considering *Charter* questions, entitled or obliged to consider whether Mr. Earle's freedom of expression is a BFRJ for discriminating against Ms. Pardy?

[438] Ms. Pardy refers to the *Knights of Columbus* case, in which the Tribunal recognized constitutionally-protected religious belief as a BFRJ for refusing to rent a church-owned hall to a lesbian couple for their wedding reception (though it found that, in the specific circumstances of

that case, the respondents did not accommodate the complainants to the point of undue hardship). However, in that case, the Tribunal did not refer to, and may not have been asked to consider, its statutory inability to apply the *Charter*, on the one hand, and judicial direction not to apply *Charter* principles in the interpretation of unambiguous provisions of the *Code*, on the other.

[439] The Supreme Court of Canada has frequently cautioned against measuring unambiguous statutes against *Charter* "values". In *R. v. Gomboc*, 2010 SCC 55, Abella J., writing for herself and two other judges, and concurring in the result with four others, emphatically and at length articulated the rationale and authority for that caution. In that case, a *Code of Conduct Regulation*, enacted under the *Electric Utilities Act*, S.A. 2003, c. E-5.1, permitted an electrical utility, Enmax, to disclose to police, information collected by a device called a "DBA", about electricity consumption, unless the customer specifically told it not to. Mr. Gomboc did not make such a request, and the information was disclosed to police and used to support a search warrant. The search authorized by the warrant disclosed the existence of a marijuana grow-op. Though the constitutionality of the regulation was not in issue, Mr. Gomboc asserted that it should be interpreted in accordance with *Charter* values to prevent the utility from breaching his right to privacy by disclosing information to the police. Abella J. wrote, at paras. 86-91:

> [T]he constitutionality of the *Regulation* was not challenged either before this Court or at any stage of the proceedings. Mr. Gomboc, however, argued that the *Regulation* must nonetheless be read in accordance with *Charter* "values" and interpreted so as to prevent Enmax from collecting information to assist the investigative efforts of the police.
>
> With respect, this is an approach which has been clearly rejected by this Court. There is no doubt that the application of *Charter* values can be a valuable interpretive tool, but it is only to be used where there is genuine ambiguity (*Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559). It cannot be used as a freewheeling *deus ex machina* to subvert clear statutory language, or to circumvent the need for direct *Charter* scrutiny with its attendant calibrated evidentiary and justificatory requirements. As Iacobucci J., writing for a unanimous Court, confirmed in *Bell ExpressVu*:
>
> > ... to the extent this Court has recognized a "*Charter* values" interpretive principle, such principle can only receive application in circumstances of genuine ambiguity, i.e., where a statutory provision is subject to differing, but equally plausible, interpretations.
> > ...
> > ... if courts were to interpret all statutes such that they conformed to the *Charter*, this would wrongly upset the dialogic balance. Every time the principle were applied, it would pre-empt judicial review on

> *Charter* grounds, where resort to the internal checks and balances of s. 1 may be had. In this fashion, the legislatures would be largely shorn of their constitutional power to enact reasonable limits on *Charter* rights and freedoms, which would in turn be inflated to near absolute status. Quite literally, in order to avoid this result a legislature would somehow have to set out its justification for qualifying the *Charter* right expressly in the statutory text, all without the benefit of judicial discussion regarding the limitations that are permissible in a free and democratic society. Before long, courts would be asked to interpret this sort of enactment in light of *Charter* principles. The patent unworkability of such a scheme highlights the importance of retaining a forum for dialogue among the branches of governance. As such, where a statute is unambiguous, courts must give effect to the clearly expressed legislative intent and avoid using the *Charter* to achieve a different result. [Emphasis in original; paras. 62 and 66.]

More recently, Charron J. observed in *R. v. Rodgers*, 2006 SCC 15, [2006] 1 S.C.R. 554, at para. 18, that it is "well settled that, in the interpretation of a statute, *Charter* values as an interpretative tool can only play a role where there is a genuine ambiguity in the legislation" (emphasis in original). Absent ambiguity, as Charron J. explained, a court that interprets a clear statutory provision "so as to accord with its view of minimal constitutional norms", risks "effectively [trumping] the constitutional analysis, [rewriting] the legislation, and [depriving] the government of the means of justifying, if need be, any infringement on constitutionally guaranteed rights" (para. 20; see also *Charlebois v. Saint John (City)*, 2005 SCC 74, [2005] 3 S.C.R. 563, at para. 23).

I see no room for interpretive creativity in this case because I see no ambiguity in the language of the provisions. "[C]ustomer information" is defined as information that is "uniquely associated with a customer". DRA information is information relating to the electrical flow and consumption of electricity in a specific home, something that is obviously "uniquely associated with a customer".

This means that DRA information, whenever it is collected, is, necessarily, "customer information" and, as such, information under s. 10(3)(f) of the *Regulation* that can be collected by Enmax and disclosed "without the customer's consent" to the police investigating an offence.

Absent a direct *Charter* challenge, we must presume the *Regulation* to be constitutional. And absent any ambiguity, we must treat its clear meaning as binding.
(emphasis added)

[440] Similarly, in *Maughan v. University of British Columbia*, 2009 BCCA 447, the Court upheld a trial judge's refusal to consider *Charter* values in interpreting the *Civil Rights Protection Act*, R.S.B.C. 1996, c.49. Ms. Maughan argued that the trial judge breached *Charter* values because he "applied too high a standard to the nature of the conduct she had to establish in

order to found a claim for breach of the *CRPA*, [and] erred in treating the *CRPA* as if it were a quasi-criminal statute, rather than a statute simply establishing a tort of discrimination." Citing *Bell ExpressVu*, the Court rejected that argument, saying, "[W]e are unable to find any ambiguity in the provisions of the *CRPA* which requires or justifies the analysis of its provisions through the lens of *Charter* values" (para. 66).

[441] The respondents have not identified any ambiguity in the provisions of the *Code* which would permit me to interpret them in light of *Charter* values as to Mr. Earle's freedom of speech. As discussed at length above, the provisions of s. 8 of the *Code* as to the elements of a *prima facie* case of discrimination, and of a *bona fide* and reasonable justification for such discrimination are unambiguous and well-settled, and their application in this case does not give rise to any significant difficulties. On the authority of *Bell ExpressVu* and *Maughan*, I "must treat [the *Code*'s] clear meaning as binding".

8. *Charter* values of free expression

[442] In the alternative, if I am mistaken in my conclusion that the provisions of s. 8 of the *Code* contain no ambiguity which would permit the Tribunal to consider *Charter* values or principles of free expression in deciding whether Mr. Earle's actions were a BFRJ for his treatment of Ms. Pardy, the Supreme Court of Canada's decision in *Grant v. Torstar Corp*, 2009 SCC 61 provides some helpful guidance.

[443] In *Grant*, the Court was weighing a *Charter* right to free expression against a common law right not to be defamed. The right to expression was thus, as a constitutional right, at its highest, and the right to protection of reputation was, as a common law right, at its lowest. The Court's reasoning, while not addressing quasi-constitutional human rights legislation, is helpful in assessing whether Mr. Earle's right to free expression outweighs Ms. Pardy's right under the *Code* to be protected against discrimination. Mr. Earle's right cannot be greater than his *Charter* right, and Ms. Pardy's quasi-constitutional statutory right cannot be less than her common law right.

[444] In *Grant*, Mr. Grant and his company proposed to develop a golf course on his land. The Toronto Star published an article which recorded the views of local residents that the plaintiffs had improperly used political influence to secure government approval for the development. Mr.

Grant sued for libel, and the Court considered whether the *Charter* right to free expression required modification of the common law of defamation to recognize a new defence of "responsible communication on matters of public interest". The Court held that the trial judge erred by not leaving the defence to the jury. It ordered a new trial.

[445] The significance of *Grant* for the present case is that the Court articulated the principled bases in the law, both for protection of freedom of expression, and for protection of reputation. With respect to freedom of expression, the Court said in part:

> The guarantee of free expression in s. 2(*b*) of the *Charter* has three core rationales, or purposes: (1) democratic discourse; (2) truth-finding; and (3) self-fulfillment: *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at p.976. These purposes inform the content of s. 2(*b*) and assist in determining what limits on free expression can be justified under s. 1.
>
> First and foremost, free expression is essential to the proper functioning of democratic governance. As Rand J. put it, "government by the free public opinion of an open society ... demands the condition of a virtually unobstructed access to and diffusion of ideas": *Switzman*, at p. 306.
>
> Second, the free exchange of ideas is an "essential precondition of the search for truth": *R. v. Keegstra*, [1990] 3 S.C.R. 697, at p. 803, *per* McLachlin J. This rationale, sometimes known as the "marketplace of ideas", extends beyond the political domain to any area of debate where truth is sought through the exchange of information and ideas. Information is disseminated and propositions debated. In the course of debate, misconceptions and errors are exposed. What withstands testing emerges as truth.
>
> Third, free expression has intrinsic value as an aspect of self-realization for both speakers and listeners. As the majority observed in *Irwin Toy*, at p. 976, "the diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated in an essentially tolerant, indeed welcoming, environment not only for the sake of those who convey a meaning, but also for the sake of those to whom it is conveyed".
>
> Of the three rationales for the constitutional protection of free expression, only the third, self-fulfillment, is of dubious relevance to defamatory communications on matters of public interest. This is because the plaintiff's interest in reputation may be just as worthy of protection as the defendant's interest in self-realization through unfettered expression. We are not talking here about a direct *prohibition* of expression by the state, in which the self-fulfillment potential of even malicious and deceptive expression can be relevant (*R. v. Zundel*, [1992] 2 S.C.R. 731), but rather a means by which individuals can hold one another civilly accountable for what they say. *Charter* principles do not provide a licence to damage another person's reputation simply to fulfill one's atavistic desire to express oneself.
> (paras. 47-51, emphasis added)

[446] With respect to the importance of protection of reputation, the Court said in part:

> Canadian law recognizes that the right to free expression does not confer a licence to ruin reputations. In assessing the constitutionality of the *Criminal Code*'s defamatory libel provisions, for example, the Court has affirmed that "[t]he protection of an individual's reputation from wilful and false attack recognizes both the innate dignity of the individual and the integral link between reputation and the fruitful participation of an individual in Canadian society": *R. v. Lucas*, [1998] 1 S.C.R. 439, *per* Cory J., at para. 48. This applies both to private citizens and to people in public life. People who enter public life cannot reasonably expect to be immune from criticism, some of it harsh and undeserved. But nor does participation in public life amount to open season on reputation.
> (para. 58, emphasis added)

[447] This is not to suggest that the interest in reputation protected by the law of defamation is identical to the interest in dignity in the *Code*. In *Bou Malhab v. Diffusion Métromédia CMR inc.*, 2011 SCC 9, in dismissing a class action suit for defamation against a radio host by Montréal taxi drivers whose mother tongue was Arabic or Creole, the Supreme Court of Canada said:

> The effect of defamation is therefore not so much to interfere with the dignity and equal treatment recognized to each person under the [Canadian and Quebec] Charters as to reduce the esteem in which a person should be held as a result of his or her interactions with society.
>
> It is the importance of "others" in the concept of reputation that justifies relying on the objective standard of the ordinary person who symbolizes them. Therefore, the fact that a person alleging defamation feels humiliated, sad or frustrated is not a sufficient basis for an action in defamation.
> (paras. 27-28)

[448] Read together, *Grant* and *Bou Malhab* suggest that the quasi-constitutional equality and dignity interests protected by human rights legislation such as the Quebec *Charter* and the *Code* are both a higher interests than the reputation interest protected by the common law of defamation, and interests in which an individual's subjective feelings of humiliation are relevant. This is consistent with the purposes of the *Code*, which include protecting dignity, and with its remedial provisions, which provide compensation for "injury to dignity, feelings and self respect" which arises from discrimination.

[449] In his argument, Mr. Earle justifies his actions as a necessary part of his performance to deal with "hecklers", and cautions against any decision which would have a "chilling effect upon performers simply because someone in the audience doesn't 'get' the joke". I have already found that Ms. Pardy was not a heckler, and that Mr. Earle had means to deal with perceived

disruption to the show far short of his attack on her as a woman and as a lesbian. None of the witnesses testified that Mr. Earle was telling "jokes".

[450] I test Mr. Earle's asserted right to free expression, as framed by him in his argument, against the rationale stated in *Grant* for protecting such expression: "an aspect of self-realization for both speakers and listeners". These are the relevant "*Charter* values" in assessing the balance between Mr. Earle's right to express himself against Ms. Pardy's right under the *Code* to protection from discrimination. It is obvious that Mr. Earle's actions were destructive of Ms. Pardy's "self-realization"; I confine my discussion to whether they were justified by his stated purpose in undertaking them.

[451] As noted, Mr. Earle relies on *Disley* as a case which supports the comedic use of exaggerated stereotypes to expose and prompt examination of prejudices with the aim of reducing discrimination.

[452] None of the respondents tendered any evidence that Mr. Earle's actions had this purpose or effect. The evidence was all to the contrary: that his purpose, put at its highest, was to "shut her up", and that his effect was to humiliate and injure Ms. Pardy with specific reference to her sex and sexual orientation. It cannot fairly be suggested that the tone, content, or context of Mr. Earle's words and actions directed at Ms. Pardy were consistent with the *Code*'s purposes of promoting "a climate of understanding and mutual respect where all are equal in dignity and rights" or of "removing impediments to full and free participation in the economic, social, political and cultural life of British Columbia".

[453] Even if there was a basis in the evidence for an inference that Mr. Earle was on a mission to "expose prejudices" (other than, perhaps, his own), the Canadian Broadcast Standards Council's decision in *Disley* expressly recognized that the purpose of the human rights clause it was considering was to "protect against harmful speech".

[454] Further, the radio comedian's words at issue in *Disley*, which the Council found did not contravene the human rights clause, were a far cry from the abuse Mr. Earle turned on Ms. Pardy. In a passage not referred to by Mr. Earle, the Council reproduced the full text of the remarks which were the subject of the complaint in that case:

> So Pride Day's coming up, huh? I'm not a fag myself; if I was, I'd tell ya. I can't, so I won't. I mean, really, homophobia in the year 2000 looks particularly stupid,

> doesn't it? 'Cause it's the year 2000. And we're all in the same freaking boat, so just get over it. This is what I tell people that I come across that I don't want to bother with, who are homophobic.
>
> Fags renovate like a [muted phrase: "son of a bitch"]. Me, I'm not good with tools. I mean, renovating for me is putting a candle in a bottle, you know. Am I in the right apartment? Homosexual men have projects around the house. You hand a fag a square foot and say "make it attractive", no problem. I mean I know men with bachelor apartments and sliding doors. Like French doors. Window boxes, hardy cacti. Man, you walk into a house full of straight boys and suggest a project, you know what you get? "Uhh, you mean like take the empties back? I've got some popsicle sticks; you can build a birdhouse. What?"

[455] One can accept that that these comments may have been, as the Council found, on one side of the line of "harmful speech", while concluding that Mr. Earle's comments were far beyond the other side of that line.

[456] I conclude that any defence by the respondents that Mr. Earle's freedom of expression was a *bona fide* and reasonable justification for discrimination fails on both the facts and the law. Mr. Earle's conduct was not reasonably related to any effort to deal with a disruption to the show. Mr. Earle was not engaged in exposing the stereotypes of others. Nothing about Mr. Earle's asserted purposes in verbally and physically attacking Ms. Pardy on the basis of her sex and sexual orientation justified elevating his right to free expression over her right under the *Code* to be protected against his discriminatory conduct.

9. Section 7 of the *Code*

[457] As noted, the Zesty respondents distinguish between the legislative purpose of s. 8, which they say protects public access to services, from the legislative purpose of s. 7, which they say is the only *Code* provision related to discriminatory statements. They argue that, because s. 7 requires intention, or at least a likelihood that a statement will expose a group to hatred or contempt, it recognizes the importance of freedom of expression by creating a higher test for discriminatory statements than discrimination in the delivery of services.

[458] The Zesty respondents provide no evidence beyond the text of the *Code* for these different legislative purposes, and cite no case in which a tribunal or court has treated statements made in the course of discriminating in delivery of a service as "publications" to which s. 7, or its equivalent in other jurisdictions, would apply.

[459] "Discriminatory statements" may arise in the context of other areas in which discrimination is prohibited, including services (s. 8), tenancy (s. 10), and employment (s. 13) of the *Code*. There is nothing about the structure of the *Code*, or the cases decided under it, to support the view that complaints about expression can only be brought under s. 7. Indeed, it is difficult to imagine a case in which discrimination under the other sections would not necessarily involve some form of "expression" by words or conduct.

[460] I conclude that there is no warrant for treating discriminatory acts and discriminatory statements separately under the *Code*, or for requiring that a complaint of discriminatory expression must be brought under s. 7. Accordingly, the Zesty respondents have not established that s. 7 recognizes the importance of free expression by creating a different and higher test for discriminatory statements, or that Mr. Earle's statements to and about Ms. Pardy were justified if she does not meet that higher test.

[461] The respondents have not established that any right to free expression enjoyed by Mr. Earle, informed by *Charter* principles or *Charter* values, was a *bona fide* and reasonable justification for discriminating against her based on her sex and sexual orientation.

[462] Since Ms. Pardy has established a *prima facie* case of discrimination against all of the respondents, and since the respondents have not established a BFRJ for that discrimination, her complaint is justified.

D. Remedies

1. Ms. Pardy's position on remedies

[463] Ms. Pardy asks the Tribunal, under s. 37 of the *Code*, to order that the respondents cease the contravention and refrain from future ones; declare that their conduct was discrimination contrary to the *Code*; compensate her for expenses incurred because of the contravention; and compensate her for injury to her dignity, feelings, and self respect. The focus of her submissions on remedy is on the appropriate award for injury to dignity.

[464] Ms. Pardy refers to the factors considered in *Torres v. Royalty Kitchenware Ltd.*, (1982), 3 C.H.R.R. D/858 (Ont. Bd. Inq.) as those which the Tribunal has found helpful in assessing compensation in cases involving harassment based on sex, sexual orientation, lawful source of income, and disability: *Bro and Scott v. Moody (No. 2)*, 2010 BCHRT 8, paras. 97-98.

[465] As listed in *Bro and Scott*, the *Torres* factors are:

1. the nature of the harassment, that is, was it simply verbal or was it physical as well;
2. the degree of aggressiveness and physical contact in the harassment;
3. the ongoing nature, that is, the time period of the harassment;
4. its frequency;
5. the age of the victim;
6. the vulnerability of the victim; and
7. the psychological impact of the harassment upon the victim.

[466] Ms. Pardy says that Mr. Earle's actions in this case were both verbal and physical, that they involved physical aggression and anger which caused her to fear for her safety, and that they culminated in a physical assault in which he grabbed and broke her glasses.

[467] She says that the effect on her of Mr. Earle's discriminatory acts was exacerbated by his published comments portraying her as a "drunken heckler" trying to destroy his right to free speech and artistic expression.

[468] Ms. Pardy submits that she was vulnerable because of her pre-existing anxiety disorder.

[469] Ms. Pardy says the psychological impact on her was severe. Mr. Earle targeted her identity as a woman and as a lesbian. In the days following the incident, she felt humiliated and afraid, and suffered from physical symptoms of ears ringing, shaking, and sweating, and from a panic attack. In the following days, she continued to feel humiliated and crushed, jumpy and easily startled, and to suffer panic attacks.

[470] After she saw Mr. Earle's YouTube interview in November 2007, Ms. Pardy suffered another panic attack, with palpitations and sweating. She felt sick and vomited. She experienced anxiety, missed work, and experienced anxiety relating to the media coverage.

[471] After the event, Ms. Pardy says that she became less social, avoided Commercial Drive and her old friends, and began to isolate herself. She no longer participated in activities she used to enjoy. She experienced insomnia. Though improved over time, Ms. Pardy says that she continued to experience flashbacks and anxiety up to the time of the hearing.

[472] Ms. Pardy says that Dr. Menzies diagnosed her with anxiety disorder and post traumatic stress disorder caused by the events at Zesty's. He said that these had a great negative impact on her life, including her work and relationships.

[473] While asking the Tribunal to order compensation which it considers appropriate, Ms. Pardy refers to three cases, *Gill v. Grammy's Place Restaurant and Bakery Ltd.*, 2003 BCHRT 88, in which the Tribunal ordered $10,000 for injury to dignity, *Bro and Scott*, where it awarded $15,000, and *Radek*, where it also awarded $15,000. She notes that, since *Gill* was decided, damage awards under this heading have increased significantly.

2. Mr. Earle's position on remedies

[474] Mr. Earle's only submission on remedy, written and submitted before the hearing, and therefore without any reference to the evidence of impact on Ms. Pardy, asserts that the "effect of the confrontation was minor, a pair of broken sunglasses and hurt feelings".

[475] He submits that the purpose of the *Code* "is not to punish wrongdoers, but to promote conciliation between the parties and to compensate the victim for the wrong done".

[476] In a footnote to his argument, he refers to *Badyal* as a 1998 case in which the Tribunal awarded $1,200 for "similar injury".

3. Zesty respondents' position on remedies

[477] The Zesty respondents say that, even if they are found to have discriminated against Ms. Pardy, the Tribunal should award no remedy to her.

[478] They say that they dealt with the complaint appropriately, in that Mr. Ismail apologized the next day to Ms. Pardy, and offered to pay for her sunglasses. They refer to *Valle v. H&M*, 2008 BCHRT 456, in which the Tribunal dismissed a complaint without a hearing because the respondents had appropriately dealt with the situation which led to the complaint.

[479] They do not address the question of remedies if the Tribunal should find, as I have, that they are responsible for Mr. Earle's actions on May 22, 2007, as well as their own.

4. Ms. Pardy's reply on remedies

[480] In reply, Ms. Pardy disputes that the Zesty respondents dealt appropriately with the situation leading to her complaint. In particular, she says that the next day Mr. Ismail questioned whether the incident was her fault, demanded to know why she didn't speak to him, call the police or leave. She says Mr. Ismail's action exacerbated the effect on her of Mr. Earle's behaviour, by blaming her. She says they continue to justify Mr. Earle's behaviour and their inadequate response by making unfounded allegations that she was drunk and aggressive.

[481] Ms. Pardy contrasts the extensive steps the respondent took in *Valle*, after preventing the complainant from breastfeeding in its store, with those taken by the Zesty respondents. In *Valle*, the respondent reinforced and publicized its existing written policy, and repeatedly apologized for the embarrassment its employees' actions had caused.

5. Analysis on remedies

[482] I have set out above my factual conclusions about the impact on Ms. Pardy of the events at Zesty's on May 22, 2007, and subsequent events. These largely accord with Ms. Pardy's submissions in support of her claim for compensation for injury to dignity.

[483] Mr. Earle's submissions on remedy are of limited assistance, as they assert, contrary to the evidence, that the impact on Ms. Pardy was "minor", and refer to cases decided twelve years earlier, without discussing their similarities to the case before me.

[484] As noted, the Zesty respondents' submissions do not address appropriate compensation in the event they are found responsible for Mr. Earle's actions.

(a) Cease and refrain

[485] Section 37(2)(a) of the *Code* requires the Tribunal, when it finds a complaint justified, to order those who have contravened it to "cease and refrain". Since I have determined that Ms. Pardy's complaint is justified, I order Mr. Earle, Zesty and Mr. Ismail to cease the contravention and to refrain from committing the same or a similar contravention.

(b) Declaratory order

[486] Section 37(2)(b) of the *Code* permits the Tribunal to make a declaratory order identifying the conduct covered by a complaint as discrimination. None of the parties made submissions on why I should, or should not, make such an order in this case, and my own brief research has not led me to any case in which the Tribunal has considered in any detail the factors to consider in deciding whether to make such an order. In my view, in the circumstances disclosed by the reliable evidence in this case, it is important both to Ms. Pardy and to the public to clearly identify that the conduct engaged in by Mr. Earle, in particular, was a breach of Ms. Pardy's human rights under the *Code*. Accordingly, I make a declaratory order that his words and actions in relation to Ms. Pardy, both on and off the stage, on May 22, 2007, constituted discrimination contrary to the *Code*.

(c) Wages and expenses

[487] Section 37(2)(d)(ii) of the *Code* permits the Tribunal to order those who have contravened it to compensate a successful complainant for wages lost or expenses incurred because of the contravention. Ms. Pardy's evidence that she had to take two days off work to attend the hearing, at $160 per day, was uncontradicted. Her evidence that she took taxis to and from home each day of the hearing was supported by one receipt, but she did not explain why she was required to use taxis rather than public transportation. I order that the respondents compensate Ms. Pardy for $320 in lost wages because of their contravention. I decline to order compensation for expenses. The respondents are jointly and severally liable for this amount.

(d) Injury to dignity

[488] Section 37(2)(d)(iii) of the *Code* permits the Tribunal to order those who have contravened it to compensate a person who suffers discrimination for injury to their dignity, feelings and self respect.

[489] I accept that the *Torres* factors provide a helpful framework in which to assess the extent of the injury to Ms. Pardy, though not all are relevant here, and they do not necessarily capture the full extent and effect of the discrimination in this case.

[490] Mr. Earle's treatment of Ms. Pardy was both verbal and physical, and involved both aggressiveness and physical contact.

[491] Perhaps even more importantly, he employed, and repeated, publicly, the most extreme terms that came to mind to directly attack her identity and dignity as a woman and a lesbian. His attack showed every sign of being calculated to inflict as much damage as possible, in as short a time as possible, on her greatest vulnerabilities. Though intention is not required to prove discrimination, it may be considered in crafting an appropriate remedial response.

[492] In attacking both Ms. Pardy, and Ms. Broomsgrove in her presence, Mr. Earle did further damage to Ms. Pardy because of her sexual orientation. In Ms. Pardy's poignant words, "All of our power was taken from each of us in front of each other." In *Bro and Scott*, para. 111, the Tribunal considered that the complainant's "inability to shelter his friend completely from Mr. Moody's discriminatory words and actions heightened the negative impact of that discrimination on his dignity and self esteem".

[493] I am not overlooking the fact that, on two occasions, in each case after Mr. Earle had verbally abused her from the stage and approached her aggressively in the audience, Ms. Pardy threw water in his face. I do not think this was a wise or effective means of responding, or defending herself. However, I accept that Mr. Earle's conduct had put Ms. Pardy in a condition where she was unable to immediately formulate a measured, or even rational, response.

[494] Though the incident in May 2007 was relatively brief, six months later, in his YouTube interview, after the complaint was filed, Mr. Earle publicly made false and inflammatory statements about Ms. Pardy's conduct at Zesty's which seriously exacerbated and prolonged the effect on her of his earlier actions.

[495] The psychological impact on Ms. Pardy of Mr. Earle's conduct was immediate, severe, lasting, and well supported by credible evidence from Ms. Pardy, Ms. Ertan, and Ms. Sandor, and by detailed, uncontradicted medical evidence.

[496] In assessing the extent of Mr. Earle's responsibility for injury to Ms. Pardy's dignity, feelings and self respect, the factors I have taken into account include the egregious nature of his discriminatory conduct in May 2007, both in comparison to other cases, and relative to the other respondents in this case.

[497] Apart from their responsibility as Mr. Earle's employers for his actions on May 22, 2007, I have found that the Zesty respondents also discriminated against Ms. Pardy by their failure to prevent, respond to, or remedy the effect of his actions on her.

[498] As noted, I accept that Mr. Ismail had no intention of discriminating against women or lesbians in general, or Ms. Pardy in particular. However, he took the risk of leaving Mr. Earle without any effective supervision, and he did not undertake an adequate, or any, investigation into the events which had occurred in the restaurant in his absence.

[499] I accept that Mr. Ismail did apologize to Ms. Pardy the next day, though his suggestion that she may have been to blame detracted significantly from the value to her of his apology. I have also found that Ms. Pardy's behaviour in confronting Mr. Ismail on May 23, though understandable given her upset from the night before, contributed to his inaccurate perception that she might have been at least partly at fault, and his unwillingness to do more to investigate or remedy Mr. Earle's actions.

[500] I also accept that, with the benefit of hindsight, Mr. Ismail took steps, albeit belated, to ensure that his stage did not remain a platform for Mr. Earle, or become one for anyone similarly inclined.

[501] In assessing the extent of the Zesty respondents' responsibility for injury to Ms. Pardy's dignity, feelings and self respect, the factors I have taken into account include their own conduct, including Mr. Ismail's apology; the steps he took to remove Mr. Earle from further performances and prevent a recurrence; and the conduct of Mr. Earle for which I have found the Zesty respondents liable.

[502] After careful consideration of all the evidence, the submissions of the parties, and the relevant law, I order Mr. Earle to pay Ms. Pardy $15,000 for injury to her dignity, feelings, and self respect. Mr. Earle is individually liable for this amount.

[503] After similar careful consideration, I order Zesty and Mr. Ismail to pay Ms. Pardy $7,500 for injury to her dignity, feelings and self respect. The Zesty respondents are jointly and severally liable for this amount.

(e) Interest

[504] I order the respondents to pay Ms. Pardy pre- and post-judgment interest on my award for lost wages, and post-judgment interest on my awards of damages against each of them for injury to dignity, feelings and self respect, until paid in full, at the rates set out in the *Court Order Interest Act*. R.S.B.C. 1996, c. 79, as amended.

E. Costs

[505] Section 37(4) of the *Code* gives the Tribunal's authority to order costs. It provides:

> (4) The member or panel may award costs:
>
> (a) against a party to the complaint who has engaged in improper conduct during the course of the complaint; and
>
> (b) without limiting paragraph (a), against a party who contravenes a rule under section 27.3(2) or an order under section 27.3(3).

[506] Each of Ms. Pardy and Mr. Earle has applied for an award of costs against the other.

1. Ms. Pardy's application for costs

[507] Ms. Pardy alleges that Mr. Earle, whether acting on his own or through his counsel, has engaged in improper conduct and contravening the Tribunal's *Rules of Practice and Procedure* or its orders by:

- making misrepresentations to the Tribunal;
- failing to abide by the *Rules*;
- repeatedly re-litigating issues already decided;
- delaying the hearing of the complaint, and then withdrawing from the proceedings on the first day of hearing;
- making scurrilous attacks on the Tribunal and Ms. Pardy; and
- advising the Tribunal of without-prejudice discussions.

[508] The touchstone for finding the conduct of a party to be "improper" under s. 37(4) is set out in *McLean v. B.C. (Min. of Public Safety and Sol. Gen.) (No. 3)*, 2006 BCHRT 103, para. 8:

> Any conduct which has a significant impact on the integrity of the Tribunal's processes, including conduct which has a significant prejudicial impact on another party, may constitute improper conduct within the meaning of s. 37(4).

[509] Assuming, without deciding, that Mr. Earle engaged in any or all of the conduct detailed in Ms. Pardy's submissions on her costs application, I am not persuaded that his conduct had a

sufficiently significant prejudicial impact on the integrity of the Tribunal's processes to warrant an award of costs.

[510] After Mr. Earle successfully applied to the B.C. Supreme Court to have the reconsideration issues returned to the Tribunal, the Tribunal was able to set and maintain hearing dates, hear from the witnesses all parties sought to call, receive in evidence the documents all parties sought to tender, consider and determine all preliminary issues, and hold a full hearing on the merits, after which Ms. Pardy was substantially successful in both establishing the respondents' liability, and in being awarded significant compensation and other remedies.

[511] In these circumstances, I decline to exercise my discretion to award costs against Mr. Earle.

2. Mr. Earle's application for costs

[512] Mr. Earle's application for costs is included in his response to Ms. Pardy's application. It consists of the bare assertion that Ms. Pardy "should be held responsible for the reckless accusations of her counsel in this application". He does not allege, and does not provide any basis for concluding, that her conduct has had a significant impact on the integrity of the Tribunal's processes. He does not refer to any case in which the Tribunal has awarded costs in such circumstances.

[513] Mr. Earle's submissions do not establish any basis for characterizing Ms. Pardy's counsel's submissions as "reckless". To the contrary, they are measured, relevant, and supported by considerable authority.

[514] Mr. Earle's application for costs is wholly without merit.

[515] I decline to exercise my discretion to award costs to Mr. Earle against Ms. Pardy.

VI. Summary of Decisions and Orders

[516] The Tribunal does not have jurisdiction to consider whether s. 8 of the *Code* is inconsistent with s. 2(b) of the *Charter*, or whether, in the context of this case, s. 8(1) of the *Code* is a justifiable limit on Mr. Earle's *Charter* right to freedom of speech.

[517] The Tribunal does not have jurisdiction to state a case to the Supreme Court of British Columbia with respect to any issue of conflict or inconsistency between the *Code* and the *Charter*.

[518] Ms. Pardy's complaint against the respondents, of discrimination regarding a service customarily available to the public, because of her sex and sexual orientation, is within the Tribunal's jurisdiction.

[519] Mr. Earle was an employee of the Zesty respondents, such that his acts in that capacity are deemed to be those of the Zesty respondents, pursuant to s. 44(2) of the *Code*.

[520] Ms. Pardy's complaint against Mr. Earle, Zesty and Mr. Ismail is justified.

[521] Ms. Pardy is entitled to the following remedial orders against the respondents:

a. Pursuant to s. 37(2)(a) of the *Code*, an order that they cease contravening the *Code*, and refrain from committing the same or similar contraventions;

b. Pursuant to s. 37(2)(b) of the *Code*, a declaratory order that Mr. Earle's conduct in relation to Ms. Pardy or similar conduct constituted discrimination contrary to the *Code;*

c. Pursuant to s. 37(2)(d)(ii) of the *Code*, an order to pay Ms. Pardy compensation of $320, plus pre- and post-judgment interest, for wages lost because of the contravention;

d. Pursuant to s. 37(2)(d)(iii) of the *Code*, an order that Mr. Earle pay Ms. Pardy $15,000, plus post-judgment interest, for injury to her dignity, feelings, and self respect; and

e. Pursuant to s. 37(2)(d)(iii) of the *Code*, an order that Zesty and Mr. Ismail pay Ms. Pardy $7,500, plus post-judgment interest, for injury to her dignity, feelings, and self respect.

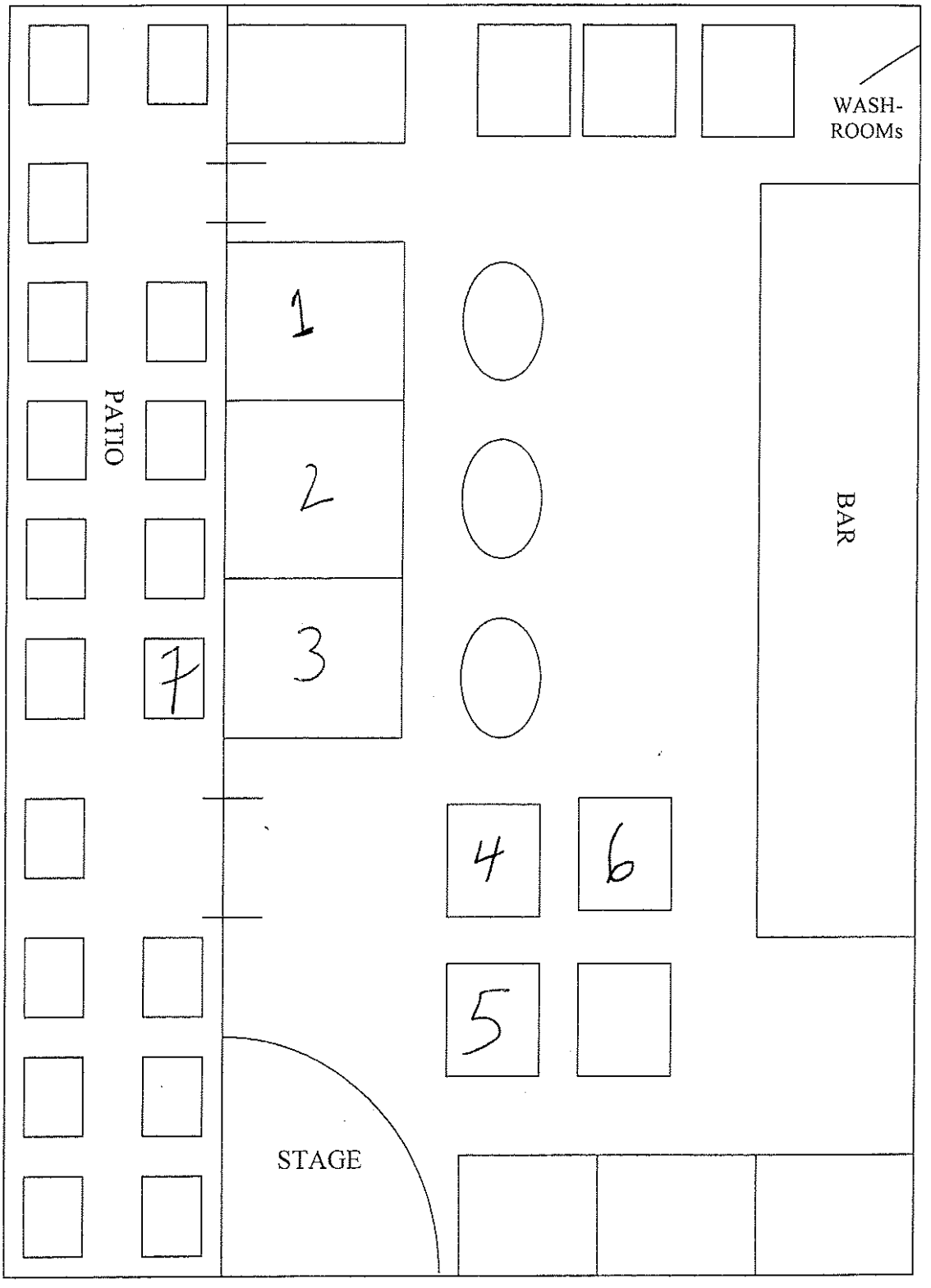
[522] Ms. Pardy's application for costs against Mr. Earle is denied.

[523] Mr. Earle's application for costs against Ms. Pardy is denied.

Murray Geiger-Adams, Tribunal Member

Appendix "A"

ZESTY'S LAYOUT



Hearing 5338 PMDY
Date MAR. 29/10
Member M.G.A.
Exhibit No. 12