

Example Mediation Brief

Date of Mediation: June 1, 2022

Complainant v. The Restaurant and Dean Smith, BCHRT Case XXXX

For the Respondent(s): [note of the names of the lawyer or person who is helping the organization and person(s) the complaint is against (the Respondents)]

Mediator: [note the name of the mediator]

I. OPENING STATEMENT

1. *Good morning. I want to thank everyone for participating today to work towards finding a resolution to my Complaint. This claim is about sexual harassment and discrimination I experienced while working at The Restaurant. The Restaurant discriminated against me on the basis of sex and sexual orientation in the area of employment.*
2. *If my complaint were to proceed to a hearing, I believe I would be successful and awarded a significant amount of lost earnings and injury to dignity, feelings, and self-respect. However, I recognize that going to a hearing can be time-consuming, costly, and stressful.*
3. *For these reasons, I am here in good faith, prepared to resolve all issues today, including this human rights complaint. However, if we are unable to reach a resolution today, I am willing to proceed to a hearing where I will enforce my legal rights and ask for the full extent of the financial compensation I am entitled to.*
4. *I have prepared an opening statement about the discrimination and how it impacted me.*

Background

5. *In April 2021, I was hired as a server at The Restaurant. I am a lesbian woman and was 19 years old at the time I was hired.*
6. *I felt very fortunate to have been hired because The Restaurant's customers are known for giving high tips. The Restaurant was my only source of income, and I needed to a job earning high tips or a high wage to support myself. I was paid \$15.20 per hour plus tips.*
7. *Dean Smith, the Manager, was approximately 35 years old and had the power to hire and fire staff members, and to change the shift schedule as he liked.*

8. *In May 2021, Dean Smith began making comments about how I looked. He told me I needed to “step it up a notch” by wearing “sexier” clothing and higher heels.*
9. *On June 11, 2021, during informal after-work drinks with some coworkers, Dean Smith asked me if I would “make out” with a female co-worker for him and the other men to watch.*
10. *On June 12, 2021, I reported the incident to The Restaurant’s human resources department in an email to the HR Manager, Mina Campbell.*
11. *On June 13, 2021, I spoke to Mina on the phone about the incident. She asked for more details about what happened, and I cooperated. She listened to my story, but at the end of the phone call she told me “boys will be boys.” She then advised me to try to avoid after-work drinks when Dean Smith is around if I’m not comfortable with his behaviour.*
12. *After the phone call with the Mina, Dean Smith’s behaviour only got worst. I noticed him starting to stare at me in a sexual way. He began asking me personal questions about my romantic life and sex life. For instance, in July 2019, he asked me if I had ever “been with a real man” and asked for details of what kind of sexual activity I engage in with my partner.*
13. *On September 8, 2021, Dean Smith showed me a photo on his phone of a woman he had matched with on a dating app. The image was sexual and depicted the woman in lingerie on a bed. He asked me “What do you think? Pretty hot, right?” I said, “I don’t know” and walked away. I spent the rest of my shift fighting back tears.*
14. *Before the September 8 incident, I almost always worked evening shifts and opted to stay late to earn as many tips as possible. Each shift started at 5:00pm. The dinner rush typically ended around 9:00pm. Around that time, Dean Smith would let some servers go home if they wanted to. Although the dinner rush ended around 9:00pm, alcohol sales between 9:00pm and 11:00pm were much higher than during dinner, and as a result, customer tips were especially high.*
15. *After September 8, I started getting anxious and stressed being around Dean Smith. Because of this, I started ending my evening shifts as soon as I could in order to avoid being around Dean Smith.*
16. *Prior to September 8, I worked approximately four nights per week. I started each shift at 5:00pm, and usually stayed until about 11:00pm. During these evening shifts I earned an average of \$200 in tips.*
17. *After September 8, I continued to work approximately four nights per week starting at 5:00pm. However, after September 8, I never opted to stay past 9:00pm. I earned an average of \$100 in tips during these shorter shifts.*
18. *I was crying all the time and unable to sleep. I called in sick a few days in October because I couldn’t face going into work. I saw my doctor who diagnosed me with anxiety and depression.*

19. *I decided I could no longer continue working at The Restaurant. October 29, 2021 was my last day of work at The Restaurant. I sent an email to the Mina saying I couldn't work there anymore.*
20. *Between September 8 and October 29, 2021, I worked 28 shorter shifts where I earned fewer tips and I missed 6 days of work.*

Law

21. *It is my position that the Respondents' conduct is a violation of the BC Human Rights Code.*
22. *This is a clear case of discrimination. I am a lesbian woman and the Respondents' conduct targeted me because of my sex, gender, and sexual orientation.*
23. *I been negatively impacted because of the sexual harassment. I started having anxiety and depression. It was because of the harassment that I quit The Restaurant and have been unable to work in similar restaurants earning high tips, and it was the cause of my anxiety and depression.*
24. *For these reasons, I believe am likely to succeed if my complaint were to proceed to a hearing.*

Impact Statement

22. *Dean Smith's behaviour affected me throughout my employment at The Restaurant. I was humiliated and felt degraded by his behaviour towards me. I started feeling anxious before shifts and was diagnosed with anxiety and depression.*
23. *Because my main income is tips, I usually wanted to stay on shift as late as possible to earn as many tips as I could. However, since the September 8, 2021 incident, I started leaving shifts as early as possible if Dean Smith was working. I felt uncomfortable and unsafe in his presence, and I was constantly worried about what he would say or do to me next.*
24. *Because he was the manager, and capable of hiring or firing me or changing my shift schedule as he pleased, I was worried about upsetting him and that he might fire me. At first, I just tried to ignore or make a joke of his comments and behaviour. Later, I started to feel like it was my fault for not asserting myself more and speaking up earlier or learning how to handle his behaviour. I started to lose confidence and to worry that I had done something to deserve this behaviour.*
25. *It was not only Dean Smith's conduct that affected me. The conversation with Mina on June 12, 2021, made me feel like there was something wrong with me for not being able to handle the harassment. I felt let down that the Restaurant did not do anything to help me or address the sexual harassment.*

26. *Even though I have since learned that this behaviour is clearly discrimination, at the time, I found myself going over and over each incident and wondering what I had done wrong to invite it or what I should have done to make him stop.*
27. *Prior to working at The Restaurant, I was keen and excited to work in a fun, youthful environment like The Restaurant, and I was excited for a job where I could earn high tips. I used to enjoy socializing with coworkers, and I had a lot of energy to work long, busy shifts. Since the harassment started, I developed anxiety and depression. I lost the desire to socialize with coworkers and the energy or ability to work long, difficult shifts. It also affected my general health and personal relationships.*
28. *I was financially impacted by the harassment. While I worked at The Restaurant I worked fewer hours and earned lower tips because of the emotional impact of the harassment.*
29. *Additionally, the idea of working in another restaurant environment with a male supervisor increases my anxiety. I no longer think I could work in a similar workplace because of the risk of sexual harassment. Since leaving The Restaurant, I had applied for a few other restaurant jobs. I had two interviews with male managers and started to have a panic attack during both interviews.*
30. *After three months, I found a part-time job in a small café owned and operated by a woman. I earn much lower salary and tips and don't have benefits because it's only part-time. I work the same number of hours as I did before the September 8 incident, but I now earn an average \$17.00/hour including my wage (\$15.20/hour) and tips.*

II. RESPONDENT(S)' OPENING STATEMENT

(space for notes)

III. OFFER AND NEGOTIATION

Negotiation Statement

1. *As previously mentioned, I am here in good faith with the hopes of resolving my complaint today. However, if we are unable to come to an agreement, I am prepared to proceed to a hearing, and for the reasons I already mentioned, I believe I will be successful at a hearing.*
2. *In my view, the Tribunal is likely to make a significant injury to dignity award if my complaint were to proceed to hearing.*
3. *As I mentioned earlier, I was particularly vulnerable because of the age difference and power imbalance between me and Dean Smith. I relied on the income from my job to support myself. Dean Smith's comments were vulgar and demeaning towards me. The Restaurant was aware of the harassment and did nothing to protect me. Instead, they only made me feel as though it was my fault and told me to stop socializing after work when Dean Smith was around, which only isolated me from my coworkers.*
4. *I have also suffered significant mental health consequences: I developed anxiety and depression; I was unable to sleep, I lost my appetite, I became irritable with my family and friends; I lost my ability and desire to socialize and engage with coworkers; and I have had ongoing panic attacks in interviews with male managers.*
5. *I have identified the following cases that are similar to mine:*
 - a. *In Araniva v. RSY Contracting and another (No. 3), 2019 BCHRT 97, the complainant's hours were reduced because she refused to accept or tolerate the Respondent's sexual advances, and she left her job because of the sexual harassment. In that case, the Tribunal awarded \$40,000 for injury to dignity.*
 - b. *In Harrison v. Nixon Safety Consulting and others (No. 3), 2008 BCHRT 462, the complainant was sexually harassed at work, and the employer did not deal with the harassment and terminated her. The Tribunal awarded \$15,000, which is approximately \$19,797 adjusted for inflation.*
 - c. *In McIntosh v. Metro Aluminum Products and another, 2011 BCHRT 34, the complainant experienced ongoing sexual harassment through text messages. In that case, the Tribunal awarded \$12,500 for injury to dignity. Adjusted for inflation, that is approximately \$15,630 in 2022 Canadian dollars.*
6. *Considering these cases and because the Tribunal has been increasing awards for injury to dignity in sexual harassment cases in recent years, I believe the Tribunal would award anywhere from \$25,000-\$30,000 for injury to dignity if my complaint went to a hearing.*

7. *However, because I am here today to try to come to find a settlement that all parties can agree on, I am willing to accept \$20,000 for the injury to dignity aspect of my claim.*
8. *In terms of wage loss, I have calculated that I have lost \$5,398.40 in wages between September 8, 2021, when I started working fewer hours, and October 29, 2021, when I quit.¹*
9. *After that, I was unemployed between October 29, 2021, and January 29, 2022, in which I lost \$15,142.40 in earnings. I did not collect EI or other benefits during that time.*
10. *Since starting work at the café, I have lost \$36,840 in earnings because of the difference in tips.*
11. *I lost \$821.63 in vacation pay between September 8, 2021, and January 29, 2022.*
12. *Therefore, my total wage loss to-date is \$58,002.43.² This was in part because I had panic attacks in interviews with male managers, and because my anxiety and depression prevented me from applying to as many jobs as I otherwise would have. This was also during the holiday season where many companies had recently hired temporary holiday staff and did not need any more. For these reasons, I believe the Tribunal would award me the full amount of my lost wages.*
13. *Additionally, my wage loss is ongoing. I continue to earn less at the café than I did at The Restaurant. However, I am willing to waive any future wage loss claim and accept a settlement offer which only includes past wage loss of \$58,002.43. Therefore, I am willing to accept a settlement amount of \$78,002.43 (which includes \$20,000 for injury to dignity and \$58,002.43 for wage loss) in exchange for me withdrawing this complaint.*

¹ The other party may want to see how you calculated your wage loss and other supporting evidence. It can be helpful to bring paystubs, income tax returns, and other records to show what you earned before the discrimination and what you have been earning since.

² The Complainant could also have a claim for her employer's contribution to CPP and EI, as well as her extended health and dental benefits. We do not have enough information in this case to calculate how much she could claim for each of those, and we have not included them in our calculations.

APPENDIX A: SAMPLE WAGE LOSS CALCULATIONS

The complainant could claim for the following under her wage loss claim:

- Lost earnings, including:
 - her reduced hours between September 8 and October 29, 2021
 - the period she was unemployed between October 29, 2021, and January 29, 2022
 - since she started working at the café January 29 and until the mediation date (June 1, 2022)
- Vacation pay
- Lost future earnings because of how the harassment affected the types of jobs she can do
- Employer contributions to CPP and EI
- Extended health and dental benefits

Below are examples of how we calculated her lost earnings and vacation pay.³

Lost earnings September 8, 2021 – October 29, 2021

Estimated earnings per shift if I continued working my usual hours between September 8 and October 29

$$\begin{aligned} & \$200 \text{ (average tips per 6-hour shift)} \\ & + \underline{\$91.20} \text{ } (\$15.20/\text{hour} \times 6 \text{ hours per shift}) \\ & = \$291.20 \text{ (average income per shift)} \\ & \underline{\times 28} \text{ (number of shifts I would have worked between September 8-October} \\ & \text{29.)} \\ & = \$8,153.60 \\ & + \underline{1747.20} \text{ (6 missed workdays because of harassment)} \\ & = \mathbf{\$9,900.80} \end{aligned}$$

Actual earnings between September 8 and October 29:

$$\begin{aligned} & \$100 \text{ (average tips per 4-hour shift)} \\ & + \underline{\$60.80} \text{ } (\$15.20/\text{hour} \times 4 \text{ hours per shift}) \\ & = \$160.80 \\ & \underline{\times 28} \text{ (number of shifts at reduced hours)} \\ & = \mathbf{\$4,502.40} \end{aligned}$$

³ All earnings are calculated based on their gross amounts (before taxes, benefits, and other payroll deductions). If the complainant receives a settlement award that includes any amount of compensation for wage loss, she will have to pay taxes on those as if she earned them through employment.

Calculation of what I would have earned between September 8 and October 29:

\$9,900.80
- \$4502.40

= \$5,398.40 (lost earnings Sept 8 – Oct 29)

Lost earnings October 29, 2021 – January 29, 2022 (start of new job)

Lost earnings between October 29 – January 29:

\$291.20 (average earnings per shift at The Restaurant before the harassment)
x 52 (number of shifts I would have worked)
= \$15,142.40 (lost earnings Oct 29 – Jan 29)

Lost earnings January 29, 2022 – June 1, 2022 (date of mediation)

Lost earnings between January 29, 2022 – June 1, 2022

\$291.20 (av. Earnings per shift at The Restaurant before the harassment)
x \$200 (number of shifts worked at the café January 29 – June 1, 2022)
= \$58,240 (what I would have earned during this period at The Restaurant)
- \$21,400 (actual net earnings during this period)
= \$36,840 (lost earnings Jan 29 – June 1)

Calculation for Vacation Pay

The Complainant in this case is entitled to 4% of her total wages. Because the Complainant earns the same hourly rate at her new job and works the same number of hours, she can only claim vacation pay for the time between September 8-October 29, 2021, when her hours were reduced at The Restaurant, and October 29, 2021-January 29, 2022, when she was unemployed.

\$20,540.8 (total wages lost between September 8-January 29)
x 0.04 (4% vacation pay entitlement)
\$821.63 (total vacation pay entitlement)