

COLLEGE OF LICENSED PRACTICAL NURSES OF ALBERTA

**IN THE MATTER OF
A HEARING UNDER *THE HEALTH PROFESSIONS ACT*,
AND IN THE MATTER OF A HEARING REGARDING
THE CONDUCT OF KAMAL DAHAL**

**DECISION OF THE HEARING TRIBUNAL
OF THE
COLLEGE OF LICENSED PRACTICAL NURSES OF ALBERTA**

**IN THE MATTER OF A HEARING UNDER THE *HEALTH PROFESSIONS ACT* REGARDING THE
CONDUCT OF KAMAL DAHAL, LPN #40730, WHILE A MEMBER OF THE COLLEGE OF LICENSED
PRACTICAL NURSES OF ALBERTA**

DECISION OF THE HEARING TRIBUNAL

(1) Hearing

The Hearing was conducted via videoconference using Zoom on January 5, 6, and 7, 2021 with the following individuals present:

Hearing Tribunal

Jim Lees, Public Member, Chairperson

Michelle Stolz, Licensed Practical Nurse (“LPN”), Panel Member

Jan Schaller, LPN, Panel Member

Doris Kuelken, LPN, Panel Member

Independent Legal Counsel for the Hearing Tribunal:

Heidi Besuijen

Staff:

Ayla Akgungor, Legal Counsel for the Complaints Consultant

Susan Blatz, Complaints Consultant, College of Licensed Practical Nurses of Alberta (“CLPNA”)

Investigated Member:

Kamal Dahal, LPN (“K.D.”, “Investigated Member”)

Nnamelugo Okoye, Counsel for the Investigated Member

(2) Preliminary Matters

The hearing was open to the public pursuant to section 78 of the *Health Professions Act*, RSA 2000, c. H-7 (the “HPA”).

There were no objections to the members of the Hearing Tribunal hearing the matter, and no Hearing Tribunal member identified a conflict of interest. There were no objections to the jurisdiction of the Hearing Tribunal.

While the hearing was open to the public, Mr. Okoye raised that a criminal trial had previously proceeded with regard to some of the same matters which form the basis for the issues which the Hearing Tribunal is asked to determine in the course of this hearing. He noted the Court had directed a publication ban on the names. The Hearing Tribunal was not provided with a

copy of that decision or the transcript; however, it is the practice of the CLPNA to anonymize names in decisions which it publishes so this protocol has been followed.

Application of the Complaints Consultant

The Complaints Consultant asked the Hearing Tribunal to consider applying section 276 of the *Criminal Code*, RSC 1985, c. C-46 (the “Criminal Code”) or the principles underlying it. Ms. Akgungor advised the Hearing Tribunal the Complaints Consultant acknowledged K.D. and one of the parties involved in the allegations, H.C., had carried on a consensual sexual relationship. However, she submitted, specific details of the consensual relationship should be excluded from evidence.

Ms. Akgungor provided the Hearing Tribunal with a copy of section 276 of the Criminal Code which reads:

Evidence of complainant’s sexual activity

276 (1) In proceedings in respect of an offence under section 151, 152, 153, 153.1 or 155, subsection 160(2) or (3) or section 170, 171, 172, 173, 271, 272 or 273, evidence that the complainant has engaged in sexual activity, whether with the accused or with any other person, is not admissible to support an inference that, by reason of the sexual nature of that activity, the complainant

(a) is more likely to have consented to the sexual activity that forms the subject-matter of the charge; or

(b) is less worthy of belief.

Conditions for admissibility

(2) In proceedings in respect of an offence referred to in subsection (1), evidence shall not be adduced by or on behalf of the accused that the complainant has engaged in sexual activity other than the sexual activity that forms the subject-matter of the charge, whether with the accused or with any other person, unless the judge, provincial court judge or justice determines, in accordance with the procedures set out in sections 278.93 and 278.94, that the evidence

(a) is not being adduced for the purpose of supporting an inference described in subsection (1);

(b) is relevant to an issue at trial; and

(c) is of specific instances of sexual activity; and

(d) has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.

Factors that judge must consider

(3) In determining whether evidence is admissible under subsection (2), the judge, provincial court judge or justice shall take into account

(a) the interests of justice, including the right of the accused to make a full answer and defence;

(b) society's interest in encouraging the reporting of sexual assault offences;

(c) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case;

(d) the need to remove from the fact-finding process any discriminatory belief or bias;

(e) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury;

(f) the potential prejudice to the complainant's personal dignity and right of privacy;

(g) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and

(h) any other factor that the judge, provincial court judge or justice considers relevant.

Ms. Akgungor submitted this provision is designed to protect sexual assault complainants from two rape myths. First, that a person having consented to sexual activity in the past is more likely to consent to sexual activity on further occasions. Second, that a person who had engaged in a sexual activity with another is less worthy of belief when asserting a subsequent sexual encounter was non-consensual.

She argued evidence of prior sexual activity, frequency, locations, and so on is evidence that is irrelevant to whether the allegations before the Hearing Tribunal occurred. Further, that admitting evidence of these details would raise the concerns relating to the myths and stereotypes which are problematic with respect to sexual assault.

Ms. Akgungor acknowledged the Hearing Tribunal is not bound by the Criminal Code but noted also section 79(5) of the HPA states:

(5) Evidence may be given before the hearing tribunal in any manner that it considers appropriate, and it is not bound by the rules of law respecting evidence applicable to judicial hearings.

In light of this, Ms. Akgungor submitted the Hearing Tribunal has flexibility in how it hears evidence and in what evidence it hears.

In walking the Hearing Tribunal through the structure of section 276 of the Criminal Code, Ms. Akgungor noted that there were three parts of it to consider. First, s 276(1) which is an exclusionary rule prohibiting the evidence of prior sexual history of a complainant where such evidence is tendered to support either an inference that the complainant is more likely to have consented to the sexual activity at issue or an inference that the complainant is less worthy of belief.

Moving to the second part, section 276(2), Ms. Akgungor identified criteria which might lead to the admission of evidence of prior sexual activity. Those criteria include:

- (a) the evidence is not brought forward for the purpose of supporting one of the inferences described in s 276(1); and
- (b) the evidence is relevant to an issue at trial; and
- (c) is specific instances of sexual activity; and
- (d) has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.

Ms. Akgungor submitted there was nothing in this hearing which would lead to a determination the general exclusionary rule under s 276(2) should not apply. Again, she noted that although the Hearing Tribunal is not bound to follow section 276 that it could consider it. Further, that if the Hearing Tribunal was persuaded it should follow section 276 that it could consider the criteria which a judge would consider under section 276(3).

In relation to the criteria under s 273(3), Ms. Akgungor referred to section 276(3)(a) which requires a judge to “consider the interests of justice, including the right of the accused to make a full answer and defence”. As such, she affirmed the Hearing Tribunal must consider whether the exclusion of evidence of prior sexual history would impact K.D.’s right to make a full answer and defence. She contended, on the understanding the nature of the defence being one of complete denial of the occurrence of events forming the subject matter of the allegations, that prohibiting evidence as to the extent, nature, frequency, location and other similar details of consensual sexual encounters would not inhibit K.D.’s ability to present his defence at all.

Ms. Akgungor brought the Hearing Tribunal back to the bias which section 276, and the principles underlying it, sought to address. She asserted the risk that such evidence would unduly arouse sentiments of prejudice, sympathy or hostility was the reason for the application to exclude that evidence.

As such, while the Complaints Consultant was prepared to admit that the fact of a relationship was part of the narrative which was acknowledged, the details of what occurred in the course of the relation would not assist the Hearing Tribunal in making its determinations and were not needed for K.D. to make a full answer and defence. Accordingly, to prevent impermissible reasoning, the Complaints Consultant asked the Hearing Tribunal to decide, pursuant to section 276 or the principles informing its purpose, not to admit specific evidence of details of the consensual relationship between K.D. and the complainant H.C.

Mr. Okoye opposed the application of the Complaints Consultant. He began by acknowledging the important principles underlying section 276. He asked the Hearing Tribunal, if it were to determine to import the law and principles applicable to criminal proceedings, to adopt the transcripts of the Court in the criminal trial of his client and make its decision on that basis. Nonetheless, Mr. Okoye urged the Hearing Tribunal not to apply section 276 since it applies to judges who have a different mandate to the Hearing Tribunal, have authority under the Criminal Code and consider different standards of proof. Instead he contended the Hearing Tribunal has the HPA and section 79(5) under which it operates.

Further, he argued K.D. appeared before the Hearing Tribunal in jeopardy of losing his licence and his livelihood. Accordingly, Mr. Okoye submitted K.D. must be able to defend himself against the very serious charges he was facing. He likened a ruling against specific evidence of the relationship to watching a one-minute video of an hour-long incident in that the Hearing Tribunal would not have the entire story. He asked that some but not all details of the consensual relationship should be permitted as evidence.

Mr. Okoye asserted the Hearing Tribunal should concern itself with the HPA and leave the Criminal Code for the courts to interpret. Further, he indicated that if evidence of the relationship was permitted, that his client would commit to respecting the underlying principles of section 276 as best as possible.

By way of rebuttal, Ms. Akgungor contended there was nothing preventing the Hearing Tribunal from importing the principles from the Criminal Code into this professional discipline matter. Further, she noted that matters of this nature are likely to affect professional regulatory proceedings as well as criminal ones and there was no reason why those two streams of adjudication should differ. She ended by reiterating the Hearing Tribunal is asked only to determine whether the allegations put before it occurred and allowing the disputed evidence would result in a higher degree of risk that stereotypes and myths relating to sexual assault would be relied upon.

The Hearing Tribunal retired to consider the matter but returned to ask counsel a few questions of clarification.

The Hearing Tribunal inquired what use, if any, it might make of the Supreme Court of Canada decision *R v Seaboyer*, (SCC) [1991] 2 SCR 577 ("*Seaboyer*"). The Hearing Tribunal asked Mr.

Okoye, specifically, to address the prejudicial impact of not allowing the evidence in question, what was the probative value of the evidence, and to provide submissions in relation to the specific provisions of Section 276.

My. Okoye submitted that for the purpose of the defence being put forward that banning the evidence in question was akin to asking someone to watch a 1-minute segment of a 1-hour video. That this would not tell the whole story which may be dangerous. He noted that in the context of a prevailing consensual sexual relationship the allegations are that H.C. did not consent to certain sexual acts. The position of his client was, as such, that without hearing what happened prior or after would leave the Hearing Tribunal with a monstrous picture of a predator. Mr. Okoye noted that the Hearing Tribunal would not be urged to find that H.C. having consented in the morning that she probably consented in the afternoon.

Mr. Okoye stated that the full extent the consensual relationship is relevant, and the Hearing Tribunal should hear it. Further, that if the detail is relevant to the defence of the allegations then it is his client's position that the Hearing Tribunal should hear that, as mandated under s 79(5) of the HPA which is the legislation under which the Hearing Tribunal is empanelled, not the Criminal Code.

In regard of the probative value, Mr. Okoye noted he would not know what would come out in evidence but that the matter should become an issue of weight.

With regard to the specific provision of s 276, Mr. Okoye stated his prior submissions would suffice. He noted he was very concerned about the sensitive nature of what was to be discussed. He noted that section 70 [sic] states evidence should not be admitted to support any of the inferences that the complainant is less worthy of belief or that because they consented before they probably consented after which would not be what the Hearing Tribunal would be asked to do. Mr. Okoye stated all the evidence will boil down to credibility because there would be totally different versions of what transpired.

The Hearing Tribunal further asked whether either counsel had relevant caselaw for the Hearing Tribunal to consider. Ms. Akgungor stated it would not be a stretch to apply the principles in this case but did not have any specific case law. She noted, in reply to Mr. Okoye's submissions, that the concern was that whether H.C. did some act and did it happily and enjoyed it, whether that was before or after the alleged events, is irrelevant to whether the non-consensual instances occurred. Further, that the accounts are quite different, so it was not an issue of how consent was given before and then given later. She conceded in such a case it might be possible to see the relevance of the consensual relationship, but where the situation was one of denying whether or not the events happened at all, then there is a question as to the relevance of prior consensual sexual history.

Ms. Akgungor submitted the Hearing Tribunal could rely on the *Seaboyer* decision for the purpose of the commentary relating to the issue of the twin myths.

Mr. Okoye cited the decision of *R v Goldfinch*, 2019 SCC 38, to the Hearing Tribunal as a 2019 decision from the Supreme Court which addressed the underlying principles.

With regard to whether the Hearing Tribunal ought to rely on Section 276 of the Criminal Code, the Hearing Tribunal acknowledged that the Criminal Code is legislation drafted with regard to criminal matters. However, section 79(5) of the HPA allows the Hearing Tribunal a broad ability to deal with and manage evidence. This does not preclude it from accepting evidence from other legal sources such as the Criminal Code or the common law in other areas of law. The Criminal Code is drafted with the jeopardy of an accused's liberty in mind and therefore it can be said to account for the jeopardy of professional practice in a professional regulatory proceeding. As such, the Hearing Tribunal is comfortable applying the important policies and principles which underlie Section 276 and to be guided by it. While the Hearing Tribunal is not going to strictly adhere to Section 276 as might be done in a courtroom, the members of the Hearing Tribunal have had section 276 in mind when making a decision with regard to the exclusion of particular evidence. The Hearing Tribunal is not satisfied on the submissions of counsel that the inclusion of the proposed evidence has sufficient probative value which overrides any prejudicial effect or that evidence of that nature will assist in determining any of the issues. As such, the Hearing Tribunal orders that no evidence shall be adduced which relates to specific instances of consensual activities as between K.D. and H.C., including but not limited to where, when, how those activities occurred or came about. However, the Hearing Tribunal acknowledges the admission of the Complaints Consultant that a consensual sexual relationship did exist as between H.C. and K.D. during the relevant period before, during, after as covered in the Allegations. The Hearing Tribunal is not of the view that this decision will prevent K.D. from mounting a full answer and defence to the Allegations. Therefore, the application is granted.

The Hearing Tribunal noted that it would provide more fulsome reasons if needed but it has concluded that the reasons provided herein adequately express its decision and the reasons for it.

(3) Allegations

The Allegations in the Statement of Allegations are:

"It is alleged that **KAMAL DAHAL, LPN**, while practising as a Licensed Practical Nurse engaged in unprofessional conduct by:

1. On or about August 2017, did one or more of the following with respect to a colleague, "H.B." who was a facility scheduler:
 - a. Engaged in inappropriate behaviour when he touched H.B.'s buttocks with his hand, without her consent;

- b. Engaged in inappropriate behaviour when he kissed H.B., without her consent;
2. On or about December 2017, made inappropriate advances with respect to a colleague, "K.F." who was a health care aide.
3. On or about December 2017 or January 2018, engaged in inappropriate behaviour when he did one or more [sic] the following with respect to a colleague, "H.C." who was a health care aide:
 - a. Touched H.C.'s breast and buttocks with his hand, without her consent;
 - b. Physically pushed or held H.C. against a wall;
 - c. Pressed his genitals against H.C., without her consent;
 - d. Touched H.C.'s vagina and clitoris with his hand, without her consent;
 - e. Inserted his fingers into H.C.'s vagina, without her consent;
 - f. Placed H.B.'s hand on his genitals, without her consent;
4. On or about January 30, 2018, engaged in inappropriate behaviour when he did one or more [sic] the following with respect to a colleague, "H.C.":
 - a. Engaged in sexual behaviour with H.C. while H.C. provided care to a patient, GW;
 - b. Touched H.C.'s vagina and clitoris with his hand, without her consent;
 - c. Inserted his fingers into H.C.'s vagina, without her consent;
 - d. Inappropriately pressured H.C. to have sexual intercourse;
 - e. Had sexual intercourse with H.C. without obtaining her consent;
5. On or about March 22, 2018, engaged in inappropriate behaviour when he did one or more [sic] the following with respect to a colleague H.C.:
 - a. Placed H.C. into a headlock;
 - b. Exposed or attempted to expose his genitals to H.C.;
 - c. Pressured H.C. to engage in sexual conduct;

6. On or about January to May 2018, engaged in inappropriate behaviour when did one or more [sic] the following with respect to a colleague H.C.:
 - a. Engaged in sexual behaviour with H.C. in a patient's room;
 - b. Inserted his fingers into H.C.'s vagina without her consent;
7. On or about May 17,2018, engaged in inappropriate behaviour when he did one or more [sic] the following with respect to a colleague H.C.:
 - a. Placed H.B.'s hand on your [sic] genitals, without her consent."

The Hearing Tribunal received clarification that Allegations 3(f) and 7(a) referred to H.C. rather than H.B. Accordingly, further reference to these Allegations will reference H.C. rather than H.B.

(4) Exhibits

The following exhibits were entered at the hearing:

- Exhibit #1: Statement of Allegations
- Exhibit #2: Bathroom diagram of H.C. dated July 31, 2018
- Exhibit #3: Letter of H.C. dated July 5, 2018
- Exhibit #4: Statement of H.C.
- Exhibit #5: Email Statement of H.B. dated July 10, 2018
- Exhibit #6: Handwritten Statement of K.F.
- Exhibit #7: Statement of C.S.

(5) Witnesses

The following individuals were called as witnesses for the CLPNA in the Hearing:

- Harlee Courtney ("H.C.")
- Holly Boehme ("H.B.")
- Kinzie Fraser ("K.F.")

The following individuals were called as witnesses for the Investigated Member during the Hearing:

- Christine Shurtz ("C.S.")
- Kamal Dahal ("K.D.")

The Hearing Tribunal recognizes some of the evidence it may be asked to accept and consider in this matter may be hearsay evidence. The Hearing Tribunal concludes that hearsay evidence can be admissible when it is determined the central issues have been established or where there is additional evidence to support the Allegations. All issues of guilt or innocence are considered on a balance of probabilities. The onus is on the Complaints Consultant to establish on a balance of probabilities the facts as alleged in the Statement of Allegations occurred and that the conduct rises to the level of unprofessional conduct as defined in the HPA.

The following is a summary of the evidence given by each witness.

H.C.

H.C. is a Health Care Aide (“H.C.A”) who, from July 2012 until June 2018 worked at the Prairie Ridge Good Samaritan Society (the “Facility”) in Raymond, Alberta. Her duties in that role included helping residents with personal needs such as dressing, providing medications if applicable, applying medicated creams, bathing, and helping with transfers.

H.C. worked with K.D. at the Facility. She stated that she had worked with him casually but in October 2017 got a position in the dementia unit (the “Unit”) of the Facility where he worked as an LPN. She worked with him there over the period of October 2017 until April 2018.

She described K.D.’s role as providing medications the H.C.A.s could not provide and doing whatever was in his scope, including monitoring the care H.C.A.s provided and ensuring residents received the care they needed.

H.C. described the physical layout of the Unit for the Hearing Tribunal. She indicated it is a large circle and the residents’ rooms are located on the outside of the circle. At the far end of the circle there is a dining room and kitchen area, to the right there is a stairwell which leads off of the Unit and where it is possible to go up or down. The central area in the Unit has bathing areas, storage rooms, and laundry rooms. In order to come in or out of the Unit it is necessary to either have a swipe card or enter a PIN.

H.C. indicated that during the time she worked on the Unit her regular shift was from 7:00 p.m. to 7:00 a.m. On occasion she was asked to come early but usually she worked her regular shift. She believed K.D.’s shift was from 3:00 p.m. to 10:00 p.m.

H.C. described how, at first, she and K.D. had a largely professional relation which mostly involved small talk. However, she described how on December 14, 2017, K.D. was trying to give one of the residents some medication and she was nearby waiting to get the resident ready for bed. She recalled K.D. had made a comment along the lines of “of course he’s not taking his medicine, he’s too busy staring at the beautiful girl”. She responded “oh whatever” and K.D. followed up with “what you don’t think you’re beautiful?”. She stated her response

was “no” and then that she said something like “not as much as you’re handsome”. She said there was some more flirting which occurred until the end of his shift and then, when everyone else was gone, he returned to the Unit at 10:00 p.m. At that time, she was folding laundry in the counter and most of the residents were in bed. She described the conversation between them. First, she stated K.D. said to her “there’s so much I want to say to you, but I can’t because we’re married”. Her response was that he could tell her whatever he wanted because it was just flirting and there’s nothing wrong with that. He responded to her that he had never cheated before. She told him that they were not cheating since they were not doing anything physical, only flirting. She recalled that there was more chatting and then he left to go home.

H.C. noted she was aware of the exact date since it had been the last shift she worked before going on a vacation with her husband. The next shift she worked with K.D. was on December 22, 2017 which was her first shift back from her vacation.

During the December 22 shift, H.C. recalled how she and K.D. had flirted throughout the shift. Again, at 10:00 p.m. he came to the Unit when everyone had left. She recollected that she knew he wanted to do more than just flirt.

H.C. described how she told K.D. she did not want to do more than just flirt, that she was not meaning for it to be more. She related that she felt badly because he was pressuring her and making her feel guilty as though she had led him on that it would be something more.

Next, she said he asked if she wanted to walk him out. She told him she could do that and then, when he was leaving through the staircase exit, he asked if he could have a hug. H.C. noted the door to the stairwell was open already and K.D.’s back was against the door. She agreed she would give him a hug.

She recounted that as she hugged him he pulled her into the staircase, the door closed behind them and locked. In the stairwell they were facing one another, she could feel him thrusting his erection into her pelvis. She pushed him away and said “no” and that she did not want to do anything and did not want to cheat on her husband. She turned to leave the stairwell. She had her hand on a button which would allow the door to open without using the keypad and was about to push the handle to leave when she felt K.D. behind her pushing his erection against her buttocks. She described how he then pushed her against a wall so she could not leave as she was pinned; his erection was at her buttocks and his chest pressed against her back. At that point she felt K.D. putting his hand down the back of her pants, he inserted his finger into her vagina and rubbed her clitoris, repeating this motion numerous times. She stated she was telling him “no”, to stop, and that she did not want to cheat and did not want to do this. He kept going and she stated her hormones reacted and it began to feel good so she stopped fighting it.

Next, they were against a different wall, her back to the wall with him in front of her. She noted there was kissing and K.D. was touching her breasts, her buttocks and her vagina with his hands. She touched his genital area with her hands.

H.C. could not say how long she and K.D. were in the stairwell but that eventually she left the stairwell and K.D. went home.

She indicated that she did not yell out or call for help because when it happened she felt like it was her fault. She felt that he had misunderstood when she said she wanted to flirt and got the wrong impression from that conversation. She also said she felt people would not believe her if she told them she had said no. She said she felt this way because “that’s just kind of how it is in the world” that it is always asked what did “you do to make that happen?” She decided not to tell anyone what happened because she thought no one would believe her and that she would be judged because she was married.

After that she worked with K.D. frequently but the next time something similar happened was on January 30, 2018.

By way of background to January 30, H.C. explained the LPNS are responsible for giving medication. There were three H.C.A.s on shift. Two H.C.A.s, or two people, were required for doing a mechanical lift. She would help K.D. with medications so that he could then assist her in doing lifts.

On January 30 around 8:00 p.m., she had assisted K.D. with medications and he attended with her to do a sit-to-stand transfer to bring a resident to the toilet and then put the resident to bed. H.C. described how the lift functioned to support a resident so they could be lifted from their wheelchair and maneuvered to the bathroom where they could be lowered to sit on the toilet.

The resident they were transferring also had a nightly suppository which needed to be administered. H.C. stated that normally, in that Unit, a suppository was the LPN’s duty to administer but sometimes they would be delegated to H.C.As. On that evening, K.D. handed her the suppository to administer.

In this resident’s bathroom the toilet was at the wall right as you enter the room which meant that in order to administer the suppository she had to stand on the other side of the toilet and bend over to ensure she was putting the suppository in the right place. A drawing of the bathroom which H.C. made and dated on July 31, 2018 was entered as Exhibit 2. The Hearing Tribunal reviewed Exhibit 2 in relation to H.C.’s evidence.

As H.C. was bent over to give the resident the suppository, she recounted that K.D. pressed his pelvis against her buttocks. Next, she felt his hand go down her pants and he began to insert his finger into her vagina and rub her clitoris. She said “what the hell do you think you’re

doing? Stop.” He told her “no” and to keeping going, to finish the suppository. When the suppository was done he pulled his hand out.

While this was occurring, she advised she did not call out for help because she was embarrassed it was happening as it was a very inappropriate time. She stated there was a history of consensual activities so she did not think her “no” meant anything at that time.

After K.D. removed his hand from her pants, she detailed how she and K.D. then finished cleaning the resident and again used the lift, but this time, to move the resident from the toilet to her bed. Once the resident was in bed, K.D. asked if she needed anything else in the bathroom and she told him to leave as she only needed to get the garbage. He asked her if she wanted to have sex but she told him she did not. He told her it was the last time they could have sex before he left for his vacation. She told him later, because she was trying to buy time. She did not want to be in a situation where she was trying to do her job and she was unable to say “no, I don’t want to be fooling around. I don’t want to have sex at work”.

Her evidence was that K.D. persisted. She went back to the bathroom to remove the garbage which had incontinence products in it so it needed to be removed. When she bent over to collect the garbage he came behind her, pulled down her pants and inserted his penis into her without any protection. She was in shock and just stayed where she was until K.D. pulled out to ejaculate. She stated he cleaned himself up as well as any mess in the bathroom and left. H.C. did not recall any conversation during this episode.

H.C. indicated she stayed in the bathroom for a few minutes to compose herself and get over the shock. She knew it was busy on the floor as everyone was busy getting people to bed so she pulled herself together and went back to work.

During the episode in the bathroom, the resident was in her bed in the room. H.C. stated it was possible the resident could have observed what occurred in the bathroom mirror if the door to the bathroom was open but she could not recall if it was or not. She was sure the resident would have been able to see what occurred while she was administering the suppository.

Again, H.C. related that she did not tell anyone what happened at that time.

After the episode, H.C. indicated K.D. was on vacation for about month so he did not return to work until March. They worked together again during March. H.C. indicated she was distancing herself from K.D. because she did not want things to continue.

She recounted that on shift on March 22 she was in the pantry in the kitchen unit. The kitchen unit was in a big open area but had a gate to it which was to prevent residents from entering the kitchen. The pantry was located in the kitchen past the stove and oven and countertops.

On March 22 she was cleaning in the pantry because that task was part of her night cleaning duties.

K.D. came into the pantry and asked her if she wanted to go to the staircase. She declined and told him she did not want to continue to do things. H.C. understood that meant he wanted her to come with him to have sex or for her to give him oral sex because that was where he would try to get her to do things. She thought she had already placed a hint with him because throughout the shift he had been trying to flirt with her and to do subtle touches but she did not reciprocate. So, when K.D. asked her if she wanted to go to the staircase and she was just reiterating that she was not interested and did not want to.

H.C. conveyed how K.D. tried to guide her out of the pantry. She just backed up and said no; she kept saying no. Next, he grabbed her arm and tried to pull her out of the pantry. He was taking things out of her hands and putting them down to try and pull her into the staircase. She described how she kept removing his grasp from her arm and then trying to go back to work – the whole time telling him “no” and “I don’t want to”. Later in her evidence, H.C. stated that it was her wrist not her arm which K.D. tried to grab. She could not recall which wrist he grabbed.

She expressed how she began to get nervous because K.D. had not been physically aggressive toward her before. She was nervous and embarrassed; she began laughing. She said it sounds ridiculous but she was trying to stand her ground and say no. H.C. indicated that laughter is her nervous tic.

When grabbing her arm did not work, H.C. related that K.D. began to put her in a headlock. H.C. managed to get free a few times but then was not able to. She said she remembered trying to get her shoes to grip to the floor to try to not go with him but that they kept slipping and she would try to make them grip again. She tried grabbing things but was not able to stop him from pulling her into the staircase. H.C. stated it was maybe 6’ to 10’ from the pantry to the staircase door.

Her head was caught underneath K.D.’s left arm and he used his right arm to swipe the keypad to enter the staircase. He pulled her into the staircase. H.C. conveyed how, by this point, her neck was hurting, and she was having troubles breathing. She stopped fighting so hard because she was getting exhausted. She could see he was trying to undo his pants to take his penis out. At that point she was able to free her head. She pushed the button to release the door and got back into the Unit. K.D. stormed out the door that lead toward the parking lot.

After K.D. left, H.C. texted him “sorry”. She felt maybe the laughing had made him think she was kidding when she was not. She blamed herself for what had happened. She was scared and shaken from the situation because she had never experienced K.D. becoming physically aggressive. H.C. was unable to recall how long after the incident it was that she texted K.D. but she could recall that it was the same night.

When she was asked whether she discussed the incident with K.D., H.C. indicated that she did not have a specific conversation with him about it. She noted he had asked her at some point that he hoped she did not think he was assaulting her. She told him no because she was trying to protect his feelings. Despite this, she described how she felt very violated and assaulted but was afraid to hurt his feelings and blamed herself because he was always telling her she was going to ruin his life and his career. He would put the same on her so for that reason in her mind it was her fault.

As a result of the incident, H.C. stated she had some redness and tenderness on her forearm where he was grabbing and that her throat hurt. Both felt better within a few hours. She tried to take a photo of her forearm with the marks but deleted the photo shortly after taking it. She could not recall why she deleted it.

H.C. indicated the incident occurred around 10:00 p.m. because she was the only person on that side of the building and K.D.'s shift ended at that time so he would walk back to the Unit between 10:00 p.m. and 10:30 p.m. to talk to her and then he would leave through the staircase to go to his vehicle.

After the incident, H.C. stated she sent a text to her friend, C.S., who worked the night shift in another unit and asked her to come earlier than normal because H.C. needed to talk to her. She could not recall whether C.S. did come earlier. H.C. related that she and C.S. would normally have a visit around midnight and then C.S. would go back to her duties. When H.C. told C.S. what had happened, she said C.S. responded by telling her to end things with K.D. and that she was worried about H.C.'s safety.

H.C.'s evidence was that she told C.S. what had happened in the same way she had just described before the Hearing Tribunal. She recalled she told C.S. how she was shocked that things had got to that point and how much she had told him she did not want to do anything but how he did not listen and was only getting more aggressive.

After talking with C.S., H.C. did not report the incident to her manager. She said she did make it clear to K.D. that she did not want to continue things with him. She could not say what day she made that clear with him but only that it was clear they were not messing around anymore. She could not recall where that discussion occurred or what was said specifically or whether it was by text or in person.

On another occasion, which H.C. indicated was between the end of March and the end of April, she was assisting a resident in a wheelchair who was vomiting and she had called K.D. to come and give the resident something for her nausea. She stated he came and administered an injection because the resident would not have been able to keep a pill down. After this the resident expressed a need to use the bathroom.

H.C. described how this resident was unstable when walking and so H.C. assisted the resident to stand. The resident had been sitting in her wheelchair since it was unsafe for her to be in her bed while she was vomiting. After H.C. assisted the resident to stand, she kept one hand on the resident's back and the other on the resident's walker in order to offer the resident stability.

K.D. asked H.C. if she needed assistance but she told him she was okay and he could leave.

H.C. recounted how she then started walking the resident to the bathroom when K.D. came behind her and put his hands down her pants. He put his fingers into her vagina and began to rub her clitoris. She told him to stop and tried to swat him away but she could not let go of the resident and the resident's walker because the resident needed the assistance. Due to this, she said she had nothing she could do. Once the resident reached the bathroom, K.D. stopped as H.C. had to enter the bathroom in order to assist the resident to the toilet. She recalled he asked her if she needed any help, she told him no and he left.

H.C. described the walking pace with the resident as extremely slow with one step, a pause of a few seconds and then another step.

H.C. stated she did not call out and there would not have been anyone around even if she had as she and K.D. were the only workers on the Unit at that time. She recollected it was close to 10:00 p.m. or a few minutes before as K.D. was close to the end of his shift.

H.C. did not recall telling anyone about what happened. She said she was embarrassed because, again, something had happened in a resident's room which was really bad, especially since they were at work.

At the end of April, H.C.'s position in the Unit had ended and she was back to working casual. One evening she was working an evening shift upstairs. K.D. was working his normal shift. She had asked him whether he wanted to walk her to her car since their shifts ended at the same time – at 10:00 p.m. H.C. stated she asked K.D. to walk her to her car for friendly conversation, to catch up. He agreed but she was late getting off her shift and he had already gone outside.

H.C.'s car was parked beside K.D.'s. She went up to his vehicle and stood in the driver's side door frame, leaning on the open door. K.D. was sitting in the driver's seat. She recalled they were engaged in small talk when he grabbed her hand and tried to get her to feel his erection. She remembered him telling her something about how looking at her gave him an erection. She pulled away and told him no, that she had said to him they were not going to mess around anymore and she meant it. She stated she did not touch his erection on that occasion. After that she left and went home.

H.C. did not report the incident to anyone at that time.

In July 2018, H.C. decided to report the incidents with K.D. to her assistant unit manager.

When asked what brought that about, she described how her husband had found out that she had been unfaithful. He asked her to tell him everything. When she told her husband about what happened he asked her “do you not hear what you’re saying?” Her husband told her “you were assaulted”, “he was using aggression”, “he was manipulating”, “he was harassing”, “he wouldn’t leave you alone like from what you’re saying you were assaulted”. She conveyed how she had trouble dealing with that notion because she had felt everything which had happened was her fault because if she had not said they could flirt then maybe K.D. would not have thought something else would happen.

She also related how she had seen a therapist who explained to her that consent on one occasion is not blanket consent. Further, that in the first occasion even though she had said no and, in the end, felt turned on that it was a hormonal response and that she had never changed her answer, instead, she had just stopped fighting as much.

H.C. testified she reported this to her manager by writing out everything she wanted to say since in person she would be nervous and have trouble saying it. She wrote everything out and read from that paper to her assistant manager. The document H.C. created for that purpose was entered as Exhibit #3.

H.C. was asked to clarify a statement in Exhibit #3 in which she wrote “I don’t want [K.] knowing as he will know it was me and he has manipulated me into to [SIC] “protecting” him”. She indicated he would always tell her she was going to ruin his life, his marriage, and that he was going to lose his job as an LPN. As a result of this, she felt badly and that everything which happened was her fault and she knew he had a wife and kids and did not want to be the reason they struggled.

A statement which H.C. prepared as part of the investigation of the CLPNA was entered as Exhibit #4.

Returning to her husband’s discovery of her interactions with K.D., she indicated he discovered what occurred at the end of May 2018. She advised the relationship was strained and her husband was upset but she was not worried he would leave her as she was “checked out” at that point. She described it as more giving him a reason to leave. She related that she and her husband had decide to try and work things out and did stay together until December 2019 when they separated.

H.C. advised her employment with the Facility ended in July, not June as she had previously noted, and that her termination occurred due to sexual impropriety at the workplace. She recounted that she was aware that by reporting what had happened that she was risking losing her own job, not only K.D.’s.

Under cross examination, H.C. advised she had checked out of her relationship at some point between January 2018 and May 2018. She reiterated that in December 2017 she did not want to cheat on her husband and that later on things had gotten worse.

H.C. confirmed that in December 2017 she had told K.D. that flirting was o.k. but that, even though he was pressuring her for more, she did not want to do more. She explained that to her flirting was compliments, or teasing , but not touching one another.

With regard to what occurred on December 22, she confirmed that when she was pulled into the stairwell; she had told K.D. “no” but that he continued regardless.

H.C. testified that her partner in the Unit was gone at the time the incident occurred because from 10:00 p.m. to 7:00 a.m. there was only one H.C.A. in the Unit. She did not recall that any residents were walking around the Unit at the time. Her evidence was that it would not be usual for family members to be on the Unit at that time unless someone was passing away. Otherwise she had no recollection of family members visiting late in the evening.

She stated that she told C.S. about the incident at a later date but was not sure if she told another co-worker about it.

With regard to the January 30 incident, H.C. recounted that she was in the resident’s room and had dressed her upper half but needed assistance for the rest of the care. The other H.C.A.s were in another room doing a lift with a different resident. She confirmed that the other room would have been in the same large circle described earlier but disagreed that noise anywhere in the circle could easily be heard by others elsewhere in the circle. She testified that the door to the room where she and K.D. were providing care would have been closed because they were providing care.

H.C. reiterated that once K.D. commenced touching her she had said to him “what the hell are you doing”. She disagreed that would be heard in other rooms in the circle. She advised it was whispered because they were with a resident and she did not want the resident to see what was happening. She confirmed the resident would have been able to see what was happening but was not sure whether the resident would understand what was happening.

When asked whether she tried to stand up she related that she did not since she was trying to do her job and it would not be safe to leave the resident.

When asked whether she heard K.D.’s steps following her into the bathroom she explained they were talking, that he was asking to have sex and she was telling him no. When she bent over to take the garbage, he pulled down her pants and started having sex with her. She explained K.D. was pushing her down with a hand around her hips and on her back.

When asked about the business of the Unit at the time she explained she could not give an accurate description but the Unit was very busy until everyone was in bed, however, she could not guarantee it was quiet by that time on that day.

When asked whether there would be family visitors at that time, she explained there usually were not visitors because most people do not visit their family members especially in dementia units.

In regard of the question of whether she told someone about the incident, she said she eventually talked with C.S. about it.

In relation the March 22 incident, H.C. reported there were three, possibly four, resident rooms in the distance between the pantry and the stairwell.

H.C. confirmed that during the March 22 incident she was laughing and telling K.D. to stop. When asked if she thought that would be confusing to him, she replied it could be but that she feels saying no should be taken seriously no matter the context.

H.C. confirmed she related the incident to C.S., that she asked C.S. to come to visit earlier but she could not recall the time C.S. came. She did not recall that she had shown C.S. a photo of her arm but confirmed she took one.

When asked whether she had indicated K.D. was dragging her by her wrist she confirmed it was her wrist/arm area. She described the photo she took as being of the lower part of her forearm, directly around her wrist or a little bit more up but did not have perfect recollection.

When asked about when K.D. said to her that he hoped she did not think he was assaulting her, her evidence was that she was shocked he brought it up. She noted that at that point she was still blaming herself for everything and she was concerned about hurting his feelings and she did not want to ruin his life like he was always telling her. As a result of this she told K.D. that no she did not think he was assaulting her.

H.C. described that numerous times she tried to end the relationship with K.D. but he would always reinitiate it. She indicated that she finally stopped it when she stopped working in the Unit at the end of April 2018.

Counsel for K.D. returned to the March 22 incident asking H.C. whether K.D. exposed his penis to her at that time. She expressed that by that point she was getting lightheaded and she was not wanting to look at his penis so she did not know whether he got it out. He was playing with his pants and she was able to get free then bolted for the door.

In relation to the incident when H.C. was walking the resident to the bathroom, H.C. confirmed that K.D. had put his hand down the back of her pants and inserted his finger into her vagina and rubbed her clitoris while she was walking with the resident.

She confirmed she was the only worker in the unit at that time and that there was no other LPN. She confirmed she whispered to K.D. to stop but that he did not stop until she got to the bathroom and then he stopped. She explained he had to stop because there would not have been enough room for three people to enter into the bathroom through the doorway.

H.C. was unable to recall whether she told any coworkers about the incident because at that time she was not telling C.S. as much. She said she was not working with C.S. as much as C.S. was having a lot more holidays than H.C. was.

H.C. indicated she would visit with C.S. frequently but not necessarily every day. Normally their visits would occur between midnight and 1:00 a.m. Her evidence was that the visits would last approximately 30 to 45 minutes; she agreed that they could have been up to an hour sometimes. She indicated they talked about her life and C.S.'s. She was unable to recall whether there was a conversation which occurred in that period in which she did not discuss K.D. with C.S. because there were many conversations that occurred.

Counsel for K.D. referred H.C. to Exhibit #4, on the last page, to determine whether the incident at the vehicles occurred on May 17 which she did confirm in reference to the exhibit.

In reviewing her intentions in asking K.D. to walk her to her car, H.C. indicated she wanted to walk to her car, chit chat and "call it good".

H.C. indicated that as at May 17, 2018, the relationship with K.D. was "off". Despite what had occurred prior, H.C. indicated she was comfortable walking to her car with K.D.

Again, H.C. related that what occurred was she was standing at the driver's side door where K.D. was in the seat. She detailed that K.D. attempted to have her touch his erection but that she pulled her hand away, went to her own car and drove away.

Again, in reference to Exhibit #4, H.C. confirmed her husband had discovered what had been occurring with K.D. on May 20, 2018. H.C. confirmed she had not intended that her husband would find out about what occurred. She reported that her husband had found out when he read her emails.

H.C. confirmed she and her husband had been able to get past "all of this". She confirmed she did not expect her husband to find out and she felt guilt for other indiscretions. She denied a need to vindicate herself, while she had not told her husband about the infidelity, when he discovered it, she was open with him about what happened.

H.C. denied that she had blamed everything on K.D., while there were occasions where she had not consented to sexual acts there were other times that she did and she had owned up to those.

H.C. related how she had known for sure the “headlock” situation was sexual assault but that, until talking things through, she had a notion of blanket consent wherein if K.D. wanted something, her consent did not matter as they did have consensual relations.

Returning to the “headlock” situation, H.C. confirmed she had believed that was assault but she felt guilt and shame because she had laughed during that interaction. She advised when she reported the assault to C.S. and another co-worker she had believed it was assault but was not sure.

Counsel for K.D. engaged in a line of questioning wherein he directed H.C. to a comment in Exhibit #4 about another man she was seeing at the time. He was looking to ask H.C. about her statements that she was not wanting to cheat on her husband and to comment on that in light of the statement in Exhibit #4. Counsel for the Complaints Consultant objected citing H.C.’s prior evidence was that it was in December 2017 when she expressed she did not want to cheat on her husband; H.C. agreed that had been what she said. Counsel for K.D. urged the Hearing Tribunal to review the evidence on that point as he submitted that was not the thrust of H.C.’s evidence on that point.

The Hearing Tribunal reviewed H.C.’s evidence on this point. During examination in chief, H.C. referenced a reluctance to cheat on her husband in relation to the incident alleged to have occurred on December 22, 2017 but not otherwise. During cross examination, counsel for K.D. asked H.C. when she had made up her mind to check out of the relationship (with her husband). H.C. replied that was when she started cheating on her husband and that this was at the beginning of 2018 because she did not want to cheat on her husband in December 2017. Accordingly, the Hearing Tribunal has concluded that H.C. did not want to cheat on her husband in December 2017 but that by January 2018, she had come to a different decision.

After her husband discovered the affair, H.C. confirmed she sent a text to K.D. to tell him her husband had found out.

When asked what medications she was prescribed in December 2017 and May 2018, H.C. indicated that as of January 2018, she was off all of her medications and did not resume any until May 2018. H.C. confirmed that in December 2017 she was taking some medications but she could not recall which ones. Counsel for K.D. specifically asked H.C. whether she was taking Prozac, Abilify, Wellbutrin, or Trazadone but she repeated that she could not recall what she was taking. When asked whether she took any medication for post-partum, she indicated that she did but was not sure which ones. H.C. confirmed she used cannabis in May 2018 but indicated she did not otherwise because her husband did not like it so she did not use cannabis when she was with him. When asked about her memory of the drugs she was

taking, H.C. indicated she has taken a lot of medications for depression and could not remember what she was taking at that time.

H.C. confirmed she stopped taking medications in January to May 2018 and that she had told co-workers about this. Further, she confirmed that the decision to do so was her own.

In re-examination, H.C. described that in the off again, on again relationship with K.D., she would be the one to end things but K.D. would pursue her with flattery and persistence and things would start up again.

H.B.

H.B. works as a scheduling clerk at the Facility; she has worked there for almost 10 years. H.B. works at the front area of the Facility. When employees attend to work they sign in near her desk so she encountered K.D. in that capacity in addition to her role as the scheduler.

H.B. did not know what period of time K.D. was working at the Facility but indicated she worked with him prior to August 2017. To that point their working relationship was limited to small talk.

She described one occasion when she socialized with K.D. outside of work. She stated K.D. had overheard her talking with some coworkers about going out. He said something to her about going for drinks so she recalled she had the impression there were a few people from work who would be going for drinks together. When she showed up it was only herself and K.D. She said the two had drinks and then he asked her to go to a hotel. She understood that request to mean he wanted to sleep with her. She refused the offer but ended up getting a ride home from one of his cousins. H.B. was unsure of the day of the week this occurred but she assumed it would have been a Friday or Saturday night because she does not go out during the week.

When she returned to work, H.B. said she tried to make things so they were not uncomfortable. She gave K.D. the same greeting and otherwise acted the same around him.

Following that, H.B. described how K.D. would come close and make comments such as to tell her she is sexy. She also described how he had also placed his hand on her buttocks.

On one occasion when this touching occurred, H.B. was at the front desk area where she works. Her desk space is behind a counter area near the front entrance of the Facility. She was behind her desk when he briefly placed his hand on her buttocks. On another occasion she was in the copy room when the same thing occurred.

On the occasion behind the front desk, H.B. testified that it would have been possible for someone to see what happened but her recollection was that no one was around. The copy

room is located behind the front desk area and while it has a door, the door is open. She did not recall that anyone else was around when the incident occurred and that it was only her and K.D. in the room at the time.

H.B. told the Hearing Tribunal that she reacted to the touches by telling K.D. he needed to be careful and by walking away from him. She recounted how she felt uncomfortable and the touch was inappropriate and caught her off guard. She did not go into detail with K.D. but wanted to express that he should not be touching her like that. H.B. was unable to recall how K.D. reacted when she told him to be careful.

On another occasion H.B. recounted how she entered the stairwell and K.D. followed her in. She was partway up the stairs but the two were talking so she stopped and faced him down the stairs. K.D. walked up the stairs to the front of her and kissed her on the lips. She stepped back and continued walking up the stairs. H.B. did not recall saying anything to K.D. nor did she discuss the incident with K.D. later.

H.B.'s recollection was that the incidents occurred in August 2017.

When these incidents occurred, H.B. did not report them to anyone. Later on, she reported them to her manager, first verbally and later by providing a written statement. The Hearing Tribunal was provided with H.B.'s written statement which was entered as Exhibit #5. The written statement was an email provided in July 2018.

H.B. explained she waited so long to report the incident because everything had stopped. She felt she was clear with K.D. that nothing was going to happen and so nothing further occurred. Later she heard from a friend, whose daughter also works at the Facility, that K.D. had made the friend's daughter uncomfortable at work. She heard that K.D. was asking her for drinks and being persistent with her but not more detail than that. At that point H.B. decided something needed to be said because maybe these things were happening to other people. H.B. identified the friend's daughter as K.F.

H.B. reviewed Exhibit #5 and confirmed it was an accurate record of her recollection although she admitted there were aspects of it which she did not remember at the time of the hearing.

When she reported the incidents, in July 2018, H.B. had never spoken with H.C. in regard of her relationship with K.D. nor did she have an awareness of the circumstances between H.C. and K.D. H.B. confirmed she was aware something was going on but not what that was.

In cross-examination, H.B. described how her role in scheduling was only related to extra shifts that needed to be filled due to vacancies or sick calls. There is someone in Edmonton who places employees on their schedule and H.B. covers off the extra shifts.

H.B. explained that she did not know how many times a week K.D. would work but that she would see him 2 or 3 days a week. She explained how the shifts were scheduled and how, from that, she would see him 2 or 3 days in a week as she worked Monday to Friday from 8:00 a.m. to 4:15 p.m. H.B. was unable to say what K.D.'s work involved other than that he was an LPN.

With regard to the drinks meet up, H.B. was pretty sure K.D. had overheard her conversation about drinks with other coworkers. When he invited her for drinks she did not follow up with anyone else about it because she assumed it was set up so she just went. She was unable to recall how many drinks K.D. had but indicated she had about 4.

With regard to the request to attend to a hotel, counsel for K.D. asked her how K.D. said that. She stated that K.D. kept asking her to go to a hotel and she kept saying no. She did not recall that K.D. appeared drunk – she was unable to say whether he was at the time or not.

When asked about a statement relating to K.D.'s sex life in her written statement she told the Hearing Tribunal she was unable to remember that conversation at the time of the hearing.

H.B. was also asked about the indication in her written statement that K.D. had touched her buttocks 4 to 5 times. She explained that at the time of the Hearing she could only recall two occasions when that occurred.

In regard of the touching incidents, H.B. recalled her shift overlapped with K.D. by about 15 minutes. She indicated that during that time there might be someone else around but lots of times no one else was there. She confirmed that other LPNs would be working at that time but indicated they would be other places at the Facility. Further, she admitted it would be possible that visitors may have been coming in to the Facility at 4:00 p.m.

She was asked whether she was sure that the touch behind the desk was not accidental. She did not consider the touch to be accidental because he placed his hand on her buttocks which is not accidental like a brush could be accidental.

H.B. was asked about why she was in the copy room the day that touch occurred. She said she assumed she was getting the print-out of the schedule for the next day because that was when she would print it out to have. She was asked whether she was sure the copy room touch was not accidental. She stated she was sure it was not accidental because it was not just a brush or from him walking behind her - it was an actual touch.

H.B. was unable to recall whether she knew K.D. was suspended when she made her written statement. She indicated that she had never spoken with K.F. about what happened to her. She confirmed she knew something was going on with K.D. and H.C. but she did not know if it was good or bad and she had no details. She assumed it was something similar to what happened to her but did not know.

K.F.

K.F. is an H.C.A. who was employed at the Facility from November 2015 until July 2018. She worked with K.D. from 2017 to 2018 when they both worked in the Unit on evening shifts. Prior to November 2018, they were coworkers who would socialize at work but not outside of work. She explained that by socialize she meant that he would do a report, and since he was the LPN she would go to him with any questions.

K.F. recounted that there were 2 to 5 occasions when she was invited to socialize with K.D. outside of work. On three of the occasions he asked her to go with other coworkers for drinks or for dinner. On two occasions he asked her to go by herself. These requests occurred around the end of November 2017 with a few weeks passing between each occasion but she was not sure about that timing.

K.F. recalled K.D. told her that they should go for drinks after work some time, just the two of them and that his wife and her boyfriend did not need to know. She said she responded by telling him she was busy and that it would not be appropriate. She told him it would not be appropriate because she had a boyfriend and he had a wife. She offered to watch his children if he wanted to go for dinner with his wife but he never took her up on the offer. He said that he would rather go with her or their coworkers.

On another occasion K.D. asked her if she was free on the weekend and whether they could go to get dinner or drinks. She declined so they never did that. She explained that when he asked her on that occasion she was kind of laughing so she was not sure if he was joking or teasing.

K.F. spoke with a co-worker about what happened. The co-worker told her K.D. was just teasing and not to worry about it. She also spoke with her mother about it. Her mother told her not to go if she did not feel comfortable. K.F.'s mother also spoke with K.D. about it; K.F.'s mother also worked at the Facility. K.F. recalled she wanted to speak to her co-worker and her mother because she wanted to know if she should be worried or uncomfortable or if she was just overthinking it.

K.F. explained that in December, K.D. began to treat her differently. For example, during report he would not look at her and would only talk to the other co-workers if he had a question. When he did speak to her it would be to point out she was doing something wrong. As a result, working with him was awkward. K.F. thought the reason K.D. was treating her differently was because she had talked to her co-worker and because her mother confronted him which made him feel awkward.

Near the end of December, K.F. approached K.D. to ask him what was going on. He told her she was not supposed to tell people or her mother and that he was just teasing her and did

not mean any harm by what he said. He apologized to her. After that K.F. described the relationship with K.D. as being more professional, if he had questions she would answer and they would just get the job done.

Other than speaking with her co-worker and her mother, K.F. did not take steps to report what happened until July 2018 when she told management about her experience. She decided to tell management because she was feeling uncomfortable and wanted them to know if it happened to anyone else. A statement which K.F. handwrote at the time she reported this matter to management was entered as Exhibit #6.

K.F. confirmed she worked with H.C. during her time at the Facility. She had heard there were interactions between H.C. and K.D. from her mother but was unsure if what she heard was true or not. She never spoke with either H.C. or K.D. about it. K.F. was asked to elaborate what her mother had told her. She stated that she heard there was an incident of sexual assault so when she heard that she went forward with her story as well.

In cross examination, K.F. explained that two of the occasions when K.D. invited her for a drink she was alone and three of the occasions there were others around.

She explained that K.D. would have known she had a boyfriend because when they would work together, they would each talk about their family lives.

K.F. described how K.D. started treating her differently after she had spoken with her mother about what was happening and her mother had then spoken to K.D. about it. She described how he would avoid looking at her; in report he would ignore her and speak only with other co-workers. She assumed the reason for this was because she had talked with her mother who then talked to K.D.

She confirmed she did not speak to H.C. about what had happened with K.D. nor did she text H.C. She also confirmed she did not speak with H.B. about anything other than work including that they had not discussed K.D. or H.C.

When referred to a statement in Exhibit #6, K.F. confirmed that at some point K.D. had apologized to her and then the relationship became more professional.

When asked whether the information her mother had given her was the reason she prepared Exhibit #6, she explained she was going to go forward before then but did not feel comfortable doing that so hearing what she heard gave her more confidence to come forward. She confirmed that she found out K.D. was no longer coming to work and that she had discussed that with her mother and subsequently made her statement to management.

C.S.

C.S. confirmed she worked at the Facility as an H.C.A. and that from the period of December 2017 to May 2018 she recalled working with K.D. and H.C. She explained that her shift began at 8:00 p.m. so she would have limited interaction with K.D. She worked in a different section of the Facility to H.C.

C.S. described the reception area of the Facility as having double sliding doors to enter. Inside there was the front desk, hallways leading to the various sections of the Facility, and a seating area which could seat perhaps 10 people. Behind the reception area there is a manager's office and the LPN's office. Behind that to the side there is also a kitchen area behind a big door.

In regard of her relationship with H.C., she reported that H.C. confided in her. C.S. is a good listener and it seemed H.C. did not have many people to talk with. C.S. would go to visit H.C. during their shifts to see how she was doing and H.C. would fill her in on her life. The visits would last around an hour.

She recalled that the first night she went to see H.C., H.C. seemed to be bothered by something so C.S. asked her what was going on. H.C. confided that she was having an affair with a co-worker. H.C. did not want to say who but C.S. was able to guess it was K.D. as there were only a few male employees at the Facility.

C.S. was asked to describe the front reception area. She detailed that it had a straight front that wraps back and around with a wall beside it. She explained the receptionist sits in that area and then there are two offices behind the front desk. C.S. confirmed H.B. was the scheduler and also the receptionist. She described the reception as being 6' by 4' or 6' by 6' explaining she is bad with dimensions but that quite a few people could sit behind the desk and the offices.

She was also asked to describe aspects of area of the Facility where H.C. worked. She indicated that there were 12 resident rooms, a communal bathing area, a staff washroom, a laundry room, a pantry, storage room, and a housekeeping room. She confirmed that each resident had their own bathroom.

She indicated the pantry was separated from the hallway by a counter and then the distance from the pantry to the hallway was maybe 10' or 15'.

C.S. described the area as having resident rooms down one side with seating arrangements and a dining room with more resident rooms on the other side. She described it as a large "U" shape. She reported the kitchen area was found at the end with the stairwell off on the edge where the other residents' rooms were.

C.S. detailed the first few hours of her shift. First, she would attend to the front desk and sign in. She would attend to her work area and receive report then start doing some of her nightly cleaning duties. If there were medications that an H.C.A. is able to administer she would give those to residents. She indicated there would not usually be visitors to the Facility, she could not remember any coming that late. She recalled that perhaps a resident would walk around at that time but she was unable to recall any family members visiting during those times.

On the topic of H.C. and her relationship with K.D., C.S. stated that H.C. told her the two had been talking for a while. She related that when he was away in Nepal and H.C. expressed that she missed him. H.C. confided to C.S. that her marriage was not going well and K.D. gave her attention which made her feel good. C.S. described H.C. as giddy about K.D.; H.C. felt bad about what was happening in her marriage but was excited and “twitter pated” with K.D.

C.S. confirmed that H.C. would share intimate details of her relationship with K.D. including intimate sexual activities. H.C. would discuss K.D. with C.S. each time they visited which would occur when their shifts coincided. Rarely H.C. would text C.S. but mostly it was conversations they had at work.

When asked whether she recalled if H.C. confided that K.D. had pushed her to do a sexual act without consent, C.S. recalled one incident where H.C. seemed distressed. C.S. digressed briefly to explain that a few days earlier H.C. had told C.S. that she wanted to work on her marriage and wanted to cool things off with K.D. With that in the background, C.S. advised that when she went to visit H.C., H.C. looked distressed and asked her what was wrong. H.C. showed C.S. her arm and said he had grabbed her and pulled her into the stairwell. There he was kissing her and she told him no, she wanted to work on her marriage. C.S. expressed some problems with the details but that H.C. said K.D. kept talking to her about it and then she gave him oral.

C.S. described how H.C. showed her a picture on her phone of her arm to demonstrate the marks from where he grabbed her but that C.S. was unable to discern anything either on H.C.’s arm or in the photo.

C.S. described that when she heard what H.C. had told her, she did not feel good about it. She felt like it might not have been consensual. She asked H.C., “are you sure you’re ok with that, that seems a little, like a little questionable?” In response H.C. responded that no, she still liked K.D., it was good, she enjoyed it, it was good. Based on that, C.S. felt like it was ok and she had voiced her concern and so she did not pry anymore.

The Hearing Tribunal notes that Counsel for the Complaints Consultant raised the concern with C.S.’s version of events wherein H.C. told C.S. that she felt good about it or that it was consensual. The issue with this is it offends the rule in *Browne v Dunn* which is a rule of evidence rooted in the concern for fairness. The rule requires that if a party intends to call evidence which will contradict evidence that a witness has given that, as a matter of fairness,

the contradictory evidence should be presented to the witness in order for the witness to have the opportunity to respond to it.

At this point, C.S. was excluded from the hearing for the purpose of a discussion on a point of evidence. Counsel for K.D. indicated he did ask H.C. questions intended to elicit her information about consent; however, admitted that H.C. was not asked specifically what she said to C.S. nor was C.S.'s version of events presented to H.C. He indicated that the Tribunal is not bound by the rules of evidence and that he asked that the Hearing Tribunal weigh all of the evidence and come to a decision.

Counsel for the Complaint Consultant was content in raising the issue and it would be addressed later but no ruling on the point was requested at that time. The Hearing Tribunal has noted this concern and accounted for it in the weighing of the evidence before it as outlined in detail below.

Counsel for K.D. suggested that H.C. could be recalled in order to have the statements put to her but the request was not made at that time nor was it made later in the hearing.

C.S. was re-admitted to the hearing and her evidence resumed.

C.S. advised that the incident detailed was the only occasion when H.C. described an occasion of non-consensual contact with K.D. C.S. recollected that she and H.C. would discuss H.C.'s relationship with K.D. at every meeting they had including the consensual contact between them. C.S. was unable to state when the relationship had ended between the two.

A statement which C.S. made on 29 July 2018 was provided to her, she confirmed that she remembered giving it. The statement was marked as Exhibit #7.

C.S. was unable to state when K.D. stopped coming to work since she ended her employment there at the end of April 2018 of that year. She indicated there was one evening in April when she and her boyfriend went out with H.C. and K.D.

On cross examination, C.S. confirmed she did not observe any sexual interactions between H.C. and K.D. and she did not she have any direct knowledge of those interactions.

Returning to the evening when H.C. told C.S. about what had happened in the stairwell, C.S. described H.C. as being flustered and that it seemed she really wanted to tell C.S. about it. H.C. seemed distressed, flustered, like she needed to tell C.S. something, something was wearing on H.C. and she needed to tell C.S. C.S. confirmed this was different than normal demeanour. She also confirmed she was fuzzy on the details of what H.C. had told her that night.

C.S. confirmed she had concerns about what H.C. told her, she explained she had those concerns because it seemed one sided. H.C. was normally giddy about what occurred between her and K.D. However, when she asked H.C. about it, H.C. said it was o.k. and it was good. That was confusing to C.S.

When C.S. was asked whether H.C. had told C.S. that K.D. had grabbed her by the wrist and dragged her to the stairwell, she confirmed that was the case. C.S. did not recall H.C. indicating K.D. had put her in a headlock. C.S. corrected the word dragged, stating that pulled was the right word to use.

C.S. explained she did not have alarms going off at what she heard but that it made her question a little bit.

On the point of H.C.'s marriage, C.S. recounted that H.C. was not getting attention from her husband.

In regard of their relationship, C.S. indicated that at the time of the confidences from H.C., she would have considered them close friends and that she would also have confided in H.C. However, C.S. explained that she did not trust H.C. with her confidence anymore since H.C. had shared those with her husband. Afterwards, H.C.'s husband threatened to use that information for blackmail. C.S. agreed she felt betrayed by H.C. and that she was trying to erase her from her life.

K.D.

K.D. told the Hearing Tribunal that he graduated from the LPN program at Lethbridge College in June 2015. He was an LPN until 2018 when he was suspended. When he graduated in 2015, he explained he did his practicum at the Good Samaritan Facility in Taber and was hired there right away. He also worked casual at the Campbell Clinic in Lethbridge ("the Clinic") and the Lethbridge Regional Hospital.

When he was working in Taber, a part time position came up for the Facility and he applied for it. He received a good reference from his manager at the Clinic and his manager in Taber; he got the job.

Further to the LPN program, K.D. attended Bow Valley College online and completed an immunization course.

K.D. related to the Hearing Tribunal that he was born in Bhutan but had fled the country when he was young. He lived in a refugee camp in Nepal for many years and then eventually came to Canada in 2010. He completed a 1-year course in English as a Second Language and had to upgrade his English for 2 years before getting into LPN training.

K.D. confirmed he understands the allegations against him.

As the evidence moved to the allegations before the Hearing Tribunal, K.D. related that he came to know K.F. while working at the Facility where he was an LPN and she was an H.C.A. When asked about the invitations K.F. described, he explained it was a plan of another co-worker, S.M. that everyone would go for a drink. He described that he might have asked K.D. a few times when they were going but he did not persistently ask her to go for a drink, that he might have asked her once.

K.D. recalled speaking to K.F.'s mother about what occurred. She came to talk to K.D. to tell him K.F. was uncomfortable he asked her for a drink. He testified that he replied that it was all the staff, that it was not his idea. He explained that if it made K.F. uncomfortable he would not ask her again.

Afterwards, he told K.F. she could have asked him about that and he would not have asked her again. He also apologized.

Before speaking with K.F.'s mother, K.D. described the relationship with K.F. as being friendly but after that point he was scared to talk to her personally for fear of offending her. However, he indicated that they would speak as staff, by having work-related conversations.

K.D. explained that as English is his second language he did not know if he offended and he explained to his co-workers that they should clarify with him because people might misunderstand him.

In relation to H.B., K.D. stated he did not touch H.B.'s buttocks. He also explained that when he attended to his shift at 4:00 p.m. there would be another LPN waiting for him who works from 3:00 to 11:00. He would come in and listen to report and pass report on to his staff. By the time that occurred, H.B. would be gone and he would not see her. He asserted that was always the routine.

Between August 2017 and May 2018, K.D. indicated that at first, he would pick up extra shifts at the Facility but once he got the position at the Clinic he would not pick up any additional shifts. His rotation at the Facility would be 2 days off, 3 days on, 2 days off. He explained he started working at the Clinic in early 2016. The Clinic would accommodate his schedule at the Facility. When he worked at the Facility, he would work at the Clinic from 8:30 a.m. to 3:00 p.m. On days when he did not work at the Facility, he would work 8:30 a.m. to 5:00 p.m. at the Clinic.

As such, he would finish his work day at the Clinic at 3:00 p.m. and then drive the 45 minutes to Raymond to start work at the Facility. He explained that often he would not leave the Clinic until closer to 3:15 p.m. so normally he would arrive right on time or sometimes late. The Facility knew he was coming from another position so that was never raised with him.

K.D. confirmed he continues to work at the Clinic as a doctor's assistant. He was in an LPN role but that since his suspension he is not. Instead now he works as a psychiatrist's assistant, answering calls and booking appointments.

K.D. asserted he did not touch H.B.'s buttocks at the front desk nor did he touch her buttocks in the copy room. When asked whether his hand would have brushed off on her buttocks accidentally he stated he had no idea. He stated H.B. had described him faxing but that he does not do any faxing, everything was faxed in the morning and if something has come up then he would fax it after he was done giving medications.

He described that if they spoke at work it would be something like when he came in she would ask him how he was doing. They did not speak about their families with one another.

When asked about whether he had kissed H.B. he indicate that was not true. He stated he did not have time to walk up to her, to walk together. He indicated that he would attend at 4:00 p.m. to the Facility, sign in, and go inside the LPN office. Then the LPN who works 3:00 p.m. to 11:00 p.m., would come and they would receive report. By the time that was over it would be 4:00 p.m. and he would have to leave to give medication right away because supertime medication starts at 4:30 p.m.

K.D. explained that the report would be recorded by the LPN before him who worked from 7:00 a.m. to 1:00 p.m. He would also receive the report from the other LPN who worked from the 7:00 a.m. to 3:00 p.m. shift. Finally, he would also receive a report from the nurse who started the hour before him to receive any information from that time.

After receiving reports, K.D. advised the Hearing Tribunal that he would prepare medications. He explained some people are on narcotics which are locked in the unit and would need two LPNs to remove those. He indicated by the time that happened, H.B. was already gone.

K.D. described how he came to know H.C. She worked as an H.C.A. from 7:00 p.m. to 7:00 a.m. whereas he would work 4:00 p.m. to 10:00 p.m. When she attended to shift he would have to give report to her and another worker, "R", would be there. They would talk and have conversation. He described H.C. as a very happy woman, that he had never seen her sad; she was friendly to everyone.

He explained that the staff would share their cell numbers with one another. That way, if someone was going to be late, they could text and let you know that. As such, he had her number and somehow, they started texting especially after work. He recalled that they would text about their families. He was having difficulty in his relationship and she was having difficulties with her husband. They talked about family and joked as well.

From there they were texting more often and he called her. Then they started talking more often. He told her about the problems in his relationship and she told him about the problems in hers and they decided they could have a relationship.

K.D. explained that the H.C.A.s did not report to the LPNs but rather that there was a nurse who worked from 7:00 a.m. to 7:00 p.m. and another who worked from 7:00 p.m. to 7:00 a.m. and those were their supervisors. His job was more to be the team leader so if there was an accident or someone was vomiting or an injury then they would tell him and ask him to come and assist. Otherwise he would just give the medication.

He explained that he had the same shifts as H.C. in the rotation. As such, they always worked together unless one of them took a vacation or took a sick leave.

In regard of the first allegation relating to H.C. – that K.D. had held her against the wall, pushed his genitals into her and touched her without consent – K.D. indicated that he did not think any human being would do that. He became upset and stated that it portrayed him like an animal, that he would not do those kinds of things. When pressed, he confirmed he denied that incident occurred and he stated that he did not know what H.C. was talking about.

With regard to the incident which was alleged to have occurred on 30 January 2018, the sexual behaviour in the resident GW's room, he stated that never happened. He explained G.W.'s room was next to the main door. He explained that G.W.'s husband was a resident in another section upstairs at the Facility and he would often visit her. He explained there were kitchen staff coming, resident family members coming, that there was no way anyone could do such a thing in the room.

He also stated he is responsible for giving a suppository and if he was not there then someone else would give it. He denied that he gave H.C. the suppository to administer, he explained if he was present then he would give it.

When asked whether, while H.C. gave the suppository, that he touched her without consent and pressured her to have sexual intercourse then had sexual intercourse without consent. K.D. stated that he did not know what H.C. was talking about.

In regard of the incident which is alleged to have originated in the pantry area, K.D. stated that never happened. He did not place her in a headlock. He did not expose or attempt to expose himself to H.C.

K.D. said there were always staff around at that time and that there would be staff and residents walking around. He denied pressuring H.C. to engage in sexual conduct. Again, K.D. explained he was not an animal, that he would not do those things. He stated he had a family, that he has lived a stressful life, being a refugee, that he would not do those types of things.

K.D. was brought back to the allegations relating to H.B. He indicated that before December 2016, he was working casual everywhere and he had told H.B. he needed extra shifts because his wife was not working and he was supporting his kids and parents as well. One day he asked her if she wanted to meet for a drink and she agreed. He stated he did not ask anyone to meet as a group, that H.B. knew it was only her and him. He explained that he asked her to a nice restaurant not a bar. He wanted to take her there so he could show her appreciation.

He recalled she had arrived before him. They each drank. He indicated he drank too much and that she had a drink too. He stated after that he called his cousin to drop her home. He stated he was drunk and maybe he did ask her to go to a hotel just to keep drinking more.

K.D. recalled the meeting occurred on a Friday night because the next day he had off.

Returning to the allegations relating to H.C., K.D. denied being in the stairwell alone with H.C. at any time from December 2017 to May 2019. He denied grabbing her hand, he indicated he might have touched her but did not remember grabbing her hand. He indicated he did not grab or drag her. He explained when he said he might have touched her, he meant that it might have happened when he asked her to do something.

With regard to the allegations said to have occurred while a resident was nauseous, K.D. denied that he had done the acts described in the allegations. He explained that he gave a Gravol injection and that when he gives that type of injection, a resident would not go to the bathroom, they would go to sleep because Gravol makes people drowsy. In elderly people, it makes people very drowsy and sleepy so you would not be walking them to the bathroom.

He explained that H.C. or another H.C.A. would ask him to assist with a vomiting person. He would go and get the injection and then give it to the person. Then he would have the needle in his hand and there are not containers for those in every room. He indicated that probably a resident would already be in bed so they would not take them to the bathroom. He explained that the resident in question was a person about 80 years old with dementia.

K.D. described how a vomiting person would have a garbage beside them and use that to vomit into and they would be cleaned up afterward.

K.D. was asked how he communicated with H.C. between December 2017 and May 2018. He explained that they would communicate by cell phone. They would talk after his shift ended at 10:00 p.m. because between 10:00 p.m. and 11:00 p.m. was the window he had to talk to anyone.

He talked about his trip to Nepal which was during the month of February but that he had extra time off at the end of the trip because flying makes him sick.

In relation to the allegations about the parking lot, K.D. explained that H.C. was working upstairs as she was on casual and was not working as many shifts. She asked him around 6:45 p.m. whether he could meet her after work as they were done at the same time, at 10:00 p.m. He described how at the end of his shift he was working on charting in the computer and H.C. came to ask whether he was done. He told her he was almost done and it took about another 5 minutes for him to finish. By this time, H.C. was already outside. When he went out, H.C. was talking on her phone and he went straight to his car since he thought she was speaking to her husband. Their cars were parked side by side, he went to sit in his car with the door open and she came to him there. When she approached she commented “your boy looks happy today” meaning that he had an erection. He responded that “when I see you I do”. She asked to see it but he told her “No”, can we go to the place where we usually meet. She said that no she cannot because her husband would be waiting for her. Then she grabbed him and said that she could give him a quick blow job. He stated he made the mistake and agreed to it and so that is what happened. He stated that was the last time he had a sexual encounter with her.

When asked whether H.C. has ever told him the relationship was over or she wanted to end the relationship, K.D. said she did not. They met on May 8th and she mentioned that her husband suspected something so she could not bring her phone when she came to meet K.D. because her husband tracks her.

K.D. told the Hearing Tribunal that he had been tried criminally for sexual assault but that he had been acquitted.

K.D. reported that May 17 he had received a text from H.C.’s husband about cheating with H.C. After that H.C. told K.D. that her husband had found out and he told her “I hope you get through this”.

In cross examination, K.D. agreed that he did not want his wife to find out about his affair with H.C. He disagreed that he was worried about losing his job or that it would ruin his life but he did not want anyone to know about it. He agreed he told H.C. that he did not want anyone to know about the relationship and had a lot of regrets over it.

K.D. agreed he called H.C. beautiful and she called him handsome.

K.D. agreed he might have asked K.F. for a drink but that he did it in a group setting. He confirmed he knew K.F. had a boyfriend and stated he did not intend to have any relations with her. He denied telling K.F. he should go for drinks with her and that her boyfriend and his wife did not need to know about it.

K.D. explained that in his culture it was o.k. to ask someone to go for a drink in a restaurant, that if you like someone and want to appreciate them then you can ask that. He explained that was his intention and he thought cultural differences played a role.

K.D. denied being upset when K.F.'s mother spoke to him but he did tell her that she could have said the same thing to him instead of telling her mother. That he would have said sorry and told her that in his culture it's ok. So, if she had spoken to him about it he could have told her sorry and stopped.

K.D. indicated everyone knew he had asked K.F. for a drink because all the group knew about it and what they were planning.

With regard to H.B., K.D. confirmed his evidence that he did not touch her on the buttocks nor did he kiss her. He disagreed that he was interested in her sexually. He stated that he took her for a drink in a friendly way to thank her.

When asked about whether he asked H.B. to a hotel he stated he was drunk and that he might have but he was drunk. Counsel for the Complaints Consultant put a prior statement which K.D. had provided to the CLPNA in which he indicated he might have asked H.B. to stay at a hotel – he agreed he did that, to go for a drink. The document was not entered as an exhibit.

When pressed as to the meaning of the invite and the suggestion it would carry, K.D. said his plan was to drink more and since he did not have much money that they could go a nearby liquor store and buy more to drink then go drink in a hotel.

When asked to agree that asking someone to go to a hotel generally meant to have sexual relations he responded "That, wasn't my intention, but if you understand that way then..."

In regard of his 4:00 p.m. shifts at the Facility, K.D. indicated that he did not arrive early but usually on time. He agreed the first thing he would do would be to sign in to his shift at the front desk where H.B. works. Next, that he would go to the LPN office at 3:00 p.m. where the other LPN would have already come to the office because he did not have a key to the office so the other LPN would let him in.

In regard of the allegation of the kiss in the stairwell, he agreed his evidence was that he did not have time to walk up to her and that this was when he worked his regular shift. When asked about picking up other shifts he stated that was during the time before he asked H.B. for a drink because by that time he was working two jobs. He did not think he had picked up any extra shifts at the Facility after June 2017 but that he might have picked up a night shift. Further, that if he picked up a night shift it would be a Friday night because the pay is higher on the weekend. He explained the night shift would run from 7:00 p.m. or 11:00 p.m. until 7:00 a.m.

In relation to the first allegation relating to H.C., K.D. confirmed his evidence was that it was fabricated.

In relation to the allegation in resident G.W.'s room, K.D. was asked to confirm whether his evidence was that he was not in the room with H.C. He stated that if he was there then he would be giving the suppository and that he did not remember being there with her.

A further document was put to K.D. He was directed to a statement on the page that indicated that in response to the facts underlying the allegation that he "helped H.C. but that [he] gave the suppository to the resident". He was asked again whether he was in G.W.'s room with H.C. He replied that he did not recall the exact date but that if there was suppository to be given that he did it. He indicated that was the meaning of his statement and explained maybe his English was not good enough. The document was not entered as an exhibit.

K.D. was unable to confirm whether he was in the room on the date in question. He stated, however, that it was his duty to give a suppository to the resident. His duty is to give the suppository and if he cannot do it then he would delegate it to someone but he did not remember whether or not it was on January 30. K.D. agreed it would be common practice at the Facility to delegate a suppository.

When asked whether there would be visitors at 10:00 p.m. in the area where H.C. worked, he stated that many of the people in there are from the Raymond area. He said it was possible that people would come to visit and that this resident's son would visit her until she went to bed. When asked whether there would be visitors at 10:00 p.m. he indicated that a resident's husband might visit from upstairs but that it would not be that often.

When asked whether residents in that area would be in bed by 10:00 p.m., K.D. stated that since it is people with dementia that people could be wandering around. He indicated that the bedtime might be 11:00 p.m. or 12:00 a.m. but usually he would be gone from that area by 9:00 p.m. because he would have to finish charting and then would leave at 10:00 p.m.

K.D. confirmed that at 10:00 p.m. there would only be one H.C.A. on the unit and no other unit clerks or other people like that. He was asked about his evidence where he stated that he could not have dragged H.C. to the stairwell because there were always staff around at that time. When asked whether he agreed it would be pretty quiet in the Unit by 10:00 p.m. he agreed it could be quiet but that there could sometimes be residents or staff around. He confirmed that his evidence was that he denied everything to do with that incident.

He confirmed that the allegations around the occasion with the nauseous resident were a complete fabrication.

He confirmed he recalled giving an anti-nausea shot to the resident. He confirmed that he recalled the resident used a walker or a wheelchair but was not sure which. He confirmed that the resident was not taken to the bathroom after the anti-nausea shot. He described how when giving that to an elderly person they would have a quick reaction so you would put them in their recliner or their bed and then administer the shot. He stated that if the resident

needed to go to the bathroom then the resident was wearing a diaper and she would use a garbage to vomit into rather than going back and forth to the bathroom. He stated the resident has a diaper and a garbage to vomit into so there would be no need to take that resident to the bathroom.

K.D. stated that safety protocols, no matter where you were working, would be that once you give that injection you do not take someone to the bathroom.

K.D. was directed to his earlier statement that he asked H.B. to go to a hotel so that they could drink more and he was asked whether he agreed that the cost of a hotel room would be more expensive. He stated he did not know how much that would cost but that he could buy a bottle then you could drink all night and would not have to pay that much, and that was what he was thinking because he was drunk at that time.

K.D. was again directed to the allegation relating to the time that a resident required a suppository. He agreed that a lift was needed with that resident and that two people were needed to use the lift. He stated, however, that two H.C.A.s would lift the resident and once everything was done then he would come and give the suppository.

K.D. was the final witness. Counsel for K.D. indicated that while a third witness had been contemplated that no further witness would be called.

(6) Summary of Closing Submissions by the Parties

Closing Submissions of Ms. Akgungor

Ms. Akgungor set out the two-fold task of the Hearing Tribunal in making determinations in this matter. First, to determine whether the evidence presented establishes that the allegations are proven. Second, if the allegations are established then to determine whether they amount to unprofessional conduct under the HPA.

Ms. Akgungor submitted the Complaints Consultant has the burden to prove the allegations on a balance of probabilities. A balance of probabilities means that it is more likely than not the facts as alleged occurred; there must be at least a 51% chance these things occurred as alleged.

She noted that, for the most part, the Hearing Tribunal is faced with making decisions in the face of versions of events which are dramatically different. In light of this, the Hearing Tribunal will need to assess credibility and determine which evidence it prefers. Ms. Akgungor provided the Hearing Tribunal with §11.10 of James T. Casey's *Regulation of Professions in Canada* which addresses assessing the credibility of witnesses setting out the seven factors which an administrative tribunal should consider:

1. Demeanour of the Witness
2. The Witness' memory
3. Plausibility
4. Internal Consistency
5. External Consistency
6. Motivation
7. Ability to Perceive

Ms. Akgungor asked the Hearing Tribunal to maintain these factors in mind while assessing the evidence. With that, she turned to her submissions in relation to each of the allegations.

In regard of Allegation 1, Ms. Akgungor submitted H.B. had given evidence that K.D. touched her on the buttocks on two occasions – once at the front desk and once in the photocopy room. H.B. did not recall any other person being around when these things occurred. Ms. Akgungor pointed out H.B.'s evidence was that she told K.D. he needed to be careful and could not be doing that. Accordingly, she submitted these interactions were not welcome and did not occur with consent. Similarly, H.B.'s evidence that being kissed took her by surprise and she left the stairwell quickly indicated the kiss occurred without consent.

Ms. Akgungor noted that K.D.'s evidence was that the interactions could not have occurred because of how his day unfolds when he arrives for his shift at 4:00 p.m. Ms. Akgungor submitted that K.D. confirmed he signs in at the reception desk right next to where H.B. sits. Further, that the LPN office is locked and he must be let in. As such, Ms. Akgungor reasoned, one could assume the door would be closed and could limit any ability to see what occurs at the front desk. Further, that while K.D. stated there would be no time when he could come behind H.B. in the stairwell since he would be receiving report at the beginning of his shift and then H.B. would be gone for the day. Ms. Akgungor submitted that, while the window would be narrow, the evidence did not lead to a necessary conclusion that it would be impossible for the two co-workers to be alone in the stairwell at any time in August 2017.

Ms. Akgungor submitted the Hearing Tribunal could conclude there was a level of sexual interest on the part of K.D. in light of his invitation to H.B. to go for drinks. Further, he asked H.B. to go to a hotel with him. She noted K.D.'s evidence was he did not have money to pay for drinks so he just wanted to go to the hotel to save money. Ms. Akgungor submitted it would be difficult to understand how a few drinks in a bar or restaurant would cost more than the cost of a room, even a cheap hotel room. Further, she argued that it stretched the bounds of plausibility to suggest that inviting someone to come to a hotel room with them was not a sexual overture.

Ms. Akgungor noted a lack of motivation on the part of H.B. given a lack of evidence before the Hearing Tribunal which suggested she had an axe to grind in relation to K.D. While H.B. reported what happened to her after hearing that a co-worker, K.F., was also reporting she

had not spoken with that co-worker about what her experience was. Further, while H.B. was aware of something happening between H.C. and K.D., she was not aware of what that was and had assumed it was similar to what happened to her. Therefore, Ms. Akgungor argued there was no evidence of collusion between H.B., H.C., and K.F. Nor was there evidence the three were close or spent time together socially. Instead, Ms. Akgungor stated, the evidence supports that H.B. reported on her own experience and reported it after hearing a colleague also had concerns.

Further, Ms. Akgungor urged the Hearing Tribunal to consider why H.B. would report these matters in the workplace and see them through a CLPNA investigation and hearing if they were not true.

Ms. Akgungor submitted that H.B.'s evidence was substantially similar to what she had reported to management at the Facility and, where she did not remember parts of her prior statement, she freely admitted that was the case. Moreover, that it was unsurprising H.B. would not remember all of the details of incidents which occurred in August 2017 given the timing of the hearing in January 2021.

Thus, Ms. Akgungor encouraged the Hearing Tribunal to accept H.B.'s evidence in light of its internal consistency, lack of evidence of collusion, and the prior sexual interest of K.D. in H.B. Further, that if the Hearing Tribunal accepts H.B.'s evidence then Allegation #1 is proven.

Moving to the question of whether the conduct set out in Allegation #1 is unprofessional conduct, Ms. Akgungor submitted that it is. Specifically, she asserted that it satisfied the following definitions of unprofessional conduct found in the HPA:

- (ii) contravention of this Act, a code of ethics. or standards of practice;
- ...
- (xii) conduct that harms the integrity of the regulated profession.

Ms. Akgungor argued the provisions of the Code of Ethics, which were breached include:

- 1.1 maintain standards of practice, professional competence, and conduct;
- 3.1 maintain the standards of the profession and conduct themselves in a manner that upholds the integrity of the profession
- 4.2 collaborate with colleagues in a cooperative and respectful manner with the primary goal of providing safe, competent, ethical, and appropriate care to individuals, families and communities

She also submitted the following Standard of Practice was breached:

1.9 Practice in a manner consistent with ethical values and obligations of the Code of Ethics, for Licenced Practical Nurses.

In relation to Allegation #2, Ms. Akgungor submitted K.D. did not deny asking K.F. for drinks on at least one occasion. K.F.'s evidence was that K.D. extended an invite to her saying that her boyfriend and his wife did not need to know. Further, K.D. acknowledged he was aware K.F. had a boyfriend but denied making that comment.

Ms. Akgungor noted K.F. testified she spoke with her mother and co-worker about what occurred as she felt uncomfortable. K.F.'s mother spoke with K.D. about what happened which led to K.D. treating her differently by giving her the cold shoulder. K.F. testified she spoke to K.D. to ask why he was treating her that way and he indicated she was not supposed to tell anyone about what he said.

Ms. Akgungor pointed out that K.D. acknowledged speaking with K.F. about her discussing matters with her mother but his evidence was that he told her she could have spoken with him first and he indicated he apologized to K.F. for making her feel uncomfortable and things were professional thereafter. Further, that K.F. had confirmed he apologized to her.

Ms. Akgungor submitted that inviting a co-worker to drinks, with nothing more, does not rise to the level of unprofessional conduct. However, what tipped the situation into the realm of unprofessional conduct was the suggestion K.F.'s boyfriend and K.D.'s wife would not need to be told about the meeting.

As K.D. denied telling K.F. his wife and her boyfriend would not need to know if they met for drinks, again, Ms. Akgungor identifies this as another situation in which a determination of credibility would need to be made.

Again, she submitted, on the issue of motivation, there was no evidence before the Hearing Tribunal which suggests K.F. had an axe to grind or had any reason to fabricate her allegations. K.F. reported her allegations to her employer after hearing from her mother that another co-worker was coming forward. K.F.'s evidence was that she did not know who the other co-worker was and, accordingly, it stood to reason she would not have known the circumstances either. K.F.'s evidence was that she was not asked by her employer to provide a statement but that she came forward because she did not have the confidence to do that until she knew others were coming forward.

Ms. Akgungor noted K.F. was aware that something had occurred between H.C. and K.D.; her evidence was she understood K.D. had sexually assaulted H.C. However, Ms. Akgungor submitted, K.F. did not speak with H.C. or K.D. or take other steps to determine what had happened. As such, Ms. Akgungor submitted, this was not a case of K.F. and others organizing and fabricating stories but rather that K.F. reported what happened to her when she was aware another person was coming forward. Ms. Akgungor submitted this was a reasonable

course of action in the circumstances. Further, Ms. Akgungor asked the Hearing Tribunal to consider why K.F. would proceed with an investigation and hearing if the allegations were not true where there is no upside for her, no axe to grind. Further, K.F.'s evidence that the relationship between her and K.D. was cool but that following an apology from K.D. meant that there was no animosity by July 2018 when K.F. came forward.

Ms. Akgungor urged the Hearing Tribunal to accept that the invite from K.D. came with the qualification that her boyfriend and his wife did not need to know. Further, that if the Hearing Tribunal accepted this, then that was an inappropriate advance. K.F.'s testimony was that this made her uncomfortable. As such, Ms. Akgungor submitted that if the Hearing Tribunal accepts K.F.'s version of events then the facts underlying Allegation #2 have been established. Further, that these facts amount to unprofessional conduct by meeting the definitions set out in relation to Allegation #1.

Turning to Allegations #3-7 which relate to H.C., Ms. Akgungor started with comments of credibility overall as between H.C. and K.D.

First, with regard to Allegation #3, the "stairwell incident" of December 22, 2017, Ms. Akgungor reviewed H.C.'s evidence. H.C. described how she walked K.D. out and agreed to a hug at which time they moved into the stairwell. H.C.'s testimony was that she turned to press the button to leave the stairwell when she felt K.D. push his erection into her buttocks and then he pinned her to the wall in the stairwell. She testified that she felt his hands go down the back of her pants and his finger enter her vagina, that she used the term "fingering" to describe how he moved his fingers in and out. Further, she described how he touched her clitoris with his hand. Ms. Akgungor submitted, on the basis of this evidence, what occurred was done without H.C.'s consent.

H.C. was, Ms. Akgungor said, plain that she said "no" at the outset of this interaction and that she continued to say no but that K.D. continued with the conduct.

Ms. Akgungor submitted that this evidence addressed Allegations #3(a) to #3(e). However, in fairness, there was no evidence before the Hearing Tribunal which could establish Allegation #3(f).

K.D.'s evidence was, in contrast, that none of the conduct described in Allegation #3 occurred – that it was a complete fabrication.

Ms. Akgungor asked the Hearing Tribunal to consider, in light of the differing accounts of K.D. and H.C. was that H.C. gave a very fair account of what occurred in that she described that she was eventually turned on by the interaction and reciprocated. H.C. described the natural response of her hormones kicking in. As such, Ms. Akgungor urged the Hearing Tribunal to ask --- why would she add this if the story was pure fabrication. If that were the case, then she could have only described how she said no or pushed him away throughout. An added

detail of this nature creates a more balanced account and it would be a sophisticated point to fabricate where an interaction started as non-consensual and then became consensual in the end. Further, that this detail does not bear well with K.D.'s suggestion that it was pure fabrication to make herself look better in her husband's eyes once he found out about the affair.

Turning to Allegation #4, which occurred around the occasion of administering a suppository to G.W., Ms. Akgungor again reviewed H.C.'s evidence. H.C. described being in G.W.'s room and having G.W. in a lift which was required for movement. She described how K.D. was also in the room assisting with the lift which requires two people to execute. H.C. indicated the suppository had to be administered and K.D. asked her to do it. H.C. bent over to administer the suppository and when she did, she felt K.D. place his hands in her pants and touch her vagina, inserting his fingers into her vagina and rubbing her clitoris. H.C. finished administering the suppository then, with K.D.'s assistance, moved G.W. back to bed. When she had finished with the suppository, K.D. stopped touching her.

Once the resident was in bed, there were discussions in which K.D. wanted to engage in sexual interactions but H.C. said no, she did not want to. He brought up it would be their last chance before he went on his holiday. Ms. Akgungor noted that detail to be consistent with K.D.'s evidence that he left on February 1 for that trip whereas this alleged conduct was on January 30.

Further, Ms. Akgungor recounted how H.C.'s evidence was that when she went into the bathroom to take the garbage out, as she was bent over, K.D. came behind her, pulled down her pants and had sexual intercourse with her. H.C.'s testimony provided details about how she was caught between the garbage, the caddy and the wall with K.D. behind her. She testified that after K.D. ejaculated, they cleaned up and he left but she remained in the room to compose herself for a few minutes and then returned to her work.

If the Hearing Tribunal accepts H.C.'s evidence, Ms. Akgungor submitted this evidence establishes all of Allegation #4. Ms. Akgungor noted K.D.'s evidence was that this was a complete fabrication and did not occur.

At this point, Ms. Akgungor reviewed K.D.'s evidence. She stated, when he was first asked in cross examination, he confirmed he was never in a room with H.C. giving G.W. a suppository. When he was brought to the statement he provided to the CLPNA, his statement indicated he was helping H.C. and that he gave the suppository. K.D. explained that what he meant was he was giving the suppository and he meant more generally that if he was there then he would have been the one to give the suppository. Ms. Akgungor suggested that what was first a complete denial then became a confirmation of at least some details. For this reason, Ms. Akgungor submitted, H.C.'s version of events had more of an air of reality. What was first a complete denial then became a partial acceptance that certain parts of the events did occur. This, Ms. Akgungor suggested, leads to the question the credibility of K.D.'s other evidence.

Returning to the notion of H.C.'s testimony as a complete fabrication, Ms. Akgungor noted that again H.C.'s version of events included details about how GW could have viewed part of the conduct which occurred. Ms. Akgungor questioned why, in a fabricated story, H.C. would include such a shocking detail? A fabricated story could well be made in a context where no patients are involved; the inclusion of that information seemed to stretch the bounds of plausibility according to Ms. Akgungor.

In relation to Allegation #5, which involved the allegation that H.C. was placed in a headlock and dragged from the pantry to the stairwell. Again, Ms. Akgungor submitted, H.C. was plain in her version of events. H.C. noted she had decided to cool things with K.D. and that she wanted to work on her marriage. With that in the background, when K.D. came to see her in the pantry to ask her to come to the stairwell, she understood that as an invitation to engage in sexual activity and H.C. indicated she did not want that.

H.C. described how she was trying to organize items in the pantry but K.D. kept insisting. When she did not cooperate, he started to grab her by the wrist which she kept pulling free. Then K.D. put her in a headlock, she was able to break free a few times but then he was able to get a firmer headlock which she could not get free from. In this position, K.D. dragged her toward the stairwell. Here, Ms. Akgungor noted, H.C. provided very specific details; how she wished her shoes would give her a better grip on the floor and how she wished she could stop the motion toward the stairwell. This detail, Ms. Akgungor argued, was difficult to imagine being something a person who had fabricated the account would include. H.C.'s evidence was that she was only able to break free when K.D. loosened the headlock in order to pull his penis from his pants.

K.D.'s evidence in relation to this incident was that it did not occur.

Ms. Akgungor noted it was also important to note the evidence of C.S. Ms. Akgungor pointed to C.S.'s status as a confidante to H.C., that she came to meet with H.C. and observed H.C. to be distressed, flustered, not calm. C.S. testified that H.C. told her K.D. had grabbed her by the arm and pulled her to the stairwell. C.S. recounted not feeling good about what she heard from H.C. because it did not seem consensual. Further, that what she heard seemed one sided and H.C. did not seem as happy about it as past encounters.

Ms. Akgungor submitted C.S.'s evidence is important but that the Hearing Tribunal must take care not to accept her evidence for the purpose of independent corroboration that the incidents occurred. C.S. did not witness the incident and her account is based on what H.C. told her. Instead, C.S.'s evidence is important in what she observed of H.C. on that evening. Her friend who was normally happy was distressed, flustered, not calm and did not seem happy about her most recent encounter with K.D.

Ms. Akgungor drew the Hearing Tribunal to C.S.'s account and H.C.'s own evidence which was she was upset and texted C.S. to see her earlier than normal that evening. The evidence of C.S. could reasonably be used to lend plausibility or probability to H.C.'s account and providing some external consistency to it.

Ms. Akgungor reminded the Hearing Tribunal about the objection which she had raised on the point of evidence in which C.S. indicated that H.C. had concluded her account by stating she liked it and it was good. This statement had not been put to H.C. by counsel for K.D. and, Ms. Akgungor argued it was a breach of the principle in *Browne v Dunn* which requires contradictory evidence to be put to a witness so that they might address it. Ms. Akgungor noted that the comment is only relevant to the extent the incident occurred whereas K.D.'s position is that it did not occur. Further, she noted, the Hearing Tribunal would need to decide on how it would deal with that evidence.

Another point Ms. Akgungor asked the Hearing Tribunal to consider was the evidence of H.C. that she sent K.D. a text after the incident to apologize. Ms. Akgungor submitted, if this was a fabricated account, why would a comment like that be added since it might raise questions about why someone would apologize if they were assaulted. Again, she suggested this would be a highly sophisticated fabrication so it is not plausible to consider H.C.'s story to be a fabrication in light of such comments.

In relation to Allegation #6, Ms. Akgungor reminded the Hearing Tribunal of H.C.'s evidence that she was assisting a resident to the bathroom when K.D. inserted his fingers into her vagina and rubbed her clitoris. H.C.'s evidence was that she was walking with the resident while this was occurring but that the resident was walking very slowly.

K.D.'s evidence, Ms. Akgungor noted, was that he denied the incident occurred. Instead, he recalled attending to the resident to administer an anti-nauseant so, to at least that point, there was agreement on the fact. However, K.D.'s evidence was that a resident who had just received an anti-nauseant would not be brought to the bathroom and that it was known that this would not be done.

Before moving on with further comments on credibility, Ms. Akgungor addressed Allegation #7. She stated that, on the wording of the allegation, there was no evidence which established that it had occurred.

Ms. Akgungor turned her submissions back to credibility and the factor of motivation. She identified that suggestions were made, and more might be made, that H.C.'s allegations were suspect since they only came out once H.C.'s husband became aware of the affair. Ms. Akgungor contended this was not quite accurate since H.C. made C.S. aware of the pantry incident immediately after it occurred whereas H.C.'s husband did not find out about the affair until May 2018. It would be highly sophisticated to plant the seeds of fabrication in March in anticipation that H.C.'s husband might one day find out what occurred. Thus, Ms.

Akgungor suggested this timeline was not consistent with fabrication motivated by H.C.'s husband's discovery.

Again, since K.D.'s version of events was that the incidents alleged did not occur at all rather than that they were consensual at the time and turned non-consensual only when H.C.'s husband discovered the affair. Further, if the fabrication was a gambit to stay in her husband's favour when he discovered the affair, then why would H.C. go to a criminal investigation and trial, an employer investigation, to lose her job, to go through a CLPNA investigation and hearing just to maintain her husband's favour. Further, Ms. Akgungor noted, H.C.'s evidence is that she has been separated from her husband for over a year so it would not matter by the time of the hearing.

Ms. Akgungor also argued that H.C.'s explanation for the timing of her report is reasonable in light of her story. H.C. testified that in recounting what happened to her husband, H.C. took ownership for the consensual actions but her husband pointed out that some of what occurred was not consensual. Following this H.C. considered it. Further, H.C. went to therapy where she learned that blanket consent does not exist. Moreover, H.C. knew she was jeopardizing her position when she came forward to her employer. Ms. Akgungor asked why H.C. would risk her employment for false allegations.

Ms. Akgungor also spoke about demeanour as it relates to credibility. She noted it is viewed as the least reliable of the credibility factors which witnesses under the stress of examination can react differently than they normally would. However, she indicated H.C. came across as forthright, she answered the questions put to her and did not shy away from responding to difficult questions. Ms. Akgungor described H.C.'s testimony as clear and H.C. as articulate and consistent in her testimony. Ms. Akgungor noted K.D. was also forthright in his demeanour so this decision might not be one which should rest on that factor.

Finally, Ms. Akgungor drew the Hearing Tribunal's attention to the myths and stereotypes and credibility of a witness. She directed the Hearing Tribunal's attention to *The College of Physicians and Surgeons of Ontario v LMN*, 2016 ONSCPSD 21 (CanLII) at page 17 where the Court discussed avoiding myths about victims of sexual abuse. She submitted, the Supreme Court of Canada has made it clear that sexual assault cases must not be decided in reference to folktales or stereotyped assumptions about how victims of sexual assault are expected to behave. A delay in disclosing or behaving in a manner other than what might be expected cannot be the basis for drawing an adverse inference.

Ms. Akgungor discussed comments in *R v D(D)*, 2000 SCC 43 where the Court noted there is no inviolable rule about how victims of sexual assault will behave. Further, that reasons to delay disclosure can include embarrassment, fear, guilt, or a lack of understanding and knowledge. Ms. Akgungor argued that no assessment of credibility should result from any delay in reporting. H.C. did state she was embarrassed, felt like it was her fault, and felt that she would not be believed.

As to the demeanour of a witness in relation to sexual assault allegations, Ms. Akgungor pointed to the Hearing Tribunal to comments found on page 77 of the copy of *R v Seaboyer*, [1991] 2 SCC 577 provided to the Hearing Tribunal. There she drew the Hearing Tribunal's attention to the expectation that a woman who has been sexually assaulted will be hysterical or visibly upset. Ms. Akgungor noted H.C. gave evidence that after some of the circumstances she collected herself and went back to work but that this should not be taken to conclude H.C. is less credible. Ms. Akgungor also raised the notion of a female under surveillance which assumes that a woman claiming she was raped consented to sexual activity but later states there was no consent to maintain the esteem of others.

Ms. Akgungor briefly directed the Hearing Tribunal to *R v C.P.*, 2016 ONCJ 879 in which the Judge rejected the argument that where a complainant did not call out for help during an assault was less credible. Ms. Akgungor noted that although H.C. did not cry out or call out for help that this should not be a factor used to diminish her credibility.

The last case Ms. Akgungor asked the Hearing Tribunal to consider was *R v ARD*, 2017 ABCA 237 where at para 58, the Court wrote that a witness who did not avoid or change their behaviour with regard to an assaulter cannot be found to be less credible on that basis since all sexual assault victims will behave differently. Ms. Akgungor stated this was important for the Hearing Tribunal to consider since someone might wonder why, if someone had been sexually assaulted, they would not avoid the assaulter. Ms. Akgungor suggested this was relevant as H.C. carried on a consensual relationship with K.D. but that fact cannot be used to afford her less credibility. Absence of a change in behaviour is irrelevant and should not be used to assess credibility. Later avoidance of the perpetrator is the same and that one cannot read anything into that. Furthermore, H.C. only realized later it was not consensual.

Ms. Akgungor asked the Hearing Tribunal to consider the overall plausibility and whether, in light of the details H.C. provided and that she did not provide sanitized incidents presented in her favour. Rather than hiding aspects of her accounts which might put her in a bad light, she laid them out. This overall, in considering this and the evidence of C.S. that there is a sound basis for the Hearing Tribunal to accept the evidence of H.C. and therefore of finding that the Allegations, other than 3(e) and 7 have been made out.

Ms. Akgungor submitted further that there was no question those allegations amount to unprofessional conduct in relation to the provisions of the HPA, Code of Ethics, and Standards of Practice which were noted above.

Ms. Akgungor made a final comment about a statement K.D. had made indicating that he had been acquitted in a criminal trial. Ms. Akgungor noted that criminal matters require proof beyond a reasonable doubt whereas the standard applicable to this proceeding is the less onerous standard of the balance of probabilities.

Closing Submissions of Mr. Okoye

Mr. Okoye commenced his submissions by offering his agreement with the credibility factors Ms. Akgungor presented.

He turned to the allegations, beginning with Allegation #2. He recapped that K.F.'s evidence was K.D. had asked her to go for a drink about two times between November and December. On one of those occasions, she testified, K.D. had stated their partners did not need to know – referring to her boyfriend and his wife. Further, her evidence was K.D. had inquired whether she was still dating her boyfriend around the time of asking her for a drink. K.F.'s evidence was also that when K.D. heard from K.F.'s mother that the alleged request made her feel uncomfortable, he apologized and asked her why she did not come to him first to let him know she was uncomfortable. In response to K.F.'s evidence she felt she was being treated differently, K.D. had testified that he kept his distance as he was scared of being misunderstood. Further, that there was evidence they carried out their professional working relationship from that time until July 2018.

Mr. Okoye stated there was one significant contradiction in K.F.'s evidence in that she stated her mother told her about the rape allegation but did not tell her the detail or the name of the alleged victim. During cross examination, K.F. stated she knew the allegation related to H.C.

Mr. Okoye noted the passage of time between the alleged invitations which were said to have been made in November and December 2017 and the timing of her report in July 2018 suggesting this would have impacted her ability to recall the words spoken by K.D. In contrast, Mr. Okoye noted, K.D. denied the words in question but admitted asking K.F. for a drink but apologizing after realizing the request made her uncomfortable. Moreover, Mr. Okoye identified that K.D. had stated the invitation was to a group and not one to K.F. alone. K.D. also raised the possibility of misunderstanding due to cultural differences and a language barrier. Further, Mr. Okoye suggested this issue could relate to Allegation #1.

Nonetheless, Mr. Okoye argued, even if the Hearing Tribunal accepts the evidence of K.F. and that Allegation #2 occurred, that conduct does not rise to the level of unprofessional conduct.

With regard to Allegation #1 relating to H.B., Mr. Okoye recounted the key aspects of H.B.'s evidence. He noted how, in her testimony about the stairwell kiss, H.B. could not recall what conversation she was having with K.D. when he kissed her. In contrast, however, her statement found at Exhibit #5 did record specific comments. He noted that a lapse of about 10 months had occurred between the timing of the allegation and the timing of H.B.'s report. In any event, the specificity of the recollection can impact how a witness' evidence is assessed.

Mr. Okoye noted the evidence that H.B. ended her shift at 4:15 p.m. whereas K.D. commenced work at 4:00 p.m. leaving only 15 minutes of overlap between their work days.

In reference to Exhibit #5, Mr. Okoye pointed to H.B.'s email of July 2018 which noted four to five occasions when K.D. touched her buttocks but that she was only able to specifically recall two of those occasions in her testimony. He noted this was only 50% of the incidents she had initially reported.

He noted that K.D.'s evidence was that there was not enough time between their shifts in which these incidents could have occurred. Further, K.D.'s evidence of his routine covered the first minutes of his shift; the routine included receiving reports and comparing notes with a fellow LPN. That LPN would attend to open the LPN office door to give K.D. access and that LPN would stay for the reports as well.

Mr. Okoye also referenced the layout of the front desk area and the evidence in regard of that. Further, K.D.'s evidence was that in the first minutes of his shift he would also prepare medications for residents and go to administer those.

While acknowledging the timing of reports of sexual assault should not impact whether those are considered credible, Mr. Okoye highlighted that H.B.'s report was made after H.B. heard from a friend that K.D. had asked K.F. out for a drink in a sexually suggestive manner. Further, he stated, K.F. chose to report following information from her mother that K.D. raped H.C. As such, Mr. Okoye submitted it was reasonable to infer from K.F. and H.B. that they would have heard about the same rape allegation which was the allegation that started the chain of reports. Further, Mr. Okoye suggested a picture was being painted of a serial sexual predator, that any decent human would be outraged by it and want to do anything possible to erase it. My. Okoye cautioned the Hearing Tribunal that there was a reasonable likelihood of a bandwagon effect at play.

My. Okoye noted that, while the *Criminal Code* operates on a different standard not binding on the Hearing Tribunal, this does not change the fact some of the allegations were before the Court and a trained judicial officer made a finding regarding them.

K.D.'s evidence, Mr. Okoye stated, was that he did not touch H.B.'s buttocks nor did he kiss her. With regard to internal and external consistencies, he submitted that the 15-minute window of overlap of H.B. and K.D.'s shifts was short especially in light of K.D.'s evidence about the routine in his first minutes of his shift. Further, that K.D.'s evidence about his multiple shifts at multiple facilities meant he would not arrive early for work.

Thus, Mr. Okoye urged the Hearing Tribunal to find K.D. had not touched H.B.'s buttocks and did not kiss her as alleged because of the evidence about the small window of overlap and K.D.'s evidence about what he would be doing at that time.

Mr. Okoye also raised that there were many possibilities of people coming to the Facility at the time and that the offices behind the front desk were occupied. In light of all this, Mr. Okoye suggested it stretched the bounds of credibility that the allegations would have occurred.

Moving on to Allegations #3 through #6, Mr. Okoye brought the Hearing Tribunal to December 2017 and the first stairwell incident. Mr. Okoye reviewed that Allegation #3 related to touching of H.C.'s breasts, buttocks, vagina and clitoris including the insertion of a finger in her vagina. He suggested Allegation #4 appeared to be a repeat of that although it occurred in a resident's room. Mr. Okoye noted that no evidence had been led as to the parties' consensual activities so, while the allegations were graphic and detailed, they were not unique. Mr. Okoye mused that it could have been routine for sexual encounters between H.C. and K.D.

Nonetheless, Mr. Okoye confirmed K.D. denies the events of Allegation #3 occurred. As such, Mr. Okoye countered the comments of Ms. Akgungor relating to blanket denials or assertions of fabrication by H.C. by saying what K.D. denies is the events as alleged.

Mr. Okoye talked about the incident alleged to have occurred in relation to an occasion when H.C. testified K.D. directed her to administer a suppository and that while she was doing that he touched her vagina and clitoris without her consent and inappropriately pressured her to have sexual intercourse.

Mr. Okoye pointed out that K.D. denied these allegations. Mr. Okoye submitted that, when K.D. acknowledged his statement to the CLPNA investigator that if he was in the room he would have been the one administering the suppository and not H.C., as would be consistent with his professional responsibilities. Mr. Okoye identified that K.D. had worked in multiple health care settings and had no record of medication error or allegation of unprofessional incompetence. As such, the Hearing Tribunal could find that in regard to his job, his responsibility, his work ethic and safety protocols that K.D. observed them.

Turning to the incident with a resident who needed an anti-nauseant, Mr. Okoye noted H.C.'s evidence was K.D. fingered and touched her while she was walking a resident to the bathroom after the administration of anti-nausea medication which K.D. stated he would routinely use Gravol for that purpose. K.D. gave evidence that the safety protocol, which Mr. Okoye suggested should be known to all LPNs, would be to put an elderly resident to bed as this drug would make them drowsy. Furthermore, K.D.'s evidence was that the resident was wearing a diaper and would not have needed to be taken to the bathroom.

Mr. Okoye left it with the Hearing Tribunal to determine whether it was plausible that K.D. could be touching H.C. as she described while she was in motion towards the bathroom – no matter what pace that was. Mr. Okoye urged the Hearing Tribunal to find it more likely than not these events did not occur and that K.D. is more credible.

In regard of the second stairwell incident, H.C. gave evidence of being grabbed and dragged some 6 to 15 feet to the stairwell where she was able to wriggle free when K.D. was trying to undo his zipper. Mr. Okoye noted C.S.'s evidence was that she would regularly visit with H.C. for up to an hour at a time. H.C. admitted only to regular visits while C.S. admitted the visits would occur almost every shift. During these conversations they talked about their lives. Mr. Okoye argued it was striking that H.C. narrated the grabbing, what C.S. would call a holding incident, but left out other details. Mr. Okoye noted it was very unlikely that H.C. would have forgotten on that occasion that she was put in a headlock when she told C.S. what happened but remembered that she asked C.S. to come early that night.

Mr. Okoye questioned whether it was possible that there were marks that H.C. noted but C.S. could not see, either on H.C.'s arm or in the photo. As such, he suggested that, while the Hearing Tribunal might accept something flustered H.C. that evening, that it is unknown what happened. Further, the Hearing Tribunal did not hear evidence about the couple's consensual encounters. However, K.D. denies that the allegation put forward by H.C. happened. So, while the evidence of C.S. might support the fact that *something* happened, what could have happened is something in the context of their consensual sexual encounter. The Hearing Tribunal does not know what happened, where and how it happened as between H.C. and K.D. However, the evidence of H.C. in Exhibits #3 and #4 was different than the evidence C.S. gave.

Mr. Okoye submitted it was reasonable to assume the relationship between K.D. and H.C. had a therapeutic effect on H.C. between December 2017 and May 2018. This was because she did not need her antidepressants anymore because she did not feel depressed anymore. Mr. Okoye submitted it was concerning H.C. chose to stop taking her medication, including medications for post-partum depression. Thus, Mr. Okoye submitted it was K.D.'s position that H.C.'s mental health condition during the relevant period is suspect and may have contributed to some of the allegations. Further, to the credibility of H.C., she was unable to recall any one of the medications she was taking for her depression when she was taking many, she could not recall even one – even when specific medications were suggested to her which she had testified to in court.

In light of this, Mr. Okoye urged the Hearing Tribunal to accept K.D.'s version of events regarding his relationship with H.C. as being more likely than H.C.'s accounts of sexual impropriety.

Mr. Okoye addressed the submission of Ms. Akgungor that, when H.C.'s husband found out about the affair, she took ownership and told her husband everything that occurred. Mr. Okoye countered that H.C. did not really take ownership by alleging she was assaulted and manipulated. Again, Mr. Okoye noted that the Hearing Tribunal did not hear evidence about the details of their consensual relationship so it was unknown what she told her husband. Mr. Okoye suggests it was the allegations of sexual impropriety which H.C. reported to her

husband and that is what led her husband to tell her she had been assaulted. Further, she reported the allegations of sexual impropriety to her therapist who told H.C. what she was talking about amounted to sexual assault. From there, this led to the police and that led to the criminal charges.

Mr. Okoye noted, again, that being mindful of the rape myths and the importance of encouraging women to report sexual impropriety and the importance of believing them when they come forward and of not shaming or blaming them. Further, that one cannot say that if a woman consented on one day, she consented on another. Nonetheless, the Hearing Tribunal is being asked to determine the allegations based on the facts before the Hearing Tribunal and the Hearing Tribunal should find that the allegations are not proven.

Mr. Okoye disputed Ms. Akgungor's suggestion H.C. had no motive in sustaining the allegations even after she was separated from her husband because by that point, her reputation was at stake, she was invested – her credibility and reputation were at stake. As such, she did have motive to see the allegations through.

Finally, Mr. Okoye noted that K.D. faces very serious allegations with serious consequences and that he asked the Hearing Tribunal to find that the burden had not been met and the allegations were not proven.

Questions from the Hearing Tribunal

The Hearing Tribunal posed some questions in order to better understand some of the finer points of the submissions of the parties.

First, Mr. Okoye was asked to clarify whether there was a difference between “denying the allegations” and “denying the facts as alleged”. Mr. Okoye advised there was no distinction.

Second, the Hearing Tribunal asked Mr. Okoye to address the evidence about the resident receiving an anti-nauseant medication. The Hearing Tribunal asked Mr. Okoye to confirm whether that fact had been put to H.C. Mr. Okoye confirmed that it was not.

Next, in light of that information, the Hearing Tribunal asked Mr. Okoye what the Hearing Tribunal is asked to do in weighing that evidence. Mr. Okoye suggested the Hearing Tribunal attached whatever weight they deemed appropriate. However, he noted that it goes to the issue of credibility and the likelihood of what could have happened.

The Hearing Tribunal also asked Ms. Akgungor about what she would ask the Hearing Tribunal to do in terms of weight on that evidence. Ms. Akgungor referred to the rule in *Browne v Dunn* and that H.C. had not been given a chance to address that information. Following that, Ms. Akgungor suggested little weight would generally be afforded such evidence.

Further, however, Ms. Akgungor suggested that even if a patient was wearing a diaper that if they needed to have a bowel movement that they would not be just left in a diaper in such circumstances. Instead, she suggested the Hearing Tribunal rely on its knowledge as a group of LPNs to provide context to that practice. Further, that there would have been a window of time before the anti-nauseant would kick in.

Next, the Hearing Tribunal noted Mr. Okoye made statements with regard to H.C.'s medication and her mental health condition during the relevant period and how that went to H.C.'s credibility. The Hearing Tribunal asked what it was able to make of those comments because no expert evidence was led in regard of H.C.'s mental health condition in relation to that medication.

Mr. Okoye submitted his comment was made in regard of her failure to recollect or recall any of the medications. Further, he noted that LPNs are on the Hearing Tribunal and although they are not qualified experts that they would have functional knowledge of how those things work, of the impact of medication on one's mental health and when one stops taking their medication. My. Okoye suggested that was the whole point of bringing one's peers, one's professional colleagues to adjudicate matters of this nature. As such, an expert was not called assuming that there are LPNs on the panel who understand and have basic functional knowledge of how those things work.

On this point, Ms. Akgungor noted she had intended to address the matter in reply. She agreed that there is no medical expert evidence before the Hearing Tribunal in respect of the medications H.C. might have been taking, her mental health status, whether it was appropriate for her to come off the drugs, whether it was not, what drugs she was taking, what impact there was. Further, Ms. Akgungor submitted there was no evidence at all about H.C.'s mental health status. She argued, that while there are LPNs on the Hearing Tribunal, that the panel members are not expert witnesses and should not be treated as such. She acknowledged that they have knowledge of an LPN's practice and bring that to bear in their role as Hearing Tribunal members but they would not be expected to replace an expert. In summary, her submission was that no weight could be placed on H.C.'s mental health status as a factor in a credibility assessment as there is no evidentiary basis before the Hearing Tribunal for that assessment.

At this point, Heidi Besuijen, Independent Counsel to the Hearing Tribunal, provided her advice, for the record, to the Hearing Tribunal on this point. She stated the advice she would give is that as a matter of fairness, the Hearing Tribunal cannot replace the opinion of an expert in making its determinations. As such, the Hearing Tribunal will have to be very careful as there is an appreciation of the fact that they are there to provide an assessment as to whether to not a person has engaged in unprofessional conduct. The Hearing Tribunal can make that assessment as LPNs but they are not substitutes for an expert. The reason for that would ultimately be as a matter of fairness because there would be no way to test the

expertise; there would be no way for both parties to be able to assess what was going into that decision making.

Finally, Ms. Besuijen advised the parties that during the submissions there was reference made to trial evidence and that her advice to the Hearing Tribunal was that they cannot make use of that because that was not in evidence before them, and they must confine themselves to the evidence led at the hearing.

After some exchange with Mr. Okoye, Ms. Besuijen clarified that the Tribunal asked what use they might make of evidence relating to the outcome of the trial. She told the parties her advice on that point was that it was a different procedure, that they were not aware of what occurred at the criminal procedure and that they must decide the allegations on the merit of the evidence presented to them and on the balance of probabilities.

Reply Submissions of Ms. Akgungor

Ms. Akgungor raised a few brief points in reply to Mr. Okoye's closing submissions.

First, she identified that Mr. Okoye had raised an issue with respect to K.F.'s credibility. Ms. Akgungor suggested there might be a misapprehension of K.F.'s evidence in chief in that she stated she was not aware of the other person who was reporting conduct at that time. Ms. Akgungor understood that to be a reference to H.B. and that she was not aware of H.B.'s reporting. Mr. Okoye seemed to have understood that K.F. stated she was not aware of H.C. reporting and then on cross-examination K.F. acknowledged she was aware of H.C.'s reporting. In light of this, Ms. Akgungor urged the Hearing Tribunal to review the evidence on that point. Specifically, Ms. Akgungor noted that her understanding was K.F. indicated she was not aware of who else was reporting but she did indicate under cross examination that K.F. acknowledged there was something going on between H.C. and K.D. and that she termed it as rape. However, K.F. did not mention H.C.'s reporting.

Further, Ms. Akgungor identified Mr. Okoye's comment that it was reasonable to draw an inference that H.B. would have known what was happening between H.C. and K.D. Ms. Akgungor submitted it was not reasonable to draw that inference because H.B. gave specific evidence on that point and her evidence was that she did not know what happened between them but she assumed it was similar to what had happened to her.

With respect to C.S.'s evidence, Mr. Okoye made the point that it was very unlikely that H.C. would not have raised the detail about the headlock with C.S. Ms. Akgungor noted C.S. indicated she was fuzzy on the specifics of the encounter and left that comment with the Hearing Tribunal to consider.

Ms. Akgungor noted Mr. Okoye had raised the spectre of a bandwagon effect at play, meaning people had been jumping on the bandwagon to report. Ms. Akgungor countered

that actually it was called the “Me Too effect” and that if women hear about other women reporting sexual misconduct that they too can come forward in those difficult circumstances. As such, she suggested that was what happened.

Finally, she noted how Mr. Okoye had suggested that while H.C. told C.S. and reported what happened but that what the Hearing Tribunal does not know is whether that was a consensual encounter. Ms. Akgungor submitted it was not reasonable to assume she would be upset and distressed about a consensual encounter and that more likely than not what happened was what she relayed to C.S. Further, the details from C.S. were consistent with what H.C. stated occurred.

Reply Submissions of Mr. Okoye

Mr. Okoye made one brief comment in reply on the point of K.D.’s evidence about delegating responsibilities to note that K.D. indicated that if he was not present for some reason then he would delegate to an H.C.A. the task of administering a suppository.

(7) Decision of the Hearing Tribunal

The onus is on the Complaints Consultant to establish the facts as alleged in the Statement of Allegations occurred. The standard of proof in civil cases is the balance of probabilities.

The Hearing Tribunal has a two-part task in considering whether a regulated member is guilty of unprofessional conduct. First, the Hearing Tribunal must make factual findings as to whether the alleged conduct occurred. If the alleged conduct occurred, it must then proceed to determine whether the conduct rises to the threshold of unprofessional conduct in the circumstances.

Unprofessional conduct is defined in the HPA at s 1(1)(pp). It is inclusive of the following:

(ii) contravention of this Act, a code of ethics or standards of practice;

...

(xii) conduct that harms the integrity of the regulated profession.

The Code of Ethics for Licensed Practical Nurses includes the following provisions:

Principle 1: Responsibility to the Public – LPNs, as self-regulating professionals, commit to provide safe, effective, compassionate, and ethical care to members of the public.

Principle 1 specifically states that LPNs:

1.2 maintain standards of practice, professional competence, and conduct

Principle 3: Responsibility to the Profession – LPNs have a commitment to their profession and foster the respect and trust of their clients, health care colleagues and the public. Principle 3 specifically states that LPNs:

3.1 maintain the standards of the profession and conduct themselves in a manner that upholds the integrity of the profession

The Standards of Practice for Licensed Practical Nurses in Canada includes the following provisions:

Standard 1: LPNs are accountable for their practice and responsible for ensuring that their practice and conduct meet both the standards of the profession and legislative requirements. Standard 1 specifically states that LPNs:

1.9 Practice in a manner consistent with ethical values and obligations of the Code of Ethics for Licenced Practical Nurses.

Standard 4: Ethical Practice – LPNs uphold, promote and adhere to the values and beliefs as described in the Canadian Council for Practical Nurse Regulators (CCPNR) Code of Ethics. Standard 4 specifically states that:

4.2 collaborate with colleagues in a cooperative and respectful manner with the primary goal of providing safe, competent, ethical, and appropriate care to individuals, families and communities.

The Hearing Tribunal has carefully considered the testimony of the witnesses and the exhibits. The Hearing Tribunal finds the particulars in Allegations #1, 2, 3(a)-(e), 4, 5 and 6 are proven and that the conduct constitutes unprofessional conduct. The reasons for the decision of the Hearing Tribunal are set out below.

The Hearing Tribunal did not consider Allegations 3(f) or 7 in light of the Complaints Consultant's submissions that there was no evidence before the Hearing Tribunal on which these could be established.

(8) Hearing Tribunal Findings and Reasons

Allegation 1

1. On or about August 2017, did one or more of the following with respect to a colleague, "H.B." who was a facility scheduler:

- a. Engaged in inappropriate behaviour when he touched H.B.'s buttocks with his hand, without her consent;
- b. Engaged in inappropriate behaviour when he kissed H.B., without her consent;

The Hearing Tribunal finds, for the following reasons, that Allegation #1 is proven in full and that this conduct meets the threshold of unprofessional conduct.

H.B. was plain-spoken and candid. She took care to ensure that her evidence was understood and offered clarifications to various aspects of it.

H.B.'s evidence to the Hearing Tribunal was generally consistent with her prior written statements. Where there were discrepancies, it was that her prior statement had more detail which she agreed she had written but which she explained simply that she no longer recalled those details. This is to be expected as H.B.'s statement was created 9 or 10 months after the incidents it described, whereas her testimony before the Hearing Tribunal was approximately 3.5 years later. Overall, H.B. did not have difficulty in providing her evidence.

While H.B. gave evidence of only two incidents in which K.D. touched her buttocks, counsel for K.D. noted she had originally reported four or five incidents. H.B. explained that by the time of the hearing she could only recall two of the occasions when that occurred. The Hearing Tribunal finds that H.B.'s comments were fair and that it was appropriate for her to only give evidence of those incidents of which she had a specific memory.

H.B. was positioned as a first-hand witness to all of the events she spoke about. When asked about her knowledge of incidents relating to K.D. and another co-worker, she readily agreed she was aware that something had occurred but that she had no details. The Hearing Tribunal declines to draw any inference that H.B. was aware of the same details as K.F. as H.B. was specifically asked what she knew about K.D. and H.C. but she indicated she had no details, she did not even know if it was good or bad.

With regard to motivation, there was no evidence which the Hearing Tribunal considers to have shown any motivation to fabricate on the part of H.B. The Hearing Tribunal rejects the notion that H.B. reported what happened as part of any effort to portray K.D. in a particular light or as part of a bandwagon effect. The Hearing Tribunal accepts that H.B. determined she would report what happened to her because she was aware that others were making a report of some kind and she thought it would be important to do that.

In H.B.'s version of events, there was no element of consent with regard to the touching of her buttocks or the kiss in the stairwell. H.B. specifically recounted that she had made comments to K.D. that he should be careful when he touched her buttocks and that she was surprised by the kiss and quickly left the stairwell following it. Of course, victims in such circumstances might react differently but the Hearing Tribunal accepts this evidence is part

of H.B.'s narrative and tends to accord with a lack of prior consent – which cannot be provided after the fact.

K.D. flatly denied all of Allegation #1. His evidence was that there would have been no time in which he would have crossed paths with H.B. for the events in this allegation to have occurred.

The Hearing Tribunal was not convinced that the timelines which K.D. described conclusively foreclosed any possibility of opportunity for the conduct alleged to have occurred. In each case, the time required to either touch H.B.'s buttocks or to follow her into the stairwell and kiss her would be very short. This is especially so when there was no issue to confirming that K.D. had invited H.B. to go for drinks which he stated she would have known was an invite to her alone (which she understood related to a group). This does not level with the suggestion that the two would not have had time to overlap at work alone. The Hearing Tribunal found that the incidents H.B. described were plausible notwithstanding the limited overlap between her shift and K.D.'s.

Perhaps most important to the Hearing Tribunal's assessment of K.D.'s evidence was his testimony given in relation to the invitation to H.B. to go for drinks and what followed. H.B. stated she had the impression that the invite related to a group event and was surprised when it was only her and K.D. K.D. stated that H.B. knew it was an invite to her alone, he did not explain why this was the case. The Hearing Tribunal is not able to reconcile why H.B. would have known and understood that the invitation was to her alone but then that she would relate that she believed it to be a group invite. There would be no reason for her to draw this distinction in her version of events.

In relation to the invitation to join K.D. in a hotel, H.B. showed reluctance or embarrassment to say the words but was unequivocal that she understood the invitation related to a sexual overture. H.B. did not have any understanding that the invitation related instead to continuing on with drinking as K.D. suggests. The Hearing Tribunal notes that version of events was not put to her in cross examination.

In his examination in chief, K.D. stated maybe he invited H.B. to go to a hotel but just to drink more. On cross examination he first indicated that he might have done that but that he was not sure as he was drunk. When his prior statement was put to him he then agreed that he had made the invite but that it was for the purpose of getting a drink. He proffered that he made the invitation because he did not have the money to continue to drink where they were and that it would be less expensive to buy alcohol to consume in a hotel. When Ms. Akgungor put to K.D. that it would have been expensive to get a hotel room he said he did not know how much that would cost and that maybe he was thinking you could drink all night and not pay that much but that he was drunk and did not know what he was thinking. He also denied the suggestion that inviting someone to a hotel carried a particular connotation responding only that was not his intention.

The Hearing Tribunal found K.D.'s evidence in this respect to be unreliable. K.D. first stated he might have made the invite but then, when confronted with his prior statement, he confirmed he did this but also offered further details. Moreover, there is a lack of plausibility to K.D.'s explanation.

Accordingly, for these reasons, the Hearing Tribunal is satisfied on a balance of probabilities that the conduct alleged in Allegation #1 has been established. The Hearing Tribunal is also satisfied this conduct amounts to unprofessional conduct.

This behaviour harms the integrity of the LPN profession because LPNs are expected to be trustworthy but this behaviour undermines trust. An objective observer who was aware that K.D. had engaged in this behaviour might reasonably have concern for his co-workers or people under K.D.'s care given his lack of respect for H.B.'s personal autonomy. H.B. had a right to safety in her employment, to be free of harassment, and to be treated with dignity.

The conduct described also breaches both the Code of Ethics and the Standards of Practice. It cannot be said that K.D. acted respectfully towards H.B. when he touched her buttocks and kissed her in the workplace. By failing to afford H.B. respect, he undermined the integrity of the profession as described above and flowing from each of these he failed to maintain the standards of practice and ethical values of his profession.

Allegation 2

2. On or about December 2017, made inappropriate advances with respect to a colleague, "K.F." who was a health care aide.

K.F. described how K.D. asked her to go for drinks by herself, the two occasions were a few weeks apart and she was not sure of the exact dates but that it occurred around late November 2017. She described that he first asked her out and suggested her boyfriend and his wife did not need to know. She declined, stating that it would be inappropriate. K.F. said she offered to watch K.D.'s children but he did not take her up on the offer. On the second occasion, K.D. asked if she was free on a weekend for them to get dinner or drinks.

K.F. freely agreed there were some occasions where she was aware that K.D. was making an invite to join a group for drinks.

K.F. spoke with her mother, an employee at the Facility, about what happened and K.F.'s mother spoke to K.D. Following that, K.F. described how K.D. treated her differently by avoiding looking at her or by ignoring her and speaking only with her co-workers during report. She assumed he did this because of what her mother had done. She confirmed he spoke with her and apologized after which the relationship became more professional.

K.D. denied asking K.F. for drinks alone. He indicated when he spoke with K.F.'s mother that his invitation was for a group invite. He confirmed he was aware K.F. had a boyfriend but denied telling her his wife and her boyfriend did not need to know if they went for drinks.

K.D. indicated that it was another co-worker, S.M., who planned for everyone to go for a drink. The Hearing Tribunal notes that K.F. gave specific evidence that she spoke with S.M. about K.D.'s invite. K.F. reported that S.M. told her K.D. was joking and not to worry about it. K.F. did not indicate that S.M. told her it was a group plan to go for drinks. While neither party called S.M. as a witness, the Hearing Tribunal notes it has a broad ability to receive evidence and it is not bound by the rules of evidence applicable to judicial hearings in accordance with section 79(5) of the HPA. Nonetheless, the Hearing Tribunal accepts this evidence but is cognizant that S.M. was not present to provide evidence directly.

The Hearing Tribunal accepts K.F.'s version of events on a balance of probabilities.

K.F. had no motive and there was no benefit to her in coming forward with this conduct.

K.D. agreed he had invited K.F. for drinks but insisted it was a group invite. However, if that were the case, K.F. would not have felt uncomfortable about those two incidents but not others which she knew to be group invites. There would be no reason for her to have singled out those two invites amongst the others which she knew were for group meetings.

In regard of the strain in the relationship between K.F. and K.D., K.F. would have no reason to embellish her experience. The Hearing Tribunal accepts that even in situations where K.D. was required to work directly with K.F. around others, such as during report, that he ignored her and spoke to other co-workers rather than to her directly. This is markedly different than the friendly relationship she described having with him prior to that. K.D.'s evidence, however, was that regular work conversations did occur. The Hearing Tribunal does not accept this. K.F. gave evidence she spoke with K.D. about that treatment, in response to it, and that was when he apologized to her and downplayed what occurred. After that the relationship improved to become a more professional one.

The Hearing Tribunal does not accept that K.F. reported what occurred because of a band wagon effect since the Hearing Tribunal accepts her evidence as true. The Hearing Tribunal accepts that K.F. decided to come forward because before that she did not feel comfortable in doing so until she knew others were doing that as well.

Mr. Okoye submitted there was a significant contradiction in K.F.'s evidence in that she stated her mother told her about the rape allegation but did not tell her the details or the name of the alleged victim. The Hearing Tribunal reviewed the evidence on this point. In examination in chief, K.F. gave evidence that she was aware, through her mother, that there were interactions between H.C. and K.D. but she did not know if that was true or not. She was asked to elaborate and she stated she heard there was an incident of sexual assault. In cross

examination, K.F. stated she did not speak or text with H.C. about what happened with K.D. As such, the Hearing Tribunal does not find the significant contradiction, as submitted, is borne out in the review of the evidence.

As such, the Hearing Tribunal accepts the conduct described in Allegation #2 did occur. Furthermore, the Hearing Tribunal has determined this conduct amounts to unprofessional conduct by reason that it engages the HPA, the Code of Ethics and the Standards of Practice as set out above.

K.D. asked K.F. to go for drinks while specifically referencing that her boyfriend did not need to know. While it might not amount to unprofessional conduct for an LPN to ask a co-worker for a drink, the added reference to K.F.'s relationship changes the tone of the request. Following that, a further request for dinner or drinks later on when K.F. had stated it would be inappropriate is a violation of the autonomy she exercised in declining the first invite with no opening to suggest she would welcome a further invite.

The Hearing Tribunal also notes that the power imbalance between K.F. and K.D. is a factor in its assessment of this conduct. Whether it was intentional or not, a member of the public would expect a regulated professional to be aware of their place in relation to others on their team. K.F. as an HCA would report to and take direction from K.D. whether or not he was her manager. This element is an added aspect of what makes this conduct unprofessional conduct as it adds to the harm to the integrity of the profession.

K.D.'s unwanted overtures were not in keeping with the call to LPNs to collaborate with colleagues in a cooperative and respectful manner. This conduct occurring in the workplace detracts from, not enhances, the atmosphere of care which should have been centred on the residents at the Facility.

Allegation 3

3. On or about December 2017 or January 2018, engaged in inappropriate behaviour when he did one or more [sic] the following with respect to a colleague, "H.C." who was a health care aide:
 - a. Touched H.C.'s breast and buttocks with his hand, without her consent;
 - b. Physically pushed or held H.C. against a wall;
 - c. Pressed his genitals against H.C., without her consent;
 - d. Touched H.C.'s vagina and clitoris with his hand, without her consent;
 - e. Inserted his fingers into H.C.'s vagina, without her consent;

H.C. described some flirtatious behaviour between her and K.D. She also described how after these initial flirtations, she worked a shift with K.D. on December 22, 2017 – her first day back from a vacation – when she told him she did not want anything more than flirting. She recalled K.D. pressuring her and making her feel guilty as though she led him on. At the end of his shift, he asked her to walk him to the door. She agreed. At the door to the stairwell he asked for a hug. She agreed to a hug.

When H.C. hugged K.D., she gave evidence that he pulled her into the stairwell, pushed her against the wall and pushed his erection into her. She pushed him away and said “no” and that she did not want to do anything, she did not want to cheat on her husband. She went to the door to leave when K.D. pinned her, put his hands down her pants and inserted his finger into her vagina and rubbed her clitoris in a repeating motion. She described how she continued to say no but eventually her hormones kicked in, she was turned on and it felt good so she stopped fighting him. During this, some kissing occurred, K.D. touched H.C.’s breasts and buttocks and she touched his genital area.

K.D. denied this occurred.

H.C. decided not to tell anyone what happened. She felt she would not be believed. She felt guilt that she had given him the wrong impression. She felt like she would be judged because she was married.

The Hearing Tribunal prefers H.C.’s account of what occurred including that it was without consent. She provided significant detail and included portions of the story which might not be favourable to her – such as her participation at the end of the exchange. The Hearing Tribunal accepts the submissions of Ms. Akgungor, it would be a sophisticated fabrication to include such details which might cause questions about what happened. H.C. offered a balanced view, not one sanitized to convince.

H.C. provided significant detail not only about what happened, but about her thoughts around what occurred. She detailed that K.D. had wanted more than flirting and pressured her for more and then later she felt guilt that maybe she had led him on. Her reasons for not reporting ring true, she feared what people would say about her role in what happened.

The factor of motivation is one which the Hearing Tribunal must contend with, this discussion touches on all of the Allegations.

H.C.’s evidence was that once her husband “found out that [she] had been unfaithful” he wanted every detail. In H.C.’s telling of this she did not suggest she denied any consensual relations with K.D. She explained her misunderstanding regarding blanket consent and how she thought she did not know that saying yes on one occasion did not mean she could not say no on others. She noted that even in the incident described in Allegation #3, she had been

fighting and saying no to K.D. but then she stopped resisting, in part, because of the hormonal response triggered. Ms. Akgungor submitted H.C. acknowledged her role in the affair, the consensual relationship was acknowledged. Mr. Okoye submitted H.C. did not acknowledge her role because she was alleging she was assaulted and manipulated. The Hearing Tribunal rejects this argument; it is not a matter of all or nothing. The Hearing Tribunal finds as fact that H.C. discussed with her husband the full details of her relationship with K.D. and that it was consensual. However, that it was in discussing that with her husband and therapist that she came to understand aspects of the relationship were not consensual. As such, H.C. admitted her infidelity to her husband, there was nothing for her to gain in coming forward about incidents where sexual activity with K.D. occurred without her consent.

Ms. Akgungor suggested also, that H.C. would have no motive for sustaining the allegations long after the split from her husband. Mr. Okoye suggested she did in that she was committed to them, that her credibility was at stake. The Hearing Tribunal does not draw any conclusion in regard of these submissions finding it unnecessary to do so in light of its prior conclusions regarding motive.

In contrast to H.C., K.D. had significant motive to deny the allegations given the significant professional consequences that might flow from a finding of unprofessional conduct in light of non-consensual sexual behaviour. K.D. denied concern about the affair in relation to his job but admitted he did not want his wife or anyone to know about the relationship.

Another matter which the Hearing Tribunal will address at this point but which is applicable to all of the allegations relating to H.C. is the comments of Mr. Okoye relating to H.C.'s mental health status. The Hearing Tribunal is comprised, in part, of LPNs. However, LPNs do not have specialized training in mental health. The Hearing Tribunal would not feel comfortable making any assessment of H.C.'s mental health or the significance of her medication history. Moreover, the Hearing Tribunal did not have any clinical information about H.C.'s mental health. Furthermore, the Hearing Tribunal, on the advice of independent legal counsel, would not propose to take the place of a qualified expert giving evidence and made available for questioning.

The Hearing Tribunal is not prepared to find the relationship between K.D. and H.C. had a therapeutic effect on H.C. on the basis of the evidence before it. Even if the Hearing Tribunal made this finding it would not necessarily preclude any of the allegations before it.

The Hearing Tribunal notes H.C. was clear; she was unable to recall which medications she was taking during any particular time but that this is not unexpected given it seemed, on the limited evidence available, that she had cycled between a number of medications. H.C. was clear she did not remember and that she had taken many medications for depression but could not remember what she was taking at the time. Mr. Okoye suggested H.C. had given evidence about her medications in court but this is not in evidence before the Hearing Tribunal.

Returning to Allegation #3, the Hearing Tribunal finds that on a balance of probabilities the conduct in Allegation #3 did occur. Further, the Hearing Tribunal finds that this conduct amounts to unprofessional conduct under those provisions of the HPA, Code of Ethics and Standards of Practice set out above.

It is clear that the conduct in this allegation would tend to harm the integrity of the profession of LPNs. LPNs are called to care for others and these actions are not in keeping with that calling. Certainly, these actions do not accord with the obligation of LPNs to collaborate with colleagues towards the primary goal of providing care. H.C. is entitled to feel safe in the workplace and to be free from violation of her body. These actions are not consistent with the ethical values of LPNs.

Allegation 4

4. On or about January 30, 2018, engaged in inappropriate behaviour when he did one or more [sic] the following with respect to a colleague, "H.C.":
 - a. Engaged in sexual behaviour with H.C. while H.C. provided care to a patient, GW;
 - b. Touched H.C.'s vagina and clitoris with his hand, without her consent;
 - c. Inserted his fingers into H.C.'s vagina, without her consent;
 - d. Inappropriately pressured H.C. to have sexual intercourse;
 - e. Had sexual intercourse with H.C. without obtaining her consent;

In relation to this allegation, H.C. told the Hearing Tribunal how K.D. was assisting her with a lift of a resident which is a maneuver that requires two people. They used the lift to assist the resident to the washroom. While there, H.C. testified K.D. directed her to administer a suppository, then while she followed that direction, he pressed his pelvis into her buttocks, put his hands down her pants and inserted his finger into her vagina and rubbed her clitoris. Her response was clearly for him to stop but he did not until she had administered the suppository. After H.C. and K.D. returned the resident to bed, K.D. followed H.C. into the bathroom; when she bent over to remove the garbage, he pulled down her pants and had intercourse with her. He had been asking her to have sex with him but she told him she did not want to, he persisted noting it was the last day they could have sex before his trip to Nepal. She tried to put him off as she could not be direct as she was trying to do her work to assist the resident.

K.D. flatly denied the allegations occurred. He indicated there was no way for something like that to happen in the room. In his examination in chief, K.D. stated that if he was there he

would give the suppository. In cross examination he repeated that if he was there he would give the suppository but he stated he did not remember being there. He confirmed his evidence was that he was not in the room with H.C. and that resident on 30 January 2018. K.D. was confronted with his prior statement in the CLPNA investigation in which he said he helped H.C. but he administered the suppository. He denied touching her sexually. In further cross examination he indicated it is his duty to give a suppository, that he might delegate a suppository but that would be when he could not be there.

The Hearing Tribunal noted H.C. provided specific details about the assistance the resident needed, in providing the resident with the suppository, and her placement in the room. She provided details about what the resident could have seen, the Hearing Tribunal accepts that such a detail would be unlikely to be included in a wholly fabricated account.

The Hearing Tribunal found K.D.'s evidence on the issue of his presence in the room and the administration of the suppository diminished his credibility. His evidence was difficult to follow and contradictory. He denied being in the room but then in light of his prior statement his story changed. He focussed on the administration of the suppository stating if he was in the room he would administer it but then acknowledged it is common practice at the Facility for LPNs to delegate that function.

H.C.'s evidence is more plausible in that she described the size of the bathroom and the limited space there would have been with the resident, H.C., K.D. and the lift. It would make sense that while H.C. provided peri care to the resident that she would also be positioned to administer the suppository.

The Hearing Tribunal notes the external consistency to H.C.'s version of events as she referenced the discussion of K.D.'s upcoming trip, a detail which he confirmed.

On the balance of probabilities, the Hearing Tribunal finds that Allegation 4 is proven. Further, the Hearing Tribunal finds this conduct rises to the degree of unprofessional conduct. The reasons for this are quite similar to those set out in relation to Allegation 3 since the conduct is of the same nature and concern. However, in addition to those reasons, the Hearing Tribunal finds that the fact this conduct occurred in proximity of a resident who could have observed what occurred which would be an additional element that diminishes the integrity of the profession of LPNs. There is no element of concern for the well-being or care of this resident evident in these actions, this seriously undermines the very heart of what the LPN profession seeks to achieve.

Allegation 5

5. On or about March 22, 2018, engaged in inappropriate behaviour when he did one or more [sic] the following with respect to a colleague H.C.:

- a. Placed H.C. into a headlock;
- b. Exposed or attempted to expose his genitals to H.C.;
- c. Pressured H.C. to engage in sexual conduct;

H.C. related how she had been working in the pantry in the Unit taking care of regular cleaning duties when K.D. came to ask her to the stairwell which she understood to invite her for sexual activity. She declined. She testified he tried to lead her from the pantry but she said no. Things began to escalate, he grabbed her arm and tried to pull her. She kept removing his grasp of her and telling him no but he persisted. She indicated she began to get nervous and embarrassed because he was being aggressive. She was laughing because she was nervous. Finding that grabbing her was not working, K.D. placed her in a headlock. She was able to get free a few times but then he got her in a headlock where she could not get free. She described trying to use her feet to stop herself from moving with him, wishing that her shoes had more grip. She gave evidence that he was able to drag her to the stairwell but he loosened his grip when he was working to take his penis from his pants and she was able to get free and leave.

K.D. denied the events as alleged occurred at all.

C.S., a co-worker and confidante of H.C. gave evidence of her experience meeting H.C. on the evening in question. C.S. frequently visited H.C. when they were both on shift. The Hearing Tribunal does not find any significance in H.C.'s agreement that visits with C.S. were regular whereas C.S. described them as almost every shift.

C.S. testified that she observed H.C. was distressed following an incident when K.D. had pulled H.C. into the stairwell. H.C. showed C.S. her arm and a photo she had taken of redness but C.S. was unable to observe any redness.

C.S. noted she did not have a good feeling about what H.C. told her, she felt it was one-sided, that it might not have been consensual. She had observed that normally H.C. was giddy when she talked about K.D. however, this time H.C. was flustered and distressed.

C.S. admitted she was fuzzy on the details of what H.C. had told her that evening. C.S. did not note that H.C. described being placed in a headlock but in light of C.S.'s limited memory of what happened, the Hearing Tribunal is unable to make a finding or draw any inference on that basis.

Part of the evidence C.S. gave was that when she prodded H.C. about what happened because she was concerned, H.C. stated that it was good and she liked it. The Hearing Tribunal does note this matter was not specifically put to H.C.; no request was made to recall her for that purpose. The Hearing Tribunal has placed limited weight on these statements.

Of greatest importance to the Hearing Tribunal, was C.S.'s observation of H.C.'s demeanour. Whereas H.C. was normally happy in speaking about K.D., on this occasion she was visibly distressed. The Hearing Tribunal finds this detail a compelling external confirmation of H.C.'s version of events.

Again, H.C. was fair in her version of events. She was open about her laughing and concern that K.D. might have misinterpreted her. She told the Hearing Tribunal how she texted him after to apologize because she blamed herself for what happened. These are details which the Hearing Tribunal finds contribute to its assessment of H.C.'s memory as being good and details of this nature were consistent throughout H.C.'s evidence. For example, in her discussion of why she did not report the first incident she stated she felt blame for what had happened. When she discussed her affair with her husband and he pointed out to her she was assaulted that she had difficulty with the notion because she blamed herself. Throughout her evidence, H.C. had an internal consistency which made her a credible witness.

As such, the Hearing Tribunal finds Allegation #5 is proven on a balance of probabilities, moreover that it rises to the level of unprofessional conduct. Again, the Hearing Tribunal finds the conduct proven to be unprofessional conduct for substantially the same reasons as given in relation to Allegations #3 and #4. The actions occurred in the workplace where H.C. has a right to feel safe and secure; this was violated when she clearly expressed she did not wish to engage in sexual conduct but was nonetheless dragged to a stairwell for that purpose. This conduct is not in keeping with the ethical values LPNs espouse and with the nature of the profession which is devoted to the health and well-being of the greater community and to work in the public interest.

Allegation 6

6. On or about January to May 2018, engaged in inappropriate behaviour when did one or more [sic] the following with respect to a colleague H.C.:
 - a. Engaged in sexual behaviour with H.C. in a patient's room;
 - b. Inserted his fingers into H.C.'s vagina without her consent;

H.C. described another incident in which a resident was vomiting and in need of assistance. K.D. attended to administer an anti-nausea shot since the resident would not have been able to keep down a pill. K.D. administered the shot and then H.C. assisted the resident in walking to the bathroom. The resident used a walker but H.C. held the walker and steadied the resident with her free hand. H.C. testified that, as she was walking slowly with the resident, K.D. came from behind, put his hands down her pants and inserted his fingers into her vagina and rubbed her clitoris. H.C. told him to stop and tried to swat him away but she was in the midst of assisting the resident so was limited in what she could do. K.D. stopped when they reached the bathroom.

K.D.'s evidence was that he did provide the injection to the resident. His evidence, however, was that with an elderly person such as the resident, the injection would make them very drowsy and sleepy and that person would not be brought to the bathroom after the injection. Further, his evidence was that an elderly person would feel the effects of Graval more quickly than other people so they would be put in a safe place such as their bed or a recliner then the shot would be administered. In cross-examination, K.D. was asked about what would happen if the resident needed to go to the bathroom. K.D. explained that the resident would be in a diaper and would not be brought to the bathroom as a matter of safety.

Mr. Okoye asked the Hearing Tribunal to consider the mechanics of K.D. touching H.C. as alleged, even at a slow pace. The Hearing Tribunal does not view H.C.'s evidence implausible in this sense.

The Hearing Tribunal rejects K.D.'s assertion that it would be the practice not to take a person to the toilet following the administration of Graval as described. The Hearing Tribunal notes that a person would not be knocked out as quickly as K.D. suggests. Further, the Hearing Tribunal rejects the notion that it would be the practice to allow a person to use a diaper as an alternative to taking them to the washroom. A diaper would be used for other reasons such as incontinence not to replace the care of bringing someone to the bathroom.

This raises concerns with K.D.'s evidence overall. The Hearing Tribunal had difficulties with K.D.'s evidence, in areas where he offered evidence in relation to the allegations beyond mere denials, there were elements to that evidence which caused concern. In relation to asking H.B. to a hotel, he offered the implausible explanation that the invite was not for a sexual purpose but rather to offer a less expensive place to continue drinking. This explanation was offered only after his prior statement was brought to his attention. In relation to K.F.'s assertion that he treated her differently following the conversation with her mother, he responded that professional work discussions carried on. Nonetheless, this explanation was unsatisfactory given K.F.'s evidence that he ignored her and the relationship reverted to professional work discussions only after she confronted him about the different treatment. In regard of whether he administered the suppository to a resident, his evidence was unclear. Returning to this allegation, his assertion that a resident would not be brought to the toilet as a matter of course lacks an air of reality. Overall, K.D. was a witness which the Hearing Tribunal had difficulty finding credible or reliable.

The Hearing Tribunal find Allegation #6 was proven on a balance of probabilities and that the conduct was unprofessional conduct as defined in the HPA. The same provisions of the HPA, the Code of Ethics and the Standards of Practice are engaged as with all of the allegations in this matter. In addition to the reasons previously given in relation to Allegations 3 through 5, the Hearing Tribunal notes this conduct occurred in such a way that it would have had a significant negative impact to the patient. K.D.'s touching of H.C. occurred while she was in

the course of providing care, it is obvious this diminishes the integrity of the LPN profession and that a member of the public aware of this conduct would have significant concerns.

DATED THE 13TH DAY OF APRIL 2021 IN THE CITY OF EDMONTON, ALBERTA.

THE COLLEGE OF LICENSED PRACTICAL NURSES OF ALBERTA



James Lees

Chair, Hearing Tribunal