Human Rights Digest

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CMHA Discriminates Against Employee with Alcohol Problem

DISABILITY — employment terminated on the basis of alcoholism — definition of alcoholism — proof of disability — perceived disability — DISCRIMINATION — theft as reasonable cause for discrimination — REASONABLE ACCOMMODATION — duty to accommodate short of undue hardship — DAMAGES — injury to dignity and self-respect — wages — REMEDIES — monitoring of employment practices

A Manitoba Board of Adjudication ruled that the Canadian Mental Health Association ("CMHA") discriminated against C.R. on the basis of a perceived disability (alcoholism).

C.R. started working for the CMHA in October 2005 as a part-time Community Educator and Fundraising Coordinator. She disclosed at the time she was hired that she suffered from depression and was undergoing radiation treatment for cancer. The respondent became aware that C.R. was also engaging in bouts of excessive or binge drinking.

In 2006, she began renting an apartment from the respondent and also took on duties of Housing Coordinator and of part-time Caretaker for the building that she was living in. She was considered a good worker, never had a performance review and never received any negative comments on her work.

In the summer of 2008, C.R. discussed the possibility of attending the CMHA National Conference to be held in August in Halifax. She was excited to go because she had never travelled to the East Coast. At this time, C.R. was very stressed. Her two daughters had recently died. She was also working 50 hours a week and was on call 24 hours a day. The basement of the apartment that she was living in had flooded in February and the floor had to be replaced. The existing floor was being jack-hammered out, and because the space was not properly vented, the fire alarms were continually going off.

The day before she was to fly to the conference C.R. called in sick. Her employer became concerned that she was drinking, cancelled her flights, told her not to go to the conference, then rebooked her flights for the following day, but required her to produce a doctor's note stating that she was fit to attend the conference. Her supervisor, on the second attempt, once more ordered her not to go to the conference because the doctor's note did not satisfy him.

The complainant was perceived to be an alcoholic, and she was treated adversely and ultimately terminated because of it.

C.R. did not go to the conference and was off work, first on sick leave and then on vacation from August 21 to September 1, 2008. When she returned to work she was asked about the "float" of $500, which she had been given to pay for her travel expenses to the conference. She admitted that she had forgotten about it, and said that she did not have the money with her at the time. She promised to repay it, and in fact did repay it, in full, on the same afternoon. However, C.R.'s employment was terminated on the grounds that she had misappropriated funds and had been insubordinate by not producing the doctor's note as required.

The Tribunal found that the evidence did not show that there was any misappropriation of funds. Employees were often given "floats" for various reasons, which they subsequently repaid. In addition, the employer's requirement that she produce a doctor's note with specific content was not reasonable in the circumstances. She was scheduled to leave for the conference the following morning and did not receive the request for a doctor's note until after 8 p.m. the preceding night.

The Board of Adjudication concluded that C.R. was perceived to have a disability, and that she was treated adversely and ultimately terminated because of it.

The Board awarded C.R. compensation for four week's pay in the amount of $1,894.20 and $4,000 as compensation for injury to her dignity.

C.R. v. Canadian Mental Health Assn. (Jan. 7, 2013), CHRR Doc. 13-3001, 2013 MHRBAD 1 (Harrison)

Thrifty Discriminates Against Pharmacist

DISABILITY — employment terminated on the basis of depression — perceived disability — POLITICAL BELIEF — employment terminated — definition of political belief — EVIDENCE — credibility — DAMAGES — injury to dignity and self-respect — wages

The B.C. Human Rights Tribunal ruled that Ahmad Wali was discriminated against by Thrifty Foods because he became disabled and because of a political position he took regarding the regulation of pharmacy technicians.

Mr. Wali is a trained pharmacist. He accepted a position with Thrifty to work in its 25-store grocery chain in August 2008 and worked at different times in Coquitlam, Morgan's Crossing and Port Moody. His supervisor was the Pharmacy Director, Ms. B., who was responsible for the overall operation of the Thrifty pharmacies.

Mr. Wali liked his job and did not receive any negative feedback. His performance evaluation was positive, and he received two letters of recognition congratulating him for positive feedback from customers.

In January 2010, Mr. Wali was in a car accident. It resulted in injuries to his back which required medication. He was in pain, and advised Ms. B. of his injuries and his pain. He was told that he was required to assist with such things as stocking because a new store was opening.

Mr. Wali regularly worked 40 hours per week. On May 17, 2010, he made a written request for a reduction in work hours from 40 to 32. He testified that he provided a doctor's note to support his request. He also scheduled himself for 32 hours and 8 hours vacation, subject to Ms. B.'s approval. He received an email several days later from Ms. B. indicating that his request was not approved.

Mr. Wali took vacation in July 2010. He testified that at this time, his back pain was severe, he was having difficulty sleeping and working, and could not see his doctor on a regular basis because of his working hours. The pain did not begin to abate until a year later. He was also diagnosed with depression in July 2010.

At the end of his vacation he went on medical leave and was approved for short-term disability benefits based on what he described as severe depression.

> *To terminate an employee for expressing his view on the regulation of his own profession would be contrary to both the public interest and the purposes of the Code.*

Also in this period in 2010, an issue arose regarding the regulation of pharmacists by the provincial College of Pharmacists. The provincial government amended the Pharmacists Regulation to include pharmacy technicians as of January 1, 2011. The effect of this amendment was to allow pharmacy technicians to provide certain services without direct supervision from a pharmacist.

Mr. Wali, who was a member of the College of Pharmacists, attended and spoke at a meeting of pharmacists held to discuss the proposed change. Mr. Wali expressed the view that allowing the technicians to provide services without supervision by a pharmacist would put the public at risk. Mr. Wali did not identify himself as a Thrifty employee; he spoke as a community pharmacist on his own behalf.

Ms. B. was also present at the meeting. Mr. Wali's views were not those of Thrifty. Thrifty supported the change on the ground that it would be less expensive and would help alleviate the problem of a shortage of pharmacy managers. Thrifty was concerned that Mr. Wali's representation of himself as a community pharmacist would associate him with Thrifty, even though many other stores also operate community pharmacies.

Mr. Wali was on an approved medical leave when his employment was terminated in September 2010. He received a letter from Thrifty terminating him "without cause", for "business reasons", and offering him two weeks' pay in lieu of notice, with an additional sum if he signed a release. He declined to do so.

The Tribunal concluded that Mr. Wali's mental disability was one of Thrifty's "business reasons" for his termination. Mr. Wali's termination occurred after he went off on an extended leave, and after having sought a reduced work week for health-related reasons. Thrifty had a problem scheduling pharmacy managers, and had a

What Was Said…

"In my view, the free speech of College [of Pharmacists] members on matters affecting the regulation of their profession falls within the scope of political belief, given the legislative framework under which the College operates and the express regulatory mandate given the College by the government regarding pharmacy technicians. This was a new legislated initiative, that involved the public welfare, and that was being debated within the pharmacy community."

Wali v. Jace Holdings Ltd. (2012), CHRR Doc. 12-0389, 2012 BCHRT 389 at § 117 (Marion)

policy against reduced work weeks for them. While Mr. Wali's disability may not have been the sole reason for his termination, the Tribunal found that it was a factor. Thrifty advanced no *bona fide* occupational requirement as a defence.

The Tribunal also concluded that Mr. Wali was discriminated against on the grounds of political belief. Mr. Wali argued that the mandate of the College of Pharmacists is grounded in the public interest and that the College cannot perform its functions properly without input from its members. If an employer can terminate an employee for expressing his view on the regulation of his profession, that would have a chilling effect and be contrary to both the public interest and the purposes of the *Code*.

The Tribunal agreed that the free speech of College members on matters affecting the regulation of their profession falls within the scope of the ground "political belief". This was a new regulation that involved the public welfare; it was being debated within the community of pharmacists.

Thrifty admitted that Mr. Wali's position before the College was a factor in his termination. Since the Tribunal found that Mr. Wali's position falls within the scope of "political belief" under the *Code,* it ruled that Mr. Wali's complaint on this ground was also justified.

The Tribunal awarded Mr. Wali $10,000 as compensation for injury to dignity. Thrifty was also ordered to compensate Mr. Wali for four weeks pay and vacation time.

Wali v. Jace Holdings Ltd. (Nov. 8, 2012), CHRR Doc. 12-0389, 2012 BCHRT 389 (Marion)

Landlord Refuses to Build Ramp

AGE DISCRIMINATION — discriminatory treatment of the aged — DISABILITY — access to housing accommodation for person who is mobility impaired — HOUSING ACCOMMODATION — tenancy condition discriminates on the basis of age and disability — DISCRIMINATION — *Grismer* test — REASONABLE ACCOMMODATION — duty to accommodate short of undue hardship — REMEDIES — access to building — DAMAGES — damages assessed for injury to dignity and self-respect — COSTS — respondent's failure to comply with tribunal order

The B.C. Human Rights Tribunal ruled that Satorotas Enterprises Ltd. ("Satorotas"), Alan Oakley, and Patricia Vermette discriminated against Joyce Stewart on the basis of disability.

Ms. Stewart is 68 years of age. She has severe osteoporosis and a clubfoot. She has lived on the main floor of an apartment building in Campbell River since 1999. At the entrance to the apartment building are five concrete steps. Since 1999 Ms. Stewart's mobility has decreased, and as of June 2010, she required a walker for mobility. A registered physiotherapist who treated her for several years described Ms. Stewart as "a small, frail lady weighing 115 lbs" who uses a walking frame due to her poor balance and lack of strength. Stairs are a major obstacle for Ms. Stewart because she cannot lift her body weight vertically to get from one step to the next.

Over time, Ms. Stewart has increasingly restricted her outings because going up and down the five stairs is so difficult. She leaves the apartment once a month to go to the hospital for testing, her doctor's office, grocery stores, the bank and the library. She can go to these places using her walker once she gets down the stairs. If a ramp were installed she would be able to get out more often.

In August 2010, she asked the respondents to build a ramp. She had done some research and learned that Canada Mortgage and Housing Corporation ("CMHC") might provide some financial assistance. She told Mr. Oakley about this, but he told her that CMHC asks too many nosey questions and he could not afford to install a ramp. He also informed her that he did not have to build a ramp as the apartment was not a seniors' building or a facility for disabled persons. The respondents' position was that they did not have to build a ramp, and did not want to spend the money.

The Tribunal concluded that the respondents discriminated against Ms. Stewart. They did not establish that they could not afford to build a ramp. The ramp was necessary in order for Ms. Stewart to access her apartment with safety and dignity.

The Tribunal ordered the respondents to build an entrance ramp, to pay Ms. Stewart $15,000 as compensation for the injury to her dignity, and to pay her $500 in costs.

Stewart v. Satorotas Enterprises Ltd. (Dec. 21, 2012), CHRR Doc. 12-0442, 2012 BCHRT 442 (Tyshynski)

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Employee Terminated Because of Disability

DISABILITY — employment terminated on the basis of stress-related disorder and heart condition — definition of disability — REASONABLE ACCOMMODATION — duty to accommodate short of undue hardship — DAMAGES — damages assessed for injury to dignity and self-respect — determining quantum by considering previous awards

The Human Rights Tribunal of Ontario ruled that 1497422 Ontario Inc. discriminated against Jocelyn Hébert because of disability.

Mr. Hébert was employed from 2003 to 2010 by Mr. Bernard Dignard, the owner of the numbered company, to keep the Ontario Provincial Police station in Embrun clean and well-maintained. Mr. Hébert cleaned the station, made small repairs, cleaned police vehicles, drove them to be serviced, and supervised the work of contractors when they were required. Mr. Hébert liked his work, and Mr. Dignard was pleased with his performance.

There were stresses in Mr. Hébert's life. Starting around 2006, his marriage was under strain. He also cared for his aging mother. Family pressures caused him to miss six weeks of work in 2009. In October 2010 he had heart palpitations, and went to his doctor, who directed him to remain off work on stress leave until the end of January 2011. Mr. Hébert fully intended to return to his job.

Mr. Dignard was given a doctor's note, and he testified that he was not surprised by the request for leave, as he knew that Mr. Hébert was having personal problems. However, he was surprised by the length of time that he needed.

Mr. Dignard hired Alex Lemieux, the son of the one of the officers at the OPP Embrun station, who had been employed occasionally before, to replace Mr. Hébert. Mr. Lemieux wanted indeterminate, not time-limited, employment. Mr. Dignard informed Mr. Hébert early in December 2010 that his employment was terminated.

The Tribunal found that Mr. Dignard required a full-time replacement for Mr. Hébert for the time that he was away, but it rejected Mr. Dignard's argument that it was too much trouble to replace Mr. Hébert temporarily. It would have been only an inconvenience to hire someone other than Mr. Lemieux on a temporary basis.

The Tribunal ruled that Mr. Hébert's disability was a factor in the decision to terminate his employment. There was no concern about the quality of his work, and no reason to replace him permanently.

The Tribunal awarded Mr. Hébert $12,000 as compensation for injury to dignity.

Hébert v. 1497422 Ontario Inc. (Jan. 25, 2013), CHRR Doc. 13-0633, 2013 HRTO 133 (Aterman)

Alberta Government Discriminates Against Older Employee

AGE DISCRIMINATION — employment terminated — BURDEN OF PROOF — onus shifts to respondent — DISCRIMINATION — government reorganization as reasonable cause for discrimination — EVIDENCE — credibility

DAMAGES — injury to dignity and self-respect — wages — determining quantum by considering previous awards — duty to mitigate — REMEDIES — employment reinstatement

The Human Rights Tribunal of Alberta ruled that Alberta Employment and Immigration discriminated against Joan Cowling because of her age.

Ms. Cowling was employed by the Alberta Department of Employment and Immigration as a labour relations officer 3 ("LRO 3"). She began working in this position in 1999 when she was 59 years of age. She worked under contract for eight consecutive years.

About one year prior to the renewal of the fourth contract in April 2006, Alberta notified Ms. Cowling that her contract would not be renewed because Alberta planned to restructure the Mediation Services Branch and create a permanent position at an LRO 2 level, one level lower than Ms. Cowling's job and at a lower rate of pay. Ms. Cowling applied for the LRO 2 job, and was unsuccessful in obtaining it. She was 67 at this time.

Ms. Cowling's assessments throughout her period of employment were positive. She was considered fully competent, and received bonuses for meeting all objectives. She loved her work, and was regularly looking for opportunities to improve her performance and expand her expertise. She had specifically pursued courses to enhance her knowledge about mediation.

Alberta argued that there were two reasons why Ms. Cowling's employment was not continued. First, her supervisors believed that she was not a good "fit" for the LRO 2 position because the job required hands-on mediation skills and in their opinion Ms. Cowling did not have the skills or potential to be a mediator. Second, Alberta

argued that a government department can legitimately replace a position at will according to organizational needs and this does not indicate discrimination.

The Tribunal rejected both these arguments. Although Ms. Cowling's supervisors consistently emphasized the need for Ms. Cowling to be able to mediate, the evidence showed that actual mediation skills were not in demand in the branch, and were not required for the LRO 2 job. Further, if mediation skills were required, there was no evidence to show that Ms. Cowling could not have obtained these skills. Ms. Cowling was considered "personally unsuitable" for the position because of a question she asked during her job interview about the differences between the LRO 3 and the LRO 2 positions. The Tribunal found that this was a reasonable question and appropriate in the circumstances; it did not support a finding that Ms. Cowling was likely to be "confrontational" in mediations. The contention that Ms. Cowling was denied continued employment because she was not a good "fit" and did not have the skills of a mediator was not credible.

While the organization could legitimately engage in succession and transitional planning, that planning did not provide a credible explanation for deciding not to continue to employ Ms. Cowling. Alberta created a position with a requirement (ability to stay in the position for 5 to 10 years) which would likely eliminate any older employee from consideration.

The Tribunal concluded that Ms. Cowling was discriminated against because of her age. Alberta was ordered to reinstate Ms. Cowling to a one-year contract as an LRO 3 or a comparable position at a comparable salary level. After the one year, the Tribunal directed that Ms. Cowling's age cannot be a factor in future decisions regarding renewing her contract. Alberta was also ordered to compensate Ms. Cowling for five years lost wages, discounted at a rate of 30 percent, and to pay damages for injury to dignity in the amount of $15,000.

> *While the government could legitimately engage in succession planning, that planning could not impose job requirements that would likely eliminate any older employee from consideration.*

Cowling v. Alberta (Employment and Immigration) (No. 2) (Dec. 13, 2012), CHRR Doc. 12-3101, 2012 AHRC 12 (Heafey)

John Pontes Sexually Harasses Aboriginal Woman

ABORIGINAL PEOPLES — poisoned work environment — racial slurs and harassment — SEXUAL HARASSMENT — poisoned work environment — verbal abuse and denigration — EMPLOYMENT — obligation to provide discrimination-free workplace — EVIDENCE — similar fact evidence — credibility — DAMAGES — damages assessed for sexual harassment and wilful or reckless discrimination — determining quantum by considering previous awards — REMEDIES — display decision or order — anti-discrimination policy — COSTS — improper conduct of respondent

The Saskatchewan Human Rights Tribunal ruled that John Pontes, the owner of Northwoods Inn & Suites ("Northwoods") in Saskatoon, sexually harassed Raymonda Ahpay while she was employed by him.

Raymonda Ahpay is a woman of Aboriginal ancestry. She and her two daughters resided at Northwoods for about a month in 2008, with her rent paid by social assistance. She began working for Northwoods at the end of July. She cooked and served customers in the restaurant until October 2008, when she moved to housekeeping. She worked in housekeeping until February 2009, when she quit. All her income went to pay for her room and food for herself and her children.

Ms. Ahpay testified that Mr. Pontes made a number of sexually harassing comments to her. He told her that he had a 12-inch penis and could break a table with it. He told her that he would "spank her bum bare assed". He told her that her 13-year-old daughter "is a child in a woman's body". He told Ms. Ahpay and an Aboriginal friend that "Native women are good for only one thing — being on their backs". Ms. Ahpay quit her job because of John Pontes' conduct.

Other employees testified that they and other Aboriginal women were treated similarly by Mr. Pontes. One witness testified that when Mr. Pontes hired her he asked if she was married or had a boyfriend. Later he invited her to go to his room for "drinks and a little fun". She heard Mr. Pontes call customers "dirty Indians".

Brenda Boulet, who was the shop steward at Northwoods, and an employee for 23 years, testified that Mr. Pontes swore at employees, verbally abused them and sexually harassed them and that there had been a number of grievances against Mr. Pontes.

John Pontes testified that he took Ms. Ahpay on as an employee although she was "crazy" due to drink and drugs. He denied making any harassing comments. He called Ms. Boulet a liar and instigator who had criminal

intent, and said the other witnesses were also liars, crazy and unstable. He attacked the Commission, and said it should be shut down. He called Commission's counsel "a bitch"; he interrupted the hearing, banged the table with his fist, and was generally hostile and disruptive.

The Tribunal found Ms. Ahpay a credible witness. It accepted her testimony and that of her witnesses. The Tribunal concluded that there was a pattern of conduct. Northwoods was a workplace where women were targets and subjected to ongoing sexual harassment and discrimination.

The Tribunal also noted that Mr. Pontes was the respondent in two previous human rights complaints, one about sexual harassment and one about discrimination based on Aboriginal ancestry. He was also the respondent in four union grievances about discrimination and harassment because of union activity. Mr. Pontes was found liable in every case.

Northwoods was a workplace where women were targets and subjected to ongoing sexual harassment and discrimination.

The Tribunal awarded Ms. Ahpay $5,000 for the injury to her dignity caused by the sexual harassment. It also awarded her $2,500 in costs because of Mr. Pontes' threatening, intimidating and insulting treatment of both witnesses and counsel.

Ahpay v. Northwoods Inn & Suites (Nov. 6, 2012), CHRR Doc. 12-3087 (S.H.R.T.; Senko)

Property Manager Fired Because of Disability

DISABILITY — employment terminated on the basis of stress-related disorder — perceived disability — BURDEN OF PROOF — elements of a *prima facie* case — DAMAGES — damages assessed for injury to dignity and self-respect — wages

The Human Rights Tribunal of Alberta found that Kingsway Asset Management Ltd. ("Kingsway") discriminated against Dianna Morris on the basis of disability.

Ms. Morris accepted a position with Kingsway in April 2006 as a property manager. She was responsible for managing finances and maintenance for properties owned by Kingsway, as well as for maintaining a relationship with relevant boards of directors of condominiums.

She took on the management of Meadowlark Village in Edmonton, which was a very challenging project because there had been a fire and resulting water damage. There were many management and maintenance issues at Meadowlark, and she did not receive additional support from Kingsway. She worked long hours, and when she complained to Mr. Elsafadi, who was the president of Kingsway and her supervisor, she testified that he yelled at her, and intimidated her.

Ms. Morris experienced a great deal of stress during this time, which manifested itself in physical symptoms, including vomiting blood. She sought medical help and on December 3, 2007, Dr. Govender wrote a note indicating that she was suffering physically and mentally from stress and required a leave of absence. Kingsway was informed of her illness and short-term disability benefits were arranged. She was away from work from December 3, 2007, to January 7, 2008.

Upon her return she was offered the position of a property manager assistant at a lower salary and with less responsibility. She accepted that position because she felt she had no choice, in part because she was not yet well enough to set out to look for another job, and in part because she felt bullied by Mr. Elsafadi.

On February 21, 2008, Ms. Morris asked to go home early because there were strong odours emanating from renovations taking place in the office that were making her feel sick. Her request was denied. The same afternoon, she was dismissed.

The Human Rights Tribunal concluded that Ms. Morris's disability was a factor in her demotion and in her dismissal. Kingsway did not attend the hearing, and the Tribunal accepted the uncontroverted evidence of Ms. Morris. She was demoted within one week of returning from a disability leave that was necessary because of work-related stress, and within five weeks she was terminated after making a request to leave the workplace because of odour and breathing issues. The respondents provided no justification for the decisions to demote her and terminate her employment.

The Tribunal awarded Ms. Morris four months' salary at her original level of pay, as well as $8,000 as compensation for injury to dignity.

Morris v. Kingsway Asset Management Ltd. (Oct. 25, 2012), CHRR Doc. 12-3085, 2012 AHRC 9 (Scragg)

Briefly Noted

Alberta

Malko-Monterrosa v. S.M.W.I.A., Local 8 (2012), CHRR Doc. 12-3102, 2012 AHRC 13 (McFetridge)

PREGNANCY — BENEFITS — TRADE UNIONS / Decision on a complaint of discrimination in services and membership in a trade union on the basis of gender and pregnancy. The Tribunal found that the complainant's indemnity benefits were denied by the insurance company and plan administrators because she failed to provide sufficient medical evidence, not for discriminatory reasons. Allegations against the union were dismissed because there was no evidence to suggest that the business manager withheld services or provided the complainant with less help than would have been available to a male member or a member who was not pregnant. The respondents' request for costs was denied. Dismissed: Dec. 13, 2012.

Wright v. College and Association of Registered Nurses of Alberta (2012), CHRR Doc. 12-3097, 2012 ABCA 267 (Berger, Ritter and Slatter JJ.A.)

APPEALS AND JUDICIAL REVIEW — ADMINISTRATIVE TRIBUNALS — HUMAN RIGHTS — DISCRIMINATION — DISABILITY / Appeal of a professional conduct tribunal decision which found professional misconduct and imposed sanctions on two nurses for stealing narcotics and for falsifying related records. The majority of the Court found that there was no reviewable error by the respondent in its interpretation of human rights law and it was reasonable to have found that there was no *prima facie* discrimination in the respondent's decision to proceed with the disciplinary charges. Dismissed: Sept. 18, 2012.

British Columbia

MacDonald v. Najafi (No. 2) (2013), CHRR Doc. 13-0013, 2013 BCHRT 13 (Geiger-Adams)

SEXUAL HARASSMENT / Decision on a complaint of discrimination in employment on the basis of sex and marital status. The Tribunal found that the treatment to which the complainant was subjected and the advice she received from the police, made it reasonable for her to decide that it was no longer tenable to remain in her employment. The Tribunal determined that the respondents discriminated against the complainant because of her sex. The respondents were ordered to pay the complainant $5,291.50 for wage loss, $306.79 for expenses and $4,000 for injury to dignity and self-respect. Allowed: Jan. 17, 2013.

Ontario

Addai v. Toronto (City) (No. 3) (2012), CHRR Doc. 12-2752, 2012 HRTO 2252 (Reaume)

RACE, COLOUR AND PLACE OF ORIGIN — PUBLIC SERVICES AND FACILITIES / Decision on a complaint of discrimination in services. The Tribunal found that the complainant did not show that the respondent's taxi licensing regime was discriminatory on the basis of race, colour and ethnic or place of origin. Dismissed: Dec. 3, 2012.

Campbell v. Revera Retirement LP (No. 2) (2012), CHRR Doc. 12-2910, 2012 HRTO 2410 (Sengupta)

DISABILITY — REASONABLE ACCOMMODATION / Decision on an application alleging discrimination in employment on the basis of disability. The Tribunal found that there was no position within the respondent's workplace where the applicant could perform essential duties even with accommodation. However, the respondent made the decision to terminate the applicant's employment and, given the connection between the reason for termination and the applicant's disability, failed to meet its procedural obligation under the duty of accommodation. The respondent was ordered to pay $5,000 for injury to dignity, feelings and self-respect. Allowed: Dec. 28, 2012.

Davis v. Nordock Inc. (2012), CHRR Doc. 12-2718, 2012 HRTO 2218 (Eyolfson)

DISABILITY / Decision on an application alleging discrimination in employment on the basis of disability. The Tribunal found that it is more likely than not that all of the applicant's absences due to hypothyroidism were a factor in the decision to terminate his employment. The Tribunal awarded $12,000 for injury to dignity, feelings and self-respect and ordered the respondents to (1) develop and implement a workplace human rights policy that includes the duty to accommodate, and (2) provide a mandatory training program about human rights and the duty to accommodate for all supervisors management and staff who perform supervisory and/or human resources functions. Allowed: Nov. 27, 2012.

Gamache v. York University (2012), CHRR Doc. 12-2828, 2012 HRTO 2328 (Hart)

DISABILITY — EDUCATION — REASONABLE ACCOMMODATION — EVIDENCE / Decision on an application alleging discrimination in services of disability. The Tribunal found that the delay in providing the applicant with textual materials in accessible format amounts to discrimination on the basis of visual disability. However, the Tribunal concluded that the applicant was not denied necessary accommodations during her practicums and found that her visual disability was not a factor in the termination of the placements or in the assessment of her course work. The parties were directed to file submissions on remedy. Allowed in part: Dec. 12, 2012.

View Point…

Moore: The Bad News

In the November / December 2012 View Point on the Supreme Court of Canada's decision in *Moore v. British Columbia* (CHRR Doc. 12-3089), we wrote about the good news. The Supreme Court of Canada swept away a narrow definition of "service" and faulty comparator group analysis, both of which were impeding progress towards inclusion for people with disabilities. In this case, Jeffrey Moore, a child with severe dyslexia who was denied adequate assistance in school to learn to read, was told by lower courts that the service in question was special education, not general education, and that consequently he could only compare himself to other children with special needs. Since he did not receive worse treatment than other children with dyslexia, he could not claim discrimination. Justice Rosalie Abella, for a unanimous court, repudiated this closed-box thinking. It cannot be the case that as long as accommodation for all disabled students is inadequate, human rights law can do nothing. On the contrary, she wrote, adequate special education is the means by which children with disabilities gain access to the education that is the right of every child.

But here is the bad news. It has two parts. First, the Supreme Court of Canada did not find the province liable for the discrimination. Instead, it placed responsibility for the failure to adequately accommodate Jeffrey solely on the shoulders of the school district, finding that, in a time of budgetary restraint, the district could have cut other programs rather than the special assistance that Jeffrey and other children with severe dyslexia needed. The Tribunal had ruled that the province was also liable for the discrimination because it had: imposed a funding cap on monies for special education by restricting the number of students that a district could identify as needing special assistance; under-funded the District; failed to ensure that necessary services, including early intervention, were mandatory; and failed to monitor the activities of the districts. The Tribunal ordered the Province to allocate funding on the basis of actual incidence levels of learning disabilities and to establish mechanisms to ensure that accommodations for students with severe learning disabilities were appropriate and adequate.

But the Supreme Court ruled that this remedy could not be sustained. With respect to the funding cap on monies for children with learning disabilities, Abella wrote: "It is entirely legitimate for the Province to choose a block funding mechanism in order to ensure that districts do not have an incentive to over-report Severe Learning Disabilities students, so long as it …complies with its human rights obligations". The Court found that the province was not liable in any way for the discrimination.

For the future inclusion of children with severe dyslexia in school systems in British Columbia, this approach is not promising. The responsibility for inclusion has been assigned entirely to school districts, while the senior level of government, which has the statutory authority for education and controls the funding for the districts, is let off the hook.

The second part of the bad news, which is integrally connected to the first, is Abella's distinction between individual and systemic discrimination. She writes that it is not helpful to approach discrimination in a binary way, dividing individual discrimination from systemic discrimination: "A practice is discriminatory whether it has an unjustifiably adverse impact on a single individual or systemically on several".

However, Abella proceeds to do exactly what she warns against. She finds that this claim was individual, made on behalf of Jeffrey, and the evidence was principally about him. The Tribunal should not have considered systemic evidence regarding provincial funding mechanisms or the entire provincial administration of special education. Apparently, it should have conducted a much narrower inquiry, and left the systemic funding and policy issues alone. The effect of treating this case as an individual one, and the systemic remedies against the province as not legitimate, is to require more parents to take on the long and costly struggle that Jeffrey's parents did.

Although this decision will be known for its resounding endorsement of equal access to education for children with learning disabilities, it is a timid one. Because of its approach to the remedies the Court's decision does not guarantee equal access.

Shelagh Day, President and Senior Editor,
Canadian Human Rights Reporter

Letter to the Editor

By virtue of the recent decision by the Supreme Court of Canada in *Moore,* the new equation for special needs students in order to achieve equality of opportunity now includes the right to meaningful access and not to be dealt with disproportionately. In light of the foregoing as well as the Court's reaffirmation of the right to equality and equity, one would have thought the Canadian Constitution Foundation, of all groups, would totally support the Moore decision. Instead [as noted in the November / December 2012 View Point, *Moore: The Good News*] , its litigation director, Ms. Selick, would deny vulnerable students these fundamental rights and dump them in the garbage can of society, because the provision of reasonable accommodation they are entitled to by law would, according to her, be "financially ruinous".

There is no justification either in law or in fact for the alarmist views expressed by the Foundation's representative that there will be a rush by all parents for special services. The Supreme Court of Canada made it clear that it's the one out of ten students identified as special needs who is by law entitled to reasonable accommodation. It would be morally, ethically and legally wrong not to provide the relatively few special needs students the opportunity to achieve what is readily available to all other students. Governments and school systems have to do what is right for all students, not just for the majority. It may be tough to achieve, but "we can't afford it" is no longer an excuse.

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Mr Henteleff was counsel for the intervener, Learning Disabilities Association of Canada.

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