

**NOVA SCOTIA HUMAN RIGHTS COMMISSION**

IN THE MATTER OF:

Complaint under the Human Rights Act  
R.S.N.S., 1989, C. 214, as amended by 1991 C.12

**The Nova Scotia Human Rights Commission**

and

**Brian Bobbitt**

Complainant

- and -

**The Royal Canadian Legion,  
Armstrong Memorial, Branch 19  
and/or Cecil MacLeod and/or Eric MacLean**

Respondents

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ORAL DECISION

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Chair: Mr. J. Royden Trainor

Held on: May 21, 22, and 23, 2003

Held at: North Sydney, Nova Scotia

Counsel: Ms. Jennifer Ross, representing the Commission  
Ms. Meaghan Beaton, Article Clerk, assisting

Mr. Cecil MacLeod, representing himself  
Mr. Eric MacLean, representing himself

Court Reporter:

Judith  
M. Robson, OCR, RPR

**INTRODUCTION:**

This is a matter arising out of a complaint filed by Mr. Brian Bobbitt under the *Nova Scotia Human Rights Act* against the Royal Canadian Legion, Armstrong Memorial Branch 19, and/or Cyril MacLeod, and/or Eric MacLean. Mr. Bobbitt believes that his injury constitutes a disability under the *Act* and that his disability was a factor in the decision to terminate his employment at the Legion, contrary to section 5(1)(d)(o) of the *Act*.

The Board has decided to provide an oral decision on this matter in part because of the weight of the evidence and the conclusions the Board has drawn. The Board apologizes that, from time to time, it will quote case law at some length but this is an important element of the decision.

After much review both of the case law and evidence presented at this hearing, I have chosen to provide an immediate and oral decision for two reasons, first the evidence is compelling and convincing and, second; it is important to come to resolution in these matters promptly as it provides the earliest opportunity for all the parties to move forward. An oral decision does not end up as neat or as tight a decision but in this case, it is still the better course.

**BACKGROUND:**

On March 4, 2000, Mr. Bobbitt injured his knee while at work, and was off work until June 2000. Mr. Bobbitt underwent surgery in March 2000 and again in May 2000. During the time that he was off work, Mr. Bobbitt was in receipt of Workers' Compensation benefits.

Mr. Bobbitt returned to work in June 2000, but continued to experience pain and difficulty arising from the injury. Mr. Bobbitt worked until approximately the middle of October 2000, at which point he was again placed off work and in receipt of Workers' Compensation benefits. In November 2000 Mr. Bobbitt had a third surgery on his knee. Following Mr. Bobbitt's medical leave in October 2000, management at the Legion hired someone to replace Mr. Bobbitt during the time he was off work.

In January 2001, the respondent Mr. MacLean, then the President of the Legion, contacted the Workers' Compensation case manager requesting an update on Mr. Bobbitt's medical condition. The case manager provided Mr. MacLean with the requested information, and indicated that a further update would follow.

On February 8, Mr. MacLeod, the new President of the Legion, wrote to Mr. Bobbitt (who was still on medical leave) and informed him that his employment with the Legion would be terminated effective March 7, 2001.

Mr. Bobbitt alleges that his injury constitutes a disability under the *Act* and that his disability was a factor in the decision to terminate his employment at the Legion, contrary to section 5(1)(d)(o) of the *Act*.

The Board heard and accepts the evidence that during that time Mr. Bobbitt received Workers' Compensation, although there may have been a week in between the time where Mr. Bobbitt was not working or being paid by Branch 19 of the Legion and not yet being paid by Workers' Compensation.

On or about February 08th, 2001, Mr. MacLeod sent a letter to Mr. Bobbitt, who was still on Workers' Compensation leave at the time, advising that his employment had been terminated, the letter gave no reason given for the dismissal.

These facts are in not in dispute.

Mr. Bobbitt subsequently filed a complaint under section 5(1)(d)(o) of the *Nova Scotia Human Rights Act* relating to disability.

**ASSESSING THE EVIDENCE:**

A Board of Inquiry appointed pursuant the *Human Rights Act* is not a civil proceeding subject to the Nova Scotia Civil Procedure Rules and the traditional rules of evidence, Section 34(7) of the *Human Rights Act* Reads:

“A Board of Inquiry has jurisdiction and authority to determine any question of fact or law or both required to be decided in reaching a decision as to whether or not any person has contravened this *Act* or for the making of any order pursuant to such a decision.”

Regulations made under the *Human Rights Act* with respect to evidence the Board may hear are set out at O.I.C. 91-1222 (October 15, 1991). N.S. Reg. 221/91 reads:

“In relation to a hearing before a Board of Inquiry, a Board of Inquiry may receive and accept such evidence and other information, whether on oath or affidavit or otherwise, as the Board of Inquiry sees fit, whether or not such evidence or information is or would be admissible in a court of law; notwithstanding however, a Board of Inquiry may not receive or accept as evidence anything that would be inadmissible in a court by reason of any privilege under the law of evidence.”

There is often very little direct evidence of discrimination, and a complainant may have to rely on circumstantial evidence in order to rebut a respondent's justification or explanation of discriminatory conduct in some cases.

Circumstantial evidence regarding discrimination has been accepted by a Nova Scotia Board of Inquiry in *Fortune v. Annapolis District School Board* (1992), 20 C.H.R.R. D/100 (N.S. Bd.Inq.). In *Fortune*, the complainant was a female school bus driver whose application to work for the respondent school board was passed over in favor of male applicants who had no experience and who were less qualified. There was no direct evidence of discrimination in this case. The Board of Inquiry said the following at paragraph 25 regarding the use of circumstantial evidence in such cases:

As is stated in *Beatrice Vizkelety, Proving Discrimination in Canada* (Toronto: Carswell, 1987) at p. 142: The appropriate test in matters involving circumstantial evidence...may therefore be formulated in this manner: an inference of discrimination may be drawn where the evidence offered in support of it renders such an inference more

probable than the other possible inferences or hypotheses.

Vizkelety, *Proving Discrimination in Canada* is helpful on this point. She says at pp. 142 to 143:

Where there is an undertaking to proceed by way of circumstantial evidence, to prove a fact at issue piece by piece, bit by bit, the probative value of each item, when taken singly, will not always be

apparent...But in many instances it may well be impossible to prove the discrimination otherwise. At the very least, a decision on relevance should take into account the fact that the evidence being tendered is but part of an aggregate from which the fact finder will ultimately be asked to infer the existence of a fact in issue.

Even if the Board of Inquiry finds that there is no direct evidence of discrimination against Mr. Bobbitt, it can still infer discrimination from circumstantial evidence.

The Board is bound by the rules of fair play, procedural fairness and natural justice but we do not follow the strict rules of Civil Procedure such as we would experience in the Supreme Court for example. In the matter before the Board where the Respondents were not represented by legal counsel, the Board is mindful of the necessity of applying a generous view in the application and interpretation of the hearing procedures and the questioning of witnesses. This may have made the hearing somewhat longer than it might have otherwise been, but the Board is of the view this was the better course.

The Board then has an obligation and a duty to assess that evidence, give it the appropriate weight that it ought to be given, and come to conclusions about what that evidence supports in the context of the facts, and the law.

In considering the testimony and the validity of the testimony or the veracity of the testimony, the Board looks at not just what the individual said, although that is important, but how it was said, the witnesses' demeanor and the context of what everyone said and all the other evidence. The Board looks to the context of how it relates to documentary evidence, where it gels and where it does not gel to tell the whole picture. In previous Board of Inquiry decisions I referenced a number of cases as a template to be used in assessing evidence and testimony, and repeat this reference to indicate the Board's guide to assessing evidence and the credibility of witnesses.

With respect to the credibility of witnesses, the Board finds a number of cases helpful to guide its thinking. In assessing the evidence given before the Board, the Board was aided by *McNulty v. GNF Holdings Ltd.* (1992), 16 C.H.R.R. D/418 (B.C.C.H.R.) and *Farnya v. Chrony*, [1952] 2 D.L.R. 354 (B.C.C.A.) at 356-58:

“The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanor of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a Court satisfactorily appraise the testimony of

quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skillful exaggeration with partial suppression of the truth...”

Inquiry Chair David Bright aptly articulates these criteria in his Nova Scotia Human Rights Board of Inquiry decision, **McLellan v. Mentor Investments Ltd.** (1991), 15 C.H.R.R. D/134, para.

[20](N.S. Bd. Inq.):

“There is no machine that an adjudicator can use to discover if a witness is being truthful or less than candid. Therefore, any adjudicator, including myself, is left with our own personal background, and reaction to evidence given. It is a less than perfect system, but one that usually is successful as a direct consequence of the adversarial process.”

Part of the assessment of evidence is the credibility of individual witnesses and how all the testimony does or does not hold together. The Board has benefited from documentary evidence including official reports from the Workers’ Compensation Board to aid it in coming to its decision. The Board’s decision today is based on the evidence and testimony of the Respondents themselves.

### **RESPONDENTS’ EVIDENCE:**

With respect to the credibility of witnesses and the credibility of the evidence given, the

Respondents' testimony before the inquiry over the last number of days and, indeed, even in the argument presented today was consistently inconsistent, particularly as between Mr. MacLean and Mr. MacLeod, and this is troubling. This is an important issue involving the dismissal of an individual, which is by any definition a serious matter. The reasons for that dismissal seem to have been a matter of some argument and dispute as between the Respondents with little or contradictory documentary evidence to support, what appeared to the Board to be shifting reasons for the dismissal of Mr. Bobbitt.

Mr. MacLean told the Board, and in his interview of September 17, 2001, with Mr. Gordon Hayes of the Human Rights Commission, entered into evidence, that Mr. Bobbitt could not do the work and that there was a letter from the Workers' Compensation Board to support this position. In his testimony before the Board, he provided a new never before heard interpretation of where he indicated he actually came by the information from Mr. Bobbitt. Mr. MacLean's contention that there was a letter from the Workers' Compensation Board indicating Mr. Bobbitt could not do the work required but there was in fact no such letter. The Board does not accept either version as consistent or an accurate reflection of the facts. In January 2001 it is clear that at least one of the Respondents was convinced the dismissal of Mr. Bobbitt, was related to his injury, which is another way of saying relating his disability.

Mr. MacLean and Mr. MacLeod testimony suffered from revisited history, poor memory, and perhaps misdirection in effort to fill out the story. Whether it was intentional misdirection, poor memory or simply reconstructing history individually and together, the Respondents', MacLeod and MacLean, testimony was more troubling than helpful.

Mr. MacLean's evidence was inconsistent, within his own testimony, within his documentation as represented by Mr. Hayes's report, and strikingly inconsistent with the testimony of Mr. MacLeod.

The Board is struck by the apparent certainty by which Mr. MacLean indicated that Mr. Bobbitt told him he could not do the job before he was dismissed. This was new evidence not reported in the Hayes' interview or mentioned in Mr. Bobbitt's testimony or any other person that appeared before this Board. Mr. MacLeod's contention is that this type of considerations was not part of the equation when the executive made the decision. There are two dramatically opposing views from the two key decision-makers, MacLeod and MacLean. The Board notes the tendency throughout this hearing when one respondent was on the stand and says something; another tries to correct the testimony by way of "corrective heckling". This only adds to the Board's conclusion that Respondents', MacLeod and MacLean, testimony does not hold up.

The testimony between both Mr. MacLeod and Mr. MacLean is striking by its contrast. A

more serious concern is evidence created evidence to fill out gaps to explain what they thought they were doing at the time. Their evidence on this point was not helpful to their case and I have a difficulty concluding there is any credible evidence from Mr. MacLeod or any documentary evidence to support that Mr. Bobbitt was dismissed because of performance issues. There is no credible documentary evidence to sustain this position and the evidence of every witness was that when asked to correct a performance issue, Mr. Bobbitt always did. Phone calls made to the Workers' Compensation Board inquiring about the status of Mr. Bobbitt's disability or of his injury either the day of or the day before or just before the decision, a curious thing to do if the disability issue was not an issue.

The Board does not hold the Respondents to the standard of a lawyer's argument with respect to parsing their words carefully but I found that type of inconsistency through all of the testimony. In questioning Mrs. Bobbitt, Mr. MacLeod suggested that no one would think there was any reason other than Mr. Bobbitt's disability as the reason for his dismissal. A curious question suggestion from witness the claims disability had nothing to do with Mr. Bobbitt's dismissal. .

If you recall the testimony, there was constant questioning back and forth, particularly in an effort to try to explain why there was no documentary evidence regarding the dismissal, no minutes, which talked about the dismissal of Mr. Bobbitt. It was only after that questioning that this other meeting emerged in evidence. Mr. MacLeod's demeanor changed and he was uncomfortable with this evidence, so was the Board.

The Board found it unusual that Mr. MacLean, Mr. Winstanley, nor Ms. Maloney have any recollection of a special meeting of the executive where the decision to dismiss Mr. Bobbitt was made. I am prepared to accept that it may well have been a couple of the executive who got together some time and decided that they were going to let Mr. Bobbitt go, maybe that happened but it is not helpful to the Respondents if it did. This is a very suspicious additional piece of evidence and proffered only when Mr. MacLeod ran into difficulty in explaining away other problems with his testimony and the absence of executive minutes about the reasons for Mr. Bobbitt's dismissal.

Mr. MacLeod became more certain as he spoke of this special meeting only he can recall, had said, "Well, the entire executive would be there," Yet, Mr. MacLean in did not refer to that at all, nor did Mr. MacLeod ask him about it. Mr. MacLean contended, "I was not around when the decision was made." This was troubling testimony.

The Board measures the testimony of Mr. MacLeod and Mr. MacLean against the weight of evidence showing this issue was in the minds of the Respondents who contacted the Workers' Compensation Board with respect to the Legion, and addressed calls to the Department of Labour about how to dismiss Mr. Bobbitt. Testimony indicated that significant matters are always reported in the minutes. The absence of any minutes to support either that there was a serious performance problem with Mr. Bobbitt or how and if the issue of his dismissal was addressed by the executive is suspicious, and the demeanor of the Mr. MacLean and Mr. MacLeod when questioned on this

point was excessively defensive and uncomfortable.

In the Respondents' conversation with the Workers' Compensation Board the day either of or just before the dismissal of Mr. Bobbitt, it does not appear that it was mentioned Mr. Bobbitt was about to be fired or that he was fired. Their failure to disclose this to the Workers' Compensation Board is consistent with other things that I see with respect to missing documents, mystery meetings and inconsistencies in testimony. I accept that memories are imperfect but Mr. MacLeod told us in testimony "I have a perfect memory," and he will recall that I asked him questions about that afterwards on my own. His perfect memory is imperfect when it comes to details, which might be more embarrassing or difficult to them.

On a question of credibility of the evidence both individually and collectively of Mr. MacLean and Mr. MacLeod, their evidence was not credible, and was replete with inconsistency with each other often with in their own testimony and certainly the documentary evidence. Mr. MacLean and Mr. MacLeod's evidence was inconsistent, changeable, and generally clashed with the facts.

**BURDEN OF PROOF:**

The standard for assessing the evidence before the Board of Inquiry is on the civil balance of probabilities. If the Board of Inquiry is satisfied on balance that the complainant has proved the

discrimination alleged and that there is no justification or defence available to the Respondent, then the Board can fashion a remedy. If the Board is not satisfied that the complainant has met this burden, then the Board can dismiss the complaint.

The Board has been careful to assess all the evidence in the context of the burden of proof with respect to a complaint of this nature under the *Human Rights Act* as set out in s. 39(3) of the *Act* wherein it states:

39(3) In any prosecution under this *Act*, it is sufficient for a conviction, if a reasonable preponderance of evidence supports a charge that the accused has done anything prohibited by this *Act* or has refused or neglected to comply with an order made under this *Act*.

The Board is guided by the principles to be applied with respect to the burden of proof that must be met by the Complainant as articulated by Board Chair David Bright in *McLellan v. Mentor Investments Ltd.* (1991), 15 C.H.R.R. D/134 para. [15] (N.S. Bd. Inq.):

What is meant by the term "a reasonable preponderance of evidence supporting a charge"? The terminology is one often used in law and understood by lawyers. Human rights decisions are, however, not written solely for lawyers, but for the benefit of all because of the remedial nature of the legislation.

“Let me start out by stating the obvious: There are, in essence, two types of burdens of proof; firstly, the burden of proof used in criminal cases which is "proof beyond a reasonable doubt"; secondly the proof required in a civil case, namely, proof on a "preponderance of evidence", often called the civil burden.

“There is a very significant and real difference between the two. The criminal proof requires the trier of fact to ensure that he is satisfied as a matter of moral certainty the facts alleged are true, beyond a reasonable doubt. This is an extremely high standard.”

The civil burden or "preponderance of evidence", or proof of a fact on a balance of probabilities has been described as follows:

“It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If this evidence is such that the tribunal can say, "we think it more probable than not," the burden is discharged, but, if the probabilities are equal, it is not.”

In a case involving disability, the onus is on the complainant to show that he had a disability, was treated adversely by the respondent employer, and that there was evidence from which it is reasonable to infer that the disability was a factor in the adverse treatment. On this point, see *Sylvester v. British Columbia Society of Male Survivors of Sexual Abuse* (2002), CHRR Doc. 02-073 (B.C.H.R.T.) at para. 30. It is well-accepted in human rights jurisprudence that the prohibited ground need only be a factor in the discriminatory conduct in order to constitute discrimination.

**FINDINGS:**

The Board that disability was a factor in the decision to dismiss Mr. Bobbitt. There may have been other factors but Mr. Bobbitt's disability was a factor in his dismissal and Mr. Bobbitt was disabled within the meaning of the *Human Rights Act*. The exploitation of the opportunity presented to the Respondents because someone is on disability can result in discrimination under the *Act* and the Board so finds in this matter. There may or may not have been other issues with Mr. Bobbitt but the Respondents were opportunistic in latching onto and exploiting the opportunity of Mr. Bobbitt's disability to dismiss him is discrimination by stealth.

The Board agrees with the argument presented by Ms. Ross, Commission Counsel that as a matter of law it does not matter if discrimination based on disability was not the only reason for the dismissal to violate the Human Rights Act. .

The Board heard evidence that two and a half months or three months later following the dismissal of Mr. Bobbitt there was a letter from the Workers' Compensation Commission stating Mr. Bobbitt cannot do the job. Had the Respondents waited for that letter, waited to do the right thing at the right time for the right reasons, we would face a different argument right now or more likely not be here at all. But they did not wait, they did not consider reasonable accommodation, they thought they found a loophole and tried to drive a truck through it. The Respondents acted before they had that information even though they specifically knew information was pending about a determination of Mr. Bobbitt's ability to continue to resume his duties. The Workers' Compensation

Board had specifically told Mr. MacLeod a determination about Mr. Bobbitt's ability to return to work until after March 2001. Mr. MacLeod said, "We may have acted in haste." Mr. MacLeod was correct on this point, the Respondents did act in haste and violated the Nova Scotia Human Rights Act in so doing.

The Respondents have not lived up to that great tradition of their military service or the Royal Canadian Legion, or the legal obligations set out in the Human Rights Act. Mr. MacLean stated, "Maybe we're a little old school" if old school means not being entirely forthright in their testimony or providing full and prompt disclosure of documents and records.

#### **APPLICATION OF LAW:**

With respect to the matter of findings of law and/or the application of the facts to the law, Mr. Bobbitt was at the time of his dismissal disabled in fact and law within the meaning of the *Nova Scotia Human Rights Act*.

The Board finds that disability played a factor in Mr. Bobbitt's dismissal in February 2001. The relevant prohibition against discrimination in the *Human Rights Act* is as follows:

- 5 (1) No person shall in respect of
- (a) employment

discriminate against an individual or class of individuals on account of

- (o) physical disability or mental disability

“Physical disability” is specifically defined in the *Act* as follows:

3 In this *Act*

- (l) “physical disability or mental disability” means an actual or perceived
  - (i) loss or abnormality of psychological, physiological or anatomical structure or function,
  - (ii) restriction or lack of ability to perform an activity,
  - (iii) physical disability, infirmity, malformation or disfigurement, including, but not limited to, epilepsy and any degree of paralysis, amputation, lack of physical co-ordination, deafness, hardness of hearing or hearing impediment, blindness or visual impediment, speech impediment or impediment or reliance

on a hearing-ear dog, a guide dog, a wheelchair or a remedial appliance or device,

- (iv) learning disability or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language,

- (v) condition of being mentally handicapped or impaired,
- (vi) mental disorder, or
- (vii) previous dependency on drugs or alcohol.

The Supreme Court of Canada set out the requirements as to what constitutes a *prima facie* case of discrimination in ***O'Malley v. Simpsons-Sears Ltd.*** (1985), 7 C.H.R.R. D/3102 at D/3108:

*A prima facie* case of discrimination ... is one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent employer.

In a case involving disability, the onus is on the complainant to show that he had a disability, was treated adversely by the respondent employer, and that there was evidence from which it is reasonable to infer that the disability was a factor in the adverse treatment.

On this point, I reference, Sylvester *v. British Columbia Society of Male Survivors of Sexual Abuse* (2002), CHRR Doc. 02-073 (B.C.H.R.T.) at para. 30. It is well accepted in human rights jurisprudence that the prohibited ground need only be a factor in the discriminatory conduct in order to constitute discrimination.

The issue of physical disability arising from injury and the duty on an employer not to discriminate on the basis of such disability was considered in ***Belliveau v. Steel Co. of Canada*** (1988), 9 C.H.R.R. D/5250 (Ont. Bd.Inq.). In that case, a labourer at a steel company had suffered

shoulder injuries on the job, which resulted in surgery and a required period of convalescence. The labourer received Workers' Compensation benefits while he was off work. When the labourer attempted to return to work, the respondent employer indicated that his employment was terminated on the basis that the labourer would not be capable of performing the necessary job functions. The Board of Inquiry in that case discussed the requirement that an employer provide objective evidence that an employee is not capable of doing the job (at paras. 39561 and 39564):

The complainant has a physical handicap and he was not allowed to return to work because of this handicap, or at least, because of the perception of this handicap. *Prima facie*, there is a breach of sections 4(1) and 8 of the *Code*. To reject an employee in the position of Mr. Belliveau without unlawfully denying him equal treatment with respect to employment, an objective assessment is required of the employer, and the onus is upon the employer to establish by a preponderance of evidence that the employee is not capable of performing the essential requirements of the job. ...

\* \* \*

The onus is upon the respondents to establish that the complainant is incapable of doing his job. As stated, it is not enough for the respondents to have an honest belief in the complainant's inability – rather, they must show on an objective basis that a reasonable person in the position of the employer would conclude he was incapable. Moreover, if an employer can accommodate the employee without undue hardship, then the employer must do so. Put otherwise, an

employer cannot establish that an employee is incapable unless it shows that reasonable accommodation is either not possible at all, or at least that it is not possible without undue hardship to the employer.

*Metsala v. Falconbridge Ltd.* (2001), 39 C.H.R.R. D/153 (Ont. Bd.Inq.) at para. 47, where the Board of Inquiry found that an employer's failure to consider any accommodating measures constitutes a failure to accommodate. The duty to accommodate involves more than determining whether an employee can perform an existing job. It requires determining whether something can be done to the existing job to enable the employee to perform that job.

In part because there is a dispute between the two Respondents as to whether or not disability was the reason for the dismissal arguments including reasonable accommodation, undue hardship or any other defense authorizing this type of discrimination were not proffered. There is no good evidence that the issue like reasonable accommodation or was considered by the Respondents.

Mr. MacLeod insists disability wasn't a factor so accommodation was not an issue at all in his mind to accommodate. Mr. MacLean claims Mr. Bobbitt could not do the job because of his injury and just as insistent that accommodation was not considered but for the opposite reason. The Respondents had not turned to that issue of reasonable accommodation at all. In the prophetic words of Mr. MacLeod, "Maybe we acted in haste," and they did.

## **REMEDIES**

The powers available to a Board of Inquiry are found at section 34(8) of the *Human Rights Act*:

Section 34(8) of the *Human Rights Act* Reads:

A Board of Inquiry may order any party who has contravened the *Act* to do any act or thing that constitutes full compliance with the *Act* to rectify an injury caused to the person or class of persons or to make compensation thereof.

I will quote another case or two that has informed my decision with respect to the appropriate award. **Henwood v. Gerry Van Wart Sales Inc.** (1995), 24 C.H.R.R. D/244 (Ont. Bd.Inq.) provides some guidance as to the purpose of remedies and damage awards in human rights complaints at para 33:

These remedial provisions should be construed liberally to achieve the purposes and policies of human rights legislation: *Cameron v. Nel-Gor Castle Nursing Home* (1984), 5 C.H.R.R. D/2170 (Ont. Bd.Inq.) at D/2196. It is a principle of human rights damage assessment that damage awards ought not to be minimal, but ought to provide true compensation. This is necessary in order to meet the objective of restitution and also to give true compensation to a complainant to meet the broader policy objectives of the *Code*. The objectives of the *Code* are to put the complainant in the same position

she would have been in had her human rights not been infringed by the respondents:

*Cameron* at p. D/2196, paras. 18526-27. The measure of monetary damages in a case such as this is the amount that the complainant

would have earned had she not been denied the employment opportunity: *Cameron* at p. D/2197, para. 18532; *Piazza v. Airport Taxicab (Malton) Assn.* (1989), 69 O.R. (2d) 281 at 284 [10 C.H.R.R. D/6347] (C.A.). The complainant in this case had a duty to mitigate her damages; however, the onus of proving a failure to mitigate lies upon the respondents, as it does in other areas of the law: *Gohm v. Domtar Inc. (No. 4)* (1990), 12 C.H.R.R. D/161 at D/180 (Ont. Bd.Inq.), citing *Red Deer College v. Michaels*, [1976] 2 S.C.R. 324.

Some of the considerations in assessing general damages in the human rights context are addressed at para. 38 in *Henwood v. Gerry Van Wart Sales Inc.* (1995), 24 C.H.R.R. D/244 (Ont. Bd.Inq.):

Loss of dignity and self-respect are relevant considerations in assessing general damages for “loss arising from the infringement.” Damages for this loss should reflect the seriousness of the injury caused: *Cameron, supra*, at D/2198, para. 18538. An inherent but

separate component of the damage award for “loss arising out of the infringement” in s. 41(1)(b) reflects the loss of the human right of equality of opportunity in employment. This is based upon the recognition that, independent of the actual monetary or personal losses suffered by the complainant, whose human rights are infringed, the very human right, which has been contravened, has intrinsic value. The loss of this right is therefore an independent injury suffered by the complainant: *Cameron, supra*, at D/2198, para. 18539.

Although exemplary damages in Nova Scotia are rare, they have been awarded by human rights tribunals. Exemplary damages are designed to ensure future compliance with the human rights legislation, and have been awarded by boards of inquiry in Nova Scotia. See, for example, the awards in *Miller v. Sam's Pizza House* (1995), 23 C.H.R.R. D/433 [at paragraphs 214-219] (N.S. Bd.Inq.) and *Wallace v. Hillcrest Manor Ltd.* (May 18, 1994, N.S. Bd.Inq. North, unreported). In both cases, the Board awarded \$10,000 in exemplary damages.

Some Nova Scotia Boards of Inquiry have commented on the relatively low general damage awards made in human rights cases. The range in Nova Scotia tends to be between \$2,000.00 and \$6,000.00. In a supplementary decision on costs and interest, the Board of Inquiry made the following observations in *Hill v. Misener (No. 2)*, June 9, 1997, Unreported, N.S. Bd.Inq.:

In a physical injury, damages in the range of \$2,000, to [sic] represent an extremely minor physical problem which resolves quickly. People who sustain minor physical injuries do not question who they are, they do not question their self-worth, and they do not question their value as human beings. An injury to one's self-respect, dignity and self-worth is an injury that is far more destructive and painful and takes a longer time to heal than a minor physical injury.

General damage awards, which have not properly applied the compensatory principles, do not reflect the serious nature of discrimination and fail horribly to uphold the principles, which have been established by human rights legislation.

Boards of inquiry in Nova Scotia have awarded various non-compensatory remedies, largely designed to require respondents to remedy their discriminatory practices. Such remedies have included apologies (*Hill v. Misener* (1997), 28 C.H.R.R. D/355 (N.S. Bd.Inq.); *Wigg v. Harrison* (1999), CHRR Doc. 99-188 (N.S. Bd.Inq.); and *Association of Black Social Workers v. Arts Plus* (1994), 24 C.H.R.R. D/513 (N.S. Bd.Inq.)); mandatory sensitivity training and development of anti-discrimination policies (*Wigg v. Harrison, supra*; *Miller v. Sam's Pizza House* (1995), 23 C.H.R.R. D/433 (N.S. Bd.Inq.); and *Dillman v. I.M.P. Group Ltd.* (1994), 24 C.H.R.R. D/322 (N.S. Bd.Inq.); monitoring of employment practices (*Wallace v. Hillcrest Manor Ltd.* (May 18, 1994, N.S. Bd.Inq. North, unreported)), and posting copies of the *Act* in a conspicuous place (*Borden v. MacDonald* (1993), 23 C.H.R.R. D/459 (N.S. Bd.Inq.)).

The *Act* authorizes a Board of Inquiry to try and find a way of remediation, try to find a way of making this a better community for human rights, try to correct wrongs and where possible to compensate an individual who has been wronged.

The Board has reviewed the case law extensively and done so for other Boards of Inquiry, with an oral decision it is sometimes difficult to quote the case law at length. However, there is a decision, which I have used in the past as a guiding element to me with respect to general damages. I believe the case is Willis v. David Anthony Phillips Properties; the exact citation escapes me now. It is a Board of Inquiry out of Ontario and I summarize this case by noting its conclusion, as it is very instructive:

Awards of general damages under the Human Rights code should be high enough to provide real redress for the harm suffered insofar as money can provide redress and high enough to encourage respect for the legislative decision that certain kinds of discrimination are unacceptable in our society. No award should be so low as the amount is a mere license for the continuation of discrimination. At the same time fairness requires the award bear a reasonable relationship to the awards made by earlier Boards of Inquiry.

Ms. Ross, Commission Counsel, provided a written brief including recommendations on damages. If I summed it all up, my conclusion is that the law for this type of damage award in general and exemplary damages in Nova Scotia fall between \$2,000.00 up to \$10,000.00. There is some case law, a bit more speculative, that it may go as high as \$15,000.00. .

The Respondents are correct, Mr. Bobbitt was on Workers' Compensation and his salary continued except for perhaps a week period but that week period predated his dismissal. I find therefore that an award for lost wages is not appropriate in this case. The Workers' Compensation Board is not in place to subsidize those who discriminate. However, if Mr. Bobbitt was not on Workers' Compensation, this Board would be making an award of lost wages.

The Legion Branch 19 has existed for 75 years and has done great work for the community and has an honourable tradition of service, both to the community and to the veterans of the Armed Forces, and I think there are some good things you can do in keeping with this tradition.

The Board has considered whether this award and these finding should attach to the Respondent in their personal capacity and individuals or solely to Branch 19 of the Legion, and has determined the decision and award shall attach to the Branch 19 and not Mr. MacLean and Mr. McLeod as individuals. Although, key players in the decision, it is difficult to ascribe individual blame to them or other members of the legion executive. The Board is giving Mr. MacLean and Mr. MacLeod the benefit of the doubt as to their individual responsibility and liability for the award.

**AWARD:**

Based on the evidence and the mission and obligations of the *Human Rights Act*, and the authority it grants the Board, in consideration of the discrimination Mr. Bobbitt has suffered, and with the hope of setting things right for the future, the Board therefore makes the following Award:

1. Within the next six months the executive of Branch 19 of the Royal Canadian Legion in North Sydney are to undergo a sensitivity training workshop session to be arranged with the Nova Scotia Human Rights Commission and their staff.

The six-month time limit may be extended up to one year by mutual agreement of Branch 19 and the Nova Scotia Human Rights Commission but in no case will be extended beyond a period of one year from the date of this decision.

2. The Board orders that the Royal Canadian Legion Branch 19 executive provide a formal letter of apology (approved by the Human Rights Commission) to Mr. Bobbitt. The Commission must review and approve of this letter.

It is the Boards hope this is not seen punitive but as an opportunity to acknowledge something that should not have happened and provide, a bridge for people to cross and a fence for people to mend.

3. Within 12 months of this decision, the Branch 19 of the Royal Canadian Legion is required to conclude a memorandum of agreement with the Nova Scotia Human Rights

Commission which sets out that Branch 19 abide by the principles of the *Nova Scotia Human Rights Act*. The memorandum is to be included in the Royal Canadian Legion Branch 19 bylaws as an addendum.

4. Branch 19 of the Royal Canadian Legion shall donate \$250.00 to the Nova Scotia Abilities Foundation in the names of Mr. Brian Bobbitt and Branch 19 of the Canadian Legion. They may opt to use the donation to sponsor a disabled adult from Cape Breton region in attending the summer “Camper” program of the Abilities Foundation.

5. For the next five years, Branch 19 of the Royal Canadian Legion will pay the membership legion fees for Mr. Bobbitt and for Mrs. Bobbitt to the legion of his and her choice, and the membership fees are not to exceed more than \$500 in total.

This will be a yearly reminder and acknowledges the importance of the legion in the lives of both the Respondents and Claimants. It is important to acknowledge that these issues are issues which impact on more than the individual and that the family is also part of it as is the community that makes up the Royal Canadian Legion.

6. Branch 19 of the Royal Canadian Legion Branch 19 pay to Mr. Brian Bobbitt, the sum of \$2500.00, within 30 days of the publication of this decision. The Board has considered but declines to award prejudgment interest.

Royden Trainor

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Inquiry Chair.

May 23,2003