2010

**IN THE MATTER OF**
**THE NOVA SCOTIA HUMAN RIGHTS COMMISSION**

**BOARD OF INQUIRY**

BETWEEN:

**MICHAEL TRASK - Complainant**

and

**DEPARTMENT OF JUSTICE (CORRECTIONAL SERVICES) - Respondent**

**Parties**

Mr. Michael Trask

**Complainant**

Represented by:
Mr. Paul Conway

Counsel

Mr. Michael J. Wood, Q.C.
Mr. Jason T. Cooke

**Solicitors for Nova Scotia Human Rights Commission**

Ms. Dale Darling
Ms. Alicia Arana
Mr. Sheldon Choo

**Department of Justice (Correctional Services)**

Board of Inquiry: Honourable Donald H. Oliver, Q.C.

Decision: March 18, 2010

Supplementary Decision on General Damages

Following the decision of February 1, 2010, I made a finding that general damages should be awarded to Mr. Trask as a result of the discrimination he suffered at the hand of the respondent. I had found that the system had failed him. I had found that the discrimination was systemic, but not specific to any one person or persons.

The respondent had requested that before the Board of Inquiry made a final determination of General Damages that the parties be provided with an opportunity to agree on an appropriate quantum. I, therefore, ordered that the parties must reach such an agreement and notify the Chair within 30 days of the date of decision or the Inquiry will be reconvened at which time the Chair will make the order of general damages. An agreement was not achieved.

Since that time (following a detailed conference all), the parties have submitted memorandums and briefs outlining their respective positions on the question of general damages.

In the decision, I outlined a series of contemporary cases where general damages had been awarded. In their post decision brief, Counsel for the Nova Scotia Human Rights Commission raised new principles and new authorities with respect to general damages. They referred the Chair to ***Willow v. Halifax Regional School Board*** 2006 Carswell NS 205.

In that case a school teacher was discriminated against by her employer on the basis of sexual orientation. The Board of Inquiry found that the complaint was false and that the complainant was discriminated against unjustifiably. The complainant in that case was alleged to have suffered for years as a result of the

discrimination. The question of "years" was the basis upon which the *Willow* case differed from a long line of other Nova Scotia cases.

It was alleged that the complainant was engaged in a sexual encounter in a washroom with a student. In that case, Mr. Thompson, for the Board, said that he did not find systemic discrimination, but he found negligence and mal-administration. He also said that he was not persuaded that aggravated or exemplary damages are warranted. This is a Human Rights case. He said that it seems that higher orders of damages should be reserved, in the context of the *Human Rights Act*, for blatant acts of discrimination. He went on to assess damages of $5,000 for the false report to the police, and the agony Mrs. Willow suffered immediately, and $5,000 for the school year 2001. He assessed $5,000 for each of the school years that followed while Dr. Young remained Principal, i.e. 2001-2002, 2002-2003, and 2003-2004, for a total of $25,000.

He also allowed simple interest at the rate of 2.5% on the amount accumulating from year to year, thus totally $2,375.

The issue for me is whether or not the *Willow* case is an appropriate precedent to be followed in terms of quantum in the Trask case. The authorities I cited in the *Trask* decision ranged more in the $3,000 - $10,000. For instance, in ***Cottreau v. R. Ellis Chevrolet Oldsmobile Ltd.,*** (2007), 61 C.H.R.R. D/8 (N.S. Bd.Inq.), a physically disabled employee terminated from his employment while on disability leave was awarded $10,000 in general damages.

Counsel for the respondent highlighted the fact that in the *Willow* case, the Board of Inquiry made findings that the complainant suffered ongoing discrimination at the hands of her Supervisor and accusers and that words such as "malicious" and "animus" were used to describe her accusers.

Counsel pointed out that there were many differences in *Trask* and *Willow* and it was not a major task to distinguish the cases on many grounds. Counsel for the respondent put it this way:

> *Willow* is distinguishable from Mr. Trask's case in a number of ways. Firstly, Ms. Willow was fasely accused of sexual assault on a student. This is a very serious accusation of criminal behaviour in an employment context where trust is of the utmost importance. In addition, the Chair in *Willow* found that the accusers misled school officials and failed to clear Ms. Willow's name once the accusations were concluded to be unfounded. Ms. Willow continued to be exposed to negative treatment from management and her accusers for a number of years following the incident. In contrast the Chair concluded the following with respect to Mr. Trask "the discrimination in this case did not arise from any one individual, but rather seem [sic] to arise from a systemic failure to accommodate Mr. Trask" (para. 225). There was no evidence presented that Mr. Trask was subjected to the degree of discriminatory conduct as was found to have occurred in *Willow*. Apart from the fact that both cases arise from an employment context, the cases are entirely different.

In *Willow*, the Board said the following:

> Ms. Willow continued to be perceived as a person who may have been carrying on a sexual relationship with a student of the same sex. This perception was not only wrong, but as it was born of prejudice, it had to be corrected in order for Ms. Willow to thrive in the school community. Dr. Young had a positive duty towards her to create a positive work environment for her. He did not fulfill it. Instead, he compounded the difficulties of her life within the school."

Later the Board repeated that Ms. Willow's situation was that she had to face day after day her accusers and those who were suspicious of her. That cannot be said to be the case in *Trask*.

Counsel for the Respondent later made reference to **Johnson v. Halifax Regional Police Services** (2003), 48 C.H.R.R. D/307, where Mr. Johnson was awarded $10,000 for discrimination that occurred when a member of the Halifax Police stopped his car and erroneously impounded his vehicle. In *Willow* the Board of Inquiry said the following:

> I do not think that I will "do too much damage" to the rules that govern me if I apportion damages on a yearly basis during Dr. Young's tenure.

In making the award in Trask, I do not intend to "do any damage" to the rules that govern, but instead to be guided by and follow the rules. In *Trask* I do not think it appropriate to apportion the general damages on a yearly basis. Mr. Trask left employment with the Respondent May 2005 and has been at home for the last 5 years. There was no daily confrontation with the systemic discrimination he suffered while actively engaged in the workforce.

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

> A Board of Inquiry may order any party who has contravened this act to do any act or thing that constitutes full compliance with the act and to rectify any injury caused to any person or class of persons or to make compensation therefore.

So what is adequate compensation for Mr. Trask for the situations already detailed by me in the February 1st decision. I will not repeat the reasons therefore over again in this memorandum on quantum.

It is always difficult to gauge the seriousness of degree and extent of discrimination. However, in the *Natasha Williams* case referred to by the respondent, the employee was discriminated against when her employer failed to provide her with adequate accommodation resulting in her having to take early maternity leave. General damages were ordered for injury to dignity, feelings and self-respect. The award was $2,000.

In the *Trask* case, the award is not for injury to dignity, feelings and self-respect, but for systemic discrimination that affected him in various ways at various times throughout various weeks and months on the job. It is my opinion, therefore, that the *Williams'* case and the *Trask* case have no relationship whatsoever to one another in terms of quantum of general damages.

I make the same finding with respect to the *Patricia Saunders* case in which the award was $2,000.

Mr. Trask was frustrated by days, weeks, months, and years of promises of accommodation that were never realized. See Decision page 178, 179, 181, 182 and 183 FF. The aggravation of the Adjustment Disorder by a ubiquitous failure to provide adequate accommodation leads me to conclude, and I therefore find that Mr. Trask shall recover from the respondent the sum of $15,000 as general damages.

I make no order as to costs.

Respectfully submitted

Hon. Donald H. Oliver, Q.C.

Board of Inquiry

March 18, 2010