26-06R 01-08

IN THE MATTER OF the Human Rights Act, S.N.W.T. 2002, c. 18, as amended;

AND IN THE MATTER OF a complaint filed by Jennifer McSwain against Government of the Northwest Territories, Department of Justice

Appearances: Jennifer McSwain ("the Complainant") for herself

Erin Delaney, legal counsel for Government of the Northwest Territories, Department of Justice ("the Respondent")

Date of hearing: 4 June 2009

Mode of hearing: Telephone conference

Adjudicator: Adrian C. Wright

A. Introduction

[1] This decision flows from my decision dated 16 March 2009 in which I found the complaint had merit. This decision addresses remedy. I heard submissions from the parties by telephone conference on 4 June 2009.

B. Preliminary matters

[2] Paragraphs 3 to 9 come from the memorandum arising from the pre-hearing conference on 19 May 2009. They concern the Complainant's request for punitive or exemplary damages under s. 62.(3)(a)(vii). I refer to them here so my reasoning forms part of this decision.

[3] The Complainant indicated she wished to call two witnesses – Lyla Boulanger and Dolores Shields. The Complainant does not know what either witness's evidence will be. She thinks these witnesses may testify about the conversation between Lyla Boulanger and the warden Tom Hamilton when

Ms Boulanger told Mr Hamilton Ms McSwain's name was on the snow removal list.

[4] Counsel for the Respondent objected. She contended the Complainant had her opportunity to present evidence. Further, the Complainant should not be allowed to call more evidence now. I asked counsel for the Respondent how her client would be prejudiced if the Complainant called evidence now. She responded she would have to recall witnesses to respond to this evidence.

[5] I indicated in my reasons I would hear evidence on remedy if I found the complaint had merit. The parties must, however, be able to tell me how any evidence is relevant to remedy.

[6] I wish to keep this hearing focused and not become a "fishing expedition". The Complainant does not know whether the above two witnesses will have any evidence relevant to this issue – whether the Respondent's actions were wilful or malicious. She has not spoken to them.

[7] On the other hand, any prejudice to the Respondent in allowing this evidence could be addressed by allowing the Respondent to respond with additional evidence.

[8] The balance weighs in favour of not allowing these witnesses. I heard nothing in the evidence suggesting the Respondent's actions were either "wilful" or "malicious" – the terms used in s. 62(3)(vii). As indicated, the Complainant could not say whether these witnesses would add anything. The Complainant knew before the hearing and since my reasons were released that she alleged the Respondent's actions were wilful and malicious. She has had the opportunity to determine what evidence may be relevant to this issue and to put it before me. As a result, I will not allow the Complainant to call these witnesses.

[9] The Complainant may, however, address this issue in argument.

C. Events after the hearing

[10] After the hearing in September 2008, the Respondent adjusted the snow removal policy. It issued a standing order (dated 26 November 2008) which clarifies the criteria for snow removal. SMCC removes snow so long as

> "3.2 There are no able-bodied persons living in the Client's home and
> a. The Client is disabled, or
> b. The client has confirmed medical concerns "(Doctors [sic] Note)" or
> c. The residences [sic] are all 65 years of age or older or
>
> 3.3 There are no conflicts of interest."

[11] The standing order also requires all snow removal recipients to sign a letter declaring they meet the criteria in the policy. The order contains a process for adding and deleting names from the snow removal list. The order is also in the standing orders binder at SMCC so all administration, staff and corrections officers are aware of it.

[12] I issued my decision after the standing order was amended. As a result the standing order still states snow removal will be provided so long as there are "no conflicts of interest". Counsel for the Respondent assures me the Respondent will observe my direction – snow removal will be provided to individuals who otherwise qualify but who are in a spousal relationship with a correctional officer.

D. Relief sought by the complainant

a. Cease the contravention and refrain from similar conduct in the future

[13] As requested by the Complainant, I order the Respondent to cease from any discrimination on the basis of marital status in its providing snow removal at South Mackenzie Correctional Centre. In particular, I order the Respondent to refrain from not making snow removal available to individuals who otherwise qualify for the service and who are in spousal relationships with correctional officers.

b. Declaration

[14] I further declare the Respondent not providing snow removal at South Mackenzie Correctional Centre to persons in spousal relationships with correctional officers is discrimination contrary to the *Human Rights Act.*

c. Compensation for injury to dignity, feelings and self-respect

[15] The Complainant requests such compensation for the following reasons:

- Warden Hamilton was aggressive with her on the phone when she complained about the change in policy regarding snow removal

- As a result, she asked herself whether she was wrong – she should not question the policy.

- People in town asked her why snow was not removed from her property. Other disabled people with able-bodied people at home received snow removal.

- She believes the policy on snow removal is not fair.

- She believes the snow removal policy was created so she would not benefit from snow removal

- Her physician told her that her health suffers whenever she experiences stress. She has felt stressed since she first discussed this issue with Warden Hamilton. I did not receive any medical evidence of this.

[16] The Respondent contends a purpose of the *Human Rights Act* is education. The Respondent contends the hearing educated it about problems with the snow removal service. As a result, no relief – other than the above declarations – should be awarded. It relies on *Lawson* v. *994486*

N.W.T. Ltd., a 2008 decision of Adjudicator Gullberg (Northwest Territories). Adjudicator Gullberg found the Respondent in *Lawson* was "genuinely concerned about the health and safety of patrons in the restaurant" and "was trying to balance those concerns with the health and safety of each individual patron." As a result, though she found the conduct in question was discrimination, she granted no further remedy.

[17] Section 62(3)(c)(v) allows me to compensate a party for injury to dignity, feelings and self respect. This is not intended as punishment: exemplary or punitive damages are awarded under s. 62 (3)(c)(vii). Section 62(3)(c)(v) requires me to award compensation for injury to the Complainant's dignity, feelings and self-respect arising from the Respondent's contravention of the *Act*. The Respondent's intentions or motivation may, in appropriate circumstances, be one of the relevant factors.

[18] The Complainant asked for some amount between $5000.00 and $10,000.00. She provided a number of cases.

[19] I looked at the following cases which establish the range for this compensation:

> *Tracey* v. *502798 NB Inc*, 2007 N.B.H.R.B.I.D. No. 1 – $2,000.00 awarded for discrimination on the basis of marital status. Male employee's employment terminated as a result of a relationship with a female employee.
>
> *Radek* v. *Henderson Development (Canada) Ltd*, 2005 BCHRT 302 – $15,000.00 awarded for repeated acts of racial discrimination
>
> *Sherman* v. Mbotloxo Investments Ltd, operating as Boston Pizza (June 2008, Adjudicator Gullberg, HRAPNT) – $1000.00 – sexual discrimination
>
> *Savage* v. *984239 N.W.T. Ltd operating as Polar Tech* (November 2008, Adjudicator Mercredi, HRAPNT) – $15,000.00 – sexual discrimination
>
> *Burles* v. *City Cab (1993) Ltd.* (7 January 2009, Adjudicator Posynick) – $1500.00 – disability
>
> *Walden* v. *Social Development Canada*, 2009 CHRT 16 – $6000.00 damages for pain and suffering - pay equity issue

J and J on behalf of R. v. *British Columbia (Children and Family Development) (No. 2)*, 2009 BCHRT 61 – this case (at para 360 to 363) referred to a number of decisions (including *Radek* above) which set out a range of $4,000.00 to $35,000.00 in recent B.C. cases dealing with this area of compensation.

[20] The compensation in each case is determined by the facts – the nature of the contravention of the *Act*, and its impact on the complainant

[21] In this case, I take into account,

- the clear emotional effect of this case on the Complainant.
- the circumstances described by the Complainant and listed above.
- also, the Complainant's husband became involved or "caught in the middle" in this matter which must have affected the Complainant.
- the contravention, in this case, was significant in the sense that it arose from the Complainant's relationship with her husband and her medical condition.

[22] As a result, I award $4000.00 as compensation for injury to dignity, feelings and self-respect.

d. Punitive or Exemplary Damages

[23] I can award such damages when I find a party acted wilfully or maliciously, or has repeatedly contravened this *Act* (s. 62 (3)(c)(vii). The damages may not exceed $10,000.00.

[24] The Complainant argued she should receive these damages for the following reasons:

- Warden Hamilton testified that criteria governing the availability of snow removal were always in place. They were not established only to deny the service to the Complainant

- no one working at SMCC confirmed this
- the correctional officers who testified were not aware of any criteria governing snow removal
- Warden Hamilton said he discussed the criteria in the 6 January 2006 letter to Frances Aylward of Home Care at staff meetings. There was no evidence confirming this.
- Deputy Warden Groenheyde was not involved in the preparation of the 6 January 2006 letter. He was only shown the letter when it was sent to Home Care. He pointed out the confusion in the letter when it came to his attention. The Complainant questions why nothing was done about the letter at that time – when Groenheyde brought the issue to Hamilton's attention.
- The Complainant contends the 6 January 2006 letter was created only to deny her snow removal. She says no one other than her was excluded from the service either before or after the criteria were established in the 6 January 2006 letter.
- The 26 November 2008 standing order was again created only to deny her snow removal.
- Dan Norris could not have been taken off the snow removal list in 2005 as she thought Warden Hamilton testified. Norris was on neither of the 2005 or 2006 Home Care lists – only the 2007/2008 list. As a result, he could only have come off the list in 2007 or 2008. He was removed from the list only to show correctional officers (other than her husband) were denied snow removal.
- Warden did not take her needs and circumstances into account when he denied her snow removal. He was belligerent and rude on the phone.

[25] As a result, she maintains the creation of the written policy in January 2006 and denial of snow removal to her was malicious and intentional. She therefore claims exemplary or punitive damages.

[26] The Respondent's position is,

- a high standard must be satisfied before such damages can be awarded.
- none of the Complainant's arguments are clear and persuasive; they are all circumstantial
- the goal of the program is to provide assistance to people who need help.
- the problem (that is, snow removal being provided to residences having able-bodied persons) did not come to Warden's attention until he learned the Complainant was on the snow removal list.
- the Respondent disagrees that Hamilton's evidence was that Norris was removed from the snow removal list in 2005.

[27] I will deal with the last point first. I reviewed the recording of the hearing before issuing this decision. Warden Hamilton testified as follows:

Question: Have other rev – residences of correctional officers been removed before from the list?

Answer: Umm – I don't know before [but probably] around the same time or after, there has been a Dan Morris – Dan Norris – his residence was flagged by Home Care as being someone who needed assistance but it was removed because his common-law spouse was a corrections officer, Stella Wasylicia.

[28] The portion in square brackets is somewhat unclear from the recording.

[29] This evidence is, in my mind, inconclusive. Warden Hamilton did not say when he removed Mr Norris's name from the list. Dan Norris's name first appears on the Home Care snow shoveling

list for 2007/2008. This suggests his name was likely removed from the SMCC snow removal list in the fall of 2007. I do not agree, however, that this suggests Warden Hamilton's actions were malicious or intentional. I heard no evidence that any other corrections officers appeared on either the Home Care show shoveling list or the SMCC snow removal list. The only conclusion I can draw from the evidence is Dan Norris was the next person (after the Complainant) in a spousal relationship with a corrections officer on the Home Care snow shoveling list. His name was not transferred to the SMCC snow removal list because of the perceived conflict-of-interest.

[30] Similarly, there is nothing in the other aspects of the evidence highlighted by the Complainant which suggest the Respondent's actions are malicious or wilful. I do not agree that either the 6 January 2006 letter to Ms Aylward or the 26 November 2008 standing order were created only to deny snow removal to the Complainant. There are many possible conclusions regarding the Respondent's intentions or motivations which may be drawn from the evidence. As a result, I cannot award exemplary or punitive damages.

e. Costs

[31] The Complainant paid a lawyer $2500.00 to advise her and assist her with this hearing. She asks to be reimbursed. She relies on s.63(3)(c)(iv). She would not have incurred this bill if she had not filed this complaint.

[32] The Respondent contends I have no authority to order costs under s. 62 (3) (c). My only jurisdiction comes from s. 63: I may only order a party to pay costs when I am satisfied

- the complaint is frivolous or vexatious
- the investigation or adjudication of the complaint has been frivolously or vexatiously prolonged by the conduct of the party; or
- there are extraordinary reasons for making such an order in the particular case.

[33] The Respondent argues since none of these apply here, I cannot order costs. The Respondent relies

on *Halifax (Regional Municipality)* v. *Nova Scotia (Human Rights Commission)* 2005 NSCA 70.

[34] Section 62 (3)(c)(iv) states I may compensate a party for expenses incurred as a result of the contravention of the *Act*. The issue is whether legal fees are such "expenses". The legislation considered in the *Halifax* decision authorized a board of inquiry under the Nova Scotia Act to order a party who contravened the Act to do "any act or thing" constituting full compliance with the Act; also, to rectify an injury caused to a person or class of persons or to compensate for the injury. The Nova Scotia Court of Appeal in the *Halifax* found costs – compensation for legal fees – did not fall within that section. The Court found that a compensation award is different from a costs award. Compensation awards relate to the victim's injury; costs relate to the process. "Compensation" therefore does not include costs.

[35] Costs are awarded in some jurisdictions. The *Canadian Human Rights Act* contains section 53 (2) (c) – which is similar to s. 63(3)(c)(iv) – the "victim" is compensated for "any expenses incurred as a result of the discriminatory practice". This was interpreted (in *Premakumar* v. *Air Canada No. 3*, (2002), 43 C.H.R.R. D/210 (C.H.R.T.)) as authorizing the member or panel conducting the inquiry to award costs. No provision similar to s. 63 of the Northwest Territories Act exists in the *Canadian Human Rights Act*.

[36] Section 32 (1)(b)(iv) of the Alberta *Human Rights, Citizenship and Multiculturalism Act* is identical to s. 63(3)(c)(iv). The Alberta Act (s. 32 (2)) specifically allows a human rights panel to "make any order as to costs that it considers appropriate." As a result, costs are awarded in Alberta.

[37] The Northwest Territories *Human Rights Act* is different than the legislation in all these jurisdictions. Section 62 (3)(c)(iv) allows for compensation for expenses incurred by reason of the contravention but, s. 63 specifically provides costs may be awarded in certain circumstances. To me, these provisions only make sense if they are read as allowing costs only in the circumstances provided in s. 63. Any other interpretation makes s. 63 meaningless. As a result, the Legislature

intended costs to be awarded only in the circumstances listed in s. 63.

[38] As a result, I do not have the authority to award costs except as provided in s. 63. There are no extraordinary reasons for order costs in this case. As a result, section 63 does not apply here so I cannot award costs.

E. Conclusion

[39] To conclude, I grant the relief listed below:

1. I order the Respondent to cease from any discrimination on the basis of marital status in its providing snow removal at South Mackenzie Correctional Centre. In particular, I order the Respondent to refrain from not making snow removal available to individuals who otherwise qualify for the service and who are in spousal relationships with correctional officers.

2. I declare the Respondent not providing snow removal at South Mackenzie Correctional Centre to persons in spousal relationships with correctional officers is discrimination contrary to the *Human Rights Act*.

3. I order the Respondent to pay the Complainant $4000.00 as compensation for injury to dignity, feelings and self-respect.

DATED at the City of Yellowknife in the Northwest Territories this 15th day of June 2009.

Adrian C. Wright
Adjudicator