

**THE NORTHWEST TERRITORIES HUMAN RIGHTS ADJUDICATION PANEL**

**IN THE MATTER OF the *Human Rights Act*, R.S.N.W.T. 1988, as amended;**

**BETWEEN:**

**ELIZABETH PORTMAN**

**Complainant**

**-and-**

**UNION OF NORTHERN WORKERS**

**Respondent**

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**REASONS FOR DECISION**

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**Adjudicator: James R. Posynick**

**Place of Hearing: Yellowknife NT**

**Dates of Hearing: May 13-17, June 3-5, 2013; December 3, 2014.**

**Appearing:**

**Elizabeth Portman, Self-represented**

**Robert Blair, Legal Counsel for the Respondent**

**Caitlin Lacey, Assistant to the President, UNW**

**Statutes Considered:**

**Sections 1, 5, 10, 11 of the N.T. *Human Rights Act***

## REASONS FOR DECISION

### A. The Complaint

[1] Elizabeth Portman filed a human rights complaint with the NWT Human Rights Commission on or about October 4, 2011 alleging the Union of Northern Workers (the “UNW”) denied her goods, services, accommodation or facilities that are customarily available to the public because she has a disability, contrary to sections 5 and 11 (1)(a) of the *Human Rights Act*; and excluded her from the benefits of full membership, namely educational and training opportunities, because she has a disability, contrary to Sections 5 and 10 of the *Human Rights Act* (the *HRA*).

[2] The UNW does not dispute Ms. Portman has Multiple Sclerosis (“MS”) or that it is a physical disability as defined in Section 1 of the *HRA*. Nor does it dispute the use of stairs to gain entry to the UNW building (which I will refer to as “Headquarters” in this decision) poses a barrier to Ms. Portman gaining access. The UNW argues, instead, reasonable accommodation for Ms. Portman’s disability was in place at all material times.

### B. Summary

[3] UNW Headquarters is situated in an area adjacent to the downtown core of Yellowknife. It was constructed in the 1980’s. It contains two boardrooms used for meetings and educational purposes on the main floor. The meetings and other activities are often held in the board rooms after regular working hours. The street-front entrance requires the ascendance of approximately 14 stairs incorporating a landing with a 90 degree turn to reach the main floor. In 1999 Ms. Portman was diagnosed with MS. It affects her energy and mobility. She suffers from fatigue and body weakness, particularly on her left side. She has balance and coordination difficulties so ascending and descending stairs can be extremely difficult. She moved to Yellowknife in 2010 after enjoying 10 years of remission but the MS returned after she found employment with the GNWT. The effects of MS make it difficult for Ms. Portman to ascend and descend stairs. The Headquarters rear, alleyway entrance has a stairway and is equipped with an electric ‘stair-lift’ to reach the main floor.

[4] As an employee of the Government of the Northwest Territories (the “GNWT”) Ms. Portman paid union dues to the UNW. She informed the UNW that, in her view, the alley-way entrance equipped with the stair-lift is unsuitable accommodation for persons with disabilities and, specifically, that it prevented her from exercising her rights as a member of the UNW. In particular she wanted to attend a UNW Local 1 meeting to lobby delegates to adopt resolutions she drafted. She made several recommendations for changing the Headquarters’ accessibility and asked for the Local 1 meeting to be moved to a more accessible location, namely the offices of the Public Service Alliance of Canada (“PSAC”) situated several blocks away. PSAC is the UNW’s parent organization. The UNW President (the “President”) invited her to meet with

him to discuss her concerns. She was advised by PSAC's National Disabilities Representative ("NDR") not to meet with the President alone. The NDR offered to arrange and attend any such meeting with Ms. Portman. The President offered to meet Ms. Portman several times.

[5] The President told Ms. Portman the stair-lift at Headquarters accommodated her needs and he declined to move the Local 1 meeting to PSAC's offices. Ms. Portman did not attend the Local 1 meeting.

[6] For the reasons set out below, I find the Respondent discriminated against Ms. Portman, a person with a disability, contrary to Sections 5(1), 10(1) and 11 (1) of the *Human Rights Act* and the UNW and failed to reasonably accommodate her.

### **C. Issues for Decision**

1. Did the UNW unlawfully discriminate against Ms. Portman?
2. Did the UNW accommodate Ms. Portman's disability?

### **D. Summary of the Evidence**

[7] Both parties called evidence to show how their relationship, and hence the accommodation process, was impacted by communications between them and, in Ms. Portman's case, between her and other union officials. I find it useful to summarize that evidence.

[8] When Ms. Portman's MS "flared-up" in 2010, she sought accommodation from her employer. She contacted the UNW for help with negotiations. Her representative was busy so she spoke with the President who said he needed time to review her case. Two weeks later the President referred her back to the representative. She felt betrayed.

[9] On May 25<sup>th</sup>, 2011, she sent an email, copying the UNW Executive and the president of PSAC, criticizing the UNW's representation of people with disabilities and alleging the UNW executive was "sitting on its hands" instead of helping them. The President responded the following day. He offered to meet with her "in person" to discuss her concerns.

[10] Ms. Portman started talking to PSAC's National Disabilities Representative (the "NDR") about what she felt was the UNW's "failure to represent" her in the accommodation negotiations with the GNWT. The NDR was sympathetic to her concerns about persons with disabilities. He too is a person with disabilities. He explained how the union operated. He said she should *not* meet with the President alone and that his office would try to arrange and attend a meeting with her and the President. Despite making subsequent inquiries about the progress in setting-up such a meeting, Ms. Portman received no details of any efforts made by PSAC. As far as she knew, the efforts were continuing. She concluded the meeting was not taking place because the President refused to do so.

[11] On June 5<sup>th</sup>, 2011, Ms. Portman sent another email to the President criticizing him for not responding to her “repeated requests” for him to represent her in the accommodation negotiations. She also stated: “As you are no doubt aware, your office is inaccessible for persons with disabilities; the choices are 14 steps or an undignified chair-lift behind a locked door and yet you invite someone to your office that has a disability?...You don’t need to meet with me or anyone else to acknowledge that the Executive of the UNW... does nothing of merit to address the reality for [persons with disabilities] within the employ of the GNWT or to begin to implement the needed changes to fix it...”

[12] In an email exchange between Ms. Portman and the President in early on June 7<sup>th</sup> and 8<sup>th</sup>, 2011, the President sent an email to Ms. Portman recognizing her “perception” that the UNW as not advancing issues she would like. He said he offered, on several occasions, to meet with her and “[he had] difficulty understanding why you would refuse to meet with me when the meeting would be for the purpose of improving what we do with the input of a directly affected member”. He stated he would not respond to further emails from her because he believed she was “more interested” in a personal attack on him than “correcting... perceived inadequacies of the organization”. He repeated his interest in having a face to face meeting “to work out our differences... in our offices *or another place* that is more comfortable for you”.

[13] Over the following days, Ms. Portman focused her attention on getting information from the president of Yellowknife Local 1 about how to get resolutions before the UNW’s upcoming Convention, a meeting that takes place just once every 3 years. The meeting was scheduled to take place on the first floor of Headquarters on October 13<sup>th</sup>, 2011. Notice of the meeting was posted on the UNW website. It gave a telephone number for members to call-in to participate by way of teleconference.

[14] The Local 1 president gave her information about the resolution process and provided her with the necessary forms. She explained Ms. Portman’s status as a “Rand” member rather than a full-fledged UNW member. She offered to meet with Ms. Portman in-person and asked for her phone number, promising to call the following week. Ms. Portman did not respond to the offer.

[15] Ms. Portman prepared 13 draft resolutions largely reflecting her frustration with UNW processes and procedures. She also suggested the creation of an “Equity Page” on the UNW website, the creation of an “Equity Local” and the inclusion in the UNW regulations of the wording of the *UN Convention of the Rights of Persons with Disabilities*.

[16] Between Jun 13<sup>th</sup> and June 20<sup>th</sup>, 2011 the Local 1 president and Ms. Portman exchanged several emails. Ms. Portman complained she was not getting responses to her questions and asked for a referral to someone who would respond. She was directed to the President.

[17] Ms. Portman corresponded with the NDR at PSAC many times in July and August, 2011, enquiring about when the anticipated meeting with the President would take place. By July 13<sup>th</sup> Ms. Portman had sent some 75 emails to the NDR and he expressed concern to one of his

colleagues about how angry and distressed she was. He felt she was being excessive in her communications and he counselled her on “effective communication” skills.

[18] On or about September 8<sup>th</sup>, 2011, Ms. Portman became a full-fledged member of the UNW. She sought information about the delegates to the upcoming Convention. She wanted to contact them to let her views be known. The Local 1 president refused contact information on the basis that it was “private”. Ms. Portman received an email from the President on September 27<sup>th</sup> informing her of the applicable Bylaw and reiterating an offer he made during a previous conversation with her that, *if she attends the Local 1 meeting at Headquarters*, the Convention agenda will be discussed and he will be there to offer her “assistance”.

[19] That afternoon the President emailed Ms. Portman suggesting she contact the UNW’S Director of Finance and Administration (the “Director”) to view the member’s list. He encouraged her involvement including her attendance at Local meetings so she would have “input into the direction of our union, including convention resolutions and lobbying convention delegates”.

[20] On September 28<sup>th</sup>, 2011 the (then) Director of Finance and Administration for the UNW emailed Ms. Portman advising her access can be accommodated by using the “handicap-lift at the rear entrance” to Headquarters. He said her taxi costs would be reimbursed.

[21] That evening Ms. Portman emailed the Local 1 president setting out various process and procedural concerns and noting her resolutions were not accepted by the President. She explained why she would not attend the Headquarters meeting:

“There are no markers or signs at the front of the union building to indicate how persons with physical disabilities are meant to enter the building...[the] chair lift ... is behind a locked door. Chair lifts are undignified and typically used only in private homes as a means to maintain occupancy of a home when disabled... The only way to access the rear of the building is by walking down the block to gain entrance to an alleyway [where the] pavement is uneven, unlit, used for parking and frequented by intoxicated persons. The back...where the chair lift resides in a shed like structure (I believe) is more akin to a loading dock than a building entrance and I do not care to be treated as though I were freight or a pallet of goods to be hoisted up into a dimly lit building...[she felt the lack of access] is effectively barring [her] from participating in union business such as meetings, events, training and in this particular instance, voting...I have found almost without exception that when people truly understand the impacts of such barriers that they are more than happy to make changes”.

Ms. Portman asked if, under the circumstances, she would move the meeting location and reply by “end of day Friday September [30<sup>th</sup>]”. She offered to extend the time if necessary.

[22] The President responded explaining why her resolutions were not accepted and stated:

“The UNW building... has an accessible entrance for persons with disabilities. This can be accessed by calling our office.... We have also offered to cover any cost you may incur should

you require a taxi to access the rear of our building.... I hope you will reconsider your decision not to attend your Local's general meeting".

He recommended to the Local 1 president that the meeting go ahead as scheduled at Headquarters on October 13<sup>th</sup>, 2011.

[23] Ms. Portman emailed the President, questioning his explanation about the resolutions. He responded by saying:

"I have offered to meet on several occasions to discuss any issues you may have including your union activity. Emails dated April 21, April 27, May 26, June 8 and June 29 will confirm my repeated offer to meet personally with you."

He drew her attention to the bylaw giving the President the authority to interpret the Bylaws and said:

"The UNW building... has been accessible for persons with disabilities since 1988".

[24] On October 1<sup>st</sup>, 2011 Ms. Portman responded to the offer to meet with her. She said:

"You have offered to meet with me and to that end [the NDR] and I both recognized that any such meeting would require the presence of himself as an advocate to protect [her] and [the former Director for the UNW] due to his knowledge and background. Since June that meeting has been proposed with no reply". She called the President a "plain old bully" alleging mistreatment of his staff during a recent strike and ended by saying "Have a nice day!"

[25] The President attended a social function sometime between June and October of 2011. He spoke to a female representative of the Equal Opportunity Committee of PSAC. She asked if he would meet with her and Ms. Portman. He told her it "wasn't the time to be talking... business" but he recalled "explicitly saying" he was willing to do so. No such meeting took place.

[26] On or about October 4<sup>th</sup>, 2011, Mr. Portman filed this complaint with the N.W.T. Human Rights Commission. After it was filed, the UNW's former Director contacted the office of the Fire Marshall. The Fire Marshall examined the Headquarters and determined it did not meet the *current* accessibility demands of the National Building Code ("NBC") but noted the NBC would only be enforced "on all future construction projects and only applied to existing [buildings] where a major renovation occurs". In an email he noted a few "spots" of concern in relation to the 1985 NBC requirements:

- The requirement to have at least one entrance barrier-free;
- Signage required to identify the barrier-free access location;
- Minimum clear width of door 760 mm;
- Maximum height of threshold 13 mm;
- Maximum force to open door 38 Newton.

[27] The Fire Marshall returned to examine Headquarters between October 31<sup>st</sup>, 2011 and November 2<sup>nd</sup>, 2011. He sent an email stating he was satisfied the building “meets the code it was built to.”

[28] On December 9<sup>th</sup>, 2011, the President responded in writing to Ms. Portman’s complaint. The letter stated doorbells were being installed on the front and alley-way doors and “cab vouchers” were available so Ms. Portman would not have to pay cash for taxis to the Headquarters. The voucher system was subsequently improved by creating an account with the taxi company so there would be no need for vouchers.

[29] On June 4<sup>th</sup>, 2013, by agreement with the parties, I attended Headquarters with the UNW’s current Director. Based on the Director’s testimony and my first hand observations, I made several findings of fact that I will discuss under the heading “Analysis and Decision”, below.

## **E. The Human Rights Act**

### **i. What is a “disability”?**

[30] According to section 1 of the *HRA*, “disability” means “...any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness...” Section 5 of the *HRA* prohibits discrimination based on disability.

### **ii. What is “Discrimination”?**

[31] Section 1 of the *HRA* says “discrimination includes the conduct described in subsections 10(1) and 11(1)”, which state:

10. (1) No employees organization, employers’ organization or occupational association shall, on the basis of a prohibited ground of discrimination and without a *bona fide* and reasonable justification...

(b) expel, suspend or otherwise discriminate against any of its members...

11. (1) No person shall, on the basis of a prohibited ground of discrimination and without a *bona fide* and reasonable justification...

(b) discriminate against any individual or class of individuals with respect to any goods, services, accommodation or facilities that are customarily available to the public.

[32] The Supreme Court of Canada has described discrimination as “a distinction, whether intentional or not but based on [in this case, “disability”] which has the effect of imposing burdens, obligations or disadvantages on [a person which are] not imposed upon others, or which withholds or limits access to opportunities, benefits and advantages available to other members of society”<sup>1</sup>.

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<sup>1</sup> *Andrews v. Law Society of B.C.* [1989] 1 S.C.R. 143

**ii. What is a “*bona fide* and reasonable justification”?**

[33] A “*bona fide* and reasonable justification” will be established if the UNW proves “that the *accommodation* of the needs of [the] individual... affected would impose *undue hardship* on a person who would have to accommodate those needs” (sections 10(2) and 11(2) of the *HRA*).

**iii. What is “accommodation”?**

[34] Accommodation may be defined as “the responsibility of one party to adapt or adjust facilities, services or employment requirements to meet the needs of an individual or group having a characteristic that is protected under human rights legislation...”<sup>2</sup>

**iv. What is “undue hardship”?**

[35] An “undue” hardship is an unreasonable or excessive burden or significant interference with business operations taking into account the facts and circumstances in individual cases.<sup>3</sup>

**F. The Submissions of the Parties**

**The Complainant’s Submissions**

[36] Ms. Portman submits the UNW Headquarters was not accessible to her because of her disability and she was not offered reasonable accommodation to facilitate access for the purpose of attending the October 13, 2011 Local 1 meeting or for any other reason relating to her rights as a member of the UNW.

[37] She says she did not participate in discussions – other than email exchanges – about her need for accommodation because of advice she received from the NDR and a personal fear of the President. She relied on the NDR to set up a meeting which she would attend in their presence and with their support. She says the President never suggested he would meet with her in the presence of an advocate or a support person. When the President was approached at a social function by a PSAC representative, he refused to discuss such a meeting and took no steps to follow-up afterwards.

[38] She submits the UNW made changes to signage and a free, no charge taxi to meetings only *after* she filed her human rights complaint. She says the signage requires a phone number be called after hours to gain access and that would only apply if the person requiring such access had a cell phone. Ms. Portman says a person without one would have to find a way to the back alley entrance and navigate it in virtual darkness to meetings normally held after hours, at their own risk. She says the alleyway is a “notorious” drug use place. She did not

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<sup>2</sup> *Arnold v. Canada (Human Rights Commission)* [1997] 1 F.C. 582

<sup>3</sup> *Council of Canadians with Disabilities v. VIA Rail Canada Inc.* [2007] 1 SCR 650

know the “chairlift” did not require the use of a wheelchair before hearing testimony at the hearing but maintains it is undignified to use the rear entrance of the building and dangerous because of the absence of back-up electrical power.

[39] She maintains her request to move the October 13<sup>th</sup> meeting to the PSAC offices was a reasonable request to accommodate her disability. The number of persons attending would be small. It posed no undue hardship to the UNW or its members and the opportunity to get funding for any costs associated with accommodating her or, for that matter any person with a disability, was available to the UNW through PSAC. The opportunity to attend such meetings arises once every 3 years. She says teleconference access would not have permitted her to speak to the delegates face to face, privately and individually.

### **The Respondent’s Submissions**

[40] The UNW submits “...the only complaint properly before the Panel is ...that UNW’s offices are not accessible to her by reason of her disability, and [the] UNW has failed in its duty to accommodate her.”

[41] While acknowledging the stairs at Headquarters make access “difficult” for Ms. Portman, the UNW says the stair-lift at the rear entrance of the building accommodates her needs safely and conveniently and was available to facilitate her attendance at the October 13<sup>th</sup>, 2011 meeting and otherwise.

[42] The UNW says Ms. Portman was not entitled to her “preferred accommodation” nor to “perfect accommodation”. The law requires “reasonable accommodation” and the stair-lift was reasonable. The law says if reasonable accommodation is proposed and the party requiring it refuses it, there is no obligation on the proposer to demonstrate “undue hardship”.

[43] Further, the UNW says Ms. Portman did not fulfill her legal obligation to “participate cooperatively” with the UNW to find reasonable accommodation. She refused to meet with the President despite his many offers to do so. She did not do so because of unreasonably held, very negative opinions.

[44] In support of its submissions, the Respondent cites several authorities which I will discuss in my analysis, below.

### **G. Analysis and Decision**

#### **Issue 1. Did the UNW unlawfully discriminate against Ms. Portman?**

[45] I must be satisfied Ms. Portman has proven a *prima facie* case of discrimination. A *prima facie* case is “one which covers the allegations made and which, if they are believed, is

complete and sufficient to justify a [decision] in [Ms. Portman’s] favor in the absence of an answer from [UNW]”<sup>4</sup>.

[46] The UNW acknowledges Ms. Portman’s disability made it difficult for her to access Headquarters and the services available there in the manner that the vast majority of its members [the “public” in section 11(1) above] can, i.e. by using stairs. The UNW’s position is consistent with the evidence I heard at the hearing. I find Ms. Portman has discharged her obligation of proving a *prima facie* case of discrimination.

[47] However, the *HRA* allows discrimination in cases where a “*bona fide* and reasonable justification” is proven by the Respondent, UNW. In other words the lack of accessibility to Headquarters for Ms. Portman, a person with a disability, may be permissible if I decide the UNW has complied with the accommodation requirements in sections 10(1) and 11(1) of the *HRA*.

## **Issue 2. Did the UNW accommodate Ms. Portman’s disability?**

### **The Duty to Accommodate**

#### **Review of the Law**

[48] The UNW says Ms. Portman did not participate – had an “undischarged duty to participate - in the search for accommodation and is therefore not entitled to complain about accommodation process generally and the UNW’s participation specifically: *Renaud*<sup>5</sup>.

[49] In *Renaud* the Supreme Court of Canada dealt with the scope and content of the duty of an employer to accommodate religious beliefs. It is authority for several accommodation principles applicable in this case:

- It is a “multi-party” inquiry and both participants (the UNW and Ms. Portman) had a “duty” to participate;<sup>6</sup>
- Ms. Portman had a duty to facilitate any reasonable proposal to accommodate failing which her complaint may be dismissed; NOT A REASONABLE PROPOSAL
- Ms. Portman is not entitled to “perfect accommodation” only reasonable accommodation;
- The UNW must make more than a “mere negligible effort” to accommodate Ms. Portman; MADE A NEGLIGIBLE EFFORT
- The UNW must make a “reasonable” effort to do so.

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<sup>4</sup> *Ontario Human Rights Commission and O’Malley v. Simpsons-Sears* [1985] 2 S.C.R. 536 @558

<sup>5</sup> *Central Okanagan School District No. 23 v. Renaud* [1992] 2 S.C.R. 970

<sup>6</sup> See also *McGill University Health Centre v. Syndicat des Employes de l’Hopital* [2007] 1 S.C.R. 161

[50] In the Meiorin<sup>7</sup> decision of the Supreme Court of Canada, McLachlin J., for the majority, described how tribunals ought to assess whether employers have fulfilled their obligation or “duty” to accommodate employees. The court emphasized the individualized nature of the search for accommodation. It said the party with a duty to accommodate “must accommodate factors relating to the unique capabilities and inherent worth and dignity of every individual up to the point of undue hardship.”<sup>8</sup> The court said tribunals ought to be “sensitive to the various ways in which individual capabilities may be accommodated”<sup>9</sup> and suggested some “important questions” tribunals might ask when analyzing whether the employer has fulfilled its obligation to accommodate:

- “(a) Has the employer investigated alternative approaches that do not have a discriminatory effect, such as individual testing against a more individually sensitive standard?
- (b) If alternative standards were investigated and found to be capable of fulfilling the employer’s purpose, why were they not implemented?
- (c) Is it necessary to have all employees meet the single standard for the employer to accomplish its legitimate purpose or could standards reflective of group or individual differences and capabilities be established?
- (d) Is there a way to do the job that is less discriminatory while still accomplishing the employer’s legitimate purpose?
- (e) Is the standard properly designed to ensure that the desired qualification is met without placing an undue burden on those to whom the standard applies?
- (f) Have other parties who are obliged to assist in the search for possible accommodation fulfilled their roles? As Sopinka J. noted in *Renaud, supra*, at pp. 992-96, the task of determining how to accommodate individual differences may also place burdens on the employee and, if there is a collective agreement, a union.”

[51] The “important questions” suggest parties having a duty to accommodate must investigate alternative approaches to accommodation, explain why alternatives were or were not investigated, must take into account the individualized needs of the party requiring accommodation and implement an accommodation proposal that will not be too difficult (an “undue burden”) for the party requiring accommodation.

[52] McLachlin J. then suggested tribunals may wish to examine both the procedure employed in the search for accommodation and the substantive content of the search.<sup>10</sup> She said the two inquiries “overlap”.

[53] In *Hutchinson*<sup>11</sup> the Federal Court of Appeal decided if an employer proposes reasonable accommodation for an employee, and the employee refuses to accept that accommodation in favor of her “preferred alternative”, there is no need to conduct an “undue hardship” analysis.<sup>12</sup> The UNW says the case is analogous to the facts here: the use of the stair-lift

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<sup>7</sup> *B.C. (Public Service Employee Relations Commission) v. BCGSEU* [1999] 3 S.C.R.

<sup>8</sup> *Ibid*, para. 62

<sup>9</sup> *Ibid*, para. 64

<sup>10</sup> *Ibid*, para. 66

<sup>11</sup> *Hutchinson v. Canada (Minister of the Environment)* [2003] FCA 133.

<sup>12</sup> See also: *Ontario (Ministry of Community and Social Services) v. OPSEU* (2000), 50 O.R. (3<sup>rd</sup>) 560

reasonably accommodates Ms. Portman's accessibility needs and Ms. Portman refuses to facilitate its use *ergo* there is no need for the UNW to prove "undue hardship".

[54] I was also referred to a case from the B.C. Human Rights Tribunal in which Ms. Portman complained of discrimination by her employer on the basis of her physical disability.<sup>13</sup> The Tribunal found when Ms. Portman complained to her employer, the employer promptly took several steps to accommodate her workplace needs, e.g. flexible hours, nap time, and the use of a cot. The Tribunal found Ms. Portman did not try some of the proposed means of accommodation and decided her "lack of co-operation" in the accommodation process to be "fatal" to the procedural aspect of her claim. The UNW says the facts of that case are analogous to what happened here: Ms. Portman did not try the stair-lift and despite repeated invitations to meet with the President to discuss her concerns, she failed to do so.

[55] Since the hearing of this case, the Federal Court Trial Division decided *Meiorin* created no "separate procedural right to accommodation that can be independently breached and attract remedies..."<sup>14</sup> where there is a finding of undue hardship. In May of this year, the Federal Court of appeal agreed.<sup>15</sup> It reached its decision after considering decisions of human rights tribunals that found remedies were available for the breach of procedural duties "even though the accommodation of the particular person would impose an undue hardship on the employer". It agreed with Madam Justice Gray's statement in a B.C. Supreme Court judicial review decision<sup>16</sup>: "While McLachlin J. wrote that it may often be useful to consider any procedure adopted in assessing accommodation, she did not write that such an analytical tool created a separate duty that can be breached. The single question remains of whether the employer could accommodate the employee without experiencing undue hardship".<sup>17</sup>

[56] The Federal Court of Appeal said tribunals that have interpreted *Meiorin* as having created a separate procedural duty are not reasonable or correct "...if that interpretation cannot be supported by the applicable legislation". The legislation considered in *Cruden* (the *Canadian Human Rights Act*) has similar wording to sections 10(1) and 11(1) in the *HRA*.

[57] The Federal Court decisions focused on paragraph 66 in *Meiorin* which states:

"Notwithstanding the *overlap* between the two inquiries, it may be useful as a *practical matter* to consider separately, first the procedure, if any, which was adopted to assess the issue of accommodation and, second the substantive content of either a more accommodating standard which was offered or alternatively the employer's reasons for not offering any such standard..." (italics added)

[58] The Trial Division judge stated McLachlin J. characterized the inquiry into procedure as a "practical matter" and said "...the Supreme Court is merely stating that a court or tribunal can

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<sup>13</sup> *Portman v. Custom House Currency Fund Ltd. and Stephen O'Connor* 2012 BCHRT 16

<sup>14</sup> *A.G. of Canada v. Bronwyn Cruden and the CHRC* [2013] FC 520.

<sup>15</sup> *CHRC v. A.G. of Canada and Bronwyn Cruden* [2014] FCA 131

<sup>16</sup> *Emergency Health Services Commission v. Cassidy* 2011 BCSC 1003

<sup>17</sup> *Ibid*, para. 34

look at the procedure employed in the accommodation process as a practical tool for deciding whether an employer has established – on an evidentiary basis- undue hardship”. The Court of Appeal judges agreed.

[59] With respect, considering the length to which McLachlin J. went to describe how the accommodation process is to be conducted and how important it is to the duty of accommodation, I do not believe the court contemplated a review of “procedure” as a mere practicality. Rather the phrase “as a practical matter” refers to how the two step process is to be considered, beginning *first* with an examination of procedure and, *second*, examining the substantive content. It is the practical way of conducting the two stage inquiry. In my view the phrase does not mean the procedural requirements are less important than the substantive content in considering whether the proposed accommodation is ‘reasonable’ or not. A procedure that is not conducted in good faith or which demonstrates “mere negligible effort”, I suggest, could not meet McLachlin J.’s requirement of sensitivity and consideration of the “unique capabilities and inherent worth and dignity” of persons being accommodated. The word “*overlap*” suggests the procedural requirements are not only relevant to the substantive outcome but part and parcel of it. Discriminatory conduct often results from an imbalance of power. For example if an employer’s adopted procedure is coercive or designed to minimize the participation of the employee, should the employee not have a remedy even if the substantive content is found to be “reasonable accommodation”? Conversely, should an employee who intentionally fails to communicate with or provide necessary personal information to employers derive the benefits of the duty to accommodate? Such results would not be consistent with basic human rights principles requiring all people be treated with dignity and respect. The way to avoid those results was to create *enforceable* procedural standards and, in my view, that is what the court did in *Meiorin*.

[60] In any event, I am not bound to follow the *Cruden* decision. In my view the “overlap” of the procedural and substantive aspects of accommodation referred to by McLachlin, J. means they both must be considered on the question of whether accommodation is “reasonable”. Since the question of whether the duty of accommodation has been discharged depends upon the facts and circumstances in each case, so will the question of whether a failure to engage in an appropriate procedure ought to result in a finding that the duty has not been discharged. The remedies will flow from the facts and the empowering legislation. I think that is what tribunals have done to date.

### **The Procedure in this case**

[61] Ms. Portman initiated discussions with the President, by email, on June 5<sup>th</sup>, 2011 complaining about the accessibility of the Headquarters. When the President subsequently offered to meet with her anywhere she would feel “comfortable”, she refused to meet because of advice she received from PSAC’S NDR not to meet with him without support present. The NDR’s evidence confirmed that advice describing it as “Union 101...never, ever go into a

meeting by yourself". He agreed to try and set up a meeting with the President and attend in support of Ms. Portman.

[62] She sent many emails to the NDR to follow-up on the meeting. She assumed the President was refusing to meet with her and her support because, as far as she knew, the NDR was ready, willing and able and the meeting was not happening. The President testified to meeting a PSAC representative at a social function who asked if he would meet with her and Ms. Portman but the President declined to discuss it at the time. When asked if he did anything by way of follow-up he said it was "not [his] responsibility".

[63] On September 28<sup>th</sup>, Ms. Portman sent an email to the Local 1 president detailing her accessibility concerns. She wanted the meeting moved and wanted an answer because the October 13<sup>th</sup> meeting was coming-up. The President responded instead. He said the Headquarters had been "accessible" since 1988.

[64] After Ms. Portman filed her human rights complaint On October 4<sup>th</sup>, 2011 the UNW took some of her concerns seriously. It installed signage and door bells and implemented an account with a local taxi company. The Fire Marshall's office was contacted and it was learned (apparently after some of the latter improvements were made) the building met 1985 NBC accessibility standards.

[65] There was a mutual distrust between Ms. Portman and the President evidenced in their emails and in their respective testimonies at the hearing. Ms. Portman thought the President's efforts at representing her in a previous complaint and with looking after members with disabilities, was inadequate. The President thought Ms. Portman was less concerned about those inadequacies than in discrediting him and the UNW generally. The President testified it was "well understood" Ms. Portman was "litigious" and he was aware she had "at least five human rights complaints". He felt litigation between them was inevitable. No wonder Ms. Portman did not want to meet the President alone. No wonder the President was cautious in his dealings with Ms. Portman.

[66] I accept Ms. Portman's testimony about why she did not want to meet with the President. On the other hand I have some difficulty understanding why the President, who knew of Ms. Portman's disability, knew she was unhappy with his leadership at least as early as May 25<sup>th</sup>, 2011 and who knew as early as June 5<sup>th</sup>, 2011 of her accessibility concerns, did not arrange for another union official or someone agreeable to both parties, to meet Ms. Portman and engage in a discussion about how to resolve their evident *impasse*. Since the President testified that *he* would have support present if he met with anyone who was "very difficult" and since his testimony left little doubt he considered Ms. Portman "very difficult" at best, I do not understand why he would not suggest they meet in the presence of support of her choice. As the NDR said: it is Union 101 to have such support.

[67] Given the President's testimony and the impression he left in emails to Ms. Portman that her accessibility issues were a concern to him, I do not understand why he felt he had no

responsibility for contacting PSAC after he learned they were prepared to arrange and attend a meeting with Ms. Portman. I do not understand why he did not do so after October 1<sup>st</sup>, 2011, when Ms. Portman explained the reason she would not meet with him without an NDR present. I find it probable he had the discussion with the NDR and could have arranged the meeting *before* the October 13<sup>th</sup>, 2011 Local 1 meeting. He did not do so because, as he testified, he did not think it was his responsibility to do so. While I understand why he might be *cautious* in dealing with Ms. Portman because he thought she was “litigious”, being cautious did not relieve him of the UNW’s responsibility to facilitate a reasonable accommodation process.

[68] These questions raise concerns about the President’s credibility when he testifies and writes in emails he was prepared to meet with Ms. Portman. It is more probable he did not want to do so because he believed the UNW’s obligation to accommodate was met by having a stair-lift at Headquarters. That belief does not discharge him from participating in the accommodation process, however. The law requires he test that belief against the subjective needs of Mrs. Portman. To do that he had to make a reasonable effort to engage Mrs. Portman in the multi-party process.

[69] Ms. Portman communicated by email with the NDR, the Local 1 president, UNW staff and the President. She let her concerns and needs be known. She was not shy about letting the UNW know how she felt about the stair-lift, the rear entrance and having to get there via taxi through a poorly lit, notorious alleyway, at night. Her candor was effusive and challenged the UNW’s policies, practices and leadership. Her concerns about accessibility were taken seriously enough that steps were taken to make changes that purportedly met the 1985 national standards for accessibility.

[70] I am satisfied Ms. Portman participated in the search for accommodation as much as she could considering her disability and advice she received not to meet in person with the President without support. I am not satisfied the UNW took its procedural obligation to inquire into the individual needs of Ms. Portman seriously. Granted it made some changes based on the Fire Marshall’s inspection (prompted by Ms. Portman’s complaint). But the goal was to seek compliance with the 1985 National Building Code not to meet Ms. Portman’s needs. The changes were not even communicated to her.

### **The Substantive Content**

[71] The UNW argues it treated Ms. Portman differently than other members but was justified in doing so because the stair-lift reasonably accommodates Ms. Portman’s needs. If I find the stair-lift is a “reasonable accommodation” of her individual needs, the employer does not have to prove “undue hardship”.<sup>18</sup> I heard no evidence alleging undue hardship. I heard testimony to the effect the UNW has been looking for a new Headquarters since at least 2009 and that any “major” changes to the current building would be costly. In terms of access to the

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<sup>18</sup> *Supra*, Note 13

October 11, 2013 meeting, the UNW says she could have attended those meetings at Headquarters either in person, cost free, or by teleconference.

[72] Ms. Portman says the stair-lift is not “reasonable accommodation”. I understand her to mean it is “undignified” both because of its location in the rear of the building and the means of accessing it, e.g. having to prearrange her attendance, arriving via the rear entrance by taxi, having an escort to get inside the building and having assistance getting it running each way. She is concerned that she may not have a means of leaving Headquarters if the power goes out, not an unusual occurrence in Yellowknife. She says she was deprived of attending the October 13<sup>th</sup> meeting when an obvious accommodation was available: the use of barrier free, PSAC offices. Attendance by telephone was not an option because she would not have been able to speak to delegates to gain their support for her draft resolutions.

[73] As noted above, with the consent of the parties I visited Headquarters in the presence of the current UNW Director who, having given evidence just before the visit, answered my questions while still under oath. It is worth reviewing my findings.

[74] The front entrance faces north. It has a sign on a window indicating access for persons with disabilities is at the rear of the building. A doorbell is affixed below the sign. On weekdays, staff are available to answer the bell between 08:30 and 5 p.m. (except during lunch hour) and for after-hours meetings, a staff member will do the same. The Director said when boardroom meetings are held after hours sometimes the front doorway will be “blocked open so people can just come up and into the boardroom if there is a...local meeting”. There are 14 stairs and a 90 degree turn to navigate to get to the main floor where the boardrooms are located.

[75] Headquarters is fenced on the east and west sides. While there are gates to the rear on each side, the east side is impassable due to a huge gate blocking the passage to facilitate the remediation of an oil spill. The west side has a locked gate which must be opened by a staff member. The gate was put there to discourage transients from walking through the property.

[76] The stair-lift is situated inside a locked entrance near the southwest corner at the rear of the building. A paved parking lot extends the length of the building. There is no sign restricting parking by the rear door but an able person can get there by walking between cars. From the pavement one steps onto a concrete sidewalk. Two concrete sidewalk blocks are in front of the door. The first has a broken, separated corner. The block immediately in front of the door is higher, creating a ridge which necessitates a very small step-up. The Director said the entrance is not used by the public except for tenants who occupy 4 suites in the building. The public use the front entrance. The rear entrance is used by “some” staff who work downstairs or some who want to get a cup of coffee in the lunchroom on the way to their offices. Otherwise staff use the front entrance or another entrance at the rear, east side of the building.

[77] Unmonitored security cameras are set-up at various locations. The building has fire alarms. There is a street lamp across the alleyway but, as the Director stated, “not an

abundance of light...” Other street lamps are too far away to shed much light on the rear entrance. She said “...we could light the whole alley but how does that benefit our members?”

[78] Inside the doorway is a landing and a set of 7 stairs. Running along the wall beside the stairs is a track at the base of which is the stair-lift. The stair-lift is a metal platform, folded against the wall. Its operation requires electricity and a key. There is no back-up generator in the building. The platform will hold a wheel chair and there is a folding seat to accommodate sitting. A wheelchair is kept nearby. It takes about a minute to go up and the same amount of time to go down after it is started, unfolded and ready for occupancy.

[79] After the filing of Ms. Portman’s complaint the UNW installed doorbells and signage and offered to reimburse her taxi fare to attend meetings. Later the UNW made arrangements to pay taxi fares directly. It also offered her an “escort” from her taxi to alleviate her concerns about attending meetings after hours via the alleyway entrance.

[80] Ms. Portman had never seen the stair-lift and called it a “chair-lift” and characterized it as “undignified”. When she was offered the use of the stair-lift by the former Director, he called it a “handicap lift”. None of the witnesses testified to giving Ms. Portman any information about or inviting her to try it but each said or suggested it accommodated her disability.

[81] In the *VIA Rail* case<sup>19</sup> the Supreme Court of Canada reviewed a decision of the Canadian Transportation Agency which decided that new rail cars ordered by VIA were inaccessible to persons who used personal wheelchairs. The Agency found the rail cars were, in the language of the legislation under consideration in that case, “undue obstacles to the mobility of persons with disabilities”. The Court agreed and, in doing so had this to say about accessibility:

“In <sup>20</sup>*Grismer*, the court held at para. 19, that “[e]mployers and others governed by human rights legislation are now required *in all cases* to accommodate the characteristics of affected groups within their standards, rather than maintaining discriminatory standards supplemented by accommodation for those who cannot meet them”(emphasis in original). Standards, in other words, must be as *inclusive* as possible... The accommodation of personal wheelchairs enables persons with disabilities to access public services and facilities as independently and seamlessly as possible. *Independent access to the same comfort, dignity, safety and security as those without physical limitations is a fundamental human right for persons who use wheelchairs. This is the goal of the duty to accommodate: to render those services and facilities to which the public has access equally accessible to people with and without physical limitations*”. (Italics added)

[82] The Court when on to say this about “reasonable accommodation” in the context of discrimination on the basis of disability:

“A “reasonable accommodation”, “undue hardship”, or “undue obstacle” analysis is, necessarily defined by who the complainant is, what the application is, what environment is being complained about, what remedial options are required and what remedial options are reasonably available.”

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<sup>19</sup> *Council of Canadians with Disabilities v. VIA Rail Canada Inc.* 2007 SCC 15, paras. 161-162

<sup>20</sup> *B.C. (Supt. of Motor Vehicles) v. British Columbia (Council of Human Rights)* [1999] 3 S.C.R. 868

[83] In my view Ms. Portman’s complaint, including her reference to the “undignified” nature of using a stair-lift she had never seen, is similar to the complaint raised by personal wheelchair users in *VIA Rail*. Her complaint is about losing her ability to have *independent* access to the same comfort, dignity and security the general public and UNW members have, i.e. by using the front entrance of Headquarters or some other fully accessible location without depending upon others.

[84] In response to the UNW’s submission that Ms. Portman is not “entitled” to perfect accommodation, if being able to attend a meeting through the same door as people without disabilities, without depending upon a series of actions by others to get her there is “perfect”, then I disagree. Attending a different, fully accessible location in Yellowknife is not the “perfect” solution, of course, since there are many other services and resources available to UNW members at Headquarters. The “perfect” solution in this case was spoken about briefly in the evidence: a new building. A retrofit of the old building, e.g. the installation of an elevator, might also amount to “perfect” accommodation. However there were just two options on the table: the barrier free PSAC location for a meeting and the stair-lift. The stair-lift was not a reasonable means of accommodating Ms. Portman needs as a person with a disability.

[85] The suggestion in the evidence that complying with the 1985 National Building Code standards somehow alleviated the UNW’s responsibility to accommodate Ms. Portman is simply incorrect. It demonstrated not only a misunderstanding about the legal duty to accommodate but a misunderstanding of 21<sup>st</sup> Century community standards of inclusivity and accessibility for persons with disabilities.

## **REMEDIES**

[86] Section 62(3) of the Act sets out the specific remedies that I may consider:

62. (3) If the adjudicator finds, under subsection (1) that a complaint has merit in whole or in part, the adjudicator

(a) may order a party against whom the finding was made to do one or more of the following:

- (i) to cease the contravention complained of,
- (ii) to refrain in the future from committing the same or any similar contravention,
- (iii) to make available to any party dealt with contrary to this Act the rights, opportunities or privileges that the person was denied contrary to this Act,
- (iv) to compensate any party dealt with contrary to this Act for all or any part of any wages or income lost or expenses incurred by reason of the contravention of this Act,
- (v) to pay to any party dealt with contrary to this Act an amount that that the adjudicator considers appropriate to compensate that party for injury to dignity, feelings and self respect,
- (vi) to reinstate in employment any party dealt with contrary to this Act,

(vii) where the adjudicator finds that the party acted willfully or maliciously, or has repeatedly contravened this Act, to pay to any party dealt with contrary to this Act an amount not exceeding \$10,000 as exemplary or punitive damages, 41

(viii) to take any other action that the adjudicator considers proper to place any party dealt with contrary to this Act in the position the person would have been in but for the contravention of this Act; and

(b) may make a declaratory order that the conduct complained of, or similar conduct, is discrimination contrary to this Act.

[87] Ms. Portman seeks the following relief:

- The UNW be directed to move its meetings to an accessible location to accommodate persons with disabilities;
- The President be required to attend training on human rights, the duty to accommodate and sensitivity toward persons with disabilities;
- The President issue a “genuine public apology” for denying Ms. Portman access;
- The UNW be required to establish a fund to be used to accommodate the needs of persons with disabilities and publicize the fund, yearly, to its membership;
- The UNW be directed to pay her wages for time spent at the hearing.

[88] The UNW says if I find a failure to accommodate, I have no jurisdiction to order wages be paid, apologies be given nor make any specific remedies against the President and I may only give a remedy that addresses Ms. Portman’s case or, in the alternative, make no remedial Order.

[89] Ms. Portman has not adduced evidence of any lost income, wages or expenses resulting from the failure of the UNW to accommodate her disability. To be clear: the discriminatory conduct did not prevent her from seeking and maintaining employment. Complainants are not awarded ‘wages’ for conducting their own proceedings. Also, I decline to make any Order or direction requiring an apology. As far as training for the President and the establishment of a fund for accommodation purposes, the evidence I heard suggests training, policy development and funding is available to the UNW through PSAC. It is inconceivable to me that, in the light of this hearing and its result, the UNW would not take steps to ensure its staff and its membership were given the opportunity to use such funding accordingly.

[90] The purpose of human rights legislation is not to punish wrongdoers rather it is to prevent further discrimination by them and by others.<sup>21</sup> I am satisfied Ms. Portman has suffered injury to her dignity, feelings and self-respect and she should have damages that reflect the degree of seriousness of the conduct and its impact on her.<sup>22</sup>

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<sup>21</sup> *C.N.R. Co. v. Canada (Canadian Human Rights Commission)* [1987] 1 S.C.R. 114.

<sup>22</sup> *Arunachalam v. Best Buy Canada* 2010 HRTO 1880

[91] The UNW failed to accommodate procedurally and then dug-in-its-heels rather than seriously consider any other reasonable options, including the one proposed by Ms. Portman. The President, who made the decision on behalf of the UNW, believed the offered accommodation was reasonable. His conduct amounted to ignoring her request for alternative accommodation. His lack of responsiveness, knowing Ms. Portman was a person with a disability, knowing from her emails she wanted to attend the Local 1 meeting to make changes affecting hers and the rights of other persons with disabilities and very probably knowing from the tenor of her emails she was certainly frustrated and stressed by his responses, is troubling but I hesitate to find he acted in bad faith. Nonetheless from an objective point of view it resulted in a serious injury to Ms. Portman's dignity, feelings and self-respect.

[92] The evidence showed Ms. Portman was already involved with a complaint against her employer when the accessibility issue first arose. She thought the UNW, and the President in particular, had not provided adequate representation to her. Ms. Portman became very frustrated with the UNW's intransigence on moving the October 13<sup>th</sup> meeting to an accessible location. She testified to experiencing several "peaks" of frustration in dealing with the UNW. The emails certainly speak volumes about her frustration in dealing with the President. I take into account the undisputed evidence that her MS results in fatigue and find it likely the fatigue was worsened by that sense of frustration.

[93] I award ten thousand dollars (\$10,000.00) for injury to her dignity, feelings and self-respect. I also Order and direct the UNW to cease discrimination against persons with disabilities who wish to obtain the services available at Headquarters and to refrain from committing the same or any similar contravention.

[9] Finally, I find this is an appropriate case to Order and direct the UNW to provide access to services to its members in a non-discriminatory manner and at such location or locations that meet or exceed the accessibility requirements in the current National Building Code.

Dated this 15<sup>th</sup> day of August, 2014

A handwritten signature in blue ink, appearing to read "James R. Posynick", is written over a light blue rectangular background.

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James R. Posynick, Adjudicator