

**NORTHWEST TERRITORIES HUMAN RIGHTS ADJUDICATION PANEL**  
**IN THE MATTER OF The Northwest Territories *Human Rights Act*,**  
**S.N.W.T. 2002, c.18, as amended**

**BETWEEN:**

**A.B.**

**Appellant**

**-and-**

**THE CITY OF YELLOWKNIFE**

**Respondent**

**-and-**

**NORTHWEST TERRITORIES HUMAN RIGHTS COMMISSION**

**Party**

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**Reasons for Decision**

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Before: Sheldon Toner, Adjudicator, Human Rights Adjudication Panel

Place of Hearing: Yellowknife, Northwest Territories

Date of Hearing: July 8, 2016

A.B. for herself

Michelle Thériault, Counsel for the Respondent, the City of Yellowknife

No-one appearing for the Northwest Territories Human Rights Commission

**Introduction:**

[1] This decision addresses the appropriate remedy in this matter. It follows an earlier decision, dated April 13, 2016, in which I decided the City of Yellowknife (“the City”) discriminated against the complainant (A.B.) on the basis of family status and failed to meet its duty to accommodate.

[2] Once an adjudicator has found that a complaint has merit, the available remedies are set out in subsection 62(3) of the *Human Rights Act*, S.N.W.T. 2002, c.18.

[3] The hearing on remedy took place at Yellowknife, Northwest Territories, on July 8, 2016. The complainant gave evidence regarding her efforts to find work after resigning from the City, and responded to the City’s legal counsel in cross-examination. The complainant entered documentary evidence of her efforts, plus receipts for expenses and tax returns showing her income from 2012 to 2015. The City entered evidence of job postings listed in the *Yellowknifer*, a newspaper, from the time A.B. resigned to September 2013, by which time the complainant found other work.

[4] The parties offered submissions and case law in support of their respective positions.

**Decision:**

[5] The complainant is entitled to wage loss compensation, as well as damages for injury to dignity, feelings and self-respect. The complainant is also entitled to hearing expenses, exemplary damages, pre-hearing interest and declaratory relief. The City is to refrain from committing the same or similar contraventions in future.

**Summary of Evidence:**

[6] The evidence presented at the hearing on remedy was mainly relevant to whether the complainant adequately mitigated her loss of income. The respondent took the position the complainant should receive no damages for loss of income, but alternatively argued the complainant’s damages should be reduced for failure to mitigate.

[7] The relevant facts are summarized as follows:

- The complainant started looking for work before she left her job with City.
- The complainant consulted job search websites and government websites, and applied for part-time and full-time positions.
- The complainant applied for clerical jobs, but not exclusively, as she applied for jobs that would work with her schedule even if she was not exactly qualified.
- The complainant had documents showing she applied for approximately 20 jobs, and she recalled applying for approximately 20 others without being able to give specifics.
- The complainant turned down work with a federal government agency in July 2013, since she was concerned the schedule would not accommodate her child-care needs. She did not inform the agency of her child-care needs or request accommodation.
- The complainant found part-time work as a driver in September 2013. The job schedule worked well for the complainant, and she stopped looking for full-time work.
- The complainant found additional part-time seasonal book-keeping work in 2014.
- The complainant acknowledged she did not recall applying for any of the approximately 62 positions posted in the newspaper ads entered into evidence by the respondent.

[8] The respondent's counsel questioned the complainant's credibility regarding the applications she claimed to have made by challenging her recollection. I accept the complainant's evidence as a rough estimate of her efforts only, since she could not recall precisely and did not keep a complete record. The facts outlined above are otherwise undisputed.

#### **Complainant's Position:**

[9] The complainant's position is that the remedy should include the following:

- Compensation for lost income, from the point of resignation to the hearing in November 2015. The complainant estimates this amount to be from \$95,547.17 (based on taking 9 weeks leave without pay for childcare each summer), to \$100,169.86 (based on 8 weeks).
- Compensation for lost benefits, including housing (\$11,400.00 to \$12,600.00), vacation travel allowance (\$5,700.00 to \$6,300.00), long service bonus (\$633.08 to \$699.72), fuel

discount (\$946.81), plus reimbursement for the value of the complainant's pension payout upon resignation (\$30,589.14, subject to valuation).

- Compensation for injury to dignity, feelings and self-respect, in the sum of \$20,000.00.
- Exemplary or punitive damages, in the range of \$20,000.00 to \$25,000.00.
- Hearing expenses with receipts (\$129.07)
- Hearing expenses without receipts, estimated to be approximately the same as those with receipts (\$129.07)
- Interest on the above amounts.

[10] The complainant also seeks non-monetary remedies, including a letter of apology and orders requiring the City to cease its discriminatory practice and to take human rights, negotiation and sensitivity training.

#### **Respondent's Position:**

[11] The City's position on remedy can be summarized as follows:

- Compensation for lost income and benefits should not be awarded since the complainant was not dismissed but resigned. If there is no finding of a poisoned work environment or constructive dismissal, there is no "causal nexus" between discrimination and the loss. In addition, the respondent submits, the City did not constructively dismiss A.B. since it did not evince an intention to end the employment relationship.
- Alternatively, any compensation for lost income and benefits should be reduced significantly because the complainant failed to apply constant and assiduous efforts to mitigate her losses.
- The respondent submitted estimates of the complainant's combined wages and benefits for various periods of time from 2012 until 2015.
- Compensation for injury to dignity, feelings and self-respect, should be in the range of \$3,000.00 to \$6,000.00. The complainant was not dismissed, and was not subjected to prolonged discrimination or any intention to harass on the part of the City.
- Exemplary or punitive damages require conduct which is willful or malicious, and are capped at a statutory maximum of \$10,000.00.

- Interest should not be awarded, as the complainant would have earned any amounts awarded incrementally.

[12] The respondent deemed it inappropriate to issue an apology, since it has appealed my decision on the merits. With respect to additional orders, the City rejected the idea of additional training on the basis the City did not intentionally discriminate against the complainant.

### **Compensation for Lost Income and Benefits:**

[13] In order for compensation to be awarded under this heading, the adjudicator must be satisfied that any lost income and benefits were incurred by reason of the contravention.<sup>1</sup>

[14] The fact that A.B. resigned, as opposed to being terminated, is not determinative. The circumstances of the resignation must be considered to see if there is a causal link between the discrimination and the loss.

[15] In the human rights context, there are cases in which employees have established workplace harassment or discrimination, but where the resignation or abandonment of position has been deemed a matter of choice.<sup>2</sup> The situation is different, however, where the employer makes the workplace intolerable such that the harassment or discrimination leads directly to resignation, lost income and benefits.<sup>3</sup>

[16] There is a causal link in this case. The evidence establishes that the City persisted in treating A.B.'s request for accommodation as a disability claim without due consideration to family status. The complainant said she had no choice but to abandon her position to provide childcare. In her resignation letter, she said she would have preferred to remain in the job. There is no reason to doubt her evidence on these points. The City failed to address the real issue, and as a result, placed the complainant in an untenable position. In the circumstances, I am satisfied she did not resign voluntarily but under compulsion of the human rights contravention.

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<sup>1</sup> *Human Rights Act*, clause 62(3)(iv)

<sup>2</sup> *Collins v. Elizabeth Metis Settlement*, 2004 AHRC 14; *Ford v. Adriatic Bakery*, 2010 HRTO 296

<sup>3</sup> *Turner v. 507638*, 2009 HRTO 249, at para. 29

[17] The same result follows under the test for constructive dismissal, regardless of the City's intentions.<sup>4</sup> The City's failure to accommodate A.B. to the point of undue hardship, as the mother of a child with special needs, breached the employment contract contrary to the *Human Rights Act*. Human rights provisions are essential to any employment contract, and the breach in this case was substantial enough to force the complainant's resignation.

[18] The evidence establishes the complainant lost income and benefits as a result of the contravention. She is entitled to compensation for lost income and benefits, subject to the duty to mitigate which applies in the human rights setting.<sup>5</sup>

[19] The income loss period begins in September 2012. The complainant was unable to reach an accommodation for the summer off work from the City, but she was not expecting to be paid during that timeframe. The relevant period ends in July 2013, when I find the complainant declined employment with a government agency presumably offering pay and benefits similar to the City. In failing to discuss possible accommodations with the agency, the complainant fell short in her duty to mitigate.

[20] Within this 9-month period, I am satisfied the City established the complainant did not make adequate use of newspaper postings in her employment search. The complainant used internet sources and submitted applications which she did not document, but more diligent efforts would have been reasonable to expect. I have considered the cases submitted by counsel and determined it is appropriate to reduce the compensable period from 9 to 6 months.

[21] In terms of the amount to be paid over this period, the employer's 2013 estimates incorporate benefits the complainant would have received, including pension contributions. There is no basis to direct the City to repay the complainant for amounts she received on exercising her pension options at resignation, so this portion of the wage loss claim is denied.

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<sup>4</sup> *Potter v. New Brunswick Legal Aid Services Commission*, [2015] 1 SCR 500, 2015 SCC 10, at para. 34. The test is as follows:

- Did the employer's unilateral change constitute a breach of the employment contract?
- Did the breach substantially alter an essential term of the contract?

<sup>5</sup> The complainant has a duty to make "constant and assiduous efforts" to find alternative employment, and is only entitled compensation for avoidable losses. (*Dhamrait v. JVI Canada*, 2010 HRTO 1085, at para. 104; *Adams v. Knoll North America*, 2010 HRTO 376, at paras. 16-19; *Bates v. John Bishop Jewellers Limited*, 2009 BCSC 158, at para. 86)

[22] The hearing expenses claimed by the complainant fall under clause 62(3)(iv) of the *Human Rights Act*, along with compensation for lost income. I am satisfied the complainant has proven the expenses for which she provided receipts.

[23] The City is ordered to pay the complainant compensation for lost income and benefits in the total amount of \$35,213.47, and expenses in the amount of \$129.07.

**Compensation for Injury to Dignity, Feelings and Self-Respect:**

[24] The parties provided a number of cases outlining the factors to be considered in assessing this type of compensation.<sup>6</sup> The following is my assessment of these factors:

*The vulnerability of the complainant:*

[25] The complainant was a non-management level employee of the City with two years' seniority. She had access to union representation, but the evidence at the hearing showed that neither she nor her representative were particularly effective in convincing the City her request for accommodation was driven by her child's needs. The City controlled the discussion throughout and would not alter the terms of reference. The complainant remained vulnerable to the City's management authority throughout.

*The humiliation and hurt feelings of the complainant:*

[26] The complainant gave compelling evidence of the embarrassment she felt at having to approach doctors to request notes excusing her from work, since she never claimed to be unable to work. She expressed the frustration she felt when the City rejected each new doctor's note she provided, and when the City persisted in giving her schedules she had told them would not work.

*The experience of victimization:*

[27] The complaint's experience of victimization culminated at the point when she resigned. She expressed how she enjoyed her work and did not want to resign, but the City's failure to accommodate left her no choice. The end of the school year meant she had to do something for

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<sup>6</sup> *Adams v. Knoll North America*, supra, at paras. 6-10; *Robertson v. Goertzen*, 2010 NTHRAP

her child that summer, which meant she either had to abandon unworkable shifts or resign. In being forced to make this impossible choice, she was victimized.

*Seriousness of the discriminatory conduct:*

[28] The discriminatory conduct in this case is serious. In my decision on the merits, I found the City's whole approach to accommodation was so flawed as to amount to bad faith. The complainant tried to make arrangements well before the summer break. The City insisted on imposing its new approach, without considering it could easily have granted the same accommodation as the previous year without undue hardship.

[29] In awarding compensation for injury to dignity, feelings and self-respect, adjudicators should be mindful not to trivialize the importance of human rights by setting the amount so low as to create a "license fee" to discriminate.<sup>7</sup> Adjudicators should also recognize that losing employment for discriminatory reasons usually affects dignity more than does a one-time comment or gesture.<sup>8</sup> The complainant's testimony about her feelings at the time of resignation, including her understandable shock and disbelief, illustrate the seriousness of the effect on her in this case.

[30] I am not influenced by cases at the lower end of the spectrum for this type of compensation. In *McCreary*, for example, the Human Rights Tribunal of Ontario set damages at \$8,750.00 where the employee was terminated *in part* due to discrimination on enumerated grounds. In the case of A.B. and the City, the loss of employment was entirely the direct result of discrimination.

[31] In *Thorson v. Northwest Territories*, Adjudicator James R. Posynick awarded compensation in the amount of \$25,000.00 for injury to dignity, feelings and self-respect.<sup>9</sup> This was also a case where the employer failed to accommodate an employee. There are, however, distinguishing facts which justify the quantum. The employee was a longer-term employee and the employer failed to accommodate for at least 18 months. The employee also suffered major depression disorder, which compounded the subjective effect of her dismissal.

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<sup>7</sup> *McCreary v. 407994 Ontario*, 2010 HRTO 2369 at paras 7-8

<sup>8</sup> *Arunchalam v. Best Buy Canada*, 2010 HRTO 1880, at para. 53

<sup>9</sup> *Thorson v. Northwest Territories*, 2013 CanLII 82655 (NT HRAP)



[32] Based on my review of the cases provided by the parties, I am satisfied the appropriate sum falls between the lower end and *Thorson*, somewhere in the range at \$15,000.00. This amount has been awarded in several cases, including cases involving discrimination on the basis of family status.<sup>10</sup> This amount is reasonable and consistent with the overall range in this jurisdiction with *Thorson* at the higher end.

[33] The City is ordered to pay the complainant compensation for injury to dignity, feelings and self-respect in the total amount of \$15,000.00.

#### **Exemplary or Punitive Damages:**

[34] The adjudicator may order exemplary or punitive damages under clause 62(3)(vii), upon finding that a party acted willfully, maliciously, or repeatedly contravened the *Human Rights Act*.

[35] The purpose of exemplary or punitive damages is generally “to punish, to deter the wrongdoer and others and to denounce egregious conduct.”<sup>11</sup> Exemplary or punitive damages are not to be awarded without good reason, which will necessarily consist of conduct that is harsh, vindictive, reprehensible and malicious in nature.<sup>12</sup> In *Thorson*, Adjudicator Posynick declined to order exemplary or punitive damages where the respondent acted recklessly, but where management appeared to lack awareness of the duty to accommodate and did not knowingly disregard the complainant’s situation.

[36] The Canada Human Rights Tribunal (CHRT) has, however, awarded \$20,000.00 punitive damages in cases involving discrimination on the basis of family status. In *Richards v. Canadian National Railway*, the employer failed to make efforts to understand the complainant’s situation but deemed to know what was best without speaking with her.<sup>13</sup> In *Canada (Attorney General) v. Hicks*, the respondent stuck to a “rigid application” of policy and did not consider its duty to accommodate.<sup>14</sup> The award in these cases was the maximum under the legislation.

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<sup>10</sup> *Adams v. Knoll North America*, supra; *Turner v. 507638*, supra; *Arunchalam v. Best Buy Canada*, supra; *Whyte v. Canadian National Railway*, 2010 CHRT 22 (CanLII); *Richards v. Canadian National Railway*, 2010 CHRT 24 (CanLII)

<sup>11</sup> *Whiten v. Pilot Insurance Co.*, 2002 SCC 18 (CanLII); as cited in *Thorson*, supra, at para. 164

<sup>12</sup> *McKinley v. B.C. Tel.*, 2001 SCC 38 (CanLII); as cited in *Thorson*, supra, at para. 164

<sup>13</sup> *Richards v. Canadian National Railway*, supra, at para. 247

<sup>14</sup> *Canada (Attorney General) v. Hicks*, 2015 FC 599 (CanLII), at para. 30

[37] There are reasons to exercise caution in following these precedents in the Northwest Territories. The federal legislation allows punitive damages for acting “willfully or recklessly”. The federal legislation also sets the maximum amount for punitive damages at \$20,000.00, whereas the maximum in the Northwest Territories is \$10,000.00.

[38] In this case, I am not prepared to order punitive damages on the basis of recklessness. Adjudicator Posynick was not prepared to do so in *Thorson* and the statute does not specifically authorize an adjudicator to sanction recklessness in and of itself. The focus of my assessment is whether the City willfully discriminated, such that punishment and denunciation are warranted.

[39] In the decision on the merits, I found that the City failed to inquire into A.B.’s circumstances or her child’s diagnosis where the facts were not hidden. The City’s employees were dismissive of the doctors’ notes and made no follow-up inquiries. They presumed to know better than A.B. even after she explained why the proposed schedules would not work. They maintained the formalistic strategy of dealing with A.B. as if she were asserting disability, and used the complainant’s comments about vacation and date nights to cast suspicion on her motives.

[40] The conduct was willful and harsh, and it was pursued over a period of months under legitimate protest from the complainant. I am satisfied the conduct warrants denunciation in the form of exemplary damages. The maximum available is \$10,000.00, but this should be reserved for the worst case, whereas this case falls somewhere lower in the spectrum.

[41] The City is ordered to pay the complainant exemplary damages in the total amount of \$5,000.00.

**Interest:**

[42] The *Human Rights Act* does not establish clear authority for an adjudicator to award interest, so I am not in a position to order the City to pay the complainant pre-hearing interest.

[43] The order in this matter may be filed as a judgment of the Supreme Court of the Northwest Territories to which post-judgment interest will apply until the judgment is satisfied.<sup>15</sup>

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<sup>15</sup> *Human Rights Act*, section 64; *Judicature Act*, R.S.N.W.T. 1988, c.J-1, section 56.1

**Summary of Compensation:**

[44] The following is a summary total of the monetary remedies outlined in these reasons for decision:

- a. \$35,213.47 for lost income and benefits;
- b. \$129.07 for hearing expenses;
- c. \$15,000.00 for injury to dignity, feelings and self-respect; and
- d. \$5,000.00 in exemplary damages;

Total: \$55,342.54

**Non-Monetary Remedies:**

[45] I will make a declaratory order that the conduct complained of was discriminatory, consistent with my decision on the merits. I will also remain seized of this matter through implementation.

[46] I do not propose to order an apology if the City is not prepared to make one. It would be more meaningful if the City were to develop clear policies to accommodate employees on the basis of family status. The City's human resource personnel should be trained in this policy to ensure it is meaningfully applied in future.

[47] The City defended its actions throughout this matter without demonstrating an appreciation that accommodation of family status may require a different approach from accommodation of disability. The City's policies do not address family status, so managers and human resource personnel are confronted with a policy and training gap.

[48] There are many factors the City will need to consider addressing this gap, so I do not propose to direct the City on the mechanics. I will simply order the City to refrain from committing the same or similar contraventions in future.<sup>16</sup> It will be incumbent on the City to use this case as an opportunity to revise its practices to ensure compliance with human rights.

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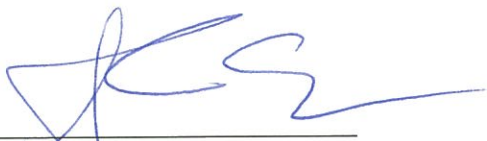
<sup>16</sup> *Human Rights Act*, clause 62(3)(ii)

**Order:**

[49] Based on my review of the evidence and argument, and for the reasons outlined above, I make the following order:

1. The City discriminated against the complainant and failed to accommodate her on the basis of family status, contrary to the *Human Rights Act*;
2. The City will pay the complainant \$55,342.54;
3. The City will refrain in future from committing the same or any similar contravention;
4. In the event there are any issues arising from the implementation of the remedial orders set out in this decision, I will remain seized as the adjudicator.

DATED at Yellowknife, Northwest Territories, this 14th day of December 2016.



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Sheldon Toner

Adjudicator

Human Rights Adjudication Panel