

**THE NOVA SCOTIA HUMAN RIGHTS COMMISSION
BOARD OF INQUIRY**

BETWEEN:

ROBERT A. PINNER

- and -

**K. BURRILL'S SUPERMARKET LIMITED
and/or KEN BURRILL**

Peter D. Nathanson
Board of Inquiry, Chair

APPEARANCES:

Robert A. Pinner
appearing on his own behalf

Louis A. d'Entremont
on behalf of K. Burrill's Supermarket Limited
and Ken Burrill

Michael J. Wood, Q.C.
on behalf of the Nova Scotia Human Rights Commission

DECISION dated April 11, 2011

I INTRODUCTION

[1] This case arises out of a complaint alleging discrimination on the basis of "mental disability" contrary to Section 5(1)(d) and (o) of the *Human Rights Act*, R.S.N.S., 1989, C. 214, as amended (the "Act").

[2] The Complainant, Robert A. Pinner, alleges that his employment with K. Burrill's Supermarket Limited (the "Corporate Respondent") was terminated after and, as a result of, Pinner's admission to the Mental Health Unit at the Yarmouth Regional Hospital, Yarmouth, Nova Scotia.

[3] Ken Burrill (the "Respondent") is the principal operator of the Corporate Respondent.

II THE LAW

[4] Section 2 of the *Act* sets out the purpose of the *Act*. It states:

2 The purpose of this Act is to

- (a) Recognize the inherent dignity and the equal and inalienable rights of all members of the human family;
- (b) Proclaim a common standard for achievement of basic human rights by all Nova Scotians;
- (c) Recognize that human rights must be protected by the rule of law;
- (d) Affirm the principle that every person is free and equal in dignity and rights.

[5] For the purposes of the *Act* "physical disability or mental disability" is defined in Section 3(l). The prohibition against discrimination is defined in Section 5. Those sections are as follows:

3(l) "physical disability or mental disability" means an actual or perceived

- (i) loss or abnormality of psychological, physiological or anatomical structure or function,
- (ii) restriction or lack of ability to perform an activity,
- *
- (v) condition of being mentally handicapped or impaired,
- (vi) mental disorder, or
- (vii) previous dependency on drugs or alcohol.

*

5(1) No person shall in respect of

- (d) employment;

*

discriminate against an individual or class of individuals on account of

*

(o) physical disability or mental disability.

III BURDEN OF PROOF

[6] The burden of proof in cases alleging contravention of human rights legislation, generally, is on complainants. That burden requires that a complainant establish a *prima facie* case of discrimination on an enumerated ground and with respect to an enumerated service or process.

[7] If the complainant is able to establish, on a balance of probabilities, a *prima facie* case of discrimination, the burden of proof then shifts to any one or more respondents to provide a reasonable explanation for the otherwise discriminatory behaviour or, in some cases, to demonstrate that it has made reasonable accommodation for the complainant, given the particular circumstances of the complainant.

[8] If the Respondent provides a reasonable explanation the burden reverts to the complainant to prove that the reasonable explanation, if provided, is flawed, without merit or otherwise pretextual.

[9] Thus, while the evidentiary burden may shift during a proceeding, the overall burden does not; it remains with a complainant.

[10] In this case, then, the Complainant must prove, on a balance of probabilities, that his employment with the Corporate Respondent was terminated because of his "mental disability".

[11] While proof is the goal, it is the establishment of a *prima facie* case which will cause the evidentiary burden to shift to the Respondents.

[12] With that burden shifted to the Respondents, the Respondents, should they wish to rebut the *prima facie* case and oppose the possible eventual finding of proof, on a balance of probabilities, must provide a reasonable explanation for the allegedly discriminatory behaviour or they must demonstrate that a reasonable accommodation has been made.

IV COMPLAINT

[13] The complaint to the Nova Scotia Human Rights Commission is dated September 16, 2000.

[14] According to the complaint:

My most recent health problems started around the beginning of September of 1999 when I came home from work and found out that my wife had left me and had taken all the furniture with her. ... For two days, I walked up and down the streets in our neighbourhood. I did not eat and had very little sleep during this time span. Nevertheless, on Monday, September 6, 1999, I went back to work. I also worked on Tuesday although I had not slept Monday night due to my depressions. After another sleepless night, on Wednesday, September 8, I went to the psychiatric ward at the Yarmouth Hospital. ... I tried to go to work, but around lunch time I noticed that I needed immediate help.

I called the Mental Health Unit of the Yarmouth Regional Hospital from my work. ... Following my discussion with Dr. Godsoe, he came to my place of work to take me to the hospital in Yarmouth. ... One hour after my discussion with Dr. Godsoe, and RCMP officer came to my place of employment and asked me to accompany him to the Yarmouth Hospital. When I noticed that I did not have a choice, I informed Dianne Burrill about the order of the RCMP officer and told her that I had not done anything wrong.

My psychiatrist informed my employer that my medical condition would not allow me to come in the rest of the week. On Monday, September 13, 1999, I was discharged from the In-patient Unit.

The week of September 13, 1999, was the start of my vacation. As the week progressed, I heard rumours about me being dismissed. A former co-worker told me on the street about the hiring of a new meat cutter by Mr. Burrill. When I called Ken Burrill to find out about the validity of these rumours, he affirmed the rumours and asked me to come in ...

V FACTS

[15] During the course of this hearing, this Board heard evidence from the Complainant, "his" psychiatric social worker, the Respondent, as well as other representatives and employees of the Corporate Respondent.

[16] The Complainant is 48 years of age. He has lived in Yarmouth nearly his whole life. He has a Grade 10 education.

[17] Approximately 15 years ago, the Complainant took a meat cutting course at the Nova Scotia Agricultural College in Truro, Nova Scotia. He received a diploma for successful completion of the course.

[18] Since completing his training, the Complainant has worked as a meat cutter in a

number of retail food outlets.

[19] Over his years of employment with a variety of employers, the Complainant acquired certain skills and experience.

[20] With the possible exception of the latter portion of his employment with Yarmouth Food Master, the Complainant said that he had no previous employment or disciplinary problems related to his employment. With respect to the Yarmouth Food Master, the Complainant acknowledges that he "bit off way more than I could chew". Even then the Complainant indicates that he left his employment at Yarmouth Food Master of his own volition but as a result of the owner making excessive and unrealistic demands upon him.

[21] Subsequent to his employment with Yarmouth Food Master, although not immediately so, the Complainant was contacted by the Respondent. Initially, the Respondent simply requested that the Complainant come to the store to help with a meat grinder. Subsequently, it offered him employment. Although he was originally hesitant to accept employment from the Respondents, he was "pressured" to do so and, eventually, agreed. He was employed as the Meat Manager. He started late in September, 1997.

[22] The Complainant expressed the view that there was a historical connection of some sort between his family and the family of the Respondent. The Complainant appears to be of the belief that this family connection explains, in whole or in part, the fact of his employment by the Corporate Respondent. While the Respondent acknowledges some connection between his family and that of the Complainant, the Respondent indicates that the connection was not so close as to be meaningful.

[23] As the Meat Manager, the Complainant was alternately the meat cutter, the meat wrapper as well as the person responsible for maintaining the meat cases, product presentation, ordering and customer service. The extent to which he had assistance with any of these functions is not altogether clear. However, the parties agree that the Complainant received occasional, and often informal, assistance with functions including meat wrapping.

[24] When discussing his daily employment responsibilities, the Complainant appeared authoritative. He testified at some length about what was required of him on each day of his working week.

[25] The Complainant reported no employment or disciplinary issues. He described a rather relaxed employment atmosphere as well as a positive and, indeed, jovial relationship with the Respondent.

[26] It is apparent, nonetheless, that the Complainant consumed alcohol during working hours. The fact of his consumption of alcohol during working hours and on his employer's premises appears to have been an open secret; not publicized to the general public but not hidden from those working in the store. It was certainly a fact

known to the Respondent and the other employees of the Corporate Respondent who testified. It was known to the Respondent because the Respondent and the Complainant consumed alcohol together at the store during working hours.

[27] During the course of the examination of June Jayne, the Respondents, through counsel, admitted as a fact that the Respondent and the Complainant consumed alcohol together at the store during working hours. The Respondents later applied to withdraw this admission of fact. They indicated a belief that the admission of fact had not been to the consumption of alcohol *with store employees* at the store and during working hours but had, instead, been to the consumption of alcohol at the store during working hours. A *voir dire* was held to better determine the nature and circumstances of the misunderstanding under which the Respondents were, apparently, labouring at the time the admission of fact was made. The Respondent testified at the *voir dire* and indicated, essentially, that he had not been fully attentive to the evidence then being given as well as to the specific content of the admission of fact made on the Respondents' behalf.

[28] After considering *Wilson v. Sears Canada Inc.* (1990), 96 N.S.R. (2d) 361 (C.A.) as well as Sopinka, Lederman and Bryant in *The Law of Evidence in Canada* (Toronto: Butterworths 1999), this Board concluded that the Respondents' application to withdraw the admission of fact would not be granted. This Board was of the view that, regardless of the test utilized, it would be inappropriate to allow the Respondents to withdraw from their admission of fact for reasons including, but not limited to, the fact that the admission had been made as a result of the inattentiveness of the Respondents.

[29] As a result, it remains an admitted fact that the Respondent consumed alcohol at the store with employees of the store and during working hours.

[30] In this context the reliance of the Respondents upon the apparent consumption of alcohol by the Complainant at the store during working hours is of considerably less import. It is difficult, although not impossible, for the Respondents to base the dismissal of the Complainant upon his consumption of alcohol and the impact that that consumption may have had upon his job performance when the fact of his consumption of alcohol was known by and apparently acquiesced in by the Respondents.

[31] That being said, if this Board accepts that the Respondents ceased acquiescing to the consumption of any or excessive alcohol by the Complainant at the store during working hours and, thereafter, provided the Complainant with reasonable notice of this and with a reasonable opportunity to change his ways, the consumption of alcohol at the premises during working hours by the Complainant could still prove to be a more than adequate basis upon which to found a termination of the Complainant's employment. This does not appear to have been the case. There is scant, if any, evidence indicating that the Respondents changed their position on the consumption of alcohol at the store by employees during working hours and, similarly, little evidence that any such change in approach, had it occurred, had been conveyed or expressed to the Complainant.

[32] As a result, this Board cannot conclude that any consumption of alcohol by the

Complainant at the store during working hours caused or contributed to the termination of his employment by the Corporate Respondent.

[33] That is not to say that the Complainant was an ideal employee nor is it to say that with respect to matters other than his consumption of alcohol, the Respondents were without complaint. Indeed, that does not appear to be the case.

[34] While the Complainant testified at some length about his busy weekly schedule, the implication is that much of it was uneventful. According to the Complainant, he completed, essentially without incident, each of the requirements of his employment. He cut meat. He ordered and managed the meat supply. He maintained appropriate meat cases. He made special cuts when necessary and appropriate. He interacted appropriately with the public.

[35] Representatives of the Corporate Respondent, primarily in the person of Mark Jayne, tell a very different story.

[36] Mark Jayne is the Assistant Manager of the supermarket. He has held that position for 10 years, approximately. Mr. Jayne describes his responsibility as being for produce and grocery items, although the Complainant was the Meat Manager.

[37] During the Complainant's employment with the Corporate Respondent, Mr. Jayne describes himself as working 25 hours per week with the Complainant. He indicates that he worked very little with at least two of the meat managers who preceded the Complainant. During the 25 hours a week that Mr. Jayne worked with the Complainant, Mr. Jayne indicates that he wrapped meat, relined the meat case and essentially took over responsibility for ordering for the freezer as it was not "up to par".

[38] Mr. Jayne indicates that he worked 65 to 70 hours per week when the Complainant was there although he is now down to 45 hours per week, more or less. Mr. Jayne indicates that he, amongst others, was not pleased or satisfied with the Complainant's performance. According to Mr. Jayne, it was his idea to take over ordering for the freezer. He indicated to the Complainant that he was not doing a good job, that he was not keeping the case filled, nor was the product "moving". Mr. Jayne attributes this last factor to difficulties that the Complainant had with counter presentation.

[39] According to Mr. Jayne, although the Complainant was the Meat Manager and placed the orders for the meat, the specials for the week were chosen by Mr. Jayne, the Respondent and the Complainant and the decision as to how much to cut was made collectively between Mr. Jayne and the Complainant.

[40] In addition, Mr. Jayne indicates that he received complaints from customers including complaints, possibly in the form of returns, about rotting product. Mr. Jayne was unclear as to how much product was returned but did state that it was worse in the last year of the Complainant's employment.

[41] Mr. Jayne was a compelling witness. He was animated during his testimony and obviously felt strongly about his employer and employment.

[42] Mr. Jayne indicates that he liked the Complainant, that he had respect for him. Perhaps it is for these reasons that he indicates that he and the Respondent gave the Complainant "50 to 60 chances" to rectify his behaviour.

[43] Nonetheless, it is this Board's conclusion that Mr. Jayne often embellished his own importance within the organization. At the same time, he appeared to denigrate the Complainant unnecessarily and to dismiss the possibility of any substantial contribution being made by the Complainant. Mr. Jayne's testimony was frequently contradictory.

[44] It is the position of this Board that Mr. Jayne's testimony must be treated carefully.

[45] In most important regards, Mr. Jayne's testimony is, nonetheless, supported by the evidence given by Mae Muise.

[46] Ms. Muise apparently started work for the Corporate Respondent in 1997. She was both a cashier as well as a meat wrapper. She had little contact with the Complainant while she was a cashier and, obviously, had considerable contact with him for "a couple of months" when she was a meat wrapper.

[47] Ms. Muise described the Complainant as a "good guy" but one who drank a lot and who, by activities such as dancing, singing and putting his arm around her, on at least one occasion, showed others that he drank a lot.

[48] As noted earlier, Ms. Muise essentially agrees with or supports the position of Mr. Jayne. She confirms that Mark Jayne was required to help the Complainant "quite a bit". She confirms that Mr. Jayne was frequently required to wrap and re-wrap meat. She also indicates that Mark Jayne was doing much of the ordering, that Diane Burrill was doing much of the "traying", that the Respondent had to help out with the cutting and that, generally speaking, near the end of her time with the supermarket much of the work that she would reasonably have expected the Complainant to accomplish was being done by others as the Complainant appeared unable or unwilling to do so.

[49] When asked, by counsel for the Commission, whether she and Mark Jayne had talked about the hearing, Ms. Muise indicated "never really". Her hesitation in responding was clear. This is understandable. In acknowledging her testimony in this regard, this Board imputes no ill intent.

[50] However, what is worthy of note is the substantial similarity in phrasing between the evidence given by Mr. Jayne and the evidence given by Ms. Muise. While it is not the intention of this Board to imply that there was any collusion between Mr. Jayne and Ms. Muise, the marked similarity in phrasing is troubling. It causes this Board to look upon the evidence of both Ms. Muise and Mr. Jayne with a certain cynicism.

[51] It is worthy of note that the testimony of Mark Jayne's mother, June, contradicts much of the testimony of Mae Muise. June Jayne, too, was an employee of the store.

[52] It is also noteworthy that the exact circumstances of the Complainant's termination were not apparently known by Mr. Jayne.

[53] It is the circumstances of that termination which will be critical in determining whether there has been a violation of the *Act*.

[54] On September 9, 1999, the Complainant's employment with the Corporate Respondent was terminated.

[55] The Complainant was not informed of the termination of his employment for at least five days. At the time he was informed of the termination of his employment, the Complainant had just been released from the Mental Health Unit of the Yarmouth Regional Hospital.

[56] The Complainant was admitted to the Mental Health Unit apparently as a result of marital difficulties. Specifically, the Complainant's wife had recently moved out of the matrimonial home. The fact of the end of the marriage does not appear to have been a substantial surprise to the Complainant. Instead, what appears to have been a greater source of consternation for the Complainant was that his wife took with her all, or almost all, of the couple's matrimonial property. This, the Complainant informed this Board, was contrary to an agreement that he and his wife had reached.

[57] In the days leading up to his wife's departure from the matrimonial home, the Complainant had begun to see some of their property boxed for transport. He had sought from his wife a promise that she would not "clean(him) out". He went to work that morning. Before leaving, he said to his wife that he would see her later. She did not tell him otherwise. Apparently, as a result of a "gut feeling", he called home 15 times that day. There was no indication of the content of any of those phone calls or even whether his wife answered the phone. He arrived home at 6:00 p.m.. The house had been cleaned out. The Complainant "felt like a beat dog". He called his mother. He called his daughter. He felt lost.

[58] The Complainant went to work in the morning, said good-bye to his wife before he left and never imagined that his life would be so changed upon his return. Whether it was the speed and extent of the change or whether it was the simple fact that he no longer possessed any substantial personal property, the reason for the Complainant's substantial emotional, indeed, psychiatric, response is not altogether clear.

[59] The Complainant's reaction to the stimulus of his wife's departure was not substantially lessened by the manner in which the Complainant and his wife interacted prior to that date. In many regards, they had been living their lives separate and apart for some time. They had spent extended periods with the Complainant living elsewhere than the matrimonial home. They had each had romantic relationships with others. The

fact that they were living together in the same home did not indicate a mutual desire to cohabit, once again, as husband and wife but, instead, reflected a financial and, perhaps, emotional reality. The Complainant and his wife could not afford to live in the manner they wished while they were living separate and apart.

[60] On Saturday night, after his wife's departure, the Complainant called the Respondent and offered to sell the Respondent his coin collection. The Respondent and his wife came to the Complainant's house and bought the coins. It is impossible to conclude that the Respondent was not informed of the Complainant's marital situation and emotional state by that time.

[61] The Complainant was not able to settle down. Although he had not started to drink yet, he could not stop walking around.

[62] Nonetheless, the Complainant continued to go to work. To the best of his ability, he fulfilled the obligations of his employment. He informed his fellow employees and the Respondent of what had happened. Reactions differed. From some people, the Complainant received sympathy. From the Respondent, he received encouragement to move on with his life without consideration of his wife. While the Respondent appears to believe that advice of this sort was in the best interests of the Complainant, the Complainant appears to believe that the advice showed substantial insensitivity on the part of the Respondent to the sadness, if not depression, that the Complainant was experiencing.

[63] The Complainant went to the Mental Health Unit over the weekend but was not able to gain admission.

[64] On Monday, he went to work. While at work, he spoke with Jack Godsoe, a psychiatric social worker with the Mental Health Unit of the Yarmouth Regional Hospital. The Complainant admitted to Godsoe that the Complainant was experiencing emotional turmoil and that he did not know what to do. He confirmed that he had not eaten. He said that he missed his wife, that he was really depressed and, most alarmingly, that he was not scared of suicide.

[65] Subsequent to that conversation, at least one member of the Royal Canadian Mounted Police attended at the Complainant's work place. When the RCMP asked the Complainant to go with them, the Complainant indicated that he could not, that he was "too busy". The RCMP informed him that he had no choice. It appears that if the Complainant did not go with the RCMP voluntarily, they would take the Complainant with them involuntarily. He went. On the way out the door, the Complainant indicated to Dianne Burrill, the Respondent's wife, that he had to go. He said that everything was all right and that he had not done anything wrong. With that and little more, he left.

[66] If the Respondent was at the supermarket at that time, the Complainant did not speak with him. In fact, the Respondent testified that it was his wife that informed him that the RCMP had come and taken the Complainant to the hospital. The Respondent

testified that he did not ask why.

[67] The Complainant was taken to the Mental Health Unit at the Yarmouth Regional Hospital. There, the Complainant reiterated to the staff of the Mental Health Unit that he could not be admitted because he was "too busy". The staff indicated that he had no choice. The Complainant was admitted. While his admission to the Mental Health Unit was technically a voluntary admission, that technical fact is more true semantically than practically.

[68] The Complainant remained at the Mental Health Unit for 5 days.

[69] Within hours of his admission to the Mental Health Unit, Dianne Burrill was contacted by the Mental Health Unit. She was informed that the Complainant was at the Mental Health Unit and that he would not be back to work "for awhile". According to Jack Godsoe, Dianne Burrill was informed that the Complainant would not return to work "until after the weekend" at least. The conversation between Jack Godsoe and Dianne Burrill appears to have occurred only once and to have been brief. Mr. Godsoe felt somewhat constrained in what he could tell Dianne Burrill due to an overriding obligation to protect the Complainant's confidentiality interests.

[70] The primary diagnosis that came out of the Complainant's time at the Mental Health Unit was of an Adjustment Disorder with Depressed Mood. There was also a diagnosis of a Mixed Personality Disorder with Alcoholism. Little psychiatric or psychological information was provided to add further depth or substance to these diagnoses. However, Mr. Godsoe did note that the Adjustment Disorder essentially reflected the Complainant's difficulty adjusting to a stressor. In this case the stressor was identified as the somewhat abrupt end of the Complainant's marital relationship.

[71] Mr. Godsoe indicated that adjustment disorders of the nature suffered by the Complainant and in the circumstances experienced by the Complainant are not uncommon. He also confirmed that it was his belief that the Complainant continued to suffer from the disorder subsequent to his discharge from the Mental Health Unit.

[72] It is the understanding of this Board that a substantial reason for the "voluntary" admission of the Complainant was the presence or possible presence of suicidal ideation. It is also the understanding of this Board that the Complainant was able to withdraw from the Mental Health Unit when, by his own lack of consistency in reporting the symptoms of his disorder, there came to be substantial doubts as to whether there really was any suicidal ideation on the part of the Complainant.

[73] After his discharge from the Mental Health Unit, the Complainant contacted the Respondent. The Complainant was on an already scheduled vacation at the time of his discharge. The Complainant was informed that his employment had been terminated by Diane Burrill. He was informed him that there were problems with his work. The Complainant later spoke with the Respondent. The Respondent indicates that he did not provide reasons for the dismissal to the Complainant and did not know what reasons

were given by his wife.

[74] The Respondent testified that the final straw was an incident of inappropriate touching involving the Complainant and a female employee. This is not borne out by other evidence given by the Respondent or his wife and is conspicuous, by its absence, from the written answers provided to the Commission's investigators during the investigation stage of this matter, with the exception of an "Additional Comment" in the Respondent's interview dated August 28, 2001. It is worthy of note that the parties have acknowledged that those written answers have sufficient reliability to allow this Board to rely upon those answers for the truthfulness of their content and not merely to assist in a determination of credibility.

[75] Reference to the Record of Employment (RoE) indicates that the Complainant was dismissed on the same day that he was taken to the Mental Health Unit by the RCMP; not the Saturday that followed as the Respondents indicated was their intention well prior to the attendance of the RCMP and the admission of the Complainant to the Mental Health Unit. This is in addition to the Respondent's evidence that the decision to terminate the Complainant's employment was made several months before and the evidence of the Respondent's wife that the Respondent hoped that he could find a replacement by the time that the Complainant's vacation was over.

[76] This Board has not relied substantially upon the testimony of the Respondent. That testimony was often vague and evasive. The Respondent's time on the witness stand was notable more for the vagueness, evasion and apparent disinterest of the Respondent than by any clarity or sense of gravity expressed by the Respondent.

[77] After considering all of the evidence, it is difficult to conclude that the Respondents were not aware of the difficulties being experienced by the Complainant. The Respondent and his wife were contacted by the Complainant soon after he learned of his wife's departure from the matrimonial home. The nature and purpose of that contact could not be termed "usual".

[78] This is, of course, in addition to the fact that the Complainant, prior to the termination of his employment, was last seen by Mrs. Burrill at the Corporate Respondent's location when he was in the presence of the RCMP and being taken to the Mental Health Unit, substantially against his will.

[79] As a result of these facts, the co-incidence of the termination of the Complainant's employment and the presence of a real or perceived mental health issue is striking.

[80] In order to determine whether there has been a contravention of the *Act*, it is necessary to determine whether there is, in fact, a mental disability. A perception of such a disability will suffice: s. 3(l).

[81] In many cases, a finding of disability is not contentious. In this case, counsel for the Respondents has effectively placed this issue squarely before this Board. The

Respondents have argued that the nature of the difficulties experienced by the Complainant do not rise to the definition of disability. While this Board finds the evidence of disability less than complete and, indeed, less than desirable, the evidence of Jack Godsoe is sufficient, to cause this Board to conclude that at the time of the termination of his employment the Complainant was suffering from a mental disability.

[82] In reaching this conclusion, this Board notes that there is a meaningful distinction to be drawn between an ailment that is "common" - as phrased by the Respondents - and one that is "not uncommon" - as phrased by Jack Godsoe.

[83] This is not, of course, to say that there need be an uncommon or unexpected reaction to a stimulus in order to be actionable.

[84] As the perception of a disability will suffice, the finding that the Complainant's "condition" rises to the level of disability is not a necessary one. Given the circumstances under which the Complainant left the Corporate Respondent's location and the phone call that was placed to Diane Burrill by Jack Godsoe after the Complainant's "voluntary" admission to the Mental Health Unit, it would be impossible for this Board to conclude that if the Complainant was not suffering from a mental disability, this fact was known to the Respondents at the time of the termination of the Complainant's employment. The Respondents, therefore, were of the perception that the Complainant was suffering from a mental disability, even if he was not.

[85] In reaching this conclusion this Board is cognizant that there is no direct evidence of discrimination. It has reached this conclusion by the drawing of an inference from the circumstantial evidence presented. The test for the use of circumstantial evidence is set out in *Vizkelety, Proving Discrimination in Canada* (Toronto: Carswell, 1987) at p.142, where the author states:

The appropriate test in matters involving circumstantial evidence ... may therefore be formulated in this manner: an inference of discrimination may be drawn where the evidence offered in support of it renders such an inference more probable than the other possible inferences or hypotheses.

...

Where there is an undertaking to proceed by way of circumstantial evidence, to prove a fact in issue piece by piece, bit by bit, the probative value of each item, when taken singly, will not always be apparent ... But in many instances it may well be impossible to prove the discrimination otherwise. At the very least, a decision on relevance should take into account the fact that the evidence being tendered is but part of an aggregate from which the fact finder will ultimately be asked to infer the existence of a fact in issue.

[86] Having found that the Complainant was suffering from a mental disability or that

the Respondents perceived him to be so suffering, the question, quite simply, becomes one of whether there is a causal connection between the disability or the perception of a disability and the termination of the Complainant's employment.

[87] There is no direct evidence on this subject. This is not unexpected. Jurisprudence in the human rights context is no different from jurisprudence in other contexts in that it allows for inferences to be drawn from the evidence. It is an inference of a causal connection that the Complainant urges this Board to draw.

[88] There are competing submissions as to why the Complainant's employment was terminated and terminated when it was. The Complainant's theory is that his employment was terminated because the Respondents learned of his real or perceived mental disability and used his absence from work and the circumstances of that absence to rationalize terminating his employment. The Respondents' theory is that they were displeased with the Complainant's job performance for some time. They were displeased with his alcohol consumption at work, the quality of his work and, in indeed, the quantity of his work, as they allege that he was leaving work early and without permission. The Respondents indicate that a search for a replacement for the Complainant had been on-going for some time and a replacement just happened to become available at or around the time the Complainant was taken from their location to the Mental Health Unit.

[89] In support of an inference of discrimination, the Complainant relies upon co-incidence. The co-incidence of his real or perceived disability, his departure from the Respondents' store and his admission to the Mental Health Unit with the termination of his employment.

[90] In support of their theory and the inference of innocent intention or no causal connection, the Respondents refer to the evidence previously alluded to. However, nothing else is offered. No proof of an on-going search was provided in the form of documentation or any source other than employees of the Respondents. In addition, while this is not a case for employment law *per se* the absence of any reference to an employment file or to any form of graduated discipline for violation of employment rules makes the drawing of inferences in support of the Respondents' theory difficult.

[91] In reaching its conclusion, this Board has not relied upon the "frosting on the cake" comment much discussed during testimony except to the extent that it indicates the Respondents are more likely to have known of the Complainant's mental health status, real or perceived. This comment, presuming that it was made, is open to multiple reasonable interpretations. Not all of these interpretations lead to a finding or inference of ill intent on the part of the Respondents. The comment, therefore, was not relied upon.

[92] This Board has also not relied upon the incident wherein Mr. Jayne drove the Complainant home while the Complainant was intoxicated. While this Board has little doubt that an event did occur and that the Complainant was driven home by Mr. Jayne, this Board is not convinced that the event is probative. Whether the event was the

beginning of the end or the end of the beginning is not particularly probative to the

issues before this Board. The period of time that passed between the event and the termination makes the event interesting and noteworthy only from a narrative point of view.

[93] On the balance of probabilities, this Board believes that the co-occurrence of events to which the Complainant refers and relies, provides an overwhelming basis upon which to find discrimination on the basis of mental disability in the form of a causal connection between the Complainant's real or perceived mental disability and the termination of his employment by the Respondents.

VI CORPORATE VEIL

[94] The Respondents twice moved to have the complaint against the individual Respondent dismissed. The motions were made on the basis that the Respondent was protected by the Corporate Respondent's corporate veil.

[95] No authority, other than a general proposition of protection by the corporate veil, was cited in support of the application of the corporate veil in cases under the *Act*.

[96] This Board is disinclined to apply the protection of the corporate veil to cases under the *Act*. This Board finds the application of the protection provided by the corporate veil to be antithetical to the stated and inherent purposes of human rights legislation. While there may be valid reasons for the application of the corporate veil in the civil litigation and corporate governance contexts, this Board can see little reason to extend the coverage to this context.

[97] Human rights legislation must be seen to operate on the basis of parallel principles. One principle is the recognition of the inherent dignity present in every member of society; granting members not only the privilege of being but the privilege of being valued for who or what they are. Another principle is the application of the civil concept of compensation whenever that inherent dignity is denigrated. A third principle is educative; it requires that steps be taken, both in the context of Boards of Inquiry and in the non-adjudicative functioning of an administrative human rights body, to educate society generally about the presence of the inherent dignity, the value in recognizing that inherent dignity and the consequences in failing to do so.

[98] Bearing in mind these parallel principles this Board sees no reason that the Respondent should be shielded by the corporate veil. As a result, the complaint is not dismissed against the Respondent.

VII AWARD

[99] Having found that the Respondents discriminated against the Complainant on the basis of a real or perceived mental disability, this Board finds that the Complainant is entitled to a remedy.

[100] The *Act* allows for a wide variety of remedies. Section 34(8) sets out this Board's authority with regard to the fashioning of a remedy. It states:

(8) A board of inquiry may order any party who has contravened this *Act* to do any act or thing that constitutes full compliance with the *Act* and to rectify any injury caused to any person or class of persons or to make compensation therefor.

Reasonable Notice/Lost Earnings

[101] As an employee dismissed without cause, the Complainant is entitled to reasonable notice of the termination of his employment or to pay in lieu thereof.

[102] As the Complainant was employed by the Corporate Respondent for two years and as he was employed in a relatively senior position, this Board determines that reasonable notice would be 3 months. Having been provided with no notice, the Complainant is entitled to 3 months pay in lieu of notice. The rate of pay for the 3 months shall be the average of the Complainant's gross income during the one year immediately preceding the termination of his employment, less any statutory deductions and moneys already paid to the Complainant.

[103] In determining what amount of notice or pay in lieu thereof is reasonable in the circumstances, this Board has utilized the decisions in *Wallace v. United Grain Growers Ltd.* (1997), 152 D.L.R. (4th) 1 (S.C.C.); *Bardal v. Globe & Mail Ltd.* (1960), 24 D.L.R. (2d) 140 (O.C.J.); and *Vorvis v. I. C. B. C.* (1989), 58 D.L.R. (4th) 193 S.C.C.

Mitigation

[104] The duty to mitigate his loss rests with the Complainant.

[105] The Complainant's evidence is that he experienced an epiphany, of sorts, in front of the Burrigge Campus of the Nova Scotia Community College and decided to retrain. He has since obtained a GED and taken and passed a Community Residential Worker (CRW) course. He now works in that field.

[106] Given the period of notice, the apparent relative lack of positions commensurate with the Complainant's experience, the Complainant's psychiatric or emotional state and lack of any allegation of a failure to mitigate, this Board finds the decision of the Complainant to retrain to be a reasonable one and makes no deduction for any failure to mitigate.

General Damages

[107] The general principles in awarding general damages in human rights decisions were described by the Board of Inquiry in *Willis v. David Anthony Phillips Properties*

(1987), 8 C.H.R.R. D/3847 at D/3855 [para. 30460] (Ont. Bd. Inq) as follows:

Awards of general damages ... should be high enough to provide real redress for the harm suffered, insofar as money can provide such redress, and high enough to encourage respect for the legislative decision that certain kinds of discrimination are unacceptable in our society ... No award should be so low as to amount to a mere "license fee" for continued discrimination. At the same time, fairness requires that an award bear a reasonable relationship to awards made by earlier boards of inquiry.

[108] General damages are compensatory in nature. They are intended to compensate for pain and suffering, hurt feelings and injuries to self and self-esteem.

[109] It is apparent that the Complainant suffered from hurt feeling and damage to his self-esteem as a result of the discriminatory actions undertaken by the Respondents. However, it is also apparent that not all of the Complainant's injuries to his feelings and self-esteem resulted from the discriminatory actions of the Respondents.

[110] The acts which lead to his Adjustment Disorder were not perpetrated by the Respondents. Even before his employment was terminated, the Early Response Assessment prepared by the Mental Health Unit indicated the Complainant as being "dysthymic and his affect was sad and, by turns, self-justifying or even angry in relationship to his ex-wife and her associates...".

[111] The evidence presented does not allow for a clear delineation between those injuries resulting from the circumstances of the end of the marriage and the circumstances of the termination of his employment. Nonetheless, the testimony of the Complainant does lead this Board to conclude that some injury was either caused, or materially contributed to, by the termination of the employment in a manner that has already been found to be discriminatory.

[112] While the Complainant sought general damages for slander, this Board declines to award damages on this basis as there is insufficient evidence to support such an award.

[113] As a result of the foregoing, this Board orders general damages payable to the Complainant in the amount of \$2000.00.

Pre-Judgment Interest

[114] The Complainant is entitled to pre-judgment interest. The rate of pre-judgment interest shall be set by this Board after receiving input from the parties.

VIII ORDER

[115] This Board invites the input of counsel and the Complainant on the form of Order.

That input is to be received no later than January 17, 2003, and should deal with the issue of Employment Insurance benefits received during the notice period and the rate, if any, of pre-judgment interest.

[116] An Order will then issue.

DATED: April 11, 2011

Peter D. Nathanson