2012 NSHRC

IN THE MATTER OF
THE NOVA SCOTIA HUMAN RIGHTS COMMISSION

BOARD OF INQUIRY

BETWEEN:

SCOTT HEWEY - Complainant

and

634623 NB LTD., a body corporate
(Carrying on business under the firm name and style of Peterbilt Nova Scotia) - Respondent

Parties:

Mr. Scott Hewey, the Complainant
represented by Michael Coyle, solicitor

634623 NB Ltd., the Respondent
represented by Karen Cochrane, solicitor

Counsel

Lisa Teryl, Solicitor for Nova Scotia Human Rights Commission

Board of Inquiry: E.A. Nelson Blackburn, Q.C.

DECISION ON REMEDY: August 7th, 2013

BACKGROUND:

On October 12, 2012 I was appointed to a Human Rights Board of Inquiry to inquire into the complaint of Scott Hewey, which revised complaint was dated October 11, 2011, against the Respondent, alleging discrimination, contrary to section 5(1)(d) and (o), employment, physical disability under the *Human Rights Act*, R.S.N.S. 1989 c. 214, as amended.

An Inquisitorial Hearing format was conducted with consent of the parties on December 10, 2012, and a Decision on the alleged discrimination was made on January 3, 2013, which Decision of the Board found the Respondent had discriminated against the Complainant, pursuant to sections 5(1)(d) and (o), of the *Human Rights Act*, supra., for the reasons set forth in that Decision.

I reserved jurisdiction to deal with an appropriate remedy in the event the parties were unable to resolve that matter.

Since the date of the Decision on Discrimination, the Complainant and Respondent have engaged legal counsel to argue the issue of remedy, and following a conference call with Counsel for all parties, written submissions were received.

The Boards' authority to Order a Remedy:

Remedial powers of a Board of Inquiry are found in section 34 (8) of the Human Rights Act supra, which provides as follows:

> A board of inquiry may order any party who has contravened this Act to do any act or thing that constitutes compliance with the Act and to rectify any injury caused to any person or class of persons or to make compensation therefore and, who are authorized by and to the extent permitted by the regulations, may make any Order against that party, unless that party is a complainant, as to costs as it considers appropriate in the circumstances.

The most common remedies for violations of the Act include monetary compensation and non-monetary awards in a goal to make the victims whole, taking into account the principles such as reasonableness, foreseeability and remoteness.

Human Rights Boards of Inquiry in Nova Scotia and other Canadian jurisdictions have stated these remedial provisions should be construed liberally to achieve the purposes and policies of Human Rights legislation.

In Hinwood v. Gerry Van Wort Sales Inc., 1995, 24 C.H.R.R., D/244 (OMT.B. Inquiry), the Board at paragraph 33 stated:

> These remedial provisions should be construed liberally to achieve the purposes and policies of Human Rights legislation: **Cameron v. Nel-Gor Castle Nursing Home,** (1984), 5 C.H.R.R., D/2170 (Ont. Bd, Inq.) At D/2196. It is a principle of human rights damage assessment that damage awards ought not to be minimal, but ought to provide true compensation. This is necessary in order to meet the objective of restitution and also to give true compensation to meet the broader policy objectives of the Code. The objectives of the Code are to put the complainant in the same

> position she would have been in had her human rights not been infringed by the respondents: Cameron at p. D/2196, paras 18526-27. The measure of monetary damages in a case such as this is the amount that the complainant would have earned had she not ben denied the employment opportunity: **Cameron** at p. D/2197 para. 18532; ...

These interpretations have been supported by Nova Scotia Boards of Inquiry in such cases as Cottreau v. R. Ellis Chevrolet Oldsmobile Limited, 2007- NSHRC-3, at paragraph 152, and in Hall v. Seetharamdoo, 2006-NSHRC-4 (NS Bd Inq, Bonita M. Small, Chair at para 78.

The Complainant is seeking damages for loss of employment income, for loss of health benefits as well as general damages. Michael Coyle on behalf of the Complainant filed a letter from the Complainant's physician, Dr. Jyri S. Ainamo, dated April 7, 2013, attached to his written submission, and Counsel for the Respondent requested the letter not be considered by the Board. Ms. Karen Cochrane on behalf of the Respondent, argued the issues to address on remedy should be based on the evidence presented at the hearing on December 10, 2012.

I agree with the Ms. Cochrane and I will not consider the letter from Dr. Ainamo attached to Mr. Coyle's submission, as it was not part of the record at the hearing.

FACTS RELEVANT TO REMEDY:

The Board found at the Discrimination Hearing the Complainant, worked for the Respondent and its predecessor company as a mechanic, primarily working on heavy truck and trailer equipment, but he was also licensed to issue motor vehicle inspection stickers. The Complainant's work history with the Respondent and its predecessor company was from on or about November 2004 until January 7, 2010, a period of five years and two months.

I found from the evidence at the Hearing, as the Complainant was not feeling well on January 7, 2010, he informed the service manager, David MacLean, who indicated to him he should take a couple of days off and on that same day the Complainant saw his physician Dr. Ainamo who issued a note after examining him, Exhibit C-1, that indicated the Complainant should be off work until March 1, 2010. I found that the Complainant gave this note to Mr. MacLean on January 7, 2010, and Mr. MacLean had indicated he would pass the doctor's note on to the general manager, Mr.

Cunningham. I found from the evidence at the Hearing the Respondent discriminated against the Complainant under the Human Rights Act supra., as the Respondent treated the Complainant as quitting by the act of him taking his tool box home and not inquiring about his medical condition and issuing an Record of Employment indicating that he had quit. I further found from the evidence of Mr. Cunningham and Mr. MacLean and also from the Complainant, that he did not take any more time off than anyone else for sickness and there was no disciplinary problems at work.

I find the Complainant was entitled to health benefits with the Respondent, which was not contradicted, and his common law spouse and family had incurred approximately $500.00 per month for medical expenses which would normally be covered under this group plan with the Respondent. Further, I find the Complainant indicated he was unemployed for approximately one year and went through the EI Self-Employed Business Program (SEB) and became self employed in and around February 2011. I find from January 7, 2010 to March 1, 2010, the Complainant could not work as his physician indicated he should be off for medical reasons.

I also find from March 1, 2010 to when the Complainant became self employed in February 2011, he had attempted to try to find work in the Kingston, Nova Scotia, area, near his home, but he testified small businesses were not hiring truck mechanics and it would cause hardship to his family if he had to leave the area to try and find work which would have been a great cost and expense to him.

I further find the training certificates that the Complainant earned while in the employment of the Respondent, and in particular the Peterbilt and Cummings Training Certificates, were not given to him when he left on June 7, 2010, as Mr. Cunningham had told him they belonged to Peterbilt. However, as his motor vehicle inspection licenses were obtained through the Registry of Motor Vehicles he would have to contact them to have one issued as they are site based. With respect to the issue of how all of that would affect his job search, I will comment on later in this Decision.

I further find the Complainant's previous medical history was to some extent known by Mr. Cunningham, the general manager of the Respondent, employer, in that he knew the Complainant had stress and anxiety issues, but he did not recall the particulars. Mr. Cunningham further indicated he did not recall seeing the note from Dr. Ainamo of January 7, 2010, Exhibit C-1, indicating the Complainant should be off work until March 1, 2010, and even if he did, he said he did not know how he would have handled the matter.

The Complainant submitted a job search record for June and July 2010, following the hearing, at the direction of the Chair of the Board of Inquiry, which included jobs not related to his profession as well as those that related to his work as a mechanic in an attempt to show efforts to mitigate. The Complainant had filed a complaint through the Labour Standards office of the Department of Labour and it was found the Respondent had to pay one month's pay to the Complainant in lieu of notice under the Labour Standards Code. The Respondent had maintained throughout that the Complainant had quit his job and they did not have to pay severance to him and the Labour Standards officer found otherwise and the Respondent was obligated to provide severance pay.

I find the Complainant from the Fall of 2010 had registered his vehicle repair business to be operated from his garage; however, his business was not opened until February 2011.

ISSUES:

The issues are:

1. What amount, if any, should be awarded for special damages?
2. Did the Complainant fail to mitigate? If so, should there be any set-off for failing to mitigate?
3. What amount, if any, is appropriate for general damages?
4. Should any non-monetary remedies be awarded?

I will deal with the issues in order as stated above:

1. SPECIAL DAMAGES - LOSS OF EMPLOYMENT INCOME:

The Complainant is not seeking reinstatement, but just compensation for loss of income. There are differing views from Boards of Inquiry as to how to treat loss of employment income; should there be actual pecuniary loss or a method commonly used in wrongful dismissal cases.

I agree with Board of Inquiry Chair Elizabeth Cusack in Marchand v. 30104970 Nova Scotia Limited, reported in 2006 NSHRC-1, at paragraph 60, as follows:

I am not using the unjust dismissal rule or the Labour Standards Code as my guide because they are not relevant. The issue is appropriate compensation as the statute calls for restitution in the position the Complainant would have been in, but for the discriminatory conduct.

Further, in Hall supra, Chairman Small at paragraph 80, stated:

> ... I agree with Adjudicator Cusack in Marchand v. 3010497 Nova Scotia Ltd., supra, at para 15, when she states that the unjust dismissal rule or the Labour Standards Code are not relevant; the remedy in a human rights context should attempt as far as possible to put the parties back in the same position that they would have been in had the discrimination not occurred. Having said that, the contingencies of how long the Complainant would have remained employed absent the discriminatory behaviour must be also be taken into account. ...

Further in Marchand v. 3014970 Nova Scotia Limited, supra, at paragraph 15 [sic] Board Chair Cusack states the unjust dismissal rule or the Labour Standards Code are not relevant:

> ... the remedy in a human rights context should attempt as far as possible to put the parties back in the same position that they would have been had discrimination not occurred.

The criteria frequently used in common law for pay in lieu of notice in wrongful dismissal cases is as set out in 1960 by the Ontario Court of Justice in Bardal v. Globe & Mail Ltd. (1960), 24 D.L.R. (2d) 140 (O.C.J.) at, paragraph 21, as follows:

> There can be no catalogue laid down as to what is reasonable notice in particular classes of cases. The reasonableness of notice must be decided with reference to each particular case, having regard to the character of the employment, the length of service of the servant, the age of the servant and the availability of similar employment, having regard to experience, training, and qualifications of the servant.

These are some of the factors used commonly to award a remedy in wrongful dismissal cases in the employment context. Some courts have used a rule of thumb of one month's pay for each year worked, but this is not a rule of law and our courts have repeatedly indicated, and in particular,

Justice Laskin, of the Ontario Court of Appeal, in Minott v. O'Shanter Development Co. Ltd, 1999, CanLII 3686 (ON CA) at paragraph 73,

> The rule of thumb approach suffers from two deficiencies: It risks overemphasizing one of the Bardal factors, "length of service", at the expense of the other; and it risks undermining the flexibility that it s the virtue of the Bardal test. The rule of thumb approach seeks to achieve this flexibility by using the other factors to increase or decrease the period of reasonable notice from the starting point measured by length of service. But to be meaningful at all, this approach must still give unnecessary prominence to length of service. Thus, in my opinion, the rule of thumb approach is not warranted in principle, nor is it supported by authority.

The Complainant argues through his Counsel, his compensation period should start when he was ready to return to work following his medical leave and that, according to his family physician, Dr. Ainamo, by note dated January 7, 2010, he recommended the Complainant be off work from January 7, to March 1, 2010, and accordingly, if he had been employed, he would have been off for medical reasons for that period of time and would have received EI benefits.

The Respondent argues through its Counsel, the Complainant set up a business in his garage in October 2010, and any compensation should be limited from when he was able to go back to work, (April 2010, to October 2010). The Respondent argues the Complainant's job search record shows his efforts to try to find employment as a requirement for the self-employment program, and that all his job searches were in the Kingston - Greenwood area and she argued he did not properly mitigate as he did not try to fine employment in an area where he was previously employed, such as Kentville, and he did not seek work at any truck stops in other Valley areas such as New Minas or Avonport as he testified they were too far away from his home.

The issue of whether the compensation for loss of employment income should terminate when the Complainant requested his business to be set up in his garage in October 2010 or when he first opened his doors for business in February 2011, once he completed the EI Self-Employed Business Program? Further, should there be a reduction for failure to mitigate?

I find under this head of damages, the Complainant's period of unemployment caused by the discrimination by the Respondent is from March 1, 2010 to February 1, 2011, a period of one year. The Complainant would have been off work until March 1, 2010, and there was no evidence as to

when in February 2011 he became self-employed and I fix the date as of February 1, 2011.

2. <u>MITIGATION:</u>

There is a duty on the Complainant to make reasonable efforts to mitigate his loss; however, the onus of proving a failure to mitigate is on the Respondent. Ms. Cochrane argued the Complainant was not hampered in his search to find work by the Respondent not giving him the training certificates he obtained for the Peterbilt trucks and the Cummings diesel engines and she argued there is no evidence he lost out on employment opportunities as a result of this. She argued he only started to look for work on June 7, 2010, and there is a gap of not looking for work at all between March and June 2010. She argued his compensation should be reduced by 50 percent from six months to three months as a result of his failure to mitigate.

Mr. Coyle argued the Complainant was highly motivated to look for work, not only as a mechanic, but for anything, such as pumping gas. He argued the Complainant was told, for him to be considered as a self-employed business, he had to satisfy EI that he had done an exhaustive job search and he submitted search records and did all that was necessary for him to try to mitigate his loss.

He argued failure by the Respondent to provide the Complainant's training certificates that he earned while employed with the Respondent hampered his job search.

On the issue of mitigation, I find the only record I have of his efforts to find employment is attempts made by the Complainant in June and July 2010, and there is no indication what, if any, attempts were made from March to June 2010 or thereafter. I am not satisfied the Complainant made reasonable efforts to go outside his home area to look for a mechanics position, or any work for that matter. I find, notwithstanding the Complainant's evidence that he was under a lot a stress due to loss of income, his evidence also indicated he would do anything to try to get work. I am not satisfied from March to June 2010, and from August 2010, thereafter, there were any reasonable attempts to mitigate and find other employment. Following enrolment in the EI Self Employed Program, other than the efforts made in June and July 2010, as shown on the job search report, there is no indication any further attempts were made to find employment and he indicated he registered his business in October 2010, but the shop was not open for business until February 2011. The evidence was unclear when he actually started working out of his garage and engaged in a self-

employed business; however, I find on the balance of probabilities it was February 1, 2011, when he started his self-employed business.

Accordingly, I find on the issue of mitigation there is a duty on the Complainant to make reasonable efforts to mitigate and I find he did not take all reasonable steps to do so and I reduce his compensation for loss of employment income by two (2) months, for his failure to mitigate under this head of damage. Further, I find there was no evidence that the failure by the Respondent to provide the training certificates received by the Complainant hindered his job search.

Further, there will be a deduction for the statutory payment of one month's gross pay of $2,997.59, paid by the Respondent under the Labour Standards Code, following a complaint made by the Complainant.

Accordingly, I am awarding ten (10) months' pay as compensation for loss of income under that head of damages less one month already received under the Labour Standards Code. I find this is an appropriate remedy under section 34 (8) of the Human Rights Act supra.

3. <u>SPECIAL DAMAGES - LOSS OF HEALTH BENEFITS:</u>

The uncontradicted evidence led by the Complainant was that he had health benefits which covered such things as prescription drugs that were needed by his family as his common law spouse was in need of drugs for herself and the family which totalled approximately $500.00 per month. There was no documented evidence to show a pattern as to whether this amount had been paid through his employer entirely for a period of time during his employment or for how long the expenditure lasted, either before or after his last day of work. I do, however, accept that this was a benefit through his employer which was subsequently denied to him and his family as a result of loss of employment on January 7, 2010, and I award the amount of six (6) months loss of benefits at $500.00 per month for a total of $3,000.00 for loss of health benefits to the Complainant and his family. I find the Complainant would have received three (3) months benefits from January to March if employed by the Respondent and I award a further three (3) months for this loss of health benefit. I find this an appropriate remedy for this loss of benefit under section 34 (8) of the Human Right Act supra.

GENERAL DAMAGES:

The Complainant claims $20,000.00 under this head of damages. I was referred to a number of authorities cited by both the Respondent and the Complainant. I agree with Board Chair Cusack in Marchand supra., at paragraph 67, indicated:

> In considering an appropriate range of general damages I am guided by a number of factors, which are, I believe relevant. I have considered the non-applicability of the principles applicable to unjust dismissal. The relevant factors considered include the following:

a) the redress for harm suffered by the discriminatory conduct, which in this case I consider to be economic, sociological (impacting an entire family) and emotional;

b) the need to ensure that a message is delivered to the Complainants and others that human rights must be respected; and

c) the need to ensure that the award does not appear to be so small as to constitute a minor cost of doing business, such as to encourage risk taking.

Further, Board Chair Cusack at paragraph 69 indicated awards are generally set between $1,000.00 and $10,000.00 and it tends to gravitate to the low end. At page 127 of her decision, she states:

> ... Generally, the range of general damages in Nova Scotia Human Rights cases has been relatively low considering the harm they are meant to address as outlined above. While it is true that awards are usually set at between $1,000.00 and $10,000.00, awards tend to gravitate to the low end of the range.

A number of cases were referred to me by Counsel with respect to general damage awards in Human Rights cases including Westphal Home Court Limited (2005), CHRR. Doc-05-785 (NS. Bd. Inq.) $10,000.00 general damages were awarded for a physical disability case; Trask v. Nova Scotia Justice 2010 NSHRC-1, where there was systemic discrimination award for general damages of $15,000.00.

A case was cited by the Respondent, namely Cottreau v. R. Ellis Chevrolet Oldsmobile Limited, supra, where a disabled employee was terminated while on disability and the award was $10,000.00;

Hall v. Seetharamdoo $2,500.00; Marchand supra., $4,500.00; MacLellan v. McTara Limited $1,000.00; Bobbit v. Royal Canadian Legion $2,500.00; Pinner v. K. Burill's Supermarket $2,000.00.

It is trite to say all these cases can be distinguished on the facts of each individual case. However, I find from the demeanor and testimony of both Mr. MacLean and Mr. Cunningham, on behalf of the Respondent, they had no ill will toward the Complainant and furthermore, they honestly believed in their line of business when mechanics take their tool box home, it meant they were quitting. Further, as Mr. MacLean had indicated there was disagreement between him and the Complainant with respect to him requesting the Complainant do some other type of work and there was some resistance, he believed he was just dissatisfied generally and decided to quit.

Considering the principles outlined in Marchand supra., paragraph 67, of which I agree, and also taking into consideration the factors of harm suffered by the discriminatory conduct to ensure a message is delivered, and human rights must be respected, any award is not to be a minor cost of doing business. After reviewing the authorities cited by both the Complainant and the Respondent, I award the sum of $5,000.00 for General Damages. In doing so, I have taken into account the Complainant having had to file a complaint under the Labour Standards Code and the Respondent not considering the medical reasons for leaving his work place on January 7, 2010. I find this is an appropriate remedy under section 38 (8) of the Human Rights Act supra.

I am not persuaded by the argument of Mr. Coyle for the Complainant that the general damages should be increased. As there is no systemic discrimination in this matter and I am not persuaded the refusal to give the Complainant the Peterbilt training certificates, affected his employment in any way and there was no evidence led to that effect. These certificates would have to be updated if he wanted to work on Peterbilt or Cummings diesel engines and a record would always be with Peterbilt, in any event, and they could be obtained by a new employer. With respect to the motor vehicle inspection license, these are issued by the Registrar of Motor Vehicles and they pertain to a particular site and the Complainant would be entitled to apply for such a certificate to do motor vehicle inspections.

I find there may be a concern if the Complainant had not upgraded his training with Peterbilt, his ability to work on Peterbilt and Cummings diesel equipment may be affected and to advertise to the public he had these certificates that were obtained some time ago without being upgraded, could be misleading to the public. I further agree with the submission from the Respondent that

notwithstanding his medical condition and that he suffers from stress, there would be stress in owning his own business.

I am not convinced the actions of the Respondent were deliberate or calculated to retaliate against the Complainant and I do not find there was any violation of section 11 of the Human Rights Act, as argued by Mr. Coyle. Accordingly, there should be no increase in an amount for general damages, as stated in this Decision.

4. NON-MONETARY REMEDY:

The Respondent conceded it is prepared to provide the Complainant with information on the training courses that he has taken through Peterbilt and it is willing to receive any information from Nova Scotia Human Rights Commission on discriminatory practices and will continue to work with the Board.

I find it is in the public interest in this case to Order the Respondent to do the following:

1. To provide a letter to the Complainant within 30 days of the date of this Decision, providing him with a list of all the courses that he had successfully completed through the Respondent's or its predecessor company's training program.

2. To make immediate contact with the Nova Scotia Human Rights Commission within 30 days of the date of this Decision to seek information and assistance on how to make its workplace environment void of discriminatory practices which may involve training sessions or programs as suggested by the Nova Scotia Human Rights Commission and to follow and adhere to such practices or direction of the Nova Scotia Human Rights Commission in that regard.

Accordingly, I find this an appropriate remedy under section 34 (8) of the Human Rights Act, supra.

ORDER:

Accordingly, I Order the following:

1. SPECIAL DAMAGES - Loss of employment income based on the Complainant's gross monthly pay of $2,997.59 as at January 7, 2010, for a period of 12 months less two (2) months for failure to mitigate for a total of ten (10) months employment income less any applicable statutory deductions for income tax, EI, Canada Pension, etc. There shall also be a deduction for the payment already made by the Respondent under the Labour Standards Code in the gross amount of $2,997.59.

Summary of lost wages: $2,997.59 per month x 10 months	= $29,975.90
Less one month paid	$ 2,997.59
TOTAL	$ 26,978.31

2. Loss of health benefits $3,000.00

3. General Damages $5,000.00

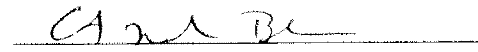
4. The Respondent shall provide a letter within 30 days of the date of this Decision, providing the Complainant with a list of all the training courses that he had successfully completed through the Respondent or its predecessor company.

5. The Respondent shall within thirty (30) days of the date of this Decision contact the Nova Scotia Human Rights Commission to seek information and assistance on how to make its workplace environment void of discriminatory practices which may involve training sessions or programs as suggested by the Nova Scotia Human Rights Commission and to follow and adhere to such practices or direction of the Nova Scotia Human Rights Commission in that regard. I will leave it in the discretion of the Nova Scotia Human Rights Commission and the Respondent to work out how any training or informational sessions should be implemented.

6. I have considered interest on the amounts ordered, and as there were delays by both sides in obtaining legal counsel and moving the matter forward, I exercise my discretion to not award interest.

I will retain jurisdiction in the event the parties cannot agree on the implementation of this Order.

DATED AT BEDFORD, NOVA SCOTIA THIS 7th DAY OF AUGUST, 2013.



E.A. Nelson Blackburn, Q.C.
Chair, Board of Inquiry