

File Name: In the Matter of Molly Marchand v. 3010497 Nova Scotia Limited (Needs Convenience Store #0211) and Judy Burchell

Date of Decision: April 20, 2006

Area(s): Employment

Characteristic(s): Disability

Complaint: Molly Marchand worked for Judy Burchell at Needs Convenience Store. Ms. Marchand went on a medical leave because of a soft tissue injury she suffered from a car accident and when she was ready to return to work, she was fired.

Decision: Ms. Marchand was fired due to discrimination.

Duty to Accommodate

It is an employer's responsibility to inquire about an employee's disability and to accommodate the employee. Ms. Burchell was required to make inquiries about Ms. Marchand's availability to return to work and had a duty to accommodate Ms. Marchand on her return to work. The Board found that Ms. Burchell did neither.

Good Faith not Enough

The Board found that even though Ms. Burchell acted in good faith in firing Ms. Marchand (she thought that Ms. Marchand did not want to return to work and was surprised when Ms. Marchand phoned her and asked to return to work), she was still responsible for the discrimination. Also, this responsibility exists even if an employer does not know about it. In this case, a retail advisor with TRA told Ms. Burchell that she must not rehire Ms. Marchand, and Ms. Burchell contacted the Department of Labour for information on this situation. She was not told to check with the Nova Scotia Human Rights Commission and so was not aware she needed to follow the *Human Rights Act*.

Company's Liability

A company is responsible for discriminatory actions of their employees, even if the employee manages the business, and makes all profits from the business. The Board found that both Ms. Burchell and Needs Convenience Store were responsible for discriminating against Ms. Marchand.

Remedy:

Individual Remedies

- General damages (emotional harm): \$4,500 plus 2.5% interest
- Special damages: \$7,329.51- Lost Wages
- Provide complainant with Canada Pension employer contributions for lost wages

Systemic Remedies

- The Chair acknowledged he had no authority over Sobeys's Companies, which own Needs Stores, but suggested that Sobeys's make sure that their managerial employees are familiar with Human Rights legislation.
- The Chair did not order human rights education because Ms. Burchell is no longer in business.

2006-NSHRC-1

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

BETWEEN:

MOLLY MARCHAND

COMPLAINANT

- and -

**3010497 NOVA SCOTIA LIMITED (Needs Convenience Store #0211)
and JUDY BURCHELL**

RESPONDENTS

-and-

THE NOVA SCOTIA HUMAN RIGHTS COMMISSION

COMMISSION

DECISION

Counsel:

Michael J. Wood, Q.C.
Nova Scotia Human Rights Commission

Molly (Cindy) Marchand
Self-represented

Judy Burchell
Self-represented

3010497 Nova Scotia Limited
Represented by Judy Burchell

[1] The Complainant, Molly Marchand, whose middle and known name is “Cindy” commenced employment at a Needs store in New Waterford on May 12, 2003. Her last day of employment was on February 10, 2004.

[2] The Respondent, Judy Burchell, was the sole officer, director and shareholder of the numbered company, 3010497 Nova Scotia Limited, which ran the store. She was personally designated in exhibited correspondence as the “operator” of the store (Exhibit 1).

[3] On February 11, 2004, Ms. Marchand was injured in a motor vehicle accident. The undisputed and uncontradicted oral testimony of Ms. Marchand, and two of the medical reports in Exhibit 1 and the oral testimony of Dr. Sheira Haq, all establish that the Respondent suffered soft-tissue injuries which were sufficient to warrant a prescription for muscle relaxants, a course of physiotherapy over a number of weeks and a period of prescribed convalescence from work. Although a report generated by Dr. Stannish, an orthopaedic specialist, who was reporting to Ms. Marchand’s Section B. motor vehicle insurer, characterized the injuries as “mild”, Dr. Haq stated that during the relevant period, between the occurrence of the accident and Ms. Marchand’s termination, the term “moderate” was more appropriate. Dr. Stannish’s report is Exhibit 1, Tab 9. Dr. Haq’s report to RBC Insurance dated May 26, 2004 is Exhibit 1, Tab 8. Dr. Haq described Ms. Marchand’s pain as being scaled at 8 out of 10 during the relevant period.

[4] Essentially during the period from February 11 to at least May 26, 2004, Ms. Marchand suffered from a whiplash type injury which caused her initial mild neck pain followed within a few days with back pain which was described as severe by Ms. Marchand. There was marked limitation of leg raising on examination and sufficient evidence on examination to satisfy Dr. Haq that the period of convalescence was between February 11 and June 5, 2004.

[5] Dr. Haq identified a brief note as bearing her signature and being in her handwriting

(Exhibit 1, Tab 4). The document has some odd characteristics. In the first place, it appears to be on a prescription pad page stapled to another page with a stamped or typed “sincerely Dr. Sheira Haq” and then “Dr. Sheira Haq” apparently typed underneath it. The original was not produced but I am satisfied that Dr. Haq identified the handwritten portion of the document as her own. (The note is Exhibit 1, Tab4).

[6] As the note is not dated and as Ms. Marchand alleged that she gave it to Ms. Burchell on February 12, 2004, I inquired as to ability of Dr. Haq to be precise about the return to work date so as to predict it on the day after an accident. She indicated that it was unlikely that she would have made such a prediction so early on.

[7] However, in a letter dated May 3, 2004, Dr. Haq gave the same period for convalescence. (Exhibit 1, Tab 7).

[8] Ms. Burchell does not recall receiving the first note which Ms. Marchand says she handed to her in the store on February 12, 2004. She did not deny receiving it after the distinction between no recollection and denial was made clear to her. After consideration of all the evidence on this issue, I have concluded that Dr. Haq wrote the note on or about February 12, 2004 and that it was given to Ms. Burchell by Ms. Marchand on or about that date, but more likely than not on the 12th of February. February 28th was the first date on which Ms. Marchand contacted Dr. Haq after her injury. I also considered that there was at least a partial admission of the existence of such a note in a letter of Judy Burchell contained in Exhibit 1 at Tab 2.

[9] On or about the 10th of May, 2004, Ms. Marchand called Judy Burchell indicating that she would be ready to return to work in June. She said that she wanted to wait approximately one month because of a kidney infection. Dr. Haq’s evidence indicates that June 5, 2004 was the appropriate return date based solely on the injuries. Dr. Haq indicated that her last relevant examination of Ms. Marchand was on May 26, 2004. She reviewed all of her chart notes in her oral testimony and they confirm ongoing pain management and convalescence issues during the relevant period.

[10] As a result of considering the documentary evidence and all of the testimony and as there was no contradictory evidence, I conclude that Molly Marchand suffered from a physical disability during the period February 11, 2004 to June 5, 2004.

[11] Dr. Haq's description of her clinical observation, which she indicated were made at a date earlier than those of Dr. Stannish in July of 2006, and her description of the severity of pain and limitations of movement were sufficient to substantiate the conclusion that there was actual physical disability with some limited loss of physiological function and restriction or lack of ability to perform an activity. In addition, I find that there was an "infirmity".

[12] These findings are consistent with the definition of disability under section 3(1)(i)(ii) and (iii) of the *Human Rights Act* RSNS 1989 C 214 as amended.

[13] The definition sub-section does not appear to require a restriction caused by broken limbs or non-functioning motor control. A soft-tissue injury sufficient to warrant a significant period of convalescence, such as is the case here, brings the situation of Ms. Marchand within the definition of "disability". I find this, even though the restriction or lack of ability to perform activities related to the job are caused by pain and the need for convalescence, rather than significant anatomical restriction of movement.

[14] In making this assessment, in addition to the evidence of Dr. Haq and Ms. Marchand about the injuries, I note that Ms. Marchand's job included stacking shelves which convenience store merchandise; an activity of significant importance on the back shift based on the testimony at the hearing.

[15] I specifically find that Ms. Marchand was restricted by pain of such a significant nature that it impaired her ability to perform a substantial portion of the activities in her job.

[16] Commission Counsel called employees and former employees of the store. They included: Shauna Hurley, Brenda Conrod, Melissa Mills, Sharon Copan, Meghan Brushett and Frank Fahey.

[17] Sharon Copan is the current operator of the store through her own numbered company. She took over the store on February of 2006. Therefore , at the time of testifying none of the witnesses had a financial dependence on the Respondents.

[18] The evidence of all of the witnesses including the Complainant and Respondent, Judy Burchell, establishes that the store was run twenty-four hours a day, seven days per week. There were usually two employees on the day shift and sometimes with Ms. Burchell there were three people in the store. The night shift which began at 4:00 p.m. had one to two employees, depending on the need. For example, there were more customers on lottery nights. The back shift from midnight to 8:00 a.m. was staffed by one employee, except when another employee was being trained for that shift. Some employees worked shifts of fewer than eight hours.

[19] The rate of pay for back shift was, according to Judy Burchell, one dollar higher than minimum wage, which was the rate payed to other employees.

[20] The staff witnesses all corroborated the evidence of Ms. Burchell about how shifts were scheduled. Ms. Burchell, who scheduled the shifts, tried to accommodate and often did accommodate requests for setting the numbers of shifts employees wished to work per week and accommodated changes in schedule for personal reasons advanced by employees.

[21] It is clear that for most employees, the day shift was preferable to the night shift. The back shift was the least favorite among staff, with the exception of the Complainant and Mr. Lahey, who preferred the back shift.

[22] Three witnesses described being off work for varying periods of time. One was off for maternity leave and two because of accidents outside of the workplace.

[23] Shauna Hurley went on maternity leave mid-May, 2004, according to the evidence of Ms. Burchell. Ms. Hurley said she worked 4 or 5, eight hour shifts per week. She did not give a return to work date to her employer at any time. She phoned Ms. Burchell in December of 2004 asking if she

could return to work and was put back to work at that time.

[24] Brenda Conrad worked fewer shifts, usually two a week. Recently she was off work for two months in 2005. She returned to work with an ease back at the end of her convalescence. Ms. Conrad testified that she kept her employer advised of her medical progress while she was off by providing medical and physio information. She discussed return to work with both Sharon Copan and Judy Burchell without a request to do so. She did not recall anyone being hired to replace her position. Ms. Conrad recalled that Ms. Burchell had not required updates; they were volunteered.

[25] Meaghan Brushett was also out due to an accident and returned to her position.

[26] Judy Burchell described posting shift notices once a week. She testified about which employees worked various shifts over each of several weeks during periods throughout the time when the Complainant was employed and while she was off work. The schedule review confirmed that Ms. Burchell would re-schedule staff as needed to cover personal issues and that shift scheduling was always a challenging task for her as some employees would not show for shifts and as employees were often seeking changes.

[27] Her evidence was that she had the greatest difficulty with holiday periods and the back shift during the time she operated the store. This was for a period of close to nine years. She finally left the business because it was too challenging, particularly as her husband, who assisted her, had to work in Alberta for months at a time.

[28] It was clear from the evidence of all of the witnesses and Ms. Burchell that most employees were hired almost instantly on applying if they were prepared to work shifts which needed filling. The evidence of Ms. Burchell was that there was no need to advertize for employees.

[29] There is no significant difference between the evidence of the Complainant and respondent on essential facts.

[30] Ms. Burchell was aware that Ms. Marchand was injured in an accident and spoke directly with her within twenty-four hours. Within a few days she filled in an insurance form and an EI sick benefits Record of Employment, both of which indicated that the employee was off work for medical reasons. The word “disability” appears in this material, but that is not important as Ms. Burchell acknowledging that she assumed that Ms. Marchand was off work due to the accident, not any other cause. On considering the documentary evidence and all of Ms. Burchell’s testimony as well as the evidence of the Complainant, I conclude that the Respondent was aware that Ms. Marchand was off work due to a physical disability.

[31] Ms. Burchell did not ask Ms. Marchand for any medical reports or inquire as to physiotherapy or other treatment. Ms. Marchand did nothing to update Ms. Burchell on her condition after the initial conversation and form filling were completed. Although I have found that Dr. Haq’s note with the off-work dates was given to Ms. Burchell, she said she did not recall it. Ms. Burchell formed the opinion that Ms. Marchand was not returning to work, but she had no reasonable basis for making that conclusion, as she had not been so advised by Ms. Marchand.

[32] On or about May 10 and May 11, 2004, Ms. Marchand approached Ms. Burchell in respect of her return to work. Ms. Burchell was taken aback as she had not anticipated this. She had hired four other employees during the convalescence period. Not all of the employees stayed, but two who did stay were working the back shift; one three days a week and the other, four days a week.

[33] The newest employee was hired less than two weeks before Ms. Marchand called Ms. Burchell and after training, the new employee worked her first full shift alone on the back shift two or three days earlier.

[34] On questioning by myself about whether there was another factor in play, Ms. Burchell revealed that on or about March of 2004 she had been told by David MacDonald, the retail advisor of TRA that she must not rehire Ms. Marchand under any circumstances. TRA is a Sobeys Company which owns the Needs stores and is the primary supplier to the stores. Sharon Copan testified about

the relationship between TRA and the operator, including their control over pricing. In her evidence the retail advisor must be consulted about work-related problems which cannot be resolved initially and the advice is to be followed, subject to independent legal advice. Ms. Burchell was not so clear on the line of authority when questioned about it.

[35] Ms. Burchell testified that she recalled Mr. MacDonald's direction when faced with Ms. Marchand's request to return to work in June, but indicated it was not primary in her mind. She was expecting the new employee to work out and was happy with the current but very new schedule for the back shift. She had a good feeling about the new employees (as she admittedly had with other employees who quit after a few days or weeks).

[36] Ms. Burchell volunteered that she had no idea about her legal obligations to Ms. Marchand. As a result, she contacted what she called the Nova Scotia Department of Labour for advice. She did not reveal her identity and she did not inquire about the name of the person she spoke to. She said she dialed a Sydney number and spoke with a female employee. She testified that the advice she was given about how to handle what she perceived to be a predicament was as follows:

Either give the employee one weeks severance and a notice of termination;

- or -

Let the employee return to work for one week and then lay her off.

[37] In view of the requirements of the work place, assuming that Ms. Burchell understood the advice she was given and assuming that the person who gave the advice knew or ought on reasonable inquiry to have known that the absence of the employee was due to injuries from a work place, such advice was highly inappropriate given the provisions of the *Human Rights Act*. Nevertheless, Ms. Burchell, who testified that she had given no thought to calling the Nova Scotia Human Rights Commission for advice, took the advice she perceived that she had been given to heart. She typed

out a termination notice giving Ms. Marchand one week's pay in lieu of notice (Exhibit 1, Tab 11).

[38] Ms. Burchell gave her evidence clearly, straightforwardly and articulately, without any apparent artifice, and I have no doubt that she acted in good faith, relying on her understanding of the advice she was given and believing, although erroneously, that she was fulfilling her legal obligations to the Complainant. I believed Ms. Burchell when she said she didn't realize it was her job to call or make inquiries of Ms. Marchand and when she said she thought she didn't want to come back to work, based on gossip within the store.

[39] Ms. Burchell testified that Ms. Marchand was a reliable and dependable employee. In answer to one of my questions, she said that she was as good as any other employee.

[40] At the time Ms. Burchell terminated Ms. Marchand, she knew that Shauna Hurley was having difficulties with her pregnancy and had accommodated shift changes and reduced hours. It was obvious that she would be requiring a maternity leave in the near future. In fact, Sharon Hurley began her leave five days after the termination of Ms. Marchand.

[41] The termination of Ms. Marchand was not warranted for reasons I will describe below, but it could have been rectified a few days later when Shauna Hurley stopped working.

[42] Ms. Burchell admitted that if she had to lay someone off it would be the last hired. As a result, it would not have been difficult to advise the last hired employee that within a few weeks she would be laid off due to the return of an employee on disability leave ; nor after Shauna left, would it have been difficult to offer that employee's shifts to the new employee for the period of the maternity leave.

[43] Ms. Burchell agreed that such moves would have been an imposition but that there was nothing approaching undue hardship or any economic difficulty if Ms. Marchand were put back into the schedule. There was no evidence of any residual disability which would have required accommodation in the work force to any significant degree.

[44] Ms. Burchell testified that after the present complaint was filed she was upset with David MacDonald, her retail advisor, with TRA, Needs and herself. She said if the Department of Labour had told her to take the Complainant back, she would have done so.

[45] In formulating this decision I considered the burden of proof upon the Complainant to prove a *prima facie* case, thence the onus shifting to the Respondent to rebut the *prima facie* case and followed the principle that discrimination on a prohibited ground may be one of a number of factors leading to the termination. See *O'Malley v. Simpson Sears* (1985), 7 C.H.R.R. D/3102 at D/3108 and in the case of the physical disability I followed the logic in *Sylvester v. British Columbia Society of Male Survivors of Sexual Abuse* (2002), 43 C.H.R.R. D/55, 2002 (B.C.H.R.T.) 14 at para 30 and *Morris v. British Columbia Railway Co.* (2003), 46 C.H.R.R. D/162 (B.C.H.R.T.) at paras 183-185 and 227.

[46] I find that there is proof on balance of probabilities of a *prima facie* case of discrimination in the matter of employment on the basis of physical disability as described above. I find that the Complainant's disability was a factor in the refusal to continue the Complainant's employment. I find that the employer did not rebut the *prima facie* case or establish that accommodation was made to the point of undue hardship. In fact, there would have been no hardship whatsoever, other than the awkwardness of dealing with the fresh hire, whose longevity in the workplace was unknown compared with Ms. Marchand's dependability.

[47] I find that Ms. Burchell and her company fell far short of the duty to accommodate for reasons set forth above and have followed the logic of the *Meoirin* decision in so finding. See *British Columbia (Public Service Employee Relations Comm). V. B.C.E G.E. U.* (1999), C.H.R.R. D/257 (S.C.C.).

[48] I note that even if the policies or a directive from TRA played a role in the decision not to permit Ms. Marchand to return to work, it is clear that she would have been taken back but for the absence which the employer knew was due to a disability of close to four months. I have decided this

because Ms. Burchell was clear that Ms. Marchand was not coming back and had made other arrangements for staff. As unexcused discrimination is a factor in the dismissal of Ms. Marchand, the role Sobeys may have played, although it may have been more significant than Ms. Burchell explained, cannot act as a bar to the necessity of a ruling in support of the Complainant.

[49] It is clear from the evidence of accommodation given to the personal needs and absences of other employees that absences were tolerable and tolerated despite the inconvenience.

[50] As a result of the hearing, I believe Ms. Burchell has learned that she misunderstood the law and now knows that the practical consideration which concerned her does not absolve her or her company of their responsibility. Moreover, I believe she now understands that she bears the onus of making inquiries about the availability of the employee to return to work.

[51] During the hearing I asked Ms. Burchell about her familiarity with her legislative obligations. She had a copy of the Nova Scotia Labour Standards Code, but when I asked her whether she had a copy of the *Human Rights Act*, she said she did not.

[52] I considered whether I should exercise my authority to compel David MacDonald and perhaps a TRA representative to appear and whether I should add a party to the complaint pursuant to Section 33 of the *Human Rights Act*, I decided against that course on hearing from the parties and Commission's counsel, primarily because it was not necessary to dispose of the complaint. However, I have recommendations which flow from this specific case. They include that consideration be given to a method of ensuring that all employees and all managers of employees in Nova Scotia have a copy of the *Human Rights Act*. At the very least, Ms. Burchell's desire to comply with the law would have resulted in her calling the Human Rights Commission for advice if she had read the *Act*.

[53] While I have no authority to make an order regarding the Sobeys Companies, I would respectfully suggest that they may benefit from a policy of ensuring that managerial employees within their range of direct and contractual influence have familiarity with Human Rights legislation. I did not investigate whether any such policies are in place, but if they are, they were unknown to Ms. Burchell, who seems like a pretty conscientious individual.

[54] I did not summon anyone from the Department of Labour. Some further investigation and education may be in order if Human Rights issues are being ignored by staff. Ms. Burchell may have some cause to be concerned about the advice she received as it appears led to have contributed to an inappropriate decision, which has negative consequences for her.

[55] I have not described Ms. Marchand's evidence in any great detail as, like Ms. Burchell's evidence, it was clear and largely uncontradicted. There were no significant credibility issues with the testimony of the participants.

[56] Ms. Marchand regularly worked 40 hours per week, 8 hours per days, 5 days per week. Sometime after she commenced employment, she asked for Wednesday night and Sunday night off. In the language of the store, this actually meant the first 8 hours of Thursday and Monday of each week. Those were her regular nights off for most of her employment. Until she was injured in the accident, she seldom took time off. She took a shift off due to a death in her family and re-arranged some shifts. There was some overtime pay likely caused by statutory holidays according to Ms. Burchell. Vacation pay was included in every pay cheque, so that none was paid when employment terminated, except that which was included in the pay cheque. On examination of the final Record of Employment it appears that some pays were higher and some lower than the average. The average pay inclusive of vacation pay was \$321.45. Ms. Burchell indicated that the average pay could be accurately calculated by taking an average of all pays issued in the insurable earnings calculation, except for one of the pay periods. As Ms. Marchand did not challenge that method, that is how I have calculated her pay loss for the purpose of determining compensation. The average gross pay, inclusive of vacation pay was \$321.46. (Exhibit 1, Tab 13)

[57] I will not recite Ms. Marchand's previous work history in detail, but over the course of several years, although she had a number of different employers, she was normally employed in a minimum wage job with few periods of unemployment.

[58] Ms. Marchand was unemployed after her injury from February 11, 2004 until November 12, 2004 when she had a temporary job until just before Christmas. She was in receipt of EI during this time. She had a further period of unemployment and has had a number of other jobs since, moving for better working conditions and benefits.

[59] Commission Counsel, without objection by the Complainant or comment or objection, from the Respondent, indicated that I should consider awarding compensation for the period from the anticipated return to work date to the date of first employment.

[60] 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 to the position the Complainant would have been in but for the discriminatory conduct.

[61] Since Ms. Marchand was a reliable employee and was usually employed in the labour force, I find that it is more likely than not that she would have remained as an employee with the Respondent for the period June 12, 2004 to November 12, 2004, during which time she would have earned \$7,329.51 (23 weeks at \$321.45 less a day) gross at the rate specified above. I order that this amount still be paid to the Complainant. However, I note the evidence that Ms. Marchand will have to reimburse the EI Fund as will the Respondents after they comply with this decision. I have had regard to the fact that Ms. Marchand was happy with her job, liked her employer and lived within walking distance of the store at the relevant time and was therefore not likely to have quit before November 12, considering the work history. I did not order interest on the wage replacement as I had no evidence on the appropriate quantum.

[62] I also order that the Respondents make Canada Pension employer contributions for the Complainant for the relevant period.

[63] I am considering contingencies such as illness and mobility in not granting compensation for the further period of employment after December 22, 2004

[64] Ms. Marchand testified in great detail about serious family problems which I will not detail here, other than to say she was under a great deal of stress due to insufficient funds to maintain her household and properly feed her children, had to move to Port Hawkesbury from New Waterford, had to depend on family charity and ended up with only one child living with her as a result of the move. The family problems were very unfortunate, but the ones relevant to a determination of general damages are strictly related to the emotional stress caused by the discriminatory conduct and job loss. The stress caused by being on EI during the illness and what appear to be factors unrelated to the job loss cannot be taken into account in determining general damages, although Ms. Marchand appeared to strongly believe that all of her problems were caused by the loss of her job.

[65] I note that the Respondents cannot be held responsible for the prior financial problems of the Complainant and their impact on how short of cash she was at the time of the incident. Having said that, it should be fairly considered that employees who receive low wages are simply not in a position to save money for a rainy day. As a single parent of four children, Ms. Marchand was definitely not in a position to save money from her \$7.25 per hour income. However, the employer's responsibility does not extend to rectifying all financial problems suffered by the Complainant regardless of remoteness.

[66] I find that Ms. Marchand's job search efforts were vigorous and were pursued in both the Sydney and Port Hawkesbury areas. Ms. Marchand made reasonable efforts to mitigate her damages.

[67] 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 the 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.

[68] See *Willis v. David Anthony Phillip Properties* (1987), 8 C.H.R.R. D13847 (Ont. Bd. Inq.), at para 30460, which has a similar analysis.

[69] The Act is remedial in focus and not preventive. Having said that, there is an underlying expectation that when discrimination is found the remedy should be instructive to others in similar situations. See *Morrison v. O'Leary* (1990), 15 C.H.R.R. D/237 (N.S. Bd. Inq.) at para 84, *Henwood v. Gerry Van Wart Sales Inc.* (1995), 24 C.H.R.R. D/244 (Ont. Bd. Inq.) at para 33 and *Farm Meats Canada Ltd. v. Berry* (2000), 39.C.H.R.R. D/317, 2000 A.B. Q.B. 682 at para 16. The award of monetary damages must, after considering the obligation of the Complainant to mitigate her loss, provide full compensation, subject to reasonable consideration of contingencies. The requirement for complete compensation is discussed in *Morrison v. O'Leary* (supra) at paras 126-127. 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 \$1000.00 and \$10,000.00, awards tend to gravitate to the low end of the range. See *Johnson v. Halifax Regional Police Service* (2003), 48 C.H.R.R. D/307 (NS. Bd. Inq.) at para 32 and *Hill v. Misener* (No. 2) (1997), C.H.R.R. Doc 97-215 (NS. Bd. Inq.). In *Matthews v. Westphal Home Court Ltd.* (2005), C.H.R.R. Doc 05-785 (NS. Bd. Inq.), \$10,000.00 general damages were awarded with 2.5% pre-judgment interest for a physical disability case.

[70] I made a provisional award in *Blanchard v. Labourers' International Union, Local 1115 and Doug Saroul and Bernie MacMaster* [2002] N.S.H.R. B.I., Doc No. 2 (N.S. Bd. Inq.) of \$15,000.00. However, I distinguish the present case from *Matthews* and *Blanchard* for the following reasons:

- (a) the disability in the instant case was of a significantly shorter and

more minor nature than in either of those two cases; and

- (b) the impact of the discriminatory conduct was significantly less than in either of those two cases, although it was serious for the Complainant.

Considering the evidence in this case, I am convinced that it is unnecessary to consider specific deterrence to Ms. Burchell, who has clearly learned a hard lesson and does not, in any event, intend to be in the business world in the future.

[71] I am, however, cognizant of the need for general deterrence and encouragement of respect for the law, to borrow the language of criminal sentencing principles.

[72] It is my view that a \$4,500.00 award is reasonable having considered all of the evidence and the seriousness of the matter.

[73] I award 2.5% pre-judgment interest on the award.

[74] I am not prepared to order a public interest remedy in this case because the Respondents are no longer in business. If they were in business, I would order a mandatory education process to be directed by the Commission. I do, however, refer to the general recommendations made above.

[75] Ms. Burchell was the sole director and officer of her numbered company. She managed the business. There is no question that she was the person who directly engaged in the discriminatory conduct. In so doing she is personally responsible for her conduct.

[76] Regardless of whether she was an employee of the business, she was the operating mind in addition to being the sole corporate officer and director and made all profit from the business as a result of which the corporate entity is responsible for her discriminatory conduct regardless of whether she was an employee.

[77] I am cognizant of Justice Davison's warning in *Lockhart's Ltd. v. Excaliber Holdings Ltd.* [1987] N.S.J. No. 450 in which His Lordship stated that one person corporations should be considered as separate entities from their major shareholders save from exceptional circumstances. The cases on piercing the veil generally protect or do not protect officers and directors and related corporations depending on such issues as whether fraud is involved and focus on the "directing mind" principle in some situations. See for example *Wilson v. Service Canada Inc.* [2003] O.J. 1571 (at paras 42 to 44).

[78] In this case it is not necessary to perform a reverse veil piercing as the Complainant, Ms. Marchand, was employed by the corporate entity respondent which acted through Ms. Burchell. Therefore the corporation meets the definition of "employee" under section 3(e) of the *Act* and fits within the category of "person" under section 3(k) as used in sections 4 and 5 of the *Act*. Regardless of the employment status of Ms. Burchell, an issue of concern to Commission Counsel, I find that the Respondent numbered company is jointly and severally liable with Ms. Burchell to pay the damages awarded in this proceeding. There is no question of Ms. Burchell acting independently of her company or without authority from her company.

[79] I have concluded that Ms. Burchell knew about Ms. Marchand's disability as a result of having spoken with her and being given a very brief medical report. After that the employer had an obligation to keep informed of the situation so that it would be aware through management of whether there was an ongoing obligation toward the employee. Likewise, the employee would have had to provide reasonable requested updates and would have to satisfy the employer to a reasonable extent that she continued to be disabled and was not suffering from a minor, trivial or chronic but non-debilitating problem.

[80] The employee's obligation could not be in place until the employer made a reasonable request for information. This of course did not occur in the case I have considered.

[81] Commission counsel requested me to give some guidance on this point and so I have

considered what would have been reasonable in such a case in which there is no broken limb or other obvious visible disability.

[82] A demand for detailed expert reports from a person other than the family physician or a physiotherapist, would be financially and emotionally onerous and unfair. A demand for complete medical files, hospital records and the like, would be invasive and discriminatory in itself as well as financially unfeasible for most employees on sick leave or disability.

[83] On the other hand, it is not unreasonable for an employer to want sufficient information about the details of the disability to know how to plan for replacements and accommodation on the employee's return to work and to require information which will give the employer reasonable assurance that the employee is legitimately suffering from a protected disability and is not malingering. The latter is a legitimate concern, particularly in the case of non-visible conditions.

[84] Because reports from family physicians are sometimes expensive if not voluntarily given, it would be helpful if a protocol for an appropriate type of reporting at minimum or no cost could be worked out between physicians and the Nova Scotia Human Rights Commission.

[85] I do not consider that it would have been invasive in this situation for Ms. Burchell to have requested information which would have advised of any necessary ergonomic or physical re-arrangements which might have been necessary. It would not have been invasive as she asked for a monthly update on the projected return to work date.

[86] Depending on the safety and performance issues directly relevant to a particular job function, I do not believe that it would be contrary to the *Human Rights Act* if an employer were to ask for a physician's assurance that the employee is medically able to handle an ease-back or a complete return to work or to ask for specific recommendations as to how that could be accomplished.

[87] Such inquiries could also encompass questions of occupational health and safety for both

the employee and others in the workplace, if that were a relevant issue under the particular circumstances of the workplace and the disability in question.

[88] I note that the pecuniary award may have tax consequences, which may be more in the current tax year than they would have been had the Complainant been paid in 2004. However, I have no evidence before me as to specific tax consequences and am not prepared to order compensation for the same on a speculative basis. See *Martin v. 3501736 Inc. (c.o.b. Carter Chevrolet Oldsmobile)*

[89] 2001 B.C.H.R.T.D. No. 39 (B.C. Hum. Rts. Trib.) at para 39 and also *Green v. Public Service Commission of Canada* (2003) C.H.R.D. No. 30 at paras 5 and 28 and *Rhandawa v. Yukon (Territory)* (1997), C.H.R.D. No. 11 (Ca. Hum. Rts. Trib.) at para 67. If I had more information and had more certainty about Ms. Marchand's 2006 income, I may have ordered a gross up for taxes or may have considered making an award for when tax consequences are calculated in the future. However, under the circumstances of this case, I do not believe that to be beneficial for the Complainant given the emotional nature of the proceedings and the fact that it is likely more beneficial for the parties to have finality than an ongoing need to interact over tax matters. Moreover, after reimbursing the EI fund, Ms. Marchand is unlikely to have a large tax burden as a result of the award.

[90] In summary, my rulings are as follows:

1. The Respondents shall be jointly and severally liable to pay forthwith to the Complainant the following:
 - (a) \$7,329.51 for her loss of wages;
 - (b) \$4,500.00 in general damages; and
 - (c) 2.5% pre-judgment interest on the general damages.
2. The Respondents shall have the right to comply with any obligations it has under the *Income Tax Act* with respect to the payment ordered and to deduct the same from the

payment to the Complainant.

3. If possible, the Respondents shall make Canada Pension contributions for the Complainant in respect of the reimbursement of lost wages.

[91] Dated at Sydney, Nova Scotia, this 20th day of April, 2006

Elizabeth Cusack, Q.C.
Nova Scotia Human Rights Commission
Board of Inquiry