

March 24, 2015

Via email: NSHRCBOI@gov.ns.ca

Tracey Williams
Director & CEO
Nova Scotia Human Rights Commission
Summit Place
1601 Lower Water Street
Halifax, NS B3J 3P6

Dear Ms. Williams,

**Re: John Tanner v. Alumitech Distributions Centre Limited.
File No. 51000-30-H13-1326**

Please find enclosed my amended decision in this matter, which corrects a minor typographical error in paragraph 22. I have also attached a Word version of the amended decision.

Yours truly,



Gail Gatchalian
GG/km
ggatchalian@pinklarkin.com

Enclosure

CC: John Tanner, by email
Norsat Eblaghi, by email
Kendrick Douglas, by email

In the matter of: **The Nova Scotia *Human Rights Act*, R.S.N.S. 1989, c.214**
and

In the matter of: **Board File Number: 51000-30-H13-1326**

Between:

John Tanner

Complainant

and

Alumitech Distribution Centre Limited

Respondent

and

The Nova Scotia Human Rights Commission

AMENDED DECISION OF THE BOARD OF INQUIRY *

Board of Inquiry Chair: Gail L. Gatchalian

For the Complainant: John Tanner, self-represented

For the Respondent: Norsat Eblaghi, President, Alumitech, self-represented

For the Commission: Kendrick Douglas, counsel

Date of Hearing: February 23 and 24, 2015

Date of Amended Decision: March 24, 2015

* I issued a Decision in this matter on March 20, 2015 that contained a typographical error in paragraph 22, referring to Mr. "Taylor" instead of the Complainant, Mr. Tanner. This amended decision corrects the error.

INTRODUCTION

1. John Tanner alleges that his former employer, Alumitech Distribution Centre Ltd., discriminated against him because of his physical disability. Mr. Tanner was a delivery driver with Alumitech for almost four years when, on November 18, 2012, he was involved in a car accident. After that, he was absent from work due to a back injury resulting from the accident. On September 17, 2013, he told Alumitech that he was able to return to his full duties. He alleges that the next day, his employer told him that he no longer had a job.

2. I have found that Alumitech did not terminate Mr. Tanner's employment. In fact, Norsat Eblaghi, the owner of Alumitech, was looking forward to Mr. Tanner's return to work once he was able to perform the full duties of his job. Mr. Eblaghi had assured Mr. Tanner in July, 2013, that he had a job to return to.

3. I have found, however, that Alumitech improperly took the position that it had no transitional or modified duties available for Mr. Tanner and that Mr. Tanner could only return to work once he was medically fit to perform one-hundred percent of his duties. I have also found that Alumitech failed to adequately address the conduct of Mr. Tanner's supervisor, who subjected Mr. Tanner to adverse treatment on the basis of his disability. By taking the position that it had no transitional or modified duties, and by failing to adequately address the supervisor's behaviour, Alumitech discriminated against Mr. Tanner on the basis of disability. Alumitech was not able to establish a non-discriminatory justification for the discrimination.

BACKGROUND FACTS

4. On September 26, 2014, I was appointed by the Nova Scotia Human Rights Commission as a one-person Board of Inquiry under the Nova Scotia *Human Rights Act*, R.S.N.S. 1989, c.214, to inquire into the October 9, 2013 complaint of John Tanner against Alumitech Distribution Centre Ltd.

5. Case management conferences were held on October 14, November 24, and December 10, 2014.

6. The hearing took place on February 23 and 24, 2015.

7. The Board heard from the following witnesses:

John Tanner, Complainant

Elizabeth Tanner, Mr. Tanner's mother

Erica Beaver, Mr. Tanner's partner

Jennifer Staszko, Kinesiologist, Centric Health

Norsat Eblaghi, President, Alumitech

Tara Bowser, Accountant, Alumitech

Paul Hipgrave, Production Manager, Alumitech, and Mr. Tanner's supervisor

8. The following individuals attended on behalf of the Commission:

Kendrick Douglas, counsel for the Human Rights Commission

Kaitlyn Ashley, Restorative Facilitator for the Commission

Linda Nicholl, Co-Restorative Facilitator for the Commission

9. Prior to the hearing, the parties had signed a Procedures Consent Order (attached as Appendix "A") agreeing to the process set out in the "Board Chair-Lead Questioning, Restorative Board of Inquiry, Simplified Procedures." Given the principles underlying the restorative approach, the parties' consent to the process, and their agreement that I had the authority to vary or alter the process at any time, I was satisfied that it was in the public interest to proceed in accordance with the Procedures Consent Order and the Simplified Procedures. For a fuller discussion of the restorative board of inquiry process, see *Hewey v.*

634623 NB Ltd., 2013 CanLII 91794 (NSBOI) at paras.7-13 and *Gilpin v. Halifax Alehouse Ltd.*, unreported, June 13, 2013 (NSBOI) at paras.4-9.

10. The hearing proceeded largely in accordance with the Simplified Procedures, with me asking further questions when I required clarification.

11. All parties were provided with a full opportunity to be heard and to comment on the answers given by the other parties.

ISSUES

12. The complaint raised the following issues:

- a) Did Alumitech discriminate against Mr. Tanner in employment on the basis of disability by taking the position that it had no modified or transitional duties for him, and if so, did Alumitech establish a non-discriminatory justification for the discrimination?
- b) Did Alumitech discriminate against Mr. Tanner in employment on the basis of disability by failing to address the behaviour of Mr. Tanner's supervisor, and if so, did Alumitech establish a non-discriminatory justification for the discrimination?
- c) Did Alumitech discriminate against Mr. Tanner in employment on the basis of disability by terminating his employment, and if so, did Alumitech establish a non-discriminatory justification for the discrimination?
- d) Did Alumitech discriminate against Mr. Tanner in employment on the basis of disability when it suspended his medical, dental, long-term disability and life insurance coverage, and if so, did Alumitech establish a non-discriminatory justification for the discrimination?

FINDINGS

Agreed Facts

13. The parties agreed on the following facts, which were set out in a Memorandum of Understanding signed by the parties:

- On January 19, 2009, John Tanner commenced employment with Alumitech on a full-time basis as a delivery driver, working 7:00 a.m. – 5:00 p.m.
- Norsat Eblaghi, owner of Alumitech, hired Mr. Tanner on January 19, 2009.
- On November 18, 2012, Mr. Tanner was involved in a motor vehicle accident unrelated to his employment and suffered a lumbar spine sprain/strain.
- Mr. Tanner went on medical leave on November 19, 2012 due to his injury.
- Mr. Tanner provided medical notes to Mr. Eblaghi from November 19, 2012 to September 18, 2013 at a rate of one every two weeks.
- Mr. Tanner's medical benefits were terminated on December 1, 2012.
- Mr. Tanner began regular physiotherapy sessions at PhysioLink on November 28, 2012 and continued these sessions until May 10, 2013.
- Alumitech issued Mr. Tanner's Record of Employment due to illness or injury on December 3, 2012.
- On June 19, 2013, Centric Health contacted Mr. Tanner's supervisor at Alumitech, Paul Hipgrave, who indicated that Mr. Eblaghi wanted Mr. Tanner to return to work once he was able to resume full duties and that they were not willing to accommodate.
- Mr. Tanner was assessed for a Comprehensive Functional Restoration Program (CFRP) at Centric Health on July 16 and 17, 2013.
- Mr. Tanner began the CFRP program on July 29, 2013 and attended 6 hours per day, 5 days per week, with a total of 34 treatment sessions.

- On July 22, 2013 Mr. Tanner called Mr. Eblaghi to advise he was ready to begin an ease back to work program.
- Mr. Eblaghi sent Mr. Tanner a letter on July 22, 2013 requesting an update on his health status and expected date he would be able to resume full duties at Alumitech.
- Mr. Tanner completed his CFRP program with Centric Health on September 17, 2013.
- Mr. Tanner contacted Tara Bowser on September 17, 2013 to advise he was cleared by his physician to return to work.
- Ms. Bowser requested that Mr. Tanner contact Mr. Eblaghi on September 17, 2013 to advise he was able to return to work.
- Mr. Tanner's physician approved his return to work on September 18, 2013.

No Modified or Transitional Duties

14. Mr. Tanner alleges that Alumitech discriminated against him on the basis of disability by taking the stance that there were no transitional or modified duties for him, and that he could only return to work when he was able to perform the full duties of his position.

15. As I explain further below, I find that Mr. Tanner's complaint is well-founded. After his accident, Mr. Tanner wanted to return to work as soon as possible. Alumitech improperly took the position that he could only return to work when he was able to perform the full duties of his position at full-time hours.

16. After his accident, Mr. Tanner diligently attended physiotherapy and work hardening treatment sessions in order to regain the ability to perform the full duties of his delivery driver position:

- Mr. Tanner regularly attended physiotherapy sessions at PhysiLink in Porters Lake from November 28, 2012 to May 10, 2013.

- Mr. Tanner started a work conditioning/hardening program with Centric Health, but the program was placed on hold due to his elevated blood pressure readings and his diabetic condition. He continued with physiotherapy sessions.
- Mr. Tanner participated in a more comprehensive, demanding “Comprehensive Functional Restoration Program” (CFRP) from July 29 to September 17, 2013. He attended the CFRP six hours per day, five days per week for a total of 34 treatment sessions.
- Mr. Tanner was medically cleared to perform the full duties of a delivery driver on September 18, 2013.

17. On January 10, 2013, during Mr. Tanner’s treatment at PhysiLink, Shauna Taylor, physiotherapist, spoke to Mr. Hipgrave to confirm Mr. Tanner’s job demands. Mr. Hipgrave stated that Mr. Tanner’s position fell into the “heavy” category, with frequent lifting of 50 pounds and occasional lifting of 100 pounds. Mr. Hipgrave told Ms. Taylor that there were no transitional duties available at Alumitech.

18. On June 29, 2013, during Mr. Tanner’s treatment at Centric Health, Ms. Staszko, kinesiologist, spoke with Mr. Hipgrave on the phone, to inquire about Mr. Tanner’s job demands and whether there were any other duties available for him. Mr. Hipgrave told Ms. Staszko that there were no other duties available, and that when Mr. Tanner was “one-hundred percent”, he could speak with Mr. Eblaghi prior to returning to work.

19. Ms. Staszko’s evidence was that half-way through the program, Centric Health would, if there were transitional duties available, attempt to have the employee work for a few hours per day, so that some work conditioning could be done in the clinic and some at work. Ms. Staszko stated that, according to a May, 2013 assessment of Mr. Tanner, while Mr. Tanner could not yet lift 100 pounds, he was able to sit for 48 minutes at a time on a frequent basis, and therefore would have been able to drive short distances.

20. At the hearing, Mr. Eblaghi acknowledged that he had not given any consideration to providing Mr. Tanner with light duties. He felt it was not necessary because he thought that Mr. Tanner would only be off work for a short period of time. He came to this conclusion because of the doctor's notes provided by Mr. Tanner, which each suggested that he would be back to work soon.

21. Mr. Eblaghi acknowledged that it would have been feasible for Mr. Tanner to return to work and only perform driving duties on a temporary basis. He readily acknowledged that none of the people at Alumitech work at one-hundred percent all of the time. He stated that Alumitech could have provided someone to help Mr. Tanner with the loading and unloading of material from the truck, as had happened in the past when Mr. Tanner had an injured wrist for two or three weeks. However, Mr. Eblaghi felt that if this is what Mr. Tanner wanted to do, he should have said so.

22. I find that Mr. Tanner had a physical disability within the meaning of s.3(l) of the *Human Rights Act*, in that he had a restriction or lack of ability to perform an activity due to a lumbar spine sprain/strain and mechanical low back pain.

23. I find that Alumitech discriminated against Mr. Tanner within the meaning of s.4 of the *Act*. The effect of Alumitech's position regarding modified or transitional duties was to subject Mr. Tanner to adverse treatment: Alumitech would not allow him to return to work until he was able to perform 100% of the duties of a delivery driver at full-time hours. I find that Mr. Tanner's physical disability was a factor in the adverse treatment: the reason that Mr. Tanner could not perform 100% of his duties prior to September 18, 2013, was because of his back pain.

24. I find that Alumitech was unable to establish a defence to the discrimination.

25. In *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (BCGSEU) (Meiorin Grievance)*, [1999] SCJ No. 46 (QL) at paragraph 54, the Supreme Court of Canada stated that an employer may only justify discriminatory treatment by showing that the workplace standard giving rise to a distinction is a

bona fide occupational requirement (BFOR). To do this, the employer must prove on a balance of probabilities that:

1. It adopted the standard for a purpose rationally connected to the performance of the job;
2. It adopted the particular standard in an honest and good faith belief that it was necessary to the fulfillment of that legitimate work-related purpose; and
3. The standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be impossible to accommodate individual employees with the characteristics of the claimant without imposing undue hardship upon the employer.

26. The standard at issue in this case is the requirement imposed by Alumitech on Mr. Tanner that he had to be able to perform all of his duties at full-time hours before he could return to work.

27. The first part of the *Meiorin* BFOR test requires that the standard be for a purpose rationally connected to the job. I find that Alumitech failed to meet this part of the test. This is because Alumitech had applied a less stringent standard to Mr. Tanner in the past, and Mr. Eblaghi acknowledged at the hearing that he would have been willing to apply a less stringent standard to Mr. Tanner during the period of Mr. Tanner's absence. In fact, Mr. Eblaghi went as far as acknowledging that no one at Alumitech performs at 100% all of the time. Alumitech did not adequately explain why it did not apply this less stringent, more accommodative standard to Mr. Tanner in 2013.

28. I also find that Alumitech failed to meet the second and third parts of the *Meiorin* test. The standard adopted by Alumitech in relation to Mr. Tanner's most recent absence was not adopted in an honest and good faith belief that it was necessary to the fulfillment of a legitimate work-related purpose, nor was the standard reasonably necessary to the accomplishment of a legitimate work-related purpose. Mr. Eblaghi's evidence demonstrated

that he did not believe that the strict standard imposed on Mr. Tanner was necessary to fulfill a legitimate work-related purpose. His evidence also demonstrated that the strict standard was not reasonably necessary to the accomplishment of a legitimate work-related purpose. Moreover, Alumitech failed to establish that it was impossible to accommodate Mr. Tanner without experiencing undue hardship. Mr. Eblaghi's evidence showed that it might have been possible to accommodate Mr. Tanner with modified duties without experiencing undue hardship.

29. As stated by the Supreme Court of Canada in *Central Okanagan School District No. 23 v. Renaud* (1992), 16 C.H.R.R. D/425 at paras.43-44, the search for accommodation is a multi-party inquiry that must involve the employer, the employee, and the union, if there is one. After the employee brings to the attention of the employer the need for accommodation, the employer must explore possible solutions, as the employer is in the best position to determine how the employee can be accommodated without causing undue hardship to the operation. The employee must facilitate the search for accommodation.

30. Alumitech should have communicated to PhysioLink and Centric Health that it was open to considering modified or transitional duties for Mr. Tanner. An obvious start would have been for Alumitech to indicate that it was willing to consider a temporary accommodation whereby Mr. Tanner would only have to drive the delivery truck, and others would take care of loading it and unloading it. At the hearing, Mr. Eblaghi expressed concern with the concept of having Mr. Tanner work for only a couple of hours a day, a couple of days a week, and whether or not this would have been productive work. However, this concern should have been explored with Mr. Tanner and his health care providers.

Mr. Hipgrave's Treatment of Mr. Tanner

31. I find that Mr. Hipgrave subjected Mr. Tanner to derogatory comments and conduct based on Mr. Tanner's physical disability. I also find that once Mr. Eblaghi was informed of Mr.

Hipgrave's behaviour, he had an obligation to ensure that it did not recur, and to assure Mr. Tanner that he would be provided with a workplace that was free of discrimination.

32. Shortly after Mr. Tanner went off work, he had an encounter with Mr. Hipgrave in the Alumitech parking lot. Mr. Hipgrave asked Mr. Tanner for the company credit card and phone. Mr. Tanner alleged that Mr. Hipgrave "ripped" them out of his hand, saying "You don't need these anymore." Mr. Hipgrave acknowledged at the hearing that he may not have done this in a nice way, and if this happened, he would apologize. Mr. Hipgrave said he acted in this way because he was frustrated with Mr. Tanner. Mr. Hipgrave said that he was frustrated with Mr. Tanner because when Mr. Tanner had the accident, he did not come to Mr. Hipgrave personally and explain to him what happened. Mr. Hipgrave felt disrespected. He acknowledged that this was probably a slight overreaction on his part.

33. In July, 2013, Mr. Tanner encountered Mr. Hipgrave at a gas station. Mr. Tanner alleges that Mr. Hipgrave directed the comment "Oh, my back" to him in a mocking way. Mr. Hipgrave denies making this statement about Mr. Tanner, and asserts that he was making the comment about his own back. I find that it is more likely than not that Mr. Hipgrave was referring to Mr. Tanner when he made this comment, and that he did so in a mocking way. I rely for this conclusion on the rest of the conversation at the gas station. Mr. Hipgrave admitted at the hearing that he told Mr. Tanner at the gas station that if it were up to him, Mr. Tanner would no longer have a job. Mr. Hipgrave acknowledged at the hearing that he was of this opinion because of Mr. Tanner's "dismal employment record." Mr. Hipgrave pointed to Mr. Tanner's absenteeism record up to the date of Mr. Tanner's car accident. However, I find that it is more likely than not that Mr. Hipgrave was also relying on Mr. Tanner's absence after the car accident.

34. In the parties' Memorandum of Understanding, it stated that Mr. Tanner was advised by Paul Hipgrave that he no longer had a job at Alumitech on July 19, 2013. However, this is not accurate. As stated above, Mr. Hipgrave told Mr. Tanner that if it were up to him, Mr. Tanner would no longer have a job.

35. Nonetheless, Mr. Tanner found the exchange in the gas station parking lot to be distressing. Because of Mr. Hipgrave's comments, Mr. Tanner called Mr. Eblaghi on July 22, 2013 to inform him about the conversation, concerned that he might no longer have a job. Mr. Eblaghi assured Mr. Tanner that he still had a job at Alumitech.

36. Although Mr. Eblaghi does not recall that Mr. Tanner told him about Mr. Hipgrave's comments during this telephone conversation, I find it more likely than not that Mr. Tanner did so inform him, and that this is why Mr. Eblaghi assured Mr. Tanner that he had a job to return to.

37. Mr. Eblaghi acknowledged at the hearing that it was only recently that he discussed the gas station exchange with Mr. Hipgrave.

38. I find that Mr. Tanner's disability and disability-related absence were factors in the manner in which Mr. Hipgrave demanded the company credit card and phone from Mr. Tanner, and in Mr. Hipgrave's insensitive comments to Mr. Tanner at the gas station in July, 2013.

39. Alumitech is liable for the acts of its supervisor, Mr. Hipgrave: *Robichaud v. Canada (Treasury Board)* (1987), 8 C.H.R.R. D/4326 at paras.33942-33946.

40. Once Mr. Tanner informed Mr. Eblaghi of Mr. Hipgrave's discriminatory comments, Mr. Eblaghi had an obligation to address those comments with Mr. Hipgrave and to ensure that the conduct was not repeated. Mr. Eblaghi had an obligation to ensure that Mr. Tanner was provided with a workplace free of discrimination on the basis of his physical disability. See *Robichaud* at pp.94-96.

Alleged Termination of Employment

41. At the hearing, Mr. Tanner asserted that Mr. Eblaghi had terminated his employment during a telephone call on September 18, 2013.

42. As I explain further below, I find that Mr. Eblaghi did not terminate Mr. Tanner's employment. In fact, I find that no telephone call took place between Mr. Tanner and Mr. Eblaghi on September 18, 2013.

43. Mr. Tanner's evidence at the hearing was that Mr. Eblaghi informed him by telephone on September 18, 2013 that he no longer had a job with Alumitech. Mr. Tanner said that he spoke to Ms. Bowser on September 17, 2013 to inform her that he was cleared to return to work, and that he spoke to her again from his home phone on September 18, 2013 to say he had a form from his doctor clearing him to return to full duties. He said it was on September 18 that Ms. Bowser advised him to call Mr. Eblaghi on his cell phone, and that he immediately, from his home phone, called Mr. Eblaghi on Mr. Eblaghi's cell phone, who then told him he no longer had a job.

44. Mrs. Tanner's evidence was that she was with Mr. Tanner in the house when he spoke to Mr. Eblaghi on the phone. She recalled that after the conversation, Mr. Tanner was upset, and that he said he had been told by Mr. Eblaghi that he no longer had a job. Mrs. Tanner could not pinpoint the date of the conversation, but said it happened after Mr. Tanner was cleared to return to full duties. However, Mrs. Tanner did not hear the voice of the person on the other line, or what that person said.

45. Mr. Eblaghi's evidence was that he never told Mr. Tanner that he no longer had a job; that his last conversation with Mr. Tanner was in July, 2013; that during that conversation he assured Mr. Tanner that he did still have a job with Alumitech; and that he did not speak to Mr. Tanner again and certainly did not speak to him on September 18, 2013.

46. I prefer the evidence of Mr. Eblaghi on this point. I find that Mr. Tanner's evidence concerning the alleged termination of his employment is unreliable. Mr. Tanner's evidence was both internally inconsistent and inconsistent with other facts.

47. Mr. Tanner signed his Complaint form on October 9, 2013. In his Complaint, he alleged that it was on July 22, 2013 that Mr. Eblaghi told him no longer had a job. In his Complaint, he also alleged that, on September 18, 2013, Ms. Bowser told him he did not have a job. This allegation about Ms. Bowser is written three times in the Complaint. There is no mention in the Complaint of Mr. Tanner talking to Mr. Eblaghi on September 18, 2013.

48. Mr. Tanner's evidence at the hearing was quite different. Mr. Tanner stated that every time he asked Mr. Eblaghi whether he had a job to return to, including on July 22, 2013, Mr. Eblaghi assured him that he did, once he was "one-hundred percent." Mr. Eblaghi told Mr. Tanner to get better, and to come back when he could. At the hearing, Mr. Tanner was no longer alleging that Mr. Eblaghi had terminated his employment on July 22. He was alleging that it was on September 18, 2013 that Mr. Eblaghi told him that he no longer had a job. This was the first time that Mr. Eblaghi had learned of this allegation.

49. Ms. Bowser's evidence was that Mr. Tanner called her on September 17, 2013 to say that he was cleared to return to work. She told him during that conversation to call Mr. Eblaghi on his cell phone, as Mr. Eblaghi was out of the office, and she gave Mr. Tanner the cell phone number to call. Ms. Bowser gave Mr. Tanner the cell phone number only once, on September 17. Mr. Tanner called her again on September 18 and said "I guess I don't have a job," and asked for his Record of Employment. Ms. Bowser did not say anything to indicate that Mr. Tanner no longer had a job, nor did she know why he said that. Ms. Bowser made notes on September 18, 2013, that reflect the foregoing sequence of events. I have no reason to question Ms. Bowser's evidence on this issue.

50. Finally, Mr. Eblaghi's cell phone records for September 18, 2013 show that no calls were received from Mr. Tanner's home phone or cell phone that day. Mr. Tanner could not provide an explanation for why Mr. Eblaghi's cell phone records for September 18, 2013 did not show a call from Mr. Tanner's home phone number or cell number.

51. I accept Mr. Eblaghi's evidence that he assured Mr. Tanner in a July, 2013 telephone call that he had a job, and that he did not speak to Mr. Tanner on September 18 and in fact he was waiting for Mr. Tanner to contact him once he was cleared to return to work and would have arranged for him to return to work. I accept Mr. Eblaghi's evidence that he always wanted Mr. Tanner back at work. I find that it is more likely than not that what Mrs. Tanner heard was Mr. Tanner's phone conversation with Ms. Bowser, in which Mr. Tanner inexplicably stated to Ms. Bowser "I guess I don't have a job."

52. I therefore find that Alumitech did not discriminate against Mr. Tanner in employment on the basis of disability by terminating his employment.

Suspension of Benefit Coverage

53. Mr. Tanner alleged that Alumitech discriminated against him on the basis of disability when it suspended his medical, dental and long-term disability benefit coverage. I find that Alumitech's suspension of the benefits was not discriminatory.

54. In order to have benefit coverage, the premiums had to be paid. The arrangement at Alumitech was for the employees to pay fifty percent of the medical and dental benefit premiums, and one-hundred percent of the LTD benefit premiums. Alumitech employees could choose whether or not to have benefit coverage.

55. Although the parties had agreed in the Memorandum of Agreement that Mr. Tanner's benefits were terminated on December 1, 2012, I accept Ms. Bowser's evidence at the hearing that she suspended his benefit coverage on December 3, 2012, after speaking with him that day. Ms. Bowser produced a document from Desjardins Financial Security entitled "Transmission confirmation," which indicates that she cancelled Mr. Tanner's benefit coverage effective December 3, 2012 for 6 months due to "unpaid leave." The transmission confirmation refers to a "temporary interruption of employment."

56. Mr. Tanner and Ms. Bowser differed on what transpired prior to the cancellation of benefit coverage. Mr. Tanner says that he was not given a choice to continue his benefit premium payments, and that the benefit coverage ceased without his knowledge. Because of the difficulties with Mr. Tanner's evidence concerning the termination of his employment, I prefer the evidence of Ms. Bowser on this point. Ms. Bowser's evidence was that she did not cancel Mr. Tanner's benefit coverage until she spoke to him on December 3, 2012. Her evidence was that Mr. Tanner informed her that he did not require the benefit coverage through Alumitech because he had coverage elsewhere. Ms. Bowser stated that she advised Mr. Tanner to ensure that his daughters also had benefit coverage under the other policy, as they had been covered under Alumitech's benefit plan. Ms. Bowser's evidence was that she would not have cancelled Mr. Tanner's benefit coverage without speaking to him first. I accept her evidence.

57. Ms. Bowser confirmed that Mr. Tanner's insurance coverage was in place until December 3, 2012. I was not provided with any receipts showing that Mr. Tanner was denied coverage for expenses incurred prior to December 3, 2012.

REMEDY

58. Pursuant to my request, Commission counsel provided me with written submissions on the appropriate remedy in this case.

59. Mr. Tanner and Mr. Eblaghi were given the opportunity to provide me with written comments on the Commission's submissions. Mr. Eblaghi provided me with written comments. Mr. Tanner chose not to comment.

60. Under s.34(8) of the *Human Rights Act*, a Board of Inquiry has the discretion whether to order a party who has contravened the *Act* to do any act or thing that constitutes full compliance with the *Act*, and to rectify any injury caused to any person.

General Damages

61. I order Alumitech to pay Mr. Tanner \$2500 in general damages for taking the position that Mr. Tanner could not return to work on transitional or modified duties, and for its failure to adequately address Mr. Hipgrave's discriminatory treatment of Mr. Tanner. Alumitech must make this payment to Mr. Tanner within 60 days of the date of this decision.

62. I am satisfied that the award of general damages, in the circumstances of this case, satisfies the criteria set out in *Willis v. David Anthony Phillips Properties (1987)*, 8 C.H.R.R. D/3847 (Ont. Bd. Inq.) at para.30460:

Awards of general damages under the *Human Rights Code, 1981*, 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.

63. It is my view that the award of \$2500 in general damages is high enough to provide real redress to Mr. Tanner for the harm he suffered as a result of the discrimination, and high enough to encourage respect by Alumitech for the *Human Rights Act*. I do not believe it is so low as to be considered a mere "license fee" for discrimination by Alumitech.

64. The amount of the award of damages is at the low end of the range. The Board of Inquiry in *Trask v. Department of Justice (Correctional Services)*, 2010 NSHRC 1 (CanLII) at paras.197-203 reviewed a number of Nova Scotia Human Rights Board of Inquiry cases involving

disabled employees who were terminated from their employment. The general damage awards in those cases ranged from a low of \$1,000 (in a 2004 decision) to a high of \$10,000 (in a 2007 decision).

65. I have decided on an amount at the low end of the range because Mr. Tanner's employment was not terminated. In fact, it was clear that Mr. Eblaghi would have welcomed him back to work. Mr. Tanner did not explain to the Board why he decided not to return to work at Alumitech, and why he said to Ms. Bowser "I guess I don't have a job". It is possible that Mr. Tanner had found work elsewhere: he started working for another employer on October 8, 2013, and shortly thereafter began to earn the same income as he had been earning with Alumitech. Mr. Tanner asserted that he did not begin looking for work until after he was told he did not have a job by Mr. Eblaghi on September 18, 2013. However, I have found that that conversation did not happen. Had Mr. Tanner been forthcoming, and had it been the case that Alumitech's discriminatory treatment of him played a part in his decision not to return to work there, I might have been willing to award a higher amount in general damages.

66. I also set the general damages award at the low end of the range because I do not believe that a higher amount is necessary to send a message to Alumitech that it is required to comply with its human rights obligations. Mr. Eblaghi and Mr. Hipgrave willingly and respectfully participated in the restorative board of inquiry process. During the hearing, Mr. Eblaghi expressed a desire to understand what he and Alumitech should have done to comply with the *Human Rights Act*, and a willingness to work with the Commission to educate himself and Alumitech employees on their obligations and rights under the *Act*. Mr. Hipgrave also expressed some insight into his behavior.

Special Damages

67. I decline to make any award for special damages, because I find that Mr. Tanner formed an intention sometime in July, 2013 not to return to work at Alumitech, even after Mr. Eblaghi assured him that he had a job to return to. I base this conclusion on the fact that he lead Ms.

Beaver and his treatment providers at Centric Health to believe that he had been terminated in July of 2013. The only health care provider to give evidence in this case was Ms. Staszko, and her evidence was that Mr. Tanner would have only returned to work on modified or transitional duties half-way through the CFRP, which would have been around the end of August, 2013. This would have occurred after Mr. Tanner formed an intention not to return to work at Alumitech.

Public Interest Remedy

68. I order that Alumitech management and employees undertake human rights education training on discrimination and accommodation, as well as sensitivity training, as directed by the Human Rights Commission. The Commission is willing to provide the training. Furthermore, I order Alumitech to draft human rights policies related to discrimination and accommodation in the workplace, in consultation with and with the assistance of the Human Rights Commission. The training must be completed, and the policies drafted, within five months of the date of this decision. Alumitech shall bear the cost of the implementation of these remedies.

Dated at Halifax this 24th day of March, 2015.



Gail L. Gatchalian

Nova Scotia Human Rights
Board of Inquiry Chair