HUMAN RIGHTS TRIBUNAL OF ONTARIO

B E T W E E N:

Terri-Lynn Garrie

Applicant

-and-

Janus Joan Inc.

Respondent

DECISION

Adjudicator: Ken Bhattacharjee

Date: February 28, 2014

File Number: 2009-04057-I

Citation: 2014 HRTO 272

Indexed as: **Garrie v. Janus Joan Inc.**

APPEARANCES

Terri-Lynn Garrie, Applicant	)	Mindy Noble and M. Kate Stephenson, Counsel
Janus Joan Inc., Respondent	)	No one appearing

INTRODUCTION

[1] The applicant, Terri-Lynn Garrie, is a person with a developmental disability. Her mother, Marjorie Tibbs, filed an Application under s. 34 of the *Human Rights Code*, R.S.O. 1990, c. H.19, as amended (the "*Code*"), which alleged that the respondent, Janus Joan Inc., discriminated against the applicant with respect to employment because of her disability.

[2] Among other things, the Application alleged that for more than 10 years, the applicant and other persons with developmental disabilities worked as general labourers on the respondent's work site, and were paid a training honorarium of $1.00 to 1.25 per hour, while general labourers who did not have developmental disabilities were paid the statutory minimum wage in Ontario.

[3] As will be set out below, I have found that the applicant performed general labour work on the respondent's work site, and the respondent paid her less than general labourers who did not have developmental disabilities for performing substantially similar work. Flowing from this finding of fact, I have decided that the respondent's differential pay practice was discriminatory because the applicant was paid less solely because she has a developmental disability, and, even though the practice allowed her to continue to receive monthly disability support payments from the provincial government, it still had the effect of imposing an arbitrary disadvantage on her because of her developmental disability.

[4] I have ordered the respondent to pay the applicant monetary compensation for lost income, and for the violation of her inherent right to be free from discrimination and for injury to dignity, feelings and self-respect. I have also made a cease and desist order with respect to the respondent's differential pay practice, and ordered the respondent to receive training to remedy the violation of the *Code*.

[5] Furthermore, I have directed that a copy of this Decision be delivered to the Ontario Human Rights Commission, and recommended that the Commission determine

how widespread the practice of paying persons with developmental disabilities below the statutory minimum wage is in employment settings in Ontario, and make recommendations, if appropriate, to the Ontario government on how to rectify the situation.

BACKGROUND

Application

[6] The applicant started working for the respondent in the late 1990s. On October 26, 2009, the respondent terminated her employment.

[7] On November 12, 2009, the applicant filed an Application with the Tribunal, which was signed by her, but which indicated that her mother was her representative, and that her mother and stepfather, Brian Tibbs, had compiled and typed the Application.

[8] Although the applicant is a person with a developmental disability, her mother and stepfather did not check off the box for, or file, a Form 4 (Application on Behalf of Another Person) to act as her litigation guardian.

[9] The Application named Janus Joan Inc. and its owner, Stacey Szuch, as respondents, and alleged that the respondents paid the applicant less than other employees, refused to give her an electronic pass card, refused to pay her overtime, and terminated her employment because of her disability.

Respondents' Failure to File a Response

[10] The Tribunal delivered the Application to the respondents, who communicated with the Tribunal by telephone and letter, but failed to file a Response. The letter stated that Janus Joan Inc. was "closed", but did not attach any supporting documentation.

[11] On September 1, 2010, the Tribunal issued an Interim Decision, 2010 HRTO 1792, which addressed the respondents' failure to file a Response to the Application. I found that the respondents received notice of the Application, but were evading service of further correspondence from the Tribunal, and were refusing or choosing not to participate in this proceeding. I decided that the consequence of the respondents' failure to file a Response and comply with the Tribunal's Rules and directions was that the Tribunal deemed them to have accepted all of the allegations in the Application, and to have waived all rights with respect to further notice or participation in this proceeding.

[12] In the Interim Decision, I also noted that the onus was on the applicant to establish on a balance of probabilities that a violation of the *Code* had occurred, and that my decision to deem the respondents to have accepted all of the allegations set out in the Application did not mean that findings of discrimination had been or would be made.

Initial Hearing and Decision

[13] The initial hearing of the merits of the Application took place by teleconference on May 26, 2011. The respondents did not attend or otherwise participate in the hearing. I heard oral testimony from the applicant, her mother, and her stepfather. The applicant's mother testified about the facts of what happened and the impact of the alleged discrimination on the applicant, and the applicant testified about the impact of the alleged discrimination on her. I also admitted several documents into evidence, including receipts that showed how much Janus Joan Inc. paid the applicant.

[14] During the hearing, the applicant's mother presented evidence that Janus Joan Inc. paid the applicant less than other employees because of her disability, and terminated her employment because of her disability. The allegations that the respondents refused to give the applicant an electronic pass card and refused to pay her overtime were not pursued.

[15] The applicant's mother and stepfather also presented evidence that Janus Joan Inc. has not closed down, and is operating under a slightly different name. The applicant's mother asked me for legal advice about this matter. In response, I informed her that she should contact the Human Rights Legal Support Centre ("HRLSC") for legal advice. No one contacted the Tribunal to address this matter between the end of the hearing and the date that the Tribunal issued a Decision.

[16] On January 12, 2012, the Tribunal issued a Decision, 2012 HRTO 68, which made two significant rulings. First, I dismissed the allegation that the respondents discriminated against the applicant by paying her less than employees who did not have developmental disabilities on the basis that the allegation was untimely, and therefore outside of the Tribunal's jurisdiction. Second, I upheld the allegation that Janus Joan Inc. discriminated against the applicant on the basis of disability when it terminated her employment. To remedy the discrimination, I ordered Janus Joan Inc. to pay the applicant $15,000 as monetary compensation for the violation of her inherent right to be free from discrimination and for injury to dignity, feelings and self-respect, and $2,678.50 as monetary compensation for lost income.

Reconsideration Request and Decision

[17] On February 13, 2012, the applicant, who was now represented by the HRLSC, filed a Request for Reconsideration of my jurisdictional decision to dismiss her allegation that the respondents discriminated against her by paying her less than employees who did not have developmental disabilities. The Request also stated that the Application probably should have been filed by the applicant's mother in the capacity of litigation guardian.

[18] On February 28, 2012, an insolvency and restructuring firm filed documents with the Tribunal, which indicated that Ms. Szuch had filed for bankruptcy and a trustee of her estate had been appointed in February 2010.

[19] On May 4, 2012, Ms. Szuch filed a Response to the Request for Reconsideration, which was, in substance, a Response to the Application, rather than a Response to the Request for Reconsideration. The Response stated the following:

- Notwithstanding Ms. Szuch's bankruptcy and the protection that it afforded her in the case before the Tribunal, she wanted to respond because, unchallenged, the applicant's mother had been allowed to destroy her personal and professional reputation.

- Ms. Szuch and another person, V.M., formed Janus Joan Inc. in 1997 while they were both working for non-profit social service agencies that provided support and services to persons with developmental disabilities.

- Janus Joan Inc. had formal agreements with these agencies to provide "work activity and training" to persons with developmental disabilities.

- Janus Joan Inc. did not provide "supported employment" where persons with developmental disabilities were paid minimum wage. Rather, it provided "volunteer trainee" placements which were tailored to the "choice" and the other activities of the trainees. The trainees did not have time cards, responsibilities, or accountability, and were allowed to work, look at magazines, play cards and games, makes crafts, or go bowling with their peers.

- Janus Joan Inc. gave the trainees a bi-weekly allowance/honorarium, which it was agreed would be reported by their family or support worker to the Family Benefits [now the Ontario Disability Support Plan ("ODSP")] office.

- The applicant's mother and her other daughter worked as employees at Janus Joan Inc. and were paid minimum wage. The applicant's mother became a supervisor and her duties included overseeing the trainees, including the applicant, and giving the trainees their bi-weekly allowance/honorarium.

- If Janus Joan Inc. discriminated against the applicant, then the applicant's mother, the social service agencies, the applicant's support worker, and the Family Benefits/ODSP office were all co-discriminators.

[20] On May 8, 2012, the applicant's counsel filed written submissions to address the Response. The submissions stated the following:

- The applicant's mother's allegations were unchallenged because Ms. Szuch chose not to respond to them.
- Equal treatment with respect to wages is consistent with the provision of "choice" in a work environment.
- It was not true that the applicant was free to come and go from the workplace at any time, and had no responsibilities or accountability. If the applicant had not attended work regularly at Janus Joan Inc., she would not have been allowed to continue working there.
- The applicant did the following work at Janus Joan Inc.: making boxes, filling boxes, filling bags, and doing anything else to process orders.
- The only time when the trainees looked at magazines, played cards and games, or made crafts was when work was slow, and there were no orders to be filled and no work assigned.
- The applicant's mother was not a "supervisor" at Janus Joan Inc. She simply carried out the tasks that were requested of her, and did "similar work" as other staff.
- The applicant's mother's knowledge of the differential pay scheme does not mean that the applicant cannot claim that Janus Joan Inc. discriminated against her.

[21] On May 29, 2012, Ms. Szuch filed further written submissions. She stated that the applicant's mother's denial that she was a supervisor at Janus Joan Inc. is untruthful. In support of her submission that the applicant's mother was a supervisor who oversaw the trainees, Ms. Szuch attached a letter with the applicant's mother's name in signature form at the bottom. The letter stated:

> April 28/03
>
> I was [name blacked out]'s floor supervisor and I found [name blacked out] to be very hard to deal with. I would give him a job to do and half way through the job he seem to get bored with it and didn't want to finish what he was doing.

> He also would like to pick and choose what job he would do. If he did not like the job he would refuse to do it all together.
>
> On his last day of work he was told that he was not to return to work until he spoke to his worker, and he would explain the problems we were having with his work habits.
>
> Marjorie Tibbs

[22] On May 30, 2012, a different panel of the Tribunal conducted an oral hearing with respect to the Request for Reconsideration, and heard submissions from the applicant and the Ontario Human Rights Commission, which was an intervenor in the reconsideration process. The respondents did not attend or otherwise participate in the hearing.

[23] The panel reconsidered the Decision, and found that the allegations of discrimination based on a wage differential between the applicant and non-disabled employees were, in fact, timely, and therefore within the Tribunal's jurisdiction. However, the panel also ruled that it was not appropriate for it to make any findings regarding the merits of allegations of discrimination or the remedy to be awarded should these allegations be proven. The case has been assigned back to me to decide these issues. See *Garrie v. Janus Joan Inc.*, 2012 HRTO 1955.

Further Hearing

[24] On October 22, 2012, I issued a Case Assessment Direction, which provided the following directions at paras. 11 and 12:

> The Tribunal will schedule a half-day oral hearing in St. Catharines to address the issues that remain outstanding following the Reconsideration Decision. The applicant will be afforded the opportunity to provide further evidence and oral submissions with respect [to] the wage differential issue and the remedy to be awarded should her allegation of discrimination be proven. The applicant should also address whether I should consider any of the submissions and documents filed by the individual respondent, and if so, whether and how they affect the issues of liability and remedy.

> No later than three weeks before the hearing, the applicant shall deliver to the other parties and file with the Tribunal any further submissions, documents or case law that she wants the Tribunal to consider in deciding the outstanding issues in the Application.…

[25] On February 22, 2013, the Commission notified the Tribunal and the parties that it would no longer participate as an intervenor.

[26] The further hearing of the merits of the pay differential allegation in the Application took place in person on March 5, 2013. The respondents did not attend or otherwise participate in the hearing. I heard oral testimony from the applicant and her mother, who adopted written witness statements as their testimony, and answered questions from both myself and the applicant's counsel. Similar to the hearing on May 26, 2011, the applicant's mother testified about the facts of what happened and the impact of the alleged discrimination on the applicant, and the applicant testified about the impact of the alleged discrimination on her. I also admitted several more documents into evidence, including the April 28, 2003 letter with the applicant's mother's signature on the bottom of it.

[27] Upon my request, following the hearing, the applicant's counsel submitted an affidavit from the applicant's mother and supporting documents with respect to the applicant's post-termination employment, and documents related to a repealed provision of the *Employment Standards Act*, which permitted employers to pay employees with disabilities below the minimum wage. I have admitted the affidavit and the documents into evidence.

PRELIMINARY ISSUES

Litigation Guardian

[28] In light of the capacity issue raised in the Request for Reconsideration, I asked the applicant's counsel at the outset of the hearing whether she would be requesting that the Application be amended to name the applicant's mother as her litigation guardian. In response, the applicant's counsel stated that she would not be pursuing

such a request because she has been able to obtain instructions directly from the applicant. I accepted the applicant's counsel's representation on this matter.

[29] However, I would be remiss not to point out that in her testimony, the applicant stated that when she was working for the respondent, she did not know how much money the respondent was paying her and her co-workers, and that it was only after the respondent terminated her employment that she found out that the respondent had paid her and her friends with disabilities less than her co-workers who did not have disabilities. Furthermore, when I asked the applicant how she found out about this, she was unable to provide an answer, and her mother then stated that she had told the applicant. (See paras. 45-46, below.)

[30] In view of this, if the applicant's counsel had not represented that she has been able to obtain instructions directly from the applicant, I likely would have made additional enquiries with respect to the scope of the applicant's capacity to manage her financial matters, particularly given that I have decided to award the applicant significant monetary compensation to remedy the discrimination that the respondent subjected her to.

[31] In determining that further inquiries were not appropriate I was mindful of not only of the legal presumption that adults have capacity (see *Perino v. Perino* (2008), 52 R.F.L. (6th) 341 at para. 46 (Ont. S.C.J.)), but the principles underlying this presumption. As explained in *Kacan v. Ontario Public Service Employees Union*, 2010 HRTO 795 at paras. 16-17:

> (…) Whether an individual has capacity depends upon the particular decision being made. As explained by Benotto J. in *Calvert (Litigation Guardian of) v. Calvert* (1997), 32 O.R. (3d) 281 at paras. 54-55 (Gen. Div.):
>
> > A person's right of self-determination is an important philosophical and legal principle. A person can be capable of making a basic decision and not capable of making a complex decision. Dr. Molloy, the director of the Geriatric Research Group and Memory

> Centre and associate professor of geriatrics at McMaster University, said:
>
> > Different aspects of daily living and decision-making are now viewed separately. The ability to manage finances, consent to treatment, stand trial, manage personal care, make personal care or health decisions, all require separate decision-making capabilities and assessments.
>
> The courts have recognized these varying levels of capacity. Birkert L.J. said there "can be no doubt there are degrees of capacity": *Park v. Park*, [1953] 2 All E.R. 1411 at p. 1434. [1954] P. 112 (CA).

Decisions about litigation generally require a relatively high level of capacity. As noted in *Calvert* at para. 36:

> There is a distinction between the decisions a person makes regarding personal matters such as where or with whom to live and decisions regarding financial matters. Financial matters require a higher level of understanding. The capacity to instruct counsel involves the ability to understand financial and legal issues. This puts it significantly higher on the competency hierarchy.

Removal of the Individual Respondent

[32] I also asked the applicant's counsel whether the applicant was pursuing the Application against Ms. Szuch given that *Code* proceedings against her appear to be stayed pursuant to the *Bankruptcy and Insolvency Act,* R.S.C. 1985, c. B-3, as amended. In response, the applicant's counsel stated that the applicant was not pursuing the Application against Ms. Szuch. On consent, I issued an order removing Ms. Szuch as an individual respondent to the Application, and amending the title of proceeding accordingly.

EVIDENCE

Initial Hearing

[33] The applicant's mother testified that in the late 1990s, Ms. Szuch and V.M., who had worked for organizations that assist persons with developmental disabilities, started the respondent as a business together. She stated that V.M. then called and asked her

if the applicant would be interested in working for the respondent as a general labourer and be paid $1.00 per hour. She stated that the applicant then began working for the respondent.

[34] The applicant's mother testified that the applicant was the second person with a developmental disability to be hired, but that the respondent subsequently hired at least 10 more such persons to work as general labourers. She stated that the respondent also hired persons who did not have developmental disabilities as general labourers. She stated that the general labourers with developmental disabilities performed the same heavy lifting and manual labour duties as the general labourers who did not have developmental disabilities, and that the only tasks that they did not perform were those that required fine skills, such as labelling wine bottles.

[35] The applicant's mother testified that the applicant generally attended work full-time and performed 40 hours of work per week. She stated that the applicant and other general labourers with developmental disabilities were initially paid a training honorarium of $80 bi-weekly or $1.00 per hour, which, after a few years, was increased to $100 bi-weekly or $1.25 per hour. By contrast, she stated, the general labourers who did not have developmental disabilities were paid at the minimum wage level or higher. The Tribunal admitted into evidence receipts that show that the respondent paid the applicant a $100 "training honorarium" between September 27 and October 10, 2009, and another one for the same amount between October 11 and 24, 2009.

[36] The applicant's mother testified that the applicant also received ODSP payments from the provincial government, and that the employment income that she received was reported to the government. However, she stated, the applicant's ODSP payments were never reduced because her employment income was just under the threshold for claw back.

[37] The applicant's mother testified that she and her husband were uncomfortable with the pay differential, but did not complain until after the termination of the applicant's

employment because the applicant enjoyed her work and socializing with others, and the respondent treated her respectfully.

[38] When I asked the applicant's mother how she knew so many details about the work that was being performed on the respondent's premises, she responded that she herself had worked there for about one and a half years. When I asked her whether she was paid, she responded that the respondent paid her at the minimum wage level.

Further Hearing

[39] The applicant's mother testified that the applicant worked for the respondent from the time that it started operating, and was paid a "training honorarium" even though she was not being trained, and was, in fact, doing work that produced revenue for the respondent. She also stated that the applicant worked each day between 8:00 a.m. and 4:00 p.m. with a half-hour break for lunch plus two additional 15-minute breaks. She also stated that the applicant performed "bull labour" and heavy lifting duties, and performed them at the same speed as the general labourers who did not have developmental disabilities.

[40] The applicant's mother testified that she herself and her other daughter, who does not have a developmental disability, also worked for the respondent, and were paid minimum wage. When I asked the applicant's mother if it was true that the respondent employed her as a supervisor, she responded: "No". She admitted that she dealt with the general labourers with developmental disabilities when they had problems, but stated that she never received the pay of a supervisor.

[41] When I put the April 28, 2003 letter in front of her and asked her if she had written the letter, she responded: "Yes." When I pointed out that she had self-identified as a "floor supervisor", she stated that the general labourers with developmental disabilities saw her as a supervisor, but she never received the pay of a supervisor.

[42] When I asked the applicant's mother why she did not demand that the respondent pay the applicant the same minimum wage that she herself and her other daughter were being paid, she responded that at that time, she had no idea that it was illegal to pay the applicant and the other general labourers with developmental disabilities less than minimum wage.

[43] The applicant's mother also testified that the respondent never issued a T4 (Statement of Remuneration Paid) or any other official employment-related document to the applicant, and never withheld tax, Employment Insurance ("EI") premiums or Canada Pension Plan ("CPP") contributions from her bi-weekly pay. She also stated that the local ODSP office occasionally assessed overpayments on the applicant's ODSP payments because of her income from the respondent, which means that the office would have reduced or possibly eliminated her ODSP payments if the respondent had paid her minimum wage. However, she stated, the applicant would have had employment income to make up for any such loss.

[44] The applicant testified that she liked working for the respondent because her job got her out of the house every day, she liked the work that she was doing, it felt good to have a job and get paid, and she had friends in the workplace. She also stated that having money allowed her to do things that she enjoyed, such as going out bowling or to lunch with her friends.

[45] The applicant testified that when she was working for the respondent, she did not know how much money the respondent was paying her and her co-workers. However, she stated, after the respondent terminated her employment, she found out that the respondent had paid her and her friends with disabilities less than her co-workers who did not have disabilities. She stated that after learning of this, she became very upset, angry, sad, and disappointed because she feels that the respondent took advantage of her and her friends because they have disabilities.

[46] When I asked the applicant how she found out that that the respondent had paid her and her friends with disabilities less than her co-workers who did not have

disabilities, she was silent and looked at her mother, who then stated that she had told the applicant.

Post-Hearing

[47] Following the second hearing, the applicant's counsel submitted a number of further documents, which I have admitted into evidence, including s. 24 of the *Employment Standards Act*, R.S.O., 1980, c. 137 (the "*ESA*"); s. 14 of the *Equality Rights Statute Law Amendment Act*, 1986, S.O. 1986, c. 64 (the "*ERSLAA*"); and excerpts from the Debates (Hansard) in the Legislative Assembly of Ontario in 1985 and 1986.

[48] Between 1974 and 1986, s. 24 of the *ESA* read as follows:

> For the purpose of enabling a handicapped person to be gainfully employed, the Director may, upon the application of the handicapped person or his employer and with the consent of the handicapped person, his parent or guardian, authorize the employment of such handicapped person to perform such work as is authorized at a wage lower than the minimum wage prescribed under this Act.

[49] In 1986, the *ERSLAA*, whose long title was "An Act to amend certain Ontario Statutes to conform to section 15 of the Canadian Charter of Rights and Freedoms" received Royal Assent and was enacted. Section 14 of the *ERSLAA* repealed s. 24 of the *ESA*.

[50] In 1985, during the first and second readings of the *ERSLAA* bill in the legislature, the Attorney General stated that various statutes were being amended to bring them into compliance with the anti-discrimination and equality provisions of the *Code* and the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11 (The "*Charter*").

[51] On May 7, 1986, the Minister of Labour made the following statement in the legislature about the rationale for repealing s. 24 of the *ESA*:

> I am pleased to inform the House today that the government is moving on two important fronts to provide fairer treatment of disabled people in sheltered workshops and other rehabilitation settings that are connected with work. One initiative concerns greater equity with regard to pay….
>
> First, the pay question. As honourable members may know, section 24 of the Employment Standards Act sets out a procedure for authorizing the payment to employed handicapped people of wages that are below the minimum wage. It is the view of the government that this section, which has been in force since 1947, is arbitrary and unfair and may well violate Canada's Charter of Rights and Freedoms. [Emphasis added]

ANALYSIS

Liability

Human Rights Code

[52] The Application relates to sections 5 and 9 of the *Code*, which provide:

> 5. (1) Every person has a right to equal treatment with respect to employment without discrimination because of… disability.
>
> (…)
>
> 9. No person shall infringe or do, directly or indirectly, anything that infringes a right under this Part.

Onus

[53] The applicant has the onus of proving, on a balance of probabilities, that a violation of the *Code* has occurred. A balance of probabilities means that it is more likely than not a violation has occurred. Clear, convincing and cogent evidence is required in order to satisfy the balance of probabilities test. See *F.H. v. McDougall*, [2008] 3 S.C.R. 41 at para. 46.

Credibility and Reliability

[54] In assessing credibility and reliability, I have applied the traditional test set out by the British Columbia Court of Appeal in *Faryna v. Chorny*, [1952] 2 D.L.R. 354:

> (…) Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors, combine to produce what is called credibility….
>
> The credibility of interested witnesses, particularly in cases of conflict of evidence cannot be gauged solely by the test of whether the personal demeanor of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of the witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions…. Again, a witness may testify to what he sincerely believes to be true, but he may be quite honestly mistaken.

[55] I am also mindful of the Ontario Court of Appeal's comments on credibility and reliability in *R. v. Morrissey* (1995), 97 C.C.C. (3d) 193 (C.A.) at p. 205:

> Testimonial evidence can raise veracity and accuracy concerns. The former relate to the witness's sincerity, that is his or her willingness to speak the truth as the witness believes it to be. The latter concerns relate to the actual accuracy of the witness's testimony. The accuracy of a witness's testimony involves considerations of the witness's ability to accurately observe, recall and recount the events in issue. When one is concerned with a witness's veracity, one speaks of the witness's credibility. When one is concerned with the accuracy of a witness's testimony, one speaks of the reliability of that testimony. Obviously a witness whose evidence on a point is not credible cannot give reliable evidence on that point. The evidence of a credible, that is honest witness, may, however, still be unreliable.

Issue

[56] The main liability issue to decide is whether the respondent discriminated against the applicant on the basis of disability by paying her less than employees who did not have developmental disabilities.

[57] The first matter to determine is whether the respondent actually paid the applicant and other persons with developmental disabilities less than persons who did not have developmental disabilities for performing substantially similar work. I find that it did.

[58] The applicant's mother's provided credible and reliable testimony that between the late 1990s and 2009, the applicant worked for the respondent as a general labourer; performed the same heavy lifting and manual labour duties as the general labourers who did not have developmental disabilities; was paid a training honorarium of $80 to $100 bi-weekly, while the general labourers who did not have developmental disabilities were paid at the minimum wage level or higher; and reported the honorarium to the ODSP office, but generally did not have her ODSP payments reduced because her employment income was just under the threshold for claw back.

[59] The applicant's mother's testimony was corroborated by Ms. Szuch's Response, which admitted that the applicant and other persons with disabilities performed "work activity" for the respondent, and were paid a bi-weekly allowance/honorarium by the respondent, while the applicant's mother and sister, who did not have developmental disabilities and worked for the respondent as employees, were paid minimum wage. Furthermore, the Response stated that it was agreed the allowance/honorarium would be reported by the family or support worker of the persons with development disabilities to the Family Benefits/ODSP office.

[60] The applicant's mother's testimony about the amount of the bi-weekly training honorarium was corroborated by receipts that show that the respondent paid the applicant a $100 "training honorarium" between September 27 and October 10, 2009, and another one for the same amount between October 11 and 24, 2009.

[61] I find it revealing that Ms. Szuch's Response identified the applicant and other persons with disabilities as "trainees", and stated that the respondent was providing "training" to them during their tenure with the respondent. I cannot see how a person

who is doing a simple manual labour job can be in “training” or be called a “trainee” for more than 10 years.

[62] I also find it revealing that Ms. Szuch’s Response claimed that the applicant and other persons with developmental disabilities did not have responsibilities and were not accountable to the respondent, but then later disclosed a letter which showed that the applicant’s mother was a supervisor, but which also showed that the workers with developmental disabilities clearly had responsibilities and were accountable to a supervisor. In fact, the letter is about a person with a developmental disability who was not allowed to continue working for the respondent unless his job performance issues were resolved.

[63] Ms. Szuch’s Response did not allege that, and I cannot see how, the duties involving fine skills, such as labelling wine bottles, which the applicant and other general labourers with developmental disabilities were unable to perform, justified the respondent’s differential pay practice.

[64] In my view, the logical factual inference to be drawn from all this evidence is that the respondent paid the applicant and other general labourers with developmental disabilities less than the general labourers who did not have developmental disabilities for performing the substantially similar work because the respondent knew that the former group of workers were receiving ODSP payments from the provincial government. In fact, I find that the respondent, likely with the agreement of the parents of workers with developmental disabilities, intentionally set the honorarium level just under the threshold for claw back of ODSP payments in order to maintain the receipt of such payments from the government.

[65] In other words, the respondent’s pay scheme contemplated that the workers with disabilities would be compensated for their work by receiving a training honorarium from the respondent and continuing to receive ODSP payments from the provincial government. However, this does not change the fundamental fact that the respondent paid the applicant and other general labourers with developmental disabilities less than

the general labourers who did not have developmental disabilities for performing substantially similar work.

[66] The second matter to determine is whether the respondent's pay practice was discriminatory. I find that it was.

[67] In *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, the Supreme Court of Canada defined discrimination as follows at pp. 174-75:

> Discrimination is a distinction which, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, has an effect which imposes disadvantages not imposed upon others or which withholds or limits access to advantages available to other members of society.

[68] However, the Court has also emphasized that anti-discrimination law is concerned with substantive discrimination, not merely differential treatment. In *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*, [2007] 1 S.C.R. 161, Abella J., in her concurring reasons, stated at para. 49:

> (…) there is a difference between discrimination and a distinction. Not every distinction is discriminatory. It is not enough to impugn an employer's conduct on the basis that what was done had a negative impact on an individual in a protected group. Such membership alone does not, without more, guarantee access to a human rights remedy. It is the link between that group membership and the arbitrariness of the disadvantaging criterion or conduct, either on its face or in its impact, that triggers the possibility of a remedy. And it is the claimant who bears this threshold burden.

[69] Furthermore, in *Quebec (Attorney General) v. A*, 2013 SCC 5, Abella J., writing for the majority on the analysis of discrimination under s. 15(1) of the *Charter*, stated, at para. 331, that courts and tribunals should engage in a flexible and contextual inquiry into whether a distinction has the effect of perpetuating arbitrary disadvantage on the claimant because of an enumerated ground, and that the contextual factors will vary from case to case because there is no rigid template.

[70] I find that there was a distinction based on disability because the respondent paid the applicant and other general labourers with developmental disabilities less than the general labourers who did not have developmental disabilities for performing substantially similar work solely because the former group of workers had developmental disabilities.

[71] I also find, for the following reasons, that, although the respondent's differential pay practice allowed the applicant and other general labourers with developmental disabilities to continue to receive ODSP payments from the provincial government, it still had the effect of imposing an arbitrary disadvantage on them because of their developmental disabilities.

[72] First, the respondent's decision to blatantly breach the *ESA* by paying the applicant and other general labourers with developmental disabilities below the minimum wage was, by its very nature, an affront to their dignity and a disadvantage. It is no coincidence, in my view, that workers who receive less than the statutory minimum wage tend to be members of disadvantaged groups in society, and often have *Code* ground-related personal characteristics, such as a disability or a lack of immigration status.

[73] In this regard, I entirely agree with the following submission by the applicant's counsel:

> The minimum wage represents a public policy statement about the worth of human labour in our society. Underpayment of the Applicant represents a profound comment about the value of her labour relative to that of the non-disabled people working alongside her.

[74] The applicant's counsel also submitted an article, "Mental Disability and Canadian Law" (1993) 2 Health L. Rev. No. 1, 23-27, by Gerald B. Robertson, who is a Professor of Law at the University of Alberta, and a leading authority on mental disability and the law in Canada. I entirely agree with the following statements by Professor Robertson at paras. 19-20:

> Another perception that is very common is that of the mentally disabled as less than human. Again, this is not simply a social perception, but one that is reaffirmed by our laws. One example of that is the minimum wage legislation of Alberta. As you know, our legislation, like most provinces, sets a minimum wage, but there are some exceptions. One exception is in relation to what the legislation calls the "mentally handicapped". It states that the mentally handicapped do not have to be paid the minimum wage and that an employer can get a special exemption and thereby not be required to pay a mentally handicapped employee the minimum wage. What does that tell us about how we perceive mentally handicapped people? What does it tell us about how the law perceives mentally handicapped people?
>
> Minimum wage legislation does much more than simply try to make people economically secure. It tells us something about how we perceive self-worth and human-worth. In other words, what minimum wage legislation says is, regardless of who you are, regardless of what you do for a job, regardless of how well you do that job, we think that this is the minimum any self-respecting human being should receive if they are working. [Emphasis added]

[75] I would add that this was also the Ontario government's view in 1986 when it repealed s. 24 of the *ESA*, and outlawed paying persons with disabilities less than the minimum wage.

[76] Second, the respondent's practice of classifying and referring to the applicant and other general labourers with developmental disabilities as "trainees", while referring to the general labourers who did not have developmental disabilities as "employees", even though both groups performed substantially similar work, was a further affront to dignity and a further disadvantage. It is indisputable, in my view, that a "trainee" has a lower status than an "employee" in the workplace, particularly when they are performing substantially similar work.

[77] Third, in contrast to the pay of general labourers who did not have developmental disabilities, the respondent did not withhold EI premiums or CPP contributions from the bi-weekly pay of the applicant and other general labourers with developmental disabilities. As a consequence, the applicant was ineligible to receive EI after the respondent terminated her employment, and will receive lower CPP payments in her

retirement. This is a significant disadvantage that was not imposed on the general labourers who did not have developmental disabilities.

[78] Although the respondent and Ms. Szuch decided, after receiving the Application, not to participate in the process before this Tribunal, given the public interest nature of this case, I believe that it is important to address some of the written arguments that Ms. Szuch belatedly filed with the Tribunal.

[79] Ms. Szuch argued that if the respondent discriminated against the applicant, then the applicant's mother, the social service agencies, the applicant's support worker, and the Family Benefits/ODSP office were co-discriminators. This may be true. In fact, I was quite troubled by the evidence that emerged during the reconsideration process and the further hearing that showed the applicant's mother had some kind of supervisory role in the respondent's workplace, which involved overseeing the work of the general labourers with developmental disabilities. I was further troubled that the applicant's mother admitted that she and her other daughter, who does not have a developmental disability, also worked for the respondent, and were paid minimum wage, but she never demanded that the respondent pay the applicant the same minimum wage that they were being paid. In my view, however, the applicant's mother's role in the workplace, even if it included complicity in, or consenting to, the differential pay scheme, does not change the fundamental fact that the respondent was the employer.

[80] Furthermore, the respondent chose not to participate in the process before the Tribunal. If the respondent had fully participated, it could have sought to add other individuals and organizations as respondents, and argued that those other respondents should share liability in the event that the Tribunal finds that its pay practice was discriminatory.

[81] Ms. Szuch also argued that the applicant's mother and other parents of persons with developmental disabilities agreed to the pay scheme. The applicant's mother does not dispute this, but, in my view, it is irrelevant because the *Code* establishes a floor

which the respondent and the parents were legally prohibited from contracting below. It is a fundamental principle of human rights law that an agreement between parties cannot allow a "contracting out" of the application of the *Code*. See, for example, *Ontario Human Rights* Commission *v. Etobicoke*, [1982] 1 S.C.R. 202 at pp. 213-14; *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, [2003] 2 S.C.R. 157 at para. 28; and *C.S.W.U. Local 1611 v. SELI Canada and others (No. 8)*, 2008 BCHRT 436 at paras. 390-91. This principle is all the more applicable when one party to the agreement is acting on behalf of a person with a developmental disability who may not have the legal capacity to enter into a contract.

[82] Given the public interest nature of this case, I believe that it is also important to address one other matter. There was no evidence before me about the extent to which similar pay schemes exist in other employment settings in Ontario, but, given the sophisticated nature of the differential pay scheme in the case at hand, and the fact that the parents of the workers with developmental disabilities appear to have agreed to this scheme, I believe that it is appropriate to direct that a copy of this Decision be delivered to the Ontario Human Rights Commission, which has a duty pursuant to s. 29 of the *Code* to protect the public interest by identifying and promoting the elimination of discriminatory practices in Ontario. The Commission, which had intervened in this case during the reconsideration process, has the power and authority to determine how widespread these schemes are, and make recommendations, if necessary, to the Ontario government on how to rectify this untenable situation.

[83] To sum up, I find that the respondent discriminated against the applicant on the basis of disability by paying her less than employees who did not have developmental disabilities for performing substantially similar work.

Remedy

Human Rights Code

[84] The Tribunal's remedial powers are set out in s. 45.2 of the *Code*, which provides:

(1) On an application under section 34, the Tribunal may make one or more of the following orders if the Tribunal determines that a party to the application has infringed a right under Part I of another party to the application:

1. An order directing the party who infringed the right to pay monetary compensation to the party whose right was infringed for loss arising out of the infringement, including compensation for injury to dignity, feelings and self-respect.

2. An order directing the party who infringed the right to make restitution to the party whose right was infringed, other than through monetary compensation, for loss arising out of the infringement, including restitution for injury to dignity, feelings and self-respect.

3. An order directing any party to the application to do anything that, in the opinion of the Tribunal, the party ought to do to promote compliance with this Act.

(2) For greater certainty, an order under paragraph 3 of subsection (1),

(a) may direct a person to do anything with respect to future practices; and

(b) may be made even if no order under that paragraph was requested.

[85] Accordingly, the issues that I am required to determine are whether the applicant is entitled to monetary compensation or restitution, and whether the Tribunal should order the respondent to do anything further to promote compliance with the *Code*.

Lost Income

[86] The applicant is seeking an award of compensation for lost income during employment and post-termination of employment.

[87] The purpose of compensation for loss of income is to restore the applicant as far as is reasonably possible to the position that the applicant would have been in had the discriminatory acts not occurred. See *Impact Interiors Inc. v. Ontario (Human Rights*

Commission) (1998), 35 C.H.R.R. D/477 (Ont. C.A.), and *Piazza v. Airport Taxi Cab (Malton) Assn.* (1989), 10 C.H.R.R. D/6347 (Ont. C.A.).

[88] First, the applicant is seeking an award for the difference between what the respondent should have paid her (the statutory minimum wage) and what the respondent actually paid her (an honorarium far below minimum wage) between January 1, 1999 (the applicant's approximate first day of work) and October 22, 2009 (the applicant's last day of work). Her counsel prepared a chart with calculations, which indicates that the amount is $142,124.

[89] Second, with respect to the Tribunal's previous Decision, 2012 HRTO 68, which awarded the applicant lost income in the form of honorarium payments between October 26, 2009 (the applicant's first day of unemployment) and November 6, 2010 (the day she started a substantial new job), she is seeking a further award to reflect the difference between the statutory minimum wage and the honorarium rate. Her counsel prepared a chart with calculations and filed supplementary submissions following the hearing, which indicate that the amount is $19,613.87. This second amount appears to be erroneous because the chart indicates that the applicant started a new job on November 26, 2010, when, in fact, she started on November 6, 2010.

[90] In my view, the applicant's request for an award of monetary compensation for lost income should be granted in its entirety, except for any amount claimed for November 6-26, 2010, because it will restore her as far as is reasonably possible to the position that she would have been in had the respondent not discriminated against her with respect to payment of wages.

[91] To sum up, the respondent shall pay the applicant $142,124, less statutory deductions, as monetary compensation for lost income during her employment, and $19,613.87, less any amount claimed for November 6-26, 2010, and less statutory deductions, as monetary compensation for lost income post-termination of employment. The respondent shall also remit the statutory deductions related to income tax, EI and

CPP to the federal government, and issue T4s and a Record of Employment to the applicant.

[92] The Tribunal has the jurisdiction to order the respondent to pay interest in accordance with the *Courts of Justice Act*, R.S.O, 1990, c. C.43, as amended (the "*CJA*"). See *Quereshi v. Ontario (Human Rights Commission)*, 2006 CanLII 63686 (ON SC) at para. 55, and *Impact Interiors Inc.*, above, at para. 1.

[93] Under s. 128(1) of the *CJA*, pre-judgment interest runs from the date the cause of action arose to the date of the order. Where multiple payments were due on a scheduled basis over time, pre-judgment interest is payable from the date that each payment became due. See *Lowndes v. Summit Ford Sales Ltd.*, 2006 CanLII 14 (ON CA) at paras. 21-28.

[94] The respondent made the first discriminatory payment to the applicant on or about January 14, 1999. As such, I find that the date the cause of action arose is January 14, 1999. The subsequent discriminatory payments then occurred on a bi-weekly basis. Accordingly, pre-judgment interest on the award for lost income with respect to the first payment is payable from January 14, 1999, pre-judgment interest on the award for lost income with respect to the second payment is payable from January 28, 1999, and so on.

[95] Under s. 129(1) of the *CJA*, money owing under an order bears interest at the post-judgment interest rate and is calculated from the date of the order.

[96] In view of the fact that the respondent decided not to fully participate in the process before this Tribunal, there is no reason to delay the running of post-judgment interest. Accordingly, money owing under this order bears interest at the post-judgment interest rate and is calculated from the date of this Decision.

Violation of Inherent Right to be Free from Discrimination and Injury to Dignity, Feelings and Self-Respect

[97] The applicant is also seeking an award of $25,000 compensation for injury to dignity, feelings and self-respect.

[98] An award of monetary compensation for injury to dignity, feelings and self-respect includes recognition of the inherent value of the right to be free from discrimination and the experience of victimization. The Divisional Court has recognized that the Tribunal must ensure that the quantum of damages for this loss is not set too low, since doing so would trivialize the social importance of the *Code* by effectively creating a "licence fee" to discriminate. See *ADGA Group Consultants Inc. v. Lane* (2008), 91 O.R. (3d) 649 (Div. Ct.) at para. 152.

[99] The Divisional Court has also recognized that humiliation; hurt feelings; the loss of self-respect, dignity and confidence by the applicant; the experience of victimization; the vulnerability of the applicant; and the seriousness of the offensive treatment are among the factors to be considered in setting the amount of damages. See *ADGA Group Consultants Inc.,* above, at para. 153.

[100] In *Arunachalam v. Best Buy Canada*, 2010 HRTO 1880, the Tribunal reviewed recent awards under this heading of damages, and stated at paras. 52-54:

> (…) The Tribunal's jurisprudence over the two years since the new damages provision took effect has primarily applied two criteria in making the global evaluation of the appropriate damages for injury to dignity, feelings and self-respect: the objective seriousness of the conduct and the effect on the particular applicant who experienced discrimination: see, in particular, *Seguin v. Great Blue Heron Charity Casino*, 2009 HRTO 940 at para. 16 (CanLII).
>
> The first criterion recognizes that injury to dignity, feelings, and self respect is generally more serious depending, objectively, upon what occurred. For example, dismissal from employment for discriminatory reasons usually affects dignity more than a comment made on one occasion. Losing long-term employment because of discrimination is typically more harmful than losing a new job. The more prolonged, hurtful,

> and serious harassing comments are, the greater the injury to dignity, feelings and self-respect.
>
> The second criterion recognizes the applicant's particular experience in response to the discrimination. Damages will be generally at the high end of the relevant range when the applicant has experienced particular emotional difficulties as a result of the event, and when his or her particular circumstances make the effects particularly serious. Some of the relevant considerations in relation to this factor are discussed in *Sanford v. Koop*, 2005 HRTO 53 (CanLII) at paras. 34-38.

[101] I find that, objectively, the respondent's discriminatory pay practice was a serious violation of the *Code*. For more than ten years, the respondent paid the applicant less than certain other workers solely because she had a developmental disability. To make matters worse, the respondent blatantly breached the *ESA* by paying the applicant below the minimum wage during those years. At this point, Professor Robertson's words are worth repeating:

> Minimum wage legislation… tells us something about how we perceive self-worth and human-worth. In other words, what minimum wage legislation says is, regardless of who you are, regardless of what you do for a job, regardless of how well you do that job, we think that this is the minimum any self-respecting human being should receive if they are working.

[102] I also find that the applicant has experienced serious emotional difficulties as a result of the discrimination, which are exacerbated by the fact that, as a person with a developmental disability, she is vulnerable to being exploited and discriminated against by employers. Specifically, I accept the applicant's testimony that when she was working for the respondent, she did not know how much money the respondent was paying her and her co-workers, but after the respondent terminated her employment, she found out that the respondent had paid her and her friends with disabilities less than her co-workers who did not have disabilities, which made her very upset, angry, sad, and disappointed because she feels that the respondent took advantage of her and her friends because they have disabilities.

[103] In my view, the only mitigating factor is the fact that the respondent's pay scheme was devised in such a way that the applicant continued receiving ODSP payments from the provincial government. The impact on the applicant would have been even more severe if this arrangement was not in place.

[104] The only recent case that I am aware of where there was an award of monetary compensation for injury to dignity, feelings and self-respect as a result of an employer's discriminatory pay scheme is the decision of the British Columbia Human Rights Tribunal (the "BCHRT") in *C.S.W.U. Local 1611 v. SELI Canada and others (No. 8)*, 2008 BCHRT 436. In that case, the BCHRT found that the respondents' practice of bringing temporary foreign workers from Latin America and Europe to work on its projects in Canada, and paying the Latin American workers lower wages and providing them with less favourable housing, meal and expense arrangements than the European workers, was discriminatory, and ordered the respondents pay each complainant $10,000 for injury to dignity, feelings and self-respect.

[105] With respect, my view is that the BCHRT's award was too low and does not reflect the objective seriousness of paying workers less because of their *Code* ground-related personal characteristics. In my view, this type of discrimination falls closer to the high end of the spectrum with respect to seriousness. The Human Rights Tribunal of Ontario's awards in the middle to high end of the spectrum for all cases have ranged from $10,000 to $50,000 based on the criteria and factors set out in *Arunachalam*, *ADGA Group Consultants Inc.*, and *Sanford*, above.

[106] I find, overall, after considering the seriousness of the violation of the *Code*, the applicant's individual circumstances, and this Tribunal's case law, that $25,000 is an appropriate award of compensation for the violation of her inherent right to be free from discrimination and for injury to dignity, feelings and self-respect.

[107] Money owing under this order bears interest at the post-judgment interest rate and is calculated from the date of this Decision.

Compliance Remedies

[108] The applicant also requested that the Tribunal issue an order that the respondent cease and desist from paying persons with developmental disabilities any amount less than Ontario's minimum wage, and an order that the respondent's principals and staff receive training regarding the *Code*, and in particular regarding the social and economic inclusion of persons with disabilities.

[109] Given the Tribunal's findings in this case, I find that it is appropriate to make orders of this nature. Therefore, I order the respondent to cease and desist from paying workers with developmental disabilities less than Ontario's minimum wage, and from paying workers with developmental disabilities less than persons who do not have developmental disabilities for performing substantially similar work.

[110] I also find that it is appropriate to order the respondent to retain an expert in disability-related discrimination to provide training to the respondent's principals and staff on how to integrate persons with developmental disabilities into the workplace in compliance with the *Code*.

ORDER

[111] Accordingly, the Tribunal orders as follows:

> 1) The respondent shall pay the applicant $142,124, less statutory deductions, as monetary compensation for lost income during her employment, and $19,613.87, less any amount claimed for November 6-26, 2010, and less statutory deductions, as monetary compensation for lost income post-termination of employment. Pre-judgment and post-judgment interest are payable, as set out above, in accordance with the *CJA*.
>
> 2) The respondent shall remit the statutory deductions related to income tax, EI and CPP to the federal government, and issue T4s and a Record of Employment to the applicant.
>
> 3) The respondent shall pay the applicant $25,000 as monetary compensation for the violation of her inherent right to be free from discrimination and for injury to dignity, feelings and self-respect. Post-

judgment interest is payable, as set out above, in accordance with the *CJA*.

4) Effective immediately, the respondent shall cease and desist from paying workers with developmental disabilities less than Ontario's minimum wage, and from paying workers with developmental disabilities less than persons who do not have developmental disabilities for performing substantially similar work.

5) Within 60 days of the date of this Decision, the respondent shall retain an expert in disability-related discrimination to provide training to the respondent's principals and staff on how to integrate persons with developmental disabilities into the workplace in compliance with the *Code*.

[112] I have also directed that a copy of this Decision be delivered to the Ontario Human Rights Commission. I would recommend that the Commission determine how widespread the practice of paying persons with developmental disabilities below the statutory minimum wage is in employment settings in Ontario, and make recommendations, if appropriate, to the Ontario government on how to rectify the situation. I have no authority under the *Code* to order the Commission to take such steps, but I hope, given the Commission's mandate, its prior intervention in this case, and the findings of fact in this Decision, that it will consider looking into the systemic aspects of this situation in some manner.

Dated at Toronto, this 28th day of February, 2014.

"Signed by"

_____

Ken Bhattacharjee
Vice-chair