

Date Issued: December 17, 2013  
File: 5777

Indexed as: Kelly v. University of British Columbia (No. 4), 2013 BCHRT 302

IN THE MATTER OF THE *HUMAN RIGHTS CODE*  
R.S.B.C. 1996, c. 210 (as amended)

AND IN THE MATTER of a complaint before  
the British Columbia Human Rights Tribunal

B E T W E E N:

Carl Kelly

**COMPLAINANT**

A N D:

University of British Columbia

**RESPONDENT**

---

**REASONS FOR DECISION  
REMEDY**

---

|                             |                                 |
|-----------------------------|---------------------------------|
| Tribunal Member:            | Enid Marion                     |
| Counsel for Dr. Kelly:      | Marjorie Brown and Laura Sworn  |
| Counsel for the Respondent: | Don Jordan                      |
| Dates of Hearing:           | May 7-9, 2013                   |
| Additional Submissions:     | October 30 and November 4, 2013 |

## **Complaint**

[1] In *Kelly v. UBC (No. 3)*, 2012 BCHRT 32, the Tribunal concluded that Dr. Kelly's complaint of discrimination against UBC was justified. This is the decision on remedy. The facts of the complaint are set out in *Kelly (No. 3)* and will not be reviewed here, except to the extent necessary to put the decision in context.

[2] Dr. Kelly seeks compensation for lost wages (past and future) and expenses. Certain of the expenses are not in dispute and will be described at the end of this decision. Dr. Kelly also seeks damages for injury to dignity, feelings and self-respect in the amount of \$75,000.

[3] UBC characterizes Dr. Kelly's loss as a loss of opportunity to complete his residency program (the "Program") in a timely fashion. It says that the appropriate remedy is for UBC to reinstate Dr. Kelly to the Program and to fully consider his accommodation requirements through consultation with him and Dr. Gibbins.

[4] Dr. Kelly testified in support of his position, as did his father, Dr. Dominick Kelly. Each party also called an economist as an expert witness. Dr. Kelly called Mr. Doug Hildebrand and UBC called Mr. Darren Benning. There was no dispute as to expert qualifications.

[5] All witnesses were straightforward and professional. The experts, in particular, were each respectful of the other's position and were of assistance to the Tribunal in assessing wage loss. I have taken into consideration that Dr. D. Kelly is Dr. Kelly's father, but have not found this to diminish the weight or reliability of his evidence.

## **Evidence**

### *Dr. Kelly*

[6] Dr. Kelly was born in Ireland. His family subsequently moved to Canada, and he moved to British Columbia in 2005 to start the Program.

[7] Dr. Kelly testified that he first decided to become a physician in childhood. He loved learning about the human body, and watched his father complete medical school

while he was still in grade school. He observed his father in a family medicine practice and this instilled a desire in him to travel the same career path as his father.

[8] Dr. Kelly testified that he was close to his father, and that he planned to work full-time in his father's family medicine clinic after completing the Program.

[9] Dr. Kelly has been diagnosed with ADHD and a non-verbal learning disability. He described the impact on him of moving to Kelowna, British Columbia to start the Program, the disappointment of failing his first rotation in the Program, and the difficulties he experienced when he was transferred to Vancouver to complete the Program.

[10] After Dr. Kelly disclosed his disabilities to the Program, he was asked to see Dr. Myers, a psychiatrist. He testified that while he was pleased to see someone of Dr. Myers' calibre, he was concerned that he might be perceived as incompetent due to being referred to a psychiatrist. In general, though, he considered his association with Dr. Myers to be beneficial.

[11] Dr. Kelly described his doubts about his abilities given his progress in the Program, but how his confidence increased in 2006 as he began to pass rotations.

[12] He testified about feeling embarrassed and humiliated when disclosing his disabilities to supervisors and feeling that he was not supported or reasonably accommodated in the Program. However, Dr. Kelly also agreed in cross-examination that if he had more openly discussed his disability with his preceptors during his rotations, it may have diminished the frustration and upset he experienced with not getting the help he needed during those rotations.

[13] After Mr. Kelly's termination from the Program, he was provided with two months' severance pay and then collected employment insurance. While receiving employment insurance benefits, he maintained his medical studies to keep current in the hope of returning to the Program.

[14] Once it was evident that his complaint against UBC was not going to be resolved expeditiously, he began to look for work. He could not, however, practice as a physician. He described an extensive job search for medically-related work, including the utilization

of a career counsellor, contacting law firms to do medical/legal work and contacting WorkSafeBC for potential employment. He said that a barrier to securing full-time employment was that prospective employers questioned why someone with a medical degree would be seeking employment other than as a physician, and many considered him overqualified for positions.

[15] Dr. Kelly also took certain courses while he was unemployed to assist in skill upgrading. The cost of the courses was \$1,170. A St. John Ambulance course resulted in an Occupational First Aid (OFA) 3 designation which opened up certain employment opportunities. Dr. Kelly acknowledged that he did not initially inquire about OFA training and the potential rate of pay when he was terminated from the Program.

[16] Dr. Kelly obtained some contract work as a care attendant and did some teaching and tutoring. He also worked as a medical technician in 2009, and attempted to set up a medical English training program that year, which was not successful. He incurred business losses related to the set up of that program.

[17] After his termination from the Program, Dr. Kelly incurred interest costs related to a student loan. He testified that the interest paid from May 1, 2006 to December 31, 2011 was \$27,828.75 and from January 1, 2012 to September 30, 2012 it was \$2,921.94.

[18] After *Kelly (No. 3)* was released, arrangements were made for Dr. Kelly to return to the Program. He did so and, with accommodations in place, is progressing through his rotations. Dr. Kelly understands that he must meet the responsibilities and expectations as any other resident in the Program.

[19] Dr. Kelly testified about the ongoing negative impact of the termination on him until his reinstatement to the Program. He felt terrified, embarrassed and described the despair of not being able to complete his residency and become a family physician after studying, training and committing significant resources to fulfill this life-long dream.

[20] Dr. Kelly described ongoing feelings of panic, depression, not sleeping, and feeling like “a complete failure.” He testified about feeling angry, sad, dejected and “completely worthless” and that he felt like the life had been “sucked out” of him. He felt disillusioned and like a “complete loser.”

[21] After the termination, Dr. Kelly moved back in with his parents for financial reasons. He found this difficult, and described feeling miserable, and experiencing a negative impact on his relationships with friends and family. He described continuing symptoms of depression, including the loss of a will to live.

**Dr. Dominick Kelly**

[22] Dr. D. Kelly is Dr. Kelly's father. He is a co-owner of a large family practice clinic in Coquitlam. Dr. D. Kelly is also a clinical instructor in the Faculty of Family Practice at UBC, and teaches medical students at his clinic.

[23] Dr. D. Kelly testified that, as a family practice physician, there is flexibility to control the numbers of patients one sees in a day, and the days of the week and hours you work. He described situations where either he or other physicians had worked flexible hours to accommodate illness or family obligations. He also noted that associates at the clinic are paid a percentage based on their actual billings so the amount of money they earn depends on how many patients they see.

[24] Dr. D. Kelly testified that he and Dr. Kelly had discussed him working at the clinic after the completion of his residency. He also thought that Dr. Kelly might join Médecins Sans Frontières and do charitable work abroad for a period of time.

[25] UBC conceded that Dr. D. Kelly would be prepared to do all that was necessary to accommodate Dr. Kelly in order to practice as a family physician at the clinic.

[26] Dr. D. Kelly testified about his observations of his son after termination from the Program. He said that he observed a distraught, devastated human being. He said that he quickly advised his son to move back in with his family. He testified that his son was very dejected, depressed and shattered by the experience of having his livelihood and career taken from him. He described a "horrific" impact on his son and family as a result of the termination.

[27] Since his son's return to the Program, Dr. D. Kelly described the transformation of his son as "night and day." He said that his son is no longer anxious and is easier to live with.

[28] Dr. D. Kelly testified that he observed his son looking for work after his employment insurance ended and that he “must have sent out hundreds of applications.”

*Expert Reports*

[29] Mr. Hildebrand prepared and explained his report which calculated past and future wage loss for Dr. Kelly. Past wage loss was calculated for the period August 27, 2007 (the date of Dr. Kelly’s termination from the Program) until May 31, 2013. Future loss was calculated for the period April 1, 2013 to age 70. Dr. Hildebrand used the residency wage rate set out in the applicable collective agreement for the period of residency and the 2005 Statistics Canada census average earnings for general practitioners, indexed to 2013 dollars.

[30] Mr. Benning utilized a similar period, but reduced the average earnings by 50% “for illustrative purposes” to account for the possibility that Dr. Kelly would earn less than the average earnings of a general practitioner.

[31] Mr. Hildebrand testified that he did not take into account Dr. Kelly’s individual circumstances in reaching his valuation. He testified that he is not aware of any standard accepted practice of discounting earnings based on the presence of ADHD or a non-verbal learning disability. Rather, he said that the Statistics Canada values that he used in his calculations included physicians practising with a disability and who practice with a reduced workload.

[32] Two calculations were provided by each expert. One was “with incident” (the termination) (“Incident”) and one was “without incident”. The difference between the two calculations represented the loss for past and future wage loss.

[33] Each expert, for the purposes of the report, assumed that Dr. Kelly would complete his residency and become licensed to practice as a family physician.

[34] Mr. Hildebrand’s with Incident calculation assumed a delayed entry to practice of approximately 6.8 years. This was calculated based on Dr. Kelly’s re-entry to the Program on February 1, 2013 and assumed entry into practice on February 1, 2015. Mr. Hildebrand also assumed that Dr. Kelly would have completed his original residency and entered practice without Incident on March 31, 2008.

[35] Mr. Benning utilized a shorter delayed entry of 6 years based on his assumption that Dr. Kelly would have required an additional two years as a resident to complete the Program given that he had only completed a portion of the first year at the date of his termination. He also assumed employment as a physician without Incident starting January 1, 2010 and with Incident commencing at January 1, 2016.

[36] In addition to the above, Mr. Hildebrand did not make any deduction from the wage loss for receipt of employment insurance benefits. He testified that this was standard practice in the preparation of such reports. Mr. Benning originally deducted employment insurance benefits from past wage loss in the amount of \$18,400. He testified that he later became aware that Dr. Kelly was in receipt of medical employment insurance benefits and would revise his report to not make the deduction.

[37] Each expert included a similar figure for non-wage benefits for the relevant periods.

[38] Mr. Hildebrand explained that he used a 100% labour force participation rate because Dr. Kelly had been in the labour force at the time of his termination and returned after termination. Mr. Benning, on the other hand, used an average rate of labour force participation, which included individuals who chose to be out of the labour force for a variety of reasons, including disability.

### **Decision**

[39] Pursuant to s. 37 of the *Code*, the Tribunal has the jurisdiction to award a variety of remedies if it concludes that a complaint is justified:

- (1) If the member or panel designated to hear a complaint determines that the complaint is not justified, the member or panel must dismiss the complaint.
- (2) If the member or panel determines that the complaint is justified, the member or panel,
  - (a) must order the person that contravened this Code to cease the contravention and to refrain from committing the same or a similar contravention,
  - (b) may make a declaratory order that the conduct complained of, or similar conduct, is discrimination contrary to this Code,

- (c) may order the person that contravened this Code to do one or both of the following:
  - (i) take steps, specified in the order, to ameliorate the effects of the discriminatory practice;
  - (ii) adopt and implement an employment equity program or other special program to ameliorate the conditions of disadvantaged individuals or groups if the evidence at the hearing indicates the person has engaged in a pattern or practice that contravenes this Code, and
- (d) if the person discriminated against is a party to the complaint, or is an identifiable member of a group or class on behalf of which a complaint is filed, may order the person that contravened this Code to do one or more of the following:
  - (i) make available to the person discriminated against the right, opportunity or privilege that, in the opinion of the member or panel, the person was denied contrary to this Code;
  - (ii) compensate the person discriminated against for all, or a part the member or panel determines, of any wages or salary lost, or expenses incurred, by the contravention;
  - (iii) pay to the person discriminated against an amount that the member or panel considers appropriate to compensate that person for injury to dignity, feelings and self respect or to any of them.

[40] A declaration pursuant to s. 37(2)(a) has already been made in *Kelly (No. 3)*. In addition, Dr. Kelly seeks damages for wage loss, expenses and injury to dignity, feelings and self-respect. I will address each of these separately.

### ***Wage Loss***

[41] Section 37(2)(d)(ii) of the *Code* gives the Tribunal the discretion to compensate a complainant for all or part of any wages lost as a result of a contravention of the *Code*. At the outset of this part of the decision, I note that subsequent to the conclusion of the hearing, Dr. Kelly submitted an additional case in support of his request for past and future wage loss. UBC responded that the case was simply another example of the approach advocated by Dr. Kelly in his original submissions. I concur with UBC.

[42] In *Gichuru v. Law Society of British Columbia (No. 9)*, 2011 BCHRT 185, the Tribunal set out the following principles to guide the Tribunal in assessing an award of wage loss:



First, the purpose of compensation under s. 37(2)(d)(ii) is to restore a complainant, to the extent possible, to the position he or she would have been in had the discrimination not occurred.

Second, the burden of establishing an entitlement to compensation is on the complainant.

Third, in order to establish such an entitlement, the complainant must show some causal connection between the discriminatory act and the loss claimed.

Fourth, once a causal connection is established, the amount of compensation is a matter of discretion, to be exercised on a principled basis, in light of the purposes of the remedial provisions of the *Code*, and the purpose of the award. (paras. 300-303).

[43] Dr. Kelly says that, like the decision in *Howard v. University of British Columbia*, [1993] BCHRD No. 34, the fact that he was not employed as a family physician at the time of the discrimination, but lost the opportunity to complete his training and enter that profession, should not diminish his ability to obtain recovery for future wage loss. As noted in that decision:

Some distinction is made in the cases between those situations in which the discrimination results in a direct loss of employment, for which the complainant receives compensation for all lost wages, and those in which the complainant has merely lost an employment opportunity and for which wage loss may not be awarded: (see, for example, *Canada (Canadian Human Rights Commission) v. Greyhound Lines of Canada* (1987), 8 C.H.R.R. D/4184 (F.C.A.), *Muir v. Emcon Services Inc.* (1991), 16 C.H.R.R. D/65 (B.C.C.H.R.); for a discussion of the distinction, see *Chapdelaine v. Air Canada* (1991), 15 C.H.R.R. D/22 (Can. Rev. Trib.) at D.27 para. 19-D/32 para. 32). I do not find the distinction to be helpful in this case. A complainant is entitled to be “made whole”. In doing so, it may be necessary to consider the effect of the discrimination on a complainant’s future income. That calculation is necessarily speculative. In some cases, the evidence may indicate a denial of a specific job at a specific wage for a specific period and, therefore, the calculation of lost wages can be relatively precise. In other cases, the evidence may show that, had the discrimination not occurred, the complainant would have competed for a job but the likelihood that the complainant would succeed in the competition was too uncertain to warrant any compensation for wage loss. This case does not fall at either extreme.

The delay faced by the Complainant in changing to a better-paid profession had measureable economic loss. The likelihood and extent of that loss require consideration of future events. In these circumstances, I think the appropriate approach in assessing damages is to calculate the

difference between what he likely would have earned as a teacher if his entrance to the profession had not been delayed, and what he will earn if he now proceeds as quickly as possible to obtain his degree and employment as a teacher, then to adjust that figure to allow for uncertainties. This approach is consistent with the reasoning of Marceau J.A. in *Canada (Attorney-General) v. Morgan* (1991), 85 D.L.R. (4<sup>th</sup>) 473 (F.C.A.):

It seems to me that the proof of the existence of a real loss and its connection with the discriminatory act should not be confused with that of its extent. To establish that real damage was actually suffered creating a right to compensation, it was not required to prove that, without the discriminatory practice, the position would certainly have been obtained. Indeed, to establish actual damage, one does not require a probability. In my view, a mere possibility provided it was a serious one, is sufficient to prove its reality. But, to establish the extent of that damage and evaluate the monetary compensation in which it could give rise, I do not see how it would be possible to simply disregard evidence that the job could have been denied in any event. The presence of such uncertainty would prevent an assessment of the damages to the same amount as if no such uncertainty existed. The amount would have to be reduced to the extent of such uncertainty. (at para. 479)

[44] Dr. Kelly notes that in *Howard*, the Tribunal concluded that it is foreseeable that a student who is prevented from pursuing a career because of a discriminatory act will suffer financial loss as a result (para. 14), and that he is entitled to be made whole as this is one of the remedial purposes of the *Code*.

[45] Dr. Kelly says that, in order to be made whole, there should be an award of \$451,144 in past wage loss and \$293,197 for future wage loss based on the delay in entering practice as a family physician.

[46] On the other hand, UBC relies on *Chopra v. Canada (Attorney General)*, 2007 F.C.A. 268, for the proposition that there is a limit on liability for the consequences flowing from a discriminatory act:

If one were pressed to identify, in law school fashion, the *ratio decidendi* of *Morgan* on this issue, it seems to me that the most that could be said is that the three members of the Court agreed on the need for a limit on liability for the consequences flowing from a discriminatory practice, but the nature of that limit was uncertain. The members of the Court agreed that there must be a casual connection between the discriminatory practice and the losses, but they did not agree as to whether foreseeability cut off

liability for events past a certain point in time or past a certain even in the chain of causation. As a result, *Morgan* is not authority for the proposition that foreseeability applies to limit the extent of loss recoverable, as opposed to the kind of loss recoverable.

...

The fact that foreseeability is not an appropriate device for limiting the losses to which a complainant may be compensated does not mean that there is no limit on liability for compensation. The first limit is that recognized by all members of the Court in *Morgan*, that is, there must be a causal link between the discriminatory practice and the loss claimed. The second limit is recognized in the act itself, namely, the discretion given to the tribunal to make an order for compensation for any or all wages lost as a result of the discriminatory practice. This discretion must be exercised on a principled basis. (paras. 32, 37)

[47] In assessing lost wages, UBC says that the Tribunal must take into account the possibility that Dr. Kelly might not complete the Program. It says it has not located any case in which a person dismissed from a training program as a result of a discriminatory act received lifetime future wage loss based upon delay arising from completing the training program. It says that in all cases, even those involving termination from actual employment, tribunals have utilized a cut-off point for compensatory damages reflecting the reasonable foreseeable consequences of the discriminatory act: *Morgan* (paras. 16-19).

[48] UBC relies on *Tahmoupour v. Royal Canadian Mounted Police*, 2008 CHRT 10, where the Canadian Human Rights Tribunal awarded a remedy to an individual dismissed from the RCMP Training Academy, for the proposition that the appropriate remedy is to provide Dr. Kelly with the opportunity to complete the Program:

The case law makes a distinction between situations where the discrimination has caused a direct loss or denial of employment for which reinstatement or reinstatement is an appropriate remedy, and situations where the discrimination has caused the complainant to lose an employment or training opportunity. In the latter situation, tribunals have felt that the appropriate remedy is to require the respondent to provide the lost or denied opportunity, with or without financial compensation. (see, for example: *McCreary v. Greyhound Lines of Canada* (1987), 8 CHRR D/4184; *Chapdlaine v. Air Canada* (1991), 15 CHRR D/22 at para. 19-22; *Bitonti v British Columbia (Ministry of Health) (No. 4)*, 2002 BCHRT 29 at para. 33 and *Chopra*...

[49] UBC notes that, in that case, the Tribunal ordered the complainant be given the opportunity to enrol in the next available training program. It also ordered past wage loss, subject to a contingency discount to reflect the possibility that the complainant may not complete the program. UBC further notes that the Tribunal in that case did not order future wage loss:

There was no evidence that the discriminatory conduct caused any permanent damage to Mr. Tahmoupour’s ability to work. He is relatively young at 35 years of age and has the potential for a full career life ahead of him. Mr. Tahmoupour is still eager to become an RCMP officer. He said that he was given the opportunity to embark on the training program at Depot. Again, he could “ace it.”

...

Upon extension of the offer to attend training, the RCMP’s obligation to compensate Mr. Tahmoupour for the loss of opportunity to complete training in 1999 is extinguished. No further payments shall be made under this head of compensation. (paras. 242, 244)

[50] As well, UBC notes that, after a portion of the award was remitted back to the Tribunal on appeal, the Tribunal refused to order any damages for matters arising after the date that the training program would have been completed: *Tahmonpour v. Royal Canadian Mounted Police*, 2010 CHRT 34, para. 9.

[51] UBC acknowledges that in *Howard, Bitonti v. British Columbia (Ministry of Health)*, 2002 BCHRT 29 and *Gichuru*, the Tribunal concluded that each complainant was removed from a training program for a discriminatory reason and was awarded damages for the delay period in completing training, subject to a discount for contingencies, which varied dependent on individual circumstances. It says, however, that in none of those cases was the complainant awarded damages for time periods subsequent to the delay period.

[52] UBC says that because its relationship with Dr. Kelly ends upon completion of the Program, it should not be liable for any damages beyond the training period. UBC says that had Dr. Kelly not been dismissed from the Program, he could not have completed the Program until 2009 and, assuming he successfully passed his certification exams in October 2009, he may have commenced practice as a family physician in late 2009. Dr. Kelly was reinstated into the Program in February 2013 and, if successful, will complete

the Program at the earliest in February 2015. If he successfully completes his certification exams, he may commence practice as a family physician in May 2015. It says the delay in Program completion is a maximum of 6 years.

[53] UBC also says that the Tribunal should make a contingency deduction in this case. It says that there is no guarantee that the implementation of Dr. Gibbins' recommendations and Dr. Kelly's reasonable accommodation will result in Dr. Kelly successfully completing the Program. It says that the Tribunal acknowledged this in *Kelly (No. 3)*:

It may be that implementation of the accommodations would have sufficiently reduced the effect of the disorder in Dr. Kelly's learning and working environment to allow him to successfully complete the Program. If he was not successful in his family practice training after having been provided these reasonable accommodations, then the Program would have a factually sustainable position to determine that it was unable to reasonably accommodate him within the Program without incurring undue hardship. As it now stands, it made that decision prematurely. (para. 565)

[54] As well, UBC says that the contingency discount should reflect the fact that even if Dr. Kelly graduates from the Program, he must then pass his licensure and certification examinations and may not be successful in doing so.

[55] UBC further says that little, if any, weight should be placed on the expert calculations of future wage loss. In particular, it says that the calculations of future wage loss assume that Dr. Kelly would pass the Program, become licensed and work as a family practice physician. It says these assumptions are unproven, and contrary to the Tribunal's finding in *Kelly (No. 3)*.

[56] In assessing Dr. Kelly's wage loss, I have considered that when he was terminated from both the Program and his employment on August 23, 2007, he was provided with two months' severance, received employment insurance benefits in 2008 and earned some income from employment until the resumption of his residency in 2013.

[57] I have concluded that Dr. Kelly fulfilled his duty to mitigate by making reasonable efforts to secure alternate employment. As well, I find that it was reasonable for Dr. Kelly to maintain his studies while in receipt of employment insurance benefits in

the hope of maintaining his knowledge and returning to the Program: *Koskinen v. Foremost Foods Ltd. (c.o.b. Extra Foods Ltd.)*, [1997] B.C.J. No. 2397.

[58] I further accept that prior to the Incident, Dr. Kelly was a full-time workforce participant, and that he has returned to the workforce full-time as a result of his return to the Program. In this regard, I adopt Mr. Hildebrand's labour force participation rates since, in my view, they reflect the actual work experience of Dr. Kelly both prior to and after the Incident.

[59] I further accept that there is a possibility that Dr. Kelly may not complete the Program. However, I do not consider that there is evidence before the Tribunal upon which to conclude that this is a probable outcome. UBC has committed to providing Dr. Kelly with reasonable accommodation, and Dr. Kelly has demonstrated success in the Program since his return, including success in a family practice rotation. Prior to his termination from the Program, Dr. Kelly successfully completed or demonstrated progress in rotations upon being provided reasonable accommodation. In the circumstances, I have concluded that there should be a 10% reduction in the award to reflect the possibility that Dr. Kelly might not complete the Program.

[60] Dr. Kelly says that it should be assumed that without the Incident, he would have completed the Program on October 31, 2007 and entered the labour market as a family physician in April 2008. He says that UBC's failure to reasonably accommodate him should not be a basis to extend the time in which he would have reasonably completed the Program, if he had been reasonably accommodated. He relies on Mr. Hildebrand's calculation that he suffered a delay in labour market entry of approximately 6.8 years.

[61] UBC says that Dr. Kelly suffered approximately a 6-year delay from the end of 2009 to the end of 2015.

[62] I find that, if Dr. Kelly had not been terminated from the Program, he was on track to complete the Program and to enter the labour market as a family physician by January 1, 2010. Given the Program components Dr. Kelly had yet to complete (which would have taken well over a year), he would not have been able to complete the Program by the April 2008 date adopted by Mr. Hildebrand. I find that the January 1, 2010 entry date more reasonably reflects the time necessary to complete the Program and

obtain licensing to enter practice, taking into consideration time for remediation as may be necessary.

[63] I also find that, given Dr. Kelly's reinstatement to the Program, he is on track to complete the Program and enter the labour market as a family physician by January 1, 2016. I accept the 6-year delay period asserted by UBC. This period reasonably provides some time in the event remediation in Program components was required, and a reasonable period to obtain College certification. This is consistent with the minimum Program components still required to be completed by Dr. Kelly, and his past experience requiring some remediation.

[64] I also find that there was no evidence to suggest that, if Dr. Kelly successfully completes the Program, he would not be reasonably accommodated by the College in regard to any exams that may be required, or that there would be a basis for the College to deny licensing him to practice as a physician.

[65] Having said this, I do accept that there may be some delay in him passing the exams necessary to obtain his license, given his past experience with exams and participation in the Program. However, I find that such a delay is reasonably reflected in the assumption that Dr. Kelly would have entered the workforce as a family physician without Incident by January 1, 2010 and with Incident by January 1, 2016.

[66] I accept Mr. Hildebrand's revised calculations for labour market entry on January 1, 2010 and January 1, 2016, with modifications to reflect Dr. Kelly's actual income (including dividends) during the relevant period.

[67] I also accept that Dr. Kelly would have a position at his father's clinic available for him after completion of his residency and licensure as a family practitioner. I do consider, however, that it would be reasonable to make a more significant reduction for future contingencies than that set out in Mr. Hildebrand's report. Mr. Hildebrand testified that his figures included physicians who worked part-time or were absent from the workforce for a period of time. While that may reflect an average, I must assess Dr. Kelly as an individual and take into consideration his individual circumstances.

[68] It is clear that Dr. Kelly required additional time to complete both his medical degree and the Program. It is reasonable to conclude that he will take some time to familiarize himself with family practice before being able to maintain a full-time practice. I also accept that there should be some reduction for the contingency that he may not maintain a full-time practice, but might carry a reduced patient load.

[69] Having said this, I do not accept Mr. Benning's reduction of 50%. In my view, this is unreasonable, given Dr. Kelly's prior work and training history and commitment to medicine. After considering all the circumstances, I consider a reduction of 20% to be more appropriate.

[70] I have further concluded that there should be no deduction made from the wage loss award for receipt of employment insurance benefits. The Tribunal's standard approach is not to make a reduction for the receipt of employment insurance benefits and I adopt that approach in this case: *Willems-Wilson v. Allbright Drycleaners Ltd.*, [1997] BCHRTD No. 26. Any repayment of employment insurance benefits is a matter between the parties and the government.

[71] I am not persuaded that Dr. Kelly should be awarded wage loss past January 1, 2016. Apart from the delayed entry into practice, there is no evidence of any impairment, as a result of the discrimination, to Dr. Kelly's ability to earn a living as a family physician. For example, there was no evidence that Dr. Kelly's billing rates would be different based on years of practice. I am unable to conclude, based on the nature of the evidence before me, that if he is successful in completing the Program and obtaining his College certification, that he will suffer any further ongoing loss to his ability to earn income arising out of the discrimination.

[72] After considering all the circumstances, and recognizing that I have the discretion, on a principled basis, to award all or part of any wages lost as a result of discrimination, I am persuaded to order UBC to compensate for Dr. Kelly's wage loss to January 1, 2016 in accordance with the findings set out above.

[73] Dr. Kelly earned the following amounts from 2007 to 2012, excluding employment insurance benefits and including income from periods of residency, dividends and other employment, and the following estimated earnings for 2013 to 2015:



|      |           |
|------|-----------|
| 2007 | 48,174.00 |
| 2008 | 7,369.40  |
| 2009 | 40,971.01 |
| 2010 | 34,723.00 |
| 2011 | 57,562.00 |
| 2012 | 62,233.99 |
| 2013 | 50,884.00 |
| 2014 | 56,050.00 |
| 2015 | 59,511.00 |

[74] In total, I have concluded that Dr. Kelly's actual and projected earnings for the period 2007 to 2015 are \$417,478.40. From this, I have made a 10% contingency deduction of \$14,599.00 for the period April 1, 2013 to the end of 2015 to reflect the possibility that Dr. Kelly might not have completed the Program. The total, therefore, is \$402,879.40.

[75] If Dr. Kelly had not been terminated from the Program, I find that Dr. Kelly could have earned the following during the period 2007 to 2015:

|      |            |
|------|------------|
| 2007 | 48,695.00  |
| 2008 | 53,422.00  |
| 2009 | 58,411.00  |
| 2010 | 120,793.00 |
| 2011 | 138,138.00 |
| 2012 | 156,296.00 |
| 2013 | 170,564.00 |
| 2014 | 170,274.00 |
| 2015 | 163,362.00 |

[76] In total, had he not been terminated from the Program, I find that Dr. Kelly could have earned \$1,079,955.00 during this period. From this, I have made a total contingency deduction of 30% on the practice earnings commencing in 2010 to reflect the possibility that Dr. Kelly might not have completed the Program and might not have practiced on a full-time basis. Therefore, I have deducted \$275,828.10 from total earnings to January 1, 2016. I have also made a further deduction of \$16,052.80 which represents a 10%

contingency for the period 2007 to 2009 to reflect the possibility that Dr. Kelly might not have completed the Program. The total earnings for the without Incident period, therefore, are \$788,074.10.

[77] The difference between the without Incident (\$788,074.10) and with Incident earnings (\$402,879.40) is \$385,194.70.

[78] I order UBC to pay to Dr. Kelly the sum of \$385,194.70 as compensation for lost wages.

### *Expenses*

#### *Expert Reports*

[79] Dr. Kelly seeks the following reimbursement for expert expenses:

- a) \$2,227 for Dr. Gibbins' report, consultation and attendance at hearing; and
- b) \$2,529 for Dr. Myers' consultation and attendance at hearing (in U.S. dollars);
- c) \$7,631.13 for Dr. Hildebrand's report, consultation and attendance at hearing;

[80] He says that in *Gichuru*, at paras. 121-122, the Tribunal noted that the rationale for compensability of expenses related to expert evidence is much the same as the rationale for the compensability of expenses incurred to attend a hearing. Expert evidence may be necessary to prove a complainant's loss arising out of the discrimination. I accept that in this case, the expert evidence was helpful to the Tribunal in assessing both the liability and remedy aspects of the complaint, and are compensable.

[81] As well, even though the expenses were initially paid by a third party, there is an agreement in place requiring Dr. Kelly to repay those expenses. In the circumstances, I am persuaded that the expenses are properly compensable: *Radek v. Henderson Development (Canada) Ltd.*, 2005 BCHRT 302 at para. 652.

[82] I order UBC to pay to Dr. Kelly the above-noted amounts as compensation for expenses incurred by Dr. Kelly.

*Student Loan Interest*

[83] Dr. Kelly is also seeking compensation for student loan interest. I am not persuaded to order any compensation for interest accruing on student loans. While I accept that Dr. Kelly experienced a period of unemployment, he was in receipt of employment insurance benefits and other income during that period, some part of which could have been applied to the loan. While the loan may have become payable at an earlier time, he would have been required to repay it in any event.

*Mitigation Expenses*

[84] Dr. Kelly also seeks reimbursement for what he characterizes as mitigation expenses and which include advertising costs associated with the start-up of a small teaching business. I am not persuaded to award such expenses. Dr. Kelly endeavoured to mitigate his damages by starting a business. That was his choice. The evidence demonstrated that there were other teaching opportunities that Dr. Kelly had accessed to earn income, and I am not persuaded that it is reasonable in the circumstances to hold UBC responsible for any expenses associated with Dr. Kelly's decision to try to establish his own teaching practice.

*Tuition Fees*

[85] Dr. Kelly also seeks compensation for the following:

- a) \$350 tuition for a phlebotomy training program; and
- b) \$820 tuition for a first aid course.

[86] UBC does not oppose the tuition expenses set out in the paragraph above. I am persuaded that these are compensable expenses flowing from the discriminatory conduct and order UBC to pay these sums to Dr. Kelly.

*Attendance at Hearing*

[87] Dr. Kelly also claimed loss of wages of \$900 for attending six days of hearing. He testified that this was the average of what he would have earned had he worked those days.

[88] UBC did not oppose this request and I order it to pay to Dr. Kelly the sum of \$900 as lost wage incurred while in attendance at the hearing of this complaint.

*Tax Gross-Up*

[89] Dr. Kelly seeks a tax gross-up for a lump sum payment. He notes that in *Morris v. B.C. Rail*, 2003 BCHRT 14, para. 262, the Tribunal stated that an order for a tax gross-up is consistent with the purpose of the *Code*, in making a complainant whole, and has been ordered in cases such as *Bolster v. British Columbia (Ministry of Public Safety and Solicitor General)*, 2004 BCHRT 32, para. 144 and *Kerr v. Boehringer Ingelheim (Canada) Ltd.*, 2009 BCHRT 196, para. 703.

[90] UBC did not actively oppose such an order and I order it to pay to Dr. Kelly an amount sufficient to offset any additional income tax he may incur as a result of receiving a lump sum payment for lost wages, payable in one taxation year.

[91] If the parties are unable to agree on the amount of the tax gross-up, then I retain jurisdiction to hear submissions and decide the quantum.

*Injury to Dignity, Feelings and Self-Respect*

[92] Dr. Kelly seeks damages in the amount of \$75,000 for injury to dignity, feelings and self-respect. He notes that there is no legislative cap on the amount that the Tribunal may award for compensation for this injury, and says that the circumstances of this case warrant an award at that level. He relies on the Tribunal's approach in *Gichuru v. Law Society of British Columbia*, 2011 BCHRT 185:

In particular, the nature of the discrimination found, the time period and frequency of the discrimination, the vulnerability of the complainant, the impact of the discrimination upon the complainant, and the totality of the relationship between the parties are all factors that the Tribunal will consider in assessing injury to dignity awards, and which I consider appropriate to consider in the context of this case. (para. 260)

[93] In particular, he says that following circumstances warrant a large award:

- a) The discrimination was ongoing and repetitive and occurred throughout a significant period of residency, as noted in *Kelly No. 3*, para. 504;
- b) Dr. Kelly was vulnerable and there was a power imbalance between him and UBC;

- c) UBC should be held to a high standard because of its professional and education position; and particularly because the discrimination involved medical professionals who should have been more aware and sensitive to Dr. Kelly's situation;
- d) Dr. Kelly experienced negative physical symptoms, such as diarrhea and an inability to sleep, and stress and anxiety as a result of the discrimination;
- e) UBC acted on stereotypical assumptions about Dr. Kelly; including its assumption that since his disability was lifelong, he could not be accommodated and would not be able to function as a physician;
- f) His termination from the Program "destroyed the life [he] was building; it shattered his life, career plans and his self identity." He had to move back in with his parents, lost his independence and had to "rethink his future." He suffered humiliation, embarrassment and depression.

[94] Dr. Kelly says that the impact of the discrimination in his case was extreme, as it affected his ability to use his skills and training to find alternate employment, and he experienced significant barriers in securing alternate employment. He says that his circumstances were more severe than those experienced by the complainants in cases such as *Toivanen v. Electronic Arts (Canada) Inc.*, 2006 BCHRT 396, *Datt v. McDonald's Restaurants of Canada Ltd.*, 2007 BCHRT 324, *Senyk v. WFG Agency Network (B.C.) Inc.*, 2008 BCHRT 376, *Kerr v. Boehringer Ingelheim (Canada) Ltd.*, 2009 BCHRT 196 and *Gichuru*, where the complainants received awards ranging from \$20,000 to \$35,000.

[95] He also notes that he was terminated not only from the Program, but also from his employment and that discrimination was found under both s. 8 and s. 13 of the *Code*.

[96] UBC says that even though the Tribunal concluded there was a breach of two separate sections of the *Code*, there was only one act of discrimination. UBC also says that the Tribunal needs to take into consideration its attempts to accommodate Dr. Kelly during his Program when assessing any award, and how the demands of the Program would have attenuated any stress he experienced during the Program in any event.

[97] UBC also says that it is not principled to conclude that a person with a life-long passion, such as Dr. Kelly, suffers more than someone else when they experience

discrimination. As well, it says that Dr. Kelly had available to him the grievance process through PARBC if he felt overworked or mistreated during the Program.

[98] As noted in *Gichuru*, injury to dignity awards are compensatory, not punitive, and the assessment of quantum is “highly contextual and fact-specific” (para. 256). In this regard, I have considered the totality of the relationship between Dr. Kelly and UBC.

[99] I concur with UBC that while two sections of the *Code* were found to have been breached, it was Dr. Kelly’s termination from the Program which caused the loss of his employment. This was not a case where there was both an initial breach of the *Code*, and then subsequently a further act of discrimination, such as retaliation, which might warrant additional damages for injury to dignity, feelings and self-respect.

[100] However, I am also of the view that the gravity of the effects of the discrimination in this case warrants a substantial award for damages for injury to dignity, feelings and self-respect which is beyond the highest award that has yet been made by this Tribunal.

[101] My reasons for this are as follows:

- a) Dr. Kelly lost the opportunity to complete his medical residency program, to apply for licensing and to practice in the career of his choosing, and for which he had spent considerable time and resources in pursuing the necessary educational underpinning. While he is now participating in the Program again, the potential completion of the Program and commencement of his medical practice has been significantly delayed.
- b) I do not accept UBC’s argument that it is not principled to conclude that a person with a life-long passion suffers more than someone without such a passion when they experience discrimination. Each case must be assessed on its individual circumstances. In this case, it is relevant and principled to consider that Dr. Kelly was pursuing an almost life-long desire to become a physician and that the loss of that opportunity had a serious and detrimental impact on him, particularly within the context of his family dynamics.
- c) Dr. Kelly suffered deep humiliation and embarrassment as a result of the discrimination, which was ongoing for a significant period of time. He experienced symptoms of depression, including a lack of interest in life, trouble sleeping, and other health-related problems. I accept his evidence about the depth and continuing nature of those symptoms, including his thoughts of “ending it”, from the date of his termination in 2007 until his reinstatement to the Program in 2013, including his loss of self-identity

and self-esteem, his feelings of worthlessness, and his despair and uncertainty about his future.

- d) Dr. Kelly experienced further embarrassment when applying for jobs and explaining why, with his educational background, he was not pursuing his medical career. As well, he encountered barriers to obtaining employment because of the specialized nature of his skills and education and the perception that he was overqualified.
- e) Dr. Kelly lost his source of income and felt compelled to move back in with his parents, losing his independence.
- f) Dr. Kelly's relationships with his family and friends became strained, and he isolated himself socially.
- g) Dr. Kelly was in a vulnerable position as both a student and resident who suffered from a mental disability, was compliant with the requests for medical information made of him by UBC, and was dependent upon them to reasonably accommodate his disabilities in order to complete his residency.

[102] I find that the particular circumstances of this case are unique and serious. Unlike *Gichuru*, Dr. Kelly was unable to complete his training and enter practice as a physician as a result of the discrimination. He was unable to obtain work in his chosen field and had to continue to independently study and retain his medical knowledge in the hope of being reinstated to the Program.

[103] In all the circumstances, I am persuaded that an award of \$75,000 is reasonably proportionate to the injury to dignity, feelings and self-respect suffered by Dr. Kelly. I order UBC to pay to Dr. Kelly the sum of \$75,000 damages for injury to dignity, feelings and self-respect.

*Pre-Judgment and Post-Judgment Interest*

[104] The Tribunal regularly awards pre- and post-judgment interest on its awards. I order UBC to pay pre-judgment interest on the past wage loss award and post-judgement on the order for future wage loss, expenses and damages for injury to dignity, feelings and self-respect in accordance with the provisions of the *Court Order Interest Act*. I retain jurisdiction to deal with any issues related to these calculations.

*Summary*

[105] I order UBC to pay to Dr. Kelly the following:

- a) \$385,194.70 as damages for lost wages;
- b) compensation for expenses incurred as a result of the discrimination as set out earlier in this decision;
- c) a tax gross-up;
- d) \$75,000 as damages for injury to dignity, feelings and self-respect; and
- e) Pre-and post-judgment interest in accordance with the provisions of the *Court Order Interest Act*.

[106] I remain seized to deal with any issues respecting the calculation of the amounts set out in this award.

---

Enid Marion, Tribunal Member