HUMAN RIGHTS TRIBUNAL OF ONTARIO

2016 HRTO 41 (CanLII)

B E T W E E N:

Jolando Miraka

Applicant

-and-

A.C.D. Wholesale Meats Ltd.

Respondent

DECISION

Adjudicator: Sheri D. Price

Date: January 11, 2016

File Number: 2013-14677-I

Citation: 2016 HRTO 41

Indexed as: **Miraka v. A.C.D. Wholesale Meats Ltd.**

APPEARANCES

Jolando Miraka, Applicant	)))	Jamie McGinnis, Counsel
A.C.D. Wholesale Meats Ltd., Respondent	)))	Andrew Zabrovsky, Counsel

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INTRODUCTION

[1] This is an Application under the *Human Rights Code*, R.S.O. 1990, c. H.19, as amended (the "*Code*"), in which the applicant alleges that the respondent employer discriminated against him by terminating his employment as a delivery truck driver in June 2012.

[2] The applicant alleges that the respondent terminated his employment because of his absences from work on June 12, 13, and 14, 2012, which absences the applicant alleges were because of his family status and disability. Specifically, the applicant alleges that he had to stay home from work on June 12 and 13, 2012, to take care of his young children, because his wife, who normally took care of the children, was ill. The applicant alleges that he returned to work on Thursday, June 14, 2012, but had to leave very early into his shift because he had sharp pain in his side, which was later diagnosed as a right inguinal hernia, for which he had surgery on July 2, 2012. The applicant alleges that the respondent terminated his employment because of his three consecutive days of absence in June 2012 and that, in doing so, discriminated against him because of family status and disability.

[3] I note that, in the Application that he originally filed, the applicant alleged that the respondent terminated his employment because of disability only. However, after receiving the Response to the Application, in which the respondent pleaded that it terminated the applicant because of his "inability to attend work" and raised the applicant's absences on June 12 and 13, 2012, the applicant sought and was granted permission to amend his Application to include the ground of family status: 2014 HRTO 363.

[4] The respondent denies that it terminated the applicant's employment because of his disability or family status. At the hearing, the respondent argued that the applicant's employment was terminated on June 14, 2012 solely because the applicant had shown himself to be an unreliable employee, by failing to call the respondent in advance of his June 13, 2012 shift to say that he would not be able to work that day.

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[5] At the hearing, the applicant testified on his own behalf and also called the doctor who saw him at a walk-in clinic on June 18, 2012. The respondent called three witnesses: the owner of the respondent company, Albertino Domingues, who made the decision to terminate the applicant's employment; Rosa Ruffolo, the respondent's office manager; and Sergio Azevedo, a supervisor with the respondent.

[6] I made an order excluding witnesses at the commencement of the hearing.

BACKGROUND

[7] The respondent carries on business as a wholesale meat distributor, distributing meat to customers such as grocery stores and butcher shops. At all material times, the respondent employed about 30 employees, approximately 10 of whom worked as delivery truck drivers.

[8] On or about May 14, 2012, the respondent hired the applicant to work as one of its delivery truck drivers on a full-time basis, Monday to Friday. In this role, the applicant's duties included "building" customers' orders in the cooler room under the direction of the cooler room supervisor (i.e. placing boxes of products on wooden skids according to what had been ordered), loading such orders onto the delivery truck and delivering them to the respondent's customers.

[9] The applicant, like all of the respondent's delivery truck drivers, was generally expected to begin work at 5:00 a.m., except on Monday, which tended to be the slowest day of the week, when the applicant started work somewhat later. The applicant's daily stopping time varied, depending on when his deliveries were completed.

The applicant's June 12 and 13, 2012 absences

[10] On Monday, June 11, 2012, the applicant worked his normal shift for the respondent, punching in at approximately 8:00 a.m. and punching out at approximately 4:00 p.m.

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[11] The applicant testified that, during the afternoon of June 11, 2012, he told the respondent's office manager, Rosa Ruffolo, that he would not be able to work the next day, Tuesday, June 12, 2012, because he had to stay home and look after his children, who were then one and four years old. The applicant testified that Ms Ruffolo told him that that was fine, that family was "number one", and he thanked her.

[12] The applicant testified that the reason he had to stay home to take care of his children was because his wife, who normally cared for them, was ill and that he told Ms Ruffolo that. The applicant testified that, following a traumatic birth experience and related surgeries the previous year, his wife sometimes had anxiety attacks to the point that she could not even get out of bed. The applicant testified that, while he was working on Monday, June 11, 2012, his wife called him and asked him to stay home with the children the following day because she was not well and she did not want anything to happen to the kids. The applicant testified that because he knew his wife's situation, he did not want to take a chance on leaving the children home alone with her. He testified that he was afraid that something could happen if the children were left at home "unattended", and noted that he lived on the seventh floor of a building with a balcony. The applicant testified that he did not ask anyone else to stay at home with his wife and children because there was no one to ask. He testified that he has no family he could ask to take care of his children and everyone else is busy with their own lives.

[13] Ms Ruffolo disputed that the applicant said anything to her about his wife being ill or that she made the "family is number one" comment to the applicant. Otherwise, she confirmed the applicant's evidence that he told her on June 11, 2012 that he would be unable to work the following day because he had to take care of his children and that she told him "okay" and that that was "fine".

[14] In accordance with his discussion with Ms Ruffolo, the applicant did not attend work on June 12, 2012.

[15] In the normal course, the applicant would have been expected to return to work on Wednesday, June 13, 2012. However, the applicant did not show up for work that

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day, nor did he call the respondent prior to the commencement of his shift to advise that he would not be coming to work.

[16] Ms Ruffolo testified that the applicant called her on June 13, 2012, at around 11:00 a.m., to say that he had been unable to go to work that day because he still needed to stay home and take care of his children, but that he would be in the following day. Ms Ruffolo testified that she responded by telling the applicant, “Okay. Fine.”

[17] This was largely consistent with the applicant’s evidence. The applicant testified that his wife had not improved by the next day, Wednesday, June 13, 2012, so he had to stay home again to take care of his children. He testified that he called Ms Ruffolo on Wednesday June 13, 2012, well after his scheduled start time, to tell her that he was sorry, but his wife was still ill and he had to stay home again to take care of his children. He testified that Ms Ruffolo told him that was fine.

[18] The applicant testified that the reason he called in so late on Wednesday, June 13, 2012 was because he did not sleep on Tuesday night and was not thinking clearly. The applicant also testified that he was busy taking care of three people, his wife and two children, and had to go out on Wednesday morning for things they needed such as diapers and milk. The applicant also suggested that he did not think it was necessary for him to call in because the respondent already knew that he was at home taking care of his children. The applicant noted in his testimony that the respondent did not call him on June 13, 2012 to ask why he was not at work.

[19] Ms Ruffolo testified that she never asked the applicant anything about his childcare situation or why he needed to take time off work to take care of his children. Ms Ruffolo acknowledged during cross-examination that the applicant’s absences from work were “an issue” but she never told the applicant this. She testified that the applicant was on probation and should have known that he had to report to work.

[20] At this juncture, I note that one of the factual disputes between the parties is whether the applicant was a probationary employee at the time his employment was

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terminated. Although, as discussed below, the duration of the applicant's employment with the respondent is relevant to remedy, I do not think much turns on whether the applicant was on probation at the time of his dismissal. Probationary, like non-probationary employees, are protected under the *Code* from having their employment terminated for discriminatory reasons. In any event, other than Ms Ruffolo's reference to the applicant being "on probation", there was no evidence that there was a probationary period for delivery truck drivers employed by the respondent. Mr. Domingues testified that delivery truck drivers are given a hourly raise after three months with the respondent and are put on the respondent's benefit plan after six months of employment. He also testified that drivers sometimes quit if they do not like the job, or he will let a driver go if he does not like him. However, he did not testify that there was any probationary period *per se*. Consistent with this, the applicant denied that he was ever told that he would be subject to a probationary period when hired by the respondent.

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The events of June 14, 2012 and the termination of the applicant's employment

[21] The applicant returned to work on Thursday, June 14, 2012. Documents submitted by the respondent show that he punched his time card at 4:58 a.m.

[22] After arriving on June 14, 2012, the applicant testified that he went to the cooler room and went to work. He testified that one of the cooler room supervisors, Sergio Azevedo, gave the orders and he started loading the skids. The applicant testified that he felt a sharp pain upon picking up the first box. He testified that he picked up a second box and felt an even sharper pain. The applicant testified that he realized that there was "no way" he could continue working. He testified that he went to Ms Ruffolo and told her that he was sorry, because he knew he had been off work the previous two days, and he did not want to seem "like a kid" but he could not work. He testified that he showed Ms Ruffolo where he was feeling pain and she suggested that it might be his appendix that was causing the pain. The applicant testified that he said he did not know what was causing it, but he could not work. He testified that Ms Ruffolo told him to "do what he had to do" and the applicant left. Contrary to the respondent's evidence, which

is addressed below, the applicant denied that he saw or spoke to Mr. Domingues before he left work on June 14, 2012.

[23] Ms Ruffolo's evidence diverged from the applicant's with respect to the time the applicant approached her on June 14, 2012. Ms Ruffolo testified it was at 5:02 a.m. and the applicant testified it was somewhat later than that. Otherwise, Ms Ruffolo confirmed the applicant's evidence that he told her that he did not want to sound like a baby but he did not feel well and wanted to go home. Ms Ruffolo testified that the applicant told her that he had a pain in his side and that he probably also said that he had to go see a doctor. Ms Ruffolo testified that she asked the applicant what was wrong and he told her that he hurt himself in the cooler picking up a box. Ms Ruffolo testified that she challenged the applicant on this, asking him how he could have hurt himself picking up a box, because none of the drivers had even started working by that point. At that point, Ms Ruffolo testified that Mr. Domingues, who was just three feet away from her in his office and who had heard what the applicant had said, terminated the applicant's employment by telling him, "I don't think this job is suitable for you. Find yourself another job." Although she initially testified that she did not remember if the applicant responded to Mr. Domingues, Ms Ruffolo later testified that the applicant said something to Mr. Domingues in reply but she did not know what it was because she had to take a telephone call at that moment. Ms Ruffolo testified that she punched the applicant's time card at 5:15 a.m. after the applicant had left. Ms Ruffolo testified that she needed to punch the applicant out because drivers are paid according to the hours reflected on their time cards.

[24] Ms Ruffolo testified that, right after punching the applicant out, she asked Mr. Azevedo, the cooler room supervisor, whether it was possible that the applicant had hurt himself by picking up a box, and Mr. Azevedo said "no," because no one had started working by that point. Ms Ruffolo testified that when she spoke to Mr. Azevedo, the drivers were still "standing around" the office and that no one was even in the cooler room.

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[25] However, this was inconsistent with Mr. Azevedo's testimony. Mr. Azevedo testified that he remembering seeing the applicant inside the cooler on the morning of June 14 2012, but after a while, he did not see him anymore. He testified that he thought the applicant had gone out on a delivery with another driver. He testified that he left the cooler room and went to the office and Ms Ruffolo asked him if something had happened to the applicant and he told her that he did not know. Under cross-examination, Mr. Azevedo testified that he did not ask the applicant to move any boxes on the morning of June 14, 2012, but he did not know if the applicant had moved any boxes without being asked. He acknowledged that it was possible that the applicant had hurt himself when Mr. Azevedo was not watching.

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[26] As for Mr. Domingues' evidence about the events of June 14, 2012, he testified that he was in his private office, near Ms Ruffolo's desk, when he overhead the applicant telling Ms Ruffolo that he did not want to sound like a baby, but that he was "not feeling good," that he had to go home, but would come back to work the following day. Mr. Domingues testified that he terminated the applicant's employment at that point by telling him not to come back the following day. He testified he told the applicant that the job was not suitable for him and that he told the applicant, "Get a job somewhere else. I don't want you here." Mr. Domingues testified that the applicant replied that if Mr. Domingues did not give him a job, the applicant would "take him to the labour board." Mr. Domingues testified that he replied that the applicant did not have to threaten him, that he was not going to give the applicant his job back, and that he did not care where the applicant went.

[27] The applicant's evidence about what was said when Mr. Domingues terminated his employment was largely consistent with the respondent's witnesses' evidence. However, the applicant's evidence differed from the respondent's with respect to when the conversation took place. Whereas Mr. Domingues and Ms Ruffolo testified that Mr. Domingues terminated the applicant's employment on his last day of work, June 14, 2012, the applicant testified that this occurred on June 19, 2012, when he returned to the workplace with a Workplace Safety and Insurance Board ("WSIB") form.

[28] Specifically, the applicant testified that it was Tuesday, June 19, 2012, when he returned to give Ms Ruffolo a WSIB form from his doctor, indicating that he could return to modified duties, that Mr. Domingues came out of his office and told Ms Ruffolo to "let him go" and to give the applicant his cheques. The applicant testified that it was at that point that Mr. Domingues told the applicant to find a job somewhere else, "an easy job", and to "take unemployment". The applicant testified that he protested, and told Mr. Domingues that he could still work as long as he had a helper, that he was not asking to sit at a desk. He testified that he also asked Mr. Domingues to give him something in writing explaining why he was letting him go, but Mr. Domingues refused, saying that replied that he had "no time to waste" with the applicant.

[29] The applicant testified that he met Mr. Domingues' son, "Mike", as he was leaving and told him that he had been laid off by his father. He testified that he told Mike that what had happened to him could happen to anyone and asked Mike Domingues to help him out at least for a couple of months, while he recovered, because he had two children to provide for. The applicant testified that Mike Domingues told him that he would help him and that the applicant should call him. However, the applicant testified that Mike Domingues never answered his phone when the applicant called and he never returned the applicant's calls.

[30] For the respondent's part, Ms Ruffolo agreed that the applicant returned to the workplace on June 19, 2012, to give her a WSIB form but, as set out above, she disagreed that that is when the applicant's employment was terminated.

[31] After he left on June 14, 2012, Ms Ruffolo testified that the next she heard from the applicant was on Friday, June 15, 2012, when he called to ask her to send his cheque home with another employee. Although Ms Ruffolo initially denied that the applicant said anything during that call about his health or coming back to work, she later acknowledged that the applicant told her during the June 15, 2012 call that he had a hernia.

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[32] Ms Ruffolo testified that the applicant called her again on Monday or Tuesday of the following week, which would have been June 18 or 19, 2012, to say that he had been to the doctor and had a paper which the doctor had told him to bring to her. Ms Ruffolo testified that she told the applicant that he could bring it to her and that he subsequently showed up and gave her a WSIB form, specifically, a "Health Professional's Report (Form 8)", which had been completed by Dr. Hans Guo. The June 18, 2012 form from Dr. Guo stated that the applicant was capable of "resuming modified duties" effective June 18, 2012, with "some limitations", namely, "avoid[ing] lifting/pushing and pulling heavy objects".

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[33] Ms Ruffolo denied that anyone else spoke to the applicant when he dropped off the Form 8. She specifically denied that Mr. Domingues was even in the office when the applicant dropped off the WSIB form. She testified that Mr. Domingues left the respondent business every day at about 8:00 a.m. to go to another business he owned in Cambridge, Ontario.

[34] For his part, Mr. Domingues testified that he did not go to his other business every day. Nonetheless, he was adamant that he was not in the office on June 19, 2012 when the applicant came in with his WSIB form. Mr. Domingues testified that he recalled Ms Ruffolo phoning to tell him that the applicant had come to the office with a WSIB form and that he was going to claim WSIB benefits.

[35] Ms Ruffolo testified that part of her job as office manager is handling workplace safety and insurance issues and that she took the Form 8 from the applicant and subsequently filed a report with the WSIB. In particular, she testified that she wrote a letter to the WSIB on June 19, 2012 objecting to the applicant's WSIB claim on the basis that his injury had not occurred while the applicant was working for the respondent. Ms Ruffolo's June 19, 2012 letter, which is largely consistent with her evidence at the hearing, stated in part:

> On June 14th [the applicant] reported to work, and punched his card at 4:58 am, starting time 5:00 a.m.. At 5:02 a.m. he came to the office, approached me (Rosa Ruffolo) and said "I don't want to sound like a child

> but I can't work because I feel sick." When I asked what was wrong he said "I have a pain on my side" and he pointed to his lower front side, and said that the pain started when he picked up a box. The owner said to him "Obviously this job is not for you. I suggest you find yourself an appropriate job to suit your needs".
>
> Accordingly (sic) to the foreman (Sergio Azevedo…), supervisor (Fernando Maia …) and Steve worker … they did not start working until 5:15 a.m. or 5:20 a.m. because it takes time to prepare the invoices in runs, so he did not touch any boxes.
>
> On June 15th, at 1:00 pm, [the applicant] called the office and asked to talk to Rosa, I picked up the phone and I asked how he was doing and he said "I have a hernia", he asked me to give his paycheque to … a fellow worker, assuming that he was not returning to work, according to the conversation that took place on the morning of June 14th, I did. On Monday, June 18th, in the afternoon, [the applicant] called and said "I went to the doctor today and he said that I can return to work (light duties because I have a hernia)", I have the report from the doctor and I have to bring it to you. I told him that I have his termination papers ready, so he can come to pick up his papers and cheques or I will mail them to him, but he agreed to come in on Tuesday June 19th and bring me the doctor's report.

[36] Despite the respondent's objection, the WSIB allowed the applicant's claim for WSIB benefits up to August 9, 2012 on the basis of its determination that the applicant's hernia was work-related and occurred while working for the respondent.

ANALYSIS AND DECISION

[37] In order to make out his discrimination claim, the applicant must establish on a balance of probabilities that the respondent treated him in a disadvantageous manner because of his family status and/or disability. In particular, the issue in this case is whether the respondent's decision to terminate the applicant's employment was discriminatory based on disability and/or family status.

[38] In my view, the evidence in this case establishes on a balance of probabilities that the applicant was unable to work on June 12 and 13, 2012 because of his family status and on June 14, 2012 because of disability. Moreover, the evidence establishes that the applicant's absences on all three dates were at least a significant part of the

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reason the respondent decided to terminate the applicant's employment. Accordingly, I find that the respondent discriminated against the applicant because of his family status and disability, contrary to the *Code*. My reasons for these conclusions are below.

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[39] I note at the outset that there were a number of factual disputes between the parties in this case, such as, for example, whether the applicant was hired by Mr. Albertino Domingues or his son, "Mike"; whether the applicant knew who Mr. Albertino Domingues was before his employment was terminated; how long the applicant was at work on June 14, 2012; and whether the applicant was always on time for work, etc. Ultimately, these disputes are not material to the issues in the Application and it was not necessary for me to resolve each and every one of them in order to determine the issues in the Application. The respondent argued that the evidence on these non-material facts was relevant to my assessment of the parties' overall credibility. However, as set out below, I was able to make credibility findings on the material issues in the Application without resolving these disputes.

Whether the applicant's absences on June 12, 13, and 14, 2012 were *Code*-related

Applicant unable to work on June 12 and 13, 2012 because of his "family status"

[40] I begin with the applicant's absences on June 12 and 13, 2012 and why I conclude, based on the evidence presented at the hearing, that the applicant was unable to work on those dates because of his family status.

[41] In *Canada (Attorney General) v. Johnstone*, 2014 FCA 110, the Federal Court of Appeal clarified that the sorts of parental obligations that fall within the protected ground of "family status" under human rights legislation are substantive obligations that engage a parent's legal responsibility to a child. The reasoning in *Johnstone* has since been accepted and applied by this Tribunal in a number of decisions: *Tomlinson v. Runnymede Healthcare Centre*, 2015 HRTO 4; *Devaney v. ZRV Holdings Limited*, 2012 HRTO 1590; *Wing v. Niagara Falls Hydro Holding Corporation*, 2014 HRTO 1472; and

was adopted by the Ontario Divisional Court in *Partridge v. Botony Dental Corporation*, 2015 ONSC 343 at para. 88.

[42] In this case, the applicant testified that he was unexpectedly required to miss work on June 12 and then again on June 13 to take care of his children because his wife, who normally took care of the children, was ill and unable to do so. The thrust of the applicant's evidence was that, given his wife's situation, it was not safe for him to leave his very young children at home alone with her on the days in question as they would be basically unattended. The applicant's uncontradicted and relatively detailed evidence on these points made sense, was straightforward and clear, and I accept it as credible.

[43] In coming to this conclusion, I have considered the respondent's argument that the applicant's evidence about his wife's inability to take care of the children should be rejected as incredible. The respondent submits that it does not make sense that on the applicant's wife called him on June 11, 2012 and told him that she needed him to take care of the children the following day. The respondent submits that if the applicant's wife's health was such that she knew on June 11, 2012 that she would not be able to take care of the children the following day, then she would not have been able to take care of them at the time of the call either, and would have needed the applicant to leave work immediately to go home and take care of the children. Since the applicant did not tell Ms Ruffolo that he needed to leave work immediately on June 11, 2012, the respondent submits that the Tribunal should be very sceptical about his evidence that he needed to take June 12, 2012, and subsequently June 13, 2012, off to take care of his children.

[44] I take the respondent's point on this. However, I do not think that I can fairly conclude that the applicant's evidence about his wife's telephone call makes no sense. It may be that the applicant's wife called near the end of the applicant's shift and it was therefore unnecessary for him to leave work before he finished his deliveries. I do not know, because the applicant was never asked what time his wife called him on June 11,

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2012. However, in the circumstances, I am not persuaded that the applicant's uncontradicted evidence can be rejected on the basis that it does not make sense.

[45] The respondent also argues that an adverse inference should be drawn from the applicant's failure to call his wife as a witness and/or his failure to put his wife's medical records into evidence to confirm that the applicant's wife had an anxiety problem. At a minimum, the respondent submits that these are gaps in the applicant's evidence that undermine his credibility. However, I note that the applicant's evidence that his wife was ill and unable to take care of the children on June 12 and 13, 2012 was not challenged on cross-examination.

[46] Although the applicant might have attempted to bolster his case by calling his wife to testify and putting her medical records into evidence, I am not inclined to reject the applicant's uncontradicted and otherwise credible evidence that his wife was ill and unable to take care of the children on June 12 and 13, 2012 because he failed to do these things. In my view, the applicant has proved this fact on a balance of probabilities by his sworn testimony, which I have found to be credible.

[47] Based on the applicant's evidence, I am satisfied on a balance of probabilities that the applicant had to miss work on June 12 and 13 because of substantive obligations that engaged his legal responsibilities as a parent to ensure that his young children were safe and secure. Accordingly, I find that the applicant had a *Code*-protected need to be absent from work and take care of his children on the two dates in question.

[48] In my view, it would be unreasonable to expect the applicant to leave his children at home alone with their mother on June 12 and 13 given that she was not in a position to take care of them. Had the applicant done so, his young children would have been effectively left unsupervised and therefore put at risk of harm. Clearly, this would have been inconsistent with the applicant's substantive obligations as a parent. Indeed, in *Johnstone*, the Federal Court of Appeal expressly stated that the need to ensure that young children are not left unattended is a substantive obligation that engages a

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parent's legal responsibilities: *Johnstone*, *supra*, at para. 70. In addition, requiring the applicant to go to work and leave his children at home with his wife while she was unable to care for them would have interfered in a manner that was more than trivial or insubstantial with the fulfillment of the applicant's substantive obligations to his children.

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[49] This is not an end to the matter, however, as the respondent argues that even if the applicant's wife was not able to care for their children on June 12 and 13, the applicant has not established that he made reasonable efforts to make reasonable alternate arrangements for his child care needs on the two days in question. In this regard, the respondent relies on *Johnstone*, above, at para. 93, where the court found that a parent claiming that she had a *Code*-protected right to modified hours of work as a form of accommodation to allow her to care for her children needs to establish that she has made reasonable efforts to meet her childcare obligations through reasonable alternative solutions and that no such alternative solution is reasonably accessible. The respondent points out that on cross-examination, the applicant testified that he did not try to find someone else to come in and "babysit" his children on June 12 because there was no one for him to call and everyone else was busy with their own lives. Based on this, the respondent submits that the applicant has not established that he tried but could not make reasonable alternative arrangements for the care of his children on June 12 and 13 and therefore cannot establish that he had a *Code*-protected need to be absent from work on June 12 and 13, 2012.

[50] With respect, I cannot agree.

[51] First of all, *Johnstone* is distinguishable from the case at hand. As the applicant points out, *Johnstone* was a case in which an employee was seeking permanent or at least long-term accommodation of her hours of work because they conflicted with her ability to take care of her children. It was in that context that the court held that, in order to make out a *prima facie* case of discrimination based on family status, the applicant had to establish, among other things, that she had made reasonable efforts to make reasonable alternative arrangements for childcare, but had been unable to do so.

[52] I am not convinced that the requirement to demonstrate reasonable efforts to make alternative childcare arrangements applies in cases like this, where there is only an infrequent, sporadic or unexpected need to miss work to take care of one's children. For example, I doubt that a parent who is called away from work to pick up a sick child from school or daycare has to prove that he or she first tried to find someone else to care for the child in order to fall within the *Code*'s protection.

[53] Rather, what comes into play in cases like this one is the overarching principle that a "bona fide childcare problem" has resulted in an employee being unable to meet his or her work obligations. *Johnstone*, *above*, at para. 88 and 96. As the Federal Court of Appeal explained in *Johnstone,* at para. 96, this is a highly fact-specific inquiry, and each case must be reviewed on an individual basis in regard to all of the circumstances.

[54] In the case at hand, I am satisfied that the applicant's actions in addressing his brief and unexpected need for childcare were reasonable in the applicant's circumstances. As noted above, in this case, unlike *Johnstone*, for example, the applicant was not seeking to have indefinite or even long-term accommodation of his hours of work in order to be at home with his children. Rather, the applicant's need to stay at home with his children on June 12 (and then on June 13), which he first learned about on June 11, 2012, was relatively sudden and unexpected. In my view, it was not a situation where the applicant could be reasonably expected to either already have an alternate child care arrangement in place or to put one in place for the following day(s). The respondent submits that the fact that the applicant "did not even try" to find alternate care for his children on June 12 is fatal to his family status claim, but it is difficult for me to see what the applicant could reasonably have been expected to do in his circumstances. It would be completely unrealistic for example to expect that the applicant could have had a babysitter "on call" for when the applicant's wife fell ill and was unable to care for the children. The applicant could perhaps be expected to prevail upon close family members or friends if there was anyone like that available, but the applicant testified that there was no one that he could reasonably ask to take care of his

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children for him and there is nothing to contradict this and no basis for me to reject his evidence in this regard. Nor can I agree with the respondent's suggestion that the applicant was obliged to try to hire, on short notice, a stranger from "Craigslist" or "Kijiji" to care for his young children before he falls within the *Code*'s protection. Indeed, doing so might have been inconsistent with the applicant's legal obligations to ensure the safety and well-being of his children.

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[55] Another problem with the respondent's argument that the applicant was obliged to make reasonable efforts to make alternate childcare arrangements for June 12 and 13 is that on June 12, at least, the respondent acknowledges that it gave the applicant permission to be off work to take care of his children. In my view, having given the applicant permission to take June 12 off to take care of his children, the respondent cannot then hold the applicant's absence on that date against him and terminate his employment partly because of it (which is what I find happened, as addressed below). Doing so, in my view, treats the applicant in a disadvantageous manner because of his "family status" and violates the *Code*.

[56] In sum, I am satisfied based on the evidence that the applicant's substantive obligations as a parent required him to take care of his children on June 12 and 13, 2012. There was no reasonable alternative for childcare available to the applicant on those dates and the applicant realized this. Accordingly, I find on a balance of probabilities that the applicant's absence from work on June 12 and 13, 2012 was due to his "family status" within the meaning of the *Code*.

Applicant unable to work on June 14, 2012 because of "disability"

[57] I now turn to the applicant's absence on June 14, 2012, and whether he needed to leave work that day because of a "disability" within the meaning of the *Code*.

[58] "Disability" is specifically defined in the *Code* to include "an injury or disability for which benefits were claimed or received under the insurance plan established under the *Workplace Safety and Insurance Act, 1997*."

[59] In this case, the respondent acknowledges that the applicant had a hernia in June 2012 for which he claimed and received benefits under the *WSIA* and that the applicant therefore had a "disability" within the meaning of the *Code*. However, it is not entirely clear to me whether it is also agreed that the applicant had to leave work on June 14, 2012 because of that disability. In any event, I find that this fact is established on a balance of probabilities by the evidence before me.

[60] The applicant testified that he could not stay at work on June 14, 2012 because he felt a sharp pain in his side. He testified that he went home and tried but was unable to get in to see his regular family doctor that same day. The applicant testified that he could not see his doctor the following day either, because his doctor's office was closed on Fridays. The applicant testified that he decided to go to a walk-in clinic on Monday, June 18, 2012, because it was closer to his home and he would not have to wait as long to see a doctor. He testified that he was seen at the walk-in clinic by Dr. Guo, who diagnosed the source of the applicant's pain as a right inguinal hernia.

[61] The applicant's evidence in this regard was consistent with that of Dr. Guo, who testified that the applicant came in to see him at the walk-in clinic on June 18, 2012 complaining about right abdominal pain and swelling since the previous Thursday. After examining the applicant, Dr. Guo diagnosed the applicant with a right inguinal hernia and referred him to a surgeon, whom the applicant saw a few days later, on June 22, 2012. Two reports from the surgeon indicate that the surgeon confirmed the hernia diagnosis and recommended a surgical hernia repair, which the applicant underwent on July 2, 2012.

[62] I accept the applicant's evidence that he needed to leave work on the morning of June 14, 2012 because of pain caused by his hernia as credible. The applicant's evidence in this regard was clear and uncontradicted. It was also consistent with the evidence of Dr. Guo, as well as some of the documentary evidence, in particular, the WSIB Form 8, Dr. Guo's clinical notes and two letters from the applicant's surgeon. The applicant's evidence that he left work because of pain caused by his hernia was also consistent with the respondents' evidence, insofar as Ms Ruffolo testified that the

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applicant told her that he had to leave work shortly after arriving on June 14, 2012 because he had a pain in his side; and Mr. Domingues confirmed that he heard the applicant telling Ms Ruffolo that he was leaving work because he was "not feeling good."

[63] Having accepted that the applicant had to leave work on June 14, 2012 because of pain caused by his hernia, it follows from that the applicant needed to be absent from work on June 14, 2012 because of a "disability" within the meaning of the *Code*. The applicant's hernia was a physical injury for which he claimed, and received, WSIB benefits. By definition, then, when the applicant left work because of pain related to his hernia, he left because of a "disability".

[64] Having determined that the applicant had a *Code*-related need to be absent from work on June 12, 13 and 14, 2012, the issue then becomes whether the applicant's absences on any or all of these dates were a factor in the respondent's decision to terminate the applicant's employment.

[65] However, before turning to this, I wish to briefly address the respondent's contention that, contrary to his testimony, the applicant did not pick up any boxes in the few minutes he was at work on June 14, 2012 and he did not injure himself while working for the respondent. The respondent alleges that the applicant merely claimed to have injured himself on June 14, 2012 so that he could claim WSIB benefits.

[66] The fact of the matter is that whether the applicant was injured at work or elsewhere is not relevant to the determinations I need to make in this case. The issue with respect to where and how the applicant was injured was certainly an issue for the WSIB, which found that the applicant was injured at the respondent's workplace. However, it is not an issue in the case before me. The issue that I need to determine is whether the applicant had a *Code*-related need to be absent from work on June 14, 2012. In my view, the evidence in this case clearly establishes, on a balance of probabilities, that the applicant could not work on June 14, 2012 because of an injury for which he claimed (and received) WSIB benefits, and that he therefore had a *Code*-

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related need to be absent on the date in question. Moreover, this conclusion would not change even if I were to agree with the respondent that the applicant's evidence as to how he came to be injured or other non-material facts was not credible.

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[67] In any event, I cannot agree with the respondent that its witnesses' evidence establishes that the applicant could not have been injured at the respondent's workplace on June 14, 2012. As noted above, there were inconsistencies in Mr. Azevedo's and Ms Ruffolo's evidence as to whether the drivers had started working in the cooler room by the time the applicant left on June 14, 2012. In addition, although Mr. Domingues testified at one point that he had not given the customer orders to Mr. Azevedo by the time the applicant left work (the implication being that the drivers had not started working), this was inconsistent with his earlier testimony that he had finished putting the bills in order "before 5:00" and that he was no longer working on them by the time the applicant punched in at 4:58 a.m. Further, Mr. Azevedo, the applicant's supervisor in the cooler room, acknowledged that it was possible that the applicant was injured picked up a box on June 14, 2012. Contrary to Ms Ruffolo's testimony, Mr. Azevedo testified that, when she asked, he told Ms Ruffolo on June 14, 2012 that he did not know if anything had happened to the applicant. Finally, the respondent's theory that the applicant hurt himself somewhere else but went into work for a few minutes on June 14, 2012 just so he could pretend to have been injured there and claim WSIB benefits seems unlikely for this reason: it does not make sense to me that someone who essentially planned to stage a workplace injury so that he could claim WSIB benefits would claim to have hurt himself working before he had actually done any work at all.

Whether the decision to terminate the applicant was based in whole or in part on the applicant's June 12, 13 and/or 14, 2012 absences

[68] At the outset, and although it is not clear to me that much turns on it, I accept the respondent's evidence that Mr. Domingues terminated the applicant's employment on June 14, 2012, as opposed to the applicant's evidence that this occurred on June 19, 2012. There are a number of reasons for this. First of all, in final argument, the

applicant conceded that the conversation in which Mr. Domingues terminated the applicant's employment had probably taken place on June 14, 2012, not on June 19, 2012, as he had testified. In addition, Mr. Domingues and Ms Ruffolo were consistent in their evidence that the termination occurred on June 14, 2012, and that Mr. Domingues was not even in the office when the applicant came in with his WSIB form on June 19, 2012. Their evidence was also consistent with the June 2012 Form 6 (Worker's Report of Injury) submitted to the WSIB by the applicant in September 2012, on which the applicant indicated that he had reported his June 14, 2012 injury to Rosa Ruffolo and "Alberto Domingues", "the owner". The fact that this document, prepared close in time to the events in question, suggests that the applicant reported his injury to Mr. Domingues when it occurred on June 14, 2012 lends further support to the respondent's version of events that the termination of the applicant's employment occurred on June 14, 2012 insofar as it suggests that the applicant did interact with Mr. Domingues on June 14, 2012, as Mr. Domingues and Ms Ruffolo testified.

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[69] I now turn to whether the applicant's inability to work on June 12, 13 or 14, 2012 because of his family status and disability were all or part of the reason for the respondent's decision to terminate his employment.

[70] As noted above, there is no dispute that, having sought and obtained permission to take June 12, 2012 off to stay home and take care of his children, the applicant did not show up for work on June 13, 2012, and did not call in to tell the employer that he was unable to work until well into his shift.

[71] Although in its original and amended Responses to the Application, the respondent pleaded that it terminated the applicant because of his inability to attend work, at the hearing, the respondent argued that its decision to terminate the applicant's employment was based solely on the applicant's failure to call in before his shift started on June 13, 2012, and not the applicant's *Code*-related absences. The respondent argued that if the applicant had let the respondent know he could not come to work on June 13, 2012, before his shift started, that would have been fine and the applicant's employment would not have been terminated. However, this is not borne out by the

evidence. On the contrary, the evidence establishes that the respondent terminated the applicant's employment in whole or in part because of his *Code*-related absences on June 12, 13 and 14, 2012.

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[72] As the owner of the respondent, there is no dispute that Albertino Domingues is the one who made the decision to terminate the applicant's employment. During his examination-in-chief and his cross-examination, Mr. Domingues testified a number of times that the applicant's failure to work on June 12, 13, and 14, 2012 showed the applicant to be an unreliable employee, and was why he terminated the applicant's employment.

[73] For example, very early on in his evidence-in-chief, Mr. Domingues testified that, after he heard the applicant telling Ms Ruffolo on June 14, 2012 that he did not feel well and he could not work that day, he told the applicant that he did not need to return the following day "because for two days, I needed someone responsible to do the work… He had missed Tuesday and Wednesday and he did not phone in…" Although Mr. Domingues' evidence in this regard supports the respondent's position that the applicant's failure to call in on June 13, 2012 was a problem for the respondent, it establishes that the applicant's unavailability to "do the work" – not only on Wednesday, June 13, 2012, but also on Tuesday, June 12, 2012, when he had permission to stay home to take care of his children – was also part of the reason Mr. Domingues decided to terminate the applicant's employment.

[74] That the applicant's absences, and not just his failure to call in before his shift started on June 13, 2012, were held against him by the respondent is consistent with and bolstered by Mr. Domingues' evidence that what he looks for in a permanent employee is someone "who comes to work every day". He testified that if employees do not attend work, he cannot depend on them. Mr. Domingues testified that he also looks for employees who provide good customer service.

[75] On cross-examination, Mr. Domingues was asked to explain why he regarded the applicant as an undependable employee. Mr. Domingues testified that he could not

depend on the applicant because he “need[ed] people to come to work every day” so that he could deliver his product to his customers and stay in business. Mr. Domingues also testified, referring to the applicant, “Both days not coming to work. I can’t keep someone like that.” In addition, in explaining why he did not think the applicant was suitable for continued employment with the respondent, Mr. Domingues testified, “If a person does not come to work, how can I count on someone like that? I can’t. I am sorry.”

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[76] These were not the only instances in Mr. Domingues’ evidence when he testified that he decided to let the applicant go because of his failure to attend work.

[77] Based on the above, I find that the evidence clearly establishes that the applicant’s family-status-related absences from work on June 12 and 13, 2012 were a significant part of the reason that Mr. Domingues decided to terminate the applicant’s employment.

[78] The evidence also establishes that the applicant’s inability to stay at work on June 14, 2012 was part of the reason Mr. Domingues decided to terminate the applicant’s employment with the respondent company.

[79] First of all, Mr. Domingues expressly agreed on cross-examination that his decision to terminate the applicant’s employment was based on his three consecutive days of absence on June 12, 13, and 14, 2012.

[80] In addition, contrary to the position taken by the respondent in final argument, Mr. Domingues testified that he made the decision to terminate the applicant’s employment on the morning of June 14, 2012, after he heard the applicant say that he had to go home. Specifically, he testified that he was not there to “babysit” the applicant, that for two days the applicant had not come to work and “they had not even started to work on the 14th and already he was coming to say that he was not feeling good and had to go home.” In my view, the reasonable inference to be drawn from this evidence is that the applicant’s announcement on June 14, 2012 that he had to miss yet another day of

work was essentially "the final straw" precipitating Mr. Domingues' decision to terminate the applicant's employment.

[81] Finally, my conclusion that the respondent terminated the applicant's employment not just because of his failure to call in on June 13, 2012, but also because he missed work on June 12, 13 and 14, 2012, is consistent with the respondent's Response to the Application, in which the respondent pleaded that it terminated the applicant's employment because of his inability to attend work.

[82] In finding that the respondent terminated the applicant's employment in whole or in part because of his inability to work on June 12, 13 and 14, 2012, I have considered but cannot accept the respondent's assertion that Mr. Domingues decided to terminate the applicant's employment not on June 14, 2012, but on June 13, 2012, based solely on the applicant's failure to call in on June 13, 2012.

[83] Although during his testimony Mr. Domingues referred a few times to the fact that the applicant did not call in in advance of his shift on June 13, 2012, the evidence does not establish that Mr. Domingues made the decision to terminate the applicant's employment on June 13, 2012 because of the failure to call in.

[84] First of all, the respondent's position that the applicant's failure to call in was the only reason his employment was terminated is inconsistent with the numerous statements by Mr. Domingues during his testimony that he came to regard the applicant as an unreliable employee not only because he did not phone in on June 13, 2012 but because he missed work on June 12, 13 and 14, 2012. In fact, when he testified, Mr. Domingues placed much greater emphasis on the applicant's absences than on his failure to call in on June 13, 2012.

[85] In addition, based on the overall evidence, I do not find it credible that that Mr. Domingues made the decision to terminate the applicant on June 13, 2012 when he failed to call in.

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[86] First, there is no evidence that Mr. Domingues conveyed to anyone at the respondent company that he intended to terminate the applicant's employment prior to the applicant saying that he had to leave work on June 14, 2012, not even Ms Ruffolo whose role included preparing the employees' Record of Employment and final paycheque. It seems to me unlikely, if Mr. Domingues had truly made up his mind on June 13, 2012 to terminate the applicant's employment, that he would have failed to mention this to anyone.

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[87] Perhaps more importantly, Mr. Domingues took no steps to tell the applicant that his employment had been terminated before Mr. Domingues overhead the applicant telling Ms Ruffolo that he had to leave work on June 14, 2012. Instead, on June 14, 2012, the applicant's timecard was waiting for him in the usual place and he punched in and went to work. In my view, it does not make sense and I do not find it credible that, having decided to terminate the applicant's employment on June 13, 2012, the respondent took absolutely no steps to communicate to the applicant that he should not return to the workplace or to prevent the applicant from punching in and starting work. Mr. Domingues testified that the one "mistake" he made was allowing the applicant to punch in on June 14, 2012. He testified that, if he had seen the applicant come in, he would never have allowed him to punch in. I have no doubt that, in retrospect, having unsuccessfully opposed the applicant's claim for WSIB benefits, with what the respondent submits were significant financial consequences, and having had to respond to this Application, Mr. Domingues certainly wishes that he had taken steps to terminate the applicant's employment on June 13, 2012 when the applicant failed to call in before his shift. However, neither the circumstantial evidence nor Mr. Domingues' own evidence about his reasons for terminating the applicant supports a finding that Mr. Domingues made a decision to terminate the applicant on June 13, 2012 because the applicant failed to show up for his shift without calling in.

[88] I note that the respondent's argument that Mr. Domingues decided to terminate the applicant's employment on June 13, 2012 was further undermined by Mr. Domingues' testimony that he thought, based on the applicant's failure to show up or

call in on June 13, 2012, that the applicant was not going to return to the workplace. This indicates to me that Mr. Domingues perhaps thought that the applicant was abandoning his job. However, it is not consistent with a finding that the respondent had decided to fire the applicant.

[89] Finally, I wish to address the respondent's argument that the applicant failed to establish that the respondent "failed to accommodate" his family status and/or disability-related needs. In my view, the issue is not whether the respondent infringed the applicant's rights under the *Code* by "failing to accommodate" him. A person's rights under the *Code* are not infringed by a "failure to accommodate" *per se*, but rather disadvantageous treatment that is linked to a prohibited ground. If a person establishes that he or she has experienced disadvantageous treatment because of a prohibited ground, then, at that point, the respondent can avoid liability under the *Code* if it can justify the disadvantageous treatment, including by establishing that the individual's *Code*-related needs could not be accommodated without undue hardship (see s. 11 and s. 17 of the *Code*, as well as *Baber v. York Region District School Board*, 2011 HRTO 213 at para. 88 to 95).

[90] In the case at hand, the applicant has established that the respondent treated him in a disadvantageous manner because of his family status and disability when it terminated him because of his June 12, 13, and 14, 2012 absences from work, which absences were caused by his need to take care of his children and his inability to work because of pain caused by a disability. In this way, the applicant has made out a *prima facie* case of discrimination based on both family status and disability under the *Code*.

[91] In this case, the respondent disputed that a *prima facie* case of discrimination had been made out. It did not assert that the applicant's *Code*-related absences on June 12, 13, and 14, 2012 could not be accommodated without undue hardship. Nor would there any basis in the evidence for me to conclude that the respondent could not have continued to employ the applicant following his June 12, 13, and 14, 2012 *Code*-related absences without undue hardship.

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[92] For the above reasons, I find that the respondent infringed the applicant's right to be free from discrimination based on family status and disability when it terminated his employment in June 2012. I now turn to the appropriate remedy for such infringement.

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REMEDY

[93] Section 45.2 of the *Code* establishes the Tribunal's jurisdiction to order a remedy where it finds that one party has infringed another party's rights under the *Code*:

> 45.2(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.

[94] The Tribunal has broad discretion to award remedies, which it considers appropriate in the circumstances and which advance the remedial purposes of the *Code: Giguere v. Popeye Restaurant*, 2008 HRTO 2 at para. 80.

[95] In this case, the applicant seeks an order pursuant to s. 45.2(1) of the *Code* requiring the respondent to provide him with monetary compensation for the injury to his dignity, feelings and self-respect, as well as lost wages in respect of the period from June 14, 2012 to September 9, 2012. The applicant does not seek lost wages beyond September 9, 2012 because he acknowledges that a second hernia he

developed at that point would have prevented him from continuing to work for the respondent in any capacity. In addition to monetary compensation, the applicant asks that the Tribunal make certain orders to promote future compliance with the *Code*.

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Monetary Compensation

[96] The applicant requests an award of $25,000 as compensation for the injury to his dignity, feelings and self-respect caused by the discriminatory termination of his employment by the respondent. He also seeks an order requiring the respondent to compensate him for lost wages in respect of the period from June 14, 2012 to September 9, 2012.

[97] In support of his claim for monetary compensation, the applicant testified that he lost confidence and felt depressed as a result of his employment being terminated by the respondent. He testified that he felt hopeless because the loss of his job compounded the other difficulties he had coping with his wife's illness, his own physical injury, and his responsibilities for his two young children. He testified that he was fearful that something like what had occurred could happen to him again in the future. He testified that he tried to find another job after the respondent terminated him but no one would hire him and he felt worthless. The applicant testified that he has only a grade 10 education and most of the jobs he was qualified for required heavy lifting, and he did not get hired for those jobs after disclosing that he had been let go after getting injured while working for the respondent.

[98] The applicant testified that he had no income after his six weeks of WSIB benefits were used up and had to live on his credit cards. He testified that he had to declare bankruptcy in May 2013.

Injury to Dignity, Feelings and Self-respect

[99] In *Arunachalam v. Best Buy Canada,* 2010 HRTO 1880 at para. 52-54, the Tribunal summarized the principles on which monetary compensation for injury to dignity, feelings and self-respect is awarded:

> The Tribunal's jurisprudence … 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…
>
> 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…

[100] Having considered the matter carefully, and taking into account the relevant principles, I find that it is appropriate to order the respondent to provide the applicant with the sum of $10,000.00 as monetary compensation to compensate the applicant for the injury to his dignity, and feelings and self-respect caused by having his employment terminated because of circumstances beyond his control, namely his obligation to take care of his children on June 12 and 13 and his inability to work on June 14 because of pain caused by his disability. I accept the applicant's evidence that he lost confidence and felt hopeless and depressed at having lost his job, and this award is appropriate to compensate him for the injury to his dignity, feelings and self-respect caused by the discriminatory termination of his employment.

[101] This is on the lower end of the range for cases involving the termination of employment. However, I find that the amount is appropriate in the circumstances of this case, having regard to the applicant's short service with the respondent (one month) and the fact that the respondent had non-discriminatory reasons that also likely played a role in the respondent's decision to terminate the applicant's employment.

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[102] On this latter point, there is no dispute that the applicant failed to call in to work in a timely manner on his second day of absence to say that he was unable to work because he had to stay home again with his children. The applicant's evidence, which was vague on this point, was that he did not call in until hours into his shift because he was distracted and not thinking clearly. In my view, this is not a valid explanation for the applicant's failure to let his employer know that he was not going to be at work as scheduled. Nor is there evidence that the applicant was unable to call in because of a *Code*-related reason. Although the applicant may have been tired and distracted, he ought to have advised his employer in a timely manner that he would require a second day off work to take care of his children instead of not showing up and not calling until several hours into his shift. I am not persuaded on the evidence in this case that the applicant could not do this for *Code*-related reasons.

[103] Moreover, the evidence establishes that the applicant's transgression was part of the reason the respondent decided to terminate his employment. Although in my view the evidence establishes that the predominant reason for the applicant's termination was his failure to attend work on June 12, 13, and 14, 2012, Mr. Domingues also testified that he saw the applicant as unreliable because he failed to call in on June 13, 2012 before his shift started to let the respondent know he would not be there. In my view, the fact that part of the reason for the applicant's termination was a non-discriminatory reason serves to reduce the award of monetary compensation that might be otherwise appropriate.

Lost wages

[104] As noted above, the applicant seeks an order requiring the respondent to compensate him for lost wages from June 2012 to September 9, 2012, as of which date he acknowledges he would not have been able to keep working for the respondent because of a second hernia.

[105] The record shows that the applicant received WSIB benefits from June 14, 2012 to August 9, 2012, based on the Board's finding that the applicant's hernia was a

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workplace injury. The fact that the applicant was in receipt of WSIB benefits does not automatically disentitle him from compensation for lost wages. If the applicant were able to establish that his income was reduced as a result of the discriminatory treatment, he would be entitled to be made whole in respect of his losses.

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[106] However, the evidence in this case does not establish that the applicant's lost earnings from June 14, 2012 onwards were the result of the termination of his employment by the respondent. Rather, the evidence establishes that the applicant's disability – his hernia – would have prevented him from earning any income with the respondent from June 14, 2012 to September 9, 2012, whether or not the applicant's employment had been terminated. In particular, the applicant testified that he was unable to do any of the heavy lifting which was an essential part of his job as a delivery truck driver during the period in question. Although the applicant suggested that the respondent could have accommodated him in some other position, the evidence did not bear this out. The respondent's uncontradicted evidence was that there was no other work available in which the applicant could have been accommodated during the period in question if he was unable to do his delivery truck driver job. In the circumstances, it is not appropriate to order the respondent to compensate the applicant for lost wages.

Remedies for future compliance

[107] Pursuant to s. 45.2 of the *Code*, the Tribunal has the power to make an order directing any party to the Application to do anything that, in the opinion of the Tribunal, would promote compliance with the *Code*. Moreover, under s. 45.2(2) of the *Code*, the Tribunal has the power to make such an order whether or not it is requested by the parties.

[108] In this case, Ms Ruffolo testified that although she was one of the two individuals responsible for human resources issues at the respondent company (the other being Mr. Domingues' daughter, Anita Domingues), she did not know what accommodation under the *Code* was, nor was she familiar with an employer's obligations under the *Code*.

[109] In the circumstances, I think the respondent would benefit from training on its obligations under the *Code*. Accordingly, in accordance with the Tribunal's remedial authority under s. 45.2 of the *Code*, I order that, within 60 days of the date of this Decision, the respondent have those members of its managerial staff complete the Ontario Human Rights Commission's free basic on-line training "Human Rights 101" (available at www.ohrc.on.ca/hr101). The respondent should confirm to the applicant's counsel within 75 days of this Decision that it has complied with the above-noted Order regarding training.

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ORDERS

[110] In sum, the Tribunal orders as follows:

1. Within 30 days of the date of this Decision, the respondent will pay the applicant $10,000.00 as monetary compensation for injury to the applicant's dignity, feelings, and self-respect flowing from the infringement of his right to be free from discrimination on the basis of family status and disability.

2. Post-judgment interest is payable on any amount not paid within 30 days of the date of this Decision, in accordance with the *Courts of Justice Act*, R.S.O. c. C.43.

3. Within 60 days of the date of this Decision, the respondent shall have its managerial staff complete the Ontario Human Rights Commission's basic on-line training "Human Rights 101" (available at www.ohrc.on.ca/hr101).

4. Within 75 days of the date of this Decision, the respondent will confirm to the applicant's counsel, in writing, that it has complied with the above-noted order regarding training.

Dated at Toronto, this 11th day of January, 2016.

"Signed by"

____

Sheri Price
Vice-chair