



# HUMAN RIGHTS TRIBUNAL OF ONTARIO

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**BETWEEN:**

**Daryle Hayes**

**Applicant**

**-and-**

**Workplace Safety and Insurance Board**

**Respondent**

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## DECISION

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**Adjudicator:** Michelle Flaherty

**Date:** November 9, 2012

**File Number:** 2010-07176-I

**Citation:** 2012 HRTO 2126

**Indexed as:** **Hayes v. Workplace Safety and Insurance Board**

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**APPEARANCES**

Daryle Hayes, Applicant	)	David Ingraham and Elizabeth
	)	Heenan, Representatives
	)	
	)	
Workplace Safety and Insurance	)	Gurjit Brar, Counsel
Board, Respondent	)	
	)	

## INTRODUCTION

[1] The applicant filed an Application under s. 34 of the *Human Rights Code*, R.S.O. 1990, c. H.19, as amended (the “*Code*”), alleging discrimination on the basis of disability in the provision of goods, services or facilities.

[2] The applicant receives loss of earnings benefits from the respondent, the Workplace Safety and Insurance Board (“WSIB”). He alleges that the respondent discriminated against him because of his disability because it refused to deposit his benefits directly into his bank account.

[3] The Tribunal held a summary hearing in this matter on October 17, 2011, following which I dismissed the Application, in part: 2011 HRTO 2152. I concluded that the matter could proceed to a merits hearing on only the following issue: Did the respondent’s failure to provide direct deposit services to the applicant amount to constructive discrimination or otherwise discriminate against him on the basis of disability because the applicant did not have the same access to benefits as injured workers whose mobility is not limited?

[4] The merits hearing took place on October 19, 2012. At that time, I heard evidence from the applicant and from Luc Soulière, who testified on behalf of the respondent. As I explain in more detail, below, I declined to hear evidence from a further witness proposed by the applicant because it was not relevant to the sole remaining issue before the Tribunal.

[5] For the reasons that follow, the Application is allowed. I find that the respondent constructively discriminated against the applicant by refusing to directly deposit his loss of earnings (“LOE”) benefits into his bank account. In addition to damages of \$1,800 to compensate him for his losses, the respondent must pay the applicant compensation for injury to dignity in the amount of \$5,000.

## THE FACTS

[6] The facts giving rise to the Application are not in dispute.

[7] The applicant suffered a workplace injury to one of his knees in 1999 and the WSIB has determined that the applicant is entitled to be compensated for loss of earnings (“LOE”). Since 1999, the applicant has injured his other knee and has since required surgery on both knees. There is no dispute that the applicant has a disability within the meaning of the *Code*.

[8] Until approximately 2010, the applicant’s WSIB LOE benefits were paid to him by cheque. At all material times, the applicant lived in suburban Ottawa, roughly two kilometres from the nearest bank.

[9] The applicant testified that he generally did his own banking. Until he declared bankruptcy in October 2008, the applicant owned a vehicle and he typically drove himself to the bank. He testified that, after his bankruptcy, when he no longer owned a vehicle, he sometimes took a bus to the bank, but usually took a cab or got a ride from a friend.

[10] The applicant testified that, because of his disabilities, he was sometimes unable to go the bank himself and had to ask a friend to do his banking for him. For example, the applicant underwent knee surgery in 2006 and was immobile for approximately six weeks following the surgery. During this time, others deposited his LOE benefits cheque for him and did his other banking.

[11] The applicant testified that there were other times when he could not do his own banking either because of depression, pain or the effects of medication. He stated that, for approximately two and a half years (from February 2006 to mid-2008) he was prescribed strong pain medication and was unable to drive. He testified that, during this period, “I can’t tell you how many times I had to rely on someone else to do my banking, many times, sometimes for as much as a month and a half at a time.” He stated that, at

times, his disability and the effect of the medication prevented him from getting out of bed, let alone going to the bank.

[12] The applicant's sometimes inability to do his own banking because of his disabilities was not seriously challenged in cross-examination. The applicant testified in a straightforward manner, he answered my and respondent counsel's questions candidly, and his evidence was consistent throughout his examination in-chief and cross-examination. He readily acknowledged that he did his own banking most of the time, but testified about times when his disabilities forced him to depend on others.

[13] I found the applicant to be a credible witness and I accept his evidence that his disabilities sometimes prevented him from doing his own banking.

[14] The parties agree that, on a number of occasions, the applicant asked the respondent to provide him with a direct deposit service as an accommodation for his disabilities. His request was refused. The respondent states that, until recently, it did not have structures in place to allow for the direct deposit of LOE benefits. It acknowledged, however, that during the material times, it paid employees and other types of benefit recipients by direct deposit.

[15] The parties agree that all of the cheques sent to the applicant were ultimately cashed or deposited.

[16] The applicant occasionally relied on his common law partner's son to do his banking. The applicant states that he was prejudiced because, from roughly 2006 to January 2008, this individual stole money from him. The applicant testified that he lost at least \$1,800 this way. He testified that he knows at least \$1,800 was stolen because his account was overdrawn by this amount. I understood the applicant to mean that he did not withdraw more money than he had in his account and that any overdraft was a result of the theft. This was not challenged in cross-examination.

[17] The applicant testified that the theft had broad-ranging consequences: although

he had sometimes been struggling to make ends meet, the theft was the straw that broke the camel's back and led to his bankruptcy. The applicant is a single father of two children, now in their 20s. He testified about the impact of the bankruptcy on him and his family, explaining that it changed their lifestyle considerably and led to the breakdown of his common law relationship.

[18] In November 2010, the respondent introduced a direct deposit for LOE benefits. Since approximately that time, the applicant's benefits have been deposited directly into his account.

### **THE SCOPE OF THE APPLICATION**

[19] At the hearing on October 19, 2012, the applicant's representatives sought to argue discrimination because the respondent provided direct deposit services to recipients of some types of benefits and not to others. In support of this, they sought to lead the evidence of Mr. Hudon, an individual who receives pension benefits from WSIB and whose benefits have been deposited directly into his account for some time.

[20] After hearing submissions from the parties regarding the proposed evidence of Mr. Hudon, I declined to hear his evidence. I found that it was not relevant to the sole outstanding issue before me and that, in any event, much of his proposed evidence was not in dispute. For example, the respondent acknowledged that recipients of pension benefits had access to direct deposit, while, until 2010, LOE recipients did not.

[21] As I have indicated, following the summary hearing, I held that the Application could proceed on the sole issue set out in para. 3, above. At the summary hearing, the applicant had an opportunity to advance arguments in support of his claim and to explain why the matter should proceed. It is not open to the applicant, at this late stage of the proceeding, to re-litigate issues that have been decided or to seek to introduce new arguments.

[22] At the merits hearing, the applicant's representatives suggested that because the

applicant had been found to be permanently disabled, he ought to have direct deposit services in the same way as some other categories of benefit recipients. This argument also goes beyond the scope of the issues before me. In any event, as I indicated in my earlier Interim Decision, the purpose of the *Code* is not to define the services that an organization ought to offer, but to consider whether a service that is offered is provided differentially based on a *Code* ground: para. 22.

## THE ISSUES

[23] At the outset of the hearing, the parties agreed that the outstanding issue raises the following questions:

- a. Did the applicant have a have a disability that impacted his ability to cash the cheques provided by WSIB?
- b. If so, did the difficulties he encountered in seeking to negotiate cheques result in exclusion, restriction or preference based on disability?
- c. Is the fact that the applicant successfully negotiated all of the cheques he received from WSIB a complete answer to the allegations of discrimination?

## ANALYSIS

### **Does the applicant have a disability that impacted his ability to cash the cheques he received from WSIB?**

[24] Based on the evidence described above, I find that the applicant has disabilities that, at times, prevented him from doing his own banking.

### **Was the applicant subjected to exclusion, restriction or preference based on disability?**

[25] Section 11 of the *Code* states:

11. (1) A right of a person under Part I is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of

discrimination and of whom the person is a member, except where,

- (a) the requirement, qualification or factor is reasonable and bona fide in the circumstances; or
- (b) it is declared in this Act, other than in section 17, that to discriminate because of such ground is not an infringement of a right.

[26] Section 11 of the *Code* recognizes that discrimination can occur when neutral rules that do not appear to be discriminatory have a disproportionate and adverse impact on a group identified by one of the personal characteristics covered by the *Code*: *Hogan v. Ontario (Health and Long-Term Care)*, 2006 HRTO 32, at para. 97.

#### *The parties' submissions*

[27] As I understand their submissions, the applicant's representatives argued systemic discrimination and discrimination because certain categories of benefit recipients have access to direct deposit while others do not. They also argued that, based on the law of negligence, the respondent owes a heightened duty of care to the applicant. For the reasons I have provided, these arguments fall outside the scope of the Application. Further, as I indicated to the applicant's representatives at the hearing, I cannot see that the principles of negligence would apply to the Tribunal's discrimination analysis.

[28] Counsel for the respondent argued that there is no constructive discrimination in this case. He submitted that the services in question are LOE benefits. Because the cheques representing LOE benefits were delivered to the applicant in the same way as to all other LOE benefit recipients and because the applicant negotiated each cheque he received, there was no adverse impact. In other words, as the applicant actually received the LOE benefits, there was no exclusion, restriction or preference within the meaning of section 11 of the *Code*.

[29] In response to my questions, counsel for the respondent acknowledged that a benefit recipient could, in some circumstances, be effectively denied access to benefits



paid to him or her by cheque. According to counsel, this might occur if, for example, the recipient was completely bedridden and has no resources to call upon (such as friends of family) to help with banking. In such circumstances, counsel acknowledged that the respondent may have some further obligations under the *Code*.

[30] However, counsel argued that the circumstances in this case are different because the applicant was able to obtain assistance from friends or family to obtain the benefits in question. On the facts of this case, he argues that a need to draw upon help from friends did not adversely impact the applicant, constitute a barrier to obtaining LOE benefits or impose a disadvantage upon the applicant.

### *Analysis*

[31] As the Tribunal explained in *Co.K. v. Ontario Hockey Federation*, 2012 HRTO 76, in applying section 11 of the *Code* it is helpful to start with the identification of the rule in question. Here, the “rule” was the respondent’s practice of paying LOE benefits by cheque.

[32] Section 11 requires that I next consider whether this neutral rule had an adverse impact on the applicant because of his disability and, more particularly, because his disability sometimes prevented him from depositing or cashing the cheque himself and meant that he had to rely on others.

[33] In many ways, this case is analogous to *Dixon v. 930187 Ontario*, 2010 HRTO 256, where the Tribunal found that a respondent had constructively discriminated against the applicant when it refused to transfer her to a ground floor apartment or make modifications to entryways of the building. As in this case, the issue in *Dixon* was a neutral rule that resulted in a party being reliant on the assistance of others. In *Dixon*, *supra*, the Tribunal wrote:

The “requirement” at issue in this case is the requirement to cope with entrances to [an] apartment building that are not negotiable without assistance by a person using a wheelchair. As noted above, the applicant testified that her husband's situation imposes significant limitations on

everyday life for both of them. If her husband needs or wishes to leave the building, she must be there to assist him. I am satisfied on the evidence that the requirement at issue in this Application created an adverse effect on the applicant on the grounds of disability and marital status.

[34] This case is similar in that, at times, the applicant could not negotiate the benefits paid to him by cheque without assistance. As was the case in *Dixon, supra*, the fact that the applicant was sometimes forced to rely on the assistance of others created a barrier or restriction to his accessing WSIB benefits. Thus, because of his disability and the mobility issues it entailed, the neutral rule (failure to directly deposit benefits) had an adverse impact on him.

[35] Given my finding of constructive discrimination, I must now consider whether it would have been an undue hardship for the respondent to directly deposit the applicant's benefits into his account. As the Tribunal explained in *Dixon*, at para. 37:

That adverse effect can only be justified under the *Code* if the respondent can establish that the requirement was "reasonable and bona fide". The Tribunal may not find that the requirement is reasonable and bona fide unless it is satisfied that accommodating the applicant's needs would cause "undue hardship" on the respondent.

[36] In this case, the respondent stated that it did not have structures in place to provide direct deposit for LOE benefits until November 2010. However, it did not argue or present any evidence to suggest that direct deposit could not have been provided short of undue hardship. As the applicant's representatives pointed out, at the material times, the respondent did have some structures in place to directly deposit salaries and other types of benefits. For these reasons, the respondent has not satisfied me that it would have been an undue hardship for it to directly deposit the applicant's LOE benefits.

**Is the fact that the applicant successfully negotiated all of the cheques he received from WSIB a complete answer to the allegations of discrimination?**

[37] I have largely addressed this issue in my earlier analysis. To summarize, I find

that, for the purposes of the *Code*, it is not sufficient that the applicant was able to negotiate the cheques he received. This is because, to access his benefits, the applicant was forced to rely on others to help him with the very personal matter of banking. The issue under the *Code* is not simply whether the applicant received the benefits but whether, because of his disability, he faced barriers in accessing those benefits. Therefore, the fact that the applicant ultimately cashed or deposited all of the benefits is not a complete answer to the allegations of discrimination.

## REMEDY

[38] Section 45.2 (1) of the *Code* provides that, if the Tribunal determines that a party to the application has infringed a right under Part I of another party to the application, it may make the following orders:

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.

[39] The applicant is seeking the following remedies: general damages, damages for fees associated with late payment or NSF cheques, creditor reimbursement, and costs associated with his bankruptcy. Together, these total over \$100,000.

### **Loss Arising out of the Infringement: Specific Damages**

[40] At the hearing, the applicant's representatives argued that all these damages flow from the alleged discrimination because, but for the respondent's failure to provide a direct deposit service, the applicant would not have been robbed, would not have

declared bankruptcy, would not have incurred NSF fees, and would not have had to reimburse creditors. I understood them to also argue that the applicant's common law relationship would not have broken down but for the discrimination. In support of these arguments, the representatives cited cases on negligence and the Crown's duty of care, as well as a text on negligence.

[41] The principle underlying the Tribunal's remedial jurisdiction is to put the applicant in the position he would have been but for the discrimination and I have applied this principle in my assessment of damages. Again, the law of negligence of the duty of care of the Crown do not generally apply in Tribunal matters and the applicant's representatives did not explain how submissions on these issues could assist me in determining the issues before me.

[42] I accept, on the evidence before me, that but for the respondent's refusal to directly deposit benefits into the applicant's account, the applicant would not have been robbed of \$1,800. But for the discrimination, the applicant would have done his own banking and would not have been vulnerable to theft by people he had to rely on to assist him. While the applicant alleges that more than \$1,800 was stolen from him, he could not provide any evidence in this regard. Accordingly, there is no basis for awarding more than \$1,800 in damages for losses incurred. I cannot accept that, but for the discrimination, the other monetary losses claimed would not have arisen. Documents the applicant provided to his bankruptcy trustee show that he was approximately \$50,000 in debt in October 2008 and that, even without accounting for NSF cheques, the applicant estimated that his expenses exceeded his revenues. I am not satisfied that there is a sufficient causal connection between the discrimination, the theft of \$1,800, and the applicant's eventual bankruptcy. In other words, it is not clear to me that, even without the theft, the applicant would not have declared bankruptcy in any event.

[43] Further, I cannot accept that there is any causal link between the discrimination and the breakdown in the applicant's common law relationship. The applicant testified that difficulties arose in the relationship because his partner's son stole money from

him; he argued that the opportunity to steal arose from the respondent's refusal to directly deposit his benefits. Inter-personal relationships are complex and, evidence of added tension is not sufficient to show a causal connection between the relationship breakdown and the discrimination. In any event, it is not at all clear to me that the respondent could be held accountable for a relationship breakdown or that it would be appropriate to award compensation in this regard. Finally, the applicant did not provide evidence regarding fees associated with NSF cheques, nor did he explain how these relate to the stolen money as opposed to other financial issues the applicant may have been experiencing. He did not provide evidence regarding creditor reimbursement or explain why he would not have had to reimburse his creditors regardless of any discrimination.

### **Damages for Injury to Dignity, Feelings and Self-respect**

[44] I turn now to the issue of compensation for injury to dignity, feelings and self-respect. Such an award must recognize the inherent value of the right to be free from discrimination and the experience of victimization. The Divisional Court has recognized that humiliation, hurt feelings, the loss of self-respect, dignity and confidence by the applicant, the experience of victimization, the vulnerability of the applicant, and the seriousness of the offensive treatment are among the factors to be considered in setting the amount of damages. See *ADGA Group Consultants Inc. v. Lane*, 91 O.R. (3d) 649, at para. 153.

[45] In *Arunachalam v. Best Buy Canada*, 2010 HRTO 1880, the Tribunal reviewed awards for injury to dignity and stated at paras. 52-54:

(...) The Tribunal's jurisprudence over the two years since the new damages provision took effect has primarily applied two criteria in making the global evaluation of the appropriate damages for injury to dignity, feelings and self-respect: the objective seriousness of the conduct and the effect on the particular applicant who experienced discrimination: see, in particular, *Seguin v. Great Blue Heron Charity Casino*, 2009 HRTO 940 at para. 16 (CanLII).

The first criterion recognizes that injury to dignity, feelings, and self-

respect is generally more serious depending, objectively, upon what occurred. For example, dismissal from employment for discriminatory reasons usually affects dignity more than a comment made on one occasion. Losing long-term employment because of discrimination is typically more harmful than losing a new job. The more prolonged, hurtful, and serious harassing comments are, the greater the injury to dignity, feelings and self-respect.

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

[46] The applicant testified about the difficulties he experienced as a result of his bankruptcy and relationship breakdown. It was very clear to me that the applicant was deeply troubled by these events and that they changed his and his children's lives in significant ways.

[47] However, for the reasons set out above, I cannot conclude that the applicant's bankruptcy and the breakdown of his common law relationship are sufficiently connected to the discrimination. Accordingly, there is no basis to award the applicant compensation for injury to dignity in relation to these events.

[48] In determining the appropriate award for compensation for loss of dignity, I have considered the facts within the context of the factors set out in *Arunachalam*, supra. While the discrimination continued over a number of years, it directly affected the applicant only sporadically. The applicant's evidence regarding when and how frequently his disability prevented him from doing his own banking was vague and he could not say how often he had to rely on others.

[49] I accept that the applicant's dignity and self-worth are engaged when he had to rely on others to do his banking for him. This put him in a vulnerable position and it required him to bank according to others' schedule, sometimes resulting in

inconveniences. While I accept that this created some hardship for the applicant, I find that the discrimination in this case does not fall at the serious end of the scale referred to in *Arunachalam*.

[50] In finding discrimination in the provision of services on the ground of disability, the Tribunal has awarded monetary compensation ranging from \$500.00 to \$12,500.00: See for example *B.M. v. Cambridge (City)*, 2010 HRTO 1104 (\$12,000); *M.O. v. Ottawa Catholic District School Board*, 2010 HRTO 1754 (\$10,000); *Wozenilek v. 7-Eleven Canada*, 2010 HRTO 407 (\$6,000); *Jakobek v. Toronto Standard Condominium Corporation No. 1626*, 2011 HRTO 1901 (\$5,000); *Patterson v. Gowan Property Management*, 2009 HRTO 2025 (\$3,000); *Donnelly v. Spinz Coin Laundries*, 2009 HRTO 754 (\$2,500); *Rutledge v. Fitness One Peter*, 2010 HRTO 2039 (\$2,500); *Thai v. Hing Loong Investments Ltd.*, 2011 HRTO 2227 (\$2,500); and *Schussler v. 1709043 Ontario*, 2009 HRTO 2194 (\$500).

[51] In some ways, this matter is analogous to cases where the Tribunal found a physical barrier that limited access to services. For example, in *Wozenilek v. 7-Eleven Canada*, *supra*, until an automatic door was installed, the applicant could access the store “only if someone assisted him in holding the door open”. The Tribunal held that the failure to install an automatic door constituted a breach of the *Code* and it awarded compensation for injury to dignity of \$6,000. See also *Thai v. Hing Loong Investments Ltd.*, *supra*, where an applicant who used a motorized scooter could not enter a store because of a small step. In that case, the applicant sought to enter the store twice before the respondent denied him entry. The Tribunal awarded compensation for loss of dignity in the amount of \$2,500.

[52] In the circumstances of this case, having regard to the duration of the discrimination, its relative seriousness, the effect of the discrimination on the applicant, the fact that the applicant was only adversely impacted on sporadic occasions, and Tribunal awards in cases involving similar issues, I find that an award of \$5,000 for compensation for injury to dignity is appropriate.

**ORDER**

[53] Having found that the respondent violated the *Code*, I make the following order:

- a. Within 30 days of the date of this Decision, the respondent shall pay the applicant \$5,000 for his losses arising from the infringement of his rights under the *Code*;
- b. Within 30 days of the date of this Decision, the respondent shall pay \$1,800 to the applicant for the direct loss occasioned by its refusal to directly deposit his benefits into his account;
- c. The respondent shall pay the applicant pre-judgment interest on the sums in paragraphs a) and b) above, calculated in accordance with section 128 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, from January 1, 2008.
- d. The respondent shall pay the applicant post-judgment interest on any accumulated principal and interest, calculated in accordance with section 129 of the *Courts of Justice Act*, from the date that is 30 days after the date of this Order.

Dated at Toronto, this 9<sup>th</sup> day of November, 2012.

*“Signed by”*

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Michelle Flaherty  
Vice-chair