

Indexed as: Garrie v. Janus Joan Inc. (No. 3) Cited: (2012), CHRR Doc. 12-0568, 2012 HRTO 68

HUMAN RIGHTS TRIBUNAL OF ONTARIO

B E T W E E N:

Terri-Lynn Garrie

Applicant

-and-

Janus Joan Inc. and Stacey Szuch

Respondents

Adjudicator: Ken Bhattacharjee

Date: January 12, 2012

File Number: 2009-04057-1

Citation: 2012 HRTO 68

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APPEARANCES

Terri-Lynn Garrie, Applicant: Marjorie Tibbs, Representative

DECISION

1. The purpose of this Decision is to determine whether the respondents discriminated against the applicant with respect to employment because of her disability.

2. BACKGROUND

3. The applicant, Terri-Lynn Garrie, identifies as a person with a developmental disability. On November 12, 2009, she filed an Application under s. 34 of the *Human Rights Code*, R.S.O. 1990, c. H.19, as amended (the "*Code*"), which alleged that the respondents discriminated against her with respect to employment because of her disability.

4. Specifically, she alleged that the organization respondent, Janus Joan Inc., and the individual respondent, Stacey Szuch, who is the owner of the company, paid her less than other employees, refused to give her an electronic pass card, refused to pay her overtime, and terminated her employment because of her disability.

5. The Tribunal delivered the Application to the respondents, who communicated with the Tribunal by telephone and letter, but failed to file a Response. The letter stated that the organization respondent was "closed", but did not attach any supporting documentation.

6. The Tribunal issued an Interim Decision, 2010 HRTO 820 [CHRR Doc. 10-0978], dated April 14, 2010, which warned the respondents of the possible implications for failing to file a Response. When the respondents still failed to file a Response, the Tribunal issued a further Interim Decision, 2010 HRTO 1792 [CHRR Doc. 10-2442], dated September 1, 2010, which made the following order:

7. The consequence of the respondents' failure to file a Response and comply with the Tribunal's Rules and directions is that the Tribunal deems them to have accepted all of the allegations in the Application, and to have waived all rights with respect to further notice or participation in this proceeding.

8. A hearing took place on May 26, 2011. I heard oral testimony from the applicant, her mother (Marjorie Tibbs), and her stepfather (Brian Tibbs). I also admitted into evidence several documents and things, including two receipts that show how much the organization respondent paid the applicant, and nine exterior photographs of the organization respondent's premises.

9. The applicant presented evidence that the organization respondent paid her less than other employees, and terminated her employment because of her disability. She did not pursue her allegations that the respondents refused to give her an electronic pass card and refused to pay her overtime.

10. **EVIDENCE**

11. In the late 1990s, the applicant and several other persons with developmental disabilities started working at the organization respondent as general labourers. The organization respondent also employed persons who did not have developmental disabilities as general labourers. The applicant and other general labourers with developmental disabilities performed the same duties as the general labourers who did not have developmental disabilities, except for tasks that required fine skills, such as labelling wine bottles.
12. The applicant and other general labourers with developmental disabilities were paid a training honorarium of \$1.00 per hour. After a few years, the honorarium was increased to \$1.25 per hour. The general labourers who did not have developmental disabilities were paid at the minimum wage level or higher.
13. The applicant generally worked full-time hours (40 hours per week), and was happy in her job. She also received Ontario Disability Plan Support ("ODSP") payments from the provincial government. She reported the employment income that she received to the government, but never had her ODSP payments reduced because her employment income was just under the threshold for claw back.
14. The applicant's parents were uncomfortable with the pay differential, but did not complain because the applicant enjoyed her work and socializing with others, and the respondents treated her respectfully.
15. On October 26, 2009, the organization respondent's floor supervisor called the applicant's mother and informed her that the applicant's employment was terminated. The reason that the supervisor gave was that the applicant was unhappy in her job. The applicant denies that she was unhappy. Within a month or so, the organization respondent also terminated the employment of all the other general labourers with developmental disabilities, but continued to employ general labourers who did not have developmental disabilities.
16. The applicant's parents deny that the organization respondent is closed, and state that the name has simply been changed from Janus Joan Inc. to Janus Joan Inc. with a number after the name. The applicant's parents visited the premises in April 2010, and saw the business banner at both the original building and a new building. They also saw the individual respondent's car in a parking spot, and a truck backing into an open loading bay to unload materials. They took photographs of what they saw, which were tendered into evidence.
17. The applicant's parents believe that the respondents built up the

company using persons with developmental disabilities as cheap labour, fired them all when they were no longer useful, and then changed the name of the company to try to avoid legal liability.

18. The applicant testified that the termination of her employment made her upset, sad, mad, and depressed. The applicant's mother testified that the applicant was devastated because her job was her livelihood and social life, and she no longer had anything to occupy her during the day. She stated that the applicant also became reclusive.
19. Two weeks after the termination of her employment, the applicant joined a government-funded program that assisted her with job searches on a weekly basis. She eventually obtained a seasonal position at a Walmart store from November 6 to December 31, 2010.
20. **ANALYSIS AND DECISION Applicable Law and Issues** *Human Rights Code*
21. The Application relates to sections 5, 9 and 10 of the *Code*, which provide:
22. 5. (1) Every person has a right to equal treatment with respect to employment without discrimination because of? disability. (. . .) 9. No person shall infringe or do, directly or indirectly, anything that infringes a right under this Part. 10.(1) In Part I and in this Part . . . "disability" means, (a) any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, includes diabetes mellitus, epilepsy, a brain injury, any degree of paralysis, amputation, lack of physical co-ordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog or other animal or on a wheelchair or other remedial appliance or device, (b) a condition of mental impairment or a developmental disability, (c) a learning disability, or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language, (d) a mental disorder, or (e) an injury or disability for which benefits were claimed or received under the insurance plan established under the *Workplace Safety and Insurance Act, 1997*. **Did the respondents discriminate against the applicant on the basis of disability by paying her less than employees who did not have developmental disabilities?**
23. As a preliminary issue, I will address whether the applicant's allegation that the respondents discriminated against her from the late 1990s until October 2009 by paying her less than employees who did not have

developmental disabilities is out of time, and therefore outside of the Tribunal's jurisdiction (power to decide).

24. The statutory deadline for filing an Application with the Tribunal and the circumstances under which a late Application will be accepted are set out in subsections 34(1) and (2) of the *Code*:
25. 34(1) 26. If a person believes that any of his or her rights under Part I have been infringed)
27. 28. 29. within one year after the incident to which the application relates; or
30. 31. if there was a series of incidents, within one year after the last incident
- 32.
33. (2) 34. A person may apply under subsection (1) after the expiry of the time limit unless the delay is due to a result to any person affected by the delay.
- 35.
36. The first matter to consider is whether there was a continuing contravention of the *Code*. In *Visic v. Ontario Human Rights Commission*, [2008] O.J. No. 1768 (QL) [CHRR Doc. 08-249], at para. 45, the Ontario Divisional Court adopted the test for a "continuing contravention" applied by the Manitoba Court of Appeal in *Manitoba v. Manitoba (Human Rights Commission)*, (1984), 25 Man. R. (2d) 117, 5 C.H.R.R. D/1885 at para. 19:
37. To be a 'continuing contravention', there must be a succession or repetition of separate acts of discrimination of the same character. There must be present acts of discrimination, which could be considered as separate contraventions of the *Act*, and not merely one act of discrimination, which may have continuing effects or consequences.
38. In *Visic, supra*, the Divisional Court upheld a decision of the Ontario Human Rights Commission which declined to deal with a complaint on the basis that it had been filed beyond the six-month time limit then in the *Code* (the *Code* was subsequently amended to provide for the current one-year time limit). The Commission did not accept the complainant's argument that a university's repeated reliance on a transcript claimed to be discriminatory extended the limitation period in the *Code*.

39. In *Mafinezam v. University of Toronto*, 2010 HRTO 1495 [CHRR Doc. 10-2145], this Tribunal adopted the test in *Visic, supra*, and stated at para. 13 that "the continuing effects of an act of alleged discrimination do not in themselves constitute further acts of discrimination." In that case, the respondent refused to allow the applicant to attend events at a centre at the university on an ongoing basis after issuing him a trespass notice. The Tribunal found at para. 14 that the continuing effect of the trespass notice did not constitute further incidents of discrimination or a series of incidents within the meaning of s. 34(1).
40. In my view, the respondents' ongoing practice of paying the applicant less than employees who did not have developmental disabilities was not a succession or repetition of separate acts of alleged discrimination of the same character. Rather, it was one act of alleged discrimination in the late 1990s, which had continuing effects until the applicant's employment ended in October 2009. As such, the applicant's allegation is approximately 10 years out of time.
41. The next matter to consider is whether the applicant's delay in applying to the Tribunal with respect to this allegation was incurred in good faith. In *Miller v. Prudential Lifestyles Real Estate*, 2009 HRTO 1241 [CHRR Doc. 09-1698], the Tribunal explained at paras. 24-25 what an applicant must show to satisfy the Tribunal that a delay was incurred in good faith:
42. In my view, where an applicant seeks to establish that a delay in filing an application was "incurred" in good faith, the applicant must show something more than simply an absence of bad faith. Otherwise, there would be little meaning to the statutory limitation period. The *Code* requires a person who wishes to pursue a claim of discrimination to bring the claim forward by filing an Application within one year of the alleged incident, or where there is a series of incidents, within one year of the date of the last incident. This is a mandatory provision, subject only to section 34(2). The mandatory one-year limitation period is consistent with the policy objective, expressed elsewhere in the *Code*, that human rights claims should be dealt with expeditiously. Thus, the *Code* requires an individual to act with all due diligence, and file their application within one year, when they may seek to pursue a human rights claim. In dealing with requests that applications be considered outside the one-year limitation period, the Tribunal has set a fairly high onus on applicants to provide a reasonable explanation for the delay See also *Corrigan v. Peterborough Victoria Northumberland and Clarington Catholic District School Board*, 2008 HRTO 428 [CHRR Doc. 08-1098] at para. 20 and *Cartier v. Northeast Mental Health Centre*, 2009 HRTO 1670 [CHRR Doc. 09-2217] at para. 21.

43. Therefore, in order to satisfy the Tribunal that the delay was incurred in good faith, the applicant must provide the Tribunal with a reasonable explanation as to why she did not pursue her rights under the *Code* in a timely manner.
44. The applicant did not testify about the pay differential issue or explain why she waited 10 years to file a human rights claim about it. In fact, it is not even clear to me that she found the pay differential problematic. I would also note that the applicant's parents admit that they did not complain earlier on her behalf because the applicant enjoyed her work and socializing with others, and the respondents treated her respectfully. The fact that the applicant's parents appear to have re-evaluated their position on this issue after her employment was terminated does not amount to a good faith explanation for the delay.
45. Accordingly, the applicant's allegation that the respondents discriminated against her by paying her less than employees who did not have developmental disabilities is not within the Tribunal's jurisdiction and is dismissed.
46. **Did the respondents discriminate against the applicant on the basis of disability when they terminated her employment?**
47. The applicant has the onus of proving on a balance of probabilities that a violation of the *Code* has occurred. A balance of probabilities means that it is more likely than not a violation has occurred. Clear, convincing and cogent evidence is required in order to satisfy the balance of probabilities test. See *F.H. v. McDougall*, [2008] 3 S.C.R. 41 at para. 46.
48. In order to establish a *prima facie* case of discrimination, the applicant must prove that (1) she had, or was perceived to have, a disability, (2) she received adverse treatment, and (3) her disability was a factor in the adverse treatment. See, for example, *Communications, Energy & Paperworkers' Union of Canada (CEP), Local 789 v. Domtar Inc.*, 2009 BCCA 52 at para. 36.
49. With respect to the first part of the test, the applicant proved that she had a disability within the meaning of the *Code*. In section 10 of the *Code*, the definition of disability explicitly includes a developmental disability. The applicant provided uncontradicted evidence that she has a developmental disability.
50. With respect to the second part of the test, the applicant proved that she received adverse treatment. She provided uncontradicted evidence that the organization respondent's floor supervisor terminated her

employment.

51. With respect to the third part of the test, the applicant proved that her disability was a factor in the adverse treatment. She provided uncontradicted evidence that the organization respondent terminated the employment of all general labourers with developmental disabilities, but continued to employ general labourers who did not have developmental disabilities.
52. Accordingly, the applicant's allegation that the organization respondent discriminated against her on the basis of disability when they terminated her employment is upheld.
53. However, aside from pointing out that the individual respondent was the owner of the company, the applicant did not provide any evidence that the individual respondent was personally involved in the termination of her employment. Accordingly, the applicant's allegation that the individual respondent discriminated against her is dismissed.

54. **REMEDY Applicable Law and Issues**

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

56. (1) On an application under section 34, the Tribunal may make one or more of the following orders if the Tribunal determines that a party to the application has infringed a right under Part I of another party to the application: 1. An order directing the party who infringed the right to pay monetary compensation to the party whose right was infringed for loss arising out of the infringement, including compensation for injury to dignity, feelings and self-respect. 2. An order directing the party who infringed the right to make restitution to the party whose right was infringed, other than through monetary compensation, for loss arising out of the infringement, including restitution for injury to dignity, feelings and self-respect. 3. An order directing any party to the application to do anything that, in the opinion of the Tribunal, the party ought to do to promote compliance with this Act. (2) For greater certainty, an order under paragraph 3 of subsection (1), (a) may direct a person to do anything with respect to future practices; and (b) may be made even if no order under that paragraph was requested. **Monetary Compensation Injury to Dignity, Feelings and Self-Respect**

57. In her Application, the applicant sought an award of \$15,000 compensation for wrongful dismissal, discrimination, and humiliation. At the hearing, the applicant's parents requested \$10,000 for injury to

- dignity, feelings and self-respect. The applicant is a person with a developmental disability and her parents are laypersons, not lawyers. It was obvious to me that they do not fully understand the legal concept of remedy and the Tribunal's case law on remedy. Accordingly, I will determine, based on my expertise in human rights law, what the appropriate award should be for compensation for injury to dignity, feelings and self-respect.
58. Such an award includes recognition of the inherent value of the right to be free from discrimination and the experience of victimization. The Ontario Divisional Court has recognized that the Tribunal must ensure that the quantum of damages for this loss is not set too low, since doing so would trivialize the social importance of the *Code* by effectively creating a "licence fee" to discriminate. See *ADGA Group Consultants Inc. v. Lane* (2008), 91 O.R. (3d) 649 [64 C.H.R.R. D/132] at para. 152.
 59. The Divisional Court has also recognized that humiliation, hurt feelings, the loss of self-respect, dignity and confidence by the applicant, the experience of victimization, the vulnerability of the applicant, and the seriousness of the offensive treatment are among the factors to be considered in setting the amount of damages. See *ADGA Group Consultants Inc., supra*, at para. 153.
 60. In *Arunachalam v. Best Buy Canada*, 2010 HRTO 1880 [CHRR Doc. 10-2530], the Tribunal reviewed recent awards under this heading of damages, and stated at paras. 52-54:
 61. (...) 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 [reported 69 C.H.R.R. D/325] at para. 16. 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) [reported 55 C.H.R.R. D/102] at paras. 34-38.

62. I find that the organization respondent's discriminatory treatment of the applicant was serious. The respondent terminated her employment because of her disability after she had worked for them for approximately 10 years. I accept her testimony that she became upset, sad, mad, and depressed. I also accept the applicant's mother's testimony that the applicant was devastated because her job was her livelihood and social life, that she no longer had anything to occupy her during the day, and that she became reclusive. I also find that, as a person with a developmental disability, the applicant was vulnerable.
63. Recent Tribunal decisions that have considered disability-related discrimination in the context of the termination of the applicant's employment have generally made awards ranging from \$10,000 to \$45,000. See, for example, *Lane v. ADGA Group Consultants Inc.*, 2007 HRTO 34 [reported 61 C.H.R.R. D/307] (\$45,000); *Krieger v. Toronto Police Services Board*, 2010 HRTO 1361 [reported 70 C.H.R.R. D/405] (\$35,000); *Lopetegui v. 680247 Ontario*, 2009 HRTO 1248 [CHRR Doc. 09-1705] (\$20,000); *Mirashrafi v. Circuit Centre*, 2010 HRTO 512 [CHRR Doc. 10-0605] (\$15,000); *Vetricek v. 642518 Canada*, 2010 HRTO 757 [CHRR Doc. 10-0903] (\$15,000); *Duliunas v. York-Med Systems*, 2010 HRTO 1404 [reported 70 C.H.R.R. D/441] (\$15,000); *LeBlanc v. Syncreon*, 2010 HRTO 2336 [CHRR Doc. 10-2986] (\$10,000); and *Coscina v. Halton School of Equitation*, 2011 HRTO 1949 [CHRR Doc. 11-2449] (\$10,000).
64. In the cases where awards less than \$10,000 have been made, the Tribunal found the applicant had work performance issues that contributed to the termination, only worked for the respondent for a short period of time, and/or failed to present evidence of the impact of discriminatory termination on him or her. See, for example, *Quattroci v. Boz Electric Supply*, 2009 HRTO 1082 [CHRR Doc. 09-1512]; *Garcia v. Tri-Krete*, 2009 HRTO 2181 [CHRR Doc. 09-2848]; and *Buckingham-Vanderlei v. Walker*, 2010 HRTO 1338 [CHRR Doc. 10-1564]. None of those circumstances exist in the case at hand.
65. I find after considering the applicant's individual circumstances, including the impact of the discrimination on her and her vulnerability as a person with a developmental disability, as well as the cases cited above, that \$15,000 is an appropriate award of compensation for injury to dignity, feelings and self-respect.

66. *Lost Income*
67. The applicant seeks an award of monetary compensation for lost income. The purpose of compensation for loss of income is to restore the applicant as far as is reasonably possible to the position that the applicant would have been in had the discriminatory acts not occurred. See *Impact Interiors Inc. v. Ontario (Human Rights Commission)* (1998), 35 C.H.R.R. D/477 (Ont. C.A.) and *Piazza v. Airport Taxi Cab (Malton) Assn.* (1989), 10 C.H.R.R. D/6347 (Ont. C.A.).
68. The applicant is under a duty to mitigate her losses by making reasonable efforts to obtain suitable employment, and is only entitled to be compensated for those losses that could not have been avoided. The respondent, however, has the onus of proving the applicant's failure to mitigate. See *Heintz v. Christian Horizons*, 2008 HRTO 22 [reported 63 C.H.R.R. D/12] at para. 265.
69. The applicant provided uncontradicted evidence that she lost \$50 per week from October 26, 2009 (the date the organization respondent terminated her employment) to November 6, 2010 (the date that she started a new job at a Walmart store). As such, I find that her lost income was \$2,678.50 (\$50/week x 53.57 weeks).
70. I also find that the applicant fulfilled her duty to mitigate her losses. She provided uncontradicted evidence that two weeks after the termination of her employment, she joined a government-funded program that assisted her with job searches on a weekly basis. Furthermore, I accept that it is challenging for a person with developmental disability to obtain new employment after losing a job.
71. I therefore find that \$2,678.50 is an appropriate award to the applicant for lost income.
72. *Interest*
73. Under s. 128(1) of the *Courts of Justice Act*, R.S.O., 1990, c. C.43, as amended, prejudgment interest runs from the date the cause of action arose to the date of the order. Accordingly, I find that the organization respondent should pay the applicant pre-judgment interest on her lost income from October 26, 2009 to the date of this Decision.
74. Post-judgment interest is payable on any amount of the award of monetary compensation for injury to dignity, feelings and self-respect and lost income not paid within 30 days of the date of this Decision.

75. The applicable interest rates may be found on the website of the Ministry of the Attorney General of Ontario:
<http://www.attorneygeneral.jus.gov.on.ca/english/courts/interestrates.asp>

Compliance Remedies

76. Based on the evidence, I am not satisfied that the organization respondent is aware of its obligations under the *Code*. I therefore find it appropriate to order that the organization respondent's owners, managers, and supervisors complete the Ontario Human Rights Commission's online training module on human rights (<http://www.ohrc.on.ca/hr101/>) and provide copies of the certificates of completion to the applicant.

77. ORDERS

78. Accordingly, the Tribunal orders as follows:

1. Within 30 days of the date of this Decision, the organization respondent shall pay the applicant \$15,000 as monetary compensation for the violation of her inherent right to be free from discrimination and for injury to dignity, feelings and self-respect.
2. Within 30 days of the date of this Decision, the organization respondent shall pay the applicant \$2,678.50 as monetary compensation for lost income. Pre-judgment interest is payable on her lost income from October 26, 2009 to the date of this Decision.
3. Post-judgment interest is payable on any amount of the awards of monetary compensation for injury to dignity, feelings and self-respect and lost income not paid within 30 days of the date of this Decision.
4. Within 60 days of the date of this Decision, the organization respondent's owners, managers, and supervisors shall complete the Ontario Human Rights Commission's online training module on human rights and provide copies of the certificates of completion to the applicant.

Dated at Toronto, this 12th day of January, 2012. _____ "signed
by" _____ Ken Bhattacharjee Vice-chair