Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

**Between:**

**Leslie Hicks**

**Complainant**

**- and -**

**Canadian Human Rights Commission**

**Commission**

**- and -**

**Human Resources and Skills Development Canada**

**Respondent**

**Decision**

**Member:** Réjean Bélanger
**Date:** September 18, 2013
**Citation:** 2013 CHRT 20

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## I. Complaint

[1] As part of his employment, the Complainant was required to relocate from Sydney, Nova Scotia to Ottawa, Ontario. The Complainant's wife did not relocate to Ottawa with the Complainant, due in part to her mother's ailing health. As a result, the Complainant and his wife maintained dual residences. In this regard, the Complainant made an expense claim for temporary dual residence assistance under the Respondent's applicable Relocation Directive. That claim was denied.

[2] The present complaint revolves around the Respondent's interpretation and application of its Relocation Directive. In its interpretation and application of this Relocation Directive, the Complainant alleges the Respondent engaged in a discriminatory practice within the meaning of sections 7 and 10 of the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6 [the *Act*], on the basis of family status and disability.

## II. Background

[3] The Tribunal held a hearing in this matter from April 15 to 17, and on May 7, 2013 in Ottawa, Ontario.

[4] On the first day of the hearing, the parties agreed on a partial statement of material facts. These agreed facts are as follows.

[5] The Complainant worked in Sydney, Nova Scotia, for the federal government in the federally-regulated underground coal mining industry in Cape Breton, Nova Scotia. He was a Principal Advisor, EN-ENG-05, for the Coal Mining Safety Commission.

[6] In 1999, the Complainant's employer, the Respondent, informed him that his position would become redundant.

[7] On January 21, 2002, the Complainant received a formal letter of offer/deployment to Ottawa, dated January 14, 2002 from Micheline Bélanger-Brulé, Human Resources Manager for the Respondent. The letter states, “Relocation Expenses will be reimbursed at public expense according to the Treasury Board Relocation Directive.”

[8] On February 18, 2002, a letter from Warren Edmondson was sent to the Complainant to inform him of the condition of his deployment and with a revised letter of deployment (the “February 18, 2002 Letter”).

[9] By e-mail of February 21, 2002, the Complainant accepted the revised offer of deployment. On February 27, 2002, a letter was sent to the Complainant from Ms. Bélanger-Brulé, confirming his acceptance of the conditions in the February 18, 2002 Letter and advising that he had been deployed to his new position as of March 4, 2002.

[10] The Complainant was deployed as a full time indeterminate Industrial Safety Engineer, EN-ENG-05 position for the Respondent’s Labour Branch, Occupational Health and Safety and Injury Compensation Division located in National Headquarters in Hull, Quebec (“NHQ”).

[11] The Complainant began work at NHQ on September 16, 2002. He officially relocated to Ottawa on October 17, 2002.

[12] The Complainant’s family, including his wife, did not relocate with him in October 2002 due in part, to his mother-in-law’s serious health problems.

[13] The Complainant’s mother-in-law moved to an assisted-living apartment in approximately May 2002 and was living in this assisted-living apartment when he relocated to NHQ in October 2002. His mother-in-law moved to a full-care nursing home on October 9, 2003.

[14] On September 22, 2004, the Complainant applied for financial assistance under the Treasury Board of Canada's Temporary Dual Residence Assistance ("TDRA") Directive. The reason he gave for claiming financial assistance was, among other things, that his wife had to stay in Sydney, Nova Scotia, to care for her mother. The amount of the claim, with respect to the Complainant's mother-in-law, was $21,247.00 covering the first twelve months of the relocation period, namely from October 1, 2002 to September 20, 2003.

[15] The Relocation Directive in effect at the beginning of the Complainant's relocation was "Relocation Directive – Effective Until March 31, 2003 (Archived)", which came into effect March 1993 ("1993 Relocation Directive"). The Relocation Directive, including the TDRA, is deemed part of the collective agreement governing the Complainant's terms and conditions of employment.

[16] For the purposes of this complaint, the relevant portions of the 1993 Relocation Directive are:

> **Purpose and scope**
>
> It is the policy of the government that in any relocation, the aim shall be to relocate the employee in the most efficient fashion, that is, at the most reasonable cost to the public yet having a minimum detrimental effect on the transferred employee and family.
>
> [...]
>
> **Application**
>
> This directive applies to the following departments, agencies and corporations as listed in the *Financial Administration Act*:
>
> - all Schedule I, I.1 departments,
> - all Schedule II departmental corporations,
> - those Schedule C corporations listed in Part I of Schedule I of the *Public Service Staff Relations Act*, and
> - branches of government designated as departments for purposes of the Financial Administration Act with the exception of Royal Commissions.

Unless specifically stated otherwise, the relocations provisions shall apply to all relocations within Canada resulting from a transfer or an appointment that originated in the Public Service of Canada as defined in section 11(1) of the *Financial Administration Act*. These provisions do not apply to members of the Royal Canadian Mounted Police (RCMP) and the Canadian Armed Forces.

[...]

Unless specifically stated otherwise, the standards, rates or allowances and the reimbursement of expenses incurred as authorized in this chapter shall be applied to all eligible persons irrespective of their age, sex, marital or family status, or disability.

[...]

**Definitions**

**Dependant** (personne à charge) - means any person who lives with the employee or appointee and is either the employee's spouse, a person for whom the employee can claim a personal exemption under the Income Tax Act, or an employee's (or a spouse's) unmarried child, step-child, adopted child or legal ward who cannot be claimed as an income tax deduction but is in full-time attendance at school. A family member who is permanently residing with the employee, but who is precluded from qualifying as a dependant under the Income Tax Act because the family member receives a pension, shall also be considered as a dependant under this directive;

[...]

**1.2 Responsibilities**

1.2.1 For any relocation, the terms and conditions of reimbursement shall be discussed with the person relocating at the time of the authorization to relocate.

1.2.2 Once a relocation has been authorized:

[...]

(c) every attempt will be made to ensure that the timing of the relocation, and the travelling associated with it, is convenient to both the employer and the employee. The relocation should be planned to minimize disruptions to family life, and to minimize the costs to the employer; to this end, managers shall ensure that employees who are relocating receive appropriate counselling, and also that employees' enquiries regarding this directive are answered promptly and accurately.

**Temporary dual residence assistance (TDRA)**

**2.11 Criteria**

2.11.1 Financial assistance is intended to offset the cost of maintaining the second residence. The employee remains responsible for one set of household expenses.

> 2.11.2 Financial assistance towards living expenses can be obtained in situations when two residences are temporarily maintained during the initial stages of a relocation, i.e.:
>
> (a) when one of the residences is occupied by dependant(s) (a term which includes a spouse):
>
> - for reasons of temporary illness, or
>
> [...]

[17] Financial assistance under the TDRA can only be claimed in respect of a dependant, and only someone "who has been living with the employee prior to relocation" qualifies as a "dependant" under the 1993 Relocation Directive.

[18] On April 1, 2009 the definition of "dependant" under the Relocation Directive was expanded to include "a person who resides outside the employee's residence and for whom the employee has formally declared a responsibility for assistance and/or support".

[19] On November 23, 2004, the Respondent denied the Complainant's application for financial assistance under the TDRA.

[20] The Complainant filed a grievance challenging the denial of the TDRA, which was received on December 2, 2004.

[21] The Complainant's grievance was heard at the first level in January 2005. He received the Respondent's decision denying his grievance on February 10, 2005. The basis for the denial was that the Complainant was "not eligible for the Temporary Dual Residence Assistance since he was a renter and not the owner of a house in Sydney".

[22] The Complainant's grievance was heard at the second level and a decision denying that grievance was rendered on June 17, 2005. The reason provided for the denial was that "your claim for your mother-in-law could not be approved as she was not living with you in the principal residence, and as such, cannot be considered a dependant pursuant to the 1993 Relocation Directive."

[23] The Complainant's grievance was heard at the third level on March 15, 2006 before the National Joint Council ("NJC")'s Executive Committee. The grievance was denied for the same reasons as at the second level.

[24] The Complainant's grievance was then referred to adjudication before the Public Service Labour Relations Board ("PSLRB") on July 18, 2006.

[25] On July 19, 2006, the Complainant filed the instant complaint with the Canadian Human Rights Commission ("Commission").

[26] In the meantime, the Complainant's mother-in-law passed away on January 13, 2007, while she was living in the full-care nursing home.

[27] The parties to the grievance, the Complainant and Respondent, jointly submitted to the adjudicator a "Statement of Agreed Facts" that is signed by representatives for the two parties, and dated January 26, 2007.

[28] The grievance was heard by expedited adjudication on January 26, 2007. The PSLRB rendered its decision denying the Complainant's grievance on February 2, 2007. The grievance was denied for the same reasons as at the third level (see *Hicks v. Treasury Board (Department of Human Resources and Skills Development)*, 2007 PSLRB 16).

[29] On October 26, 2007, the Commission advised the Complainant that it would not deal with his complaint, pursuant to paragraph 41(1)(c) of the *Act*. The Complainant sought judicial review of the Commission decision and the Federal Court allowed the application (see *Hicks v. Canada (Attorney General)*, 2008 FC 1059).

[30] The Commission commenced investigation of the Complainant's complaint, and ultimately recommended conciliation in its Investigation Report of July 12, 2010. Conciliation took place, but was unsuccessful, and the matter was referred back to the Commission.

[31] On November 9, 2011, the Commission referred the matter to this Tribunal.

## III. The Complainant's Case

[32] The Complainant alleges violations of sections 7 and 10 of the *Act*, on the basis of the prohibited grounds of family status and disability. In this regard, the relevant portions of the *Act* are as follows:

> 3. (1) For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.
>
> 7. It is a discriminatory practice, directly or indirectly,
>
> (a) to refuse to employ or continue to employ any individual, or
>
> (b) in the course of employment, to differentiate adversely in relation to an employee,
>
> on a prohibited ground of discrimination.
>
> 10. It is a discriminatory practice for an employer, employee organization or employer organization
>
> (a) to establish or pursue a policy or practice, or
>
> (b) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment,
>
> that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.

[33] The complainant in proceedings before the Tribunal must establish a *prima facie* case of discrimination. A *prima facie* case is "…one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent…" (*Ontario Human Rights Commission v. Simpsons-Sears*, [1985] 2 SCR 536 at para. 28).

[34] Despite the Respondent's assertion that the present complaint is limited to whether the definition of "dependant" in the 1993 Relocation Directive is discriminatory, the Complainant states the nature of his complaint as: whether the Respondent's decision to decline payment of the TDRA was discriminatory. The Complainant's complaint form and statement of particulars have been consistent with this position, and I see no reason to limit the scope of the complaint as suggested by the Respondent.

[35] That said, there is no claim that the Respondent refused to employ or to continue to employ the Complainant, pursuant to subsection 7(a) of the *Act*; or, that the Respondent's interpretation and application of the 1993 Relocation Directive resulted in the Complainant being deprived of employment opportunities, pursuant to section 10 of the *Act*. Therefore, in my view, this complaint is limited to an analysis under subsection 7(b) of the *Act*.

[36] Similarly, I do not view the prohibited ground of disability as being applicable in the circumstances of this case. The alleged victim in this case, the Complainant, does not suffer from a disability. Rather, it was his mother-in-law who suffered from a disability. While her disability may have been a factor that defined the Complainant's family status in the circumstances giving rise to this complaint, the Complainant himself was not treated adversely because of his own disability, nor is he claiming that his mother-in-law was the victim of discrimination on the basis of her disability.

[37] Therefore, in analyzing the Complainant's case, I will only examine whether the Complainant, in the course of employment, was differentiated adversely on the basis of his family status, pursuant to subsection 7(b) of the *Act*.

[38] To "differentiate" is to create a distinction or to treat someone differently (see *Tahmourpour v. Canada (Royal Canadian Mounted Police)*, 2009 FC 1009 at para. 44 [*Tahmourpour*]; varied on other grounds in *Tahmourpour v. Canada (Royal Canadian Mounted Police)*, 2010 FCA 192 [*Tahmourpour (FCA)*]; and, *Canada (Human Rights Commission) v. Canada (Attorney General)*, 2012 FC 445 at para. 254, aff'd 2013 FCA 75). However, not every

distinction is discriminatory, as the *Act* qualifies the differential treatment with the term "adversely". According to the Federal Court, "adverse" is an adjective that in its ordinary meaning means harmful, hurtful or hostile (see *Tahmourpour* at para. 44; see also *Tahmourpour (FCA)* at para. 12). Finally, the adverse differential treatment must be based on a prohibited ground of discrimination.

[39] The 1993 Relocation Directive and the criteria for claiming TDRA create a distinction between persons who are "permanently residing with the employee" and those who are not. The Respondent also says the Complainant was also ineligible for TDRA because his mother-in-law was not a person suffering from a "temporary illness" pursuant to clause 2.11.2(a) of the 1993 Relocation Directive, but rather was chronically ill.

[40] These distinctions were harmful to the Complainant because it resulted in the denial of his claim for TDRA. The denial of his claim was also hurtful to the Complainant because he interpreted the Respondent's decision to mean that his mother-in-law was not considered as a member of his family. The Complainant also testified that the denial of his TDRA claim and subsequent grievances resulted in stress and frustration towards his employer. This stress resulted in physical problems: not being able to sleep, digestion problems, and heart murmurs. Eventually, the Complainant says the stress resulted in him having to take a 40 day stress leave.

[41] The next question is whether the adverse distinctions created by the 1993 Relocation Directive towards the Complainant were based on his family status. The term family status is not defined in the *Act*. However, jurisprudence has recognized that the ground protects the absolute status of being or not being in a family relationship; the relative status of who one's family members are; the particular circumstances or characteristics of one's family; and, the duties and obligations that may arise within the family (see *B. v. Ontario (Human Rights Commission)*, 2002 SCC 66 at paras. 39-41, 57; and, *Canada (Attorney General) v. Johnstone*, 2013 FC 113 at paras. 104-113 [*Johnstone*]).

[42] There is no dispute that the Complainant's spouse and mother-in-law are a part of the Complainant's family. Nor does the Respondent dispute that eldercare responsibilities can be protected by the ground of family status. While I am unaware of any decisions from the Tribunal on the issue of eldercare, I find the rationale of the Human Rights Tribunal of Ontario in *Devaney v. ZRV Holdings Limited*, 2012 HRTO 1590 [*Devaney*] to be relevant.

[43] In that case, Mr. Devaney was an architect who had been dismissed because he had to be absent from work, and a significant portion of those absences were required due to his family circumstances: he had to take care of his mother who was very ill. There was no other member of his family to take care of her. His mother was on a critical waiting list for a long-term care facility, but until she was able to move, the son was the primary health-care provider. The employer was aware of Mr. Devaney's family situation, but dismissed him for his absences. On this basis, the Ontario Tribunal decided that Mr. Devaney had established a discriminatory practice on the basis of his family status.

[44] In my view, the rationale of *Devaney* is: just as the jurisprudence recognizes family status as protecting the childcare obligations of a parent towards a child, the reciprocal eldercare responsibilities of a child towards their parent should also be recognized in the same fashion. I agree with this rationale.

[45] At the hearing of this matter, the Complainant and his wife testified about the eldercare responsibilities that they felt towards their mother/mother-in-law and that they could not have immediately moved to Ottawa without abandoning those responsibilities. They explained that their mother/mother-in-law was not living with them because her health condition required assistance that could not be offered in their home. Furthermore, because of her fragile health, her doctors did not permit her being transported by ambulance or even by plane to Ottawa. The Complainant and his wife were also of the opinion that support could not adequately and reasonably be provided only by third-party caregivers. This is the conclusion that they had reached after years of observing and caring for their mother/mother-in-law as her health steadily declined.

[46] In this regard, the Complainant and his wife testified to the effect that the Complainant's mother-in-law's health started deteriorating around 2001 and the related responsibilities the Complainant's wife took on to care for her mother. At the time of the Complainant's relocation, his mother-in-law was then living in an assisted-living apartment and was depending a lot on her daughter. The Complainant's mother-in-law had great difficulty expressing herself and indicating her needs, and few people could communicate with her. However, the Complainant's wife could.

[47] While the Complainant's mother-in-law was living in the senior's apartment (assisted-living apartment), the Complainant's wife testified to providing care in the following ways: she checked in on her several times a day; did her laundry; did her daily external chores, such as groceries and paying bills; prepared her meals and/or arranged for prepared meals to be delivered; arranged home care assistance (meals, cleaning, bathing, etc.) and regular home nursing care; arranged and accompanied her on doctors' visits; and, provided all of her social interaction by arranging regular visits and supervised excursions.

[48] According to the Complainant, the presence of his wife was highly beneficial for her mother's emotional well-being. She communicated frequently with the nursing home staff, and continuously monitored her mother's health.

[49] As the Complainant's testimony indicates, but for the Complainant's family status, that is his and his wife's commitment to care for their elderly and disabled mother/mother-in-law, maintaining dual residences following the Complainant's relocation would not have been necessary, nor would a TDRA claim have arisen.

[50] However, the Respondent argues that the denial of the Complainant's TDRA claim did not result in a conflict between his family obligations and work-related requirements. According to the Respondent, the Complainant admitted that his mother-in-law was cared for by his wife, notwithstanding the denial of the Complainant's TDRA claim.

[51] I agree that the circumstances of this complaint do not give rise to an "...employment rule or condition [that] interferes with an employee's ability to meet a substantial [family] obligation in any realistic way..." (see *Johnstone* at para. 125). The nature of the present complaint is not a conflict between the Complainant's work and family obligations, but relates to the denial of a benefit.

[52] The Complainant argues that discrimination arises from the Respondent's under-inclusive provision of its TDRA benefit. On this point, the Supreme Court of Canada has indicated that:

> Underinclusion may be simply a backhanded way of permitting discrimination. Increasingly, employee benefit plans have become part of the terms and conditions of employment. Once an employer decides to provide an employee benefit package, exclusions from such schemes may not be made in a discriminatory fashion...Benefits available through employment must be disbursed in a non-discriminatory manner.
>
> *Brooks v. Canada Safeway ltd.*, [1989] 1 SCR 1219 at p. 1240

[53] In determining whether a benefits scheme is *prima facie* discriminatory, the first step is to determine the purpose of the benefit plan. If the benefits are "...allocated pursuant to the same purpose, yet benefits differ as the result of characteristics that are not relevant to this purpose, discrimination may well exist" (*Battlefords and District Co-operative Ltd. v. Gibbs*, [1996] 3 SCR 566 at para. 33).

[54] As outlined above, the purpose of the 1993 Relocation Directive was "...to relocate the employee in the most efficient fashion, that is, at the most reasonable cost to the public yet having a minimum detrimental effect on the transferred employee and family". Clause 1.2.2(c) of the 1993 Relocation Directive also provides that "The relocation should be planned to minimize disruptions to family life, and to minimize the costs to the employer...".

[55] As is clear from these statements, the 1993 Relocation Directive was designed to assist transferred employees with relocating their lives, in the most efficient manner, while recognizing that efficiency must be balanced against any detrimental effects to the transferred employee or

his/her family. The 1993 Relocation Directive was also supposed to apply to "...all eligible persons irrespective of their...family status...".

[56] Despite the broad purpose and application of the 1993 Relocation Directive, the Complainant was denied the TDRA because of the characteristics of his family: that he and his wife cared for his elderly mother-in-law who, because of a permanent disability, could not live with them in the family home.

[57] Having found that eldercare duties fall within the protection against discrimination on the basis of family status under the *Act*; that the characteristics of the Complainant's family were defined by his and his wife's eldercare responsibilities towards their mother/mother-in-law; and, that the Complainant was denied TDRA because of those family characteristics; therefore, the Respondent's denial of the Complainant's expense claim under the TDRA constitutes a *prima facie* discriminatory practice, under subsection 7(b) of the *Act* . The Complainant's evidence is complete and sufficient to justify a verdict in his favour in the absence of an answer from the Respondent.

## IV. The Respondent's Case

[58] Since I am satisfied that the Complainant has demonstrated *prima facie* discrimination on the ground of family status, the burden shifts to the Respondent to demonstrate that the *prima facie* discrimination did not occur as alleged or that the practice is justifiable under the *Act* (see sections 15-24 of the *Act*).

[59] The Respondent claims its 1993 Relocation Directive and the criteria used to determine whether an employee is eligible for the TDRA is a *bona fide* occupational requirement. In this regard, the *Act* provides:

> 15. (1) It is not a discriminatory practice if
>
> (a) any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based on a *bona fide* occupational requirement;

> [...]
>
> (2) For any practice mentioned in paragraph (1)(a) to be considered to be based on a *bona fide* occupational requirement and for any practice mentioned in paragraph (1)(g) to be considered to have a *bona fide* justification, it must be established that accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost.

[60] According to the Respondent, a rational basis exists for limiting financial assistance under the TDRA to family members living with the employees who otherwise qualify as dependants: employees do not need to maintain a second residence to facilitate their relocation unless they have dependant family members residing with them in these residences who are unable to relocate at the same time as the employee. In the Respondent's view, family members residing in their own homes do not need employees to maintain their former homes for them. It is on the basis of this assumption that the Respondent says the federal Crown and the other parties to the 1993 Relocation Directive defined who is a dependant.

[61] The Respondent submits that family members having other needs, whether related to their medical or day-to-day care, and claiming financial assistance in respect of those needs, fall outside the coverage of the TDRA. According to the Respondent, assistance is not given for the voluntary separation of the family for personal reasons. The Respondent argues the TDRA is not intended to facilitate medical and other care giving arrangements for family members, but to allow them to continue living in the employee's former residence until able to relocate with the employee.

[62] Mr. Daniel Gauthier, Chief, Accounts Payable and Receipt and Deposit, for Human Resources and Skills Development Canada, testified on behalf of the Respondent. The main part of his testimony was made in relation to the 1993 Relocation Directive and his knowledge of the Complainant's application under the TDRA.

[63] Mr. Gauthier explained that the Complainant's claim under the TDRA could not be accepted because: (1) the Complainant's mother-in-law could not be considered a "dependant"

under the 1993 Relocation Directive since she had not been living in the Complainant's home at the time of the Complainant's relocation; and, (2) the Complainant's mother-in-law was considered as a permanently disabled person and not as a temporary ill person as required by section 2.11.2 of the 1993 Relocation Directive.

[64] Mr. Gauthier also stated the allocation of benefits under the TDRA is different if the claiming employee owns or rents a home. In the circumstances of this case, the Respondent arrived at the conclusion that the Complainant rented his home in Nova Scotia and, therefore, was ineligible for the TDRA benefits in subsections 2.11 through 2.18 of the 1993 Relocation Directive. Mr. Gauthier recognized that the Complainant was however covered by subsection 3.2.1, which would have allowed the Complainant to claim a monthly payment of $420 per month.

[65] When asked to indicate a precise reference in the 1993 Relocation Directive that would support his interpretation of a distinction between renters and owners, Mr. Gauthier was unable to do so. Therefore, it would appear that his interpretation of the 1993 Relocation Directive is not supported by its actual language.

[66] On more than one occasion, Mr. Gauthier's testimony also emphasized the fact that the 1993 Relocation Directive prioritized the efficient use of public resources. However, he was silent as to the other purpose of the 1993 Relocation Directive, of having a minimum detrimental effect on the transferred employee and family.

[67] Overall, I did not find Mr. Gauthier's testimony particularly persuasive or useful in understanding the Respondent's assertion that its interpretation and application of the 1993 Relocation Directive in the Complainant's circumstances was a *bona fide* occupational requirement.

[68] Furthermore, no explanation was advanced by the Respondent, either through its witness or otherwise, as to how an interpretation of the 1993 Relocation Directive that included the

circumstances of the Complainant's family in relation to his need to maintain dual residences would have caused the Respondent undue hardship. In fact, given that the Relocation Directive currently in effect now defines a dependant to include persons who reside outside the employee's residence, it may have been difficult for the Respondent to do so.

[69] Nor do I find relevant the fact that the 1993 Relocation Directive was a negotiated policy between the National Joint Council and the Respondent, and that it is considered a part of the Complainant's collective agreement. The *Act* is not negotiable and must be respected despite what a collective agreement may provide.

[70] The standard for establishing a *bona fide* occupational requirement and undue hardship was succinctly summarized by the Tribunal in *Johnstone v. Canada Border Service Agency*, 2010 CHRT 20:

> [348] In *Meiorin* the Supreme Court of Canada affirmed that the duty of employers to accommodate is a fundamental legal obligation. An employer must demonstrate that the discrimination is necessary to achieve legitimate work-related objectives and tender affirmative evidence that the point of undue hardship has been reach in its efforts to accommodate the employee.
>
> [349] Also in *Meiorin*, the Supreme Court of Canada stated that "[u]nless no further accommodation is possible without imposing undue hardship, the standard is not a BFOR in its existing form and the prima facie case of discrimination stands".
>
> [350] In *Council of Canadians with Disabilities v. Via Rail Canada Inc.*, [2007] S.C.J. No. 15 (*Via Rail*) the Supreme Court of Canada stated that "undue hardship is reached when reasonable measures of accommodation are exhausted and only unreasonable or impracticable options for accommodation remain".
>
> [351] These cases very apparently set out a duty on the part of CBSA to make a real effort to accommodate, an effort that is tangible and measurable, and tests out the employer's ability to meet the accommodation request. CBSA must not base its assessment of whether an employee needs accommodation, or of whether it can implement accommodation measures, based on "impressionistic assumptions."

[71] No legitimate work-related objective or affirmative evidence to the point of undue hardship was advanced by the Respondent to justify its *prima facie* discrimination in this case. The Respondent's assumption justifying its policy in this case, that family members residing in

their own homes do not need employees to maintain their former homes for them, clearly did not take into account family circumstances such as the Complainant's. Furthermore, the Respondent's assertion that the Complainant's family circumstances arose because of a "voluntary separation of the family for personal reasons" and that the "TDRA is not intended to facilitate medical and other care giving arrangements for family members" ignores the duties and obligations within the Complainant's family and which are protected by the ground of family status under the *Act*. The Respondent's position also contradicts the purpose of the 1993 Relocation Directive of minimizing the detrimental effects of relocation on a transferred employee and family.

[72] Therefore, based on the evidence presented and the analysis above, I find the Respondent has not established a *bona fide* justification for its *prima facie* discrimination towards the Complainant. As a result, I find the Respondent has engaged in a discriminatory practice, pursuant to subsection 7(b) of the *Act*, on the basis of the Complainant's family status.

## V. Conclusion

[73] For the reasons above, this Tribunal finds the present complaint to be substantiated:

(1) the Complainant has established a *prima facie* case of discrimination within the meaning of subsection 7(b) of the *Act*, on the basis of his family status; and,

(2) the Respondent has failed to establish a *bona fide* occupational requirement, present a reasonable explanation for, or otherwise justify the *prima facie* case of discrimination against it.

## VI. Remedy

[74] Pursuant to subsection 53(2) of the *Act*, if at the conclusion of an inquiry the Tribunal finds a complaint is substantiated, the Tribunal can make an order against the person found to have engaged in the discriminatory practice. In this case, the Complainant seeks an order with the following remedies: reimbursement of his claim under the TDRA; compensation for pain and

suffering; compensation for having engaged in the discriminatory practice wilfully or recklessly; and, interest.

[75] The aim in making an order under subsection 53(2) is not to punish the person found to have engaged in the discriminatory practice, but to eliminate - as much as possible - the discriminatory effects of the practice (see *Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84 at para. 13). To accomplish this, the Tribunal's remedial discretion must be exercised on a principled basis, considering the link between the discriminatory practice and the loss claimed (see *Chopra v. Canada (Attorney General)*, 2007 FCA 268 at para. 37). In other words, the Tribunal's remedial discretion must be exercised reasonably, in consideration of the particular circumstances of the case and the evidence presented (*Hughes v. Elections Canada*, 2010 CHRT 4 at para. 50).

## A. Claim for TDRA

### (i) Issue estoppel motion

[76] Prior to the commencement of the hearing of this complaint, the Complainant brought a motion for an order declaring that issue estoppel applies to the quantum of the TDRA claimed by him and that the proper amount of the TDRA at issue in this matter is $21,427.

[77] As part of the adjudication of his grievance before the PSLRB, both parties jointly submitted a Statement of Agreed Facts, which provided:

> "... Mr. Hicks explained on his claim that the reason for claiming TDRA is because his wife had to stay in Sydney, NS to take care of his mother in law that could not be moved at the time of the relocation ... For his mother in law he is requesting 12 months (21 247$) of TDRA ..."

[78] According to the Complainant, while the PSLRB dismissed his grievance, at no point during the course of the adjudication did the Respondent or the adjudicator raise an issue regarding the quantum of the TDRA claimed. In fact, the Complainant argues the Respondent

explicitly conceded that the TDRA quantum at issue was $21,247, as set out in the Statement of Agreed Facts.

[79] The Complainant submits that issue estoppel should apply in this case because there has been a previous adjudication between the same parties, on the issue of whether the TDRA claim should be granted. The Complainant argues that issue estoppel extends to material facts that were necessarily (even if not explicitly) determined in the earlier proceedings. The Complainant adds, the dispute over his application for TDRA has been litigated for years between the same parties, but it is only now before the Tribunal that the Respondent disputes the issue of the quantum of his claim. If the Respondent intended to challenge the quantum of his TDRA claim, the Complainant says it should have done so when he made his application or during the grievance process.

[80] In response, the Respondent states issue estoppel applies only in circumstances where it is clear from the facts that the legal or factual question in issue between the same parties has already been decided. According to the Respondent, the nature and amount of the expenses submitted by the Complainant under the TDRA was never addressed or adjudicated upon in previous litigation between the parties. In the Statement of Agreed Facts before the PSRLB, while the Respondent agreed that the Complainant had submitted a TDRA claim in the amount of $21,247, it otherwise claims to have agreed to nothing else. As the PSRLB denied the TDRA claim on the ground that the Complainant's mother-in-law did not qualify as a dependant, the Respondent submits the PSLRB did not decide the issue of whether the alleged expenses were actually incurred and, if so, whether they otherwise qualified for reimbursement under the TDRA.

[81] Both parties agree on the rationale for the doctrine of issue estoppel as clearly explained in *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44 [*Danyluk*]:

> A litigant, to use the vernacular is only entitled to one bite at the cherry ... An issue, once decided, should not generally be re-litigated to the benefit of the losing party and the harassment of the winner. A person should only be vexed once in the same cause.

(*Danyluk* at para. 18)

[82] Both parties also agree on the three preconditions to the operation of issue estoppel, as outlined in *Danyluk*:

> (1) that the same question has been decided;
>
> (2) that the judicial decision which is said to create the estoppel was final; and,
>
> (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.
>
> (*Danyluk* at para. 25)

[83] The only previous litigation between the parties on the issue of the Complainant's entitlements under the TDRA resulted in a decision by the PSLRB.

[84] However, in its decision, the PSLRB did not cover the issue of the quantum of the Complainant's claim for TDRA.

[85] Rather, as the PSRLB found that it did not have the jurisdiction to address the Complainant's human rights arguments, it rendered its decision based on the definition of "dependant" in the 1993 Relocation Directive. Based on that definition, the PSLRB determined the Complainant was not entitled to TDRA at all.

[86] The PSLRB's decision is consistent with the Respondent's position to the Complainant's TDRA claim. Throughout the grievance process, the Respondent maintained a position that the Complainant was not entitled to any TDRA. On this basis, it even refused to attempt to mediate the issue because it maintained it had nothing to give the Complainant. As is also clear from Mr. Gauthier's testimony, even if the Complainant's mother-in-law qualified as a dependant, the Respondent has its own view and interpretation of what expenses the Complainant can claim.

[87] For these reasons, in my view, the question of the quantum of the Complainant's TDRA claim has not been previously decided by the PSRLB. The Complainant's argument for issue

estoppel therefore fails under the first precondition to the operation of issue estoppel, as outlined in *Danyluk*. It would be unfair if the Respondent was unable to defend itself against the Complainant's claimed expenses under the TDRA. The Respondent has the right to question each one of the elements of the Complainant's claim and verify their validity.

[88] Therefore, the Complainant's motion for an order declaring that issue estoppel applies to the issue of the quantum of the TDRA claimed by him and that the proper amount of the TDRA at issue in this matter is $21,427 is dismissed.

(ii) Compensation

[89] Pursuant to paragraph 53(2)(c) of the *Act*, a victim of discrimination is entitled to compensation for any expenses incurred as a result of the discriminatory practice. But for the discriminatory practice, the Complainant would have been reimbursed some of his expenses under the TDRA.

[90] However, the parties disagree on the interpretation of the TDRA and, specifically, the expenses the Complainant can claim. The Respondent claims there is a distinction between the amounts that can be claimed by renters as opposed to owners. While I was unable to find support in the actual language of the 1993 Relocation Directive for this distinction, I also do not feel as though I have sufficient information to be able to make an informed decision on the interpretation and application of the TDRA and to determine the actual quantum of the Complainant's TDRA claim.

[91] Given this lack of information, my decision on the estoppel issue above, and the fact that the Respondent was previously unwilling to offer the Complainant anything in relation to his TDRA claim, I will first leave it to the parties to work out the details of the quantum of the Complainant's TDRA claim. I will retain jurisdiction in the event the parties are unable to reach an agreement in this regard.

## B. Compensation for pain and suffering

[92] The Complainant seeks $20,000 in compensation for pain and suffering under paragraph 53(2)(e) of the *Act*. This is the maximum amount of compensation the Tribunal can award for pain and suffering. The Tribunal only awards the maximum amount in the most egregious of circumstances: where the extent and duration of the complainant's suffering as a result of the discriminatory practice warrants the full amount.

[93] The Complainant explained that he had been under stress and had been experiencing frustration with his employer for his transfer from Sydney to Ottawa for a long period of time. He alleged he started having physical problems: not being able to sleep, digestion problems, and heart murmurs. His doctor thought it was from all the stress. He had to take medical tests and was advised to take time off. He states he arrived in Ottawa in the fall of 2002 and that his medical problems started then and increased in the summer of 2003. He then had to take sick leave of about 40 days, ending the first of the month of September 2003.

[94] The Complainant claims his stress was caused by the unsettled nature of his problem with his employer, and the ongoing struggle he had to resolve this problem, including filling a series of grievances with his employer.

[95] The Complainant deplored the fact that during his ordeal he never felt his employer was trying to help him out; it did not show any willingness to inquire and engage with him with regard to how to deal with his family obligations; and, therefore, he felt abandoned by the Respondent, his employer.

[96] That said, no medical report was filed before this Tribunal. However, the Complainant indicated that the Respondent authorized his sick leave, which information was not denied by the Respondent. Nor did the Respondent raise an objection or make submissions regarding the Complainant's health during the hearing.

[97] The Respondent does note, however, that the Complainant had many other disputes with the Respondent in respect of his relocation, aside from the denial of his application for financial assistance under the TDRA. According to the Respondent, while the Complainant testified that he suffered disappointment, frustration and stress as a result of dealing with his various disputes with the Respondent in respect of his relocation, he was unable to describe how much of this was attributable to the Respondent's denial of his application for financial assistance under the TDRA.

[98] Taking into account the submissions of the parties above, and the circumstances of this case, I award the Complainant $15,000 for the pain and suffering he experienced as a result of the discriminatory practice.

## C. Compensation for having engaged in the discriminatory practice wilfully or recklessly

[99] The Complainant seeks $20,000 as compensation from the Respondent for having engaged in the discriminatory practice wilfully or recklessly, pursuant to subsection 53(3) of the *Act*.

[100] In *Johnstone*, the Federal Court stated the following with regard to subsection 53(3) of the *Act*:

> This is a punitive provision intended to provide a deterrent and discourage those who deliberately discriminate. A finding of wilfulness requires the discriminatory act and the infringement of the person's rights under the *Act* is intentional. Recklessness usually denotes acts that disregard or show indifference for the consequences such that the conduct is done wantonly or heedlessly.
>
> (*Johnstone* at para. 154)

[101] As $20,000 is the maximum amount that can be awarded under subsection 53(3) of the *Act*, the maximum award should be reserved for the very worst cases.

[102] According to the Complainant, the Respondent failed to treat his claim with the seriousness that it deserved. The Complainant discussed his relocation and his claim for TDRA several times with representatives for the Respondent and informed them of the reasons that his mother-in-law was unable to live with his family. The Complainant claims the Respondent did not even inquire into his needs in relation to his mother-in-law, in light of her serious health issues and disabilities, in its application of the 1993 Relocation Directive to his TDRA claim.

[103] The Complainant submits he was thorough and diligent in his efforts to have his mother-in-law recognized as a dependant, and based his arguments on human rights principles, yet the Respondent failed to consider his position and simply mechanically applied a rigid definition that was discriminatory. In this regard, the Complainant claims the Respondent acted recklessly as to whether its TDRA policy resulted in discrimination and whether accommodation should be considered.

[104] The Respondent notes that its denial of the Complainant's application for financial assistance under the TDRA was upheld at every grievance level, including the PSLRB, which also noted why the denial was appropriate for reasons other than those advanced by the Complainant in his grievance. According to the Respondent, the fact that it disagreed with the Complainant regarding whether its denial of his application for TDRA raised a human rights issue does not constitute a basis for awarding special compensation.

[105] The evidence indicates that the Respondent followed a strict application of the text of the 1993 Relocation Directive. During the hearing, I was left with the impression that, in the Respondent's mind, any deviation from the text of the 1993 Relocation Directive was unimaginable. Nor was there evidence to indicate that the Respondent considered the *Act* in following such a rigid application of the 1993 Relocation Directive. When faced with a difficult family situation and a request for compassion, there is no indication that the Respondent considered its duty to accommodate to the point of undue hardship. Overall, the Respondent showed disregard and indifference for the Complainant's family status and for the consequences that its decision to deny the TDRA would have in this regard.

[106] For all these reasons, and pursuant to subsection 53(3) of the *Act*, this Tribunal awards the Complainant $20,000 for the Respondent's reckless discriminatory practice.

**D. Interest**

[107] Pursuant to subsection 53(3) of the *Act*, an order to pay compensation may include an award of interest at a rate and for a period that the member considers appropriate. Rule 9(12) of the Tribunal's *Rules of Procedure (03-05-04)* provides that, unless the Panel order otherwise, any award of interest shall be simple interest calculated on a yearly basis at the Bank of Canada Rate (monthly series) established by the Bank of Canada; and, shall accrue from the date on which the discriminatory practice occurred, until the date of payment of the award of compensation.

[108] The Complainant requests compound interest to be awarded on all of the amounts sought. In his view, given that many years have elapsed since the human rights complaint was filed, a failure to award compound interest would reward the Respondent for the delays incurred.

[109] Relying on the Tribunal's decision in *Chopra v. Canada (Department of National Health and Welfare)*, 2004 CHRT 27, the Respondent submits that compound interest is warranted only if it can be deduced from the evidence or circumstances of the case that it is required to cover the loss in issue. Aside from the long period between when the Complainant submitted his complaint to the Commission (September 2006), and the date his complaint was heard by the Tribunal (April 2013), the Respondent submits there are no circumstances in this case to distinguish it from any other complaint that typically comes before the Tribunal. According to the Respondent, unless the delay can be attributed to it, which it denies, there are no special circumstances that would result in the Complainant not being fully compensated through the payment of simple interest.

[110] While the Complainant requests compound interest for the delay incurred between the filling and hearing of his complaint, there is no indication that these delays were as a result of the

Respondent. Therefore, I see no reason to deviate from Rule 9(12) of the Tribunal's *Rules of Procedure (03-05-04)*.

[111] As a result, I award interest on the compensation granted under paragraph 53(2)(e) and subsection 53(3) above. The interest shall be simple interest calculated on a yearly basis at the Bank of Canada Rate (monthly series) established by the Bank of Canada; and, shall accrue from November 23, 2004, the date the Complainant's application for TDRA was denied, until the date of payment of the award of compensation.

[112] In working out the details of the quantum of the Complainant's TDRA claim as directed above, the parties should also factor in an award of interest pursuant to the instructions in paragraph 111 above.

## E. Retention of Jurisdiction

[113] Given that I have left it to the parties to first attempt to work out the details of the quantum of the Complainant's TDRA claim, I will retain jurisdiction for three (3) months from the date of this decision in the event the parties are unable to reach an agreement. In that situation, I would ask the Complainant to provide the Tribunal with written submissions explaining the basis of the disagreement and providing its position thereon, with supporting documentation. Within two (2) weeks of receiving the Complainant's written submissions, the Respondent can provide a response. Within one (1) week of receiving the Respondent's written submissions, the Complainant can provide a reply.

*Signed by*

Réjean Bélanger
Tribunal Member

Ottawa, Ontario
September 18, 2013

**Canadian Human Rights Tribunal**

**Parties of Record**

**Tribunal File:** T1751/10611

**Style of Cause:** Leslie Hicks v. Human Resources and Skills Development Canada

**Decision of the Tribunal Dated:** September 18, 2013

**Date and Place of Hearing:** April 15 to 17, 2013
May 7, 2013
Ottawa, Ontario

**Appearances:**

Linelle S. Mogado and Steven Welchner, for the Complainant

No one appearing, for the Canadian Human Rights Commission

Patrick Bendin, for the Respondent