



IN THE MATTER OF THE HUMAN RIGHTS ACT 1981

IN THE MATTER OF THE BERMUDA HUMAN RIGHTS TRIBUNAL

BETWEEN:

PHILLIP ANTHONY INGHAM

Complainant

-v-

(1) DIET CENTER AND MAGNUM POWER FORCE GYM LTD.

(2) KAREN MAGNUM

(3) TONI-LEE CURTIS

Respondents

J U D G M E N T

Mr Chen Foley, Sedgwick Chudleigh Ltd., for the Complainant

Mr Thaddeus A. Hollis III, McKenzie Friend, for the Respondents

Background

1. The Complainant is a former employee of the Diet Center and Magnum Power Force Gym Ltd. (“the Company”) and has cerebral palsy.
2. The First Respondent is a limited liability company in the business of operating a members’ fitness gym.
3. The Second Respondent is a shareholder, a director and a manager of the First Respondent.

4. The Third Respondent is an employee of the First Respondent. The Third Respondent is employed by the First Respondent as a part-time front desk attendant.
5. The Complainant's complaint against the Respondents is set out in an Amended Particulars of Complaint dated 6 February 2015 (the "**Complaint**") and, in essence, alleges that:
 - a. On 2 December 2012, the Complainant's employment was terminated by the Second Respondent on behalf of the First Respondent, which amounted to a breach of section 6(1)(b) of the Human Rights Act 1981 (the "**Act**") as read with Section 2(2)(a)(iiiA) and Section 2(2)(b)(iiiA) respectively;
 - b. On various occasions between 24 October 2012 to 2 December 2012, the Complainant was harassed by the Third Respondent, which amounted to a breach of section 6B(1) of the Act as read with Section 2(2)(a)(iiiA); and
 - c. the First Respondent and the Second Respondent failed to take steps to prevent the Complainant being harassed by the Third Respondent and to take remedial steps upon complaining that he was being harassed because of his disability.
6. The Complainant did not make any allegation in the Complaint, nor mention at all, as to what specific condition (if any) the Respondents applied to the Complainant that he could not fulfil because of his disability, which on the face of the Complaint amounted to a breach of section 6(1)(b) of the Act as read with Section 2(2)(b)(iiiA). Instead, the Complainant's case at trial was essentially that the First Respondent and the Second Respondent directly discriminated against him by terminating his employment at Magnum because of his disability and that the Third Respondent (another employee of Magnum) harassed him in the work place because of his disability.
7. In their defence, the Respondents denied the allegations of harassment and discrimination because of disability generally. The Respondents further claimed that they were unaware that Complainant had cerebral palsy during his employment and that the Respondents further claim that they were unaware of the Complainant's allegations of harassment during the course of his employment.

The Law

8. Section 2 of the Act defines discrimination as follows:

“(2) For the purposes of this Act a person shall be deemed to discriminate against another person---

(a) if he treats him less favourably than he treats or would treat other persons generally or refuses or deliberately omits to enter into any contract or arrangement with him on the like terms and the like circumstances as in the case of other persons generally or deliberately treats him differently to other persons because ---

...

(iiiA) of his disability;”

(b) if he applies to that other person a condition which he applies or would apply equally to other persons generally but ---

(i) which is such that the proportion of persons of the same... disability...as that other who can comply with it is considerably smaller than the proportion of persons not of that description who can do so; and

(ii) which he cannot show to be justifiable irrespective of the ...disability...of the person to whom it is applied; and

(iii) which operates to the detriment of that other person because he cannot comply with it.”

9. Paragraph 2(2)(a) of the Act is concerned with direct discrimination and paragraph 2(b) of the Act with indirect discrimination.¹

¹ *Thompson v Bermuda Dental Board* [2008] UKPC 33, para 12.

10. For these purposes, ‘disability’ is defined in section 2(1) of the Act as meaning “the condition of being a disabled person”, and a “disabled person” is –

“a person who has any degree of physical disability, [or] infirmity... that is caused by illness...”

11. We find that it is clear that cerebral palsy would be a disability within the meaning of the Act. This was not in issue at trial.

12. Having defined ‘disability’, the Act makes it unlawful for employers to discriminate in the circumstances set out in section 6 of the Act and for another employee to discriminate in the circumstances set out in section 6B of the Act.

13. Section 6 of the Act provides as follows:

“Employers not to discriminate

6 (1) *Subject to subsection (6), no person shall discriminate against any person in any of the ways set out in section 2(2) by ---*

...

(b) dismissing or refusing to employ or continue to employ any person;

(c) refusing to train, promote or transfer an employee;”

14. Section 6B of the Act provide as follows:

“Employers, etc, not to harass employees

6B(1) *No person who is an employee shall be harassed in the work place by the employer or agent of the employer or by another employee on the basis of any ground referred to in section 2(2)(a)(i) to (vii).*

(2) *For the purposes of subsection (1) a person harasses another person if he persistently engages in comment or conduct towards that other person –*

(a) which is vexatious; and

(b) which he knows, or ought reasonably to know, is unwelcome.”

15. Counsel for the Complainant relied upon guidance from the Ontario Human Rights Commission that provides that the definition of harassment within the context of harassment in the workplace in the Ontario Human Rights Code involves both objective and subjective elements. These two (2) elements include how the conduct would be viewed by a reasonable person taking into account the perspective of the person being harassed and the views of the person being harassed. This guidance from the Ontario Human Rights Commission also reiterated that the subjective views of a person who has harassed someone do not determine whether a finding of harassment will be made and that harassment can be found to exist even if the harasser is not aware of his or her behaviour being received.
16. We consider this guidance from the Ontario Human Rights Commission to be persuasive particularly since the Supreme Court of Bermuda has previously held that the Act is substantially based upon the Ontario Human Rights Code.²
17. For present purposes, the exceptions and qualifications to section 6 of the Act are material and are as follows:

“(9A) For the avoidance of doubt it is hereby declared that nothing in this section confers upon any person any right to employment.

(9B) For the avoidance of doubt it is hereby declared that nothing in this section confers upon any person any right to be given, or to be retained in, any employment for which he is not qualified or which he is not able to perform or of which he is unable to fulfil a bona fide occupational requirement, or any right to be trained, promoted, considered or otherwise howsoever treated in or in relation to employment if his qualifications or abilities do not warrant such training, promotion, consideration or treatment.

(9C) Notwithstanding subsections (9A) and (9B), a disabled person shall not be considered disqualified for an employment by reason of his disability if it is possible for the employer, or prospective employer, to modify the circumstances of the employment so as to eliminate the effects of the disabled person’s disability in relation to the employment, without causing unreasonable hardship to the employer, or prospective employer.

(9D) For the purpose of subsection (9C), “unreasonable hardship” shall be construed in accordance with Schedule 1.

² *Roberts & Hayward v Minister of Home Affairs & Public Safety et al.* [2008] Bda LR 47, para. 11-12, affirmed in *Apex Construction Management Ltd. et al. v Pernell Grant* [2015] Bda LR 37, para. 14.

(9E) The Minister may give general directions of a policy nature to the Human Rights Commission, relating to the application and interpretation of Schedule 1, and the Human Rights Commission shall give effect to any such directions."

18. With respect to the concept of *bona fide* occupational requirement, the Act creates a two step approach:

- (i) is the requirement a *bona fide* occupational requirement and so permitted by section 6(9C)? and
- (ii) if it is, notwithstanding that, could it be modified without unreasonable hardship to the employer to eliminate its effect on the disabled person's disability?

19. There does not appear to be any guidance in local jurisprudence from the Supreme Court relating to disability discrimination except for *Roberts & Hayward v Minister of Home Affairs & Public Safety et al.*, which we consider to be binding upon us and particularly instructive.

20. According to *Roberts & Hayward v Minister of Home Affairs & Public Safety et al.*, in the absence of rules having been made by the Minister to define 'unreasonable hardship', the Tribunal must rely upon the natural and ordinary meaning of those words.³ It was further found in that case that a considerable body of Canadian jurisprudence on the expression of 'undue hardship' when used in a similar context is relevant and helpful in interpreting and applying the Bermuda provisions.

21. With respect to the burden of proof in this context, the Complainant must establish a *prima facie* case of discrimination. However, once a *prima facie* case has been established, then the burden of showing that any condition or requirement is a *bona fide* occupational one, and also the burden of showing that it is not possible for the employer to modify the employment without unreasonable hardship rests on the employer.

22. The Honourable Chief Justice Ian Kawaley recently confirmed in *Apex Construction Management Ltd. et al. v Pernell Grant* that "*construing the statute liberally with a view to giving effect to its goal of protecting human rights, it seems self-evident that:*

³ *Roberts & Hayward v Minister of Home Affairs & Public Safety et al.* [2008] Bda LR 47, para 9.

- (a) *'no person shall discriminate' potentially includes not just the employer in a narrow legal sense, but includes any directors, managers, supervisors and/or general employees as well;*
- (b) *a person would potentially be liable for discrimination if they either :*
- (i) *committed the allegedly discriminatory acts,*
 - (ii) *procured other persons to commit the acts complained of, and*
 - (iii) *omitted to take remedial steps, in circumstances where the relevant person had knowledge to put a stop to them; and*
- (c) *although there may be some overlap with the tortious liability test (e.g. examples (i) and (ii) in subparagraph (b) hereof), it is impossible to exclude the possibility of a more fluid and generous test for liability depending on the applicable facts."*⁴

The Issues

23. With consideration of the aforesaid background and legal framework, the issues in this case are as follows:

1. Was the Complainant discriminated against by the First Respondent and the Second Respondent upon the termination of his employment by the First Respondent and the Second Respondent because of his disability?
2. If the Complainant was discriminated against by the First Respondent and the Second Respondent upon the termination of his employment by the First Respondent and the Second Respondent because of his disability, was there a *bona fide* occupational requirement for the Complainant within the meaning of subsection 6(9B) of the Act.

⁴ [2015] Bda LR 37, para 23.

3. If there was a *bona fide* occupational requirement, have the First Respondent and the Second Respondent shown that it was not possible without unreasonable hardship to modify the circumstances of the Complainant's employment so as "to eliminate the effects of his disability in relation to the employment".
4. Was the Complainant discriminated against by the Third Respondent when the Third Respondent allegedly harassed him because of his disability?
5. Did the First Respondent and the Second Respondent fail to take steps to prevent the Complainant from being harassed because of his disability, and also failed to take remedial steps in response to the Complainant's complaint that he was being harassed?

The Evidence

24. The evidence in this case was taken over a period of 2 days. The examination-in-chief of each witness was taken by witness statement.
25. We do not seek to summarise all of the evidence in this judgment. The Complainant had four witnesses provide witness statements that were read in and stood as examination-in-chief. They were cross-examined by Mr. Hollis. These witnesses included the Complainant, Heather Matthews, Sirilak Yodpanya and Father Joseph Morley. We regrettably did not hear any evidence from Ron Magnum because he was admitted to the Mid Atlantic Wellness Institute at that time.
26. The Respondents had five witnesses provide witness statements that were read in and stood as examination-in-chief. Three of these witnesses, namely Denise Simmons and the Second and Third Respondents, were cross-examined by Mr. Foley. The other two witnesses, namely Phillip Jent and Ashlee Brady-Kelly, did not appear at the hearing. Consequently, Mr. Foley was unable to cross-examine them.
27. Prior to the hearing, we ordered directions including *inter alia* that every witness shall attend and be produced for cross-examination at the hearing. We also ordered that, should Phillip

Jent and Ashlee Bradley-Kelly fail to appear at the hearing, we may give limited weight to the contents of their respective witness statements in light of the Complainant's inability to cross-examine them. Consequently, we find that the evidence of Phillip Jent and Ashlee Bradley-Kelly shall be given limited weight.

Evidence of Phillip Ingham

28. We find that the evidence of Phillip Ingham was generally clear and credible.

29. The following issues were not in dispute:

29.1. Phillip Ingham was employed by the Company as a 'part time' front desk attendant starting on 24 October 2012 until he was terminated on 2 December 2012. Philip Ingham was paid \$16.50 per hour. The Company never provided Phillip Ingham with a letter of termination.

29.2. Phillip Ingham's statement of employment expressly provided for a ninety (90) day probationary period.

29.3 Phillip Ingham's hours of employment were on Tuesdays from 5:00 p.m. to 8:00 p.m. or 9:00 p.m., on Thursdays from 5:00 p.m. to 8:00 p.m. or 9:00 p.m. and on Saturdays from 9:00 a.m. to 3:00 p.m.⁵ During the course of Phillip Ingham's employment with the Company, Toni-Lee Curtis' employment generally ended at 6 p.m. on Tuesdays and Thursdays, so Phillip Ingham and Toni-Lee Curtis typically worked for the Company together for an hour on Tuesdays and Thursdays.

29.4 The Company's Employee Handbook expressly stated that with respect to the issuance of warnings and/or the termination of employment, the Company has a three-step disciplinary procedure leading to termination of employment.

"First: a verbal warning. Second: a written warning. Third: termination of employment."

⁵ Phillip Ingham avers that he worked until 9 p.m. on Tuesdays and Thursdays while Karen Magnum (who admits that she did not work at the same time as Phillip Ingham) avers that he worked until 8 p.m.

The Company's Employee Handbook also expressly stated that "*Ron Magnum is the General Manager of the gym and Karen Magnum is the General Manager of the Diet Center and Human Resource Manager of the business. Phillip is the Operations Manager of the gym.*"

29.6 Phillip Ingham originally approached Karen Magnum about possible employment with the Company by Facebook on 20 October 2012.

29.7 Phillip Ingham has cerebral palsy.

29.8 Phillip Ingham and Toni-Lee Curtis were generally required to work together during the course of Phillip Ingham's employment with the Company for approximately an hour on Tuesdays and Thursdays.

29.9 At all material times, the Company did not possess a written anti-discrimination policy or an anti-harassment policy.

30. Phillip Ingham gave evidence that, because of his cerebral palsy, he often exhibits certain atypical physical conduct. For example, he walks unsteadily, his movements may be rigid, is prone to knock things over since he does not have complete control of his right arm and he is only able to type using his two (2) index fingers. Notwithstanding that he experienced challenges in the performance of his duties because of his disability, Philip Ingham's evidence was that, despite these challenges, he believed that he performed his duties well.

31. More specifically, Phillip Ingham stated that he had struggled with learning how to process new membership applications, but he stated that all of the employees of the Company did. Further, Phillip Ingham stated that it took him some time to sort out the keys if they became tangled (because of the limited use of his right hand) and to prepare the towels if they were not folded when he came on duty. In any event, Philip Ingham insists that these struggles did not stop him from undertaking these tasks.

32. Phillip Ingham stated that he informed Ron Magnum (on the third day of his employment with the Company), Phillip Jent within two and a half weeks of his employment with the Company) and eventually Toni-Lee Curtis about his cerebral palsy. Phillip Ingham admitted that he had not informed Karen Magnum.

33. Phillip Ingham's statement of employment expressly stated that Mr. Ingham's job duties included *"Monitoring the front desk, answering the telephone, signing up new members, cleaning gym equipment, selling products, showing new members around the gym, photocopying paperwork, washing/folding towels etc."*

34. Phillip Ingham gave evidence that his duties at the Company included:

- 31.1 welcoming members at the front desk and checking them in;
- 31.2 processing new memberships;
- 31.3 cleaning machines;
- 31.4 processing soft-drink sales;
- 31.5 balancing the cash float from soft-drink sales;
- 31.6 tidying the bathrooms;
- 31.7 folding towels;
- 31.8 ensuring staff and members received their towels on-time; and
- 31.9 handing out keys.

35. Phillip Ingham gave evidence as to how he was treated by Toni-Lee Curtis and Phillip Jent during the course of his employment with the Company. In a nutshell, it was Philip Ingham's evidence that their treatment towards him included but was not limited to the following:

- Toni-Lee Curtis mimicked and mocked the manner in which Phillip Ingham typed;
- Toni-Lee Curtis antagonized and bullied Phillip Ingham;
- Toni-Lee Curtis created a physical obstacle (namely by the placement of her feet) that obstructed Phillip Ingham's path in the laundry room shortly after he told her about his physical limitations (including his ability to walk and balance) to which she did not respond;
- Toni-Lee Curtis suggested to Phillip Ingham that he was physically unsuitable for working at the gym.
- In relation to those tasks where Phillip Ingham required a little extra assistance, he was berated and sworn at by Phillip Jent (the Company's operations manager of the gym). This conduct was not demonstrated towards other employees of the Company.

36. With respect to his performance of his duties during the course of his employment with the Company, Phillip Ingham gave evidence that on one occasion he was responding to a guest's request that he help the guest with a broken exercise machine and that Karen Magnum telephoned the front desk while Phillip Ingham was on the gym floor. He further gave evidence that, because of his disability, it took him a little while to get back to the desk to answer the telephone. Consequently, Karen Magnum was upset with him and told him never to leave the front desk unmanned after that.
37. Phillip Ingham gave evidence that, as a result of the manner by which Toni-Lee treated him, he sent a Facebook message to Karen Magnum about Toni-Lee Curtis' conduct towards him. However Mrs. Magnum replied that she was on vacation and that Phillip Ingham should discuss "*any problems*" that he had with Phillip Jent. A copy of this message was brought into evidence.
38. Phillip Ingham also gave evidence that no one, on behalf of the Company, took any steps to address Toni-Lee's conduct or spoke to him about his complaint. In fact, Phillip Ingham's evidence was that after Phillip Ingham complained to Karen Magnum via Facebook, Ron Magnum asked him whether he found the job difficult.
39. With respect to the termination of Phillip Ingham's employment with the Company, Phillip Ingham gave evidence that Karen Magnum told him that he was terminated because of complaints from staff and members of the gym and that she did not provide him with any details of any of these complaints. Phillip Ingham stated that Toni-Lee Curtis and Phillip Jent did not think that Phillip Ingham fitted in because of his cerebral palsy, but that he had only ever received positive feedback from members.
40. With respect to Phillip Jent's witness statement. Phillip Ingham disputed Phillip Jent's allegations of Phillip Ingham's poor performance of his employment duties save for an acknowledgement that he did on one occasion leave without telling Phillip Jent that he was going home. Phillip Ingham also acknowledged that Phillip Jent provided him with additional training during his probationary period.
41. Phillip Ingham gave evidence in respect of Ashley Brady-Kelly's witness statement. Phillip Ingham stated that he and Ashley Brady-Kelly were required to work together alongside Ron

Magnum in relation to memberships on one occasion on a Saturday. Phillip Ingham disputed Ashley Brady-Kelly's specific allegations of Phillip Ingham's alleged poor performance of his employment duties and he stated that he was not required by Phillip Jent to do physically demanding tasks such as moving weights and wiping down machines. Further, with respect to cerebral palsy, Phillip Ingham stated that it affected people in different ways and he was unaware if Ashley Brady-Kelly was more or less able than he was due to his cerebral palsy since they only worked together once.

42. Phillip Ingham gave evidence that he was exempted by the Company, by way of Phillip Jent from lifting the heavy metal trash bins that he had struggled to lift in the past and he stated that this was the heaviest task that he was ever asked to do.

Evidence of Heather Matthews, Father Joseph Morley and Sirilak Yodpanya

43. We find that the evidence of Heather Matthews, Father Joseph Morley and Sirilak Yodpanya was both credible and satisfactory, albeit their evidence was not substantially relevant to the matters in issue.

Evidence of Denise Simmons

44. Denise Simmons gave evidence that she is a current employee of the Company and she worked with Philip Ingham when he was employed by the Company.
45. She gave evidence that "working at the gym wasn't quite for" Phillip Ingham because he was unable to complete all of the tasks required to open and close the gym and that she expected that anyone that was employed by the Company to work at the front desk should be able to multi-task in order to complete their duties or such an individual should not be employed to work at the front desk. She stated that his inability to complete the latter made her and other employees uncomfortable to leave him at the front desk alone.
46. She stated that Phillip Ingham was not doing the things that he should do at the front desk. For example, he was unable to put on or take off the jacuzzi cover or lift weights when cleaning up the gym and was unable to lift the metal trash cans when it came to emptying the trash. She confirmed that she had complained to Karen Magnum about Phillip Ingham in respect of these two issues. She also stated that Phillip Ingham took twenty minutes or more

than her to count cash for one cash register during idle periods, that Phillip Ingham never understood the Company's computer system and that he left the gym on three occasions at the end of the night and did not let her know that he was leaving.

47. She additionally gave evidence that she was unaware that Phillip Ingham had cerebral palsy during the course of his employment with the Company. She also stated that she was unaware that Phillip Ingham was excused from various activities by Phillip Jent including the two issues that formed the substance of her complaint. She also confirmed that when she found out that Phillip Ingham had cerebral palsy that she recognised that it might affect his work.

Evidence of Karen Magnum

48. Karen Magnum gave evidence that she is the General Manager of the Diet Center and Human Resource Manager of the Company. She also gave evidence that, on evening shifts, Ron Magnum was responsible for Phillip Ingham, that she was not in attendance and that Phillip Jent was Phillip Ingham's supervisor.
49. She stated that she knew of his limitations since the date of the interview and consequently purchased him a left-handed mouse. However, she stated that at that time she was unaware that he had cerebral palsy and that she was unaware that Phillip Ingham had later discussed the fact that he had cerebral palsy with Phillip Jent, Ron Magnum and Toni-Lee Curtis. She said that that during the course of his employment, she was simply aware that he had an issue with his right arm and with lifting heavy things.
50. With respect to Phillip Ingham's termination, Karen Magnum's evidence was that she ultimately decided to terminate Phillip Ingham on behalf of the Company based on the information that she had received from staff with respect to security concerns upon Phillip Ingham's unannounced departure. She stated that the reason for Phillip Ingham's termination was that he was unable to perform the tasks required by a front desk attendant. She stated that he was unable to multitask and that training for this post usually takes two months, that he required an additional six (6) weeks as he seemed "*unable to grasp the basics of the job*" in respect of his "*mental and physical capacity*". There was no evidence of any discussion between Karen Magnum and Phillip Ingham with respect his mental capacity upon his termination.

51. For example, she stated that he was unable to sell basic memberships properly, forgot to deal with the towels, forgot to cash out and let members in without swiping them in. She stated that on numerous occasions management of the Company had telephoned the gym on the evening shift and he did not answer the telephone. When asked about this he said he was helping a customer and could not do both simultaneously.
52. She stated that on a couple of occasions he left the gym at 9:10 p.m., wide open and without telling the other staff. She also stated that after being told that he could not do this he proceeded to do it again and left the manager downstairs cleaning up after a party with the facility left unlocked. She said this was the final straw.
53. Karen Magnum gave evidence that Toni-Lee Curtis and Denise Simmons complained to her that he could not perform his tasks and they were consequently burdened with doing his job. Karen Magnum also gave evidence that the Company received complaints from members that he was too slow and did not answer the phone. There was no evidence of any written complaints to this effect.
54. Karen Magnum gave evidence that Phillip Ingham's employment duties included but were not limited to emptying plastic trash bins and lifting and arranging weights, although she stated that he was not expected to cover and uncover the jacuzzi. She stated that Toni-Lee Curtis may have known that these duties were part of the closing procedure and she acknowledged that Toni-Lee Curtis was complaining about work not being done that she was unaware that Phillip Ingham was exempted from doing. She also stated that she did not know whether Phillip Ingham's employment duties included putting on or taking off the jacuzzi cover. She also gave evidence that Phillip Jent had the authority to tell Phillip Ingham what tasks to do and to excuse him from heavy tasks.
55. With respect to Phillip Ingham's Facebook complaint to her, Karen Magnum stated that in response she discussed the matter with Phillip Jent who was acting in her stead while she was on vacation. She acknowledges that she did not arrange a meeting with Phillip Ingham to discuss this matter, but states that she met with Toni-Lee Curtis and Phillip Jent met with Phillip Ingham to discuss it. She also claimed that Phillip Jent informed her that he spoke to both of them, however such evidence amounts to hearsay. Notwithstanding her receipt of this complaint, she stated that no bullying was brought to her attention.

56. Karen Magnum also gave evidence that the gym (and consequently front desk attendants) was busy and frantic from 5 p.m. to 6 p.m. on Mondays, Wednesdays and Fridays and from 9 a.m. to 12 p.m. on Saturdays. She stated that, during these times, the focus for front desk attendants was primarily on check-in and otherwise involved answering calls, ensuring that memberships are current and selling drinks. She stated that there should always be two employees working at the front desk at a time, so that if one of them leaves (i.e, to go to the restroom), then another employee can remain at the front desk.
57. With respect to Phillip Ingham's failure to answer the telephone at the front desk, Karen Magnum gave evidence that she was unaware as to why the other employee on duty did not answer the telephone instead since Phillip Ingham was on the gym floor with a member.

Evidence of Toni-Lee Curtis

58. Toni Lee Curtis struck us as being less than frank and far from convincing. She was not forthcoming with her answers in an apparent attempt to avoid saying anything that may adversely affect her position. She also sought to avoid answering controversial questions.
59. Toni-Lee Curtis gave evidence that she was a former employee of the Company and she worked with Philip Ingham when they were employed by the Company. She gave evidence that she assumed that Phillip Ingham's employment duties were the same as others typically in that post and included emptying metal trash bins, lifting and arranging weights, covering and uncovering the pool and closing and locking up the business. She stated that he was unable to cover and uncover the pool and to lift and arrange weights. She also stated that she was unaware that he was exempted from most of these duties. She also gave evidence that she did not harass, bully or intend to harm or intimidate Phillip Ingham.
60. With respect to Phillip Ingham's job performance, she stated that he failed to complete tasks ordinarily expected of someone in that post. She also stated that she complained about his inability to multitask during busy periods to Karen Magnum.
61. With respect to the incident that formed the basis of Phillip Ingham's complaint to Karen Magnum, she stated that Phillip Ingham simply walked across her and that he did not explain or discuss any problems that he had with her. She also stated that she spoke to Karen

Magnum about it but that she could not remember the conversation. She stated that no one at the Company explained the problem(s) to her either.

Evidence of Phillip Jent and Ashlee Brady-Kelly

62. Notwithstanding that we find that the evidence of Phillip Jent and Ashlee Brady-Kelly shall be given limited weight, it is noteworthy that Phillip Jent stated in his witness statement that the only problem that Phillip Ingham had *“was a weakness in his right side which made heavier work tough for him”* and that the *“heaviest task he was assigned was emptying the bins”*. He stated that Phillip Ingham was exempted from heavy cleaning in the Kids Zone section of the gym. He also stated that *“the only person who had an issue with him was our lead receptionist Toni who couldn’t deal with his incompetence and would on occasion be very short with him. I could understand her frustration completely as Phil’s errors made more work for me and Toni.”*

63. Ashlee Brady-Kelly’s evidence was that she also has cerebral palsy and she worked alongside Phillip Ingham in the Kids Zone section of the gym. She stated that Phillip Ingham made no effort to perform physically demanding tasks in the Kids Zone and that he had a poor work ethic.

Conclusion

(1) Was the Complainant terminated because of his disability?

64. The Complainant must show that his disability was a factor in the decision to terminate his employment. He does not need to show that it was the sole or even the dominant reason.⁶

65. We find convincing the authority from the Ontario Human Rights Commission advanced by Mr. Foley in support of the contention that a person who *“is terminated from employment during or at the end of a probationary period, as a result of discrimination or the consideration of discriminatory factors, is entitled to file a human rights complaint and seek remedies including damages”*.⁷ We consequently accept the proposition of law advanced by

⁶ *Jocelyn Hébert v 1497422 Ontario Inc* 2013 HRTO 133 (CanLII), Tab 20, para 36.

⁷ See *“Ending the Employment Relationship”* <http://www.ohrc.on.ca/en/book/export/html/8904>

Mr. Foley that an employer cannot terminate an employee without cause during probation if the real reason for the termination is discriminatory.

66. Notwithstanding the Respondents' averment that the Respondents were not aware nor were they made aware by the Claimant of his disability until the end of his employment, the Second Respondent gave evidence that she knew of the Complainant's "limitations" with respect to his right arm and with lifting heavy things since the date of the interview and consequently purchased him a left-handed mouse. However, she stated that at that time she was unaware that he had cerebral palsy. Nonetheless, we accept the Complainant's evidence that he informed Phillip Jent, Ron Magnum and Toni-Lee Curtis that he had cerebral palsy.
67. We accept the proposition of law advanced by Mr. Foley that the First Respondent was under a duty to take pro-active steps in response to the disclosure of his disability.⁸ This authority supports the notion that an employer's ignorance of this obligation under the Act is no defence to a claim for discrimination. Further, once the disability is apprehended or disclosed, there is a positive legal obligation on the employer to make enquiries about the employee's disability, and to make accommodation for the disability where appropriate.⁹
68. On the evidence, we find that the First Respondent failed to make such enquiries. Karen Magnum did not make enquiries as to why Phillip Ingham had an issue with his right side once she was made aware of this. Thereafter, she received complaints about the Complainant's "*physical slowness and mental slowness*". She didn't elaborate on what that meant. But this did not lead Karen Magnum to make inquiries. Similarly, Phillip Jent and Ron Magnum were aware that the Complainant had cerebral palsy but no one made any inquiries about his disability.
69. The complaints from Denise Simmons and Toni-Lee Curtis to Karen Magnum were provided in the absence of any knowledge by Karen Magnum, Denise Simmons and Toni-Lee Curtis that (a) Phillip Ingham has cerebral palsy (at least in the case of Denise Simmons), (b) Phillip Ingham was unable to perform certain duties because he possessed cerebral palsy and (c) Phillip Ingham was exempted from performing certain duties by Phillip Jent because he possessed cerebral palsy. There was an obvious disconnect between the Company's

⁸ *Emra v Impression Bridal Inc.* 2014 HRTO 1736 (CanLII), para 82, 83 and 106.

⁹ *Ibid.*

employees' expectations for Phillip Ingham and the expectations of Phillip Jent for Phillip Ingham (and consequently Phillip Ingham's expectations for himself). Further, Karen Magnum clearly relied on these complaints, rather than any first-hand experience or information of her own, as justification for Phillip Ingham's termination. This may been avoided had the Company made enquiries about Phillip Ingham's disability once Karen Magnum, Phillip Jent and/or Ron Magnum were informed by Phillip Ingham about his disability and subsequently informed the employees about Phillip Ingham's duties in light of such enquiries. Regrettably, no such plan was acted upon.

70. Much of the evidence was that the Company's gym was not an aggressive place to work, that everyone there acts like a team and that it is not usual for employees to be sworn at when they make a mistake. It is not usual for employees to be mocked or mimicked. Instead, there was a collegial atmosphere. However, that was clearly not the case for Phillip Ingham. Consequently, he was treated less favourably than others.

71. For the above reasons and based on the totality of the evidence presented to us, we are satisfied on a balance of probabilities that the Complainant has established at least a *prima facie* case that his disability was a factor in the decision to terminate his employment and consequently the Complainant was discriminated against by the First Respondent and the Second Respondent upon the termination of his employment by the First Respondent.

(2) *Was there a bona fide occupational requirement for the Complainant?*

72. The First Respondent failed to expressly aver a specific *bona fide* occupational requirement.

73. However, there was evidence heard in respect of the same. Karen Magnum gave evidence that Phillip Ingham was unable to multitask. Denise Simmons gave evidence that one must be able to multitask to work as a front desk attendant for the Company.

74. There was also substantial evidence heard, which we accept, in respect of how busy the gym can get during peak hours. Consequently, for the purposes of section 6(9B) of the Act, we find that an ability to multitask amounts to a *bona fide* occupational requirement for this post particularly in light of the busy periods at the gym that comprise a key period of the Complainant's hours of employment.

(3) *Could the Company and Karen Magnum nevertheless have accommodated the Complainant without unreasonable hardship?*

75. The Respondents argued that the Company accommodated Phillip Ingham's "*working abilities to the reasonable extent that*" it could and that the Company was ultimately unable to accommodate the Complainant based on performance. The Respondents also argued that the Company was unable to employ the Complainant elsewhere within the business.

76. In a Canadian case wherein the issues similarly involved multitasking as a *bona fide* occupational requirement and a duty to accommodate, Judge Edmond P. Blanchard stated as follows:

*"In my view, the evidence concerning the CRA managers' intentions and decisions in responding to the limitations identified by Dr. Hilliard, in particular with respect to multi-tasking, was obviously crucial to determining whether the "course of conduct" between the CRA and the Applicant resulted in adverse differential treatment of the Applicant on the basis of her disability."*¹⁰

77. We accept the evidence that, in response to being made aware that Phillip Ingham has a disability, Phillip Jent exempted Phillip Ingham from performing certain employment duties. However, we also find that the Company marginally demonstrated, on a balance of probabilities, that Phillip Ingham was unable to perform fundamental and essential functions and duties of this job even with reasonable adjustments (i.e., exemptions) provided for by Phillip Jent and would be unable to meet the production standards required by the job even with reasonable adjustments. In *Forster v Canada (Attorney General)*, it was recommended that the Applicant work on specific tasks rather than on general tasks that involve varied and multiple activities.¹¹ On the evidence, we find that most of the tasks relating to this post are general tasks that involved varied and multiple activities while interacting with customers at the front-desk. Consequently, with particular consideration of paragraph 4 of Schedule 1 of the Act, we consider therefore that on the evidence the First Respondent has discharged its burden of proof and demonstrated that the retention of the Complainant as a front desk attendant would have caused the Company unreasonable hardship.

¹⁰ *Forster v Canada (Attorney General)*, 2006 FC 787 (CamLII), para 77.

¹¹ *Ibid.*, para 72.

78. In any event, we find that as a small business with limited staff, the Company would suffer undue hardship if it was compelled to modify the circumstances of Phillip Ingham's employment by changing his work hours and/or his the timing of his shifts generally to a less busy period. This is particularly the case, because Phillip Ingham's employment at the Company involved filling a temporary post that had become available.

(4) Was the Complainant discriminated against by the Third Respondent when the Third Respondent allegedly harassed him because of his disability?

79. Only Phillip Jent gave direct evidence of Toni-Lee Curtis' treatment of Phillip Ingham during the course of their employment with the Company. His evidence made clear that Toni-Lee Curtis had an issue with Phillip Ingham in light of his job performance and would get frustrated with him. According to Phillip Jent, Toni-Lee Curtis "*would on occasion be very short with him*" and his "*errors made more work for me and Toni*". Otherwise, the key evidence on this issue was that from Phillip Ingham and Toni-Lee Curtis.

80. We find that Phillip Ingham's evidence as to Toni-Lee Curtis' persistent treatment of him (including but not limited to her mocking and bullying of Phillip Ingham) was very convincing. We also find that such treatment was vexatious and that Toni-Lee Curtis knew, or ought reasonably to have known, such treatment was unwelcomed by Phillip Ingham.

81. We find that Toni-Lee Curtis' evidence was consistently unconvincing. This was particularly the case with respect to her encounter with Phillip Ingham in the gym's laundry room. This incident took place after a complaint made by Phillip Ingham about Toni-Lee Curtis to her employer. It was also the only time that Phillip Ingham and Toni-Lee Curtis ever discussed Phillip Ingham's complaint to Karen Magnum as well as the nature of Phillip Ingham's disability. Contrary to her evidence, we do not accept that Toni-Lee Curtis has absolutely no recollection of this incident or conversation with Phillip Ingham. It is more likely that such a conversation would be memorable for Toni-Lee Curtis given the nature of what was discussed. Consequently, we find that on a balance of probabilities Phillip Ingham was harassed in the work place by Toni-Lee Curtis on the basis of his disability.

(5) Did the First Respondent and the Second Respondent fail to take steps to prevent the Complainant from being harassed because of his disability, and also failed to take remedial steps upon the Complainant complaining that he was being harassed because of his disability?

82. Besides the fact that at all material times the Company did not have an anti-harassment policy, for the reasons outlined above we find that the Company failed to make enquiries when put on notice about Phillip Ingham's disability.

83. We find that the Company and Karen Magnum failed to conduct a proper investigation of Phillip Ingham's complaint about Toni-Lee Curtis' treatment of him. Toni-Lee Curtis gave evidence that no specific mention of Phillip Ingham's allegations were discussed with her. Further and more importantly, no one at the Company discussed Phillip Ingham's complaint with him. We accept Mr. Foley's submission that the Company's suggestion is that Phillip Ingham's complaint was investigated by the Company but that averment is not supported by the evidence. Instead, Phillip Ingham's complaint was ignored and no one at the Company tried to determine whether or not he was telling the truth, what the cause of those complaints were and how they related to any issues which might have arisen during his employment. In light of Phillip Ingham's complaint and the subsequent facts, the evidence confirms that there was no plan in place at the Company with respect to dealing with someone with a disability. There was no awareness by the Company as to what its obligations were when it employs someone with a disability. With this in mind, we find that the First Respondent and the Second Respondent failed to take steps to prevent the Complainant from being harassed because of his disability, and also failed to take remedial steps upon the Complainant complaining that he was being harassed because of his disability.

84. With respect to the Complainant's claim for loss of wages, Phillip Ingham earned \$16.50 per hour and we find that he earned a total of \$12,012 per year. The Complainant avers that, despite his best efforts, he has been unable to secure alternative employment.

85. However, the Complainant has a duty to mitigate his loss. Other than Philip Ingham's employment stint at Siam Thai Massage and Herbal Spa Ltd. in March 2013, there is no evidence of any efforts to mitigate his loss such as job applications or searches and the contacts that were made if possible. We find that this is particularly relevant since Phillip Ingham claims that he was unemployed for approximately 2½ years after the termination of

his employment with the Company. Accordingly, we award damages in the sum of \$6,006 reflective of loss of wages for a period of six months.

86. With respect to the Complainant's claim for injury to feelings pursuant to section 20A of the Act, the general principles in relation to assessing compensation for injury to feelings are helpfully set out in the decision of *Vento v Chief Constable of West Yorkshire Police*¹² and are as follows:

(a) Awards for injury to feelings are compensatory. They should be just to both parties. They should compensate fully without punishing the tortfeasor. Feelings of indignation at the employer's conduct should not be allowed to inflate the award;

(b) Awards should not be too low, as would diminish respect for anti-discrimination legislation. Society has condemned discrimination and awards must ensure that it is seen to be wrong. On the other hand, awards should be restrained, as excessive awards could be seen as the way to "*untaxed riches*".

(c) Awards should bear some similarity to the range of awards in personal injury cases;

(d) In exercising their discretion in assessing a sum, tribunals should remind themselves of the value in everyday life of the sum they have in mind. This may be done by reference to purchasing power or by reference to earnings;

(e) Tribunals should bear in mind the need for public respect for the level of awards made.

(f) The level of compensation should relate to the degree of detriment suffered by the complainant.

87. The Court of Appeal in *Vento* identified three broad bands of compensation for injury to feelings, which were updated in *Da'Bell v National Society for the Prevention of Cruelty to Children* [2010] IRLR 19:

(a) The top band is normally between £18,000 and £30,000. Sums in this range should be awarded in the most serious cases, such as where there has been a lengthy campaign of

¹² [2003] IRLR 102. This authority was similarly relied upon in the Board of Inquiry Decision of *Sticca v Stonington Beach Hotel Ltd. and Robinson*, dated 15 December 2006.

harassment. Only in the most exceptional cases should an award of compensation for injury to feelings exceed £25,000.

- (b) The middle band is between £6,000 and £18,000. This should be used for serious cases that do not merit an award in the highest band.
- (c) The lower band is between £500 and £6,000. This is for less serious cases, such as where the act of discrimination is an isolated or a one-off occurrence. In general, awards of less than £500 (\$900) are to be avoided altogether, as they risk being regarded as so low as not to be a proper recognition of injury to feelings.

88. We have determined that Phillip Ingham should receive injury to feelings in the amount of \$9,000. This amount falls at the lower end of the mid-band range. The following factors were determinative:

- (a) Phillip Ingham, as a disabled person, was vulnerable;
- (b) Toni-Lee Curtis' harassment had such a negative effect on Phillip Ingham that he sought solace from his pastor, Father Joseph Morley;
- (c) Toni-Lee Curtis' harassment caused Phillip Ingham to be anxious, distressed and made him physically ill;
- (d) The harassment was both verbal and physical and took place over a period of approximately five weeks;
- (e) Phillip Ingham complained about Toni-Lee Curtis' harassment and no proper investigation into his grievance was conducted; and
- (f) Phillip Ingham's employment with the Company was ultimately terminated.

Conclusions

89. In light of our findings of fact and our analysis of the law, we conclude that the Company, Karen Magnum and Toni-Lee Curtis are liable to Phillip Ingham. The rationale for this conclusion is that they have each committed breaches of the Act independent of each other. Toni-Lee Curtis has committed the acts complained of by Phillip Ingham and the Company

and Karen Magnum have failed in complying with their respective obligations to take such action as is reasonably necessary to ensure that harassment does not occur in the workplace.

Powers of Tribunals

90. Section 20(1) of the Human Rights Act sets out the following powers of Tribunals:

“20(1) A tribunal after hearing a complaint shall decide whether or not any party has contravened this Act, and may do any one or more of the following-

- (a) order any party who has contravened this Act to do any act or thing that, in the opinion of the tribunal constitutes a full compliance with such provision and to rectify any injury caused to the complainant by the contravention and to make financial restitution therefor:

Provided that financial restitution shall not be ordered for any loss which might have been avoided if the Complainant had taken reasonable steps to avoid it; or

- (b) if it is satisfied that an offence has been committed and that any order that it may make under paragraph (a) will be complied with, refer the complaint to the Director of Public Prosecutions with a view to a prosecution; and additionally or alternatively;

- (c) order any party to the dispute to pay any other party or the Commission costs of the proceedings before the tribunal, not exceeding in the aggregate \$1000.

Order

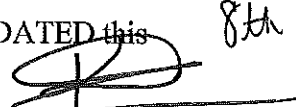
91. For the reasons outlined above, we order as follows:

- (a) The Company and Karen Magnum are jointly and severally liable to Phillip Ingham in the gross amount of \$6,006 for loss of wages.¹³
- (b) Toni-Lee Curtis, Karen Magnum and the Company are jointly and severally liable to Phillip Ingham in the amount of \$9,000 for injury to feelings;

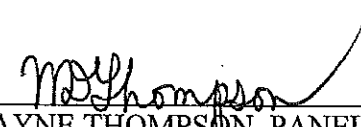
¹³ See section 7(1)(c) of the Payroll Tax Act 1995.

- (c) Toni-Lee Curtis shall pay to the Human Rights Commission the sum of \$1,000 in respect of costs pursuant to section 20(1) (c) of the Act;
- (d) Karen Magnum shall pay to the Human Rights Commission the sum of \$1,000 in respect of costs pursuant to section 20(1) (c) of the Act;
- (e) The Company shall pay to the Human Rights Commission the sum of \$1,000 in respect of costs pursuant to section 20(1) (c) of the Act; and
- (f) The Company shall within 90 days formalise its anti-harassment policy. The Company shall update the Company's employee handbook by amongst other things setting out this policy and stating that the terms of each employee's employment are to be construed in a manner to give effect to the Act. In addition, the Company should adopt a non-discrimination policy.

DATED this 8th day of October, 2015


KAI MUSSON, CHAIRMAN


NAOMI SCHROTER, PANEL MEMBER


DWAYNE THOMPSON, PANEL MEMBER