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DIFFERENTIAL PAY-SCHEMES RULED DISCRIMINATORY

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A. INTRODUCTION

The Human Rights Tribunal of Ontario is likely the first Canadian court or tribunal to consider a discriminatory pay scheme affecting persons with developmental disabilities. In February 2014, the Tribunal Vice-Chair Ken Bhattacharjee ruled in *Garrie v Janus Joan Inc.* that paying developmentally-disabled employees $1.25 per hour, while paying employees without disabilities minimum wage for doing substantially similar work was discriminatory.[1] This decision, to be discussed in this *Charity Law Bulletin*, is important for charities and not-for-profits that employ people with disabilities. It should also have a wide-reaching impact on any potential situation dealing with a differential pay scheme.

B. THE FACTS

Terri-Lynn Garrie, a developmentally-disabled woman, was paid $1.00 to $1.25 per hour during the ten years that she worked for Janus Joan Inc. Garrie began working for Janus Joan Inc. in January 1999 as a general labourer, and she was terminated on October 26, 2009. Following her termination, Garrie's mother filed a human rights complaint on Terri-Lynn's behalf, alleging discrimination in employment on the basis of disability contrary to Section 5 of the Ontario *Human Rights Code* (the "Code").

At Janus Joan Inc., Garrie, and up to ten other developmentally-disabled employees, worked alongside other labourers who did not have developmental disabilities. All of the workers did substantially similar

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[1] *Garrie v Janus Joan Inc*, 2014 HRTO 272 (CanLII).

work, including heavy lifting and other manual duties. The employees with developmental disabilities earned a "training honorarium" that was initially $1.00 per hour and later increased to $1.25 per hour. The employees without disabilities earned minimum wage in accordance with the Ontario *Employment Standards Act, 2000* (the "ESA").

In addition to the "training honorariums" the developmentally-disabled employees continued to receive Ontario Disability Support Plan payments. The honorariums were kept low so that the income could not be clawed back. The parents or guardians of the developmentally-disabled employees therefore likely knew of the low pay being given to the employees with disabilities. Janus Joan Inc. did not report any of the income that it paid its disabled employees and it did not make any Employment Insurance (EI) or Canadian Pension Plan (CPP) contributions.

Within a month after Janus Joan Inc. terminated Garrie, it also terminated all of the other employees who had developmental disabilities.

After the human rights complaint was made in November 2009, Janus Joan Inc. subsequently ceased operations. Its owner, Stacy Szuch, filed for personal bankruptcy in Febuary 2010. Ms. Szuch subsequently filed submissions on a personal basis in May, 2012 in the reconsideration request referred to below. In her submissions, Szuch claimed that Janus Joan Inc. did not provide "supportive employment", which would pay people with developmental disabilities minimum wage, but rather it provided "volunteer trainee" placements and that the trainees did not have the same work responsibilities as other labourers.

C. CASE HISTORY

This is the second time that the Tribunal dealt with this application. In 2012, the Tribunal found that the firing itself was discriminatory and awarded damages in the amount of $15,000 for violation of the right to be free from discrimination, and $2,678.50 for lost income, based on the $1.25 pay rate.[2] However, in 2012 the Tribunal declined to rule on the important question as to whether Janus Joan Inc. discriminated against Garrie by paying her less than employees who did not have developmental disabilities, ruling

[2] *Garrie v Janus Joan Inc*, 2012 HRTO 68 (CanLII).

that Garrie had missed the applicable limitation period. Under the Code a person is required to file an application within one year of the alleged discrimination occurring, which in this instance was deemed to be within one year of receiving her first pay cheque.

Garrie's counsel requested reconsideration of this 2012 decision. Garrie's lawyers argued that the wage difference was an on-going series of acts and that her award for lost income should reflect minimum wage she would have earned over the entire term she worked at the company. Reconsideration was allowed and the Ontario Human Rights Commission (the "Commission") intervened in the subsequent hearing.

D. REASONS OF THE TRIBUNAL

Vice-Chair Bhattacharjee considered whether Janus Joan Inc. discriminated against Garrie on the basis of disability by paying her less than employees who did not have developmental disabilities. Sections 5 and 9 of the Code are applicable. They state:

> s. 5(1) Employment – Every person has a right to equal treatment with respect to employment without discrimination because of...disability.
>
> s. 9 Infringement prohibited – No person shall infringe or do, directly or indirectly, anything that infringes a right under this Part.

Vice-Chair Bhattacharjee found that Janus Joan Inc. did, in fact, pay its developmentally-disabled employees less than it paid its employees who did not have disabilities. He commented that characterizing Garrie as a "trainee" was impossible because Garrie had worked for Janus Joan Inc. for more than 10 years. He also found that, contrary to what was stated in Szuch's submissions, the employees with developmental disabilities had work-related responsibilities and their inability to do some duties involving fine-skills could not justify a differential pay scheme.

Vice-Chair Bhattacharjee also found that the pay scheme was discriminatory because it distinguished based on disability and imposed an arbitrary disadvantage. Vice-Chair Bhattacharjee commented that

paying Garrie and other developmentally-disabled employees less than minimum wage was "an affront to their dignity and a disadvantage."[3] He agreed with Garrie's counsel that:

> *Minimum wage represents a public policy statement about the worth of human labour in our society. Underpayment of the Applicant represents a profound comment about the value of her labour relative to that of the non-disabled people working alongside her.*[4]

Vice-Chair Bhattacharjee emphasized that the Ontario government held a similar view in 1986 when it repealed Section 24 of the former version of the ESA, which at that point allowed employers to pay employees with disabilities lower wages.[5] He also held that by not withholding EI premiums or CPP contributions Janus Joan Inc. caused a significant disadvantage, as the employees were ineligible to receive EI after being dismissed and would receive lower CPP payments upon retirement.

Finally, Vice-Chair Bhattacharjee's decision emphasized that although the parents of the developmentally-disabled employees and, potentially, the Ontario provincial government knew about Janus Joan's pay scheme, this did not eliminate the employer's responsibility to adhere to the Code. He concluded by stating that "it is a fundamental principle of human rights law that an agreement between parties cannot allow a 'contracting out' of the application of the Code."[6]

E. REMEDIES

In addition to finding that the pay scheme was discriminatory, the Tribunal awarded Garrie over $185,000, including almost $162,000 in lost wages and $25,000 in damages for injury to dignity, feelings, and self-respect. Further, the Tribunal directed a copy of the decision to the Commission and recommended that the Commission determine whether the practice of paying persons with developmental disabilities below the statutory minimum wage is widespread in Ontario, and make recommendations, if appropriate, to the Ontario government on how to rectify the situation.

[3] *Supra* note 1 at 72.
[4] *Ibid* at 73.
[5] *Ibid* at 51.
[6] *Ibid* at 81.

F. CONCLUSION

The decision in *Garrie v Janus Joan Inc.* gives a strong warning to employers, including charities and not-for-profits, that all employees, regardless of whether or not they have disabilities of any type, must be paid at least the provincial minimum wage for their work, and their pay should reflect the prevailing labour market rate for their position. Therefore, unless the employer is participating in a federal or provincial wage subsidy program, it is required to pay at least the full provincial minimum wage to an employee with disabilities.[7] The decision in *Garrie v Janus Joan Inc.* also emphasizes that any differential pay scheme between employees based on a protected ground under the Code will be considered discriminatory. Further, the decision underlines that all employers have a basic duty to adhere to the Code, regardless of whether or not any other parties (including the employee) might be aware of a discriminatory practice. Finally, depending on any further investigation by the Commission or the Ontario government, there is the potential for similar practices to be subject to legal scrutiny.

The text of this decision is available online at: http://canlii.ca/t/g609z .

[7] Section 3(5) of the ESA contains limited exceptions concerning those to whom the ESA applies. If a charity or not-for-profit employs a person with a disability who falls within one of these exceptions, it does not need to pay that person minimum wage. These exceptions include: secondary school students who perform work under a work experience program authorized by the school board; individuals who perform work under a program approved by a college or university; participants in community participation under the *Ontario Works Act, 1997*; and individuals who perform work in a stimulated work environment if the primary purpose is placing the individual in the environment for his/her rehabilitation.

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