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**BEFORE THE HUMAN RIGHTS BOARD OF ADJUDICATION**

**IN THE MATTER OF  
THE YUKON HUMAN RIGHTS ACT**

**AND  
IN THE MATTER OF**

**Sharon McConnell**

**v.**

**Y.T.G. - Public Service Commission and Department of Justice**

**- DECISION -**

**AND**

**Reasons for the Decision**

**March 26, 1999**

IN THE MATTER OF THE YUKON HUMAN RIGHTS BOARD OF ADJUDICATION  
And in the matter of  
Sharon McConnell v. Y.T.G. Public Service Commission & Dept. of Justice

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**-- DECISION --**

On September 11, 1998, the Board issued its Decision in connection with the complaint of Sharon McConnell dated December 17, 1992, filed with the Yukon Human Rights Commission, with respect to whether the Respondent had discriminated against her because of a mental disability. The Board found that the Respondent had discriminated against the Complainant and held that the Respondent had failed to establish reasonable accommodation of the Complainant's mental disability, in contravention of the Yukon Human Rights Act.

The Board made the following Orders for damages:

1. Ms. McConnell was entitled to an award equal to the amount she would have earned as a full-time Employee for two full years;
2. Any award must deduct the actual income earned by the Complainant during each of the first two years after the discrimination;
3. Simple interest shall be calculated and added to the award for financial loss;
4. \$1,500 attributable as damages for injury to dignity, feelings, and self-respect; and
5. The Yukon Territorial Government shall pay costs to the Complainant.

The Board also ordered that the Yukon Territorial Government shall, within one month, offer to re-hire Sharon McConnell in a department other than Justice.

Following the Board's decision of September 11, 1998, the Complainant wrote to the Yukon Human Rights Board of Adjudication to request that it reconvene to consider several outstanding matters. The Board reconvened on March 5, 1999 to consider the following five issues:

1. Whether the Board had the jurisdiction to reconvene after the final Decision was issued on September 11, 1998;
2. Whether the Board had the jurisdiction to consider the implementation and enforcement of certain terms of the Board's decision of September 11, 1998;
3. Whether the Board was obliged to assess costs pursuant to Section 15 of the Regulations of the Yukon Human Rights Act;
4. Clarification of the interest rate to be used in the calculation for "simple interest"; and
5. Clarification of the deductibility of disability benefits received by the Complainant.

The Board was able to rule on the first three of the above issues on March 5, 1999, but required further submissions relating to the issues of "simple interest" and the deductibility of insurance benefits. The Parties agreed to provide written submissions to the Board by March 12, 1999 and the Board would provide a written decision by March 26, 1999.

## Jurisdiction - Preliminary Issue

On March 5, 1999, the Board held in an oral decision that the Board was not precluded from reconvening for the purposes of clarifying our decision of September 11, 1998. The Board is not *functus officio* provided the Board reconvenes to clarify the previous decision and not make any new findings, set aside, vary or change any aspect of the previous decision.

Although the Board has jurisdiction to reconvene, the Board held that the Parties in this matter may challenge the Board's specific jurisdiction with respect to each issue by showing that the Board has already ruled on the matter and is therefore *functus officio*.

## Enforcement

In the oral decision, the Board held that issues in respect of enforcement of certain terms of our decision of September 11, 1998, is addressed in Section 25 of the Yukon Human Rights Act, which provides:

*25. An Order of the Board of Adjudication may be filed in the Supreme Court and it shall then be enforceable as an Order of the Supreme Court.*

## Costs

Counsel for the Complainant submits that costs should be assessed by this Board in accordance with Section 15 of the Regulations of the Yukon Human Rights Act. Section 15 of the Regulations provide:

*15. If the Board of Adjudication awards costs, those costs, (a) shall not exceed actual costs incurred by the party to whom the costs are awarded, and (b) shall be assessed by the Board as party and party costs in the same manner and on the same basis as if the hearing had been in proceeding of the Supreme Court. [emphasis added]*

Counsel for the Respondent submits that Section 15 of the Regulations must be read in conjunction with the entire Yukon Human Rights Act and the Supreme Court Rules. In interpreting Section 15 (b) of the Regulations, the Board held that costs should be determined by the Registrar of the Supreme Court.

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Although the Board recognizes that the Yukon Human Rights Act and Regulations should be given a purposive approach, the issue of who should be assessing costs should have no impact to the Complainants human rights. The assessment of costs is a procedural matter. Furthermore, the Board concludes that the words "in the same manner and on the same basis" directs this Board to have costs assessed "in the same manner" as a decision of the Supreme Court, which is to have the Registrar assess costs. Therefore, this Board orders that the costs shall be assessed by the Registrar of the Supreme Court.

## **Interest**

The Board's decision on September 11, 1998, held that "simple interest shall be calculated and added to the award for financial loss."

The Complainant and the Human Rights Commission submit that the interest rate should be calculated in accordance with the Yukon Judicature Act, with a further submission by the Human Rights Commission that interest is calculated at 3-month intervals from the date of the Complainant's termination to the date of the award. The Respondent submits that the Board's final decision of September 11, 1998 created a "debt obligation" that should be calculated in accordance with the Yukon Financial Administration Act and Regulations.

This Board finds that the Judicature Act is the Act that should direct the calculation of simple interest. The Judicature Act is preferred over the Financial Administration Act for two reasons:

1. The Government of the Yukon should not receive favorable treatment than any other employer when it has been found to have discriminated against the human rights of an Employee. In this case, the obligation arose by the Government in its capacity as an Employer, and not in its capacity as a governing body.
2. The Financial Administration Act is intended to apply to situations where the Government of the Yukon contracts with other Parties.

This board finds that the calculation of "simple interest" will be in accordance with the Judicature Act, and calculable as if this was an order of the Supreme Court of the Yukon Territory.

## Deductibility Of Insurance Benefits

The Complainant and the Yukon Human Rights Commission both submit that the sum of money that was paid to the Complainant by her disability insurer in August of 1992, should not be deducted from the actual income earned by the Complainant. The Complainant submits further that the Board of Adjudication is *functus officio* on this issue and, as the Respondent did not appeal this portion of the decision, it must therefore stand as pronounced.

On the issue of jurisdiction, this Board finds that we are not *functus officio* to clarify our decision on the question of deductibility of insurance benefits. This Board finds that additional explanation is required to interpret how the law deducts insurance benefits.

Having found that the Board is not *functus officio*, the Board finds that the disability insurance benefits should be deducted from the Complainant's actual income, for the reasons set out below. After considering the written submissions and cases by Counsel, the question of the deductibility of insurance benefits has to consider the issue of double recovery against the common law principle that disability benefits arising from contractual obligations such as insurance benefits, are not deductible from damages.

Although the sum of money in dispute is unquestionably from an insurance provider, and the Complainant has at least partially provided consideration for the insurance premiums, this Board finds the general rule against double recovery should be applied in this case and only the net loss should be awarded as damages.

In this case, the general rule against double recovery should prevail over the common law exception for insurance benefits because:

1. The Complainant has not lost the value of her insurance benefits. In fact, the Complainant had received the full value of her insurance benefits for two full years, and now seeks to claim the sum of money that was provided to assist the Complainant in finding a new job. This sum of money was essentially a "bonus" for which the complainant provided no consideration.
2. The issue of the deductibility of long-term disability benefits in the Yukon was considered by Mr. Justice Hudson in the Yukon Supreme Court in *Kenneth Smith v. Shakir Alwarid and Government of Yukon Territory*. In that case, as in the present case, the court held that although the Complainant contributed to the long-term disability plan, the plan was not the subject of negotiation and was unrelated to any prescience on the part of the plaintiff. Nor was there evidence that there was a trade-off whereby the long-term disability was obtained in exchange for a lesser wage.