HUMAN RIGHTS TRIBUNAL

IN THE MATTER OF a Notification made under Part 4 of the Nunavut *Human Rights Act* and before the Nunavut Human Rights Tribunal

B E T W E E N:

Peter Petaulassie

Applicant

-and-

Hamlet of Cape Dorset

Respondent

DECISION

Adjudicator: Bonnie Almon

Heard at: Iqaluit

Decision Date: April 16, 2012

File Number: 06-11

Indexed as: **Petaulassie v. Hamlet of Cape Dorset, 2012 NHRT 2**

APPEARANCES BY

Peter Petaulassie, Applicant:	**Mark Mossey, Legal Counsel**
Hamlet of Cape Dorset, Respondent:	**Sylvie Molgat, Legal Counsel**

INTRODUCTION

[1] This Notification was filed by Peter Petaulassie ("the applicant") alleging discrimination against The Hamlet of Cape Dorset ("the respondent") on January 11, 2007 under the Nunavut *Human Rights Act* ("the *Act*"). Mr. Petaulassie alleges he suffered discrimination on the grounds of race, ethnicity, place of origin and family status during a job competition with the Hamlet of Cape Dorset in May, 2005.

[2] In a Part IV decision dated April 29, 2009 it was noted that Mr. Petaulassie's original claim did not fit the criteria of race, ethnicity or place of origin. However, there was information which, if accepted at a hearing, could support a finding of discrimination based on family status under the *Act.* Therefore, the decision said that the Notification would go to a hearing on the issue of whether Mr. Petaulassie experienced discrimination in employment on the basis of family status.

[3] Throughout several months of correspondence between the Nunavut Human Rights Tribunal office and both parties, and at a Pre-hearing conference in June 2010, it is noted Mr. Petaulassie's legal representative requested specific documents from the respondent that pertained directly to his claim of discrimination. The said documents (which related to the job competition at issue) were a significant piece of evidence in these proceedings. The documents were never disclosed by the respondent after repeated requests. Several attempts were made to enter into a mediation process with both parties without success, as the respondent was unable to provide necessary documentation to proceed. A Notice of Pre-Hearing conference scheduled for September 09, 2011 was sent and received by both parties on June 21, 2011. No requests were made at this time to reschedule this Pre-Hearing.

[4] On September 09, 2011 a second Pre-Hearing conference took place. The applicant's legal counsel was in attendance. No one appeared on behalf of the respondent, nor did the respondent contact the Tribunal to advise it would not be in attendance. After a twenty minute delay in waiting for the respondent, the Pre-Hearing commenced, in accordance with Rule 38 of the Tribunal's Rules of Procedure.

[5] In a Pre-Hearing Conference memorandum issued after the Pre-Hearing, the respondent was given until October 06, 2011 to disclose all relevant documentation. As well, the respondent was to indicate whether it intended to call any witnesses (and advise who they would be) and to give the Tribunal dates for a one-day hearing. The respondent was cautioned about its ongoing failure to participate in these proceedings and was told that if it did not follow these procedural directions, the Tribunal could fix a date for a hearing with no further notice to the respondent (Rule 23 of the Tribunal's Rules of Procedure). The memorandum also explained that the Tribunal could, if it found discrimination after the hearing, order the respondent to pay the applicant compensation. Despite the clear direction of the Tribunal, the respondent failed to advise the Tribunal whether it would be participating in the hearing, to advise whether it would be calling any witnesses and who those witnesses would be, to provide any documents or to provide dates it would be available for a hearing.

[6] Even though the Tribunal was not required to give the respondent notice of the hearing, the Notice of Hearing was sent to the respondent. The respondent received the Notice but did not contact the Tribunal to advise that it wanted to participate in the hearing, would not be available or that it wished to retain counsel. However, just one business day before the scheduled hearing, the respondent contacted the Tribunal to request an adjournment. The respondent advised that it had retained a lawyer but that the lawyer was not available on the date of the hearing.

[7] Under the circumstances, the request for an adjournment was denied. The Tribunal noted that it has the discretion to grant or refuse an adjournment on proper grounds. Last minute adjournment requests (in this case, a request received one business day prior to the hearing) will only be accepted in extraordinary circumstances. The fact that the respondent decided at the very last moment to participate in the hearing and just days before the hearing retained counsel who was not available on the date of the hearing was not found to be an extraordinary circumstance. The Tribunal noted that the respondent had ample opportunity to comply with the repeated directions of the Tribunal and to seek legal counsel in a timely fashion and failed

to do so.

[8] The Tribunal indicated that the respondent is not entitled to delay these proceedings any further through its own failure to comply with the directions of the Tribunal and to seek legal counsel in advance; see for example *CUPE, Local 30 v. WMI Waste Management of Canada Inc.* (1996), 34 Admin. L.R. (2d) 172 (Alta C.A.) at paras 9, 10. Allowing an adjournment in these circumstances would be both unfair to the applicant and contrary to the interests of having human rights disputes heard in a timely fashion and preventing an abuse of the Tribunal's process.

[9] Therefore, the hearing went ahead as scheduled on December 05, 2011 in Iqaluit, Nunavut. The applicant and his legal counsel were in attendance.

[10] The respondent's legal counsel Ms. Sylvie Molgat was also in attendance via teleconference.

[11] At the beginning of the hearing, I was asked to consider the role of Ms. Molgat in the hearing given the respondent's lack of participation to date. I heard submissions from both parties. I also allowed the parties time to speak to see if they could reach an agreement on the issue. Ultimately, after hearing the submissions I ruled that I would allow Ms. Molgat the right to cross examine to fully test the evidence of the applicant, but I would not allow her to make argument at the close of the hearing.

[12] I then heard the evidence of the applicant. The applicant was cross examined by Ms. Molgat. The respondent did not present any evidence of its own.

FACTS

[13] As indicated, I heard evidence from one witness, Mr. Peter Petaulassie. While his evidence was tested under cross examination, Mr. Peter Petaulassie's evidence was not

contradicted by evidence of any other witness. In assessing Mr. Petaulassie's evidence I have considered the traditional test used in human rights and other cases from the decision of the British Columbia Court of Appeal in *Faryna v. Chorny*, [1952] 2 D.L.R. 354:

> (…) Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors, combine to produce what is called credibility….
>
> The credibility of interested witnesses, particularly in cases of conflict of evidence cannot be gauged solely by the test of whether the personal demeanor of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of the witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions…. Again, a witness may testify to what he sincerely believes to be true, but he may be quite honestly mistaken.

I found Mr. Petaulassie testified in a straightforward and honest manner. Even under cross examination his evidence on the major points remained fairly consistent. Where he did not recall information or was unsure he admitted it. While he could not remember some details, this was not surprising given that the events occurred over 6.5 years earlier. He did not exaggerate and his evidence was balanced and reasonable in the circumstances. In light of the fact that I found Mr. Petaulassie to be a credible witness and the fact that his evidence was not contradicted by any evidence called by the respondent, I accept his version of the events at issue in this Notification.

[14] Peter Petaulassie testified that he was born and raised in Cape Dorset and that his family has been in the community for generations. The high school in Cape Dorset is named after Mr. Petaulassie's grandfather.

[15] Mr. Petaulassie applied for the position of Arena Manager/Recreation Coordinator with the Hamlet of Cape Dorset after the respondent posted the competition on or about the 12th of April, 2005. Mr. Petaulassie testified that he understood the requirements of the job to include

maintaining the arena, Zamboni duties, janitorial duties and supervising people using the arena. He described the position as an 'unskilled' position.

[16] Three people applied for the position in response to the competition which closed on or about April 30, 2005. The three applicants were Peter Petaulassie, Mr. W.S. and Mr. J.A.

[17] W.S. is the common law son- in- law of Ms. C.C. At the time of the competition, Ms. C.C. was the respondent's Director of Recreation. Mr. W.S. was ultimately successful in landing the position.

[18] The respondent's hiring policy and procedures, which was made an Exhibit, state in the third paragraph: "Every effort must be made to ensure local community members are given priority in the hiring practice for all jobs". Mr. Petaulassie testified that having been born, raised and educated in Cape Dorset and having lived there most of his life, he considered himself to be a local community member. His evidence was that the successful candidate had only been resident in Cape Dorset for several months.

[19] Mr. Petaulassie presented his résumé as evidence showing his education and employment history both before and after he was unsuccessful in the competition for the Hamlet of Cape Dorset. His résumé, which was made an Exhibit, shows that when he applied for the arena manager job he had obtained a Grade 12 diploma from Peter Pitseolak High School and two Certificates, one in Legal Interpreting and one in Office Administration, from Nunavut Arctic College. He had held a variety of jobs including as a store clerk, Inuit Qaujimajatuqangit Coordinator and court worker.

[20] There was no evidence before me concerning the qualifications of the other candidates.

[21] Mr. Petaulassie testified that he believed he was qualified for the Arena Manager position and that he felt he had answered the questions in the interview proficiently and professionally.

[22] Mr. Petaulassie stated that as a result of this loss of a job opportunity he was forced to

leave his community to look for employment. He described the impact of the loss of this job opportunity on him.

ANALYSIS AND DECISION

[23] Section 9 of the *Act* states:

> **9.** (1) No person shall, on the basis of a prohibited ground of discrimination,
> (a) refuse to employ or refuse to continue to employ an individual or a class of individuals; or
> (b) discriminate against any individual or class of individuals in regard to employment or any term or condition of employment, whether the term or condition was prior to or is subsequent to the employment.

Under s. 7(1) of the Act, family status is a prohibited ground of discrimination.

[24] Even where a respondent does not call evidence at the hearing, the applicant must still show the Tribunal, on a balance of probabilities that discrimination occurred. In a hiring case, this requires showing that: (1) he was qualified for the position (2) but was not chosen and (3) the person who was chosen was no better qualified but lacked the characteristic that the applicant says was the reason he was not chosen (i.e. a different family status); *Rivers v. Squamish Indian Band Council*, 1994 CanLII 1217 (CHRT) at p. 42. Therefore, I must find that Mr. Petaulassie was qualified for the position, that Mr. W.S. was not more qualified and that the decision to choose Mr. W.S. over Mr. Petaulassie was related to family status, i.e. his relationship to the Director of Recreation with the respondent.

[25] I accept Mr. Petaulassie's evidence, based on his uncontradicted testimony that he was qualified for the Arena Manager position. Given the nature of the position and Mr. Petaulassie's education and work experience at the time, I find that he was qualified for the job. Due to the respondent's lack of participation in the hearing, I have no evidence concerning the qualifications of Mr. W.S. In the absence of any evidence to the contrary, I accept Mr. Petaulassie's position that Mr. W.S. was not more qualified.

[26] I am prepared to find that based on the fact that Mr. Petaulassie was a life-long

community member of Cape Dorset and Mr. W.S. had not been in the community for long (perhaps just a matter of months), Mr. Petaulassie was more qualified than Mr. W.S. owing to the Hamlet's policy giving preference for hiring "local community members." While I am not finding that a person who has recently joined a community cannot be a local community member, based on the evidence in this case, Mr. Petaulassie's connection to the community clearly went much deeper than that of Mr. W.S. However, Mr. W.S. was given the job and was a family member of someone who worked for the Hamlet at the time.

[27] The applicant's counsel presented cases to the Tribunal that illustrate that discrimination on the basis of family status includes "nepotism" or preferring someone because they are a relative; e.g. *Fitzherbert v. Underhill*, 1990 CarswellNat 1367, 13 C.H.R.R. D/105, *Thomson v. Eurocan Pulp & Paper Company* (2002), 2002 BCHRT 32; *B. v. Ontario Human Rights Commission* (2000), 195 D.L.R. (4th) 405, [2002] 3 S.C.R. 403, *Szabo v. Atlas Employees Welland Credit Union*, 1987, 9 C.H.R.R. D/4735; *Rivers v. Squamish Indian Band*, 1994 CanLII 1217 (CHRT). I agree that these cases show that not being considered for a job because someone who is a relative is given preferential treatment can constitute discrimination based on family status.

[28] In this case, I find that Mr. Petaulassie was qualified for the Arena Manager position and that Mr. W.S. was no more qualified than Mr. Petaulassie but was given the job. He was a family member of the Recreation Director, while Mr. Petaulassie clearly was not. As the respondent did not call any evidence, there is nothing before me to rebut any of the evidence given by Mr. Petaulassie. Therefore, I find that Mr. Petaulassie was not given an equal opportunity to compete for a job with the Hamlet and that this was because he was not related to someone who worked there. I find that this constitutes discrimination based on family status.

[29] In summary, there is sufficient evidence that Mr. Petaulassie experienced discrimination in employment based on family status contrary to the *Act*.

REMEDY

[30] Under s. 34 of the *Act*, I have the power to order damages to compensate Mr. Petaulassie for lost wages or expenses resulting from the discrimination. I can also make an award for injury to dignity, feelings or self-respect as a result of the discrimination.

[31] As I have found that Mr. Petaulassie experienced discrimination on the basis of family status in relation to a job competition, an award of lost wages is appropriate. With regard to calculating lost wages, one challenge is the fact that we have no information from the respondent about the salary and Northern Living Allowance for this job. However, the applicant conducted a Google search and presented to the Tribunal a Hamlet of Cape Dorset document titled Annual and Hourly Rates of Pay – Conversion Grid Effective December 31, 2004. This document is from the Collective Agreement governing Hamlet employees. It lists the Level 1 salary for an Arena Manager as $32,960.00. This amount seems reasonable in the circumstances and is not contradicted.

[32] The applicant is not asking for the full salary for the position, but rather for one-third of this amount for one year. He bases this on the calculation of damages in the case law he presented. In those cases the tribunals determined what the odds were that the complainant would have been the successful candidate, if given an equal opportunity to compete for the job, and awarded that percentage of the salary for the position. Mr. Petaulassie says that as there were three candidates, he had a one-third opportunity to succeed in the competition were it not for the nepotism at issue. Therefore, he is asking for one-third of one year's salary, or $10,876.89.

[33] He also asks for a pro-rated share of the Northern Living Allowance. Unfortunately, I did not have evidence before me as to the Northern Allowance for the position. However, I believe a reasonable estimate for the Northern Allowance at the time would be approximately $7,000.00. One-third of that amount is $2,333.00.

[34] People who experience discrimination still have a duty to mitigate their damages. This means that they must take steps to reduce their losses, for example by searching for another job. The onus is on the respondent to show that the applicant did not take proper steps to mitigate.

[35] Mr. Petaulassie did find employment as a summer student employee not long after he was denied the position with the Hamlet. Unfortunately, there was little evidence with regard to the details of that position or how much Mr. Petaulassie earned.

[36] Mr. Petaulassie also indicated that his father passed away in July that year and that this, and the responsibilities he owed to his mother, limited his ability to search for work outside of Cape Dorset. He also went back to school for a few months from October to December 2005.

[37] I find that Mr. Petaulassie took some steps to mitigate his damages and that his personal circumstances were such that searching for work was very difficult. He also went to school to upgrade his education. He did earn some income within the one year period after he was denied the job opportunity with the Hamlet but is not sure of the amount. This amount would normally be deducted from the damages for wage loss ordered against the Hamlet.

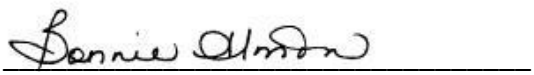
[38] Once again, I am faced with the difficult task of calculating how much Mr. Petaulassie earned based on little evidence. He indicated that he worked for approximately two months. He did not indicate that this employment was part-time. At the time, the minimum wage in Nunavut was $9.65 per hour. Based on this and a 37.5 hour work week, I estimate he earned approximately $2,895.00 which should be deducted from the award for lost wages.

[39] Mr. Petaulassie is asking for $10,000.00 for injury to dignity and self-respect as a result of the discrimination. This type of award is commonly used in human rights cases where discrimination or harassment has been found to have occurred to compensate the applicant for the loss of the right to be free from discrimination. This includes compensation for the humiliation, injury to dignity and self-respect, and emotional harm that results from the

discrimination. Mr. Petaulassie described the impact on him of losing an opportunity to be employed by the Hamlet and remain in his community. He stated, and I accept, that the impact of learning that a family member had been preferred over him and that he could not remain and work in his own community made him feel "sick to his stomach" and had a significant impact on him.

[40] I am satisfied that the applicant is entitled to $20,314.89. Accordingly, I order the respondent the Hamlet of Cape Dorset to pay the applicant Mr. Petaulassie $20,314.89 within thirty (30) days of the date of this decision. Mr. Petaulassie is responsible for remitting any necessary statutory deductions. I further order the respondent to pay pre-judgment and post-judgment interest on this amount as calculated under sections 52-56 of the Nunavut *Judicature Act*, S.N.W.T. 1998, c. 34, s.1.

Dated at Cambridge Bay this 16th day of April, 2012



Bonnie Almon

Member