

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by E.D.
AICAC File No.: AC-05-113**

PANEL: Mr. Mel Myers, Q.C., Chairperson
Dr. Patrick Doyle
Ms Wendy Sol

APPEARANCES: The Appellant, E.D., appeared on his own behalf;
Manitoba Public Insurance Corporation ('MPIC') was
represented by Mr. Morley Hoffman.

HEARING DATE: October 12, 2006

ISSUE(S): Whether the rate of pay provided by MPIC to the Appellant
in respect of the personal services rendered by the
Appellant's wife to the Appellant are contrary to *The Human
Rights Code* on the grounds of family status

RELEVANT SECTIONS: Sections 91(1)(b), 9(2) and 13(1) of *The Human Rights Code*
(*'Code'*) and Section 131 of *The Manitoba Public Insurance
Corporation Act* (*'MPIC Act'*)

**MAIC NOTE: THIS DECISION HAS BEEN EDITED TO PROTECT THE
PERSONAL HEALTH INFORMATION OF INDIVIDUALS BY REMOVING
PERSONAL IDENTIFIERS AND OTHER IDENTIFYING INFORMATION.**

Reasons For Decision

E.D. (hereinafter referred to as the 'Appellant') is appealing a decision by MPIC with respect to the provision of personal care assistance provided to him by his spouse. The Appellant alleges that he has been discriminated against on the basis of family status under the provisions of *The Human Rights Code*. The Appellant asserts that his spouse is providing personal care assistance to him and MPIC limits her compensation to the prevailing statutory minimum rate of \$7.60 per

hour rather than providing her compensation at higher rates such as the amount of \$9.03 that is currently being paid by the Worker's Compensation Board to family members for personal care services, or at the commercial rates \$15 to 21.50 per hour paid by MPIC to outside contractors for providing these services to victims of motor vehicle accidents. The Appellant further submits that the differential rate between that which MPIC pays in respect of these services provided to the Appellant by his wife, and the rate MPIC pays to an outside contractor providing similar services to a motor vehicle accident victim, is discriminatory on the grounds of family status contrary to Sections 9(1)(b) and 2, and Section 14(1) of the *Code*.

Section 14 of the *Code* states:

Discrimination in employment

14(1) No person shall discriminate with respect to any aspect of an employment or occupation, unless the discrimination is based upon bona fide and reasonable requirements or qualifications for the employment or occupation.

The *Code*, in Section 9(1)(b) defines "discrimination" as "differential treatment of an individual or group on the basis of any characteristic referred to in subsection (2)." Section 9(2) goes on to list these characteristics, including family status. Thus, discrimination is clearly defined within the *Code*.

The Commission notes that MPIC has not raised any objection to the application of the *Code* to the manner in which MPIC administers the provisions of the *MPIC Act*. However, MPIC states that its policy of paying an Appellant's spouse the minimum wage for the services she provides to her husband is not discriminatory under Section 14(1) of the *Code* on the grounds of family status.

The Commission notes that:

1. Section 131 of the *MPIC Act* states:

Reimbursement of personal assistance expenses

131 Subject to the regulations, the corporation shall reimburse a victim for expenses of not more than \$3,000. per month relating to personal home assistance where the victim is unable because of the accident to care for himself or herself or to perform the essential activities of everyday life without assistance.

2. An examination of MPIC's *Personal Injury Protection Plan* ('PIPP') Policy Manual states:

It is acceptable for persons who are not "*at arm's length*" from the claimant to be engaged to provide in-home care. Such persons are defined as relatives, friends or acquaintances. The following rules will apply in circumstances in which care is being provided by a person who is not "*at arm's length*" from the claimant.

- i) We will pay up to a maximum of \$7.00 per hour for non-specialized domestic assistance. It is expected that this limit will be strictly adhered to in all but the most exceptional circumstances where a compelling case can be made to pay in excess of this limit. Any deviation must be authorized by the Supervisor or by the RCMC or CRCC Manager . . .

3. The rate of \$7.00 per hour has been adjusted to \$7.60 to meet Manitoba minimum wage requirement changes since the policy was written (*Minimum Wages and Working Conditions Regulation*, Man. Reg. 62/00, s.11).

4. There is no specific provision for a maximum rate for a personal care provider who is "at arm's length".

The Appellant submits that his spouse is providing the same services to him as would a arm's length provider, or a person providing such services under *The Worker's Compensation Act*, but

these parties are receiving a higher rate of pay than his wife for the same services. He further asserts that the only reason for the differential in pay is because MPIC limits payment to his wife for her services as a member of his family to a maximum provided under *The Manitoba Minimum Wage Act* but MPIC does not oppose such limitation on the rates of pay to outside contractors.

Discussion

The issue that must be determined by the Commission is whether or not this differential in payment between the family member who is not at arm's length and a commercial provider who is at arm's length is discrimination within the meaning of Section 9(1)(b) of the *Code*.

The Commission finds that the British Columbia Supreme Court, in *British Columbia v. Hutchinson* ([2005] B.C.J. No. 2270 [*Hutchinson*]), confirmed that the analysis enunciated by the Supreme Court of Canada in *Law v. Canada (Minister of Employment and Immigration)* ([1999] 1 S.C.R. 497 [*Law*]), for alleged breaches of s. 15(1) of the *Canadian Charter of Rights and Freedoms* is also applicable in determining the existence of discrimination in Human Rights cases. At para. 104 of *Hutchinson*, Cullen J. considered himself bound by *British Columbia Government Service Employees Union v. H.M.T.Q.* ([2002] B.C.C.A. 476 [*Reaney*]) and was obliged to apply the analytical framework in the *Law* decision.

The court summarized the *Law* decision in *Hutchinson*, at paras. 110-111:

110 After considering the approach taken in *Andrews* [*Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143] and in subsequent cases which applied it, including *Egan v. Canada*, [1995] 2 S.C.R. 513 and *Miron v. Trudell*, [1995] 2 S.C.R. 418, the court concluded that in considering a discrimination claim a court should make three broad inquiries:

111 First, does the impugned law:

- (a) draw a formal distinction between the complainant and others on the basis of one or more personal characteristics, or
- (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantially different treatment between the complainant and others on the basis of one or more personal characteristics? If so, there is differential treatment for the purpose of s. 15(1).

Second, was the complainant subject to differential treatment on the basis of one or more of the enumerated and analogous grounds? Third, does the differential treatment discriminate in a substantive sense bringing into play the purpose of s. 15(1) of the Charter in remedying such ills as prejudice, stereotyping and historical disadvantage. The second and third enquiries are concerned with whether the differential treatment constitutes discrimination in the substantive sense intended by s. 15(1).

Thus, the Commission finds that the first and second inquiries of the *Law* analysis are specifically identified in the *Code*, but that the third enquiry is required for a purposive analysis of potential discrimination.

The Commission determined that the key to determining differential treatment lies in the selection of the appropriate comparator group. This was identified by the Supreme Court of Canada in *Auton (Guardian ad litem of) et al v. British Columbia (Attorney General)* ([2004] 3 S.C.R. 657 [*Auton*]), at paras. 51-54:

First, the choice of the correct comparator is crucial, since the comparison between the claimants and this group permeates every stage of the analysis. “[M]isidentification of the proper comparator group at the outset can doom the outcome of the whole s. 15(1) analysis”: Hodge [*Hodge v. Canada (Minister of Human Resources and Development)*], [2004] 3 S.C.R. 357], at para. 18.

Second, while the starting point is the comparator chosen by the claimants, the Court must ensure that the comparator is appropriate and should substitute an appropriate comparator if the one chosen by the claimants is not appropriate: Hodge, *supra*, at para. 20.

Third, the comparator group should mirror the characteristics of the claimant or claimant group relevant to the benefit or advantage sought, except for the personal characteristic related to the enumerated or analogous ground raised as the basis

for the discrimination: Hodge, at para. 23. The comparator must align with both the benefit and the “universe of people potentially entitled” to it and the alleged ground of discrimination: Hodge, at paras. 25-31.

Fourth, a claimant relying on a personal characteristic related to the enumerated ground of disability may invite comparison with the treatment of those suffering a different type of disability, or a disability of greater severity:...

MPIC’s legal counsel submitted that, having regard to the Supreme Court decision in *Auton* (supra), payment received by the Appellant’s wife can only be compared to the payment received by an arm’s length contractor who is providing personal care services to victims of motor vehicle accidents under the *MPIC Act* and cannot be compared to a person who is providing these services under *The Worker’s Compensation Act*. MPIC’s legal counsel further submitted that:

1. there was no real comparison between an independent contractor who is at arm’s length from MPIC and the Appellant’s spouse who is not at arm’s length.
2. the outside contractor is operating a business and therefore calculates rates to be paid by MPIC for domestic services, having regard to the contractor’s business expenses such as salaries, rent, taxes and other incidentals, as well as the contractor’s profit margin.
3. as a result, in order to provide these services the outside contractor must charge a rate well beyond the minimum wage rate in Manitoba to operate a viable business.
4. the Appellant, in hiring his wife to provide personal services, is not conducting a business and therefore is not concerned about paying the usual business expenses or earning a profit.
5. As a result, MPIC is not obligated to pay the Appellant a rate similar to that which MPIC pays to an outside contractor.
6. unlike a commercial contractor, the services provided by the Appellant’s wife are of

a personal nature and clearly less intrusive in respect to the Appellant's privacy than that provided by a commercial contractor.

Discussion

The Commission accepts the submission made by MPIC's legal counsel that the differential between the rates paid by MPIC to an outside contractor, and the rates paid to the Appellant's wife, are not based on family status, but are based on the requirement of the outside contractor that in order to operate a viable business the contractor is required to charge MPIC a rate based on the contractor's business expenses and profit margin. On the other hand, the Commission finds that the Appellant is not operating a business and, therefore, MPIC is not obliged to pay the Appellant a rate based on the Appellant's business expenses or profit margin. As a result, the Commission finds there is no violation of Sections 9(1)(b) and (2), and Section 14(2) of the *Code* on the grounds of family status. For these reasons the Commission confirms the decision of the Internal Review Officer dated May 16, 2005 and dismisses the Appellant's appeal in this respect.

Dated at Winnipeg this 15th day of December, 2006.

MEL MYERS, Q.C.

DR. PATRICK DOYLE

WENDY SOL