

**PRINCE EDWARD ISLAND HUMAN RIGHTS PANEL**

**File 1058-99**

**BETWEEN:**

**STEPHEN DOWLING**

**COMPLAINANT**

**AND:**

**GOVERNMENT OF PRINCE EDWARD ISLAND**

**RESPONDENT**

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**DECISION ON REMEDY**

**Hearing Dates:** May 2, 4 and 10, 2007

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**Panel:**

**Commissioner Richard W. Montigny  
Prince Edward Island Human Rights Commission  
PO Box 2000  
Charlottetown PE C1A 7N8  
(902) 368-4180**

## **INTRODUCTION**

1. On April 29, 2004, a Human Rights Panel issued a decision wherein “. . . I find that Mr. Dowling has proven on a balance of probabilities that the Respondent discriminated against him by failing to offer him an opportunity to compete for the position of Golf Shop Superintendent at Crowbush. . . .”
2. The Panel awarded the Complainant general damages of \$5000 for hurt and humiliation. Also, costs were awarded to the Complainant from the Respondent in the amount of \$9600.
3. The Panel found that no wage loss had been shown by the Complainant, and thus made no award for such loss. At paragraph 74 of the decision, Commissioner Cormier stated, “What Mr Dowling lost was an opportunity to compete for the position of [Golf Shop] Supervisor. It would be speculative to award damages for loss of income.”
4. The Complainant next applied to the Panel for a reconsideration of its decision in respect of remedy. The Panel declined to allow a reconsideration.
5. The Complainant subsequently applied to the Supreme Court of Prince Edward Island for judicial review of this decision, seeking relief under various headings, including:
  - (a) an order nullifying the decision of the respondent tribunal dated June 2, 2004, refusing the complainant’s request for reconsideration;
  - (b) an order directing the respondent tribunal to conduct a hearing on the appropriate remedy as a result of the discrimination of the respondent Government of Prince Edward Island;
  - . . .
  - (f) aggravated, punitive and exemplary damages as against the respondent government.
6. In a decision dated September 25, 2006, Chief Justice Jacqueline R. Matheson of the Prince Edward Island Supreme Court, Trial Division, allowed the application for judicial review to the extent that the Panel was directed to hold a hearing on the appropriate remedy for the discrimination previously found by the Panel. Chief Justice Matheson stated:

“Accordingly, the issue of remedy is remitted back to the Commissioner to hear evidence and submissions, but it will not be necessary to rehear evidence already before the tribunal on the issue of income loss. The applicant’s request for aggravated, punitive and exemplary damages should be addressed to the Commissioner at the remedy hearing. I wish to point out remission of this matter to the Commissioner is not to be construed as comment on the actual findings she

made on damages to date or any suggestion as to what damages might be.” [¶ 53]

7. The learned Chief Justice declined to allow the application on the issue of the costs awarded by the Panel; consequently, the only costs to be considered in this decision is the issue of costs on this reconsideration hearing only.

### **AGGRAVATED, PUNITIVE, EXEMPLARY DAMAGES**

8. As a matter of law, I am aware that a Panel, in contrast to a superior court of law, has no inherent jurisdiction; its authority emanates exclusively from statute. The *Human Rights Act* comprehensively sets out the Panel’s powers as follows:

#### **28.4 (1) A Human Rights Panel**

- (a) shall, if it finds that a complaint is without merit, order that the complaint be dismissed; and
- (b) subject to subsection (2) may, if it finds that a complaint has merit in whole or in part, order the person against whom the finding was made to do any or all of the following:
  - (i) to cease the contravention complained of;
  - (ii) to refrain in future from committing the same or any similar contravention;
  - (iii) to make available to the complainant or other person dealt with contrary to this Act, the rights, opportunities or privileges that the person was denied contrary to this Act;
  - (iv) to compensate the complainant or other person dealt with contrary to this Act for all or part of wages or income lost or expenses incurred by reason of the contravention of this Act;
  - (v) to take any other action the Panel considers proper to place the complainant or other person dealt with contrary to this Act in the position the person would have been in, but for the contravention. [Emphasis added]

9. As a preliminary matter, I must consider whether sub-section 28.4 (1)(b)(v) of the *Human Rights Act* confers authority on a Human Rights Panel to award aggravated, punitive, or exemplary damages.
10. Aggravated damages I take to be compensatory in nature, a salve to the feelings of the injured party. As stated by Mr. Justice Binnie of the Supreme Court of Canada in *Whiten*

*v. Pilot Insurance Co.*, “Aggravated damages are the proper vehicle to take into account the additional harm caused to the plaintiff’s feelings by reprehensible or outrageous conduct on the part of the defendant.”

11. While I conclude that aggravated damages are within the scope of the powers afforded a Panel under the statute, I decline to make any such award at this stage. I hold that such compensation was already provided to the Complainant by the award of \$5000 for hurt and humiliation granted in the Panel’s original decision dated April 29, 2004, and above-noted at paragraph 2. I further note that the application for judicial review did not deal with that award, which was not disturbed by the said decision of Chief Justice Matheson.
12. I take “punitive” and “exemplary” to be two essentially synonymous terms for damages designed to punish and deter wrongful conduct by respondents. As such, they are not compensatory or restorative to the victim of discrimination. Therefore, I hold that punitive damages are not within my powers as above-stated under the *Human Rights Act*.

### **RECONSIDERATION HEARING ON REMEDY**

13. In coming to these reasons, I have reviewed the Panel decision of Commissioner Cormier dated April 29, 2004, the decision of Chief Justice Matheson of the Prince Edward Island Supreme Court dated September 25, 2006, and the evidence and submissions of the parties during the hearing before me, which was held on May 2, 4, and 10, 2007.
14. The evidence and submissions on behalf of the Complainant included much that was not relevant to the issue set out in the carefully-worded direction from Chief Justice Matheson noted in paragraph 6, above—namely, what more in relation to remedy is appropriate in the circumstances of this case?
15. The onus of proof remains with the complainant to establish on a balance of probabilities that the awarding of any further remedy is appropriate.
16. Mr Greg Collins, counsel for the Complainant, called the Complainant, Stephen Dowling, and his wife, Leslie Collins, to give evidence tending to show that Mr. Dowling suffered psychologically and professionally from the discrimination originally found by Commissioner Cormier. Mr Dowling testified that he believed that he could have worked both at the job he was wrongfully refused an opportunity to compete for, and at the more remunerative Holland College position he subsequently secured.
17. I am unable to conclude that the discrimination suffered by this complainant has resulted in any loss of income to him, for two reasons:
  - (i) the loss of income issue is not before me as it was heard and determined by Commissioner Cormier and not disturbed by Chief Justice Matheson;
  - (ii) should I be found to be in error on the previous point, I find that I cannot accept Mr Dowling’s evidence of intention to work at two overlapping jobs as being any

more than speculation, and it appears unlikely on all the evidence, including the complainant's work history.

18. I have not found any other remedy necessary or appropriate in these circumstances.

19. I make no order as to costs on this hearing.

**DATED** this 21<sup>st</sup> day of September, 2007.

Signed: Richard W. Montigny  
Richard W. Montigny, Panel

Appearances:

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