In the Court of Appeal for the Northwest Territories

Citation: NWT (WCB) v. Mercer, 2014 NWTCA 01

Date: 2014 02 06
Docket: A-1-AP-2013-000004
A-1-AP-2013-000005
Registry: Yellowknife, N.W.T.

Docket: A-1-AP-2013-000004

In the matter of the *Human Rights Act,* S.N.W.T. 2002, c. 18 (as amended)

- and –

In the matter of a decision by Shannon Gullberg Human Rights Adjudication Member dated 10 August, 2007, concerning a complaint filed by Phillip Mercer against the Workers' Compensation Board of the Northwest Territories and Nunavut

Between:

Workers' Compensation Board of the Northwest Territories and Nunavut

Appellant
(Appellant)

- and –

Phillip Mercer and Northwest Territories Human Rights Commission

Respondents
(Respondents)

Docket: A-1-AP-2013-000005

In the matter of the *Human Rights Act,* S.N.W.T. 2002, c. 18

And in the matter of a complaint filed on October 13, 2005 by Philip Mercer against the Workers' Compensation Board of the Northwest Territories and Nunavut

And in the matter of an adjudication of the complaint by Human Rights Adjudication Panel Member Shannon P.W. Gullberg dated August 10, 2007

Between:

Philip Mercer

Appellant
(Respondent)

- and -

Workers' Compensation Board of the Northwest Territories and the Northwest Territories Human Rights Commission

Respondents
(Appellant/Respondent)

The Court:

The Honourable Madam Justice Virginia Schuler
The Honourable Madam Justice Myra Bielby
The Honourable Madam Justice Barbara Lea Veldhuis

Reasons for Judgment Reserved of The Honourable Madam Justice Bielby
Concurred in by The Honourable Madam Justice Schuler
Concurred in by The Honourable Madam Justice Veldhuis

Appeal from the Judgment by
The Honourable Madam Justice S.H. Smallwood
Filed on the 12th day of July, 2012
And the Orders filed the 22nd day of March, 2013
(2012 NWTSC 57, 2012 NWTSC 58,
Dockets: S-1-CV-2007000187, S-1-CV-2007000188)

Reasons for Judgment Reserved of
The Honourable Madam Justice Bielby

Overview of Appeal

[1] Unlike in most other Canadian jurisdictions, workers in the Northwest Territories who wish to contest the amount of workers' compensation they have received after sustaining a work-related injury are not necessarily limited to launching an appeal within the workers' compensation system. They may also pursue relief through human rights legislation in certain circumstances. That relief is potentially wider than a simple increase or adjustment of any payment made pursuant to the workers' compensation scheme; it may include an award of damages for such things as resulting economic loss, embarrassment or humiliation suffered by the injured worker.

[2] Here a seasonal worker, the respondent Philip Mercer, suffered an employment-related injury. He received less workers' compensation than would have been paid to a permanent worker who suffered the same injury. As a result, he made a complaint to the territorial human rights commission that he had suffered discrimination on the basis of his social condition, a prohibited ground within the *Human Rights Act*, SNWT 2002, c 18 [*HRA*].

[3] The adjudicator appointed pursuant to the *HRA* agreed and concluded that the appellant, the Workers' Compensation Board of the Northwest Territories (the "WCB"), as it was then called, had discriminated against Mercer on the basis of his social condition in assessing his claim for workers' compensation for a work-related accident, in violation of ss 5 and 11 of the *HRA*. In particular, she determined that Mercer, as a seasonal worker, was a member of a socially identifiable group protected from discrimination on the basis of his "social condition".

[4] According to the adjudicator, the WCB's policy discriminated against Mercer on the ground of his social condition because, under it, the WCB did not assess Mercer's pre-accident income (a primary component in the calculation of his workers' compensation entitlement) on the basis of his salary at the time of the accident but rather on the basis of his entire income in the year prior to being injured, including that from both his salary from employment and employment insurance ("EI") benefits received. Had he been a permanent worker, the WCB would have assessed his pre-accident income on the basis of his salary at the time of the accident. Had his entitlement been calculated on this basis he would have been entitled to receive approximately $265 more in benefits every two weeks than otherwise paid.

[5] The adjudicator declared that the practice was discriminatory under the *HRA*, ordered the WCB to amend its policies accordingly and to pay Mercer the difference between the benefits he received and what he would have received but for the discriminatory policy. The adjudicator did not award collateral damages for humiliation and embarrassment or resulting economic loss.

[6] The WCB unsuccessfully appealed the adjudicator's discrimination decision to a judge of the Northwest Territories Supreme Court (the "reviewing judge"). The reviewing judge found that

the adjudicator's decision that the policy discriminated against Mercer on the ground of his social condition was reasonable but in a separate decision remitted the issue of collateral damages to the adjudicator, after concluding that her lack of reasons on this issue precluded appellate review.

[7] We understand that these are the first decisions in the Northwest Territories which address discrimination on the basis of social condition. The WCB now appeals both to the Court of Appeal of the Northwest Territories.

[8] The two appeals were heard together pursuant to the provisions of a consent order. The Northwest Territories Human Rights Commission (the "Commission") elected not to file a factum nor make oral submissions in relation to the collateral damages appeal.

[9] The appeal is dismissed.

Statement of Facts

[10] Mercer worked as a seasonal worker in the Northwest Territories for several years prior to being injured. He would work for approximately six months each year in the Northwest Territories as a transport truck driver and then return to his residence in Newfoundland for the balance of the year, where he collected EI benefits if he was unable to find further work there.

[11] On February 18, 2001, Mercer was injured while working in the Northwest Territories, breaking his hip and requiring surgery. He applied for and received total temporary disability benefits from the WCB as a result. In calculating the amount of Mercer's workers' compensation entitlement, the WCB took into account his remuneration for the year prior to the accident. In doing so it did not include the sums he received by way of EI benefits during that time period. This omission reduced the benefit he received from workers' compensation, as noted, by approximately $265 for every two week period.

[12] Mercer filed a human rights complaint, claiming that he was discriminated against given that the WCB's practice or policy was to calculate temporary total disability benefits for seasonal workers based on their entire prior year's income, not including EI benefits. Mercer also appealed the WCB's calculation of his temporary total disability benefits to the WCB Appeals Commission. The Appeals Commission decided, after Mercer had filed his human rights complaint, to extend benefits to him based on his prior year's income including EI benefits on a one-time only basis. By agreement, his human rights complaint nevertheless proceeded to adjudication because the WCB sought guidance as to how to address this issue in future situations; it did not therefore raise mootness as a defence to the complaint at any stage.

[13] Under the *Workers' Compensation Act*, RSNWT 1988, c W-6 [*WCA*], in force at the time of Mercer's injury, an injured worker's temporary total disability benefit is calculated on the basis of his or her gross annual remuneration. That is an estimate of what the worker would have earned in the year the accident occurred, if the accident had not occurred. The *WCA* authorizes different methods of estimating gross annual remuneration. At the time Mercer was injured, the WCB had a written policy which provided that the gross annual remuneration of a permanent worker would be

estimated based on the salary the worker was earning at the time of the accident. For a seasonal worker, such as Mercer, who had a history of regular or ongoing employment, the gross annual remuneration would be estimated on the basis of the worker's "actual remuneration, beginning 12 months before the accident". Remuneration was defined in ss 1(1) of the *WCA* as follows:

> "Remuneration" includes all salaries, wages, commissions, bonuses, allowances, tips, service fees or other earnings, including earnings for overtime, piece work and contract work, the cash equivalent of board and lodging, store certificates, credits or any other remuneration in kind or other substitute for money, but does not include clothing, materials or transportation allowances supplied to a worker because of the special nature or location of the employment.

[14] Although the WCB's policy did not expressly address EI benefits received, its practice was to ignore them in calculating the gross annual remuneration of seasonal workers. We are told that subsequent to Mercer's complaint, the WCB amended its policies to expressly provide that EI benefits paid to a worker are to be excluded from the calculation of his or her remuneration. This interpretation and subsequent policy amendment continues to affect only seasonal workers, as a permanent employee's entitlement is calculated based on his or her salary at the time of the injury rather than an actual calculation of earnings during the prior year. The issue of whether such an amendment to policy can offset the express provisions of ss 1, 5 and 11 of the *HRA* need not be addressed in this appeal.

[15] The adjudicator accepted Mercer's complaint that he was the subject of discrimination based on "social condition", contrary to ss 1, 5 and 11(1) of the *HRA* which provide:

> 1. (1) "social condition", in respect of an individual, means the condition of inclusion of the individual, other than on a temporary basis, in a socially identifiable group that suffers from social or economic disadvantage resulting from poverty, **source of income**, illiteracy, level of education or any other similar circumstance.
>
> 5. (1) For the purposes of this Act, the prohibited grounds of discrimination are race, color, ancestry, nationality, ethnic origin, place of origin, creed, religion, age, disability, sex, sexual orientation, gender identity, marital status, family status, family affiliation, political belief, political association, **social condition** and a conviction that is subject to a pardon or record suspension.
>
> 11. (1) No person shall, on the basis of a prohibited ground of discrimination, and without a *bona fide* and reasonable justification,
>
> > (a) deny to any individual... any goods, services, accommodation or facilities that are customarily available to the public; or

> (b) discriminate against any individual… or class of individuals with respect to any goods, services, accommodation or facilities that are customarily available to the public. [emphasis added]

[16] The adjudicator held that Mercer was part of a group "composed of seasonal workers who live in areas of high unemployment; are required to work away from home, and often outside their home province; they earn less than the national and provincial average salaries; and they have lower education levels with fewer job opportunities. Further, because of the seasonal nature of their employment, they return home for the rest of the year and are eligible for EI" (Appeal Book, Vol 2, p 239). She concluded that the policy of excluding EI payments from the calculation of seasonal workers' gross annual remuneration, and its consequent impact on the quantum of their temporary total disability benefits, discriminated against some seasonal workers on the ground of social condition. However, the adjudicator awarded no additional damages beyond ordering that Mercer's entitlement to workers' compensation be adjusted to include consideration of EI payments.

[17] Mercer had led evidence before the adjudicator to support a collateral damages claim. It showed his financial situation post-injury required him to take out a mortgage on the family home to pay living expenses, cash in RRSPs and take out loans on insurance policies. He was denied other loans because he was a bad credit risk and had to depend upon financial help from his father to help pay household expenses.

[18] The WCB appealed the adjudicator's finding of discrimination, while Mercer appealed her conclusion on remedy. Both appeals were heard together by a reviewing judge who issued two decisions.

[19] In the first, in articulate, thoughtful written reasons, the reviewing judge dismissed the WCB appeal. She found the discrimination conclusion of the adjudicator to have been reasonable, stating at para 72:

> Government benefit programs do need to have eligibility criteria and it may be necessary to draw lines. However, those lines cannot have the effect of discriminating against a claimant on the basis of a prohibited ground. The adjudicator considered each element of the *prima facie* discrimination test and determined that each had been met. In my view, while I have concerns about the adjudicator's failure to consider the purpose of the workers' compensation program… the adjudicator's conclusions on the issue of whether discrimination had been established on the basis of social condition were reasonable.

[20] In the second, companion decision, the reviewing judge allowed Mercer's appeal, remitting the issue of collateral damages to the adjudicator. She noted that the adjudicator did not address Mercer's claim for those damages, concluding that, given the absence of reasons, she was unable to determine whether that decision was reasonable. Collateral damages were potentially available to Mercer under s 62(3) of the *HRA* which granted the adjudicator broad remedial

powers; she stated"it was open to the adjudicator to make a number of rulings, including with respect to compensating Mercer for his monetary loss, humiliation and embarrassment, and awarding exemplary or punitive damages". She remitted the matter back to the adjudicator for consideration of those claims. During the oral argument of this appeal, counsel for Mercer advised that he would not be seeking exemplary or punitive damages from the adjudicator if and when the matter returned to her.

[21] The WCB appealed both of these decisions of the reviewing judge. In the appeals, it did not take issue with the following:

> a. that the WCB was a proper respondent in this matter;
>
> b. that the complaint was not moot because of the voluntary extension of full benefits to Mercer by the WCB – it is apparently keen to have this issue resolved as it affects other claimants;
>
> c. that WCB compensation is a "service customarily available to the public", one of the prerequisites of discrimination contrary to s 11(1) of the *HRA*;
>
> d. that, if WCB policy constituted *prima facie* discrimination, the policy did not have a *bona fide* and reasonable justification pursuant to s 11(1) of the *HRA*; or
>
> e. that Mercer, as a "seasonal worker" fell within the *HRA* protected ground of "social condition", nor the reviewing judge's conclusion that this finding of the adjudicator was reasonable.

Issues

[22] The following two issues are raised in these appeals.

> 1. Did the reviewing judge err in finding the adjudicator's discrimination decision reasonable given that the adjudicator did not address the purpose and scheme of the *Workers' Compensation Act,* RSNWT 1988, c W-6 in her analysis?
>
> 2. Did the reviewing judge err in finding the adjudicator's decision on collateral damages unreasonable due to a lack of express reasons addressing this issue?

Standard of Review

[23] The standard of review to be applied by the Court of Appeal to the reviewing judge's choice and application of standards of review is correctness: *Dr Q v College of Physicians & Surgeons of British Columbia*, 2003 SCC 19 at para 43, [2003] 1 SCR 226 [*Dr Q*]; *Watson v Alberta (Workers' Compensation Board),* 2011 ABCA 127 at para 17, 502 AR 207.

[24] The WCB does not challenge the reviewing judge's selection of the standard of review. She held that the adjudicator's decision was reviewable on a standard of reasonableness, noting at paras 28-30 of the first decision:

> In the consideration of an appeal from a decision of an adjudicator under the *HRA*, the standard of review will generally be that of reasonableness unless the issue is outside the expertise of the adjudicator or involves issues of general legal importance.
>
> In this case, the adjudicator was interpreting her home statute which implies a level of familiarity with the statute. It is to be expected that an adjudicator appointed under the *HRA* has experience and expertise in interpreting the Act. Further, the issues involved do not raise questions of general legal importance. This suggests that the reasonableness standard is applicable.
>
> The decision by the adjudicator also required her to consider Mercer's background, including his level of education, employment history and income, and to apply these circumstances to the statutory definition of social condition and determine whether discrimination was established. This decision-making process involves questions of mixed fact and law and further suggests that the reasonableness standard is the appropriate standard of review.

[25] Nor do the parties challenge the reviewing judge's conclusion, at para 7 of her second decision, that the standard of review to be applied the adjudicator's decision on collateral damages was also reasonableness. The utter absence of any reasons for a decision in circumstances which require them amounts to a breach of a duty of procedural fairness, reviewable on the correctness standard. However, where reasons are provided, challenges to the quality of the reasons given and the outcome are reviewable on the reasonableness standard: *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paras 19-22, [2011] 3 SCR 708 [*Newfoundland Nurses*]; see also *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 43-44, 174 DLR (4th) 193.

[26] In both appeals before this Court, the issue is whether the reviewing judge erred in applying the reasonableness standard, which she had correctly selected, to the adjudicator's decision. Following *Dr Q*, the reviewing court's choice *and* application of the standard of review is reviewable for correctness. As such, this Court's role is to determine whether the reviewing judge correctly applied the reasonableness standard to the adjudicator's decisions.

Analysis

1. *Was the reviewing judge correct in finding the adjudicator's discrimination decision reasonable?*

[27] Section 11(1) of the *HRA* provides as follows:

> No person shall on the basis of a prohibited ground of discrimination and without a bona fide and reasonable justification,
>
> > (a) deny to any individual or class of individuals any goods, services, accommodation or facilities that are customarily available to the public; or
> >
> > (b) discriminate against any individual or class of individuals with respect to any goods, services, accommodation or facilities that are customarily available to the public.

[28] A claimant who alleges discrimination in the provision of a service customarily available to the public must prove that he or she has a characteristic protected from discrimination under the *HRA*; that he or she experienced an adverse impact with respect to the service; and that the protected characteristic was a factor in the adverse impact: *Moore v British Columbia (Education)*, 2012 SCC 61 at para 33, [2012] 2 SCR 360 [*Moore*]. If the claimant proves these elements, *prima facie* discrimination is established. The onus then shifts to the respondent to establish that it has a *bona fide* and reasonable justification.

[29] As noted above, in this case the WCB did not argue before the adjudicator, the reviewing judge or this Court that, if its policy is *prima facie* discriminatory under s 11(1) of the *HRA*, the policy is nevertheless justified. The only live issue has always been whether the policy amounted to *prima facie* discrimination.

[30] The adjudicator accepted that Mercer was a seasonal worker. She found that seasonal workers were a group socially identified by the following factors: they live in areas of high unemployment (in this case, Newfoundland); they were required to work away from home, and often outside their home province; they earn less than the national and provincial average salaries; and they have lower education levels with fewer job opportunities. Further, because of the seasonal nature of their employment, they return home for the rest of the year and are then eligible for receipt of employment insurance benefits. None of these conclusions are challenged.

[31] Rather, the WCB argues, the adjudicator was unreasonable in finding its policy discriminated against Mercer, a seasonal worker, on the basis of his source of income which was made up of, in part, EI benefits. It argues that this differentiation between seasonal and permanent workers does not amount to *prima facie* discrimination, given the nature and scheme of the *WCA*, factors which the adjudicator did not address in her decision. As noted at para 99 of the first decision under appeal: "not all distinctions which create a disadvantage are discriminatory", citing *Ontario (Disability Support Program) v Tranchemontagne*, 2010 ONCA 593 at para 93, 102 OR (3d) 97.

[32] While the adjudicator engaged in an analysis of the relevant provisions of the *HRA*, she did not expressly identify and address their interaction with specific provisions in the *WCA*, perhaps

because this issue was not placed squarely before her by the parties; Mercer represented himself before the adjudicator. The WCB argues that such an analysis was mandatory and the adjudicator's failure to conduct it rendered her decision unreasonable. The reviewing judge agreed that such an analysis should have been undertaken but she nonetheless found that the adjudicator's conclusion was reasonable.

[33] The WCB cites *Withler v Canada (Attorney General)*, 2011 SCC 12, [2011] 1 SCR 396 [*Withler*], in its argument that an analysis of the object of the workers' compensation scheme was "absolutely necessary". In *Withler*, the Court analyzed the nature and purposes of two federal statutes which provided a reduced death benefit to surviving spouses of certain ages. At para 3 of that decision, the Court concluded that a discrimination assessment required consideration of the objects of these statutes. It stated:

> Where, as here, the impugned distinction is the denial of a benefit that is part of a statutory benefit scheme that applies to a large number of people, the discrimination assessment must focus on the object of the measure alleged to be discriminatory in the context of the broader legislative scheme, taking into account the universe of potential beneficiaries.

[34] The WCB argues that had the adjudicator conducted such a discrimination assessment, she would have had to consider the WCB's "broader legislative scheme" which is predicated upon work and which creates a scheme funded by workers' contributions, based on their remuneration. As workers' compensation premiums are not subtracted from EI benefits, EI benefits do not contribute to funding the scheme.

[35] Mercer and the Commission respond by suggesting that a more thorough analysis of the interaction between the *WCA* and *HRA* by the adjudicator would not have changed the result, and so any deficiency in this regard does not render her decision to be unreasonable. The reviewing judge arrived at just such a conclusion.

[36] We agree that the lack of an explicit analysis of the object of the *WCA* did not render the adjudicator's conclusion on *prima facie* discrimination unreasonable, for three reasons.

[37] First, a failure to analyze the *WCA* scheme does not force the conclusion that the adjudicator's conclusion, that the policy constituted *prima facie* discrimination on the basis of social condition, was unreasonable. As observed by the Supreme Court in *Newfoundland Nurses*, "[r]eviewing judges should pay "respectful attention' to the decision-maker's reasons, and be cautious about substituting their own view of the proper outcome by designating certain omissions in the reasons to be fateful": para 17. There was, as noted, nothing in the legislation or policy at the relevant time which expressly required the calculation of pre-accident income to be limited to income earned from employment or to exclude income received from the payment of social benefits. There is nothing in either the *WCA* or *HRA*, then or now, which purports to exempt the calculation of workers' compensation benefits from the prohibition against discrimination on the basis of social condition.

[38] Had the adjudicator analyzed the scheme and object of the *WCA*, she would have considered more than simply the source of funding for the workers' compensation scheme. She would have considered that EI exists to replace income earned from work; without the worker meeting minimum prerequisites for periods of time in paid employment, there is no EI entitlement. EI benefits are thus very much employment-related earnings.

[39] The adjudicator would also have considered that under the WCB policy, a permanent worker who had received some EI benefits in the year prior to being injured would not be penalized as a result, as his or her entitlement to benefits would be based on salary as of the date of injury. This starkly illustrates the discriminatory impact of the WCB policy, which bases a seasonal worker's entitlement on his or her income during the year before the injury but excludes any EI benefits received during that time period.

[40] Further, such an analysis would show that the workers' compensation scheme in several Canadian jurisdictions include EI benefits as part of a worker's remuneration calculation (apparently including British Columbia, Ontario, Manitoba, Nova Scotia, Prince Edward Island and New Brunswick). The purpose of the workers' compensation scheme is thus not necessarily defeated by such an approach.

[41] Second, the case relied on by the WCB for the proposition that an analysis of the legislative scheme is "absolutely necessary" may be distinguished in various ways. For one thing, the statute at issue in *Withler* contained on its face a distinction on the basis of age. This is a much more powerful indication of legislative intent than a policy issued by the WCB or, as here, the WCB's interpretation of a policy which is silent on the issue. Further, *Withler* involved a s 15 *Charter* challenge to legislation imposing different treatment in relation to a whole suite of benefits, of which the plaintiffs were complaining about only one, the pension benefit. The Court looked at discrimination in relation to the entire suite in concluding that a difference in treatment in relation to only one benefit did not constitute discrimination. Here, it is not possible to save the act of discrimination by finding that the overall suite of benefits is fair, as there is no overall suite but only one benefit which is impacted by discrimination.

[42] Third, a claimant seeking to establish *prima facie* discrimination in the provision of services need not establish the purpose behind the allegedly discriminatory conduct. In this case, *prima facie* discrimination is established if the WCB policy had an adverse impact on Mercer and his social condition was a factor in that adverse impact, never mind the purpose for it: *Moore* at para 33. The purpose of the WCB's policy, or of the wider legislative scheme under which it was adopted, may be relevant to whether the WCB has a justification for a policy that is otherwise discriminatory but, as noted above, justification was not argued in this case.

[43] In conclusion, the adjudicator's discrimination decision is reasonable in the sense that it is defensible. It arose from a line of analysis within her decision which led from the evidence before her to a clear result. It falls within the range of justifiable, transparent and intelligible decisions open to the adjudicator; see *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 47-48, [2008] 1 SCR 190; *Law Society of New Brunswick v Ryan*, 2003 SCC 20 at para 55, [2003] 1 SCR 247.

[44] The reviewing judge correctly concluded that it was reasonable for the adjudicator to find that the WCB's practice of establishing seasonal workers' levels of remuneration on a basis which excluded consideration of any EI benefits received during the year prior to injury is *prima facie* discriminatory.

2. *Did the reviewing judge err in finding that the adjudicator's decision on collateral damages was unreasonable due to the lack of express reasons addressing the issue?*

[45] Section 62(3) of the *HRA* authorized the adjudicator to award additional monetary compensation to Mercer, over and above making a declaration that he was entitled to WCB benefits calculated on a basis which included EI in his gross annual remuneration during the year before his injury. Mercer raised the issue of his collateral financial losses in his original complaint. He led evidence before the adjudicator that he had suffered financial loss and experienced humiliation and embarrassment arising from his loss of income after his injury, although he did not explicitly claim damages for that during the hearing, nor did he expressly claim exemplary or punitive damages. In the result, the adjudicator gave him no compensation on account of these additional claims but provided no express reasons for that decision.

[46] The reviewing judge observed that this absence of reasons precluded effective appellate review, and went on to remit the matter back to the adjudicator to address Mercer's claims for monetary loss, humiliation and embarrassment, but also for exemplary and punitive damages.

[47] The WCB argues that reasons for dismissing Mercer's collateral damage claim may be inferred from the reasons the adjudicator did give, and the context in which they were given, inviting us to look at the record in a search for implicit reasons; see *Newfoundland Nurses* at paras 14-18, in which the Supreme Court agreed that courts may look to the record for the purposes of assessing the reasonableness of the outcome.

[48] This record reveals a number of factors which may have borne on the adjudicator's decison to award no collateral damages to Mercer, including the uncertain state of the law and the WCB's voluntary payment to Mercer of the level of benefits he sought, with the result that these appeals proceeded without his being in financial jeopardy as a result of their pursuit.

[49] However, the record also reveals evidence to the contrary including his uncontroverted evidence of the traumatic consequential losses suffered by his family as a result of the loss of his salary from jobs in the Northwest Territories. While it may be that some or all of those losses arose because of his injury and the fact that the Workers Compensation scheme does not provide full indemnity for such losses in any event, it is not possible to draw an unambiguous inference from the record as to why the adjudicator concluded that no collateral damages at all should be paid. Further, express, clear reasons are always desirable, particularly where a litigant is self-represented; see *Burke v NLAPP* 2010 NCCA 12 at para. 71.

[50] The reviewing judge was therefore correct in her conclusion that it is not possible to determine if the adjudicator's decision to deny compensation for collateral loss was reasonable in

the absence of express reasons for that conclusion. We therefore dismiss the appeal from her remission of this issue to the adjudicator for consideration of this issue. In so doing, we must not be seen to endorse the suggestion that exemplary or punitive damages are necessarily available for this type of loss in this or any other situation. That issue remains to be addressed on another day.

Conclusion

[51] The appeal is dismissed.

Application heard on October 22, 2013

Reasons filed at Yellowknife, N.W.T.
this 06 day of February, 2014

_____
Bielby J.A.

I concur: _____
Schuler J.A.

I concur: _____
Authorized to sign for: Veldhuis J.A.

Appearances:

S.R. Paul
for the Appellant Workers' Compensation Board

A.K. Akgungor
for the Respondent Northwest Territories Human Rights Commission

A.F. Marshall
for the Respondent Philip Mercer

IN THE COURT OF APPEAL FOR THE
NORTHWEST TERRITORIES

Docket: A-1-AP-2013 000004

In the matter of the *Human Rights Act*, S.N.W.T. 2002, c. 18 (as amended)
- and –

In the matter of a decision by Shannon Gullberg Human Rights Adjudication Member dated 10 August, 2007, concerning a complaint filed by Phillip Mercer against the Workers' Compensation Board of the Northwest Territories and Nunavut

Between:

Workers' Compensation Board of the Northwest Territories and Nunavut
Appellant
(Appellant)

- and -

Phillip Mercer and Northwest Territories Human Rights Commission
Respondents
(Respondents)

Docket: A-1-AP-2013-000005

In the matter of the *Human Rights Act*, S.N.W.T. 2002, c. 18 (as amended)

And in the matter of a complaint filed on October 13, 2005 by Philip Mercer against the Workers' Compensation Board of the Northwest Territories and Nunavut

And in the matter of an adjudication of the complaint by Human Rights Adjudication Panel Member Shannon P.W. Gullberg dated August 10, 2007

Between:

Philip Mercer
Appellant
(Respondent)

- and -

Workers' Compensation Board of the Northwest Territories and the Northwest Territories Human Rights Commission
Respondents
(Appellant/Respondent)

REASONS FOR JUDGMENT