Noteworthy Decision Summary

Decision: WCAT-2011-00152 **Panel**: H. McDonald, W. Hoole, D. Sigurdson **Decision Date:** January 19, 2011

Section 153 of the Workers Compensation Act – Policy item #D6-153-2 of the Prevention Manual "Discriminatory Actions/Failure to Pay Wages – Remedies"

Common law or employment standards approaches to remedies for wrongful dismissal or termination do not incorporate the "make whole" approach to remedy contemplated by section 153(2) of the *Workers Compensation Act* (the Act). Therefore, they should be rejected as the basis for awarding remedies under this section.

In this case, the Workers' Compensation Board, operating as WorkSafeBC (Board), allowed a worker's discriminatory action complaint against her employer, finding that the termination of the worker's employment had been in violation of section 151 of the Act. In a subsequent decision, the Board ordered the employer to pay the worker a sum in wage loss by way of remedy. The employer appealed the Board's remedy award to WCAT.

The WCAT panel noted the existence of two different approaches to remedy under section 153(2) in prior WCAT decisions.

The panel rejected the first approach, pursuant to which remedies were to be calculated with reference to common law principles for wrongful dismissal, and employment standards principles governing dismissal.

The panel noted the fundamental distinction between the statutory remedial authority found in section 153(2), and the common law remedies for wrongful dismissal. Section 153(2) provides broad remedial powers. Section 153(2) and policy item D6-153-2 reflect a make whole remedy. The make whole remedy is specific to the purposes and objects of a statutory occupational health and safety regime, which include protecting workers who raise safety concerns, deterring employers from retaliating against such workers, and encouraging a culture of workplace safety in British Columbia. Under this approach, an individual worker is to be put back into the position s/he would have been in, had the unlawful discrimination not occurred.

Common law principles of reasonable notice do not incorporate this make whole concept, and thus do not further these purposes. The panel endorsed a second line of prior WCAT decisions, to the extent that those decisions reject a common law wrongful dismissal approach to remedy.

The panel then elaborated upon the make whole approach. This type of remedy is to compensate only for losses that are reasonably foreseeable as likely to result from the discriminatory action. There must be a causal connection between the discrimination and the loss. Punitive damages are not contemplated by section 153(2) or policy D6-153-2. The make whole approach entails making predictions about the claimant's future career progress, and involves factoring in the following types of contingencies: likelihood of complainant's promotion with the employer; degree of complainant's job security with the employer; likelihood of increase or decrease of complainant's earnings; probability of complainant obtaining a replacement job; comparability of wages and benefits of complainant's replacement or likely replacement job.

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The panel considered these contingencies in relation to the facts before it, in ordering a wage loss award for the worker. Ultimately the panel allowed the employer's appeal in part, and varied the Board's remedy award.

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Panel: Heather McDonald, Vice Chair
Warren Hoole, Vice Chair
Debbie Sigurdson, Vice Chair

Introduction

[1] The employer is appealing a November 20, 2009 decision by an officer in the Compliance Section, Investigations Division of the Workers' Compensation Board (Board)[1]. In that decision the Board officer was dealing with the issue of remedy for the worker's successful discriminatory action complaint against the employer. In an earlier decision dated June 30, 2009 the officer had found the employer took prohibited discriminatory action against the worker when it terminated her employment on February 1, 2008. The officer found that the employer had violated section 151 of the *Workers Compensation Act* (Act). Under section 153 of the Act the November 20, 2009 decision ordered the employer to pay the worker $20,296.75 less statutory deductions by February 19, 2010.

[2] In *WCAT-2010-00762* (March 15, 2010) the Workers' Compensation Appeal Tribunal (WCAT) granted the employer's request for a stay of the officer's order to pay the monetary award to the worker. This decision deals with the merits of the employer's appeal of the remedy awarded to the worker. Under section 238(5) of the Act the WCAT chair has appointed us as a non-precedent panel to decide the appeal.

[3] On appeal to WCAT the employer submits that the officer incorrectly calculated damages by failing to properly apply the policy in the *Prevention Manual* (Manual). The employer asks WCAT to cancel the Board's award and order a new award based on the Manual's policy. The employer also requests WCAT to order the worker to pay its costs arising from this appeal including the employer's application for a stay.

Issue(s)

[4] What is the appropriate remedy for the worker under section 153 of the Act for the employer's unlawful discrimination?

Jurisdiction and Procedural Matters

[5] WCAT's jurisdiction in this appeal arises under subsection 240 of the Act as the appeal of an order made under section 153 of the Act. Under section 250(1) of the Act, WCAT

[1] Operating as WorkSafeBC

may consider all questions of fact and law arising in an appeal, but is not bound by legal precedent.

[6] Pursuant to section 250(2) of the Act, WCAT must make its decision based on the merits and justice of the case. In doing so WCAT must apply a policy of the board of directors of the Board that is applicable in that case unless the provisions of section 251 of the Act come into play; in that situation a WCAT panel must make a referral to the WCAT chair regarding the issue of whether a policy is so patently unreasonable that it is not capable of being supported by the Act and its regulations. In this case, no issue has been raised regarding the lawfulness of Board policy and we have not found any concern in that regard; accordingly, we will consider and apply relevant Board policy. The relevant policy regarding discriminatory action complaints, including remedy for successful complaints, is found in Division 6 of the Manual, in particular policy item D6-153-2(Discriminatory Actions/Failure to Pay Wages – Remedies).

[7] Both the employer and the worker are participating in this appeal. Legal counsel represented the employer and a workers' adviser represented the worker.

[8] On its notice of appeal the appellant requested an appeal process by way of written submissions. We agreed that an oral hearing would not be necessary to decide the appeal issues in this case. We considered the criteria in Rule #7.5 of WCAT's *Manual of Rules of Practice and Procedure* (MRPP) regarding when WCAT may decide to convene an oral hearing. Credibility is not an issue in this appeal. The issues deal with whether the Board correctly applied mitigation and other remedy principles referred to in Manual policy. On the file there is evidence and submissions from both the worker and the employer from the earlier Board proceedings. With the basic background of evidence in the file, together with the parties' written submissions in this appeal, we are satisfied there is no issue that would be easier to resolve by way of an oral hearing than by an analysis of the documentation, written submissions, and the relevant law and policy. Where there have been disputes of fact we have applied the test in the British Columbia Court of Appeal decision of *Faryna v. Chorny* [1952] 2 D.L.R. 354, [1951] 4 W.W.R. 171 that "the real test of the truth of the story of a witness ... 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".

[9] This case involves the remedy for a successful complaint of a discriminatory action under section 151 of the Act. Therefore the standard of proof is the balance of probabilities.

Relevant Law and Policy

[10] Section 153(2) of the Act gives the Board the authority to order a remedy or remedies for discriminatory action. It states as follows:

> **153**
>
> (2) If the Board determines that the contravention occurred, the Board may make an order requiring one or more of the following:
>
> (a) that the employer or union cease the discriminatory action;
>
> (b) that the employer reinstate the worker to his or her former employment under the same terms and conditions under which the worker was formerly employed;
>
> (c) that the employer pay, by a specified date, the wages required to be paid by this Part or the regulations;
>
> (d) that the union reinstate the membership of the worker in the union;
>
> (e) that any reprimand or other references to the matter in the employer's or union's records on the worker be removed;
>
> (f) that the employer or the union pay the reasonable out of pocket expenses incurred by the worker by reason of the discriminatory action;
>
> (g) that the employer or the union do any other thing that the Board considers necessary to secure compliance with this Part and the regulations.

[11] Division 6 of the Manual deals with Board policy relating to complaints of discriminatory action. Policy item D6-153-2 of the Manual states in part as follows:

> **(a) Object of awarding remedies**
>
> The Board's object in exercising these powers is, as far as is practicable, to put the worker in the same position as the worker would have been if the discriminatory action or the failure to pay wages had not occurred. *This may involve measuring not only the worker's actual loss, but determining whether there were any measures the worker could have reasonably taken to reduce or eliminate that loss.*

(b) Factors considered in awarding remedies

The factors considered in determining the worker's loss include:

- *whether the worker has tried to eliminate or reduce the loss and, if the worker has not done so, whether it would have been reasonable for the worker to have tried;*

- any collateral benefits the worker has received from the employer (collateral benefits from a source other than the employer, such as employment insurance and private insurance benefits, are not to be considered); and

- *other circumstances affecting the worker's loss that arise independently of the worker's conduct after the discriminatory action or failure to pay wages has occurred*, for example, the closure of the place of employment.

(c) Explanation of Specific Remedies

Reinstatement to employment

The Board may order reinstatement to employment retroactive to when the discriminatory action occurred.

Payment of wages

The Board may make orders with respect to payment of wages in a variety of circumstances. These include:

- an order for reinstatement that requires the employer to pay back wages, reinstate benefits retroactively and perform other incidental acts. The authority to do this is found in section 153(2)(b);

- an order that requires the employer to pay, by a specified date, the wages required to be paid under Part 3 or the regulations. The authority to do this is found in section 153(2)(c); and

- an order that requires an employer to reimburse the loss of pay where the discriminatory action involved the employer reducing the worker's pay. The authority to do this is found in section 153(2)(g).

> The wages, salaries and other employment benefits covered by these provisions are those falling within the definition of "wages" in the Employment Standards Act. This definition does not include every payment or benefit that workers receive as a result of their employment.
>
> [italic emphasis added]

Evidence and Submissions

[12] The employer operates a motor inn. The worker, now 53 years old, began working for the employer on September 9, 2007 with responsibilities to clean rooms on a daily basis for guests, and after guests departed, to clean and prepare the rooms for new guests. The worker's evidence is that she was hired as a full-time housekeeping supervisor and guaranteed 40 hours per week. However, the kitchen and lounge were then under construction and the employer's owner wanted to keep the restaurant and lounge/kitchen staff working so he directed her to give up some of her work hours to keep the other staff working. The owner told her he did not want to have the workers quit since he would need them once the construction was complete. Therefore the worker gave hours to the other workers as directed. She says, however, that she also worked unpaid overtime, and was told her hours would increase once the construction was completed. She understood construction would be completed in January 2008.

[13] The worker was paid at a rate of $10.50 per hour. She says she was promised a raise to $10.75 per hour after three months but the raise was never given. The employer terminated her employment on February 1, 2008. The Board officer found that during the period September 9, 2007 through to February 1, 2008, the worker earned a total of $7,545.36.

[14] The Board officer reviewed the worker's pay stubs and found that although the number of hours she worked varied per pay period, on average the worker was paid for 40 hours per week, or $420.00 per week.

[15] The employer issued a separation slip which indicated the worker had been fired so she was not eligible for employment insurance (EI) benefits. The worker said that with no income, she was extremely motivated to find alternate work to pay her bills. She said that she applied for full-time jobs but took whatever work she could find.

[16] The Board officer considered the worker's work history after the employer terminated her employment:

- Within two weeks of her job termination, in February 2008, she found part-time employment, on a sporadic basis, with Company A, cleaning newly-built homes. Her rate of pay was $25.00 per hour. The worker's evidence is that this job sometimes provided about two days of work per week, but sometimes she might get called only

once a month to clean a house. As of August 2009, the date of her submissions to the Board, the worker continued to be employed by Company A.

- From June 13, 2008 to July 31, 2008 the worker was employed with Company B, detailing recreational vehicles and working as a cashier. This was a seasonal job, providing about two to three days of work per week. The worker earned $12.00 per hour and worked between 24 and 48 hours per week.

- From October 24, 2008 until April 14, 2009 the worker was employed by Company C, a fast-food franchise, as a food preparer, earning $9.30 per hour, working an average of 20 hours per week (five hours per day, four days per week).

- As of April 14, 2009 the worker was employed with Company D as a dietary aide, earning $16.78 per hour, working between 32.5 and 36.5 hours per week. The worker described this as a permanent, part-time position but the Board officer found it was full-time employment, comparable in "permanence and scope" to her previous work with the employer. The worker was still employed with Company D as of the date the Board officer issued his decision.

[17] The Board officer disagreed with the employer's submission that, leaving the discriminatory action issues aside, the employer was about to fire the worker in any event from her position. The Board officer found that were it not for the discriminatory action, the worker would have continued to work for the employer for the foreseeable future and was entitled to some wage loss compensation for the employer's illegal discrimination.

[18] As compensation, the worker sought wage loss from February 1, 2008 until she commenced work with Company D on April 14, 2009. The Board officer agreed that April 14, 2009 was the appropriate date to which wage loss should be calculated in order to put the worker in the same position that she would have been in if the discriminatory action had not occurred. He calculated the worker's total wage loss during that period (62 weeks), at a rate of $420.00 per week, as $26,040.00, but considered the principle of mitigation to subtract her earnings from Companies A, B and C from that amount. He calculated the total income from those companies as $7,444.35, reducing the wage loss to $18,595.65. The Board officer also deducted $420.00 as severance pay the employer had given to the worker, reducing the wage loss to $18,175.65. He then added 4% holiday pay, bringing the total wage loss to $18,902.68.

[19] The Board officer was satisfied the worker had made reasonable efforts to pursue employment and mitigate her loss. Therefore, he decided that only severance pay and the income she earned from Companies A, B, and C would be deducted from her total wage loss. Under section 153(2)(g) of the Act, he also added interest of $1,394.07 to the bring the total award to $20,296.75.

[20] On appeal to WCAT the employer submits that the Board officer's decision is incorrect in that it failed to apply Board policy because he did not properly consider whether the worker had met her duty to mitigate by seeking alternate employment; further he improperly calculated the period of loss and amount of compensation. In addition, the employer says that the officer's decision represents an excessive penalty without justification. The employer seeks to have WCAT establish a new award, and as well, the employer seeks reimbursement of its expenses (legal costs) from the stay application and from this appeal proceeding.

[21] With this background in mind, we turn now to review in more detail the employer's submissions, and the worker's responses, according to each of the alleged errors in the Board officer's decision as well as the employer's request for reimbursement of its expenses (legal costs).

Mitigation

[22] The employer refers to Manual policy item D6-153-2 which requires consideration of whether the worker has tried to eliminate or reduce her loss and, if she has not done so, whether it would have been reasonable for the worker to have tried. The employer relies on *WCAT-2009-03062* (November 24, 2009). That decision stated that in assessing section 153(2) of the Act and Manual policy item D6-153-2, the Board and WCAT apply the common law principle of mitigation which requires a worker to make reasonable efforts to find other reasonably comparable alternative employment, and that the burden is on the employer to prove that a worker failed to mitigate his or her loss arising from the employment termination.

[23] The employer also relies on *WCAT-2009-02609* (October 7, 2009) which referred to *Michaels v. Red Deer College*, [1975] S.C.J. No. 81 in stating that the burden of proof is for the employer to show that the worker, by the exercise of proper industry in a search, could have found other employment of an approximately similar kind reasonably adapted to the worker's abilities. Further, although an employer need not prove that there were specific jobs available to the worker, the length of the alternate job terms and their specific rates of pay, the burden is on the employer to show that job opportunities existed, reasonably comparable to the position from which the worker was terminated, and that the worker failed to mitigate his or her losses by not taking reasonable steps to be hired in such positions or to obtain such available work.

[24] The employer says that the worker's skill set and the work she did for the employer illustrate that alternate comparable employment required no specialized training, certificates, diplomas or degrees. The employer says the worker was providing the employer with unskilled general labour in a minimum wage setting for a short period of time. The employer characterizes the worker as "relatively young", submitting she was mobile with respect to her place of employment as illustrated by her subsequent jobs. Therefore, the employer submits, the worker's personal factors placed her in the range of workers where alternate employment was readily available and easily accessible.

[25] The employer says there was ample work available in the general labour field but the worker failed to take reasonable steps to mitigate her loss, providing no explanation as to why she did not seek comparable alternate employment. The employer says the worker has given no explanation why she chose part-time employment with Company A, cleaning newly constructed houses, rather than seeking full-time employment. The employer says the worker gave no explanation why she left her employment with Company B on July 31, 2008, and no explanation as to why she left the fast-food franchise Company C on April 9, 2009. The employer says that no further skills were required to clean the employer's motel rooms than to clean houses, recreational vehicles or cars, or to run a cash register or work in a fast-food kitchen. The employer says the worker has not explained why she chose only part-time employment for a considerable length of time, or why she left full-time employment several times. The employer submits that the Board officer penalized the employer for these factors by awarding wage loss for an extraordinary length of time.

[26] The employer says the worker could have sought full-time employment in various industries, including the hotel/motel industry, cleaning and housekeeping, fast-food or other restaurants, and other general labour positions. The employer attached, in Tab 2 of its submission, a list of employers in the worker's area that involve jobs it says are commensurate with the worker's skill and with wages similar to that paid by the employer. The employer says there were hundreds of employers in the area, and that suitable alternate full-time employment was readily available had the worker chosen to pursue those options. The employer submits that it should not be penalized for the worker's personal choices.

[27] The employer submits that the Board officer awarded continuous wage loss for over 60 weeks until the worker obtained better employment as a dietary aide, earning over 60% more income than she had with the employer. The employer says that the officer's decision did not properly apply the mitigation principle to consider the worker's efforts prior to obtaining the better employment as a dietary aide. The employer says the worker chose to remain in her initial part-time position with Company A and did not promptly seek additional employment elsewhere, but for some unknown reason simply remained in the part-time position with Company A. Also, when the worker finally did obtain other employment she later left those positions without explanation. The employer says that it is under no duty to continue to compensate a worker indefinitely, because a worker must take reasonable steps to seek comparable alternate employment.

[28] The worker emphasizes that the employer issued her a separation slip which effectively disentitled her to claim EI benefits. She says this is a very significant factor which supports that she was highly motivated to find alternate employment. The worker says that she was not able to find work other than the part-time on-call jobs until she found work with Company D in 2009, and she certainly would have accepted a full-time job if she could have found one. The worker attached a list of the places where she had applied for work, including 12 establishments where her applications were unsuccessful.

These included fast-food places, retail stores, hotel/motels and supermarkets. She says the inability to find full-time work was not her personal choice and she did make reasonable efforts to mitigate the loss that arose from the employer's discriminatory action.

[29] The employer says that of the list of employers submitted by the worker as evidence of where she had applied for work after her job termination, only two are "approximately similar in kind" to the employer's business. The employer says that in the area there were numerous other employers of a similar kind and the worker only applied to two of them. It concludes that the worker's efforts to mitigate were not reasonable and she made almost no effort to find similar employment.

[30] The employer disagrees that the separation slip it issued for the worker should be taken into account because there is no support or precedent for such a novel argument.

Improper calculation of period of wage loss and amount of wage loss

[31] The employer says that the Board officer erred (a) in calculating the amount actually earned by the worker during her period of employment with the employer; (b) in assuming the same hours would have been available to the worker had she continued working for the employer; (c) in finding the worker would have stayed with the employer for a 60-week period; and (d) in calculating the period of wage loss.

[32] With respect to (a), the employer says the Board officer erred in calculating the worker's average monthly earnings on a 40-hour work week. This was based on the reasoning that the worker's pay stubs showed that on average the worker was paid for 40 hours per week, or $420.00 per week. The employer disagrees, saying that the pay stubs submitted by the worker did not average 40 hours per week, because $420.00 severance pay must be deducted from the total of $7,545.36, leaving a total of $7,125.36 as earned income. The officer also awarded 4% holiday pay because the worker did not have vacation time with the employer. Thus the period worked by the worker during which she earned $7,125.36 is 21 weeks, the period between September 9, 2007 and February 1, 2008. This equals a salary of approximately $340.00 per week, not the $420.00 estimated by the officer. This is a difference of over 20%.

[33] With respect to (b) the employer says that the officer overestimated the number of hours the worker would have worked for the employer if she had continued in her employment because he improperly assumed that she would have had full-time hours. The employer says that full-time hours were seldom available to the worker during her tenure with the employer and were similarly seldom available to any other housekeeping employee during the seasonal months. The employer provided timesheets in Tab 3 of its submission. Those timesheets list the total hours of all housekeeping department employees for the year following the worker's dismissal. The employer points out the high turnover of employees and says this demonstrates that

sufficient full-time hours were rarely available to any single employee. The employer further submits that the timesheets illustrate the winter months have always been a slow time with not much work available for anyone in the months following the worker's dismissal. The employer also produced, at Tab 4 of its submission, monthly revenue and expenditure statements which it says illustrates the winter months of February, March and April are those in which the employer reports its largest losses of the year.

[34] The employer submits that the 40 hours per week awarded by the Board officer is far above the actual amount of hours that would have been worked by the worker if she had continued in employment with the employer. The employer says the hours that would have been available to the worker should be based on the average hours available to housekeeping staff in the months following the worker's dismissal. At the very least, the worker would not have worked more hours than the maximum available to any employee during the time period. The employer says it would be appropriate to allocate hours midway between maximum weekly hours and average weekly hours, with the result of 19.5 hours per week in February 2008, 21.7 hours per week in March 2008, and 36.7 hours per week in April 2008. The employer submits the Board officer overestimated average hours per week both before and after the worker's dismissal, which results in the award being grossly miscalculated. The employer requests an appropriate reduction in the award.

[35] The worker submits that the wage rate of $420.00 per week set by the Board officer is consistent with the documentary evidence and her evidence that the employer had guaranteed her income to be full time, told her it was happy with her work, and indicated the reduction in hours during the restaurant/lounge construction phase was temporary. The worker says she was hired as a housekeeping supervisor, not a regular housekeeper, and therefore the employer is comparing "apples to oranges" when it tries to draw an analogy between the hours available to regular housekeepers and the hours promised her as a housekeeping supervisor. The worker further submits that the employer's assertion that full-time hours were seldom available to any employee, particularly in the winter months, is contradicted by the advertisement the employer posted in December 2007 seeking a full-time housekeeping employee. That advertisement referred to the job as "permanent, full-time" with a 40-hour work week and a start date as "soon as possible."

[36] The worker also says the employer is unreasonable in requesting that the entire period of wage loss benefits should be based on earnings solely calculated from the slow winter average housekeeper earnings, because the period of wage loss benefits extends for more than a year which includes the busy summer. The employer responds that if WCAT determines the wage loss period should be extended beyond the winter months, it can make calculations beyond the winter months regarding the hours that were actually available to its employees. It emphasizes that the "make-whole" principle requires that the worker be placed in the position she realistically would have been in, and this requires calculations of hours actually available, not broad overestimates that ignore actual market conditions.

[37] The employer says there is no basis in the worker's submission that it had promised her full-time hours and it specifically denies making any such statement to the worker. Further the employer says that the worker's evidence is inconsistent on this point because she later says she was promised full-time hours after the completion of construction in January 2008. As well, the worker said in her submission that she had to put in "extra" hours to keep up with the workload during the construction period which is inconsistent with the worker working full-time hours on a regular basis. The employer says that available work to housekeeping staff is entirely dependent upon the influx of customers and as such, it could not have made a promise of full-time work to housekeeping staff.

[38] The employer confirms it hired the worker as a housekeeping supervisor but says the duties involved in performing the job were, for the most part, identical to the duties of the general housekeeping staff. The only additional task accompanying this position was double-checking the rooms during busy periods to ensure the other staff had properly cleaned the rooms. The employer says that no increased hours were associated with the supervisor position, as the hotel was never busy enough to require a housekeeper to act solely as a supervisor. There was no further skill or training required for the supervisor role. Therefore, the employer submits that the worker is wrong in arguing that the supervisor and housekeeper positions were not comparable regarding the number of hours available and the wages.

[39] The employer says that construction had the effect of creating more work for the housekeeping staff because they were required to clean the rooms in which construction workers and their families were residing. The employer says the construction was a non-issue because if in fact the worker did have to give up some hours to other staff as she alleged, the additional work created by the construction negated any hours allegedly lost.

[40] With respect to the job advertisement it placed in December 2007, the employer points out that it was placed before the worker's job termination, not afterward. The employer says that given the temporary nature of housekeeping work and the high turnover of employees in its housekeeping department, it runs such advertisements continuously. The employer refers to Tab 3 of its initial submissions to illustrate that running the advertisement did not change the total number of hours available to the housekeeping staff as a whole during the slow months.

[41] With respect to (c), the employer submits the Board officer erred in finding the worker would have stayed with the employer for a 60-week period because he failed to take into account that the worker held at least four different jobs during a 14-month period. The employer says that employment history is not consistent with a finding the worker would have stayed with the employer for 60 weeks. The officer gave no explanation as to why the worker's employment with the employer would have been any different than with her other employers.

[42] The worker disagrees that she was not job-attached with the employer and says she would have stayed with the employer were it not for the employer's discriminatory action. The worker says that after the employer terminated her employment, she was forced to find a variety of jobs simply because for a long time she could only find part-time or seasonal work. The worker says *WCAT-2009-02609* confirms that the appropriate quantum of remedy should be calculated from the date of her employment termination until she found comparable full-time work, which in her case was April 2009.

[43] With respect to (d), the employer submits the Board officer overestimated the period of wage loss because his decision is inconsistent with previous WCAT decisions as well as common law principles. The employer says that this was not a case involving inflammatory behaviour on the part of the employer and that such an extreme penalty was not warranted in the circumstances. The employer refers to *WCAT-2004-05722* (October 28, 2004) in which a worker who had been employed for 15 years was dismissed in violation of section 151 of the Act, and WCAT found the appropriate period of wage loss to be 24 weeks. The employer also refers to *WCAT-2004-02846* (May 28, 2004) in which the worker was awarded seven weeks of wage loss compensation. The employer notes that in that decision, the WCAT panel said the four main principles considered in calculating the period of wage loss are: length of service, age of the employee, nature of the employment and the availability of suitable alternate employment. The WCAT panel in that decision also noted that Canadian administrative tribunals ordinarily give awards in the range of two to six weeks of pay per year of service as compensation, depending on the circumstances. The employer submits that applying the principles in that case to the case at hand, the appropriate period of wage loss would "generously be in the area of one to three weeks, given the worker's approximately half a year of service, relatively young age, the low skill requirements of the employment, and the availability of alternate work." The employer notes it has already paid the worker one week severance and therefore submits no further award is necessary.

[44] The worker responds that employer conduct is not a relevant factor under Manual policy item D6-153-2 but in any event, in this case, the employer imposed further punishment on the worker after terminating her job by making it impossible for her to receive EI benefits. Thus if deterrence was a relevant factor, the worker says the employer's conduct in this case calls for condemnation and deterrence.

[45] The employer says there were no aggravating factors, over and above the unlawful discrimination, which call out for condemnation and deterrence. The employer says there is no support for a penalty in this case that would be higher than what is otherwise reasonable in similar cases of unlawful discrimination.

[46] The worker submits that *WCAT-2009-02609* and *WCAT-2006-03655* support the remedy awarded by the Board officer. The worker says that other decisions referred to by the employer are not relevant; for example, in *WCAT-2009-03062* the panel concluded the worker had not mitigated damages and in *WCAT-2004-05722* the panel

relied on irrelevant considerations such as *Employment Standards Act* provisions to calculate damages in lieu of notice.

[47] The employer submits that WCAT must follow its own "precedent" decisions unless the precedent decision involved different circumstances or was based on a policy that has changed. Therefore, the employer argues that WCAT must apply *WCAT-2004-02846* which clearly considers "reasonableness" in determining the appropriate wage loss period and is the most relevant decision in the context of a remedy for section 151 unlawful discrimination.

Excessive penalty

[48] Referring to Tab 4 of its submission, its revenue and expenditure statements, the employer says the Board officer's award is roughly equivalent to the employer's recent monthly revenue for December 2009 and January 2010. Given that the employer is already operating at a loss during the off-season, it says the award imposes an undue hardship that may affect the viability of its business. The employer says the award far exceeds the profit of its business in any month following the worker's dismissal. The employer says it is a small independently-run business and will suffer undue hardship if required to pay the officer's award, because the award was grossly overestimated without any consideration to the modest overall performance of the employer's business. The employer adds that it has had to incur extensive legal costs to have the award reviewed and therefore it has already been financially penalized as a result.

[49] The employer concludes that an appropriate remedy should be based on a salary of $205.00 per week with the appropriate period of loss being in the lower end of the one to three-week range. As the employer has already paid $420.00 in severance to the worker, the employer submits that its obligation to the worker has been satisfied and no further award is appropriate. It requests WCAT to "dismiss" the Board officer's remedy "with costs".

[50] The worker submits that the employer's financial losses and its expenditure of legal costs to defend the discriminatory action complaint are not relevant factors to consider under Manual policy item D6-153(2). The worker notes that the employer continues to carry on its business despite its financial losses, presumably with an expectation of future profit. The worker says the employer did not wind up its business within the loss period which might have been relevant. The worker says that she is entitled to the remedy awarded by the Board officer, with applicable interest.

Reasons and Findings

[51] We note at the outset that the remedy of reinstatement was not argued by the parties in this case. It is clear that job reinstatement is not a practical option and therefore we have proceeded on the basis argued by the parties that monetary compensation is the appropriate remedy.

The worker's reasonably foreseeable earnings

[52] First, we turn to review the income earned by the worker while working for the employer during the period September 9, 2007 through to February 1, 2008. Our calculations indicate that the worker earned a total of $7,125.36 during that period, with an additional $420.00 in severance paid to her by the employer. Pursuant to Manual policy item D6-153-2(b), we consider the severance pay a collateral benefit from the employer which we are not including as part of the worker's earnings. We have not discounted the holiday pay included in the total income of $7,125.36 as the worker did not take vacation and was therefore entitled to the holiday pay as part of her income. We have found, therefore, that actual earnings amounted to $7,125.36 over a period of 21 weeks, which averages to weekly earnings of approximately $340.00 per week. At the wage rate of $10.50 per hour earned by the worker during that period, the worker's average weekly income suggests she had worked an average of approximately 32.5 hours per week. This is inconsistent with the Board officer's finding that the worker had been working 40 hours per week on average before her employment was terminated.

[53] Our review of the employer paystubs provided by the worker indicates there was a very wide variation in the number of hours the worker worked each month. September 2007 provided the worker with well over 40 hours of work per week. The number of hours began to decrease in October 2007 although the worker still averaged approximately 40 hours of work per week that month. There was a significant drop in the worker's hours in mid-November and December 2007 which may, as some of the worker's submissions suggest, be partly attributable to ongoing construction during those months.

[54] The employer's records (see Tab 3) indicate that the worker and another housekeeper were back to full-time hours in January 2008. However, we note that apart from the construction issue, the records provided by the employer illustrate a marked slowdown in the employer's motel business during the winter and early spring months of 2008, with business recovering to full-time hours for at least some housekeepers by mid-April 2008. The employer's records illustrate that for the months of May, June, July and August 2008 some housekeepers were working well in excess of full-time hours. Given the worker's status as housekeeping supervisor and the fact that during her time with the employer she was receiving more hours than other housekeepers, it is reasonable to find that if she had continued in employment with the employer through the summer of 2008, she would have been one of the housekeepers with hours well in excess of full time for that period.

[55] We accept the employer's submission that the December 2007 advertisement for housekeeping staff was a "running" advertisement which was intended to ameliorate the effects of staff turn-over by encouraging applications by an enticement of full-time hours at a higher wage rate of $12.05 per hour. We note the reference in the advertisement to "20 vacancies" which supports our finding that the advertisement was in the nature of a continuous one to deal with the uncertainties of business needs and some staff

turn-over. We find that the reality of the situation was that in some months full time and even well in excess of full-time housekeeping hours would be available, and in the slow season housekeeping staff could expect substantially less than full-time hours. Further, the $12.05 wage rate was a "come-on" for the truth of the matter was that hourly wages, at least on a starting basis, were approximately $1.50 per hour less.

[56] The employer has urged us to assume that if the worker had continued in employment as its housekeeping supervisor, she could reasonably expect an average of 19.5 hours per week, at a wage rate of $10.50 per hour, for a total of approximately $205.00 per week. We find this estimate to be low for several reasons. We note the worker's somewhat superior status as housekeeping supervisor and the fact that during her time with the employer she received more hours than other housekeepers. We find that the worker could reasonably be expected to continue to receive more hours. We further note that the documentary evidence indicates the employer's business tends to recover and is very busy in the late spring and summer months (approximately a four-month period), with some housekeepers obtaining well in excess of full-time hours during that time.

[57] We acknowledge the worker's evidence that the employer had promised her a pay raise of $0.25 but this never transpired and we are not satisfied on the evidence that this would have happened even during the following year. Given the inherent uncertainty in any prediction based on generalizations and the "ups and downs" of business economy, we have found it reasonable to use the hours of two housekeepers who, like the worker when she was employed as housekeeping supervisor for the employer, were generally getting the most hours in the months following the worker's job termination. This does not mean that they always received the most hours, but that they usually did. We used the hours of "MH" until she left the employer's workplace near the end of 2008 and then we used the hours of "MD" to establish what the worker's hours likely would have been in the absence of the discriminatory action.

[58] The employer's records in Tab 3 illustrate housekeeping hours until the end of December 2008. Using those records, for the purpose of determining average weekly hours, the worker would have worked if she had continued in employment; we have estimated the total number of hours the worker would likely have worked as 1,931.3 in that 48-week period, that is February 1, 2008 through to the end of December 2008. This averages to approximately 40 hours per week.

[59] Therefore, although we disagree with the reasoning of the Board officer regarding the average hours the worker had worked during her five-month tenure with the employer, we agree with his conclusion that for the purpose of determining the worker's average weekly earnings for calculation of loss of future income expected from the employer, it is reasonable to assume a weekly loss of income of $420.00, representing 40 hours per week at a wage rate of $10.50 per hour. This best reflects the seasonal variations of hours available to housekeeping staff.

Mitigation

[60] We acknowledge Manual policy item D6-153-2 and WCAT jurisprudence which refers to the principle of mitigation as a relevant consideration when determining an appropriate remedy under section 153(2) of the Act. In *WCAT-2009-02609*, relied on by the employer in this case, the mitigation principle was described as follows at paragraphs 37 and 38:

> The Board and WCAT, when interpreting and applying section 153(2) of the Act and Manual policy item D6-153-2, have applied the common law principle that the law regarding mitigation requires a worker to make reasonable efforts to find other reasonably comparable alternative employment, and that the burden is on the employer to prove that a worker failed to mitigate his or her loss arising from the employment termination. **It is clear from the case law that it is a relatively high standard of proof.** See *WCAT-2008-03679* (December 8, 2008). Those principles, in particular the principle that the burden is on the employer to prove that a worker failed to make reasonable mitigation efforts, reflect the leading Canadian case in the Supreme Court of Canada decision *Michaels v. Red Deer College,* [1975] S.C.J. No. 81, 57 D.L.R. (3d) 386 (*Michaels* case). The *Michaels* case addressed not only the issue of who bears the onus of proof in a mitigation defence (the defendant) but also the nature of the evidence required to establish this defence.
>
> In the *Michaels* case the Supreme Court of Canada expressly stated **that the burden of proof is upon the former employer to show that the worker, by the exercise of proper industry in the search, could have found other employment of an approximately similar kind reasonably adapted to the worker's abilities, and that in the absence of such proof the worker is entitled to recover the salary fixed by the contract. This can be a difficult requirement for an employer to overcome.** The *Michaels* case has been applied in numerous British Columbia cases, notably *Edge v. Kilborn Engineering (B.C.) Ltd.*, [1988] B.C.J. No. 807 (C.A.) and *Forshaw v. Aluminex Extrusions Ltd.* (1989), 27 C.C.E.L. 208, 39 B.C.L.R. (2d) 140, [1989] B.C.J. No. 807 (C.A.). **Further, although an employer need not prove that there were specific jobs available to the worker, the length of the alternate job terms and their specific rates of pay** (see *Carlisle-Smith v. Dennison Dodge Chrysler Ltd.* (1997), 33 C.C.E.L. (2d) 280 (B.C.S.C.)), **it is nevertheless clear that the burden is on the employer to show that job opportunities existed, reasonably comparable to the position from which the worker was terminated, and that the worker failed to**

> **mitigate his or her losses by failing to take reasonable steps to be hired in such positions or to obtain such available work** (see *Stuart v. Navigata Communications Ltd.* [2007], B.C.J. No. 662, [2007] 9 W.W.R. 50 (S.C.)).
>
> [bold emphasis added]

[61] We find that in this case the employer has failed to discharge the onus of proving, on a balance of probabilities, that the worker failed to take reasonable steps to mitigate her damages by finding other comparable employment in the period after her job termination and prior to April 14, 2009.

[62] The worker was approximately 50 years old at the time of her job termination and when she was seeking work to replace her former job with the employer. Although the employer describes the worker's age as "relatively young" we consider it obvious that in the context of unskilled general labour the worker would be competing with job applicants many years younger. She would be at a disadvantage compared to younger applicants, particularly with respect to jobs involving substantial physical activity such as cleaning jobs. Similarly, for reasons of both age and prior experience/training, she would be at a disadvantage in applying for even entry-level sales and cashier jobs in the retail sector such as mall stores and supermarkets.

[63] Given that the separation slip provided the worker by the employer prevented her from applying for EI benefits, we accept as logical and credible the worker's explanation that she was highly motivated to find alternate employment and made her best efforts to do so. She was fortunate to find, within two weeks of her job termination, employment with Company A that paid a high rate, compared to her job with the employer, of $25.00 per hour. We can understand why she would want to keep this job, albeit it was sporadic in nature, in the hope that the hours would increase. We note that she kept this employment even after finding other work with Companies B, C and D, which indicates she was trying to maximize her hours and her income.

[64] The employer provided an Internet listing of employers in the same general geographical area that included cleaning companies; hair salons; theatres; retail mall stores such as jewellery/clothing/book stores; drug stores and pharmacies; gyms and fitness centres; motels and hotels; and restaurants. We find that with respect to "comparable alternate employment" to the worker's job with the employer, only the cleaning companies, motels/hotels and restaurants fall into that category. We note that although the employer gave a general listing of employer names and contact information and made a blanket statement that there was "ample work" in the general labour field, the employer did not provide evidence that these employers had job vacancies or were hiring in the unskilled, general labour category during the period after the worker's job termination. For example, there were no copies of job advertisements or letters from employers indicating they were hiring during that time period. Thus, we find the employer has not provided persuasive evidence to support a finding that there

were other jobs generally available to the worker in the geographical area for which she would likely have been considered a suitable candidate if she had applied.

[65] We have no reason to doubt the worker's credibility with the respect to the list of employers to which she applied for jobs during the period after her job termination. We note that of 12 employers where her applications were unsuccessful, these included fast-food restaurants, motels/hotels, retail stores and supermarkets.

[66] Given the slowdown in the employer's business during the winter and early spring months, it is not surprising that the worker was unsuccessful in finding comparable housekeeping jobs with other hotel/motel employers during those months. The employer has found fault with the worker's choice to keep her part-time job with Company A instead of applying at all the other hotels/motels in the area. We find the worker likely made a reasonable choice that a job in hand was important to keep, particularly given the evidence of a business slow-down in the hotel/motel area in that initial winter/early spring period. We also do not fault the worker for casting her job search net wider than just the cleaning industry, even though her experience and background made it unlikely, in our view, that her applications would have been successful in the retail store or supermarket context.

[67] By mid-June 2008 she had found additional employment (in addition to her job with Company A) as a cleaner/cashier with Company B, which helped to increase her income until the seasonal work concluded at the end of July 2008. We accept as credible the worker's explanation that she took the work she could get. We do not accept as reasonable, given the difficult financial circumstances in which she found herself, that the worker made a "personal choice" (as alleged by the employer) to avoid full-time work. We note that the worker was obviously willing to work, full or part time, for restaurant and fast-food employers because as of late October 2008 the worker was successful in finding part-time work (in the middle range of average weekly hours) at a fast-food franchise, Company C. It is reasonable to find that if the worker had been successful in finding that type of work earlier or on a full-time basis, she would have taken the opportunity.

[68] We note the worker kept her jobs with Company A and Company C for long periods of time, and only left Company C when she found the substantially higher-paying job with Company D in mid-April 2009 where she continues to work. We also note that she continued to work for Company A even though she had over 30 hours of work per week with Company D at a substantially higher wage rate than she had earlier earned, another indicator the worker was trying her best to maximize her employment income.

[69] We disagree with the employer's submissions that the worker gave no explanation for leaving Companies B and C, as well as its suggestion the worker chose only to look for part-time work and avoided full-time work. The worker did not "leave" Company B but rather her job ended because it was only seasonal, terminating at the end of July 2008. She left Company C only when she found employment with Company D at the much

higher wage rate and higher average hours per week. We find these are solid reasons for the end of the worker's jobs with Companies B and C, not evidence of a worker with a poor attachment to the workforce as the employer suggests in its submissions.

[70] The evidence in this case satisfies us, on a balance of probabilities, that the worker made reasonable efforts to mitigate her losses after the employer terminated her employment. In applying the mitigation principle, decision-makers should not use hindsight and standards of perfection to hold a worker to an unreasonable level by predicting combinations of diligence and luck in achieving success in job search. The evidence in this case gives us a picture of a person in late middle-age without job skills apart from general labour experience, who found herself suddenly without work and without any income such as EI benefits to cushion her loss of employment income. We find that she took prompt and diligent efforts to replace her loss of income and was partly successful in doing so, until ultimately, in mid-April 2009, she was entirely successful. Therefore, we reject the employer's submission that the quantum of remedy in this case should be reduced on the ground of the worker's failure to mitigate her losses.

The role of precedent

[71] The employer argued that we are required to follow the reasoning in prior WCAT decisions dealing with remedies for discriminatory action contrary to section 151 of the Act. In particular, the employer referenced a line of WCAT authority indicating remedy was based on employment law concepts such as wrongful dismissal damages at common law and statutory compensation under the *Employment Standards Act*.

[72] MRPP item #17.2.2. (Decision-Making Principles) states in part as follows:

> WCAT must not fetter a discretion conferred on it under the WCA [*Workers Compensation* Act] and policy. However, taking into account individual circumstances and providing a decision according to the merits and justice of the case under section 250 does not mean that the panel's focus is solely on the individual case. A decision must also be consistent with the WCA, policy, and WCAT precedent decisions.
>
> The legislature has taken specific measures to promote consistency and predictability. These include sections 250(2) and 251 concerning the binding nature of policies of the board of directors, and section 250(3) concerning the binding nature of WCAT precedent panel decisions. Having regard to this legislative intent, WCAT will recognize consistency and predictability as important values in adjudication

[73] MRPP items #9.4.3 and #9.4.4 state in part as follows:

> **9.4.3 Legal Precedent Not Binding**
>
> The panel is not bound by legal precedent such as prior WCAT decisions on similar issues unless provided by a precedent panel under section 238(6) [s. 250(1)] (item 2.7.2). WCAT is bound by previous final decisions on the specific claim that is the subject of appeal. This includes decisions of Board officers, the Review Division, WCAT, former appeal bodies, and the courts.
>
> The panel is also not bound by decisions of the courts. However, if a court in another case determined the correct interpretation of a WCA or Board policy provision, the panel may be bound to apply the court's interpretation. In contrast, if a court upheld an earlier WCAT interpretation of a WCA or Board policy provision as reasonable, the panel need not follow that interpretation if it prefers another interpretation that is also reasonable.
>
> **9.4.4 Except Precedent Panel Decisions**
>
> The panel is bound by a prior precedent panel decision (under section 238(6)) unless the specific circumstances of the matter under appeal are clearly distinguishable from the circumstances addressed in the precedent panel's decision or, subsequent to the precedent panel's decision, a policy of the board of directors relied upon in the panel's decision was repealed, replaced or revised [s. 250(3)] (item 2.7.2).
>
> WCAT precedent panel decisions are accessible on the WCAT website at: www.wcat.bc.ca.

[74] Under section 250(3) of the Act the WCAT chair may appoint a precedent panel but none of the decisions referred to by the parties in this appeal were decisions of precedent panels. Therefore, we disagree with the employer's submission that as a WCAT panel we are required to follow the reasoning in certain decisions upon which it relies, in particular *WCAT-2004-02846*. However, we acknowledge that we are obliged to apply the Act and relevant Board policy. We also acknowledge the importance of considering the merits and justice of the case as well as the need to respect the values of consistency and predictability in decision-making.

Prior WCAT decisions – two different interpretations of the make-whole remedy

[75] We have identified in prior WCAT decisions a distinct difference in the approach panels have taken in interpreting the "make-whole" remedy authorized by section 153(2) of the Act and Manual policy item D6-153-2. We use the description "make-whole" remedy

because of the statement in policy item D6-153-2 which says that the object in exercising remedial authority under section 153(2) is "as far as is practicable, to put the worker in the same position as the worker would have been in if the discriminatory action or the failure to pay wages had not occurred." The policy then goes on to state that this may involve measuring "not only the worker's actual loss" but also considering mitigation measures the worker ought reasonably to have taken.

[76] One approach is exemplified in *WCAT-2004-05722a* (January 7, 2005) in which the panel was considering a remedy for a worker who had worked for the same bingo hall for 15 years and who was a manager at the time the employer (a successor to the previous bingo hall employer) terminated her employment in violation of section 151 of the Act.

[77] Ultimately, the WCAT panel awarded a total of 24 weeks wages to be paid by the employer to the worker, in addition to and separate from any other payments the worker may have received from the previous bingo-hall employer. The panel referred to and agreed with a decision of the Board's former Appeal Division, *Decision #2003-0089* (January 15, 2003) which stated the Act's discriminatory action provisions would be rendered meaningless if the only remedy would be the equivalent of the payments or notice a worker would receive under the *Employment Standards Act*. The panel also agreed with the Appeal Division's statements, however, that a worker should not profit by sections 151 and 153 beyond being restored to the position he or she would have been in were it not for the contravention of section 151. The panel further agreed with the Appeal Division's comments that to some extent a decision-maker may need to be somewhat arbitrary in determining a fair and reasonable period of time in which to order an employer to pay a continuation of a worker's wages, because there is no formula in the Act or Board policy to assist in that regard. In giving its reasons for awarding 24 weeks wage loss compensation as a remedy for the section 151 violation, the panel stated in part as follows, at pages 7 and 8:

> The payments in respect of termination of employment found in the *Employment Standards Act* are a statutory minimum. It is trite law to note that the common law of wrongful dismissal may provide an individual with damages in lieu of notice of termination of employment far in excess of the minimum statutory requirement. Those damages are based on considerations relating to such things as the individual's age, length of service, the availability of suitable alternate employment, and the nature of the employment that has been lost.
>
> Subject to legislation such as the *Workers Compensation Act* and the *Human Rights Code*, an employer in British Columbia has the right to terminate employment at any time, without just cause, provided payment in lieu of or adequate notice of termination is provided. As such, the worker's employment was subject to potential termination, with or without just cause, at any time. If the employer could establish just cause, there

> may have been no liability respecting notice or payment in lieu. If there was no just cause, then the employer would be liable for payments under the *Employment Standards Act* as a minimum and, potentially, additional payment in lieu of notice in respect of a wrongful dismissal.
>
> As such, I consider that in order to put the worker in the position she would have been had there been no discriminatory action, she should be provided with wages roughly equivalent to what she would receive based on the application of the *Employment Standards Act* and, in addition, payment in lieu of notice based on an action for wrongful dismissal.
>
> The amount payable in respect of the *Employment Standards Act* and any amount payable respecting an action for wrongful dismissal are cumulative. They overlap. In other words, the employment standards amount is a minimum and amounts payable for damages for wrongful dismissal are in addition but inclusive of the minimum statutory payment.
>
> After considering all of the circumstances of this appeal, and all of the submissions, I have concluded that the payment in respect of wages should be equivalent to 24 weeks wages….
>
> Published policy states that the objective is to put the worker, as far as practicable, in the position she would have been in if the discriminatory action had not occurred. There is no other guidance in the Act, the Regulations or published policy. As such, the amount must be determined primarily on the manner in which the worker can be restored to the position she was in before the discriminatory action. That position was as an employee for an indefinite term, with all the rights and responsibilities flowing from the statutory and common law of British Columbia. I have considered the award of wages on that basis and although the amount is one based on the exercised of judgement, that judgement was guided by employment law principles applicable to termination of employment.

[78] Thus, this line of authority suggests a formula for calculating a worker's remedy under section 153(2) of the Act with reference to a worker's theoretical entitlement under the common law principles for wrongful dismissal together with the worker's theoretical entitlement under employment standards legislation.

[79] Some months later the same panel issued *WCAT-2004-02846* which the employer relies on in this appeal. That case involved a worker who had been employed for three years with the employer as a secretary/bookkeeper before her employment was terminated in violation of section 151 of the Act. The WCAT panel confirmed the Board decision to award seven weeks' wage loss as a remedy, and also ordered the employer

to provide the worker with a letter of reference. In that case the WCAT panel stated in part as follows, at pages 12 and 13:

> An award designed to put the worker as close as possible in the position she would have been in without the discriminatory action is what is mandated by the legislation and published policy. I consider that such an award must take into account the uncertainty inherent in employment, including the possibility that the worker could lose her employment for a wide variety of reasons, none of which necessarily constitute discriminatory action under the Act or any other legislation…
>
> The general principles of law relating to damages for wrongful dismissal do not directly apply to discriminatory actions. However, they do provide some general principles applicable to determining what is the appropriate period of notice that can be of assistance, if only because they have been developed by the courts over years of considering how to [sic] the put a dismissed worker back, as far as practicable, in the position she would have been in had a wrongful dismissal not occurred.
>
> The four main principles considered are length of service, age of the employee, nature of the employment, and the availability of suitable alternate employment. Considering these factors, in this worker's case I consider the RO2's decision that the worker was entitled to three weeks in addition to the four provided by the employer was reasonable in the circumstances. In that regard, I note that the worker was able to find alternate employment, albeit short-term.

[80] The employer relies on these two foregoing cases to support its position that in awarding a remedy under section 153(2) of the Act and Manual policy item D6-153-2, the Board and WCAT should take guidance from common law principles in wrongful dismissal cases. The employer also relies on these cases to support its position that a remedy under section 153(2) should take into account the reasonableness of awards so that they are generally consistent with compensation in the range of two to six weeks of pay per year of service.

[81] We do not agree that the remedy required under section 153(2) of the Act and Manual policy item D6-153-2 can be fulfilled simply by applying either the common law principles for wrongful dismissal remedies, or notice requirements under employment standards legislation, or a combination of both. If the legislature had intended such a formula to be applied, it could and would have said so in section 153(2), but it did not. Similarly, the Board could have provided such direction in policy item D6-153-2, but again it did not.

[82] Instead, section 153(2) of the Act provides broad remedial powers and Board policy expressly refers to measuring the worker's "actual loss" (while applying the principle of mitigation) and keeping in mind the object of the statutory remedial powers is, so far as practicable, to put the worker in the same position as the worker would have been if the discriminatory action had not occurred.

[83] Board policy therefore uses language akin to remedial authority found in Canadian human rights legislation; in our view it is no accident that the policy adopts the "make-whole" or *restitutio in integrum* remedial authority of human rights tribunals. That type of statutory remedial authority is fundamentally different than the common law remedies for wrongful dismissal which flow from the law of contract. Those common law contractual principles do not incorporate the "make-whole" concept found in human rights legislation and in Board policy.

[84] Thus, we disagree with the suggestion that common law remedies for wrongful dismissal, even when combined with compensation under employment standards legislation, are sufficient to put a dismissed worker back, as far as practicable, in the position he or she would have been in had the unlawful discriminatory action not occurred. In some cases where the evidence showed that the employer in question likely would have terminated the worker's employment in the near future in any case for other reasons, apart altogether from anti-safety animus, common law remedies for wrongful dismissal and/or employment standards notice provisions might coincidentally be similar to the make-whole remedy. Such a result does not mean that the common law analysis is applicable under section 153(2) of the Act.

[85] If evidence of an imminent loss of employment is lacking, a worker's situation is like every other worker in Canada in that there exists only the theoretical possibility that in the reasonably foreseeable future one's employer *might possibly* terminate one's employment. In our view, that speculative possibility should not translate into an automatic calculation of damages based on common law wrongful dismissal remedies and/or notice provisions under employment standards legislation. To do so would ignore the public policy reasons behind unlawful discrimination legislation in the occupational health and safety context. It would ignore the importance of protecting all workers from retribution in relation to workplace health and safety issues. It would be tantamount to saying "Well, the employer could have fired you for any reason so we will ignore the employer's anti-safety behaviour, assume you were fired for other reasons and then apply remedy principles relevant to that other context." It would be akin to giving, in the context of human rights legislation, a negligible remedy to an unskilled labourer, on the job for only days, who was terminated by an employer because it disliked his religion: since the worker had little employment history with the employer, no employment standards notice would be needed and, perhaps, virtually no compensation under wrongful dismissal law, therefore, virtually no remedy under human rights legislation. But that would defeat the very purpose of the human rights legislation, as does such an approach defeat the very purpose of unjust discrimination provisions in occupational health and safety legislation. As observed in paragraph 5.171 (4) of

Employment Law in Canada (Geoffrey England, Innis Christie and Merran Christie, 3rd ed., 1998, looseleaf: Butterworths, updated to 2005):

> The argument that the "make whole" approach *indirectly* incorporates the common law "reasonable notice" period as the cut-off date for the compensable period on the ground that the employer *could* have lawfully terminated the claimant's employment by giving him or he "reasonable notice" of termination should be rejected. If accepted, this argument would drive a coach-and-four through the "make whole" philosophy, the very purpose of which is to ameliorate the limitations of the common law rules in the sensitive area of human rights. Furthermore, the argument is illogical. While it is true that the employer could have given lawful notice of termination, the fact remains that it did not; it chose to discriminate against the worker instead, and there is no logical reason why his or her compensation should be reduced because of a contingency that was not on the cards.

[86] To put such a worker back into the situation he or she would have been in were it not for the section 151 violation is to examine the evidence in each case on an individual basis and determine the situation the worker likely would have been in were it not for the section 151 violation. That is what Manual policy item D6-153-2 requires. Case law interpreting make-whole remedies found in human rights and occupational health and safety unjust discrimination legislation has provided guidance in how to do that, which we will later turn to examine.

[87] We are also concerned with the consequences of applying common law wrongful dismissal remedies and/or employment standards remedies in the occupational health and safety context of unjust discrimination. One obvious problem would be that workers such as young workers or workers new to a job would be vulnerable in raising occupational health and safety issues involving their workplaces. This is because, unlike the situation of a worker who had worked decades for an employer, a worker with only a few weeks of employment would, under common law or employment standards principles of remedy, receive almost nothing in the way of damages (if job reinstatement was not a practical remedy).

[88] Our view is that the legislature did not intend section 153(2) of the Act to be interpreted and applied in such a way as to effectively deny protection to workers, new on a job, who raise occupational health and safety concerns at their workplaces or otherwise act under section 151(a) through (c). Remedies under section 153(2) should be even-handed and take into account, so far as practicable, the true loss suffered by a worker whose employer has violated section 151. For all these reasons, we disagree with the first line of reasoning about discriminatory action remedies referenced in the above-noted WCAT decisions.

[89] The second line of reasoning found in prior WCAT decisions analyzing remedies for unlawful discrimination under section 151 of the Act is illustrated by *WCAT-2009-02609*, where the panel confirmed a Board decision which awarded a worker who had been employed for less than two months with the employer, wage loss equivalent to 18 weeks wages. That amount was the worker's assessment of his financial loss, representing his wage loss for the full period between his date of employment termination and the date he found another job. The WCAT panel rejected the employer's argument that the remedy was unreasonable given the short length of time the worker had been employed by the employer. In that regard the WCAT panel stated as follows at paragraphs 20 and 21:

> The case officer was aware that the worker had less than two months' service with the employer before his termination, but noted that the *Employment Standards Act* provisions do not apply in discriminatory action remedies under section 153(2) of the Act. I agree with the case officer that Manual policy item D6-153-2 illustrates that wage loss remedies under section 153(2) of the act are based on the same principle guiding the award of wage loss remedies in human rights complaints, namely, to restore a complainant, so far as practicable, to the position he or she would have been in were it not for the employer's discriminatory action. Thus, the *Employment Standards Act*, under which the worker would not be entitled to any pay on termination, does not apply in this case.
>
> I also agree with the case officer's reliance on *Dewitter v. Northland Security Guard Services Ltd.*, [1996] B.C.C.H.R.D. No. 27 as well as the WCAT cases approving the "make whole" principle (see *WCAT-2007-01377* and *WCAT-2004-02587*) that the common law notice period/damages principles are not a proper measure of wage loss in discriminatory action remedies awarded under section 153 of the Act. Therefore, the factor of the worker's short duration of employment with the employer is not a relevant factor in this case in determining the appropriate quantum of remedy.

[90] See also *WCAT-2004-02587* (May 18, 2004) in which the panel noted the differences between damages for wrongful dismissal under the common law, and remedies under statutory schemes prohibiting unlawful discrimination. In that decision the panel stated in part as follows at pages 24 and 25:

> In *Individual Employment Law* (Kingston: Quicklaw, 2000), **Geoffrey England reviews the differences in remedies granted under the common law for wrongful dismissal, and those remedies available to an unjustly dismissed employee under statutory schemes in the Canadian federal jurisdiction and several provinces. He concludes that the differences are dramatic…**

> Unlike the common law, however, compulsory reinstatement is viewed as the primary remedy for unjust dismissal **under statutory schemes, and there is a "make whole" philosophy empowering a decision-maker to do any other like thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal. This make-whole authority is apparent in the wording of section 153(2) of the Act. England points out that the broad remedies available under statutory schemes are intended to be pivotal features of the protection against illegal termination of employment. He states:**
>
> > **Indeed, were it not for these special remedies, there would appear to be little point to enacting the statutory schemes, since they would largely parallel the common law.** Therefore, those adjudicative awards that have applied the common law measure of damages or have suggested that reinstatement is an exceptional remedy should be regarded as palpably wrong.
>
> [bold emphasis added]

[91] We agree in general with the second approach to the extent that it rejects common law wrongful dismissal damages as a proper basis for calculating damages under the make-whole remedy; however, we also consider that other jurisdictions in Canada offer further relevant guidance on this issue.

Approach to make-whole remedy in other jurisdictions

[92] As noted at paragraph 5.168 of *Employment Law in Canada* (earlier cited), human rights legislation across Canada grants adjudicative tribunals "remedial authority to make-whole a complainant's loss, that is, to restore the victim to the position he or she would have been in had the unlawful discrimination never occurred." We note that these words are akin to those found in Manual policy item D6-153-2.

[93] Section 50 of Ontario's *Occupational Health and Safety Act* (OHSA) has an unjust discrimination provision similar to section 151 of the Act, with similarly broad remedial authority. Among other remedies, the Board generally directs that a complainant be compensated for all lost wages and benefits resulting from the unlawful termination, with allowance for mitigation of damages. See *Chevrette v. Canadian Gypsum Construction*, 1978 Can LII 592 (O.L.R.B) (October 19, 1978) in which the remedy required that in the context of a construction project which had been completed by the time the complaint was dealt with by the Ontario Labour Relations Board (OLRB) "the four complainants be compensated for all lost wages and benefits resulting from their unlawful termination from the date of their discharge (March 6, 1978) to the date they would have been

laid-off for lack of work." See also *Ryerson v. H.H. Robertson Inc*, 1991 Can LII 6047 (O.L.R.B.) (April 15, 1991) in which the OLRB panel stated at paragraphs 58 to 60:

> The OHSA is a remedial package which creates new rights and imposes important responsibilities on all members of the workplace....
>
> As a result of the *Occupational Health and Safety Act,* a worker is no longer confined to the legal regime established at common law or under the terms of a collective agreement, for as the Board observed in *Inco* it was a dissatisfaction with the legal *status quo* which prompted the passage of the OHSA in the first place. Under the OHSA, a worker's rights are *statutory* rather than *contractual*, and the Ontario Labour Relations Board has been given new responsibilities to give effect to them. The legislation is more than a bundle of individual rights, worker protections, regulations and penal provisions. It is an integrated whole designed to bring to light and resolve safety concerns. It introduces a new *process* which supercedes what went before.
>
> Against that background, there is no obvious reason why the Board should defer to, or prefer the piecemeal approaches of Courts or arbitrators, unless the language of the legislation and utilitarian considerations clearly point in that direction. Rather, we think we should interpret the statute in a manner most likely to promote workplace safety, and most likely to provide an expeditous, economical and final resolution of workplace disputes.
>
> [italic emphasis in original]

[94] Similar statements were made in *Proctor v. Whitler Industries Limited*, 1992 Can LII 6314 (O.L.R.B.) (July 16, 1992) in which the panel emphasized that compensation for unlawful discrimination under the Ontario OHSA is compensation for a breach of a statute which "certainly should not be held to be in the reasonable contemplation of parties to an employment contract." The panel drew an analogy to remedies under human rights legislation, observing it was not constrained by the measure of damages in common law wrongful dismissal cases because this would often inadequately compensate a complainant and fail to carry out the purposes of the OHSA. Rather, the panel stated it was "free to tailor the remedy to the actual damaging effects, given the fact that the Legislature left the Board to use its broad discretion as to remedy as set out in the Labour Relations Act."

[95] Similarly, in the context of the New Brunswick *Occupational Health and Safety Act*, courts have rejected the proposition that remedies for unjust discrimination are limited to common law wrongful dismissal remedies. See *Chaleur Building Supplies v. New Brunswick (Workplace Health, Safety and Compensation Commission),* 2006 NBQB 101, in which the court stated that an amount awarded as wage loss compensation under the statute was "totally distinct in nature and an entirely different

remedy than any amount paid in lieu of notice. In my opinion, one does not exclude the other."

[96] In the human rights context, the general law of damages awards for lost wages is summarized as follows at pages 6 and 7 of *Remedies in Labor, Employment & Human Rights Law* (Field, Atkinson & Perraton, 2008 loose leaf: Thompson Carswell), citing an Ontario Board of Inquiry in *Rodley v. Barclay* (1993), 19 C.H.R.R. D/503 at D/510:

> With respect to the claim for lost wages, I find that the law has established as a general principle that human rights remedies are intended to encompass full and complete compensation for the complainant's losses. The purpose of the damage award is to put the complainant, so far as money can do, in the position she would have been in had her rights not been violated. An award of damages under the [Human Rights] Code must reflect the social importance of the rights that are being protected. However, a complainant is under a duty to mitigate her damages, by making reasonable efforts to obtain other employment.

Our conclusions about the make-whole remedy

[97] Our review of the law leads us to conclude that a remedy under section 153(2) of the Act for unlawful discrimination is a different remedy than an amount paid in lieu of notice under the common law of wrongful dismissal and/or employment standards legislation.

[98] The make-whole remedy under the Act and Board policy is specific to the purposes and objects of a statutory occupational health and safety regime. These purposes include ensuring safe workplaces by protecting workers who raise safety concerns, deterring employers from retaliating against such workers, and encouraging a culture of workplace safety in British Columbia. It is apparent that such purposes are very different from the contractual principles underlying common law wrongful dismissal damages. For that reason, it is reasonable to expect that in many cases, remedies under section 153(2) of the Act will be different in scope and quantum than remedies in contexts outside of occupational health and safety. Our approach is therefore more consistent with the second line of WCAT authority rather than the first as discussed above.

Potential elements of the make-whole remedy under the Act

[99] Having determined that wrongful dismissal damages and remedies under employment standards legislation do not form the basis for a make-whole remedy, the question that arises is what are the potentially relevant factors to consider under section 153 of the Act?

[100] As the authors observe in *Employment Law in Canada* at paragraph 5.169:

> Today, the "make whole" rationale is commonly accepted as governing the measure of damages for unlawful discrimination. The tricky issue with the "make whole" rationale is deciding at what point to cease compensating a victim's future losses.

[101] It is important to keep in mind the requirement that there be a causal connection between the discrimination and the loss of income. Despite this requirement we agree that it is still a complex matter to determine a make-whole remedy. The test of reasonable foreseeability is central to this inquiry, requiring a decision-maker to engage in the difficult task of predicting a person's future. In doing so, the decision-maker will have to consider whether the likelihood of a loss is too remote to compensate. This is often not a matter of precision but a matter of judgment in all the circumstances.

[102] Indeed, the general approach of human rights and occupational health and safety tribunals is to compensate only for those losses that are reasonably foreseeable as likely to result from the discrimination. Some jurisdictions (Alberta and Prince Edward Island) have legislated express limits in the amount of compensation that complainants can recover in cases of unlawfully discriminatory employment terminations. The authors of *Employment Law in Canada* observe that in the absence of such legislative "caps" tribunals apply the make-whole approach by making predictions about the claimant's future career progress. This involves factoring in the following types of contingencies:

- Would the complainant's job performance have been sufficiently meritorious for him or her to be promoted into a higher paying position if he or she remained with the employer? If the complainant would likely have won a promotion, then his or her compensation should take this into account.

- What degree of job security would the complainant have enjoyed had he or she remained with the employer?

- Would the level of the complainant's earnings likely have increased or decreased had he or she remained employed with the employer?

- What is the probability of the complainant obtaining a replacement job having regard to the state of the labour market in his or her area of expertise and the complainant's personal characteristics in matters such as age, experience, and skills?

- How does the complainant's replacement job, or likely replacement job, compare in terms of wages and benefits with his or her previous job?

[103] Apart from factors relevant to predicting a claimant's future career progress, tribunals also use the make-whole concept to recognize other losses and grant a broad range of innovative remedies. For example, particularly in the human rights context, compensation has been awarded for mental stress if medical evidence establishes that a complainant's symptoms are attributable to the unlawful discrimination.

[104] Compensation has also been awarded for the infringement of a worker's statutory right not to be discriminated against for raising occupational health and safety concerns, the rationale being that the worker's personal dignity and self-respect are presumed to have been diminished if his or her legal rights have been violated. This head of damages is distinct from mental stress and distinct from compensation for wage loss. See *Graphite Specialty Products Inc.* [2009] O.L.R.D. No. 1611 (May 6, 2009) (O.L.R.B.) where the panel considered an appropriate make-whole remedy for an unlawful job termination motivated by the worker's exercise of rights under Ontario's OHSA. The panel observed that a make-whole remedy does not, in most instances, continue in perpetuity but is limited by what is "foreseeable and reasonable in the circumstances." The panel stated that the usual approach is to order either reinstatement and/or damages, in the form of what the individual would have earned had his or her employment not ceased because of the discriminatory action. Reinstatement was not an appropriate remedy in that case and therefore the panel concluded damages should be the remedy. The panel decided that the evidence did not support an award for mental stress caused by the unlawful discrimination.

[105] The panel also decided to give the equivalent of 16 weeks of wages (almost $11,000.00) under the head of damages for "loss of employment". In doing so the panel commented at paragraphs 18 and 19 that:

> ...a reprisal under OHSA is one of the few circumstances in which employees are entitled to be reinstated to their employment. Consequently, the loss of employment as a result of reprisal has a value that is separate and distinct from the notice entitlements to which employees may be entitled.

[106] In determining the appropriate award for "loss of employment" the panel considered the length of the employment relationship which was slightly less than two years.

[107] As an illustration of the various factors to consider under a make-whole remedy, we note in *Graphite* that, in addition to the head of damages for "loss of employment", the OLRB panel also determined the appropriate amount of damages for wage loss resulting from the unlawful discrimination. The panel took into account the length of the employment relationship as well as the worker's mitigation attempts. Further, the panel noted that the employer was not a large employer and stated that while it was clear that ability to pay cannot be a determining factor when assessing damages, it was kept in mind that the purpose of remedial awards is compensatory, not punitive. Unfortunately the panel's reasoning was not very clear as to how it weighed the foregoing factors. In

the result, the panel awarded the worker an additional 16 weeks of wage loss, almost $11,000.00. The panel also awarded reimbursement of gasoline expenses and other job search related costs, for a total award of $22,760.00.

[108] In addition, we note that section 153(2)(f) of the Act provides for reimbursement of reasonable out-of-pocket expenses. This provision might provide compensation for reasonable travel and other expenses incurred in seeking replacement employment.

[109] Paragraph 5.177 of *Employment Law in Canada* refers to another head of damages for unlawful discrimination: punitive damages. Generally, this head of damages is only awarded where there is express statutory authorization to do so. Normally make-whole remedies are considered to be compensatory in nature, not punitive. We note that by statutory definition, all illegal discriminatory action necessarily involves a finding of fault. Without express statutory authority, the relative degree of that fault is not relevant in assessing remedy.

[110] Finally, we note that the make-whole concept embraces orders that are directed at restoring other harm resulting from the discriminatory conduct, such as orders for employers to write a letter of apology, or a letter of reference, or to post a copy of the tribunal's decision in conspicuous places at the workplace. As well, tribunals have directed employers to implement anti-discrimination educational and training programs at the workplace, at the employers' expense. These types of remedies would fall within section 153(2)(g)'s broad remedial authority to order that "any other thing" be done that is considered "necessary to ensure compliance with this Part and the regulations."

[111] We note as a final point that the make-whole remedy concept is not intended to result in damages that continue indefinitely. Nor should it provide a windfall. The make-whole remedy is grounded in the goal of compensating for reasonable actual losses caused by the unlawful discrimination, and for losses that are both reasonably foreseeable and caused by the unlawful discrimination.

The appropriate remedy for the worker

[112] We now turn to assess the appropriate make-whole remedy for the worker in this case.

Compensation for wage loss

[113] An important factor is the wage loss resulting from the unlawful discrimination. In making a projection about the worker's future career progress with the employer, in order to reduce the speculative nature of such an inquiry, we have considered a number of factors including the worker's five-month history of employment with the employer. We consider that this is a relevant factor in such an inquiry because, for example, if a worker had been employed for many years with an employer before job termination, this might well be evidence weighing in favour of a finding that in the absence of the unlawful discriminatory termination such a worker could have expected to enjoy

continued employment for a long period. That is, all other considerations being equal, the "reasonably foreseeable future" of continued employment might be a long one in such a case. In this case, the worker's five-month history of employment does not constitute evidence of sufficient weight for us to draw such a conclusion. On the other hand, we do not consider that in this case a five-month history of employment suggests a poor attachment to the employer's workforce.

[114] We have also considered whether, in the absence of the unlawful discrimination, the worker would likely have been given a pay raise or been promoted into a higher paying position. For reasons earlier given in this decision, we conclude this was unlikely, despite the worker's evidence that the employer had promised her a wage raise in the future. With respect to promotion into another position, the worker's position as housekeeping supervisor was the head position in the housekeeping department; thus we find the potential for further promotion at the workplace to be too remote of a possibility to consider as a relevant factor in determining the probable length of her continued tenure with the employer.

[115] A difficult consideration is the degree of job security the worker would likely have enjoyed had she remained with the employer. For example, does the evidence suggest that in the foreseeable future she would she have been laid off for economic reasons or terminated for job performance? Or is there evidence she would have left the employer's workplace on her own initiative? In this case the evidence is that the employer was pleased with the worker's job performance. Although there is evidence of the slow season in the winter and early spring months in 2008, we note that the worker was the head housekeeper and had enjoyed more hours than other housekeepers so we conclude it was unlikely she would have been laid off during the slow season.

[116] We do, however, agree with the employer that its time sheet records indicate a generally high staff-turnover, with none of the housekeepers employed in December 2007 still employed at the end of 2008. Some housekeepers only remained employed with the employer for a couple of months. Higher staff turnover can be expected at the end of the busy summer season because the evidence suggests the employer hired extra housekeepers on a temporary basis only in that busy season. But the records illustrate that housekeepers who continued to be employed in both low and high seasons during 2008, working well over full time in the busy months, did not remain employed for the full year with the employer.

[117] In our view, the best example is MH who had the longest tenure in 2008, staying nine months with the employer. This evidence illustrates that for whatever reasons, housekeeping staff did not remain with the employer for extended periods of time. We accept the worker's evidence that she was committed to her job with the employer. We also acknowledge the evidence that she did her best to maximize her earnings and we find she would not have left the employer's employ lightly, but would have tried to stay until she could find work that equalled or bettered her earnings with the employer.

[118] Notwithstanding those points, however, we conclude that given the inherent uncertainties in predicting the future in any workplace, and the evidence of the high staff turnover in the employer's workforce, it is unlikely that the worker would have remained with the employer beyond the end of 2008. We find that this is a factor we must take into account in evaluating the reasonable foreseeability of wage loss as part of the make-whole remedy. In reaching this conclusion we emphasize that this is not a matter of scientific certainty. We are simply recognizing that the unstable nature of the employer's workplace must be accounted for. This means we find it is not reasonably foreseeable that the worker would have remained with the employer for the full period of September 9, 2007 (date of hire with the employer) to April 14, 2009 (date of hire with Company D).

[119] We have also considered the probability of the worker obtaining a replacement job, having regard to evidence about the worker's personal characteristics of age, skills and experience in the labour market in the general geographical area. For reasons earlier provided in this decision, we have found that the worker did her best to mitigate her losses and accepted employment offered to her. Thus we conclude that there should not be a reduction for failure to mitigate in the appropriate compensation period, whatever we conclude that to be.

[120] We have considered the worker's ultimate replacement job with Company D as of April 14, 2009 as the job that would have justified the worker voluntarily leaving the employer's workforce to accept other employment. It paid substantially more than the wage she was earning with the employer, despite the fact that initially she was receiving less hours on average per week, so that she still earned more on a weekly basis than she did with the employer. However, although that is the job that would have justified her voluntarily leaving the employer's workforce, we find that the evidence of high staff turnover at the employer's workplace indicates the worker likely would have left some months before she found her ultimate "replacement job" with Company D.

[121] In considering the evidence as a whole and recognizing the uncertainty inherent in exercising the judgment required by section 153 of the Act, we conclude that the appropriate period of time to calculate wage loss damages should be from February 1, 2008 through to December 31, 2008. This is a period of 48 weeks because we find it unlikely the worker would have left her position with the employer for another job in 2008.

[122] Regarding wage loss, at a rate of $420.00 per week for 48 weeks, this amounts to $20,160.00. We subtract the $420.00 severance pay provided by the employer which reduces the amount to $19,740.00. Adding 4% holiday pay of $789.60, this brings the total wage loss to $20,529.60.

[123] The principle of mitigation of damages applies in this case and we find it appropriate to deduct from the amount of $20,529.60, the amount the worker earned during the period ending December 31, 2008. Subtracting the $2,597.67 which the worker earned from

January 1, 2009 through to April 9, 2009 from the total income for the period February 1, 2008 through to April 9, 2009 calculated by the Board officer as $7,444.35, this leads to the amount of $4,846.68 as the worker's mitigation of her losses during the relevant period February 1, 2008 through to December 31, 2008. After deducting $4,846.68 from $20,529.60, this results in a wage loss total of $15,682.92.

Punitive damages

[124] The worker has argued that the employer's conduct in completing the separation slip thereby prevented her from claiming EI benefits, but we have not taken this into account as a factor in assessing the appropriate remedy in this case. We find that the make-whole remedy contemplated by section 153(2) of the Act and Manual policy item D6-153-2 does not include punitive damages. As discussed earlier, the law appears to require express statutory authority for such a remedy. We see no such authority in the Act.

Loss of employment

[125] The worker did not request a remedy under this potential element of the make-whole remedy. There was insufficient available evidence before us related to this issue and because the parties did not address this matter in their submissions, we have decided to make no award in this regard.

Excessive penalty and the employer's alleged limited ability to pay

[126] The employer characterized the Board officer's award as unreasonable and an excessive penalty. The employer's views of what is reasonable, however, are largely taken from the context of damage awards under common law wrongful dismissal cases and/or employment standards "in lieu of notice" provisions, which we have found to be completely different than awards in cases of unjust discrimination where legislation and Board policy require a make-whole remedy.

[127] The employer has also referred to its revenue statements and has argued that its small size and modest profits should be taken into consideration when awarding damages. We note that under the Act and Board policy, the primary focus of inquiry for remedy is on the requirement to make whole the worker's loss rather than an inquiry into the financial impact on an employer of a damage award. Having said that, we observe that a remedy under section 153 of the Act should not be punitive in nature and therefore we consider it appropriate to take into account the employer's financial situation in this case.

[128] After reviewing the employer's records and its submissions, we do not find an award in the approximate amount of $17,000.00 to be punitive or unfair to the employer. The evidence does not persuade us on a balance of probabilities that the employer would be unable to pay such an award or that to do so would lead to the closure of the employer's

business or other severe financial or business result. Keeping in mind the purposes of the unlawful discrimination provisions of the Act and the requirement to provide a make-whole remedy that is meaningful to measure the worker's reasonably foreseeable losses, we have decided not to make any reduction in the award on the grounds of "excessive penalty."

Out-of-pocket expenses

[129] Section 153(2)(f) of the Act provides authority for the reimbursement of reasonable out-of-pocket expenses incurred by the worker by reason of the discriminatory action. In this case, the worker has not requested such reimbursement and we see insufficient evidence on the record to grant such a remedy.

Rectifying other harm

[130] The worker made no request for a written apology, reference letter or other remedy dealing with rectification of other harm she may have suffered. Therefore we make no order in that regard. We note that the Board officer ordered the employer to immediately post an enclosed inspection report in a conspicuous place in the workplace until February 19, 2010. Our understanding is that the employer complied with that direction and accordingly it is unnecessary for us to make any order in that regard.

Interest

[131] WCAT granted the employer a stay of the Board officer's remedy and therefore to date the worker has not received any payment from the employer. Following the reasoning in *WCAT-2004-00641* and numerous other WCAT decisions which award interest on discriminatory action awards, we find it appropriate to award the worker interest pursuant to policy item #50.00 of Volume II of the *Rehabilitation Services and Claims Manual*.

[132] We requested the Board's Actuarial Department to apply the policy item's interest rate calculation with the effective date for interest being February 1, 2008 until December 31, 2010. The Actuarial Department has indicated that the total interest payable on $15,682.92 is $1,587.90. Therefore we are awarding interest of $1,587.90 in addition to the award of $15,682.92 for a total award of $17,270.82.

[133] Therefore, we order the employer to pay the worker $17,270.82, less the usual statutory deductions (Canada Pension Plan, Employment Insurance and income tax) on that amount, no later than January 31, 2011.

Reimbursement of appeal expenses

[134] Under section 7 of the *Workers Compensation Act Appeal Regulation* (Appeal Regulation), WCAT may order the Board to reimburse a party to an appeal for expenses associated with obtaining or producing evidence submitted to WCAT.

[135] The worker has made no request for reimbursement of appeal expenses and therefore we make no order in that regard.

[136] In its submissions, the employer referred to having to incur extensive legal costs in the appeal process, although it fell short of requesting reimbursement for its legal costs. Under MRPP item #16.1.4 (Representatives' Fees), WCAT will not reimburse a party for the expense of a representative. This is because section 7(2) of the Appeal Regulation provides that WCAT may not order the Board to reimburse a party's expenses arising from a person representing the party, or the attendance of a representative of the party at a hearing or other proceeding related to the appeal. Therefore we are not ordering the Board to reimburse the employer for its legal fees.

[137] The employer also requested "its costs arising from the stay application and this appeal" but did not specify the nature or amount of such costs. Presumably a request for costs includes a request for reimbursement of its legal fees. MRPP item #16.2 (Costs) refers to section 6 of the Appeal Regulation which provides that WCAT may only award one party to pay the costs of another party if:

> (a) another party caused costs to be incurred without reasonable cause, or caused costs to be wasted through delay, neglect or some other fault;
>
> (b) the conduct of another party has been vexatious, frivolous or abusive; or
>
> (c) there are exceptional circumstances that make it unjust to deprive the successful party of costs.

[138] Although the employer has partially succeeded in its appeal of the Board officer's November 20, 2009 decision, we do not find this a case in which it is appropriate to order the worker to pay costs to the employer. The finding of unjust discrimination by the employer against the worker stands, and while in this decision we have reduced the remedy amount to the worker, she was still substantially successful. We do not find any exceptional circumstances in this case that would suggest the worker should pay costs to the employer.

Conclusion

[139] For the foregoing reasons, we allow, in part, the employer's appeal and vary the Board officer's November 20, 2009 decision. We find that the appropriate make-whole remedy under section 153(2) of the Act and Manual policy item D6-153-2 is for the employer to pay the worker, no later than January 31, 2011, the sum of $17,270.82, less the usual statutory deductions (Canada Pension Plan, Employment Insurance and income tax) on that amount.

[140] We have made no order for reimbursement of appeal expenses. We have made no order for one party to pay the costs of the other party.

Heather McDonald
Vice Chair

Warren Hoole
Vice Chair

Debbie Sigurdson
Vice Chair

HMcD/hb