

2003 HRTO 13  
Ontario **Human Rights** Tribunal

Weiher v. Polhill

2003 CarswellOnt 6084, 2003 HRTO 13, 47 C.H.R.R. D/104

**Ontario **Human Rights** Commission, Commission and  
Erika Weiher, Complainant and David Polhill, Respondent**

Faughnan Adjud.

Judgment: July 11, 2003

Docket: BI-481-02

Counsel: Eddie Taylor, for Ontario **Human Rights** Commission

Richard Atkinson (Agent), for Complainant, Erika Weiher

David Polhill, for himself

Subject: Constitutional; Property

**Related Abridgment Classifications**

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

**Headnote**

****Human rights** --- What constitutes discrimination — Handicap — Mental handicap —  
Mental disorder**

Complainant suffered from bouts of depression and eating disorder resulting from borderline personality — Complainant made appointment with **landlord** to view accommodation in house where other tenants lived and entered into tenancy agreement — Complainant paid \$600 to **landlord** for first and last month's rent — After complainant disclosed her **disability** to **landlord**, discussions led to complainant asking for her money back, which **landlord** refused — Complainant filed complaint with **Human Rights** Commission — **Landlord** infringed complainant's rights under **Human Rights** Code by treating her unequally with respect to occupancy of accommodation due to her **disability** — Complainant ultimately decided herself not to move in — Evidence supported complainant's testimony that **landlord** asked questions about her illness in discriminatory way during telephone call — **Landlord** attached improper condition that complainant would have to leave house when other tenants had boyfriends and girlfriends over, which amounted to discrimination.

****Human rights** --- Remedies — Damages — General**

Complainant suffered from bouts of depression and eating disorder resulting from borderline personality — Complainant made appointment with **landlord** to view accommodation in house where other tenants lived and entered into tenancy agreement — Complainant paid \$600 to **landlord** for first and last month's rent — After complainant disclosed her **disability** to **landlord**, discussions led to complainant asking for her money back, which **landlord** refused — Complainant filed complaint with **Human Rights** Commission — **Landlord** infringed complainant's rights under **Human Rights** Code by treating her unequally with respect to occupancy of accommodation due to her **disability** — Complainant was entitled to return of \$600 and to general **damage** award of \$4,000 — **Landlord's** conduct was more in nature of negligent rather than wilful or reckless — **Landlord** ordered to post **Human Rights** Code cards in house.

## Table of Authorities

### Cases considered by *Faughnan Adjud.*:

*Basi v. Canadian National Railway* (1988), 88 C.L.L.C. 17,006, 9 C.H.R.R. D/5029 (Can. **Human Rights** Trib.) — referred to

*Bui v. B & G Foods Inc.* (2001), 41 C.H.R.R. D/191, 2001 CarswellOnt 5582 (Ont. Bd. of Inquiry) — referred to

*Cameron v. Nel-Gor Castle Nursing Home* (1984), 5 C.H.R.R. D/2170, 84 C.L.L.C. 17,008 (Ont. Bd. of Inquiry) — considered

*Faryna v. Chorny* (1951), 4 W.W.R. (N.S.) 171, [1952] 2 D.L.R. 354, 1951 CarswellBC 133 (B.C. C.A.) — followed

*Fuller v. Daoud* (2001), 40 C.H.R.R. D/306, 2001 CarswellOnt 5337 (Ont. Bd. of Inquiry) — considered

*Kalbfleisch v. Carillo* (2002), 2002 CarswellOnt 5511, 44 C.H.R.R. D/163 (Ont. Bd. of Inquiry) — considered

### Statutes considered:

*Courts of Justice Act*, R.S.O. 1990, c. C.43

Generally — referred to

**Human Rights Code**, R.S.O. 1990, c. H.19

Generally — referred to

s. 2(1) — referred to

s. 9 — referred to

s. 10(1) — considered

s. 21(1) — referred to

s. 41(1) — referred to

s. 41(1)(b) — referred to

s. 47(2) — referred to

*Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22

s. 23 — referred to

*Tenant Protection Act*, 1997, S.O. 1997, c. 24

Generally — referred to

HEARING before **human rights** commission on complaint of discrimination by **landlord** on grounds of mental **disability** of prospective tenant.

***Faughnan Adjud.***

**Introduction**

1 This proceeding arises out of the Complainant's search for rental accommodation at 190 East Frederica Street in Thunder Bay, Ontario.

**Issues**

2 In this decision the Tribunal deals with the following issues:

a. Did the Respondent directly or indirectly discriminate under the Ontario **Human Rights Code**, R.S.O. 1990, c. H.19, as amended, (the "*Code*") by treating her unequally with respect to the occupancy of accommodation due to her **disability**?

b. If so, what is the appropriate remedy?

## Preliminary Matters

3 The Respondent was not represented at the hearing and advised the Tribunal that he was prepared to proceed. At the outset of the hearing, I advised the parties that my primary concern was in hearing evidence about what went on between the Complainant and the Respondent with respect to the House, and not what went on between the Respondent and the Ontario **Human Rights** Commission (the "Commission"). As sometimes occurs, the absence of counsel for the Respondent resulted in a situation where the evidence of the Respondent and some statements that he made, which were more in the nature of submissions, were admixed. In the decision that follows I have endeavoured to divide the two, although there may be some overlap. Even if all the evidence and submissions of the parties are not explicitly set out in this decision, I considered all the evidence and submissions made before me in determining this matter.

4 The Commission took issue with the Respondent's failure to participate in the Commission's investigation, and his conduct during this proceeding. The Respondent himself took issue with the acts and conduct of the Commission and its counsel in the investigation and in this proceeding. For the sake of orderly presentation, the evidence relating to these issues is also set out in separate sections of this decision.

5 This is a case that involves difficult determinations of credibility. It is trite to say that a case that hinges on credibility is one of the most difficult that an adjudicator can face, but as is the case in many **Human Rights** cases, discrimination often does not occur in full view and the Tribunal must weigh two sometimes competing versions of the events. In assessing credibility, the Tribunal has consistently applied the following test articulated in *Faryna v. Chorny* (1951), [1952] 2 D.L.R. 354 (B.C. C.A.), at 356-57:

Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what [the witness] has seen and heard, as well as other factors, combine to produce what is called credibility ... The test must reasonably subject [the witness's] story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of the witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

6 The factors set out in that decision and the following non-exhaustive list of factors have informed my determinations on the credibility of witnesses in this case: their motives, their relationship to the parties, the internal consistency of their evidence, inconsistencies and contradictions in relation to other witnesses' evidence and my observations of the manner in which the witnesses gave their evidence.

## Witnesses

7 The Complainant and the Respondent testified at the hearing. The Respondent had two witnesses: Ms Patricia Cotton, who resided in the House from November 15, 2000 to September 1, 2001, and was present when the Complainant first attended at the property; and Mr. Peter Scarfo, who has been a tenant at the House for approximately three years.

## Decision

8 The Respondent infringed the rights of the Complainant under the *Code*, entitling the Complainant to the relief set out in the order that follows this decision.

## Facts

9 In 1989 the Respondent purchased a multi-room dwelling located at 190 East Frederica Street in Thunder Bay (the "House"). He operated the House as a rooming house and rented the rooms out separately, with the tenants sharing common facilities. The Respondent has on occasion stayed in the House but at the time of the events in issue he did not reside there. In addition to operating the House, the Respondent has assisted Mr. Peter Scarfo in finding tenants for a rental property owned by Mr. Scarfo when Mr. Scarfo was out of town.

10 The Respondent is active in ensuring that the tenants that he obtains for the House are compatible with the other tenants and intend to stay on a long-term basis. He does try, if possible, to arrange a meeting of the current tenants with a prospective tenant before finalizing a rental agreement. In June and July it is hard to find tenants for this type of property because students are no longer in school and there is a high vacancy rate. As testified to by the Respondent and his witnesses, he has rented to persons on a fixed income, students and persons of all nationalities. There was no evidence led that he rented to someone who had a **disability** before. Because the rent is so low, a prospective tenant's source of income is not a great concern for him.

11 Ms. Cotton and Mr. Scarfo testified that to their knowledge there are no house rules that the Respondent applied to them or to other co-tenants. Furthermore, other than respecting each others privacy and personal space, there are no House rules that they apply to one another other than advising when a third party is staying overnight and matters relating to the division of labour with respect to House cleaning. Ms. Cotton testified that she was present when a prospective tenant was interviewed and neither she nor the prospective tenant were asked medical or personal questions. When Ms. Cotton moved out halfway through the month of her month-to-month tenancy, an arrangement was made with the Respondent, which she thought was fair, so that neither of them owed each other money. She testified that the locks were not changed when she moved in or out.

12 The Respondent has a somewhat extensive knowledge of the *Tenant Protection Act, 1997* S.O. 1997, c. 24, as amended (the "*Tenant Protection Act*") and readily accesses the resources of the Ontario Rental Housing Tribunal. Based on my observations of him at the hearing, he prides

himself on applying the *Tenant Protection Act* to the letter. He stated on a number of occasions that this matter should have been dealt with by the professionals at that Tribunal who would have resolved it a long time ago. As set out in more detail below, he does not share the same opinion of the Commission, its investigative process or its legal counsel. The Respondent has had only two incidents of non-payment of rent since 1989 and, based on his testimony, always tries to work things out. He stated that he always dealt with people to give a hand. That being said, when he feels justified in doing so, he can be confrontational and manifest unusual and unfortunate behaviour, as will be seen later.

13 The Complainant testified that she suffers from a mental disorder that arose shortly after the birth of her second child. She has been diagnosed as having a borderline personality, an eating disorder, and suffering from post-traumatic stress and depression. She goes through, in her words, "extreme depression", and has attempted suicide. She has been hospitalised on occasion because of her **disability** and her children have been removed from her care. When she is depressed, which can last for many days, she cries, cuts her wrist (which she bandages up herself) and then retreats to her bed. She has had to call a crisis centre before matters escalate further. She explained that during these bouts of depression, she doesn't eat or bathe. She mainly cries.

14 She receives treatment for her **disability** and is now on a number of medications that had been changed the month before the hearing. This medication change causes her to feel "groggy", instead of "hyper" as she had felt before the medication change. This allows her to sit for longer periods. She also engages in an assistance program, attends at a social worker and sees a psychiatrist every two weeks.

15 Prior to May 2001, the Complainant lived in a house that she shared with a family, none of whom were called as witnesses. According to the Complainant's evidence, the family initially gave the Complainant space and privacy when she was suffering from bouts of depression. Over time however, conflict arose and the family had in her words "a little bit of difficulty when I was depressed." Even though they knew that she was **disabled**, the family felt that the Complainant shouldn't be in her room for so long, rather she should be eating more and that she should try to work. The Complainant preferred to be left alone.

16 As a result, the Complainant began to search for alternate accommodation. It is reasonable to assume that this would have been quite a big step for the Complainant, in her fragile state. She learned through a newspaper advertisement that there was shared accommodation available at 190 East Frederica Street, Thunder Bay. Although she had never lived in a rooming house before, because she was on social assistance and her income was fixed, the advertised rent of \$350.00 a month and the location, were attractive to her.

17 The Complainant arranged a first appointment to see the House but was unable to see it at the time, she testified, because she had another appointment. The Complainant did not explain the nature of the appointment.

18 Shortly thereafter, the Complainant was in the vicinity of the House. She thought the Respondent lived in the House and could let her see the accommodation if he was there, so she knocked on the door. Patricia Cotton answered. At the time Ms. Cotton, Mr. Scarfo and an individual named Jessica were tenants in the house. In the notes of an interview that the Complainant had with Ms. Buffington, an investigator for the Commission marked as Exhibit 4 at the hearing (notes that the Complainant had not seen before the hearing but admitted that the contents were true), she identified the person that answered the door as "Tara". Although the Respondent sought to challenge the Complainant's credibility by inferring that to bolster her case, the Complainant obtained the name of Tara from the phone book, no such phone book was tendered in evidence nor did the Respondent otherwise satisfy me that the name of Tara was obtained from a phone book. Rather, I am satisfied that the Complainant was simply in error as to the person's name.

19 Ms. Cotton was in a rush to leave for work but spent approximately 15 minutes with the Complainant before the Respondent ultimately arrived. Ms. Cotton showed her the House and the room for rent, both of which were clean, in good condition and ready for immediate occupancy. The Complainant liked the room and the House and Ms. Cotton phoned the Respondent. Ms. Cotton testified that during their brief interaction the Complainant mentioned that she was going through a separation and that she did not have her children living with her. There was no discussion of her **disability**. There was no mention in their conversation of a policy or rule for the conduct of the people who shared the House.

20 The Complainant made a good impression on Ms. Cotton, who felt she could share a house with her. When the Respondent arrived he asked whether Ms. Cotton had shown the Complainant around the House and if she thought the Complainant was suitable for the shared accommodation. Ms. Cotton replied in the affirmative and thought that it would work out well. She then went to work, leaving the Respondent alone with the Complainant.

21 The Complainant testified that when on a tour of the House with the Respondent, he was upset to find three empty beer bottles in the garbage. She testified that this prompted him to ask her about her friends and if they were drinkers. She said that he stated that he didn't want her friends to be around if they were partying and that there was absolutely no drinking in the House, which was a rule for everybody. She explained that she had an occasional drink, but no wild parties. Since she wasn't really a drinker this line of inquiry did not raise concerns about the Respondent and she testified she didn't pay too much attention to it. The Respondent denies this conversation took place and states that there are no rules against drinking in the House. In their evidence Ms. Cotton



and Mr. Scarfo confirmed that there is no such House rule. On balance, I find that on a tour of the House beer bottles were found and there was discussion about drinking. I do not find that the Respondent imposed a rule prohibiting drinking. What likely occurred is that, sensitive about the prospects of a major life change, the Complainant misinterpreted the content of the Respondent's comments about the beer bottles.

22 The Respondent testified that at this first meeting the Complainant told him of her divorce, that she did not have custody of her children and that she had to make special arrangements to visit them. The Complainant denies that this disclosure occurred at this time, rather that the Respondent was advised of her family situation during a lengthy telephone call on or about May 13, 2001, set out below. As Ms. Cotton testified that this disclosure was made to her when the Complainant first attended at the House, I find that it is more probable than not that the same disclosure was made to the Respondent at that time, and not during the lengthy telephone call.

23 Although no meeting was held with all the tenants, the Respondent was content to rely on the positive opinion of Ms. Cotton about the Complainant, and they entered into a tenancy agreement.

24 The tenancy was month to month with a monthly rental in the sum of \$350.00. The rent included the room, use of the common areas, satellite T.V. and laundry facilities. The Complainant paid the Respondent \$600.00 and receipts dated May 11, 2001, were issued for that amount. The Respondent explained that of the \$600.00 paid, \$250.00 represented the balance of rent for the month of May and \$350.00 was the last month's rent deposit. The Respondent provided the Complainant with the keys for the House and the tenancy agreement took immediate effect.

25 There was some dispute in the evidence as to the initial move-in date. It is not necessary for me to resolve the issue of whether the Complainant was to move in on May 12, 2001, or the following weekend because however the date was set, it was by mutual agreement.

### **The Disclosure of the Complainant's Disability**

26 The Complainant testified that because of what had happened where she lived, she decided to telephone the Respondent and inform him of her depression and its effects. She testified that she wanted to disclose this to the Respondent so that if her prospective co-tenants became concerned about her behaviour, and advised the Respondent, this would not result in him rushing over to the House, or asking her inappropriate questions. Rather, being apprised of the circumstances he would simply say that she should be left alone.

27 On or about May 12, 2001, the Complainant disclosed her disability to the Respondent in a telephone call. She testified that until this telephone call the Respondent had acted in a professional manner but after this disclosure his demeanour changed. In the call they talked for a little bit about her depression. She said that he stated that he would feel more comfortable renting the room out to someone else. The Respondent ultimately said that he would think it over. He asked her to call



him the next day and he would let the Complainant know his answer. The Respondent denies that this exchange took place. This however, seems at odds with his assertion that the Complainant was indecisive about moving in. On balance, I find that some interaction did occur with respect to her **disability** and that the Respondent did ask to think it over and for her to call him the next day.

### *The Twenty-Minute Phone Call*

28 The Complainant testified that when she phoned back on or about May 13, 2001, the Respondent told her that he was not comfortable with her tenancy and had already informed the other tenants that she would not be moving in. He explained that he was putting an ad to rent the room in the newspaper on the weekend. When the Complainant inquired why he was doing this, the Respondent replied that it was because he was uncomfortable with her situation and he wanted no problems. She testified that the Respondent said that this was his house and he wanted what's best for his house.

29 The Complainant testified that in desperation she implored him to return the money. In her evidence the Complainant advised the Tribunal that this was money that had taken her months to save. She did so by taking a little bit each week from her social assistance cheques. She had no other funds. She testified that she pointed out to the Respondent that it was he who did not want her to move in and that she had already boxed up her possessions and had given notice to her **landlord**. He refused to return the funds.

30 She testified that she was worried and she did not know where to go and what to do. In desperation and in an attempt to change his mind, she began to answer a series of questions posed by the Respondent. She was embarrassed by the questions but felt she had no choice but to answer them in order to be allowed to move in. The Complainant testified that the Respondent wanted to know the following: what her illnesses were, what medication she was on, did she have children, how she and her husband had split up, who has the kids, and how many.

31 The Complainant testified that the Respondent indicated that he wanted to let everyone in the House know about her depression. He wanted the tenants to bring her to the hospital, and not stay in her bedroom.

32 She testified that the Respondent also stated that her children could not visit because the House was not a place for children. She told him that she did not have custody of her children (her children lived with her husband) and that she sees the children at another location. The Complainant testified that she had no intention of having the children stay overnight but that she contemplated having them over for supper or a visit. She testified that he asked her point blank whether she could feed herself. There was also discussion of a rule that when the other tenants had dates she would have to leave the House to give them privacy. There was no discussion of reciprocal conduct by the other tenants.

33 It seemed to the Complainant that the more she talked to the Respondent the more he wanted to rent to someone else, without returning her money. She testified that the conversation ended with her feeling awkward and terrible, and stating that if the Respondent wanted to rent it out to someone else there was nothing she could do, but that she wanted her money back. The Respondent went on to say that the Complainant could not have her \$600.00 back because she would have to pay \$250.00 for a lock change, \$110.00 for advertising fees, and \$75.00 a week for each week that the room wasn't rented. He advised that while she might get some of her money back, it was more likely than not that she wouldn't.

34 The Respondent admits that a conversation of approximately 20 minutes duration did take place, but strongly disputes the content of the conversation and denies engaging in any discriminatory conduct. In direct examination the Respondent denied asking medical questions, setting out any House rules on drinking, that the Complainant had to leave when the other tenants had their boyfriends or girlfriends over and that her children could not visit. He stated that a tenant's medication and health problems were really none of his business. In his view the two professionals who would be sharing the House would present no problem for her and would possibly be role models.

35 Under cross-examination by Mr. Atkinson, however, the Respondent gave further evidence about the telephone call. Regarding questions that dealt with personal or medical matters, the Respondent testified that he has been involved in residential tenancy matters for far too long for himself and others to know what to ask and what not to ask and he would not be in business for very long if he had to deal with situations like this. He stated that there is no need to know about someone's overall medical problems, which is an even greater issue now that a new hospital was going up in the area. He asserted that it would be against the law to discriminate against someone who has health problems.

36 Still under cross-examination by Mr. Atkinson, he testified that the only question that he knew for sure that he asked in the telephone conversation, was whether she would be moving in or not. The Respondent was adamant that the separation from her husband, her children, her relationship with alcohol or drugs, or of friends who drank, the requirement that she leave if other tenants have boyfriends or girlfriends over and any eating problems were not discussed.

37 He admitted in the cross-examination however, that the Complainant mentioned her depression and how she stays in her room. He testified that he just "brushed it off." He testified with respect to the content of the call that she "was doing a lot of talking and I was doing a lot of listening".

38 Throughout the hearing the Respondent testified that since she had the keys and had paid the rent there was a valid and binding lease agreement and that as a **landlord** there was nothing he could do to stop her from moving in. In cross-examination by Mr. Atkinson, the Respondent

denied that he said he would think about whether to let her move in, but rather, that it was the Complainant who wanted to think about it. He testified that in that twenty-minute call that it was the Complainant who stated that she would not move in.

39 The Respondent testified that once she decided that she did not want to move in, in accordance with the provisions of the *Tenant Protection Act*, it was up to her to provide written notice. In his testimony the Respondent advised that he really didn't know why the Complainant didn't want to move in. He thought it had to do with the convenience of the location of the House and that there were more centrally located areas in the City that in his view were more accessible.

40 The Respondent does not recall the exact date of placing an ad for re-renting the room, but recalls that he put it in for a full month. He also does not recall giving an exact figure for the cost of advertising, which he testified runs for about \$100.00 for a month. He does not recall telling her an exact figure, but did tell her that a prorated amount would be charged for each week the room was not re-rented.

41 Ms. Cotton testified that the Respondent never told her any personal or medical information about the Complainant. She stated that there were two weekends where she believed that the Complainant would move in. The first weekend she was there to help and the Complainant did not attend nor did she attend the following weekend. It then became apparent to her that the Complainant wasn't moving in. Eventually the Respondent advised her that the Complainant would not be moving in because she had changed her mind. She did not specify the date that the Respondent told her this. Mr. Scarfo testified that the Respondent told him "after the fact" that the Complainant was supposed to move in on May 12, 2001.

## **The Aftermath**

42 The Complainant testified that she then spoke to a few friends about the incident. They advised her to contact Mr. Richard Atkinson, a community legal worker at Kinna-Aweya Legal Clinic in Thunder Bay. As she still had the keys in her possession, Mr. Atkinson advised her to return them as fast as she could. A friend of hers dropped them off along with a note, which she handed to a tenant at the House. The accompanying note marked as Exhibit 5 at the hearing simply stated, "David Kinna Aweya Legal Clinic will be writing you this week."

43 The Complainant did not agree with the Respondent that it would have been a good idea to go into the House with her friend when she dropped off the keys, and have a witness to confirm the Complainant's version of the events. The Complainant asserted that as her friend had nothing to do with the House there was no reason to bring her in. Furthermore, this was after the fact when she was not able to move into the House and she states, "I wouldn't try to bring someone in to convince me to stay at that place."

44 Mr. Atkinson forwarded a letter dated May 24, 2001, to the Respondent (marked as Exhibit 2 at the hearing) that detailed some of the events and demanded the return of the monies paid. The Respondent testified that until he received that letter, he really didn't have anything "firm" that the Complainant would not move in. He stated in his evidence that the note accompanying the keys was vague and, that he couldn't go on the assumption that she wasn't going to move in, he needed something in writing. In his view no steps could be taken, such as changing lock tumblers, until a **landlord** has received this type of notice.

45 No monies were paid to the Complainant nor did the Respondent respond to the letter. The failure of the Respondent to respond to the letter and his motivation for such failure became an important issue at the hearing. However, I accept the Respondent's explanation given in his evidence that the reason he did not respond was because his name was misspelled on the letter, resulting in it not being valid. I also accept that the reason that the Respondent did not return the money was because of his belief that the Complainant breached the tenancy agreement by not moving in.

46 Although the letter from Mr. Atkinson refers to a variety of forums where the Complainant could seek redress, the Complainant did not commence any application in the Courts or at the Ontario Rental Housing Tribunal, choosing to remain with Mr. Atkinson in pursuing her claim by way of a complaint under the *Code*.

47 In the letter of May 24, 2001, Mr. Atkinson suggested that the Respondent find a lawyer of his choice to deal with the matter. In direct examination the Respondent implied that he did not have a lawyer from his golf club represent him because this case needed "someone difficult" and the lawyers at his club were "gentleman lawyers". In his submissions the Respondent gave an alternate explanation when he stated that the reason he did not hire a lawyer was because of cost.

48 When the Complainant was asked how she felt about what the Respondent did to her, she replied that she felt traumatized. She testified that she felt cheated and used and that the matter should have been dealt with a long time ago. She said that in the last three nights before the hearing she hadn't slept at all. In the past when people do things to hurt her she does pretty much the same thing. She would cry, stay in her room, not eat, and a lot of times she would contact the crisis centre. The contact with the crisis centre would give her a feeling of calmness, and they would pull her through. Fortunately, the Complainant was able to extend her stay with the family and successfully obtained her own apartment.

49 The Respondent testified that an individual named Jay moved into the House on July 1, 2001.

## **The Conduct of the Respondent**

### ***The Investigation***

50 Counsel for the Commission spent a great deal of time at the hearing focussing on the conduct of the Respondent during the investigation, after referral and in the proceedings before the Tribunal, all in an effort to demonstrate that this conduct makes it more probable than not that the Respondent engaged in discriminatory conduct with the Complainant.

51 Commission counsel first focussed on the failure of the Respondent to participate in the investigation of the Commission. Mr. Taylor challenged the failure of the Respondent to respond to invitations contained in letters that the Respondent received from the Commission, which invited the Respondent to provide his version of the events and the evidence of supporting witnesses. Mr. Taylor sought to show that the reason that the Respondent did not reply to these letters was because he believed that the *Code* did not apply to him.

52 In cross-examination by Mr. Taylor however, the Respondent ultimately gave a direct response why he did not participate in the investigation, nor provide the names of Mr. Scarfo or Ms. Cotton as witnesses. Until the Complaint and title of proceedings was amended in a telephone conference call held on September 10, 2002, all the material that the Respondent received from the Commission had his name misspelled. The Respondent stated that the reason why he did not respond to the letters was two-fold; firstly, because of his view that the misspelling of his name meant that the proceeding was defective, which he compared to the misspelling of a name on a parking ticket; and secondly, because he felt that the Commission had sent him "things" that he felt they could not substantiate. He stated that the information that the Commission sent did not make sense to him and in his view "there was no solid legal ground to stand on." Under cross-examination by Mr. Taylor, the Respondent stated that if his name had been spelled correctly and there was some proof that someone's rights were violated, not what he viewed as "hearsay", he would agree that he said those things and he should be punished. The Respondent acknowledged that he is bound by the *Code*, and that the way he conducted himself during the investigation was unprofessional and wrong and probably poor judgement on his part, but that did not mean "in any way, shape, or form, that I violated someone's **human rights**."

53 As unappealing as it is at first glance, because the Respondent did not cooperate for all the wrong reasons, I accept that the reasons that he gave were the reasons why he did not involve himself in that process. He has continually asserted that this was the reason for his failure to cooperate. While I do not condone it, I accept his explanation.

### ***Post-Referral***

54 The Respondent repeatedly stated that he had no ill will towards Mr. Atkinson and Ms Weiher and that he respected Mr. Atkinson for what he does. As for the Commission, he said that their standards are supposed to be higher than anyone else's but that they are acting like the "Mickey Mouse Club". The Respondent felt that in light of his view of the conduct of the Commission,

especially Ms. Pike, he had every right to be "jumping up and down" and he felt she should have been at the hearing.

55 Some of the concerns that the Respondent had about the conduct of Ms. Pike, who was the original counsel for the Commission in this proceeding, were raised before me in a case-management pre-hearing conference call that was held on September 10, 2002. An exchange of letters between Mr. Polhill and Ms. Pike that occurred prior to the call referred to Mr. Polhill's concerns about the form in which the Commission's disclosure was provided and that, in his mind, the disclosure contained private information of witnesses. By the time of the conference call, Ms. Pike had replaced a previously allegedly illegible copy of a document with a legible one, but the Respondent continued to voice his concerns about the Commission's conduct with respect to the form of disclosure, and specifically that the disclosure material contained telephone numbers and social insurance numbers of witnesses. During the conference call, the misspelling of the Complainant's last name was corrected and the Complaint and title of proceedings were amended accordingly. Ms. Pike also undertook to resend and renumber the disclosure previously provided and black out the items to which the Respondent objected, which was done. Once the materials had been sent, the Respondent provided what amounted to a series of witness statements, including his own, which were marked collectively as Exhibit 8 at the hearing.

56 However, it would seem that his concerns with the conduct of Ms. Pike were not limited to the provision of disclosure.

57 The Respondent testified that he did not understand the last letter that Ms. Pike sent to him which explained that Mr. Taylor had taken over carriage of the file from Ms. Pike. As a result of his concern over the change of Commission counsel, he made multiple phone calls and left telephone messages with the Commission. The Respondent testified that he wanted it spelled out that Mr. Taylor would be attending the hearing because, he said, the only thing that was clear is that Mr. Taylor was participating in the conference call, not the hearing.

58 As a result of the multiple phone calls and their content, the Commission brought a motion under section 23 of the *Statutory Powers Procedure Act*, R.S.O. 1990, c.S.22, as amended ("*SPPA*") for abuse of process. The remedy requested was an Order directing that the Respondent be directed to communicate with the Commission only in writing and only through its counsel, Mr. Taylor.

59 That motion was heard by conference call on November 20, 2002. After I stated in no uncertain terms that Ms. Pike was no longer Commission counsel and that the Respondent was to deal with Mr. Taylor, and the Respondent gave his undertaking to communicate with the Commission only in writing and stated that he did not intend to contact anyone other than Mr. Taylor, that motion was adjourned to the hearing. This was subject to a provision that the motion could be brought back on short notice. That motion was not renewed at the hearing.



### *The Three Solutions*

60 In cross-examination, in an effort to discredit the Respondent and demonstrate that it is more likely than not that the Respondent engaged in discriminatory conduct, Mr. Taylor took the Respondent through Exhibit 8 in some detail.

61 Mr. Taylor first referred to a statement in the last paragraph of page 2 of Exhibit 8 that provides in part that, "This is a money issue that has failed to fly under the Tenancy Act." The Respondent agreed with Mr. Taylor that this means that he was assuming, without checking and without receiving anything from the Ontario Rental Housing Tribunal, that Mr. Atkinson attempted to access the procedures of the *Tenant Protection Act*, but was turned down. He admitted that when he made that statement he was "shooting from the hip".

62 Mr. Taylor also drew the Respondent's attention to the second sentence of the last paragraph of page 2 of Exhibit 8 that provided that, "The **human rights** issues were introduced primarily because she felt she could use her medical condition to full advantage". In Mr. Taylor's cross-examination, the Respondent testified that he believed this statement to be true then and now. The Respondent believes that the Complainant had gone to the Ontario Rental Housing Tribunal and had been turned down, and then filed a Complaint under the *Code* to "get money."

63 Mr. Taylor then drew the Respondent's attention to the second paragraph on page three of Exhibit 8, which addressed an early morning call that the Respondent received from Ms. Boar. It reads:

In the morning I called Richard Atkinson's office and continued to call all morning trying to reach Mr. Atkinson to make it very clear that this middle-of-the night phone calling could not be happening again and I would not be harassed in anyway by Ms. Weiher or any of her friends. When I suggested to his legal department they call the police, the response was they did not wish to get the police involved. And why not? Is it because I have no criminal record and Ms. Weiher has had problems with the police department before?

64 Then Mr. Taylor put to the Respondent that he had also called the Commission on several occasions and left messages. These messages were the subject of the earlier motion that the Commission brought under section 23 of the *SPPA*. In the course of leaving the messages the Respondent had stated that if his conduct is harassment they should call the police.

65 Initially the Respondent did not answer the question "Is there some reason why you want to have the police involved in this case" then stated that it was too broad. That said, he offered that if he did wish to get the police involved he probably would have called them. He did not acknowledge that this was him, "shooting from the hip", yet again. Mr. Taylor then asserted that his conduct

demonstrates that he is a bully. The Respondent stated that the conversations he had with Ms. Pike has to do with him and the Commission and has nothing to do with him and the Complainant.

66 Finally at the close of his cross-examination Mr. Taylor put to the Respondent the three solutions that the Respondent set out at page 8 of Exhibit 8 which read as follows:

#### SOLUTION

When Ms. Weiher attempts to rent any dwelling in the future that she be accompanied by someone capable of assisting her in making a knowledgeable firm decision.

#### SOLUTION

Someone should review Ms. Pike's work to ensure it is complete and correct.

#### SOLUTION

The Ontario **Landlord** Association and affiliated branches and Ontario Rental Housing Tribunal should have access to documentation that is not confidential but can be used as a learning tool in how to deal with **Human Rights** complaints and those people trying to use their **disabilities** to their advantage.

67 When asked if some of these solutions were implemented whether the Respondent would be satisfied he replied in the negative. He stated that the reasons for putting solution two forward is that Ms. Pike's work should be checked for completeness, because, in his mind, there were a lot of things dropped.

68 With respect to the first solution, the Respondent is of the opinion that the Complainant is not capable of finding rental accommodation on her own. With respect to the third solution, Mr. Taylor focussed on the part of the last statement, "those people trying to use their **disabilities** to their advantage," and inquired as to whether the Respondent was referring the people of Ontario who have **disabilities**. The Respondent testified that he was referring to someone who has **disabilities** and uses them to their advantage with no proof to substantiate their case. I am satisfied that this is what the Respondent meant when he made this statement and it was not meant to be a blanket indictment of the **disabled** community.

#### *The Conduct of Commission Counsel at the Hearing*

69 In the course of the Respondent's submissions, he stated that as opposed to the questions posed by Mr. Atkinson, it was hard to answer the questions of Mr. Taylor: first because Mr. Taylor had continued to point his finger at him, even after Mr. Taylor was asked not to do so and he spent more time focussing on the finger than the questions; secondly, the questions were lengthy and had multiple parts; and lastly, because Mr. Taylor looks intimidating to him.

70 With respect to the last point the Respondent stated with respect to the way in which Mr. Taylor was attired that:

He represents the people of Ontario and I found it very unprofessional and very intimidating and he looks like a biker to me and out to get me. And I hope you consider some of those comments that I made because I made them with sincerest (sic) that I was finding it really hard, and it was hard for me to realize what was happening because I was over there being questioned and I didn't realize until later how much I was intimidated.

71 Some comments are necessary to put the above into context. Commission counsel is a powerful looking man and has an aggressive cross-examination style. At the hearing he chose to wear blue jeans and T-shirts emblazoned with slogans and corporate logos. One day Commission counsel wore a T-shirt that read "Bad Company", and on the other day, a T-shirt with an emblem of a stylised eagle and the words "Harley-Davidson." I must say that I have never seen Commission counsel or any other officer of the Court in similar attire in any administrative or judicial proceeding in which I have been involved, in any capacity. In the course of the Respondent's cross-examination by Mr. Taylor he did inquire whether Mr. Taylor was trying to intimidate him by pointing his finger, but made no other mention of his concerns and he declined my offer to adjourn his cross-examination to the next day, if he wished.

72 As a result, until the Respondent mentioned that he was intimidated by, amongst other things, the style of dress of Commission counsel, I had no idea of the extent of his concerns. With respect to finger pointing, when concern about Commission counsel pointing his finger was raised, Commission counsel responded somewhat defiantly, that he would put his finger up if he wished. Ultimately, Commission counsel lost interest in finger pointing a few questions later.

73 This was yet another collateral matter that took precious attention away from the matters in issue. After a short recess, I asked the Respondent a series of questions on the topic. The Respondent confirmed that he had no concerns about Mr. Atkinson's questions, only Mr. Taylor's, for the reasons that he gave. When I asked whether the concerns the Respondent raised affected his ability to give answers in cross-examination he replied that he really didn't know and that it was very confusing. When asked if there was any answer the Respondent would have answered differently, he could give no specific examples. He offered that the way that some of the questions were worded *may* (emphasis mine) have been responded to differently if they were asked another way. He clarified that he is not saying he lied under oath and to his knowledge he answered the questions to the best of his ability.

74 I do have some concerns about the manner in which the cross-examination unfolded, however, on balance, in the absence of specific examples of questions answered incorrectly, I was not prepared to revisit the cross-examination process, nor investigate more drastic remedies such as a mistrial. With respect to the conduct of Mr. Taylor, aggressiveness in cross-examination is

acceptable provided it does not cross the line into unfair treatment or abuse of process. In this case I find that the conduct of Mr. Taylor, although at times unfortunate, does not meet that threshold.

75 The Respondent also felt that providing a statement of what Ms. Boar said, but not calling her as a witness was meant to confuse him and had a lot to do with his state of mind. He asserted that the behaviour of Ms. Pike and Mr. Taylor amounted to him being treated unfairly. The evidence before me does not bear that out, but that was his impression. The Respondent stated that until the Tribunal "came on board" and corrected some of his perceived mistakes by the Commission, he did not feel he was getting a "fair shake". This, he says, explains the attitude he displayed from the beginning.

## **Submissions of the Parties**

### ***The Complainant's Submissions***

76 Mr. Atkinson submitted that the Complainant has been consistent throughout her testimony whereas the Respondent has done everything he could to confuse the issues and avoid making any clear statements. During the investigation he submits the Respondent refused to make any statements at all.

77 Mr. Atkinson challenged the various reasons for the Respondent's failure to clearly state his case and asserted that the Respondent is willing to represent facts in whatever way suits him or his purposes. Mr. Atkinson submitted that it was rare that the Respondent would give a straight answer to the simplest question. He submitted that he could not recall the Respondent giving a straight answer at all. He submitted that the Respondent was rude and disruptive during the Complainant's testimony and dismissive of her as a human being. He submitted that the Respondent is not aware of the power imbalance between himself and the Complainant and is a bully.

78 Mr. Atkinson submits that until the disclosure of medical information, everything was fine with the tenancy agreement. He submits that after the disclosure the Respondent acted badly and ultimately it was the Respondent who advised the Complainant that he was not allowing her to move in, that he was re-renting the unit and not returning the money. The Complainant was devastated and engaged in a twenty minute telephone conversation with the Respondent. In response to the assertion put to the Respondent by Mr. Atkinson that it was the Respondent who did not let her move in, Mr. Atkinson submits that the Respondent did not answer directly, saying simply that this would be against the law.

79 Mr. Atkinson submits that instead of the Respondent admitting that he asked her some questions during that twenty minute telephone conversation which to his mind were appropriate, except for whether or not she was going to move in, he denied asking any questions altogether. Each of the subjects that the Complainant stated were discussed was denied, yet no alternative explanation of what was discussed was provided. This Mr. Atkinson submits, is not credible.

80 The Respondent's position that it was the Complainant's idea not to move in is not believable. The Complainant was desperate to move in, had no other money to pay for rent and no way of getting any. She was on the verge of being homeless, because she had given notice to her **landlord** and she was penniless. The Complainant testified how she felt humiliated, and embarrassed by his treatment and that she felt she had to beg him to move in. She testified that notwithstanding her pleas, the Respondent kept on piling on offensive rules that would only apply to her, and worst of all, told her that he would tell the other tenants of her mental illness. No other tenant was subjected to a lock change charge or to the various rules he set and there is no explanation given for this unequal treatment.

81 Furthermore, based on the three solutions suggested, in the Respondent's mind, the Complainant is not capable of renting an apartment on her own, and the Respondent demonstrates his attitude in the statement about the Complainant "being one of those people trying to use their **disabilities** to their advantage."

82 Mr. Atkinson submits that the Complainant's evidence is logical and consistent with the events and the Respondent's evidence is incomplete, illogical and inconsistent with the events. The Respondent has failed to satisfy his onus. As a result, the Complainant's evidence about what occurred during the telephone call should be accepted and a finding that the Respondent breached the *Code* follows.

### ***The Commission's Submissions***

83 The Commission attempted to show the Tribunal that the conduct of the Respondent both before and after the alleged act of discrimination cannot be isolated from the act itself and allows the Tribunal to infer that it is more probable than not that the Respondent engaged in discriminatory conduct, and was reckless in doing so. The Commission submitted that the Respondent behaved as he did in refusing to cooperate with the investigation because he had engaged in discriminatory conduct. The Commission also submitted that his conduct throughout demonstrates recklessness, and demonstrates that any motive, justification or explanation that he gave (the position being that none was given) is a pretext and offered by the Respondent to obscure the discriminatory purpose of his conduct.

84 The Commission submits that the statement made by the Respondent in his evidence, that during the twenty minute telephone conversation she did a lot of talking and he did a lot of listening is not credible. The Commission submits that the Complainant answered every question in a straightforward and guileless manner but the manner in which the Respondent gave his direct evidence, his answers in cross-examination, his answers to the Tribunal's questions and his interjections, demonstrate that he does not do a lot of listening.

85 The Commission submits that the Respondent has not offered any explanation for his conduct and is liable for the breach of the *Code*. In the alternative, the Commission submits that based on the circumstantial evidence in this case any explanation given is not rational, reasonable nor fits with the other evidence tendered. Asserting that the Complainant changed her mind in the circumstances that she found herself in and electing homelessness is irrational, unreasonable, and does not fit with the other evidence. The Respondent's attitude and behaviour show that he has no regard for the truth and has made statements that demonstrate that he does not care whether something is true or false, which the Commission characterized as "shooting from the hip". The Commission submits that the Respondent will say anything to avoid liability in this case.

86 The Commission further submits that the Respondent not participating in something if he feels it does not apply to him, his allegation that the Complainant filed the Complaint for monetary gain and that she was doing this to take advantage of her **disability** is reckless and wanton. Furthermore, the explanation given by the Respondent that it was an error in judgment for him to have done what he did and in hindsight perhaps he wouldn't have done it that way is no defence, for such conduct should still be considered reckless, which need not be motivated by animus, in order for a breach of the *Code* to be found.

87 The Commission submits that invisible **disabilities** are the most difficult to address and the Respondent's lack of understanding of her **disability** impacted directly on the Complainant. The Commission submits that the three solutions suggested by the Respondent demonstrates his discriminatory attitude, is an affront to her dignity and autonomy and went beyond this matter to a general condemnation of the people of Ontario who live with **disabilities**. Such conduct, in the view of the Commission, is wanton and reckless.

### ***The Respondent's Submissions***

88 It should be noted that Mr. Taylor did bring another motion for abuse of process when the Respondent was giving his submissions. He argued that the Respondent should be given a time limit because his submissions were repetitive and amounted to an abuse of process. That motion, which interrupted the Respondent's submissions, was denied, although I did urge the Respondent not to repeat himself.

89 The Respondent denies engaging in discriminatory conduct and feels that he is doing a community service giving housing to young people and people of all nationalities. He submitted that this is the first time something like this has happened to him and the first time that a tenant did not move in.

90 The Respondent denies that he discriminated against the Complainant and asserts that there is no "solid concrete evidence" to support the allegation of discrimination other than what the Respondent referred to as "hearsay". He submits that nobody was present to back up any of the



"stuff set out in the disclosure". He also emphatically and emotionally stated that this issue was the most important issue in his life and that he will fight this until the day that he dies. He stated that he was shocked as a taxpayer.

91 The Respondent asserts that the allegations are fabricated. Whether this has to do with the Complainant's mental illness or something else he is not aware of, he is not in a position to say. He asserts that there are many statements in the documentary disclosure provided by the Commission that are "outright lies." He was upset by the allegations made by the Complainant, the content of the Commission's disclosure, and by his treatment by Commission counsel. He challenges the assertion of Mr. Atkinson that he did not conduct himself properly at the hearing. He asserts that he knows the difference between right and wrong and the witnesses that he called confirm that he is a good **landlord**.

92 There was nothing for him to think over about the Complainant's tenancy. He read the *Tenant Protection Act*, and because the Complainant paid the money and had the keys she was a legal tenant and he could not stop her from taking occupancy. If the Respondent had said that the Complainant couldn't move in and she attempted to move in and put a key in a lock that didn't work, in his view that would contravene the *Tenant Protection Act*.

93 It is the Respondent's position that it was the Complainant who changed her mind when she made the first appointment and then changed her mind about renting the House. He asks rhetorically that if she had received the keys and he told her she couldn't move in, would he not take back the keys. He submits that she is using her **disability** to her advantage.

94 The Respondent submits that the statement in the letter dated May 24, 2001, that he had asked her not to move in for a week is "substantially a lie" and regarding the allegation that the Respondent established rules of conduct for the Complainant he states that he had never heard anything so ridiculous in all his life and that's why his anger is there. The Respondent submits that he called two witnesses who testified as to the lack of rules of the nature alleged by the Complainant whereas the Commission did not call any witnesses. Notably absent in his view was Ms. Boar who made a late night call to him regarding this matter.

95 He submits that he never discussed the Complainant's mental illness with anybody and that he never asked her any questions. He asserts that if he was going to tell somebody about her medical information he would have told Ms. Cotton or Mr. Scarfo, and he did not. He submitted that he does use the phrase "I'm listening" and he does listen. He submits that Mr. Atkinson did not ask him specifically what he and the Complainant talked about on the telephone call, only what pertained to the issues. The Respondent submits that he made mistakes and that he is not afraid to admit that, but he did not treat the Complainant any differently than any other tenant.

96 The Respondent submits that according to the information he received from the Ontario Rental Housing Tribunal, it is his right to charge an amount for the period of time that it took to

re-rent the premises because the Complainant did not give proper notice and breached the lease. He is also entitled to charge for advertising costs and the costs of changing the locking system. He acknowledges that he never charged a tenant a lock change fee before, but points out that he never had a tenant not move in before.

97 The Respondent explained that regarding the phrase in the solution three, "people trying to use their **disabilities** to their advantage", the Respondent submits that if the Commission allows one person to rent a dwelling and all that person has to do is to make a phone call alleging discrimination in order to found a complaint, then the Commission would be overwhelmed with phone calls and complaints. The Respondent said he does not mean in any way, shape or form to discriminate against someone on **disability** and acknowledges that they have rights like anyone else in Ontario and should be treated with the utmost respect. He states that if he is guilty of anything in this matter, he is guilty of acting in an unprofessional manner at times, but that the Commission is in the same category.

98 The Respondent submits that the suggestion in solution one that the Complainant have someone with her was because that way she would have someone to support her and to help her make decisions.

99 Regarding the issue of money the Respondent stated that he has lost money for the past five years but that doesn't mean it gives him the right to take someone's \$600.00.

## The Law

100 Subsection 2(1) of the *Code* sets out that the Complainant has a right to equal treatment with respect to occupancy of accommodation without discrimination because of **disability**. The definition of **disability** found at subsection 10(1) of the *Code*, includes "a mental disorder".

101 Section 9 of the *Code* provides that no person shall infringe or do, directly or indirectly, anything that infringes that right of the Complainant, but subsection 21(1) of the *Code* provides an exemption to the application of the *Code*, in certain circumstances. That subsection provides that the right to equal treatment with respect to the occupancy of residential accommodation without discrimination is not infringed by discrimination, where the residential accommodation is in a dwelling in which the owner or his or her family reside, if the occupant or occupants of the residential accommodation are required to share a bathroom or kitchen facility with the owner or family of the owner. On the facts of this case that exemption does not apply.

102 There is another potential exemption to the application of the *Code* that was addressed at the hearing. On many occasions the Respondent expressed how he thought this matter could have been resolved quickly though the mechanism of the Ontario Rental Housing Tribunal, which has specific expertise in **landlord** and tenant matters.

103 Subsection 47(2) of the *Code* provides that where a provision in an Act or regulation purports to require or authorize conduct that is a contravention of a right to occupancy of accommodation without discrimination because of **disability**, the *Code* applies and prevails unless the other Act or regulation specifically provides that it is to apply despite the *Code*. No such provision is present in the *Tenant Protection Act* or its regulations.

104 The standard of proof in cases of discrimination is a civil standard, a balance of probabilities. With respect to the burden of proof in cases of discrimination, the cases demonstrate that once the Complainant and Commission establish a *prima facie* case the burden shifts to the Respondent to provide a reasonable credible explanation for its conduct and then it is to the Complainant to show that such explanation is a pretext. To establish a *prima facie* case, discrimination must be a factor in the conduct, but it need not be the only factor.

105 The Commission submits that if I find that there is no direct evidence of discrimination, the Tribunal must consider circumstantial evidence, to draw the inference that the Respondent discriminated against the Complainant. In that regard the Commission relied on the reasoning set out in *Basi v. Canadian National Railway* (1988), 9 C.H.R.R. D/5029 (Can. **Human Rights** Trib.).

106 For the purpose of establishing that the conduct of the Respondent was reckless in general when he was "shooting from the hip", and met the definition of reckless under the *Code* for the purpose of clause 41(1)(b), the Commission relied on the following definition found in *Cameron v. Nel-Gor Castle Nursing Home* (1984), 5 C.H.R.R. D/2170 (Ont. Bd. of Inquiry). In that decision, at paragraph 18479, the Board states:

The word "reckless" implies that one is guilty of more than a mere error of judgment; one is indifferent or heedless of the consequences; one is rash or even just careless. See the World Book Dictionary, vol. 2, *supra*, at page 1743. But recklessness does not mean that a person acted intentionally: ...

## Analysis

107 As a full time adjudicator, initially for the Ontario Rental Housing Tribunal and now for the **Human Rights** Tribunal of Ontario, this is one of the most difficult cases I have had to address to date. I did not find the Respondent to be disruptive at the hearing but he did allow his attention to be diverted by collateral issues and had to be reminded to focus on the matters in issue. In addition, the conduct of the Commission counsel at the hearing did not greatly assist my fact-finding determinations.

108 There was no dispute that the Complainant suffers from a **disability** as defined by subsection 10(1) of the *Code*.

109 Neither her former **landlords**, the friends that the Complainant spoke to that referred her to Mr. Atkinson's office, Ms. Boar (although the Commission had earlier advised the Tribunal that it was considering calling her as a witness) nor the individual who dropped the note and keys off at the House were called as witnesses.

110 Although it may have assisted the Tribunal in its fact finding function if either the Respondent or the Complainant had a third party present when the discussions at issue herein took place, the presence or absence of a witness to corroborate a party's version of events, is not fatal. Generally, if a party testifies as to the events that the party participated in or were observed by them, which the Complainant did in this case, this amounts to direct evidence and not "hearsay", as suggested by the Respondent. In the event of a contest of credibility, while a third party witness is often helpful, their absence is not fatal.

111 The Respondent did call witnesses whom he relied on to support his version of the events but their testimony was not of great help. The evidence of Ms. Cotton was of little assistance to me as I must be wary not to rely on evidence going only to character and propensity that is not admissible as similar fact evidence, and she only met with the Complainant for a short period of time. As a result she was not privy to any subsequent conversations between the Complainant and the Respondent regarding the facts at issue herein. I must say however, that while Ms. Cotton is clearly a friend of the Respondent she gave her testimony in a clear and forthright manner, and I have no hesitation in accepting the relevant portions of her testimony.

112 Mr. Scarfo's evidence was of very little assistance. He is a current tenant and has a business relationship with the Respondent. He was not present for any interaction between the Respondent and the Complainant and learned of the Complainant's anticipated move in date after the fact. Although he sought to be of assistance to the Tribunal and answered the questions that were asked in a clear and forthright manner and I have no hesitation in accepting the relevant portions of his testimony, his evidence went more to the character and propensity of the Respondent.

113 That being said I do accept the evidence of Ms. Cotton and Mr. Scarfo regarding how the Respondent dealt with the House and prospective tenants. I accept that to their knowledge the Respondent did not discriminate, did not have House rules prohibiting drinking or the requirement to leave if another tenant had their boyfriend or girlfriend present, did not ask any questions of a personal or medical nature when he rented rooms, and would rent to young people, students, persons on fixed incomes and persons of all nationalities. However, the Respondent's witnesses could not properly comment on what actually occurred during the interaction between the Respondent and the Complainant because they simply were not there.

114 Although Mr. Atkinson sought to establish unequal treatment, especially in regards to a fee for a tumbler change, by comparing the Complainant's treatment of Ms. Cotton with his treatment of the Complainant, I did not find that comparison to be helpful as the situations were completely

different. On the one hand the Complainant was alleged by the Respondent to have breached the tenancy agreement by not moving in. Ms. Cotton, on the other hand, left voluntarily.

115 I do not agree that the Respondent's conduct in the investigation and proceeding can be used for the purposes suggested by the Commission, in the circumstances of this case. In the first case, this borders on finding liability on the basis of propensity, which is not relevant unless it satisfies the test of similar fact evidence. Secondly, the behaviour of a person in the midst of an investigation and proceeding may not be representative of someone's typical conduct, due to the nature of the process, which in this case became adversarial in nature. Thirdly, the conduct of the Respondent arose from his concerns about the misspelling of his name, his perception that such a misspelling made the letter of May 24, 2001 and the Complaint inapplicable to him, the perception of the lack of evidence and improper disclosure, and the disclosure of what he felt was private information, matters that he felt justified in expressing his displeasure. Fourthly, just as the Tribunal should not review the pre-referral conduct of the Commission in the investigation unless it amounts to an abuse of process, logically the same rationale applies to the conduct of the Respondent (see for example the discussion at paragraphs 25 to 28 in *Bui v. B & G Foods Inc.* (2001), 41 C.H.R.R. D/191 (Ont. Bd. of Inquiry). Furthermore, it could be argued that the conduct of the Respondent tends to show that he is a person who attempts to follow rules to the letter, almost to an extreme. This could support the Respondent's contention that he never would ask the questions he is alleged to have asked, in the manner in which the Complainant alleges they were asked. On balance, it is up to a respondent as to whether or not they wish to participate in an investigation or mediation, or a hearing for that matter. While the choice may have adverse consequences, it is up to a respondent to make.

116 The most troublesome aspect of this case is deciphering what exactly occurred in the telephone call between the Complainant and the Respondent. Based on the evidence of both Ms. Cotton and the Complainant that the location of the House was convenient, although the Respondent sought to assert the contrary, I find that location was not a factor in any decision that the Complainant made. But it is also clear that the Complainant did not take the step of attempting to physically obtain occupancy of the premises. She was not refused entry by the Respondent. While the Respondent did talk of a locking mechanism change, he did not demand the return of the keys, which were returned voluntarily. This distinguishes this case from others and adds a level of complexity. The Complainant had the keys and there was at least initially a tenancy agreement.

117 Based on my careful consideration of the evidence, I am satisfied that if the Respondent, in breach of the tenancy agreement, had unilaterally refused the Complainant access to the unit, he would have returned her funds. I also believe that the Respondent would only have retained the money and discussed deductions if he believed that the Complainant unilaterally breached the tenancy agreement herself by deciding not to move in. As a result, I am satisfied on a balance of probabilities that it was the Complainant, not the Respondent who ultimately decided that she would not move in. The question then becomes whether the content of the conversations or nature



of the inquiries that the Respondent made amounted to discrimination by becoming improper conditions being imposed to occupancy as a result of her **disability**, leading to the Complainant reasonably terminating the agreement.

118 The Complainant's version of the May 13, 2001 telephone call was put on record in the letter of May 24, 2001. The substance of that letter, almost contemporaneous with the event, alleges that inappropriate questions were asked of the Complainant and that if she was to move into the House she would have to abide by some very strict rules of conduct. This corresponded somewhat with the version of the events that the Complainant gave at the hearing. The Respondent waited until the hearing to provide his side of the story, which is his right. As a result, there was no similarly contemporaneous documentary evidence that corroborated his version of the events.

119 I find that the reason that the Complainant initiated the calls is a straightforward one. I am satisfied that the reason for the calls to the Respondent was because she had never lived in a situation like the one found at the House, she was concerned about what the interaction with the other tenants would be and was understandably sensitive about the move because of her recent experiences. This would reasonably have led to her having second thoughts about renting the room. By calling the Respondent and disclosing her **disability** she sought to have some measure of reinforcement for her decision or at least the comfort of knowing that this new situation would not be a repetition of the earlier one. She obviously did not find the reassurance she sought, which led her to return the keys.

120 Mr. Atkinson asked the Respondent in a number of ways whether he asked questions during the May 13, 2001 call and what was discussed. While admitting that the medical condition of the Complainant was discussed, the Respondent gave no depth of detail of what took place in the conversation or what questions he asked of her, other than him asking whether she was moving in or not. The Respondent denied asking the questions attributed to him or imposing the conditions the Complainant alleged and asserted that on the telephone call the Complainant "was doing a lot of talking and he was doing a lot of listening". This I find to be incredible, thereby rendering any possible explanation given by the Respondent a pretext. This is because it would be reasonable to assume that once the Complainant's mental illness and its effects were disclosed, a **landlord** as diligent as the Respondent would have engaged in a discussion with the Complainant and would have made inquiries of the extent of her **disability** and its potential effects on the other tenants. This corresponds somewhat to the theme of the conversation that the Complainant testified to. As the Respondent provided no detailed alternative version of what was discussed, save for the matters as found above, I prefer the evidence of the Complainant with respect to the content of the conversation and the types and nature of the questions that were asked. In particular, I find it more probable than not that the Respondent inquired of the Complainant what her illnesses were, whether she could feed herself while in a depressed state, suggested that she would have to leave when other tenants had boyfriends or girlfriends over and that he would advise the other tenants of her **disability**. Any variation between this finding and her testimony I ascribe to her state of



mind, likely one of great anxiety, during the twenty minute telephone call. While it may not be discriminatory per se for the Respondent to have made inquiries of the Complainant as to the extent of her **disability** and its effects (if he sought to somehow accommodate the Complainant, which I find on a balance of probabilities was not what he intended to do), the suggestion that the Complainant would have to leave when other tenants had their boyfriends and girlfriends over, in the midst of inquiries about her **disability**, amounted to an improper condition being imposed to occupancy, due to her **disability**. This led to the Complainant reasonably terminating the agreement and not entering into occupancy of the rental unit.

121 This was a condition that the Respondent attached to the Complainant's continuing tenancy and to no others and I find that it is more probable than not that the Complainant was treated unequally due to her **disability**. As a result, by imposing that condition, I find that the Respondent infringed the Complainant's right to equal treatment with respect to occupancy of accommodation without discrimination because of **disability**.

## Remedy

122 Subsection 41(1) of the *Code* sets out the remedial authority of the Tribunal. The Tribunal can award public interest remedies and monetary compensation for the loss arising out of the infringement. In this case the Complainant seeks special **damages** in the sum of \$600.00, being the amounts forwarded to the Respondent for rent, general **damages** in the sum of \$5,000.00 and **damages** for mental anguish in the sum of \$5,000.00. The Commission submits that the evidence shows reckless behaviour and conduct on the part of the Respondent that meets the requirements of clause 41(1)(b) of the *Code*. The Complainant also claims pre and post judgment interest on these amounts.

123 With respect to public interest remedies, relying on the decision of the panel in *Fuller v. Daoud* (2001), 40 C.H.R.R. D/306 (Ont. Bd. of Inquiry) ("*Fuller*"), the Commission requested that the Respondent undergo sensitivity training at his expense and submitted that he would benefit from that kind of training. The Commission submitted that the Respondent seems to the Commission to be a man who would benefit from more knowledge from people who are experts in the field.

124 The Commission advised the Tribunal that there are a number of private consultants in Thunder Bay who could do training in **Human Rights** outreach. The Commission suggested that the Order could include a provision that the Respondent be directed to find a consultant who would provide training of this kind. The Commission also requested that an Order be made requiring the respondent to post *Code* cards at the House. The Commission asked that the panel remain seized of the matter until the remedies are fulfilled.

125 In response to the submissions regarding remedy the Respondent submits that unlike the case of *Fuller*, relied upon by the Commission, which in his view was "more cut and dried",

he believes that this matter is ridiculous based on information and evidence presented before the hearing and that the amount of money claimed can't be established by the evidence. When I again asked the Respondent to address the monetary amounts specifically, he stated that he did not have the ability to pay any large sum of money because his wages were already being garnished, the price of property values in Thunder Bay are tumbling and he has a part-time, not a full-time job. The Respondent took no issue with the posting of *Code* cards but did not feel that sensitivity training is helpful.

## Analysis

126 Mitigation is not an issue in this case. In the circumstances of this case, considering the factors germane to quantifying a general **damage** award set out at paragraph 46 of *Kalbfleisch v. Carillo* (2002), 44 C.H.R.R. D/163 (Ont. Bd. of Inquiry) and considering that the Respondent takes the Complainant as he finds her, someone who may be more adversely affected than others in a similar situation, the Tribunal finds that an appropriate award of general **damages** is the sum of \$4,000.00. The Complainant is also entitled to the return of the sum of \$600.00 paid to the Respondent.

127 I do not find the degree of wilfulness or recklessness required for an award of **damages** for mental anguish. This is because, in my view, the conduct of the Respondent was more in the nature of negligent than wilful or reckless.

128 I not believe that ordering that the Respondent engage in sensitivity training would be practical or useful. The result of this case should be sufficient to bring home to the Respondent the importance of ensuring that an individual suffering from the **disability** that the Complainant faces should be dealt with sensitively and appropriately and in a non-discriminatory fashion.

129 I do order that the Respondent post *Code* cards in his House.

130 In the event that the **damage** awards are not paid within 60 days of this decision, the Complainant is entitled to prejudgment and postjudgment interest on the monetary sums awarded based on the rates set under the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended. If the **damage** awards are not paid within 60 days of this decision, prejudgment interest on the **damage** awards shall run from the date of the discriminatory conduct, being May 13, 2001, to the date of this decision at a rate of 6%, and postjudgment interest thereafter.

131 It is not necessary for me to remain seized of this matter.

## Order

132 Upon finding that the Respondent violated the Complainant's rights under subsection 2(1), contrary to s. 9 of the *Code*, the Tribunal orders:

1. The Respondent shall pay general **damages** to the Complainant in the amount of \$4,000.00.
2. The Respondent shall pay special **damages** to the Complainant in the sum of \$600.00.
3. If the **damage** awards are not paid within 60 days of this decision, prejudgment interest on the **damage** awards shall run from the date of the discriminatory conduct, being May 13, 2001, to the date of this decision at a rate of 6%, and postjudgment interest thereafter based on the rates set out in the *Courts of Justice Act*.
4. The Respondent must post three *Code* cards in a prominent location in the House, within five business days of being provided with a copy of the *Code* cards by the Commission.  
*Order accordingly.*