HUMAN RIGHTS TRIBUNAL OF ONTARIO

B E T W E E N:

JKB as represented by her Litigation Guardian JB

Applicant

-and-

Regional Municipality of Peel Police Services Board

Respondent

DECISION ON REMEDY

Adjudicator:	Brenda Bowlby
Date:	December 31, 2020
File Number:	2017-29780-I
Citation:	2020 HRTO 1040
Indexed as:	**JKB v. Regional Municipality of Peel Police Services Board**

APPEARANCES

JKB as represented by her Litigation Guardian JB, Applicant	)	Janina Fogels and Kisha Munroe, Counsel
Regional Municipality of Peel Police Services Board, Respondent	)	Paula Rusak and Hilary Grice, Counsel

INTRODUCTION

[1] This Decision deals with the issue of remedy in respect of an Application filed by JKB, as represented by her Litigation Guardian JB, under s. 34 of the *Human Rights Code*, R.S.O.1990, c. H.19, as amended ("the *Code*").

[2] The applicant filed her Application on September 27, 2017, alleging discrimination by the respondent with respect to services on the basis of race, colour, ethnic origin or ancestry contrary to the *Code*. The hearing of the Application commenced on May 29, 2019. At the request of the parties, at the outset of the hearing, the issues of liability and remedy were bifurcated with a hearing on remedy to be held if a finding of liability was made.

[3] The Decision on the issue of liability ("Liability Decision) was issued on February 24, 2020 (2020 HRTO 172). The respondent was found to have violated the applicant's right to be free from discrimination in the provision of services, contrary to s. 1 of the *Code*.

[4] As the process for setting up a hearing on remedy ("remedy hearing") was about to begin, the COVID-19 pandemic intervened. Ultimately, a videoconference hearing on the issue of remedy was held on October 27 and 28, 2020 for the purpose of hearing from witnesses. Argument was submitted in writing.

[5] The applicant requests monetary compensation comprised of compensation for injury to dignity, feelings and self-respect in the amount of $150,000.00 and payments for counselling, tutoring and pre-and post-judgement interest. In addition, the applicant requests a public interest remedy in the form of detailed directions to the respondent regarding training, the implementation of an interim protocol for police response at schools, protocol revision, data collection, and compliance measures, including deadlines for meeting these directions.

[6] The respondent disputes the amounts claimed by the applicant as monetary compensation. In respect of a public interest remedy, the respondent argues that no order is required in this case because the respondent has voluntarily and pro-actively entered into a Memorandum of Understanding with the Ontario Human Rights Commission to make extensive changes to policies, procedures, protocols and training with the goal of removing systemic racism in the services it provides, including services to children under the age of 12 years.

BACKGROUND

[7] The following findings were made in the Liability Decision:

- In this case, police officers with no training in dealing with children in crises were called into a school to deal with a situation involving the applicant which the school staff had been unable to manage.

- The applicant's behaviours, before the arrival of the officers had been dysregulated and included running away and aggressive behaviours towards another child, to the principal and to the behavioral education assistant ("BEA") who worked with her. The applicant was, at the time, a small six year old. This was the fourth time the police had been called to the school that school year to assist with the applicant. However, on prior occasions, the police had not dealt directly with the applicant during an episode of behavioural dysregulation.

- At the point the first officer arrived in the main office, the applicant was sitting calmly on a chair. Upon the arrival of the second officer, the applicant abruptly left the office and ran to the stage of the school's auditorium where an assembly was taking place. The officers followed her. When the applicant refused to accompany the officers off the stage and began exhibiting resistant behaviours, the officers carried her back to the office where they initially placed her on a chair in the front office, seated between them, with the officers holding her arms and legs. When she began to "heel kick" them by swinging her legs backwards, they placed handcuffs on her ankles. They subsequently moved her to a back office when the assembly began to disburse.

- In the back room, when the applicant continued to struggle and tried to scratch and bite the officers, they handcuffed her hands behind her back and placed her on her stomach on a padded bench in the

office (“the incident”). This was possibly preceded by the applicant bending over and biting the thumb of one of the officers as they held her. After the officers placed the applicant on her stomach and handcuffed her hands behind her back, with her ankles still cuffed together, they held her in this position for at least 28 minutes, until the arrival of the paramedics they had called. She continued to struggle while being held in this position.

- In September 2016, the applicant was a small girl, 48 pounds, just six years old. The officers were both about six feet tall and 190-200 pounds.

- The evidence was undisputed that the officers conducted themselves throughout the incident in a professional and polite manner and that they made efforts to verbally de-escalate the applicant while she continued to struggle. The officers said that they decided to use handcuffs in order to prevent harm to others, themselves and the applicant. However, they denied handcuffing her hands behind her back, placing her on her stomach or holding her in that position for 28 minutes.

- The officers’ denial was found not to be credible. The evidence of the BEA employed by the school board was preferred. This witness was present throughout the incident and described the officers’ actions from a firsthand perspective.

- The officers’ denial that they handcuffed the applicant’s hands behind her back, placed her on her stomach and held her in that position for 28 minutes amounted to a concession that the degree of force they had applied in “controlling” the applicant was more than was required. Their action was an overreaction to the situation with which they were dealing.

- Expert witnesses provided evidence about implicit bias based on racial stereotypes and how this bias operates in dynamic situations. Studies show that perceptions exist, both generally and amongst police specifically, that Black children are bigger, stronger and more in need of control than white children in the same circumstances.

- I concluded that certain actions of the officers amounted to discriminatory treatment at paragraphs 164-5 of the Liability Decision:

    > The Tribunal has recognized that “race plays a very subtle role in our society. It can influence many social interactions without the knowledge or the intention of those involved.” See *Adams v. Knoll North America,* 2009 HRTO 1381; judicial review

dismissed, 2010 ONSC 3005 (Div. Ct.) at para. 45. This was clearly the case here.

> [One of the officers] said that he would never place a child on her stomach because it would put her at risk of asphyxiation. However, [the officers] did just that. The clear difference between the applicant and a typical child, from the perspective of two White police officers, is her race – as a Black person, the applicant is a member of a 'different group'. While I do not believe that it was the intention of these officers to discriminate against the applicant based on her race, it is clear that their focus throughout was on controlling her. Their overreaction can only be explained by the inference that because of implicit stereotypical associations that arose because of the applicant's race, they saw her, as a Black child, being more of a threat, being bigger, stronger and older than she was and, consequently, of being more in need of control than they would have seen a White child in the same circumstances

- In handcuffing the applicant's hands behind her back and holding her on her stomach with her ankles handcuffed for at least 28 minutes, the officers violated the applicant's rights under s. 1 of the *Code* to equal treatment in the provision of services by treating her in a way they would not have treated a white child.

PROCEDURAL ISSUES

[8] As noted above, within a month of the Liability Decision being released, the COVID-19 pandemic and the period of lockdown intervened. 'In person' hearings at the Tribunal were - and remain - temporarily postponed. Ultimately, the Tribunal determined that the most efficient way to proceed, during this period, was to conduct hearings electronically, including video conferencing.

[9] In order to move this matter forward to completion, Case Management measures were implemented, including directions on the manner in which evidence would be presented. Case Management Conference Calls ("CMCC") were on held on April 7, May 19, August 12, September 2, and October 19, 2020, resulting in Case Assessment Directions ("CAD") aimed at ensuring that the remedy hearing could be conducted as quickly, efficiently and fairly as possible.

[10] Each party identified an intention to call one witness. As part of Case Management, I directed that the evidence in chief of both witnesses be submitted by way of affidavit with each party to have 15 minutes at the hearing to ask questions of their own witness to highlight the evidence set out in the witness's affidavit. Timelines were set for the production of the affidavits, the filing of any objections to evidence in the affidavits and for the filing of documents which the party proposed to enter as exhibits at the remedy hearing. The goal was to have as many evidentiary objections as possible dealt with prior to the hearing.

[11] Several objections arose before the remedy hearing which required decisions with reasons. Two of these decisions were delivered orally and I told the parties I would record these in this Decision.

[12] The respondent made a Request for Order during Proceedings ("RFOP") objecting to evidence set out in the Affidavit of the Litigation Guardian who was the witness to be called by the applicant at the Remedy Hearing. I delivered an oral decision on this RFOP at the October 19, 2020 CCMC with the understanding that the text of this decision would be included in this Decision. It is set out immediately below.

> The Respondent filed an RFOP objecting to evidence in the Affidavit of the Litigation Guardian ("the Affidavit"). Three grounds were raised:
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> 1. Hearsay: paragraphs 9, 12, 13, 14, 16, 17, 21, 30;
> 2. New Events and Allegations not previously raised: 8, 9. 10, 13, 14, 15, 16, 18, 20 & 21; and
> 3. Evidence outside the Scope of the Application: paragraphs 24 – 32
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> I will deal with each of these in turn.
>
> **1. Hearsay**
>
> Paragraphs 9, 13, 14, 16, 17 and 21 all set out hearsay statements made by the applicant to the litigation guardian regarding the impact of the discrimination on her. The respondent objects that the paragraphs in question set out hearsay evidence and says that "the reliability, necessity and probative value of the evidence does not outweigh the prejudice to the

respondent posed by the admission of the hearsay." Primarily, the respondent's objection is that evidence relating to the impact of the discrimination on the applicant is being provided by the litigation guardian rather than the applicant and that the respondent is prejudiced because it cannot cross-examine the applicant.

It is well established that the Tribunal will accept the hearsay evidence of a parent in lieu of hearing evidence from the child. In a number of cases, the Tribunal has accepted evidence from parents about the impact of discrimination on child applicants, where the child did not testify. For example, see *L.B. v. Toronto District School Board*, 2015 HRTO 1622.

The respondent argues that because the applicant attended the hearing on one day, she should have been put on the stand to testify on her own behalf. (She was 9 years old at that time.) However, all parties are aware of the circumstances in which the applicant attended the hearing; on that day, the litigation guardian's day care plans fell through at the last minute. The Tribunal was advised that she had no other option but to bring the applicant with her to the hearing. Moreover, the fact of the applicant's vulnerability, as she sat in the hearing, was recognized by all. Although I advised of the availability of another room for the applicant to sit in, the litigation guardian initially declined this offer. After the applicant had sat through a portion of her mother's evidence in chief, at the request of respondent's counsel, both parties' counsel and I met outside the hearing room and we all agreed that the applicant should be placed in an adjacent meeting room rather than remain in the hearing room for the remainder of the day. I do not accept that this situation supports the conclusion that the evidence given by the litigation guardian on her observations about the impact of the discrimination on the applicant should be rejected out of hand.

The respondent will have an opportunity to cross examine the litigation guardian and to make submissions on the weight to be attributed to the evidence she provides. The normal rules of evidence will apply in assessing her evidence, including the weight to be attributed to the evidence.

Paragraph 12 of the Affidavit sets out the evidence of Laura Girou who testified in the hearing on the merits and that of several other individuals. Respondent's counsel had an opportunity to cross-examine Ms. Girou. To the extent that there was no cross examination on hearsay evidence on which the applicant relies for the purposes of remedy, this can be addressed in final argument.

Paragraph 12 also contains "double hearsay" in the form of statements made by the applicant to her grandmother and to a psychotherapist, which were then related to the litigation guardian. However, in both cases, the litigation guardian says she was present in part when such statements were made. The litigation guardian can be cross examined on what she saw and

heard. The question then becomes what weight, if any, should be given to her evidence about what others told her the applicant. This can be addressed in final argument.

Paragraph 30 sets out the litigation guardian's hearsay report of what her twenty-two year old son has said and feels. I will deal with this paragraph under the third heading below, but I agree that in the case of this sibling, who is an adult, it is troublesome that he would not be called to provide the hearsay evidence which the applicant now seeks to rely on.

2. New Events and Allegations:

The respondent objects to allegations and events, set out in the litigation guardian's affidavit that were not previously specifically raised in the Application or the summary of expected evidence filed in accordance with Rule 17 of the HRTO Rules of Procedure.

In fact, the allegations set out in Part V of the Application, under the heading "Impact", are quite broad and general. These allegations generally refer to the fear of police developed by the Applicant, the negative impact on her "sense of self-worth, dignity, confidence, security and self-esteem" and her trust of authority figures. As the applicant submits, the litigation guardian's evidence merely provides illustrations of general allegations regarding impact which have already been made.

With respect to the allegation that the applicant has denied that the handcuffing incident occurred, which does not appear in either the application or in the summary of evidence, this was raised in the applicant's RFOP requesting a sealing order without objection from the respondent. It should come as no surprise that it would be repeated here.

In any event, I am not satisfied that there would be any undue delay or prejudice to the respondent in allowing these allegations to stand. The respondent has not asserted that it is surprised by these allegations or would need an adjournment to prepare to cross-examine the litigation guardian on these allegations – and it is very difficult to see why any such adjournment would be necessary given the nature of the allegations objected to. I am not prepared to strike the identified paragraphs based on this argument.

3. Outside the Scope of the Application

The respondent objects to paragraphs 24 – 32 of the litigation guardian's affidavit on the basis that these paragraphs are not relevant. These paragraphs set out allegations pertaining to the impact of the incident on the litigation guardian and the applicant's two brothers.

> The applicant argues that these paragraphs are relevant because when discrimination occurs, especially to children, it occurs in the context of a family unit. The applicant says that "what happens to one child will affect all members of that family unit", that "they have dependent relationships to siblings, parents, caregivers, teachers and peers. These relationships can be stressed by the discrimination they live through…"
>
> There is no question that when a child is subjected to discrimination, this can have an effect on the entire family and may impact the relationships which the child has with parents and siblings. I agree with the applicant's statement that "Evidence from a mother about her child's affected relationships with her young sibling is highly relevant to this proceeding." However, the disputed evidence in paragraphs 24 – 32 focuses on the impact of the discrimination on the litigation guardian and the applicant's brothers without mention of how this impact affected the relationship between the applicant and the litigation guardian and/or her brothers. Evidence limited to how the litigation guardian and the applicant's siblings were impacted by the discrimination in isolation is not relevant to determining a damages award for the applicant.
>
> I agree with the respondent that this evidence should be struck. It is not relevant to the hearing on remedy for the applicant.

[13] In a CAD issued following a CMCC on September 2, 2020 the parties were directed to file their documents at least 10 days in advance of the hearing. While the respondent did so, the applicant did not file her documents until the morning of October 19, just 8 days in advance of the hearing. As a result, I did not get the documents before the CMCC that had been set for October 19 and the respondent's counsel had only scant opportunity to review the documents. During that CMCC, respondent's counsel advised that once she had the opportunity to better review the applicant's documents, the respondent would likely have objections to some of the documents the applicant had filed. She offered to provide an outline of her objections in writing by the end of the week and did so. Applicant's counsel provided a brief written response the day before the hearing.

[14] The Applicant's Book of Documents ("the documents") included, at Tabs 1-7, report cards and IEPs, dating back to 2014/15, including 4 documents which existed prior to the start of the hearing on liability ("liability hearing") in May, 2019. In addition, at Tab 13, the applicant's book of documents included 3 invoices dating back to 2018. All of the documents at Tabs 1-7 and Tab 13 had been redacted by the applicant to remove any

identifying information about the person or persons to whom they pertained. The documents also included, at Tab 14, a single page with what appeared to be quotes for the cost of tutoring services from two providers.

[15] The respondent advised, and the applicant did not dispute, that the documents at Tabs 1-7, 13, and 14 had not been previously disclosed to the respondent and were not included in the applicant's original book of documents filed in advance of what became the liability hearing. This is significant because it was only after the liability hearing started on May 19, 2019 that the request was made to bifurcate the issues of liability and remedy. Consequently, in order to comply with the Tribunal's rules regarding the filing of documents and witness will-says in advance of a hearing, the applicant should have included the documents she would be relying on in respect of remedy as well as liability.

[16] The documents in dispute were not referred to or identified in the litigation guardian's Affidavit filed in advance of the remedy hearing. Moreover, the applicant made no request under Rule 16.4 of the Tribunal's Rules of Procedure for permission to file documents that not been disclosed as required by the Rules.

[17] The respondent's objections to the documents centred on the fact that they had not been previously disclosed and, in the case of the documents at Tabs 1 - 7, that the failure to disclose those documents much earlier denied any opportunity to the respondent to request disclosure of other related documents. In this respect, the report cards included amongst the documents in Tabs 1 - 7 did not include all of the applicant's report cards, but just some of them. The respondent submitted that there might be other related documents, including communications between home and school, that were arguably relevant that had not been previously disclosed. The respondent further submitted that the late effort of the applicant to rely on these documents prejudiced the respondent and argued:

> This kind of "back door" approach to the introduction of documents is contrary to the Rules and practices of the Tribunal. If this is permitted in this case, it would allow Applicants to withhold the release of "arguably relevant" documents at the outset and, having avoided this full disclosure, to

> subsequently be able to selectively pick what documents support their position at the hearing stage.

[18] The applicant provided a written response to the respondent's objections. The applicant argued, in part, that the documents disputed by the respondent, were admissible as business records and that the respondent could have requested documents related to the applicant's schooling much earlier. The applicant also asserted that the disputed documents could be identified by the litigation guardian in her examination in chief. As noted above, there was no reference to these documents in the litigation guardian's affidavit despite my direction that the affidavit was to set out the full Examination in Chief of the deponent.

[19] On the day before the hearing, the parties were notified by the Tribunal that they would be asked to address the applicant's redaction of documents to be submitted as evidence without permission from the Tribunal to do so. Overnight, the applicant's counsel sent to the Tribunal unredacted copies of the documents at Tabs 1, 2, 3, 4, 6, 7.

[20] Most of the first morning of the hearing was spent dealing with the respondent's objection to the documents filed by the applicant. After hearing arguments from the parties, I gave an oral decision with the caveat that I reserved the right to make any necessary amendments to the written text of the decision which would be placed in this Decision. My decision on the respondent's objection to the applicant's documents is as follows:

> First, it is clear that the applicant has not complied at all with her obligations of disclosure under Rule 16 of the Tribunal's rules in respect of at the disputed documents.
>
> Starting with the documents of Tab 1 - 7, we now have copies in unredacted form. First, I agree with the applicant that report cards are business records - they are hearsay but are subject to the business records exception to rule against the admission of hearsay in courts. However, the respondent's objection is that it is prejudiced by the late disclosure of these records and the failure to clearly identify in the applicant's affidavit that these records would be going into evidence. I note that normally documents are identified by a witness when they are put into evidence, including business records, unless the parties agree that they can be entered without being identified.

As part of Case Management, I made clear in the CMCC and in the CAD of September 8th that the complete Examination in Chief would be put in through Affidavit, with 15 minutes of live examination to highlight evidence in the Affidavit. The clear expectation was that the evidence set out in the Affidavit should be complete. Part and parcel of the Case Management, as reflected in the CAD, was that any objection to the witness's evidence in chief would be raised and dealt with in advance of the by RFOP to enable the hearing to proceed as expeditiously as possible. Clearly this would not be possible if the Affidavit did not include all the evidence which the witness was going to give.

In respect of the documents at Tab 1-7 of the applicant's Affidavit, the respondent claims prejudice on the basis that the litigation guardian's Affidavit contained no reference to the disputed documents and none of them was disclosed before they were filed as part of the applicant's Book of Authorities. The respondent says that had the respondent known that these were going to be filed, further disclosure would have been requested in respect of missing report cards and any other communications between school and home. I note that amongst the report cards in the applicant's book of authorities, there is only a mid-term report card and no final report card for 2014/15 - the JK year, no report cards at all for the 2015/16 years - the K year - and only a mid-term report card for the 2016/17 year – i.e. no final report card. The applicant seeks to rely on these documents to support the allegation that the applicant's education was affected by the breach of her rights under the *Code*. However, the documents at Tabs 1- 7, constitute an incomplete record of her school experience and it would be unfair to the respondent to allow these documents to go in without the respondent having an opportunity to review the missing report cards.

I do not accept the applicant's argument that the respondent should have somehow foreseen that report cards might have been arguably relevant and sought earlier to obtain them. This ignores the primary obligation on the applicant to disclose all arguably relevant documents in a timely manner and some of the documents at Tabs 1- 7 should have been disclosed at the time disclosure was initially made under Rule 16, now years ago.

During argument, the applicant pointed out that the respondent had not requested permission to file the MOU or the documents generated in relation to the discussions between the OHRC and the respondent in respect of the MOU. I pointed out that the applicant had made no objection to these documents and that the Tribunal had been made aware in early September that these documents existed and would be submitted as evidence.

I agree that the applicant's disclosure of these documents at this very, very late date prejudices the respondent. Given that the applicant seeks to rely on the report cards to support that the applicant's education was affected

by the breach of her rights under the *Code*, it is clear that all report cards and not just some of them should have been produced. The missing report cards are arguably relevant and the respondent is prejudiced by the failure to produce them. I am not prepared to adjourn this hearing and order disclosure given the challenges in setting up these hearing dates and the absence from the applicant of any reasonable explanation why the documents were not previously produced. Counsel for the applicant say that they were not involved with the earlier decisions about disclosure, but their colleague at the Human Rights Legal Support Centre was and current counsel have had this file since before the April 7th CMCC.

With respect to the documents at tab 13, these are invoices. Applicant's counsel says that she will provide unredacted copies of the invoices by the end of the day and if she does so, these may be filed as exhibits. She also says that she is relying on them only to support the litigation guardian's evidence that the applicant went to counselling. The respondent has made no argument regarding prejudice in respect of these documents. Applicant's counsel advises that the name redacted is the applicant's. For the limited purpose of confirming that the applicant saw a counsellor, I will allow unredacted copies of the documents to be admitted. I note that the documents do not say what the counselling was for.

Finally, with respect to Tab 14, this document is apparently a note created by the applicant's counsel setting out information obtained by the litigation guardian. It is hearsay. Since the respondent has not claimed that prejudice would arise if this document was admitted. I will allow it to be admitted as evidence but, as with the documents at Tab 13, the weight I give these documents will be a matter for argument in written argument.

[21] I add to the foregoing that it is always important for parties to follow the Tribunal's Rules and Case Assessment Directions. It is not only a matter of respect for the Tribunal but counsel play a critical role in ensuring an orderly and efficient process that is fair for all parties. This imperative has taken on new meaning during the current period when the Tribunal is being faced by the challenges of operating during a pandemic.

LEGAL PRINCIPLES

[22] The Tribunal's remedial authority is set out in s. 45.2 of the *Code*:

45.2 (1) On an application under section 34, the Tribunal may make one or more of the following orders if the Tribunal determines that a party to the

application has infringed a right under Part I of another party to the application:

1. An order directing the party who infringed the right to pay monetary compensation to the party whose right was infringed for loss arising out of the infringement, including compensation for injury to dignity, feelings and self-respect.

2. An order directing the party who infringed the right to make restitution to the party whose right was infringed, other than through monetary compensation, for loss arising out of the infringement, including restitution for injury to dignity, feelings and self-respect.

3. An order directing any party to the application to do anything that, in the opinion of the Tribunal, the party ought to do to promote compliance with this Act. 2006, c. 30, s. 5.

(2) For greater certainty, an order under paragraph 3 of subsection (1),

(a) may direct a person to do anything with respect to future practices; and

(b) may be made even if no order under that paragraph was requested.

[23] The goal of compensation in human rights law is to restore an applicant to the position they would have been in had the discriminatory act not occurred: *Maynard v. Toronto Police Servces Board*, 2012 HRTO 1220 *("Maynard")* at para. 194; *Smith v. Ontario Human Rights Commission* (2005), 2005 CanLII 2811 (ON SCDC), 195 O.A.C. 323 at para. 28 (Div. Ct.).

[24] Inherent in an award of monetary compensation for injury to dignity, feelings and self-respect is the recognition of the value of the right to be free from discrimination and the experience of victimization. The Tribunal has established two criteria, one objective and one subjective, to be considered in making a global evaluation for injury to dignity, feelings and self respect:

i) Objective seriousness of the discriminatory conduct: the more serious the conduct is, the greater the injury to the applicant's dignity, feelings and self-respect is likely to be. Factors considered include the nature of the respondent's actions, the significance of the event, the frequency or intensity of the discrimination or harassment, and the period of time over which it occurred.

> ii) Subjective effect of the discriminatory conduct on the applicant: under this criterion, the actual experience of the applicant is looked at, taking into account the immediate and ongoing impact of the discrimination on the applicant's emotional and physical health. Factors considered include humiliation, hurt feelings, loss of self-respect, dignity and confidence, as well as the experience of victimization and the vulnerability of the applicant.

See *Arunachalam v. Best Buy Canada*, 2010 HRTO 1880 ("*Arunachalam*") at paras. 52-54; *Strudwick v. Applied Consumer & Clinical Evaluations Inc*., 2016 ONCA 520 ("*Strudwick*"), at paras. 52-77, *ADGA Group Consultants Inc. v. Lane*, 2008 CanLII 39605, 91 OR (3d) 649, (ON S.C.D.C.) ("*ADGA*"), and *Sanford v. Koop*, 2005 HRTO 53 ("*Sanford*") at paras. 34-38.

[25] It is important to note that the Tribunal's remedial powers are not intended to be exercised in a punitive manner: *McCreary v. 407994 Ontario*, 2010 HRTO 2369.

[26] However, at the same time, neither must the quantum of damages be set so low that the social importance of the *Code* is trivialized by effectively creating a "licence fee" to discriminate: *ADGA* at para. 153.

[27] Credibility has been raised as an issue respecting the evidence provided by the litigation guardian. In assessing credibility, I have used the well-established test set out in *Faryna v. Chorny*, 1951 CanLII 252 (BC CA) at pp. 356-357:

> …Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors combine to produce what is called credibility.
>
> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his 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 is reasonable in that place and in those conditions.... Again a witness may testify to what he sincerely believes to be true, but he may be quite honestly mistaken…

[28] I have also considered the factors set out in *Cugliari v. Telefficiency Corporation*, 2006 HRTO 7: the motives of the witnesses; the relationship of the witnesses to the parties; the internal consistency of their evidence; inconsistencies and contradictions in relation to other witnesses' evidence; and observations as to the manner in which the witnesses gave their evidence.

[29] I have kept in mind the Ontario Court of Appeal's comments on reliability in *R. v. Morrissey,* 1995 CanLII 3498 (ON CA), at p. 205:

> Testimonial evidence can raise veracity and accuracy concerns. The former relate to the witness's sincerity, that is his or her willingness to speak the truth as the witness believes it to be. The latter concerns relate to the actual accuracy of the witness's testimony. The accuracy of a witness's testimony involves considerations of the witness's ability to accurately observe, recall and recount the events in issue. When one is concerned with a witness's veracity, one speaks of the witness's credibility. When one is concerned with the accuracy of a witness's testimony, one speaks of the reliability of that testimony. Obviously a witness whose evidence on a point is not credible cannot give reliable evidence on that point. The evidence of a credible, that is honest witness, may, however, still be unreliable.

[30] Finally, the following comments from *Re Pitts and Director of Family Benefits Branch of the Ministry of Community & Social Services*, 1985 CanLII 2053 (ON SC) ("*Pitts*") are relevant in determining credibility in this case:

> Has the witness any interest in the outcome of the litigation? We all know that humanity is prone to help itself, and the fact that a witness is interested in the results of the litigation, either as a plaintiff or defendant, may, and often does, quite unconsciously tend to colour or tinge or shade his evidence in order to lend support to his cause.

ANALYSIS

I. Monetary Remedy

[31] The applicant's claim for monetary compensation is comprised of the following:

> a. $150,000 as compensation for injury to dignity, feelings and self-respect;

> b. The cost of psychological and trauma counselling for two years, which amounts to approximately $20,000;
>
> c. The cost of educational tutoring services for two (2) years of educational tutoring for the applicant, which amounts to between $7,000 and $15,000; and
>
> d. Pre-judgement and post-judgement interest on compensation for injury to feelings, dignity and self-respect in accordance with the *Courts of Justice Act*.

a) Compensation for Injury to Feelings, Dignity and Self-Respect

[32] As noted above, the Tribunal bases the determination of appropriate compensation for injury to dignity, feelings and self-respect on consideration of two criteria: i) the objective seriousness of the discriminatory act and ii) the effect on the particular applicant who experienced the discrimination.

i) Objective consideration: the seriousness of the discriminatory act

[33] The discriminatory act in this case was the handcuffing of the applicant's hands behind her back, placing her on her stomach with both hands and ankles handcuffed and holding her in that position for 28 minutes.

[34] Regarding the act of handcuffing a citizen, generally, I noted as follows at paragraph 144 of the Liability Decision:

> The handcuffing of an individual by police epitomizes a use of force that is a potent symbol of the authority of the state. Quite simply, the use of handcuffs by police restricts the individual's freedom and therefore amounts to adverse treatment.

[35] The applicant is not just any individual. She is a child and was just six years old at the time of the incident.

[36] The BEA who testified in the liability hearing said that he was taken aback when the handcuffs went on the applicant's ankles and then taken aback again when the

handcuffs were placed on the applicant's hands. He expressed concern that the handcuffs could be abrasive to a child's tender skin and injure the applicant. He believed, based on his experience working with children and youth who experience dysregulated behaviour, that the officers might have tried something different.

[37] As noted above, one of the officers said that placing a child on her stomach with her hands cuffed behind her back put her at risk of asphyxiation.

[38] Handcuffing the hands of a six year old behind her back, placing her on her stomach with her legs handcuffed and holding her in that position for 28 minutes is, to say the least, shocking. I concluded in the Liability Decision that this overreaction to the situation with which the two officers were dealing at least has the appearance of being punitive.

[39] That the officers, according to the BEA, acted in a manner that was polite and professional throughout and that there were no physical injuries to the applicant do not diminish the fact that the conduct in question was serious. It is fortunate that there were no physical injuries to the applicant since she struggled throughout the 28 minutes. Had the officers acted other than politely and professionally throughout, had the applicant suffered physical injuries, this would have exacerbated the seriousness the officer's actions.

[40] The respondent argues that the discriminatory actions of the officers in this case are less serious because these actions were the result of implicit bias rather than explicit bias. I do not accept this argument. Whether the actions were the result of implicit or explicit bias, the harm caused to the applicant is the same.

[41] From an objective perspective, the actions which constituted the breach of the applicant's *Code* rights in this case were very serious, involving as they did the use of police authority in restraining a six year old child by handcuffing her wrists behind her back and holding her, with her ankles also cuffed, on her stomach for a prolonged period of time. These actions can be expected to have an impact on the applicant's dignity,

feelings and self-respect. I agree with the applicant that the quantum of compensation in this case should not be set so low that it "would trivialize the social importance of the *Code* by effectively creating a 'license fee' to discriminate" - in this case, by creating a 'license fee' for police to treat Black children experiencing behavioural dysregulation more harshly than they would treat white children in the same circumstances. At the same time, the quantum of compensation should not be so high as to amount to a penalty or punishment of the respondent.

ii) Subjective consideration: the Effect on the Particular Applicant who Experienced the Discrimination

[42] The second criterion to be considered in assessing compensation for injury to feelings, dignity and self-respect is how, subjectively, discrimination impacted the applicant. To the extent possible, the goal of monetary compensation is to restore the applicant to the position she would have been in had no discrimination occurred. The first step in understanding how the discrimination affected the applicant in this case is to consider the particular circumstances of the applicant as of the date of the incident. The second step is to examine how things changed for the applicant after the discrimination.

The Applicant's Circumstances at the Point of the Discrimination

[43] The applicant's short life up to the point of the incident was far from ordinary. Evidence provided in the liability hearing paints the picture of a child who is extremely vulnerable:

- The applicant was made aware that her father had been shot and killed within the two year period prior to the incident. When her mother told her about this, she displayed a great deal of distress. After this, when her father's death was brought up, she would become upset.

- For about a year prior to the incident, the applicant's mother had been gravely ill with cancer; she had two surgeries and was still being treated when the incident occurred. The applicant had seen the impact of the illness on her mother including how it affected her mother's energy and mood. She had seen her mother bandaged after surgery and had been kept away from her mother while her mother was undergoing radiation

treatments. The effects all of this exacerbated the applicant's existing anxiety and insecurity about losing a parent. Her protests when separated from her mother intensified and were more frequent. Her attempts to be right beside her mother when in her presence intensified.

- Prior to the incident, the applicant had been struggling to cope and was often at odds with school administration, staff and her classmates. A Safety Plan had been put into place by the school in the prior school year. This Safety Plan identified behaviours of the applicant for which Proactive and Reactive strategies were in place. These behaviours included physical and verbal aggression to peers and adults, refusal to follow instructions, isolating herself, running from the room.

- Starting in September, 2016, the BEA had begun working with the applicant and when her behavioural dysregulation posed a danger to herself or others, he would apply a Child Safety Lock hold, which serves both to restrain a child and calm them down. These particular holds had been applied by the BEA on several occasions on September 30th, prior to the arrival of the police. The police were called in because the applicant would calm down and then re-escalate and the BEA had become fatigued in applying the Child Safety Lock hold. This hold is to be applied for up to 15 minutes at a time.

- A letter from the school to the applicant's family doctor, dated May 1, 2016, was filed in the liability hearing. In this letter, it was noted that there were significant gaps and limited progress in the applicant's behavioural and social skills areas, compared to her peers, that were limiting the applicant's academic progress.

- A psychoeducational report from the Peel District School Board, dated 2017.1.19 was filed as an exhibit in the liability hearing. This report was based on two assessments, the first prior to the incident and the second four months later when the applicant had enrolled in a new school. This report listed a number of behavioural incidents between January and October, 2016, many of which involved the applicant leaving her classroom. The report concluded that the applicant had "a longstanding history of behavioural difficulties, which had been present since Junior Kindergarten and appeared to be impacting on her social and academic success." The report concluded that, "due to her significant behavioural challenges, and the difficulty she has had joining the classroom learning environment, [the applicant] currently has significant gaps in many areas of development, including social and academic skill development."

- JB had been called to the school on a number of occasions to pick up the applicant early following behavioural incidents. The applicant would refuse to go to school quite often.

- As a result of the struggles she was having at school, and concerns that her mother's illness might be the source of this, the school initiated counselling for the applicant and her family with Peel Children's Centre, which started after the incident.

- At the start of the school year in which the incident occurred, the applicant saw her mother's finger get caught in the door of the cab that was dropping them off at school. The injury looked "gruesome" and required seven stitches. The applicant believed that she was responsible for the injury and she did not like to be apart from her mother at this time.

Impact of the Discrimination on the Applicant

[44] Normally, the most critical evidence about how discrimination has affected an applicant comes from the applicant. Although this evidence is often supplemented by evidence from medical professionals who have treated the applicant, where the applicant is competent and capable of testifying, the applicant will be in the best position to explain how things changed after the discrimination. However, the applicant did not testify in this case and the respondent submits that this is a "crucial omission".

[45] The applicant was six years old as of the date of the incident, and 10 years old as of the date of the remedy hearing. While no reason was given for the decision not to call her as a witness, it is not uncommon in hearings before the Tribunal for a child applicant not to be called as a witness: see *B.M. v. Cambridge (City),* 2010 HRTO 1104 at para. 52 ("*B.M*".); *E.P. v. Ottawa Catholic School Board*, 2011 HRTO 657; *R.B. v. Keewatin-Patricia District School Board*, 2013 HRTO 1436 ("*R.B.*"); *L.B. v. Toronto District School Board*, 2015 HRTO 1622 ("*L.B*."). In none of these cases was an adverse inference drawn when the applicants did not testify. In the circumstances of this case, including the age of the applicant and the issues disclosed in her psychoeducational assessment, I am not prepared to draw an adverse inference from the fact that the applicant did not testify.

[46] However, the fact that a child applicant is not called to provide evidence in their own case does not mean that the rules of evidence are relaxed to exempt them from the obligation to provide credible evidence that establishes their claims on a balance of probabilities. In this case, the applicant must provide credible evidence that establishes

her claim for compensation for injury to dignity, feelings and self-respect arising out of the discrimination. In each of *B.M.*, *R.B*. and *L.B.*, this evidence was provided by parents of the child applicant and expert witnesses who had provided psychological counselling services to the applicants. In these circumstances, it was particularly important to hear from any professionals who counselled or treated a child in order to get a full picture of how they were impacted by the discrimination.

[47] The evidence received by the Tribunal about the impact of the discrimination on the applicant in this case came primarily from her mother. Although the applicant saw several professionals in the years following the incident, only one testified: Laura Ginou, a Social Worker employed as a clinician at the Peel Children's Center (a children's mental health centre), provided counselling sessions to the applicant and her mother from October 2016 to January 2017.

[48] Counselling for the applicant and her family with Ms. Ginou was initiated prior to the incident, but started in October 2016, less than a month after the incident. JB terminated the counselling sessions in April 2017. Her reason for doing so was that she was taking the applicant to her family doctor to get a referral for a psychiatric consultation and that, at that time, she was dealing with a number of appointments to deal with her own health.

[49] Ms. Ginou's clinical notes and her testimony at the hearing reflect that at her initial meeting with JB, less than a month after the incident, JB "shared" that the focus of the family counselling sessions was to be on the impact of JB's illness on the applicant and her siblings because there were questions about whether JB's illness was contributing to the applicant's behavioural struggles and outbursts at school. The incident on September 30, 2016 is mentioned in Ms. Ginou's assessment notes as one of the things to be considered in understanding the applicant's struggles. However, Ms. Ginou testified that the incident was not the focus of the counselling and as a result she did not get details about exactly what had happened.

[50] Ms. Ginou's clinical notes and her evidence at the hearing disclose that the incident was discussed with the applicant at just one session, on March 13, 2017, after the applicant's mother asked if the applicant could be given space to talk about the handcuffing incident. Ms. Ginou's notes for the session on that date indicate as follows:

> The focus of the meeting was on exploring feelings [the applicant] has associated to some of the more challenging moments in her life. She was able to link feelings with events – happy, sad, mad/angry, worried/nervous/scared, tired. She was able to use the feeling thermometer (0-10) to rate the intensity of feelings. She identified her mother hurting her finger, not having a father and the incident at school with Police as things she thinks about. She associates being at fault with her mother hurting her finger and sometimes what happened with Police, even though her mother said it wasn't her fault. [The applicant] was reluctant to talk about the incident at school with Police, worried that it would make her feel angry and sad. This was normalized. [The applicant] did a lot of distracting through story telling and play. In her retelling of the incident with Police, she talked about being scared when they put handcuffs on her. She talked about wanting them to give her a snack to help calm her down. She also talked about crying when [her] mother arrived and took her home. [The applicant] shared that her mother doesn't like her crying because it makes her sad. After a game of cards, [the applicant] shared that she was feeling happy.

[51] It is clear that Ms. Ginou was not asked to do an assessment about the impact of the incident on the applicant. Beyond what is set out in her note, above, Ms. Ginou provided no evidence about the impact of the incident on the applicant or whether the applicant might experience future emotional or psychological problems because of the incident.

[52] Notable by her absence as a witness was Haneen Aboshawish, a Registered Psychologist, who had 5 counselling sessions with the applicant over a three month period starting in October of 2018. Ms. Aboshawish neither testified nor provided a report. Her clinical notes were filed by the applicant in the liability hearing, without objection.

[53] Because Ms. Aboshawish did not testify, I have considered her notes only to the limited extent of what they reveal about what did or did not occur in the counselling sessions.

[54] Ms. Aboshawish's intake note, dated October 10, 2018, referencing a telephone call with JB says that JB:

> …called because her daughter has been having behaviour issues at school. Issues started a few years ago where she was being aggressive with other children but Mom was okay with it because in each [?]* teachers. Once when she was 6 they called the police and when the police arrived they handcuffed [the applicant's] hands and the Mom changed her school but now it was happening again and Mom doesn't know what else to do.[*Sic*]
> *Note: a line appears to be missing, between "each" and "teachers".

[55] There is no reference to the incident in Ms. Aboshawish's notes from any of the counselling sessions with the applicant.

[56] It appears from Ms. Aboshawish's notes that the counselling came to an end when, following a consultation between Ms. Aboshawish and the school, Ms. Aboshawish made several efforts to contact JB, but got no response. No explanation for JB's effective termination of these counselling sessions was provided. These sessions ended just five months before the liability hearing began.

[57] Clearly the Tribunal would have benefited from hearing from Ms. Aboshawish. No explanation was given for not calling her.

[58] There was evidence that JB took the applicant to see their family doctor. However, this doctor was not called as a witness and no report from this doctor was filed. Further, JB testified that a telepsychiatry session was conducted to explore all avenues of support around the incident, trying to come to terms as a family and for the applicant. However, again, this doctor was not called as a witness and no report was filed from either of them. No explanation was provided for the failure to adduce evidence from these medical professionals about the impact of the discrimination on the applicant including any emotional or psychological issues arising from the incident.

[59] JB was the primary witness on the issue of the impact of the discrimination on the applicant. Her evidence in the remedy hearing focused on her observations of the applicant and what the applicant has told her.

[60] The respondent argues that no weight should be given to the hearsay evidence given by JB and points to the Tribunal's jurisprudence, as reflected in *Robinson v. Overland RNC Inc*., 2019 HRTO 620 ("*Robinson*") at para 27, that "[t]he Tribunal generally will not rely upon hearsay evidence as the basis for important findings of fact". In that case, the respondent attempted to discredit the applicant by adducing evidence of alleged incidents recounted by witnesses who were not present when the incidents occurred with the result that the actual witnesses to the events could not be cross-examined to test their veracity. In this case, I have not relied on hearsay statements made by JB about what third parties told her they heard the applicant say as the sole basis for any finding of fact.

[61] However, JB has also given evidence about what she herself saw and what she heard the applicant say. This is direct evidence from JB about her observations of her child's behaviour. The applicant's comments heard by JB, whether those comments are true or not, form part of these observations. The observations by a parent of her child's behaviours including comments made by the child have been accepted as circumstantial evidence by the Tribunal based on which it is possible to infer findings about the feelings of a child for the purposes of determining remedy. (See *B.M*., *L.B.* and *R.B*.) The parent's evidence must, of course, be credible.

[62] The respondent argues that JB's evidence should be given no weight because she is not a credible witness. As noted above, under Legal Principles, the issue of credibility has two elements: veracity and reliability.

[63] In this case, there are instances where JB's evidence conflicts with other evidence, including her own evidence. These instances include the following:

> a. In her *viva voce* examination in chief at the remedy hearing, JB testified that, following September 30, 2016 (the date of the incident), there were two months of a lot of crying on the part of both herself and the applicant and that they were seeing a counsellor. However, the counsellor they were seeing, Ms. Ginou, provided no evidence supporting this statement. Ms. Ginou made no mention, in either her notes or her testimony, of any report from JB that she and the applicant were doing a lot of crying, either before the counselling began or during

the course of the counselling. Such a report to the counsellor would be expected if this was occurring to the extent JB said it was.

b. In her *viva voce* evidence in chief during the remedy hearing, JB said that during all the counselling sessions the applicant has had, she has mainly cried or remained silent. This conflicts with Ms. Ginou's evidence in which she made no mention of the applicant crying in any meetings and made clear that the applicant did engage with her during the counselling sessions. In fact, Ms. Ginou's notes reflect that during at least some counselling sessions, the applicant was excited and would dance around. Further, Ms. Ginou said that there was nothing abnormal or particularly different in the interactions she had with the applicant. Ms. Aboshawish's notes for each of the 5 sessions she conducted with JB and the applicant specifically state that there was no emotional outburst or crying from either JB or the applicant. The notes for the last two of the five sessions with Ms. Aboshawish do indicate that the applicant was initially guarded and took a while to warm up but also note that she was engaged by the end of the sessions. The notes for one session do reflect that when the topic of her school came up, the applicant "shut down" and clung to her mother. The bottom line is that the evidence of Ms. Ginou and the notes of Ms. Aboshawish, both contradict JB's evidence mainly cried or was silent during the counselling sessions.

c. In her Affidavit filed in the remedy hearing, JB says that after the incident, "whenever I or anyone in my presence asked my daughter what had happened at school with the police, [the applicant] would become upset and deny the incident had taken place." This sweeping statement is later modified in the Affidavit by a statement that the applicant "expressed discomfort in how the police dragged her to the office" and that the applicant tended to shut down and "mostly refused to speak about the details of the incident", referencing Ms. Ginou's evidence about the applicant being reluctant to speak about the incident. Ms. Ginou testified that when she spoke with the applicant about the incident, the applicant expressed reluctance to talk about it but did so, sharing her emotions about it. Moreover, although JB was present during this session, there is no evidence that the applicant got upset.

d. JB said in her evidence in the liability hearing that she did not read the psychoeducational report prepared by the school board and given to her in January 2017. This psychoeducational report was made an exhibit in the liability hearing. JB denied discussing this report with Ms. Ginou. However, both the question of whether JB read the report or discussed it with Ms. Ginou is contradicted by Ms. Ginou's evidence. Ms. Ginou, who did not receive a copy of the report, testified that JB advised her about the report, including a diagnosis set out in the psychoeducational report. This is confirmed in Ms. Ginou's notes of March 27, 2017. Further, Ms. Ginou's services summary, dated April 25, 2017, indicate

that JB told her that she was seeking a second opinion about the diagnosis set out in the report.

[64] In the forgoing examples, JB's evidence was embellished, exaggerated and/or was inconsistent with other evidence. However, I do not believe that JB is dishonest. Rather, I believe that in the four years that passed between the incident and JB testifying, with all that has been going on in her life, including her health concerns, the pressures of this case which has achieved a fair amount of notoriety and her ongoing concerns about the applicant ongoing struggles at school, JB "quite unconsciously tend[ed] to colour or tinge or shade [her] evidence in order to lend support to [her] cause." Her evidence also made clear that she has been personally affected by the incident. This has prompted me to approach with caution JB's evidence about her observations and, in particular, any generalizations or sweeping statements she has made about the applicant's emotions.

[65] However, I have considered JB's evidence about her observations and find a number of them to be both credible and relevant to the issue of the impact of the incident on the applicant:

a. The applicant attended a local Boys and Girls Club at the time of the incident. After news of the incident circulated, the applicant told JB that she did not want to attend any longer because she was being teased that she "got arrested". On at least three occasions, the applicant told JB that groups of children "were making fun of me and laughing at me". She refused to attend the Boys and Girls Club for the rest of the school year. The applicant also insisted that JB avoid passing the school bus stop where the children who teased her would wait and socialize. For a period of time the applicant did not socialize with these children. It was a year before she started interacting with them again.

b. The applicant had told JB in the school year prior to the incident that a classmate ("Z"), who was said to have serious behavioural challenges and who the applicant identified as white, had hit the applicant over the head with a block. After the incident, the applicant asked JB why school staff had not called the police on Z the year before. On the same day, the applicant told JB that she wished JB was white, as that would have prevented the incident from happening.

c. Weeks after the incident, before the applicant returned to school, JB and the applicant were driving together when the applicant noticed a police car driving behind them. The applicant appeared to be nervous

and urged JB to make sure she drove safely, she said she feared the police would stop them. JB says that the applicant had not previously shown fear of the police.

d. JB witnessed the applicant reacting in a frightened way while watching movies, when uniformed police officers appeared on screen. For instance, while watching the movie, “Hidden Figures”, there was a scene in which police officers who were following the protagonists, pulled the car over to speak with the Black women riding in the car. JB observed the applicant appear to be nervous even though the police officers quickly turned out to be allies who escorted the women so that could get to their destination safely and in time.

e. When the Liability Decision was publicly released and reported on, neighbours approached JB and the applicant with comments about the Decision. Although these neighbours have been encouraging and supportive, the applicant tended to get quiet and hide behind JB when neighbours approached, which was a change from her prior behaviour with them.

f. Although JB’s evidence about the applicant’s reaction when asked about the incident was inconsistent, I do accept that the applicant was reluctant to speak about the incident and that on at least one or two occasions denied that the incident occurred. JB’s evidence about the applicant’s reaction when neighbours approached to speak about the Decision supports that the applicant was still reluctant to speak about the incident more than three years after the incident.

Assessment of Monetary Compensation

[66] The Tribunal has commented in other cases about the difficulty of quantifying injury to dignity, feelings and self-respect from an infringement of *Code* rights where child applicants do not testify. As noted, in other such cases, the Tribunal has had the benefit of receiving evidence from medical professionals about psychological or mental distress injuries to the applicant.

[67] In the present case there is evidence from one professional who provided counselling services to the applicant, but none from the psychotherapist who most recently saw the applicant in late 2018 or any other doctor who saw the applicant. Consequently, no medical evidence was provided in this case that the applicant

experienced any emotional distress or trauma arising from the incident that impacted her ability to function as she did prior to the incident.

[68] Ms. Ginou provided evidence that some six months after the incident, the applicant was reluctant to talk about the incident, that she was worried that it would make her angry or sad, that she was scared during the experience and, concerningly, that she felt that the incident was her fault.

[69] I conclude, based on the credible evidence I received, that the applicant was frightened by the manner in which she was treated by the officers during the incident. I find that this incident has caused the applicant to view the police as a source of punishment and that she is now apprehensive of police officers. This is very concerning since all children should be able to have confidence that police are there is to protect them, not punish them. While it is not possible to predict with certainty the impact of any interaction, the nature of this particular experience for the applicant was such that this apprehension may be long lasting.

[70] It is difficult not to conclude that being restrained in the manner in which the applicant was, over such a significant period of time, would give rise to feelings of victimization and would impair anyone's dignity, including the applicant's. I infer that the applicant felt shame or humiliation about the incident that impacted her self-confidence from the facts that the applicant refused to attend the Boy's and Girl's Club where she was teased by some children about 'being arrested', that she did not want to be driven by the bus stop where those children congregated and her ongoing reluctance to speak about the incident. This was most recently seen during the incident when the applicant hiding behind her mother when neighbours approached to speak about the liability decision after it was released.

[71] It is also concerning that some six months after the incident, the applicant would express to her counsellor a feeling that she was at fault about the police handcuffing her. This speaks to the impact of the incident on the applicant's self-confidence. The fact that

the applicant has been reluctant to speak about the incident is indicative of an ongoing emotional reaction to the incident that has yet to be resolved.

[72] Finally, that the applicant would experience anti-Black racism at such a young age is alarming: it is clear that, because of this incident, she became aware that as a Black person, she may be subject to different treatment than a white child. The full impact of this is unknown but it is now part of the applicant's lived experience and will affect her into the future.

[73] Respecting the applicant's struggles at school, it is possible that because the incident occurred at school could result in the applicant having an emotional reaction to being in school, as the applicant argues. However, no clear credible evidence was provided supporting the conclusion that the applicant's academic or school attendance struggles after the incident differed in type or intensity than the struggles she had prior to the incident. A letter dated May 1, 2016, some five months prior to the incident, written by the applicant's school to be given to the applicant's family doctor by her parent, stated, "…there are significant gaps and limited progress in the behavioural and social skills areas compared to her peers. This is limiting her academic progress." The applicant's psychoeducational report confirmed that her academic struggles at school pre-dated the incident and her mother testified that she often refused to attend school prior to the incident. Meanwhile, there was evidence that there was improvement at school following the change in school after the incident, at least for a period of time. While it is possible that the incident might have had an impact on the applicant's experience at school, the evidence, on a balance of probabilities, does not support a finding that the incident contributed to or exacerbated the applicant's struggles in school.

[74] The applicant has submitted that the appropriate amount for compensation for injury to dignity, feelings, and self-respect in this case is $150,000. She has provided, as comparators, a number of cases in which applicants were subjected to significant sexual abuse, and in some cases sexual assault, over prolonged periods. Frequently, reprisal was also a factor. In these comparator cases, the applicants suffered significant and sometimes debilitating trauma. While this case does involve a physical violation of the

applicant, in that the discriminatory action involved her being handcuffed and restrained for a lengthy period of time, this is quite different than a sexual assault. Evidence of harm similar to that suffered by the applicants in those cases was not presented in this case.

[75] The applicant has made arguments in favour of the Tribunal increasing the quantum of compensation awards generally. I do not accept these arguments. I adopt the approach set out by the Tribunal in *Arunachalam*:

> In a system in which many decisions on the merits are made each year, there is a particular importance that damage awards for intangible losses be consistent and principled. As the Supreme Court stated in Andrews, supra at p. 263, in relation to the assessment of damages for intangible losses in negligence law:
>
> > [T]here is a great need in this area for accessibility, uniformity and predictability. In my opinion, this does not mean that the courts should not have regard to the individual situation of the victim. On the contrary, they must do so to determine what has been lost. For example, the loss of a finger would be a greater loss of amenities for an amateur pianist than for a person not engaged in such an activity. Greater compensation would be required to provide things and activities which would function to make up for this loss. But there should be guidelines for the translation into monetary terms of what has been lost. There must be an exchange rate, albeit conventional.

[76] To the extent that this case involves an interaction between police and a very young child, it is unique amongst Tribunal decisions. However, there are cases involving racially discriminatory treatment by police in interactions with members of the public. None has facts comparable to this case, but the following do provide some measure for what has been awarded by the Tribunal in prior cases:

> a. In *Maynard*, the Tribunal awarded $40,000 as compensation for injury to dignity, feelings and self-respect in a case of racial profiling. In this case, a police officer had followed the applicant as he drove his car home. When the applicant arrived home, the officer parked his car near the end of his driveway. When the applicant approached the officer in his car to ask what was going on, an exchange ensued between them which quickly escalated into the officer drawing his firearm and pointing it at the

applicant. Several other officers arrived on the scene and took up positions around the applicant with their firearms drawn, one a pump shotgun. The applicant was then instructed to turn, walk backward, kneel on the ground and was physically picked up by two officers, searched and placed into the back of a police vehicle. Despite being detained and searched the applicant was never cautioned about his rights. Shortly thereafter, the applicant was released when new information was received that he was not a suspect. The incident had a profound and lasting emotional impact on the applicant in that case and he was not able to completely recover the person he was before the incident.

b. In *Phipps v. Toronto Police Services Board*, 2009 HRTO 877, the applicant, a young Black man, was awarded $10,000 in another racial profiling incident. This applicant, while driving a Mercedes, was stopped for no valid reason by police. The Tribunal found that the officer had been neither intimidating nor rude when he spoke with the applicant.

c. In a much more recent case, *MS v. Gino's Pizza*, 2020 HRTO 465, the applicant, who was 15 years old, was called the "N-word" when he approached the counter to collect his lunch after he and a group of friends were asked to leave following an accident in which a glass window was cracked when one of the applicant's friends leaned against it. An award of $15,000 as compensation for injury to dignity, feelings and self-respect was made.

[77] For the reasons stated above, an award of compensation in the amount requested by the applicant is not supported in this case. However, there are facts respecting the impact of the discrimination in this case which make clear that neither is the minimal award that the respondent argues for appropriate in this case. These facts include the following:

- The applicant was a very young child.
- The applicant was vulnerable as a result of a number of factors, which are set out above.
- The act was a physical in nature in that the applicant was placed on her stomach with her hands and ankles handcuffed and held in this position for almost half an hour.
- The act had the appearance of being punitive.
- The applicant experienced fear during the incident and following the incident experienced humiliation, shame, loss of self-confidence as

manifested in a misplaced sense that she was at fault; she has on occasion denied the incident and is reluctant to discuss it;

- The applicant has suffered implicit harm in experiencing anti-Black racism at a very tender age.
- The applicant has suffered implicit harm in experiencing racism by the police who were supposed to protect her.
- There is a risk of future impacts that are not known because of the age of the applicant.

[78] In assessing the appropriate amount to be awarded in this case for compensation for injury to dignity, feelings and self-respect, I have had regard to the fact that an award of compensation is intended to recognize the inherent value of the right to be free from discrimination and the experience of victimization. I have considered the vulnerability of this applicant and the fact that the discriminatory act in this case involved physically restraining her in a manner which was demeaning and would be expected to give rise to a significant sense of victimization. I have also taken into account the factors of humiliation, hurt feelings, loss of self-respect, confidence and the injury to her dignity. Based on these considerations, I have determined that the appropriate award of compensation in this case is $30,000.00.

b) Costs of Psychological and Trauma Counselling

[79] The applicant has made a claim for two years of counselling to assist her in returning to the position she would have been in but for the discrimination. She has had two courses of counselling, the last which ended just 5 months prior to the start of the liability hearing. However, I note that both courses of counselling came to an end prematurely – that is, before the counsellor in each case concluded that no further counselling was required. Further, the first course of counselling was focused on one of the other significant issues in the applicant's life and it not clear what attention was given to the incident in the second course of counselling.

[80] As I concluded above, from an objective perspective the incident was very serious and can be expected to give rise to emotional injury to the applicant. The evidence

discloses that the applicant continues to have residual issues related to the incident. In the particular circumstances of this case, I am satisfied that the applicant's request that the respondent pay for counselling for the applicant is reasonable and necessary to ensure that she is placed in the position she would have been in but for the discrimination. An order for such payment falls within the remedial authority of the Tribunal.

[81] In *Elliott v. Can-Art*, 2014 HRTO 1574, the Tribunal made a prospective order for counselling, directing that the respondent pay the costs of a set number of counselling sessions to be completed within a fixed time frame following the decision by reimbursing the applicant for each session. In the present case, however, we are in unique circumstances. Because of the ongoing COVID-19 pandemic with parts of the province in virtual lock down, including the region where the applicant lives, it cannot be known at this time when counselling services could begin. Moreover, setting an unlimited period over which the respondent must reimburse the applicant is not feasible because it does not allow the respondent to know with certainty when its financial obligations to the applicant will be completed. In these circumstances, it is appropriate to order a lump sum payment to pay for counselling for the applicant.

[82] The applicant has requested a lump sum of $10,000 to $20,000 to pay for two years of counselling. In support of her claim, the applicant provided invoices from her last psychotherapist showing a charge per session in 2018 of $141.25, inclusive of HST. While the number of sessions that will be required to pay for the counselling needed by the applicant is not known, a lump sum payment of $5000 will allow for a reasonable number of sessions of counselling and will allow flexibility in when they occur.

[83] Accordingly, the respondent will be directed to pay to the applicant a lump sum of $5,000 to be used by the applicant to pay the costs of counselling with an accredited psychotherapist.

c) Costs of Educational Tutoring

[84] The applicant has submitted that she should be provided with compensation to pay for two years of educational tutoring. She says that because of the incident, her schooling was interrupted, that she had significantly increased absences and late arrivals for her Grade One year and that she continued to be reluctant to attend school or attempt schoolwork for the majority of her Grade Two year to the point that many areas of her report card were left blank, citing lack of data. These report cards are not in evidence before the Tribunal, for reasons set out above.

[85] As noted above, the evidence does not support, on a balance of probabilities, that any school-related problems the applicant experienced after the incident – including her poor attendance – were the result of the incident rather than because of the pre-existing issues identified in the psychoeducational report.

[86] Respecting the applicant's claim for tutoring services to provide remediation for the 2-3 month period in 2016 when the applicant did not attend school, there is no credible evidence that the respondent is responsible for the 2-3 month gap in the applicant's school attendance following the incident.

[87] The fact that the applicant missed 2-3 months of school after the incident was because of JB's decision to remove the applicant from school on the day of the incident. It was clear that there had been ongoing issues between JB and the school at that point. In her evidence in the liability hearing, JB described her disagreement with the school's repeated calls to her, asking her to pick up her daughter during school hours, and her disagreement with the school's safety plan. At about the same time as this Application was commenced against the respondent, the applicant filed a separate Application against the school board alleging discriminatory treatment of the applicant, which was settled. JB stated in the liability hearing and confirmed in the remedy hearing that her decision to remove the applicant from the school was made before she knew all the details of the incident. She said that after the children's aid society told her she had to return the applicant to school in October, she met with the school staff and reviewed the safety plan.

JB testified that at that meeting, she decided she could not trust the school to keep her child safe and so she declined to return the applicant to that school. She then had to wait until the school board made arrangements for the applicant to be enrolled in another school.

[88] Consequently, there is no basis to find that the respondent is responsible for the 2-3 month gap in the applicant's education while she was kept out of school. Consequently, there is no justification for an order that the respondent pay the costs of educational tutoring.

II. Public Interest Remedy

[89] The Tribunal is given the discretion under s. 45.2(1)3 of the *Code* to direct that a party do anything that, in the Tribunal's opinion, the party ought to do to promote compliance with the *Code*. It is my view that it is not appropriate or necessary for the Tribunal to exercise this discretion in the particular circumstances of this case.

[90] In February of this year, the respondent began discussions with the Ontario Human Rights Commission ("OHRC") regarding strategies to end systemic racism in policing, promote transparency in policing and enhance the trust of Black and other racialized communities and Indigenous communities in policing in Peel Region. On July 3, 2020, the OHRC released a set of recommendations directed towards achieving this goal. The OHRC and the respondent signed a Memorandum of Understanding ("MOU") on October 14, 2020 in which the respondent has committed to work with the OHRC towards the implementation of these recommendations. This MOU was placed into evidence in the remedy hearing.

[91] At the remedy hearing, the Tribunal received evidence from Inspector Dirk Niles ("DN") who is directly involved in the implementation of the OHRC's recommendations. It is clear from DN's evidence that the changes that will be made to the respondent's policies, procedures, protocols, data collection and training as a direct result of the respondent's work with the OHRC, are comprehensive. It is also clear that the way in

which police services are delivered to children under the age of 12 and how police respond to calls from schools for police assistance are included in these changes.

[92] I accept DN's evidence that there are legal and logistical complexities involved in the implementation of the OHRC's recommendations that will require the respondent to rely on and consult with third parties including community stakeholders, paramedical services, CAMH and others who are involved in the changes to be made.

[93] The applicant has requested an order setting out a number of directions about the implementation of these changes, including the content of protocols and training, the setting of firm time lines for completion, the development of interim protocols and the identity of experts to be involved in aspects of the changes, as well as reporting obligations for the respondent. It is important to note that the applicant does not dispute that the respondent has taken the steps outlined in DN's evidence.

[94] It is also noteworthy that the Human Rights Legal Support Centre lawyer who acted as counsel for the applicant at the liability hearing has been seconded to the OHRC to work on this initiative.

[95] In *Aiken v. Ottawa Police Services Board*, 2019 HRTO 934, a case in which the Tribunal declined to make an order for the public interest remedy requested, the Tribunal observed as follows (at para. 32):

> In determining whether to order a public interest remedy, this Tribunal will consider steps that a respondent already has taken to address the issue raised in the proceeding when deciding whether ordering a public interest remedy is appropriate.

[96] The Tribunal also found that a public interest remedy was not warranted in *Phipps v. Toronto Police Services Board*, 2009 HRTO 1604 and in *Maynard v. Toronto Police Services Board*, 2012 HRTO 1220. In both cases the Tribunal was satisfied with the steps taken by the respondents, in collaboration with the OHRC in both cases, to reduce the occurrence of racial discrimination in policing. In *Maynard*, the Tribunal stated as follows at para. 207:

> Although I appreciate the seriousness of the conduct experienced by Mr. Maynard and the potential for that conduct to arise from systemic racial bias, I decline to exercise my discretion to order the public interest remedies sought by Mr. Maynard on the basis of the evidence before me. To do so could cause interference with the collaborative work of the Commission and the TPSB. There was insufficient evidence that the work of the Commission and the TPSB together is incapable of bringing about the changes that Mr. Maynard is hoping to see in policing in Toronto.

[97] At the outset of the second day of the remedy hearing, having had the opportunity to review DN's affidavit and the exhibits to be submitted by the respondent, I made the following statement to the parties because I wanted them to address the question of whether or not a public interest remedy was appropriate in this case:

> I expect that you are aware that in past cases, the Tribunal has declined to make public interest remedies where the Commission has been working with a respondent on making changes to the respondent's procedures directed to removing systemic racism. The Tribunal has declined to so if this might cause interference with the collaborative work of the Commission and the respondent. I have made no decisions yet about any remedy issue including the public interest piece, but I wanted to point you to what the Tribunal has done in the past.

[98] I have considered the parties submissions on this point as well as the steps taken up to the point of the hearing by the respondent in collaboration with the OHRC. I am satisfied that the respondent has shown a commitment making substantial changes to the way in which the respondent's officers provide services to children under the age of 12 years in order to remove systemic racial discrimination. The respondent has provided concrete examples of how this will occur. This includes changing the way in which police deal with a child experiencing behavioural dysregulation that will avoid the use of physical restraints at all except as a last resort where the safety of a child or another arises. It also includes providing training to police on Understanding and Managing Aggressive Behaviour in Children ("UMAB"). This training, which is provided by a company that is partnered with SickKids Centre for Community Mental Health, emphasizes the child's overall psychological and physical well-being and will include training for officers in UMAB restraint methods should any physical restraint of a child actually be required.

[99] I am also concerned that the directions which the applicant seeks to have the Tribunal make may interfere with the work being done by the OHRC and the respondent by placing what could amount to rigid constraints on them or that the directions could otherwise interfere in the collaborative work of the OHRC and the respondent.

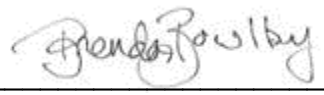
[100] I conclude therefore that this is not a case where the public remedy requested by the applicant is appropriate or required.

ORDER

[101] The Tribunal makes the following orders:

> a. Within 45 days of this Decision, the respondent shall pay $30,000.00 to the litigation guardian in trust for applicant for violation of the applicant's inherent right to be free from discrimination, and for injury to her dignity, feelings and self-respect.
>
> b. Pre-judgment interest at the rate of 0.8% pursuant to section 128 of the *Courts of Justice Act,* R.S.O. 1990 c. C.43, as amended ("*CJA*") is payable on this amount from September 30, 2016, the date of the incident.
>
> c. Post-judgement interest, at a rate of 2.0% pursuant to s. 129 of the *CJA* is payable on any amount unpaid 45 days from the date of this decision.
>
> d. Within 45 days of this decision, the respondent shall pay to the litigation guardian in trust for applicant a lump sum of $5,000 to be used to pay the costs of counselling for the applicant with an accredited psychotherapist.

Dated at Toronto, this 31st day of December 2020.



Brenda Bowlby
Member

CORRECTION

The decision issued December 31, 2020 incorrected referred to the Human Rights Legal Support Centre as the “Human Rights Legal Resource Centre” in paragraphs 20 and 94. That has been corrected.

The name of the witness for the Regional Municipality of Peel Police Services Board has also been corrected from “Derek Niles” to “Dirk Niles” in paragraph 91.

In paragraph 101 a. the word “his” has been corrected to “her”.

Dated at Toronto, this 8th day of January, 2021.

Brenda Bowlby
Member