MANITOBA HUMAN RIGHTS BOARD OF ADJUDICATION

IN THE MATTER OF THE HUMAN RIGHTS COMPLAINT OF:

WENDY HIEBERT,

Complainant,

against

MARTIN-LIBERTY REALTY LTD. o/a AMBERWOOD VILLAGE,

Respondent.

REASONS FOR DECISION

Adjudicator: M. Lynne Harrison

Appearances:

Sarah Lugtig, counsel for the Manitoba Human Rights Commission and the Complainant

Shirley Wood and Wayne Mennie, representatives of the Respondent

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These proceedings arise out of a Complaint filed May 11, 2007 by Wendy Hiebert against Martin-Liberty Realty o/a Amberwood Village. Ms Hiebert alleges that the Respondent discriminated against her by denying her the opportunity to rent an apartment, without reasonable excuse, on the basis of her family status (parent of a young child), contrary to section 16 of *The Human Rights Code.*

On June 25, 2008, in accordance with subsections 32(1) and (2) of *The Human Rights Code*, I was designated by the Minister of Justice as a Board of Adjudication, to hear and decide this Complaint.

The hearing took place in Brandon on October 21, 2008. Notice of the hearing was duly given to the parties and the public. The Respondent appeared without legal counsel. Ms Wood and Mr. Mennie, appearing on the Respondent's behalf, confirmed that the Respondent was aware that it was entitled to be represented by counsel and was prepared to proceed without counsel.

At the outset of the hearing, a Joint Book of Documents, including an Agreed Statement of Facts, was filed by consent. Three witnesses were called by the

Commission: Ms Pamela Roberts, the investigative officer from the Commission assigned to investigate this Complaint; Ms Hiebert, the Complainant; and Mr. Amos O'Donnell, the Complainant's father. Two witnesses were called by the Respondent: Mr. William John Cook, the owner and manager of the Acadia Apartments in Brandon; and Ms Tracy Lynn Gaucher, the caretaker for Amberwood Village. Ms Wood also gave evidence for the Respondent.

The Evidence

Amberwood Village is an apartment complex located at 1010 26th Street in Brandon. It is made up of six buildings, with three floors each. The Respondent, operating under the name of Royal LePage/Martin-Liberty Realty, property manages the complex.

Ms Hiebert is the mother of three children, two of whom are now adults. Her third child, a daughter, Hannah, was born in January 2001.

In or about December 2006, Ms Hiebert separated from her husband. She and Hannah then moved in with Mr. O'Donnell, in his apartment at 1400 Pacific Avenue in Brandon. Mr. O'Donnell's apartment consisted of a combined living room/dining room, kitchen, bathroom and two bedrooms. Ms Hiebert and her daughter shared one of the bedrooms.

In early January 2007, Ms Hiebert began looking for her own apartment, for herself and Hannah. She was finding her father's apartment small for three people. She also felt that the separation had been hard for Hannah, and that it would be better if she could get her furniture and belongings out of storage and provide her daughter with more familiar surroundings.

Ms Hiebert was looking for an unfurnished two bedroom apartment. She preferred to be in a central location relative to her father and sister, but did not want to be downtown. She felt that she could afford a moderate rent of about $600.00 per month.

Ms Hiebert's search for an apartment was conducted mainly through the newspaper. Mr. O'Donnell got the Brandon Sun on a daily basis, and Ms Hiebert would go through the advertisements to find available apartments. She said that she would usually phone as soon as she found an advertisement. In some cases, the apartments were already taken. In others, if the apartment was not on the main floor, she was told that they did not want kids.

Ms Hiebert testified that Amberwood Village was one of the apartment blocks that she found through an advertisement. Copies of classified ads from five editions of the Brandon Sun between January 10 and 24, 2007, with advertisements for Amberwood Village, were marked as Exhibit 12. Each advertisement read:

AMBERWOOD
VILLAGE
1 + 2 BEDROOM APARTMENTS FOR RENT
• No pets • References required
CALL 728-9547 before 8 p.m.

Ms Hiebert identified this as the type of advertisement she recalled seeing. She said that she called the phone number listed in the advertisement. She remembered doing so because, she said, "I had a sheet of paper, and I would write them all down" and "if it's taken, I'd put taken, or I'd put no answer . . . ." While she agreed that she called a number of apartments, she reiterated that she called Amberwood Village because she "wrote it down".

Ms Hiebert's recollection of her phone call to Amberwood Village was that:

> I just asked, I said, "Do you have a two bedroom apartment available?" And she said, "Yes, we do." And I said, "Okay." And I said, "How much?" And I said, "Is that off of 26th Street?" And you know, things like that.
>
> . . . And she said, "Is this for yourself?" I said, "No, I have a child." And she said, "How old?" And I told her, and then she said, "Well, I guess this isn't the apartment, like it's not on the bottom floor. We tend to keep our families . . . to the bottom floor, and it's not a bottom floor suite that's available."
>
> . . .
>
> So, I said, "Okay," . . . and that was the end of the conversation, because I just felt like, what was the point . . . to going over there

> even. She didn't say . . . do you want to come and put in . . . an application and then when one comes open, we'll contact you.

Ms Hiebert said that she was not asked for references, or whether there had been noise complaints about her daughter. She did not fill out an application because:

> I just didn't feel comfortable then.
>
> . . .
>
> I felt like . . . they may not rent to me, because, you know what I mean.
>
> . . .
>
> I don't know. I just felt like she . . . more or less didn't invite me to, so I thought well, I don't think I'll bother.

Ms Hiebert testified that she received the same response from four or five apartment buildings as to whether children were allowed to live in their suites. After the third or fourth phone call, she threw the phone down and started to question whether she was going to be able to find somewhere to live and whether they were allowed to do this.

On January 24, 2007, Ms Hiebert contacted the Human Rights Commission.

Two weeks later, she submitted an Intake Questionnaire, together with notes she had written out to hand in to the Commission. In her notes, she referred to several landlords she had contacted and "received negative attitude from" on her hunt for a place for her and her little girl to live, and stated: "I feel very hurt and let down all for having a child". At the end of the notes, she listed five apartments and landlords, with phone numbers, the first one being "Acadia - 573-6812" and the fifth one "Amberwood - 727-4903".

On May 11, 2007, Ms Hiebert filed this Complaint against the Respondent with the Human Rights Commission.

Ms Hiebert referred in her testimony to other complaints she had made against other landlords on similar grounds. Some of those, she said, went to mediation, some were settled by agreement, and others were dismissed.

She said that one of the complaints, against the Acadia Apartments, was dismissed on the basis that there had been a misunderstanding with the landlord

regarding a missed appointment to see an apartment. That landlord later offered her an apartment, but she did not accept because, she said, she did not believe his explanation for missing the appointment and did not feel comfortable renting from him.

Ms Hiebert also received money in settlement of one of her complaints totalling about $900.00, or one month's rent and 2-3 months' storage.

The Complaint in these proceedings is the only one which remains outstanding.

Ms Hiebert said that the experience had been difficult for her, and that she was disappointed, feeling that you cannot find a place to live if you have a family. She said that the separation from her husband had had a big impact on Hannah, as Hannah could not understand why nothing was familiar. She felt badly about that, and thought that if might not have been so hard for Hannah if her daughter had had certain of her belongings and familiar things.

Ms Hiebert and her daughter continued to live in Mr. O'Donnell's apartment throughout. She said that she had only recently found a house through Manitoba Housing.

On cross-examination, it was pointed out to Ms Hiebert that the phone number that she wrote down and gave to the Commission for Amberwood Village was in fact shown in the Brandon Sun as the phone number for The Towers, which was also advertising one and two bedroom suites. Ms Hiebert replied that she could have written the wrong number down, as she was looking at all of them at that time. In response to a suggestion that she had actually spoken to The Towers, and not Amberwood Village, Ms Hiebert said that she called The Towers as well.

Mr. O'Donnell testified that he had been living in his apartment since September 1, 2006. Before his daughter and granddaughter came to live with him, he had to, and did, obtain permission from the building manager for them to move in.

Mr. O'Donnell's apartment was on the fourth floor of his apartment block. Although there were children living on each floor of the building, he said that he had never had to complain about them. The only time he had had to complain about noise was when some university students living below him had been loud and played loud music, but that stopped after he complained to the manager. He said that no one in his block has ever complained to him about Hannah making noise.

Mr. O'Donnell confirmed that his daughter made several attempts to find an apartment, beginning around January 2007, by checking the newspaper every day, underlining the names and addresses of places she found, then going and trying to get them. This did not go well for her, he said, and she would come and complain to him about the problems she was having.

Asked whether he had seen any reaction from Ms Hiebert and Hannah to not being able to get an apartment, he said yes, that both his daughter and granddaughter had gone through a lot in their lives, and were really wanting to get a place of their own, where they would have a little more freedom. He said that he moved out after a while and stayed with his fiancée, to let his daughter and granddaughter have some free space.

The Respondent submitted a written Reply to Ms Hiebert's Complaint. That Reply, which was filed as an Exhibit at the hearing, sets out various reasons for why they "do not allow children to live anywhere but on the main floor", including:

> - Once rented to a young couple with a baby. They stayed in the suite for 4 years. Every tenant that lived below them complained about the child running around the suite.
>
> . . . .
>
> - Children like to run and play. There are long hallways in the suites. Running up and down the hallways is quite bothersome to the tenants below.
>
> . . . .
>
> - Apartments are not completely sound proof. Any noise that is not part of everyday living can be bothersome to another tenant.
>
> . . . .
>
> - Safety is also an issue. We do not want a child falling off the second or third floor balcony.
>
> - Kids do not plan on making noise, they are just kids. We only have this policy to keep every tenant happy. When you have a lot of

> people living in a building, you want to keep everyone as happy as possible.

The letter also lists several "examples of actual complaints received", and concludes with the belief that "these are satisfactory reasons to why we have this rule."

Ms Gaucher has been the caretaker for Amberwood Village since January 1, 2000. Her title, according to the Agreed Statement of Facts, is "Subcontractor with Royal LePage/Martin-Liberty Realty".

Ms Gaucher testified that the rule with respect to children did not exist when she began working at Amberwood Village. At that time, there were families with children living on the second and third floors, and there were always complaints. Ms Gaucher said that the other tenants were quite happy once the rule was implemented, and those families had either moved down to the ground floor or moved on.

Ms Gaucher reviewed a number of letters or notes in support of the policy of keeping children on the ground floor, which were included in the Joint Book of Documents and marked as Exhibit 13 at the hearing. These letters of support, she said, were from current tenants who had volunteered them on their own when they heard that "this was happening to Amberwood Village". At least some of the letters came from parents living with children.

Ms Gaucher said that some days she receives too many phone calls to count from people asking about suites. If there is nothing available, she always tells them that she does not have anything, but that if they want to call her back on the first or second day of the month, she will be able to tell them what is coming available for the following month, since they go on a month to month tenancy. Although people can fill out applications, they usually just say that they will call back.

On cross-examination, Ms Gaucher described her responsibilities as including renting the suites, collecting rent, addressing any issues that arise with or between tenants, and maintaining the property, both inside and out. She said that she places the advertisements for Amberwood Village in the newspaper, when needed, and

confirmed that the advertisements in Exhibit 12 were theirs. It is her phone number which is listed in the advertisements, and she said that if someone called that number, they would get her.

Ms Gaucher agreed that when a person calls and the available suite is on an upper floor, it is important for her to find out if that person has children. She added that she generally asks who the apartment would be for anyway, because she needs to know who is moving into the building. If the person has children and the suite is on an upper floor, she will tell them what their policy is, and that she is sorry, but they do not have any ground floor suites available. She will also tell them that if they would like to call her back at the beginning of the next month, she can let them know if anything is then available.

Ms Gaucher said that a lot of people phone and ask her whether Amberwood Village allows children because they say they have phoned everywhere and cannot find a place that will allow children. She tells them that of course they allow children, but that their policy is to keep them on the ground floor. She agreed that people are often not aware of their policy until they ask her about it.

Ms Gaucher agreed that she would have no way of knowing for sure whether a particular person phoned or not, and that not everyone who calls comes by to view a suite.

References are required as part of the application for a suite at Amberwood Village. Ms Gaucher said that they do follow up on references, and definitely find them helpful in terms of identifying potential problems.

Ms Gaucher acknowledged that she receives complaints about adults making noise, but said that they usually smarten up very quickly once they are told that this will not be tolerated. It is her experience that people do not like to complain, and will put up with a reasonable amount of noise before contacting her.

Ms Gaucher agreed that there had been noise complaints with respect to children living on the main floor at Amberwood Village. She also agreed that there are no

restrictions with respect to children visiting people in upper floor apartments, as opposed to living on those floors.

Mr. Cook testified with respect to the missed appointment at the Acadia Apartments, where a two-bedroom suite was also advertised for rent in January 2007. He said that he had arranged to show the apartment, but had been working at the back of the building and had forgotten to watch the time. When he finally remembered and went around to the front, he did not see anyone. He subsequently advised the Commission that he had missed the appointment, and told them to tell the person that he would have a suite for her.

On cross-examination, Mr. Cook confirmed that he would have rented an apartment to Ms Hiebert, including an upper floor suite, unless there were problems with references or the past, such as not paying rent. He said that he does not have a policy that children have to stay on the main floor, although some people do ask about that.

Ms Wood is described in the Agreed Statement of Facts as an employee of Royal LePage/Martin Realty, whose title is "Property Management Administration". She confirmed that Amberwood Village's rule is, as expressly stated in paragraph 4(c) of the Tenancy Agreement, that: "Families with children may occupy first floor only."

Ms Wood referred to an excerpt from the Province of Manitoba, Residential Tenancies Branch Guidebook, filed as Exhibit 15, and in particular, to the policy in Section 2, Tenancy Agreements, dealing with house rules. That section reads, in part, as follows:

> In addition to the rules in the standard agreement, a landlord may set their own house rules. . . . A landlord should make a rule as clear as possible. If a landlord wants tenants to avoid certain behaviour, the landlord should be specific in their rules. . . .
>
> Although a landlord may choose not to enforce a rule at present, it doesn't prevent them from enforcing the rule in the future. However, a landlord must ensure that they treat all tenants equally in order to be fair.

Ms Wood said that to her knowledge, they treat tenants equally and fairly.

Ms Wood testified that the Respondent has another apartment block where children are allowed on other levels. She explained that this is because the other block has concrete walls and floors. Amberwood Village is different, in that it is made out of wood, which tends to be much noisier than concrete.

On cross-examination, Ms Wood confirmed that the rule in question has been adopted by the Respondent. She also agreed that Ms Gaucher takes direction from the Respondent.

Issue

The issue in this case is whether the Respondent discriminated against Ms Hiebert on the basis of family status, by denying her the opportunity to lease an apartment because she was the parent of a young child, contrary to section 16 of *The Human Rights Code*.

The Legislation

Subsection 16(1) of the *Code* prohibits discrimination in the leasing or rental of residences or commercial premises, and reads as follows:

> **Discrimination in rental of premises**
> 16(1) No person shall discriminate with respect to
> (a) the leasing or other lawful occupancy of, or the opportunity to lease or otherwise lawfully occupy, any residence or commercial premises or any part thereof; or
> (b) any term or condition of the leasing or other lawful occupancy of any residence or commercial premises or any part thereof;
> unless bona fide and reasonable cause exists for the discrimination.

(An exception is made in subsection 16(2), with respect to "private residences, etc.", but that exception is not relevant to this case.)

"Discrimination" is defined in subsection 9(1) of the *Code* as, among other things, "differential treatment of an individual or group on the basis of any characteristic referred to in subsection (2)". One of these characteristics, under clause (2)(i), is "marital or family status".

Subsection 9(3) of the *Code* provides that discrimination "includes any act or omission that results in discrimination . . . regardless of whether the person responsible for the act or omission intended to discriminate."

Position of the Parties

The Commission

It is clear, said Ms Lugtig, that the *Code* prohibits discrimination in the provision of rental accommodation based on family status. "Family status", she argued, includes the status of being a parent. There have been many findings to that effect in cases in this and other jurisdictions, including *Moxon* v. *Samax Investments Ltd.* (1984), 6 C.H.R.R. D/2835 (Man. Bd. Adj.), *Cunanan* v. *Boolean Developments Ltd.*, [2003] O.H.R.T.D. No. 17, and *Leadley* v. *Oakland Developments Ltd.*, [2004] N.S.H.R.B.I.D. No. 10.

In this case, there is no question that Ms Hiebert was at the relevant time a parent of 5 year old Hannah. At issue, is whether she was adversely treated by the Respondent with respect to renting an apartment, and whether her status as a parent was a factor in that treatment.

Ms Hiebert claims that she was told not to bother applying for an apartment because she had a young child and the available apartment was on an upper floor. The Respondent may dispute this, and argue that Ms Hiebert was mistaken, that she had made many calls, but had not called Amberwood Village. Yet Ms Gaucher admitted that she had no way of knowing whether Ms Hiebert had called, and that she tells prospective tenants that the Respondent only rents main floor suites to people with children. The Respondent was advertising an apartment many times during the relevant time period, and has admitted that it had this policy. Ms Hiebert contacted the Commission soon after experiencing the difficulty, and sent handwritten notes describing in general terms the difficulty she had had in trying to rent an apartment because she had a child. She remembered that she called Amberwood Village because she had made notes at the time and was referring to those.

The Respondent may point to the mistake in the phone number which Ms Hiebert provided to the Commission. Ms Hiebert said, however, that she had written down a number of phone numbers, and also recalled phoning The Towers.

The Respondent may also point to Ms Hiebert's complaint against the Acadia Apartments, which was subsequently dismissed. In Ms Lugtig's submission, this was a misunderstanding, and there was nothing in those circumstances to suggest that Ms Hiebert was being untruthful or had made a mistake with respect to this Complaint.

Referring to the test in the case of *Faryna* v. *Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.), Ms Lugtig argued that Ms Hiebert's story fits with the "preponderance of the probabilities" and the other evidence in this case. Her story matches the caretaker's story in terms of what is asked of, and told to, prospective tenants. Without calling Amberwood Village, she had little way of finding out that the Respondent had such a policy, and she recalls calling them. There were ads in the newspaper at the relevant time. All of this is consistent with Ms Hiebert's story, and there is nothing which is inconsistent with it.

Ms Lugtig anticipated that the Respondent might also argue that it should be fatal to the Complaint that Ms Hiebert did not fill out an application. However, Ms Hiebert was not asked to fill one out, and there did not appear to be any point in doing so if no apartment was available to her at the time. The Respondent acknowledged that a number of callers do not fill out applications.

Ms Lugtig then turned to the potential defences by the Respondent to the effect that it had a bona fide and reasonable cause for discrimination. She argued that the same three principles or questions as were identified and applied by the Supreme Court of Canada in *British Columbia (Public Service Employee Relations Commission)* v. *British Columbia Government Service Employees' Union (BCGSEU)*, [1999] 3 S.C.R. 3 ("Meiorin") and *British Columbia (Superintendent of Motor Vehicles)* v. *British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868 ("Grismer") must be applied in evaluating this issue in this case.

The first question is whether the Respondent's rule is rationally connected to the provision of rental accommodation. In this case, it appeared that the rule was designed to prevent children from bothering downstairs tenants with their noise. This must be qualified as unreasonable or excessive noise, since it was acknowledged that all tenants accept a certain amount of noise. While there was also some mention of concerns about safety and children being on balconies, the Commission challenged this as a motivating reason behind the rule, as there was nothing preventing children from entering balconies in upper floor apartments. In summary, the Commission accepted that the prevention of excessive noise is an objective that is logically connected to providing rental accommodation, provided it is qualified as excessive noise.

The second question is whether the Respondent adopted the rule in an honest and good faith belief that it was necessary to fulfill its rental-related purpose. Ms Lugtig acknowledged that the Commission does not question the Respondent's good faith in adopting this rule.

The emphasis here, said Ms Lugtig, is on the third question, being whether the rule is reasonably necessary to accomplish the purpose of limiting excessive noise in apartment blocks, or whether it would be impossible for the Respondent to accommodate individual or group differences without giving rise to undue hardship of some kind.

In the Commission's submission, the Respondent fails on this important question. The rule excludes families like Ms Hiebert's from upper floor apartments based on impressionistic assumptions. There is no data about noise complaints against adults, or whether children are likely to make more noise than adults. The notes from existing tenants who agree with the policy are not sufficient to establish that children are noisier than adults, or that other less restrictive policies would not work as well.

The Respondent does not appear to have considered any alternative to its rule. Ms Hiebert was not asked for references, which would have been the most obvious alternative. The Respondent has done little or nothing to minimize the burden of the rule on families, and has not established that accommodating families would be impossible without giving rise to undue hardship. Other apartments blocks, including the Acadia

Apartments and Mr. O'Donnell's block, rent to families with children and are able to conduct a successful business.

While the Respondent may talk about differences between wood and concrete and the way they conduct noise, any such reference is again of a purely impressionistic nature. In the absence of expert evidence to that effect, differential treatment cannot be justified.

Ms Lugtig went on to address two other potential issues. First, she anticipated that the Respondent might argue that it was allowed to adjust the lease under landlord and tenant legislation and guidelines published by the "Rentalsman". In her submission, such an argument cannot succeed for the reason that section 58 of the *Code* provides that the *Code* is paramount over other provincial legislation, unless that legislation says that the *Code* does not apply. *The Landlord and Tenant Act* contains no such statement, and the *Code* therefore prevails.

The second issue is whether the Respondent would be liable for Ms Gaucher's actions, given that it is a corporation and her title is that of a "subcontractor" or independent contractor. Ms Lugtig argued that under section 10 of the *Code*, a corporate respondent is vicariously liable for the acts of its employees. Referring to the decision in *Crane* v. *British Columbia (Ministry of Health Services)*, [2005] B.C.H.R.T.D. No. 361 as setting out the appropriate principles for determining whether someone is an employee for the purposes of the *Code*, she noted that "employ" and "employer" are to be given a large and liberal interpretation which will best achieve the purposes of the *Code*.

While a number of factors can be taken into account in considering whether someone is an employee, Ms Lugtig argued that the most important one in this case was the remedial purposes of the *Code*, or whether the ability to remedy any discrimination lies with the alleged employer. In this situation, it does. The policy emanated from the Respondent, who adopted it and placed it in its standard tenancy agreement. Only the Respondent could remove the policy or stop the caretaker from talking about it when people called. Ms Gaucher would therefore be considered an employee under the *Code*, and someone for whom the Respondent would be liable.

In any event, Ms Gaucher was acting as an agent for the Respondent, which is also someone for whom the Respondent would be liable under section 10 of the *Code*, in that she was representing the Respondent in seeking tenants to enter into tenancy agreements with the Respondent. The *Code* is directed against unlawful discrimination by any and all persons who cause that discrimination, and in the Commission's submission, it is the Respondent who caused that discrimination to occur.

The Respondent

Mr. Mennie submitted that when the Respondent first began looking after Amberwood Village, the place was a mess and people did not get along. Although it took a few years, they now have Amberwood Village running very well. The tenants, those with children and those without children, like the way things are organized and are happy. In all the time that it has managed Amberwood Village, the Respondent has never been faced with a human rights complaint or problem until now.

This is very much a "she says, he says" situation. There are discrepancies. The phone number which Ms Hiebert provided is not the phone number for Amberwood Village. Ms Hiebert says she called Amberwood Village, but Ms Gaucher does not remember talking to her. Ms Hiebert says that she remembers being told about Amberwood Village's policy. She admits, however, that other blocks said the same thing, that they did not accept kids except on the main level.

Ms Hiebert did not ask to fill out an application. If she had attended at the property, she would have seen the Respondent's office phone number out front. Ms Hiebert could then have called the Respondent's office, and they could have found her a suite in another block, one made of concrete.

The Respondent has other apartment blocks where children are allowed on the upper floors. Those blocks are made of concrete and are very quiet. Amberwood Village is built of wood, which is noisier. There are also safety reasons for this policy, as balconies which are made of wood tend to deteriorate.

Mr. Mennie acknowledged that they do not know Hannah. They have no knowledge as to whether she is a quiet child or not, although he suggested that everybody thinks that their own child is quiet.

Mr. Mennie argued that the Respondent has always based its policies on the Residential Tenancies Branch guidelines, which say that in addition to the rules in the standard agreement, they may set their own house rules, as long as they treat everybody the same. That is what they have done. They and other landlords follow the guidelines of the Residential Tenancies Branch. Mr. Mennie did not know of any landlord who was aware that *The Human Rights Code* may overpower those decisions.

Finally, Mr. Mennie argued that people who are paid by and work for someone else too, who are responsible for their own income tax and other payments, are independent contractors. On this basis, he submitted, Ms Gaucher is not an employee of the Respondent, but an independent contractor for whom the Respondent would not be responsible.

Decision

The onus is on Ms Hiebert to establish a *prima facie* case of discrimination. She must therefore establish, on a balance of probabilities, that the Respondent treated her differently on the basis of family status with respect to the leasing of, or the opportunity to lease, an apartment at Amberwood Village.

"Family status" is not defined in *The Human Rights Code*. It is not disputed, and I accept, that "family status" under clause 9(2)(i) must include the status of being in a parent and child relationship.

There is no question that Ms Hiebert was at the relevant time the parent of a young child, her daughter Hannah. There is also no dispute that the Respondent had a rule at that time that families with children were allowed to occupy first floor apartments only.

What is in dispute is whether Ms Hiebert in fact contacted Amberwood Village, and whether she was denied the opportunity to lease a suite on the basis of her family status. I am satisfied that the answer to this is yes.

Ms Hiebert maintains that she called Amberwood Village; the Respondent questions whether this is the case, and points to "discrepancies" in the evidence.

The case of *Faryna* v. *Chorny*, *supra*, is often cited as setting out the classic test for assessing credibility. In that case, the Court stated, at p. 357, that:

> [t]he 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 a 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.
>
> (Emphasis added)

The evidence indicates that Ms Hiebert was making serious efforts in January 2008 to find an apartment for herself and her daughter, mainly by searching out and responding to advertisements in the Brandon Sun. Ms Hiebert's evidence in this regard is supported by that of her father.

One and two-bedroom apartments at Amberwood Village were advertised for rent in several editions of the Brandon Sun at that time. Ms Hiebert said that she would go through the paper and usually call as soon as she saw an advertisement. Amberwood Village's advertisements were among the largest and most conspicuous ones, and it would seem highly unlikely that she would have missed them. No suggestion was made of any reason why she would not have responded to those advertisements.

Ms Hiebert's account of the conversation when she phoned Amberwood Village is consistent with what Ms Gaucher later testified she would say to prospective tenants. The available suite was on an upper floor, and Ms Gaucher candidly acknowledged that she asks prospective tenants who the apartment would be for, and

advises those with children that they cannot rent upper floor suites. As indicated above, there is no question that Amberwood Village has a rule that families with children may only occupy suites on the main floor. That Ms Hiebert may have been told something similar when she contacted other apartment blocks does not explain how she would have known that Amberwood Village had that rule unless she contacted them.

The Respondent relies on the fact that the phone number which Ms Hiebert provided to the Commission is the number for another apartment block, not Amberwood Village. The correct phone number for Amberwood Village appears in the newspaper advertisements which Ms Hiebert consulted when she was trying to find an apartment. The wrong number appears in the notes which she later prepared to hand in to the Commission, when she lodged her complaint against the Respondent and others. In the circumstances, I find it more likely that Ms Hiebert copied the wrong phone number down for the Commission than that she was mistaken as to the name of the apartment block she contacted.

With respect to the Respondent's suggestion that there is a discrepancy in the evidence of Ms Hiebert and Ms Gaucher, as to whether Ms Hiebert spoke to Ms Gaucher, I fail to see any discrepancy. Ms Gaucher did not deny that Ms Hiebert called. Rather, she indicated that she receives a large number of calls, and acknowledged that she would have no way of telling if a particular person called. Ms Gaucher could not say, one way or the other, whether Ms Hiebert called.

Taking into account all of the evidence, I am convinced that Ms Hiebert's assertion that she called Amberwood Village, and was told that she would not be able to rent the suite which was advertised for rent at that time, is in harmony "with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable" in these circumstances.

I am also convinced that she was denied the opportunity to rent that suite because she intended to live there with her daughter Hannah, and therefore on the basis of family status. This is consistent with the Respondent's policy and with what Ms Gaucher unequivocally said she would tell someone in this situation.

I would note that while Commission counsel argued that Ms Hiebert only had to establish that her status as a parent was one of the factors that contributed to the Respondent's denying her the opportunity to rent the apartment (as opposed to the sole or even the primary factor), there was no suggestion by the Respondent of any other reason why Ms Hiebert would have been told that she could not lease the apartment. Nor was it suggested that the apartment was otherwise unsuitable for her, except that she might have had some difficulty with stairs due to a disability, which she denied. Based on the evidence, therefore, Ms Hiebert's being a parent was the sole reason, or at the very least, a primary reason, for the Respondent's refusal.

Is the fact that Ms Hiebert did not fill out, or ask to fill out, an application to rent a suite fatal to her claim of discrimination? In my view, it is not.

The *Code* speaks of differential treatment with respect to the "opportunity to lease" premises. Ms Hiebert had already been treated differently from other prospective tenants on the basis of family status when she called the Respondent, as contemplated in its advertisement, and was told that the available suite was not for her. While the fact that she did not subsequently fill out, or ask to fill out, a written application might have an impact in terms of any ultimate remedy, it does not change how Ms Hiebert was treated originally .

I am therefore satisfied that Ms Hiebert has established, on a balance of probabilities, a *prima facie* case that she was discriminated against on the basis of family status with respect to the leasing of, or opportunity to lease, an apartment at Amberwood Village.

The onus thus shifts to the Respondent to prove, again on a balance of probabilities, that there is a bona fide and reasonable cause or justification for such discrimination. For the reasons which follow, I conclude that the Respondent has not met this onus.

In *Meiorin*, *supra*, the Supreme Court of Canada outlined a three-step approach to determining whether a standard is justified. Based on that approach, the

Respondent must show that its rule or policy was adopted for a purpose rationally connected to the function being performed, was adopted in good faith, and is reasonably necessary to accomplish its legitimate purpose.

With respect to the first of these steps, there is little doubt that the Respondent's objective in implementing its rule was to control noise levels at Amberwood Village, and more particularly, to prevent tenants being disturbed by children making noise. The evidence indicates that the Respondent, and tenants generally, are prepared to tolerate a reasonable amount of noise. What the Respondent is seeking to control, therefore, is unreasonable or excessive disturbance or noise.

The Respondent is not seeking to exclude children from the complex, but to restrict them to living in main floor suites, where there is no apartment below and less chance of their disturbing others. It says that they "only have this policy to keep every tenant happy". The evidence suggests that this includes tenants with children, as well as those without.

I accept that a goal of maintaining reasonable noise levels, and protecting tenants from being unreasonably disturbed by children making noise, is rationally connected to the Respondent's general function of providing and managing rental accommodation.

The Respondent also referred, in its Reply and in argument, to safety reasons for its policy. Safety is obviously important, but the evidence does not support an argument that it was a motivating factor behind the adoption of this rule at Amberwood Village.

The second step or question is whether the rule or policy was adopted in good faith. Counsel for Commission has acknowledged that they do not challenge the good faith of the Respondent in adopting its rule. The Respondent honestly believed that the adoption of such a rule was both reasonable and consistent with the Residential Tenancies Branch guidelines. There is no indication of any intention to discriminate

against Ms Hiebert personally. I have no hesitation finding that this requirement has been satisfied.

At the third step in the justification process, the Respondent must show that the rule is reasonably necessary to accomplish its legitimate purpose, and that it could not accommodate Ms Hiebert and others adversely affected by the rule without experiencing undue hardship. In my view, the Respondent has not satisfied this requirement.

The Respondent's rule is based on an assumption that all families with children are noisy, and that any such family, if allowed to occupy an upper level suite at Amberwood Village, will generate an unreasonable amount of noise. On that basis, any tenants or prospective tenants living with children are denied accommodation on the second and third floors, and restricted to occupying first floor suites only.

A standard or rule that excludes members of a particular group on impressionistic assumptions is generally suspect. (*Grismer*, *supra*, at para. 31)

The Respondent's evidence was that it had had certain problems with children being particularly noisy and disturbing tenants living below them. That evidence is not proof that all children, or indeed any other children, would cause such problems or disturbances. The Respondent's experience did not justify it drawing an inference that all children are particularly noisy, or adopting a rental policy which classifies families with children as unacceptably noisy, without consideration of their individual situations and merits.

Similarly, the notes or letters of support referred to by the Respondent largely reflect the views and impressions of current tenants, and do not prove that children cannot be sufficiently quiet or that families with children cannot be accommodated without undue hardship.

The Respondent argued that its rule is justified because Amberwood Village is constructed of wood, which tends to be much noisier than concrete. The Commission argued that expert evidence would be required on this point, and there was none. Whether wood is or is not noisier, however, is beside the point. It would not affect the fact

that the Respondent's policy treats parents with children as a group differently from others, based on its assumption that all children are noisy and will disturb others, without considering their individual merits.

It is clear that there were, and are, other alternatives available to the Respondent. The Respondent could, for example, ask prospective tenants about their past history and what they would do to control noise. It could also ask for, and check out, references on this issue. It is significant, in this regard, that the newspaper advertisements for Amberwood Village expressly state that references are required. Ms Gaucher confirmed that references are required as part of an application for a suite, that they follow up on them, and that references definitely help in identifying problems or potential problems. Given that this is part of the normal application process for a suite, it cannot be suggested that it would cause, or would have caused, the Respondent undue hardship to consult references for this purpose.

The Respondent relied on evidence that the tenants at Amberwood Village are happy with the policy and support it, and argued that "you want to keep everyone as happy as possible". This is clearly not a basis on which the rule can be justified or considered reasonably necessary. A rule which treats a tenant or prospective tenant differently on the basis of a prohibited ground cannot be defended by arguing that it meets the wishes of, and is supported by, other tenants. In other words, the Respondent is not justified in discriminating because its tenants want it to do so.

The Respondent also argued that the policy in the Residential Tenancies Branch Guidebook or guidelines dealing with "Tenancy Agreements" and "Reasonable Rules" says that landlords may set their own house rules, and that that is what they had done.

In my view, the Respondent's rule is not the type of rule that is contemplated under the term "house rules". As an example of a reasonable "house rule", the policy refers to a rule that the "tenant agrees to use the rental unit and residential complex for residential use only". This rule with respect to the use of a unit is very different from the rule at issue in this case. The guidelines do not suggest in any way that a rule which

allows for discrimination based on any of the characteristics set out in subsection 9(2) of *The Human Rights Code*, including family status, would be permissible as a "house rule".

In any event, if there was any inconsistency or conflict between the guidelines and the *Code* in this regard, the provisions of the *Code* would prevail by virtue of section 58 of the *Code*. That section provides that the substantive rights and obligations in the *Code* are paramount over the substantive rights and obligations in every other Act of the Legislature, unless expressly provided otherwise. *The Residential Tenancies Act* does not provide otherwise. As a result, the prohibition against discrimination on the grounds of family status under the *Code* would be paramount.

I therefore conclude that the Respondent has not satisfied the onus of establishing that its rule that families with children may only occupy main floor suites in Amberwood Village is reasonably necessary or justified.

With respect to the Respondent's further submission that it is not liable for Ms Gaucher's actions on the basis that she is an subcontractor, and is not "employed" by it, the fact that Ms Gaucher's title is "Subcontractor" is not determinative of whether she is an employee of the Respondent for the purposes of the *Code*.

While the Respondent also suggested in argument that Ms Gaucher pays her own income tax and works elsewhere too, and is therefore an independent contractor, there was no evidence to this effect. Even if there had been evidence to this effect, it would not have been of assistance to the Respondent in this case.

What constitutes an employment relationship under the *Code* may differ considerably from what constitutes an employment relationship in another context, such as for income tax purposes, where the policies or purposes are not the same.

The courts have repeatedly emphasized that human rights legislation must be given a liberal interpretation which recognizes the special nature of the legislation and advances the broad policy considerations underlying it. When the word "employee" is interpreted in accordance with that approach, Ms Gaucher may well be considered an

employee under the *Code*. It is not, however, necessary for me to determine whether that is the case, given section 10 of the *Code*.

Section 10 deals with the "vicarious responsibility" of a "person" (which is defined to include a corporation) for acts of not only its employees, but also its agents. The section states that where an employee or agent of a person, acting in the course of the employment or the scope of actual or apparent authority, contravenes the *Code*, the person is also responsible for the contravention, unless the person takes all reasonable steps to prevent the contravention and avoid its effect. Consistent with the remedial purpose of the legislation, section 10 places responsibility on the person who is in a position to take effective action to remedy the contravention.

In this case, it is the Respondent's rule which prohibits families with children from occupying upper floor suites at Amberwood Village. That rule was authorized and adopted by the Respondent, and incorporated into its Tenancy Agreement. The only one who can change that policy and remove it from the Agreement is the Respondent.

Ms Gaucher was following and implementing the Respondent's policy when she asked Ms Hiebert about her family status and advised her of that rule. In doing so, she was acting as the employee or agent of the Respondent within the meaning of section 10 of the *Code*.

For the purposes of the *Code*, the Respondent is therefore responsible for Ms Gaucher's actions.

Accordingly, I find that the Respondent discriminated against Ms Hiebert by denying her the opportunity to rent an apartment at Amberwood Village based on her family status, in contravention of subsection 16(1) of the *Code*.

Remedy

Counsel for the Commission stated that if I were to conclude that the Respondent had discriminated against Ms Hiebert, in contravention of the *Code*, the Commission would be seeking two remedial orders. The first would be an order, pursuant

to clause 43(2)(a) of the *Code*, that the Respondent refrain in the future from restricting the location of families with children to main floor apartments in Amberwood Village and other apartments that they manage, including removing that restriction from its standard lease. The second would be an order for general damages in favour of Ms Hiebert, pursuant to clause 43(2)(c) of the *Code* for injury to dignity, feelings or self-respect, in the amount of $3,000.00.

In Mr. Mennie's submission, an award of damages in the amount of $3,000.00 would be excessive and unfair. He pointed to the authorities which the Commission had relied upon, and in particular, the *Moxon* case, *supra*, where the amount awarded to each complainant in respect of hurt feelings was $100.00.

Under section 43(2)(a) of the *Code*, where an adjudicator decides that a party has contravened the *Code*, he or she may order the party to do or refrain from doing anything in order to secure compliance with the legislation.

I am satisfied that an order that the Respondent refrain from restricting the location of families with children to main floor apartments, and that it remove that restriction from its Tenancy Agreement, is warranted with respect to Amberwood Village.

I am not prepared to make a similar order with respect to other apartment buildings which the Respondent manages, as there is no evidentiary basis for such an order. Rather, the evidence is that the Respondent allows families to occupy upper floor suites in other blocks, since these are made of concrete.

With respect to general damages for injury to dignity, feelings and self-respect, while I believe that an order for damages under this heading is justified, I agree with the Respondent that an award of $3,000.00 would be excessive. On the other hand, the amount awarded in the *Moxon* case, which was decided 25 years ago, would be insufficient.

There is little evidence as to the extent of any injury which Ms Hiebert may have suffered because of the discrimination in this case. She was obviously frustrated at being unable to rent an apartment for herself and her daughter. In terms of her emotional

reaction to the experience of trying to rent an apartment, she said that she was "disappointed". With respect to Amberwood Village itself, she said that once she was told that the apartment was not for her, she did not ask or try to fill out an application because she "didn't feel comfortable then" and did not think she'd "bother". Taking into consideration the evidence in its totality, I am of the view that an appropriate award of damages for injury to dignity, feelings and self-respect caused by the discrimination in this case would be $1,000.00.

In summary, having found the Respondent in breach of section 16 of *The Human Rights Code*, I order:

1. That the Respondent refrain from restricting the location of families with children at Amberwood Village to main floor apartments, and that it remove that restriction from its Tenancy Agreement;

2. That the Respondent pay to the Complainant the sum of $1,000.00, to compensate her for injury to her dignity, feelings and self-respect.

Dated at the City of Winnipeg, in Manitoba, this 30th day of September, 2009.

"M. Lynne Harrison"
Adjudicator