MANITOBA HUMAN RIGHTS BOARD OF ADJUDICATION

BETWEEN:

A.B.

Complainant,

-and-

ANDREW JASNIKOWSKI AND JEFFERY JASNIKOWSKI O/A JAZCO MANAGEMENT

Respondent,

Appearances:

Andrew Joseph Jasnikowski,

A.B.

Heather Unger, Counsel for the Manitoba Human Rights Commission

DAN MANNING, adjudicator:

1. On December 18, 2013 the Complainant, A.B.[1], a 35-year-old woman, was looking for a place to live. She saw an ad on the internet for a suite that was for sublet at a Mulvey Avenue apartment building in Winnipeg. It was a one-bedroom basement suite apartment. Rent was about $620 per month. She arranged a viewing of the apartment for the following day. At the time it was a hot rental market with low vacancy. She believed that if she was the first applicant, her chances of getting the suite would be good.
2. The next day she went to see the apartment. She was shown the apartment by the then tenant who was seeking to sublet the suite ("the subleasing tenant"). It was an unusual looking apartment. It was a one-bedroom basement suite with pipes running along the ceiling. A.B. thought this might deter other potential applicants thus increasing her chances of getting the suite. She promptly completed the rental application and gave it to the subleasing tenant.
3. To understand A.B.'s perspective at the time she was completing the application you have to know a bit of her background. Like many Manitobans, A.B.'s life up to this point had not been story-book perfect. During A.B.'s childhood, her mother had bouts of mental illness. Growing up was hectic. A.B. spent a lot of

[1] During the hearing I issued an order under s.46(3) directing the Commission to delete any information that would disclose the identity of the Complainant and to identify her by her initials, "A.B.". See the Appendix to this decision.

time caring for her mother. Sometimes her mother's mental illness rendered her homeless. This interfered with A.B.'s childhood including her ability to complete her education.

4. A.B. also had mental health issues. This made it difficult for her to maintain employment. She was on social assistance and had been so for most of her adult life. She was receiving about $1100 per month from social assistance payments at the relevant time.
5. The application that A.B. was required to fill out requested information regarding her present and previous employment. It asked whether she possessed a Visa, Mastercard, or American Express. It asked for details about past and present landlords. A.B. did not have any of these things. She had been staying with friends and roommates. She had not been formally a party to a lease agreement. She had not been able to maintain steady employment for years. A.B. filled everything out as best she could. She left a cheque to cover the damage deposit.
6. She was told by the subleasing tenant that she was the first applicant. She believed that being first meant she would be considered first. She thought she had a chance of getting this apartment. She left optimistic and hopeful.
7. The subleasing tenant delivered the applications at a prearranged location and Mr. Jasnikowski retrieved them on or about December 20, 2013. The subleasing tenant did not testify at the hearing.

8. On December 21, 2013, A.B. provided more information by email to the Respondent. She included references that confirmed her income and also advised that "[f]ull rent amount can be made payable from Disability/PHB direct to Jazco on the 1st of the month upon request."

9. On or about December 20, Mr. Jasnikowski looked at the applications. They were folded together. He could not remember seeing any indication of which application came in first, second, etc. Normally, Mr. Jasnikowski explained, he would consider each application in the order in which he received them, "first come, first served." If the first applicant did not pass muster, then he would turn to the next.

10. There were about ten applicants. He went through the applications. He separated them into two piles, his attention focussed on each applicant's total income. One pile was viable applicants, the other not. He determined financial viability by operation of a rent-to-income ratio. He was looking for a rent-to-income ratio of no more than 35 to 40 percent. In other words, rent should not be more than 35-40 percent of an applicant's income. If it is, they would not be financially viable. He told us that as soon as he saw A.B.'s income level, he "knew right away that she would not meet the financial requirements." His evidence is clear that his primary basis for rejecting A.B.'s application was that she did not meet the rent-to-income ratio of 35-40 percent.

11. In justifying the rent-to-income ratio, he explained that he would never want to put anyone in a position that their ratio was so high that they would have to make a choice between buying food or paying rent. He pointed to the budgeting guidelines of the Credit Counselling Society which indicates that housing should be 35% of ones budget. He told me that sometimes he is flexible in applying the ratio. Someone who falls outside the range might bring a co-signer or provide a co-signor application.

12. On December 29, A.B. sent an email to the Respondent asking if he had reviewed her application. There was no reply, so on January 2, 2014 she sent the following email to Mr. Jasznikowski:

> "Hello,
> I applied in late December for 21-635 Mulvey and haven't heard a response. I am inquiring as to whether or not you've had a chance to look over my references and application…"

13. The same day the Respondent replied, "Sorry it's been rented already." The Complainant then asked, "Thank you for the reply, but may I ask why my application wasn't considered when I was the first applicant?" The Respondent replied, on January 3, "I don't rent to anyone on assistance without a co-signor application." A.B. was never advised of the co-signor requirement.

14. On December 31, 2014 A.B. filed a complaint alleging a contravention of section 16 of the Manitoba Human Rights Code ("Code"). She alleges that the Respondent discriminated against her in the rental of premises on the basis of her

source of income without *bona fide* and reasonable cause, contrary to section 16 of the *Code.*

ANALYSIS

15. For A.B. to make a case of discrimination she must prove that (i) she has the protected characteristic contemplated by section 9 of the Code (ii) that she has experienced an adverse impact with respect to the service; and that the protected characteristic was a factor in the adverse impact. Once a *prima facie* case has been established, the burden shifts to the Respondent to justify the conduct or practice. (See *Moore v. British Columbia (Education),* [2012] 3 SCR 360 at para. 33. ("*Moore*")

16. Mr. Jasnikowski relied on a flexible rent-to-income ratio as the primary guideline in determining whether a prospective applicant met the minimum income criteria. In Ontario, rent-to-income ratios applied rigidly or flexibly, and whether they are the sole or partial factor in determining minimum income criteria for an applicant have been found to contravene the *Ontario Human Rights Code*. (See *Kearney v. Bramalea Ltd. (No.2)(1989)*, 34 C.H.R.R. D/1 (Ont. Bd Inq.), upheld in *Ontario (Human Rights Commission) v. Shelter Corp*., [2001] O.J. No. 297 (paras. 34-39).

17. In *Sinclair v. Morris A. Hunter Investments Ltd*., [2001] O.H.R.B.I.D. No. 24, (*"Sinclair"*) the Tribunal heard expert evidence and concluded at paragraph 33:

> "The unchallenged expert evidence in this case unequivocally supported findings that rent/income ratios: discriminate against rental applicants at least up until their middle twenties; discriminate against visible minority rental applicants; result in the creation of "ghettoized" communities of low income visible minority tenants in poor quality housing about whom prejudices and stereotypes develop and flourish; and are not reliable predictors of rental default. The expert evidence further established that, even if rent/income ratios were reliable predictors of default, losses associated with such default are not a significant factor in determining the economic viability of a landlord's rental business."

18. The law in Québec is similar. It is contrary to the *Québec Charter of Human Rights ("Charter"*) to summarily dismiss an applicant solely based on rent-to-income ratio. To do so violates section 10 of the *Charter* on the basis of "social condition". (see *Québec (Commission des droits de la personne) c. Whittom (re Drouin)*, [1997] J.Q. no 2328) and more recently, *Commission des droits de la personne et droits de la jeunesse c. Blanchette*, [2014] J.T.D.P.Q. no 8 (para. 80-83) ("*Blanchette")*

19. Although no expert evidence was called in this case, I heard from Mr. Jasnikowski that not only did he use the rent-to-income guideline to screen applicants but that in his experience it is common for landlords to apply the rent-to-income ratio when screening potential tenants. I find that by his operation of the rent-to-income guideline that the result was that anyone on social assistance would not financially qualify on their own without a co-signor. I come to that conclusion because that is effectively what he told A.B. in his January 3, 2014 email to her. I also note that the co-signor requirement was never expressly or

impliedly communicated to A.B. during the application process nor did it form part of the Respondent's application for tenancy form.

20. A.B. experienced an adverse impact because her application was summarily removed from contention on financial grounds by operation of the ratio. The rent-to-income guideline used by the Respondent rendered A.B.'s application dead from the start. The fact that A.B. was on social assistance was clearly a factor in the adverse impact.

21. I find, therefore, on balance, that Ms. A.B. has made out a case of discrimination. She has been discriminated on based on her source of income which in this case is being on social assistance. She has experienced an adverse impact because of her being on social assistance.

22. The Respondent can justify discrimination if he is able to show on balance, that a *bona fide* and reasonable cause exists for the discrimination. He justifies the use of the rent-to-income guideline on the basis that a tenant should not have to choose between paying rent and buying food. The ratio prevents situations where a tenant cannot afford both. He relies on the Credit Counseling Society budgeting guidelines. Additionally, I infer from the Respondent's evidence, that it avoids situations where a tenant defaults on the lease and that the Respondent incurs financial loss.

23. In *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868 the Supreme Court discussed what I must consider in determining if the Respondent has met his onus. (paras. 20-22) In my view, the Respondent has not satisfied me that the ratio is reasonably necessary to accomplish his purported goal. Income declared by an applicant may not always include other means by which a person can make ends meet. For example, an applicant may structure their budget to permit them to make ends meet notwithstanding a higher rent-to-income ratio. Or, people may acquire food from friends, family or other sources that fall outside their stated income. There was also no evidence provided to me that shows a rational connection between rent-to-income ratio and the likelihood of a tenant defaulting on their lease. The Respondent has not satisfied me that the ratio is reasonably necessary to meet his purported goal.

REMEDY

24. The Commission seeks a remedial order under section 43(2)(c) in the amount of $10,000. Ms. Unger argues that this is justified because A.B. was devastated and that the action of the Respondent was "one more example of barriers being thrown up" to prevent A.B. from being considered as a prospective tenant due to her being on social assistance. The Commission argues that A.B. had done everything that could reasonably be expected of her to apply for tenancy but was

rejected nonetheless based on discrimination. The Commission also suggests that an order be made under section 43(2)(a) to ensure future compliance with the *Code.*

25. Section 43(2)(c) authorizes monetary awards to compensate for injury to dignity, feelings or self-respect. After A.B. received the January 3 email from the Respondent, she sent an email to her mental health worker the same day. In that email A.B. wrote: "This isn't just hurting me, it's hurting everyone who's trying to get housing under similar circumstances. You mentioned yourself agencies are starting to ask for co-signers. I don't know what hope I have of getting anything with this happening all the time but maybe I can do something about it." In the hearing she testified that she believed that the discrimination she experienced by the Respondent was common-place and that "just to be denied, takes the rental market down from a very sparse market to an almost impossible market."

26. In arriving at a just award under section 43(2)(c) I take into account the comments of Adjudicator Sim, in *Emslie v. Doholoco Holdings Ltd*, 2014 CanLII 71723 who quoted the following two part test from *Arunachalam v. Best Buy Canada*, 2010 HRTO 1880 (CanLII) which has been adopted by other tribunals:

> [52] I turn now to the relevant factors in determining the damages in a particular case. The Tribunal's jurisprudence over the two years since the new damages provision took effect has primarily applied two criteria in making

> the global evaluation of the appropriate damages for injury to dignity, feelings and self-respect: the objective seriousness of the conduct and the effect on the particular applicant who experienced discrimination: see, in particular, Seguin v. Great Blue Heron Charity Casino, 2009 HRTO 940 at para. 16 (CanLII).
>
> [53] The first criterion recognizes that injury to dignity, feelings, and self respect is generally more serious depending, objectively, upon what occurred. For example, dismissal from employment for discriminatory reasons usually affects dignity more than a comment made on one occasion. Losing long-term employment because of discrimination is typically more harmful than losing a new job. The more prolonged, hurtful, and serious harassing comments are, the greater the injury to dignity, feelings and self-respect.
>
> [54] The second criterion recognizes the applicant's particular experience in response to the discrimination. Damages will be generally at the high end of the relevant range when the applicant has experienced particular emotional difficulties as a result of the event, and when his or her particular circumstances make the effects particularly serious. Some of the relevant considerations in relation to this factor are discussed in Sanford v. Koop, 2005 HRTO 53 (CanLII) at paras. 34-38.

27. In my view the appropriate award is $4000. I take the following into account:

a) This was a single act of discrimination.

b) A.B. was hurt by the act of discrimination but many of the criteria set out in *Sanford v. Koop,* 2005 HRTO 53 at para 34-38 are absent.

c) The quantum should not be too low, since doing so would trivialize the importance of the *Code* by effectively creating a "license fee" to discriminate. (*Vetricek v. 642518 Canada*, 2010 HRTO 757 para. 75)

d) The instant case is similar to the recent 2014 decision of *Blanchette, supra.*, where the Tribunal ordered $3,000 in compensation for injury to dignity.

28. The Respondent is ordered under section 43(2)(a) to cease and desist from rejecting applications for tenancy by applying a rent-to-income ratio guideline.

CLOSING REMARKS

29. A landlord cannot be obliged to rent to someone who does not have enough income to pay the rent. A landlord who has a reasonable apprehension of a prospective tenant's inability to pay rent has sufficient reason to justify refusal to rent. However, a landlord cannot rely on expedient and abstract criteria, such as the rent-to-income ratio, to justify refusal. Instead, a landlord must select or reject prospective tenants based on non-discriminatory criteria on an individualized basis using application forms, interviews and reference checks.

30. With regards to Mr. Jasnikowski, I do not believe he implemented the rent-to-income guidelines in bad faith. I believe he had no intention to contravene the *Code*. The evidence I heard from Mr. Jasnikowski and a reference letter he filed lead me to believe he is a conscientious, kind and hard-working landlord who cares about his tenants. It may be of great assistance and prevent future similar cases if the Legislature provided direction to landlords and tenants by way of regulation under the *Code*. For example, the *Ontario Human Rights Code* has a regulation which provides guidance to landlords and tenants on what are, and are not appropriate factors to consider during the application and screening process. (see *Ontario Human Rights Code* ("*Business Practices Permissible to Landlords*

in Selecting Prospective Tenants for Residential Accommodation", (O. Reg. 290/98))

31. I will retain jurisdiction to deal with any issues that arise from the making of this Order.

DATED: 5th day of March 2019

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Dan Manning

Adjudicator

APPENDIX

32. On September 7, 2018 I issued oral reasons pursuant to section 46(3) of the *Code* directing the Complainant's name be deleted from the decision. I have replaced the Complainant's name with her initials.
33. In making this order I had before me the submissions of A.B. which had been sent to me in advance of the hearing which I reproduce below along with the decision of *Walmsley v. Brousseau Bros. Ltd.*, [2014] M.H.R.B.A.D. No. 105. Any identifying information contained in the Complainant's submission has been deleted.
34. I have taken the liberty of editing grammatical errors in reproducing my oral reasons but have not materially changed my decision.

Complainant's Submission

I am formally requesting that my name not be included as a part of the public notice and the decision.

My predominant concern is that by my name becoming a matter of public record, so too would the sensitive information regarding my health and sources of income, which are included in the complaint. I believe that disclosure of my name in this case would result in undue prejudice and hardship, especially with regards to future employment, academics, and housing.

In line 1, 3 and 5 of the Complaint, I mention the PHB, or Portable Housing Benefit, as one of my sources of available rent funds. The Portable Housing Benefit is described by the Manitoba government as providing "600 low-income Manitobans who have mental health issues and unstable housing with a rent subsidy of up to $200 per month." Additionally, on line 1, 5, and 8 of the complaint, it is indicated that EIA is one of my sources of income.

If my name is included as a part of these proceedings, anyone searching for my name as part of either rental references, employment, academic or any other reasons, would have access to these sensitive elements of my private health information, as well as knowledge of EIA as a source of my income. A public record of my being the recipient of social assistance disability benefits concerns me due to the societal stigma towards those receiving said benefits.

The publication of this decision will likely become the first or second result in an internet search for my name, the first step of any record check. My name is not common and as of June 2018 results for it are few. Searching someone's name is now a common method of obtaining information about someone before hiring them, renting to them or in other interpersonal circumstances. It should be noted that because this public record will prominently feature my name it will have a higher likelihood of appearing

in online queries at the top of the results. This public record will certainly become one of the most significant online documents to contain my personal information.

In a report from the BC Minister of Health's Advisory Council on Mental Health (Discrimination Against People with Mental Illnesses and their Families: Changing Attitudes, Opening Minds - Executive Summary and Major Recommendations 2002): "In a Canadian survey of people with mental illness, half the respondents said the area of their life most affected by discrimination was housing. They said that their experience as a psychiatric patient meant they were less likely to get an apartment lease..." This is a familiar experience for me, as I was the caregiver of a family member with a disclosed mental illness who was denied housing, due to their disclosure. It is my fear that by my name becoming record I will not have the option to choose whether to disclose my medical information, since it will be available through this public decision.

Ontario's Human Rights Commission, citing the same summary, further concludes, "People with mental health disabilities...often lack access to adequate, affordable supportive housing. Housing problems may intersect with experiences with poverty and with other *Code* grounds, such as receipt of social assistance, sex, race, age and family status." In my experience, it has been very difficult to find housing that accepts EIA Disability funds as an acceptable source of income. Further disclosure of my mental health status is likely only to exacerbate these circumstances.

My personal experiences are not unusual as Corrigan (2003) noted: "...research has shown that persons are less willing to hire, offer jobs, or rent apartments to those with a mental illness." Additionally, Corrigan (2003) goes on to state, "More generally, there is a tendency towards social avoidance (or, social distance) – the desire to not interact with people with mental illness." I can confirm these social tendencies from my own experience when I used to disclose this information, both privately and professionally. Disclosure of my own health has lead to people refusing to interact with me, become suddenly distant and cold, or begin interacting with me in a patronizing or infantilizing manner.

This information being available as part of the public decision concerns me as someone working towards a career in academics, where my personal history will become essential to me achieving funding, networking and securing professional opportunities. Currently, it is challenging to rent a safe, clean, affordable place in Winnipeg, especially for someone with a stigmatized source of income. This situation is further exacerbated by a 1% vacancy rate, a small rental agency network and a market that allows unregulated Kijiji ads from sublets and landlords that state a requirement for renters to be employed before renting. Buildings that accept EIA/Disability are so rare that they advertise themselves as "EIA friendly". A landlord even ripped an application out of my hand during a showing of a suite when I mentioned my source of income. This decision being publicly available is likely to make it even more challenging to rent in the future, regardless of my strong references, good credit and ability to pay.

In light of the stigmatization of mental health diagnoses and the current challenges of renting in Winnipeg as both a low income renter and someone with EIA Disability, I believe the inclusion of my name along my essential personal history in the publication of this decision would result in undue prejudice and hardship. I respectfully request that my name not be part of these proceedings and that in the place of my name, my initials A.B. be used.

Thank you for your time and consideration,

"A.B."

Citations:

Human rights and mental health research and policy consultation paper – Discrimination and rental housing. (2011, January 22). Retrieved June 10, 2018, from http://www.ohrc.on.ca/en/human-rightsand-mental-health-research-and-policy-consultation-paper/5-discrimination-and-rental-housing

Province of British Columbia – Ministry of Health. (2002, May 8). *Discrimination Against People with Mental Illnesses and their Families: Changing Attitudes, Opening Minds.* Retrieved June 10, 2018, from https://www.health.gov.bc.ca/library/publications/year/2002/discrimination-against-people-withmental-illnesses-and-their-families.pdf

Corrigan, P., Markowitz, F. E., Watson, A., Rowan, D., & Kubiak, M. (june 2003). An Attribution Model of Public Discrimination Towards Persons with Mental Illness. Journal of Health and Social Behavior, 44(2), 162-179. doi:10.2307/1519806

Annotated Footnotes:

Current example listing for an EIA friendly building, note the text which states "EIA Friendly": https://www.kijiji.ca/v-bachelor-studio-apartments-condos/winnipeg/bachelor-west-end-close-to-uofw-and-hsc/1361326702?enableSearchNavigationFlag=true

Current example of a listing that requires permanent employment from the renter: https://www.kijiji.ca/v-1-bedroom-apartments-condos/winnipeg/newley-renovated-1-and-2-bedroomapartment-for-rent/1353487480?enableSearchNavigationFlag=true

Oral Reasons:

THE ADJUDICATOR:

I want to deal with the application under 46(3) to delete any information that discloses the identity of a party or witness at the hearing. It's an application of course by the complainant to have her name not disclosed as part of these proceedings. I am going to give oral reasons right now. I do not need to hear from the Commission. I have taken into consideration the information that was provided to me by the complainant by an email on the 14th of June 2018 at 3:41. In it she raises concerns about sensitive information regarding her health and sources of

income which could cause undue prejudice and hardship with regards to future employment, academics and housing.

The evidence that I heard over the last two days did disclose information with respect to mental health issues and disclosed significant information regarding her source of income and I am concerned that if it did become a matter of public record that she could be in a position where she could result in undue prejudice or hardship.

I just note that we live in a world now where anytime someone is applying for a job, or potentially even renting a place, that their name is going to be searched. I would like to think that everyone is striving to adhere to this *Code* but we don't know and so as a result I am going to order that any information that would disclose the identity of Ms. A.B. be deleted.

In coming to this decision, I take into account the submissions of the Respondent but in all the circumstances, balancing everything that I have read in A.B.'s email I am making that Order.