



ONTARIO LABOUR RELATIONS BOARD

OLRB Case No: **1818-19-ES**

Britney Lozza, Applicant v **Jason A. Tereszko operating as Northern Nerds**, and Director of Employment Standards, Responding Parties

Employment Practices Branch File No: **70224979-6**

BEFORE: Patrick Kelly, Vice-Chair

APPEARANCES: Britney Lozza on behalf of the Applicant; Jason A. Tereszko on behalf of the employer Responding Party; no one for the Director of Employment Standards.

DECISION OF THE BOARD: August 21, 2020

1. This is an application for review pursuant to section 116 of the *Employment Standards Act, 2000*, S.O. 2000, c.41, as amended, (the "Act").
2. The issues in this matter are, first, whether the applicant (or "Lozza") was an employee of Jason A. Tereszko operating as Northern Nerds ("Tereszko") entitled to the protections of the Act, or an independent contractor. If Lozza was an employee, then the second issue arises, whether she was entitled to the public holiday pay, vacation pay and termination pay that she claims. The third issue, also contingent upon a finding that she was an employee, is whether Lozza was the subject of reprisals by Tereszko contrary to section 74 of the Act.
3. A preliminary issue that was raised before and during the hearing of this application concerned the Board's use of Zoom to conduct the hearing. In a decision dated July 3, 2020, I dismissed Tereszko's request that the Board adjourn the Zoom hearing scheduled for July 18, 2020 on the basis, among other things, that the Zoom

platform was not secure and potentially violated Tereszko's privacy rights. I provided reasons for dismissing those submissions. Nevertheless, on July 23, 2020, four business days before the next hearing date, the Board received correspondence from a lawyer retained (on a limited basis) by Tereszko, requesting, among other things not necessary to set out here, that the Board not proceed to hear the matter via Zoom.

4. In a brief decision dated July 24, 2020, I rejected counsel for Tereszko's submissions concerning the use of Zoom, and I indicated that I would provide reasons in the final decision on the merits. My reasons follow in this paragraph. First, the submissions concerning Zoom were simply an amplification of Tereszko's earlier arguments that were rejected with reasons in my July 3, 2020 decision. In that sense, counsel's letter was a request for reconsideration of that decision. The Board's jurisprudence is clear that a request for reconsideration is not an opportunity for a party to re-argue its position. Secondly, in her letter, counsel requested that Tereszko be permitted to participate in the hearing via Microsoft Teams, and that the Board advise Microsoft that the matter involved a legal hearing which should only be hosted on a server located in Canada. While Information Bulletin No. 37 regarding Video Hearings contemplates the possibility of alternatives to Zoom, the request to use Teams could have been made by Tereszko himself shortly after he was informed in my decision dated June 1, 2020 that the hearing on July 8, 2020 would be conducted on the Zoom platform. He did not do so. So, again, the principles applicable to the Board's power to reconsider, as well as issues of delay, come into play. Tereszko did not make a timely application for reconsideration following the release of the June 1, 2020 decision, and did not ask in his submissions of July 2, 2020 that the matter be heard on the Teams platform. Arguments that could have been made in a timely manner were not made. Instead, on the eve of the resumption of the hearing which originally began on the Zoom platform, counsel for Tereszko sought to have the Board switch to a different platform, obtain assurances from Microsoft that the hearing would be hosted only on a server located in Canada, notify the parties of the change in platform, and familiarize the presiding Vice Chair on all aspects of the Teams platform, within four business days. Simply put, that is not a reasonable request in the circumstances.

5. The continuation of the hearing on July 28, 2020 proceeded on Zoom. Tereszko briefly reiterated his opposition to Zoom, but nevertheless commenced to testify. However, shortly after he began his computer camera failed or there was insufficient bandwidth to

support a continuous video image. Tereszko attempted to remedy the situation, but ultimately was unable to do so. He requested that he be allowed to resume his testimony by audio only. Lozza agreed and confirmed her agreement even after I informed the parties of the inherent risk that an unobserved witness might testify with some form of assistance (for example, consulting notes, researching on a device, secretly consulting another person, etc.). Accordingly, I permitted Tereszko to continue his testimony by audio only.

6. I next turn to the issues of substance in this dispute. As I have indicated the first issue concerns the question of Lozza's status as an employee or independent contractor. The evidence on that point disclosed the following.

7. Tereszko operates a computer service out of his home in Burk's Falls. The core of his business is repair of individuals' computer devices in his home. He also has clients, mainly municipalities (for example, the Town of Kearney, the Township of Armour, the Township of Perry, the Township of Lake of Bays), for whom he has been engaged to complete Information Technology ("IT") type projects, such as hardware upgrades. The work on these projects takes place on the clients' premises.

8. Prior to working for Tereszko, Lozza worked as an employee of Burk's Falls as a landscaper. That appears to be the extent of her employment experience. She did not operate any form of business in the period preceding her engagement by Tereszko.

9. In March of 2016, Lozza submitted her resumé to a local employment agency in Burk's Falls. Tereszko needed help in the business and made that known to the same employment agency. In July 2016, Lozza went to Tereszko's home for an interview. Tereszko was eager to engage Lozza's services, and provided her with a document entitled, "Independent Contractors Agreement" (or "the ICA"), which she later reviewed and signed, as did Tereszko, on July 26, 2016.

10. Some of the terms of the ICA relevant to this matter are as follows. Lozza agreed that she was "an independent contractor of Northern Nerds" and that she would be "responsible for all of [her] expenses, including federal and state income and employment taxes and related costs." The section in paragraph 1 of the ICA in which Lozza agreed to "fulfill the following duties and obligations" is blank – in other words, no duties and obligations are described in the ICA.

Under paragraph 2 entitled, "Compensation", the parties agreed that Lozza would be paid "per job upon invoiced amounts" on the condition that the invoice was "pre-approved prior to payment." No amount is specified in the ICA concerning a specific rate of compensation, nor is the term "job" defined. Pursuant to paragraph 3 ("Term") of the ICA, the ICA became effective on July 21, 2016 for a period of one year, "unless terminated earlier." There is no provision in the ICA with respect to its renewal after the expiry of the term of one year.

11. The remaining parts of the ICA deal with, among other things, Lozza's obligations to keep confidential Northern Nerds' business and proprietary information, and her agreement not to compete with Tereszko within a 200 kilometers distance from Tereszko's home for one year after termination of her association or termination of the contractual obligations with Tereszko. Nothing in the ICA authorized Lozza to hire anyone to assist her in her work for Tereszko.

12. Lozza initially performed between four and eight hours of work a week for Tereszko, but by November of 2016 she was working approximately 20 hours per week. This continued beyond the expiry of the ICA on or about July 20, 2017 until January 2018 when Lozza attended at Sheridan College.

13. Tereszko provided Lozza with business cards, pamphlets, a t-shirt and a button all branded with the Northern Nerds logo.

14. Most of Lozza's work consisted of computer repair in Tereszko's home. She had no control over the scheduling of this work or the deadlines for completion. She received work assignments as Tereszko saw fit, and she performed these assignments at Tereszko's place of business/home to which she was given a key.

15. Tereszko gave Lozza general instructions on how to perform the computer repair work. Based on these instructions, Lozza backed up the malfunctioning computer's data and files to a USB hard drive owned by Tereszko, which was then connected to a server computer owned by Tereszko where the backup was stored for long term archiving. The backup would then be tested for functionality, and if it was good, the malfunctioning computer would be "erased", followed by installation of Windows 10 and a transfer of the backed-up files to the client's computer. This work was often done by Lozza using the local area network or USB Hard Drive owned by Tereszko, or by using a USB computer-to-computer transfer cable, also owned by Tereszko.

16. Initially, Tereszko paid Lozza \$40 per repaired computer, which at some point he increased to \$70. Lozza's uncontested evidence is that Tereszko alone determined the level of her compensation regarding the computer repairs. For his part, Tereszko gave no evidence at all on Lozza's compensation for the computer repair work. He testified that he paid for Lozza's cell phone bills, bought her many meals, and even a refrigerator and groceries among other gifts.

17. The only equipment Lozza owned that she used to perform computer repair work was her Apple computer, but only for the few times that the work involved a malfunctioning Apple computer. She also used her own screwdriver from time to time, although her evidence is that she also used Tereszko's screwdrivers, as well as his USB Flash drives, various software, monitors, keyboards, mice, power bars and tables.

18. Lozza also worked on some of the IT projects described in paragraph 7 above. Tereszko drove Lozza to the client locations where the work was to be performed according to Tereszko's instructions and under his supervision. According to her testimony, Tereszko alone decided what Lozza earned for her work on those projects. After the work was completed, Tereszko would advise Lozza the amount that she was permitted to invoice for the work, and Lozza would then submit the invoice and receive the invoiced amount. On one occasion, she unilaterally submitted an invoice for her work on a project for the Town of Lake of Bays, which Tereszko rejected as too high an amount, and refused to pay. Lozza recalled that she received only what Tereszko was willing to pay - \$200.

19. According to Tereszko, on IT project work, he and Lozza would consult one another about what Lozza expected to receive as compensation, and then he would submit an estimate to the client for the entire cost of the project work. What his testimony failed to disclose is whether he ever agreed to pay Lozza what she was expecting, or even whether he considered Lozza's expectations in the calculation of his estimate to the client. He also gave no evidence about what he actually paid Lozza.

20. Lozza testified that she was paid a total of approximately \$24,000 over the course of her engagement with Tereszko. Of that amount, she received \$2000 for her work for the Township of Kearney, \$1000 for her work for the Township of Perry, and \$200 for the work

she did for the Town of Lake of Bays. Lozza did not work on any public holidays except Family Day in February 2017.

21. Lozza attended Sheridan College in January 2018 to study to become a paralegal. The only work offered by Tereszko to Lozza in 2018 was with respect to the Lake of Bays project in November and December, described above, for which Lozza received \$200. She did not work for Tereszko at any time before that in 2018, or at any time afterward.

22. On August 13, 2018, in phone text exchange, Tereszko upbraided Lozza for having asked clients of his for letters of reference. He told Lozza that if she wanted a letter of reference, she should ask only him. That led to the following exchange:

Lozza: Wow ok I didn't know people were that touchy

Tereszko: It's not a matter of touchy, it's just a matter of professionalism. Letters of reference should come from your employers. If you need one you should have approached me.

Lozza: Sorry, thought I wasn't an employee but an independent contractor and it was government job, clerks aren't usually assholes

Tereszko: You were employed as an independent contractor to Northern Nerds. Let's not get pedantic Anyways I am understanding that you need a letter of reference?

Lozza: Yeah I just wanted to impress this guy with a government letter Wasn't expecting such a hot reaction

23. Subsequently, Tereszko did provide Lozza with a letter of reference in which he referred to himself as her "direct manager".

24. It would appear that once Lozza's involvement in the Lake of Bays project ended in or around November or December 2018, there was no further contact between her and Tereszko until the end of May 2019.

25. On May 27, 2019, Lozza sent what can only be described as a vitriolic letter via her Sheridan College e-mail address to Tereszko in which, quite apart from challenging her status as an independent contractor and claiming that she was subject to discrimination and

harassment at the Lake of Bays project, Lozza accused Tereszko of fraudulent misrepresentation in his business dealings generally and in his dealings with her specifically, of treating her like a slave, and of committing "surplus labour value theft". Lozza goes on in the letter to characterize Tereszko as a psychopath, a fake, a liar and a cheat. Around the midpoint of the letter, Lozza proposed a "settlement" in which, in exchange for her foregoing claims under the Act, under the *Human Rights Code* and a small claims court action Tereszko would: make Employment Insurance and Canada Pension Plan deductions in respect of Lozza's earnings in 2016 and 2017; provide her T-4 slips for 2016 and 2017; pay her vacation pay on earnings in 2016 and 2017; and pay her \$5400 for injury to dignity, feelings and self-respect. Among further details, Lozza claimed in the letter that her employment with Tereszko ended in January 2018 (when she went to College), and that her status vis-à-vis Tereszko thereafter – in November and December 2018 – more closely resembled that of an independent contractor because she used her own tools for that work and "didn't let you [Tereszko] boss me around."

26. At the conclusion of her letter, Lozza warned Tereszko that he could not hide from her litigation, and that he ought to think about her offer to settle. She told him that she was in the process of making a claim to the Ministry of Labour, and that unless he immediately provided a down payment of \$600 of the \$5400 she was seeking as damages, she would make her claim on June 3, 2019.

27. Tereszko testified that he felt the demand from Lozza was harassment and extortion¹, a blatant attempt to obtain money from him. He called the Ontario Provincial Police ("OPP") and disclosed the content of Lozza's letter. He indicated in his testimony that he was aware at the time that Lozza had ongoing dealings with the police (which, in fact, was corroborated in Lozza's evidence). On May 28, 2019, one day after Tereszko received Lozza's demand letter, OPP

¹ The relevant provisions of section 346 of the *Criminal Code*, dealing with extortion, read:

346 (1) Every one commits extortion who, without reasonable justification or excuse and with intent to obtain anything, by threats, accusations, menaces or violence induces or attempts to induce any person, whether or not he is the person threatened, accused or menaced or to whom violence is shown, to do anything or cause anything to be done.

...

(2) A threat to institute civil proceedings is not a threat for the purposes of this section.

Constable Trownson ("Trownson") filled out an Occurrence Summary. The Occurrence Summary states that Lozza was "to be spoken to."

28. On May 29, 2019, Lozza discovered that her Sheridan College e-mail password did not work. She went to the College's IT department and learned that her e-mail account had been suspended. She suspected Tereszko had something to do with it. She was directed to the head of security, Joshua Fortier ("Fortier"), and had a discussion with him. In an e-mail to Lozza on June 5, 2019, Fortier inadvertently revealed that Northern Nerds had alerted Sheridan College about Lozza's use of Sheridan's e-mail. However, it would appear that no further action was taken by Sheridan College concerning that issue.

29. Lozza contacted Tereszko on May 29, 2019, probably after her visit to the Sheridan College IT Department and her chat with Fortier, this time using her Outlook e-mail address, and advised Tereszko that her previous offer to settle was rescinded. Within the hour, Tereszko replied, advising Lozza that, on the instructions of his legal counsel, she was not to contact him, his team members or his clients by any means, otherwise he would treat further communication as harassment and report it "to the appropriate authorities".

30. On June 9, 2019, Lozza received an email in the middle of the night from Constable Trownson asking Lozza to provide her with a phone number by which the Constable could contact her to discuss an urgent matter (which, though not identified in the email, turned out to be Lozza's letter of May 27, 2019 to Tereszko). Several hours later, Lozza told Trownson she had nothing to say. Trownson persisted in demanding a phone number, to which Lozza responded by saying she did not wish to be harassed and would remain silent. Trownson replied with a warning that Lozza was not to contact Tereszko or anyone at Northern Nerds, otherwise she would be charged with criminal harassment².

² The relevant provisions of section 264 of the *Criminal Code*, dealing with criminal harassment, read:

264 (1) No person shall, without lawful authority and knowing that another person is harassed or recklessly as to whether the other person is harassed, engage in conduct referred to in subsection (2) that causes that other person reasonably, in all the circumstances, to fear for their safety or the safety of anyone known to them.

(2) The conduct mentioned in subsection (1) consists of

(a) repeatedly following from place to place the other person or anyone known to them;

31. Lozza filed and delivered her application for review in this matter on September 19, 2019. Although it did not emerge directly from the testimony, in all probability, Tereszko complained to the police when he received the application for review, because on September 20, 2019, Trownson emailed Lozza indicating that the Constable would be seeking an arrest warrant against Lozza. An arrest warrant was subsequently obtained.

32. Lozza then contacted more senior representatives of the OPP, neither of whom were prepared to take any steps to revoke the arrest warrant. Consequently, Lozza voluntarily turned herself in to the OPP and was charged. However, according to Lozza, the Crown Attorney's office dropped the charge against her, and the criminal proceeding against her no longer exists. In his testimony, Tereszko testified that the criminal matter is still open, and has not been concluded. Furthermore, in a letter dated July 2, 2020 in which he sought an adjournment of the July 8, 2020 hearing for various reasons and complained about the failure of Lozza to provide him with relevant documents in this proceeding, Tereszko indicated that he was going to send the police a copy of his letter as further proof of Lozza's alleged harassment and extortion attempt.

Analysis and Conclusions

33. The first issue is: was Lozza an independent contractor?

34. In *Warren v. 2006515 Ontario Inc.*, 2005 CanLII 1757 (ON LRB) the Board made the following observations:

37. The test to be applied in determining whether an individual is an employee or an independent contractor at

(b) repeatedly communicating with, either directly or indirectly, the other person or anyone known to them;

(c) besetting or watching the dwelling-house, or place where the other person, or anyone known to them, resides, works, carries on business or happens to be; or

(d) engaging in threatening conduct directed at the other person or any member of their family.

(3) Every person who contravenes this section is guilty of

(a) an indictable offence and is liable to imprisonment for a term not exceeding ten years; or

(b) an offence punishable on summary conviction.

...

common law was recently reviewed by the Supreme Court of Canada in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.* 2001 SCC 59 (CanLII), [2001] 2 S.C.R. 983. The Court reviewed the various tests which have been articulated at common law over time: the "control test"; the "fourfold test"; and the "organization test" or "integration test". The Court noted the difficulties which have emerged from the application of each of these tests. Of note, with respect to the "organization test", the Court referred favourably to the following statement by MacGuigan J.A. in *Wiebe Door Services Ltd. v. M.N.R.*, 1986 CanLII 4771 (FCA), [1986] 3 F.C. 553:

Of course, the organization test of Lord Denning and others produces entirely acceptable results when properly applied, that is, when the question of organization or integration is approached from the persona of the "employee" and not from that of the "employer," because it is always too easy from the superior perspective of the larger enterprise to assume that every contributing cause is so arranged purely for the convenience of the larger entity. We must keep in mind that it was with respect to the business of the employee that Lord Wright [in *Montreal v. Montreal Locomotive Works Ltd.* 1946 CanLII 353 (UK JCPC), [1947] 1 D.L.R. 161] addressed the question "Whose business is it?" [Emphasis added [by the Supreme Court of Canada].]

38. The Court concluded (at paragraph 46) that: "there is no conclusive test which can be universally applied to determine whether a person is an employee or an independent contractor". The Court continued, however, as follows:

¶ 47 Although there is no universal test to determine whether a person is an employee or an independent contractor, I agree with MacGuigan J.A. that a persuasive approach to the issue is that taken by Cooke J. in *Market Investigations*, supra [*Market Investigations Ltd. v. Minister of Social Security* [1968] 3 All E.R. 732]. The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will

always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks.

¶ 48 It bears repeating that the above factors constitute a non-exhaustive list, and there is no set formula as to their application. The relative weight of each will depend on the particular facts and circumstances of the case.

39. Finally, it is important to note that whether or not an individual is an employee or an independent contractor is a question of law to be determined after consideration of all of the relevant factors. The intention of the parties is relevant only to the extent that it is reflected in the actual arrangements they have made with each other in structuring their relationship. Put another way, the parties cannot by their "agreement" render the relationship of an employee an independent contractor or vice versa: see for example *Greypoint Properties Inc.* [2000] OLRB Rep. May/June 479 at paragraph 15.

35. The evidence in this matter falls well short of establishing that Lozza was in business for herself. Although the workplace parties entered into the Independent Contractors Agreement which expressly described Lozza as an independent contractor responsible for her own expenses and statutory remittances, that does not reflect the reality of the relationship. Lozza had no business of her own. Apart from using her own laptop computer to do some work for Tereszko, she worked out of his place of business, used his equipment, took direction from him, received assignments as Tereszko saw fit, had no say in any aspect of her remuneration (and was rebuffed when she tried to put her own value on the Lake of Bays work), worked exclusively for Tereszko and his clients, had no other clients of her own, hired no helpers, had no chance to earn a profit and took no risk of loss, and used Tereszko's Northern Nerds promotional materials. Quite simply, she was an employee, entirely and exclusively dependent on Tereszko to earn a living. The notion that Lozza was an independent contractor, even when she made that claim in the latter stages of her employment, is fanciful, a completely artificial construct, though it might have served the parties' interests. Perhaps there is no better illustration of this than the exchange between Lozza and Tereszko

concerning her attempt to get one of Tereszko's clients to provide her a reference. Clearly, Tereszko viewed the relationship as one of employment in that exchange even though he attempted to characterize it differently. Moreover, he referred to himself as Lozza's manager in the subsequent reference letter he composed.

36. I find that Lozza was an employee at all times during her association with Tereszko. I further find that Tereszko violated subsection 5(1) of the Act by treating Lozza as if she were not an employee.

37. The next issue is, what if anything was Lozza denied that she would otherwise have been entitled to under the Act. For one thing, she was owed vacation pay.

38. The vacation pay issue is not difficult. Lozza received no vacation pay, and her uncontradicted testimony is that she earned approximately \$24,000 in wages from Tereszko over the course of her entire employment. Therefore, pursuant to paragraph (a) of section 35.2, she is entitled to an order of four per cent of that figure, or \$960.

39. The public holiday pay issue is more complex. Lozza was a part-time employee with no particular fixed schedule. She worked when Tereszko had work for her, mainly repairing individuals' computers. There was no evidence led concerning any amount of wages earned in any particular period of Lozza's employment. Section 24 of the Act specifies that the calculation of holiday pay is the total amount of regular wages earned and vacation pay payable to the employee in the four work weeks before the work week in which the public holiday occurred, divided by 20. Neither Lozza nor Tereszko provided any information that would enable the Board to make that calculation.

40. I turn to the claim for termination pay. If Lozza is entitled to termination pay at all, it would be the equivalent of two weeks' wages because, regardless of when she may have been terminated, it was after one year of employment but before she reached the three-year threshold: see paragraph (b) of section 57. The Board might be able to approximate the value of two weeks' wages if it could ascertain the length of employment over which Lozza was paid \$24,000.

41. Did Tereszko terminate Lozza's employment? Lozza attended College starting in January 2018. She performed no work for Tereszko from that point forward, until November or December 2018 when she was engaged to assist Tereszko on the Lake of Bays project. My view of the matter is that Lozza quit her employment as of the end of 2017 and was rehired by Tereszko in November or December 2018. She then returned to College again, which again I find to be consistent with a resignation. She is therefore not entitled to termination pay because Tereszko did not terminate her employment.

42. Aside from Lozza's claim that she was the subject of a reprisal and is entitled to compensation as a result, the remainder of her requested remedial relief – directing Tereszko to make Employment Insurance and Canada Pension Plan deductions from her wages – is not within the Board's jurisdiction under the Act to order.

43. I turn now to the last issue. Did Tereszko make reprisals against Lozza because she exercised her right to demand compliance with the Act?

44. Section 74 reads:

74 (1) No employer or person acting on behalf of an employer shall intimidate, dismiss or otherwise penalize an employee or threaten to do so,

(a) because the employee,

(i) asks the employer to comply with this Act and the regulations,

(ii) makes inquiries about his or her rights under this Act,

(iii) files a complaint with the Ministry under this Act,

(iv) exercises or attempts to exercise a right under this Act,

(v) gives information to an employment standards officer,

(v.1) makes inquiries about the rate paid to another employee for the purpose of determining or

assisting another person in determining whether an employer is complying with Part XII (Equal Pay for Equal Work),

(v.2) discloses the employee's rate of pay to another employee for the purpose of determining or assisting another person in determining whether an employer is complying with Part XII (Equal Pay for Equal Work),

(vi) testifies or is required to testify or otherwise participates or is going to participate in a proceeding under this Act,

(vii) participates in proceedings respecting a by-law or proposed by-law under section 4 of the Retail Business Holidays Act,

(viii) is or will become eligible to take a leave, intends to take a leave or takes a leave under Part XIV; or

(b) because the employer is or may be required, because of a court order or garnishment, to pay to a third party an amount owing by the employer to the employee.

Onus of proof

(2) Subject to subsection 122 (4), in any proceeding under this Act, the burden of proof that an employer did not contravene a provision set out in this section lies upon the employer.

45. Section 1 of the Act defines "employee". That definition includes a person who was an employee. Clearly, in her May 27, 2019 correspondence to Tereszko, Lozza, who I have found was an employee within the meaning of the Act, was bluntly and aggressively asking her former employer to comply with the Act. Tereszko's reaction was that Lozza was engaging in harassment and extortion, and he reported it to both Sheridan College and to the police. This resulted in Lozza being spoken to by the head of security, although nothing further developed there. However, the police officer assigned to Tereszko's complaint made two attempts to speak to Lozza. And after she filed the application for review a few months later, the police officer treated the matter as a case of criminal harassment for which an arrest warrant was obtained, and to which Lozza reacted by turning herself in to face a criminal charge. Tereszko seems to be of the belief

that the matter is still ongoing. However, Lozza is in a better position to know the status of the case, and based on her evidence, I find that the charge was ultimately dropped by the Crown Attorney's office. That being said, this entire episode must have been extremely upsetting to Lozza.

46. Subsection 74(2) of the Act places the burden of proof on Tereszko to show that he did not contravene any provision of section 74. I am not satisfied that he met that burden in this proceeding. His evidence demonstrates that he was deeply insulted and offended by what he saw as a shakedown by Lozza - who up until that point he had considered a talented technician, wonderful person and friend - to obtain money to which he felt she was not lawfully entitled. His reaction was to notify Sheridan College and the OPP. He knew at the time of Lozza's tense relationship with the OPP, and of course he knew that Lozza was in the midst of her studies at Sheridan to obtain accreditation as a paralegal. While he may also have felt that Lozza was engaging in criminal and otherwise inappropriate conduct, the overall impression I took from his evidence was that he felt betrayed. He lashed out from a sense of that betrayal, which included Lozza's assertion that her status as an independent contractor was a fraud perpetrated by Tereszko, for which she deserved compensation. He breached subsection 74(1)(a)(i) by attempting to penalize Lozza by reporting her demand letter to the College and to the OPP. He also penalized Lozza contrary to subsection 74(1)(a)(vi) by reporting the filing of the application for review to the OPP. It may be that Tereszko also believed that Lozza's conduct in 2019 amounted to a breach of criminal law. Were I persuaded that that was his only reason for reporting Lozza to the two institutional entities to whose authority Lozza was subject, I might have arrived at a different result on this issue. However, I am not inclined to that view based on the evidence before me. Whatever other motivations Tereszko may have had for intervening with Sheridan College and the OPP, I find that he was at least partially driven by a desire to dissuade Lozza from asserting and pursuing her rights under the Act.

47. In my view, an ex-employee who tells her former employer that she wants her entitlements under the Act, and that failing that, she will pursue her claims with the Ministry of Labour (and the Human Rights Commission and the Courts) is acting within the law, even if she does so in an offensive manner. And of course, filing an application for review of a refusal to issue an order to pay is expressly sanctioned by the Act. Neither of Lozza's actions constituted an unlawful threat. Tereszko's reaction was extreme and punitive, particularly his

reporting to the police of Lozza's application for review. No person should have to face arrest and criminal charges for exercising the right to make an application for review before the Board. True, Tereszko did not directly impose those sanctions, but he set the process in motion.

48. The last issue is what, if any compensation, should the Board order to compensate Lozza for the reprisals. In her letter of May 27, 2019, Lozza sought \$5400 from Tereszko for "injury to dignity, feelings and self-respect". That type of damages is often awarded by the Human Rights Tribunal of Ontario when it finds discrimination in employment. The Board's jurisprudence generally refers to "pain and suffering".

49. In *L & L McCaw Holdings Ltd. operating as Canadian Tire v Chun Bao Yin*, 2019 CanLII 64732 (ON LRB), the Board observed:

44. The prohibition on reprisals to protect employees who exercise their rights is particularly important in the statutory scheme. It is well documented and accepted universally that non-union employees in particular, because of inequalities in the power relationship and vulnerability, are extremely reluctant to exercise their rights under this Act because of the fear of reprisals, precisely like the reprisal in this case. The importance of deterring and dealing with reprisals effectively was underscored in *Sense Appeal Brands Inc. (Sense Appeal Coffee Roasters)*, 2015 CanLII 49516 (ON LRB):

20. Enforcement of the web of employment standards inserted legislatively into the employer/employee contractual relationship depends principally upon employee driven complaints. Given the command/obedience framework upon which the employment relationship is constructed, it is only too easy for an employer to undermine the enforcement of ESA [Employment Standards Act, 2000, as amended] standards by way of an employee complaint: it need simply threaten the security of employment of the complaining worker to forestall the latter's filing and pursuit of a complaint.

21. The very integrity of the ESA is under assault in the case of employer reprisal against an employee for seeking its enforcement; and if left unaddressed by the state, such reprisal would

eventually reduce the statute to an enactment 'writ on water'. For the mere threat of such reprisal, much less its actual exercise, goes beyond simple interference with a statutory right: it destabilizes a pillar of our constitutional order — the rule of law. Given the negative impact of employer reprisals on the legislative scheme, the legislature not only declares them to be violative of the ESA, but in addition places upon the employer the burden of establishing that it has not engaged in such reprisal misconduct when a worker so alleges. By the same token, it provides as a possible remedy, the reinstatement of an employee dismissed by way of reprisal — a remedy unknown at common law. When ordered, such reinstatement acts generally as a powerful disincentive to engage in reprisal misconduct [footnotes omitted].

50. Lozza led no evidence about the effect on her of Tereszko's reprisals. She appears to have dealt effectively with Sheridan College over the issue of her use of the College's e-mail system to communicate with Tereszko, and nothing more came of that. The evidence further suggests that she was not intimidated much by Constable Trownson. However, Lozza was ultimately charged with an offence, and faced the possibility of a trial and the sanction of a court of law. That is a serious matter, and Tereszko's unjustified complaint to the police contributed significantly to the situation. In my view, in all the circumstances, and particularly for reasons of deterrence, Tereszko should pay Lozza \$2500 for pain and suffering on account of the reprisals.

51. For all the above reasons, the application is allowed. Pursuant to subsection 199(7)(b) of the Act, the Board orders Tereszko to pay to the Director of Employment Standards in trust a total of \$3460 comprising \$960 in vacation pay and \$2500 for damages for pain and suffering. If Tereszko fails to pay the entire amount in trust by September 20, 2020, the Board orders that he also pay into trust administrative costs of \$346.

"Patrick Kelly"
for the Board