



FORM 14A
Courts of Justice Act

Court File no.

Electronically issued : 20-Apr-2022
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Toronto

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

WANH PORTER

Plaintiff

-and-

NORTH YORK GENERAL HOSPITAL

Defendant

STATEMENT OF CLAIM

TO THE DEFENDANT:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service in this court office, **WITHIN TWENTY DAYS** after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

IF YOU PAY THE PLAINTIFF'S CLAIM, and \$3,500.00 for costs, within the time for serving and filing your statement of defence you may move to have this proceeding dismissed by the court. If you believe the amount claimed for costs is excessive, you may pay the plaintiff's claim and \$400 for costs and have the costs assessed by the court.

TAKE NOTICE: THIS ACTION WILL AUTOMATICALLY BE DISMISSED if it has not been set down for trial or terminated by any means within five years after the action was commenced unless otherwise ordered by the court.

Date March _____, 2022

Issued by _____
Local Registrar

Address of
Court Office Toronto Region
361 University Avenue
Toronto, ON
M5G 1T3

CLAIM

1. The Plaintiff, Ms. Wanh Porter claims against the Defendant, North York General Hospital the following relief:
 - a. A Declaration that Ms. Porter was wrongfully terminated by North York General Hospital;
 - b. General damages of \$190,000, representing twenty-four (24) months pay in lieu of notice, including salary and matching pension contributions;
 - c. Discrimination Damages pursuant to section 46.1(1) of the *Ontario Human Rights Code* in the amount of \$25,000 for Creed-based discrimination;

- d. Moral damages in the amount of \$25,000 for mental distress caused by the manner in which Ms. Porter was terminated;
- e. Punitive damages in the amount of \$50,000;
- f. Compensation for out-of-pocket expenses arising from Ms. Porter's efforts to mitigate her loss and injury by seeking alternative employment following her wrongful dismissal in an amount to be proved at trial;
- g. Pre- and post-judgement interest pursuant to the *Courts of Justice Act*;
- h. Costs of this action on a substantial indemnity scale; together with Harmonized Sales Tax payable pursuant to the *Excise Act*; and
- i. Such further and other relief as counsel may advise and as this Honourable Court deems just and equitable.

The Parties

2. The Plaintiff, Ms. Wanh Porter resides in North York, Ontario, and was previously employed by the Defendant, North York General Hospital. She is married with two children.
3. Ms. Porter was born in the country of Laos. She escaped the violence and tyranny of Communism in Laos at the age of three, fleeing to Canada as a refugee with relatives. Her family had been sponsored by a Christian church to immigrate to Canada.
4. Ms. Porter grew up actively attending a Baptist church. She accepted Jesus Christ as her Lord and Saviour at the age of 16 and her Christian faith has been the cornerstone of her entire adult life.

5. When Ms. Porter graduated from her Occupational Therapy program, her dream job was to be in a hospital working in the Neonatal Intensive Care Unit, but there were no job openings at the time. She worked in private practice for approximately two years. One day, an opening came up at North York General Hospital offering the job position that Ms. Porter had wanted and was waiting for. She prayed about the job and the interview.
6. Ms. Porter became an employee of North York General Hospital as an Occupational Therapist in 2004. She remained in the Occupational Therapist position for the duration of her nearly two decades of employment with the Hospital. She settled down with her husband in North York and organized much of her life around her employment.
7. Ms. Porter faithfully and diligently performed her duties on behalf of North York General Hospital, and throughout her employment, Ms. Porter proved herself to be a valuable and reliable employee. Her job, her colleagues, and those she cared for meant a great deal to her.
8. Ms. Porter's duties included but were not limited to:
 - a. Providing comprehensive paediatric consultation, assessment, interventions, follow-up and complex feeding plans for newborns or infants with medical complexity, oral aversion, prematurity, and/or genetic anomalies;
 - b. Conducting bedside clinical feeding evaluation to identify, manage and address feeding and swallowing concerns, and assessing and treating orthopedic and musculoskeletal conditions that may impair function;
 - c. Working in close collaboration with families and other members of interdisciplinary healthcare teams including nurses, doctors, social workers, dietitians, pharmacists and lactation consultants to provide comprehensive patient care plans;

- d. Providing education and training to colleagues, families, and community professionals on a variety of feeding, oral motor and swallowing issues as well as strategies that can help foster and promote all areas of infant and child development;
 - e. Consulting with other service providers to ensure continuity of care when transferring between institutions and at discharge; and
 - f. Serving as an expert resource for staff, students, and other healthcare providers related to newborn developmental therapy.
9. Ms. Porter's employment with the Hospital continued unabated until she was put on unpaid leave, without her consent, on November 9, 2021, and terminated on November 30, 2021, allegedly for just cause.
10. The Defendant, North York General Hospital (the "Hospital") is a public hospital in Toronto. It is an "academic" hospital that offers a wide range of acute care, ambulatory and long-term care services across multiple sites.

The Hospital's COVID Vaccine Mandate

11. On April 24, 2021, a COVID update email was sent to all Hospital staff advising that the Hospital was going to introduce a number of programs to further enhance the "safety" and "wellbeing" of patients and residents. The Hospital strongly recommended that all employees who work regularly at hospital sites receive the COVID-19 vaccine unless it was medically contraindicated.
12. The Hospital further stated that it would be introducing a COVID-19 Immunization Policy. The email outlined what this meant for staff. It stated that all employees, physicians, learners

and volunteers who were eligible to receive the COVID vaccine must take one of three possible steps no later than May 31, 2021. Those three steps were:

- a. Receive the required doses of the COVID-19 vaccines and provide proof thereof; or
- b. Submit a medical certificate from a qualified specialist confirming that the vaccine is medically contraindicated; or
- c. If COVID-19 vaccination is declined (and no certificate confirming medical contraindication is provided), take an e-learning module about the COVID-19 vaccines.

13. Ms. Porter completed the third step the following week, at or near the start of May 2021.

14. The same email described above was also sent to Ms. Porter on May 6, 2021 by Maja McGuire, of the Hospital's Occupational Health and Safety Department. By then, Ms. Porter had already taken step three by completing the e-learning module regarding the COVID vaccines.

15. On August 25, 2021, an email was sent out to all staff from the Hospital's President and CEO reminding staff that all hospitals, including North York General Hospital, must, pursuant to Chief Medical Officer of Health Directive 6, mandate that all staff submit to regular COVID rapid antigen testing if they do not provide proof of vaccination by September 7, 2021.

16. On August 26, 2021, Ms. Porter received an email from Ms. McGuire stating that she was receiving an email because the Hospital had identified that she completed the COVID vaccine learning module and that if her COVID vaccination "status" changed or she would

like to show proof of COVID vaccination to please submit her documentation by September 1, 2021. The email further stated that if proof of COVID vaccination was not provided, she would be required to submit to the COVID testing program.

17. On September 7, 2021, an email was sent by the Hospital's President and CEO to all staff stating that COVID vaccination was now *mandatory* for all staff, physicians, contractors, volunteers and learners, and that by October 29, 2021, proof of COVID vaccination must be provided. To implement this mandate, the Hospital introduced a new, revised COVID-19 Immunization Policy (the "Policy"). The email went on to explain that exemptions to the mandate would be extended to staff with proof of a medical contraindication, or for other protected grounds under the *Ontario Human Rights Code*.
18. Starting September 8, 2021, the Hospital required testing to be done three times per week by all staff that had not provided proof of full COVID vaccination, such as Ms. Porter. Ms. Porter complied with all COVID testing requirements of the Hospital at all material times.

Denial of Request for Accommodation on the Protected Ground of Creed

19. On September 16, 2021, counsel for Ms. Porter sent the Hospital a letter requesting human rights accommodation regarding the Policy on the protected ground of Creed. Specifically, Ms. Porter explained to the Hospital through counsel that she was unable to receive the COVID vaccines because of her sincere religious beliefs. She requested that she be accommodated by the Hospital in such a manner that she would be permitted to continue working (through, for example, continuing to test twice weekly, which was the required frequency for her part-time position). Ms. Porter thoroughly articulated her beliefs, discharging her onus to satisfy the *Amselem* requirements. She therefore triggered the

Hospital's duty to accommodate on the basis of Creed pursuant to its statutory human rights obligations and the Hospital's own Policy.

20. Ms. Porter's accommodation request was addressed to Mitch Birken, Hospital Vice President and Chief Human Resources Officer. He forwarded the request to Delia Veta-Attard, Hospital Director of Human Resources and Organizational Development.
21. On September 22, 2021, Ms. Veta-Attard responded to Ms. Porter's request by email, asking for a number of items to verify the request for accommodation and stating that only once all material demanded of Ms. Porter was provided would the Hospital assess her request. Specifically, Ms. Veta-Attard stated:

...we would request a letter from your faith leader. In order to clarify we would ask that it speak to your participation and length of membership in the church. We would also ask that you provide us with an explanation of how your beliefs as articulated in the letter from the church's legal counsel manifest in your daily practices. Do they restrict you from any and all medications or medical interventions of any kind or simply the Covid Vaccine? Once we have received your response we will conduct our assessment and review of your request. Please also feel free to provide any additional information that you believe may be of assistance to our review that may not be captured by the above including your own history with the faith.

22. Counsel for Ms. Porter replied that same day, stating that Ms. Veta-Attard's demands and questions were unreasonable, in conflict with the applicable law pursuant to *Amselem*, that Ms. Porter had already provided enough material to trigger the duty to accommodate on the basis of Creed, and that she would be providing no further material.
23. Ms. Veta-Attard replied in turn the next day, September 23, stating that counsel for the Hospital would respond further. A brief call between Ms. Porter's counsel and counsel for the Hospital occurred on or around October 20, 2021, but nothing was resolved.

24. A written response to Ms. Porter's request for accommodation was issued by Ms. Veta-Attard and received by Ms. Porter on October 29, 2021. The Hospital rejected her request for accommodation, stating that:

...it has been determined that your request does not meet the criteria for a creed based accommodation, and has thereby been denied.

25. No reasons for the denial or the "criteria" used in arriving at the denial were provided.

Termination of Ms. Porter

26. On October 29, Ms. Veta-Attard issued a further letter to Ms. Porter declaring that Ms. Porter would be placed by the Hospital on "unpaid leave" as of November 9, 2021 if Ms. Porter did not disclose proof of COVID vaccination to the Hospital by that date. Ms. Veta-Attard further threatened to terminate Ms. Porter with cause on November 30, 2021 if she did not receive the COVID vaccines. Ms. Veta-Attard accused Ms. Porter of "wilful [*sic*] misconduct, refusal to comply with policy and willful neglect of duty".
27. Notwithstanding the coercion she felt and the threat of the loss of her employment income, Ms. Porter did not receive the COVID vaccines due to the depth of her conviction regarding her sincere religious beliefs.
28. The last day Ms. Porter was permitted by the Hospital to work was October 28, 2021.
29. For the month leading up to receiving the notification that her request for a Creed-based accommodation was denied, Ms. Porter felt a multitude of emotions: anxiety, hope, disappointment associated with how long it was taking to receive an answer, and intense uncertainty about her employment and her future. Ms. Porter was overcome with emotion upon reading the denial such that she wept openly. Despite having started to grieve the

potential outcome of losing her job weeks before, her grieving continued and intensified when the potential became a reality. There was little doubt for Ms. Porter that a denial of her request for accommodation was effectively the loss of her job. During her last week of work (October 25-28, 2021), Ms. Porter grieved and cried with a small group of her close friends and colleagues who spent time with her and supported her during that week. Ms. Porter felt robbed of the opportunity to have face to face closure with the rest of her teammates and departments in which she worked and consulted with. After reading the letter denying her request, she sent a “good-bye” closure email to all staff & physicians:

To all of our staff, physicians & nurses:

I wanted to take this opportunity to thank everyone who has contributed to my growth as a clinician, over the past 18 years here at NYGH, serving my community and our patients and families. I couldn't have been blessed with a more rewarding career, one that gave me a mission and purpose everyday, to wake up and make a meaningful impact in the lives of others.

I gave myself permission to wholeheartedly grieve, the potential reality of losing my job a few weeks ago, to prepare me for this moment where I am being placed on a LOA that will be subject to termination of employment. This is not how I envisioned leaving my job and my team. I am so grateful and thankful for the friendships that I've made here over the years, earning the trust and respect of my teammates and for being a valued team member.

The length of my employment here is just 5 months shy of the length of my marriage with Dan. Being together for almost 2 decades and having to say good-bye like this without having the proper closure, face to face, with each of you hurts deeply. I know that some of you may have wanted to know what was happening and how I'm doing. I'm taking every day in stride and continuing to trust in God's guidance and provision for my family. I wanted to take this moment to have closure and to express that this is not what I wanted. Losing my job not only impacts my immediate family but my extended work family and those families who we care for with babies with feeding difficulties.

I had submitted an application for an accommodation that is protected under the Human Rights Legislation and was notified today that it has been denied.

30. In the first week of November 2021, Ms. Porter was overcome with grief and sorrow, knowing that she would not be able to continue doing what she loved and using the gifts she

was blessed with to serve her community. She felt betrayed by the Hospital to which she dedicated herself for so many years. She was shocked that the Hospital would so callously dismiss her, seemingly without a care for her years of dedication and commitment to putting patients and families first in everything she did.

31. On November 30, 2021, Ms. Porter received a letter from Dianne Rice, Clinical Team Manager of NICU and Pediatrics. The letter notified Ms. Porter that her employment with the Hospital had been terminated with cause “for failing to comply with the hospital’s COVID-19 Immunization Policy”.

General Damages: Notice Period

32. The Hospital had no justification for terminating Ms. Porter for cause. First, because it failed to adhere to the Policy and its duty at law to reasonably accommodate Ms. Porter by permitting her to continue working and submitting regular COVID test results twice weekly.
33. Second, because COVID vaccination is not a *bona fide* occupational requirement such that an inability to receive the COVID vaccines, regardless of the reason for said inability, could ever be a ground for termination for cause. Aside from the issue of its discriminatory behaviour toward Ms. Porter, it was not open to the Hospital to terminate Ms. Porter for not receiving the COVID vaccine without pay in lieu of notice.
34. When Ms. Porter was terminated, she had been with the Hospital for almost 19 years, which was nearly her entire career up to that point as an Occupational Therapist. She was good at her job, enjoyed it, and had the respect of her colleagues. She had no plans to ever leave the Hospital.

35. Among other reasons, as a result of her knowledge, her skills and qualifications, her experience, her age, her excellent record of employment throughout her time at the Hospital, her duties and responsibilities generally, and the challenges she is and will continue to encounter in obtaining reasonably comparable and alternative employment, a common law notice period of twenty-four (24) months is appropriate in the circumstances.
36. At her date of termination, Ms. Porter was earning an annual salary of approximately \$88,500. For several years prior to her termination, Ms. Porter had consistently contributed the maximum percentage of her salary permitted to her pension plan, said contributions being matched by the Hospital at the rate of 126%.

Discrimination Damages

37. It is trite law that employers must accommodate employees to the point of undue hardship if employees trigger an employer's duty to accommodate by demonstrating a relevant protected ground is engaged by the employer's conduct or policies. Applied to the circumstances of the case at bar, NYGH has a duty to accommodate employees who are unable to comply with a policy requirement to receive the COVID vaccines as a result of their Creed, Creed being a protected ground in the *Ontario Human Rights Code*.
38. Ms. Porter submitted a detailed request for accommodation to the Hospital that abundantly articulated her sincere religious beliefs. She provided the Hospital with highly detailed explanations of her beliefs, complete with dozens of references to Christianity's religiously authoritative text, the Bible. Ms. Porter discharged her onus to establish that her beliefs are sincerely-held, have a nexus with religion (Christianity), and would be interfered with in a manner that is more than trivial or insubstantial if she received the COVID vaccines (as Ms.

Porter explained, it would be nothing less than a sin). By doing so, Ms. Porter more than satisfied her obligation to establish that her beliefs amount to a Creed protected by the *Ontario Human Rights Code* and therefore triggered the Hospital's duty to accommodate her unless it could demonstrate that doing so would amount to undue hardship.

39. By refusing to grant any form of accommodation regarding the COVID vaccination requirement, such as permitting Ms. Porter to continue working and submitting regular COVID test results, the Hospital discriminated against Ms. Porter on the basis of her Creed.
40. However, the actions of the Hospital involve more than mere discrimination in the form of denying accommodation. It is reprehensible that the Hospital made the invasive and disingenuous demands that it did of Ms. Porter, threatening to not even consider her request for accommodation if the material it demanded was not provided. The Hospital's actions in this regard represent contempt for Ms. Porter's religious beliefs and disdain for her statutory human rights.
41. The refusal or failure to provide reasons for the denial of Ms. Porter's request for accommodation is a yet further manifestation of Creed discrimination against Ms. Porter and disregard by the Hospital of its human rights obligations.
42. The Hospital's inappropriate demands, refusal to accommodate, and lack of provisions of reasons for said denial all caused Ms. Porter intense anguish and she experienced an acute loss of her sense of dignity. She wept and experienced severe anxiety when she received the email from Ms. Veta-Attard containing the questions and demands for letters from third-parties. She wondered how on earth such demands and questions could be lawful, how she could ever satisfy such items, and how whoever would contemptuously demand such things

could ever be expected to respect her human rights. She felt like her beliefs were dismissible with a wave of the hand, like she was less equal because she was a Christian, and that the value of her beliefs was entirely contingent on how valid others considered them to be. She felt humiliated for having disclosed something as immensely personal as her religiously beliefs, so carefully described, only to have them ignored.

43. Ms. Porter therefore claims damages in the amount of \$25,000 to compensate her for these losses and injury to her dignity.

Moral and Punitive Damages

44. Ms. Porter pleads that the Hospital failed to abide by its duty to act honestly, in good faith, and to deal fairly with Ms. Porter, and further pleads the Hospital refused or failed to be open, candid, honest and informative regarding the reasons and circumstances surrounding its refusal to grant her request for accommodation, and its delay in communication of said refusal to her, such refusals or failures constituting actionable independent wrongs.
45. The decision by the Hospital to completely deny her reasonable request for accommodation, contrary to the Policy, was effectively a decision to terminate her job because it immediately resulted in her being unilaterally placed on “unpaid leave”. This “unpaid leave” constituted constructive dismissal. It then led to explicit dismissal a month later.
46. The explicit dismissal was allegedly for just cause stemming from alleged non-compliance with the Policy, but, in reality, the “non-compliance” was on the part of the Hospital, which failed or refused to abide by its own Policy to provide accommodation to employees who could not receive the COVID vaccines for reasons that fall under a protected ground in the *Ontario Human Rights Code*, such as Creed.

47. The Hospital did not assess Ms. Porter's request for accommodation in good faith, as evidenced by the questions and demands for material communicated by Ms. Veta-Attard on September 22, 2021. These questions and demands, reproduced above in paragraph 19, were intentionally designed to frustrate Ms. Porter's request for accommodation, as evidenced by both the substance of what was demanded by Ms. Veta-Attard, and the threat that she would not assess Ms. Porter's request for accommodation until the material was provided. A reasonable person, properly appraised of the circumstances, including the applicable law from *Amselem*, would apprehend that Ms. Veta-Attard's attempt to frustrate Ms. Porter's request for accommodation was a result of bias, that she had no intention of considering the request in good faith, and that she would not even consider granting Ms. Porter's request for accommodation.
48. Further, on November 9, 2021, Ms. Porter discovered that the Hospital had publicly advertised her occupational therapist position 29 days earlier on LinkedIn, which was October 11, 2021. There can be no doubt the position being advertised was Ms. Porter's, as she was the only pediatric occupational therapist at the Hospital, and her position was a part-time permanent position of 0.6 FTE in the NICU—which is exactly what was advertised. No other occupational therapist at the Hospital could fill Ms. Porter's position because it is so specialized.
49. By posting Ms. Porter's position on October 11, the Hospital acted in bad faith and without candor. Such conduct reveals that as of October 11, the Hospital had no intention of accommodating Ms. Porter and every intention of terminating her. Yet, no response communicating the Hospital's refusal to accommodate Ms. Porter was provided to her until October 28. The Hospital delayed at least 17 days in telling Ms. Porter it was rejecting her

request for accommodation and effectively terminating her. During all that time, Ms. Porter was anxiously awaiting a response to her request for accommodation, presuming that the Hospital was considering her request in good faith. When the Hospital finally responded to Ms. Porter's request, six weeks after receiving the request, it did not even bring itself to provide Ms. Porter with any reasons for denying her request, further evidencing bad faith and an unwillingness to be open, honest, and deal fairly with Ms. Porter. A reasonable person, properly appraised of the circumstances described above, would infer this delay was intentional. Such intentional delay is reasonably expected to inflict mental distress.

50. Further still, in her letter of October 29 to Ms. Porter, Ms. Veta-Attard accused Ms. Porter of “wilful misconduct, refusal to comply with policy and willful neglect of duty”, all while knowing that Ms. Porter could not receive the COVID vaccines because of her *sincere* religious beliefs, which she could not violate even to keep her employment precisely because her beliefs are so *sincerely* held. Such aspersions were false, discriminatory, and reasonably expected to inflict mental distress. As Ms. Veta-Attard well knew, Ms. Porter complied with the requirement of the Policy to request accommodation on the basis of Creed and was only “non-compliant” with the Policy because of the Hospitals’ refusal to adhere to the Policy and its obligation at law to either provide reasonable accommodation or demonstrate that doing so would amount to undue hardship.

51. Ms. Veta-Attard went so far as to disingenuously and callously state that Ms. Porter had a “choice” to receive the COVID vaccines, as if adherence to her sincere religious beliefs was a mere “choice”. Or as if Ms. Porter was casually “choosing” to lose her job, which was of central importance to Ms. Porter both because of the income and the meaning that it

provided to her. To say such a thing is to mock Ms. Porter and mock the concept of free choice itself.

52. The egregious manner in which Ms. Porter was discriminated against, misled, and terminated resulted and continues to result in mental distress through emotional and psychological harm including, but not limited to, humiliation; embarrassment; damage to her self-respect, self-esteem and self-worth; stress; strain on her personal relationships with her immediate family; anxiety; and other symptoms, all of which were reasonably foreseeable by the Hospital when it terminated Ms. Porter in the manner that it did. She therefore claims *Wallace/Honda*, or moral damages in a compensatory amount of \$25,000.
53. The Hospital's discriminatory and coercive behaviour also cries out for a punitive damages award to denounce and deter such outrageous and cruel treatment of its employees. Ms. Porter submits \$50,000 in punitive damages is a just amount in the circumstances.

Mitigation

54. Since October 30, 2021, Ms. Porter has made faithful and diligent efforts to find comparable employment to mitigate her losses. Unsurprisingly, those efforts have been dramatically hindered by the fact that almost all occupational therapy positions at a hospital or other public facility requires new hires to be "fully vaccinated" with COVID vaccines.

Reliance on Statutes and Regulations

55. *Excise Tax Act*, R.S.C., 1985, c. E-15
56. *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194; and
57. *Courts of Justice Act*, R.S.O. 1990, c. C.43

Appropriate Venue

58. The Plaintiff proposes this matter be tried in Toronto.

March 16, 2022

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