



HUMAN RIGHTS TRIBUNAL OF ONTARIO

BETWEEN:

Elsa Torrejon

Applicant

-and-

1147335 Ontario Inc. O/A Weston Property Management

Respondent

DECISION ON REMEDY

Adjudicator: Naomi Overend
Date: July 12, 2010
File Number: 2009-01682-I
Citation: 2010 HRTO 1513
Indexed as: **Torrejon v. 1147335 Ontario**

APPEARANCES

Elsa Torrejon, Applicant)
)
) Michelle Mulgrave, Counsel

1147335 Ontario Inc. Respondent)
)
) Alistair Trent, Representative

INTRODUCTION

[1] This Decision deals with the issue of remedy on the Application filed by the applicant on March 24, 2009, under s. 34 of the *Human Rights Code*, R.S.O.1990, c. H.19, as amended, (the “Code”). On April 29, 2010, I issued a Decision, 2010 HRTO 934 (CanLII), finding that the applicant was discriminated against on the basis of disability when she was terminated from her job with the respondent company after disclosing to her supervisors that she required an indefinite leave to receive treatment for breast cancer, which had been recently diagnosed.

[2] The hearing in this matter was bifurcated as the applicant’s psychiatrist, who was slated to testify on the impact of the termination on the applicant, was unavailable on the scheduled hearing dates. It was agreed that, in the event that it was necessary to proceed with the hearing on the issue of remedy, this would be conducted by teleconference. In the end, the respondent was content to allow the psychiatrist’s report to be filed without the necessity of calling the witness, and the matter proceeded by way of oral submissions only.

SUMMARY OF FINDINGS RELEVANT TO THE ISSUE OF REMEDY

[3] The applicant worked as a leasing agent for the respondent property management company. Following tests in late 2008, she was advised of a diagnosis of breast cancer on January 30, 2009. Initially, she was scheduled to have surgery on February 13, 2009, and advised her employer that she would work until the day before.

[4] Shortly thereafter she decided that, instead of proceeding with the surgery, she would get a second opinion. To that end, she arranged to see a specialist at the Princess Margaret Hospital. She then advised her employer that she would continue working until she had met with and commenced a treatment

plan with this new specialist. As it turned out, she commenced treatment on March 18, 2009.

[5] When the applicant first advised her supervisors, Doug and Geri McDonald of her diagnosis and plan, she was treated sympathetically. She was asked to prepare a letter indicating when she would be leaving, so that it could be forwarded to head office to prepare the necessary paperwork. When she advised Doug McDonald of her change in plans, however, he insisted that she had resigned her position and that she would be not welcome at work past her initial departure date.

[6] The applicant wrote a letter to Doug McDonald setting out the requirements of the *Code* to accommodate workers with disabilities, which she handed to him on February 11, 2009. Mr. McDonald testified that he did not read that letter at the time, and only looked at it two days before the hearing of this matter in March 2010. He also testified that he failed to educate himself on the provisions of the *Code*.

[7] The applicant attempted to return to work on February 13, 2009, but was met by Geri McDonald, who handed her an envelope containing her last paycheque, her T4 and her Record of Employment. Ms McDonald told the applicant that she had to leave and that she would no longer be allowed on the premises.

[8] The issue of whether the applicant had resigned her position or asked to go on a leave of absence was in issue at the hearing and I made a finding that the applicant had not resigned her position. It was also argued on behalf of the respondent at the hearing that the employer had no obligation to accommodate any period of a disability-related leave, given the provisions of the *Employment Standards Act* S.O. 2000, c. 41. I made a finding that the respondent was incorrect, and that it had a duty to make an individualized assessment of whether it could accommodate the applicant, which it failed to do. The respondent did not

lead evidence at the hearing that it could not accommodate the applicant's absence.

[9] The applicant was very upset about the termination of her employment. She contacted a reporter at the Toronto Sun, who wrote a story about her situation. This resulted in further media attention. She also sought out the assistance of a psychiatrist to deal with the anxiety and depression she experienced in the wake of her diagnosis and the termination of her employment.

[10] The applicant led evidence that she has been unable to work from the time that she started treatment in March 2009. She will be undergoing tests at the end of this month that will determine whether she is able to return to work and under what conditions.

[11] The respondent's witnesses testified that, except for a brief period in the spring of 2009, the respondent did not fill the applicant's position, and continues to this day to operate without a leasing agent. Although the reason for the downturn was in dispute (as was the timing), there was no evidence led to contradict the respondent's assertion that it experienced a downturn in its business or that it has not filled the applicant's position.

REMEDY

[12] The Tribunal's remedial powers are set out in section 45.2 of the Code:

45.2 On an application under section 34, the Tribunal may make one or more of the following orders if the Tribunal determines that a party to the application has infringed a right under Part I of another party to the application:

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

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

3. An order directing any party to the application to do anything that, in the opinion of the Tribunal, the party out to do to promote compliance with this Act.

Wage Loss

[13] The applicant is claiming wage loss for the period from when her employment was terminated (February 13, 2009) until March 17, 2009, the date on which she testified she would have stopped working in order to start her treatment. All parties agree that this is an appropriate period in light of my findings. The applicant calculated the amount owing as \$2,640.00 and the respondent did not take issue with that calculation.

[14] The applicant was not eligible to receive benefits or money in lieu of sick time and so no money is owed for the period she has been off work.

Reinstatement and/or Prospective Wage Loss

[15] The applicant is seeking immediate reinstatement to her position as leasing agent at any of the respondent's Toronto locations, with her remaining on leave until she is medically cleared to return to work. The applicant also suggests a number of conditions about accommodation and prior training to facilitate her return to work. In the alternative, she seeks 12 months of prospective wages, to assist her in returning to the work world.

[16] As pointed out by counsel to the applicant, the aim of human rights remedial orders is to put applicants, as much as is possible, in the position they would have been but for the discriminatory conduct. This, however, does not assist the applicant in that the respondent testified that it did not replace the

applicant after she left, except for a brief period in the spring of 2009, which was during the period she was unable to work. This assertion was not challenged by the applicant at the hearing.

[17] Moreover, it would appear (there being no evidence to the contrary) that the Weston Road location is, in fact, the only location at which the respondent is operating in Toronto. There was a suggestion that the company may have related corporations managing other buildings in the Toronto area, but no evidence was led on this point and, in any event, these related corporations were not named as parties to this proceeding.

[18] The only evidence I have before me is that the applicant's position has been eliminated and no other alternative position existed in which she would have been placed had her employment not been terminated. That being the case, neither reinstatement nor a prospective wage loss component is appropriate.

Monetary Compensation for Injury to Dignity, Feelings and Self-Respect

[19] The applicant testified that she was very upset about the loss of her job, and the manner in which it came about. She testified that as a single mother of two children, then aged 12 and 17, she was extremely worried about her finances and being able to work during the time she was awaiting the start of her treatment would have helped her cope both financially and emotionally. Moreover, she had immigrated to Canada from Peru in 1986 and most of her family was back in Peru so she did not have the support network of family at this difficult time.

[20] The applicant was sufficiently distraught in March 2009 that she sought out and was treated by Dr. Marlinda Friere, a psychiatrist who she continued to see over the year between the diagnosis and the hearing. In her report to this Tribunal, Dr. Freire writes:

At the time of her diagnosis and having been told the tumor was an aggressive type, Ms. Torrejon described her state of shock... but she went into survival mode and focussed on obtaining a second opinion and work. *Ms. Torrejon has a strong work ethic and she realized that by continuing to work, she did not only secure her finances but also distracted her from facing the reality of the disease. Ms. Torrejon felt devastated when she learned that she could not return to work after she informed her supervisors (“Doug and Gerry”) of her diagnosis and that she had to take time off for chemo and radiotherapy. Ms Torrejon felt she was treated “like a criminal” when ordered out of her office. She spoke of how the same people who had treated her “nicely” before became cold and distant and even refused to accept some of the documentation on her case that she was trying to give them. Ms. Torrejon had to fax this documentation to them instead.*

Ms. Torrejon has talked about the fact that “you can even be kicked when you are already down”. She says that “it’s one thing being given a horrible diagnosis and another to be treated like a dog by the same people who seemed to like you until they [sic] you tell them our are sick”. ... Losing her job meant Ms. Torrejon would be losing her earnings, seek welfare which does not cover the level of basic expenses she has and [sic] an overwhelming sense of loss, lack of control and betrayal with an impact on her overall psycho-emotional functioning. ...

Throughout the time I have seen Ms. Torrejon, she has presented with anxiety and depressive-related symptomatology in response to her diagnosis but also secondary to the response of her administrators (or supervisors) at work. Ms Torrejon is an intelligent, resourceful, capable woman who felt assaulted emotionally/psychologically by the actions of the same people at work from whom she expected an empathic and supportive response at a time of extreme vulnerability. This experience led to further emotional decompensation which affected even further her mood, affect, sleep, attention and concentration, level of energy and general well being. [Emphasis added]

[21] Dr. Friere’s report is consistent with the applicant’s testimony. Moreover, it provides guidance in distinguishing the psychological impact of the diagnosis of breast cancer, for which the respondent is not responsible, from the impact of the termination of her employment in the wake of that diagnosis, for which the respondent is liable.

[22] The applicant seeks \$30,000.00 in compensation for the intangible impact of the respondent's conduct on her. The applicant asserts that her extreme vulnerability at the time of her termination – in particular, her recent diagnosis of breast cancer and the fact that she is single parent who was financially dependent on her income – made the experience of discrimination that much more traumatic. She also submits that the callous manner in which her supervisors treated her, after initially being so supportive, added to her distress.

[23] The respondent argues that given the brief duration of the discriminatory acts, as well as the lack of “intention” to discriminate, that only nominal damages are appropriate. With respect to the latter point, while acknowledging that it is the impact on the applicant rather than the intention of the respondent that is important, the respondent argues that the acts for which it has been found liable flowed from a misunderstanding. In fact, while it is possible that the initial act of asserting that the applicant had resigned her position resulted from a misunderstanding, once the applicant attempted to clarify her position, the respondent's agents (i.e., her supervisors) became entrenched in their position that she could not come back. Once entrenched, their behaviour towards the applicant was insensitive and dismissive.

[24] Each case must be determined on its own merits, but in determining the appropriate range it is sometimes helpful to compare the matter under determination with the fact situation of other cases. In *Maciel v. Fashion Coiffures*, 2009 HRTO 1804 (CanLII), the Tribunal awarded \$15,000 for injury to dignity, feelings and self-respect in a case involving a finding of discrimination on the basis of sex (pregnancy) where the applicant was terminated on her first day of work. In assessing compensation in that case, the Tribunal considered a number of factors including the applicant's vulnerability in coping with an unplanned pregnancy, her youth and her financial dependence on her family, as well as the evidence of her subsequent depression.

[25] In this case, the vulnerability of the applicant was greater, given both her life situation and the dire nature of her diagnosis. Moreover, her depression and anxiety (which are partly rooted in the treatment she received from the respondent) have persisted. In light of these factors, an award of \$20,000.00 is appropriate.

Remedy for Future Compliance

[26] The applicant asks that the respondent be ordered to hire an outside consultant with expertise in human rights to develop a policy on accommodation of persons with disabilities and to embark on training of all staff working for the respondent in Toronto. However, this request was made in the context of the request that the applicant be reinstated, and for the purpose of ensuring that the environment to which she returned was respectful of her human rights.

[27] Despite the fact that the applicant will not be reinstated to her position with the respondent, there is a concern about potential issues with future compliance with respect to other employees. As indicated above, it would appear that the respondent's agents are not only unaware of their obligations under the *Code*, but have done little or nothing about educating themselves on these obligations despite being involved in a human rights proceeding.

[28] The evidence indicates that the respondent's operation in Toronto consists of Geri and Doug McDonald and two administrative staff. Given the size of its operation, it would be appropriate to require the respondent to ensure that its two supervisory employees, Geri McDonald and Doug McDonald, complete the Ontario Human Rights Commission's on-line training "Human Rights 101" (available at www.ohrc.on.ca/hr_101) within 30 days of this Decision. The respondent's representative shall confirm to the Tribunal and the applicant's counsel, in writing, that this aspect of the Order has been complied with, within 45 days of this Decision.

ORDER

[29] I make the following orders:

- 1) The respondent shall pay to the applicant \$2,640.00 minus applicable statutory deductions, as compensation for her loss of employment income;
- 2) The respondent shall pay to the applicant \$20,000.00 as compensation for injury to her dignity, feelings and self-respect;
- 3) The respondent shall pay to the applicant prejudgment interest in accordance with the *Courts of Justice Act*, R.S.O. 1990 c. C.43, on the amount set out in (1) from March 1, 2009;
- 4) The respondent shall pay to the applicant prejudgment interest in accordance with the *Courts of Justice Act*, R.S.O. 1990 c. C.43, on the amount set out in (2) from February 13, 2009;
- 5) The respondent shall pay the applicant post-judgment interest on any accumulated principal and interest, calculated in accordance with section 129 of the *Courts of Justice Act*, R.S.O. 1990 c. C.43, from 30 days after the date of this Decision;
- 6) Within thirty (30) days from the date of this Decision, the respondent shall ensure its employees, Geri McDonald and Doug McDonald complete the Ontario Human Rights Commission's on-line training "Human Rights 101" (available at www.ohrc.on.ca/hr101); and
- 7) Within forty-five (45) days from the date of this Decision the respondent shall have its representative confirm in writing to the Tribunal and the applicant that the training set out in (6) is completed.

Dated at Toronto this 12th day of July, 2010.

"Signed by"

Naomi Overend
Vice-chair