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Indexed as: Pedro v. Morrey Nissan and Grone, 2006 BCHRT 225

IN THE MATTER OF THE *HUMAN RIGHTS CODE*
R.S.B.C. 1996, c. 210 (as amended)

AND IN THE MATTER of a complaint before
the British Columbia Human Rights Tribunal

BETWEEN:

Shannon L. Pedro

COMPLAINANT

AND:

Morrey Nissan of Coquitlam Ltd. and Brad Grone

RESPONDENTS

**REASONS FOR PRELIMINARY DECISION
APPLICATION TO DISMISS**

Tribunal Member:

Lindsay M. Lyster

On behalf of the Complainant:

George Valinho

Counsel for the Respondents:

Michael H. Korbin

Introduction

[1] Shannon Pedro filed a complaint in which, as amended, she alleged that Morrey Nissan of Coquitlam Ltd. and Brad Grone discriminated against her on the basis of sex (pregnancy) in relation to her employment with Morrey Nissan, contrary to s. 13 of the *Human Rights Code*. In essence, Ms. Pedro alleges that the respondents discriminated against her by altering her job duties after she took a medical leave related to her pregnancy.

[2] The respondents deny any discrimination, and filed an application to dismiss, supported by affidavits sworn by Mr. Grone and Chris Plessl. Mr. Grone is Morrey Nissan's Office Manager and was Ms. Pedro's supervisor. Ms. Plessl is Morrey Nissan's Controller. The respondents rely on s. 27(1)(b) – that the acts or omissions alleged do not contravene the *Code*; s. 27(1)(c) – that the complaint has no reasonable prospect of success; and s. 27(1)(d)(ii) – that allowing the complaint to proceed would not further the purposes of the *Code*.

Background Facts

[3] Ms. Pedro worked as an administrative clerk with Morrey Nissan from October 2001 to November 2005. Her job included both processing warranty claims and accounts payable and accounts receivable.

[4] In 2005, Ms. Pedro became pregnant. She was due around April 2006.

[5] The parties agree that on October 6, 2005, Ms. Pedro asked Mr. Grone for a one week vacation from October 10 to 17, which he approved. She explained to him that she wanted to have this time off because she was tired and the stress she was experiencing was not good for her baby.

[6] The parties agree that Ms. Pedro returned to work on October 18, 2005. They also agree that Ms. Pedro expressed concerns with respect to warranty work which had not been done in her absence. They disagree about the precise nature of the concerns which she expressed.

[7] The parties agree that Ms. Pedro, Mr. Grone and Ms. Plessl met at Ms. Pedro's request on October 20, 2005. While they disagree about the details of that meeting, they agree that Ms. Pedro informed Ms. Plessl and Mr. Grone that she needed to take a medical leave because of the stress associated with her workload and its negative effects on her health and that of her baby. The parties agree that there was some discussion about Ms. Pedro's workload, and what would be done to lessen it, both after her return from her upcoming medical leave to the point of her maternity leave, and after her return from maternity leave. They disagree about the precise nature of those discussions, a matter discussed in further detail below, but agree that it involved Ms. Pedro's job being split to reduce her work load.

[8] Ms. Pedro went on medical leave until November 7, 2005. Her complaint centres around what happened on her return. She alleges that on her return, she found someone else sitting at her desk, and that she was, contrary to the parties' earlier agreement, assigned to do all of the warranty work and not accounts payable or accounts receivable.

[9] Ms. Pedro expressed her unhappiness with the arrangements to Mr. Grone and Ms. Plessl. She did not accept their explanations. On November 9, 2005, she quit.

Analysis

[10] In my view, this application is best considered under s. 27(1)(c) of the *Code*. I therefore consider whether the complaint has no reasonable prospect of success. As stated in *Wickham and Wickham v. Mesa Contemporary Folk Art and others*, 2004 BCHRT 134:

The role of the Tribunal, on an application, is not to determine whether the complainant has established a *prima facie* case of discrimination, nor to determine the bona fides of the response. Rather, it is an assessment, based on all of the material before the Tribunal, of whether there is a reasonable prospect the complaint will succeed: *Bell v. Dr. Sherk and others*, 2003 BCHRT 63.

The assessment is not whether there is a mere chance that the complaint will succeed, which would be the lowest threshold a complainant would have to meet. Nor is it that there is a certainty that the complaint will succeed, which would be at the highest threshold a complainant would have to meet. Rather, the Tribunal is assessing whether there is a

reasonable prospect the complaint will succeed based on all the information available to it. (at paras. 11 – 12)

[11] In considering the application of s. 27(1)(c), the materials filed by the parties on this application require some comment. Ms. Pedro cites one of the Tribunal's leading cases on the application of s. 27(1)(c), *Bell v. Dr. Sherk and others*, *supra*, referred to with approval in *Berezoutskata v. British Columbia (Human Rights Tribunal)*, 2006 BCCA 95, at paras. 9 and 27. As stated in the passage from *Bell v. Sherk* quoted by Ms. Pedro:

The Tribunal can only make a decision based on the information which it has. As the Tribunal does not conduct investigations, it is the responsibility of the parties to put before the Tribunal the information which they believe is necessary, and in a form which they consider appropriate, to enable the Tribunal to make decisions under s. 27, and more particularly, s. 27(1)(c). (at para. 25)

[12] The decision continues as follows:

However, it is not helpful to the Tribunal when parties in their submissions summarize what they say the evidence of a witness will be, or provide the Tribunal with the names and phone numbers of witnesses. It is not the Tribunal's role – nor would it be appropriate for the Tribunal – to contact witnesses to obtain statements from them. Similarly, it is not helpful when parties summarize what a document in their possession states. If the parties believe that a signed witness statement or a document is relevant and will assist the Tribunal in determining whether or not there is a reasonable prospect the complaint will succeed, it is their responsibility to put that document in the form they consider appropriate before the Tribunal...

Further, when the Tribunal is considering whether to dismiss a complaint on the basis that there is no reasonable prospect the complaint will succeed, more than the mere assertion that the other party's version of events is untrue is required. In other words, if a respondent, in its application to dismiss the complaint on the basis that there is no reasonable prospect the complaint will succeed, merely asserts that everything the complainant has alleged is untrue, it is unlikely the application will be successful. (at paras. 26 - 27) (emphasis added)

[13] In this case, the respondents provided sworn affidavits from the persons directly involved in the events in issue, Mr. Grone and Ms. Plessl. Ms. Pedro, despite her reliance on *Bell v. Sherk*, responded with mere assertions as to what occurred, unsupported by

sworn evidence. I have taken this into account in assessing the totality of the information before to determine whether the complaint has no reasonable prospect of success.

[14] The real dispute in this case is whether the changes made to Ms. Pedro's job while she was away from work on medical leave were discriminatory. The parties agree that Ms. Pedro had earlier complained about excessive workload and job-related stress, and that they had agreed for her to take a medical leave, following which changes would be made to her job. They further agree that her job would be split in two. What they disagree about is what the precise split would be and when it would occur.

[15] Ms. Pedro complains that the accounts receivable and accounts payable work was taken away from her, and she was required to do the warranty work, when she would have preferred the opposite arrangement. Ms. Pedro also appears to have been extremely unhappy that a new person was hired to perform the accounts payable and accounts receivable work while she was on her medical leave, and that this person was assigned to her desk, while she was moved to a different desk on her return. She submits that the changes were not supposed to occur so quickly, and that they were supposed to occur only shortly before she left for her maternity leave, approximately six months later.

[16] For their part, the respondents submit that all changes were made in a good faith effort to accommodate Ms. Pedro, and were consistent with the concerns which she expressed at their October 20, 2005 meeting. As stated in Mr. Gronc's affidavit:

The Complainant explained that she felt that the accounts payable, accounts receivable and warranty duties amounted to a two person job, and she indicated that she was overworked in performing all of these duties. We discussed the fact that her baby was due in about 6 months time, and that when she was on her maternity leave we would need employees to perform the duties she had been performing. We suggested as a solution to her concerns that her position be reorganized into two jobs, one being processing of warranty claims and the other focussing on accounts payable and receivable, and upon the Complainant's return from the requested medical leave her duties would be supervising and training the two individuals who would perform the two separate jobs until the Complainant's maternity leave ended. We viewed this as a positive solution for all parties, because it would relieve the Complainant from having to perform her full duties, which was causing her stress, and it would enable the Company to have employees trained by her so that they could adequately perform the duties while she was off on maternity leave.

We assured the Complainant that she would retain her position after her maternity leave and that this reorganization of the position was being done to support her. The change to the position was being made solely to accommodate the Complainant's concerns and to support her. If she had not requested changes to her position we would not have made them.

[17] Considering the matter as a whole, I find that Ms. Pedro's complaint has no reasonable prospect of success. I find the following factors particularly relevant in coming to this conclusion.

[18] On her own account, Ms. Pedro was finding her job extremely stressful due to the heavy workload. She expressed concerns to the respondents about the effects of the stress on her health and that of her baby. As a result, she took a vacation, followed by a medical leave. The respondents approved both. This tends to suggest that the respondents were cognizant of their responsibilities to accommodate Ms. Pedro and were prepared to take appropriate steps to fulfil their duty to accommodate.

[19] Further, Ms. Pedro agrees that the respondents assured her following her return to work from her medical leave, that her job was secure. Her complaints that her job was taken away from her by the changes made in her absence are not reasonably supportable on the information before me.

[20] Ms. Pedro agrees that her job was to be split to address her concerns. Her submissions are internally inconsistent as to when the split was to occur: at one point she says it was to happen on her return from her medical leave, and at others she says that it was not supposed to occur until six months later, shortly before she was due to take her maternity leave. She complains about the fact it was split on her return from her medical leave. This position makes no sense, as Ms. Pedro was already experiencing the adverse effects of the stresses associated with her job. She needed to have her workload reduced immediately, not six months later, just before she was to go on maternity leave. In order for that to happen, she needed to be relieved of some portion of her duties.

[21] Ms. Pedro disagrees with the respondents as to what the split was supposed to be, saying that she was to do the accounts payable and accounts receivable and not the warranty work. But as I have already mentioned, the respondents' submissions in this

regard are supported by affidavit evidence, while Ms. Pedro's are not. I have given their respective positions the weight they deserve.

[22] A particular concern of Ms. Pedro's is that she returned to work on November 7, 2005 to find a new person at her desk. The new person had removed her pictures, rearranged the computer terminal to meet her needs, and was in the process of putting a plant on the desk. Ms. Pedro says that she was not given advance notice that she would be moved to a different desk, and took offence at arriving at work to find herself displaced. The respondents have a somewhat different version of events, saying that Mr. Grone and Ms. Plessl met with her first thing to go over the changes made in her absence. Ms. Pedro agrees that she met with them, but only after she found that her desk had been taken over. In my view, little turns on the parties' varying versions of the events of November 7, 2005. It is clear that Ms. Pedro reacted negatively to the changes made in her absence. Her reaction, however, appears to have been disproportionate, and there is no reasonable prospect that she would be able to show that those changes were discriminatory.

[23] Looking at the matter as a whole, there is no reasonable prospect that Ms. Pedro would be able to show that the respondents discriminated against her in making the job changes which they did. Rather, I find that the respondents would be able to demonstrate that they made the changes in question in an effort to accommodate Ms. Pedro's concerns about her workload and the effects which it was having on her health and pregnancy. It is apparent that she was not satisfied with the manner in which the respondents attempted to accommodate her. However, the duty to accommodate requires employers to take reasonable measures, not perfect ones: *Central Okanagan School District No. 23 v. Renaud* (1992), 16 C.H.R.R. D/425 (S.C.C.). It also requires complainants to take reasonable steps to facilitate the search for and implementation of an accommodation. What is reasonable is not necessarily the equivalent of a complainant's preferred or ideal solution.

U.S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

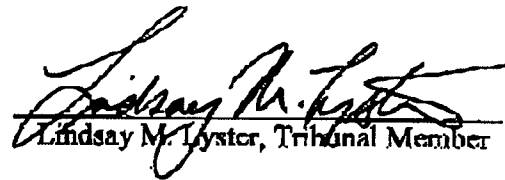
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Conclusion

[24] For these reasons, I dismiss the complaint on the basis that it has no reasonable prospect of success.


Lindsay M. Lyster, Tribunal Member