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2009 BCHRT 95

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

B E T W E E N:

Olga Routkovskaia (Ront)

COMPLAINANT

A N D:

FPI Fireplace Products International Ltd. and Deborah Millichamp

RESPONDENTS

**REASONS FOR PRELIMINARY DECISION
APPLICATION TO DISMISS**

Tribunal Member:

Lindsay M. Lyster

Counsel for the Complainant:

Olga Routkovskaia

Counsel for the Respondents:

Michael Korbin

I INTRODUCTION

[1] Olga Routkovskaia, also known as Olga Ront, filed a complaint alleging that her former employer, FPI Fireplace Products International Ltd., and its Marketing Director, Deborah Millichamp, discriminated against her on the basis of her sex (pregnancy) and family status (single) in her employment, contrary to s. 13 of the *Human Rights Code*.

[2] The respondents deny any discrimination, and apply to dismiss the complaint on the basis that it fails to allege acts or omissions which could contravene the *Code*, has no reasonable prospect of success, or allowing it to proceed would not further the purposes of the *Code*. While ss. 27(1)(b), (c) and (d) of the *Code* are all referred to by the respondents, the thrust of their submissions relates to whether the complaint has no reasonable prospect of success, and should therefore be dismissed under s. 27(1)(c). In support of their application, they include affidavits from Ms. Millichamp and Susan Milne, FPI's Director of Human Resources.

[3] Ms. Routkovskaia responded to the application by way of her own lengthy affidavit.

[4] The respondents replied, including second affidavits from Ms. Millichamp and Ms. Milne, and an initial affidavit from Amanda Hillier, who was FPI's Marketing Manager until she resigned in October 2007.

[5] Ms. Routkovskaia filed sur-reply, in the form of a second lengthy affidavit from herself. The respondents consented to its introduction.

[6] While I do not refer to all of the information contained in the parties' materials in this decision, I have reviewed and considered it all.

II BACKGROUND

[7] Ms. Routkovskaia was employed by FPI as a Marketing Coordinator from June 18, 2007 until the termination of her employment on February 21, 2008.

[8] In August 2007, Ms. Routkovskaia learned that she was pregnant; the pregnancy was unplanned.

August 20, 2007 conversation

[9] On August 20, 2007, shortly after learning of her pregnancy, Ms. Routkovskaia told Ms. Millichamp about it. Ms. Routkovskaia and Ms. Millichamp both agree that such a conversation occurred. Their recollections of it differ.

[10] In her complaint, Ms. Routkovskaia says that she told Ms. Millichamp she was pregnant, and that the pregnancy was unplanned, and she was not sure what she was going to do. She told Ms. Millichamp that she was single, and did not intend to get married, and, if she kept the child, would be a single parent. Ms. Routkovskaia alleges that Ms. Millichamp responded by saying that she should consider her options because being a single parent would be difficult, and would limit her career and advancement opportunities. Ms. Routkovskaia asked for clarification, in response to which Ms. Millichamp told her that management positions require overtime work and travel, which she was sceptical Ms. Routkovskaia could perform as a single parent. Ms. Routkovskaia also alleges that Ms. Millichamp told her about a single woman she knew who ended up going on welfare after maternity leave because it was too difficult to combine work and motherhood.

[11] In her affidavit filed in support of this application, Ms. Millichamp recalls this conversation somewhat differently. She says that Ms. Routkovskaia came into her office in a distraught state, and informed her of her unplanned pregnancy. Ms. Routkovskaia did not know what to do about it. Ms. Millichamp says that Ms. Routkovskaia wanted her counsel, and they had a lengthy conversation. Ms. Millichamp says that she was very supportive, and encouraged Ms. Routkovskaia to do whatever thinking she needed. She did not tell Ms. Routkovskaia she should consider her options because being a single parent was going to be difficult or limit her career advancement opportunities. Ms. Millichamp says that such statements are directly contrary both to her own experience, and to her own views. Further, Ms. Millichamp says that Ms. Routkovskaia asked about management positions at FPI, and in that context she explained that some management positions require overtime and travel, but this was infrequent at FPI. She denies expressing any scepticism about Ms. Routkovskaia's ability to work overtime or travel.

She also denies making the alleged reference to a single mother going on welfare, saying that she does not know such a person.

[12] In her affidavit filed in response to the application, Ms. Routkovskaia denies that she was distraught when she spoke to Ms. Millichamp, saying that she was pleased with the news that she was pregnant, and wanted to share it with someone. Ms. Routkovskaia gives further information about her personal circumstances in support of the assertion in her affidavit that the pregnancy was a good surprise. Ms. Routkovskaia also gives further details about what Ms. Millichamp said to her. In particular, she says that Ms. Millichamp told her that she had three options: abortion, adoption, or keeping the baby, and encouraged her to take time off and to see a counsellor to consider these options.

[13] In her affidavit filed in reply, Ms. Millichamp says that Ms. Routkovskaia was crying and shaking in this conversation. She specifically denies telling Ms. Routkovskaia she had the three options Ms. Routkovskaia described in her affidavit. She agrees that she did provide her with contact information for two counselling resources.

[14] In her affidavit filed in reply, Ms. Milne says that Ms. Millichamp came to her office after this conversation, and told her Ms. Routkovskaia was pregnant and upset because this was not a planned pregnancy. Ms. Milne advised Ms. Millichamp that they should not tell anyone else about Ms. Routkovskaia's news, in order to protect her privacy.

[15] In her affidavit filed in sur-reply, Ms. Routkovskaia essentially reiterated what she had said in her first affidavit about this conversation.

[16] The parties agree that Ms. Routkovskaia did not complain to anyone about this conversation at the time it occurred, or at any time prior to filing her complaint with the Tribunal.

Performance prior to termination

[17] In the application to dismiss, the respondents outline certain performance problems which they say Ms. Routkovskaia had, and which they assert led them to extend her probationary period, and are the reasons her employment was terminated. In her response to the application, Ms. Routkovskaia takes strong issues with these assertions,

saying that no one ever raised any such performance problems with her prior to the termination of her employment. She denies that her probation was extended. These matters are addressed in extensive detail in the parties' materials.

[18] I do not address these issues in detail here, but consider their potential significance in the course of my analysis.

Termination of employment

[19] There is no dispute that Ms. Routkovskaia's employment was terminated on February 21, 2008. On that date, Ms. Routkovskaia met with Ms. Millichamp; Ms. Milne later joined their meeting. At the time, Ms. Routkovskaia was seven and a half months pregnant.

[20] In her complaint, Ms. Routkovskaia alleges that she expected to undergo an employee review with Ms. Millichamp on that date and intended to discuss the date she would begin her maternity leave. Ms. Routkovskaia alleges that she was shocked when Ms. Millichamp began the meeting by informing her employment was terminated, effective immediately. She says that she was also shocked when Ms. Millichamp told her no advance notice or cause for termination was necessary because she was still on probation. Ms. Routkovskaia disputed her probationary status, and Ms. Millichamp told her it had been extended due to performance problems. Ms. Routkovskaia says this is the first she had heard of any such alleged performance problems. She also says that Ms. Millichamp declined to give her more details in response to her questions.

[21] Ms. Routkovskaia says that Ms. Millichamp then invited Ms. Milne into the meeting to confirm her entitlement to employment insurance maternity benefits. When she pressed Ms. Milne for further details about the termination, Ms. Milne would say only that the decision was final. Ms. Milne escorted Ms. Routkovskaia to her desk, where she gathered her personal belongings, and then escorted her to her car.

[22] Both Ms. Millichamp and Ms. Milne discussed this meeting in their affidavits. Their recollections differ somewhat from Ms. Routkovskaia's, but not significantly. They agree that Ms. Routkovskaia asked for further details, but that they did not go into them, other than to say the termination was based on Ms. Routkovskaia's performance.

[23] The respondents gave Ms. Routkovskaia a letter that day, dated February 21, 2008, in which they stated the following:

On October 18, 2007 your Manager met with you to discuss issues she had with your performance. Then, on November 27, 2007 your probation period was extended by the Director of Marketing due to the same issues that were addressed with you by your Manager. Since that time, there has not been a significant improvement in these areas.

It is therefore with regret we inform you that your services with FPI Fireplace Products International Ltd. are no longer required effective today.

We would like to thank you for the service you have given to FPI, and we wish you the very best in your career endeavours.

[24] Ms. Routkovskaia asked Ms. Milne for a reference. In an e-mail dated February 27, 2008, Ms. Milne told her that, as a matter of company policy, they do not write reference letters, but that she would be happy to provide her with a positive reference by phone.

Comments about maternity leave

[25] In her complaint, Ms. Routkovskaia says that "the above points represent milestones in a chronology of prejudice that concluded with my discriminatory firing for the reasons mentioned. Along that chronology were other instances of note." In this regard, she refers, without detail, to repeated references to her impending maternity such as "if you return from maternity leave" instead of "when you return from maternity leave", despite her repeated assurances that she had every intention of returning. Ms. Routkovskaia alleges that such scepticism appeared to be endemic in FPI, and was even repeated by the company's president.

[26] These somewhat vague allegations are not specifically addressed in the respondents' materials. Nor are they fleshed out in any detail in Ms. Routkovskaia's further materials. The respondents do refer to various FPI employees who have successfully returned from maternity leave and to Ms. Routkovskaia's predecessor, who was a single mother. Ms. Routkovskaia does not dispute this information, but questions

its relevance to her complaint that she was discriminated against on the basis of her impending status as a single mother.

III DECISION

[27] For the reasons that follow, I have decided to dismiss the complaint.

IV ANALYSIS

[28] While the respondents refer to ss. 27(1)(b), (c) and (d) in support of this application, their focus is on s. 27(1)(c). In my view, the application is most appropriately considered under s. 27(1)(c). I have taken into account the parties' submissions with respect to the other sub-sections, insofar as they are relevant to my decision under s. 27(1)(c).

[29] The Tribunal has discretion to dismiss complaints under s. 27(1)(c) if the respondent establishes that the complaint has no reasonable prospect of success. The principles applied by the Tribunal in considering such applications are well established and not in dispute: see *Bell v. Sherk*, 2003 BCHRT 63; *Wickham v. Mesa Contemporary Folk Art*, 2004 BCHRT 134; and *Berezoutskaia v. British Columbia (Human Rights Tribunal)*, 2006 BCCA 95, leave to appeal denied, 2006 SCCA 171.

[30] The parties disagree about a number of issues; in particular, about Ms. Routkovskaia's performance as an employee and whether her probationary period was extended as a result of performance problems. As such, the complaint and application raise credibility issues. The existence of such issues does not necessarily mean that a complaint should not be dismissed under s. 27(1)(c): *Bell v. Sherk*, para. 28; *Becker v. Cariboo Chevrolet Oldsmobile Pontiac Buick GMC Ltd. (No. 2)*, 2004 BCHRT 80, paras. 47 – 56. Credibility issues, insofar as they are relevant to an application to dismiss, must be assessed on a global basis to determine, on the whole of the materials before the Tribunal, whether the complaint has no reasonable prospect of success.

[31] At hearing, the burden lies on a complainant to establish a connection or nexus between the ground of discrimination relied upon and the discriminatory treatment alleged. In order to succeed in her complaint, Ms. Routkovskaia would have to establish

that her pregnancy and/or impending status as a single mother played a role in the respondents' decision to terminate her employment.

[32] On a preliminary application, a complaint may be dismissed if the respondent shows that a complainant has no reasonable prospect of being able to establish such a nexus. This was explained in *Schnurr v. Douglas College and Greathouse*, 2007 BCHRT 40, paras. 22 – 23, upheld on judicial review in oral reasons for judgment, February 1, 2008:

In order to ground a complaint under the *Code*, facts must be alleged from which some nexus or relationship can be inferred between a prohibited ground of discrimination and the negative treatment alleged. As explained in *Ingram v. Workers' Compensation Board and others*, 2003 BCHRT 57:

So far as disability is concerned, most if not all wage loss and other benefit decisions made by the WCB will have some connection with an alleged disability: it is the existence of a workplace injury or illness which may qualify a worker for WCB benefits. That alone is not sufficient to ground a human rights complaint. There would have to be some allegation that a worker has been discriminated against on the basis of disability in order for a potentially valid human rights complaint to exist. In other words, a complainant must allege facts that, if proven, would establish that they have been in some way adversely affected by reason of their disability. It is not enough to say one is disabled and has been treated unfairly. There must be some connection or nexus between the two. That nexus is missing on the facts alleged by the Complainant. (at para. 20)

The requirement for a nexus does not mean that the respondent must be alleged to have explicitly stated that the reason why he or she treated the complainant badly was the prohibited ground of discrimination. The facts, alleged, however, must be capable of supporting the reasonable inference that the bad treatment was related to the prohibited ground of discrimination. (emphasis added)

[33] Here, as is often the case, there is nothing explicit in the reasons given by the respondents for terminating Ms. Routkovskaia's employment which would tend to suggest that her pregnancy or impending status as a single mother played any role in that decision.

[34] Ms. Routkovskaia relies primarily upon her August 2007 conversation with Ms. Millichamp to support the inference that her pregnancy and/or marital status played a

role. In fact, she submits that they were the only reasons her employment was terminated, and that there were no performance issues whatsoever. To a lesser extent, she also relies on the alleged remarks from unspecified persons about "if" rather than "when" she returned from maternity leave. All of this, Ms. Routkovskaia submits, reflects negative assumptions about her ability to work as a single mother. She puts it this way in her complaint:

FPI Fireplace Products International Ltd. and Ms. Millichamp in particular discriminated against me based on my condition (seven and a half months pregnant) and circumstances (unmarried and about to become a single parent). This discrimination included: prejudice about the ability of a single parent to perform in the workplace; an undisguised scepticism of my intention to return from maternity leave; both of which culminated in the ultimate discrimination of my employment termination within weeks of my maternity leave.

The preparation for this pre-meditated act of discrimination included blindsiding me with the surreptitious acquisition of my permanent replacement (under the guise of acquiring my maternity leave replacement), the falsification of undocumented and unsubstantiated allegations regarding my performance, and the deliberate falsification of the probation extension.

[35] The parties clearly join issue with respect to Ms. Routkovskaia's alleged performance problems, and the extension of her probationary period. Those alleged performance problems would only arise as a factual issue which would need to be decided if Ms. Routkovskaia were able to establish facts from which a reasonable inference could be drawn that her pregnancy and/or marital status played a role in the termination of her employment. That is because the alleged performance problems and extension of probation would form a defence for the respondents at hearing. Absent evidence from which the inference of a connection between the pregnancy and/or marital status and the termination could reasonably be drawn, the respondents would not be called upon to show that the termination was based upon other, non-discriminatory grounds.

[36] Accordingly, if, on the extensive materials before me, I conclude that Ms. Routkovskaia would have no reasonable prospect of establishing a connection between her pregnancy and/or marital status and the termination of her employment, it will not be

necessary for me to go further and consider the information about Ms. Routkovskaia's alleged performance problems.

[37] I focus, then, on whether Ms. Routkovskaia has no reasonable prospect of establishing the necessary connection between the grounds relied upon and the termination of her employment. On all of the materials before me, I conclude that she has no reasonable prospect of doing so.

[38] As I have said, the primary evidence relied upon to establish this connection is Ms. Routkovskaia's and Ms. Millichamp's August 2007 conversation about Ms. Routkovskaia's pregnancy. The parties disagree about some of the details of that conversation, but there is no dispute about some aspects of it. Ms. Routkovskaia clearly sought out Ms. Millichamp to discuss her recently discovered pregnancy. Ms. Routkovskaia was not sure what she was going to do. They talked about the matter at some length, in the course of which they talked about Ms. Routkovskaia's options.

[39] None of this is even arguably evidence of discrimination. The only aspect of this conversation which is even arguably evidence of discrimination is Ms. Routkovskaia's allegation that Ms. Millichamp advised her to consider her options because being a single parent would be difficult, and would limit her career and advancement opportunities. Ms. Millichamp denies suggesting that being a single parent would be difficult or would limit Ms. Routkovskaia's career opportunities, but says that Ms. Routkovskaia asked about management positions. It was in that context, Ms. Millichamp says, that she told Ms. Routkovskaia that some management positions require overtime and travel, but that this was infrequent at FPI.

[40] It is common sense that some management positions require overtime and travel. It is also common sense that combining overtime and travel with parenthood, single or otherwise, may provide challenges. These are issues which all employed persons contemplating parenthood must consider. Different people choose different ways in which to balance work and family life.

[41] In considering the evidence about this conversation, it is significant that, at the time it occurred, Ms. Routkovskaia had been employed by FPI for less than two months. While she had management aspirations, she was not employed in a management role.

Therefore, any discussion about the potential effects of being a single parent on her prospects for employment as a manager was entirely speculative.

[42] Regardless of whose version of this conversation might ultimately be accepted, I find little evidence in it of discrimination or negative views about the ability of single parents to work at FPI or as managers. Further, it is clear that Ms. Routkovskaia herself thought little of it at the time. She made only a “mental note” of it, and did not mention it or complain to anyone about it until after the termination of her employment.

[43] Ms. Routkovskaia also relies upon remarks allegedly expressing scepticism about her return to work after her maternity leave. These alleged remarks are unparticularized in any meaningful way by Ms. Routkovskaia in her extensive materials. No information is provided about who made these remarks, when, or in what context. They provide no reasonable basis upon which it could be inferred that the subsequent termination of Ms. Routkovskaia’s employment was related to her pregnancy and/or marital status.

[44] The timing of the termination decision is significant. In many pregnancy cases, the close temporal proximity between the employer learning of the pregnancy and the termination or other adverse employment-related consequence is sufficient to permit an inference of causation. This case is quite different. The conversation between Ms. Millichamp and Ms. Routkovskaia happened in August 2007. Ms. Routkovskaia’s employment was terminated on February 21, 2008, some six months later. If the respondents had the negative views about Ms. Routkovskaia’s ability to perform her job as a single parent which Ms. Routkovskaia alleges, they had ample opportunity between August and February to terminate her employment. In particular, they could easily have done so within the original six month probationary period set out in the June 12, 2007 letter to Ms. Routkovskaia offering her employment, without any need to extend that probationary period.

[45] I find this situation to be similar to that in *Lapansie v. Dr. Ralph Bieg Medical Corporation*, 2008 BCHRT 210, a case in which a complaint on the basis of pregnancy and physical disability was dismissed on a preliminary basis because the complainant had failed to take her complaint out of the realm of speculation and conjecture: para. 12. Ms. Routkovskaia does a valiant job of attempting to distinguish the *Lapansie* case on the

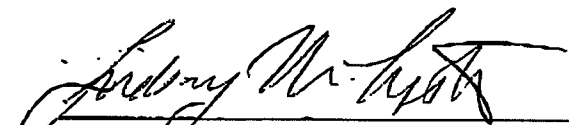
basis that, unlike Ms. Lapansie, who admitted she did not know why her employment was terminated, she is certain that discrimination was a factor in the termination of her employment.

[46] From her well-organized and exhaustive materials, it is apparent that Ms. Routkovskaia is a highly capable person. The materials also make clear that she is ambitious and motivated to succeed. It is likely that, whatever performance issues may have occurred or been raised with her, Ms. Routkovskaia honestly believes that there were no problems with her performance, and that the only possible conclusion is that the termination of her employment was the result of discrimination.

[47] The difficulty for Ms. Routkovskaia is that, while she may be certain in her own mind that discrimination was a factor in the termination of her employment, the alleged factual basis for that belief is very weak. Ms. Routkovskaia can point to no more than a conversation with her manager about her unplanned pregnancy six months before the termination, and some alleged but unparticularized expressions of scepticism about whether she would return from her maternity leave, in support of an inference that her pregnancy and/or marital status had anything to do with the termination of her employment. As *Wickham* makes clear, it is not enough for there to be some chance that a complaint might succeed; it must have a reasonable chance of success. Here, I am persuaded that Ms. Routkovskaia's complaint has no reasonable likelihood of success.

V CONCLUSION

[48] Considering the matter as a whole, I am satisfied that Ms. Routkovskaia has no reasonable prospect of succeeding in showing that her pregnancy and/or marital status played a role in the termination of her employment. Accordingly, I exercise my discretion to dismiss the complaint under s. 27(1)(c) of the *Code*.


Lindsay M. Lyster, Tribunal Member