

MANITOBA HUMAN RIGHTS BOARD OF ADJUDICATION

IN THE MATTER OF: The Human Rights Code RSM Cap H175
and In The Matter of a complaint between L.H.
(Complainant) and Vietnamese Non-Profit Housing
Corporation (Respondent).

BETWEEN:

L.H.,

Complainant,

- and -

VIETNAMESE NON-PROFIT HOUSING CORPORATION,

Respondent.

DATE OF DECISION: MARCH 16, 2007

BEFORE MANITOBA BOARD OF ADJUDICATION: LYLE M. SMORDIN

APPEARANCES BY :

COUNSEL FOR THE COMPLAINANT: SARAH LUGTIG

COUNSEL FOR THE RESPONDENT: VINCENT J. BUETI

CASES CITED:

1. A. v. Natural Progress Inc. (2005), 51 C.H.R.R. D/305 (Man.Bd.Adj.)
2. Allum v. Hollyburn Properties Management Inc. [1991] B.C.C.H.R.D. No. 14
3. British Columbia (Public Service Employee Relations Commission v. British Columbia Government and Service Employees' Union (B.C.G.S.E.U.) (Meiorin Grievance) [1999] S.C.J. No. 46
4. British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights) [1999] S.C.J. No. 73 (Grismer complaint)

5. Buchanan v. WMC Management Services BC Ltd. [2006] B.C.H.R.T.D. No. 339
2006 BCHRT 339
6. Budge v. Thorvaldson Care Homes Ltd. [2002] M.H.R.B.A.D. No. 1 (aff'd [2006] M.J. No. 369 (C.A.))
7. Central Okanagan School District N. 23 v. Renaud [1992] S.C.J. No. 75
8. Dubeck v. Friesen (c.o.b Vy-con Construction) [2002] M.H.R.B.A.D. No. 2
9. Innes v. Re-Con Building Products [2006] B.C.H.R.T.D. No. 99
10. Mager v. Louisiana-Pacific Canada Ltd. [1998] B.C.H.R.T.D. No. 36
11. Ontario Human Rights Commission v. Gaines Pet Foods Corp. [1993] O.J. No. 2973 (Gen Div.)
12. Piazza v. Airport Taxicab (Malton) Assn. [1989] O.J. No. 994 (C.A.)
13. Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montreal (City); Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City) [2000] S.C.J. No. 24
14. Willems-Wilson v. Allbright Drycleaners Ltd. [1997] B.C.H.R.T.D. No. 26
15. Zaryski v. Loftsgard (1995, 22 C.H.R.R. D/256 (Sask. Bd. Inq.))

LEGISLATION CITED:

The Human Rights Code C.C.S.M. CAP. H175.

This claim was initiated by the Complainant on March 24th, 2004 with The Human Rights Commission alleging that her employer failed to reasonably accommodate her due to her physical disability (cancer) and the necessary surgery associated with it contrary to Section 14 of The Manitoba Human Rights Code. A reply was received on behalf of the Respondent through its counsel indicating that the complaint was not a valid complaint and denying any discrimination. The position of the Respondent was that they challenged the Complainant's inability to work due to a medical operation and says that it does not qualify as discrimination as contemplated by

the legislation. Their position was that it was not a matter of discrimination due to an existing handicap, but rather an inability on the part of the Complainant to fulfill her employment contract due to poor health.

On April 27th, 2006 I was designated by The Minister of Justice under Section 32 of the Code as a Board of Adjudication to hear and rule on the complaint. The hearing of this matter took place in Winnipeg, Manitoba on January 22nd, 23rd and 24th, 2007.

The following Exhibits were filed by agreement between the parties:

1. Notice of Designation of Board of Adjudication , by Gord Mackintosh, Minister of Justice and Attorney-General, dated April 27, 2006
2. Manitoba Human Rights Commission Complaint for File No. 04 EN 123, registered March 30, 2004
3. Reply of Vietnamese Non-profit Housing Corporation (VNHC), letter from Vincent J. Bueti, Bueti Baumstark, dated August 5, 2004
4. Notice of Public Hearing, Winnipeg Free Press, Saturday January 13, 2007
5. Notice of Public Hearing, Manitoba Gazette, 136(2), January 13, 2007
6. Articles of Incorporation and 2006 Annual Return, VNHC
7. Summary and attached T-4 Form for L.H.'s Income Tax Return for 2003
8. Summary and attached T-4 Form for L.H.'s Income Tax Return for 2004
9. Summary and attached T-4 Form for L.H.'s Income tax Return for 2005

10. Doctor's Note from St. Boniface Hospital Ambulatory Care dated December 17, 2003, regarding L.H.
11. Record of Employment (Human Resources Development Canada) for L.H.'s employment at Respondent, signed January 27, 2004
12. Letter from Vincent J. Bueti to Jean Boyes dated May 10, 2004, with handwritten notice from Mr. Boyes dated May 11, 2004
13. Letter from C.B., Manager of the Respondent, to Mr. and Mrs. L.H. dated February 14, 2005
14. Notice of Termination for the Non-Payment of Rent (Residential Tenancies Form 7) directed to L.H. and Mr. H. by Respondent dated February 14, 2005
15. Paystubs for cheques from Respondent to L.H. from December 1-31, 2003, January 1-7, 2004, vacation pay July to December, 2003
16. Notice of Respondent in Vietnamese signed by D.D. advertising caretaker position for January 8 to March 8, 2004
17. Notice in Vietnamese dated April 23, 2004 signed by B.N. advertising a caretaker position and another position
18. Agreed Statement of Facts
19. Caretaker's job description
20. Manager's job description

The legislation is clear that the onus is on the Complainant to establish a prima facie case of discrimination. The Complainant must establish this on a balance of probabilities and need not prove that her disability was the sole or even the primary factor taken into account. A violation of the Code will occur if the disability was one of the reasons why the Respondent treated the Complainant adversely. Counsel for The Human Rights Commission argues that the mistreatment does not have to be intentional and if a prima facie case is established then the onus shifts to the Respondent. Respondent's counsel in his opening remarks indicated that the Respondent was not

aware that it was necessary to accommodate the Complainant and that there was no malice intended, but argues that her absence put an unreasonable demand upon the Respondent and that the relationship deteriorated upon the Complainant's intended return to work. Exhibit 18 contains an agreed statement of facts.

The evidence was heard through a Vietnamese interpreter which presented a minor barrier to being able to discern both the full story and credibility, however I was able to manage to grasp the entire story from all witnesses, despite the difficulty of the interpretation, for which however I do not fault the interpreter. He made valiant efforts to repeat the evidence word for word. His best efforts however were thwarted by the witnesses overlapping his interpretation from time to time.

THE EVIDENCE

The Complainant indicated she now lives in Winnipeg at [address deleted] and folds newspapers for 10 – 15 hours per week as her current employment. That appears to be her only job. She has lived in Winnipeg for approximately five years. In Vietnam she worked as a seamstress and when she moved to Winnipeg she worked for her brother, also as a seamstress, for a short time and lived at The Saigon Centre, the building in question owned by the Respondent for which she was later hired as a caretaker.

It appears that she commenced her employment on December 1, 2002 and worked until January 7th, 2004 as a full-time caretaker for the Respondent. Prior to and approximately shortly before her employment commenced she lived with her sister, her husband and two of her sons in the Respondent's building, but moved to Apartment No. 609 with her husband and two of her sons shortly before December 1st, 2002, perhaps as early as September of that year. The building contains fifty-four suites with more than two hundred tenants. Her job requirements were to work six hours per day, Monday through Friday and two hours per day, Saturday and Sunday. She said she cleaned four washrooms, the hallways and the stairs on all six floors, collected the garbage, cleaned the walls, took care of the garbage bin, shoveled snow, changed lightbulbs, fixed water leaks and cleaned units which were vacated. During the initial part of her employment, Mr. D.D. was the building manager to whom she reported. Mr. D.D. was replaced as building manager by Ms. C.B. in September, 2004. The president of the corporation during her employment and continuously to the date of the hearing was Mr. B.N. who seemed to have a more than passive involvement in this matter. It appears that the Complainant's salary was \$14,738.00 for the year 2003. In addition she paid \$300.00 per month for rent which in the evidence was stated to be far below the market rent, but was not included as a taxable benefit to her. She said she had a good reaction to her work and it seemed that everyone was satisfied with the way she carried out her duties.

In her evidence she indicated that she first found out about her cancer illness in approximately November 2003 when she took four days off for a

biopsy during which time her children took over her duties. She said she presented the manager Mr. D.D. with a doctor's note dated December 17th, 2003 (Exhibit 10) which says "The above patient will be having surgery January 8, 2004. She will require eight weeks off from work for her recovery". In her evidence she says that the manager indicated that the time off was not acceptable. When asked whether anyone else knew about the cancer and the surgery she answered that many people did, but in his evidence Mr. B.N. indicated he did not know of the illness or the surgery. She did however say that Mr. B.N. said "If you are sick you have to leave" . She also said she was presented with a document which was either a confirmation of employment or a resignation, but as the document was never presented in evidence it is not clear what it said. In any event she said she would not sign any document and went for surgery the next day. She was in the hospital for sixteen days and when she returned to the building she saw someone else cleaning. In fact the person taking her place according to the Complainant delivered her Record of Employment to her (Exhibit 11) which indicated that she was unable to work after January 7th, 2004 due to "illness or injury". The Complainant said that after two months she was feeling better and eating a lot and went to the manager Mr. D.D. indicating she wanted to return to work. He showed her the Record of Employment and told her to apply for Employment Insurance and allegedly said that she didn't need to come back to work. She said she went to Mr. B.N., the president of the Respondent corporation, and he told her to talk to the manager. She said she then felt sad and stayed home. She also indicated that her job had been posted on a bulletin board in the building (Exhibit 16) as a temporary posting and as well was posted as a permanent position (Exhibit 17). When asked whether she applied for either of the jobs she indicated in the

negative because she had already asked about it. She said she felt tired and suicidal as a result of not being allowed to return to the job and continued to live in the building until February 2005. She said she moved out after she went to the manager to pay her reduced rent (\$300.00 per month) for January and February 2005 and she said neither the president or the manager was willing to take the rent. As well she indicated that the new manager Ms. C.B. delivered a notice of termination to her (Exhibit 13), both by letter and as well a Notice of Termination for Non-Payment of Rent under The Residential Tenancies Act (Exhibit 14). That matter is the subject of a separate issue and as a result I need not make any decision in that respect. When asked whether she looked for work, her answer was rather indefinite. She talked about inquiring about a cleaning job at The University of Winnipeg and at a funeral home and an Asian restaurant. At some later time she obtained the job folding newspapers referred to earlier. She also indicated she collected employment insurance for nine months together with sick benefits which likely were provided to her during January and February of 2004.

In cross-examination it was established that the Complainant arrived in Canada in 2001 and was sponsored by her younger brother under the Nominee Program and she confirmed that she lived in her sister's apartment. She admitted that likely the reason she got the job was due to Mr. B.N. trying to assist her and that the reason she was hired was to help her family. She did agree that if she could not do her job, they could lay her off. She denied that she had a conversation with the manager on January 7th, 2004 indicating that she wanted her pay to continue while she was off work. She said she applied for disability benefits, but only after she got her Record of Employment. She said Mr. D.D. told her how to apply. She reconfirmed in cross-

examination that she attempted to pay the \$300.00 rent in January and February, 2005, but her attempts to pay were refused.

The only witness called on behalf of the Respondent was the president of the corporation, Mr. B.N.. He testified that the Saigon Centre was built in 1988 as a low income housing project with the cooperation of the federal and provincial governments. He is also the president of the Free Vietnamese Association and indicated that the building and the association provides full services to its tenants such as the attainment of jobs, applications for welfare and English as a second language classes. He testified that when the previous caretaker left the job for a higher salaried job and moved out of the building he recommended the Complainant. While Mr. B.N. testified that the Complainant was paying \$300.00 per month prior to becoming a caretaker, it is unclear whether she started working on December 1st, 2002 or September 1st, 2002 when she moved into the caretaker's apartment (Suite 609). He thought that while she was working since September 2003 the cheques were paid to her son. Clearly she was paid commencing December 2002. It also seems that she continued to pay \$300.00 per month rent after she returned from surgery which lasted for approximately one year until February 2005.

In his evidence Mr. B.N. described the living conditions in the apartment building. According to him it is located in a dangerous area of the city and many problems arose with crime, drugs, stolen goods and prostitution. Dealing with the Complainant he said he was made aware of her operation likely in December 2003, but

did not know the nature of the operation until after the surgery, although he did not remember when he learned of her specific illness. He said he never saw the doctor's note (Exhibit 10) but admitted that he understood he needed to accommodate the Complainant for a reasonable period of time off for an operation and to keep her job open. He admitted there was a meeting the day before the operation with the manager and himself and the Complainant and he said she could come back after the operation. He did not remember whether there was a contract discussed and denies that it was said that there was no guarantee she would have her job back when she returned. The Respondent's counsel chose not to call the manager as a witness to either confirm or deny what went on at the meeting or any of the allegations of the Complainant. Mr. B.N. did say that when the Complainant came back he indicated she could apply for disability or they could find something for her to do. When she returned and wanted her job back he said he told her to see the manager, but that she had to apply again. He did not know whether the board was prepared to rehire her and only knows that notices were put up likely by the manager at that time. He speculated when asked whether the board would have hired her had she applied and he said that if the doctor's note said it was okay, then perhaps she might have been rehired. He also said that there were no applications received in response to Exhibit 18 because there were too many problems in the building and in the area. There was some reference to hiring a cleaner as opposed to a caretaker, which would have been at a lower salary. As well he added in his evidence that in response to a question of why he did not rehire the Complainant, he answered that because of troubles in the building they were looking for alternatives and a change in the position. He also added that the position was changed and they were paying \$200.00 per week for a cleaner only.

Exhibits 19 and 20 which came from the records of the Respondent were produced indicating the caretaker's job description as it is currently and as well the manager's job description. Mr. B.N. said that the manager's job description was prepared prior to September, 2004. Mr. B.N. said that on behalf of the board he was sorry the matter had not been settled and asked the Complainant for forgiveness.

Having reviewed the evidence I will now summarize the law as argued by counsel.

Counsel for the Complainant quoted Section 9 (3) indicating that discrimination under the Code can be considered regardless of whether the person responsible for the act or omission intended to discriminate. As well Section 14 (1) in her opinion was applicable due to the fact that the Complainant was denied the opportunity to continue working and that the Respondent was unwilling to accommodate her. Section 52 provides that if a provision of the Code has been contravened the onus lies on the person alleging the contravention, but the onus of proving the existence of a bona fide in reasonable cause or the fact that a requirement or qualification for an employment or occupation is bona fide lies on the party alleging that matter which in this case would be the Respondent. Section 9(1)(d) and Section 9(2)(1) covers special needs and accommodation. Counsel argues that a prima facie case has been made out as the Complainant was: 1) employed, 2) suffered from a disability in accordance with her medical condition and needed time off; 3) was treated adversely and 4) had a perceived disability. Buchanan v. WMC Management Services BC Ltd. at Paragraph 57 says in

part that in order to establish a prima facie case of discrimination of the Code it must be established there is evidence upon which it is reasonable to infer that age (in that case) was a factor in the termination of the employment. It is not necessary that the discriminatory reasons be the sole or even the primary reason for the termination; it is sufficient that it is one of the factors that influenced the decision.

Paragraph 58 of the decision goes on to say that if the Complainant establishes a prima facie case the onus shifts to the Respondent to prove on the balance of probabilities that the Respondent terminated the employment for a non-discriminatory reason and that age was not a factor in that decision.

The Allum v. Hollyburn Properties Management Inc. case from British Columbia (Paragraphs 17 to 20) was referred to by counsel for the Complainant and that decision quotes O'Malley v. Simpsons-Sears Ltd. (1986) 7 C.H.R.R. D/3102 which says :

"Direct discrimination occurs in this connection where an employer adopts a practice or rule which on its face discriminates on a prohibited ground. For example, "No Catholics or no women or no blacks employed here." There is, of course, no disagreement in the case at bar that direct discrimination of that nature would contravene the Act. On the other hand, there is the concept of adverse effect discrimination. It arises where an employer for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force...An employment rule honestly made for sound economic or business reasons, equally applicable to all to whom it is intended to apply, may yet be discriminatory if it affects a person differently from others to whom it may apply."

It is further conceded that cancer is a handicap. This was conceded in the case of Ontario Human Rights Commission v. Gaines Pet Foods Corp. [1993]. Clearly the Complainant in our case had a disability and the question is whether she was adversely treated and the fact that she was not offered her job back is evidence of that. The job was posted and there was no proof of her resignation. As a result the Complainant must be considered to have been terminated. She was told to apply and the question to be decided is whether her disability was a factor. There were no financial records submitted regarding a change in her employment and as a result it is logical to assume that she was terminated when she indicated she needed time off. She has proven that she was treated adversely and that her disability was a factor. The onus then shifts to the Respondent who could argue reasonable accommodation. However, considering all of the factors it would seem that the Respondent refused to keep her job open. Counsel for the Complainant asked for remedies such as one year's pay less one week of lost wages from March 8th, 2004 to February 28th, 2005 together with prejudgment interest at 2.75%, general damages of \$4,000.00 to \$5,000.00 and an Order that the Respondent adopt and post a suitable accommodation policy acceptable to The Manitoba Human Rights Commission. In the case of Budge v. Thorvaldson Care Homes Ltd. Adjudicator A. Peltz in Paragraph 111 retained jurisdiction for that purpose and as well to resolve any other disputes regarding the effective implementation of the Order.

Counsel for the Respondent acknowledged that the Respondent should have accommodated the Complainant and argued that there were no previous violations. He also argued that the Respondent had little understanding of the

law and their problems with crime and security caused them to "bend the rules". He urged me to consider the following factors:

- 1) There was no public embarrassment or lack of dignity;
- 2) There was no emotional illness;
- 3) There was no malice or contempt in any discrimination;
- 4) There was a financial loss incurred;
- 5) The Complainant received Employment Insurance for nine months;
- 6) Her mitigation efforts were minimal and not up to any reasonable standards;
- 7) The Respondent provided support services.

Taking all of the above into consideration, while I do find there was discrimination, I can understand that lack of knowledge of the Respondent was the cause of the problem, although I would have preferred to have heard the evidence of the manager who was not produced as a witness.

I am prepared to award to the Complainant the following:

- 1) One month's pay as compensation for the dismissal amounting to \$1,228.17 based on her year's earnings of \$14,738.00 less statutory deductions taking into consideration her short term of employment and minimal efforts at mitigation;
- 2) The sum of \$3,000.00 for general damages for loss of self-respect which falls into the middle category of damages quoted with no interest;

- 3) An Order that the Respondent adopt and post a suitable accommodation policy acceptable to The Human Rights Commission;
- 4) I will retain jurisdiction for the implementation of any of the above remedies.

I am satisfied that the Respondent did not treat the Complainant fairly, but that was likely prompted by its lack of understanding of the law.

Dated at the City of Winnipeg, in Manitoba, this 16th day of March, 2007.

LYLE M. SMORDIN, Adjudicator