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 Doris Chestnut (Complainant) and Theo C Limited o/a Hampton Inn & Suites (Respondent).

BETWEEN:

DORIS CHESTNUT,

Complainant,

- and -

THEO C LIMITED o/a Hampton Inn & Suites,

Respondent.

DATE OF DECISION: MAY 25, 2012

BEFORE MANITOBA BOARD OF ADJUDICATION: LYLE M. SMORDIN

APPEARANCES BY :

DORIS CHESTNUT IN PERSON AS COMPLAINANT

PAUL COSTAS ON BEHALF OF THE RESPONDENT

ISHA KHAN ON BEHALF OF THE MANITOBA HUMAN RIGHTS COMMISSION

CASES CITED:

1. Quebec Human Rights Commission v. Montreal, Quebec Human Rights Commission v. Boisbriand [2000] 1 S.C.R. 665

2. 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

3. Central Okanagan School District N. 23 v. Renaud [1992] S.C.J. No. 75

4. Willems-Wilson v. Allbright Drycleaners Ltd. [1997] B.C.H.R.T.D. No. 26

5. Sylvester v. British Columbia Society of Male Survivors of Sexual Abuse . [2002] B.C.H.R.T.D. No. 14

6. Lane v. ADGA Group Consultants Inc. [2007] O.H.R.T.D. No. 34

7. Farnya v. Chorny [1951] B.C.J. No. 152

8. Budge v. Thorvaldson Care Homes Ltd. [2002] M.H.R.B.A.D. No. 1

9. Manitoba Human Rights Commission Policy and Procedures Manual dated April 16, 2002.

10. Manitoba Human Rights Commission Policy and Procedures Manual Policy No. L-5 dated February 17, 2010

LEGISLATION CITED:
The Human Rights Code C.C.S.M. CAP. H175.

This claim was initiated by the Complainant on September 22, 2009 with The Human Rights Commission alleging that her employer failed to reasonably accommodate her due to her physical disability (Osteoperosis) and that the discrimination was not based upon bona fide and reasonable requirements or qualifications for the employment or occupation contrary to Section 14 of The Manitoba Human Rights Code. A reply was received on behalf of the Respondent indicating that the complaint was not valid and stating that at no time did the Respondent act in any discriminatory manner toward the Complainant. The Respondent challenged the Complainant's claim that she was unable to work due to her physical disability and says that the Respondent's actions do not qualify as discrimination as contemplated by the legislation.

On August 30th, 2011 I was designated by the Minister of Justice and Attorney General 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 April 11, 2012.

The following Exhibits were filed by the parties:

1. Designation of Board of Adjudication dated August 30, 2011 by Andrew Swan, Minister of Justice and Attorney General.

2. Notice of Public Hearing.

3. Notice with respect to request pursuant to Section 36 (2) of The Human Rights Code.

4. Dr. R. Bhayana letter dated March 28, 2012 to legal counsel for The Manitoba Human Rights Commission.

5. Manitoba Provincial Drugs Program letter dated August 15, 2008 addressed to the Complainant.

6. Employee Handbook Hampton Inn and Suites.

7. Acknowledgement of Receipt of handbook dated April 26, 2005.

8. Housekeeping list of requirements dated April 26, 2005.

9. Warning misconduct notice dated March 13, 2009.

10. Warning misconduct notice dated June 23, 2009.

11. Warning misconduct notice dated June 26, 2009.

12. Termination Notice from Respondent to Complainant dated July 7, 2009.

13. Calendar for July 26, to July 31, 2009.

14. Respondent's paystub in favour of the Complainant.

15.. Complainant's Resume.

16. Complainant's attempts at re-employment.

The issue in this case revolved around an allegation of discrimination by the Complainant on the basis that she was not accommodated by the Respondent by its failure to recognize her disability and not accommodating her medical condition which she alleged was disclosed to the Respondent.

I had to consider the following:

1) Does the Complainant have a disability?

2) Was the Respondent aware of her special needs?

3) If so, the onus then shifts to the Respondent to establish by evidence that it did reasonably accommodate the Complainant.

The Complainant at all material times was employed by the Respondent as a housekeeper at its hotel establishment.

In her evidence the Complainant advised me that she suffered from Osteoporosis which was diagnosed in 2005 and further that she had contracted Osteoarthritis in the year 1999. She complained of sharp back pain in the middle of the day which affected her energy level and caused her to be tired and sore. As a result in her employment as a housekeeper, changing beds as well as washing bathroom floors was a problem. She worked for the Respondent from April 26, 2005 to the end of July 2009.

She was terminated by way of a letter dated July 7, 2009 (Exhibit 12) advising her that her employment would be terminated as of August 4th, 2009.

As part of her evidence she produced a letter from her doctor (Exhibit 4) confirming the diagnosis of Osteoarthritis in 1999 and the diagnosis of Osteoporosis in 2005. Exhibit 5 is a letter from The Province of Manitoba Provincial Drug Program dated August 15, 2008 which describes the medications she was taking. In her evidence she indicated she provided this letter to the Respondent. She is currently 54 years of age.

Prior to being first employed she met with the Respondent's representative Mr. Paul Costas and was provided with an employee handbook (Exhibit 6). She acknowledged receipt of the handbook on April 26, 2005 (Exhibit 7). Exhibit 8 outlines her housekeeping duties in detail. She indicated to the hearing that she reported her disability to Amy Bluecoat, her first supervisor and then subsequently to Rhonda Nobis, another supervisor. She also indicated that Mr. Dan Deschenes was the hotel manager and Paul Costas was the owner. She then advised that she became a supervisor in 2007, but at the end of 2008 was demoted once again to a housekeeper. She started her employment earning $7.25 per hour based on a 37 ½ hour week. Her salary increased to $9.75 per hour as a supervisor and then when she returned to the housekeeper position she was earning $10.00 per hour. That wage lasted until she was dismissed.

She provided evidence that she cleaned the fifth floor of the hotel which contained sixteen guest rooms. She also said that both her supervisors, Amy Bluecoat

and Rhonda Nobis were aware of her physical condition and Rhonda told her she could take a little rest every now and then. She gave evidence that she told the hotel manager Mr. Deschenes about her condition and he said he would talk to the owner about her switching to another hotel owed by the same organization, but that did not take place. The Complainant indicated that the other hotel was too far away from her residence.

During the term of her employment she was given three warning notices, the first one on March 13th, 2009 (Exhibit 9) about taking a guest's clothes hanger that had been left behind. That matter was apparently resolved and there was no discussion about her physical condition at that time.

Subsequently on June 23rd, 2009 she received a warning letter (Exhibit 10) signed by Supervisor Rhonda Nobis indicating that a spot had been found on a duvet cover in one of the rooms. She also admitted there were other notices for her being "slow".

Subsequently on June 26, 2009 she received a further warning notice (Exhibit 11) which focused upon her lack of productivity indicating she was taking too long in cleaning rooms.

She then received a termination letter (Exhibit 12) dated July 7, 2009 giving her four weeks' notice of the termination of her employment. She told the hearing that she was paid to July 31st, 2009.

Subsequently she applied to other hotels and is now employed in the same industry.

On cross-examination Mr. Costas questioned the Complainant about her hiring interview and indicated that he had given her the handbook which she acknowledged and that the duties were fully explained to her either by himself or the hotel manager. He then reviewed Exhibits 9, 10 and 11 which all were warning notices as outlined earlier. On cross-examination the Complainant indicated that she received no other warning notices. Her assertion was unchallenged.

Next to testify was the Complainant's daughter Stephanie Chestnut who works elsewhere also as a housekeeper. She described her mother's condition and the effect upon her and the fact that she would come home from work tired and limping with pain in her back. She indicated she had spoken to Rhonda Nobis, her mother's supervisor who she indicated was aware of her mother's history and medical condition. Ms. Chestnut also told the hearing she helped in her mother's search for alternate employment.

After the Complainant concluded her case, the Respondent called several witnesses, the first being of no assistance to the Board of Adjudication because she was not able to speak. The second witness was Amy Bluecoat who was employed for ten years as a supervisor. She only remembers the Complainant telling her she was going to

be let go. She did admit under cross-examination that the Complainant had told her about her back, but her evidence was not very clear in that respect.

The next witness was Mr. Andy Zhao who is now the general manager of the Respondent. He commenced working for the Respondent in June 2006. In his observation he said the Complainant was lacking in quality and efficiency in doing her work. Mr. Zhao gave evidence that she never complained to him about her health. He indicated he signed the dismissal letter as Director of Sales and Assistant General Manager on July 7th, 2009. I note in Exhibit 12 there was no reason given for her dismissal.

Under cross-examination, the handbook was reviewed. It was pointed out by counsel for the Commission that there was no allowance for accommodation. Mr. Zhao said there was never any accommodation offered to any employee. In his evidence he indicated he did random checks of rooms and he did not recall the Complainant's demotion from supervisor to housekeeper. He denied he knew about the disability and as a result his evidence was not helpful in that respect. He did confirm that he talked to the Complainant about her performance, especially referenced in Exhibits 10 and 11, the second and third warnings. He confirmed that the Complainant worked until July 31st, 2009 and that there was no reference letter given to her. He did indicate under cross-examination that at the time of termination the Complainant said: "You can't fire me" and handed him the letter of August 15th, 2008 (Exhibit 5) outlining her medication.

In closing arguments, counsel for the Commission provided the authorities as earlier referred to and argued that the Complainant's lack of speed at her employment was due to her condition as referred to in Exhibit 4. The question is whether the Respondent was aware of her condition during her term of employment and whether the Respondent had a duty to enquire as to her condition.

(Case #2) The Supreme Court of Canada case from British Columbia was quoted. In that case Madam Justice McLachlin (as she then was) proposed a three step test for determining whether a prima facie discriminatory standard is a bona fide occupational requirement

Madam Justice McLachlin in her Judgment (Paragraph 54) suggests that an employer may justify the impugned standard by establishing a balance of probabilities :

1) That the employer adopted the standard for a purpose rationally connected to the performance of the job;
2) That the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfillment of that legitimate work-related purpose; and
3) That the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate

individual employees sharing the characteristics of the Claimant without imposing undue hardship upon the employer.

In this case since the Respondent employed a large number of housekeepers I would suggest that there would have been no undue hardship to the Respondent if they accommodated the Complainant, at least to some degree. Madam Justice McLachlin suggested that the initial task of the employer is to determine what the impugned standard is generally designed to achieve. The ability to work safely and efficiently is the purpose most often mentioned in the cases, but there may well be other reasons for imposing particular standards in the workplace. I cannot find the necessity for that standard in this case. Secondarily once the legitimacy of the employer's more general purpose is established, the employer must take the second step of demonstrating that it adopted the particular standard with an honest and good faith belief that it was necessary to the accomplishment of its purpose with no intention of discriminating against the Complainant. I find no evidence in the present case of that.

The third and final hurdle is to demonstrate that the impugned standard is reasonably necessary for the employer to accomplish its purpose and that the employer must establish that it cannot accommodate the Claimant and others adversely affected by the standard without experiencing undue hardship. Once again I do not find that applicable in the present case.

Counsel for the Human Rights Commission referred to a Supreme Court of Canada case Central Okanagan School District No. 23 v. Renaud [1992] 2 SCR 970 which says in part that the conduct of the Complainant must be considered in determining whether the employer has to accommodate the employee. The case goes on to say that while the employee may be in a position to make suggestions, the employer is in the best position to determine how the employee can be accommodated without undue interference in the operation of the employer's business. In this case it seems there was no inquiry whatsoever.

The case of Willems-Wilson v. Allbright Drycleaners Ltd. [1997] B.C.H.R.T.D. No. 26 is a Human Rights Tribunal case in which there was an allegation that the employer discriminated against the employee with respect to employment because of a physical and/or mental disability. The decision of the tribunal imposed upon the employer an obligation at the very least to make some enquiries.

I would imagine that given the circumstances of the present case, it would not have been a hardship on the Respondent to make such an enquiry and then to accommodate the Complainant especially in light of the fact that there were a number of housekeepers assigned to the same floor. There was no evidence that they could not have accommodated her.

As well there was no evidence that the Complainant was not a satisfactory worker. Aside from the warning notices, she seemed to be reliable over the period of

time that she was employed. The three notices were all in 2009, four years after she was first hired.

Section 43 (2) provides me with the opportunity in addition to considering damages to suggest a remedial Order and to potentially compensate the Complainant for loss of self respect. Counsel for The Human Rights Commission referred me to the case of Budge v. Thorvaldson Care Homes Ltd. [2002] M.H.R.B.A.D. No. 1 in which Adjudicator A. Peltz awarded the sum of $4,000.00 as damages for injury to the Complainant's dignity, feelings and self-respect. The present case does not suggest as high an award as I fully believe the Respondent did not intentionally fail to accommodate the Complainant and may have merely disregarded their awareness of her condition.

I am therefore ordering that the following occur:

1. The Respondent pay to the Complainant one months' salary which I would calculate at $1,650.00 utilizing a pay rate of $10.00 per hour for 7 ½ hours per day. As well I would award the Complainant the sum of $2,000.00 for loss of self-respect and as well order the following:

a) That the Respondent develop a reasonable accommodation policy in consultation with The Human Rights Commission or to be approved by the Commission within three months of this decision;

b) That the Respondent post that policy in a staff room at their establishment;

c) That all current and future staff be provided with a copy of that policy;

d) That two members of management attend a workshop on reasonable accommodation conducted by The Human Rights Commission prior to the end of 2012.

In so doing I find that this case revolved around human rights principles and that the Respondent had the onus to make further inquiries.

In closing I would find that while the Respondent did not treat the Complainant fairly, that treatment was probably prompted by the Respondent's lack of understanding of the law and likely was not intentional.

I will retain jurisdiction for the implementation of any of the above remedies.

Dated at the City of Winnipeg, in Manitoba, this 25th day of May, 2012.

LYLE M. SMORDIN, Adjudicator