MANITOBA HUMAN RIGHTS BOARD OF ADJUDICATION

IN THE MATTER OF a complaint made under *The Human Rights Code*, CCSM c. H175

BETWEEN

Audrey Blatz,
complainant,

AND

4L Communications Inc.,
respondent,

AND

Manitoba Human Rights Commission,
Commission.

MHRC File No.: 09 EN 206

For the complainant: Ms Janet I. Jardine
For the respondent: Ms Sharon L. Tod
For the Commission: Ms Isha Khan

Complaint heard: 9, 10, 11, 12, 13, 18, 23, and 24 June 2014
Complaint decided: 20 May 2015

ROBERT DAWSON, adjudicator:

[1] A former employee complains that her former employer terminated her employment, because she had become pregnant. For the reasons that follow, the complaint is dismissed.

Facts

[2] The respondent, 4L Communications Inc., hired the complainant, Ms Audrey Blatz, on 5 June 2007. She had impressed the company's owner, Mr Al Koop, with her

project management training and previous work experience. She came to the company at a time when its owner planned to expand significantly the operations of the business.

[3] Mr Koop sought, in the words of Ms Blatz, a "right hand", especially because he wanted to reduce his time in the office. Although he remained involved in high-level issues, Mr Koop entrusted the day-to-day operations to Ms Blatz .She therefore reported directly to Mr Koop, and her responsibilities were extensive, including oversight of inventory, sales, retail branch operations, and office administration, such as IT and some aspects of the accounting department.

[4] Soon after she began work, 4L Communications Inc. opened a new retail location in Beausejour in September 2007, and Ms Blatz was the lead person for that project. Pleased with her work, Mr Koop announced that she would thereafter be the company's general manager with a commensurate salary increase. By late 2008, 4L Communications Inc. proposed a profit-sharing plan that would supplement her salary, and the formal agreement was executed on 3 December 2008.

[5] In that same month, Ms Blatz informed Mr Koop that she was pregnant. In February and March 2009, pregnancy-related medical incidents occurred, encouraging Ms Blatz to reduce her workload.

[6] Between 6 and 12 April 2009, Ms Blatz and her husband travelled to Orlando for a vacation that Mr Koop had supplied in appreciation of her work. Up until that time,

the respondent had expressed no concerns about, or dissatisfaction with, Ms Blatz's work performance. Nevertheless, the respondent summarily terminated Ms Blatz on 13 April 2009.

Applicable law

[7] Sub-section 14(1) of *The Human Rights Code*, CCSM c. H175, provides that "no person shall discriminate with respect to any aspect of an employment or occupation, unless the discrimination is based upon bona fide and reasonable requirements or qualifications for the employment or occupation."

Issues

[8] The instant complaint raises the following issues:

a. Did the pregnancy of the complainant form any part of the reason for which the respondent decided to terminate the complainant's employment?

b. If so, was the discrimination based upon bona fide and reasonable requirements or qualifications for the employment or occupation?

c. If there was a violation of the *Code* without such bona fide and reasonable requirements or qualifications, what remedial order should be made?

[9] Having answered the first question in the negative, it was not necessary that these reasons should address the remaining two.

Submissions of the parties

The complainant

[10] The complainant adopted the submissions of the Commission about a contravention of the *Code.* In addition, she advanced her own position on the compensation to which she submitted that she is entitled.

[11] Because I have found no such contravention occurred, it is unnecessary to consider the complainant's submissions which relate to any remedial order.

The Commission

[12] The Commission argued that the respondent had contravened s. 14 of the *Code* when it terminated the complainant's employment. The Commission acknowledged that the burden of proof is upon the complainant and the Commission, although it was common ground that the complainant was pregnant and the respondent knew her to be pregnant at the time of her employment's termination.

[13] I accept the Commission's submission that, in order for a violation of the *Code* to occur, it is not necessary that the complainant's pregnancy should be the only reason for

which the respondent had terminated the employment; instead, it is sufficient to establish a contravention if pregnancy was only one of the factors that caused the respondent to terminate the complainant's employment. Moreover, where more than one factor entered into consideration, the complainant's pregnancy need not have been the chief reason for termination.

[14] I also accept the Commission's submission that direct proof of a contravention is not necessary. Instead, an adjudicator may determine that there has been a violation of the *Code*, relying only upon circumstantial evidence. To that end, I adopt as my guide the approach set out in *Comeau* v. *Community Solutions Ltd*, 2010 HRTO 1391 at para 15:

> The applicant was unable to provide any significant direct evidence that she was subjected to discrimination arising out of her pregnancy. However, discriminatory actions are often by their nature, actions which cannot be verified by direct proof. As such, it may become necessary to infer discrimination from the conduct of an individual or individuals especially in circumstances in which differential treatment and/or termination is alleged proximate to an employer being informed of an employee's pregnancy.

[15] I further agree with the Commission that the credibility of witnesses should be assessed in this complaint in accordance with the rule set out in *Faryna* v. *Chorny*, [1952] 2 DLR 354 (BCCA):

> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried the conviction of the truth. The test must reasonably subject his story to an examination of its

> consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

I have additionally kept in mind two points that are peculiar to the hearing of this complaint: first, some of the witnesses were in the employ of the respondent at the time that they gave evidence, and the owner of the company that employs them was present throughout all of the testimony that those witnesses gave; and secondly, Mr Koop had the arguable benefit of hearing the evidence of all witnesses before he testified. Both of these considerations go the credibility of the evidence, although I did not note any attempt by a witness to tailor his or her testimony.

[16] The Commission submitted that, as the complainant's pregnancy evolved and became complicated, the respondent decided that Ms Blatz was, or would be, unable to do her job, so it terminated her employment. Moreover, the Commission argued that the respondent's purported reasons for termination are implausible, leaving only the conclusion that Ms Blatz was terminated because she had become pregnant.

[17] The Commission went on to set out the remedial order that should follow from such a conclusion. However, as explained above in connection with the complainant's submission, it is unnecessary for me to consider that point.

The respondent

[18] The respondent denied that the complainant and the Commission had established pregnancy as a factor in the decision that led to the termination of Ms Blatz's employment. Instead, the respondent argued that it had terminated the complainant's employment, simply because her employer was not satisfied with her performance.

Analysis

[19] I have considered the submissions of the parties in relation to the evidence that I received during the hearing. In making the findings of fact that follow, I have obliged counsel for the complainant, who had reminded me that there is a parallel proceeding pending in the Court of Queen's Bench and had therefore asked me to limit my findings to only those that are necessary to determine the outcome of the instant complaint.

The complainant's pregnancy was not a factor in the respondent's decision to terminate the complainant's employment

[20] The Commission submitted that, as the complainant's pregnancy evolved and became complicated, the respondent decided that Ms Blatz was, or would be, unable to do her job, so it terminated her employment. The argument began from the premise that, as owner of the business, Mr Koop made performance demands upon his

employees; indeed, some witnesses referred to his attitude of "get the work done". At the same time, Mr Koop was familiar with the work disruption that could result from a complicated pregnancy, and he testified to the experience of an acquaintance. Mr Koop confessed to being surprised when Ms Blatz had informed him of her pregnancy. For her part, Ms Blatz described Mr Koop's reaction as "blindsided", adding that he said her pregnancy was not something for which he had planned. From all of this, the Commission inferred that, as Ms Blatz's pregnancy evolved and became complicated, Mr Koop had come to the realization that his employee was not, or would not be, able to do her job. He had already seen Ms Blatz cancel her Caribbean vacation in December 2008 due to her pregnancy, and Ms Blatz's physician had required her on 20 February 2009 to reduce her work hours. On 23 March 2009, Ms Blatz suffered another complication, the details of which are unnecessary to share publicly in these reasons. "Here we go again," texted Mr Koop in an electronic chat shortly thereafter with the head of the company's accounting department. Ms Blatz's employment was thereafter terminated within a few weeks, which is what the Commission suggested any business planner and leader like Mr Koop would have done.

[21] I am unable to share this inference, even if I accept the evidence upon which that conclusion is based.

[22] First, there is the insight of Mr Leo Jansens, a long-timer business adviser to Mr Koop. In testimony that especially impressed me as careful and forthright, Mr Jansens reported that he had talked with Mr Koop about Ms Blatz's pregnancy and its likely impact upon the business. Mr Koop told him that the business would "work around it" and that he would "take it in stride". Even in later conversations, Mr Jansens never heard Mr Koop cite the pregnancy of Ms Blatz as a consideration in her eventual termination.

[23] Secondly, I do not share the Commission's interpretation of Mr Koop's reaction to the pregnancy and its effects. Mr Koop was surprised at the initial news of Ms Blatz's pregnancy, and his electronic chat showed him to be alive to the impact that the pregnancy might have upon his business. However, in his evidence, Mr Koop characterized these as reasonable and honest reactions, and not as the seeds of a plan to terminate the employment of Ms Blatz. I found Mr Koop to be dispassionate when testifying, and I prefer his evidence on this point to the negative intonation that inflected the voice of the complainant when she gave her version of events. Regardless, at the time of his electronic chat with the head of the company's accounting department, Mr Koop had no reason to believe that Ms Blatz was not "getting the job done". For example, despite her pregnancy and the restrictions that it had imposed, Ms Blatz had

been able to prepare and submit a response to a Request for Proposal by MTS, and she had been able to oversee the opening of yet another new retail location for the company.

[24] Thirdly, Mr Koop had been supportive of Ms Blatz after she announced her pregnancy. Although the Commission sought to make much of Mr Koop's offer to install a playpen in Ms Blatz's office in order to hasten her return to work, I find no compelling reason to read into the gesture anything so contrived. I take into account as indicative the very supportive e-mail message that Mr Koop had written to Ms Blatz after her pregnancy forced her to cancel a planned vacation to the Dominican Republic in December 2008.

[25] Fourthly, I see little sense in this purported plan, which would have terminated the complainant in order to avoid business disruptions. Whether Ms Blatz had stayed but taken medical and maternity leave or whether she had been terminated and a replacement hired, the operations of the business were in any event to be disrupted. It would have made no difference whether that replacement was a newly-hired employee or a redistribution of the terminated employee's workload. Mr Koop and the complainant had had discussions about the complainant's plans to return to work after giving birth. It was the complainant's own evidence – and indeed it is built into her calculation of damages – that she did not plan to take a long maternity leave. Instead, she was hoping to return to work by October 2009, and the respondent confirmed this

understanding in the evidence that it had led. If the respondent believed that its operations would thus return to normal within a few months, the respondent must also have appreciated that, if it chose to terminate the pregnant complainant, its business operations would similarly be impacted while a new candidate was hired and trained or while it redistributed her workload among existing employees. In other words, whether by terminating and replacing the complainant or whether by letting her pregnancy and medical leave unfold, the respondent employer must have appreciated that, over the next few months, it would not be operating as usual. I therefore decline to impute to the respondent the notion that, by terminating the complainant, it would avoid what might be seen as a disruption to its operations.

The respondent had plausible reasons unrelated to pregnancy for the termination of the complainant's employment

[26] I find that the respondent has established grounds unrelated to pregnancy for the termination, and I reject the Commission's submission that the respondent's purported reasons for termination are implausible.

[27] The respondent had genuine and substantive concerns about the performance of the complainant.

[28] First, her personality and her management style did not suit the corporate culture. The evidence shows the importance of being a "team player" when working for the respondent. The requirement is set out in the complainant's employment agreement, executed on 5 June 2007, where para. 15(b) requires an employee to "be a team player; co-operate with and encourage your fellow employees." In his testimony, Mr Koop used the word "family" to refer to his team of employees, and other witnesses, such as the former administrative assistant Sandra Hicks, left me with the impression of a close and cohesive group that worked together towards the goals of the company. Ms Blatz brought a more formal and hierarchical management style to the business. "I can be firm", she agreed in her rebuttal evidence. Ms Blatz also introduced changes and attitudes that many employees found jarring. Two employees, Mr Will Gordon and Ms Kim Franklin, seemed especially harsh in their assessment of Ms Blatz, and, although I accordingly discounted their testimony, I nonetheless took away from their evidence an indication that Mr Koop had hired an exceedingly poor fit to the corporate culture that he had created.

[29] Further concerns about Ms Blatz's performance collect under the heading of omissions. No longer in the employ of the respondent, Ms Hicks testified about the empty assurances that staff would sometimes receive when they asked Ms Blatz to do something. "I'll get back to you" was her reply, and it was apparently uttered so often

that the line became a running joke among the staff behind Ms Blatz's back. Unlike Mr Gordon and Ms Franklin, Ms Hicks impressed me as a witness without a personal agenda or bias. She was straightforward in her replies, and she refused to speculate beyond her knowledge and recollection, stating for example "I'd be guessing" in reply. The Commission made some suggestion that the comments of Ms Hicks should be discounted because of a friendship with Ms Franklin, but I found no reason to diminish her testimony.

[30] In any event, problems with omissions and "getting back to you" were frequently cited, but one obvious instance relates to the MTS reconciliations. As Mr Gordon explained, the respondent derived part of its revenue from payments that MTS made to it, reflecting commissions on sales. It appears that the records of MTS were inaccurate, so the respondent would reconcile the MTS statements with its own records. Invariably, discrepancies were found, resulting in the collection of significant additional revenues. Mr Koop and Ms Franklin testified that a backlog arose in preparing these reconciliations in late 2008, and Ms Blatz undertook to do some of the work. Mr Koop stated that Ms Blatz later reported to him that she had completed the reconciliations. However, while Ms Blatz was away on vacation in April 2009, MTS had telephoned Mr Koop, informing him that those reconciliations had still not been received. Mr Koop testified that he considered this to be a serious breach of confidence, and he also

expressed distress at the lost revenue that the missing reconciliations could have cost him.

[31] In setting out this version of events, I have omitted reference to the testimony of Ms Blatz, because, for the purpose of deciding this complaint, it does not matter whether or not Ms Blatz agrees that she undertook to prepare reconciliations or that she actually did the work. It is sufficient that the respondent should have formed the opinion that the complainant had failed to perform her employment duties. This demonstrates the respondent's motive that underlies the decision to terminate the complainant. In obliging counsel for the complainant, I leave it to another forum to determine whether or not such a breach of those duties occurred and whether or not such a breach constitutes grounds for dismissal of the employee.

[32] It similarly makes no difference to the outcome of these proceedings that Mr Koop's investigation of Ms Blatz was not as complete as the complainant might want. Spurred by an electronic chat with Kim Franklin on 2 April 2009, Mr Koop spoke with several senior and administrative employees, aiming to confirm the negative workplace atmosphere about which Ms Franklin had told him. In his evidence, Mr Koop concluded that he must "fire the coach before team leaves." Mr Jansens similarly provided insight into the decision.

[33] Accordingly, I accept that the respondent had concerns about the performance of the complainant, and these concerns alone were the basis for its decision to terminate the complainant's employment. I find no evidence that suggests the pregnancy of the complaint played any part in the decision to terminate Ms Blatz's employment.

A digression on remedial compensation

[34] Having held that the complainant and the Commission have failed to prove on the balance of probabilities that the respondent has contravened the *Code*, it is unnecessary that I should determine the remedies to which the complainant would otherwise have been entitled.

[35] However, during the hearing when the outcome of this complaint was not settled, I had asked the parties to make submissions about the interplay between the notice period under s. 61(2) of *The Employment Standards Code*, CCSM c. E110, and the compensation that could be ordered under s. 43(2)(b) of *The Human Rights Code*, CCSM c. H175. The parties had kindly indulged me with very helpful submissions that deserve an extended and careful consideration in these reasons. At the same time, I have been aware all along of a pending application for judicial review that had raised this very issue. After it came to my attention on 7 May 2015 that reasons had been released in connection with that application for judicial review, my own work on the subject was supplanted and rendered unnecessary by the guidance found in *Manitoba*

Human Rights Commission et al. v. *Jewish Community Campus of Winnipeg Inc.*, 2015 MBQB 47 at para.. 45-47.

Decision and order

[36] For the reasons set out above, the complaint is dismissed.

[37] I draw to the parties' attention s. 50(2) of the *Code*, which requires that any application for judicial review must be made the Court of Queen's Bench within 30 days of the making of this decision or within such further time as the court may allow.

[Original signed by]

20 May 2015

Robert Dawson