



HUMAN RIGHTS TRIBUNAL OF ONTARIO

BETWEEN:

Sonya McIlravey

Applicant

-and-

Vincent Salon & Spa, Vincent Castano and Kelly Castano

Respondents

CASE RESOLUTION CONFERENCE DECISION

Adjudicator: Judith Hinchman
Date: March 6, 2009
File Number: T-0175-08
Citation: 2009 HRTO 246
Indexed as: **McIlravey v. Vincent Salon & Spa**

APPEARANCES BY

Sonya McIlravey, Applicant

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On her own behalf

Vincent Salon & Spa,
Vincent Castano, and
Kelly Castano, Respondents

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M. Steven Rastin,
Counsel

INTRODUCTION

[1] This is an Application under section 53(3) of the *Human Rights Code* R.S.O. 1990, c. H.19, as amended (the “Code”). The underlying human rights complaint was filed with the Ontario Human Rights Commission on October 2, 2007 and abandoned upon the filing of this Application with the Tribunal.

[2] This hearing was conducted in accordance with the expectation, expressed in the Code and the Tribunal’s Rules, that section 53(3) applications proceed in a highly expeditious manner given they are often based on complaints, like this one, which are nearly a year old by the time they reach the Tribunal. To that end, the witnesses adopted their written statements filed in advance and the hearing proceeded with minimal examination and cross-examination.

[3] In addition to the parties, the following persons provided evidence at the Case Resolution Conference: Linda Ellis, accountant for corporate respondent and Danielle Gregoire, employee of corporate respondent.

BACKGROUND

[4] The applicant worked at the corporate respondent (the “Salon”) for approximately four years in the capacity of apprentice hairdresser, colourist, and for a few months, floor manager. The Salon is owned by the personal respondents who are spouses.

[5] The applicant believed she had approval for a vacation beginning Saturday, August 25 through September 5, 2007. Towards the end of August, Mr. Castano told the applicant that, contrary to her belief, he would not approve a vacation for that week.

[6] The parties had several conversations between August 21 and 24, 2007. The applicant alleges that during these conversations she raised health concerns. She alleges that by the end of the week she had informed the respondents that she had decided not to pursue the vacation request as she might instead require a sick leave depending on the outcome of a doctor’s appointment booked for August 24.

[7] The respondents claim that the conversations concentrated on the dispute over the vacation request and that they were unaware of health concerns that might require a sick leave. They further allege that following the vacation dispute, the applicant stated twice that she was quitting.

[8] When the applicant did not come to work on August 25, Mr. Castano instructed the Salon's bookkeeper Linda Ellis to prepare a Record of Employment (the "ROE") and final paycheque for the applicant.

[9] Prior to receiving her ROE, on August 27 the applicant went to the Salon and left an envelope on the front desk that contained a Medical Certificate Employment Insurance form (the "medical certificate") filled out by her doctor and dated August 27, 2007. The medical certificate stated that due to illness the applicant was incapable of working from August 24, 2007 until an "unsure" expected recovery date.

[10] The applicant received the ROE and final paycheque on September 4, 2007. She immediately filed a human rights complaint alleging that the respondents terminated her because she was on sick leave.

[11] For the reasons which follow, I find that on a balance of probabilities the respondents genuinely had no knowledge of any condition that would trigger a duty to accommodate. Furthermore, I accept the respondents' explanation that they terminated the applicant's employment because they thought she was angry over a denied vacation leave and not planning on showing up for work. I find that explanation more probable than any inference that they terminated her because she was about to commence a sick leave. The Application is therefore dismissed.

EVIDENCE

Applicant's Submissions

[12] The applicant asserts that the respondents should have known over the course of 2007 that she might become unwell enough to require a sick leave. She asserts that both Mr. and Ms. Castano were well aware of certain personal circumstances that had

become quite stressful for her. She testified that over the summer of 2007, she was losing weight and suffering from dizziness and panic attacks. She testified that her doctor prescribed first antidepressants and then sleeping pills. In addition, she underwent ultrasounds. She asserts that Mr. and Ms. Castano knew about her doctor's appointments because she booked time off work for those.

[13] However, at the Case Resolution Conference, the applicant testified that during that period:

1. She "mostly worked" taking as little time off as possible other than when her children were sick;
2. When she needed time off during the previous year she did not request any accommodations from the respondents; she just booked herself off when she needed the time for an appointment and that "the system worked;" and
3. She tried to book her appointments over her lunch hour if possible.

[14] Finally, the applicant does not dispute that she did not bring any medical notes or requests for accommodations to the respondents over the summer of 2007.

[15] At the end of the summer, the applicant alleges that between August 21 and August 24, she informed the employer during the course of several conversations that she was not well and may need a sick leave. Her evidence is:

- **Tuesday August 21**

While in the Salon basement preparing coffee for a client, she spoke to Mr. Castano. She had been sick in the washroom and told Mr. Castano she was not feeling well and had a doctor's appointment on Friday. She told him that she and her doctor were trying to figure out what was wrong with her and that she would be getting test results back on Friday. She testified that Mr. Castano told her "you are always sick, always something wrong, why don't you take a leave of absence, a sick leave."

- **Wednesday August 22**

Mr. Castano said that one person could go home because the Salon was not busy. She told him she was not feeling well and he permitted her to

go home. Later that afternoon, at Mr. Castano's request, she came to the Salon and picked up a letter. The letter stated that she could not take a vacation the following week. She called Mr. Castano at home that evening to discuss the letter. She testified that he told her that the following week was not convenient for the Salon. She testified that she thought at the time Mr. Castano was being unfair.

- **Thursday August 23**

After spending the previous night up sick, she called in sick to the Salon, speaking to Ms. Castano. She requested a meeting at the Salon with Mr. Castano that evening. During the meeting with Mr. Castano, she told him that she might not be pursuing the vacation request for the following week. She told him that depending on her doctor's advice the next day, she may not be coming in the following week for medical reasons. She testified that she then spoke to Ms. Castano and told her about her illness.

- **Friday August 24**

The applicant went to the Salon in the morning. She thought from the look on their faces that the respondents were surprised to see her come in. She testified that a few minutes later Mr. Castano said in a loud voice to her "you don't work here anymore." She stated that after that she did not speak to anyone just left because she felt humiliated. However, in submissions filed on October 28, 2008, the applicant stated that before she left, she said "I might as well quit then." She did not mention any illness to the respondents on that day.

[16] The applicant testified that later that afternoon her doctor put her on sick leave to avoid a nervous breakdown. She therefore did not come to work on Saturday because she was on sick leave. She also testified, however, that she did not feel that she should go to work on Saturday because she was very upset that she was treated so unprofessionally and had felt humiliated in the Salon on Friday. The applicant's explanations appear somewhat inconsistent. She agrees with the respondents that she did not communicate to them at all on Saturday.

[17] As of Monday, the applicant did not know that she had been terminated. She testified she phoned the Salon on August 27 and spoke to Danielle Legacy. She asked Ms. Legacy to take her off the schedule for that week because she had a doctor's note for stress leave. In support, the applicant submitted a letter, dated November 14, 2008 from Ms Legacy, which supports that evidence. She alleges she then went to the Salon

and dropped off an envelope containing the medical certificate and a letter to Mr. Castano, dated August 27, that was a “follow up to their meeting on Thursday August 23rd”. This letter reiterates her position that she forewarned Mr. Castano of the possible sick leave and ends “I am not on holiday as of August 27 – September 1, 2007. I am on stress/sick leave.”

[18] The medical certificate is a form and other than filling in the date of illness onset and stating that the recovery date is unsure, the doctor did not describe the illness or otherwise characterized it in any way. There are no comments or descriptors on the form. Although the medical certificate states that illness onset is August 24, the signature date is August 27.

Respondent’s Submissions

[19] The respondents’ evidence is that during the summer of 2007 they did not know about the prescribed medications or the medical tests and were unaware of any serious medical concerns. They agree they knew the applicant had ongoing personal issues and always took that into consideration if the applicant required a specific day off to attend to those concerns. They deny any awareness that stress related to that situation resulted in health issues.

[20] The respondents testified that they did not know about the applicant’s medical appointment on the Friday, August 24. They testified the applicant never raised sick leave with them prior to her termination. They also testified that they never saw the letter dated August 27th that the applicant states she included with the medical certificate.

[21] The respondents’ specific evidence regarding their conversations with the applicant during the week of August 20th is:

- **Tuesday August 21**

Mr. Castano spoke to the applicant about her vacation request and told her that in his opinion the requested week fell on one of the busiest times of the year and consequently she could not have that week off. The applicant responded she had made plans and that it was too late to make changes. Later that evening Mr. Castano called his accountant, Linda Ellis, and asked her advice. She advised that he put his position in writing

and offer the applicant a different week. Ms Ellis was asked to prepare a letter to that effect. Ms Ellis corroborated this testimony.

- **Wednesday August 22**

During the applicant's shift, Mr. Castano went to the basement to look for her. Mr. Castano asked her if she was going to work that day. She told him that she wanted to go home or leave early because she was not feeling well. He agreed that if she would first finish her clients she could then go home. He testified that although both Tuesday and Wednesday she "had not been herself" he assumed it was because she still wanted to take the vacation he had denied. Before she left, he asked her to come back that day and pick up the letter that he had asked Ms. Ellis to draft. She did so.

The applicant phoned Mr. Castano that evening and he testified that for approximately an hour they discussed only the disagreement regarding the requested vacation. His recollection is that they did not discuss any health issues.

- **Thursday August 23**

The applicant was scheduled to work at noon. She phoned in the morning and told Ms. Castano that she would not be coming in. She did not state a reason. About an hour later, she called back and said that she would like to come in and would deal with some personal problems from the Salon. Mr. Castano phoned her back and said that she should stay home and deal with her problems there. The applicant asked for a meeting later that day and Mr. Castano agreed.

At the end of the business day, the applicant and Mr. Castano met at the back of the Salon. Mr. Castano's evidence is they had a heated discussion about the vacation request. Mr. Castano states the applicant told him that she was going to take the time off no matter what and that she knew she could be fired if she did. He told her that she knew the rules and then said something to the effect that you do what you do and I will deal with it. The applicant responded "if you are going to let me go I might as well quit," and a few minutes later said that she was not coming in the next day. Ms. Castano testified that she overheard the applicant say "I'm just not coming back."

Ms. Castano testified that she changed the Friday schedule as a result. Mr. Castano testified that he phoned another employee, Danielle Gregoire, at home and asked her to come in early to cover for the applicant. Ms Gregoire confirmed this evidence.

- **Friday August 24**

Both personal respondents testified they were surprised when the applicant came to the Salon in the morning. Mr. Castano testified that he

asked the applicant why she was there and told her he had moved her clients because he thought she had quit. Mr. Castano recalls she stated that she wanted to work her “last” day. He gave her some cleaning duties. After about 20 minutes, appearing angry, the applicant left. Mr. Castano said that they now wondered if the applicant would come to work the next day and so left her schedule on the books. Later that day, the applicant came into the Salon to pick up her regular paycheque. She did not say anything to Mr. Castano.

- **Saturday August 25**

The applicant did not come to work on Saturday and so Mr. Castano asked Ms. Ellis to prepare the ROE and final paycheque. Ms. Ellis testified and her evidence corroborates this. I found her a credible witness and the applicant did not dispute that the ROE was prepared on Saturday. I find that the respondents terminated the applicant on August 25, 2007.

Analysis

[22] This case turns mostly on whose version of certain conversations occurring the week of August 20, 2007 is most credible. In determining witness credibility, the Tribunal has followed *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.) for the proposition that the hearer of fact must subject the witness’s “story to an examination of its consistency with the ...preponderance of the probabilities which a practical and informed person would readily recognize is reasonable” in the circumstances. Other factors cited in *Cugliari v. Clubine and Brunet* 2006 HRTO 7 (add Cite), include the witness’s motives, the witness’s relationship to the parties, the internal consistency of their evidence, and inconsistencies and contradiction in relation to other witnesses’ evidence.

[23] The first issue is whether the applicant had a disability. Pursuant to the *Code* s. 10, disability includes:

Any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, includes diabetes mellitus, epilepsy, a brain injury, any degree of paralysis, amputation, lack of physical co-ordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, physical reliance on a guide dog or other animal or on a wheelchair or other remedial appliance or device...

Not all illnesses, however, have been found to be protected by the *Code*. In *Ouimette v. Lily Cups Ltd.* (1990), 12 C.H.R.R. D/19 (Ont. Bd.Inq.) the Ontario Board of Inquiry

found that a “temporary illness [such as the flu] which is experienced from time to time by everyone,” did not rise to the level of disability under the *Code*.

[24] The applicant alleges that she was terminated because she was on sick leave, but she does not identify her disability. The respondents do not dispute that she went home early two days the week of August 20th because she did not feel well. It is undisputed that the applicant did not say that she was unwell when she left the Salon on Friday. It is also undisputed that the applicant did not contact the respondents on Saturday to explain why she chose not to come to work that day. The medical certificate does not identify the illness requiring the sick leave. Notably it was dated and delivered to the employer after her termination.

[25] The applicant submitted that several weeks after her termination she learned that she was in the early stages of pregnancy. She testified, however, that neither she nor her doctor thought at the time that she was pregnant.

[26] I am satisfied on the evidence that the respondents genuinely had no knowledge of the applicant’s condition, were therefore untainted by a protected ground, and thus their duty to accommodate was not triggered.

[27] The second issue is whether the respondents terminated the applicant’s employment because they perceived that the applicant had a disability.

Summer 2007

[28] I am not persuaded that the respondents were aware of any health issues during the summer of 2007. Bolstering the respondents’ position is Ms. McIlravey’s testimony discussed earlier that essentially she took as little time off as possible trying to schedule her appointments on her lunch hour if possible, she did not request accommodations for time off or ask the respondents to remove her from the schedule for appointment, instead she booked herself off on the computer. Finally, the applicant does not dispute that she did not bring any medical notes or requests for accommodations to the respondent over the summer of 2007. I find that it is more likely than not that they were not under sufficient notice of facts to know that accommodation for sick leave might be

required at some point in the future.

Week of August 20th

[29] For the following reasons, I find the respondents' characterization of the week's events more credible. First, I find it more probable in the circumstances that the parties had several heated discussions about the denied vacation request and did not discuss health issues. Second, it is undisputed that when she left the Salon on Friday the applicant did not mention any illness. And by her own evidence on Saturday she did not contact the respondents to say that her doctor had put her on a sick leave.

[30] Finally, Ms. McIlravey's own evidence is that she did not give the sick leave note to her employer until Monday, two days after she was terminated. Therefore, they were not in possession of this note prior to termination. Furthermore the applicant never formally asked for accommodation.

[31] The weight of the evidence supports that it is more likely than not that on August 25, 2007 the respondents were not aware nor could they have been aware that the applicant had a disability. Furthermore, the evidence supports that as of that date they did not perceive that she had a disability. The evidence supports a conclusion that it is more likely than not that the respondents were not aware that her doctor put her on sick leave or might put her on sick leave until after they severed the employment relationship.

Reason for Termination

[32] I find that the respondents terminated the applicant's employment because she did not show up to work after expressing anger that her vacation had not been granted and stating twice that she was not coming back to work as a result.

[33] Much of Ms. McIlravey's written submissions over the past year and a half and her testimony at the Case Resolution Conference reflect a view that her vacation request was handled unfairly. She testified that she had to book vacations that meshed with her ex-spouse's schedules well in advance per agreements with them. She

testified that she thought the respondents were not truthful in how they dealt with the request. At the Case Resolution Conference, the applicant appeared still to be upset about this and her testimony and demeanour on this point is consistent with the respondents' evidence that after August 21st, she was very upset about their decision to deny the vacation.

[34] Also consistent with the respondents' position is that the parties agree that Ms. McIlravey called Mr. Castano on Wednesday evening to discuss his letter regarding the vacation. And the evidence is that that was a lengthy conversation.

[35] Evidence that the applicant's behaviour led the respondents to believe that she intended to quit when she left on Thursday is Ms. McIlravey's testimony that the respondents appeared surprised to see her on Friday and that Mr. Castano announced that she did not work there anymore. The respondents' position that they thought they needed to cover Ms. McIlravey's Friday appointments was corroborated by Ms. Gregoire's evidence. Ms. McIlravey did not dispute and I have no reason to doubt Ms. Gregoire's testimony regarding the phone call from Mr. Castano.

[36] In written submissions, filed October 28, 2008, Ms. McIlravey states that before she left on Friday; because Mr. Castano was being unfair to her, she stated "I might as well quit then." This supports the respondents' evidence that Ms. McIlravey stated twice in two days that she intended to quit because she was upset about the denied vacation. Finally, the applicant testified that she did not want to go to work on Saturday because she had felt humiliated on Friday.

[37] On the balance of probabilities, the weight of the evidence supports that it is more likely than not that on August 25, 2007 the respondents' reasons for terminating the applicant were non-discriminatory based on their belief that she did not intend to return to work because she was upset over a denied vacation.

Conclusion

[38] I find that on a balance of probabilities the respondents genuinely had no knowledge of any condition that would trigger a duty to accommodate. Furthermore, I

accept the respondents' explanation that they terminated the applicant's employment because they thought she was angry over a denied vacation leave and not planning on showing up for work. I find that explanation more probable than any inference that they terminated her because she was about to commence a sick leave.

ORDER

[39] This Application is dismissed.

Dated at Toronto, this 6th day of March, 2009.

"Signed by"

Judith Hinchman
Member