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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:

Belen Gardner and Marissa Jurao

COMPLAINANTS

A N D:

Belinda Geldenhuys

RESPONDENT

REASONS FOR DECISION

Chair:	Bernd Walter
On her own behalf:	Belen Gardner
On her own behalf:	Marissa Jurao
Hearing Date:	June 18, 2014
Hearing Location:	Vancouver

INTRODUCTION AND PROCEDURAL HISTORY

[1] Marissa Jurao and Belen Gardner initially filed their complaint against Belinda Geldenhuys and Cherington Place. The complaint alleged discrimination in employment on the basis of race, place of origin and colour, contrary to s. 13 of *the Human Rights Code*.

[2] On August 13, 2013, the complaint was dismissed against Cherington Place but it continued against Ms. Geldenhuys. Her response to the complaint was filed on February 15, 2013.

[3] On November 12, 2013, a Notice of Hearing was issued and the complaint was scheduled to be heard commencing June 18, 2014.

[4] Since October 13, 2013, Ms. Geldenhuys has not communicated with, or responded to correspondence from the Tribunal. Such correspondence has routinely been returned undelivered.

[5] Since May 2014, the Tribunal has made several attempts to communicate with Ms. Geldenhuys and to serve her with documents, in particular, the Notice of the Hearing.

[6] On June 11, 2014, the Tribunal was provided with an Affidavit of Attempted Service, sworn by a process server, Mr. P. Dick. The affidavit deposes that on May 30 and June 4, 2014, on the basis of a number of inquiries, Mr. Dick was unable to serve Ms. Geldenhuys. He believes she cannot be personally served. At no time did Ms. Geldenhuys apply to adjourn the hearing.

[7] It appears that Ms. Geldenhuys has not seen fit to comply with *Rule 7* of the Tribunal's *Rules of Practice and Procedure*:

Address for delivery

1. Every participant must provide notice in writing of an address for delivery to the tribunal and all other participants.

Address if lawyer or agent

2. If a participant is represented by a lawyer or agent, the postal address of the lawyer or agent is the participant's address for delivery.

Change of address

3. A participant must immediately, in writing, notify the tribunal and other participants of a change of address for delivery, and may use the Change of Address for Delivery Form (Form 10).

Deemed delivery

4. If the Tribunal or another participant delivers a communication to a participant's address for delivery under rule 9, that participant is deemed to have notice of the communication.

[8] Ms. Geldenhuys did not appear at 9:20 a.m. on June 18, 2014, the time set for the hearing in the Tribunal's Notice of Hearing and Notice of Rescheduled Hearing. The hearing was postponed for thirty minutes during which time I attempted to contact Ms. Geldenhuys by telephone, to no avail. The hearing then proceeded in the absence of Ms. Geldenhuys.

[9] Ms. Jurao testified on her own behalf and called two witnesses, Maryann Domrique and Marcellina Kelly. Ms. Gardner testified on her own behalf and called no additional witnesses.

EVIDENCE OF MS. JURAO AND WITNESSES

[10] Ms. Jurao says she is of Filipino origin and was treated adversely by Ms. Geldenhuys, whom she says targeted her on the basis of her race.

[11] Ms. Jurao immigrated to Canada with her family in 1997. She has worked as a care aide, at Cherington Place, a nursing home, for fourteen years. Cherington Place provides residential care for up to seventy-five elderly residents, who present with a variety of

health issues including Alzheimer's or dementia, and who are unable to care for themselves or to be cared for more independently in their own homes. Cherington Place residents require care on a "24/7" basis. Ms. Jurao's job was to provide intimate personal care to residents of Cherington Place including in such areas as personal hygiene, toileting, escorting them for meals, and feeding. She is a union member.

[12] Ms. Jurao says Ms. Geldenhuys came to work at Cherington Place in February 2012, in the position of resident care manager. She was responsible for day to day supervision and management of Cherington Place's care provision operation. Ms. Jurao said that it was "chaotic and stressful" to work with Ms. Geldenhuys whom she says "traumatized" the place. She would change policy at whim and enter residents' rooms unannounced.

July 13, 2012

[13] Ms. Jurao says that when Ms. Geldenhuys began her employment she experienced her as prejudiced and against her. On July 13, 2012, at 6:30 a.m., Ms. Jurao was about to commence her shift. She was gathered at the main floor nurse's station along with the night nurse, other care aides, and as many as eight practicum students. Marcellina Kelly, another care aide, was there. Such meetings are routine events at shift changes, to report on and debrief any incidents or occurrences which may have taken place on the previous shift.

[14] Ms. Jurao testified that, of the number of persons assembled, two staff, one of whom was herself, were not wearing uniforms. Ms. Jurao testified that uniforms are optional, as long as other clean, appropriate attire is worn. Ms. Jurao says that she was dressed in plain clothing. She says that Ms. Geldenhuys pointed directly at her and said, "Marissa, you are not wearing a uniform", and added that she could be sent home. Ms. Geldenhuys pointed to staff who were wearing uniforms and to Ms. Jurao's clothing, saying "yours is not".

[15] Ms. Jurao introduced an excerpt from Cherington Place's parent company's Human Resources Manual entitled "Staff Decorum", effective May 2006. That manual provides at paragraph 1.2 that:

1.2 Clean, comfortable clothing allowing appropriate work movements to be worn. Uniforms are optional. Blue jeans, spandex and tank tops are not acceptable. Walking shorts may be worn during summer months.

Exhibit 4

[16] Ms. Jurao says she was deeply embarrassed in front of the night nurse, five staff and eight students. She says she did not respond out of respect. She wondered why Ms. Geldenhuys could not have spoken to her privately. She says the other individual who was not wearing a uniform, was Russian, and she was not "picked on". Ms. Jurao says this was the first time this was raised as an issue and that she was the only Filipino. Marcellina Kelly confirmed this incident.

July 27, 2012

[17] Ms. Jurao says that, on July 22, 2012, she fainted and had to leave work and return home. On July 23, 2012, Ms. Geldenhuys phoned her at home to inquire when she would be returning to work. Ms. Jurao responded that she would be back at work on July 27, 2012. Ms. Jurao says she was trying to be polite and, as a friendly gesture, told Ms. Geldenhuys she herself deserved a holiday.

[18] On Ms. Jurao's return to work on July 27, 2012, she was seen in Ms. Geldenhuys' office. Ms. Geldenhuys asked her if she knew a co-worker, a care aide named Felix, who was also Filipino. Ms. Jurao only knew this individual from staff "orientation" and that he performed volunteer work by singing with Cherington Place's residents.

[19] Ms. Jurao testified that Ms. Geldenhuys told her she had terminated Felix because of his "lies". Ms. Jurao did not know what Ms. Geldenhuys was referring to. Ms. Geldenhuys then mentioned two other Filipino care aides, one of whom had been suspended and the other terminated. Ms. Geldenhuys said "Good for you Marissa, I did not vendetta you". Ms. Jurao says she does not know why Ms. Geldenhuys said this. She thinks it meant that she had not fired Ms. Jurao.

[20] Ms. Jurao testified that Ms. Geldenhuys also said “Filipinos are gossipers and I don’t know if this is a cultural thing”.

[21] Ms. Jurao says she was shocked by Ms. Geldenhuys’ “discriminatory” comments. After work she told her shop steward about the conversation and was advised not to go Ms. Geldenhuys’ office unaccompanied.

August 21, 2012

[22] On August 21, 2012, Ms. Jurao was invited by her shop steward “Margaret” to attend at Ms. Geldenhuys’ office. She says that Ms. Geldenhuys was upset and started “berating” her in front of the shop steward, for having disclosed their July 27 conversation saying, “I am the boss. I can fire anybody. I don’t care anymore human rights”. The shop steward answered, “Marissa knows about it”, meaning, “human rights”.

[23] Ms. Jurao testified that she interpreted this exchange as a warning or threat to fire her. She says she felt “demoralized, uncomfortable, scrutinized, vulnerable and worried about her job security”.

August 28, 2012

[24] Ms. Jurao testified that on August 28, 2012, at 6:25 a.m., in front of the night nurse and several care aides, including Marcellina Kelly, and nurse Maryanne Domrique, Ms. Geldenhuys said to her, “Marissa, you are not wearing a uniform again, I could send you home”. Ms. Jurao responded that she had talked to the shop steward who had told her care aides can wear their own clothes instead of uniforms. Ms. Geldenhuys replied that she too had spoken to the shop steward and asked why other care aides wore uniforms. Ms. Geldenhuys asked Ms. Jurao how long she had been working at Cherington Place. Ms. Jurao said twelve years, and Ms. Geldenhuys said, “You have been here for twelve years and you don’t have a uniform”? Ms. Jurao answered that she had had lots of uniforms but gave them away. Ms. Jurao also asked why she was being singled out when another care aide, Ms. Sharma, was not wearing a uniform. Ms. Jurao says Ms. Geldenhuys did not explain and simply said, “I am talking to you Marissa”.

[25] Ms. Jurao says she was trembling and felt sick, and unable to work. She asked Ms. Gardner, the nurse in charge, for permission to go home and left, but first tried to see a doctor. Marcellina Kelly confirmed this event, as did Maryanne Domrique, who wonders why only Ms. Jurao was picked on.

[26] Ms. Jurao says that later, at 10:15 a.m., Ms. Geldenhuys phoned her at home and accused her of abandoning her shift. She said Ms. Jurao would need to meet with her on August 29th. Ms. Jurao says her union advised her not to, and she did not attend.

[27] Later on August 28, 2013, Ms. Jurao wrote a letter to Cherington's CEO and its Operations Manager, documenting her complaint of repeated humiliation and harassment by Ms. Geldenhuys: Exhibit 5.

[28] On October 15, 2012, Cherington responded, apologizing for Ms. Jurao's distress; agreeing that uniforms were not mandatory in lieu of other suitable clothing; agreeing that she had not abandoned her position on August 28, 2012, and indicating that her "allegations of racial stereotyping" had been addressed: Exhibit 6.

[29] Ms. Jurao has not returned to work since August 28, 2012, for health reasons which predated the allegations and incidents she complains of.

[30] Nevertheless, Ms. Jurao says Ms. Geldenhuys' treatment of her traumatized and demoralized her. She says she was treated badly on four occasions during which her family's future was threatened. She lost trust and became nervous. She became socially withdrawn from family and friends. She has trouble sleeping and functioning. She continues to struggle with her feelings of powerlessness and confusion. She submitted no medical evidence relating to the impact of Ms. Geldenhuys' alleged conduct upon her.

[31] Ms. Jurao seeks the sum of \$5,000.00 as compensation for injury to her dignity.

EVIDENCE OF MS. GARDNER

[32] Ms. Gardner has been employed by Cherington Place as a registered nurse for thirty-four years. She continues to work at the facility. She has, over the years, worked closely with many managers.

[33] Ms. Gardner alleges Ms. Geldenhuys treated her in a discriminatory and adverse manner. She described Ms. Geldenhuys as a very controlling, stress-inducing manager, who was constantly checking up and monitoring everything.

[34] Ms. Gardner testified that, on August 28, 2012, at 6:15 a.m., Ms. Geldenhuys called her into her office by walkie-talkie. Ms. Gardner thought she was to provide updates on the residents. Immediately, Ms. Geldenhuys began saying, “What is wrong with you Filipinos”. Ms. Gardner says she was shocked and replied “What do you mean?” Ms. Geldenhuys responded, “Is it your culture? It is not East Indians, but you Filipinos”. Ms. Gardner again sought an explanation. Ms. Geldenhuys said “you Filipinos have problems to work”. Ms. Gardner replied, “What problems? Filipinos are good, hardworking people”. Ms. Geldenhuys responded “You think so?” and Ms. Gardner said “I know so”.

[35] Ms. Gardner testified that Ms. Geldenhuys then asked her why she used Gardner, her married name and asked “What’s your maiden name?” When Ms. Gardner told her her Filipino sounding last name, Ms. Geldenhuys said “Why don’t you change your name back to that?” Ms. Gardner says she was very insulted and offended by the comment.

[36] Ms. Gardner also testified that Ms. Geldenhuys told her everyone was surprised that she had hired a Filipino nurse, just two days previous. When Ms. Gardner responded that the individual was an excellent nurse, she says it seemed like Ms. Geldenhuys was saying she should not have hired the individual because she is Filipino.

[37] Ms. Gardner said that Ms. Geldenhuys’ treatment of her stressed and demoralized her and made her feel devalued, vulnerable, singled out and targeted on the basis of her characteristics. She said she was made to feel unwelcome in her workplace of thirty years. She seeks compensation for injury to her dignity.

ANALYSIS AND DECISION

[38] Section 13 of the *Code* provides:

- (1) A person must not

- (a) refuse to employ or refuse to continue to employ a person, or
 - (b) discriminate against a person regarding employment or any term or condition of employment because of race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation or age of that person or because that person has been convicted of a criminal or summary conviction offence that is unrelated to the employment or to the intended employment of that person.
- (2) Subsections (1) and (2) do not apply with respect to a refusal, limitation, specification or preference based on a bona fide occupational requirement.

[39] The legal burden is on Ms. Jurao and Ms. Gardner to establish, on a balance of probabilities, a *prima facie* case of discrimination. A *prima facie* case is one which covers the allegations made and which, if the allegations are believed, is sufficient to justify a finding in Ms. Jurao's and Ms. Gardner's favour absent an answer or justification from the respondent: *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Limited*, [1985] 2 S.C.R. 526, p. 558.

[40] In order to establish a *prima facie* case, Ms. Jurao and Ms. Gardner would have to prove that:

- (a) they are members of one or more of the protected groups against whom discrimination is prohibited by the *Code*;
- (b) they suffered adverse treatment in regard to their employment; and
- (c) it is reasonable to infer from all the circumstances that their membership in the protected group was a factor in the adverse treatment: *Moore v. British Columbia* 2012 SCC 61.

[41] It is not necessary the prohibited ground be the sole or primary factor in the adverse treatment, provided it is at least a factor: *O'Connor v. Town Taxi*, 2000 BCHRT 9, para. 55.

[42] Further, the *Code* does not require that there be any intention to discriminate in order for there to be a breach of the *Code* (s. 2).

[43] It is not disputed that Ms. Jurao and Ms. Gardner are of Filipino origin. That aspect of a *prima facie* case is accepted and established.

[44] In this context, discriminatory acts “can arise from a process of subconscious stereotyping as well as from conscious decisions”, and thus, the Tribunal “must be alert to all stages of the inquiry for evidence from which such stereotyping might be inferred”: *Johnson v. Halifax Regional Police Service* (2003), [2003] N.S.H.R.B.I.D. No. 2, 48 C.H.R.R.D/307 (N.S. Bd. Inq.).

Ms. Jurao

[45] I am persuaded by the evidence that, on at least three occasions, July 13, July 27, and August 28, 2012, Ms. Jurao was subjected to intimidating, and differential treatment by Ms. Geldenhuys, on the basis of her place of origin. Other staff were not singled out for their dress choices on the same occasions. On another occasion, Ms. Geldenhuys directed the slur that Filipino’s are gossipers at Ms. Jurao.

[46] Ms. Geldenhuys’ conduct embarrassed Ms. Jurao. She felt singled out for unjustified criticism on the basis of her race or place of origin. On another occasion, during which her heritage was specifically mentioned or highlighted, Ms. Jurao felt threatened in terms of her employment to the point she felt compelled to report to her shop steward.

[47] On August 28, 2012, Ms. Jurao wrote a letter of complaint to her manager in which she provided detailed documentation and dates to support her allegations. In a letter dated October 15, 2012, Cherington Place’s Operations Manager acknowledged Ms. Jurao’s distress and confirmed her “allegations of racial stereotyping” had been addressed.

[48] Ms. Jurao testified that Ms. Geldenhuys’ conduct has left her with ongoing difficulties including insomnia and feeling powerless. She also says she has become socially withdrawn. She broke down and wept at several points in her testimony. Her testimony is uncontradicted.

[49] I find that Ms. Jurao’s race and place of origin were factors in Ms. Geldenhuys’ negative treatment of her. Ms. Jurao has established a *prima facie* case of discrimination.

Ms. Gardner

[50] After over thirty years with Cherington Place, as a respected senior professional, Ms. Gardner was treated in a demeaning, disrespectful and discriminatory manner by Ms. Geldenhuys, her supervisor. Clearly, Ms. Gardner's race and place of origin were central to Ms. Geldenhuys' race-based slurs. She was made to feel devalued and vulnerable. Her testimony stands uncontradicted. Ms. Gardner has established a *prima facie* case of discrimination.

[51] Both complaints are justified.

REMEDIES

[52] Under section 37(2)(a), I order Ms. Geldenhuys to cease contravening the *Code* and to refrain from similar contraventions in the future.

[53] I have above set out the injurious impacts of Ms. Geldenhuys' conduct on Ms. Jurao's and Ms. Gardner's dignity, feelings and self-respect, respectively.

[54] In *Hopkins v. T.T.I.C.L. Computer Corp. et al.*, 2003 BCHRT 8, serious race-based remarks disturbed the complainant to the point of stress, anxiety, and insomnia. The conduct was verbal and the complainant's employment, unlike in this case, was of relatively short duration. The conduct complained of was egregious. The Tribunal awarded \$2,500.00 for injury to dignity, feelings and self-respect.

[55] Under s. 37(2)(d)(ii), I order Ms. Geldenhuys to pay to Ms. Jurao the sum of \$2,000.00 for injury to dignity, feelings and self-respect, along with post-judgment interest.

[56] I order Ms. Geldenhuys to pay to Ms. Gardner the sum of \$1,500.00 for injury to dignity, feelings and self-respect along with post-judgment interest.

Bernd Walter, Chair