HUMAN RIGHTS TRIBUNAL OF ONTARIO

B E T W E E N:

Riaz Mohammed

Applicant

-and-

C. & E. Fein (Canada) Ltd. Operating as Fein Canadian Power Tool Company

Respondent

DECISION

Adjudicator:	Marinus Lamers
Date:	March 17, 2023
File Number:	2018-34153-I
Citation:	2023 HRTO 376
Indexed as:	**Mohammed v. C E Fein (Canada) Ltd**

APPEARANCES

Riaz Mohammed, Applicant	)	Daniel English, Paralegal
C. E. Fein (Canada) Ltd. Operating as Fein Canadian Power Tool Company, Respondent	)	Preston Tu, Counsel

INTRODUCTION

[1] This Application alleges discrimination with respect to employment because of disability, family status and reprisal contrary to the *Human Rights Code*, R.S.O. 1990, c. H.19, as amended (the "*Code*").

[2] The applicant alleges that the respondent failed to comply with its duty to accommodate the applicant's disability subsequent to a motor vehicle accident which occurred on November 27, 2017 and further that the respondent discriminated against the applicant on the basis of disability, family status and reprisal in relation to the termination of the applicant's employment on January 19, 2018.

[3] The respondent denies any discrimination in violation of the *Code*.

[4] For the reasons provided below and based on the evidence presented at the merits hearing and the written submissions of the parties, I conclude that the applicant has not proven, on a balance of probabilities, that the respondent's conduct amounts to discrimination in violation of the *Code.* Accordingly, the Application is dismissed.

PROCEDURAL BACKGROUND

[5] In the Application, the applicant initially sought, among other things, a declaration that the applicant's employment with the respondent was wrongfully terminated, together with damages for wrongful dismissal.

[6] At noted in the Case Assessment Direction dated September 8, 2022, in the face of the respondent's Form 10 Request for an Order During Proceedings for a dismissal of all claims based on the wrongful dismissal allegations, the applicant agreed to withdraw those claims. Accordingly, and in accordance with the jurisdiction of this Tribunal, this Application proceeded solely with regards to any breach of the *Code* on the grounds of disability, family status and reprisal in the social area of employment.

[7] A merits hearing in this matter was held on December 15, 2022.

[8] The applicant called two witnesses, namely himself and Rachel Joanne Persad-Mohammed, his spouse.

[9] The respondent called five witnesses, namely: Heino Claessens, former CEO ("Claessens"): JF Bosse, former National Sales Manager and current General Manager: Suzanne McGrattan, Controller ("McGrattan"); Richard Carbis, Service Manager; and Sharon Pateman, Order Desk Manager.

[10] An Agreed Statement of Facts and Joint Book of Documents were filed by the parties. Multiple exhibits were filed by the parties, all on consent.

CREDIBILITY

[11] To determine whether the *Code* was violated, I must make findings of fact based on an assessment of the evidence, and where the evidence conflicts, I must assess the credibility and reliability of the witnesses' conflicting accounts of what happened. In assessing credibility, I have relied, when necessary, on the principles in *Faryna v. Chorny*, [1952] 2 DLR 354 (BCCA), in particular the following:

> … Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors, combine to produce what is called credibility.
>
> …
>
> 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 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 the 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 (…) Again, a witness may testify to what he sincerely believes to be true, but he may be quite honestly mistaken. (pages 356-357)

[12] I also have relied on the observations on credibility assessment made in *R. v. Taylor*, 2010 ONCJ 396, cited by the Tribunal in *Soheil-Fakhaei v. Canadian Business College*, 2012 HRTO 172 as follows:

> Testimonial evidence can raise veracity and accuracy concerns. The former relate to the witness's sincerity, that is his or her willingness to speak the truth as the witness believes it to be. The latter concerns relate to the actual accuracy of the witness's testimony. The accuracy of a witness's testimony involves considerations of the witness's ability to accurately observe, recall and recount the events in issue. When one is concerned with a witness's veracity, one speaks of the witness's credibility. When one is concerned with the accuracy of a witness's testimony, one speaks of the reliability of that testimony. Obviously a witness whose evidence on a point is not credible cannot give reliable evidence on that point. The evidence of a credible, that is honest witness, may, however, still be unreliable. See *R v. Morrissey*, 1995 CanLII 3498 (ON C.A.) at para. 205

[13] Depending on the circumstances, some portions of a witness' testimony may be more credible or worthy of belief than other portions. Accordingly, I can, with good reason, accept all, some or none of any witness' evidence: see *R. v. R.E.M.*, 2008 SCC 51, at para 65.

LAW

Legal Framework

[14] The relevant provisions of the *Code* are s. 5, 8, 9 and 10(1):

> 5. (1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability.
>
> …
>
> 8. Every person has a right to claim and enforce his or her rights under this Act, to institute and participate in proceedings under this Act and to refuse to infringe a right of another person under this Act, without reprisal or threat of reprisal for so doing.

> 9. No person shall infringe or do, directly or indirectly, anything that infringes a right under this Part.
>
> …
>
> 10. (1) … "disability" means, (a) any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury. . .

Onus

[15] The applicant has the onus of proving, on a balance of probabilities, that a violation of the *Code* has occurred. What this means is that it is more probable than not that a violation of the *Code* occurred. Clear, convincing, and cogent evidence is required in order to satisfy the balance the probabilities test. See *F.H. v. McDougall*, 2008 SCC 53 at para. 46.

Prima Facie Test

[16] To meet the traditional three step test for *prima facie* discrimination as set out by the Supreme Court of Canada in *Moore v. British Columbia (Education)*, 2012 SCC 61 at para. 33, the applicant must show that:

> 1. The applicant has a protected characteristic under the *Code*.
>
> 2. The applicant suffered disadvantage or an adverse impact; and
>
> 3. The protected characteristic was a factor in the disadvantage or adverse impact.

[17] In *Garofalo v. Cavalier Hair Stylists Shop Inc.*, 2013 HRTO 170, at para. 155, the Tribunal further noted:

> … If the applicant establishes a *prima facie* case of discrimination, the respondent must establish, on a balance of probabilities, a statutory defence and/or a credible non-discriminatory explanation for the impugned treatment. If the respondent is able to rebut the applicant's *prima facie* case of discrimination, the burden returns to the applicant to establish, on a balance of probabilities, that the respondent's explanation is erroneous or a pretext for discrimination. See *Wedley v. Northview Co-operative Homes*

> *Inc.*, 2008 HRTO 13 at para. 52. The ultimate issue is whether the applicant has proven, on a balance of probabilities, that a violation of the *Code* has occurred. Although an evidentiary burden to rebut discrimination may shift to the respondent, the onus of proving discrimination remains on the applicant throughout. See *Ontario (Disability Support Program) v. Tranchemontagne*, 2010 ONCA 593 at paras. 112 and 119.

[18] As noted in *Peel Law Association v. Pieters*, 2013 ONCA 396 ("*Pieters*"), at paras. 82-84, in a case where there has been a full hearing on the merits, the *prima facie* analysis is not necessarily required. *Pieters* at para. 83, stated:

> … After a fully contested case, the task of the tribunal is to decide the ultimate issue whether the respondent discriminated against the applicant. After the case is over, whether the applicant has established a *prima facie* case, an interim question, no longer matters. The question to be decided is whether the applicant has satisfied the legal burden of proof of establishing on a balance of probabilities that the discrimination has occurred.

[19] The *prima facie* analysis may, however, as further noted in *Pieters* in para. 84, be useful as an analytic tool to consider whether the applicant has been able to establish discrimination.

[20] As further noted in *Pieters* at para. 59, it is well established that the protected characteristic does not need to be the only factor in the adverse impact. It is sufficient that the protected characteristic was "a factor" in the adverse treatment. All that is required is that there be a "connection" between the adverse treatment and the ground of discrimination.

Circumstantial Evidence

[21] The Tribunal has clarified that it is not uncommon for there to be no direct evidence that a prohibited ground was relied upon by an employer in an employment discrimination case. For example, in *Blakely v Queen's University,* 2012 HRTO 1177, at para 40 ("*Blakely*") the Tribunal explains that:

> It is not at all unusual that cases alleging discrimination in relation to a hiring decision proceed on the basis of circumstantial evidence, as

> applicants generally are not privy to the discussions held by the persons who made the hiring decision and as it is not uncommon that unstated and sometimes even unconscious biases may affect a hiring decision.

[22] Because this need to consider the contextual evidence from the respondent's witnesses is significant to determining the legal issue where the respondent's evidence has been heard, the Tribunal has explained that a one-step circumstantial evidence test may be more appropriate, as described in *Blakely*, at paras. 48-50:

> … in circumstantial evidence cases where the respondent's evidence has been heard, the test should simply be whether the evidence is sufficient to satisfy the adjudicator that discrimination on the ground alleged is more probable than the explanations provided by the respondent, bearing in mind that the onus of proving discrimination always rests with the applicant and that discrimination need only be one factor in the respondent's decision.

[23] As stated in *Lannin v. Ontario (Ministry of the Solicitor General)*, 1993 CanLII 16448 (ON HRT) and followed in *Clennon v. Toronto East General Hospital*, 2009 HRTO 1242 at para 103,

> … a finding of discrimination on the basis of circumstantial evidence will be made where the inference of discrimination is more probable from the evidence than the actual explanation offered by the respondent, rather than "any other rational explanation".

[24] In this matter, both parties presented their cases, and this decision is based on the totality of the evidence presented.

Duty to Accommodate

[25] The duty to accommodate is a co-operative and collaborative process. See *Chappell v. Securitas Canada Limited*, 2012 HRTO 874, at para. 27, and *Daykin v. Ford Motor Company of Canada*, 2014 HRTO 319, at para. 32, where the Tribunal stated:

> At the outset I note that jurisprudence regarding the duty to accommodate clearly establishes that all parties to the accommodation process have obligations. An individual seeking accommodation, for example, is responsible for initiating the process by stating the need for accommodation. The duty to accommodate is a cooperative duty and

> requires the applicant, who is seeking accommodation, to provide sufficient information to allow the respondents to understand the nature of the disability. The duty to accommodate would require, at the least, the party seeking accommodation to act in a reasonable and cooperative manner. See for example, *Matthews v. Chrysler Canada Inc.*, 2011 HRTO 1939 and *Simpson v. Commissionaires (Great Lakes)*, 2009 HRTO 1362.

[26] The respondent has both procedural and substantive obligations. Procedurally, the respondent has an obligation to take the necessary steps to determine what kinds of modifications or accommodations might be required and how accommodation might be achieved. The substantive duty requires the respondent to provide appropriate accommodation measures up to the point of undue hardship (*Taite v. Carleton Condominium Corporation No. 91*, 2014 HRTO 165).

[27] Communication is an essential part of the accommodation process. Where a respondent is unaware of and has no reason to be aware of an accommodation need, there will not be a finding of liability. See *Macanovic v. Toronto Public Library*, 2014 HRTO 1592, at paras. 10-16.

[28] In certain circumstances where an individual has not expressly made their disability needs known, there may nonetheless be a duty on a respondent to inquire further. In *Sears v. Honda of Canada Mfg.*, 2014 HRTO 45 at para. 128, the Tribunal stated:

> … the procedural duty to accommodate, including the duty to inquire into the situation of the person needing accommodation, can arise without a specific request for accommodation by the individual in circumstances in which there is reason to believe that the individual is having difficulty in an area included in Part 1, because of personal characteristics protected by the *Code*. …

[29] Though a respondent may have a duty to inquire even where there has not been a specific accommodation request, this duty has generally only arisen in situations where the respondent should have been aware that an accommodation may be required from the circumstances. See *Wall v. Lippé Group*, 2008 HRTO 50, at para. 80.

Reprisal

[30] The *Code* defines reprisal in s. 8 as follows:

> Every person has a right to claim and enforce his or her rights under this Act, to institute and participate in proceedings under this Act and to refuse to infringe a right of another person under this Act, without reprisal or threat of reprisal for so doing.

[31] To establish reprisal, an applicant must establish that the respondent engaged in an action or threat which was intended as a retaliation for claiming or enforcement of a right under the *Code*. Unlike an allegation of discrimination, where intention is not a necessary element to prove a violation, where reprisal is alleged, the applicant must establish that the action was taken with an intent to punish or retaliate.

[32] As the Tribunal set out in *Noble v. York University,* 2010 HRTO 878, in an allegation of reprisal, the following elements must be established, namely (a) an action taken against, or threat made to, the applicant, (b) the alleged action or threat is related to the applicant having claimed or attempted to enforce her right under the *Code*; and (c) an intention on the part of the respondent to retaliate for the claim or attempt to enforce the right.

BACKGROUND FACTS AND CHRONOLOGY

[33] The following facts are based on the Agreed Statement of Facts, witnesses' testimony and the documentary evidence. These facts are substantially not in dispute, unless otherwise noted. Where evidence is in dispute it is discussed. I am referring only to what is relevant and essential to my findings in the disposition of the legal issues.

[34] The applicant had been employed by the respondent as a warehouse support representative since August 5, 2014. His duties included supervision of two other warehouse support representatives, each of whom had less seniority than the applicant.

[35] The respondent was, among other things, a supplier of power tools to industrial and building renovation markets.

[36] Several years prior to the commencement of his employment with the respondent, the applicant's spouse suffered an injury and had ongoing medical needs. This was known by the respondent at the time of the applicant's hiring.

[37] The applicant requested accommodation from the respondent to attend to his spouse's medical needs by way of being permitted to leave work two hours early every Wednesday. This request was granted and remained in place continuously until the applicant's termination from employment on January 19, 2018.

[38] No evidence was presented to suggest that this long-standing accommodation was an issue in the employment relationship or that it gave rise to any resentment, on the part of the respondent, in granting this accommodation.

[39] In late October or early November 2017, the applicant asked for a raise. All employees of the respondent, including the applicant, received a 2.5% increase effective January 1, 2018. However, the applicant was denied his request for an additional increase.

[40] On November 27, 2017, the applicant was involved in a slow-speed motor vehicle accident, when he was struck from the rear while exiting a parking lot. In his evidence, the applicant acknowledged that in the accident the airbags did not deploy, there was no loss of consciousness, he was able to exit the vehicle independently and that police and emergency medical services were not present at the scene.

[41] On November 28, 2017, the applicant notified McGrattan that he had been involved in a motor vehicle accident. When asked if he was "okay" the applicant indicated that he was fine and reported to work later that same day. This was not disputed by the applicant.

[42] The applicant did inform the respondent that he would need some time off to attend medical appointments which request was accommodated. This was not disputed by the applicant.

[43] McGrattan, in her evidence, stated that other than the initial one-half day from work, the applicant did not miss any additional workdays after November 28, 2017, until

his termination on January 19, 2018 (the "relevant accommodation period"). This was not challenged by the applicant.

[44] In his evidence, the applicant acknowledged that he did not specifically request from the respondent any additional accommodation to address injuries from the motor vehicle accident. It was his evidence that in his capacity as a supervising warehouse support representative, he was able to assign himself modified duties commensurate with his physical abilities. The applicant acknowledged that the respondent "implicitly consented" to this. Further the applicant, in the Application, acknowledged that in the following weeks "all of the work was done competently and in a timely fashion".

[45] On January 19, 2018, the applicant was informed by Claessens and McGratten that he was being terminated. He alleges and the respondent disputes that during the termination meeting, he was told that he would now have time to take care of his disabled wife, more time to look after my own recovery from injuries due to the motor vehicle accident and time to seek a job more in line with his expectations for remuneration.

[46] Upon termination, the applicant received $2,282.10 as pay in lieu of notice and $1,981.33 as severance for a total of $4,263.43.

Medical Evidence of Disability and Disability Related Needs

[47] The only medical evidence presented during the hearing consisted of an undated, "To whom this may concern" note from Physiomed and an insurer examination report from Dr. El-Sherbini dated August 8, 2018 ("Sherbini Report").

[48] The Physiomed note was undated but references the applicant having undergone an MRI scan which occurred on March 5, 2018.

[49] Accordingly, both the Physiomed note, and the Sherbini Report did not exist at the time of the applicant's termination on January 19, 2018 and were never provided to the respondent. As such their content could not have been a factor in the termination of the applicant's employment.

[50] No medical evidence was produced by the applicant relating to what, if any, medical treatment or accommodations he may have required during the relevant accommodation period.

[51] The Sherbini Report does comment that one day after the motor vehicle accident, the applicant did visit his family doctor, who prescribed pain medication and a muscle relaxant but that no investigations were ordered.

FINDINGS AND ANALYSIS

Did the Respondent Discriminate Against the Applicant with Respect to Employment by Failing to Provide Reasonable Accommodation to the Applicant in Relation to the Applicant's Disability Related Needs During the Relevant Accommodation Period?

[52] There is no dispute that the applicant was involved in a motor vehicle accident on November 27, 2017. The applicant's description to the respondent suggested a minor collision in a parking lot. Accommodations were provided by way of time off to attend medical appointments and as a supervising warehouse support representative implicit approval to assign himself modified duties.

[53] These accommodations remained in place throughout the relevant accommodation period during which "all work was done competently and in a timely fashion".

[54] No evidence was presented to suggest that at any time prior to the applicant's termination did he inform the respondent that he had additional disability related accommodation needs.

[55] If the applicant had any additional disability related accommodation needs, these were not brought to the respondent's attention.

[56] Moreover, there was no evidence to suggest that during the relevant accommodation period, the respondent had any reason to believe that the applicant had

any additional disability related accommodation needs. The applicant acknowledged that during this time period “all of the work was done competently and in a timely fashion” and no medical or other evidence was presented to suggest any difficulty by the applicant in performing his duties.

[57] In all the circumstances, I find that the applicant has not satisfied the legal burden of proof of establishing on a balance of probabilities that the respondent failed to provide reasonable accommodations during the relevant accommodation period because there was no evidence of either a request for accommodation or any reason triggering a duty for the respondent to inquire into whether accommodation might be needed.

Did the Respondent Discriminate Against the Applicant with Respect to Employment Because of Family Status when it Terminated the Applicant’s Employment?

[58] Throughout the applicant’s employment with the respondent, he had been provided with accommodations in relation to his family status needed to assist his spouse with her medical needs by way of being permitted to leave work two hours early every Wednesday. No evidence was presented to suggest that this long-standing accommodation was an issue in the employment relationship, and it remained in place continuously until the termination of the applicant’s employment.

[59] The applicant alleges discrimination based on family status because of a singular comment, allegedly made by Claessens at the time of termination, that the applicant would now have more time to spend with his wife. The applicant takes the position that the Tribunal should infer from this singular comment that this ongoing accommodation need was a factor in the termination of his employment.

[60] Claessens disputes having made any comment to the applicant during the termination meeting in relation to the applicant’s spouse.

[61] I do not need to make any factual determination on this issue.

[62] Even if made, in my opinion, the inference proposed by the applicant is not reasonable or warranted. Given the long-standing nature of the family status accommodation, any such comment if made, is more consistent with an attempt to soften the blow of termination.

[63] In all the circumstances, I find that the applicant has not satisfied the legal burden of establishing on a balance of probabilities that the applicant's family status was a factor in the termination of the applicant's employment.

Did the Respondent Discriminate Against the Applicant with Respect to Employment Because of Disability When it Terminated his Employment?

[64] It is clear from the evidence that during the relevant accommodation period, the applicant's disability related accommodation needs were minimal. They consisted of a need to take time off work to attend medical appointments (which appears to have been rare) and the respondent permitting the applicant to delegate some tasks. This accommodation continued, without objection, until termination, approximately two months after the motor vehicle accident. Further, there was no evidence of any objections or resentment on the part of the respondent in regards to this ongoing accommodation.

[65] The respondent's evidence was that the termination arose for legitimate non-discriminatory reasons. Specifically, it was the position of the respondent that throughout the applicant's employment, he had displayed difficulties in his communication with co-workers, including those that he supervised. Heated arguments ensued for which intervention was required. Several co-workers had complained about the applicant's conduct. One co-worker had spoken of resigning his position if the situation was not addressed. One such argument occurred the day before the termination.

[66] It was the respondent's position that they had informally spoken to the applicant on several occasions regarding his attitude and communication issues but saw no improvement.

[67] The respondent also noted an incident, in December 2017, approximately one month prior to the termination, where they allege that the applicant had damaged inventory. There was conflicting evidence on how the inventory was damaged.

[68] In written submissions, the applicant acknowledged that his approach to the challenges of his supervisory role may have led to some direct differences of opinion with colleagues. However, the applicant takes the position that whatever his employment difficulties, he was not deserving of termination. He was never provided written performance evaluations or written reprimands.

[69] The respondent acknowledged that it was a small operation which had operated in a family-style that did not keep rigorous records and had no formal evaluation process. The applicant essentially acknowledged this to be true and that if issues existed, they were dealt with informally.

[70] Ultimately, the absence of a formal disciplinary process is not significant. Each of the respondent's witnesses and the applicant himself testified to the informal nature of the respondent's human resources. Each of the respondent's witnesses spoke of the applicant's communication issues and while the applicant's position is that these difficulties did not justify termination, he did acknowledge "some direct differences of opinions with colleagues".

[71] This Tribunal does not need to determine whether the termination of the applicant's employment was justified or not. As noted, the applicant withdrew all allegations or claims relating to any wrongful dismissal allegations, in light of this Tribunal's jurisdiction.

[72] The only issue is whether the applicant has established on a balance of probabilities that his disability was a factor in the termination of his employment. I find that the applicant has not met this burden. Any disability related accommodation needs were minimal. Accommodations were provided for almost two months without any impact on the employment relationship. There is no evidence to suggest that the respondent's concerns regarding the applicant's communication issues was a pretext to establish a

non-*Code* related justification for termination. Concerns regarding the applicant's communication issues existed prior to the applicant's motor vehicle accident.

[73] I find that the applicant has not satisfied the legal burden of establishing on a balance of probabilities that the applicant's disability was a factor in the termination of the applicant's employment.

Did the Respondent's Conduct Toward the Applicant Amount to Reprisal Contrary to the *Code*?

[74] The applicant alleges that his termination was an act of reprisal for him having coincidentally asked for a pay raise and also needing increased accommodation for his motor vehicle accident injuries as well as accommodation needed to address his family status issues.

[75] The applicant's claim of reprisal, based on him having requested and been denied a raise, must fail as a matter of law. Requesting a raise is not an attempt to claim or enforce a right under the *Code*.

[76] Throughout his employment, the applicant's request for accommodation to address his family status and the request for accommodation to address any motor vehicle related disability needs were granted. At the time of the termination, there was no evidence to suggest that additional disability related accommodation needs would arise. There is no factual basis from which to conclude that the respondent had any intention to reprise against the applicant in relation to his prior accommodation requests.

[77] I find that the applicant has not proven on a balance of probabilities that the respondent's conduct amounts to reprisal under the *Code*.

ORDER

[78] The Application is dismissed.

Dated at Toronto, this 17th day of March, 2023.

"Signed by"

_____
Marinus Lamers
Member