HUMAN RIGHTS TRIBUNAL OF ONTARIO

B E T W E E N:

Duong Yang

Applicant

-and-

Maple Leaf Foods Inc.

Respondent

DECISION

Adjudicator: Maureen Doyle

Date: March 31, 2021

File Number: 2018-31929-I

Citation: 2021 HRTO 246

Indexed as: **Yang v. Maple Leaf Foods Inc.**

APPEARANCES

Duong Yang, Applicant	)	Charles Sinclair, Counsel
Maple Leaf Foods Inc., Respondent	)	Dan Shields, Counsel

[1] This Application, filed March 29, 2018, alleges discrimination due to disability with respect to employment and alleges reprisal contrary to the *Human Rights Code*, R.S.O. 1990, c. H.19, as amended (the "*Code*"). Among other things, the applicant seeks financial compensation.

[2] This Application was deferred pending the completion of a civil matter relating to the applicant's employment at the respondent.

[3] The civil matter was completed and the Tribunal re-activated this Application in *Yang v. Maple Leaf Foods Inc.*, 2019 HRTO 916 ("*Yang*").

[4] The Tribunal convened a preliminary hearing in order for the parties to provide their submissions on whether the Application should be dismissed on the basis that the substance of it has been appropriately dealt with by the civil proceeding, and whether it should be dismissed on the basis of section 34(11) of the *Code.*

BACKGROUND

[5] The applicant alleges that the respondent did not permit her to return to work after a medical leave, due to her disability, and that it subsequently terminated her due to disability. She also filed a Statement of Claim in the Ontario Superior Court of Justice ("the civil claim") in which she raised many of the same factual allegations as are raised in this Application.

[6] By way of remedy, she seeks the following:

> a. Damages for violations of the …*Code*…in the amount of $150,000;
>
> b. Back-pay from the date of the Applicant's termination, including compensation for all employment-related benefits, with the option of reinstatement, in an amount to be determined at the hearing for this matter;
>
> c. Pre-judgment interest and post-judgment interest pursuant to the *Courts of Justice Act*…; and

d. Any goods and services tax or harmonized sales tax payable on any amounts pursuant to the *Excise Tax Act*…or any other legislation enacted by the Government of Canada or Ontario.

The Application

[7] In her Application, the applicant stated that there had been no court action based on the same facts as the Application.

[8] The applicant worked as a Senior Cost Analyst for the respondent from May 19, 2015 to February 2, 2018.

[9] In her Application, the applicant states that she was diagnosed with Transverse Myelitis and was off work due to this disability from September 8, 2016 to March 6, 2017. She asserted that when she returned to work in March 2017, she required the assistance of a cane and a walker.

[10] She states that due to stress she went off work again from September 27, 2017 to February 12, 2018. She alleges that her physician cleared her for a return to work, but that when she went back to work on February 12, 2018, she was told to leave the premises and not return to work until directed otherwise. She alleges that an individual from the human resources department told her that she would let the applicant know by the end of the day if she was going to be called back to work the next day, but that the individual did not contact her as promised.

[11] As a result, she emailed her supervisor the next day and advised him that the disability case manager had extended her coverage until February 20, 2018, and that she would return to work after that. The respondent did not respond to her to advise her as to whether she could return to work.

[12] On February 15, 2018, her disability case manager told her that the respondent indicated that she was not permitted to return to work as her cane was not allowed at the workplace.

[13] The applicant alleges that she had been using a cane since March 2017, and that she had used it on her previous return to work, without any issue being raised by the respondent. On February 15, 2018, she emailed individuals at the respondent's human resources department regarding the *Accessibility for Ontarians Act* (*AODA*) to indicate that she was aware of protections provided by legislation.

[14] She alleges that she received a phone call from an individual in the human resources department, confirming that her doctor had cleared her for a return to work. During that conversation, she asked why the respondent had told her disability case manager that she was not permitted to use a cane at work, but the individual from human resources did not provide her with any answer.

[15] On February 17, 2018, she received a voicemail from the respondent regarding her return to work on February 20, 2018. She alleges that she was nervous about being sent home again and emailed her supervisor and individuals in the human resources department, asking again why the disability case manager had been told that she could not use her cane at work, stating that she had used it when she returned to work in March 2017 and informing them that she was aware of the *AODA* and had documented the events of the past week. She asserts that the respondent did not answer her question.

[16] She alleges that when she returned to work on February 20, 2018, she was called into a meeting with her supervisor and others to discuss her February 17, 2018 email. She alleges that she asked why the respondent was making her return to work difficult, but that an individual from the human resources department did not answer the question but began to argue with her. She alleges that her manager concluded the meeting by stating that he did not have time for her questions.

[17] She alleges that on February 22, 2018, she was called into a meeting immediately after arriving at work, and the respondent terminated her employment without giving her a reason.

[18] She alleges that the respondent discriminated against her due to her disability and that it terminated her employment due to the fact that she had advised them that she had been documenting events and knew of her protections under *AODA.*

[19] The respondent denied the allegations of discrimination and reprisal and provided its version of events. It stated, among other things, that the termination of the applicant's employment was unrelated to any *Code*-protected ground.

The Civil Claim

[20] In addition to filing the Application with the Tribunal, the applicant filed the civil claim.

[21] The Statement of Claim contained 18 paragraphs. In her Statement of Claim, she claims as follows:

> 4. Erica began her employment with Maple Leaf on or about May 19, 2015 pursuant to a written employment agreement as a Cost Analyst at the Cappola (LePage Court, Downsview) location.
>
> 5. Throughout her employment, Erica was a hard-working and dedicated employee.
>
> 6. In September 2016, Erica pleads that she was hospitalized suddenly and diagnosed with Transverse Myelitis. As a result, Erica pleads that she had to take short-term disability leave.
>
> 7. Erica pleads that she returned to work in March 2017, however she required the assistance of a walker and cane to function.
>
> 8. In or around October 2017, Erica again went on short-term disability. Her illness was caused by the stressful work environment at Maple Leaf. Erica returned to work in or around February 2018.
>
> 9. On February 12, 2018, Erica was cleared by her physician and disability case manager to return to work. However, upon her arrival at Maple Leaf, she was immediately instructed by human resources to leave work and not return until advised otherwise.
>
> 10. Erica was advised that human resources would advise her by the end of the day whether she was permitted to return to work the following day.

Notwithstanding this representation, the Defendant failed advise [sic] Erica of her status.

11. After a discussion with her disability case manager and physician, Erica was cleared to return to work on February 20, 2018. However, on February 15, 2018, Erica's case manager informed her that Maple Leaf's benefit department had contacted him and advised that Erica could not return to work because her cane was not permitted in the plants.

12. Erica returned to work on February 20, 2018, and on February 22, 2018, she was terminated from her employment without cause.

13. Erica pleads that since she is not bound by an employment contract that limits her notice entitlements upon termination under the *Employment Standards Act*…, or otherwise, she is entitled to reasonable notice of her termination at common law.

14. At the time of her termination, Erica had been employed with Maple Leaf for 2 years, 9 months, was earning approximately $68,000.00 per year in remuneration and was 54 years of age.

…

15. In light of Erica's specialized position, length of service, her age, disability, the current state of the economy, and the consequential scarcity of comparable employment in the marketplace, Erica is entitled to a period of reasonable notice of the termination of her employment of not less than 12 months' pay, or the sum of $68,000.00.

[22] In the civil claim, she sought the following:

a. Damages for wrongful dismissal and breach of an employment contract in the sum of $68,000, representing 12 months' pay in lieu of notice;

b. Damages equal to the value of employment related benefits over the 12-month period including, without limitation, vacation pay, RRSP contributions, medical and any insurance coverage;

c. Special damages equal to the costs incurred by the Plaintiff in seeking to obtain alternative employment in an amount to be proven at trial;

d. The total amount claimed under paragraphs a) through c) not to exceed $1000,000.00 in compliance with Rule 76 and waiving any amount above same;

e. Prejudgement interest and post-judgment interest pursuant to the provisions of the *Courts of Justice Act*…;

f. Any goods and services tax or harmonized sales tax payable on any amounts pursuant to the *Excise Tax Act*….as amended or any other legislation enacted by the Government of Canada or the Government of Ontario;

g. Costs of this action on a substantial indemnity basis; and

h. Such further and other relief as this Honourable Court may deem just.

[23] The respondent filed a Statement of Defence in response to the civil claim, denying the applicant's claims in that forum also.

[24] On October 3, 2018, counsel for the applicant in her civil claim and counsel for the respondent appeared before a justice of the Ontario Superior Court to address the issue of whether the Action should be set down for summary judgment motion. The applicant offered to amend her claim to remove paragraphs 8, 9 and 10 from the Statement of Claim. She also agreed at that time to state in her claim for damages for wrongful dismissal, that she was citing her disability as a factor to be considered when assessing her future prospect of finding work, and to state that it was not related to any allegation of misconduct by the respondent.

[25] In a Direction dated the same day, the judge noted the above-noted changes the applicant's counsel indicated he would make. He commented "In short, the plaintiff seeks to reduce this action solely to the issue of damages for lack of sufficient notice of termination. She will pursue her claim for damages relating to allegedly oppressive behaviour by Maple Leaf Foods before the Human Rights Tribunal". He indicated he was satisfied that the "stripped down claim" would be amenable to summary judgement and ordered that it be set down for a one day summary judgement motion, later scheduled for March 26, 2019.

[26] The respondent states that the applicant's statement of claim in the civil claim was never formally amended.

[27] The parties entered into Minutes of Settlement (MOS) on January 10, 2019.

Minutes of Settlement

[28] The parties signed MOS, agreeing, in part, as follows:

> 1. The Plaintiff and the Defendant agree to the settlement of the Action in accordance with the terms of this Agreement. The Plaintiff and the Defendant agree the settlement has been reached on the basis that it represents the Decision of the Court on the pleadings delivered in the Action as if the Motion for Summary Judgment had proceeded on March 26, 2019.

The Parties' Submissions

[29] The respondent submits that this Application must be dismissed pursuant to s. 34(11). It submits that while the applicant did not specifically plead a violation of the *Code* in the civil claim, she did include the same factual allegations and sought damages specifically relating to her disability. The respondent submits that she implicitly raised the *Code* and sought remedies for *Code*-related issues.

[30] The respondent cites *Ingram v. Cayne's Super Housewares Incorporated*, 2019 HRTO 172 ("*Ingram*") as an example of a case where the Tribunal found that even if the court claim does not explicitly reference section 46.1 of the *Code,* s. 34(11) of the *Code* may still apply. It also cited *Mauch v. J. Koo Family Healthycare Inc.*, 2017 HRTO 67 ("*Mauch*") in support of its submission that the applicant cannot avoid the application of s. 34(11) of the *Code* by subsequently withdrawing that portion of a civil action that raised a *Code* issue or by expressing an intention not to pursue a *Code* claim already pleaded in a civil action.

[31] The respondent further submits that while the applicant did not explicitly plead a contravention of the *Code* in her civil claim, she included the same factual allegations as are in the Application and she sought damages specifically relating to her disability in the context of the termination of her employment. The respondent submits therefore that she has implicitly raised the *Code* and sought remedies for *Code*-related issues.

[32] Last, the respondent submits that in the MOS the applicant agreed to settle the "entire Action, including the issues relating to the termination of her employment and any remedies resulting therefrom". It submits that even with the amendments endorsed by the judge, the claim still included the same factual allegations regarding the circumstances of her employment and her termination, and sought remedies flowing from the termination of her employment. It submits that the parties agreed to resolve the issues concerning the termination of her employment, including the issues of the appropriate remedies. It submits that in similar circumstances, the Tribunal held that an application was barred pursuant to section 34(11) of the *Code.*

[33] The applicant submits that the allegations are serious and should be determined on their merits.

[34] She submits that the civil action against the respondent was confined to a wrongful dismissal action and she originally sought 12 months of damages "in lieu of notice" and that she settled for six months' notice. She submits that the civil claim did not address the core issue in the application, being "whether the Respondent's decision to terminate Ms. Yang's employment was related to her disability", a *Code*-protected ground. As such, her allegations of discrimination and the remedies she seeks were not pled in the civil claim and have not been addressed or even considered.

[35] The applicant cites *Pham v. Dimpflmeier Bakery Ltd.*, 2018 HRTO 123 ("*Pham*") and *Rinaldi v. Paragon Security*, 2017 HRTO 1370 ("*Rinaldi*") which she says are examples of cases where dismissed employees in her position were allowed to bring a civil action and an Application at the Tribunal for discrimination. She states that in *Pham,* the Tribunal found that both are permitted "where the remedies and legal issues are sufficiently distinct, and there is no danger of inconsistent findings or duplicative remedies".

[36] She submits that the civil action was settled without any remedy for discrimination and without any finding regarding her allegation of discrimination. She submits that the $150,000 she seeks at the Tribunal "for human rights damages and reinstatement" would

not be duplicative of the six months' pay she received by way of settlement of the civil claim. She states that with respect to her claim at the Tribunal for back-pay, should she be awarded back pay, she agrees she would not be entitled to back pay for the six month period represented by the damages in lieu of notice she has received.

[37] She submits that in her civil claim she did only sought damages for wrongful dismissal and that she did not allege discrimination, or claim monetary damages for human rights violations under section 46.1 of the *Code.* She submits that she sought no determination that the respondent discriminated against her on the basis of her disability while she was employed or at her termination.

[38] She disputes the respondent's assertion that the civil claim raises the same factual allegations as are in the Application. She submits that the only determination the court was being asked to make was whether her employment was terminated with reasonable notice, and if not, what length of notice she was entitled to. To the extent that she mentioned her disability in the civil claim, it was simply as a factor which should determine the appropriate length of notice awarded by the court. She submits that the Supreme Court has held that the health or disability or illness of a dismissed employee may be considered in determining the length of reasonable notice.

[39] The applicant also submits that on the same day the judge released his endorsement, her lawyer sent a draft Amended Statement of Claim to counsel for the respondent, for him to discuss with his client, and stating that "this is what we would be looking to amend the claim to". She submits that paragraph 1 of the MOS, above, must be understood in the context of an Amended Statement of Claim which had been delivered to the respondent, though not filed with the Court. She also notes that she never signed a release in favour of the respondent.

[40] She submits that applicants are permitted to split their cases between civil claims and applications at the Tribunal. She submits that s. 46.1 of the *Code* permits dismissed employees to claim wrongful dismissal before civil courts and to seek damages for *Code* breaches in their civil claim. She submits that while the *Code* does not permit an employee

to commence an action for wrongful dismissal which claims *Code*-based damages under s. 46.1 and also commence an Application at the Tribunal for discrimination. She agrees that this would be prohibited by section 34(11) and 45.1 of the *Code*, as well as by the doctrine of abuse of process, but she submits that she has not made a claim for *Code-based* damages in her civil claim. She submits that the type of "case splitting" which she has done is permitted.

[41] She cites *Beaver v Dr. Hans Epp Dentistry Professional Corporation*, 2008 HRTO 282 (*Beaver*), paragraphs 8 through 11, to say that 34(11) is only triggered where a claimant makes a claim for *Code* damages under s. 46.1, or advances a claim for bad faith or punitive damages based on a violation of the *Code.* She asserts that she has made no such claim.

[42] The applicant submits that the decision in *Ingram* is distinguishable from this case because in that case, the applicant included a claim for damages for infliction of mental harm and moral damages, which the Tribunal found to be essentially the same as the compensation she sought in the Application.

[43] She submits that *Mauch* is distinguishable because the applicant in that case explicitly mentioned the *Code* and claimed discrimination in her initial filing, but then amended the claim to remove them.

[44] She submits that she did not amend her claim in an effort to avoid the application of s. 34(11), but rather to avail herself of the opportunity to proceed to summary judgment. Her submissions state "By amending her Claim to remove any reference to the nature and extent of her disability, and the impact her disability would have on her ability to find similar employment, Ms. Yang narrowed the scope of her civil claim for reasonable notice, she did not withdraw any claim for *Code*-based damages".

ANALYSIS AND DECISION

[45] Section 34(11) of the *Code* reads as follows:

> A person who believes that one of his or her rights under Part I has been infringed may not make an application under subsection (1) with respect to that right if,
>
> (a) a civil proceeding has been commenced in a court in which the person is seeking an order under section 46.1 with respect to the alleged infringement and the proceeding has not been finally determined or withdrawn; or
>
> (b) a court has finally determined the issue of whether the right has been infringed or the matter has been settled.

[46] Section 46.1 reads as follows**:**

> 46.1 (1) If, in a civil proceeding in a court, the court finds that a party to the proceeding has infringed a right under Part L of another party to the proceeding, the court may make either of the following orders, or both:
>
> 1. An order directing the party who infringed the right to pay monetary compensation to the party whose right was infringed for loss arising out of the infringement, including compensation for injury to dignity, feelings and self-respect.
>
> 2. An order directing the party who infringed the right to make restitution to the party whose right was infringed, other than through monetary compensation, for loss arising out of the infringement, including restitution for injury to dignity, feelings and self-respect.
>
> (2) Subsection (1) does not permit a person to commence an action based solely on an infringement of a right under Part l.

[47] In *Linton v. Regional Municipality of Peel Police Services Board*, 2009 HRTO 1449, at paragraph 6, the Tribunal described the operation of s. 34(11) as follows:

> If a person raises in a civil proceeding an allegation of an infringement of a right under the Code arising out of a specific factual context, s. 34(11) bars that person from also filing an application before the Tribunal to claim a Code infringement arising out of the same factual context.

[48] The Tribunal has stated that it is not necessary for an applicant to cite the *Code* or section 46.1 in his or her civil proceedings to find an Application barred pursuant to s. 34(11) of the *Code*.

[49] In *Beaver* at paragraph 10, the Tribunal discussed the purpose of s. 34(11):

> Section 34(11) is intended to eliminate duplicate court and Tribunal proceedings alleging breaches of the Code. An applicant's ability to bring an application at the Tribunal is removed where there is an ongoing court proceeding in which he or she has made a claim for remedies based upon the same alleged infringement of the Code, where a court has finally determined the issue of whether the right has been violated, or where the matter has been settled. Section 34(11) is triggered by the applicant's decision to raise the Code and seek remedies for its violation in a court action.

[50] The applicant cites *Rinaldi* in which the Tribunal stated at para. 12:

> There is no doubt that a person is entitled to bring a civil action and also proceed with a human rights application in certain circumstances. The most common example of this occurs when a person's employment is terminated. The person can bring a civil action for wrongful dismissal seeking reasonable notice damages, and can also proceed with a human rights application alleging that discrimination was a factor in the termination of employment. These two proceedings raise different factual and legal issues, and provide different potential remedies.

[51] However, in that decision, the Tribunal went on to state in para. 13:

> What a person cannot do is to take one event or transaction, such as the applicant's allegations regarding the events of April 27, 2016, and hive off some aspects of that event or transaction as the basis of one proceeding, such as a civil claim, and leave other aspects of this very same transaction to form the basis for a human rights application. It is this kind of case-splitting that offends the principles of judicial economy and the integrity of the administration of justice.

[52] The applicant's civil action very clearly arises out of the same facts as the Application and, I find that in essence, the applicant seeks remedies for the same alleged violations of the *Code* in the civil action as in the Application. Paragraphs 4 through 14 of her Statement of Claim, above, recount essentially the same allegations she makes in

her Application to the Tribunal. While she states that she has not sought damages alleging a breach of the *Code,* running through paragraphs 4 through 14 is a claim that she was discriminated against and reprised against on the basis of her disability and on the basis of having sought accommodation for her disability. In her explanation for the fact that she was seeking 12 months; pay in lieu of notice, she again harkens back to her disability.

[53] While it may be permissible for an individual to file a Statement of Claim for wrongful dismissal and still pursue an application at the Tribunal alleging discrimination, here the overlay of allegations is so striking as to make any differentiation between the two claims, meaningless. The basis of the applicant's resulting claim for damages in her Statement of Claim is that the respondent dismissed her for no good reason, as it discriminated against her. As the Tribunal stated in *Mauch*, merely amending a Statement of Claim cannot remove the bar imposed by s. 34(11) of the *Code.* In any event, I note that the applicant did not remove paragraphs 11 or 12 of her Statement of Claim, in which she recounts that she "could not return to work because her cane was not permitted in the plants" and then states that her employment was "terminated without cause".

[54] In the October 3, 2018 Direction from the judge, he states that in removing certain paragraphs from the statement of claim, she "*seeks to reduce this action* solely to the issue of damages for lack of sufficient notice of termination." (emphasis added). He stated that she would "pursue her claim for damages relating to allegedly oppressive behaviour by Maple Leaf Foods before the Human Rights Tribunal", and characterized the Amended Statement of Claim as "stripped down'. It is evident that the judge concluded that prior to the Amendments which *reduced* the action to solely the issue of damages for lack of notice, the applicant was placing allegations of discrimination before the Court for its determination. I find that in filing her Statement of Claim, the applicant was seeking from the Court, in accordance with section 46.1(1), "An order directing the party who infringed the right to pay monetary compensation to the party whose right was infringed for loss arising out of the infringement".

[55] This Application falls within the circumstances described in section 34(11). Consequently, the Application may not proceed because the language in section 34(11) is a mandatory bar and the Tribunal has no jurisdiction over this Application.

[56] Given my finding regarding the applicability of section 34(11), it is not necessary for me to address the parties' arguments regarding section 45.1 of the *Code,* the MOS or Abuse of Process.

DIRECTIONS

[57] The Application is dismissed.

Dated at Toronto, this 31st day of March, 2021.

"Signed by"

_____
Maureen Doyle
Vice-chair