



MANITOBA LABOUR BOARD
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DISMISSAL NO. 1911
CASE NO. 327/08/LRA
C/R CASE NO. 396/08/LRA

IN THE MATTER OF: *THE LABOUR RELATIONS ACT*

- and -

IN THE MATTER OF: An Application by

Marielle Huguette Marie Rowan,

Applicant,

- and -

**GOVERNMENT OF MANITOBA - MANITOBA
CIVIL SERVICE COMMISSION "CSC",
ORGANIZATION & STAFF DEVELOPMENT "OSD",
JACKIE DESROCHERS "DESROCHERS",
ANNA SCHMIDT BEAUCHAMP "BEAUCHAMP" AND
CHARLOTTE ELSON "ELSON,"**

Employer/Respondents.

BEFORE: W.D. Hamilton, Chairperson

SUBSTANTIVE ORDER

WHEREAS:

1. On October 2, 2008, the Applicant filed an Application (the "Application") with the Manitoba Labour Board (the "Board"), requesting that the Board "... conduct a fair and objective review of the complaint." As to remedy, the Applicant requests "... compensatory damages."
2. The Applicant alleges that during the time she was employed in a one-year term position as a Training Administrator, Clerk 3, with the Respondent Civil Service Commission (the "Commission") in Organization and Staff Development ("OSD") [the Commission and OSD hereinafter sometimes collectively referred to as the "Commission"] from March 31, 2007, to April 30, 2008, said term being extended for three months to June 30, 2008, the OSD, primarily through the actions taken by the Respondents, Ms. Jackie Desrochers ("Desrochers"), Ms. Anna Schmidt Beauchamp ("Beauchamp"), and Ms. Charlotte Elson ("Elson"), violated various statutes and/or Government employment policies. The Applicant alleges that actions taken (or not taken) by the Commission and OSD were inappropriate for a number of reasons including, but not limited to, the following:

- a. Desrochers, as the Supervisor and Manager of Training and Operations,

... through unfair labour practices created an unhealthy and hostile work environment which included, but not limited to, unfair work distribution, inappropriate and unprofessional behaviour (and violations under the Human Rights Code - religious and mental health) as well as unsubstantiated attacks on the Applicant's work performance, character and health as described in the Respectful Workplace Policy, Forming Part of Complaint dated April 30, 2008 against Jackie Desrochers attached.

- b. The Applicant was promised a permanent position with OSD and that, having passed her six month probationary period with positive feedback, as well as receiving two satisfactory performance reviews, there was no valid reason to deny her a permanent position with OSD. In this regard, the Applicant,

... believes that she has been discriminated against due to the stereotypical belief that ... people are unpredictable and unreliable.

and that this stereotype is very unfair for the reasons summarized in Paragraph 4 of the Application.

("..." - Characterization omitted by the Board.)

- c. The Applicant was not given any backup or assistance in managing the workload assigned to her by Desrochers particularly during a period when a co-worker was on extended sick leave [Paragraph 5 of the Application].

- d. The Commission failed in its duty to ensure that the Applicant's complaint against Desrochers, filed on May 5, 2008, was handled or processed fairly and objectively and OSD should not have undertaken the investigation of the complaint.

- e. The Commission, OSD and the other individual Respondents never offered the Applicant appropriate accommodation on account of her mental health, the Applicant asserting that she declared her illness on June 2, 2008 (Paragraph 13 of the Application).

- f. The Applicant was never contacted by the Director, Human Resources Program, to meet or discuss the Applicant's request filed on or about June 25, 2008, to review the actions of the Commission including the Applicant's concerns under *The Human Rights Code* (the "HRC").

- g. The Applicant asserts she was further discriminated against by the Commission's Employee Assistance Program (the "EAP") in that the EAP failed to return her call when she sought help [Paragraph 14 of the Application].
 - h. The Applicant notes, in Paragraph 17 of the Application, that she has filed a complaint, pursuant to the *HRC*, with the Human Rights Commission and that these matters are still pending before the Human Rights Commission.
3. As to the complaints/allegations contained in Paragraph 1 of the Application, the Applicant asserts that the actions complained of were contrary to and in violation of:
- a. Subsections 7(d), (e) and (h) of the *Act*;
 - b. various provisions of *The Workplace Safety and Health Act* (the "*WSHA*"), particularly the obligations cast on employers under Sections 2, 4 and 7.4(5) of the *WSHA*;
 - c. the Commission's Respectful Workplace Policy (the "*RWP*") and various provisions of the Government's Principles and Policies for Human Resource Management and Staffing [2.1.5, PG 9];
 - d. Sections 34(1) and 133(1) of *The Employment Standards Code* (the "*ESC*") and certain provisions of *The Personal Investigations Amendment Act* (the "*PIA*");
 - e. Sections 38 and 39(1) of *The Freedom of Information and Protection of Privacy Act* ("*FIPPA*"); and
 - f. Sections 9(2) and 9(11) of the *HRC*, with the Applicant noting that there was a complaint in respect of these Sections currently being processed at the Human Rights Commission.
4. On November 7, 2008, following an extension of time, the Respondents, through counsel, filed their Reply disputing the Application and denying that there has been any contravention of the provisions of the *Act*, the *WSHA*, the *PIA*, the *FIPPA*, the *HRC*, the *ESC* or the *RWP*. The Respondents further assert that the issues raised in the Application do not constitute unfair labour practices within the meaning of the *Act* and that the Application ought to be dismissed on that basis. The Respondents deny that they have violated any of the statutes or policies referred to by the Applicant and, in the result, the Respondents submit that the Board ought to exercise its discretion under Subsection 30(3)(c) of the *Act* and decline to take further action on the Application. In the Reply, the Respondents outline their position(s) on the allegations in the Application.

5. On November 17, 2008, the Applicant filed documentation with the Board stating her intention that she would be filing a reply to the Reply of the Respondents to clarify, confirm and correct information that was alleged to be false or misleading and which she states may unfairly prejudice her.
6. On November 21, 2008, the Board, through the Registrar, advised the Applicant that the *Manitoba Labour Board Rules of Procedure*, M.R. 184/87 R, ("*Rules of Procedure*") do not provide for the filing of a reply to a Reply and that if such a reply should be filed the Board would have to address any challenges that may be taken by the Respondents to its filing and, in any event, would have to determine what weight, if any, should be placed on such a reply.
7. On November 24, 2008, the Applicant filed a reply to the Respondents' Reply.
8. On January 30, 2009, the Respondents, through counsel, advised the Board that the Respondents offer no additional comments other than to say that the Applicant's "reply" is not permitted under the *Board's Rules of Procedure* and, as such, does not require a response.
9. The Board, following consideration of all material filed by the parties, having noted the Respondents' position on the "reply" to the Reply, has determined the following:
 - a. A hearing is not necessary as the issues raised in the Application can be determined by a review of the written material filed by the parties.
 - b. The Applicant seeks unspecified compensatory damages (not reinstatement to a permanent position with OSD) under the foregoing statutes and the RWP. The Board, being a statutory tribunal, can only exercise the specific jurisdiction given to it under an Act of the Legislature.
 - c. As to the Applicant's assertion(s) that the Commission and/or the OSD and/or the individual Respondents have violated any duties or obligations under the *WSHA*, the Board does not possess the jurisdiction to address such complaints in the first instance. The Board's jurisdiction under the *WSHA* is limited to hearing appeals from decisions made either by a Safety and Health Officer or the Director of the Workplace Safety and Health Division [see Sections 37(1) to (39) of the *WSHA*].
 - d. As to the Applicant's assertion that certain actions taken by the Respondents violates Sections 9(2) and 9(11) the *HRC*, the Board has no jurisdiction to provide relief under the *HRC*. This falls within the purview of the Human Rights Commission. The Applicant has acknowledged that she filed a complaint with the Human Rights Commission and that these matters are currently "... in process." Based on the

- material provided, the Board reasonably concludes that the Applicant's complaint(s) to the Human Rights Commission are based on her assertion that the Respondents failed to accommodate her disability (as referred to in the Application). The Board has no jurisdiction to provide relief on the basis of an alleged contravention of the *HRC*.
- e. As to the Applicant's reliance on the RWP, the *PIA* and the *FIPPA*, the Board has no jurisdiction to address complaints under or purported breaches of the RWP, the *PIA* or the *FIPPA*. The *PIA* and the *FIPPA* outlines the processes to be followed and the remedial relief that is available under those statutes.
 - f. To the extent the Application alleges there has been a breach of Section 133(1) of the *ESC*, the Applicant has not established a *prima facie* case that this provision has been violated. There are no facts recited in the Application which allege that the Applicant has been terminated, laid off or otherwise discriminated against for one or more of the reasons outlined in Subsections 133(1)(a) and (f) of the *ESC*. To the extent that the Applicant alleges that the Respondents breached Section 34(1) of the *ESC* (Vacations), the Board does not possess any original jurisdiction in respect thereof and any complaint relating thereto must be taken to the Employment Standards Division (the "ESD"). This Board functions only in an appellant role under the *Code* in respect of decisions made by the ESD [see Sections 108 to 111 of the *ESC*].
 - g. While the Application refers to "unfair labour practices" in the broad sense, conduct which may constitute (an) unfair labour practice(s) is/are defined in Part I of the *Act*. The Application, on its face, only alleges a breach of Subsections 7(d), (e) and (h) of the *Act*. An allegation by an employee that s/he had her/his employment terminated without cause, unfairly, or for an improper reason does not, standing alone, constitute an unfair labour practice under the *Act*. The onus is on the Applicant, as it is on any applicant, to establish, through the facts recited in the Application, that there has been a *prima facie* breach of the *Act*.
 - h. In determining whether the Applicant has established a *prima facie* case under Subsections 7(d), (e) and (h) of the *Act*, the Applicant must establish two elements, namely:
 - i. that the Commission, as an objective fact, refused to employ, discharged from employment, refused to continue to employ or discriminated in regard to employment in respect of the Applicant; and
 - ii. that, in relation to the Commission's action(s) described in (i) above, the Applicant was engaged in one or more of the activities or forms of conduct described in Subsections 7(d), (e) and (h) of the *Act*. There must be some

reasonable evidence before the trier of fact that the employee (here, the Applicant) has engaged in one or more of the types of conduct referred to in these provisions and that said conduct can be linked to the employer's actions. The onus is on the Applicant to establish that a *prima facie* case exists on the balance of probabilities.

- iii. Regardless of the fact there is some discrepancy in the material as to what was stated at the meeting held on June 4, 2008, the Board is satisfied that it was at this meeting that the Applicant became aware of the fact that her (extended) term appointment with the Commission would not be extended beyond June 30, 2008. In fact, it was not renewed, as confirmed by a memorandum from Beauchamp to the Applicant dated June 5, 2008. There is no dispute between the parties that the employment relationship ended as of June 30, 2008. Accordingly, the Board accepts that the Commission refused to continue to employ the Applicant beyond the expiry of her term appointment on June 30, 2008, and that is sufficient to establish the first element of a *prima facie* case.
- iv. Based on the material filed, the Board is not satisfied that the Applicant has established that she was engaged in one or more of the forms of conduct referred to in Subsection 7(d), (e) and (h) of the *Act*. As to Subsection 7(d), there are no facts asserted that the Applicant had made a complaint or filed an application under the *Act* or any other Act of the Legislature prior to or at the time the term appointment expired. As to Subsection (e), the Applicant has not provided any facts which would allow the Board to conclude that the Applicant had testified or may testify in a proceeding under the *Act* or any other Act of the Legislature. As to Subsection 7(h), the Applicant has failed to plead any material facts to establish that, at the time the appointment ended, she had exercised or was exercising her rights under the *Act* or any other Act of the Legislature.
- i. In the supplementary material filed with the Board, the Applicant states, in Paragraph 11, that the Respondent has the onus of satisfying the Board that it did not refuse to employ the Applicant in a permanent position. The Applicant further states that she believes,
 - ... that the Respondents did discriminate in regard to employment contrary to the protected rights as set out in HRC complaint and is in further violation of The Civil Service Act 47 as well as numerous violations under the collective agreement.

None of these concerns reveal, in a *prima facie* way, conduct that would constitute an unfair labour practice under Part I of the *Act*.

- j. While the Applicant may have grounds to pursue either a complaint with the Human Rights Commission or seek remedies under other statutes to which reference is made in the Application (and upon which the Board takes no position), the Board is satisfied that the Application as a whole does not disclose any facts which arguably constitute a *prima facie* case under any of the substantive unfair labour practice provisions of *Part I* of the *Act*, particularly Sections 7(d), (e) and (h) of the *Act*, and, accordingly, the Board declines to take further action on the complaint pursuant to Section 30(3)(c) of the *Act*. It follows that the Application will be dismissed.

T H E R E F O R E

The Manitoba Labour Board **HEREBY DISMISSES** the Application filed by the Applicant, Marielle Huguette Marie Rowan, on October 2, 2008.

DATED at WINNIPEG, Manitoba, this **17th** day of **June 2009** and signed on behalf of the Manitoba Labour Board by

“original signed by”

W.D. Hamilton, Chairperson

WDH/dr

NOTES

REQUEST FOR REVIEW BY MANITOBA LABOUR BOARD OF A DECISION, ORDER, ETC., OF THE BOARD

- a. Subsection 143(3) of *The Labour Relations Act* of Manitoba, C.C.S.M. Chapter L10, provides:

Board review.

143(3) The board or a panel of the board may

- (a) review and vary or rescind any decision, order, direction, declaration or ruling that it or another panel has made; and
- (b) rehear a matter that it has heard or that another panel has heard.

- b. Request for review by the board of its decision, order etc. must be made by application to the board within ten days of the making of the board decision, order, etc.

Section 17 of the *Manitoba Labour Board Rules of Procedure* (being *Manitoba Regulation 184/87R*, published in the *Manitoba Gazette Part II*) provides:

Application for review of board decision

17(1) Where an application is made to the board under subsection 143(3) of the Act, to review, rescind, amend, alter or vary any decision, order, direction, declaration or ruling made by it, the applicant, in addition to the material required to be filed under section 2, shall

- (a) file a concise statement of any new evidence with such evidence being verified by statutory declaration;
- (b) file a statement explaining when and how the new evidence became available and the applicant's reasons for believing that the new evidence so changes the situation as to call for a different decision, order, direction, declaration or ruling; and
- (c) in the absence of any new evidence, file a concise statement showing cause why the board should review or reconsider the original decision, order direction, declaration or ruling.

Time limit for review

17(2) Except by leave of the board, no application under subsection 143(3) of the Act for a review of any decision, order, direction, declaration or ruling made by the board shall be reviewed by the board after more than 10 days have elapsed following the date of the making of the decision, order, direction, declaration or ruling.

JUDICIAL REVIEW OF FINAL DECISION OF THE MANITOBA LABOUR BOARD

Subsection 143(6) of *The Labour Relations Act* of Manitoba provides:

Judicial review of final decision

143(6) Notwithstanding any other Act, a final decision, order, direction, declaration or ruling, but not a procedural, interim or any other decision, order, direction, declaration or ruling, of the board or a panel of the board may be reviewed by a court of competent jurisdiction solely by reason that the board or the panel failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction, if

- (a) the applicant for review has first requested the board or the panel, as the case may be, to review its decision under subsection (3), and the board or the panel has decided not to undertake a review, or has undertaken a review and rendered a decision thereon, or has failed to dispose finally of the request to review within 90 days after the date on which it was made;
- (b) the board has been served with notice of the application and has been made a party to the proceeding; and
- (c) no more than 30 days have elapsed from, as the case may be, the decision by the board or panel not to undertake a review, or the date of the decision rendered by the board or panel on the review, or the expiration of the 90 day period referred to in clause (a).

REASONS FOR DECISION

It is the policy of the Manitoba Labour Board that, where a party to the proceedings is adversely affected by an Order or by a decision of the Board, within ten (10) calendar days of the date on which the Board's Order or decision was signed, that party may request the Board in writing to furnish written reasons for its Order or decision. The Board then may consider such request for reasons for its Order or decision and shall notify the requesting party as to whether reasons will be provided.