

Date Issued: September 16, 2011
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Indexed as: Hudym v. PJB Mechanical and others, 2011 BCHRT 255

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:

Beverly Hudym

COMPLAINANT

A N D:

PJB Mechanical, Plumbing and Heating, Baza Ventures Inc., Rob Zadra and
Paul Bach

RESPONDENTS

REASONS FOR DECISION
APPLICATION TO ADD A RESPONDENT AND TO DISMISS: Section 27(1)(c)

Tribunal Member: Enid Marion
Counsel for the Complainant: Christopher D. Martin
On behalf of the Respondents: Robert Zadra

Complaint

[1] Beverly Hudym filed a complaint against PJB Mechanical, Plumbing and Heating (“PJB”), Rob Zadra and Paul Zach (collectively, the “Respondents”), alleging discrimination in employment based on sex (pregnancy), contrary to s. 13 of the *Human Rights Code*.

[2] The Respondents deny any discriminatory conduct and apply to dismiss the complaint pursuant to s. 27(1)(c) of the *Code* on the basis that it has no reasonable prospect of success.

[3] In order to put the decision in context, I will briefly review the background to the complaint. In doing so, I make no findings of fact.

[4] Ms. Hudym has also filed an application to add Baza Ventures Inc. (“Baza”) as a respondent. The application was filed slightly over six months from the date of the alleged discriminatory conduct. I will first address this application, and then the application to dismiss.

Application to Add a Respondent

[5] In *Sheska v. B.C. (Liquor Distribution Branch (No. 2))*, 2011 BCHRT 69, the Tribunal summarized the criteria for adding a respondent as follows:

- i) Whether there are any allegations before the Tribunal on which it could make a finding of liability against the proposed respondent;
- ii) Whether it is in the public interest to add the respondent;
- iii) Whether the potential respondent would suffer any real prejudice as a result of the delay in being added that is not capable of being cured.
(para. 50)

[6] The last two criteria are only applicable if the application is filed more than six months from the date of the alleged discriminatory conduct, which in this case it is.

[7] Ms. Hudym says that Baza carries on business as PJB and that the individual respondents are directors of Baza. Therefore, she says that Baza is the proper legal entity against which to pursue her complaint and, if successful, obtain an enforceable remedial order.

[8] The Respondents have taken no position on this application. After reviewing the complaint, I am satisfied that it contains allegations on which the Tribunal could make a finding of liability against Baza. As well, given the relationship between Baza and PJB, I accept that it is in the public interest and, in particular, is consistent with the remedial purposes of the *Code*, to add Baza as a respondent. I also note that Baza has identified no prejudice arising out of the delay in making the application.

[9] In light of the uncontested information provided Ms. Hudym, I grant the application to add Baza as a respondent and have amended the style of cause to reflect this decision.

Background to the Complaint

[10] Ms. Hudym says that she was employed by PJB from May 23, 2007 to January 6, 2011. She says that on January 8, 2010, she took two weeks of vacation and on January 22, 2010 commenced maternity/parental leave.

[11] She says that in December 2010, she met with Mr. Zadra and Mr. Bach and it was agreed she would return to work on February 1, 2011. However, she says that, on or about January 6, 2011, she received a letter terminating her employment. She also says that the individual who had replaced her during her pregnancy-related leave remained employed for some time after her termination.

[12] The Respondents dispute when Ms. Hudym took her two weeks of vacation. In their view, her maternity/parental leave commenced on January 8, 2010 and was scheduled to end on January 8, 2011. They say that in early December, Ms. Hudym unexpectedly came to the office and had an “impromptu” meeting with Mr. Zadra and Mr. Bach, during which she informed them she would like to return to work the first week of February 2011. At the time, the Respondents say that there was concern about PJB’s economic situation and planning was underway to reduce office staff. They say there was no assurance given to Ms. Hudym that there would be continued employment at the conclusion of her leave.

[13] At the end of December, PJB says that it decided to reorganize its office staff, and to combine Ms. Hudym’s position with another position to create an office manager

position. They say that ultimately, PJB's staff was reduced from 13 full-time employees to eight full-time employees.

[14] PJB says that it decided to lay off Ms. Hudym as there had been some prior concerns with Ms. Hudym's performance and they did not feel she would be able to manage the office herself. PJB was concerned, however, about how to lawfully terminate her employment since she was still on maternity leave. Therefore, it says that it contacted the Employment Standards Branch ("ESB") to inquire when they might lawfully be able to implement the layoff. PJB says that it was assisted by the ESB in determining the effective date of January 10, 2011 for Ms. Hudym's termination, and was assured by it that the date fell at the end of her 52 week maternity/parental leave, and that PJB would not be terminating her during her maternity/parental leave.

[15] PJB says that it did everything within the guidelines of the *Employment Standards Act*, and did not discriminate against Ms. Hudym due to her pregnancy. It also says that it attempted to preserve her dignity as much as possible during the termination, and supported her in her pursuit of alternate employment.

[16] Ms. Hudym says that there were only minor performance concerns raised with her during her employment. As well, she says that it is her understanding that the individual hired to replace her during her maternity leave continued to work for PJB for some months after her termination. PJB says that it retained this individual on a month-to-month contract, after the maternity leave replacement contract expired at the end of the December, to see them through to the end of their peak season. It says that this individual is no longer employed with it.

Decision

[17] When assessing an application to dismiss pursuant to s. 27(1)(c), the role of the Tribunal is to determine, after considering all of the material before it, whether the evidence justifies the time and expense of a full hearing because "there is no reasonable prospect that findings of fact that would support the complaint could be made on a balance of probabilities after a full hearing of the evidence:" *Berezoutskaia v. British Columbia (Human Rights Tribunal)*, 2006 BCCA 95, para 22, and also paras. 9 and 27; *J. v. School District No. 43 (Coquitlam)*, 2011 BCCA 343, para. 34-35; *Bell v. Dr. Sherk*

and others, 2003 BCHRT 63, para. 28; *Wickham and Wickham v. Mesa Contemporary Folk Art and others*, 2004 BCHRT 134, paras. 11-12; and *Gichuru v. British Columbia (Workers Compensation Appeal Tribunal)*, 2010 BCCA 191, para. 31.

[18] In *Workers' Compensation Appeal Tribunal v. Hill*, 2011 BCCA 49, the B.C. Court of Appeal described the Tribunal's role under s. 27(1)(c) as follows:

It is useful to describe the nature of an application under s. 27 of the *Code* to provide context for the appellants' arguments. That provision creates a gate-keeping function that permits the Tribunal to conduct preliminary assessments of human rights complaints with a view to removing those that do not warrant the time and expense of a hearing. It is a discretionary exercise that does not require factual findings. Instead, a Tribunal member assesses the evidence presented by the parties with a view to determining if there is no reasonable prospect that the complaint will succeed. The threshold is low. The complainant must only show the evidence takes the case out of the realm of conjecture. If the application is dismissed, the complaint proceeds to a full hearing before the Tribunal. If it is granted, the complaint comes to an end, subject to the complainant's right to seek judicial review: *Berezoutskaia v. British Columbia (Human Rights Tribunal)*, 2006 BCCA 95, 223 B.C.A.C. 71, at paras. 22-26, leave to appeal ref'd [2006] S.C.C.A. No. 171; *Gichuru v. British Columbia (Workers Compensation Appeal Tribunal)*, 2010 BCCA 191, 285 B.C.A.C. 276 at para. 31. (para. 27)

[19] I have adopted this approach in assessing this application. As well, even if I do not refer to it all, I have considered all the material before the Tribunal in reaching my decision.


[20] Ms. Hudym does not dispute that an employer is entitled to make legitimate business decisions, including amalgamating and eliminating positions, in order to address legitimate financial concerns. Rather, her concern is premised on the fact that her replacement was retained while she was not, and that, from her perspective, she was terminated prior to the conclusion of her pregnancy-related leave. Therefore, she says that, but for her pregnancy-related leave, she would have continued to be employed, at least for the period that her replacement continued to work at PJB. As a result, she says it is reasonable to infer that her pregnancy was a factor in her termination.

[21] The Respondents do not dispute that Ms. Hudym's maternity leave replacement remained employed after Ms. Hudym's termination, though say it was only on a month-

to-month basis. They did not describe what duties this individual was performing. In *Su v. Coniston Products (No. 2)*, 2011 BCHRT 223, the Tribunal concluded that an employer had breached the *Code* when it refused to allow an employee to return to work from a pregnancy-related leave while the person who had replaced her remained employed. Similarly, in this case, based on the limited information before me, I am not persuaded that, if the facts as alleged by Ms. Hudym are proven at hearing, she would have no reasonable prospect of success in establishing her complaint.

[22] As a result, I deny the application to dismiss.

[23] I encourage the parties to utilize the Tribunal's mediation services to try to informally resolve this complaint.



Enid Marion, Tribunal Member