

MANITOBA HUMAN RIGHTS BOARD OF ADJUDICATION

IN THE MATTER OF a complaint made under *The Human Rights Code*, CCSM c. H175

BETWEEN

**Andrea Szabo**

*complainant,*

AND

**Cindy Dayman,**

**operating as Take Time**

**Home Clean & Life Style Services**

*respondent,*

AND

**Manitoba Human Rights Commission,**

*Commission.*

*File No.: 14 LP 12*

*For the complainant: In person*

*For the respondent: In person*

*For the Commission: Ms Isha Khan and  
Ms Heather Unger*

*Complaint heard: 20, 21, and 22 July  
2015*

*Complaint decided: 25 April 2016*

**R. DAWSON, adjudicator:**

[1] A former employee complains that her former employer terminated her employment, because the employee had become pregnant. For the reasons that follow, the complaint is allowed.

**Facts**

[2] The respondent Cindy Dayman was the proprietor of a household cleaning service called Take Time Home Clean & Life Style Services. Ms Dayman hired the

complainant Andrea Szabo, who began work on 19 June 2012 performing household cleaning tasks.

[3] The complainant became pregnant soon after she had been hired. She chose not to tell her employer that she was expecting, especially because the pregnancy seemed to be without complications and did not impact her ability to perform household cleaning tasks. In order to attend routine medical examinations related to her pregnancy, Ms Szabo asked to leave work early on 20 September 2012, although she did not mention that the appointment had anything to do with pregnancy. She again asked to leave work early on 25 October 2012 for another routine medical examination relating to her pregnancy, but she again did not explain to Ms Dayman that she was pregnant. On both occasions, the respondent accommodated Ms Szabo's request and scheduled her cleaning assignments so that she could leave work early.

[4] These routine medical examinations continued into November 2012. Ms Szabo notified her employer that, on 22 November 2012, she again wanted to leave work early and that, on 21 November 2012, her medical appointment would fill the entire afternoon. Despite asking for the time away from work, Ms Szabo continued to offer no explanation for the examinations, except to identify them as medical. She simply chose not to tell her employer that she was pregnant.

[5] Shortly after notifying her employer about the absences requested for November 2012, the respondent's assistant presented her with a "Cleaner Health and Availability" form. Among other things, the form asked if the employee was "pregnant or trying to get pregnant". The complainant completed the form on 8 November 2012, responding "Y" for "yes" to the question about whether or not she was "pregnant or trying to become pregnant".

[6] At the same time that she was given the form, Ms Szabo received an envelope with her paycheque and a copy of customer feedback that negatively commented on her recent work.

[7] At the request of the respondent, Ms Szabo met with Ms Dayman on 13 November 2012. During that meeting, Ms Dayman pointed to the customer feedback and characterized Ms Szabo's performance as poor. Accordingly, Ms Dayman gave notice that she intended to terminate the complainant's employment on 20 November 2012.

[8] On 28 November 2012, Ms Szabo filed a complaint with the Manitoba Human Rights Commission, alleging that the respondent had, contrary to s. 14(1) of the *Code*, discriminated against the complainant on the basis of her sex, including her pregnancy or circumstances related to her pregnancy, with respect to her employment.

[9] The Chief Adjudicator designated me on 8 January 2015 to hear the complaint.

Pursuant to the requirements of the *Code*, I provided notice of the hearing to the parties and the public. During a pre-hearing teleconference on 14 May 2015, I reminded the parties that they were entitled to be represented by a lawyer. While the Commission was so represented, the respondent chose to proceed without a lawyer.

### **Submissions of the parties**

#### *The complainants*

[10] The complainants entirely relied upon the Commission to put in their case, and they made no submissions.

#### *The Commission*

[11] The Commission conceded that the respondent had several reasons that caused her to terminate the complainant's employment. However, the Commission underlined that one of those reasons was the complainant's pregnancy and the circumstances related to her pregnancy. In its submission, the intent of the respondent was not relevant to the finding that there had been a contravention of the *Code*. It was sufficient to determine that discrimination within the meaning of the *Code* was at least a factor in the decision to terminate the complainant's pregnancy; such a discriminatory

consideration need not to be the only or chief reason that a complainant's employment was terminated.

[12] The Commission acknowledged that the burden of proof is upon the complainant and the Commission in order to show on a balance of probabilities that the respondent had discriminated against the complainant. The Commission added that, once that had been demonstrated, the burden shifted to the respondent in order to justify the termination as being bona fide and reasonable within the requirements of the *Code*.

*The respondent*

[13] The respondent denied that the pregnancy of the complainant had any part in her decision to terminate the employment of Ms Szabo. Instead, the respondent identified four considerations that triggered the termination. First, the complainant was not consistently available for work, even though she had agreed to abide by the written company policies that required such availability. Secondly, in her dealings with the respondent, Ms Szabo had occasionally been uncooperative, aggressive, and rude. Thirdly, the quality of the complainant's household cleaning had been variable. Lastly, Ms Szabo had been the subject of a customer complaint.

## Analysis

### *Applicable law and governing principles*

[14] Sub-section 14(1) of *The Human Rights Code* prohibits discrimination in the workplace:

[n]o person shall discriminate with respect to any aspect of an employment or occupation, unless the discrimination is based upon bona fide and reasonable requirements or qualifications for the employment or occupation.

The meaning of “discriminate” derives from s. 9 of the *Code*, where s. 9(1)(b) defines discrimination to include “differential treatment of an individual or group on the basis of any characteristic referred to in subsection (2)”. That subsection in turn lists at s. 9(2)(f), among the applicable characteristics, “sex, including sex-determined characteristics or circumstances, such as pregnancy, the possibility of pregnancy, or circumstances related to pregnancy”.

[15] By reason of s. 14(1) of the *Code*, I have adopted the analytical approach that the Commission correctly proposes; namely, it first falls to the complainant and the Commission in order to prove discrimination on a balance of probabilities, but the burden thereafter shifts to the respondent in order to show any bona fide and reasonable requirement that would excuse the discrimination.

*Issues*

**[16]** The instant complaint raises the following issues:

- a. Did the pregnancy of the complainant or circumstances related to her pregnancy at least partly inform the respondent's decision to terminate the complainant's employment?
- b. If so, was the discrimination based upon bona fide and reasonable requirements or qualifications for the employment or occupation?

*The respondent discriminated against the complainant*

**[17]** At the time that the complainant's employment was terminated, Ms Dayman had actual knowledge that Ms Szabo was pregnant.

**[18]** It was common ground among the parties that, on 8 November 2012, the respondent's assistant had requested that Ms Szabo complete a "Cleaner Health and Availability" form. One of the questions related to whether the complainant was "pregnant or trying to get pregnant". The complainant responded "Y", confirming that she was pregnant or trying to get pregnant. Ms Szabo testified that, on 12 November 2012, she received a telephone voice-mail message from Ms Dayman's assistant, following up on the completed form and asking about Ms Szabo's due date. Although Ms Szabo stated that she did not respond to the telephone message, I find that, at least

by 12 November 2012, which was one day before the termination, the respondent therefore knew that the complainant was pregnant.

[19] However, even where an employer knows that an employee is pregnant, the employer may nonetheless terminate the employment without contravening the *Code*, provided that the pregnancy or circumstances related to the pregnancy do not inform any part of the decision to terminate the employee's employment: see, for example, *Blatz v 4L Communications Inc.*, 2015 CanLII 27309 (MB HRC). At the same time, where an employee's pregnancy or circumstances related to the pregnancy form at least part of the reasons for which an employer decided to terminate the employee's employment, the employer has discriminated against the employee, within the meaning of the *Code*. In short, a protected characteristic under the *Code* need not be the only or main reason that an employer decided to terminate the employment of an employee; it is sufficient that such a consideration should be only a part of the reasons for the decision.

[20] It was the consistent position of the respondent that the pregnancy of Ms Szabo was irrelevant to the decision to terminate the complainant's employment. As she succinctly explained during cross-examination,

[Her pregnancy] was irrelevant to me. It had nothing to do with her termination. [Another employee] was on maternity leave. I had had cleaners before and after who had left on maternity leave and came back. We have one returning next month. I had taken four maternity leaves myself. I found it kind of offensive, in fact, that that would be the reason



that she filed a complaint. I have – I host showers for staff members who are going on maternity leave.

Transcript, p. 350, ll. 15-24.

[21] Immediately after that statement, the Commission put the following question, to which Ms Dayman made an inadvertent concession in her reply:

Q But [Ms Szabo's] apparent lack of availability for work or requesting of scheduling changes certainly formed part of your reason to terminate her employment?

A *It was part of it*, but I didn't know what the reason for her lack of availability was.

Q Well, you knew they were –

A I didn't know that she was pregnant.

Q Well, you knew that they were medical appointments?

A I did, yes.

Q And on the day you terminated her employment, you knew then that those medical appointments were related to her pregnancy?

A Yes, her lack of availability. I don't understand why a Thursday was the only day that she could have scheduled medical appointments. However, that may be the case. That would not have been an issue if she had have explained that to me.

Q Well, she did. You told us, right, she told you that her doctor could only see her Thursdays, and you said, "yes okay but I don't like it"?

A Yes, well, that's true. Yes, that's right. It certainly was not *the key issue for me in terminating her*. Not at all.

Q But it certainly was something you had considered?

A Hmm hmm.

Q Yes?

A Yes.

Transcript, pp. 350, l. – p. 353, l. 3  
[emphasis added]

In other words, the scheduling of medical examinations created concerns for the respondent about the complainant's availability for work. Moreover, at the time that the

complainant's employment was terminated, the respondent acknowledges that she knew that the reason for the medical appointments was related to the complainant's pregnancy. Ms Dayman did not understand why those appointments had to fall on a Thursday, but she did know that they related to the complainant's pregnancy. Nevertheless, as acknowledged at the opening of the quoted exchange, Ms Szabo's resulting unavailability was part of the respondent's reason to terminate the employment.

[22] Nothing in the evidence before me portrays Ms Dayman as someone who deliberately set out to discriminate against her employee. She compellingly explained the realities of operating a business in the service industry. The satisfaction of customers is the only way in which such a business will thrive. To that end, her employees must be available and reliable, and they must provide their cleaning services when it suits the customers. As captured at para. 3 of the respondent's "Company Policies",

[c]leaners must be available for work Monday to Friday between the hours of 8 am and 5 pm, be available to work full time hours meaning 7-8 hours per day 5 days per week. Please do not request changes to this. Avoid causing chages to the schedule for any reason except for bereavement or emergency; make personal appointments for after work hours.

Nevertheless, the public policy that underlies Manitoba's *Human Rights Code* requires that the exigencies of business must yield on occasion.

[23] Moreover, although it is not necessary that I should determine all of the reasons that inform the respondent's decision to terminate the employment of the complainant, I accept Ms Dayman's testimony and her closing submission that, at least in her opinion, there were other and more prominent grounds for the termination.

[24] In the end, I am left with the concession of Ms Dayman during cross-examination: the complainant's medical appointments were affecting her availability for work, and the respondent knew those appointments were related to the complainant's pregnancy; moreover, this resulting unavailability was part of the respondent's decision to terminate the employment of the complainant.

[25] In the circumstances, I find that, contrary to s. 14(1) of the *Code*, the respondent discriminated against the complainant on the basis of sex, which means in this instant complaint the pregnancy or circumstances related to the pregnancy of the complainant.

*The respondent has not demonstrated any bona fide and reasonable requirement or qualification*

[26] By reason of s. 14(1) of the *Code*, the burden of proof now shifts to the respondent after my finding above that she discriminated against the complainant.

[27] The respondent made no attempt to discharge this burden of proof. In her direct testimony and closing submission, Ms Dayman denied that she had discriminated

against the complainant. She mounted no case that would have excused or justified that discrimination within the exceptions that s. 14(1) of the *Code* set out.

[28] In the circumstances, I find that there was no bona fide and reasonable requirement or qualification for the complainant's employment or occupation that would lawfully excuse or justify the discrimination that I have found to have occurred.

### **Remedies**

[29] Having found that the respondents have contravened the *Code*, s. 43(2) affords me with a discretion to order the respondents to do one or more of the following:

- a) do or refrain from doing anything in order to secure compliance with this Code, to rectify any circumstance caused by the contravention, or to make just amends for the contravention;
- (b) compensate any party adversely affected by the contravention for any financial losses sustained, expenses incurred or benefits lost by reason of the contravention, or for such portion of those losses, expenses or benefits as the adjudicator considers just and appropriate;
- (c) pay any party adversely affected by the contravention damages in such amount as the adjudicator considers just and appropriate for injury to dignity, feelings or self-respect;
- (d) pay any party adversely affected by the contravention a penalty or exemplary damages in such amount, subject to subsection (3), as the adjudicator considers just and appropriate as punishment for any malice or recklessness involved in the contravention;

(e) adopt and implement an affirmative action program or other special program of the type referred to in clause 11(b), if the evidence at the hearing has disclosed that the party engaged in a pattern or practice of contravening this Code.

*Damages for injury to dignity, feelings, or self-respect*

[30] The Commission submits that an appropriate award under s. 32(2)(c) is \$6,000.00, pointing to other cases involving discrimination on the basis of pregnancy and noting that a range there emerges between \$5,000 and \$8,000.

[31] The Commission argued that the conduct of the respondent had caused stress and concern to the complainant during her pregnancy. The termination had left the complainant uncertain about finding alternate employment, especially while pregnant. She was also concerned that the termination might affect her entitlement to government maternity benefits. At the same time, Ms Szabo agreed on cross-examination that she had not suffered any serious mental distress as a result of her termination.

[32] Accordingly, I find that the complainant did suffer injury to dignity, feelings or self-respect within the meaning of s. 43(2)(c) of the *Code*. She is therefore entitled to an award of damages. I accept as useful the range of damages that the Commission has extracted from the case law. I find that the extent of the complainant's injury was at the low end of that range.

[33] In the circumstances, I award \$5,000.00 to the complainant as damages under s., 43(2)(c).

*Damages for financial losses sustained*

[34] The complainant mitigated her lost wages by almost immediately returning to work at Canada Post. Accordingly, she made no claim for lost income and benefits. However, she does claim the sum of \$100.00 as a referral bonus owing to her but not paid by the respondent after the termination of the complainant's employment.

[35] The respondent's "Company Policies" explains at para. 20 that employees may earn a \$100 referral bonus:

[c]leaners will receive \$100 bonus for every client that employs us because of the cleaners actions... advertising efforts through flyers distributed; referrals from their clients; the bonus will be paid out to the cleaner after the fourth regular clean.

[36] The complainant testified that she had made such a referral but that the respondent had not paid her any part of the referral bonus because of the termination. In her closing submission, the respondent explained that no bonus was payable, because the complainant's employment had been terminated due to poor performance. However, I have already found above that the termination decision was informed at

least in part by consideration of the circumstances relating to the complainant's pregnancy.

[37] In the circumstances, I find that the complainant is entitled to the \$100.00 referral fee.

*Implementing a special program*

[38] The Commission has requested that I make certain orders that aim to promote the respondent's future compliance with the *Code*, and I am prepared to do so.

**Procedural and other issues**

*No negative inference arising out documents that the respondent did not produce*

[39] My pre-hearing procedural order of 10 July 2015 required the respondent to produce certain documents. The order arose at the request of the Commission and by the respondent's consent as to its content. Despite that production order, the Commission informed me at the opening of the hearing that the respondent had failed to provide all of the documents that were subject to the order. In her reply, Ms Dayman advised that she had turned over all of the documents that she possessed; the additional documents that the Commission now demanded, simply did not exist. The Commission asked me to draw a negative inference from the respondent's failure to produce the

documents, noting from time to time throughout the hearing instances in which the Commission opined that some of the missing documents would have been helpful.

[40] After hearing the evidence, I did not need to draw any negative inferences about documents that had not been produced. I was able to come to the findings set out in these reasons for decision without such efforts. Accordingly, I confirm that, despite the Commission's motion, I have not drawn any negative inferences arising from the failure to produce the documents described in my pre-hearing procedural order.

[41] For what it is worth, I accept the respondent's submission that she produced all of the documents that she has. I believe that Ms Dayman did not exactly understand the nature of the production order that the Commission sought and to which she consented. A party cannot produce documents that do not exist.

*The respondent's concern about the role of the Commission*

[42] In a very respectful and appropriate manner, Ms Dayman raised a concern on more than one occasion about the role of the Commission in the hearing process. In essence, she noted that, although the complainant is a nominal party to the proceedings, it is the Commission that effectively acts as the complainant's lawyer and puts in the complainant's case.



[43] She explained that this seems unfair for a number of reasons. A complainant appears to receive the free services of a Commission lawyer, while a respondent must either retain its own lawyer at considerable expense or appear without a lawyer and hope for the best. Even when they act on their own without a lawyer, respondents must still spend time, money, and other resources in defending themselves.

[44] I invited the lawyer for the Commission to comment during her closing submission. I discourage any reader of these reasons for decision to make too much of her remarks, because I had not previously signalled to the Commission that I would ask for it to address the respondent's concern. Despite this, I think the remarks were sound.

[45] In essence, the Commission has the statutory obligation of administering *The Human Rights Code*. In the context of adjudications, the Commission is deemed by law to be as much a party to the complaint as the complainant and respondent themselves. Moreover, the law also assigns carriage of the complaint to the Commission. In adjudications, the Commission aims to prove the complaint in service of the public interest. Accordingly, while it may appear as if the Commission is acting as the complainant's free lawyer, it is not, and there are burdens that also fall upon the complainant.

[46] I know that Ms Dayman is not alone in wondering about the role of the Commission in adjudications. To be sure, the system is not perfect. Some complaints

amount to proceedings in parallel to actions commenced in the Court of Queen's Bench, and the effect, whether intended or otherwise, is to open through the Commission a second flank in the litigation battle, which necessarily wears down a respondent and leans the party towards settlement: *Blatz v. 4L Communications Inc.*, 2012 CanLII 42311 (MB HRC). Other complaints rely upon the Commission to explain complex financial claims without the rigorous discovery rules, pre-trial preparations, and judicial resources found in the Court of Queen's Bench: *Jedrzejewska et al. v. A+ Financial Services Ltd et al.*, (25 April 2016) (MB HRC). Despite all of this, I nonetheless appreciate the impromptu and helpful remarks that the Commission's lawyer put on the record and that I have more or less summarized here.

### **Decision and order**

[47] For the reasons set out above, the complaint is allowed.

[48] I order as follows:

1. The respondent Cindy Dayman shall pay damages for injury to dignity, feelings, or self-respect in the amount of \$5,000.00 payable to the complainant Andrea Szabo within 45 days of the date of this decision;
2. The respondent Cindy Dayman shall pay damages for financial loss sustained by reason of a contravention of the *Code* in the amount of \$100.00

payable to the complainant Andrea Szabo within 45 days of the date of this decision;

3. For a period of 2 years after the date of this decision, the respondent Cindy Dayman shall not collect information from or about any employee that the respondent could use in order to discriminate against the employee on the basis of (a) sex, including pregnancy, the possibility of pregnancy, or circumstances related to pregnancy, or (b) a physical or mental disability or related characteristic or circumstances;

4. The respondent Cindy Dayman shall attend and satisfactorily complete a workshop on harassment in the workplace within 6 months of the date of this decision, where the provider of that workshop is satisfactory to the Commission; and,

5. The respondent Cindy Dayman shall revise to the satisfaction of the Commission within 90 days of the date of this decision para. 3 of the “Companies Policies”, entered into evidence at Tab 4 of the Agreed Book of Documents, so that the policy conforms with the *Code*, including but without limiting the generality of the foregoing an accommodation for employees to whom may be attributed any of the characteristics set out in s. 9(2) of the *Code*.

[49] I retain jurisdiction for the purpose of resolving any issues that may arise out of the implementation or interpretation of this order.

[50] I draw to the parties' attention s. 50(2) of the *Code*, which requires that any application for judicial review of this decision must be made the Court of Queen's Bench within 30 days of the making of this decision or within such further time as the court may allow.

25 April 2016

*[Original signed by]*

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R. Dawson