HUMAN RIGHTS TRIBUNAL OF ONTARIO

B E T W E E N:

Sean Carter

Applicant

-and-

Neurologic Rehabilitation Institute of Ontario

Respondent

DECISION

Adjudicator:	Jay Sengupta
Date:	January 25, 2011
File Number:	2009-02759-I
Citation:	2011 HRTO 170
Indexed as:	**Carter v. Neurologic Rehabilitation Institute of Ontario**

APPEARANCES

Sean Carter, Applicant	)	Self-represented
Neurologic Institute of Canada, Respondent	)	George Leibbrandt, Counsel

[1] This is an Application filed on June 26, 2009 under section 34 of Part IV of the *Human Rights Code*, R.S.O. 1990, c. H.19 as amended (the "*Code*"), alleging discrimination in employment on the basis of disability and reprisal.

[2] Over the course of the two day hearing, I heard evidence from the applicant on his own behalf and from Frank Tanuta, the applicant's immediate manager, and Dr. Rolf Gainor, the CEO and founder of the respondent employer, Neurologic Rehabilitation Institute of Ontario ("NRIO").

[3] NRIO provides rehabilitation services, attendant care, and residential accommodations to persons with neurological injuries and disabilities in a number of locations in Ontario, including a residential facility in Hamilton. The applicant was employed as a program coordinator at the Hamilton location from July 23, 2007 through to December 5, 2008.

[4] The applicant alleges that he was subjected to discrimination on the basis of disability. Specifically, he alleges that he experienced discrimination in his rate of pay, by having negative comments made, in being inappropriately disciplined, and by being repeatedly denied time off to deal with stress and depression. He also alleges he was reprised against because when he attempted to take time off to deal with his disability, he was fired.

[5] The respondent takes the position that the applicant sought and was granted accommodation of physical injuries arising out of a WSIB related matter in early 2008, until he was cleared to return to his pre-injury job without accommodation. The respondent employer denies that the applicant's rate of pay was affected, that he was subjected to inappropriate comments or discipline, or that he was denied time off or fired for reasons relating to any disability.

[6] In fact, the respondent employer says that at no time did the applicant make them aware that he had a disability involving stress or depression, the conditions that he now alleges he suffers from, nor did he seek any accommodation in respect of any such disability. They state that performance related concerns that were discussed with the

applicant during performance evaluations and documented in Performance Improvement Plans ultimately led them to terminate the applicant's employment with the company as the company believed that the applicant's conduct and the problems with his job performance were placing vulnerable clients in jeopardy.

[7] For the reasons that follow, this Application is dismissed.

The Law

[8] The relevant sections of the *Code* are set out below:

> 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, age, record of offences, marital status, family status or disability.
>
> (2) Every person who is an employee has a right to freedom from harassment in the workplace by the employer or agent of the employer or by another employee because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, 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) In Part I and in this Part,
>
> "disability" means,
>
> (a) any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, includes diabetes mellitus, epilepsy, a brain injury, any degree of paralysis, amputation, lack of physical co-ordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog or other animal or on a wheelchair or other remedial appliance or device,
>
> (b) a condition of mental impairment or a developmental disability,
>
> (c) a learning disability, or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language,

(d) a mental disorder, or

(e) an injury or disability for which benefits were claimed or received under the insurance plan established under the *Workplace Safety and Insurance Act, 1997*; ("handicap")

11(1) A right of a person under Part I is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where,

(a) the requirement, qualification or factor is reasonable and *bona fide* in the circumstances; or

(b) it is declared in this Act, other than in section 17, that to discriminate because of such ground is not an infringement of a right.

(2) The Tribunal or a court shall not find that a requirement, qualification or factor is reasonable and *bona fide* in the circumstances unless it is satisfied that the needs of the group of which the person is a member cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any

(3)The Tribunal or a court shall consider any standards prescribed by the regulations for assessing what is undue hardship.

The Facts

[9] The parties agree that the applicant was employed by the respondent from July 23, 2007 through to December 5, 2008 as a Program Coordinator in a residential facility offering care and therapeutic services to persons with neurological disabilities and injuries.

[10] The position involved therapeutic as well as administrative and supervisory functions. The applicant played a supervisory role in the facility and was responsible for ensuring adequate staffing levels of rehabilitation therapists for the number of residents present, maintaining health and safety information and policies, ensuring care arrangements for residents, along with some hiring and staff supervision. Other duties included communicating with community partners, such as social workers, family members of residents, WSIB case workers and private insurers.

[11] The parties also agree that the applicant was involved in a motor vehicle accident during work hours on March 5, 2008. Following approximately a month off work to recover from some physical injuries, during which time the applicant received WSIB benefits, he returned to modified duties and a graduated return to work schedule on April 9, 2008, beginning initially with a four hour work day and flexible work arrangements from home. There is no evidence that the accident resulted in any mental health issues or that the applicant was treated for any conditions other than physical ones.

[12] The respondent indicates that the applicant did not seek further accommodation with respect to his WSIB related issues and was released to full time duties by July 23, 2008 by WSIB. The applicant's evidence on this issue does not contradict the version of events presented by the respondent, and the respondent provided emails confirming the arrangements put in place during the applicant's modified re-entry to work and confirming his return to his pre-injury job full time.

[13] The parties take a different view of the events that follow the applicant's full time return to the job and lead up to the termination of his employment in December 2008.

[14] The applicant's evidence is that he was treated differently from other employees in his position from the time that he returned to his pre-injury job. He believes he was reprimanded and disciplined more than other employees. For example, he says he was reprimanded for speaking on his cell phone during a meeting and others would not have been. He did not feel supported by his manager, Frank Tenuta, and believed his views on how staff that he supervised were to be treated and disciplined were dismissed by his supervisor, thereby undermining his position.

[15] Although he alleged in his Application that his rate of pay was affected, he did not provide any evidence indicating that his rate of pay had decreased, and it appears from the documentary evidence submitted by the respondent that he did receive pay increases during the time he alleges he was discriminated against.

[16] The applicant gave evidence that his uncle and nephew both passed away in early 2008 and that he experienced great difficulties coping with these losses. The untimely passing of his young nephew, in particular, caused him tremendous distress. These deaths and the stress of catching up with his work after his WSIB related leave caused him to experience difficulties at work. He says he told his supervisor, Frank Tenuta, on a weekly basis about the stress and depression he was experiencing, but that because of an accreditation process coming up in September 2008, he was denied time off to deal with his disabilities.

[17] There is evidence that, following the death of his nephew in late May 2008, the applicant did not work from May 29 through June 6, 2008. The respondent indicates it gave him three days bereavement leave to cover some of that time off work even though he was not eligible to receive that leave. They say they did so for compassionate reasons. There were emails between the applicant and his managers confirming this arrangement.

[18] Although the applicant alleges that he made repeated requests for time off to deal with stress and depression following his being cleared to return full time to his pre-injury job, he has not entered into evidence any documents to support his contention that he was suffering from a disabling condition at the material time, that he disclosed the existence of a disability to his employer during that time, or that he sought accommodation in the form of time off work as a result of those disabling conditions.

[19] The respondent takes the position that the applicant did not inform any of his managers of any existing disability or that he needed accommodation of any disability. Frank Tenuta, the applicant's immediate supervisor, gave evidence that if an employee indicated that they had issues with respect to any disability, a formal process would have immediately been initiated to obtain additional information about the type of limitations being experienced and the accommodation that was needed. His evidence is that further medical information would have been sought from the employee and then he would be called on to make staffing adjustments to continue to ensure optimal care for the clients of the organization. This was not done, he says, because no such issues were ever raised by the applicant.

[20] The respondent, through the evidence provided by Frank Tenuta, the applicant's manager, and Rolf Gainor, the president of the company, takes the position that it had concerns about the applicant's job performance and that these performance issues had been discussed with him. According to Frank Tenuta, the applicant's job performance in 2008 was very poor and he pointed to specific occasions when he had to discuss and document deficiencies in the applicant's performance of his duties.

[21] Frank Tenuta indicated that on more than one occasion the applicant had failed to ensure that there were enough staff at the facility and that he had left one rehabilitation therapist with five clients and left to attend an appointment. He indicated that he received calls from parents of clients and other community partners that NRIO worked with in providing services to vulnerable clients indicating dissatisfaction with the applicant's handling of matters. He stated that he had concerns about ongoing issues with disgruntled stuff, health and safety issues that had not been addressed adequately by the applicant and, finally, that the applicant was missing management and coordinator meetings.

[22] Frank Tenuta gave evidence that during a meeting held on August 14, 2008, he outlined several areas in which the applicant needed to improve. A Performance Improvement Plan ("PIP") was put in place on that date. There is no indication that the applicant raised any health concerns during the meeting or in response to receiving the PIP or that he intimated that his lack of performance was due in part to a disability or that he needed accommodation of that disability.

[23] Subsequently, the applicant went through another Performance Evaluation on September 26, 2008. Frank Tenuta was of the view that he could still take steps to improve and he believed the applicant was capable of doing his job but needed further coaching. However, he indicated that he had concerns about what he viewed as the applicant's lack of judgement. Again, there is no indication that the applicant raised any disability related issues or concerns during this meeting with his supervisor.

[24] On November 25, 2008, Frank Tenuta sent the applicant another note documenting his concern about the applicant's performance. He highlighted his

concern about the applicant not returning to work following a personal appointment without informing staff or his supervisor and his failure to attend an appointment at the hospital to meet with a new resident, “NM”, and his family and care team, to prepare for NM’s imminent transfer from hospital to the respondent’s facility.

[25] On Friday, November 28, 2008, the applicant received two emails. The first was an email from Colleen Boyce, the Executive Director of the facility, explaining that she had received two complaints from outside parties about the applicant’s failure to communicate with them in a timely way and asking him to follow up with one of the parties. She conveyed her disappointment and explained she would be away for two weeks.

[26] The second email was from Frank Tenuta attaching a four page letter outlining deficiencies in the applicant’s job performance with detailed examples and indicated that should he not show improvement by December 15, 2008, he would be demoted to a Rehabilitation Therapist from the position of Program Coordinator. Frank Tenuta indicated he would get in touch to discuss the email and its contents with the applicant on Monday, December 1, 2008.

[27] On Monday December 1, 2008, the applicant sent an email message to both Frank Tenuta and Colleen Boyce indicating that he had gone to see the doctor “for some results and that (he was) going to be off for 6-8 weeks”. Although his email said that he would fax the doctor’s letter in the same day, the respondents say they did not receive it.

[28] On Wednesday, December 3, 2008, the facility received a complaint from the parents and social worker of the new client, “NM”, on whose transfer from hospital to the respondent’s facility the applicant had been working. The complaint indicated that the applicant had assured the team supporting the client that he would ensure that medications would be ordered and in place but that had not happened. The email expressed concern that the client was showing behavioural changes without the medications. The complaint went on to state that staff had not been trained on transfers as required and that the client had been left in the bathroom unattended. This aspect

was also within the purview of the applicant and something the respondent's witnesses maintain he ought to have done.

[29] On the same day, the applicant spoke to Christine Romanenchuk, Director of Administration at NRIO. He asked if she had received the doctor's note and when she confirmed the note had not been received, he told her that he would re-fax the doctor's note, that he was going to have a "procedure done", that he was glad "it wasn't cancerous but that he had to have it removed". The faxed doctor's note was received either on the 4th or the 5th of December, 2008 by the respondents and states:

> This person was seen on Monday, December 1, 2008. Due to medical reasons, this patient should remain off work for the next 6-8 weeks. He will be reassessed prior to returning to work. He is actively under my care.

There is no further information in the note about the medical conditions being treated or their possible impact on the applicant's ability to perform his job leading up to his requested leave.

[30] Rolf Gainor gave evidence that although he was not on site or in Ontario full time, he was aware of the ongoing issues regarding the applicant's job performance. He indicates that as a result of Colleen Boyce's absence, he was playing a more active role in assisting Frank Tenuta during the week of December 1, 2008.

[31] He says that he found out about the concerns of the social worker and parents of the new client resident NM on December 3, 2008. He described his reaction as being "outraged" and indicated that if he had been there, he would personally have escorted the applicant off the premises. His view was that this final incident persuaded him that the applicant could not continue in the job as his negligent conduct could have resulted in actual harm to vulnerable clients and had exposed the respondent to potential risk.

[32] Rolf Gainor took issue with the applicant's assertion that as he was off the job effective December 2, 2008, the transfer of NM from the hospital to the respondent's facility was, therefore, someone else's responsibility. He indicated that upon approval by the insurer, the arrangements for the transfer should have begun and he gave

evidence that the process is usually two weeks to a month long. A number of people are involved in the arrangements but the overall coordination of the intake of a client was the applicant's responsibility and, from the facility's perspective, a successful transition for the client required that people follow through on commitments made to the other members of the team. In this situation, Rolf Gainor took the view that the applicant had not honoured his commitments with respect to the arrangements he had undertaken to complete.

[33] Rolf Gainor indicated that he was the person to make the ultimate decision to terminate the applicant's employment and that it was unrelated to the applicant's absence from work for medical reasons or any subsequently alleged disability.

[34] A letter dated December 5, 2008 was sent to the applicant terminating his employment. Two weeks later the applicant sent a letter seeking clarification of the number of hours for which he would be paid. The letter does not mention a disabling condition.

ANALYSIS

Credibility

[35] Where my resolution of the factual differences relates to a credibility assessment, I am guided by the well-established principles stated by the British Columbia Court of Appeal in *Faryna v. Chorny,* [1952] 2 D.L.R. 354, which is often quoted by this Tribunal. The Court held:

> 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 a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize is reasonable in that place and in those conditions.

Discrimination on the Basis of Disability

[36] The applicant argues that he was discriminated against because of a disability. In order to prove his allegation of discrimination in respect of employment on the basis of disability, he must either establish direct discrimination, that is to say that he was treated adversely on the basis of a disability, or constructive discrimination, that because of a disability he was unable to fulfill certain neutral requirements in the workplace, that the employer took action against him as a result and did not accommodate him to the point of undue hardship.

[37] Although the applicant did not present a clear theory of discrimination in his Application documents or, indeed, during the hearing, I have considered the facts he has presented in view of both possible theories of discrimination.

Direct Discrimination

[38] The applicant must establish, on a balance of probabilities, that he was subjected to adverse treatment, and that that treatment was related, in whole or in part, to his disability.

[39] While the applicant's WSIB injury clearly constitutes a disability under the *Code,* there is no indication the effects of that injury resulted in ongoing difficulties of a physical nature for the applicant after his full time return to his pre-injury job.

[40] The applicant alleges that he was stressed and suffering from depression after his return to work. I have been provided with no evidence of disability relating to these mental health conditions other than the applicant's testimony.

[41] I am not persuaded by the applicant's evidence that he sought time off almost on a daily basis by talking to Frank Tenuta, during which conversations he disclosed that he was suffering from a disabling condition involving stress and depression. Frank Tenuta testified that he was not made aware of any disabling conditions or needs for

accommodation and I prefer his evidence that he was unaware of the existence of a disability over that of the applicant on this point for the following reasons.

[42] The communication between the applicant and his managers, particularly Frank Tenuta, appears to have been frequent and often effected electronically via email. There were no emails or documents provided to substantiate the applicant's allegation that he disclosed a disabling condition related to stress or depression or a request for accommodation in the form of time off work.

[43] Given the applicant's contention that he told them of his disability, I find it surprising that there would be no subsequent request for further medical condition documentation or details from the respondent employer regarding the impact of his disability on his ability to perform his job, particularly if compared to the manner in which the WSIB accommodation process was handled.

[44] In addition, there is no suggestion that the applicant raised the existence of a disability and related concerns during the performance evaluation process that resulted in a PIP being put in place in August, 2008. If requests for time off to deal with stress and depression had been made on an almost daily basis by the applicant for the past month, it would be reasonable that he would raise the issue during this meeting. It is clear that he did not.

[45] Despite the issuance of a Case Assessment Direction in advance of the hearing date, the applicant did not file any medical condition documentation regarding his disabling conditions at the material time, or evidence that he sought or received medical treatment for the conditions to which he refers, or that he provided evidence of functional limitations at the time to his employer.

[46] On the first day of hearing the applicant presented and was permitted to enter into evidence a number of medical notes despite not having disclosed them earlier in accordance with the Tribunal's Rules. However, none of them relate to his medical condition in 2008. They refer to his being under medical care after his termination. The only note that makes any reference to depression relates to a time period beginning in

June, 2009, almost 7 months after his termination. The applicant failed to provide the "test results" relating to his request for medical leave and any medical notes from his physician from that time period.

[47] For all these reasons, I am not persuaded that the applicant has established that he suffered from a disability relating to his mental health issues as alleged and there is nothing in his Application or his evidence regarding continuing physical functional limitations from the WSIB injury.

[48] Even if I were satisfied that he suffered from a disability at the material time, the applicant has not established that he was subject to adverse treatment relating to his disability.

[49] He alleges that his rate of pay suffered. However, his rate of pay increased by a few percentage points during 2008. In addition, he alleges that he was subject to negative comments and inappropriate and extra discipline. The example he offers of negative comments being made is that he was told not to take a cell phone call during a manager's meeting. Even accepting that this is differential treatment not meted out to others, I do not see a connection between the comment and the applicant's disability.

[50] Finally, while it is clear that performance related concerns were being raised regularly with the applicant from August, 2008 to November, 2008, when questioned about the specific concerns being raised, the applicant acknowledged that many of the issues raised were legitimate. Again, given my finding that the applicant has not established the existence of a disability and given that he does not appear to have responded to the performance measures by asserting that functional limitations resulting from disabilities were potentially having an impact on his job performance, I am not persuaded that he suffered discrimination on the basis of disability.

Constructive Discrimination

[51] The second possible theory of disability-related discrimination in this Application is based on a violation of section 11 of the *Code,* and would require that the applicant

show that because of a disability, he was unable to fulfill certain neutral requirements of the workplace, and if the employer was going to hold him to that standard or take action because he could not fulfill those requirements, it was required to accommodate him to the point of undue hardship.

[52] On the constructive discrimination claim, in order to trigger the duty to accommodate, the applicant has to show that he cannot meet neutral job requirements because of his disability and that he brought this to the attention of the employer in such a way as to require them to take steps to accommodate.

[53] In this Application, the applicant has not provided me with any evidence that his inability to meet *bona fide* and reasonable requirements relating to his employment was affected by a disability, which required accommodation. Nor has he persuaded me that he made the employer aware of his disability-related need to be accommodated in doing his job.

[54] I have considered whether the applicant's submission of a medical note seeking time off work gave rise to any obligation on the part of the respondent to make inquiries regarding the reason for the leave request before proceeding with the termination and asked that the respondent address the Tribunal's ruling in *McLean v. DY 4 Systems,* 2010 HRTO 1107 (CanLII), para 56, which states:

> A number of decisions of this Tribunal, as well as other tribunals applying human rights legislation, have considered when a respondent can be said to have enough knowledge of an applicant's disability to trigger responsibilities under human rights legislation. Most of these decisions have arisen in the context of identifying when the employer has a duty to accommodate. Most authority indicates that the claimant will not be held to a high standard of clarity in communication. This approach is in keeping with the principles enunciated by the Supreme Court of Canada in respect of the need to interpret human rights legislation generously and purposively. Liability has been found when an employer had no knowledge of the disability. See, for example, *Re Ottawa Civic Hospital*, (1995) 48 LAC (4th) 388, [1995] O.L.A.A. No. 60 (QL), at p. 398, in which an arbitrator concluded that there can be a breach of the *Code* if an employer fires an employee in ignorance of the disability that caused problems, and refuses to reinstate a disabled employee once the disability becomes known to the employer. Also see *Willems-Wilson v. Allbright Drycleaners,*

> (1998) 32 C.H.R.R. D/71 (B.C. Trib.). There are several cases in which the employee gave little or no information about the disability, beyond an indication that a disability existed. See *Bielecky v. Young, Macnamara* (1992), 20 C.H.R.R. D/215, 12 L.W. 1237-003 (QL) (Ont. Bd.Inq.); *Belliveau v. Steel Co. of Canada* (1988), 9 C.H.R.R. D/5250 (Ont. Bd.Inq.); *Koeppel v. Canada* (1997), 32 C.H.R.R. D/107, 1997 CanLII 1443 (Can. Trib.); and *Conte v. Rogers Cablesystems Ltd*. (1999), 36 C.H.R.R. D/403, 1999 CanLII 1022 (Can. Trib.)

[55] As the Tribunal held in *Simpson-Bowlyn v. Commissionaires (Great Lakes)*, 2009 HRTO 1369 (CanLII):

> For the purposes of a request for employment accommodation, generally the focus should be on the functional limitations of the employee's condition (capacities and symptoms) and how those functional aspects interact with the workplace duties and environment. Consequently, an employer need not be informed of the specific cause of the employee's condition or the exact diagnosis in order to be put on notice that an employee has disability-related needs requiring accommodation: see *Wall v. The Lippé Group*, 2008 HRTO 50 (CanLII); *Mellon v. Canada (Human Resources Development)*, [2006] C.H.R.D. No. 2.
>
> In order to trigger the duty to accommodate, it is sufficient that an employer be informed of the employee's disability-related needs and effects of the condition and how those needs and effects interact with the workplace duties and environment. As such, an employee does not necessarily have to disclose a detailed diagnosis of the disability in order for an employer to respond to a request for accommodation. This is not to detract from the well-established principle that accommodation is a collaborative process and the applicant should endeavour to provide as much information as possible to facilitate the search for accommodation.
>
> The test is whether the respondent knew or ought reasonably to have known that the applicant had a disability requiring accommodation: see *Wall*, *supra*, and the authorities cited therein.

[56] I have made a finding that the applicant did not disclose a disability requiring accommodation during the time leading up to December 1, 2008, despite the multiple opportunities to raise the issue of a connection between a disability and his job performance during the various performance evaluation meetings and when sent emails about specific concerns by Colleen Boyce and Frank Tenuta.

[57] In addition, on the evidence before me, it is clear that the applicant did not provide any information about any functional limitations of any disabling conditions and their impact on his job performance.

[58] When he did discuss his request for time off work, he referred to “test results”, “having procedures done” for something that “was not cancerous” but should be removed nonetheless. There is no reference to functional limitations relating to a disability that he now says existed at the time and was the reason for his leave, just as there was no mention of it in his letter to the respondent two weeks after his employment was terminated.

[59] Prior to the hearing on July 21 and 22, 2010, as no disclosure had been provided by the applicant, a Case Assessment Direction, dated July 12, 2010, was issued in which the applicant was directed to do the following:

> (…) provide all arguably relevant documents to the respondent as soon as possible. In addition, if the applicant plans to introduce documents or witnesses into evidence at the hearing, he must comply with Rules 16 and 17 immediately, and forward these materials to the respondent and the Tribunal immediately and, in any event, no later than Friday, July 16, 2010. Failure to comply with Rules 16 and 17 may result in the Tribunal refusing permission to the applicant to introduce documents or evidence of witness he did not disclose.

[60] In fact, even at the hearing into his Application over a year after the events in question, despite the Case Assessment Direction alerting him to the need to serve and file all relevant evidence and witness statements, the applicant did not serve or bring any supporting evidence that related to the existence of a disability and the functional limitations he alleges were associated with it during the material time.

[61] The applicant’s job performance appears to have been lacking for months, leading up to the termination. In my view, given the applicant’s less than stellar performance leading up to the month of December, his failure to raise the issue of disability during performance management meetings, his oblique statements surrounding the reason for the leave, and, in contrast with the circumstances noted in the *Ottawa Civic Hospital* decision discussed in *McLean*, above, his total silence about

the issue in the letter sent following the termination, there is nothing to suggest that the respondent knew or reasonably ought to have known of a disability requiring accommodation at the time it made the decision to terminate his employment.

Reprisal

[62] The applicant argues that the respondent's decision to terminate his employment amounts to reprisal for claiming his rights under the *Code*. The *Code* protection against reprisal is as follows:

> 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 the right of another person under this Act, without reprisal or threat of reprisal for so doing.

[63] In determining whether the respondent reprised against the applicant for enforcing his rights, I am guided by the case law which states that, unlike other protections in the *Code*, the applicant must show that the respondents "intended" to reprise against him. See *Jones v. Amway of Canada, Ltd*., [2002] O.J. No. 1504 (Ont. Sup. Ct.).

[64] It is well-established in human rights law that the protected ground need only be one factor in the decision made that adversely affected the applicant; it does not have to be the only or primary reason. See *Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252, 1989 CanLII 97 (S.C.C.).

[65] The respondent states that the applicant's employment was terminated for cause. They state that ongoing problems with the applicant's job performance and conduct, culminating in an incident when he failed to take necessary steps to ensure the adequate and safe care of a vulnerable client and resident dealing with severe disabilities and brain injuries was the reason for the termination of his employment.

[66] Having heard the evidence of Rolf Gainor, the person who made the decision to terminate the applicant's employment, I am satisfied that the decision was unrelated to

the applicant's December 1, 2008 request for time off work for medical reasons and does not constitute a reprisal under the *Code.*

Order

[67] For the reasons provided, the Application is dismissed.

Dated at Toronto this 25th day of January, 2011.

_____*"signed by"*_____
Jay Sengupta
Vice-chair