CITATION: Crêpe It Up! v. Hamilton, 2014 ONSC 6721
DIVISIONAL COURT FILE NO.: 517/13
DATE: 20141204

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

LEITCH, SWINTON & NORDHEIMER JJ.

BETWEEN:	)	
CRÊPE IT UP!	)	*Chris Quy Lee*, self-represented
Applicant	)	
– and –	)	
KATIE HAMILTON and HUMAN RIGHTS TRIBUNAL OF ONTARIO	)	*Toby Young*, for the Respondent Katie Hamilton
Respondents	)	*James Schneider* , for the Respondent Human Rights Tribunal of Ontario
	)	**HEARD at Toronto:** October 23, 2014

Swinton J.:

Overview

[1] Crêpe It Up!, a business owned by Chris Quy Lee, has brought an application for judicial review of a decision of an adjudicator of the Human Rights Tribunal of Ontario ("the Tribunal") dated October 12, 2012, in which he held that Mr. Lee had created a poisoned work environment as a result of racial and sexual comments and conduct. The applicant also seeks review of the adjudicator's decision refusing reconsideration dated March 8, 2013.

[2] In my view, two findings of misconduct are unfounded on the evidence and are, therefore, unreasonable. As a result of those errors, the finding of liability for creating a poisoned work environment is also rendered unreasonable. Accordingly, I would grant the application for judicial review, set aside the original decision and refer the matter back to the Tribunal for a new hearing.

Background

[3] The applicant is a small restaurant owned and operated by Mr. Lee, a man who self-identifies as gay. The individual respondent Katie Hamilton ("the Respondent") was employed as a cook/cashier at the Church Street location in Toronto from August 25, 2009 to February 21, 2010.

[4] In September 2010, the Respondent brought an application under the *Human Rights Code*, R.S.O. 1990, c. H.19 ("the Code") on the basis of six allegations of discriminatory racial and sexual comments and conduct by Mr. Lee. A two day hearing was held before the Tribunal in late May, 2012.

[5] In the decision of October 12, 2012, the adjudicator rejected two of the allegations: alleged discriminatory comments unfavourably comparing the Respondent's work ethic to that of Japanese employees and an allegation about Mr. Lee hugging the Respondent and its connection to the allegation that Mr. Lee only hired "good looking employees". The adjudicator found that the evidence supported four other allegations, which I shall describe briefly in chronological order.

[6] The adjudicator found that at some point early in the Respondent's employment, around September 2009, Mr. Lee made a reference to at least one former Black employee being on "Jamaican time". The Respondent confronted him about this comment in January 2010, taking personal offense because her stepfather is Black. Mr. Lee agreed to having used the expression, although he explained why he thought the comment was funny and cultural in nature and not racist. The adjudicator held that Mr. Lee ought reasonably to have known the statement "Jamaican time" was racially discriminatory and said that the statement "in reference to a Black person who is late is a derogatory racial stereotype".

[7] The adjudicator also found that Mr. Lee made a comment about anal sex to the Respondent during a car ride in September 2009. The adjudicator found that Mr. Lee asked her whether girls liked anal sex and, when she did not agree, he said "oh come on, you know you've tried it." The adjudicator concluded that Mr. Lee knew or should have known the comment was unwelcome.

[8] The adjudicator further found that Mr. Lee sent an inappropriate text to the Respondent's boyfriend the day after Halloween. The Respondent had dressed as Little Red Riding Hood for Halloween. On the morning of November 1, 2009, there was an exchange of texts between Mr. Lee and the Respondent's boyfriend. Mr. Lee contacted the Respondent's boyfriend because the Respondent had not telephoned Mr. Lee to tell him she had opened the restaurant, as required by policy. According to the Respondent's boyfriend, after he texted Mr. Lee indicating that the

Respondent was at the store, Mr. Lee sent a text asking him "were you a wolf, did you eat her?" followed by a winking smiley face. The Respondent's boyfriend later showed the message to the Respondent. Mr. Lee testified that he believed he texted "where is she? Did you eat her?", and he could not confirm what symbol he added at the end of the message. The adjudicator accepted the version of the text message described by the Respondent, her boyfriend and her friend, another female employee KF. The adjudicator found that the message was meant as a sexual comment about oral sex, that Mr. Lee ought reasonably to have known that the comment would be shown to the Respondent, and that it would be unwelcome to her.

[9] The adjudicator also upheld an allegation respecting a Valentine's Day Promotion in which staff members were required to wear a button saying "A kiss gets you 14% off". The adjudicator held that Mr. Lee knew or ought reasonably to have known that the promotion could be interpreted by customers as an invitation to kiss staff, and this would make a female staff member like the Respondent uncomfortable. While Mr. Lee did change the wording of the promotional button the day after being pressed to do so by the Respondent and KF, the adjudicator found that Mr. Lee's initial reaction to the Respondent - rejecting her statement that customers tried to kiss her - caused her further upset.

[10] The adjudicator then concluded that the Respondent had experienced a poisoned work environment contrary to s. 5(1) of the Code. Although he cited no legal authority on what constitutes a poisoned work environment, he stated (Reasons at para. 91):

> In making this finding, I have considered the following factors: that the comments and conduct that form the basis of this finding occurred over the course of the entire period of the applicant's employment with the respondent business; that the applicant was upset and discomfited by Mr. Lee's comments and conduct, and at least in respect of two of the incidents at issue expressed her discomfort and upset to Mr. Lee; that Mr. Lee was the applicant's boss and owner of the respondent business; and that Mr. Lee failed to respond appropriately when concerns were raised with him by the applicant. These factors, when combined with the nature and seriousness of the comments and actions themselves, in my view combined to make it effectively a term or condition of the applicant's employment with the respondent business that she be subjected to and required to endure comments and actions by Mr. Lee that were discriminatory in nature on the grounds of sex, race and colour.

[11] The adjudicator rejected the Respondent's claim for compensation for lost wages, finding that she had quit her employment for non-Code related reasons. However, he awarded compensation for injury to dignity, feelings and self-respect in the amount of $3,000. The adjudicator also ordered Mr. Lee to take an on-line training course on human rights. Mr. Lee was also ordered to develop a human rights policy for his business and to make current and former employees of his business aware of the policy.

The Issues

[12] Mr. Lee takes issue with the adjudicator's findings of misconduct that created a poisoned work environment. He also alleges that the adjudicator was biased against him, and that the remedy ordered is unreasonable.

The Standard of Review

[13] Mr. Lee seeks to attack the soundness of the adjudicator's findings with respect to the Respondent's allegations, along with the conclusion that his comments and conduct created a poisoned work environment. The standard of review of the Tribunal's decision concerning these issues is reasonableness (*Shaw v. Phipps*, 2012 ONCA 155 at para. 10).

[14] In determining whether a decision is reasonable, the reviewing court examines the reasons of the decision-maker for intelligibility, justification, and transparency and considers whether the decision falls within the range of possible acceptable outcomes, defensible on the facts and the law (*Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 at para. 47).

[15] With respect to the allegations of procedural fairness, there is no need to determine a standard of review. The question is whether the appropriate level of fairness has been accorded (*London (City) v. Ayerswood Development Corp.* (2002), 167 O.A.C. 120 (C.A.) at para. 10).

The Motion for Fresh Evidence

[16] Mr. Lee sought to put a great deal of new evidence before this Court, both relating to the reconsideration decision and the original decision.

[17] This evidence is not admissible, given that it does not meet the test in *Keeprite Workers Independent Union v. Keeprite Products Ltd.* (1980), 29 O.R. (2d) 513 (C.A.). The material does not show a finding of fact on an essential point made without an evidentiary basis, nor a denial of procedural fairness that is not apparent from the record or reasons for decision.

The Poisoned Work Environment Finding

[18] In *General Motors of Canada Ltd. v. Johnson*, 2013 ONCA 502, Cronk J.A. discussed the concept of a poisoned work environment, albeit in the context of a wrongful dismissal action, at paras. 66 and 67:

> ... There must be evidence that, to the objective reasonable bystander, would support the conclusion that a poisoned workplace environment had been created. ...
>
> Moreover, except for particularly egregious, stand-alone incidents, a poisoned workplace is not created, as a matter of law, unless serious wrongful behaviour sufficient to create a hostile or intolerable work environment is persistent or repeated. [legal citations omitted]

[19] The adjudicator in the present case made no reference to the legal test for a poisoned work environment. However, it is evident from the passage in his reasons that I quoted above

that he considered the number of comments, their nature and their seriousness and concluded that, taken together, it had become a condition of the Respondent's employment that she must endure discriminatory conduct and comments.

[20] However, the adjudicator's findings with respect to two of the allegations are not reasonably justified, with the result that his ultimate conclusion - that there was a poisoned work environment - is unreasonable.

The finding with respect to the anal sex comment

[21] Both the Respondent and Mr. Lee testified about a conversation that occurred during a car ride in September 2009 on their way back from a festival. The Respondent testified that Mr. Lee asked her if girls liked anal sex. She replied that she did not know and had never tried it. Mr. Lee is said to have replied, "... I know you've tried it."

[22] Mr. Lee testified that the Respondent had asked him what it was like for him to be gay. He replied with an explanation and, in the course of it, said he had not known about anal sex when he came out as gay. He testified that the Respondent said "eww", and he replied that straight people have anal sex too.

[23] Clearly, the adjudicator had to deal with the reliability and credibility of the two witnesses in determining what had been said. He gave a number of reasons why he refused to make an adverse credibility finding against the Respondent. I note, though, that he never made an express finding with respect to Mr. Lee's credibility.

[24] Instead, the adjudicator resolved the problem of the competing versions of the conversation by relying on the evidence of a former employee and friend KF and the Respondent's boyfriend as to what was said. At para. 59, the adjudicator stated that the evidence of these two witnesses was "material" in determining what had occurred. Both had been told about the conversation by the Respondent shortly after it occurred, and he observed that KF's version of the key elements of the conversation was essentially the same as the Respondent's.

[25] At para. 60, the adjudicator stated:

> If the conversation had occurred as alleged by Mr. Lee, it is my view that KF and the applicant's boyfriend who [*sic*] have had very different evidence to give about what they were told by the applicant at the time.

The adjudicator then concluded on a balance of probabilities that the conversation had occurred as stated by the Respondent.

[26] I acknowledge that the findings of credibility made by an administrative tribunal are deserving of deference, and reviewing courts are cautious about interfering with such findings. However, there is a serious problem with the adjudicator's analysis of the evidence here.

[27] The fact that an individual makes a complaint after an event may be circumstantial evidence that the event has occurred, depending on the circumstances of the case (see, for

example, *R. v. Lindsay*, 2005 CanLII 24240 (Ont. S.C.J.) at para. 159). However, that is not how the complaint evidence was used here. The adjudicator relied on the evidence of KF and the Respondent's boyfriend to determine what had been said in the car, even though neither KF nor the Respondent's boyfriend were present for the conversation. Their evidence was hearsay in nature, as it was based on what the Respondent had told them.

[28] The adjudicator does have the power to admit hearsay evidence, given s. 15(1) of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22. However, it was unreasonable for the adjudicator to use the evidence of KF and the Respondent's boyfriend as he did here. Prior statements by a complainant as to the content of a conversation are not probative of what was originally said between the complainant and an alleged wrongdoer. The fact that the complainant repeated the same story to others shows only that he or she consistently repeated his or her version of the incident over time. However, such consistent repetition does not prove what actually occurred or was said in the car in September 2009.

[29] To decide what was discussed between Mr. Lee and the Respondent required a close examination of their evidence. While the adjudicator commented in detail on why he would not make an adverse finding of credibility against the Respondent, he never assessed Mr. Lee's version of events and his credibility, as the adjudicator should have done, in determining what occurred. Mr. Lee described the context of the conversation and denied having bluntly asked about female preferences for anal sex. It was incumbent on the adjudicator to consider Mr. Lee's version of events as well as the Respondent's and to explain why Mr. Lee's version was not accepted.

[30] With respect to this allegation, the reasoning process of the adjudicator was fatally flawed, and the finding that the allegation was proved is consequently unreasonable.

The post-Halloween text

[31] This allegation turns on a text that Mr. Lee sent to the Respondent's boyfriend on November 1, 2009. Again, there are competing versions of events.

[32] The restaurant has a policy requiring staff to telephone Mr. Lee in the morning so that he knows the restaurant is open. On November 1, 2009, the Respondent did not telephone Mr. Lee. She testified that after arriving at work, she sent him a text on the cell phone that she shares with her boyfriend. The Respondent's boyfriend had walked her to work and returned home with the phone.

[33] Mr. Lee telephoned the restaurant three times around 10:30 AM because he had not received a call. There was no answer and no call back. The Respondent testified that she was serving customers.

[34] Mr. Lee then sent some text messages to the Respondent, asking where she was. The Respondent's boyfriend replied by text, saying that the Respondent was at work. A series of texts was exchanged between Mr. Lee and the Respondent's boyfriend, starting, according to Mr. Lee, with an inquiry about the boyfriend's job search. One comment dealt with Halloween. The Respondent had dressed up as Little Red Riding Hood. According to the Respondent's

boyfriend, Mr. Lee sent him a text asking if he had been dressed as a wolf for Halloween and also asking "did you eat her", followed by a winking smiling face. The Respondent's boyfriend took this as a sexual comment about oral sex, and he later showed the text to the Respondent. KF testified that she also saw the text and confirmed the content.

[35] Mr. Lee testified that he believes he said, "where is she? did you eat her?" He had made the comment as a joke, because the Respondent had been missing.

[36] The adjudicator rejected this explanation, because Mr. Lee already knew where the Respondent was at the time he sent the message. The adjudicator held that the comment was a "double entendre" that was sexual in nature, and Mr. Lee ought reasonably to have known the Respondent's boyfriend would share the message with the Respondent, and it would be unwelcome. Therefore, he found that the allegation had been proved.

[37] The actual text message was never put before the Tribunal. As previously set out, the content of this message was contentious. Mr. Lee had asked for a copy of the message in his response to the application on December 1, 2010. The Respondent did not provide a copy. At a Case Assessment in April 2012, held in preparation for the hearing on May 28-29, 2012, the Respondent indicated that she had been trying to obtain copies of text messages. She did not mention the cell phone had been lost during a move about a year before the hearing, as her boyfriend later testified. The adjudicator accepted this explanation, without considering the impact of Mr. Lee's earlier request for this document and the unfairness to him arising from the failure to produce the actual text messages. This is one of a number of occasions where the adjudicator seems to have been prepared to forgive the frailties in the Respondent's evidence while elsewhere subjecting Mr. Lee's evidence to a higher level of scrutiny.

[38] More importantly, the adjudicator's line of reasoning is not clear. Even accepting that the comment was a joke that was sexual in nature, it is not evident why Mr. Lee would "reasonably" believe the comment would be shared with the Respondent. The comment was made in the course of an exchange with her boyfriend that started with Mr. Lee asking her boyfriend about his search for work. One might reasonably expect that the Respondent's boyfriend would delete the message or not show it to the Respondent if it was offensive in nature.

[39] As well, there is no finding that the comment was workplace-related. It was not directed at the Respondent and was made to her boyfriend in a conversation outside the workplace, It is therefore difficult to see how this conduct, even if it is discriminatory, could have contributed to the poisoning of the work environment. I note, as well, that the Respondent does not appear to have ever complained to Mr. Lee about this incident.

[40] The adjudicator's reasons do not adequately justify a finding of discriminatory conduct affecting the workplace with respect to this allegation.

Result

[41] The adjudicator's finding of a poisoned work environment turned on the cumulative effect of four incidents. Given that the findings with respect to two of those four allegations are unreasonable, the finding of liability cannot stand. At most, two allegations have been proven: a

comment about Jamaican time in September 2009 and the Valentine's Day campaign in February 2010. The offending slogan on the button was changed after the applicant and KF objected. No objective and reasonable person could find that there was a poisoned work environment on the basis of these two allegations, given their content, the fact that they were separated by months, and Mr. Lee's change to the campaign. Therefore, the finding of liability based on a poisoned work environment must be set aside.

[42] While Mr. Lee asked that the Respondent's application under the Code be dismissed, that is not an appropriate disposition of this application for judicial review. The adjudicator's findings with respect to two of the allegations are unreasonable, but there was evidence that might, if properly treated, support a finding of liability. Unfortunately for everyone, there must be a new hearing, at least with respect to the four allegations I have discussed.

The Systemic Remedy

[43] The adjudicator ordered Mr. Lee to create a human rights policy and to share it with present and former employees. Mr. Lee argues that the communication to former employees is unreasonable. I agree.

[44] Pursuant to s. 45.2(1)3 of the Code, the Tribunal has the remedial authority to order a party who has infringed a right of another party "to do anything that, in the opinion of the Tribunal, the party ought to do to promote compliance with this Act."

[45] The language of the provision is forward looking. I can see no authority, nor any rationale, for requiring Mr. Lee to notify former employees of the human rights policy, once the policy is adopted. Indeed, counsel for the Respondent agreed that this aspect of the remedy was unreasonable.

The Allegation of Bias

[46] Mr. Lee also alleges bias or a reasonable apprehension of bias against the adjudicator as a result of comments made in the reconsideration decision.

[47] An apprehension of bias must be reasonable and informed. The question is whether an individual, informed of the circumstances and acting reasonably, would conclude that the decision maker was likely to act unfairly and would not decide impartially (*Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978]1 S.C.R. 369 at 394-95).

[48] In my view, Mr. Lee has failed to satisfy the test for a reasonable apprehension of bias. While he may not agree with the adjudicator's findings and comments, he has not shown a reasonable and informed appearance of bias.

Conclusion

[49] For these reasons, the application for judicial review is granted and the October 12, 2012 decision of the Tribunal is set aside. The matter is referred back to the Tribunal to be heard by a different adjudicator.

[50] While Mr. Lee sought changes to the rules of the Tribunal, he was informed at the outset of the oral argument that this Court has no authority to impose rule changes on the Tribunal.

[51] Mr. Lee also sought compensation from the Respondent and his legal costs before the Tribunal. This Court has no jurisdiction to make such orders on an application for judicial review.

[52] Mr. Lee is entitled to costs of this application to cover his disbursements, such as printing and filing fees, which amount to $400 or $500, in his estimation. He is also entitled to a reasonable amount to compensate him for the time he has had to take from his work to prepare the application materials and his argument. I would award costs to Mr. Lee, payable by the individual Respondent Ms. Hamilton, fixed in the amount of $1,500.00 all inclusive. The Tribunal does not seek costs and none are awarded.

Swinton J.

Leitch J.

Nordheimer J.

Released: December 4, 2014

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REASONS FOR JUDGMENT

Swinton J.

Released: December 4, 2014