HUMAN RIGHTS TRIBUNAL OF ONTARIO

B E T W E E N:

Katie Hamilton

Applicant

-and-

Crêpe it Up!

Respondent

2013 HRTO 407 (CanLII)

RECONSIDERATION DECISION

Adjudicator:	Mark Hart
Date:	March 8, 2013
File Number:	2010-06944-I
Citation:	2013 HRTO 407
Indexed as:	**Hamilton v. Crêpe it Up!**

[1] This Decision addresses a Request for Reconsideration filed by the respondent in relation to the Tribunal's Decision 2012 HRTO 1941 dated October 12, 2012, which found that the respondent had created a poisoned work environment for the applicant and had thereby violated her rights under s. 5(1) of the *Human Rights Code*, R.S.O. 1990, c. H.19, as amended (the "*Code*").

[2] On November 23, 2012, the respondent filed a Request for Reconsideration of the Tribunal's Decision which is dated November 13, 2012. It appears from the file that the respondent initially sent the text of his reconsideration request and supporting documents to the Tribunal in an e-mail dated November 14, 2012. He states that there were e-mail difficulties that prevented him from transmitting the Request for Reconsideration form to the Tribunal at that time. While a reconsideration request is required under the Rules to be filed within 30 days of this Tribunal's final decision, I find that the respondent substantially transmitted the substance of his reconsideration request on November 14, 2012, only three days after the deadline. In the circumstances, I exercise my discretion under the Rules to extend the time for filing the reconsideration request and will consider this request on its merits.

[3] Section 45.7 of the *Code* provides as follows:

> 45.7 (1) Any party to a proceeding before the Tribunal may request that the Tribunal reconsider its decision in accordance with the Tribunal rules.
>
> (2) Upon request under subsection (1) or on its own motion, the Tribunal may reconsider its decision in accordance with its rules.

[4] Under section 45.7 of the *Code*, the Tribunal may, at the request of a party or on its own initiative, reconsider a final decision in accordance with the Tribunal's Rules. The Tribunal has issued rules governing such requests as well as a Practice Direction to provide guidance to the community on the Tribunal's exercise of its reconsideration powers (Practice Direction on Reconsideration, January 2008 amended June 2008).

2013 HRTO 407 (CanLII)

[5] The Tribunal's Practice Direction on Reconsideration begins with the following statements:

> Decisions of the Tribunal are generally considered final and are not subject to appeal. However, parties may request that the Tribunal reconsider a final decision it has made. Reconsideration is a discretionary remedy; there is no right to have a decision reconsidered by the Tribunal. Generally, the Tribunal will only reconsider a decision where it finds that there are compelling and extraordinary circumstances for doing so and where these circumstances outweigh the public interest in finality of orders and decisions.
>
> Reconsideration is not an appeal or an opportunity for a party to repair deficiencies in the presentation of its case.

[6] As is evident from the above, reconsideration is a discretionary remedy. That is, while the Tribunal has the jurisdiction to re-open and reconsider its own decisions, it is not obliged to do so. It may decide when reconsideration is advisable, both through the promulgation of rules setting out conditions for the exercise of its discretion, and through the application of its discretion on a case-by-case basis.

[7] In *Sigrist and Carson v. London District Catholic School Board*, 2008 HRTO 34, the Tribunal stated that reconsideration is not an opportunity to re-argue a case. Once the parties to an Application have had the opportunity to present their evidence and arguments to the Tribunal, and the Tribunal has made a decision disposing of the issues, parties are entitled to treat the matter as closed, subject to limited exceptions.

[8] The Tribunal's Rules of Procedure provide that any party may request reconsideration of a final decision in accordance with the Rules. Rule 26.5 of the Rules provides:

> A Request for Reconsideration will not be granted unless the Tribunal is satisfied that:
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> a. there are new facts or evidence that could potentially be determinative of the case and that could not reasonably have been obtained earlier; or
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> b. the party seeking reconsideration was entitled to but, through no

2013 HRTO 407 (CanLII)

> fault of its own, did not receive notice of the proceeding or a hearing; or
>
> c. the decision or order which is the subject of the reconsideration request is in conflict with established jurisprudence or Tribunal procedure and the proposed reconsideration involves a matter of general or public importance; or
>
> d. other factors exist that, in the opinion of the Tribunal, outweigh the public interest in the finality of Tribunal decisions.

2013 HRTO 407 (CanLII)

[9] As a result, I need to determine whether the material filed by the respondent in support of his request for reconsideration satisfies any of the criteria set out in Rule 26.5. The respondent relies upon criteria (a) as identified in Rule 26.5, namely that there are new facts or evidence that could potentially be determinative of the case and that could not reasonably have been obtained earlier**.**

[10] The respondent first states that he did not call any witnesses, other than himself, to testify at the hearing based upon his lawyer's recommendation. He states that if he had called witnesses, they would have testified to his good character. This is not new evidence that could not reasonably have been obtained earlier. The respondent was represented by legal counsel, was aware of his ability to call witnesses in support of his position, and made a decision not to, based upon legal advice. Further, this is not evidence that could potentially be determinative of the case, as general evidence of good character is not admissible. If the respondent had witnesses who could testify to the matters at issue in the case, he could and should have called these witnesses to testify at the hearing. The fact that he chose not to, based on legal advice, is not a proper basis to support reconsideration of the Tribunal's decision.

[11] The respondent next states that he has evidence to support that the applicant made a false claim to the Ministry of Labour alleging that he had deducted $50.00 from one of her paycheques. This matter was not in issue before this Tribunal, as it does not engage any allegation of an infringement of rights under the *Code*. While I appreciate that the respondent is asserting that this allegation should be regarded as tarnishing the applicant's credibility, the fact remains that this issue was addressed by the Ministry of

Labour and a finding was made in a decision by the Ministry of Labour that the respondent had not submitted sufficient evidence to dispute the applicant's claim regarding the improper deduction. As a result, the respondent voluntarily agreed to pay this amount to the applicant. The respondent asserts that he was ill at the time and so was not able to properly dispute the claim. That may or may not be the case. However, it is not a proper claim for the respondent to re-litigate in front of this Tribunal. Further, to the extent that this issue bears any relevance regarding my assessment of the applicant's credibility, the respondent, through his legal counsel, had full possession of the relevant evidence at the time of the hearing and could have pursued this issue before me. Once again, this does not constitute new evidence that could not reasonably have been obtained earlier or that would be potentially determinative of the case.

[12] The respondent also submitted a voluminous record of text messages between himself and his staff during the period from January 2010 to November 2012. None of these records pertain directly to the matters at issue at the hearing. Further, there is no basis upon which the respondent asserts that this evidence was not reasonably available to him at the time of the hearing. Indeed, it appears that these records could have been submitted into evidence to the extent that any of them were relevant. Once again, this is not evidence that could not reasonably have been obtained at an earlier time, or that is potentially determinative of the case.

[13] I appreciate that the respondent is submitting these records to demonstrate that his text messages to his staff are unexceptional. Further, having reviewed this voluminous evidence, I agree that in large part these texts relate to business issues and are entirely appropriate. I also note that these records contain some light-hearted and joking banter between the respondent and his staff, which are of no concern under the *Code*.

[14] At the same time, there are some exchanges in these records that are cause for concern. On February 15, 2012, the respondent has an exchange with a staff member regarding his need for a SIN number to prepare a T-4 slip. This exchange develops into a light-hearted exchange about the respondent potentially stealing the staff member's

2013 HRTO 407 (CanLII)

identity, a joking request by the respondent for the staff member to buy him a drink in return for keeping the staff member's identity safe, a joking response that the staff member would poison the drink, and the respondent's response that the staff member would not be able to afford poison because it is too expensive. So far, none of this exchange would be cause for any concern under the *Code*. However, when the staff member goes on to reply that the respondent is wrong to think that they could not afford to buy poison, the respondent texts: "That was a test to see how much you make. So you are rich, wanna be my sugar daddy? Lol". When the staff member replies that the previous text was a lie and they cannot really afford poison, the respondent texts: "Bitch!" After receiving a laughing reply, the respondent texts: "When you gonna be rich, let me know so I will chase after you. Ha!" The exchange goes on from there.

[15] In addition, during another exchange with a staff member on October 31, 2010, a staff member asks the respondent what he intends to dress up as for Halloween. The respondent replies that he wants to dress up as an anaconda, and then says that he is an anaconda. The staff member replies, "Yea . . . In yur pants:-S". While I appreciate that the explicit sexual reference came from the staff member, it was prompted by the respondent's text that he is an anaconda. Further, during an exchange on November 9, 2011, a staff member confesses to the respondent that they "messed up again" to which the respondent replies, "I think you secretly in love with me lol".

[16] These text messages were not in evidence before me when I made my determination in my original decision, and so played no role in my decision. But the presence of these inappropriate texts may explain why this evidence was not brought forward at the hearing, as they appear to be consistent with some of the applicant's allegations and with the testimony I heard from KF. Not only are these text messages not evidence that would be determinative of the case in the respondent's favour, this evidence may have assisted the applicant by providing further support for her case. It is striking to me that all of the problematic exchanges I have identified took place even after the respondent had notice of the applicant's allegations, and so had every reason to be even more careful about his text messages.

2013 HRTO 407 (CanLII)

[17] The respondent also takes issue with my assessment of credibility, and states that I dismissed all evidence pertaining to the applicant's lack of integrity and credibility and demonstrated a bias in the applicant's favour. There is simply no support for this allegation. I canvassed the competing evidence of the parties at length in my decision and carefully set out the basis for my findings of credibility. I see no reason to change my conclusions in this regard.

[18] The respondent states that the applicant added new allegations at the hearing, including that he referred to African-Americans as "gorillas" and that he had been stalking her and had peered through the window at the applicant's new workplace. With regard to the former allegation, this was raised by the applicant for the first time in her evidence at the hearing and I ruled that this allegation was excluded due to a failure to provide proper notice. As such, it was not an allegation before me for determination. With regard to the latter allegation, once again this was not an issue before me for determination.

[19] The respondent states that the applicant's witnesses did not seem like they had been coached when they gave their evidence at the hearing, because the respondent alleges that they collaborated on their stories at the time the Application was filed two years earlier. There is simply no basis provided to support this allegation, which is not consistent with my assessment of the credibility of the applicant's witnesses who appeared and testified before me.

[20] The respondent raises an issue regarding the applicant's evidence that she lost the cell phone to which he sent his text message regarding the post-Halloween incident. He states that it is suspicious that the applicant first stated to this Tribunal that she was trying to retrieve the text message from this phone, and then claimed to have lost the phone. I heard this evidence and addressed it in my decision: see para. 70. At the end of the day, as I discuss at length in my decision, there was not much dispute between the parties about the content of the post-Halloween text sent by the respondent, with the exception that, at the hearing, the respondent stated for the first time that his text message expressly included the words "where is she?" or "where was she?". I address

2013 HRTO 407 (CanLII)

this evidence at length at paras. 75 to 79, and see no reason to change my finding as to what the text message said or its sexual connotation.

[21] Finally, the respondent re-states his evidence regarding the Valentine's Day promotion and once again alleges that the applicant was lying when she told him that customers had tried to kiss her. I addressed the evidence regarding this issue at length in my decision (see paras. 36 to 50). I see no reason to change my finding arising from this issue.

[22] Accordingly, I find that the respondent has not satisfied me that there is new evidence that could potentially be determinative of the case and that he could not reasonably have obtained at an earlier time.

[23] For all of the foregoing reasons, the respondent's Request for Reconsideration is denied.

Dated at Toronto, this 8th day of March, 2013.

"Signed by"

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Mark Hart
Vice-chair

2013 HRTO 407 (CanLII)