



HUMAN RIGHTS TRIBUNAL OF ONTARIO

BETWEEN:

Robabeh Pourasadi

Applicant

-and-

Bentley Leathers Inc.

Respondent

INTERIM DECISION

Adjudicator: Jo-Anne Pickel
Date: January 29, 2015
File Number: 2013-14699-I
Citation: 2015 HRTO 138
Indexed as: **Pourasadi v. Bentley Leathers Inc.**

WRITTEN SUBMISSIONS

Robabeh Poursadi, Applicant)	Bruce Best, Counsel
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)	
Bentley Leathers Inc., Respondent)	Jodi Gallagher Healy, Counsel
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[1] This Interim Decision addresses a preliminary legal issue raised in this case regarding the scope of the respondent's duty to accommodate under the *Human Rights Code*, R.S.O. 1990, c. H.19, as amended (the "*Code*").

BACKGROUND TO THE APPLICATION

[2] In her Application, the applicant alleged that the respondent discriminated against her because of disability contrary to the *Code* when it terminated her employment. The applicant was employed by the respondent as a Store Manager. During her employment, she developed a work-related injury to her right wrist. In her Application, she claimed that the respondent failed to provide reasonable accommodations for her disability up to the point of undue hardship.

[3] The Tribunal held a first hearing day in this case. At the hearing, it appeared that the parties agreed that the applicant was incapable of performing some portion of the essential duties of the Store Manager position. Although the parties did not agree on what portion of the essential duties of the Store Manager position the applicant was capable of performing, there appeared to be no dispute that she could not herself perform all of the essential duties of this position.

[4] At the hearing, the applicant's counsel indicated that the applicant was seeking as an accommodation that the employer continue to schedule a second employee during the time that a Store Manager would normally be working alone in case there was a need to perform duties that the applicant was physically incapable of performing.

[5] I raised with the parties what appeared to me to be a threshold/preliminary issue arising in this case. Section 17 of the *Code* provides that a person's right not to be discriminated against on the basis of disability is not infringed by reason only that the person is incapable of performing or fulfilling the essential duties or requirements attending the exercise of the right because of disability. However, before finding that a person is incapable of performing the essential duties or requirements attending the exercise of a right because of disability, the Tribunal must be satisfied that the needs of

the person cannot be accommodated without undue hardship on the person responsible for accommodating those needs.

[6] The issue I raised at the hearing, and later confirmed in a Case Assessment Direction (“CAD”), was the following:

Will the defence contained in s. 17 of the *Code* be established where the applicant is incapable of performing or fulfilling some portion of the essential duties of her position and that the only possible accommodation is that the employer schedule a second employee to perform the duties that the applicant is incapable of performing.

[7] The parties agreed that it was appropriate that the Tribunal treat the issue above as a preliminary/threshold issue and that the Tribunal receive written submissions on this issue before taking any further steps in this case. The parties agreed to prepare a statement of facts for the Tribunal’s consideration of the issue set out above.

[8] After the issuance of the Tribunal’s CAD, I held a case management conference call with the parties’ counsel due to difficulties they encountered in agreeing upon a statement of facts relevant to the preliminary issue set out above. In the call, the applicant’s counsel raised a different form of accommodation that, in his view, also should have been considered by the respondent in this case. The parties agreed that, in their written submissions, they would address both the preliminary issue set out above as well as the other form of accommodation raised by the applicant’s counsel in the case management conference call.

[9] In their Statement of Issue and Agreed Facts, the parties noted that the applicant now has conceded the issue set out in the Tribunal’s CAD. That is, the applicant has conceded that the *Code* does not require the respondent to continue to schedule a second employee during the time that the applicant would normally be working alone in case there was a need to perform duties that the applicant is incapable of performing. As a result, both parties focused their submissions on the second preliminary issue raised in the case management conference call.

[10] The parties framed this issue as follows:

Could the duty to accommodate under the *Code* require the respondent to accommodate the applicant by (amongst other things) scheduling her to work alone in the store and permitting her to ask customers who wish to see or purchase items that would require the applicant to go outside her physical restrictions to return to the store at a time when other staff will be able to assist the customer and defer any merchandising, housekeeping or other Store Manager duties that fall outside her restrictions to other employees to perform?

PARTIES' STATEMENT OF AGREED FACTS

[11] The agreed facts portion of the parties' Statement of Issue and Agreed Facts states as follows:

The Parties agree on the following facts relevant to this issue:

3. The Respondent sells merchandise including purses, wallets, umbrellas, backpacks, totes, luggage of various sizes (both wheeled and non-wheeled), briefcases, etc.
4. The Applicant began working for the Respondent in 2005. In 2006, she became a store manager. She worked at the Promenade Mall location in Thornhill.
5. Approximately 65-70% of the Applicant's Store Manager position involves sales/customer service, 25-30% of the duties involve merchandising, display and housekeeping and 5-10% of the daily duties involve store operations, training and development.
6. The Store Manager typically works alone from 10:00 a.m. to 2:15 p.m. four week days per week and from 9:30 a.m. to 12:00 p.m. on Saturday and when covering lunch/breaks of other staff members. Other staff work afternoon/evening/weekend shifts.
7. In August 2008, the Applicant injured her right wrist while unpacking a box. The Applicant's WSIB claim was approved. The Applicant had physical restrictions in her right hand/arm and developed restrictions in her left hand/arm due to overuse, which the WSIB recognized as compensable.
8. The Applicant continued to work full time from August 2008 until November 2009, subject to her restrictions, and was provided modified duties from November 2008 onwards. The Applicant

underwent right wrist surgery in November 2009 that unfortunately did not resolve her condition. She returned to work at the Promenade Mall store in April 2010, still with various physical restrictions.

9. Due to her physical restrictions, the Applicant could not perform all Store Manager duties while alone in the store.
10. The Parties disagree about the percentage of the Store Manager duties that were outside the Applicant's restrictions and therefore how often the Applicant would turn away customers or deferring (sic) other duties under the accommodation now being proposed by the Applicant. The Applicant's position is that only a small percentage of the Store Manager duties were outside her restrictions so it could occur infrequently. The Respondent's position is that a large percentage of the Store Manager duties were outside the Applicant's restrictions so she would be turning away customers or deferring duties frequently.
11. The Respondent voluntarily agreed to provide up to 25 additional staff hours over the store budget to allow the Applicant to schedule another employee to work with her. The second employee was supposed to perform all work outside the Applicant's physical restrictions.
12. In Spring 2012 a number of meetings were held amongst the Applicant, Respondent and the WSIB regarding the Applicant's restrictions and the suitability of the Store Manager position.
13. A May 25, 2012 FAF completed by the Applicant's doctor is attached and reflects the Applicant's restrictions at that time.
14. The Respondent determined that it was no longer in a position to provide the accommodation of scheduling an additional 25 hours per week so that the Applicant did not have to work alone. The parties disagree on what triggered this decision. A WSIB Functional Abilities Evaluation in July 2012 concluded that the Store Manager job was not suitable for the Applicant because there were many duties outside her restrictions and no further accommodations or modifications could be identified by the Applicant, the Respondent or the Occupational Therapist to make the job suitable. The Applicant disputes that conclusion, and maintains that she did propose alternative accommodations.
15. As a result of the July 2012 assessment, the WSIB accepted the Applicant into the Work Transition re-training program. The

Applicant's last day actively working for the Respondent was July 28, 2012.

16. Neither the Applicant nor the Respondent suggested or discussed an accommodation of scheduling the Applicant to work alone and allowing her to ask customers to return to the store at a later time when other staff would be able to assist them and defer the other Store Manager duties outside her restrictions while the Applicant was still an employee of the Respondent. This possible accommodation was raised for the first time by the Applicant during this Application after the hearing commenced.

PARTIES' SUBMISSIONS

Applicant's Submissions

[12] The applicant submits that the *Code* could (a) require the respondent to permit the applicant to ask customers to come back later, and (b) require the respondent to permit the applicant to defer certain tasks to other employees. According to the applicant, whether the respondent in this case was required to implement one of the above accommodations would depend on the frequency with which the applicant would be called upon to perform tasks that exceed her physical restrictions. As noted in the Statement of Issue and Agreed Facts, the parties are significantly divided on this issue.

[13] The Applicant's position is that her restrictions precluded her from carrying out very few tasks and, as such, the work that did fall within her restrictions would be meaningful and valuable to the respondent. The applicant submitted that any tasks that she could not do could be deferred to other employees without undue hardship to the respondent. She also took the position that the circumstances where she would be unable to help a customer would be infrequent or "extremely rare" and that any hardship to the respondent would be minimal.

[14] The applicant seeks to rely upon the following cases in support of her position that the duty to accommodate may include deferring tasks to other employees: *Briffa v. Costco Wholesale Canada Ltd.*, 2012 HRTO 1970 ["*Briffa*"]; *British Columbia v. Tozer*, 2000 BCHRT 3; and *Vanegas v. Liverton Hotels International Inc.*, 2011 HRTO 715.

The applicant seeks to rely upon the following decision in support of her position that the duty to accommodate may require allowing an employee to tell customers to return at a later date when another employee would be able to assist them: *Pileggi v. Champion Products*, 2009 HRTO 2097 [*“Pileggi”*].

Respondent’s Submissions

[15] The respondent submits that it would be an extraordinary and unwarranted extension of the duty to accommodate to find that the duty could require an employer to permit a disabled Store Manager to refuse to serve customers, send them away from the store and defer merchandising, housekeeping and other duties that are part of her job description to other employees to perform.

[16] The respondent seeks to rely upon case law that has held that the duty to accommodate does not require an employer to fundamentally change the working conditions of employees, assign the essential duties of an employee with a disability to other employees or change the essential duties and requirements of a position: *Yeats v. Commissionaires Great Lakes*, 2010 HRTO 906 [*“Yeats”*]; *Perron v. Revera Long Term Care Inc.*, 2014 HRTO 766 [*“Perron”*].

[17] The respondent submits that, when the applicant was working alone 19.5 hours per week in the store, her essential duties included assisting every customer who came into the store and making sales, not turning away customers and sales. The respondent argues that it is irrelevant whether the applicant would be turning away customers rarely or frequently. According to the respondent, it is antithetical to the *raison d’être* of a retailer to require them to allow employees to turn away customers and sales. The respondent also takes the position that employers are not obligated to allow an employee to defer tasks that exceed her physical restrictions. According to the respondent, in a previous form of accommodation, the respondent provided a second employee to perform tasks that exceeded the applicant’s restrictions. It submits that this indicates that the tasks outside the applicant’s restrictions were required by the business and were essential to be performed.

[18] Finally, the respondent notes that, since the focus of the applicant's pleadings has been on whether the respondent was obligated to continue to schedule a second employee to perform the tasks she was physically unable to perform, she should not be permitted to now submit that the *Code* requires the opposite. That is, she should not be permitted to now submit that she should have been required to work alone. The applicant did not raise the possibility of telling customers to go away until her counsel raised it after the first hearing day in this case. The respondent argues the applicant should not be permitted to raise a new form of potential accommodation years later when she did not raise it at the relevant time.

Applicant's Reply Submissions

[19] In her reply submissions, the applicant argued that the accommodations she required would not fundamentally change her working conditions since, according to the applicant, she would only have to turn customers away and defer work to other employees in rare cases.

[20] The applicant submitted that the fact that the respondent scheduled a second employee to perform tasks that exceeded her restrictions does not mean that these tasks were essential duties of her position. According to the applicant, the fact that the respondent may have a business requirement does not make it an "essential duty" for the purposes of the *Code*. The applicant submits that the identification of which duties are essential duties within the meaning of the *Code* requires evidence and cannot be made out simply because the respondent implemented a particular measure for business reasons.

[21] Finally, the applicant submitted that she is not precluded from raising an alternative accommodation at this point. The applicant takes the position that the accommodation her counsel proposed is not the opposite of the accommodation she was previously provided. The applicant argues that the accommodation required has not changed and that the accommodation is that the respondent not require the applicant to work outside her work restrictions. The applicant submits that there may be

a number of different ways that an appropriate accommodation can be implemented. According to the applicant, some will be required by the *Code*, some will not; some will fit the respondent's business needs, some will not. The applicant argues that if there is a solution that would accommodate her short of undue hardship the respondent would not have met its onus of establishing that the exemption contained in s. 17 of the *Code* applies to this case.

[22] Overall, the applicant submits that the duty to accommodate under the *Code* could require the respondent to accommodate the applicant's disability by permitting her to work alone, tell customers to come back later and defer those tasks that fell outside her physical restrictions to other employees to perform later in the day.

Respondent's Reply Submissions

[23] In its reply submissions, the respondent submits that the key issue is not how frequently the applicant would be required to send customers away or defer tasks. Instead, according to the respondent, the key issue is the following: while working alone in a retail store, are being able to serve every customer and performing merchandising, display and housekeeping tasks essential duties of the applicant's job? According to the respondent, if those duties are essential duties, the duty to accommodate does not require the respondent to assign them to other employees, change those duties or exempt the applicant from performing them.

[24] The respondent seeks to rely upon the description of essential duties contained in the Ontario Human Rights Commission's Policy on Preventing Discrimination Based on Mental Health Disabilities and Addictions and its Policy and Guidelines on Disability and the Duty to Accommodate. These policies describe essential duties as those that are "very important", "necessary", "requisite", "vital" or "indispensable". The respondent submits that all of these descriptors apply to describe the importance of the applicant being able to service every customer who enters the store and also to carry out the merchandising and other duties set out in her job description.

APPLICABLE LAW

[25] As noted above, sections 17(1) and (2) of the *Human Rights Code* state:

17. (1) A right of a person under this Act is not infringed for the reason only that the person is incapable of performing or fulfilling the essential duties or requirements attending the exercise of the right because of disability.

(2) No tribunal or court shall find a person incapable unless it is satisfied that the needs of the person 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.

ANALYSIS AND FINDINGS

[26] For the reasons that follow, I find that the duty to accommodate under the *Code* does not require the respondent to accommodate the applicant by scheduling her to work alone in the store and permitting her to ask customers who wish to see or purchase items that would require the applicant to go outside her physical restrictions to return to the store at a time when other staff will be able to assist the customer.

[27] The Supreme Court of Canada discussed the goal and purposes of accommodation in *Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000* (SCFP-FTQ), 2008 SCC 43 at paras. 14 and 16:

... the goal of accommodation is to ensure that an employee who is able to work can do so. In practice, this means that the employer must accommodate the employee in a way that, while not causing the employer undue hardship, will ensure that the employee can work. The purpose of the duty to accommodate is to ensure that persons who are otherwise fit to work are not unfairly excluded where working conditions can be adjusted without undue hardship.

(...)

The test is not whether it was impossible for the employer to accommodate the employee's characteristics. The employer does not have a duty to change working conditions in a fundamental way, but does

have a duty, if it can do so without undue hardship, to arrange the employee's workplace or duties to enable the employee to do his or her work.

[28] As the Tribunal has held in many cases, the duty to accommodate may require arranging an employee's workplace in a way that enables the employee to perform the essential duties of his or her work. However, it does not require permanently changing the essential duties of a position or permanently assigning the essential duties of a position to other employees. The duty to accommodate also does not require exempting employees from performing the essential duties of their position. See *Brown v. Children's Aid Society of Toronto*, 2012 HRTO 1025 at para. 99; *Briffa*, above, at para. 60; *Yeats*, above, at paras. 58 and 59; *Perron*, above, at para. 16.

[29] Each accommodation case must be decided upon the particular facts of that case. The accommodation process is an individualized process and similarly accommodation cases turn on their particular facts. These cases turn upon the precise nature of the work being performed, the nature of the employee's work restrictions, and the nature of the workplace. Accommodation cases also often turn upon the identification of the essential duties or requirements of an employee's work or position. I agree with the applicant that not all duties that an employer may assign to a position will necessarily be "essential duties" within the meaning of the *Code*. I also agree that the Tribunal will often require evidence to determine whether a duty is or is not an essential duty.

[30] The applicant accepts that the sales and customer service component constitutes the majority of the duties of the Store Manager position – that is, 65-70% of the duties of the position. The applicant appears to accept that assisting customers is an essential duty of the Store Manager position but appears to submit that it is not an essential duty that the applicant herself be capable of assisting every customer who comes into the store. The essence of her submission is that she should be considered capable of performing the essential duties of her position if she is physically capable of assisting customers with purchases most of the time.

[31] I cannot accept this position. In my view, based on the agreed upon facts, assisting customers constitutes over two thirds of the duties of the Store Manager position. As well, according to the agreed upon facts, Store Managers typically are assigned to work alone 19.5 hours per week. Based on these facts, I find that it is an essential duty of the Store Manager position to assist customers. In my view, the proper way of framing the essential duty relevant to this case is that it is an essential duty to “assist customers”, not to assist customers “most of the time”. In my view, if a duty is essential, it is a duty that is required to be performed whenever there is a need to perform it.

[32] The “accommodations” sought by the applicant would not enable her to meet the essential duties of the Store Manager position. Instead, the accommodations sought by the applicant would exempt her from meeting the essential duties of the position. I agree with the Tribunal’s caselaw cited above that has found that the duty to accommodate does not require exempting an employee from the essential duties of her position. For this reason, in my view, the *Code’s* duty to accommodate does not require the respondent to permit the applicant to tell customers to go away and come back later when another person could assist them with their purchases.

[33] In my view, this case is distinguishable from *Pileggi*, above. In *Pileggi*, the applicant’s employment was terminated while he was off on medical leave due to his disability. Among submissions made at the hearing as to why the termination was not discriminatory, the respondent argued that the applicant would not have been able to perform the duties of his employment when he returned to work. The evidence in *Pileggi* was that the applicant worked with two or three other employees for most of the work day. However, the vice-chair found that it was “conceivable” that the applicant maybe be alone in the workplace early or late in the workday. It is within this context that the Tribunal held that the kind of evidence put forward by the employer in that case was a far cry from the kind of evidence required to establish that accommodating the applicant’s lifting restriction would have caused the respondent undue hardship. The evidence put forward by the respondent in *Pileggi*, to the extent that there was any, was

highly speculative. The facts agreed to in this case are far less speculative in significant respects. Unlike the applicant in *Pileggi*, Store Managers such as the applicant were required to work alone for 19.5 hours per week. In my view, the likelihood that the applicant might be required to perform tasks beyond her restrictions in assisting customers is a great deal less speculative in this case than it was in *Pileggi*.

[34] For the reasons set out above, I find that the duty to accommodate under the *Code* did not require the respondent to permit the applicant to ask customers who wished to purchase items that would require her to go outside her physical restrictions to return to the store at a time when other staff would be able to assist them. Given my findings on this point, it is not necessary for me to consider whether the *Code* might require the respondent in this case to permit the applicant to defer merchandising, housekeeping, or other Store Manager duties to other employees to perform later in the day. In my view, this question would require, in any event, evidence to determine whether merchandising, housekeeping, or other Store Manager duties are essential duties of the Store Manager position.

NEXT STEPS

[35] In their Statement of Issue and Agreed Facts, the parties framed the preliminary issue set out at para. 10 above using the qualifying phrase “among other things”. In my view, it is appropriate for the Tribunal to hold a case management conference with the parties to determine next steps in this case. The Registrar will contact the parties to canvass their availability for a case management call.

ORDER/DIRECTION

[36] For the reasons set out above, I find that the duty to accommodate under the *Code* does not require the respondent to permit the applicant to ask customers who wished to see or purchase items that would require the applicant to go outside her physical restrictions to return to the store later to be assisted by other staff.

[37] The Tribunal's Registrar will contact the parties to schedule a case management call to discuss next steps in this case.

Dated at Toronto, this 29th day of January, 2015.

"Signed by"

Jo-Anne Pickel
Vice-chair