`HUMAN RIGHTS TRIBUNAL OF ONTARIO

B E T W E E N:

Joan Thompson

Applicant

-and-

1552754 Ontario Inc. o/a Country Style, Donald Park, Jun Gon Park and Joanne (Jung Soon) Park

Respondents

DECISION

Adjudicator: Maureen Doyle

Date: May 3, 2013

File Number: 2010-05440-I

Citation: 2013 HRTO 716

Indexed as: **Thompson v. 1552754 Ontario Inc.**

APPEARANCES

Joan Thompson, Applicant	)	Bruce Best, Counsel
1552754 Ontario Inc. o/a Country Style, Donald Park, Jung Gon Park and Joanne (Jung Soon) Park, Respondents	)	Donald Park, Representative

INTRODUCTION

[1] This is an Application filed under s. 34 of the *Human Rights Code*, R.S.O. 1990, c. H.19, as amended (the "*Code*"), alleging discrimination with respect to employment because of disability.

[2] The respondents filed one Response jointly and deny having discriminated against the applicant.

BACKGROUND

[3] The applicant was employed as a "counter person" at the corporate respondent's premises, a coffee and doughnut shop. Her duties included serving customers, making sandwiches, stocking, light cleaning and closing the store at midnight. She commenced work there in November 2007. She alleges that after she was away from work ill for three days in September, 2009, the employer refused to allow her to return to work without medical clearance indicating that her epilepsy did not prevent her from working at the coffee shop.

The applicant's disability and shift work

[4] The applicant testified that she told the personal respondents about her epilepsy at the commencement of her employment, and that they expressed no concern about her ability to work at the coffee shop. The respondent Donald Park testified that the respondents first learned that the applicant suffered from a disability associated with seizures in February 2009, when she requested not to be assigned to the night shift. There is no dispute, therefore, that the respondents were aware, at least in February 2009, of the applicant's disability.

[5] The evidence indicated that the corporate respondent was owned and managed by the personal respondents. The day to day running of the business, especially in relation to the employees, appeared to fall mostly to Donald Park. Jun Gon Park and

Joanne (Jung Soon Park) are his parents. According to the evidence before me, they too worked from time to time in the doughnut shop and Jun Gon Park completed a Record of Employment for the applicant. Donald Park also testified that on one occasion, the applicant asked Jun Gon Park to pay her cash for hours she worked in excess of 20 hours per week and that he refused her request.

[6] In her Application, the applicant makes allegations regarding the employer's failure to accommodate her disability by not assigning her to regular shifts in order to permit her to take the medication she requires for her epilepsy. She alleges that she was assigned to the night shift until February 2009, when she requested "straight day shifts" in order to give her the opportunity to take her medication. She also alleges that though she was taken off the night shift, she never was accommodated with consistent start and end times for her shifts, which would have enabled her to schedule taking her medication accordingly.

[7] In their Response, the respondents assert that they changed the applicant's work hours at her request, once reducing her hours in order not to affect her "disability assistance", in addition to changing her shift from the evening shift to the afternoon shift and changing her shift from the afternoon shift to the morning shift.

[8] At the hearing, the applicant acknowledged that in fact no accommodation by way of change in shifts was necessary for her disability and indicated that she had referenced the earlier discussion regarding changing her shifts "by way of background".

[9] The applicant testified that when she worked the late shift, prior to February 2009, she was required to work alone in the coffee shop for the final two hours of the shift, and that the respondents expressed no concern about her epilepsy in those circumstances. In her testimony, she stated that while working at the coffee shop, she never felt the need for special treatment or accommodation. She testified that her medication regime consisted of taking a pill two times per day and that though she was not allowed to eat or drink in front of customers, she could take them in her half hour

break, or, during rush hour, could go to "the back" to take her pills. She did testify, however, that she asked for "straight shifts", but that she did not get them.

[10] In cross-examination, Donald Park stated that before February 2009, the applicant told the personal respondents that she had a condition whose symptoms were seizures, but that at that point, they did not know it was epilepsy. He testified that when she told them she had epilepsy, they were concerned about her having seizures and that is why they changed her shifts from midnights to afternoons, at her request. He did not recall if there had been any discussion regarding whether she had any concern about having a seizure at work, but testified that the respondents changed her shifts in order to make the workplace safer for her.

[11] He testified that he and the other respondents treated the employees at the doughnut shop well, and that the employees were treated with compassion. He testified that he had given cash advances, shift changes and accommodation to the applicant when she sought them. He also testified that changing the applicant's shifts caused some hardship, as he had to work more hours, his parents had to come from out of town to work more hours, and eventually they decided to close the shop earlier at night.

The applicant's illness in September 2009

[12] The applicant alleges that she was away from work due to stomach flu on September 16, 17 and 18, 2009. She testified that she called the workplace each day, advising that she would not be in as she was sick. On the first day, she says she spoke with a former co-worker, Christine, and on the second day, she says she spoke with the personal respondent Joanne Park. She also testified that when she called in to work on September 18, 2009, at 4:50 am, she spoke with the personal respondent Donald Park and told him that she would not be in that day, as she was sick.

[13] In their Response, the respondents asserted that on the third day of her absence, September 18, 2009, the applicant's boyfriend advised that she was not able to work because the time constraints of her work did not allow her to consume her medication at

the necessary time of day. The Response also states that in a telephone call later that day, the applicant stated that her condition had become worse due to the fact she was not able to take her medications at the necessary time when at work, and that she was not in any condition to work. The Response also states that out of concern for her safety, the applicant was then advised that she would not be put back on the schedule until she produced a note from her doctor indicating that her health had returned to its "prior state" and that she was fit to return to work.

[14] The applicant testified that her boyfriend went through the drive-through at the respondent business on September 18, 2009 and that when he came home, he told her that Donald Park questioned him about her. She testified that she did not speak to Donald Park again that day. The applicant denied that she or her boyfriend advised Donald Park that her three day absence was related to her disability.

[15] The applicant's boyfriend did not testify.

[16] The respondents called another employee, Christine Spiers, as a witness. Ms. Spiers testified that she answered the phone one morning when the applicant called in sick in September 2009 and that the applicant advised her she was sick. She also testified that Donald Park usually arrived at the shop shortly after its 4 a.m. daily opening, and that he stayed until the afternoon, 7 days per week. She also testified that on the morning of September 18, 2009, the applicant's boyfriend came to the drive-through lane at the coffee shop and told Donald Park that he was the reason for the applicant's sickness. On cross-examination, she testified that she was standing back to back with Donald Park when the applicant's boyfriend was at the drive-through, and that it was a very quick conversation. She testified that she only heard the applicant's boyfriend state that Mr. Donald Park was the cause of the applicant's sickness, and that she did not believe there was more to the conversation than that, but that she had her headset on as he was talking, and she was focused on listening to the next customer.

[17] Ms. Spiers also testified that through the course of their shifts, the employees were able to take breaks to get drinks, snacks, or smoke cigarettes. She testified that during rush hour, they used their discretion in this matter, and that they were not ordered not to take breaks.

[18] The respondent Donald Park gave evidence. He testified that when he arrived at work on September 16, 17 and 18, 2009, Ms. Spiers advised him that the applicant would not be coming in. He testified that on September 18, 2009, he tried to call the applicant on her cell phone, but got no answer. He testified that her shift normally began at 6 a.m. and that her boyfriend normally dropped her off at about 5:50 a.m. He testified that at about that time on September 18, 2009, her boyfriend came to the drive through at the coffee shop and ordered his coffee. Donald Park testified that when the boyfriend arrived at the window, he asked the applicant's boyfriend why the applicant was not coming in to work. He testified that her boyfriend then became visibly upset and accused him of being responsible for the applicant's illness.

[19] He testified that he tried to contact the applicant several times during the day and that he was able to contact her on her cell phone later that afternoon. He testified that he asked her why she had missed several days at work and she told him "pretty much the same thing" as her boyfriend had said at the drive-through.

[20] Later in his evidence, he testified that she had said that her condition was worse because of how he had scheduled her and that it had prevented her from taking her medication at the right time. He testified that he was shocked and that he was very upset to think that he was responsible for her illness. He testified that it was due to the nature of the applicant's allegations and the allegations of her boyfriend that he asked her for a doctor's note, stating that she was fine to return to work. Later in his evidence, he testified that he sought medical documentation confirming that her health had "returned to normal".

The doctor's note

[21] The applicant testified that on Friday, September 18, 2009, she called the coffee shop in order to find out what her shift was to be the next day. She testified that she spoke with a co-worker who advised her that she had no shift assigned. She testified that she then called Donald Park on the Saturday to find out why she was not scheduled, but she was not able to reach him until Monday, September 21, 2009. She testified that when she spoke to him, he said he wanted a doctor's note saying that she would have no seizures in the coffee shop, as he did not want to be responsible for her having a seizure in the shop. She testified that she told him she could get a doctor's note, but that when she phoned her doctor for an appointment, she was unable to get in to see the doctor for "a couple of weeks".

[22] In her Application, she alleges that approximately October 6, 2009, she went to the workplace to inquire about being put back on the schedule, but that Donald Park advised her that he was going to "write her off for medical reasons". She alleges that he said he did not want to be responsible for her having a seizure at work and that prior to returning to work, she was required to provide a doctor's note clearing her to work in the doughnut shop. She alleges that she was upset as she had not had a seizure in four or five years and she felt this was unfair.

[23] In her Application, she alleges that she continued to call the shop every Thursday night to see if she was back on the schedule. She alleges that she spoke to a co-worker, Sue, who told her that her name was on the schedule, but no hours were assigned.

[24] Her testimony was unclear as to whether there was a separate meeting with Donald Park on October 6, 2009 regarding the medical note and being put back on the schedule, or whether her only meeting with him was on October 21, 2009, when she brought him the note. I note here that Donald Park's evidence supported a version of events in which she spoke with him on October 6, 2009.

[25] The doctor's note she gave to Donald Park is dated October 21, 2009 and states "Please excuse the above mentioned patient from work…for medical reasons from Sept 16/2009 – Sept 18, 2009." She testified that when she gave Donald Park the note, she advised him that the doctor would not give her a note guaranteeing that she would not have a seizure at work. She testified that Donald Park told her that the note was not sufficient. In her testimony, she stated that he did not give her any further clarification about what he required at that time.

[26] The applicant testified that after giving him the note, she asked Donald Park if she was going to be scheduled for any hours, but that he said he did not know if he had room for her on the schedule or not. In her Application, she indicated that this was discussed at the October 6, 2009 meeting, however, the meeting in which she gave Donald Park the note took place after October 21, 2009.

[27] She testified that after giving him the note, she made repeated calls to the coffee shop, and that she spoke with Joanne Park. In her Application, she stated that she brought the note in to Donald Park on October 23, 2009.

[28] In her Application, she alleges that approximately October 9, 2009, she called the workplace and spoke with Joanne Park and that she inquired into whether she would get any shifts the following week. She alleges that Ms. Park advised her that it was uncertain as to whether she would be getting more shifts, as more people had been hired and there was no room on the schedule for her.

[29] In her Application, the applicant alleges that on approximately October 15 and October 22, 2009 she again spoke with Ms. Park regarding whether she would be assigned hours at the workplace, but Ms. Park again stated that she did not know. She also alleges that Ms. Park indicated that they would call the applicant again if they needed her, but that she was free to get another job.

[30] In cross-examination, Donald Park agreed that there were 3 “new hires” at the doughnut shop in the 5 weeks after the applicant left, but indicated that this kind of turnover was not unusual and that the new employees were students who would not “play the same role” as the applicant had played.

[31] Donald Park testified that the applicant was not successful in her attempts to reach him for a period of three weeks. He testified that she never provided him with the particular kind of medical documentation he sought, nor did she call him to discuss any alternative options for a return to work. He testified that though the applicant indicated that she spoke to a co-worker regarding the schedule, he felt that if she really wanted to resolve workplace issues, she would have made an effort to contact him instead.

[32] Donald Park testified that the applicant gave him the doctor’s note on October 23, 2009. He testified that he saw that it excused her from work for the three missed days, but did not say that she was fit to return to work. He testified that he told her that this is not what he required, as he needed a letter saying that she was fit to return to work. He testified that he did not recall what she said at the time, but that the next contact with her was her request for a Record of Employment (“ROE”).

[33] In cross-examination, Donald Park agreed that the doctor’s note he received was not what he sought, as based on the allegations made by the applicant and her boyfriend, he required a doctor’s note saying that she was “ok to return to work”. He testified that he did not believe the applicant had misunderstood what he wanted included in the doctor’s note, as the applicant had “plenty of time” between her absence and the date the note was written. He testified that when he received the note, he clarified what he sought, by reiterating his request for her to produce a doctor’s note clearing her for a return to work.

[34] Donald Park was asked in cross-examination if it was not implicit that as she was excused from work for medical reasons for 3 days, the applicant was cleared to return to work at the end of those three days. He testified that had the event in the drive-through not occurred and had the applicant not confirmed what her boyfriend said, and

if she had simply said that she had a stomach flu, the doctor's note would have been sufficient for him to conclude that she was fit to return to work. He testified that the reason for requiring the note was not because she had a seizure disorder, but because he was accused of being responsible for her illness.

[35] It is not disputed that the respondents scheduled no further hours for the applicant, nor did they call her to come in to work.

[36] The applicant testified that when she was no longer being scheduled for work at the coffee shop, she was cut off benefits from Ontario Works, until she was able to produce a note from the employer indicating that her ROE would be supplied shortly.

[37] The applicant alleges that Donald Park initially advised that he would give her a Record of Employment ("ROE") indicating that the reason she was no longer at work was "medical", and that on October 29, 2009, she received her ROE on which the employer had indicated "illness or injury" and then crossed it out to indicate "quit". She alleges that she went to the workplace the next day and protested, stating that she did not quit. At that time, she alleges, Donald Park indicated "leave of absence" on her ROE.

[38] Donald Park testified that when the applicant requested an ROE, it was a brief conversation. He testified that he recalled that he initially believed he was going to receive the form by October 26, 2009, from the company that handled the payroll, but that it did not arrive until October 27 or 28, 2009. A note written by him and dated October 23, 2009, was entered into evidence. The note stated that he anticipated being able to provide the applicant's ROE by October 26, 2009.

[39] He identified the completed ROE provided to the applicant and testified that he believed it was his father, Jun Gon Park, who filled it out. He testified that at first, the ROE was completed indicating the reason she left her employment was for "medical reasons". He testified that this was because he believed she was going to provide medical information from her doctor, but that when she did not, he concluded that her

doctor was not providing her with medical clearance for a return to work, so “medical reasons” was indicated. He testified that as he had not received the medical note he sought, the code was changed to “quit”.

[40] He testified that when he handed the ROE to the applicant, she opened it in front of him and advised him that she had not quit. He testified that there was no further discussion regarding her employment status at that time, but stated that he then changed the code to indicate “Leave of Absence”. He agreed that he had also indicated that she was “not returning”, but indicated that this was an oversight and that he should have indicated that her return date was “unknown”. He testified that he had concluded that she quit because she had not provided the medical note he sought and had not contacted them to return to work. He stated that he gave the applicant her ROE on October 28 or 29, 2009.

[41] Donald Park testified that the business was sold to new owners on February 28, 2010.

[42] In cross-examination, Donald Park agreed that subsequent to her sick days, the applicant did call in to see if she was on the schedule, but he asserted that it was closer to October 21 than to September 18, 2009. He also stressed that the applicant contacted her co-worker, but that she did not contact him or the other personal respondents. When he was asked if the fact that she called in to see if she was on the schedule indicated that she was ready to return to work, he testified that it just meant that she was “curious” as to whether she was on the schedule. He again asserted that if she wanted to work, she would have contacted him or one of the other personal respondents.

[43] He testified that he is very easy to contact and that all of the staff were aware of his hours. He testified that he was at the doughnut shop 7 days per week, but that one month went by before he received a single phone call from the applicant.

[44] The other personal respondents did not testify.

Effects on applicant of not being scheduled for work and job search efforts

[45] The applicant alleges that the respondents did not want her to suffer a seizure at work and terminated her, violating her rights under s. 5.1 of the *Code.* She testified that she was upset about being fired due to her epilepsy, as she had managed to deal with it all of her working life. She testified that her income was reduced and she and her boyfriend had to move from where they were living.

[46] The applicant introduced statements of earnings and deductions for her final four pay periods. They indicate that she earned $9.50 per hour and that she worked an average of 20.18 hours per week.

[47] The applicant testified that she has not found a job since that time and that since January, 2011 she has been in receipt of Ontario Disability Support Program benefits.

[48] The applicant introduced a list of 20 workplaces where she said she looked for work in 2009-2010 following her employment at the doughnut shop. There are no dates, addresses, phone numbers or other notations included on this list. She testified that she got the names of places looking for workers at "job skills" and then she went and put in her application. She testified that she worked with someone at "job skills" who helped her develop a resumé and check jobs on the computer. She testified that there were a number of places where she returned in person, as they were not open when she went the first time. This, she testified, resulted in her writing the same business names down more than one time and that she applied for the same jobs over and over, as she had no vehicle. She testified that this was the job log she produced when Ontario Disability Support Program asked her for one. She testified that the workplaces on the list may not have been listed in the order in which she went to the businesses, as she would go out in the day, drop off several applications, and then return home at the end and write them all down, perhaps out of order. She testified that she would drop off 3-4 applications in a day, depending on the weather.

ANALYSIS AND DECISION

The applicant's submissions

[49] Counsel for the applicant submits that this is a case about an employer's decision to refuse to allow the employee to continue working due to concerns regarding her disability. He submits that the Tribunal must ask whether the employer was justified in not allowing her to work and he also submits the employer did not fulfil its procedural duty to accommodate according to the *Code.*

[50] He stated that the applicant says that no accommodation was necessary for her disability and that she was at no greater risk of having a seizure at work in September 2009 than she had been at any other point in her employment there. He submits she was seizure free for approximately 9 years and that she needed no particular accommodation to do her job.

[51] He submits that when she wanted to return to work at the end of her three sick days in September, 2009, she found out she was not on the schedule and that she tried a number of times to contact Donald Park, without success. He noted that there is a factual dispute between the parties regarding when the applicant first contacted Donald Park, but submits that there is no dispute that he said he would not put her back on the schedule without a medical note.

[52] He submits that in their Response, the respondents stated that Donald Park wanted a note because the applicant's boyfriend had said in the drive-through that the applicant's 3 day absence was related to problems with her epilepsy medication. It also indicates that Donald Park spoke to the applicant later in the day and she confirmed that her illness was related to her epilepsy. He submits that this was not confirmed by Donald Park's evidence.

[53] The applicant's counsel submits that the respondents' other witness, Ms. Spiers, was only able to confirm that the applicant's boyfriend indicated that Donald Park was the cause of the applicant's illness. He submits that Donald Park's evidence regarding his encounter with the boyfriend was the same, indicating that the boyfriend gave no more details regarding how or why it was that he was holding Donald Park responsible. He notes that this is all disputed by the applicant, who denies that she ever blamed Donald Park. Rather, he submits, she confirmed that her absence was due to the flu.

[54] He submits that even if it is accepted that the applicant's boyfriend said something about Donald Park being responsible for the applicant's illness, the employer had no basis for requesting medical confirmation of her fitness to work. Further, even if there was a basis for requesting medical confirmation of her fitness to work, he submits that the respondents did not meet their procedural duty to accommodate under the *Code.*

[55] He cited *Black v. Etobicoke Ironworks,* 2010 HRTO 2082 ("*Black*"), where the applicant's disability was the reason the employer did not permit him to continue working. He submitted that this case is essentially the same and that the applicant has thereby established disadvantageous treatment on the basis of her disability. He submits that as the applicant has established a *prima facie* case of discrimination, the legal burden shifts to the respondent.

[56] He submits, furthermore, that as in *Black*, the respondents had a duty to investigate whether they could accommodate the applicant, and if they could, they had a duty to provide accommodation. The respondents considered no other options, and held the applicant out of work without pay for an indefinite period of time. He submits that the respondents took no reasonable steps to determine if their concerns were well-founded, and noted that there is no evidence of Donald Park having asked the applicant if she felt she needed accommodation. Rather, he submits, Donald Park simply took her off work.

[57] He also submits that the evidence is disputed as to what Donald Park sought. He submits that in the face of this lack of clarity, it would have been reasonable for Donald Park to clarify precisely what was required, and why.

[58] He submits that the applicant did co-operate, going to her doctor and obtaining a note. He submits that it was implicit in the note that after the 3 days when she was off sick, the applicant was fit to return to work. He submits that when an employer is not satisfied with information provided, its duty to accommodate makes it incumbent on the employer to be more specific regarding its concerns and its requirements. Simply re-stating the request, he submits, is not reasonable.

[59] The applicant's counsel submits that there was scant evidence of any real problem – merely some vague comments at the drive-through. He submits that Donald Park indicated that he was indignant that he was considered responsible, but that there was no real basis for concern over her ability to work.

[60] He refers to the Ontario Human Rights Commission (OHRC) Policy and guidelines on disability and the duty to accommodate, indicating that a person with a disability may wish to assume some risk. He submits that there was no real evidence here to suggest that there was a serious risk and that if there was, she was entitled to take it, providing there was no serious impact on health and safety. He notes that according to the OHRC Policy, the factors for determining the seriousness of a risk are the nature, severity, probability, real or speculative nature of the risk, and the scope of the risk and submits that the respondents did not consider the appropriate factors in determining whether there was a real risk.

[61] The applicant's Counsel also cites *DeSouza v. 1469328 Ontario Inc.*, 2008 HRTO 23, where the applicant suffered seizures at work and the Tribunal concluded that there was a minimal safety risk. In that case, the Tribunal determined that it was reasonable for the employer to ask for information regarding how to deal with a seizure should it happen, not an assurance that a seizure would not happen.

[62] He submits that in this case, there was insufficient reason for the respondents to be concerned about the applicant having seizures. He also submits that even if there was, the respondents did not take proper steps with respect to its procedural duty to accommodate.

[63] By way of remedy, he notes that the applicant has been out of work since losing her job at the respondents' doughnut shop. He noted that she worked at minimum wage for 20 hours per week, and that based on those figures, her wage loss from September 21, 2009 to the date of the hearing was $34,240.00. He also submits that it is appropriate to award the applicant $15,000.00 as monetary compensation in respect of injury to dignity, feelings and self-respect, arising out of the violation of s. 5(1) of the *Code.*

The respondents' submissions

[64] The respondent Donald Park submitted that the applicant had not been able to provide him with a note clearing her for a return to work and therefore it was logical for him to conclude that she was not well enough to return to work. Accordingly, he submits, the respondents initially indicated "medical reasons" on her ROE as the reason for her discontinuing employment. He submits that when she did not provide the note, the logical conclusion was that she had quit her job.

[65] He submits that in her testimony and in her Reply document, she indicated that she told him over the telephone that she was sick due to the stomach flu. He submits that had she told him this, the parties would not be embroiled in this dispute, as he would not have asked for a doctor's note. Rather, the applicant simply would have returned to work after her illness.

[66] He submits that according to his evidence and the evidence of Ms. Spiers, the applicant's boyfriend blamed him for the applicant's illness. He submits that it does not make sense that he would be blamed for her having a stomach flu. He submits that in her Application, the applicant claimed that she did not get adequate breaks, but that Ms.

Spiers had testified that they got the required breaks. He submitted that Ms. Spiers also testified that the staff was able to take breaks, for example to drink, snack and smoke at almost any time they wished. He submits that this detracts from the applicant's credibility. He submits that they were trying to accommodate the applicant, and that prior to September 2009, they had accommodated her by changing her shifts at her request when they learned of her seizures.

[67] He submits that changing the applicant's shifts resulted in a big burden for him and for his parents, but that they had been willing to do it.

[68] He submits that from September 18 to October 6, 2009, the applicant made no attempt to contact the respondents. He submits that had she provided a letter from the doctor explaining her illness and the accommodation required, they would have done their best to accommodate her and she would have been put back on the schedule.

DECISION

[69] It was not disputed that the applicant suffers from a disability. Though there is a factual dispute regarding what medical documentation Donald Park sought, placing the respondents' evidence at its highest in this regard, the issue before me is whether, by preventing the applicant from returning to work until she provided medical evidence clearing her for a return to work and indicating that she had returned to her "prior state" or "normal" health, the respondents discriminated against her on the basis of disability, contrary to the *Code.*

[70] I find that the respondents prevented the applicant from returning to work for reasons of her disability. Though Donald Park asserts that this was due to his need for medical assurances that she could return to work given her boyfriend's comments, I find, for the reasons below, that his insistence upon such assurances and his attendant refusal to hold her off work was not reasonable and was action taken due to her disability. Accordingly, I find that Donald Park and the corporate respondent violated the

applicant's right to be free of discrimination due to disability at work, in violation of s. 5(1) of the *Code.*

[71] While there is dispute as to whether the applicant and/or her boyfriend told Donald Park that it was his fault that the applicant was away sick in September, 2009, I find on a balance of probabilities that it is more likely than not that her boyfriend did make a remark of this nature when he was at the doughnut shop's drive-through on the morning of September 18, 2009. I make this finding for several reasons. Though the applicant denied that her boyfriend made such a comment, in her testimony she indicated that when he came home that morning after having been at the drive-through, he told her that Donald Park questioned him about her. She does not indicate that her boyfriend provided details regarding his conversation with Donald Park. What she says he told her, therefore, is not inconsistent with him having told Donald Park that her illness was his fault.

[72] The applicant's boyfriend did not testify, but the other two individuals at the drive-through that day, Donald Park and Ms. Spiers, both testified that he said that the applicant's illness was Donald Park's fault. Ms. Spiers gave her evidence in a straightforward fashion, and did not appear inclined to embellish or exaggerate. At times, her testimony appeared to fall short of what Donald Park had expected her to say, as she said that she spoke to the applicant on one of the three sick days only, while Donald Park indicated that she spoke to the applicant on each of the three days. When asked if the applicant's boyfriend had made any more detailed remarks regarding why the applicant's illness was Donald Park's fault, she was clear that she had heard nothing further. I found her to be a credible witness, and I accept that she heard the applicant's boyfriend tell Donald Park that he was to blame for the applicant's illness.

[73] When it came time for him to give evidence, Donald Park echoed what Ms. Spiers said and did not indicate that the applicant's boyfriend blamed him for not giving the applicant working hours which would permit her to better schedule taking her medication.He testified simply that at the drive-through on September 18, 2009, the

applicant's boyfriend told him that he was to blame for the applicant's illness. He was also quite clear that he found it very upsetting to be so blamed.

[74] Finally, I note that there is no dispute that the respondents knew at least as early as February 2009 that the applicant suffered from a condition associated with seizures, nor is there any dispute that she asked for a change in hours in order to permit her to schedule her medications, nor is there any dispute that the respondents changed her schedule (though in her Application, the applicant disputed the adequacy of the schedule change). Given the fact, therefore, that they knew about her disability and granted her a change in her schedule without ever having requested medical documentation, it would appear that something must have occurred to trigger the request for medical documentation. While it is possible that the mere fact of three days of illness may have caused the requirement for medical documentation, considering the above-noted testimony, I find that the change in approach is consistent with Donald Park having been personally blamed for the applicant's illness and I find that he sought medical documentation because of the applicant's boyfriend's remarks, which he concluded meant he had caused a deterioration in the applicant's disability.

[75] There is dispute about whether Donald Park and the applicant spoke on the phone later on September 18, 2009 and whether she advised him that her condition had worsened due to the fact that he had not provided her with the kind of regular hours which would facilitate her consuming her medicine in a timely fashion. The applicant testified that she did not have such a conversation with him and Donald Park testified that she did. Whatever the truth of that situation, however, it is clear that whether because the applicant said so, or whether because he surmised it by considering the comments made by her boyfriend in light of her request for regular and uniform daytime shifts, Donald Park concluded that the reason he was being blamed for the applicant's worsened condition was due to his failure to provide her with regular daytime hours to permit her to schedule her medication. Ultimately, however, I do not find that anything turns on whether this was said to him or whether it was simply the conclusion he drew from being blamed for her illness.

[76] There is also dispute with regard to what kind of medical documentation Donald Park told the applicant she was required to provide. She testified that he told her she was required to provide medical documentation from her doctor guaranteeing that she would not have a seizure at work. Donald Park testified that he required medical documentation before permitting her to return to work. He was clear, however, that he required more than a doctor's note confirming that her three day absence had been for medical reasons. He indicated that he needed explicit confirmation that her health had returned to "normal", or its "prior state" and that she had medical clearance to return to work.

[77] For the purposes of this Decision, I am prepared to conclude that Donald Park believed that he was being blamed for the applicant's worsening health condition due to the fact that he had not given her the regular and uniform hours she said she required in order to schedule her medications. Also for the purposes of this Decision, I am prepared to conclude that he therefore requested a medical note which indicated that she had returned to her prior state of health and that she was ready to return to work. The question before me, then, if the respondents' assertions are accepted, is whether it was a violation of the applicant's rights under s. 5(1) of the *Code* for the respondent to require a note indicating that she had returned to her prior state of health when he was being blamed for a deterioration in her condition due to not having provided her with a regular, uniform schedule in order to consume her medication in a timely fashion.

[78] There was some lack of clarity regarding the dates on which the applicant and Donald Park spoke and regarding when she called in to inquire into whether she had been included on the schedule and regarding when she provided her doctor's note to Donald Park. I do not find that anything turns on this confusion, however. Though Donald Park testified that the applicant did not speak to him until "three weeks later", there does not appear to be serious dispute about the fact that the applicant and Donald Park spoke on October 6, 2009. At least as early as that date, Donald Park advised her of the medical documentation he required. The applicant testified that she was unable to provide Donald Park with the documentation he sought immediately, as she had to

wait until October 21, 2009 to see her doctor. There was no evidence before me to contradict her assertion, and I accept that she had to make an appointment in order to obtain a letter from her doctor. The fact that she obtained a doctor's letter dated October 21, 2009, therefore, also supports a conclusion that she spoke to Donald Park at some time between September 18, 2009 and October 23, 2009 and that he advised her of the necessity for medical documentation at some point in that intervening period.

[79] Though it was unclear whether she gave him the doctor's note on October 21, 2009 or October 23, 2009, I do not find that anything turns on the exact date. Further, though he questioned the adequacy of speaking to a co-worker or to his mother, Joanne Park, he has not disputed that the applicant made several calls to the workplace to ascertain whether she was on the schedule between September 18, 2009 and October 23, 2009, when he says she gave him the note. Though Donald Park asserted it was his view she called simply because she was "curious", I find it is more likely that she called to ascertain whether she was expected at work. I find that she maintained contact with the workplace and she made a doctor's appointment with a view to providing Donald Park with medical documentation she hoped would result in being included on the work schedule. Therefore, though there was some confusion and some dispute in the evidence regarding when she spoke with Donald Park and when she provided the medical note, I am satisfied that between September 18, 2009 and the date when she gave him the note, the applicant was in communication with the workplace and was making efforts to provide what Donald Park indicated he required, and she had not quit her employment.

[80] Though the respondents changed the ROE to indicate that the applicant's employment status continued, even after the applicant provided a letter from her doctor and indicated that she would not be able to provide a guarantee from him that she would never have a seizure at work, the evidence before me indicates that Donald Park would not assign the applicant to shifts unless he had a letter from her doctor indicating that she had returned to her "prior state" of health and that she was cleared for a return to work.

[81] I do not find that it was reasonable for Donald Park to have required medical documentation confirming that the applicant had returned to her "prior state" of health or or "normal health" prior to scheduling her for shifts. While I accept that it is appropriate for an employer to take reasonable steps to ensure the safety of the workplace, Donald Park clearly indicated that it was his understanding that the worker's hours had aggravated her disability condition, and this concerned him. The medical documentation he says he required had nothing to do with assurances that the applicant was cleared to work irregular shifts or an inquiry into what kind of hours would make work safe for the applicant. The assurances he says he sought, therefore, bore little relation to his stated concern. In these circumstances, it is unclear how a letter from a doctor stating that the applicant had returned to her "prior state" of health and was cleared for a return to work, would have done anything to alleviate Donald Park's stated concern that her hours had caused a deterioration in her condition. He simply held her off work, due to her disability.

[82] Donald Park violated the applicant's right under s. 5(1) of the *Code* to be free of discrimination at work. Due to her disability and his beliefs about her disability, he refused to schedule her for shifts and refused to allow her to earn wages.

Liability

[83] The liability of a respondent for actions of its officers, officials, employees and agents is addressed at s. 46.3(1):

> For the purposes of this Act, except subsection 2 (2), subsection 5 (2), section 7 and subsection 46.2 (1), any act or thing done or omitted to be done in the course of his or her employment by an officer, official, employee or agent of a corporation, trade union, trade or occupational association, unincorporated association or employers' organization shall be deemed to be an act or thing done or omitted to be done by the corporation, trade union, trade or occupational association, unincorporated association or employers' organization.

[84] When this Application was originally filed, only the corporate respondent was named as a party. Subsequently, the applicant filed a Request for an Order During Proceedings (RFOP) requesting that the personal respondents be added as parties. In her RFOP, the applicant submitted that there could be a finding made against each of the personal respondents on the following basis:

> *Jung Gon Park:*
>
> Jung Gon Park is a principle of the Organization Respondent and he acted as a manager at the Country Style Donuts; and,
>
> Jung Gon Park refused Ms. Thompson's request for accommodation in February 2009.
>
> *Joanne Park:*
>
> Joanne Park is a principle of the Organization Respondent and she acted as a manager at the Country Style Donuts; and,
>
> Joanne Park advised Ms. Thompson on two occasions that she had not been put back on the work schedule.
>
> *Donald Park:*
>
> Donald Park is the son of Jung Gon Park and Joanne Park and he acted as a manager at the Country Style Donuts;
>
> Donald Park refused to put Ms. Thompson back on the work schedule in September 2009 because he perceived that she would have an epileptic seizure if he did so;
>
> Donald Park would not put Ms. Thompson back on the work schedule until she provided a letter from her doctor addressing his perception of Ms. Thompson's disability; and,
>
> Donald Park refused to accept the medical note provided by Ms. Thompson on October 23, 2009 stating that he needed a doctor's note that said she was safe to work at the business.

[85] On January 31, 2012, the Tribunal issued an Interim Decision, 2012 HRTO 225, adding the individual respondents as respondents to the Application, stating as follows:

> The applicant submits that on the face of her Application, the conduct of each of these three individuals is a central issue in this matter. Indeed, it would appear from the allegations (which I note the respondents deny) that the respondents were reacting to particular situations rather than following an organizational practice or policy. Moreover, in light of the

> situation with the change in ownership, there is now an issue with respect to whether the named respondent can respond to or remedy the alleged *Code* infringement.

[86] As noted above, on the first day of hearing in this matter, counsel for the applicant advised that the applicant is not pursuing any allegation that the respondents violated the *Code* by failing to accommodate her request for a particular shift. The only other evidence regarding the role of Jung Gon Park is that he worked at the shop, and apparently assisted with managing the shop at least to the extent that he initially completed the applicant's ROE and to the extent that he refused the applicant's request for payment in cash for certain hours. Even if he was a directing mind of the corporate respondent, however, I am unaware of any basis which would permit me to make him personally liable for the actions of another directing mind of the corporation, nor was any argument to this effect before me. Accordingly, I do not find that Jun Gon Park has violated the applicant's rights under the *Code* and I find no basis to make him liable for the violation of her rights by Donald Park. The Application is dismissed as against Jun Gon Park.

[87] Joanne Park communicated to the applicant regarding whether she was on the schedule and whether she was likely to pick up any shifts, but there is no evidence before me of any role played by Joanne Park in the decision to refuse to assign the applicant to shifts until she had provided the medical documentation required by Donald Park. Even if she was a directing mind of the corporate respondent, however, I am unaware of any basis which would permit me to make her personally liable for the actions of another directing mind of the corporation, nor was any argument to this effect before me. Accordingly, I do not find that Joanne Park has violated the applicant's rights under the *Code* and I find no basis to make her liable for the violation of her rights by Donald Park. The Application is dismissed as against Joanne Park.

[88] The thrust of the applicant's complaint is that she was kept off work unless and until she could provide to Donald Park the kind of medical documentation that he sought. He clearly played a managerial role and is properly identified as a directing mind of the corporate respondent. There is no question that pursuant to s. 46(3) of the

Code, the corporate respondent is responsible for his actions. In this case, however, as noted in the Interim Decision, there is reason to believe that given the change in ownership of the doughnut shop, the corporate respondent may not be able to respond to or remedy the *Code* infringement. In these circumstances, the Tribunal found it appropriate to name the personal respondents as well as the corporate respondent. I find that Donald Park's refusal to assign work hours to the applicant until he received medical documentation which indicated that the applicant had returned to her "prior state" or "normal" health, was a violation of her right under s.5(1) to be free of discrimination on the basis of her disability, with respect to her employment. Donald Park was a directing mind of the corporate respondent, there is no indication that he was acting according to any corporate policy beyond his control. The evidence indicates that the decision was his alone.

[89] There may be no ability of the corporate respondent to remedy the *Code* infringement of its directing mind. In these circumstances, I am concerned that there is a real and increased risk that if I make an order as against the corporate respondent only, there may be no remedy actually provided to the applicant. In any event, the fact that the corporate respondent may be liable for the conduct of its employees does not insulate employees from personal liability. I find that both the corporate respondent and the personal respondent Donald Park are liable for having violated the applicant's right to be free of discrimination with respect to employment.

[90] In these circumstances, I find that it is appropriate to find the personal respondent Donald Park and the corporate respondent jointly and severally liable for the violation of the applicant's right to be free from discrimination with respect to employment, due to her disability.

Remedy

[91] The Tribunal's remedial powers are set out in section 45.2 of the *Code:*

> On an application under section 34, the Tribunal may make one or more of the following orders if the Tribunal determines that a party to the application has infringed a right under Part I of another party to the application;
> 1. An order directing the party who infringed the right to pay monetary compensation to the party whose right was infringed for loss arising out of the infringement, including compensation for injury to dignity, feelings and self-respect.
> 2. An order directing the party who infringed the right to make restitution to the party whose right was infringed, other than through monetary compensation, for loss arising out of the infringement, including restitution for injury to dignity, feeling and self-respect.
> 3. An order directing any party to the application to do anything that, in the opinion of the Tribunal, the party ought to do to promote compliance with this Act.

[92] By way of remedy, the applicant seeks an order for financial compensation for wages lost from September 18, 2009 and an order for $15,000 as monetary compensation in respect of the violation of her right under s. 5(1) of the *Code,* for injury to her dignity, feelings and self-respect.

[93] In *Arunachalam v. Best Buy*, 2010 HRTO 1880, at paragraphs 52 to 54, the Tribunal summarized some of the considerations relevant to an assessment of damages to be awarded under s. 45.2 of the *Code*:

> I turn now to the relevant factors in determining the damages in a particular case. The Tribunal's jurisprudence over the two years since the new damages provision took effect has primarily applied two criteria in making the global evaluation of the appropriate damages for injury to dignity, feelings and self-respect: the objective seriousness of the conduct and the effect on the particular applicant who experienced discrimination. See, in particular, *Seguin v. Great Blue Heron Charity Casino*, 2009 HRTO 940 at para. 16.
>
> The first criterion recognizes that injury to dignity, feelings and self-respect is generally more serious depending, objectively, upon what occurred. For

> example, dismissal from employment for discriminatory reasons usually affects dignity more than a comment made on one occasion. Losing long-term employment because of discrimination is typically more harmful than losing a new job. The more prolonged, hurtful, and serious harassing comments are, the greater the injury to dignity, feelings and self-respect.
>
> The second criterion recognizes the applicant's particular experience in response to the discrimination. Damages will be generally at the high end of the relevant range when the applicant has experienced particular emotional difficulties as a result of the event, and when his or her particular circumstances make the effects particularly serious. Some of the relevant considerations in relation to this factor are discussed in *Sanford v. Koop*, 2005 HRTO 53 at paras. 34-38.

[94] The non-exhaustive list of relevant considerations discussed in *Sanford v. Koop,* are: humiliation experienced by the applicant; hurt feelings; loss of self-respect, dignity, self-esteem, confidence; the experience of victimization and; the seriousness, frequency and duration of the offensive treatment.

[95] The applicant gave evidence about the distress she experienced when asked to produce medical documentation clearing her for a return to work when she had never had a seizure at work. She also gave evidence about the extent to which she had relied on her income from the doughnut shop and the fact that without that income, she was required to move.

[96] Based on the evidence before me, I am satisfied that there was no reason other than the applicant's disability which led to Donald Park's refusal to include the applicant on the work schedule.

[97] I am also mindful of the fact that the discrimination arose in a context where there had previously been good faith efforts to provide accommodation even where that accommodation was otherwise unwarranted.

[98] Objectively, work has a central importance in an individual's life, and the loss of work has a commensurate impact. Further, the applicant lives in a smaller community, and gave evidence about the limitations she faced in her job search, due to the lack of

transportation. The work she sought can be characterized as unskilled labour. While I do not find that the evidence of a job search which she provided can be characterized as robust, I am satisfied that in a small community, and difficulties with transportation, her opportunities for employment would have been somewhat limited.

[99] In view of the subjective and objective factors, I find that $12,500.00 is an appropriate amount to award the applicant as monetary compensation for the loss of her right to be free from discrimination and the injury to her dignity, feelings and self-respect. I order the corporate respondent and the personal respondent Donald Park to pay this to the applicant. The corporate respondent and Donald Park will also be liable for postjudgment interest on this amount, as set out below.

[100] Though the applicant's employment was not formally terminated by the respondents, in the face of their intransigence, and with the applicant advising Donald Park that she was not able to provide a medical guarantee that she would never have a seizure at work, I find that it is appropriate to award the applicant an amount in respect of lost wages, as had Donald Park not prevented her from returning to work in the absence of medical clearance, she would have continued to earn wages at the doughnut shop.

[101] With respect to lost wages, the applicant asserts that the respondents are liable for lost wages beyond the date of the sale of their business to new owners. There is no evidence before me, however, which would establish the number of hours assigned, if any at all, by the new owners to the corporate respondent's former employees. In these circumstances, I am not satisfied that I have sufficient evidence before me to conclude that the applicant's earnings would have continued as before after the sale of the business and accordingly, I am not satisfied that it is appropriate to award loss of wages to the applicant beyond the date when the doughnut shop was sold, being February 28, 2010.

[102] The applicant worked an average of 20 hours per week and earned minimum wage, which at the time was $9.50 per hour. Between September 21, 2009 and

February 28, 2010, therefore, she would have been expected to earn $4370.00. The corporate respondent and Donald Park are jointly and severally liable to pay the applicant this amount, and will also be responsible for prejudgement interest and postjudgment interest as set out below.

ORDER

[103] For the reasons above, the Tribunal makes the following orders:

1.The Application is dismissed as against Jung Gon Park.

2. The Application is dismissed as against Joanne Park.

3. Within 30 days of the date of this Decision, the personal respondent Donald Park and the corporate respondent are jointly and severally liable to pay the applicant $12,500.00 for violation of her inherent right to be free of discrimination with respect to employment and to be free from reprisal and for the injury to his dignity feelings and self-respect flowing from this violation. Postjudgment interest shall be payable on this amount at the rate of 3.0%, calculated in accordance with section 129 of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43 as amended, commencing 30 days from the date of this Decision.

4.Within 30 days of the date of this Decision, the personal respondent Donal Park and the corporate respondent are liable to pay the applicant $4370.00 in respect of loss arising out of the infringement of the applicant's right to be free from discrimination with respect to employment. Prejudgment interest on this amount at the rate of 0.5%pursuant to section 128 of the *Courts of Justice Act***,** from October 26, 2010 to the date of this Decision. Postjudgment interest shall be payable on this amount at the rate of 3.0% pursuant to section 129 of the *Courts of Justice Act*, commencing 30 days from the date of this Decision.

Dated at Toronto, this 3rd day of May, 2013.

"signed by"

_____

Maureen Doyle
Vice-chair