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CASE NO. 32/18/LRA

IN THE MATTER OF: ***THE LABOUR RELATIONS ACT***

- and -

IN THE MATTER OF: **An Application by**

N.W.N.,

Applicant,

- and -

BLOSSOMS SENIOR CARE INC.,

Respondent.

BEFORE: **K. Pelletier, Vice-Chairperson**

B. Peto, Board Member

S. Gordon, Board Member

APPEARANCES: **N.W.N, on behalf of Applicant**

D.T.I., on behalf of Respondent

B.T.E.T., on behalf of Respondent

This Decision/Order has been edited to protect the personal information of individuals by removing personal identifiers.

REASONS FOR DECISION

INTRODUCTION

1. On February 12, 2018, the Applicant filed an Application seeking remedy for an alleged unfair labour practice ("ULP"), contrary to sections 7(d), (e), (f), (g) and (h)

of *The Labour Relations Act* (the "*Act*"). The matter proceeded to hearing on May 9, 2018, at which time both the Applicant and Respondent attended to present evidence and make submissions.

2. The Applicant alleges that her hours were reduced by the Respondent as a result of her approaching the Employment Standards Division relating to the improper calculation of statutory wages in accordance with *The Employement Standards Code*. The Applicant submits that this constitutes an ULP, contrary to the *Act*.

3. While the Respondent acknowledges that the Applicant's hours were reduced in the latter part of January and in February 2018, she explains that they were reduced due to a lack of work, and not as a result of the Applicant's discussions with Employment Standards.

4. The issue for the Board's consideration is whether the Applicant has demonstrated a *prima facie* violation of the *Act* and, if so, whether the Respondent's actions were predicated on any of the prohibited grounds as outlined in section 7 of the *Act*.

5. For the reasons that follow, the Board has concluded that, while the Applicant has established a *prima facie* case under section 7 of the *Act,* the Employer has satisfied the Board that its actions were not taken because the Applicant engaged in one or more of the enumerated activities, but rather were based on legitimate business considerations.

BACKGROUND

6. The Applicant is employed as a caregiver with the Respondent. The evidence was that she has worked for the Employer on and off for approximately three years. Her most recent employment resumed in May 2017, following a period of extended leave. Since that time, the Applicant says that she has been consistently working in the range of eighty or more hours bi-weekly. This is not disputed by the Respondent.

7. D.T.I., President for the Respondent, testified that she employs approximately sixty-five workers to provide senior care to clients located in and around the City of Winnipeg, in the Province of Manitoba. D.T.I. says that the Respondent attempts to provide as many hours to its employees as they desire, especially those who are exclusively employed with the Respondent. D.T.I. testified that she understood that the Applicant wished to work eighty hours bi-weekly, and agrees that she was able to provide sufficient work for her until January 2018, following the loss a few clients, necessitating a reshuffling of hours for the Applicant and other workers in the Respondent's employ.

8. D.T.I. says that all workers are hired as casual employees. This is reflected in a document that was entered as an exhibit, at the hearing titled: "Job Description", in which it is noted: "You are employed as a casual worker, therefore, no paid sick time is given."

9. In light of the consistent hours she has worked, the Applicant disputes that she is employed as a casual employee. She further disputes having ever seen or received a copy of the document referenced by the Respondent as "Job Description".

10. B.T.E.T., a scheduler with the Respondent, also testified at the hearing. She stipulated that there are three schedulers working for the Respondent, all of whom work in the same office. She stated that it was the responsibility of the schedulers to slot workers in with clients, based on the individual worker's skill sets; the hours of work requested; the needs of the patient; and the location of the client. The goal, according to B.T.E.T., is to find the "right fit" between the client and the worker.

11. B.T.E.T. testified that schedulers are solely responsible for the scheduling of workers. According to B.T.E.T., D.T.I. does not get involved in the scheduling of workers or the preparation of schedules.

12. B.T.E.T. also testified that when schedules are set, they are sent around to the workers in two week blocks, a few days before the commencement of the new pay period. The workers then have the ability to provide feedback on the draft schedule prepared by the schedulers. B.T.E.T. indicated that if a worker does not feel comfortable providing care to any client, it is well within their right to refuse the shift. This is reflected in the "Job Description" document as well, which stipulates: "Do not accept clients you are not comfortable with."

13. The Applicant suggested at the outset that she did not have any concerns with B.T.E.T. She acknowledged that B.T.E.T. was a credible witness. However, she was concerned that B.T.E.T. was operating under the direction of D.T.I. The Applicant maintained throughout that she believed that the reduction of her hours was at the direction of D.T.I., but acknowledged that she did not believe B.T.E.T. to have had any involvement in the reduction of her hours. Specifically, the Applicant testified that she had been advised that "a scheduler", but not B.T.E.T., had been directed by D.T.I. to reduce the Applicant's hours.

14. Both B.T.E.T. and D.T.I. denied that there had been any instruction to any scheduler about the reduction of the Applicant's hours. Rather, B.T.E.T. explained that the reason for the Applicant's reduction of hours in the months of January and February was because the Respondent had lost three clients in late December/early January, two of whom required twenty-four hour care. This obligated the schedulers to redistribute hours for a number of workers, including the Applicant. B.T.E.T. explained that this redistribution of hours frequently occurred as clients passed away or no longer required services, and that it would necessarily have an impact on workers. She also explained that the workers did not have any proprietary interest in any singular client, and that it was at the discretion of the Employer to reshuffle client assignments, as required.

15. B.T.E.T. explained that one of the Applicant's regular clients passed away at the end of December 2017, and the Respondent attempted to find an alternate client for the Applicant to fill in the time. B.T.E.T. testified that Client D appeared to be a good fit for the Applicant, given the client's needs and the Applicant's skill sets. Accordingly, the Applicant was scheduled to work several shifts in the month of January with Client D. The Applicant provided services to Client D on one occasion in early January, but subsequently refused any shift involving this client. No reason was provided for the refusal, but B.T.E.T. testified that it was within her right to refuse, if she did not feel comfortable with the client. According to B.T.E.T. and D.T.I., this refusal directly contributed to a reduction of hours for the Applicant. Both testified that, if the Applicant had accepted to provide care to Client D, she would have worked closer to the desired eighty hours in a bi-weekly period. In February, when it became clear that the Applicant did not wish to provide services to Client D, she was no longer scheduled for this work.

16. While D.T.I. and B.T.E.T. acknowledged that it was well within the right of the Applicant to refuse to work with Client D, neither believed that the Employer should be required to compensate the Applicant for her refusal.

17. The Applicant's version of events differed greatly from the information presented by witnesses for the Respondent. The Applicant indicated that, once she approached the Employment Standards Division on or about January 9, 2018, she immediately noticed a reduction in her hours. Whereas in December, she had consistently worked upwards of eighty hours in a bi-weekly period, in January, she had a significant reduction in her hours. This, she suggests, could be directly attributed to her approaching the Employment Standards Division regarding her statutory pay.

18. The Applicant testified that she provided care to four patients in December. B.T.E.T. agreed with this information, but clarified that she had two regular patients (Client K and Client L), along with two patients for which she was asked to fill in. One of her

regular patients (Client L) passed away, which resulted in fewer hours available for the Applicant. The Applicant provided her personal notes regarding the hours she worked in December and her schedule for the months of January and February. In December, the Applicant was scheduled seventeen shifts with Client K. In January, she was scheduled fourteen times with Client K, and in February, she was scheduled for eleven shifts. She says that one of her coworkers was provided additional shifts with Client K, and this resulted in fewer hours for the Applicant. According to the Applicant, this supported her contention that her hours had been reduced as a direct result of her approaching the Employment Standards Division.

19. B.T.E.T. acknowledged that the Applicant had been scheduled fewer hours with Client K, but confirmed that the Applicant could have made up the shortfall if she had agreed to provide services to Client D: shifts which she refused.

20. D.T.I. acknowledged that she was contacted by the Employment Standards Division on January 9, 2018. She explained that, once she understood that she had improperly calculated the Applicant's statutory holiday pay, she made the necessary arrangements for a payroll correction for her next paycheque, namely on January 20, 2018. She confirmed that the Applicant was one of two employees who had been issued this correction in wages.

21. There was also an issue relating to the cancellation of two additional scheduled shifts on January 25 and 28, 2018. D.T.I. testified that the Applicant was taken off the schedule (as confirmed by text message) due to her expressed concerns regarding the distance of the client. D.T.I. explained that there had been a previous occasion where the Applicant had expressed concerns with the mileage involved in travelling to see a client located a fair distance from her home. When the Applicant again expressed these concerns, D.T.I. said that she made the decision to cancel her shifts to ensure that there was coverage for this client. From D.T.I.'s perspective: "We couldn't wait around to see if she would take it. We needed to find someone else."

22. The Applicant maintained throughout the hearing that these shifts had been cancelled by D.T.I., and was emphatic that she would have worked these two shifts. She says that she ought to be compensated for the January 25 and 28, 2018 shifts.

23. The Applicant confirmed that she requested to be taken off the schedule for the shifts of January 24 and 31, 2018, as they involved Client D, to whom she did not wish to provide service.

24. Beginning in early March 2018, a new client was assigned to the Applicant, which provided her sufficient hours to reach her desired eighty hours of work in a bi-weekly period.

ISSUES

25. The first issue for the Board's consideration is whether the Applicant has sufficiently demonstrated that there is a *prima facie* violation of section 7 of the *Act*.

26. If the Applicant has indeed disclosed a *prima facie* case, the onus then shifts to the Respondent to demonstrate that its actions were not premised on any of the prohibited grounds as outlined in section 7(a) to (h) of the *Act*.

A. Prima Facie Case

27. An applicant claiming a violation of section 7 of the *Act* must establish a *prima facie* case. Section 7 of the *Act*, on which the Applicant relies, stipulates as follows:

> "Every employer and every person acting on behalf of an employer who refuses to employ, or who discharges from employment, or who refuses to continue to employ, or who discriminates in regard to employment against, any person who
>
> (a) was or is a member of a union; or
>
> (b) has participated, or is participating in union activities, or

(c) was or is involved in a organizing a union; or

(d) has made a complaint or filed an application under this or any other Act of the Legislature or of Parliament; or

(e) has testified or may testify in a proceeding under this or any other Act of the Legislature or of Parliament; or

(f) has made, or may make, a disclosure that may be required of him in a proceeding under any Act of the Legislature or Parliament; or

(g) has participated in or is about to participate in a proceeding under any Act of the Legislature or of Parliament; or

(h) has exercised or is exercising his rights under this or any Act of the Legislature or of Parliament;

unless he satisfies the board that he did not refuse to employee or discharge from employment or refuse to continue to employ or discriminate in regard to employment against he person because of any of the reasons set out in clauses (a) to (h), commits an unfair labour practice."

28. Specifically, the Applicant relies on section 7 (d), (e), (f), (g) and (h) of the *Act*.

29. In evaluating whether an applicant has established a *prima facie* case under Section 7 of the *Act*, the Board must be satisfied that there is sufficient factual basis to support the assertions of the applicant. Specifically, in order to satisfactorily establish a *prima facie* case under section 7 of the *Act*, an applicant must satisfy the Board that:

1) she was discriminated against in regard to her employment;

2) the said action was taken by the employer or a person acting on behalf of the employer; and

3) she engaged in one or more of the enumerated activities referred to in subsections 7 (d) to (h) of the *Act*.

30. In the instant case, if the Applicant can establish that these three elements exist, then she has demonstrated a *prima facie* case of discriminatory action. It should be noted that, at this preliminary stage of analysis, an Applicant's evidence is accepted as being accurate.

31. On review of the evidence presented, the Board is satisfied that the Applicant has met the *prima facie* case. The uncontested evidence was that the Applicant approached the Employment Standards Division on January 9, 2018, which is an activity referred to in section 7 of the *Act*. The evidence also established that the Applicant's hours were reduced by the Employer in and around the same time period, which invariably had a negative impact on her employment.

B. Reverse Onus

32. Having determined that the Applicant has disclosed *a prima facie* case, the onus now shifts to the Respondent to demonstrate that its actions were not motivated, in whole or in part, by the Applicant having raised a concern with the Employment Standards Division.

33. It has long been established by this Board that it can only remedy matters relating to unlawful conduct under the *Act*. Section 7 of the *Act* is not designed to remedy all instances of perceived unfairness: the objective evidence must establish that there is a correlation, or *nexus*, between the Applicant exercising her rights under the *Act* and the Employer's unlawful conduct. The fact that the Applicant in this case made a complaint with the Employment Standards Division does not, standing alone, shield her from employment actions which reflect legitimate business considerations, provided that these are not influenced in any way by an improper motive contrary to Section 7 of the *Act*.

34. In assessing whether or not an improper motive exists, the Board is entitled to look at factors such as the timing of the employer's action (here, reduction of the

Applicant's hours), the credibility of the reasons offered and whether the response is a proportionate one. In order to make a positive determination in favour of the Applicant, the Board must be satisfied that the Employer's actions were not influenced, in whole or in part, by the Applicant having engaged in one of more of the enumerated activities in the section.

35. The evidence presented at the hearing was conflicting, and accordingly credibility findings were required to be made in respect of a number of factual issues presented. The evidence of what transpired with the Applicant's hours of work differed as between the Applicant and both of the Employer witnesses. On the one hand, the Applicant claimed that her hours were reduced at the direction of D.T.I. and that this action was deliberately taken to "punish her" for approaching the Employment Standards Division. She also argued that the cancellation of two shifts in January was as a direct result of her engaging her rights under Employment Standards. The Applicant further indicated that she had been specifically informed by "a scheduler" that they had been directed by D.T.I. to reduce the Applicant's hours. The Applicant could neither provide a name; nor any description of the scheduler with whom she alleged to have had this discussion.

36. On the other hand, D.T.I. testified that as she soon as she was advised by Employment Standards that she had inappropriately calculated the Applicant's statutory pay, she instructed payroll to issue a correction to the Applicant on the next scheduled pay date. She denied that she held any ill-intent vis-à-vis the Applicant for her approaching the Employment Standards Division.

37. B.T.E.T., for her part, testified that she was not instructed by D.T.I. to reduce the Applicant's hours, and denied that any other scheduler had similarly been instructed. B.T.E.T. also advised that Board that she did not have any information relating to the Applicant approaching the Employment Standards Division until "sometime in early February". Schedules had been created by then, and she claimed that the Applicant's

schedule was in no way impacted by her engaging her rights under Employment Standards. Rather, she testified that the reduction of her hours was entirely based on sound business considerations. Specifically, the loss of three clients had a direct impact on the hours that could be offered to some of the Employer's employees, including the Applicant. In any event, in the Employer's view, the Applicant had refused work that would have enabled her to top up her hours significantly.

38. In assessing credibility, the Board has considered the guidelines distilled in the oft-quoted and seminal case of *Farnya* v. *Chorney*, [1952] 2 DLR 353 (B.C.C.A.), (O'Halloran, J.), particularly the principle noted at page 357d at P. 357:

> "… In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would reasonably recognize as reasonable in that place and in those conditions."

39. There were significant concerns with the case presented by the Applicant. In addition to being obstinate and often disrespectful, there were concerns with the evidence which she presented: she denied the existence of a number of text messages which, once confronted, she had no choice but to acknowledge, as it was shown that she was an active participant in the conversations. She denied that she had ever raised an issue with the distance of a client. When confronted with the text message, she took the opposing view. She also presented information relating to a "scheduler", whom she could not identify, either by name or otherwise.

40. Conversely, B.T.E.T. presented evidence clearly and concisely. Her demeanour was calm and she was credible: this fact was also acknowledged by the Applicant.

41. On the whole of the evidence, and on balance of probabilities, the Board prefers the evidence presented by B.T.E.T., and accepts that the reduction in the Applicant's hours was not due to her raising employment related concerns with the Employment Standards Division. The Board accepts that the reduction of hours was as a direct

result of the loss of three of the Employer's clients, which required a redistribution of hours. The Board has also accepts that the Applicant bears some responsibility for the reduction in her hours, as she refused work that was otherwise available to her.

42. As it relates to the two cancelled shifts, the Board accepts the evidence of the Employer that it had concerns that the Applicant would not be able to attend to the client, based on her expressed concerns relating to gas and distance. The Board accepts that the Employer had to make the decision to assign the work to another available worker.

43. Weighing all the evidence, the Board finds that, although the Applicant made out a *prima facie* case, it is satisfied that the Respondent's actions were not predicated on any of the prohibited grounds outlined in section 7(a) to (h) of the *Act*. The Board is satisfied that the Applicant's employment standards claim was not a factor in the decision of the Respondent to reduce her hours of work.

44. As a result, the Application is dismissed.

DATED at **WINNIPEG**, Manitoba, this 4th day of July, 2018, and signed on behalf of the Manitoba Labour Board by

"original signed by"
K. Pelletier, Vice-Chairperson

"original signed by"
B. Peto, Board Member

"original signed by"
S. Gordon, Board Member

KP/rm/acr/lo-s