HUMAN RIGHTS TRIBUNAL OF ONTARIO

B E T W E E N:

Rylee James Freeman Hart

Applicant

-and-

F & P Manufacturing Inc.

Respondent

INTERIM DECISION

Adjudicator: Eva Nichols

Date: December 21, 2020

File Number: 2017-30369-I

Citation: 2020 HRTO 1021

Indexed as: **Hart v. F & P Manufacturing Inc.**

APPEARANCES

Rylee Janes Freeman Hart, Applicant	)	Michelle Mulgrave, Counsel
F & P Manufacturing Inc., Respondent	)	Greg McGinnis, Counsel

INTRODUCTION

[1] This Application alleges discrimination with respect to employment because of gender identity and gender expression contrary to the *Human Rights Code*, R.S.O. 1990, c. H.19, as amended (the "*Code*").

[2] The Application was submitted to the Tribunal on November 15, 2017. In the Application the applicant described his experiences as an employee of the respondent company between February 2012 and September 2017, when he resigned. He alleged that the respondent breached his *Code* protected rights by allowing fellow workers to harass him, by not accommodating his gender identity and by failing to investigate his allegations of harassment.

[3] In addition to the organizational respondent, the original Application also named five individual respondents. Subsequently, in response to a request from the corporate respondent to the Tribunal to remove the personal respondents, the applicant agreed to the removal of the personal respondents. The Application continued within the Tribunal process with the organizational respondent only.

[4] The organizational respondent also asked the Tribunal to determine that all allegations relating to matters that occurred before November 2016, i.e., more than one year prior to the submission of the Applications should be dismissed for delay. In response to this request, the Tribunal referred the matter to a preliminary hearing to consider the allegation of delay at a preliminary hearing..

[5] The preliminary hearing proceeded by teleconference on November 26, 2020.

BACKGROUND

[6] The applicant began his employment with the respondent in February 2012 and was hired as a female employee. In October 2014, he informed his supervisors at work that he was beginning the gender transition process and informed them of the planned

and required steps, including the plans for his immediate name change. In February and March 2015, the applicant underwent certain medical procedures and was on medical leave. Prior to leaving on his medical leave, he alleged that he raised the issue of certain accommodations that he will require once he returns to work. He stated that he had communicated his accommodation needs during the workday and in the workplace to human resources before going on medical leave.

[7] He described that, when he returned from medical leave, no attempts had been made to provide him with the requested accommodations. These accommodations included the request to allow him to use the male change room at work. Eventually, the requested changes regarding the use of change rooms and restrooms were implemented by May, 2015.

[8] The applicant described the difficulties he faced as a result of the many intrusive questions and inappropriate comments that were directed towards him. He stated that he had numerous discussions with the person responsible for health and safety at the workplace, who stated that the company was doing the best that it could, given that these were circumstances that his fellow workers or the company as a whole had not been aware of or experienced before.

[9] These difficulties continued with apparently very little change in the workplace. The applicant stated that although he made numerous suggestions for how things should be or could be improved, it was primarily left up to him to figure out how to deal with the challenges of functioning among fellow workers who knew him prior to transitioning, during the transition process and afterwards, when he was functioning in his acquired gender.

[10] Finally, he decided to change jobs in September 2017. He resigned his employment with the respondent and, since then, has moved to a different Province to live. As stated above, he filed his Application with the Tribunal in November 2017.

THE LAW

[11] At a preliminary hearing the Tribunal focuses upon the matter of delay in filing an application in accordance with Section 34 of the *Code*, which sets out a one year limitation period for an individual to bring an application as follows:

> 34. (1) If a person believes that any of his or her rights under Part I have been infringed, the person may apply to the Tribunal for an order under section 45.2,
>
> (a) within one year after the incident to which the application relates; or
>
> (b) if there was a series of incidents, within one year after the last incident in the series.
>
> 34. (2) A person may apply under subsection (1) after the expiry of the time limit under that subsection if the Tribunal is satisfied that the delay was incurred in good faith and no substantial prejudice will result to any person affected by the delay.

[12] A plain reading of section 34 of the *Code* is that timely Applications are those which are filed within one year of the last (or only) allegation of discrimination. Untimely Applications are barred, unless they can establish a "series of incidents" or they can establish a "good faith" explanation in accordance with section 34(2) of the *Code*.

[13] When considering whether the allegations constitute a series of incidents within the meaning of section 34(1)(b) of the Code, the Tribunal generally considers the following factors:

- Whether there is an ongoing series of incidents or whether there is a single act of alleged discrimination with continuing effects: see *Garrie v. Janus Joan Inc*., 2012 HRTO 1955;
- Whether the incidents involve fresh steps taken by the parties, with each step giving rise to a separate alleged breach of the Code: see *Visic v. Ontario Human Rights Commission*, 2008 CanLII 20993 (ON SCDC);
- Whether the alleged discriminatory incidents are part of a pattern or series of incidents of a similar nature or character; and

- Whether any gap of a year or more interrupts the series of incidents.

see, e.g.: *Savage v. Toronto Transit Commission*, 2010 HRTO 1360; *Chintaman v. Toronto District School Board*, 2009 HRTO 1225; and *Killeen v. Soncin Construction*, 2013 HRTO 350.

ANALYSIS

The parties' submissions regarding the matter of timeliness

[14] Both parties agreed that the allegations relating to the period between November 2016 and 2017 are in time and are, therefore, properly before the Tribunal.

[15] The respondent alleged that the series of allegations relating to the earlier period, ranging from October 2014 to November 2016, and describing the applicant's interactions with his fellow workers and communications from time to time with health and safety staff and managers, are out of time and do not amount to a series of events. Therefore, he stated that these allegations should be dismissed on the grounds of timeliness.

[16] The applicant disagreed. He stated that the discriminatory actions and events that he described, including the intrusive and often offensive questions and comments that he faced from fellow workers and the ineffective interventions and accommodations offered by management, while he was transitioning, amount to a series of events and should therefore be considered together with the later timely allegations. In making this statement, the applicant asked me to consider the Tribunal's jurisprudence and in particular focus on *Garrie v. Janus Joan Inc*., 2012 HRTO 1955.

Series of incidents

[17] The applicant stated that from the time that he had made it known that he was transitioning until the time of his resignation he regularly faced comments and intrusive questions about what was happening to him and how that made him feel. This was coupled with a delay in management providing him with the accommodations and supports that company policy mandated and he should have been able to expect.

[18] He described his regular and frequent communication to and with the health and safety manager without any appropriate actions being taken to protect him and meet his identified and expressed needs. He stated that the events formed a pattern of discrimination, which made his workplace at best extremely uncomfortable and at times almost intolerable.

[19] Although all the alleged incidents arose from the single fact of his disclosure that he was transitioning, the actions of his fellow workers and of his supervisors resulted in his facing a series of discriminatory events. I am prepared to accept the applicant's allegation that, in accordance with the *Garrie* analysis, each time the applicant was subjected to an intrusive or offensive comment, such an event could be deemed to be a new incident of discrimination.

[20] In the Application, the applicant described in some detail the comments, questions and negative allegations and observations that he received from fellow workers about gender identity and gender expression such as the anticipated anatomical changes that he was seeking through surgery; the comments about "what it takes to be a guy" and why he is not that; the issues relating to his use of gender-appropriate washrooms and change rooms at the workplace; and his voice as it changed during the transition process.

[21] The particulars of these allegations cover the period between October 2014, when he officially informed his workplace of his impending transition and name change to September 2017, when he resigned.

[22] The only temporal gap in these events was the two months' period in February to March 2015, when he underwent the related surgery.

[23] The respondent countered the reference to the series of incidents by stating that there was not enough detail in the allegations in terms of who were the individuals involved, what was it that they actually did that amounted to discrimination, and how did these allegations involve the "directing minds of the corporation" between 2015 and 2017.

Without such particulars, the Tribunal cannot, in the opinion of the respondent, accept that the allegations amount to a series of events.

[24] The respondent further stressed that in accordance with section 46(3)(1) of the *Code*, the corporate respondent is not liable for the alleged actions of the employees and therefore, the allegations do not implicate the liability of the respondents. While acknowledging the fact that all the allegations relate to and arise from the applicant's gender transition, the respondent stated that they do not create a link to the alleged breach of the *Code*.

[25] In response to these concerns, the applicant stated that, in order to determine whether all these events over the period of time cited in the Application form a series of events, the allegations should be considered at a merits hearing. The applicant asked me to consider the statement in *Grange v. Toronto (City),* 2014 HRTO 633 at para. 53, which states the following:

> The last incident is an allegation of discrimination and it appears to be in time. The relationship between the last incident and each incident in the series and whether or not the applicant will be successful in advancing these allegations is a matter to be determined at hearing on the basis of real evidence.

[26] Based on the above, and the parties' mutual agreement that the allegations starting in November 2016 are timely, I also find that the Application, as a whole, is in time and the allegations amount to a series of incidents, as required by section 34(1)(b) of the *Code*. Therefore, they will, in their entirety, be considered at a merits hearing.

[27] In order to complete the analysis of all the issues that the parties raised at the preliminary hearing and in case there is a concern about my finding above, I also considered the matter of good faith explanation and prejudice to the respondent. These were also addressed at the preliminary hearing.

Good faith explanation

[28] Subsection 34(2) of the *Code* allows that an Application filed outside of the time limit may proceed if the Tribunal is satisfied that the delay was incurred in good faith. In order to satisfy the Tribunal that a delay was incurred in good faith, an applicant must do more than show an absence of bad faith. Rather, the applicant must provide the Tribunal with a reasonable explanation as to why he or she did not pursue his or her rights under the *Code* in a timely manner. A reasonable explanation must substantiate that the applicant acted with all due diligence. See *Miller v. Prudential Lifestyles Real Estate*, 2009 HRTO 1241.

[29] The respondent stated that the applicant's statement that he was afraid to do more than he was already doing by speaking to the health and safety person from time to time does not amount to a good faith explanation, which the *Code* demands for a delayed Application. The Tribunal's jurisprudence has certainly stated that fear does not amount to a good faith explanation.

[30] The applicant countered this argument by referring to the fact that he spoke to both the health and safety as well as management personnel and continued to hope for action. Once it became clear that there would be no resolution to the issues that he raised, he ended up resigning.

[31] In spite of the above, I find that the applicant has not satisfied the test for offering a good faith explanation for the delay in filing his Application, given that it is clear that he was aware of the *Code* and of the process for alleging a breach.

[32] Since I find that there is no good faith explanation offered, I do not need to address the matter of whether proceeding to the merits of the Application represents a prejudice for the respondent.

DECISION

[33] The Application is in time and the applicant's allegations include a series of events, as required in section 34(1)(b) of the *Code*.

[34] Therefore, the Application will continue in the Tribunal's process to a merits hearing.

Dated at Toronto, this 21st day of December, 2020.
"Signed by"

_____
Eva Nichols
Member