HUMAN RIGHTS TRIBUNAL OF ONTARIO

B E T W E E N:

Tonka Misetich

Applicant

-and-

Value Village Stores Inc.

Respondent

-and-

Ontario Human Rights Commission

Intervenor

DECISION

Adjudicator: Jennifer Scott

Date: September 20, 2016

File Number: 2013-15612-I

Citation: 2016 HRTO 1229

Indexed as: **Misetich v. Value Village Stores Inc.**

APPEARANCES

Tonka Misetich, Applicant	)	Self-represented
Value Village Stores Inc., Respondent	)	Kathryn Bird, Counsel
Ontario Human Rights Commission, Intervenor	)	Cathy Pike, Counsel (written submissions)

INTRODUCTION

[1] This Application alleges discrimination with respect to employment because of family status contrary to the *Human Rights Code*, R.S.O. 1990, c. H.19, as amended (the "*Code*"). More specifically, the applicant alleges that a proposed change to her work schedule to accommodate her physical restrictions discriminated against her on the basis of her eldercare responsibilities. The applicant concedes that the proposed schedule change accommodated her physical restrictions.

THE FACTS

[2] The applicant commenced employment with the respondent in April 2006 at its Niagara Falls store. The store manager for that location is Tony Serra (the "store manager").

[3] The applicant was hired as a part-time sales clerk working at the front of the store in retail. Her duties included: keeping the retail floor, dressing room, washrooms, and check stands neat and orderly; providing fast, efficient and accurate checkout service; acknowledging customers within a 10-foot radius; making announcements over the P.A. system; answering the telephone in a business-like manner; and assisting customers with their shopping needs. In this position, the applicant worked days, evenings and on-call.

[4] In or around June 2010, the applicant moved to a production position in the back of the store. This position involved sorting items, evaluating them for quality and condition, pricing the items, hanging the items on racks, and moving the merchandise to the retail floor. In this position, the applicant worked straight days, Monday to Friday. The applicant worked more hours in production.

[5] The work in production is more physically demanding than the work in retail. The respondent's normal practice is to move production employees to retail when they require accommodation for physical restrictions.

[6] In January 2013, the applicant developed repetitive strain injury to her left hand and arm. A functional abilities form ("FAF") was completed by her family doctor on January 9, 2013. The FAF indicated that the applicant had the following restrictions: no bending/twisting repetitive movement with her left wrist and arm, limited use of her left hand, and no lifting with her left hand and arm for 14 or more days.

[7] On January 10, 2013 (the letter incorrectly states 2012), the store manager wrote to the applicant and offered temporary, modified duties that would fit her physical restrictions. These duties included cash, rolling racks, general maintenance, light general recovery and other customer service related activities as necessary, in the front of the store. The applicant was advised that she was expected to return to work on January 11, 2013, at 2:00 p.m. The applicant was advised further that her shifts and hours might vary based on the needs of the business and could include days, nights and weekend shifts.

[8] The applicant declined the respondent's offer of modified duties on January 16, 2013. She returned the January 10, 2013 letter to the store manager with a hand-written note on the letter which stated the hours would place a hardship on the applicant because she prepared evening meals for her mother.

[9] The applicant provided a further medical note from her doctor dated January 29, 2013 that indicated a restriction of no heavy lifting with the applicant's left arm.

[10] A further FAF was completed by the applicant's family doctor on February 14, 2013. It confirmed the January restrictions for 14 or more days.

[11] On February 14, 2013, the applicant sent a note to the Niagara Falls store where she stated the following:

> I am available to work 7 30 – 4, 8 – 4 30 or the occasional 10 – 6 30 shift (cash) Mon. – Fri. I am unable to work evenings, weekend or on call shifts. To try and force me to work these shifts would completely change the terms of my employment. I care for an elderly (86 year old) parent & my "family status" is such that I can only work the above mentioned shifts.

[12] On June 28, 2013, the store manager sent the applicant a registered letter regarding her failure to provide medical evidence to support her ongoing absence from work, as well as her failure to provide medical evidence to support her request for accommodation as a result of her eldercare responsibilities. The respondent enclosed a physician's statement for the applicant's doctor to complete. The respondent required the following medical evidence from the applicant regarding her eldercare responsibilities:

a. You are the primary caregiver for your parent requiring elder care;

b. The parent requiring elder care is unable to safely perform the duties which are described in the letter you wrote dated February 14, 2013;

c. There is no one other than yourself who is able to provide the care you describe in the letter dated February 14, 2013;

d. You have taken all reasonable steps to self-accommodate and/or resolve the conflict created by the parent who requires elder care.

[13] The applicant responded in writing to this letter on July 4, 2013. The applicant indicated that she was asking to work her normal daytime, weekday shift to take care of her eldercare responsibilities. The applicant stated further that the respondent's temporary job offer changed her shift, which made meeting her eldercare obligations a problem. She stated that the requirement to provide evidence that she had taken all reasonable steps to self-accommodate or resolve conflict created by a parent who requires elder care was insulting and offensive. The applicant stated: "My elderly parent has not created any "conflict" with respect to my work duties or shift times; Value Village has created the conflict by changing my normal work hours as a result of my work-related injury". The applicant took the position that she would not share her elderly parent's confidential and private medical information with the store manager.

[14] On July 8, 2013, the store manager sent a second registered letter to the applicant. The respondent requested the applicant provide a physician's statement to validate her continued absence from work. The respondent also advised the applicant that she was required to provide "bona fide evidence (medical or legal) to verify working

evenings, weekends and/or “on call” shifts would cause (the applicant) undue hardship due to these responsibilities”. The applicant was given 10 business days to comply with these directives.

[15] On July 9, 2013, the applicant advised the store manager in writing that she had seen her doctor that day and that he would complete the forms. She advised the respondent that she was still having problems with her left hand, arm and shoulder and was on a waiting list for physiotherapy at the hospital.

[16] On July 19, 2013, the applicant wrote to the store manager again. She advised the respondent that she saw her doctor that day: he was busy and would get the forms as soon as he could.

[17] The applicant’s family doctor completed the physician’s statement on July 19, 2013. It confirmed the applicant continued to have restrictions with her left shoulder and arm for a further 12 months. The applicant was able to work 3-4 hours per day, every other day, for 2-3 days per week. The applicant provided this note to the store manager on July 22, 2013.

[18] On August 19, 2013, the applicant’s doctor provided the following note:

> This is to confirm that Tonka Misetich cannot work outside her normal hours because she has to take care of her mother.

[19] On August 22, 2013, the applicant and the store manager agreed that the applicant would return to work on Tuesday, September 3, from 1:00 p.m. to 4:30 p.m. and Friday, September 6, from 1:00 p.m. to 4:30 p.m., and would call the store for her weekly schedule thereafter. The agreement indicated the applicant would work within the guidelines of her physical capacities form. She would work mainly on cash, with some general recovery, fitting room and light dusting.

[20] The applicant provided the August 19, 2013 doctor’s note to the store manager during the August 22, 2013 meeting. The store manager told the applicant that he would

pass the note on to Sheri Blankinship, the WC and Property Claims Manager for the respondent (the “claims manager”).

[21] On August 30, 2013, the claims manager wrote to the applicant regarding the physician’s statement provided in relation to the applicant’s care of her mother. The claims manager did not accept the statement because she believed the doctor was the applicant’s doctor, not the mother’s doctor. The claims manager requested evidence, other than from the applicant, that there were no reasonable alternatives available to care for her mother beyond 5 p.m. Monday to Friday and the entire weekend. She also requested medical evidence from the applicant’s mother’s doctor confirming the applicant was required to care for her mother after 5 p.m. in order to prevent a serious compromise to her mother’s health.

[22] In the August 30, 2013 letter, the applicant was advised that her failure to cooperate with the respondent’s directives may be viewed as insubordination and could put her employment in jeopardy. The claims manager stated:

> I strongly recommend for you to either accept the modified sales clerk duties and shifts offered to you, or provide acceptable evidence to support your request for accommodation due to your family responsibilities.

[23] In early September, the applicant completed two handwritten notes directed to the store manager and the claims manager. In the first note dated September 3, 2013, the applicant sought clarification in writing as to whether the respondent was committed to accommodating her pursuant to the requirements of the *Code* or whether the offer of employment was temporary during the busy Halloween season, before returning to work.

[24] In the second note dated September 4, 2013, the applicant advised the respondent that her family doctor was also her mother’s family doctor. The applicant sought clarification as to the information requested of the mother’s doctor.

[25] Both notes were provided to the store manager on or about September 4, 2013.

[26] The applicant did not work the scheduled September shifts.

[27] On September 16, 2013, the store manager sent the applicant a third registered letter requesting medical documentation which included: (a) confirmation that the care provided to her mother before 5:00 p.m. Monday to Friday to ensure her mother's health and safety was not available after 5:00 p.m. or during weekends; (b) confirmation that the applicant had done everything reasonable and within her control to find alternate care for her mother after 5:30 p.m. and during weekends; (c) confirmation that her mother required care after 5:00 p.m. and on weekends to ensure her mother's health and safety was not jeopardized. The applicant was advised that her failure to return to work on the modified duties provided and/or her failure to provide acceptable evidence to support her request to be accommodated due to family responsibilities would result in the termination of the applicant's employment because of job abandonment. The applicant was given until September 26, 2013 to comply with these directives.

[28] On September 24, 2013, the applicant provided a handwritten note to the store manager, the claims manager and the district manager advising them that her doctor was on vacation until September 30, 2013, and that she was not abandoning her position.

[29] On October 1, 2013, the store manager terminated the applicant's employment for job abandonment.

[30] On October 1, 2013, the applicant attempted to provide the following doctor's note to the store manager:

> This is to confirm that Tonka Misetich is care giver of her mother. The hours she worked for the past several years (Mon – Fri 7:30 am to 4:30 pm) suit her elderly mother's needs.

The note was not accepted by the store manager.

[31] There is no evidence the applicant looked for work after her termination.

ANALYSIS

Relevant *Code* provisions

[32] The following *Code* provisions are relevant to this case:

> 5(1) Every person has a right to equal treatment with respect to employment without discrimination because of ….family status.
>
> 11(1) A right of a person under Part I is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the member is a member, except where,
>
> (a) the requirement, qualification or factor is reasonable and *bona fide* in the circumstances; or
>
> (b) it is declared in this Act, other than in section 17, that to discriminate because of such ground is not an infringement of a right.
>
> (2) The Tribunal or a court shall not find that a requirement, qualification or factor is reasonable and *bona fide* in the circumstances unless it is satisfied that the needs of the group of which the person is a member cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

[33] In section 10(1) of the *Code*, "family status" is defined as "the status of being in a parent and child relationship".

Family Status

[34] The Federal Court of Appeal in *Canada (Attorney General) v. Johnstone*, 2014 FCA 110 ("*Johnstone*"), held that the ground of family status in the *Canadian Human Rights Act* includes the status of being in a parent/child relationship, as well as the obligations that flow from that relationship. This is how the ground of family status has been applied under the *Code*.

Tests for Family Status Discrimination

[35] Different courts and administrative decision-makers have applied different tests for family status discrimination and within that ground, different tests for childcare and eldercare. The case law on family status discrimination is unsettled. The Ontario Human Rights Commission (the "Commission") has provided written submissions setting out its position on the appropriate test for family status discrimination. I have taken this opportunity to clarify what I believe is the correct test for family status discrimination based on well-established human rights principles. Before I do so, I would like to summarize the case law. I would note that the Tribunal is not bound by decisions from other administrative decision-makers and courts from outside Ontario.

[36] In *Johnstone* at para. 93, the Federal Court of Appeal developed a specific test for establishing family status discrimination. The Court of Appeal held that in order to establish discrimination, in the context of childcare, a claimant must prove:

a. The child is under his or her care and supervision;

b. The childcare obligation at issue engages the individual's legal responsibility for that child, as opposed to personal choice;

c. The individual has made reasonable efforts to meet those childcare obligations through reasonable alternative solutions, and that no such alternative solution is reasonably accessible; and

d. The impugned workplace rule interferes in a manner that is more than trivial or insubstantial with the fulfillment of the childcare obligation.

[37] At paragraph 70, the Court of Appeal held the childcare obligations protected under the ground of family status are those which a parent cannot neglect without engaging his or her legal liability.

[38] In *Health Sciences Association of British Columbia v. Campbell River et al.*, 2004 BCCA 260 at para. 39, the British Columbia Court of Appeal held family status discrimination will be made out when a change in a term or condition of employment

imposed by an employer results in “a serious interference with a substantial parental or other family duty or obligation”.

[39] In *Devaney v. ZRV Holdings Limited*, 2012 HRTO 1590 at para. 117, the Tribunal held to make out a case of discrimination on the basis of family status, the applicant must establish that the respondent’s workplace rule (attendance requirements) had an adverse impact on the applicant because of absences that were required as a result of the applicant’s responsibilities as his mother’s primary caregiver. The Tribunal held if it is the employee’s choice rather than family responsibilities that prevent the employee from meeting the attendance requirements, discrimination is not established.

[40] In *Power Stream Inc. and I.B.E.W., Local 636 (Bender) (Re)*, (2009) 186 L.A.C. (4th) 180 (“*Power Stream*”), the arbitrator proposed the following questions to determine family status discrimination in that case:

a. What are the relevant characteristics establishing the grievors’ family status?

b. What are the adverse effects complained of and is it reasonable to expect that the *Code* offers protection against the particular adverse effect of the Employer’s action on each grievor?

c. What prompted the adverse effect on the grievor – a change in the Employer’s rule or a change in the characteristics of the grievor’s family status?

d. What efforts have the grievors made to self-accommodate their conflict? Have they rejected options at self-accommodation that they should reasonably be expected to have made?

e. In light of the answers to all of these questions taken together, is it reasonable to make finding of discrimination necessitating an inquiry into whether the Employer is able to accommodate the adverse effects of the discrimination.

[41] In *Ontario Public Service Employees Union (Bharti) v. Ontario (Natural Resources and Forestry)*, 2015 CanLII 19330 at para. 28, the arbitrator followed the

Johnstone test. The arbitrator held legal responsibility in eldercare is the obligation to provide “necessaries of life”.

[42] In my view, these cases have attempted to narrow the ambit of the ground of family status by developing specific tests for discrimination on that basis. This was done because of the real concern that not every negative impact on a family obligation, or conflict between a family and work obligation, is discriminatory. I agree with that concern. Where I part ways with these decisions is the notion that there is a different test for family status discrimination than for other forms of discrimination. I say this for the following reasons.

[43] One, the test for discrimination is the same in all cases. An applicant must establish that he or she is a member of a protected group, has experienced adverse treatment, and the ground of discrimination was a factor in the adverse treatment. There is no principled basis for developing a different test for discrimination depending on the prohibited ground of discrimination alleged.

[44] Two, different tests for family status discrimination have resulted in inconsistency and uncertainty in the law. Moreover, some of the tests are more stringent than others, resulting in different outcomes depending on the test that is followed.

[45] Three, by developing different tests, the test for family status discrimination has become, perhaps inadvertently, higher than for other kinds of discrimination. For example, in *Johnstone*, the Court of Appeal held the childcare obligation at issue must engage the individual’s legal responsibility for the child, as opposed to a personal choice. The Court of Appeal stated the obligations that are covered are those that a parent cannot neglect without engaging his or her liability. In other words, to neglect those obligations would result in legal sanctions.

[46] There may be many obligations that caregivers have that may not emanate from their legal responsibilities, but are still essential to the parent/child relationship. I agree

with the submissions of the Commission that to limit human rights protection to legal responsibilities imposes an unduly onerous burden on applicants.

[47] Four, the test of legal responsibility is difficult to apply in the context of eldercare. An adult child's legal responsibility to provide care for his or her elderly parent is not as clear as a parent's legal responsibility to care for his or her minor child. In *Bharti*, the arbitrator held the legal responsibility must be providing the necessaries of life for eldercare. This may be a higher test than that applied for childcare. As a result, there may be a different test for childcare and eldercare in the family status case law.

[48] Five, some of the cases have conflated the test for discrimination and accommodation. In *Johnstone*, the Federal Court of Appeal held a claimant had to prove he or she made reasonable efforts to meet childcare obligations through reasonable alternative solutions and that no alternative solution was reasonably accessible, as part of the test for discrimination. In *Power Stream*, this concept was described as the efforts made by an employee to self-accommodate. I do not agree that in order to prove discrimination, an applicant must establish that he or she could not self-accommodate the adverse impact caused by a workplace rule.

What is Discrimination?

[49] The Supreme Court of Canada's decision in *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, defined discrimination as:

> (…) a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society.

[50] The test for discrimination requires an applicant to establish that he or she is a member of a protected group, has experienced adverse treatment, and the ground of discrimination was a factor in the adverse treatment. Discrimination is not made out

simply because the impugned treatment has a negative impact on a member of a protected group. As Justice Abella stated in *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*, [2007] 1 S.C.R. 161 at para. 49:

> (…) there is a difference between discrimination and a distinction. Not every distinction is discriminatory. It is not enough to impugn an employer's conduct on the basis that what was done had a negative impact on an individual in a protected group. Such membership alone does not, without more, guarantee access to a human rights remedy. It is the link between that group membership and the arbitrariness of the disadvantaging criterion or conduct, either on its face or impact, that triggers the possibility of a remedy. And it is the claimant who bears this threshold burden.

[51] Thus, the role of the Tribunal is to determine whether the impugned treatment is discriminatory. In some cases, the discriminatory nature of the treatment will be obvious when the link between the treatment and the prohibited ground of discrimination is established. In other cases, it will not be readily apparent and the Tribunal will have to conduct a more nuanced inquiry to determine whether the distinction actually engages the right to equal treatment under the *Code* in a substantive sense. See *Ontario (Disability Support Program) v. Tranchemontagne*, 2010 ONCA 593.

[52] In order to determine whether the impugned treatment constitutes substantive discrimination, the focus of the inquiry is on the actual impact of the treatment, taking full account of the social, political, economic and historical factors concerning the protected group. "The result may be to reveal differential treatment as discriminatory because of prejudicial impact or negative stereotyping. Or it may reveal that differential treatment is required in order to ameliorate the actual situation of the claimant group". See *Withler v. Canada (Attorney General)*, 2011 SCC 12 at para. 39.

Substantive Discrimination and Family Status

[53] The arbitrator in *Power Stream* gave helpful examples as to the kinds of disadvantage that might and might not constitute discrimination on the basis of family

status. The arbitrator opined that an overtime rule that required an employee to work on an evening where the employee was scheduled to attend an activity with his/her child was not discriminatory. On the other hand, the requirement to perform overtime would have to give way if the employee was required to attend to some medical need of the child. In that case, the arbitrator held that the workplace rule – a shift change – was discriminatory because it forced parents to alter a carefully constructed custody agreement to their detriment.

[54] In order to establish family status discrimination in the context of employment, the employee will have to do more than simply establish a negative impact on a family need. The negative impact must result in real disadvantage to the parent/child relationship and the responsibilities that flow from that relationship, and/or to the employee's work. For example, a workplace rule may be discriminatory if it puts the employee in the position of having to choose between working and caregiving or if it negatively impacts the parent/child relationship and the responsibilities that flow from that relationship in a significant way.

[55] Assessing the impact of the impugned rule is done contextually and may include consideration of the other supports available to the applicant. These supports are relevant to assessing both the family-related need and the impact of the impugned rule on that need. For instance, if the applicant is a single parent, both the family-related need and the impact of the impugned rule on the family-related need may be greater.

[56] Considering the supports available to an applicant may appear to some to be akin to considering whether an applicant can self-accommodate. It is different in a fundamental way. Requiring an applicant to self-accommodate as part of the discrimination test means the applicant bears the onus of finding a solution to the family/work conflict; it is only when he/she cannot that discrimination is established. This is different than considering the extent to which other supports for family-related needs are available in the overall assessment of whether an applicant has met his/her burden of proving discrimination.

[57] Once the applicant proves discrimination, the onus shifts to the respondent to establish that the applicant cannot be accommodated to the point of undue hardship. It is then that one considers whether the applicant cooperated in the accommodation process. The obligation to cooperate includes providing the respondent with sufficient information relating to the family-related needs and working with the respondent in identifying possible solutions to resolve the family/work conflict. Accommodation is a joint process; it is not something that falls solely to the applicant.

Application to this Case

January 10, 2013 modified work offer

[58] On January 10, 2013, the respondent proposed that the applicant move from production at the back of the store to retail at the front of the store to accommodate her physical restrictions. The applicant concedes that this change accommodated her physical restrictions. The move to retail resulted in a change to the applicant's hours as it required her to be available for work on days, evenings and weekends.

[59] Upon receiving the proposal, the applicant asserted the change in hours would create a hardship for her because she had eldercare responsibilities and prepared evening meals for her mother.

[60] Over the next ten months, the respondent requested medical proof from the applicant regarding her mother's care. The questions asked by the respondent were not always identical, but the information sought was similar. Was the applicant the primary caregiver of her parent? What was the care the applicant's mother required? Was the care essential to the mother's health and safety? Were there alternative means to provide this care?

[61] The applicant provided little information to the respondent because she believed the respondent was not entitled to private information about her mother. The applicant was angry that this information was even requested. In January 2013, she told the respondent that she prepared evening meals for her mother. In February 2013, she told

the respondent that she cared for her 86-year old parent. In July 2013, she advised the respondent that she would not share her mother's confidential and private medical information.

[62] On August 19, 2013, the mother's family doctor told the respondent the applicant had to "take care of her mother". On October 1, 2013 (this note was not accepted by the respondent because the applicant had been terminated), the family doctor stated the applicant is the caregiver of her mother and her previous hours "suit her elderly mother's needs". The applicant testified that she advised her mother's doctor not to share personal information about her mother's health.

[63] The applicant baldly asserted to the respondent that the change in hours discriminated against her on the basis of her family status. While the applicant made this assertion, she provided no information to the respondent about the nature of her eldercare responsibilities. The only information that she gave was that she provided evening meals for her mother.

[64] The applicant's ability to provide evening meals for her mother was not adversely affected by the requirement to work days, evenings and weekends. The applicant could have worked these shifts and provided evening meals for her mother, when required, in the same way that she was able to provide a meal in the middle of the day. As a result, the applicant has failed to establish discrimination. In light of this ruling, it is not necessary to consider the issue of accommodation.

[65] For these reasons, the applicant has failed to make out her claim of discrimination.

Allegation of Previous Eldercare Accommodation

[66] During the hearing, the applicant testified that she asked to move to production in 2009 or 2010 because the hours suited her mother's needs. The applicant testified that at that time, she told her supervisor that she had eldercare issues and the production

hours would suit her. The store manager denied any knowledge of the applicant's eldercare issues. The store manager testified that the applicant was moved to production because she had difficulties with cash.

[67] The applicant's time cards show that she had shifts in retail and production in 2009 and 2010, although she worked predominantly in production in 2010. The applicant was formally transferred to production in June 2011. In my view, little turns on this. Even accepting that the applicant moved to production in 2010 because it "suited her mother's needs", this did not preclude the respondent from obtaining information about the applicant's eldercare responsibilities several years later when she refused modified work because of her family status.

Evidence during hearing about eldercare responsibilities

[68] During the hearing, the applicant provided after-the-fact evidence about her mother and her eldercare responsibilities. This evidence, set out below, was never provided to the respondent at the time of the events at issue.

[69] The applicant lives with her mother. She has a sister that lives in Toronto. The applicant and her mother live in a community with seasonal residents. They have no neighbours during the winter.

[70] The applicant testified that when she worked the day shift, she prepared breakfast for her mother, administered her medication and left a cold lunch. When the applicant returned from work, she prepared the evening meal, administered medication and assisted her mother with a bath and then bed. The applicant takes her mother to doctor's appointments. The applicant's mother has been rushed to emergency several times.

[71] The applicant testified that her mother is on seven medications for heart, high blood pressure and cholesterol. English is her mother's second language. The applicant's mother is reverting back to her first language and is becoming forgetful. The

applicant is concerned that these factors make it difficult for her mother to take her medication safely. In her mother's culture, having external care is stigmatized.

[72] Had the applicant provided this information to the employer, the applicant may have been able to establish that the proposed change in hours constituted adverse treatment on the basis of her family status. Had she done so, the respondent may have been obligated to accommodate the applicant's eldercare responsibilities up to the point of undue hardship. That accommodation may have been to permit the applicant to work days in production (if there were tasks the applicant could physically perform) or in retail. However, all of this is theoretical because the applicant did not communicate this information to the respondent.

Termination

[73] It was unclear during the hearing (and in the applicant's pleadings) whether she was asserting her termination was discriminatory. Because there was evidence about the termination, I will address this issue.

[74] The applicant was terminated on October 1, 2013 for job abandonment because she did not work her scheduled shifts in September, pursuant to the August 22, 2013 agreement.

[75] During the hearing, the applicant took the position that the September shifts were revoked by the respondent when it refused to accept the doctor's letter of August 19, 2013.

[76] The applicant testified that she attempted to fax her September 3, 2013 note to the store manager early in the morning on September 3, 2013. She was unable to do so and came into the store around 11:30 that morning. At that time, the store manager gave her the August 30, 2013 letter. The applicant testified that the August 30, 2013 letter made her angry. She testified further that the store manager told her the September shifts were off because the claims manager did not accept the doctor's note.

[77] The store manager testified that he spoke to the applicant the morning of September 3, 2013. She told him that unless she had guaranteed hours for November and December, she was not coming in that day and was not abandoning her job. The store manager told the applicant to come in because he needed to give her a letter (the August 30, 2013 letter).

[78] In my view, the evidence of the store manager is more credible than the applicant's evidence. The applicant admitted that she attempted to fax her September 3, 2013 note to the store manager the morning of September 3. The note clearly indicates the applicant was not returning to work until she received confirmation that she would be accommodated past the Halloween season. It is not credible that after attempting to fax this note to the store manager, she was content to start work a few hours later. The applicant went to the store at the request of the store manager. She was given the August 30, 2013 letter. The letter made her angry. It is also not credible that upon receiving the letter, she was willing to work. The applicant was given notice that she could be terminated for abandoning her position. The applicant sent a note to the store manager, the claims manager and the district manager on September 24, 2013 which said she was "in no way abandoning" her position. The applicant did not say that she could not have abandoned her position because her scheduled shifts were revoked. I therefore find the applicant refused to work on September 3 and 6, 2013.

[79] On September 16, 2013, the respondent again advised the applicant to provide acceptable medical evidence to support her request to be accommodated due to family responsibilities. The applicant was advised that if she failed to either return to work on the modified duties offered on January 11, 2013 or failed to provide the required evidence, her employment would be terminated due to job abandonment. The applicant was given until September 26, 2013 to comply with these directives.

[80] The applicant did not provide the required information and did not return to work. Her employment was terminated on October 1, 2013. Had the respondent accepted the doctor's note of October 1, 2013 before terminating the applicant's employment, the

information provided in that note was still insufficient. It simply confirmed the applicant's regular hours suited "her elderly mother's needs".

[81] The applicant's family status and the assertion of her human rights were not factors in the decision to terminate her employment. The applicant's employment was terminated because she failed to comply with the directives given by the respondent and refused to work the September shifts. In fact, the applicant had not attended work since January 2013. I find that she had abandoned her position.

Conclusion

[82] The applicant took an intransigent position regarding her human rights. When the respondent attempted to move the applicant to less physically demanding work in retail and schedule her on a variety of shifts, the applicant took the position that it could not do so because of her family status. The applicant believed that all she needed to do was to assert her family status and that would be the end of it. The applicant was wrong. The applicant was required to provide sufficient information to substantiate her eldercare responsibilities. She failed to do so.

[83] This case must be decided on the basis of what occurred at the time of the alleged discrimination and not on the basis of the information provided by the applicant during the hearing. The respondent heard about the applicant's eldercare responsibilities for the first time during the hearing. At the time of the events at issue, the applicant told the respondent only that she prepared evening meals for her mother. The applicant could have worked days, evenings and weekends and still have provided evening meals for her mother. As such, the applicant has failed to establish that the modified shifts proposed by the respondent in January 2013 discriminated against her on the basis of her family status.

[84] It is for these reasons that the Application is dismissed.

ORDER

[85] The Application is dismissed.

Dated at Toronto, this 20th day of September, 2016.

"Signed by"

_____
Jennifer Scott
Vice-chair