CANADA
PROVINCE OF SASKATCHEWAN

COMPLAINT
COMPLAINT UNDER PART II OF
THE SASKATCHEWAN HUMAN RIGHTS CODE

BETWEEN:

NANCY GRAHAM

Complainant

- and -

COUNTRY LEATHERS MANUFACTURING LTD.
and PHIL MARZO

Respondents

DECISION

1. INTRODUCTION

The Complainant, Nancy Graham, in a complaint dated February 22, 2000 alleges that the Respondent, Country Leathers Manufacturing and the Respondent, Phil Marzo refused to continue to employ her and otherwise discriminated against her due to a disability contrary to Section 16(1) of *The Saskatchewan Human Rights Code*.

Ms. Graham states in the complaint that the Respondents refused to continue to employ her due to the fact that she has shoulder tendonitis.

The Respondents take the position that Ms. Graham was dismissed from employment due to a poor attitude, and an inability to do the work reasonably required. The Respondents contend that Ms. Graham was given a reasonable time to learn the job, however, simply was not able to progress satisfactorily through the expected learning curve. A decision was ultimately made to discontinue her employment despite the investment by the employer in having trained her.

The Human Rights Commission was represented by it's counsel, Milton Woodard, Q.C. and the Respondents were represented by Ron Mills. Nancy Graham was unrepresented, but indicated at the hearing that she wished to rely solely on the representation provided by the Human Rights Commission in respect of her complaint.

2. FACTS IN EVIDENCE

Nancy Graham testified on behalf of herself and the Human Rights Commission. The Respondents called Phil Marzo, Ian Tilsley, Lorraine Boger, Denise Waite, Gene Parker and Marlene Lipchuk.

Country Leathers Manufactures Ltd. in Birch Hills, Saskatchewan is a small glove manufacturing operation, which employs: Mr. Phil Marzo as General Manager, one cutter, three to four sewers, and shares a receptionist with another company. On April 1, 1999, the Complainant began employment with the Respondent, Country Leathers Manufacturing Ltd. She was the only person with the primary responsibility to cut the leather. Initially there were three sewers. A fourth sewer was hired in September 1999. Prior to commencing employment, the Complainant was in a car accident and developed tendonitis in her left shoulder. She was seeing Dr. Malan and had never been referred to a specialist. The tendonitis was not cured, but was controlled. The Complainant received cortisone shots commencing February 1999, and continuing with the shots every three months.

The Complainant was able to work with these steps to control the pain and limit any effect on her ability to work. As often as possible the cortisone shots were given just before her days off, giving her time to recover. The Respondent, Country Leathers Manufacturing Ltd. trained the Complainant, and was satisfied with her work during the period of time that she was taking these steps to control the tendonitis. Country Leathers Manufacturing Ltd. gave the Complainant a raise on two occasions. She started at $6.00/hour. She later received a raise to $6.50/hour, and then yet another raise to $7.00/hour.

By August 1, 1999 the Complainant was experiencing pain in her right shoulder and was diagnosed as having suffered further tendonitis. The Complainant says that Dr. Malan felt the cortisone treatments had controlled the tendonitis in the left shoulder, and recommended that the same treatment be applied to the right shoulder. Once the tendonitis developed in both shoulders, Ms. Graham was no longer able to keep the tendonitis from interfering with her ability to work as a cutter. In August 1999, she was in constant pain. She was prescribed painkillers, and other drugs, which she believes were anti-inflammatory medications. The cortisone shot for her right shoulder was scheduled for September 15, 1999. On August 18, 1999 the pain was so bad that she was unable to do the job. In early August she had been able to continue by altering the way she did

the job. For example, she moved the dyes from being kept up above her to being at her left side where she would not have to reach over head. By August 18, 1999 the pain was very bad, and she advised Mr. Marzo of the problem. On August 19, 1999 she left work early and on August 20, 1999 she saw her doctor. She continued to work until September 2, 1999 with pain. She saw Dr. Krusch on September 3, 1999 and received a new prescription which she thought worked better in controlling the pain. She saw Dr. Malan again on September 9 or 10, 1999.

The Complainant stated that she told Mr. Marzo she would have a cortisone shot on September 15, 1999 and as a result would require some time before it "kicked in". She provided her employer with a form she required for a bank loan. She believes that the form required verification of employment. When she came back to her employer on Friday, she was told that the employer no longer had a position for her. She states that Mr. Marzo indicated he didn't think that she was physically able to do her job and he didn't want ongoing problems. He indicated that he believed he owed her one week severance pay, and accordingly, provided one week notice to her before terminating her employment. She did receive the cortisone shot on September 15, 1999.

Ms. Graham was able to find alternate full time employment as of February 1, 2000. She has not required a second cortisone shot for her right shoulder since September 1999 to the date of hearing. She indicates that she was able to work for the further week commencing Monday, September 20, 1999.

Ms. Graham's new employment was with Life Touch Photographers doing school photography, which required her to haul heavy photography equipment. She experienced no difficulty with this physical labour.

Prior to obtaining new full time employment she did work for about five days at McMaster's Photographers. She advises that she was simply paid out of the till and received $300.00. McMaster's Photographers is no longer in business. In September of 2000, Ms. Graham and her husband moved to Alberta where there were more and better employment opportunities for her husband.

Ms. Graham's attitude at work was not positive during the month of August 1999. Mr. Marzo was not sure whether or not he would continue her employment. He didn't reach his decision to

terminate her employment until after he learned of the shoulder tendonitis problems, the treatment required and the fact that Ms. Graham did not know how quickly the inability she experienced in August 1999 would improve. He stated in writing that the reason for dismissal was because she was not "physically capable". No steps were taken by the employer to enquire as to how any disability might be accommodated.

3. ISSUES

(3)1 Was Ms. Graham dismissed by her employment for a reason that violates *The Human Rights Code* specifically due to a disability as defined therein?

(3)2 In the event, Ms. Graham was fired due to a disability and/or in violation with *The Human Rights Code*, has the employer established that it made an effort of accommodate the disability of the Complainant to the extent contemplated by *The Human Rights Code*?

(3)3 In the event the employer did not fulfill its obligation to accommodate the Complainant, what is the appropriate remedy?

4. ANALYSIS

Was Ms. Graham dismissed by her employment for a reason that violates *The Human Rights Code* specifically due to a disability as defined therein? "Disability" is defined in *The Human Rights Code* as including any degree of physical disability. It is clear and undisputed that Ms. Graham injuries resulting from the automobile accident prior constitute a "disability" within the meaning of s. 2 of the Code (see *Par 8 Real Canadian Superstore v. United Food and Commercial Workers* (1999) 182 D.L.R. (4th) 223 and *Eyerley v. Seaspan International Ltd.* (2001) C.H.R.D. No. 45).

Ms Graham did suffer limited ability to function, particularly in August of 1999 while physicians were taking steps to treat the tendonitis. There was a period of time where she was not able to work at all. Throughout other periods of time she was able to do the work but with pain, and by doing

her best to time the treatments so as to allow her to use her days off to re-cooperate as she has stated to allow the shot to "kick in". On at least one occasion she was able to work the day following a cortisone shot.

In August of 1999, Mr. Marzo did see a change in her attitude. He indicates that she had asked for a third raise and was turned down and that he simply decided that her attitude was such that she should be dismissed. I do not believe Mr. Marzo is being forthright. I find it difficult to believe, as Mr. Marzo states, that after being told of Ms. Graham's pain and difficulties by August 18, 1999 and of the medication she was on, he did not "put two and two together" so to speak, to see that it could be the injury, pain and medication could be what was effecting her work. Although he says it never occurred to him, he later testified that once he learned of the medication that Ms. Graham was on, he advised her that he did not believe she should be operating the equipment. This evidence suggests to me that he could, in fact, put two and two together and see that the pain, medication and the tendonitis were relevant, and did have an effect on her ability to meet his expectations.

Mr. Marzo states that he fired Ms. Graham because of her attitude, yet it is clear in the termination provided in writing, the reason stated for terminating her employment was that she was not "physically capable" of doing the work. Her attitude is not mentioned. Mr. Marzo stated that Ms. Graham was not able to learn quickly enough, and was not progressing as quickly as had been hoped with her training. The fact that he provided her with two raises within a short period of time also contradicts this explanation for the dismissal.

There was evidence provided by other employees suggesting that Ms. Graham had complained of pain prior to the date she had to leave work. There was some suggestion of antagonism between the employer and Ms. Graham with respect to a Workers' Compensation Claim and/ or her expressed hopes of being able to successfully make such a claim. It appears that what finally "broke the straw" was the employer learning of disability with potentially ongoing detrimental effects on Ms. Graham's ability to complete the tasks required of her.

In *R. v. Bushnell Communications (1975),* 1 O.R. (2d) 442, (Ontario H.C.) aff'd (1975), 4 O.R. (2d) 288 (Ontario C.A.), the Court suggests that it was clear from the evidence there had been antagonism between the employer and this particular employee and there were other reasons why he had been terminated. The Court states:

> "If the evidence satisfies it beyond a reasonable doubt that membership in a trade union was present to the mind of the employer in his decision to dismiss, either as a main reason **or one incident to it**, or as of many reasons regardless of priority, s. 110(3) of the *Canada Labour Code* has been transgressed."

The Court of Appeal agreed, stating that the question is "What motivated the employer to take the action which he in fact took with respect to the employee?" *The Bushnell Communications* case is a case where the employer was charged under *The Canada Labour Code*. However, the approach in finding that a breach of the Code does not have to be the sole reason for dismissal but could be one of many has been adopted in a number of Human Right's cases. See *Bauer v. Crossroads Family Restaurant* 9 C.H.R.R. 4951 at paragraph 38034. There are a number of cases that illustrate that it will be a rare situation where there are not many factors that have influenced an employer in deciding to dismiss an employee. In such situations a Board of Inquiry need only conclude that the characteristic protected by the Code is a reason for the treatment received by the employee. The discriminatory reason must be present but it doesn't have to be the only motivation of the employer. See *Hendry v. Liquor Control Board of Ontario* (1980), 1 C.H.R.R. 160 at paragraph 1457 and *Scott v. Foster Wheeler Ltd.* (1985), 6 C.H.R.R. 2885 at paragraph 23520 aff'd C.H.R.R. 4179 (Ont.Div.Ct.) at paragraph 33020.

The discovery that Ms. Graham had a perceived disability which may have ongoing detrimental effects on the employer was a factor, if not the factor, in the decision to dismiss her.

Having made the determination that Ms. Graham had an ongoing health problem which may or may not be able to be controlled on a reliable basis, the employer submits that it is a small company and that there was no way it could accommodate Ms. Graham. The cutter is the front end of the production line. When Ms. Graham had missed days from time to time in the past, Mr. Marzo filled in for her however, it meant that he was taken away from his duties as General Manager. Certainly the effect is harder on a small company than one large enough to call upon other employees or other people within a large city to take the cutters position while Ms. Graham was recovering. Further the employer submits that there simply were not other jobs within the company to give to her. An argument had been made that Mr. Marzo's friend held an interest in another corporation, and this

other corporation could have been expected to find a position for the Complainant. The other corporation does not have the obligation to hire other people's employees, nor is it reasonable for an employee to expect this.

However, in the case at bar, after the August 18, 1999, there are things Mr. Marzo could easily have done. Mr. Marzo could have at least inquired, and asked for Ms. Graham's consent to inquire into the prognosis and how it might effect her employment. Further, Country Leathers Manufacturing Ltd. could have given Ms. Graham an opportunity to show whether or not she was capable of returning to her employment. The employer submits that after he gave her notice that her employment had terminated she had done terrible work during that last week. There was testimony from another employee that Ms. Graham was angry enough that she said she was going to "cut like shit". Rather than serve notice of termination, it would not have been a huge burden upon the employer to inquire into the prognosis and to allow a return to work in order to evaluate whether or not the effect of the disability was such that she could not be accommodated. Unfortunately, the employer made no efforts, no inquiries and never allowed any such evaluation to occur. The employer cannot now claim an inability to accommodate in these circumstances.

In *Central Okanagan School District #23 v. Renaud*, (1992) (2 S.C.R. 970), Mr. Justice Sopinka said that more than mere negligible effort by the employer is necessary to satisfy the duty to accommodate. This is reviewed in *Conte v. Rogers Cablesystems Ltd.* (1999), 36 C.H.R.R. D/403 (Can.Trib.) at page D/417 paragraph 77 going on to state "And the duty involves more than just investigating whether an employee can do the existing job. It is the employer who has charge of the workplace and thus is expected to initiate the process of accommodation. At the very least, the employer is required to engage in an examination of the employee's current medical condition, the prognosis for recovery and the employee's capabilities for alternative work." It is clear on the evidence that the employer made no such inquiry and did no such evaluation as to the employees abilities for the work she had been doing or for alternative work.

In *McArthur v. M & A Ventures Ltd. (c.o.b. "Esso Consumer Sales Centre")*, the British Columbia Council of Human Rights Victoria, British Columbia per B. Humphreys on July 17, 1996 found on the issue whether the Respondent discriminated against the Complainant on the basis of her sex and/or her physical disability contrary to Section 8 of the *Human Rights Act* that "What I must do is to determine whether, on the balance of probabilities, the Complainant's physical

disability was a factor in the Respondent's decision to terminate her employment: See *Holloway v. Clairco Foods Ltd.* (1983), 4 C.H.R.R. D/1454 (B.C. Bd. Inq.)." The complainant's physical disability in this case was undergoing a double mastectomy and the evidence indicated that the Complainant's physical disability was a significant factor in the Respondent's decision to terminate her employment and the Council subsequently found in favour of the Complainant.

In conclusion, I have found that Ms. Graham has suffered a disability, that Country Leathers Manufacturing Ltd. as her employer has engaged in a discriminatory practice and that accordingly, Ms. Graham is entitled to a remedy.

Section 31(7) and (8) of the code provide:

> "(7) Where, at the conclusion of an inquiry, the board of inquiry finds that the complaint to which the inquiry relates is substantiated on a balance of probabilities, the board may, subject to subsections (9), (9.1) and (10), order any person who has contravened any provision of the Act, or any other Act administered by the commission, to do any act or thing that in the opinion of the board constitutes full compliance with that provision and to rectify any inquiry caused to any person and to make compensation therefore...
>
> (8) Where a board of inquiry finds that:
>
> (a)a a person has willingly and recklessly contravened or is willfully and recklessly contravening any provision of this Act or any other Act administered by the commission; or
>
> (a)b the person injured by a contravention of any provision of this Act or any other Act administered by the commission has suffered in respect to feeling or self-respect as a result of the contravention;

> the board of inquiry may, in addition to any other order it make under subsection (7), order the person who has contravened or is contravening that provision to pay any compensation to the person injured by that contravention that the board of inquiry may determine, to a maximum of $5,000.00."

Mr. Woodard, on behalf of the Commission submitted that in addition to an order placing the Complainant in the position she would have been in had she not lost her employment between September 19, 1999 and February 1, 2002. She may also be awarded compensation for the injury to her feelings and self-respect.

I am in agreement with the findings of the Tribunal, in *Premakumar v. Air Canada* (2002), 42 CHRR D/63 at para. 107, and Desormeaux 2003 CHRT 2 para.128 and *Parisien v. Ottawa-Carleton Regional Transit Commission* 2003 CHRT 10 that the $5,000.00 maximum award must be reserved for the very worst cases that fall within the range of cases in which such awards are warranted.

In Human Rights cases, where a complaint of discrimination is found to be substantiated, it is the duty of the Tribunal to attempt to restore a complainant to the position that he or she would have been in, but for the discrimination (see *Canada v. Morgan*, [1992] 2 F.C. 401 at 414-15 (C.A.)).

Pursuant to my powers under the *Code*, I therefore order that Country Leathers Manufacturing Ltd pay to Nancy Graham compensation for lost wages in the amount of $2,911.12, pre-judgment interest of $548.09, and special compensation for injured feelings and self-respect of $3,500.00 for a total monetary award of $6,959.21.

Dated at the City of Prince Albert, Saskatchewan this 4th day of April, 2003.

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Ms. Randi Arnot
BOARD OF INQUIRY