



HUMAN RIGHTS TRIBUNAL OF ONTARIO

B E T W E E N:

Kimberly Clarke

Applicant

-and-

Mohamed Elsabakhawi Drugs Ltd.

Respondent

DECISION

Adjudicator: Karen Mason

Date: December 5, 2024

File Number: 2021-47905-I

Citation: 2024 HRTO 1733

Indexed as: Clarke v. Mohamed Elsabakhawi Drugs Ltd.

APPEARANCES

Kimberly Clarke, Applicant)	Sehmani Kingsun-Leo, Paralegal
)	
Mohamed Elsabakhawi Drugs Ltd.,)	Craig Colrain and Marina
Respondent)	Sarpong, Counsel
)	

INTRODUCTION

[1] This Application alleges discrimination with respect to services because of race, colour and disability, contrary to the *Human Rights Code*, R.S.O. 1990, c. H.19, as amended (the “Code”).

[2] The Application was filed on November 30, 2021.

[3] In due course, the Tribunal scheduled a hearing on the merits of the Application to take place by video conference.

[4] At the hearing, the Tribunal received documentary evidence and heard testimony from 5 witnesses, including the applicant, her friend, the owner of the respondent (the “Owner”), the Pharmacy Assistant and the Pharmacy Manager.

[5] For the reasons that follow, I find on a balance of probabilities that the applicant has established discrimination by the respondent on the ground of disability.

LEGAL FRAMEWORK

[6] The relevant sections of the *Code* provide as follows:

1 Every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability.

[7] To successfully establish discrimination, an applicant must prove on a balance of probabilities that their protected characteristic was a factor in the respondent’s actions. A balance of probabilities means that the Tribunal must determine whether it is more likely than not that the violations of the *Code* alleged by the applicant occurred. See *Peel Law Association v. Pieters*, 2013 ONCA 396 and *Ontario (Disability Support Program) v. Tranchemontagne*, 2010 ONCA 593.

[8] In assessing the credibility of witnesses, I applied the traditional test set out in *Faryna v. Chorney*, 1951 CanLII 252 (BC CA), namely, whether the alleged facts were in “harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.”

[9] I was also mindful of the Ontario Court of Appeal’s comments on credibility and reliability in *R. v. Morrissey*, 1995 CanLII 3498 (ON CA):

Testimonial evidence can raise veracity and accuracy concerns. The former relate to the witness's sincerity, that is his or her willingness to speak the truth as the witness believes it to be. The latter concerns relate to the actual accuracy of the witness's testimony. The accuracy of a witness's testimony involves considerations of the witness's ability to accurately observe, recall and recount the events in issue. When one is concerned with a witness's veracity, one speaks of the witness's credibility. When one is concerned with the accuracy of a witness's testimony, one speaks of the reliability of that testimony. Obviously a witness whose evidence on a point is not credible cannot give reliable evidence on that point. The evidence of a credible, that is honest witness, may, however, still be unreliable.

DECISION AND ANALYSIS

[10] It is the applicant’s testimony that she suffers from asthma. In support of this, the applicant submitted a doctor’s note dated March 18, 2022, stating that she has asthma. While the applicant did not provide any medical evidence contemporaneous with the alleged discriminatory event in the Application, the applicant submitted a history of prescriptions filled by the respondent for a Ventolin inhaler dating back to 2014. I find that the applicant has asthma and that asthma is a disability as defined in section 10 (1) (a) of the Code. See *Moulton v. Leisureworld Caregiving Centre*, 2009 HRTO 1575, *Krywyj v. Steele*, 2022 HRTO 8.

[11] The applicant self identifies as a Black Canadian woman.

[12] The applicant testified that, on September 12, 2021, she was experiencing symptoms relating to her asthma. She called the respondent, which operates a Shoppers

Drug Mart store located in a shopping centre in Mississauga, to fill her prescription for a Ventolin inhaler because the inhaler she had was almost empty.

[13] It is the applicant's uncontested evidence that when she entered the store, she observed two customers, who she described as white, not wearing masks. These customers were not in the pharmacy area of the store.

[14] The applicant testified that when she went to the pharmacy counter, the Pharmacy Assistant did not have a record of the applicant calling in advance to have her prescription filled and told her that there would be a twenty minute wait. The respondent did not challenge this evidence.

[15] It is the applicant's evidence that she told the Pharmacy Assistant that she was having difficulty breathing and asked her to have her prescription for an inhaler filled as quickly as possible. The Pharmacy Assistant testified that she did not recall interacting with the applicant then later testified that she did not recall the conversation she had with the applicant. She also testified that she did not recall if the applicant told her she was having an asthma attack and she testified that the applicant did not address a medical condition with her. I prefer the applicant's evidence regarding her interaction with the Pharmacy Assistant over the Pharmacy Assistant's evidence which I find to be contradictory and therefore less credible than the applicant's evidence. I find that the applicant told the Pharmacy Assistant that she was experiencing difficulty breathing due to her asthma.

[16] According to her testimony, the applicant initially wore a mask but subsequently lowered the mask and wore it around her neck, without removing it completely, because of her difficulty breathing. The applicant's friend testified that she was speaking on the phone with the applicant who told her she was uncomfortable wearing her mask because of her breathing difficulties. The friend advised the applicant to lower the mask. It was the testimony of the Pharmacy Assistant that the applicant was not wearing a mask; however, it was also her testimony that she did not see the applicant until she was in the

line up to pick up her prescription. The Pharmacy Manager also testified that the applicant was not wearing a mask, however he did not observe her enter the store.

[17] I find that the applicant wore a mask when she entered the store, but while in the pharmacy area removed it from her face so that her nose and mouth were not covered because she was experiencing difficulty breathing due to her disability, asthma.

[18] The applicant testified she was the only customer in the pharmacy area who was not wearing a mask. The respondent did not contest this evidence. I find that the applicant was the only person in the pharmacy area who was not wearing a mask.

[19] The Pharmacy Manager testified that he was conducting Covid tests. Two customers complained to him about the applicant not wearing a mask, walking back and forth in front of the counter attempting to skip the line and talking loudly on her phone. He further testified that the Pharmacy Assistant informed him that other customers were complaining about the applicant not wearing a mask. The Pharmacy Manager said that he did not see the applicant himself until he approached her at the pharmacy counter.

[20] The Pharmacy Assistant also testified that other customers complained about the applicant's behaviour while she waited for her prescription to be filled and that she reported these complaints to the Pharmacy Manager.

[21] The applicant does not contest this evidence, although she did say that she understood another customer had agreed to her skipping the line. She also stated that customers were scattered in the pharmacy area and there were no clear lines.

[22] The Owner was not present in the store that day. He testified that during Covid, it was a stressful time in the community and the pharmacy staff were overworked due to occupancy limits, conducting tests, and receiving complaints from customers when someone was not wearing a mask.

[23] I find that the Pharmacy Manager received complaints from customers about the applicant directly from customers and through the Pharmacy Assistant who failed to tell the Pharmacy Manager that the applicant was having difficulty breathing due to her disability, asthma.

[24] It was the Owner's evidence that the store policy was that, if a person had a medical exemption from their doctor, they didn't have to wear a mask and they did not need to provide proof of this exemption. He also testified that wearing masks was mandatory and that there was signage to inform customers of that. The Owner testified that if a customer indicated they had a medical condition that exempted them from wearing a mask, service to them would be expedited and they would be offered accommodated services such as delivery so that they could be served without being in the store without a mask.

[25] It was the Pharmacy Assistant's evidence that everyone had to wear a mask unless they were medically exempt. She stated the policy was to offer a mask to any customer who was not wearing a mask. If the customer did not agree to wear the mask, then she would ask the pharmacist on duty to engage in a conversation with the customer. She further testified that she did not recall engaging with the applicant about not wearing a mask before referring her to the Pharmacy Manager.

[26] The Pharmacy Manager testified that the respondent's policy on masking at the time of the incident was in accordance with the bylaws. He said that all patients had to wear a mask unless they had medical conditions. The Pharmacy Manager stated that if patients informed the respondent that they had a medical condition which prevented them from wearing a mask, it was "100% okay".

[27] It is uncontested that, after the applicant paid for her prescription, the Pharmacy Manager came to the counter offered the applicant a mask. The Pharmacy Manager testified that when he offered the mask he said to the applicant, "this is for you".

[28] The applicant testified she was speaking with her friend on a phone call while she was waiting for her prescription to be filled. They disconnected the phone call, and the friend subsequently called the applicant on a video call. It is not clear from either the applicant's testimony or the applicant's friend's testimony how much time elapsed between the phone call and the video call.

[29] The applicant's evidence is that the Pharmacy Manager told the applicant that if she was not willing to wear a mask she had to leave immediately. The applicant told the Pharmacy Manager that she was having an asthma attack and he responded that "she was talking". She told him that while she was talking, her chest was tight, she was wheezing and having difficulty breathing. The Pharmacy Manager told her, in a stern voice, that lots of people have medical conditions and are still wearing masks.

[30] The applicant's friend testified that she also has asthma and was helping the applicant calm her breathing. It is her evidence that when she video called the applicant, she could see that the applicant was struggling to breathe. The friend also testified that the Pharmacy Manager challenged the applicant when she told him she was having an asthma attack by asking her how she was able to breathe.

[31] The respondent contests the applicant's evidence that she was having an asthma attack because she was able to carry on a phone conversation with her friend and conversations with the Pharmacy Manager.

[32] Both the Pharmacy Manager and the Pharmacy Assistant testified that they were trained to recognize asthma and it was policy to offer a customer suffering an asthma attack an emergency inhaler. They both testified that they did not believe the applicant was having an asthma attack and did not offer her an emergency inhaler. The respondent did not adduce any evidence about the training staff received on assessing asthma attacks.

[33] There is conflicting evidence about the conversation that ensued between the applicant and the Pharmacy Manager however, it is agreed that the Pharmacy Manager

escorted the applicant to the store entrance. The applicant states that the Pharmacy Manager was rude and demanded the applicant leave the store. She also states that she was respectful, did not yell or raise her voice to him or use profanity, however she agrees that she insulted him by saying he has no common sense, but stated this was in response to the Pharmacy Manager insulting her.

[34] It is the friend's uncontested testimony that the applicant told the Pharmacy Manager several times that she was having difficulty breathing and that he was insisting she put on a mask. While she said that the applicant and the Pharmacy Manager were "going back and forth" she did not say what the tone of the conversation was.

[35] The Pharmacy Manager's evidence is that the applicant was swearing and used a racial slur about his ethnicity by calling him a "Paki" which was not challenged by the applicant.

[36] The Pharmacy Assistant testified that she was not able to hear all the words spoken between the applicant and the Pharmacy Manager because she was busy serving customers, however she stated that there was "shouting and loud conversation". She said that the applicant used improper language but was not comfortable repeating the exact words she heard.

[37] I am persuaded that there was a heated exchange between the applicant and the Pharmacy Manager, and that the applicant was escorted to the store entrance by the Pharmacy Manager.

[38] It is uncontested that the Pharmacy Manager told the applicant that she was banned from the store, however, she continued to obtain her prescription from the respondent until March 2022, when she was able to move her prescription to another provider. It is her uncontested evidence that she did not wear a mask when she picked up those prescriptions.

Did the applicant receive adverse treatment because of her race and colour?

[39] The applicant asserts that the Pharmacy Manager was discriminating against her because of her race and colour by the way he spoke to her and by banning her from the store.

[40] The respondent refers me to the principles applicable when assessing allegations of racial discrimination set out in paragraph 111 of *Peel law Association v. Pieters*, 2013 ONCA 396 (“*Pieters*”) which states as follows:

- (a) The prohibited ground or grounds of discrimination need not be the sole or the major factor leading to the discriminatory conduct; it is sufficient if they are a factor;
- (b) There is no need to establish an intention or motivation to discriminate; the focus of the enquiry is on the effect of the respondent's actions on the complainant;
- (c) The prohibited ground or grounds need not be the cause of the respondent's discriminatory conduct; it is sufficient if they are a factor or operative element;
- (d) There need be no direct evidence of discrimination; discrimination will more often be proven by circumstantial evidence and inference; and
- (e) Racial stereotyping will usually be the result of subtle unconscious beliefs, biases and prejudices.

[41] The applicant asserts that she was respectful throughout the conversation although she admits she did return insults after she believed the Pharmacy Manager insulted her. The applicant argues that the manner in which the Pharmacy Manager approached her initially and his continued conduct were due, at least in part, to assuming stereotypical behaviours often assigned to black women by healthcare professionals. The applicant refers me to the Canadian Centre for Policy Alternatives undated report entitled “Black Women in Canada” and the Ontario Human Rights Commission report dated December 2004 entitled “Racial inequality to access to health care services” in support of this argument. While I recognize that there is racial inequity in the provision of health care services, each alleged event of racial discrimination must be determined on its own merit.

[42] It is the applicant's position that she was treated differently than two other customers who didn't wear masks and were white. She testified that they were not in the pharmacy area and that she was the only customer in the pharmacy area who was not wearing a mask. However, there was no evidence to show that the Pharmacy Manager had responsibility to ensure customers outside of the pharmacy area were adhering to the mask policy and was treating the applicant differently than those customers. There is no evidence that the Pharmacy Manager saw these customers.

[43] It is the respondent's position that the Pharmacy Manager did not know the applicant's race or colour before he approached her at the pharmacy counter and therefore his approach was not informed by racial stereotypes. Additionally, they argue that the Pharmacy Manager did not target the applicant but was responding to requests from customers and the Pharmacy Assistant who were concerned because the applicant was not wearing a mask.

[44] There is no evidence in front of me in this case that the applicant was different from the other customers in the pharmacy because of her race and colour. There was no evidence presented identifying the race or colour of the other customers.

[45] I am not persuaded that the Pharmacy Manager approached the applicant for any reason other than that she was not wearing her mask. I find that the Pharmacy Manager's reason for approaching the applicant about wearing a mask was in response to customer and staff concerns about the applicant not wearing a mask and was not discriminatory because of her enumerated grounds.

[46] The applicant argues that the Pharmacy Manager's conduct and description of the applicant's behaviour during the conversation they had was informed by the stereotype of the "angry black woman".

[47] I am mindful of the Owner's description of the stresses customers and his staff faced during the COVID pandemic and that staff were overworked managing the additional work caused by the pandemic. In my view, the escalation in the conversation

between the applicant and the Pharmacy Manager was most likely caused by these stresses and not racial stereotypes.

[48] For these reasons, when I weight all of the evidence, I find on a balance of probabilities that the applicant has not established that the experience she had while attending the respondent's store was discriminatory in its effect on the grounds of race and colour contrary to section 1 of the *Code*.

Did the applicant receive adverse treatment because of her disability?

[49] The applicant claims, and I have found above, that she is a person with a disability. It is her evidence that she normally wore a mask but on the day in question, she was experiencing difficulty breathing due to her disability. She attended the respondent's store for the express purpose of filling a prescription to alleviate the symptoms she was experiencing.

[50] The respondent's witnesses were inconsistent in their descriptions of the respondent's policy in respect of customers with disabilities which prevented them from wearing masks. According to the Owner, mask wearing was mandatory, and the accommodation provided was for the service, in this case a prescription, to be expedited and/or alternative modes of service delivery offered.

[51] Both the Pharmacy Manager and the Pharmacy Assistant testified that customers who were medically exempt did not need to wear masks in the store.

[52] Despite these differences, all the respondent's witnesses agreed the customer would be accommodated based on verbally identifying they were exempt from wearing a mask and did not need to provide a doctor's note or other documentation to prove that they had a valid exemption.

[53] When the applicant spoke to the Pharmacy Assistant, she told her that she was having difficulty breathing. The Pharmacy Assistant did not expedite the applicant's order

and instead told her that there would be a 20 minute wait. Although the Pharmacy Assistant testified that the store procedure was for her to offer the customer a mask and tell the Pharmacy Manager or pharmacist on duty if the customer did not agree to wear a mask, the Pharmacy Assistant did not offer a mask to the applicant and she did not relay any concern to the Pharmacy Manager until other customers complained. Although the applicant had told her she was having trouble breathing, the Pharmacy Assistant did not tell the Pharmacy Manager that the applicant may have a medical reason for not wearing a mask.

[54] The Pharmacy Manager did not accept the applicant's explanation about why she was unable to wear a mask. Instead, he preferred his own assessment of her disability and insisted she wear a mask. He failed to consider that her explanations about why she was unable to wear a mask was a request for an accommodation.

[55] I note that the applicant did receive the prescription for which she came to the store and that she did not wear a mask while she was in the store, however this was not an accommodation to the requirement to wear a mask, but rather due to the inattentiveness of the Pharmacy Assistant and the respondent's policy requiring a pharmacist or pharmacy manager to deal directly with customers who were not wearing masks.

[56] I do find that the applicant was treated adversely when the Pharmacy Manager challenged the applicant's claim that she could not wear a mask because she was experiencing difficulties breathing due to her disability, despite the respondent's policy to accept a customer's declaration of a disability preventing them from wearing a mask. In my view, this was one of the reasons the discussion between the Pharmacy Manager and the applicant became heated and resulted in the applicant being escorted out and banned from the store.

[57] For these reasons, when I weigh all of the evidence, I find on a balance of probabilities that the respondent's refusal to accept the applicant's explanation that she could not wear a mask due to her disability created an adverse impact and was discriminatory in its effect because of her disability contrary to section 1 of the *Code*.

REMEDY

[58] An award of compensation for injury to dignity, feelings and self-respect recognizes the inherent value of the right to be free from discrimination and the experience of victimization. In *ADGA Group Consultants Inc. v. Lane*, 2008 CanLII 39605 (ON SCDC), 91 OR (3d) 649, (ON S.C.D.C.), the Divisional Court confirmed that the factors to be considered in setting the amount of damages include: humiliation, hurt feelings, the loss of self-respect, dignity and confidence by the applicant, the experience of victimization, the vulnerability of the applicant, and the seriousness of the offensive treatment.

[59] In *Arunachalam v. Best Buy Canada*, 2010 HRTO 1880, the Tribunal stated as follows regarding the jurisprudence dealing with awards for injury to dignity, feelings and self-respect, at paragraphs 52-54:

(...) The Tribunal's jurisprudence over the two years since the new damages provision took effect has primarily applied two criteria in making the global evaluation of the appropriate damages for injury to dignity, feelings and self-respect: the objective seriousness of the conduct and the effect on the particular applicant who experienced discrimination: see, in particular, *Seguin v. Great Blue Heron Charity Casino*, 2009 HRTO 940 (CanLII), 2009 HRTO 940 at para. 16 (CanLII).

[60] The first criterion recognizes that injury to dignity, feelings, and self-respect is generally more serious depending, objectively, upon what occurred. The more prolonged, hurtful, and serious harassing comments are the greater the injury to dignity, feelings, and self-respect.

[61] The second criterion recognizes the applicant's particular experience in response to the discrimination. Compensation will generally be at the high end of the relevant range when the applicant has experienced particular emotional difficulties as a result of the event, and when his or her particular circumstances make the effects particularly serious. Some of the relevant considerations in relation to this factor are discussed in *Sanford v. Koop*, 2005 HRTO 53, at paras. 34-38.

[62] Neither party provided submissions in respect of remedies.

[63] In the Application, the applicant, who was self-represented at the time, requested two to three million in damages. In the appendix attached to the Reply, the applicant, who was then represented by paralegal, stated, “While the Applicant agrees that she has not suffered the damages sought in terms of the amount claimed in her original application, Clarke does maintain that she has endured much palpable damage”, however, the applicant did not file any request to amend the remedies that she was seeking.

[64] A review of the remedies awarded by the Tribunal when an applicant experiences discrimination in respect of services because of disability range from \$500 to \$15,000. See *Schussler v. 1709043 Ontario*, 2009 HRTO 2194 (\$500); *Robdrup v. Werner Property Management*, 2009 HRTO 1372 (\$200); *Sprague v. RioCan Empress Walk Inc.* 2015 HRTO 942, (\$1,000); *Smolak v. 1636764 Ontario*, 2009 HRTO 1032 (\$2,000); *Sweet v. 1790907 Ontario Inc. o/a Kanda Sushi*, 2015 HRTO 433 (\$2,500); *Hill v. Bani-Ahmad*, 2014 HRTO 937, (\$5,000); *P.G. v. Groupe Restaurant Imvescor Restaurant Group Inc. o/a Baton Rouge Restaurant*, 2016 HRTO 500 (\$12,000); *Bourdeau v. Kingston Bazar*, 2012 HRTO 393 (\$15,000), *Smith v. Strictly Bulk*, 2019 HRTO 1260 (\$500), *Bain v. River Poker Tour*, 2015 HRTO 734 (\$5,000), and *Austen v. Senior Tours Canada Inc.*, 2013 HRTO 1417 (\$5,000).

[65] The Tribunal is mindful of the age of many of these cases and that it must consider the effects of inflation when determining the appropriate level of compensation. See *Madkour v. Alabi*, 2017 HRTO 436 at paragraph 118.

[66] While the applicant testified that she experienced difficulty in moving her prescription to another store, she also stated that she attended the respondent four times after September 12, 2021, without wearing a mask. She was not challenged about not wearing a mask during those visits. She did not utilize the accommodated services of having her prescription delivered or curbside pickup to avoid going into the store. Without

minimizing the applicant's experience on September 12, 2021, I find that she provided no evidence of those events having a lasting impact on her.

[67] Considering all the circumstances of this case, I award \$10,000 to the applicant as compensation for their *Code* rights infringement, and for the injury to the applicant's dignity, feelings and self-respect.

[68] The applicant did not request any non-monetary remedies and therefore none are ordered.

ORDER

[69] Within 30 days of the date of this Decision, the respondent shall pay to the applicant \$10,000 in compensation for injury to dignity, feelings and self-respect.

[70] The applicant is entitled to post-judgment interest on this amount calculated in accordance with section 129 of *the Courts of Justice Act*, R.S.O. 1990, c. C. 43, commencing 30 days after the date of this decision.

Dated at Toronto, this 5th day of December, 2024.

“Signed by”

Karen Mason
Vice-chair