

Date Issued: April 9, 2024

File: CS-000953

Indexed as: Del Monte v. Kwantlen Polytechnic University, 2024 BCHRT 111

IN THE MATTER OF THE *HUMAN RIGHTS CODE*,
RSBC 1996, c. 210 (as amended)

AND IN THE MATTER of a complaint before
the British Columbia Human Rights Tribunal

BETWEEN:

Sabrina Del Monte

COMPLAINANT

AND:

Kwantlen Polytechnic University

RESPONDENT

REASONS FOR DECISION
APPLICATION TO DISMISS COMPLAINT
Section 27(1)(c)

Tribunal Member:

Christopher J. Foy

Counsel for the Complainant:

Steven Barker

Counsel for the Respondent:

Colin Gibson

I INTRODUCTION

[1] Sabrina Del Monte filed a complaint against her employer Kwantlen Polytechnic University [**University**] alleging that they discriminated against her based on mental disability contrary to the *Human Rights Code*.

[2] Ms. Del Monte is a full-time regular faculty member in the University's School of Business. She alleges that she was adversely treated by the University due to a "perceived and real medical disability". Ms. Del Monte's allegations principally relate to the University unilaterally placing her on a paid leave of absence on February 27, 2018. She says this caused her emotional distress and injury. Further, Ms. Del Monte alleges the University "failed to accommodate my medical issues and assist with my gradual return to work."

[3] The University denies discriminating and applies to dismiss the complaint under s. 27(1)(c) of the *Code*. The University argues that there is no reasonable prospect the complaint will succeed at a hearing. The University argues that it is reasonably certain to prove that it has a solely non-discriminatory explanation for its actions and denies refusing to provide accommodation to Ms. Del Monte.

[4] The issues I must decide on this application are whether:

1. there is no reasonable prospect Ms. Del Monte will establish at a hearing that she was adversely impacted in her employment and that either a perceived or actual mental disability was a factor in that adverse treatment; and
2. it is reasonably certain the University will establish it met its duty to accommodate Ms. Del Monte.

[5] For the reasons that follow, I deny the University's application to dismiss the complaint.

[6] While I do not refer in my decision to all the information filed by the parties in relation to this application to dismiss, I have considered it and thank the parties for their respective submissions. The following is not a complete recitation of the parties' submissions, but only

those necessary to come to my decision. Given the nature of the application, I make no findings of fact.

II BACKGROUND

[7] Ms. Del Monte began working for the University in 2013 and is a full-time faculty member in the School of Business. The University is a unionized workplace and Ms. Del Monte is a member of the Kwantlen Faculty Association [**KFA**].

[8] On January 24, 2017, Ms. Del Monte's mother passed away. Ms. Del Monte took a leave of absence until on or about April 2017 when she returned to work.

[9] In the fall of 2017, the Associate Dean of the School of Business attests that she began receiving "very concerning information from students and faculty members regarding Ms. Del Monte's behaviour.". Much of the information conveyed that Ms. Del Monte was acting out-of-character from how she was prior to her January to April 2017 leave.

[10] On December 5, 2017, the Associate Dean received an email from a faculty member and colleague of Ms. Del Monte. This email set out concerns that Ms. Del Monte "...has become increasingly erratic, inappropriately emotional, and what I would call paranoid/conspiracy-oriented....Long story short, I'm concerned about Sabrina's mental health...".

[11] On December 13, 2017, the Associate Dean met with two second-year students who described Ms. Del Monte as no longer approachable after returning from her leave of absence. The students described her as "terse" and "short", whereas she used to be warm.

[12] The Associate Dean connected with the Dean of the School of Business and the University's Director of People Relations in the Human Resources Department. They decided that "perhaps she had a difficult semester and just needed some time off which we hoped would be solved by the upcoming holiday break."

[13] As a result of additional input from a student and a faculty member, it became clear to the Associate Dean in January 2018 that the holiday break had not resolved concerns about Ms. Del Monte.

[14] The Associate Dean met with another second-year student in January 2018 who told her Ms. Del Monte was “not herself” and that her behaviour was “unrecognizable from first year”.

[15] On January 11, 2018, the Associate Dean received an email from a faculty member that Ms. Del Monte had recently cried in front of a student. The Associate Dean shared this information with the Director of People Relations.

[16] The following day, the Associate Dean sent an email to Ms. Del Monte to set up an informal meeting to discuss student complaints. The purpose of the meeting was to “respectfully consider the students’ concerns and explore possible solutions.”. This meeting was eventually set for February 27, 2018.

[17] At the meeting on February 27, 2018, the Associate Dean provided Ms. Del Monte with a letter placing her on a paid leave of absence. [**Leave Letter**]

[18] The Leave Letter set out in part:

We have serious concerns about your behaviour and performance at work and we suspect this may be related to medical issues. As a result, in the best interest of you and of our students, we are placing you on a paid leave of absence effective immediately.

The paid leave of absence is for a period of thirty calendar days or until such time as you are medically cleared to return to work. In order for you to return to your duties, we require you to provide medical documentation to support that you are fit for work.

[19] The Associate Dean says the Leave Letter was prompted in part by the Associate Dean’s fears that Ms. Del Monte was planning to do something at a March 1, 2018 fundraiser that “could embarrass herself, the University, or the students...I felt that we could not risk having Ms. Del Monte at the Fundraiser...”.

[20] According to Ms. Del Monte, prior to receiving the Leave Letter she was never advised by the University either in 2017 or 2018 about any concerns with her medical fitness for work.

[21] Ms. Del Monte alleges the following regarding receiving the Leave Letter and being placed on paid administrative leave:

Kwantlen Polytechnic University's unilateral imposition of administrative leave and abrupt manner in which it was implemented caused me emotional distress and injury. I was caught off guard and utterly shocked by Kwantlen Polytechnic University's conduct. I felt targeted and labelled as "crazy" by an institution that had raised no prior concerns with me. At this point in time my mental health began to deteriorate.

[22] At the end of the 30 days of paid administrative leave, Ms. Del Monte had not provided the University with any medical documentation to support a return to work. On March 28, 2018, Ms. Del Monte requested and was granted 30 days of paid sick leave. This ended on April 29, 2018, at which time Ms. Del Monte went on short-term disability.

[23] On August 24, 2018, Ms. Del Monte went on long-term disability which ended on January 7, 2019, at which time the University returned her to a paid administrative leave pending the outcome of a number of complaints Ms. Del Monte had filed with the University while on leave.

[24] The University's investigations into Ms. Del Monte's complaints concluded in September 2020.

[25] On September 19, 2020, the University contacted Ms. Del Monte to make arrangements for her return to work on December 1, 2020, provided she was medically cleared to return.

[26] As a result of Ms. Del Monte's failure to provide the University with any medical documentation clearing her to return to work by December 1, 2020, the University placed her on an unpaid leave of absence.

[27] On January 5, 2021, the University sent a letter to Ms. Del Monte notifying her that if she did not return a completed medical certificate form to the University by January 15, 2021, the University would consider that she abandoned her employment.

[28] On January 13, 2021, the University received a completed medical certificate from Ms. Del Monte's physician. The doctor indicated Ms. Del Monte was not currently fit to return to full-time duties and it was not known at that time of any specific accommodations required. Further, Ms. Del Monte's physician opined that although her prognosis was good, it was not yet known when she would be medically fit to resume full-time duties.

[29] The University sought further clarification from Ms. Del Monte regarding her fitness to return to work given that they had information she was teaching at BCIT.

[30] On February 10, 2021, Ms. Del Monte's physician provided a medical note setting out the following:

This is to confirm that Sabrina, for health reasons, has not been capable of full time work. She has been capable of part-time work at BCIT which she has done for many years. If Kawantlan [sic] University can give her a position that uses her skills in a respectful and safe environment (not back in the School of Business), she would probably be able to begin a GRTW [Gradual Return to Work] schedule almost immediately.

[31] The University states that at the time the February 10, 2021 medical note was received, the applicable collective agreement required that a faculty member must be vetted by the search committee in a department as being "qualified to teach" courses in that department. The University says that "Ms. Del Monte had neither applied to be, nor been vetted as "qualified to teach" any courses outside the University's School of Business."

[32] Ms. Del Monte accessed 30 days of sick leave from January 13, 2021 – February 11, 2021 and was eligible to apply for short-term disability effective February 12, 2021.

[33] Ms. Del Monte's application for short-term disability benefits was denied and she subsequently notified the University that she wished to return to work because she was without income.

[34] On or about July 14, 2021, the University retained OccuMed Consulting Inc. to provide medical case management services. In a letter from the University to Ms. Del Monte dated July 14, 2021, the University explained that the purpose of retaining OccuMed was to assist in “determining fitness to work status, identifying any restrictions or limitations that may exist, and helping facilitate any modifications or other measures that may be required to accommodate any disability...”.

[35] Ms. Del Monte agreed to participate in the medical case management process which is ongoing. As of the date of this application, she had not returned to work.

III DECISION

[36] Section 27(1)(c) of the *Code* is a gatekeeping provision where the Tribunal has the discretion to dismiss a complaint if it determines that the complaint has no reasonable prospect of success. The Tribunal's role is to assess whether, based on all the material before it, and applying its expertise, there is no reasonable prospect the complaint will succeed at a hearing: *Berezoutskaia v. British Columbia (Human Rights Tribunal)*, 2006 BCCA 95 at paras. 9 and 27; *Workers' Compensation Appeal Tribunal v. Hill*, 2011 BCCA 49 at para. 27 [**Hill**].

[37] To be successful under s. 27(1)(c), the burden is on the respondent to show there is no reasonable prospect of the complaint succeeding. This may be established in two ways. First, if the Tribunal determines there is no reasonable prospect that the complainant will be able to establish one or more elements of the complaint at a hearing, it may dismiss the complaint. The threshold for proceeding to a hearing is low. In circumstances where the respondent disputes one of these elements, the complainant's only obligation is to point to some evidence capable of raising their complaint “out of the realm of conjecture”: *Hill* at para. 27.

[38] Second, the Tribunal may consider a defence in an application under s. 27(1)(c): *Trevena v. Citizens' Assembly on Electoral Reform and others*, 2004 BCHRT 24 at para. 67. Section 13(4) of the *Code* sets out circumstances within which a respondent may prove their actions are justified based on a *bona fide* occupational requirement [**BFOR**]: *British Columbia (Public Service*

Employee Relations Commission) v. B.C.G.S.E.U. [1999] 3 S.C.R. 3 at para. 54 [**Meiorin**]. This test includes establishing that the respondent discharged its duty to reasonably accommodate the complainant's disability.

[39] If it is reasonably certain that a respondent will establish a defence at a hearing of the complaint, then there is no reasonable prospect that the complaint will succeed: *Purdy v. Douglas College and others*, 2016 BCHRT 117 at para. 50.

[40] The requirements to prove discrimination were affirmed by the Supreme Court of Canada in *Moore v. British Columbia*, 2012 SCC 61 at para. 33. The Court held that complainants must show that they have or are perceived to have a characteristic protected from discrimination; that they have experienced an adverse impact in a protected area; and that the protected characteristic was a factor in the adverse impact. The Tribunal refers to this as the complainant's case: *Vik v. Finamore (No. 2)*, 2018 BCHRT 9 at para. 50.

[41] I begin my analysis with the elements Ms. Del Monte would have to prove at a hearing to establish discrimination, recognizing that she need not prove these elements on this application, rather the University must persuade me Ms. Del Monte has no reasonable prospect of doing so. I conclude the University has not shown there is no reasonable prospect of Ms. Del Monte's complaint succeeding. Finally, I will explain why I conclude that it is not reasonably certain that the University will establish they met their duty to accommodate.

1. Mental Disability

[42] Ms. Del Monte's complaint alleges she has a mental health condition that is a disability under the *Code*. Evidence on this application demonstrates Ms. Del Monte suffered from anxiety, depression and insomnia which are recognized as mental disabilities within the meaning of the *Code*: *McConnell v. School District No. 8*, 2014 BCHRT 239 at para. 59.

[43] Given the evidence, I am satisfied that the University has not met their burden to show there is no reasonable prospect Ms. Del Monte will succeed in establishing she had a mental disability protected under the *Code*.

2. Adverse Impact

[44] Ms. Del Monte says she was adversely affected by the University unilaterally removing her from the workplace on February 27, 2018. She says her reputation was tarnished, she wasn't able to continue "with the job I love", was financially prejudiced, made to feel inferior and the imposed leave caused her to suffer "emotional distress and injury".

[45] The evidence sets out that Ms. Del Monte was sent a letter from the University on March 7, 2018 explaining that during the administrative leave she was "not to perform any duties of your faculty position...not to have contact with students, not to attend KPU campuses or KPU events."

[46] The Tribunal has recognized that in some circumstances being placed on an administrative leave can constitute an adverse impact in employment: *Conklin v. University of British Columbia* 2018 BCHRT 130 at para. 46.

[47] The Supreme Court of Canada in *Wallace v. United Grain Growers Ltd.* [1997] 3 S.C.R. 701 at paras. 93-94 has emphasized the following with respect to the importance of work in a person's life:

Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being.

....

Accordingly, any change in a person's employment status is bound to have far-reaching repercussions. In "Aggravated Damages and the Employment Contract", supra, Schai noted at p. 346 that, "[w]hen this change is involuntary, the extent of our 'personal dislocation' is even greater."

[48] Given the evidence on this application, including but not limited to Ms. Del Monte being prohibited from performing any duties of her faculty position and the direction to not attend any University events, which Ms. Del Monte says removed her from the job she loves, the

University has not convinced me that Ms. Del Monte has no reasonable prospect of establishing at a hearing that she was adversely impacted by being placed on an involuntary leave on February 27, 2018.

[49] In addition, Ms. Del Monte claims that she suffered an adverse impact because the University frustrated her return to her work, arguing that the University has made no efforts to try to engage with her and try to canvass reasonable accommodation in a timely manner. Instead the only steps taken, Ms. Del Monte argues, occurred almost three and a half years after she was placed on leave.

[50] Being prevented from returning to work can be an adverse impact in employment: *Kerr v. Boeringher Ingelheim (Canada) Ltd.*, 2011 BCCA 266 at para. 29. [**Kerr**]

[51] The University says that Ms. Del Monte has not suffered an adverse impact because the medical information the University has received indicates she cannot perform the duties for which she is qualified.

[52] There is evidence on this application of the February 10, 2021 medical note from Ms. Del Monte's physician setting out that if she was not placed back in the School of Business she would probably be able to begin a gradual return to work schedule "almost immediately".

[53] The University says that Ms. Del Monte had neither applied to be, nor had been vetted as "qualified to teach" any courses outside the School of Business.

[54] There is no evidence that the University took any steps to assess her capabilities for alternative work or request Ms. Del Monte apply to be vetted to be "qualified to teach" any courses outside the School of Business. Consequently, the University has not convinced me that there is no reasonable prospect of Ms. Del Monte succeeding to establish she was adversely affected by the University failing to canvass reasonable accommodation in a timely manner.

3. Connection Between Disability and Adverse Impacts

[55] The issue is whether Ms. Del Monte has taken out of the realm of conjecture that she was adversely impacted in her employment and her disability or perceived disability was a factor in that adverse impact. The focus is on the effect of the University's conduct, and not its intentions: *Code, s. 2; Robichaud v. Canada (Treasury Board)*, [1987] 2 SCR 84; *Stewart v. Elk Valley Coal Corp.*, 2017 SCC 30 at para. 45.

[56] At a hearing, Ms. Del Monte would not have to prove that her perceived or actual mental disability was the only factor, overriding factor, or even a significant factor in the alleged adverse impact she experienced: *Quebec (Commission des Droits de la personne et des droits de la jeunesse) v. Bombardier Inc.*, 2015 SCC 39 at paras. 45-52; *Stewart v. Elk Valley Coal Corp.*, 2017 SCC 30 at para. 46.

[57] The University says that "Ms. Del Monte's mental health was not mentioned in the February 27, 2018 meeting. Rather, the meeting was about general wellness and fitness.". It is evident however that the University does not seriously dispute that Ms. Del Monte had been experiencing mental health difficulties arising from the death of her mother and she had described challenges at work to the Associate Dean on January 18, 2018 as "overwhelming and daunting".

[58] The University received reports about Ms. Del Monte's uncharacteristic behaviour, it was worried she would do something "embarrassing" at a fundraiser. The University claims it put her on leave out of concern for her well being and that of the students and University as a whole. The University required medical evidence to prove she was fit to return to work before it would let her return. The Leave Letter expressly connected the decision to put Ms. Del Monte on administrative leave to the University's suspicion that she was dealing with medical issues.

[59] I am not persuaded that Ms. Del Monte's allegation, that the University placing her on administrative leave with its alleged adverse impacts was connected to either a perceived or actual mental disability, has no reasonable prospect of success.

[60] Regarding whether Ms. Del Monte has taken out of the realm of conjecture that her disability was a factor in the University's frustration of her return to work by failing to provide

timely accommodation, the British Columbia Court of Appeal has set out the following “common sense proposition” in *Kerr* at para. 33:

if a previously disabled employee says that they wish to return to work and the employer claims to have only information that suggests the employee cannot perform the jobs available, the employer can reasonably be expected to seek clarification as to the employee's actual condition. To fail to do so and refuse to return the employee to work constitutes arbitrary conduct.

[61] As mentioned, the February 10, 2021 medical note from Ms. Del Monte’s physician set out that if she was not placed back in the School of Business she would probably be able to begin a gradual return to work schedule “almost immediately”. It was not until July 17, 2021, approximately a five-month gap, before the University notified Ms. Del Monte that they had retained OccuMed Consulting Inc. to provide medical case management services.

[62] Given this evidence, I am not persuaded that Ms. Del Monte’s allegation that the University frustrated her return to work by failing to provide timely accommodation with its alleged adverse impacts was connected to either a perceived or actual mental disability, has no reasonable prospect of success.

4. Duty to Accommodate

[63] As the University has not met its onus to establish Ms. Del Monte has no reasonable prospect of success in establishing a complainant’s case, the issue I must now decide is whether the University is reasonably certain to establish at a hearing a BFOR defence. I am not convinced that it is reasonably certain to do so.

[64] The University argues that it had a reasonable, non-discriminatory explanation for placing Ms. Del Monte on leave and that there is no reasonable prospect she will succeed in arguing that the failure to return her to work was discriminatory.

[65] The University says that placing Ms. Del Monte on the administrative leave was rationally connected to the performance of her job. The University says it acted appropriately and reasonably to address the situation and was done in good faith. The leave was necessary to

fulfill the purpose of safeguarding students and employees and to determine the factors contributing to her conduct.

[66] *Meiorin* at para. 59 sets out that the focus of the first step “is not on the validity of the particular standard that is at issue, but rather on the validity of its more general purpose.” The University is reasonably certain to establish at a hearing that its general purpose of safeguarding students and employees is a legitimate work-related purpose.

[67] With respect to the second step, there is nothing in the materials that would question that the University had a good faith belief that placing Ms. Del Monte on leave was necessary to fulfill its legitimate work-related purpose. The University is reasonably certain to establish at a hearing this second step of the BFOR test.

[68] However, the University has not convinced me that it is reasonably certain it will establish the third step of the BFOR test.

[69] It is trite law that the duty to accommodate is a process where the University, the KFA and Ms. Del Monte all have obligations. However, the Supreme Court of Canada has ruled that it is the employer that has the primary responsibility for workplace accommodations. The Court stated in *Central Okanagan School No. 23 v. Renaud*, [1992] 2 S.C.R. 970 at para. 39:

Nevertheless, account must be taken of the fact that ordinarily the employer, who has charge of the workplace, will be in the better position to formulate accommodations. **The employer, therefore, can be expected to initiate the process.** The employer must take steps that are reasonable.
(emphasis added)

[70] There is both a procedural component and a substantive component within the duty to accommodate. The procedural component requires the employer to undertake an individualized investigation of accommodation measures and an assessment of an employee’s needs. The substantive component requires the employer to make modifications or provide the accommodation necessary in order to allow an employee to participate fully in the workplace: *Meiorin* at para. 66.

[71] The Tribunal has found that the procedural component imposes a duty on an employer to obtain all relevant information about the employee's disability. That includes "information about the employee's medical condition, prognosis for recovery, ability to perform job duties, and **capabilities for alternate work**": *Gordy v. Painter's Lodge (No. 2)*, 2004 BCHRT 225 at para. 84. (emphasis added)

[72] An employer has a duty to inquire if something reasonably alerts an employer that an employee may have a disability that requires accommodation. This can occur even before an employee explicitly advises an employer of a disability and need for accommodation: *Patzwald v. FMC of Canada Ltd.* 2020 BCHRT 162 at para. 132 where the Tribunal stated:

Generally, an employee is expected to tell their employer about their disability and their need for accommodation in order to enable the employer to fulfil its duty to accommodate. **In some situations, the responsibility shifts to the employer to ask an employee if they need accommodation even if the employee has not explicitly disclosed a disability or requested accommodation. An employer's duty to inquire is triggered if something reasonably alerts them that the employee may have a disability that requires accommodation. In those circumstances, the duty to inquire would be the first step in an employer's duty to accommodate.** (emphasis added)

[73] The University argues that it made the inquiry into whether or not Ms. Del Monte required accommodation through the February 27, 2018 Letter and placing her on administrative leave.

[74] Ms. Del Monte argues that the University unilaterally suspended her with no meaningful enquires beforehand. There is no evidence or arguments by the University about why it would have been an undue hardship to make any enquires into whether or not Ms. Del Monte required accommodation while allowing her to continue working.

[75] The evidence on this application is that the Associate Dean was informed in the fall of 2017 that Ms. Del Monte was acting out-of-character, that a colleague was concerned about her mental health and students found her "terse" and "short", whereas she used to be warm. The Associate Dean was concerned enough to connect with the Dean and the Director of

People Relations in late December 2017 but the University did not reach out to Ms. Del Monte and make any enquiries at that time whether she required accommodation. In the University's reply materials they cite a January 18, 2018 email from Ms. Del Monte to the Associate Dean and state:

The evidence shows that before her leave, the Complainant had been experiencing mental health difficulties from the death of her mother, and she had described challenges at work as "overwhelming and daunting".

[76] In light of the evidence on this application it is open at a hearing for the Tribunal Member to find that the University should have been aware of the possible need to accommodate Mr. Del Monte, if not an actual need for accommodation, by December 2017 triggering the obligation on the part of the University to take active steps to inquire sooner. In addition, on the materials before me, the University has not proven that it would have been undue hardship to seek medical information from Ms. Del Monte while still allowing her to work. Accordingly, the University has not persuaded me they are reasonably certain to prove at a hearing that they satisfied their duty to accommodate.

[77] The University argues that Ms. Del Monte's complaint alleging they failed to accommodate her return to work is premature as they are currently engaged in the accommodation process and in any event the complaint has no reasonable prospect of success because she's not medically cleared to return to work.

[78] Ms. Del Monte argues that the University has made no efforts to try to canvass reasonable accommodation in a timely manner and the only steps taken occurred on July 14, 2021, more than three years after she was put on leave.

[79] Again, there is evidence on this application of the February 10, 2021 medical note from Ms. Del Monte's physician setting out that if she was not placed back in the School of Business she would probably be able to begin a gradual return to work schedule "almost immediately".

[80] The University says that Ms. Del Monte had neither applied to be, nor had been vetted as "qualified to teach" any courses outside the School of Business. There is no evidence that the

University took any steps to assess her capabilities for alternative work or request Ms. Del Monte apply to be vetted to be “qualified to teach” any courses outside the School of Business.

[81] The evidence is not clear as to what the University was doing to accommodate Ms. Del Monte once it received the February 10, 2021 medical note and there is a gap of five months from the time of the February 10, 2021 medical note to the University retaining OccuMed Consulting Inc. I can only consider information that is before me and I cannot consider what additional evidence might be given if there is a hearing: *University of British Columbia v. Chan*, 2013 BCSC 942 at para. 77.

[82] A Tribunal Member hearing the evidence could conclude that Ms. Del Monte’s complaint regarding a failure to accommodate her is not premature and that the University did not follow up in a reasonably timely way to accommodate Ms. Del Monte. As such, the University has not met their onus that they are reasonably certain to establish at BFOR defence at a hearing.

5. Conclusion: s. 27(1)(c)

[83] Given the low threshold under s. 27(1)(c) the University has not demonstrated that there is no reasonable prospect of the complaint succeeding. Further, it is not reasonably certain that the University will establish it discharged its duty to accommodate.

IV CONCLUSION

[84] The University's application to dismiss Ms. Del Monte’s complaint is denied.

[85] I encourage the parties to take advantage of the Tribunal's mediation services to try to resolve this matter by mutual agreement.

Christopher J. Foy
Tribunal Member