

IN THE MATTER OF a Complaint
Pursuant to section 9 of the **Human
Rights Code**, R.S.N.L. 1990, c.H-14

File No. 2711

BETWEEN;

SHERRY NIPPARD

COMPLAINANT

AND:

LAZER and CO. CLOTHING
CORPORATION t/a Jeans Experts

RESPONDENT

Aidan B. Beresford, Q.C. (Adjudicator)

Hearing Date: June 24, 2010

Decision: August 25, 2010

Appearances:

On behalf of the Commission:

Ms. Kimberley Pochini

DECISION OF THE ADJUDICATOR

INTRODUCTION

1. The Complainant, Sherry Nippard, began working in 2003, as a retail sales clerk at the Respondent's retail outlet in the Gander Mall, Gander, Newfoundland and Labrador. She worked on a seasonal basis, usually working from May or June to September, and again from November until the end of December of each year.
2. In November 2005, the Complainant became ill and was ordered off work by her physician. She made an unsuccessful attempt at returning to work in December 2005, when she was again ordered off work by her physician.
3. In April 2006, the Complainant was given a notice of termination of employment on the grounds that she was not reliable and dependable.

4. On May 16, 2006, the Complainant filed a complaint with the Newfoundland Human Rights Commission claiming discrimination on the basis of a mental disability contrary to section 9 of the *Human Rights Code*.

RELEVANT EVIDENCE AND FACTS;

5. On April 3, 2008, the undersigned was appointed as Adjudicator to handle the subject complaint.

6. On May 13, 2008, the Commission was advised that Mr. Gerald Ralph, solicitor, anticipated representing the Respondent in this matter, and that a Fall 2008 date was likely.

7. On June 5, 2008, the Commission confirmed hearing dates for the complaint as February 24-27, 2009, at Gander, NL.

8. Mr. Gerald Ralph, solicitor, notified the Commission, on December 6, 2009, that Lazer and Co. Clothing Corporation t/a Jeans Experts had made an assignment into bankruptcy in late November 2008. In January 2009, Mr. Ralph was instructed by the Trustee in Bankruptcy that he was not to attend the Human Rights hearing scheduled for Gander in February 2009.

9. On February 17, 2009, the Commission advised that discussions had been held with the Complainant who had indicated that she wished to withdraw her complaint because a continuance was adverse to her emotional well-being and she was in the process of moving out-of-province.

10. In July 2009, the Complainant advised the Commission that she wished to proceed with her complaint. At that time, the Complainant was advised by the Commission that because the Respondent had made a bankruptcy assignment, neither the Commission nor the Respondent would be appearing at a Board of Inquiry. The Complainant was also advised that there was little likelihood of recovering damages from the Respondent in the event she should succeed at the hearing.

11. In March, 2010, the Commission proceeded to set the matter down for a hearing on June 17, 2010, at the Commission offices in St. John's, NL, and all parties were notified of that hearing. The Complainant did not contact the Commission to indicate whether she intended to appear at the hearing. The hearing date was later moved back to June 24, 2010 at the Commission offices in St. John's, and notice respecting that change was sent to the Complainant.

12. On June 24, 2010, the matter was called at the hearing room in the Commission's offices in St. John's Newfoundland. Ms. Kim Pochini, Legal Counsel, appeared on behalf of the Commission. No appearances were made by either the Complainant or the Respondent.

13. Ms. Pochini advised the hearing that counsel for the Commission had written the Complainant in the Fall of 2009 to advise her that it was not in the public interest for the Commission to proceed further in this matter. In September 2009, the Commission sent a letter to the parties and advised the Complainant that she was free to proceed on her own with respect to the complaint. At that time, the Complainant was given the file, and she was advised that the Respondent would not be appearing because of the bankruptcy. Additionally, the Complainant was advised that the only remedy that would be available in the circumstances, if she were successful at the hearing, would be a non-monetary award. The Complainant was requested to notifying the Commission within 30 days of her intentions with respect to matter. No response was received. Further correspondence sent to the Complainant on January 5, 2010 and January 22, 2010 remained unanswered. In March 2010, a second registered letter was sent to the Complainant. The letter was returned to the commission because it was not delivered. Correspondence in June 2010, advising of the change of date to June 24, 2010 remains unanswered. Given that the Complainant has not appeared, the Respondent has not appeared, and the Commission is not prepared to present evidence in the matter, Ms. Pochini asks is that the complaint be dismissed in accordance with section 28(1)(a) of the **Human Rights Code**.

DISCUSSION

14. In reviewing the process with respect to this complaint, I have concerns that individuals who feel they have been discriminated against can be left by the wayside when employers choose the route of declaring bankruptcy. However, the case law dictates that in such a case the best remedy available for a Complainant is a non-monetary award. Monetary awards are essentially claims that have to be filed and proven with the Trustee in Bankruptcy and are governed by the laws respecting bankruptcy. These claims are outside the jurisdiction of this Board. A non-monetary award is really a Pyrrhic victory for a Complainant in a case such as this one, but there is little that I can do to alleviate that situation in the circumstances.

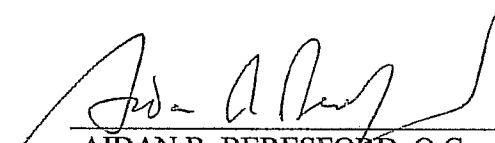
15. The other area of concern is the withdrawal of the Commission from its position in furthering the complaint that has been laid. Again the case law, specifically the case of *McKenzie Forest Products Inc. v. Ontario Human Rights Commission and Adam Tilberg, Board of Inquiry (Human Rights Code) and Attorney General of Ontario* (2000) 37 C.H.R.R. D/316 (Ont C.A.) sets forth the position that the role of the Commission in these hearings is to represent the interests of the public. The Complainant is free to have his or her own representation at the hearings.

16. The Complainant has decided not to represent herself in this complaint. She has not made any attempt to notify the Commission in writing or in person with respect to her position on this complaint. The Respondent has decided not to appear, given its financial status. The Commission has advised of its withdrawal from the proceedings and appears to day with a motion seeking that the complaint be dismissed.

CONCLUSION

17. Given the non-appearance by the parties. The absence of any evidence being called before me, and the motion of the Commission that the complaint be dismissed, I hereby order that the within complaint be dismissed.

DATED AT Sandy Cove, Newfoundland and Labrador, this 25th day of August, 2010.


AIDAN.B. BERESFORD, Q.C.
ADJUDICATOR