K.P.S. (Litigation Guardian) v. National Service Dogs

Ontario Human Rights Tribunal Decisions

Ontario Human Rights Tribunal

Panel: Romona Gananathan, Vice-chair

Decision: April 19, 2024.

File No. 2022-50081-I

[2024] O.H.R.T.D. No. 557 | *2024 HRTO 548*

Between K.P.S. as represented by their Litigation Guardian S.S., Applicant, and National Service Dog Training Centre, o/a National Service Dogs, Respondent

(74 paras.)

Appearances

K.P.S. as represented by their Litigation Guardian S.S., Applicant: Emilie Aloe, Counsel.

National Service Dog Training Centre o/a National Service Dogs, Respondent: Linette King, Counsel.

DECISION

INTRODUCTION

1 This Application alleges discrimination and reprisal with respect to services because of disability contrary to the *Human Rights Code*, *R.S.O. 1990, c. H.19*, as amended (the "*Code*"). Specifically, the applicant alleges that the respondent removed the applicant's service dog from the home on March 28, 2022 without notice or any alternative supports in place, and failed to accommodate her as a minor living with Autism Spectrum Disorder.

2 The respondent denies the allegations and submits that the applicant's disability had no connection to its decision to remove the service dog "Sammy" from the applicant's home. The service dog is trained and owned by the respondent. It had been placed with the applicant since September 2018, but had gained substantial weight which was unsafe for the animal's health. The respondent submits that it removed the dog from the applicant's home for rehabilitation. The service animal has since been retired from service as a result of the health problems that arose from being placed with the applicant, and the dog is no longer capable of functioning as a service animal.

Procedural History

3 The applicant requested that the Tribunal expedite this proceeding and requested an Interim Remedy to have the service dog placed back in the family, due to the impacts of being without a service animal and because the applicant intended to utilize the service dog in their return to school in September 2022. The applicant's Request was supported by a signed declaration from their medical professional, confirming that the applicant has severe Autism Spectrum Disorder ("ASD") with level three supports needed, and indicating that the removal of the service dog resulted in an escalation of the applicant's symptoms and self-isolation, and regression of some previously learned skills and behaviours. The declaration also suggests that the applicant was being home schooled at the time.

4 The respondent opposed the requests, arguing that an expedited proceeding would prejudice the respondent's ability to properly respond to the Application. The respondent also denied the assertions that the service dog was utilized to assist the applicant with school, and submits that it would make no practical difference to the applicant to return the dog, as the school year had already commenced. The service dog Sammy had been placed with the applicant since September 2018 but had gained significant weight which the respondent felt was unsafe for the animal.

5 In an Interim Decision *2023 HRTO 375*, issued on March 17, 2023 the Tribunal denied the applicant's Request for an interim remedy to return Sammy to the family, noting that despite the compelling circumstances of the applicant's family, the service dog in question had been retired from service, and was no longer able to function as a service animal due to its health issues. In that Interim Decision, the Tribunal granted the applicant's Request to expedite the hearing on the merits of this Application.

6 A mediation was scheduled on April 18, 2023 but the matter did not settle. A hearing on the merits of the Application was held from August 8 -10, 2023. I heard testimony from the applicant's litigation guardian S.S. on her behalf, and the applicant presented a former employee of the respondent Tamara Liniew as her only other witness. The respondent's Executive Director Danielle Forbes, and the respondent's Operations Manager Rochelle Barber testified for the respondent.

7 For the reasons below, I find that the Application should be dismissed. In summary, the respondent's removal of the service dog Sammy due to the dog's health concerns, does not in my view constitute discrimination on the basis of disability under the *Code*. There is nothing in the evidence to suggest that the removal of the animal was in any way connected to the applicant's disability. With respect to the duty to accommodate, I find that the respondent met its procedural duty to accommodate the applicant and that it participated in the accommodation process by offering reasonable alternative supports to the family. I also find that the applicant's family failed to participate in the accommodation process, and stopped communicating with the respondent after filing this Application, which frustrated the accommodation process.

LEGAL FRAMEWORK

8 Sections 1, 9, 11, and 17 of the *Code* state 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.

9. No person shall infringe or do, directly or indirectly, anything that infringes a right under this Part. *R.S.O. 1990, c. H.19, s. 9*.

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 person 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.

(3) The Tribunal or a court shall consider any standards prescribed by the regulations for assessing what is undue hardship.

17. (1) A right of a person under this Act is not infringed for the reason only that the person is incapable of performing or fulfilling the essential duties or requirements attending the exercise of the right because of disability.

(2) No tribunal or court shall find a person incapable unless it is satisfied that the needs of the person 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.

***Prima Facie* Case**

9 The Tribunal's jurisprudence is clear that the protected characteristic only needs to be a factor in deciding that discrimination occurred. The onus is on the applicant to establish a *prima facie* case of discrimination. The test for *prima facie* discrimination as set out by the Supreme Court can be summarized as follows:

a. The applicant has a protected characteristic under the *Code;*

b. The applicant suffered disadvantage or adverse impact; and

c. The protected characteristic was a factor in the disadvantage or adverse impact.

See, *Moore v. British Columbia (Education)*, *2012 SCC 61* at para. 33 ("Moore"), and *British Columbia Human Rights Tribunal v. Schrenk*, *2017 SCC 62*, at para. 86 ("Shrenk").

10 In *Garofalo v. Cavalier Hair Stylists Shop Inc.*, *2013 HRTO 170*, at para. 155, the Tribunal further noted: . . . If the applicant establishes a prima facie case of discrimination, the respondent must establish, on a balance of probabilities, a statutory defence and/or a credible non-discriminatory explanation for the impugned treatment. If the respondent is able to rebut the applicant's prima facie case of discrimination, the burden returns to the applicant to establish, on a balance of probabilities, that the respondent's explanation is erroneous or a pretext for discrimination. See *Wedley v. Northview Co-operative Homes Inc.*, *2008 HRTO 13* at para. 52.

> The ultimate issue is whether the applicant has proven, on a balance of probabilities, that a violation of the *Code* has occurred. Although an evidentiary burden to rebut discrimination may shift to the respondent, the onus of proving discrimination remains on the applicant throughout. See *Ontario (Disability Support Program) v. Tranchemontagne*, *2010 ONCA 593* at paras. 112 and 119.

11 As noted in *Peel Law Association v. Pieters*, *2013 ONCA 396* ("*Pieters*"), at paras. 82-84, in a case where there has been a full hearing on the merits, the *prima facie* analysis is not necessarily required. A prima facie analysis may, however, be useful as an analytic tool to consider whether the applicant has been able to establish discrimination.

Duty to Accommodate

12 There is no free-standing right of accommodation under the *Code*. To trigger the duty to accommodate, an applicant must show that there has been direct or indirect discrimination on the basis of one of the *Code* grounds. The duty to accommodate arises, under ss. 11 and 17 of the *Code*, when a respondent attempts to justify discrimination. The respondent must show that it could not accommodate the person's needs without experiencing undue hardship in order for the discrimination to be justified. See: *Barber v. South East Community Care Access Centre*, *2013 HRTO 60* at para. 28.

13 The duty to accommodate is a co-operative and collaborative process. See *Chappell v. Securitas Canada Limited*, *2012 HRTO 874*, at para. 27. A failure by a respondent to take the appropriate steps in the procedural duty to accommodate is a violation of a right under Part 1 of the *Code*. The person seeking accommodation must do their part as well, and has a duty to cooperate in the accommodation process by providing a reasonable amount of

information about their disability related needs. See *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, 1999 CanLII 652 (SCC), [1999] 3 S.C.R. 3 ("*Meiorin*"), at para. 65 and *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, 1999 CanLII 646 (SCC), [1999] 3 S.C.R. 868; *Hamilton-Wentworth District School Board v. Fair*, 2016 ONCA 421 ("Hamilton-Wentworth"), at para. 51, citing *Lee v. Kawartha Pine Ridge District School Board*, 2014 HRTO 1212 at para. 95, and *ADGA Group Consultants Inc. v. Lane*, 91 OR (3d) 649, 2008 CanLII 39605 (Div. Ct.), at paras. 107 and 113.

Credibility and Reliability

14 The case turns on the evidence of the witnesses and I found the witnesses generally credible and forthright in their evidence. I note that a witness' testimony is not considered in isolation, but rather in the context of the evidence as a whole. See *FH v. McDougall*, 2008 SCC 53 at para. 58. The assessment of credibility is generally determined by applying the principles set out by the British Columbia Court of Appeal in *Faryna v. Chorny*, 1951 CanLII 252 (BCCA), [1952] 2 DLR 354 at pp. 356-57.

EVIDENCE AND ANALYSIS

Does the Removal of Sammy Constitute Discrimination Under the *Code*?

15 As noted above, the applicant has the onus of proving a prima facie case by showing that she has a disability, that she experienced an adverse impact, and that her disability was a factor in the removal of the service dog from her home.

16 There is no dispute that the applicant, a minor living with Autism Spectrum Disorder ("ASD") has a disability as defined under the *Code*. In a letter dated June 21, 2023, Dr. Sharon Carson confirms that she has known the applicant since May of 2020 and that she provides consulting care to the applicant around her ASD diagnosis. The report confirms that the applicant is minimally verbal and requires extensive supports for all aspects of her life, and that she struggles with repetitive behaviours and rigid thinking.

17 There is also no dispute that the service dog Sammy was removed from the applicant's home on March 28, 2022.

18 The applicant's mother testified that Sammy was placed with the family in September 2018 and that he helped her daughter recover from previous trauma she had experienced including nightmares she was having because she didn't feel safe to sleep. The mother testified that Sammy was a fluffy dog, and her daughter enjoyed the sensory experience and calming he provided. Her daughter spent all her time with him, and they ate together and slept together. He kept her safe from strangers or from bolting when they went out together, and he helped her self-regulate and do her homeschooling work.

19 The applicant's mother testified that the removal of the dog had an adverse impact on the applicant. When Sammy was removed in March 2022, her daughter regressed with increased stimming behaviours such as facing the wall and rocking, losing skills and words and being unresponsive or violent. Because Sammy wasn't there to help her, it was hard to get her back to the table to do her home schooling, or to transition her daughter from car to vehicle to get her usual McDonalds, and the applicant withdrew from the family because she thought they sent her dog away.

20 Based on this evidence, I accept that the removal of the service dog had an adverse impact on the applicant which satisfies the second element of the *Moore*'s test for establishing a prima facie case. However, for the reasons that follow, I am unable to conclude that the applicant's disability was a factor in the removal of the service dog.

21 I find that the applicant's family knew, or ought to have known about their responsibilities for the care and upkeep of the service animal. For example, The applicant's mother testified that she completed a rigorous application process and was placed on a waiting list for several years for a service dog for her child, which included

completing questionnaires, participating in home visits to assess suitability, and signing contracts with the respondent. She also confirmed during her testimony that the service dog contract indicates that the respondent could recall dogs where they were seriously injured, incapacitated or otherwise incapable of performing its duties, and that she was informed during the training that the respondent would recall the dog as a last resort either temporarily or permanently at their sole discretion in these circumstances.

22 The applicant's mother testified that she was referred to the respondent's service when her daughter was diagnosed in 2012. They were experiencing a great deal of challenges because the applicant's father would travel for work and the mother would be home alone with the applicant and her sister who also had ASD. Due to safety concerns, their pediatrician had suggested her daughter would be perfect for a service dog. They had moved to Ontario in 2014 and did their research, and applied for a service dog with the respondent's organization in 2014 and they were approved in June of 2015.

23 The applicant's mother testified that once approved there was a three year waiting period. She participated in a week-long training program at the respondent's facility in September 2018 and signed the service dog agreements before the dog Sammy was officially received at her home in September 2018. The applicant's mother testified that the dog was fully integrated into their lives from then onwards. He was normally tethered to her daughter to prevent her from bolting, and the dog could sense her daughter's emotions and help her to calm down by putting his head on her shoulder. She testified that her daughter blossomed, and they were planning to initiate conversations with the school board for her daughter to return to school with Sammy.

24 The applicant's mother testified that she first became aware of Sammy's weight issues in early 2019. He was not getting enough nutrition and his vet had suggested healthier dog food. The family started with raw food, and tried him on home cooked meals, but he was still not satiated, so she went back to the vet who recommended another vet with expertise in drafting diet plans. She testified that she felt the dog was healthy and making progress with weight loss on the new vet formulated diet, and she kept the respondent's staff in the loop about the situation and the remedial actions they were taking. The evidence on the whole suggests that the family was aware of the dog's weight issues and their responsibilities with respect to exercising and feeding the dog.

25 When asked whether the dog continued to gain weight, the applicant's mother testified that the dog remained on this diet until he was taken away in March 2022, but that "realistically it was difficult to exercise the dog" because her husband was still travelling a lot for work. She was the primary caregiver for her two children with ASD, and funding was cut for respite hours, so taking the dog out in the winter was hard. She agreed that he had gained some "winter weight".

26 When asked about when the respondent got involved in monitoring the dog's weight, the applicant's mother confirmed that they were never out of the picture because she would get him vaccinated and do routine vet checks and update the respondent. She confirmed that the dog was about 83 pounds when he was placed with the family at 3.5 years of age in September 2018, and that the respondent never raised any concerns earlier.

27 However, when questioned further she agreed that the respondent had many conversations with them about Sammy's weight over the years, and that she did take the dog to the vet for an examination after one of these discussions about the respondent's concerns about the dog's weight in July 2019. The report from Dr. Bagnell the veterinarian at this visit dated July 9, 2019 indicates with respect to the dog's digestive examination, that it was "hard to palpate due to obesity" and the assessment was that the dog "needs to lose weight, possibly hypothyroid". The vet comments, "had a long discussion on weight loss and feeding. Do not recommend raw diets for safety reasons. Recommend cook for dog or try on Hill's Metabolic diet".

28 The accompanying clinical notes confirm that the dog weighed 53.2 kg on February 25, 2019 which translates to 117.2 pounds, and 58 kg in July 2019 which translates to 127.8 pounds. Given the dog was about 83 pounds when placed with the family, I find it reasonable that the respondent had concerns about the dog's weight given the nearly 45 pound weight gain in a time period of less than one year. Further clinical notes indicate that the dog did lose

some weight at times but that he remained significantly overweight over a long period of time. For example, the dog weighed 47.6 kg in November 2019, 47 kg in February 2020 and 45.7 kg in March 2020.

29 Although the applicant's mother testified that the respondent did not raise any issues about the dog's weight, the email exchanges between the applicant's family and the respondent's staff suggest that the respondent's had raised concerns about the dog's weight much earlier as described above in July 2019, and at least by February 2020. The applicant's mother testified that at that time she had agreed to go to the vet on the 20th of every month to do a weight check and report it to the respondent's staff, who could call the vet to verify this weight. However, the applicant's mother testified that Covid put a wrench in the monthly weigh-ins because the vet's offices were closed by March 2020, and they didn't have access to scales. Due to the applicant's vulnerabilities they had to stay home and isolate, which affected their ability to do the weight checks.

30 The applicant's mother testified that the dog would undergo an annual public access test, called the PAT test, in October or November each year with the respondent. The applicant would be tethered to the animal in full uniform, and they would meet in a public place for the test. However, due to Covid, the dog went untested for two years. In essence the applicant's mother suggested that the respondent was not concerned about the dog's weight during the pandemic.

31 When questioned further about this, the applicant's mother testified that the respondent was completing the testing virtually due to Covid, so the family declined the test because "that would not be good for the applicant". She also confirmed that the respondent reached out again, and the PAT test was completed in March 2022. I find based on this evidence that the respondent made reasonable inquiries about the dog's weight loss throughout this period, and that the family was aware of the dog's weight concerns.

32 The applicant's mother testified that apart from a comment about Sammy being "tubby", his weight did not affect his recertification in March 2022. However, when questioned further, she confirmed that the certification letter dated March 2, 2022 was sent by email with the respondent expressing concerns in the email about Sammy's weight and wanting them to get some remedial action. This once again confirms that the respondent had ongoing concerns about the dog's weight gain and its ability to work as a service animal from 2019 to 2022.

33 The documentary evidence also confirms that the veterinary clinic was unable to confirm the dog's weight and expressed concern about the reported weight loss in March 2022. For example, an email to the applicant's mother from the Southdown Animal Clinic states:

> Weight: Thank you for the updated weight. We will note it in the file. Are you sure it was 47kg. Unfortunately, we have to mark that weight as unverified as we did not weigh Sammy and there is a huge difference from his weight a month before. February 22nd, 2022 he was 51. 6kg. On March 22, 2022 weighing 47kg is a significant difference and 4.6 kg (10lbs) is a concerning amount of weight loss in 4 weeks for a dog of Sammy's size. On Jan 22nd, 2022 he weighed 51.8 kg and in one month lost .2kg. My thoughts are either their scale maybe was not balanced when he went on it or there is an error in the communication of his weight. We are happy to weigh him again when he comes in for the 4dx to check things for you. I know Sammy's weight is something you are monitoring closely and we would only ever want it to be accurate for you/him.

34 The applicant's mother testified that the family was about to travel to Kingston on vacation, and the respondent's staff arranged a visit with a vet in Kingston to have the dog weighed and checked. However, the applicant's mother testified that both her daughters were not adapting well to the changes in the environment of being in a different home without safety proofing during the vacation, and that her husband was working so it created a great deal of challenges over the two week period she was there. As a result, she couldn't make it to the vet immediately and communicated that to the respondent but there was a lot of misunderstanding between them and the respondent.

35 While they were heading back home, she testified there were a barrage of emails back and forth, and she felt the respondent was "pressuring" and almost "bullying" the family, who were doing their best. There are several email exchanges submitted by the parties, which confirm that the respondent expressed concerns about Sammy's

weight and repeatedly asked the applicant's family to take Sammy to the vet to be weighed. Contrary to the applicant's mother's testimony, I do not find that these emails were harassing or bullying in their tone.

36 The applicant's mother testified that when they returned home, the respondent made an appointment with the vet for Sammy to be weighed and also set up a home visit on March 28, 2022. The applicant's mother testified that the family needed to have clarity about where all this was going and agreed to a phone call. During that call, the respondent's staff indicated her team was coming over and there was no indication that they were not going to work with the family or take the dog away.

37 However, the documentary evidence suggests that the respondent had emailed the family on March 22, 2022 to confirm that they would be doing a home visit at 9:00 am and taking the dog to the vet at 10:00 am. The applicant's father responded to this email confirming the home visit at 9:00 and indicating that he did not feel comfortable with the respondent's staff taking the dog, because the children have never seen the dog leave the house with anyone else.

38 The documentary evidence also suggests that the applicant's mother had expressed concerns about the dog being removed from the home as early as in October 2019. For example, the veterinarian's notes dated October 10, 2019 states: [S.S.] was in to discuss Sammy's weight. He is down again and she is doing very well at getting the weight off him. She seems very afraid that NSD will remove him from the home because he is overweight. I advised I will call and speak to them but Sammy's wt loss must be slow and graduated to be safe. 1 pound a week is ideal and 2 lbs a week is maximum. He is losing wt @just over the 1lb a week right now.

39 The applicant's mother testified that family thought that they would increase the dogs exercise and change his diet in March 2022, but the team decided to take Sammy from the home. She testified that Sammy had broken a nail and the vet suggested he take a day off from work and being tethered to the applicant to make sure the nail didn't bleed again, but there were no other health concerns, so they were surprised with the "heavy handed approach" taken by the respondent's staff at the home visit in March 2022.

40 When asked about what the family understood about Sammy's removal, the applicant's mother testified that they were "hopeful that the respondent would take the lead on managing his health and reduce his weight and once he was down, he would be returned" to the family. She testified that as challenging as it was, they were "never given any indication that it would be anything other than that". This testimony is consistent with the respondent's stated intentions at the time to rehabilitate the dog and return it to the family.

41 In my view, the evidence on the whole suggests that the respondent did not make the decision to retire the dog from service when it was removed from the house to be taken to the vet in March 2022. The evidence confirms that the dog was removed for rehabilitation as recorded by staff in the case notes of the respondent and in email communications.

42 For example, case notes from the respondent dated March 28 indicate that NSD had real concerns about Sammy's overall health, arthritis, ongoing ear infections and being overweight for several years. It is noted that when staff attended the home visit on March 28, these concerns were solidified, as he was "extremely large, panting while sitting down and took a while to stand up - his back took a while to get off the ground". The staff notes indicate that it "became apparent that Sammy needed immediate intervention" and that his condition "solidified the plan to bring Sammy back to NSD for a health assessment and weight loss plan".

43 This was confirmed by the respondent's director of operations Rochelle Barber, who testified that the team had received the medical records from the veterinarian and were concerned about Sammy's health. Several meetings were held with the team and offers were made to the family to assist with a consistent plan to get Sammy healthy, which was met with resistance from the family. For example, mom stated she was alone with the girls a majority of the time and that it was impossible to leave them to go for a good walk with Sammy. The staff had suggested play dates with other families with autistic children and their service animals, but the family was resistant. They even suggested a dogwalker, but the family declined because they didn't want somebody else handling the dog because

they didn't want the dog being allowed to sniff around too much. She testified that the respondent's staff had offered to train a volunteer with handler training and the family declined this offer. As a result, the staff were feeling frustrated and concerned because they felt they were being very clear that the dog was at a critical point with his health and weight, but the family was hesitant about accepting the weight concerns and not taking the urgency of the situation seriously.

44 Ms. Barber testified that she had attended the home visit on March 28, 2022 with Amy, the client service worker. She immediately observed the dog's size and that he was bigger than assessed by his weight alone and seemed unhealthy and unwell. He lumbered really slowly, was panting significantly while lying down, and was visibly uncomfortable with his weight. He struggled to stand up and took a good amount of time to get his back off the ground. She testified that the staff communicated that they had to take the dog and the family was visibly upset and crying. She understood that taking the dog away would have an impact on the family and recalled that the staff explained to the family that they know it would be a potentially difficult time and that they could access some local crisis counselling resources, and that they hoped to get Sammy back to health with some rehabilitation.

45 The respondent's Executive Director, Ms. Danielle Forbes testified that the organization was concerned about Sammy's weight as early as in October 2019 when the staff suggested strategies to the family to make sure his weight was managed in line with what they would usually do with a dog in that situation. He was morbidly obese at about 37kg at that time and his ligaments could tear, so the staff recommended 20 minute play breaks so that his body was not stressed by his weight during exercise. The staff also implemented monthly weigh-ins as a way to monitor Sammy's weight loss. At the time, it appeared that the family was managing. However, by March 2022 it was apparent that Sammy was struggling and needed intervention. The dog came back to the respondent at the end of March, and she testified that it took over nine months for the respondent's staff team to get his weight back down. Because he had many health issues with his heart and hips, and it would be unsafe for him to be tethered as a service animal, it was decided to retire him from service.

46 In my view, the evidence on the whole confirms that the applicant's disability was not a factor in the respondent's decision to remove the service dog Sammy from the applicant's home or to retire him from service. The email communication to the family from the respondent dated May 3, 2022 also confirms that the decision to retire Sammy from service was made after he was removed from the home, and based on his health and the family's ability to care for the service animal. I find that the applicant's disability was never a factor in the respondent's decision to remove Sammy or retire him from service.

47 For example, the respondent writes on May 3, 2022 over a month after he was removed from the applicant's home:

> We wanted to follow up with you on how Sammy is doing and how we are moving forward with him. He was in to see our vet and had some x rays done to assess his orthopaedic health. Sammy has lost 7.5 lbs and is slowly but surely working towards his goal.
>
> The x rays have shown the following:
>
> P-radiograph series - views of hips, stifles, elbows and shoulders.
>
> Shoulders and elbows - no arthritic changes evident
>
> Hips - M1 flattened femoral heads with reduced acetabular coverage, M1 thickened femoral necks, osteophytes present - Mild hip dysplasia.
>
> Stifles - left normal, right - M1 compression of infrapatellar fat pad - Laxity of right stifle (stable ACL injury/partial tear)
>
> Back - bridging spondylosis noted along spine (thorax and lumbar regions)
>
> Given the results and in consultation with our animal health professionals we have determined that it is in Sammy's best interests to be retired from service. The spondylosis is degenerative and will be exacerbated by the repetitive stress of any lateral pressure put on him when he is required to "halt" when tethered. Additionally, obesity has a profound negative impact on all of the issues listed above. It will be crucial to his

> long-term health that his weight be reduced back to where it was at time of deployment and maintained for the remainder of his life. [emphasis added]
>
> We understand that you and the children are very attached to Sammy but given the requirements of his ongoing care and exercise needs, we will not be returning him to your family. Please know that this decision was not made lightly. I believe we all want him to have a healthy, pain free future and we are committed to supporting him on this journey.
>
> Please let us know how we can support you through this transition.

48 Based on the totality of the evidence, I find that the applicant's disability was not a factor in the respondent's decision to remove the dog from the family home. The applicant's family knew there were ongoing concerns about the dog's significant weight gain. The applicant's family was notified by the respondent repeatedly to exercise the dog, reduce food and monitor its weight. There was nothing in these communications that suggest that the applicant's disability was in any way a factor in the decision to remove the dog.

49 I also find that the dog was initially removed from the home to be taken to the vet by the respondent, and that it was reasonable for the respondent to want to complete a veterinary check given the ongoing concerns about the dog's weight, the recent PAT test in March 2022 and visual confirmation of the weight gain by the respondent's staff, and the family's recent difficulties taking the dog to the vet. I find that the respondent's removal of the service dog was reasonable, after several attempts to work with the family on the care and upkeep of the animal over a three year period of time.

50 For all of these reasons, the applicant has failed to establish a prima facie case of discrimination on the basis of disability under the *Code*. There is nothing in the evidence to suggest that the removal of the animal was in any way connected to the applicant's disability. The service dog Sammy was owned by the respondent, and the applicant's family was expected to cooperate in its care. I find that it was reasonable for the respondent to have an expectation that the dog's health be maintained so that it could continue working.

51 The respondent had a contract to provide the service animal with express expectations around its care and the applicant's family understood that the respondent could remove the service animal if it had concerns about its health. The applicant's family could have followed the suggestions for feeding and dog walking and could have hired a dogwalker if they didn't have time to walk the dog themselves. The applicant's family knew Sammy was overweight. The animal deserves to be healthy and able to work and it was not, and as a result, the respondent was forced to remove the dog. I find it reasonable that the respondent decided to retire the animal from service due to its significant health issues, and that this decision was not in any way connected to the applicant's disability.

Duty to Accommodate and Participation in the Accommodation Process

52 With respect to the duty to accommodate, I find that the respondent met its procedural duty to accommodate the applicant and that it participated in the accommodation process by offering reasonable alternative supports to the family to maintain the service animal. I accept that the service dog Sammy was a valuable resource to the respondent and that it made several attempts to work with the family as described above, to address the dog's weight gain and health concerns, but that the family repeatedly failed to maintain the health of the dog over the course of a three year period or more.

53 Despite the applicant's mother's testimony that she did not have respite care for her children in order to walk the dog, I find that the applicant's family could have taken steps much earlier to exercise the dog appropriately. I accept the respondent's submissions that its screening process included questions about the family's resources and ability to care for the dog, and that the family had indicated that they were financially secure and able to provide for the animal.

54 I also find that the respondent made several suggestions for the care and upkeep of Sammy, and in this way, participated in the accommodation process. For example, the respondent had suggested enlisting support from a

local high school student to walk the dog, and offered to sign off on their community service hours, which the applicant's family did not take advantage of. The respondent had also offered to have the family bring Sammy to its leash free facilities and arrange play dates with other families with service animals, which the applicant's mother testified was difficult to do since it was an hour away in Cambridge. I find that the respondent's attempts to engage the family and support the family in the care of Sammy, meet the procedural duty to accommodate the applicant's disability. The respondent did not remove the service animal in 2019 when the dog was significantly overweight. It worked with the family over a three year period before it was forced to remove the dog in March 2022 for the welfare of the animal.

55 An email to the applicant's parents dated March 11, 2022 indicates that the respondent communicated its concerns following a meeting with the family in early March. The email states:

> Thank you for meeting with us the other day to discuss Sammy's weight loss plan. As we mentioned, please put him on 3 cups of food a day as soon as possible. We understand the difficulties with finding a dog walker due to lack of funding. However, it is critical that Sammy gets his body moving. If you can find a high school student in your neighbourhood that needs their volunteer hours NSD will sign off on this. We can come out to Mississauga to do some handlers support training for them as well. Let us know if and when you find a student so we can get this organized! Feel free to also stop by NDS anytime for Sammy to get some exercise in the leash free park. Amy and I are going to set up the in person play dates sooner rather than later. It is important to get Sammy moving so he can be a healthy weight and able to work in his full capacity. We found a vet in Kingston that will email us his weight. They said to call them first and to say it is for Sammy from National Service Dogs (this will be no cost to you)- see information below. Please keep us updated on how his weight loss journey is going, we will need an updated weight from Sammy in a month from now which would be the week of April 11th.

56 I also find that the applicant's family failed to participate in the accommodation process, and stopped communicating with the respondent after filing this Application, which frustrated the accommodation process. For example, when questioned about hiring a dogwalker, the applicant's mother indicated that they were concerned about strangers coming into the home due to the pandemic, and that the applicant's father "couldn't provide that". I find that the applicant's family could have hired a dogwalker at their own expense, or arranged for a volunteer dogwalker, if the family could not leave the home to walk the dog themselves due to there being no respite care funding, or because they couldn't make it to the leash free facilities or play dates arranged by the respondent. Despite the Covid-19 pandemic related vulnerabilities of the applicant, a dogwalker could have taken the dog out for a daily walk independently without the child, or need for respite care for the mother to do so, given the ongoing concerns about the dog's weight for over three years.

57 I also find based on the mother's testimony, that the family declined to do the PAT test virtually, despite the respondent's efforts to have the animal tested virtually and certified annually during the pandemic. This prevented the respondent from assessing the dog until early in March 2022, when the family participated in the PAT test in order to travel to Kingston. I find that the respondent's efforts to engage in the accommodation process were frustrated due to the family's lack of cooperation. In this way when the family failed in its procedural duty to participate in the accommodation process, leaving the respondent no alternative but to remove the dog for rehabilitation.

58 I am cognisant that the applicant is a vulnerable minor with significant disabilities. I accept that a service dog like Sammy can significantly ameliorate the impact of autism on a child. For example, Dr. Carson, the applicant's pediatrician who provides consulting care states that she met the applicant in May of 2020. She indicates that "her family is well connected with community resources at the time of our meeting and did indicate on their intake forms that they had a service dog". The doctor goes on to report:

> Through the first 18months, our goal was to reduce the most aggressive outbursts (self-injury, injury to others, flight behaviour. Many medications were tried, with a period of stability between November 2021-March 2022. Things were not perfect, but there was a reduction in violent behaviour and discussion about getting home instruction and a return to school. At this time COVID services had resumed, her sister was also starting some schooling, things were opening ip, medication was optimized and Sammy was in the

> home. Parental report was that Sammy helped calm [the applicant] and allowed them out in the community with safety. I did not directly observe [the applicant] with her service dog.
>
> In March of 2022, I was informed that Sammy was abruptly removed from the home. The next several months were centered around parental reports of increased negative behaviours. These included increased aggression, lashing out, poor sleep, increased appetite, repetitive behaviours such as covering her head and rocking in a corner and self-injurious behaviour. KPS was no longer engaging in home schooling and parents were not able to take her out into the community. Although there have been improvements the last few months (ex. return to school) we have not returned to the level of functioning in early 2022 as per parental reporting. Parents feel there has been a loss of language, escalation in negative behaviours and increased isolation from the family. KPS has rigid thinking and difficulties with emotional regulation make tolerance to change particularly difficult for her. Parents continue to advocate for [the applicant] to get mental health supports, as these are hard to find for children with ASD, especially those that are minimally verbal. As a vulnerable person, [the applicant] has not been able to get the mental health support she needs to process all that she has been through.

59 I accept based on this report that the service dog Sammy was beneficial to the applicant. However, I do not find that there is any medical or other evidence to support a finding that a service dog is an essential accommodation for the applicant in this case. While the doctor comments on the parental reporting of the impact of the removal of the service animal, the doctor also indicates a variety of treatment modalities such as medication and homeschooling in addition to the benefits of the service dog. Significantly, the doctor does not indicate in this report that the service animal is necessary or essential as an accommodation for the applicant.

60 There is also no evidence to suggest that the respondent questioned the applicant's need for the service animal or that it denied a replacement service animal based on the applicant's disability. The respondent's staff testified that they have placed numerous dogs with children with ASD, and that they have trained staff of school boards to handle these service dogs. In any event, this doctor's report was prepared for the purpose of this litigation in June 21, 2023, and does not address the applicant's essential need for a service dog at the time Sammy was removed from the home in March 2022 or any time thereafter. As Dr. Carson was not called to give evidence at the hearing, I have given less weight to the contents of her report in making my determination in this Application.

61 Based on the above evidence, I do not find that the respondent failed in its substantive or procedural duty to accommodate the applicant when it removed Sammy from the applicant's home or failed to replace Sammy with another service dog. The applicant's mother testified that once the dog was removed, they stopped communicating with the respondent shortly after. In this way, I find that the applicant's family withdrew from the accommodation process, and failed to meet their procedural obligation to participate in the accommodation process.

62 The applicant's mother testified that the respondent's staff left a list of crisis counselling hotline numbers with the family that didn't address the impact on the applicant. Some of the resources were too far away and these resources didn't speak to the applicant's particular disability. She testified that the applicant was in crisis and the family tried to help her with therapy and urgent response services that they qualified for, but that didn't help. Despite the unfortunate circumstances, I find that the respondent acted reasonably by leaving crisis counselling resources with the family at this time. I accept the respondent's director of operations Ms. Barber's testimony that the staff acknowledged the impact on the family and provided some resources to the family, but that the family was understandably unresponsive at that time.

63 Ms. Barber also testified that she had spoken with the family's support worker from a community organization after the dog was removed. She had explained to the family support worker that the dog's physical and mental health needs were not being met, and that they did not have any replacement dog to be placed with the applicant's family in the interim. The family support worker understood and had indicated to Ms. Barber, that she would work with the family to provide support services and access crisis funding to get help for the family. Based on this evidence, I accept that the respondent was participating in the accommodation process by speaking with the

applicant's family support worker and that it understood that the applicant had access to crisis supports during this time.

64 For all of these reasons, I find that the respondent met its procedural duty to accommodate by offering a number of resources to the family for the care and upkeep of the service animal. With respect to the procedural duty to accommodate, I find that the respondent met this duty by providing alternative resources and by following up with the family support worker to ensure the family had access to crisis supports. As detailed above, a replacement service animal was not an essential requirement for the respondent to meet its substantive duty to accommodate.

65 I also recognise that there is a significant obligation and responsibility on parents and families with young children who have service animals to ensure animal wellbeing. The respondent's Executive Director Danielle Forbes testified that organizationally, the respondent provides the service dogs at no charge to families, and does not charge for any ongoing support including the in-school seven day training for families. All that the respondent asks in return is that the families keep the dogs safe and healthy.

66 Ms. Forbes testified that their service dogs are usually placed with individuals with ASD or Post Traumatic Stress Disorder. They have facility dogs who work with social workers, and justice facility dogs who work with kids who are victims of violence, and peer support facility dogs who work with mental health teams and in fire halls. She explained that the service dogs are carefully bred and selected for the role and undergo significant training over the first two years with volunteer handlers at a significant cost to the respondent. The respondent picks dogs that would excel at service because the dogs don't view it as work but as social engagement. The dogs undergo rigorous testing to ensure they have the physical and emotional ability to be a service dog.

67 The families are also carefully screened to make sure they have the resources to care for the dog. They undergo a week-long training that is a combination of practical dog handling, animal health, and first aid. There is a dedicated lecture on weight management and fitness, because the goal is that the dog can work until they are about 9-10 years of age as a service animal. Ms. Forbes testified that in the applicant's case, the family had indicated that they were experienced and that their financial situation was above average, in their ability to care for the dog.

68 Once the families are approved, they have a 3-5 year wait time for the dog. When the dog is ready, the organization does a home visit to make sure that the circumstances have not changed. Because children with disabilities are not in a position to provide ongoing care for the dogs, the emphasis is on making sure the adults are all on board. When one parent attends the training, the respondent makes sure that the other parent also signs the contract, and follows up after the dog is placed in the home to ensure they also know how to handle the dog.

69 Ms. Forbes testified that to her knowledge, the applicant's family did not begin the process to have Sammy accompany the applicant to school. Schools usually have an internal process and NSD works with the school to go in and train and retrain staff as needed because the children are not independent handlers. The organization trains the parents, teachers, educational assistants and school staff to the PAT public access standards - because they are considered the handlers and it is their job to make sure the dog is safe and following training protocols.

70 Ms. Forbes testified that after they put all that effort into supporting the families and dogs, they don't want it to end this way. They have placed over 500 dogs across Canada over 27 years and have only rarely had to remove dogs involuntarily. In this case, she testified that initially the dog was removed with the intention of rehabilitation, but that once they understood that the dog's health was permanently compromised they had to retire Sammy from service. She testified that the organization uses an animal wellness tool and makes decisions as a team on a case-by-case basis to see how the family can take care of the dog, which was done in this case. She also confirmed that the training and contract is crystal clear about the expectations of the family for daily animal care.

71 Despite all of the training and supports, I find that the applicant's family did not engage in the accommodation process with the respondent. I find that the family was unable to walk the dog or exercise it consistently. They were unable or unwilling to pay for a dogwalker or accept the respondent's offers to attend play dates or have a high school student walk the dog, and ultimately, the applicant's family withdrew from the accommodation process by

ceasing communication with the respondent. While I recognize the challenges of families with children living with ASD, accepting a service animal includes a commitment to care and support these animals to excel in their work.

72 In this case, I find that the evidence confirms that the applicant's family failed to participate in the accommodation process, and that the respondent's removal of the animal was reasonable after several years of engaging in the accommodation process with the applicant's family. The applicant did not have an inherent right to a replacement service animal from the respondent and did not provide any medical evidence in support of a service animal as an essential accommodation, or continue to engage in the accommodation process with the respondent.

73 For all of these reasons, the applicant has not met the onus of proving a prima facie case of discrimination, and has not been able to show that the respondent failed to accommodate her disability in the provision of services.

ORDER

74 The Application is dismissed.

Dated at Toronto, this 19th day of April, 2024.

"Signed by"
Romona Gananathan
Vice-chair

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