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Indexed as: Nehlawi (Nelson) v. Mahalia Productions Ltd., 2024 BCHRT 100

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:

Justin J. Nehlawi (Nelson)

COMPLAINANT

AND:

Front Street Pictures Inc. (o/a Mahalia Productions Ltd.)

RESPONDENT

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

Tribunal Member:

Ijeamaka Anika

On their own behalf:

Justin J. Nehlawi (Nelson)

Counsel for the Respondent:

Jeff Bastien

I INTRODUCTION

[1] Justin J. Nehlawi (Nelson) got a job as a day-to-day production assistant at Front Street Pictures Inc. operating as Mahalia Productions Ltd in November 2020. As part of the terms of his employment agreement, Mr. Nelson agreed to abide by Front Street's COVID-19 protocols that, among other things, recommended all employees wear a mask. Mr. Nelson says he has a disability-related barrier to wearing a face mask. Mr. Nelson says he followed the Covid-19 protocols except wearing a mask because his disability prevents him from doing so, but despite that Front Street terminated his employment. He says by terminating him Front Street breached s. 13 of the *Human Rights Code*.

[2] Front Street denies discriminating and applies to dismiss the complaint under ss. 27(1)(c) and (e) of the *Code*. Front Street argues that there is no reasonable prospect that the complaint will succeed because Mr. Nelson has not provided evidence of a disability-related barrier to wearing a face mask. In any event, they say, Mr. Nelson was unwilling to comply with the reasonable accommodation it offered. Front Street also applies to dismiss on the basis that Mr. Nelson made his complaint for improper motives or in bad faith.

[3] For the following reasons, I deny the application to dismiss the complaint. To make this decision, I have considered all the information filed by the parties. In these reasons, I only refer to what is necessary to explain my decision. I make no findings of fact.

II BACKGROUND

[4] The background is taken from the materials filed by the parties. Where there are disputes in evidence, I indicate it below.

[5] Front Street is a film and television production company in British Columbia. Between November and December 2020, it operated as Mahalia Productions Ltd. to film a television production in Vancouver.

[6] On March 18, 2020, the Province of BC declared a state of emergency because of the COVID-19 pandemic. While masks were not yet mandatory in the province (public health orders requiring them in indoor spaces followed sometime later in November 2020), Front Street says it implemented COVID-19 protocols to follow public health orders, government-issued regulations, and COVID-19 prevention protocols from British Columbia Centre for Disease Control and WorkSafeBC. Front Street explains that the COVID-19 protocols it adopted were part of the measures it implemented to protect its crew members from becoming infected with COVID-19 and to continue to film the Mahalia Production amid the COVID-19 pandemic.

[7] Front Street's COVID-19 protocols included wearing masks, sanitizing frequently, and physically distancing from other crew members [**COVID-19 Protocols**]. The COVID-19 Protocols stated that wearing masks was recommended. The COVID-19 Protocols also stated that all crew on set were required to wear personal protective equipment (PPE). It is unclear whether the reference to PPE included masks.

[8] Front Street employed Mr. Nelson as a day-to-day production assistant to work on November 5, 2020. This means he was hired for one day's work with the possibility that he would be asked to return on subsequent days. Mr. Nelson was assigned to work in Front Street's crew parking lot, directing production vehicles and crew members to safely park.

[9] When Mr. Nelson arrived at work, he was not wearing a mask. Front Street staff asked Mr. Nelson to wear a mask and Mr. Nelson said he could not wear a mask due to a medical condition which exempted him from wearing masks. Front Street says Mr. Nelson would not reveal the nature of the medical condition or provide the doctor's note he said he had. Mr. Nelson disputes this and says he disclosed the nature of his medical conditions to Front Street when he arrived at work. Mr. Nelson does not specify to whom he says he disclosed his medical conditions.

[10] Mr. Nelson describes his mental disabilities as Tourette's syndrome, ADHD, PTSD, anxiety, and depression. He also says that he has weak breathing muscles and sleep apnea, which at times cause him to have difficulty breathing. Mr. Nelson says he did not wear a face

mask or shield because it exacerbated his disabilities and caused him further stress and anxiety. The parties agree that Mr. Nelson was required to sanitize frequently and maintain a physical distance from others while observing the parking lot for safety and security issues.

[11] Front Street says that in addition to failing to wear a mask, Mr. Nelson failed to comply with the other Covid-19 Protocols. It says his supervisor asked him to stay at least 6 feet from other people, but Mr. Nelson continued to get within 6 feet of other staff both in their cars and on foot. Front Street says it received complaints that Mr. Nelson was poking his head in car windows when maskless. Front Street says that despite the request of its COVID-19 Officer, Mr. Nelson would not sanitize after using a pen that everyone else was using.

[12] Mr. Nelson disputes interacting with others in close proximity and says he always maintained more than a six feet distance from others, sanitized frequently, and did not poke his head into any crew members' cars.

[13] Front Street asked Mr. Nelson to leave the work site before the end of his shift. It paid his wage for the entire day in accordance with the employment terms. Front Street says that it terminated Mr. Nelson's employment because he refused to follow the COVID-19 Protocols.

III DECISION

A. Does this complaint have no reasonable prospect of success?

[14] In this application, the burden is on Front Street to show that the complaint should be dismissed because there is no reasonable prospect that Mr. Nelson's complaint would succeed after a full hearing: s. 27(1)(c).

[15] Section 27(1)(c) is part of the Tribunal's gate-keeping function. It allows the Tribunal to remove complaints which do not warrant the time and expense of a hearing.

[16] The Tribunal does not make findings of fact under s. 27(1)(c). Instead, the Tribunal looks at the evidence to decide whether "there is no reasonable prospect that findings of fact that would support the complaint could be made on a balance of probabilities after a full hearing of

the evidence”: *Berezoutskaia v. British Columbia (Human Rights Tribunal)*, 2006 BCCA 95 at para. 22, leave to appeal ref’d [2006] SCCA No. 171. The Tribunal must base its decision on the materials filed by the parties, and not on speculation about what evidence may be filed at the hearing: *University of British Columbia v. Chan*, 2013 BCSC 942 at para. 77.

[17] A dismissal application is not the same as a hearing: *Lord v. Fraser Health Authority*, 2021 BCSC 2176 at para. 20; *SEPQA v. Canadian Human Rights Commission*, 1989 2 SCR 879 at 899. The threshold to advance a complaint to a hearing is low. In a dismissal application, a complainant does not have to prove their complaint or show the Tribunal all the evidence they may introduce at a hearing. They only have to show that the evidence takes their complaint out of the realm of conjecture: *Workers’ Compensation Appeal Tribunal v. Hill*, 2011 BCCA 49 at para. 27.

[18] Many human rights complaints raise issues of credibility. This is not, by itself, a sufficient reason to deny an application to dismiss: *Evans v. University of British Columbia*, 2008 BCSC 1026 at para. 34. However, if there are foundational or key issues of credibility, the complaint must go to a hearing: *Francescutti v. Vancouver (City)*, 2017 BCCA 242 at para. 67

[19] To prove his complaint at a hearing, Mr. Nelson will have to prove that (1) he has a disability-related need that prevented him from wearing a mask, (2) he was adversely impacted in employment, and (3) his protected characteristic was a factor in the adverse impact: *Moore v. British Columbia (Education)*, 2012 SCC 61 at para. 33. If he did that, the burden would shift to Front Street to justify the impact as a *bona fide* reasonable justification. If Front Street justifies the impact, there is no discrimination.

1. *Has Mr. Nelson taken his disability-related need not to wear a mask out of the realm of conjecture?*

[20] I turn to the first element of the *Moore* test. Front Street argues that Mr. Nelson has not taken his assertion that he has a disability-related need not to wear a face mask out of the realm of conjecture. Whether a complainant has a disability for the purposes of the *Code* depends on the facts and circumstances of the case: *Young v. Vancouver Coastal Health*

Authority and others, 2018 BCHRT 27 at para. 100. Although the *Code* does not define "disability," it has been interpreted by the Tribunal to mean a "physiological state that is involuntary, has some degree of permanence, and impairs the person's ability, in some measure, to carry out the normal functions of life": *Rael v. Cartwright Jewelers and another*, 2021 BCHRT 106 at para. 13, citing *Boyce v. New Westminster (City)*, 1994 CanLII 18445 at para. 50.

[21] As evidence of his disability, Mr. Nelson has put before the Tribunal a medical note dated February 21, 2018, which reads: "Please be advised that this man has Tourette's Disorder and ADHD." Mr. Nelson also describes the symptoms of his mental and physical disabilities which he says at times make it difficult for him to breathe. Mr. Nelson claims that when he is in stressful situations, his conditions are exacerbated which causes a reduction of oxygen and creates neurochemical stress on his nervous system. He says he finds wearing a mask stressful.

[22] Front Street agrees that Mr. Nelson has a disability but submits there is no evidence before the Tribunal to take his disability-related need not to wear a mask out of the realm of conjecture. It argues that the medical evidence does not explain how Mr. Nelson's medical conditions prevent him from wearing a mask.

[23] Having reviewed the materials before me, I am unable to accept Front Street's argument. Although Mr. Nelson does not provide medical evidence to corroborate his own evidence that he has a disability that prevents him from wearing a mask, lack of medical evidence alone is not fatal to his case on an application to dismiss; the Tribunal must assess the whole of the evidence to determine whether it takes the claim of disability-related need not to wear a mask out of the realm of conjecture: *Gichuru v. Purewal and another*, 2017 BCHRT 19 at para. 275.

[24] I am satisfied on the low threshold required at this stage of the proceedings that Mr. Nelson has taken his claim of a disability that impacts his ability to wear a mask, out of the realm of conjecture. Mr. Nelson provides the Tribunal with his own statements and evidence concerning his disabilities. His medical note supports his assertion that he has ADHD and

Tourette's. Further, Mr. Nelson describes how his disability impacts him. He says that his Tourette's disorder, in particular, is exacerbated when he wears masks, and he feels as though his oxygen supply is reduced which in turn worsens his neurological condition.

[25] While this may not be enough evidence to ultimately meet Mr. Nelson's burden in a hearing, it is sufficient for now to raise his complaint out of the realm of conjecture.

[26] Front Street does not seriously dispute that Mr. Nelson experienced an adverse impact that triggers the protection of the *Code*. Front Street asked Mr. Nelson to leave work before he completed his shift and was not asked to return for further shifts. Mr. Nelson says he felt humiliated and lost the opportunity for future work and wages. I am satisfied that Mr. Nelson has taken this element of the *Moore* test out of the realm of conjecture, and at a hearing, the Tribunal could find that being unable to complete his shift and the loss of a potential opportunity to work future days at the site constitutes adverse impact in respect to employment.

[27] As I said above, Mr. Nelson's allegation that he has a disability that impacts his ability to wear a mask has been taken out of the realm of speculation and conjecture. The burden now shifts to Front Street to show that is reasonably certain that they would establish a defence at a hearing: *Purdy v. Douglas College and others*, 2016 BCHRT 117 at para. 50.

2. *Is Front Street reasonably certain to prove it discharged its obligation to accommodate Mr. Nelson?*

[28] To justify dismissing Mr. Nelson's complaint, Front Street would have to prove that: (1) they adopted the Covid-19 Protocols for a purpose rationally connected to the performance of the job; (2) they adopted the Covid-19 Protocols in an honest and good faith belief that it was necessary to the fulfillment of that legitimate purpose; and (3) the Covid-19 Protocols were reasonably necessary to the accomplishment of that legitimate purpose: *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (Meiorin Grievance)*, [1999] 3 SCR 3 [Meiorin] at para. 54. This third element encompasses Front Street's duty to accommodate Mr. Nelson to the point of undue hardship.

[29] I understand from Mr. Nelson's submissions that he does not dispute that Front Street adopted its COVID-19 Protocols for safety reasons; specifically, to minimise the transmission of COVID-19 in the workplace during the pandemic.

[30] The crux of Mr. Nelson's argument is the third element of *Meiorin*. Mr. Nelson argues that it is not reasonably certain that Front Street will make out the third element of *Meiorin* at a hearing because, he says, Front Street sent him home despite his compliance with the COVID-19 Protocols, except wearing a mask.

[31] Front Street, as noted above, disputes that Mr. Nelson complied with its other protocols. It argues it accommodated Mr. Nelson's disability-related need not to wear a mask by asking him to ensure he maintained physical distancing and sanitized frequently. It says it decided to send him home when he failed to abide by those safety measures which would have both accommodated his need to remain mask-free while also limiting the chances he would transmit Covid-19.

[32] Front Street says it would have put others at risk of contracting Covid-19 had it allowed Mr. Nelson to continue working while he continued to violate pandemic safety protocols. So too, it argues, Front Street has legal obligations under health and safety laws, generally and particularly in regard to operating a film production during the pandemic, which it risked violating if it allowed Mr. Nelson to remain at work while disregarding Covid-19 Protocols. All of this, it says, means it is reasonably certain to prove that it discharged its duty to accommodate to the point of undue hardship.

[33] The parties disagree on many facts and present different interpretations of the same encounters. As mentioned above, where there are foundational or key issues of credibility, the complaint must go to hearing: *Francescutti*, at para. 68. I consider the dispute in the evidence about whether Mr. Nelson adhered to the Covid-19 Protocols to be a credibility issue about a foundational issue in the dispute.

[34] The parties dispute whether Mr. Nelson complied with Front Street's COVID-19 Protocols. Specifically, they dispute whether Mr. Nelson poked his head in cars to give

directions to crew members, maintained physical distance, and sanitized his hands, as required by Front Street. Mr. Nelson does not allege he was unable to comply with physical distancing and sanitizing for reasons related to his disability or any other protected characteristic. Determining whether he did not, in fact, comply with those provisions is key to deciding whether Front Street provided him with a reasonable accommodation – which he failed to cooperate with – and therefore whether Front Street discharged its duty to accommodate under the *Code*.

[35] It is a well-established principle of human rights law that those seeking accommodation have a duty to cooperate with reasonable accommodations suggested by or implemented by their employers. If they fail to cooperate, the respondent's accommodation obligations will be ended: *Van Leening v College of Physical Therapists of British Columbia*, 2006 BCHRT 357 at para. 53; *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 SCR 970 at 994-995.

[36] I am unable to say whether Mr. Nelson has no reasonable prospect of proving Front Street sent him home because he did not comply with the COVID-19 Protocols. Whether he did or did not will likely turn on an assessment of credibility, which I cannot make on an application to dismiss. Since I am unable to reconcile the conflicting evidence on this key issue, I deny the application to dismiss: *Smyth v. Loblaw and another*, 2017 BCHRT 73 at para. 41.

[37] It goes without saying that in this decision I am not finding that Mr. Nelson will succeed at a hearing. I have merely found that the complaint rises above the level of conjecture and Front Street has not persuaded me that it is reasonably certain to prove at a hearing that Mr. Nelson failed to comply with the COVID-19 Protocols; that is, failed to cooperate in his own accommodation.

[38] The application to dismiss under s. 27(1)(c) is denied.

B. Did Mr. Nelson file the complaint in bad faith or for improper motives?

[39] Front Street also applies to dismiss the complaint on the basis that Mr. Nelson did not have an honest belief that Front Street violated the *Code* and his motives for filing the complaint were improper and vindictive.

[40] The Tribunal may dismiss a complaint that was filed for improper motives or in bad faith: *Code*, s. 27(1)(e). Dismissal under this section requires a finding of wrongdoing: *Mokhtari v. Hain-Celestial Canada and others*, 2007 BCHRT 196 at para. 7. This is a difficult standard to meet on a preliminary application, where parties are not subject to cross-examination.

[41] To establish an improper motive or bad faith, a respondent must do more than present a different version of events and say the complainant is wrong: *Crosby v. Dairyland Fluid Division Ltd. and others*, 2004 BCHRT 1 at para. 35. They must show that the complainant did not have an honest belief that the *Code* was violated, or was motivated by some “ulterior, deceitful, vindictive, or improper” purpose that is inconsistent with the *Code*: *Stopps v. Just Ladies Fitness (Metrotown) and D. (No. 2)*, 2005 BCHRT 359 at para. 13. This issue is assessed objectively, because it is rarely possible to know the mind of the complainant: *Johnson v. Cheng and another*, 2012 BCHRT 408 at para. 57.

[42] First, Front Street argues that Mr. Nelson’s complaint that he was discriminated against on the basis of religion and political belief, which were not accepted for filing by the Tribunal, demonstrate his true motivations for refusing to wear a mask. In his complaint on the basis of religion and political belief, Mr. Nelson’s allegations include but are not limited to the following:

- a. He did not adhere to a religion that requires its followers to cover themselves and did not want to be perceived as such by wearing a mask,
- b. He believed in sovereignty of the individual and medical consent and wearing a mask would amount to forcing him to use a medical device against his consent,
- c. Wearing a mask would violate his constitutional right to freedom of opinion because wearing a mask implied an opinion,

- d. He had a freedom of belief and believed that his immune system exists and would protect him from the flu so long as he stays healthy and gets enough oxygen by not wearing a mask.

[43] Mr. Nelson argues that the other complaints do not on their own indicate an improper motive or bad faith.

[44] The question in this application is whether, Mr. Nelson's complaint was motivated by an honest belief that Front Street discriminated against him on the basis of disability, in the manner he alleges in the complaint. In my view, the other complaints are not, on their own, sufficient to demonstrate that Mr. Nelson made his complaint of disability discrimination for improper motives and in bad faith. Front Street has not provided any objective evidence that Mr. Nelson made the other complaints in bad faith or that he did not have a genuine belief that he was discriminated against on grounds of his disability. The Tribunal has said that in order for an application to succeed on this ground, a respondent must show the complainant's allegations have no foundation in fact or reality, were made for spurious reasons, or "on the basis of something other than an honest belief that the allegation in it occurred and amounted to a breach of the *Code*: *Hartley v. Glenlyon Norfolk School*, 2004 BCHRT 384, at para. 13; *Nieuwkerk v. Cimex Industries Ltd.*, 2003 BCHRT 126, at para. 13.

[45] The Tribunal rejected Mr. Nelson's complaint of discrimination on the grounds of religion and political beliefs at the screening stage because Mr. Nelson did not set out facts that could violate the *Code*. However, the screening decision cannot serve as a basis for inferring bad faith regarding Mr. Nelson's complaint of discrimination on the basis of disability. There is no evidence in the disability discrimination complaint that indicates that that complaint itself was brought for improper motives or in bad faith. The fact that Mr. Nelson believed he should not wear a mask for religious reasons or because of his political beliefs do not, on their own, indicate that he does not have a belief that he was discriminated against on the basis of his disabilities.

[46] Second, Front Street argues that Mr. Nelson was seeking financial gain and pursued his agendas at Front Street's expense which points to his bad faith in filing the complaint. I disagree. Seeking monetary compensation as a remedy for an alleged discrimination, is not enough to demonstrate that the complaint is solely for financial gain: *Okhrimchuk v. Domino's Pizza and others*, 2023 BCHRT 217 at para 47. Monetary compensation is one of the remedies the Tribunal provides and seeking that remedy does not, on its own, indicate an improper motive.

[47] Third, Front Street argues that as further evidence of Mr. Nelson's improper motives, he made a baseless criminal complaint against its COVID-19 Technician to the RCMP because he was sent home. An RCMP Constable questioned the COVID-19 Technician, and the criminal complaint was dismissed. Therefore, Front Street argues that the dismissal of the criminal complaint demonstrates that Mr. Nelson's allegations have no legitimate basis and were made for an improper motive.

[48] Mr. Nelson argues that he pursued an alternative legal avenue for redress which on its own does not demonstrate an improper motive or that Mr. Nelson did not have an honest belief that the allegations occurred and amounted to a breach of the *Code*.

[49] I agree. In my view, the mere fact that Mr. Nelson made a criminal complaint to the RCMP is not objective evidence establishing an improper motive or bad faith. The Tribunal has repeatedly said that a complainant seeking redress in other forums available to them is not evidence that filing a human rights complaint is improper: *Young Worker v. Heirloom and another*, 2023 BCHRT 137, at para 95; *NIWA obo Souter v. Pacific Island Resources*, 2011 BCHRT 130 at paras. 16-17; *Hartley* at para. 13. Front Street has not provided objective evidence wrongdoing by Mr. Nelson or showing that he did not have a genuine belief that he was discriminated against when he made the complaint. In the absence of such objective evidence, Front Street's application to dismiss the complaint under s. 27(1)(e) is denied.

IV CONCLUSION

[50] I deny Front Street's application to dismiss. Mr. Nelson's complaint will proceed to hearing.

Ijeamaka Anika
Tribunal Member