

Date Issued: April 9, 2024

File: CS-000553

Indexed as: King v. Greater Vancouver Care Services Society and another, 2024 BCHRT 106

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:

Peter King

**COMPLAINANT**

AND:

Greater Vancouver Care Services Society and Vancouver Coastal Health Authority

**RESPONDENTS**

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**REASONS FOR DECISION**  
**APPLICATION TO DISMISS A COMPLAINT**  
Section 27(1)(c) and (d)(ii)

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Tribunal Member:

Andrew Robb

Counsel for the Complainant:

Steven Rogers

Counsel for the Respondent Vancouver  
Coastal Health Authority:

Melissa Perry

No submissions from the Respondent Greater  
Vancouver Care Services Society

## I INTRODUCTION

[1] Peter King is a resident of a supported housing facility that is funded by Vancouver Coastal Health Authority [VCH] and operated by Greater Vancouver Care Services Society [GVCSS], under a contract with VCH. He has a disability that affects his mobility. He uses a wheelchair and he requires assistance with some activities of daily living. He filed a human rights complaint alleging that VCH and GVCSS discriminated against him, based on his disability, when they decided that GVCSS staff would stop assisting him to use a sit to stand lift [the **S/S Lift**] to complete transfers, in his residence. Mr. King says this decision had negative effects on his health and his independence.

[2] The Respondents deny discriminating. They say the decision to stop using the S/S Lift was based on occupational health and safety rules, and they reasonably accommodated Mr. King by making a different type of lift available to him.

[3] VCH filed an application to dismiss the complaint. It says there is no reasonable prospect the complaint will succeed because VCH is reasonably certain to establish that the decision to stop using the S/S Lift was justified. It also says proceeding with the complaint would not further the purposes of the *Human Rights Code*.

[4] GVCSS did not file an application to dismiss the complaint. It had notice of VCH's application to dismiss but did not participate in the application process.

[5] For the following reasons, I deny VCH's application to dismiss. 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.

[6] I apologise to everyone affected by this matter for the Tribunal's delay in making this decision.

## II BACKGROUND

[7] Until April 2017, GVCSS staff assisted Mr. King to use the S/S Lift in his residence. The S/S Lift helps Mr. King to transfer from a sitting to standing position, with assistance from at least one other person. This facilitates his movement around his residence.

[8] Around April 2017, one or more GVCSS workers made a complaint to WorkSafeBC about using the S/S Lift as part of Mr. King's care. WorkSafeBC records show that GVCSS staff reported it was no longer safe to use the S/S Lift due to changes in Mr. King's condition. The workers said these changes increased the amount of manual effort required to assist Mr. King to use the S/S Lift, which created injury risks to workers. GVCSS staff also said Mr. King was at risk of falling while using the S/S Lift, creating additional safety risks to him and to workers.

[9] On April 27, 2017, WorkSafeBC issued an order under the *Workers Compensation Act*. It required GVCSS to investigate and address the workers' concerns. The order does not specify what investigations or actions were required.

[10] On or about May 5, 2017, GVCSS notified Mr. King about the WorkSafeBC order. GVCSS also informed him that:

- a. VCH had requested a musculoskeletal injury [MSI] risk assessment of the tasks performed by GVCSS staff who assisted Mr. King with his activities of daily living.
- b. Effective immediately, GVCSS staff would stop assisting Mr. King to use the S/S Lift, pending a VCH-approved MSI risk assessment by an occupational therapist.
- c. Instead of the S/S Lift, Mr. King could use a ceiling lift in his residence.

[11] The ceiling lift serves a purpose similar to the S/S Lift, but it works in a different way. VCH says it creates less risk of MSI for the workers who assist Mr. King.

[12] Mr. King objected to the decision to stop using the S/S Lift. He says that reliance on a ceiling lift could have a negative impact on his health.

[13] On May 15, 2017, two physiotherapists assessed Mr. King's ability to use the S/S Lift, at his request. They wrote a report which said use of the S/S Lift was safe for Mr. King and those assisting him. The report recommended continued use of the S/S Lift to maintain his strength.

[14] Mr. King provided a copy of the physiotherapists' report to VCH, and made a request for GVCSS workers to resume assisting him to use the S/S Lift. VCH refused the request.

[15] On August 10, 2018, an occupational therapist assessed Mr. King's use of the S/S Lift, with assistance from GVCSS staff. The occupational therapist's report, dated September 10, 2018, concluded that, "Mr. King can be safely and functionally transferred and assisted with the associated bed mobility if he has use of [the S/S Lift], hospital bed, and sliding sheet, and if the recommendations contained in this report are adhered to." The report noted that Mr. King objected to using the sliding sheet, which is a tool that facilitates transfers by reducing friction.

[16] After GVCSS received the occupational therapist's report, GVCSS decided its staff would resume assisting Mr. King to use the S/S Lift. One or more GVCSS workers complained about this decision to WorkSafeBC. WorkSafeBC investigated the complaint. On October 18, 2018, WorkSafeBC representatives advised GVCSS that the occupational therapist's report did not adequately address the MSI risk to GVCSS workers presented by use of the S/S Lift. On October 19, 2018, GVCSS notified Mr. King that its staff would once again stop assisting him to use the S/S Lift, effective immediately.

[17] On or about October 30, 2018, WorkSafeBC issued another order under the *Workers Compensation Act*. It required VCH to conduct an MSI risk assessment for the task of assisting Mr. King to use the S/S Lift, and to take steps to address concerns about MSI risk.

[18] On December 14, 2018, the MSI risk assessment was conducted by two physiotherapists who were qualified as MSI assessors (not the same physiotherapists who assessed Mr. King in May 2017). Their report [the **MSI Risk Report**] said Mr. King does not have adequate functional capacity to safely use the S/S Lift without undue MSI risk to workers. It recommended using the ceiling lift for Mr. King's transfers, instead of the S/S Lift, as a way to eliminate the MSI risk.

[19] On January 16, 2019, VCH sent the MSI Risk Report to Mr. King, along with a letter saying use of the S/S Lift would not be reinstated.

[20] On June 1, 2019, an ergonomic risk consultant issued a report, on behalf of Mr. King. The consultant was present for the MSI risk assessment on December 14, 2018, and his report questioned the methodology and conclusions of the MSI Risk Report. The consultant's report said some of the risks identified by the MSI Risk Report could be mitigated, while maintaining use of the S/S Lift. It said that using a ceiling lift instead of the S/S Lift could have an adverse impact on Mr. King's independence and sense of self.

[21] On July 2, 2019, Mr. King's physician, a specialist in physical medicine and rehabilitation, issued a report, on behalf of Mr. King. The report said that if Mr. King was required to use a ceiling lift instead of the S/S Lift, he could become deconditioned and weaker, with a higher chance of skin breakdown, a likelihood of increased spasticity, and a possibility of increased pain. It recommended that he should have the choice of using the S/S Lift as a mode of transfer and a rehabilitation tool. It also recommended that Mr. King should use a ceiling lift when he is feeling fatigued or unwell.

[22] Mr. King refuses to use the ceiling lift. He says his refusal is justified based on the risks identified in his physician's report.

[23] Mr. King provided the ergonomic risk consultant's report and the physician's report to VCH, but VCH refused to resume using the S/S Lift. VCH has advised Mr. King that he can only challenge the recommendations in the MSI Risk Report by hiring a qualified MSI assessor to conduct a new assessment jointly with a VCH-approved assessor.

[24] In response to VCH's application to dismiss, Mr. King provided an additional report, dated September 9, 2021, by his occupational therapist (not the same one who assessed him in August 2018). This report described how Mr. King uses the S/S Lift, and said he has the functional capacity to use it safely, with assistance from a caregiver. It concluded, "If done correctly as above, there should be no risk of any type of injury to the caregiver or Mr. King, including no MSI risk for the caregiver or Mr. King."

### III DECISION

#### A. Section 27(1)(d)(ii) – Proceeding would not further the purposes of the Code

[25] Section 27(1)(d)(ii) allows the Tribunal to dismiss a complaint where proceeding with it would not further the purposes of the Code. These purposes include both private and public interests: s. 3. Deciding whether a complaint furthers those purposes is not only about the interests in the individual complaint. It may also be about broad public policy issues, like the efficiency and responsiveness of the human rights system, and the expense and time involved in a hearing: *Dar Santos v. UBC*, 2003 BCHRT 73, at para. 59, *Tillis v. Pacific Western Brewing and Komatsu*, 2005 BCHRT 433 at para. 15, *Gichuru v. Pallai (No. 2)*, 2010 BCHRT 125, at paras. 113-118.

[26] VCH cites s. 3(b) of the Code, which says the Code is intended to promote a climate of understanding and mutual respect where all are equal in dignity and rights. It says this means a balance must be struck between Mr. King's interests and those providing for his care. But it does not cite any authority saying this balance should be considered in an application under s. 27(1)(d)(ii).

[27] VCH says the MSI Risk Report was prepared by a healthcare professional, and cites decisions indicating the Tribunal is reluctant to interfere with clinical decisions of professionals so long as they are not tainted by discrimination: *M.K. v. Health Authority and others*, 2014 BCHRT 34; *X.P. obo J.R. v. The Hospital and The Correctional Centre*, 2018 BCHRT 4. But neither of these cases refer to s. 27(1)(d)(ii), and VCH does not explain how this argument relates to the purposes of the Code.

[28] VCH says it would not further the purposes of the Code to proceed because it is still providing services to Mr. King, albeit not the exact services he wants. VCH also says it is relevant that Mr. King has not agreed to hire a new assessor to conduct a joint MSI assessment along with a VCH assessor, which VCH says is the only way to change its decision about GVCSS staff assisting Mr. King to use the S/S Lift. VCH does not explain how these factors relate to the

purposes of the *Code*, or cite any relevant authority. I find VCH's arguments are better addressed under s. 27(1)(c) of the *Code*, in the context of whether the Respondents can show they are reasonably certain to establish a justification defence.

[29] I deny the application under s. 27(1)(d)(ii) of the *Code*.

### **B. Section 27(1)(c) – No reasonable prospect of success**

[30] VCH applies to dismiss Mr. King's complaint under s. 27(1)(c) on the basis that it has no reasonable prospect of success. The onus is on VCH to establish the basis for dismissal.

[31] 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.

[32] 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. 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.

[33] 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.

[34] To prove his complaint at a hearing, Mr. King will have to prove he has a characteristic protected by the *Code*, he was adversely impacted in the services he receives from the Respondents, and his protected characteristic was a factor in the adverse impact: *Moore v.*

*British Columbia (Education)*, 2012 SCC 61 at para. 33. If he does that, the burden shifts to the Respondents to justify the impact as a *bona fide* reasonable justification. If the impact is justified, there is no discrimination.

[35] The elements of Mr. King's case under the *Moore* framework are not in dispute. VCH generally denies the allegations in Mr. King's complaint, but it does not argue that he does not have a disability. VCH says it has not denied services to Mr. King, but it does not argue that refusing to use the S/S Lift had no adverse impact on him, or that the adverse impact was not connected to his disability.

[36] VCH's main argument is that there is a *bona fide* reasonable justification for its decision to stop using the S/S Lift. To succeed in its application under s. 27(1)(c), VCH must establish that it is reasonably certain to prove its justification defence at a hearing: *Purdy v. Douglas College and others*, 2016 BCHRT 117 at para. 50.

[37] VCH says its decision to stop using the S/S Lift for Mr. King's transfers was justified because the decision was made in order to comply with legislated occupational health and safety requirements. VCH says WorkSafeBC identified the S/S Lift as exposing GVCSS staff to an unacceptable MSI risk. The evidence before me shows that WorkSafeBC required VCH to assess the MSI risk to workers associated with use of the S/S Lift, and to take steps to address concerns about MSI risk. VCH says it could not address the MSI risk while maintaining use of the S/S Lift.

[38] VCH also says Mr. King failed to meaningfully participate in the accommodation process, and he failed to follow the proper process to challenge the MSI Risk Report.

[39] To justify its decision that GVCSS staff would stop assisting Mr. King to use the S/S Lift, VCH would have to prove: (1) it decided to stop using the S/S Lift for a purpose rationally connected to the function performed by GVCSS staff, (2) it made that decision in an honest and good faith belief that it was necessary to the fulfillment of that legitimate purpose; and (3) the decision to stop using the S/S Lift was reasonably necessary to the accomplishment of that legitimate purpose. This third element encompasses VCH's duty to accommodate Mr. King to



the point of undue hardship: *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 SCR 868 [**Grismer**] at para. 20.

[40] There is no dispute that VCH decided to stop using the S/S Lift for the purpose of reducing MSI risk for GVCSS staff. In his response to the application to dismiss, Mr. King does not deny that VCH decided to stop using the S/S Lift based on an honest belief that it was necessary to reduce MSI risk. He argues that VCH has not established it is reasonably certain to demonstrate that it cannot accommodate Mr. King's use of the S/S Lift without undue hardship. So the dispute in this application involves only the third element of the justification test set out in *Grismer*. I turn to that now.

1. *Mr. King's cooperation in the accommodation process*

[41] A complainant must participate meaningfully in the accommodation process: *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970. VCH says the Tribunal should consider that Mr. King has failed to cooperate with its processes. It cites a dispute that started around March 2017, when VCH asked Mr. King to participate in an annual assessment of his home care needs. VCH says such assessments are required by the Ministry of Health, for all residents of supportive housing. VCH says Mr. King refused to participate, and it was not until December 2018, after VCH told Mr. King it could withdraw his housing supports, that Mr. King agreed to participate.

[42] VCH cites Mr. King's refusal to cooperate in the annual assessment of his home care needs as an example of his refusal to cooperate in the accommodation process. VCH also says Mr. King's refusal to use a sliding sheet during transfers is unreasonable.

[43] VCH says there is additional evidence that Mr. King will not cooperate with VCH procedures: it says it told Mr. King how he could challenge the MSI Risk Report, by hiring a qualified MSI assessor to carry out a new assessment jointly with VCH staff, but he never took steps to do so. In response, Mr. King says he was not required to exhaust VCH's internal appeal processes before filing a human rights complaint: *The Child by the Parent v. The Boys and Girls Club of Central Vancouver Island*, 2019 BCHRT 214 at para. 38.

[44] VCH says Mr. King has rebuffed its efforts to communicate with him, but the parties provided evidence of ample communication about the S/S Lift and other issues, before this complaint was filed. Their correspondence suggests that VCH and Mr. King are entrenched in their positions, but still open to communication.

[45] I am not persuaded that the evidence about Mr. King's general lack of cooperation make VCH reasonably certain to establish that he failed to participate in the accommodation process in relation to his transfers and his use of the S/S Lift. VCH does not say the home care needs assessment was required in order to assess MSI risk, or to determine whether the S/S Lift could be used safely. Nor does VCH suggest that Mr. King's refusal to use the sliding sheet was material to its decision to stop using the S/S Lift. VCH appears to have conflated its view that Mr. King is a generally uncooperative client with his specific obligations to cooperate in the accommodation process.

[46] VCH also says Mr. King's refusal to use the ceiling lift demonstrates his unwillingness to cooperate in the accommodation process. I address that issue in the context of whether the ceiling lift is a reasonable accommodation.

## 2. *Accommodation to the point of undue hardship*

[47] VCH says it investigated whether there are any accommodation measures that could adequately mitigate the MSI risk for GVCSS staff while operating the S/S Lift. It says it could not identify any such measures, but it does not refer to any particular measures it considered, other than the ceiling lift.

[48] VCH says the use of a ceiling lift reasonably accommodates Mr. King because it enables him to complete transfers while minimising the risk of MSI for GVCSS workers. VCH says Mr. King is entitled to a reasonable accommodation, not a perfect one, and his refusal to use the ceiling lift is a matter of personal preference. VCH questions the reports about the risks to Mr. King's health, if he must use a ceiling lift instead of the S/S Lift. It says his physician's report is not helpful because it is based on a physical examination of Mr. King conducted nearly a year prior to the report, and does not account for changes in his condition.

[49] The physician's report says the physician reviewed Mr. King's hospital chart from 2014 to 2019, and met with Mr. King numerous times between 2014 and 2018, including an in-person meeting on August 3, 2018, and a telephone assessment on December 10, 2018. Based on this evidence about the physician's familiarity with Mr. King's condition, it would be open to the Tribunal, after a hearing, to accept the physician's opinion that dependence on the ceiling lift could harm Mr. King's health.

[50] The MSI Risk Report refers to undue MSI risk for workers who assist Mr. King to use the S/S Lift, but it does not suggest the authors of the report considered any risk to Mr. King's health if he stopped using the S/S Lift. Understandably, the MSI Risk Report focused on VCH's obligations under the *Workers Compensation Act*, not under the *Code*.

[51] VCH says there are no accommodations available within the parameters of its Safe Patient Handling Policy and Safe Work Procedures, which would allow continued use of the S/S Lift. It relies on these and other policy documents, including Provincial and VCH Safe Resident Handling Standards, a Mobility Decision Support tool, a Pre-Transfer Checklist, and Sit-to-Stand Safe Work Procedure. VCH also refers to a Hierarchy of Hazard Controls, which prescribes elimination or substitution of all injury risks to workers, wherever possible. But VCH does not address whether these policies incorporate the need to accommodate people with disabilities who receive VCH services to the point of undue hardship. It says it has an obligation to eliminate risks to workers unless it is not practicable to do so, but it does not say whether it considers its duty to accommodate the people to whom it provides services, when determining whether it is practicable to eliminate a risk to workers.

[52] VCH says the Tribunal should not interfere with its decision-making by preferring the opinions of the professionals who provided reports on behalf of Mr. King over the MSI Risk Report. It cites cases saying the Tribunal will not interfere with medical decisions so long as they are not tainted by discrimination: *M.K.* at para. 101; *X.P. obo J.R.* at para. 20. But VCH's decision to stop using the S/S Lift was not a clinical decision based on Mr. King's medical needs. It was a decision about the services to be provided to him, based on concerns about MSI risk faced by GVCSS workers.

[53] VCH describes the 2021 report from Mr. King’s occupational therapist, which says the S/S Lift can be used without any risk to Mr. King or his caregivers, as vague and speculative. The report does not address VCH’s occupational health and safety concerns, and it does not explain its findings about MSI risk, or refer to the MSI Risk Report. But the occupational therapist appears to be familiar with Mr. King’s restrictions, and qualified to opine about MSI risk.

[54] The reports provided by Mr. King suggest the ceiling lift is not a reasonable accommodation because it could harm his health. They also say it is possible for VCH to accommodate his use of the S/S Lift without undue hardship. Considered together, those reports take Mr. King’s claim that VCH failed to reasonably accommodate him out of the “realm of conjecture.” The conflicting expert opinions, on issues that are central to the complaint, cannot be resolved in an application to dismiss.

[55] I find VCH has not shown that it is reasonably certain to establish a justification defence at a hearing, and I deny the application under s. 27(1)(c).

#### **IV CONCLUSION**

[56] The application to dismiss is denied.

[57] I encourage the parties to use the Tribunal’s mediation services.

Andrew Robb  
Tribunal Member