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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:

Neal Tan

COMPLAINANT

AND:

R.C. Purdy Chocolates Ltd.

RESPONDENT

REASONS FOR DECISION
APPLICATION TO DISMISS A COMPLAINT
Section 27(1)(b), (c), and (g)

Tribunal Member:

Edward Takayanagi

On their own behalf:

Neal Tan

Counsel for the Respondent:

James D. Kondopulos
Natalie Cuthill

I INTRODUCTION

[1] Neal Tan was employed by R.C. Purdy Chocolates Ltd. from 2010 to 2018. He alleges that Purdy discriminated against him based on his age, physical disability, place of origin, sex, colour, and race during his employment when it singled him out for discipline, denied his request for a rotation in job duties and ultimately fired him.

[2] Purdy denies discriminating and applies to dismiss the termination allegation under s. 27(1)(b) and s. 27(1)(c) of the Code. Purdy says it is reasonably certain to prove that it terminated Mr. Tan solely because of poor work performance, not his protected characteristics.

[3] Regarding the pre-termination allegations, Purdy applies to dismiss under s. 27(1)(g) on the basis that they are out of time and it is not in the public interest to accept them. In the alternative Purdy also applies under s. 27(1)(b) and (c) to dismiss the pre-termination allegations.

[4] I find it most efficient to consider first under s. 27(1)(g) whether Mr. Tan's pre-termination allegations are timely because the complaint alleges a continuing contravention, and if not whether it would be in the public interest to accept the late-filed allegations. In my view, aside from the termination allegations, all of the allegations are late-filed and it would not be in the public interest to accept them.

[5] For the timely allegation of the termination, I will first consider under s. 27(1)(b) whether Mr. Tan has alleged facts that could, if proven, contravene the *Code*. In my view Mr. Tan's allegations has met the low threshold required under this section.

[6] Next, I consider whether there is no reasonable prospect Mr. Tan would be able to establish at a hearing that his protected characteristics were a factor in the termination. Based on the materials I am not persuaded that Purdy is reasonably certain to establish that their decision was based wholly on non-discriminatory reasons. I cannot say that there is no reasonable prospect the complaint would succeed and deny the application to dismiss.

II BACKGROUND

[7] The following background is taken from the parties' materials. I make no findings of fact.

[8] In or about late 2010, Purdy hired Mr. Tan as a general labourer. His primary duties involved packaging chocolates at one of Purdy's factories.

[9] Mr. Tan says that during his employment he was singled out for coaching and discipline because of his protected characteristics. He says he was treated differently than other employees regarding compliance with the company's good manufacturing practices, tardiness, and absenteeism. Mr. Tan says that in or around September 2014, he requested to be rotated into other jobs but was denied because he was a man.

[10] On or about September 16, 2017, Mr. Tan suffered a workplace injury and went on a leave. Mr. Tan returned to work on or around January 2, 2018, pursuant to a graduated return to work plan. Mr. Tan worked until January 22, 2018, when he went on a second leave because his injury was aggravated.

[11] Mr. Tan then went through a pain management program with WorkSafeBC which completed on April 6, 2018. On April 24, 2018, WorkSafe concluded that Mr. Tan was fit to return to work at full hours and closed his claim. Mr. Tan did not return to work. He told WorkSafeBC that he was taking a seven-week vacation. Mr. Tan did not contact Purdy to inform it about his continued absence from work.

[12] On May 7, 2018, Mr. Tan emailed Purdy to request time off work from May 7 to June 1, 2018. He attached a doctor's note stating he was not fit to work. Purdy requested additional information, but Mr. Tan did not respond.

[13] On June 3, 2018, Mr. Tan emailed Purdy saying he was still not fit for work and requesting time off from June 4 to June 29, 2018.

[14] On July 2, 2018, Mr. Tan emailed Purdy requesting time off from July 3 to July 27, 2018.

[15] On July 29, 2018, Mr. Tan sent an email to Purdy saying he was still not fit for work and requested additional time off from July 30 to August 24, 2018.

[16] On July 30, 2018, Purdy terminated Mr. Tan's employment.

[17] Mr. Tan filed his complaint on July 30, 2019.

III PRELIMINARY ISSUE – APPLICATION TO FILE A SUR-REPLY

[18] Mr. Tan applies to provide a sur-reply to, what he characterizes as, new issues raised by Purdy in their reply to the dismissal application. Generally speaking, the Tribunal's application process involves three submissions: the application, the response, and the reply: Rule 28(2). The Tribunal may accept further submissions where fairness requires that a party be given an opportunity to respond to new issues raised in reply: Rule 28(5); *Kruger v. Xerox Canada Ltd (No. 2)*, 2005 BCHRT 24 at para. 17. The overriding consideration is whether fairness requires an opportunity for further submissions: *Gichuru v. The Law Society of British Columbia (No. 2)*, 2006 BCHRT 201, para. 21.

[19] I have reviewed all the materials and, in my view, there are no new issues or arguments raised for the first time in Purdy's reply submissions that were not present in the original application. What Mr. Tan characterizes as new arguments are simply restatement of Purdy's position in their application. For example, Purdy's has consistently argued that most of Mr. Tan's allegations are out of time and that his complaint has no reasonable prospect of succeeding at a hearing because his allegations are not supported in any evidence and therefore no more than mere conjecture.

[20] The central point of Mr. Tan's proposed sur-reply submissions appears to be that he disagrees with Purdy's submissions and the Tribunal should find his evidence and arguments more compelling. Mr. Tan's proposed sur-reply submissions for the most part similarly repeats his arguments and submissions in his response.

[21] I am not persuaded, based on the materials before me, that there are any new issues or arguments raised for the first time in Purdy's reply submissions such that fairness would require Mr. Tan be given an opportunity to make further submissions. I am satisfied that the parties have already had an adequate opportunity to make submissions and respond to the issues raised in the application.

[22] Consequently, I deny Mr. Tan's request to submit a sur-reply. My decision on this dismissal application is based only on those materials submitted by the parties up to Purdy's reply.

IV ANALYSIS AND DECISION

A. Timeliness of the Complaint – s. 27(1)(g)

[23] There is a one-year time limit for filing a human rights complaint: *Code*, s. 22. Section 22 is meant to ensure that complainants pursue their human rights remedies promptly so that respondents can go ahead with their activities without the possibility of a dated complaint: *Chartier v. School District No. 62*, 2003 BCHRT 39 at para. 12.

[24] A complaint is filed in time if the last allegation of discrimination happened within one year, and older allegations are part of a "continuing contravention": *Code*, s. 22(2); *School District v. Parent obo the Child*, 2018 BCCA 136 at para. 68. A continuing contravention is "a succession or repetition of separate acts of discrimination of the same character" that could be considered separate contraventions of the *Code*, and "not merely one act of discrimination which may have continuing effects or consequences": *Chen v. Surrey (City)*, 2015 BCCA 57 at para. 23; *School District* at para. 50.

[25] The assessment of whether discrete allegations are a continuing contravention is a "fact specific one which will depend very much on the individual circumstances of each case": *Dickson v. Vancouver Island Human Rights Coalition*, 2005 BCHRT 209 at para. 17.

[26] As Mr. Tan filed his complaint on July 30, 2019, allegations of incidents before July 30, 2018, more than one year before the complaint was filed, would be out of time unless they are a part of a continuing contravention with a timely allegation of an incident of discrimination.

[27] It is undisputed that Mr. Tan's last day of employment was July 30, 2018. Therefore, Mr. Tan's allegation that his employment was terminated on July 30, 2018, for discriminatory reasons is timely. The next question I address is whether Mr. Tan's allegations about events that occurred earlier in his employment are part of a continuing contravention with the timely allegation.

[28] Mr. Tan's allegations are broadly that he was denied his desired work roles, had to perform tasks, and that he was singled out for coaching and discipline. Mr. Tan argues that all of the alleged discrimination is of a similar character and part of a continuing contravention because Purdy's decision to fire him was based on his disciplinary history and poor performance of the duties he was assigned. He says that being denied his request to work his preferred jobs is a continuing contravention because Purdy's decision not to allow him to work these jobs was effective for the duration of his employment.

[29] I am not persuaded by Mr. Tan's argument. Based on the materials before me and considering the specific circumstances of this case, Mr. Tan's allegations of discrimination are distinct and dissimilar from the timely allegation of being fired. Mr. Tan alleges he was coached and disciplined on December 16, 2016, October 18, 2017, and January 18, 2018. The coaching and discipline occurred on distinct dates, months or years prior to the firing and were for reasons including problems with punctuality and attendance, breaching manufacturing practices, performing duties in an unsafe manner, absenteeism, insubordination, and failing to perform his duties.

[30] Mr. Tan alleges he was denied his request to work a different role in September 2014 and in 2017. In my view, these are distinct acts which had the continuing effect of Mr. Tan not being allowed to work a requested role. As such, I find these allegations are not continuing contraventions.

[31] Additionally, I am not persuaded that the alleged incidents occurred with sufficient frequency to constitute a continuous contravention as alleged. Mr. Tan's allegations span a period of three years from 2016 until he was fired in 2018. His most recent allegation prior to being fired is that he was disciplined six-months earlier on January 18, 2018, for breaching manufacturing procedures. There are significant gaps of time between each of his allegations spanning several months. These gaps weigh against finding that the complaint alleges a continuing contravention.

[32] Based on the materials before me, I am unable to reasonably interpret Mr. Tan's allegations of events prior to July 30, 2018, as being sufficiently connected in either character or time of occurrence to the allegation that he was fired. I am not persuaded that there are timely incidents of these allegations. Accordingly, I find that the allegations of incidents occurring before July 30, 2018, are not a part of a continuing contravention and untimely.

[33] I now consider whether to accept the untimely portions of the complaint under s. 22(3). The burden is on Mr. Tan to persuade the Tribunal to accept the complaint. I must consider two things: public interest and substantial prejudice.

[34] The Tribunal assesses the public interest in a late-filed complaint in light of the purposes of the *Code*. These include identifying and eliminating persistent patterns of inequality, and providing a remedy for persons who are discriminated against: s. 3. It may consider factors like the length of the delay, the reasons for the delay, the complainant's interest in accessing the Tribunal, the respondent's interest in being able to continue its activities without worrying about stale complaints, whether the complainant got legal advice, and the public interest in the complaint itself: *British Columbia (Ministry of Public Safety and Solicitor General) v. Mzite*, 2014 BCCA 220 [*Mzite*] at para. 53 and 63; *Hoang v. Warnaco and Johns*, 2007 BCHRT 24; *Complainant v. The Board of Education of School District No. 61 (Greater Victoria)*, 2022 BCHRT 44 at para. 18. These are important factors, but they are not necessarily determinative and not every factor will be relevant in every case: *Goddard v. Dixon*, 2012 BCSC 161 at para. 152; *Mzite* at para. 55. The inquiry is always fact and context specific.

[35] Mr. Tan's complaint spans the time from 2016 to the end of employment on July 30, 2018. The delay in filing, therefore, is from six months to up to two years. This is a significant delay and weighs against the public interest.

[36] Mr. Tan says he does not believe his complaint is late filed but provides some explanation for his delay saying he was fearful of retaliation during his employment and that he had some injuries after he was fired.

[37] Mr. Tan asserts that he was focusing on treatment of injuries, but he has provided no details of what injuries he had, how it limited his ability to file a complaint, or any information about the treatment he says he was undergoing. Without more I am not persuaded by Mr. Tan's assertion that treatment of injuries prevented him from filing his complaint from July 30, 2018, to July 30, 2019. Similarly, Mr. Tan has given no details about his assertion that he feared retaliation.

[38] I am not persuaded, based on the paucity of information, that Mr. Tan's reasons support a conclusion that it is in the public interest to accept allegations originating over two years ago.

[39] Finally, Mr. Tan has not persuaded me that there is a particular public interest in the complaint itself. In considering whether acceptance of a late-filed complaint is in the public interest, the Tribunal has also considered whether there is anything particularly, novel, unique or unusual about the complaint that has not been addressed in other complaints: *Hilger v. Dr. Terry Abel Dentistry*, 2023 BCHRT 32 at paras. 64 to 65. The Tribunal has heard and decided many complaints alleging that an employee was treated differently by an employer because of their protected characteristics.

[40] Mr. Tan's submission on why he believes it is in the public interest to accept his complaint is that he believes Purdy is a poor company that manufactures poor quality of consumer products. I am not persuaded that Mr. Tan's impression of his former employer makes this complaint unique, novel, or unusual so that it is in the public interest to accept the late-filed portions of the complaint.

[41] Considering all of the circumstances, I am not persuaded that it is in the public interest to accept the late-filed portions of the complaint.

[42] Having concluded that it is not in the public interest to accept the untimely portions of the complaint for filing, it is unnecessary for me to consider whether accepting the late-filed complaint would give rise to substantial prejudice.

[43] I will now consider whether the remaining allegation – the termination allegation – should be dismissed under s. 27(1)(b) or (c).

B. No arguable contravention - s.27(1)(b)

[44] Section 27(1)(b) of the *Code* gives the Tribunal the discretion to dismiss all or part of a complaint if it does not allege facts that could, if proven, contravene the *Code*. Under s. 27(1)(b), the Tribunal only considers the allegations in the complaint and information provided by the complainant. It does not consider alternative scenarios or explanations provided by the respondent: *Bailey v. BC (Attorney General) (No. 2)*, 2006 BCHRT 168 at para. 12; *Goddard v. Dixon*, 2012 BCSC 161 at para. 100; *Francescutti v. Vancouver (City)*, 2017 BCCA 242 at para. 49. The threshold for a complainant to allege a possible contravention of the *Code* is low: *Gichuru v. Vancouver Swing Society*, 2021 BCCA 103 at para. 56.

[45] In this case, Mr. Tan must set out facts that, if proved, could establish that he has a characteristic protected by the *Code*, he was adversely impacted in employment, and his protected characteristic was a factor in the adverse impact: *Moore v. British Columbia (Education)*, 2012 SCC 61 at para. 33.

[46] Mr. Tan alleges he was terminated because of his physical disability. As I understand it, Mr. Tan asks the Tribunal to infer a nexus between his physical disability and his firing because of the close temporal proximity of requesting time off from work due to a physical disability on July 29, 2018, and his termination on July 30, 2018. As such, Mr. Tan is connecting the adverse impact to his protected characteristic.

[47] In my view, these allegations are enough to surpass the low threshold of s.27(1)(b), and I deny the application to dismiss the complaint under that section.

C. No reasonable prospect the complaint regarding the termination could succeed? – s. 27(1)(c)

[48] Purdy applies to dismiss Mr. Tan’s complaint on the basis that it has no reasonable prospect of success: *Code*, s. 27(1)(c) The onus is on Purdy to establish the basis for dismissal.

[49] 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.

[50] 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.

[51] 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 [*Hill*] at para. 27.

[52] To prove his complaint at a hearing, Mr. Tan will have to prove that he has a characteristic protected by the *Code*, he was adversely impacted in employment, and his protected characteristic was a factor in the adverse impact: *Moore v. British Columbia (Education)*, 2012 SCC 61 at para. 33.

[53] For the purposes of this application, Purdy does not dispute that Mr. Tan's age, place of origin, sex, colour, and race are characteristics protected under the *Code*. Purdy does not dispute that being fired is an adverse impact in employment.

[54] Purdy disputes that Mr. Tan had a physical disability at the time of his firing. It also disputes that Mr. Tan's protected characteristics was a factor in their decision to fire him.

[55] The issues for me to decide on this application is whether there is no reasonable prospect that Mr. Tan can establish at a hearing that he had a physical disability and can establish that his protected characteristics were a factor in Purdy's decision to terminate his employment.

[56] On the issue of physical disability, Mr. Tan submits that he was injured in a workplace accident in 2017 and continued to suffer symptoms of his injury when he was fired. He has provided some medical information and documents including a progress report from a physician dated June 28, 2018, which states that Mr. Tan suffers from a back injury, and it is estimated that he will continue to have physical restrictions until November. Purdy points out that the documentary evidence supporting the alleged disability is "vague and unsubstantiated." While more evidence may be required at a hearing to establish Mr. Tan's disability, for the purpose of this application, he has met the low bar of bringing this element of the complaint beyond the realm of mere conjecture.

[57] The third part of the *Moore* test requires that there be a connection between the characteristic protected under the *Code* and the adverse impacts alleged. It is not necessary that one or more of the protected characteristics be the sole or even primary factor in the adverse impacts: *Québec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC at paras. 45-52.

[58] Human rights jurisprudence has consistently recognized that a decision that the *Code* has been contravened may be based on circumstantial evidence, and in the inferences that are reasonable to draw from that evidence: *Hill v. Best Western and another*, 2016 BCHRT 92 at para. 28. However, such inferences must be based on some evidence capable of

substantiating a claim that a protected characteristic was a factor in the alleged discriminatory factor.

[59] Mr. Tan asks the Tribunal to draw an inference that his physical disability was a factor in Purdy's decision to terminate his employment based on the timing of his firing on July 30, 2018, one day after he requested time off for his injuries on July 29, 2018.

[60] Based on the information and materials before me at this stage, in my view Purdy has not persuaded me that there is no reasonable prospect the Tribunal would find after a full hearing that Mr. Tan's protected characteristics was a factor in Purdy's decision to terminate his employment.

[61] While Purdy has provided evidence by way of affidavits from Mr. Tan's supervisors, letters of warning issued to Mr. Tan, attendance reports, and performance evaluations which support their position that Mr. Tan was repeatedly warned about his performance issues, absenteeism, tardiness, and failure to abide by the company's standards of hygiene and cleanliness, they have not explained why there was suddenly an urgency to fire Mr. Tan after several years of performance issues.

[62] Purdy has explained their decision to terminate Mr. Tan was based on his poor performance which did not improve despite multiple warnings, discussions, and coaching. The evidence before me is that Mr. Tan's job performance was the subject of multiple conversations and reprimands from 2016 until the end of his employment in 2018. The evidence does not indicate that the frequency or the egregiousness of Mr. Tan's performance issues increased prior to their decision to terminate him. Purdy's assertion that they chose to fire Mr. Tan because he did not return to work following a workplace injury may suggest that his physical disability and his recovery was a factor in their decision to terminate the employment.

[63] It may well be that the decision to fire Mr. Tan was based on his job performance, however given the temporal proximity of Mr. Tan requesting a medical leave and the decision to terminate his employment, Purdy has not satisfied me that there is no reasonable prospect that Mr. Tan could establish that his protected characteristics were a factor in Purdy's decision.

[64] I conclude that Mr. Tan has taken this portion of his complaint, that at least one of his protected characteristics – his physical disability- was a factor in the termination out of the realm of speculation. Accordingly, I decline to dismiss the complaint under s. 27(1)(c).

[65] This decision is not a finding that Purdy has discriminated, nor should it be taken as a commentary on the likelihood of success. But I have found that Purdy has not persuaded me on this application that there is no reasonable prospect that Mr. Tan’s complaint could succeed.

V CONCLUSION

[66] I allow the application in part. The allegations of discrimination prior to July 30, 2018, are dismissed under s. 27(1)(g) of the Code.

[67] I decline to dismiss the allegation that Mr. Tan’s employment was terminated on July 30, 2018, for discriminatory reasons under s. 27(1)(b), or (c). This portion of the complaint will proceed.

Edward Takayanagi
Tribunal Member