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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:

Jason Anson

COMPLAINANT

AND:

Arbutus RV & Marine Sales Ltd.

RESPONDENT

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

Tribunal Member:

Edward Takayanagi

Counsel for the Complainant:

Christina D. Judge

Counsel for the Respondent:

Christopher A. Siver

I INTRODUCTION

[1] Jason Anson is a person with Asperger's Syndrome. He alleges he was discriminated in employment based on mental disability contrary to s. 13 of the *Human Rights Code* when he was bullied and harassed by coworkers, and he was ultimately fired.

[2] Arbutus RV & Marine Sales Ltd., deny discriminating. Arbutus says Mr. Anson misinterpreted normal workplace interactions as bullying and harassment and that his employment was terminated for wholly non-discriminatory reasons, specifically his behaviour. It applies to dismiss the complaint under s. 27(1)(c) and (e) of the *Code*. Arbutus says the complaint has no reasonable prospect of success, and the complaint was filed for improper motives or made in bad faith.

[3] While I do not refer to it all in my decision, I have considered all the information filed by the parties in relation to this application to dismiss. This is not a complete recitation of the parties' submissions, but only those necessary to come to my decision. I make no findings of fact.

[4] For the reasons that follow the application to dismiss the complaint is denied.

II BACKGROUND

[5] The following facts are not in dispute on this application.

[6] Mr. Anson began working at Arbutus as a sales representative on January 9, 2020.

[7] During the initial months of employment Mr. Anson says he felt bullied and harassed by coworkers and managers. Mr. Anson reported his concerns to his manager in or about March 2020. Mr. Anson disclosed to his manager at this time that he had been diagnosed with Asperger's Syndrome which makes him vulnerable to sensory overload and he has emotional outbursts when overwhelmed.

[8] In April 2020, during the COVID-19 pandemic, Mr. Anson followed public health recommendations and chose to self-isolate and did not work for Arbutus. Mr. Anson communicated with his manager and coworkers through text messages and emails during this time. Mr. Anson eventually returned to work on April 29, 2020.

[9] On May 1, 2020, Mr. Anson says he felt he was being bullied and harassed by his coworkers when they turned the lights off in the workplace and began closing procedures while he was still working. Mr. Anson yelled at his coworkers and wrote a letter to management expressing his concerns. Mr. Anson subsequently asked his manager about transferring to another branch.

[10] On May 7, 2020, Mr. Anson met with the Arbutus management team. During this meeting Mr. Anson expressed that he felt he was being bullied by his coworkers because they sent him insulting text messages and memes, loudly slammed doors near him, and made sarcastic, condescending comments. He requested he be transferred to another branch. Arbutus denied any bullying and harassment had taken place and informed Mr. Anson that he was misinterpreting the conduct of his coworkers. Mr. Anson conceded that his disability made social interactions challenging and he may have misinterpreted some behaviour and overreacted. Arbutus concluded that no bullying or harassment had taken place and instructed Mr. Anson to apologize to his coworkers for his reactions to their conduct.

[11] In or about May 2020, Mr. Anson says he entered the manager's office when the manager was absent, and he took photographs of his resume and personnel file.

[12] Mr. Anson continued to have hostile interactions with his coworkers over the following weeks. On June 4, 2020, Mr. Anson had an interaction with a coworker about sales and customers where he raised his voice.

[13] Arbutus fired Mr. Anson on June 5, 2020.

III DECISION

A. Section 27(1)(c) – No reasonable prospect the complaint will succeed

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

[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; *SEPOA 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] To prove his complaint at a hearing, Mr. Anson 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.

[19] For the purposes of this application Arbutus does not dispute that Mr. Anson has a mental disability which is protected under the *Code*. Therefore, the first element of the *Moore* test is not at issue before me.

[20] Mr. Anson alleges that he suffered two adverse impacts that are connected to his disability. First, that he was bullied and harassed by coworkers, and second, being fired. Arbutus does not dispute that it fired Mr. Anson but says it was for wholly non-discriminatory reasons. Arbutus disputes that Mr. Anson suffered workplace bullying and harassment and say his allegations are based on misinterpretation of his coworker's behaviour.

[21] As I understand the submissions, Arbutus is making two arguments. First, that there is no reasonable prospect Mr. Anson could succeed in establishing that he suffered workplace bullying and harassment because he misinterpreted normal workplace conduct and social interactions, and second, that there is no reasonable prospect of the complaint succeeding because Mr. Anson's disability was not a factor in the decision to terminate his employment.

[22] I deal first with the allegation that Mr. Anson was bullied and harassed by coworkers because of his disability. Arbutus says that Mr. Anson's allegations of bullying and harassment are ordinary workplace interactions that he has misinterpreted as targeted behaviour based on his protected characteristic. It cites a statement Mr. Anson made at a meeting where he acknowledged that he misinterpreted a coworker's conduct. Arbutus submits that because Mr. Anson acknowledged mistaking a coworker's conduct and intentions, his allegations that coworkers bullied and harassed him do not rise above conjecture or speculation.

[23] Mr. Anson says his disability makes social interactions challenging and submits a medical assessment report about his limitations and need for accommodations. He says that acknowledging one instance where he misinterpreted a coworker's behaviour does not invalidate his assertion that he was subjected to bullying and harassment by coworkers. He has described multiple occasions where he felt belittled by the conduct of his coworkers including when coworkers turned off the lights and closed the office while he was still working, sending

insulting text messages, audibly slamming doors near him, and describing his disability as a “problem” that he should “fix”.

[24] 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. This principle is important in this case because the parties provide fundamentally different versions of what they say occurred during Mr. Anson’s employment.

[25] The parties have provided conflicting evidence on what, in my view, is a foundational issue of the context for the interactions between Mr. Anson and his coworkers during his employment. The parties agree on some facts including the fact that Mr. Anson raised his voice with coworkers and that a coworker sent Mr. Anson an unflattering meme. However, the parties present conflicting evidence about the motivation of Mr. Anson’s coworkers. I understand that Mr. Anson is alleging that his coworkers were aware of his disability and their conduct was intended to bully and harass him. Arbutus says its employees were engaging in good natured teasing among friendly coworkers.

[26] In my view, whether the coworkers were aware of Mr. Anson’s disability and the motivation for their interactions are foundational issues that cannot be determined on the basis of the materials before me. These issues cannot be resolved on the documentary evidence at this stage where findings of fact cannot be made. A hearing is required so that the evidence can be tested through cross-examination. Accordingly, I am unable to dismiss this portion of the complaint.

[27] I next turn to the issue of the termination. To establish that Arbutus violated s. 13 of the *Code*, Mr. Anson would be required to prove at a hearing that his protected characteristic was a factor in his termination. It need not be the sole or overriding factor: *Québec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc.*, 2015 SCC 39 at paras. 45-52.

[28] Arbutus argues that it is reasonably certain to prove at a hearing that it terminated Mr. Anson's employment because of his workplace conduct including conflict with coworkers and photographing private documents. It also says they have discovered after-acquired cause for termination because Mr. Anson was recording meetings.

[29] Mr. Anson disagrees. He says he consistently told Arbutus that the conflicts with coworkers were due to his mental disability and difficulties with interpersonal relationships. He says he requested accommodation by improving communication among staff or removing him from difficult work situations. Mr. Anson argues that his mental disability makes him sensitive to sensory and emotional overload which cause Asperger's meltdowns in the form of outbursts, withdrawal, or emotional responses. Mr. Anson says that the behaviour Arbutus cites as the reason for his firing are all Asperger related reactions to bullying by coworkers.

[30] The undisputed evidence is that throughout Mr. Anson's employment there were incidents where Mr. Anson felt harassed by his coworkers' behaviour. The evidence before me is that Mr. Anson met with his supervisor on multiple occasions during his employment to discuss his mental disability and difficulties he had in the workplace. On June 4, 2020, one day before Arbutus decided to terminate the employment, there was an interaction with a coworker where Mr. Anson raised his voice.

[31] I am persuaded on the basis of the materials before me that Mr. Anson's allegation that his mental disability was a factor in the termination of his employment has been taken out of the realm of conjecture. This is because the medical evidence supports Mr. Anson's position that his behavioural difficulties, which Arbutus cites as the reason for his firing, are directly related to his mental disability. The undisputed evidence before me is that Mr. Anson has Asperger's, and he has meltdowns when triggered by overwhelming sensory or emotional experiences. On the evidence before me Mr. Anson informed Arbutus of his disability including how it causes difficulty with social behaviour and meltdowns when overstimulated. In my view, Arbutus knew or reasonably ought to have known that Mr. Anson's behaviour was connected to his mental disability.

[32] Arbutus has not persuaded me that it is reasonably certain to establish it terminated Mr. Anson's employment for solely non-discrimination reasons because the evidence before me is that the workplace conflicts are related to Mr. Anson's mental disability.

[33] Arbutus raises other issues that they say justify their termination of Mr. Anson's employment. Specifically, they say Mr. Anson photographed confidential documents at the workplace and he recorded meetings with his supervisor without their knowledge and permission.

[34] There is little information before me about Mr. Anson photographing confidential documents. The parties have provided little details of when this occurred, when it came to the attention of Arbutus, and how it informed Arbutus' decision to fire Mr. Anson. Based on the limited information before me I cannot conclude that Arbutus is reasonably certain to establish that this was a reason for firing Mr. Arbutus that rebuts the inference that his disability was a factor in the termination.

[35] Arbutus says it was not aware that Mr. Anson recorded a meeting he attended with his supervisors on June 5, 2020, until he disclosed it in his submissions on this dismissal application. They argue that unauthorized recording constitutes after-acquired cause justifying the termination of Mr. Anson's employment.

[36] There is a distinction between after-acquired cause and after-acquired evidence of cause already alleged. After-acquired cause is irrelevant to the liability analysis in a human rights case: *Sullings v. Laughlin & Company Law Corporation*, 2017 BCHRT 144 at para. 17.

[37] I understand Arbutus is arguing that its decision to fire Mr. Anson was justified because after they terminated the employment, they discovered non-discriminatory reasons to terminate the employment during the submissions for this dismissal application. As noted, after-acquired cause cannot be relied upon in a human rights complaint to justify dismissal because it does not address the question of whether Arbutus decision to terminate Mr. Anson's employment at the material time was based, at least in part, on his protected characteristics.

[38] Therefore, in my view these additional factors Arbutus says were reasons to terminate the employment do not persuade me that Arbutus is reasonably certain to prove at a hearing that the firing was wholly for non-discriminatory reasons. As such, I cannot conclude that Mr. Anson's complaint has no reasonable prospect of succeeding at a hearing and I deny the application to dismiss the complaint under s. 27(1)(c).

B. Section 27(1)(e) – Complaint made for improper purposes or bad faith

[39] The Tribunal may dismiss a complaint that was filed for improper motives or made 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.

[40] 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*: *Stoppes 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.

[41] Arbutus says Mr. Anson has demonstrated bad faith by making unfounded complaints about bullying for the purposes of making a request to be transferred to another work location. It cites statements he made where Arbutus says he acknowledged he misinterpreted the actions of other workers and then immediately expressed a desire to transfer to another branch. Arbutus says this is evidence of his ulterior motives in making his complaint – the desire to have his transfer request approved by Arbutus.

[42] I am not persuaded that Arbutus' argument reaches the high bar for showing that the predominant purpose for filing the complaint was improper: *Yaniv v. Various Waxing Salons*

(No. 2), 2019 BCHRT 222 at paras. 103-106. On the evidence before me, Arbutus relies on isolated statements by Mr. Anson which ignores the larger context of those comments. Specifically, the evidence before me is that Mr. Anson stated he wished to transfer to another branch because he perceived the environment at Arbutus to be hostile, and he had difficulty interpreting social interactions because of his disability. In my view, on the evidence before me Arbutus' assertion that Mr. Anson was not motivated by an honest belief that his allegations are true, but instead for ulterior or improper motives is speculation. I am not satisfied on the evidence that Arbutus has met its onus under s. 27(1)(e).

[43] I find Arbutus has not provided any objective evidence showing that Mr. Anson did not have a genuine belief that he was discriminated against when he made the complaint. Accordingly, I deny the application to dismiss under s. 27(1)(e).

IV CONCLUSION

[44] I deny the application to dismiss Mr. Anson's complaint.

Edward Takayanagi
Tribunal Member