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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:

Berris Smith

COMPLAINANT

AND:

Sysco Canada Inc. and Hanoun Medical, Inc. dba BTE Workforce Solutions

RESPONDENTS

REASONS FOR DECISION
APPLICATION TO DISMISS A COMPLAINT
Section 27(1)(b), (c), (d)(i), (d)(ii) and (f)

Tribunal Member:

Ijeamaka Anika

Counsel for the Complainant:

Kayla Bergsson

Counsel for the Respondent Sysco Canada
Inc:

Micheal Schalke

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Inc. dba BTE

Eileen Vanderburg

I INTRODUCTION

[1] Berris Smith is a Black man. He was offered a job at Sysco Canada Inc. Sysco's job offer was on the condition that Mr. Smith fulfill certain pre-employment steps, including a physical abilities test [**conditional offer**]. Sysco contracted Hanoun Medical, Inc. dba BTE Workforce Solutions to administer the physical abilities test [**test**]. On BTE's intake form it asked Mr. Smith to identify his race. Mr. Smith was disturbed by this question. He left BTE after completing most, but not all of the test. He first asked BTE and then Sysco, why it was collecting data on race. The next business day Sysco withdrew its job offer saying he had failed to sign and return Sysco's offer letter by the deadline.

[2] Mr. Smith alleges that Sysco and BTE [together, the **Respondents**] discriminated against him in employment based on race, contrary to s. 13 of the *Human Rights Code*.

[3] The Respondents deny discriminating and apply to dismiss the complaint without a hearing. BTE applies to dismiss the complaint under sections 27(1)(b), (c) and (d)(ii) of the *Code*. BTE argues that Mr. Smith was inadvertently given the U.S. version of the intake form and consequently asked his race by mistake. BTE also argues that proceeding with the complaint would not further the purposes of the *Code* because merely asking about race does not violate the *Code* and collecting demographic data on race can be used to identify and eliminate persistent patterns of inequality.

[4] Sysco applies to dismiss the complaint based on ss. 27(1)(b), (c), (d)(i), (d)(ii), and (f). Common to Sysco's arguments under various sections of s.27(1) is that it did not ask candidates about race and had no way of knowing BTE did. Further, Sysco argues, once Mr. Smith told them BTE asked about race, it addressed the situation immediately. Sysco says it withdrew the offer of employment for entirely non-discriminatory reasons, namely the impact of the Covid-19 pandemic on its staffing requirements.

[5] For the reasons that follow, I decline to dismiss the complaint.

[6] 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.

[7] I note that Mr. Smith originally named Sysco's Human Resources Manager as a respondent to this complaint. In his response to this application, Mr. Smith agreed to remove the Human Resources Manager as an individual respondent in these proceedings. As the complaint against her is effectively withdrawn, I have removed her as a respondent from the style of cause.

[8] I apologize to the parties for the delay in issuing this decision.

II BACKGROUND

[9] The background is taken from the materials filed by the parties. Where there are disputes in evidence, I indicate it below. I make no findings of fact.

[10] Mr. Smith applied for the position of "Outbound Selector" with Sysco. The advertised position was hourly/part-time/seasonal, with an anticipated start date of April 6, 2020, and an end date of September 4, 2020. Mr. Smith completed an in-person interview with Sysco's warehouse supervisor. During the interview, Mr. Smith was told that the position would be conditional upon successfully completing the test to make sure he was able to safely do the job.

[11] On March 5, 2020, Sysco made Mr. Smith a conditional offer of employment. The conditional offer required Mr. Smith to sign and return an offer letter to the Human Resources Manager no later than 3:00 pm on March 10, 2020. It also advised that the offer of employment was conditional on Mr. Smith's ability to meet or exceed the test requirements and that the test would be administered by BTE. On March 13, 2020, Mr. Smith informed the Human Resources Manager that he was having issues sending the signed letter electronically and would drop the signed letter in person on March 15, 2020. The Human Resources Manager agreed.

[12] Mr. Smith went for the test on March 13, 2020. BTE sub-contracts with service providers in or near Victoria to provide its testing services and one such service provider is where BTE scheduled Mr. Smith's appointment [the **Service Provider**].

[13] The receptionist asked Mr. Smith to complete an intake form when he arrived at the clinic. Amongst other identifying information, the intake form had "Race" with a blank space next to it, indicating test takers were to fill in their race. The form did not indicate why BTE sought the information or whether it was mandatory. Mr. Smith wrote "why" on the blank line next to "Race".

[14] Mr. Smith asked the receptionist why he was asked to identify his race on the intake form. The receptionist told him that it was part of the standard form. Mr. Smith says that the receptionist apologized for the question and told him that the intake forms come from an American company. Mr. Smith also says the receptionist advised him that his answers to the personal questions including the race question, would not be shared with Sysco. Mr. Smith signed the intake form without identifying his race.

[15] Mr. Smith met with a physiotherapist for the test. The physiotherapist says Mr. Smith was visibly upset. Mr. Smith told the physiotherapist that he was upset because the intake form asked about race. Mr. Smith explained that it was particularly upsetting for him because the question was asked in the context of completing a physical assessment for a labourer position. The physiotherapist said it was his understanding that BTE collected the information on race for statistical purposes only and that BTE would not use it for any discriminatory purpose.

[16] Mr. Smith started the test but says he found this explanation unsatisfactory and became more distraught. The physiotherapist noticed that Mr. Smith appeared frustrated throughout the assessment. Mr. Smith asked the physiotherapist if anyone had quit without finishing the assessment; the physiotherapist answered no and told Mr. Smith that if he quit, he would likely not get the position. The physiotherapist encouraged Mr. Smith to finish the assessment. Mr. Smith kept going until approximately 30 seconds before the end of the assessment, when he said "F*** this" and left the clinic with the heart rate monitor still attached to his body. The

physiotherapist and receptionist looked for Mr. Smith but they could not find him. The receptionist called Mr. Smith and left him a voicemail asking him to return the heart rate monitor. Mr. Smith returned the monitor the following Monday.

[17] At the time Mr. Smith left the clinic, he had completed the first five parts of the test at a level that met or exceeded the testing requirements. Mr. Smith did not complete the sixth, and last, part of the test.

[18] The physiotherapist informed BTE and Sysco did not complete the test. The report sent to Sysco indicated that Mr. Smith had failed the test because he “stopped participating in the test during the last component and left the clinic abruptly.”

[19] The Human Resources Manager emailed Mr. Smith that afternoon. They engaged in a discussion over a series of emails that included the following:

- a. Mr. Smith questioned the relevance of his racial background. He informed the Human Resources Manager that he found the entire situation upsetting and racially insensitive. He said he felt like “a slave on the box going thru inspection to see if I’m a good investment [...]” Mr. Smith informed the Human Resources Manager that he completed the first five parts of the test. He asked why BTE was collecting race-based data and whether Sysco knew about it.
- b. The Human Resources Manager said she was not sure why BTE asked the race question, that she was not aware that BTE asked that question, and that she would investigate the matter. She said the intake form had absolutely no bearing on his offer of employment. In response to one of Mr. Smith’s questions, the Human Resources Manager informed him that the race question “definitely [had] nothing to do with [Sysco] insurance or risk assessments”, (which Mr. Smith had asked her about). The Human Resources Manager told Mr. Smith that she had reached out to BTE to inquire about the questions, and she was fairly certain his information would be kept confidential.

- c. The Human Resources Manager also told Mr. Smith the test was company policy, and he could not start work if he did not complete it. She explained that the test was done to ensure applicants were physically capable of performing the job and they would not be put in danger given the intense pressure of the job.
- d. In his final email to the Human Resources Manager on March 13, 2020, at 5:47 pm, Mr. Smith wrote the following:

[20] ... you provided information on the heart rate, blood pressure and lifting tasks, but have not clarified the reasons for the other data collected or tests to be completed. The statement, "It is company policy, so unfortunately, there is no way around it" suggests that the testing and the components of the testing are Sysco's and not the third-party conducting the testing. Therefore, it suggests to me that Sysco is collecting all the information and data (including race) related to the forms and procedures for this assessment, and ethnic background (and socio-economic and education levels) does play a role in outcomes and potential hiring of me.

[21] In short, the testing is company (Sysco) policy. The company has authorized the third party to conduct the testing and to collect specific information. It is the company (Sysco) that needs to explain: (1) the rationale for each piece of data collected and each test conducted, and (2) Sysco needs to confirm that the information collected will not be shared with or used by third parties without my consent, including the company who conducts the testing. The third party company is conducting the tests on behalf of Sysco and should turn all results and data over to Sysco. We can speak more Monday enjoy your weekend.

[22] Also on March 13, 2020, the Human Resources Manager emailed BTE. She informed them about Mr. Smith's experience. She asked whether it was necessary to include the race question on the intake form. She asked BTE to ensure similar incidents did not occur in the future.

[23] By Sunday, March 15, 2020, Sysco says it became increasingly concerned about the Covid-19 public health emergency. Sysco's Regional Vice President (Human Resources) emailed the Human Resources Manager indicating that many if not all job offers were to be retracted. The email stated the following: "I will provide final update to this information mid day Monday

March 16, 2020, for action (retraction of offers); at which point I will ask that you contact the candidates by phone, send written confirmation of retraction.”

[24] The next day, Monday March 16, 2020, Sysco withdrew Mr. Smith’s conditional offer. In her email to Mr. Smith, the Human Resources Manager said that the offer was withdrawn because he did not sign and return the offer letter by the deadline of March 10, 2020, at 3pm, as stated in the offer letter. She did not explain to Mr. Smith what, if anything, had changed since Friday when she accepted that Mr. Smith could return the offer letter on Monday. Nor did she mention the pandemic.

[25] Sysco says it withdrew every outstanding offer for the Outbound Selector position in Victoria by the end of the day on March 16, 2020. Sysco informed some candidates that COVID-19 was the reason for withdrawing the offer.

[26] Also on March 16, 2020, BTE advised Sysco that that they would tell their BC locations to no longer ask the race question.

III DECISION

A. BTE’s application

1. *Should the complaint against BTE be dismissed under s. 27(1)(b) because it does not allege acts or omissions that contravene the Code?*

[27] BTE asks the Tribunal to dismiss the complaint on the grounds that asking an employment candidate to state their race on an intake form does not contravene the *Code*.

[28] 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 [*Gichuru*] at para. 56.

[29] To prove his complaint at a hearing, Mr. Smith will have to demonstrate 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.

[30] There is no dispute that the first element is satisfied. Mr. Smith identifies as a Black man, and by virtue of his race, has a characteristic protected by the *Code*.

[31] BTE argues that Mr. Smith does not identify an adverse impact in his employment because of the race question on the intake form. BTE also argues that Mr. Smith does not allege that his ability to complete the test was adversely impacted by the inclusion of the race question. I do not agree.

[32] I find Mr. Smith has pled facts that, if proven, could establish an adverse impact. Mr. Smith could not finish a test which was required for him to start his job. As a result, the hiring process stalled and, eventually, the employment offer was withdrawn. Mr. Smith meets the low threshold for establishing that he has taken adverse impact out of the realm of speculation, which is all that is required at this stage of the proceedings: *Gichuru* at para 56.

[33] On nexus, BTE argues that Mr. Smith does not articulate facts that, if proven, will establish a nexus between the adverse impact and his race. Mr. Smith's race only needs to be a "factor" in the adverse impact, not a "significant" factor or a "material" factor: *Stewart v Elk Valley Coal Corp*, 2017 SCC 30 at para. 46; *Francis v BC Ministry of Justice (No 3)*, 2019 BCHRT 136 at para. 282-290.

[34] Based on Mr. Smith's evidence, I am unable to accept BTE's argument. Mr. Smith alleges that he was unable to complete the test because, as a Black man, he was upset by the race question. It is not unreasonable for a Black person, alert to the long history of anti-Black racism and how it impacted their family, to be triggered when asked his race in the context of trying to

meet a potential employer's hiring requirements. Particularly when staff gave him different answers to his questions about why race was included on the intake form. Above, I accepted that Mr. Smith could establish adverse impact based on his evidence that he was upset and could not finish the test, and as a consequence, the hiring process stalled. I also find he has taken nexus out of the realm of conjecture.

[35] I am persuaded that Mr. Smith has alleged facts that, if proven, would constitute a contravention of the *Code*. I decline to dismiss the complaint against BTE under s. 27(1)(b)

2. *Should the complaint be dismissed because there is no reasonable prospect it will succeed against BTE?*

[36] BTE also asks the Tribunal to dismiss Mr. Smith's complaint on the grounds that Mr. Smith has no reasonable prospect of proving that the race question adversely impacted him to the point that he was unable to complete the test: s. 27(1)(c). BTE argues that despite Mr. Smith being upset by the race question, he successfully completed the first five parts of the test. Essentially BTE argues he chose to quit and therefore the Tribunal should dismiss the complaint against it because it has no reasonable prospect of success. I do not agree.

[37] 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. 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.

[38] 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.

[39] As set out above, to prove his complaint at a hearing, Mr. Smith will have to demonstrate 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.

[40] BTE disputes that Mr. Smith was adversely impacted by the race question because, it argues, he was able to complete the first five parts of the test but chose to quit just before he completed it.

[41] I am unable to accept this argument. Mr. Smith says he could not finish the test because of the impact the race question continued to have on him. The physiotherapist confirmed that Mr. Smith appeared upset during the test and he left in a manner that suggests continued emotional or psychological distress. Ultimately, Mr. Smith did not complete the test and his hiring was delayed. Simply saying it was his choice to stop the test is not enough to say there is no reasonable prospect that Mr. Smith will prove an adverse impact. Moreover, it appears to put the onus solely on the complainant to cope with or tolerate the effects of allegedly discriminatory acts or omissions. I am not persuaded this would be in keeping with a broad and liberal interpretation of the rights protected under the *Code*: *British Columbia Human Rights Tribunal v Schrenk*, 2017 SCC 62 at para. 85.

[42] On the third element of the *Moore* test, BTE argues that there is no reasonable prospect that Mr. Smith will establish a nexus between the adverse impact and his race. They say that Mr. Smith was not required to and did not answer the race question, he proceeded with the test, and completed the first five parts successfully. BTE argues that the most relevant factor in determining whether the race question was discriminatory is that the race question was asked in the context of a standard form for all candidates and not asked of Mr. Smith specifically. I

understand BTE to argue that there is no reasonable prospect of the Tribunal finding that the race question was discriminatory because it was asked in the context of a standardized form.

[43] Mr. Smith argues that his race was a factor in his inability to complete the test because as a Black man, he was asked his race in the context of physical testing for a labour-intensive job, which given the history of his ancestors' enslavement, disturbed him to the point he could not complete the test. Mr. Smith says Sysco did not warn him he'd be asked about his race, despite their extensive preparatory documentation and correspondence leading up to the test, and there was no explanation on the intake form. I am not persuaded that that Mr. Smith has no reasonable prospect of proving adverse impact based on his race for the same reasons I found he has made allegations which, if proved, could amount to discrimination under the *Code*.

[44] BTE points to the Tribunal case law which states that it is not necessarily discriminatory to ask questions regarding a person's protected characteristics in the hiring process: *Jahromi v Control Solutions and others (No. 2)*, 2018 BCHRT 2 at paras. 12-14. I accept BTE's argument that asking about a person's protected characteristic is not necessarily discriminatory. However, in *Jahromi*, the Tribunal also stated that the context of the question is important, including details about "the characteristics of the job which have prompted the questions." In the evidence before me, the only context BTE has provided is that used an American form, possibly, in error. I say possibly because, amongst other things, it is not clear to me why, if it was a mistake that Mr. Smith was given that form that day, neither the receptionist or the physiotherapist told him that and gave him the correct form. It is also not clear why BTE would have needed to follow up with all its BC locations to ensure they no longer used that form, as it told Sysco it would.

[45] In any event, there is nothing before me that suggests collecting race-based data was somehow necessary given the characteristics of the Outbound Selector position. In fact, both BTE and Sysco's evidence suggests the opposite: that neither thought asking people their race was necessary as part of the Outbound Selector hiring process. I am not persuaded by BTE's

argument that because asking about race in the hiring process is not prohibited under the *Code* that it means Mr. Smith has no reasonable prospect of succeeding at a hearing.

[46] I also understand BTE to argue that Mr. Smith was inadvertently given the US version of their Intake form and in the US, they are required by law to ask about race as part of governmental efforts to identify and eliminate systemic discrimination experienced by employment candidates. It is unclear whether this mistake was a one-off or if the Service Provider gave other candidates the American version of the form. I am unable to resolve this based on the evidence before me.

[47] In any event, it is irrelevant that Mr. Smith was inadvertently given the American version of the form. Contraventions of the *Code* do not require an intention to discriminate: s. 2. Rather, central to the purposes of the human rights legislation is the emphasis on discriminatory effects: *CN v. Canada (Canadian Human Rights Commission)*, [1987] 1 SCR 1114. As Mr. Smith argues, BTE's report on the demographic data collection in Canada was focused on age and gender demographics but not race. Even assuming BTE is reasonably certain to prove at a hearing that it mistakenly gave the form to Mr. Smith - which is not clear on the materials before me - I am not convinced it amounts to Mr. Smith having no reasonable prospect of making out his case at a hearing on the merits. The fact remains that, on the evidence before me, Mr. Smith has a reasonable prospect of proving he was adversely impacted by the race question on the Intake form given to him.

[48] On this basis, I am satisfied that, Mr. Smith has met the low threshold for finding that his allegation is more than mere speculation and at a hearing, he could establish adverse impact connected to his race: *Berezoutskaia v. British Columbia (Human Rights Tribunal)*, 2006 BCCA 95, leave to appeal ref'd [2006] S.C.C.A. No. 171 at paras. 24-26.

[49] BTE does not argue that it is reasonably certain to establish a justification at a hearing in their dismissal application under s. 27(1)(c), so I have not considered it in this decision.

3. *Would it not further the purposes of the Code to proceed with the complaint?*

[50] 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. They include general purposes that advance the broad public policy of fostering a society free of discriminatory barriers, as well as the specific purpose of providing a means of redress for people who have been discriminated against. 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.

[51] Deciding whether to dismiss a complaint under s.27(1)(d)(ii) is a discretionary, case-by-case determination: *Safaei v Vancouver Island Health Authority*, 2024 BCHRT 39 at para. 34.

[52] BTE argues that proceeding with the complaint would discourage employers from using statistical data to identify and eliminate persistent patterns of inequality experienced by protected groups. BTE cites *Radek v Henderson* 2005 BCHRT 302 and *Fraser v. Canada (A. G.)*, 2020 SCC 28, for this proposition. I do not disagree that some employers can and do collect demographic data for ameliorative purposes. I have no trouble accepting that many do so without breaching the *Code*. I stress that nothing in this decision should be taken to say employers cannot collect demographic information to address systemic discrimination. Certainly, if the Tribunal received a complaint where the respondent sought to justify asking an employee or prospective employee about their race on the basis that it was doing so to address barriers to employment and address systemic discrimination, the Tribunal would consider that argument. Much would likely turn on the details of how that information was collected - including voluntariness and how the employer communicated with those whose data was being collected – as well as what the information was actually used for. But this is not that case.

[53] Neither BTE or Sysco has put in front of me anything that suggests they were collecting data on race to test their hiring practices for unintended adverse effects on racialized groups or any other *Code*-related ameliorative purpose. In fact, at this stage neither have identified a purpose for asking the race question. Rather Sysco says it did not know about the race question and did not want or need BTE to collect that data. BTE says it used an American form where, by law, companies are required to collect race-based data. What some other employers might be doing (and why) is of little assistance in determining whether allowing a complaint about what the Respondents actually did, should go to hearing. I am not persuaded by BTE's argument that employers generally may be discouraged from "proactively taking steps to identify and prevent discrimination in their hiring practices" if I allow this complaint to move forward, where the alleged facts are markedly different.

[54] I am persuaded that BTE took – or at least expressed an intention to take – steps to ensure the alleged discrimination did not occur again. At Sysco's request, it agreed to instruct its service providers in B.C. to stop asking test-takers their race. It also said staff would enter "N/A" in its software program in the race field. These steps, if implemented, convince me that BTE took steps to prevent the alleged discrimination from happening again.

[55] However, assuming without deciding that BTE took the alleged discrimination seriously, I am not persuaded that BTE appropriately addressed the impact on Mr. Smith. Among other things, the receptionist and physiotherapist gave Mr. Smith internally inconsistent answers to why he was asked to identify his race. The receptionist said it was because the form came from the U.S., while the physiotherapist said he thought race was collected for statistical reasons. Further, although he was visibly upset, the physiotherapist encouraged him to continue with the test and told him that he would likely not get the job if he did not complete it. Finally, there is no evidence that BTE offered to compensate Mr. Smith for the emotional and psychological distress he says he experienced beginning with the race question. Mr. Smith says he should be compensated for that distress and seeks a remedy before the Tribunal.

[56] The Tribunal has said that it is not necessary for a complainant to obtain all the remedies the Tribunal could order, or exactly what he is seeking *Issa v. Loblaw*, 2009 BCHRT

264 at para. 35; *SA v. Greater Vancouver Regional District dba Metro Vancouver Housing Corporation*, 2023 BCHRT 15 [SA]. The evidence before me is that BTE sought to remedy the impact on Mr. Smith by the receptionist apologizing and not making it mandatory that he disclose his race before starting the test. I am not satisfied that this amounts to appropriately remedying the impact on Mr. Smith. I distinguish the present case from *SA* and *Issa* below.

[57] In *SA*, the policy the complainant sought to challenge was thoroughly addressed and she was made financially whole: *SA* at para. 52. Therefore, the Tribunal in that case did not award damages for injury to dignity. *Issa* dealt with whether a settlement offer was reasonable. Notably, the Tribunal states that any settlement “must fully address the allegations and available remedies, both monetary and non-monetary”: *Issa* at para. 35. Here, there is no evidence of any settlement offer. Therefore, I am not persuaded that, in keeping with the purposes of the *Code*, Mr. Smith was provided with an appropriate means of redress or that his complaint has been appropriately dealt with.

[58] For the above reasons, I am not persuaded that BTE sufficiently remedied the situation and that proceeding with the complaint would not further the purposes of the *Code*.

[59] The complaint against BTE will proceed to hearing.

B. Sysco’s application

[60] Sysco applies to dismiss the complaint against it under s. 27(1)(b), (c), and (f). I address Sysco’s argument under each section in turn.

1. *Should the complaint against Sysco be dismissed under s. 27(1)(b) because it does not allege acts or omissions that contravene the Code?*

[61] Sysco asks the Tribunal to dismiss the complaint on the grounds that being asked the race question does not constitute a breach of the *Code*: s. 27(1)(b). I addressed this question above in the context of BTE’s application. Sysco’s application on this ground mirrors BTE’s. Again, I am persuaded that Mr. Smith has alleged facts that, if proven, would constitute a contravention of the *Code*.

[62] I note here that Sysco argues that for the purposes of s. 27(1)(b), the Tribunal is limited to assessing the bare wording of Mr. Smith's complaint as contained in the complaint form. I disagree. The Tribunal has long held that a complainant may add particulars in response to the application and the Tribunal may consider them: *Larssen v. City of Port Coquitlam and others (No. 2)*, 2005 BCHRT 548 [*Larssen*] at paras. 26-27; *Braden v. Howe Sound Pulp and Paper and others*, 2023 BCHRT 225 at para 16.

[63] Sysco also argues that Mr. Smith's complaint form does not indicate how his answer to the race question prevented him from completing the test or how his concern about the race question resulted in the termination of the conditional offer. Therefore, Mr. Smith does not allege an arguable contravention of the *Code*.

[64] Again, I disagree. As I found above, Mr. Smith identifies as a Black man, which is a protected characteristic. As I decided in the context of BTE's application, Mr. Smith's allegation is that the race question adversely impacted him in the test to the extent that he was visibly upset and unable to complete the test. Sysco subsequently withdrew its job offer for – on the face of the termination letter – “the unsuccessful completion and return of the employment agreement.” Therefore, in my view, Mr. Smith meets the threshold for adverse impact at this stage of the proceedings: *Gichuru* at para 56.

[65] On nexus, at a hearing on the merits, Mr. Smith's race only needs to be a “factor” in the adverse impact, not a “significant” factor or a “material” factor: *Francis* at para 282-290. For the reasons that follow, I am persuaded that Mr. Smith's allegation would, if proven, constitute a contravention of the *Code*.

[66] Mr. Smith alleges that he suffered an adverse impact due to the race question. Mr. Smith says though he was allowed to begin the test without identifying his race, he was unable to complete a required test because he was upset by being asked his race in the context of a job-related assessment. If Mr. Smith proves this at a hearing, it would constitute adverse impact discrimination, and therefore a contravention of the *Code*. Further, Mr. Smith alleges that the concerns he raised about the race question led to the withdrawal of his conditional

offer. Mr. Smith argues that the Human Resources Manager had previously agreed to him dropping off his signed conditional offer on Monday, March 16, 2020, and contrary to that agreement, Sysco withdrew the conditional offer the morning of March 16, 2020. I understand Mr. Smith's argument to be that the Tribunal could infer that his race was a factor in Sysco withdrawing the conditional offer, based on the temporal relationship between the concerns he raised and Sysco withdrawing the offer – including Sysco's abrupt and unexplained change from extending the date when he could return the offer letter to terminating on the basis that he hadn't returned it. On this basis, I am satisfied that, for the purpose of s. 27(1)(b), Mr. Smith's allegations would, if proven, constitute a contravention of the *Code*.

[67] Sysco's application to dismiss under s. 27(1)(b) is denied.

2. *Should the complaint be dismissed because there is no reasonable prospect it will succeed against Sysco?*

[68] I set out above the law applicable to the Tribunal's gate-keeping function under s. 27(1)(c), so I do not repeat it here. I apply that law to Sysco's arguments under s.27(1)(c) below.

[69] First, Sysco argues that Mr. Smith has no reasonable prospect of proving that Sysco was responsible for him being asked the race question. It says it is reasonably certain to prove BTE acted unilaterally to collect race data, contrary to what Sysco had contracted it to do.

[70] Mr. Smith argues that Sysco required BTE to ask the race question, knew about the race question in advance (and expressly or implicitly approved of it being asked), and failed to warn him about the race question or ensure it was asked with sensitivity. Mr. Smith also argues that Sysco had the ability to influence the content of the intake form because they asked BTE to remove the race question after Mr. Smith raised concerns and BTE said it removed the question. I understand Mr. Smith to be arguing that because Sysco had the influence to interfere with the content of the intake form, they were responsible for its content.

[71] I accept that Sysco is reasonably certain to prove that it did not require BTE to ask the race question, know about it in advance, or approve the question being asked. Both Sysco and BTE submit that BTE asked the race question as part of BTE's intake form. BTE's Post Offer

Employment Testing Program Validation Report (which it prepared for Sysco) stated that BTE would only collect demographic data on age and gender in Canada for the purpose of assessing adverse impact. Therefore, Sysco argues it had no way of knowing that race data was also being collected. The evidence demonstrates that Sysco discovered, through Mr. Smith, that BTE provided Mr. Smith with an intake form that included the race question.

[72] However, the real issue here is whether Sysco is reasonably certain to establish that BTE was not its agent at the relevant time, making Sysco responsible for BTE's act. The *Code* provides that "an act or thing done or omitted by an employee, officer, director, official or agent of any person within the scope of the person's authority is deemed to be an act or thing done or omitted by that person": s. 44(2). As the Tribunal has explained, s. 44(2) fulfills the purpose of the *Code* by "ensuring that corporate and institutional entities are held responsible for the acts and omissions of their employees and the other listed representatives": *Daley v. B.C. (Ministry of Health) and others*, 2006 BCHRT 341 at para. 48.

[73] The onus is on Sysco to persuade the Tribunal that BTE was not its agent within the meaning of s.44(2) of the *Code*. It has not done so. On the evidence, Sysco contracted BTE to perform pre-employment testing for Sysco's job candidates, as required by Sysco to fulfill the requirements of conditional job offers. Sysco did not address s. 44(2) in its submissions on this application and I am not persuaded that it is reasonably certain to prove BTE was not acting as its agent in administering the test, including asking Mr. Smith his race. At the hearing, it will be up to Sysco to make submissions on the merits about the application of s. 44 of the *Code* to its relationship with BTE.

[74] Based on the evidence before me, I am not persuaded by Sysco's argument that Mr. Smith has no reasonable prospect of proving that Sysco was not responsible for him being asked the race question.

[75] Second, Sysco argues that Mr. Smith has no reasonable prospect of proving that race was a factor in Sysco's withdrawal of its conditional offer of employment: s. 27(1)(c). It says it is

reasonably certain to prove that it had an entirely non-discriminatory reason for withdrawing the offer; namely, the Covid-19 pandemic.

[76] As discussed above, Mr. Smith's race only needs to be a factor in the adverse treatment: *Stewart* at para. 46; *Francis* at para 282-290. The Tribunal's case law recognises that racism is often difficult to prove. Racism can be subtle and insidious, it sometimes takes the form of unconscious or unintentional bias and stereotyping: *Batson-Dottin v Forensic Psychiatric Hospital (No 2)*, 2018 BCHRT 246 at paras 82. At the same time, the "recognition of the subtlety of discrimination does not transform into a presumption of discrimination, however:" *Jahromi v. Control Solutions and others (No. 2)*, 2018 BCHRT 2 at para 47. Evidence of discrimination is required: *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39 at para 88.

[77] Rarely is there direct evidence of racial discrimination, rather it will often be proven by circumstantial evidence and inference: *Radek* at para. 482. The timing of events is one basis on which the Tribunal may draw a reasonable inference of nexus between a protected characteristic and adverse impact: *Varghese v. Dueck Richmond Chevrolet Buick Cadillac GMC Ltd*, 2024 BCHRT 43 at para. 24.

[78] Sysco withdrew the job offer on the morning of March 16, 2020. This was the first business day after Mr. Smith had failed to complete the test and raised concerns with Sysco about being asked about his race. It was also the first communication from Sysco after Mr. Smith's last email to the Human Resources Manager on the evening of March 13, 2020. In his last email Mr. Smith, among other things: outlined his position that Sysco authorized BTE to conduct the testing and to collect specific information, including race; insisted Sysco explain certain things about the testing, and ended the email by saying they could talk more on Monday.

[79] Instead of continuing the discussion on Monday, Sysco sent Mr. Smith a letter withdrawing their job offer. In that letter the reason Sysco gave for withdrawing the offer was "due to [Mr. Smith's] unsuccessful completion and return of the employment agreement."

However, as I've noted above, the Human Resources Manager told Mr. Smith on Friday that he could return the signed letter on Monday. Sysco suggests that the change in its position was due to concerns that grew over the weekend about the impact the pandemic might have on its business. It says it withdrew its conditional offers from all Outbound Selector candidates because of its concerns. Yet that is not what it told Mr. Smith at the time. Sysco has not explained this seeming inconsistency in what it said at the time was the reason for withdrawing the offer, versus what it says now.

[80] Given the timing of the events leading up to Sysco withdrawing Mr. Smith's job offer, and the inconsistencies and gaps in the evidence before me about the basis for that withdrawal, I am not persuaded that there is no reasonable prospect the Tribunal could accept that race was a factor in that withdrawal. Put another way, in my view Sysco is not reasonably certain to prove it had an entirely non-discriminatory reason for withdrawing Mr. Smith's offer of employment.

[81] Whether race was a factor in the offer withdrawal is a key issue in this complaint. I am unable to reconcile this issue based on corroborative affidavit or contemporaneous evidence: *Smyth v. Loblaw*, 2017 BCHRT 73 at para. 41. As mentioned above, where there are foundational or key issues of credibility, the complaint must go to a hearing: *Francescutti* at para 67.

[82] My conclusion is informed by the role social context evidence and contextual analysis can play in determining human rights complaints on their merits. The Tribunal has been clear that there "must be objective evidence from which any such reasonable inference [of nexus] is drawn": *Francis* at para. 283. In assessing the evidence, the Tribunal is often required to engage in a contextual analysis of all the relevant circumstances. As part of the contextual analysis, the Tribunal can, and often does, look at the particular historical disadvantage faced by the group to which the complainant belongs and how subtle, even subconscious, stereotypes or prejudices manifest to their detriment: *Francis* at para. 284.

[83] Sysco argues that Mr. Smith was being unreasonable in the face of the Human Resources Manager's attempts to reassure him that it was not involved in asking the race question and that race played no role in the hiring process. Mr. Smith argues that the experiences of Black people in the workplace is that their concerns are often not addressed or are dismissed. Mr. Smith suggests that Sysco drew upon misconceptions regarding racialized people – that they play the race card, are too sensitive, overreact or have a chip on their shoulder – to reach the conclusion that they no longer wished to employ him. Mr. Smith asks the Tribunal to infer that these myths and misconceptions together with the concerns he raised led Sysco to withdraw the conditional offer.

[84] I make no finding of fact about whether Mr. Smith's argument will succeed at a hearing. It is for the member who hears this matter to decide whether the inference he asks the Tribunal to make – that race was a factor in Sysco's decision to withdraw the offer – is more probable than other possible explanations or inferences. However, on this application to dismiss, it is relevant to my decision that Mr. Smith is asking the Tribunal to engage in a contextual analysis, including the sometimes-subtle stereotypes and prejudices faced by Black people in the workplace. Given the timing and gaps in Sysco's evidence discussed above, and considering the Tribunal's contextual analysis, I cannot accept Sysco's argument that there is no reasonable prospect Mr. Smith's complaint will succeed.

3. Proceeding with the Complaint will not Further the Purposes of the Code or benefit Mr. Smith

[85] In my decision concerning BTE, above, I stated the purpose of the *Code* and the considerations for the Tribunal to decide whether a complaint will proceed to hearing on this ground.

[86] Sysco argues that they sought to remedy the situation in a timely manner. It argues that the Human Resources Manager answered Mr. Smith's questions about the race question and offered him the chance to finish the test. Sysco also argues that they requested that BTE not ask the race question in their intake form in the future. Finally, Sysco argues that there is no chance of lost income damages because the offer was withdrawn on the cusp of the state of

emergency in BC relating to the COVID-19 pandemic. Therefore, Mr. Smith would have likely been laid off even if he had completed the assessment.

[87] I am not persuaded by Sysco's argument that it took appropriate steps to remedy the adverse impact. I accept that Sysco sought to reassure Mr. Smith that the race question had not bearing on his employment. However, Sysco's argument in this application is that Mr. Smith was being unreasonable when he communicated with the Human Resources Manager concerning the race question. Mr. Smith argues that he was agreeable to completing the test but his enquiries concerning the race question were not addressed satisfactorily and ultimately, his conditional offer was withdrawn. The Tribunal has said the respondent must convince the Tribunal that it has appropriately addressed the discrimination by demonstrating that it took the claim of discrimination seriously, addressed the impact on the complainant, and took steps to ensure the discrimination would not happen again: *Baker v. Brentwood College School and another*, 2011 BCHRT 335.

[88] I am unable to accept that Sysco satisfactorily addressed the alleged discrimination. Sysco's argument is that the race question was not discriminatory and that when it instructed BTE not to ask the question in the future, it was to avoid further misunderstandings and not because the question was discriminatory. Further, Mr. Smith argues, and I accept that Sysco's focus was for him to complete the test as a condition of employment and not on the discriminatory impact of the race question which caused him to leave his test abruptly before completion. On the basis of my decision under s. 27(1)(c), Mr. Smith has taken his allegation of discrimination out of the realm of conjecture and if Mr. Smith does ultimately prove that he experienced discrimination at work, Sysco will come to understand what conduct constituted discrimination, and why. Proceeding with the complaint therefore furthers the purposes of the *Code*.

[89] The Tribunal has said that it is not necessary for a Complainant to obtain all the remedies the Tribunal could order, or exactly what he is seeking *Issa* at para. 35; *SA* at para 52; *Carter v. Travelex Canada*, 2007 BCHRT 275 at para. 30, upheld in 2009 BCCA 180. However, there is no evidence that when Mr. Smith informed the Human Resources Manager about his

experience at the Service Provider, that Sysco sought to remedy the impact on Mr. Smith beyond getting him to complete of the test. For instance, Sysco has not provided evidence that Mr. Smith was offered any remedy for the injury to his dignity, feelings, and self-respect. As I stated above, in SA, the policy SA sought to challenge was thoroughly addressed and she was made financially whole: SA at para. 52. Therefore, the Tribunal in that case did not award damages to for injury to dignity. Here, there is no evidence of any settlement offer for Mr. Smith. Therefore, I am not persuaded that, in keeping with the purposes of the *Code*, Mr. Smith was provided with an appropriate means of redress or that his complaint has been appropriately dealt with according to the purposes of the *Code*.

[90] For the above reasons, I am not persuaded that Sysco sufficiently remedied the situation and proceeding with the complaint would not further the purposes of the *Code*.

4. *Was the substance of the complaint dealt with by the Office of the Information and Privacy Commissioner?*

[91] The Tribunal may dismiss a complaint under s. 27(1)(f) of the *Code* if the substance of the complaint has been appropriately dealt with in another proceeding. The principles underlying s. 27(1)(f) flow from the doctrines of issue estoppel, collateral attack, and abuse of process, and include finality, fairness, and protecting the integrity of the administration of justice by preventing unnecessary inconsistency, multiplicity, and delay: *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52 at paras. 25 and 36.

[92] To decide whether the substance of a complaint has been appropriately dealt with in another proceeding, the Tribunal must ask itself three things:

- a. Did the other proceeding have jurisdiction to decide human rights issues under the *Code*?
- b. Was the previously decided legal issue essentially the same as what is being complained of to the Tribunal?

- c. Did the complainant have the opportunity to know the case to be met and have a chance to meet it, regardless of whether the previous process mirrored the Tribunal's?

Figliola at para. 37

[93] Sysco argues that the bulk of Mr. Smith's complaint relates to privacy concerns which are outside the jurisdiction of the Tribunal and have been dealt with by Office of the Information and Privacy Commissioner [OIPC]. Mr. Smith disputes this and argues that his complaint to the Tribunal concerns human rights violations which were not dealt with by OIPC.

[94] I am satisfied that the substance of Mr. Smith's human rights complaint has not been dealt with by the OIPC. First, the OIPC does not have jurisdiction to apply the *Code*. Second, OIPC dealt with Mr. Smith's privacy concerns which is substantially different from Mr. Smith's allegation that Sysco discriminated against him on the basis of race, most notably by withdrawing its employment offer which OIPC did not address. Therefore, the present complaint does not amount to relitigating the same dispute: *Figliola* at para. 37.

[95] I deny Sysco's application under s. 27(1)(f).

IV CONCLUSION

[96] The Respondents' application to dismiss the complaint is denied. The complaint will proceed to hearing. In making my decision, I am not finding that Mr. Smith will succeed in his case at a hearing, I am merely finding that on the evidence before me the complaint rises above the level of conjecture and a hearing is required to decide the merits of the complaint.

Ijeamaka Anika
Tribunal Member