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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:

Jenny Hwang

COMPLAINANT

AND:

Entertainment Partners of Canada ULC doing business as EP Canada

RESPONDENT

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

Tribunal Member:	Jonathan Chapnick
On her own behalf:	Jenny Hwang
Counsel for Respondent:	Michael Horvat and Jessica Schissler

I INTRODUCTION

[1] Jenny Hwang, worked as a set monitor on the health and safety team for a television production called "Big Sky" on August 17 and 18, 2020. The following week, Ms. Hwang filed a discrimination complaint to the Human Rights Tribunal under s. 13 of *Human Rights Code*. She alleges that, on August 19, 2020, her supervisor on the Big Sky production [**Supervisor**] told her she was being let go and said, "not to sound sexist," but they "would have to hire a man" to do her job because "the work was labour intensive" [**Alleged Statement**]. This Alleged Statement forms the basis of Ms. Hwang's complaint.

[2] The respondent to the complaint, Entertainment Partners of Canada ULC doing business as EP Canada [**EP**], denies there was any discrimination and applies to dismiss Ms. Hwang's complaint without a hearing on the ground that it has no reasonable prospect of success. EP says Ms. Hwang was a "daily hire" on Big Sky, and the decision to refuse to continue to engage her services was not an adverse impact in her daily employment on the television production. EP also asserts that the termination of Ms. Hwang's employment was not connected to her sex. It says there is no corroboration that the Alleged Statement was made, and argues that the position put forward in Ms. Hwang's complaint is inconsistent with the other evidence before the Tribunal.

[3] This is not a case where the alleged discrimination is subtle and must be inferred. Ms. Hwang's evidence of discrimination is direct: she says the Supervisor made the Alleged Statement. EP denies that the statement was made or that Ms. Hwang's sex had anything to do with the cessation of her employment on Big Sky. As I discuss below, I find that the credibility of Ms. Hwang's evidence, versus that of the Supervisor, is the foundational issue in this complaint. For this reason and others, I deny EP's application to dismiss Ms. Hwang's complaint.

[4] To make this decision, I have considered all the information filed by the parties. In these reasons, I only refer to what is necessary to explain my decision. I make no findings of fact and reach no conclusions regarding the merits of Ms. Hwang's complaint.

II BACKGROUND

[5] In its dismissal application, counsel for EP describes Ms. Hwang's employment on Big Sky as being with the Walt Disney Family of Companies [**Disney**], making no reference to EP's relationship with Disney or Ms. Hwang. EP has not, however, disputed the style of cause in these complaint proceedings, nor denied that it will be liable for the alleged discrimination if Ms. Hwang's complaint succeeds.

[6] Along with its dismissal application, EP submitted a sworn statement from Disney's director of employee relations [**HR Director**] and supporting documents. With her response submission, Ms. Hwang provided an unsworn statement of evidence and argument, as well as supporting documents. The following background information is drawn from the parties' materials.

[7] The parties agree that Ms. Hwang worked on Big Sky on August 17 and 18, 2020. EP provided the Tribunal with a signed, but undated, "Employee Deal Memo," which EP says accurately describes the terms of Ms. Hwang's employment. The Deal Memo seems to identify Ms. Hwang as a "daily employee," and states that her services are "for a minimum period of one day," with "no other guarantee of the period of services." Similarly, in her statement, the HR Director says that Ms. Hwang's position was classified as a "daily hire," meaning that employees like Ms. Hwang were "hired on a daily basis and are not guaranteed future employment with Big Sky … unless they [were] expressly advised that they [were] being hired for an additional day." I note that the Deal Memo provides an August 17, 2020 start date, but no end date.

[8] Ms. Hwang says the Supervisor texted her on the night of August 18, telling her to take the next day off. She says the following night, the Supervisor called her and told her she was being let go, which is when the Supervisor made the Alleged Statement. The HR Director, however, says she interviewed the Supervisor in or around February 2021, and the Supervisor "denied ever making this statement, or words to that effect, or referencing gender or sex at all, in respect of the Set Monitor position or in any conversation with Ms. Hwang." The HR Director

says she was advised by the Supervisor that the decision not to retain Ms. Hwang "was solely due to Ms. Hwang's refusal to perform certain required duties of the Set Monitor position." Ms. Hwang adamantly denies refusing to perform her job duties.

[9] The HR Director says Ms. Hwang "did not report any complaint to Big Sky or Disney management" regarding the Alleged Statement, and so "Disney does not have … any record of any complaint of any statement being made and, consequently, did not have the opportunity to conduct a timely investigation." She says that, in "the weeks immediately following Ms. Hwang's departure, the Company proceeded to hire two (2) female replacement Set Monitors," who worked directly with the Supervisor. The HR Director's evidence is that, throughout the Big Sky production, roughly 18 out of the 46 employees on the health and safety team were women, including roughly 11 out of the 25 set monitors.

[10] Ms. Hwang filed her discrimination complaint with the Tribunal on August 26, 2020.

III DECISION

[11] Section 27(1)(c) of the *Code* gives the Tribunal discretion to dismiss complaints that have no reasonable prospect of success and therefore do not warrant the time and expense of a hearing: *Berezoutskaia v. British Columbia (Human Rights Tribunal)*, 2006 BCCA 95, at paras. 22-26, leave to appeal ref'd [2006] S.C.C.A. No. 171; *Workers' Compensation Appeal Tribunal v. Hill*, 2011 BCCA 49 at para. 27 [***Hill***]. To make her case at a hearing, Ms. Hwang would need to prove three things: (1) she has a personal characteristic that is protected by the *Code*, (2) she was adversely impacted in employment, and (3) her personal characteristic was a factor in the adverse impact: *Moore v. British Columbia (Education)*, 2012 SCC 61 at para. 33. In the present dismissal application, the onus is on EP to establish that Ms. Hwang has no reasonable prospect of proving the three elements of her complaint, and therefore her complaint should be dismissed: *Paulsen v. BC Hydro and another*, 2020 BCHRT 75 at para. 11.

[12] The first element of Ms. Hwang's complaint is not in dispute; the parties agree her sex is a protected characteristic under the *Code*. At issue in this dismissal application are the second

and third elements. EP argues Ms. Hwang did not experience an adverse impact in employment and, in any event, there was no connection between her sex and "the decision to terminate/cease her employment with the [Disney] Company." I will address these arguments in turn.

A. Does Ms. Hwang have no reasonable prospect of proving an adverse impact in employment?

[13] EP says that the "decision to refuse to continue to engage the services of Ms. Hwang does not constitute an adverse impact" because there is no evidence she was hired to work on Big Sky for an extended period of time. Ms. Hwang, however, says she was told by a third-party that her position on Big Sky would be for several months. She says the loss of her job caused her financial stress and psychological and emotional harm.

[14] In its submission to the Tribunal, EP describes the end of Ms. Hwang's employment in several different ways. For example, in one paragraph, EP states that a decision was made to "terminate/cease [Ms. Hwang's] employment." Earlier in the same paragraph, EP references a "decision to not continue, retain or re-hire Ms. Hwang in her daily position as a Set Monitor." Despite the variety of terminology used, it is clear that EP does not dispute that a decision was made to no longer employ Ms. Hwang. Under the *Code*, a refusal to employ or to continue to employ a person may be a discriminatory adverse impact: *Code*, s. 13(1)(a). Therefore, regardless of the term of Ms. Hwang's position or her employment status when she was let go, I am not persuaded that she has no reasonable prospect of proving an adverse impact in employment.

B. Does Ms. Hwang have no reasonable prospect of proving a connection between her sex and the adverse impact?

[15] Most of EP's submissions are aimed at the third element of Ms. Hwang's case. EP says there "is no link or connection between Ms. Hwang's sex" and the decision not to retain her as a set monitor. It says her sex was not a factor in the decision to hire her, and it "was not considered and/or a factor" in the decision to terminate her employment.

[16] EP argues its position in two ways. First, it argues there is "no corroboration" that the Alleged Statement was made. EP says "there is no likelihood that [the Supervisor] made [the Alleged Statement], and no proof or corroboration that such a statement was made." It says Ms. Hwang failed to report the Alleged Statement to management, so "the [Disney] Company has no independent record of this statement being made, either as a formal or even informal complaint brought by Ms. Hwang." In addition, EP observes that the Supervisor denies making the Alleged Statement, and "Ms. Hwang has not submitted any notes regarding the [phone] conversation [with the Supervisor] or any witnesses thereto." Further, EP says there is no proof or corroboration "that the [Disney] Company took any step to rely upon [the Alleged Statement] (if it had been made)" in deciding "not to retain Ms. Hwang." In this regard, EP says that the "immediate steps following the cessation of Ms. Hwang's employment/engagement was to hire two new Set Monitors … both of whom are/were female." EP also points to what it says are external inconsistencies in Ms. Hwang's complaint and "the overwhelming presence of females on the health and safety team," asserting that "Ms. Hwang's recollection of events is unlikely to be favoured" by the Tribunal at a hearing. This brings me to EP's second way of arguing its position, which I discern to proceed as follows.

[17] EP says that Ms. Hwang's complaint "is riddled with external inconsistencies." More specifically, it says Ms. Hwang's "position is inconsistent (and thus should not be relied upon) for three reasons":

> (1) the duties of Set Monitor … were and could clearly be performed adequately by either sex, and there was no required strength and fitness level for the position; (2) … in any event, for the duration of the Production of Big Sky, females formed a significant portion of the … Health and Safety team, including Set Monitors … which clearly would not have been the case if only "males" were needed for that type of work; and (3) following Ms. Hwang's … departure … two (2) females were hired as Set Monitors, effectively as replacements, and … were able to complete the same/assigned tasks of the Set Monitor position, without issue or complaint.

[18] EP characterizes Ms. Hwang's position in this case as amounting to "the allegation … that being 'male' was a requirement of [being a] Set Monitor, and as such governed the [Disney] Company's hiring decisions." EP disputes this position, arguing that the evidence does not establish that only men could adequately perform the set monitor job duties. EP says the evidence "suggests there is no support for the allegation that any employment decision, and in particular for Ms. Hwang and her not being called to return to the [Big Sky] Production, had any relationship to the implied 'strength' of males, or any other improper decision relating to Ms. Hwang's sex." Rather, EP says the "evidence strongly suggests that Ms. Hwang was not rehired … for the simple fact that she refused to perform certain [required] duties."

[19] EP cites *Kachidza v. Hyperwallet Systems and others*, 2020 BCHRT 59 in support of its argument. In *Katchidza*, the complainant alleged he was not hired because of his age (early 40s) and other protected characteristics. The respondent, on the other hand, claimed the complainant was not hired because he failed to demonstrate the requisite level of understanding or initiative expected of someone with his level of experience. In assessing whether the complainant's age was a factor in the respondent not hiring him, the Tribunal noted that there was no evidence that anyone asked the complainant about his age during the recruitment process. The evidence before the Tribunal was that: in an interview for the job, the complainant was asked how he felt about being managed by younger, less experienced colleagues; the majority of the respondent's employees were under the age of 40; and instead of hiring the complainant, the respondent hired someone much older than him for the role. The Tribunal found that some of this evidence could support an inference that the complainant's age was connected to the reason he was not hired, but other evidence strongly suggested the contrary. It concluded that the age-based portion of the complaint had no reasonable prospect of success. EP says *Kachidza* involved very similar circumstances to those now before me. As I discuss further below, I disagree.

[20] Under s. 27(1)(c) of the *Code*, the Tribunal considers all the evidence before it in examining the merits of the complaint: *Berezoutskaia* at para. 22. This assessment is not about making findings of fact; it is about testing the evidence for some probability the complainant's

case could prevail: *Lado v. Hardbite Chips and others*, 2019 BCHRT 134 at para. 26. For Ms. Hwang's complaint to continue forward, there must only be some evidence capable of raising her complaint "out of the realm of conjecture": see *Hill* at para. 27; *Ritchie v. Central Okanagan Search and Rescue Society and others*, 2016 BCHRT 110 at para. 118. EP says the evidence in this case does not meet this low standard. For the following reasons, I disagree and find that Ms. Hwang's complaint must go to hearing.

[21] First, I do not agree with some of EP's assertions regarding the evidence before me. For instance, I do not agree that there is "no independent record of [the Alleged Statement] being made, either as a formal or even informal complaint brought by Ms. Hwang." In my view, the complaint to the Tribunal, filed one week following the alleged discrimination, is such a record. I also do not agree that "the evidence strongly suggests that Ms. Hwang was not rehired … for the simple fact that she refused to perform certain [required] duties." The only evidence before me regarding Ms. Hwang's alleged performance issues is the HR Director's second-hand description of the Supervisor's apparent evidence. EP did not provide the Tribunal with a statement from the Supervisor. On the other hand, Ms. Hwang's materials contain several direct (albeit unsworn) statements specifically denying the alleged performance issues and asserting that the Alleged Statement was made.

[22] Second, on the materials before me, I do not accept EP's broad characterization of Ms. Hwang's position in this case. Her complaint narrowly asserts that the Alleged Statement was made, and that dismissing her was a contravention of the *Code*. Ms. Hwang does not allege that being a man was a requirement of the set monitor job, or that such a requirement governed hiring decisions. She does not need to prove these things for her complaint to succeed at a hearing. In this regard, previous decisions of the Tribunal, such as *Ben Maaouia and others v. Toscani Coffee Bar and another*, 2021 BCHRT 23 [***Maaouia***] and *English v. Sihota*, 2000 BCHRT 19, are instructive. They indicate that Ms. Hwang may be successful at a hearing simply by proving that the Alleged Statement was made at the moment of termination, and by establishing its impact.

[23] In *Maaouia*, the complainants alleged that the owner of the Toscani Coffee Bar refused to serve them, telling them she did not want "you Arabs" to come to the coffee shop anymore. In that case, the Tribunal determined that the complainants' race was a factor in the service refusal, despite accepting that the owner did not refuse to serve the Complainants because they were Arab, reasoning as follows:

> In a discrimination complaint, it is not the respondents' intention that matters but the effect of their behaviour: *Code*, s. 2. In this case, the effect of [the owner's] words was to connect the Complainants Arab ancestry to her communication that she would not serve them. The discriminatory words were "spoken at the very same time and place" as she told [a complainant] she would not serve him, and they were 'inextricably linked' to that communication: *Gichuru v. Purewal*, 2019 BCSC at para. 484. The effect was discrimination: *Maaouia* at para. 34.

[24] Similarly, in *English*, the respondent told the complainant he was being fired because the employer was "going with a younger look." At the hearing before the Tribunal, however, the respondent claimed he had been trying to be "delicate" when he was firing the complainant, and that, in reality, the complainant's age was not a factor in the termination decision. The Tribunal found that the respondent's motivation did not matter. Rather, the effect of making the age-related comment at the moment of termination – whether or not it was true – was to discriminate against the employee.

[25] Unlike the *Maaouia* and *English* decisions, I do not find *Kachidza* helpful to my analysis of the dismissal application before me. In *Kachidza*, no one told the complainant he was not hired because of his age. In contrast, in the present case – as in *Maaouia* and *English* – the complainant alleges being told directly that the adverse impact she experienced was related to a protected characteristic. Unlike in *Kachidza*, the discrimination alleged in Ms. Hwang's complaint need not be proven by circumstantial evidence and inference. Ms. Hwang's allegation is not conjectural; it is a specific, first-hand accusation.

[26] Which brings me to the final and determinative reason for denying EP's dismissal application. I acknowledge that human rights complaints often involve issues of credibility, and these issues are not necessarily fatal to a dismissal application under s. 27(1)(c): *Safaei v. Vancouver Island Health Authority (No. 2)*, 2024 BCHRT 39 at para. 48, citing *Francescutti v. Vancouver (City)*, 2017 BCCA 242 at para. 67. However, if there are foundational or key issues of credibility, then a complaint must go to a hearing: *Francescutti* at para. 67. I find this to be the case in the matter before me.

[27] As EP states in its application, the Alleged Statement is "at the core" of Ms. Hwang's complaint. Ms. Hwang says the Supervisor told her they needed "to hire a man" because "the work was labour intensive" as an explanation for refusing to continue to employer her. The HR Director says the Supervisor denies this. This is the central dispute in the complaint, and its resolution will turn on the Tribunal's assessment of the credibility of Ms. Hwang's evidence, versus that of the Supervisor. At a hearing, the Tribunal may well accept that Ms. Hwang's performance was a factor in her termination. But Ms. Hwang's complaint may succeed regardless, if the Tribunal also decides that the Alleged Statement was made at the time of her dismissal. In making its decision, the Tribunal might consider EP's circumstantial evidence and its arguments regarding flaws in Ms. Hwang's evidence. Those considerations go to the credibility of Ms. Hwang's evidence, which is a foundational issue in this case. I therefore find that Ms. Hwang's complaint must go to a hearing.

[28] For all of the above reasons, EP's application under s. 27(1)(c) is denied.

IV CONCLUSION

[29] EP's application to dismiss is denied. Ms. Hwang's complaint will proceed to a hearing.

Jonathan Chapnick
Tribunal Member