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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:

Melanie Neske

COMPLAINANT

AND:

Sobeys Inc. and Keith Shaw

RESPONDENTS

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

Tribunal Member:

Edward Takayanagi

Counsel for the Complainant:

Jessica Forman

Counsel for the Respondents:

Grant Machum

I INTRODUCTION

[1] Melanie Neske worked as a Compounding Pharmacy Manager at a Safeway store owned by Sobeys Inc. She alleges Sobeys and her supervisor Keith Shaw [together the “**Respondents**”] discriminated in employment based on age and physical disability, contrary to s. 13 of the *Human Rights Code*, when they eliminated her position effectively demoting her.

[2] The Respondents deny discriminating. They say their decision to eliminate Ms. Neske’s role was solely a business decision unrelated to Ms. Neske’s protected characteristics. They apply to dismiss the complaint under s. 27(1)(b) because the acts alleged do not contravene the *Code*, under s. 27(1)(c) because there is no reasonable prospect the complaint will succeed, and under s. 27(1)(d)(ii) because proceeding with the complaint would not further the purposes of the *Code*.

[3] For the following reasons, I allow the application to dismiss the complaint as against Mr. Shaw. I deny the balance of the dismissal application. 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.

II BACKGROUND

[4] The following background is taken from the parties’ materials.

[5] Ms. Neske began working for Sobeys’ predecessor, Safeway in 1990. She was the Compounding Pharmacy Manager at the company’s Central Fill location. Her duties involved working 40 hours a week managing the compounding pharmacy where pharmacists prepare drugs. She reported directly to Mr. Shaw who was the Pharmacy District Manager.

[6] Sobeys took ownership of Safeway in or about 2014.

[7] Ms. Neske went on medical leave in May 2016 due to spinal issues. She underwent two surgeries and returned to work on January 8, 2018. In accordance with a graduated return to

work plan put in place by her physician, Ms. Neske initially worked up to four hours a day for three days a week.

[8] On March 26, 2018, Ms. Neske was cleared by her physician to increase her work hours to six hours a day for four days a week. No estimate was provided as to when Ms. Neske could return to fulltime hours. In May 2018, Ms. Neske increased her work hours to six hours a day for five days a week.

[9] On or about November 22, 2018, Ms. Neske's physician confirmed she still suffered from physical limitations and recommended that she continue working six hours a day for five days a week. No estimate was provided as to when Ms. Neske could return to fulltime hours.

[10] In May 2019, Ms. Neske's physician advised that she should reduce her hours to six hours a day for four days a week. The limitations and restrictions were deemed to be temporary in nature, but no estimate was given as to when Ms. Neske could return to fulltime hours.

[11] Miss Neske was 52 years old in September 2019.

[12] On September 27, 2019, Sobeys advised Ms. Neske that her position would be eliminated effective October 1, 2019. Ms. Neske was told that she would be transferred to the role of Staff Pharmacist which involved a pay cut and elimination of her managerial duties.

III DECISION

A. Section 27(1)(b)

[13] 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.

[14] In this case, Ms. Neske must set out facts that, if proved, could establish that she has a characteristic protected by the *Code*, in this case her age and physical disability, she was adversely impacted in employment and her protected characteristic was a factor in the adverse impact: *Moore v. British Columbia (Education)*, 2012 SCC 61 at para. 33.

[15] In this case, the complaint alleges a contravention of the *Code*. For the purposes of this application, the Respondents do not dispute that Ms. Neske has the protected characteristics of age and physical disability in the form of her spinal injuries. They also do not dispute that Ms. Neske's position was eliminated. Ms. Neske alleges that her position was eliminated because she was only able to work limited hours during her graduated return to work. She also says Sobeys had previously eliminated other employees over the age of 50 and replaced them with significantly younger employees. The allegations clearly connect the adverse impact to her protected characteristics and if proven could establish a contravention of the *Code*.

[16] The Respondents say they eliminated Ms. Neske's position for non-discriminatory business reasons. However, in a s. 27(1)(b) application, I cannot consider alternative scenarios or explanations put forward by a respondent. Rather, I must only assess the complainant's allegations to determine whether, if proved, they would contravene the *Code*. In my view, the Respondents' arguments on whether there were legitimate non-discriminatory reasons for their actions is a matter best considered under s. 27(1)(c).

[17] I deny the Respondents' application under s. 27(1)(b).

B. Section 27(1)(c)

[18] Sobeys applies to dismiss Ms. Neske's complaint on the basis that it has no reasonable prospect of success: *Code*, s. 27(1)(c) The onus is on Sobeys to establish the basis for dismissal.

[19] 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.

[20] 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.

[21] 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.

[22] As set out above, to prove her complaint at a hearing, Ms. Neske will have to prove that she has a characteristic protected by the *Code*, she was adversely impacted in employment, and her protected characteristic was a factor in the adverse impact: *Moore v. British Columbia (Education)*, 2012 SCC 61 at para. 33. If she did that, the burden would shift to the Respondents to justify the impact as a *bona fide* occupational requirement. If the impact is justified, there is no discrimination.

[23] The Respondents argue that there is no reasonable prospect of Ms. Neske proving a nexus between her protected characteristics of her age and physical disability and the elimination of her position as a Compounding Pharmacy Manager. As I understand the submissions, the Respondents say that their decision to eliminate Ms. Neske’s job was a business decision arising out of a pre-existing plan to streamline operations.

[24] The Respondents also make some arguments under this section that they have accommodated Ms. Neske to the point of undue hardship and have offered reasonable

accommodation to Ms. Neske that she has refused to accept. I am not persuaded that the Respondents are reasonably certain to prove they accommodated Ms. Neske to the point of undue hardship.

[25] Based on the information and materials before me at this stage, I cannot say there is no reasonable prospect that the Tribunal would find after a full hearing that Ms. Neske's age and physical disability were a factor in the elimination of her position.

[26] Ms. Neske asks the Tribunal to draw an inference that her protected characteristics was a factor in the Respondent's decision because: hers was the only position eliminated at her job site in 2019; Ms. Neske is not aware of any other restructuring at other Sobeys pharmacies; and at the time that her position was eliminated, Ms. Neske was on a graduated return to work and her physician had recently recommended she reduce her hours.

[27] The Respondents provide an affidavit from Mr. Shaw where he attests that he was involved in discussions at Sobeys about streamlining management structure over several years and in the spring of 2019, it was determined that the Compounding Pharmacy Manager position could be eliminated.

[28] What is lacking in the materials the Respondents put before me is any documentation regarding Sobeys plan to streamline operations or contemporaneous materials showing these issues were discussed and considered prior to Ms. Neske's injury and graduated return to work.

[29] It may well be coincidental that the Respondents decided to eliminate Ms. Neske's position during her ongoing graduated return to work, and a few months after being told that she should reduce her hours. However, in the absence of documentary evidence pre-dating the elimination of the Compounding Pharmacy Manager position, I am not persuaded that the Respondents will be able to rebut an inference that Ms. Neske's protected characteristics were a factor in the decision to eliminate her position. Therefore, I cannot say that there is no reasonable prospect the complaint will be successful.

[30] I deny the application to dismiss under s. 27(1)(c).

C. Section 27(1)(d)(ii)

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

[32] The Respondents submit that they have accommodated or offered reasonable accommodation to Ms. Neske by allowing her a graduated return to work and maintaining her work benefits despite her reduced hours, offering her an alternate position of Staff Pharmacist, and offering to maintain her manager-level payment and benefit coverage for several months after her position was eliminated. I understand the Respondents are arguing that it would not further the purposes of the *Code* to proceed with the complaint because the underlying dispute has been resolved or remedied: *Williamson v. Mount Seymour Park Housing Coop*, 2005 BCHRT 334.

[33] Based on the materials I am not persuaded that it does not further the purposes of the *Code* to proceed with this complaint. First, while the Respondents say they have accommodated Ms. Neske to the point of undue hardship, they have provided little submissions and no documentary materials to support this assertion. The Respondents have provided little information about their business, how maintaining Ms. Neske's position affected costs of operation, or whether there were any safety issues related to maintaining Ms. Neske's position. Second, the Respondents' evidence of reasonable accommodation offered to Ms. Neske is that she was given the option of accepting a demotion to a non-managerial position with less responsibility and a lower hourly rate of pay. There is no information before me that the Respondents explored other options or considered other possible accommodations. It

appears that the options provided to Ms. Neske was to accept the position with lower pay or lose her employment.

[34] Under the circumstances, I am not persuaded that the Respondents have resolved or remedied the complaint so that it would not further the purposes of the *Code* to proceed. Accordingly, I decline to dismiss the complaint under s. 27(1)(d)(ii).

[35] I arrive at a different conclusion on the application to dismiss as against Mr. Shaw under s. 27(1)(d)(ii). The Respondents argue that it would not further the *Code's* purposes to proceed against Mr. Shaw: *Daley v. BC (Ministry of Health)*, 2006 BCHRT 341.

[36] There are strong policy reasons that favour complaints against individual respondents. As the Supreme Court of Canada has acknowledged, “the aspirational purposes of the *Code* require that individual perpetrators of discrimination be held accountable for their actions”: *British Columbia Human Rights Tribunal v. Schrenk*, 2017 SCC 62 at para. 56. This is especially true for allegations of discrimination with a high degree of personal culpability, like sexual or racial harassment: *Daley* at para. 53.

[37] On the other hand, naming individual respondents can complicate and delay the resolution of complaints, exacerbate feelings of personal animosity, and cause needless personal distress to individuals who are accused of discrimination: *Daley* at para. 54. Because employers and institutional respondents are liable for the acts of their agents, they will be responsible for any remedy ordered by the Tribunal: *Code*, s. 44(2); *Robichaud v. Canada*, [1987] 2 SCR 84. In those situations, the remedial aims of the *Code* may be most fairly and efficiently fulfilled without holding individuals liable.

[38] The Tribunal balances all these considerations to decide whether the purposes of the *Code* are best served by having a complaint proceed against individuals as well as an institutional respondent, or against the institutional respondent only. It has identified the following factors as relevant:

- a. whether the complaint names an institutional employer as a respondent and that respondent has the capacity to fulfill any remedies that the Tribunal might order;
- b. whether the institutional respondent has acknowledged the acts and omissions of the individual as its own and has irrevocably acknowledged its responsibility to satisfy any remedial orders which the Tribunal might make in respect of that individual's conduct; and
- c. the nature of the conduct alleged against the individual, including whether:
 - i. their conduct took place within the regular course of their employment;
 - ii. the person is alleged to have been the directing mind behind the discrimination or to have substantially influenced the course of action taken; and
 - iii. the conduct alleged against the individual has a measure of individual culpability, such as an allegation of discriminatory harassment.

Daley at paras. 60-62.

[39] In my view, each of these factors favours dismissing the complaint against Mr. Shaw. I will address these factors in turn.

[40] First, Sobeys is named as a respondent. It has submitted that it has the capacity to fulfill any remedy the Tribunal may order and has irrevocably acknowledged as its own the acts or omissions of Mr. Shaw in his capacity as a manager and takes full responsibility for satisfying any remedial orders.

[41] Second, the allegations in the complaint are about the elimination of Ms. Neske's position. The evidence before me is that Mr. Shaw, as a manager, had some input into the decision to eliminate the position but was not the directing mind with unilateral power to

restructure the business. In my view the allegation does not take the conduct outside of the normal scope of Mr. Shaw's duties as an employee of Sobeys.

[42] Finally, the nature of the allegations against Mr. Shaw do not include conduct that has a measure of personal culpability that would warrant proceeding against him. Ms. Neske says she was humiliated by Mr. Shaw informing other employees of the change in the reporting structure. I have no doubt that is true but that is an insufficient reason to proceed against him as an individual. Informing other employees to the changed structure is something that can be expected of a manager. The alleged individual culpability is based only on the adverse impact Ms. Neske says she experienced, not the kind of egregious conduct that warrants individual liability under the *Code*.

[43] Based on the information before me I am not persuaded that allowing the complaint to proceed against Mr. Shaw would further the purposes of the *Code*. I find the individual respondent was acting on behalf of, and within the scope of, their employment with Sobeys. Sobeys has accepted responsibility for their actions and said it would be responsible for any damages that are ordered, in the event that there is a finding of discrimination. The allegations against the individual respondent do not indicate a level of individual culpability that would justify their inclusion as a respondent.

[44] The application to dismiss the complaint as against Mr. Shaw is granted under s. 27(1)(d)(ii) of the *Code* and the style of proceeding will be amended to name Sobeys as the sole respondent.

IV CONCLUSION

[45] The application to dismiss the complaint as against Mr. Shaw is granted under s. 27(1)(d)(ii). The balance of the application to dismiss is denied.

Edward Takayanagi
Tribunal Member