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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:

Karen Catchot

**COMPLAINANT**

AND:

Western Holistic Health Inc. dba Canadian School of Natural Nutrition and Kate McLaughlin

**RESPONDENTS**

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# REASONS FOR DECISION
# APPLICATION TO DISMISS A COMPLAINT
**Section 27(1)(b) and (d)(ii)**

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| Tribunal Member: | Kylie Buday |
| Counsel for the Complainant: | Katherine Shortreed |
| Counsel for the Respondent: (Kate McLaughlin) | Fred Wayne |

## I INTRODUCTION

[1] Karen Catchot filed a complaint of discrimination under s. 8 of the *Human Rights Code* which prohibits discrimination in services. Ms. Catchot alleges Western Holistic Health Inc. dba Canadian School of Natural Nutrition [the **School**] and Kate McLaughlin [together, the **Respondents**] discriminated against her after physical and mental disabilities prevented her from attending classes, turning in assignments on time, and taking tests on their scheduled dates. She says the Respondents did not satisfy their duty to accommodate her and she was adversely impacted by, among other things, the resulting delays to her ability to complete her program and graduate on time.

[2] The Respondents have not yet filed their response to the complaint. Instead, Ms. McLaughlin sought and was granted permission to file an application to dismiss the complaint against her in accordance with the Tribunal's November 7, 2019, Practice Direction. Under that Practice Direction, respondents may apply to dismiss a complaint against individually named respondents under s. 27(1)(b) and (d)(ii) only, before filing a response and fulfilling their disclosure obligations.

[3] For the following reasons, I deny Ms. McLaughlin's application under s. 27(1)(b). I am not persuaded Ms. Catchot did not allege an arguable contravention of the *Code* in her complaint. I also deny Ms. McLaughlin's application under s. 27(1)(d)(ii). There is no dispute that the School filed for bankruptcy and does not have the ability to satisfy any remedial orders the Tribunal might make in the event Ms. Catchot's complaint succeeds. There is also no dispute that Ms. McLaughlin owned the School. I find it would be contrary to the purposes of the *Code* to dismiss the complaint against Ms. McLaughlin in theses circumstances and am not persuaded otherwise.

## II BACKGROUND

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

[5] In September 2019, Karen Catchot started a one-year long program at the School. At the time of the alleged discrimination, Ms. McLaughlin owned and managed the School.

[6] In October 2019, Ms. Catchot was diagnosed with pneumonia. She says she was bedridden for two weeks, missed classes, an assignment deadline, and had to reschedule a test. She says the Respondents penalized her by reducing her final course grade and charging her a fee of $105.00 to reschedule a test.

[7] In February 2020, Ms. Catchot was in a car accident. She sustained a concussion and soft tissue injuries. She says she had a history of concussions and back injuries prior to the collision and the mental and physical effects of the collision were severe.

[8] Ms. Catchot says she emailed Ms. McLauglin to request two accommodations after the car accident: (1) to reschedule a test and (2) for an extension on two case study assignments. Ms. Catchot alleges Ms. McLauglin replied that she could accommodate diagnosed disabilities. In response, Ms. Catchot says she offered to provide Ms. McLaughlin with a doctor's letter to support her accommodation request and asked what kind of documentation was required.

[9] Ms. Catchot says Ms. McLaughlin did not initially address her request but instead asked her if she would be attending class on March 3, 2020. Ms. Catchot says that in response, she again requested clarification on what documentation was required for accommodations. She alleges that Ms. McLaughlin told her that a specialist's full assessment and report were required to support her request for academic accommodations. Ms. Catchot also says Ms. McLaughlin added that students typically have this documentation prior to enrolling in their program. She also provided Ms. Catchot a link to a clinic that offers psychoeducational assessments.

[10] Ms. Catchot says the Respondents' failure to accept medical documentation from her doctor as proof of her health condition, and failure to provide her with accommodations absent a psychoeducational assessment, caused a delay in her graduation from the program (among other things). She says psychoeducational assessments cost between $1700.00 and $2,200.00 and it would have imposed little, if any, hardship on the Respondents to accommodate her without a costly specialist report.

[11] Ms. McLaughlin disputes Ms. Catchot's version of events. She says that Ms. Catchot asked for an accommodation on February 27, 2020, but did not state any specific needs or accommodations she required. Ms. McLaughlin also says Ms. Catchot did not provide her or the School with any medical documentation. Ms. McLaughlin says she followed up with an email on February 29, 2020, requesting medical documentation and information on the accommodation needed in accordance with the School's policy. She says in response, Ms. Catchot then asked to deal with a specific employee at the School [the **Employee**] and not Ms. McLaughlin. Ms. McLaughlin says Ms. Catchot and the Employee met March 2, 2020, to discuss Ms. Catchot's accommodation needs. On March 12, 2020, Ms. Catchot transferred to the School's Distance Education program. The Respondents say this was an appropriate accommodation in the circumstances. Ms. Catchot disagrees.

[12] The School ceased operations and filed for bankruptcy in November 2021.

## III ANALYISIS AND DECISION

### A. Section 27(1)(b) – No arguable contravention

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

[14] In the case against the individually named respondent, Ms. McLaughlin, the complaint must set out facts that, if proved, could establish that Ms. Catchot has a characteristic protected by the *Code*, she was adversely impacted in services by an act or omission of Ms.

McLaughlin, and her protected characteristic was a factor in the adverse impact: *Moore v. British Columbia (Education)*, 2012 SCC 61 at para. 33.

[15] On the first element of the test for discrimination, Ms. McLaughlin argues that for a medical condition to meet the definition of a disability under the *Code*, the condition must have some degree of permanence or persistence. She says more transient conditions, akin to a cold or temporary illness, are not disabilities, citing *McGuire v. Level4Tehcnologies*, 2019 BCHRT 50 at paras. 14-16 [***McGuire***]. Accordingly, she argues the complaint does not disclose facts that engage the protection of the *Code* because Ms. Catchot's bout of pneumonia does not meet the criteria for a physical disability under the *Code*.

[16] In response, Ms. Catchot submits that for the purposes of s. 27(1)(b), the Tribunal has determined that pneumonia can fall within the category of physical disability, citing *Schmidt v. City Furniture and another,* 2010 BCHRT 321 [***Schmidt***] at para. 44, *Steele v. School District No. 36*, 2014 BCHRT 276 [***Steele***] at para. 37 *and Gower v. Molly Maid Victoria and others,* 2015 BCHRT 22 [***Gower***] at para. 19.

[17] I am not persuaded by Ms. McLaughlin that the complaint against her does not allege facts that, if proven, would satisfy the first element in the test for discrimination. In reaching this conclusion, I considered the *McGuire* decision cited by Ms. McLaughlin. *McGuire* was an application for dismissal under s. 27(1)(c). In reaching its decision, the Tribunal examined all the evidence and argument before it to determine whether the complaint merited a hearing. After doing so, the Tribunal concluded there was no reasonable prospect Mr. McGuire would prove his "sickness" was a disability. In that case, Mr. McGuire was absent from work five times and late to work three times because he was feeling nauseous or attending a doctor's appointment. Mr. McGuire was diagnosed as having a parasite, which was treated with antibiotics.

[18] I am not prepared to find the alleged facts in *McGuire* analogous to those in Ms. Catchot's complaint, particularly so in a decision on a s. 27(1)(b) application where the threshold to advance a complaint to a hearing is different than in a s. 27(1)(c) application. Under s. 27(1)(b) the Tribunal only considers the allegations in the complaint and information

provided by the complainant to determine if the facts alleged could amount to discrimination under the *Code*. The Tribunal does not assess whether there is no reasonable prospect the complaint will succeed, as it does under s. 27(1)(c). At this stage Ms. Catchot is not required to prove her health condition at the time of the alleged discrimination meets the definition of a disability.

[19] I find Ms. Catchot's complaint to be more analogous to *Gower*. In *Gower*, the Tribunal accepted that pneumonia "could be a disability under the *Code*" for the purposes of s. 27(1)(b). Further, looking at the complaint in its entire context, in addition to alleging her pneumonia constitutes a physical disability, Ms. Catchot also alleges her injuries from a car accident in 2020 are physical and mental disabilities under the *Code*. Ms. Catchot says the concussion impaired her cognition, caused her to experience confusion, mental fogginess, difficulties communicating (stuttering and disorganized speech) and anxiety. I have no submissions from Ms. McLaughlin on why, in her view, those alleged facts if proven do not amount to a physical and/or mental disability under the *Code*.

[20] Even if I am wrong in finding Ms. Catchot's allegations on her pneumonia are more analogous to the allegations in *Gower* than those in *McGuire*, I am not prepared to parse out allegations in a s. 27(1)(b) application to dismiss allegations against an individually named respondent only. I find that in these circumstances it could "prompt inconsistent adjudicative decisions" if I were to dismiss the allegations regarding Ms. Catchot's pneumonia against Ms. McLaughlin only, and she later introduced evidence at hearing to prove the pneumonia allegations against the School: *Byelkova v Fraser Health Authority*, 2021 BCSC 1312 at para. 115. I also find there would be no efficiency gained by parsing out and dismissing the pneumonia allegations from the car accident related injury allegations.

[21] In sum, I am not persuaded that the complaint does not allege facts that if proven would show Ms. Catchot had one or more health conditions that were disabilities for the purpose of the *Code*.

[22] Turning to the second and third elements of the test for discrimination, I have no submissions on why, in Ms. McLaughlin's view, the complaint does not allege facts that if proven satisfy those elements. In her complaint, Ms. Catchot asserts alleged facts which I outlined earlier about adverse impacts she experienced in relation to the service provided by the School. She also alleges her disabilities factored into those alleged adverse impacts. This is sufficient to meet the low threshold of alleging a possible contravention: *Gichuru* at para. 56.

[23] Finally, Ms. McLaughlin submits the complaint should be dismissed because it fails to outline how the accommodations offered to Ms. Catchot did not meet the School's duty under the *Code* to reasonably accommodate her. This argument is about whether the Respondents would prove a valid defense to the alleged discrimination, something I cannot consider in an application to dismiss under s. 27(1)(b). In an application to dismiss under s. 27(1)(b) the Tribunal looks only at the substance of the complainant's allegations and does not consider the respondent's alternative explanation or evidence.

[24] I deny the application to dismiss the complaint against Ms. McLaughlin under s. 27(1)(b).

## B. Section 27(1)(d)(ii) – Would not further the purpose of the *Code*

[25] Ms. McLaughlin also asks the Tribunal to dismiss the complaint against her as an individually named respondent under s. 27(1)(d)(ii) on the basis that it would not further the purposes of the *Code* to proceed against her. I deny that application for the following reasons.

[26] There are strong policy rationales 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.

[27] There are also policy arguments against naming individual respondents. Doing so 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 v. BC (Ministry of Health),* 2006 BCHRT 341 [***Daley***] at para. 54. Because employers and

institutional respondents are liable for the acts of their agents and employees, 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.

[28] The Tribunal balances all these considerations to decide whether the purposes of the *Code* are best served by having a complaint proceed against an individual as well as an institutional respondent, or against the institutional respondent only. In *Daley*, the Tribunal identified the following factors as guidance:

> 1. whether the complaint names an institutional respondent and that respondent has the capacity to fulfill any remedies that the Tribunal might order;
>
> 2. 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
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> 3. the nature of the conduct alleged against the individual, including whether:
>
>    a. their conduct took place within the regular course of their employment;
>
>    b. the person is alleged to have been the directing mind behind the discrimination or to have substantially influenced the course of action taken; and
>
>    c. the conduct alleged against the individual has a measure of individual culpability, such as an allegation of discriminatory harassment.
>
> *Daley* at paras. 60-62.

[29] On the first two *Daley* factors, Ms. McLaughlin has not said whether the School has acknowledged her acts and omissions as its own and has irrevocably acknowledged its responsibility to satisfy any remedial orders. This is not surprising in the circumstances given the School is not capable of fulfilling any remedies the Tribunal might order if Ms. Catchot proves her case. To overcome this, Ms. McLaughlin argues not all factors in *Daley* need to be satisfied in order to dismiss a complaint against an individual respondent.

[30] The crux of Ms. McLaughlin's argument on why the Tribunal ought to dismiss the complaint against her thus rests on the third factor in *Daley*. Ms. McLaughlin submits that at all material times she was acting as an employee of the School, carrying out her supervisory and management duties. Ms. McLaughlin further argues that although she was the owner of the School, that is not the determinative factor for assessing individual culpability, citing *Klewchuk v. City of Burnaby and others,* 2018 BCHRT 200 [***Klewchuk***] at para. 32; and *Artuso v. CEFA Systems and others,* 2017 BCHRT 53 [***Artuso***] in support. Ms. McLaughlin also points out that corporate and institutional actors are legally responsible for the acts of their employees and other representatives under s. 44(2) of the *Code*. She argues that absent serious incidents or misconduct, acts or omissions done within the scope and authority of employment should not attract individual liability.

[31] In response, Ms. Catchot argues that it would not be consistent with the purposes of s. 3(e) of the *Code* to dismiss the case against Ms. McLaughlin in circumstances where the School is not able to satisfy remedial orders of the Tribunal. Section 3(e) provides that one of the *Code's* purposes is "to provide a means of redress for those persons who are discriminated against." Ms. Catchot submits dismissing the case against Ms. McLaughlin would leave her with no means of redress. She also submits that the first two factors in *Daley* must be satisfied and that an order to dismiss the complaint against Ms. McLaughlin cannot be granted on the third factor only.

[32] It is not necessary for me to resolve the dispute between the parties about whether the *Daley* factors must all be met to decide this application because in my view, the first two factors weigh so strongly against dismissal that even if I agreed with Ms. McLaughlin's submissions on why the third factor weighs in favour of dismissal, I am not persuaded the third factor would tip the balance in her favour.

[33] There is no dispute that the School filed for bankruptcy. Ms. McLaughlin attests to this fact in her affidavit and attaches documents in support. I also have no evidence or submissions that would indicate the School irrevocably acknowledges its responsibility to satisfy any

remedial orders which the Tribunal might make in respect Ms. McLaughlin's conduct, if it were in a position to do so.

[34] Further, in my view Ms. McLaughlin is asking the Tribunal to apply *Klewchuk* and *Artuso* in a manner that the Tribunal did not contemplate in those decisions. At paragraph 41 of *Artuso*, the Tribunal summarized the test in *Daley* as follows:

> The test in *Daley* **requires that the respondent have the capacity to fulfil any remedies that the Tribunal might order**. […] *Daley* also urges consideration of whether the nature of the conduct alleged against the individual was outside of the normal scope of their duties, whether the individual respondents had the ability to influence substantially the course of action take and/or whether the discrimination has a measure of individual culpability. [emphasis added]

[35] In dismissing the complaint against several individually named respondents in *Klewchuck* the Tribunal expressly noted "this will have no impact on the Tribunal's ability to remedy any discrimination that it may ultimately find to have occurred" because "Ms. Klewchuk can obtain all remedies from the City" if she succeeds: para. 38. Ms. McLaughlin's circumstances are distinguishable because in her case, the institutionally named respondent does not have the capacity to fulfill remedial orders.

[36] In sum, I agree with Ms. Catchot that it would be contrary to the purposes of the *Code* to dismiss the complaint against Ms. McLaughlin in the circumstances of this case. I find the first two factors of *Daley* to be determinative and deny the application under s. 27(1)(d)(ii). I am therefore not persuaded that proceeding against Ms. McLaughlin would not further the purposes of the *Code*.

## IV CONCLUSION

[37] I deny the application to dismiss the complaint under ss. 27(1)(b) and (d)(ii).

Kylie Buday
Tribunal Member