

Date Issued: January 30, 2024

File: CS-001293

Indexed as: Complainant v. Company and others, 2024 BCHRT 23

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:

Complainant

COMPLAINANT

AND:

Company, Mr. A and Ms. B

RESPONDENTS

REASONS FOR DECISION

Tribunal Member:	Jessica Derynck
Agent for the Complainant:	Representative
Counsel for the Respondents:	Trevor Thomas
Date of Hearing:	February 21 to 24 and March 8, 2023
Location of Hearing:	Video Conference

I INTRODUCTION

[1] Complainant was employed with Company for about 11 months in 2018 and 2019 until the Respondents terminated her employment in September 2019. She filed a human rights complaint alleging that Company, Mr. A and Ms. B [**Respondents**] discriminated against her in employment on the basis of her sex and a physical disability, contrary to s. 13 of the *Human Rights Code*.

[2] Company carries on business as a general contractor. Mr. A and Ms. B are spouses and co-owners of Company. At times relevant to the complaint, Ms. B was Company's operations manager. Ms. B is now Company's COO. Mr. A performs supervisory work, carpentry, and various other tasks for Company.

[3] Complainant alleges that the Respondents treated her adversely throughout her employment because of her sex as the only woman at Company working "on the tools" as a carpenter. She also alleges the Respondents discriminated against her based on a physical disability when she was injured and they did not accommodate her by providing her with alternative work. Finally, she alleges that the termination of her employment was discrimination based on physical disability, and that her sex was a factor in how her employment was terminated.

[4] The Respondents deny that any of their alleged conduct during Complainant's employment was adverse treatment. In any case, they say Complainant's sex was not a factor in how they treated her. They say it was not possible to accommodate Complainant by giving her alternative work to do when she was injured. The Respondents also say Complainant's injury and her sex were not factors in the termination of her employment. They ask the Tribunal to dismiss the complaint.

[5] I heard this matter over five days. Complainant filed written closing submissions on May 9, 2023. In those submissions she asks for an award of costs against the Respondents. The Respondents filed written closing submissions on May 29, 2023. They also seek an order for

costs against Complainant. On June 5, 2023, Complainant acknowledged receipt of the Respondents' submissions and advised that she would not file a reply.

II DECISION

[6] After consideration of all the parties' evidence and submissions, I find that Complainant has not established discrimination in employment contrary to s. 13 of the *Code*, and I dismiss the complaint.

[7] I deny Complainant's and the Respondents' applications for costs.

III ORDER LIMITING PUBLICATION

[8] Prior to the hearing Complainant applied for an order limiting publication of her name and identifying information. The Respondents did not object. I found, based on information that Complainant provided related to her personal circumstances, that her privacy interests outweigh the public interest in access to the parties' names and identifying details in this case. On February 1, 2023, I issued the following order:

- a. No person shall publish in any document, or broadcast or transmit in any way any information disclosed in or in relation to this complaint that could identify the parties, witnesses, or [an individual formerly on Complainant's witness list], including any contact information (including general location, ie. city, town or region).
- b. If the Tribunal releases parts of the complaint file to the public pursuant to Rule 5(10), it will redact any information that could identify the parties, witnesses, or [the individual formerly on Complainant's witness list], including any contact information (including general location, ie. city, town or region).

[9] Complainant was represented at the hearing by a friend who is not a lawyer or professional advocate. The parties agreed that he would be anonymized because identifying him may inadvertently identify Complainant. I refer to him as Representative in my decision.

IV BACKGROUND

[10] Mr. A and Ms. B started Company in 2014. They initially operated Company out of their home. Ms. B does much of the administrative and management work for Company. She also had an administrative assistant at times relevant to the complaint [**Assistant**]. Mr. A did all of Company's carpentry work when they were first starting out. He hired employees as Company's business grew. He continues to perform carpentry tasks, as well as foreman tasks, project management, ordering, discussions with customers, and at times helps with billing and other administrative work.

[11] The Respondents hired Complainant in November 2018. They had about 15 employees by that time. Complainant testified to uncertainty about her job title at various times, but there is no dispute that she was hired to perform carpentry work on projects at various construction sites. There is also no dispute that Complainant was the only woman doing this type of work at Company at this time. Ms. B and Assistant were the only other women at Company, and they did not work on the tools.

[12] Company has an extended health benefits plan for employees. Employees are eligible to enroll in the plan after 90 days of employment. There was a delay in adding Complainant and her spouse to the plan. Complainant says that male employees did not experience similar delays. She alleges that the delay was personal to her, and was discrimination based on her sex.

[13] Complainant and her spouse were eventually added to the benefits plan. The Respondents say Complainant's sex was not a factor in the delay, but the delay was a result of administrative errors and confusion between the Respondents and the benefits provider.

[14] Mr. A says that in February 2019 he promoted Complainant. The Respondents say Complainant was initially hired as a carpenter, and she was promoted to be a lead carpenter. Complainant does not recall being assigned a particular job title at this time, but she was given more responsibilities and a raise from \$30 to \$31 per hour.

[15] Although the Respondents gave Complainant a raise and increased responsibilities, they say there were concerns with some aspects of her work by February 2019. For example, they say that at one time in January Complainant spent time training an apprentice when she was supposed to be performing other jobs. They also say that she spent one day in January doing framing work without instructions from the foreman, which later had to be removed so a plumber could perform work in that area. Complainant's evidence is that she does not recall either of these incidents.

[16] Despite these issues, Mr. A says Complainant displayed work ethic, and he believes in giving people opportunities, which is why he promoted Complainant in February.

[17] Mr. A says it then became apparent that Complainant's skills were not adequate to be a lead carpenter. The Respondents say Complainant's work was not always up to standard and sometimes had to be redone at the Respondents' cost. They say she did not consistently follow directions, she was late to safety meetings, and she did not get along well with other employees. At some point, it is not clear when, the Respondents stopped giving Complainant lead responsibilities and her role changed back to carpenter. The Respondents continued to pay her \$31 per hour. The Respondents did not communicate their concerns about Complainant's work to her at this time, and did not explain to her that they would stop giving her lead responsibilities.

[18] Complainant's perspective is that the Respondents never communicated to her that she was demoted from one position to another, but if she was demoted, it was likely because she raised concerns with how the Respondents ran things and concerns about other employees' conduct, not because of the quality of her work. She says her work was high quality at times, including on one occasion when she built siding that an inspector described as "textbook". At the same time, Complainant acknowledges that she was not always impressed with her own work. When her work was not at its best, she attributes this to failure on the Respondents' part to provide her with what she needed to do a good job, and her confusion about people's roles and who was in charge at worksites.

[19] There is no dispute that the parties' employment relationship was troubled by spring 2019. Complainant was not yet able to use her extended health benefits by March 2019, and while her coverage was in place by late April, her spouse's was not. She felt that this was personal to her. She also wanted to be reimbursed for fuel expenses for transporting materials to work sites. She says the Respondents authorized her to transport materials in her own vehicle, but there were no instructions for how to claim her expenses. She alleges that the Respondents did not treat her equally to male employees when it came to reimbursement of expenses.

[20] The Respondents say they never directed Complainant to transport materials and then claim her fuel expenses, but they reimbursed her for an expense claim in May 2019 anyway.

[21] Complainant reported concerns she had about other employees to Mr. A in mid-May 2019. She told Mr. A that some employees were drinking beer at worksites and then driving company vehicles, and that she saw bullying and harassment at worksites. She does not claim that any of her co-workers' alleged conduct was related to her sex, and their alleged conduct is not part of her complaint. Complainant does say that she was not satisfied with how Mr. A addressed the issues she reported about her colleagues, and that this is an example of the Respondents valuing her less as an employee.

[22] Mr. A says he raised Complainant's issues with other employees and made it clear that drinking on job sites or in company vehicles is not allowed, and that bullying and harassment are not acceptable. He says employees acknowledged drinking one beer after work before driving home. He did not view this to be as problematic as Complainant did, because the employees had only one beer at the end of their long work day and did not drink while driving. Mr. A acknowledges that he did not follow up with Complainant after he investigated her issues to his satisfaction. He says that if he erred in not following up with her, he "owns" this mistake.

[23] Mr. A says it eventually became difficult to place Complainant at work sites because other employees did not get along well with her. He says two foremen and a project manager

found her to be insubordinate, and were frustrated. The Respondents considered terminating her employment in late spring 2019, but did not do so at that time.

[24] Complainant was injured in an accident at home on or around July 1, 2019. On July 1 she told the Respondents that she broke her foot and would not be able to return to work until she was cleared by a doctor.

[25] Complainant says she emailed the Respondents later in July to offer to do administrative work for them while she was injured, and they did not respond to her. She does not recall who she emailed about this.

[26] Ms. B says she was aware that Complainant was available for administrative work, although Complainant never directly talked to her about it. She says she became aware when someone, possibly Assistant or Mr. A, mentioned in passing that Complainant was available if they needed her. Mr. A does not recall this. In any case, Ms. B says there was no administrative work available for Complainant to do. Ms. B says Assistant was only working part-time on a flexible basis, the Respondents used legal counsel for contracts and for drafting policies and procedures, and she did the rest of the administrative work herself.

[27] On July 23, 2019, Complainant emailed Assistant to ask for a letter of employment [LOE], which she needed to apply for a mortgage to buy a home. Assistant responded that she could not write this herself, so she would forward the request to Ms. B. Complainant emailed Ms. B to follow up a few weeks later. Ms. B did not respond, and Complainant did not follow up again. Ms. B's evidence is that she does not recall receiving the email at the time, and she believes it fell through the cracks because she was stressed at the time about the Company and about issues impacting her life outside of work.

[28] Complainant was still off work in September 2019. The Respondents terminated her employment on September 23, 2019. Mr. A phoned Complainant on September 23 and told her that her employment was being terminated. Complainant says Mr. A told her that he needed to replace her because she could not come back to work yet and he needed someone who could work. Mr. A denies this. He says he talked about Complainant's injury in the context of asking

her how she was doing and expressing sympathy, but he told her that he was terminating her position because work was slowing down. He says he intentionally did this while Complainant was still off work with her injury so she would have time to look for other jobs before she was ready to go back to work while she was still receiving medical employment insurance [EI] payments.

[29] The Respondents followed up with an email to Complainant on October 9, 2019 [Termination Email]. They said that they would pay Complainant one week of pay in lieu of notice pursuant to the *Employment Standards Act*, and offered to provide her with an additional two weeks' pay in exchange for a release as well as an additional amount related to premiums for extended health coverage for her spouse. Complainant did not accept that offer. She filed her human rights complaint on January 15, 2020.

[30] I now turn to set out the issues I must decide in this complaint, and a summary of my findings.

V ISSUES AND SUMMARY OF FINDINGS

[31] Section 13 of the *Code* says, in part:

(1) A person must not

(a) refuse to employ or refuse to continue to employ a person, or

(b) discriminate against a person regarding employment or any term or condition of employment

because of the...physical or mental disability, [or] sex...of that person.

...

(4) Subsections (1) and (2) do not apply with respect to a refusal, limitation, specification or preference based on a bona fide occupational requirement.

[32] I must decide whether any of the Respondents' conduct within the scope of the complaint amounts to a breach of s. 13 of the *Code*.

[33] I must first decide whether Complainant establishes her case. To do this, she must show that she experienced an adverse impact in employment, and that her sex or a physical disability was a factor in the adverse impact: *Moore v. British Columbia (Education)*, 2012 SCC 61 [**Moore**] at para. 33.

[34] If Complainant establishes her case, the Respondents may defend against the complaint by establishing a bona fide occupational requirement [**BFOR**] for any adverse impacts.

[35] Under the BFOR test, I must consider whether the Respondents' standard or conduct that had an adverse impact on Complainant because of her sex or physical disability: (1) had a purpose rationally connected to the performance of Complainant's job, (2) was adopted in an honest and good faith belief that it was necessary to fulfill a legitimate work-related purpose, and (3) was reasonably necessary to fulfill that purpose, including that the Respondents could not accommodate Complainant without experiencing undue hardship: *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 SCR 3 [**Meiorin**].

[36] Complainant alleges that the Respondents discriminated against her on the basis of her sex during her employment by:

- a. Delaying extended health benefits coverage for her and her spouse [**Benefits Allegation**];
- b. Refusing to reimburse her for fuel expenses [**Expenses Allegation**]; and
- c. Refusing to provide her with an LOE when she requested one [**LOE Allegation**].

[37] Complainant alleges that the Respondents discriminated against her based on a physical disability when they did not accommodate her by allowing her to do administrative work while she was injured [**Accommodation Allegation**]. She also alleges that her sex was a factor in the Respondents' refusal to accommodate her.

[38] Finally, Complainant alleges that the Respondents discriminated based on physical disability by terminating her employment because she was not able to work, and that her sex was a factor in how they ended her employment [**Termination Allegation**].

[39] With respect to the Benefits Allegation and Expenses Allegation, I find that Complainant has not established any adverse impacts in employment within the meaning of the *Code*. In any case, I find that her sex was not a factor in any of the Respondents' conduct. Complainant has not established her case with respect to these allegations.

[40] With respect to the LOE Allegation, I find that Complainant experienced an adverse impact in employment, but that her sex was not a factor in the adverse impact. Complainant has not established her case with respect to this allegation.

[41] The Respondents do not dispute that Complainant's broken foot was a "temporary disability" and that this was a protected characteristic under s. 13 of the *Code*. For the purposes of this decision I assume, without finding, that Complainant's injury was a physical disability protected under the *Code*. There is no dispute that the injury impacted Complainant's ability to perform her regular work. However, I find that the Respondents could not have accommodated her with alternative work while she was injured without incurring undue hardship. The Respondents have established a defence to the Accommodation Allegation.

[42] Finally, there is no dispute that the Respondents terminated Complainant's employment, which is an adverse impact. However, I find that Complainant has not established that her injury or her sex were factors in the termination.

[43] In summary, Complainant has not proven a breach of the *Code* with respect to any of her allegations, and I dismiss the complaint.

[44] Complainant raised other allegations in her closing submissions that are not part of her complaint. She made some of these allegations in her complaint form, and I explained at the hearing that they do not form part of the complaint. For example, Complainant claims that the Respondents breached provisions of the *Employment Standards Act*. I explained at the hearing

that this Tribunal does not have jurisdiction to decide whether a respondent breached the *Employment Standards Act*, and that those allegations are not part of her complaint.

[45] Complainant also alleged in her complaint that the Respondents did not adequately address the concerns she reported about her co-workers' behaviour in spring 2019. She clarified at the hearing that she provided this information for context, and she does not claim that her co-workers' alleged behaviour, or how Mr. A addressed it, was discrimination contrary to the *Code*. I address the parties' evidence about this context only as necessary to explain my decision.

[46] Complainant also raises allegations in her closing submissions that she did not make in her complaint form, and do not form part of her complaint. For example, she alleges that the Respondents did not follow a Revenue Canada required practice of verifying her social insurance number within three days of her hiring.

[47] It is not necessary for me to set out all of Complainant's allegations that do not form part of her complaint. At the hearing it was clear that the Benefits Allegation, LOE Allegation, Expenses Allegation, Accommodation Allegation, and Termination Allegation make up the scope of the complaint. My task is to determine whether Complainant has established that any of these allegations amount to a breach of the *Code*. The Respondents were not required to respond to other allegations Complainant raised in her closing submissions, and they confined their closing submissions to the scope of the complaint. I address the parties' evidence about background and context only where it is relevant to the issues I need to decide.

[48] I now turn to my summary of the witnesses' evidence and my findings of credibility.

VI WITNESSES AND CREDIBILITY

[49] Complainant testified on her own behalf. She also called a former colleague she worked with at the Company as a witness. I refer to him as Colleague.

[50] Mr. A and Ms. B testified on the Respondents' behalf.

[51] Complainant's evidence was directly contradicted by the Respondents' evidence in some important areas. This has made it necessary for me to make findings of credibility and decide which evidence to prefer.

[52] Credibility involves an assessment of the extent to which a decision maker can rely on a witness's testimony, considering both the sincerity of the witness, and the accuracy of their evidence: *Bradshaw v. Stenner*, 2010 BCSC 1398, aff'd 2012 BCCA 296, leave to appeal refused, [2012] S.C.C.A. No. 392 (QL) [**Bradshaw**] at para. 186. This involves consideration of factors including the ability and opportunity to observe events, firmness of memory, the ability to resist the influence of interest to modify recollection, consistency within the witness's own testimony, harmony with independent evidence that has been accepted, whether the witness's evidence seems unreasonable or unlikely, whether there is a motive to lie, and the witness's general demeanour: *Bradshaw* at para. 186.

[53] In some cases, a witness' evidence may not be reliable because they have "made a conscious decision not to tell the truth": *Youyi Group Holdings (Canada) Ltd. v. Brentwood Lanes Canada Ltd.*, 2019 BCSC 739 [**Youyi**] at para. 89. In other cases, a witness may make an honest effort to give truthful evidence but their testimony may not be reliable because of their inability to accurately observe, recall, or recount the event: *R. v. H.C.*, 2009 ONCA 56 at para. 42; *Youyi* at paras. 89-90. In that case, if their testimony conflicts with the testimony of other witnesses who are better positioned to testify accurately, their evidence is not reliable: *Klewchuk v. Burnaby (City)*, 2022 BCHRT 29 [**Klewchuk**] at para. 15.

[54] I find that much of Complainant's evidence is not accurate or reliable.

[55] I accept that Complainant genuinely believes that the Respondents treated her unfairly. In that sense, she had an honest basis for filing her complaint and giving her evidence. However, I find that her perspective of her employment relationship with the Respondents is skewed. She seeks to paint a picture of the Respondents as poor employers who are entirely responsible for what went wrong in the employment relationship. I find that she was unable to

resist the influence of her interest in giving evidence consistent with this perspective to modify her recollection.

[56] For example, Complainant blames the Respondents for difficulties in her life that only peripherally relate to events that occurred during her employment. After Complainant sent one follow up email to Ms. B in summer 2019 about her request for an LOE, she gave up her mortgage application entirely, even though a mortgage broker emailed her about options for other documents that might help, including pay records. Complainant had been off work for her injury for six weeks by the time she received this email, but could have provided her pay records from earlier in the year to support her application, or could have followed up with Ms. B again. Instead, Complainant decided not to continue with the application process, and places full blame on the Respondents for this. In cross examination she testified that she felt the Respondents were actively working against her, which left her crushed and heartbroken. She refused to acknowledge any personal responsibility for her predicament, and testified that while she could have texted or called the Respondents when Ms. B did not respond to her email, doing so after their “silence” towards her would be like putting herself through torture. This is not consistent with evidence, which I accept, that the Respondents were not “silent” about Complainant’s issue with her benefits coverage, but that they made consistent efforts to resolve this issue, which Assistant communicated to Complainant about before and during summer 2019.

[57] Complainant’s efforts to give evidence consistent with her own narrative made her an uncooperative witness in cross examination. She did not consider the Respondents’ counsel’s questions and attempt to give her best recollection in response. She was often evasive in her responses. She sought to give evidence she believed would support her position that the Respondents wronged her and are responsible for her life difficulties, rather than making a sincere effort to tell the Tribunal her genuine recollection of events.

[58] For example, Complainant claimed that she did not know her job title at the Company. Respondents’ counsel showed her an email she wrote to the Tribunal on September 19, 2019, where she referred to herself as a “Lead Carpenter”, and asked her if she was a carpenter. She

responded that she “had no idea”. She then testified that her Record of Employment [ROE] said that she was a “carpenter”, and Respondents’ counsel asked her if her reference to herself as a “Lead Carpenter” was dishonest. She gave evasive answers in the following exchange:

Complainant: If uh, if you mean I was employed on September 19 in construction, that’s obvious I wasn’t. I’m not sure what your question is, besides very specific meaning of the present tense use of the word “work”.

Counsel: [Complainant], I’m not focused on the word “work”, and you know that, right.

Complainant: I’m not sure what you’re trying to get I know.

Counsel: Did you ever dispute the ROE where it says “carpenter”?

Complainant: I’m not sure how many hurdles you are expecting a woman to jump.

[59] During cross examination, Complainant struggled to answer questions where responses might contradict her narrative or beliefs. For example, Respondents’ counsel asked her questions related to her Expenses Allegation in cross examination, and she testified that she was asked to leave worksites to get materials dozens of times. She said that possibly Mr. A, a project manager, and a foreman had asked her to do this. When she struggled to identify any specific person other than Mr. A., Respondents’ counsel then asked her to confirm whether Mr. A asked her to pick up materials:

Counsel: I will ask you this. You have told me that [Mr. A] has asked you to leave the worksite to pick up materials, is that right?

Complainant: Um, I’m not sure about leaving the worksite to pick up materials, but if materials were needed in the middle of the day, for example, there was one time, um, I think [Mr. A] had dropped off some materials and it wasn’t enough and I needed more to finish the job and that job was do that day, so I went and got the remainder of the materials that were needed. Um...

Counsel: Sorry to interrupt you. Here’s a different way to ask this question. Did [Mr. A] ever ask you to pick up materials?

Complainant: I would need to access the text messages to know that, that is not something I kept in my memory as being relevant to my complaint.

Counsel: Ma'am, you've just provided evidence to me that [Mr. A], a PM and a foreman asked you to get materials.

Complainant: Yes.

Counsel: Here's why I'm asking these questions, because you're saying that you were authorized to leave the worksite, use your personal vehicle to pick up materials, and as a result of that, you're claiming this mileage reimbursement. And so I am trying to understand who authorized you to do this or who asked you to do it. Because to my understanding, this was completely unauthorized and something that you did on your own volition. So I want to know who told you, or who asked you, to do this.

Complainant: Well, there was no, um, paper trail for this. There was no CRM at the time, there was no policy in place, there was no procedure in place as to who did what, um, when. It was very much, um, get the job done.

Counsel: That's not what I'm asking, ma'am. I'm asking for a name. You provided me with a name, you said [Mr. A]. But then you changed your evidence. So yes or no, did [Mr. A] ask you, or did [Mr. A] instruct you to go get materials?

Complainant: Um, can you explain how I have changed the evidence?

Counsel: Sure. You initially told me that it was [Mr. A], a PM, and a foreman who had asked you to go get these materials.

Complainant: Right.

Counsel: And then you changed it, you said it wasn't [Mr. A]. So I am trying to understand, did [Mr. A] tell you to go get materials?

Complainant: I would have to have access to the text messages for that. From my memory, yes, he would have. There were sites...oh. I'm not sure.

[60] Respondents' counsel went on to ask Complainant whether another individual specifically asked her to go get materials, and she responded that he definitely did at one site because he was the project manager. In this response Complainant described her recollection of the individual's role, not a recollection of any instance when he asked her to go get materials. Respondents' counsel then asked her whether another individual asked her to get

materials. She said she could not recall and that her memory was foggy, and there was something “in there” that she could not identify.

[61] I find that Complainant has no recollection of anyone with authority to do so directing her to leave worksites to transport materials in her own vehicle, yet she claimed that this happened dozens of times, and alleged that the Respondents discriminated against her by failing to reimburse her for doing this.

[62] Complainant also said in response to several questions in cross examination that she has a poor memory for details. She said that details do not stay in her long term memory, but her experience does. At best, this is an acknowledgement that her actual recollection of events and details is poor, which alone would be a reason to treat her evidence with caution. I also find that she did not make a sincere effort to testify about her level of recollection, or to give accurate evidence based on what she genuinely did recall. She was not able to “resist the influence of interest to modify recollection” during cross examination.

[63] For these reasons, I cannot accept all of Complainant’s evidence. There are areas where her testimony conflicts with Mr. A’s or Ms. B’s testimony on important issues, especially related to the Termination Allegation. Where this is the case, I prefer Mr. A’s and Ms. B’s evidence. Where this is relevant to my decision, I explain this in my analysis below.

[64] Colleague was a sincere witness and I find that his evidence is reliable.

[65] Mr. A was a sincere witness. He expressed frustration in response to a question early in his cross examination, however, he followed my direction to answer questions and refrain from commentary. I find that he gave evidence based on his genuine recollection of events, which included evidence about his own actions that would not necessarily cast him in a positive light. For example, he acknowledged that he did not follow up with Complainant after looking into issues she raised about other employees’ conduct, and said he “owns” this mistake. Overall, I find his evidence to be reliable.

[66] Ms. B was a sincere witness. I find that she gave evidence based on her genuine recollection of events, including evidence that would not necessarily cast her in a positive light. For example, she acknowledged that the Company did not have proper human resources policies in place in its early days, that she was not always at her best while Complainant was working at Company, and that some things related to Complainant's employment fell through the cracks. Overall, I find her evidence to be reliable.

[67] I have considered all the evidence admitted by the parties at the hearing. In my reasons below, I recount only the evidence necessary to make my decision.

[68] I now turn to explain my decision to dismiss the complaint.

VII ANALYSIS

A. Proving discrimination by inference

[69] Complainant claims that she was valued less than her co-workers as the only woman working on the tools in a male-dominated environment. This claim underlies her Benefits Allegation, LOE Allegation, and Expenses Allegation, and is relevant to her Accommodation Allegation and Termination Allegation. I consider all of her allegations in context with each other, and in the context of the parties' employment relationship, to determine whether her sex was a factor in how the Respondents treated her.

[70] Complainant does not allege any overt harassment or mistreatment based on her sex. It is only open to me to find a connection between her sex and any of the Respondents' conduct based on an inference. This is often the case with human rights complaints – respondents are not likely to explain that they are denying an employee benefits or opportunities, or treating them more harshly than others, because of a protected characteristic like sex.

[71] An inference of discrimination may arise "where the evidence offered in support of it renders such an inference more probable than the other possible inferences or hypotheses": *Vestad v. Seashell Ventures Inc.*, 2001 BCHRT 38 at para. 44; *Kondolay v. Pyrotek Aerospace Ltd.*,

2020 BCHRT 208 [*Kondolay*] at para. 108. In this case, I must decide whether an inference of discrimination based on sex is more likely than the Respondents' explanations for how they treated Complainant and the decisions they made about her employment. It is not necessary that the Respondents' conduct be consistent only with the allegations of discrimination and not any other rational explanation: *Kondolay* at para. 108. Complainant only needs to prove that her sex was one factor in an adverse impact to establish her case.

[72] Complainant testified that she felt ostracized as the only woman working on the tools for the Respondents. She also testified about difficult experiences she had as a woman working in trades generally, for past employers before she came to Company.

[73] I accept that women working in trades sometimes continue to experience sex-based discrimination while working in historically male-dominated industries, particularly while working in trades and workplaces that are still male-dominated today. This form of discrimination will often be subtle and an inference will need to be drawn to establish a connection between any adverse treatment and sex. However, this subtlety, and the availability of an inference, does not create a presumption of discrimination: *Kondolay* at para. 110. Not all male-dominated workplaces discriminate against women based on their sex. I cannot begin my analysis with an assumption that the Respondents discriminated against Complainant because she was the only woman working on the tools. Any inference of discrimination must be rooted in the evidence of her particular case against the Respondents: *Kondolay* at para. 110.

[74] In this case, I find that there is no evidence to support an inference that the Respondents discriminated against Complainant based on her sex. There is no evidence on which I can find an inference that the Respondents ostracized Complainant, took her less seriously as an employee, or mistreated her, because of her sex.

[75] I explained above that I found Mr. A and Ms. B to be credible witnesses. I accept their evidence about their business and what it was like when Complainant worked for them. Company went from a new business where Mr. A and Ms. B did almost all of the work themselves to a business with about 15 employees in four years. The Respondents were not

perfect employers, and they acknowledge this. When Complainant started in 2018, the Respondents were still operating Company out of a small den in their rented home. They had three young children at the time. Ms. B had some part-time help from Assistant, but otherwise managed all projects, invoices, payroll, taxes, marketing, and other administrative and management work herself. She acknowledges that Company did not have all necessary human resources policies in place in 2018 and 2019.

[76] When Complainant was hired, the Respondents needed some grace as a fairly new family business and growing employer when it came to minor or inconsequential issues. They needed employees to have some level of flexibility and understanding when they were not perfect.

[77] Complainant did not give the Respondents grace, flexibility, or understanding. Rather, she focused on any issues that she saw as problems. For example, she testified that when she first started in November 2018 she enjoyed working with a colleague on her first worksite, but the next site that Mr. A directed her to work on, which she moved to in February 2019, was “absolute chaos”, with tape everywhere, and atrocious framing. She says she identified many issues to the project manager, and possibly to Mr. A.

[78] I have explained that I must treat Complainant’s evidence with caution. I do not accept her evidence that her second worksite was “absolute chaos”. Rather, I find that her view of the Respondents had shifted by the time she went to the second worksite, and she was focused on their imperfections. For example, she did not approve of the Respondents’ system for storing and sharing tools. She testified that she often found that she did not have tools available to her that she needed to do jobs. Mr. A’s evidence, which I accept, is that Complainant’s second worksite had a cargo trailer with shelving that was full of Company tools, and had a storage area for staff so they did not need to transport any of their own tools back and forth daily. This was not satisfactory to Complainant, and she testified that she spent time creating a “tools checklist”. I find that the Respondents did not ask her to do this. Rather, she was not satisfied with how the Respondents managed or organized use of tools, and felt that she could do it better.

[79] I find that Complainant's focus on the Respondents' imperfections tainted her view of many things they did. Complainant testified that in past employment, including in other industries, she developed systems and strategies to assist her employers. For example, she was once a general manager of a dining facility and oversaw hiring, firing, workers' compensation, and other legislative responsibilities. I find that she was dissatisfied with the Respondents' systems and strategies, felt they should do better, and believed that if she were in their position, she could do better.

[80] I find that the parties' relationship had soured by spring 2019 because of Complainant's view of the Respondents and her attitude towards them, and because of issues the Respondents had with her work.

[81] I accept Mr. A and Ms. B's evidence that Complainant sometimes did work she was not asked to do instead of what she was supposed to do. Complainant does not dispute that she did this on at least some occasions. For example, she acknowledges that she once built a structure around a porta potty at a worksite. This is not what the Respondents were paying her to do. She downplayed this in her evidence and suggested that other employees supported her in doing this. However, I accept the Respondents' evidence that there was a cost to Company when Complainant built a structure that was not part of her job, which later had to be taken down.

[82] Complainant did not recall an incident of framing shelving units that later had to be removed for plumbing. I accept Mr. A's evidence that this occurred and that this was a cost to Company. Again, Complainant downplayed the impact of an incident like this, and said that it is common to move framing around for plumbing and electrical.

[83] I also accept Mr. A's evidence that while working at her second worksite, Complainant framed a fire stop in a chimney, which later failed an inspection. Complainant recalled that there was some sort of issue, and believed she went back to redo it. I accept Mr. A's evidence that another employee redid the work. In any case, Complainant did not suggest that she redid the work at no cost to Company, and I accept that there was a cost to this mistake.

Complainant again downplayed this; she testified that inspections happen all the time, it is just checking things off on a list if they are done, and if they are not, you go back and do them. She testified that she does not recall telling the project manager that she could frame the fire stop exactly to code. I find that this evidence was an attempt to minimize the Respondents' concerns and to place blame on the project manager for having reasonable expectations of her, including that if she performed work it would be done to an acceptable standard and would pass an inspection.

[84] I accept Mr. A's evidence that by some point in spring 2019 he was having trouble placing Complainant at worksites because other employees did not get along with her. Mr. A testified that he formed the view that Complainant was toxic to their organization.

[85] I find that Complainant's sex was not a factor in any of this. Her own evidence is that she could not always be proud of her work. She blames the Respondents for any issues with her work, and says she was stressed at this time. She does not accept any personal responsibility, but she does acknowledge that her work was not always to standard.

[86] The Respondents were not perfect. I find that they did not communicate with Complainant about the issues they had with her and her work. Rather, when Mr. A found that she was not suited for lead work, he stopped giving her those responsibilities without explaining why. He eventually formed a view that Complainant was toxic to the organization without taking any steps to help her improve or to address the issues between her and other employees. However, I find that Complainant's sex was not a factor in this. I find that the root of the problems in the parties' employment relationship was Complainant's dissatisfaction with the Respondents, her belief that she could do better, and her inability to take responsibility for her own shortcomings. There is no basis in the evidence about the general deterioration in the parties' relationship for an inference that the Respondents discriminated against Complainant based on her sex.

[87] Complainant testified about some specific instances where she felt ostracized or less valued, which she believes may have been because of her sex. One example is when she

reported her concerns with her co-workers' behaviour to Mr. A in May 2019. Complainant says her co-workers engaged in verbal abuse and harassment. She also reported that her co-workers' drank beer at a worksite. Complainant does not allege that any employee made negative comments related to her sex, or that any of her co-workers' behaviour targeted her. She raised this issue as an example of Mr. A not taking her seriously.

[88] I accept Mr. A's evidence that he did not see the beer drinking issue as a problem to the level that Complainant did, and I find this was a reasonable perspective in the circumstances. I also accept Mr. A's evidence that he dealt with this issue to his satisfaction, and that he owns his mistake of not following up with Complainant. This is another example of the Respondents' communication being far less than perfect, but I find that Complainant's sex was not a factor. Complainant acknowledged in cross examination that she does not know whether Mr. A's response to her raising issues about her co-workers because of her sex. She says she **might** have been treated differently because she was a woman who "spoke up", but there is no evidence to support an inference that this was the case. Rather, I find that Complainant and Mr. A had different views about the alleged conduct that Complainant reported. This is an example of Complainant having different standards and views from the Respondents of how an employer should respond to a particular situation. It is not evidence that supports an inference of discrimination based on sex.

[89] Complainant also raised an example of the Respondents failing to ensure that she was invited to attend a summer Company event after she broke her foot. She says she was excluded from a fishing derby and lunch at a restaurant. However, the Respondents' evidence is that she was invited and welcome to attend. Complainant emailed Assistant on July 11, 2019 with an update about her injury, and said she did not know whether she would be able to participate in the fishing derby. Assistant emailed Complainant the next day to say they would likely be going to a certain restaurant around 1pm after the fishing derby for food and drinks with a shuttle to take everyone home, and she was welcome to join them so she did not have to miss out on the whole day. Assistant said they would keep Complainant posted on the final plans. Complainant did not respond to Assistant. Complainant testified that she felt she was not wanted because

Assistant's email did not provide her with enough details, and she did not want to be included if she was not wanted. She says that since Assistant said she would keep Complainant posted, then did not give her any further details, she was excluded. I find that this is not the case. Assistant's email made it clear to Complainant that she was welcome, and Complainant did not respond to say she was interested in attending. If she wanted to attend the lunch, she could have followed up with Assistant.

[90] Complainant's belief that she was ostracized, mistreated, or lesser valued because of her sex is not supported by the evidence. Although it is clear that the Respondents had issues with Complainant and her work before she was injured, and they did not do a good job of communicating with her about this, I find that they did not ostracize or exclude her. There is no evidence on which I could find an inference that Complainant felt unwelcome because of her sex, rather than because of the deterioration in the parties' relationship by this point for reasons unrelated to her sex.

[91] In summary, I find that there is no evidence to support an inference that the Respondents ostracized Complainant, valued her less than others, or treated her differently from others, because of her sex. I now turn to address each of Complainant's specific allegations.

B. Benefits Allegation

[92] I find that the delay in Complainant accessing extended health benefits was a result of administrative errors between the Respondents and the benefits provider, and this was not an adverse impact in employment. I also find that Complainant's sex was not a factor in the delay.

[93] In her closing submissions, Complainant says that the Respondents denied her equal benefits to her male coworkers, and that Ms. B "toyed with" her account with the benefits provider to keep her from experiencing the benefits.

[94] The evidence does not support this claim.

[95] There is no dispute that Assistant sent Complainant an enrollment form in January 2019, before she was employed for 90 days and would become eligible for coverage. Complainant found that she was not able to fill out the form electronically, so she printed a form, completed it by hand, and gave it to a project manager at a worksite instead of sending it back to Assistant. About six weeks later, Assistant told Complainant that the project manager had lost the form. Complainant then filled out another form electronically and sent it to Assistant. This initial delay is attributable to Complainant because she did not return the form to Assistant, but instead gave it to a project manager who was not involved in the process of setting up employee benefits.

[96] On April 11, 2019, Ms. B had an email exchange with the benefits provider in which Ms. B said that the provider's system would only process Complainant as "single" when she should be enrolled with coverage for her spouse as a couple, and asked whether the provider could fix the issue. The provider responded and told Ms. B that it would be faster for Ms. B to fix this on her end. Complainant acknowledged at the hearing that from this email it appeared that when Ms. B tried to sort out the issue when she found she could not enroll Complainant's spouse.

[97] Ms. B testified that before trying to enroll Complainant and her spouse, she had a similar issue when trying to enroll another employee and his spouse, but in that case, when she contacted the benefits provider they told her to send them the employee's forms, and they fixed the issue. Ms. B hoped that the benefits provider would say the same about Complainant's issue, but when they told Ms. B she could fix it "on her end" she left the issue with Assistant, and told Assistant to let her know if she needed any help.

[98] On April 29, 2019, Assistant emailed Complainant to tell her that she had Complainant's benefits card, and she expected her spouse's card to come soon. However, there was still an issue with Complainant's spouse's coverage. On May 7, 2019, Assistant emailed Complainant to ask her for the date of her marriage, because she was just adding Complainant's spouse to the plan that day, following a glitch when she first entered Complainant into the system. On May 13, 2019, Assistant emailed Complainant to tell her the marriage date had been entered, and that she could submit receipts for past health expenses.

[99] In July 2019, Complainant emailed Assistant to tell her that she found that her spouse was not listed on the benefit provider's website, and that she contacted the benefit provider herself and they said he was not added. Complainant testified that she did not know why her spouse had not been added by then. Understandably, this was confusing and frustrating for Complainant.

[100] Assistant responded that when she logged in to the provider's website it appeared that Complainant's spouse had coverage effective March 1, 2019. Assistant then contacted the benefits provider about the issue.

[101] A service representative from the benefits provider emailed Complainant and said their records showed that Complainant and her spouse had coverage effective March 1, 2019. However, a different representative emailed Assistant the next day and said the provider should have taken a closer look at the situation because it appeared that Complainant's spouse was a late applicant.

[102] Assistant suggested to Complainant that she ask Ms. A and Ms. B whether it was possible for the Company to reimburse Complainant directly for her extended health costs if it would take much longer to sort out the issue with the benefits provider. Complainant responded that Assistant did not need to worry about doing that.

[103] In any case, Ms. B testified that she was open to Company directly reimbursing Complainant for her spouse's extended health costs until her coverage was sorted out and she was getting the same benefits everyone else was getting. Ms. B says she told Assistant she would do this, although she may not have told Complainant directly. I accept Ms. B's evidence.

[104] On September 19, 2019, a staff person from the benefits provider emailed Ms. B and confirmed that Complainant and her spouse were both eligible for benefits coverage as of March 1, 2019, but her spouse was considered a late applicant because he was not enrolled within the first 30 days of his eligibility. The benefits provider said an explanation was needed as to why the application was late, they could review the matter to waive the late applicant restrictions, backdate Complainant's spouse's benefits to March 1, 2019, and Company would

need to pay back charges for his premiums. This email references a phone call between the benefits provider staff person and Ms. B preceding the email.

[105] Ms. B's evidence is that she does not recall this specific phone call with the benefits provider, but she does recall having several phone calls with them to resolve the issue. She testified that Complainant's husband was finally enrolled with the plan and backdated some time around the time of the September 19, 2019 email. She recalls paying the back charges for Complainant's spouse's premiums so his application could be backdated. In cross examination Complainant's Representative asked Ms. B about the cost of doing this. She did not recall the exact amount, but believed that the cost of doing this was around \$500. Complainant's Representative then showed Ms. B the Termination Email. I will return to the Termination Email in my analysis of the Termination Allegation. For the purposes of the Benefits Allegation, Representative pointed out that Ms. B offered to pay Complainant an amount of \$576.70 "to account for the difference in benefit premium between your Blue Cross single and family benefits between March 2019 and the present", as well as offering her pay in lieu of notice in exchange for signing a release. Ms. B agreed that \$576.70 was the cost of backdating Complainant's spouse's premiums to March 1, 2019. Complainant did not accept the offer.

[106] Ms. B does not recall exactly when she paid the benefits provider \$576.70 to backdate Complainant's spouse's coverage. Her evidence is that although Complainant's employment was terminated on September 23, 2019, she left Complainant's benefits coverage in place until February 2020. Unfortunately, there is no evidence that anyone communicated to Complainant that her spouse had coverage backdated to March 2019, or that the coverage was in place until February 2020. Ms. B thinks she would have asked Assistant to communicate to Complainant that the issue was resolved, but does not recall doing so, and does not recall that either she or Assistant spoke to Complainant after the issue was resolved.

[107] It is understandable that the issue of Complainant's spouse's coverage was confusing and frustrating for her. However, I accept Ms. B's evidence that the issue was extremely frustrating for her as well. There is no evidence to support the allegation that Ms. B, or anyone else, intentionally kept Complainant from receiving the benefits she was entitled to. It is not

clear whether the delay in adding Complainant's spouse was entirely the fault of the benefits provider, or if the Respondents made any errors that contributed to the issue. It is clear, however, that Ms. B attempted to enrol Complainant's spouse when she enrolled Complainant, Ms. B contacted the benefits provider when the issue arose, Assistant made efforts to resolve the issue right away when Complainant told her in July 2019 that her spouse was still not covered, and inconsistent communication from the benefits provider at least contributed to the issue. I find that if Ms. B or Assistant made any errors that contributed, this was inadvertent, and Ms. B and Assistant made considerable efforts to resolve the issue so Complainant and her spouse could use her coverage. Complainant does not dispute that her spouse was eventually added to her coverage and backdated to March 2019. In cross examination, she acknowledged that the whole issue may have simply been due to administrative errors, and testified that she is aware that administrative errors happen all the time.

[108] Ms. B testified that in preparation for this hearing, she reviewed documents and realized, for the first time, that part of the difficulty may have been related to Complainant's spouse not being Canadian. When she realized this, she called the benefits provider to ask if a dependant can be added without being a Canadian citizen, and was told that all family members must have MSP coverage to be enrolled. She did not ask the benefits provider about this at the time she was trying to enroll Complainant's spouse because she was not aware that it may be an issue. She has no way to know whether Complainant's spouse's status in Canada contributed to the issue – this is merely a theory that there may have been an issue with covering Complainant's spouse that the benefits provider did not communicate to her at the time. I accept her evidence that she still did not understand the source of the issue by the time of the hearing.

[109] I appreciate that this situation was confusing and frustrating for Complainant. However, I find that the Respondents took appropriate steps to provide her with the same extended health benefits they provided to other employees, and ultimately did so. The only reason Complainant and her spouse did not have access to her benefits as soon as she was eligible for the plan was because of administrative errors. There is no dispute that she was able to use her

coverage herself by the end of April 2019, and no dispute that her spouse's coverage was eventually resolved and backdated. It is unfortunate that no one explained this to Complainant at the time. In my view, this is the error the Respondents made that impacted Complainant the most. However, I find that this was poor communication and does not amount to an adverse impact for the purposes of s. 13 of the *Code*. Complainant could have inquired with the Respondents or directly with the benefits provider about the status of her and her spouse's coverage when her employment was terminated, and she did not do so.

[110] In any case, there is no evidence that Complainant's sex was a factor in the issue of adding her spouse to her benefits coverage. I have found that there is no evidence to support an inference that the Respondents generally valued Complainant less than other employees, or treated her worse, because of her sex. There is also no evidence on which I could find an inference that her sex was a factor in the administrative delays in accessing her benefits.

[111] When asked in cross examination whether the benefits issue had anything to do with her sex, Complainant said she didn't know, but she was disappointed that it took so long to get it sorted out. She testified that if it had been up to her she would have sorted the issue out with a conference call in an hour, and because that did not happen, she felt like a less valued employee. However, there is no evidence of any connection between the amount of effort the Respondents put into resolving this issue and the Complainant's sex.

[112] Finally, Complainant introduced evidence from Colleague to show that he had access to his extended health benefits once he was eligible without any significant delay. Ms. B also testified that there were issues with getting some other employees' benefits in place, and those issues were resolved quicker than Complainant's. Complainant submits that the differences in her experience from her male co-workers' experiences are evidence of discrimination based on her sex.

[113] I find that this is not the case. I considered that Complainant was the only woman working on the tools and the only employee who experienced a delay of this length in accessing benefits for herself and her spouse, but in light of the evidence supporting the explanation that

this was an administrative problem, which the benefits provider at least contributed to, an inference that Complainant's sex was a factor is not more probable than this explanation.

[114] The Benefits Allegation is dismissed.

C. Expenses Allegation

[115] Complainant alleges that the Respondents refused to reimburse fuel costs for her as they did for her male co-workers. I find that Complainant has not established an adverse impact related to fuel expenses, and has not established that her sex was a factor in any decision related to this issue.

[116] Complainant says her co-workers were given fuel cards so they could directly purchase fuel at Company's expense, and she was not. She says she was authorized to transport materials and then seek reimbursement, but no one instructed her how to seek reimbursement, so she had to create a form to give the Assistant. She says the Respondents only ever reimbursed her for \$126.90 for fuel expenses, even though she spent more than this transporting materials.

[117] Ms. B testified that the Respondents provided site supervisors with a company vehicle and gas cards. I accept her evidence and find that the Respondents only gave gas cards to certain employees in supervisory positions. Complainant was not one of those employees.

[118] I explained in my assessment of Complainant's credibility above that I found problems with her evidence about this issue. She claims that she was not reimbursed for fuel costs after she was directed to transport materials in her own vehicle dozens of times, but she could not say who directed her to do this. She said she found she had to leave work sites to get materials when the Respondents did not provide her with what she needed to finish a job, which is not the same as being directed to do this. Colleague testified that he occasionally left worksites to get something he needed, but no one told him to do this, and he did not ask or expect to be reimbursed for fuel.

[119] Ms. B testified that Complainant submitted an expense for travelling 12 km round trips to and from a certain worksite, for a total of 189.2 km. Ms. B says Complainant worked at this certain worksite for 15 working days, and she did not know whether or not Mr. A or someone else had approved Complainant to go back and forth and incur this expense, so she asked Mr. A about Complainant's request for reimbursement.

[120] Mr. A's evidence is that he does not expect employees to use their own vehicles to transport materials to worksites. Suppliers deliver materials directly, or in some cases, Mr. A, a project manager, or a supervisor brings supplies on a flatbed truck or in a pickup truck. He says he did not instruct Complainant to leave worksites to get materials at any time, and is not aware of anyone else authorizing her to do so. He says this is not part of a carpenter's or a lead carpenter's job.

[121] I accept Mr. A and Ms. B's evidence on this issue. I find that the Respondents did not instruct Complainant to use her own vehicle to leave worksites to get materials, and did not specifically authorize her to claim fuel expenses for doing this. However, Complainant claimed fuel expenses at a rate of \$0.58 per kilometre for the 189.2 km she drove to and from the certain worksite, and an additional 29.6 km between the certain worksite and another worksite, for a total of \$126.90. The Respondents paid her this amount on May 22, 2019. Mr. A did not testify about this reimbursement in direct examination, and was not asked about it under cross examination. In her cross examination, Ms. B testified that when she asked Mr. A about the reimbursement request, he said it was "unfortunate". It is not clear why the Respondents reimbursed Complainant for this expense when it was not authorized. There is no evidence that they talked to Complainant about the issue to find out why she claimed the expenses, or to ensure she understood what she was and was not obligated to do as part of her job. It appears that this was another failure of communication on the Respondents' part, which is not evidence of discrimination.

[122] The expense claim for \$126.90 is the only evidence before me of a request from Complainant to reimburse her for fuel expenses, and the Respondents did so. Complainant has not established an adverse impact of a failure to reimburse her for expenses, or at all related to

how the Respondents treated her compared to other employees when it came to fuel expenses. She also has not established that her sex was a factor in any decision the Respondents made related to fuel expenses.

[123] The Expenses Allegation is dismissed.

D. LOE Allegation

[124] Complainant alleges that the Respondents were willing to provide LOEs for other employees, including Colleague, but were not willing to provide one for her.

[125] I find that Complainant has not established this. The Respondents did not refuse to provide her with a LOE. Rather, Ms. B did not issue the letter because the task got away from her, and Complainant did not follow up with her. While this was not intentional, I find that neglecting to provide Complainant with a LOE was an adverse impact in Complainant's employment. However, I find that Complainant's sex was not a factor.

[126] Complainant emailed Assistant on July 23, 2019 to ask for an LOE. Assistant replied the next day to say that she could not write the letter, but would forward the request to Ms. B. Ms. B explained at the hearing that this was a task she did not delegate to Assistant because she is a bit of a "control freak" and prefers to do it herself, and had a template that allowed her to do it easily.

[127] Ms. B's evidence, which I accept, is that she saw Assistant right after Assistant forwarded her Complainant's email. Assistant told Ms. B she had just forwarded her an email from Complainant about an LOE. Ms. B told Assistant to reply to Complainant, and direct Complainant to email Ms. B directly about what she needed. There is no evidence that Assistant did this. In any case, Complainant emailed Ms. B directly on August 15, 2019, about her request for an LOE:

I'd emailed [Assistant] about getting a letter of employment from [Company] stating I've been employed – [spouse] and I are applying for a mortgage and the LOE is the last thing the bank needs to process. The said if [Company] can't provide a LOE, they can possibly use my paystubs, but

they prefer a LOE. The bank has been asking me for this document for several weeks now, is this something that can be provided or is it something you don't have time for right now?

[128] Ms. B testified that she does not remember receiving this email. She testified that this was a stressful time for the Company and in her life outside of work. Ms. B explained that Company lost out on a contract around this time, and had two other jobs terminate, which meant they had to resituate some employees. Their home rental situation was also difficult at that time, because the owner of their home rented a lower level unit to a new tenant who disliked children – the new tenant yelled at Mr. A and Ms. B's children and threatened to call police when the children tried to play outside. The new tenant also started smoking in August 2019, which impacted their youngest's daughter's health.

[129] Ms. B's evidence was sincere. I find that August 2019 was a stressful time for her and Mr. A. I accept that Ms. B did not ignore Complainant's email. Rather, it fell through the cracks.

[130] I find that when Complainant's request fell through the cracks and Ms. B did not respond to her request for an LOE, this was an adverse impact in employment. The failure to respond was not intentional, but the result was that Complainant was not able to obtain a LOE to use to apply for a mortgage.

[131] However, there is no evidence that Complainant's sex was a factor in Ms. B's failure to respond to Complainant and provide her with a LOE. Having accepted Ms. B's explanation, and having found that there is no inference of sex discrimination to be drawn from the evidence about the parties' relationship generally, I find that Complainant's sex was not a factor in this incident.

[132] Finally, I note that Complainant requested the LOE while she was off work after her injury. She does not allege that her injury was a factor in Ms. B not sending her an LOE, but considering that Complainant does not have legal representation, for the sake of clarity and completeness, I explain here that I would not find that her injury was a factor in any event. Having accepted Ms. B's explanation in response to this allegation, I find that Complainant's request simply fell through the cracks, and neither her sex nor her injury were factors in this.

[133] The LOE Allegation is dismissed.

E. Accommodation Allegation

[134] Complainant broke her foot around July 1, 2019. At the time her employment was terminated in September 2019, she was still not able to work as a carpenter because of this injury. She claims that her injury was a “temporary disability”. The Respondents do not dispute that Complainant’s injury was a disability protected under s. 13 of the *Code*, and they acknowledge an obligation to accommodate Complainant while she was injured and could not perform her job.

[135] In my decision it is not necessary for me to make a finding of whether or not the Complainant’s broken foot was a disability for the purposes of the *Code*. Even if I found that Complainant had a disability, I dismiss the Accommodation Allegation and Termination Allegation for other reasons. My decision should not be taken as a finding that the Complainant’s broken foot is a disability.

[136] Complainant alleges that the Respondents breached the *Code* by failing to accommodate her after she broke her foot, because she could have performed administrative work, and the Respondents did not give her any administrative work to do.

[137] The Respondents do not dispute Complainant’s assertion that they had a duty to accommodate her when she could not do her job as a result of her injury. However, they say there was no other work for her to do while she was injured.

[138] I find that the Respondents could not have accommodated Complainant by providing her with alternative work without incurring undue hardship.

[139] When Complainant broke her foot on July 1, 2019, she told the Respondents this, and told them that she could not work. On July 10, 2019, she emailed the Respondents and asked them to provide a Record of Employment so she could apply for medical employment insurance. Ms. B replied the same day to say that Complainant’s ROE was successfully

submitted online. Complainant replied on July 11, 2019 to say that a surgeon told her she would be in a cast for the next three months, then she would be reassessed for surgery.

[140] Complainant does not claim that she could have done any aspect of her own job, which consisted of carpentry work at various construction sites, during this time period. She does not recall how she made the Respondents aware that she was available to perform administrative work. Ms. B's evidence is that Complainant did not talk to her about this directly, but in any case, she became aware that Complainant had said she was available to perform administrative work.

[141] Ms. B says she did not know that Complainant perceived the Respondents as having a duty to provide her with some sort of alternative work at this time. I accept Ms. B's evidence. It is consistent with the emails Complainant sent to Assistant, in which she says she was not available to work, requests her ROE to apply for medical EI, and does not ask about performing other work. Complainant also does not recall how she made the Respondents aware that she was available to perform administrative work.

[142] Complainant's Accommodation Allegation is based on an assumption that the Respondents' duty to accommodate her included an obligation to give her alternative work to do when she temporarily could not do any part of her own job. I find that this was not part of the Respondents' obligations in this particular case.

[143] When an employee is not able to their work because of a disability, the employer's duty is to reasonably accommodate them. This means taking reasonable and practical steps to assess whether working conditions can be changed to allow the employee to do their work, and if not, whether there is other work they can do – an assessment which requires flexibility and common sense: *Klewchuk* at para. 410. This is a collaborative process, which requires active participation and cooperation by the employee as well as the employer: *Klewchuk* at para. 414. What is reasonable, and the lengths that the employer is required to go before any further efforts would cause undue hardship, always depends on the particular circumstances: *Klewchuk* at paras. 411 to 412. The employer will reach undue hardship when reasonable means of

accommodation are exhausted, and the only remaining options for accommodation are unreasonable or impractical: *Klewchuck* at para. 412.

[144] In this case, Complainant told the Respondents that she temporarily was not able to do her own job at all and requested her ROE so she could apply for medical EI benefits.

Complainant does not recall how she made the Respondents aware that she was available for administrative work, but there is no evidence that she communicated anything more than she was available if needed. Ms. B and one part-time employee, Assistant, did the administrative work for Company, and all other work was on the tools at construction sites. It would not be reasonable to expect the Respondents to consider whether there was alternative work for Complainant to do in these circumstances.

[145] Even if Complainant had not told the Respondents that she would be off work entirely, or had directly asked them for alternative work to do as part of a reasonable accommodation, I find that the Respondents could not have given Complainant work to do without incurring undue hardship.

[146] I accept Ms. B's evidence that there was no administrative work for Complainant to do. This is why she did not contact Complainant when she learned that Complainant was available if needed. Ms. B testified that in any instance when an employee has been injured at work and WorkSafeBC has asked if there are any administrative or modified duties for them to perform, the answer is always no. This is because Ms. B does most of the administrative work herself, with the exception of drafting contracts, policies, and procedures, for which Company retained legal counsel. Assistant only worked part time on a flexible basis to help Ms. B with her tasks. Complainant suggests that Ms. B could have made use of her skills for drafting contracts or policies, but Complainant did not make the Respondents aware of any relevant skills she had. In any case, the Respondents were not obligated to have Complainant do work that they preferred to have done by legal counsel, or take work away from Assistant for Complainant, or create work for Complainant to do where none existed – any one of these scenarios would be undue hardship in the circumstances.

[147] Ms. B testified to other reasons that she would not have wanted Complainant to perform administrative work, including related to confidential information and the Company office still being in Mr. A and Ms. B's den in their home at the time, but the lack of available work alone is enough for the Respondents to establish that they could not have accommodated Complainant with alternative work without incurring undue hardship.

[148] Finally, Complainant alleges that her sex was a factor in the Respondents' decision not to provide her with alternative work. I find there is no evidence to support this assertion. I have explained above that there is no inference of sex discrimination to be drawn from the evidence about the parties' relationship generally. Having accepted the Respondents' explanation of not understanding that Complainant expected to be offered alternative work, and not having any work available in any case, I find that Complainant's sex was not a factor.

[149] The Accommodation Allegation is dismissed.

F. Termination Allegation

[150] Complainant alleges that the Respondents terminated her employment while she was still off work for her injury because they needed someone who could work at that time. She also alleges that her sex was a factor in some of the Respondents' actions related to the termination.

[151] I find that Complainant has not established her case for this allegation. She has not established that her injury or her sex were factors in the termination of her employment.

[152] There is no dispute that Complainant was still on leave for her injury when her employment was terminated. However, the fact that Complainant was on leave for her injury when her employment was terminated does not necessarily mean that her injury was a factor in the Respondents' decision and that the termination contravened the *Code*.

[153] The Tribunal **may** find an inference of discrimination based on timing of events: *Beckett and Kuan v. Owners Strata Plan NW 2603*, 2016 BCHRT 27 at para. 157. This is not a foregone conclusion. To find discrimination in this case, I must find that the evidence supports a

reasonable inference that Complainant's injury was a factor in the termination, which is more probable than other possible inferences or hypothesis: *Kondolay* at para. 108. An employer may provide a reasonable non-discriminatory explanation for terminating an employee's employment during a leave, leading to a conclusion that there is no inference of discrimination despite the timing: *Monge v. Cascades Casino & Entertainment Ltd.*, 2012 BCHRT 132 at para. 18.

[154] Complainant testified that when Mr. A phoned her on September 23, 2019, he told her that he was terminating her employment because she was not able to work and he needed to replace her because he needed people on site. If the Respondents terminated Complainant's employment to replace her with someone who was available to work while she was injured, this would connect the termination to her injury. However, I do not accept Complainant's evidence. I find that the Respondents terminated Complainant's employment for other reasons unrelated to her injury.

[155] There is no dispute that Mr. A and Complainant spoke on the phone on September 23, 2019. Complainant's phone records show that they spoke for about three minutes.

Complainant wrote notes about this phone call some time after it occurred. The notes say:

Phone conversation [Mr. A] Sept 23

[Mr. A]: You've got another six months? (in reference to healing time, can't remember exact words)

Me: No, two or so

[Mr. A]: Oh, well, if you're not able to work we have to replace you as I need people on site, so I'm just calling to inform you that we are terminating your position.

Me: Uh, ok, you realize you could just hire someone and have them work and not have to terminate me?

[Mr. A]: "I don't know how this all works"

[156] Complainant says she wrote these notes when she realized the complaint process would take a long time and she did not want to forget what was said.

[157] In direct examination Complainant testified that during this call Mr. A asked her about her foot, she told him that she had three more weeks in a boot, then he told her that he really needed her on site and that if she could not be on site he needed to terminate her employment. Complainant testified that she asked Mr. A why he could not just let her sit on EI and decide what to do with her once she was able to work, or put her in the office.

[158] In cross examination Complainant testified that she cannot recall when she wrote her notes. She may have written them some time in 2019, but said she could have written them after that. She testified that she was worried that she would lose her memory of the conversation so she eventually wrote it down, but she had just been fired for breaking her foot, contrary to the *Employment Standards Act*, so the conversation was not going to just fly out of her mind. She says she remembers the conversation because it stood out to her that the Respondents would fire her while she was on leave for an injury. She says that when she spoke to Mr. A her spouse was in the room with her and he looked up afterwards and said “this is illegal, they can’t do that”, and she agreed with him.

[159] Respondents’ counsel asked Complainant why she put the last sentence of her notes in quotation marks. Complainant testified that she was not sure, and she had never noticed that detail before. She speculated that she put that sentence in quotation marks because it struck her as odd that Mr. A did not know how staffing works, but she does not know what she was thinking at the time.

[160] Mr. A testified that he started this phone call by asking Complainant how she was doing and how her summer was going. He says he mentioned her injury to show some sympathy and ask her how her recovery was going. He said he then explained how work was going at the Company, that things were slowing down, and ultimately said that because of the slowdown, he was terminating Complainant’s position.

[161] Mr. A says he stands by his decision to terminate Complainant’s employment while she was still off work for her injury. He says he considered that if her employment was terminated at that time, she would have more time to find another job before her medical EI ended. He

says he has to make decisions for the health of the company on a daily basis, he believes that terminating Complainant's employment was the right decision, and he does not believe in letting people hang on when they could be moving on with their lives. He testified that he did not tell Complainant that her termination was related to her injury.

[162] In Termination Email, which Ms. B sent to Complainant on October 9, 2019, Ms. B said that Complainant's termination was without cause, she was entitled to one week of pay in lieu of notice, and asked how she would like to be paid. The Respondents also offered her an additional two weeks' pay and an amount to account for the difference in her benefit premiums for single and family benefits in exchange for a release. In the email Ms. B said:

We take great pride in being an equal opportunity employer and take your words to heart, please understand that none of our staffing decisions have been or ever will be influenced by anyone's gender.

[163] At the hearing Ms. B testified that Company took some hits between March and August 2019, they did not have as much need for carpenters when Complainant's employment was terminated, and they did not know when they would need carpenters again.

[164] I explained above in the section about the witnesses' credibility why I generally prefer the Respondents' evidence to Complainant's where their evidence conflicts. With respect to the evidence about their September 23, 2019 phone call, I prefer Mr. A's evidence over Complainant's for the following reasons.

[165] I find that Complainant has a poor recollection of the phone call and of creating her notes about the call. Her notes are not reliable evidence of what Mr. A said during the call. Complainant does not know when she wrote the notes, but it is clear that it was not immediately after the phone call. The notes are too short to represent all of what Complainant and Mr. A said during the call. Complainant could not explain why one sentence was in quotation marks, even though she created the notes. Her evidence in direct examination was also not entirely consistent with her notes. For example, she testified that she told Mr. A that she had three more weeks in a boot, that she asked him why he could not let her sit on EI and decide what to do once she was able to work, and asked why she could not work in the office

during this call – none of this is reflected in her notes. In cross examination she testified that she and her spouse both believed that the termination was “illegal”, but she was focused on the fact that she was fired while she was still on leave. Even if she immediately thought that the termination was wrong because of this timing, this does not mean that Mr. A indicated to her that he was firing her because she was not able to work at that time.

[166] Ms. B’s email, which was sent just over two weeks after the phone call, suggests that Complainant may have raised a question at some point about whether her termination was related to her gender, however, no party testified to any conversations between them about whether her gender was a factor. The email otherwise does not shed any light on the reasons for termination other than it was without cause.

[167] I find Mr. A’s evidence to be clear and genuine. I accept that his evidence is an accurate reflection of his recollection and is closer to what was, in fact, said than Complainant’s evidence. I accept his evidence that he did not tell Complainant that he was terminating her employment because he needed someone to work at that time. I also accept his evidence that he felt that terminating Complainant’s employment was the right thing to do for reasons unrelated to her injury and inability to work, and that he did not want to wait until she was ready to return to work so she would have more time to look for another job in the meantime.

[168] I accept Mr. A’s and Ms. B’s evidence that they were already considering terminating Complainant’s employment in spring 2019 before she was injured, and that in September 2019 they did not know when they would need as much carpenter labour again.

[169] Ms. B testified, and I accept, that Company lost out on a contract they were hoping to get that would have been a large job, and that two jobs terminated before completion, which meant the employees working on those jobs had to be resituated. Another job involved difficult conditions at the site, which was stressful because she did not know when she would be able to put employees at the site to work.

[170] The Respondents introduced records of employment for three other carpenters whose employment ended between July and October 2019. Two of the records of employment

indicate that the employees quit. The third says that October 23, 2019 was the employee's last day of work and the reason for their employment ending is "Shortage of work / End of contract or season". Ms. B testified, and I accept, that Company did not hire any carpenters in the second half of 2019 to replace Complainant or the other three employees who left during this time period.

[171] Before the hearing, in response to an application Complainant made for disclosure, I ordered the Respondents to disclose profit and loss statements for the six month time periods before and after Complainant's termination. Ms. B explained these statements at the hearing. She testified, and I accept, that the statements are not clear indicators of cash flow or work available because many factors impact both cash flow and available work. These factors include late payments and money owing from clients while expenses remain consistent, and lengthy delays that impact when Company is able to start building at a site. In any case, Company's profit and loss statements are not inconsistent with Ms. B's evidence explaining why they did not have as much work for carpenters by fall 2019. Complainant's Representative cross examined Ms. B about these statements, but did not point to any increase in profit any time before or after Complainant's termination that could contradict the Respondents' evidence that they did not need to replace Complainant with someone who was able to work while she was still injured, and they in fact were experiencing a slowdown in work at that time, and did not know when the work would pick up again.

[172] I find that the Respondents did not terminate Complainant's employment because she was injured and could not work at the time. I find that they were already considering terminating her employment before she was injured, and by September 2019, they did not have as much work for carpenters, and decided to terminate her employment. I accept that Mr. A chose to do this at the time because it did not make sense to wait until she was medically able to return to work, but he would rather give her a chance to look for other work during that period of time. The Respondents did not terminate her employment because she was on leave for an injury – rather, they did so at that time despite the fact that she was on leave. Her injury and inability to work at that time was not a factor.

[173] Complainant does not directly claim that her sex was a factor in the decision to terminate her employment, but generally alleges that she was less valued as an employee because of her sex. She also alleges that her sex was a factor in the Respondents' offer to pay her an additional amount in lieu of notice in exchange for her signing a release of claims against them.

[174] I have explained that there is no basis in the evidence for me to find an inference that the Respondents valued Complainant less than other employees because of her sex. I also find that her sex was not a factor in the termination of her employment, or in the decision to offer her additional compensation in exchange for signing a release. While I appreciate that Complainant perceived the offer and release as insulting, there is no evidence on which I could infer that her sex was a factor in the Respondents' decision to end her employment or their manner of dealing with the termination.

[175] The Termination Allegation is dismissed.

VIII COSTS

[176] Complainant seeks an order for costs against the Respondents. She alleges improper conduct on their part during the hearing and in relation to their disclosure obligations.

[177] The Respondents also seek an order for costs against the Complainant. They allege that Complainant engaged in improper conduct by being evasive and manipulating evidence at the hearing.

[178] Under s. 37(4) of the *Code* the Tribunal may award costs against a party who has engaged in improper conduct during the course of a complaint. Improper conduct includes "any conduct which has a significant impact on the integrity of the Tribunal's processes, including conduct which has a significant prejudicial impact on another party": *McLean v. British Columbia (Ministry of Public Safety and Solicitor General) (No. 3)*, 2006 BCHRT 103 at para. 8.

A. Complainant's Application

[179] Complainant submits that the Respondents refused to disclose documents that Ms. B says exist and are accessible, despite the Tribunal twice ordering the Respondents to produce them. Complainant does not elaborate on this. I find there was no instance of the Respondents refusing to disclose documents as ordered.

[180] Complainant also alleges that the Respondents "interfered" with a co-worker whom she says initially agreed to testify, then "disappeared", and intervened in Assistant's appearance before the Tribunal. These are baseless allegations with no evidence to support them.

[181] I find that the Respondents did not engage in any improper conduct in the course of this hearing process. Complainant's application for costs is denied.

B. Respondents' Application

[182] The Respondents submit that Complainant's evasiveness resulted in additional time required for the hearing, and additional work for the Respondents' counsel to obtain answers to simple, straightforward questions. They submit that Complainant's propensity to manipulate evidence is improper conduct warranting costs. They seek a cost award of \$2,500.

[183] The Respondents rely on *Horn v. Norampac (No. 2)*, 2009 BCHRT 243. In that case the Tribunal found that the complainant did not file and pursue his complaint based on a good faith belief that his rights under the *Code* had been violated, but rather on the improper basis that he might benefit from a financial windfall in a settlement, to punish his employer, to obtain and retain terms of employment to his liking, and protect himself from the consequences of his own behaviour: para. 111. The Tribunal concluded that this complainant engaged in improper conduct and awarded \$2,000 in costs against him: paras. 113 to 118.

[184] I accept the Respondents' submission that Complainant was a difficult and evasive witness. I also agree with the Respondents' characterization of Complainant's evidence as having a "tendency to twist innocuous events into more insidious accusations and to fit her

own narrative or beliefs”. I have explained this in my credibility analysis above. However, I find that Complainant’s conduct in the course of this process falls short of improper conduct.

[185] I explained in my credibility analysis that I find that Complainant genuinely believes that the Respondents wronged her and are responsible for many of her difficulties, and in that sense, she had an honest basis for making her complaint. While I accept that it was frustrating for the Respondents to respond to this case, I cannot find that Complainant pursued it for any improper basis. I have found that Complainant’s perspective was skewed, her blame on the Respondents for her difficulties was misplaced, and that she has not established her complaint. I also found that she was an evasive witness and her evidence was not credible. However, I also find that she was doing the best she could in the difficult circumstances of appearing before the Tribunal without legal representation to pursue what she believed to be a complaint of discrimination based on sex and physical disability. While I appreciate the Respondents’ frustration, Complainant has not engaged in improper conduct warranting costs.

[186] The Respondents’ application for costs is denied.

IX CONCLUSION

[187] The complaint is dismissed under s. 37(1) of the *Code*.

[188] The Complainant’s application for costs is denied.

[189] The Respondents’ application for costs is denied.

Jessica Derynck
Tribunal Member