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Indexed as: Smith v. Provincial Health Authority and another, 2024 BCHRT 35

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:

Daniel Smith

COMPLAINANT

AND:

Provincial Health Authority and His Majesty the King in Right of the Province of British Columbia
as represented by the Ministry of Public Safety and Solicitor General (Okanagan Correctional
Centre)

RESPONDENTS

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

Tribunal Member:

Edward Takayanagi

On their own behalf

Daniel J. Smith

Counsel for the Respondent, Provincial
Health Authority:

Devon Peck

Counsel for the Respondent, Ministry of
Public Safety and Solicitor General:

Annie MacDonald

I INTRODUCTION

[1] Daniel Smith filed a complaint alleging that the Provincial Health Authority and His Majesty the King in Right of the Province of British Columbia as represented by the Ministry of Public Safety and Solicitor General (Okanagan Correctional Centre) [together, the **Respondents**] discriminated against him in the area of service, based on physical disability, contrary to s. 8 of the *Human Rights Code* because they did not allow him the use of his personal shoes when he was incarcerated.

[2] The Respondents deny discriminating and apply to dismiss the complaint under s. 27(1)(c) of the *Code*. The Respondents say there is no reasonable prospect that Ms. Smith's complaint will succeed because there is no evidence that Mr. Smith has a disability related requirement to use his own shoes.

[3] To make this decision, I have considered all the information filed by the parties. In these reasons, I only refer to what is necessary to explain my decision. I make no findings of fact.

[4] For the reasons that follow, based on the evidence before me, I am satisfied that there is no reasonable prospect Mr. Smith could establish that being denied the use of his personal shoes resulted in an adverse impact. I therefore dismiss the complaint under s. 27(1)(c).

II BACKGROUND

[5] The Health Authority provides healthcare to people incarcerated at the Okanagan Correctional Centre [**OCC**]. People who are incarcerated are not permitted to have personal effects, including their own shoes.

[6] Mr. Smith was incarcerated at OCC from October 3, 2019, to November 22, 2019.

[7] On October 11, 2019, Mr. Smith requested the use of his personal shoes, described as "new Nike Airs", which he said helps with his back pain. The Respondents said that any footwear other than those provided by OCC, require medical approval. Mr. Smith was instructed to submit a health care request for his shoes.

[8] Mr. Smith did not submit a health care request. Instead, he made a second request for his shoes on October 13, 2019. Mr. Smith's second request for his shoes was denied.

[9] On October 21, 2019, Mr. Smith submitted a third request for his shoes. He wrote, "I found the health care answer for my street shoes on the biometrics system that states I was approved."

[10] The Respondents replied to Mr. Smith's request informing him that, contrary to what he said, his request had not been medically approved. They said his shoes cannot be deemed orthopedic shoes, and his request for his shoes was denied.

[11] On November 22, 2019, Mr. Smith was transferred out of OCC to another correctional centre.

III ANALYSIS AND DECISION

[12] The Respondents apply to dismiss Mr. Smith's complaint on the basis that it has no reasonable prospect of success: *Code*, s. 27(1)(c). The onus is on the Respondents to establish the basis for dismissal.

[13] Section 27(1)(c) is part of the Tribunal's gate-keeping function. It allows the Tribunal to remove complaints which do not warrant the time and expense of a hearing.

[14] The Tribunal does not make findings of fact under s. 27(1)(c). Instead, the Tribunal looks at the evidence to decide whether "there is no reasonable prospect that findings of fact that would support the complaint could be made on a balance of probabilities after a full hearing of the evidence": *Berezoutskaia v. British Columbia (Human Rights Tribunal)*, 2006 BCCA 95 at para. 22, leave to appeal ref'd [2006] SCCA No. 171. The Tribunal must base its decision on the materials filed by the parties, and not on speculation about what evidence may be filed at the hearing: *University of British Columbia v. Chan*, 2013 BCSC 942 at para. 77.

[15] A dismissal application is not the same as a hearing: *Lord v. Fraser Health Authority*, 2021 BCSC 2176 at para. 20; *SEPQA v. Canadian Human Rights Commission*, [1989] 2

SCR 879 at 899. The threshold to advance a complaint to a hearing is low. In a dismissal application, a complainant does not have to prove their complaint or show the Tribunal all the evidence they may introduce at a hearing. They only have to show that the evidence takes their complaint out of the realm of conjecture: *Workers' Compensation Appeal Tribunal v. Hill*, 2011 BCCA 49 [*Hill*] at para. 27.

[16] To prove his complaint at a hearing, Mr. Smith will have to prove that he has a characteristic protected by the *Code*, he was adversely impacted in a service, and his protected characteristic was a factor in the adverse impact: *Moore v. British Columbia (Education)*, 2012 SCC 61 at para. 33.

[17] For the purposes of this application the Respondents do not dispute that Mr. Smith has a physical disability. OCC notes that Mr. Smith's allegations are vague, and it is unclear whether his disability has the severity, permanence, and persistence so that it would be protected by the *Code*. For this decision, I am prepared to assume, without deciding, that at a hearing Mr. Smith would be able to establish that he suffers from a disability, specifically back pain. Therefore, the first part of the *Moore* test is not at issue before me.

[18] My analysis turns on the second part of the *Moore* test, whether there is no reasonable prospect Mr. Smith could establish that he suffered an adverse impact. In order to establish he suffered an adverse impact, Mr. Smith must show he was subjected to disadvantages, burdens or obligations related to his protected characteristic: *Deboo and others v. B.C. (Ministry of Public Safety and Solicitor General)*, 2018 BCHRT 10 at para. 146.

[19] Mr. Smith says that being denied the use of his shoes inflicted "pain and suffering due to injuries directly impacted by the improper footwear" he was forced to wear.

[20] The Respondents dispute that Mr. Smith suffered an adverse impact connected to a disability when he was denied the use of his shoes. They argue that there is no reasonable prospect Mr. Smith could show that use of his shoes could have prevented his pain. They say there is no evidence that a doctor approved Mr. Smith's shoes, that the shoes had any medical qualities, or being denied their use caused any negative health effect. I am persuaded on the

whole of the evidence that a Tribunal member hearing this matter could not reasonably conclude that being denied the use of his shoes caused Mr. Smith an adverse impact related to his physical disability. This is because the Respondents have provided evidence contradicting Mr. Smith's assertion that his shoes had any medically prescribed benefits.

[21] It is undisputed that there was no medical recommendation that Mr. Smith should be allowed to use his personal shoes during his incarceration at OCC. Mr. Smith's assertion that his shoes had been medically approved is not supported in any materials and is contradicted by the evidence. The evidence before me is that Mr. Smith accessed healthcare services on multiple occasions during his incarceration and was told that his shoes could not be deemed as orthopedic or having any medical qualities.

[22] Other than Mr. Smith's complaint, there is no medical information before me about what impact, if any, the Respondents' denying Mr. Smith the use of his shoes while incarcerated had on Mr. Smith. Mr. Smith has provided documents pertaining to other medical conditions and treatment he received in 2021 during subsequent instances of incarceration. The materials submitted do not pertain to his request for personal shoes in 2019, nor do they contain information about the effect that being denied the use of personal shoes had on Mr. Smith.

[23] The only document that appears to reference Mr. Smith's use of footwear is a note from a Foot Clinic dated October 13, 2020, stating Mr. Smith has been prescribed a custom orthotic and requires a quality of shoe that offers functional support. It is unclear from the note if they examined the shoes provided by OCC. Mr. Smith says this is evidence supporting his allegation that being denied the use of his shoes in 2019 was an adverse impact connected to his physical disability.

[24] Because the Respondents have provided contemporaneous documentary materials inconsistent with Mr. Smith's assertion that being denied the use of his shoes had an adverse effect on his health I am persuaded, that a single medical note written nearly a year after his incarceration at OCC, does not bring the allegation that Mr. Smith experienced an adverse

effect out of the realm of conjecture. They have provided health service records, including Mr. Smith's own requests stating that his shoes had no orthotic element or medically prescribed benefits.

[25] I am persuaded that there is no reasonable prospect Mr. Smith could succeed in his complaint. On the entirety of the evidence, and in particular the undisputed information that Mr. Smith's shoes were not medically prescribed, I cannot say that there is a reasonable prospect of Mr. Smith establishing that he suffered an adverse impact as a result of the Respondents' refusal to allow him to use his personal shoes while incarcerated. Because Mr. Smith has no reasonable prospect of establishing this element of the *Moore* test, it follows that he has no reasonable prospect of succeeding with his complaint.

IV CONCLUSION

[26] I dismiss the complaint under s. 27(1)(c) of the *Code*.

Edward Takayanagi
Tribunal Member