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Indexed as: Emslie v. Costco Wholesale Canada Ltd. (Kamloops), 2024 BCHRT 46

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:

Lori Emslie

COMPLAINANT

AND:

Costco Wholesale Canada Ltd. (Kamloops)

RESPONDENT

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

Tribunal Member:

Laila Said Alam

Complainant:

Lori Emslie

Counsel for the Respondent:

Donovan Plomp

I INTRODUCTION

[1] Lori Emslie shopped, maskless, at Costco Wholesale Canada Ltd. (Kamloops) [Costco] a day before it implemented a revised mandatory mask policy which would no longer permit in-store maskless shopping to members of the public with a medical exemption to mask wearing [Revised Mask Policy]. Costco told her that in lieu of a face mask, they could offer her a face shield to wear. Ms. Emslie says that she was adversely impacted by the Revised Mask Policy because she had a medical exemption and would not be able to shop maskless. As a result, she says she felt “scared that [she] will not be able to purchase groceries or feed [her] family.” Ms. Emslie says that Costco breached s. 8 of the *Human Rights Code* as it discriminated against her in the provision of services on the basis of disability.

[2] Costco denies discriminating and applies to dismiss the complaint under s. 27(1)(c) of the *Code* on the basis that there is no reasonable prospect the complaint will succeed. Costco disputes that Ms. Emslie has a disability that prevents her from wearing a face shield or that she experienced an adverse impact by the Revised Mask Policy. Costco also applies to dismiss the complaint on the basis that they will establish the defense of *bona fide* and reasonable justification.

[3] I am satisfied that the only issues I need to address in this application to dismiss are whether there is no reasonable prospect Ms. Emslie could establish that she has a disability that prevents her from wearing a face shield or that she experienced an adverse impact, and whether it is reasonably certain that Costco would establish a defense at the hearing of the complaint.

[4] For the reasons set out below, I allow the application. I have reviewed all the materials submitted by the parties. While I do not refer to it all in my decision, I have considered it all. This is not a complete recitation of the parties’ submissions, but only those necessary to come to my decision. I make no findings of fact.

II BACKGROUND

[5] Costco is a retail business which operates retail warehouses in various locations across British Columbia and Canada. Costco is a membership-based retailer and members of the public must purchase a Costco membership and pay an annual fee to access Costco's products or services.

[6] In March 2020, the Province of British Columbia declared a state of emergency because of the COVID-19 pandemic. Costco first introduced a mask wearing policy for its warehouses in May 2020. This policy required everyone entering its warehouses to wear a face mask or other face covering [**Initial Mask Policy**]. The Initial Mask Policy provided an exemption for individuals who could not wear a face mask or other face covering due to a medical condition.

[7] On November 16, 2020, Costco revised the Initial Mask Policy in response to the increasing COVID-19 cases across Canada. The Revised Mask Policy removed the exception for maskless, in-store shopping for individuals who could not wear a face mask or other face cover due to a medical condition.

[8] The Revised Mask Policy required everyone working in or visiting a Costco location to wear a face mask or other face cover, or a face shield (if they cannot wear a face mask or other face covering).

[9] Prior to implementing the Revised Mask Policy, Costco instructed its customer-facing employees to offer members who were unwilling or unable to wear a mask alternatives to shopping in the warehouse. The alternatives are set out in Costco's Temporary Operational Guidelines and include:

Wearing a face shield. If the member did not have a face shield, Costco would provide one to the member at no charge.

Allow a masked guest to shop on behalf of the member with the member's membership card.

Online shopping through Costco's website or through a third-party delivery service.

Curbside pick-up for prescriptions.

Occasionally, assistance from a manager to shop for members personally.

[10] Ms. Emslie says that she has PTSD and anxiety. She has provided a doctor's note that reads, "Lori was assessed on August 21/20. Due to medical reasons I would recommend, if appropriate, that she be exempt from mask wear.

[11] On November 15, 2020, Ms. Emslie went to Costco. Costco alleges that she shopped and made a purchase on that day. Ms. Emslie does not dispute this allegation. On that day, the Initial Mask Policy was in effect.

[12] That same day, Ms. Emslie spoke with the assistant manager [**Manager**] about the Revised Mask Policy which was to take effect the following day. From the materials before me it appears that there is some disagreement about what Ms. Emslie and the Manager discussed at that time. However, what is not in disputes is that the Manager told her that Costco would offer her the option to wear a face shield instead of a face mask.

[13] Ms. Emslie explains that "wearing a face covering that [inhibits her] breathing, physically covers [her] face or creates heat and/or condensation stimulates and triggers" her PTSD. Ms. Emslie says that because she would not be able to shop maskless and, as a result, was "scared that [she] will not be able to purchase groceries or feed [her] family."

[14] Ms. Emslie cancelled her Costco membership on November 18, 2020. Ms. Emslie did not return to Costco during the time the Revised Mask Policy was in effect.

[15] By March 13, 2021, Ms. Emslie had reinstated her Costco membership and had returned to shopping at Costco.

III DECISION

[16] Costco seeks to dismiss the complaint under s. 27(1)(c). Costco argues that there is no reasonable prospect that Ms. Emslie could establish that she has a disability that prevents her from wearing a face shield or that she experienced an adverse impact. I am satisfied, on a review of the whole of the materials before me, that this is the case.

[17] Section 27(1)(c) of the *Code* allows the Tribunal to dismiss complaints that do not warrant the time and expense of a hearing: *Berezoutskaia v. British Columbia (Human Rights Tribunal)*, 2006 BCCA 95 at paras. 22-26, leave to appeal ref'd [2006] S.C.C.A. No. 171 [*Berezoutskaia*].

[18] The Tribunal's analysis under s. 27(1)(c) takes into consideration all materials filed by the parties, including a respondent's explanation for their alleged conduct. The Tribunal does not make findings of fact or credibility, but rather, assesses all the information and evidence: *Berezoutskaia; Francescutti v. Vancouver (City)*, 2017 BCCA 242 at para. 52.

[19] When determining whether a complaint should be dismissed under s. 27(1)(c), the Tribunal only considers the information before it and not what evidence might be given at a hearing: *University of British Columbia v. Chan*, 2013 BCSC 942 at para. 77. It is up to the parties to give the Tribunal the information necessary for it to make a decision: *Bell v. Dr. Sherk and others*, 2003 BCHRT 63 at paras. 25-26.

[20] At a hearing, Ms. Emslie would have to establish that she has a disability that prevents her from wearing a face shield, that the respondents treated her adversely, and that the adverse treatment was connected to her physical disability: *Moore v. BC (Education)*, 2012 SCC 61 at para. 33. Ms. Emslie is not required to prove the complaint at this time but need only point to some evidence capable of taking the complaint "out of the realm of conjecture": *Berezoutskaia* at para. 24. The threshold to move the complaint forward to a hearing is low.

[21] Regarding the first element of the *Moore* test, whether a complainant has a disability for the purposes of the *Code* depends on the facts and circumstances of the particular case: *Young v. Vancouver Coastal Health Authority and others*, 2018 BCHRT 27 at para. 100.

[22] On this application, Ms. Emslie says she has PTSD and anxiety. She has provided a note from her doctor. The doctor "recommends" for "medical reasons" that, "if appropriate, that she be exempt from mask wear."

[23] Costco argues that this evidence is insufficient to take the first element of *Moore* out of the realm of conjecture. Costco emphasizes that under the Revised Mask Policy, it was open to Ms. Emslie to wear a face shield. Costco argues that Ms. Emslie has not provided any evidence to support an allegation that she has a disability that prevents her from wearing a face shield.

[24] I accept Costco's submissions. Ms. Emslie has not provided evidence that she was unable to wear a face shield because of her disability. She explains in her own words how her disability creates a barrier to wearing a face shield, and points to a counsellor's letter dated June 2021. The letter is dated several months after Ms. Emslie had reinstated her membership at Costco and had completed at least one purchase there. The counsellor's letter states Ms. Emslie had been working with the counsellor "in recent months" and that Ms. Emslie's PTSD has made wearing a face covering intolerable. The letter does not point to Ms. Emslie's inability to wear a face shield during the time the Revised Mask Policy was in effect. Ms. Emslie has not taken her assertion that she had a disability that prevents her from wearing a face shield outside of the realm of conjecture. As such, I am satisfied there is no reasonable prospect Ms. Emslie will prove her PTSD or anxiety prevented her from complying with Costco's Revised Mask Policy.

[25] Turning to the second element of *Moore*, I am satisfied that there is no reasonable prospect Ms. Emslie could establish that she experienced an adverse impact.

[26] I understand Ms. Emslie's allegation to be that the adverse impact she experienced was not being allowed to shop maskless in Costco during the time the Revised Mask Policy was in effect. Ms. Emslie said she never returned to Costco during that time. She cancelled her Costco membership on November 18, 2020. She says that following the conversation with the Manager, she experienced was the fear of "not [being] able to purchase groceries or feed [her] family" because, once the Revised Mask Policy would come into effect, she would no longer be able to shop, maskless, in-store.

[27] Costco argues that she has not taken the allegation of an adverse impact out of the realm of conjecture. I agree. At best, Ms. Emslie "references a prospective adverse impact, not

one that she has actually experienced”: *Complainant v. Dr. Bonnie Henry*, 2021 BCHRT 119 at para. 10. As the Tribunal has explained, “[w]ithout an actual adverse impact related to a service, facility or accommodation customarily available to the public, this Complaint could not constitute a breach of the *Code*”: *Complainant v. Dr. Bonnie Henry*, 2021 BCHRT 119 at para. 11.

[28] On the materials before me there is no dispute that Ms. Emslie never returned to Costco or sought its services while the Revised Mask Policy was in effect. The materials before me confirm that, at the time the Revised Mask Policy was in effect, Costco offered members the choice to shop online or to wear face shields while shopping in-store. However, there is no evidence before me about how Ms. Emslie was treated by Costco under the Revised Mask Policy because Ms. Emslie never returned during the time that it was in effect. As such, on the limited materials before me, I am satisfied that there is no reasonable prospect she can establish that she experienced an actual adverse impact regarding a service.

[29] With no evidence before me that Ms. Emslie has taken the first or second element of the *Moore* test out of the realm of conjecture, I am satisfied there is no reasonable prospect Mr. Emslie will prove her disability prevented her from complying with Costco’s Revised Mask Policy or availing herself of the accommodations offered.

[30] I turn now to Costco’s assertion that there is no reasonable prospect that this application will succeed because it is reasonably certain that Costco would establish a defence at the hearing of the complaint: *Purdy v. Douglas College and others*, 2016 BCHRT 117 at para. 50. Costco says it is reasonably certain to prove at a hearing that it reasonably accommodated Ms. Emslie.

[31] The Supreme Court of Canada set out the three-stage analysis for determining a bona fide reasonable justification in respect of a standard or policy: *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, 1999 CanLII 646 (SCC), [1999] 3 S.C.R. 868 [*Grismer*]. Applying that analysis in this case, at a hearing Costco would have to establish that:

1. It adopted the Revised Mask Policy for a purpose or goal that is rationally connected to the function being performed;
2. It adopted the Revised Mask Policy in good faith, in the belief that it is necessary to the fulfilment of the purpose or goal; and
3. The Revised Mask Policy is reasonably necessary to accomplish its purpose or goal, in the sense that the respondent cannot accommodate the complainant and others adversely affected by the standard without incurring undue hardship.

[32] The issue I must decide is whether Costco is reasonably certain to establish these three elements at a hearing.

[33] I begin with whether Costco is reasonably certain to establish that it adopted the Revised Mask Policy for a purpose that is rationally connected to the function being performed. I am satisfied that it is.

[34] On the first requirement, the Revised Mask Policy required people working or shopping in Costco stores to wear a face mask. Costco says the rational, business-related purposes for the Revised Mask Policy were to “provide a safe shopping environment for Costco’s members and guests; to provide a safe work environment for its employees; and, specifically, to provide greater protection for Costco’s employees, members and guests than could be provided by a mask policy that permitted exceptions.”

[35] In the context of the whole of the materials before me, I agree with Costco that it is reasonably certain to establish the first element of *Grismer*. The Revised Mask Policy is rationally connected to Costco’s obligation to ensure the health and safety of its employees and members of the public, and the surrounding circumstances of a global pandemic. Ms. Emslie may disagree with Costco’s approach not to exempt members of the public who had medical exemptions to wearing a face mask from their Revised Mask Policy. She may disagree that the accommodations Costco offered, generally, to members of the public who were unable or unwilling to wear a face mask were equally adequate for members of the public who had

medical exemptions to wearing a face mask or face shield. However, her disagreement does not undermine Costco's evidence about the Revised Mask Policy's rational connection to its goal "in the face of a then-novel virus that had formed the basis of a state of emergency in the Province": *Coelho v. Lululemon Athletica Canada Inc.*, 2021 BCHRT 156 at para. 25.

[36] Turning to the second element of *Grismer*, I am satisfied that Costco is reasonably certain to establish that it adopted the policy in good faith. There is ample evidence of both the context and development of the Revised Mask Policy, and no evidence before me that could support a finding to the contrary.

[37] On the third requirement, I am persuaded that Costco is reasonably certain to establish that it discharged its duty to accommodate Ms. Emslie.

[38] I understand Ms. Emslie's contention to be that, in order to be a reasonable accommodation, the Revised Mask Policy required Costco to carve out a special exception for customers with a medical exemption to wearing a face mask, face cover, or face shield. I understand her position to be that the accommodations offered to the public who were unable or unwilling to wear a face mask in store is not appropriate for those with a medical mask exemption.

[39] Having a disability-related barrier to wearing a mask "does not then entitle the complainant to simply do what they please": *Coelho* at paras. 29-30. As in *Coelho*, the fact that Ms. Emslie said that she could not wear a mask did not give her an "exemption" from Costco's Mask Policy. Rather, her medical condition obliged Costco to reasonably accommodate her to the point of undue hardship to mitigate the adverse impact she experienced because of the Mask Policy: *Coelho* at para. 31.

[40] There is no dispute here that Costco offered Ms. Emslie with the option to wear a face shield. She says the Manager did not offer to shop for her personally and that Costco grocery delivery was not available at that time. Ms. Emslie says Costco did not ask how they could accommodate her or ask her details about her medical exemption to assist her in an

accommodation. She says that the duty to accommodate is a joint discussion that takes place between the parties involved, and that Costco's accommodation options "are not perfect."

[41] I agree with Ms. Emslie that the duty to accommodate is dialogic in nature. Ms. Emslie has an obligation to participate in the accommodation process, and to accept solutions that are reasonable, without insisting on perfection: *Central Okanagan School District No. 23 v. Renaud*, 1992 CanLII 81 (SCC), [1992] 2 SCR 970 [**Renaud** at 994-995]. Costco was not obligated to provide a perfect accommodation, but a reasonable one: *Renaud*. What is reasonable and what constitutes undue hardship is fact specific and will turn on the specific circumstances of a particular case: *Renaud*.

[42] In this case, Ms. Emslie visited the store before the Revised Mask Policy was implemented. The materials before me show that online shopping was available during the time the Revised Mask Policy was in effect, and that personally shopping by a manager would be offered as part of accommodation measures in some cases. Instead of engaging Costco's accommodation options, such as shopping online while the Revised Mask Policy was in effect, Ms. Emslie cancelled her membership a few days later. Ms. Emslie may have preferred in-store maskless shopping, but that does not make Costco's accommodation proposals unreasonable under human rights law: *Coelho* at para. 33.

[43] As in *Coelho*, Ms. Emslie is essentially "seeking her perfect accommodation – to shop freely in-person at Costco without having to wear a face mask, face covering, or face shield, at a time when the Province had declared a State of Emergency over a respiratory virus about which little was yet known": para. 34. In any case, Ms. Emslie chose to cancel her membership and discontinue shopping at Costco while the Revised Mask Policy was in effect. She did not explore the accommodation options that Costco was prepared to put forward while the Revised Mask Policy was in effect. This alone persuades me that Costco is reasonably certain to prove that it met its accommodation obligations because Ms. Emslie's conduct thwarted the accommodation process: *Coelho* at para. 34.

[44] I acknowledge that at issue in this complaint is some disagreement between the parties concerning the details of what happened before, during, and after Ms. Emslie's visit to Costco. For example, the parties' recollections differ as to whether there was a telephone call before or after Ms. Emslie's visit to Costco, and the information that was shared during that telephone call. Such differences do not go to the key issues in this complaint as discussed above, particularly whether Ms. Emslie has taken her complaint outside the realm of conjecture or whether it is reasonably certain Costco will establish a defense at a hearing.

[45] For the reasons set out above, I am persuaded it is reasonably certain that Costco would establish that it discharged its duty to accommodate Ms. Emslie. As a result, there is no reasonable prospect Ms. Emslie's complaint could succeed.

IV CONCLUSION

[46] The application to dismiss the complaint is granted. The complaint is dismissed.

Laila Said Alam
Tribunal Member