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Indexed as: Warren v. San Group Inc., 2024 BCHRT 74

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:

Eric Warren

COMPLAINANT

AND:

San Group Inc.

RESPONDENT

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

Tribunal Member:

Andrew Robb

Counsel for the Complainant:

Hana Felix

Counsel for the Respondent:

Navpreet Chhina

I INTRODUCTION

[1] Eric Warren filed a human rights complaint against his employer, San Group Inc. [San]. San is in the business of lumber manufacturing. Mr. Warren worked at a mill operated by San. In 2019, he was promoted to the position of heavy equipment operator. But shortly after he started training for the position, San removed him from the training, cancelled the promotion, and returned him to his previous position. Mr. Warren says this was discrimination on the ground of his mental disability. He cites statements made by San's mill manager, in response to his application for benefits from Worksafe BC, as evidence that his mental disability was a factor in the cancellation of his promotion.

[2] San denies discriminating. It says Mr. Warren was removed from the training and returned to his previous position because he committed safety infractions during the training. It does not admit Mr. Warren has a mental disability, and denies that the cancellation of his promotion was connected to his mental disability, if he has one.

[3] San applies to dismiss Mr. Warren's complaint. It says there is no reasonable prospect that Mr. Warren can prove a connection between a mental disability and the cancellation of his promotion. San further argues that even if there was a connection, it is reasonably certain to establish that its decision to cancel the promotion was justified because it could not accommodate Mr. Warren. San also says the complaint should be dismissed because it does not allege facts that contravene the *Human Rights Code*, the substance of the complaint has been appropriately addressed by Worksafe BC, and the complaint is late-filed.

[4] I am satisfied that I can decide this application under s. 27(1)(c) of the *Code*. For the following reasons, I find there is no reasonable prospect Mr. Warren can prove a connection between a mental disability and the cancellation of his promotion, and I dismiss the complaint. 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.

[5] I apologise to the parties for the Tribunal's delay in making this decision.

II BACKGROUND

[6] Mr. Warren started working for San in 2014. The mill where he worked was unionised, and he was a member of the union.

[7] San says Mr. Warren successfully applied for a promotion to a heavy equipment operator position in July 2019. The position required him to operate heavy equipment to move and stack logs. It also required the use of power saws and chainsaws.

[8] On July 22, 2019, Mr. Warren began training as a heavy equipment operator. One week later, before his training was complete, the mill manager removed him from the training. This meant Mr. Warren could not be a heavy equipment operator. He was returned to his previous position at San.

[9] There is no dispute that the mill manager removed Mr. Warren from the heavy equipment operator training on July 29, 2019. What is in dispute is why the mill manager removed him from the training. San says it was because Mr. Warren committed safety infractions during the training. In support of its application to dismiss the complaint, San provided an undated letter written by the mill manager. San says the mill manager no longer works for San, but at the material time he was responsible for hiring, firing, disciplining, and training the mill's employees, and overseeing mill operations. The mill manager's letter says:

- a. Mr. Warren started training for the heavy equipment operator position on July 22, 2019.
- b. The log yard crew told the mill manager Mr. Warren is a loner, does not fit in, and does not listen to others. They feel he could be injured because he does not communicate with the rest of the crew. The letter included examples of what the mill manager described as dangerous conduct and poor communications by Mr. Warren, during his training.
- c. Mr. Warren's disregard for safety, lack of communication, and "know it all attitude" make him a high risk employee in a dangerous area.

d. As of July 29, Mr. Warren was disqualified as a heavy equipment operator in the log yard.

[10] Mr. Warren objected to the mill manager's decision to stop his training and disqualify him from the heavy equipment operator position. He says San's safety concerns were fabricated and untrue, and he was not given notice of any safety issues before he was removed from the training.

[11] Mr. Warren says his union supported him. In a letter to San dated October 15, 2019, the union's business agent said the union planned to proceed to arbitration with a grievance about Mr. Warren being removed from the heavy equipment operator position. Mr. Warren says the arbitration did not proceed because the mill manager agreed to return him to the heavy equipment operator position, but this never happened. Mr. Warren does not say when the mill manager agreed to return him to the position.

[12] In support of this application to dismiss, San provided a sworn statement from a company representative who has no personal knowledge of the conversation between Mr. Warren and the mill manager, or the grievance. The San representative says he was told the union investigated Mr. Warren's complaint and dismissed the grievance. I understand this to mean the union decided not to pursue the grievance. The San representative says it is unlikely the mill manager agreed to return Mr. Warren to the heavy equipment operator position.

[13] After his promotion was cancelled, Mr. Warren filed a claim with Worksafe BC, alleging that he sustained a mental health injury resulting from his employment with San. The claim said he faced bullying and harassment at work, from the start of his employment with San until July 29, 2019. It alleged unfair treatment throughout that period, including the decision to cancel his promotion, on July 29, 2019.

[14] On December 2, 2019, a Worksafe BC entitlement officer notified Mr. Warren that his claim for a mental health injury had been disallowed. The entitlement officer found the incidents described in Mr. Warren's claim reflected interpersonal conflict or disagreement with decisions by his employer, but did not amount to threatening or abusive behaviour by the

employer, and did not support a finding that he had a compensable mental health injury under the *Workers Compensation Act*.

[15] In January 2020, Mr. Warren requested a review of Worksafe BC's decision to disallow his claim. In the review process he was represented by the Workers' Advisers Office [**WAO**], a provincial government agency that supports workers in disputes with Worksafe BC. In a letter dated January 30, 2020, a WAO representative submitted a written argument to Worksafe BC on Mr. Warren's behalf. It said Mr. Warren's mental health had suffered because of the mill manager's accusations that he committed safety infractions during the training. It also said he was seeking assistance with his mental health, and his family practitioner had advised him to work in a less stressful position.

[16] On behalf of San, the mill manager wrote a two-page response to WAO's written argument [the **Worksafe Response**]. The Worksafe Response is not dated. Mr. Warren says he received it on February 12, 2020.

[17] In the Worksafe Response, the mill manager says Mr. Warren presents safety risks because he does not communicate with co-workers. The mill manager wrote:

Eric to this day does not take any of the events as his fault and is very demanding that he gets his way. His admission to mental health worries myself as the mill environment does not have room for this. Moving machinery, mobile equipment and the fact that Eric cannot work the base line job without being injured worries me...I am only looking after his safety and the safety of the crew he has to work with.

[18] A letter from a Worksafe BC entitlement officer, dated August 18, 2020, shows that Worksafe BC agreed to reconsider its initial decision and conduct further investigation, but after investigating it still reached the same decision, to disallow Mr. Warren's claim for a mental health injury. The entitlement officer had obtained the union's file, which showed the union investigated Mr. Warren's concerns about his removal from the heavy equipment operator position in 2019, and found the evidence demonstrated that Mr. Warren was removed from the position due to safety concerns that were corroborated by multiple San employees.

[19] In Mr. Warren’s human rights complaint he says he was diagnosed with depression due to a hostile working environment at San. In his response to the application to dismiss his complaint, he says he has been trying to get a diagnosis and treatment for his depression for years, but referrals take a long time. In late 2019, he says his general practitioner referred him to a mental health clinic, where he had a pre-assessment in early 2021, which led to a referral to a psychiatrist. When he filed his response to the application to dismiss, he had an appointment scheduled with the psychiatrist the following week. He provided no further evidence about his mental disability.

III DECISION

A. Preliminary issue – unsworn affidavit

[20] Mr. Warren’s response to the application to dismiss refers to his sworn affidavit, but the affidavit he provided to the Tribunal is unsworn, and not signed by Mr. Warren. In its reply submission, San says less weight should be given to the affidavit because it is unsworn. Mr. Warren did not address the weight to be given to his unsworn affidavit and did not provide a sworn version of the affidavit.

[21] In light of my conclusion I have not found it necessary to decide how much weight should be given to the unsworn affidavit. Nothing in my decision turns on the weight to be given to Mr. Warren’s affidavit.

B. Section 27(1)(c) – No reasonable prospect of success

[22] San applies to dismiss Mr. Warren’s complaint on the basis that it has no reasonable prospect of success: *Code*, s. 27(1)(c). The onus is on San to establish the basis for dismissal.

[23] 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.

[24] 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. 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.

[25] A dismissal application is not the same as a hearing: *Lord v. Fraser Health Authority*, 2021 BCSC 2176 at para. 20; *SEPQA v. Canadian Human Rights Commission*, [1989] 2 SCR 879 at 899. The threshold to advance a complaint to a hearing is low. In a dismissal application, a complainant does not have to prove their complaint or show the Tribunal all the evidence they may introduce at a hearing. They only have to show that the evidence takes their complaint out of the “realm of conjecture”: *Workers’ Compensation Appeal Tribunal v. Hill*, 2011 BCCA 49 at para. 27.

[26] To prove his complaint at a hearing, Mr. Warren would have to prove that he has a characteristic protected by the *Code*, he was adversely impacted in his employment, and his protected characteristic was a factor in the adverse impact: *Moore v. British Columbia (Education)*, 2012 SCC 61 at para. 33. If he did that, the burden would shift to San to justify the impact as a *bona fide* occupational requirement. If the impact is justified, there is no discrimination.

[27] In his human rights complaint form, Mr. Warren says San caused his mental disability by targeting him for harassment and cancelling his promotion, but he has not pursued this allegation in response to the application to dismiss. The Tribunal has found that causing a disability, on its own, does not constitute discrimination within the meaning of the *Code*: *Kras v. Coast Mountain Bus Company and another*, 2017 BCHRT 122 at para. 68.

[28] In his response to San’s application to dismiss his complaint, Mr. Warren says his promotion was cancelled because of his mental disability. There is no evidence before me that Mr. Warren ever indicated to San that he may have a mental disability, before he filed his Worksafe claim. I understand Mr. Warren’s argument to be that the mill manager formed a

perception that Mr. Warren had a mental disability, based on his conduct during the training. Mr. Warren suggests that the mill manager removed him from the training and cancelled his promotion based on this perception, instead of investigating whether his mental disability could be accommodated.

[29] San disputes that a mental disability was a factor in the cancellation of Mr. Warren's promotion. San says there is no evidence that Mr. Warren has a mental disability, and his promotion was cancelled solely because of his safety infractions during the training.

[30] Mr. Warren says his depression is a disability, and he describes some steps he has taken to get a diagnosis and treatment. He does not describe how his depression affects him. There is no evidence, and Mr. Warren has not alleged, that his conduct during the heavy equipment operator training or the alleged safety infractions were related to a disability.

[31] Assuming (without deciding) that Mr. Warren has taken the allegation of mental disability out of the "realm of conjecture", the issue I must decide is whether he has done the same for his allegation that a mental disability, or San's perception that he had a mental disability, was a factor in the cancellation of his promotion. Put another way, has San established that Mr. Warren has no reasonable prospect of proving at a hearing that his mental disability, or San's perception that he had a mental disability, was a factor in San's decision to end the training and cancel his promotion?

[32] As I understand it, Mr. Warren argues that the Worksafe Response is sufficient to take his allegation out of the realm of conjecture. He says the Worksafe Response shows the mill manager cancelled his promotion based on a perception that Mr. Warren had mental health issues. In support of this argument, Mr. Warren refers to the parts of the Worksafe Response that refer to him as a loner, and the parts that say "the log yard is no place for him" and "his admission to mental health worries myself as the mill environment does not have room for this."

[33] San offers a different interpretation of the Worksafe Response: it says the mill manager's statement that "the mill environment does not have room for this" refers to Mr. Warren's behaviour and lack of accountability, not mental health issues.

[34] The context for the mill manager's statements in the Worksafe Response does not clearly show what he was referring to when he wrote, "the mill environment does not have room for this." There is no evidence before me from the mill manager. It is at least arguable that this statement demonstrates the mill manager was resistant to accommodating workers with mental disabilities.

[35] However, even if the mill manager's statements in the Worksafe Response reflect an attitude inconsistent with the purposes of the *Code*, on the whole of the evidence before me, I find that Mr. Warren's complaint has no reasonable prospect of success.

[36] The mill manager wrote the Worksafe Response over six months after Mr. Warren's promotion was cancelled, in response to WAO's submission that the mill manager's conduct caused Mr. Warren's mental health issues. Nothing in the Worksafe Response suggests the mill manager perceived Mr. Warren's conduct at the time—that is, during the heavy equipment operator training—to be related to a mental disability.

[37] Further, Mr. Warren does not explain why the mill manager or anyone else might have perceived that his conduct during the training was related to a mental disability. There is no evidence that he was considered a loner or a poor fit in the log yard because of symptoms of his undiagnosed depression.

[38] Mr. Warren says the mill manager agreed to return him to the heavy equipment operator position, after the union said it planned to proceed to arbitration with a grievance, but the mill manager did not honour this agreement. Mr. Warren does not provide any information about when the mill manager agreed to return him to the heavy equipment operator position, or what Mr. Warren did when the mill manager did not honour the agreement. Even if the mill manager did agree to return Mr. Warren to the heavy equipment operator position, there is no

evidence that his failure to honour the agreement was connected to a perception that Mr. Warren had a mental disability.

[39] For these reasons I find Mr. Warren has no reasonable prospect of proving a connection between a mental disability, or a perception that he had a mental disability, and the cancellation of his promotion.

IV CONCLUSION

[40] I dismiss Mr. Warren's complaint under s. 27(1)(c) of the *Code*. It is not necessary for me to consider San's arguments under s. 27(1)(b), s. 27(1)(f), or s. 27(1)(g).

Andrew Robb
Tribunal Member