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IN THE MATTER OF THE *HUMAN RIGHTS CODE*,
RSBC 1996, c. 210 (as amended)

AND IN THE MATTER of a complaint before
the British Columbia Human Rights Tribunal

BETWEEN:

Yen Hahn Lee

COMPLAINANT

AND:

London Drugs Limited, Sunae Min, Shiraz Thobani and Tracey McDonald

RESPONDENTS

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

Tribunal Member:

Theresa Etmanski

On their own behalf:

Yen Hahn Lee

Counsel for the Respondent:

Jennifer Devins and Jordan Michaux

I INTRODUCTION

[1] Yen Hahn Lee was a part-time Pharmacy Assistant at London Drugs. He says his work environment was rife with bullying, harassment, poor management, and retaliation, which culminated in his employer making false claims to the police about him and an involuntary stay in the psychiatric ward. He has filed a complaint against London Drugs Limited, and individual members of the management team, Sunae Min, Shiraz Thobani, and Tracey McDonald [collectively, the **Respondents**]. He alleges discrimination in employment because of his mental disabilities (autism and depression), contrary to s. 13 of the *Human Rights Code*.

[2] The Respondents deny discriminating against Mr. Lee and apply to dismiss the complaint without a hearing under s. 27(1)(c) of the *Code*, because they say there is no reasonable prospect that the complaint will succeed. The Respondents do not dispute that Mr. Lee had one or more mental disabilities at the material time of the complaint. However, they describe a very different situation of a management team that was concerned about the well-being of Mr. Lee, an employee with increasing performance and behaviour issues, and made significant effort to fulfill their duty to inquire. They argue that Mr. Lee has no reasonable prospect of successfully proving that they subjected him to any adverse treatment, or that any such adverse treatment was connected to his mental disabilities. The Respondents say they have a non-discriminatory explanation for all the alleged conduct. Furthermore, they state that they are reasonably certain to prove they met any duty they had to accommodate Mr. Lee.

[3] The Respondents further argue that, in the alternative, the complaint should be dismissed against Ms. Min, Mr. Thobani, and Ms. McDonald under s. 27(1)(d)(ii) of the *Code*, because proceeding with the complaint against those individual respondents would not further the purposes of the *Code*.

[4] The issues I must decide in this application are whether Mr. Lee has taken out of conjecture that he experienced adverse treatment by the Respondents, and if so, whether his mental disabilities were a factor in that adverse treatment. In doing so, I must consider whether the Respondents have provided a reasonable, non-discriminatory explanation for the alleged

conduct. In addition, I must consider whether it would further the purposes of the *Code* to proceed with the complaint against the individual respondents.

[5] For the following reasons, I allow the Respondents' application in part under s. 27(1)(c) of the *Code*. I also allow the application under s. 27(1)(d)(ii) and dismiss the complaint against the individual respondents. 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.

II BACKGROUND

[6] The following is a summary of the relevant evidence and information provided by the parties. I make no findings of fact.

[7] Mr. Lee was employed at London Drugs from February 2018 to April 2019. Ms. Min was the Assistant Pharmacy Manager, Mr. Thobani was the Pharmacy Manager, and Mr. McDonald was the Store Manager at the relevant time of this complaint.

[8] Mr. Lee has provided a detailed timeline of events throughout his employment with London Drugs. In general, he says that starting from March 2018, he repeatedly raised concerns with management about the way the pharmacy was functioning, and the inequitable distribution of tasks between himself and other pharmacy staff. However, he says that his concerns were not addressed, and only his conduct was scrutinized while others were not held accountable for performance or conduct issues that negatively impacted him. He says this includes incidents where other staff and management humiliated, bullied, and harassed him.

[9] The Respondents state that in September and October of 2018, a series of issues arose with respect to Mr. Lee's performance and conduct in the workplace. They say they met with Mr. Lee several times to discuss issues related to coming to work outside his scheduled shifts, bringing his own equipment from home, and conflict with co-workers involving his use of inappropriate language. The Respondents say that they repeatedly asked Mr. Lee if he had any medical issues that might have been affecting his ability to meet their expectations, but he

stated that there were no such issues. On October 19, 2018, the Respondents issued a letter of expectations to Mr. Lee outlining concerns with his performance and behaviour.

[10] Mr. Lee went on unpaid medical leave for the month of December 2018. He states that this was related to stress at work caused by the escalating “bullying and harassment.” Mr. Lee was also studying for a pharmaceutical exam during this time. He returned to work on or around January 11, 2019.

[11] The parties disagree about the normal range of hours Mr. Lee worked in the months leading up to his medical leave. Mr. Lee states he had been working full time hours from April to November 2018, and that upon his return from leave his hours were significantly reduced. In contrast, the Respondents say that Mr. Lee worked on average 25 hours per week, and his schedule fluctuated based on factors such as availability, suitability for available work, staffing and other operational needs, and seniority.

[12] The parties agree that shortly after his return to work, the Respondents became aware that Mr. Lee was intending to file a “bullying and harassment” complaint with WorkSafeBC [the **WSB Complaint**]. The parties further agree that on January 17, 2019, Mr. Lee met with Ms. McDonald, and they discussed his potential complaint, as well as the Respondents’ intention and responsibility to conduct their own investigation into his allegations. The parties agree that Mr. Lee informed Ms. McDonald that he had been late for work that day because he had fallen asleep while driving. The Respondents state that Ms. McDonald again inquired about whether Mr. Lee had any medical issues that may require accommodation. The parties agree that Mr. Lee disclosed a childhood autism diagnosis, but Mr. Lee stated that this did not impact his ability to perform the job and he did not require any accommodations. The parties have otherwise provided differing accounts of the tone and content of this discussion. These divergent accounts are detailed further below.

[13] The Respondents state that on January 25, 2019, Mr. Lee provided Ms. McDonald with the written details of the intended WSB Complaint. It alleged harassment by management and that his hours had been reduced because of his intention to file the WSB Complaint. The details

included information from Mr. Lee that he had experienced depression and suicidal impulses, which he attributed to the situation at work. The Respondents state that London Drugs immediately initiated an internal investigation into the allegations. However, the investigation found that his allegations were not substantiated.

[14] On or around February 11, 2019, Mr. Lee met with Ms. Min and the Assistant Store Manager to discuss allegations involving his behaviour towards other staff members, such as the use of foul language. According to the Respondents, Ms. Min and the Assistant Store Manager observed “concerning behaviours” from Mr. Lee during the meeting, and they decided to provide him the rest of the day off with pay. The Respondents state that before leaving the meeting, Mr. Lee made comments about being homeless and malnourished, and a comment to the effect that “he would die soon.” Mr. Lee denies making any comment about suicide but suggests that he may have been referring to his inability to afford food to eat.

[15] The Respondents state that they were concerned about Mr. Lee following this meeting and decided to seek medical information to ensure he was fit and able to work before returning. The Respondents say they attempted to contact him by telephone and email over the next two days but could not reach him. They say that they decided to contact the police to request a welfare check on Mr. Lee. On February 14, 2019, the police located Mr. Lee and detained him under the *Mental Health Act*. Mr. Lee says that he was held in the psychiatric ward of the hospital for three days. He states that a doctor informed him that they needed to assess him because his employer had said he was “dangerous” and “delusional”.

[16] On February 19, 2019, a London Drug’s Employee Relations Advisor contacted Mr. Lee, and informed him of the findings of the internal investigation. Mr. Lee was not happy with the results and wanted a further investigation into the Respondent’s involvement in his arrest and hospital stay. The Employee Relations Advisor informed Mr. Lee that a member of Human Resources would be visiting the pharmacy to discuss the concerns he raised with other staff members.

[17] Also on February 19, 2019, London Drugs provided Mr. Lee with a medical questionnaire for his doctor to complete before he could return to work. The Respondents say that they gave him until March 5, 2019, to have it completed, and placed him on a paid leave of absence during that time. Mr. Lee did not return the completed form by March 5, 2019. London Drugs then placed him on unpaid leave and gave him an extension until April 25, 2019, to return the completed medical questionnaire. On April 9, 2019, the Respondents say they received the medical questionnaire from Mr. Lee's doctor. The medical questionnaire stated that Mr. Lee did not have any medical restrictions or limitations, but that "April 1 is quit day for him from London Drugs." The next day, the Respondents wrote to Mr. Lee to request confirmation of his intention to resign from employment. They say that they did not hear back from Mr. Lee, so they issued him a Record of Employment on April 20, 2019.

[18] Mr. Lee states that on April 1, 2019, the Respondents removed him from the employee WhatsApp group chat. He states that he felt forced to quit his employment after this act of "hostility".

III PRELIMINARY ISSUES

[19] The Respondents have raised two preliminary issues that I must address. First, the Respondents seek permission to file one additional page of submissions in their reply. They state that this is necessary given the "length and number" of Mr. Lee's response arguments.

[20] Mr. Lee initially provided the following materials in response to this application: a four-page document titled "Response to Application to Dismiss"; a seven-page document titled "Response"; a 16-page document titled "Timeline" which includes both written arguments and approximately two pages of evidence; approximately 18 pages of evidence; and an audio recording. The Respondents subsequently applied to amend their application to dismiss, as the incorrect documents had been attached as exhibits to one of their affidavits. The Tribunal allowed this application and provided Mr. Lee an opportunity to provide an amended response. He subsequently provided a three-page document, which included two pages of arguments, and one page of evidence.

[21] A substantially identical document to the one titled “Timeline” was also included as an exhibit to one of the affidavits provided by the Respondents, with minor formatting edits. It is not clear when this document was created or if Mr. Lee intended this document to be arguments or evidence in his response. However, given that it appears to have previously been provided to the Respondent in the course of his employment, I will take this as evidence in support of his response. By my estimation, Mr. Lee has therefore provided 13 pages of argument.

[22] As set out in the Tribunal’s guide on Format for dismissal applications, the relevant page limits are as follows: 15 pages for the Respondent’s application to dismiss; 15 pages for the Complainant’s response to the application; five pages for the Respondent’s final reply. There is no page limit for documents submitted as evidence.

[23] The Tribunal will only allow additional pages of arguments in exceptional circumstances. As Mr. Lee has complied with the page limit requirements, I do not find that these amount to exceptional circumstances warranting additional pages of argument from the Respondent. Furthermore, the Respondents have applied to submit additional pages within their Reply argument, which is inconsistent with the requirement that they apply for additional pages one week before their documents are due. I therefore deny the Respondent’s application to extend the page limit for their reply and have only considered the first five pages in this decision.

[24] Second, the Respondents argue that Mr. Lee has raised a new allegation in his response that was not contained in his original complaint, contrary to Rule 24(4)(b) of the Tribunal’s *Rules of Practice and Procedure*. Specifically, the Respondents state that Mr. Lee has alleged for the first time that at a staff meeting on December 21, 2018, an unidentified Pharmacy Manager aggressively stated: “I am already too busy to improve the numbers. So, I am not going to hear anything about your problems with each other!” The Respondents further argue that this allegation is unsupported by any record, is not connected to any personal characteristic, and represents only Mr. Lee’s discontent with the way interpersonal conflict between him and other staff members has been addressed.

[25] Rule 24(4)(b) requires that a complainant apply to amend their complaint if there is an outstanding application to dismiss, such as in the current case. The purpose of this rule is to ensure that a respondent who files an application to dismiss a complaint does not face a moving target: *Pausch v. School District No. 34 and others*, 2008 BCHRT 154 at paras. 28-29. Respondents are entitled to know the allegations against them to assess whether, or on what basis, to bring their application to dismiss the complaint: *Purdy v. Douglas College and others*, 2016 BCHRT 117 at paras. 35-37. I note that Mr. Lee has not applied to amend his complaint.

[26] At the same time, the Tribunal's complaint forms are not the equivalent of pleadings in a civil litigation process: *White v. Nanaimo Daily News Group Inc. and Klaholz*, 2004 BCHRT 350 at para. 23. It is not uncommon, or a violation of the *Rules*, for a complainant to add new particulars of their complaint in response to an application to dismiss, as long as they do not expand the scope of the complaint: *Powell v. Morton*, 2005 BCHRT 282 at para. 20.

[27] I find that this allegation is not merely a particularization of Mr. Lee's allegations for the following reasons. First, it is not clear whether Mr. Lee was personally present at the staff meeting on December 21, 2018, or if he is recounting information told to him by a third party. According to the record before me, Mr. Lee was on medical leave for the full month of December 2018. Second, Mr. Lee has not named the party to whom he attributes this statement. I therefore cannot conclude that this is an extension of the pattern of behaviour he alleges of one of the individual respondents named in this complaint. Finally, Mr. Lee's complaint form does not make any allegations involving management's refusal to intervene in interpersonal conflicts of the staff in general; rather, his complaint focuses on how he was targeted and singled out by management. This therefore appears to be an entirely new allegation.

[28] The onus is on Mr. Lee to persuade the Tribunal to exercise its discretion to allow the amendment. He has not provided any information or argument to support the amendment of his complaint to include this allegation. I therefore do not allow an amendment to this complaint, will not consider this new allegation in the current application to dismiss.

IV DECISION

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

[29] The Respondents apply to dismiss Mr. Lee’s complaint on the basis that it has no reasonable prospect of success. Section 27(1)(c) of the *Code* 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. The onus is on the Respondents to establish the basis for dismissal.

[30] 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.

[31] A dismissal application is not the same as a hearing: *Lord v. Fraser Health Authority*, 2021 BCSC 2176 at para. 20; *SEPOA 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.

[32] To prove their complaint at a hearing, Mr. Lee will have to prove that he has a characteristic protected by the *Code*, he was adversely impacted in 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 does that, the burden will shift to the Respondents to justify the impact as a *bona fide* occupational requirement. If the impact is justified, there is no discrimination.

[33] The parties do not dispute that Mr. Lee has a mental disability protected by the *Code*. Mr. Lee states that he has autism (Asperger's Syndrome) and that he developed major depressive disorder from the bullying and harassment he says he experienced at London Drugs. Mr. Lee states that behaviours associated with his Asperger's Syndrome include "different scopes of common sense, requiring tasks to be done properly, enhanced perception, social awkwardness, and increased IQ." The medical questionnaire completed by Mr. Lee's doctor on April 9, 2019, states that he has anxiety and sleep disturbance issues. Mr. Lee argues that the Respondents incorrectly perceived him to be "psychotic," "delusional" and "insane" because of his disclosed disabilities.

[34] The Respondents argue that Mr. Lee has no reasonable prospect of successfully proving that they subjected him to any adverse treatment, or that any such adverse treatment was connected to his mental disabilities. The Respondents argue that they have a non-discriminatory explanation for the alleged conduct. They state that where a respondent has provided a reasonable, non-discriminatory explanation for the alleged unfair treatment, the complaint can be dismissed, even if there are factual disputes between the parties: *Rivera v. Newdale Holdings Inc.*, 2010 BCHRT 99 at para. 114, *Lal v. Best Buy Canada Ltd.*, 2014 BCHRT 216 at para. 71, *Sailer v. Verizon Information Services Canada Inc.*, 2005 BCHRT 93 at para. 47, and *Ting v. Gotto*, 2004 BCHRT 127 at para. 35.

[35] The Respondents state that Mr. Lee makes repeated bare allegations that one or more of the Respondents' actions were motivated by "[his] autism and depression" or "[his] complaint." However, he has not asserted any form of evidence of that alleged motivation, other than his own perception and speculation. The Respondents say that the Tribunal has been clear that a complainant must provide sufficiently detailed evidence to show a connection beyond mere speculation between adverse treatment and a protected ground: *Grewal v. Biring and others (No. 3)*, 2007 BCHRT 416.

[36] In contrast, the Respondents state that the record of contemporaneous notes they have provided show that Mr. Lee was subject to performance management resulting from documented, recurring performance issues. The Respondents say that the Tribunal has been

clear that contemporaneous written records are of a particular significance in evaluating whether a complaint has a reasonable prospect of success: *Raudales v. Interior Health Authority (c.o.b. Swan Valley Lodge)*, 2019 BCHRT 73 at para. 50.

[37] Further, the Respondents state that London Drugs understands its duty to accommodate and recognized here that it had a duty to inquire into whether Mr. Lee had a medical condition that was impacting his work or that required accommodation. However, Mr. Lee provided no medical information that indicated that he had a disability that impacted his job.

[38] The Respondents state that it is clear that Mr. Lee does not agree with their performance management, or inquiries supporting the company's own occupational health and safety obligations. However, Mr. Lee's dissatisfaction with the Respondents' approach does not render that approach discriminatory. The Respondents say that the Tribunal does not have any jurisdiction over treatment by employers alleged to be generally unfair. Rather, the Tribunal's jurisdiction is limited to complaints of discrimination contrary to the *Code: Geraskina v. Immigrant Services Society of British Columbia*, 2008 BCHRT 323 at para. 31.

[39] For his part, Mr. Lee disputes the accuracy of the Respondents' version of events and provides his perspective on how the relevant events unfolded. He states that he has provided sufficient "logic and factual support" for his complaint, and that his version of events is "far more reasonable and probable" than the Respondents'. He further says that the Respondents have hid or ignored evidence, their information contains contradictions, and they have not addressed the main issues in his complaint. He states: "it is more likely than not that London Drugs does not want to admit that their staff had participated in bullying and harassment and discriminatory action and did not want to be responsible for it."

[40] Mr. Lee is self-represented in this complaint, and his complaint and various submissions could at times be described as appearing "in ragged form": *Lord v. Fraser Health Authority*, 2021 BCSC 2176 at para. 38 and recently discussed by the Tribunal in *PL v. BC Ministry of Children and Family Development and others*, 2023 BCHRT 58 and *Rush v. Fraser Health*

Authority (No. 2), 2024 BCHRT 13. However, in my view, the substance of Mr. Lee’s complaint is captured within six broad headings: (1) reduction of hours; (2) harassment; (3) report to police; (4) failure to investigate; (5) medical inquiries; and (6) removal from group chat. I address each allegation, as well as the parties’ specific arguments related to each allegation, in turn.

1. Reduction of Hours

[41] Mr. Lee says that he discussed the “bullying and harassment” he had been subject to at work with some colleagues and decided that he would file the WSB Complaint. He says that someone warned Mr. Thobani and Ms. McDonald about his intention to file a complaint, and in response, Mr. Thobani and Ms. McDonald decided to reduce his hours from 72-80 hours every two weeks to 24 hours every two weeks, starting on January 20, 2019. Mr. Lee also alleges that his hours were reduced because Ms. McDonald believed that he was “crazy since [he has] major depressive disorder”, which he says was caused by the workplace bullying and harassment. He states that the Respondents did not notify him that his hours would be reduced in advance. He states that because of the reduced hours, he could no longer afford to eat or pay rent, and he became homeless. This allegation is largely consistent with the details of the intended WSB Complaint he provided to the Respondents in January 2019, in which he states: “The Store manager said your hours were cut because you are creating conflicts. Throughout the conversation she was loud and rude. She was also talking in a way that implied they thought my autism (enhanced functioning) and stress (which is now mostly from this job) was affecting me and that I was imagining everything.”

[42] In his response to this application, Mr. Lee further states that the Employee Relations Advisor told him that his shifts had been reduced because he made his colleagues feel uncomfortable. He has provided a surreptitious audio recording of the telephone conversation in which she allegedly made this statement.

[43] Mr. Lee has provided copies of his bank statements and shift schedules which he says will prove that his hours were reduced in January 2019.

[44] The Respondents state that Mr. Lee never had a guaranteed number of hours, and the hours he was scheduled upon his return from medical leave were consistent with the regular fluctuation in scheduling over the overall course of his employment. They have provided a copy of the interview notes and findings of the Respondents' internal investigation into Mr. Lee's complaint. On the issue of his reduced hours, there is information to support that over time, his hours were increased or decreased in relation to his availability, as well as the employment of other staff. The evidence also supports that he was only scheduled for three shifts from January 20, 2019, to February 4, 2019, following his return from medical leave. In addition, there is information to support that management had consciously decided to limit overlap in scheduling between Mr. Lee and another employee who had voiced concerns about working with him. There is third-hand evidence to support that the other employee's discomfort stemmed from the fact that Mr. Lee had been talking about collecting evidence about bullying. In her affidavit, Ms. McDonald also mentioned that the other employee complained that Mr. Lee was "doing weird things and hiding things." The other employee was responsible for training new employees, so it appears that her scheduling was given priority. Notably, Mr. Lee had previously accused this employee of bullying him. The Respondents have also provided records of ongoing interpersonal conflict between Mr. Lee and the other employee, including several instances where the Respondents spoke to him about his use of foul language towards her.

[45] The evidence before me supports that Mr. Lee was scheduled for fewer hours in January 2019 than he was in November 2018. However, there is some dispute between the parties regarding why his hours were reduced, and whether an explanation was provided to Mr. Lee. It is not necessary for me to resolve these conflicts to resolve the issues in this application. The question before me is simply whether Mr. Lee has provided sufficient information to bring his allegation that his hours were reduced because of his mental disability, or the Respondents' perception of his mental disabilities, out of the realm of conjecture. I find that although Mr. Lee does appear to have engaged in some speculation about the motivation for the Respondents' actions, there is also information on record to support his allegation. Specifically, it appears that the Respondents decided to separate Mr. Lee from another employee and prioritize giving her shifts over him. According to the evidence, the reported reasons for this separation were that

the other employee was uncomfortable that Mr. Lee said he was collecting evidence about bullying, and that he was behaving “weird”. Mr. Lee has explained that behaviours associated with his Asperger’s Syndrome include “different scopes of common sense” and “social awkwardness.” I am not satisfied based on all the evidence that the other employee was not separated from Mr. Lee because of behaviours associated with his disabilities. Bearing in mind that a protected characteristic need only be a factor, not the only factor, in the adverse treatment, I find that this information takes the allegation that Mr. Lee’s hours were reduced because of his disabilities out of the realm of conjecture.

2. Harassment

[46] Harassment is negative conduct that deprives its victim of dignity, for example because it is “abusive, demeaning, degrading and/or humiliating”: *International Forest Products v. United Steelworkers’ Union, Local 2009 (Sohal Grievance)*, [2017] BCCAAA No. 12 (Nichols) at para. 119. It can be subtle, and its impact can be cumulative over time: *Sohal* at para. 124. Where harassment is connected to a characteristic protected by the *Code*, in an area of life regulated by the *Code*, it is discriminatory: *Brito v. Affordable Housing Society*, 2017 BCHRT 270 at para. 40.

[47] It is not always easy to identify when conduct rises to a level of “harassment”. In *Gaucher v. Fraser Health Authority and others*, 2019 BCHRT 243 at para. 62 the Tribunal explained:

In the employment context, unequal power dynamics may contribute to an employee feeling bullied or harassed by the people exercising power over their employment. However, those subjective feelings are not enough to prove that harassment has occurred. There must be an objective element to the assessment as well – one that distinguishes between reasonable conduct arising from management of a workplace and conduct that is degrading or otherwise demeaning of an employee’s dignity. I have found Arbitrator Nichol’s analysis in *Sohal* to be helpful:

In *UFCW, supra*, Arbitrator Larson addressed the boundary between legitimate management direction and harassment. He noted that carrying out normal management rights does not amount to harassment, as long as it has a legitimate workplace purpose and is not abusive or demeaning. With respect to interactions with supervisors, Arbitrator Larson stated the following at para. 32:

Even severe criticism of an employee by a supervisor who is genuinely attempting to deal with a perceived performance problem is not harassment: *Re Religious Hospitaliers of St. Joseph* (1995) 1995 CanLII 18428 (ON LA), 50 L.A.C. (4th) 225 (Simmons). Nor is it necessarily harassment where an employee is demonstrated to have been improperly disciplined by a supervisor or other supervisory action is shown to be unjustified. Supervisors have a right to be wrong provided that they act in good faith and not for an improper purpose. Poor judgment or wrong action is not discriminatory per se. It only becomes harassment when it done in a seriously hostile or intimidating manner or in bad faith.

Thus, not every situation where an employee experiences subjective negative feelings about an interaction at work will amount to harassment. There will likely be situations where an employee disagrees with a direction and may feel it is unfair or undesirable. To determine whether harassment has occurred, the entire context of the situation must be considered on an objective basis. Within that analysis, it is relevant to consider whether there was a legitimate purpose for the management direction and whether a reasonable person, considering all of the circumstances, would find the treatment to be abusive, demeaning, degrading and/or humiliating. Even when there are legitimate purposes for certain directions, an employer will not be excused if it has carried out those directions in a manner that is objectively intimidating and hostile. [paras. 118-119]

I agree with this analysis, though it may need to be adapted within the human rights context to account for the myriad and subtle ways that a person may be adversely treated or impacted in connection with characteristics protected by the *Code*.

[48] In this case, Mr. Lee alleges that the conduct of the individual respondents amounted to discriminatory harassment. In his reply materials, and the “Timeline” document in particular, Mr. Lee also refers to allegations of harassment against co-workers who he has not named as respondents in this complaint. The Respondents’ responsibility to provide a harassment-free environment is addressed under the heading “Failure to Investigate”. In this section I only address the allegations against the named individual respondents. I consider additional information provided by Mr. Lee for contextual purposes only.

a. Tracey McDonald

[49] Mr. Lee states that he was called to Ms. McDonald’s office on January 17, 2019, where she shouted at him and explained that his hours were reduced because he was planning to file the WSB Complaint without letting her know first, and because the complaint was making his colleagues uncomfortable. He alleges she yelled: “it’s just you, and nobody else. It’s in your head... you are building a wall between yourself and others. You are creating conflicts...”. Mr. Lee states that she then gave him an unrealistic time limit to file his complaint and provided him with misleading information about London Drugs having to file it with WSB for him.

[50] Mr. Lee alleges that Ms. McDonald then asked him if his autism would affect his job, and if he was seeing his therapist. He says she proceeded to humiliate him by saying that he needed to continue seeing his therapist because he was “not sane”; he had imagined all the bullying and harassment because he was “delusional”; he had created all the conflict himself because he is autistic; and he was unfit to work in that environment because he is autistic. He says he had the impression that she assumed he had paranoia from mental problems. Mr. Lee states that he maintained his temper and remained respectful in this meeting, even though Ms. McDonald was loud, rude, and made “gestures towards the head”.

[51] The Respondents have provided a very different account of Mr. Lee's conversations with Ms. McDonald. They state that the contemporaneous record and Ms. McDonald's sworn statements show that Ms. McDonald was engaging in an ongoing attempt to determine whether Mr. Lee had any medical condition requiring accommodation.

[52] The Respondents describe two separate meetings between Mr. Lee, Ms. McDonald, and another member of the management team on January 17, 2019. In her affidavit, Ms. McDonald states that at no time did they discuss Mr. Lee's scheduled hours, nor did she indicate that his hours had been reduced for any reason. Ms. McDonald states that they did discuss that Mr. Lee had been late that day because he had fallen asleep in his vehicle while driving to work. She states that she was concerned about this information and asked if he had met with his health care professionals and received clearance to return to work after his recent medical leave. She states that Mr. Lee did not provide a clear response but did indicate that he had a doctor's appointment the next day. Ms. McDonald states that she reiterated her request that Mr. Lee inform London Drugs of any medical condition that could prevent him from meeting expectations, including those relating to attendance and respectful workplace conduct. Mr. Lee indicated for the first time that he had been diagnosed with autism as a child but did not identify any issues meeting the expectations of his position, and he did not request any accommodations.

[53] Ms. McDonald also states that she requested that Mr. Lee provide details about his intended WSB Complaint, so that London Drugs could meet its obligation to investigate and address those issues. Ms. McDonald has provided contemporaneous notes from this meeting, which she sent by email to the London Drugs management team. The notes support her account. The notes also state that Ms. McDonald suggested a deadline for Mr. Lee to provide her details of the WSB Complaint by the end of the following week, and that Mr. Lee agreed to this timeline.

[54] There is a conflict in the evidence between Mr. Lee and Ms. McDonald regarding what was said by Ms. McDonald in this meeting, particularly in relation to the alleged derogatory comments about Mr. Lee's disability. Many human rights complaints raise issues of credibility.

This is not, by itself, a sufficient reason to deny an application to dismiss: *Evans v. University of British Columbia*, 2008 BCSC 1026 at para. 34. The Tribunal must consider whether credibility can be resolved based on corroborative affidavit and contemporaneous documentary evidence: *Smyth v. Loblaw and another*, 2017 BCHRT 73 at paras. 41-42.

[55] In view of all the circumstances of the present complaint, I find that Mr. Lee has no reasonable prospect of proving that the alleged adverse treatment occurred as alleged. Given Mr. Lee's disclosure that he had fallen asleep while driving, as well as his recent return from medical leave, I find that the Respondents are reasonably certain to prove that it was appropriate for Ms. McDonald to inquire about his health status in those circumstances, and that they have a non-discriminatory explanation for the alleged conduct. I further find that given this contemporaneous record the Respondents are reasonably certain to prove their version of events at a hearing. I find that Mr. Lee's allegations of harassment against Ms. McDonald have no reasonable prospect of success.

b. Shiraz Thobani

[56] Mr. Lee alleges that Mr. Thobani shouted at him in front of customers about "getting him [Mr. Thobani] in trouble." Mr. Lee states that this occurred after he had not been able to take his break on time, and that this was somehow connected to him having filed an internal complaint. Mr. Lee states that Mr. Thobani then made a false report to Human Resources alleging that Mr. Lee was aggressive towards him. Although Mr. Lee states that this occurred on February 3, 2019, I understand this to be the same event described by the parties as having occurred on February 4, 2019.

[57] Mr. Lee has provided an email he sent to the Employee Relations Advisor responsible for the internal investigation on February 11, 2019, in which he describes a confrontation he had with Mr. Thobani on February 4, 2019. He describes how he was not able to take his break on time that day because he was helping a patient. He describes how Mr. Thobani suddenly came over and yelled at him to take his break on time.

[58] The Respondents have provided an email from Mr. Thobani to London Drug's Employee Relations Advisor dated February 4, 2019. It describes how Mr. Thobani spoke to Mr. Lee about failing to take his break on time, to which Mr. Lee replied: "there was no one to cover for me." Mr. Thobani states that he told Mr. Lee that he should have asked, and Mr. Thobani would have found someone to replace him. The email ends with the statements: "Yen gets very angry when asked to do something. He is very confrontational when asked about anything."

[59] The accounts of both parties support that there was a conversation between Mr. Lee and Mr. Thobani regarding the time Mr. Lee took his break that day, but they differ with respect to whether either Mr. Lee or Mr. Thobani was the aggressive party. However, even assuming Mr. Lee's version of events is accepted at a hearing, Mr. Lee has not provided any information to suggest that his mental disabilities were a factor in this adverse treatment. Where there is no information to support a link to a protected characteristic, there can be no reasonable prospect that the allegation will succeed.

c. Sunae Min

[60] Mr. Lee alleges that on February 12, 2019, he was called to a meeting with Ms. Min and another Store Assistant Manager because of the allegations made by Mr. Thobani about Mr. Lee's angry attitude, described above. Mr. Lee states that he explained that Mr. Thobani was retaliating against him because of the intended WSB Complaint, but Ms. Min insisted that he had remembered things incorrectly. He states that he was not allowed to work that day because he "was not well enough from being made homeless." He alleges that Ms. Min assumed that because he is autistic, he "must be crazy and dangerous".

[61] The Respondents have provided an email from the Assistant Store Manager, dated February 11, 2019, documenting what appears to be the same meeting, despite the different date. It describes their conversation regarding a confrontation Mr. Lee had with Mr. Thobani, as well as another incident from the same day where Mr. Lee used foul language in the lunchroom. The email references Mr. Lee stating that he was homeless and malnourished. It further describes Mr. Lee's conduct in the meeting: "As we were talking he started to stare at

me and grit his teeth and use his thumb to pick at his forefinger, which started to bleed. We basically had a staring contest several times during the meeting.” The Assistant Store Manager then wrote: “I told him I really sense his anger and hostility so I told him that we will pay him the full 8 hours and sent him home early. He was in no shape to complete his shift.”

[62] The evidence provided by the Respondents does not address Ms. Min’s conduct at this meeting. However, it is undisputed that Mr. Lee was sent home from work that day. I am not persuaded that Mr. Lee has no reasonable prospect of establishing that his disabilities were a factor in the Respondents decision not to allow him to work. The Respondents’ evidence is that they sent Mr. Lee home because of what they say was concerning behaviour. However, the Respondents have not persuaded me that the way they interpreted Mr. Lee’s behaviour was not influenced by their perceptions about Mr. Lee’s disabilities, or that Mr. Lee’s behaviour in the meeting was not connected to his disabilities. While this alleged conduct may be better characterized as adverse treatment than harassment, I am not persuaded that Mr. Lee has no reasonable prospect of success with this allegation at a hearing.

3. Report to Police

[63] Mr. Lee alleges that on February 14, 2019, the Respondents’ contacted the police and made statements about his mental health based on their inaccurate perceptions of his disabilities. Specifically, he states that Ms. Min made a false report to the police to have him taken to the hospital for psychiatric assessment. Mr. Lee states that this action was taken because the Respondents believed that he would commit suicide because he was “not medically fit,” when in reality he had only explained to them that he was starving because his hours had been cut. He denies making a comment about suicide, or that the Respondents attempted to contact him prior to calling the police. He further states that his family doctor and the doctors at the hospital can support his allegations.

[64] The Respondents agree that they contacted the police about Mr. Lee. However, they state it was out of concern for his wellbeing following the concerning behaviour they observed on February 11, 2019, including his parting statement that “he would die soon,” and their

subsequent inability to contact him for two days. They have provided an email dated February 13, 2019, in which the Employee Relations Advisor states that she attempted to contact Mr. Lee by telephone “a few times” but he did not answer, and his voicemail was full, as well as sent him an email requesting that he call her. On February 14, an email from Ms. McDonald to other managers confirms that she is the one who contacted the non-emergency police line, and that the police would be conducting a “mental health check” on Mr. Lee. Later that day, another email from Ms. McDonald states that she was informed by the police that Mr. Lee was arrested under the *Mental Health Act* and taken to the hospital for medical evaluation.

[65] The audio recording of Mr. Lee’s conversation with the Employee Relations Advisor reveals that Mr. Lee raised his concerns about why the police had been contacted on February 19, 2019. In response, the Employee Relations Advisor said the police had been contacted out of concern for his well-being. She told him she had been involved in that decision. She explained the London Drugs’ concern arose because it was reported that he had made a statement about dying soon, he had previously sent her emails which referenced his self-harm impulses, and that he was homeless and could not afford to eat.

[66] The Respondents further state that Mr. Lee’s allegations regarding their motivation and actions in contacting the police are entirely based on speculation and in any event are not connected to his employment. The Respondents say that the decision by the police to detain Mr. Lee was an exercise of discretion based on the police’s internal protocols, and the Respondents did not and could not have any involvement in that process.

[67] I am satisfied that Mr. Lee has brought this allegation out of the realm of conjecture. There is no question that the Respondents contacted the police about Mr. Lee, and this resulted in a very serious situation for him. Viewed in its proper context, I am satisfied that this arose in the course of the employment relationship between Mr. Lee and the Respondents. I am not persuaded that there is no reasonable prospect that Mr. Lee can prove that his disabilities, or the Respondents’ perception of his disabilities (whether conscious or not), were a factor in the Respondents’ decision to contact the police. I find it would be incongruous to say that the Respondents’ concerns about Mr. Lee’s mental health, or risk of self-harm, can be

separated from his real or perceived mental disabilities at this stage. It may be that the Respondents were motivated by concern for his wellbeing, however a finding of discrimination does not require an intention to discriminate.

4. Failure to Investigate

[68] Mr. Lee states that when he raised concerns about bullying and harassment to the Respondents, they repeatedly insisted that he was wrong, “imagining things” or “self-victimizing” because of his mental disability. He states that this encouraged and caused the bullying and harassment to continue. I understand him to be alleging that the Respondents did not take any actions to address his concerns until they found out he was going to file the WSB Complaint.

[69] Further, after he provided the Respondents with the details of his potential WSB Complaint, I understand Mr. Lee to be alleging that the Respondents did not adequately investigate his complaint. He says that the Respondents did not interview any of his witnesses, they ignored relevant evidence, and they did not review security camera footage, even though he provided exact dates and times. He also says that his witnesses were afraid to speak up because they were worried about receiving a bad reference or being retaliated against, such as having their hours cut. He says the Respondents reached a conclusion that he had imagined everything because he was “autistic and insane”.

[70] Finally, Mr. Lee alleges that human resources would not investigate false statements he says were made by someone at London Drugs to the police which resulted in his arrest, or the subsequent comments that he was “dangerous” and “delusional” to hospital staff. He says those comments formed the basis for the police and hospital’s assessment of him. He says London Drugs refused to investigate because it would breach his confidentiality. Mr. Lee states that the audio recording of a phone call between himself and the Employee Relations Advisor supports this allegation.

[71] The Respondents do not comment on whether they addressed Mr. Lee’s concerns about bullying or harassment prior to him providing the details of his intended WSB Complaint.

Rather, they provide details of the performance management they were engaging in with Mr. Lee in response to various behaviour and conduct issues, including interpersonal conflicts he was having with other staff.

[72] However, the Respondents state that they began investigating Mr. Lee's concerns, as detailed in the intended WSB Complaint, as soon as he provided them. The investigation was conducted by the Employee Relations Advisor, who has provided an affidavit supporting this application, including her investigation notes and report of findings. The final investigation report addresses Mr. Lee's allegations involving unfair treatment and negligence of duties by senior staff; having to take stress leave in December 2018 due to workplace conduct; reduction of his hours in January 2019; being told that his hours were cut because he was "creating conflicts"; management being angry that he intended to file the WSB Complaint without going through them first; and Ms. McDonald saying that he only had one week to file or his complaint would be dropped. The investigation included interviews with Mr. Lee, Ms. McDonald, Mr. Thobani, and Ms. Min, as well as a review of documentation on Mr. Lee's file, including his timecards. It found that none of Mr. Lee's allegations were substantiated.

[73] The investigation report recommended a follow-up visit with the Pharmacy staff by an Employee Relations Advisor from Human Resources to address the concerns about the management of the pharmacy raised by Mr. Lee. This occurred on March 5, 2019, and the Employee Relations Advisor and a Pharmacy Operations Manager met individually with all the Pharmacy staff working at the time of their visit. During that visit, they say that no concerns were raised about management, but a few employees spoke of issues with Mr. Lee. These issues included Mr. Lee using profanity, bringing unnecessary tools to work that made other employees feel uncomfortable with him carrying them, publicly stating he did not like a particular employee, and being generally disruptive. Employees who were not working at the time of the visit were encouraged to reach out to Human Resources if they wished to discuss any concerns.

[74] The Respondents have not commented on whether they conducted an internal investigation into their decision to contact the police about Mr. Lee, or whether any

inappropriate or inaccurate comments were made to the police at that time. The Respondents have also not commented on whether they investigated Mr. Lee's concerns about inappropriate comments made by someone at London Drugs about him to hospital staff. However, in the audio recording provided by Mr. Lee, the Employee Relations Advisor informed him that this would not be possible because the hospital staff were bound to confidentiality by "privacy legislation". She also states repeatedly that the decision to contact the police was done out of concern for his well-being.

[75] An employer has an obligation to provide a discrimination-free work environment, and this includes responding appropriately when complaints are raised. The Tribunal has held that the failure to investigate a complaint of discrimination can independently cause harm, and therefore, can independently be a discriminatory breach under the *Code: Employee v. The University and another (No. 2)*, 2020 BCHRT 12 at para. 272.

[76] Although the parties have provided conflicting information about the internal investigation of Mr. Lee's complaint, I find that the evidence supports that the Respondents did investigate at least some of Mr. Lee's allegations, and that the results of that investigation were discussed with Mr. Lee. However, I find there is insufficient evidence before me to establish that the Respondents are reasonably certain to prove that they took all appropriate steps to investigate Mr. Lee's concerns in a timely manner. I am not persuaded on the evidence that Mr. Lee has no reasonable prospect of proving that he did not raise his concerns about bullying and harassment prior to his leave of absence in December 2018, and that the Respondents did not take steps to address it until he was prepared to file the WSB Complaint.

[77] I have already found that the Respondents' have not established that they are reasonably certain to show that their decision to contact the police about Mr. Lee was not connected to his disabilities, and that finding applies to the current analysis as well. Further, I am not persuaded that the Respondents are reasonably certain to prove that they addressed Mr. Lee's concerns that inappropriate comments were made to hospital staff. While hospital staff may not have been able to discuss private medical records, the Respondents could have

made internal inquiries about Mr. Lee's concerns. There is no evidence before me that they did so.

[78] Finally, the Respondents have provided ample evidence that they had concerns about Mr. Lee's mental health, and I am not persuaded that the Respondents are reasonably certain to prove that any failure to investigate was not related to their perceptions about Mr. Lee's disabilities.

5. *Medical Inquiries*

[79] Throughout his materials, Mr. Lee takes issue with the Respondents asking him about his medical conditions, including the requirement that his doctor complete a medical questionnaire prior to his returning to work. Mr. Lee further alleges that London Drugs gave him an unrealistic timeline for him to see his doctor and complete a medical questionnaire, which he says he could not afford. Finally, he states that the medical questionnaire directly attributed his problems to his depression and autism, rather than the bullying and harassment against him.

[80] The Respondents say that an employer does not need to wait for an employee to agree that there are performance problems before taking steps to collect medical information and address conduct: *Petrar v. Thompson Rivers University and another*, 2014 BCHRT 193 at para. 105; *Tuson v. The Board of Education of School District No. 5 (No. 4)*, 2020 BCHRT 195 at para. 175. The Respondents argue that their inquiries into Mr. Lee's health demonstrate that they were taking steps to accommodate Mr. Lee. They further state that Mr. Lee's dissatisfaction with their approach does not render that approach discriminatory.

[81] I find that it is reasonably certain the Respondents will prove that inquiring into Mr. Lee's health was justified in the circumstances. An employer may be subject to a duty to inquire when it simply has sufficient information to raise a question as to whether an employee has a disability, and whether some accommodation is necessary as a result: *Balak v. Ellis*, 2009 BCHRT 84 at para. 93-94. There is no prerequisite that medical evidence is required for an employer's duty to inquire to be triggered: *O'Beirne v. District of Mission*, 2020 BCHRT 199 at para. 100.

Further, an employer's failure to seek reasonably and necessary medical information in circumstances where medical issues are brought to its attention may itself be discriminatory under its duty to inquire: *Lewis v. Hour of Power Canada and another*, 2018 BCHRT 25 at para. 88.

[82] An employer who fulfills its obligation to inquire sensitively and in good faith cannot be understood to have engaged in discrimination, simply by making the inquiry: *Petrar* at para 109. In short, the fact of an inquiry, even in close proximity to a decision to terminate, is ambiguous. It might signal discrimination, or an attempt to avoid discriminating: *Skerry v British Columbia (Human Rights Tribunal)*, 2023 BCSC 1819.

[83] On the medical questionnaire provided to Mr. Lee's doctor, the Respondents identified the following "concerning behaviours" that they say caused the company to question Mr. Lee's wellbeing and fitness to be at work:

- a. Using highly offensive profanities about staff in the workplace;
- b. Staring at individuals for extended periods of time while gritting his teeth;
- c. Compulsive behaviours including picking at his finger to the point of bleeding;
- d. Becoming increasingly confrontational and angry, including raising his voice;
- e. Self-reports that he is malnourished and this affects his ability to think straight;
- f. Self-reports that he is homeless;
- g. Inability to remember when questioned about his alleged comments;
- h. Statement that he would "die soon"; and
- i. Hospitalization after the police were contacted for a wellness check.

[84] The Respondents have also provided evidence of Mr. Lee disclosing suicidal or self-harming impulses at earlier periods of his employment. When the circumstances are considered

as a whole, including Mr. Lee's December 2018 medical leave, it appears that the Respondents are reasonably certain to prove that they had a basis to inquire about Mr. Lee's health in order to avoid discriminating by failing to do so.

[85] It follows that the Respondents are reasonably certain to prove that they acted appropriately by asking Mr. Lee about any potential medical issues in meetings where his performance and conduct were discussed. They are similarly reasonably certain to prove that the medical questionnaire confirming Mr. Lee's fitness to return to work was reasonable and necessary in the circumstances.

[86] While Mr. Lee says that the timeline the Respondents provided to him to complete the medical questionnaire was unrealistic, it appears that the Respondents were flexible about providing him an extension of time, albeit unpaid, when he did not meet the initial deadline. Mr. Lee's doctor returned the medical questionnaire well-before the revised deadline. Based on this information, I am satisfied that Mr. Lee has no reasonable prospect of establishing that the timeline provided by the Respondents was unreasonable. Mr. Lee further says that he was unable to afford to pay for the medical questionnaire. However, the medical questionnaire clearly states that "London Drugs will pay reasonable and customary fees for the completion of this form," and provides information on where to send the applicable invoice. Based on this information, I find that Mr. Lee has no reasonable prospect of proving these aspects of his allegation.

[87] Finally, I find that Mr. Lee has no reasonable prospect of success with respect to his allegation concerning the medical questionnaire directly attributing his problems to his depression and autism, rather than the bullying and harassment against him. Neither the medical questionnaire, nor any of the communications from the Respondent regarding the medical questionnaire, reference Mr. Lee's autism. While the medical questionnaire does mention Mr. Lee's previous disclosure that he "suffers from depression", it does not attribute any problems to this fact. Rather, this information, along with the list of "concerning behaviours" described above, appears to have been provided to explain the purpose of the inquiry into his fitness to work. It was open to Mr. Lee to provide additional context to his

doctor during the medical assessment. However, I am not persuaded that Mr. Lee has any reasonable prospect of establishing that the failure to mention his allegations of bullying and harassment in the medical questionnaire amounted to adverse treatment based on his disability.

[88] Overall, I find that these allegations have no reasonable prospect of success at a hearing.

6. Removal from Group Chat

[89] Mr. Lee alleges that Ms. Min removed him from the staff group chat on April 1, 2019. Mr. Lee states that he felt he had no choice but to quit following this action, as he could not return to work in circumstance where such “bare hostility” was shown. Mr. Lee states that this action caused him embarrassment because other employees asked him what had happened.

[90] The Respondents have not commented on whether Ms. Min removed Mr. Lee from the group chat on April 1, so for the purposes of this analysis I accept that Mr. Lee will be able to prove that this occurred. Nevertheless, the context of this alleged conduct is necessary to consider. Mr. Lee was on an unpaid medical leave pending an assessment of his fitness to return to work, and it does not appear that he raised any concerns with the Respondents about his removal from this chat. He has not explained why he would expect to remain on the employee group chat while on leave, given that he was not scheduled for any shifts during that time. I understand that he interpreted this as an act of “hostility”, however this assertion cannot be objectively supported on the record before me. This allegation is mentioned numerous times in his materials, and nowhere does he provide additional details about why he interpreted this action as hostile or serious enough to warrant his resignation. He also has not argued that this action was a culmination of events forcing him to resign. Furthermore, Mr. Lee has not provided any basis to support that his mental disabilities were a factor in Ms. Min’s decision to remove him from the group chat. Based on these considerations, I find that this allegation has no prospect of success.

7. Summary

[91] To reiterate, I have found that Mr. Lee has not brought the following allegations out of the realm of conjecture:

- a. Ms. McDonal made discriminatory comments to him on January 17, 2019.
- b. Mr. Thobani shouted at him in front of customers and falsely accused him of being aggressive on or around February 4, 2019.
- c. The Respondents' inquiries into his medical condition were discriminatory.
- d. The Respondents' decision to remove him from the WhatsApp chat was hostile or discriminatory.

[92] It follows that I grant the Respondents' application to dismiss the complaint under s. 27(1)(c) with respect to these allegations only. All of Mr. Lee's other allegations will proceed.

B. Section 27(1)(d)(ii) – Proceeding would not further the purposes of the Code

[93] The Respondents also apply to dismiss the complaint against Ms. Min, Mr. Thobani and Ms. McDonald under s. 27(1)(d)(ii) because proceeding against the individual respondents would not further the purposes of the *Code*: *Daley v. BC (Ministry of Health)*, 2006 BCHRT 341.

[94] The purposes of the *Code* include both private and public interests: s. 3. Deciding whether a complaint furthers those purposes is not only about the interests in the individual complaint. It may also be about broad public policy issues, like the efficiency and responsiveness of the human rights system, and the expense and time involved in a hearing: *Dar Santos v. UBC*, 2003 BCHRT 73, at para. 59, *Tillis v. Pacific Western Brewing and Komatsu*, 2005 BCHRT 433 at para. 15, *Gichuru v. Pallai (No. 2)*, 2010 BCHRT 125, at paras. 113-118.

[95] There are strong policy reasons that favour complaints against individual respondents. As the Supreme Court of Canada has acknowledged, “the aspirational purposes of the *Code* require that individual perpetrators of discrimination be held accountable for their actions”: *British Columbia Human Rights Tribunal v. Schrenk*, 2017 SCC 62 at para. 56. This is especially true for allegations of discrimination with a high degree of personal culpability, like sexual or racial harassment: *Daley* at para. 53.

[96] On the other hand, naming individual respondents can complicate and delay the resolution of complaints, exacerbate feelings of personal animosity, and cause needless personal distress to individuals who are accused of discrimination: *Daley* at para. 54. Because employers and institutional respondents are liable for the acts of their agents, they will be responsible for any remedy ordered by the Tribunal: *Code*, s. 44(2); *Robichaud v. Canada*, [1987] 2 SCR 84. In those situations, the remedial aims of the *Code* may be most fairly and efficiently fulfilled without holding individuals liable.

[97] The Tribunal balances all these considerations to decide whether the purposes of the *Code* are best served by having a complaint proceed against individuals as well as an institutional respondent, or against the institutional respondent only. It has identified the following factors as relevant (*Daley* at paras. 60-62):

- a. whether the complaint names an institutional employer as a respondent and that respondent has the capacity to fulfill any remedies that the Tribunal might order;
- b. whether the institutional respondent has acknowledged the acts and omissions of the individual as its own and has irrevocably acknowledged its responsibility to satisfy any remedial orders which the Tribunal might make in respect of that individual's conduct; and
- c. the nature of the conduct alleged against the individual, including whether:
- d. their conduct took place within the regular course of their employment;

- e. the person is alleged to have been the directing mind behind the discrimination or to have substantially influenced the course of action taken; and
- f. the conduct alleged against the individual has a measure of individual culpability, such as an allegation of discriminatory harassment.

[98] Mr. Lee has not made any submissions on whether he opposes dismissing the complaint against the individual respondents. I have considered the Respondents' arguments and am satisfied that it would not further the purposes of the Code to proceed against Ms. Min, Mr. Thobani and Ms. McDonald. The institutional employer London Drugs submits, and I accept, that it has the capacity, and is better placed, to fulfill any remedies the Tribunal may order. London Drugs further submits that it accepts responsibility for the actions of the individual respondents in this matter and will fulfill any applicable remedies.

[99] The evidence before me supports the Respondents' submission that each of the individual respondents always acted within the regular scope of their duties as employees at London Drugs. I have already found that some of the allegations against the individual respondents have not been brought out of the realm of conjecture. For the remaining allegations, I find there is no indication that the acts or omissions of the individual respondents raise a measure of individual culpability. In my view, the *Daley* factors favour dismissing the complaint against the individual respondents and proceeding against London Drugs alone. Therefore, I dismiss the complaint against Ms. Min, Mr. Thobani and Ms. McDonald.

V CONCLUSION

[100] The Respondents' application under s. 27(1)(c) is granted in part. The Respondent's application to dismiss the complaint against the individual respondents under s. 27(1)(d)(ii) is allowed.

Theresa Etmanski
Tribunal Member