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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:

Krista James

COMPLAINANT

AND:

ARCannabis Enterprises

RESPONDENT

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

Tribunal Member:	Laila Said Alam
On their own behalf:	Krista James
Counsel for the Respondent:	Jack Lloyd

I INTRODUCTION

[1] Krista James filed a complaint against ARCannabis Enterprises [**ARCannabis**] alleging they discriminated against her in the area of services on the ground of disability contrary to s. 8 of the *Human Rights Code*. The basis for her complaint is that ARCannabis refused her services on December 2, 2020, because she was not wearing a face mask. Ms. James says she has epilepsy and anxiety which prevented her from wearing a face mask at ARCannabis.

[2] At the time, the Province had mandated mask wearing in all public indoor spaces in response to the Covid-19 pandemic.

[3] ARCannabis denies discriminating against Ms. James. ARCannabis applies to dismiss this complaint under ss. 27(1)(a), 27(1)(b), 27(1)(c), 27(1)(d) of the *Code*. I find that I can decide this application under s.27(1)(c) of the *Code*. ARCannabis argues that the complaint should be dismissed under s. 27(1)(c) of the *Code* on the basis that there is no reasonable prospect the complaint will succeed because Ms. James has not established that her disability is a factor preventing her from wearing a mandatory face covering.

[4] In order to decide this application under s.27(1)(c), the issue I must decide is whether there is no reasonable prospect Ms. James will establish that her anxiety and epilepsy is a disability-related barrier that prevented her from wearing a mask. The answer to this question turns on whether the evidence before me takes her allegation that she was a disability-related barrier to mask wearing, out of the realm of conjecture.

[5] For the reasons set out below, I find it does not. I allow the application.

[6] 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

A. The incident that gives rise to this complaint

[7] In March 2020, the Province of British Columbia declared a state of emergency because of the COVID-19 pandemic. In November 2020, the Province mandated wearing a mask in all indoor public spaces.

[8] ARCannabis operates a licensed cannabis store. Ms. James says she is "a regular long-term customer" at ARCannabis.

[9] The parties' recollection of events differs significantly as to the details of what happened on December 2, 2020, including whether Ms. James disclosed medical information at the time and whether ARCannabis offered Ms. James accommodations. However, the parties agree on the following: Ms. James entered ARCannabis on December 2, 2020. Staff approached Ms. James and asked her to wear a mask. Ms. James said that she was exempt from wearing a mask. Staff told Ms. James that they would not serve her if she did not wear a face mask. A staff member asked Ms. James to leave, and she refused. A staff member told her they would call the police. Ms. James stayed in the store until the police arrived.

[10] The police report that followed the incident states that Ms. James was "still standing in the middle of the store without a mask" when they arrived at the scene. It further says that she "claimed she was exempt from wearing a mask due to her undisclosed medical condition." The police officer wrote that it was their "impression that apparent mental health and/or [Emotionally Disturbed Person] issues were NOT factors in this incident."

B. Disability

[11] Ms. James says she has a disability-related barrier to wearing a mask. She says that she has grand mal seizures which cause her to foam at the mouth, vomit, and have breathing difficulties. She says that she cannot take a mask off when she has a seizure because she loses consciousness. She says every seizure has the potential to be fatal.

[12] In summary, Ms. James supplies the following materials regarding her disability. She provides a doctor's note date September 2, 2021, which reads in full "Krista James has a medical condition of auto-immune epilepsy. Due to this she may require accommodations. Thank you for your understanding in this matter." Ms. James also provides a January 13, 2004, progress note from an anxiety disorders clinic. It is heavily redacted. The legible portions provide the clinic's diagnosis at the time. In relevant part, the diagnosis includes general anxiety disorder and mild social anxiety disorder.

[13] Ms. James also provides an article dated July 12, 2020: Asadi-Pooya AA, Cross JH. Is wearing a face mask safe for people with epilepsy? *Acta Neurol Scand.* 2020;142:314-316 [***Acta Neurol Scand***]. The article states in relevant part:

> SHOULD PEOPLE WITH EPILEPSY WEAR FACE MASKS?
> There is no direct evidence in the literature to answer this question with confidence. However hyperventilation (i.e. deep and rapid respiration)…is an effective method of seizure activation in [people with epilepsy]…
>
> Therefore, while concrete evidence is lacking, if we consider that wearing a face mask may stimulate [hyperventilation], at least to some extent, we would probably avoid recommending this practice indiscriminately to all [people with epilepsy]. On the other hand, in the absence of any proven treatment or vaccine to combat COVID-19, prevention is the best available strategy and it is probably not reasonable to suggest avoid wearing face masks in [people with epilepsy] under any circumstances. Logically, [people with epilepsy] (and many other people) do not need to wear a face mask most of the time, as long as there is not close contact with others, especially during intense physical activities such as exercise (eg, walking, jogging, etc). To the contrary, it is probably more advantageous to wear a face mask in crowded locations (eg, shopping malls, theme parks, move theatres, etc), with intermittent breaks in safe locations, away from others.

[14] Ms. James also provides an abstract from an article published on February 2, 2018, which states that stress is a common trigger for individual seizures for people with epilepsy: Lang JD, Taylor DC, Kasper BS. Stress, seizures, and epilepsy: Patient narratives. Epilepsy Behav. 2018 Mar; 80:163-172. doi: 10.1016/j.yebeh.2018.01.005. Epub 2018 Feb 2. PMID: 29414547 [***Epilepsy Behav****]*.

[15] Ms. James offers to provide a more detailed medical report before the hearing if the Tribunal requires it.

III DECISION

A. Should I exercise my discretion to allow this late-filled application to dismiss?

[16] ARCannabis' application to dismiss was filed 4 days after the scheduled submission deadline. Before I consider the dismissal application, I must first determine whether the late filed dismissal application should be accepted.

[17] Rule 19(2) of the Tribunal's *Rules of Practice and Procedure* [***Rules***] requires a respondent to apply to dismiss a complaint within 70 days of filing a response to the complaint. Rule 19(5) permits a respondent to request an extension of time by applying for such an order in Form 7.2 – Dismissal Application.

[18] In this case, ARCannabis was required to file an application to dismiss by September 20, 2021. ARCannabis filed this dismissal application on September 24, 2021, and requested an extension of time in that application.

[19] I allow the late application to dismiss for the following reasons.

[20] First, Ms. James did not object to the late filed application and had an opportunity to file her response. Second, a 4 day delay is relatively short and Ms. James has not argued that the delay causes her any prejudice. Third, I find that allowing the late application furthers the purpose of facilitating the just and timely resolution of complaints that are filed with the Tribunal: Rule 1.

[21] I will now consider the substance of the dismissal application.

B. Is there no reasonable prospect Ms. James will establish that her anxiety and epilepsy is a disability-related barrier?

[22] ARCannabis applies to dismiss Ms. James' complaint on the basis that it has no reasonable prospect of success: *Code,* s. 27(1)(c) The onus is on ARCCannabis to establish the basis for dismissal.

[23] 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 [***Chan***].

[24] 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 CanLII 44 (SCC), [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.

[25] 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. However, if there are foundational or key issues of credibility, the complaint must go to a hearing: *Francescutti v. Vancouver (City)*, 2017 BCCA 242 at para 67.

[26] At a hearing, Ms. James would have to establish that she has a disability, that ARCannabis treated her adversely, and that the adverse treatment was connected to her disability*: Moore v. BC (Education)*, 2012 SCC 61 at para. 33. Ms. James is not required to prove

the complaint at this time; rather, the evidence must take the complaint "out of the realm of conjecture": *Berezoutskaia* at para. 24.

[27] This Tribunal has stated "any claim of disability discrimination arising from a requirement to wear a mask must begin by establishing that the complainant has a disability that interferes with their ability to wear the mask": *The Customer v. The Store,* 2021 BCHRT 39 at para. 14.

[28] For the following reasons, I am not satisfied that Ms. James has taken her complaint out of the realm of conjecture.

[29] Based on the materials before me, I am satisfied that Ms. James is reasonably certain to establish that she has a disability and she experienced an adverse impact at ARCannabis. However, I am not satisfied that she is reasonably certain to establish that her disabilities interfere with her ability to wear a mask.

[30] Ms. James' doctor's note from 2004 states that she had been diagnosed with anxiety. Even if I found that the Tribunal could rely on a twenty-year old note as evidence of a current disability, the note does not reference how this disability would interfere with her ability to wear a mask.

[31] Ms. James' doctor's note from 2021 states that she has autoimmune epilepsy that may require accommodations. The note does not state what accommodations are required or in what circumstances accommodations might be required. There is nothing in the note for me to infer that this disability interferes with her ability to wear a mask.

[32] Ms. James also provided excerpts from articles discussing the impact of stress and hyperventilation on people with epilepsy. The article that discusses the intersection between hyperventilation, mask wearing, and epilepsy cautions against generalized mask exemptions for people with epilepsy. It cautions that, absent "any proven treatment or vaccine to combat COVID-19, prevention [through mask wear] is the best available strategy." It states that,

logically, mask wear is not required all of the time, and safe, intermittent breaks from mask wear away from people would be a good practice for people with epilepsy.

[33] Ms. James relates these articles to her situation. Ms. James says that masks are not recommended indiscriminately because her epileptic seizures are volatile and unpredictable. She says, “it’s possible I could wear a mask and not have a seizure but it’s possible that I could. I choose not to take that chance.” She says that there are times when she is at a higher risk of a seizure, and that these times are unpredictable.

[34] My understanding is that Ms. James argues that her doctors’ notes and the articles support that she has a disability-related barrier to wearing a mask because: she is a person with epilepsy; hyperventilation may lead to an epileptic seizure, and; that she, as a person with epilepsy, needed to avoid wearing a mask because it could trigger a seizure. Moreover, as a person with anxiety and epilepsy, her risk of triggering a seizure is heightened. I understand her argument to be that the situation at ARCannabis was stressful, stress can trigger a seizure, she is a person with epilepsy, and so should not have been placed under the stress of having to wear a mask because it risked triggering a seizure.

[35] Respectfully, these inferences based on the articles and her medical notes are speculative. The *Epilepsy Behav.* abstract is brief and purports to “illustrate the significant role of stress as a seizure-provoking factor by referring to nine patient narratives.” The patient narratives include those who experienced epilepsy syndromes as well as nonepileptic episodes. Ms. James has not provided evidence beyond her assertions to support that she suffers from a type of stress that induces epilepsy. The abstract does not provide enough context or information for me to make an inference on this application that the narratives of the nine patients and their experience with stress-induced epileptic and nonepileptic seizures can be applied broadly to Ms. James’s diagnosis of auto-immune epilepsy.

[36] The *Acta Neurol Scand* article is clear that there “is no direct evidence in the literature” to confidently answer the question of whether people with epilepsy should wear masks. The article contemplates the benefit and harm for people with epilepsy to wear a mask. It then errs

on the side of encouraging people with epilepsy to wear masks, noting that it is unlikely people with epilepsy will need to wear a face mask for most of the day. In other words, in most circumstances, people wear masks for relatively brief periods of time. The article further says that wearing a mask "may simulate [hyperventilation], at least to some extent" not that wearing a mask categorically does or will cause hyperventilation in every case. It suggests mask wear during intense physical activities, such as exercise, and in crowded locations like a movie theatre, theme park, or shopping mall. Ms. James' medical evidence does not refer to her having a particular predisposition to hyperventilation.

[37] Additionally, Ms. James says she is a repeat, long-term customer and frequently purchases the same products at ARCannabis, and no one was in the store at the time of her December 2020 visit. I infer from her assertions that this would have been a relatively short, routine visit. I am not satisfied that wearing a mask during a short, routine visit would not be appropriate when the article she provides suggests it would be appropriate for a person with epilepsy to wear a face mask for the duration of a movie. I am not convinced from these materials that Ms. James could not have worn a mask for the brief period of time it would have taken for her to make the purchases she says she made frequently without experiencing a disability-related harm.

[38] The above article and abstract are consistent with Ms. James' statement that it is possible for her to wear a mask, though she chooses not. This further satisfies me that her claim to a disability-related barrier to wearing a mask remains speculative.

[39] Ms. James offers to provide the Tribunal with a more detailed medical report if this matter proceeds to a hearing. However, on this application, it is up to the parties to give the Tribunal the information necessary for it to make a decision, and the Tribunal only considers the information before it and not what evidence might be given at a hearing: *Bell v. Dr. Sherk and others*, 2003 BCHRT 63 at paras. 25-26; *Chan* at para. 77.

[40] In all of the circumstances, her statements about her disability-related barrier to wearing a face mask is not taken out of the realm of conjecture by the materials she has provided: *Lum v. Valley Medical Imaging,* 2022 BCHRT 22 at para 16.

[41] I note the credibility issues raised by the conflicting assertions about what happened on December 20, 2020, that gave rise to ARCannabis denying Ms. James service and whether it offered her reasonable accommodations at that time. As this application turned on the specific issue of whether Ms. James is reasonably certain to prove she had a disability-related barrier to wearing a mask at ARCannabis that day, these are not foundational issues in this application that require a hearing to resolve. Therefore, I am not persuaded a hearing is required.

IV CONCLUSION

[42] The application is allowed. The complaint is dismissed pursuant to s.27(1)(c) of the *Code*.

Laila Said Alam
Tribunal Member