Date Issued: March 22, 2024
File: CS-002550

Indexed as: Fyffe v. University of British Columbia, 2024 BCHRT 88

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:

Jessica Fyffe

COMPLAINANT

AND:

University of British Columbia

RESPONDENT

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

Tribunal Member:	Robin Dean
Counsel for the Complainant:	Carolyn Janusz and Satkaran Sandhu
Counsel for the Respondent:	Jennifer Devins and Natalie Cuthill

I INTRODUCTION

[1] Jessica Fyffe, a Black woman of Caribbean and West Indian ancestry, alleges that the University of British Columbia discriminated against her in employment based on race and colour contrary to s. 13 of the *Human Rights Code* when it terminated her employment. She says that her termination was influenced by subconscious discriminatory attitudes about Black workers reflected in comments and assumptions made by her supervisor.

[2] UBC denies discriminating. It applies to dismiss Ms. Fyffe's complaint under s. 27(1)(d)(ii) of the *Code* because Ms. Fyffe agreed to release UBC from any future claims related to the termination of her employment, including under the *Code*. In the alternative, UBC says that Ms. Fyffe's complaint has no reasonable prospect of success under s. 27(1)(c) because she will not be able to prove that her termination was linked to her race or colour.

[3] The issues I must decide are:

a. Under s. 27(1)(d(ii), whether it would further the purposes of the *Code* to allow the complaint to proceed where Ms. Fyffe signed a release agreement releasing UBC from all claims under the *Code*;

b. Under s. 27(1)(c), whether there is no reasonable prospect that Ms. Fyffe will be able to prove that her race was a factor in the termination of her employment.

[4] For the following reasons, I deny UBC's application. Ms. Fyffe's complaint will proceed.

II BACKGROUND

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

[6] On May 6, 2019, Ms. Fyffe began work at UBC's Okanagan Campus as a Communications and Marketing Specialist in the department of UBC Student Housing and Hospitality Services. Ms. Fyffe's employment was subject to a 12-month probationary period. UBC says Ms. Fyffe's

essential duties were to use Wordpress to update the Student Housing and Hospitality Services' websites and to use various Adobe products including InDesign to prepare communications such as posters, signs, and images.

[7] Prior to being hired, Ms. Fyffe provided UBC with a cover letter and resume, which included a description of relevant skills and abilities. Among those skills listed was a bullet point reading: "Proficient in with Adobe Creative Suite knowledge (InDesign, Lightroom, and Photoshop)" [as written]. Ms. Fyffe says she used the term "proficient" to indicate that she had the level of knowledge that UBC required based on her understanding of the job description as well as what had been required in her previous positions. She also indicated on her resume that she had "considerable knowledge in … WordPress."

[8] Ms. Fyffe also had two interviews with UBC before she was hired. As reflected in the interview notes from UBC's Communications and Marketing Director, Ms. Fyffe indicated her familiarity with Adobe Creative Suite and WordPress. Ms. Fyffe says UBC asked her during the interview process about her general experience with Adobe Creative Suite, including InDesign, and WordPress. However, according to Ms. Fyffe, there were few in-depth questions about her experience and technical skills apart from a question about changing text in Adobe files. Ms. Fyffe says she was clear in her interviews that she did not do graphic design work.

[9] UBC says that it had several issues with Ms. Fyffe's work performance. Specifically, it says that it was apparent soon after Ms. Fyffe began her employment that she did not have the software skills that UBC had understood she had during the interview process. Further, UBC says that Ms. Fyffe's work product regularly included typos and spelling errors. Finally, says UBC, Ms. Fyffe was significantly delayed in completing assigned tasks, failed to complete assigned tasks, or reassigned tasks to her colleagues.

[10] Given these issues, UBC says it gave Ms. Fyffe two paid training days to learn products such as Adobe's InDesign. According to Ms. Fyffe, this training involved reading a book about the software. UBC says Ms. Fyffe's performance did not improve after the two training days. Following a performance meeting in July 2019, UBC allowed Ms. Fyffe to use two paid hours a

day to take online courses put together by her supervisor. Ms. Fyffe says this training had to be done on top of her regular work and consisted of watching online videos even though she had told UBC that she is a tactile learner who learns by doing. According to UBC, Ms. Fyffe's performance again did not improve as a result of this additional training.

[11] Ms. Fyffe says that during her employment, her supervisor, the Communications and Marketing Director, made comments and assumptions that indicated her supervisor thought Ms. Fyffe was lazy, untruthful, and incompetent. Those comments and assumptions include the following statements:

a. "I don't want to say you lied, but you misrepresented your skills on your resume."

b. "I'm not saying your lazy, but..." before telling Ms. Fyffe how long an assignment should take.

c. Assuming Ms. Fyffe did not know how to do certain tasks.

[12] UBC ultimately determined that Ms. Fyffe was not suitable for the job and terminated her employment effective August 28, 2019. UBC paid Ms. Fyffe one week's pay in lieu of notice.

[13] In addition to this severance pay, UBC offered Ms. Fyffe a sum equivalent to three weeks' pay in exchange for signing a release. UBC gave Ms. Fyffe until September 4, 2019 to sign and return the release; however, Ms. Fyffe signed and returned the release during the termination meeting. Ms. Fyffe says that she was under financial pressure to sign the release right away because she needed to pay September rent. Ms. Fyffe says she did not read the release prior to signing it given the emotional nature of the termination meeting. She says she would not have signed the release without first getting advice had she read it or understood it.

[14] The release contained a clause stating that Ms. Fyffe agreed not to "commence, pursue, or maintain any proceedings or Claims whatsoever against the Releasees … in relation to or in any way arising out of my employment with the University, the termination of my employment

by the University … including … under … the British Columbia *Human Rights Code*." The release also contained the following clause:

> I further acknowledge that I have read this Release and understand all of its terms, that I have been represented by AAPS [the Association of Administrative and Professional Staff][1], my exclusive bargaining agent, with regard to this Release and the underlying settlement, and that I have also had the full opportunity to obtain independent legal advice prior to signing this Release. I voluntarily enter into this Release of my own free will.

III DECISION

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

[15] Section 27(1)(d)(ii) allows the Tribunal to dismiss a complaint where proceeding with it would not further the purposes of the *Code*. These purposes 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.

[16] Ms. Fyffe takes the position that her complaint should not be dismissed even though she signed a release which purported to preclude her from bringing a human rights claim related to her termination. The burden is on Ms. Fyffe to persuade me that the purposes of the *Code* are best served by allowing the complaint to proceed: *Thompson v. Providence Health Care*, 2003 BCHRT 58 at para. 46.

[1] AAPS is the labour association for the Management and Professional Staff group at UBC.

[17] There is strong policy rationale for holding people to their agreements. Among other things, as the Tribunal said at para. 15 in *Nguyen v. Prince Rupert School District No. 52*, 2004 BCHRT 20:

> When parties are able to resolve human rights disputes by way of a settlement agreement, considerable public and private resources may be saved. They may be able to resolve the complaint more expeditiously than would a formal hearing process. The parties may also be able to craft a resolution which more closely matches their needs and interests than would a decision of the Tribunal. Finally, the mediation process itself may be better for the parties' relationship than a formal hearing. For all of these reasons, the Tribunal encourages and assists parties in attempting to resolve complaints.

[18] At the same time, the Tribunal wrote in *Thompson* at para. 38, "[t]he fact that parties have entered into a settlement agreement respecting a human rights dispute does not deprive the Tribunal of jurisdiction to hear the dispute". Parties cannot contract out of their rights under the *Code*: *Insurance Corporation of British Columbia v. Heerspink*, [1982] 2 SCR 145 at 158; *The Employee v. The Company and the Owner*, 2017 BCHRT 266 at para. 27.

[19] The Tribunal has recognized several factors that may signal circumstances where the terms of the parties' settlement or the conditions under which it was reached, run contrary to the *Code*'s purposes. In such circumstances, it may be that a complaint should proceed through the Tribunal's process regardless of the settlement agreement. Those factors were set out in *Thompson* at para. 44:

> 1. The actual language of the release itself as to what is included, explicitly or implicitly.
>
> 2. Unconscionability, which exists where there is an inequality of bargaining power and a substantially unfair settlement. This does not, however, allow a tribunal to interfere with a settlement where it finds inadequacy of consideration.
>
> 3. Undue influence may arise where the complainant seeks to attack the sufficiency of consent. A plea of this nature will be made out where there has been an improper use by one party to a contract of any kind of

> coercion, oppression, abuse of power or authority, or compulsion in order to make the other party consent.
>
> 4. The existence or absence of independent legal advice may also be considered. However, if a party has received unreliable legal advice that may not affect the settlement.
>
> 5. The existence of duress (not mere stress or unhappiness) and sub-issues of timing, financial need, and the like, may also be factors.
>
> 6. The knowledge on the party executing the release as to their rights under the *Act*, and, possibly, the knowledge on the party receiving the release that a potential complaint under the *Act* is contemplated.
>
> 7. Other considerations may include lack of capacity, timing of the complaint, mutual mistake, forgery, fraud, etc.

[20] Here, the parties' evidence directly and substantially conflicts on what was said at the termination meeting. I find these conflicts, which go to the factors set out in *Thompson*, to be irreconcilable on the evidence that I have before me.

[21] According to UBC's Human Resources Advisor, the person leading the termination meeting, she explained the termination letter and the release to Ms. Fyffe, including that the release agreement would release UBC from any further claims; that she had one week to consider and sign the release; and that she was entitled to speak to AAPS about the release. The Human Resources Advisor says Ms. Fyffe asked her if she would sign the release if she were Ms. Fyffe, to which the Human Resources Advisor replied that it was Ms. Fyffe's decision to make and that she could speak with AAPS about it. The Human Resources Advisor says that she believed Ms. Fyffe understood the terms of the release agreement.

[22] For her part, Ms. Fyffe says she was "emotionally shocked", "overwhelmed" and "confused" during the termination meeting. She says that the termination letter and release appeared very daunting to her so she asked the Human Resources Advisor whether she would sign the release. She says that the Human Resources Advisor responded that she would sign the release because it was standard and if Ms. Fyffe signed the release, she would get more money. According to Ms. Fyffe, the Human Resources Advisor spoke "vaguely" about the terms of the release and told her that the release meant that she could not say anything to her family or

friends about what had happened. Ms. Fyffe says that at no point did the Human Resources Advisor inform Ms. Fyffe that she would be releasing UBC from all claims. Ms. Fyffe said if she had known that, she would have not signed the release and would have gotten legal advice. Further, Ms. Fyffe says that the Human Resources Advisor did not explain to her that she was entitled to speak to AAPS before signing the release.

[23] Given the conflicts about what the Human Resources Advisor told Ms. Fyffe, I cannot properly assess the factors set out in *Thompson* or conclude that proceeding with Ms. Fyffe's complaint would not further the purposes of the *Code*. Where the Tribunal does not have sufficient evidence or information before it to make a determination, fairness to both parties requires that the issue be left to be determined at a hearing, should UBC wish to raise it there: *Thompson* at para. 50.[2]

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

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

[25] 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.

[26] 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.

[2] Ms. Fyffe makes an application for further submissions on the effect of the release, citing additional case authorities to support her position that the complaint should not be dismissed in the face of the release. However, given the factual issues I have identified, and the outcome of the application, I need not consider the further submissions at this juncture.

[27] 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.

[28] 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.

[29] At a hearing, Ms. Fyffe would have to establish that the termination of her employment was connected to her race or colour: *Moore v. BC (Education)*, 2012 SCC 61 at para. 33. If she did that, the burden would shift to UBC to justify the impact as a *bona fide* occupational requirement. If the impact is justified, there is no discrimination.

[30] UBC does not dispute that Ms. Fyffe's race and colour are protected characteristics or that she suffered an adverse impact in employment. UBC says that I should dismiss Ms. Fyffe's complaint because she has no reasonable prospect of showing that her race or colour were factors in the termination of her employment.

[31] Ms. Fyffe argues that her termination was tainted by subconscious discriminatory attitudes. She points to the comments and assumptions she says were made by her supervisor, the Communications and Marketing Director. In the application materials, Ms. Fyffe's supervisor does not deny making the comments Ms. Fyfe alleges.[3]

[3] Even if Ms. Fyffe's supervisor had denied making these comments, it would be a conflict central to the complaint and irreconcilable on the materials before me, necessitating a hearing.

[32] In considering whether Ms. Fyffe has no reasonable prospect of showing that race or colour were factors in how she was treated at work, I draw on the following principles which were recently summarized in *Young Worker v. Heirloom and another*, 2023 BCHRT 137 at para. 47:

a. Ms. Fyffe's race or colour need not be the sole or even primary factor that led to the adverse impacts she experienced. It is enough if race or colour were a factor: *Stewart v. Elk Valley Coal Corp.*, 2017 SCC 30 at para. 50.

b. Ms. Fyffe does not need to prove that UBC intended to or was motivated to discriminate against her; the focus of the Tribunal's inquiry is on the effect of UBC's actions on Ms. Fyffe: *Radek v. Henderson Development (Canada) and Securiguard Services (No. 3)*, 2005 BCHRT 302 [***Radek No. 3***] at paras. 474-482; *British Columbia Human Rights Tribunal v. Schrenk*, 2017 SCC 62 at para. 88.

c. Discrimination is rarely announced, and in many cases, it is not practiced in an obvious or overt way: *Complainant v. College of Physicians and Surgeons of BC (No. 2)*, 2018 BCHRT 189 at para. 96; *Mezghrani v. Canada Youth Orange Network (CYONI) (No. 2)*, 2006 BCHRT 60 [***Mezghrani***] at para. 28.

d. It is often the case that discrimination takes the form of subtle, and even unconscious, beliefs, biases, prejudices, and stereotypes: *Campbell v. Vancouver Police Board (No. 4)*, 2019 BCHRT 275 [***Campbell No. 4***] at paras. 101-102; *Radek No. 3* at para 482; *Francis v. BC Ministry of Justice (No. 3)*, 2019 BCHRT 136 [***Francis No. 3***] at para. 280; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39 at para. 1.

e. Since discrimination is often not practiced openly, direct evidence of it will seldom be available: *Mezghrani* at para. 28; *Campbell No. 4* at para. 102; *Radek No. 3* at para. 482. Instead, the Tribunal may make a finding of discrimination

based on all of the circumstantial evidence and by inference: *Campbell No. 4* at paras 102-103; *Radek No. 4* at para. 482.

f. The Tribunal may infer that discrimination is more probable than not based on all of circumstantial evidence, including a respondent's explanation for their conduct: *Campbell No. 4* at para. 103; *Pieters v. Peel Law Association*, 2010 HRTO 2411 at para. 85 (upheld in *Peel Law Association v. Pieters*, 2013 ONCA 396); *Mema v. City of Nanaimo (No. 2)*, 2023 BCHRT 91 at paras. 12 and 289-290.

g. Circumstantial evidence should be understood within its broader social context: *Campbell No. 4* at paras. 104-105. In assessing complaints, the Tribunal is tasked with identifying and eliminating "persistent patterns of inequality" associated with discrimination prohibited by the *Code*: s. 3(d). Therefore, the Tribunal must understand what those persistent patterns of inequality are and how they occur, including any beliefs, biases, and prejudices that may be at play. Such an understanding may support a finding of discrimination: *Campbell No. 4* at paras. 104-105. This is because:

> individual acts themselves may be ambiguous or explained away, but when viewed as part of the larger picture and with appropriate understanding of how racial [or other forms of] discrimination take place, [they] may lead to an inference that … discrimination was a factor in the treatment an individual received: Ontario Human Rights Commission, Policy and Guidelines on Racism and Racial Discrimination (as revised in 2009) at p. 21; cited with approval in Campbell No 4. At para. 105 and Francis No. 3 at paras. 288-289.

[33] Ms. Fyffe proffers an expert report regarding anti-Black stereotypes in employment to situate this case within the social context. UBC objects to the expert report because it provides "generalized comments" and "no opinion based on the facts of this case."

[34] Whether to consider this expert report and what weight to give it is an issue I do not have to resolve on this preliminary application. This is because I need not rely on the expert report tendered by Ms. Fyffe to make my decision. How anti-Black stereotypes show up in the

employment context has been explored by this Tribunal in *Francis No. 3*, *Young Worker*, and *Balikama v. Khaira Enterprises Ltd.*, 2014 BCHRT 107. [4]

[35] In discussing the social context of the complaint in *Young Worker*, the Tribunal stated:

> Canadian law recognizes that anti-Black stereotypes, as a type of racial discrimination, continue to seep into our collective psyche whether consciously or subconsciously: *R. v. Parks*, 1993 CanLII 3383 (ON CA) [***Parks***]; *Balikama obo others v. Khaira Enterprises and others*, 2014 BCHRT 107 [***Balikama***] at paras. 585-586; *Turner v. Canada Border Services Agency*, 2020 CHRT 1 [***Turner***] at para. 49; *Symonds v Halifax Regional Municipality (Halifax Regional Police Department) (Re)*, 2021 CanLII 37128 (NS HRC) at paras. 84-85. This social context is inextricably tied to centuries of Black slavery, segregation, colonialism, and other gross inequalities founded on racism: *Balikama* at paras. 474-476; *Knights v. DebtCollect Inc.*, 2017 HRTO 211 at para. 21; *R. v. Morris*, 2018 ONSC 5186 at para. 22 (reversed on other grounds in *R. v. Morris*, 2021 ONCA 680).
>
> Given the mandate to identify and eliminate persistent patterns of inequality associated with discrimination, the Tribunal needs to be alert to the ways anti-Black stereotypes may manifest when assessing complaints of anti-Black discrimination: Code, s. 3(d).

[36] At para. 302 of *Francis No. 3*, the Tribunal referred to the expert evidence in *Balikama*, which explained some of the anti-Black stereotypes that arise in the workplace:

> In *Balikama v. Khaira Enterprises Ltd.*, 2014 BCHRT 107 [79 C.H.R.R. D/40], the Tribunal accepted evidence of an expert on anti-Black racism who testified that some discriminatory beliefs held in respect to persons of African descent are stereotypes that Blacks are inferior, stupid, lazy, and incompetent. The expert noted that "the everydayness of racism shows up in employment in that Blacks lack credibility in the workplace, are given the worst jobs and that their concerns are often not addressed": paras. 585–86.
>
> > It is clear from the evidence of Dr. Bernard that the lot of many Black people in Canada is exceedingly difficult with significant difficulty encountered being accepted as equals in Canadian

[4] Ms. Fyffe also makes an application for further submissions with respect to the admissibility of the expert report. Given that I need not consider the expert report on this preliminary application, I do not consider the further submissions.

> society. In particular, she pointed to discriminatory beliefs that whites hold with respect to persons of African descent, including stereotypes of Blacks being inferior, stupid, lazy, incompetent, and over-sexed.
>
> Dr. Bernard pointed to the under-employment of Blacks, even highly educated Blacks, in Canada due to lack of recognition of qualifications. She pointed out that, for Blacks, constantly witnessing others experiencing racism was just as damaging to them as if they had experienced it themselves. She referred to this as the "everydayness of racism". She pointed to the fact that the everydayness of racism shows up in employment in that Blacks lack credibility in the workplace, are given the worst jobs and that their concerns are often not addressed.

[37] Turning to whether Ms. Fyffe's race or colour were factors in her termination, there is nothing inherently discriminatory about firing an employee who is not performing the job adequately during a probationary period. However, where there is some evidence which could lead to a finding that a protected characteristic was at play in the decision-making process, that is enough to take the complaint out of the realm of speculation and conjecture.

[38] Here, while there is evidence before me that Ms. Fyffe was not performing in a way that UBC wanted her to, there is also evidence from which the Tribunal could conclude that its perception of Ms. Fyffe's work was tainted by anti-Black stereotypes. Those stereotypes, which include that Black workers are lazy, untruthful, and incompetent are directly mirrored in the comments of Ms. Fyffe's supervisor, which are undisputed on the application before me.

[39] In my view, these are allegations, which if proven, could lead to an inference of discrimination in light of the social context concerning anti-Black stereotypes in employment.

[40] Ms. Fyffe has taken her allegations of race discrimination out of the realm of speculation and conjecture. I decline to dismiss Ms. Fyffe's complaint under s. 27(1)(c).

IV CONCLUSION

[41] I deny UBC's application to dismiss Ms. Fyffe's complaint. Ms. Fyffe's complaint will proceed.

Robin Dean
Tribunal Member