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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:

Harmony Powell

COMPLAINANT

AND:

His Majesty the King in Right of the Province of British Columbia as represented by the Ministry
of Finance and Fariba Pacheleh

RESPONDENTS

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

Tribunal Member:

Christopher J. Foy

Counsel for the Complainant:

Blair W. Curtis

Counsel for the Respondents:

Rochelle Pauls

I INTRODUCTION

[1] Ms. Harmony Powell worked as a Project Manager with the Liquor Distribution Branch for His Majesty the King in Right of the Province of British Columbia as represented by the Ministry of Finance [**Ministry**]. Ms. Powell filed a complaint against the Ministry and her manager, Ms. Fariba Pacheleh, alleging that they discriminated against her based on physical disability regarding her employment contrary to the *Human Rights Code* [**Code**].

[2] Ms. Powell alleges that during a pregnancy she suffered various physical symptoms including dizziness, fatigue, brain fog and exhaustion that impacted her ability to perform her duties effectively. She alleges that the Ministry and Ms. Pacheleh harassed her as a result of her pregnancy and failed to accommodate her which culminated in a letter requesting a meeting to discuss her “work performance”.

[3] The Ministry and Ms. Pacheleh deny discriminating against Ms. Powell and apply to dismiss her complaint under s. 27(1)(c) and (d)(ii) of the *Code*. The basis of the application is that there is no reasonable prospect that the complaint will succeed and proceeding specifically against Ms. Pacheleh in her individual capacity would not further the purposes of the *Code*.

[4] The issues I must decide are:

- i. Under s. 27(1)(c) of the *Code*, whether there is no reasonable prospect Ms. Powell will establish at a hearing that she was adversely impacted in her employment and that her pregnancy and related health issues were a factor in that adverse treatment; and
- ii. Under s. 27(1)(d)(ii) of the *Code*, whether proceeding with the complaint against Ms. Pacheleh would not further the purposes of the *Code* because, the Ministry says, all of Ms. Pacheleh’s interactions with Ms. Powell occurred within the scope of Ms. Pacheleh’s duties and the Ministry acknowledges its responsibility to satisfy any remedial orders from the Tribunal.

[5] While I do not refer in my decision to all the information filed by the parties in relation to this application to dismiss, I have considered it and thank the parties for their respective

submissions. The following will not be a complete recitation of the parties' submissions, but only those necessary to come to my decision. Given the nature of the application, I make no findings of fact.

[6] Below I first set out the background to the complaint. I then set out my reasons for denying the application to dismiss under s. 27(1)(c) and granting a dismissal of the complaint against Ms. Pacheleh in her individual capacity under s.27(1)(d)(ii).

II BACKGROUND

[7] Ms. Powell commenced employment with the Ministry on or about November 12, 2018. In early January 2019, Ms. Powell learned that she was pregnant.

[8] On February 19, 2019, Ms. Powell disclosed her pregnancy to Ms. Pacheleh. She also advised Ms. Pacheleh that she had faced significant physical and mental health challenges related to her first pregnancy in 2017. In addition, she said she miscarried and lost twins in her second pregnancy in June 2018.

[9] Ms. Powell found working while pregnant difficult. She experienced exhaustion, difficulty sleeping, nausea, and brain fog. By mid-June 2019, she was having dizzy spells and was later diagnosed with anemia.

[10] Ms. Powell alleges that after telling Ms. Pacheleh of her pregnancy, Ms. Pacheleh's behaviour towards her changed. Ms. Pacheleh was at times unresponsive to communications from Ms. Powell. Further, Ms. Pacheleh was rude to Ms. Powell, particularly if Ms. Powell was going to appointments or not feeling well.

[11] Ms. Powell alleges that Ms. Pacheleh showed discontent towards her in meetings when Ms. Powell needed to use the washroom, stand to avoid discomfort, chew ice or get more water. As some of Ms. Pacheleh's behaviour was in front of colleagues, Ms. Powell felt shame and humiliation.

[12] In particular, Ms. Powell alleges that on April 30, 2019, she arrived late in the office because she had slept exceptionally poorly and Ms. Pacheleh asked what had happened. Mr. Powell explained she was waking up multiple times during the night because of her pregnancy. There is a dispute over how Ms. Pacheleh reacted.

[13] Ms. Powell's evidence is that Ms. Pacheleh stated: "Welcome to my world...that happens to me every night, get used to it." and that the interaction left Ms. Powell "feeling attacked" and that accommodations such as coming in late would be met with disdain and be unacceptable.

[14] Ms. Pacheleh's evidence is that she was trying to be understanding and demonstrate empathy on April 30, 2019 when she spoke with Ms. Powell. Ms. Pacheleh also often slept poorly and that she was conveying to Ms. Powell that you get used to it after a while.

[15] It is not disputed that Ms. Pacheleh was "frustrated by the unpredictability of the Complainant's absences, the amount of time the Complainant was socializing while at work, and the fact that the Complainant was not entering her hours in her timesheets".

[16] On June 5, 2019, Ms. Pacheleh made a note to herself setting out in part the following:

Harmony Powell always uses different excuses for being late, especially after weekends she shows up around 11 or even noon. She used all sorts of excuses before and after her pregnancy the excuses changed to need for sleeping more, etc....The amount of work she is doing is one-third of another PM in the same level, however, she suggests she doesn't have the capacity to take anything else out but have time to spend lots of time socializing!"
[sic]

[17] In or around June 2019, Ms. Pacheleh consulted with a Ministry Labour Relations Advisor for assistance in managing Ms. Powell's attendance and performance.

[18] On June 24, 2019, Ms. Powell met with Ms. Pacheleh and disclosed that her health had deteriorated as a result of the pregnancy and that she would be moving up her maternity leave date from September 3, 2019 to August 4, 2019.

[19] Ms. Powell's health issues related to her pregnancy exacerbated and she had to go on short-term disability commencing July 8, 2019 through to the start of her maternity leave.

[20] On August 6, 2019, Ms. Pacheleh sent a registered letter [**August 6, 2019 Letter**] to Ms. Powell advising of a meeting regarding Ms. Powell's workplace performance as follows:

We are writing to inform you the Employer will need to meet with you regarding your recent workplace performance. The Employer will be holding these matters in abeyance until your return to work. Upon your return to work the Employer will schedule a meeting with you to address the concerns.

[21] Ms. Powell found the August 6, 2019 Letter "incredibly stressful and humiliating". Ms. Powell considered the letter "as a threat by the employer to my ongoing employment...that if I choose to return after my maternity leave, I would be facing a hostile work environment."

[22] The Ministry states that the August 6, 2019 Letter is not disciplinary but simply advised Ms. Powell that there would be a meeting upon her return to work to address "unresolved performance concerns". They did not want Ms. Powell to be surprised by these issues when she returned from maternity leave.

III DECISION

A. Should the complaint be dismissed under s. 27(1)(c) of the *Code*?

[23] Section 27(1)(c) of the *Code* is a gatekeeping provision where the Tribunal has the discretion to dismiss a complaint if it determines that the complaint has no reasonable prospect of success. The Tribunal's role is to assess whether, based on all the material before it, and applying its expertise, there is no reasonable prospect the complaint will succeed at a hearing: *Berezoutskaia v. British Columbia (Human Rights Tribunal)*, 2006 BCCA 95 at paras. 9 and 27; *Workers' Compensation Appeal Tribunal v. Hill*, 2011 BCCA 49 at para. 27 [**Hill**].

[24] To be successful under s. 27(1)(c), the burden is on the respondent to show there is no reasonable prospect of the complaint succeeding. This may be established in two ways. First, if

the Tribunal determines there is no reasonable prospect that the complainant will be able to establish one or more elements of the complaint at a hearing, it may dismiss the complaint. The threshold for proceeding to a hearing is low. In circumstances where the respondent disputes one of these elements, the complainant's only obligation is to point to some evidence capable of raising their complaint "out of the realm of conjecture": *Hill* at para. 27.

[25] Second, the Tribunal may consider a defence in an application under s. 27(1)(c): *Trevena v. Citizens' Assembly on Electoral Reform and others*, 2004 BCHRT 24 at para. 67. Section 13(4) of the *Code* sets out circumstances within which a respondent may prove their actions are justified based on a *bona fide* occupational requirement: *British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U.* [1999] 3 S.C.R. 3 at para. 54 [**Meiorin**]. This test includes establishing that the respondent discharged its duty to reasonably accommodate the complainant's disability.

[26] If it is reasonably certain that a respondent will establish a defence at a hearing of the complaint, then there is no reasonable prospect that the complaint will succeed: *Purdy v. Douglas College and others*, 2016 BCHRT 117 at para. 50.

[27] The requirements to prove discrimination were affirmed by the Supreme Court of Canada in *Moore v. British Columbia*, 2012 SCC 61 at para. 33. The Court held that complainants must show that they have or are perceived to have a characteristic protected from discrimination; that they have experienced an adverse impact in a protected area; and that the protected characteristic was a factor in the adverse impact. The Tribunal refers to this as the complainant's case: *Vik v. Finamore* (No. 2), 2018 BCHRT 9 at para. 50.

[28] I begin my analysis with the elements Ms. Powell would have to prove at a hearing to establish discrimination, recognizing that she need not prove these elements on this application, rather, the Respondents must persuade me Ms. Powell has no reasonable prospect of doing so. I conclude the Respondents have not shown there is no reasonable prospect of Ms. Powell's complaint succeeding.

1. *Protected Grounds: Sex & Physical Disability*

[29] Ms. Powell's complaint alleges she has various physical conditions as a result of her pregnancy that meet the standard to establish disability under the *Code*. Human rights case law has long recognized discrimination on the basis of pregnancy, including pregnancy related health impacts, as sex-based discrimination: *Brooks v. Canada Safeway Ltd.*, [1989] 1 SCR 1219.

[30] The Respondents do not take issue with pregnancy being protected under the *Code*. Further, they do not dispute that Ms. Powell experienced a difficult pregnancy and there is evidence that satisfies me this is so. I am satisfied that it is beyond the realm of conjecture that Ms. Powell has characteristics protected by the *Code* under sex and physical disability.

2. *Adverse Impacts*

[31] The Respondents argue that to the extent that there was conflict in the interactions between Ms. Powell and Ms. Pacheleh, these did not amount to adverse treatment but common interactions in the workplace between employees and managers.

[32] Ms. Powell has provided evidence that raises her complaint that she was adversely affected in her employment out of the realm of conjecture.

[33] There are a significant number of alleged adverse impacts Ms. Powell suffered in her employment. These include but are not limited to harassment, a failure by the Ministry to accommodate her pregnancy, anxiety, and humiliation. The Tribunal has recognized that stress as a result of alleged harassment and humiliation can satisfy the low threshold of overcoming conjecture: *Mattu v. Evergrow Greenhouse Ltd.*, 2018 BCHRTD 103 at para. 14

[34] Given the evidence on this application, in my view the Respondents have not shown that there is no reasonable prospect of Ms. Powell succeeding to establish she was adversely affected in her employment.

3. Connection Between Pregnancy And Adverse Impacts

[35] The issue is whether Ms. Powell was adversely impacted in her employment in a manner connected to her pregnancy and related physical ailments. The focus is on the effect of the Respondents' conduct, and not its intentions: *Code, s. 2; Robichaud v. Canada (Treasury Board)*, [1987] 2 SCR 84; *Stewart v. Elk Valley Coal Corp.*, 2017 SCC 30 at para. 45.

[36] At a hearing Ms. Powell would not have to prove that her pregnancy and related physical disability were the only factor, overriding factor, or even a significant factor in the alleged adverse impact she experienced: *Quebec (Commission des Droits de la personne et des droits de la jeunesse) v. Bombardier Inc.*, 2015 SCC 39 at paras. 45-52; *Stewart v. Elk Valley Coal Corp.*, 2017 SCC 30 at para. 46. She would need to prove that her pregnancy was a factor.

[37] In this case the Respondents argue that Ms. Powell fails to establish a nexus between her pregnancy and the alleged mistreatment. The Respondents submit that Ms. Powell suffered no adverse treatment connected to her pregnancy. They say Ms. Powell was never harassed, denied time off for medical appointments, or denied accommodation. The Ministry, they say, was within its management rights to assign work, request medical verification for short-term disability benefits and send the August 6, 2019 Letter.

[38] I am mindful in my analysis of the British Columbia Supreme Court's caution against dismissing portions of a complaint under s.27(1)(c). In *Byelkova v Fraser Health Authority*, 2021 BCSC 1312 at para. 115, the Court stated:

While the Tribunal may dismiss all or part of the complaint under s 27(1), insofar as the rationale for the s 27(1)(c) gatekeeping function is the efficient operation of the Tribunal, it may well be that no efficiency is gained by only dismissing half of the claim.

[39] Ms. Powell has alleged that she was harassed by Ms. Pacheleh on a number of occasions which is disputed by the Respondents. The fact that a complaint raises issues of credibility does not mean an application to dismiss under s. 27(1)(c) is automatically denied: *Evans v. University of British*, 2008 BCSC 1026 at para. 34. Rather, I must consider whether issues of credibility "can be resolved on the basis of corroborative affidavit and contemporaneous documentary

evidence": *Smyth v. Loblaw and another*, 2017 BCHRT 73 at para. 41. However, "[i]f there are foundational or key issues of credibility, then the matter must go to a hearing": *Francescutti v. City (Vancouver)*, 2017 BCCA 242 at para. 67.

[40] Although the Respondents argue that the interactions were just common employee/manger types of interactions and that they have a managerial right to performance manage a pregnant employee, they have not persuaded me that there is no reasonable prospect Ms. Powell will not succeed at a hearing. I find that credibility is a foundational consideration of what occurred on April 30, 2019 as well as other incidents where it is alleged Ms. Pacheleh was angry at Ms. Powell or where Ms. Pacheleh allegedly demonstrated discontent at Ms. Powell's actions that were connected to her pregnancy, including coming in late, Ms. Powell's capacity for work, her use of the washroom, standing to avoid discomfort, chewing ice or getting more water.

[41] Discrimination is often subtle rather than overt. For this reason, discrimination is often proven by inference rather than direct evidence: *Durrani v. Insurance Corp. of British Columbia* 2022 BCHRT 100 at para. 106.

[42] As a result, I cannot at this stage find there is no reasonable prospect of success Ms. Powell will prove that her pregnancy was at least a factor in the alleged adverse impacts she suffered.

4. Duty To Accommodate

[43] As the Respondents have not met their onus to establish Ms. Powell has no reasonable prospect of success in establishing a complainant's case, the issue I must now decide is whether the Respondents are reasonably certain to establish at a hearing that they discharged their duty to accommodate Ms. Powell. I am not convinced that the Respondents are reasonably certain to do so.

[44] The Respondents argue that Ms. Powell did not, prior to June 2019, request a leave of absence due to her pregnancy or indicate that she required modified duties as a result. The

Respondents say Ms. Powell was never denied time off, denied accommodations, was granted a medical leave when requested and her job remained open to her.

[45] It is trite law that the duty to accommodate is a tripartite process in a unionized environment, which the Ministry is. The Ministry, Ms. Powell's union, and Ms. Powell all have obligations in the accommodation process. However, the Supreme Court of Canada has ruled that it is the employer that has the primary responsibility for workplace accommodations. The Court stated in *Central Okanagan School No. 23 v. Renaud*, [1992] 2 S.C.R. 970 at para. 39:

Nevertheless, account must be taken of the fact that ordinarily the employer, who has charge of the workplace, will be in the better position to formulate accommodations. **The employer, therefore, can be expected to initiate the process.** The employer must take steps that are reasonable.
(emphasis added)

[46] There is both a procedural component and a substantive component within the duty to accommodate. The procedural component requires the employer to undertake an individualized investigation of accommodation measures and an assessment of an employee's needs. The substantive component requires the employer to make modifications or provide the accommodation necessary in order to allow an employee to participate fully in the workplace: *Meiorin* at para. 66.

[47] The Tribunal has found that the procedural component imposes a duty on an employer to obtain all relevant information about the employee's disability. That includes "information about the employee's medical condition, prognosis for recovery, **ability to perform job duties**, and capabilities for alternate work": *Gordy v. Painter's Lodge (No. 2)*, 2004 BCHRT 225 at para. 84. (emphasis added)

[48] An employer has a duty to inquire if something reasonably alerts an employer that an employee may have a disability that requires accommodation. This can occur even before an employee explicitly advises an employer of a disability and need for accommodation. Unusual behaviour, which may turn out to be related to an unsuspected or undiagnosed disability, may trigger a duty on an employer to inquire into that possibility. In some cases, when an employer

becomes aware of a possible connection between an employee's poor job performance and disability, or the possibility of a disability, the employer has a duty to investigate whether the poor job performance is disability-related before taking any action that adversely impacts the employee: *Willems-Wilson v. Allbright Drycleaners Ltd.*, [1997] B.C.H.R.T.D. No. 26; *Lewis v. Crystal Cathedral Ministries – Hour of Power Canada* 2018 BCHRT 251 at paras. 86-89; *Lord v. Fraser Health Authority* 2022 BCHRT 49 at para. 113. In *Lewis* at para. 85 the Tribunal stated:

Usually, a complainant must request accommodation in relation to the disability. In other cases, a respondent should reasonably be aware of the need for accommodation - or the possible need for accommodation - absent a clear communication.

[49] The evidence in this case is that the Respondents knew Ms. Powell was pregnant and had difficult pregnancies in the past. Although Ms. Powell was being accommodated regarding various medical appointments and for arriving late, the evidence from Ms. Pacheleh's email to herself on June 5, 2019 sets out Ms. Pacheleh's thoughts that Ms. Powell was using her pregnancy as an excuse for the need to sleep more resulting in being late, and that Ms. Powell was doing one third of the work of others at her same level. However, there is no evidence on this application that the Respondents were taking steps to inquire as to whether or not Ms. Powell needed any further accommodation regarding her pregnancy, including but not limited to in relation to her to workload.

[50] Given this evidence, it is not reasonably certain that at a hearing the Respondents will establish they met their duty to inquire and their duty to accommodate.

5. *Conclusion: s. 27(1)(c)*

[51] Given the low threshold under s. 27(1)(c) the Respondents have not demonstrated that there is no reasonable prospect of the complaint succeeding. I deny the application to dismiss under s.27(1)(c).

B. Should the complaint be dismissed under s. 27(1)(d)(ii) of the *Code*?

[52] The Respondents apply to dismiss the complaint against Ms. Pacheleh, the individual respondent, under s. 27(1)(d)(ii) of the *Code*.

[53] The Tribunal has identified several factors that are relevant in the determination of whether to dismiss a complaint against an individual respondent: *Daley v. B.C. (Ministry of Health) and others*, 2006 BCHRT 341 [**Daley**], paras. 8-62. As stated by the Tribunal in *Daley*:

In my view, there are circumstances in which it would not further the purposes of the *Code* to name individual respondents. In particular, where the complainant names the corporate or institutional employer as a respondent, and that respondent has the capacity to fulfil any remedies that the Tribunal might order, little useful purpose may be served by also naming the individuals who were involved in the events in issue on behalf of that respondent. A significant factor to be taken into account is whether the institutional respondent, as in *Marc*, and in the present case, has acknowledged the acts and omissions of the individual in question 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 (para. 60).

[54] The Respondents argue that the complaint against Ms. Pacheleh should be dismissed because the Ministry, who is responsible for her conduct and can fulfill any remedies that the Tribunal might order, is also named. Further, Ms. Pacheleh at all times was acting within the scope of her employment. The Respondents submit that proceeding against Ms. Pacheleh would not further the purposes of the *Code*.

[55] Ms. Powell opposes the dismissal of her complaint against Ms. Pacheleh as she alleges that Ms. Pacheleh had personal motives to push Ms. Powell towards quitting her job and was “misinforming HR in order to obtain an outcome she personally desired – to have her life made easier by no longer having to manage Ms. Powell as an employee.”.

[56] I am not persuaded by Ms. Powell’s argument as there is no evidence beyond conjecture that Ms. Pacheleh was misinforming HR to obtain an outcome she personally desired.

[57] I exercise my discretion to dismiss the complaint under s. 27(1)(d)(ii) of the *Code* against Ms. Pacheleh in her personal capacity on the basis that the Ministry acknowledges its responsibility to satisfy any remedial orders which the Tribunal might make in regard to the conduct of Ms. Pacheleh.

IV CONCLUSION

[58] The Respondents' application to dismiss Ms. Powell's complaint based on ss. 27(1)(c) is denied.

[59] The Respondents' application to dismiss Ms. Powell's complaint based on ss. 27(1)(d)(ii) against Ms. Pacheleh in her personal capacity is granted.

[60] I encourage the parties to take advantage of the Tribunal's mediation services to try to resolve this matter by mutual agreement.

Christopher J. Foy
Tribunal Member