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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:

Ali Shaikh

**COMPLAINANT**

AND:

Atira Property Management, Kirby Lewis, and Afsana Nitol

**RESPONDENTS**

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

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Tribunal Member:

Robin Dean

On his own behalf:

Ali Shaikh

Counsel for the Respondents:

Morgan K. Sterns

## I INTRODUCTION

[1] Ali Shaikh (a.k.a. Alex Shaikh), who is Muslim, alleges that Atira Property Management, along with its employee Kirby Lewis, discriminated against him based on religion contrary to s. 13 of the *Human Rights Code* by denying Mr. Shaikh's request to work the day shift instead of the night shift [**day shift allegation**]. He also alleges that Atira employee Afsana Nitol defamed him in a way that harmed his professional reputation [**single comment allegation**].

[2] The Respondents deny discriminating and ask the Tribunal to dismiss Mr. Shaikh's complaint in its entirety under s. 27(1)(c) of the *Code*. In the alternative they ask that the complaint be dismissed against the individual respondents, Lewis and Nitol, under s. 27(1)(d)(ii).<sup>1</sup> Mr. Shaikh did not respond to the Respondents' application to dismiss.

[3] In this decision, I must decide:

- a. whether there is no reasonable prospect that Mr. Shaikh will be able to show that Atira denying his request to work the day shift was connected to his religion.
- b. Whether Nitol's single comment was so egregious as to require state intervention.
- c. whether proceeding with the complaint against Lewis and Nitol would not further the purposes of the *Code*.

[4] For the following reasons, I deny the Respondents' application to dismiss the day shift allegation under s. 27(1)(c) but grant the Respondents' application to dismiss the single comment allegation. I also grant the application to dismiss the complaint against Lewis and Nitol under s. 27(1)(d)(ii). The remainder of the complaint will proceed against Atira alone.

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<sup>1</sup> The Respondents' materials refer to Lewis and Nitol by their last names only, so I also refer to them in this way.

## 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] Atira is a property management company that operates throughout Greater Vancouver. At the material times, Lewis and Nitol were employed by Atira as a Program Manager and a Health Care Support Worker respectively.

[7] On April 25, 2020, Mr. Shaikh commenced a temporary, two-month contract position with Atira as a Health Care Support Worker. Mr. Shaikh was hired to work the night shift Saturday through Tuesday from 7:30 p.m. to 8:00 a.m.

[8] On April 27, 2020, Mr. Shaikh sent Atira's HR Recruiting Specialist an email inquiring into whether there was a need for additional day shift staff and about possibly switching from the night shift to the day shift. The HR Recruiting Specialist told Mr. Shaikh to speak with Lewis about the request. In Mr. Shaikh's complaint, he says that "I informed Mr. Lewis that I have to fast for religious reasons and I would like to switch to day shift." Lewis advised Mr. Shaikh that there were no open positions for the day shift.

[9] Mr. Shaikh alleges that on or around May 17, 2020, while he was fasting for Ramadan, Nitol saw him breaking his fast and "expressed displeasure." He says that Nitol later said to Lewis: "When asked to help out during last night's shift, Alex refused to do so." Mr. Shaikh calls this a "misstatement" that caused harm to his professional reputation and eventually led to his "constructive dismissal."

[10] The Respondents' version of events is that Mr. Shaikh failed to respond to a person screaming on May 17, 2020. Nitol reported the incident to Lewis and said she felt that Mr. Shaikh's conduct on shift was a "safety issue".

[11] Mr. Shaikh resigned from his position at Atira on May 27, 2020, alleging that he was not being treated fairly. In the materials before me is the email Mr. Shaikh sent resigning his

position. In it, he writes, “My request to accommodate a shift change early on was denied even though I explained my religious obligations (fasting during this month).”

[12] Lewis says that at no time did Mr. Shaikh tell him that he wanted to switch to the day shift for religious reasons.

### III DECISION

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

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

[14] 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.

[15] 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.

[16] 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.

[17] Many human rights complaints raise issues of credibility. Issues of credibility at the foundation of a case should not be decided based on conflicting affidavits alone. However, not all credibility issues are central to a case, and the fact that a complaint raises issues of credibility does not mean the Tribunal must deny an application under s. 27(1)(c). A Tribunal member may be able resolve credibility issues by other means. Usually corroborative evidence is required: *Monnette v. BC (Ministry of Justice)*, 2017 BCHRT 34 at para. 34.

[18] To prove his complaint at a hearing, Mr. Shaikh 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 did that, the burden would shift to the Respondents to justify the impact as a *bona fide* occupational requirement. If the impact is justified, there is no discrimination. The Respondents do not raise a justification defence in this application to dismiss.

[19] The Respondents argue that Mr. Shaikh's complaint should be dismissed because there is no reasonable prospect of Mr. Shaikh establishing that his religion was a factor in any adverse impact he may have experienced.

[20] First, the Respondents take issue with Mr. Shaikh's allegation that he suffered an adverse impact in employment. They say it is unclear what adverse impacts Mr. Shaikh is alleging. However, reading the complaint, Mr. Shaikh clearly alleges that he "was denied an accommodation for religious needs" when his request to switch to the day shift was denied. He says that the Respondents' conduct affected his ability to practice his faith. Ultimately, his resignation letter suggests he felt he had to resign because he was being treated unfairly, including by being denied a religious accommodation.

[21] The Respondents say that these allegations are unsubstantiated. However, it is undisputed that Mr. Shaikh's request to switch to the day shift was denied and that Nitol made a comment about Mr. Shaikh's work performance to Lewis. He says damage to his professional reputation flowed from this comment. His resignation letter shows he resigned, at least in part,

because he believed he was being treated unfairly. I am not persuaded that, at a hearing, Mr. Shaikh would have no reasonable prospect of proving an adverse impact, in particular with regards to his request to switch to the day shift. This of course does not mean that Mr. Shaikh will prove an adverse impact at a hearing of this matter. It means only that he has taken his allegation out of the realm of conjecture.

[22] However, in the analysis of whether Nitol's single negative comment rises to a level of harassment that adversely affected Mr. Shaikh, the context is critical, and the Tribunal will consider all of the circumstances to determine whether it violates the *Code: Hadzic v. Pizza Hut Canada (c.o.b. Pizza Hut)*, [1999] B.C.H.R.T.D. No. 44 at paras. 32-33; *Pardo v. School District No. 43*, 2003 BCHRT 71, *Brito v. Affordable Housing Societies and another*, 2017 BCHRT 270 at paras 43-44.

[23] In this case and with regard to all the circumstances, even if Nitol told Lewis in the context of Mr. Shaikh breaking his fast that "[w]hen asked to help out during last night's shift, Alex refused to do so", it is unlikely that this one comment would rise to the level of discrimination requiring state intervention. Some of the relevant factors to consider are taken from *Pardo* at para. 12, where the Tribunal stated:

Without suggesting that this is an exhaustive list, some of the relevant factors would be the egregiousness or virulence of the comment, the nature of the relationship between the involved parties, the context in which the comment was made, whether an apology was offered, and whether or not the recipient of the comment was a member of a group historically discriminated against.

[24] I find these factors weigh in favour of dismissing the single comment complaint on the basis that there is no reasonable prospect Mr. Shaikh will succeed in proving it breached the *Code*. Nitol's comment was not particularly egregious and was made in the context of one employee expressing concern over another employee's conduct. As I understand it, Nitol did not hold a position of power over Mr. Shaikh. While Mr. Shaikh is a member of a group historically discriminated against and no apology was offered, I find that the attenuated nature

between the comment and Mr. Shaikh's protected characteristic also militates in favour of dismissing the complaint about Nitol's comment. The single comment allegation is dismissed.

[25] The Respondents further argue that Mr. Shaikh will not be able to prove a connection between the alleged adverse impact and his religion. In terms of the allegations related to the denial of Mr. Shaikh's request to switch to the day shift, there is a direct conflict in the parties' version of events. Mr. Shaikh says in his complaint that he informed Lewis that he was making the request during Ramadan due to his "need to fast for religious reasons." Lewis says: "at no point did A. Shaikh tell me that he wanted to switch shifts on the basis of his religion." This conflict goes to the heart of Mr. Shaikh's allegations. However, there is contemporaneous, corroborative evidence that Mr. Shaikh did tell Lewis that he needed to change shifts due to his religion. In Mr. Shaikh's email resigning from Atira, he states that he told Lewis he needed to change shifts for religious reasons. While I am not finding that this indeed occurred, the email weighs in favour of allowing the complaint to proceed to a hearing as does the disagreement about this fact, which is foundational to the likelihood of the complaint succeeding.

[26] For all of the above reasons, I dismiss the single comment allegation but deny the remainder of the Respondents application under s. 27(1)(c).

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

[27] 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: *Code* 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.

[28] The Respondents argue that it would not further the *Code's* purposes to proceed against the individual Respondents, Nitol and Lewis: *Daley v. BC (Ministry of Health)*, 2006 BCHRT 341 [**Daley**]. I agree.

[29] 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.

[30] 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.

[31] 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:

- 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.

*Daley* at paras. 60-62.

[32] Here, Atira has acknowledged the acts and omissions of Lewis and Nitol as its own and has irrevocably acknowledged its responsibility to satisfy any remedial orders which the Tribunal might make in respect of Lewis's and Nitol's conduct. Further, Lewis was acting within the scope of his managerial duties when he denied Mr. Shaikh's request to switch to the day shift. I have dismissed the complaint about Nitol's comment given that it was a single comment that was not particularly egregious and, on its face, did not appear to be connected to Mr. Shaikh's protected characteristic. The nature of the conduct, which took place during the regular course of their employment, does not, in my opinion, contain a measure of individual culpability sufficient to continue the complaint against them.

[33] I dismiss the complaint against Nitol and Lewis. The complaint will proceed against Atira alone.

#### **IV CONCLUSION**

[34] I deny the Respondents' application to dismiss the day shift allegation under s. 27(1)(c) but grant the Respondents' application to dismiss the single comment allegation. I dismiss the complaint against Nitol and Lewis under s. 27(1)(d)(ii). The remainder of the complaint will proceed against Atira alone.

Robin Dean  
Tribunal Member