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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:

Geneviève Dubois

COMPLAINANT

AND:

Farfalla Hair & Esthetics

RESPONDENT

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

Tribunal Member:

Robin Dean

On their own behalf:

Geneviève Dubois

Counsel for the Respondent:

Emily Dvorak

I INTRODUCTION

[1] Geneviève Dubois alleges that her former employer, a salon called Farfalla Hair & Esthetics, discriminated against her in employment based on ancestry and place of origin when it took several actions over the course of her employment, including suspending her in part for speaking French at work, implementing an English-only policy in the workplace, excluding her from receiving a \$50 gift card received by other employees, and eventually terminating her employment. The essence of Ms. Dubois's complaint, as I understand it, is that Farfalla treated her adversely because she is French-Canadian.

[2] Farfalla denies discriminating and says that there are solely non-discriminatory reasons for each of the actions Ms. Dubois complains about. Farfalla applies to dismiss the complaint under s. 27(1)(b) and s. 27(1)(c) of the *Human Rights Code*.

[3] I find it most efficient to deal with this application under s. 27(1)(c). The issue I must decide is whether Farfalla has convinced me that Ms. Dubois has no reasonable prospect of success in proving that her ancestry or place of origin were factors in the adverse impacts that she experienced.

[4] For the reasons that follow, I am satisfied that Farfalla is reasonably certain to prove that it had solely non-discriminatory reasons for its conduct. I allow Farfalla's application and dismiss Ms. Dubois's complaint.

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] Ms. Dubois was first hired at Farfalla as a subcontractor for a senior hairstylist position in July 2012. In December 2019, the salon changed ownership. That same month, Farfalla entered into a new subcontractor agreement with Ms. Dubois for a twelve-month term.

[7] Shortly after entering into the agreement, Farfalla shut down its operations due to the COVID-19 pandemic. Prior to the salon closing, however, Farfalla received two complaints from other staff about Ms. Dubois. In one email to the salon owners, a staff member wrote that she was not happy with what she perceived as Ms. Dubois's attitude, lack of respect for her peers, use of French to exclude other staff members, and resistance to change. She wrote that other staff members reported feeling uncomfortable, threatened, and unhappy coming to work because of Ms. Dubois.

[8] In another email to the owners, a different staff member wrote that Ms. Dubois created an unpleasant work environment and made other staff feel uncomfortable or anxious to come to work. The email discusses Ms. Dubois's use of French, including the staff member's suspicion that Ms. Dubois would speak in French to another French-speaking employee in order to discuss negative things about other staff members or the salon.

[9] Farfalla was closed from March 16, 2020 through June 15, 2020, with staff, including Ms. Dubois, returning to work on June 16, 2020.

1. The Suspension

[10] Problems seem to have arisen between Ms. Dubois and Farfalla after the salon reopened. Farfalla's materials say that on June 17 and 18, there was an "incident at Farfalla of serious insubordination by Ms. Dubois." From the materials, I take it that this incident refers to an altercation between Ms. Dubois and the salon's manager when an appointment was cancelled because one of Ms. Dubois's clients refused to wear face mask. On June 21, 2020 Farfalla suspended Ms. Dubois for two weeks.

[11] Farfalla says it suspended Ms. Dubois because of inappropriate workplace conduct. In support of its position, it put before the Tribunal a document titled "Farfalla Hair & Esthetics Disciplinary Record". Farfalla says the document was prepared by the salon's manager at the time Ms. Dubois was suspended. The document appears to set out Farfalla's reasons for suspending Ms. Dubois, which included:

- Display of aggressive, rude and unprofessional behaviour; and creating a very unpleasant work environment;
- Failure to follow instructions, despite clearly understanding them, and challenging management decisions;
- Making own decisions without prior approval;
- Invading personal space of co-workers; and
- Failure to comply with common used language during work hours (unless speaking to a client) therefore creating a non-inclusive and uncomfortable environment for staff members.

[12] In the disciplinary record, Farfalla also outlined its expectations and timelines going forward, stating:

Due to the reasons above there is a urgent need for employee to display evident positive changes in her behaviour and actions. Employee needs to return to work prepared, to work in a team environment (after suspension), follow all instructions, policies and guidelines put forward by the management. Employee to be reassessed after return to work.

[13] In Farfalla's materials are contemporaneous letters and emails that further explain the alleged issues with Ms. Dubois's behaviour at work. These include correspondence between the salon manager and Farfalla's owner, in which the manger identified concerns with Ms. Dubois's behaviour on June 17 and 18, 2020. It appears from the correspondence that the manager ultimately resigned from Farfalla because of that behaviour. The salon manager says that Ms. Dubois actions included:

- not responding to questions;
- invading personal space;
- intimidation;
- a disrespectful attitude; and
- disregarding management decisions.

[14] The manager also writes that Ms. Dubois was “[s]peaking French and laughing when looking at me to try to intimidate me.” The manager ends her letter explaining why she left her job at the salon:

I felt bullied by [Ms. Dubois] and everyday I would go in I knew it was going to be a fight. She made it one of the most hostile places I’ve ever worked in. So I decided to leave for my own mental health.

[15] Ms. Dubois has a different version of the events leading up to the suspension. According to Ms. Dubois, it was the salon manager who “lashed out and treated me with blatant disrespect in front of clients and staff.” Ms. Dubois submits a copy of an email from one of the salon’s clients who witnessed the altercation. It reads:

I’m not normally one to complain but what I witnessed this morning was unacceptable behaviour by one new member of your staff who was publicly berating your top stylist [Ms. Dubois], the stylist was discussing with the new manager about one of her clients who has a problem wearing a mask, she was looking for a solution, it was clear that the manager was angered because her authority was being threatened, and she lashed out, instead of using diplomacy, and diffusing the situation she made it a personal attack on the stylist, and embarrassed all who were present in the store!

[16] Ms. Dubois says she was never given the chance to tell her side of the story to the salon’s owners before she was suspended.

2. The Gift Card

[17] During the suspension, other Farfalla employees received a \$50 gift card for working extra hours. When Ms. Dubois came back to work and inquired why she did not receive a gift card she was told “[t]he owners offered it as an appreciation for everyone working together through the current situation/shortage – we had no manager and a team member was on suspension.” Farfalla says that Ms. Dubois did not receive the gift card because she was the one who was suspended and was thus the reason that other employees had to pick up the extra hours.

3. *The Policy*

[18] On July 6, 2020, Farfalla implemented an updated workplace policy, which included a section on communication. That section states, among other things, “All staff are to speak in English only during work hours within the Salon unless you need to accommodate a client who speaks another language.” Ms. Dubois alleges that she was forced to sign this policy or lose her job. Farfalla responds that all staff were required to sign and adhere to the policy.

[19] I do not have in the materials before me the policy that applied to Farfalla staff before July 6, 2020—i.e. the policy that was in place when Ms. Dubois was suspended. However, Farfalla says that the same policy related to communication was in place at that time.

4. *The Termination*

[20] Farfalla says when it reopened during the COVID-19 pandemic, government requirements necessitated cleaning breaks in between customers, meaning that staff could see fewer clients in a day because of the scheduled breaks.

[21] Farfalla alleges that on August 18 and August 28, 2020, Ms. Dubois used the log-in credentials of Farfalla’s receptionist to access Farfalla’s scheduling system. Farfalla alleges that she did so in order to delete the mandatory COVID-19 cleaning breaks between her clients to add more appointments to her schedule. Ms. Dubois admits to doing this in order to delete or shorten the breaks but says that as a subcontractor she was entitled to manage her own schedule.

[22] On August 28, 2020, Farfalla terminated Ms. Dubois’s subcontractor agreement. Farfalla provided Ms. Dubois with a notice of termination letter that states the reasons for Farfalla’s decision to terminate her employment as follows:

- a. Accessing Farfalla’s salon scheduling/appointment system with a PIN you obtained covertly from a Farfalla employee and using this, made changes within the system that you had no authority and/or right to do; and

- b. While accessing the system in the aforementioned manner, you cancelled required cleaning breaks between appointments and moved appointments as a result of the cancelled cleaning breaks.

[23] Ms. Dubois filed her human rights complaint on August 31, 2020.

III DECISION

[24] 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. The onus is on Farfalla to establish the basis for dismissal.

[25] 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.

[26] 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 at para. 27.

[27] To succeed at a hearing, Ms. Dubois will have to prove that she has a characteristic protected by the *Code*, she was adversely impacted in employment, and her protected characteristic was a factor in the adverse impact: *Moore v. British Columbia (Education)*, 2012

SCC 61 at para. 33. If she does that, the burden would shift to Farfalla to justify the impact as a *bona fide* occupational requirement. If the impact is justified, there is no discrimination.

[28] As language is not a protected characteristic under the *Code*, this application centres on whether Ms. Dubois's use of French was sufficiently connected to her ancestry or place of origin such that it was discrimination when she was not permitted to speak French during working hours at the salon. It is only if language is tied to a prohibited ground—such as ancestry or place of origin—that the *Code* protects against discrimination based on language: *M.L. v. BC Ministry of Children and Family Development*, 2019 BCHRT 101 at para. 35. When scrutinized, discrimination on the basis of language may not actually be based on a protected ground in all cases: *M.L.* at para. 36. This is so despite language being an important aspect of cultural expression.

[29] In *Fletcher Challenge Ltd. v. British Columbia (Human Rights Commission)*, 1992 CanLII 1119 (BCSC), the Court explained that language has two functions, one connecting it to culture and another connecting it to communication:

[32] ...Apart from its capacity to convey culture, language is also a communication skill that may be learned, and the ability to learn any language is not dependent on race, colour or ancestry.

[33] So too in a work environment, language may simply be a means of communicating to accomplish a task. In that context the important aspect of language is not the expression of culture, but simply a means to communicate. Language is in this context a skill, not unlike the ability to operate a machine. It is the process by which job-related information is passed back and forth from employee to employee and/or from employee to anyone he or she meets in the course of performing his or her duties.

[34] Language then, has a dual aspect. It is inextricably bound with culture in one sense, but in another it is a means of communication unrelated to culture... [Emphasis in original]

A. The Suspension

[30] It is undisputed that one of the reasons Farfalla suspended Ms. Dubois was because she spoke French contrary to Farfalla's policy. Farfalla argues that Ms. Dubois's use of French was in this instance a communication skill only that had no connection to her protected characteristics. Ms. Dubois responds that she was subjected to "linguistic discrimination" which she defines as "unfair treatment of people which is based on their use of language, and the characteristic of their speech, including their first language."

[31] As discussed above, however, language is not explicitly protected under the *Code*. Ms. Dubois still must show that her suspension, and her use of French, was connected to her ancestry or place of origin. Based on the limited materials before me and under the specific circumstances of this case, I find that Ms. Dubois's suspension allegation has no reasonable prospect of success because she will likely not be able to show at a hearing that speaking French at the salon was connected to her protected characteristics—i.e. ancestry and place of origin.

[32] As set out in *Fletcher Challenge*, speaking one's first language is not in all circumstances connected to culture and therefore ancestry and place of origin. While that case does not set out all the ways in which it may be discriminatory to impose language-based requirements at work, it is clear that in cases where a person's first language is being used to communicate only, it will be "unrelated to culture." Here, the evidence indicates that Ms. Dubois was using French in the workplace to communicate with the other French-speaking member of the salon staff. Ms. Dubois has not provided the Tribunal with any evidence or argument as to how speaking French at Farfalla with another French-speaking employee was related to Ms. Dubois's culture as a French-Canadian person. Without this evidence, I find that Ms. Dubois's complaint has no reasonable prospect of success because she will likely not be able to show at a hearing that speaking French at the salon was connected to her ancestry or place of origin.

[33] Further, there is evidence that Ms. Dubois was suspended for a variety of reasons having nothing to do with speaking French during work. I am satisfied based on the materials

before me that Farfalla would be reasonably certain to prove it had solely non-discriminatory reasons for the decision to suspend. The suspension decision was based on Ms. Dubois's conduct. To the limited extent her conduct involved the use of the French language, she has no reasonable prospect of establishing her use of French is connected to a protected characteristic.

B. The Gift Card

[34] Ms. Dubois says that she felt excluded, singled out and bullied by the salon owners when she did not receive a gift card during the suspension. Farfalla says that she did not receive a gift card because she was not working during that time. Farfalla explains that the reason other employees were offered a gift card was because they had to work harder and longer during and because of Ms. Dubois's absence at a time when the salon was short staffed. There is no dispute that the salon was short staffed at the time because Ms. Dubois was suspended, and the salon manager had resigned. As I understand Farfalla's argument, Ms. Dubois did not receive a gift card because it was intended as a reward for employees who had to pick up additional hours, and she was the cause of other employees having to pick up additional hours.

[35] I find that Farfalla is reasonably certain to prove at a hearing that the purpose of distributing the gift cards was to reward and improve employee morale at a time when the salon was short staffed. But for the staff shortage they would not have given anyone gift cards. To the extent that Ms. Dubois argues there is nexus because the only reason she was not working was because of the suspension, which was connected to her ancestry and place of origin, I find the gift card allegation has no reasonable prospect of success for the same reasons as those related to the suspension complaint. While Ms. Dubois did not receive the gift card, in part, because she spoke French contrary to the English-only policy, as I explained above, Ms. Dubois is not likely to show that the suspension was connected to her ancestry and place of origin.

C. The Policy

[36] Ms. Dubois says that she was told she would lose her job if she did not sign the English-only policy. Ms. Dubois says she was singled out under the policy, which made her feel “unwelcome, undermined, unappreciated, and isolated.” While adopting an English-only policy in the workplace is not inherently discriminatory, under scrutiny, language requirements in employment can be a veiled attempt to discriminate based on a person’s protected characteristics: *Fletcher Challenge* at para. 37. A complainant must demonstrate that the requirement adversely affects them in a way that is connected to their place of origin, ancestry, or another protected characteristic.

[37] Farfalla says it adopted the policy “to allow for the fair and effective communication of all staff at Farfalla” and that the policy applied only during working hours, not during staff breaks. According to Farfalla, the English-only policy was an essential component to the teamwork and collaboration that must take place at the salon. Farfalla’s evidence is that the use of languages besides English in the workplace led to misunderstandings amongst staff and feelings of exclusion.

[38] Under the particular circumstances of this case, I find there is no reasonable prospect Ms. Dubois’s complaint about the English-only policy would succeed at a hearing. For Ms. Dubois’s complaint about the policy to proceed, there must be some evidence that the English-only policy was pretextual. Farfalla’s explanation for the English-only policy indicates that the policy was reasonably necessary for the smooth operation of the salon to ease communication amongst staff. There is no evidence from either party that would allow me to conclude that Ms. Dubois is reasonably likely to prove at a hearing that the English-only policy was a veiled attempt to discriminate against her based on her ancestry or place of origin. English-only policies may be discriminatory where they are not necessary for the job; however, here, I am satisfied that a member hearing this complaint would determine that Farfalla’s reasons for adopting the policy were legitimate and non-discriminatory.

D. The Termination

[39] Farfalla says that Ms. Dubois's employment was terminated because she accessed the salon's scheduling system without permission. The circumstances of the termination, it says, have nothing to do with Ms. Dubois's protected characteristics. Rather Farfalla says that it terminated Ms. Dubois's employment due to the importance of the mandatory COVID-19 cleaning breaks and the relationship of trust being broken down as a result of Ms. Dubois's actions, all of which are admitted by Ms. Dubois.

[40] Farfalla argues that it is reasonably certain to prove at a hearing that its reasons for the termination were non-discriminatory. I agree and find that Farfalla is reasonably certain to show at a hearing on the merits that there was an entirely non-discriminatory reason that Ms. Dubois's employment was terminated—i.e. she covertly accessed the salon's scheduling system and made alterations to her schedule contrary to Farfalla's cleaning policy.

[41] Ms. Dubois says that at the time of termination, she "felt dislike by the owner because I'm a French Canadian woman." To the extent that she is arguing the termination was a veiled attempt at discrimination, I rely on my reasons above for finding that Ms. Dubois has not taken this out of the realm of conjecture. To the extent she is asking the Tribunal to draw an inference of discrimination from all the evidence, I decline to do so. The Tribunal has often remarked that discrimination can be subtle and can take the form of unconscious beliefs, biases, prejudices, and stereotypes: *see e.g. Young Worker v. Heirloom and another*, 2023 BCHRT 137 at para. 47. Indeed, discrimination will often be proved by circumstantial evidence and inference: *Radek v. Henderson Development (Canada) and Securiguard Services (No. 3)*, 2005 BCHRT 302 at para. 482.

[42] While there need be no direct evidence of discrimination, feelings of discrimination cannot be the sole basis for the Tribunal to make an inference that discrimination occurred: *K.W. v. BC Ministry of Children and Family Development*, 2018 BCHRT 219 at para. 59. Here there is no evidence—circumstantial or otherwise—that would permit me to decide that Ms. Dubois has taken her complaint on this point out of the realm of conjecture. I only have her

statement that she felt discriminated against because she is French-Canadian. This is not enough.

IV CONCLUSION

[43] I allow Farfalla's application under section 27(1)(c) and dismiss Ms. Dubois's complaint.

Robin Dean
Tribunal Member