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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:

Iris Chow

COMPLAINANT

AND:

Save-on-Foods Limited Partnership

RESPONDENT

REASONS FOR DECISION
APPLICATION TO ADD A RESPONDENT
Rule 25(2)

Tribunal Member:	Edward Takayanagi
On their own behalf:	Iris Chow
Agent for the Respondent, Save on Foods Limited Partnership:	Justin Wood
Counsel for the Proposed Respondent, Guardteck Security Corp.:	Connor Levy

I INTRODUCTION

[1] Iris Chow filed a complaint alleging that Save-On-Foods discriminated against her based on her race in the area of service contrary to s. 8 of the *Human Rights Code* when she attempted to shop at their store and was denied entry on April 15, 2020.

[2] Mr. Chow subsequently filed an application on April 14, 2021, to add Guardteck Security Corp. as a respondent to the complaint. She says Guardteck employed the security guard who denied her entry to the store. In her application Ms. Chow says Guardteck was responsible for enforcing Save-on-Foods' policies and should be held accountable.

[3] The Tribunal held the application to add a respondent in abeyance and did not serve Guardteck until November 9, 2023. Guardteck objects to the application on the ground that it is procedurally unfair for the Tribunal to consider an application that was not disclosed to them for over two and a half years. It says the Tribunal's delay in notifying them of the application has caused significant prejudice in its ability to respond to the complaint because the passage of time has deprived it of being able to locate essential witnesses and gather reliable testimony.

[4] Save-on-Foods takes no position on the application.

[5] For the following reasons, I allow the application to add Guardteck to the complaint. In my view, the Tribunal's delay in informing Guardteck of the application did not result in an impact on the fairness of a hearing or significant prejudice amounting to an abuse of process.

II BACKGROUND

[6] On June 30, 2020, Ms. Chow filed her complaint alleging she was denied entry to a Save-on Foods store on April 15, 2020.

[7] Save-on-Foods filed an application to dismiss the complaint on April 1, 2021, six-days after the deadline to file a dismissal application and sought leave from the Tribunal to late-file.

[8] On April 14, 2021, Ms. Chow filed an application to add Guardteck as a respondent to her complaint.

[9] Because the application to add Guardteck was filed while there was an outstanding dismissal application, the Tribunal decided to hold the application to add in abeyance until it decided the late-filed dismissal application.

[10] Ms. Chow was informed that she could respond to the dismissal application, or she could apply to defer the dismissal application pending a decision on the application to add Guardteck as a respondent. Ms. Chow chose not to defer and respond to the dismissal application.

[11] The Tribunal did not inform Guardteck of the pending application to add it as a respondent until after the decision denying Save-on-Foods' late-filed application to dismiss was released on November 3, 2023.

[12] On November 9, 2023, The Tribunal sent Guardteck the application to add it as a respondent.

III ANALYSIS AND DECISION

A. Does Ms. Chow set out a basis to add Guardteck as a respondent?

[13] I begin by considering the merits of Ms. Chow's application to add Guardteck.

[14] Ms. Chow's allegation is about an incident that occurred on April 15, 2020, and she filed her application to add Guardteck as a respondent on April 14, 2021. The application was made within the time limit under s.22 of the *Code*.

[15] The Tribunal's Rules of Practice and Procedure, Rule 25(2)(a) and (b) provide that a person applying to add a respondent within the time limit must state why adding the proposed respondent will further the just and timely resolution of the complaint, and set out facts that, if proven, could establish a contravention of the *Code* by the proposed respondent.

[16] To prove discrimination under s. 8 of the *Code*, Ms. Chow would have to establish that the security guard's conduct constituted an adverse impact on Ms. Chow in which her race was a factor: *Moore v. British Columbia*, 2012 SCC 61 at para. 33.

[17] When the Tribunal is assessing whether alleged facts could establish a contravention of the *Code*, the threshold is low, and the Tribunal will assume that the alleged facts can be proven: *Taylor v. BC (Ministry of Attorney General) and others (No. 2)*, 2013 BCHRT 173 at paras. 8 and 17.

[18] Human rights jurisprudence has consistently recognized that a decision that the *Code* has been contravened may be based on circumstantial evidence, and in the inferences that are reasonable to draw from that evidence: *Hill v*. *Best Western and another*, 2016 BCHRT 92 at para. 28. An inference of discrimination may arise "where the evidence offered in support of it renders such an inference more probable than the other possible inferences or hypotheses": *Kondolay v. Pyrotek Aerospace Ltd.*, 2020 BCHRT 208 at para. 108.

[19] In this case, I am satisfied that Ms. Chow alleges a contravention of the *Code*. Ms. Chow alleges that she was denied entry to Save-on-Foods by a security guard employed by Guardteck. She says that she was denied entry because of her race and alleges that other non-Asian customers were allowed entry into the store. I also take note of the fact that the alleged contravention occurred in the social context of the COVID-19 pandemic and the increase in anti-Asian hate during that time: British Columbia's Human Rights Commissioner's Report "From hate to hope: Report of the Inquiry into hate in the COVID-19 pandemic."

[20] For the purposes of this application, I am satisfied that Ms. Chow's allegation, if proven could infer a connection between her protected characteristic and adverse impact. In this context, these facts, if proven at a hearing, could establish a contravention of the *Code* by Guardteck.

[21] Next, I turn to whether adding Guardteck as a respondent will further the just and timely resolution of the complaint.

B. Will adding Guardteck further the just and timely resolution of the complaint?

[22] I find that adding Guardteck will further the just and timely resolution of the complaint.

[23] Ms. Chow alleges discrimination by Guardteck and Save-on-Foods. Ms. Chow is not applying to substitute Guardteck for Save-on-Foods as a respondent, but to add Guardteck alleging that they are jointly responsible for her adverse impact of being denied entry to the store.

[24] On this application I am not deciding whether Guardteck discriminated or if it did, whether it is jointly responsible with Save-on-Foods. I do not consider the likelihood of success of Ms. Chow's complaint against Guardteck. Rather, I consider that Ms. Chow has set out an arguable contravention of the *Code* by Guardteck. If Ms. Chow can prove her allegations of discrimination against Guardteck, she would be able to obtain an order for a remedy regarding that discrimination. This will uphold the purpose set out in s.3(e) of the *Code* to provide a means of redress for those persons who are discriminated against contrary to the *Code*. A just determination, and the possibility of a remedy if any part of the complaint against Guardteck is successful, requires participation by Guardteck. I am satisfied that adding Guardteck as a respondent will further the just resolution of the complaint.

[25] I also consider the effect that adding Guardteck will have on the timeliness of the Tribunal's process. A timely resolution of a complaint is not simply a rapid process but one where the process used is as quick as possible without jeopardizing the integrity of the process: *Pike v. Ooh La La Café and others*, 2022 BCHRT 72 at para. 36.

[26] I acknowledge that if I were to grant the application, Guardteck would be entitled to file a response to the complaint, and the parties would undergo a process of document disclosure which will lengthen what has already been a protracted process (not through the fault of any party). I find though that the potential of a lengthier process is outweighed by the furtherance of a just resolution of the complaint.

[27] First, a hearing has not been set for this complaint. While the parties will have to undergo a process of document disclosure, given the Tribunal's practice of scheduling hearings in the order that the complaint was filed, I am not persuaded that adding Guardteck as a respondent will result in a significantly lengthier wait time for a hearing. In my view, completing disclosure will have some impact on the scheduling of the hearing dates but it will not be so significant as to jeopardize the integrity of the process.

[28] Second, Ms. Chow's allegation that she was denied entry to the store by a security guard has been set out in her complaint. The Tribunal will need to decide this allegation, whether or not Guardteck is added as a respondent.

[29] Third, Guardteck says it is unfair to add it as a respondent now, when it was unable to participate in earlier settlement meetings. The Tribunal's mediation process is available at any point in the process and Guardteck will be able to request mediation if it is added as a respondent: Rule 14(2).

[30] I am satisfied that it serves the just and timely resolution of the complaint to add Guardteck as a respondent. I next turn to Guardteck's argument for opposing the application.

C. Was Guardteck's ability to have a fair hearing impaired by the Tribunal's delay?

[31] Guardteck argues that the Tribunal's discretionary decision to delay service of the application to add it as a respondent was procedurally unfair and has significantly impaired its ability to respond to the complaint. I understand from its submissions that Guardteck argues that the Tribunal's exercise of its discretion was an abuse of process that precludes it from proceeding to add Guardteck as a respondent to the complaint.

[32] In administrative proceedings, abuse of process is a question of procedural fairness: *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44 [***Blencoe***] at paras. 105-7 and 121; *Law Society of Saskatchewan v. Abrametz*, 2022 SCC 29 [***Abrametz***] at para. 38.

[33] There are two ways in which delay in administrative proceedings may constitute an abuse of process: hearing fairness and significant prejudice: *Blencoe* at paras. 122 and 132; *Abrametz* at para 41. While Guardteck says it will be "substantially prejudiced," based on its submissions I understand that its central argument is about hearing fairness.

[34] The fairness of a hearing can be compromised where delay impairs a party's ability to answer the complaint against them, such as when memories have faded, essential witnesses are unavailable, or evidence has been lost: *Blencoe* at para. 102; *Abrametz* at para 41.

[35] Guardteck argues that the Tribunal's delay in informing it of the application to add them as a respondent negatively impacted their ability to respond to Ms. Chow's complaint. It says they have been deprived of witnesses who can provide reliable, useful evidence and testimony due to the passage of time.

[36] Guardteck asserts that the security guard who is alleged to have interacted with Ms. Chow has not been in their employ since 2020 when he moved out of the province. It says he has been unresponsive and unwilling to respond to communications. Guardteck says the security guard is necessary to respond to the allegations because a determination of the merits of this complaint will turn on the credibility of witnesses and their version of what occurred.

[37] I find that these are vague assertions that do not establish an inability to prove facts necessary to respond to Ms. Chow's complaint. While I accept that a determination of the merits of this complaint at a hearing may turn on the credibility of witnesses involved, Guardteck has not pointed to anything beyond its speculation that indicates its ability to respond to Ms. Chow's complaint has been compromised. It says the security guard has been unresponsive, but it has not provided information about what measures it has taken to contact this witness; whether they have sent correspondence through emails and texts, sent mail to their last known address, or called their last known phone number.

[38] While I accept the general principle that memory fades over time, I am not persuaded that this is sufficient to establish that Guardteck's ability to have a fair hearing has been compromised. Guardteck submits that if they can locate the security guard or other potential

witnesses, the reliability of their evidence and testimony has been negatively affected by the delay in being informed of this application. In my view, the passage of time affects all witnesses and parties. Without more, I find this factor to be neutral.

[39] Based on Guardteck's submission I am not persuaded that the Tribunal's decision to delay informing them of the application to add them as a party has jeopardized Guardteck's right to a fair hearing. Without evidence Guardteck attempted to find witnesses or that witnesses cannot be located, Guardteck has not demonstrated that its ability to answer the complaint against it has been so compromised to impact the fairness of the hearing.

[40] I next consider if the Tribunal's exercise of its discretion to hold the application to add Guardteck in abeyance has resulted in significant prejudice.

D. Has Guardteck been significantly prejudiced by the Tribunal's delay?

[41] A delay in administrative proceedings may amount to an abuse of process in certain circumstances even when the fairness of the hearing has not been compromised: *Blencoe* at para. 115.

[42] The test to determine if a delay that has not affected the fairness of a hearing, amounts to an abuse of process has three steps:

a. First, the delay must be inordinate. This is determined on an assessment of the context overall, including the nature and purpose of the proceedings, the length and causes of the delay, and the complexity of the facts and issues in the case;

b. Second, the delay itself must have caused significant prejudice;

c. Third, when these two requirements are met, the Tribunal conducts a final assessment as to whether abuse of process is established. This will be so when the delay is manifestly unfair to a party to the litigation or in some other way brings the administration of justice into disrepute: *Abrametz* at para 101.

1. Whether the Delay is Inordinate

[43] A process that takes considerable time does not in itself amount to inordinate delay: *Abrametz* at para. 50. In determining whether delay is inordinate, the Tribunal considers the following contextual factors:

a. the nature and purpose of the proceedings,

b. the length and causes of the delay, and

c. the complexity of the facts and issues in the case.

[44] These factors are not exhaustive, such that additional contextual factors can be considered in a particular case: *Abrametz* at para. 51.

[45] The purpose of human rights proceedings is to prevent discrimination, vindicate private rights and address grievances: *Blencoe* at para. 94. As set out in s. 3(e) of the *Code*, proceedings under the *Code* are intended to provide a means of redress for those who have experienced discrimination.

[46] The Tribunal has the discretionary ability to vary the Rules and time limits in the Rules as it considers appropriate under the circumstances: *Code* 27.3, Rule 2. Such discretion is intended to facilitate the just and timely resolution of complaints.

[47] In my view, the purpose of each step of the Tribunal's process must therefore be a just and timely proceeding for all participants with the goal of resolving a complaint on its merits to allow a means of redress for a person who has experienced discrimination.

[48] The delay in this case is from April 14, 2021, when Ms. Chow filed her application to November 9, 2023, when the Tribunal first served Guardteck with the application. A span of two and half years. Within the context of an administrative tribunal where an intended purpose is a just and timely resolution of complaint; this is a lengthy delay. However, a lengthy delay is not *per se* inordinate, and may be justifiable when considered in context: *Abrametz* at para. 59.

[49] Guardteck says that, even if the application was held in abeyance pending the outcome of the dismissal application, the Tribunal could have informed Guardteck of the existence and pending status of the application during that time. While this was an option, the Tribunal has discretion to decide when to serve a party. This is not a review of that decision. It may have been preferable, in hindsight, to have notified Guardteck of the application. However, the decision to place the application in abeyance without notifying Guardteck must be considered in context. First, the Tribunal's usual practice for new complaints is to provide notice only when it decides to proceed. In this case, there was an outstanding application to dismiss the complaint. Second, at the time, the Tribunal was taking steps to address a significant increase in case volume and resulting backlog. At the time of the application, the Tribunal was not experiencing as extensive process delays as it would later and it would not have been as clear as it became in hindsight that there would be such a lengthy delay in deciding the application to dismiss.

[50] When considering that context in light of the Tribunal's purposes I am not persuaded that informing a potential respondent of the possibility of being added to a complaint when the underlying complaint may be dismissed without a hearing facilitates the just and timely resolution of complaints.

[51] While the complexity of the facts and issues in a case will affect the time required to decide the matter, here the delay was caused by the Tribunal's exercise of its discretion to hold the application to add in abeyance and process delays from a significant increase in the Tribunal's case volume. Therefore, I do not find the complexity of the underlying complaint to be a significant factor in my consideration.

[52] Viewed in context, while I find the delay in the Tribunal informing Guardteck of the application to add them as a respondent to be regrettable, I am not persuaded that it is so egregious as to be considered inordinate. In my view, when considering the purposes of the human rights proceeding and the nature of the rights at stake, I find that a delay of two and a half years is not so egregious that it would offend the community's sense of decency and fairness or bring the human rights system into disrepute.

2. Whether there is Significant Prejudice

[53] The doctrine of abuse of process as it relates to administrative delay requires proof of significant prejudice: *Abrametz* at para. 67. Prejudice is a question of fact and may include, but not limited to, significant psychological harm, stigma attached to the individual's reputation, disruption to family life, loss of work or business opportunities, as well as extended and instructive media attention: *Abrametz* at para. 69.

[54] Guardteck submits that allowing the application undermines its reasonable expectation that, based on the absence of prior communication by the Tribunal, Ms. Chow was not pursuing her complaint. It further argues that locating witnesses at this late stage will require substantial time, effort, and resources.

[55] In my view, the evidence before me is insufficient to support a finding that the Tribunal's delay in informing Guardteck of the application to add them has caused significant prejudice. First, while I acknowledge Guardteck's submission that it operated under the assumption that Ms. Chow was not pursuing a complaint against it, there is nothing before me to suggest that Guardteck relied upon this assumption to their detriment.

[56] Second, while I accept that locating witnesses may require some time and effort, based on the evidence before me I am not persuaded that the time and effort in this case will be greater than in any other circumstance. Furthermore, given Guardteck's assertion that the security guard moved out of the province in August 2020, without any other evidence or submissions, I am not persuaded that any increase in the cost and difficulty of locating this witness is attributable to the Tribunal's delay in notifying Guardteck of an application filed in April 2021.

[57] Based on the materials before me I am unable to find that Guardteck has or will experience significant prejudice due to the delay.

3. Whether there is an Abuse of Process

[58] When the first two requirements of the test are met, the Tribunal conducts a final assessment as to whether abuse of process is established. The Tribunal considers whether the delay is manifestly unfair to the party to the proceedings or in some other way brings the administration of justice into disrepute: *Behn v. Moulton Contracting Ltd.,* 2013 SCC 26 at paras. 40-41; *Abrametz* at para. 72.

[59] Guardteck has not established inordinate delay or significant prejudice, so there is no basis to conclude that there is an abuse of process in the circumstances of this case. Therefore, it is not necessary to proceed to the next step and consider what remedy should be ordered.

IV CONCLUSION

[60] I allow the application and add Guardteck as a respondent.

Edward Takayanagi,
Tribunal Member