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Indexed as: Sherlock v. Provincial Health Services Authority and others, 2024 BCHRT 96

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:

Stacy Sherlock

COMPLAINANT

AND:

Provincial Health Services Authority operating as BC Emergency Health Services and
Vikki Subarsky and Heather Choi

RESPONDENTS

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

Tribunal Member: Amber Prince

Agent for the Complainant: Conor McKenna (until October 24, 2019)
On their own behalf: Stacy Sherlock (after October 24, 2019)

Counsel for the Respondents: Bianca C Jaegge (until November 17, 2021)
David Bell (after November 17, 2021)

I INTRODUCTION

[1] Stacy Sherlock was employed with the Provincial Health Authority [**PHSA**] as a causal switchboard operator for approximately seven months until her employment was terminated. Ms. Sherlock filed a complaint against PHSA, her manager at PHSA, Vikki Subarsky, and a human resources consultant for PHSA, Heather Choi (now known as Heather Hall) [together, the **Respondents**].

[2] Ms. Sherlock alleges that she has a physical disability in the form of a fragrance allergy and Multiple Chemical Sensitivity. She says that the Respondents did not accommodate this disability, and that PHSA terminated her employment instead, in violation of s. 13 of the BC *Human Rights Code* [***Code***].

[3] The Respondents deny discriminating against Ms. Sherlock. They apply to dismiss her complaint on the basis that it has no reasonable prospect of success under s. 27(1)(c) of the *Code*. Alternatively, the Respondents argue that the complaint against Ms. Subarsky and Ms. Hall should be dismissed under s. 27(1)(d)(ii) of the *Code* because PHSA is responsible for their workplace conduct.

[4] For reasons that follow, I allow the Respondents' application to dismiss the complaint under s. 27(1)(c). As a result, it is not necessary for me to address the Respondents' alternative arguments under s. 27(1)(d)(ii).

[5] I have arrived at this decision for two reasons. First, Ms. Sherlock has no reasonable prospect of establishing that her disability was a factor in her termination. Instead, the Respondents have persuaded me that they terminated Ms. Sherlock's employment for solely non-discriminatory reasons: her refusal to provide a medical questionnaire about her stated allergy and/or Multiple Chemical Sensitivity; and for breach of PHSA's Privacy and Confidentiality Policy. Second, while Ms. Sherlock has a reasonable prospect of proving she was exposed to allergens at work, the Respondents are reasonably certain to justify their response to that reported exposure, and any risk of further exposure.

[6] On behalf of the Tribunal, I apologize to the parties for the lengthy delay in issuing this decision. We have a backlog of cases because of a rapid spike in the number of complaints filed: https://www.bchrt.bc.ca/message-from-the-chair-about-the-tribunals-backlog-strategy/.

II ISSUE

[7] The issue before me is whether to allow the Respondents' application to dismiss Ms. Sherlock's complaint under s. 27(1)(c) of the *Code*.

[8] Section 27(1)(c) is part of the Tribunal's gate-keeping function. As part of this gate-keeping function, the Tribunal has discretion to dismiss a complaint, under s. 27(1)(c) if the complaint has no reasonable chance of succeeding at a hearing: *Lord v Fraser Health Authority*, 2021 BCSC 2176, para. 19. If there is no reasonable prospect of a complaint succeeding after a full hearing of the evidence, then it serves no purpose to proceed with the time and expense of a hearing: *Workers' Compensation Appeal Tribunal v. Hill*, 2011 BCCA 49, para. 27.

[9] The Tribunal does not make findings of fact on a dismissal application, as it would at a hearing. Instead, the Tribunal considers the whole of the evidence to decide whether there is no reasonable prospect that a complaint could be proven, after a full hearing of the evidence: *Byelkova v Fraser Health Authority*, 2021 BCSC 1312, para. 24; *Francescutti v. Vancouver (City)*, 2017 BCCA 242, para. 52. The Tribunal bases its decision on the materials filed by the parties; not on what evidence might be given at the hearing: *University of British Columbia v. Chan*, 2013 BCSC 942, para. 77; *Conklin v University of British Columbia*, 2021 BCSC 1569, para. 32.

[10] The onus is on the applicant to show there is no reasonable prospect a complaint will succeed: *Byelkova*, para. 27. At this stage, the complainant must show that their evidence is based on more than speculation: *Lord*, para. 19.

[11] To prove discrimination at a hearing, Ms. Sherlock would have to meet the three criteria set out in *Moore v. BC (Education)*, 2012 SCC 61, para. 33, which are bolded below:

a. **She has a physical disability protected by the *Code*.** Ms. Sherlock alleges that she has a fragrance allergy and Multiple Chemical Sensitivity. The Respondents say that Ms. Sherlock did not provide them with enough medical information to show that she has a disability.

b. **She was adversely impacted in her employment.** Ms. Sherlock alleges that the Respondents exposed her to allergens, and then terminated her employment. The Respondents say that they took significant steps to create safe working conditions for Ms. Sherlock. There is no question that PHSA terminated Ms. Sherlock's employment on July 18, 2018.

c. **Her physical disability was a factor in that adverse impact.** Ms. Sherlock alleges that her fragrance allergy and Multiple Chemical Sensitivity were a factor in being exposed to allergens at work, and PHSA's termination of her employment.

[12] If the Tribunal determines there is no reasonable prospect that a complainant will prove one or more of these three elements, it may dismiss the complaint.

[13] The Tribunal may also dismiss a complaint under s. 27(1)(c) of the *Code* if it is reasonably certain that a respondent will establish a defence at a hearing of the complaint: *Purdy v. Douglas College and others*, 2016 BCHRT 117, para. 50. If it is reasonably certain that a respondent would establish a defence, based on the dismissal application materials, then there is likely no reasonable prospect that the complaint will succeed: *Purdy*, para. 50.

[14] If a complainant proves the three elements of discrimination at a hearing, the burden shifts to the respondent to justify their conduct. To justify their conduct, the Respondents need to meet the three criteria set out in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 SCR 3 [***Meiorin***], para. 54, which are bolded below:

a. **The Respondents adopted a standard or policy for a purpose or goal that is rationally connected to the performance of Ms. Sherlock's job.** In this case the workplace standard at issue was possible allergens in the workplace, and a requirement that Ms. Sherlock complete a medical questionnaire to address those allergens. Ms. Sherlock says that the medical questionnaire was unnecessary, and the Respondents could have addressed allergens by requiring a scent-free workplace.

b. **The Respondents adopted the standard or policy in an honest and good faith believe that it was necessary to the fulfillment of that purpose.** In essence, the Respondents argue that it set reasonable and good faith standards with respect to scents in the workplace, including the requirement that Ms. Sherlock provide the completed medical questionnaire. Ms. Sherlock argues that the medical questionnaire was unnecessary for her safe return to the workplace. She argues that the Respondents could have enforced a scent-free workplace instead.

c. **The Respondents accommodated Ms. Sherlock to the point of undue hardship.** The Respondents argue that they exhausted their efforts to accommodate Ms. Sherlock. They say that they could not have done more without Ms. Sherlock taking the reasonable step of completing the medical questionnaire. Ms. Sherlock says that it would not have been undue hardship for the Respondents to enforce a scent-free workplace; and ensure the medical questionnaire was within the scope of what was necessary, and free from errors.

[15] Next, I turn to the parties' dismissal application materials. Then I return to the question of whether Ms. Sherlock's complaint has no reasonable prospect of success.

III BACKGROUND

[16] The background is taken from the parties' materials. I have considered all of their materials, but I only refer to what is necessary to make my decision. I make no findings of fact.

[17] The Respondents are represented by counsel. In support of their dismissal application, they have provided affidavits with exhibits, including contemporaneous documents. Ms. Sherlock was self-represented at the time she filed her 12-page dismissal application response. Her evidence is contained in her response.

[18] I do not prefer the Respondents' evidence merely because it is in affidavit format but weigh all of the evidence as a whole: *Kachidza v. Hyperwallet Systems and others*, 2020 BCHRT 59, para. 34; *NT by CT v. Board of Education of FV School District*, 2019 BCHRT 224, paras. 43-45.

A. Ms. Sherlock reports a fragrance allergy and chemical sensitivities

[19] On November 7, 2017, Ms. Sherlock had a job interview with Ms. Subarsky for the position of casual switch board operator with PHSA. Ms. Subarsky's evidence is that Ms. Sherlock mentioned, in passing, at the interview that she had a "fragrance sensitivity": Subarsky Affidavit, para. 7. Ms. Sherlock's evidence is that she was "fully transparent" about her need for a workplace free from fragrances and "products which would trigger reactions": Application Response, p. 3.

[20] In any event, PHSA offered Ms. Sherlock the casual switchboard operator position, and she accepted. After Ms. Sherlock was hired, there were written communications between the parties about the nature and extent of Ms. Sherlock's self-reported fragrance allergy and chemical sensitivities.

[21] On accepting the position, Ms. Sherlock signed a PHSA policy agreement agreeing to abide by PHSA policies, including the Privacy and Confidentiality Policy: Subarsky Affidavit, Exhibit D. As I will discuss later, the Respondents say that one of the reasons Ms. Sherlock's employment was later terminated was because of a breach of this Policy.

[22] On November 21, 2017, Ms. Sherlock emailed Ms. Subarsky to request that her co-workers: be told about her "fragrancing allergies + multiple chemical sensitivities"; and reminded that she is "highly reactive": Subarsky Affidavit at Exhibit C. In response to her request, Ms. Subarsky emailed staff to advise them that Ms. Sherlock had a "severe fragrance sensitivity": Subarsky Affidavit, para. 9.

[23] Switchboard operators at PHSA are provided with alcohol wipes to wipe down their equipment and workstations at the start and end of their shifts. Casual staff are provided with shared headsets but individual headset sponges: Subarsky Affidavit, para. 11.

[24] On December 5, 2017, after her shift, Ms. Sherlock emailed Ms. Subarsky to report that Lysol wipes had been used in the workplace instead of alcohol wipes. Ms. Sherlock also indicated that she was unable to use a shared headset because of her "high sensitivities" and

"potential chemical transfer." She asked for her own dedicated headset and signage at the worksite advising of the need for a fragrance-free workplace: Subarsky Affidavit, Exhibit F.

[25] Ms. Subarsky replied to Ms. Sherlock on December 6, 2017, advising: "PHSA only has scent guidelines, no formal policy for staff to adhere to. We can chat more in person as I'll be at the [worksite] later for a meeting. We don't provide casuals with their own headset, however, in the past some casuals have purchased their own due to personal reasons." Ms. Subarsky then gave information for Ms. Sherlock to purchase a headset: Subarsky Affidavit, Exhibit F.

[26] Ms. Subarsky and Ms. Sherlock then discussed the matter. After that discussion, on December 8, 2017, Ms. Subarsky emailed staff to remind them of Ms. Sherlock's reported severe allergy and fragrance sensitivities: Subarsky Affidavit, Exhibit H. On the same day, and at Ms. Sherlock's request, Ms. Subarsky emailed Ms. Sherlock a "severe allergy alert" notice for placement at the switchboard worksite. Ms. Sherlock replied by email, confirmed that she had posted the notice, and thanked Ms. Subarsky: Subarsky Affidavit, Exhibits I and J.

B. Ms. Sherlock reports allergic reaction on January 18, 2018

[27] On January 18, 2018, Ms. Sherlock told Ms. Subarsky that when she arrived at work she could smell an air freshener scent, had to leave, and could not complete her shift. Ms. Sherlock reported that her face and lips were swelling, with a tingling and burning sensation: Subarsky Affidavit, Exhibit K. Ms. Subarsky investigated the issue, asked staff to remove the bathroom air freshener, and reminded them not to use scented products in the workplace. Another staff told Ms. Subarsky that one of the staff had "accidently sprayed an air freshener in the bathroom approximately two hours prior to Ms. Sherlock's arrival": Subarsky Affidavit, paras. 17-18, and Exhibit K.

[28] On January 19, 2018, Ms. Sherlock called in sick for work: Subarsky Affidavit, Exhibit L. On January 23, 2018, Ms. Sherlock emailed Ms. Subarsky, and confirmed that all the problematic products had been removed from the workplace: Subarsky Affidavit, Exhibit M.

[29] On January 29, 2018, Ms. Sherlock emailed Ms. Subarsky stating that she had decided not to purchase her own headset as wiping down the headset with the alcohol wipes provided was "working well": Subarsky Affidavit, Exhibit O.

C. Ms. Sherlock reports allergic reaction on February 8, 2018

[30] On February 8, 2018, Ms. Sherlock emailed Ms. Subarsky and reported that she had to leave work because she had been exposed to a fragrance. At the time she reported that her eyes were burning, and a rash was emerging on her skin. She indicated that she going to the Emergency Room to seek treatment: Subarsky Affidavit, Exhibit P.

[31] Ms. Subarsky investigated the incident: Subarsky Affidavit, Exhibit Q. She responded to Ms. Sherlock in an email on February 9, 2018, that she had followed up with staff, but they advised that no one had used any scented products at work: Subarsky Affidavit, para. 23 and Exhibits P and Q.

[32] On February 9, 2018, Ms. Sherlock emailed Ms. Subarsky that she would be absent from work from February 8-13, 2018, and included a medical note stating that she was "unable to attend work … due to illness / injury" during that time period: Subarsky Affidavit, Exhibit U. On the same day, Ms. Subarsky emailed PHSA's Disability Management Advisor, Alana Severinski, for guidance on how to address Ms. Sherlock's reported exposure to scents in the workplace. Heather Hall was copied to the email, given her human resources consultant role at PHSA: Subarsky Affidavit, Exhibit V.

[33] On February 9, 2018, after consulting with the Ms. Severinski, and Ms. Sherlock, Ms. Subarsky amended the "Severe Allergy Alert" Notice posted at the switchboard worksite to include stronger wording. Ms. Sherlock's response to the amendment, in an email on February 13, 2018, was "Excellent!": Subarsky Affidavit, Exhibits S and T.

[34] On February 20, 2018, Ms. Severinski received an email from Ms. Subarsky and Ms. Hall requesting Ms. Severinski's assistance with Ms. Sherlock's reported scent allergies and

sensitivities in the workplace. As a result, Ms. Severinski arranged a phone conversation with Ms. Sherlock: Severinski Affidavit, para. 21.

D. PHSA requests a completed medical questionnaire

[35] On February 22, 2018, Ms. Severinski spoke on the phone with Ms. Sherlock. They discussed what triggers Ms. Sherlock's allergy and how Ms. Sherlock goes about her daily life, such as on transit. On Ms. Sherlock's account, she told Ms. Severinski that she uses a respirator on flights, and wears gloves in public in the fall, winter, and spring to limit "any potential cross contamination that may occur" on her wrists: Application Response, p. 6.

[36] On Ms. Severinski's account, Ms. Sherlock told her that she wraps her face in a scarf on transit, uses a mask while shopping, and carries an epi-pen: Severinski Affidavit, para. 22.

[37] The parties agree that Ms. Severinski suggested that Ms. Sherlock wear a medical mask and gloves at work. Ms. Sherlock responded that if there was a scent in the work site it would cause an allergic reaction, and she would "not be able to do the job with a respirator on at all times": Application Response, p. 6.

[38] During the call, Ms. Severinski also told Ms. Sherlock that PHSA's Enhanced Disability Management Program [**Disability Program**] could support and assist her. Ms. Severinski explained that the first step was to sign a Disability Program authorization form, authorizing Ms. Severinski to exchange information with Ms. Sherlock's union steward, and other workplace health staff for the purpose of assisting her. Ms. Severinski also explained that the authorization form would allow her to request a medical questionnaire for Ms. Sherlock's doctor to complete.

[39] Ms. Severinski emphasised that she needed current medical documentation to help her understand Ms. Sherlock's "current medical condition, triggers, and the limitations and restrictions that impact her ability to work in her current position": Severinski Affidavit, para. 22.

[40] Ms. Severinski emailed Ms. Sherlock on the same day, with a copy to Ms. Sherlock's union steward, confirming the need for the Disability Program authorizations: Severinski Affidavit, Exhibit E.

[41] On March 12, 2018, the union steward emailed Ms. Sherlock to confirm that she was required to participate in the Disability Program. The steward explained that the purpose of the Disability Program was to understand Ms. Sherlock's workplace barriers and develop action plans to address them. The steward also explained the consequences of non-participation in the Disability Program without a "bona fide reason" is a referral to "human resources/labour relations and any continued absence will be managed as per the collective agreement and the employer's policy": Subarsky Affidavit, Exhibit W. [1]

[42] The steward further explained that that any information Ms. Sherlock provided to the Program would only be seen by the "disability management team" working on Ms. Sherlock's file, and by her manager or human resources advisor on a "strictly need to know basis." Ms. Sherlock responded by email on the same day to say thank you and that she would send her authorization "momentarily via email": Subarsky Affidavit, Exhibit W.

E. Ms. Sherlock reports allergic reaction on March 25, 2018

[43] On March 25, 2018, Ms. Sherlock emailed Ms. Subarsky to report that she noticed a fragrance in the workplace, and had an allergic reaction, including: hives, throat swelling affecting her voice, and severe digestive upset. She told Ms. Subarsky that she would need to call in sick and was attempting to have someone "resolve" her shift: Subarsky Affidavit, Exhibits Y and AA. Ms. Subarsky investigated the incident: Subarsky Affidavit, Exhibits Y, Z, and AA.

[44] On March 27, 2018, Ms. Severinski received Ms. Sherlock's completed and signed Disability Program authorization form: Severson Affidavit, Exhibit F. As a result, Ms. Severinski

[1] Email exchanges between Ms. Sherlock and the union steward were disclosed by Ms. Sherlock to the Respondents as part of the Tribunal's disclosure process.

enrolled Ms. Sherlock in the Disability Program and prepared the medical questionnaire for Ms. Sherlock's doctor: Severinski Affidavit, paras. 27-28 and Exhibit G.

[45] The medical questionnaire states: "The purpose of these questions is NOT to inquire into illness/injuries or restrictions/limitations that are unrelated to this patient's current absence from work": Severinski Affidavit, Exhibit G.

[46] Ms. Severinski states that around the beginning of April, 2018, Ms. Sherlock "indicated" to her and the union steward that she had no intention of having her doctor complete the medical questionnaire: Severinski Affidavit, para. 30. It is not clear how Ms. Sherlock indicated her intentions to Ms. Severinski and the union steward. However, Ms. Sherlock agrees that she deemed the original medical questionnaire as unacceptable: Application Response, p. 7. Ms. Sherlock also states that she had questions about the questionnaire that Ms. Severinski "never directly answered": Application Response, p. 7. Given Ms. Sherlock's evidence, and evidence about her further conduct discussed below, I am satisfied that she indicated to Ms. Severinski and the union steward that she had no intention of providing the medical questionnaire.

[47] On April 4, 2018, Ms. Severinski met with the union steward and Heather Hall. They agreed that the medical questionnaire was reasonable and necessary. As a result, Ms. Severinski emailed Ms. Sherlock on April 5, 2018 confirming the views of PHSA and the Union that the medical questionnaire was reasonable and necessary, and asking that the questionnaire be completed by April 13, 2018: Severinski Affidavit, Exhibit H.

[48] The union steward also emailed Ms. Sherlock on April 5, 2018, and told her that it was "highly recommended" that she provide the completed medical questionnaire to avoid discipline. The union steward further explained that if Ms. Sherlock's doctor found certain questions in the questionnaire were not pertinent, he didn't have to answer them: Subarsky Affidavit, Exhibit CC.

[49] On April 9, 2018, Ms. Sherlock provided Ms. Subarsky with a doctor's note dated April 7, 2018, indicating that Ms. Sherlock reported having "3 episodes of allergic reactions in the work place … in response to contact with fragrances and particular chemical sensitivities, such as

some cleaning products." The note concluded that Ms. Sherlock was unable to return to work until it was ensured that she would not be further exposed to these triggers: Subarsky Affidavit, Exhibit DD.

[50] Ms. Sherlock did not provide the completed medical questionnaire to the Disability Program by the April 13, 2018 deadline.

[51] Between April 12-20, 2018, as an interim measure, Ms. Subarsky engaged a workplace safety consultant for further guidance on Ms. Sherlock's reported scent exposures at work. The workplace safety consultant suggested a "scent inspection schedule" at the work site. The scent inspection schedule took place from April 17, 2018 to July 10, 2018. Completed site inspection forms from the inspections indicate that unscented products were used at the site and workers on site were adhering to providing a scent free workplace: Subarsky Affidavit, Exhibit FF.

F. Ms. Sherlock does not provide the medical questionnaire

[52] On May 3, 2018, Ms. Subarsky emailed Ms. Sherlock to advise that her Disability Program file would be closed due to Ms. Sherlock's failure to provide the medical questionnaire. Ms. Subarsky requested that Ms. Sherlock attend a meeting to discuss her intentions with respect to returning to work, and current "unauthorized leave of absence": Subarsky Affidavit, para. 39 and Exhibit GG.

[53] On May 14, 2018, Ms. Subarsky met with Ms. Sherlock and Ms. Hall. Ms. Subarsky and Ms. Hall emphasized the need for Ms. Sherlock to provide medical documentation to know what triggered her reported reactions and try to eliminate them from the workplace: Subarsky Affidavit, para. 40; Hall Affidavit, paras. 21-22.

[54] On May 15, 2018, Ms. Sherlock emailed Ms. Hall and Ms. Subarsky alleging that Ms. Hall knowingly wore a scented hair product in the May 14 meeting, exposing Ms. Sherlock to a potentially unsafe environment. Ms. Hall denies this allegation: Hall Affidavit, para. 22 and Exhibit F. In the email, Ms. Sherlock also confirmed her refusal to provide the medical questionnaire. She alleged that the questionnaire contained inaccurate information, was not

"arguably relevant" and was an invasion of her privacy. Ms. Sherlock copied two government officials and four media outlets to this email. She offered to provide any of them with an interview and further documents related to what she described as "continued offences" in her employment: Hall Affidavit, Exhibit F.

G. PHSA's letter of expectation and termination of employment

[55] On May 23, 2018 Ms. Subarsky provided Ms. Sherlock with a letter of expectation stating that Ms. Sherlock's email to an audience outside PHSA was a breach of PHSA policies that Ms. Sherlock had agreed to: Hall Affidavit, Exhibit G. The letter included a copy of the Policy Agreement signed by Ms. Sherlock on December 1, 2017. In the Policy Agreement, Ms. Sherlock agreed to comply with nine PHSA policies, including PHSA's Privacy and Confidentiality Policy. The letter of expectation confirmed PHSA's expectation that Ms. Sherlock comply with these polices and provided a link to the policies. The Respondents' dismissal application states more specifically that Ms. Sherlock breached PHSA's Privacy and Confidentiality Policy: Dismissal Application, paras. 58-62 and 126.

[56] In my view, the letter of expectation could have been more specific about what policy Ms. Sherlock was alleged to be in breach of. Both the letter of expectation and Dismissal Application could have been more precise about which part of the Privacy and Confidentiality Policy Ms. Sherlock was said to be in breach of. That said, I am satisfied that Ms. Sherlock understood from the letter of expectation that her communication outside of PHSA was deemed by PHSA to be a breach of PHSA's Privacy and Confidentiality Policy.

[57] The Respondents included the Privacy and Confidentiality Policy in their dismissal application materials: Hall Affidavit, Exhibit B. The policy states in part that employees must only disclose confidential information "as necessary to fulfill the terms and requirements of their employment." Confidential information includes information provided to, collected, or created by the PHSA, in the course of business operations of PHSA. I infer from this that PHSA relied on this aspect of the policy to determine that Ms. Sherlock was in breach of it.

[58] On June 6, 2018, Ms. Severinski emailed Ms. Sherlock to confirm that the medical questionnaire was needed to provide medical documentation to support the severity of Ms. Sherlock's reported medical condition and particular fragrance and chemical sensitivities. Without that medical information, Ms. Severinski advised Ms. Sherlock to contact her human resources representative directly to determine next steps: Severinski Affidavit, Exhibit L.

[59] On June 8, 2018, Ms. Sherlock responded to Ms. Severinski's email, with a copy to Ms. Subarsky. She pointed to the medical note she already provided, asserted that it was sufficient, and said that she was not able to return to work until she was advised by PHSA that it was safe: Severinski Affidavit, Exhibit L. Ms. Sherlock again copied two government officials and four media outlets on the email.

[60] In response to this email, Ms. Subarsky scheduled a meeting with Ms. Sherlock on July 16, 2018, to discuss her "repeated non-compliance with PHSA's Privacy and Confidentiality policy": Subarsky Affidavit, para. 48 and Exhibit OO.

[61] On July 15, 2018 Ms. Sherlock emailed advising that she would not participate in the meeting without assurances that "Fragrance Free Policies will be adhered to and enforced": Subarsky Affidavit, Exhibit OO. Ms. Subarsky replied on July 16, 2018 that the location of the meeting was a "scent-free environment, however to date we have no supporting evidence for your scent allergy": Subarsky Affidavit, Exhibit OO. Ms. Sherlock reiterated her concerns in a further email and did not attend the July 16, 2018 meeting: Subarsky Affidavit, Exhibit OO.

[62] On July 18, 2018, and after consultation within PHSA, Ms. Subarsky advised Ms. Sherlock that her employment was terminated due to lack of cooperation with the medical questionnaire and repeated lack of compliance with PHSA's Privacy and Confidentiality Policy: Subarsky Affidavit, para. 49 and Exhibit PP.

IV DECISION

[63] Having summarized and considered the background from the parties' materials, I return to the question of whether Ms. Sherlock's complaint has a reasonable prospect of success. First

I consider whether Ms. Sherlock has no reasonable prospect of proving discrimination. Then I consider whether it is reasonably certain that the Respondents will establish a defence at a hearing.

A. Does Ms. Sherlock have no reasonable prospect of proving discrimination?

1. Disability

[64] The Tribunal has recognized that an allergy or Multiple Chemical Sensitivity may be a disability: *Klewchuk v. City of Burnaby (No. 6)*, 2022 BCHRT 29, para. 356*; Foote v. Essence Pilates and another*, 2021 BCHRT 77, paras. 8 and 73-79. Ms. Sherlock's evidence about her reported fragrance allergies and chemical sensitives is limited. However, some of the materials supplied by the parties support Ms. Sherlock's self reported allergies:

- A medical note dated June 10, 2005 indicating that Ms. Sherlock had allergy tests done showing "positive reactions to: cat hair, pelt, soybean grasses, boxelder tree, wheat and cinnamon": Severinski Affidavit, Exhibit K.
- A May 26, 2017 report from her doctor, based on the 2005 allergy test, that Ms. Sherlock's allergies were triggered by perfumes/fragrance including cosmetic and cleaning products: Severinski Affidavit, Exhibit K.
- A February 8, 2018 emergency discharge summary for Ms. Sherlock, indicating a primary discharge diagnosis of "allergic reaction": Severinski Affidavit, Exhibit K.
- The April 7, 2018 note from Ms. Sherlock's doctor, indicating that Ms. Sherlock had "3 episodes of allergic reactions in the workplace in the past 3 months": Subarsky Affidavit Exhibit DD. However, this medical note appears to be based on Ms. Sherlock's self-report about those reactions and the origin of them.

[65] In the circumstances, I am satisfied that Ms. Sherlock has a reasonable prospect of proving that she has an allergy and/or Multiple Chemical Sensitivity, and that either or both conditions are a disability within the meaning of the *Code*.

2. Adverse impacts

[66] Ms. Sherlock alleges two adverse impacts. The first alleged adverse impact is her exposure to allergens at work. The second alleged adverse impact is the termination of her employment. I will address these allegations in turn.

[67] The Tribunal has recognized that an allergic reaction may amount to an adverse impact: *Klewchuk*, paras. 375 and 400; *Redmond v. Hunter Hill Housing Co-op (No. 2)*, 2013 BCHRT 276, para. 40. Ms. Sherlock alleges three allergic reactions due to being exposed to allergens at work. She alleges that those reactions occurred on January 18, 2018, February 8, 2018, and March 25, 2018. Some of the application to dismiss materials support Ms. Sherlock's version of events. Those materials include: Sherlock's contemporaneous self-reporting, the emergency discharge summary, and the April 7, 2018 doctor's note.

[68] With respect to the February 8, 2018 and March 25, 2018 alleged incidents, the Respondents have put forward evidence that no scented products were used at the worksite on those days: Subarsky Affidavit, paras. 23 and 32 and Exhibits P, Q, Z and AA. This evidence challenges whether Ms. Sherlock was exposed to allergens at work – at least with respect to February 8, 2018 and March 25, 2018. However, at this stage, I need to be satisfied that Ms. Sherlock has no reasonable prospect of proving that she had allergic reactions due to being exposed to allergens at work.

[69] Considering the evidence as whole, I am satisfied that Ms. Sherlock has a reasonable chance of proving she had allergic reactions due to being exposed to allergens at work. This allegation is based on more than speculation. There is some evidence to support it. Further, to the extent the evidence on this issue conflicts, it is a key issue, and I decline to dismiss Ms. Sherlock's complaint on this basis: *Lord*, paras. 49-50.

[70] There is no dispute that PHSA terminated Ms. Sherlock's employment on July 18, 2018. It is uncontroversial that an employee's job loss is an adverse impact: *Holland v. Vancouver Native Housing Society*, 2023 BCHRT 206, para. 18.

3. Disability as a factor in adverse impacts

[71] I have already determined that Ms. Sherlock has a reasonable chance of proving that she had allergic reactions due to being exposed to allergens at work. In the event that Ms. Sherlock proved that adverse impact, it would follow that her allergy and/or Multiple Chemical Sensitivity was a factor in those adverse impacts: *Klewchuk*, para. 400; *Redmond*, para. 43. As a result, I find that Ms. Sherlock has a reasonable chance of proving that a disability was a factor in this alleged adverse impact. I decline to dismiss her complaint on this basis.

[72] I come to a different conclusion regarding PHSA's termination of Ms. Sherlock's employment. Ms. Sherlock argues that her employment was terminated because the Respondents decided it was easier to remove her from the workplace than address her exposure to allergens: Complaint, p. 5. If Ms. Sherlock proved this allegation, it would follow that her allergy and/or Multiple Chemical Sensitivity was a factor in the termination of her employment. However, there is no evidence before me to support this allegation, and it based only on speculation. Instead, the whole of the evidence supports the Respondents' submissions that PHSA terminated Ms. Sherlock's employment because she did not cooperate with the medical questionnaire and did not comply with PHSA's Privacy and Confidentiality Policy: Subarsky Affidavit, para. 49 and Exhibit PP. I will discuss this evidence next.

[73] It is uncontroversial that Ms. Sherlock did not provide PHSA with the completed medical questionnaire. There is also no dispute that on two occasions she copied two government officials and four media outlets on emails to PHSA employees about work-related issues.

[74] With respect to the medical questionnaire, Ms. Sherlock alleges that it was unacceptable because it went beyond the scope of what PHSA required and contained factually incorrect information: Application Response, p. 7. She argues that the Respondents could have relied on medical information she already supplied: Application Response, p. 7. With respect to the alleged privacy violation, Ms. Sherlock argues that PHSA management was not protecting her from discrimination, and she was holding them accountable by exposing these issues outside PHSA: Application Response, p. 11. I will address these arguments in turn.

[75] First, nothing about the medical questionnaire supports Ms. Sherlock's allegation that it unacceptable by virtue of being out of scope or factually inaccurate. With respect to the scope of the medical questionnaire, the questionnaire itself states: "The purpose of these questions is NOT to inquire into illness/injuries or restrictions/limitations that are unrelated to this patient's current absence from work": Severinski Affidavit at Exhibit G. On April 5, 2018, Ms. Sherlock's union steward told Ms. Sherlock that if her doctor found that certain questions in the questionnaire were not pertinent, he didn't have to answer them: Subarsky Affidavit, Exhibit CC. This evidence shows that the questionnaire was not outside the scope of what the Respondents needed.

[76] With respect to any alleged factual errors in the medical questionnaire, Ms. Sherlock appears to be referring to the brief summary PHSA provided at the start of the questionnaire. The summary indicates that Ms. Sherlock reported fragrance and scent exposures at work on January 18, 2018, February 8, 2018, and March 25, 2018, and that these exposures caused adverse reactions. In my view, the summary appears consistent with other contemporaneous documents about these events, including documents authored by Ms. Sherlock.

[77] Even if there were factual inaccuracies in PHSA's summary, in my view nothing turns on that. The doctor answering the questions in the medical questionnaire is not asked to adopt that summary. Rather, the questions for the doctor are focussed on Ms. Sherlock's reported medical conditions, related triggers, treatment, and restrictions in the workplace. It was Ms. Sherlock who advised that she could not return to work until it could "be ensured" that she would not be exposed to "further triggers" of her allergic reactions: Subarsky Affidavit, Exhibit DD. In light of this, PHSA was entitled to require Ms. Sherlock to provide sufficient medical documentation to justify her absence from work: *McDonagh v. Langara College*, 2006 BCHRT 590, para. 15.

[78] I am also not persuaded by Ms. Sherlock's argument that the Respondents could have relied on medical information she already supplied. The evidence shows that the April 7, 2018 note from Ms. Sherlock's doctor was insufficient because it relied on Ms. Sherlock's self-reported allergen exposures and reactions at work. The note is also vague in terms of the

specific fragrances and chemicals that would trigger Ms. Sherlock's allergic reactions. The note does not specify the type or level of fragrance or chemical exposure which would trigger Ms. Sherlock's allergic reactions.

[79] The May 26, 2017 report from Ms. Sherlock's doctor relies on a 2005 allergy test. That test does not address fragrance or chemical allergies but Ms. Sherlock's positive reactions to: "cat hair, pelt, soybean grasses, boxelder tree, wheat and cinnamon": Severinski Affidavit, Exhibit K.

[80] The evidence shows that:

- Ms. Sherlock's employment was terminated because she refused to provide sufficient medical information to support both her absence from work and safe return to work.
- The Respondents could not ensure Ms. Sherlock's safe return to the workplace without this information.
- The termination of Ms. Sherlock's employment stemmed from that issue, and the evidence does not otherwise show that Ms. Sherlock's allergy and/or Multiple Chemical Sensitivity was a factor in her refusal to provide the medical questionnaire, and as a result, the termination of her employment.

[81] Next, I turn to the second basis for PHSA's termination of Ms. Sherlock's employment: Ms. Sherlock's alleged, repeated breach of PHSA's Privacy and Confidentiality Policy. Ms. Sherlock does not dispute that she sent work-related emails to an audience of people outside of PHSA. Instead, Ms. Sherlock states: "any suggested privacy violation occurred after a series of discriminatory acts … When those whom are in place to supposedly protected you through policy enforcement, are the ones directly attacking, systemic injustices need to be exposed": Application Response, p. 11.

[82] I have considered Ms. Sherlock's argument that she was sharing information outside of PHSA to seek accountability for discrimination within. In my view the evidence does not support Ms. Sherlock's allegation that she was being directly attacked in her employment by those who were supposed to protect her. Instead, the evidence shows that Ms. Subarsky, Ms. Hall, Ms.

Severinski, and the union steward agreed on a reasonable approach to address Ms. Sherlock's reported exposure to allergens in the workplace. That reasonable approach included the medical questionnaire which Ms. Sherlock refused to provide.

[83] Based on the whole of the evidence, Ms. Sherlock has no reasonable prospect of proving that her allergy and/or Multiple Chemical Sensitivity was a factor in PHSA's decision to terminate her employment.

4. Conclusion about Ms. Sherlock's prospect of proving discrimination

[84] Ms. Sherlock has a reasonable prospect of proving that she: has a disability as a result of an allergy and/or Multiple Chemical Sensitivity; and was adversely impacted at work because she was exposed to allergens. The alleged adverse impacts are inherently connected to her alleged allergy and/or Multiple Chemical Sensitivity: *Klewchuk*, para. 400. In other words, Ms. Sherlock has a reasonable prospect of proving discrimination with respect to this aspect of her complaint. If this were the end of my inquiry, this aspect of Ms. Sherlock's complaint could proceed to hearing. However, for the reasons that follow, I find that the Respondents would be reasonably certain to justify their conduct on this aspect of the complaint.

B. Are the Respondents reasonably certain to justify their conduct?

1. The Respondents' standard

[85] To justify Ms. Sherlock's alleged exposure to allergens, the Respondents would first need to prove that they had a workplace standard or policy in place, rationally connected to the performance of Ms. Sherlock's job. The workplace standard or policy in this case is the potential presence of allergens in Ms. Sherlock's workplace, namely scents from fragrances or chemicals. I am satisfied that the presence of these scents are rationally connected to the nature of the switchboard operator work in this case. The scents at issue are linked to common and frequently used products in any workplace: *Klewchuk*, para. 403.

[86] The products in this case include cleaning products, air fresheners, and other fragrances, such as those stemming from grooming products. The evidence shows, for example, that Lysol

or alcohol-based wipes are used at the worksite to disinfect switchboard operator desks, and other equipment, including headsets. Such products have a legitimate purpose to ensure a sanitary and clean workplace; and the basic hygiene of workers at the worksite. In my view, the presence of these potential allergens are rationally connected to the performance of the switchboard operator role at the worksite. As a result, I am persuaded that the Respondents are reasonably certain to meet the first step of justification analysis.

2. Good faith

[87] I am also satisfied that the Respondents had an honest and good faith belief that the scents in the workplace - derived from certain products - were necessary to fulfill legitimate work-related purposes: a sanitary and clean workplace; and the basic hygiene of workers at the worksite. The presence of such products are not, on their own, an indication of bad faith. And there is no evidence before me to suggest otherwise. In this specific context, I am persuaded that the Respondents are reasonably certain to prove the second step of the justification criteria.

3. Accommodation

[88] Finally, I also find that the Respondents are reasonably certain to prove the third step of the justification criteria – that they accommodated Ms. Sherlock to the point of undue hardship. An employer can establish undue hardship by showing that they could not have done anything else reasonable or practical to avoid the negative impact on the employee: *Meiorin*, para. 38. The duty to accommodate to the point of undue hardship rests with the respondent. However, if a respondent can show that accommodation required the complainant to take reasonable steps to move the process forward, and the complainant did not take those steps, the complaint will fail: *Drobic v. B.C. (Ministry of Employment and Income Assistance) and others (No. 2)*, 2008 BCHRT 143, citing *McLoughlin v. B. C. Ministry of Environment, Lands and Parks*, 1999 BCHRT 47, para. 126.

[89] The materials in this case show that the Respondents are reasonably certain to prove that: they took all reasonable and practical steps to address Ms. Sherlock's exposure to

allergens at work; and there was nothing further they could do without Ms. Sherlock providing the completed medical questionnaire. The evidence shows that the Respondents took these steps:

- the allergy notice at the workplace – and a revised notice with stronger wording;
- prompt investigation of Ms. Sherlock's reports of allergic triggers in the workplace;
- prompt removal of scented products from the workplace;
- prompt instructions and reminders to staff to not use scented products at work;
- use of a "scent inspection schedule" for nearly three months to monitor for the presence of scents in the workplace; and
- guidance from workplace health and safety consultants on other steps to take.

[90] By January 23, 2018, Ms. Sherlock told Ms. Subarsky that all scented products had been removed from the workplace: Subarsky Affidavit, Exhibit M. Nonetheless, Ms. Sherlock reported an allergic reaction from fragrance exposure at work on February 8, 2018. Ms. Subarsky investigated this incident the next day, and that investigation showed that no other staff had used scented products at work: Subarsky Affidavit, para. 23 and Exhibits P and Q.

[91] By February 9, 2018, Ms. Subarsky says that she was at a loss about how to address Ms. Sherlock's reported allergic reactions: Subarsky Affidavit, Exhibit U. She sought help from PHSA's Disability Management Advisor, Ms. Severinski. Ms. Subarsky, Ms. Severinski, and the union steward agreed that the medical questionnaire was necessary and appropriate to understand and address Ms. Sherlock's reports about allergen exposures in the workplace.

[92] The evidence points to the Respondents taking all practical and reasonable steps to address Ms. Sherlock's reported exposure to allergens in the workplace. There was nothing further that the Respondents could reasonably do short of requesting the medical questionnaire. Without the questionnaire the Respondents did not have the information needed to address Ms. Sherlock's risk of further exposure to allergens in the workplace.

[93] The evidence shows that the medical questionnaire was in Ms. Sherlock's control, and she refused to provide it. The accommodation process could not move forward because of Ms. Sherlock's conduct, not the Respondents.

[94] Given the evidence as a whole, the Respondents are reasonably certain to prove that they accommodated Ms. Sherlock's reported exposure to allergens at work to the point of undue hardship.

4. Conclusion about the reasonable certainty of the Respondents' proving their justification

[95] Even if Ms. Sherlock proved at a hearing that she was exposed to allergens at work, and a disability was a factor, the Respondents are reasonably certain to prove that they were justified in how they addressed this issue. In these circumstances, there is no reasonable prospect that Ms. Sherlock's complaint would succeed. As a result, I exercise my discretion to dismiss her complaint under s. 27(1)(c).

V CONCLUSION

[96] The complaint is dismissed under s. 27(1)(c).

Amber Prince
Tribunal Member