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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:

David Drover

COMPLAINANT

AND:

Engineers and Geoscientists British Columbia and Efrem Swartz

RESPONDENTS

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

Tribunal Member:

Andrew Robb

On his own behalf:

David Drover

Counsel for the Respondents:

Lindsay A. Waddell and Daniel McBain

I INTRODUCTION

[1] David Drover filed a human rights complaint against Engineers and Geoscientists British Columbia [EGBC], which is the professional regulator of engineers and geoscientists in British Columbia, and Mr. Efrem Swartz, EGBC's Director of Legislation, Ethics and Compliance. Mr. Drover was a member of EGBC until he resigned, after EGBC initiated disciplinary proceedings against him. He says EGBC and Mr. Swartz failed to accommodate his disability during the disciplinary process, mainly by attempting to communicate with him in ways that aggravated his disability.

[2] The Respondents deny discriminating. They say Mr. Drover's complaint is an attempt to relitigate disciplinary decisions and other legal actions against him. They also say their conduct in the disciplinary proceedings was justified, and they accommodated Mr. Drover to the point of undue hardship.

[3] The Respondents applied to dismiss the complaint. They say it has no reasonable prospect of success, and it was filed in bad faith or for improper motives. They also say it would not further the purposes of the *Human Rights Code* to proceed with the complaint against Mr. Swartz.

[4] For the following reasons, I find the Respondents are reasonably certain to establish that their conduct was justified, and I dismiss the complaint. Even if Mr. Drover could establish that he experienced an adverse impact that was connected to his disability, there is no reasonable prospect that he could prove the Respondents failed to accommodate him.

[5] To make this decision, I have considered all the information filed by the parties. In these reasons, I only refer to what is necessary to explain my decision.

II BACKGROUND

[6] EGBC regulates the professions of engineering and geoscience in British Columbia. During the events described in Mr. Drover's complaint, EGBC's authority came from the *Engineers and Geoscientists Act* [the **Act**].

[7] Mr. Swartz's role at EGBC includes retaining and instructing external lawyers in relation to disciplinary proceedings against EGBC members.

[8] Mr. Drover became a member of EGBC in 2015. At that time he was also a member of the Association of Professional Engineers and Geoscientists of Alberta [**APEGA**].

[9] In 2017, APEGA found Mr. Drover had engaged in professional misconduct and cancelled his membership. This meant he could no longer work as an engineer or geoscientist in Alberta. Most of the misconduct identified by APEGA related to unprofessional communications and making serious, unfounded allegations of wrongdoing against Mr. Drover's former business associates, government and regulatory organisations, and others.

[10] In 2018, the matter of APEGA's disciplinary action against Mr. Drover was referred to EGBC's disciplinary committee, under s. 33.1 of the *Act*. Section 33.1 allowed the disciplinary committee to make orders equivalent to any disciplinary orders made against a member by regulators in other provinces.

[11] On August 7, 2018, EGBC's external lawyer, Ms. R, sent a letter to Mr. Drover to notify him that EGBC's disciplinary committee would appoint an independent adjudicative panel under s. 33.1 of the *Act* to consider disciplinary measures against him. Mr. Drover replied and acknowledged receipt of the letter. His reply was copied to Mr. P, a lawyer with whom Mr. Drover had consulted.

[12] On August 12, 2018, Mr. Drover sent an email to Mr. Swartz, Ms. R, and several other EGBC staff, saying he was resigning his membership in EGBC, but he still planned to cooperate with the adjudicative panel.

[13] Mr. Drover's resignation did not change EGBC's plan to appoint an adjudicative panel to consider disciplinary measures under s. 33.1 of the *Act*. EGBC says this is because the *Act* allowed it to conduct disciplinary proceedings against former members.

[14] On August 13, 2018, Mr. Drover sent an email to Mr. Swartz, Ms. R, and Ms. W, the adjudicative panel's independent counsel, setting out Mr. Drover's position in relation to the disciplinary proceedings. Ms. W replied to the email and asked Mr. Drover not to copy her on emails until the adjudicative panel was convened. Mr. Drover responded to Ms. W's email, saying that he was no longer a member of EGBC so Ms. W was not authorized to communicate with him directly. He accused her of being corrupt and harassing him.

[15] On August 27, 2018, Ms. R sent an email to Mr. Drover and Mr. P. The email said Ms. R had previously emailed Mr. P, to confirm whether he was representing Mr. Drover, but she had not received any response.

[16] In his reply, Mr. Drover said that since he was no longer a member of EGBC, EGBC had no authority over him. He said Ms. R's attempts to contact him were harassment, and he would report her to the police. He said he refused to communicate directly or indirectly with anyone at EGBC except Mr. Swartz, who was authorised to communicate with him only via email to Mr. P.

[17] On August 30, 2018, Mr. P emailed Ms. R and said he was not representing Mr. Drover. The email was copied to Mr. Drover. On August 31, 2018, Ms. R sent an email thanking Mr. P for his email. This email was also copied to Mr. Drover. In response, Mr. Drover accused Ms. R of harassing him and said she had no authority over him, and she was not to contact him again.

[18] From September 2018 to January 2019, Mr. Drover sent multiple unsolicited emails to Mr. Swartz and other EGBC staff. His emails addressed EGBC's disciplinary proceedings against him, his communications with other government and regulatory agencies, his requests for documents from EGBC, his complaints against former business associates, and other issues.

[19] On January 10, 2019, Mr. Drover applied for reinstatement of his membership in EGBC. EGBC held the application in abeyance pending the adjudicative panel proceedings.

[20] On February 11, 2019, Ms. Waddell (co-counsel for EGBC in this application to dismiss, and not the same Ms. W who had been the adjudicative panel's independent counsel) sent a letter to Mr. Drover, advising that she was now representing EGBC in the disciplinary proceedings. The letter said EGBC was applying for an order under s. 33.1 of the *Act* to cancel his membership, and included EGBC's formal application and submissions to EGBC's adjudicative panel. Cancellation of Mr. Drover's EGBC membership would mean he could not work as an engineer or geoscientist in British Columbia.

[21] On February 12, 2019, Mr. Drover emailed Ms. Waddell, Mr. Swartz, and others. He accused Ms. Waddell of harassing him, and said she was no longer authorised to contact him directly or indirectly. He said that receiving communications from EGBC was traumatizing for him, but he also said EGBC's internal lawyers, including Mr. Swartz, were authorised to contact him by emailing Mr. P. EGBC says this email was the first time Mr. Drover referred to communications from EGBC's lawyers as traumatizing for him.

[22] Later on February 12, 2019, Ms. Waddell sent an email thanking Mr. Drover for acknowledging receipt of her letter, and asking him to refrain from copying her entire firm on his correspondence. Mr. Drover replied and said EGBC had no authority over him, and Ms. Waddell was harassing him by trying to communicate with him.

[23] On February 13, 2019, Mr. P advised Ms. Waddell by email that he was not representing Mr. Drover, but he could accept email correspondence on Mr. Drover's behalf. Mr. P's email said he had been advised that Mr. Drover has post-traumatic stress disorder relating to previous experiences with regulatory agencies, and it can be damaging for him to receive emails. EGBC says this was the first time it received notice that Mr. Drover had PTSD, or that his objection to communicating with its lawyers could be connected to a disability.

[24] On February 15, 2019, new counsel for the independent adjudicative panel, Mr. L, emailed Mr. Drover and Ms. Waddell to confirm receipt of EGBC's application under s. 33.1 of

the *Act*. Mr. Drover responded by email, saying Mr. L was not authorized to communicate with him directly, but Mr. L could communicate with him by emailing Mr. P. In this email, Mr. Drover said he had PTSD, and receiving emails could trigger him and cause him to experience stress, anxiety, and panic.

[25] Ms. Waddell and Mr. L did not contact Mr. Drover directly again until May 2019, but Mr. Drover continued to send multiple emails to Mr. Swartz and other EGBC staff. These emails concerned his complaints to the Law Society and the Canadian Bar Association about EGBC's external lawyers, his submissions to the adjudicative panel, a civil claim he planned to file against EGBC, and other issues.

[26] On May 6, 2019, in response to an inquiry from Ms. Waddell, Mr. P said he could not accept service of documents on behalf of Mr. Drover.

[27] On May 10, 2019, Ms. Waddell sent a letter by email to Mr. Drover and Mr. P. EGBC says this was the only attempt by EGBC's lawyers to contact Mr. Drover directly, after his assertion that he had PTSD and found direct communication triggering. The letter said Ms. Waddell needed a way to serve Mr. Drover, and asked him to consider instructing Mr. P to accept service on his behalf. Mr. Drover replied promptly, and said Ms. Waddell was harassing him and was to never contact him again.

[28] On May 11, 2019, Mr. Drover emailed Ms. Waddell and said he had a change of heart, and he would accept service of documents by registered mail. Until September 2019, Ms. Waddell and Mr. L communicated with Mr. Drover via email to Mr. P, and by registered mail when it was necessary to prove service of documents, for the purpose of EGBC's application under s. 33.1 of the *Act*.

[29] On July 15, 2019, in an email to Mr. L and Mr. Swartz, Mr. Drover said his PTSD causes memory loss, and cited an online resource saying that memory and concentration problems are common symptoms of PTSD.

[30] On or about July 16, 2019, Ms. Waddell sent a letter to Mr. Drover, via registered mail and via email to Mr. P. The letter said that if he required accommodation during the adjudicative panel proceedings, he should provide medical information setting out his restrictions and accommodation needs. EGBC says Mr. Drover did not provide any medical information in response to this request.

[31] On August 15, 2019, Mr. Drover sent submissions to the adjudicative panel, in response to EGBC's application under s. 33.1 of the *Act*.

[32] On September 18, 2019, the adjudicative panel released its decision. It decided to cancel Mr. Drover's membership in EGBC. Mr. L sent the decision to Mr. Drover via email to Mr. P.

[33] On the same day, September 18, 2019, EGBC's CEO notified Mr. Drover that EGBC was blocking his email address, and it would no longer receive communications from him by email. EGBC says this was because of his hundreds of emails to EGBC, some of which included serious, unfounded allegations against Mr. Swartz and other EGBC staff.

[34] On September 26, 2019, Mr. Drover sent an email to Mr. L and Ms. Waddell, saying he was blocking their email addresses and that they and EGBC were no longer permitted to contact him directly or indirectly, not even via Mr. P. The next day, Mr. P advised Mr. L and Ms. Waddell that he could no longer accept any communications on behalf of Mr. Drover.

[35] Between November 2019 and January 2020, Mr. Drover sent multiple emails to Mr. L and Ms. Waddell. His emails requested that the adjudicative panel's decision be reopened and overturned, and discussed his plans to litigate against EGBC in the British Columbia Supreme Court. EGBC says Mr. Drover never appealed the adjudicative panel's decision.

III DECISION

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

[36] The Respondents apply to dismiss Mr. Drover’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.

[37] 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.

[38] 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. The Tribunal must base its decision on the materials filed by the parties, and not on speculation about what evidence may be filed at a hearing: *University of British Columbia v. Chan*, 2013 BCSC 942 at para. 77.

[39] 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.

[40] To prove his complaint at a hearing, Mr. Drover will have to prove he has a characteristic protected by the *Code*, he was adversely impacted in the services he received from the Respondents, 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* reasonable justification. If the impact is justified, there is no discrimination.

[41] For this application, the Respondents accept that there is some evidence capable of establishing that Mr. Drover has a disability, namely PTSD. But they say there is no reasonable prospect that Mr. Drover will establish that he experienced an adverse impact in the services he received from the Respondents, or a connection between his PTSD and any alleged adverse impact. Even if he could establish his case, the Respondents say the complaint has no prospect of success because they are reasonably certain to prove their conduct was justified and they accommodated Mr. Drover to the point of undue hardship.

[42] Mr. Drover's submissions in response to the application under s. 27(1)(c) are not responsive to the Respondents' arguments, or to the factors the Tribunal considers under s. 27(1)(c). He says his complaint must have a reasonable prospect of success because, unlike other human rights complaints he filed, which were dismissed at the Tribunal's initial screening stage, the Tribunal agreed to proceed with this complaint. The fact that the complaint has not already been dismissed leads Mr. Drover to believe it has a reasonable chance of success.

[43] Mr. Drover's submissions reflect a misunderstanding of the Tribunal's process. The Tribunal's *Rules of Practice and Procedure* provide that its decision to proceed with a complaint does not preclude a respondent from applying to dismiss the complaint: Rule 12(8). At the screening stage, the Tribunal only decides whether a complaint sets out facts that, if proven, could breach the *Code: Gichuru v. Vancouver Swing Society*, 2021 BCCA 103 at paras. 57-60.

B. Are the Respondents reasonably certain to establish a defence?

[44] I acknowledge the Respondents' arguments about whether Mr. Drover can establish his case, but I find the application under s. 27(1)(c) can be addressed most efficiently in the context of the Respondents' justification defence. To justify any adverse impacts experienced by Mr. Drover that were connected to his disability, the Respondents would have to prove they were acting in good faith, for a purpose rationally connected to EGBC's function, and they accommodated Mr. Drover to the point of undue hardship: *British Columbia (Superintendent of*

Motor Vehicles) v. British Columbia (Council of Human Rights), [1999] 3 SCR 868 [*Grismer*]. In an application to dismiss on this basis, the Respondents must establish that they are reasonably certain to prove their defence at a hearing: *Purdy v. Douglas College and others*, 2016 BCHRT 117 at para. 50.

[45] Mr. Drover's complaint alleges EGBC and Mr. Swartz are responsible for EGBC staff and lawyers communicating with him, despite knowing that their communications could trigger symptoms of his PTSD. Mr. Drover says the communications he received from EGBC's staff and external lawyers in August 2018, February 2019, and May through September 2019, and an automatic out of office reply email from Ms. R, in January 2020, traumatised him and triggered his PTSD. He says this trauma was an adverse impact on him which was connected to his disability. He also says EGBC ought to have accommodated his PTSD by staying its application against him, or by proceeding in a manner that accommodated his disability. He does not say what accommodation he may have required, other than not having direct contact with EGBC's external lawyers.

[46] The Respondents say they applied a standard requiring a reasonable means of communicating with Mr. Drover, and this standard was for a purpose rationally connected to their function: EGBC and its lawyers had a duty to communicate with Mr. Drover during the course of the application against him under the *Act*, in order to ensure procedural fairness in the disciplinary process. They say the purpose of having a reasonable means of communication was rationally connected to EGBC's function as a regulatory body administering disciplinary proceedings, and their attempts to communicate with Mr. Drover were motivated by a good faith belief that they needed to communicate with him to ensure procedural fairness.

[47] There is no evidence before me that could contradict these submissions by the Respondents. I find they are reasonably certain to establish the first two elements of the *Grismer* test.

[48] In assessing whether the Respondents accommodated Mr. Drover to the point of undue hardship, I consider that there is no evidence before me suggesting he disclosed any disability

to the Respondents until February 2019, after Ms. Waddell first contacted him. His complaint says the Respondents should have known he was exhibiting signs of PTSD before that, but Mr. Drover does not specify which signs they should have perceived. Nor does he point to any evidence on which I could infer that the Respondents ought to have known of his PTSD or any need for accommodation, before February 2019. The evidence before me suggests the Respondents could not reasonably have known that he needed accommodation, before February 2019. On this basis, I find they are reasonably certain to prove their conduct to that point was justified.

[49] After Mr. Drover said he had PTSD, in February 2019, it appears that EGBC's external lawyers attempted to respect his request that there be no direct communication with him. They worked with Mr. P to find a way to communicate with Mr. Drover indirectly, as he requested.

[50] The communications after February 2019, which Mr. Drover says had an adverse impact on him, include Ms. Waddell's letter dated May 10, 2019, which asked for his input about how to serve documents on him. They also include replies to Mr. Drover's emails, including some automatic out of office replies, and some emails that appear to have been sent to him via email to Mr. P, as Mr. Drover requested.

[51] I find the Respondents are reasonably certain to establish that their conduct was justified when EGBC lawyers and staff replied to emails they received from Mr. Drover, including the automatic out of office replies. Mr. Drover has not explained why it was unreasonable, or a failure to accommodate him, when the Respondents and their agents responded to communications that he persistently initiated.

[52] I also find the Respondents are reasonably certain to establish that Ms. Waddell's letter dated May 10, 2019, was justified. The letter was part of an effort to obtain information about how to accommodate Mr. Drover, when Mr. P was unable to facilitate service of documents. Mr. Drover has not suggested there was any other way for the Respondents to obtain that information.

[53] Mr. Drover's complaint says the Respondents should have stayed the adjudicative panel proceedings, as a form of accommodation. But Mr. Drover did not ask the panel for a stay of proceedings, or give the Respondents any medical information to support a request for a stay. Other than his assertion that PTSD affected his memory, and his statement that direct email contact was triggering for him, he did not give the Respondents any information about his symptoms or restrictions, before he filed this complaint. In 2021, after the Tribunal ordered him to disclose relevant medical records to the Respondents, he provided his doctor's notes showing he was exhibiting symptoms of PTSD during EGBC's disciplinary process. But the records do not refer to memory problems, and they do not suggest he was incapable of participating in the process, or that the only reasonable accommodation was to stay the proceedings.

[54] There is no evidence before me that could support a finding that Mr. Drover's disability prevented him from participating in EGBC's disciplinary process, or that the only reasonable accommodation in the circumstances was a stay of proceedings. I find the Respondents are reasonably certain to establish that continuing with the disciplinary process was necessary to the accomplishment of EGBC's purposes and that they reasonably accommodated Mr. Drover in the circumstances.

[55] I find Mr. Drover's complaint has no reasonable prospect of success because the Respondents are reasonably certain to establish their conduct was justified.

IV CONCLUSION

[56] I dismiss the complaint under s. 27(1)(c). This means it is not necessary for me to address the Respondents' arguments under s. 27(1)(e) and s. 27(1)(d)(ii).

Andrew Robb
Tribunal Member