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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:

Kerry-Ann Lewis

COMPLAINANT

AND:

His Majesty the King in Right of the Province of British Columbia as represented by the Ministry of Public Safety and the Solicitor General operating as Alouette Correctional Centre for Women

RESPONDENT

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

Tribunal Member:

Robin Dean

Counsel for the Complainant:

Jylle Carpenter-Boesch

Counsel for the Respondent:

Joanne Kim

I INTRODUCTION

[1] Kerry-Ann Lewis describes herself as a Black Trinidadian and Indian woman of Muslim faith who follows a Halal diet. Ms. Lewis says that she also has several dietary restrictions due to food allergies and sensitivities. She alleges that while incarcerated at Alouette Correctional Centre for Women, she was denied a Halal diet that accommodated her religious and dietary needs. She has filed a complaint in the area of services alleging discrimination based on race, physical disability, sex, and religion contrary to s. 8 of the *Human Rights Code*.

[2] Ms. Lewis's complaint alleges that:

- a. Her meals were contaminated with non-Halal food because they were not prepackaged, unlike the Halal meals provided to male inmates at BC correctional centres;
- b. She experienced recurring issues with her meals, including:
 - i. Delivery of meals;
 - ii. Meals that had been tampered with;
 - iii. Receiving moldy food;
 - iv. Receiving food that was not Halal or that she was allergic to; and
 - v. Receiving Halal meals contaminated with non-Halal food.
- c. She was subjected to offensive comments by staff regarding her diet which led to a hostile correctional environment while in custody, including:
 - i. "Ignorant comments";
 - ii. Comments that she should go on the vegan or vegetarian diets; and
 - iii. Comments "minimizing" her Halal diet and allergy concerns.

[3] Alouette denies discriminating, pointing to efforts it made to accommodate Ms. Lewis's Halal diet as well as her food allergies and sensitivities. Further, it says that Ms. Lewis's complaints regarding a hostile correctional environment are speculation and conjecture. It applies to dismiss Ms. Lewis's complaint under ss. 27(1)(b), 27(1)(c), and 27(1)(d)(ii) of the *Code*.

[4] The issues I must decide on Alouette's application are:

- a. Under s. 27(1)(b), whether Ms. Lewis's complaint alleges arguable contraventions of the *Code*;
- b. Under s. 27(1)(c), whether there is no reasonable prospect Ms. Lewis will establish at a hearing that Alouette discriminated against her based on race, physical disability, sex, or religion in allegedly failing to provide Halal meals that accounted for her dietary restrictions;
- c. Under s. 27(1)(c), whether Ms. Lewis has taken her complaint regarding the hostile correctional environment out of the realm of speculation and conjecture; and
- d. Under s. 27(1)(d)(ii), whether proceeding against Alouette would not further the purposes of the *Code* because Alouette responded to her complaints about not being provided with meals that complied with her religious and dietary requirements.

[5] For the following reasons, I deny Alouette's application to dismiss Ms. Lewis's complaint under s. 27(1)(c) with the exception of the pre-packaged Halal meals allegation. Ms. Lewis's complaint will proceed in all other respects.

II BACKGROUND

[6] 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. I make no findings of fact.

[7] Alouette is a provincially operated correctional centre. According to Alouette, it provides Halal meals to those who have a sincere religious belief in following a Halal diet. Once a Halal diet has been approved, it is provided “as soon as practicable.” Alouette says that those who are approved for a Halal diet receive the same meal, regardless of sex, except that males are provided with more food to account for their increased caloric needs.

[8] Ms. Lewis was remanded to Alouette’s custody on August 20, 2018. According to Ms. Lewis, when she arrived at Alouette, she was told that her only options were a vegetarian, vegan or “regular” diet. She says she was not told that Halal food was available to her at Alouette. In the materials before me it does not appear that she asked for a Halal diet upon intake. Regardless, from the beginning of Ms. Lewis’s incarceration, it seems that she struggled with the food Alouette provided. This was in part due to her food allergies and sensitivities, which are not disputed by Alouette. Further, says Ms. Lewis, most of the food she received was not Halal.

[9] Ms. Lewis says that when she met with her criminal lawyer in September 2018, she had lost a substantial amount of weight. Ms. Lewis told her lawyer that she had lost weight because none of the food was Halal. According to Ms. Lewis, her lawyer told her that Alouette had to accommodate her Halal diet and that she should ask for it. Ms. Lewis says that on September 18, 2018, she filled out a request form saying that she did not eat pork. The request form, which is in Alouette’s materials, says that for “religious reasons” she does “not eat PORK, nor has [she] ever eaten it in [her] entire life.” Ms. Lewis says that Alouette responded that she would be placed on a no pork diet and that no further changes to her diet would be made.

[10] Ms. Lewis says she asked about the availability of a Halal diet on October 7, 2018, and also told Alouette that she could not eat eggs. The request form that she filled out on that date says: “Why no halal diet?” According to Ms. Lewis, her inquiry about a Halal diet was ignored, but she was told that she would have to speak to health care to have a no egg alert put on her records with the kitchen. According to Alouette, it did not view Ms. Lewis’s question about the availability of a Halal diet as a request that she receive a Halal diet so at that point, Halal meals were not provided to her.

[11] Ms. Lewis verbally requested a Halal diet in March 2019 and began to receive a Halal diet in May or June 2019, after her request was approved by an Imam.

[12] At various times during her incarceration at Alouette, alerts were put on file for Ms. Lewis's diet to account for her food allergies and sensitivities including:

- a. August 20, 2018: no mushrooms or kiwis;
- b. September 6 & 14, 2018: no eggs, kiwis, mushrooms, or mayonnaise;
- c. September 19, 2018: no pork;
- d. October 8, 2018: no eggs or egg products;
- e. December 12, 2018: no gravy or sauce;
- f. March 7, 2019: substitute apples for oranges and whole wheat bread for white bread; and
- g. June 7, 2019: no tomatoes or tomato soup.

[13] Following medical appointments with a doctor, the following alerts were put in place for Ms. Lewis's diet:

- a. March 27, 2019: no oranges;
- b. July 3, 2019: no eggs; and
- c. November 20, 2020: no mushrooms or kiwis.

[14] Ms. Lewis says that despite the approval to receive a Halal diet, she still experienced contamination of her food with non-Halal items and received vegetarian or vegan meals instead of Halal meals. She also says that she continuously received food items that she was allergic or sensitive to. In the materials are several complaint forms detailing Ms. Lewis's troubles with the food that she received from Alouette's kitchen. Ms. Lewis's complaint describes physical,

mental, and emotional harm that she experienced from “the constant stress, malnutrition, and extensive minimizing of my religious Halal/Allergy diet. Along with the toxic environment it created with some staff and some inmates.” She says that she did not trust the food that she received at Alouette because of these issues.

[15] Alouette says that it worked to investigate and rectify Ms. Lewis’s complaints about the food she received, including, sending replacement items, saran wrapping Ms. Lewis’s food to prevent contamination, placing her food in Styrofoam coolers to prevent contamination, creating a custom Halal menu to account for Ms. Lewis’s food allergies and sensitivities, ordering special Halal items, and providing Ms. Lewis with ginger products for her stomach issues. Ms. Lewis says that despite these efforts, the problems with her food persisted.

[16] Ms. Lewis filed her complaint with the Human Rights Tribunal on December 21, 2020. She was released from custody on September 3, 2021.

III DECISION

A. Section 27(1)(b) – No arguable contravention

[17] Section 27(1)(b) of the *Code* gives the Tribunal the discretion to dismiss all or part of a complaint if it does not allege facts that could, if proven, contravene the *Code*. Under s. 27(1)(b), the Tribunal only considers the allegations in the complaint and information provided by the complainant. It does not consider alternative scenarios or explanations provided by the respondent: *Bailey v. BC (Attorney General) (No. 2)*, 2006 BCHRT 168 at para. 12; *Goddard v. Dixon*, 2012 BCSC 161 at para. 100; *Francescutti v. Vancouver (City)*, 2017 BCCA 242 at para. 49. The threshold for a complainant to allege a possible contravention of the *Code* is low: *Gichuru v. Vancouver Swing Society*, 2021 BCCA 103 at para. 56.

[18] In this case, Ms. Lewis must set out facts that, if proved, could establish that she has a characteristic protected by the *Code*, she was adversely impacted in services, and her protected characteristic was a factor in the adverse impact: *Moore v. British Columbia (Education)*, 2012 SCC 61 at para. 33.

[19] Alouette says Ms. Lewis’s complaint that she was not provided with consistent access to a diet that properly accommodated her physical disability and religion does not allege a violation of the *Code*. I disagree. Ms. Lewis’s complaint clearly alleges that she has the protected characteristics of a physical disability and a religion – Islam. She alleges that she suffered the adverse impacts of losing a substantial amount of weight as well as stress. Finally, she alleges that these adverse impacts occurred because she has a physical disability and religious beliefs about her diet that were not properly accommodated. Looking only to Ms. Lewis’s complaint, as I am required to do on a s. 27(1)(b) application, I find that Ms. Lewis has alleged a violation of the *Code* with respect to the complaint about her diet.

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

[20] Alouette applies to dismiss Ms. Lewis’s complaint on the basis that it has no reasonable prospect of success: *Code*, s. 27(1)(c) The onus is on Alouette to establish the basis for dismissal.

[21] 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.

[22] 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.

[23] 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.

[24] To prove her complaint at a hearing, Ms. Lewis will have to prove that she has a characteristic protected by the *Code*, she was adversely impacted in services, and her protected characteristic was a factor in the adverse impact: *Moore v. British Columbia (Education)*, 2012 SCC 61 at para. 33. If she did that, the burden would shift to Alouette to justify the impact as a *bona fide* reasonable justification. If the impact is justified, there is no discrimination.

[25] Where a Respondent argues that the complaint has no reasonable prospect of success because it is reasonably certain to prove a defence at the hearing: *Purdy v. Douglas College and others*, 2016 BCHRT 117 at para. 50, the onus is on the Respondent.

[26] To justify adverse impacts at a hearing, a Respondent has to prove that: (1) they adopted the standard for a purpose rationally connected to the function being performed, (2) they adopted the standard in an honest and good faith belief that it was necessary to the fulfillment of that legitimate purpose; and (3) the standard is reasonably necessary to the accomplishment of that legitimate purpose. This third element encompasses their duty to accommodate [the complainant] to the point of undue hardship: *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 SCR 868.

[27] If the adverse impacts are justified, there is no discrimination.

1. Pre-packaged Halal Meals Allegation

[28] Ms. Lewis says that pre-packaged meals are less susceptible to contamination from non-Halal food and argues that Alouette discriminated against her on the basis of sex because males who are incarcerated in British Columbia receive pre-packaged meals while females do not. Alouette says that this is untrue. It asserts that males and females who are incarcerated in British Columbia receive Halal meals from the same distributor and that the only difference in the meals is the portion size. Alouette provides evidence of a contemporaneous investigation it

made into Ms. Lewis's allegations during the time she was incarcerated. The result of that investigation was the determination that no other individuals incarcerated in the province received pre-packaged meals.

[29] Ms. Lewis says that I must send this issue to a hearing because there is conflicting evidence. I disagree. Issues of credibility at the foundation of a case should not be decided based on conflicting affidavits alone. However, not all credibility issues are central to a case, and the fact that a complaint raises issues of credibility does not mean the Tribunal must deny an application under s. 27(1)(c): *Evans v. University of British Columbia*, 2008 BCSC 1026 at para. 34. A Tribunal member may be able resolve credibility issues by other means. Usually corroborative evidence is required: *Monnette v. BC (Ministry of Justice)*, 2017 BCHRT 34 at para. 34.

[30] I must therefore consider whether the credibility issue presented here is central to Ms. Lewis's case and whether corroborative evidence is available to resolve the credibility issue.

[31] In my view, the conflict presented here is central to the case. However, the substance of Ms. Lewis's complaint about the pre-packaged meals is speculative, whereas Alouette has provided contemporaneous, corroborative evidence that males and females in the province's correctional centres receive the same Halal food from the same distributor. In response to similar allegations made by the Complainant during her custody, the Respondent investigated and confirmed several times that no other provincial correctional centre provides pre-packaged Halal meals as alleged. At various times during Ms. Lewis's incarceration, Alouette told Ms. Lewis the results of their investigation into her complaints – that they were not able to find any commercial food service providers providing pre-packaged Halal meals.

[32] Because Ms. Lewis has not taken her allegation about the pre-packaged Halal meals beyond the realm of speculation and conjecture, I dismiss this allegation under s. s. 27(1)(c).

2. *Diet Allegations*

[33] Ms. Lewis alleges that she was not provided with consistent access to a diet that properly accommodated her physical disability and religion while at Alouette. She says as a result, she experienced stress, malnutrition, and animosity between herself, staff, and other inmates as a result the constant complaints about her food. Alouette says that it might have made some “unfortunate oversights” in the provision of food to Ms. Lewis, but that these mistakes were not discrimination. Alouette says that “[t]he *Code* does not require a service to be performed perfectly, without administrative errors.” Further, Alouette asserts that Ms. Lewis’s decision not to eat was voluntary, saying “[h]er decision not to access a service does not mean she was denied or discriminated against in the provision of a service.”

[34] Ms. Lewis responds that Alouette’s position invalidates her experience and fails to recognize “the systemic issues that specially impact Ms. Lewis as a Muslim woman with a physical disability.” She says that while a standard of perfection in accommodation is not required, accommodation must be reasonable.

[35] Here, Ms. Lewis has not alleged a few minor mistakes in accommodation. Ms. Lewis alleges that the complaints about her food were nearly constant. These allegations are supported by her client logs and complaint forms which show the difficulties she had in receiving a diet that worked for her. Under these circumstances, I cannot accept Alouette’s argument that Ms. Lewis is holding it to a standard of perfection. While Alouette says it did try to accommodate Ms. Lewis, where mistakes in accommodation happen frequently enough so as to render the accommodation unreasonable, a Respondent could be found to have discriminated in the provision of that accommodation. I do not find, based on the materials before me, that Alouette is reasonably certain to establish that it properly accommodated Ms. Lewis’s disability and religion.

[36] Finally, a note about choice. Ms. Lewis, as a person incarcerated, was in a vulnerable position. Her choice over the food she ate was limited, and she was entirely dependent on Alouette to meet its obligation to provide her with food that respected her human rights and

accommodated her disability and religion. Ms. Lewis was not obligated to either eat food that would make her sick and violate her religious beliefs or go hungry. Putting her to that choice could be found to be discrimination should a member hearing this matter determine that this is indeed what occurred.

3. *Hostile Correctional Environment Allegations*

[37] Ms. Lewis says that she experienced a hostile correctional environment due to the frequency of her complaints about her food, which she says poisoned the correctional staff and other inmates towards her. She says that correctional staff called her a “princess” or “high maintenance” on several occasions. She also alleges that on one occasion, one of the correctional staff told her that she was “giving Muslims a bad name”. She says that her complaints about the food she received were minimized by staff telling her to go on the vegan or vegetarian diet.

[38] Alouette asserts that Ms. Lewis will not be able to prove any adverse impact regarding her complaint about a hostile correctional environment. Alouette focuses its argument on the steps it took at the time to address the comments and says that it did not minimize her concerns about her diet but rather worked with kitchen staff to accommodate those concerns.

[39] Alouette has not persuaded me that Ms. Lewis has no reasonable prospect of proving that she suffered an adverse impact with regards to the hostile environment complaint. While Alouette may have taken steps to address the complaints Ms. Lewis had about her treatment from staff and other inmates, Ms. Lewis says that these efforts did not work in reducing the hostility that she was subjected to. And to the extent that Alouette says that any of the comments were not made, that is a credibility issue central to the complaint that I cannot resolve on the basis of the materials before me.

[40] Further, Alouette’s argument is more akin to a defence in which it says it took all reasonable and appropriate steps. To be successful at a hearing, the Respondents must show that they investigated alternatives and “could not have done anything else reasonable or practical to avoid the negative impact on the individual”: *Moore* at para. 49.

[41] While I accept Alouette attempted to respond in good faith to Ms. Lewis's complaints, I am not persuaded based on the material before me that it is reasonably certain they will demonstrate they could not have done anything else reasonable or practical to avoid the negative impact on Ms. Lewis. I have no evidence or argument that Alouette did everything it reasonably could have to address these issues. I have no evidence or argument about undue hardship, and I cannot say based on the evidence before me that Alouette is reasonably certain to prove that it reached this threshold.

[42] Alouette bears the burden of convincing me that it is reasonably certain to make out a defence. It has not done so; I decline to dismiss this part of Ms. Lewis's complaint.

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

[43] Section 27(1)(d)(ii) allows the Tribunal to dismiss a complaint where proceeding with it would not further the purposes of the *Code*. These purposes include both private and public interests: s. 3. Deciding whether a complaint furthers those purposes is not only about the interests in the individual complaint. It may also be about broad public policy issues, like the efficiency and responsiveness of the human rights system, and the expense and time involved in a hearing: *Dar Santos v. UBC*, 2003 BCHRT 73, at para. 59, *Tillis v. Pacific Western Brewing and Komatsu*, 2005 BCHRT 433 at para. 15, *Gichuru v. Pallai (No. 2)*, 2010 BCHRT 125, at paras. 113-118.

[44] Alouette argues that it would not further the *Code's* purposes for the complaint to proceed because the underlying dispute has been resolved or remedied: *Williamson v. Mount Seymour Park Housing Coop*, 2005 BCHRT 334. In particular, Alouette says:

- a. It investigated and responded to every inmate complaint form or general request form Ms. Lewis submitted regarding issues with her meals or diet;
- b. Where Ms. Lewis raised concerns about her meals during mealtime, Alouette immediately investigated and resolved her concerns; and

- c. Where Ms. Lewis raised concerns about Alouette staff acting inappropriately or offensively regarding her dietary issues, Alouette took them seriously and offered ways of resolving these concerns.

[45] Generally, where a complaint of discrimination has been appropriately resolved, proceeding with the complaint would not further the purposes of the *Code* because the discrimination has already been remedied: *Williamson* at para. 13. The Tribunal's ability to fulfill the purposes of the *Code* is harmed when its resources are taken up with complaints that have already been adequately addressed, whether through settlement, unilateral respondent action or other proceedings: *Williamson* at para. 13.

[46] For the Tribunal to dismiss a complaint under s. 27(1)(d)(ii) on the basis that the respondent has appropriately addressed the alleged discrimination, the respondent must persuade the Tribunal that:

- a. The respondent took the complainant's discrimination claim seriously;
- b. The respondent appropriately addressed the impact on the complainant; and
- c. Where necessary, the respondent took appropriate steps to ensure the discrimination would not happen again: see, e.g., *Horner v. Concord Security Corp*, 2003 BCHRT 86; *Williamson*; *Aflakian v. Fraser Health Authority*, 2011 BCHRT 170; *Baker v. Brentwood College School and another*, 2011 BCHRT 170; Stengert.

[47] The Tribunal's analysis under s. 27(1)(d)(ii) is contextual and case specific. Alongside the above requirements for dismissing a complaint on the basis that the alleged discrimination has been addressed, the Tribunal may also consider relevant contextual factors, such as: the seriousness of the alleged discrimination; the timeliness of the respondent's response to the allegation; the nature of its response (e.g., whether the respondent investigated the allegation); whether the respondent acknowledged the discrimination; whether the complainant was compensated for their losses; whether the respondent has a discrimination policy; and the

importance of encouraging parties to address allegations of discrimination in a timely and constructive manner: see *Baker* at para. 47.

[48] Here, I decline to dismiss Ms. Lewis's complaint under s. 27(1)(d(ii)). In my view, given the seriousness of the discrimination alleged – that Ms. Lewis could not eat because she was not properly accommodated in the meals she received – it was necessary for Alouette to ensure that the discrimination alleged did not occur again. Yet, as discussed above, Ms. Lewis alleges that the mistakes about her food were continuous throughout her incarceration. Ms. Lewis describes the stress and malnutrition she experienced as well as a hostile carceral environment due to her making complaints about her food. I cannot say that Alouette remedied the issues that Ms. Lewis alleges she faced where the allegations are that the mistakes were ongoing.

IV CONCLUSION

[49] I deny Alouette's application to dismiss Ms. Lewis's complaint. Ms. Lewis's complaint will proceed with the exception of the pre-packaged Halal meals allegation.

Robin Dean
Tribunal Member