

Date Issued: April 23, 2024

File: CS-002337

Indexed as: The Employee v. LifeLabs BC LP, 2024 BCHRT 126

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:

The Employee

COMPLAINANT

AND:

LifeLabs BC LP

RESPONDENT

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

Tribunal Member:

Edward Takayanagi

Counsel for the Complainant:

Aleem Bharmal

Counsel for the Respondent:

James D. Kondopulos
Jaime H. Hoopes

I INTRODUCTION

[1] The Employee filed a retaliation complaint against her former employer, LifeLabs BC LP, alleging it retaliated against them contrary to s. 43 of the *Human Rights Code*, for filing a complaint of employment discrimination based on sex and gender identity [the **Original Complaint**]. The Employee alleges LifeLabs retaliated by not complying with the terms of settlement of the Original Complaint, and by interfering with the Employee's attempt to find new work when it did not provide a positive reference to potential employers.

[2] LifeLabs denies retaliating and applies to dismiss the complaint under ss. 27(1)(b), (c), and (d)(ii) of the *Code*. I find it most efficient to deal with this application under s. 27(1)(c) on the basis that the complaint has no reasonable prospect of succeeding at a hearing.

[3] For the following reasons, I dismiss the complaint. Based on the materials before me, I am persuaded there is no reasonable prospect the Tribunal would find after a hearing that the Employee's allegation that LifeLabs engaged in retaliatory conduct related to the Original Complaint goes beyond speculation and conjecture. 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 PRELIMINARY ISSUES

A. Limitation of publication

[4] The parties consent to an order limiting publication of the Employee's name.

[5] Complaints at Tribunal are presumptively public: *Mother A obo Child B v. School District C*, 2015 BCHRT 64 at para. 7. This openness serves four main goals: maintaining an effective evidentiary process, ensuring that Tribunal members act fairly, promoting public confidence in the Tribunal, and educating the public about the Tribunal's process and development of the law: *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 SCR 1326 at para. 61; *JY v. Various Waxing Salons*, 2019 BCHRT 106 at para. 25. These goals align with the purposes of the

Code, which include fostering a more equitable society and identifying and eliminating persistent patterns of inequality: *Code*, s. 3. The main way that the Tribunal furthers these purposes is through its public decisions: *A. v. Famous Players Inc.*, 2005 BCHRT 432 at para. 14.

[6] The Tribunal has discretion to limit publication of identifying information where a person can show their privacy interests outweigh the public interest in full access to the Tribunal's proceedings: *Tribunal Rules of Practice and Procedure [Rules]*, Rule 5(6); *Stein v. British Columbia (Human Rights Tribunal)*, 2020 BCSC 70 at para. 64(a). The Tribunal may consider factors like the stage of the proceedings, the nature of the allegations, private detail in the complaint, harm to reputation, or any other potential harm: *JY* at para. 30. It may also consider whether the proposed limitation relates to only a "sliver" of information that minimally impairs the openness of the proceeding: *CS v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2019 BCCA 406 at para. 37. It is not enough to just assert that a person's reputation may be tarnished: *Stein* at para. 64(c).

[7] The dismissal application turns on interpretation of a Settlement Agreement which contains a confidentiality clause. I find that it will be necessary to explain the contents of the agreement in some detail to explain my decision. I am satisfied that naming the Employee in this decision in these circumstances may impact her privacy interests, which outweigh any public interest in knowing the identity of the Employee.

[8] Accordingly, the complaint will be identified as "the Employee" in this decision.

B. Sur-reply

[9] The Employee provides a sur-reply to, what she says are new issues raised by LifeLabs in its reply to the dismissal application.

[10] Generally, the Tribunal's application process involves three submissions: the application, the response, and the reply: Rule 28(2). The Tribunal may accept further submissions where fairness requires that a party be given an opportunity to respond to new issues raised in reply: Rule 28(5); *Kruger v. Xerox Canada Ltd (No. 2)*, 2005 BCHRT 24 at para. 17. The overriding

consideration is whether fairness requires an opportunity for further submissions: *Gichuru v. The Law Society of British Columbia (No. 2)*, 2006 BCHRT 201, para. 21.

[11] The Employee says LifeLabs argued for the first time in its reply that the Employee made misleading arguments and filed an improper affidavit referring to privileged settlement discussions. She seeks to address these allegations in their sur-reply.

[12] I have reviewed all the materials and I agree with the Employee that the reply submission raises new allegations. In these circumstances I am satisfied that the reply submission includes new issues requiring the Employee to have a fair opportunity to respond and I allow her to do so.

[13] I grant the application for sur-reply under Rule 28(5).

III BACKGROUND

[14] The following background is taken from the parties' materials. I make no findings of fact.

[15] The Employee was employed by LifeLabs.

[16] On July 26, 2017, the Employee filed the Original Complaint alleging discrimination in employment based on sex and gender identity.

[17] On September 13, 2018, the parties resolved the Original Complaint at mediation. The parties agreed that the employment relationship would be terminated, and LifeLabs would provide the Employee with a letter of reference. The parties agreed LifeLabs would limit its response to reference inquiries from potential employers to the contents of the reference letter. The parties further agreed that any disputes about the interpretation of the terms of settlement would be resolved by the mediator. The terms of settlement were recorded in a Settlement Agreement signed by the parties on September 13, 2018.

[18] In or about February 2020, the Employee applied for a job with a new employer. The potential employer made a reference inquiry to LifeLabs. LifeLabs provided the information from the letter of reference to the potential employer.

[19] When the potential employer requested additional information, LifeLabs sought a release of liability from the Employee authorizing it to provide this information. LifeLabs provided additional reference information to the potential employer after the Employee gave written consent to do so in or about March 2020.

[20] The potential employer did not hire the Employee.

[21] In or about May 2020, the Employee applied for a job with another potential employer. LifeLabs responded to a request for a reference from the potential employer by providing the letter of reference agreed upon by the parties at the mediation.

[22] The second potential employer did not hire the Employee.

[23] The Employee alleges Lifelabs retaliated by delaying or not providing a positive reference to potential employers.

IV DECISION

[24] Section 27(1)(c) is part of the Tribunal's gate-keeping function. It allows the Tribunal to remove complaints which do not warrant the time and expense of a hearing.

[25] The Tribunal does not make findings of fact under s. 27(1)(c). Instead, the Tribunal looks at the evidence to decide whether "there is no reasonable prospect that findings of fact that would support the complaint could be made on a balance of probabilities after a full hearing of the evidence": *Berezoutskaia v. British Columbia (Human Rights Tribunal)*, 2006 BCCA 95 at para. 22, leave to appeal ref'd [2006] SCCA No. 171. The Tribunal must base its decision on the materials filed by the parties, and not on speculation about what evidence may be filed at the hearing: *University of British Columbia v. Chan*, 2013 BCSC 942 at para. 77.

[26] A dismissal application is not the same as a hearing: *Lord v. Fraser Health Authority*, 2021 BCSC 2176 at para. 20; *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 [*Hill*] at para. 27.

[27] Section 43 of the *Code* protects people from retaliatory conduct for participating in a human rights complaint process:

43 A person must not evict, discharge, suspend, expel, intimidate, coerce, impose any pecuniary or other penalty on, deny a right or benefit to or otherwise discriminate against a person because that person complains or is named in a complaint, might complain or be named in a complaint, gives evidence, might give evidence or otherwise assists or might assist in a complaint or other proceeding under this Code.

[28] To succeed on her retaliation complaint at a hearing the Employee would have to show: (1) Lifelabs was aware of the Original Complaint; (2) Lifelabs engaged in or threatened to engage in conduct described in s. 43; and (3) there is sufficient connection between the impugned conduct and the Original Complaint: *Gichuru v Pallai*, 2018 BCCA 78, at para. 58.

[29] As I understand it, the Employee alleges that Lifelabs retaliated by thwarting her efforts to find new employment in two ways. First, she alleges Lifelabs purposely delayed responding to a reference request from a potential employer in March 2020. Second, she alleges that Lifelabs disclosed information to two potential employers that hindered her job search efforts.

[30] There is no dispute Lifelabs knew of the Original Complaint. Lifelabs says there is no reasonable prospect the Employee could establish that it has engaged in any conduct described in s. 43 because it provided references to the potential employers in accordance with the terms of settlement of the Original Complaint.

[31] The settlement terms provide that LifeLabs is to provide a reference for the Employee as follows:

[LifeLabs] will provide [the Employee] with a letter of reference in the form agreed between the Parties...

...when providing any reference for [the Employee], [LifeLabs' Manager of Labor Relations] agrees to limit her comments to the content of the letter.

[32] Lifelabs has provided documentary evidence inconsistent with the Employee's assertion that it delayed providing a reference to potential employers. The materials before me show that Lifelabs' Manager of Labour Relations provided a response to the first potential employer on February 21, 2020, after receiving a request on February 20, 2020, and responded to the second potential employer on May 12, 2020, after receiving a request on May 11, 2020.

[33] Furthermore, the evidence before me shows that Lifelabs completed a questionnaire from the first potential employer on March 18, 2020, on the same day the Employee released Lifelabs from the agreement limiting its comments to the contents of the letter. While the Employee asserts that Lifelabs' refusal to provide information to the potential employer was retaliatory, the materials support Lifelabs' position that the settlement terms stated it would not provide information beyond what was agreed upon. On the whole of the materials before me, I am satisfied that the Employee has no reasonable prospect of establishing that Lifelabs delayed (purposely or otherwise) responding to requests for references as alleged in the complaint.

[34] Lifelabs also submitted into evidence its response to the questionnaire. On a scale of one to four, with four being the highest assessment, Lifelabs rated the Employee's job performance as three. Three is described in the questionnaire as neutral. The Employee disagrees with the neutral assessment of her job performance and believes Lifelabs should have rated her work performance more positively. In response to a question asking if the Employee ever lost her temper or composure at work, Lifelabs answered that the Employee had one confrontation with a patient. The Employee does not dispute that she was involved in a

confrontation with a patient but believes that Lifelabs providing this information harmed her employability.

[35] I am persuaded on the evidence that there is no reasonable prospect the Employee would be able to show Lifelabs retaliated by engaging in conduct described in s. 43. The evidence supports Lifelabs' position that it responded to reference inquiries in a timely fashion. The Employee's allegation that Lifelabs did not provide a reference or delayed its response to her detriment is not supported in the materials and I am not satisfied that these allegations have been brought out of the realm of conjecture.

[36] The materials before me also support Lifelabs' position that it limited its comments to the contents of the agreed upon letter of reference. The only instance where Lifelabs provided additional information was with the express consent of the Employee to respond to a potential employer's questionnaire. While the Employee believes that Lifelabs interfered with her job applications, the evidence before me is that Lifelabs provided a reference to potential employers using the agreed upon verbiage from the settlement. Therefore, I am not persuaded that the Employee's allegation that Lifelabs engaged in conduct described in s. 43 has been taken out of the realm of conjecture.

[37] On the materials before me I am satisfied that the Employee has no reasonable prospect of establishing a sufficient connection between Lifelabs' response and the original complaint. Rather, the evidence before me supports Lifelabs' assertion that it provided references to potential employers, and only provided information beyond what was agreed upon in response to specific questions put to it. The undisputed evidence is that the Employee was involved in a workplace confrontation, and Lifelabs was specifically asked about instances where the Employee lost her temper at work. While the Employee disagrees with Lifelabs' assessment of her job performance, Lifelabs has provided a reasonable explanation in the affidavit materials of how they assessed the Employee's performance. In my view, there is nothing in the materials before me from which the Tribunal could reasonably infer that there is a sufficient connection between the Original Complaint and the answers they provided the potential employers.

[38] In light of the entirety of the evidence I find that there is no reasonable prospect the Employee will be able to persuade the Tribunal that Lifelabs engaged in retaliatory conduct described in s. 43. I am persuaded that Lifelabs is reasonably certain to establish that it responded to reference requests in a timely manner and provided truthful answers to a follow-up questionnaire. The Employee's assertion that Lifelabs engaged in retaliatory conduct has not been taken out of the realm of mere conjecture. As such, I find the retaliation complaint has no reasonable prospect of success and I dismiss it under s. 27(1)(c).

V CONCLUSION

[39] I allow the application to dismiss the complaint under s. 27(1)(c).

Edward Takayanagi
Tribunal Member