

Date Issued: April 23, 2024
Files: CS-001232; CS-002117

Indexed as: Buffalo v. Vancouver Native Housing Society (Skwachàys Lodge) and others, 2024
BCHRT 127

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:

Preston Buffalo

COMPLAINANT

AND:

Vancouver Native Housing Society (Skwachàys Lodge), Olivia Davies, Lakshmi McCall
and Margaret Go

RESPONDENTS

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

Tribunal Member:

Theresa Etmanski

On their own behalf:

Preston Buffalo

Counsel for the Respondents:

Katy Allen

I INTRODUCTION

[1] Preston Buffalo is an accomplished artist. In July 2019, he was admitted into Vancouver Native Housing Society's [VNHS] Artists in Residence program at Skwachàys Lodge [the **Program**]. The Program provides tenancy and professional development opportunities for selected Indigenous artists. VNHS decided not to renew Mr. Buffalo's residency in the Program after he did not complete a condition of his participation, which required monthly hours of volunteer service. He alleges that he was unable to fulfill this requirement because of his disabilities. Mr. Buffalo filed a human rights complaint (file CS-001232) against the VNHS and three individuals [together, **the Respondents**] alleging discrimination based on his physical and mental disabilities, under ss. 10 and 13 of the *Human Rights Code*. VNHS subsequently served him with a notice to end his tenancy.

[2] In parallel proceedings, Mr. Buffalo and VNHS reached a settlement agreement regarding a complaint he filed with the Residential Tenancy Branch [RTB]. The settlement agreement included a clause that Mr. Buffalo withdraw his human rights complaint. Mr. Buffalo has declined to withdraw his complaint, stating that the agreement requiring him to do so was unconscionable. He has also filed a retaliation complaint (file CS-002117) against VNHS under s. 43 of the *Code*.

[3] On March 22, 2022, the Tribunal directed that complaints CS-001232 and CS-002117 be joined. The Respondents were provided the opportunity to amend their application to dismiss to address the retaliation complaint. Mr. Buffalo was permitted to file an amended response.

[4] The Respondents deny discriminating. They argue that complaint CS-001232 should be dismissed under s. 27(1)(d)(ii) because it would not further the purposes of the *Code* to proceed with the complaint where the parties have already resolved the complaint through a valid settlement agreement. The Respondents further argue that both complaints should also be dismissed under s. 27(1)(c) of the *Code* because there is no reasonable prospect that they will succeed. The Respondents state that they have a *bona fide* and reasonable justification for ending Mr. Buffalo's tenancy, and that VNHS fulfilled its duty to accommodate him. In the

alternative, should the Tribunal decline to dismiss the complaint in its entirety, the Respondents seek to have the complaint against the individual respondents dismissed because it would not further the purposes of the *Code* for the complaint to proceed against them.

[5] Mr. Buffalo opposes this application and argues that his complaints have a reasonable chance of success. He says the Tribunal retains jurisdiction of his human rights complaint as the terms of the settlement agreement are unconscionable, unfair, and he entered the agreement under intimidation with the prospect of homelessness looming. He further says that the individual respondents are individually culpable and the complaint against them should proceed.

[6] This application turns on the following issues:

- a. Would it not further the purposes of the *Code* to:
 - i. proceed with this complaint where a settlement agreement has already been reached between the parties?
 - ii. proceed with the complaint against the individual respondents?
- b. Are the Respondents reasonably certain to prove that Mr. Buffalo has no prospect of success with respect to whether:
 - i. there was an employment relationship between the parties?;
 - ii. the volunteer hours requirement is a bona fide and reasonably justified requirement of the Program?; and
 - iii. the Respondents' decision to evict Mr. Buffalo, and their conduct at the RTB proceedings, was retaliation for his human rights complaint?

[7] For the following reasons, I allow the application under s.27(c) in part. I dismiss the application under s. 27(1)(d)(ii). 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

[8] The following background is taken from the materials filed by the parties. I make no findings of fact.

[9] VNHS is a registered charity that provides subsidized housing to urban Indigenous and vulnerable populations. VNHS also funds the Program which provides subsidized housing as well as personal and professional development programs for Indigenous artists. There is no ongoing government subsidy associated with residency units for the Program. Rather, the rental subsidy for the Program is made up by VNHS through the profits of two social enterprises: the Skwachàys Lodge Hotel [**Lodge**] and the Urban Aboriginal Fair Trade Gallery [**Gallery**].

[10] The Program is a three-year residency subject to renewal every six months. Participants in the Program enter into a Participant Agreement, which includes a requirement that participants provide eight hours of volunteer time per month at either the hotel or the art gallery. Participants are required to comply with the terms of the Participant Agreement to maintain access to the Program's subsidized housing and other benefits.

[11] At the time of the complaint, the individual respondents were employed by VNHS as follows: Margaret Go was the Director of Operations and Quality Assurance, Olivia Davies was the Artists in Residence Program Manager, and Lakshmi McCall was the Gallery Manager.

[12] Mr. Buffalo was accepted into the Program while completing a Bachelor of Fine Arts degree. He states that he has depression, which he disclosed to the Respondents during his interview for the Program. He also says that he has anxiety, which he disclosed to Ms. McCall and Ms. Davies by email in August 2019. At that time, he expressed his concerns about working in the Gallery in light of these conditions but indicated that he still wanted to "uphold [his] end of the deal." Mr. Buffalo says he met with Ms. McCall on August 30, 2019, to discuss his email; however, he says that no accommodations for his disabilities were offered.

[13] The parties agree that Mr. Buffalo complied with the Program's volunteer hour requirements in July and August 2019. However, the Respondents say that he did not complete his volunteer hours in September, as he did not attend a scheduled shift on September 21, 2019. Mr. Buffalo has provided an email he sent to VNHS, dated September 20, 2019, in which he explained that he needed to go out of town to help and spend time with his mother, who was moving, and he would not be able to cover his shift. He asked what other shifts were available to make this up upon his return.

[14] Mr. Buffalo says that on September 27, 2019, he was admitted to the hospital with pneumonia. He has provided a doctor's note, dated September 30, 2019, which confirms a hospital stay from September 27, 2019, to October 1, 2019. He states that he emailed Ms. Davies to advise her of his condition, but forgot he had a shift scheduled and did not attend.

[15] The Respondents state that Mr. Buffalo did not fulfill his volunteer hour requirements in October 2019. A meeting was scheduled between Mr. Buffalo, Ms. McCall, and Ms. Davies for November 8, 2019, to discuss his shift absences. At this meeting, Mr. Buffalo provided two doctors' notes, including one dated November 5, 2019, stating that he should be excused from work or school for six weeks due to illness. This note indicates the first missed day of work or school as September 27, 2019. Mr. Buffalo alleges that the Respondents told him at this meeting that he had "misrepresented" his mental health disability in his application, and that this would play a factor in the renewal of his participation in the Program. He further alleges that he was told that he needed to complete his volunteer hours despite his doctors' notes, and that the Respondents "would not and could not" support his disabilities. In contrast, Ms. McCall's notes from this meeting state that Mr. Buffalo was very "upset and angry" with her for not replying to an email, and for not displaying his art in the Gallery. He was reminded to speak to her with respect. The notes state that Ms. McCall asked Mr. Buffalo how he could participate in the Program if he "does not want to do sales in the Gallery" and suggested that they work together to allow him to complete his volunteer hours. Ms. McCall's notes state that they agreed Mr. Buffalo would come to the Gallery to help with inventory.

[16] On November 12, 2019, Mr. Buffalo's sister wrote a letter to the Respondents on her brother's behalf. The letter explains that Mr. Buffalo has been recovering from pneumonia, and this precarious medical condition could become "fatal" if he exerts himself against medical advice. It further explains how Mr. Buffalo has attempted to comply with the terms of the Program and make up missed shifts, however he had been unable to do so because of lack of shift availability. It proposes a plan for making up missed hours moving forward and advises that Mr. Buffalo may file complaints with the RTB and this Tribunal if appropriate accommodation is not provided for his disabilities. The Respondents state that this letter was sent to Ms. Davies on November 14, 2019.

[17] On November 25, 2019, Ms. Go provided Mr. Buffalo with a letter advising him that they would not be renewing his participation in the Program upon the first renewal period, and his Participation Agreement would expire on December 31, 2019. The letter states:

It has come to our attention that you are unable to fulfill your initial participation agreement with [VNHS]. You have expressed that a pre-existing condition does not allow you to work with the public. At your application interview, you were asked if there were any pre-existing conditions that would prevent you from fulfilling any of the responsibilities of your Participation Agreement. You indicated there were no such impediments.

[18] The letter also indicated that they did not intend to make him homeless and were offering him alternative housing in another subsidized building which did not require the completion of volunteer hours.

[19] On December 3, 2019, Mr. Buffalo responded to Ms. Go's letter, and included the letter dated November 12, 2019, from his sister, as well as a doctor's letter. His response email states: "To punish me for being sick and not able to work is a violation of my Human Rights. Im now adding your name to the Human Rights Complaint that Im filing" [as written].

[20] On December 5, 2019, Mr. Buffalo filed a human rights complaint (file CS-001232).

[21] On December 11, 2019, Ms. Go responded to Mr. Buffalo's email. The Respondents offered to extend Mr. Buffalo's residency and participation in the Program for another six months on the condition that he fulfill his commitment to the Program going forward. On December 20, 2019, Ms. Go again wrote to Mr. Buffalo and advised him that he had only logged 22 out of the minimum 48 volunteer hours during his lease term, and he was expected to "log in participation hours required for the remainder of this month." The letter states: "If you wish to be considered for lease renewal, you must provide a report of your activities and actions taken during the (6) months program participation (July 2019 – December 2019) along with participation evidence to the minimum of (8) hours for the remainder of December 2019."

[22] Mr. Buffalo did not provide the information requested, nor did he fulfill the December volunteer hours. He states that he believes he was being set up to fail, because it would have been impossible to fulfill these tasks over the Christmas holidays. On January 8, 2020, he emailed Ms. Go stating that he had filed a human rights complaint and that the Respondents did not have the authority to evict him. On January 10, 2020, Mr. Buffalo again emailed Ms. Go describing a list of his accomplishments as an artist since he began the Program. The email states: "I would say that its been a very successful 6 months, the only barriers to my continued success have been put in place by you."

[23] On January 22, 2020, Ms. Go wrote Mr. Buffalo a letter explaining that since he had not complied with the requirements of the December 20 letter, he was being given notice of 30 days to end his tenancy for cause.

[24] On January 31, 2020, Mr. Buffalo filed an application for Dispute Resolution with the RTB against VNHS. A hearing was scheduled for April 6, 2020.

[25] On March 16, 2020, Mr. Buffalo, who was still residing in his VNHS residence, received a notice stating that in response to COVID-19, all programs requiring in-person services and gatherings were indefinitely cancelled. Mr. Buffalo's legal advocate emailed VNHS and expressed Mr. Buffalo's concern that if he were evicted at the beginning of April, he would be homeless "in what is predicted to be the peak of the Pandemic." The email noted that since

other tenants would not be required to fulfill the Program requirements indefinitely, they were hoping to negotiate to allow Mr. Buffalo to remain in his unit and make up his missing volunteer hours when the Program was reinstated. The email explained that Mr. Buffalo would be willing to cancel the proceedings at the RTB and withdraw his human rights complaint if VNHS were willing to nullify the Notice to End Tenancy. On March 25, 2020, Ms. Go responded to the email stating that VNHS was prepared to proceed with the RTB hearing.

[26] Mr. Buffalo did not attend the RTB hearing on April 6, 2020, and the hearing was adjourned until June 2, 2020. The Respondents have provided some emails between VNHS's legal counsel and Mr. Buffalo's legal advocate in which negotiations to settle the issues between the parties were discussed. These discussions explicitly included consideration of Mr. Buffalo withdrawing his human rights complaint.

[27] On June 2, 2020, the parties attended the RTB via conference call, prepared for an arbitration. Mr. Buffalo was represented by his legal advocate. At the outset, the proceedings were converted to a mediation and the parties reached the following settlement agreement:

- a. The tenant PD agrees to vacate the rental unit on September 31, 2020 at 1:00 p.m. Should the tenant fail to vacate, the landlord can serve the attached Order of Possession.
- b. Monthly rent will continue to be paid by the tenant in accordance with the tenancy agreement.
- c. The tenant agrees to withdraw his Human Rights complaint for Discrimination at the BC Human Rights Tribunal Vancouver in relation to this tenancy.
- d. The tenancy ends on the effective date of September 31, 2020 at 1:00 p.m.

[28] The settlement agreement was written up by the RTB arbitrator. It includes the following comments about the process of the settlement:

The Advocate and Legal Counsel were provided 15 minutes to discuss the terms of the settlement amongst themselves at Counsel's request. A further 10 minutes was provided to the parties to agree to the final terms.

[...] Both parties gave verbal sworn affirmation at the hearing that they understood and agreed to the above terms as legal, final and binding, which settle all aspects of this dispute.

The landlord and tenant testified that they understood that the above terms are legal, final, binding and enforceable.

[29] On June 25, 2020, the RTB arbitrator issued a Correction Decision, after review of the notes from the June 2, 2020, hearing. The following terms were added:

- a. The landlord agrees to provide the tenant with a positive rental reference.
- b. The tenant will not pursue any further claims against the landlord in relation to this tenancy.

[30] The date for Mr. Buffalo to vacate the rental property was also corrected in the settlement agreement to say "September 30, 2020."

[31] On September 19, 2020, Mr. Buffalo filed complaint CS-002117, in which he alleges that VNHS retaliated against him for filing a human rights complaint by evicting him and intimidating him through the RTB process.

III DECISION

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

[32] 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.

[33] The Tribunal may dismiss a complaint under s. 27(1)(d)(ii) where the parties have settled the complaint. While a settlement agreement does not interfere with the Tribunal's jurisdiction over a complaint, there is a strong public interest in honouring settlement agreements: *Thompson v. Providence Health Care*, 2003 BCHRT 58 at para. 38. Those negotiated outcomes can save considerable public and private resources and may offer a more expeditious resolution for the dispute. They may also include remedies outside the Tribunal's power, which more closely match the parties' interests, and which may better serve the relationship in the long run. For these reasons, the Tribunal recognizes the role of settlement agreements in furthering the remedial purposes of the *Code* and encourages and invests its own resources to help parties resolve complaints through mediation: *Nguyen v. Prince Rupert School District No. 52*, 2004 BCHRT at para. 15; *Pursley v. Donald's Find Foods dba Britco Pork*, 2024 BCHRT 24 at para. 6.

[34] There are also situations, however, where the terms of the settlement or the conditions under which it was reached run counter to the purposes of the *Code*: *Edwards v. Cowichan Valley Regional District*, 2018 BCHRT 172 at para. 35; *Thompson* at paras. 39-46; *The Employee v. The Company and the Owner*, 2017 BCHRT 266 at para. 35.

[35] In the present case, neither party has argued that the settlement agreement reached on June 2, 2020, as corrected on June 25, 2020, is invalid. Rather, Mr. Buffalo states that this is a situation where the Tribunal should proceed with his complaint despite the settlement agreement because the terms of the agreement, and the conditions under which they were reached, were marked by the type of inequality that the *Code* aims to eliminate.

[36] In deciding whether to allow a complaint to proceed in the face of a settlement agreement, the Tribunal is seeking an outcome that best furthers the purpose of the *Code*. The

burden is on Mr. Buffalo to persuade me that his complaint should be allowed to proceed in that face of an agreement that expressly proposed to resolve it: *The Employee* at para. 30; *Banfield v. Strata Geodata Services Ltd.*, 2021 BCHRT 142 at para. 105.

1. *Would it not further the purposes of the Code to proceed with the complaint where a settlement has already been reached?*

[37] The Tribunal has recognized a number of factors that may signal circumstances where dismissing a complaint on the basis that a settlement agreement has been reached, could run contrary to the purposes of the *Code*. These include: unconscionability, “which exists where there is an inequality of bargaining power and a substantially unfair settlement”; undue coercion or influence; where the party did not have access to independent legal advice; conditions of duress, which may be related to the timing of the agreement, financial need, or other circumstances; and, whether the party received little or no consideration for the release: *Thompson* at paras. 42-44, citing *Chow (Re)* (1999), and *Pritchard v. Ontario (Human Rights Commission) (No. 1)* (1999), 35 C.H.R.R. D/39 (Ont. Ct. (Gen. Div.)) at para. 17. The Tribunal may also consider the language of the release and whether the parties understood its significance; whether the complainant understood their rights under the *Code*; and “the seriousness of the allegations in a complaint and what is at stake for the complainant”: *Gerard v. Olive’s Market Whistler and others*, 2015 BCHRT 102 at para. 17. See also *Edwards* para. 35; *R. v. Insurance Company*, 2024 BCHRT 30 at para. 65.

[38] The Respondents say that to allow the complaint to proceed where it has already been resolved between the parties would not further the purposes of the *Code*. In contrast, Mr. Buffalo says that the terms of the settlement agreement are unconscionable. He provides various arguments for why it would not further the purposes of the *Code* to dismiss the complaint in these circumstances. In consideration of the factors set out above, I address each of his arguments in turn.

[39] First, Mr. Buffalo says that the settlement agreement was unfair because he received no consideration for agreeing to release the Respondents from the human rights complaint. He says the Respondents agreed to allow him to remain in his home for four more months and

provide him with a positive reference letter; however, he did not receive any compensation for the injury to his dignity, feelings and self-respect caused by the alleged discrimination.

[40] While I acknowledge that the agreement did not provide Mr. Buffalo with any financial compensation, I do not agree that Mr. Buffalo received no consideration for settling the complaint. In this case, Mr. Buffalo received the non-financial benefits of a positive reference letter and an extension to his tenancy of four months. A remedy which the parties negotiate through a settlement does not have to mirror what the Tribunal might award if the complaint were successful. Parties sign releases and settle complaints for many reasons, only one of which is what they might be awarded if they were to win a human rights complaint: *Perricone v. Fabco Plastics Wholesale (Ontario) Ltd.*, 2010 HRTO 1655 at para. 46; *The Employee* at para. 44; *Carter v. Travelex Canada*, 2009 BCCA 180 at para. 36. The lack of financial compensation in a settlement agreement does not, without more, mean that a settlement agreement was unfair, especially in circumstances where non-financial remedies are negotiated.

[41] However, the Tribunal has also held that circumstances where a party receives “little or no consideration” for the release, and a “substantially unfair settlement” may be indicators of unconscionability: *The Employee* at para. 31. In the present case, where Mr. Buffalo lost both his residence and access to the professional development and other benefits of the Program for allegedly discriminatory reasons, it appears that the consideration he received was relatively small in the circumstances. While this on its own would not render the agreement unconscionable, when combined with other factors, it weighs towards proceeding with the complaint.

[42] Second, Mr. Buffalo states that he felt intimidated during the settlement negotiations because of the numbers of the Respondents’ team, which he says included their CEO, legal counsel, the three managers named in his complaint, as well as an additional manager from VNHS. In contrast, Mr. Buffalo was there with only his advocate. He states that this was his first encounter with the CEO, who “kept interjecting” about his “powerful voice that needed to be heard.” He states that he felt “very small.”

[43] The Respondents deny that they stacked their team in the mediation. They state that the only people engaged in the mediation on behalf of VNHS were the CEO, Ms. Go, and VNHS's legal counsel. They say Mr. Buffalo may be referring to the other VNHS managers who introduced themselves at the beginning of the hearing, but then left the call and were on standby to give evidence as witnesses. Further, the Respondents say that during the mediation, the parties did not directly speak to each other, instead communicating through their legal representatives. Finally, they note that Mr. Buffalo gave a verbal sworn affirmation at the hearing that he understood and agreed to the terms as legal, final and binding.

[44] Whether or not the Respondents intentionally "stacked their team" for the hearing, it is apparent that there was a degree of power imbalance between the parties by virtue of the Respondents' control over Mr. Buffalo's access to the Program including his tenancy. This is not an uncommon dynamic between landlords and tenants, or employers and employees, and does not automatically render the resulting agreement unfair. Such a finding would risk undermining the agency of unrepresented complainants in settlement negotiations to resolve matters in their own best interests. However, the Tribunal has held that in certain circumstances, inequality of bargaining power may also be an indicator of unconscionability of a settlement agreement: *The Employee*, at para. 31. In the present case, while it may not have been subjectively unreasonable for Mr. Buffalo to feel intimidated in the face of the Respondents' larger team, he was not unrepresented at the hearing. Specifically, he had the assistance of his legal advocate during all stages of the settlement negotiations. Mr. Buffalo has not suggested that his legal advocate did not represent him appropriately or that she acted at anytime without his consent. Further, other than Mr. Buffalo's own impression, there is no evidence before me to indicate that the Respondents acted inappropriately by bringing their witnesses or representatives to the hearing. Overall, I find this factor to be neutral with respect to proceeding with the complaint.

[45] Third, Mr. Buffalo states that during the RTB proceedings, his anxiety built as he considered the health risks and difficulties of finding an apartment during the pandemic. He

says that he feared he would end up homeless and this would make it impossible for him to continue his degree, which he says would have been humiliating.

[46] I understand Mr. Buffalo to essentially be arguing that the timing and overall circumstances of the settlement diminished his agency to negotiate a fair agreement. The Tribunal has previously recognized that factors such as the timing of the agreement, financial need or other circumstances may indicate unfairness in a settlement agreement: *The Employee*, at para. 31; *Thompson*, at para. 44. Further, in *Prichard*, the Court indicated that circumstances where a complainant “was in such serious financial need that she or he felt there was no choice but to accept the package offered” may relieve a complainant of moral blameworthiness for pursuing a human rights complaint after a final release was executed. While *Pritchard* was decided in a different statutory context and on the basis of whether the complainant acted in bad faith, the factors mentioned by the Court in that case are ones which may also be relevant to deciding whether it would further the purposes of the *Code* to allow the complaint to proceed in the face of a settlement agreement: *Thompon* at para. 43.

[47] In this case, Mr. Buffalo faced the prospect of losing his subsidized housing during the height of the pandemic, which may have left him unhoused and could have had negative effects on his health, ability to continue his education, and pursue his career as an artist. There is nothing on the record before me to indicate that VNHS’s offer of alternative housing, which Mr. Buffalo had previously refused in a pre-pandemic context, was still available to him at that time. Nevertheless, I agree that Mr. Buffalo was in an exceptionally precarious situation at the time of executing the settlement agreement, both in terms of the timing of the pandemic, and all that he was at risk of losing for being removed from the Program. These circumstances may explain why he agreed to terms that favoured his immediate housing situation at the cost of seeking to enforce his rights at the Tribunal and, if successful, an unknown potential remedy. These circumstances weigh in favour of allowing his complaint to proceed.

[48] Forth, Mr. Buffalo says that he was not aware that the RTB had no jurisdiction to hear or decide his human rights complaint when he signed the agreement. He says that he should not

have been required to drop his human rights complaint as a condition of settling the residential tenancy matter, because they deal with two different issues.

[49] I am not persuaded by this argument. It was the parties and not the RTB who determined the terms of the settlement agreement. In doing so, they had the flexibility to consider a resolution that may not have been open to the RTB's adjudicator to order had the hearing proceeded. It is apparent from the evidence that Mr. Buffalo and his legal advocate had been using the human rights complaint as a point of negotiation to resolve the issues between the parties from as early as March 2020. This suggests that both parties had turned their minds to the human rights issues when reaching this settlement, and it was open for them to include this term in the agreement.

[50] Fifth, Mr. Buffalo states that he was not given sufficient time to decide or read over the agreement before he signed it. He states that he should have been given the chance to research whether the agreement was reasonable or consult with a third party. Instead, he says he felt as though if he did not agree on the spot, he would be homeless in a matter of days, so he had no choice but to accept "their uncompromising deal."

[51] The Respondents say, and I agree, that Mr. Buffalo had plenty of time to contemplate the settlement offers being made and the prospect of withdrawing his human rights complaint as a term of such settlement, because his legal advocate had proposed similar offers in settlement offers as early as March 2020. While the ultimate agreement may have come about quickly in the context of the RTB hearing, it is reasonable to assume that he would have had the opportunity to discuss potential terms with his legal advocate, or others, in advance of the hearing had he wished to do so.

[52] Finally, Mr. Buffalo says that the allegations in this complaint are serious: he is alleging discrimination in respect to both his tenancy and his employment based on his mental and physical disabilities. He says he lost both his home and an important opportunity as an artist. In contrast, the Respondents argue that this matter is about tenancy only, as there was no employment relationship between VNHS and Mr. Buffalo. They argue that they made

reasonable efforts to accommodate his continued housing, however Mr. Buffalo did not cooperate with the process.

[53] I agree that the Respondents' removal of Mr. Buffalo from the Program had serious consequences for him, particularly when considered in context of the early days of the COVID-19 pandemic in June 2020. For the reasons set out below, I am not persuaded that the Respondents are reasonably certain to establish that this was merely a tenancy dispute, and that there was no employment relationship between the parties. This factor weighs in favour of proceeding with the complaint.

[54] I have considered all the circumstances of this complaint contextually, including the seriousness of the allegations, the little consideration Mr. Buffalo received for releasing the Respondents from his human rights claims, and the precarious situation Mr. Buffalo faced at the time he agreed to the settlement. Based on these factors and in these circumstances, I am persuaded that to uphold the release would not serve the purposes of the *Code*, which includes fostering a free and equal society, eliminating inequality, and providing a means of redress for those persons who are discriminated against.

2. *Would it not further the purposes of the Code to proceed with the complaint against the individual respondents?*

[55] The Respondents also apply to dismiss the complaint against the individual respondents, Ms. Davies, Ms. McCall, and Ms. Go under s. 27(1)(d)(ii) because proceeding against the individual respondents would not further the purposes of the *Code*: *Daley v. BC (Ministry of Health)*, 2006 BCHRT 341.

[56] There are strong policy reasons that favour complaints against individual respondents. As the Supreme Court of Canada has acknowledged, "the aspirational purposes of the *Code* require that individual perpetrators of discrimination be held accountable for their actions": *British Columbia Human Rights Tribunal v. Schrenk*, 2017 SCC 62 at para. 56. This is especially true for allegations of discrimination with a high degree of personal culpability, like sexual or racial harassment: *Daley* at para. 53.

[57] On the other hand, naming individual respondents can complicate and delay the resolution of complaints, exacerbate feelings of personal animosity, and cause needless personal distress to individuals who are accused of discrimination: *Daley* at para. 54. Because employers and institutional respondents are liable for the acts of their agents, they will be responsible for any remedy ordered by the Tribunal: *Code*, s. 44(2); *Robichaud v. Canada*, [1987] 2 SCR 84 at para. 17. In those situations, the remedial aims of the *Code* may be most fairly and efficiently fulfilled without holding individuals liable.

[58] The Tribunal balances all these considerations to decide whether the purposes of the *Code* are best served by having a complaint proceed against individuals as well as an institutional respondent, or against the institutional respondent only. It has identified the following factors as relevant (*Daley* at paras. 60-62):

- a. whether the complaint names an institutional employer as a respondent and that respondent has the capacity to fulfill any remedies that the Tribunal might order;
- b. whether the institutional respondent has acknowledged the acts and omissions of the individual as its own and has irrevocably acknowledged its responsibility to satisfy any remedial orders which the Tribunal might make in respect of that individual's conduct; and
- c. the nature of the conduct alleged against the individual, including whether:
 - i. their conduct took place within the regular course of their employment;
 - ii. the person is alleged to have been the directing mind behind the discrimination or to have substantially influenced the course of action taken; and
 - iii. the conduct alleged against the individual has a measure of individual culpability, such as an allegation of discriminatory harassment.

[59] Mr. Buffalo opposes the application to dismiss the complaint against the individual respondents because he says there is a measure of individual culpability on their part, and they were the directing mind for VNHS's conduct towards him: *Cartwright v. Rona and another*, 2011 BCHRT 65 at para. 185. He points to examples of the individual respondents' conduct, including:

- a. Ms. McCall and Ms. Davies would not excuse him from work, even after he had provided two doctors notes proving that his pneumonia required him to be admitted to the hospital and requesting that he be excused from work for six weeks.
- b. Ms. Davies ignored and did not respond to the letter sent by Mr. Buffalo's sister which proposed a plan for him to make up the missed hours after his doctors' prescribed recovery period.
- c. Ms. Davies and Ms. McCall told him that he could not be trusted to schedule a shift ahead of time. Ms. Davies told him he had to come to the gallery daily to ask if work was available.
- d. Ms. Go sent him a letter four weeks into his six-week recovery period, stating that his lease would not be renewed because he was not fulfilling his obligations of the Program.
- e. Ms. Go accused him of misrepresenting his disability during the interview process.
- f. Ms. Go falsely claimed that he had not offered any medical evidence excusing him from work.

[60] The Respondents state that VNHS has confirmed it accepts responsibility for the individual respondents in this matter. However, they have not explicitly confirmed that VNHS irrevocably acknowledges its responsibility to satisfy any remedial orders which the Tribunal might make in respect of that individual's conduct. The Respondents also deny the allegations

of misconduct by the individual respondents; however, they have not provided submissions with respect to the nature of the conduct alleged against the individuals.

[61] While the level of individual culpability is unclear at this time, I am not persuaded that the Respondents are reasonably certain to prove that the individuals were not the directing minds of the alleged discrimination, or did not substantially influence the course of action taken when removing Mr. Buffalo from the Program. As such, I am not persuaded that the complaint against the individual respondents should be dismissed at this time.

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

[62] The Respondents also apply to dismiss Mr. Buffalo’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.

[63] 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.

[64] 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.

[65] 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.

[66] Many human rights complaints raise issues of credibility. This is not, by itself, a sufficient reason to deny an application to dismiss: *Evans v. University of British Columbia*, 2008 BCSC 1026 at para. 34. However, if there are foundational or key issues of credibility, the complaint must go to a hearing: *Francescutti v. Vancouver (City)*, 2017 BCCA 242 at para 67.

[67] To prove his complaint at a hearing, Mr. Buffalo will have to prove that he has a characteristic protected by the *Code*, he was adversely impacted in tenancy and employment, and his protected characteristic was a factor in the adverse impact: *Moore v. British Columbia (Education)*, 2012 SCC 61 at para. 33. The Tribunal refers to this as the complainant's case. If Mr. Buffalo proved his case, the burden would shift to the Respondents to justify the impact as a *bona fide* reasonable justification or *bona fide* occupational requirement. If the impact is justified, there is no discrimination.

[68] The Respondents do not argue there is no reasonable likelihood that Mr. Buffalo will succeed in proving his case in the area of tenancy. Rather, they argue that Mr. Buffalo's tenancy complaint has no reasonable chance of success because it is reasonably certain that they would prove a defence at a hearing: *Purdy v. Douglas College*, 2016 BCHRT 117 at para. 50. The Respondents submit that the volunteer hours requirement is a good faith and reasonably justified requirement. Further, the Respondents state that they accommodated Mr. Buffalo to the point of undue hardship.

[69] In addition, the Respondents argue that Mr. Buffalo's complaint has no reasonable prospect of success in the area of employment, because Mr. Buffalo has not taken out of the realm of conjecture that there was an employment relationship between the parties: *McCormick v. Fasken Martineau DuMoulin LLP*, 2014 SCC 39. In the alternative, should the Tribunal find that there was an employment relationship between the parties, the Respondents argue that they are reasonably certain to prove that the volunteer hours requirement is a *bona fide* occupational requirement.

[70] Finally, the Respondents argue that Mr. Buffalo's retaliation complaint has no reasonable prospect of success because the Respondents have a reasonable, non-discriminatory explanation for their conduct.

[71] For the reasons that follow, I find that Mr. Buffalo has taken both his employment and tenancy complaints out of the realm of conjecture. However, I am only persuaded that part of his retaliation complaint is more than just conjecture.

1. *Has Mr. Buffalo brought out of the realm of conjecture that he had an employment relationship with the Respondents?*

[72] The Respondents argue that:

- a. the requisite degree of control and direction was not present between the parties to establish an employment relationship; and
- b. the complaint on the basis of employment does not further the purposes of the *Code*.

[73] Mr. Buffalo has not made direct submissions on either of these arguments. However, based on all the information before me, I am not persuaded that he has no reasonable prospect of proving that there was an employment relationship in this case. I also find that it would further the purposes of the *Code* to proceed with the employment complaint.

[74] It is a well-established principle that human rights legislation must be interpreted broadly and purposively, in acknowledgement of its special, quasi-constitutional nature: *Robichaud* at para. 89. Therefore, when interpreting the meaning of employment for the purposes of s. 13 of the *Code*, I must give it a broad and purposive interpretation that best meets the objectives of the *Code*. This includes fostering a society without impediments to full and free participation in the economic, social, political, and cultural life in BC.

[75] The test for determining who is in an employment relationship rests on two factors: “control exercised by an employer over working conditions and remuneration, and corresponding dependency on the part of a worker”: *McCormick* at para 23.

[76] The Court in *McCormick* references, among other cases, *Crane v. British Columbia (Health Services)*, 2005 BCHRT 361, reversed on other grounds 2007 BCSC 460, where the Tribunal identified four factors at para. 79 to consider in undertaking such an exercise:

- a. Utilization: whether the alleged employer gained some benefit from the employee in question.
- b. Control: whether the alleged employer exercised control over the employee in relation to wages, other terms and conditions of employment, or work more generally.
- c. Financial Burden: whether the alleged employer bore the burden of remuneration of the employee.
- d. Remedial Purpose: whether the alleged employer had the ability to remedy any discrimination.

See also: Bahadur v. Yacht, 2018 BCHRT 234 at para. 87.

[77] A traditional employer-employee relationship is not required to invoke the protections of the *Code: Nixon v. Vancouver Rape Relief Society*, 2002 BCHRT 1, rev'd on other grounds 2005 BCCA 601, leave to appeal to SCC refused, 2007 CanLII 2772. Some of the factors to consider when determining whether a volunteer position falls within the scope of s. 13 include:

- a. whether there is a formal recruitment and interview process;
- b. whether there is a training process including defined tasks.
- c. whether volunteers have to agree to abide by the policies and practices of the organization; and

- d. if there are set requirements as to volunteer availability and defined tasks.

See also: Warrington v. Harness Racing BC Society Board and another, 2023 BCHRT 243 at para. 32.

[78] I base my assessment largely on the Participant Agreement required for participation in the Program. The Participant Agreement States:

The artists are currently charged a rental amount of \$375 a month for each studio apartment. The actual costs (economic rent) to operate and maintain those residential units are currently set at \$1100/month and are subject to change due to operating cost fluctuations. The difference between the tenant rent contribution and the break-even rent is \$725 a month. This rental subsidy is made up by VNHS through the profits of the hotel and the gallery.

Unlike out other residential buildings, there is no ongoing government subsidy associated with this building. We, Vancouver Native Housing Society, through the profits of our two social enterprises, Skwachàys Lodge Hotel and the Urban Aboriginal Fair Trade Gallery, provide the rental subsidy.

[...]

3. MANDATORY PARTICIPATION HOURS

There is an expectation that residents will make themselves available for volunteer work at least eight hours a month to the building, the hotel, or the gallery. This can take on many forms and will be dictated to some degree on operational and marketing needs. One of the main concepts of the artist in residence program is that of reciprocity. In return for VNHS providing a subsidy to each artist to the tune of \$725 per month or \$8700 per year, the artists will reciprocate by being actively involved in the program through participating in events and workshops that from time to time are provided by us, but also by

giving 8 hours of their time to help with the success of the hotel and gallery and to concretely affirm their commitment to the program.

These mandatory participation hours will be logged by each artist in residence and a monthly report is to be submitted to the Program Manager on the 1st day of each month. Failure to meet the minimum requirement of (8) each month will impact future lease negotiations and may result in early ending of tenancy agreement and dismissal from the program.

Participation Hours will include at least (1) hour each month working in the Gallery, and the remaining hours may include participation in special event planning and activities, programming, and other ad-hoc tasks required by the gallery. [...]

[79] Applying the *Crane* and *Nixon* factors to the record before me, I am not persuaded that the Respondents are reasonably certain to prove that there was not an employment relationship in these circumstances.

[80] Utilization: It appears that VNHS gained some benefit from Mr. Buffalo through the work he did, and was intended to do, during his volunteer hours at the Lodge and Gallery. The Respondents' materials state that these volunteer contributions were "quid pro quo" or part of a reciprocal relationship between the parties. It stands to reason that the volunteer contributions likely provided benefit to the Respondents.

[81] Control: It appears that VNHS controlled the amount of rental subsidy received by Mr. Buffalo, and conditions of work including the number of hours per month, the location where volunteer hours would be performed, which tasks were performed based on operational and marketing needs, how to account for hours completed, and the consequences of not completing the set number of hours.

[82] Financial Burden: It appears that VNHS bore the burden of renumeration Mr. Buffalo with a set rental subsidy in exchange for his volunteer efforts.

[83] Remedial Purpose: It appears that the Respondents had the ability to remedy the alleged discrimination, as they were responsible for controlling his hours and tasks, and had the duty to accommodate Mr. Buffalo's disabilities.

[84] Recruitment Process: It appears that there is a recruitment and interview process associated with participation in the Program that goes beyond a typical tenancy arrangement. According to the Participant Agreement, all applicants and renewing residents in the Program are required to provide examples of their artistic work, including their creative portfolios, artist bio, artist statement, and artist resume. The Participant Agreement also requires participants to create and fulfill a professional development plan.

[85] Training Process: The parties have not provided any information about whether training is offered to participants with respect to their volunteer duties.

[86] Abidance to Policies and Practices of Organization: It appears that Mr. Buffalo was required to abide by the policies and practices of VNHS in relation to his volunteer duties and participation in the Program. Of note, along with the standard language of the tenancy agreement, and additional no-smoking and pets policies which are commonly associated with tenancy, participants in the Program are required to adhere to an Artist Work Studio Usage Policy, "Brave Space/Safe Space Guidelines" for personal conduct in the artist studio, and the Participation Agreement, which sets out the requirements for mandatory participation hours. Failure to adhere to any of these addendums could result in termination of their participation in the Program.

[87] Availability and Task Requirements: It appears that VNHS maintained control over the number of hours Mr. Buffalo contributed, and well as the specific tasks he was expected to complete, as set out in the Participant Agreement.

[88] In consideration of all these factors, I am satisfied that the balance weighs toward Mr. Buffalo having taken out of the realm of conjecture that there was sufficient control and dependency between the parties to establish an employment relationship within the meaning of s. 13 of the *Code*.

[89] Further, I do not believe it would accord with a broad and purposive interpretation of the *Code* if VNHS were required to abide by the anti-discrimination provisions of the *Code* with respect to its paid employees but could select volunteers to perform all or a part of similar work without regard to those provisions: *Nixon*, at para. 73.

2. *Are the Respondents reasonably certain to prove that the volunteer hours requirement is a bona fide and reasonably justified requirement of the Program?*

[90] If Mr. Buffalo succeeds in establishing his case, the burden will shift to the Respondents to show that removing Mr. Buffalo from the Program for not complying with the volunteer hours requirement was *bona fide* and reasonably justified.

[91] To do so, the Respondents would have to prove that: (1) they adopted the standard for a purpose rationally connected to operation of the Program, (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 Mr. Buffalo to the point of undue hardship: *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (Meiorin Grievance)*, [1999] 3 SCR 3 [**Meiorin**] at para. 54; *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 SCR 868 [**Grismer**] at para. 20.

[92] In the tenancy context, the Tribunal in *Alexander v. PAL Vancouver (No. 4)*, 2006 BCHRT 461 at para. 44, held:

[93] Section 10 of the *Code*, unlike the provisions prohibiting discrimination in employment and services, does not contain a statutory justification defence. Despite this, the Tribunal and its predecessors have considered whether a *prima facie* case of discrimination in tenancy is justifiable, including considering whether the landlord could have accommodated the tenant or prospective tenant: *Trudeau v. Chung*, [1991] B.C.C.H.R.D. No. 21; and *Ferguson v. Kimpton*, 2006 BCHRT 62. I agree with this approach, and apply it here.

[94] Applying this analytical structure to the current context, I therefore consider the following questions:

- a. Is VNHS reasonably certain to show that it adopted the volunteer hours requirement for a purpose rationally connected to the operation of the Program?;
- b. Is VNHS reasonably certain to show that it adopted the volunteer hours requirement in an honest and good faith belief that they were necessary to the fulfilment of a legitimate purpose related to the operation of the Program?; and
- c. Is VNHS reasonably certain to show that the volunteer hours requirement is reasonably necessary to the accomplishment of those legitimate purposes? To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individuals sharing the characteristics of Mr. Buffalo without imposing undue hardship upon VNHS.

[95] For the reasons that follow, I am not persuaded based on the record before me that the Respondents are reasonably certain to prove that the volunteer hours requirement is a *bona fide* and reasonably justified requirement of the Program.

[96] The Respondents submit that the volunteer hours requirement was made for sound economic reasons, and it applies equally to all participants in the Program. They rely on the principle that a rule will meet the rational connection test if it is “honestly made for sound economic or business reasons, equally applicable to all whom it is intended to apply”: *Trudeau v. Chung*, 1991 CanLII 13149 (BC HRT) at para. 43 citing *Ont. Human Rights Comm. v. Simpsons-Sears*, [1985] 2 SCR 536 and *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990] 2 SCR 489.

[97] To this end, the Respondents explain that the Program is not a social housing program supported by BC Housing or any other government agency. Rather, the Program is funded entirely by VNHS. VNHS uses the revenue from the Lodge and Gallery to subsidize the artists’

tenancy and Program participation. Through completing the volunteer hours requirements in the Lodge or Gallery, the Program participants contribute to the sustainability of the Program and the ability of VNHS to support its artists' personal and professional development.

[98] While I accept that VNHS may have valid economic reasons for implementing the volunteer hours requirement for Program participants, they have not sufficiently explained in this application what those reasons are. I understand that the participants' volunteer labour somehow contributed to the economic viability of the Program. However, the Respondents have not provided any information to demonstrate how they arrived at the standard of eight hours of mandatory volunteer hours per month for each Program participant, or how this specific contribution of volunteer hours impacts the financial situation of the Lodge, the Gallery, or the Program. Without specific information, I am unable to conclude that the standard was rationally connected or reasonably necessary to fulfill the stated purpose of the volunteer hours requirement. 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.

[99] The Respondents do not argue that it would be impossible to accommodate individuals sharing the same protected characteristics as Mr. Buffalo. Rather, they say that they did fulfill their duty to accommodate, but Mr. Buffalo refused to participate in his own accommodation. Specifically, the Respondents state that VNHS first sought to accommodate Mr. Buffalo by providing alternate housing in a subsidized unit not connected to the Program. Mr. Buffalo rejected this proposed alternate housing despite its rent being the same as his current rent, and the absence of volunteer hours. Subsequently, the Respondents state that they sought to accommodate Mr. Buffalo in December 2019 by renewing his lease at the Lodge, even though he had not fulfilled his volunteer hours in September and October 2019, and they say this was not explained by medical reasons. However, Mr. Buffalo ultimately failed to fill out the paperwork required for him to continue in the Program.

[100] Mr. Buffalo agrees that he refused the Respondents' offer of an alternative residence outside the Program. However, Mr. Buffalo argues that this offer was not based on comparable

housing. The unit offered was in supportive housing for low-income individuals facing multiple barriers, and Mr. Buffalo says that there is a strong negative social stigma attached to it. He states that this was not an appropriate environment for him. In contrast, Mr. Buffalo says the Lodge is branded as an “Indigenous Artist Utopia,” and by leaving he would lose access to the studio space, mentorship, connection with other Indigenous artists, and cultural practices such as the sweat lodge and smudge room.

[101] Mr. Buffalo does not dispute that he did not complete volunteer hours or the paperwork requested by the Respondents on December 20, 2019. However, Mr. Buffalo states that he was being set up to fail, as he would not have had enough time to complete the volunteer hours requirements by the end of the month given the Christmas holidays. Mr. Buffalo does appear to have tried to provide some of the information requested by the Respondents in early January 2020, when he emailed a list of his accomplishments during his residency to Ms. Go. However, he did not provide the other required documents, nor did he communicate with the Respondents to request additional time to comply.

[102] The Tribunal in *Purdy* said:

[63] Whether a respondent has met the duty to accommodate is a question of fact. It will depend on the specific circumstances and relevant considerations appropriate to each case. In an application under s. 27(1)(c), the Tribunal’s role is not to determine, as a matter of fact, whether the respondent met its duty. Rather, the Tribunal considers the likelihood that the respondent will be able to establish that defence. The respondent must persuade the Tribunal that it is reasonably certain it will be able to do so. This requires the respondent to provide the Tribunal with evidence showing that it took all reasonable and practical steps, including effort to look at alternative approaches. The Tribunal will be alert to shortfalls in the evidence regarding relevant considerations and situations where the evidence requires testing by way of cross-examination.

[103] I accept that the Respondent is reasonably certain to prove that it took some steps to accommodate Mr. Buffalo's disability. However, based on the information before me, I am not persuaded that they are reasonably certain to establish that they took all reasonable and practical steps. In particular, recalling that I have found that there may have been an employment relationship between the parties, I am not persuaded that the Respondents are reasonably certain to prove that the offer to move Mr. Buffalo to another residence, outside of the Program, was a reasonable accommodation for his continued participation in the Program. I am also not convinced that the Respondents are reasonably certain to prove that their December 20 requirement that Mr. Buffalo complete his December volunteer hours and provide detailed paperwork in order for him to continue in the Program in a relatively short timeframe, in the context of the parties' already deteriorated relationship, demonstrates that all reasonable and alternative approaches were considered.

[104] Based on these considerations, I am not persuaded that the Respondents are reasonably certain to prove that they discharged their duty accommodate Mr. Buffalo to the point of undue hardship.

3. *Has Mr. Buffalo brought his retaliation complaint out of the realm of conjecture?*

[105] To establish retaliation contrary to s. 43 of the *Code* at a hearing, Mr. Buffalo must establish:

- a. VNHS was aware that he made or might make a complaint;
- b. VNHS evicted, discharged, suspended, expelled, intimidated, coerced, imposed a penalty on, denied a right or benefit to, or otherwise adversely treated him; and
- c. There is a sufficient connection between the impugned conduct and his involvement in the complaint or possible complaint. This connection may be established by proving that VNHS intended to retaliate, or may be inferred where VNHS can reasonably have been perceived to have engaged in that conduct in retaliation, with the element of reasonable perception being assessed

from the point of view of a reasonable complainant, apprised of the facts, at the time of the impugned conduct.

See: Gichuru v. Pallai, 2018 BCCA 78 at para. 58

[106] On this application, the onus is on VNHS to establish the basis for the dismissal.

[107] The Tribunal must consider VNHS's explanations for the alleged conduct, together with all the evidence, to assess whether the requisite connection has been established: *Gichuru* at para. 59.

[108] Mr. Buffalo alleges that VNHS retaliated against him for filing a human rights complaint by intimidating him during the RTB process, and ultimately evicting him. Specifically, Mr. Buffalo alleges that VNHS attended the RTB hearing with the CEO, their lawyer, and three managers. He says this was an effort to intimidate him, as the CEO does not attend other RTB hearings and at the outset he stated: "Let's get this started, lots of powerful voices to be heard." He says that this made him feel very small. Further, Mr. Buffalo alleges that VNHS evicted him after not accommodating his disability, threatening him with eviction while he was on medical leave, ignoring his proposed back to work plan, and imposing impossible to meet obligations in order to continue his participation in the Program. He states that these actions were taken after he notified VNHS of his intention to file a human rights complaint.

[109] VNHS denies retaliating and argues that Mr. Buffalo's retaliation complaint has no reasonable prospect of success. While they acknowledge that they were aware of his intention to file a human rights complaint as early as November 14, 2019, VNHS states:

- a. It has a non-retaliatory explanation for the decision to evict Mr. Buffalo;
- b. It did not intimidate Mr. Buffalo during the RTB hearing; and
- c. A reasonable complainant could not have viewed the eviction, or VNHS's conduct at the RTB hearing, as retaliatory.

[110] VNHS says that Mr. Buffalo will not be able to prove that evicting him was an act of retaliation because there is overwhelming evidence to rebut any inference related to the timing of the eviction and VNHS becoming aware of Mr. Buffalo's intention to file a human rights complaint. VNHS says a respondent can rebut the inference of timing by providing a reasonable, non-discriminatory explanation for their conduct: *Han v. New Chelsea Society*, 2019 BCHRT 242 at paras. 31-32; *Seignoret v. Bakonyi Holdings and others*, 2019 BCHRT 277 at para. 52.

[111] VNHS says that its ultimate decision not to renew Mr. Buffalo's participation in the Program was based on his failure to satisfy the requirements for lease renewal, despite VNHS's attempts to accommodate him and facilitate his compliance with the requirements.

[112] VNHS acknowledges that it sent Mr. Buffalo a letter on November 25, 2019, after learning on November 14, 2019, that Mr. Buffalo intended to file a human rights complaint. This letter did inform Mr. Buffalo that VNHS would not be renewing his participation in the Program. However, VNHS says that the purpose of the letter was to offer an accommodation of alternative housing where Mr. Buffalo would not be required to fulfil the hours requirement. Further, VNHS's decision to send this letter was based on a culmination of the events in the preceding months and not based on Mr. Buffalo's intention to file a human rights complaint. VNHS says that it had taken steps to address Mr. Buffalo's failure to fulfill the hours requirement prior to November 14, 2019, both in meetings and emails. Therefore, VNHS says the "wheels for the eviction attempt" were in motion before Mr. Buffalo notified them of his intention to or actually file the human rights complaint. VNHS says that this rebuts any inference that the November 25, 2019, letter was retaliatory. Similar to the respondents in *Winfrey v. Fletcher*, 2005 BCHRT 585 at para. 49, VNHS says its conduct was an exercise in diligence in enforcing the terms of the Program Agreement, and it was prepared to take steps to evict Mr. Buffalo, failing his compliance.

[113] VNHS says that after receiving Mr. Buffalo's response on December 3, 2019, in which he declined the offer of alternative housing and reiterated his intention to file a human rights complaint, it decided to reconsider its position. On December 11, 2019, VNHS sent Mr. Buffalo

a letter informing him that it would give him another chance to meet the requirements to qualify for lease renewal. VNHS says this was another attempt to accommodate Mr. Buffalo and de-escalate the situation.

[114] Similarly, VNHS acknowledges that Mr. Buffalo informed them that he had filed a human rights complaint on January 8, 2020, but says its letter of January 22, 2020, was not retaliatory. The January 22 letter explained that its decision to evict Mr. Buffalo and remove him from the Program was due to his own failure to make any effort to satisfy the requirements for lease renewal, his failure to communicate with VNHS to discuss shift availability or his reasons for non-compliance, his rejection of VNHS's accommodation attempts, and the ultimate breakdown in the relationship between the parties. VNHS says that a reasonable complainant, apprised of the facts of Mr. Buffalo's own lack of cooperation, would not perceive VNHS's actions as being retaliation for his human rights complaint.

[115] Further, VNHS says that it did not intimidate Mr. Buffalo at the RTB hearing. Intimidation, as described in s. 43 of the *Code*, captures conduct which generates fear or a sense of powerlessness, and carries the potential to deter the complainant or those who assist them from pursuing allegations of discrimination. This is not purely a subjective assessment but should be assessed from the perspective of a reasonable complainant: *Birchall v. BCS 61 Strata Corporation and another*, 2018 BCHRT 29 at 70-71.

[116] Specifically, VNHS reiterates that only the CEO, Ms. Go and VNHS's legal counsel attended for the duration of the mediation; the three other VNHS employees were only called in at the beginning of the hearing to introduce themselves and did not otherwise participate. Further, VNHS says the settlement discussions were respectful, and took place in front of an arbitrator. The VNHS representatives did not speak to each other directly, rather the parties spoke through their legal representatives. Mr. Buffalo's claim that he felt intimidated is not sufficient to establish intimidation within the meaning of the *Code*, they say.

[117] Finally, VNHS says that even if Mr. Buffalo could show that its conduct amounted to intimidation, a reasonable complainant could not reasonably have perceived it as retaliatory.

[118] There is no dispute that VNHS was aware of Mr. Buffalo's intention to file a human rights complaint at the time of the alleged retaliatory conduct. While the parties disagree about whether VNHS intimidated Mr. Buffalo during the RTB process, there is also no dispute that VNHS evicted Mr. Buffalo. The parties further disagree on whether any of VNHS's conduct was retaliation for Mr. Buffalo's intention to file a human rights complaint.

[119] For reasons already discussed in this decision, I am not persuaded based on the record before me that VNHS has provided an entirely non-discriminatory explanation for their decision to evict Mr. Buffalo, or that they took all reasonable steps to accommodate him to the point of undue hardship. VNHS continues to rely on its position that its actions leading to the eviction were in effort to accommodate Mr. Buffalo and diligently enforce the Participant Agreement, and it was his own conduct which led to his eviction. However, I am not persuaded that the inference that can be drawn with respect to the undisputed timing of these events has been rebutted. Mr. Buffalo notified VNHS of his intentions to file a human rights complaint in the midst of the breakdown of the parties' relationship, when each side claims to have been pursuing reasonable accommodation. I find this sequence of events cannot be disentangled on this application and am therefore not persuaded that Mr. Buffalo has no reasonable prospect of establishing that his human rights complaint was a factor in the Respondents' decision to evict him.

[120] However, I am persuaded that Mr. Buffalo has no reasonable prospect of establishing that VNHS intimidated him at the RTB hearing, from the perspective of a reasonable complainant. With all forms of retaliation, what amounts to prohibited intimidation will depend on the circumstances of each case. It is not purely a subjective assessment. The Tribunal has found that the *Code* does not cover all unpleasant activities between the parties that bear some connection to the human rights complaint; rather, it is limited to prejudicial conduct with serious effects: *Birchall* at paras 69 and 71.

[121] In this case, I accept that the alleged intimidating conduct occurred in the context of a power imbalance between the parties where Mr. Buffalo had higher stakes in the outcome of the RTB proceeding. At the same time, VNHS had the right to present its case at the RTB,

including calling relevant witnesses to attend and provide evidence. I am not persuaded that Mr. Buffalo will be able to establish that the presence of these witnesses, or the CEO, is in itself prejudicial conduct rising to the level of intimidation. Similarly, while the CEO's comment regarding "powerful voices" was perhaps not sensitive to the power imbalance in the room, I am not persuaded that Mr. Buffalo will be able to establish that this was prejudicial conduct amounting to intimidation within the meaning of the *Code*. I have considered that this was a virtual hearing, and the parties communicated through their legal representatives during the mediation. While I accept that Mr. Buffalo may establish that he subjectively felt intimidated, I am not persuaded that he has brought out of the realm of conjecture that this conduct was intimidation within the meaning of the *Code*.

[122] For these reasons, I grant VNHS's application to dismiss Mr. Buffalo's allegation that VNHS retaliated against him by intimidating him at the RTB hearing. However, I deny VNHS's application with respect to all the other allegations in this complaint.

IV CONCLUSION

[123] The Respondents' application under s. 27(1)(c) is granted in part. Specifically, I dismiss the allegation that VNHS retaliated against Mr. Buffalo by intimidating him at the RTB hearing. Otherwise, the application is dismissed. Mr. Buffalo's remaining allegations will proceed to a hearing.

Theresa Etmanski
Tribunal Member