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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:

Winnie Smrekar

COMPLAINANT

AND:

City of Richmond and Monique Markham

RESPONDENT

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

Tribunal Member:

Ijeamaka Anika

On their own behalf:

Winnie Smrekar

Counsel for the Respondents:

Kacey Krenn

Armaan Kassam

I INTRODUCTION

[1] Winnie Smrekar was employed as a Disclosure Clerk with the City of Richmond [City]. She arrived at work on January 28, 2020, after returning from a trip to Hong Kong the previous day. Ms. Smrekar's supervisor, Monique Markham, asked her to leave the office temporarily, citing health and safety concerns. Ms. Smrekar alleges that the City and Ms. Markham [together, the Respondents] discriminated against her on the basis of race, colour, place of origin and ancestry [protected characteristics] contrary to s. 13 of the *Human Rights Code*. Ms. Smrekar describes herself as Chinese by race, colour and ancestry and says her place of origin is Hong Kong (Special Administrative Region). Specifically, Ms. Smrekar says that the Respondents told her to leave the workplace because she had the same ethnic origin as those infected by COVID-19 in Wuhan, China.

[2] The Respondents deny discriminating and apply to dismiss the complaint under ss. 27(1)(c) and (d)(ii) of the *Code*. The Respondents argue that there is no reasonable prospect that the complaint will succeed. They say that Ms. Smrekar did not experience an adverse impact as contemplated by the *Code* because she was allowed to return to the office less than 30 minutes after she was asked to leave. The Respondents also apply to dismiss the complaint on the basis that the time and expense of a hearing is not warranted because they took Ms. Smrekar's complaint seriously and effectively resolved it. Further, the Respondents argue that proceeding against the individual respondent would not further the purposes of the *Code*.

[3] I find that I can decide the application under s. 27(1)(c). The issue I must decide is whether there is no reasonable prospect Ms. Smrekar could establish that she was adversely impacted in employment based on being asked to leave the office for less than 30 minutes.

[4] For the reasons set out below, I allow the application and dismiss the complaint. I am not persuaded Ms. Smrekar has a reasonable prospect of proving that the conduct she complains about adversely impacted her in employment.

[5] To make this decision, I have considered all the information filed by the parties. In these reasons, I only refer to what is necessary to explain my decision. I make no findings of fact.

II BACKGROUND

[6] The background is taken from the materials filed by the parties. Where there are disputes in the evidence, I indicate it below.

[7] The City operates municipal facilities at a variety of locations throughout Richmond. Ms. Smrekar worked at one of the facilities [the **department**] and Ms. Markham was Ms. Smrekar's supervisor.

[8] Early in January 2020, the Public Health Agency of Canada issued warnings for travellers to China about the new coronavirus. Canada implemented a screening protocol for travellers returning from China on January 22, 2020, and passengers with symptoms were advised to self-isolate for 14 days. The first COVID-19 case in British Columbia was announced on January 25, 2020. It is not clear from the evidence whether Hong Kong was included in the travel or self-isolation advisory.

[9] On the day before Ms. Smrekar's return to work, some staff members that worked in the same department as Ms. Smrekar expressed their concern to Ms. Markham about Ms. Smrekar returning to the workplace after travelling to Hong Kong due to the spread of COVID-19 from China. The staff members were concerned about working in close proximity to Ms. Smrekar because they lived with vulnerable family members. They said they wanted to limit the risk of COVID-19 infection and possibly transmitting it to their family members because of the serious risk posed to their family members if they contracted COVID-19.

[10] Ms. Markham contacted her manager to find out whether Ms. Smrekar's return to work would constitute a health and safety risk and whether there were any health and safety protocols to put in place. Ms. Markham's manager says he sought direction from OHS concerning the issue. It is not clear when Ms. Markham and her manager made these inquiries, but as will become apparent, they did not receive a response from OHS before Ms. Smrekar arrived at work the next day.

[11] When Ms. Smrekar arrived at work, Ms. Markham met her in the hallway outside the department just as Ms. Smrekar was about to enter the office. Ms. Smrekar says that Ms. Markham asked her how she was feeling and informed her that there was concern about Ms. Smrekar returning to work because of the COVID-19 outbreak in China. Ms. Smrekar says she told Ms. Markham that she did not visit mainland China, the cases of COVID-19 in Hong Kong were due to travellers arriving from Wuhan, and there was no Health Canada directive to quarantine, nor had she been intercepted at the airport when she returned the day before.

[12] Ms. Smrekar proceeded to her workstation. The Respondents say that after Ms. Smrekar arrived at work, Ms. Markham sought advice from the Manager on how to handle the situation while the manager waited for a response from OHS. Based on the manager's advice, Ms. Markham told Ms. Smrekar to leave the office temporarily until she received direction on how to proceed. Ms. Smrekar left the building upset and waited in her car for less than 30 minutes until Ms. Markham called her to let her know she could come back in.

[13] The following day, Ms. Markham apologized to Ms. Smrekar. She explained that she had not been expecting Ms. Smrekar to arrive for work early, and so she was caught of guard and the situation could have been handled better.

[14] Ms. Smrekar filed a complaint with the City which was investigated by an external investigator in accordance with the City's Respectful Workplace Administrative Procedures Policy [**Policy**]. The investigation found that Ms. Markham had not breached the Policy.

III DECISION

[15] In this application, the onus is on the Respondents to establish the basis for dismissal. 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.

[16] 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.

[17] 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.

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

[19] The Respondents do not dispute Ms. Smrekar’s protected characteristics.

[20] Next, I turn to the second element of the *Moore* test. On the evidence, I am not satisfied that Ms. Smrekar has taken adverse impact, within the meaning of the *Code*, out of the realm of conjecture. The Respondents argue that Ms. Smrekar did not experience the kind of adverse impact contemplated by human rights protections because she was out of the workplace for less than 30 minutes.

[21] I agree. The subjective impact of this incident alone is not enough to prove adverse impact for the purpose of the *Code*. The Tribunal has consistently held that there is some conduct which falls below the threshold of discrimination: *Brito v. Affordable Housing Societies and another*, 2017 BCHRT 270 at para. 41. The Tribunal will examine the full context of an

incident to determine the impact of the incident on the dignity and equality of the complainant:
Reilly v. City of Vancouver and another, 2024 BCHRT 81 at para 55.

[22] In my view, there is no reasonable prospect of Ms. Smrekar proving the incident complained of rose to the level of adverse impact as required by the *Code*. Ms. Smrekar was out of the office for less than 30 minutes while the Respondents sought clarity from OHS. Both Ms. Markham and the manager apologized to Ms. Smrekar for the inconvenience and Ms. Smrekar does not allege any further adverse impact either when she returned to the office or anytime afterwards. On the evidence, the context of the incident could not support the finding of adverse impact that rises to the level of discrimination at a hearing.

[23] I accept that Ms. Smrekar is reasonably certain to prove she was upset when Ms. Markham asked her to leave the office. This may have been particularly so because she had gone to Hong Kong for her father's burial, so it is easy to understand that she may have felt particularly vulnerable at that time. Indeed, she says she was so upset that she took an illogical route to her car while she waited to hear from Ms. Markham. While Ms. Smrekar found the incident to be emotionally upsetting and subjectively stressful, I find that even on the low threshold required at this stage, there is no reasonable prospect of Ms. Smrekar proving adverse impact at a hearing.

[24] This allegation has no reasonable prospect of success, and the complaint is dismissed.

IV CONCLUSION

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

Ijeamaka Anika
Tribunal Member