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File: CS-001113

Indexed as: Makhija v. CSH (Carlton Gardens) Limited Partnership and others, 2024 BCHRT 98

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:

Dr. Jamuna Makhija

COMPLAINANT

AND:

CSH (Carlton Gardens) Limited Partnership and Pro Vita Care Management Inc. and Burnaby
Division of Family Practice

RESPONDENTS

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

Tribunal Member: Andrew Robb

Counsel for the Complainant: Clea Parfitt and Eileen Myrdahl

Counsel for the Respondent CSH (Carlton Gardens) Limited Partnership: Natasha Jategaonkar

Counsel for the Respondent Pro Vita Care Management Inc.: Gradin D. Tyler

Counsel for the Respondent Burnaby Division of Family Practice: Bianca C. Jaegge, Shauna Gersbach, Nida Sohani and Kristal Low

I INTRODUCTION

[1] Dr. Jamuna Makhija filed a human rights complaint against CSH (Carlton Gardens) Limited Partnership, Pro Vita Care Management Inc., and Burnaby Division of Family Practice [together, the **Respondents**]. From 1996 to 2019, Dr. Makhija provided physician services to some residents at a long-term care facility in Burnaby, known as Carlton Gardens [the **Residence**]. In 2019, multiple Residence staff accused Dr. Makhija of inappropriate conduct, and the Respondents responded to these accusations in various ways.

[2] Dr. Makhija says the Respondents discriminated against him based on his sex, age, race, ancestry, place of origin, and history of criminal charges, in their response to the accusations against him, particularly by prohibiting him from providing physician services at the Residence. He also says that starting in 2013, one or more of the Respondents discriminated against him by reducing his patient roster at the Residence.

[3] The Respondents deny discriminating. They say they did not have an employment relationship with Dr. Makhija, and even if he did experience an adverse impact in his employment, it had no connection with his protected characteristics.

[4] Each of the Respondents applies to dismiss Dr. Makhija's complaint. They all apply under s. 27(1)(c) of the *Human Rights Code* and under other subsections of s. 27(1). I find it most efficient to decide the applications under s. 27(1)(c).

[5] For the following reasons, I find that Dr. Makhija has no reasonable prospect of establishing a connection between the alleged adverse impacts and his protected characteristics, and I dismiss the complaint. 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.

[6] I apologise to everyone affected by this matter for the Tribunal's delay in making this decision.

II BACKGROUND

A. Background information about the parties

[7] Dr. Makhija was born and received his medical training in India, before emigrating to Canada. He describes himself as a visible minority. When this complaint was filed he was in his 70's.

[8] Dr. Makhija is licensed by the College of Physicians and Surgeons of British Columbia [CPSBC] to practice medicine. CPSBC has imposed restrictions on his licence [the **Restrictions**]. Among other things, the Restrictions require him to have a third party present when he sees female patients at nursing homes.

[9] CSH (Carlton Gardens) Limited Partnership [CSH] is owned by Chartwell Retirement Residences [Chartwell], a publicly traded company with offices in Quebec, Ontario, and British Columbia. CSH has owned and operated the Residence since 2005. CSH is licensed by the Fraser Health Authority [Fraser Health] to operate the Residence as a long-term care facility, under the *Community Care and Assisted Living Act*.

[10] CSH directly employs only two employees: a general manager [the **General Manager**] and a business manager. Chartwell provides administrative and operational support to CSH, and the General Manager sometimes consults with Ms. A, Chartwell's director of regional operations, about the Residence's operations.

[11] All services at the Residence are provided by contractors or staff employed by contractors, including Pro Vita Care Management Inc. [Pro Vita]. Pro Vita describes itself as a contract care service provider in the healthcare industry in British Columbia. It employs nurses and other healthcare workers, who work at sites operated by businesses and organisations that contract with Pro Vita.

[12] CSH and Pro Vita are parties to an agreement which requires Pro Vita to provide nurses and other staff for the Residence. CSH relies on the services provided by Pro Vita under this

agreement to comply with its licensing requirements under the *Community Care and Assisted Living Act*.

[13] Pro Vita employs a director of care, who works at the Residence [the **Director of Care**]. The Director of Care reports to two managers, Ms. S and Ms. J, who both work for Pro Vita, but not at the Residence.

[14] Burnaby Division of Family Practice [**BDFP**] is a non-profit society governed by a board of directors. Its members are family physicians who provide patient care in Burnaby, including Dr. Makhija. Its mission is “to engage, support and mobilize family physicians in co-creating a network that supports the well-being of the Burnaby community” and it operates programs that support this mission.

[15] In 2016, BDFP started the Residential Care Initiative Program [the **Program**]. The Program acts as an incentive system to support physicians to provide services for patients living at residential care facilities in Burnaby. BDFP employs a manager for the Program [the **Program Manager**]. The Program Manager reports to BDFP’s executive director.

[16] As part of the Program, BDFP enters into service agreements with BDFP members who agree to provide physician services to patients in residential care facilities in Burnaby, including the Residence. BDFP says Fraser Health is a partner of the Program, and BDFP regularly communicates with Fraser Health about issues related to the Program.

[17] In October 2016, Dr. Makhija entered into an agreement with BDFP as part of the Program [the **Agreement**]. The Agreement includes the following terms:

- a. Dr. Makhija will maintain a patient roster of at least 10 residents of residential facilities in Burnaby, and will comply with specified care practices.
- b. BDFP may immediately terminate the Agreement upon any material breach.
- c. Dr. Makhija must arrange for a qualified locum physician to cover his obligations under the Agreement when necessary.

[18] Dr. Makhija provided physician services to some patients at the Residence starting around 1996, before the Residence was owned by CSH and before the Program existed. By 2019, he says he attended the Residence once every two weeks, for about two to three hours, to monitor his patients and advise Residence staff about resident care.

[19] Dr. Makhija says that in 2013, he had about 33 patients on his roster at the Residence. Until 2013, when his patients at the Residence moved or passed away, he would be assigned new patients. Since 2013, when his patients moved or passed away, he was not assigned new patients. As of February 2019 he had about 10 patients at the Residence.

B. Harassment allegations

[20] Pro Vita says that in February 2019, it received complaints from female employees about Dr. Makhija [the **Complaints**]. On or about February 8, 2019, the Director of Care told the General Manager about the Complaints. The General Manager says the Director of Care told her Dr. Makhija had persisted in the behaviour that gave rise to the Complaints, even after being asked to stop, and Pro Vita staff were uncomfortable working with him. There is no evidence before me from the Director of Care.

[21] Pro Vita says most of the Complaints were made verbally. Three were reduced to written statements. One of the written statements was an email from a nurse, dated February 11, 2019, addressed to the Director of Care. It said:

- a. In one of his visits to the Residence, Dr. Makhija touched her back, near her waist, in a way that made her uncomfortable. She told him not to touch her again and he did not respond. She could not recall the date of the visit.
- b. She had heard from another nurse that Dr. Makhija had done the same thing to the other nurse in the past.
- c. Dr. Makhija usually looked for her when he arrived at the Residence. Due to what she had heard about him and her experience with him she tried to minimise her interactions with him.

- d. She was uncomfortable with Dr. Makhija because he asked her why she works so hard and said she does not have enough time with her family or her husband. She described this conversation as awkward and unprofessional.
- e. She was sending the email at the Director of Care's request.

[22] Another written statement came from Pro Vita's care manager at the Residence. The care manager's statement described an interaction with Dr. Makhija during a Christmas party hosted by BDFP. It said:

Me and my husband were in the same table as Dr. Makhija and his wife. We introduced ourselves to each other. I asked Dr. Makhija if he would be willing to attend his own care conferences by new year. Dr. Makhija walked behind me and I felt his hands touched my back sweeping across. He came up to me and talked to me upclose to my face, asking about care conference and the schedule. This incident happens at least 3x that night where in he will walk behind me and touch my back and talk very closely to my face. Part of it, he will ask for my name and when I tell him my name he will look closely to my name tag which is placed in my chest, this incident happened at least 2-3x that night.

I was holding my personal phone when Dr. Makhija suddenly asked for my number, I don't know if he meant to ask for my personal number but I gave him my work phone number. [as written]

[23] The third written statement was made by another nurse. It says that when the nurse first met Dr. Makhija, he asked if she was married and had kids. She said yes and he never asked again. The statement also says Dr. Makhija once mentioned going on vacation with his girlfriend, and this made the nurse uncomfortable because she knew he was married. The nurse says she is cautious about Dr. Makhija because of "rumors circulating that he can be inappropriate". The statement provides no further information about those rumors.

[24] The General Manager says she received copies of the written statements from the Director of Care, on or about February 14, 2019. Pro Vita says there are no notes or records regarding its conversations with the staff who made the Complaints.

[25] The Respondents never asked Dr. Makhija for his response to the Complaints. In response to the applications to dismiss his human rights complaint, he made a sworn statement which included his response to the Complaints:

- a. With respect to the nurse who sent her statement to the Director of Care by email on February 11, 2019, Dr. Makhija recalls saying in a joking way that she was working too hard. He does not recall talking about her family or touching her back, and he denies that she told him not to touch her. Dr. Makhija says the events described by the nurse happened at least three years before the date of her email.
- b. He recalls sitting with the care manager at BDFP's Christmas party on November 30, 2018. He spoke to her about patient care conferences at the Residence. She asked for his phone number so she could invite him to these conferences, and he gave her his office and cell numbers. He does not recall looking at her name tag or touching her in any way.
- c. With respect to the third written statement, Dr. Makhija does not recall asking about the nurse's family and denies telling her he was going on vacation with his girlfriend.

[26] Dr. Makhija denies that anyone at the Residence ever told him they were uncomfortable with his conduct.

[27] Chartwell has a harassment policy that includes the following terms:

- a. It applies to all employees who are employed or volunteering at a long-term care residence owned or managed by Chartwell.
- b. When a written harassment complaint is received, a Chartwell human resources representative will decide whether an investigation is warranted. Investigations may also be conducted if the complainant refuses to submit a written complaint.

- c. If there is an investigation, the investigation will be undertaken promptly and will provide the complainant and the respondent equal treatment in evaluating the allegations.

[28] Pro Vita has a Bullying and Harassment policy that includes the following terms:

- a. Every complaint about bullying and harassment will be investigated.
- b. In multi-employer worksites, the complainant's employer will investigate the complaint, in collaboration with the employer of the person complained about. If that person is an independent contractor, they will be encouraged to appoint an unbiased person to participate in the investigation.

[29] On February 8, 2019, before she received the written statements, the General Manager sent an email to the Program Manager about the Complaints. The email asked how CSH could remove Dr. Makhija from its list of physicians as soon as possible. On the same day, the General Manager sent an email to Ms. A about Dr. Makhija, saying "I would like this man out of our building ASAP".

[30] On or about February 11, 2019, the General Manager says she accessed CPSBC's online directory and learned for the first time about the Restrictions on Dr. Makhija's licence. She also learned that CPSBC had disciplined Dr. Makhija on multiple occasions since 2010. In support of its application to dismiss, CSH provided excerpts from the CPSBC online directory, which show the Restrictions include:

- a. Dr. Makhija must have a chaperone present continuously for all new female patients, all complete physical and otherwise sensitive examinations of female patients and all examinations that require female patients to disrobe.
- b. Dr. Makhija must have a third party present at all times for house calls, hospital visits, or nursing home visits on female patients.

- c. Dr. Makhija must have conspicuous signage in the office waiting area and all examining rooms, which indicates that he is required to have a chaperone present continuously for all sensitive examinations of female patients.
- d. Dr. Makhija must not initiate or pursue social contact with female patients.
- e. Dr. Makhija must practice in a setting that has been approved by CPSBC.
- f. Dr. Makhija must not see patients unless another staff member is present in the clinic.

[31] CSH also provided CPSBC media releases about Dr. Makhija. The first, dated December 13, 2010, said he admitted unprofessional conduct with a patient, including entering into inappropriate business and social interactions. It said he had been suspended from practicing medicine for six months, and he had consented to remedial conditions required by CPSBC. It does not say what those conditions were, or whether they included the Restrictions. The other media releases refer to additional CPSBC findings against him, between 2010 and 2015, for: failing to keep financial records for medical services provided; breaching an undertaking not to perform and read electrocardiograms in the management of his patients; and failing to exhibit adequate skill and knowledge. The media releases say Dr. Makhija's future professional and ethical conduct must be "beyond reproach."

[32] The General Manager says she discussed the Restrictions with the Director of Care, who said he was not previously aware of them. The General Manager asked the Director of Care to ask Pro Vita employees if they knew whether a third party was always present when Dr. Makhija met with female patients. The General Manager says that based on the information she received from the Director of Care in response to this request, she formed the opinion that Dr. Makhija had not complied with the Restrictions.

[33] The Respondents never asked Dr. Makhija if he complied with the Restrictions. In his response to the applications to dismiss, he says he did. He says he always brought a nurse or

another person when seeing a female patient in her room, and he often saw patients at the Residence's nursing station rather than in their rooms.

[34] On the same day she accessed the CPSBC online directory, February 11, 2019, the General Manager says she found an online news article about Dr. Makhija, from 2007. The article said Dr. Makhija had been charged with criminal offences including sexual assault and criminal harassment, and at least one of the charges involved a patient. There is no information in the article about the outcome of the charges. Dr. Makhija's evidence does not refer to these charges specifically, but he says he has never been prosecuted or found guilty of a criminal offence.

[35] On February 12, 2019, the General Manager sent a letter to the Program Manager at BDFP. The letter referred to the Complaints and said CSH "will immediately seek to re-assign Chartwell residents that are cared for by Dr. Makhija while it conducts a thorough investigation into the matter."

[36] On the same day, February 12, 2019, the Program Manager told Fraser Health about the Complaints, and that CSH would investigate. The Program Manager says Fraser Health then decided that Dr. Makhija would be prohibited from providing care to patients at any residential care facility in Burnaby, pending the investigation. Dr. Makhija says he was never notified about this prohibition.

[37] On February 13, 2019, the General Manager and the Director of Care had a phone call with Dr. Makhija. The General Manager told him there had been complaints against him. She said an investigation would be conducted, and Dr. Makhija would not be permitted to return to the Residence, pending the investigation. She also told him she had notified BDFP about the Complaints, and BDFP had notified Fraser Health. The General Manager's notes from the call say she advised him that "we have received allegations of sexual misconduct from several of our nurses." The notes say Dr. Makhija questioned the allegations and "we reconfirmed they were allegations" [underlining in the original], and CSH would follow Chartwell policies in the investigation.

[38] On the same day, February 13, 2019, the General Manager followed up in a letter to Dr. Makhija. The letter said:

- a. CSH had received numerous reports that he had repeatedly engaged in inappropriate touching and objectionable sexual behaviour that he knew or ought to have known was unwelcome.
- b. Multiple female staff felt unsafe and distressed working with him when other staff were not around.
- c. CSH would conduct an investigation into the Complaints.
- d. CSH would work with BDFP to reassign his patients at the Residence to other physicians.
- e. He was no longer authorised to attend the Residence.

[39] BDFP says that on February 13, 2019, its board decided to terminate the Agreement between Dr. Makhija and BDFP, effective immediately. It says this decision was made because he was prohibited from providing services at the Residence, so he was in breach of his obligation to maintain a roster of at least 10 patients in residential facilities in Burnaby. BDFP notified Dr. Makhija about this decision in a letter dated February 26, 2019.

[40] On or about February 14, 2019, the General Manager met with Ms. A from Chartwell and Ms. J from Pro Vita. The General Manager says that during the meeting, Ms. J said Pro Vita would investigate the Complaints by interviewing Pro Vita staff.

[41] Pro Vita denies that it advised CSH it would investigate the Complaints. There is no evidence before me from Ms. J. But in a later email to Pro Vita staff, Ms. J said she thought Ms. S and the Director of Care—both Pro Vita employees—were “following up” about the Complaints.

[42] On February 19, 2019, the General Manager sent CPSBC a copy of her letter to Dr. Makhija dated February 13, 2019. On February 26, 2019, CPSBC advised the General Manager that it would conduct its own investigation into the Complaints. A CPSBC investigator told the General Manager they hoped to speak to the nurses who made the Complaints. The General Manager passed this request on to the Director of Care, who said he would ask the nurses if they wanted to speak to CPSBC.

[43] The General Manager later told the CPSBC investigator that the nurses were not comfortable bringing their concerns about Dr. Makhija to CPSBC. The investigator asked the General Manager to provide a general description of the Complaints, and the General Manager responded by letter dated March 21, 2019. The letter said:

- a. Five different nurses had complained about Dr. Makhija's conduct. They were cautious about providing first-hand statements and wanted to maintain anonymity.
- b. During a holiday function in 2018, a nurse said Dr. Makhija repeatedly touched her, making her feel uncomfortable. The nurse said Dr. Makhija walked up behind her, touched her back, and swept his hand across her back. Several times during the event, Dr. Makhija walked up to her and asked what her name was, as an excuse to directly and uncomfortably stare at her chest area, where her name tag was pinned.
- c. On another occasion, a different nurse reported that Dr. Makhija touched her on the lower back, making her feel uncomfortable, and attempted to do it again despite her asking him not to.
- d. One nurse reported that Dr. Makhija does not respect personal space and stands too close to her, making her uncomfortable.
- e. Several other nurses reported conversations with Dr. Makhija that they considered inappropriate, sexist, or unprofessional.

[44] The General Manager says the information in this letter was given to her by the Director of Care.

[45] In a letter dated April 16, 2019, addressed to Dr. Makhija's former patients and their families, the General Manager wrote that Dr. Makhija was no longer practicing at the Residence, and a new physician would be taking over care of his patients.

[46] On July 16, 2019, Dr. Makhija's legal counsel sent letters to BDFP and CSH. The letters said Dr. Makhija had not received any details of the Complaints beyond the information in the General Manager's March 21, 2019 letter to CPSBC, and the Respondents had not given him a chance to respond to the Complaints. The letters threatened legal action if CSH did not lift its exclusion order against Dr. Makhija and BDFP did not readmit him to the Program.

[47] Chartwell's legal counsel responded by letter dated July 30, 2019. This letter said CSH relied on Pro Vita to investigate the Complaints and CSH had no duty to do so. It said that BDFP was Dr. Makhija's employer so BDFP was responsible for investigating any allegations against him. The letter went on to refer to the 2007 news article discovered by the General Manager in February 2019, about the criminal charges against Dr. Makhija, and to Dr. Makhija's record of being disciplined by CPSBC, and to the Restrictions. The letter said that if CSH knew of the Restrictions earlier, it would not have agreed to Dr. Makhija's assignment to the Residence in the first place. Now that CSH knew of the Restrictions, it would not lift the exclusion order against him, and it had advised BDFP that it would not accept Dr. Makhija's re-assignment to the Residence.

[48] In a letter dated August 2, 2019, CPSBC advised the General Manager that it could not substantiate her complaint against Dr. Makhija without further information, including the identities of the nurses who complained about him, and details about the places and times when the alleged incidents took place.

[49] On October 10, 2019, Dr. Makhija filed this human rights complaint against the Respondents.

III DECISION

A. Preliminary issue: application to file new affidavit

[50] Several months after the Respondents filed their final replies to Dr. Makhija's response to the applications to dismiss, BDFP filed an application to file a further affidavit.

[51] It is within my discretion to consider new evidence if fairness requires it, but an application to file new evidence is an unusual procedure and should be limited to replying to new information or submissions contained in a reply submission: *Kruger v. Xerox Canada Ltd. (No. 2)*, 2005 BCHRT 24 at para. 22.

[52] The new affidavit that BDFP seeks to file was made by Ms. T, a former CSH employee who served as general manager of the Residence from 2014 to 2017. The affidavit says it was her understanding that if residents needed a physician, she could approach BDFP, and BDFP would give her the names of physicians who were interested in working in long-term care facilities, and BDFP would not have any further involvement. This supports BDFP's argument about its limited role in connecting physicians to residents of care facilities. BDFP says it merely refers physicians to these facilities, and has no further involvement after making the referral.

[53] In support of its application to file Ms. T's affidavit, BDFP says its counsel made efforts to locate Ms. T before filing BDFP's reply to Dr. Makhija's response to the applications to dismiss. BDFP also says its counsel contacted Ms. T several months after it filed its reply. BDFP does not say whether its counsel's initial efforts to locate Ms. T were successful, or why it was unable to obtain Ms. T's affidavit until after it filed its reply. Without more information about why the affidavit could not have been provided sooner, I am not persuaded that fairness requires me to consider it.

[54] In any event, Ms. T's affidavit is not relevant to my decision. The parties made extensive arguments about whether the Respondents' relationships with Dr. Makhija were employment relationships, for the purpose of the *Code*, and Ms. T's affidavit may be relevant to this issue. But I have not found it necessary to address those arguments, in light of my finding that Dr.

Makhija has no reasonable prospect of proving a connection between his protected characteristics and the alleged adverse impacts.

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

[55] 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. The onus is on the Respondents to establish the basis for dismissal.

[56] 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.

[57] 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 under s. 27(1)(c), 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.

[58] Dr. Makhija says parts of his case will come from examination of the Respondents’ witnesses. However, in an application under s. 27(1)(c), the Tribunal must base its decision on the materials filed by the parties, and not on speculation about what the evidence may be at a hearing: *University of British Columbia v. Chan*, 2013 BCSC 942 at para. 77.

[59] To prove his complaint at a hearing, Dr. Makhija would have to prove he has characteristics protected by the *Code*, he was adversely impacted in employment, and his protected characteristics were a factor in the adverse impact: *Moore v. British Columbia (Education)*, 2012 SCC 61 at para. 33.

[60] Dr. Makhija says the Respondents discriminated against him in multiple ways. He says CSH and Pro Vita discriminated against him in his employment, based on his sex, age, race, ancestry, place of origin, and his history of criminal charges, by:

- a. Excluding him from the Residence, due to the Complaints;
- b. Failing to give him details of the Complaints, including the names of the people who complained about him, and failing to investigate the Complaints;
- c. Failing to reinstate him, when he requested reinstatement in July 2019; and
- d. Failing to assign new patients to him when his patients at the Residence moved out or passed away, from 2013 to 2019.

[61] Dr. Makhija says BDFP discriminated against him in his employment, based on his sex, age, race, ancestry, place of origin, and his history of criminal charges, by terminating the Agreement and advising Fraser Health about the Complaints, without any investigation into the Complaints.

[62] The Respondents do not deny that Dr. Makhija has the protected characteristics listed in his complaint, with one exception: CSH denies that he has the protected characteristic of having been charged or convicted of an offence that is unrelated to his employment. I discuss that issue below, in the context of CSH's refusal to reinstate Dr. Makhija in July 2019.

[63] The Respondents deny that they employed Dr. Makhija. They also deny there was a connection between his protected characteristics and the adverse impacts described in his complaint. As noted above, I have not found it necessary to address whether the Respondents' relationships with Dr. Makhija were employment relationships under the *Code*. For this application I will assume, without deciding, that they were.

[64] BDFP says Dr. Makhija's sex was not a factor in how it treated him. It says its decision to terminate its Agreement with Dr. Makhija was not based on the Complaints, but on his material

breach of the Agreement, when he no longer had a roster of 10 or more patients in residential care facilities.

[65] CSH says Dr. Makhija's sex was not a factor in its decision to exclude him from the Residence and reassign his patients. It says these decisions were based on the Complaints, the Restrictions, the fact that CSH had not been advised of the Restrictions, and CSH's belief that Dr. Makhija had not complied with the Restrictions. CSH says it reasonably relied on Pro Vita to investigate the Complaints, and it believed Dr. Makhija would have an opportunity to respond to the Complaints during Pro Vita's investigation.

[66] Pro Vita denies that it treated Dr. Makhija adversely but says that even if it did, there is no connection between that adverse treatment and his sex. It denies that it was obligated to investigate the Complaints, and it denies that its decision not to investigate them was related to Dr. Makhija's sex. Pro Vita says the fact that the Complaints were made by women does not mean they were made because Dr. Makhija is a man.¹

[67] Dr. Makhija points out that in order to prove his complaint, he would not be required to prove a connection between his protected characteristics and the Respondents' deliberate treatment of him, or their decision-making about him. The test is whether his protected characteristics were a factor in the adverse impact he experienced, and this does not necessarily require a causal relationship with the Respondents' actions. The focus should be on the effect of the Respondents' conduct, not their intentions: *Code, s. 2; Jamal v. Translink Security Management and another (no. 2)*, 2020 BCHRT 146 at para. 83.

C. Connection to protected characteristics

[68] Dr. Makhija says the adverse impacts he experienced as a result of the Complaints, and the Respondents' response to the Complaints, were connected to his sex as a man and one or

¹ In their submissions the parties address sex and gender in binary terms of men and women. Gender is more complex than these biological categories but the parties do not suggest that complexity is relevant to this case.

more of his other protected characteristics. He argues that a connection between his protected characteristics and the alleged adverse impacts can be established in multiple ways:

- a. He says the Complaints would not have been made, and the conduct alleged in the Complaints would not have been seen as unacceptable, if he was not a man, and particularly an older, racialised man.
- b. He says sexual harassment is inherently a gendered event, and the Respondents' flawed response to the Complaints had a disproportionate impact on him as a man because men are overwhelmingly the respondents in sexual harassment cases.
- c. He says a connection between the adverse impacts and his protected characteristics can be inferred because the Respondents' response to the Complaints was hasty, plagued by confusion, and unfair to him.

[69] With respect to the first argument, I find it is speculation for Dr. Makhija to say the conduct alleged in the Complaints was only considered unacceptable because he is a man, or an older, racialised man. The Complaints alleged unwanted touching, staring at sexualized parts of a woman's body, and uncomfortable discussions about family and romantic relationships. These types of conduct could amount to sexual harassment. There is no evidence before me that could support an inference that the people who made the Complaints would not have complained if Dr. Makhija's alleged actions were committed by a person of a different sex or a non-racialised person or a younger person.

[70] Dr. Makhija relies on the fact that sexual harassment is fundamentally a gendered phenomenon. This has been confirmed by the Tribunal: *Curken v. Gastronome Enterprises*, 2023 BCHRT 2 at para. 108; *Ms. K v. Deep Creek Store and another*, 2021 BCHRT 158 at para. 72. But Dr. Makhija does not cite any authority suggesting that adverse impacts experienced by people accused of sexual harassment are connected to their sex, or that deficiencies in investigations of sexual harassment are connected to the sex of the alleged harasser.

[71] In support of his submission that the Respondents' response to the Complaints had a disproportionate impact on him as a man, Dr. Makhija cites Professor Bethany Hastie's review of the Tribunal's decisions on sexual harassment from 2010 to 2016.² Professor Hastie found that in all sexual harassment cases where the Tribunal issued a final decision, the alleged harasser was a man. Dr. Makhija says this means men are more likely to be negatively impacted if sexual harassment allegations are used to terminate the employment of the alleged harasser without an investigation.

[72] In some cases, statistics may clearly demonstrate a connection between a protected characteristic and negative treatment of a group. In other cases, statistical evidence is insufficient to establish the connection. In *Vancouver Area Network of Drug Users v. Downtown Vancouver Business Improvement Association*, 2018 BCCA 132, the Court of Appeal said:

[90] Statistics can show correlations between membership in a particular group and facially neutral characteristics that have legal consequences. This correlation can point to a connection between adverse treatment and protected grounds. [...]

[91] A correlation itself, however, is not sufficient. While often indicative of the sort of link that must be shown to permit an inference of *prima facie* discrimination, a statistical correlation is not, itself, a link. A correlation may be merely coincidental, or may be the result of confounding factors or a constellation of influences that are so remote from protected grounds of discrimination as to fail to constitute a link.

[92] For example, persons convicted of violent crimes in Canada are overwhelmingly male. That correlation, however, does not establish that statutes that prohibit acts of violence discriminate against men. The correlation between sex and criminal liability, while not mere coincidence, is also not indicative of a connection that would satisfy the requirements of human rights legislation. Even the much-attenuated causal relationship that will establish discrimination in a human rights context is absent.

² Bethany Hastie, "Assessing Sexually Harassing Conduct in the Workplace: An Analysis of BC Human Rights Tribunal Decisions in 2010–16" (2019) 31:2 CJWL 293 (https://commons.allard.ubc.ca/cgi/viewcontent.cgi?article=1516&context=fac_pubs) [Hastie, 2019a] and Bethany Hastie, *Workplace Sexual Harassment: Assessing the Effectiveness of Human Rights Law in Canada* (Vancouver: University of British Columbia, 2019) (https://commons.allard.ubc.ca/cgi/viewcontent.cgi?article=1501&context=fac_pubs) [Hastie, 2019b].

[73] Where the link between the adverse treatment complained of and the complainant's protected characteristics is more complex and tenuous:

courts and tribunals will often have more difficulty using statistical evidence to draw the factual inference that membership in a protected group was a factor in discrimination. These instances may demand that the evidence of statistical correlation is supplemented with additional evidence explaining the connection. Such evidence may take the form of expert reports, direct testimony from members of the affected group, or even judicial (or official) notice. [*Vancouver Area Network of Drug Users* at para. 98]

[74] The statistics cited in Professor Hastie's research do not persuade me that Dr. Makhija has a reasonable prospect of proving a connection between the adverse impacts he experienced as a result of the Complaints, or the Respondents' response to them, and his sex as a man. For one thing, these statistics are not representative of all allegations of sexual harassment: Professor Hastie only reviewed cases that reached a hearing at the Tribunal, and she notes these cases are not "reflective of the scope of sexual harassment incidents, many of which will be not reported or pursued through legal means, or which may be settled, dismissed or abandoned prior to a full hearing."³

[75] More importantly, as Professor Hastie says in the publications cited by Dr. Makhija, the fact that an overwhelming proportion of sexual harassment complaints are against men "aligns with existing literature that identifies sexual harassment as a highly gendered issue which predominantly and historically targets women in the workplace."⁴ Professor Hastie writes, "Sexual harassment has long been recognized as a tactic used by male supervisors and co-workers to push women out of the workplace," and she cites research showing that women are subject to sexual harassment far more often than men.⁵ These observations complicate the relationship between a man's sex and the experience of being negatively impacted by sexual harassment allegations, or by deficient investigations into those allegations. They show that the

³ Hastie, 2019b, page 2.

⁴ Hastie, 2019b, page 14.

⁵ Hastie, 2019a, page 301.

gendered phenomenon of sexual harassment is more likely to result in women being pushed out of the workplace, not men.

[76] As in the example given by the Court of Appeal in *Vancouver Area Network of Drug Users*, about the fact that persons convicted of violent crimes are overwhelmingly male, the statistical evidence of a correlation between being a man and being fired due to accusations of sexual harassment is not, on its own, indicative of a connection that satisfies the *Moore* test. But Dr. Makhija does not provide additional evidence or context explaining the connection between being a man and being accused of sexual harassment, or being fired based on uninvestigated allegations of sexual harassment. For example, there is no evidence before me that allegations of sexual harassment, or deficient investigations into such allegations, have previously been used to exclude men from the workplace. There is also no evidence before me of a correlation between the sex, age, or ethnicity of an alleged harasser and the likelihood that an employer might fail to investigate alleged harassment.

[77] Dr. Makhija draws an analogy between the experience of men accused of workplace sexual harassment who are fired without an investigation, and the negative employment consequences that may impact pregnant women. In both cases, he argues, the negative consequences are a function of the person's sex. But there is a biological element in the relationship between being a woman and becoming pregnant,⁶ and Dr. Makhija does not suggest that there is any biological element in the relationship between being a man and being accused of sexual harassment, or being fired due to uninvestigated allegations of sexual harassment. I also consider that, unlike pregnant women, men who are accused of sexual harassment are not a historically disadvantaged group.

[78] I am not persuaded that the statistics cited by Dr. Makhija, or the gendered nature of sexual harassment, could support a finding that he has taken the connection between his protected characteristics and the alleged adverse impacts out of the realm of conjecture.

⁶ I recognise that a person's gender does not determine whether they are capable of getting pregnant or not. I observe again that gender is more complex than the biological categories of men and women, or male and female.

1. Unfairness in the Respondents' response to the Complaints

[79] Dr. Makhija says a direct connection between the adverse impacts he experienced and his protected characteristics can be inferred because the Respondents' response to the Complaints was hasty, plagued by confusion, and unfair to him. He cites the Respondents' rush to judgment against him despite what he calls the "palpable weakness" of the Complaints, the Respondents' failure to conduct a reasonable investigation into the Complaints, and their failure to give him more details about the Complaints, including the names of the people who complained about him.

[80] It is difficult to understand Dr. Makhija's claim that the allegations in the Complaints are weak. Even if some of the conduct described in the Complaints could be seen as innocuous, the Complaints alleged unwanted staring and physical contact. They said Dr. Makhija made women feel uncomfortable in the workplace. These appear to be serious allegations, which demanded a response from the employers of the people who made them.

[81] Whether the Respondents' response was reasonable is a different question. Dr. Makhija's concerns about the response to the Complaints are supported by evidence that the Respondents rushed to judgment against him, did not consider alternative or interim measures, and did not give him a chance to respond to the Complaints.

[82] The evidence suggests confusion among the Respondents about who should have investigated the Complaints. Both CSH and Pro Vita had policies providing for investigations into harassment allegations, but there is no evidence that anyone considered those policies when the Complaints were made. There is evidence that Pro Vita told CSH that Pro Vita would investigate, and CSH told BDFP and Dr. Makhija that CSH or Chartwell would investigate. But in their submissions to the Tribunal, all three Respondents deny they had a duty to investigate. Pro Vita and BDFP say CSH should have investigated, and CSH says Pro Vita and BDFP should have investigated. This confusion and finger-pointing between the Respondents appears to stem from CSH's decision to structure the Residence as what Dr. Makhija calls a "fissured

workplace”, again citing Professor Hastie,⁷ and it appears to exemplify concerns about a lack of accountability in such workplaces.

[83] There is support for Dr. Makhija’s claim that the Respondents’ response to the Complaints was unfair to him. It appears he did not receive any details of the Complaints until CPSBC gave him a copy of the General Manager’s letter to CSPBC, dated March 21, 2019. None of the Respondents ever asked Dr. Makhija for his response to the allegations in the Complaints. CSH never told Dr. Makhija about its concerns about the Restrictions, or the criminal charges against him, until it heard from his counsel in July 2019.

[84] There is also evidence the Respondents acted hastily, based on vague information. The General Manager decided she wanted Dr. Makhija out of the Residence as soon as she heard about the Complaints. It appears there was uncertainty about how many Pro Vita employees initially complained about Dr. Makhija. It also appears the Respondents did not consider alternative interim measures, such as temporarily suspending Dr. Makhija from attending the Residence, pending an investigation. The Agreement between Dr. Makhija and BDFP envisioned the use of a locum at times when Dr. Makhija was unavailable, but it appears BDFP never considered that option before it terminated the Agreement.

[85] All this evidence could support a finding that the Respondents responded to the Complaints in a way that was unreasonable and unfair to Dr. Makhija. The remaining issue is whether the evidence related to that unfairness could bring the connection between the adverse impacts he experienced and his protected characteristics out of the realm of conjecture.

2. *Case law*

[86] Dr. Makhija relies on decisions of the Tribunal finding that employers have an obligation to investigate sexual harassment complaints in the workplace and respond in a reasonable

⁷ “Human Rights and Precarious Workplaces: A Comment on *British Columbia Human Rights Tribunal v. Schrenk*”, UBC Law Review Vol. 52:1 (2019), pages 174-175. Citing other scholars, Professor Hastie defines a fissured workplace as one where “direct-employment relationships have been shed in favour of an approach that contracts out specific aspects of the business model to external employers and entities.”

manner, to comply with their obligations under the *Code: Beharell v. EVL Nursery*, 2018 BCHRT 62; *The Sales Associate v Aurora BioMed*, 2021 BCHRT 5. He argues that the employer's duty to investigate complaints of sexual harassment must be intended to protect those against whom complaints are made, in addition to the people who make the complaints.

[87] In *Beharell* and *The Sales Associate*, the Tribunal found that employers have an obligation to investigate employees' harassment allegations. The purpose of this obligation is to ensure employers follow proper procedures, in order to provide a discrimination-free workplace: *Laskowska v. Marineland of Canada Inc.*, 2005 HRTO 30 at para 53.

[88] The cases cited by Dr. Makhija involved complaints filed by victims of alleged harassment. None of these cases found that an employer's duty to investigate was owed to an alleged harasser. In *The Sales Associate*, at para. 125, the Tribunal indicated that the employer's duty to investigate harassment complaints arises, in part, from a recognition that employers' responses to such complaints sometimes compound the impact on women who report harassment, because their accounts of harassment are frequently not believed. At any rate, an employer's duty to investigate harassment complaints is not a standalone duty under the *Code: Hale v University of British Columbia Okanagan*, 2023 BCHRT 121 at para. 13. A failure to conduct a fair investigation into harassment allegations is only discrimination if it has an adverse impact on a person, which is connected to their protected characteristics.

[89] The Tribunal has previously considered claims that employers' responses to sexual harassment allegations had an adverse impact on the alleged harasser, in connection to their sex. These cases involved applications to dismiss complaints similar to Dr. Makhija's, where complainants alleged they were treated unfairly by their employers after they were accused of workplace harassment.

[90] In *Rojas v. EaglePicher Energy Products and CAW Local 114 (No. 2)*, 2006 BCHRT 450, the complainant was a racialised man who was accused of sexual harassment. His employment was terminated following an investigation that heard from him and from the people who accused him of harassment. He alleged procedural deficiencies in the investigation process, including

that he was not informed of the names of the people who complained about him, the specific details of the alleged incidents, or the names and observations of witnesses. He also said the investigators failed to look into his version of events. He argued that these deficiencies gave rise to an inference that one or more of his sex, race, ancestry, and place of origin were factors in his termination.

[91] In its analysis of the respondents' application to dismiss Mr. Rojas's complaint, the Tribunal observed, at para. 51:

The *Code* only prohibits discrimination on defined grounds. It does not create a comprehensive code of fair treatment in the workplace. An employer or a union could engage in unfair procedures in the investigation of a complaint of sexual harassment or reach wrong or unreasonable conclusions, without falling afoul of the *Code*. While unfair procedures might ground some other sort of legal action...they would not be the basis for a complaint under the *Code* unless there is some connection or nexus to a prohibited ground of discrimination.

[92] The evidence showed the investigation into Mr. Rojas's conduct was fair in all the circumstances, even though he was not informed of the identities of some of his accusers, and he said he needed more information in order to respond to the accusations. Even if the investigation had been unfair, the Tribunal found there was no reasonable prospect that Mr. Rojas could establish that any deficiencies were related to his protected characteristics.

[93] In *Mortensen v. Convergys CMG Canada and others*, 2008 BCHRT 432, the Tribunal considered a complaint by a man who was accused of sexual harassment, and who claimed his employer's investigation into the accusations was tainted by discrimination. The Tribunal cited *Rojas* but came to a different conclusion: it found the respondents had not established there was no reasonable prospect that Mr. Mortensen could prove a connection between his sex and the procedural deficiencies in the investigation. In reaching this conclusion the Tribunal cited factors including:

- a. One of the people who made a complaint against Mr. Mortensen did so after hearing him complain about the office dress code not being enforced against women;
- b. A manager agreed with Mr. Mortensen's concern that a woman who investigated the accusations against him was biased, in part because he was a man, but the manager did not reconsider the results of the investigation; and
- c. One of the people who complained about him was allowed to work on her complaint form during work hours, while Mr. Mortensen was not allowed to prepare his response during work hours. [*Mortensen* at paras. 38 to 43]

[94] In *Dalton v. Corporation of Delta and another*, 2010 BCHRT 9, the complainant was accused of sexual harassment in the workplace. He alleged that his employer was influenced by gender stereotypes in its treatment of him. He argued that if he were female, he would have been given more opportunity to explain and defend his actions. The Tribunal found that even if there were deficiencies in the respondents' investigation process, that would not necessarily mean the respondents discriminated based on Mr. Dalton's sex. The Tribunal also found there was no evidence that could support Mr. Dalton's allegation that his sex was a factor in the respondents' actions, or that the respondents were motivated by gender stereotypes in their treatment of him.

[95] The decisions in *Rojas*, *Mortensen*, and *Dalton* suggest that an accusation of sexual harassment in the workplace can lead to a finding that the alleged harasser faced discrimination if the response or investigation into those accusations "is affected by stereotypical beliefs about men and women and sexual harassment": *Mortensen* at para. 36. As the Tribunal said in *Rojas* at para. 54:

complaints of sexual harassment are more often than not brought by women against men. That generality does not give rise to an inference that any problems which may exist in the investigation of a harassment complaint by women against a man are the consequence of discrimination on the basis of sex.

[96] Dr. Makhija relies on cases saying an investigation into allegations of sexual harassment must hear from the alleged harasser. In *Gichuru v. Vancouver Swing Society and others*, 2018 BCHRT 18 at para. 39, the Tribunal found that an investigation into allegations of sexual harassment may take into account social realities of power imbalances between men and women, but this “does not mean that every man is a harasser or that when assessing a complaint of harassment there is no need to hear from the alleged harasser.” This statement was affirmed on judicial review: *Gichuru v Vancouver Swing Society*, 2019 BCSC 402 at para. 104. In *Rojas*, the Tribunal also expressed the view that an investigation of sexual harassment must hear from the alleged harasser, at para. 57.

[97] Fairness in an investigation requires giving the alleged harasser enough information to respond to the allegations against them, and an opportunity to respond. But I do not interpret *Rojas* or *Gichuru* to mean that if an employer does not hear from the alleged harasser, or the employer’s response was otherwise unfair, then it can be inferred that the alleged harasser’s sex or other protected characteristics were a factor in any adverse impact on them.

[98] An inference of a connection between a person’s protected characteristics and an adverse impact they experienced may be drawn where the evidence offered in support of the inference makes it more probable than other possible inferences or hypotheses: *Li v. Options Community Services and others*, 2020 BCHRT 104 at para. 77. But there must be some evidence to support the connection. There is no presumption of discrimination: *Dibah v. Veraart and others*, 2013 BCHRT 218 at para. 72.

[99] Dr. Makhija argues that the haste and unfairness in the Respondents’ response to the Complaints are evidence of a connection to his protected characteristics. However, the existence of deficiencies in the response to the Complaints does not mean Dr. Makhija’s sex or other protected characteristics were a factor in these deficiencies. Haste and unfairness in an employer’s response to sexual harassment allegations, however serious they may be, do not necessarily equate to discrimination against the alleged harasser. I am unable to discern evidence on which I could infer the Respondents’ haste or unfairness were effects of stereotypical beliefs related to Dr. Makhija’s sex or his other protected characteristics.

[100] I consider the evidence of deficiencies in the Respondents' response to the Complaints against the backdrop of the statistics cited by Dr. Makhija, and his arguments about the gendered nature of sexual harassment, but I still find this evidence is insufficient to take his complaint out of the realm of conjecture.

[101] I find Dr. Makhija has no reasonable prospect of establishing a connection between his sex, age, race, ancestry, or place of origin, and the adverse impacts he experienced as a result of CSH's decision to exclude him from the Residence, CSH and Pro Vita's failure to give him details of the Complaints or an opportunity to respond, or BDFP's decision to terminate the Agreement and notify Fraser Health about the Complaints.

D. CSH and Pro Vita's failure to reinstate Dr. Makhija

[102] In July 2019, Dr. Makhija contacted BDFP and CSH, via his counsel, and requested reinstatement to the Program, and to be reassigned to his former patients at the Residence. CSH says it refused this request because Dr. Makhija never told CSH about the Restrictions, and because it believed Dr. Makhija did not comply with the Restrictions in his work at the Residence.

[103] Dr. Makhija says CSH refused to reinstate him due to the criminal charges against him in 2007, and because of the Complaints. He says his sex was a factor in the refusal to reinstate him just as it was in the initial decision to bar him from the Residence, because both decisions were related to the Complaints. For the reasons set out above, I find there is no reasonable prospect that Dr. Makhija can establish a connection between the Respondents' response to the Complaints, including the failure to reinstate him, and his sex, age, race, ancestry, or place of origin.

[104] That leaves the criminal charges. The *Code* prohibits discrimination in employment on the ground of a person being convicted of an offence that is unrelated to the employment or to the intended employment of that person: s. 13(1). The Tribunal has found this prohibition also applies to discrimination against people who were merely charged with an offence or perceived

to have a conviction: *Steinman v. Wholesale Blind Factory and others*, 2013 BCHRT 261 at para. 19.

[105] The letter to Dr. Makhija's counsel from Chartwell's counsel, dated July 30, 2019, referred to the criminal charges against Dr. Makhija, in explaining why he would not be permitted to return to the Residence. The letter mainly focuses on the Restrictions, as the reason for this decision, but it also says CSH was surprised and disappointed to discover the criminal charges.

[106] CSH says that even if the criminal charges were a factor in its decision-making, the prohibition against discrimination based on criminal charges does not protect Dr. Makhija because the charges he faced were related to the services he provided at the Residence.

[107] The test for whether a conviction is related to a person's employment is set out in *Woodward Stores Ltd. v. McCartney*, 1982 CanLII 4851 (BC HRT):

[76] In the light of the wording of the *Code* and the policy behind it, I conclude that whether a charge or conviction is related to the occupation or employment of a person, depends upon all of the circumstances of the individual case, including at least the following:

- (1) Does the behaviour for which the charge was laid, if repeated, pose any threat to the employer's ability to carry on its business safely and efficiently?
- (2) What were the circumstances of the charge and the particulars of the offence involved, e.g. how old was the individual when the events in question occurred, were there any extenuating circumstances?
- (3) How much time has elapsed between the charge and the employment decision? What has the individual done during that period of time? Has he shown any tendencies to repeat the kind of behaviour for which he was charged? Has he shown a firm intention to rehabilitate himself?

[77] Therefore, in my view, an employer must, in dealing with an employee who has a criminal record, consider the factors listed above in deciding whether this employee's criminal record relates to this employee's job. A Board of Inquiry must consider the same factors in reviewing an employer's actions in connection with such an employee.

[108] The Tribunal has applied this test in cases where the complainant alleged discrimination because they were merely charged with an offence but not convicted, or involved in a negative interaction with police but not even charged: *Junkin v. B.C. (Ministry of Attorney General) (No. 3)*, 2012 BCHRT 148 at para. 85; *The Applicant v. BC Ministry of Education*, 2019 BCHRT 60 at para. 23; *Ireland v. Translink and another*, 2016 BCHRT 19 at para. 104.

[109] In *The Applicant* and *Ireland*, the Tribunal found the test set out in *Woodward Stores Ltd.* requires consideration of all relevant factors. In cases where there is a criminal charge but no conviction, this may involve weighing the reliability of the criminal allegation against the complainant versus the risk to the employer if the allegation is true, considering whether the truth of the allegation can be tested, and gathering information about what investigation has already occurred: *Ireland* at paras. 107-108.

[110] Based on these cases, Dr. Makhija argues that CSH had an obligation to investigate the circumstances of the charges against him, before relying on them as a factor in any decisions adverse to him.

[111] CSH says physicians providing medical care at the Residence occupy a role of substantial power and trust in relation to vulnerable residents, and the behaviour for which Dr. Makhija was charged would pose an incalculable risk to residents and workers at the Residence, and impair CSH's ability to operate the Residence efficiently.

[112] There is no evidence that CSH investigated the circumstances of the criminal charges against Dr. Makhija, but the Restrictions and the information about him in the CPSBC media releases are relevant to the factors set out in *Woodward Stores Ltd.* and *Ireland*. They show CPSBC found Dr. Makhija had engaged in inappropriate social interactions with patients, and prohibited him from being alone with female patients in nursing homes.

[113] There is no evidence before me about whether the events that led to the criminal charges against Dr. Makhija also led to CPSBC's decision to impose the Restrictions. If they did, that would mean CPSBC had investigated those events, and found they established, at least, inappropriate conduct with a female patient. On the other hand, if the events that led to the

criminal charges are unrelated to the Restrictions, then the conduct that led to the Restrictions would show a tendency to engage in the same kind of behaviour for which Dr. Makhija was charged, which is one of the factors listed in *Woodward Stores Ltd*. In either case, Dr. Makhija was the subject of at least one allegation that CPSBC found to be reliable. The nature of the Restrictions indicates the conduct that CPSBC was concerned about, if repeated, would pose a serious threat to the safety of his patients at the Residence.

[114] CSH did not give Dr. Makhija a chance to explain the circumstances of the charges, the conduct that led to the Restrictions, or how he has rehabilitated himself, before it refused his July 2019 request to have his patients at the Residence reassigned to him. However, neither has Dr. Makhija provided any evidence about these issues. In his response to the applications to dismiss, he offers no information about the circumstances of the charges, or why the Restrictions were imposed on him, or how he has rehabilitated himself since the Restrictions were imposed. In the absence of this information, and considering the nature of the Restrictions, CPSBC's finding that Dr. Makhija had engaged in unprofessional and inappropriate interactions with a patient, and the risk to CSH's business and the safety of Dr. Makhija's patients at the Residence if the allegations in the criminal charges are true, I find he has no reasonable prospect of proving the charges were unrelated to his duties at the Residence. This means he has no reasonable prospect of proving that the refusal to reinstate him was connected to his protected characteristics.

[115] For the same reasons, I find all of Dr. Makhija's allegations of discrimination based on his criminal charges have no reasonable prospect of success. Even if he could establish that the Respondents treated him adversely in his employment as a result of the criminal charges, he has no reasonable prospect of proving the charges were unrelated to his employment.

E. CSH failure to reassign patients, 2013-2019

[116] The Respondents do not appear to deny Dr. Makhija's claim that even before the Complaints were made, his patient roster dwindled between 2013 and 2019. Nor do they offer any explanation for this.

[117] Dr. Makhija says he raised the issue of his declining patient roster with the Residence's medical director, who is a CSH contractor, and with Pro Vita staff. But he says he was never told why patients were not being added to his roster.

[118] In his complaint, Dr. Makhija said CSH was responsible for the reduction in his patient roster. In his response to the applications to dismiss, he says both CSH and Pro Vita are responsible. He says CSH was responsible because of its overarching responsibility for the Residence, but he does not refer to any particular acts or omissions of CSH that led to the reduction in his patient roster. He says Pro Vita was responsible because the Director of Care, a Pro Vita employee, managed the assignment of Program physicians to residents of the Residence.

[119] Dr. Makhija says the reduction in his patient roster could not have been accidental: someone must have made a decision not to assign new patients to him, as his patients moved out or passed away. He argues that in the absence of any explanation from the Respondents, it is reasonable to infer his protected characteristics were a factor in the decision not to assign new patients to him. He says this was subtle discrimination, in the form of negative treatment that grows over time into a wall of discriminatory exclusion.

[120] CSH says Dr. Makhija has made no allegation that could suggest his protected characteristics were related to any decisions regarding assignment of patients to physicians at the Residence.

[121] As with his allegations about the Respondents' deficient response to the Complaints, I find Dr. Makhija has not provided evidence of facts that could support an inference that his sex, age, race, place of origin, or ancestry were a factor in the reduction in his patient roster between 2013 and 2019. The Respondents offer no explanation for the reduction in Dr. Makhija's patient roster, but they do not have to: it is for Dr. Makhija to take the connection between his protected characteristics and the adverse impact out of the realm of conjecture.

[122] Even if the Respondents deliberately decided to reduce Dr. Makhija's patient roster, that does not mean the impact on him was connected to his protected characteristics. I

recognise that discrimination in employment can be subtle and insidious, and it can be difficult to prove a connection between protected characteristics and adverse impacts. But this connection cannot be inferred without some factual basis.

[123] On the evidence before me, I find Dr. Makhija has no reasonable prospect of establishing a connection between his protected characteristics and the adverse impacts he experienced as a result of the reduction in his patient roster.

IV CONCLUSION

[124] Dr. Makhija's complaint is dismissed under s. 27(1)(c) of the *Code*.

Andrew Robb
Tribunal Member