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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:

Valerie Ann Foley

COMPLAINANT

AND:

TransLink Security Management Ltd./Metro Vancouver Transit Police and Peter Kwok

RESPONDENTS

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

Tribunal Member:

Ijeamaka Anika

On their own behalf:

Valerie Ann Foley

Counsel for the Respondents:

Donald J. Jordan, K.C. and Leah Singer

I INTRODUCTION

[1] Valerie Ann Foley went to a Vancouver SkyTrain station in December 2020. She was not wearing a mask. She says that when she boarded the SkyTrain, the TransLink Security Management Ltd./Metro Vancouver Transit Police and Peter Kwok [**Respondents**] assaulted, handcuffed, and physically removed her from the train because she was not wearing a mask. She says that Peter Kwok [**Constable Kwok**] refused to accept that she was medically exempt from wearing a mask. She alleges that this was discrimination on the basis of disability pursuant to s. 8 of the *Human Rights Code*.

[2] The Respondents deny discriminating and apply to dismiss the complaint under s. 27(1)(c) of the *Code*. The Respondents argue that there is no reasonable prospect that the complaint will succeed because Ms. Foley has not provided evidence of a disability-related barrier to wearing a face mask. The Respondents also argue that, in any event, they took steps to accommodate Ms. Foley but could not reasonably do so because Ms. Foley failed to participate in the accommodation process.

[3] For the following reasons, the application to dismiss the complaint is granted and the complaint is dismissed. 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

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

[5] TransLink Security Management Ltd. is mandated to police the transit system in Metro Vancouver. It is responsible for ensuring transit community safety and security in Metro Vancouver. Constable Kwok is employed by TransLink Security Management Ltd.

[6] On March 18, 2020, the Province of BC declared a state of emergency because of the COVID-19 pandemic. TransLink implemented a mandatory face covering policy effective August 24, 2020 [**Policy**]. The Policy required customers to wear non-medical masks or face coverings on board transit vehicles. Customers who were unable to wear face coverings due to a medical condition or disability were exempt. Customers could request a TransLink branded exemption card which noted they were exempt from wearing a face covering. Customers were not required to provide proof of a medical condition or disability to obtain an exemption card. TransLink posted signs containing the Policy on their vehicles, stations, and faregates. The *Greater Vancouver Transit Conduct and Safety Regulation*, B.C. Reg. 87/99 [**Regulations**] empowered TransLink Police to enforce the Policy requiring face coverings.

[7] On November 24, 2020, BC's Minister of Public Safety and Solicitor General issued Ministerial Order M425 regarding the use of face coverings in public indoor spaces, including public transportation vehicles and indoor or sheltered transit stations and terminals [**Order**]. The Order set out exemptions to mandatory indoor face covering, including for individuals who were "unable to wear a face covering because of a psychological, behavioural or health condition, or a physical, cognitive or mental impairment": s.4(b). The Minister of Public Safety and Solicitor General also issued a Compliance and Enforcement Guidance Document with the Order. The Guidance Document stated that if an individual is issued a ticket for failing to comply with mandatory face covering, they could dispute the ticket by proving how they met one of the listed exemptions.

[8] On November 25, 2020, TransLink sent a letter to employees with updated information on masks for transit police and interacting with customers that are not wearing masks [**letter**]. The letter instructed employees as follow:

- a. Inform the individual of the mandatory mask policy and exceptions to the rule.
- b. Determine if the individual is claiming an exemption.
- c. If the individual does not claim an exemption, request the individual to comply with the rule.

- d. If the individual continues to refuse the request and the member has exhausted all reasonable efforts to obtain compliance, the officer may exercise their discretion to enforce the rule under the Regulations based on an assessment of the situation.
- e. If the officer determines that enforcement is appropriate, explain to the individual that if they do not comply with the rule, they will have to leave the vehicle.
- f. If the individual refuses to leave, inform them that they are committing an offence and may be arrested to prevent continuation of the offence.
- g. Give the individual every opportunity to comply by appealing to their sense of public safety and employing all verbal means to persuade the passenger.
- h. As a last resort, arrest the individual, if necessary, to prevent continuation of the offence and move the individual out of the vehicle.
- i. Identify and serve the individual with a violation ticket.

[9] On November 27, 2020, TransLink issued a media release stating that “TransLink Police [would] conduct standard inquiries with any customer not wearing an appropriate mask or face covering.” The media release did not provide further information regarding the “standard inquiries.”

[10] There is no dispute concerning the sequence of events at the centre of this complaint: Ms. Foley sought to board a SkyTrain; Constable Kwok advised her that she required a mask; Ms. Foley did not respond to Constable Kwok and entered the train without wearing a mask, and ultimately, Constable Kwok arrested and removed her from the train. Constable Kwok issued Ms. Foley two tickets for failing to wear a mask in an indoor public space and for abusive or belligerent behaviour.

[11] The details of that interaction are in dispute.

[12] Ms. Foley says she cannot wear a face mask because face masks exacerbate her disabilities. Ms. Foley says she has been diagnosed with PTSD as a result of previous trauma, intestinal inflammation, and diverticulitis for which she requires a free flow of oxygen. Constable Kwok did not accept Ms. Foley's expired TransLink exemption card as proof of her disability. Ms. Foley says Constable Kwok physically removed her from the SkyTrain, assaulted and handcuffed her, stole her phone, and forced her to sign a document she could not understand because of her dyslexia.

[13] The Respondents have a different version of events. They say Ms. Foley was initially non-responsive to Constable Kwok's requests that she put on a mask. They say that when Ms. Foley indicated that she had a medical exemption, Constable Kwok asked her to validate her exemption by a number of means. TransLink says she refused to provide any information beyond her TransLink exemption card which was no longer valid. The Respondents say Ms. Foley became verbally abusive, causing a disturbance which required her removal from the train. They say that Ms. Foley kicked Constable Kwok while he was trying to place handcuffs on her. They say that he used his body weight to keep her in her seat, to avoid further assault, until they reached the next station, and he could remove her from the train. There is no dispute that this was a physical encounter though the parties disagree on why it escalated to that point.

[14] At the next station, Constable Kwok escorted Ms. Foley out of the train and handcuffed her to the railing. Two other police officers arrived and took Ms. Foley to the Vancouver jail. Ms. Foley told officers she recorded Constable Kwok on the train, so they took her phone. Ms. Foley was released and given a court date of May 11, 2021. The police officers drove her to the SkyTrain station where her car was parked. Ms. Foley's phone was returned to her at a later date.

III DECISION

[15] In this application, the burden is on the Respondents to show that the complaint should be dismissed because there is no reasonable prospect that Ms. Foley's complaint would succeed after a full hearing: s. 27(1)(c).

[16] 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.

[17] 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.

[18] 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. The threshold to move the complaint forward to a hearing is low.

[19] 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.

[20] To prove her complaint at a hearing, Ms. Foley will have to prove that (1) she has a disability, (2) she was adversely impacted in services, and (3) that her protected characteristic was a factor in the adverse impact: *Moore v. British Columbia (Education)*, 2012 SCC 61 at para. 33. Ms. Foley is not required to prove the complaint at this time but need only point to some evidence capable of taking the complaint "out of the realm of conjecture": *Berezoutskaia* at para. 24.

[21] If she does that, the burden will shift to the Respondents to justify the impact as a *bona fide* reasonable justification. If the Respondents justify the impact, there is no discrimination.

[22] I find that I can decide this application by determining whether the Respondents are reasonably certain to prove at a hearing that they discharged their obligation to reasonably accommodate Ms. Foley. For that reason, I will assume without deciding that Ms. Foley has taken the elements of her case out of the realm of conjecture.

[23] The Supreme Court of Canada set out the three-stage analysis for determining a *bona fide* reasonable justification defence in *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, 1999 CanLII 646 (SCC), [1999] 3 S.C.R. 868 [*Grismer*]. Applying that analysis in this case, at a hearing the Respondents would have to establish the following: (1) the Respondents required individuals on transit vehicles to confirm their entitlement to an exemption for the purpose or goal of fulfilling their duty to enforce the mask mandate in accordance with the Order; (2) the Respondents acted in good faith, believing that their actions were necessary to the fulfilment of the Order; and (3) the Respondents' behaviour was reasonably necessary to accomplish its purpose or goal, in the sense that the Respondents could not accommodate the complainant without incurring undue hardship. This third element encompasses the Respondents duty to accommodate Ms. Foley to the point of undue hardship and Ms. Foley's duty to cooperate in the accommodation process.

[24] Ms. Foley has not submitted a response to this dismissal application. I am satisfied on the materials before me, that Ms. Foley had notice of the dismissal application. Nonetheless, I have considered the whole of the evidence before me, and I am satisfied that the Respondents are reasonably certain to establish the three elements at a hearing. I set out my reasons next.

[25] Regarding the first and second elements, there is no dispute that the Respondents are reasonably certain to prove that the standard of confirming/requiring proof of an exemption was reasonably required for the purpose of ensuring public safety by reducing the transmission of COVID-19 in indoor public spaces and the Respondents had the authority to enforce the Order. The Respondents have put the Order before me which they say authorized them to

maintain public safety by ensuring customers were complying with the Order and to help with reducing the transmission of COVID-19 in indoor spaces.

[26] In the context of the whole of the materials before me, it seems apparent that the heart of the dispute between the parties is whether the Respondents failed to accommodate Ms. Foley to the point of undue hardship. Ms. Foley says the Respondents failed to accommodate her even though she repeatedly informed Constable Kwok that she was exempt and provided her TransLink exemption card. Therefore, I must decide whether it is reasonably certain that the Respondents will make out the third element of *Grismer* at a hearing.

[27] The Respondents argue that allowing Ms. Foley to remain on the train without proof that she was entitled to an exemption would contravene the Order and constitute undue hardship given the second wave of COVID-19 at the time in British Columbia. They say that the TransLink exemption cards were no longer accepted as proof of an exemption due to the provisions of s. 4 of the Order setting out exemptions to mandatory masking including on the basis of disability. The Respondents also say the exemption cards were insufficient to enforce the Order because it had issued those cards without medical confirmation of a customer's disability necessitating an exemption. The Respondents argue that the Enforcement Guidance Document required that "if a ticket is issued to a person who claims to be exempt it will be their responsibility to dispute the ticket (as per normal dispute processes) and prove how they meet one of the listed exemptions." And the letter advised officers to "exercise discretion and refrain from issuing a violation ticket based on the information received from a passenger claiming an exemption or where there is evidence from the interaction that conditions exist for an exemption to apply." Therefore, the Respondents' argue accommodating Ms. Foley to ride maskless on the SkyTrain without confirming her exemption, and after Constable Kwok provided her with options to do so, would constitute undue hardship given the ongoing second wave of COVID-19 transmissions in the province.

[28] First, I note that on the evidence before me, I am not persuaded that the Respondents are reasonably certain to prove the Order required proof of a disability as part of its enforcement requirements. There is nothing on the face of the Order that prescribed how the

Respondents were to enforce it. The Order does not set out what confirmation or proof enforcement officers were required to collect in order to verify an exemption under s. 4 or the standard inquiries those officers were to make. However, I am satisfied that it is reasonably certain that the Respondents would establish that they discharged their duty to accommodate Ms. Foley and that duty came to an end when Ms. Foley failed to participate in her accommodation. What is reasonable and what constitutes accommodation short of undue hardship is fact specific and will turn on the specific circumstances of each case: *Central Okanagan School District No. 23 v. Renaud* [1992] 2 SCR 970 [**Renaud**] at para 19.

[29] The parties agree that Ms. Foley informed Constable Kwok that she was medically exempt from wearing a mask and produced a TransLink exemption card. The Respondents' evidence about the steps Constable Kwok took is set out below. Ms. Foley did not address this in her complaint and, given she did not make submissions in this application to dismiss, the Respondents version is undisputed. I must only consider the evidence before me and cannot speculate about what evidence might be called at hearing: *Chan* at para. 77. Accordingly, I find it is reasonably certain that the Respondents will establish as a matter of fact that Constable Kwok took these steps. Specifically, Constable Kwok offered Ms. Foley a number of options in accordance with the letter to demonstrate that she was exempt under the Order and remain on the train. Constable Kwok:

- a. Advised Ms. Foley that she could inform him which of the exemptions she was claiming under the Ministerial Order;
- b. Read out the exemptions under the Ministerial Order and asked Ms. Foley to verbally confirm which exemption applied to her; and
- c. Told Ms. Foley that she could call her doctor to verify the existence of a medical note, as Ms. Foley had indicated that she had a medical note at home.

[30] Ms. Foley refused to confirm her exemption under any of the options and insisted that her exemption card was enough. As I noted above, TransLink were no longer issuing the exemption cards and TransLink no longer considered the cards a valid means of establishing an

exemption. The fact that Ms. Foley claimed she could not wear a mask because she was exempt and in possession of a TransLink exemption card did not allow her to disregard the requirements when Constable Kwok informed her that the exemption cards were no longer valid. On the evidence, British Columbia had entered the second wave of the COVID-19 pandemic prompting the Minister of Public Safety and Solicitor General to put the Order in place as part of the province's efforts to reduce the transmission of COVID-19. Therefore, I am satisfied that the Respondents are reasonably certain to prove that it would constitute undue hardship to allow Ms. Foley to ride the SkyTrain maskless without confirming she was entitled to an exemption particularly because of the serious public safety risk during the second wave of the COVID-19 pandemic.

[31] Further, Ms. Foley had an obligation to participate in the accommodation process, and to accept solutions that are reasonable: *Renaud* at para 44. Without any information from Ms. Foley, the Respondents are reasonably certain to prove that Constable Kwok could not determine whether Ms. Foley was entitled to an exemption in accordance with the Order. Without that information and cooperation, the Respondents could not go further with the accommodation process, and they are reasonably certain to prove their obligation to accommodate Ms. Foley was discharged.

[32] For the reasons set out above, I am satisfied that there is no reasonable prospect the complaint would succeed at a hearing. The complaint is dismissed in its entirety pursuant to s. 27(1)(c).

IV CONCLUSION

[33] The complaint is dismissed.

Ijeamaka Anika
Tribunal Member