

Date Issued: May 3, 2024

File: CS-003259

Indexed as: Hassan v. BFI Constructors and another, 2024 BCHRT 137

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:

Kafi Bashir Hassan

COMPLAINANT

AND:

BFI Constructors and Graham Construction & Engineering Inc.

RESPONDENTS

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

Tribunal Member:

Edward Takayanagi

On their own behalf:

Kafi Bashir Hassan

Counsel for the Respondents:

Chris Lane

I INTRODUCTION

[1] Kafi Bashir Hassan filed a complaint against his former employer, BFI Constructors and another company, Graham Construction & Engineering Inc. [together the **Respondents**]. He alleges the Respondents discriminated against him in employment on the basis of his race and colour contrary to s. 13 of the *Human Rights Code*. He alleges colleagues and a foreman made harassing comments about him and his employment was terminated, all of which were connected to his protected characteristics. He also says the Respondents failed to investigate when he complained about the allegedly discriminatory conduct.

[2] The Respondents deny discriminating. They apply to dismiss the complaint under s. 27(1)(c) because they say the alleged comments were not made. They also argue that there is no reasonable prospect Mr. Hassan can prove the comments, if made, were related to his race and colour or that his protected characteristics were a factor in his termination. The Respondents do not address whether it investigated Mr. Hassan's complaints of mistreatment.

[3] For the following reasons, I deny the application to dismiss. 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] The parties agree that Mr. Hassan was employed by BFI Constructors as a construction worker until he was laid off on or about December 21, 2020. The Respondents say BFI is a subcontractor to Graham.

[5] Mr. Hassan filed his complaint on February 10, 2021, alleging he was bullied and harassed at work, and he was fired, because of his colour and race. Mr. Hassan did not specify what his race or colour was and simply says he is from a "minority community."

[6] Based on his complaint as amended, Mr. Hassan alleges the following:

- a. In or about October 2020, a coworker took a picture of Mr. Hassan and friends when they were doing paperwork and claimed they were not working.
- b. On or about December 7, 2020, a foreman said, "I will fire you."
- c. On or about December 21, 2020, when he complained about how he was being treated, a foreman said, "You came to this country to work not to seek rights."
- d. Employees were told to do jobs Mr. Hassan thought were unnecessary.
- e. On or about December 21, 2020, Mr. Hassan was fired.

[7] In response to the Tribunal's question of why he believes the alleged comments and termination related to his race or colour, Mr. Hassan stated "because I was harassed bullied direct and indirectly."

III DECISION

[8] In a Case Path decision, the Tribunal allowed the Respondents to file an application to dismiss the complaint under s. 27(1)(c) of the *Code* on the basis that the complaint has no reasonable prospect of success. The Respondents filed an application to dismiss under s. 27(1)(c). They also make additional arguments under s. 27(1)(b) and (d)(ii). Therefore, I will only consider their arguments under s. 27(1)(c).

[9] 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.

[10] 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.

[11] 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.

[12] To prove his complaint at a hearing, Mr. Hassan will have to prove that he has a characteristic protected by the *Code*, he was adversely impacted in employment, and his protected characteristic was a factor in the adverse impact: *Moore v. British Columbia (Education)*, 2012 SCC 61 at para. 33.

[13] I acknowledge the Respondents' submission that Mr. Hassan provides few particulars of the alleged mistreatment and how they are connected to his protected characteristics. Mr. Hassan is self-represented in this complaint. His complaint and submissions could be described as appearing at the Tribunal's gate "in ragged form": *Lord v. Fraser Health Authority*, 2021 BCSC 2176 at para. 38; *PL v. BC Ministry of Children and Family Development and others*, 2023 BCHRT 58 at paras. 30-31; *Rush v. Fraser Health Authority (No. 2)*, 2024 BCHRT 13 at para. 28. The Tribunal's duty of fairness requires it to make efforts to understand the arguments self-represented litigants are actually trying to advance. We must be cautious in dismissing complaints that, despite their ragged form, may have merit, including when assessing whether a complaint has no reasonable prospect of success under s. 27(1)(c).

[14] It may have been helpful for Mr. Hassan to provide additional details and context for his allegations. To the extent that his argument is that because he has the protected characteristics of race and colour, any mistreatment he was subject to at BFI is discrimination under the *Code*, there is no reasonable prospect his complaint will succeed. The Supreme Court of Canada has

been clear that there must be evidence of discrimination, even if it is circumstantial, that is tangibly related to the impugned decision or conduct: *Québec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc (Bombardier Aerospace Training Center)*, 2015 SCC 39 at para. 88. It is not enough to bring a complaint out of the realm of conjecture for a complainant to say they belong to a particular marginalized group and, because they belong to that group, any mistreatment they allege is connected to, for example their race and colour.

[15] However, I am satisfied that Mr. Hassan has provided sufficient evidence that tangibly relates his race and colour to the alleged mistreatment. He alleges that he was heavily scrutinized, and a foreman made a pointed comment about him being an immigrant – which in the circumstances of this case is on its face connected to Mr. Hassan’s race and colour – and he was ultimately fired, at least in part, because of his race and colour. Specifically, he has alleged that a foreman said that Mr. Hassan “came to this country to work not seek rights”. This comment, by a person in a position of authority over Mr. Hassan, takes out of the realm of conjecture that there is a nexus between Mr. Hassan’s race and colour and how he was treated at work.

[16] The Respondents do not appear to dispute that Mr. Hassan has the protected characteristics of colour and race in their submissions. However, they deny that any of the alleged mistreatment occurred. I have already explained why, in my view, Mr. Hassan has taken nexus out of the realm of conjecture. I now turn to whether the dispute about the factual matrix on which his complaint is based, requires a hearing.

[17] 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. These principles are important in this case because the parties disagree on whether any of the alleged mistreatment occurred.

[18] The Respondents deny Mr. Hassan's allegations generally. More critically for the purposes of deciding this application, they specifically deny that a foreman told Mr. Hassan that he came to this country to work and not to seek rights when he complained about his treatment at work.

[19] In my view, this is a fundamental disagreement between the parties on a key issue. Mr. Hassan says the foreman made this comment, which I have found is enough to take nexus out of the realm of conjecture. The foreman says he made no such comment. I find this dispute raises a credibility issue fundamental to the complaint so it must go to a hearing. At a hearing the evidence can be tested through cross-examination and the Tribunal will determine if the foreman made this statement and, if he did, whether it is sufficient to establish that Mr. Hassan's race and colour were a factor in his termination and the other adverse impacts he alleges.

[20] Mr. Hassan included with his response to the dismissal application photographs of letters he says he provided the Respondents during his employment. While some of the photographs are illegible those that I can read appear to be Mr. Hassan's reporting how he was mistreated at work. From this I infer that Mr. Hassan is alleging that he reported the incidents he says were discriminatory, but the Respondents failed to investigate or provide a reasonable response.

[21] Employers have a duty to ensure a discrimination-free workplace. This includes a duty to investigate complaints. The Tribunal explained at para. 106 of *Jamal v TransLink Security Management Ltd*, 2020 BCHRT 146:

... employers have obligations under the *Code* to respond reasonably and appropriately to complaints of discrimination: *Laskowska v. Marineland of Canada Inc.*, 2005 HRTO 30 at paras. 52-53. This includes a duty to investigate. Because the *Code* obliges employers to respond to allegations of discrimination, a failure to do so in a way that is reasonable or appropriate can amount to discrimination: *Beharrell v. EVL Nursery Ltd.*, 2018 BCHRT 62 at para. 24. In particular, an investigation can, on its own, amount to discrimination "regardless of whether the underlying conduct subject to the investigation is found to

be discriminatory": *Employee v. The University and another (No. 2)*, 2020 BCHRT 12 at para. 272. Some factors the Tribunal may consider are whether the employer and persons charged with addressing discrimination have a proper understanding of discrimination, whether the employer treated the allegations seriously and acted "sensitively", and whether the complaint was resolved in a manner that ensured a healthy work environment: *Laskowska* at para. 59, cited in *Beharrell* at para. 21.

[22] The Respondents did not address the letters Mr. Hassan says he provided to them, nor did they make submissions on whether Mr. Hassan reported the mistreatment he now alleges. Accordingly, on the information before me, I cannot say that there is no reasonable prospect the complaint will succeed based on the Respondents' failure to investigate his complaints and his subsequent firing.

[23] In my view, Mr. Hassan's complaint contains sufficient details to take it out of the realm of conjecture. On an application under s. 27(1)(c), the burden is not on Mr. Hassan to establish a *prima facie* case. Rather, the burden is on the Respondents to show that he has no reasonable prospect of success in doing so. In the circumstances, I am not persuaded that the complaint has no reasonable prospect of success.

[24] For the reasons set out above, the Respondents' application to dismiss the complaint under s. 27(1)(c) of the *Code* is denied. In reaching this conclusion, I express no opinion on the likelihood that Mr. Hassan will succeed at a hearing. I encourage the parties to take advantage of the Tribunal's mediation services.

IV CONCLUSION

[25] For the reasons above, I deny the Respondents' application to dismiss the complaint.

Edward Takayanagi
Tribunal Member