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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:

Brian Forrest

COMPLAINANT

AND:

Costco Wholesale Canada Ltd. and Shannon Stratychuk

RESPONDENTS

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

Tribunal Member:

Laila Said-Alam

On their own behalf:

Brian Forrest

Counsel for the Respondents:

Donovan Plomp and Lauren Soubolsky

I INTRODUCTION

[1] Brian Forrest (preferred name Allen)¹ filed a complaint on December 7, 2020, against Costco Wholesale Canada Ltd. [**Costco**] and Shannon Stratychuk [together, the **Respondents**] alleging that they breached s. 8 of the *Human Rights Code* when they discriminated against him in the provision of services based on disability. Mr. Forrest alleges that Costco would not allow him to enter the warehouse without a face covering even though he had an “exemption.”

[2] Costco denies discriminating and applies to dismiss the complaint on two grounds. First, Costco applies to dismiss the complaint under s. 27(1)(c) of the *Code* on the basis that there is no reasonable prospect the complaint will succeed. Costco argues that Mr. Forrest has no reasonable prospect of establishing that he has a disability that prevents him from wearing a face mask or face shield [together, **Face Covering**], that he disclosed to the Respondents at the material time that he had a disability, or that he experienced an adverse impact. Further, Costco says it is reasonably certain to establish the defense of bona fide and reasonable justification. Second, Costco applies to dismiss the complaint against Shannon Stratychuk under s. 27(1)(d)(ii) of the *Code*, on the basis that proceeding against an individual respondent would not further the purposes of the *Code*. I find that I can decide this application under s. 27(1)(c), and that the only issue I need to address is whether Costco is reasonably certain to establish a defense at the hearing.

[3] For the reasons set out below, I allow the application. I have reviewed all the materials submitted by the parties. While I do not refer to it all in my decision, I have considered it all. This is not a complete recitation of the parties’ submissions, but only those necessary to come to my decision. I make no findings of fact.

¹ Mr. Forrest asks to be called by his preferred name, Allen, in addition to his legal name. For the remainder of this decision, I will refer to him as Mr. Forrest.

II BACKGROUND

[4] Costco is a membership-based retail business which operates retail warehouses in various locations across British Columbia and Canada. Members of the public must purchase a Costco membership and pay an annual fee to access Costco's products or services.

[5] In March 2020, the Province of British Columbia declared a state of emergency because of the COVID-19 pandemic.

[6] In May 2020, Costco implemented a mask policy which provided an exception for individuals who could not wear a Face Covering due to a medical condition.

[7] Effective November 16, 2020, Costco implemented a revised mask policy in response to the increasing COVID-19 cases across Canada [**Mask Policy**]. The Mask Policy removed the exception for maskless, in-store shopping for individuals who could not wear a face mask or other face cover due to a medical condition.

[8] The Mask Policy required everyone working in or visiting a Costco location to wear a Face Covering.

[9] Prior to implementing the Mask Policy, Costco instructed its customer-facing employees to offer members who were unwilling or unable to wear a mask alternatives to shopping in the warehouse. The alternatives include:

Wearing a face shield. If the member did not have a face shield, Costco would provide one to the member at no charge.

Allow a masked guest to shop on behalf of the member with the member's membership card.

Online shopping through Costco's website or through a third-party delivery service.

Occasionally, assistance from an employee or manager to shop for members personally.

[10] The Mask Policy includes the above alternatives.

[11] Mr. Forrest says that he has PTSD and anxiety that prevents him from wearing a mask. In his complaint form he describes a near drowning experience as a child and says that putting on a mask or face shield, “prevents me from breathing the air.”

[12] On December 2, 2020, Mr. Forrest arrived at Costco as the guest of a Costco member. At the time, provincial Ministerial Order No. M425 [**Order**] was in effect, and generally required people to wear a Face Covering inside indoor public spaces.

[13] There is no dispute that at the time of the alleged discrimination, Mr. Forrest did not have a Costco membership and that the individual respondent, Shannon Stratychuk, was the General Manager [**General Manager**].

[14] At the time of Mr. Forrest’s visit to Costco, the Mask Policy was in effect. There is no dispute that at this time, Costco required Face Coverings to be worn prior to entry to the warehouse, and that communicating the Mask Policy was part of an employee’s standard communication to individuals entering the warehouse without a Face Covering.

[15] Mr. Forrest says he told Costco staff that he had a mask “exemption,” but they told him that he was not permitted to enter the warehouse maskless. He says the General Manager refused to speak with him. Mr. Forrest says he spoke to an Assistant General Manager, who he describes as nice and respectful, but would not let him enter. He said that he left after asking the Assistant General Manager for his business card.

[16] In response to this application, Mr. Forrest does not provide further details about his time at Costco. Instead, he seeks to prove that the COVID-19 pandemic was not real. He generally characterizes social distancing measures or the use of Face Coverings as part of a larger “globalist” agenda created to manufacture compliance in society.

III DECISION

[17] Section 27(1)(c) of the *Code* allows the Tribunal to dismiss complaints that do not warrant the time and expense of a hearing: *Berezoutskaia v. British Columbia (Human Rights*

Tribunal), 2006 BCCA 95 at paras. 22-26, leave to appeal ref'd [2006] S.C.C.A. No. 171 [*Berezoutskaia*].

[18] On an application under s. 27(1)(c), the Tribunal takes into consideration all materials filed by the parties, including a respondent's explanation for their alleged conduct. The Tribunal does not make findings of fact or credibility, but rather, assesses all the information and evidence for the purpose of determining if there is a reasonable prospect the complaint would succeed: *Berezoutskaia*; *Francescutti v. Vancouver (City)*, 2017 BCCA 242 at para. 52. The Tribunal only considers the information before it and not what evidence might be given at a hearing: *University of British Columbia v. Chan*, 2013 BCSC 942 at para. 77. It is up to the parties to give the Tribunal the information necessary for it to make a decision: *Bell v. Dr. Sherk and others*, 2003 BCHRT 63 at paras. 25-26.

[19] Costco bears the burden on this dismissal application. To succeed, Costco must persuade me that the complaint has no reasonable prospect of success at a hearing.

[20] Costco argues that there is no reasonable prospect that the complaint will succeed because it is reasonably certain to establish a defence at the hearing of the complaint: *Purdy v. Douglas College and others*, 2016 BCHRT 117 at para. 50. Costco says it is reasonably certain to prove at a hearing that it reasonably accommodated Mr. Forrest to the point of undue hardship.

[21] To address this argument, I assume, without deciding, that Mr. Forrest has taken the elements of his case out of the realm of conjecture.

[22] The Supreme Court of Canada set out the three-stage analysis for determining a bona fide reasonable justification in respect of a standard or policy: *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868 [*Grismer*]. Applying that analysis in this case, at a hearing Costco would have to establish that:

1. It adopted the Mask Policy for a purpose or goal that is rationally connected to the function being performed;

2. It adopted the Mask Policy in good faith, in the belief that it is necessary to the fulfilment of the purpose or goal; and
3. The Mask Policy is reasonably necessary to accomplish its purpose or goal, in the sense that it cannot accommodate the complainant and others adversely affected by the standard without incurring undue hardship.

[23] The issue I must decide is whether Costco is reasonably certain to establish these three elements at a hearing.

[24] I begin with whether Costco is reasonably certain to establish that it adopted the Mask Policy for a purpose that is rationally connected to the function being performed. I am satisfied that it is.

[25] On the first requirement, the Mask Policy required people working or shopping in Costco stores to wear a face mask. Costco says the rational, business-related purposes for the Mask Policy were to “provide a safe shopping environment for Costco’s members and guests; to provide a safe work environment for its employees; and, specifically, to provide greater protection for Costco’s employees, members and guests than could be provided by a mask policy that permitted exceptions.”

[26] Mr. Forrest filed a response to Costco’s application to dismiss. It consists of 5 pages of submissions, and 10 pages of supporting documents consisting of over 100 hyperlinks to articles and videos.

[27] Mr. Forrest opposes the application to dismiss. I understand his position to be that the Respondents are not reasonably certain to prove a justification defence because, he argues, the COVID-19 pandemic was not real. He writes by way of introduction, “The Respondent’s Dismissal Argument and Evidence seeks to prove there is a real pandemic using many of the corrupt government and health organizations data to justify their position. In that case I feel free to present my argument in its full context since they have opened the door.”

[28] I understand Mr. Forrest to assert, among many other things, that the COVID-19 pandemic did not exist and was part of a larger global conspiracy, that the existence of the COVID-19 virus is in dispute, that masking and social distancing are not effective measures in mitigating the spread of an airborne virus, that mask wear is part of a “globalist” social engineering agenda, and that there was no health risk associated with contracting COVID-19 beyond what would be associated with the common cold or influenza.

[29] Reviewing his response materials as a whole, I understand Mr. Forrest’s position to be that he opposes Costco’s application to dismiss because, in his view, the COVID-19 pandemic is a hoax, and that face covering mandates are part of a broader social engineering agenda to condition society to comply with arbitrary government orders. I understand him to assert that face coverings in general are not an effective measure to minimize the spread of contagions. At the same time, I understand that Mr. Forrest argues that the Order that required face coverings in all indoor spaces exempted him from the Face Covering requirement.

[30] In the context of the whole of the materials before me, I agree with Costco that it is reasonably certain to establish that the Mask Policy is rationally connected to Costco’s obligation to ensure the health and safety of its employees and members of the public, and the surrounding circumstances of a global pandemic. Mr. Forrest may disagree with Costco’s approach. He may disagree with whether the Mask Policy complied with the Order as it relates to exemptions. However, the Tribunal does not enforce compliance with public health orders: *Vero v. UNIQLO*, 2022 BCHRT 20 at para. 18. He may disagree with the efficacy of Face Coverings. He may disagree with the scientific information and sources Costco relied upon to inform their decision to implement the Mask Policy. I am not satisfied on the whole of the evidence before me that his disagreement undermines Costco’s evidence that their Mask Policy has a rational connection to its goal “in the face of a then-novel virus that had formed the basis of a state of emergency in the Province”: *Coelho v. Lululemon Athletica Canada Inc.*, 2021 BCHRT 156 at para. 25 [*Coelho*].

[31] Turning to the second element of *Grismer*, I am satisfied that Costco is reasonably certain to establish that it adopted the policy in good faith. Costco has put before me ample

evidence of both the context and development of the Mask Policy, and no evidence before me that could support a finding to the contrary. Again, while Mr. Forrest may disagree with the Mask Policy or the basis for it, nothing in his materials casts down on Costco's evidence that it adopted the policy in good faith, in the belief that it is necessary to the fulfilment of the purpose or goal.

[32] On the third requirement, I am persuaded that Costco is reasonably certain to establish that it discharged its duty to accommodate Mr. Forrest.

[33] Costco put forward evidence of its Mask Policy and related training for their employees. They also put forward evidence that accommodations outlined in the Mask Policy are offered and explored with all customers who may not be able to wear a Face Covering. On the materials before me, I understand Costco to be saying that Mr. Forrest was offered accommodations.

[34] Mr. Forrest was given an opportunity to respond to Costco's application to dismiss. Mr. Forrest does not dispute Costco's claim that he was offered other accommodations and did not engage in the accommodation process. Mr. Forrest does not dispute Costco's claim that after speaking with the Assistant General Manager and asking for his business card, he simply left without exploring any accommodation options that were before him. Additionally, Mr. Forrest does not make any submissions for why the accommodations offered by Costco would not have been reasonable.

[35] Mr. Forrest asserts that Costco defied the *Code* by requiring him to wear a mask when he had an "exemption" under the Order. I understand Mr. Forrest's contention to be that under the *Code*, the only reasonable accommodation was for him to be permitted to shop without a Face Covering. I understand his position to be that the accommodations offered to the public who were unable or unwilling to wear a face mask in store is not appropriate for those with a mask exemption under the Order.

[36] Having a disability-related barrier to wearing a mask "does not then entitle the complainant to simply do what they please": *Coelho* at paras. 29-30. As in *Coelho*, the fact that Mr. Forrest said that he could not wear a mask did not give him an "exemption" from Costco's

Mask Policy. Rather, under the *Code*, a person's disability related barrier to wearing a mask would have obliged Costco to reasonably accommodate the person entering the warehouse to the point of undue hardship to mitigate the adverse impact he experienced because of the Mask Policy: *Coelho* at para. 31.

[37] I infer from his submissions that the only reasonable accommodation he would have accepted is to shop without a Face Covering. Mr. Forrest does not explain why the other accommodations offered by Costco under their accommodation policy would have been unreasonable. As in *Coelho*, I am satisfied on the materials before me that Costco is reasonably certain to prove that Mr. Forrest is essentially "seeking [his] perfect accommodation – to shop freely in-person at Costco without having to wear a face mask, face covering, or face shield, at a time when the Province had declared a State of Emergency over a respiratory virus about which little was yet known": para. 34. In any case, Mr. Forrest chose to leave without exploring other accommodation options. This alone persuades me that Costco is reasonably certain to prove that it met its accommodation obligations because Mr. Forrest's conduct abandoned the accommodation process: *Coelho* at para. 34.

[38] For the reasons set out above, I am persuaded it is reasonably certain that Costco would establish that it discharged its duty to accommodate Mr. Forrest. As a result, there is no reasonable prospect Mr. Forrest's complaint could succeed.

[39] As I am dismissing this complaint in its entirety under s.27(1)(c), I do not need to consider the Respondents' arguments under s.27(1)(d)(ii).

IV CONCLUSION

[40] The application is granted. The complaint is dismissed against the Respondents.

Laila Said Alam
Tribunal Member