

Date Issued: May 7, 2024

File: CS-003506

Indexed as: Figueroa v. Canadian Tire Corporation, Ltd and another, 2024 BCHRT 140

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:

Andres Figueroa

COMPLAINANT

AND:

Canadian Tire Corporation, Ltd and Nigel Magee

RESPONDENTS

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

Tribunal Member:

Laila Said-Alam

On their own behalf:

Andres Figueroa

Counsel for the Respondents:

Declan C. Redman

I INTRODUCTION

[1] Andres Figueroa filed a complaint against Nigel Magee and Canadian Tire Corporation, Ltd [together, the **Respondents**]. He alleges they discriminated against him on the grounds of race, colour, and place of origin in the area of services contrary to s. 8 of the *Human Rights Code* when Mr. Magee made a comment related to Mr. Figueroa's protected characteristics.

[2] The Respondents deny discriminating. They apply to dismiss the complaint under s.27(1)(c) of the *Code* on the basis that the complaint has no reasonable prospect of success. They argue that the complaint is about a single comment that does not rise to the level of discrimination contrary to the *Code*.

[3] Mr. Figueroa did not respond to the application, but I am satisfied he had notice of the application and an opportunity to respond. The issue in this case turns on whether there is no reasonable prospect the single comment rises to the level of adverse impact to constitute discrimination within the meaning of the *Code*.

[4] For the following reasons, I allow the application. 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

[5] On or around August 7, 2020, Mr. Figueroa brought a flat tire to a Canadian Tire store for repair.

[6] A few hours later, Mr. Magee, an employee of Canadian Tire, called Mr. Figueroa to advise him that the tire had been repaired and was ready for pickup.

[7] During that call, Mr. Figueroa requested that the repaired tire be installed on his vehicle that same day. Mr. Magee told him that it would not be possible to install the tire until the following day. Mr. Figueroa says he was surprised by this information.

[8] Mr. Figueroa attended the Store and reiterated his request to Mr. Magee in person. Mr. Magee advised him that no staff member was available to install the tire that afternoon. Mr. Magee offered to book an appointment the following day to install the tire. Alternatively, Mr. Magee told Mr. Figueroa could that he could take the repaired tire with him and have it installed elsewhere.

[9] The parties disagree about what happened next, through they agree that the interaction between Mr. Magee and Mr. Figueroa ended with Mr. Figueroa uttering profanities. In particular, the parties disagree about whether Mr. Magee made the alleged comment, who witnessed the interaction, and what prompted Mr. Figueroa to utter profanities.

[10] The materials before me that encompass Mr. Figueroa's account of what occurred are the complaint received by the Tribunal on March 11, 2021, and the complaint amendment received by the Tribunal on October 14, 2022. The Respondents have also put before me an email the General Manager received from Mr. Figueroa on August 20, 2020.

[11] In the complaint received by the Tribunal on March 11, 2021, Mr. Figueroa alleges that he tried to explain to Mr. Magee that Canadian Tire's tire repair services included installation, but Mr. Magee was not receptive to this information. He says he was accompanied by his 6-year-old grandchild. He says that when the Respondents were not receptive, he decided to leave. He says he turned to his grandchild and said in Spanish words to the effect of, "Come on kid, let's go home." He alleges that in response, Mr. Magee shouted at him something to the effect of "speak English." His grandson asked him why Mr. Magee said that. Mr. Figueroa says that being spoken to this way in public and in front of his grandchild made him feel very bad, unwelcome, rejected, and insulted. He said that initially he did not respond to the comment. Mr. Figueroa alleges that Mr. Magee continued making comments, but he does not say what those comments were. In a moment of frustration, Mr. Figueroa says he responded with a series of Spanish expletives.

[12] In the October 14, 2022 complaint amendment, Mr. Figueroa says he attended the Store with his 8-year-old grandchild. He says the General manager mistreated him in a "completely

bias, unfair” way and left “no room for neutrality” to address his complaint. He said he was “getting discouraged with the lack of understanding and responsibility” by the General Manager and Mr. Magee, so he decided to leave.

[13] The Respondents say that it was Mr. Figueroa who confronted, berated, and verbally abused Mr. Magee to the point of shouting. They say his abusive behaviour was witnessed by other customers at the Store.

[14] The Respondents deny that Mr. Figueroa had a child with him and say that he attended the Store alone.

[15] The Respondents deny the allegation that Mr. Magee made the comment “speak English.” The Respondents also deny that Mr. Figueroa experienced any negative impact with respect to access to or use of any of their services.

[16] Following the interaction, Mr. Figueroa left the Store with the repaired tire.

[17] On the materials before it appears that Mr. Figueroa followed up with the General Manager by email in October 2020. The General Manager responded the same day, thanking Mr. Figueroa for contacting him again. The General Manager apologized for the delayed response, and explained that he had previously understood that the matter had been resolved. He wrote, “We aim to provide each of our customers with a positive shopping experience, and it is disappointment to learn that we did not succeed over the course of your visit. Providing such detailed feedback like you have given me is very much appreciated. This type [of] feedback helps our team to make improvements and a[n] overall...better experience for everyone. I apologize for any frustration that you have experienced and look forward to ensuring your next visit to our store is a much better one. If there is anything else I can do to help you please do not hesitate to contact me.”

III DECISION

[18] The Respondents apply to dismiss Mr. Figueroa's complaint on the basis that it has no reasonable prospect of success: *Code*, s. 27(1)(c). The onus is on the Respondents to establish the basis for dismissal.

[19] 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.

[20] 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.

[21] 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 must only show that the evidence takes their complaint out of the realm of conjecture: *Workers' Compensation Appeal Tribunal v. Hill*, 2011 BCCA 49 [*Hill*] at para. 27.

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

[23] The Respondents assert that there is no reasonable prospect that Mr. Figueroa will prove that the alleged single comment - “speak English” - rises to the level of adverse impact that would constitute discrimination within the meaning of the *Code*.

[24] I agree. I am satisfied that there is no reasonable prospect the alleged single comment rises to the level of adverse impact that would constitute discrimination within the meaning of the *Code*. For the purpose of my analysis, I will assume, without deciding, that the comment – “speak English” - was made, and that the contextual details of the statement, as alleged by Mr. Figueroa will be proven. In particular, that Mr. Magee shouted at him and that Mr. Figueroa’s grandchild was present and he spoke to the child in Spanish.

[25] In circumstances where alleged discrimination arises from a single comment, the Tribunal will consider all of the circumstances to determine whether it violates the *Code*. Those circumstances include, “the egregiousness or virulence of the comment, the relationship between the involved parties, the context in which the comment was made, whether an apology was offered, and whether or not the recipient of the comment was a member of a group historically discriminated against”: *Pardo v. School District No. 43*, 2003 BCHRT 71 [**Pardo**] at para. 12. Because the *Code* focuses on effects, the impact of the incident is an important consideration. The Tribunal is also cognizant that:

[...] not every negative comment that is connected to a protected characteristic will be discriminatory harassment contrary to the *Code*. It is certainly undesirable for people to treat each other rudely, disrespectfully, or inappropriately. However, it is not the Tribunal’s purpose to adjudicate disputes other than where a person’s protected characteristic has presented as a barrier in their ability to fully, and with dignity, access an area of life protected by the *Code*. In performing this function, the Tribunal is cognizant that the disputes brought to it arise between human beings, with all the imperfection that entails. Not every failure to be kind or professional requires state intervention. This includes failures with discriminatory overtones – and therefore highlights a distinction between comments that may be “discriminatory” in the everyday sense of that word, and comments that amount to discrimination, within the meaning and scope of human rights legislation. [*Brito v. Affordable Housing Societies and another*, 2017 BCHRT 270 [**Brito**] at para. 41]

[26] In essence, the context of the comment is critical: *Brito* at para. 43.

[27] When I consider the relevant factors to be considered from *Pardo*, I am persuaded that Mr. Figueroa has no reasonable prospect of establishing that the single “speak English” comment had a discriminatory impact contrary to the *Code*.

[28] First, I consider the egregiousness or virulence of the comment.

[29] The Tribunal has previously dismissed complaints where isolated impugned comments or conduct, while inappropriate or offensive, were found not so virulent or inherently damaging to a complainant’s dignity so as to trigger the protection of the *Code*: *Patria v. Winners*, 2018 BCHRT 164 [***Patria***]; *Falou v. Royal City Taxi*, 2014 BCHRT 149 at para. 56 [***Falou***]; *Campbell and Abraham v. Krizmanich*, 2009 BCHRT 5 at paras. 33-37 [***Campbell***]; *Banwait v. Forsyth (No. 2)*, 2008 BCHRT 81 [***Banwait***]; *Finucci v. Mohammed*, 2005 BCHRT 80 [***Finucci***]; *Feleke v. Cox*, 2009 BCHRT 7 [***Feleke***].

[30] In contrast, the Tribunal has found the threats and slurs made against an employee amounted to discrimination *Hadzic v. Pizza Hut Canada (c.ob.b. Pizza Hut)*, [1999] B.C.H.R.T.D. No. 44 [***Hadzic***]. In *Hadzic*, a Bosnian Muslim was subjected to repeated offensive, threatening comments by a Serbian coworker that consisted of threats to decapitate him, harm his family, and kill all Muslims in Sarajevo. The Tribunal noted that the context in which the racial harassment occurs is important. The Tribunal noted, “[u]sually repeated conduct is required to establish racial/religious harassment. However, if the conduct is considered extreme, there is less need to establish a pattern of behaviour and a single act may be sufficient evidence”: para. 33.

[31] In *Patria*, the complainant, a woman of Asian Indian origin, interpreted an employee’s rude tone, loud pitch, and slow cadence as suggesting that she did not speak English. Accompanied by her young children, she approached a fitting room with clothes draped on the top of the stroller. In response to her question of whether the fitting room was unlocked, the employee said “this is not a washroom. You cannot change your baby here.” This was said loudly enough that nearby customers would be able to hear. She was shocked, embarrassed, and offended by the incident. The Tribunal found that this single comment did not meet the

threshold of particularly egregious or virulent language. The Tribunal noted that, “although apparently made in a rude tone” the comment was “merely a statement that Ms. Patria could not change her baby in a fitting room:” at para. 21.

[32] In *Falou*, the complainant alleged he was referred to by an offensive term that invoked his religious identity on three occasions. The Tribunal found that the term was not at “the extreme or egregious end of the spectrum of such remarks.” The Tribunal characterized the comments as falling “into the realm of poor taste or insensitivity, but not approaching the threatening, offensive and repeated comments of the sort referenced in [*Hadzic*]” at para 56.

[33] I am satisfied that this complaint falls somewhere between *Patria* and *Falou* and does not approach the threatening and offensive comments of the sort referenced in *Hadzic*. Unlike in *Patria*, the statement “speak English” is not merely a statement designed to clarify the decorum expected of a retail space. In this case I am satisfied that Mr. Figueroa has provided information that rises above the level of conjecture or speculation that the comment was connected to his protected characteristics. However, I accept that the comment, as in *Falou*, is in the realm of “poor taste or insensitivity” and does not approach the threatening and offensive comments of the type referenced in *Hadzic*. This factor weighs in favour of dismissing the complaint.

[34] Second, I consider the context of the comment. The context Mr. Figueroa provides is that of a single, isolated incident, made during a heated exchange, and in the presence of his grandchild.

[35] On the materials before me, the context in this case is that of a customer who had different expectations than a service provider for a service he was provided. He picked up his repaired tire and could not get it installed the same day. He expected that it would. An argument ensued. He made a comment in Spanish and a staff member told him to speak English. He cursed at the staff member in Spanish. He left with his repaired tire. He says he is “daunted” by the comment.

[36] The alleged single comment appears to be part of an isolated incident between Mr. Figueroa and Mr. Magee that was relatively brief and transitory. Similar to *Patria*, their relationship does not extend beyond accessing the service provided, which, in this case, was Mr. Figueroa picking up the repaired tire. In my view, in the context of an isolated incident where there is no hint of a pattern or of a prior personal interaction between the parties weighs in favour of dismissing the complaint.

[37] Additionally, Mr. Figueroa says the alleged comment was in the context of an escalating dispute and made at a point where the parties were exasperated with each other. He says it was made after they had already begun arguing about Mr. Figueroa's expectation of a same day tire installation. Consistent with the Tribunal's authorities that have found that the exchange of a single or multiple negative comments made during an angry and heated exchange did not violate the *Code*, I find that Mr. Figueroa and Mr. Magee's heated exchange weighs in favour of dismissing the complaint: *Campbell* at para. 37; *Banwait* at paras. 164 and 165; *Finucci* at para. 40; *Finnamore v. Strata Plan NW 3153*, 2018 BCHRT 26 at para. 28.

[38] Mr. Figueroa also says that the alleged comment was made in the presence of his grandchild. I understand that the interaction was particularly upsetting for Mr. Figueroa because, he says, his grandchild was present. This factor weighs against dismissal. However, the child's presence is one of three factors that I consider in the context provided by Mr. Figueroa. In all of the circumstances, I am not satisfied that the child's presence outweighs the brief and transitory heated exchange.

[39] Third, I consider whether an apology was offered. On the materials before me, it appears that Mr. Figueroa sent an email to the General Manager on October 20, 2020 to follow up on his complaint about Mr. Magee. The General Manager responded the same day. On the evidence before me, it is undisputed that the General Manager emailed an apology to Mr. Figueroa after the incident and invited him to return to the Store. The General Manager explained the reason for the delay as stemming from the belief that the matter had been resolved. On the materials before me, Mr. Figueroa does not address the sufficiency or timeliness of the apology. In my view, this *Pardo* factor also favours dismissal.

[40] Fourth, I consider whether or not the recipient of the comment was a member of a group historically discriminated against. Mr. Figueroa describes himself as being of Latin-American descent, Spanish descent, a “brown person of colour,” with his place of origin as South America. He describes himself as having an audible accent of a non-native English speaker. I am satisfied that he is a member of a group historically discriminated against. His factor weighs against a dismissal. However, as in *Patria*, I am not satisfied that his membership in a group historically discriminated against alone overwhelms the other considerations: at paras. 20-21.

[41] Finally, I consider the impact of the incident on Mr. Figueroa. Mr. Figueroa describes the negative feelings he was left with because of the interaction. I acknowledge this incident was deeply upsetting for Mr. Figueroa, and that he says he did not visit the Store again because of the incident. This is a factor in that weighs against dismissing the application.

[42] I have weighed the various *Pardo* factors, and I am satisfied that this complaint is in the realm of an isolated comment that, while inappropriate or offensive, is not so inherently damaging as to trigger the protection of the *Code*. The comment was directed against Mr. Figueroa as a member of a group historically discriminated against, and it was deeply upsetting. The single comment was made in the context of an escalating argument. An apology was issued, and Mr. Figueroa did not face a barrier to accessing the service provided. I am satisfied that on the materials before me, the former factors outweigh the latter considerations. In my view, it would not further the purposes of the *Code* to allow a complaint that has no reasonable prospect of success at a hearing on the merits to proceed.

[43] In this case and with regard to all the circumstances, even if Mr. Magee told Mr. Figueroa to “speak English,” it is unlikely that this one comment would rise to the level of discrimination requiring state intervention. This decision should not be taken to condone the use of inappropriate or offensive utterances. However, it is not the purpose of the *Code* or the Tribunal to sanction all incivility which occurs in society.

IV CONCLUSION

[44] The application is allowed. The complaint is dismissed.

Laila Said Alam
Tribunal Member