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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:

Robert Ross

COMPLAINANT

AND:

Interfor Adams Lake Division

RESPONDENT

REASONS FOR DECISION
APPLICATION TO DISMISS A COMPLAINT
Section 27(1)(b), (c), and (g)

Tribunal Member:	Jonathan Chapnick
On his own behalf:	Robert Ross
Counsel for Respondent:	Gregory Heywood and Gabrielle Berron-Styan

I INTRODUCTION

[1] Robert Ross was employed at Interfor Corporation, Adams Lake Division, for approximately 14 years. On September 30, 2016, he was involved in a workplace incident, during which he is alleged to have threatened his supervisor [**Supervisor**] following a heated argument involving yelling and profanity [**Incident**]. Mr. Ross was immediately sent home after the Incident. During Interfor's subsequent investigation, Mr. Ross disclosed a mental health condition. According to Interfor, what followed was a "process of accommodation," ending in the termination of Mr. Ross' employment due to frustration of contract on December 11, 2019. Mr. Ross, on the other hand, says he was dismissed "following a procedure of systemic discrimination."

[2] On September 21, 2020, Mr. Ross filed a discrimination complaint with the Human Rights Tribunal, alleging discrimination in contravention of s. 13(1) of the *Human Rights Code*. He says he has a mental disability and experienced an emotional breakdown during the Incident. He claims Interfor's investigation was "a façade" with a predetermined outcome, and he was mistreated throughout the entire process following the Incident, culminating in Interfor terminating his employment, saying it could not accommodate him. He also says the Supervisor was a bully, his work environment was toxic, and he was exposed to daily intimidation and bullying, which Interfor did nothing about despite his repeated complaints.

[3] Interfor denies discriminating and applies to dismiss Mr. Ross' complaint. It says most of the acts or omissions alleged in the complaint should be dismissed because they do not contravene the *Code*, did not occur within the time limit for filing a complaint, and do not form part of a continuing contravention with Mr. Ross' timely claim that his termination was discriminatory: *Code*, ss. 27(1)(b), 27(1)(g), and 22. Further, Interfor argues that the entire complaint should be dismissed because it has no reasonable prospect of success: *Code*, s. 27(1)(c).

[4] For the reasons that follow, I find that Mr. Ross' complaint alleges a timely continuing contravention dating back to September 30, 2016. That part of his complaint will proceed to a

hearing. The pre-Incident allegations in the complaint were filed late, and I dismiss them under s. 27(1)(g) of the *Code*. I deny Interfor's application under ss. 27(1)(b) and (c).

[5] 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 and reach no conclusions regarding the merits of Mr. Ross' complaint.

II BACKGROUND

[6] Along with its dismissal application, Interfor submitted a sworn statement from the Mill Manager at the Adams Lake Division [**Mill Manager**] and supporting documents. Mr. Ross' submission in response to the application is comprised of an unsworn statement of evidence and argument. The following background is drawn from the parties' materials, including Mr. Ross' original complaint and Interfor's initial response.

[7] Mr. Ross began working for Interfor in March 2005. The evidence indicates that, at some point during his employment, he began working under the supervision of the Supervisor. Mr. Ross says the "work environment was toxic." He says the Supervisor's desk, located in the common locker room/lunchroom, was a "bully pulpit" where the Supervisor regularly "spewed racist, bigoted, misogynistic hate speech." Mr. Ross says he was told his position was precarious, so he worked very hard and it "became a game for [the Supervisor] to see how much [he] would do." He says he would respond to the Supervisor's "fascist rants," and they would engage in verbal arguments involving "screaming and spitting in each other's face." In his submission to the Tribunal, Mr. Ross describes instances of bullying and intimidation by the Supervisor in June and July 2016. He says he reported what he was experiencing to Interfor management on several occasions.

A. The Incident

[8] In a letter dated October 17, 2016, Interfor's human resources manager [**HR Manager**] described the Incident as involving "a heated argument" between Mr. Ross and the Supervisor, in which they "yelled at one another" and "used profane language." According to the letter,

following the Incident, the Supervisor reported that, during their exchange, Mr. Ross had yelled, "sure, keep kicking the depressed guy just like what happened in Nanaimo – just like him, I'll come back with a rifle and shoot you." Mr. Ross describes the Incident differently. He claims he said that "this was all sport" to the Supervisor and his "management style created fertile ground for situations like Nanaimo" – which he admits was a reference to a 2014 shooting at a sawmill in Nanaimo, B.C. Mr. Ross says he referred to the Nanaimo shooting because it was on his mind; the accused shooter's trial was in the news and he was reported to have been receiving treatment for depression. Mr. Ross denies threatening the Supervisor or mentioning a gun during their exchange.

B. Events following the Incident

[9] The materials before me indicate that Mr. Ross was sent home after the Incident, and was subsequently suspended pending the outcome of Interfor's investigation. The HR Manager's October 2016 letter states that, after commencing its investigation and interviewing both parties, Interfor decided "that a psychiatric assessment was required for both Mr. Ross and [the Supervisor] before determining next steps."

[10] Interfor arranged an independent medical examination of Mr. Ross by a third-party psychiatrist [**First IME**], who issued a report on November 5, 2016 [**First IME Report**]. The psychiatrist diagnosed Mr. Ross with a major depressive disorder. In the First IME Report, the psychiatrist stated that Mr. Ross had "identified being taunted and bullied by [the Supervisor] as the trigger at work that made him lose his temper." The psychiatrist commented that Mr. Ross' "depression and current psychosocial problems might have contributed to this." The psychiatrist recommended Mr. Ross continue to access treatment for his mental health and psychosocial problems. He also recommended "that similar issues between other colleagues at work may well merit training for employees in effective communication strategies to minimize conflicts," and he stated that "bullying at work should not be tolerated."

[11] The Mill Manager says that, after receiving the First IME Report, Interfor management determined that Mr. Ross' behaviour during the Incident was egregious and violated Interfor's

policies and core values. However, despite Mr. Ross' misconduct, the Mill Manager says Interfor decided to make a genuine attempt to accommodate him by offering a Last Chance Agreement [**LCA**] under which Mr. Ross could retain his employment.

[12] The Mill Manager says he met with Mr. Ross on December 14, 2016, and provided him with the First IME Report, the LCA, and a December 9, 2016 letter confirming the outcome of the Incident investigation. The letter described the Incident as follows:

> We have determined that on September 30, 2016, you were involved in a workplace incident where you lost your temper at work, and directed some threatening comments towards a fellow co-worker.
>
> During this incident, you made reference to the workplace shooting in Nanaimo that took place in 2014. Your comment was found to be both inappropriate and considered to be a threatening comment.

[13] The LCA provided Mr. Ross with a final opportunity to maintain his employment with Interfor. The Mill Manager says he told Mr. Ross that he would not be able to return to work until he was medically cleared to do so. Under the terms of the LCA, Mr. Ross' return would be conditional on providing Interfor with ongoing medical evidence of his continued compliance with the treatment recommendations set out in the First IME Report over a 24-month period, during which time any breach of this condition or other terms of the LCA would justify Mr. Ross' immediate termination. The LCA indicated that, upon returning to work, Mr. Ross would not be supervised by the Supervisor.

[14] The Mill Manager says he gave Mr. Ross until December 23, 2016 to respond to the offer of the LCA, but Mr. Ross did not do so. The Mill Manager says that, on January 6, 2017, he sent a final notice letter to Mr. Ross, requiring him to contact Interfor or it would consider him to have abandoned his employment. The Mill Manager says Mr. Ross subsequently sent a text message to him on January 16, 2017, a copy of which was provided to the Tribunal. In the text message, Mr. Ross stated that he was "unable to complete point number 10 on the [last chance] agreement" – which was a reference to a provision in the LCA requiring Mr. Ross to

confirm that he had an opportunity to obtain independent professional advice regarding the implications of the LCA. Mr. Ross stated that his major depressive disorder was a daily battle. He said he was experiencing low self-esteem and self-worth, shame, and fear, as well as feelings of paranoia and trust issues that had increased since the Incident, all of which impaired his ability to perform basic daily functions. He said it had been helpful to obtain a diagnosis through the First IME, but the experience was a step backwards because it resulted in feelings of "embedded paranoia and mistrust." He said that his path for returning to work was not clear, stating that he did not feel welcome, valued, or secure, but rather felt harassed, discriminated against, intimidated, and bullied. He ended his text message by saying that, in his current state, he was "physically unable to secure third party counsel" but remained open to dialogue with Interfor.

[15] The Mill Manager says that, given Mr. Ross' mental state and in a further effort to accommodate him, Interfor decided to give Mr. Ross some time to recover. Documents filed with the Tribunal indicate that the Mill Manager texted Mr. Ross on January 31, 2017, encouraging him to apply for short-term disability [**STD**] plan benefits and asking him to keep the Mill Manager "updated as to how things are going and any progress you make."

[16] The Mill Manager says Mr. Ross relocated to Vancouver in February 2017. He says he was next in contact with Mr. Ross in May/June 2017, when he texted Mr. Ross to ask him how things were going, to which Mr. Ross responded with a brief update.

C. October 2017 correspondence and return to work agreement

[17] The Mill Manager says Mr. Ross filed a workers' compensation claim at some point following the Incident. In an email to the Mill Manager on September 26, 2017, a return to work coordinator advised that WorkSafeBC had denied the claim. The Mill Manager says that during the preceding period, Mr. Ross did not provide Interfor with any documentation to support his continued absence. He says that on October 3, 2017, he wrote to Mr. Ross to advise him that the Company could not allow an employee to be absent without leave for an indefinite period of time. The letter stated that Interfor deemed Mr. Ross to be absent without leave, and

that he had two options: (1) sign the LCA, return to work on October 10, 2017, and provide medical clearance for his return; or (2) by October 10, provide medical documentation through WorkSafeBC or the STD plan supporting his ongoing absence from work since the Incident. The letter stated that failure to accept one of these options would result in Interfor considering Mr. Ross to have abandoned his employment and would give rise to his termination.

[18] In an email dated October 5, 2017, a lawyer responded to the Mill Manager on Mr. Ross' behalf. The lawyer advised that Mr. Ross did not intend to abandon his employment, and asked for more time to provide the requested medical documentation. The next day, Interfor sent a letter to the lawyer [**October 2017 Letter**] and enclosed a Return to Work Agreement [**RTWA**].

[19] In the October 2017 Letter, Interfor began by setting out the "relevant facts which bring us to the current circumstance," stating that Mr. Ross had "threatened to kill his supervisor at the worksite." The letter indicated that Mr. Ross had been absent from work since that time, and it outlined some of the events following the Incident. The letter stated that Mr. Ross had failed to maintain regular contact with the Company during his absence and was currently deemed absent without leave. It said that, in the absence of mitigating circumstances, Mr. Ross' conduct during the Incident was grounds for termination for cause, but Interfor considered the situation a hybrid case in which mental health issues may have contributed to his behaviour. The letter stated that Interfor expected Mr. Ross to sign and return the RTWA within 14 days to avoid termination. Interfor also expected Mr. Ross to "seek treatment for any and all mental health issues which render him unable to return to work in his position, abide by any treatment plans, provide regular updates regarding his current limitations and restrictions, whether he is compliant with the treatment recommendations and an estimated duration of his absence."

[20] The letter noted that Mr. Ross had "relocated to Vancouver, while the job that he professes not to have abandoned is in Adams Lake, approximately 440 kms away."

[21] The content of the enclosed RTWA was similar to the LCA, but with certain differences. For instance, the subject line in the LCA had stated, "**Misconduct** in the Workplace" (emphasis added), and the "whereas" statement had referred to "the reasons set out in our letter of

December 9th, 2016 including our findings of serious misconduct." In contrast, the subject line in the RCA stated, "**Death Threat** in the Workplace" (emphasis added), and the "whereas" statement referred to "an incident … in which you threatened to *kill your Supervisor* and our subsequent findings of serious misconduct" (underlining and italics in original).

[22] Under the terms of the RTWA, Mr. Ross could not return to work until medically cleared to do so. In the meantime, he was required to provide Interfor "with bi-weekly medical updates with respect to his current limitations and restrictions and expected return to work date" (underlining in original). Upon his return, he would not be supervised by the Supervisor. Like under the LCA, the conditions of Mr. Ross' return included providing Interfor with ongoing medical evidence of his continued compliance with the treatment recommendations set out in the First IME Report over a 24-month period, during which time any breach of this condition or other terms of the RTWA could result in the termination of his employment. The RTWA included a statement "that the decision not to terminate the employment of Mr. Ross as a result of the death threat, and the proposed accommodation in this Agreement, is a reasonable accommodation for Mr. Ross." It concluded with a provision stating that, "in the absence of an executed agreement within the time stipulated the employment of Mr. Ross will be terminated for cause, alternatively terminated for failing to participate in the above noted accommodation."

[23] Mr. Ross did not sign the RTWA. The Mill Manager says that, on October 19, 2017, in a further effort to accommodate him, Interfor offered to arrange another medical assessment to determine if Mr. Ross was fit to return to work. The Mill Manager says Mr. Ross agreed to Interfor's offer and they kept in touch until January 2018. However, the medical assessment did not go ahead. According to the Mill Manager, after learning that Mr. Ross' file would be transferred to a long-term disability [**LTD**] claim, Interfor decided the medical assessment was no longer necessary.

D. Second IME and termination of Mr. Ross's employment

[24] The Mill Manager says he had very little contact with Mr. Ross from January 2018 to July 2019, at which time he learned Mr. Ross' LTD claim had been referred to rehabilitation and he was ready to return to work on a graduated return to work program. He says Interfor required Mr. Ross to attend a medical examination with a third-party psychologist [**Second IME**] before returning to work. The psychologist's report is dated October 28, 2019 [**Second IME Report**].

[25] In the Second IME Report, the psychologist answered several questions posed by Interfor, including questions regarding the medical basis for Mr. Ross' absence since the Incident, whether he had a disabling health condition that was preventing his return to work, and whether he would be able to return to work in the reasonably foreseeable future. The psychologist found that "a clinically significant mood disorder" was the likely medical basis for Mr. Ross' absence, stating that the workplace discussions and return to work requirements that followed the Incident "served as further trigger events for Mr. Ross, exacerbating his depression, anxiety, and stress related difficulties."

[26] Regarding Mr. Ross' ability to work, the psychologist said he "could manage his symptoms to the level where he could pursue other employment," but he was "restricted from returning back to his job, or any alternate job," with Interfor, because "the level of distress and disruption to his emotional functioning that would be caused by anticipated interactions involving his work or employer … [were] too high." According to the psychologist, Mr. Ross remained sensitive to, and agitated by, the Incident and its aftermath. The psychologist estimated that Mr. Ross would be able to return to work in the near future with a different employer, but recommended he not return to Interfor, stating that there were "no sufficient restrictions or limitations that [Interfor] could implement to mitigate the complexity of Mr. Ross' ongoing emotional reactions" to the work environment and his past interactions at Interfor. Near the end of the Second IME Report, the psychologist commented as follows:

> Individuals with a mood disorder diagnosis are not automatically restricted from employment by virtue of the diagnostic label alone; many individuals manage their symptoms to the level that they remain working … . Interfor is a poor fit for Mr. Ross due to the fact that he has reported historical problems working alongside [the Supervisor], he has a strong perception of his employer representing an adversary, and he experiences emotional deterioration when he was to revisit the work incident or think about his employer.

[27] The Mill Manager says that, shortly after receiving the Second IME Report, Interfor management concluded that, unless Mr. Ross could provide medical evidence to prove otherwise, his employment with Interfor was frustrated and would be terminated. By letter dated October 31, 2019, Interfor told Mr. Ross it was considering dismissing him for non-culpable reasons, and offered him an opportunity to provide medical information "that would cause [it] to reconsider this direction." The Mill Manager says Mr. Ross did not provide further medical information. By letter dated December 11, 2019, Interfor terminated Mr. Ross' employment for non-culpable reasons. He filed his complaint with the Tribunal on September 21, 2020.

III DECISION

[28] Mr. Ross' allegations of discrimination are set out in his original complaint and his submission in response to Interfor's dismissal application. Interfor says his response submission contains certain new allegations that ought not be considered. In my view, for the most part, Mr. Ross' submission further particularizes his original complaint in response to Interfor's application, which is permissible and not uncommon: see *Rush v. Fraser Health Authority (No. 2)*, 2024 BCHRT 13 at para. 25; *Backeland v. BCGEU and others*, 2023 BCHRT 52 at para. 137. In deciding Interfor's application, I have not considered small portions of Mr. Ross' response that add new allegations or otherwise expand the scope of his complaint. Specifically, I have not considered his allegations that Interfor's lawyers used their knowledge of and expertise

regarding his diagnosis against him, and I have not considered his evidence regarding postings he discovered on his locker of an image of a Jewish actor and a list of Jewish holidays.

[29] Mr. Ross' complaint, as further particularized in his response to Interfor's dismissal application, comprises both broad allegations of ongoing discrimination and allegations of discrete instances of discrimination, some of which date back to before the Incident took place. In terms of broad allegations, Mr. Ross says he was exposed to "daily intimidation and bullying," during his employment before the Incident, which Interfor did not address despite his repeated complaints (Complaint at p. 2). Mr. Ross also alleges "a procedure of systemic discrimination" following the Incident and says he was bullied and intimidated through the "entire process" preceding his dismissal (Response to Application at para. 1; Complaint at p. 2).

[30] Mr. Ross' allegations of discrete instances of discrimination include the following:

a. He "was in the throes of a full blown nervous breakdown" following the Incident. To resolve the situation, Interfor should have supported him in accessing medical care. Instead, Interfor's response to the Incident was "a façade for due diligence." Interfor did not report the Incident to WorkSafeBC, and its workplace investigation had a predetermined outcome – his termination. During the investigation, he was asked leading questions and directed to give one word answers – yes or no (Response to Application at paras. 34, 35, and 38).

b. Interfor required him to attend the First IME (Complaint at p. 2). As I outlined above, in his correspondence with the Mill Manger, Mr. Ross said the IME was a step backwards. He described the process as extremely personal and invasive, and said his "non confidential consent" was obtained in an underhanded manner, which resulted in feelings of paranoia and mistrust.

c. Interfor found him in breach of its policies and asked him to sign the LCA after he had experienced an emotional breakdown during the Incident and while he remained "in a state of cognitive impairment" (Complaint at p. 2; Response to Application at para. 36).

d. Interfor accused him of being absent without leave since the Incident, despite knowing about his workers' compensation and benefits claims processes, and despite having received medical information regarding his health condition (Response to Application at para. 37).

e. The RTWA stated he had threatened to kill the Supervisor, which was a lie. The change in wording in the RTWA (compared to the LCA) shows, at the very least, a lack of accommodation. This had a very negative impact on his health condition (Complaint at p. 2; Response to Application at paras. 2-3).

f. Interfor terminated his employment, saying it could not accommodate him (Complaint at p. 2-3).

[31] In addition, Mr. Ross' response particularizes discrete instances of alleged bullying, harassment, and intimidation by the Supervisor, pre-dating the Incident (e.g., Response to Application at paras. 23-25 and 29).

[32] Interfor applies to dismiss Mr. Ross' complaint on several grounds. First, it argues that, other than his claim that Interfor discharged him from employment because of his mental disability, Mr. Ross' allegations are untimely. Interfor says these untimely allegations do not form part of a continuing contravention with Mr. Ross' termination claim, and should therefore be dismissed under s. 27(1)(g) of the *Code*. Alternatively, Interfor argues that these allegations should be dismissed under. s. 27(1)(b) because they do not amount to contraventions of the *Code*. Finally, Interfor argues that the entire complaint should be dismissed under s. 27(1)(c) because it has no reasonable prospect of success.

[33] I will address these arguments in turn.

A. Was a part of the complaint filed late, and, if so, should that part of the complaint be dismissed?

[34] There is a one-year time limit for filing a human rights complaint: *Code*, s. 22. Allegations of discrimination falling within this one-year time limit are timely and cannot be dismissed

under s. 27(1)(g): *Code*, s. 22(1); *Dove v. GVRD and others (No. 2)*, 2006 BCHRT 197 at para. 39. Allegations falling outside the time limit are late, unless they form part of an alleged continuing contravention with a timely allegation: *Code*, s. 22(2). To allege a continuing contravention under the *Code* is to allege discrimination that is ongoing, successive, or repetitive: *Rush* at para. 32; see generally *School District v. Parent obo the Child*, 2018 BCCA 136.

[35] A complaint alleging a continuing contravention must be anchored in a timely allegation of discrimination: *Code*, s. 22(2); see *School District* at para. 44. If there is a timely allegation of discrimination, the Tribunal then determines if there are earlier allegations falling outside the one-year time limit that form part of a continuing contravention with the timely allegation: *Rush* at para. 33; see *School District* at para. 44. The burden is on the complainant to establish that their complaint alleges a timely continuing contravention: *Dove v. GVRD and others (No. 3)*, 2006 BCHRT 374 at para. 38 [***Dove No. 3***]. If the Tribunal finds that the complaint does not allege a timely continuing contravention and was filed outside the one-year time limit, it can still exercise its discretion to accept the late complaint: *Code*, s. 22(3).

1. Has Mr. Ross put forward a timely allegation of discrimination in his complaint?

[36] A complaint under the *Code* must allege timely acts or omissions of discrimination: *Code*, s. 27(1)(b) and s. 22. To determine whether a complaint alleges a "continuing contravention" within the meaning of s. 22(2) of the *Code*, the Tribunal must first assess whether the complaint alleges acts or omissions that fall within the preceding one-year time period, which could, if proven, contravene the *Code*: see *Chen v. Surrey (City)*, 2015 BCCA 57 at para. 23. As I outlined above, Mr. Ross' alleges that Interfor discriminated against him when it terminated his employment, saying it could not accommodate him [**Termination Allegation**]. Interfor says this allegation "is the <u>only</u> timely allegation before the Tribunal" (underlining in original). There is no disagreement, then, that the complaint puts forward an allegation (the Termination Allegation) that falls within the one-year time limit. Interfor does not dispute, and I accept, that this allegation could, if proven, contravene the *Code*, as it is an allegation of facts that could establish Mr. Ross experienced an adverse impact in his employment connected to

his disability: see *The Worker v. The Company and another*, 2019 BCHRT 235 at para. 36 [***The Worker***]; *Rush* at para. 39.

2. *Has Mr. Ross put forward other allegations of discrimination that form part of a continuing contravention, and, if so, how far back does the alleged contravention go?*

[37] The continuing contravention concept is not meant to arbitrarily sweep any and all untimely allegations into a complaint that is properly before the Tribunal: see *Van Baranaigien v. BC Ferry Services Inc.*, 2016 BCHRT 33 at para. 44. Rather, the purpose of s. 22(2) of the *Code* is to allow complainants to seek redress for alleged discrimination falling outside the *Code*'s time limits if, and only if, "the complaint that is properly before the Tribunal represents a continuation of the earlier discrimination": *School District* at para. 43. In each case the continuing contravention analysis must be grounded in the individual circumstances of the complaint; the assessment of whether earlier allegations of discrimination form part of a continuing contravention is contextual and fact-specific: *Dickson v. Vancouver Island Human Rights Coalition*, 2005 BCHRT 209 at para. 17. Various factors may be relevant to this assessment, including the character of the allegations: see generally *School District*; *Rai v. Annacis Auto*, 2003 BCHRT 31; *Callaghan v. University of Victoria*, 2005 BCHRT 589; *Bjorklund v. BC Ministry of Public Safety and Solicitor General*, 2018 BCHRT 204. For earlier allegations falling outside the one-year time limit to form part of an alleged continuing contravention with a later allegation falling within the time limit, the earlier allegations must be of the same or similar character as the later allegation: *Rush* at para. 51; see generally *Dove No. 3* at paras. 11-33 and *School District* at paras. 46-65.

[38] In the present case, Interfor argues that the Termination Allegation does not form part of an alleged continuing contravention with any of Mr. Ross' other allegations, because the latter are of a different character than the former. Mr. Ross makes no submissions on this question. For the following reasons, I am satisfied that Mr. Ross's allegations of ongoing discrimination and discrete instances of discrimination **since the Incident**, which I have set out

above in this decision, all share a common character, and amount to an alleged continuing contravention that goes back to September 30, 2016.

[39] I find that Mr. Ross' complaint can be split into two distinct periods; one before the Incident, the other after. Regarding the period before the Incident, Mr. Ross makes a broad allegation of daily bulling, harassment, and intimidation, and sets out discrete instances of alleged misconduct by the Supervisor. I agree with Interfor that Mr. Ross' submissions do not clearly link this misconduct to his protected characteristic (mental disability) under the *Code*. But even if they did, I would still find that they are of a different character from the post-Incident allegations.

[40] The post-Incident allegations relate to what Interfor describes as a process of accommodation that ended in the frustration of Mr. Ross' employment contract; Mr. Ross alleges it was a procedure of systemic discrimination ending in his termination. He says Interfor used stress to bully and intimidate him through this entire process, and he makes several allegations of discrete, post-Incident instances of discrimination. For example, Mr. Ross references being sent to the First IME in his description of the details of the discrimination alleged in his complaint. Interfor, on the other hand, argues that the First IME was a standard part of the accommodation process; it was not bullying, intimidation, or discrimination. Mr. Ross also alleges that asking him to sign the LCA when he was unwell was "institutionalized discrimination." The Mill Manager, in contrast, says the LCA was a genuine attempt at workplace accommodation. Similarly, the RTWA provided that its terms amounted to a proposed accommodation, whereas Mr. Ross says the wording of the RTWA shows a lack of accommodation and had a negative impact on his health condition.

[41] Based on this information and the whole of the materials before me, I am satisfied that Mr. Ross' allegations regarding the events following the Incident, culminating in his dismissal, share a common character in that they challenge the process and outcome of Interfor's response to his alleged disability-related workplace behaviour. The post-Incident allegations relate not only to the content of the accommodative measures Interfor offered Mr. Ross, but also to how Interfor treated him during the accommodation process.

[42] The post-Incident allegations are distinct in character from Mr. Ross' pre-Incident claims of daily bulling, harassment, and intimidation by the Supervisor, which may or may not have related to his mental disability, and do not appear to engage the concept of the duty to accommodate. As a result, Mr. Ross' pre-Incident allegations do not form part of a timely alleged continuing contravention with the Termination Allegation and other post-Incident allegations. The pre-Incident allegations were therefore filed late, and I decline to exercise my discretion to accept them under s. 22(3) of the *Code*. Under the circumstances, considering the principles and factors discussed in *British Columbia (Ministry of Public Safety and Solicitor General) v. Mzite*, 2014 BCCA 220 at paras. 53-81, and in the absence of any submissions from Mr. Ross on the matter, I am not convinced that it is in the public interest to accept his late-filed allegations. The pre-Incident allegations are dismissed under s. 27(1)(g) of the *Code*.

[43] Returning to the post-Incident allegations, I am mindful that a relevant consideration in the continuing contravention analysis is whether there are time gaps between the allegations: *Dickson* at para. 16. A significant, unexplained gap in time between allegations of discrimination sharing a common character will weigh against a finding that they form part of an alleged continuing contravention: *Braun v. Avcorp Industries Inc.*, 2023 BCHRT 167 at para. 39. Interfor did not directly address this part of the analysis in its submissions, and I find that it is not determinative in the present case.

[44] The significance of a gap in time between allegations is assessed contextually; considerations include the length of the gap, and explanations for it: *Reynolds v Overwaitea Food Group*, 2013 BCHRT 67, at para. 28. While there are clearly gaps in the chronology of post-Incident events giving rise to the complaint, I am satisfied that the materials before me provide explanations for the longer gaps in time, such as that Mr. Ross was pursuing benefits claims, obtaining treatment for his disability, and accessing LTD. Further, there is no evidence before me of an intervening event that might have broken the chain of Mr. Ross' post-Incident allegations or altered the character of the parties' dealings during that time. Rather, Interfor's evidence is that it was accommodating Mr. Ross throughout his leave following the Incident, up to the date of his termination. I therefore conclude that this is not a case where the gaps

between allegations of discrimination were "significant" as that concept is understood within the continuing contravention analysis.

[45] In sum, then, I conclude that Mr. Ross' complaint alleges a timely continuing contravention within the meaning of s. 22(2) of the *Code*, and that the alleged continuing contravention goes back to September 30, 2016. This part of Mr. Ross' complaint was not filed late. Interfor's application to dismiss this part of the complaint under s. 27(1)(g) of the *Code* is denied. The pre-Incident allegations, however, are dismissed.

B. Should a part of the complaint be dismissed because it comprises allegations that do not contravene the *Code*?

[46] Section 27(1)(b) of the *Code* gives the Tribunal discretion to dismiss all or part of a complaint that does not put forward an arguable contravention of the *Code*. This means the Tribunal may dismiss a portion of a complaint if it does not allege facts that could, if proven, violate the *Code*. The threshold is low for a complainant to allege an arguable contravention: *Gichuru v. Vancouver Swing Society*, 2021 BCCA 103 at para. 56. An employee alleging disability-related discrimination must only allege facts that could establish they experienced an adverse impact in their employment connected to their disability: see, e.g., *The Worker* at para. 36. In the present case, Interfor argues that, aside from the Termination Allegation, Mr. Ross' complaint does not meet this low threshold.

[47] I have already decided to dismiss Mr. Ross' pre-Incident allegations under s. 27(1)(g) of the *Code*, so I need only consider Interfor's s. 27(1)(b) argument as it relates to the allegations following the Incident. Mr. Ross says Interfor used stress to bully and intimidate him during this time, and he makes several allegations of discrete, post-Incident instances of discrimination. Interfor argues that these allegations lack sufficient particulars and supporting evidence, make only vague references to certain alleged acts, and do not support a connection between the alleged acts and Mr. Ross' disability.

[48] I am not persuaded that Mr. Ross' allegations are so lacking that they fail to meet the low threshold for alleging an arguable contravention of the *Code*. While I acknowledge that his

materials are somewhat rough and challenging to comprehend, I also appreciate that Mr. Ross is self-represented and, in his words, does "not have judicial chops." Self-represented parties "face significant barriers in bringing a claim of discrimination," including not knowing "how to file their complaint in such a way that it will be heard, or in what form evidence is received, believed, or weighed by the Tribunal": *Lord v. Fraser Health Authority*, 2021 BCSC 2176 at para. 36. An efficient human rights complaint process requires the Tribunal to be cautious in winnowing out complaints that are imperfectly brought, but which may have merit: see *Lord* at para. 38 and *PL v. BC Ministry of Children and Family Development and others*, 2023 BCHRT 58 at paras. 30-31; see also *Chidley v. BC Housing and another*, 2020 BCHRT 51 at para. 53.

[49] Keeping this in mind, I have identified a number of discernible, post-Incident allegations of discrete, discriminatory acts or omissions in Mr. Ross' materials, which I outlined above in this decision. Mr. Ross alleges discrimination by Interfor in the form of, for example: improperly investigating his alleged disability-related behaviour during the Incident, with the aim of terminating his employment; requiring him to attend an invasive medical examination following the Incident; requiring him to sign the LCA when he was in a vulnerable state related to his disability; accusing him of being absent without leave despite having received medical information regarding his health condition; during the accommodation process, using inaccurate and harmful language in the RTWA to describe his disability-related behaviour; and terminating his employment, saying it could not accommodate him. I have found that these allegations all share a common character in that they challenge the process and outcome of Interfor's response to Mr. Ross' disability-related workplace behaviour. The allegations take issue with not only the content of the accommodative measures Interfor offered Mr. Ross, but also how Interfor treated him during the accommodation process.

[50] I have already found that the Termination Allegation could, if proven, contravene the *Code*, and that it forms part of an alleged continuing contravention with Mr. Ross' other post-Incident allegations. In my view, these findings, and my reasons above, provide a sufficient basis for denying Interfor's s. 27(1)(b) application, without the need to further parse out and consider each post-Incident allegation separately. To be properly understood and assessed at a

hearing, Mr. Ross' allegations of discrete instances of discrimination must be considered not only in context with one another, but also in the broader context of his overarching allegation of "a procedure of systemic discrimination" culminating in his termination: see *Complainant v. City of Richmond*, 2023 BCHRT 57 at para. 45; see generally *Fraser v. Tolko Industries Ltd. and others*, 2021 BCHRT 118 at paras. 210-225. Further, no efficiency would be gained from parsing and dismissing individual, post-Incident allegations. As I outline below, at a hearing, the Tribunal would need to consider Mr. Ross' "entire situation," including the entire accommodation process following the Incident, to determine whether Mr. Ross' termination amounted to discrimination in contravention of the *Code*.

[51] Interfor's application to dismiss part of the complaint under s. 27(1)(b) is denied.

C. Should the complaint be dismissed because it has no reasonable prospect of success?

[52] I have already decided to dismiss Mr. Ross' pre-Incident allegations under s. 27(1)(g) of the *Code*, so I need only consider Interfor's s. 27(1)(c) application as it relates to his post-Incident allegations.

[53] Section 27(1)(c) of the *Code* gives the Tribunal discretion to dismiss complaints that have no reasonable prospect of success and therefore 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; *Workers' Compensation Appeal Tribunal v. Hill*, 2011 BCCA 49 at para. 27 [***Hill***]. The Tribunal does not make findings of fact under s. 27(1)(c). Instead, my task in applying this section of the *Code* is to look at the information filed by the parties to decide if there is no reasonable prospect that findings of fact supporting the complaint could be made on a balance of probabilities after a hearing of the evidence: *Berezoutskaia* at para. 22. The onus is on Interfor to establish that Mr. Ross' complaint should be dismissed under s. 27(1)(c): *Paulsen v. BC Hydro and another*, 2020 BCHRT 75 at para. 11. Interfor must show me that either (1) Mr. Ross has no reasonable prospect of making his case

at a hearing, or (2) Interfor is reasonably certain to establish a defence: *Lado v. Hardbite Chips and others*, 2019 BCHRT 134 at para. 25.

1. Mr. Ross' case

[54] To make his case at a hearing, Mr. Ross would need to prove that (1) he had a personal characteristic protected by the *Code*, (2) he was adversely impacted in his employment, and (3) his protected characteristic was a factor in the adverse impact: *Moore v. British Columbia (Education)*, 2012 SCC 61 at para. 33. Interfor says Mr. Ross will be unable to make his case. It argues that his complaint has "critical deficiencies," asserting that Mr. Ross "has failed to demonstrate that there is a nexus between his mental disability and the alleged adverse treatment he received." Interfor says its actions after the Incident (e.g., requiring Mr. Ross to undergo the First IME and sign the LCA; requiring him to sign the RTWA) fell "under reasonable workplace direction," and just because Mr. Ross did not agree "with the process or accommodation attempts does not mean he [was] being bullied or discriminated against."

[55] Under s. 27(1)(c), my assessment of Mr. Ross' prospects for satisfying the elements of his case involves testing the evidence for some probability his case could prevail: *Lado* at para. 26. The threshold to advance a complaint to a hearing is low; Mr. Ross does not have to prove his case or show the Tribunal all the evidence he may introduce at a hearing: *Sadvandi v. Hudson's Bay Company*, 2024 BCHRT 8 at para. 19. Rather, the materials before me must only suggest a nexus between his protected characteristic and the adverse impact in his employment: *Gichuru v. Pallai (No. 2)*, 2010 BCHRT 125 at para. 107, quoting *Runyowa and Kanani v. Vicinia Strata Plan LMS1647 and another*, 2007 BCHRT 89 at para. 22. In my view, Interfor has not established that the evidence before me falls short of this low standard.

[56] Interfor does not deny that Mr. Ross' dismissal related to his disability. This is one disability-related adverse impact in Mr. Ross' employment that is supported in the evidence, but it is not the only one. Interfor characterizes the First IME, the LCA, the RTWA, and its related conduct and correspondence as forming part of its process of reasonably accommodating Mr. Ross' disability after the Incident. The stated aim of this process was to

offer him accommodative measures related to his disability, to allow him to continue his employment at Interfor. Mr. Ross alleges, however, that this process was harmful, and the Second IME Report says the workplace discussions and return to work requirements following the Incident exacerbated his health condition. The Second IME Report also suggests Interfor's disability-related accommodation process impacted Mr. Ross' ability to return to the workplace. In recommending he not go back to Interfor, the report states that Mr. Ross perceived Interfor as representing an adversary, and he remained sensitive to, and agitated by, the Incident and its aftermath. In my view, this is sufficient to take the issue of nexus out of the realm of conjecture: *Hill* at para. 27.

[57] For the reasons outlined above, I decline to further parse out the evidence regarding each post-Incident allegation. On the materials before me, I am satisfied that Mr. Ross' allegations of discrete instances of discrimination following the Incident, framed within the broader allegation of a procedure of systemic discrimination culminating in his disability-related termination, are not merely conjectural. Interfor has not shown me that Mr. Ross has no reasonable prospect of proving he experienced disability-related adverse treatment or impacts during the period following the Incident and ending in his dismissal.

2. Interfor's defence

[58] My findings above do not end the analysis under s. 27(1)(c). Interfor argues that, at a hearing, even if Mr. Ross makes his case, it is reasonably certain to establish a "*bona fide* occupational requirement" [**BFOR**] defence; therefore, the complaint has no reasonable prospect of success.

[59] Section 13(4) of the *Code* provides a justification defence against a complaint of discrimination in cases where a workplace standard (i.e., a rule, requirement, policy, procedure, practice, norm, etc.) adversely impacts an employee in relation to a protected personal characteristic. This defence is also known as a "BFOR defence" because of the language of s. 13(4), which precludes the application of s. 13(1) "with respect to a refusal, limitation, specification or preference based on a bona fide occupational requirement." At a hearing, if the

employee is able to prove the elements of their case, the burden shifts to the respondent – typically the employer – to justify the adverse impact. If the employer succeeds in doing so, there is no discrimination: *Smith v. Sobeys Inc.,* 2023 BCHRT 138 at para. 30; see *Hydro-Québec v. Syndicat des employé-e-s de technique professionelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ)*, 2008 SCC 43 [***Hydro-Québec***] at para. 18. To justify the adverse impact of a workplace standard, an employer must prove three things:

a. **Valid purpose**. The employer must prove it adopted the standard for a purpose rationally connected to the performance of the employee's job or function.

b. **Good faith**. The employer must prove it adopted the standard in an honest and good faith belief that it was necessary to fulfil its valid purpose.

c. **Reasonable necessity and accommodation**. The employer must prove that the standard was reasonably necessary to accomplish its purpose and that it discharged its duty to accommodate: *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (Meiorin Grievance)*, [1999] 3 SCR 3 [***Meiorin***] at para. 54.

[60] In the present application, Interfor's submissions regarding its chances of defending itself at a hearing relate solely to the Termination Allegation. Interfor describes the relevant workplace standard as a requirement that an employee attend work. It argues that this attendance standard satisfies the first two elements of the justification defence.

[61] At a hearing of Mr. Ross' complaint, the Tribunal's first task in its justification analysis would be to determine what this attendance standard was generally meant to achieve: *Meiorin* at para. 57. This determination is made on the basis of the available evidence: see *Gordy v. Painter's Lodge (No. 2)*, 2004 BCHRT 225 at paras. 104-107; see also *Meiorin* at paras. 24-27. In general, attendance standards are aimed at ensuring the fulfillment of the essence of the employee's side of the contractual employment relationship – i.e., that the employee performs work for the employer according to the terms and conditions expressed or implied in the applicable collective agreement or individual employment contract. In my view, considering the

Tribunal's case law and given the absence of any evidence or argument pointing toward a different purpose behind the attendance standard applied when Mr. Ross was dismissed, the Tribunal is reasonably certain to conclude it was generally aimed at ensuring Mr. Ross performed work as required under his employment relationship with Interfor: see *Kelly (by Kelly) v. Saputo Dairy Products Canada and another (No. 3)*, 2021 BCHRT 128 [***Kelly***] at para. 161; *Morris v. ACL Services Ltd.*, 2012 BCHRT 6 at para. 210; *Ford v. Peak Products Manufacturing and another (No. 3)*, 2010 BCHRT 155 at para. 97; *Senyk v. WFG Agency Network (No. 2)*, 2007 BCHRT 376 at para. 354. The Tribunal's case law establishes that this general purpose is rationally connected to the performance of an employee's job or work function: see, e.g., *Kelly* at para. 161; *Senyk* at para. 354; *Chohan v. Costco Wholesale Canada*, 2017 BCHRT 233 at para. 30; see also *Hydro-Québec* at para. 15. I therefore find that Interfor is reasonably certain to prove at a hearing that the attendance standard it applied to Mr. Ross when it terminated him was adopted for a valid purpose. Mr. Ross makes no submissions to the contrary.

[62] The question of Interfor's good faith beliefs and intentions is more contentious. In his materials, Mr. Ross accuses Interfor of knowingly leveraging his mental disability to bully and intimidate him during the accommodation process following the Incident. Interfor adamantly denies these accusations. I need not resolve this dispute at this preliminary stage of the complaint process. For the purposes of this decision, I will assume, without finding, that Interfor is reasonably certain to prove at a hearing that it adopted the attendance standard in good faith when it dismissed Mr. Ross.

[63] The remaining question, then, is whether Interfor is reasonably certain to establish the third element of its justification defence. At a hearing, the onus would be on Interfor to prove that the attendance standard was reasonably necessary to accomplish its purpose, and that it discharged its duty to accommodate Mr. Ross before dismissing him: *Meiorin* at para. 54. Mr. Ross makes no submissions regarding Interfor's chances of meeting this onus of proof. Interfor does not argue its position in express reference to the reasonable necessity of the standard in general. Instead, it focuses its arguments on the issue of whether it discharged its duty to

accommodate Mr. Ross in particular. Interfor says it met its duty to Mr. Ross and so it is reasonably certain to establish a justification defence at a hearing. It argues it accommodated Mr. Ross to the point of undue hardship, relying on the doctrine of frustration of contract to support its position.

[64] Under the doctrine of frustration, an employment relationship can come to an end when an employee's disability is of such a nature, or is likely to continue for such a period of time, that the performance of their job in the future would be impossible or at least something fundamentally different than was originally contemplated by the parties to the relationship: *Ciliberto v. Tree Island Industries Ltd.*, 2024 BCHRT 87 at para. 41; see *Senyk* at paras. 301-302; see also *Demuynck v. Agentis*, 2003 BCSC 96. The frustration of contract analysis is contextual and fact-specific. The Tribunal considers relevant contextual factors in assessing whether an employment contract has become frustrated, such as the terms and conditions of the employment relationship, the nature of the employee's position, their length of service, and their prospects for recovery and return to work: *Senyk* at para. 302 and *Chohan* at paras. 33-34, each citing *Marshall v. Harland & Wolff Ltd.* [1972] 2 All E.R. 715 (N.I.R.C.). Depending on the circumstances, a frustration of contract finding may support a conclusion that the duty to accommodate has been discharged: *Senyk* at para. 314. To utilize the doctrine of frustration to justify the dismissal of an absent employee with a disability, an employer must be able to show that it made reasonable accommodation efforts and that, despite those efforts, at the time of their dismissal the employee was unable to work for the foreseeable future: see *Chohan* at para. 47. To assess this type of justification defence, the Tribunal must consider the employee's entire situation: *Hydro-Québec* at para. 21.

[65] Interfor's submissions regarding its potential justification defence against the Termination Allegation centre on two assertions: (1) that Mr. Ross' employment contract was frustrated when he was dismissed, and (2) that it accommodated Mr. Ross throughout his leave from work following the Incident. Regarding its first assertion, Interfor argues that the application of relevant contextual factors from *Marshall* confirms that Mr. Ross' employment contract was frustrated – citing the indefinite nature of its employment relationship with Mr.

Ross, the length of his tenure with the company, the length of his absence following the Incident, the nature of his health condition, and the Second IME Report's findings regarding his prospects for returning to work at Interfor. Regarding its second assertion, Interfor argues that it accommodated Mr. Ross by permitting him to remain on medical leave from February 2018 to December 2019, and, before that, by allowing him "to be on leave despite … failing to submit medical documentation to support his absence." Interfor says that from December 2016 to the date of his termination, it remained prepared to accommodate Mr. Ross if and when he was fit to return to work.

[66] For the following reasons, I am not persuaded by Interfor's arguments.

[67] First, on the materials before me, I am not convinced that Interfor is reasonably certain to prove Mr. Ross' employment contract was frustrated based on the analysis established in *Marshall* and *Senyk*. In my view, the evidence before me related to several relevant factors from those cases militate against a conclusion that Interfor is reasonably certain to prove frustration of contract. For example:

a. Interfor's evidence is that Mr. Ross was an indefinite term employee who was employed with Interfor for a lengthy period (approximately 14 years) under a contract that provided both STD and LTD benefits. This evidence factors against a finding that the employment relationship was frustrated: *Senyk* at paras. 302 and 358-359.

b. There is nothing before me to indicate that Mr. Ross' employment was "inherently temporary in nature or for the duration of a particular job," rather than long term. This factors against a frustration determination: *Senyk* at paras. 302 and 360-361.

c. Interfor's evidence is that Mr. Ross was employed as a Saw File Helper. Mr. Ross' evidence seems to be that he performed various physically demanding roles and functions over the years, involving manual labour and operating equipment and machinery. There is no evidence he was the sole employee in his job category or

occupied a "key post" such that the employment relationship could not survive a prolonged absence. This factors against a frustration determination: *Senyk* at paras. 302 and 362-363.

d. Mr. Ross' evidence is that Interfor's conduct played a role in the development of his disability from working. He alleges that Interfor's role in this regard was culpable. This factors against a frustration determination: *Senyk* at paras. 383-388.

[68] I also note that the evidence before me suggests Mr. Ross was not generally incapacitated by his health condition at the time of his dismissal. In the Second IME Report, the psychologist estimated that Mr. Ross would be able to resume working in the near future, despite his mood disorder. The problem, according to the IME Report, was the work environment and history at Interfor, related to alleged intimidation and bullying by the Supervisor, and "a strong perception of his employer as an adversary."

[69] Second, based on my assessment of the whole of the evidence provided by the parties, I am not satisfied that Interfor is reasonably certain to prove it reasonably accommodated Mr. Ross throughout his leave from work following the Incident.

[70] Accommodation is a consultative and cooperative process, not an adversarial one: *Brady v. Interior Health Authority and Inaba (No. 4)*, 2007 BCHRT 233 at para. 212; *Fodor v. Justice Institute of British Columbia*, 2009 BCHRT 246 at para. 19. In the workplace, it is about removing barriers to safe and productive employment and full participation. It involves taking reasonable steps, to make reasonable changes, in order to remove or reduce barriers and related adverse impacts on employees with protected personal characteristics: see generally *Meiorin*; *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970 [***Renaud***]; *Kelly*. Accommodation is "an exercise in common sense and flexibility," comprised of both procedural and substantive components: *Kelly* at para. 164 and cases cited therein. In assessing whether an employer has met its obligations to an employee under the *Code*, the Tribunal considers the employer's process of accommodating the employee, and the substantive outcome of those efforts: see

Emergency Health Services Commission v. Cassidy, 2011 BCSC 1003 at paras. 34-38. Considering these principles in my assessment of the information before me, I am not satisfied that Interfor is reasonably certain to establish a justification defence related to its process of accommodating Mr. Ross and the content of the accommodations it offered him.

[71] For instance, in the materials provided by the parties, there is no evidence of meaningful consultation with Mr. Ross in Interfor's accommodation process. The parties' evidence seems to be that the LCA was imposed on Mr. Ross, not proposed to him. And while I appreciate that the Mill Manager says the LCA was a genuine attempt at workplace accommodation, aspects of the document could be found to be more corrective or disciplinary in tone than accommodative. Overall, the LCA could potentially be construed as a contract with which Mr. Ross must comply under risk of dismissal, as opposed to an accommodation plan aimed at removing barriers to his continued employment. In an email to the HR Director, dated December 14, 2016, in which the Mill Manager describes his meeting with Mr. Ross earlier that day, the Mill Manager notes telling Mr. Ross that he would be terminated if he did not sign and return the LCA within 10 days. I query whether, at a hearing, the Tribunal would find that this was a reasonable way to put forward an accommodation option, let alone whether the Tribunal would find that the option, itself, was reasonable. Like in the s. 27(1)(c) dismissal application in *K v. RMC Ready Mix and another*, 2019 BCHRT 102 [***RMC Ready Mix***], there is no evidence before me as to the necessity or reasonableness of the approach embodied in the LCA: see *RMC Ready Mix* at para. 65.

[72] Similar to the LCA, the parties' evidence regarding the RTWA seems to be that it was imposed, rather than proposed. Also, the text of the RTWA appears to embody the same approach as the LCA.

[73] Mr. Ross says the change in wording in the RTWA (compared to the LCA) shows, at the very least, a lack of accommodation on Interfor's part. While the wording changes are not necessarily determinative of whether Interfor met its duty to accommodate, I find that the text of the RTWA, combined with the content of Interfor's related communications, raise additional doubts regarding its chances of proving it reasonably accommodated Mr. Ross during the

period between the Incident and his termination. In particular, at a hearing, the October 2017 Letter accompanying the RTWA could be found to be adversarial. Among other things, it describes the Incident in terms that are disputed by Mr. Ross, discloses medical information that does not appear to have been requested, asserts that Mr. Ross' behaviour during the Incident provided Interfor with grounds for termination for cause, and sets out further terms and conditions with which Mr. Ross needed to comply to avoid termination.

[74] Finally, it is not clear to me why Interfor's description of the Incident shifted from the more neutral, "Misconduct in the Workplace," in the LCA, to the disputed, "Death Threat in the Workplace," in the RTWA. Mr. Ross' evidence is that these changes felt aggressive and intimidating, and "had an extreme effect on [his] stability."

[75] As I said above, accommodation is about removing barriers, through a consultative and cooperative process in which the parties, together, explore reasonable options. On the whole of the evidence filed by the parties, I am not able to say with reasonable certainty that, at a hearing, the Tribunal will decide that this is what took place in the present case. In sum, then, while I do not rule out the possibility that Interfor's justification defence against the Termination Allegation could succeed, on the materials before me I am unable to conclude that it is reasonably certain to do so. Nor can I conclude that Interfor is reasonably certain to succeed in defending itself against the other post-Incident allegations, which form part of the timely continuing contravention alleged in Mr. Ross' complaint.

[76] For all of the above reasons, Interfor has not established that Mr. Ross' complaint has no reasonable prospect of success and does not merit a hearing. I therefore deny its application to dismiss his complaint under s. 27(1)(c) of the *Code*.

IV CONCLUSION

[77] Interfor's application to dismiss under s. 27(1)(g) of the *Code* is granted in part:

a. The complaint alleges a timely continuing contravention dating back to September 30, 2016. Interfor's application to dismiss this part of the complaint is denied.

b. The pre-Incident allegations in the complaint are dismissed.

[78] Interfor's application to dismiss under s. 27(1)(b) is denied.

[79] Interfor's application to dismiss under s. 27(1)(c) is also denied.

[80] Mr. Ross' complaint alleging a continuing contravention dating back to September 30, 2016 will proceed to a hearing.

Jonathan Chapnick
Tribunal Member