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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:

KW

COMPLAINANT

AND:

His Majesty the King in Right of the Province of British Columbia as Represented by the Ministry
of Health

RESPONDENT

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

Tribunal Member:

Shannon Beckett

On her own Behalf:

KW

Counsel for the Respondent:

Audrey Lieberman

I INTRODUCTION

[1] On January 2, 2019, KW filed a complaint with the Tribunal alleging that the Ministry of Health [**Ministry**] discriminated against her in the area of services, on the basis of sex, contrary to s. 8 of the *Human Rights Code* [**Code**], when it refused to consider her funding application for out of country health services. In particular, KW alleges that her identity as a transgender woman made it impossible for her to complete the funding application for Laparoscopic Sigmoid Colon Vaginoplasty, a gender affirming surgery which was not being performed in Canada at the time. She says that in order to be considered, the application had to be completed by a “BC Specialist” practicing in the area of gender reassignment surgery. However, she says there were no such specialists in BC at the time. KW says cisgender women seeking funding for the same out of country procedure would not have faced the same barrier as her, because cisgender women could access a “BC Specialist”, such as a gynecologist, and complete the application form.

[2] The Ministry denies discriminating, and argues that KW was not denied access to medical treatment, nor was she treated differently than any other beneficiary who requests out of country medical services. The Ministry says that KW’s application form was incomplete, and she never provided the Ministry with the information it required to complete the application. Further, the Ministry argues the medical service she was seeking was available in Canada, and as such, the public health system was not obligated to fund the service she was seeking overseas.

[3] The Ministry applies to have KW’s complaint dismissed prior to hearing on the basis that the complaint has no reasonable prospect of success: *Code*, s. 27(1)(c). Resolution of this application turns on whether the Respondents have persuaded me that KW has no reasonable prospect of proving a connection between her identity as a transgender woman, and the adverse impact she says she experienced by being unable to access funding for the Laparoscopic Sigmoid Colon Vaginoplasty she sought overseas.

[4] For the following reasons, I deny the Ministry's application, and this complaint will proceed to hearing. 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.

[5] This decision contains sensitive and highly personal medical information. Therefore, I have decided to anonymize KW's name. If either party disagrees with this anonymization, they may apply to have KW's name identified in this decision. If KW wishes to have her name anonymized in future Tribunal decisions, she may apply to the Tribunal under Rule 5(6) of the Tribunal's *Rules of Practice and Procedure* to limit publication of her name.

II BACKGROUND

[6] The Ministry is responsible, through the Medical Services Commission, for giving prior written approval for "elective (non-emergency), medically necessary, out-of-country medical care". The Medical Services Commission has published guidelines in relation to funding out of country care [**Guidelines**].

[7] The Guidelines set out the process for applying for out of country funding, and the criteria which must be met in order to be considered and approved. Relevant portions of the guidelines include the following:

Funding approval will not be granted in the following circumstances:

a) the application is incomplete;

...

c) appropriate acceptable medical care is available in BC or elsewhere in Canada;

...

e) the application has been made without a referral from the appropriate specialist* involved in the beneficiary's care in BC;

[8] “Appropriate Specialist” is defined in the Guidelines as “a medical practitioner actively involved in the beneficiary’s care with expert knowledge in the proposed service and/or speciality that will deliver the out of country service”, and is qualified as being “actively involved in the beneficiary’s care in BC”.

[9] Trans Care BC is a provincial program run by the Provincial Health Services Authority. The Ministry says that the purpose of Trans Care BC is to provide information on transgender health and wellness, as well as to provide assistance with accessing gender-affirming health care services. The Ministry says that Trans Care BC does not provide direct clinical or counselling services, but can refer individuals seeking gender-confirming health care to services in their area.

[10] In May 2017, KW appears to have reached out to Trans Care BC to inquire about a gender affirming procedure. On May 19, 2017, KW signed a release of information form authorizing Trans Care BC to share her personal information with GRS Montreal, a surgical centre in Montreal specializing in gender-affirming surgery. The release of information form states:

The gender-affirming procedure(s) you are requesting **is/are not available from surgeons who practice in the province of British Columbia**. In order to obtain this care, you will be referred to GRS Montreal. [emphasis added]

[11] On October 11, 2017, the Ministry, through the BC Medical Services Plan, approved funding for KW to undergo a “Vaginoplasty” procedure at GRS Montreal. The top of the form approving funding for the surgery indicated that it was an application for pre-authorization of payment for “Surgery for Alteration of Appearance”.

[12] On January 25, 2018, KW applied to the Ministry for funding for “Out of Country Health Services”. The application form indicated that it had to be completed by “the attending BC specialist”, or that it would be considered to be incomplete. KW’s application was not completed by a BC Specialist. Instead, it was completed by Dr. Kamol Pansritum, of the Kamol Cosmetic Hospital in Bangkok, Thailand. The procedure KW sought funding for was described

on the application form as “Laparoscopic Sigmoid Colon Vaginoplasty”. In the section of the form which asked whether treatment for “this condition” was available in either BC or in Canada, the form indicated no treatment was available in BC, and that “there are no Surgeons currently performing this procedure in Canada”. Attached to the application, was a letter written by KW which set out her reason for seeking the out of country procedure as follows:

To whom it may concern,

I am a Transgender patient seeking out of country funding for Laparoscopic Sigmoid Colon Vaginoplasty.

Although the funding was already approved for Vaginoplasty surgery with Dr. Brassard in Montreal, (which is notably out of province), **I have had medical advice that indicates that the procedure being offered there is not the most appropriate for my particular circumstances. I therefore prefer the procedure offered by Dr. Pansritum, who has completed the request for funding.**

I am only asking for funding to the same level as what would be billed to MSP through Dr. Brassard, for which there are many prior cases.

Please note that both Ontario and Saskatchewan currently approved the procedure in Thailand on the same factual basis. [emphasis added]

[13] In a letter dated May 18, 2018, the Ministry wrote to KW and advised her that her application for funding for out of country medical services was incomplete, and that it would hold the application in abeyance until the application was complete. The letter set out that in order to review and consider the application the following information was necessary:

To review provincial coverage for surgery in Thailand, **the medical recommendation is required from the attending gender reassignment surgical specialist in BC.** The Specialist may provide medical documents to show the medical necessity to obtain treatment in Thailand, as the appropriate standard of care is not available for the patient in BC/elsewhere in Canada. [emphasis added]

[14] The letter further set out the part of the Guidelines which explained that if there was an “appropriate and medically acceptable treatment” available in BC or elsewhere in Canada, then the funding for the out of country procedure would not be approved.

[15] On May 30, 2018, Dr. Burns, who appears to be KW's family doctor, wrote to the Ministry on KW's behalf, and asked the Ministry to provide the contact information for a gender reassignment surgeon in BC so KW could complete the application. Dr. Burns copied Trans Care BC on his correspondence to the Ministry.

[16] On June 5, 2018, KW contacted the Ministry by telephone, and asked for the contact information for a surgical specialist in BC so she could complete the application. The Ministry advised that they could not provide her with that information, and that she would have to contact Trans Care BC or her family doctor to get that information. KW advised the Ministry that she had already contacted Trans Care BC "a year ago", and they referred her to GRS Montreal. She also advised the Ministry that her family doctor did not know of any surgical specialists in BC. The Ministry then told her it could not provide her with any further information.

[17] On June 25, 2018, the Ministry wrote back to Dr. Burns in relation to KW's application for out of country health services. Among other things, the Ministry advised him that KW's application was reviewed and that "funding approval will not be granted [where]...the application has been made without a referral from the appropriate specialist involved in the beneficiary's care in BC". The letter also appears to contradict the Ministry's earlier correspondence which indicated the application was incomplete and would be held in abeyance until it was complete. In that regard, the letter advised Dr. Burns that:

Trans Care BC reviewed treatment services in Montreal and has confirmed the appropriate acceptable standard of care is available in Canada.

When surgery is available in Canada, the attending specialist in BC may recommend surgery outside Canada. The specialist must include peer reviewed medical articles with the application to confirm surgery outside Canada will result in a significant difference in success.

...

The recommendation for surgery is sincerely respected; however as surgery is available in Canada, provincial coverage was not approved for surgery in Thailand. [emphasis added]

[18] On January 6, 2020, KW underwent a Vaginoplasty procedure at GRS Montreal.

III DECISION

Section 27(1)(c) – No reasonable prospect of success

[19] The Ministry applies to dismiss KW’s complaint on the basis that it has no reasonable prospect of success: *Code*, s. 27(1)(c) The onus is on the Ministry to establish the basis for dismissal.

[20] 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.

[21] 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.

[22] A dismissal application is not the same as a hearing: *Lord v. Fraser Health Authority*, 2021 BCSC 2176 at para. 20; *SEPQA v. Canadian Human Rights Commission*, [1989] 2 SCR 879 at 899. The threshold to advance a complaint to a hearing is low. In a dismissal application, a complainant does not have to prove their complaint or show the Tribunal all the evidence they may introduce at a hearing. They only have to show that the evidence takes their complaint out of the realm of conjecture: *Workers’ Compensation Appeal Tribunal v. Hill*, 2011 BCCA 49 at para. 27.

[23] To prove her complaint at a hearing, KW will have to prove that she has a characteristic protected by the *Code*, she was adversely impacted in the area of services, and her protected characteristic was a factor in the adverse impact: *Moore v. British Columbia (Education)*, 2012 SCC 61 at para. 33.

[24] In its dismissal application, the Ministry does not dispute that KW has characteristics protected by the *Code*, or that she experienced an adverse impact in the areas of services. The Ministry focusses its argument on the third element of the test for discrimination, and says KW has no reasonable prospect of proving a connection between her identity as a transgender woman, and the adverse impacts she says she experienced.

1. Protected Characteristics

[25] Although this complaint was brought solely under the ground of sex, the Ministry has based its response and dismissal application on KW's identity as a transgender woman, which also intersects with the ground of gender identity. As the Ministry does not contest KW's protected characteristics, and as its response and dismissal application has addressed her identity as a transgender woman, I find no prejudice flows to either party from my consideration of both sex and gender identity in this application.

2. Adverse Impact

[26] Although the Ministry says that it does not dispute that KW experienced adverse impacts in the area of services, I find it necessary for my analysis to identify the specific adverse impacts at issue.

[27] On her complaint form, filed before she underwent surgery, KW indicated that she experienced adverse impacts because the delay in processing her application increased her gender dysphoria and her anxiety. In her response to the dismissal application, filed after she underwent surgery, she indicates that the Ministry's refusal to process her application for funding for out of country medical services, denied her access to the specific type of surgery that she was seeking. Together with her January 25, 2018, letter to the Ministry which indicated she had received medical advice to get the other type of surgery, I understand her to allege the

adverse impact of being denied access to a medical procedure which was more appropriate in her particular circumstances.

3. *Connection Between Protected Characteristics and Adverse Impact*

[28] The Ministry argues KW has no reasonable prospect of proving a connection between her protected characteristics and the adverse impacts she says she experienced, because its decision not to process her application for out of country medical services was made because her application was incomplete. The Ministry says it never denied her application, but was unable to process it because KW never completed it. It says that the Guidelines subject all applications for funding for out of country medical services to the same criteria, regardless of the personal characteristics of the patient on whose behalf the application is made. As such, the Ministry says it has provided a reasonable and non-discriminatory explanation for its actions.

[29] This argument does not address KW's key argument that the application process created a barrier for her that was not present for cisgender women. KW's argument on this point is comprised of two separate and related arguments. First, KW says that that because the application had to be completed by a specialist in BC, she was unable to complete the application because at the time, there were no gender reassignment surgical specialists in BC. Second, she argues that this would not be the case for cisgender women, who, if they required this surgery, would be able to access specialists in BC, such as gynecologists, who would be able to complete the application.

[30] It is trite law that if an otherwise neutral policy, practice, or procedure adversely impacts certain groups, it may be discriminatory: *Stewart v. Elk Valley Coal Corp.*, 2017 SCC 30 at para. 24. Thus, if KW can demonstrate that the Guideline requirement for a BC specialist adversely impacted her as a transgender woman, she will be able to prove the requisite connection between her protected characteristics and the adverse impacts she alleges she experienced.

[31] KW's argument about the requirement for and availability of a BC specialist is supported, at least in part, by the Ministry's own documents. For example, in the May 19, 2017, release of information form, Trans Care BC acknowledged that the gender-affirming procedure (gender reassignment surgery) KW was seeking was "not available from surgeons who practice in the province of British Columbia." Further, the May 18, 2018, letter from the Ministry to KW indicated that in order to have her application considered "a medical recommendation is required from the attending gender reassignment surgical specialist in BC." When KW asked for the name or contact information of such a specialist, the Ministry did not provide her with that information but said she had to contact Trans Care BC or her family doctor. Similarly, when KW's family doctor tried to ascertain the name and contact information for a gender reassignment surgical specialist in BC, the Ministry did not provide him with that information. KW says that when she contacted Trans Care BC to get a referral, albeit a year prior to her discussions with the Ministry, she was referred to GRS Montreal, and not to anyone in BC.

[32] In its submissions, the Ministry now says that "the [Ministry] recognizes the physicians at Trans Care BC as the **appropriate specialists in BC** from whom a beneficiary who seeks out of country funding for a vaginoplasty procedure can request a referral" [emphasis added]. However, it is not clear if the Ministry is saying KW should have contacted Trans Care BC to get a referral to a BC specialist who could have helped her fill out the application, or whether the Ministry is now saying the physicians at Trans Care BC could have been the "Appropriate Specialists" for the purpose of completing KW's application. If the former, then, as I note above, KW says she did contact Trans Care BC and was referred to GRS Montreal and not to any BC specialist. If the latter, then this submission contradicts the Ministry's submission that Trans Care BC does not provide any direct clinical services. It is also inconsistent with Trans Care BC's own release of information form in relation to KW, which indicated that the gender-affirming procedure she was seeking was "not available from surgeons who practice in the province of British Columbia".

[33] Based on the above evidence, I find that KW has taken her allegations that the application process created a barrier for her as a transgender woman because it required a BC

specialist to complete the form, and that there were no BC specialists at the time who could complete the form for her, out of the realm of conjecture. I next move on to consider her assertion that cisgender women would not experience the same barriers as transgender women in the application process.

[34] The Ministry denies KW's argument that the Guidelines do not pose the same barrier for cisgender women because cisgender women have access to specialists (such as gynecologists) in BC. However, the Ministry's argument in response does not actually address KW's argument. Instead, the Ministry simply says:

The surgical procedure for which MSP approved coverage for [KW], and for which [KW] sought out of country funding, is Surgery for Alteration of Appearance (vaginoplasty)[.] **This procedure is rarely performed on cisgender women, and only in cases where it is medically necessary (i.e. due to disease or injury).** [emphasis added]

[35] This argument is problematic for a number of reasons. First, it does not address the substance of KW's argument that even in those "rare" cases, cisgender women would have access to specialists in BC (such as gynecologists) who could complete the application form for them, whereas transgender women would not. Second, it implies that where transgender women are seeking the same surgery, it is not in cases "where it is medically necessary". This argument appears to be based on stereotypical and outdated ideas about the nature and reason for gender-affirming surgery. There is no indication in the context of this complaint that the gender-affirming care KW was seeking was *not* medically necessary. Indeed, the parties agree that she had already been approved for MSP funding for out of province gender-reassignment surgery.

[36] In any event, the Ministry's response to KW's argument does not persuade me that KW has no reasonable prospect of proving the application process negatively impacted her, as a transgender woman. In my view, KW has taken this allegation out of the realm of speculation and conjecture.

[37] Before I conclude, I will briefly address a point repeatedly made by the Ministry in its submissions. The Ministry says in numerous places that out of country medical services will not be approved where appropriate and acceptable medical care is available in BC or elsewhere in Canada. It says that GRS Montreal would not have approved KW for vaginoplasty surgery if the acceptable standard of care for the procedure in Canada was not appropriate for her. It further says in reviewing the treatment services at GRS Montreal, Trans Care BC confirmed that “the appropriate and acceptable standard of care for the surgical services (vaginoplasty) in question is available in Canada”. This argument seems to impliedly ask the Tribunal to determine that even if KW’s application had been formally considered, she would not have been approved for funding for the surgery she requested in Thailand because Trans Care BC and GRS Montreal had both determined that she would be able to access appropriate services in Canada.

[38] In my view, based on the information and evidence before me, this argument is speculative. According to the Ministry’s own submissions, it never considered the substance of KW’s application. Moreover, the argument does not address KW’s concern that it was the refusal to consider her application, which adversely impacted her and amounted to discrimination in this case.

[39] Further, I note that the Guidelines provide for, in effect, an internal appeal process in circumstances where out of country funding requests are declined. If the Ministry had decided KW’s application, and if the Ministry made an adverse decision in relation to her application, she would have been entitled to two additional levels of review of the decision, including an “Administrative Review”, and a “Formal Review”. In the Administrative Review, KW would have been able to provide the reviewers with additional evidence explaining why the procedure she was seeking out of country was appropriate for her. In the Formal Review, she would have been able to have the Administrative Review decision reviewed by a three-member panel comprised of a member of the Ministry of Health Services, a member of the British Columbia Medical Association, and a member of the general public. In these circumstances, which involve substantial opportunities for detailed consideration and review of her request for funding, it is

not persuasive for the Ministry to argue on this dismissal application that KW's application was doomed to fail.

[40] What KW says she lost when her application was not reviewed, was the opportunity to have her argument considered as to why a Laparoscopic Sigmoid Colon Vaginoplasty was more appropriate for her than the procedure being offered in Canada, and why it should have been funded. She also lost the opportunity to have that argument reviewed if the original decision-maker disagreed with her and denied her application. Whether the application was not reviewed because she did not complete it, or whether it was not reviewed because she had no way of completing it, is a question to be answered at a hearing. For the purposes of this application, I am satisfied that KW has brought her allegations of discrimination out of the realm of conjecture, and the Ministry has not persuaded me that her complaint has no reasonable prospect of success.

IV CONCLUSION

[41] For the above reasons, I deny the Ministry's dismissal application. This matter will proceed to hearing.

Shannon Beckett
Tribunal Member