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IN THE MATTER OF THE *HUMAN RIGHTS CODE*
R.S.B.C. 1996, c. 210 (as amended)

AND IN THE MATTER of a complaint before
the British Columbia Human Rights Tribunal

B E T W E E N:

Masters Student A

COMPLAINANT

A N D:

University B, Faculty Member C and Faculty Member D

RESPONDENTS

REASONS FOR DECISION
APPLICATION TO DISMISS: Sections 27(1)(c)
AND APPLICATION TO LIMIT PUBLICATION

Tribunal Member:

Norman Trerise

Counsel for the Complainant:

Fred Wynne

Counsel for the Respondents:

Patrick Gilligan-Hackett

I INTRODUCTION

[1] Masters Student A (“Student A”) filed a complaint alleging that University B, Faculty Member C (“Faculty C”) and Faculty Member D (“Faculty D”) (hereinafter referred to collectively as “the Respondents”) discriminated against him with respect to his participation in his Masters program on the basis of race, colour, ancestry, place of origin and sex, contrary to s. 8 of the *Human Rights Code*. The Respondents deny there has been any such discrimination and apply to dismiss the complaint pursuant to ss. 27(1)(c), and (d)(ii), which provide:

- (1) A member or panel may, at any time after a complaint is filed and with or without a hearing, dismiss all or part of the complaint if that member or panel determines that any of the following apply:

...

- (c) there is no reasonable prospect that the complaint will succeed;

...

- (d) proceeding with the complaint or that part of the complaint would not:

- (ii) further the purposes of this Code.

[2] The Respondents also filed an application for the Tribunal to limit public disclosure of personal information regarding Faculty C and D, including their names and other information that might identify them by referring to them in this decision. This application is not opposed.

II BACKGROUND TO THE COMPLAINT AND APPLICATIONS

[3] I make no findings of fact in this decision.

[4] Faculty Member C is an Assistant Professor at a School providing a Masters degree program (“the School”) at University B acting as the School’s Graduate Advisor at all relevant times.

[5] Faculty member D is an Associate professor at the School and the Director of the School.

[6] The School is a small academic unit of University A that provides post – secondary education to students interested in Student A’s field of interest.

[7] Effective September 2008, Student A was admitted into his Masters program at the School by the University.

1. The circumstances leading to the Complaint

[8] Student A was summoned to a meeting with Faculty C and Faculty D on March 27, 2009. He asserts that the faculty members informed him that some of his classmates complained that he dominated class discussions, that they felt intimidated in his presence and therefore were denied a voice in class and that he controlled the discussion in class.

[9] Student A stated that he requested particulars of the complaints but did not receive them beyond the generic statements related in the previous paragraph. Student A requested a facilitated meeting with the complaining classmates but the request was refused.

[10] Faculty D allegedly told Student A to “look at [his] own culture being an Indo-Canadian male and how [they] treat women in [their] community”. He also allegedly told Student A to “look at the role of masculinity being Indo-Canadian in [your] culture in relation to [your] thesis topic and how it influences [your] worldview of gender roles.” Student A points out that his thesis has nothing to do with masculinity.

[11] Student A stated that he was informed by Faculty C and D that he needed to give women a voice and should remain quiet in the classroom to allow women to feel they could speak. He was informed that being a confident male makes it difficult for women to speak and that he should give them a safe place to speak.

[12] Faculty C and D are alleged to have advised and requested that Student A drop out of a scheduled Masters program course and take it in the following winter semester in order that some classmates would be comfortable taking the course.

[13] The Respondents have a different slant on the meeting. They say that the meeting covered numerous complaints from classmates including allegations that, “if true, could constitute discrimination on the basis of sex and extremely inappropriate behaviour for a future child care professional”. It is notable that they still do not specify the precise nature of these allegations in their response to this complaint.

[14] Faculty D acknowledges that during the meeting he “commented generally about his understanding that [Student A’s] thesis research related to culture and gender and invited [Student A] to think about how these issues might also be playing out in the current situation.”

[15] It is acknowledged that Faculty D “may have made a passing comment regarding gendered patterns of communication in the classroom.” Faculty D however states that he did not say that Student A’s cultural background or gender explained any alleged conduct of Student A. The faculty members state that at the time of the meeting they had formed no conclusions regarding whether any of the allegations made against Student A were substantiated.

[16] Faculty C points out that she made neither of the specific remarks alleged in the complaint.

[17] Both faculty members fail to recall whether Faculty C made any comments respecting needing to give women a voice and permitting women to speak. Neither is in a position to deny those comments were made.

[18] The Respondents acknowledge that during the meeting Faculty C told Student A that some of his classmates did not want to take the scheduled course with him. They contend that Student A offered to defer the course to another semester.

[19] Student A attended at the University’s Equity and Human Rights Office and sought advice respecting these circumstances and an issue arising from his ouster from the MA Program. Student A states that he was advised that his human rights had been directly violated but that he would need the violation to be in writing to prove it. The individual who he spoke to denies stating that he had a strong case. He further deposes that Student A said nothing to him about any allegedly discriminatory comments and that “Rather, [Student A] was focussed on academic issues he was facing in respect of an e-mail he had sent to an instructor and his view that the School was pursuing issues relating to that e-mail because of accusations made against him by two girls he had dated.” The advisor’s notes at exhibit D to his affidavit however clearly reveal that, whether or not his advisor understood the concerns, Student A was clearly approaching him about the March 27th meeting as well as the subsequent issue of the e-mail resulting in his ouster from the Masters Program.

III ANALYSIS AND DECISION

[20] I will address each of the sections relied on by the respondents, in turn. I have considered all of the submissions, materials and affidavits filed in support of these applications.

1. The application to anonymize

[21] The application to anonymize is made to protect the identities of the faculty members who are a party to this proceeding. It is not opposed.

[22] The Respondents seek an order that:

1. The individual Respondents' names not be published but that they be identified as "A" or "B";
2. The individual Respondent's positions, precise place of employment, or the name of the School not be published;
3. Any other information that could be used to identify the individual respondents, including their working and reporting relationships with individuals connected to the complaint not be published.

[23] The Tribunal discussed the issues relating to such an application in *Tenant A v. Landlord and Manager*, 2007 BCHRT 260 (paras. 6-8):

There is a public interest in access to information about the Tribunal and complaints before it. Because of this public interest, the Tribunal makes a significant amount of information available to the public about complaints. To this end, the Tribunal has created Rule 6 of its *Rules of Practice and Procedure*. Rule 6 (2) provides:

- 2 The tribunal's proceedings are public and the information in a complaint file, including personal information, may be disclosed to members of the public in the following circumstances:
 - a. if the tribunal publishes a preliminary decision;
 - b. at a hearing;
 - c. in a final decision of the tribunal;

- d. in a judicial review concerning a complaint;
- e. if a person makes a successful application under the Freedom of Information and Protection of Privacy Act; and under rule 6(3).

Further, Rule 6(3), provides:

3. If a complaint has not settled three months before the dates scheduled for hearing, the following parts of the complaint file, except participants' addresses, phone numbers and fax numbers, will be available to the public:
 - a. the Complaint Form (Form 1) and the Representative Complaint Form (Form 2);
 - b. the Response to Complaint Form (Form 3);
 - c. the Time Limit Response Form (Form 4) and Time Limit Reply Form (Form 5);
 - d. tribunal notices regarding the hearing of the complaint; and
 - e. any preliminary decision regarding the complaint.

At the same time, the Tribunal recognizes that complaints often involve very personal and sensitive information. Sometimes, the privacy interests of parties or others will outweigh the public interest in access to information. To this end, the Tribunal has the power to make orders limiting the disclosure of personal information. Rule 6(5) provides:

- 5 A participant who wants the tribunal to make an order limiting public disclosure of personal information must apply to the tribunal under rule 24 setting out the reasons why that participant's privacy interests outweigh the public interest in access to the tribunal's proceedings

[24] It is apparent as discussed in *Roberts v. UBC and another*, 2010 BCHRT 147 (para. 69) that:

The Tribunal has historically placed a heavy burden on a party seeking to limit disclosure. The reason for this is that the Tribunal's processes are to be conducted openly and only restricted in certain limited exceptions where it is necessary to protect competing social values of overriding importance: *A and B v Famous Players Inc. and C.*, 2005 BCHRT 432. The question to be answered

in any specific case is whether the party seeking the limit on disclosure has succeeded in establishing strong grounds to justify the limitation.

[25] The material filed by the Respondents is persuasive that the grounds to justify the limitations are established. It is difficult to set out those grounds given the need to limit information about the personal respondents. The information received establishes to my satisfaction that the nature of the duties performed by Faculty C and Faculty D are such that their functionality and usefulness to the University would be severely compromised by publication of their personal information as could the reputation of both these individuals and the entire program that they are involved in at the University.

[26] I order that in order to protect the identities of the individual respondents:

1. The personal respondents will be referred to as Faculty Member C and Faculty member D respectively in this decision;
2. The name of the University and of the School within the University will not be published in this decision;
3. Any other information that could be used to identify the individual respondents, including the nature of their working and reporting relationships with individuals connected to the complaint, and the name of the Complainant will not be published in this decision to the extent possible while still producing a meaningful decision.

2. Section 27(1)(c): Is there no reasonable prospect that the complaint will succeed?

[27] Under s. 27(1)(c) of the *Code*, the Tribunal has the discretion to dismiss a complaint if it determines that the complaint has no reasonable prospect of success. The principles which the Tribunal employs in considering applications to dismiss under s. 27(1)(c) are well established. In *Wickham and Wickham v. Mesa Contemporary Folk Art and others*, 2004 BCHRT 134, the Tribunal stated:

[t]he role of the Tribunal, on an application, is not to determine whether the complainant has established a *prima facie* case of discrimination, nor to determine the *bona fides* of the response. Rather, it is an assessment, based on all of the material before the Tribunal, of whether there is a reasonable prospect the complaint will succeed: *Bell v. Dr. Sherk and others*, 2003 BCHRT 63.

The assessment is not whether there is a mere chance that the complaint will succeed, which would be the lowest threshold a complainant would have to meet. Nor is it that there is a certainty that the complaint will succeed, which would be at the highest threshold a complainant would have to meet. Rather, the Tribunal is assessing whether there is a reasonable prospect the complaint will succeed based on all the Information available to it. (*Wickham and Wickham v. Mesa Contemporary Folk Art and others*, 2004 BCHRT 134, paras. 11 and 12)

[28] Thus, the Tribunal's role is to assess whether, based on all the material before it, and applying its expertise, there is no reasonable prospect the complaint will succeed. The Tribunal's role in this regard was most recently described by the Court of Appeal in *Workers Compensation Appeals Tribunal v. Hill* 2011 BCCA 49, at para. 27:

It is useful to describe the nature of an application under s. 27 of the *Code* to provide context for the appellants' arguments. That provision creates a gate-keeping function that permits the Tribunal to conduct preliminary assessments of human rights complaints with a view to removing those that do not warrant the time and expense of a hearing. It is a discretionary exercise that does not require factual findings. Instead, a Tribunal member assesses the evidence presented by the parties with a view to determining if there is no reasonable prospect the complaint will succeed. The threshold is low. The complainant must only show the evidence takes the case out of the realm of conjecture. If the application is dismissed, the complaint proceeds to a full hearing before the Tribunal. If it is granted, the complaint comes to an end, subject to the complainant's right to seek judicial review: *Berezoutskaia v. British Columbia (Human Rights Tribunal)*, 2006 BCCA 95, 223 B.C.A.C. 71 [reported 55 C.H.R.R. D/450] at paras. 22-26, leave to appeal ref'd [2006] S.C.C.A. No. 171; *Gichuru v. British Columbia (Workers Compensation Appeal Tribunal)*, 2010 BCCA 191, 285 F.C.A.C. 276 [CHRR Doc. 10-1031] at para. 31

[29] As stated above the complaint alleges discrimination on the basis of disability. The essential allegations appear to be that the Respondents discriminated in:

1. Accepting the allegations against Student A without providing him with a meaningful opportunity to respond to the allegations as a result of the application of racial and cultural stereotypes;
2. Allowing racial and cultural stereotypes to influence their approach to their investigation; and
3. Uttering statements during the course of the investigation which revealed racial and cultural biases.

[30] I will deal with these allegations globally because they present a common theme.

The Removal of Student A from the Masters Program and other new allegations

[31] In the Complaint, Student A does not rely on the fact that he was terminated from the Masters program as a basis for his complaint. Interestingly however it is referred to extensively in both the Respondents' Response to Complaint form and their Application to dismiss.

[32] Student A does rely on the termination from the program as an adverse consequence of the alleged discrimination as well as an example, in itself, of the discrimination in the Complainant's Response to Dismissal Application.

[33] The Respondents argue that because termination from the program was not a basis for the original complaint and no application has been made to amend the complaint to include it, that Student A should not be allowed to rely upon it for purposes of the present application. I note that it was the Respondents that introduced the matter strongly into the factual matrix. I do not propose to deal with this submission because it is not necessary for me to look beyond the original underpinnings to the complaint in order to decide this application. I will not be referring to what have been referred to as "the new allegations" in the *Reply* on the Respondents' Applications to Dismiss the Complaint. In my view some of them are new allegations which require a formal application for amendment pursuant to s. 25 of the *Rules of Practice and Procedure* whereas others are merely a fleshing out of already alleged grounds which do not require an amendment.

The Application of Racial and Cultural Stereotypes

[34] Student A puts forward a version of the events that suggests that he was informed of complaints of classroom behaviour of a general nature, not given sufficient information to respond to that information and then treated in the investigation meeting in a manner that suggested that a determination was already made against him, based on racial and cultural stereotypes.

[35] The Respondents reply that the specific statements Student A relies on were either not made or significantly different in context from how Student A has portrayed them. They further point out that the students who had complained to the faculty about Student A were afraid of being identified to Student A and that was a significant factor in their inability to provide Student A with particulars of the complaints made.

[36] The statements attributed to Faculty D, being (“ look at [your] own culture being an Indo-Canadian: male and how [you] treat women in [your] community” and “look at the role of masculinity being Indo-Canadian in [your] culture in relation to [your] thesis topic and how it influences [your] worldview of gender roles”), could in the context alleged by Student A be found to support a finding of discrimination under section 8 of the *Code*. However, they could, in the context put forward by the Respondents, be innocent with no hint of discrimination. The Respondent has argued that these statements should be treated as a single comment. I do not agree.

[37] Important to a determination of the proper context will be evidence of the nature of the complaints received by the faculty, which are completely absent from the submissions to date, the facts related to how and under what terms of reference the investigation was entered into, and the testing of the various versions of the facts through cross examination.

[38] I am unable to conclude on the materials before me that Student A’s complaint has no reasonable prospect of success against University B.

Should the Complaint be Dismissed under s. 27(1)(d)(ii) of the *Code* on the basis that it would not further the purposes of the *Code* to proceed with it?

[39] The Respondents submit that hearing the Complaint does not further the purposes of the *Code*. They take this position on the grounds that the matter can be dealt with adequately by the Human Rights Equity Office of the University followed, if necessary, by a Senate Committee on Appeals hearing, and alternatively on the grounds that Student A has engaged in misconduct in the course of the complaint. Materials have been filed that establish that care will be taken to ensure a fair hearing for the Complainant. The material also discloses that the Complainant will be required to exhaust all other internal avenues of appeal including a discrimination complaint to the Equity Office prior to any consideration by the Senate Committee on Appeals.

[40] The Complainant submits that no appeal is underway at this time, that s. 27(1)(d)(ii) is to be restricted to matters that have been adequately addressed in other proceedings and that the University appeals processes do not have the jurisdiction to interpret and apply the *Code*. Further the Complainant submits that dismissing the complaint “could have the result of increasing inefficiency of use of the Tribunal’s resources because a decision of the Senate Committee on

Appeals could result in a fresh complaint. The argument appears to be that adjudicating one complaint is a more efficient use of the Tribunal's resources than adjudicating two complaints.

Availability of an internal process?

[41] The written appeal to the Senate Committee on Appeals was received by the Office of the University Secretary on August 28, 2009. The University advises that the contents of the appeal are similar to the allegations in the Complaint and points to certain cases decided under s. 27(1)(f) of the *Code*. The University also relies on *Chan v. The University of British Columbia* to support its application under s. 27(1)(d)(ii).

[42] The seminal case on the application of s. 27(1)(d)(ii) is *Williamson v. Mount Seymour Park Housing Co-operative and others*, 2005 BCHRT 334 (paras. 9-13) where the Tribunal stated:

Section 27(1)(d)(ii) has been the subject of comparatively little discussion by the Tribunal. In my view, there are a number of reasons for this. Often in dismissal applications reliance on s. 27(1)(d)(ii) is redundant, as it would obviously not further the purposes of the *Code* to proceed with a complaint that is outside the jurisdiction of the Tribunal, has no reasonable prospect of success, or otherwise ought to be dismissed under one of the other sub-sections of s. 27. Further, the application of s. 27(1)(d)(ii) may require a more nuanced consideration of the purposes of the *Code* than other sub-sections of s. 27, most of which are typically more straightforward in their application: a complaint either is or is not within the Tribunal's jurisdiction, either alleges acts or omissions which could contravene the *Code* or does not. While all sub-sections of s. 27 require the Tribunal to exercise its judgment and discretion, that exercise is more apparent in relation to s. 27(1)(d)(ii) than others. All of these are factors which have led the Tribunal to prefer to rely on other sub-sections of s. 27 where possible.

That said, complaints have been dismissed on the basis of s. 27(1)(d)(ii) in a number of circumstances. For example, where a complaint has been settled, the Tribunal has stated that proceeding with it would not further the purposes of the *Code*: see *Thompson v. Providence Health Care*, 2003 BCHRT 58 and *Gareau v. Kersey and others*, 2003 BCHRT 87. The Tribunal has also held that it would not further the purposes of the *Code* to proceed with a complaint where the complainant has engaged in misconduct in the course of the complaint, for example, by repeatedly failing to comply with Tribunal Rules and orders: see *Mahal v. Hartley (No. 2)*, 2004 BCHRT 63, *Mahal v. Hartley (No. 3)*, 2004 BCHRT 77 and *Smith v. Valley Recovery Support Association (No. 2)*, 2004 BCHRT 130. The Tribunal has also stated that a complaint may be dismissed under s. 27(1)(d)(ii) where it duplicates the substance of an existing complaint by the same complainant before the Tribunal: *Stone v. B.C. (Min. of Health Services)*

and others, 2004 BCHRT 221 at paras. 39-40. In addition, the Tribunal has dismissed complaints under s. 27(1)(d)(ii) where the respondent had responded appropriately to the complaint; *Horner v. Concord Security Corporation*, 2003 BCHRT 86 at paras. 30-32 and *Wilkie v. ICBC*, 2005 BCHRT 318 at paras. 4-6.

A number of common threads can be discerned underlying these decisions. One has to do with efficiency and avoiding the duplication of resources: it may not further the purposes of the *Code* to proceed with a complaint where to do so would result in the unnecessary duplication of the Tribunal's or the parties' resources. Another has to do with fairness to the respondent: it may not further the purposes of the *Code* to proceed with a complaint where the complainant has failed to act appropriately, as for example, by failing to comply with Tribunal Rules and orders. A third has to do with encouraging parties to comply with their obligations under the *Code* without recourse to the Tribunal: it may not further the purposes of the *Code* to proceed with a complaint where the underlying dispute has been settled or the respondent has already taken appropriate action to remedy the problem. As time goes on and the Tribunal continues to develop its case law, other circumstances and considerations relevant to the application of s. 27(1)(d)(ii) will doubtless be identified.

In my view, all of the concerns which have actuated the Tribunal's s. 27(1)(d)(ii) decisions to date can be readily related to the purposes of the *Code*, which are set out in s. 3 as follows:

3. The purposes of this Code are as follows:

- (a) to foster a society in British Columbia in which there are no impediments to full and free participation in the economic, social, political and cultural life of British Columbia;
- (b) to promote a climate of understanding and mutual respect where all are equal in dignity and rights;
- (c) to prevent discrimination prohibited by this Code;
- (d) to identify and eliminate persistent patterns of inequality associated with discrimination prohibited by this Code;
- (e) to provide a means of redress for those persons who are discriminated against contrary to this Code.

Generally, the Tribunal's ability to ensure that any of the purposes of the *Code* will be fulfilled is harmed insofar as its resources are taken up with matters that have already been adequately addressed, whether through settlement, unilateral respondent action or other proceedings. More specifically, where a complaint of discrimination has already been appropriately resolved, through whatever means, there is no need to proceed with the complaint in order to prevent discrimination or provide a means of redress – the discrimination has already been remedied.

Further, the promotion of a climate of understanding and mutual respect where all are equal in dignity and rights may be enhanced by parties resolving claims of discrimination through consensual as opposed to adjudicated processes.

[43] There is little practical difference between Student A's complaint and that of the complainant in *Chan v. The University of British Columbia* in which this Tribunal held that the complaint should be deferred under s. 25 to allow the University's internal review process to deal with the matter. *Chan* however was an application for deferral under s. 25 while the application in this case is to dismiss. The ramifications of an application to defer are found in the word itself. The application is deferred but if the complainant is dissatisfied with the outcome of the other proceeding it is open to the complainant to apply to re-open its application. An application to dismiss, if allowed, is determinative of the complaint and deprives the complainant of any remedy. There is no application to defer before the Tribunal on this matter.

[44] While in many circumstances it is desirable that internal processes be followed to foster the purposes of the *Code*, nothing in the *Code* requires that a Complainant exhaust his or her internal remedies prior to availing themselves of recourse to the *Code*.

[45] It is clear that, although the Notice of Appeal was filed with the Senate on August 28, 2009, through no fault of the University, it has languished and no attempt has been made by Student A to move it forward. In the circumstances I see no advantage in requiring Student A to return to a process which he abandoned 18 months ago.

Should Student A's complaint be dismissed on the basis that he engaged in misconduct?

[46] It is suggested by the Respondents that Student A engaged in misconduct by indicating an intention to turn to the media in the face of the Tribunal's existing order to limit publication of personal information.

[47] No information is before me that suggests such action was taken. The Complainant says he did not turn to the media. The materials reveal no action by Student A which flouts the Tribunal's order or this process.

[48] I am not prepared to find that Student A engaged in misconduct which would justify dismissal of his complaint.

[49] I reject the Respondent's application under s. 27(d)(ii).

Application against Faculty C and Faculty D

[50] University B has acknowledged that the acts and omissions of Faculty C and Faculty D were carried out in the ordinary course of their positions by stating that “The University acknowledges the acts and omissions of Faculty C and Faculty D as its own, and irrevocably acknowledges its responsibility to satisfy any remedial orders which the Tribunal might make in respect of their conduct”, and “Faculty C and Faculty D were acting within the scope of their employment at the University”.

[51] Nothing in the material presented weighs in favour of retaining the individual respondents as respondents in this complaint.

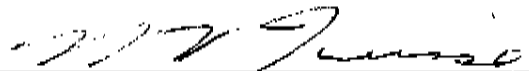
[52] Accordingly, the complaint is dismissed against Faculty C and Faculty D, pursuant to s. 27(1)(c) of the *Code*.

IV CONCLUSION

[53] Considering Student A’s allegations as a whole, I am unable to determine that there is no reasonable prospect that his complaint will succeed. In my view a full hearing will be required to establish what actually transpired between Student A and Faculty C and D, and whether a *Code* violation has taken place.

[54] For these reasons, I decline to grant the application of the respondent to dismiss this complaint. The complaint will proceed against University B only.

[55] As stated above I grant the application of the Respondents to limit the public disclosure of personal information of the personal respondents on the terms ordered herein.



Norman Terise, Tribunal Member