BCHRT Complaint No. 14965

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

BETWEEN:

GLYNNIS KIRCHMEIER AND GLYNNIS KIRCHMEIER OBO OTHERS

COMPLAINANTS

AND:

UNIVERSITY OF BRITISH COLUMBIA

RESPONDENT

APPLICATION TO DISMISS
REPLY SUBMISSION

1. The Respondent continues to rely on the submissions made in its Application to Dismiss and will not unnecessarily repeat those submissions herein.

Scope of Application

2. The Complainants appear to assert that the Respondent's application to dismiss does not apply to the general class (see, for example, paragraph 6) and have purported to reserve the right to make further submissions regarding that aspect of the Complaint.

3. The Respondent's application to dismiss is in respect of the Complaint in its entirety. At paragraph 105 of the application to dismiss, the Respondent wrote "there is no reasonable prospect that any aspect of the Complaint will succeed". At paragraphs 117, 151, 152, and 171, the Respondent asked that the Tribunal dismiss the Complaint "in its entirety".

4. There is no ambiguity in the Respondent's submission; it is plain and obvious that the application seeks the dismissal of the Complaint "in its entirety", including the aspects of the Complaint relating to the general class.

5. If the Complainants wished to make submissions regarding whether the general class complaint should be dismissed, it was incumbent upon them to make those submissions in their response, and not purport to reserve some right to make further submissions.

6. This application to dismiss was filed on May 1, 2018. The Complainants were not required to file a response until December 4, 2020. If the Complainants were uncertain about the scope of the application to dismiss, they had a period of 2-1/2 years in which to seek clarification.

7. The Respondent opposes any further opportunity for the Complainants to make submissions on this application to dismiss.

Evidence Before the Tribunal

8. In response to the application to dismiss, the Complainants note that substantial document disclosure has occurred in this matter, with the Respondent disclosing many thousands of pages of documents. The Complainants state that they have made no attempt here to provide their full case.

9. While there is no obligation that the Complainants (or Respondents) disclose their full case on an application to dismiss, the Tribunal can only decide the application to dismiss based on the evidence before the Tribunal on this application. The Tribunal cannot consider what evidence may be adduced at a hearing in determining whether the Complaint should be dismissed: *University of British Columbia v. Chan*, 2013 BCSC 942 at paragraphs 68 and 78.

10. The Respondent also notes that although the Complainants state that a statement of Caitlin Cunningham has been exhibited to the Affidavit of Jennifer Cocke, no such statement exists as an exhibit. If the Complainants are referencing one of the many documents in Exhibit A to Ms. Cocke's Affidavit, it is entirely unclear which document or pages are being referenced in this manner.

11. Further, although there is no requirement that parties include sworn evidence before the Tribunal, the Respondent notes that the Complainants have failed to provide any first hand evidence from either Ms. Cunningham or Student B, the only individuals who experienced alleged sexual misconduct. Ms. Cunningham's statement, to the extent that it may exist at all in the materials, is apparently appended to the affidavit of the legal assistant to counsel for the Complainants. Student B's anonymous statement is appended to Ms. Kirchmeier's affidavit. Both statements are, in this form, hearsay.

New Allegations

12. The Complainants' response raises a number of new allegations that are not properly before the Tribunal. In particular, paragraphs 45-46, 64, 66, 67 71-76, 88, 93-94, 107, 112-113, 115-116, 118-120, 122-123, 125-127, 131-132, 303-307, and 309-312, contain assertions of fact and allegations that are not set out in the Complaint.

13. The Respondent submits that they ought to be excluded from any consideration of the application to dismiss. The Tribunal's Rules of Practice and Procedure require an application to be made to amend a complaint with new allegations if there is an application to dismiss outstanding: Rule 24(4)(b).

14. The reason for the Tribunal's Rule is fairness. Once an application to dismiss has been filed, it is unfair to add allegations which the respondent would not have had the opportunity to address. It is not a question of using the correct form, but of not causing unfairness to the respondent.

15. Introducing new allegations when an application to dismiss is outstanding results in significant prejudice to the respondent who must then respond to a "moving target": see *Singh v. Kane, Shannon & Weiler Management Corp.*, 2012 BCHRT 139, judicial review denied 2014 BCSC 1043, at para. 36.

16. The new allegations were not raised in the Complaint, they were not the subject of an application to amend the Complaint, and they cannot be regarded as particulars of the allegations contained in the Complaint.

17. The Tribunal has frequently confirmed it will not consider new allegations raised in such a manner:

> Rule 25(4)(b) of the Tribunal's Rules of Practice and Procedure requires a complainant, where there is an outstanding application to dismiss, to apply to the Tribunal before amending a complaint. The purpose of that Rule is to prevent a complainant from presenting a respondent (and the Tribunal) with a "moving target", in which the complainant seeks to expand the complaint, or remedy deficiencies in the original complaint identified in the application to dismiss, by amending the complaint. See, generally: *Pausch v. School District No. 34 and others*, 2008 BCHRT154, paras. 20:31.
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> In accordance with the purpose of that Rule, I decline to consider Mr. Parchment's additional allegations, and need not consider the Ministry's responses to those allegations.
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> *Parchment v. B.C. (Min. of Public Safety and Solicitor General),* 2010 BCHRT 345 at paras. 26-27.

18. In *Reilly v. Langley School District No. 35*, 2009 BCHRT 133, the Tribunal faced a similar situation where a Complainant included new allegations in a response. The Tribunal refused to consider these allegations:

> 4 In his response to this application to dismiss, Mr. Reilly reiterated allegations that were not accepted by the Tribunal for filing in this complaint. In addition, he raised several new allegations respecting incidents arising from January 2005 to in or about May 2007 which are generally vague, speculative and significantly out of time. Mr. Reilly has not filed an application to amend his complaint as required by Rule 25(4)(b) of the Tribunal's Rules of Practice and Procedure when there is an outstanding dismissal application. Neither the allegations previously rejected by the Tribunal for filing, nor the new allegations that have made their way into Mr. Reilly's submissions form part of this complaint, and are not considered by me in this application to dismiss.
>
> [Emphasis added]

19. The Complainants have used the response to the application to dismiss as an opportunity to reframe and expand on the Complaint, seemingly partially in response to document disclosure. While the Complainant can, of course, use document disclosure to support their response, they cannot use that disclosure to expand on the complaint and add new allegations in the absence of an application to do so.

20. The Tribunal should not consider the new allegations included in the application to dismiss response. To allow the Complainants to expand and amend their original Complaint in this manner would work a significant unfairness to the Respondent.

Section 27(1)(c)

21. The Respondent continues to submit that there is no reasonable prospect that the Complaint will succeed, and the Complaint should be dismissed in its entirety.

22. The Complainants argue that there is jurisprudence to support their position that the failure to respond to complaints in the manner that they advocate amounts to discrimination. The cases cited by the Complainants, however, establish that an employer or service provider can be liable for a “failure to investigate” or a failure to act on an allegation of discrimination.

23. Here, there was no failure to investigate. The Complaint does not allege a failure to investigate; it alleges that the Respondent’s failure to provide the specific and detailed processes and resources outlined in Part C of the Complaint breached the *Code*.

24. What the Complainants seek is for the Respondent to fund and establish its own adjudicative system that mirrors the Tribunal’s own processes, in addition to funding and

establishing its own investigative body, counselling centres, and other resources. The Complainants say that the Respondent's failure to have in place such processes and facilities breaches its obligations under the *Code*.

25. The discrimination alleged by the Complainants here is not of the same nature found in the cases cited by them in paragraphs 185 through 199. None of those decisions establish that it could be a breach of the *Code* for the Respondent not to have replicated the Tribunal's own processes.

26. The Respondent continues to say that there is no reasonable prospect that the Complaint, as the Complainants have framed it, could succeed.

27. Further, in the cases cited by the Complainants, the underlying allegations of discrimination were before the adjudicator as part of the complaint.

28. Here, the underlying allegations of sexual misconduct are not before the Tribunal. They are not within the scope of the Complaint; this Complaint is about the Respondent's processes only.

29. Even if a response to an allegation of discrimination can itself be discriminatory, the complainant must still have experienced alleged underlying discrimination. That is the basis of the decisions relied on by the Complainants to resist the application to dismiss.

30. Here, the majority of the individuals identified in the Complainants' response, including Ms. Kirchmeier, have no claim of underlying discrimination. As is apparent from the statements of Ms. Kirchmeier, Ms. Grego, and Ms. Russell, none of them allege that they experienced sexual misconduct at the hands of Dmitry Mordvinov (or are within the general class as a result of allegations of sexual misconduct by another alleged individual).

31. Ms. Grego states that she is "at best a secondary figure". Ms. Russell acknowledges that she "had no adverse contact with Mr. Mordvinov". They have no claim of discrimination to make.

32. Allowing their complaints to proceed on the basis of process alone would be a significant expansion of the *Code*'s protections. None of those individuals interacted with the Respondent's processes because they experienced sexual misconduct; they sought to support others or make third party reports.

33. Any alleged adverse impacts experienced by them cannot provide a foundation for a finding of discrimination because they are not within the scope of the *Code*'s protections.

34. There is no precedent for the claims being made here. While the Tribunal may accept that an employer's or service provider's response to an individual who claims she has experienced discrimination may itself be discriminatory, there is no legal basis to suggest that a response to someone who has not experienced any alleged discrimination is capable of being discriminatory.

35. Allowing such claims to proceed would open the door to discrimination complaints from family members and friends of those who experienced discrimination because they too, were impacted by the discrimination experienced by someone else. Allowing such claims to proceed would allow complaints from bystanders and witnesses in respect of the response, even if they were not directly impacted by the alleged act of discrimination.

36. What the Complainants are seeking is a significant expansion of the law, which is properly a demand to be made of the legislature. The Tribunal's task is to interpret and apply the law, not to create new laws. The Respondent submits that what the Complainants seek is outside of the *Code*'s protections and there is therefore no reasonable prospect that the Complaint will succeed.

37. Further, while Student B states that she was sexually assaulted by Mr. Mordvinov, that alleged assault would be outside the Tribunal's jurisdiction as it occurred in Ontario. The Respondent submits that if the Tribunal would not have jurisdiction over the underlying allegations of discrimination, a complaint about the response to that alleged discrimination cannot stand.

38. The Complainants have mischaracterized the arguments made by the Respondent in the application to dismiss. The Respondent acknowledges in the application to dismiss that a process can be discriminatory where the adverse treatment alleged by the complainant has a nexus to a protected ground of discrimination (at paragraph 125).

39. The Respondent argues, however, that no such nexus exists here.

40. The Complainants rely on the recent decision of the Supreme Court of Canada in *Fraser v. Canada (Attorney General)*, 2020 SCC 28 ("*Fraser*"). As acknowledged by the Complainants, however, *Fraser* does not change the law. In particular, it continues to require the existence of a nexus.

41. In *Fraser*, the Court considered a discrimination claim under section 15(1) of the *Charter* in relation to the RCMP Pension Plan (the "Plan"). The Plan allowed members to buy back service for some periods of time in which they did not work, including leaves of absence without pay, but did not allow members engaged in job sharing arrangements to buy back service in respect of the periods of time in which they did not work. The majority of those engaged in job sharing arrangements were women.

42. The claimants alleged that their inability to buy back service was adverse impact discrimination on the basis of sex. The majority of the Court agreed that the impugned rules were contrary to section 15(1) of the *Charter*.

43. The majority defined adverse impact discrimination as occurring "when a seemingly neutral law has a disproportionate impact on members of groups protected on the basis of an enumerated or analogous ground. … Instead of explicitly singling out those who are in the protected grounds for differential treatment, the law indirectly places them at a disadvantage" (at para. 30).

44. This definition of adverse impact is not new, and does not represent a change in the law.

45. The Complainants assert that their complaint falls within this definition of adverse impact because women disproportionately accessed the process at issue in the complaint for dealing with sexual misconduct allegations. In making that argument, however, they conflate disproportionate *access* with disproportionate *impact*.

46. In the *Fraser* case, the claimants did not succeed by showing simply that women disproportionately accessed the job sharing opportunities; they succeeded by showing that women were disproportionately impacted by the Plan rules prohibiting buyback for all individuals in job sharing arrangements.

47. This is the nexus element of a human rights complaint; there must be a connection between the adverse impacts alleged and the protected ground at issue. It is insufficient to simply argue that there is disproportionate representation within a group advancing a complaint. In *Fraser*, the majority noted that "evidence of statistical disparity, on its own, may have significant shortcomings that leave open the possibility of unreliable results" (at para. 60).

48. The Complainants say further that *Fraser* is inconsistent with the decision of the BC Court of Appeal in *Vancouver Area Drug Users v. Downtown Vancouver Business Improvement*

Association, 2018 BCCA 132 ("*VANDU*") (leave to appeal denied). The decision in *VANDU* was before the Court in *Fraser*, as evidenced by the majority citing the decision at paragraph 60. The Court gave no indication that it was of the view that *VANDU* was inconsistent with its reasons in *Fraser*.

49. Rather, it is apparent that *VANDU* is consistent with *Fraser*: both require a "connection" between the adverse impact and the protected ground at issue. It is the Complainants' conflation of disproportionate access and disproportionate impact that create the inconsistency that they perceive.

50. Neither the Court in *VANDU* nor the Court in *Fraser* eliminated the nexus requirement; the distinction between those cases was the ability of the claimants to prove that the nexus existed. In *Fraser*, the claimants were able to prove that they as women, were disproportionately impacted by the Plan rules, making their sex a factor in the adverse treatment at issue.

51. In contrast, in *VANDU*, the claimants were unable to prove that the adverse treatment had any connection to any of the protected grounds at issue, even though individuals with the protected characteristics (such as disability) were disproportionately represented among the group advancing the complaint.

52. *Fraser* does not change the law and does not purport to change the law; it simply re-articulates the same test applied by the Court in *VANDU* and that ought to be applied by the Tribunal here.

53. In making their submissions on nexus, the Complainants make the shocking statement that "While a nexus between adverse treatment and a personal characteristic will establish a *prima facie* case of discrimination (this is often what is seen in direct discrimination cases), it is only the *absence* of nexus between protected characteristics and the *impact* of conduct that will be sufficient to say that the required nexus cannot be established (at paragraph 252; underlining added).

54. While the Complainants assert that the Respondent is applying the wrong test for discrimination, the Complainants would have the Tribunal apply a reverse onus, forcing the Respondent to prove that no nexus exists in order to resist a finding of *prima facie* discrimination. This is, of course, entirely inconsistent with the very cases on which the Complainants rely.

55. The Supreme Court of Canada has repeatedly confirmed, including in *Fraser*, that a complainant must establish the existence of a nexus in order to establish *prima facie* discrimination. There is no obligation on a respondent to establish the absence of a nexus and a nexus will not simply be inferred.

56. The requirement of a nexus is at the heart of the *Code*'s protections, and it is the complainant's onus to establish it when a complaint is heard on the merits.

57. While the Complainants have no onus on this application to dismiss, it is relevant for the Tribunal to consider whether there is a reasonable prospect that the Complainants will be able to establish the elements of their complaint if the matter proceeds to a hearing. At that time, the Complainants must prove the existence of a nexus.

58. The Respondent continues to submit that the required nexus does not exist here.

59. It is apparent from the Complainants' response that the basis of the Complainants' nexus argument is that because sex was a factor in the alleged sexual assaults of some individuals, then concerns about the Respondent's process for responding to those allegations of sexual assault are necessarily discriminatory for all women, including those who were not allegedly assaulted.

60. This is an argument of disproportionate representation: because women are more likely to be the victims of sexual misconduct, then issues in respect of the process for responding to sexual misconduct are discriminatory against women.

61. This argument, however, does not meet the test established in *Fraser*, *VANDU*, or any of the other applicable cases.

62. That the Complainants are relying on this argument is apparent from the Complainants' submissions at paragraphs 273-274. In response to the Respondent's submission that not all adverse decisions affecting teachers are discriminatory simply because there are more women teachers than men, the Complainants state that such adverse decisions are discriminatory.

63. As is apparent from the Complainants' submissions, they seek to all but eliminate the requirement to prove a nexus, going so far as to argue that a nexus must be found unless the Respondent can prove its absence.

64. As set out above, the Tribunal's task is to apply the law as it exists, including *VANDU*, *Fraser*, and the other applicable decisions. That law requires the existence of a nexus between the adverse treatment or impacts alleged by the Complainants and the protected grounds of discrimination.

65. For the reasons set out in the application to dismiss and above, the Respondent continues to submit that no such nexus exists here, and there is no reasonable prospect that the Complainants will establish such a nexus, and so the Complaint should be dismissed in its entirety.

Section 27(1)(d)(ii)

66. The Complainants' response to the application to dismiss on this ground is based on an entirely new framing of the Complaint. The "issues" that the Complainants say are still at issue despite the Respondent's new policies are new to this response to the application to dismiss.

67. This response is precisely the moving target identified by the Tribunal in the cases noted above. The Complainants seek to have the Tribunal deny the application to dismiss based on how they now describe the issues rather than the issues identified in the original Complaint.

68. The Complainants are represented by experienced counsel. They determined how they wished to frame the Complaint. Part C of the Complaint contains an extensive and detailed list of the ways in which the Complainants alleged they had experienced discrimination. They cannot now reframe the Complaint and the issues in it to avoid the Complaint being dismissed.

69. The Respondent continues to submit that the Complaint should be dismissed pursuant to section 27(1)(d)(ii) of the *Code*. As is apparent from the Complaint, the alleged discrimination in Part C focuses on the Respondent's processes that formerly existed and advocates for new processes, designed by the Complainants.

70. Since the facts set out in the Complaint, however, those policies and processes have been entirely replaced through the detailed and thoughtful consultation and development process set out in the application to dismiss and supporting affidavits.

71. As the processes about which the Complainants complain no longer exist and the remedy sought by the Complainants of replacing those processes has been rendered moot, it would not further the purposes of the *Code* to proceed with the Complaint, and it should be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Date: January 8, 2021

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Jennifer Devins,
Counsel for the Respondent