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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:

Dora Bempong

COMPLAINANT

A N D:

City Centre Care Society, operating as Cooper Place and Central City Lodge
and Hospital Employees' Union

RESPONDENTS

REASONS FOR DECISION
APPLICATION TO DISMISS: Section 27(1)(b) and (c)

Tribunal Member:

Marlene Tyshynski

Counsel for the Complainant:

Peter Busch

Counsel for City Centre Care Society, operating as
Cooper Place and Central City Lodge:

Adriana Wills

Counsel for Hospital Employee's Union:

Kaity Cooper

I INTRODUCTION

[1] Dora Bempong filed a complaint alleging that her employer, City Centre Care Society, operating as Cooper Place and Central City Lodge (the “Society”) and her union, Hospital Employee’s Union (the “HEU”) discriminated against her on the basis of mental disability. Ms. Bempong’s complaint against the Society is filed in the area of employment, pursuant to s. 13 of the *Human Rights Code*. Her complaint against the HEU is filed in the area of membership in a union, pursuant to s. 14 of the *Code*.

[2] The Society and the HEU deny discriminating against Ms. Bempong. Both apply in separate applications to have Ms. Bempong’s complaint dismissed under ss. 27(1)(b) and (c) of the *Code* which provides:

- (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:
 - (b) the acts or omissions alleged in the complaint or that part of the complaint do not contravene this Code;
 - (c) there is no reasonable prospect the complaint will succeed;

II DECISION

[3] Ms. Bempong’s complaint against the Society is dismissed pursuant to s. 27(1)(b) and (c) and her complaint against the HEU is dismissed pursuant to 27(1)(b).

III BACKGROUND

[4] I have briefly summarized the background to the complaint and then set out the complaint. This summary does not represent findings of fact.

[5] The Society provides complex care services, addiction programs and assisted living services in two downtown Vancouver locations. It operates two residences, Central City Lodge and Cooper Place. The majority of the Society’s employees are represented by the HEU. The balance of its employees are represented by the BC Nurses’ Union or are exempt.

[6] Ms. Bempong has been employed by the Society for about 20 years as a care-aide. She applied and, on about February 2012, was appointed to a newly created care-aide position. Ms. Bempong is a member of and is represented by HEU.

[7] The relationship between the Society and the HEU is governed by a Collective Agreement. The Collective Agreement was filed.

[8] Both respondents state that the Collective Agreement does not provide for Short Term Disability Insurance; rather, it provides a sick leave benefit in the form of eighteen 7.5 hour days sick leave per year. These days can be accrued to a maximum of 156 days, providing any employee with full-time pay during the waiting period for LTD benefits. Once the waiting period for LTD benefits passes, and if the employee remains totally disabled within the meaning of the LTD plan, the employee receives LTD benefits. During the period while the employee is in receipt of LTD benefits, he or she is required to pay 50% of the cost of premiums for benefits, consistent with the terms of the Collective Agreement.

[9] Based on all of the material filed, it appears that further relevant background information not disputed by Ms. Bempong is as follows.

[10] On September 24, 2014, Ms. Bempong reported to the Society that she had discovered that someone had cut the back of her lab coat. At this time she also advised that some weeks before someone had poured water into her backpack. Ms. Bempong completed her work for that day. The following day she phoned in sick. She told the Society that she did not feel safe in the work place.

[11] Ms. Bempong remained off work until all of her sick leave pay was exhausted. She remained on unpaid leave for a period of time. I understand from Ms. Bempong's material that she applied for Medical Employment Insurance. Upon the requisite number of days, she started to receive LTD benefits. She has not returned to work since September 2014 and remains in receipt of LTD benefits as of the date on this submission.

The Complaint against the Society

[12] Ms. Bempong states that she reported to the Society that she had been harassed and bullied at work over several months. This culminated in two major events. One, an

employee poured liquid in her backpack. Two, about one month later, that is, September 24, 2014, an employee cut the back of Ms. Bempong's lab coat. She says, "The mental health issues were reported to the employer."

[13] My summary of the discrimination alleged by Ms. Bempong is that the Society:

- refused to act on her behalf which resulted in her becoming ill;
- acted adversely when she was on sick leave by frequently calling her and repeatedly requiring her to obtain sick notes from her doctor;
- played a role in creating a poisoned work environment resulting in her inability to return to work;
- constructively dismissed her; and
- failed to provide short term disability benefits.

[14] Ms. Bempong did not file any further particulars of her complaints against the Society.

Complaint against the HEU

[15] Ms. Bempong's allegation against the HEU is that it discriminated against her based on her mental disability when it "refused to intervene and provide assistance to her. [It] refused to assist in stopping the bullying. The bullying caused the mental disability. [It] refused to assist her in obtaining sick leave benefits. The union and the employer entered into an agreement or work rule not to provide short term disability benefits."

[16] Ms. Bempong did not file any further particulars of her complaints against the HEU.

IV ANALYSIS

[17] I will first address the complaint against the HEU under s. 27(1)(b). Following, I address the complaint against the Society under ss. 27(1)(b) and (c).

The Complaint against HEU

[18] Ms. Bempong's complaint against the HEU is filed pursuant to s. 14 of the *Code* which provides:

A trade union, employers' organization or occupational association must not

- (a) exclude any person from membership,
- (b) expel or suspend any member, or
- (c) discriminate against any person or member

because of the race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation, gender identity or expression, or age of that person or member, or because that person or member has been convicted of a criminal or summary conviction offence that is unrelated to the membership or intended membership.

[19] The HEU submits that Ms. Bempong's complaint about it, if proven, would not amount to a breach of the *Code* and thus should be dismissed under s. 27(1)(b).

[20] Complaints may be dismissed under s. 27(1)(b) only if the acts alleged in the complaint, if proven, could not contravene the *Code*. Determinations under this section are made on the basis of the allegations outlined on the face of the complaint, without reference to any alternative explanation or evidence which the Respondent may put forward: *Bailey v. B.C. (Min. of Attorney General) (No. 2)*, 2006 BCHRT 168, para. 12.

[21] HEU submits, and I agree, that Ms. Bempong has not alleged any facts that could establish a link between what she says was HEU's discriminatory conduct and her mental disability: *Ingram v. Workers' Compensation Board and others*, 2003 BCHRT 57, para. 20. In fact, Ms. Bempong's allegations against HEU do not mention a mental disability but for stating that HEU "refused to assist in stopping the bullying". "The bullying caused the mental disability". There is no information about what factor Ms. Bempong's mental disability played in any of her allegations of *discrimination* against HEU.

[22] Ms. Bempong's allegation against the HEU is that it discriminated against her based on her mental disability when it "refused to intervene and provide assistance to her. [It] refused to assist in stopping the bullying. The bullying caused the mental disability. [It] refused to assist her in obtaining sick leave benefits. The union and the employer entered into an agreement or work rule not to provide short term disability benefits."

[23] Here, Ms. Bempong's allegations about the conduct of HEU relate to her view that it failed to represent her appropriately. She says the HEU refused to intervene and

assist her, but does not set out particulars in relation to that refusal or how it relates to disability. The allegation that workplace bullying caused a mental disability is not sufficient to support the allegation that a disability was a factor in the union's conduct.

[24] Further, Ms. Bempong makes a bald assertion that the HEU discriminated against her on the basis of her mental disability because it did not sign a Collective Agreement that specifically included a short-term disability insurance. This does not provide sufficient information to support a complaint of discrimination. Ms. Bempong does not explain the adverse impact related to the ground of disability flowing from the current Collective Agreement. She does not allege facts that, if proven, could amount to a contravention of the *Code*.

[25] The HEU's application to dismiss the complaint under s. 27(1)(b) is granted.

The Complaint against the Society

[26] First, I agree with the Society that at least a portion of Ms. Bempong's complaint against it could not, if proven, amount to a contravention of the *Code*; in particular, as stated in the case of the HEU, the mere assertion that the Society failed to specifically provide employees with "short-term disability insurance" does not allege a contravention of *Code*. This portion of the complaint against the Society is dismissed under s. 27(1)(b).

[27] I find it most appropriate to consider the remainder of Ms. Bempong's complaint against the Society under s. 27(1)(c), where I will consider the material filed by the Society.

[28] Under s. 27(1)(c), the Tribunal may dismiss a complaint if there is no reasonable prospect that the complaint will succeed. Section 27(1)(c) allows the Tribunal to dismiss complaints that do not warrant the time and expense of a hearing. The mere chance a complaint will succeed is not enough to hold a hearing. The Tribunal considers the likelihood that facts supporting the complaint will be proved at a hearing: *Berezoutskaia v. British Columbia (Human Rights Tribunal)*, 2006 BCCA 95, leave to appeal ref'd [2006] S.C.C.A. No. 171, at paras. 22-26. A decision to dismiss a complaint under s. 27(1)(c) is discretionary. 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 at a hearing.

[29] The remainder of the complaint against the Society is that it refused to act on her behalf which resulted in her becoming ill, acted adversely when she was on sick leave by frequently calling her and repeatedly requiring her to obtain sick notes from her doctor, played a role in creating a poisoned work environment resulting in her inability to return to work, and constructively dismissed her.

[30] The gist of the Society's application under s. 27(1)(c) is that Ms. Bempong's allegations against it do not even meet the very low threshold of adducing sufficient evidence to take the allegations out of the realm of conjecture (*Workers' Compensation Appeal Tribunal v. Hill*, 2011 BCCA 49, para. 27) and further, given its submissions and evidence in support, there is no reasonable prospect Ms. Bempong's complaint would succeed at a hearing, thus the complaint should be dismissed.

[31] I have reviewed the submission of both parties. I do not find it necessary to set all of it out.

[32] The Society's main points in its responding information, supported by affidavit evidence, are as follows.

[33] The Society, through its Director of Operations and Leadership (the "Operations Director"), deposes that the Society had no knowledge that Ms. Bempong had a mental disability. Ms. Bempong had many sick leaves and workplace injuries throughout her employment. A mental disability was never mentioned. The Society first became aware that Ms. Bempong was diagnosed with a mental disability on or about November 28, 2014, when her doctor stated that she suffered from anxiety and possible PTSD arising from a September incident.

[34] Upon being informed of the September 24, 2014 incident, the Society's Executive Director and the Operations Director started an investigation. The Director of Care and the Operations Director met with Ms. Bempong on September 26, 2014. At this time, Ms. Bempong reported that she had experienced a number of other incidents over the last two years and had reported one to a Care Coordinator. The directors asked Ms. Bempong what they could do to make her feel safe. She said she didn't know but she loved her job.

[35] The Society conducted an investigation. The Society and HEU worked together planning the investigation. Nineteen employees were interviewed. The Society and HEU could not identify who cut Ms. Bempong's lab coat. The Society and the HEU met with all staff to report their investigation findings and to reiterate their expectations about respectful employee behaviour in the workplace.

[36] On October 16, 2014, the Director of Care and the Operations Director, Ms. Bempong and an HEU representative met. A host of matters were communicated to Ms. Bempong, ranging from the outcome of the investigation, to information to ensure Bempong's safety at work, such as, providing Ms. Bempong with safer option for storing her belongings, that is, a locked locker in a visible location, reminding Ms. Bempong of available counselling and welcoming and encouraging her to return to work where she was missed.

[37] The Society admits to calling Ms. Bempong on a regular basis consistent with its policy that regular communication is consistent with good disability management practices. The reasons for the calls included updating Ms. Bempong on the investigation, advising her how many sick days she had left, determining if the Society could do anything to assist her with returning to work and to obtain additional medical information.

[38] The Society states that it offered Ms. Bempong the return to work option of returning as a supernumerary, to work only on the main floor and on a day shift Monday to Friday to ensure that management staff would be present at all times. The Operations Director deposes that the Society remains able and willing to continue to employ Ms. Bempong and remains prepared to provide accommodations, none of which have been requested by HEU or Ms. Bempong.

[39] In response, Ms. Bempong filed submissions and her affidavit with exhibits. Although Ms. Bempong deposes that she was bullied by her co-workers for some two years and she identifies particular co-workers who she says "hated her" or were "jealous of her" because of her new position, she does not state who, when or what happened. She states her view that supervisors were well aware of this or that she informed the HEU.

She does not say that she had a mental disability or that a mental disability played any role in the alleged “bullying”.

[40] The exhibits attached to Bempong’s affidavit show that her doctor first mentioned that Ms. Bempong was experiencing anxiety in a note dated October 7, 2014. The note further stated that it was related to the recent workplace incident. On November 7, 2014 Ms. Bempong’s doctor provided the diagnosis of anxiety and possibly PTSD. The medical and psychological reports refer to the two incidents (liquid in backpack and cutting the lab coat) as the incidents Ms. Bempong referred to as the trigger for her mental disability.

[41] All told, and after reviewing Ms. Bempong’s material filed in response, I find her allegations vague and that they fail to address how her allegations relate to her mental disability. In addition, Ms. Bempong does not answer the Society’s account of its conduct, for instance the Society’s response to her complaint of September 24, 2014, instituting an investigation, its offers to make changes to ensure her safety, its reminder that she could access counselling services as a benefit, its offer of restitution, and its statement of ongoing availability for contact about any concerns. Ms. Bempong complains of the many phone calls she received from the Society. I have considered the Society’s account for the telephone calls and I have noted in Ms. Bempong’s material that several of the calls were to ask when her doctor said she could return to work as the medical notes gave no indication.

[42] The Society has convinced me, both, that Ms. Bempong’s allegations are so speculative that they do not meet the threshold set out in *Hill* and that, having regard for all of the material filed, there is no reasonable prospect that the complaint would succeed.

[43] The Society’s application to dismiss the complaint under s. 27(1)(c) is granted.

V CONCLUSION

[44] The HEU's application to dismiss Ms. Bempong's complaint under s. 27(1)(b) is granted. The Employer's application to dismiss Ms. Bempong's complaint under s. 27(1)(b) and (c) is granted.



Marlene Tyshynski, Tribunal Member