

Date Issued: March 13, 2006
File: 3170

Indexed as: Cunningham obo Cunningham v. School District No. 71 and Cochrane,
2006 BCHRT 142

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:

Terri-Ann Cunningham on behalf of Cody Douglas Cunningham

COMPLAINANT

A N D:

Ken Cochrane and School District No. 71 (Comox Valley)

RESPONDENTS

**REASONS FOR PRELIMINARY DECISION
APPLICATIONS TO DISMISS**

Tribunal Member:	Lindsay M. Lyster
On behalf of the Complainant:	Robyn Durling
Counsel for Ken Cochrane:	Morgan Rea
Counsel for the School District:	Terri A. Cohen

Introduction

[1] Terri-Ann Cunningham filed a complaint on behalf of her son, Cody, in which she alleged that Ken Cochrane and School District No. 71 (Comox Valley) discriminated against Cody on the basis of physical and mental disability, contrary to s. 8 of the *Human Rights Code*. Mr. Cochrane was a substitute teacher working for the School District. Ms. Cunningham alleges that, while substituting in his classroom, Mr. Cochrane assaulted her son. Mr. Cochrane denies any assault, and both he and the School District have filed applications to dismiss.

The Complaint

[2] The details of the alleged discrimination set out in the complaint are very brief, and are as follows:

On June 6, 2005 my special needs son was physically assaulted by his substitute teacher. The assault apparently occurred due to the fact that the teacher wished to discipline my son for behaviours that are part of his diagnosed special needs.

[3] Ms. Cunningham attached a letter written by her on June 6, 2005, in which she alleged that Mr. Cochrane “grabbed Cody and pushed him in a chair”. At other times, Ms. Cunningham has alleged that Mr. Cochrane either grabbed Cody by the shoulders and shook him, or grabbed him by the elbows and shoved him into a chair.

[4] Elsewhere in the complaint, Ms. Cunningham says that Cody has ADHD and Tourettes.

The Applications

[5] Mr. Cochrane has applied to have the complaint dismissed against him on the following bases: that the complaint does not allege acts or omissions which could contravene the *Code* (s. 27(1)(b)); that the complaint has no reasonable prospect of success (s. 27(1)(c)); that the substance of the complaint has been appropriately dealt

with in other proceedings (s. 27(1)(f)); and that proceeding with the complaint would not further the purposes of the *Code* (s. 27(1)(d)(ii)).

[6] The School District has applied to have the complaint dismissed against it on two of those grounds: s. 27(1)(b) and s. 27(1)(d)(ii).

[7] In my analysis, I focus on s. 27(1)(d)(ii), which I consider most appropriate to dealing with the issues raised in the applications.

Analysis

[8] It is clear that Ms. Cunningham was very concerned by what she understood to have occurred on June 6, 2005. She was not present for the alleged assault, but according to her June 6 letter, heard about the incident from other children in Cody's class. As a result of her June 6 letter, the School District investigated the matter twice. Ms. Cunningham also contacted the RCMP, which investigated the matter. In addition, Ms. Cunningham filed a complaint with the British Columbia College of Teachers, who reviewed the matter.

[9] None of the bodies who has received a complaint about the alleged assault has concluded that any action should be taken against Mr. Cochrane. The School District determined that no discipline was appropriate. The RCMP determined that no further investigation was warranted. The College concluded that it would not be in the public interest to pursue the matter further.

[10] This is an unusual complaint, in that it is premised upon the single allegation that Mr. Cochrane assaulted or otherwise abused Cody on June 6, 2005. At the time, Mr. Cochrane was a substitute teacher in Cody's class. He was in the class for only 30 or 40 minutes in total, relieving the regular teacher. It was during that period that alleged incident occurred. There is no allegation of an ongoing failure on the part of the School District to accommodate Cody's disabilities. The incident alleged is an isolated one.

[11] In considering whether allowing a complaint to proceed would further the purposes of the *Code*, the Tribunal may consider a wide variety of factors. As stated in *Dar Santos v. University of British Columbia*, 2003 BCHRT 73:

... the “purposes of the *Code*” go beyond the individual rights of a complainant and respondent. The purposes of the *Code*, as outlined in s. 3, include several public policy purposes. Thus, the assessment of whether proceeding with a complaint will further the purposes of the *Code*, involves more than an assessment of an individual complaint, but encompasses broader public policy issues, such as the efficiency and responsiveness of the human rights system, and the expense and time involved in processing a complaint to a hearing.... (at para. 59)

[12] As stated by the Tribunal in *Williamson v. Mount Seymour Park Housing Co-operative and others*, 2005 BCHRT 334, there are number of circumstances in which it may not further the purposes of the *Code* to proceed with a complaint. “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”: at para. 11. Thus, for example, the Tribunal may dismiss a complaint where allowing it to proceed would have the effect of duplicating other processes to which the complainant may already have had recourse, or to which recourse could more appropriately have been had: *Schuhmann v. British Columbia (Workers’ Compensation Board)*, 2005 BCHRT 517 at paras. 26-29. The Tribunal is also concerned with issues of fairness to the parties: see *Williamson* at para. 11.

[13] Ms. Cunningham’s responses to the respondents’ s. 27(1)(d)(ii) submissions were, as noted by both respondents in their reply submissions, unresponsive, and failed to address the respondents’ submissions, the relevant Tribunal case law or the principles set out in it. She restricted her s. 27(1)(d)(ii) submissions to a recitation of the jurisprudence which sets out the principle that human rights law is remedial, the assertion that discrimination occurred, and the submission that the complaint should therefore not be dismissed. In essence, she argued that discrimination occurred, and it would therefore necessarily further the purposes of the *Code* to allow the complaint to proceed. This is directly contrary to the statement of the Tribunal in *Dar Santos* that “the ‘purposes of the

Code’ go beyond the individual rights of a complainant and respondent”. As submitted by both Mr. Cochrane and the School Board, Ms. Cunningham’s submissions are inconsistent with the analysis employed in determining whether to dismiss a complaint under s. 27(1)(d)(ii), and did not address any of the substantive arguments made by the respondents under this sub-section of the *Code*.

[14] In the circumstances, where three bodies with statutory authority and responsibility to do so have reviewed the matter, and none has concluded that any assault or other misconduct occurred, it would not, in my view, further the purposes of the *Code* to allow the complaint to proceed further. To do so would result in a needless duplication of public and private resources. Further, Mr. Cochrane, in particular, has already been required to answer to these allegations four times. Each time he has been vindicated. It would be unfair to him, and therefore contrary to the purposes of the *Code*, to require him to do so again.

[15] In this regard, the fact that the previous investigations did not directly address Ms. Cunningham’s allegations of discrimination does not alter the conclusion. The allegation of discrimination entirely hinges on the allegation that Mr. Cochrane assaulted or otherwise physically mistreated Cody. If that did not occur, there is no complaint of discrimination. Once again, the School District, the RCMP and the College of Teachers all concluded that Mr. Cochrane did not engage in any such misconduct. In this regard, the present case is somewhat similar to *Virag and Virag v. Kellington and others*, 2005 BCHRT 415, in which the Tribunal concluded that the substance of the complaint had been appropriately dealt with, despite the fact that the previous proceedings did not directly address the complaint of discrimination. The factual underpinning of the complaint of discrimination was addressed, and that was sufficient to allow the Tribunal to conclude that the complaint should be dismissed: at paras. 42-43. Similar considerations apply in the present case.

[16] While the foregoing is sufficient to dispose of these applications, there are certain matters raised by the parties’ submissions which require further comment. In their applications to dismiss, both respondents provided extensive submissions in support of

the grounds upon which they relied. In addition, Mr. Cochrane filed an affidavit, in which he described, in detail, what he says occurred on June 6. In it, he says “I did not grab, push, shake, assault, or otherwise mistreat the Complainant’s son, Cody Cunningham. My actions were corrective in that I asked Cody Cunningham to work at the desk or table in the hall where he could be supervised for a short period and were intended to defuse what was becoming a disruptive classroom situation.”

[17] I have already referred to the unresponsive nature of Ms. Cunningham’s s. 27(1)(d)(ii) submissions. Her responses to Mr. Cochrane’s s. 27(1)(c) submissions were similarly unhelpful. As stated in the submissions made in reply by Mr. Cochrane, “Inexplicably, the Complainant submits that the s. 27(1)(c) application cannot succeed on a preliminary basis ‘given the lack of evidence presented by the Respondents’”. In fact, Mr. Cochrane had submitted a lengthy and detailed affidavit. It was incumbent on Ms. Cunningham, if she did not agree with the version of events sworn to by Mr. Cochrane, to make that clear. In the circumstances, where she had expert representation, and given the seriousness of the allegations made against Mr. Cochrane, allegations which went to the core of his professional reputation, I would have expected that to have been done in the form of an affidavit. It was not proper for Ms. Cunningham to suggest that, if the Tribunal would find it of assistance, she would provide an affidavit.

[18] Further, as submitted by Mr. Cochrane, Ms. Cunningham misreads the Tribunal’s decision in *Bell*. This is of particular concern, as the Tribunal routinely applies the reasoning in *Bell* in preliminary applications, a practice very recently affirmed by the Court of Appeal in *Berezoutskaia v. British Columbia (Human Rights Tribunal)*, 2006 BCCA 95 at paras. 9 and 27. To be clear, *Bell* does not stand for the proposition that where a complaint raises issues of credibility, it cannot be dismissed under s. 27(1)(c). Rather, *Bell*, and the cases that have followed it, stand for the following propositions: that it is incumbent on parties to provide the Tribunal with the evidence necessary to support the assertions they make in their submissions; that credibility is an issue in nearly every human rights complaint; that the fact that credibility may be in issue does not necessarily mean that a complaint cannot be dismissed under s. 27(1)(c); and that the Tribunal will

review all of the material before it on a global basis to determine if the complaint has no reasonable prospect of success.

[19] In this case, these problems with Ms. Cunningham's submissions do not affect the result, as I have concluded that the complaint should be dismissed on the basis that proceeding with it would not, in light of the previous investigations, further the purposes of the *Code*. Ms. Cunningham does not dispute that those investigations occurred or their results. The problems are, however, of concern to the Tribunal, as Ms. Cunningham is represented by the publicly-funded body set up to represent complainants before the Tribunal.

[20] No one involved in human rights in this province could be unaware of the valuable work which the Clinic and its advocates perform. However, the Clinic's clients, the Tribunal and the broader public depend on the Clinic to represent its clients' interests appropriately. This includes providing the Tribunal with the submissions it requires on preliminary applications.

Conclusion

[21] The complaint is dismissed against both respondents on the basis that proceeding with it would not further the purposes of the *Code*.

Lindsay M. Lyster, Tribunal Member

