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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:

Andrew Fraser

COMPLAINANT

A N D:

Cummins Western Canada LP and International Union of Operating Engineers, Local 115

RESPONDENTS

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

Tribunal Member:	Parnesh Sharma
Counsel for Complainant:	Clea Parfitt
Counsel for the Respondent Cummins Western Canada LP:	Kevin O'Neill, Q.C.
Counsel for the Respondent International Union of Operating Engineers, Local 115:	Brett Matthews

I INTRODUCTION

[1] Andrew Fraser has filed a complaint against his former employer, Cummins Western Canada LP ("Cummins"), alleging discrimination in employment on the basis of a physical disability contrary to s. 13 of the *Human Rights Code*. He has also filed a complaint against his union, International Union of Operating Engineers Local 115 ("Union"), alleging discrimination contrary to s. 14 of the *Code*.

[2] Cummins and the Union deny discrimination and have applied, respectively, to dismiss the complaint pursuant to s. 27(1)(c) and (g) and s. 27(1)(b), (c), and (g) of the *Code*.

[3] I have reviewed and considered all of the material submitted, but reference and summarize only what was necessary in making my decision. I make no findings of fact.

[4] For the application by Cummins, I grant the application, in part, and accept a portion of the complaint for filing. For the Union, I grant the application and dismiss the complaint in its entirety. My reasons are as follows:

II BACKGROUND

[5] Mr. Fraser, a certified electrician, was employed by Cummins as a Field Service Technician from March 05, 2012 until June 11, 2014, the date of his dismissal.

[6] On December 11, 2012, Mr. Fraser was disciplined with a "letter of reprimand" for failure to follow directions.

[7] On August 6, 2013, Mr. Fraser says he injured his back at work when lifting some equipment. He was able to complete his shift but was "stiff and sore" the next day. On August 7, he went to work and reported his injury; he was directed to the first aid attendant, who, in turn, referred him to his supervisor, who then instructed Mr. Fraser to see a doctor. He was provided with a "Physical Assessment" form for his doctor to complete.

[8] The "Physical Assessment" form provided by Cummins includes the following preamble addressed to the attending physician: "The intention of our Return to Work

Program is to immediately return our injured worker to the workplace in the capacity that your assessment and restrictions allow. As a large employer we have the ability to provide meaningful work for any restrictions you identify...". On page 1 of the form, under "General Assessment of Patient to Return to Work", the attending physician is asked to respond to the following "YES" or "NO" questions (reproduced here in part): (1) Capable of returning to full duties without restrictions; (2) Capable of regular work duties with reduced hours; (3) Capable of modified duties with restricted hours; (4) Totally restricted from all work related activities. For the first three questions, the physician answered "no"; for question four, "yes".

[9] On the second page of the same form, the physician is asked to assess the "Functional Abilities of Patient" for the following subcategories: Abilities, Actions, Weight Limitations, and Arm Mobility. Under each subcategory there are several sub-subcategories. The attending physician answered the preceding by crossing several lines across the page and writing at the bottom: "not able to work at this time", and scheduled a reassessment for August 10, 2013.

[10] Mr. Fraser then delivered the doctor's assessment ("medical form") to Cummins: "I tried to give it to my supervisor, but he was not available. I then tried to give it to other supervisors but eventually had to leave it in a mail slot at Cummins". According to Cummins, Mr. Fraser had been instructed by his supervisor to return after his appointment to discuss the results with him; Mr. Fraser did not do as instructed; he deposited the medical form in another employee's mail slot and left the worksite. Cummins says Mr. Fraser's conduct in this regard violated its policy on injury management.

[11] Mr. Fraser submits that, despite the orders of his doctor, he was contacted by Cummins to report to work for an accident investigation and to discuss "suitable modified duties". He says because he had taken "strong medication", which made him feel impaired, and his doctor's orders to "lie down and not move", he refused and told Cummins he would not report to work until after he saw his doctor on August 10 for the scheduled reassessment. He told Cummins there was no accident, but that he had been

injured lifting a heavy load; he also offered to participate in the investigation via telephone.

[12] According to Cummins, Mr. Fraser failed to attend the workplace as directed on August 8 and multiple attempts were made to contact him; when contact was finally made, Cummins directed Mr. Fraser to attend the worksite for a "time sensitive accident investigation" and to discuss modified duties. When Mr. Fraser refused, saying he was unable to drive, Cummins offered to pay for a taxi, which Mr. Fraser also refused. Cummins says the refusal to participate in an accident investigation was a breach of WorkSafe BC regulations as well as company policy on injury management.

[13] According to notes titled, "Discussion with Andrew Fraser – August 8, 2013" (submitted by Cummins), Mr. Fraser said: "Robert [supervisor] said I could go to the clinic, then go home for the day, he never said anything about coming back". The notes, apparently of a telephone conversation between an "HSE Advisor" and Mr. Fraser, indicate Cummins repeatedly requesting Mr. Fraser to attend the worksite for a discussion on his injury and Mr. Fraser repeatedly citing his injury for refusing to attend. The discussion concluded with Mr. Fraser confirming he will not attend: "No [I will not attend], this is harassment, do I need to call my union? My judgement is impaired, I can't operate any machinery or anything".

[14] Mr. Fraser had his medical follow-up as scheduled on August 10, 2013, and was cleared to return to work on modified duties and hours on August 12; he returned to work on modified duties and hours until August 26, and on modified duties until September 12. He also participated in the investigation upon his return to work.

[15] On or about September 3, Cummins disciplined Mr. Fraser with a two-day suspension for failing to comply with the company's policy on injury management; namely, for refusing to attend the worksite as directed on August 8. During the period in question, Mr. Fraser submits he was disabled, heavily medicated, and under his doctor's orders to rest.

[16] Mr. Fraser was also disciplined, on the same day, with a one-day suspension for failing to obtain an earlier requested "ASTTBC" certification. He had been requested to do so by August 01, 2013, but had not done so:

> This letter is to document your inability to comply with management directions. You have been instructed numerous times to complete your ASTT application... you received two letters from ASTT... dated April 25, 2013 and June 4th, 2013 advising that your application was incomplete... on July 17th, you were sent an email [to complete the application] no later than August 1st, 2013. You were permitted shop time [to complete the application]. As of August 27th, 2013, your application is still not incomplete... considering the numerous opportunities provided to you and your inability to follow directions, you will serve a 1-day unpaid suspension... it is our expectation that you will have your application completed for the next board approval in October, 2013. Please be aware that any further incidents will result in disciplinary action up to and including termination of your employment.

[17] Mr. Fraser submits that his collective agreement with Cummins does not set a deadline for obtaining the ASTTBC certification and nor was he informed of any such deadline when first hired; he says that other employees have been employed for lengthy periods without such certification.

[18] Mr. Fraser submits that neither of the suspensions was fair and asked his union to grieve them. He says he did nothing wrong in following his doctor's advice and no company policy was breached. He also complained to his union about "feeling harassed" by Cummins. He says, at the time of the two-day suspension, he did not know a human rights complaint could be filed.

[19] Mr. Fraser filed a grievance concerning the two-day suspension; his Union declined to pursue it after considering whether the discipline was discriminatory and concluding it was not. The Union submits the decision was based on its assessment of the "likelihood of overturning the discipline".

[20] According to Cummins, no grievances were filed with respect to the above two disciplinary actions.

[21] On January 15, 2014, Mr. Fraser's originally denied WorkSafe BC claim, which Cummins had contested, was approved by the Review Division. It held that Mr. Fraser was "temporarily totally disabled from August 7, 2013 to August 11, 2013" and "temporarily partially disabled, and able to perform light duties as of August 12, 2013". This status lasted until September 13, 2013, when he was able to resume regular duties.

[22] Upon receipt of WorkSafe BC's decision, Mr. Fraser requested the union "to do something about the [earlier issued] two-day suspension". Internal Union email correspondence, which Mr. Fraser's counsel obtained after his termination, indicates discussion between Union representatives about Mr. Fraser "feeling harassed", but concluded the issue was about company policy and declined to pursue the grievance because the time-period for such action had expired.

[23] When, by late March of 2014, Mr. Fraser had not submitted his ASTT application, the Union was contacted by Cummins advising that it intended to terminate his employment. The Union says a conference call was held where it convinced Cummins not to terminate, but instead to issue Mr. Fraser a five-day suspension and enter into a "last-chance" agreement requiring ASTTBC certification by a particular date.

[24] On April 4, 2014, Mr. Fraser was issued a five-day suspension; he also took some vacation time. According to the Union, the last-chance agreement (agreed-to earlier) was presented upon his return to work on April 21, 2014, and then signed by Mr. Fraser, including representatives from Cummins and the Union. The agreement stipulated that Mr. Fraser complete the ASTTBC certification by June 11, 2014, or face termination from employment.

[25] Mr. Fraser says, even though the June deadline had not yet passed and there had been no further disciplinary offenses, he was issued a "last-chance" agreement. Both Cummins and the Union say the agreement had been concluded earlier but not signed by all parties until April 21, 2014, when Mr. Fraser returned to work from suspension and vacation.

[26] The five-day suspension was for Mr. Fraser's "inability to comply with management directions"; specifically, for not obtaining or mailing his application for ASTTBC certification. Mr. Fraser says he had mailed the application on March 31, 2014, and refused to sign the disciplinary letter. He also advised both the Union and Cummins of his intention to grieve the discipline.

[27] Mr. Fraser submits he signed the "last-chance agreement" to signify its receipt, but in no way did he agree to it, as he felt it was unfair he could be terminated for failing

an exam. He says other Cummins employees had failed the exam and had been allowed rewrites.

[28] The Union did not grieve either the five-day suspension or the last-chance agreement. This, it submits, was based on "sound labour relations reasons having regard to the likelihood of successfully overturning discipline".

[29] Mr. Fraser wrote the exam on May 01, 2014 and received a grade of 78%; the pass mark was 80%. He was then issued a termination letter.

Allegations against Cummins

[30] Mr. Fraser submits the direction by Cummins that he attend work, while he was disabled (owing to his injury of August 7, 2013), was a failure to accommodate to the point of undue hardship, and therefore discriminatory. Further, the two-day suspension, imposed later on September 3, 2013, was adverse treatment related to his disability; and, the suspension, itself, was discriminatory because Cummins did not accommodate to the point of undue hardship.

[31] Mr. Fraser also submits that the one-day suspension, imposed on the same day as the two-day suspension, for failing to comply with management directions related to the ASTTBC certification, gives rise to a "reasonable inference [he] was improperly disciplined for not attending work after his injury to worsen his disciplinary record". This, he says, was an adverse impact related to his disability, and therefore discriminatory.

[32] Mr. Fraser submits that Cummins's attempt to have him disqualified from receiving WCB benefits was adverse treatment related to his disability, and therefore discriminatory.

[33] Mr. Fraser submits the five-day suspension of April 4, 2014 was discriminatory because it relied, in part, on a disciplinary record consisting of a discipline imposed while he was disabled. He also submits that the "last-chance" agreement entered into by his union and Cummins, based in part on earlier discipline when he was disabled, was further adverse treatment related to his disability and therefore discriminatory.

Allegations against the Union

[34] In summary, Mr. Fraser says ineffective and/or non-representation by the Union in relation to various disciplinary measures, related to his disability of August 2013, is discriminatory; that the Union was obligated to provide services in respect of the collective agreement and the *Code* and failed to do so; that the Union should have been proactive, identified discrimination as an issue, and suggested action under the *Code*.

[35] Mr. Fraser submits the Union's failure to grieve the discipline, the two-day suspension received for following his doctor's orders owing to a disabling injury, was adverse treatment and thus discriminatory. Even if a grievance was not an option, owing to time-limits, the Union should have suggested a human rights complaint before the Tribunal.

[36] The Union's failure to grieve the five-day suspension that was based, in part, on an earlier discipline imposed while Mr. Fraser was disabled, was further adverse impact and therefore discriminatory. The Union's agreeing to the "last-chance" agreement, which itself was based on a discipline arising out of his disabling injury, was also adverse treatment, and therefore discriminatory.

[37] When Mr. Fraser was terminated on June 11, 2014, the Union's failure to pursue a grievance or any grievance on his behalf, including the suspension related to his disability, was further adverse treatment related to his August 07, 2013 disabling injury.

III APPLICATION TO DISMISS – CUMMINS

[38] Cummins denies discriminating and submits the complaint should be dismissed under s. 27(1)(c) for having no reasonable prospect of success and s. 27(1)(g) as the alleged contravention is late-filed.

Section 27(1)(c)

[39] Cummins takes no issue that Mr. Fraser experienced adverse treatment owing to the imposition of progressive disciplinary measures and his eventual termination from employment. These, it submits, were for valid non-discriminatory reasons; specifically, that Mr. Fraser was disciplined for repeatedly failing to follow management directions

and being in breach of its sick leave and injury management policies. Further, Cummins disagrees Mr. Fraser suffered from a disability at the time of the alleged discrimination; and submits, even if a disability is found, that there is no nexus between Mr. Fraser's disability and any alleged discriminatory treatment.

[40] Cummins is of the view that Mr. Fraser was not suffering from a physical disability at the relevant time; instead, it was a single injury which did not impact upon his obligations to follow corporate policy on accident investigations, and his subsequent unreported absence from work was a violation of its sick leave policy. Cummins says the doctor's note (medical form) stated "[Mr. Fraser] not able to work at this time"; it did not state, as alleged in the complaint, that he was "totally restricted from all work related activities". Cummins says there is no evidence that Mr. Fraser, while he may have been disabled from performing his usual duties, was disabled from participating in an accident investigation.

[41] Cummins submits that, should the Tribunal find Mr. Fraser suffered from a disability, any adverse treatment, as a consequence, was because of legitimate non-discriminatory disciplinary measures.

Section 27(1)(g)

[42] Cummins submits, in the alternative, that even if a breach of the *Code* is found, all but one of the allegations are out of time; further, the one timely allegation, concerning Mr. Fraser's termination from employment on June 11, 2014, was for failing to comply with terms of the "last-chance" agreement. The agreement was entered into owing to Mr. Fraser's dilatory approach to obtaining a repeatedly requested certification. Cummins says Mr. Fraser's dismissal was for failing to comply and did not breach the *Code*. It submits that it is not in the public interest to accept untimely allegations, many of which are several months late-filed. Further, the untimely allegations do not constitute a continuing contravention under s. 22(2) of the *Code*.

IV APPLICATION TO DISMISS - UNION

[43] The Union has applied to dismiss the complaint pursuant to s. 27(1)(b), (c), and (g) of the *Code*. I am satisfied that s. 27(1)(c) is the most appropriate approach to its application.

[44] The Union submits that Mr. Fraser's disability was not a factor in its decision declining to pursue grievances on his behalf. In summary: (1) it was asked to grieve the September 2013 two-day suspension, but did not do so as it was no longer timely; (2) the Union was not asked to grieve the five-day suspension or the last-chance agreement; and, (3) the grievance concerning Mr. Fraser's termination was initially filed, but later withdrawn after it determined "there was little chance of overturning the termination".

[45] The Union says it cannot be held responsible for late or non-filed grievances and that timely grievances were not pursued based on "sound labour relations" and its assessment of a "zero chance" of success.

[46] The Union submits there is no obligation, on its part, to proactively pursue human rights complaints on behalf of its members and, in any event, that it assessed the circumstances concerning the two-day suspension and determined, in good faith, there was no violation of the *Code*.

V ANALYSIS – SECTION 27(1)(C) – NO REASONABLE PROSPECT OF SUCCESS

[47] Under s. 27(1)(c), the Tribunal determines whether, based on the material provided by the parties, and applying its expertise, it is persuaded that there is no reasonable prospect the complaint will succeed: *Berezoutskaia v. British Columbia (Human Rights Tribunal)*, 2006 BCCA 95, leave to appeal ref'd [2006] SCCA No. 171; *Workers' Compensation Appeal Tribunal v. Hill*, 2011 BCCA 49; and *Gichuru v. British Columbia (Workers Compensation Appeal Tribunal)*, 2010 BCCA 191, leave to appeal ref'd [2010] SCCA, No. 217. The propositions that can be taken from these cases in respect of preliminary applications to dismiss under s. 27(1) of the *Code* are:

1) The Tribunal's role in evaluating complaints under s. 27(1) of the *Code* is as a gatekeeper so that only complaints with sufficient merit

will justify the time and expense of proceeding to a full hearing. (*Berezoutskaia* at paras. 23-26; *Hill* at para. 27); and,

2) The Tribunal's role in determining s. 27(1) applications is discretionary. The Tribunal does not make findings of fact but assesses the evidence with a view to whether there is "no reasonable prospect the complaint will succeed". At this stage of the proceeding, the complainant only has to show that the "evidence takes the case out of the realm of conjecture" (*Hill* at para. 27; *Gichuru* at paras. 28-31).

[48] The assessment of evidence for the purpose of determining whether there is no reasonable prospect the complaint will succeed is not of the same nature as that which occurs at a hearing.

[49] On an application to dismiss filed under s. 27(1)(c), the burden is not on Mr. Fraser to establish a *prima facie* case, but rather it is on the Respondent to show that he has no reasonable prospect of success in doing so. See: *Stonehouse v. Elk Valley Coal (No. 2)*, 2007 BCHRT 305.

[50] In order to succeed at a hearing of his complaint, Mr. Fraser will have to demonstrate a *prima facie* case of discrimination by establishing that: (1) he has a characteristic protected from discrimination under the *Code*; (2) he experienced an adverse impact regarding his employment; and (3) the protected characteristic was a factor in the adverse treatment: *Moore v. British Columbia*, 2012 SCC 61 at para. 33. If he does so, the onus shifts to the respondent to prove a *bona fide* occupational requirement, including accommodation to the point of undue hardship.

A. CUMMINS

[51] In the applications and attached affidavits there is much the parties disagree upon. The key event in this complaint, from which all subsequent events are alleged to follow, concerns the injury of August 7, 2013. Cummins does not agree that Mr. Fraser had a disability or that he required accommodation. Mr. Fraser says he was and attaches a medical form indicating he was "totally restricted from all work related activities" and therefore disabled. Cummins disagrees and considers its direction for Mr. Fraser to report to work for an accident investigation a non-work-related activity (from which he was not restricted). Mr. Fraser submits the interpretation by Cummins of the medical form is

dishonest and selective; that he ought to have been accommodated to the point of undue hardship, but was not.

[52] The first issue before me is whether there is no reasonable prospect Mr. Fraser will be able to establish that he had a physical disability. The medical form, designed by Cummins to address specific health issues, instructs the attending physician to examine the patient with the overall objective of assessing whether Cummins is able to "immediately return injured workers to the workplace in the capacity that your assessment and restrictions allow." On the first page of the form, the physician indicates Mr. Fraser is "totally restricted from work". On page two several lines are drawn across the listed "functional abilities" presumably indicating a negative assessment, if in fact an assessment was done, of Mr. Fraser's functional abilities. On the bottom of the page is a hand-written note: "not able to work at this time" and that Mr. Fraser is to be reassessed a few days later. Mr. Fraser submits the medical form establishes he had a physical disability at the relevant time. Cummins disagrees.

[53] On the basis of the information before me, I cannot conclude there is no reasonable prospect of Mr. Fraser being able to prove (1) he had a disability; (2) he experienced adverse treatment; and (3) it was a factor in his treatment. The evidence provided by Mr. Fraser – medical form, affidavit, two-day suspension for failing to attend work owing to his injury, a later confirmation of his disability by WCB – appears to take the complaint out of the realm of conjecture. Cummins and Mr. Fraser disagree on whether an injury resulting in a few days of absence from work is a disability. This is a key issue in this complaint, and I make no findings concerning the matter except to note this Tribunal has previously found that injuries resulting in temporary disabilities may be a disability within the meaning of the *Code*. In this respect, however, Cummins has not shown the complaint has no reasonable prospect of success.

[54] In reference to the subsequent disciplines, including the five-day suspension and the last-chance agreement, Cummins has satisfied me there is no reasonable prospect Mr. Fraser will be able to establish that his alleged disability was a factor in the adverse treatment. Cummins provides evidence that the disciplines were issued for non-discriminatory reasons. Mr. Fraser's disciplinary history, of not following company

directions, predates the event of August 7, 2013. The one-day suspension issued on September 3, 2013, the same day as the two-day suspension when he was injured, was for failing to obtain his ASTTBC certification. Mr. Fraser was directed by his employer to obtain it; he was reminded several times, provided with "shop time" to complete the application, given deadlines, and warned of potential disciplinary measures (including termination), but still failed to do so. I am not sure why, particularly after specific directions from Cummins and reminders from the ASTT, he did not comply. This appears to be a matter of insubordination rather than whether Mr. Fraser's collective agreement specified deadlines or other employees did not have the certification. His employer was entitled to ask for the certification; to set deadlines; and, to discipline him for failing to follow directions. I note, in the initial discipline concerning the certification, Mr. Fraser had been directed to complete the process by October 2013, but had not done so by the time of his termination in June 2014. In the face of repeated non-compliance, Cummins then moved to terminate Mr. Fraser's employment, but his Union intervened and, instead, he was suspended and given a "last-chance" agreement to obtain the certification. The agreement made clear that, if certification is not obtained within the defined time-limits, Mr. Fraser's employment would come to an end. Mr. Fraser failed the certification examination and, as a result, his employment was terminated. Based on the material before me there is nothing to show that Mr. Fraser's alleged disability of several months ago was a factor in Cummins' decision to dismiss him from employment; it was owing to a pattern of non-compliance concerning the ASTTBC certification. In this respect he appears to be the author of his own misfortune.

[55] I do not agree with Mr. Fraser that there is a reasonable inference his alleged disability was a factor in the one-day suspension, imposed on the same day as the two-day suspension. Mr. Fraser provided sufficient reason, in the form of repeated failures to obtain certification, for Cummins to impose discipline. Mr. Fraser also submits the five-day suspension and the "last chance" agreement were discriminatory because they relied, in part, on a disciplinary record consisting of a discipline imposed while he was disabled. However, this is an argument about the effects of the alleged discrimination rather than evidence supporting the subsequent disciplinary actions as discriminatory. Finally, there is no reasonable prospect of establishing that Cummins' contesting of the WCB benefits

is discrimination. It is entitled to contest such claims and did so presumably in accordance with the relevant legislative framework.

B. UNION

[56] Based on a review of all the materials, the Union has satisfied me that Mr. Fraser has no reasonable prospect of demonstrating that his alleged disability was a factor in its refusal to proceed with his grievances against Cummins. The material indicates the Union assessed the grievance for the discipline imposed on September 3, 2013, and all subsequent grievances, to be late-filed, not filed, and/or about company policy and considered Mr. Fraser to be in non-compliance. Its view was that Mr. Fraser ought to have complied and had in fact instructed him to attend the workplace for the accident investigation. The material does not indicate the Union paid any particular attention to the issue of discrimination. There is a passing mention of "harassment", but it does not appear the Union ever turned its attention to the issue (it says it did). Whether it ought to have is another matter. There is no obligation on the part of the Union to proactively pursue human rights complaints on behalf of its members. It is entitled to conduct a strategic assessment of its various options in deciding whether the expense, time, resources, and/or likelihood of success merit or justify pursuit of grievances or other action. As the Union notes, ineffective representation is not in itself discriminatory. In any event, the Union assessed the likelihood of winning the grievances based on its expertise in the subject area and concluded it was not likely. It is entitled to do so and there is no reasonable prospect of Mr. Fraser establishing that his disability was a factor in the Union's treatment.

[57] Finally I note there is disagreement concerning some of the grievances which Mr. Fraser submits he filed; the Union replies he did not. In one instance the Union says it declined to pursue a grievance; in another, it says none was received. Possibly there was miscommunication or misunderstanding between the parties or the grievances were misfiled or lost. That, however, is irrelevant to the issue of whether the Union discriminated against Mr. Fraser. The Union represented Mr. Fraser before the WCB, negotiated a reprieve when Cummins first intended to terminate his employment, and filed a later withdrawn grievance contesting his termination. While the Union may not

have been as effective or proactive as desired by Mr. Fraser, it is does not follow that it discriminated against him when it decided not to pursue grievances on his behalf. In this respect the allegation of discrimination is one of conjecture.

[58] Having so decided, I need not consider the other grounds upon which the Union submits the complaint ought to be dismissed.

VI SECTION 27(1)(G) – TIMELINESS OF COMPLAINT

[59] The issue of timeliness is determined under s. 22 of the *Code* which provides:

> (1) A complaint must be filed within 6 months of the alleged contravention.
>
> (2) If a continuing contravention is alleged in a complaint, the complaint must be filed within 6 months of the last alleged instance of the contravention.
>
> (3) If a complaint is filed after the expiration of the time limit referred to in subsection (1) or (2), a member or panel may accept all or part of the complaint if the member or panel determines that:
>
> (a) it is in the public interest to accept the complaint, and
>
> (b) no substantial prejudice will result to any person because of the delay.

The complaint was filed on December 9, 2014. The event of August 7, 2013, giving rise to this complaint is, therefore, not timely unless it is part of an alleged continuing contravention under s. 22(2) of the *Code*. In *MacAlpine v. Office of the Representative for Children and Youth*, 2011 BCHRT 29 ("*MacAlpine*"), the Tribunal discussed the concept of a "continuing contravention" (at paras. 14-16):

> In order to constitute a continuing contravention, the allegations must first disclose incidents that could, if proven, contravene the *Code*: *Pavlovic v. UBC and CUPE Local 116,* 2006 BCHRT 329, para. 9, *Fraser v. College of New Caledonia and others*, 2009 BCHRT 432, at paras. 18-20; *Alexander v. Real Estate Council,* 2010 BCHRT 45; and *Mallenby v. Malaspina University College and others*, 2009 BCHRT 208. If a potential contravention of the *Code* is alleged, then the Tribunal will assess whether the allegations constitute a continuing contravention.
>
> A continuing contravention requires a succession or repetition of separate acts of discrimination of the same character. There must also be a timely

> act of discrimination which could be considered a separate contravention of the *Code*, and not merely one act of discrimination which may have continuing consequences: *Lynch v. B.C. Human Rights Commission*, 2000 BCSC 1419.
>
> In determining whether there is a continuing contravention, the Tribunal considers all relevant circumstances and endeavours to "draw the line" in a fair and principled way which ensures not only that individuals who claim discrimination are provided access to the remedial provisions of the *Code*, but also that respondents are treated fairly: *Dove v. GVRD and others (No. 3)*, 2006 BCHRT 374, para. 20

[60] While Mr. Fraser submits the incidents complained of are continuing contraventions, I conclude that they are not. All subsequent complaints, (including the last-chance agreement and termination from employment alleged to flow from the event of August 7, 2013, in the form of progressive disciplinary action), appear to be effects or consequences and not separate incidents that constitute a continuing contravention.

[61] The issue is, therefore, whether to accept the complaint because (1) it is in the public interest to do so and (2) no substantial prejudice will result to any person because of the delay.

A. TIME LIMIT RESPONSE

[62] Cummins submits that, even if Mr. Fraser could establish the discipline of September 3, 2013 to be a breach of the *Code*, the complaint is late-filed; that it is not in the public interest to accept the complaint for filing and, rather, shall harm the public interest. It says time-limit provisions are substantive and Mr. Fraser has not discharged the onus incumbent upon him as set out in s. 22(3).

[63] According to Cummins, Mr. Fraser has failed to provide "persuasive" reasons for both his delay in filing and why the Tribunal ought to provide relief against time-limits. In its view the complaint does not involve a novel issue or unique circumstances warranting its acceptance.

B. TIME LIMIT REPLY

[64] The *Code*, submits Mr. Fraser, "must be given a large and liberal interpretation consistent with its quasi-constitutional nature"; its purpose is to identify and remedy

discrimination in order to prevent future discrimination. This important objective constitutes a "profound public interest" and is achieved, he submits, from Tribunal decisions in individual claims.

[65] Mr. Fraser also submits there is a general and continuing need to educate about human rights issues, particularly for unions. He says he was ineffectively represented owing to a lack of awareness of human rights principles and the rights of disabled workers in the workplace. This issue, he says, has not received much attention from the Tribunal and should be addressed because it is a common problem.

[66] According to Mr. Fraser the particular circumstances concerning his disability poses a novel issue in view of the disagreement between the parties; Cummins does not agree he had a disability. A consideration of this issue, submits Mr. Fraser, will advance the purposes of the *Code* because he was a disabled worker, in a state of vulnerability at the time, and placed under considerable pressure by Cummins to report to work owing, in part, to a general lack of awareness concerning disabilities. Disability, he says, remains a significant issue in the workplace and the treatment he experienced indicates a continuing need to ensure employers know how to deal appropriately with disabled employees.

[67] The preceding, Mr. Fraser submits, also raises important questions concerning the extent to which injured employees are able to rely upon the advice of their doctors. For example, Mr. Fraser's doctor considered him "totally disabled from work", prescribed "strong" medication, and told him to stay home and rest. Cummins, on the other hand, disagreed and directed Mr. Fraser to report to work for an accident investigation and to discuss "modified duties". Such disagreements, he submits, go to the issue of fairness given the significant effects of disability on the health of vulnerable employees and their full participation in the workplace.

[68] Mr. Fraser says he did not file the complaint earlier because he reasonably believed it to be a continuing contravention; and that he should not be penalized because he "reasonably and in good faith" believed his complaint to be timely.

C. REPLY – CUMMINS

[69] Cummins reiterates the Tribunal should not provide relief for the late-filed complaint; that Mr. Fraser had sufficient time to pursue this or any other action, has a habit of dilatory behaviour, and could have filed timely grievances and/or a human rights complaint, but did not do so.

[70] Cummins submits there is no reason to believe the complaint will clarify the law and that the impact of the case is limited to Mr. Fraser.

D. ANALYSIS AND DECISION

[71] The complaint concerning the discipline of September 3, 2013 is approximately ten months late-filed. I now consider whether to accept the complaint because it is in the public interest to do so and no substantial prejudice will result to any person because of the delay.

[72] The Tribunal has held that the six-month time limit in s. 22 of the *Code* is a substantive provision designed to ensure complainants pursue human rights remedies with some diligence, and to protect respondents from having to address dated complaints.

Public Interest

[73] In *Hoang v. Warnaco and Johns*, 2007 BCHRT 24, the Tribunal explained its case law on the question of public interest:

> The principles which apply in assessing the public interest element are well-established. The public interest is to be assessed in accordance with the purposes of the *Code*. Both the respondent's interest in going about its activities without the worry of stale complaints, and the complainant's interest in access to the Tribunal, are legitimate factors to be taken into account. In many cases, the length of the delay and the reasons for the delay may be important. So too may be the public interest in the complaint itself. The list of potentially relevant factors is not closed and nor will every factor be important in every case. In all cases, the enquiry is fact and context specific: see *Chartier v. School District No. 62*, 2003 BCHRT 39; *Fontaine v. Ainsworth Lumber*, 2005 BCHRT 565.

[74] Public interest, while not an open-ended inquiry, is not determined by any single factor, but rather a totality of factors and on a case-by-case basis. The Tribunal,

previously, has said: "whether or not it is in the public interest to accept a complaint filed after the time limit is to be decided in light of the purposes of the *Code* as set out in s. 3 and will depend upon the circumstances of the case" (*Chartier v. School District No. 62* at para. 14). In exercising my discretion under s. 22(3), I am guided by the Tribunal's mandate under the *Code* and agree that anything but a liberal interpretation would be inconsistent with the express intention of the legislation. I am bound also by the Supreme Court of Canada's view that the very nature of the *Code's* "quasi-constitutional legislation [requires] a generous interpretation to permit the achievement of [its] broad public purposes" (in *McCormick v. Fasken Martineau DuMoulin LLP*, 2014 SCC 39).

[75] A delay of approximately ten months, while not insignificant, is not in and of itself fatal to the issues I must consider in deciding if a complaint should be accepted for filing.

[76] First, nothing in the *Code* requires a complainant to establish "persuasive" reasons as argued by the Respondent. In this matter, s. 22(3) gives the Tribunal discretion to accept late-filed complaints if it is in the public interest to do so, and where no substantial prejudice will result to any person because of the delay. The onus is on the complainant to establish that both of these requirements are met: see *Chartier v. School District No. 62*, 2003 BCHRT 39; *Fontaine v. Ainsworth Lumber Co.*, 2005 BCHRT 565; *Riceman v. British Columbia (Hydro and Power Authority)*, 2005 BCHRT 475; *McGeragle v. Ramsden*, 2010 BCHRT 141.

[77] Mr. Fraser, in explaining the delay in filing, says he was unaware of his options under the *Code*; and, in any event, submits his complaint is timely because his eventual dismissal was a continuing contravention. While ignorance of Tribunal processes does not, on its own, excuse a late filing and I do not consider Mr. Fraser's dismissal (for reasons unconnected to his alleged disability) discriminatory or part of a continuing contravention, I do accept that unversed complainants may not find such distinctions readily apparent. Insofar as providing reasons for the delay, I note in *British Columbia (Ministry of Public Safety and Solicitor General) v. Mzite*, 2014 BCCA 220, para. 54, the Court of Appeal said that the explanation for the delay in filing is but one factor to be

considered; the reasons for delay do not "enjoy primacy among the factors to be considered" (citing *Fontaine*, para. 19).

[78] While the complaint concerns what is now a relatively common workplace issue – employees who may have a temporary disability – there continues to be disagreement and misunderstanding as to the rights of employees who may have a temporary disability and obligations of employers. This Tribunal has previously decided that the *Code's* protection applies to those suffering temporary disabling medical conditions (*Goode v. Interior Health Authority,* 2010 BCHRT 95) but, as evidenced by this complaint, there remains a gap in the jurisprudence – at least in relation to the question of whether a seemingly minor injury resulting in a brief absence from the workplace, as was the case in this complaint, could be a disability for the purpose of the *Code*. In this respect further examination of the issue is merited by the Tribunal. I consider it important for the Tribunal to clarify this "gap". I therefore disagree with Cummins' submission that "there is no reason to believe the complaint will clarify the law or the impact of the case is limited to Mr. Fraser".

[79] Further, if the Tribunal was to find Mr. Fraser's injury is a disability under the *Code*, the complaint then raises, to my mind, larger questions about how an employer should respond when an employee is medically assessed, as he was in this case, to be "totally restricted from all work related activities". Some of those questions, for example, are (1) When can an employer direct an employee absent for medical reasons to attend the workplace for what it considers non-work related matters? (2) Should such an employee be asked to do so, and what if she or he refuses?

[80] While the preceding examples may be context-specific, the issues raised herein have broader implications. With reference to the first example, Mr. Fraser alleges he was pressured to disregard his doctor's advice for an accident investigation for which, he says, there was no apparent pressing need. I have reviewed Cummins' "Health, Safety and Environmental Program" publication and did not find any information to indicate that the injury of the nature suffered by Mr. Fraser required immediate investigation. This does not appear to be a workplace accident for which an investigation may have been urgent and nor was it a time sensitive matter; rather, it has all the appearance of a prosaic

workplace injury. Mr. Fraser had offered to participate in the investigation via telephone; further, his anticipated absence from work was of a short duration. I am not sure why Mr. Fraser's offer was not accepted or why the matter could not have waited a few days until he returned to work.

[81] With reference to the second example, there is an appearance of Cummins opting for a selective interpretation of the medical form submitted by Mr. Fraser; it appears to have focused on just one section of the form and ignored or to have overlooked other pertinent sections. Mr. Fraser had delivered the form to Cummins and returned home. Cummins then directed him to report to the workplace for an accident investigation and to discuss modified duties. And this, in essence, the complaint alleges, had the effect of placing Mr. Fraser in a position of either following his doctor's advice and defying his employer or reporting to work and defying his doctor at the risk of compromising his health. This complaint also raises, more generally, questions of when is it reasonable for an employee to follow their doctor's advice over orders of their employer. Under what, if any, circumstances can an employer direct an employee to act contrary to medical advice. In this particular case, was it unreasonable for Mr. Fraser, when under the influence of medication, to refuse to participate at that particular time in an accident investigation? Was it unreasonable that he preferred his doctor's advice over that of directions by his employer? These are important matters which merit a fulsome examination.

[82] In this respect I agree with Mr. Fraser that it is through decisions in such individual complaints that the greater objectives of the *Code*, articulated in s. 3, can be achieved and the public interest served.

[83] As a corollary to the preceding, I have also considered the Tribunal's general approach to the question of public interest, in which it is often assumed that the complaint under consideration is unique to the individual filing it; and that, if there were others similarly situated, they would in turn file their own complaints in the event of *Code* violations: *Lemoine v. B.C. (Ministry of Public Safety and Solicitor-General) and BCGEU*, 2009 BCHRT 163. I differ with this general assumption. Filing human rights complaints, or taking the first step towards doing so, is not so straight-forward a matter. There are many reasons why human rights complaints may not be filed. The absence of

such complaints should not be taken to suggest all is well, or conversely, that if all is not well, complaints would have been filed. When considered against the mandate of this Tribunal, and the clear direction of the courts, there is little doubt in my mind that I ought to resolve such matters in favour the complainant.

[84] The issues raised by this complaint are not without significance to the greater public in general and to the rights of employees and obligations of employers in particular. A disability not identified as such or appropriately addressed may be an impediment to one's full participation in everyday life, the amelioration of which is a cornerstone of the *Code*.

[85] The educational function of the Tribunal and the imperative to promote human rights is constant, ongoing, and evolving. I agree with Mr. Fraser that this, in part, is achieved through decisions in individual cases. As such, and for reasons already outlined above, I consider the circumstances of this complaint merit a fuller examination by the Tribunal and that it is in the public interest to accept the late-filed complaint for filing.

E. SUBSTANTIAL PREJUDICE

[86] I find that no substantial prejudice will result to any person.

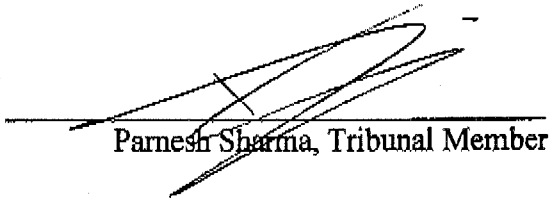
[87] In determining whether substantial prejudice will result from a delay, the Tribunal will consider whether the delay has resulted in the loss of evidence or an undue advantage or surprise. The Tribunal may consider both actual and inferred prejudice. It is appropriate for the Tribunal to infer that memories dim with time, witnesses move away or die, and documents can be misplaced or destroyed: *David Lynch v. BC Human Rights Commission,* 2000 BCSC 1419.

[88] Cummins has made no submissions on this issue. I do not consider that Mr. Fraser has gained any advantage owing to the delay or that any disadvantage has accrued to the Respondent.

VII CONCLUSION

[89] The complaint against the Union has no reasonable prospect of success and, therefore, is dismissed in its entirety.

[90] The complaint against Cummins, as outlined above, is accepted in part for filing.



Parnesh Sharma, Tribunal Member