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IN THE MATTER OF THE *HUMAN RIGHTS CODE*,
RSBC 1996, c. 210 (as amended)

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



BETWEEN:

JY

COMPLAINANT

AND:

Mint Tanning Lounge and Shelah Poyer and Jeremy Paradis

RESPONDENTS

REASONS FOR DECISION
APPLICATION TO REOPEN COMPLAINT AND AWARD COSTS
Section 37(4) and Rule 36

Tribunal Member:

Devyn Cousineau

Counsel for the Complainant:

Laura Track

Counsel for the Respondents:

Jay Cameron

I INTRODUCTION

[1] JY is a transgender woman. She filed a human rights complaint against Mint Tanning Lounge, Shelah Poyer and Jeremy Paradis. She alleged that that the Respondents discriminated against her based on her gender identity in connection with her request for waxing services. JY has filed a number of very similar complaints against other businesses and individuals advertising waxing services.

[2] Early on in this complaint, I made an interim order restricting publication of JY's name and sealing the contents of her complaint file. I said that I would re-visit these issues following a final hearing. The basis for this order was JY's claim that publishing details of her gender identity could negatively impact her business. After that interim order, Ms. Poyer and Mr. Paradis [**Individual Respondents**] retained legal counsel and applied to have the order lifted on the basis that JY in fact already had a very public online presence as a transgender woman. I held a telephone conference call to address that issue, among others.

[3] Very shortly after that call, JY withdrew her complaint against the Individual Respondents. The Human Rights Tribunal [**Tribunal**] issued a Notice of Withdrawal, ending the complaint. JY later withdrew her complaint against Mint Tanning Lounge as well.

[4] The Individual Respondents now apply to reopen JY's complaint in order for the Tribunal to order costs against her: *Human Rights Code* [**Code**], s. 37(4). They say that JY has acted improperly by: (1) misleading the Tribunal in respect of her application for a publication ban; and (2) filing, and then withdrawing, a vexatious complaint.

[5] In response, JY says that the Individual Respondents have not explained why the interests of justice and fairness justify the reopening of her complaint: Tribunal Rules of Practice and Procedure [**Rules**], Rule 36. If the Tribunal reopens the complaint, she argues that she has not engaged in improper conduct. Further, she says that the Individual Respondents cannot benefit from an award of costs in circumstances where their hands are not clean.

[6] For the reasons that follow, I have granted the application to reopen the complaint and denied the application for costs.

II BACKGROUND

[7] JY filed this complaint on March 12, 2018. It is one of 14 very similar complaints filed against other waxing service providers at around the same time. Because all JY's waxing complaints raised similar issues, the Tribunal established a process whereby the first three complaints would proceed through the regular process, while the other 11 were held in abeyance. The intention was to allow the Tribunal to address the substance of JY's allegations in fewer complaints. The results in all the complaints were likely to be affected by the Tribunal's reasoning on the substantive issues that JY had raised.

[8] This was one of JY's first complaints and, as such, followed the Tribunal's regular process. The Tribunal served a copy of the complaint on the Respondents. However, none of the Respondents filed a response within the timeline for doing so. Accordingly, the Tribunal scheduled – and then rescheduled – dates for a hearing.

[9] On June 14, 2018, JY filed an application to limit publication of her name and to restrict access to the contents of her complaint file. The basis for the application was her assertion: "I am in the public eye and my company revolves around my name, I am heavily searched online and I don't want this case ... to appear in any search results". The Tribunal requested further information and, in response, she explained:

My name and brand revolves around my business. People know me as [name] the amazing [business] person and my name is often the top searched term ... Not only can this negatively affect my business, since not everyone is in approval of gender identity laws, it can also very much so negatively affect any of my clients and their business, things I don't want to happen. The context of the complaint, reasonings and decisions are what should be brought forward ...

I have developed an extremely high social media following... I do fear retaliation.

[10] At this point, JY's complaint and, consequently, this application was unopposed. I decided the application in a letter dated June 21, 2018. I reasoned:

I accept that a person's gender identity is profoundly personal and they should retain control over how and when the public is informed of it. In certain circumstances, where a party wishes to pursue a human rights complaint but does not want to be publicly identified as transgender or gender non-conforming, their privacy interests may sufficiently outweigh the public's interest in knowing their identity in relation to a particular complaint.

However, [JY's] complaint is somewhat unique in that she has filed a large number of complaints of a similar nature. She has identified herself publicly as a woman, in some cases through online platforms such as Facebook, to all of the other respondents in those cases. [JY's] application is insufficiently detailed to understand the extent to which she is already identified as trans gender or gender non-conforming publicly, so as to understand her privacy interests in respect of this complaint.

Furthermore, the Tribunal is holding a number of those complaints in abeyance pending resolution of the first [three]. As such, the parties to [JY's] other complaints have an interest in following the progress and outcome of the other similar complaints. This cannot happen if [JY's] name is not associated with the complaints. Depending on my ultimate findings in respect of this complaint, there may – or may not - be a public interest in publishing [JY's] name.

[11] I ordered that JY's name be anonymized on an interim basis, and that the contents of her complaint file would not be available to the public up until the date of a final decision on the application. I said that I would make that final decision after the hearing of the complaint, at which point I indicated I would seek further information from JY about her request. In that regard, I note that JY has represented herself throughout this process, except in respect of this application.

[12] On July 11, 2018 Ms. Poyer contacted the Tribunal to advise that she intended to participate in the complaint. Ms. Poyer and Mr. Paradis then later retained Mr. Cameron, of the Justice Centre for Constitutional Freedom [JCCF], to represent them.

[13] On August 22, 2018, the JCCF published a news release about JY's complaint on its website. The release provided a link to JY's complaint form. JY's first name appeared in two different places on that form. After this release was published, JY says that she was contacted by a national media outlet about the complaint. After JY complained to the Tribunal, the JCCF redacted the references to JY's first name.

[14] I convened a conference call with the parties on September 5, 2018. In that call, the Individual Respondents asked me to lift the publication ban. They filed a number of documents from JY's social media accounts as well as her website. They argued that those records show that JY in fact has a very public persona as a transgender woman, including with respect to sexually explicit material. In response, JY said that some of this material had been posted without her knowledge or consent. She agreed, however, that her gender identity was public to a degree. For example, she said that she attended a women-only gym and used a female name to order pizza.

[15] I deferred the issue of the publication ban until the hearing of the complaint, which was scheduled for October 4-5, 2018. However, very shortly after the call, JY withdrew her complaint against the Individual Respondents. In doing so, she made clear to the Tribunal that her intent was to "remove" Mr. Cameron as counsel. The Tribunal issued a Notice of Withdrawal, ending the complaint, on September 10, 2018.

[16] On September 14, 2018, JY withdrew her complaint against Mint Tanning.

[17] On September 17, 2018, the JCCF posted an update about the complaint on its website. The headline was "Victory for BC aesthetician who faced human rights complaint for refusal to perform waxing service on transwoman". The post referred to JY having "intact male genitalia" and described the discussion in the Tribunal's conference call. It called JY's decision to withdraw her complaint a "vindication" for the Individual Respondents.

[18] In this post, the JCCF provided a link to the Notice of Withdrawal issued by the Tribunal. That Notice included JY's home address.

[19] On September 18, 2018, the Individual Respondents applied for an order of costs against JY. I denied that application in a letter decision dated September 21, 2018. I explained that the Tribunal no longer had power with respect to the complaint and the Individual Respondents would have to persuade me to reopen the complaint in order to consider their application: *Renner and others v. Kamloops Cariboo Regional Immigrant Society (No. 3)*, 2012 BCHRT 229. I gave the Individual Respondents two weeks to file an application to reopen the complaint and have the Tribunal order costs. I also commented that it was inappropriate for the JCCF to have published JY's home address and encouraged them to redact the address from their online materials. JY tells me that, as of November 6, 2018, her address remains published on the JCCF website.

[20] The Individual Respondents filed this application after the deadline passed and did not provide a copy to JY, which is required by the Rules.

III ANALYSIS AND DECISION

[21] As a preliminary matter, JY argues that the Tribunal should not consider the Individual Respondents' application to reopen the complaint because it was filed past the deadline for doing so. Further, they did not provide JY with a copy of the application, which is required by Rule 28(1)(c). The Individual Respondents did not address this issue at all in their reply submissions.

[22] The manner in which the Individual Respondents brought this application does not foster respect for the integrity of the Tribunal's Rules and process. While the application was only late by one day, I am more concerned with the failure to provide a copy to JY. Because of this failure, she was left with the impression that the Individual Respondents did not intend to pursue this application until she received a communication from the Tribunal two and a half weeks later. Nevertheless, I have decided to consider the application because, in my view, the just and timely resolution of the complaint favours the Tribunal reaching a decision on its merits. I turn, therefore, to the application to reopen JY's complaint.

A. Application to reopen the complaint

[23] JY withdrew her complaint against the Individual Respondents. Pursuant to s. 17(1) of the *Administrative Tribunals Act*, the Tribunal was then required to dismiss the complaint: *Code*, s. 32(d). At that point, the Tribunal no longer had jurisdiction to deal with the complaint.

[24] The Tribunal has a limited jurisdiction to reopen complaints where the interests of justice and fairness compel it: *Zutter v. British Columbia (Council of Human Rights)* (1995), 122 DLR (4th) 665 (BCCA). This is reflected in the Tribunal's Rules, which set out the Tribunal's discretion to reconsider a decision in the interests of fairness and justice: Rule 36(1); *Rashead v. Vereschagin*, 2005 BCHRT 426 at para. 56. The Tribunal exercises this power sparingly, giving due consideration to the principle of finality: *Grant v. City of Vancouver and others (No. 4)*, 2007 BCHRT 206 at para. 10.

[25] The Individual Respondents argue that it was an error for the Tribunal to have dismissed the complaint without canvassing the issue of costs with the parties. I disagree. Unlike in court, costs do not "normally follow the cause" in proceedings before the Tribunal. As a result, the Tribunal would not ordinarily canvass the parties about whether they intended to make an application for costs before issuing a Notice of Withdrawal. Rather, the burden is on the party seeking an order for costs to apply pursuant to s. 37(4) of the *Code*. In circumstances where parties may have notice that the complaint is nearing an end, it is incumbent on them to raise the issue before the Tribunal issues its final decision: *Webb and LeBlanc v. Rovner and Rovner (No. 3)*, 2010 BCHRT 165.

[26] In the circumstances of this complaint, however, I accept that the Respondents did not have notice that the complaint was being withdrawn. This case is unlike *Webb and Renner*, where the Tribunal had held a hearing and was – at that point – poised to issue a final decision. In such circumstances, the parties should reasonably predict the ending of the complaint and act promptly to ensure the Tribunal resolves the issue of costs before its jurisdiction is spent. Here, the Individual Respondents may reasonably not have predicted the closing of this

complaint. This was a decision entirely under JY's control, and she executed it in the midst of the proceedings. It would not be fair to require the Individual Respondents to have predicted this possibility and raised the issue of costs before the Tribunal issued its Notice of Withdrawal. Further, part of the basis of the costs application is the way that JY withdrew the complaint. This could not have been addressed at an earlier stage.

[27] I am persuaded that fairness in these circumstances favours reopening the complaint to consider the application for costs.

B. Application for costs

[28] Section 37(4) of the *Code* allows the Tribunal to award costs against a party who has engaged in improper conduct during a complaint. The purpose of a costs award is punitive: *Terpsma v. Rimex Supply (No. 3)*, 2013 BCHRT 3 at para. 102. It aims to deter conduct that has a significant and detrimental impact on the integrity of the Tribunal's process.

[29] The Individual Respondents argue, first, that JY engaged in improper conduct when she "intentionally misled the Tribunal by claiming that [her] name needed to be anonymized because [she] did not identify in public as female". In fact, JY has a very public profile as a woman. Further, her contention that publication of her name in connection with this complaint could harm her business is belied by the fact that her name is already associated online with sexually explicit material which the Respondents were readily able to find. JY admitted during our conference call that she uses a female name and attends a women-only gym. The Individual Respondents argue:

The Complainant applied for anonymization to insulate [herself] in a tribunal process that is intended to be public to prevent exactly this type of abuse. On the other hand, the Respondents' identities were not anonymized. Their identities were published by the Tribunal on its website.

[30] In response, JY argues that it cannot be improper conduct to make an application which seeks to protect her privacy and reputation in connection with her gender identity. She says that how she identifies online now "has no relevance to whether her application was improper

at the time it was made". Notably, however, she does not argue now that the online material the Individual Respondents refer to are not an accurate depiction of her online persona, or that her public profile as a woman was a recent development, made after her original application for a publication ban. In fact, she does not provide any evidence to explain the apparent inconsistencies between the basis on which she sought a publication ban and her public profile on the internet.

[31] One of the reasons that I granted the publication ban on an interim, rather than a permanent, basis was that JY's application did not allow me to fully understand her privacy interests in respect of the complaint. The intent of the order was to confer protection on JY up until the hearing, at which point I would receive evidence under oath and be in a position to make findings of fact about JY's gender identity, both as it is experienced privately and expressed publicly. This would allow me to make an informed decision about whether JY's privacy interests in this complaint outweighed the public interest in knowing her identity. Of course, the complaint never reached this stage.

[32] The Individual Respondents' application requires me to make a finding of fact that JY has misled the Tribunal. I cannot make that finding based on the evidence before me. I find it significant that JY has been representing herself throughout this complaint, including in her application for a publication ban as well as on the September 5 conference call. A self-represented person is not trained to express themselves in the clear manner that the law requires. I note that JY's submissions with respect to the publication ban were very brief, in a context where it appears that her gender identity, public profile, and motives in respect of this complaint are complex. It may be possible to reconcile what she has told this Tribunal with the truth. That was an exercise I had purposefully left for the hearing, at which point I could assess JY's credibility based on testimony given under oath and elicit questions to the answers that the Individual Respondents now raise. In the meantime, I take notice of the fact that transgender and gender non-conforming persons face high levels of stigma and are at an increased risk of violence, harassment, social isolation and discrimination. In these circumstances, I am satisfied that it is better to err on the side of caution in protecting a transgender person who asserts that

the publication of their name in association with a complaint may expose them to harm. Doing so on an interim basis had minimal, if any, impact on the integrity of the Tribunal's process.

[33] In that regard, I also find it significant that the alleged misrepresentation, assuming that is what occurred, was with respect to an issue collateral to the merits of the complaint. There is no evidence that it has prejudiced the integrity of the Tribunal's process. This distinguishes the circumstances from others where the Tribunal has awarded costs against a party it has found to be misleading. For example, in *Ma v. Cleator*, 2014 BCHRT 180 the Tribunal noted that the complainant had "knowingly and repeatedly misled the Tribunal on matters central to her complaint, knowing that she had promised to tell the truth": para. 282. In *Wells v. UBC and others (No. 4)*, 2010 BCHRT 100, the Tribunal found that the complainant had misled the Tribunal in a manner that resulted in a significant prejudicial impact on the integrity of the process. There, the complainant gave misleading information in an affidavit which resulted in the Tribunal accepting her complaint for filing under false pretenses. Here, all that happened was that JY's name has not been published in connection with the complaint. No other aspect of the Tribunal's process has been impacted.

[34] The Individual Respondents have not pointed me to any cases where the Tribunal has awarded costs for a misrepresentation analogous to the one they assert occurred here. The cases they cite are not helpful to their application. In *Green v. London Drugs*, 2010 BCHRT 278, the Tribunal found a party had engaged in improper conduct when they made submissions "replete with unfounded and disrespectful comments to, and about the Tribunal and the other participants in this case": para. 16. The Tribunal declined to order costs. In *McKay v. Compass Group Canada Ltd*, 2008 BCHRT 380, the complainant failed to participate in the complaint process and wilfully disregarded the Tribunal's Rules and processes. In *McLean v. British Columbia (Ministry of Public Safety and Solicitor General)*, 2006 BCHRT 103, the Tribunal awarded costs against a party which had withdrawn an admission two months prior to hearing. None of the circumstances that the Tribunal addressed in those cases have arisen here.

[35] The Individual Respondents complain that JY's identity was protected in connection with this proceeding and theirs was not. They argue, without evidence, that the complaint has

caused their personal and corporate reputation to be “wrongfully tarnished”. Assuming this is true, it does not reveal any improper conduct by JY. She is permitted to file a complaint under the *Code*. The Individual Respondents had the same right that she did to apply for an order to limit publication of their names. They did not. This was not a decision that can be attributed in any way to JY.

[36] The second basis on which the Individual Respondents seek an award of costs relates to their assertion that JY has filed complaints against a number of women who refused to provide her with waxing services. When the Individual Respondents indicated in this complaint that they intended to mount a “vigorous defence”, JY then withdrew the complaint. At that point, counsel says that he had already made travel plans to attend the hearing and arranged for an expert witness to testify. They argue: “it is a serious thing to file a human rights complaint. It is even more serious to make a complaint on false pretenses, and then withdraw it when it looks as though it will be unsuccessful”. They say that “[i]t would be unjust to permit the filing of serious public complaints against persons who have not been proven to have done anything wrong”.

[37] The difficulty with this argument is that all complaints begin with unproven allegations. It is the role of the Tribunal to decide whether there has been any wrongdoing. It is not improper conduct to make allegations of discrimination against another person. That is a quasi-constitutional right conferred by the *Code*.

[38] The Tribunal assumes that people file their complaints based on an honest belief that the allegations are true. Parties seeking to displace this assumption must show, on an objective standard, that the allegations “have no foundation in fact or reality and are made for spurious reasons”: *Nieuwkerk v. Cimex Industries Ltd.*, 2003 BCHRT 126 at para. 13; *Stopps v. Just Ladies Fitness (Metrotown) and D. (No. 2)*, 2005 BCHRT 359, the Tribunal said at para. 13. This is extremely difficult to do in an application such as this, because the Tribunal cannot make findings of fact as it would after a hearing. Further, the Tribunal has declined to issue costs where a person files a complaint that is not justified, noting that to award costs in those circumstances could “have a chilling effect on legitimate complaints coming forward, as cases

often turn on different interpretations or recollections of events by the parties”: *Jamali-Vardough v. Linklater*, 2005 BCHRT 231 at para. 24.

[39] In this case, the Individual Respondents disagree that the allegations in JY’s complaint amount to discrimination. This alone does not mean that the complaint was filed in bad faith or under “false pretenses”: *Crosby v. Dairyland Fluid Division Ltd. and others*, 2004 BCHRT 1 at para. 34. Notably, while they say that the allegations against them are “false”, I do not understand them to take issue with the facts set out in JY’s complaint. Rather, they disagree about whether those facts amount to a breach of the *Code*. This is a matter that was not determined by the Tribunal. In the meantime, there is simply no evidence from which I could conclude that JY’s complaint was “frivolous”, “vexatious”, “egregious” or “false”. I reach this conclusion taking into account that this is one of several very similar complaints that JY has filed with this Tribunal.

[40] I accept that the Individual Respondents incurred some costs in preparation for the hearing that were then lost when JY chose to withdraw her complaint. This alone, however, does not provide a foundation for a finding of improper conduct. I note that the costs they incurred to this point are less than they would have had they proceeded to hearing. At the end of a hearing, absent a finding of improper conduct, those costs are not recoverable regardless of the result. Furthermore, it is possible that they could have lost at a hearing and had other remedies awarded against them. I find it difficult to accept that JY’s withdrawal of the complaint has had an unduly prejudicial impact on the Individual Respondents.

[41] The Individual Respondents rely on *Gibbons v. Abbotsford Chrysler and Chiang*, 2009 BCHRT 381. In that case, the respondent argued that the complainant had engaged in improper conduct by withdrawing her complaint two weeks before the hearing. However, the result in that case does not assist the Individual Respondents. The Tribunal reasoned:

In the circumstances of this case, I am not convinced that Ms. Gibbons’ actions amount to improper conduct. Ms. Gibbons filed a complaint with the Tribunal, and that complaint was processed in the normal course. The respondents argue that it was a weak or flawed complaint from the

outset. I make no finding in that regard, but note that there is no information before me which would establish that Ms. Gibbons filed her complaint with anything other than a good faith belief that she had been discriminated against contrary to the *Code*. The respondents argue that Ms. Gibbons “may have made and pursued” her allegations for an improper purpose, but there is no information before me which would support this argument. (at para. 16)

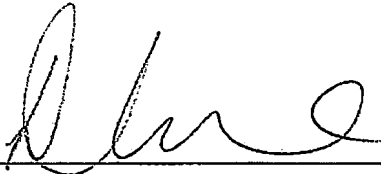
I agree with that reasoning, and find it applies equally here.

[42] Furthermore, I agree with JY that the Individual Respondents do not make this application with clean hands: *Reekie v. International Longshore and Warehouse Union (No. 4)*, 2006 BCHRT 242 at para. 10. Notwithstanding the Tribunal’s publication ban, they published JY’s first name on the JCCF website. After being told to remove that reference, they went on to publish JY’s home address. As far as I am aware, JY’s home address remains posted on the JCCF website notwithstanding my comments encouraging them to remove it. Further, they failed to file this application within the time frame set by the Tribunal and failed to provide JY with a copy of the application. Finally, in their submissions they appear to have largely disregarded the contents of my September 21 letter, in which I directed them to the proper scope of the Tribunal’s costs jurisdiction. In their submissions, they place an asterix in front of female pronouns which they use to describe JY, presumably indicating some resistance to her stated gender identity. In all of these circumstances, I am even less inclined to consider a punitive award against JY.

[43] The Individual Respondents have not persuaded me that JY has engaged in conduct that has had a significant impact on the integrity of the Tribunal’s process, a significant prejudicial impact on another party, or is otherwise improper within the meaning of s. 37(4) of the *Code*. The application for costs is denied.

IV CONCLUSION

[44] The application to reopen the complaint is granted. The application for costs is denied.



Devyn Cousineau, Tribunal Member