

A RETAILER'S DUTY TO ACCOMMODATE DISABILITIES THAT INTERFERE WITH A CUSTOMER'S ABILITY TO WEAR A FACE MASK

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The BC Human Rights Tribunal (the "**Tribunal**") has issued its first decision relating to discrimination in the context of mandated mask policies. In the *Customer v. The Store*, 2021 BCHRT 39, the Tribunal considered whether a grocery store discriminated against a customer by requiring the customer to wear a face mask in the store, in contravention of s. 8 of the *BC Human Rights Code* (the "**Code**"). S. 8 of the *Code* prohibits discrimination in the provision of an accommodation, service or facility customarily available to the public, on a number of protected grounds, including physical and mental disabilities.

The case is a 'screening decision' in which the Tribunal undertook an initial assessment of the complaint to determine whether it should be accepted for filing. As a general rule, the Tribunal does not publish screening decisions, however, it has done so in the case in light of the large volume of human rights complaints that have recently been filed in connection with mandatory face masks in public indoor spaces.

This case is of particular interest to retailers who require customers to wear face masks in compliance with Public Health Orders. The BC Human Rights Tribunal (Tribunal) provides some guidance to retailers on the duty to accommodate disabilities that interfere with a customer's ability to wear a face mask.

The Facts

The incident in question occurred when it was not a legal requirement that face masks be worn inside. However, as part of its safety plan the grocery store in question had implemented its own policy which mandated that all customers wear a mask when inside the store.

The incident occurred when the complainant entered the grocery store without a face mask. A security guard approached the complainant and requested that she wear a face mask as mandated by the store's policy. The complainant advised the security guard that she was exempt from wearing a mask. Despite claiming to be exempt, she would not provide any information to the security guard other than to say that wearing a mask caused breathing difficulties. The security guard insisted that she wear a mask or leave the store. The

customer chose to leave.

The customer filed a human rights complaint against the grocery store pursuant to s. 8 of the *Code*. In the complaint, the customer alleged the store discriminated against her based on a physical and mental disability by requiring her to wear a face mask.

The Decision

The question before the Tribunal was whether the complaint alleged facts that, if proven, could constitute a contravention of the *Code*. The Tribunal concluded that it did not, and issued a decision that the Tribunal would not proceed with the complaint.

Central to the decision was the fact that the customer refused to provide any information concerning her alleged disabilities, or how those disabilities interfered with her ability to wear a face mask. She took the position that information concerning her disabilities were private matters that she did not want to disclose to the Tribunal. The only information she provided was that it caused breathing difficulties and anxiety.

The Tribunal confirmed that, in order to establish a complaint pursuant to s. 8 of the *Code*, a complainant must establish a disability protected by the *Code* that interferes with their ability to wear a face mask. The *Code* does not protect complainants who refuse to wear a face mask as a matter of personal preference, or because they disagree with whether face masks protect them and the public during the pandemic. The complete lack of medical information in this case meant the complainant could not establish the existence of a disability protected by the *Code*.

Take-Away for Retailers

The Tribunal commented that it has not yet had the opportunity to consider how much information a customer would have to provide to a retailer to trigger a duty on the part of the retailer to accommodate the customer's disabilities. However, the Tribunal Member took guidance from the following recommendation of BC's Office of the Human Rights Commissioner:

Where the relationship is brief, I recommend duty bearers accommodate those who are unable to wear masks without requiring them to provide medical information, as this is sensitive personal information.

[A human rights approach to mask-wearing during the COVID-19 pandemic, p. 6]

In other words, while the guidance from the Tribunal at present is that retailers ought not to require medical information before accommodating a customer's disabilities that interfere with their ability to wear a face

mask, some medical information will be required to succeed with a human rights complaint.

We will continue to monitor developments in respect of a retailer's duty to accommodate in the context of mandatory masking requirements.

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A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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