

“BREATHING ISSUES” RESULTING FROM WEARING A FACE MASK DOES NOT AMOUNT TO A PROTECTED DISABILITY

Posted on August 20, 2021

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On April 5, 2021 and April 11, 2021, we published articles reporting on the Tribunal’s first two decisions dealing with allegations of discrimination in the context of mandatory face mask requirements. As noted in our articles, in both cases the Tribunal dismissed the complaints prior to filing on the basis that the facts alleged could not constitute a violation of the British Columbia *Human Rights Code* (the “**Code**”).

On August 19, 2021, the Tribunal published the decision of *Rael v. Cartwright Jewelers and Another*, 2021 BCHRT 106, where it once again dismissed a complaint of discrimination in the context of a mandatory mask policy. The Tribunal dismissed the complaint on a preliminary basis and without a hearing, pursuant to s. 27(1)(b) because the complaint did not allege facts that could contravene the Code.

The Facts

The complaint in question arose when the complainant was denied entry into the Cartwright Jewelers store (the “**Store**”) because she was not wearing a mask. In her complaint, the complainant alleged that she had breathing issues which prevented her from wearing a mask, but did not provide any further details about the incident or her disability. When asked in the complaint form to explain how the harm was related to her disability, the complainant stated that “my human rights were denied. Mask wearing is not a law”.

The Store acknowledged that it refused the complainant entry to the store, but justified its actions on the basis that it had implemented a mandatory mask policy in compliance with Public Health Orders and to prevent the spread of Covid-19.

The customer filed a human rights complaint against the Store pursuant to s. 8 of the Code. In the complaint, the complainant alleged the store discriminated against her based on a disability by declining her access to the Store for refusing to wear a face mask. The Store applied to dismiss the complaint on the basis that there was no allegation that would amount to a contravention of the Code.

The Decision

The question before the Tribunal was whether the complaint alleged facts that could contravene the Code. The

Tribunal makes this determination based only on the facts as set out in the complaint, and without consideration for any explanations from the respondent or what evidence might be adduced at a hearing. The question is whether, on its face, the complaint contains allegations which (if proven) could amount to a contravention of the Code.

To succeed with a discrimination complaint, the onus is on the complainant to establish that:

- The complainant has a characteristic protected by the Code (in this case, a disability);
- The complainant experienced an adverse impact in a protected area (in this case, being denied entry to the Store); and
- The protected characteristic was a factor in the adverse treatment.

To avoid a dismissal of the complaint under Section 27(1)(d) of the Code, the complainant had to allege facts to cover all three elements noted above.

First Element – Disability

With respect to the first element, the Tribunal confirmed that a claim for discrimination on the basis of disability must begin with the complainant establishing a protected disability. In addition, the complainant must establish how that disability interferes with, or prevents her from, wearing a face mask.

The Tribunal noted that although the Code does not define “disability”, it has been interpreted by the Tribunal to mean “a physiological state that is *involuntary*, has some *degree of permanence*, and impairs the person’s ability, in some measure, to carry out the normal functions of life”.

In this instance, the complainant alleged that she suffered from “breathing issues”. The complainant did not state whether there was an underlying cause for the breathing issues, whether that underlying cause had some degree of permanence (for example, if it related to a pre-existing medical condition), or the extent to which it impaired her functionality.

Based on the information provided, the Tribunal concluded that “breathing issues”, without more, was insufficient to establish a disability protected by the Code.

Third Element – Link between Disability and Adverse Impact

The Tribunal went on to say that, even if the complainant had provided sufficient particulars to allege a disability, her complaint would still fail because there was no information before the Tribunal to conclude or infer that there was a connection between her disability and the adverse treatment (being denied entry to the Store).

The Tribunal held that, in cases under s. 8 (i.e. denial of services, or discrimination in their provision), the complainant must provide information to indicate that the service provider “knew about, should have known about, or had a duty to inquire into the presence of a disability”. In the absence of such information the Tribunal stated that *“a complainant will have difficulty in establishing a connection between the disability and the alleged adverse treatment”*.

The only information before the Tribunal in this case was that the complainant refused to wear a face mask. The Complainant did not allege in her complaint that she informed the store personnel that her refusal stemmed from a disability or medical condition, or that she otherwise required accommodation. The Tribunal confirmed that *“while complainants are not required, for valid privacy reasons, to divulge detailed particulars of their disability when seeking accommodation, they should, at a minimum, inform a service provider that they require some form of disability-related accommodation to trigger a service provider’s duty to accommodate.”*

In other words, the Store did not have a duty to accommodate a disability of which they had no knowledge.

The Tribunal found that the complainant did not allege facts that could establish the first or third element for the test of discrimination. As a result, the complaint did not allege facts which could constitute a violation of the Code and was dismissed.

Takeaways

This case confirms, yet again, that the onus is on the complainant to establish the existence of a protected disability that prevents them from wearing a face mask. Allegations of breathing difficulties from wearing a face mask, without more, is insufficient to establish a disability under the Code.

This case also provides useful guidance to retailers about their duty to accommodate customers with disabilities that prevent them from wearing face masks. While retailers cannot insist on medical information, at a minimum retailers are entitled to be informed of the existence of the disability before a duty to accommodate arises. Retailers are advised to accommodate customers who do disclose a disability that interferes with their ability to wear a face mask without requiring them to provide medical information.

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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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