

Date Issued: March 31, 2021

File: CS-002206

Indexed as: The Customer v. The Store, 2021 BCHRT 39

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

BETWEEN:

The Customer

**COMPLAINANT**

AND:

The Store

**RESPONDENT**

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**REASONS FOR DECISION  
NEW COMPLAINT SCREENING  
Section 27(1)(b) and Rule 12(2)**

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Tribunal Member:

Steven Adamson

On her own behalf:

The Customer

## I INTRODUCTION

[1] British Columbia has declared a state of emergency because of the COVID-19 pandemic. Face coverings reduce the transmission of COVID-19. Since November 2020, face coverings have been mandatory indoors, subject to certain exemptions. Before that, they were strongly encouraged, and many businesses made them mandatory. Most recently, under the authority of the *Emergency Program Act*, the Minister of Public Safety and Solicitor General has ordered that a visitor to an indoor public space must wear a face covering: Ministerial Order No. M012, s. 3. That order identifies a number of exemptions to the rule, including where a person is unable to wear a face covering because of a “psychological, behavioural or health condition” or “a physical, cognitive or mental impairment”: s. 4.

[2] This complaint concerns a customer who went to shop at a grocery store while not wearing a face mask. At the time, masks were not mandated by government order, but the Store had a policy that required customers to wear a mask. A security guard stopped the Customer and asked her to wear a mask. The Customer told the guard that she was exempt from wearing one but refused to explain why, other than to say they “cause breathing difficulties”. The guard insisted that she wear one, and so the Customer left the Store.

[3] The Customer alleges that, in requiring that she wear a mask, the Store discriminated against her based on physical and mental disability, in violation of s. 8 of the *Human Rights Code* [**Code**]. The issue before me is whether the Customer’s complaint alleges facts that, if proven, could be a contravention of the *Code*: Tribunal’s *Rules of Practice and Procedure*, Rule 12(2). This is a screening decision and, pursuant to the Tribunal’s regular process, the Store has not yet been notified or asked for submissions on the complaint.

[4] The Customer refuses to give the Tribunal any information related to her alleged disability, or how it interferes with her ability to wear a mask. In these circumstances, I have decided not to proceed with this complaint.

## **II ORDER LIMITING PUBLICATION**

[5] The Tribunal ordinarily issues its screening decisions by letter. However, since October 2020, the Tribunal has received a large volume of complaints alleging discrimination in connection with the requirement to wear face coverings indoors. This issue has emerged as one of considerable public interest and concern. In light of the volume of these types of complaints, and public interest in this issue, I am publishing this screening decision.

[6] In doing so, I have decided to order a limitation on the publication of the name of the Customer and the Store to protect the Customer's privacy regarding the events that allegedly occurred at the Store. In making this order, I recognize there is a strong public interest in the Tribunal maintaining open and public processes in order to promote the awareness of the *Code*, education about its application, and access to its processes. However, there are exceptions to an open process where strong grounds for limited publication of personal information exist: Rule 5(6); *A v. University and Dr. B and C and D and E*, 2014 BCHRT 235 at para. 5. In this case, I am satisfied that it is not necessary for the public to identify the parties. At this early stage, where the Tribunal is merely assessing if the complaint can proceed, respondents are generally not notified of the complaint's existence. It makes no sense to make such information public in this case simply because the Tribunal decided that there is a public interest in the Tribunal's complaint screening process in the context of mask-wearing complaints. In reaching this decision, I am confident that the intended public education can occur without providing the names of the parties.

## **III BACKGROUND TO COMPLAINT**

[7] This background is taken only from the information provided by the Customer. I make no findings of fact.

[8] On September 28, 2020, the Customer went into her local grocery store and was stopped by security because she was not wearing a mask. She says the security guard told her that the Store had enacted a mask-wearing policy and she could put one on or leave.

[9] The Customer states that she told the Store security guard that she was exempt from wearing a mask because they “cause health issues”. When the guard insisted that she tell him what those health issues were, the Customer says she told him they were private. She says that the guard told her he had health problems of his own but wore one anyway. The Customer told the guard that there were exemptions for health matters, that there was a duty to accommodate, and that health matters or disabilities were covered under the *Human Rights Code*. She says she “explained that these things cause breathing difficulties, and [she] was therefore exempt”. The Customer says that the guard stood firm on her having to wear a mask or leave. She realized the conversation was going nowhere and decided to leave.

[10] In her complaint, the Customer says that the guard never said the mask-wearing policy was necessary for public safety, and that several employees have made comments that they knew this was a “hoax”. She says that, at the time, the government had not mandated masks in stores. Rather, this was a policy that the Store had instituted independently. But, she says, even if there were an order, there are exemptions and obligations to accommodate. The Customer says that the “sudden and arbitrary decision to force customers to wear masks is discriminatory”. The policy is “pointless” and discriminates against people with health issues. She argues that people should not have to give out personal health information to get daily essentials.

[11] The Tribunal asked the Customer to provide more information about the nature of her alleged disabilities and how they related to her inability to wear a mask. In response, the Customer amended her complaint to explain, “it is very difficult to breathe with masks, and it causes anxiety”. She refuses to disclose any information about having a specific mental or physical disability, which she regards as private matters that should not be disclosed to government bodies, including the Tribunal. For the Customer, “Being difficult to breathe and causing anxiety makes it a hardship [to] wear a mask”.

#### **IV ANALYSIS AND DECISION**

[12] The Tribunal reviews complaints upon filing to ensure that they allege a possible violation of the *Code*. The BC Court of Appeal recently confirmed the Tribunal’s authority to do

so: *Gichuru v. Vancouver Swing Society*, [2021 BCCA 103](#) [*Gichuru*] at para. 57. In this case, the Customer must set out facts supporting that: (1) she has a disability; (2) the Store’s conduct had an adverse impact on her regarding a service, and (3) her disability was a factor in the adverse impact: *Moore v. British Columbia (Education)*, [2012 SCC 61](#) at para [33](#).

[13] After reviewing the complaint and amendment, I am satisfied that it does not set out a possible contravention of the [Code](#). The Customer sets out an adverse impact regarding a service: she could not enter the Store unless she wore a mask. However, the Customer has not set out facts that, if proved, could establish that she has a physical or mental disability that was a factor in this adverse impact.

[14] The *Code* does not protect people who refuse to wear a mask as a matter of personal preference, because they believe wearing a mask is “pointless”, or because they disagree that wearing masks helps to protect the public during the pandemic. Rather, the *Code* only protects people from discrimination based on certain personal characteristics, including disability. This protection is reflected in exemptions to mask-wearing rules for people whose disabilities prevent them from being able to wear a mask or other face covering. Any claim of disability discrimination arising from a requirement to wear a mask must begin by establishing that the complainant has a disability that interferes with their ability to wear the mask.

[15] In this complaint, the Customer refuses to say whether she has a disability. She simply says that wearing a mask makes it “very difficult to breathe” and “causes anxiety”. This explanation, on its own, is not enough to trigger the protection of the *Code*.

[16] The Customer argues that her health conditions are private, and she should not be compelled to disclose them, to the Store or to this Tribunal. I agree that any disclosure of health information should be minimal and strictly limited to the purpose for which the information is required. However, whenever a person is asking for human rights-related accommodation, they are required to bring forward the “facts relating to discrimination”: *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 SCR 970. This Tribunal has not yet had the opportunity to decide how much information a customer must give a retailer in order to qualify for an accommodation and, in my view, that decision is best left to a complaint with the benefit of full

argument. In the meantime, however, I take note of 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*

[17] That said, there is no question that when a person files a human rights complaint with this Tribunal, they must set out facts which could, if proven, establish that they have a disability. Without a disability, they are not entitled to accommodation or any potential remedy for discrimination under the *Code*. It is not enough, as the Customer has done in this complaint, to simply say that "specific mental and physical disabilities are private matters". As this Tribunal has said, "Parties before the Tribunal, like those before the courts, face an inevitable loss of privacy with respect to the matters in issue between them": *Sinclair v. Blackmore and others*, 2004 BCHRT 37 at para. 29. The Customer's refusal to explain whether she has a disability, and how that disability impacts her ability to wear a mask, means that she has not set out facts which could, if proven, establish discrimination. The Tribunal will not proceed with the complaint.

## **V CONCLUSION**

[18] For these reasons, the Tribunal has decided not to proceed with this complaint.



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Steven Adamson, Tribunal Member