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VIA EMAIL/MAIL

April 5, 2022

David Dickson
Complainant

REDACTED

Respondent Legal Counsel

Dear David Dickson and REDACTED

Re: David Dickson v. Costco Wholesale Canada Ltd. – S2020/12/0301

Enclosed is the Decision for the above noted complaint.

Yours truly,

REDACTED

Registrar

Enc.

cc. **REDACTED** , Director, Alberta Human Rights Commission

HUMAN RIGHTS TRIBUNAL OF ALBERTA

Citation: Dickson v Costco Wholesale Canada Ltd., 2022 AHRC 40
BETWEEN:

David Dickson

Complainant

- and -

Costco Wholesale Canada Ltd.

Respondent

SECTION 26 DECISION

Chief of the Commission and Tribunals: REDACTED

Decision Date: April 5, 2022

File Number: S2020/12/0301

Overview

[1] The complainant, David Dickson, requests a review of the Director's decision to dismiss his human rights complaint under s. 26 of the *Alberta Human Rights Act* (the *Act*).¹ The complainant alleges that the respondent, Costco Wholesale Canada Ltd., discriminated against him in the area of goods and services on the ground of mental and physical disability, contrary to section 4 of the *Act* (the Complaint).

[2] In November 2020, during the COVID-19 pandemic, the respondent imposed a policy that required all staff and customers to wear a mask. The complainant presented a medical exemption to wearing a mask, but the respondent applied its mask policy and did not allow the complainant in its store without a mask. For the reasons that follow, I uphold the Director's decision to dismiss the Complaint.

Issue

[3] The issue before me is whether there is a reasonable basis in the evidence to proceed to a hearing.

Background

The Circumstances

[4] The respondent provides goods and services to the public through warehouses selling groceries and retail items, in addition to providing services like eye exams. On November 16, 2020, the complainant attempted to enter one of the respondent's warehouses without wearing a mask. He stated that he intended to obtain an eye exam and to shop for retail and grocery items. The complainant presented the respondent with a medical exemption to wearing a mask, but the respondent did not permit him to enter. The respondent's managers offered to allow the complainant to enter with a face shield or to provide alternative access to services through online purchases or through a third party grocery delivery and pick up service.

[5] The respondent explained that it had adopted its mask policy in response to the COVID-19 pandemic, including spiking cases around November 2020. In November 2020, the respondent changed its mask policy to no longer permit unmasked persons to attend its warehouses, even with a medical exemption. In order to accommodate people with disabilities or preferences against wearing masks, it made available the following alternatives to masked in person shopping:

- a. face shields instead of masks;
- b. online purchases;
- c. grocery delivery and pick-up services through a third party provider;

¹ *Alberta Human Rights Act*, RSA 2000, c A-25.5

- d. curbside pick up for prescriptions; and
- e. allowing immediate family members who can wear a face covering to use a member's membership card to shop on their behalf.

[6] The complainant did not believe these alternative methods would reasonably accommodate him. He noted the following:

- a. He could not access eye examination services without in person attendance.
- b. Delivery through the third party grocery service was not available to his rural residence.
- c. He objected to providing his personal information to the third party grocery delivery provider.
- d. Many perishable grocery items were not available through the respondent's online shopping option.
- e. In store pricing including sale pricing was not available through online shopping or the third party grocery delivery service.
- f. He could not allow his family members to use his membership card because it was attached to his personal credit card.
- g. Online shopping did not provide the same experience, including the absence of samples and viewing additional products.
- h. Returns for online shopping items required either in person access or a lengthy and inconvenient process.

[7] Further, the complainant did not believe that allowing him to attend the warehouse unmasked in person was an undue hardship:

- a. He objected to wearing a face shield instead of a mask, noting publications about the effectiveness of face shields and his own views of the safety of such shields.
- b. The municipal bylaw and provincial health orders in place at the time permitted exceptions to mask requirements because of mental or physical disabilities. The respondent's mask policy did not permit any exceptions.
- c. The respondent changed its policies. Prior to November 2020, the respondent had permitted exemptions. Subsequently, it amended its mask policy to permit exceptions and currently does not require any patrons to wear masks in store notwithstanding the ongoing global pandemic.

[8] The respondent argued that its mask policy was reasonable and justified in the circumstances because of its occupational health and safety obligations to staff and customers. The respondent argued that permitting an exception to its mask policy in November 2020 would have created an undue hardship because of these safety obligations.

[9] The respondent explained that it changed its mask policy in November 2020 in response to spiking COVID-19 case numbers in Alberta and increased data about the severity of impacts from COVID-19 infections. The respondent noted that although the municipal bylaw and other government orders permitted exceptions to mask requirements, businesses were able to set their own policies. The respondent cited data it considered from the Government of Canada, Government of Alberta, Centre for Disease Control and Prevention, and the World Health Organization about the severity of the impacts from the disease.

[10] The respondent also argued that the Complaint was frivolous and vexatious. It argued that the complainant's attendance at the respondent's store was not a genuine attempt to seek services, but rather a planned and premeditated media event. A media personality filmed and live streamed the complainant's interactions with the respondent. The respondent also pointed to the complainant's comments on a podcast and in written publications about his views of the pandemic, the government's mandatory medical restrictions, and the need for individuals to stand up for rights and freedoms.

Director's Decision

[11] A Human Rights Officer reviewed the materials related to the Complaint and prepared a recommendation memo that recommended dismissal. The Director of the Commission (Director) reviewed the Complaint, response, submissions provided by the parties, the recommendation memo, and the complainant's submissions in reply to the recommendation memo. The Director dismissed the Complaint, concluding in part:

The information supports that you have had medical conditions that cause symptoms exacerbated by the wearing of a facemask. The information also supports that the Respondent has health and safety obligations associated with the COVID-19 pandemic and that accommodating your request to remain in the store without a facemask would have created risks for store staff and for other customers. Further, the information supports that reasonable accommodation was available to you in the form of wearing a face shield as an alternative, completing the purchase online, using curbside pickup, or having another person complete the purchase in-store for you. The information does not support that the Respondent failed to accommodate your medical condition, or that the Respondent acted unreasonably. There is no reasonable basis for the matter to proceed to the next stage in the complaint process.

Request for Review

[12] The complainant filed a Request for Review of the Director's decision. In addition to relying on his previous arguments, the complainant argued that the respondent's assertion of undue hardship was not legitimate. He argued that the respondent could not have been concerned about safety of staff and customers because it allegedly failed to comply with government cleaning requirements. He further alleged that the respondent permitted other individuals into its store without masks.

[13] The respondent filed a response to the Request for Review relying on its previous submissions. In addition, the respondent explained that it has since changed its mask policy again, now to allow unmasked individuals, including the complainant, into its warehouses. It noted that it did so after reviewing data surrounding the efficacy of vaccination and high vaccination rates in Alberta. The complainant disagreed with the respondent's submissions about vaccine efficacy, arguing that vaccines do not prevent becoming infected or being infectious.

Analysis

The Screening Function under section 26

[14] Requests for review come under section 26 of the *Act*. Section 26(3) states: "The Chief of the Commission and Tribunals shall ... review the record of the director's decision and decide whether ... the complaint should have been dismissed."

[15] In *Mis v Alberta Human Rights Commission (Mis)*, the Alberta Court of Appeal described the screening function under s. 26 of the Act as determining "whether there is a reasonable basis in the evidence for proceeding to the next stage."² The next stage is a hearing before the Tribunal.

[16] I am given wide latitude in this screening decision.³ I am expected to use my experience and common sense⁴ to evaluate the quality of the information gathered, while remaining mindful of the role of the Tribunal at hearing to weigh evidence and make findings of fact.⁵

[17] If this matter were to proceed to hearing, the complainant would bear the burden of proving a *prima facie* case of discrimination, including that he had a physical disability, that he suffered adverse treatment, and that his physical disability was at least a factor in that adverse treatment.⁶ The burden of proof would then shift to the respondent to show that its conduct was reasonable and justifiable in the circumstances.⁷

² *Mis v Alberta Human Rights Commission*, 2001 ABCA 212 (*Mis*) at para 8

³ *Mis* at para 9

⁴ *Mis* at para 9

⁵ *Economic Development v Wong* at para, 17 and 20

⁶ *Moore* at para 33

⁷ Act s. 11

[18] Discrimination is only found where both the complainant proves his burden of proof and there is no reasonable justification in the circumstances. In performing my screening function to determine if there is a reasonable basis to proceed, I do not apply these tests directly but am mindful of the Tribunal's analysis. Here, while there may be a reasonable basis to proceed on the first part of the Tribunal's inquiry, *prima facie* discrimination, there is not when looking at reasonable justification in the circumstances.

Reasonable Basis to Proceed on *Prima Facie* Discrimination

[19] The complainant produced a medical note from a physician stating he "has prior health conditions which symptoms are exacerbated by wearing a mask." On its face, the medical certificate suggests a disability and that mask wearing negatively impacts that disability.

[20] It does not indicate the nature of the disability, on what basis the diagnosis was made, whether the complainant is unable to wear a mask or simply recommended not to, or any particulars about the restriction. This is not a criticism but an observation of the nature of the information before me. If this matter were to go to hearing, the complainant would bear the burden of proving both the disability and that the disability prevented him from wearing a mask. More detail than what arises from the single medical note would likely be required to meet this burden at a hearing.⁸ Nevertheless, at least for the purposes of screening, I accept that the medical note creates a reasonable basis for further inquiry about whether the complainant had a disability.

[21] The respondent's policy restricted the complainant from fully accessing the respondent's services. This was likely an adverse impact. Similarly, there is a reasonable basis in the evidence that the complainant's disability was a factor in that adverse impact. Overall, I conclude that there is a reasonable basis in the evidence to proceed to a hearing on the first stage of the human rights analysis, *prima facie* discrimination. This, however, is not the end of my screening inquiry.

No Reasonable Basis to Proceed on Reasonable Justification

[22] The second stage of the human rights analysis is the question of reasonable justification in the circumstances, often addressed through accommodation to the point of undue hardship. In *Szeles v Costco Wholesale Canada Ltd. (Szeles)*, the Chief of the Commission and Tribunals (the Chief) dismissed a mask complaint, explaining that limitations to the right to be free from discrimination may be justified in certain circumstances:⁹

There is no question that the respondent instituted a policy that had an adverse impact on persons with certain disabilities, such as those who were unable to use face masks. In this respect, the policy, on its face, limited the rights of persons who could not wear a face mask because of a disability. This, however, does not end the inquiry. The Act and human rights

⁸ *Pelletier v 1226309 Alberta Ltd. o/a Community Natural Foods*, 2021 AHRC 192 at paras 25 – 27

⁹ *Szeles v Costco Wholesale Canada Ltd.*, 2021 AHRC 154 (*Szeles*) at para 13

jurisprudence accept that limitations to the right to be free from discrimination may be justified where a) the limitation or rule is instituted for valid reasons; b) it is instituted in the good faith belief that it is necessary; and c) it is impossible to accommodate persons who may be adversely affected, without incurring undue hardship.¹⁰ [emphasis added]

[23] I do not apply this test directly but review it in the context of screening by considering whether there is a reasonable basis to proceed. Here, there is not a reasonable basis to proceed.

[24] First, the respondent adopted its mask policy for a valid reason, being the respondent's duty to keep staff, contractors, and customers safe during an unprecedented global pandemic. The respondent had significant occupational health and safety obligations. Initially, the respondent permitted exceptions to its mask policy. However, in November 2020, it reviewed the seriousness of the illness, combined with a spike in cases in Alberta, with no vaccine available to limit the spread or the serious effects of the illness, and the nature of its own operations to determine that it could no longer permit exceptions.

[25] Second, even at the high threshold for screening, it is clear that the mask policy was made in good faith. The complainant argues that it was not, alleging that the respondent failed to maintain cleaning standards and permitted other people into the store without a mask. The complainant made a bare assertion that the respondent failed to maintain cleaning standards while the respondent provided information about its efforts to keep everyone safe, including by installing Plexiglas, reducing warehouse capacity, expanding hours of operations, re-spacing registers, changing displays and aisle widths, directing traffic flow, updating cleaning and disinfecting practices, and promoting frequent and proper hygiene in addition to the mask policy and other actions.

[26] Although an unmasked third party may have entered the returns area of the respondent's store during the filmed interaction with the complainant, this appears to be an aberration caused by the confusion involving the interaction with the complainant, which interaction involved two managers being caught up in filmed discussions, rather than an inconsistent application of the policy. There is not a reasonable basis in the information before me that the respondent did not act in good faith in implementing and adopting its mask policy.

[27] Similarly, the respondent's accommodation option of a face shield instead of a mask was made in good faith. The complainant provided information about the comparative efficacy between face shields and masks, with face shields being less effective. In November 2020, there was considerable concern about spread of the virus through droplets, from which face shields offered some protection, even if that protection was limited. This option was clearly offered as a good faith accommodation alternative to

¹⁰ *Szeles* at para 13

provide an option for people with legitimate medical conditions that still offered protection to workers and customers, according to the respondent's understanding at the time.

[28] Third, even at the high screening threshold, it was impossible to accommodate the complainant without incurring undue hardship. This is the heart of this Complaint. I acknowledge that the respondent's alternatives to in person shopping did not completely address the complainant's needs. Here, there were services that could not be provided through the proposed accommodation, including an in person eye exam, and delivery of perishable items to a rural address. It is possible that a family member could have done the shopping for the complainant under his membership information without using his credit card and there was no information other than the complainant's bare assertion that he could not wear a face shield, but for the purposes of this decision, I assume that the proposed accommodation did not provide full access to the respondent's services.

[29] The question then is whether there is a reasonable basis in the evidence to proceed on whether it was an undue hardship for the respondent to permit an exception to its mask policy. I find there is not. The respondent had a duty to keep its employees and customers safe in the context of an evolving and uncertain global pandemic. The COVID-19 pandemic caused governments and businesses, including the respondent, to make extraordinary decisions that prioritized health and safety over some individual freedoms. Although these decisions negatively affected many individuals, including the complainant, that does not make them unreasonable. In *Pelletier v 1226309 Alberta Ltd. o/a Community Natural Foods* the Chief observed:¹¹

The fact that an accommodation that limits an individual's ability to peruse grocery products, as a trade-off to limiting the spread of a disease that has reportedly caused the death of 5 million people worldwide, does not mean that it is unreasonable. Further, Courts and Tribunals have recognized that accommodations need not be perfect, or be the complainant's preferred accommodation. Certainly, the duty on a service provider is to accommodate the needs of an individual to the point of undue hardship. However, the analysis must take all of the circumstances into account, and be applied with common sense. Here, the respondent was operating in an environment of a world-wide pandemic, with evolving science and health requirements, and attempting to address competing concerns. I cannot find a reasonable basis in the information to refer this complaint to a Tribunal, in order to test whether the respondent failed to accommodate the complainant. [emphasis added]

[30] When it comes to undue hardship, context is everything. In November 2020, the respondent operated enclosed retail warehouses in a global pandemic, there were spiking cases in Alberta, no available vaccine, and still only initial scientific study into the spread, treatment, and seriousness of the illness. November 16, 2020 was mere weeks before the Government of Alberta announced a four week lockdown, including cancellation of all Christmas gatherings because of the dangerous spread of COVID-19 in communities

¹¹ *Pelletier* at para 41

across Alberta. Many businesses, including the respondent, took additional measures to protect their staff and customers, and amended their policies as the pandemic progressed. The complainant argues that the respondent's policies were not in line with the municipal bylaw in effect at the time, which allowed for a medical exemption. However, nothing in the bylaw or public health measures prohibited the respondent from making reasonable policies to address the health and safety risks in the context of each business' operations.¹²

[31] It is clear from the records before me that the respondent considered objective science based evidence in light of its operations to ensure it complied with its occupational health and safety obligations. The respondent's operations involve indoor spaces where many people congregate. Even with the physical changes to the space and the respondent's reduced capacity, the information at that time suggested that permitting exceptions to the mask policy posed an undue safety risk to customers.

[32] To mitigate the restrictions of its mask policy, the respondent offered many options that would have assisted the complainant in accessing products. As outlined above, these were not perfect accommodation, particularly for the complainant, but there were numerous options to provide access to the respondent's services in the most flexible way possible in the context of the respondent's operations and the state of the pandemic in November 2020.

[33] Further, the changes to the respondent's mask policy over time do not make its stricter stance in November 2020 unreasonable. Prior to November 2020, the respondent permitted exceptions to its mask policy including where a customer presented a medical exemption certificate. That was in the early stages of the pandemic based on the information the respondent had and the municipal bylaw in place. By November 2020, the circumstances had changed. More information was known about how deadly the virus could be, and cases were spiking in Alberta. People were dying and there was little else to be done to prevent that besides lockdown or masking. Subsequently, with further information, including widespread community vaccination, the respondent relaxed its mask policy.

[34] The complainant suggests that widespread vaccination is irrelevant because a vaccinated person can still contract COVID-19 and spread it. While this is true, that does not make vaccination irrelevant in November 2020 or now. As the respondent pointed out, vaccination has a significant effect on the serious impacts of COVID-19, and can help reduce spread, even if it cannot eliminate it. Looking at the information that was available about COVID-19 in November 2020 and the overall context of the respondent's operations, there is no reasonable basis in the information to proceed. It was impossible to accommodate the complainant as he requested, to attend the respondent's warehouse in person while unmasked, without incurring undue hardship.

¹² See comments in *Szeles* at para 17

Not a Frivolous or Vexatious Complaint

[35] The respondent alleged that the Complaint is frivolous and vexatious. It cited references to the complainant's comments on podcasts and other media which it says showcases negative opinions about COVID-19 protocols and a motive in staging the interaction at the respondent's warehouse in Edmonton. The Director did not dismiss the matter on this ground, but considered the arguments and facts laid out by the parties about the circumstances. I too decline to dismiss the Complaint on this basis.

[36] Even if the interaction was contrived for media and/or a human rights complaint, there were legitimate interests at play. The complainant presented a medical exemption certificate from a physician, and provided reasons for wanting to access the respondent's services in person. While the discussion of mask exemptions has been difficult for those for and against masks, considering whether a prohibitive policy has gone too far in limiting the rights of a person with a disability is a valid use of the public's resources to determine human rights abuses.

Order

[37] There is no reasonable basis in the evidence to proceed to a hearing. I uphold the Director's decision to dismiss the Complaint.

REDACTED

April 5, 2022

Chief of the Commission and Tribunals

Written Submissions

David Dickson, Complainant
Self-represented

REDACTED
For Costco Wholesale Canada Ltd.