

Date Issued: September 21, 2016  
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Indexed as: Cameron v. Waterfall Skincare and another, 2016 BCHRT 138

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

**B E T W E E N:**

Joseph Cameron

**COMPLAINANT**

**A N D:**

Waterfall Skincare Inc. and Lorinda Zimmerman

**RESPONDENTS**

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**REASONS FOR DECISION**  
**APPLICATION TO DISMISS: Section 27(1)(c) and (d)(ii)**

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Tribunal Member:

Catherine McCreary

For the Complainant:

Matthew Scott

Counsel for the Respondents:

Derek Frenette

## I INTRODUCTION

[1] Joseph Cameron complains that his mental disability was a factor in the termination of his employment at Waterfall Skincare Inc. (“W Skincare”) contrary to s. 13 of the *Human Rights Code*. The respondent Lorinda Zimmerman is a director and representative of W Skincare, who participated in the management of the company.

[2] The respondents apply to dismiss the complaint against Ms. Zimmerman as not furthering the purposes of the *Code*. They also seek dismissal against Ms. Zimmerman due to no reasonable prospect of success of the complaint. Ms. Zimmerman does not seek to dismiss the complaint against W Skincare. Ms. Zimmerman claims that the complaint contains no reference to her as Mr. Cameron’s employer. She also claims that the complaint does not contain allegations as against her which relate to her conduct. She notes that Mr. Cameron makes allegations as against his “employer”, which was W Skincare, and says that Mr. Cameron equates the conduct of Ms. Zimmerman with that of W Skincare, the true employer.

[3] At the same time Mr. Cameron filed the complaint, he filed a document entitled “Initial Submissions.” This document contains many allegations of behaviour of the respondents which support of Mr. Cameron’s claim that the *Code* has been breached. I accept the material filed with the complaint as forming part of the complaint. I consider the allegations in the Initial Submissions attachment to be allegations in the complaint.

[4] While I do not refer to it all in my decision, I have considered all of the information filed by the parties in relation to this application to dismiss. This is not a complete recitation of the parties’ submissions, but only those necessary to come to my decision. I make no findings of fact.

## II BACKGROUND

[5] Mr. Cameron alleges, in the Initial Submissions, that he was hired by a person who is an investor in the business and who is also a director of W Skincare.

[6] The investor provided evidence that he knew Mr. Cameron before he was hired at W Skincare, and the investor agrees that he facilitated the hiring of Mr. Cameron by W

Skincare. The investor claims that Mr. Cameron was at all times an employee of W Skincare and claims that he was not employed by Ms. Zimmerman at any time. Further, the investor claims that at no time while Mr. Cameron was employed by W Skincare did he report directly to Ms. Zimmerman. The investor says that at all times, Mr. Cameron reported to another member of W Skincare's management.

[7] Mr. Cameron says that he mentioned to Ms. Zimmerman when he started his job that he suffered from post-traumatic stress disorder (PTSD) and anxiety. He also says that he told her and other staff at the clinic, that he was a recovering alcoholic.

[8] Mr. Cameron claims that at a client appreciation event in October 2014, Ms. Zimmerman encouraged him to drink, saying that he "can just have one glass."

[9] Mr. Cameron alleges that at a staff function in December 2014, he became extremely anxious and had alcoholic drinks. That night, Mr. Cameron was hospitalized and informed by doctors that he had triggered his PTSD due to stress and lack of sleep. He says that he was told by his attending physician that he needed to take time off work.

[10] Mr. Cameron says that his partner called his co-workers to inform them of what had happened, and asked them to let Ms. Zimmerman know that he was not able to attend work that day.

[11] Before lunch on that day, Mr. Cameron received a call from Ms. Zimmerman, stating "You have to come into work." Mr. Cameron says that he told Ms. Zimmerman that he was not mentally well, and was on "doctor's orders" to rest for at least a week, but that he would still like to return in by the next Wednesday. Mr. Cameron alleges that Ms. Zimmerman stated that if Mr. Cameron did not come into work that she would end his employment for the company.

[12] When Mr. Cameron returned to work five days later he says that he received a Skype message that he was to talk to his manager and Ms. Zimmerman by phone. Mr. Cameron informed them that his PTSD had been triggered by alcohol. Mr. Cameron says that in a phone conversation that day, Mr. Cameron's manager and Ms. Zimmerman reprimanded him for taking sick days, stated again that his employment was threatened, and informed him that they would be writing him up.

[13] Mr. Cameron says that he then became upset, and informed them that he would not allow them to write him up for a mental health issue, that he had already come into work sooner than was approved by his doctor. Mr. Cameron says that he told them that they were “violating his mental health rights”, that he’d “be contacting human rights because clearly you don’t know what my rights are”, and that “this is wrong”. Mr. Cameron says that after he made these statements, his manager and Ms. Zimmerman stated that they wouldn’t write him up but that this would be a “black mark” on his record.

[14] Mr. Cameron also alleges that in phone calls with Ms. Zimmerman in January 2014, she frequently changed Mr. Cameron’s work duties, and was frequently loud and abusive over the phone. He says that in a phone call with Ms. Zimmerman where Mr. Cameron had said that he can handle doing a work duty, Ms. Zimmerman screamed at him “I’m trying to cut down your stress.”

[15] Mr. Cameron alleges that he then contacted the investor who had originally hired him, and told him that the way that Ms. Zimmerman had been communicating with him was not appropriate, that it was affecting his mental health and that he had been speaking to a psychiatrist. Mr. Cameron says that the investor apologized to him and said that he would deal with it.

[16] Mr. Cameron claims that during this time, he was seeing a counsellor and psychiatrist, and his psychiatrist suggested that the next time Ms. Zimmerman behaved in a harassing or abusive way that he should go on “stress leave” and inform her immediately.

[17] Mr. Cameron says that the next month, Ms. Zimmerman called into the clinic and talked to Mr. Cameron and discussed what Mr. Cameron had been doing at work. He says that he responded to her by thanking her for acknowledging all the work he’d done that year, and told her that he really appreciated it and it was the validation he had been looking for. Mr. Cameron claims that Ms. Zimmerman responded by yelling “What! You guys are fucking adults! I’m so sick and tired of you kids nit picking if you cannot fucking do your jobs!”

[18] Mr. Cameron says that he replied:

Lorinda, I cannot handle the way you are communicating, it is not good for my mental health, I have PTSD. I have to go on stress leave. I have already been approved by my psychiatrist and I do not need to end up in the hospital again.

[19] Mr. Cameron says that Ms. Zimmerman responded by yelling "No you are not! You're finished, you are done, you are fired, I am coming down there!"

[20] Mr. Cameron says that he then called the investor, asking him what he wanted Mr. Cameron to do since he was the one that hired Mr. Cameron, and Mr. Cameron would not take any further abuse.

[21] Mr. Cameron says that the investor informed Mr. Cameron that he was sorry this was happening, and that he should check in the last client and go home. Mr. Cameron followed these instructions. Mr. Cameron says that he tried to call his manager that day but was unable to reach him. Mr. Cameron sent him a text message saying that he could not handle Ms. Zimmerman's communication and that he had to go home.

[22] The investor claims that Ms. Zimmerman is a member of W Skincare's management and acknowledges that W Skincare is bound by the actions and omissions of Ms. Zimmerman which are at issue in Mr. Cameron's complaint, as they were taken while she was acting in her capacity as a director and representative of W Skincare.

[23] The investor also says that he irrevocably acknowledges, on behalf of W Skincare, W Skincare's responsibility to satisfy any remedial orders which the BC Human Rights Tribunal might make in respect of Ms. Zimmerman's conduct in connection with the cessation of Mr. Cameron's employment with W Skincare. He also confirms that W Skincare is in good financial health and has the necessary means to satisfy any remedial order which the Tribunal might make in connection with the complaint.

### **III SECTION 27(1)(d)(ii) – DOES NOT FURTHER THE PURPOSES OF THE CODE**

[24] Under s. 27(1)(d)(ii) of the *Code*, the respondents seek dismissal of the complaint against Ms. Zimmerman as an individual respondent because the complaint against her is not in furtherance of the purposes of the *Code*. As noted above, the investor who is another director of W Skincare says that Ms. Zimmerman was acting on behalf of, and

within the scope of her capacity as director and representative of W Skincare. Further, he says that W Skincare agrees to be responsible for any compensation awarded because of Ms. Zimmerman's actions.

[25] The Tribunal's leading case regarding the advisability of proceeding with a complaint against an individual remains *Daley v. B.C. (Ministry of Health) and others*, 2006 BCHRT 341. The discussion in *Daley* begins with the liability of persons under the *Code* for the acts and omissions of their employees (and others) within the scope of their authority.

[26] In *Daley*, the Tribunal noted (at para. 48) that s. 44(2) of the *Code* "reinforces and gives statutory expression to the principles enunciated by the Supreme Court of Canada in *Robichaud v. Canada*, [1987] 2 S.C.R. 84." Section 44(2) provides:

An act or thing done or omitted by an employee, *officer, director, official or agent of any person* within the scope of his or her authority is deemed to be an act or thing done or omitted by that person. (Emphasis added)

[27] The Tribunal discussed the remedial purposes of the *Code* and the policy issues raised by the question of whether human rights complaints should proceed against individual respondents, including the policy rationales of naming individuals as respondents. (paras. 50-59) The factors set out (at paras. 60-62) in *Daley* are:

1. whether the complainant has named the corporate or institutional employer as a respondent, and that respondent has the capacity to fulfil any remedies that the Tribunal might order;
2. whether the institutional respondent has acknowledged the acts and omissions of the individual in question as its own, and has irrevocably acknowledged its responsibility to satisfy any remedial orders which the Tribunal might make in respect of that individual's conduct; and
3. the nature of the conduct alleged against the individual, including whether:
  - a. it was within the course their employment or whether there is any conduct alleged outside of the normal scope of their duties;
  - b. the person is alleged to have been the directing mind behind the discrimination alleged or to have had the ability to influence substantially the course of action taken; or

- c. whether it has a measure of individual culpability, such as an allegation of sexual harassment.

[28] The test in *Daley* requires that the respondent has the capacity to fulfil any remedies that the Tribunal might order. Here, W Skincare acknowledges that it would be responsible for any contravention of the *Code* by Ms. Zimmerman, if proven. W Skincare also acknowledges that it has the capacity to fulfill any remedies that the Tribunal might order if a finding were made that the complaint is justified against Ms. Zimmerman. W Skincare satisfies this requirement.

[29] Finally, *Daley* urges consideration of whether the nature of the conduct alleged against the individual there was outside of the normal scope of their duties, whether the individual respondents had the ability to influence substantially the course of action taken and/or whether the discrimination has a measure of individual culpability.

[30] In respect of the allegations against the Ms. Zimmerman, W Skincare has said that any acts or omissions committed by her was in the course of her role as a director and representative. Ms. Zimmerman's actions taken were in her role as director and representative of W Skincare.

[31] I note that Ms. Zimmerman does not make submissions on whether her alleged conduct does not include any significant measure of "individual culpability" as that term is explained in *Daley*. However, while s. 44(2) ensures that the remedial purposes of the *Code* are fulfilled by legislatively enshrining the principle of vicarious liability, it does not serve to absolve individuals who have engaged in discrimination in the course of their relationship from a finding that they, in addition to their principal, have engaged in discrimination contrary to the *Code*.

[32] Mr. Cameron claims that proceeding with the complaint against Ms. Zimmerman will further the purposes of the *Code* and therefore the Tribunal should not dismiss the complaints against her. Mr. Cameron argues that *Daley* suggests that factors that may support the retention of the claim against the individual respondent include where, as here, the individual respondent is alleged to be the directing mind behind an incident of discrimination, or has a degree of individual culpability in relation to the discrimination.

[33] He submits that Ms. Zimmerman was the primary individual responsible for the employer's conduct in relation to Mr. Cameron, and much of the discrimination alleged includes, beyond the simple fact of the dismissal, numerous threats related to Mr. Cameron's employment made by Ms. Zimmerman. Although W Skincare acknowledges responsibility for the acts and omissions of Ms. Zimmerman, and that it is in a financial position to satisfy any remedial provisions, these are not the only purposes recognized by the *Code*.

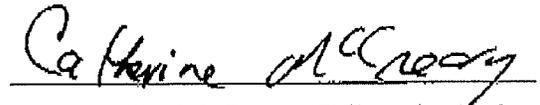
[34] Mr. Cameron points to *Kayne v Strata Plan LMS 2374*, 2004 BCHRT 62, para. 38, in pursuit of the purposes identified at s. 3(a) and (b) of the *Code*, it is important to ensure that those who are in positions where it is possible that their actions may be discriminatory have the opportunity to learn about their obligations under the *Code*, and to be held to account, even if only in declaratory terms, for individual actions taken both within and without the employment context. He also argues that the purposes of the *Code* are furthered by the continuance of the complaint against Ms. Zimmerman and that, in addition, the respondents have not fulfilled their burden to prove that the pursuit of this complaint will not further the purposes of the *Code*.

[35] After a review of the allegations against Ms. Zimmerman, I have concluded that, as a director, she falls within the provisions of s. 44 of the *Code*. Her co-director was aware of her actions and appears to have made it clear that she was acting on behalf of W Skincare. I consider that it does not further the purposes of the *Code* to continue with the complaint against Ms. Zimmerman in her personal capacity. Accordingly, the complaint against her is dismissed.

#### IV CONCLUSION

[36] The complaint against Ms. Zimmerman is dismissed as not being in furtherance of the purposes of the *Code*.

[37] The parties are encouraged to take advantage of the Tribunal's mediation services to try to resolve the remainder of the complaint. The Case Manager will be able to make those arrangements.

  
Catherine McCreary, Tribunal Member