Date Issued: October 27, 2023
Files: CS-001851

Indexed as: Gendron v. Koppert Canada Ltd., 2023 BCHRT 173

IN THE MATTER OF THE *HUMAN RIGHTS CODE,*
RSBC 1996, c. 210 (as amended)

AND IN THE MATTER of a complaint before
the British Columbia Human Rights Tribunal

BETWEEN:

Patricia Gendron

COMPLAINANT

AND:

Koppert Canada Ltd.

RESPONDENT

REASONS FOR DECISION
APPLICATION TO DISMISS A COMPLAINT
Sections 27(1)(c)

Tribunal Member:	Devyn Cousineau
Counsel for the Complainant:	Zoe Arghandewal
Counsel for the Respondent:	James D. Kondopulos and Sarah Blanco

I INTRODUCTION

[1] This is a decision about whether to dismiss Patricia Gendron's human rights complaint without a hearing.

[2] Ms. Koppert worked for Koppert Canada Ltd. as a technical consultant. Most of her work entailed driving to agricultural facilities throughout the Lower Mainland. In July 2019, she reported that she was feeling a "contact high" after spending time in a cannabis facility, and did not want to do a lot of driving in that condition. In response to that disclosure and some confusing information from Ms. Gendron's doctor, Koppert temporarily removed Ms. Gendron's driving duties and her company car. It offered her temporary work in the office and warehouse, pending a medical evaluation. From Ms. Gendron's perspective, this was a punitive response and unworkable. She took the position that she had been constructively dismissed and resigned from her employment.

[3] In this human rights complaint, Ms. Gendron alleges that Koppert's decisions to revoke her access to a company car and most of her job duties was discrimination based on a disability, in violation of s. 13 of the *Human Rights Code.* In response, Koppert says that there is no evidence that Ms. Gendron had a disability and, in any event, that the steps it took were part of a reasonable accommodation process. It asks the Tribunal to dismiss this complaint without a hearing on the bases that it does not set out facts that could contravene the *Code,* does not further the purposes of the *Code,* and has no reasonable prospect of success: *Code,* ss. 27(1)(b), (c), and (d)(ii).

[4] I can most efficiently address this application under s. 27(1)(c). The *Code* only governs situations where a person faces discrimination because of a protected characteristic. Here, Ms. Gendron seeks the protection of the *Code* based on a disability. However, based on the evidence before me in this application, Ms. Gendron has no reasonable prospect of proving that any symptoms she was feeling from exposure to cannabis stemmed from a disability. In this situation, her complaint has no reasonable prospect of success and is dismissed.

II BACKGROUND

[5] The following background is taken from the material filed by the parties. I have reviewed all that material, but only refer to what is necessary to make my decision. I make no findings of fact.

[6] Ms. Gendron began working for Koppert in January 2016. Her role was a "technical consultant". A small portion of her work was completed at home or in the office. Most of her time was spent conducting site visits to various client locations throughout the Lower Mainland. To facilitate this, Koppert provided her with a company car.

[7] By late 2016, about half of Koppert's clientele were cannabis producers. In her interview for the position, Ms. Gendron had advised that working with cannabis producers was one of the main reasons she was interested in the position. As her employment progressed, more of her work involved site visits to cannabis producers.

[8] Beginning in around June 2018, Ms. Gendron became the dedicated staff member for a large cannabis client. She attended the site two days a week for approximately ten hours a week.

[9] On June 13, 2019, Ms. Gendron emailed her employer to say that "for safety, physical, and also legal reasons", she would no longer be doing her office work after visiting the large cannabis client. She explained to Kevin Cullum, Koppert's National Sales/Technical Manager, that she was experiencing a "contact high" while working at the cannabis facility, which was affecting her ability to drive and do the office work afterwards. This was concerning to Mr. Cullum. In an email following their conversation, Mr. Cullum advised that "In order to ensure your safety, this leaves us no option other than to remove you from visiting any cannabis clients in your role at Koppert moving forward and effective immediately".

[10] Ms. Gendron responded to this news by email, calling Mr. Cullum's decision an "overreaction":

> To clarify, the issue I would like to address is doing physical tasks after my visits at [the cannabis client]. Whether it is the plants or the lights, I do feel differently when leaving site after being in the crop for 3+ hours.
>
> For the record, I have not had any issues personally with servicing [the cannabis client] despite feeling "off" when leaving site occasionally. My concern is mainly focused around the warning I was given from a police officer (doing a training exercise pulling everyone over) where after stating that I work in the cannabis industry he said that it was fine but I should have been on a direct route home and not make any unnecessary stops. Even if I was in an accident completely caused by someone else, it would not be a good impression to the law. [as written]

[11] On July 8, Mr. Cullum wrote to Ms. Gendron expressing that the company had "a concern that you may suffer from a medical condition" and making a "formal request for medical information". He asked Ms. Gendron to have her doctor fill out a questionnaire about whether she was able to "perform her full regular employment duties as a Technical Consultant – with or without accommodation".

[12] Ms. Gendron submitted the completed questionnaire to the company on July 30. In answer to a question about whether Ms. Gendron had any medical conditions preventing her from performing her full duties, the doctor wrote, "This is unknown at present". Then, in answer to a question about how her medical condition restricted or limited Ms. Gendron's ability to perform her job duties, the doctor responded, "she has difficulty in focussing and is unable to concentrate". The doctor wrote, "accommodation is advised", and recommended that Ms. Gendron "do her office work before her visit to cannabis facility" [as written].

[13] Mr. Cullum says that he found the information from Ms. Gendron's doctor to be "confusing, contradictory and wholly inadequate". By letter dated August 6, 2019, he told Ms. Gendron that the medical information was inadequate and that the company now had a "serious concern about your safety on the job as well as the safety of people around you when you are working, especially when you are operating a motor vehicle". He said they required additional information from a medical doctor about her "current and future ability to report to work and perform employment duties, your current and future medical restrictions and

limitations insofar as your job is concerned, and your prognosis and anticipated return to full regular employment duties (with or without reasonable accommodation)". He concluded:

> **Until we receive the necessary information from a medical doctor,** we intend to implement **<u>one</u>** of the following two measures on an interim basis – with your involvement and input:
>
> (1) You will perform productive employment duties at the warehouse and/or in the office – on a temporary basis and to the extent such duties are available. You will be provided with pay that is commensurate with the duties you perform. In light of the concerns emphasized by [your doctor], you will have to satisfy us that you are able to travel to and from work safely, e.g. by using public transit or taking a taxi cab. Until such time as you have been cleared to operate a motor vehicle, Koppert will require that your company vehicle remain at our offices and not be used by you for business or personal use.
>
> (2) You will be placed on an unpaid administrative leave of absence from work. [as written]

[14] Ms. Gendron responded on August 9. She addressed some of Mr. Cullum's concerns about the doctor's opinion and questioned why they did not follow up with the doctor if they had further questions. She said that neither of the proposed options were workable and protested the sudden removal of her source of income and only means of transportation. She proposed instead a third option, which was to be placed on a medical leave of absence from work.

[15] The company continued to pay Ms. Gendron's salary on a gratuitous basis until August 15, when it placed her on an unpaid administrative leave of absence.

[16] On August 16, Mr. Cullum explained that a medical leave was "simply not available without additional information". He asked again whether she would be interested in "option 1" – a temporary work assignment – to keep her financially whole until they were able to obtain the necessary medical information.

[17] Ms. Gendron did not respond to this email right away. On August 19, she updated Mr. Cullum that she had undertaken a number of medical tests "in regards to this situation", which

had not identified the issue. She advised she had an appointment with her doctor on September 6 to talk about some results. She concluded:

> I would also like to remind you both that I do have a past history of Cancer. The treatments and medications for this were quite aggressive and cause chronic damage to the parts of the body effected. This damage can manifest in a lifelong multitude of symptoms. There is a chance that this could take a very long time determining the cause for how I feel when spending long periods in Cannabis crops. In the event that there is nothing distinctly or diagnosably wrong with my health, what happens with my position with Koppert?

It is not clear whether the employer responded to this question.

[18] On August 23, after further prompting from Mr. Cullum, Ms. Gendron responded to the employer's proposal of temporary modified work. She had questions about what the nature of her job duties, schedule, and pay would be. Mr. Cullum explained that Koppert could offer her 25 hours per week and would, "on a gratuitous basis", maintain her at her hourly rate. Koppert would not provide her with a vehicle or transportation to and from work.

[19] On September 4, Ms. Gendron rejected that option, describing it as comprising reduced hours, reduced compensation (this was later corrected), reduced job security, reduced mobility, and with the added cost and time of traveling by cab or transit from Maple Ridge to Surrey. She proposed instead that she be permitted to return to the work portfolio she had before she had the cannabis clients, which she said were exclusively vegetable and ornamental growers.

[20] In response, Mr. Cullum said that the company was not prepared to modify her work as she had proposed "in the absence of clear and cogent medical information to support this modification". He said that, in light of the information that the company had at that time, "it would be reckless and irresponsible for Koppert Canada to have you return to your regular duties which involved driving a motor vehicle throughout a normal work day". He reiterated the option of a temporary modified work arrangement pending medical information. In his affidavit, Mr. McCullum disputes that Ms. Gendron ever worked for more than two or three months without any cannabis clients. He says that this option was no longer feasible in 2019, when cannabis was such a large part of the company's business.

[21] On September 18, Ms. Gendron submitted two notes from her doctor, both dated September 13, 2019. The first note said that Ms. Gendron "will be unfit for her normal work from today for 8 weeks". The second note said that Ms. Gendron "does not have any medical restrictions with her regular duties as a Technical Consultant" or "relating to her ability to operate a vehicle". The doctor clarified that any workplace restrictions were only relevant to Ms. Gendron's work with cannabis crops, and that she required "accommodation in the form of removing cannabis accounts from her job portfolio".

[22] On September 26, Mr. Cullum wrote Ms. Gendron a long email expressing that "the Company is… at a loss to understand and reconcile all of the medical information which has been provided to us". He pointed out information that he perceived as contradictory between the doctor's three written opinions, and questioned the basis of those opinions. He concluded that the efforts to return Ms. Gendron to work were being "frustrated" and "delayed needlessly" and suggested that Ms. Gendron attend an independent medical examination with a qualified occupational health physician to get to the bottom of it. In the interim, he proposed another modified work plan. He said that Ms. Gendron would have to arrange for transportation between facilities or locations "with a family member, friend or co-worker, [or] take public transit and/or use a taxi cab".

[23] Ms. Gendron did not respond to this. On November 7, 2019, she submitted a letter advising that she had been constructively dismissed and, as a result, was resigning her position. At that point, she had been on an unpaid administrative leave since August 15, 2019. She expressed her view that "Koppert has torn my livelihood apart because I raised a health issue I was facing". She described the health concern as "simple": "I believed I was experiencing some contact high which may have been affecting my driving abilities". She says she just wanted to have Koppert remove the cannabis clients from her portfolio until she could figure out what was going on. Instead, she said Koppert had removed her company vehicle, reduced her hours, and reduced her compensation. She resigned effective immediately.

[24] After this, Mr. Cullum and the company's counsel continued to extend to Ms. Gendron the offer to engage in the accommodation process, by having her work modified duties pending

an independent medical examination. Ms. Gendron has declined those offers. She filed this human rights complaint on August 13, 2020.

III DECISION

[25] Koppert Canada brings this application under ss. 27(1)(b), (c), and (d)(ii) of the *Code.* I find I can most efficiently address it under s. 27(1)(c).

[26] Section 27(1)(c) is part of the Tribunal's gate-keeping function. It allows the Tribunal to remove complaints which do not warrant the time and expense of a hearing. The onus is on Koppert to establish the basis for dismissal.

[27] The Tribunal does not make findings of fact under s. 27(1)(c). Instead, the Tribunal looks at the evidence to decide whether "there is no reasonable prospect that findings of fact that would support the complaint could be made on a balance of probabilities after a full hearing of the evidence": *Berezoutskaia v. British Columbia (Human Rights Tribunal)*, 2006 BCCA 95 at para. 22, leave to appeal ref'd [2006] SCCA No. 171.

[28] The Tribunal must base its decision on the materials filed by the parties, and not on speculation about what evidence may be filed at the hearing: *University of British Columbia v. Chan*, 2013 BCSC 942 at para. 77. This is important in this case, because the only evidence from Ms. Gendron consists of her communications with Koppert at the time of the events giving rise to the complaint. She has not submitted a statement or affidavit, or any further medical evidence about the condition that she says is a disability.

[29] At a hearing, the first thing that Ms. Gendron must prove is that she is protected from discrimination based on an actual or perceived disability: *Moore v. BC (Education),* 2012 SCC 61 at para. 33. It is only her disability-related needs that trigger Koppert's obligation to accommodate her.

[30] At the outset I acknowledge that, in her complaint, Ms. Gendron said she had a physical disability, and then, in her response to this application, she refers to "psychological symptoms".

Koppert objects to the response on the basis that it amends Ms. Gendron's complaint to add the ground of mental disability. In this application, I take a purposive approach to "disability" and do not find it helpful to focus on distinctions between a mental or physical disability – which can be illusory in any event.

[31] At this stage, Ms. Gendron is not required to prove that she has a disability within the meaning of the *Code*. Rather, the issue is whether there is no reasonable prospect that she will succeed at establishing that she has a disability at a hearing. The onus is on Koppert.

[32] The *Code* does not define what constitutes a disability. As with all terms in human rights legislation, it is interpreted liberally in a manner that best achieves the broad public purposes of the Code: *British Columbia Human Rights Tribunal v. Schrenk,* 2017 SCC 62 at para. 31. Generally speaking, the Tribunal considers the degree of impairment and functional limitation arising from the impairment, and the social, legislative or other response to that impairment or limitation: *Morris v. BC Rail,* 2003 BCHRT 14 at para. 214.

[33] Notwithstanding its broad and liberal interpretation, "disability" does not capture every medical problem. The Tribunal will consider factors such as "whether the condition entails a certain measure of severity, permanence and persistence": *Viswanathapuram v. Canadian Alliance of Physiotherapy Regulators,* 2017 BCHRT 29 at para. 40.

[34] In this case, Ms. Gendron describes her disability as a "mild contact high" triggered by exposure to cannabis. She says that, on days when she visited greenhouse blocks of flowering cannabis plants, she felt "a little different" and "off". She was worried that her symptoms could affect her ability to drive safely. The information from her doctor was that her medical condition was "unknown", and she told the employer that medical tests had not identified the issue. She speculated that the symptoms could be part of the long-term impacts of cancer treatments, but aside from this speculation, there is no evidence before me to support that is the case.

[35] Considering this evidence, there is no reasonable prospect that the Tribunal would conclude at a hearing that any effects Ms. Gendron were experiencing from exposure to

cannabis arose from a disability. In fact, there is no evidence capable of proving that it stemmed from any medical condition. In this situation, her complaint has no reasonable prospect of success.

[36] Though Ms. Gendron did not argue this, I have also considered whether the evidence could support a finding that Koppert perceived her to have a disability. I am satisfied that the evidence could not. Though Koppert sought information about whether Ms. Gendron had a "medical condition" impacting her ability to work, it was clear in its communications with her doctor that it did not have "any medical information at all" to support that she did. Its response to Ms. Gendron was triggered by her request for an accommodation and focused on what it considered unclear information about her symptoms. There is no evidence that Mr. Cullum or others perceived her to have a disability.

[37] In sum, based on the evidence before me, Ms. Gendron has no reasonable prospect of proving that, for the allegations in this complaint, she is protected from discrimination based on disability. Her human rights complaint cannot succeed and is dismissed.

[38] In reaching this conclusion, I am not suggesting that the situation was handled perfectly. I acknowledge Ms. Gendron's evidence that the employer's response to her disclosure caused her significant mental distress. Based on the written communication between the parties, which is not in dispute, it is possible that there were missed opportunities for dialogue and exploring solutions that addressed Ms. Gendron's concerns about the effects of cannabis facilities on her and the company's concerns about how that might affect her ability to drive safely, without impacting her employment and income so significantly. However, given my conclusion above, that is not an issue for this Tribunal.

IV CONCLUSION

[39] Ms. Gendron's complaint has no reasonable prospect of success. I grant the application and dismiss the complaint under s. 27(1)(c) of the *Code.*

Devyn Cousineau, Vice Chair