

Date Issued: October 22, 2021

File: 14965

Indexed as: Kirchmeier obo others v. University of British Columbia (No. 4), 2021 BCHRT 149

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:

Glynnis Kirchmeier -and- Glynnis Kirchmeier on behalf of others

COMPLAINANTS

AND:

University of British Columbia

RESPONDENT

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

Tribunal Member:

Devyn Cousineau

Counsel for the Complainant:

Clea Parfitt

Counsel for the Respondent:

Jennifer Devins and Michael Wagner

I INTRODUCTION

[1] Mr. M was a PhD student at the University of British Columbia [UBC]. He was the subject of numerous and escalating allegations about his conduct towards women, which ranged from disrespectful treatment, to roughhousing, to non-consensual touching, to sexual harassment, to sexual assault and rape. In January 2014, Glynnis Kirchmeier, a UBC alumna, emailed a UBC faculty member to raise concerns about Mr. M's misconduct. Throughout 2014, Ms. Kirchmeier and others spoke to various UBC faculty and staff about reports that Mr. M was harming women. In the fall of 2015, the university's Non-Academic Misconduct Committee concluded that Mr. M had violated the Student Code of Conduct by engaging in sexual assault, sexual harassment, intimidation, and demeaning and unwanted physically aggressive behaviour. In November 2015, UBC's President expelled him from the university.

[2] In March 2016, Ms. Kirchmeier filed this complaint of discrimination against UBC. She filed on her own behalf and on behalf of other female students who raised concerns with UBC about sexual misconduct at the university. In the early stages of the complaint process, the complaint was defined more precisely to concern two classes of women – those who raised concerns about Mr. M and those who raised concerns about other men – during a time frame between January 2014 and November 2015. In her complaint, Ms. Kirchmeier alleges that UBC's response to allegations of sexual misconduct during this period harmed women who brought forward concerns, in a manner that was connected to their sex. This, she says, was discrimination based on sex and a violation of s. 8 of the *Human Rights Code* [Code].

[3] In the time since events giving rise to this complaint, UBC has substantially reformed its policies and procedures for responding to allegations of sexual misconduct. Its current system is completely different than the system that is at issue in this complaint.

[4] In this application, UBC asks the Human Rights Tribunal [Tribunal] to dismiss Ms. Kirchmeier's complaint without a hearing: *Code*, s. 27(1). It argues that she has no reasonable prospect of proving that it discriminated against her or the class members she represents. It says that its response to the allegations about Mr. M was driven by the needs of the women

coming forward and that, ultimately, it acted diligently and expelled Mr. M. It says that the *Code* does not impose an obligation to provide a specific process for responding to allegations of discrimination and that Ms. Kirchmeier has no reasonable prospect of proving that sex was a factor in the university's response. Finally, it argues that it does not further the purposes of the *Code* to proceed with the complaint in circumstances where the impugned policies and procedures have already been replaced, and the issues raised in the complaint have been effectively remedied.

[5] This is not a decision about whether UBC violated the *Code*. It is an interim decision about whether this complaint warrants the time and expense of a hearing. For the reasons that follow, I find that it does. The application is denied.

[6] Before considering the substance of the application, I will address two preliminary issues: the names used in this decision, and UBC's objection to the scope of Ms. Kirchmeier's allegations.

II PRELIMINARY ISSUES

A. Names

[7] I have anonymized a number of names in this decision. Some relate to female students who have requested to remain anonymous in this proceeding. Given the subject matter of the complaint, and their role in it, I have no difficulty honouring that request.

[8] I have also anonymized the name of the male perpetrator who is alleged to have engaged in serious and escalating sexual misconduct giving rise to some of the events in this complaint. In this decision, I refer to him simply as "**Mr. M**". I do this because the allegations about his conduct are serious and he is not a party to, or otherwise represented, in this proceeding. My decision not to publish his name does not bind the Tribunal in respect of future published decisions in this proceeding.

B. Scope of allegations

[9] Respondents bring applications under s. 27 of the *Code* to dismiss all or some of the allegations set out in the complaint form. That complaint form establishes the scope of the complaint. A complainant who wishes to amend their complaint during an outstanding application to dismiss must make an application: Tribunal *Rules of Practice and Procedure [Rules]*, Rule 24(4)(b). The purpose of this rule is to ensure that a respondent who files an application to dismiss a complaint does not face a moving target: *Pausch v. School District No. 34 and others*, 2008 BCHRT 154 at paras. 28-29. Respondents are entitled to know the allegations against them to assess whether, or on what basis, to bring their application to dismiss the complaint: *Purdy v. Douglas College and others*, 2016 BCHRT 117 at paras. 35-37.

[10] At the same time, the Tribunal's forms are not the equivalent of pleadings in a civil litigation process: *White v. Nanaimo Daily News Group Inc. and Klaholz*, 2004 BCHRT 350 at para. 23. It is not uncommon, or a violation of the Rules, for a complainant to add new particulars of their complaint in response to an application to dismiss. The distinction between particulars and new allegations was well articulated in *Powell v. Morton*, 2005 BCHRT 282 at para. 20:

I must examine the complaint originally filed with the Tribunal, and the amendment which the complainant seeks to file, to determine whether, in substance, the amendment constitutes further and better particulars of the complaint. In making this determination, I must consider whether the amendment contains, on the one hand, further details of the facts on which the complainant intends to rely, or whether, on the other, it constitutes an expansion of the allegations made against the respondents. If the former, it will constitute particulars; if the latter, an amendment. This determination is not to be made in a narrow or technical way, but in a manner which will ensure that the parties are accorded procedural fairness, and that particulars are not used to expand a complaint beyond what can reasonably be said to have been alleged in it. Another way of looking at the questions is to ask whether the materials in issue come within the scope of the complaint filed with the Tribunal, or whether they seek to expand the scope of the complaint.

[11] UBC argues that, in her response to this application, Ms. Kirchmeier has improperly expanded the scope of her complaint to add new allegations of discrimination. It points to paragraphs in which Ms. Kirchmeier sets out facts related to: (1) allegations of sexual assault by Student E and Student B; (2) internal communications by UBC; (3) findings by an external investigator; (4) allegations by Caroline Grego; (5) the notice in which UBC restricted Mr. M's access to campus; (6) aspects of the process for addressing non-academic misconduct and the scope of allegations against Mr. M; and (7) arguments about issues which Ms. Kirchmeier says have not been resolved through UBC's new policies and procedures.

[12] I am satisfied that these paragraphs contain further and better particulars of this complaint and do not add new allegations of discrimination. Ms. Kirchmeier's original complaint is expansive in scope and challenges nearly all aspects of how UBC responded to women complaining of sexual misconduct during the relevant time. The impugned paragraphs provide more detail of those allegations, based in large part on disclosure that Ms. Kirchmeier has since obtained from UBC. They all relate to concerns that women were bringing forward about Mr. M, and how UBC responded to those concerns. This falls squarely within the broad scope of Ms. Kirchmeier's original complaint and does not unfairly create a moving target for UBC. I have considered all of Ms. Kirchmeier's materials in this decision.

III OVERVIEW AND ISSUES

[13] Mr. M was a PhD student in UBC's History Department from 2011 until 2015. For at least part of the time, he lived at Green College, a UBC residence primarily housing graduate students. Over the course of his time at UBC, Mr. M was the subject of numerous and escalating allegations about his conduct towards women, which ranged from disrespectful treatment, to roughhousing, to non-consensual touching, to sexual harassment, to sexual assault and rape. Ms. Kirchmeier first raised her concerns informally about Mr. M in January 2014 and others came forward throughout 2014 with their own allegations and concerns about his conduct.

[14] In 2015, UBC advanced the allegations of three women to the university's Non-Academic Misconduct Committee [**NAM Committee**]. Those women are Student C, Caitlin Cunningham, and Student E. Their allegations concern events in 2013 and 2014 as follows:

- a. **Student C** says that, in February 2013, she was sexually assaulted by Mr. M at Green College. Ms. Kirchmeier says that Student C reported this assault to Green College administrators in the summer of 2013, and in August 2013 another student reported that there had been a sexual assault in the College.
- b. **Ms. Cunningham** says, in April 2013, Mr. M repeatedly pulled her hair and refused to stop. He pulled her into a headlock. When he let her go, she slapped him in anger and frustration. As she walked away, he called her a 'prude'. Ms. Cunningham first reported this conduct to UBC in June or July 2014.
- c. **Student E** says that, in October 2013, Mr. M kissed her, put his hand up her shirt, and insistently tried to have sex with her over her objections. She says he attempted to have sex with her again in January 2014, and responded poorly when she rejected the advances. That night, she locked herself in her room in fear he would return. Student E reported her allegations to UBC in May 2014.

The NAM Committee concluded that Mr. M had engaged in sexual assault and harassment, as well as intimidating, demeaning, and unwanted physically aggressive behaviour. Based on these findings, UBC's President expelled Mr. M from the university.

[15] After Mr. M's expulsion, UBC retained an external investigator to review UBC's response to the allegations against Mr. M, and to "make findings regarding whether UBC followed its own relevant policies and processes in place at the time." The investigator issued her report, and a public Executive Summary, on February 15, 2016. She concluded that UBC had complied with its policies and acted in good faith, but that the university's system for responding to complaints of sexual misconduct was "flawed" and needed to change. After this report was issued, UBC underwent a significant process to review and reform its processes. The outcome

was a new sexual assault policy, and a new process for responding to reports of sexual misconduct.

[16] There are two aspects to Ms. Kirchmeier's complaint against UBC. The first is whether the university's response to the allegations against Mr. M discriminated against the women who had complained about his conduct, including Ms. Kirchmeier. In this aspect, Ms. Kirchmeier represents a class of women defined as:

any female student who at least once reported, disclosed or communicated to a faculty member or administrative staff member of UBC by any means, including telephone, fax, e-mail or in person in a formal, informal, scheduled or unscheduled interaction, a concern about the sexual misconduct of [Mr. M] towards women [**Mr. M Class**]

This issue sets the time frame for the complaint, which runs from January 8, 2014, when Ms. Kirchmeier first raised her concern about Mr. M with the university, until November 16, 2015, which was around when Mr. M was expelled from the university.

[17] The second aspect of the complaint is whether the university's policies and procedures for responding to sexual misconduct during the relevant time discriminated against women who raised concerns about sexual misconduct by a man other than Mr. M. In this aspect, Ms. Kirchmeier represents a class of women defined as:

any female student of UBC who at least once reported, disclosed or communicated to a faculty member or administrative staff member of UBC by any means, including telephone, fax, e-mail or in person in a formal, informal, scheduled or unscheduled interaction, a concern about sexual misconduct between January 8, 2014 and November 16, 2015 by a male studying or employed at UBC towards a female student enrolled at UBC [**General Class**]

The facts involving Mr. M form the basis for the first aspect of the complaint, but also are intended to illustrate the shortcomings of UBC's policies and procedures more broadly and, in that way, to substantiate the second aspect of the complaint.

[18] In order to succeed with these allegations at a hearing, Ms. Kirchmeier would have to prove that she and the class members were adversely impacted in connection with UBC's

services, and that their sex was a factor in that adverse impact: *Moore v. BC (Education)*, 2012 SCC 61 at para. 33. If she did that, then the burden would shift to UBC to justify the impact as *bona fide* and reasonably justified.

[19] As I have said, this is not a decision about whether Ms. Kirchmeier has proven discrimination. Rather, it is a preliminary decision about whether to dismiss Ms. Kirchmeier’s complaint without a hearing. The burden is on UBC to establish that her complaint does not merit the time and expense of a hearing: *Berezoutskaia v. British Columbia (Human Rights Tribunal)*, 2006 BCCA 95 at paras. 22-26. The issues I must determine are:

- a. whether Ms. Kirchmeier has no reasonable prospect of proving discrimination: *Code*, s. 27(1)(c). The threshold to advance a complaint to hearing is low, and simply requires that the allegations be taken “out of the realm of conjecture”: *Workers’ Compensation Appeal Tribunal v. Hill [Hill]*, 2011 BCCA 49 at para. 27.
- b. whether the issues underlying the complaint have been effectively remedied such that it would not further the purposes of the *Code* for the complaint to proceed: *Code*, s. 27(1)(d)(ii).

[20] With those issues in mind, I begin by setting out some – but not all – of the background giving rise to this complaint. This background is taken from the material filed by the parties. That material was extensive. In recognition of the interim nature of this decision, I have reviewed but not referred to all of it. I make no findings of fact.

IV BACKGROUND

[21] As I have said, the allegations concerning Mr. M create a factual foundation for the issues which Ms. Kirchmeier alleges are discriminatory. Those allegations concern events in 2014 and 2015, which I summarize chronologically in the sections that follow.

A. 2014

[22] Ms. Kirchmeier was a graduate student in UBC's History Department between 2011 and 2013. During that time, she says she observed Mr. M touching female students without their consent and in circumstances where they appeared uncomfortable. In around January 2014, now a UBC alumnus, Ms. Kirchmeier learned about Mr. M's assault on Ms. Cunningham. She says this caused her to be concerned that Mr. M's behaviour was escalating.

[23] On January 8, 2014, Ms. Kirchmeier emailed the Graduate Supervisor in History about "a sexual harassment issue in the department". She reported that Mr. M "makes a habit of aggressively 'flirting' and, more importantly, touching women without their consent while ignoring clear nonverbal cues to stop". She gave some examples of this behaviour going back to 2011. Two hours later, she wrote a second email asking to "rescind my allegations against [Mr. M] for now", in order to confirm that what she had reported was correct and to ensure she did not set in motion "any brute force formal action" at that point. In response, the Graduate Supervisor expressed alarm and agreed to schedule a meeting.

[24] At this point, Ms. Kirchmeier says that her expectation of UBC was simply that someone in authority within the History Department would tell Mr. M to conduct himself more professionally. This did not happen.

[25] The Graduate Supervisor reported Ms. Kirchmeier's concerns to the then-Department Head, who in turn referred her to Monica Kay, then the Director, Conflict Management in the Equity and Inclusion Office. Based on their conversation, the Graduate Supervisor told Ms. Kirchmeier that she should be talking to Ms. Kay, who could advise her of her options.

[26] Ms. Kay, and UBC's Equity and Inclusion Office, would play a central role in UBC's response to the complaints about Mr. M. At that time, this office was responsible for "heightening campus awareness of UBC's discrimination and harassment policies, and issues related to equity and inclusion, human rights, and intercultural understanding". It offered confidential advice and support to faculty, staff, and students who were experiencing difficulties with a human rights conflict. Under UBC's policy regarding "Discrimination and

Harassment” [Policy 3], a person could initiate a complaint about discrimination or harassment with the Equity and Inclusion Office. Among other things, the Office was then empowered to investigate and resolve complaints.

[27] Ms. Kirchmeier and Ms. Kay spoke on the phone on February 6. The two have different accounts of this conversation.

[28] Ms. Kirchmeier says that Ms. Kay told her that she could not act on Ms. Kirchmeier’s allegations against Mr. M because she was no longer a UBC student. Rather, she could only act if a current student brought a complaint. Ms. Kirchmeier says that Ms. Kay gave her information about formal and informal complaint processes and options, which she later learned was inaccurate. She says that Ms. Kay told her that the most she could do if Ms. Kirchmeier chose to complain was to talk to Mr. M about “professional norms”. She says that Ms. Kay “demanded total confidentiality” with respect to her allegations and warned her that sharing her allegations with others in the department would be like “putting a snake in a room and turning out the lights”. Ms. Kirchmeier says that she gave Ms. Kay the names of other students with relevant information but that Ms. Kay never followed up and talked to these students. Ms. Kirchmeier would later describe this conversation as a “boot out the door”.

[29] For its part, UBC says that Ms. Kay asked Ms. Kirchmeier if she would make a complaint, and that Ms. Kirchmeier said she would think about it. Ms. Kay denies telling Ms. Kirchmeier that UBC could not act on her information because she was not a current student but agrees that she said that there may be an issue with respect to the timeliness of some of her information. UBC agrees that Ms. Kay used a snake analogy to express concern about the risks of Ms. Kirchmeier sharing her allegations with others but says that this happened at a later meeting.

[30] The outcome of this first conversation, it seems, is that Ms. Kay recommended that the History Department arrange an education session about human rights and harassment. This took place in March 2014 and was mandatory for all graduate students. Mr. M attended.

[31] In February 2014, Mr. M was granted a leave from Green College for academic purposes from May 2014 to September 2015. He left around May 5, returned briefly from May 20-23, and was absent from campus thereafter.

[32] On May 1, Student E reported her experience with Mr. M to Clark Lundeen, the Assistant Principal of Green College. Mr. Lundeen says that she did not disclose an assault at that time, but “said that she had to repeatedly tell [Mr. M] that she did not want to have sex with him”. He understood that Student E “was only seeking support and did not seek to engage any formal complaint process”. In response, Mr. Lundeen noted that Mr. M was out of the country for an extended period and in those circumstances “there’s no direct action with him we can take to remedy this, short of being vigilant when he returns”. He proposed a mediated meeting with Mr. M, but Student E was not interested in this option. His understanding is that Student E “favoured a more general educational approach emphasizing the importance of consent”. Mr. Lundeen says this was the first he had heard of Mr. M engaging in inappropriate sexual conduct.

[33] In May 2014, Mr. M attended a conference in Toronto, as a representative of UBC. There, Student B says he sexually assaulted her while she was intoxicated and sleeping.

[34] A friend of Student B reported this assault to Mr. Lundeen, who in turn contacted Ms. Kay and Steve Bohnen at Campus Security. At that time, Mr. Lundeen also told Mr. Bohnen about Student E’s allegations. In his notes of their communications, Mr. Bohnen records that Mr. Lundeen expressed “concern about the possibility of [Mr. M] continuing a pattern of victimizing female students”.

[35] On June 12, Mr. Lundeen followed up again with Student E about her experience. He said, “[t]hough I can’t investigate further with him, what you described to me... still suggests to me that Campus Security ought to know about it”. He asked if Student E would be willing to file a report with Campus Security. In response, Student E said, “I’m willing to do whatever might help to keep others safe”. She asked how to file a report. If Mr. Lundeen replied, that reply is

not before me. His next email in this chain is dated February 26, 2015. Mr. Lundeen says that he understood that Student E had contacted Mr. Bohnen directly.

[36] It appears that, at this point, the status of the allegations against Mr. M was that Campus Security had an “information-only file”, which included Student E’s allegations of a sexual assault in February 2013 and Student B’s allegations of sexual assault in May 2014. Ultimately, there was no action taken on Student E’s complaint until about nine months later, in March 2015.

[37] In June, Mr. Lundeen also spoke to Chad Hyson, the Student Conduct Manager, about the concerns being raised about Mr. M. In his role, Mr. Hyson was responsible for investigating complaints of conduct violating UBC’s Student Code of Conduct. The information he gathered could then be used in the university’s process for addressing “non-academic misconduct”.

[38] I pause here to briefly describe the non-academic misconduct, or “NAM”, process. All Students at UBC are required to comply with standards of conduct set out in the Student Code of Conduct. Among the types of conduct explicitly prohibited are physically aggressive conduct, assault and harassment, and unwelcome or persistent conduct that a student knows, or ought to reasonably know, would cause another person to feel demeaned, intimidated, or harassed. The Code of Conduct sets out various options to resolve complaints of misconduct, including informal resolutions and hearings before the NAM Committee. At the time of the events giving rise to this complaint, allegations of sexual misconduct were resolved through the NAM process.

[39] Complaints of non-academic misconduct are investigated by the university’s Student Conduct Manager. Where a complaint is being referred to the NAM Committee, the Student Conduct Manager puts together a “Statement of Allegations” against the student. This statement, along with any supporting evidence and a list of recommended witnesses, is then forwarded to the NAM Committee for investigation.

[40] The NAM Committee is comprised of a Chair and student committee members. The only person with ‘party’ status in the proceeding is the student against whom the allegations are

made. Other people, including those who brought forward the allegations, are witnesses. The Committee investigates the allegations and reports its findings to the President of UBC. The President decides what discipline, if any, should be imposed. Discipline includes measures up to and including expulsion from the university.

[41] Returning to the narrative, Mr. Hyson says that this was the first he learned of concerns about Mr. M. He told Mr. Lundeen that there would need to be an investigation and an opportunity for Mr. M to respond. It seems he did not do anything further about Mr. M until February 2015.

[42] In July, Mr. Lundeen asked Ms. Kay for an update about UBC's process against Mr. M and was told that none of the women had made a formal complaint.

[43] On July 16, Ms. Cunningham reported her assault by Mr. M to a history professor. Her report was then forwarded to the History Department Chair, Tina Loo. On July 22, Ms. Cunningham and other graduate students emailed Ms. Loo directly about Mr. M's sexually aggressive behaviour and their feelings of discomfort and lack of safety. They asked:

We intend to piece together a larger narrative about our individual experiences within the department and with [Mr. M]; how would this information be most useful to you in pursuing this matter? Do you need individual documentation? Via email or in person? More broadly, what can we do to help resolve this unsettling issue in our department, and contribute to the safety of our faculty, grad students, and the undergraduate students we TA?

Ms. Loo responded that she would talk to Ms. Kay about their questions and to "ascertain how to proceed". Two days later, she reported that she had met with Ms. Kay, who was in turn working with other agencies on campus to address the issue. She proposed a meeting.

[44] On July 28, a graduate student told UBC's Office for the Ombudsperson that Mr. M had sexually assaulted someone. Though he did not identify her, this report concerned Student B. Three days later, he told Ms. Loo the same thing, without disclosing the names of the persons

involved. He would eventually disclose the identities of both Mr. M and Student B in an email to Ms. Loo on April 23, 2015.

[45] On July 31, Ms. Loo and Ms. Kay met with Ms. Kirchmeier, Ms. Cunningham, and other women from the History Department. Ms. Cunningham was asked to describe her assault by Mr. M. She says that this request was made without warning and was invasive of her privacy. She says that Ms. Kay encouraged her to make a complaint but again warned the women not to talk about their allegations lest other people in the department become alarmed. At the conclusion of the meeting, Ms. Kirchmeier says that she understood Ms. Kay was investigating the allegations and would contact her for further information. In fact, Ms. Kay and Ms. Loo later said they did not consider this meeting to constitute a 'report' of Ms. Cunningham's allegations so as to trigger a response by the university. Ms. Cunningham and Ms. Kirchmeier say that this damaged their trust in the process.

[46] Ms. Loo says that the meeting was "intended to be confidential and aimed at informing students about process and listening to their concerns". She says that Ms. Kay told the women that the discussion did not "constitute the start of a complaint process" and explained the difference between formal and informal complaints. She says that Ms. Kay encouraged the students to "pursue complaints of some sort regarding [Mr. M's] conduct rather than repeat rumours." On this point, UBC agrees that Ms. Kay said words to the effect that if the students told people about Mr. M it would be like telling them "there was a snake in the room and turning out the lights". This was intended to caution the students "against making serious allegations of [Mr. M] being a perpetrator of sexual assaults when those assaults were still unsubstantiated and intended to convey the fear those allegations could cause". Ms. Loo told the women she would address issues of discrimination and harassment at the first department meeting of the new school year.

[47] In spring or summer 2014, Ms. Kirchmeier says that certain professors were told not to speak to graduate students about Mr. M because the university had an active complaint proceeding against him.

[48] In the meantime, UBC was aware that women were concerned about Mr. M. In an August 29 email exchange, Ms. Kay noted that “other women are still expressing concern and discomfort with his behaviour and fear of his being unexpectedly on campus”. From her perspective, however, there was still no formal or informal complaint about his behaviour so as to trigger an official response.

[49] The first History Department meeting of the school year was on September 11. Ms. Loo reminded everyone of UBC’s bullying and harassment policies. She followed this with an email regarding Policy 3. There was also some effort to design and deliver a mandatory workshop regarding sexual violence and harassment. That workshop did not proceed. Ms. Loo says that the students did not “follow through” with the workshop. Ms. Kirchmeier suggests that it was Ms. Loo who failed to deliver this workshop.

[50] On December 4, Ms. Cunningham spoke to Ms. Kay about her allegations against Mr. M. UBC says that it was unclear whether Ms. Cunningham intended to file an informal or formal complaint at the time. Ms. Kirchmeier says this was an “official report”, and it appears that was the view later taken by the investigator. Ms. Cunningham says that this conversation formed the basis of a statement later written by Ms. Kay about her allegations, which she describes as inaccurate.

[51] On December 8, Ms. Kay wrote a memorandum in which she describes Mr. M’s behaviour as “sexually inappropriate and aggressive”. She describes the women who were bringing forward allegations, including Ms. Cunningham and Ms. Kirchmeier, as follows:

... angry, aggressively attacking UBC, and asking what UBC is doing to protect them, both if charges are brought and charges are not brought. One has now FINALLY brought me a complaint, but my process is informal: she clearly wants him punished, and needs a formal process, but complains along with her colleagues that the formal process is intimidating and humiliating ... [s]he is clearly using her complaint to ‘test drive’ UBC and critique our response, and could very likely go to the media. She is being fuelled by a male faculty member.

[52] On December 11, Ms. Kirchmeier contacted Ms. Kay to add her information to Ms. Cunningham's complaint. At this point, there was confusion about Ms. Kirchmeier's role. UBC says that Ms. Kirchmeier indicated that she "might bring her own complaint or might be a witness in Ms. Cunningham's complaint". Ms. Kirchmeier understood that she was a "co-complainant" along with Ms. Cunningham.

[53] Ms. Kirchmeier later received a copy of Ms. Kay's notes of their meeting. She says they are inaccurate and misleading, and falsely record that she was motivated by revenge. In that regard, Ms. Kay made a note that, "the intent is to punish / Versus the intention to prevent and protect the complainant". Ms. Kirchmeier says this further damaged her confidence in UBC's response.

[54] On December 18, Ms. Kay told Mr. Hyson that Ms. Cunningham wanted to file a complaint against Mr. M and engage the NAM process.

[55] On December 23, Ms. Cunningham and Ms. Kirchmeier spoke to Ms. Kay about the next steps in the process. The women said that they wanted to be directly involved in the next meetings, and to be advised before Mr. M was told about the complaint. They say neither of these two requests were respected. Ms. Kirchmeier says that this was the last contact she had with UBC about her complaint until she reached out to Mr. Hyson and Ms. Loo five months later, on May 12, 2015.

B. 2015

[56] On February 16, 2015, Ms. Kay provided Mr. Hyson with her materials regarding Ms. Cunningham's complaint, as well as Ms. Kirchmeier's statements. This was two and a half months after Ms. Cunningham had filed her complaint – a delay which the investigator would later find unnecessary.

[57] The next day, Mr. Hyson met with Ms. Cunningham and others. In that meeting, Mr. Hyson says that Ms. Cunningham indicated that she wished to pursue the NAM process. Ms. Cunningham says that she was told the hearing route was "really difficult" and that she could

mediate instead. Mr. Hyson agrees that he would have told Ms. Cunningham that, if she did not wish to proceed with a hearing, there were other avenues available.

[58] In a later email, Mr. Hyson said that at this point “it was believed that [Mr. M’s] conduct towards women may not be limited to the History Department and there was a belief that there were more serious allegations regarding his conduct and that others may come forward if they were aware that a process was underway”. He says that, because Mr. M was still out of the country, they agreed to “take the rest of the term to see what other reports might come forward”.

[59] The NAM process was formally initiated on March 3, 2015, in response to the complaints of Ms. Cunningham and Student E. That day, Mr. Hyson introduced himself to Student E. This was ten months after she had first reported her sexual assault.

[60] In March 2015, the History Graduate Students Association [**HGSA**] proposed to present a “Statement Concerning Harassment” at a departmental meeting. After reviewing the proposed statement, the Department Chair expressed concern that some of its contents were “inflammatory” and “defamatory”. The HGSA revised the Statement but Ms. Kirchmeier says that they were still not permitted to present it. UBC does not address whether it would have permitted the HGSA to present the revised statement. Ultimately, the HGSA boycotted the department meeting and held its own Faculty-Student Forum on Harassment. Ms. Loo attended the meeting and says that the History Department complied with “every request made by the students at the Forum”.

[61] In April 2015, Mr. M was scheduled to attend another conference in Ottawa on behalf of UBC. There was also a prospect that he would apply for a job at another university. A graduate student emailed Mr. Hyson and others to express concern about both of these issues in light of allegations against Mr. M, including another sexual assault allegation from a different woman, Student G. Regarding the upcoming conference, the student emphasised: **“I repeat: I FEAR FOR THE SAFETY OF MY FRIEND AND OTHER UBC STUDENTS AT THE UPCOMING CONFERENCE AND I URGE UBC TO ACT WITH ALL HASTE ON THIS ISSUE”** [emphasis in original]. This was not

the only email that UBC administrators got at this time which raised alarms and repeated serious allegations about Mr. M's conduct.

[62] Also in April, Ms. Loo and others had learned that Mr. M was planning to return to campus. Ms. Loo expressed that "the time has come for a collective conversation with all the people involved in this case so we can ensure the safety of our respective communities without violating [Mr. M's] due process rights or confidentiality". At the same time, Mr. Lundeen was emailing Mr. Hyson about whether Green College should be retracting its contract with Mr. M. This was the subject of ongoing internal discussion.

[63] On April 30, in response to Student E's complaint made one year earlier, UBC issued Mr. M a "Notice of Restriction" under UBC Policy 14 – Response to At-Risk Behaviour. The notice prohibited him from being on the Vancouver campus, including Green College. Mr. M was advised that the allegations of Student E had been referred to the NAM process. Ms. Kirchmeier says that other students were not made aware of the notice, and that Mr. M continued to attend conferences outside the country as a UBC student.

[64] On May 12, 114 current and former Green College residents signed a statement calling on the Green College administrators to take steps to address alleged harassment and sexual assault at the residence. This statement was given in draft to Green College administrators and then finalized on May 14.

[65] Also in May, Student C contacted Mr. Hyson to disclose that she had been assaulted by Mr. M in February 2013.

[66] On May 15, Mr. Hyson informed Student B that her allegations would not be included in the NAM process because the assault had occurred off campus, in Toronto.

[67] In May and June, Mr. Hyson exchanged emails with Ms. Kirchmeier about the status of her complaints. Mr. Hyson said that he was not clear, after their meeting in February, whether Ms. Kirchmeier was bringing a separate complaint against Mr. M or simply supporting Ms. Cunningham in her complaint. Ms. Kirchmeier described this lack of clarity as "frankly

shocking”. She understood that she was a co-complainant with Ms. Cunningham. She asked what process the university had for responding to the allegations that she and Ms. Cunningham had brought forward and expressed concern that she still did not know the answer to that question. Mr. Hyson responded to Ms. Kirchmeier’s concerns and set out some information about the NAM process. He advised he would be consulting with University Counsel about whether to include Ms. Kirchmeier’s allegations as part of the NAM process, and that he would notify her of the result.

[68] In July, Mr. Hyson wrote to Ms. Kirchmeier, Ms. Cunningham, and Student E about the prospect of engaging in an informal resolution process with Mr. M. He explains that he did this to “ensure they were aware that this continued to be an option available to them if they did not wish to proceed with a hearing” and that it may have achieved the same outcome, namely Mr. M not returning to UBC. None of the women were interested in that option, and Mr. Hyson did not raise it again.

[69] On August 5, Student C submitted a formal statement alleging that Mr. M had sexually assaulted her. This was the third and final complaint included in the NAM proceedings against Mr. M.

[70] Shortly after, Mr. Hyson forwarded the university’s Statement of Allegations against Mr. M to the NAM Committee Chair. That Statement set out the allegations of Student C, Student E and Ms. Cunningham. It excluded the allegations of Student B, on the basis that the conduct had occurred outside BC. It excluded Ms. Kirchmeier’s allegations on the basis that they were less serious and could be used by Mr. M to cast doubt on the “more serious, first-hand allegations” raised by the other three women. Ms. Kirchmeier objected to her information being excluded and requested contact information for the Chair of the Committee.

[71] Though Ms. Kirchmeier’s allegations were not being included in the NAM process, Mr. Hyson offered to talk to Mr. M about the concerns she had raised. From Ms. Kirchmeier’s perspective, this was no longer an appropriate solution.

C. NAM Committee

[72] In September 2015, Ms. Kirchmeier contacted the Chair of the NAM Committee directly to urge him to consider her allegations against Mr. M as evidence of a pattern of escalating misconduct dating back to 2011. She explained, “I am writing because I previously complained about [Mr. M’s] conduct in January 2014 and I feel that my information helps to establish that he has a longstanding pattern of behaviour which informs the more serious incidents which are included in the Statement of Allegations”. She set out her observations that Mr. M had engaged in “constant unwanted touching”, “aggressive” and “boundary-pushing flirtation” and that his reputation was that he did not engage with other female colleagues except to flirt with them.

[73] The Chair declined to forward Ms. Kirchmeier’s information to the Committee, on the basis that she had not personally witnessed any of the events giving rise to the complaints of Student C, Student E, and Ms. Cunningham, and was never directly assaulted or harmed by Mr. M. He later elaborated that “the Committee would not be able to base any findings on the information you wish to provide, as it does not address the specific misconduct that is before the Committee, and it relates to an allegation that has not been made and to which [Mr. M] has not been given the opportunity to respond”.

[74] The NAM Committee was comprised of the Chair and three undergraduate students. On September 30, committee members received training “to assist them in dealing with sexual assault allegations”.

[75] The NAM Committee held its hearing on October 19 and 22, 2015.

[76] Ms. Cunningham attended the hearing as a witness. Prior to the hearing, she says that the Chair denied her request to have a UBC counsellor present. On the day of the hearing, she was invited to make a statement. In an email written after the hearing, Ms. Cunningham says that she was in the hearing room for “less than 5 minutes” and could not get comfortable during that time frame, especially considering “the experience levels of the people before me”. She says that she received no forewarning that she would have the opportunity to make a statement and, as such, was not properly prepared to express why she was afraid of Mr. M.

[77] The NAM Committee ultimately concluded that the allegations against Mr. M were substantiated. Specifically, it found that Mr. M had sexually assaulted Student B and Student E, sexually harassed Student E, intimidated and demeaned Student E, and engaged in “unwanted physically aggressive behaviour with Ms. Cunningham”. The Committee concluded that the incidents “demonstrate a pattern of concerning behaviour”. The report was forwarded to the UBC President.

[78] On November 19, 2015, UBC’s President wrote to Mr. M to inform him that he was expelled from UBC as a result of his misconduct and was permanently barred from reapplying for admission to the university.

D. UBC response: external investigator and policy reforms

[79] Around this same time, CBC’s Fifth Estate aired a program about sexual assault and harassment on university campuses, and featured the story of women coming forward at UBC to raise concerns about Mr. M. On November 21, UBC’s President issued a response to the program, which forecast the university’s actions over the following months:

... I want to apologize to the women in these cases who feel they have been let down by our university. While the university had to wait until it had the necessary facts to take action, I acknowledge that the process took too long. Due process can be frustrating and time-consuming. However, the university reached an appropriate conclusion. As an institution, we are committed to justice for the survivors of sexual assault.

I appreciate the light the women have shone on this issue, and I want to make a pledge. We will begin a discussion with our students, faculty and staff on a separate sexual assault policy that will enable the university to take action in a more timely and effective manner.

We will be reviewing the steps that were taken in these cases to determine how they might have been handled more effectively and expeditiously. As an institution, we are constantly looking at ways to improve our processes to make them more responsive and effective ...

[80] The next month, UBC retained an external investigator to review UBC’s response to the allegations against Mr. M, and to “make findings regarding whether UBC followed its own

relevant policies and processes in place at the time.” The investigator issued her report, and a public Executive Summary, on February 15, 2016.

[81] The investigator concluded that UBC had complied with Policy 3, the Student Code of Conduct, and the Rules for the NAM Committee, and that staff had acted in good faith. However, she also found that the process for reporting sexual harassment or sexual assault was “unclear for the women and even for some staff”. She found that lack of clarity stemmed in part from an unfamiliarity with Policy 3 and in part from the policy itself. She described it as a “flawed system”. She noted that it was “not optimal for one complainant to have to tell [their] story to four or five different people, and to have been asked on numerous occasions if [they] want to go through a resolution process, all of which happened in this case”. She further noted that there were delays in the handling of the complaints which flowed from both human error and the absence of clear timelines in the policies. Finally, she noted other issues of concern including a reticence by one administrator to investigate Mr. M; the conclusion that Student B’s allegation fell outside UBC’s jurisdiction; and the experience of some women that made them feel “silenced” during the process. The investigator concluded: “the system of handling sexual assault complaints needs to change”.

[82] Others were making the same call. In an open letter dated January 6, 2016, a number of UBC faculty took the position that “it is clear that there are serious problems with UBC’s sexual assault policies and procedures”.

[83] By this time, UBC had already struck a Sexual Assault Policy Committee to develop a new sexual assault policy. In February 2016, UBC published a Sexual Assault Response and Support Protocol to “explain current UBC practices and procedures regarding sexual harassment and assault pending a broader review and revision of policies”. At the same time, it established a University Panel on Sexual Assault to make recommendations for UBC’s policy and practice.

[84] In April 2016, the government passed the *Sexual Violence and Misconduct Policy Act*, requiring post-secondary institutions to institute sexual misconduct policies.

[85] In June 2016, the Sexual Assault Panel issued its report. That same month, a draft of Policy 131: Sexual Assault [**Policy 131**] was presented to UBC's Board of Governors. Members of the public were invited to provide comments and feedback on Policy 131. UBC convened another Steering Committee to assist in reviewing Policy 131 and making further recommendations. Policy 131 was substantially revised in response to the feedback collected in this process.

[86] Policy 131 was approved and came into effect on May 18, 2017. Among other things, the Policy affirms UBC's commitment to "countering rape culture", reducing barriers to disclosing and reporting, taking a trauma-informed approach to responding to disclosures and reports, and providing support services to people who disclose or report sexual misconduct. It permits anonymous and third-party complaints.

[87] UBC also established a Sexual Violence Prevention and Response Office to act "as a single point of contact and liaison for UBC students, faculty and staff who have experienced sexual assault, sexual harassment, or any other form of sexual violence." It has contracted with a counselling service to provide interim support to people who have experienced sexual violence. Finally, it has hired a Director of Investigations to oversee investigations under Policy 3 and Policy 131.

[88] As a result of these efforts, UBC's current system for responding to sexual misconduct is completely different than the system in place throughout 2014 and 2015. In many ways, the changes are directly responsive to the concerns raised by Ms. Kirchmeier and others, and reflect the types of remedies that Ms. Kirchmeier envisioned when she first filed her complaint of discrimination in March 2016.

V ANALYSIS AND DECISION

[89] Ms. Kirchmeier alleges that UBC discriminated against her and other women who were raising concerns about Mr. M throughout 2014 and 2015. She argues that the university's response to those concerns was slow, confusing, silencing, and caused harm to the women

involved. She says that their sex was a factor in this harm for a number of reasons, including because women are disproportionately impacted by sexual misconduct in general and Mr. M's conduct specifically, such that their sex is the reason they had to engage with UBC's system in the first place. Ms. Kirchmeier does not directly address the General Class in her materials, based on her mistaken understanding that UBC was only applying to dismiss the allegations involving Mr. M. However, based on her complaint I understand that her allegations about the General Class are of a similar nature.

[90] UBC argues that the evidence establishes that it did not discriminate. It says that the women controlled the process at all times, and the pace of its response was determined by the timeline on which women chose to advance formal complaints, and Mr. M's absence from the country for a significant period. It says that once the students engaged the NAM process, it acted diligently and ultimately expelled Mr. M from the university. It says that, while Mr. M was absent from campus, it was justified in focusing on supporting survivors rather than managing the risk of further incidents. Regardless, however, it says that Ms. Kirchmeier has no reasonable prospect of establishing discrimination in respect of its internal policies and procedures and/or that sex was a factor in any harm the women may have experienced.

[91] As I have said, this is not a decision about whether UBC has discriminated. It is **only** a decision about whether to advance the complaint to a hearing. The issues I must resolve are:

- a. whether Ms. Kirchmeier has no reasonable prospect of proving discrimination;
and
- b. whether the issues underlying the complaint have been effectively remedied such that it would not further the purposes of the *Code* for the complaint to proceed.

I consider each in turn.

A. No reasonable prospect of success

[92] Section 27(1)(c) grants the Tribunal discretion to dismiss complaints that have no reasonable prospect of success. Under this provision, the Tribunal assesses the evidence to determine whether there is no reasonable prospect the complaint could succeed. The burden is on UBC to establish the basis for dismissal; Ms. Kirchmeier need only take her complaint out of the “realm of conjecture”: *Hill* at para. 27.

[93] To prove her claim of discrimination at a hearing, Ms. Kirchmeier must establish that she and the class members were adversely impacted in connection with a service customarily offered by UBC, and that their sex was a factor in that adverse impact: *Moore* at para. 33. If she does that, then the burden would shift to UBC to justify the adverse impact.

[94] UBC makes two arguments. First, it argues that Ms. Kirchmeier has no reasonable prospect of proving discrimination by simply challenging the university’s policies and procedures. Second, it argues that Ms. Kirchmeier has no reasonable prospect of connecting any adverse impact to sex.

1. *Discrimination in a complaint process*

[95] UBC argues that the complaint cannot succeed because the *Code* does not impose an obligation for a service provider to have in place “any particular process for ensuring that sexual harassment does not occur or for addressing or remedying harassment if it does occur”. It relies on *Rojas v. EaglePicher Energy Products Corp*, 2006 BCHRT 450 and *Maughan v. University of British Columbia*, 2006 BCHRT 33 to argue that “so long as an organization’s internal processes are not, in themselves, discriminatory... the *Code* does not require any particular form of process or policy”.

[96] As a general principle, this is not controversial. The *Code* does not regulate all aspects of a service provider’s operations. It does not guarantee particular procedures, outcomes, or even fair treatment generally. Its protections are **only** triggered in respect of allegations of

discrimination: that is, where a person experiences an adverse impact, in an area of daily life protected by the *Code*, that is connected to a personal characteristic protected by the *Code*.

[97] In this case, UBC agrees that it is a service provider which is obliged by the *Code* to provide a “safe, harassment-free educational environment”. It does not make any specific submissions about the scope of its services in this case, and who they are intended for. For the purpose of this decision, I will adopt the description of the more specific service which was set out by the Tribunal in a very similar case, namely:

... enforcing its policies for providing a safe and harassment free education environment by investigating complaints and disciplining as appropriate those who violate such policies.

Hale v. University of British Columbia Okanagan (No. 2), 2019 BCHRT 23 at para. 47, upheld in 2021 BCSC 729 (see para. 104, in which UBC Okanagan acknowledged that it offers this service to students).

[98] The issue in this complaint is not whether, in offering this service, UBC acted fairly, complied with its policies, or reached wrong or unreasonable conclusions. This distinguishes it from both *Rojas* and *Maughan*. Nor is the issue whether UBC’s services contained the specific elements which Ms. Kirchmeier has detailed in her complaint. Rather, the issue, as contemplated in both *Rojas* and *Maughan*, is whether, in the course of providing this service, UBC adversely impacted women in a way that was connected to their sex and was thus discriminatory.

[99] UBC’s argument has already been previously rejected by the Tribunal. In *Kirchmeier obo others v. University of British Columbia (No. 1)*, 2017 BCHRT 86, the Tribunal reasoned:

The decisions raised by UBC to support the proposition that the Tribunal will not venture into examination of a respondent’s internal processes, *Rojas* and *Maughan*, are only of assistance to UBC if their processes are not alleged to be discriminatory.

In this case, the Complainant is clearly alleging that UBC’s policies and procedures for sexual harassment and related sexual misconduct discriminate against women. Her essential argument is that women are, in fact, and logically by a significant margin, the recipients of sexual

harassment and as a result represent, again by a significant margin, the complainants under such policies. No proof is advanced for such an argument, however, I am of the view that the logic is persuasive. Further proof is not needed at this point.

The Complainant submits that, while the policies and procedures devised and utilized by UBC in such cases are neutral on their face, they are in fact discriminatory in their effect...

I am satisfied that, if the Complainant can prove that complainants (or potential complainants) under the UBC policies and procedures are predominantly women and that those policies and procedures have resulted in adverse treatment of those women that comprise the representative group, the Tribunal could find that the *Code* has been violated. [paras. 47-50]

The Tribunal's assessment in *Hale* was along similar lines:

UBC argues that while the *Code* requires it, as a service provider, to provide a safe, harassment-free educational environment, the *Code* does not require it "or any service provider or employer to have in place any particular process for ensuring that sexual harassment does not occur or for addressing or remedying harassment if it does occur." It points to *Rojas ...* and *Maughan ...* in asserting that the *Code* does not require any particular form of process or policy. Yet UBCO and both of these decisions expressly acknowledge that such internal processes must not be discriminatory. In this case, Ms. Hale alleges that the processes were indeed discriminatory in that her mental disability and sex factored into the adverse impacts she experienced through her interactions with the [Equity and Inclusion Office] and NAM. As such, I do not find these cases particularly instructive here. [para. 53]

I agree with, and adopt, the Tribunal's analysis in these decisions.

[100] Like in *Hale*, Ms. Kirchmeier alleges that UBC's internal processes adversely impacted her and the class members based on their sex; in other words, that those processes were discriminatory. She is not required to prove, as UBC suggests, that the processes draw direct discriminatory distinctions based on sex or treat people differently based on their sex. Such an approach would ignore the discrimination that arises when a seemingly neutral policy has a disproportionate impact on certain people based on personal characteristics protected by the *Code*: *Fraser v. Canada (Attorney General)*, 2020 SCC 28 at para. 30. I return to this below.

[101] Further, while I agree with UBC that the *Code* does not obligate service providers to implement any one specific process or system for responding to discrimination, including sexual harassment and assault, it does obligate service providers to respond in a manner that is reasonable and appropriate: *Jamal v. TransLink Security Management and another (No. 2)*, 2020 BCHRT 146 at para. 106. A failure to do so can amount to discrimination. In *Employee v. The University and another (No. 2)*, 2020 BCHRT 12 at para. 272, an employment case, the Tribunal explained why:

The failure to investigate a complaint of discrimination can independently cause harm, and therefore, can independently be a discriminatory breach under the *Code*. It is for these reasons that a complaint of failure to respond can proceed on its own merits even if the underlying complaint which gave rise to the duty is found to be unproven. An employer's liability flows from its own obligations to respond appropriately to complaints that arise between its employees. An employer has an obligation to have a discrimination-free work environment. In general, this requires that appropriate policies and procedures are in place, and that an employer respond appropriately to complaints, whether or not a complainant is ultimately able to establish the underlying allegations of inappropriate conduct. [para. 273]

Though this passage refers to a "failure to investigate", which is not what happened here, the principles apply more broadly to the manner in which an employer or service provider responds to allegations of discrimination.

[102] UBC argues that its *Code* obligations are only engaged where a complainant has experienced the alleged underlying discrimination. In this case, it argues that most of the women identified in Ms. Kirchmeier's response, including Ms. Kirchmeier herself, have "no claim of underlying discrimination" because they do not claim to have experienced sexual misconduct by Mr. M or anyone else during the relevant period. It argues, "there is no legal basis to suggest that a response to someone who has not experienced any alleged discrimination is capable of being discriminatory." It says allowing such claims to proceed would amount to "a significant expansion of the law" and open the floodgates to complaints from family members and friends of people who experience discrimination. It further argues that the underlying discrimination must be within this Tribunal's jurisdiction. In that regard, it argues

that the Tribunal does not have jurisdiction over allegations arising from Student B's sexual assault because that assault happened in Toronto.

[103] Here I return to the test for discrimination. That test simply requires Ms. Kirchmeier to prove that she and the class members experienced an adverse impact in respect of a service provided by UBC, and that their sex was a factor in that impact. It is not a stretch, or significant expansion of the law, to suggest that an employer or service provider could discriminate against a person raising a complaint even if the person is not complaining about discrimination they experienced. UBC's own Sexual Assault Panel identified the type of harm that can flow from a failure to respond appropriately to sexual violence:

... In its aim to promote equality and social justice, as well as to educate its students and allow its faculty and staff to do their jobs safely, UBC has a responsibility and opportunity to help improve the climate of safety, security, and respect for all its community members, especially those who are from groups most commonly subjected to sexual assault. While individual survivors of sexual assault are most immediately impacted by the violence they have experienced, **the overall climate created by inadequate response to violent incidents also shapes the lives of young people, women, LGBTQ2S people, racialized people and members of other marginalized groups as they study and work at UBC.**

UBC Sexual Assault Panel, *Sexual Assault at the University of British Columbia: Prevention, Response, and Accountability* (June 2016), at p. 16 (citations omitted)

[104] The 'floodgates' that UBC contemplates does not account for the fact that complaints may only be brought in relation to areas of life protected by the *Code* - for example, employment and services customarily available to the public. A person could only bring a complaint of discrimination in respect of a service that was customarily for them. UBC has not made arguments in this application about the scope of its services to Ms. Kirchmeier or other members of the classes. It remains open to the university to make such arguments at a final hearing.

[105] Again, the threshold on this application is low. I am not persuaded that Ms. Kirchmeier’s complaint has no reasonable prospect of success because it concerns UBC’s response to allegations of discrimination.

2. *Nexus*

[106] It is undisputed that, to succeed in her complaint, Ms. Kirchmeier must establish that sex was a factor in any adverse impact she and class members experienced. This is often referred to as the “nexus”. It is critical to establishing that any adverse impact is, absent a justification, discriminatory.

[107] Ms. Kirchmeier argues that she can establish a nexus based on “the persistent historical and sociological disadvantage of women in relation to sexual misconduct” and the fact that “sexual assault and sexual harassment remain highly gendered phenomena in which women are overwhelmingly the recipients of sexual misconduct and men are overwhelmingly the actors”. Women were the target of Mr. M’s conduct and that conduct caused other women to feel unsafe and undervalued.

[108] UBC argues that Ms. Kirchmeier has no reasonable prospect of proving that any adverse impact she and the class members experienced was connected to their sex. It argues that it is insufficient to simply point to the disproportionate numbers of women among survivors of sexual misconduct. Relying on *Vancouver Area Network of Drug Users v. Downtown Vancouver Business Improvement Association*, 2018 BCCA 132 [**VANDU**], it argues:

... if the mere fact that women are disproportionately the survivors of sexual misconduct makes policies aimed at addressing such misconduct discriminatory, then every policy would necessarily breach the *Code* so long as women are disproportionately the survivors of sexual misconduct.

Plainly, the *Code* requires something more...

[109] I am not satisfied that this aspect of Ms. Kirchmeier’s case has no reasonable prospect of success. Both *Fraser* and *VANDU* discuss the myriad ways in which a discriminatory impact may be proven, including through statistical evidence of disproportionate representation,

evidence about the circumstances of the claimant group, and/or “an understood theory” as to the nature of the connection: *Fraser* at paras. 60-63; *VANDU* at paras. 89-94. Both cases recognize that there may be circumstances where the nexus is sufficiently straightforward that disproportionate representation within an affected group will suffice: *VANDU* at para. 95 and *Fraser* at para. 61. The examples the courts gave are the connection between pregnancy and sex (*Fraser*, para. 61) and physiological differences between (cisgender) men and women (*VANDU*, para. 96).

[110] In this case, it would be open to the Tribunal to conclude that the connection between sex and sexual misconduct is of a similar, commonly understood, nature such that the requisite nexus can be inferred from the disproportionate representation of women among people impacted – directly and indirectly - by sexual misconduct, and “common sense” about how that disproportionate representation is significant from a human rights standpoint: *VANDU* at para. 95; *Fraser* at paras. 61-67; see also *Kirchmeier (No. 1)* at para. 48. Indeed, there is ample case law to support a discriminatory connection between sex and sexual harassment or misconduct: eg. *Janzen v. Platy Enterprises Ltd*, [1989] 1 SCR 1252; *MacGarvie v. Friedman*, 2012 BCCA 445 at para. 32. It is beyond conjecture, in my view, to take that one step further and posit a discriminatory connection between sex and the impacts of how a service provider responds to sexual misconduct or harassment.

[111] Further, unlike in *VANDU*, Ms. Kirchmeier has presented non-statistical evidence to support the connection, including from women who were directly impacted. She relies on UBC publications which have “clearly and repeatedly identified that sexual assault and sexual harassment remain highly gendered phenomena in which women are overwhelmingly the recipients of sexual misconduct and men are overwhelmingly the actors”. She also relies on the statements of some of the women involved about the harm that they experienced, including a reduced sense of safety and respect flowing from their own vulnerability, as women, to similar misconduct. This is evidence that, if proved, the Tribunal could rely on at a hearing to connect the adverse impacts experienced by women raising concerns about sexual misconduct to their sex.

[112] Finally, UBC argues that Ms. Kirchmeier has no reasonable prospect of proving that any of its actions were connected to sex. It says that its response was based on the willingness of women to make complaints and trigger disciplinary consequences, as well as the fact that Mr. M was out of the country and therefore not an imminent threat on campus. It says that its treatment of Ms. Kirchmeier had nothing to do with her sex but rather was based on the fact that she did not directly experience sexual assault or harassment.

[113] As I have said, this argument does not account for the discrimination that arises when seemingly neutral policies or conduct disproportionately impact certain people based on personal characteristics protected by the *Code: Fraser* at para. 30. At a hearing, Ms. Kirchmeier would not have to prove that UBC's actions were motivated or causally connected to sex: *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39 at para. 49. Rather, it would be sufficient to prove that the women were adversely impacted in connection with UBC's services and that sex was a factor in that impact. I have already set out how Ms. Kirchmeier's complaint takes that allegation out of the realm of conjecture and, in my view, warrants a hearing.

[114] For present purposes, I am satisfied that Ms. Kirchmeier's claim of a discriminatory nexus falls outside the realm of conjecture. The remainder of the parties' complex arguments about *Fraser*, *VANDU*, and whether the evidence is sufficient to prove a discriminatory nexus, should be resolved after a hearing on the merits of the complaint.

[115] In sum, I am not persuaded that Ms. Kirchmeier's complaint has no reasonable prospect of success. This is not a prediction about the likelihood that the complaint will succeed after a hearing, but simply a finding that it warrants a hearing. I deny the application to dismiss the complaint under s. 27(1)(c).

B. Would not further the purposes of the *Code* to proceed

[116] Section 27(1)(d)(ii) confers the Tribunal with discretion to dismiss a complaint where it would not further the purposes of the *Code* to proceed. One circumstance in which the Tribunal has held it does not further the purposes of the *Code* to proceed is where the respondent has

already effectively remedied the alleged discrimination: *Williamson v. Mount Seymour Housing Co-operative*, 2005 BCHRT 334 at paras. 10-13. In *Williamson*, the Tribunal explained:

Generally, the Tribunal's ability to ensure that any of purposes of the *Code* will be fulfilled is harmed insofar as its resources are taken up with matters that have already been adequately addressed, whether through settlement, unilateral respondent action or other proceedings. More specifically, where a complaint of discrimination has already been appropriately resolved, through whatever means, there is no need to proceed with the complaint in order to prevent discrimination or provide a means of redress – the discrimination has already been remedied... [para. 13; see also *Carter v. Travalex Canada Ltd and Travalex UK Ltd*, 2009 BCCA 180 at para. 41]

[117] In this case, UBC argues that the complaint should be dismissed because the “disclosure, investigation, and discipline processes about which the Complainant complains have been entirely replaced”. It says that, after the events giving rise to this complaint, UBC hired an external investigator to review what happened with Mr. M and publicly released the executive summary of her report. It then “carefully and deliberately reviewed its policies and processes regarding sexual assault and harassment, consulted experts and members of the UBC community, received and incorporated feedback”. The outcome is a new sexual assault policy, new processes, and new resources, which render Ms. Kirchmeier’s remedial claim for revised policies and processes moot.

[118] In response, Ms. Kirchmeier argues that, while UBC’s new policies and procedures may address some of her remedial requests, they do not resolve all of them. Further, she argues that some of the issues raised by her complaint do not arise directly from a failure of policy but rather from the conduct of university actors, which has not been addressed.

[119] Again, I am not persuaded to dismiss the complaint on this basis. I accept that the changes made to UBC’s sexual assault policy and procedures almost certainly resolve some of Ms. Kirchmeier’s original remedial requests. However, they do not address the impact of any discrimination which Ms. Kirchmeier or class members may have experienced. In *Hale*, the Tribunal resolved a similar argument this way:

What UBCO's argument entirely fails to consider is the provision of any meaningful recourse for a complainant who alleges having already experienced discrimination. This complaint is not like [*B. v. Greater Victoria School District No. 61*, 2012 BCHRT 258], where the complaint arose from the complainant's need to independently access an elevator and was provided with that exact accommodation. The fact that new policies and processes for addressing sexual assault now exist at UBC and UBCO does little if anything to provide recourse for the experience Ms. Hale says she had under the old policies.

... I am not persuaded by UBCO's argument under s. 27(d)(ii) and decline to dismiss the complaint on that basis. [paras. 75-76]

[120] Similarly, the outcome of the external investigation did not include any findings regarding whether the women in this complaint had been discriminated against, and nor did it remedy any discrimination that may have occurred. Those issues remain outstanding. It is very much consistent with the purposes of the *Code* that Ms. Kirchmeier have the opportunity to present her complaint and for the Tribunal to resolve it on its merits.

[121] I decline to dismiss the complaint under s. 27(1)(d)(ii).

VI CONCLUSION

[122] The application to dismiss the complaint is denied. A case manager will contact the parties to schedule a hearing.

Devyn Cousineau
Tribunal Member
Human Rights Tribunal