

Indexed as: Hale v. University of British Columbia Okanagan and another, 2018 BCHRT 34

IN THE MATTER OF THE *HUMAN RIGHTS CODE*
R.S.B.C. 1996, c. 210 (as amended)

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

BETWEEN:

Stephanie Hale

COMPLAINANT

AND:

University of British Columbia Okanagan and Ethan Palmiere

RESPONDENTS

REASONS FOR DECISION
TIMELINESS OF COMPLAINT
Section 22

Tribunal Member:

Steven Adamson

Counsel for the Complainant:

Clea Parfitt

Counsel for the University:

Michael Wagner and Jennifer Devins

Counsel for Mr. Palmiere:

Carman J. Overholt, QC

I INTRODUCTION

[1] On August 30, 2017, Stephanie Hale filed a complaint against the University of British Columbia Okanagan [**University**] and Ethan Palmiere alleging discrimination in the area of services based on sex and disability contrary to s. 8 of the *Human Rights Code* [**Code**].

[2] Since the complaint may have been filed outside the six-month limitation period under s. 22 of the *Code*, the Tribunal sought submissions from the parties concerning the complaint's timeliness and I have considered all of their submissions. This included a further submission from the University arising out of an amendment to the complaint made by Ms. Hale as attached to her reply submissions. The issue before me with respect to timeliness is whether to accept the complaint against the University and Mr. Palmiere for filing and I make no findings of fact regarding the merits of this complaint.

[3] Ms. Hale and the University got into some debate regarding the University's responsibility under the *Code* for the actions of Mr. Palmiere and a photographer hired by the University to do a photo-shoot. After reviewing Ms. Hale's amendment and the University's further submission, I am willing to accept the amendment for filing. I do so with the knowledge that it is an allegation only, which can be better dealt with in the course of the parties' submissions and arguments at the later stages of the complaint process. Given the outcome below, I decided it was unnecessary to give the University an opportunity to make further submissions in response to these further allegations.

II BACKGROUND TO COMPLAINT

[4] Ms. Hale began the first year of an engineering course at the University in the fall of 2012.

[5] On January 12, 2013, Ms. Hale alleges another student in the course, Mr. Palmiere, sexually assaulted her during and after a party at his University residence [the **assault**]. She states that she was intermittently unconscious during part of the assault after the party and the assault resulted in various physical injuries.

[6] On January 19, 2013, Ms. Hale reported the assault events to the University residence advisor. He called the residence life manager on duty and Ms. Hale was then asked to recount the events a second time to the life manager. The residence life manager was unable to provide her with a counsellor's number because it was the weekend. He directed her to the campus medical facility.

[7] A few days later, Ms. Hale attended the campus medical facility and reported the assault a third time to a nurse. The nurse directed her to police and the Elizabeth Fry Society. Ms. Hale was not physically examined, including a rape kit examination, despite the fact she still had bruising at the time.

[8] Ms. Hale identifies a number of things that were not done when she reported the assault to the three individuals at the University identified above. These included:

- suggesting Ms. Hale make a complaint to the University about Mr. Palmiere's conduct
- directing Ms. Hale to the University's policies on sexual harassment and non-academic misconduct
- directing Ms. Hale to an advocacy centre, if one existed on this campus, to provide information about the options available to sexual assault victims and provide advocacy and support in accessing these options
- directing Ms. Hale to the University's Vancouver campus student sexual assault centre and the equity and inclusion office [EIO]
- directing Ms. Hale to the University's campus security or ombuds office

[9] Ms. Hale further reports not receiving any general information about resources or policies related to sexual assault as part of her new student orientation.

[10] On January 22, 2013, Ms. Hale reported the alleged sexual assault to police and provided a formal statement on January 26, 2013. She states the police decided not to press charges without speaking to Mr. Palmiere, apparently because a lack of consent could not be proven.

[11] In February 2013, Ms. Hale contacted the Elizabeth Fry Society who assisted her with filing an application for assistance from the Crime Victims Assistance Program, which was later denied.

[12] In January and February 2013, Ms. Hale attended counselling through the University's medical facility. Neither counsellor she met with directed her to applicable University policies or resources after she disclosed details of the sexual assault.

[13] Ms. Hale says the University told her to personally address any conflicts directly with her professors arising from the fact she and Mr. Palmiere continued to be in the same program.

[14] Ms. Hale states the continuing contact with Mr. Palmiere in the program, including classroom contact, group assignments and extra-curricular activities, was very distressing for her and contributed to her declining mental and physical health. She remained in the program until December 2015 when she went off for mental and physical health reasons. At the time of her complaint she remained on medical leave from the program.

[15] In March 2015, Ms. Hale reports being asked by a photographer hired by the University to do an engineering class photo-shoot, whether she was "the boobs", presumably because she was only female in the lab. She raised the incident with the engineering advisor and dean and was assured it would be investigated. During the investigation she was asked to go over the allegations many different times with different people, which she found distressing. In September 2015, Ms. Hale was informed the investigation was inconclusive. After requesting more information as to why, in June 2016 she was finally told the inconclusive findings stemmed from the fact that the photographer denied the allegation and there were no witnesses to substantiate it.

[16] In April 2015, having seen the seriousness with which the University took the photo-shoot incident, Ms. Hale reported the 2013 events with Mr. Palmiere to the dean who was very concerned by what he heard and suggested she get a lawyer.

[17] As mentioned above, Ms. Hale's health declined in the fall of 2015. After failing two courses she was informed that her standing in the program while off on sick leave was "failed". She reports not resolving this failed program standing issue until May 2017.

[18] In February 2016, Ms. Hale was referred to the University's EIO at the Vancouver campus. She was informed that the role of the office was to identify resources and processes most appropriate to address her concerns. The EIO advised her that the University president's non-academic misconduct committee [NAMC] had formal investigatory and disciplinary processes available to deal with her complaint. Without getting any answers, Ms. Hale asked the EIO why she was not provided with appropriate information about the University's sexual assault policies and processes at the time of the alleged sexual assault in 2013.

[19] In March 2016, the University's campus security informed Ms. Hale that it would conduct an investigation into her complaint against Mr. Palmiere. The subsequent report was to be referred to the NAMC, which had the discretion to then hold a hearing regarding the matter. Ms. Hale sets out her various deficiencies and criticisms of the NAMC's jurisdiction, structure and process in her complaint. She states that having to engage in continual advocacy for herself around the NAMC hearing process made it unduly demanding and stressful for her.

[20] Ms. Hale states the NAMC hearing on September 2, 2016 was cancelled at the last minute because one of the committee members was unavailable.

[21] On September 13, 2016, Ms. Hale wrote to formally advise the NAMC that the process was not a suitable way to address her sexual assault complaint. She further informed them the process was discriminatory for a numerous reasons, including her limited role in the process, her limited access to evidence and the lack of training or experience by those on the NAMC to provide her with a proper and safe process or to engage in proper and non-discriminatory decision-making in complaints of this nature. Ms. Hale also claims the University was obliged to take steps to provide a harassment and assault-free environment to students, and to properly and fully deal with such discrimination when it occurred. In her view, the NAMC process in place at the time was not consistent with the requirements of the *Code*.

[22] On October 7, 2016, the University wrote Ms. Hale declining to appoint an investigator or do any of the other things she requested as part of establishing what she thought would be a proper process in which she could be a full participant. Ms. Hale was asked whether she wished

to continue participating in the process and was warned it would proceed without her if she declined.

[23] On October 31, 2016, Ms. Hale's counsellor was said to have advised that the NAMC process was unsuitable for her complaint. The counsellor stated further that until Mr. Palmiere was dealt with appropriately, Ms. Hale would not be comfortable returning to the campus.

[24] The NAMC hearing proceeded without Ms. Hale on November 25, 2016.

[25] On March 1, 2017, an email from the University informed Ms. Hale that the NAMC was unable to find on the balance of probabilities that Mr. Palmiere had engaged in non-academic misconduct. The University was silent on whether any other process would be engaged to address her complaints.

[26] Ms. Hale states the harm she suffered because of the NAMC process was exacerbated by her ongoing mental disability. With Mr. Palmiere cleared of any wrongdoing, Ms. Hale was unable to return to the school campus for risk of having contact with him. She states she was no longer able to trust the University to provide a safe, harassment-free and assault-free educational environment.

III ANALYSIS AND DECISION

[27] Section 22 of the *Code* provides:

- (1) A complaint must be filed within 6 months of the alleged contravention.
- (2) If a continuing contravention is alleged in a complaint, the complaint must be filed within 6 months of the last alleged instance of the contravention.
- (3) If a complaint is filed after the expiration of the time limit referred to in subsection (1) or (2), a member or panel may accept all or part of the complaint if the member or panel determines that:
 - (a) it is in the public interest to accept the complaint, and
 - (b) no substantial prejudice will result to any person because of the delay.

[28] The time limit set out in s. 22 of the *Code* is a substantive provision which is intended to ensure that complainants pursue their human rights remedies diligently: *Chartier v. School District No. 62*, 2003 BCHRT 39.

A. Time limit, arguable contravention and continuing contravention

[29] The complaint was filed on August 30, 2017. To comply with the six-month time limit under s. 22(1) of the *Code*, the alleged act of discrimination would have to have occurred on or after February 28, 2017 or form a continuing contravention with at least one instance of the alleged contravention occurring on or after February 28, 2017.

[30] Most all of the discrete events in question occurred before the six-month deadline for filing a complaint. As the complaint relates to Mr. Palmiere, the events with specific dates attached all appear to have occurred years ago in 2013. In addition, the various alleged actions and omissions of the University in relation to the alleged sexual assault in 2013, and the alleged harassment by the photographer in early 2015, almost all occurred before the six-month deadline for filing. The only event on a specific date that occurred after February 28, 2017 is the decision by the NAMC on March 1, 2017 to not find Mr. Palmiere had engaged in any non-academic misconduct.

1. Complainant's argument

[31] Ms. Hale argues her complaints against both respondents are continuing contraventions, each best described as a continuing state of affairs or an existing policy, legislative scheme, procedure or condition. She says her case is appropriately described as containing both specific events on the dates outlined above and ongoing alleged contraventions of the *Code* spanning the years from 2013 until her complaint was filed in mid-2017 and beyond. When looked at in this manner, her complaint is a continuing contravention of the *Code* that can appropriately be accepted for filing.

[32] As it relates to Mr. Palmiere, Ms. Hale states her complaint addresses the individual acts of Mr. Palmiere as well as his ongoing maintenance that he had consent. In her view, allegations of both discrete events and a continuing state of affairs that was discriminatory

result in a continuing contravention. Without proper disclosure, Ms. Hale states at this early stage of the complaint process she is unable to assign specific dates and statements by Mr. Palmiere that maintain an exculpatory explanation for his conduct at and after the party on January 12, 2013. However, Ms. Hale argues Mr. Palmiere's response that he had consent must have been provided on numerous occasions, including the NAMC hearing, otherwise he would not have graduated from the University and continue to hold his degree in good standing. Ms. Hale explains that Mr. Palmiere's maintenance of consent in these circumstances is itself a form of sex discrimination, meaning that it is adverse treatment with a negative impact on her related to her sex. The harm she suffered stems from her not getting closure in the matter and by being stymied in her efforts to get the University to act on the matter. It resulted in serious detriment to her health as Mr. Palmiere continued to be present in the program. She alleges the ongoing denial of his oppressive and abusive conduct prolonged and worsened the harm of that wrongful conduct. Like other women who face the denial of the conduct, she suffered the effects of not being believed, was forced to maintain an appearance of normalcy, and had to pursue remedies in very difficult and protracted legal proceedings. In her view, where a person who engaged in sexual violence and/or harassment continues to deny that conduct for their own benefit, that denial carries its own harms which are separate and in addition to the harms of the original violence or harassment.

[33] Ms. Hale argues the complaint against the University arises from its systematic and specific failures to effectively respond to the assault at any time between January 2013, when the assault was first disclosed to the University, and the present. She goes on to state that the University failed to have in place proper policies, protocols and practices, and failed to respond effectively to the disclosures of the Palmiere sexual assault, and later the photographer's sexual harassment. Ms. Hale alleges these failures harmed her as a woman and a disabled person. The University's response to the assault and harassment, and the harm Ms. Hale suffered over the deficiencies in those responses relate her sex, and therefore constitute a form of sex discrimination. The impact of these deficiencies was exacerbated by Ms. Hale's disability, and these deficiencies therefore constitute a form of discrimination on the basis of disability.

2. *Mr. Palmiere's argument*

[34] Mr. Palmiere argues there is no particular evidence in the complaint to support Ms. Hale's allegation of him asserting that he had her consent on the night in question. Further, Mr. Palmiere argues there is no ongoing state of affairs in this case capable of satisfying the requirements of a continuing contravention. In his view, the denial of non-consensual conduct is a singular statement of defense in regards to Ms. Hale's first allegation against him, regardless of the number times it is repeated. Denying that an event occurred as described, or maintaining a different version of the facts as a complainant is not a possible or arguable breach of the *Code* according to Mr. Palmiere.

3. *The University's argument*

[35] The University argues Ms. Hale must not be permitted to misuse the concept of continuing contravention to sweep in allegations otherwise far outside the *Code's* time limitations. It argues further that it is insufficient to simply allege a continuing contravention of the *Code*. Such allegations must first satisfy the arguable contravention test to determine whether there has been an allegation of a continuing contravention. The University submits that only a portion of Ms. Hale's allegations should be considered a continuing contravention. It admits that Ms. Hale's allegations from February 2016 to March 2017 regarding the University's processes for dealing with her allegations against Mr. Palmiere should be accepted for filing as a continuing contravention under the *Code*.

[36] The University submits Ms. Hale's other allegations do not appropriately form part of the admitted continuing contravention because they are separated by significant gaps in time and are of a distinct character. The University argues the Ms. Hale's reports of the sexual assault in January and February 2013 is a distinct period of allegations of a different character. This period is separated by two years when she raised the issue with the dean and engineering advisor in April 2015. The earlier timeframe is distinct from when Ms. Hale accessed the EIO and NAMC processes in February 2016 because it did not involve accessing established processes for responding to complaints, reports and disclosures of sexual assault. The University further distinguishes the events related to the photographer in March 2015 with the

investigation outcome in September 2015, with additional reasons for outcome provided in June 2016, as being of a distinct character because it involved a different allegation of harassment and a different complaint process.

[37] While accepting Ms. Hale's other allegations are arguable contraventions of the *Code*, the University is arguing they are distinct in character with gaps separating them from the continuing contravention concerning the accessing of the EIO and NAMC processes for the sexual assault allegations against Mr. Palmiere from February 2016 to March 2017. The University argues these other allegations can only be accepted for filing if it is in the public interest to do so.

4. *Issues and the law*

[38] Having reviewed the information on file and the parties' submissions I have identified the following issues for my consideration:

- (1) Whether Mr. Palmiere's maintenance of consent is an arguable contravention of the *Code*; and, if so, whether such an allegation together with the events in 2013 are a continuing contravention of the *Code*;
- (2) Whether the University's various acts and omissions before February 2016 are arguable contraventions of the *Code*; and if so, whether it can be concluded that such allegations are a continuing contravention of the *Code* together with the alleged continuing contravention of February 2016 to March 2017;
- (3) If any late-filed arguable contravention is not part of a continuing contravention, whether it is in the public interest to accept it for filing under the *Code*.

[39] For the Tribunal to properly determine whether a continuing contravention is being alleged, it must be satisfied there are allegations which, if proven, could contravene the *Code*: *Chen v. Surrey (City)*, 2015 BCCA 57, at para. 23. In this case, Ms. Hale must set out facts supporting that she is a woman with disabilities, that the University's and Mr. Palmiere's conduct had an adverse impact on her regarding the service provided, and that sex and

disability were factors in the adverse impact: *Moore v. British Columbia (Education)* 2012 SCC 61, [**Moore**], at para 33.

[40] If part of the alleged discriminatory conduct happened within six months, then the Tribunal will consider whether the complaint alleges facts that, if proven, could amount to a continuing contravention of the *Code*: *Lewis v. British Columbia (Public Safety and Solicitor General)*, 2013 BCSC 1980, at para. 39; *Chen v. Surrey (City)* [**Chen**], 2015 BCCA 57, at paras. 22-23. A continuing contravention requires either “a succession or repetition of separate acts of discrimination of the same character” or an ongoing state of affairs that is discriminatory: *Lynch v. BC Human Rights Commission*, 2000 BCSC 1419; *Dove v. GVRD and others (No. 3)*, 2006 BCHRT 374 at para. 17. Once the Tribunal determines that the complaint alleges facts that could amount to a continuing contravention, the complaint will be accepted for filing.

[41] Complaints alleging continuing contraventions may fall into two broad categories:

On the one hand, there is the kind of case in which there are allegations of repeated harassment or discrimination. Provided that the allegations are sufficiently similar in character and occur with sufficient frequency, a continuing contravention may be established. One thinks of an allegation of a poisoned work environment as a result of recurring sexual harassment.... On the other, there is the kind of case in which there is an ongoing state of affairs, for example, a public building which is inaccessible to wheelchair users or a policy withholding certain employment benefits for married persons from those in same sex relationships. ... So long as the building remains inaccessible, the policy remains in place, or the discriminatory conditions otherwise continue to exist, the discrimination is ongoing and a continuing contravention may be alleged.

Dove v. GVRD and others (No. 3), 2006 BCHRT 374, at para. 17

(citations omitted)

5. *Arguable contravention and Mr. Palmiere*

[42] For the purposes of this decision, I am satisfied Mr. Palmiere’s alleged conduct in January 2013 is an arguable contravention of the *Code*. In my view, the necessary elements of the test in *Moore* are satisfied as they relate to the alleged sexual assault. I am additionally

satisfied that interaction between these two students at the time in question is arguably covered by the area of services under the *Code: British Columbia Human Rights Tribunal v. Schrenk*, 2017 SCC 62.

[43] I have next considered whether Mr. Palmiere's alleged maintenance to the world at large on an ongoing basis that he had consent for all of his sexual contact with Ms. Hale is an arguable contravention of the *Code*. With respect, I am not satisfied that what amounts to Mr. Palmiere defending himself in proceedings related to the alleged assault, without more, is conduct for the purposes of determining the existence of an arguable contravention. While accepting Ms. Hale's information regarding the negative effects of Mr. Palmiere continuing to attend the engineering program and his successful graduation from the University in the years that followed the alleged sexual assault, in my view these harms are more appropriately characterized as continuing consequences of the alleged discrimination on the night in question only, which cannot be considered as a separate contravention of the *Code: Lynch v. BC Human Rights Commission*, 2000 BCSC 1419. For the purposes of this time limit decision, I am unable to conclude that Mr. Palmiere's stance regarding the presence of consent during the alleged assault, presumed or otherwise, is an arguable contravention of the *Code*. In reaching this conclusion, I accept that the denial of oppressive and abusive conduct may indeed worsen the harm of that wrongful conduct. I accept that it is possible that a respondent's conduct or statement about alleged discrimination may amount to discrimination. However, I am not convinced that the assertion of a defense by Mr. Palmiere can properly stand alone as an arguable contravention of the *Code*.

[44] Having found there is no arguable contravention related to Mr. Palmiere's alleged maintenance of consent, I conclude the allegations in relation to the individual complaint against him are limited to those as described by Ms. Hale in the 2013 incident. As such, Ms. Hale's complaint against Mr. Palmiere is late-filed and must be considered under the public interest in s. 22(3) of the *Code*. The issue will be dealt with later in my decision.

6. *Arguable contravention and the University*

[45] I have next considered whether Ms. Hale's complaint against the University contains arguable contraventions before February 2016. Starting with the events in 2013, I conclude there are numerous allegations of discrimination against the University clustered around its responsibility for Mr. Palmiere's actions and its response to Ms. Hale's reporting of the alleged sexual assault. For the purpose of this decision, I am prepared to accept that the University arguably had some responsibility for ensuring Ms. Hale would not be subjected to sexual assault on campus by another student at a party being held in a residence it operated. In this sense, Mr. Palmiere's conduct in early 2013 is an arguable contravention of the *Code*. There does not appear to be much dispute over the existence of arguable contraventions related to the University's response to Ms. Hale's reporting of the alleged sexual assault by Mr. Palmiere in January and February 2013. I am satisfied that there are arguable contraventions concerning the failure of the University's system in place at that time to respond to Ms. Hale's concerns because of alleged problems with its internal policies, structures, processes and practices for responding to reports of complaints of sexual violence, sexual harassment and sex discrimination.

[46] I additionally conclude there are arguable contraventions of the *Code* against the University with respect to the conduct of the photographer in 2015 and the failure of the University's system in place at that time because of alleged problems with its internal policies, structures, processes and practices for responding to reports of complaints of sexual violence, sexual harassment and sex discrimination as related to that incident.

[47] Finally, recognizing it is not disputed, I conclude there are arguable contraventions of the *Code* against the University related to Ms. Hale's complaint to the EIO and the resulting processes, the NAMC process in particular, because of alleged problems with its internal policies, structures, processes and practices for responding to reports of complaints of sexual violence, sexual harassment and sex discrimination as related to engaging in those processes.

[48] In my view, in each of the above-described arguable contraventions, the University's actions and omissions flow from a specific series of events. The first such series of discrete

events is the occurrence and reporting of the sexual assault in 2013, the second is the occurrence and reporting of the photographer's comments in 2015 with the resulting investigation and findings, and the third is the 2016 complaint to the EIO with resulting investigations and the NAMC proceedings.

7. *Continuing contravention and the University*

[49] As noted above, continuing contraventions can take the form of a succession or repetition of separate acts of discrimination of the same character or an ongoing state of affairs that is discriminatory.

[50] Here, Ms. Hale and the University agree that the University's processes for dealing with Ms. Hale's allegations against Mr. Palmiere, to the extent that it started with her complaint to the EIO office in February 2016 and finished with the findings of the NAMC, is a continuing contravention of the *Code*. While it is not entirely clear whether the parties see Ms. Hale's accessing of the EIO and NEMC processes as a continuing state of affairs or a succession of separate acts of discrimination of the same character, or a combination thereof, they agree and I support their conclusion. In my view, Ms. Hale accessed the internal mechanism for complaining about the alleged sexual assault by Mr. Palmiere at the start of 2016 and properly alleges an ongoing state of discriminatory affairs in relation to how that process was conducted. This state of affairs was dotted by discrete discrimination allegations throughout, such as the University's decision to proceed with the NAMC hearing without her participation, despite her counsellor's opinion that the process was unsuitable for Ms. Hale's complaint. I agree with the parties that this is a continuing contravention for the purposes of the *Code* because the allegations are anchored to a timely event, which is the March 1, 2017 communication of the findings of the NAMC regarding Ms. Hale's complaint. That discrete event can also be seen as the conclusion of the state of affairs that was Ms. Hale's access to the EIO and NAMC processes.

[51] The next question is whether the University's pre-February 2016 conduct forms part of a continuing contravention together with the timely allegation. I have considered Ms. Hale's position that the complaint is a systemic one where the discrimination flows from the University's policies, practices and procedures. However, in this case the University's relevant

internal policies, structures, processes and practices were only at play in the context of events that took place during each of the particular periods of alleged discrimination described above. The alleged discriminatory impact of these processes and practices is understood in the context of their application in these periods. While the University's sexual assault and sexual harassment apparatus forms part of the arguable contraventions alleged, in my view they do not amount to ongoing discrimination on their own.

[52] I have found it appropriate to look at the pre-February 2016 allegations in this case to see if they can properly be viewed as part of the alleged contravention in relation to accessing the EIO and NAMC processes in 2016. Certainly, Ms. Hale's complaints to the University in 2013 about Mr. Palmiere's alleged conduct were of a similar nature to those accessing the University's internal complaint processes in 2016 in the sense that both periods involved complaints about the same conduct by the same person. However, the earlier events are mainly about inaction on the part of university staff and insufficient resources available to students who experience these types of harms. The later events found to be part of the continuing contravention can be distinguished in the sense that they relate to the problems with the existing EIO and NAMC processes. While acknowledging Ms. Hale's submission that both periods of time should be seen as being part of the same systemic inadequacies, they are different to the extent that one involves learning about internal complaint processes and the other involves participating in them. Even if I were to find the alleged discrimination is of a similar character, the two-year gap between the alleged discrimination remains a formidable barrier to attaching the 2013 discrimination to the continuing contravention starting in 2016. While appreciating Ms. Hale's straightforward explanation that she made further inquiries about an internal process to complain about Mr. Palmiere after seeing the seriousness with which the University addressed the photographer event, I find it difficult to conclude that both time periods are appropriately viewed as part of one continuing contravention. While I have taken into account the continuing existence of the University's internal policies, structures, processes and practice, I do not find that its response to Ms. Hale's complaints about Mr. Palmiere's conduct in 2013 form part of a continuing contravention of the *Code* with the timely allegations.

[53] I have finally considered whether the 2015/2016 photographer event is part of the continuing contravention. I conclude this event does not form part of it because it is not similar in character to alleged discrimination found in the EIO and NAMC continuing contravention. While recognizing both allegations of discrimination involve sexual harassment, I do not find them similar in character because they involved different types of sexual harassment and two different individuals with different relationships to the University. In addition, each complaint involved different complaint processes. I reach this conclusion with the knowledge that Ms. Hale had complaints about her level of participation in both processes.

[54] Having found the University's EIO and NAMC processes from February 2016 to March 2017 are a continuing contravention of the *Code*, I conclude Ms. Hale's complaint against the University for these allegations of discrimination for this period of time is accepted for filing.

[55] The remainder of Ms. Hale's complaint against the University is late-filed and will, therefore, be considered as part of the public interest analysis.

B. Public interest

[56] I now turn to Ms. Hale's late-filed complaint against Mr. Palmiere and the University. Whether it is in the public interest to accept a late-filed complaint is a multi-faceted analysis. The enquiry is fact and context specific, and assessed in accordance with the purposes of the *Code: Hoang v. Warnaco and Johns*, 2007 BCHRT 24 at para. 26. The Tribunal considers a non-exhaustive list of factors, including the length of the delay, the reasons for the delay, and the public interest in the complaint itself: *British Columbia (Ministry of Public Safety and Solicitor General) v. Mzite*, 2014 BCCA 220 [**Mzite**] at para. 53. These are important factors, but not necessarily determinative: *Goddard v. Dixon*, 2012 BCSC 161 at para. 152; *Mzite* at para. 55.

[57] The events related to Mr. Palmiere's alleged sexual assault in early 2013 pertaining to both respondents are over four years late-filed, which does not weigh in favour of finding it is in the public interest to accept them as late-filed.

[58] In *Ryan v. West Vancouver Police Department*, 2015 BCHRT 104, the Tribunal, in assessing a four-year late-filed complaint, said:

Ms. Ryan resigned her employment almost five and a half years before she filed her complaint. This is an extreme delay and weighs heavily against finding acceptance of the complaint would be in the public interest. Frankly, I am unaware of any case in which the Tribunal has accepted such an extremely late-filed complaint.

[59] A filing delay measured in years cannot be characterized as brief and weighs heavily against acceptance: *Lewis v. B.C. (Ministry of Public Safety and Solicitor General)*, 2011 BCHRT 352 (upheld on judicial review); *Ferguson v. Ausenco Engineering Canada and another*, 2015 BCHRT 28.

[60] The alleged discrimination on the part of the University pertaining to the photographer incident in March 2015, with findings from the investigation provided in September 2015 and later explained in June 2016, represent a delay of approximately eight months from the June 2016 date. A delay close to eight months is significant, but not insurmountable, if other factors militate in favour of acceptance: *Robertson v. ContainerWest Manufacturing*, 2015 BCHRT 173, at para 27 and *Ferrier v. BCAA*, 2009 BCHRT 412, at para 28. A seven-month delay weighs against accepting the complaint for filing: *Paneswar v. Future Shop and others*, 2012 BCHRT 297, at para. 27.

[61] Ms. Hale states the reason for her delay in filing stems from her pursuit of the University's internal complaint processes. Once she knew that internal processes might be available to her, she reasonably directed her complaint there. Ms. Hale states further that she did not file earlier because she did not have the information and analysis she now has to file a comprehensive complaint. She says that nobody at the University raised the prospect of filing a human rights complaint. Finally, Ms. Hale states that she did not file because she believes her complaint is a continuing contravention and should not be penalized for holding this view.

[62] With respect to Ms. Hale's pursuit of an internal avenue to resolve the alleged harassment by the photographer in 2015, there is no information indicating that process continued on after the June 2016 explanation for the inconclusive findings was made. The internal process regarding this allegation was finished in June 2016, so it cannot explain the eight-month delay in filing after that time. While sympathetic to Ms. Hale's ignorance of the *Code*, ignorance of the *Code*, or the time required to become aware of one's rights, is generally

not an acceptable reason, on its own, for the delay in filing: *Rashead v. Vereschagin (No. 2)*, 2006 BCHRT 74, at para. 12; *Ferrier v. British Columbia Automobile Association*, 2009 BCHRT 412, at para. 31. Ms. Hale has provided no additional information, and there is nothing in the materials to suggest, why she should be exempt from the application of this general rule in relation to her complaint about the 2015 photographer event.

[63] With respect to the allegations regarding Mr. Palmiere, Ms. Hale argues her delay stems from pursuing internal processes. However, it is difficult to see how that would apply to her delay from 2013 until the time she accessed the EIO and NAMC in February 2016 when her information clearly shows she did not pursue any internal process related to the alleged sexual assault. While some of the delay might be explained by Ms. Hale's pursuit of internal processes, this reason does not adequately explain the rest of the delay such that the public interest in allowing these late-filed aspects of her complaint is engaged.

[64] I have also considered Ms. Hale's explanation that she thought she could wait to file because her complaint against Mr. Palmiere or that part of her complaint against the University from 2013 to February 2016 was a continuing contravention. Apart from providing a detailed legal analysis setting out her position regarding the existence of a continuing contravention related to her complaint against Mr. Palmiere and the University for all the years in question in her submissions to the Tribunal, Ms. Hale provided no information concerning when she formed this view and how she relied on it as a reason for not filing a complaint in the intervening years.

[65] In determining whether acceptance of a late-filed complaint is in the public interest, the Tribunal also considers whether there is anything particularly unique, novel, or unusual about the complaint that has not been addressed in other complaints: *Hau v. SFU Student Services and others*, 2014 BCHRT 10 at para. 22; *Bains v. Advanced Air Supply and others*, 2013 BCHRT 74 at para. 22; *Mathieu v. Victoria Shipyards and others*, 2010 BCHRT 224 at para. 60. Where a complaint raises a novel issue on behalf of a vulnerable group, which advances the purposes of the *Code*, this is a factor that may be considered in weighing the public interest in accepting the complaint: *Mzite* at paras. 65-66. The Tribunal has taken into account gaps in its jurisprudence,

on the one hand, and the existence of good precedents, on the other hand, in determining whether to permit a complaint to proceed: *Mzite* at para. 67.

[66] Much of Ms. Hale's public interest arguments relate to reviewing the alleged systemic deficiencies at the University regarding sexual assault and sexual harassment complaints. While appreciating that my decision limits the scope of her ongoing complaint to the alleged discrimination by the University in relation to its internal EIO and NAMC, I am satisfied many of her public interest arguments can be addressed as part of her complaint proceeds.

[67] Considering all of the circumstances, I am not persuaded that it is in the public interest to accept the late-filed complaint against Mr. Palmiere or that portion of the complaint against the University not accepted as a continuing contravention. Given this conclusion, it is not necessary to address the issue of whether there would be any substantial prejudice in that complaint.

IV CONCLUSION

[68] For these reasons, the complaint against the University is accepted for filing for a continuing contravention from February 2016 until March 2017 regarding the processes dealing with Ms. Hale's complaint against Mr. Palmiere. The other portions of the complaint against the University are rejected for filing, as is the entire complaint against Mr. Palmiere.



Steven Adamson, Registrar and Member