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

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

B E T W E E N:

John Yaremy

COMPLAINANT

A N D:

City of Vancouver (Fire and Rescue Services) and Vancouver Fire Fighters' Union, Local 18

RESPONDENTS

REASONS FOR DECISION
APPLICATION TO DISMISS: Section 27(1)(b) and (c)

Tribunal Member:	Catherine McCreary
Counsel for the Complainant:	Harvey S. Delaney
Counsel for the Respondent City of Vancouver:	Gabrielle M. Scorer Barbara A. Korenkiewicz
Counsel for the Respondent Fire Fighters' Union:	Allan E. Black, Q.C. Stephanie Mayor

I. INTRODUCTION

[1] John Yaremy was a firefighter employed by the respondent City of Vancouver (Fire and Rescue Services) (the "Employer" or the "City"). Mr. Yaremy is a member of the respondent Vancouver Fire Fighters' Union, Local 18 (the "Union"). Article 13.3 of the Collective Agreement between the City and the Union requires all firefighters to retire at age 60. The City terminated Mr. Yaremy's employment when he turned 60. Mr. Yaremy says that the termination of his employment was, in part, due to the City's mandatory retirement scheme contained in section 13.3 of the Collective Agreement. The Respondents say it was the only reason. Mr. Yaremy filed a grievance of his termination of employment and the Union has now abandoned his grievance.

[2] Mr. Yaremy has been involved in prior litigation concerning his employment and his relationship with the Union. See: *Vancouver (City) (Re)*, BCLRB No. B101/2011, reconsideration BCLRB No. B151/2011. He also had previous human rights complaints. See: 2011 BCHRT 280, judicial review dismissed 2013 BCSC 2386, appeal dismissed 2015 BCCA 228.

[3] When Mr. Yaremy's employment was terminated, he was physically disabled and on a WorkSafe BC medical leave. Mr. Yaremy has been disabled and away from work since 2007. He says that he has not been released from his surgeon's care and that he is not able to work at this time.

[4] Mr. Yaremy complains the respondents have discriminated against him on the basis of his age and physical disability, contrary to the provisions of s. 13 and 14 of the BC *Human Rights Code*, which state*:*

> 13(1) A person must not
>
> (a) refuse to employ or refuse to continue to employ a person, or
>
> (b) discriminate against a person regarding employment or any term or condition of employment
>
> because of the … physical or mental disability… or age of that person ...
>
> …

(3) Subsection (1) does not apply

(a) as it relates to age, to a bona fide scheme based on seniority, or

(b) as it relates to … physical or mental disability …age, to the operation of a bona fide retirement, superannuation or pension plan or to a bona fide group or employee insurance plan, whether or not the plan is the subject of a contract of insurance between an insurer and an employer.

(4) Subsections (1) and (2) do not apply with respect to a refusal, limitation, specification or preference based on a bona fide occupational requirement.

…

14 A trade union, employers' organization or occupational association must not

(a) exclude any person from membership,

(b) expel or suspend any member, or

(c) discriminate against any person or member

because of the …physical or mental disability… or age of that person or member...

[5] The respondents apply to dismiss the complaint under s. 27(1)(b), (c) and (d)(ii) of the *Code*. The respondents say that mandatory retirement of firefighters upon reaching 60 years of age, including Captains such as Mr. Yaremy, arises under a *bona fide* retirement, superannuation or pension plan. The respondents argue that the mandatory retirement provision forms part of that plan and, pursuant to s. 13(3)(b), does not amount to discrimination that contravenes the *Code.*

[6] Mr. Yaremy says that the onus is on the respondents to prove to the Tribunal that Article 13.3 of the Collective agreement is a *bona fide* occupational requirement under section 13(4) of the *Code* as it relates to the operation of a *bona fide* retirement, superannuation or pension plan.

[7] After considering the parties' materials and submissions, I conclude that I am able to determine the application to dismiss on the basis of age based on my consideration of s. 13(3)(b) of the *Code* and the applications under s. 27(1)(c).

[8] The Employer and the Union also claim that Mr. Yaremy was not discriminated against in his employment on the basis of disability, and the Union argues that s. 14 was not breached. They say that, if a *prima facie* case of discrimination is substantiated, Mr. Yaremy cannot be accommodated without imposing undue hardship on the respondents. That aspect of the s. 13 complaint against both respondents, concerning discrimination on the basis of disability, and the complaint against the Union under s. 14 of the *Code*, is also resolved under s. 27(1)(c) of the *Code*.

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

II. SECTION 27(1)(C) – DO THE ALLEGATIONS IN THE COMPLAINT CONCERNING THE MANDATORY RETIREMENT OF MR. YAREMY HAVE NO REASONABLE PROSPECT OF SUCCESS?

[10] Mr. Yaremy's complaint alleges that there are violations of s. 13 and s. 14 of the *Code* as follows:

> The Respondents entered into a collective agreement which included a clause in breach of the *Human Rights Code* which states:
>
> 13.3 Mandatory Retirement
>
> > It is mandatory for all firefighters regardless of classification, sex or department of service (i.e. Fire Prevention Office, Training Office, or Suppression) to retire from the service at the attainment of the age 60.
>
> By way of a letter dated November 8, 2012 [Mr. Yaremy] was informed by the Vancouver Fire Department that he was being terminated from his employment due to his age.
>
> [Mr. Yaremy] turned 60 years of age on November 13, 2012.

[11] Mr. Yaremy asked the Union to file a grievance, which it did initially, but later abandoned.

[12] The application to dismiss the age discrimination allegation was made under both s. 27(1)(b) (acts or omissions alleged in the complaint do not contravene the *Code*) and

27(1)(c) (no reasonable prospect of success). In this case, the application is most appropriately dealt with under s. 27(1)(c). In order to determine the application, I must have regard to the respondents' evidence and explanations respecting whether the scheme at issue relates to a *bona fide* retirement, superannuation or pension plan within the meaning of s. 13(3)(b).

[13] Under s. 27(1)(c), the Tribunal determines whether, based on the material provided by the parties, and applying its expertise, it is persuaded that there is no reasonable prospect the complaint will succeed: *Berezoutskaia v. British Columbia (Human Rights Tribunal)*, 2006 BCCA 95, leave to appeal ref'd [2006] SCCA No. 171; *Workers' Compensation Appeal Tribunal v. Hill*, 2011 BCCA 49; and *Gichuru v. British Columbia (Workers Compensation Appeal Tribunal),* 2010 BCCA 191, leave to appeal ref'd [2010] SCCA, No. 217. The propositions that can be taken from these cases in respect of preliminary applications to dismiss under s. 27(1) of the *Code* are:

1) The Tribunal's role in evaluating complaints under s. 27(1) of the *Code* is as a gatekeeper so that only complaints with sufficient merit will justify the time and expense of proceeding to a full hearing. (*Berezoutskaia* at paras. 23-26; *Hill* at para. 27);

2) The Tribunal's role in determining s. 27(1) applications is discretionary. The Tribunal does not make findings of fact but assesses the evidence with a view to whether it meets the very low threshold of getting past the conclusion that there is "no reasonable prospect the complaint will succeed". In order to defeat an application based on the ground there is no reasonable prospect the complaint will succeed, the complainant only has to show that the "evidence takes the case out of the realm of conjecture" (*Hill* at para. 27; *Gichuru* at paras. 28-31); and

A. SECTION 13(3)(B) OF THE *CODE*

[14] The Union represents approximately 800 employees in the City's fire department, of which approximately 700 are full-time career firefighters. The Municipal Pension Plan ("MPP"), or the Superannuation Fund as it was previously known, dates back to 1921 when it was created by the *Superannuation Act*, S.B.C. 1921, c. 60. Today, the MPP exists under the statutory authority of the *Public Sector Pension Plans Act,* S.B.C. 1999, c. 44.

[15] The MPP is registered with British Columbia's Superintendent of Pensions, which administers and enforces regulatory requirements. The MPP's registration is current and the 2012 annual report confirms that, as at December 31, 2012, the MPP had 282,463 members and total assets of $31.062 Billion. The Annual Report also confirms that the MPP is a long-standing plan that applies to many employers in various sectors. The MPP is also a Registered Pension Plan as defined in the Canada *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) and the MPP's registration is current.

[16] Mr. Yaremy is a member of the MPP. Enrollment in the MPP is mandatory for full-time fire fighters and the MPP is referenced in the Collective Agreement. Article 12.05 of the Collective Agreement states:

> 12.5(a) Contributions to the Municipal Pension Plan for all new employees shall commence effective the date of hire.

[17] The mandatory retirement of fire fighters at age 60 dates back to 1939 under what was then known as the *Municipal Superannuation Act,* S.B.C. 1938, c. 55. Age 60 is defined as the "normal retirement age" for firefighters in the MPP Rules. The MPP Rules, at section 96 (pp. 60 - 62) state:

> "normal retirement age" means the end of the calendar month in which a member reaches:
>
> a) age 65 for employees in group 1 or group 4; or
>
> b) age 60 for employees in group 2, group 3 or group 5
>
> "group 2" means the group of members comprised of police officers and firefighters, other than members of group 5.
>
> "firefighter" means persons who are employed in the fire sector as firefighters, as a fire chief and any other person employed in, or appointed to, a fire department and assigned to undertake fire protection services which includes fire suppression, fire prevention, fire safety education, communication, training of persons involved in the provision of fire protection services, rescue and emergency services and the delivery of all those services.

[18] As noted in the Complaint, Article 13.3 of the Collective Agreement, the term under which the City retired Mr. Yaremy, states:

> 13.3 Mandatory Retirement

> It is mandatory for all firefighters regardless of classification, sex, or department of service (i.e. Fire Prevention Office, Training Office or Suppression) to retire from the service at the attainment of age 60.

[19] The respondents say that the actuarially based supplemental pension system that confirmed the desirability of early retirement of fire fighters at age 60 due to the physically exacting nature of their work dates back to 1950. That is when what the Union describes as the "landmark" *Conciliation Report of Chairman Crumb for the City of Vancouver and Vancouver Fire Fighters* (the *"Crumb Award")* decided, based on actuarial expert evidence, that an amount equal to 4.5% of each fire fighters salary was required to be contributed to a special pension fund.

[20] The respondents say that, due to evolving requirements regarding the manner in which excess contribution arrangements are recognized under the MPP, the extra contribution first mandated by the *Crumb Award* is now expressed via an agreement between the Municipal Pension Board of Trustees and the City of Vancouver. However, they say that it is the same 4.5% extra contribution. This "Special Agreement" that facilitates fire fighters' retirement at age 60 continues and is now contained in Article 13.3 of the Collective Agreement.

[21] The respondents argue that mandatory retirement found in the Collective Agreement is inextricably linked to the operation of a *bona fide* retirement, superannuation or pension plan. In this regard, they say that mandatory retirement is exempt from the application of s. 13(1) of the *Code* pursuant to s. 13(3)(b), which provides that s. 13(1) does not apply as it relates to age to the operation of a *bona fide* retirement, superannuation or pension plan.

[22] The respondents say that the retirement plan for City firefighters was developed in the context of a relationship that dates back to the early 1900s. Over time, pension legislation and statutory requirements have evolved, and rounds of bargaining have taken place and culminated in the provisions of the current Collective Agreement.

[23] The respondents argue that the Collective Agreement, the MPP Joint Trust Agreement, the MPP Rules and the Special Agreement <u>together</u> operate as a *bona fide* retirement, superannuation or pension plan within the meaning of section 13(3)(b) of the

Code. Although it may not be as convenient as having the plan exist in a single document, the respondents submit that it would be entirely artificial to ignore the reality within which this *bona fide* retirement plan was developed and exists. They say that the fact that the terms and conditions of employment as they relate to retirement and pension are expressed via several documents as opposed to in a single document does not render this plan any less *bona fide* for the purposes of s. 13(3)(b) of the *Code.*

[24] The respondents say that this characterization of the plan is a full answer to Mr. Yaremy's complaint that he has been discriminated against on the basis of age.

[25] Mr. Yaremy acknowledges that the MPP is a *bona fide* retirement, superannuation or pension plan. However, he points out the MPP itself does not mandate retirement at age 60. That requirement is contained in the Collective Agreement. The MPP merely has a "normal" retirement age for firefighters at 60.

[26] Mr. Yaremy submits that s. 13(3)(b) provides a limited exemption. He says that article 13.3 of the Collective Agreement operates in conjunction with the other terms of the Collective Agreement and independently of the MPP, and that the mere existence of the MPP is not sufficient for the powerful exemption in s. 13(3)(b) to apply to the requirement of mandatory retirement.

[27] Thus, the central issue in the application to dismiss under s. 27(1)(c) is whether there is no reasonable prospect that Mr. Yaremy can succeed in proving that both the MPP plus the provisions for funding the Plan in Article 12 and mandatory retirement in Article 13 of the Collective Agreement does not amount to a *bona fide* retirement plan.

B. ANALYSIS AND DECISION

[28] As noted above, all parties agree that the MPP itself is a *bona fide* retirement, superannuation or pension plan. This conclusion is in keeping with the Supreme Court of Canada's decision in *New Brunswick (Human Rights Commission) v. Potash Corporation of Saskatchewan Inc.*, 2008 SCC 45 *("Potash"),* cited by the respondents. In New Brunswick there is a similar term in the legislation that provides a statutory exemption for insurance and pension plans that requires that a retirement or pension plan be *"bona*

fide." In *Potash*, the Court described the rationale and purpose that underlies this type of provision and referenced the BC *Code* as containing a similar provision (paras. 24-26):

> What the legislature was seeking to do in enacting s. 3(6)(*a*) was to confirm the financial protection available to employees under a genuine pension plan, while at the same time ensuring that they were not arbitrarily deprived of their employment rights pursuant to a sham... This was the way the Province, in its human rights legislation, sought to address the concern that age discrimination claims might make benefits available under *bona fide* pension plans vulnerable to being destabilized unless protected by legislation.
>
> In fact, most Canadian jurisdictions expressly exempt pension plans from age discrimination claims and have different provisions for dealing with pension plans and for *bona fide* occupational requirements … *Human Rights Code*, R.S.B.C. 1996, c. 210, ss. 13(3) and 13(4); …
>
> The fact that these statutes treat pension plans differently from *bona fide* occupational requirements is, to me, confirmation that these provisions are intended to perform different protective functions and are subject to different analytic frameworks.

[29] The Court also said what is required in order to meet the *bona fides* test (paras. 28-29):

> If the words "*bona fide*" in s. 3(6)(*a*) are not used the same way as in s. 3(5) and do not, as a result, attract a *Meiorin* [*British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3] analysis, what do they mean in relation to a pension plan?
>
> … the words *bona fide* do not import the "reasonableness" analysis from [*Zurich Insurance Co. v. Ontario (Human Rights Commission)*, [1992] 2 S.C.R. 321]. *Zurich* involved a complaint about motor vehicle insurance premiums.

[30] At issue in *Zurich* was an interpretation of the Ontario *Human Rights Code* that required such provisions to be *bona fide* and reasonable. The Court in *Potash* noted the distinction and held (paras. 31-33):

> Unlike s. 3(6)(*a*), the Ontario legislation speaks of a distinction based "on reasonable and *bona fide* grounds" (s. 21). Section 3(6)(*a*) of New Brunswick's Code speaks only of *bona fides*. I return to McLachlin J.'s admonition in *Meiorin* that "in the absence of a constitutional challenge, this Court must interpret [human rights statutes] according to their terms"

(para. 43). Since s. 3(6)(*a*) does not use the word "reasonable", it need not be imported.

> … the *bona fides* test is one with both subjective and objective components. The subjective requirements of "*bona fides*" are not difficult to define - they relate to motives and intentions. It is more difficult to explain what makes a pension plan, objectively, *bona fide*. In my view, a number of sources direct us to a relatively basic conclusion: a *bona fide* plan is a legitimate or genuine one.
>
> Section 3(6)(*a*), notably, states that the age discrimination provisions do not apply to the terms or conditions of any "*bona fide* pension plan". The placement of the words "*bona fide*", it seems to me, is significant. What this immunizes from claims of age discrimination is a legitimate pension plan, including its terms and conditions, like mandatory retirement. It is the plan itself that is evaluated, not the actuarial details or mechanics of the terms and conditions of the plan. The piecemeal examination of particular terms is, it seems to me, exactly what the legislature intended to avoid by explicitly separating pension plan assessments from occupational qualifications or requirements. This is not to say that the *bona fides* of a plan cannot be assessed in relation to terms which, by their nature, raise questions about the plan's legitimacy. ***But the inquiry is into the overall bona fides of the plan, not of its constituent components***. (emphasis added)

[31] The Court suggested that factors such as whether a pension plan is registered under applicable provincial and federal legislation will be indicative of the *bona fides* of that plan. The Court noted that regulatory requirements under such legislation are helpful because they set out the requisite documents and information necessary to establish and maintain the registration of a pension plan: see *Potash* at paras 35-38.

[32] The Court compared *bona fide* pension plans with "shams." It held that a sham intends to give the appearance of creating between the parties, legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intended to create: see *Potash* at para. 40. The Court said that, for a pension plan to be found to be "*bona fide*", it must be a legitimate plan, adopted in good faith and not for the purpose of defeating protected rights: para. 41.

[33] In *Potash*, the Court concluded (at para. 42):

> Pension plans today are complicated and have, in many ways, evolved from the structures and options available in 1973 ... But this does not change the purpose of what was meant to be generic protection for all

> legitimate pension plans. ***Unless there is evidence that the plan as a whole is not legitimate, therefore, it will be immune from the conclusion that a particular provision compelling retirement at a certain age constitutes age discrimination***. (emphasis added)

[34] The Tribunal recently determined that *Potash* is the governing case regarding interpretation of s. 13(3)(b) of the *Code*: *Johnston obo others v. City of Vancouver, (No. 2)*, 2015 BCHRT 90, para. 71.

[35] Thus, I need to determine whether there is no reasonable prospect of success in Mr. Yaremy's complaint in view of the respondents' position that s. 13(3)(b) of the *Code* applies to what they say is a *bona fide* retirement plan made up of both the MPP plus the provisions for funding the Plan in Article 12 and mandatory retirement in Article 13 of the Collective Agreement. For the reasons that follow, I conclude that the Mr. Yaremy has no reasonable prospect of success in proving that the Collective Agreement, the MPP and supporting documents do not work together to make up the *bona fide* retirement, pension or superannuation plan and that the exception in s. 13(3)(b) of the *Code* would not apply to his situation.

[36] Mr. Yaremy argues that neither the *Public Sector Pension Plans Act*, ref'd above or the *Pension Benefits Standards Act*, RSBC 1996, c. 352 provide a definition of "Pension Plan" or "Plan" that contemplates a retirement or pension plan itself being a piecemeal assembly of various sections of various independent agreements that were drafted for different purposes, by different legislative bodies or bargaining units.

[37] Mr. Yaremy argues that Article 13.3 of the Collective Agreement does not make reference to the MPP. He claims that it would be at odds with the principles of statutory interpretation, and contract law generally, if the Tribunal were to isolate one term from the Collective Agreement and consider it to be part of a "retirement plan", without any link and to the exclusion of the other terms of the Collective Agreement, without such an interpretation being expressly agreed-to by the parties.

[38] Mr. Yaremy argues that his employment was not terminated as the result of a term or condition contained in the MPP, which is acknowledged to be a *bona fide* plan. He argues that this is not saved by the fact that there is a mandatory retirement provision in the Collective Agreement. He argues that the MPP is a separate and independent

document. He says that statutory interpretation doctrine of *expressio unius est exclusion alterius* must apply. He argues that the drafters of the *Code* sought to express certain plans that would be subject to s. 13(3)(b) and, by doing so, he says that they choose to exclude others. He points to Sullivan and Driedger on the Construction of Statutes, 4th Ed.,

> An implied exclusion argument lies whenever there is reason to believe that if the legislature had meant to include a particular thing within its legislation, it would have referred to that thing expressly. Because of this expectation, the legislature's failure to mention the thing becomes grounds for inferring that it was deliberately excluded. Although there is no express exclusion, exclusion is implied. The force of the implication depends on the strength and legitimacy of the expectation of express reference. The better the reason for anticipating express reference to a thing, the more telling the silence of the legislature. [at pp.186-87]

[39] I disagree with Mr. Yaremy's submission that a nexus between the MPP and Collective Agreement is missing. While Mr. Yaremy is technically correct that Article 13 does not refer to the MPP, I note that Article 12 in the Collective Agreement mandates membership in the MPP and requires funding of it.

[40] The scheme must be considered more broadly and in context. It is not disputed that the retirement plan that City firefighters have has evolved over decades and, as a result, is based on an inter-connected set of rules that are expressed in documents that include the Collective Agreement, the MPP Joint Trust Agreement, the MPP Rules and the Special Agreement. Mr. Yaremy provides no contrary evidence that the Union has negotiated enhanced pension benefits in exchange for, and in recognition of, retirement for firefighters at age 60.

[41] I agree with the Union that Article 13.3 of the Collective Agreement works in conjunction with, and complementary to, the normal retirement age specified in the MPP for firefighters as well as the enhanced pension scheme provided for firefighters negotiated by the Union. The evidence presented is that mandatory retirement is a closely intertwined component of the retirement plan for firefighters that works together with the pension plan to form a retirement plan package.

[42] The historical context in which the scheme was developed includes pension legislation and statutory requirements that have evolved, and rounds of bargaining that have taken place. There is no reasonable likelihood of success in Mr. Yaremy's position, which is based mainly on his argument of statutory interpretation, and is contrary to the evidence that the terms and conditions of employment, as they relate to retirement and pension, are expressed via several documents. Mr. Yaremy's arguments that s. 13(3)(b) of the *Code* is inapplicable has no reasonable prospect of success.

[43] There is support in the case law for this conclusion. In *French v. Nova Scotia (Human Rights Commission)*, 2012 NSSC 395, the Court upheld a decision of the Nova Scotia Human Rights Commission dismissing a human rights complaint that challenged mandatory retirement. The Court specifically upheld a finding that a Collective Agreement and pension plan were together the "retirement plan" for purposes of an exemption similar to s. 13(3)(b). The Court noted that the Director of the Human Rights Commission had concluded (para 53):

> Although the Collective Agreement stipulates mandatory retirement and the pension plan only stipulates the 'normal age of retirement', these documents together are considered to be the retirement plan since they are closely intertwined.

The Court upheld the decision and said:

> It was reasonable for her to apply the *Potash* test to the retirement plan. A retirement plan need not be completely contained in one document. It was reasonable for her to treat the Pension Plan as complementing the Collective Agreement to complete Dal's retirement plan. (para. 54)

[44] Mr. Yaremy argues that *French* is distinguishable because he says that the facts are notably different than those in this complaint. In *French* the collective agreement expressly referenced the university's pension plan as follows:

> All Members shall retire at the end of the academic year in which they have reached the age of sixty-five years, as determined in accordance with the Dalhousie University Staff Pension Plan. (para. 50)

[45] Mr. Yaremy argues that the express reference allowed the tribunal to consider the documents to be "intertwined". He states that no such express reference was made in this Collective Agreement.

[46] However, as noted above, the Collective Agreement contains a clause that requires funding of contributions to the MPP by all members of the union. Article 12.5 is entitled "Pensions." Article 13 then refers to the mandatory retirement requirement. The fact that Article 13.3 does not expressly refer to the MPP does not undermine the reasoning in *French* that a retirement plan need not be contained in one document.

[47] The Tribunal has also held in determining whether s. 13(3) applies that it is appropriate to consider an entire package of benefits, and not just the impugned provisions in isolation. In *Cominco Ltd. (Certain Kimberley Operations Employees) v. Cominco Ltd.*, 2001 BCHRT 46, a complaint was considered in relation to the "differential entitlement that employees of different age and service levels" under the applicable Collective Agreements (at para. 3). While *Cominco* relates to the known closing date of a mining operation and does not consider a mandatory retirement provision, I find the Tribunal's comments about the interconnected scheme helpful to the circumstances before me:

> A review of the terms … indicates that the pension benefits, pension windows, severance payments and employment security were part of an entire package that was to address seniority and retirement issues when the Operations closed. These issues are interrelated. …
>
> Looking at the Agreements in context, the provisions negotiated, the factors that were considered by Cominco and the Union, I have no difficulty concluding that they attempted and did develop a *bona fide* scheme that related to both seniority and the operation of a *bona fide* pension plan. I agree with Cominco's submission that the "Sullivan Mine Closure Termination-Retirement Allowance Program … has an ameliorative purpose and involves more than just a severance program ... it is part of a package and is *bona fide* retirement plan." The impugned terms form part of this scheme. (para. 126-127)

[48] The Tribunal in *Bégin v. Richmond School Board and Richmond Teachers' Association*, 2007 BCHRT 60 considered *Cominco.* Mr. *Bégin* was a teacher who complained that his school board employer's early retirement plan breached s. 13 of the *Code*. The employer successfully raised s. 13(3)(b) of the *Code*.

[49] The scheme that was the subject of the complaint was an early retirement incentive plan negotiated in the collective agreement which paid teachers who retired

before they were eligible for a full pension. The complainant alleged that it was discriminatory because the ranking system used to determine which applicants were successful made age the first criterion. The school board argued that the early retirement incentive plan worked in conjunction with the pension plan to assist those teachers who wished to retire early to do so without incurring the full pension plan penalty for that early retirement, and relied on the above-noted quote from *Cominco*. Both the union and the school board claimed that the plan was a *bona fide* retirement or pension plan pursuant to s. 13(3)(b) of the *Code*, and that s. 13(1)(b) therefore did not apply to it.

[50] The Tribunal found that the early retirement incentive plan was a retirement plan that worked in conjunction with the teachers' pension plan to form a retirement plan package akin to the package of benefits in *Cominco*: para. 71. The Tribunal then commenced a review of whether the plan was *bona fide*, relying on the authority in *Zurich.* As noted above, *Potash* is now the governing authority.

[51] I disagree with Mr. Yaremy that *Bégin* must be distinguished. While the case did not deal with a mandatory retirement provision, its finding that various interconnected provisions can form a pension plan within the meaning of s. 13(3)(b) is of assistance to the issue before me in this case.

[52] Mr. Yaremy questions the reasonableness of the pension plan. He points to different requirements to make contributions. He argues that to not have mandatory retirement would not harm the plan. However, this type of analysis of the particular terms of the plan appears to be of the *reasonableness* of the plan, which may be required in Ontario, pursuant to *Zurich,* but is not required here as the provisions in the *Code* do not require reasonableness. Such a review was rejected in *Potash* where the Court said: (at para 33)

> It is the plan itself that is evaluated, not the actuarial details or mechanics of the terms and conditions of the plan. The piecemeal examination of particular terms is, it seems to me, exactly what the legislature intended to avoid by explicitly separating pension plan assessments from occupational qualifications or requirements. This is not to say that the *bona fides* of a plan cannot be assessed in relation to terms which, by their nature, raise questions about the plan's legitimacy. ***But the inquiry is into the overall bona fides of the plan, not of its constituent components***. (emphasis added)

[53] In summary, considering historical context in which the scheme was developed and the recognition in the case law that all terms need not be contained in one document, I conclude that the Collective Agreement, the MPP and supporting documents work together to make up the *bona fide* retirement, pension or superannuation plan adopted in good faith and not for the purpose of defeating protected rights: (*Potash* at para. 41). Accordingly, the exception in s. 13(3)(b) of the *Code* applies. The complaint in that regard is dismissed under s. 27(1)(c) of the *Code*.

III. COMPLAINT AGAINST THE CITY FOR DISCRIMINATION ON THE BASIS OF DISABILITY

[54] In the complaint, Mr. Yaremy alleges that, at the time the letter was sent that ended his employment by retiring him, he was off work due to a WorkSafe-approved medical condition. He said he was awaiting surgery on his right shoulder. He says that, upon his termination, WorkSafe removed him from any wage loss program. He says that he has not, despite still being on a WCB leave, received any WCB wage loss. He also says that he is not able to work at this time.

[55] In his argument, Mr. Yaremy points out that the City was also fully familiar with his medical condition due to the WorkSafe nature of the issue. He says that the City would *save* funds by having Mr. Yaremy not *receive* WorkSafe funding. He says that, when he was terminated, he did not have any access to WorkSafe funds.

[56] Mr. Yaremy says that, if his medical condition played *any* part in his termination, a claim under the *Code* is justified. Mr. Yaremy claims that, based upon the facts as set out, it is more than conjecture. He notes that the Union indicated, in its submission, that Mr. Yaremy was terminated as a result of Article 13.3, not his medical leave. He acknowledges that on the face of the documents that is accurate. However, Mr. Yaremy should not have been terminated while on medical leave for the reasons as set out above. This includes the fact that Mr. Yaremy lost wage protection that was in place while on WorkSafe when he was terminated.

[57] He says that, at all times, he was actively pursuing his medical claims. He says that his retirement was entirely unrelated to his alleged disability. The sole reason for his retirement was that he attained 60 years of age.

[58] Mr. Yaremy claims that the same decision would have been made if he was at work and had no alleged disability. All City firefighters are retired at age 60 due to the operation of the *bona fide* retirement plan described in detail above.

[59] The City argues that the Tribunal has recognized that employees with disabilities may be terminated for non-discriminatory reasons, with the result that the termination is not discriminatory: see *Papageorgiou v. ComNav Marine and Morris,* 2005 BCHRT 135 at para. 18; *Bertrend v.Golder Associates,* 2009 BCHRT 274 at para. 199; *Flores v. Duso Enterprises and Ouso 21 (No. 2),* 2008 BCHRT 368 at para. 82; *Watson v. Lawdell Services Limited Partnership,* 2013 BCHRT 82 at para. 70. The City claims that there was no nexus between Mr. Yaremy's retirement and his disability. Mr. Yaremy was retired from his position when he attained 60 years of age due to the operation of the *bona fide* retirement plan. It argues that, while Mr. Yaremy may believe that his employment was terminated because of his medical leave of absence, that was simply not the case, as demonstrated by documents that record that Mr. Yaremy was retired from service with the City upon his 60th birthday as per the collective agreement.

[60] The City submits that it may well be that Mr. Yaremy believes that the City has discriminated against him on the basis of his alleged physical disability. However, Mr. Yaremy's belief in this regard is not determinative of this Application.

[61] The City argues that the case of *Low v. British Columbia Nurses' Union,* 2004 BCHRT 358 applies, where the Tribunal dismissed a complaint because it was founded only on the complainant's subjective belief, speculation or conjecture, which was insufficient to give the complaint a reasonable prospect of success:

> [The complainant's] belief, however, is not a sufficient basis to give her complaint a reasonable prospect of success ... Her allegations of racist behaviour on the part of the respondents are never taken out of the realm of the speculative ... [S]he believes that the respondents' actions may possibly have been discriminatory, and wants to use a Tribunal hearing to examine whether that was in fact the case. That is not a proper purpose for a hearing.

> It is clear from the materials that [the complainant] believes that the respondents failed to represent her properly in her dealings with her employer. The respondents deny those allegations ... For present purposes, suffice to say that the [union] has presented submissions and documents in support of their position that they provided [the complainant] with appropriate representation. (at paras. 25-26)

[62] The City submits that it has acted reasonably and in good faith towards Mr. Yaremy at all times. The City has provided evidence that the reason for Mr. Yaremy's retirement was his attainment of 60 years of age as he was retired due to the operation of the bona fide retirement plan described in detail above. There is no reasonable prospect that Mr. Yaremy will succeed in establishing that his retirement was related to his alleged disability. Therefore, the City submits that this aspect of the Complaint should be dismissed pursuant to section 27(1)(c) of the *Code.*

[63] I agree with the City that Mr. Yaremy has only provided speculation and conjecture that his retirement was in any part based on his disability. In his own complaint, Mr. Yaremy says that he was retired because he turned 60 and it was mandated under the Collective Agreement. I conclude that Mr. Yaremy has no reasonable prospect of success in proving that the City discriminated against him based on his disability. Therefore, under s. 27(1)(c) of the *Code,* I dismiss the complaint against the City that it discriminated against Mr. Yaremy because of his disability.

IV. COMPLAINT AGAINST THE UNION

[64] Mr. Yaremy complains that the Union discriminated based on age and disability under both sections 13 and 14 of the *Code*. He made allegations about the Union negotiating the mandatory retirement provision in the Collective Agreement. Mr. Yaremy also makes allegations about the fact that he was on medical leave at the time his employment was terminated.

[65] A review of Mr. Yaremy's allegations against the Union on the issue of discrimination on the grounds of disability show that:

- At the time that the letter advising of his mandatory retirement, Mr. Yaremy was off work due to a WorkSafe BC approved medical condition.

- Mr. Yaremy informed the Union that he was terminated while on medical leave and due to his age and asked that the union grieve his termination.
- The Union, at first, did grieve Mr. Yaremy's termination of employment.
- The Union executive later informed Mr. Yaremy that it was not going to pursue his grievance.
- Mr. Yaremy wrote the Union and asked them to reconsider their position. He cited another case at the Tribunal where a firefighter was challenging his mandatory retirement. That firefighter was not disabled.
- The Union counsel informed Mr. Yaremy that the Union had confirmed its decision and that it was not pursuing the grievance.

[66] While complaints may be made against a trade union under either or both of ss. 13 and 14, in *Ferris v. Office and Technical Employees Union, Local 15* (1999), 36 C.H.R.R. D/329, the Tribunal discussed the distinction between allegations against a union that fall under s. 13 of the *Code*, and those that fall under s. 14:

> When an allegation of discrimination is made against a union in an organized workplace, a union may be found liable under s. 13 or s. 14, or both. For example, if the union negotiates a provision in a collective agreement that has a discriminatory effect on the complainant or impedes the reasonable efforts of an employer to fulfil its duty to accommodate a complainant, it will contravene s. 13 of the *Code* but not s. 14 ... If the union discriminates against a member with respect to the internal operation of the union in a manner that does not extend to the relationship with the external employer, then it will contravene only s. 14 ...
>
> Generally, s. 13 is engaged where a union discriminates against a member in a manner that touches on the employment relationship between the member and the employer. Where the union discriminates against a member as a member rather than as an employee, s. 14 will apply. The two provisions are not mutually exclusive. For example, where a union discriminates in its representation of a member in respect of an issue arising from the member's employment, both ss. 13 and 14 may be contravened. (at paras. 79 and 80)

[67] In *Bégin*, discussed above, the complainant complained against both his employer under section 13 and his union under section 14 of the *Code*. The Tribunal stated:

> Section 13(1)(b) deals with discrimination "against a person ***regarding*** employment or any term or condition of employment". (Emphasis is mine.) In my view, in order to sustain an allegation under s. 13(1)(b) of the *Code* against a union, or an individual acting on behalf of a union, the alleged discriminatory act must have affected Mr. Bégin's employment or a term or condition of that employment, directly, not tangentially, and in a substantive way ... (at para. 26)

[68] In *Bégin*, the Tribunal noted that Mr. Bégin did not allege that his union excluded him from membership, expelled or suspended him, or otherwise discriminated against him with respect to the internal operation of the union. Rather, he alleged that the union had discriminated against him in a manner that, in the words of the Tribunal in *Ferris*, "touches on the employment relationship between the member and the employer."

[69] The Tribunal held that the allegations against the union fell under s. 13(1)(b), and not under s. 14 because the negotiation of the early retirement plan impacted Mr. Bégin's employment, not his membership in the union. The Tribunal found that the acts alleged in Mr. Bégin's complaint, as against his union, even if proven, do not contravene s. 14 of the *Code* and pursuant to s. 27(1)(b), the complaint under s. 14 was dismissed against the union.

[70] In *Jones v. Coast Mountain Bus Co.*, 2014 BCHRT 166, a case where a negotiated disability insurance scheme was under review, the Tribunal held (at Para 69):

> It is established law that where a complaint against a union by a union member relates to the union's complicity in designing language in a Collective Agreement, in conjunction with an employer, which is *prima facie* discriminatory, that complaint should generally be brought under s. 13 of the *Code* as opposed to s. 14, *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970, para. 36; *Taylor v. B.C. (Ministry of the Attorney-General) and others (No. 2)*, 2013 BCHRT 173, paras 9-15.

[71] The age discrimination allegation before me is substantially similar to those in *Bégin* and *Jones*. The foregoing authorities persuade me that the allegations in the complaint do not disclose that the union allegedly contravened either s. 13 or s. 14 of the *Code* by its negotiation of the mandatory retirement provisions in the collective agreement and I dismiss that part of the complaint under s. 27(1)(c) of the *Code*.

[72] Mr. Yaremy does not make specific argument concerning how he says the Union discriminated against him on the basis of his disability; concentrating instead on the issue of mandatory retirement. It seems that it is merely that he was disabled when his employment was terminated and that the Union refused to pursue his grievance that caused that ground to be advanced.

[73] Allegations of mere inadequacy of representation will not establish union liability. The Tribunal has held that, in order for union to be liable under s. 14 in representing its member, it must have discriminated against its member in that representation. See *Dow v. Summit Logistics and RWU Local 580*, 2006 BCHRT 158, paras. 33, 69.

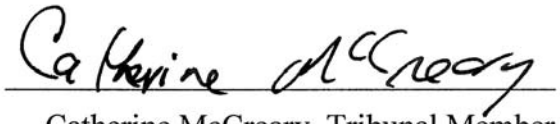
[74] With respect to the part of the complaint dealing with the fact that Mr. Yaremy was terminated while he was on medical leave and that formed part of the grievance he filed, the Union argues that its decision not to pursue a grievance to arbitration with respect to Mr. Yaremy's termination was not discriminatory because there is no link between the Union's decision and Mr. Yaremy's disability, nor, it argues, does Mr. Yaremy make that allegation. The Union reiterates its position that the termination of employment was appropriately imposed as a result of relevant, non-discriminatory factors such as its interpretation of Article 13.3.

[75] The Union points to the allegations contained in the complaint which states that the Union did not pursue the Grievance and confirmed this by legal counsel on March 13, 2013. The Union says that this allegation does not lead to a finding of discrimination by it and says that, since there are no facts alleged in the complaint that suggest this decision was in any way discriminatory, the Union argues that the Tribunal should dismiss this aspect of the complaint (and thus Mr. Yaremy's reliance on Section 14 in its entirety).

[76] I agree with the Union that this part of the complaint should be dismissed. Mr. Yaremy has failed to allege facts to support either any representational inadequacy, nor, more importantly, any relationship between any alleged inadequacy and any prohibited ground. There is no basis upon which to find that Mr. Yaremy's disability was a factor in the Union's decision to withdraw the grievance. I conclude that this aspect of the complaint has no reasonable prospect of success. Accordingly, it is dismissed under s. 27(1)(c) of the *Code*.

V. CONCLUSION

[77] The application to dismiss the complaint under s. 27(1)(c) is granted. The complaint is dismissed.



Catherine McCreary, Tribunal Member