Date Issued: May 30, 2019
File: 17587

Indexed as: JY v. Various Waxing Salons, 2019 BCHRT 106

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:

JY

COMPLAINANT

AND:

Various Waxing Salons

RESPONDENTS

REASONS FOR DECISION
APPLICATION TO LIMIT PUBLICATION AND APPLICATION FOR COSTS
Section 37(4) and Rule 5

Tribunal Member:	Devyn Cousineau
On her own behalf:	JY
Counsel for Laser Cut Beauty Salon Inc.:	Honveer Randhawa
Other waxing salons:	No submissions

I INTRODUCTION

[1] JY has filed complaints against a number of waxing salons, alleging that they discriminated against her on the basis of her gender identity and expression. All of those complaints have been consolidated within a single complaint process.

[2] This decision addresses three applications in respect of JY's waxing complaints:

a. JY's application to limit publication of any information that may identify her in these proceedings. The application is granted.

b. JY's application for costs against the respondent, Laser Cut Beauty Inc. [**Laser Cut**]. The application is denied.

c. Laser Cut's application for costs against JY. The application is granted.

[3] I begin these reasons by reviewing the unusual procedural history of JY's complaints.

II PROCEDURAL HISTORY

[4] In the spring of 2018, JY filed 13 human rights complaints against various waxing service providers. [1] In each one, she alleges that she requested an appointment for waxing services and that the service provider refused her after learning that she was transgender. She says that this is discrimination on the basis of her gender identity and expression, in violation of s. 8 of the *Human Rights Code* [***Code***].

[5] Because all of JY's waxing complaints raised similar issues, the Human Rights Tribunal [**Tribunal**] established a process whereby the first three complaints would proceed through the regular process, while the other ten were held in abeyance. The intention was to allow the Tribunal to address the substance of JY's allegations in fewer complaints. The results in all the

[1] In an earlier decision, I said that JY had filed 14 complaints. This was an error.

complaints were likely to be affected by the Tribunal's reasoning on the substantive issues that JY had raised.

[6] One of JY's first complaints, which was processed in the regular manner, was against Mint Tanning Lounge and two individual respondents [**Mint Tanning Complaint**]. In June 2018, JY applied to the Tribunal to limit publication of her name and restrict access to the contents of her complaint file in that complaint. At that point, the respondents were not participating in the process. As a result, JY's application was not opposed. I granted the application in a letter decision dated June 21, 2018, reasoning:

> I accept that a person's gender identity is profoundly personal and they should retain control over how and when the public is informed of it. In certain circumstances, where a party wishes to pursue a human rights complaint but does not want to be publicly identified as transgender or gender non-conforming, their privacy interests may sufficiently outweigh the public's interest in knowing their identity in relation to a particular complaint.
>
> However, [JY's] complaint is somewhat unique in that she has filed a large number of complaints of a similar nature. She has identified herself publicly as a woman, in some cases through online platforms such as Facebook, to all of the other respondents in those cases. [JY's] application is insufficiently detailed to understand the extent to which she is already identified as transgender or gender non-conforming publicly, so as to understand her privacy interests in respect of this complaint.
>
> Furthermore, the Tribunal is holding a number of those complaints in abeyance pending resolution of the first [three]. As such, the parties to [JY's] other complaints have an interest in following the progress and outcome of the other similar complaints. This cannot happen if [JY's] name is not associated with the complaints. Depending on my ultimate findings in respect of this complaint, there may – or may not - be a public interest in publishing [JY's] name.

I ordered that JY's name be anonymized on an interim basis, and that the contents of her complaint file would not be available to the public up until the date of my final decision on the application. I said that I would make that final decision after the hearing of the complaint and indicated that I would seek further information from JY about her request at the hearing.

[7] Shortly after this decision, the individual respondents in the Mint Tanning Complaint retained legal counsel and indicated their intention to participate in the complaint. They asked me to lift the publication ban, arguing that JY in fact had a very public persona as a transgender woman, including with respect to sexually explicit material. Almost immediately after this submission, JY withdrew her complaint against the individual respondents. She later also withdrew against Mint Tanning.

[8] The individual respondents in the Mint Tanning Complaint sought costs against JY on the basis that her sudden withdrawal, and alleged misrepresentations to the Tribunal, constituted improper conduct. I denied the application, as well as the reconsideration that followed: *JY v. Mint Tanning Lounge and others,* 2018 BCHRT 282 [***Mint Tanning***]; *JY v. Mint Tanning Lounge and others*, 2019 BCHRT 9. After that point, the Mint Tanning Complaint was closed. The publication ban and sealing order remains effective with respect to that complaint.

[9] After JY withdrew her complaint against the individual respondents in the Mint Tanning Complaint, the same lawyer who was representing those respondents was retained to represent the respondents in another of JY's waxing complaints. When she learned this, JY withdrew that complaint as well.

[10] JY ultimately withdrew all three of her original waxing complaints. As a result, in September 2018, I wrote to the participants in the remaining ten waxing complaints to advise that their complaints were being taken out of abeyance. By letter dated November 16, 2018, I consolidated all ten complaints in order to efficiently and consistently resolve procedural issues. Among other things, I set a schedule for JY to submit her application to limit publication in respect of the consolidated complaints, and for all of the respondents to respond. That schedule completed and only Laser Cut made submissions to oppose the application. This is one of the three applications that I address in this decision.

[11] Only four out of ten respondents filed a Complaint Response, thereby indicating their intention to participate in the complaint process.

[12] Laser Cut filed its submissions in respect of the application to limit publication on January 18, 2019. Four days later, JY filed an application for costs against Laser Cut, arguing that it had engaged in improper conduct in the course of its submissions by intentionally misgendering her and by demonstrating "hateful conduct and defamatory statements". This is the second application that I address in this decision.

[13] While submissions respecting the publication ban were ongoing, Laser Cut made an application to the Tribunal to dismiss JY's complaint under s. 27 of the *Code.* The next day, JY withdrew her complaint against Laser Cut. I then wrote to the parties on March 20, 2019 as follows:

> I am concerned that [JY's] withdrawal of this complaint may be part of a pattern by which she files complaints and then withdraws them when the respondent mounts a defence. This is the third time this has happened. She has previously withdrawn her complaints against [a respondent] and Mint Tanning Lounge after they hired lawyers and took steps to defend against the complaints.
>
> …
>
> While it may not be improper conduct to file and then withdraw a complaint once or even twice, by doing this repeatedly, [JY] has caused me to have concerns about her motives in filing her complaints and her good faith intention of pursuing them. When a person files a complaint, they should expect a response. In most cases, that response asks the Tribunal to take a different view of the facts and to dismiss the complaint. If [JY] is not prepared to engage in that process, then I have difficulty understanding why she is filing complaints and putting the respondents and Tribunal to the time and expense of dealing with them.
>
> Before I process [JY's] withdrawal against Laser Cut, I would like the parties' submissions about whether this withdrawal, in circumstances where [JY] has filed a number of very similar complaints and previously withdrawn two of them in similar circumstances, warrants an order for costs against [JY] under s. 37(4) of the *Code.*

Laser Cut and JY have now made those submissions, which effectively amount to an application from Laser Cut to seek costs against JY. This is the third application that I will address in this decision.

[14] At this point, JY no longer intends to proceed with her complaint against Laser Cut. She has withdrawn two of her other complaints under circumstances which I do not find it necessary to address in this decision. This leaves seven complaints that must be resolved. Those complaints have just been scheduled for hearing in the summer of 2019. In five out of the seven complaints, the respondent has not filed a response.

III SUBMISSIONS

[15] JY's submissions in respect of these three applications were intermingled and, as a result, somewhat confusing. I find it necessary to identify those submissions which I have relied on and for what purpose.

[16] By email dated December 20, 2018, JY applied for orders to limit publication in these proceedings [**Anonymization Application**]. On January 18, 2019, Laser Cut filed its response to the Anonymization Application.

[17] On January 22, 2019, JY filed an application for costs against Laser Cut, arguing that its submissions in response to the Anonymization Application constituted improper conduct [**JY Costs Application**]. The materials that JY submitted in respect of the JY Costs Application appear to also constitute, in part, her final reply to the Anonymization Application.

[18] On April 9, 2019, Laser Cut filed its application for costs against JY [**Laser Cut Costs Application**]. JY filed her response to that application by email dated April 11, 2019. Laser Cut filed its reply on April 29, 2019.

[19] In the meantime, Laser Cut responded to the JY Costs Application on April 23, 2019. JY then filed a submission dated April 26, 2019, which purported to be the final reply in respect of her costs application but also included arguments with respect to the Anonymization Application and the Laser Cut Costs Application.

[20] Laser Cut has objected to JY's April 26 submission on the basis that much of its content constitutes unsolicited further submissions respecting the Anonymization and Laser Cut Costs Applications. I agree.

[21] Generally speaking, the Tribunal's process regarding applications involves three submissions: the application, the response, and the reply: Rule 28(2). The Tribunal has discretion to accept further submissions where fairness requires that a party be given an opportunity to respond to new issues raised in a reply, or to address new information not available when they filed their submission: *Kruger v. Xerox Canada Ltd (No. 2),* 2005 BCHRT 24; Rules 28(5) and (6). It exercises this discretion sparingly, because "efficiency demands that the submission process on applications not be an endless exchange of further and better arguments": *Berezoutskaia v. MacDonald and others*, 2006 BCHRT 331 at para. 10; *Murphy v. VIHA and others (No. 2),* 2014 BCHRT 102 at para. 9.

[22] In this case, at the time that JY filed her April 26 submission, the schedule for submissions with respect to the Anonymization Application and Laser Cut Costs Application had closed. JY did not apply to file a further submission in respect of those applications, as she is required to do by Rule 28(5). This is sufficient for me to decline to consider those further submissions. However, I add that JY's further submissions essentially repeat arguments that she had already made, and so fairness would not support my accepting them even if she had filed an application.

[23] In the result, I only consider those aspects of JY's April 26 submission which constitute proper reply in respect of her costs application. I do not consider the rest. In future, I strongly encourage JY to use the Tribunal's application forms and to follow its schedule for submissions.

IV APPLICATION TO LIMIT PUBLICATION

[24] Proceedings before the Tribunal are presumptively public: *Mother A obo Child B v. School District C,* 2015 BCHRT 64 at para. 7. In particular, the Tribunal's decisions must be accessible to the public: *Administrative Tribunals Act,* s. 50(4), *Code,* s. 32(n). In addition,

hearings are open to the public: *Rules of Practice and Procedure* [**Rules**], Rule 5(1). To facilitate public access to hearings, the Tribunal publishes a hearing list 90 days in advance, identifying the parties and basic information about the complaint: Rule 5(3). At that point, it also makes parts of the complaint file available to the public: Rule 5(1).

[25] Like for courts, this openness serves four principal goals: maintaining an effective evidentiary process, ensuring that Tribunal members act fairly, promoting public confidence in the Tribunal, and educating the public about the Tribunal's process and development of the law: *Edmonton Journal v. Alberta (Attorney General),* [1989] 2 SCR 1326 at para. 61; *Southam Inc. v. Minister of Employment and Immigration,* [1987] 3 FC 329 at para. 9 (Fed Ct). These goals align with the purposes of the *Code,* which include fostering a more equitable society and identifying and eliminating persistent patterns of inequality: *Code,* s. 3. A primary means by which the Tribunal furthers these purposes is through its public decisions: *A and B v. Famous Players Inc.,* 2005 BCHRT 432 at para. 14.

[26] This open court principle is connected to the right of freedom of expression guaranteed by s. 2(b) of the *Charter*. Members of the public have a right to information about this Tribunal and its operations, which necessarily includes information about the Tribunal's proceedings: *Canadian Broadcasting Corporation v. New Brunswick (Attorney General)*, [1996] 3 SCR 480 [***CBC***] at para. 23. Orders which restrict the public's access to such information restrict free expression, which "encompasses the freedom of listeners to obtain information that fosters public criticism of the courts": *CBC* at para. 26.

[27] This openness is not absolute, however. It may be curtailed where there are private or public interests which outweigh the public interest in accessing information. For example, during the early stages of the Tribunal's process, public access to the complaint file is restricted: Rule 5(9). This encourages parties to engage in early efforts to settle complaints, which saves public and private resources and may be beneficial for the parties: *Nguyen v. Prince Rupert School District No. 52,* 2004 BCHRT 20 at paras. 15-18. For the same reason, where parties are involved in settlement discussions, they may request that the Tribunal delay adding a complaint to the hearing list: Rule 5(4).

[28] The Tribunal may also limit public disclosure of personal information where a person's privacy interests outweigh the public interest in access to its proceedings: Rule 5(6). Those privacy interests also engage a constitutional dimension: see discussion in *Mother A* at paras. 4-5. In exercising its discretion, the Tribunal is cognizant that once a person's privacy is invaded, "it can seldom be regained": *R. v. O'Connor,* [1995] 4 SCR 41 at para. 119.

[29] In the case of minors, the Tribunal will presume that the minor's privacy interests prevail: Rule 6(7). In all other cases, the burden is on the person seeking to restrict publication to establish the necessary "strong grounds" for the order: *A and B* at para. 10.

[30] The Tribunal has considered a number of factors in exercising its discretion to limit publication. Those factors include:

a. **The stage of the proceedings**. There is greater scope for limiting public access at early and interlocutory stages of the Tribunal's process, before the Tribunal has made any decision on the merits of the complaint: *A and B* at para. 11. The Tribunal will often make an order restricting publication up until the hearing of the complaint, at which point the balancing of interests may change.

b. **The nature of the allegations**. Certain types of allegations are more likely to attract the public's "prurient" attention: *CN v. Health Authority and another,* 2014 BCHRT 265 at para. 51. This is particularly the case where allegations involve sexual harassment or impropriety. In addition, the Tribunal may consider whether the subject matter of the complaint is purely a private dispute between the parties, or whether it engages the public's interest in the operation of large or public institutions: *CN* at para. 49*; B v. Victoria School District 61,* 2014 BCHRT 105 at para. 11.

c. **Private details in the complaint.** This Tribunal hears complaints which engage, by their nature, very personal details. Where a complaint involves private medical or counselling information, that is a factor that may weigh in favour of restricting publication: *Parent F obo Child G v. School H and others,* 2014 BCHRT

62 at para. 2. The Tribunal will also consider whether the nature of the complaint concerns aspects of a person's identity that they choose to keep private, for example, mental illness, sexual orientation or gender identity: see e.g. *Employee v. Life Labs (No. 2),* 2018 BCHRT 202 [***Employee***] at para. 12; *XP v. JR v. The Hospital and others,* 2018 BCHRT 4 at paras. 5-7, upheld in 2018 BCSC 2079.

d. **Harm to reputation.** The Tribunal will consider the nature of a person's profession and the allegations to determine whether the potential harm to reputation will justify an order restricting publication: e.g. *Complainant v. Health Authority,* 2016 BCHRT 98 (health workers); *A v. BC (The Ministry) and others,* 2012 BCHRT 342 (senior public servant). A bare assertion of harm will not be sufficient: *Francis v. BC (Ministry of Justice) (No. 2),* 2014 BCHRT 171 at para. 15 (correctional workers); *MS v. ACL,* 2013 BCHRT 29 at para. 22; *Musa v. Costco,* 2009 BCHRT 271 at para. 15 (corporation).

e. **Other potential harm**. Where a person faces further victimization or hardship as a result of public disclosure, that weighs in favour of a restriction: *Employee* at para. 12; *Kennedy v. Strata Corporation KAS 1310,* 2005 BCHRT 87 at paras. 58-59; *KP v. Immigration Services Society and Siemens,* 2008 BCHRT 266 at para. 10.

This list is not exhaustive. It is intended simply to show the types of factors which may justify the Tribunal restricting public access to personal information in a complaint. As in all decisions it makes, the Tribunal exercises its discretion in the manner that can best ensure the just and efficient resolution of complaints and, in doing so, further the purposes of the *Code.*

[31] In this case, JY says that she and people close to her are at risk of harassment and harm if her name is published in connection with these complaints. There are several aspects to this assertion.

[32] First, JY relies on the status of LGBTQ+ people in society generally and, in particular, the fact that certain members of society continue to hold hateful and discriminatory views toward

them. She says that if her gender identity is published in connection with these complaints, she will be the target of harassment and hatred from such groups.

[33] I agree with JY, and accept, that transgender women are disproportionately likely to be exposed to violence and hate: *Oger v. Whatcott (No. 7),* 2019 BCHRT 58 at paras. 60-65. In *Mint Tanning*, I concluded that it was "better to err on the side of caution in protecting a transgender person who asserts that the publication of their name in association with a complaint may expose them to harm": at para. 32. This is consistent with other cases recognizing the potential stigma transgender persons might face if their gender identity is publicised: *XY v. Ontario (Government and Consumer Services),* 2010 HRTO 1906; *AB v. Elementary Teachers Federation of Ontario,* 2018 HRTO 1224; *X. v. Hot Mess Salon,* 2019 BCHRT 24 at para. 12; *Employee*.

[34] Second, JY says, and I accept, that the threat of harm in this case is not theoretical. A well-known anti-transgender activist has circulated flyers in Vancouver denouncing JY in connection with her human rights complaints. JY is also subject to repeated attacks online and in social media, which are based in part on her gender identity. She says that she has received death threats and that she has had to seek police protection as a result. She says that she is in constant fear for her safety. She says that her mental health has suffered because of these threats and online harassment.

[35] JY says that she has been specifically targeted because of her connection with these complaints. She asserts that she has received "countless death threats and endured a multitude of online harassment exceeding at least 2500 posts across various platforms" as a result of her name being published in connection with these complaints, in contravention of my earlier orders. JY also attributes a rash of fake food orders made to her house to her participation in these complaints. Elsewhere, she alleges – based on the timing of those orders – that Laser Cut is ultimately behind them. I do not find that the evidence supports that conclusion. However, I am prepared to accept for the purpose of this application that JY has been subjected to harassment and harm directly as a result of being exposed online as the complainant in these complaints. This is apparent in some of the material that Laser Cut has submitted in the

application and is consistent with the general tenor of online discussion about JY in connection with transgender issues.

[36] At the same time, I also agree with Laser Cut that much of the online hatred towards JY appears to relate to her conduct unrelated to these complaints. In particular, a number of JY's communications have been posted online – she says without her consent. Those communications contain explicit material and have gained her a degree of notoriety. They appear to be the catalyst for a lot of online hate toward her.

[37] JY says that there was nothing inappropriate about the controversial communications. I specifically make no judgment about whether or not her comments were appropriate or how they came to be online. Their only relevance here is that they support Laser Cut's argument that, to the extent that JY is a target for harassment, much of that harassment is not generated by these human rights complaints but rather by other, unrelated, issues.

[38] Third, JY says that she has not made any public statements that suggest that she has transitioned from male to female. She argues that "there is absolutely no reason why the public should be able to search my name up and easily find out my gender identity and how I identify". Laser Cut strongly refutes this argument and points out that JY's public reputation is already bound up both with her gender identity and her online persona. The evidence supports this conclusion.

[39] Rightly or wrongly, JY's gender identity is the first thing a person finds when they search her name online. Notwithstanding JY's intention to control that information, the fact is that it is simply no longer private. While much of the online content comes from anti-transgender websites and activists, some of it is material that JY has posted herself.

[40] In particular, JY has posted pictures of herself online. In some of those, she presents as masculine and stereotypically male. In others, she is wearing makeup and clothing which make her appear much more feminine and stereotypically female. In her materials, JY strongly denies that she has identified herself as transgender online and says that this characterisation draws on stereotypes about what clothing and makeup people should wear. She says, and I agree

completely, that she is "free to wear what I wish". I also accept that expressing oneself in a gender fluid way does not amount to disclosing publicly that you are transgender. The point is, however, that it is simply not accurate to suggest, as she does, that her gender identity is not already public to a large degree. I agree with Laser Cut that this distinguishes the present complaints from the circumstances in *Employee,* where the complainant had gone to great lengths to conceal her transgender identity from her family, and *AB,* where the complainant had neither desired nor intended to have their gender identity publicly represented online.

[41] JY is publicly active online, in chatrooms and on social media. Several of the posts which Laser Cut has submitted in this application are about complaints that she has brought against other businesses. Given the totality of the evidence before me about JY's online identity, I find some merit in Laser Cut's argument that JY's claim for privacy is undermined because "one cannot openly seek the limelight, while at the same time retreating into namelessness, when it is convenient to do so".

[42] Finally, JY argues that, given the nature of her complaints, they are bound to generate opposition and controversy. I agree, and I am satisfied the nature of JY's allegations in these complaints, which concern intimate services for women, are such that that the public will likely take a "prurient" interest in them. Indeed, the media has already published articles about the complaints and will no doubt do so again when the Tribunal releases further decisions. However, this is a factor that cuts both ways. JY asserts that she is bringing these complaints to expose a widespread pattern of discrimination against transgender women. The expanding rights of transgender people are of intense current public interest. The fact that the complaints are sure to be divisive and generate public debate underscore the public's interest in having access to as much information as possible in respect of them.

[43] In addition to the public interest in the subject matter of the complaints, Laser Cut argues that there is a specific public interest in publicizing JY's identity in connection with these complaints. Within a short time frame, JY filed 13 similar complaints, most of them against businesses which Laser Cut says are relatively new and operated by immigrants to Canada who speak English as a second language. Laser Cut argues that JY brought these complaints in bad

faith, seeking financial gain. It says that other similar businesses should be aware of JY's conduct so that they do not "cave in" to her "pressure tactics". It equates JY to a vexatious litigant.

[44] I accept that where a litigant is vexatious or using the Tribunal purely to leverage unjustified monetary settlements, their privacy interests are unlikely to outweigh public interest in disclosing their identity. In that regard, I agree with the Ontario Superior Court that:

> … emphasizing privacy over openness not only has a negative impact on the press but also affects other stakeholders. Regulators have no way of identifying chronic offenders, reference checks on tenants and others who come before the various tribunals are impossible to carry out. Problematic landlords, police, and other actors, including repeat human rights offenders, vexatious litigants, and the like cannot be discovered by members of the public who have to engage with them….
>
> *Toronto Star v. AG Ontario,* 2018 ONSC 2586 para. 111

[45] However, I cannot, at this stage, find that JY is a vexatious litigant. The complaints that she has filed raise an important issue of the rights of transgender women to access gender-affirming care, particularly in the context of what appear to be predominantly small businesses run by racialized women. I have not yet made any findings of fact in respect of those complaints and cannot conclude JY's conduct in filing them makes her vexatious.

[46] That said, it is fair to characterize JY as a frequent litigant. Service providers who engage with her, or other parties whom she has complained against, would likely agree with Laser Cut that there is a public interest in knowing about JY's litigation history and patterns. Indeed, in a separate application, Laser Cut has submitted documents from another one of JY's legal actions in an attempt to demonstrate a pattern of targeting people from the South Asian community. This type of inquiry, which does engage the public interest, will be hampered if JY is permitted to cloak herself with anonymity in her complaints.

[47] In sum, JY's privacy interests are complex. She has a public persona that is connected with her gender identity. As a result of her notoriety, as well as social prejudice towards gender diverse people, she is subjected to harassment and hatred. These complaints engage the issue

of intimate services for transgender women and are sure to generate controversy and more hate directed toward JY. There is evidence to support that this has already occurred, given that JY's identity has been leaked and publicized online in connection with the complaints. On the other hand, JY's complaints raise an issue of significant public interest, and there is a specific public interest in publicizing JY's identity because of the sheer number of complaints that she has filed.

[48] On balance, I have decided to grant JY's application for an order to limit publication. In reaching this conclusion, I have placed the most weight on JY's vulnerability as a transgender woman and the threats and harassment she is almost certain to endure if her identity is published in connection with these complaints. I take into account that JY's complaints are still at an interim stage in the Tribunal's process. Granting the order is the best way to ensure JY's continued safety while the Tribunal resolves her complaints. In the event that new facts come to light that affect my balancing, I may lift the order. In the meantime, however, I err on the side of maintaining JY's privacy because, once that is lost, "it can seldom be regained": *O'Connor* at para. 119.

[49] I order as follows:

a. No person shall publish in any document, or broadcast or transmit in any way any information disclosed in or in relation to this complaint that could identify JY.

b. If the Tribunal releases parts of the complaint file to the public pursuant to Rule 5(10), it will redact any information that could identify JY.

V APPLICATIONS FOR COSTS

[50] This Tribunal has jurisdiction, under s. 37(4) of the *Code*, to award costs against a party who has engaged in "improper conduct during the course of the complaint". Improper conduct includes "any conduct which has a significant impact on the integrity of the Tribunal's processes, including conduct which has a significant prejudicial impact on another party": *McLean v. BC (Ministry of Public Safety and Solicitor General) (No. 3),* 2006 BCHRT 103 at para.

8. The purpose of a costs award is punitive: *Terpsma v. Rimex Supply (No. 3),* 2013 BCHRT 3 at para. 102.

[51] JY and Laser Cut each seek costs from the other. I address each application in turn.

A. JY's application for costs against Laser Cut

[52] JY argues that Laser Cut engaged in improper conduct by using male pronouns to identify her and by demonstrating "hateful conduct and defamatory statements" in its response to the Anonymization Application. I begin with the pronouns that Laser Cut chose to use.

[53] All participants in the Tribunal's process have the right to be treated with dignity and respect. It should go without saying that this includes the right not to be discriminated against on the basis of characteristics protected by the *Code* while engaging in that process. For transgender and gender diverse people, a key component of that is the right to have their gender identity respected throughout the process. And, at its most basic level, this begins with using the correct gender pronouns. I made this same point in *Oger v. Whatcott (No. 3),* 2018 BCHRT 183:

> … The *Code* confers protection on Ms. Oger to express her gender identity. For trans and gender non-conforming people, being properly 'gendered' by the service providers they are required to interact with is a critical part of their ability to participate with dignity in the economic, social, political and cultural life of the province: *Code*, s. 3; *Dawson v. Vancouver Police Board (No. 2),* 2015 BCHRT 54. In my view, this Tribunal's ability to "promote a climate of understanding and mutual respect where all are equal in dignity and rights" is strengthened when it leads by example. Any person involved in a human rights complaint is entitled to have their gender identity respected throughout the process. (para. 39)

[54] In Laser Cut's response to the Anonymization Application, it referred to JY using male pronouns or, in places, using "his/her" and "he/she". It says that it was prompted to take this approach by JY's own, seemingly fluid, expression of gender. It points to JY's argument that she can dress however she wants, use whatever name she wants, or use "any pronouns that I want at any point in time". It says that JY has been picking and choosing her gender identity

depending on her desired outcome in any given moment. For example, when JY originally sought the waxing services at issue in the complaint, she used a very traditional male name. Information about her on the internet refers to her by both male and female pronouns. Laser Cut argues:

> Based on this fluid gender approach taken by the Complainant in her Application, the Respondent provided the response where the Respondent also did not affix the response in his or her format, and rather kept it fluid to resemble the approach taken by the Complainant. This approach was not taken to offend the Complainant, but to show the Complainant that it was not acceptable to the Respondent and, would most likely would also not be acceptable to the Tribunal, for her to use whatever gender she wished to use, given her liking and/or situation.
>
> … it was of the utmost importance for the tribunal to sense and appreciate the fact that the Complainant's attitude or actions of misguiding the audience in the veil of gender fluidity was not acceptable as this why the response of the Respondent was also kept fluid so that the Complainant and Tribunal would appreciate as to how anomalous and problematic it would become, if the Complainant would not commit to one … final gender.

Laser Cut says, in short, that it was "simply trying to make a point."

[55] Some of the respondents in JY's waxing salons did express confusion about her gender arising from her name, appearance, and information about her online. In that respect, it is fair to say that how JY expresses her gender may ultimately be at issue in these complaints, particularly given the very intimate nature of the service she was seeking.

[56] However, JY has been consistent throughout the Tribunal's process that she is a woman and wishes to be addressed as such. I agree with her that this Tribunal and participants in this process are required to respect that. It was improper for Laser Cut to refer to her as a man, and to use male or dual pronouns to refer to her. The Tribunal does not require any participant to "commit to one… gender". I disapprove of this conduct in no uncertain terms. Laser Cut could have made its point without disrespecting JY in the process.

[57] However, I do not find that a costs award is warranted in all the circumstances. First, and most importantly, in responding to JY's costs application, Laser Cut extended its "sincere apologies" and ceased using male pronouns to refer to JY. It points out that all of its other submissions used the feminine pronouns with which JY has consistently identified throughout the Tribunal's process. I have now made the Tribunal's expectations clear in these reasons. A costs award is not necessary to end or further denounce the problematic conduct.

[58] Second, in my view, JY does not come to this issue with clean hands. This is a relevant consideration in respect of an application for costs because of the discretionary nature of the award and its punitive purpose. In that regard, the Tribunal has held that "a party seeking such costs should not expect a favourable result if the party's own hands are not clean": *Reekie v. International Longshore and Warehouse Union Local 400 (No. 4),* 2006 BCHRT 242 at para. 10; see also *Gibbons v. Abbotsford Chrysler and Chiang,* 2009 BCHRT 381 at para. 18; *Mint Tanning* at para. 42.

[59] In an attempt to make a point of her own, JY has made frequent reference and derogatory assumptions about the "culture" of Laser Cut's legal counsel, Mr. Randhawa. She begins by arguing that Laser Cut's conduct was tantamount to her "purposefully profiling Mr. Randhawa and attacking his culture, and his looks to committing crimes that are well known from that culture in the City of Surrey, such as the rampant gang shootings and then saying he did do that" [as written]. She then goes on, throughout her submissions, to make frequent reference to Mr. Randhawa's "culture" being one that is "very conservative" and where certain topics are not discussed. She asserts that "the majority of people in Surrey unfortunately are unproficient in English and do not possess customers service skills". Such comments, in my view, draw on racial and cultural stereotypes that have no place in this Tribunal's process. Just as JY should not have to endure being misgendered, Mr. Randhawa should not have to endure irrelevant personal judgment statements derived from stereotype.

[60] In short, I agree with JY that Laser Cut's conduct in referring to her using male pronouns was improper. However, I do not find that conduct warrants an order of costs because it has been rectified and because JY has engaged in similar conduct herself.

[61] Next, JY says that Laser Cut acted improperly by submitting material from the internet which amounts to hate speech and which she says is defamatory. I agree that some of the material that Laser Cut has submitted is hateful and I can understand why it would be upsetting to JY to have that material presented in this process. However, that material was submitted in response to JY's application to limit publication of her identity in connection with these complaints. As I have explained, the basis for that application is JY's assertion that she wishes to keep her gender identity private and that she would be exposed to harassment and hate if her name is publicized. The material that Laser Cut submitted is directly responsive to that assertion, insofar as it is intended to demonstrate that JY in fact already has a very public identity as a transgender woman and is subjected to online harassment for her conduct quite apart from these complaints. While that material would of course have no bearing on the merits of these complaints, I have found that it is relevant to the Anonymization Application. As such, relying on it for the purpose of opposing that application is not improper. This aspect of JY's costs application is denied.

[62] Finally, JY says that Laser Cut has acted improperly by impugning her character in relation to some of her Facebook messages which have been published online. I agree that Laser Cut went too far in describing JY's "tendencies" in paragraph 15 of its submission on the Anonymization Application. I will not repeat what it said because it is not necessary to do so. However, overall, I found those messages to be relevant to my decision on the Anonymization Application. They relate, again, to JY's claim to privacy in a context where she appears to be a very public figure online already. This is not to say that JY "deserves" what she has gotten. However, JY has put her privacy at issue and Laser Cut's submissions are mostly responsive to that issue. They are not improper. To the extent Laser Cut went too far in paragraph 15, I do not find the conduct to be so egregious as to warrant the sanction of costs.

[63] JY's application for costs against Laser Cut is dismissed.

B. Laser Cut's application for costs against JY

[64] Laser Cut argues that JY's conduct in respect of her waxing complaints demonstrates that she has not filed the complaints in good faith. It says that she has engaged in a pattern of conduct which suggests that she targets new or small businesses, run by immigrants to Canada. In doing so, Laser Cut submits that JY is motivated in part by racism and in part by the expectation of financial gain. In those few circumstances where the respondent has mounted a defense, she has withdrawn her complaint. It argues that this conduct is an abuse of the Tribunal's process, which has had real detrimental effects. It submits two affidavits: one from the employee who dealt with JY and one from the business owner. The owner says, as a result of JY's complaint and behaviour, one employee has quit and the small business has suffered.

[65] In response, JY argues that her complaints are legitimate. She says that she withdrew her prior complaints because she was being harassed by the respondents' lawyer, and that she has withdrawn her complaint against Laser Cut for the same reason. She says that the effect of that harassment has been extremely damaging on her mental health. She denies deliberately targeting new businesses or immigrants to Canada. In her application for costs, she asserts that she approached all businesses advertising on Facebook Marketplace and would not have any way of knowing whether they were new or run by immigrants.

[66] As an aside, I note that JY referred in her argument to a statement which she says was made by a Tribunal mediator during a mediation. I remind JY that all discussions during a Tribunal-assisted mediation are confidential and that she should not be referencing such discussions in her legal submissions. I have disregarded this information in making my decision.

[67] The Tribunal's process is deliberately designed to have as few barriers as possible. It does not cost any money to file a complaint, and its forms are intended to be understandable by people without a lawyer. The *Code's* purposes are furthered by ensuring that the Tribunal's services are as accessible as possible.

[68] However, it is a serious matter to file a human rights complaint. The allegation of discrimination is a loaded one, which carries reputational and financial risk for respondents

who are accused. A complaint requires people to respond, sometimes paying lawyers and sometimes representing themselves in a new process. It also engages the limited resources of this Tribunal. The Tribunal presumes that people file their complaints based on a good faith belief that they have been discriminated against, and with the genuine intention of having that complaint resolved. It is not a step that should be taken lightly.

[69] This case is unique because it began when JY filed approximately 14 human rights complaints about beauty services. Thirteen of those concerned waxing services and were nearly identical. On May 30, 2018, after receiving three more complaints, the Tribunal Registrar wrote to JY:

> Before it accepts this complaint, or further similar complaints, for filing, I would like you to explain how it furthers the purposes of the *Human Rights Code* [***Code***] to continue to advance further complaints that allege essentially the same facts.
>
> There is no question that your complaints raise a possible contravention of the *Code* in respect of an under-studied area of public life which warrants scrutiny from the Tribunal. However, that important issue can be resolved through a public decision from this Tribunal. In my view, it may not be necessary for the Tribunal to process 14, or more, complaints to achieve its function in respect of this issue.
>
> I am concerned that this volume of complaints undermines the efficiency of the Tribunal's process and results in "unnecessary duplication of the Tribunal's or the parties' resources": *Williamson v. Mount Seymour Park Housing Co-operative and others*, 2005 BCHRT 334 at para. 11. In that regard, the Tribunal has held that its "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": *Williamson* at para. 12.

[70] In response to this letter, JY explained:

> … In the complaints I have filed and in these four that are being filed, I have identified a pattern of discrimination from beauty based businesses in the waxing and hair and nails industry in British Columbia. This isn't a trend from just one or two businesses, but many businesses in the same industry as a whole…

She agreed not to file any further, similar, complaints until all of her others had been resolved.

[71] The substantive issue that JY has raised in these waxing complaints is an important one. Waxing can be critical gender-affirming care for transgender women. At the same time, it is a very intimate service that is sometimes performed by women who are themselves vulnerable. JY's complaints raise a novel issue around the rights and obligations of transgender women and service providers in these circumstances. There is a public interest in having this issue resolved. I cannot say that the subject matter of JY's complaint renders them frivolous – in fact, it is the opposite.

[72] However, I agree with Laser Cut that much of JY's conduct throughout the process has not been conducive to having the issue resolved on its merits. On each occasion when a respondent has retained a lawyer and opposed her applications, she has withdrawn that complaint. This has now happened three times. As a result, the Tribunal and the public are no closer to resolving the systemic issue which JY says she is here to address. At a certain point, this opens a valid question about her motives in filing so many complaints.

[73] Laser Cut says that JY's motives are twofold: racism and the hope of a financial windfall. I cannot find at this stage that JY is motivated by racism. I am troubled that some of JY's comments, made within this process and online, suggest that she holds stereotypical and negative views about immigrants to Canada. I accept that, on their face, many of the businesses which JY complains against appear to be run by people who speak English as a second language and/or are racialized women. I am also troubled by this pattern, which – if deliberate – could suggest that JY's complaints themselves risk undermining the *Code's* purposes. However, on balance, I have accepted that the complaints themselves are not frivolous and am not prepared to make such a damaging finding of fact about JY's motivations in the course of a written application like this.

[74] Similarly, despite some doubts, I cannot find at this stage that JY's motives are purely financial. I reach this conclusion notwithstanding my concern that JY does appear primarily motivated to meet the respondents in mediation. There is, of course, nothing inherently wrong

with this. Mediation is a vital part of this Tribunal's process and is the means by which most human rights complaints are resolved. However, at the same time, it is voluntary. I have said elsewhere that "[t]he decision to resolve a human rights complaint through settlement is one that should only be made voluntarily because both parties feel it is in their best interests to do so": *Colbert v. North Vancouver,* 2018 BCHRT 40 at para. 84. In her submissions, JY appears to infer that respondents who refuse to engage in settlement discussions with her are not behaving appropriately. For example, she says "I have settled many cases and I have encouraged the other Respondents to respectfully come to a settlement meeting. The fact they are ignoring the Tribunal and myself is irrelevant …". Contrary to this suggestion, respondents are under no obligation to negotiate with JY to resolve her complaints.

[75] Further, with two exceptions, the only complaints now heading toward hearing are those which are unopposed. Given the profile of the businesses which JY has complained against, this is not necessarily a surprising outcome. It is, of course, not JY's fault that some businesses have chosen not to participate in this process. However, this outcome ties into a pattern which can be attributed to her: that of withdrawing complaints in the face of opposition. I return to this in a moment. For present purposes, the point is that this situation lends support to Laser Cut's argument that JY is motivated by something other than a genuine desire to have the substantive issue decided by this Tribunal.

[76] On the whole, what seems most likely to me is that JY's motives in respect of these complaints are complex. Alongside what I have identified as troubling patterns is, in my view, a genuine grievance about what JY perceives as pervasive discrimination against transgender women. That motivation is not improper but rather is the reason that this Tribunal exists. The Tribunal has said many times that its costs power should not be exercised in a way that would dissuade complainants from filing complaints: e.g. *Dyson v. University of Victoria,* 2009 BCHRT 209 at para. 102. I will not award costs against JY because she filed these complaints.

[77] However, I do find that JY's pattern of filing so many similar complaints and then withdrawing them in the face of opposition is improper.

[78] I have already said that it is a serious matter to file a human rights complaint. Here I add that it can also be a difficult process. Critically: it is adversarial. As I said in my earlier letter to the parties, when JY filed her complaints she should have expected that they would be opposed. I understand why JY has found this opposition difficult, particularly given that it has delved into aspects of her personal life that are not directly related to the substantive issue she is trying to raise. However, the arguments that she objects to are directly relevant to her own request to have her identity shielded in this otherwise public process. In other words, they respond to something that she has put in issue.

[79] JY argues "I am allowed, at any point in time, to withdraw a complaint". This is true – to a point. Generally speaking, "[t]here is no public purpose served by requiring complainants to pursue their complaint past the point where they want to": *Boney v. UEX Corporation and another,* 2019 BCHRT 87 at para. 48. Complainants decide not to pursue complaints for many reasons, including the calculation that doing so would be too difficult. This is not improper. Indeed, in my earlier decision in *Mint Tanning,* I declined to award costs against JY for withdrawing her complaint against the individual respondents.

[80] However, there are circumstances in which a complainant's conduct in withdrawing their complaint can significantly prejudice the other parties or the Tribunal in a manner that constitutes improper conduct warranting the sanction of costs: *McKay v. Compass Group,* 2008 BCHRT 380; *Samuda v. Olympic Industries*, 2009 BCHRT 65; and *Sajid v. Black Top Cabs and others (No. 2),* 2015 BCHRT 16. Since I made my decision in *Mint Tanning,* JY has withdrawn two more complaints in very similar circumstances. I am now of the view, based on these new facts, that JY's pattern of filing such a high volume of complaints and then withdrawing in the face of opposition undermines the integrity of the Tribunal.

[81] JY has required parties and this Tribunal to invest time and resources into complaints which she does not appear prepared to pursue past a certain point. She does this at no personal financial cost and, for the time being, under the cloak of anonymity. Her conduct suggests that she is filing complaints without a proper appreciation of the gravity of doing so, and without concern about the effects that has on the people around her.

[82] JY says that she has been compelled to withdraw her complaints because the respondents, and in particular their lawyers, are harassing her. I am no longer persuaded by this explanation. While there have been aspects of the submissions, addressed above, which are disrespectful, the Tribunal has the tools to address that conduct by setting clear expectations for proper conduct and, where appropriate, enforcing those expectations through its power to order costs. JY did not give the Tribunal the chance to protect her, or its own process, before simply withdrawing altogether.

[83] JY specifically accuses Laser Cut of harassing her with a pattern of fake food orders. However, there is no evidence capable of attributing those cruel pranks to Laser Cut. Further, this submission is somewhat undermined by the fact that JY has since filed a new complaint against Laser Cut, alleging that it retaliated against her. I place very little weight on this new complaint, given that the parties did not have notice it would be at issue. However, it is surprising that JY would file a new complaint against a party which she says has compelled her, by its conduct, to withdraw her other complaint.

[84] I have found that JY's pattern of filing a large number of complaints and then withdrawing those where the respondent mounts a defence is improper. In all of the circumstances, I find that a nominal costs award is appropriate to convey this Tribunal's disapproval of JY's conduct. I take into account that the issue that JY is pursuing is an important one, that her motivations are complex, that I have made no findings of fact, and that she is self-represented. I order her to pay Laser Cut the sum of $150.

[85] Going forward, I impress upon JY the gravity of filing a human rights complaint. She should feel free to do so, in any situation where she believes she has been discriminated against. She should expect that this Tribunal will deliver its service in a way that is respectful and does not expose her to further discrimination. However, she must also understand that respondents are entitled to defend themselves and expect that they will.

VI CONCLUSION

[86] I grant JY's application to limit publication of information that could identify her. I order as follows:

a. No person shall publish in any document, or broadcast or transmit in any way any information disclosed in or in relation to this complaint that could identify JY.

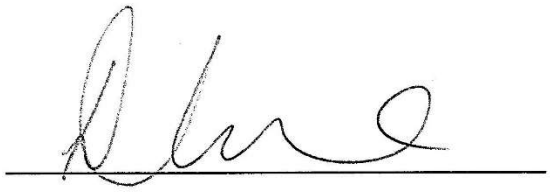
b. If the Tribunal releases parts of the complaint file to the public pursuant to Rule 5(10), it will redact any information that could identify JY.

I may revisit this order if circumstances change.

[87] JY's application for costs against Laser Cut is dismissed.

[88] Laser Cut's application for costs against JY is granted. JY must pay Laser Cut $150 within 60 days of this decision.

[89] The Tribunal will now process JY's withdrawal of her complaint against Laser Cut.



Devyn Cousineau, Tribunal Member