Date Issued: October 8, 2021
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Indexed as: Banfield v. Strata Geodata Services Ltd., 2021 BCHRT 142

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:

Catherine Banfield

COMPLAINANT

AND:

Strata Geodata Services Ltd.

RESPONDENT

REASONS FOR DECISION

Tribunal Member:	Grace Chen
Counsel for the Complainant:	Zoe Arghandewal
Counsel for the Respondent:	Spencer Sloane
Date of Hearing:	May 25-28, 2021
Location of Hearing:	Video conference

I INTRODUCTION

[1] Catherine Banfield alleges that her employer, Strata Geodata Services Ltd. [the **Respondent**], discriminated against her in employment on the basis of physical disability and sex contrary to s. 13 of the *Human Rights Code* [***Code***]. The Respondent terminated Ms. Banfield's employment four months after she started. Ms. Banfield alleges that her termination was connected to a knee pain condition that she experienced at work. She also alleges that her termination was connected to how the Respondent wrongly sexualized her conduct when it reported that a sexual harassment complaint had been made against her.

[2] The Respondent denies discriminating and says it had a non-discriminatory reason for terminating Ms. Banfield's employment. It also submits Ms. Banfield's complaint should be dismissed because she executed a release upon her termination that releases it from a human rights complaint.

II ISSUES

[3] To succeed in her complaint, Ms. Banfield must show she experienced an adverse impact in her employment that was connected to her disability or sex: *Moore v. British Columbia (Ministry of Education)*, 2012 SCC 61 [***Moore***] at para. 33.

[4] The parties dispute whether Ms. Banfield had a disability for the purposes of the *Code*.

[5] The Respondent says it had a non-discriminatory reason for firing Ms. Banfield. She was a bad employee who had a poor attitude and did not get along with co-workers and management.

[6] The Respondent also submits Ms. Banfield should be barred from any recovery because she executed a release that releases them from a human rights complaint.

[7] A summary of the issues and my findings are:

a. Does the executed release bar Ms. Banfield from recovery?

I find the executed release does not bar Ms. Banfield from recovery.

b. Did Ms. Banfield have a physical disability that is protected under the *Code*?

I find the Respondent perceived Ms. Banfield to have a physical disability that is protected under the *Code*.

c. Was Ms. Banfield's sex and/or disability connected to her termination?

I find Ms. Banfield's sex was not connected to her termination. I find Ms. Banfield's perceived disability was connected to her termination.

d. What remedies is Ms. Banfield entitled to?

I find Ms. Banfield is entitled to $12,250 for lost wages and $10,000 for injury to dignity.

III WITNESSES AND CREDIBILITY

[8] Credibility is at issue. I adopted and applied the standards set out in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 and *Bradshaw v. Stenner*, 2010 BCSC 1398, aff'd 2012 BCCA 296, leave to appeal refused, [2012] S.C.C.A. No. 392.

[9] The principles in those cases were recently summarized in *Youyi Group Holdings (Canada) Ltd. v Brentwood Lanes Canada Ltd*., 2019 BCSC 739 at paras. 89-91:

> Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the sincerity of a witness and the accuracy of the evidence that the witness provides. In some cases it becomes apparent that a witness has made a conscious decision not to tell the truth. In other cases, a witness may be sincere but their evidence may not be accurate for a number of reasons.
>
> Evaluating the accuracy of a witness' evidence involves consideration of factors including the witness' ability and opportunity to observe events, the firmness of their memory, their objectivity, whether the witness' evidence harmonizes with independent evidence that has been accepted,

> whether the witness changes his pre-trial evidence by the time of trial or their testimony at trial during direct and cross-examination, whether the witness' testimony seems implausible, and the demeanor of a witness generally.
>
> An acceptable methodology for assessing credibility is to first consider the testimony of a witness on its own followed by an analysis of whether the witness' story is inherently believable in the context of the facts of the entire case. Then, the testimony should be evaluated based upon the consistency of the evidence with that of other witnesses and with documentary evidence, with testimony of non-party, disinterested witnesses being particularly instructive. At the end, the court should determine which version of events is the most consistent with the preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

[10] I am also guided by *Hardychuk v. Johnstone*, 2012 BCSC 1359 at para. 10:

> The typical starting point in a credibility assessment is to presume truthfulness: *Halteren*. Truthfulness and reliability are not, however, necessarily the same. A witness may sincerely attempt to be truthful but lack the perceptive, recall or narrative capacity to provide reliable testimony. Alternatively, he or she may unconsciously indulge in the human tendency to reconstruct and distort history in a manner that favours a desired outcome. There is, of course, also the possibility that a witness may choose, consciously and deliberately, to lie out of perceived self-interest or for some other reason. Accordingly, when a witness's evidence is demonstrably inaccurate the challenge from an assessment perspective is to identify the likely reason for the inaccuracy in a cautious, balanced and contextually sensitive way.

[11] Ms. Banfield testified and did not call any other witnesses. She presented her counsellor, Danielle Holtjer, for cross-examination. The Respondent called three witnesses: Andrew Randell (chief executive officer), Jennifer Sly (office manager), Christopher Moll (junior geologist).

[12] Ms. Banfield, Mr. Randell, and Ms. Sly likely "indulged in the human tendency to reconstruct and distort history in a manner that favours a desired outcome" at times. Where their evidence conflicted with each other, I relied on surrounding evidence to determine which version of events was more likely.

[13] Mr. Moll is no longer employed by the Respondent. He appeared as a disinterested witness and his evidence reflected that. Ms. Holtjer's evidence was of limited assistance because Ms. Banfield first saw her two years after her employment was terminated.

IV BACKGROUND

A. Start of employment

[14] Ms. Banfield is a professional geologist. The Respondent is a company that provides consulting services to clients in exploratory geology. It is a small company. When Ms. Banfield started, the staff were Mr. Randell, Ms. Sly, Mr. Moll, and another employee.

[15] Ms. Banfield started her employment on April 23, 2018. The Respondent terminated her employment on August 28, 2018.

[16] The parties disagree on whether Ms. Banfield's employment was for a fixed term. The Respondent says it was for a six-month fixed term. Ms. Banfield says it was not for a fixed term. I will discuss this issue in my remedy analysis below.

[17] Ms. Banfield began working in the Vancouver office. The office only had two rooms. Mr. Randell and Ms. Sly witnessed Ms. Banfield bully and harass younger staff. They say she had a short temper.

[18] Mr. Moll was a junior geologist in the office. Ms. Banfield brought her dog to work. He was allergic to dogs. He testified that Ms. Banfield told him that he would be kicked out of the office before her dog. She also yelled at him at work.

B. Ontario trip

[19] In June 2018, Mr. Randell and Ms. Banfield travelled to Ontario with Mr. Moll and a younger female staff member named "D". This visit was related to a project in Ontario that the Respondent hired Ms. Banfield for.

[20] Employees ride with the client on long drives to share driving duties. After they arrived at the airport, Ms. Banfield rode with the client. During a break at a restaurant, Mr. Randell witnessed Ms. Banfield drink alcohol in front of the client. This violated the company's Drug and Alcohol Policy which stated that employees cannot be under the influence while in transit to and from site. He told Ms. Banfield that her drinking was not appropriate. It set a bad example in front of the younger team members. He switched Ms. Banfield out of the client's car as a result.

[21] Mr. Moll testified that drinking in the field is unacceptable in their industry.

[22] Ms. Banfield distinguishes the Drug and Alcohol policy and says they were not in transit to a worksite. Rather, they were in transit between an arrival area and the camp site. I am not persuaded that Ms. Banfield's interpretation of the policy is accurate. In any event, it is apparent that Mr. Randell viewed her as having breached the policy given his reaction at the time was to confront her and remove her from the client's vehicle. The Respondent says Ms. Banfield's breach of this policy was one of the reasons for why she was fired later.

[23] After they returned to the Vancouver office, Mr. Moll saw Ms. Banfield put alcohol in her coffee in the mornings. Mr. Randell said the Drug and Alcohol Policy does not apply to drinking within their office but he expected staff to conduct themselves appropriately. Ms. Banfield said the Ontario client had given them a bottle of alcohol for their office. She placed the bottle on the coffee tray in the office and put some in her coffee sometimes. The parties agree that staff may consume alcohol in the office on a Friday afternoon at the end of the workday. In any event, there is no evidence that Mr. Randell raised Ms. Banfield's drinking in the office with her during her employment.

C. Stewart, B.C. project

[24] The Ontario project that Ms. Banfield was hired for did not progress as expected so the Respondent sent her and "D" to work on a project near Stewart, B.C. The Respondent was hired by the client to do logging and mapping on this site.

[25] Around July 23, 2018, Ms. Banfield began working on the site. Her job was to retrieve and analyze the historical cores that were left on the side of a mountain at an abandoned camp.

[26] Ms. Banfield reported to Harley Hoiles, the project manager on site. Mr. Hoiles was not employed by the Respondent. His job was to build a new camp and do new drilling.

[27] Ms. Banfield says when she arrived, Mr. Hoiles told her that the camp could not accommodate her and "D". They did not have amenities for women such as separate washrooms, changeroom, and sleeping quarters. Ms. Banfield and "D" would stay in a hotel in Stewart. She felt segregated due to her gender. Mr. Randell testified that the code that they work under requires separate lockable washrooms for male and female employees. They provide temporary alternative accommodation to female staff instead of making it unisex because the camp was being constructed at the time. Ms. Banfield took a helicopter between her hotel, to the camp, and then to the side of the mountain where she did her work. I pause here to note that Ms. Banfield did not submit this living arrangement constituted an allegation of discrimination in her complaint.

[28] Ms. Banfield felt her worksite was unsafe. It was an abandoned camp from the 1980s located on the side of a mountain. The old core samples were kept in rotten wooden boxes. There was debris from the old camp in the form of toilets, sinks, stoves, glass, cable, metal, and nails at her worksite. She reported her concerns to Mr. Hoiles and sent him photographs from the site. She asked for help to clear the area to provide her with a safe flat working area. She says Mr. Hoiles told her it was not a priority. She felt unable to accomplish her work with these obstacles.

[29] On July 29, 2018, Mr. Randell and Mr. Hoiles exchanged emails about Ms. Banfield's progress. Mr. Hoiles reported that Ms. Banfield had not started the historical logging yet but would do so that day. Mr. Hoiles said she needed to "get out of everyone's hair, she seems to keep making everyone else's job her business to critique and criticize".

[30] Mr. Randell responded that he was disappointed that Ms. Banfield had not started the relogging yet. He said, “I guess we had to wait for the core facility to be built but that she should have at least got a plan together”. He indicated that Ms. Banfield was a “heavy hitter on the payroll” and told Mr. Hoiles to let him know when she started “earning it around the site over the next few days” otherwise he would have a chat with her. The parties agree that Ms. Banfield was paid $7,000 per month.

[31] On the same day, Ms. Banfield emailed Mr. Randell and Mr. Hoiles with many concerns about the worksite. She reported that due to the conditions of the site, she had just started to look at the historical core that day. She outlined the many obstacles in her worksite – a huge mess of building materials, problems with disposing materials, problems with the old core rack, two people were needed to move core boxes, and incomplete core tent and supplies. Ms. Banfield asked for labour to help with the site. She felt the site was unsafe and did not permit her to do her work.

[32] Mr. Randell did not respond to Ms. Banfield’s email because he was in the U.K. for a couple of weeks. It was better for Mr. Hoiles to deal with it. He corresponded with Mr. Hoiles by email and video conference. He understood from Mr. Hoiles that there were crews that were cleaning up the site. Ms. Banfield says Mr. Hoiles provided her with staff to move core and remove debris closer to the end of the time that she was there.

D. Knee pain

[33] Ms. Banfield testified that on July 29, 2018, she developed knee pain. She went to the medic. The medic gave her an ice pack, created an incident report, and told her to see a doctor in town. Ms. Banfield said she mentioned her knee pain to Mr. Hoiles when she completed an incident report for it. The incident report was not entered into evidence.

[34] On August 4, 2018, Ms. Banfield sent Mr. Randell another email. She outlined some continued obstacles and some good news about the project. She also criticized Mr. Hoiles’ ability to manage the team and indicated she wished to do the new core logging that Mr. Hoiles was doing. She felt Mr. Hoiles did not have time to manage so many things.

[35] Mr. Randell was still out of the country and did not respond. Mr. Randell believed Ms. Banfield's comments about the site conditions but knew there was progress being made on cleaning up the site. His impression was that she did not indicate that her work could not be done. Mr. Randell testified that he told her that she can refuse work if it was dangerous or if she was not physically able to do it, but given that he did not respond to her emails and there was no evidence they conversed otherwise while he was in the U.K., it is unclear how he could have communicated this to her while she was on site.

[36] Several things occurred on August 6, 2018. Mr. Randell's emails from that time set out the timing of events. As he was still in the U.K., his sent and received emails reflect U.K. time.

[37] At 2:27 a.m., Mr. Randell emailed Ms. Banfield and Mr. Hoiles a flight itinerary. It was for Ms. Banfield to fly back to Vancouver on August 9, 2018.

[38] At 7:18 p.m., Ms. Banfield emailed Mr. Randell and asked if the Ontario project was going ahead or whether this was a one-week break before she went back to Stewart or if there was anything else to do in Vancouver.

[39] At 8:43 p.m., Mr. Hoiles emailed Mr. Randell and told him about Ms. Banfield's sore knee and that she had asked to see a doctor. It was an overuse injury due to a pre-existing condition. The medic told him that there would be a WorkSafeBC claim if she was not able to return to work.

[40] At 11:13 p.m. Mr. Randell responded to Mr. Hoiles, "I was not made aware of any pre-existing condition, did she tell you? It is hard to deal with these things when people don't tell you before hand! So Stewart for the day and then stick her on a plane to Vancouver…not your problem then [smiley emoji]".

[41] At 11:24 p.m., Mr. Randell responded to Ms. Banfield's previous email about what would happen when she returned to Vancouver:

> Hey Catherine,

> Multiple factors:
>
> Space in camp and trying to reduce costs of hotels/heli flights for you.
>
> I was informed of a pre-existing knee issue that you are now seeking treatment for. I don't know more details than that but as I was not informed it is hard to manage a situation that could lead to "overuse". As such, it is better for you not to be in the field right now in order to rest.
>
> I still don't have an answer on [Ontario project], but it could feasibly go ahead anytime really, so better to have you take a week break to rest up.
>
> I will admit that I am a little disappointed in the amount of historical information we have got from the old core. I understand that it was a new job that none of us knew what we were getting into, but with your experience and the amenities provided on site I would have hoped for a more coherent plan to be in place as well as some detailed logs of sections. If/when Ontario happens, I hope that the fact that the core is raked will allow a quicker rate of return on the work program that I have seen from [Stewart site].
>
> So for now, head back to Vancouver, take the week off (basically days in lieu for the weekends you have worked in the field) and rest the knee.

[42] At 11:29 p.m., Mr. Hoiles' email to Mr. Randell stated Ms. Banfield had complained of a sore knee when they were walking once but he thought it was an average ache. He said this was one of the reasons why Ms. Banfield could not carry any core boxes.

[43] At 11:30 p.m. Mr. Randell responded to Mr. Hoiles that Ms. Banfield's flight is already booked for August 9th "with the rest of the crew change".

[44] The parties dispute whether Mr. Randell booked Ms. Banfield's flight back to Vancouver after he found out about her knee problem.

[45] Mr. Randell testified that he booked Ms. Banfield's flight back to Vancouver before Mr. Hoiles emailed him about her knee pain. Ms. Banfield was only scheduled to work for three weeks in Stewart. He refers to his July 29, 2018 email to Ms. Banfield and other staff on the Stewart site where he tells them to talk to Mr. Hoiles about their schedules and let him know what the plan is so that he can book flights accordingly. He explained they do pre-planning for

field projects to figure out logistics such as health and safety, food, and fuel. They have to monitor the camp numbers.

[46] Mr. Randell testified that since Ms. Banfield was already scheduled to take a break and fly back to Vancouver, he told her to take the week off to rest her knee. The break was mandated by B.C. and Yukon guidelines. For every four days in the field, the employee gets one day off. Ms. Banfield had worked eighteen days in the field so she received five days off.

[47] Ms. Banfield testified she did not know when Mr. Randell booked her flight back to Vancouver. She felt she was being sent home because she reported knee pain and concerns about her work site. She was unaware of any scheduled days off.

[48] I find it more likely than not that Mr. Randell had scheduled Ms. Banfield's flight out of Stewart before he knew about her knee pain. He sent the flight itinerary to her before Mr. Hoiles told him about her knee pain. There is no evidence that Mr. Hoiles told Mr. Randell about Ms. Banfield's knee pain before the August 6, 2018 emails. Booking flights back to Vancouver was on Mr. Randell's mind as early as July 29, 2018. I accept his evidence that this pre-planning is necessary for these sites.

[49] On August 7, 2018, Ms. Banfield emailed Mr. Randell and said she felt segregated from the camp due to her gender, that her pre-existing knee condition did not impact her job, and repeated her concerns about the worksite and the lack of help she has received. With respect to her knee, she wrote:

> My knee does not have any pre-existing issue that impacts my job, otherwise I would have mentioned it to you prior to leaving. The ACL repair surgery done in 2007 left the knee with less muscle tone, slightly stiffer, and slightly slower (due to my caution). However, the surgeon did assure me that the knee itself was just as strong (or stronger, actually, since they braided the replacement tendon before screwing it into my let; the fact that the replacement is a thicker tendon that is now screwed directly into the bone vs. a thin ligament that is only attached to the surface of the bone also makes it stronger. It has been a little stiff and sore lately, and Tim (the Matrix medic) felt it was best to err on the side of caution and see a physician to make sure everything is as it should me

> [sic]. He also has chemical ice packs that he is willing to provide for use during the day, say on my lunch break. My knee makes no difference to my unease with the idea of carrying boxes of core up and down a talus-covered slope. The boxes are awkward and somewhat heavy (for me); the last thing I want is to trip and fall on my face (on the core box, or on a rock), or have the core box fall on me, etc. Or worse! Trip and drop the box!...

[50] Ms. Banfield stated in her email, "I like and respect you but don't you dare criticize me for not doing my job when I've been busting my ass to create something useable out of a goddamn mess while getting zero feedback from you". Mr. Randell testified he was coaching her, not criticizing her.

[51] On August 8, 2018, Ms. Banfield saw a doctor in Stewart. The doctor's note said:

> Catherine Banfield will be able to work as long as her pain is minimal with her current knee condition. We will re-assess her if required.

[52] Ms. Banfield emailed the note to the Respondent and wrote some additional points that are not reflected in the doctor's note:

> The local doctor assessed my knee today and concluded the discomfort I've been experiencing is most likely related to either a patellar ligament sprain or a small meniscal tear. An MRI is the only way to accurately distinguish between the two but he feels it is most likely the former and is the result of too much repeated and unaccustomed downhill movement. He does not believe it was caused by my 2007 ACL surgery.
>
> He has advised a return to normal duties (to the point of discomfort) and to not keep it immobilized in order to prevent stiffening and speed healing. Please see attached…

[53] Ms. Banfield did not provide evidence that she had any medical treatment on her knee after this date.

E. Return to Vancouver and Mr. Randell's investigation

[54] On August 9, 2018, Ms. Banfield returned to Vancouver. She was told to take another week off from work. No one from the company responded to her messages. She was unable to

get the keys to the office so that she could drop off and pick up things. Ms. Sly was away due to a death in her family. Mr. Randell was still in the U.K. Mr. Moll did not return her messages.

[55] On August 15, 2018, a mines inspector went to the Stewart site. This was in response to a report filed in relation to Ms. Banfield's knee pain incident. Mr. Randell testified the inspector sent a multi-page report around the end of August, which was not entered into evidence. The inspector also sent a letter dated September 11, 2018, which was entered into evidence, that indicated that carrying core boxes on the steep and uneven terrain would be challenging and should be done with two people. Mr. Randell testified that neither of these documents indicated any significant problems with the site.

[56] Mr. Randell returned to Canada. He went to the Stewart site to investigate Ms. Banfield's injury. He also wanted to learn more about Mr. Hoiles' concerns about Ms. Banfield's attitude and behaviour. Mr. Randell did not tell Ms. Banfield about his investigation because he wanted to speak to the staff without her influencing them.

[57] Mr. Randell spoke to approximately 21 people who worked on the site. He took notes or had people write statements about Ms. Banfield. The Respondent produced only two written statements from Mr. Moll and Ms. Sly. Mr. Moll's statement included similar statements to what he testified to at the hearing. Ms. Sly did not work at the Stewart site and wrote her statement about her observations about Ms. Banfield in the office.

[58] The Respondent produced only two notes from Mr. Randell's interviews with the pilot and Mr. Hoiles. The pilot advised Ms. Banfield had sent "suggestive" photographs to him at night and he asked her to stop. Ms. Banfield told him that he was no longer his favourite pilot. The pilot stated she would rush him to get her into town to buy alcohol by a certain time. Mr. Hoiles advised Ms. Banfield went through his personal bags and accessed his computer without permission. She did not do what she was tasked to do. She blamed other people. She disregarded the safety of staff near the core racks. She was a bully to other employees. She told staff to send things to her and not to him. She had a public blowout with him in the camp. She had "zero knowledge" on how to use a specific software program.

[59] In relation to the site, the Respondent also produced a WorkSafeBC employer incident investigation report, photographs from the site, safety meeting forms, and email correspondence. Mr. Randell did not speak to Ms. Banfield about her knee problem or her views of the site conditions.

[60] The Respondent told Ms. Banfield to take a second week of from work because no one was at the Vancouver office.

F. Termination

[61] Mr. Randell testified that he decided to terminate Ms. Banfield's employment because there was no place in the company for her. She did not finish her tasks in a satisfactory manner. She did not have the skills and ability to lead a team. He did not trust her to run a remote camp. There was no project to put her on. She was not a good fit for the company.

[62] Mr. Randell testified that Ms. Banfield did not live up to her resume. She was not proficient in mapping software. She was unable to digitize old maps and asked Mr. Hoiles for help. She became angry and frustrated with staff and people stopped wanting to help her. She was also not good with project budgeting. He felt she was overwhelmed by the work and could not manage the project.

[63] This was the first time the company had to terminate someone's employment. Mr. Randell sought advice from a lawyer. He was advised to terminate Ms. Banfield without cause. The Respondent was a small company and this was the best method for a clean break. Mr. Randell did not want Ms. Banfield to remain on the payroll while he completed the investigation. Mr. Randell did not complete his investigation because he decided to terminate her employment.

[64] On August 28, 2018, Ms. Banfield met with Mr. Randell and Ms. Sly in the Vancouver office. Mr. Randell testified that he wanted to meet with Ms. Banfield and talk to her about the complaints made against her on site. They also presented Ms. Banfield with a termination letter that contained a release, which was drafted by the lawyer.

[65] The parties gave slightly different accounts of what happened. What is consistent is that the meeting was brief and little was said between them. I will briefly set out that evidence here but will provide more details below on the analysis about the executed release.

[66] Ms. Banfield testified that Mr. Randell told her that she was terminated without cause, said he appreciated the work that she had done, and said she had to sign the documents to get her two weeks of severance pay. She skimmed the documents and signed it.

[67] Mr. Randell and Ms. Sly testified they encouraged Ms. Banfield to sit down to talk and go over the documents but she would not engage in a conversation. Ms. Banfield was agitated and immediately went to her desk to pack things up. She took the document, did not read it, signed it, and left.

G. Post-termination social media posts, cease and desist letters, professional complaint

[68] After her termination, Ms. Banfield posted her frustrations on social media. Some of her posts included photographs of the work site. She did not name the Respondent or any employees in her posts. She did not think anyone could identify the Respondent or the site but testified that someone working there must have identified it since it got back to the Respondent somehow.

[69] Ms. Banfield's posts included statements such as:

> …how can I decide if my work environment is unsafe and worth reporting? Former work environment as I was just terminated "without cause". After reporting a workspace injury…
>
> …hey! My contract was recently and unexpectedly cut short and I'm looking to join a good mining or exploration team….Any leads would be much appreciated!
>
> Terminated "without cause". In a way I'm relieved. Now I can move on to another role where my skills, experience, and worth ethic will be more appreciated. And utilized.

> …unsafe work site with insecure, blamey PM who wasn't interested in team work. Supposed to relog historical core, not permitted to be involved in new drill program.
>
> …things were unorganized, scattered, superficial.

[70] Mr. Randell testified that Ms. Banfield had blocked the Respondent and its employees from her social media sites. He learned about her posts from other people in the industry. The Respondent had a social media policy that was based on clients' needs and the BC Securities Commission. Employees cannot post images of the site or rocks from the site because it could affect share prices. Her posts misrepresented the safety of the site because it depicted an area that was initially out of bounds and was then subsequently cleaned up. Mr. Randell had to tell his client about Ms. Banfield's posts due to these concerns because it could negatively impact the client. Reputation was everything in the consulting business. This damaged the Respondent's reputation.

[71] On August 30, 2018, Ms. Banfield received a cease-and-desist letter from the Respondent's lawyer. It outlined various reasons for her termination which included:

a. There was a sexual harassment complaint made against yourself where you are alleged to have sent suggestive photos to a subcontractor for the Company. You were told several times to cease but you persisted;

b. You were found going through personal property of staff on site without their permission (i.e. personal bags and belongings);

c. You did not attend mandated training or safety meetings on a regular basis;

d. The Company was informed that you consumed alcohol on the job, both at the worksite and in the office. The Company has a strict no alcohol policy on the worksite and in the office which you knowingly breached;

e. You have been accused of 'bullying' and 'gossiping' about and towards staff on the worksite to such a degree that you were not placed back at a certain worksite due to the disruption that you had caused;

f. Staff felt threatened by your behaviour, temperament and gestures both on and off the worksite;

g. Your attitude and behaviour towards the Company and its work culture was unacceptable. You were previously warned about your conduct;

h. You misrepresented the duties you could diligently perform to the Company and fell short of those claims.

[72] The lawyer said Ms. Banfield's social media posts breached the non-disparagement clause in the termination letter and release that she had signed. This was a direct violation of "safety and Provincial Geological confidentiality laws and mandates of the Company's clients". The lawyer told her to remove her posts and cease and desist from disparaging the Respondent.

[73] Ms. Banfield emailed the lawyer. She said she was confused about the letter, asked if it was intended for her, and asked him to provide details of the allegations. She did not receive that information. She did not take down her social media posts.

[74] Mr. Randell testified that he had three options – do nothing which meant Ms. Banfield left her social media posts up, pursue legal action, or report her to the Engineers and Geoscientists of British Columbia [**EGBC**].

[75] Around September 4, 2018, Mr. Randell filed a complaint at the EGBC. He set out the reasons for terminating Ms. Banfield along with complaints about her ethics, capability, and safety. He explained her disparaging social media posts. Mr. Randell advised that people at work made complaints against her that included sexual harassment, bullying, and alcohol consumption at work.

[76] The sexual harassment referred to in the lawyer's cease and desist letter and the EGBC complaint was Ms. Banfield's interactions with the pilot. Mr. Randell testified he classified it as sexual harassment because that was how Mr. Hoiles and the pilot referred to it in their discussion. Mr. Randell said he never dealt with sexual harassment before and had to take it seriously. He saw some of the photographs that Ms. Banfield sent to the pilot. She was clothed and holding a beer in her lap. The pilot was concerned that his wife might see the texts and asked Ms. Banfield to stop. Ms. Banfield then told the pilot that he was no longer her favourite pilot. After talking to the pilot, Mr. Randell said he would have downgraded it to "bullying".

[77] On September 10, 2018, the Respondent's lawyer sent Ms. Banfield another cease-and-desist letter. It confirmed the previous letter was intended for her and threatened legal action against her for defamation and breach of contract. It repeated the demand for her to take down her social media posts.

[78] On September 18, 2018, EGBC advised Ms. Banfield of Mr. Randell's complaint. Ms. Banfield removed the posts but she was not sure when she did that.

[79] On May 31, 2019, EGBC rendered a decision in favour of Ms. Banfield. It did not have grounds to believe Ms. Banfield contravened its bylaws or code of ethnics, nor did she demonstrate incompetence, negligence, or unprofessional conduct. However, it reminded her to remain professional and be extra diligent when posting in a public forum. It attached a disciplinary action decision for another member who had made online posts so she could consider such actions and avoid similar issues.

[80] In July 2019, Ms. Banfield filed her human rights complaint.

[81] In August 2020, Ms. Banfield first saw Ms. Holtjer for counselling sessions. Ms. Banfield testified that she went to Ms. Holtjer due to significant anxiety in her professional and personal life. She had previously seen a doctor who had put her on anti-depressant mediation. Ms. Holtjer testified it was hard to pinpoint what caused Ms. Banfield's symptoms but they talked about employment and relationships.

V ANALYSIS AND DECISION

[82] I start with determining the effect of the executed release. This is because if the release bars Ms. Banfield's recovery, it would be unnecessary to determine whether the Respondent discriminated against her.

A. Does the executed release bar Ms. Banfield's recovery?

1. Employment Contract, Termination Letter, and Release

[83] The parties agree that under the *Employment Standards Act*, Ms. Banfield was entitled to one week of wages at the time of her termination.

[84] Ms. Banfield's employment contract contained the following term at Article 2.4 (a)(iii):

> [The Employee's employment may be terminated by the Employer],
>
> ….
>
> (iii) without cause, following the Probationary Period, in the sole discretion of the Employer for any reason, upon providing the Employee with one weeks' written notice; and (ii) notice required under the *Employment Standards Act*. Any pay in lieu of notice will be calculated on the basis of the Employee's annual base salary as of the date the Employee receive notice of termination…

[85] At the termination meeting on August 28, 2018, Ms. Banfield was presented with the termination letter and release. Each document was three pages long. The letter indicated that a condition of the offer is that she agreed to execute a release.

[86] In the termination letter, the Respondent offered her:

> Financial Assistance
>
> In recognition of your services with us, you will be paid one (2) weeks pay which amounts to $3,500 ("Severance Pay")

[87] The relevant portions of the release are:

> IN CONSIDERATION of the payment to me as set out in the attached correspondence, receipt of which is hereby acknowledged, I, CATHERINE BANFIELD…hereby release and forever discharge the Company…and I hereby specifically covenant, represent and warrant to the Releasee that I have no further claim against the Releasee for or arising out of my employment or retirement from employment which specifically includes but is not limited to any claims for notice, pay in lieu of notice, wrongful dismissal, termination pay, severance pay, bonus, overtime pay, incentive compensation, vacation pay or any claims under the British Columbia *Employment Standards Act*, British Columbia *Human Rights Code,* and the British Columbia *Workers Compensation Act*.
>
> AND FOR THE SAID CONSIDERATION, I acknowledge that parties have discussed or otherwise canvassed all human rights complaints, concerns, or issues arising out of or in respect to my employment or the cessation of that employment and that this agreement constitutes a full and final settlement of any existing, planned or possible complaint or complaints against the Releasee under the British Columbia *Human Rights Code.*
>
> …
>
> You acknowledge by signing this agreement that you understand its terms and condition and have had a reasonable opportunity to obtain independent legal advice with respect to it.
>
> …
>
> As a condition of the foregoing, you agree to execute the release attached to this letter and to return it together with a signed duplicate of this letter to signify your agreement. We would ask that you review the terms of this letter carefully and seek independent legal advice if you wish to do so…

[88] The letter is signed by Ms. Banfield and Mr. Randell. The release is signed by Ms. Banfield and Ms. Sly as a witness.

2. Testimony about the Termination Meeting

[89] The common thread in Ms. Banfield, Mr. Randell and Ms. Sly's testimony was that the termination meeting was quick and not much was said between the parties.

[90] Ms. Banfield testified that after she returned from Stewart, the people at the office did not respond to her messages and she was told to take another week off from work because no

one was in the office. She had a "bad feeling" at the meeting but was still shocked by the termination.

[91] Ms. Banfield testified that she skimmed the documents briefly and signed it. She was aware of the non-disparagement clause in the letter when she signed it. She did not ask Mr. Randell and Ms. Sly about the contents of the documents because she did not feel she needed to ask them questions about it. She was not given the opportunity to seek legal advice but said she did not think she needed legal advice. She saw no reason why she needed to seek legal advice. She was sad, disappointed, and hurt but was prepared to move on.

[92] Mr. Randell testified that he and Ms. Sly encouraged Ms. Banfield to sit down to talk and go over the documents but there was no time for conversation. Ms. Banfield was agitated and immediately went to her desk to pack things up. She took the documents, signed it without reading it, and left. He said the interaction lasted ten minutes. The only thing Ms. Banfield said was, "Here we go again." Ms. Banfield did not give them an opportunity to talk about her work performance and the complaints made about her, although that was his intention. He did not want to agitate her any further. He believed the outcome would have been the same had they had a conversation with Ms. Banfield.

[93] Ms. Sly testified Ms. Banfield did not give them a chance to discuss anything. Ms. Banfield came into the office and started packing a box. She brought in a computer and a helmet. They asked her to sit down with them. Ms. Banfield said, "Here we go again". Mr. Randell told her she was being terminated without cause. Ms. Banfield opened the envelope with the documents, flipped to the back, signed it, and left. Ms. Banfield did not make any attempt to clarify the reasons for her termination. She did not appear distraught.

3. Law

[94] A respondent would normally raise the issue of a signed release in an application to dismiss a complaint without a hearing. This did not occur in this complaint. I have decided to consider the issue despite this fact so that the Respondent understands why the release does not bar Ms. Banfield from a remedy in this case. This should not be taken as a suggestion that

the Tribunal would agree to consider a similar issue outside of a timely application to dismiss under s. 27(1)(d)(ii) of the *Code*.

[95] The starting point is that parties cannot contract out of human rights legislation: *Insurance Corporation of British Columbia* v. *Heerspink*, [1982] 2 S.C.R. 145 at para. 158; *Thompson v. Providence Health Care*, 2003 BCHRT 58 at para. 27 [***Thompson***].

[96] However, parties may settle a human rights complaint. This would generally result in the employee promising not to proceed with a human rights complaint because the complaint has been resolved through the receipt of some consideration.

[97] There is a policy rationale for giving effect to these agreements. In *Thompson* at paras. 38 and 46, the Tribunal stated:

> While a settlement agreement cannot, in my view, legally deprive the Tribunal of jurisdiction, it may, however, mean that allowing a complaint to proceed would not further the purposes of the *Code*. There is a strong public policy interest in encouraging parties to resolve their disputes on a voluntary, consensual basis. This public policy would be severely undermined if parties who had entered into a final settlement of their human rights dispute were, absent public policy considerations to the contrary, permitted to come forward and pursue a complaint with the Tribunal.
>
> …
>
> Where a settlement agreement is alleged, it will be for the party seeking to rely on that agreement to prove first, the existence of a valid settlement agreement, and second, that the settlement agreement was intended to release the respondent from any further liability in respect of the human rights complaint in issue. Where those two facts are established, the burden will shift to the other party to show, taking into account the other factors discussed, that despite the existence of such a settlement agreement, the complaint should nonetheless be allowed to proceed. In practice, the evidence relevant to the different stages of the inquiry is likely to overlap substantially.

[98] In *Thompson*, the Tribunal referred to *Pritchard v. Ontario (Human Rights Commission)*, [1999] O.J. No. 2061 [***Pritchard***]. In exchange for two weeks more pay than her entitlement under employment standards legislation, the complainant signed an agreement and release

that encompassed a human rights complaint. The employer gave her one week to consider the offer. Her lawyer requested an extension to consider the offer. The employer agreed to four additional days. Her lawyer advised that was not enough time to assess the human rights claim. The complainant also spoke to the employment standards branch who advised her that the release would not be binding. She executed the release. She then filed a human rights complaint.

[99] The Ontario Human Rights Commission [**Commission**] declined to proceed with an investigation on the basis of the signed release, finding the complainant was pursuing the complaint in bad faith because there was no evidence of duress.

[100] The Ontario Superior Court [**ONSC**] in *Pritchard* stated:

> Undoubtedly, in some cases, an employee who has accepted a sum of money in exchange for a release of claims against a former employer, including human rights claims, would be acting in bad faith in subsequently turning around and filing a human rights complaint. However, in other cases, the facts may show that the employee misunderstood the significance of the release, or received little or no consideration for it beyond statutory entitlements under employment standards legislation, or was in such serious financial need that she or he felt there was no choice but to accept the package offered. To take the approach that there is bad faith whenever a human rights complaint is brought after signing a release risks ignoring the context within which a particular complainant has signed the release and denying access to the investigative procedure under the *Human Rights Code* without assessing the complainant's individual moral blameworthiness in pursuing the complaint.
>
> [No paragraph numbers in decision]

[101] The ONSC held that the Commission erred in only considering the fact of a signed release and the lack of duress. The Commission should have considered all of the relevant facts to determine whether the complainant acted in bad faith in pursing her complaint. The matter was referred back to the Commission for a new determination.

[102] The Tribunal in *Thompson* at para. 44 referred to *Chow (Re)* (1999), 37 C.H.R.R. D/442 (Alta. Q.B.) [***Chow***] for a non-exhaustive list of factors to consider:

> Another helpful list of potentially relevant factors, albeit one developed in the context of determining whether a release is valid, was provided by the Alberta Court of Queen's Bench in *Chow*, *supra*:
>
> > Some examples of applicable criteria were discussed in many of the decisions referred to me. These (some of which may be determinative in themselves and others which may not be, and several of which are or may be overlapping), … include:
> >
> > > 1. The actual language of the release itself as to what is included, explicitly or implicitly.
> > >
> > > 2. Unconscionability, which exists where there is an inequality of bargaining power and a substantially unfair settlement. This does not, however, allow a tribunal to interfere with a settlement where it finds inadequacy of consideration.
> > >
> > > 3. Undue influence may arise where the complainant seeks to attack the sufficiency of consent. A plea of this nature will be made out where there has been an improper use by one party to a contract of any kind of coercion, oppression, abuse of power or authority, or compulsion in order to make the other party consent.
> > >
> > > 4. The existence or absence of independent legal advice may also be considered. However, if a party has received unreliable legal advice that may not affect the settlement.
> > >
> > > 5. The existence of duress (not mere stress or unhappiness) and sub-issues of timing, financial need, and the like, may also be factors.
> > >
> > > 6. The knowledge on the party executing the release as to their rights under the *Act*, and, possibly, the knowledge on the party receiving the release that a potential complaint under the *Act* is contemplated.
> > >
> > > 7. Other considerations may include lack of capacity, timing of the complaint, mutual mistake, forgery, fraud, etc.

[103] The Tribunal in *Thompson* found that "all of the factors listed by the courts in *Pritchard* and *Chow* are potentially relevant to the determination of whether it would not further the purposes of the *Code* to allow a complaint to proceed in the face of an alleged settlement agreement. There may be others, to be determined by the Tribunal in future cases".

[104] I note further that in *Saliken v. Alpine Aerotech Limited Partnership*, 2016 BCSC 832, the Court explained the ground of unconscionability at para. 153:

> Two factors must be present - a weakness in bargaining position on one side and a taking of unfair advantage on the other: *Gindis v. Brisbourne,* 2000 BCCA 73, citing *Morrison v. Coast Finance Ltd.et al* (1965), 55 D.L.R. (2d) 710 (B.C.C.A.) [*Morrison*]. In *Morrison,* the Court of Appeal set out the following test for unconscionability at 713:
>
> > …[A] plea that a bargain is unconscionable invokes relief against an unfair advantage gained by an unconscientious use of power by a stronger party against a weaker. On such a claim the material ingredients are proof of inequality in the position of the parties arising out of the ignorance, need or distress of the weaker, which left him in the power of the stronger, and proof of substantial unfairness of the bargain obtained by the stronger. On proof of those circumstances, it creates a presumption of fraud which the stronger must repel by proving that the bargain was fair, just and reasonable: [citations omitted].

[105] I agree with and adopt the Tribunal's approach in *The Employee v. The Company and the Owner*, 2017 BCHRT 266 at paras. 30-31:

> The burden is on the person seeking to pursue their complaint in the face of an agreement to persuade the Tribunal that the purposes of the *Code* are best served by allowing the complaint to proceed: *Thompson* at para. 46. In this case, that means that the Employee bears the burden of persuading me that her complaint should be allowed to proceed in the face of an agreement that expressly purported to resolve it.
>
> In considering this issue, the Tribunal has recognized a number of relevant factors, including: the language of the release; unconscionability, "which exists where there is an inequality of bargaining power and a substantially unfair settlement"; undue influence;

whether the party received independent legal advice; conditions of duress, which may be related to the timing of the agreement, financial need, or other circumstances; and whether the party received little or no consideration for the release: *Thompson* at paras. 42-44, citing *Chow (Re)* (1999), 37 C.H.R.R. D/442 (Alta. Q.B.), and *Pritchard v. Ontario (Human Rights Commission) (No. 1)* (1999), 35 C.H.R.R. D/39 (Ont. Ct. (Gen. Div.)) at para. 17. The Tribunal may also consider "the seriousness of the allegations in a complaint and what is at stake for the complainant": *Gerard v. Olive's Market Whistler and others,* 2015 BCHRT 102 at para. 17.

4. Submissions

[106] Ms. Banfield relies on *Thompson* for the relevant factors to consider. She submits there was unequal bargaining power between them at the termination meeting. It was unconscionable because in the absence of legal advice, she had no knowledge of what she was executing or the rights that she was releasing. The Respondent knowingly misled her at the termination meeting about the reason for her termination so that it could receive a signed release. An unfair settlement was reached because she was misled about the facts of the termination. She submits that had she known the reasons for her termination, she would not have signed the documents.

[107] The Respondent submits the Tribunal should encourage parties to adhere to the terms of agreements and releases to promote economic efficiency. The release should bar her from any recovery.

[108] I invited the parties to provide further submissions on consideration, the *Employment Standards Act*, and Ms. Banfield's entitlement under the employment contract. They provided those submissions which will be discussed further below.

5. Analysis

[109] I will consider the factors set out in the case law above. The answer is not determined simply by tallying which side has more factors in their favour. I have considered the factors in the context of the people and situation involved. Ms. Banfield was an educated adult with

agency when she signed the documents. It was the first time Mr. Randell and Ms. Sly had to fire an employee in their small company and relied on legal advice on what they should do.

[110] The release is explicit about releasing the Respondent from a human rights complaint. There is no ambiguity that it pertains to Ms. Banfield's human rights complaint.

[111] Based on Ms. Banfield's testimony, I find she likely anticipated her termination given the company was not responding to her messages, she had a bad feeling about the meeting, and she did not ask Mr. Randell and Ms. Sly questions about her termination, and testified she wanted to move on. I accept she skimmed the documents, likely did not read it in detail, and signed it because she wanted to receive her severance and move on. Ms. Banfield says this was the first time she signed a release when departing a company. I accept her evidence that Mr. Randell told her that she had to sign the documents to get her severance.

[112] Based on Mr. Randell and Ms. Sly's testimony, they perceived Ms. Banfield did not read the documents when she signed it. They did not explain the release to her and did not tell her to seek legal advice despite having this perception.

[113] Ms. Banfield is an educated professional geologist who was around age 50 at the time. I have no doubts she understood she was signing legal documents. She testified she understood there was a non-disparagement clause in the document. However, the evidence does not clearly show she understood she was releasing the Respondent from a human rights complaint.

[114] The Respondent's position is not helped by the fact Mr. Randell and Ms. Sly did not tell Ms. Banfield that the release meant she was giving up her ability to bring forth a human rights complaint and they did not tell her she could seek legal advice before signing it. While the release provided that: "I acknowledge that parties have discussed or otherwise canvassed all human rights complaints, concerns, or issues arising out of or in respect to my employment or the cessation of that employment…", no such discussion took place between them.

[115] Had Mr. Randell and Ms. Sly had such a discussion with Ms. Banfield, she may still have chosen to sign the documents and move on with her life without further consideration or

assistance. Had she chosen that route after being informed properly, there would be less ambiguity about whether she made an informed decision.

[116] In this situation, I construe the ambiguity in favour of Ms. Banfield because the Respondent has not provided a good explanation as to why they could not tell her that there were legal consequences and to seek legal advice. Mr. Randell testified that they had wanted to go through the documents with her but her temper was so aggressive that he did not want to agitate her any further and no communication was possible. Not wanting to elevate emotions in this context is not a sufficient reason. Elevated emotions in termination meetings are to be expected.

[117] It is unfair for the Respondent to use Ms. Banfield's briskness and temperament as a reason for withholding important legal information from her. The fact that the Respondent's release indicates the parties should confirm there was discussion about human rights complaints signals the Respondent's own position is that a conversation should have taken place before Ms. Banfield signed the release. In the absence of a good explanation as to why they could not draw her attention to the legal significance of what she was signing and that she should get legal advice, and given Ms. Banfield's testimony that Mr. Randell told her that she needed to sign it to receive severance, I find there is unfairness in how the release was signed.

[118] In my opinion, Mr. Randell and Ms. Sly's omission was unfair but not unconscionable. This is because this was the first time they had to terminate an employee. The Respondent was a small company. I accept that Mr. Randell and Ms. Sly may not have been knowledgeable on termination procedures. I accept they may not have known the significance of their obligation, as the employer, to discuss the release with Ms. Banfield. However, this does not detract from the consequences which is that Ms. Banfield was not informed about the legal significance of the documents that she was signing.

[119] The parties agree Ms. Banfield was entitled to one week of pay under the *Employment Standards Act*. They make slightly different arguments about what she is entitled to under the employment contract.

[120] Ms. Banfield says she was entitled to two weeks' notice or payment in lieu of notice that amounts to two weeks pay. The Respondent says the additional week referenced by Ms. Banfield does not arise from the contract, but from the *Employment Standards Act*. I find the Respondent's distinction to be without consequence. The employment contract is clear that if Ms. Banfield is not given notice, which was the case, she was entitled to two weeks pay, which represents one more week of pay than she was entitled to under the *Employment Standards Act*.

[121] The parties agree Ms. Banfield earned $7,000 per month. The Respondent says this meant her daily pay was $233.33 ($7,000/30 days = $233.33 per day). Based on this calculation, one week of her pay was equal to $1,6733.31, which meant two weeks of pay was equal to $3,336.62. The Respondent says her $3,500 severance pay included $273.38 above her two weeks of pay.

[122] Ms. Banfield says the $3,500 represents two weeks of her wages. The Respondent stated in plain language in the termination letter: "In recognition of your services with us, you will be paid one (2) weeks pay which amounts to $3,500 ("Severance Pay")". The Respondent did not say they were providing her with more than two weeks pay.

[123] I accept Ms. Banfield's plain reading characterization. The Respondent drafted the termination agreement and release. I find the Respondent did not provide her with consideration over and above the $3,500 that she was entitled to under her employment contract for two weeks pay. I do not accept the Respondent's calculation that she was paid an excess of $273.38. Even if I did accept this was in excess of her two weeks' pay, I would not accept that small amount is adequate consideration in exchange for releasing the Respondent from her human rights complaint.

[124] The $3,500 that Ms. Banfield received was equal to what she was entitled to under her employment contract. She was entitled to that amount in the absence of signing any release. I find there is no evidence that the Respondent provided her with consideration in exchange for signing the release.

[125] The evidence shows Ms. Banfield was not intimidated by Mr. Randell or Ms. Sly at the termination meeting. There was no apparent power imbalance at this meeting. There is no evidence of any coercion, oppression, or abuse of power or authority in obtaining Ms. Banfield's consent to sign the release. There is some evidence of compulsion in that I accept Ms. Banfield's evidence that she was told she had to sign the documents to get her severance.

[126] There is no evidence of financial or emotional duress. Ms. Banfield did not testify that she was under any emotional or financial duress at this meeting. She says she was shocked by the termination but I consider that to be the normal stress and unhappiness associated with termination.

[127] There is no evidence that Ms. Banfield knew about her rights under the *Code* or that she had a potential human rights complaint when she signed the release. There is no evidence that Ms. Banfield went back to the Respondent after signing the release and signalled she had any remorse about signing it. Almost a year passed between her signing the release and the filing of her human rights complaint. She did not testify about when was she first alerted to a possible human rights issue, although some people may not understand they have a human rights complaint until they speak to a lawyer or someone else.

[128] By contrast, after Ms. Banfield reported the problem with her knee, Mr. Randell and Ms. Sly spoke to a lawyer who drafted the release for Ms. Banfield. I accept this meant the Respondent likely contemplated that Ms. Banfield had a potential human rights complaint when they presented the release to her.

[129] There is no evidence that Ms. Banfield lacked capacity when she signed the release or that there was any mutual mistake, forgery, or fraud.

[130] Ms. Banfield submits she was not told the real reasons for why she was terminated at the meeting because Mr. Randell told she was terminated without cause. The true reasons were contained in the lawyer's cease-and-desist letters which were sent to her after her termination. However, she did not testify that had she been told the real reasons that she would not have signed the release.

[131] Overall, I find the lack of consideration for the release in relation to a human rights complaint to be a significant factor. This coupled with Mr. Randell and Ms. Sly's observation that Ms. Banfield did not read the documents before signing it and their lack of good reason for not telling her the legal significance of the release and that she could obtain legal advice means her human rights complaint should not be barred as a result of the executed release.

[132] After consideration of the factors and the context, I find the executed release does not bar Ms. Banfield's human rights complaint. To uphold the release under these circumstances would not serve the purposes of the *Code*, which includes fostering a free and equal society, eliminating inequality, and providing a means of redress for those persons who are discriminated against.

B. Merits of Ms. Banfield's Discrimination Complaint

[133] To succeed in her complaint, Ms. Banfield must show she experienced an adverse impact in her employment that was connected to her sex or disability: *Moore v. British Columbia (Ministry of Education)*, 2012 SCC 61 [***Moore***] at para. 33.

1. Did Ms. Banfield have a physical disability that is protected under the Code?

[134] There is no dispute that Ms. Banfield has the protected characteristic of sex.

[135] The parties dispute whether she had a disability or that the Respondent perceived her to have a disability.

[136] The term "disability" is not defined by the *Code*. Whether a particular condition a disability must be determined based on the facts and circumstances of each case: *Edgell v. Board of School Trustees, School District No. 11 (Trail)*, [1996] B.C.C.H.R.D. No. 17 at para. 27.

[137] The concept of physical disability, for human rights purposes, generally indicates a physiological state that is involuntary, has some degree of permanence, and impairs the person's ability, in some measure, to carry out the normal functions of life": *Boyce v. New Westminster (City)* (1994), 24 C.H.R.R. D/441 (B.C.C.H.R.) at D/446.

[138] Ms. Banfield must prove that she had a physical disability or that the Respondent perceived her to have a disability. She argues that she has proved both and relies on the August 8, 2018 doctor's note that said she would be "able to work as long her pain is minimal with her current knee condition. We will reassess her if required". No further medical evidence was submitted at the hearing regarding her knee.

[139] Ms. Banfield relies on *Rogal v. Dalgliesh*, 2000 BCHRT 22 and submits the concept of physical disability generally indicates a physiological state that is involuntary, has some degree of permanence, and impairs the person's ability, in some measure, to carry out the normal functions of life.

[140] Ms. Banfield also relies on *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City)*; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City)*, 2000 SCC 27 in submitting that she is protected from the perception of a disability and her disability does not have to give rise to any limitation of functional disability. The Supreme Court of Canada stated at para. 79 that:

> Thus, a "handicap" may be the result of a physical limitation, an ailment, a social construct, a perceived limitation or a combination of all of these factors. Indeed, it is the combined effect of all these circumstances that determines whether the individual has a "handicap" for the purposes of the *Charter*.

[141] What this means is that the Respondent did not have to perceive Ms. Banfield as having a disability within the meaning of the *Code*, but rather, it could have attached meaning to her knee problem that was a factor in her termination.

[142] The Respondent submits that normal ailments are not a disability for the purposes of the *Code*. Ms. Banfield's transient knee pain does not constitute an obstacle to full participation in society. It was more akin to the common cold. The doctor's note referred to knee pain and did not state she had a disability of any permanence. There is no evidence that her condition was chronic. She did not need to take any time off work, but took a scheduled break after she

left Stewart. Ms. Banfield did not lead any evidence on that the Respondent perceived her to have a disability and it is not open for the Tribunal to make that finding.

[143] The Respondent relies on *Welch v. Knappett Projects*, 2005 BCHRT 525, where the Tribunal found an infection of a blister was not a physical disability within the meaning of the *Code*.

[144] I make no finding on whether Ms. Banfield in fact had a disability. The medical evidence and the true nature of her knee condition is not determinative because I find the Respondent perceived Ms. Banfield to have a disability. This is based on a few factors.

[145] Mr. Randell's email to Ms. Banfield indicated he viewed her knee condition as something that was more than transient, could lead to longer-term problems, and that affected her ability to work in the field at that time:

> I was informed of a pre-existing knee issue that you are now seeking treatment for. I don't know more details than that but as I was not informed it is hard to manage a situation that could lead to "overuse". As such, it is better for you not to be in the field right now in order to rest.

[146] Ms. Banfield's email back to Mr. Randell likely reinforced his view, as she told him about her doctor telling her that she needed an MRI to distinguish whether she a patellar ligament sprain or a small meniscal tear.

[147] Mr. Randell's emails with Mr. Hoiles also show he perceived her knee condition would impact her work functionality. The fact Mr. Randell went up to Stewart to investigate the site partly because of Ms. Banfield's injury also demonstrates he felt her knee condition or injury was of some seriousness. Mr. Randell also testified that Mr. Hoiles told him that this could lead to a WorkSafeBC claim and this made him instantly assume it was an injury and that it had to be taken seriously.

[148] These factors do not suggest Ms. Banfield's knee condition was akin to a cold. While the doctor's note may not have referred to any permanence, I find Mr. Randell perceived there was

some permanence given the other factors set out above. I find the Respondent perceived Ms. Banfield had a disability for the purpose of the *Code.*

2. Adverse impact

[149] The parties do not dispute that termination from employment is an adverse impact. Being terminated from employment had an obvious negative effect on Ms. Banfield's employment. I find the Respondent's termination of Ms. Banfield's employment constitutes an adverse impact regarding employment.

3. Connection to sex

[150] Ms. Banfield submits the Respondent assumed her behaviour toward the pilot was sexual because of her sex and because of Mr. Randell's already negative opinion towards her. She says there was no record of persistent sexual conduct. The sexual harassment claim was baseless. The Respondent included it in the lawyer's letter for reasons for dismissal and in the EGBC complaint as a way to punish and harm her. She submits the Tribunal should sanction this discriminatory conduct.

[151] The Respondent submits the allegation of sexual harassment was a non-discriminatory reason for her termination. I take from this argument that its position is that Ms. Banfield's conduct constituted sexual harassment even though Mr. Randell testified that in hindsight, he would have said her conduct was more bullying behaviour than sexual harassment.

[152] Ms. Banfield was not asked about her interactions with the pilot. The main evidence is Mr. Randell's testimony and his notes from his conversation with the pilot.

[153] I do not have to determine whether Ms. Banfield's conduct towards the pilot constituted sexual harassment and I make no findings on this.

[154] Ms. Banfield does not specifically dispute her conduct toward the pilot, but submits that the conduct should not have been characterized as sexual harassment. The evidence is that Ms. Banfield sent photographs of herself to the pilot, he asked her to stop which she apparently did,

and she told him he was no longer his favourite pilot. The Respondent produced a note from its interview with the pilot, which states the pilot viewed the photos as "suggestive". Mr. Randell testified that he used the phrase sexual harassment because that was how Mr. Hoiles and the pilot referred to it in their discussion. While Mr. Randell did not explain why he continued to use the phrase despite saying he would have downgraded it to "bullying" after talking to the pilot, I am satisfied that Mr. Randell used the term because it was initially reported to him that way and this was the first time he had dealt with such an allegation.

[155] I do not accept that the Respondent sexualized her conduct towards the pilot by labelling it as sexual harassment. The evidence does not support that Ms. Banfield's sex was a factor in the Respondent using the phrase in the circumstances of the pilot's apparent discomfort with her sending him photos. While the Respondent says the alleged sexual harassment was a reason for her termination, I find this does not form the basis of discrimination based on sex in these circumstances. I dismiss Ms. Banfield's complaint as it relates to the ground of sex.

4. Connection to disability

[156] Ms. Banfield submits the Respondent was not fond of her personality and this formed the backdrop and context of the demise of their relationship. Her knee injury was the "straw the broke the camel's back". It prompted the Respondent to remove her from the workplace which led to her termination.

[157] The Respondent submits Ms. Banfield's employment was terminated for a non-discriminatory reason which included: issues with her taking feedback, breaching of policies, lack of competency, inability to complete deliverables on time or at all, inability to take instructions, treatment of other staff, allegation of sexual harassment, interaction with various staff at Stewart, and Mr. Randell's preliminary investigation into her behaviour. The Respondent says it is not enough to rely on a temporal connection between her knee injury and termination. Ms. Banfield's flight out of Stewart was booked before Mr. Randell found out about her knee injury.

[158] The starting point is that there is no requirement that Ms. Banfield's perceived disability needs to be the sole or overriding factor in her termination: *Québec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center*), 2015 SCC 39 at paras. 45-52.

[159] I find that the Respondent's perception of Ms. Banfield's knee condition was not the only or main reason for her termination. I accept the Respondent was not pleased with the slow progress of her work and her complaints about the worksite and Mr. Hoiles. I also accept that her drinking in front of a client in Ontario was a violation of the Respondent's Drug and Alcohol policy and this was viewed very negatively by the Respondent. I also accept there were likely personality conflicts between Ms. Banfield and staff. These are all reasons for why the Respondent fired her.

[160] However, I also find Ms. Banfield's perceived disability was a factor in her termination.

[161] I have already discussed how Mr. Randell's emails to and from Ms. Banfield and Mr. Holies' shows he perceived her to have a disability. I will now explain how that perception was connected to his decision to fire her.

[162] There is no persuasive evidence that Mr. Randell had plans to fire Ms. Banfield before he perceived her to have a disability. He testified that he discussed her poor progress verbally several times, but he also gave evidence that he was out of the country and did not respond to Ms. Banfield's emails because he felt Mr. Hoiles was in a better position to deal with her. It is possible that he may have spoken to her about her performance while they worked in the office but there is no evidence that he spoke to Ms. Banfield about her performance while she was in Stewart.

[163] I accept Mr. Randell pre-booked Ms. Banfield's flight out of Stewart before he perceived that she had a disability. However, the timing of the flight is not determinative. Mr. Randell's decision to fire her came after she flew out of Stewart and after Mr. Randell returned from the U.K. and went up to the site to investigate.

[164] Ms. Sly testified that the Respondent received information that a WorkSafeBC report was filed and this meant Mr. Randell had to go to the site to investigate her knee injury which led to the revelations about her behaviour and problems on site. Mr. Randell testified both reasons were factors for why he started his investigation. Based on the Respondent's own evidence, Ms. Banfield's perceived disability was a factor in the chain of events that led to her termination.

[165] The evidence shows Mr. Randell felt Ms. Banfield did not want to do the historical core work on the abandoned camp and wanted to do the new core drilling that Mr. Hoiles was doing. Ms. Banfield emailed Mr. Randell after she reported knee pain and said she did not want to trip while carrying the core boxes on the slope. She said if there was no work for her in Ontario that she would be happy to return to the Stewart site.

[166] Ms. Banfield's expressed desire to continue working at the Stewart site, coupled with the Respondent's view that she was signalling how the historical core work could be unsafe for her has to be considered against Mr. Hoiles also viewing Ms. Banfield as a problem. Mr. Randell testified that Mr. Hoiles told him several things about Ms. Banfield not being focused on the job and "getting into everyone's hair". Her knee injury was "just another thing". Mr. Hoiles also told Mr. Randell there may be a WorkSafeBC claim if Ms. Banfield is not able to return to work. Based on this context, I accept the Mr. Randell likely thought he would face difficulty if there were further issues related to Ms. Banfield's perceived disability. I accept the evidence shows Ms. Banfield's disability was "a last straw" that led to her termination.

[167] There is some evidence that geologist jobs are physical. For example, Mr. Randell's email to Mr. Hoiles stated "I was not made aware of any pre-existing condition, did she tell you? It is hard to deal with these things when people don't tell you before hand!". In the EGBC complaint, Mr. Randell wrote, "As any geologist knows, field work comes with inherent risks and it is that person's role to mitigate any hazards". That said, the fact that a job is physical does not mean an employer is relieved of seeking reasonable accommodations for disabilities. Furthermore, there was no evidence led that Ms. Banfield's perceived disability could not be reasonably accommodated. Rather, the evidence indicates that the Respondent did not turn its

mind to accommodation but acted on its perception of a disability as one of the reasons to terminate Ms. Banfield's employment.

[168] The temporal connection between Ms. Banfield's disability and her termination is strong. This connection is further strengthened by these surrounding facts. I accept the Respondent had other reasons for firing Ms. Banfield. However, I find Mr. Randell's perception that Ms. Banfield had a disability was also a factor in his decision to terminate her employment.

[169] Ms. Banfield has proven the Respondent discriminated against her in employment based on perceived disability contrary to s. 13 of the *Code*.

C. Remedy

[170] Ms. Banfield seeks the following remedies under s. 37 of the *Code*:

a. A cease and refrain order.

b. A declaratory order.

c. Compensation for lost wages from the date of the termination to the date of the hearing which amounts to $166,249.

d. Compensation for expenses including future expenses for therapy which amount to $1,100 for therapy that she has already paid for plus one year of future therapy at $8,164.

e. Compensation for injury to dignity in the amount of $50,000.

[171] The Respondent submits that if a causal connection is established, the amount of compensation is a matter of discretion left to the Tribunal to exercise on a principled basis in light of the remedial provisions of the *Code*, and the purpose of the award. The Respondent did not submit what specific amounts Ms. Banfield should be entitled to if she succeeded in proving discrimination.

1. Cease and refrain order

[172] I order the Respondent to cease the contravention and to refrain from committing the same or a similar contravention under s. 27(2)(a) of the *Code*.

2. Declaratory order

[173] I make a declaratory order that the conduct complained of, or similar conduct, is discrimination contrary to the Code under s. 27(2)(b) of the *Code*.

3. Wage loss

[174] The purpose of wage loss awards under s. 37(2)(d)(ii) is to put the complainant in the position they would have been in, had the discrimination not occurred.

[175] Ms. Banfield submits her total wage loss is $166,249 after mitigation as follows:

2018: $11,666

2019: $60,000

2020: $55,000

2021: $39,583

[176] I noted above that the issue of whether Ms. Banfield was hired on a six-month contract is disputed. The parties agree that up until the signing of the employment contract, all of the communications between them were about Ms. Banfield working on a six-month contract for the period of April 23, 2018 to November 22, 2018. The job posting indicated it was a six-month contract. They discussed the six-month term during the hiring process. The six-month term was also included in her offer letter, which both parties signed.

[177] However, on Ms. Banfield's first day of work, she signed an employment contract that did not include the six-month term. She was pleased, surprised, and confused by it. She testified that prior to this employment contract, she was under the impression that she was

being hired for a six-month fixed term. She assumed the Respondent was happy with her references and was busy enough to give her a permanent position. She did not raise the discrepancy with the Respondent. Ms. Banfield, Mr. Randell, and Ms. Sly never discussed the missing fixed term from the employment contract.

[178] I find it is unnecessary for me to determine the length of Ms. Banfield's contract or whether she was hired on a full-time position because I find the employment relationship with the Respondent would not have continued even if there had been no discrimination. The Respondent likely would still have terminated Ms. Banfield's employment for the other reasons explained above.

[179] Ms. Banfield also mitigated her losses. She testified that she found another geology job In November 2018. Her record of employment for that company indicates she started on November 14, 2018 and that she "did not pass probation – not a fit". Her last day of employment was January 31, 2019. Ms. Banfield testified that it was supposed to be a permanent position but her probation was unsuccessful. She did not explain what she did at this job or why it was unsuccessful. She also posted comments about this company on social media.

[180] At the hearing, Ms. Banfield did not provide much evidence about her job search or subsequent employment. Aside from one record of employment, Ms. Banfield provided no employment records aside from charts that she created.

[181] Based on those charts, Ms. Banfield's employment since her termination has been fairly consistent but for some small gaps. She was employed from November 14, 2018 to January 31, 2019 at the job mentioned above. She was unemployed for one month and then worked for another geology company from March 2019 to July 2019. She worked for a data company from August 2019 to July 2020. She was unemployed for month and started work at a different geology company in August 2020 until December 2020 when she went on EI and CERB. At the time of the hearing, she was employed in a geologist position.

[182] Ms. Banfield did not explain what positions she applied for, what companies she applied to, how often she applied for jobs, how many job applications she made, and what responses she got from prospective employers. She did not explain why she was unable to find jobs at the same rate of pay despite being able to find work in the same industry. She suspected that some people in the industry might have been aware of what happened with the Respondent and this possibly impacted her job search. I am unable to conclude that was what happened based on the evidence before me. I am also unable to conclude that the course of her subsequent employment would have been different had the discrimination not occurred.

[183] I find Ms. Banfield is entitled to wage loss from August 28, 2018 (termination date) to November 14, 2018 (date of first new employment). I have chosen this end date because I accept the Respondent would have fired her even had the discrimination not occurred. I accept the Respondent's evidence that the Ontario project that Ms. Banfield was hired for did not progress. This meant the work that the Respondent hired her to do was not available and, if it were available, Mr. Randell would not have put her on that project because he was dissatisfied with her work at the Stewart site. For these reasons, I find Ms. Banfield's employment with the Respondent would have likely ended around November 2018 had the discrimination not occurred.

[184] Ms. Banfield's wage loss from August 28, 2018 to November 14, 2018 amounts to approximately nine weeks of wage loss totalling $15,750. To avoid double recovery, the $3,500 severance that she received must be deducted. After making that deduction, I award Ms. Banfield a total of $12,250 for wage loss.

4. Expenses

[185] Section 37(2)(d)(ii) also permits the Tribunal to order compensation for expenses incurred because of the discrimination.

[186] I find Ms. Banfield is not entitled to her therapy as a past or future expense. The first counselling session with Ms. Holtje occurred two years after the termination. Ms. Banfield provided no medical evidence outside of this counsellor's records. Despite there being a

Tribunal order for her doctors to produce her records, she was unable to get copies of her family doctor's records because his clinic was closed.

[187] Based on Ms. Banfield and Ms. Holtje's evidence, I am not persuaded there is a sufficient connection between the termination and her need for therapy. Ms. Holtje was unable to provide any specific information about Ms. Banfield's time with the Respondent. Furthermore, in the intake record, under "What brings you to counselling", the response was related to anxiety around relationships. There was nothing in that intake form about the Respondent, her employment there, or employment in general. While I accept Ms. Banfield discussed employment and the "lawsuit" with Ms. Holtje during her sessions, the records show personal relationships was the main reasons for the sessions.

[188] I make no award for counselling session as an expense related to the discrimination.

1. *Injury to dignity, feelings, and self-respect*

[189] When assessing an award for injury to dignity, feelings, and self-respect under s. 37(2)(d)(iii), the Tribunal considers factors such as the nature and frequency of the discrimination, the vulnerability of the complainant, and the impact on the complainant.

[190] I turn to the nature and frequency of the discrimination. The Tribunal has stated that longer employment is likely to make a complainant more vulnerable to the effect of the discriminatory termination of their employment but in each case, the underlying question is the impact on the particular complainant: *Ford Peak Product Manufacturing and another (No. 3)*, 2010 BCHRT 155. Ms. Banfield was not engaged in long term employment with the Respondent. She had just started her job and was terminated fourth months into it.

[191] I have considered the social context around Ms. Banfield. She testified that she had a traumatic life due to injuries and family circumstances, went back to university as a mature student, and had a hard time in university. She did not provide any medical evidence so I am unable to make any connections between any diagnoses and any effects of the discrimination on those diagnoses. However, I accept her evidence that life presented her with hardships and

that she worked hard to overcome them to become a geologist. I accept this was her first job after becoming licensed but her resume demonstrates she worked in geology for many years prior to becoming licensed. I accept she felt isolated and unsupported for most of the time when she was working at the Stewart site.

[192] With respect to impact, I find most of Ms. Banfield's impact evidence related to what happened after her termination. The evidence shows the relationship between the parties soured after Ms. Banfield made negative posts on social media following her termination. This was the catalyst that led to the Respondent's lawyer sending her a cease-and-desist letter which included all the reasons why she was fired. Her social media posts were also the catalyst that led to Mr. Randell making a complaint against her to the EGBC. This is relevant because, in my opinion, subsequent events and the negative feelings around them, are not related to the effects from the discrimination.

[193] Ms. Banfield's evidence was that at the termination meeting, she was saddened but was ready to move on with her life. Based on her own evidence, the degree of negative impact by the termination itself was not strong. I accept Ms. Banfield was severely negatively impacted when Mr. Randell made the EGBC complaint against her in an effort to get her to remove her social media posts after the lawyer's cease-and-desist letter failed to achieve that outcome. However, in my opinion, those events were unconnected to the discrimination based on her perceived disability. Those events were connected to her refusal to take down her social media posts.

[194] Ms. Banfield submits her award for injury to dignity should be $50,000 based on *Davis v. Sandringham*, 2015 BCHRT 148 [***Davis***]. The Tribunal awarded the complainant $35,000 for injury to dignity after it found that the employer had discriminated against the complainant based on stereotypical assumptions about her mental health. The complainant was employed as a care aid and was performing well. She had disclosed to a co-worker that she had posttraumatic stress disorder due to a traumatic childhood. That co-worker informed the complainant's supervisor, who called her in for questioning. Under her supervisor's intrusive and repetitive questioning, the complainant felt upset and compelled to disclose personal

details of her mental health history. Her supervisor then sent her to the emergency room, which was a humiliating experience that was completely unnecessary. Following this, the complainant was put on medical leave and ultimately lost her job.

[195] I find *Davis* is not helpful to my determination of Ms. Banfield's injury to dignity award because the facts are so dissimilar. I have considered of all of the factors in Ms. Banfield's situation and awards made in other decisions such as *Singh v. Dodd's Furniture (No. 2)*, 2021 BCHRT 85; *Mr. X v. CDI College and others*, 2020 BCHRT 11; *Pacheco v. Local Pest Control*, 2019 BCHRT 19; and *He v. Kirin Mandarin Restaurant*, 2018 BCHRT 112. Based on the evidence, I find $10,000 is the appropriate compensation for Ms. Banfield injury to dignity, feelings, and self-respect.

VI CONCLUSION

[196] I find the Respondent discriminated against Ms. Banfield in employment based on perceived disability contrary to s. 13 of the *Code*.

[197] I make the following orders:

a. Pursuant to s. 37(2)(a) of the *Code*, I order the Respondent cease the contravention and to refrain from committing the same or a similar contravention under s. 27(2)(a) of the *Code*.

b. Pursuant to s. 27(2)(b) of the *Code*, I make a declaratory order that the conduct complained of, or similar conduct, is discrimination contrary to the *Code*.

c. Pursuant to s. 37(2)(d)(ii) of the *Code*, I order the Respondent to pay Ms. Banfield $12,250 as compensation for wage loss.

d. Pursuant to s. 37(2)(d)(iii) of the *Code*, I order the Respondent to pay Ms. Banfield the sum of $10,000 as damages for injury to her dignity, feelings, and self respect.

e. I order the Respondent to pay Ms. Banfield pre- and post-interest judgment interest as set out above.

_____

Grace Chen
Tribunal Member
Human Rights Tribunal