

Is Refusal To Wear A Mask The Basis For A Human Rights Complaint?



Mask wearing indoors has become a ubiquitous part of the COVID-19 experience. The B.C. government mandated mask wearing in November of 2020 for most indoor public settings. Those orders are premised on face coverings helping to prevent, respond to or alleviate the spread of COVID-19, when used with other protective measures. Some members of our society have physical, cognitive, or psychological disabilities that make mask wearing unduly difficult or unsafe. Some others may sincerely believe that their particular religion prohibits wearing a mask, or that not wearing a mask “engenders a personal, subjective connection to the divine or the subject or object of their spiritual faith”.

A common question is, just who does not have to wear a mask? Two recent decisions of the BC Human Rights Tribunal (the “Tribunal”), *The Customer v The Store*, 2021 BCHRT 39 (the “*Customer Decision*”), and *The Worker v The District Managers*, 2021 BCHRT 41 (the “*Worker Decision*”), (collectively the “*Decisions*”) offer some guidance.

The *Decisions* were “screening decisions,” preliminary inquiries by the Tribunal evaluating whether a complaint has any reasonable prospect of success. Screening decisions are generally not made public. However, due to the “large volume of complaints alleging discrimination in connection with the requirement to wear face coverings indoors” received by the Tribunal since the pandemic began, the Tribunal elected to publish the *Decisions* and take the opportunity to educate British Columbians on proper (and improper) use of the human rights complaint system for matters related to mandatory masking. The *Customer Decision* involved a complaint on the basis of disability, and the *Worker Decision* involved a complaint on the basis of religious belief.

The *Customer Decision*

The *Customer Decision* involves a familiar set of facts. Prior to the government’s mandatory masking rule, in September 2020, the complainant attempted to enter the respondent grocery store without a mask. The store had its own mandatory masking policy. The store security guard stopped the complainant at the door and told her that she could either put on a mask or leave the store. The complainant persisted, stating that she was exempt from the store’s masking policy because wearing a mask would cause her “health issues,” including “breathing difficulties” and “anxiety” and therefore it was the

store's responsibility to accommodate her pursuant to the *BC Human Rights Code*. The security guard asked the complainant exactly what health issues she was suffering from that made it a hardship for her to wear a mask, but the complainant refused to disclose any information and ultimately left the store.

In her Complaint to the Tribunal, the complainant stated that the store making a "sudden and arbitrary decision to force customers to wear masks [was] discriminatory;" that a masking policy for the store was "pointless" and discriminated against persons with health issues; and, that "people should not have to give out personal health information to get daily essentials." However, just as with the security guard, the complainant refused to disclose any specific information about her alleged disability to the Tribunal. Instead, the complainant simply restated her broad position that "[b]eing difficult to breathe and causing anxiety makes it a hardship [to] wear a mask."

The Tribunal first explained that in order to substantiate a human rights claim, the complainant must show that (1) she has a disability; (2) the store's conduct had an adverse impact on her regarding a service; and, (3) her disability was a factor in the adverse impact that she suffered. While the complainant established that she suffered an adverse impact when she was refused entry to the store, the Tribunal did not accept that she had met the other stages of the test. Simply put, the complainant's "refusal to explain whether she has a disability, and how that disability impacts her ability to wear a mask, means that she has not set out facts which could, if proven, establish discrimination."

Although leaving to another day the question of just how much medical information a complainant may have to divulge in order to substantiate a claim that they were discriminated against for not wearing a mask, the Tribunal made the following clear statement on application of the *Code* to mandatory masking policies,

The *Code* does not protect people who refuse to wear a mask as a matter of personal preference, because they believe wearing a mask is 'pointless', or because they disagree that wearing masks helps to protect the public during the pandemic... Any claim of disability discrimination arising from a requirement to wear a mask must begin by establishing that the complainant has a disability that interferes with their ability to wear a mask.

The Worker Decision

In the *Worker Decision*, the complainant alleged that when he arrived at work, his manager told him that he had to wear a face mask. The complainant refused to do so, saying it was his "religious creed" not to wear a mask. The complainant was told that he could not enter the workplace without a mask and ultimately his contract was terminated for refusing to wear a mask. The complainant then filed a complaint with the Tribunal alleging that he had been discriminated against on the basis of his religion contrary to the *Code*.

Under human rights legislation, protection of a religious belief or practice is triggered when a person can show that they sincerely believe that the belief or practice (a) has a connection with religion; and (b) is experientially religious in nature. The complainant made numerous arguments attempting to tie his refusal

to wear a mask to his religious beliefs, including by invoking a “God given ability to breath,” and asserting that “[w]e are all made in the image of God, a big part of our image that we all identify with is our face. To cover-up our face arbitrarily dishonours God.” In spite of the ostensibly religiously-grounded arguments put forward by the complainant, the Tribunal noted that he had also placed a strong emphasis on his belief that “forced mask wearing does not help protect anyone from viruses.”

The Tribunal ultimately held that the complainant had not established that his objection to mask-wearing was grounded in protection of a religious belief. Rather, his objection was based on his opinion that wearing a mask does not stop the transmission of COVID-19. The Tribunal explained that, as in the case of the *Customer Decision*, that opinion is not a belief protected by the *Code*.

Overall, by issuing the Decisions, the Tribunal is sending a clear signal that personal preference against wearing a mask is not a sufficient basis for a human rights complaint.

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