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2005 BCHRT 514

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

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

**B E T W E E N:**

Christopher S. M. Kempling

**COMPLAINANT**

**A N D:**

School District No. 28 (Quesnel) and Randy Curr

**RESPONDENTS**

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**REASONS FOR PRELIMINARY DECISION  
APPLICATION TO DISMISS  
AND TO FILE SUR-REPLY**

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Tribunal Chair:

Heather M. MacNaughton

Counsel for the Complainant:

William S. Clark and  
Rebeka Breder

Counsel for the Respondents:

Judith C. Anderson

## **Introduction**

[1] Dr. Christopher Kempling filed a complaint with the Tribunal on May 20, 2004, in which he alleged that his employer, School District No. 28 (Quesnel) (the "District"), and Randy Curr, the District Principal – Operations, discriminated against him in his employment on the basis of his religion, contrary to s. 13 of the *Human Rights Code*. Specifically, he alleged that a Letter of Reprimand, dated February 3, 2004, reprimanding him for expressing his views on homosexuality in a CBC Radio interview aired on January 5, 2004, was discriminatory.

[2] The District and Mr. Curr have applied to have the complaint dismissed on the basis of the decision of the British Columbia Court of Appeal in *Kempling v. British Columbia College of Teachers*, 2005 BCCA 327. That case involved discipline imposed on Dr. Kempling by the British Columbia College of Teachers (the "BCCT") in respect of earlier expressions of his views on homosexuality. The discipline imposed by the BCCT was upheld in that case, on the basis that the views expressed by Dr. Kempling were discriminatory and therefore amounted to conduct unbecoming a member of the BCCT.

[3] In order to understand this application, it is necessary to provide fairly extensive background information. Then, in order to determine if Dr. Kempling's complaint should be dismissed, I determine its nature and subject matter. I then outline what was in issue, and the Court's determinations, in the BCCT case. Finally, I determine whether, as a result of the Court's decision, Dr. Kempling's complaint should be dismissed.

## **Background**

[4] Dr. Kempling is employed by the District as a teacher and guidance counsellor. The terms and conditions of his employment are governed by a collective agreement between the District and the B.C. Teacher's Federation (the "Union").

[5] Between 1997 and 2000, Dr. Kempling wrote, and published in the Quesnel Cariboo Observer, an article and a series of letters to the editor expressing his views on

homosexuality. In its decision, the Court of Appeal quotes a number of the statements made by Dr. Kempling in these publications, including the following:

Gay people are seriously at risk, not because of heterosexual attitudes, but because of their sexual behaviour, and I challenge the gay community to show some real evidence that they are trying to protect their own community members by making an attempt to promote monogamous, long lasting relationships and to combat sexual addictions. [10 August 1997, *Quesnel Cariboo Observer*.]

We cannot criticize the homosexual community for irresponsible behaviour when there is no legal requirement for them to behave responsibly. [12 April 2000, *Quesnel Cariboo Observer*.]

I refuse to be a false teacher saying that promiscuity is acceptable, perversion is normal, and immorality is simply 'cultural diversity' of which we should be proud. [19 July 2000, *Quesnel Cariboo Observer*.]

Sexual orientations can be changed and the success rate for those who seek help is high. My hope is that students who are confused over their sexual orientation will come to see me.

It could save their life. [*Quesnel Cariboo Observer*, 27 August 1997, AB. 18] (at paras. 34 and 44)

[6] On May 8, 2001, the BCCT cited Dr. Kempling for conduct unbecoming a member of the College in making these statements.

[7] In May 2002, a Hearing Panel of the BCCT's disciplinary committee found that Dr. Kempling's statements were discriminatory, and therefore conduct unbecoming. That was followed by a recommendation for discipline, including a one-month suspension. On April 1, 2003, the BCCT adopted the Panel's reasons and recommendations.

[8] In January or February 2003, Dr. Kempling granted an interview to CBC Radio concerning his views on homosexuality and the Panel's recommendations. In that interview, Dr. Kempling stated the following:

I don't feel that I have the luxury to pick and choose passages of the Bible that I believe. It is incumbent on Christians to believe all of it and I do.

...

The scripture clearly says that [homosexuality] is immoral behaviour and that it is a barrier to salvation.

...

I'm frustrated, I am frustrated that the College of Teachers believes that they have the right to control every aspect of my life simply because I am a teacher. Yes, I am a teacher and when I am on the job I will abide by the rules and I have abided by the rules of my profession. When I am not on the job I have other roles in my life and I want the freedom to act in concert with those roles, as a Christian, as a member of my church.

...

It is not my job as a school counsellor to try and argue someone out of their orientation if they are happy with it. It's ethically inappropriate, I wouldn't do it, I never have done it. At the same time, if a student were to come to me and say I have these feelings, I can't control them, I am upset about them, they are contrary to the moral teachings of my family or my religion, I don't know what to do, can you help me? I would say "yes, I can." There are effective therapies for those who are upset and concerned.

[9] The January 2003 CBC Radio interview was the controversial and the District conducted an investigation into it. On May 21, 2003, the District wrote Dr. Kempling a Letter of Direction concluding its investigation:

This letter will, therefore, outline our direction to you arising from this interview.

1. You will not publish or distribute anything that mentions your views on homosexuality except as may be required to defend and respond to the legal challenge that is currently before the BC College of Teachers.
2. You have agreed not to write letters to the local editors of Quesnel newspapers concerning your views on homosexuality.
3. You are directed not to express your views regarding homosexuality in any classroom, in any District school, or in any activities outside of the school that are school-sponsored or school related activities.

As we discussed with you during our recent meetings, our primary focus is to ensure that Correlieu Secondary School and all schools in our District do not have a poisoned environment for either students or staff. We want

our schools to remain places where there is sensitivity to issues and where an atmosphere of tolerance and respect exists.

[10] Meanwhile, Dr. Kempling unsuccessfully appealed the BCCT decisions to the British Columbia Supreme Court: (2004) 27 B.C.L.R. (4<sup>th</sup>) 139.

[11] A series of discussions and written communications ensued between Dr. Kempling and the District with respect to the parameters of the Letter of Direction. In the course of those communications, the District clarified that the Letter of Direction was not intended to preclude Dr. Kempling from:

- Engaging in collaborative and professional communications;
- Speaking or preaching in churches;
- Attending and participating in dialogue at a convention in Utah;
- Writing articles for churches or the Professional Counsellors' Association;
- Sharing his views at Union meetings;
- Writing articles in religious and professional publications not readily available in the Quesnel area; and
- Advertising private counselling services in the *Prince George Free Press* which did not refer to Dr. Kempling by name or refer to him as a teacher or school counsellor.

[12] On January 5, 2004, CBC Radio North aired an interview with Dr. Kempling. It is this interview which gave rise to the Letter of Reprimand that is the subject of this complaint. The transcript of the broadcast reveals the following:

MONROE [the anchor]: A School Counsellor in Quesnel is offering therapy for gay men who want to become heterosexual. Chris Kempling is in the midst of a legal battle with the BC College of Teachers after writing letters against homosexuality. Now he is advertising orientation change therapy in a Prince George newspaper...

TRUMPENER [the reporter]: Chris Kempling's classified ad urges men and boys to – quote – claim their masculinity. Kempling says he is offering private therapy to men experiencing unwanted attractions to other men. He says he is also offering therapy for boys whose behaviour doesn't conform to their gender.

KEMPLING: Well, it is a controversial therapy. The reason I am doing this is because it is very unusual and, in fact, politically incorrect to be offering this type of service.

TRUMPENER: ... In the meantime, he is still a School Guidance Counsellor, and he is continuing his private therapy practice.

KEMPLING: I see this as quite separate from my role as Elementary School Counsellor....

[13] The District conducted an investigation into the January 2004 interview. In a letter dated February 3, 2004, the District referred to a meeting it had held with Dr. Kempling and his Union president, in which Dr. Kempling was said to have confirmed the following:

1. You placed the following advertisement in the Prince George Free Press:

*“CLAIM your own masculinity. Orientation change therapy for men and boys from North.com clinical member 983-39-19 (Quesnel) Confidentiality assured.”*

2. In response to a call from a CBC reporter, you advised her that you were offering counselling service for therapy in Prince George and drew her attention to the advertisement in the Prince George Free Press.
3. The CBC reporter requested, and you agreed, to be interviewed by her on your offer of counselling therapy.
4. The CBC interview was aired in Quesnel on January 5<sup>th</sup>, 2004. The transcript of the interview is attached to this letter.

[14] The District went on to state:

Based on our investigation, and your confirmation of the facts set out in this letter, it is concluded that you have contravened the May 21<sup>st</sup>, 2003 directive by participating in the CBC interview. In particular, you have contravened Point 1 of the directive...

In the May 21<sup>st</sup>, 2003 letter of direction, you were advised that the primary focus of the District is to ensure that there is no poisoned environment for either students in schools or staff working in Board facilities in the District. District schools must remain places where there is sensitivity to issues and where an atmosphere of tolerance and respect exist. The BC

*Human Rights Code* and the *Charter of Rights and Freedoms* guarantees equality and respect for persons of different sexual orientation. Your continued public expression of your personal views on homosexuality is incompatible with your role as a teacher and counsellor in the public school system. For your information, since your Radio interview, we have had staff come forward to advise us of their discomfort with your published views.

Your conduct warrants a disciplinary response. Accordingly, this letter serves as a letter of reprimand for your conduct in participating in the CBC interview on January 5<sup>th</sup>, 2004. This letter of reprimand will be placed in your personnel file and a report will be made to the College of Teachers in accordance with the provision of the *School Act*.

In future, you must adhere to the May 21<sup>st</sup>, 2003 directive. Any failure to do so will result in further and more severe discipline, up to and including dismissal.

[15] The Union grieved the Letter of Reprimand and filed the present complaint.

[16] Meanwhile, Dr. Kempling appealed to the Court of Appeal the Supreme Court's decision upholding the BCCT's discipline for his earlier comments.

[17] The Union and the District agreed to delay referral of the grievance to arbitration pending the conclusion of the appeal. The Tribunal declined to defer further consideration of the complaint pending the grievance and the appeal: *Kempling v. School District No. 28 (Quesnel) and Curr*, 2005 BCHRT 134.

[18] On June 13, 2005, the Court of Appeal issued its decision dismissing Dr. Kempling's appeal of the BCCT decisions, following which the Tribunal sought submissions from the parties with respect to the effect of the Court of Appeal's decision on Dr. Kempling's complaint. In response, the respondents filed the present, opposed application to dismiss the complaint.

[19] Dr. Kempling sought, following the close of submissions on this application, to file a brief sur-reply. The three paragraph sur-reply was not responsive to anything new raised in the respondents' reply submission on the original application, and added nothing to the parties' existing submissions. As a result, no submissions were required from the respondents with respect to it and the application to file sur-reply is denied

## **The Complaint**

[20] In his complaint, Dr. Kempling alleged that the Letter of Reprimand discriminated against him on the basis of religion. He also referred to the District's rejection of his Union's grievance. In my view, this is not an independent allegation of discrimination.

[21] The focus of the complaint is on the Letter of Reprimand. Dr. Kempling stated:

I am a Christian counsellor in private practice since 1990... As a result of a revelation of the Holy Spirit on January 8, 2003, I believe I have a spiritual calling to provide this service. I do not believe that SD # 28 or Mr. Curr has the right to impose discipline on me for acting in accordance with my religious beliefs, or publicly speaking about my intention to provide a specific Christian counselling service to members of my own faith community....

[22] On June 27, 2004, Dr. Kempling amended his complaint to include allegations with respect to a letter given to him by Mr. Curr on September 2, 2003, denying him a promotion. Dr. Kempling alleges that he filed a grievance and obtained the position. As this issue forms no part of the parties' submissions on the application to dismiss, it appears that Dr. Kempling has either abandoned this allegation or, in any event, does not consider that it stands on any different footing than his allegations about the Letter of Reprimand in terms of the effect of the Court of Appeal's decision.

[23] In his amendment, Dr. Kempling also referred to a "disciplinary letter" from Mr. Curr, dated September 15, 2003, with respect to an investigation into a sermon Dr. Kempling preached. A subsequent letter from Mr. Curr, dated October 1, 2003, indicates that no discipline was in fact imposed for this incident and that the District did not seek to prevent Dr. Kempling from speaking or preaching in churches. Again, this incident does not form part of the submissions on the present application; I infer that Dr. Kempling has either abandoned this allegation or does not submit that, should his complaint with the Letter of Reprimand be dismissed, this allegation could be maintained.

[24] The parties disagree whether the earlier Letter of Direction forms part of this complaint. In my view, the complaint, properly construed, does not include an allegation that the Letter of Direction was itself discriminatory but forms part of the essential



background to the complaint, as the Letter of Reprimand was issued because of Dr. Kempling's failure to abide by paragraph 1 of the Letter of Direction. Further, the Letter of Reprimand specifically informed Dr. Kempling that he must abide by the Letter of Direction in future.

[25] Thus, while I agree with the respondents that the Letter of Direction does not itself form part of the complaint, my decision with respect to whether the complaint should be dismissed would not be affected by whether the Letter of Direction is part of the complaint. The Letter of Direction and the Letter of Reprimand are too inextricably linked for the question of whether the Letter of Direction is part of the complaint to be in any way determinative of whether the complaint should be dismissed.

### **The Court of Appeal's Decision**

[26] In its decision, the Court of Appeal upheld the decision of the Supreme Court, which had upheld the BCCT's decision. Dr. Kempling has sought leave to appeal to the Supreme Court of Canada, which has not yet issued its decision on his leave application.

[27] The Court of Appeal's decision is in four parts. First, the Court held that the applicable standard of review of the BCCT's decision that Dr. Kempling's statements were discriminatory was correctness. The BCCT's decisions that Dr. Kempling's conduct was conduct unbecoming and that a one-month suspension was appropriate were assessed on the reasonableness *simpliciter* standard.

[28] Second, the Court addressed whether Dr. Kempling's conduct was conduct unbecoming a member. A sub-issue in this regard, and one of the most important parts of the decision for the purposes of this application, was whether Dr. Kempling's statements were discriminatory. The Court determined that both the BCCT and the Supreme Court were correct in determining that they were discriminatory. The following passage encapsulates the Court's reasoning on this point:

... A central tenet of democratic society is the belief that all people are equally deserving of respect, concern and consideration, and this belief flows from a recognition that each individual is inherently valuable. Statements critical of a person's way of life or which denounce a particular

lifestyle are not in themselves discriminatory. In my view, it is only when these statements are made in disregard of an individual's inherent dignity that they become so. To hold an individual in contempt or to judge them, in the words of Abella J.A., as she then was, in *R. v. Carmen M.* (1995), 23 O.R. (3d) 629 at 633, "based not on their actual individual capacities, but on stereotypical characteristics ascribed to them because they are attributed to the group of which the individuals are a member", is to treat that individual in a manner which is not consonant with their inherent dignity. Statements and actions based on such judgments are the hallmark of discrimination.

Viewed in this light, it is clear that many of Mr. Kempling's published statements were discriminatory. [The Court here refers to the passages earlier quoted at para. 5.]

Mr. Kempling's statements about homosexuals are based on stereotypical notions about homosexuality and demonstrate a willingness to judge individuals on the basis of those stereotypes. As a result, I am of the view that even if considered on a standard of correctness, as opposed to one of reasonableness, the conclusion that Mr. Kempling's writings were discriminatory is unassailable. (at paras. 33-35)

[29] Having determined that Dr. Kempling's statements were discriminatory, the Court went on to hold that those statements harmed the integrity of the public school system. This was sufficient to justify the finding that Dr. Kempling had engaged in conduct unbecoming a member of the BCCT. These passages from the decision are of note:

A finding of conduct unbecoming may be justified on the basis that a teacher's conduct caused harm to the education system. I do not accept that it is necessary to determine whether an inference of harm is sufficient to sustain a finding of conduct unbecoming as there was, in my view, direct evidence that Mr. Kempling's writings caused harm. This harm is not to any particular student or parent (though such harm may have been caused), but to the integrity of the school system as a whole.

Non-discrimination is a core value of the public education system; the integrity of that system is dependent upon teachers upholding that value by ensuring the school environment is accepting of all students. When a teacher makes public statements espousing discriminatory views, and when such views are linked to his or her professional position as a teacher, harm to the integrity of the school system is a necessary result.

In Mr. Kempling's writings he clearly states his belief that homosexuality is immoral, perverse, and perhaps the product of mental illness. He makes

it equally clear that these views will inform his actions as a teacher and counsellor. [The Court quotes from Dr. Kempling's writings.]

These statements demonstrated that Mr. Kempling is committed to fulfilling his public and professional responsibilities in an intolerant and discriminatory manner. Proof that he had actually discriminated against a particular student, or evidence of a poisoned school environment, was not required to prove that the school system had sustained harm. Mr. Kempling's statements damaged the integrity of the school system as a whole. They undermined the core value of non-discrimination by denying homosexual students an education environment accepting of them.

In the result, I consider that there was sufficient evidence to support a finding that Mr. Kempling's off-duty statements caused harm to the integrity of the school system. Accordingly, subject only to the *Charter* considerations Mr. Kempling raises, the Panel's finding of conduct unbecoming was reasonable and was properly upheld. (at paras. 42-46)

[30] Third, the Court found that the one-month suspension imposed was reasonable.

[31] Fourth, the Court considered whether Dr. Kempling had succeeded in establishing that his rights under ss. 2(a), 2(b) and 15 of the *Charter* had been infringed. In this regard, the Court held that Dr. Kempling had not laid the evidentiary foundation necessary to establish any breach of either freedom of religion or his right to equality. There was nothing before the Court to identify Dr. Kempling's religion, or its tenets, or that his ability to practice his religion would be compromised by being unable to make public discriminatory comments about homosexuals.

[32] By contrast, the Court did find a *prima facie* breach of Dr. Kempling's freedom of expression. The Court held, however, that the restrictions imposed on him were justifiable under s. 1 of the *Charter*. The Court recognized that there was a political element to Dr. Kempling's expression, but found that, on the whole, his statements were not deserving of a high level of constitutional protection, for the following reasons:

In a number of Mr. Kempling's published writings he relied upon stereotypical notions of homosexuality, and he expressed a willingness to judge individuals on the basis of these notions. In doing so, he ignored the inherent dignity of the individual; this concept is essential to a functioning democracy, and, in my view, political discourse which ignores it is not representative of the core values underlying s. 2(b). Accordingly, Mr.

Kempling's published writings, taken as a whole, are not deserving of a high level of constitutional protection. (at para. 77)

[33] The Court then held that Dr. Kempling's statements were inherently harmful:

As I have said, the harm in evidence in this case is not that of discriminatory actions directed against particular individuals, but rather is that sustained by the school system as a whole. In his writings, Mr. Kempling made clear that his discriminatory beliefs would inform his actions as a teacher and counsellor. His writings therefore, in themselves, undermine access to a discrimination-free education environment. Evidence that particular students no longer felt welcome within the school system, or that homosexual students refused to go to Mr. Kempling for counselling, is not required to establish that harm has been caused. Mr. Kempling's statements, even in the absence of any further actions, present an obstacle for homosexual students in accessing a discrimination-free education environment. These statements are therefore inherently harmful, not only because they deny access, but because in doing so they have damaged the integrity of the school system as a whole.

Once it is accepted that Mr. Kempling's writings fall somewhere outside of the core values underlying s. 2(b) and that there was evidence that his actions caused harm, the remainder of the s. 1 analysis is relatively straightforward. As Holmes J. found, the BCCT had numerous pressing and substantial objectives, including ensuring a tolerant and discrimination-free environment, and restoring and upholding the integrity of the school system. As the harm at issue in this case arises as a direct and necessary result of Kempling's writings, in my view the rational connection between the impugned activity and the harm caused is self-evident. Moreover, as Holmes J. found, there is a rational connection between the BCCT's actions and the harm caused. Through its sanction of Mr. Kempling, the BCCT has made a strong statement to the public that what he did was wrong and that it does not condone discrimination. This statement goes some way to repairing the damage done to the integrity of the school system and tends to remove any obstacles restricting access to a discrimination-free environment. (at paras. 79-80)

[34] Finally, the Court concluded that given the demonstrable harm caused by Dr. Kempling's writings, the one-month suspension must be seen as minimally impairing and that the deleterious effects of the suspension were proportionate when weighed against their salutary effects. The Court concluded:

Finally, I am in agreement with Holmes J. that the deleterious effects of the sanction were proportionate when weighed against their salutary effects. Mr. Kempling can remain a BCCT member and continue while

off duty to express his views on homosexuality by way of reasoned discourse befitting a teacher and counsellor. What he cannot do is to advance such views in a discriminatory manner that will be seen publicly to be those of a teacher and counsellor in the public school system. While I recognize that Mr. Kempling's prominence as a teacher in what is a relatively small community may of itself confine his ability to express his views on homosexuality regardless of whether he makes mention of the fact that he is a teacher, the deleterious effects of the infringement are, nonetheless, relatively limited when compared to the salutary effects; namely, restoring the integrity of the school system and removing any obstacles preventing access for students to a tolerant school environment. (at para. 82)

### **Analysis – Should the Complaint be Dismissed?**

[35] Before considering the parties arguments, I note that cases which involve the competing rights protected under the *Charter* and human rights codes are among the most troubling for parties and adjudicators. They require a balancing of interests which is inherently fact and context specific.

[36] The respondents submit that the complaint should be dismissed on three bases: that the acts or omissions alleged in the complaint do not contravene the *Code* (s. 27(1)(b)); that the complaint has no reasonable prospect of success (s. 27(1)(c)); and that proceeding with the complaint would not further the purposes of the *Code* (s. 27(1)(d)(ii)). In my view, the application is most appropriately considered on the basis of whether the complaint has no reasonable prospect of success.

[37] The decision of the Court of Appeal is binding on the Tribunal. I must answer the following three questions in order to determine whether, in light of it, Mr. Kempling's complaint has no reasonable prospect of success:

1. Are the statements for which Dr. Kempling received the Letter of Reprimand discriminatory? In other words, can those statements be meaningfully distinguished from those found to be discriminatory by the Court of Appeal? The answer to this question will inform the analysis of the subsequent two questions.
2. The sole ground of discrimination alleged by Dr. Kempling is religion. Is there no reasonable prospect that Dr. Kempling will establish a *prima*

*facie* case of discrimination on the basis of religion? If so, the complaint must be dismissed.

3. If Dr. Kempling were successful in establishing a *prima facie* case of discrimination on the basis of religion, the burden would shift to the respondents to attempt to justify their *prima facie* discriminatory conduct on the basis that the Letter of Reprimand was issued because of a *bona fide* occupational requirement (“BFOR”). Under s. 27(1)(c), if there is no reasonable prospect that the complaint will succeed because the respondents will be able to establish a BFOR defence, the complaint must be dismissed.

#### *Were the Statements Discriminatory?*

[38] The essence of the statements made in the CBC interview was that:

- Dr. Kempling had placed the ad in the *Prince George Free Press* offering “orientation change therapy” for men and boys wishing to “claim their masculinity”;
- That Dr. Kempling is a school counsellor in Quesnel, and well-known for his ongoing legal battle with the BCCT over his statements about homosexuality;
- That he is offering this “controversial” and “politically incorrect therapy” for “men experiencing unwanted attractions to other men” and “for boys whose behaviour doesn’t conform to their gender”.

[39] Dr. Kempling argued that some of the information communicated in the CBC interview was stated by the anchor or interviewer, and not by him, with the result that he cannot be held accountable for it. I am not persuaded by this submission. Dr. Kempling agreed to be interviewed by the CBC about the therapy he was offering. As a result of his activities in the community, and the litigation with the BCCT, Dr. Kempling has acquired a public profile for his views about homosexuality. It is that public profile that would have led to the request by the CBC to interview him. It can have come as no surprise to Dr. Kempling that he was identified by name, profession and position in the broadcast. Dr. Kempling recognized that he has “a certain notoriety due to my high profile case” in an e-mail to Mr. Curr dated May 4, 2004. It was foreseeable that information like that in question would form part of the information communicated in the broadcast. The publication of such information is the risk he took in agreeing to be interviewed.

[40] In my view, the information communicated in the January 2004 CBC interview cannot be meaningfully distinguished from the statements held to be discriminatory by the Court of Appeal. The information promoted the view that homosexual males are somehow lacking in masculinity. This view is based upon stereotypical and discriminatory attitudes about gay men. Similarly, the information promoted the view that boys whose behaviour does not “conform to their gender” should have their behaviour changed. This is also a viewpoint which is based upon stereotypical and discriminatory attitudes about proper gender roles and behaviours. Finally, and taken as a whole, the information was based upon the notion that behaviours associated with being a male homosexual, whether a supposed lack of masculinity, an attraction to other men, or gender non-conforming behaviour, are aberrant, and can and should be changed.

[41] These are the same types of statements which the Court of Appeal held to be discriminatory and, for the reasons given by the Court of Appeal, I conclude that the statements for which Dr. Kempling was issued the Letter of Reprimand were discriminatory.

*Is there no reasonable prospect that Dr. Kempling will be able to establish a prima facie case of discrimination on the basis of religion?*

[42] In order to succeed in his complaint, Dr. Kempling must establish that there was some link or nexus between the respondents’ allegedly discriminatory conduct and a prohibited ground of discrimination: *Ingram v. Workers’ Compensation Board and others*, 2003 BCHRT 57 at para. 20. For the purposes of this analysis, I will assume that the Letter of Reprimand adversely impacted Dr. Kempling.

[43] Is there a link or nexus between the Letter of Reprimand and Dr. Kempling’s religion? There is a real question on the facts alleged as to whether Dr. Kempling would succeed in establishing such a link or nexus. There was nothing in the CBC interview which linked his views to his faith. Nor is there anything in the Letter of Reprimand itself which would tend to establish such a link. Dr. Kempling says in his submissions on this application that he only intended to offer his therapy to people in his own faith community outside of Quesnel. There is nothing in the CBC interview which would

place either of those limitations on the services offered by Dr. Kempling. It is also inconsistent with an intended limitation on those services that he placed his ad in the *Prince George Free Press*, a newspaper whose circulation is limited to any one faith community. The ad referred to “Quesnel”; and made no reference to Dr. Kempling’s faith community or to the therapy in question being faith-based. Dr. Kempling agreed to discuss his services on CBC Radio, again not a medium whose listeners are restricted to any one faith community and whose programs air in Quesnel as well as elsewhere in B.C. It seems apparent that Dr. Kempling was seeking to broadcast his desire to offer this kind of therapy as widely as possible, both within and outside Quesnel and in and out of his faith community.

[44] As in the Court of Appeal, in this application Dr. Kempling has not put forward any basis for saying that discussing his views on homosexuality publicly, or offering therapy designed to change sexual orientation, is related to the tenets of his faith or that his ability to practice his religion would be compromised by being unable to do so. This seems particularly pertinent in light of the fact that the respondents sought to place no restriction on Dr. Kempling’s ability to express his views in a variety of forums, including speaking or preaching in churches, and also did not seek to prevent him from offering his therapeutic services, provided he was not publicly identified by name or position with the District.

[45] For these reasons, I think there is a real question whether Dr. Kempling would be able to establish a *prima facie* case of discrimination on the basis of religion. However, as the Tribunal said in *Wickham and Wickham v. Mesa Contemporary Folk Art and others*, 2004 BCHRT 134 at paras. 11-12, the test for no reasonable prospect of success is a high one and, for present purposes, I will assume that Dr. Kempling would be able to establish a *prima facie* case.

*Will the respondents be able to establish a BFOR?*

[46] The wording of the *Code* directs that the question I must answer here is whether, assuming a *prima facie* case of discrimination, there is no reasonable prospect that the respondents would not succeed in establishing a BFOR defence: see *Trevena v. Citizens’*



*Assembly on Electoral Reform and others*, 2004 BCHRT 24, and *Insley v. Edward D. Jones & Co. and Robinson*, 2005 BCHRT 390, as examples of cases in which complaints have been dismissed under s. 27(1)(c) on this basis. The “double-negative” formulation of the question is awkward. Therefore, for ease of discussion, I restate it as follows: would the respondents be able to establish a BFOR defence? If so, then the complaint must be dismissed.

[47] I am persuaded that the respondents would be able to establish a BFOR defence. In my view, that is the result dictated by the application of the Court of Appeal decision.

[48] Although the parties did not frame their submissions in these terms, the Supreme Court of Canada set out a three-part test for considering whether a BFOR can be established in *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees’ Union*, [1999] 3 S.C.R. 3 (“*Meiorin*”). Applying that test, I reach the following conclusions.

[49] First, there is a rational connection between the standard adopted by the respondents in the Letter of Direction and applied in the Letter of Reprimand, and a legitimate work-related purpose. As stated by the Court of Appeal in its s. 1 analysis, statements such as those in issue here are inherently harmful to the integrity of the public school system: see para. 79. They present an obstacle to homosexual students accessing a discrimination-free education environment. The paramount importance of ensuring that our public schools are free from discrimination on the basis of sexual orientation was recently emphasised by the Court of Appeal in *School District No. 44 (North Vancouver) v. Jubran*, 2005 BCCA 201, (leave to appeal to the Supreme Court of Canada denied, Oct. 20, 2005). School boards are legally required to ensure that the schools under their authority are free of discrimination on grounds prohibited in the *Code*. Seeking to prevent Dr. Kempling, when cloaked with the authority of his position as a school counsellor and teacher, from making discriminatory public statements about gay men and boys whose behaviour does not conform to their gender, and reprimanding him for doing so, is rationally connected to the legitimate goal of ensuring the school system is free from discriminatory attitudes about homosexuals.

[50] Second, the respondents imposed the Letter of Reprimand on Dr. Kempling in the honest and good faith belief that it was necessary to achieve the District's purpose of maintaining a safe and non-discriminatory school environment.

[51] Third, the respondents have taken reasonable steps to accommodate Dr. Kempling to the point of undue hardship. The respondents took care to ensure that Dr. Kempling's rights to express his views were minimally impaired. As discussed earlier, the District did not seek to prevent Dr. Kempling from communicating his views in a number of forums. Nor did they take issue with Dr. Kempling's ad in the *Prince George Free Press* and his private therapy sessions until such time as he participated in the CBC interview, which publicly linked him and his position as a counsellor in the District with the ad and those services. Further, the discipline imposed on Dr. Kempling was minimal – a reprimand, without any suspension or loss of pay. This can be usefully compared with the one-month suspension the Court upheld as reasonable in the BCCT case.

[52] What this complaint raises, albeit in a slightly different legal and factual context, is the same issue conclusively dealt with by the Court of Appeal. By virtue of his status as a teacher and counsellor employed by the District, Dr. Kempling must accept and abide by some reasonable limits on the public expression of his views on homosexuality. As stated by the Court of Appeal, "Mr. Kempling can remain a BCCT member and continue while off duty to express his views on homosexuality by way of reasoned discourse befitting a teacher and counsellor. What he cannot do is to advance such views in a discriminatory manner that will be seen publicly to be those of a teacher and counsellor in the public school system": at para. 82. The information conveyed in the CBC interview crossed that line.

[53] Such restrictions do not only apply to Dr. Kempling. Teachers, and especially guidance counsellors, hold unique positions of trust and influence over young people, young people who may be questioning their own sexuality and orientation. Teachers and guidance counsellors must ensure that their public statements do not impair that trust or create an unwelcoming or intolerant school environment. Corresponding restrictions on the expressive rights of teachers have been upheld by the Supreme Court of Canada in

both *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825 and *TWU v. British Columbia College of Teachers*, [2001] 1 S.C.R. 772. As stated in *Ross*:

It is on the basis of the position of trust and influence that we hold the teacher to high standards both on and off duty, and it is an erosion of these standards that may lead to a loss in the community of confidence in the public school system. I do not wish to be understood as advocating an approach that subjects the entire lives of teachers to inordinate scrutiny on the basis of more onerous moral standards of behaviour. This could lead to a substantial invasion of the privacy rights and fundamental freedoms of teachers. However, where a “poisoned” environment within the school system is traceable to the off-duty conduct of a teacher that is likely to produce a corresponding loss of confidence in the teacher and the system as a whole, then the off-duty conduct of the teacher is relevant. (at para. 45)

See also *TWU* at paras. 36-37, cited in Court of Appeal’s decision at para. 40.

[54] Applying these principles to Dr. Kempling’s complaint, I conclude that the respondents will be able to establish that the Letter of Reprimand, and the Letter of Direction on which it was based, are justified as a BFOR. As the respondents will be able to establish a defence to a *prima facie* case of discrimination, I conclude that the complaint has no reasonable prospect of success.

### **Conclusion**

[55] Dr. Kempling’s application to file a sur-reply is denied.

[56] Dr. Kempling’s complaint has no reasonable prospect of success and is dismissed it pursuant to s. 27(1)(c) of the *Code*.

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Heather M. MacNaughton, Chair