IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Skerry v. British Columbia (Human Rights Tribunal),* 2023 BCSC 1819

Date: 20231017
Docket: S215217
Registry: Vancouver

Between:

Deborah Skerry

Petitioner

And

BC Human Rights Tribunal

Respondent

In Chambers

Before: The Honourable Mr. Justice Gomery

On judicial review from: An order of the British Columbia Human Rights Tribunal, dated March 15, 2021 (*Deborah Skerry v. Pacific National Exhibition (PNE) and Paul Bussanich and Anthony Cavlj and Shelly Frost*, case number 19683).

Reasons for Judgment

Counsel for the Petitioner:	F. Wynn
Counsel for the Respondent:	S. Monchalin J. Thackeray
Place and Date of Hearing:	Vancouver, B.C. September 18, 2023
Place and Date of Judgment:	Vancouver, B.C. October 17, 2023

Overview

[1] For 27 years, Deborah Skerry was employed as a security guard by the Pacific National Exhibition ("PNE"). In 2019, the PNE terminated Ms. Skerry's employment. She submitted a complaint to the British Columbia Human Rights Tribunal (the "Tribunal"), alleging that she had been the victim of discrimination in employment. The Tribunal dismissed the complaint at a very early stage, and this case concerns that decision.

[2] In her complaint form, together with a 15 page annex, Ms. Skerry listed many grounds of alleged discrimination, but the allegations were general in nature. She did not provide specific factual allegations. The Tribunal requested further information, advising her that, before it accepts a complaint for filing, it must be satisfied that it sets out facts that, if proven, could be a violation of the *British Columbia Human Rights Code,* R.S.B.C. 1996, c. 210 [*Code*]. Ms. Skerry submitted a 24 page response containing further allegations. The Tribunal was unpersuaded and determined not to proceed with the complaint.

[3] Ms. Skerry now applies for judicial review. In terminating its consideration of Ms. Skerry's complaint, the Tribunal exercised a statutory jurisdiction conferred under s. 27(1)(b) of the *Code* on the basis that "the acts or omissions alleged in the complaint … do not contravene this Code". Ms. Skerry maintains that her complaint presented an arguable claim that the PNE terminated her employment on the basis of a perception that she suffers from a mental disability. Accordingly, she says that the Tribunal was wrong to dismiss the complaint summarily.

[4] At the hearing, counsel for the Tribunal appeared and made submissions concerning the standard of review, the law and procedure governing the Tribunal's practice of screening complaints pursuant to s. 27(1)(b) of the *Code,* and the arguments advanced by Ms. Skerry. The Tribunal's submissions frame the issues for determination, but do not address whether the ultimate question of whether Ms. Skerry's application for judicial review should succeed.

[5] For the reasons that follow, I am unpersuaded that the Tribunal erred in any of the ways suggested by Ms. Skerry.

Legal context

Discrimination in the course of employment

[6] The *Code* prohibits discrimination against a person in the course of employment because of a mental disability; s. 13(1)(b). The prohibition extends to discrimination on the basis of a perceived mental disability, whether or not the perception is accurate; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montreal (City)); Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City) ,* [2000] 1 S.C.R. 665 at paras. 39-41.

[7] To prove a contravention of the *Code*, a complainant must prove three elements:

a) They possess a characteristic or were perceived by the respondent to possess a characteristic protected by the *Code*;

b) They experienced an adverse impact with respect to an area protected by the *Code*; and

c) The protected characteristic was a factor in the adverse impact;

Moore v. British Columbia (Education), 2012 SCC 61 at para. 33. Once these three elements are made out, the onus shifts to the respondent to justify the conduct or practice giving rise to the complaint.

[8] A person who alleges a contravention of the *Code* may file a complaint with the Tribunal in a form acceptable to the Tribunal; s. 21(1). The Tribunal's Rules of Practice and Procedure require the filing of a complaint form; s. 12(1). Section 12(2) of the Rules requires a complainant to allege facts that, if proven, could be a contravention of the *Code* against each person named as a respondent.

[9] Consistently with the established law, the complaint form asks for details including each respondent's conduct, the adverse impact on the complainant, and how each ground of discrimination alleged was a factor in the adverse impact on the complainant.

Screening complaints under s. 27(1)(b) of the *Code*

[10] Section 27(1)(b) of the *Code* provides:

> (1) A member or panel may, at any time after a complaint is filed and with or without a hearing, dismiss all or part of the complaint if that member or panel determines that any of the following apply:
>
> …
>
> (b) the acts or omissions alleged in the complaint or that part of the complaint do not contravene this Code;

[11] Section 27(1)(b) authorizes the Tribunal to screen complaints to ensure that they allege an arguable contravention of the *Code*; *Gichuru v. Vancouver Swing Society,* 2021 BCCA 103 [*Gichuru*] at paras. 52-56, aff'g 2019 BCSC 402. The question is whether the complaint is substantive enough to require adjudication by the Tribunal. As explained by Justice Fisher, speaking for the Court in *Gichuru* at para. 56, the test applied is one "requiring a complainant to establish a connection or nexus between the alleged adverse treatment and the prohibited ground of discrimination, sufficient to take the complaint beyond speculation and conjecture".

[12] In *Gichuru,* repeating an observation affirmed in earlier jurisprudence, Fisher J.A. observes that the "arguable contravention" standard is not onerous. However, a bare assertion that the respondent engaged in discriminatory conduct is not sufficient. What is required is the "allegation of some facts that *could*, if proven, establish a nexus between the alleged [discrimination] and the complainant's [protected characteristic]" [emphasis in original]; *Chen v. Surrey (City),* 2015 BCCA 57 at para. 32.

Standard of review

[13] A decision of the Tribunal to terminate consideration of a complaint following screening is subject to review by the Court on an application for judicial review. The

standard of review depends on the nature of the error alleged by the complainant; *Administrative Tribunals Act,* S.B.C. 2004, c. 45, s. 59. If the alleged error engages the exercise of a discretion by the Tribunal, the court may only intervene if the decision is patently unreasonable in that the discretion was exercised arbitrarily or in bad faith, for an improper purpose, based entirely or predominantly on irrelevant factors, or failed to take statutory requirements into account; s. 59(3) and (4). The standard of patent unreasonableness obliges the court to approach the Tribunal's decision with deference, starting with the Tribunal's reasons and determining whether they are defensible in light of the evidence and interpretive constraints imposed by law; *Canada Post Corp. v. Canadian Union of Postal Workers,* 2019 SCC 67 at para. 41; *Team Transport Services Ltd. v. Unifor,* 2020 BCSC 91 at paras. 17-19, aff'd 2021 BCCA 211, paras. 28-29. A patently unreasonable decision is one that is "clearly irrational" or "evidently not in accordance with reason"; *Holojuch v. Residential Tenancy Branch,* 2021 BCCA 133 at para. 18; *Francescutti v. Vancouver (City),* 2017 BCCA 242 at para. 45.

[14] If the allegation is that the Tribunal misinterpreted and misapplied a legal rule, the court must decide whether the Tribunal's legal analysis was correct; s. 59(1).

[15] Ms. Skerry relies on *Gichuru,* at para. 93, for the proposition that correctness is the proper standard of review on an application to review a screening decision by the Tribunal, but that is not what *Gichuru* decides. As with this case, *Gichuru* involved a screening decision by the Tribunal. The Tribunal had terminated its consideration of a complaint on the ground that the complainant's allegations that he had been the victim of discrimination prohibited by the *Code* were speculative. The complainant's application for judicial review failed. In this Court, Masuhara J. held that the decision was discretionary, involving the interpretation of the complaint and adjudication within the Tribunal's expertise; 2019 BCSC 402 at para. 63. He held that the court was therefore required to determine whether the Tribunal had made a decision that was patently unreasonable. In the Court of Appeal, Fisher J.A. held that, while the test to be applied by the Tribunal under s. 27(1)(b) of the *Code* is a question of law that is subject to review on a correctness standard, Masuhara J. had

not erred in applying the standard of patent unreasonableness in reviewing the screening decision; paras. 92-96.

The decision under review

[16] In her dealings with the Tribunal, Ms. Skerry was not represented by counsel. Her written documentation is unfocused and difficult to parse. The Tribunal was required to interpret the two documents submitted by Ms. Skerry to discern the gist of the complaint.

[17] Ms. Skerry's initial submission is dated August 19, 2019. In it, she asserts that she is not mentally ill but has been accused of having a mental illness. She suggests that she was pressured to admit to having a mental illness, and was left with the impression that if she did, all would be well. These assertions are presented without context or details.

[18] The Tribunal wrote to Ms. Skerry on June 1, 2020, advising that her complaint was now in the screening process. The letter summarizes her allegations. Concerning her allegation of discrimination based on a mental disability, the Tribunal states:

> You identify as having a learning or developmental disorder, but you make no allegations of any accommodation you required that the respondents failed to provide or of any discriminatory conduct regarding any such disability. You say the respondents accused you of having a mental disability but offer no specifics. …

[19] The letter describes the kinds of information a complaint must include if it is to pass the screening stage. It notes:

> You describe a negative experience working with PNE, but it's unclear how your protected characteristics were factors. Can you provide more details?
>
> …
>
> With respect to disability, if you were denied an accommodation or treated unfairly, that could suggest discrimination. But again, you provide no details.
>
> …
>
> **Amend your complaint**

> I can only make a decision based on information you give me. I am giving you the opportunity to provide more information. Use the enclosed Amendment Form and address the following:
>
> - Correct anything I have wrong in my description of your allegations.
> - Identify your disabilities and explain how you were discriminated against based on them. Did you request an accommodation? What happened?

[20] Ms. Skerry's response is dated July 13, 2020. On the topic of an alleged mental disorder, she states that she has never been diagnosed with a mental disorder and her mental health never came up as a concern until shortly before her termination. She provides a lengthy account of a termination meeting on April 12, 2019. I discuss that account below. It lies at the heart of this application for judicial review.

[21] The Tribunal gave its decision in a letter dated March 15, 2021 to Ms. Skerry. Concerning the complaint that is the subject of this application, it states:

> I am sorry but your complaint cannot be accepted for filing.
>
> …
>
> Regarding disability, you identify issues with your feet but no accommodation that you required or requested. The respondents showed due diligence by asking about possible mental health issues, but you say you had no such issues and needed no accommodation. You describe no adverse treatment due to a disability.

Analysis

[22] It is not disputed that Ms. Skerry alleges that she suffered an adverse impact in an area protected by the *Code,* because employment is a protected area, and she says that she was fired. Nor is it in doubt that Ms. Skerry alleges that she was perceived by the PNE to possess a characteristic protected by the *Code,* that is, a mental disability. On the other hand, it is not so clear that Ms. Skerry's complaint satisfies the third element of the test for discrimination under the *Code,* that the perception of a mental disability was a factor in the termination of Ms. Skerry's employment, bearing in mind the requirement that she allege facts sufficient to take the complaint beyond speculation and conjecture.

[23] Ms. Skerry submits that her complaint satisfies the third requirement and the Tribunal was wrong to dismiss it summarily for the following reasons:

a) The decision manifests a failure by the Tribunal to appreciate that discrimination based on a perception of disability is prohibited by the *Code*;

b) The Tribunal was bound to find that the third element of the test is satisfied because statements allegedly made by the employer at a termination meeting on April 12, 2019, can only be interpreted as demonstrating that the termination was motivated by the employer's perception of a mental disability;

c) The decision manifests a concern with defences to the allegation of discrimination, which is not a relevant concern at the screening stage;

d) The Tribunal's decision is founded on an impermissible finding of fact that the PNE has a defence to the complaint; and

e) The decision manifests an approach that lacks procedural fairness.

[24] I will address each of these arguments in turn. At the outset, it is important to underscore the narrow focus of this application, by comparison to the task that was presented to the Tribunal. It was required to consider two lengthy submissions alleging discrimination on nine different grounds. Ms. Skerry now apparently accepts that almost all of the complaint lacked substance.

[25] The Tribunal was engaged in a screening exercise, not resolving a dispute ventilated at a contested hearing with submissions from both sides. While it gave reasons for its decision, they are appropriately brief and conclusory. They do not cite authority or discuss legal principles that are undoubtedly well appreciated by the Tribunal.

Does the decision manifest a failure by the Tribunal to appreciate that discrimination based on a perception of disability is prohibited by the Code?

[26] The allegation is that the Tribunal erred in law and the standard of review, in relation to this question, requires that I determine whether the Tribunal was correct in its understanding of the law.

[27] As already noted (at para. [6] above), the legal proposition that discrimination based on a perception of disability is prohibited was settled by a decision of the Supreme Court of Canada in 2000. The proposition is well understood by practitioners of human rights law. It would be an error of law, though an unlikely one, if the Tribunal failed to appreciate it.

[28] There is nothing in the decision or the record to indicate that the Tribunal made this error. It clearly did not overlook the possibility of discrimination on the ground of a perception of mental disability. In its first letter of June 1, 2020 to Ms. Skerry, it noted her allegation that the respondents had accused her of having a mental disability and requested details. In its decision of March 15, 2021, it noted that the respondents had questioned Ms. Skerry (according to her report) about possible mental health issues.

[29] The Tribunal concluded: “You describe no adverse treatment due to a disability”. I do not think it is fair to infer that, by this choice of words, the Tribunal overlooked the possibility of adverse treatment on the basis of a perceived disability. The authorities state that the Tribunal and its predecessors may be assumed to know the law and that the court should not assume that they were unaware of trite propositions of human rights law; *British Columbia (Ministry of Public Safety and Solicitor General) v. Mzite,* 2014 BCCA 220 at para. 49; *Lee v. British Columbia Hydro and Power Authority,* 2004 BCCA 457 at para. 24.

[30] Accordingly, I am not persuaded that the Tribunal’s decision is tainted by the legal error suggested.

Was the Tribunal bound to find that the third element of the test is satisfied because statements allegedly made by the employer at a termination meeting on April 12, 2019, can only be interpreted as demonstrating that the termination was motivated by the employer's perception of a mental disability?

[31] This alleged error relates to the application of the legal test in the context of a discretionary screening decision, and the standard of review requires that I assess whether the decision was patently unreasonable.

[32] Ms. Skerry relies on her report of statements allegedly made by the employer at a termination meeting on April 12, 2019. It is necessary to set out her report in its entirety:

> 5) Stacey Shields: So we have, our finding is that Deb can't do security. There's too many instances of Deb not being able to follow directions. We don't find her to be helpful. Whenever an issue comes up with the missing keys - that should be a really easy quick conversation to have and the fact that she can't have that quick conversation its either because she is not capable of it or she is just refusing to be helpful. Which is an important part as well with a security position. Her refusal to communicate is - we don't understand how this escalated to this situation. I mean, we tried our best to try and give Deb every opportunity to come in to meet with us. This shouldn't have had to have been a mandatory meeting. We didn't want to have a mandatory meeting, but the fact that we can't have a simple conversation with her. [Space]
>
> 6) I am going to give some blunt feedback. There has to be a two way street within the employer-employee relationship. We see no value in what we get from Deb. There has to be something that the employer gets in return. We don't see any type of benefit. And we don't know. And we don't see how we can get that in the future because we don't believe that Deb really thinks that she has done anything wrong. And I really, when we ask you go to your doctor. It is not because of your feet.
>
> 7) We ask you to go to the doctor because we think there is something wrong that's causing you to make really disastrous decisions with respect to your life. And we believe that there might be some mental health issues occurring and we were worried about that. And that's why we wanted you to go to your doctor - not about your feet. About whether or not something was making you make such disastrous decisions. So, we tried to give you as much ability to turn the situation around. To go to the doctor. To let your doctor know what we happening. And if the doctor had come back and said "Ya Deb's going through a bit of a tough time. She isn't capable of dealing with the employer in an effective way. She needs to be off and to get treatment. We would have worked with that.
>
> 8) And so, I don't even know to this day - what Deb has done in terms of, not her feet - but in actually going to the doctor and talking about what's

> happened and why is she making decisions that are so irresponsible that they are affecting her livelihood. For her to say her job is so important and that she is a precarious worker and the financial implications of her decision - it's even another future flag that you would let the situation to escalate in the way that it did. And so I am wondering what's changed since these last three months. Have you gone to the doctor and discussed this aspect of what's going on in your life because what's the point in giving you your job back if you haven't dealt with this – because there is something seriously wrong.
>
> 9) You are not functioning as a successful adult here. Like most people in jobs understand they have to stay in contact with their employer and have some conversations. You are unable to do that. And I don't understand why you would even consider having a discussion about taking you back when we do not see that you even have that basic fundamental ability to do the core part of your job. **I don't think you would be successful in any job. I Just don't think you fully grasp how dysfunctional and chaotic the way you communicate**. And so, I know this is very blunt feedback - but you have a bit of a reality check here. It's not normal for the employer to have to deal with your behavior. It's not normal.
>
> [Emphasis in original.]

[33] In the first two paragraphs, the employer's representative, Ms. Shields, describes the employer's complaints with Ms. Skerry's job performance. In sum, it is that she does not follow directions and refuses to communicate. In the next paragraph, Ms. Shields expresses the view that maybe something is going on with Ms. Skerry that is causing her to make really disastrous decisions. Ms. Shields says that they wanted to give Ms. Skerry a chance to turn her life around, and asked her to see a doctor who might have offered an opinion that Ms. Skerry was not capable of dealing with the employer in an effective way, and needed time off for treatment. She says, "we would have worked with that". In the following paragraph, Ms. Shields wonders why Ms. Skerry has made such irresponsible decisions that are affecting her livelihood, and wonders whether Ms. Skerry has discussed this with a doctor. In the final paragraph, Ms. Shields reiterates her complaints that Ms. Skerry is unable to be successful in her job because the way she communicates is "dysfunctional and chaotic".

[34] Ms. Skerry submits that this report is only susceptible of one interpretation, because Ms. Shields is raising complaints and accusations of mental disability in the immediate context of the decision to terminate Ms. Skerry's employment. She

submits that the nexus between the perception of mental disability and the decision to terminate is clear and unavoidable.

[35] I do not agree. What the *Code* requires is a causal nexus. It prohibits discrimination because of a perceived mental disability. In the language of the cases, the perceived disability must have been a factor in the termination.

[36] An employer who perceives a disability that is affecting job performance may be obliged to inquire and accommodate the employee up to the point of undue hardship; *Martin v. Carter Chevrolet Oldsmobile,* 2001 BCHRT 37 at para. 29. An employer that fulfills its obligation to inquire in order to avoid discriminating cannot be understood to have engaged in discrimination, simply by making the inquiry. In short, the fact of an inquiry, even in close proximity to a decision to terminate, is ambiguous. It might signal discrimination, or an attempt to avoid discriminating.

[37] In the decision, the Tribunal states that "the respondents showed due diligence by asking about possible mental health issues". It was not unreasonable, much less patently unreasonable, for the Tribunal to interpret Ms. Shields' reported statements as evincing a wish to accommodate a perceived mental disability rather than discrimination because of a perceived mental disability, and that is what the Tribunal did.

Does the decision manifest a concern with defences to the allegation of discrimination, which is not a relevant concern at the screening stage?

[38] The allegation is that the Tribunal erred in law, requiring the court to assess whether its analysis was legally correct.

[39] Ms. Skerry submits that the screening process under s. 27(1)(b) requires the Tribunal to focus only on the allegations, and avoid consideration of explanations or possible justifications that might be put forward by the respondent. She submits that the Tribunal's statement, in its decision, that "the respondents showed due diligence by asking about possible mental health issues" demonstrates that the Tribunal was concerning itself with the employer's ability to justify its conduct, which would be an

issue that would arise only after Ms. Skerry had shown that the perception of a mental disability was a factor in her termination. In other words, it is argued that the reasoning demonstrates that the Tribunal jumped past the only issue at the screening stage, namely whether Ms. Skerry was alleging an arguable contravention of the *Code*, to the later question of the likely outcome following adjudication.

[40] I do not agree that the Tribunal committed the legal error alleged by Ms. Skerry. As indicated above, the reference in the decision to the respondents' due diligence may fairly be interpreted as pertaining to the existence or absence of a nexus. The Tribunal notes that the respondents were willing to accommodate a perceived mental disability, but Ms. Skerry denied that she needed any accommodation, and all that was left were the respondents' complaints concerning her conduct in the course of her employment. The Tribunal concludes that Ms. Skerry describes no adverse treatment due to a disability. It does not base its decision on a possible defence that adverse treatment was justified.

[41] Ms. Skerry advances a further argument in aid of her submission that the Tribunal improperly concerned itself with defences at the screening stage. She suggests that the Tribunal should not have relied on statements allegedly made by Ms. Shields at the screening stage. The answer to this is that the Tribunal was entitled to take into consideration everything Ms. Shields allegedly said, according to Ms. Skerry's report of events; *Gichuru* at para. 96.

Is the decision founded on an impermissible finding of fact that the PNE has a defence to the complaint?

[42] It will be obvious from the reasoning to this point that I reject the proposition that the Tribunal's decision is based on a finding that the PNE had an affirmative defence to the complaint. Rather, the Tribunal decided that the complaint did not make it past the screening stage because Ms. Skerry had failed to describe adverse treatment due to a disability. Unpacking this thought, Ms. Skerry had failed to allege sufficient facts to take her complaint that perception of a mental disability was a factor in her termination beyond speculation and conjecture.

[43] Read as a whole in the context of the complaint documentation, the decision does not contain findings of fact. The Tribunal did not receive evidence upon which findings might be based. All it had were Ms. Skerry's allegations, upon which the Tribunal relied for the purpose of its analysis. The Tribunal's awareness that it was dealing with allegations, not evidence, is clear from the decision. In the paragraph with which this case is concerned (quoted above at para. [21]), it states: "you identify", "you say", and "you describe".

Does the decision manifest an approach that lacks procedural fairness?

[44] In relation to a complaint of procedural unfairness, s. 59(5) of the *Administrative Tribunals Act* requires that I determine whether the Tribunal acted unfairly.

[45] Ms. Skerry submits that the Tribunal's approach was unfair, but her complaint lies with the substance of the decision rather than the procedure adopted by the Tribunal. She states:

> A second possible characterization of the above errors is a failure by the Tribunal to follow the principles of fairness and natural justice. First and foremost, the Tribunal should not have made any factual finding. Further, it was unfair for the Tribunal to consider defences or any contrary approaches to the complaint. This is particularly so in light of the clear jurisprudential and statutory focus on allegations only.

[46] The procedure followed by the Tribunal was exemplary. The Tribunal dealt with Ms. Skerry in writing. Its letter of June 1, 2020 to Ms. Skerry gives careful consideration to her written complaint and identifies its deficiencies. In plain and accessible language, the Tribunal outlines the screening process, summarizes its understanding of what Ms. Skerry has said, advises her what is missing to make the complaint legally viable, and offers her the opportunity to correct the Tribunal's understanding and submit additional information. Ms. Skerry took full advantage of the opportunity. The Tribunal nevertheless concluded, applying the law and in the exercise of its discretion, that her complaint still fell short of what is required to justify invoking the enforcement machinery of the *Code* and requiring a response from the respondents.

[47] I reject Ms. Skerry's submission that the decision results from a procedure that was unfair.

Disposition

[48] For these reasons, Ms. Skerry's application for judicial review is dismissed. There should be no order as to costs.

"Gomery J."