IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Fraser Health Authority v. Rush,*
2023 BCSC 1101

Date: 20230627
Docket: S218147
Registry: Vancouver

Between:

Fraser Health Authority

Petitioner

And

Patricia Rush and British Columbia Human Rights Tribunal

Respondents

Before: The Honourable Madam Justice J. Hughes

On judicial review from: An order of the British Columbia Human Rights Tribunal, dated August 12, 2021 (*Rush v. Fraser Health Authority*, 2021 BCHRT 103).

Reasons for Judgment

Counsel for the Petitioner:	A. Mizrahi
Counsel for the Respondent, Patricia Rush:	T.R. Thomas
Counsel for the Respondent, British Columbia Human Rights Tribunal:	J. Thackeray S. Monchalin
Place and Dates of Hearing:	Vancouver, B.C. January 10 and February 2, 2023
Place and Date of Judgment:	Vancouver, B.C. June 27, 2023

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Overview

[1] The petitioner, Fraser Health Authority ("FHA") seeks judicial review of a decision of the British Columbia Human Rights Tribunal (the "Tribunal"). That decision, indexed at *Rush v. Fraser Health Authority*, 2021 BCHRT 103 ("ATD Decision"), denied FHA's application to dismiss a human rights complaint made by the respondent, Patricia Rush.

[2] Ms. Rush is a nurse working for FHA. Ms. Rush's complaint ("Complaint") made under the *Human Rights Code*, R.S.B.C. 1996, c. 210 [*Code*], alleges that FHA discriminated against her in respect of her employment based on physical and mental disabilities. More specifically, Ms. Rush alleges that FHA failed to accommodate her by failing to allow her to continue working on modified duties, and later denying her medical leave.

[3] FHA applied to dismiss the Complaint under s. 27 of the *Code* on two grounds: that it was late-filed under s. 27(1)(g), and that there was no reasonable prospect of success under s. 27(1)(c). The Tribunal denied FHA's application on both grounds. First, it found that the Complaint was timely under s. 22(2) because it alleged a continuing contravention of the *Code* and was filed within one year of the last alleged instance of the contravention. Second, the Tribunal was not persuaded that the Complaint had no reasonable prospect of success.

[4] Only the Tribunal's decision declining to dismiss the Complaint under s. 27(1)(g) is in issue on judicial review. FHA does not seek judicial review of the ATD Decision as it relates to s. 27(1)(c) of the *Code*.

[5] The Tribunal participated in this judicial review pursuant to s. 15(1) of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 [*JRPA*], but took a limited role and took no position on the merits of the issues on review.

Alleged Conduct Underlying the Complaint

[6] Ms. Rush has been employed with FHA as a Registered Nurse since approximately 2004 and is a member of the British Columbia Nurses Union ("BCNU"). Ms. Rush remains employed by FHA.

[7] In early 2013, FHA introduced a new data entry system to track patient immunizations called "Panorama". Panorama is used by various FHA staff members, including registered nurses, to document client information in a variety of areas, including for maternal and infant immunization, and communicable disease identification and tracking. As part of her job duties, Ms. Rush was required to enter patient information in Panorama.

[8] Ms. Rush asserts that she faced various barriers to learning and using Panorama resulting from issues with the database and various personal health challenges she was experiencing. Ms. Rush was diagnosed with breast cancer in 2009, and an ovarian mass was discovered in the fall of 2013. As a result of these medical issues and resulting sequelae, Ms. Rush experienced difficulty comprehending Panorama, focussing while using the database, and completing Panorama tasks within the required timelines. She often felt substantial physical discomfort and exhaustion while using Panorama, and experienced feelings of fear and anxiety when using or being confronted with using Panorama.

[9] In mid-July 2013, Ms. Rush's physician completed an Occupational Fitness Assessment stating that she had anxiety and was not prepared to learn a new computer program. As such, FHA accommodated Ms. Rush under a temporary modified duties agreement pursuant to which she was not required to learn or use Panorama. The agreement indicated that FHA would continue to request medical updates and that it would be reviewed in three months.

[10] Discussions between FHA and Ms. Rush about her transitioning her back to full duties began in November 2014 and continued into 2015. Ms. Rush asserts that FHA was pressuring her to return to full duties and required her to provide medical information supporting continued modified duties. FHA asserts that as of the

summer of 2015, it had yet to receive any medical information from Ms. Rush or the BCNU to support her inability to use Panorama and continued need for accommodation.

[11] In the summer of 2015, through a process of meetings with FHA's representatives, Ms. Rush, and BCNU representatives, a comprehensive learning plan was developed for Ms. Rush pursuant to which she was scheduled to receive training for Panorama on July 22–24, 2015. Ms. Rush attended training on July 22, 2015 and for part of July 23, but left in the early afternoon, indicating she felt unwell. She called in sick on July 24, 2015 and did not complete the training program.

[12] On August 5, 2015, Ms. Rush provided FHA with a note from Dr. Michael Hartwig at Health First Medical Centre indicating that Ms. Rush should be excused from her regular duties because she did not feel able to do the training program at that time. FHA responded by taking the position that the note did not provide objective medical information that would preclude Ms. Rush from continuing with the training program.

[13] In light of its position that there was insufficient medical information to substantiate Ms. Rush's continued inability to use Panorama and need for accommodation by way of modified duties, FHA arranged for Ms. Rush to be assessed through an early intervention program offered by its long-term disability provider, Great-West Life. FHA sought to determine by way of the assessment whether Ms. Rush had any temporary or permanent limitations or restrictions in completing Panorama training.

[14] On August 20, 2015, Ms. Rush underwent a medical assessment by Dr. Shannon Gelb, a registered psychologist retained by Great-West Life. Dr. Gelb conducted three medical examinations of Ms. Rush and provided a report dated September 24, 2015 ("Gelb Report"). Dr. Gelb concluded that there was no evidence of cognitive impairment and thus did not make any treatment recommendations. Dr. Gelb did not believe that Ms. Rush should be restricted from any of her job duties. However, Dr. Gelb also indicated that she believed Ms. Rush would be "more likely

to succeed at returning to full-time duties if this is postponed until after she recovers from her pending surgery" and that "she may need more time than most in order to become proficient with the Panorama program and re-learn skills that she may lack confidence with due to not performing the duties in approximately two years".

[15] On October 5, 2015, a meeting was convened with Ms. Rush, and representatives of FHA, the BCNU, and FHA's Enhanced Disability Management Program ("EDMP") to discuss how to best support Ms. Rush in returning to full duties and learning to use Panorama (the "October 2015 Meeting"). FHA says that at the October 2015 Meeting, it communicated to Ms. Rush that the Gelb Report had not indicated any limitations or restrictions on her ability to use Panorama, and that it therefore believed she was able to move forward towards returning to full duties.

[16] FHA proposed that Ms. Rush would have a coordinated learning plan that included coaching and mentoring, and that she would not be expected to return to full duties without continued support and training. FHA says that at no time during the October 2015 Meeting was Ms. Rush told that she was required to report for full duties the following day, on October 6, 2015. FHA was not, however, amenable to postponing Ms. Rush's learning plan while she awaited a surgery date, which she did not have at that time.

[17] For her part, Ms. Rush says that she informed FHA that she had been diagnosed with depression and anxiety by Dr. Amita Gandhi at the October 2015 Meeting. However, she did not provide documentation confirming Dr. Gandhi's diagnosis at that time. Ms. Rush acknowledges that FHA requested objective medical documentation to support her diagnosis so as to permit her to continue working on modified duties, and says that she asked for clarification of FHA's request.

[18] Ms. Rush went off work on October 6, 2015. On October 9, 2015, she provided a medical note from Dr. Hartwig excusing her from her regular duties for medical reasons from October 6–20, 2015. On October 16, 2015, FHA wrote to Dr. Hartwig providing a copy of the Gelb Report and advising him of Dr. Gelb's opinion

that there was no evidence of Ms. Rush having any cognitive impairment and that she was medically capable of performing her full duties as a public health nurse. Accordingly, FHA asked Dr. Hartwig to explain what had changed medically so as to preclude her from working and participating in the learning plan.

[19] Upon learning that Dr. Hartwig was on an extended absence from the office, on October 21, 2015, FHA provided a copy of its October 16, 2015 letter to Dr. Gandhi. FHA asked Dr. Gandhi to comment on Ms. Rush's ability to return to work and, if she was not able to return at that time, provide the current nature of her illness and an estimated date of return.

[20] On October 22, 2015, Ms. Rush provided FHA with a medical note from Dr. Gandhi which indicated that Dr. Gandhi had assessed Ms. Rush that same day and that "She has been advised to stay off work until her condition is stable". Dr. Gandhi's note did not provide any particulars about Ms. Rush's condition, nor did it refer to her ability to perform her job duties generally or use Panorama specifically.

[21] Ms. Rush asserts that at the October 2015 Meeting, and multiple times thereafter, she requested that FHA provide her with the forms necessary to apply for long-term disability ("LTD") benefits. She says that FHA refused to provide the forms to her because of its view that she had not provided medical documentation substantiating that she was disabled from working.

[22] On November 27, 2015, FHA wrote to Ms. Rush noting that she had been off work since October 6, 2015, and had not responded to its requests for objective medical information ("November 2015 Options Letter"), as follows:

> You have been off work since October 6, 2015 and have not responded to requests for objective medical information. I am advised that Esther Lam, Disability Management Consultant for Public Health has contacted you for an update in her letters dated October 16, October 21 and November 5, 2015. To date you have not provided the requested information.
>
> As you have not provided this information, you are considered absent without leave.
>
> You are required to either provide the requested information or medical clearance within 30 days of this letter or your employment with Fraser Health will be terminated.

[23] In late November 2015, Ms. Rush underwent various medical procedures including a breast biopsy and an oophorectomy.

[24] In December 2015, FHA sent a second letter to Ms. Rush dated December 30, 2015 outlining essentially the same position as in the November 2015 Options Letter ("December 2015 Options Letter"). More specifically, FHA noted the following:

> …
>
> On December 17, 2015, a medical note was sent to Esther Lam's attention at Workplace Health; however, I have been advised that this note does not indicate functional information, nor does it explain why you have not been able to work since October 5, 2015. It is my understanding that you were sent a new medical questionnaire on December 24, 2015. I strongly encourage you to arrange for your medical professional to complete this form so you can submit it to Workplace Health by the January 21, 2016 deadline.
>
> As you have not provided the information required by Workplace Health, you are still considered absent without leave. Once the medical questionnaire is completed and submitted to Workplace Health, and it provides functional information to explain why you have not been able to work since October 2015, I will consider [an] amendment to your leave status.
>
> …

[25] In March 2016, Ms. Rush underwent a mastectomy, from which she experienced complications requiring further surgical intervention. Ms. Rush's father also passed away that same month, which she asserts caused her to experienced emotional and psychological difficulties.

[26] On May 2, 2016, Ms. Rush provided a medical note from Dr. Adrian Lee at The Plastic Surgery Group indicating that she was to remain off work due to major surgery and would be reassessed on May 6, 2016. On May 13, 2016, Ms. Rush provided FHA with a note from Dr. Rhonda Janzen indicating that Ms. Rush would be off work indefinitely until further reassessment.

[27] In June 2016, Ms. Rush provided FHA (via her union steward) with a report from Dr. Gandhi dated September 29, 2015. Ms. Rush asserts that she did not have Dr. Gandhi's report in her possession until June 2016. In her September 2015 report, Dr. Gandhi opined as follows:

> In my opinion, [Ms. Rush] is suffering from Major depression with anxiety features. There is a significant impairment in her psychosocial functioning. She is receiving counselling for the past three years. A trial with an antidepressant was suggested. She was to consider this option.
>
> [Ms. Rush] was seen for followup [sic] on November 4, 2015. She started taking Cipralex. She had nausea. She was taking Cipralex 10 mg for a couple of days when seen on November 15, 2015. She reported relative decrease in the anxiety. She was sleeping relatively better. Her mother was coming to help her as she was undergoing surgery in November 2015. She has support from her friends. I will continue to followup [sic] along with you.

[28] There is no explanation in the record for the discrepancy in Dr. Gandhi's report being dated September 29, 2015, while noting that Ms. Rush was seen in a follow-up two months later in November 2015. Nor does Ms. Rush explain why this report did not come into her possession until June 2016. Regardless, Dr. Gandhi's report did not opine on the impact of Ms. Rush's depression and anxiety on her ability to perform her job duties, or on her ability to return to work, whether with modified duties, or at all.

[29] In August 2016, following receipt of Dr. Gandhi's report, FHA provided Ms. Rush with the LTD forms. Ms. Rush says that she provided the LTD forms to Dr. Hartwig that same month, and that they were eventually submitted to Great-West Life in early October 2016. FHA also reinstated Ms. Rush's extended health benefits at that time.

[30] In December 2016, Great-West Life denied Ms. Rush's LTD application on the basis that she did not have coverage due to her benefits not being maintained. Ms. Rush asserts that she had requested that her LTD benefits be maintained through FHA's premium maintenance plan while she was on leave and awaiting determination of her LTD application.

[31] On February 22, 2017, Ms. Rush's extended health benefits that had been reinstated in October 2016 ceased. From that date forward, she purchased extended health benefits coverage privately.

[32] On March 9, 2017, FHA again wrote to Ms. Rush noting that she had been off work since October 6, 2015, that her LTD claim had been declined, and that she was

considered to be on an unauthorized leave of absence ("March 2017 Options Letter"). Ms. Rush was provided with a deadline of March 30, 2017 to provide a return to work date, failing which she would be considered to have resigned her position.

[33] On March 28, 2017, Ms. Rush responded to the March 2017 Options Letter indicating that she was not resigning her position and would be appealing the denial of her LTD benefits. Ms. Rush also requested that FHA's representative who wrote the March 2017 Options Letter cease corresponding with her as Ms. Rush had made an application to WorkSafe BC alleging that she had been subjected to "disrespectful behaviour, bullying and harassment" by that individual.

[34] FHA responded to Ms. Rush by letter dated June 15, 2017 (the "June 2017 Options Letter"). The June 2017 Options Letter is the timely correspondence from FHA that is said to constitute discriminatory conduct within 12 months of the Complaint being filed. The June 2017 Options Letter stated in material part as follows:

> You have been off work since October 6th, 2015 and have not yet responded to the employer's letters for objective medical sent to you on November 27th and December 30th, 2016. These letters stated that if sufficient medical wasn't received you would be terminated form your position.
>
> You have filed a Work Safe claim with WCB, I've investigated this matter further and your claim is suspended.
>
> On December 23rd, 2016 you were ineligible for LTD and your claim was denied.
>
> Your options are as follows:
>
> 1) Contact [your disability management consultant] to assist you with your return to work plan.
>
> 2) Provide [your disability management consultant] with updated medical to support your ongoing absence.
>
> 3) Resign from your position.
>
> Advise me of your option by no later than July 13th, 2017 at 4:00 p.m, if I don't hear from you I will assume that you have resigned from you position. I would recommend that you connect with your union representative for consultation.

[35] Finally, by letter dated November 23, 2017 (“November 2017 Options Letter”), FHA advised Ms. Rush that it had been notified by Healthcare Benefit Trust that the denial of her LTD claim was not eligible for review by a Claims Review Committee such that there was no LTD claim to reinstate. Accordingly, FHA advised Ms. Rush that her employment status would remain as a temporary unpaid leave of absence for 30 days to provide her with time to consider her options. The November 2017 Options letter provided the following options: engage in the return-to-work/work accommodation program process with her disability management consultant, or resign from her position at FHA.

[36] The November 2017 Options Letter is not mentioned in the Complaint.

[37] On January 18, 2018, FHA wrote to Ms. Rush indicating that it had not yet received a response from her to the November 2017 Options Letter. FHA indicated that if Ms. Rush did not respond within a further seven days, FHA would assume that she had relinquished her employment and her file would be processed for termination. Lengthy correspondence ensued over the following months between Ms. Rush and various representatives of FHA, the result of which appears to be that Ms. Rush did not reengage in the return to work process and FHA did not terminate her employment.

[38] Ms. Rush filed the Complaint on March 28, 2018, alleging that FHA and multiple other individuals discriminated against her by failing to accommodate her physical and mental disabilities by not providing her with modified duties or approving her medical leave, contrary to s. 13 of the *Code*.

[39] On June 28, 2018, the Complaint was accepted for filing against FHA on the grounds of physical and mental disability as a continuing contravention based on the allegation that FHA failed to accommodate Ms. Rush’s disabilities in her employment. The Complaint was not accepted for filing against the individual respondents.

[40] On November 26, 2018, following numerous reviews and reassessment, and after additional medical information was submitted to Great-West Life, Ms. Rush's LTD claim was accepted. Great-West Life back-dated Ms. Rush's LTD benefits to the period from October 6, 2015 to May 30, 2018. Ms. Rush's LTD benefits ended on May 30, 2018, and have not been reinstated.

[41] On November 12, 2019, FHA filed an application to the Tribunal seeking to have the Complaint dismissed under ss. 27(1)(c) and (g) of the *Code*. Submissions ensued from the parties, including supplemental submissions. On August 12, 2021, the Tribunal issued the ATD Decision denying the application to dismiss.

Statutory Framework

[42] The *Code* protects against discrimination and harassment. The Tribunal is established under s. 31 of the *Code*. The Tribunal is responsible for determining complaints made by an individual or group that the *Code* has been contravened.

[43] The Complaint alleges discrimination in employment on the basis of physical and mental disability contrary to s. 13 of the *Code*, which provides as follows:

> Discrimination in employment
>
> 13 (1) A person must not
>
> (a) refuse to employ or refuse to continue to employ a person, or
>
> (b) discriminate against a person regarding employment or any term or condition of employment
>
> because of the Indigenous identity, race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation, gender identity or expression, or age of that person or because that person has been convicted of a criminal or summary conviction offence that is unrelated to the employment or to the intended employment of that person.

[44] The time limit for filing a complaint is within one year of the alleged contravention, or in the case of a continuing contravention, within one year of the last alleged instance of the contravention:

> Time limit for filing a complaint

> 22 (1) A complaint must be filed within one year of the alleged contravention.
>
> (2) If a continuing contravention is alleged in a complaint, the complaint must be filed within one year of the last alleged instance of the contravention.
>
> (3) If a complaint is filed after the expiration of the time limit referred to in subsection (1) or (2), a member or panel may accept all or part of the complaint if the member or panel determines that
>
> (a) it is in the public interest to accept the complaint, and
>
> (b) no substantial prejudice will result to any person because of the delay.

[45] Pursuant to s. 27 of the *Code*, the Tribunal has discretion to dismiss all or part of a human rights complaint without a hearing in certain prescribed circumstances, including where a complaint is filed outside the 12-month limitation period. The relevant portion of s. 27 provides:

> 27 (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:
>
> …
>
> (g) the contravention alleged in the complaint or that part of the complaint occurred more than one year before the complaint was filed unless the complaint or that part of the complaint was accepted under section 22(3).

[46] FHA's application to dismiss was brought under ss. 27(1)(c) and (g) of the *Code*. The Tribunal's ATD Decision thus constituted an exercise of discretion pursuant to s. 27 of the *Code*.

The Decision

[47] The Tribunal found that the Complaint was filed within the time limit provided by s. 22 of the *Code* because it alleged a continuing contravention and was filed within one year of the last alleged instance of discrimination. More specifically, the Tribunal concluded that the Complaint alleged "a timely continuing contravention of the *Code* starting from the [October 2015 Meeting]": ATD Decision at para. 47.

[48] In so concluding, the Tribunal considered that FHA's refusal to allow Ms. Rush to continue on modified duties and refusal of medical leave in the absence of supporting medical evidence, as set out in the November 2015, December 2015, March 2017, and June 2017 Options Letters, as constituting a continuing contravention beginning at the October 2015 Meeting and continuing through to the timely June 2017 Options Letter and thereafter: ATD Decision at paras. 47, 51–52, 57 and 61–62. The Tribunal also appears to have found that despite not being referenced in the Complaint, the alleged contravention continued by way of the November 2017 Options Letter: ATD Decision at paras. 51 and 61.

[49] At para. 45 of the ATD Decision, the Tribunal set out the considerations that apply in determining whether a complaint is timely:

> [45] Complaints of discrimination must be filed within one year of the alleged contravention under s. 22(1) of the *Code*. Allegations are timely if they occurred within one year of filing the complaint, or if they form part of a timely continuing contravention of the *Code*: 22(2). A continuing contravention requires that there be allegations of discrimination within the one-year time limit, and that the allegations pre-dating the time limit form part of a succession of separate acts of discrimination of the same character: *School District v. Parent obo the Child*, 2018 BCCA 136 at para. 50 [*School District*].

[50] The Tribunal first considered whether the Complaint contained allegations regarding events that occurred within the one-year time limit leading up to the filing of the Complaint. The Tribunal member noted that in order for the Complaint to be accepted, it must contain an allegation of discrimination contrary to the *Code* that occurred between March 28, 2017 and March 28, 2018. The Tribunal then noted that the assessment in that regard was made "based only on the allegations in Ms. Rush's complaint, without regard to any justification or explanation offered by the respondent": ATD Decision at para. 48.

[51] The Tribunal rejected FHA's submission that the Complaint was filed over two years too late. In doing so, the Tribunal found that the allegations of discrimination raised in Ms. Rush's Complaint were not limited to FHA's alleged failure to accommodate her with modified duties on and before the October 2015 Meeting, but

also included an alleged failure to accommodate her thereafter by denying her medical leave:

> [50] The Respondent submits that the complaint was late filed by approximately two years. It says Ms. Rush went off work on October 5, 2015 and the main allegation of discrimination is alleged to have occurred **before** her leaving work. The Respondent acknowledges in its Reply that the letters of March 28, 2017 (from Ms. Rush to the Respondent) and June 15, 2017 (from the Respondent to Ms. Rush) form part of the complaint, and could be the "only timely portion". However, it says that they are not events that create a continuation of the October 5, 2015 meeting. It argues that a reiteration of a previous allegation or statement of facts does not constitute a new event for the timing of the continuing contravention analysis: *A by Parent v. Interior Health Authority and others*, 2019 BCHRT 213.
>
> [51] However, based on the information before me, I find that the complaint is not only about Ms. Rush's allegation that the Respondent failed to accommodate her on or before October 5, 2015, but also **after** that until the date of the complaint – specifically, as alleged by Ms. Rush, the Respondent denied her medical leave based on her disabilities as evidenced by its letters dated June 15, 2017 and November 23, 2017 (which Ms. Rush says she received on November 12, 2018), and Ms. Rush's letter of March 28, 2017, which appears to be a response to the Respondent's letter of March 9, 2017.
>
> [Bold and italics in original, underlining added.]

[52] In reaching this conclusion, the Tribunal rejected FHA's position that what would be a timely allegation of discrimination regarding the June 2017 Options Letter was merely a reiteration of earlier allegations falling outside the one-year period:

> [52] Further, I am not persuaded by the Respondent's argument that the letter in evidence from June 2017, and others like it, are merely reiterations of previous allegations. They state that Ms. Rush is on an "unauthorized leave of absence" and has to provide "updated medical information" or she would have to resign or return to work. It appears that although the letters are related to the October 5, 2015 meeting, the Respondent appears to be asking for further medical information to justify accommodation after Ms. Rush says she already provided supporting medical information. Therefore, I find that they are not simply a reiteration of the earlier allegations. Rather, they are timely allegations of discrimination filed within the one-year time limit.

[53] The Tribunal next considered whether the untimely allegations spanning the time frame from October 2015 to March 27, 2017 formed part of a continuing contravention, which would bring the allegations under s. 22(2). The Tribunal framed its analysis in this regard by noting that a continuing contravention can occur where

there is a succession or repetition of separate acts of discrimination of the same character: ATD Decision at para. 55.

[54] The Tribunal then concluded that the untimely acts alleged in the Complaint were of a sufficiently similar character to the allegations regarding the timely June 2017 Options Letter. The Tribunal reasoned that FHA "repeatedly asked Ms. Rush to provide further medical information throughout 2016 and 2017, and when she did, the Respondent denied approval of her request for a medical leave of absence each time": ATD Decision at para. 57. As such, the Tribunal member was satisfied that Ms. Rush's Complaint alleged repeated acts of a similar character that would amount to an ongoing failure to accommodate.

[55] In that regard, the Tribunal appears to have accepted that if Ms. Rush was able to prove that she had provided sufficient medical evidence to substantiate FHA's obligation to accommodate her from October 2015 to the date of the Complaint, then the following allegations could contravene the *Code* (ATD Decision at para. 61):

a) FHA unreasonably demanded that Ms. Rush return to work and perform duties that she was medically incapable of performing on an ongoing basis from October 5, 2015 to the date of the Complaint (March 28, 2018); and

b) FHA failed to accommodate Ms. Rush by not authorizing a modified work arrangement past October 5, 2015 and thereafter by not authorizing her absence from work when she could not work for medical reasons.

[56] In the result, the Tribunal concluded as follows:

> [62] After considering the overall evidence and submissions of both parties, I am persuaded that Ms. Rush's allegations relating to the letters of March and June 2017 are sufficiently similar in character and occur with sufficient frequency as the allegations before March 28, 2017, to constitute a continuing contravention of the *Code*, and they are not simply reiterations of a previous allegation or statement of facts. Specifically, the Respondent continued to view Ms. Rush's absences from work as problematic after she says she provided supporting medical information. This is indicated in the letters dated March, June and November 2017, where the Respondent stated that if Ms. Rush did not provide updated medical information to the

> Respondent, she could be considered to have resigned from her employment, and that she was expected to return to work plan or resign from her employment.
>
> [Emphasis added.]

[57] Finally, the Tribunal recognized its discretion under s. 22(3) of the *Code* to accept untimely allegations of discrimination if it is in the public interest to do so and no substantial prejudice will result. Nonetheless, and despite the parties having made submissions on that point, the Tribunal did not consider accepting the Complaint under s. 22(3) as an alternative exercise of discretion to the finding that the Complaint disclosed a timely continuing contravention.

Issues

[58] The first issue to be determined is whether the Court ought to exercise its discretion to hear the petition, or dismiss the petition as premature because the Tribunal has not rendered its final decision. If the Court exercises its discretion to hear the petition on the merits, the following two overarching issues arise: (a) what is the applicable standard of review; and (b) is judicial intervention warranted.

[59] In the latter respect, the petitioner's submissions are framed as if the matter were proceeding by way of appeal, namely with reference to alleged "errors" made by the Tribunal followed by the assertion that those errors render the ATD Decision patently unreasonable, without articulation of how the alleged errors meet the criteria set out in s. 59 of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 [*ATA*]. Under s. 59(3) of the *ATA*, the Court must not set aside a discretionary decision of an administrative tribunal unless the decision is patently unreasonable, and s. 59(4) lists a number of ways a decision may be patently unreasonable.

[60] Applying the framework for judicial review under s. 59(3) and (4) of the *ATA* to the petitioner's submissions, I interpret the petitioner to be advancing the following primary grounds of review of the ATD Decision:

a) The Tribunal's decision that the Complaint was a continuing contravention was arbitrary because it was based on a misapprehension of the evidence

and therefore failed to consider material gaps in the timeline of alleged discriminatory conduct; and

b) The Tribunal's application of the test for timeliness under s. 27(1)(g) of the *Code* was arbitrary and thus patently unreasonable because it stated that its assessment was based only on allegations in the Complaint without regard to justification by FHA, but then also considered allegations of discrimination that were not included in the Complaint.

Is the petition premature?

[61] Ms. Rush, submits that this judicial review ought to be dismissed as premature. FHA submits that judicial review is not premature because the ATD Decision concludes the Tribunal's s. 27 assessment, which is a distinct preliminary process under the *Code*, and because FHA's case for review has merit, and there is no significant effect of delay.

[62] Judicial review is discretionary in nature: *JRPA*, s. 8. It is well established that parties ought not to "proceed to the court system until the administrative process has run its course" and, absent exceptional circumstances, the courts should not interfere with ongoing administrative processes: *Chu v. British Columbia (Police Complaint Commissioner)*, 2021 BCCA 174 at para. 65; *Independent School Authority v. Parent*, 2022 BCSC 570 at paras. 48–50.

[63] The "prematurity principle" therefore operates as a discretionary bar to judicial review that "is engaged whenever the decision maker has not finished its work": *Chu* at para. 76. The court should exercise restraint in engaging in interim judicial review with a view toward appropriate deference to the designated decision makers and the review process described by the legislature: *British Columbia (Ministry of Public Safety and Solicitor General) v. Mzite*, 2014 BCCA 220 at para. 31, leave to appeal ref'd [2014] S.C.C.A. No. 358 [*Mzite*].

[64] Accordingly, a court will only intervene in an ongoing administrative process in exceptional circumstances: *Hemminger v. Law Society of British Columbia*, 2022

BCSC 30 at para. 38, aff'd 2023 BCCA 36. The applicable legal principles for those exceptional circumstances were summarized in *C.B. Powell Limited v. Canada (Border Services Agency)*, 2010 FCA 61:

> [33] Courts across Canada have enforced the general principle of non-interference with ongoing administrative processes vigorously. This is shown by the narrowness of the "exceptional circumstances" exception. […] Suffice to say, the authorities show that very few circumstances qualify as "exceptional" and the threshold for exceptionality is high: … Exceptional circumstances are best illustrated by the very few modern cases where courts have granted prohibition or injunction against administrative decision-makers before or during their proceedings. Concerns about procedural fairness or bias, the presence of an important legal or constitutional issue, or the fact that all parties have consented to early recourse to the courts are not exceptional circumstances allowing parties to bypass an administrative process, as long as that process allows the issues to be raised and an effective remedy to be granted: ... As I shall soon demonstrate, the presence of so-called jurisdictional issues is not an exceptional circumstance justifying early recourse to courts.
>
> [Citations omitted.]

[65] As the petitioner, FHA bears the burden of establishing exceptional circumstances sufficient to permit judicial intervention prior to the Tribunal completing its process: *Grimsmo v. Jones*, 2021 BCSC 575 at para. 43. Factors the Court may consider in determining whether such exceptional circumstances exist include: hardship or prejudice to the applicant, waste of resources, delay, fragmentation of proceedings, the strength of the case, and the statutory context, though the analysis is flexible and does not turn on any single factor: *Chu* at para. 66.

[66] FHA does not raise issues of hardship or prejudice, nor does either party suggest that wasting of resources is a significant factor in this case. Rather, FHA asserts that this petition is brought at the conclusion of the application to dismiss process, that it has a strong case that the ATD Decision was based on a misapprehension of the evidence before the Tribunal, and that the delay that has occurred to date in this matter was largely not of its own making. The relevant factors to consider are therefore concerns over fragmentation, the strength of FHA's case, and the potential effect of delay.

Fragmentation of the Tribunal's Proceedings

[67] When considering whether hearing the petition would fragment the administrative proceeding, the reviewing court ought to consider whether the tribunal has finished its work in relation to the specific issue in question: *Mzite* at para. 37. Concerns regarding fragmentation are less significant where judicial review is sought between two discrete stages of the administrative process, particularly at the conclusion of an application under s. 27 of the *Code*. Nielsen J.A.'s reasoning in *Workers' Compensation Appeal Tribunal v. Hill*, 2011 BCCA 49 [*Hill*], illustrates this point:

> [43] Further, this was not a review of an interlocutory decision on an evidentiary or procedural issue that arose in the middle of a hearing. The decision to embark on judicial review was taken between two discrete stages of the process. The s. 27 application was complete. The hearing before the Tribunal had not commenced. Thus the concern about fragmenting ongoing proceedings before the Tribunal was less significant. While the judicial review delayed the Tribunal's process, it was reasonable for the chambers judge to consider that correction of the record before the Tribunal might better serve the interests of justice and efficiency than permitting a full hearing to proceed without that correction.
>
> [Emphasis added.]

[68] I am cognizant that *Hill* was decided prior to *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2012 SCC 10, wherein the need for restraint in reviewing a tribunal's screening decisions was affirmed and that as such, *Hill* should be considered carefully: *Chu* at para. 90. Nonetheless, *Hill* may still serve as a guide in appropriate circumstances: *Mzite* at para. 37.

[69] Subsequent jurisprudence confirms that judicial review may appropriately be sought for a tribunal's decisions on timeliness. As noted, this was the case in *Mzite*, which involved judicial review of a timeliness decision under s. 22(3) of the *Code*. In *Mzite*, the Tribunal accepted a late-filed complaint against the province of British Columbia under s. 22(3) on the basis of public interest, though the last incident of alleged discrimination had likely occurred almost two years prior to the complaint being filed. On judicial review, the chambers judge dismissed the complainant's argument that the review was premature because the Tribunal had not completed its

work. The chambers judge then found the Tribunal's decision to be patently unreasonable on a number of grounds. The Court of Appeal agreed that the review was not premature and was appropriate at that point in the proceedings (*Mzite* at para. 44), but reversed the chambers decision on patent unreasonableness.

[70] In concluding noting that the underlying petition was not premature, the Court of Appeal in *Mzite* described the s. 22(3) determination as a "substantive" decision flowing from the Tribunal's "distinct preliminary process":

> [41] The decision under review was, however, a substantive, rather than a procedural decision. The resolution of the question is of significant value to the parties. Its resolution prior to the hearing of the substantive complaint could potentially result in a saving of significant time and expense on the part of all parties. The decision arose out of a distinct preliminary process and the petition was brought before the substantive hearing had commenced, during an interval in proceedings. It cannot be said that the petition so interfered with the process of the Tribunal that it ought not to have been heard.
>
> [Emphasis added.]

[71] Similarly, in *Edgewater Casino v. Chubb-Kennedy*, 2014 BCSC 416, aff'd on other grounds 2015 BCCA 9, the Court described the application to dismiss process as a "discrete phase", and noted that after a decision under s. 27, the proceedings were at a "specific juncture", which favoured a finding that judicial was appropriate: at para. 30.

[72] Section 22(2) of the *Code* was also in issue in *School District v. Parent obo the Child*, 2018 BCCA 136 [*School District*], where the Court of Appeal concluded that both the Tribunal member and the chambers judge erred in their interpretation and the resulting application of s. 22(2), and remitted the matter back to the Tribunal to consider whether the complaint might still be accepted under s. 22(3). The parties do not appear to have raised the issue of prematurity, and neither Court appear to have considered that judicial review was inappropriate at the end of the timeliness analysis stage in that case.

[73] This petition is also brought following the conclusion of the discrete phase of the application to dismiss process under s. 27 of the *Code*. As such, the relevant

inquiry in terms of whether the Tribunal's process would be fragmented is whether the Tribunal has finished its work in respect of the petitioner's application to dismiss the Complaint. In my view, it clearly has. I agree with FHA that the ATD Decision is a final determination on the timeliness issue. The Tribunal has completed its distinct preliminary process in respect of the petitioner's application to dismiss under s. 27(1)(g) of the *Code* and chose not to consider s. 22(3) despite that section being raised. Absent judicial review of the ATD Decision, the issue of timeliness of Ms. Rush's Complaint will not be before the Tribunal at any future stage in the proceeding. This militates in favour of a finding that judicial review of the ATD Decision is not premature.

[74] Ms. Rush says that success on this petition will "simply put the process back to the beginning" because even if the petitioner were to succeed both on judicial review and in having the Complaint found to be out of time on reconsideration, the matter would not be at an end because s. 22(3) of the *Code* would still allow the Tribunal to accept a late-filed complaint if it is in the public interest and no substantial prejudice will result from the delay. I disagree. A similar situation arose in *School District* where the remedy sought and achieved was to send the matter back to the Tribunal for determination under s. 22(3), thereby putting the process "back to the beginning."

[75] Moreover, accepting Ms. Rush's submission on this point would have the effect of insulating decisions made under s. 27(1)(g) from review in situations where the application to dismiss is denied because the Tribunal finds a complaint is timely under s. 22(1) or (2), but does not then also consider s. 22(3). This is what transpired here: s. 22(3) appears to have been raised in the parties' submissions before the Tribunal, but the Tribunal seems to have declined to consider it.

Strength of the Petitioner's Case

[76] FHA identifies multiple errors in the Tribunal's recitation of facts relating to the timing of key events that are material to the timeliness analysis, errors which are apparent on the face of the ATD Decision. In FHA's submission, these errors carried

through the Tribunal member's timeliness analysis. FHA also alleges that the member conflated alleged acts of discrimination, failed to consider the petitioner's evidence about Ms. Rush's receipt of long-term disability benefits, and considered allegations of discrimination that were not pleaded in Ms. Rush's Complaint. If this is the case, then such a misapprehension of the evidence on a point material to the Tribunal's exercise of discretion may render the decision arbitrary and therefore patently unreasonable within the meaning of s. 59(4) of the *ATA*: *Envirocon Environmental Services*, *ULC v. Suen*, 2019 BCCA 46 at para. 34.

[77] Based on my review of the record, I find that there is substance to FHA's position on judicial review. The nature of the errors raised is serious and can be generally characterized as deriving from a misapprehension of the evidence by the Tribunal member in a manner that was material to the discretionary denial of FHA's application to dismiss. In my view, this factor weighs in favour of proceeding with judicial review.

Effect of Delay

[78] Ms. Rush submits that proceeding with judicial review will delay the Tribunal's ultimate hearing because: (a) an appeal of this decision may be taken; and (b) the petitioner has reserved its right to seek to adjourn the Tribunal hearing if a decision on this petition has not been rendered by the start of that hearing. The prospect of an appeal of this decision is not persuasive; this factor is omnipresent in an application of this nature.

[79] I accept that proceeding with judicial review will have the effect of delaying the hearing before the Tribunal, but this does not favour dismissing the petition as premature. First, I find that it is in the interests of justice and efficiency to correct a potential misapprehension of the record prior to a full hearing on the merits. This is particularly the case where the error alleged may have the effect of narrowing the scope of the hearing, as may be the case here given that one of the central issues is whether or not the Complaint alleges a timely continuing contravention that may date back to October 2015.

[80] Second, up to this point, this matter has not proceeded expeditiously towards a hearing within the Tribunal's process. The Tribunal had FHA's application under consideration for over one year: submissions on the application appear to have closed in April 2020 and the ATD Decision was issued in August 2021. The petitioner acted promptly in filing the underlying petition within one month after the ATD Decision. Periods of delay also appear to have been occasioned by Ms. Rush, including delay in the filing her response to this petition, and delay in the hearing of this petition occasioned by a consent adjournment at Ms. Rush's request due to a change in counsel. In the result, I find that the potential future delay in the Tribunal's process does not weigh in favour of dismissing the petition as premature.

Conclusion on Prematurity

[81] The Tribunal has had the opportunity to fulfill its statutory mandate under s. 27 of the *Code* by considering and determining the timeliness issue raised in FHA's application to dismiss. As such, engaging in judicial review here will not fragment the administrative process or prevent the Tribunal from fulfilling its statutory mandate.

[82] I find that the petition is not premature. FHA has established exceptional circumstances sufficient to warrant proceeding with judicial review of the ATD Decision.

Standard of Review

[83] It is undisputed that in accordance with s. 32(q) of the *Code*, s. 59 of the *ATA* applies to decisions of the Tribunal. Pursuant to s. 59(3) of the *ATA*, the applicable standard of review for discretionary application to dismiss decisions is patent unreasonableness: see e.g. *Miller v. The Union of British Columbia Performers*, 2021 BCSC 1054 at para. 74, aff'd 2022 BCCA 358. This is consistent with the high degree of deference the Tribunal is entitled to when exercising its gatekeeping function and powers to dismiss a complaint under s. 27 of the *Code*: *Mzite* at paras. 49–51, citing *Lee v. British Columbia Hydro and Power Authority*, 2004 BCCA 457 at para. 27.

[84] The patent unreasonableness standard precludes curial re-weighing of evidence, or rejecting the inferences drawn by the fact finder from that evidence, or substituting the reviewing court's preferred inferences for those drawn by the fact-finder: *British Columbia (Workers' Compensation Appeal Tribunal) v. Fraser Health Authority*, 2016 SCC 25 at para. 30 [*Fraser Health*].

[85] Section 59(4) of the *ATA* provides that a discretionary decision will be patently unreasonable if the discretion:

> (a) is exercised arbitrarily or in bad faith;
>
> (b) is exercised for an improper purpose;
>
> (c) is based entirely or predominantly on irrelevant factors, or
>
> (d) fails to take statutory requirements into account.

[86] The definition of patent unreasonableness in the *ATA* must be measured against both the reasoning and the result. If the reasoning meets the definition of patently unreasonable in s. 59(4), the decision cannot be upheld on review: *The Parent obo the Child v. The School District*, 2020 BCCA 333 at para. 58 [*Parent*]; see also *Air Canada v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 BCCA 387 at paras. 69–70. Nonetheless, not every element of the tribunal's reasoning must independently pass a reasonableness test—if there is a rational basis for the decision on the record, it should not be disturbed simply because of defects in reasoning: *Air Canada* at paras. 63 and 70–73.

[87] A helpful summary of the meaning of patent unreasonableness under the *ATA* is set out in *Hollyburn Properties Limited v. Staehli*, 2022 BCSC 28 at para. 25 [*Hollyburn Properties*]:

> a) as expert tribunals are entitled to significant deference, the standard is an onerous one and their decisions can only be quashed if there is no rational or tenable line of analysis supporting them (*Victoria Times Colonist v. Communications, Energy and Paperworkers*, 2008 BCSC 109 at para. 65; aff'd 2009 BCCA 229);

b) a decision is patently unreasonable if it is openly, evidently, and clearly irrational, or unreasonable on its face, unsupported by evidence, or vitiated by failure to consider the proper factors or apply the appropriate procedures [*Gichuru v. Palmar Properties Inc.*, 2011 BCSC 827 at para. 34, citing *Lavender Co-Operative Housing Association v. Ford*, 2011 BCCA 114];

c) a patently unreasonable decision is one that almost borders on the absurd (*Voice Construction Ltd. v. Construction & General Workers' Union, Local 92*, 2004 SCC 23 at para. 18 and *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22 at para. 28);

d) it is a possible that a great deal of reading and thinking will be required before the problem in a patently unreasonable decision is apparent, but once its defect is identified, it can be explained simply and easily, leaving no real possibility of doubting that the decision is defective (*Yee v. Montie,* 2016 BCCA 256 at para. 22);

e) the standard of patent unreasonableness also applies to the consideration of adequacy of reasons, which involves an assessment of the justification, transparency and intelligibility of the decision-making process (*Vavilov*); and

f) under the *RTA* regime, the overriding test for adequacy of reasons is whether a reviewing court is able to understand how and why the decision was made (*Ganitano v. Yeung,* 2016 BCSC 2227 at para. 24).

[Emphasis added.]

[88] The role of the court on juridical review of a decision made under s. 27 of the *Code* is not to re-evaluate the evidence, substitute its own view of the proper outcome of the application, or closely parse the language of the decision in a search for error: *Miller* at para. 76. Rather, the Tribunal is entitled to a contextual review of its decision on the principle of curial deference: *Mzite* at para. 49; *Parent* at para. 50.

[89] Notably for present purposes, a decision will be patently unreasonable where the decision maker makes findings of fact that are unsupported in the evidence: *Metro Vancouver (Regional District) v. Belcarra South Preservation Society*, 2020 BCSC 662 at paras. 62 and 65, aff'd 2021 BCCA 121. Couched in the language of s. 59(4) of the *ATA*, a decision may be considered arbitrary where it is based on findings of fact that are not supported by the evidence or are otherwise unreasonable: *Hollyburn Properties* at para. 25.

[90] A tribunal's finding will thus be entitled to deference unless the "evidence viewed reasonably is incapable of supporting a tribunal's findings of fact": *Fraser Health* at para. 30, citing *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, 1997 CanLII 378 (SCC) at para. 45, [1997] 1 S.C.R. 487 at 507. However, a decision is not patently unreasonable if the evidence is merely insufficient. Only if there is no evidence to support the findings, or the decision is "openly, clearly, evidently unreasonable", can it be said to be patently unreasonable: *Speckling v. British Columbia (Workers' Compensation Board)*, 2005 BCCA 80 at para. 37.

Was the ATD Decision Patently Unreasonable?

[91] FHA submits that the ATD Decision is patently unreasonable because the Tribunal exercised its discretion arbitrarily, based the ATD Decision on irrelevant facts, and failed to take its statutory requirements into account. FHA also submits that though the Tribunal member correctly articulated the test under s. 27(1)(g) of the *Code* for an application to dismiss, the member erred in the application of the test.

[92] Ms. Rush submits that the ATD Decision is not patently unreasonable. She says that the Tribunal's determination on a timely continuing contravention per s. 22(2) is entitled to deference and was based on relevant facts in the record. Ms. Rush also submits that the Tribunal member correctly articulated and applied the test for s. 27(1)(g).

[93] An application under s. 27 of the Code engages the Tribunal's gatekeeping function and permits it to conduct preliminary assessments of human rights complaints with a view to removing those that do not warrant the time and expense of a hearing: *Hill* at para. 27. A proceeding under s. 27 involves a discretionary assessment of the evidence; it does not involve weighing the evidence or making findings of fact: *Hill* at para. 34.

Ground #1 – The Tribunal's finding of a continuing contravention was based on a misapprehension of the evidence

[94] FHA submits that had the Tribunal reviewed all of the evidence, it would have found that there was no continuing contravention and that the allegations relating to Ms. Rush going off work in 2015 were untimely. FHA alleges multiple errors in the facts and misapprehensions of the evidence in the ATD Decision. In material part, the petitioner says the Tribunal misconstrued the dates of two letters from the petitioner to Ms. Rush that she alleges are discriminatory. The petitioner also says that the Tribunal member failed to consider evidence establishing that Ms. Rush was on long-term disability and receiving related benefits during the time the Complaint alleges the petitioner failed to accommodate her in the workplace.

[95] A discretionary decision is arbitrary under s. 59(4)(a) of the *ATA* where it is based on material errors in the appraisal of the evidence or findings of fact: *Parent* at para. 57; see e.g. *McNeil v. British Columbia (Human Rights Tribunal)*, 2023 BCSC 481 at paras. 122 and 137–138. It must be established that there was both an error in fact-finding and that such an error had a material effect on the exercise of discretion, as described in *Parent*:

> [59] The proper approach to consideration of fact-finding errors made by a tribunal for the purpose of s. 59(3) and (4) was explained in *Morgan-Hung* at paras. 31-32:
>
> > An analysis under s. 59(2) does not end the matter. The impugned fact-finding is only important to the Tribunal's decision in that it was a factor in the making of a discretionary order. Having identified the error in fact-finding, therefore, it is necessary to analyze the effect of that error on the exercise of discretion. This analysis must be performed under ss. 59(3) and (4) of the Act.
> >
> > In *Berezoutskaia* at para. 21, Levine J.A. commented that a discretionary decision, based on a finding of fact that is overturned, can be characterized as "arbitrary" under s. 59(4)(a) of the *Administrative Tribunals Act*. In the context of *Berezoutskaia*, it is clear that she had in mind factual errors that might have a material effect on exercises of discretion.
>
> [Emphasis in original.]

[96] With respect to the alleged error in dates, the petitioner says that that in the course of outlining the chronology of correspondence between the petitioner and Ms.

Rush within the May 2016 to November 2017 time frame and forms part of the alleged continuing contravention, the Tribunal misstated the dates of two letters sent by the FHA to Ms. Rush at para. 41 of the ATD Decision:

> Ms. Rush's employment would be terminated if she did not provide "objective" medical information (Letter from Respondent dated November 27, 2016 and December 30, 2016;
>
> [Emphasis added]

[97] The record establishes that the two letters referenced in para. 41 were in actuality dated November 27, 2015 and December 30, 2015, not 2016. The Tribunal's error is clear on the face of the record. Having found that the Tribunal misapprehended the evidence on this point, the relevant inquiry is then whether that misapprehension had a material effect on its exercise of discretion. In my view, this question must be answered in the affirmative.

[98] The date that these letters were sent is material to the Tribunal member's analysis of whether the Complaint contained allegations of a timely continuing contravention, the last instance of which fell within the 12-month limitation period under s. 22 of the *Code*. A continuing contravention is one that arises from a succession or repetition of separate acts of discrimination of the same character or kind. There must be present acts of discrimination which could be considered as separate contraventions of the *Code*, not one act that may have continuing effects or consequences: *School District* at para. 48, citing *Goddard v. Dixon*, 2012 BCSC 161 at para. 85.

[99] One of the factors to be considered in the determination of whether there is a timely complaint of a continuing contravention is whether there are significant gaps in time between alleged contraventions: *Schaab v. Murphy*, 2010 BCHRT 349 at para. 11. A significant gap between the alleged discriminatory acts weighs against finding a continuing contravention: *Reynolds v. Overwaitea Food Group*, 2013 BCHRT 67 at para. 26, citing *Dickson v. Vancouver Island Human Rights Coalition*, 2005 BCHRT 209 at para. 17. The timing of the November and December 2015 letters is therefore material to the Tribunal's continuing contravention analysis.

[100] The Tribunal's misapprehension of the evidence regarding the dates of the November and December 2015 letters obfuscated what would otherwise have been a nine-month gap between allegedly discriminatory acts, namely from June 1, 2016 to March 9, 2017. This error manifests itself in para. 57 of the ATD Decision where the Tribunal found that the petitioner "repeatedly asked Ms. Rush to provide further medical information throughout 2016 and 2017…".

[101] The Tribunal's misapprehension of the evidence on this point also manifests itself in paras. 58–59 of the ATD Decision where the member distinguishes *Szczesniak v. Northern Health Authority*, 2010 BCHRT 295, by finding that the Complaint did not "allege discrimination over two distinct periods separated by a significant amount of time". The Tribunal's conclusion in this regard must have been at least in part based on its erroneous finding as to the chronology of correspondence sent by FHA to Ms. Rush, namely that there was allegedly discriminatory correspondence "throughout 2016": at para. 57. By consequence of that error, the Tribunal did not recognize the nine-month gap in correspondence and did not turn its mind to whether that gap was "significant" as that concept is understood within the context of the continuing contravention analysis: *Schaab* at para. 11.

[102] In this regard, the present circumstances are akin to those in *Hill*, where the Court of Appeal upheld the chambers judge's finding that misapprehensions in the evidence rendered the Tribunal's decision under s. 27(1)(c) patently unreasonable:

> [41] First, I agree with the chambers judge that the Tribunal misapprehended the evidence before it about the conversation between Ms. Hill and Mr. Campbell. I also agree this error related to the critical evidence on the material issue raised by Ms. Hill's complaint, and operated substantially in her favour, strengthening her complaint in a manner that was not supported by the evidence. While the general principle is the Tribunal should be allowed to complete its process if there is a reasonable prospect the complaint will succeed, its gate-keeping function is also important. While a hearing under s. 27 is not a fact-finding exercise, such decisions must nevertheless be based on a correct assessment of the evidence if they are to accomplish their legislative purpose of removing claims with no reasonable prospect of success [under s. 27(1)(c)]…
>
> [Emphasis added.]

[103] Likewise, the Tribunal's misapprehension of the dates of the November and December 2015 correspondence operated substantially in Ms. Rush's favour by strengthening her position that the Complaint was timely because it alleged a continuing contravention in a manner that is not supported by the record.

[104] In my view, this misapprehension resulted in an arbitrary exercise of discretion by the Tribunal, rendering its decision that the Complaint alleged a continuing contravention dating back to the October 2015 Meeting patently unreasonable. Whether the gap in the present case would be considered significant is a matter for the Tribunal to determine. However, the Tribunal did not turn its mind to this issue because the gap was obscured by its misapprehension of the evidence.

[105] The petitioner also says that the Tribunal misapprehended the evidence by conflating the issue of whether Ms. Rush was entitled to medical leave by way of placement on long-term disability with the petitioner's obligation to accommodate her in the workplace by not requiring her to use the Panorama. More specifically, the petitioner submits the Tribunal ignored evidence establishing that:

a) After going off work on October 6, 2015, Ms. Rush never advised the petitioner that she was ready to return to work and would therefore require accommodation; and

b) Ms. Rush was eventually deemed incapable of working and entitled to long-term disability for the period of October 6, 2015 to May 30, 2018 and was therefore was not capable of being accommodated in the workplace.

[106] In light of this evidence, the petitioner says that the Tribunal's conclusion that the Complaint alleges a continuing contravention is arbitrary because it would require the petitioner to have accommodated Ms. Rush in the workplace during a time frame when she was subsequently considered to be disabled from working. This error manifests itself in para. 51 of the ATD Decision:

> [51] However, based on the information before me, I find that the complaint is not only about Ms. Rush's allegation that the Respondent failed to accommodate her on or before October 5, 2015, but also **after** that date until

> the date of the complaint—specifically, as alleged by Ms. Rush, the Respondent denied her medical leave based on her disabilities as evidenced by its letters dated June 15, 2017 and November 23, 2017 (which Ms. Rush says she received on November 12, 2018), and Ms. Rush's letter of March 28, 2017, which appears to be a response to the Respondent's letter of March 9, 2017.
>
> [Bold in original, underlining added.]

[107] The Tribunal rejected FHA's contention that the Complaint was late-filed by two years because the alleged failure to accommodate occurred before Ms. Rush went off work on October 6, 2015. Instead, the Tribunal found that the Complaint made allegations of a continuing contravention. In doing so, the Tribunal interpreted the Complaint to include not only the main allegation of failure to accommodate with modified duties prior to October 2015, but also an allegation of discrimination occurring after October 2015 by denying Ms. Rush medical leave. This interpretation of the Complaint was necessary to:

a) support the Tribunal's finding that the petitioner's June 2017 Options Letter was not simply a reiteration of the same alleged discrimination arising from the October 2015 Meeting, but rather related to an allegation of discrimination filed within the one-year time limit (ATD Decision at para. 52); and

b) underpinned the Tribunal's finding that Ms. Rush had made allegations of a timely continuing contravention (ATD Decision at para. 49).

[108] In my view, the Tribunal's failure to address evidence in the record establishing that Ms. Rush was considered disabled from working from October 6, 2015, to May 30, 2018, constitutes a misapprehension of the evidence that was material to its findings that Ms. Rush had made allegations falling within the one-year time limit and its finding of a continuing contravention. In the latter regard, at para. 61 of the ATD Decision, the Tribunal accepted both elements of Ms. Rush's allegations that could, if proven, contravene the *Code*:

> The Respondent failed to accommodate Ms. Rush by not authorizing a modified work arrangement past October 5, 2015, due to medical reasons, and after that (as stated in letters dated June and November 2017) by not

> authorizing her absence from work, when she could not work for medical reasons…

[109] The Tribunal does not appear to have considered Ms. Rush's LTD application and ongoing attempts to review or appeal her denial of benefits, or the eventual acceptance of her LTD claim following submission of Dr. Gandhi's report at some point in 2016. Nor did the Tribunal reconcile how Ms. Rush could have been deemed to be disabled from work and thus entitled to LTD, while simultaneously being continuously discriminated against by FHA on account of its failure to provide accommodation in the workplace. In this regard, the ATD Decision does not address the impact of Ms. Rush's accepted LTD claim on its timeliness or continuing contravention analyses. Rather, the ATD Decision appears to be predicated on Ms. Rush having been denied LTD benefits, or that the appeal or review regarding LTD was still pending: ATD Decision at paras. 28 and 43.

[110] This misapprehension resulted in the Tribunal failing to consider whether Ms. Rush's LTD entitlement represented an intervening event or resulted in separate acts of discrimination, as manifested in its conclusion that *Szczesniak* was distinguishable: ATD Decision at paras. 58–59. In my view, this is a material omission arising from the Tribunal's misapprehension of the record as to Ms. Rush's LTD status at various points in the time period during which it found a continuing contravention. While the Tribunal asserted that it had reviewed all of the evidence before it (ATD Decision at para. 3), such an assertion does not make it so: *Lord v. Fraser Health Authority*, 2021 BCSC 2176 at para. 46.

[111] As such, I agree with the petitioner that the Tribunal's failure to consider material evidence—that Ms. Rush was deemed incapable of working and retroactively placed on LTD from October 6, 2015 to May 30, 2018—rendered the ATD Decision arbitrary. Ms. Rush was found to be disabled from working during the time frame when the Tribunal concluded that the allegedly discriminatory conduct of failing to accommodate her in the workplace or denying her medical leave was continuing. I also agree with FHA that the Tribunal's failure to grapple with the effect of Ms. Rush's changes in LTD status also lead to a conflation of the issue of

accommodation with the issue of whether Ms. Rush's leave was medically justified based on the evidence available to FHA at various times.

[112] It may be that the Tribunal did turn its mind to this issue and found that the retroactive nature of the LTD benefits determination was a relevant factor. However, this is not apparent in the ATD Decision. The proposition that the Tribunal is entitled to a contextual review of its decisions with respectful attention paid to the reasons offered or which could be offered in support of a decision does not permit me to substitute my own reasoning in place of erroneous reasoning: *Parent* at para. 57. As Chief Justice McLachlin said in *Delta Airlines Inc. v. Lukács*, 2018 SCC 2:

> [24] The requirement that respectful attention be paid to the reasons offered, or the reasons that could be offered, does not empower a reviewing court to ignore the reasons altogether and substitute its own: *Newfoundland Nurses*, at para. 12; *Pathmanathan v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 353, 17 Imm. L.R. (4th) 154, at para. 28. I agree with Justice Rothstein in *Alberta Teachers* when he cautioned:
>
> > The direction that courts are to give respectful attention to the reasons "which could be offered in support of a decision" is not a "carte blanche to reformulate a tribunal's decision in a way that casts aside an unreasonable chain of analysis in favour of the court's own rationale for the result" . . . . [para. 54, quoting *Petro-Canada v. Workers' Compensation Board (B.C.)*, 2009 BCCA 396, 276 B.C.A.C. 135, at paras. 53 and 56]
>
> In other words, <u>while a reviewing court may supplement the reasons given in support of an administrative decision, it cannot ignore or replace the reasons actually provided</u>. Additional reasons must supplement and not supplant the analysis of the administrative body.
>
> [Emphasis added.]

[113] Lastly, I have considered the additional evidentiary errors raised by the petitioner and determined that they do not materially impact the ATD Decision, and thus do not render it patently unreasonable: *Miller* at para. 111. For example, the Tribunal attributed a comment made to Ms. Rush at the October 2015 Meeting to a representative of FHA, but the record instead suggests that this comment was made by a union representative. The Tribunal also included a March 28, 2017, letter written by Ms. Rush to FHA as forming part of the alleged continuing contravention, which in essence means that a letter written by Ms. Rush was considered as potential discrimination against herself: ATD Decision at paras. 48–51. While errors

of this nature taken alone do not support a finding of patent unreasonableness, they provide further cause for concern regarding the Tribunal's grasp of the evidence as a whole as reflected in the ATD Decision.

Ground #2 – The Tribunal's application of the test under s. 27(1)(g) of the *Code* was patently unreasonable

[114] The petitioner also asserts that the Tribunal erred in its application of the test under s. 27(1)(g) of the *Code* when it stated that its assessment of whether the Complaint was timely was based only on the allegations contained in the Complaint, and was made without reference to any justification or explanation offered by the petitioner: ATD Decision at para. 48. In this regard, the petitioner asserts that the Tribunal conflated the approach to timeliness that applies under s. 22(2) of the *Code* with that which applies when an application to dismiss is brought under s. 27(1)(g), and therefore erred in failing to consider FHA's submissions and evidence when determining the ATD Decision.

[115] FHA accepts that a timeliness determination under s. 22 of the *Code* is focused on the allegations contained in a complaint, but says that under s. 27(1)(g), the Tribunal is permitted to rely on justification, argument, and evidence from a respondent. I agree. The Tribunal has previously determined that it is appropriate for affidavit evidence to be filed in support of an application under s. 27(1)(g) and for the Tribunal to consider that evidence in determining such an application: *Sanghera v. B.C. (Ministry of Attorney General and another)*, 2012 BCHRT 418 at para. 40. I accept FHA's submission that if the inquiry under s. 27(1)(g) were limited to the allegations in the Complaint without recourse to extrinsic evidence, then this would render s. 27(1)(g) void of purpose and essentially duplicative of the inquiry under s. 22.

[116] However, considering the ATD Decision as a whole, I find that the Tribunal applied the proper approach in its timeliness analysis and did not limit that analysis to the allegations contained in the Complaint. The Tribunal set out the proper analysis consistent with *School District* at paragraphs 45-46 of the ATD Decision.

The Tribunal first determined whether there were allegations of acts or instances of discrimination occurring within one year prior to the filing of the Complaint, which would be required to ground a continuing contravention: ATD Decision at paras. 49–52. Having found a timely allegation of discrimination, the Tribunal then considered whether the Complaint alleged a continuing contravention: ATD Decision at paras. 53–62.

[117] In the petitioner's submission, the ATD Decision is "entirely unclear" in terms of what test the Tribunal applied and what material it relied on in conducting its analysis under s. 27(1)(g) of the *Code*. In this regard, FHA points to paragraph 48 of the ATD Decision where the Tribunal indicated that its "assessment is made based only on the allegations contained in [the Complaint] without regard to any justification or explanation offered by [FHA]" and contrasts that statement with other instances in which the Tribunal appears to have referred to evidence and submissions beyond those contained in the Complaint: e.g. ATD Decision at paras. 51, 52, 55, 57 and 58. In FHA's submission, this renders the ATD Decision patently unreasonable because "the Tribunal did not consider evidence, argument, or justification it ought to have in determining timeliness".

[118] Despite the lack of clarity in the ATD Decision as to what material was considered by the member, considering the ATD Decision contextually and as a whole, I find that the Tribunal did not limit its analysis to the Complaint itself and did consider at least portions of FHA's evidence and submissions. Indeed, FHA takes issue with the Tribunal having relied on the November 2017 Options Letter—which is not mentioned in the Complaint—as indicative of the Tribunal relying on external justification "in an isolated way". This demonstrates that the Tribunal did engage to a certain degree with the record beyond simply considering the allegations raised in the Complaint. Whether the Tribunal engaged with all of the record before it is a different issue, and one that has been addressed above in terms of my conclusion regarding the Tribunal's misapprehension of the evidence.

[119] Regardless, whether the Tribunal erred in considering the November 2017 Options Letter in its timeliness analysis under s. 27(1)(g) of the *Code* is not material, and thus does not render the ATD Decision patently unreasonable, FHA accepted that if the June 2017 Options Letter formed part of a continuing contravention (which it denied), then the November letter was also timely.

[120] In summary, while there were fundamental misapprehensions of the evidence that render the ATD Decision arbitrary and thus patently unreasonable, the material point with respect to this ground of review is that the member nonetheless appears to have gone beyond the face of the Complaint in her timeliness analysis under s. 27(1)(g) of the *Code*. In the result, I find that the Tribunal's application of the test under s. 27(1)(g) of the *Code* was not patently unreasonable.

Conclusion

[121] In the result, I find that the Tribunal's ATD Decision that the Complaint raised a continuing contravention was based on a misapprehension of the evidence and was therefore arbitrary and patently unreasonable. The matter is remitted back to the Tribunal for reconsideration in light of these reasons.

[122] The petitioner is entitled to its costs, payable at Scale B.

"Hughes J."