IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *McNeil v. British Columbia (Human Rights Tribunal)*, 2023 BCSC 481

Date: 20230329
Docket: S18855
Registry: Smithers

Between:

Dawn Patricia McNeil

Petitioner

And:

British Columbia Human Rights Tribunal and Telus Employer Solutions

Respondents

Before: The Honourable Madam Justice Young

Reasons for Judgment

Counsel for the Petitioner:	D.E.H. Allen
Counsel for the Respondents:	J. H. Hoopes and R. Klass
Place and Dates of Trial/Hearing:	Smithers, B.C. (by MS Teams) November 21, 2022 January 23, 2023
Place and Date of Judgment:	Smithers, B.C. March 29, 2023

Introduction

[1] These facts are summarized from the petition and response (with the exception of para. 19 which was added).

[2] The petitioner, Ms. McNeil, was employed as a Client Service Advisor at Telus Employer Solutions ("TES") from November 21, 2016 until May 31, 2018. TES provides outsourced human resources and payroll services to businesses across Canada.

[3] Ms. McNeil was employed by TES on a series of temporary employment contracts. She was asked to sign a new employment contract every few months on the same terms.

[4] Ms. McNeil was diagnosed with anxiety before she began working at TES.

[5] In January 2018, Ms. McNeil began to experience unexplained health symptoms, including headaches, fatigue, poor sleep, low mood, "brain fog", and restless leg syndrome. Ms. McNeil's symptoms seemed to flare up at work, and initially Ms. McNeil thought they may be triggered by something in her work building.

[6] Ms. McNeil put TES on notice of her health symptoms in January 2018. Ms. McNeil requested that TES accommodate her disability.

[7] TES has a work from home policy (the "Work Styles Program"). TES submits that eligibility to participate in the Work Styles Program depends on, *inter alia*, employee performance. The rationale for this eligibility was to ensure that employees who require more support are able to access that support easily on site.

[8] TES denied Ms. McNeil's request to work from home because they submit that Ms. McNeil was not eligible for the Work Styles Program as she was not meeting TES's performance standards.

[9] On January 23, 2018, Ms. McNeil provided TES with a note from her physician "Dr. P" which stipulated, "[f]or health reasons, a trial of work from home is recommended". TES advised Ms. McNeil, among other things, that the medical note was vague in terms of the recommended trial, but its human resources department would review the note and determine how to proceed. Ms. McNeil continued to report allergic reactions and made further requests to work from home.

[10] Ms. McNeil requested to work from another TES location, but was informed that this was not an option due to client confidentiality. TES informed Ms. McNeil that if she was able to work, she was expected to attend at the workplace and, once it had information from her doctor, TES would consider options identified by its benefit administrator.

[11] February 5, 2018 was the last day Ms. McNeil attended work. On February 8, 2018, Ms. McNeil informed TES that, due to her allergy symptoms, she would no longer attend the workplace and would work from home. TES indicated to Ms. McNeil that it required a completed form so that it and its third-party benefit administrator could consider possible accommodations, including working from home. TES placed Ms. McNeil on unpaid leave.

[12] On February 14, 2018, TES received the completed form and a letter from Dr. P. The letter provided, *inter alia*, that Ms. McNeil was suffering from "unexplained, vague, general symptoms". Dr. P indicated that he was unable to formulate a treatment plan because of limited contact with Ms. McNeil and that there were no obvious function limitations or medical restrictions at that time. The doctor's letter was sent to TES's benefits administrator.

[13] On February 23, 2018, TES' benefit administrator denied Ms. McNeil's request for accommodation on the basis that there was no confirmed medical diagnosis, the medical information provided did not describe a condition that would prevent Ms. McNeil from performing the essential duties of her job, and she was not undergoing reasonable treatment.

[14] Ms. McNeil believed that her worksite was aggravating her allergies. She was requesting to work from home indefinitely. Her manager indicated that Ms. McNeil did not provide medical information indicating a necessity for an accommodation, and that the building's HVAC system maintenance was current and hospital grade.

[15] On March 20, 2018, Ms. McNeil wrote to TES via email and advised that she would be moving to Smithers, B.C., to live with her parents until the "situation resolved".

[16] On April 17, 2018, TES asked Ms. McNeil if she planned to return to work, or whether she was resigning from her position. Ms. McNeil informed TES that her medical assessment was on hold, as it would take nine months to see a specialist. Ms. McNeil also reported that her physician did not recommend that she return to the workplace until her medical issues were understood or resolved.

[17] Ms. McNeil's temporary employment assignment with TES ended on May 31, 2018, as per her Employment Agreement. TES did not offer her a new contract.

[18] During her employment Ms. McNeil pursued a diagnosis but did not receive one. Once she moved to another town and got another family doctor she was referred to an internist who did diagnose her condition.

[19] In July 2018, Ms. McNeil was diagnosed with Chronic Fatigue Syndrome and Myalgic Encephalomyelitis ("CFS/ME"). In April 2019 her internist Dr. Voyer completed a medical report in support of her application for provincial disability benefits.

[20] Ms. McNeil filed a human rights complaint on July 5, 2018 alleging that TES had discriminated against her in her employment on the grounds of mental disability and physical disability contrary to s. 13 of the British Columbia *Human Rights Code,* R.S.B.C. 1996, c. 210 (the "*Code*"). The B.C. Human Rights Tribunal (the "Tribunal") is established under s. 31 of *Code*.

[21] TES brought an application to dismiss Ms. McNeil's human rights complaint under ss. 27(1)(b) and 27(1)(c) of the *Code*, arguing that: a) that Ms. McNeil's allegations, even if proved, would not be a violation of the *Code*; and b) the complaint had no reasonable prospect of success. They also applied for costs and for a warning under s. 27.5 of the *Code*.

[22] The decision on TES's application to dismiss Ms. McNeil's human rights complaint was released by the Tribunal on March 23, 2022 indexed as *McNeil v. Telus Employer Solutions (TES)*, 2022 BCHRT 46 (the "Decision"). The Tribunal dismissed Ms. McNeil's complaint under s. 27(1)(c) of the Code and found that her complaint had no reasonable prospect of success. No costs were awarded and the request for a warning was denied.

[23] On May 20, 2022 Ms. McNeil filed for judicial review of the Decision to dismiss her case under s. 27(1)(c) (the "Petition").

Legislative Framework

[24] Section 13 of the *Code* addresses discrimination in employment. Section 13(1) says:

> (1) A person must not
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> (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.

[25] Section 13(4) provides a defence of *bona fide* occupational requirement:

> (4) Subsections (1) and (2) do not apply with respect to a refusal, limitation, specification or preference based on a bona fide occupational requirement.

[26] Section 27 of the *Code* provides for a preliminary screening of complaints to determine whether they should proceed to a hearing. The relevant subsections of s. 27 are:

> (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:
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> ...
>
> (b) the acts or omissions alleged in the complaint or that part of the complaint do not contravene this Code;
>
> (c) there is no reasonable prospect that the complaint will succeed;
>
> (d) proceeding with the complaint or that part of the complaint would not
>
> ...
>
> (ii) further the purposes of this Code.

[27] In *Francescutti* v. *Vancouver*, 2017 BCCA 242 at paras. 49 and 50 the Court of Appeal explained that a dismissal under s. 27(1)(b) is made solely based on the allegations in the complaint without reference to any evidence offered by a respondent, whereas a dismissal under s. 27(1)(c) requires the tribunal to consider the whole of the evidence. The evidence is reviewed solely for the purpose of assessing whether there is a reasonable prospect that the complaint would succeed and not to make findings of fact.

[28] The Tribunal's discretionary function is expressed in the often-cited decision *Wickham v. Mesa Contemporary Folk Art Inc.*, 2004 BCHRT 134 (at para. 11):

> ... The role of the Tribunal, on an application, is not to determine whether the complainant has established a *prima facie* case of discrimination, nor to determine the *bona fides* of the response. Rather, it is an assessment, based on all of the material before the Tribunal, of whether there is a reasonable prospect the complaint will succeed ...

[29] The Tribunal engages in a discretionary exercise when it makes a preliminary assessment of the facts alleged by the parties. This assessment does not require factual findings, but merely a review of the materials before the Tribunal. The

purpose of this exercise is to determine whether those facts, *if true*, "warrant the time and expense of a hearing". Complaints that have no reasonable prospect of succeeding do not warrant further consideration and are summarily dismissed: *UBC* v. *Chan*, 2013 BCSC 942, para. 67; *Parmar v. TransLink Security Management*, 2020 BCSC 1625, para. 57; *Workers' Compensation Appeal Tribunal v. Hill*, 2011 BCCA 49, para. 27.

[30] Section 27.5 addresses dismissal for failure to pursue a complaint:

> If, under the rules, a party has been given notice requiring the party to diligently pursue a complaint and the party fails to act on the notice within the time allowed, then on the request of another party or on its own initiative, a member or panel may dismiss the complaint.

[31] Section 32 sets out which provisions of the *Administrative Tribunals Act*, SBC 2004, Ch. 45 (the "*ATA*") apply to the Human Rights Tribunal. Section 32(q) says that s. 59 of the *ATA* applies. That section provides:

> 59 (1) In a judicial review proceeding, the standard of review to be applied to a decision of the tribunal is correctness for all questions except those respecting the exercise of discretion, findings of fact and the application of the common law rules of natural justice and procedural fairness.
>
> (2) A court must not set aside a finding of fact by the tribunal unless there is no evidence to support it or if, in light of all the evidence, the finding is otherwise unreasonable.
>
> (3) A court must not set aside a discretionary decision of the tribunal unless it is patently unreasonable.
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> (4) For the purposes of subsection (3), a discretionary decision is patently unreasonable if the discretion
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> (a) is exercised arbitrarily or in bad faith,
>
> (b) is exercised for an improper purpose,
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> (c) is based entirely or predominantly on irrelevant factors, or
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> (d) fails to take statutory requirements into account.
>
> (5) Questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly.

Standard of Review

[32] The parties agreed at the hearing that a dismissal of a complaint under s. 27(1)(c) of the *Code* is a discretionary decision. Section 59(3) of the *ATA* prohibits this Court from setting aside a discretionary decision of a Tribunal Member unless it is "patently unreasonable". Accordingly, the applicable standard of review to the Tribunal's decision under s. 27(1)(c) of the *Code* is patent unreasonableness.

[33] Courts must apply the highest level of curial deference in reviewing decisions made under s. 27(1)(c): *Francescutti*, paras. 42, 46. The reviewing court does not re-evaluate the evidence before the tribunal. Even if the court would have come to a different conclusion on the evidence before the tribunal, this does not mean that the decision is patently unreasonable: *Francescutti*, para 47.

[34] In *Byelkova v. Fraser*, 2021 BCSC 1312 [*Byelkova*], Justice Crerar reviewed the meaning of patently unreasonable at para. 14:

> [14] A patently unreasonable decision is one that is "clearly irrational", "evidently not in accordance with reason", "so flawed that no amount of curial deference can justify letting it stand", "openly, clearly, evidently unreasonable", and that "almost border[s] on the absurd": *Francescutti v. Vancouver (City)*, 2017 BCCA 242 at para 45; *Law Society of New Brunswick v. Ryan*, 2003 SCC 20 at para 52; *Team Transport Services Ltd. v. Unifor*, 2020 BCSC 91 at para 16, aff'd 2021 BCCA 211.

The Decision

[35] In the Decision, the Tribunal found that the claimant had established a *prima facie* case of discrimination under the *Code* so the application to dismiss under s. 27(1)(b) did not succeed. The application under s. 27(1)(c) did succeed. TES also applied for costs against Ms. McNeil and for an order that the Tribunal issue a formal warning under s. 27.5 of the *Code* to Ms. McNeil to diligently pursue her complaint. Those applications were denied and Ms. McNeil is not challenging that decision.

[36] In her decision, the Tribunal member says that she considered all the information and evidence filed by the parties related to the applications (para. 3). She made no findings of fact (para. 5).

[37] The Tribunal member noted Ms. McNeil's new diagnosis (para. 28).

[38] In para. 33, the Tribunal member sets out the test for an application under s. 27(1)(c):

> When determining whether a complaint should be dismissed under s. 27(1)(c), the Tribunal only considers the information before it and not what evidence might be given at a hearing: *University of British Columbia v. Chan*, 2013 BCSC 942 at para. 77. It is up to the parties to give the Tribunal the information necessary for it to make a decision: *Bell v. Dr. Sherk and others*, 2003 BCHRT 63 at paras. 25-26. On an application under s. 27(1)(c), the Tribunal does not make findings of fact or credibility, but rather assesses all the information and evidence submitted by the parties: *Berezoutskaia*; see also *Francescutti v. Vancouver (City)*, 2017 BCCA242 at para. 52.

[39] At para 35 the Tribunal set out what Ms. McNeil needed to prove in order to be successful at a hearing:

i. she had a disability at the relevant time;

ii. she experienced an adverse impact regarding her employment at TES; and

iii. her disability was a factor in the alleged adverse impact: *Moore v. British Columbia (Education)*, 2012 SCC 61 [*Moore*] at para. 33.

[40] The Tribunal member did not accept TES's argument that Ms. McNeil had no reasonable prospect of proving at a hearing that she experienced an adverse impact regarding her employment. In other words, she accepted that Ms. McNeil had a reasonable prospect of proving that she did have a disability protected under the *Code* at the material time and that she experienced an adverse impact as a result of that disability. (Decision, para. 40).

[41] The Tribunal noted specifically that the evidence indicated that starting in mid-January 2018, Ms. McNeil reported to her employer that she was experiencing allergic reactions from something at her workplace. She told her employer she was going to see Dr. P about her symptoms, and she might need to see a specialist. Dr. P recommended that TES allow Ms. McNeil to work from home for a trial period for health reasons. Ms. McNeil reported to her employer and Dr. P that she was experiencing symptoms including muscle paralysis, extreme exhaustion, “brain fog”, lack of appetite, and headaches.

[42] The Tribunal member noted that the medical information from Ms. McNeil’s doctor did not indicate a diagnosis, prognosis, or treatment plan; however, in the Tribunal member’s view that was not sufficient at this stage to convince her that there was no reasonable prospect of establishing that Ms. McNeil experienced an adverse impact regarding her employment. She did not consider the new diagnosis. (Decision, para. 39).

[43] The Tribunal member found that Ms. McNeil had a reasonable prospect of establishing that she suffered an adverse impact because her request to work from home was denied (Decision, para. 40).

[44] The Tribunal member rejected TES’s argument that there was no nexus between the alleged adverse impact and Ms. McNeil’s alleged disability. The Tribunal member found TES’s argument conflated the legal tests and burdens of proof. She found that Ms. McNeil’s request to work from home or other locations was because of her disability and so she had a reasonable prospect of establishing the third element of the disability test. (Decision, para. 42).

[45] Accordingly, Ms. McNeil had met the *prima facie* case for discrimination and the onus shifted to TES to establish that it had a non-discriminatory reason for its conduct.

[46] The Tribunal found that it may consider a defence raised by a respondent to a human rights complaint in an application under s. 27(1)(c) relying on *Trevena v*.

Citizens' Assembly on Electoral Reform, 2004 BCHRT 24 at para. 67. If it is found that it is reasonably possible that the defence will succeed at a hearing, then the complaint may have no reasonable prospect of success.

[47] TES's first defence is that it was reasonable for it to request medical information from Ms. McNeil. TES submitted that Ms. McNeil was given ample time to participate by providing medical evidence to support her request for accommodation and she failed to do so. The Tribunal member did not address this argument about whether Ms. McNeil was given ample time to provide medical evidence. (Decision, para. 44)

[48] Instead the Tribunal member reframed TES' argument into a *bona fide* occupational requirement ("BFOR") defence as set out in *British Columbia (Public Service Employee Relations Commission) v British Columbia Government and Service Employees' Union (B.C.G.S.E.U.)*, [1999] 3 S.C.R. 3 [*Meiorin*] at para. 54. The elements of the *Meiorin* test are:

> i. The employer must have adopted the standard it applied for a purpose rationally connected to performance of the job;
>
> ii. The employer must have adopted the standard in good faith and in the belief that it was necessary to fulfill the legitimate work related purpose;
>
> iii. The standard must be reasonably necessary to accomplish the legitimate work related purpose in the sense that the employer could not accommodate persons sharing Ms. McNeil's characteristics without incurring undue hardship. (Decision, para. 45)

[49] The Tribunal member found that to succeed TES had to show it investigated alternative approaches and "could not have done anything else reasonable or practical to avoid impacts on the individual" (*Moore*, para. 49). She noted that an employee is entitled to reasonable, not perfect accommodation and that all parties

are obliged to cooperate in the search for accommodation: *Central Okanagan School District No. 23 v. Renaud*, [1992] 2. S.C.R. 970 [*Renaud*] at p. 995.

[50] The Tribunal member also noted that an employee is obliged to bring to their employer's attention the facts relating to the alleged discrimination.

[51] The Tribunal member also noted that the accommodation process may take some time, as medical information is obtained, assessments are done, work sites are investigated, and job functions researched: *Renaud*, p. 995; *Graham* v *School District 38*, 2005 BCHRT 520 [*Graham*] at para. 42. (Decision, para. 46)

[52] The Tribunal member noted that neither party argued the BFOR test or stated standard in the context of a BFOR defence. She concluded that TES had a requirement that employees work in the office subject to its Work Styles Program that allows qualified employees to work from home. The requirements depended on individual circumstances, job performance and function, mobile readiness and space availability.

[53] The Tribunal member concluded that TES could establish the first two elements of the BFOR test. (Decision, para. 47)

[54] The Tribunal member found that it was reasonably certain that TES could establish the third element of the BFOR test because none of the medical information Ms. McNeil provided to TES identified any disability-related limitations or restrictions to support her accommodation request. (Decision, para. 48)

[55] The Tribunal member reviewed the medical information up to mid-March 2018 and the medical information Ms. McNeil provided to WorkSafe BC. She noted that Ms. McNeil's relationship with Dr. P had broken down. She makes no reference to the medical evidence from Dr. Voyer from July 2018.

[56] The Tribunal member was persuaded that TES reasonably sought medical information to support Ms. McNeil's request for accommodation and that it reasonably concluded that the information provided (prior to May 31, 2018) did not

support the request. The Tribunal member concluded that it was reasonably certain that TES could establish a BFOR defence at a hearing. TES's application to dismiss the complaint under s 27(1)(c) of the *Code* was granted. (Decision, para. 52)

[57] I will now consider each of Ms. McNeil's grounds for judicial review and TES's position.

Lack of Procedural Fairness

[58] Ms. McNeil says that the Tribunal member did not make its decision in a procedurally fair way. The Tribunal member reframed and essentially amended TES's application to dismiss to include a line of argument that TES did not advance and the Tribunal member did not provide Ms. McNeil with an opportunity to respond to the new line of argument advanced by the Tribunal member.

[59] When reviewing a tribunal decision questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether in all the circumstances the tribunal acted fairly. (s. 59, *ATA*)

[60] The Tribunal member noted that in their submissions neither party expressly articulated the standard at issue in the context of a BFOR defence. She reframed the submissions of TES into a BFOR defence.

[61] Ms. McNeil submits that there was evidence to the contrary in her lengthy submissions but it was not framed in the terms of the BFOR defence and she was denied the opportunity of directly responding to the BFOR defence.

[62] Ms. McNeil relies on *Goddard* v. *Dixon*, 2012 BCSC 161 where the court found that the Tribunal member reframed the complaint to include a new allegation against the union. Justice Fisher (as she then was) found that redefining the complaint in the manner she did, the Tribunal member effectively created a significant amendment of the original complaint without providing the union any opportunity to respond. Justice Fisher found that the Tribunal's rules of practice and procedure require a complainant to make an application to amend a complaint

where there is an outstanding application to dismiss. The purpose of such a rule is to provide for procedural fairness when TES filed an application to dismiss by preventing a moving target.

[63] Ms. McNeil points out that the 35 typed pages of responding material were prepared by lawyers. Ms. McNeil was self-represented. Experienced counsel preparing the response for Telus were well aware of the BFOR defence and yet they never referred to the defence in their argument.

[64] She submits that it is procedurally unfair to expect self-represented litigants to understand express and implied arguments made by lawyers. Procedural fairness requires more than this. It is not fair for the Tribunal to craft an argument for TES in the decision and not give Ms. McNeil an opportunity to respond.

[65] TES submits there has been no procedural unfairness. They acknowledge that they did not state they were relying on a BFOR defence but they did cite case law which considered the BFOR defence in their submissions. They submit the BFOR was implicitly relied on, if not expressly argued. The Tribunal did not amend their submissions but relied on a test that was encapsulated in what was argued.

[66] TES relies on *Conklin v. UBC*, 2018 BCHRT 262 [*Conklin*] at paras. 46-47. In *Conklin* the complainant sought a reconsideration of a Tribunal decision on a number of bases, one of which was that the Tribunal member raised matters on his own motion. The Tribunal member saw no unfairness arising from the application of a prevailing legal test that the parties were already effectively arguing so as to trigger a reconsideration.

[67] In their submissions, TES submits that it outlined the evidence that was before the Tribunal member that fit within the BFOR analysis and the opportunities that Ms. McNeil had to respond.

Ruling

[68] I find that *Goddard* is distinguishable. In that case Justice Fisher found that there had been no evidence on the record of Mr. Dixon complaining to the union giving rise to a complaint against the union. As such the Tribunal member created a new complaint in their reasons. In the present case there is sufficient evidence to rely on in formulating a BFOR defence. What is at issue is the characterization of that evidence. I find it was not a significant amendment to recharacterize the evidence in the language of the BFOR defence.

[69] I agree with the analysis in *Conklin*. The Tribunal member has relied on the arguments made by both parties and determined that those arguments are best characterized as a BFOR defence. It is the role of the Tribunal member to review volumes of evidence, and arguments and fit them within the statutory framework of the *Code*.

[70] In this case, although Ms. McNeil focused her argument on proving that she had a disability and that she experienced an adverse impact regarding her employment at TES, she proposed an accommodation which she submitted TES could easily provide. TES responded to these submissions setting out the reasons why they could not accommodate Ms. McNeil. She had full opportunity to respond.

[71] I see no unfairness in this procedure.

Exercising discretion in an arbitrary way

[72] Ms. McNeil submits that the Tribunal exercised its discretion in an arbitrary way by making three patently unreasonable findings, namely:

i. the Tribunal member only assessed one of Ms. McNeil's complaints that being failure to accommodate and did not assess her complaint about the failure to renew her contract;

ii. the Tribunal member's finding that TES had a policy that everyone had to work from the office ignored relevant evidence; and

iii. ignoring the evidence of Ms. McNeil's diagnosis because it was still being investigated at the time her contract was not renewed and finding that Ms. McNeil failed to provide medical evidence to support her disability.

i. Assessing only part of Ms. McNeil's complaint

[73] Ms. McNeil said that the Tribunal member focused on TES's failure to accommodate Ms. McNeil's request to work from home and ignored the second aspect which was TES's failure to renew Ms. McNeil's temporary contract because of her disability. Ms. McNeil complained she was not given an extension of her temporary contract because of her performance which was affected by her disability. The only comment made by the Tribunal member regarding the failure to renew Ms. McNeil's contract was the following:

> The parties do not appear to dispute that from November 16 to the end of May 2018, Ms. McNeil was employed at TES's Saanichton location as a Client Service Advisor. The parties do not appear to dispute that Ms. McNeil was hired on a temporary basis and the final extension of her employment covered the period from December 2017 to May 2018.

[74] Affidavit #1 of Dita Jarolim attaches the record that was before the Tribunal member. The page references that I make below are both hard copy and electronic copy page references to this affidavit.

[75] At p. 27 of TES's response they say that Ms. McNeil's temporary assignment was not going to be renewed beyond May 31, 2018 based on her work performance issues and business needs at the time

[76] In her original complaint under the heading 2, What is the Adverse Impact on You? Ms. McNeil said at p. 15:

> I believed my work accommodation was only a matter of time and paperwork, as my home work setup was already in place from when I worked from home on previous occasions, and many TES agents work remotely from their homes 40-100% of the time. Additionally, I had upgraded my home setup with my own funds at my Team Lead's encouragement, and had recently purchased a new cell phone with an expensive unlimited day-time calling

> 2-year plan, specifically because I occasionally worked remotely, and hoped to do so more often as I gained experience.
>
> The actions of my employer left me with no income and no time-line for any incoming funds. I had no option but to leave my job, home, community (I had lived in Victoria since 2000), and my semi-dependent adult brother, to move 1200+km north to the town of Smithers, BC, where my parents have retired.
>
> TES/TELUS did not allow any reasonable opportunity for my doctor to make a diagnosis, but I believe that this was not a valid reason for my employer to deny an easily provided temporary accommodation until a proper diagnosis could be made. I am continuing to work with my new family doctor in Smithers BC, to obtain a proper diagnosis.

[77] Also, in her original complaint under heading 3. How was Each Ground of Discrimination a Factor in the Adverse Impact? Ms. McNeil responds at p. 16:

> Physical disability-my employer refused to accommodate my disability or even allow an investigation or diagnosis into the potential causes of the illness I seem to have develop[ed] at 2261 Keating Cross Rd. They insisted that I continue coming to a building suspected of making me ill, and harassed me when I followed my doctor's advice, and refused to come to work. My illness progressed far beyond what was reasonable or necessary, as I fruitlessly navigated endless paperwork.
>
> Mental Disability- These events caused a sharp increase in my anxiety. When [Dr. P] increased the dosage of my anxiety medication to compensate, I suffered a similar increase in the negative drug side effects, and was forced to return to my regular dosage and just "cope" with the increased anxiety and attendant effects as best I could. This has caused far-reaching effects, including affecting my job search, quality of life, long-term mental health.

[78] Ms. McNeil submits that it is apparent from her evidence that she had an expectation she would continue working for TES which is why she had upgraded her home setup. She had worked on a series of fixed term contracts which were all renewed in the past.

[79] TES acknowledged in their response at p. 27 under the heading Part B Justification for respondent's conduct and other defences:

> As a temporary employee, McNeil was eligible to earn sick hours, vacation, and participate in the extended health and dental plans. However, she was ineligible for short term or long term disability.
>
> In addition, her temporary assignment was not going to be renewed beyond the May 31, 2018 date based on her work performance issues and business needs at the time.

> The Complainant has not raised any facts that would support her allegations that she was discriminated against on the basis of a disability during the course of her employment at TELUS. TELUS/TES maintains that the Complainant failed to establish that she has a bona fide disability and all of the respective claims (short term disability, workplace accommodation request, and WSBC claim) were denied for similar reasons; "no diagnosis, no evidence to support a disability, no functional limitations or restrictions". In many of these instances McNeil did not provide the necessary information or was unavailable, unresponsive of unable to contact.

[80] At p. 1080 Ms. McNeil's submitted in her response to the application to dismiss her claim:

> Complainant reported an allergic reaction when working in the employer's workplace. Rather than investigating the cause, and, working with the Complainant to accommodate or remediate the issue, TES began a campaign designed to either terminate her employment or cause the Complainant to resign.

[81] At p. 1086:

> It seems that TES supervisors seized on the Complainant's allergic reaction as an opportunity to get rid of an employee that they feared might require accommodation for her then undiagnosed CFS / ME. Certainly during this same period, they did manage to terminate the co-worker who suffered from this health issue.

[82] Ms. McNeil submits that TES's failure to renew her contract due to her disability is discriminatory. She relies on *Duong v. CIBC Wood Gundy*, 2006 BCHRT 194 (CanLII) which dealt with fixed term contracts. At para. 18, the Tribunal member says that there is nothing wrong as a matter of human rights law with a fixed term contract however if the employer is using fixed term contracts as a means of avoiding or evading its obligations to employees that could raise can significant concerns under human rights law.

[83] At para. 19 the Tribunal member says that the determination of what the parties' expectations were with respect to continuation of the employee's employment after the expiry of her latest contract extension and maternity leave and their reasons for not renewing a fixed term contract would require a full evidentiary hearing including the benefit of cross-examination. In the circumstances the Tribunal

found it could not conclude that the complaint had no reasonable prospect of success.

[84] The critical piece of this complaint is whether Ms. McNeil's contract was not renewed because of her disability. There has been no investigation into whether her slow performance was caused by her disability.

[85] Ms. McNeil submits that TES's failure to accommodate her by permitting her to work under the Work Styles Program is only one aspect of her alleged discrimination. She also alleges that the failure to renew her employment contract was discriminatory. Accordingly, the Tribunal member missed part of the complaint and that is patently unreasonable.

[86] In *Byelkova*, Justice Crerar found that a decision which failed to consider one aspect of discrimination was patently unreasonable and was an arbitrary exercise of discretionary authority within the meaning of s. 59(4)(a) of the *ATA*.

[87] TES submits that even if Ms. McNeil's performance problems were related to her disability she still had not provided sufficient medical evidence to support her disability-related need for accommodation.

[88] TES submits that failure to renew her contract was not part of Ms. McNeil's complaint to the HRC. Ms. McNeil filed her complaint on July 15, 2018 slightly over one month after the expiry of her final contract.

[89] TES submits that adding a claim for failure to renew her contract would be an improper amendment to the complaint. They address this in their reply submissions at p. 1553; paras. 8- 12 which I will reproduce here:

> 8. The Complainant has attempted to remedy deficiencies in the Complaint by raising a number of new allegations which are not properly before the Tribunal, see, for instance, paragraphs 1, 4-8 11-13, 24-29 and 31-33, of the Response which contain assertions of fact and allegations not set out in the Complaint (together, the "New Allegations").
>
> 9. TES submits that the New Allegations ought to be excluded from any consideration of the ATD.

> 10. If there is an application to dismiss outstanding, the Tribunal's Rules of Practice and Procedure require an application to be made to amend a complaint and add new allegations: Rule 24(4)(b).
>
> 11. The reason for this rule is fairness. Once an application to dismiss has been filed, it is unfair to add allegations which TES applicant would not have had the opportunity to address. It is not a question of using the correct form, but of ensuring fairness to TES.
>
> 12. Introducing new allegations when an application to dismiss is outstanding results in significant prejudice to TES which must then respond to a "moving target": *Singh v. Kane, Shannon & Weiler Management Corp.,* 2012 BCHRT 139, application for judicial review denied 2014 BCSC 1043 at para. 36 (see also: *Parchment v. B.C.,* 2010 BCHRT 345 at paras. 26 to 27).

[90] In response to Ms. McNeil's suggestion that TES ought to have inquired into Ms. McNeil's disability before not rehiring her, TES submits that this appeal is based on whether or not there were sufficient medical information and that is the only consideration at play for the Tribunal. TES submits that Ms. McNeil failed to substantiate a limitation or restriction requiring accommodation.

[91] TES submits that the Tribunal member did consider Ms. McNeil's new submissions at paras. 21-29 of the decision. The Tribunal member did reference the new evidence from Ms. McNeil that after she relocated and moved in with her parents she found a new doctor was referred to a specialist who diagnosed her with among other things, CFS/ME. She referenced Ms. McNeil's allegation that TES discriminated against her by failing to investigate the cause of her allergy symptoms and work with her to accommodate or remediate the issue. She alleges that instead TES refused to allow her to work from home and started a campaign designed to either terminate her employment or cause her to resign.

Ruling

[92] I agree with TES that the complaint did not clearly articulate an allegation of discrimination arising from TES's failure to renew Ms. McNeil's contract. Reading the evidence filed in support of the original complaint it does appear that Ms. McNeil had an expectation that she would continue to work for TES. The evidence also supports the conclusion that her work performance had deteriorated and this was the reason

that TES was not intending to renew her contract. The triable issue is whether her deteriorated performance had something to do with her disability. TES was clearly aware of her mental and physical disability.

[93] Ms. McNeil's material filed in response to TES's application to dismiss her claim is clear. She is alleging discrimination for failure to renew her contract.

[94] The Tribunal member repeats that allegation but does not reframe it into a ground for discrimination. She does not address the objection of TES to Ms. McNeil raising a new ground for discrimination where an application to amend should have been required.

[95] The Tribunal member ignores Ms. McNeil's submissions that she expected that her contract would be renewed and her reply submissions where she more clearly articulates a complaint of discrimination for failure to renew her contract. The Tribunal member seems willing to reframe TES's submissions and to articulate a BFOR defence where two experienced lawyers did not argue it but does not assist the self-represented complainant in articulating a second ground of discrimination when it appears that is what Ms. McNeil was saying in her responding submissions.

[96] If the second ground for discrimination is out of time or improperly raised, then that should have been addressed in the ruling. TES addressed this directly in their objection at p. 1553 and the Tribunal member did not consider it.

[97] I find that in all the circumstances, the Tribunal member exercised her discretion in an arbitrary way by failing to consider this second ground of discrimination which was encapsulated in the submissions made by Ms. McNeil and in failing to consider TES's procedural objection.

ii) Finding TES's policy that all Employees had to work from the office and ignoring evidence to the contrary

[98] Ms. McNeil also submits that the Tribunal member's finding that all employees had to work from the office was patently unreasonable. That finding is at para. 47 of the Decision which says:

> In their submissions, neither party expressly articulated the standard at issue in this case in the context of a BFOR defence. However, for the purpose of this application I consider it to be TES's requirement that employees work in the office, subject to its Work Styles Program that allows qualified employees to work from home depending on their individual circumstances, job performance and function, mobile readiness, and space availability. In the absence of any evidence to the contrary, I accept it is reasonably certain that TES would be able to establish the first two elements of a BFOR defence at a hearing.

[99] Ms. McNeil submits in her response to the application to dismiss at p. 732 that it was commonplace for TES employees to work from home. All the required software was installed in their assigned laptop computers and they normally carried those from home to work each day. Taking the computers home was a requirement. The purpose was so that they could work from home in the event that they could not come to the workplace the next day. She often worked from home for various reasons such as appointments, friends visiting, inclement weather, mild illness and she had even worked remotely from her parents' home while on a family vacation. This accommodation was no longer permitted after she reported her symptoms to TES.

[100] In TES's application to dismiss they admitted that one employee did work from home. They refused to allow Ms. McNeil to work from home because she had performance issues. At p. 26 in TES's response they say that members are expected to meet or exceed average handling time for calls. Throughout 2017 and the portion of 2018 worked, McNeil's results were below average for the team. She was not encouraged to set up her home office as the leadership felt she would benefit from working in the office where she could receive timely coaching to improve her performance. The performance issues are described below.

[101] In their application to dismiss at p. 62, para. 16, TES says that on January 19, 2018 Ms. McNeil met with her supervisor Mr. Yoshida and was advised that her average handling time for client phone calls was almost twice as high as company goals and as such she was not meeting her productivity threshold. She was complaining of health problems at the time and Mr. Yoshida communicated to

Ms. McNeil that she would have to provide medical support in order to work from home as her performance would not qualify her for TES's work from home program.

[102] TES submits that the fact that Ms. McNeil worked from home from time to time and other employees worked from home is irrelevant. The issue is that Ms. McNeil did not provide sufficient evidence to support her request for accommodation.

Ruling

[103] The Tribunal member based her finding on material provided by TES. The standard articulated by TES was that employees worked in the office. There were exceptions and these were articulated in the Work Styles Program. The Work Styles Program was available to employees under specified circumstances. Performance was one of those circumstances. According to TES's evidence, if the employee was not meeting company standards, having that employee work in the office was preferred so that they could receive coaching from a supervisor on site.

[104] There is evidence that TES granted permission to employees from time to time to work from home. Ms. McNeil set out some examples of when she was granted permission. She alludes to another employee who works from home on a permanent basis. When Ms. McNeil was granted permission, it was on a day-by-day basis dependent on weather or illness. The Work Styles Program addresses a long term request to work from home.

[105] When the Tribunal member found that TES could reasonably meet the first two elements of the BFOR test, she did so based on the evidence. There was no evidence to suggest that TES's requirement that employees work in the office was established in bad faith. The work from office standard enabled TES to provide effective supervision of its employees.

[106] I do not find an error in the Tribunal member's findings on this standard.

iii) Ignoring the evidence of Ms. McNeil's diagnosis because of delay

[107] Ms. McNeil submits that she did provide medical evidence to support her disability as soon as she received a diagnosis. The Tribunal member was aware that Ms. McNeil finally did get a diagnosis because she references it in para. 28 of the Decision. Para. 39 of the Decision suggests that the Tribunal member did not consider the new medical evidence because it says "the medical information from Ms. McNeil's doctors does not indicate a diagnosis, prognosis, or treatment plan".

[108] The Tribunal member focused on the lack of medical information Ms. McNeil provided to TES that identified any disability-related limitations or restrictions to support her accommodation request. She references the vague medical letter from Dr. P which was obtained before Ms. McNeil had a diagnosis.

[109] Ms. McNeil submits that an employer has a duty to make inquiries as to whether a disability had contributed to a worker's work place difficulties: *Willems-Wilson v. Albright Drycleaners*, 1997 CanLII 24821, paras. 39, 41.

[110] Ms. McNeil cites *Renaud* at p. 995 and *Graham* at para. 2 in support of her submission that the accommodation process may take some time as medical information is obtained, assessments are done, worksites are investigated, and job functions researched. TES did not give Ms. McNeil sufficient time to investigate her disability before making the decision to not renew her contract.

[111] In this case, TES was aware of Ms. McNeil's anxiety condition and referenced it in correspondence recommending that she contact the confidential Employee Assistance Program.

[112] TES submits that it was improper for Ms. McNeil to introduce her new diagnosis in reply to an application to dismiss. She should have made an application to amend her complaint. When questioned by the Court on whether an amendment was available to Ms. McNeil, TES submitted that it would be a reviewable error to consider new evidence without an amendment.

[113] TES did make this submission in their reply to the application to dismiss at p. 1553, paras. 8-16.

Ruling

[114] When at para. 48 of the Decision the Tribunal member said "the evidence indicates that none of the medical information Ms. McNeil provided to TES identified any disability related limitations or restrictions to support her accommodation request" the Tribunal member did not consider Ms. McNeil's anxiety and mental disability nor did she consider the fact that the investigation into the physical disability was ongoing.

[115] At p. 760 of her responding submissions to the application to dismiss, Ms. McNeil attached the Person with Disabilities Designation Application form (the PWD form) completed by her new physician Dr. Voyer on April 11, 2019. At Section 1 of the PWD form, Ms. McNeil describes her disability. She said that in the winter of 2018 her health declined substantially and she lost her job. In the summer 2018 she was referred to specialist Dr. Voyer and he was able to diagnose her illness.

[116] In Section 2 – Medical Report completed by Dr. Voyer, he diagnosed Ms. McNeil with chronic fatigue syndrome, environmental sensitivities, digestive disorder, anxiety and mood disorder. He says that Ms. McNeil has crippling fatigue and becomes exhausted with minimal physical exertion and with stress as well as with response to a number of environmental triggers. At that point in time Ms. McNeil was having a great deal of difficulty leaving home.

[117] Dr. Voyer said "She will likely have her current condition forever." Under communication and cognitive difficulty Dr. Voyer said "she suffers from brain fog, deficits and executive functioning, memory, emotional disturbance, motivation impulse control and attention for or sustained concentration" (at p. 771).

[118] Dr. Voyer listed the daily living activities that Ms. McNeil struggles with. They include personal self care, meal preparation, basic housework, daily shopping,

mobility inside the home, mobility outside the home, transportation and management of finances. Her social functioning is affected (p. 772). Dr. Voyer says “I see many patients with ME/CPS. Dawn’s symptoms are [illegible, possibly among] the most severe I’ve seen” (p. 773).

[119] The Tribunal member references Ms. McNeil’s new diagnosis at para. 28 of the Decision but she does not consider it in her analysis. It does disclose disabilities requiring accommodation.

[120] The Tribunal member also did not consider the fact that the employer was aware that Ms. McNeil was pursuing a diagnosis for her disability at the time her final contract came to an end but did not make any inquiries or postpone the decision about her employment until she had sufficient time to obtain a diagnosis. Ms. McNeil alludes to this in her original complaint when she said at p. 10:

> TES/TELUS did not allow any reasonable opportunity for my doctor to make a diagnosis, but I believe that this was not a valid reason for my employer to deny an easily provided temporary accommodation until a proper diagnosis could be made. I am continuing to work with my new family doctor in Smithers BC, to obtain a proper diagnosis.

[121] The accommodation process was cut short and this was not noted by the Tribunal member.

[122] The Tribunal member ignored significant new medical evidence completely. She did not consider TES’s responsibility to inquire or to provide adequate time for Ms. McNeil to obtain her diagnosis. I find this is a patently unreasonable exercise of discretion. She also did not consider whether this new medical evidence was properly before her or whether an application for an amendment to the complaint had to be brought before she could consider the new medical evidence. That procedure would have addressed TES’s need for an opportunity to respond.

[123] TES submits that it is unfair for them to have to address new medical evidence which creates a moving target for them to respond to. I suggest the balance of unfairness favours Ms. McNeil who was still investigating the cause of her disability when her contract ended and who made TES aware of this fact. To

suggest that she should not be given an opportunity to present evidence of her actual diagnosis would create an arbitrary cut-off date which would be impossible to meet given the time it takes to get an appointment with a specialist to investigate a disability.

Error of law

[124] Ms. McNeil submits that the adjudicator mixed up the *prima face* test for discrimination and the BFOR defence in her decision. The Tribunal member applied the *prima facie* discrimination test when she concluded that the evidence indicates that none of the medical information Ms. McNeil provided to TES identified any disability-related limitations or restrictions to support her accommodation request.

[125] Ms. McNeil submits that the Tribunal member failed to properly define the standard that TES was adopting in its defence or whether that standard was adopted in good faith. The Tribunal member never explored whether TES would have faced any undue hardship in accommodating persons with Ms. McNeil's characteristics by allowing them to work from home. These are statutory requirements that the Tribunal member failed to take into account. The BFOR test is enshrined in the *Code* at p. 13(4). Section 59(4) of the *ATA* says that a discretionary decision is patently unreasonable if the discretion fails to take statutory requirements into account.

[126] The respondents submit that there is no error of law. The Tribunal member properly defined the BFOR test. One does not have to slavishly follow the *Meiorin* test in every case. In this case there was no real standard at issue in the BFOR test for the Tribunal member to apply.

[127] In *Quackenbush v. Purves Richie Equipment*, 2006 BCSC 246, similar to the case at bar, neither party argued the three requirements set out in *Meiorin*. Although the requirements were not specifically argued the Tribunal considered the factors anyway. On judicial review, counsel for Mr. Quackenbush submitted that it was an error of law for the tribunal not to require counsel to argue all three requirements of the test and suggested that failure led to an insufficient examination of the mandatory test. Counsel for Purves Richie argued that where the crux of the dispute

between the parties is whether there is any sufficient work that can be performed by the employee within the individualized limitations of his particular disability, the first two requirements of the *Meiorin* test are commonly conceded.

[128] Justice Meiklem said at para. 52: “it seems to me that slavish adherence to a formal analysis using the precise language of the test set out in *Meiorin* creates conceptual difficulties in cases that do not, like *Meiorin* and *Grismer*, involve the adoption and application of qualification standards.” He dismissed the petitioner’s argument that the Tribunal erred in law in not requiring argument of all three requirements of the *Meiorin* test.

[129] This approach is followed in the *C.S.W.U. Local 1611 v. Seli Canada*, 2008 BCHRT 436 which is a complex case involving the construction of a tunnel on the Canada line project. The original complaint was that Latin American workers were discriminated against in comparison to Canadian residents with whom they work. A three-person tribunal panel noted that the justification put forward by the respondent did not easily fit within the conventional *Meiorin* analysis. The panel did not follow a rigid *Meiorin* analysis but considered the principles underlying the *Meiorin* analysis insofar as they were of assistance in determining if the respondent had established a BFOR defence. Counsel for TES cites several other cases where the *Meiorin* test was not strictly adhered to.

[130] Counsel for TES submits that it is unnecessary for the Tribunal member to decide the requisite standard in her analysis. They submit that this case is much different than the *Meiorin* case where the clear standard to be assessed was physical fitness.

[131] TES submits that the Tribunal member did assess the third element of the *Meiorin* test and its primary consideration was whether TES could establish that the medical information provided did not support Ms. McNeil’s accommodation request.

[132] TES argues that the employee has an obligation to facilitate the search for their own accommodation and bring to the attention of the employer facts related to

discrimination facilitating implementation of reasonable proposals and accepting reasonable accommodation. Where an employer has no way of knowing that a complainant requires accommodation there are no reasonable or practical steps they can take to avoid impact.

Ruling

[133] It appears in the authorities that strict adherence to the *Meiorin* test is not required in every decision and therefore it is not an error of law to omit that analysis.

[134] That is not what happened here. The Tribunal member does not discuss how she arrived at her conclusions but she does engage a *Meiorin* analysis and finds that TES has a reasonable prospect of success in this defence. She does not provide reasons.

[135] On the evidence it appears that TES does have a standard that employees have to meet. It requires workers to meet timing standards for their calls. If a worker takes twice as long on a call then they are notified of a “performance issue”. The standard connected performance of the job is efficiency. Presumably TES believes the standard is necessary to fulfil legitimate work-related purposes which I assume is to be efficient and profitable and achieve customer satisfaction. There are many unanswered questions: Is it possible for TES to modify that standard for disabled employees? Can TES reasonably accommodate employees who are slower but can still perform the work and can they accommodate those employees from a home work environment? Would the increased time it takes to complete a call cause TES undue hardship?

[136] I find there is insufficient evidence on the record to make these findings under part 3 of the *Meiorin* test.

[137] The adjudicator did not analyze the third element on these terms but allowed the defence based on the “lack of medical evidence”. I have found that this was a reviewable error. Whether the lack of medical evidence should have been

considered in the *prima facie* discrimination analysis or in the third part of the *Meiorin* test is therefore immaterial to this decision.

[138] Strict adherence to the *Meiorin* analysis may not be required but if a Tribunal member does engage in the analysis then they must do so based on evidence in the record. I find no error of law but rely on my decision that the Tribunal member exercised her discretion in an arbitrary way in failing to consider the new medical evidence.

Conclusion

[139] I conclude that the Tribunal member has exercised her discretion arbitrarily in the following ways:

a) not considering TES's failure to renew the fixed term contract as a ground for discrimination;

b) not considering substantial medical evidence provided by Ms. McNeil after the contract was not renewed;

c) failing to consider the argument that this was a new issue and new evidence requiring an amendment to the complaint;

d) not considering the employer's duty to give Ms. McNeil reasonable time to investigate her disability before deciding not to renew her fixed term contract when it knew that she alleged mental and physical disabilities and was still investigating their causes.

[140] The decision to dismiss Ms. McNeil's claim under s. 27(1)(c) of the *Code* is set aside and remitted back to the Tribunal for reconsideration. The Tribunal should consider whether there is a claim of discrimination arising from TES's failure to renew Ms. McNeil's fixed term contract while Ms. McNeil was still investigating her disability. The Tribunal should consider the medical evidence provided by Ms. McNeil in support of her application for a Person with Disability Designation and

in particular consider the impact her disability has on her activities of daily living and work performance.

[141] The Tribunal should consider and rule on TES's argument that Ms. McNeil is raising new evidence and should apply for an amendment of her claim.

[142] The Tribunal should further evaluate the BFOR defence and whether performance speed is a reasonable standard set by TES and whether TES could accommodate someone who could not meet the performance speed standard due to a disability, without suffering undue hardship.

[143] This direction assumes that TES wishes to maintain their dismissal application. If they prefer to proceed straight to a hearing on the complaints they may do so. I leave that decision to the parties and the Tribunal.

[144] Ms. McNeil is entitled to her costs from TES but not from the Tribunal.

"B. M. Young, J."
The Honourable Madam Justice Young