

Indexed as: Pattinson v. University of Northern British Columbia and another (No. 2), 2024
BCHRT 110

IN THE MATTER OF THE *HUMAN RIGHTS CODE*,
RSBC 1996, c. 210 (as amended)

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

BETWEEN:

Richard Pattinson

COMPLAINANT

AND:

University of Northern British Columbia and Bjorn Petersen

RESPONDENTS

REASONS FOR DECISION
APPLICATION TO DISMISS A COMPLAINT
Section 27(1)(c), (d)(ii) and (f)

APPLICATION TO AMEND COMPLAINT AND RESPONSE TO THE DISMISSAL
APPLICATION
Rule 24

Tribunal Member:

Edward Takayanagi

On their own behalf:

Richard Pattinson

Counsel for the Respondents:

Michael Wagner and Paige Ainslie

I INTRODUCTION

[1] Richard Pattinson filed a complaint against his employer, the University of Northern British Columbia and his supervisor, Bjorn Petersen, alleging they failed to accommodate him when Mr. Petersen's behaviour exacerbated his mental disability, and subsequently refused to allow him to return to work without undergoing an independent medical examination [IME]. He says this conduct constituted discrimination regarding employment on the ground of mental disability contrary to s. 13 of the *Human Rights Code*.

[2] Mr. Pattinson subsequently filed a second complaint with additional allegations of discrimination by the Respondents. The two complaints have not been joined but for the purposes of this application the parties have addressed the allegations in both complaints. I am satisfied that it is in the interest of the just and efficient resolution of both complaints to hear them together given they involve the same parties and arise from the same employment relationship. Therefore, moving forward the two complaints will be joined pursuant to s. 21(6) of the *Code*.

[3] The Respondents deny discriminating against Mr. Pattinson. They apply to dismiss both complaints under s. 27(1)(c), (d)(ii) and (f) of the *Code*. For the reasons set out below, I deny the application to dismiss. Under s. 27(1)(c) I am not persuaded that Mr. Pattinson's complaint has no reasonable prospect of success. The information before me takes Mr. Pattinson's complaint out of the realm of conjecture and I am not persuaded that the University is reasonably certain to prove a defence at a hearing. Under s. 27(1)(f) and s. 27(1)(d)(ii), I am not persuaded that the substance of Mr. Pattinson's complaint before the Tribunal has been appropriately addressed and dealt with in another proceeding so it would not further the purposes of the *Code* to proceed.

[4] Mr. Pattinson applies under Rule 26 of the Tribunal's *Rules of Practice and Procedure* to amend his complaint to add new allegations and amend his response to the dismissal application to revise and edit for clarity. For the reasons that follow, I deny Mr. Pattinson's amendment applications. In my view, allowing Mr. Pattinson to amend either his complaint or

his response to the dismissal application at this stage would be contrary to the principles of procedural fairness and prejudicial to the Respondents because it would effectively create a moving target.

[5] In his response to the dismissal application Mr. Pattinson consents to the dismissal of the individual respondent. I therefore allow this portion of the application and dismiss the complaint as against the individual respondent.

[6] To make this decision, I have considered all the information filed by the parties. In these reasons, I only refer to what is necessary to explain my decision.

II BACKGROUND

[7] I set out the background and the procedural history to provide context. The background is taken from the parties' materials. I make no findings of facts.

A. Background

[8] Mr. Pattinson was employed by the University as an English Language Studies Instructor. Mr. Petersen was his supervisor.

[9] On April 6, 2018, Mr. Pattinson met with Mr. Petersen to discuss his job duties and performance. Mr. Pattinson says the meeting negatively affected his mental health. He emailed Mr. Petersen after the meeting to say he was struggling with mental illness. In response, Mr. Petersen advised Mr. Pattinson to speak to the University's Human Resources department and access the Employee Assistance Program.

[10] On April 24, 2018, Mr. Pattinson met with the University's Director of Health and Wellbeing to discuss his health concerns. Mr. Pattinson was provided forms for his physician to complete so the University had current and accurate medical information.

[11] On June 12, 2018, Mr. Pattinson met with Mr. Petersen to discuss an incident when he left his class unattended and his overall job performance. Mr. Pattinson did not return to work after this meeting.

[12] Mr. Pattinson submitted a medical form completed by his physician dated June 20, 2018, stating he: would be off work for two to four weeks; suffered from anxiety and panic attacks, and; he would require accommodation when he returned to work.

[13] On July 11, 2018, Mr. Pattinson provided another note from his physician stating he needed to remain off work for an additional two weeks.

[14] On July 13, 2018, Mr. Pattinson filed a Bullying & Harassment complaint against Mr. Petersen with the University. The University hired a third-party investigator who completed an investigation and provided the University an Investigation Report on January 22, 2019. The investigator concluded that Mr. Petersen had not engaged in harassment or discrimination and neither Mr. Petersen, nor the University had failed to accommodate Mr. Pattinson.

[15] On August 22, 2018, Mr. Pattinson submitted a Return-to-Work Form signed by his physician, stating that he was fit to return to work with no restrictions. The University thought this information appeared to contradict the medical information provided on June 20, 2018, stating Mr. Pattinson would require accommodation. The University sought clarification from Mr. Pattinson's physician.

[16] On August 31, 2018, because Mr. Pattinson's physician did not respond and clarify whether Mr. Pattinson required accommodation, the University decided that Mr. Pattinson must attend an Independent Medical Examination [IME] to determine the nature and extent of his disability, if any, and what accommodations may be required before he could return to work.

[17] Mr. Pattinson attended an IME with a psychiatrist on April 16, 2019. The psychiatrist issued a report dated May 12, 2019. Mr. Pattinson was diagnosed with major depressive

disorder that was in remission. A graduated return to work over four to six weeks, and for Mr. Pattinson to be supervised by somebody other than Mr. Petersen was recommended.

[18] While Mr. Pattinson was off work, the University discontinued the English Language Studies program, and the role of English Language Studies Instructor was eliminated. The University laid off Mr. Pattinson. Upon receiving the IME results the University, in accordance with the collective bargaining agreement, arranged for Mr. Pattinson to bump into the position of Employment Services Representative [ESR] for a trial period of four months.

[19] Mr. Pattinson returned to work on July 8, 2019, in the ESR role, under a new supervisor. Mr. Pattinson met regularly with his supervisor to discuss his performance.

[20] On October 8, 2019, Mr. Pattinson informed his supervisor that he was having difficulties processing and retaining information because of his mental health and requested accommodation. Mr. Pattinson subsequently took a medical leave from October 17, 2019, to January 2, 2020.

[21] During his leave Mr. Pattinson provided the University a note from his physician dated October 31, 2019, indicating he was suffering from anxiety and panic attacks which impacted his concentration, reaction time, communication, and emotional stability.

[22] Mr. Pattinson provided the University a Return-to-Work form completed by his physician on December 20, 2019. It said that Mr. Pattinson could return to work with modified duties. Mr. Pattinson's doctor did not set out any workplace limitations or restrictions, but recommended Mr. Pattinson be allowed to take breaks as needed, communicate in writing, and be provided positive feedback.

[23] Mr. Pattinson returned to work in the ESR role on January 2, 2020.

[24] On January 23, 2020, Mr. Pattinson met with his supervisors who informed him that he had not passed his four-month trial period. The University laid off Mr. Pattinson.

B. Procedural History

[25] On July 17, 2018, Mr. Pattinson filed his complaint alleging discrimination in the area of employment on the basis of mental disability over the period of April 6, 2018, to May 8, 2018.

[26] On September 11, 2018, Mr. Pattinson filed an amendment to his complaint adding allegations of discrimination from May 31, 2018, to September 28, 2018.

[27] In May 2019, Mr. Pattinson filed a second complaint related to events between May and August 2018. The two complaints were not joined.

[28] On April 19, 2020, Mr. Pattinson filed an application to amend his original complaint to add allegations of discrimination that occurred in 2016, between July 27, 2018, to July 2019, and from August 2019 to 2020.

[29] On April 30, 2020, the Respondents filed an application to dismiss both complaints under s. 27 of the *Code*.

[30] On March 11, 2021, the Tribunal issued a decision on Mr. Pattinson's application to amend his complaint: *Pattinson v. University of Northern British Columbia and another*, 2021 BCHRT 33. The Tribunal allowed Mr. Pattinson's application in part and accepted the allegations of July 27, 2018, to July 2019, and from August 2019 to 2020.

[31] On May 7, 2021, the Respondents filed an amended application to dismiss addressing the allegations accepted in Mr. Pattinson's amended complaint.

[32] On June 18, 2021, Mr. Pattinson filed his response to the dismissal application.

[33] On June 28, 2021, the Respondents filed their reply.

[34] On July 17, 2022, Mr. Pattinson filed an application to amend his first complaint to add allegations of discrimination from March 2020 to November 2020.

[35] On July 25, 2022, Mr. Pattinson filed an application to amend his response to the dismissal application.

[36] On July 29, 2022, the Respondents emailed the Tribunal opposing Mr. Pattinson's application to amend his response to the dismissal application. They asked that the Tribunal decide the application without written submissions from the parties given the sheer volume of submissions that have already been required in the proceedings.

[37] On August 18, 2022, the Respondents filed their response to Mr. Pattinson's application to amend his first complaint.

[38] On August 25, 2022, Mr. Pattinson filed a reply to his application to amend his response to the dismissal application.

III DECISION

A. Application to Amend the Complaint

[39] Rule 24(4) of the Tribunal's *Rules of Practice and Procedure* requires that a complainant must bring an application to amend a complaint if:

- a. the amendment adds an allegation that occurred outside of the time limit for filing the complaint under section 22 of the *Code*;
- b. there is an outstanding application to dismiss the complaint; or
- c. the hearing date is less than four months from the date the amendment is filed.

[40] The overarching purpose of the Tribunal's Rules is to facilitate the just and timely resolution of complaints. The requirement that a party must apply to amend their complaint in the circumstances set out under Rule 24(4), is generally aimed at ensuring fairness between the parties.

[41] In *Pausch v School District No 34. and others*, 2008 BCHRT 154 [*Pausch*] at para. 28, the Tribunal explained that in the context of an amendment filed while an application to dismiss is

outstanding, the purpose of Rule 24(4) is to “provide procedural fairness ... by preventing a moving target”.

[42] In *Patterson v Panacea Outreach and Support Services and others*, 2015 BCHRT 150 [*Patterson*] at para. 49, the Tribunal further explained that when there is an outstanding application to dismiss, the Tribunal “tends to accept amendments which particularize or are otherwise part and parcel of the original complaint while tending to find new allegations not apparently connected to the original allegations to be less conducive to procedural fairness and more of a ‘moving target’”.

[43] Mr. Pattinson’s proposed amendment relate to events that took place from March 6, 2020, to November 2020. The allegations relate to difficulties Mr. Pattinson says he had in a new role as a Facilities Membership Assistant which began on March 9, 2020.

[44] Mr. Pattinson submits that the allegations in his proposed amendment pertain to the same allegation as contained in his amended complaint; that the Respondents failed to engage with him and accommodate his disabilities. Mr. Pattinson says that because his proposed amendment is merely a continuation of his existing complaint the Respondents will not be prejudiced if his amendment is accepted because they will not need to change their arguments. He submits that no moving target is created for the dismissal application.

[45] The Respondents oppose the application to amend and say that the proposed amendment essentially consists of a new complaint arising from employment in a wholly different role with a different reporting structure.

[46] I agree with the Respondents. I find that there is a clear delineation between the allegations in Mr. Pattinson’s complaint as accepted by the Tribunal and his proposed amendment. The proposed amendment deals with allegations during Mr. Pattinson’s employment in a different job than he held during the time of his complaint. It involves different duties and reporting to a different supervisor. In my view, the proposed amendments are distinct from – not part and parcel of – the allegations in his complaint.

[47] Mr. Pattinson’s assertion that adding these allegations to his complaint would not require any more resources and would not unfairly prejudice the Respondents ignores the reality that these new allegations extend the period of Mr. Pattinson’s complaint by an additional nine months. It also ignores the reality that the Respondents would have to revise their response to the complaint, their dismissal application, and adduce additional evidence in relation to the allegations of discrimination during this new period. While Mr. Pattinson suggests that it would be an efficient use of the Tribunal’s resources to allow his amendment and have the Tribunal consider all his allegations in one complaint, in the circumstances before me I cannot say that it would serve the Tribunal’s purpose of a “just and timely” resolution of complaints to add these new allegations to the complaint.

[48] If I were to allow these new allegations to be added to the complaint at this stage, the Respondents would be faced with a moving target. They would be required to expend time and expense to consider and respond to the new allegations. This would not be consistent with a timely resolution of this complaint as the Tribunal’s decision on the outstanding dismissal application would be delayed until the parties had an opportunity to revise their submissions.

[49] For the above reasons, I decline to allow Mr. Pattinson to amend his complaint to add the new allegations of events occurring after March 6, 2020.

B. Application to Amend the Response to the Dismissal Application

[50] Mr. Pattinson applies to amend his response to the dismissal application. He says that he prepared his submissions while suffering from his disability and he is not proud of the disarray and errors contained in his materials. He now seeks to replace his response with an amended response. He says he has fixed grammatical and lexical errors and culled large amounts of redundant information to improve its clarity and readability.

[51] The Respondents oppose the application to amend except to the extent that Mr. Pattinson adds any new documents he believes are relevant to the original response. They say the proposed amendment involves a complete retelling of the facts at issue and would be prejudicial to the Respondents requiring an amendment to their reply submissions.

[52] Because the Respondents consent to the addition of the new documentation submitted by Mr. Pattinson in support of his original response, I accept these materials. The materials accepted are specifically five pages of correspondence and a 29-page decision from the Worker's Compensation Appeal Tribunal dated April 21, 2022.

[53] The Tribunal's Rules do not expressly contemplate amending a response to a dismissal application. However, the Tribunal is guided by its overarching goal of a just and timely resolution of complaints in a procedurally fair manner. I find the principles set out in *Pausch* and *Patterson* are applicable.

[54] In my view, it would not serve the purposes of the Tribunal or be procedurally fair to accept Mr. Pattinson's proposed amendment to his response.

[55] First, the proposed amended response is wholly rewritten and reformatted compared to his original response. This is not a case where the original response has been obviously edited to enable the reader to easily compare what has changed between drafts: there are no strikethroughs of text he no longer relies on, nor has he underlined new text as one might see in amended court pleadings. Here, Mr. Pattinson seeks to replace his 18-page response with 19-pages of rewritten and reformatted materials. It is not obvious to me that the proposed amendments are substantially the same as the original response. In my view, the Respondents would be required to expend time and effort to review and compare the amended response and likely seek to revise their reply, if I were to allow Mr. Pattinson's amended response. This is not consistent with the Tribunal's goal of a just and timely resolution of the complaint.

[56] Second, the basis for Mr. Pattinson's application to amend is that he believes his submission contains "grammatical and lexical errors" and is not of a quality that represents his academic credentials or his "best effort." While I appreciate that Mr. Pattinson believes he could clarify and improve his submissions, that is not a sufficient basis for amending a response to an outstanding dismissal application. It is common for the Tribunal to get submissions from parties that contain grammatical and lexical errors. Such slips do not generally prevent the

Tribunal from considering the substance of the arguments and decided the issues raised in the submissions.

[57] Finally, while Mr. Pattinson says he was suffering from his disability at the time he prepared his response, he has not suggested that he would be prejudiced if his application to amend is not accepted. Mr. Pattinson says the only things he seeks to amend are grammatical, lexical, and stylistic errors. He seeks, he says, to make his submissions clearer and cull redundant information. He does not suggest that his disability prevented him from responding to the substance of the application. In these circumstances it would not be in the interest of a timely and efficient process to accept the amendments that purports to change the form, but not the substance, of the response. This is particularly so because verifying whether the proposed amendments merely change the form and not the substance will take time and resources.

[58] For the reasons above, I decline to allow Mr. Pattinson to amend his response to the dismissal application.

C. Application to Dismiss

1. Section 27(1)(c) – Is there no reasonable prospect the complaint will succeed?

[59] The Respondents apply to dismiss Mr. Pattinson’s complaint on the basis that it has no reasonable prospect of success: *Code*, s. 27(1)(c) The onus is on the Respondents to establish the basis for dismissal.

[60] Section 27(1)(c) is part of the Tribunal’s gate-keeping function. It allows the Tribunal to remove complaints which do not warrant the time and expense of a hearing.

[61] The Tribunal does not make findings of fact under s. 27(1)(c). Instead, the Tribunal looks at the evidence to decide whether “there is no reasonable prospect that findings of fact that would support the complaint could be made on a balance of probabilities after a full hearing of the evidence”: *Berezoutskaia v. British Columbia (Human Rights Tribunal)*, 2006 BCCA 95 at para. 22, leave to appeal ref’d [2006] SCCA No. 171. The Tribunal must base its decision on the

materials filed by the parties, and not on speculation about what evidence may be filed at the hearing: *University of British Columbia v. Chan*, 2013 BCSC 942 at para. 77.

[62] A dismissal application is not the same as a hearing: *Lord v. Fraser Health Authority*, 2021 BCSC 2176 at para. 20; *SEPQA v. Canadian Human Rights Commission*, [1989] 2 SCR 879 at 899. The threshold to advance a complaint to a hearing is low. In a dismissal application, a complainant does not have to prove their complaint or show the Tribunal all the evidence they may introduce at a hearing. They only have to show that the evidence takes their complaint out of the realm of conjecture: *Workers' Compensation Appeal Tribunal v. Hill*, 2011 BCCA 49 at para. 27.

[63] Many human rights complaints raise issues of credibility. This is not, by itself, a sufficient reason to deny an application to dismiss: *Evans v. University of British Columbia*, 2008 BCSC 1026 at para. 34. However, if there are foundational or key issues of credibility, the complaint must go to a hearing: *Francescutti v. Vancouver (City)*, 2017 BCCA 242 at para 67. These principles are important in this case because the parties disagree on key facts about the nature and extent of Mr. Pattinson's mental disability, and I am tasked with determining whether I can resolve those facts on the information before me or whether they could only be resolved at a hearing.

[64] To prove his complaint at a hearing, Mr. Pattinson will have to prove that he has a characteristic protected by the *Code*, in this case his mental disability, he was adversely impacted in employment, and his protected characteristic was a factor in the adverse impact: *Moore v. British Columbia (Education)*, 2012 SCC 61 at para. 33.

[65] For the purposes of this application the Respondents do not dispute that Mr. Pattinson has a mental disability. Therefore, the first part of the *Moore* test is not at issue in this application.

[66] The Respondents dispute that Mr. Pattinson's complaint alleges facts that amount to an adverse treatment, or that could be connected with his mental disability. I therefore consider whether there is no reasonable prospect that Mr. Pattinson would be able to establish at a

hearing the remaining two elements of the *Moore* test: whether Mr. Pattinson suffered an adverse impact in employment, and whether his mental disability was a factor in the alleged adverse impact.

[67] From the materials before me, I understand Mr. Pattinson's allegations to be accurately, if broadly, summarized as follows:

- a. The Respondents failed to accommodate him throughout his employment.
- b. The Respondents failed to discharge their duty to inquire throughout his employment.
- c. The Respondents requested medical information about Mr. Pattinson's disability and required him to attend an IME before returning to work in 2019.
- d. The Respondents failed to investigate and resolve his Bullying & Harassment complaint.
- e. The Respondents required Mr. Pattinson to follow the layoff procedure when he was cleared to return to work in 2019.
- f. The Respondents failed to accommodate Mr. Pattinson during his trial period in the ESR role and ultimately laid him off.

[68] I find it would not be helpful to parse out Mr. Pattinson's allegations and consider whether he has no reasonable prospect of establishing his case for each one. In *Byelkova v. Fraser Health Authority*, 2021 BCSC 1312 at para. 115, appeal dismissed as moot 2022 BCCA 205, the Court said the Tribunal should be reluctant to dismiss only some allegations under s. 27(1)(c) where the complaint itself will continue:

While the Tribunal may dismiss all or part of the complaint under s 27(1), insofar as the rationale for the s 27(1)(c) gatekeeping function is the efficient operation of the Tribunal, it may well be that no efficiency is gained by only dismissing half of the claim. Dismissing half of the claim could also later prove

embarrassing, in the sense of prompting inconsistent adjudicative decisions or foreclosing otherwise appropriate findings due to past rulings ...

[69] I accept that this reasoning applies here and decline to parse out and dismiss parts of Mr. Pattinson's complaint. First, Mr. Pattinson alleges a pattern of discrimination. As such, the allegations must be considered in context with each other to be properly understood: *Fraser v. Tolko Industries Ltd. and others*, 2021 BCHRT 118 at paras. 214-215. The Tribunal has found that individual incidents, viewed in isolation, may not constitute discrimination but may be viewed differently when considered together: *Rana v. P.B. Distribution and others*, 2005 BCHRT 166 at para. 41. Second, no efficiency is gained by attempting to parse and dismiss some of the complaint allegations, since the parties will need to address Mr. Pattinson's allegation of discrimination from 2018 to 2020.

[70] Based on the evidence I am not persuaded that Mr. Pattinson has no reasonable prospect of proving an adverse impact.

[71] The Respondents submit that their requests for medical information do not amount to an adverse impact but are part of the necessary steps to determine the nature and limits of Mr. Pattinson's disability in response to his request for accommodation. They say that Mr. Pattinson provided contradictory medical information including his own assertions about his mental health, a medical form completed by his physician stating Mr. Pattinson requires accommodation when he returns to work, and a Return-to-Work form also completed by his physician stating he was fit to return to work with no restrictions. They submit that the requirement for an IME was because the medical information Mr. Pattinson submitted was contradictory and they needed clear, current, and credible medical information about Mr. Pattinson's condition.

[72] The Tribunal has consistently recognized that "An employer does not have an unfettered right to inquire into an employee's medical condition": *Thorburn v. Vancouver Coastal Health Authority*, 2013 BCHRT 260 at para. 24. There must be a basis to request medical information from an employee for that request to be reasonable. Absent a legitimate reason, a request for medical information would be overly intrusive and may itself constitute

discrimination: *Gichuru v. Law Society of BC*, 2009 BCHRT 360 at paras. 560 and 565. This is because medical information is inherently private and requesting information, beyond what is reasonable, is an invasion of privacy that puts vulnerable employees in the position of having to disclose highly sensitive personal information to their employers.

[73] An employer may be justified in seeking medical information from an employee when the employer has legitimate concern that the employee's disability may impact the workplace or when that employee is seeking a disability-related accommodation: *De Champlain v. BC (Ministry of Health)*, 2018 BCHRT 252 at para. 57. Requiring an employee to submit to an assessment with a health care provider chosen by the employer can only be justified as a measure of last resort.

[74] Based on the materials before me I am not persuaded that there is no reasonable prospect of Mr. Pattinson establishing at a hearing that the Respondents' efforts to obtain medical information by requiring Mr. Pattinson to attend an IME was unreasonable.

[75] The Respondents point to the fact that they were presented conflicting medical information about Mr. Pattinson's condition to accommodate a return-to-work, and say they were unable to obtain further information from Mr. Pattinson's doctor after "efforts to follow-up with him by telephone."

[76] In my view, Mr. Pattinson's allegation that being required to undergo an IME was itself discriminatory has been taken out of the realm of conjecture.

[77] First, the evidence before me is that the Respondents first requested Mr. Pattinson attend an IME on or about May 30, 2018. The Respondents' evidence shows that on May 31, 2018, they informed Mr. Pattinson they had made an appointment to attend an out-of-province IME on June 20, 2018. This was before Mr. Pattinson submitted any medical information from his physician. It appears that after Mr. Pattinson said he was struggling with mental illness, the Respondents immediately arranged an IME. Mr. Pattinson expressed concern about the Respondents' request and states in an email on June 1, 2018, that he will see his physician the following week. Based on the evidence it appears the Respondents requested Mr. Pattinson

attend an IME and booked an appointment for him prior to receiving what they say is contradictory information from Mr. Pattinson's physician. It is not clear to me on the information before me on what basis the University decided information from Mr. Pattinson's doctor would be insufficient, or even that they considered seeking it, before moving to require him to see a physician of their choosing.

[78] Second, the Respondents moved forward with requiring an IME on August 31, 2018, nine days after receiving the Return-to-Work form completed by Mr. Pattinson's doctor. While the Respondents say they were unable to receive a satisfactory response to their request for further information from Mr. Pattinson's doctor but have provided little information about their efforts to get clarification from Mr. Pattinson's doctor before moving forward with the IME to say there is no reasonable prospect the complaint will succeed.

[79] Third, Mr. Pattinson was not seeking accommodation when he returned to work but was asserting, with the support of his doctor's medical note dated August 22, 2018, that he could return to full duties. While I appreciate the Respondents may have had concerns about Mr. Pattinson's capacity given the information dated June 20, 2018, the earlier information simply stated that Mr. Pattinson may require accommodations.

[80] Based on the materials I am not persuaded that there is no reasonable prospect that Mr. Pattinson could establish that the Respondents' requirement that he attend an IME prior to returning to work was an adverse impact connected to his protected characteristic. I therefore find that Mr. Pattinson may be able to establish a *prima facie* case of discrimination at a hearing of his complaint.

[81] The Respondents say that the requirement of an IME was a *bona fide* occupational requirement but have not provided detailed arguments on this position. As I understand it, the Respondents argue that the complaint has no reasonable prospect of success because they are reasonably certain to prove a defence at the hearing: *Purdy v. Douglas College and others*, 2016 BCHRT 117 at para. 50].

[82] To justify that the IME was a bona fide occupational requirement at a hearing, the Respondents would have to prove that: (1) they adopted the standard for a purpose rationally connected to the performance of the job; (2) they adopted the standard in an honest and good faith belief that it was necessary to the fulfillment of that legitimate purpose; and (3) the standard is reasonably necessary to the accomplishment of that legitimate purpose. This third element encompasses their duty to accommodate [the complainant] to the point of undue hardship: *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (Meiorin Grievance)*, [1999] 3 SCR 3 [**Meiorin**] at para. 54.

[83] Because the Respondents provided little submissions, I am not persuaded that the requirement of an IME is a rational standard connected to the performance of the job or that they adopted the standard in good faith. Because the Respondents requested an IME mere days after Mr. Pattinson first raised his mental illness, I am also not persuaded that it is reasonably certain that the Respondents would be able to establish at a hearing that they accommodated Mr. Pattinson to the point of undue hardship.

[84] I cannot say there is no reasonable prospect that Mr. Pattinson would be able to establish at a hearing that the Respondents' request for medical information and having him attend an IME was an adverse impact that gives rise to a *prima facie* complaint. I am not persuaded that it is reasonably certain that the Respondents will be able to establish a defence at the hearing. Therefore, I deny the application under s. 27(1)(c).

2. *Section 27(1)(d)(ii) and Section 27(1)(f) – Should the allegation that the Respondents did not investigate Mr. Pattinson's bullying & harassment complaint be dismissed because it has already been dealt with and would not further the purposes of the Code.*

[85] The Respondents ask the Tribunal to dismiss the portion of the complaint alleging a failure to investigate the bullying & harassment complaint under either or both s. 27(1)(d)(ii) or (f). They argue it does not further the purposes of the *Code* to proceed with a complaint that

has already been the subject of other investigations and processes, where they have resulted in a finding that the allegations are without merit.

[86] The Tribunal may dismiss a complaint under s. 27(1)(f) of the *Code* if the substance of the complaint has been appropriately dealt with in another proceeding. The principles underlying s. 27(1)(f) flow from the doctrines of issue estoppel, collateral attack, and abuse of process, and include finality, fairness, and protecting the integrity of the administration of justice by preventing unnecessary inconsistency, multiplicity, and delay: *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52 at paras. 25 and 36.

[87] The Respondents say they dealt with Mr. Pattinson's complaint of bullying and harassment by hiring a third-party investigator to investigate the allegations. The investigator provided a report on January 22, 2019, concluding that no bullying and harassment had taken place. The Respondents further say WorkSafeBC reviewed whether the investigation was conducted in a prompt and fair manner consistent with WorkSafeBC standards and concluded that it was in a report of January 31, 2019. Mr. Pattinson requested the WorkSafeBC report be reviewed and WorkSafeBC confirmed their conclusion that the bullying and harassment complaint was properly investigated by the Respondents in a review decision dated August 15, 2019.

[88] I am not persuaded that the complaint has been appropriately dealt with in another proceeding. The information before me does not indicate that the workplace investigation and the WorkSafeBC review of the investigation included an investigation of Mr. Pattinson's allegation of discrimination under the *Code*. The workplace investigation reviewed the allegations of bullying and harassment in the context of the University's workplace policy and code of conduct. The only question for WorkSafeBC was whether the University had "taken reasonable steps to prevent where possible, or otherwise minimize, workplace bullying and harassment." It does not appear either investigation included an assessment of Mr. Pattinson's allegation of discrimination under the *Code*, especially within the context of his other allegations.

[89] As I understand it, Mr. Pattinson's allegation in the context of his complaint is not simply that the Respondents did not pursue an investigation into his complaint of bullying and harassment in the workplace, but that the bullying and harassment was for discriminatory reasons and the investigation did not adequately address his complaint of discrimination.

[90] In my view, neither the workplace investigation nor the WorkSafeBC review of that investigation addressed Mr. Pattinson's allegation in his human rights complaint. Therefore, I deny the application to dismiss under s.27(1)(f).

[91] I also deny the application under s. 27(1)(d)(ii). This section allows the Tribunal to dismiss a complaint where proceeding with it would not further the purposes of the *Code*. These purposes include both private and public interests: s. 3. Deciding whether a complaint furthers those purposes is not only about the interests in the individual complaint. It may also be about broad public policy issues, like the efficiency and responsiveness of the human rights system, and the expense and time involved in a hearing: *Dar Santos v. UBC*, 2003 BCHRT 73, at para. 59, *Tillis v. Pacific Western Brewing and Komatsu*, 2005 BCHRT 433 at para. 15, *Gichuru v. Pallai (No. 2)*, 2010 BCHRT 125, at paras. 113-118.

[92] The Respondents argue that they have already remedied part of Mr. Pattinson's complaint by appropriately dealing with the bullying and harassment allegation and removing Mr. Petersen as his supervisor. For the reasons set out above, I am not satisfied that the Respondents have established that the workplace investigation appropriately dealt with the core issues of discrimination that forms the substance of the complaint before the Tribunal. I do not agree that proceeding with the complaint would result in re-litigation of the same issues as the evidence does not suggest that the other proceedings addressed the allegation of a breach of the *Code*.

[93] The Respondents argue that they have adequately remedied this aspect of the complaint because they placed Mr. Pattinson in a job where he is not reporting to Mr. Petersen. I am not persuaded by this argument. As the Tribunal recently explained in *Tambour v. Teamsters Union Local 155*, 2024 BCHRT 20 at paras. 22-25, for an applicant to be successful

under this section, when arguing it appropriately addressed the alleged discrimination, it must persuade the Tribunal that it addressed the impact on the complainant. If Mr. Pattinson is successful in proving discrimination at a hearing, he is entitled to other remedies including compensation for injury to dignity, feelings, and self-respect under s. 37(2)(d)(iii). I cannot say that the Respondents have appropriately dealt with the complaint when there is no evidence that they have addressed this aspect of his complaint.

[94] In these circumstances, I cannot dismiss the complaint under s. 27(1)(d)(ii).

IV CONCLUSION

[95] Mr. Pattinson's application to amend his complaint is denied.

[96] The application to dismiss the complaint as against the individual respondent is granted under s. 27(1)(d)(ii). I deny the balance of the application to dismiss.

[97] My decision is not a comment on the likelihood of Mr. Pattinson succeeding at a hearing. The onus will be on him to prove, on a balance of probabilities, that he experienced an adverse impact in his employment in which his disability was a factor. If he establishes that any of the Respondents' conduct adversely impacted him because of a disability, the Respondents may be able to defend the complaint by demonstrating that the conduct was justified.

[98] The Tribunal has mediation services available to assist parties in resolving complaints. I encourage the parties to make use of the Tribunal's mediation services to try to resolve the complaint.

Edward Takayanagi
Tribunal Member