IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *University of British Columbia v. Kelly,*
2015 BCSC 1731

Date: 20150924
Docket: S141076
Registry: Vancouver

Re: Section 57 of the *Administrative Tribunals Act*,
the *Judicial ReviewProcedure Act*, and the *Human Rights Code*

Between:

The University of British Columbia

Petitioner

And

Dr. Carl Kelly

Respondent

And

British Columbia Human Rights Tribunal

Respondent

Corrected Judgment: The text of the judgment was corrected on page 43 where changes were made on December 14, 2015

Before: The Honourable Mr. Justice Silverman

Reasons for Judgment

Counsel for the Petitioner:	Donald J. Jordan, Q.C.
Counsel for the Respondent, Dr. Carl Kelly:	Craig Bavis & Allison Tremblay
Counsel for the Respondent, British Columbia Human Rights Tribunal:	Katherine Hardie
Place and Dates of Hearing:	Vancouver, B.C. March 10-12, 2015
Place and Date of Judgment:	Vancouver B.C. September 24, 2015

INTRODUCTION

[1] The petitioner, the University of British Columbia ("UBC"), applies for judicial review of a Merits Decision and a Remedy Decision by B.C. Human Rights Tribunal ("HRT" or "the Tribunal") which determined that human rights complaint against UBC by the respondent Dr. Carl Kelly ("Dr. Kelly") was justified.

[2] UBC applies for an Order that both decisions be quashed.

[3] A brief chronology of the proceedings is as follows:

1. On February 19, 2008, Dr. Kelly filed a complaint with the HRT alleging discrimination against him on the ground of mental disability.
2. The parties agreed to bifurcate the hearing.
3. The Merits hearing was held over seven days commencing March 22, 2011. The Decision was issued on February 23, 2012: *Kelly v. UBC (No. 3)*, 2012 BCHRT 32 [Decision].
4. The hearing respecting remedy was held over three days commencing May 7, 2013. The Decision was issued on December 17, 2013: *Kelly v. University of British Columbia (No. 4)*, 2013 BCHRT 302 [Remedy Decision].

[4] The hearings before the Tribunal and the Decisions dealt, among other things, with issues of discrimination and the duty to accommodate. At the risk of oversimplification, the issues raised on this judicial review are the following:

1. the Tribunal's findings and the principles concerning discrimination and related issues;
2. the Tribunal's findings and the principles concerning the duty to accommodate and related issues;
3. the Tribunal's findings and the principles concerning the awards for compensation; and
4. the applicable standards of review concerning each of the foregoing.

[5] Before argument began on this hearing, the petitioner made a preliminary motion seeking the exclusion of the HRT from this hearing. After argument, I

dismissed the motion and permitted the HRT to have standing. However, I did not give Reasons at that time, instead indicating that I would give Reasons when I issued the final decision in this case. I give those Reasons on the preliminary motion now.

PRELIMINARY MOTION

[6] UBC has applied for an order denying standing to the HRT to participate in this hearing. It argues as follows:

1. In *Northwestern Utilities Ltd. v. Edmonton*, [1979] 1 S.C.R. 684 [*Northwestern Utilities*], the Supreme Court of Canada said this:

> Such active and even aggressive participation can have no other effect than to discredit the impartiality of an administrative tribunal either in the case where the matter is referred back to it, or in future proceedings involv-ing similar interests and issues or the same parties. The Board is given a clear opportunity to make its point in its reasons for its decision, and it abuses one's notion of propriety to countenance its partici-pation as a full-fledged litigant in this Court, in complete adversarial confrontation with one of the principals in the contest before the Board itself in the first instance.

2. In *Henthorne v. British Columbia Ferry Services Inc.*, 2011 BCCA 476 at paras. 41-42, [*Henthorne*], Newbury J.A. indicated that:

> [41] … the authorities in this province are in my opinion clearly in favour of applying *Northwestern Utilities*, subject to some exceptions (or "encroachments") arising from *Paccar.* …
>
> [42] …The dispute is essentially a private one between Mr. Henthorne and his former employer, in which a private remedy is sought. The employer, a large corporation, is well represented and has made extensive and helpful submissions. The Tribunal's reasons for reversing the decision of first instance dealt at length with the issues that subsequently became the focus of the judicial review. In these circumstances, there is little that the Tribunal could add, or has in fact added, to the proper adjudication of the appeal. As against this, the importance of fairness, real and perceived, weighs more heavily. To permit both the employer and the tribunal whose decision is being reviewed to be lined up against the appellant does not seem to me to be "just and efficient" (see *Orange Julius Canada Ltd. v. Surrey (City)* 1999 BCCA 430 (Chambers) at para. 7), particularly at a time when courts are being urged to ensure the speedy resolution of disputes.

3. The "encroachments" arising from *Paccar*, referred to in *Henthorne*, are a reference to a previous decision of the Supreme Court of Canada in *CAIMAW v. Paccar of Canada Ltd.*, [1989] 2 S.C.R. 983 [*Paccar*]. In that case, two justices of the Supreme Court of Canada adopted the comments of Taggart J.A. of the British Columbia Court of Appeal suggesting that in some circumstances a "tribunal is in the best position to draw the attention of the Court to those considerations rooted in the specialized jurisdiction or expertise of the tribunal, which may render reasonable that which would otherwise appear unreasonable to someone not versed in the intricacies of a specialized area": at 1016.

4. UBC argues that in this case none of the issues which the respondent Tribunal seeks to address are rooted in the specialized jurisdiction or expertise of the respondent Tribunal. They do not involve issues related to the proper interpretation of their home statute. The only issue in dispute is the correctness, or alternatively the reasonableness, of the decision, matters the Tribunal is not permitted to address. Further, these issues are all addressed by the respondent Dr. Kelly.

5. UBC argues that the Tribunal's reasons are extensive both in their factual recitations and their dealing with the issues. In such circumstances, there is little that the Tribunal could add to the proper adjudication of this matter. Further, the Tribunal's attempt to "highlight" certain of the factual findings is a partisan attempt to direct the Court's attention to certain elements of its decision as opposed to others.

6. Critical to the Court’s determination on this judicial review will be the question of whether the issues raise questions of law, questions of fact, or questions of mixed law and fact. The parties have made their own submissions on this matter. The Tribunal should not be entitled to interfere. The Tribunal’s assistance is not needed to assist the Court in determining these questions. Those are precisely the kinds of questions which this Court deals with every day.

[7] Dr. Kelly does not take a position with respect to UBC’s motion.

[8] The Tribunal argues:

1. It takes a limited role in this matter, addressing only topics respecting which it is well-established that a tribunal may address. The Tribunal does not make submissions defending

the merits of the decision under review, and specifically takes no position on whether the decisions should be set aside, which is fully argued by the parties.

2. Most recently, in *18320 Holdings Inc. v. Thibeau,* 2014 BCCA 494, the B.C. Court of Appeal addressed the issues of standing and costs in circumstances where the tribunal made submissions and led evidence going to the merits of its decisions. The focus of the majority judgment is on the circumstances where a tribunal may have standing to defend the merits of the decision under review. Bauman C.J. states at para. 51:

> Whether a tribunal has standing to defend the merits of the decision under review is a matter for the reviewing court's discretion. The court must strike an appropriate balance between the two fundamental values, the need to maintain tribunal impartiality and the need to facilitate fully informed adjudication on review.

3. In general, in B.C., the standing of a tribunal to be heard on a judicial review is called into question where it seeks to defend the merits of its decision. Here, the Tribunal does no such thing.

4. In its submission, the Tribunal is entitled to do, and does do, only the following:

> (a) outlines the proceedings before it, the decisions under review, and the issues on judicial review; and
>
> (b) makes submissions respecting the Court's role on judicial review, the standards of review, and the relief available on judicial review.

5. A tribunal may provide a summary of the decision under review, to assist the court in its review function: *British Columbia (Securities Commission) v. Burke,* 2008 BCSC 1244 at paras. 31, 37: *Paperworkers Union Appeal* Board, 2000 BCSC 63 at paras. 25-29.

6. In this case, the decision on the merits of the complaint is 570 paragraphs covering 139 pages and the decision respecting remedy is 23 pages. In order to assist the reviewing court, the Tribunal has provided a "road map" to the Merits Decision and outlined the bases for both decisions, identifying the findings put at issue by the Petition. This portion of the Tribunal's submission falls entirely within the permissible role of explaining the record.

7. UBC says "the Tribunal's attempt to 'highlight' certain of the factual findings is a partisan attempt to direct the Court's

attention to certain elements of its decision as opposed to others." To the extent that the Tribunal has highlighted certain factual findings, this is because it has identified those findings challenged by UBC on judicial review.

8. With respect to the question of judicial review, the Tribunal argues:

> (a) The Tribunal is entitled to make submissions on the principles of judicial review, and the appropriate standards of review, and wishes to do so in this case: *Coast Mountain Bus Company Ltd. v. National Automobile. Aerospace, Transportation and General Workers of Canada (CAW-Canada), Local III*, 2010 BCCA 447 at para. 45 [*Coast Mountain*]
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> *Pacific Newspaper Group Inc. v. Communications, Energy and Paperworkers Union of Canada, Local 2000*, 2013 BCSC 178 at para. 29-31[*Pacific Newspaper 2013*]
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> (b) In a related decision to *Pacific Newspaper 2013*, the B.C. Court of Appeal addressed an objection to the tribunal's standing. The Court rejected the argument that the tribunal's submissions were limited to the choice of standard of review, stating that "the critical determination is not the name of the standard of review, but what the standard entails so that it may properly be applied to the tribunal's decision": *Pacific Newspaper Group Inc. v. Communications, Energy and Paperworkers Union of Canada, Local 2000*, 2014 BCCA 496 at paras. 32- 33: [*Pacific Newspaper* 2014].
>
> (c) The Court of Appeal in *Pacific Newspaper 2014* at para. 35 said:
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> ... The tribunals have a general interest in the standard of review applied by the courts to their decisions and in ensuring that the courts accord them the appropriate level of deference. By limiting its submissions to the standard of review to be applied by the courts in all cases of a like nature, the administrative tribunal is not entering the "fray" of the litigation between the parties and is not discrediting its impartiality.
>
> (d) Further, a tribunal's ability to address the standard of review does not depend on whether it is in issue between the parties. It is ultimately the Court's responsibility to determine the appropriate standard of review. Submissions which may assist the Court in this regard will often be appropriate and welcome.

9. Similarly, a tribunal may make submissions on the extent of the Court's remedial authority. This Court has said that the extent

> of its authority "does *not* concern the merits of the matter and, like standard of review, is *not* an issue that is between the parties but one which the Court is tasked with getting right": *British Columbia (Public Safety and Solicitor General) v. Stelmack*, 2011 BCSC 1244 at para. 161. [Emphasis added.]

10. In this case, the Tribunal takes no position respecting whether it erred but limits its submissions to identifying the findings at issue and setting out its position respecting the applicable standards of review that must be met before the court may intervene.

11. The issue of standard of review, upon which tribunals have generally been granted standing, necessarily includes the nature of the question − that is, fact, law, or mixed fact and law. As the Court of Appeal said in *Pacific Newspaper 2014* at para. 33:

> > The critical determination is not the name of the standard of review, but what the standard entails so that it may properly be applied to the tribunal's decision:

12. What the Tribunal argues it is entitled to do in this case is in contrast to cases where tribunals have been denied standing where they sought, to varying extents, to defend the findings made.

13. The HRT seeks an order for costs with respect to this issue.

[9] Considering all of the foregoing, I am satisfied in the circumstances of this case that the Tribunal should have standing for limited purposes. Consequently, I have granted it standing for the following only:

1. outlining the proceedings which were before it, and the issues on judicial review;

2. the court's role on judicial review, the standards of review, and the relief available on judicial review; and

3. standing involving standards of review will include the nature of the question (fact, law, or mixed fact and law). If it were otherwise, the Tribunal's submissions would consist of little more than reading to the Court the applicable section of the *Administrative Tribunal's Act*, S.B.C. 2004, c. 45 [*ATA*]. As the Court of Appeal said in *Pacific Newspaper 2014*, the name of the standard of review is not the critical determination. Rather, it is what the standard involves where the Tribunal's input may provide the most assistance. This necessarily includes the nature of the question.

[10] I note that the HRT seeks an order for costs against the petitioner with respect to this issue, however, I am satisfied it is not an appropriate case for that to occur. The issue of standing for tribunals has become much more common in recent years, and it is still a developing area of the law. The specific issue in this case of whether the Tribunal should have the right to address the Court with respect to the nature of the question is a legitimate and important issue for the petitioner to have raised, even though it has not been successful. Each party will bear their own costs on this issue.

BACKGROUND

[11] UBC, through a Faculty of Medicine, operates a post-graduate training program known as the Family Medicine Residency Program (the "Program") which is accredited by the College of Family Physicians of Canada.

[12] After graduating from the Undergraduate Medical Program at the University of Alberta, Dr. Kelly entered the Program and became a resident in the Program.

[13] During their residency training, residents are employed by the various health authorities that operate the teaching hospitals that are affiliated with UBC. It is common ground between the parties that residents, including Dr. Kelly, maintain the status of both students and employees. Loss of one's status as student will necessarily result in the loss of a student's employment.

[14] Family medicine is a two-year program which residents are expected to move through quickly. Failure is rare and the majority of residents receive "pass, meets expectations" on their evaluations.

[15] A resident may be dismissed from the Program on the basis that he or she has failed to correct deficits in performance or conduct. Such a decision can only be made after the Program has employed the remediation measures set out in ss. 5 and 6 of the Faculty of Medicine's Resident Evaluation and Appeals Policy ("Policy"). These measures are undertaken when "… in the judgement of the Program Director the deficits are likely to be corrected with additional support and

training and the resident demonstrates capacity to benefit from a specified period of such support and training."

[16] Section 8 of the Policy also provides that the Program Director may decide that a resident is unsuitable for further training for reasons that cannot be remediated. One such reason is that the resident lacks a basic skill required to complete the training program.

[17] At all relevant times, Dr. Jill Kernahan was the Program Director for the Program.

[18] It was determined at an early stage that Dr. Kelly had difficulty with some aspects of the Program which was the result, at least in part, of his having Attention Deficit Hyperactivity Disorder (ADHD), and Non-verbal Learning Disorder (NVLD).

[19] A number of doctors, including residents in the same Program as Dr. Kelly, had interactions with him which caused concern for those from UBC responsible for assessing Dr. Kelly's abilities.

[20] UBC attempted to provide accommodations to Dr. Kelly sufficient, in its opinion, to resolve his difficulties.

[21] In addition, Dr. Kelly had been receiving treatment for his ADHD. The director of his residency program suggested that he see Dr. Mike Myers, a psychiatrist with a speciality treating physicians, and he began to do so.

[22] Further, at the suggestion of UBC, Dr. Kelly sought the advice and opinion of a psychologist, Dr. Gibbins, who eventually provided a report and suggested to UBC that there were further accommodations that could be made available for Dr. Kelly.

[23] The question of Dr. Kelly's suitability for continued training in family medicine was discussed by Dr. Kernahan with members of the Residents Sub-Committee. The Sub-Committee is comprised of nine physicians from the clinical areas, two of

whom are residents. Of the seven faculty members, five including the Chair had first-hand experience with Dr. Kelly's evaluations and history in the Program.

[24] At the conclusion of the meeting, the Sub-Committee determined that a letter would be written to the Post-Graduate Deans with a summary of Dr. Kelly's training, detailing the accommodations and how Dr. Kelly was incompatible with further residency training and future practice.

[25] Dr. Kernahan wrote that letter, dated August 23, 2007. Among other things, it expresses the view that the multiple assessments of Dr. Kelly confirmed that he lacked necessary basic skills and he was not able to demonstrate that he could meet the standards even when provided with accommodation. Dr. Kernahan recommended his termination.

[26] The letter concluded with the following:

> Even if it were possible for the Program to provide the level of accommodation requested by Dr. Gibbons [sic] we do not believe that Dr. Kelly would be able to successfully complete the family medicine training program, or be successful in future practice. As Dr. Gibbons' [sic] report states, Carl's deficits are life long.
>
> Family medicine is a field that requires dealing with multiple complex problems in a short time frame. To be successful in Family Medicine residents, and practicing family physicians need to have a broad ability to synthesize, prioritize and apply diverse solutions to a myriad of problems. Time stresses and multiple complex problems are part of the daily practice of family medicine. Juggling multiple tasks, accessing infrequently used information, retaining verbal information heard only once, dealing with complex social situations, the ability to pick up non verbal cues and understand social nuances are crucial to success in training and practice.
>
> We hope that there may be some other avenue that Dr. Kelly can pursue that is more consistent with his abilities or that can more readily accommodate his limitations. Despite our, and Dr. Kelly's considerable efforts, we have concluded that Dr. Kelly should be terminated from the program on the basis of unsuitability.
>
> Thank you for your consideration of the termination, and with your help throughout this process.

[27] On August 23, 2007, Dr. Kelly was dismissed from the Program on the basis of unsuitability pursuant to the Policy. Loss of his status as a student necessarily resulted in the loss of his employment.

[28] He appealed the Program's decision to the Residential Appeals Committee under the Policy. That appeal was denied.

[29] On February 19, 2008, Dr. Kelly filed a complaint with the HRT alleging that UBC discriminated against him contrary to ss. 8 and 13 of the *Human Rights Code*, R.S.B.C. 1996, c. 210 [*Code*].

THE MERITS DECISION

[30] The evidence at the merits hearing consisted of an agreed statement of facts, hundreds of documents entered for the truth of their contents, and a number of witnesses who provided *viva voce* evidence, including medical experts called by each of the parties. Dr. Myers and Dr. Gibbins were witnesses called on behalf of Dr. Kelly. Dr. Kernahan was called on behalf of UBC.

[31] The Tribunal found that Dr. Kelly suffered from disabilities and that the Program was aware of his disabilities from at least December 2005 until his termination for unsuitability. The Tribunal also found that the Program "perceived the Respondent to have disabilities that limited his ability to learn and practice medicine."

[32] The Decision is 143 pages in length. It consists of 570 paragraphs.

[33] Its structure is as follows:

1. The first heading is "**Complaint**". Paragraphs 1 to 8 provide a brief outline and details.
2. The second heading is "**Issues**" which are listed at paragraphs 9 to 13. They are as follows:

   Has Dr. Kelly proven a *prima facie* case of discrimination under s. 8 of the *Code*?

If so, has UBC proven a *bona fide* and reasonable justification ("BFRJ")?

Is s. 13 of the *Code* applicable?

If so, has Dr. Kelly proven a *prima facie* case of discrimination in employment?

If so, has UBC proven a *bona fide* occupational requirement ("BFOR")?

3. The next heading is "**Decision**". Paragraphs 15 to 18 state the following:

   Section 13 of the *Code* is applicable.

   Dr. Kelly has proven a *prima facie* case of discrimination under both s. 8 and 13 of the *Code*.

   UBC has not proven either a BFRJ or BFOR.

   The complaint is justified.

4. The next heading is "**Credibility and Witnesses**". Paragraphs 19 through 24 notes that Dr. Kelly did not testify; that testimony was given by Drs. Gibbins, Myers, and Kernahan; that all witnesses gave their evidence in a straightforward, professional manner; that there was little dispute on the facts; that the focus of the dispute is the inferences to be drawn and the legal consequences of those facts.

5. The next headings is "**Agreed Statement of Facts**". Paragraphs 25 to 28 refer to the parties having tendered hundreds of documents "for the truth of their contents", and incorporates the entirety of the Agreed Statement of Facts.

6. The next heading is **Medical Evidence**. Paragraphs 29 to 32 introduce the issue of medical evidence.

7. The next heading is "**Dr. Christopher Gibbins**". Paragraphs 33 to 96 discuss the evidence of Dr. Gibbins and the Report which he provided and does so under the following sub-headings:

   Background

   ADHD Overview

   The Psychological Assessment

   The Recommendations

8. The next heading is "**Dr. Myers**". Paragraphs 85 to 96 deal with his evidence concerning his treatment of Dr. Kelly and his opinion, his recommendations, and his interactions with UBC.

9. The next heading is "**The Residency and Dismissal of Dr. Kelly**". Paragraphs 97 to 445 are divided into a number of sub-headings, which address a number of topics including various of Dr. Kelly's rotations and their results, meetings with Dr. Myers, various other meetings, Dr. Myers' contact with the Program, recommendations by Dr. Myers, attempts to find a family practice preceptor to assist Dr. Kelly, the Gibbins' report, a report by Dr. Weiss, Dr. Kernahan's dismissal recommendation and the reply, the Family Residency Sub-Committee meeting and subsequent letter to the Deans, the response of the Deans, the grievance and appeal.

10. The next heading is "**Legal Framework and Analysis**" which comprises almost the entirety of the remainder of the judgment stretching from paragraphs 446 to 567. Under this heading, are the following subheadings:

    What is Discrimination? (paragraphs 453 to 457)

    Is s. 13 of the *Code* applicable? (paragraphs 458 to 476)

    Does Dr. Kelly have a mental disability? (paragraphs 477 to 480)

    Was there Adverse Treatment? (paragraphs 518 to 567)

    Is there a nexus or link between the disability and the adverse treatment? (paragraphs 481 to 490) (paragraphs 491 to 517)

    Duty to Accommodate (paragraphs 518 to 567)

11. The next heading is "**Remedy**". Paragraphs 568 through 570 notes that the question of remedy will be argued and determined at a later date.

[34] With respect to the question of *prima facie* discrimination, the Tribunal's submission (on this review) fairly summarizes (without taking a position) the Decision as follows:

> 1. The Tribunal set out the legal framework for a finding of discrimination. (paras. 446-457) There was no dispute that s. 8 of the *Code* (discrimination respecting services) applied to the complaint, but there was a dispute about the application of s. 13 (discrimination respecting

employment), which the Tribunal concluded applied. (paras. 458-476) That finding is not challenged on judicial review.

2. The Tribunal found that UBC discriminated against Dr. Kelly. The finding of discrimination has two aspects: First, the Tribunal found that Dr. Kelly had established a *prima facie* case of discrimination (paras. 477-517); second, the Tribunal found that UBC did not discharge its duty to reasonably accommodate Dr. Kelly (paras. 518-566). (The duty to reasonably accommodate is an element of the statutory defences found in s. 8 - *bona fide* and reasonable justification (BFRJ) - and s. 13 - *bona fide* occupational requirement (BFOR).) Both aspects of the finding of discrimination are at issue on this application.

3. The Tribunal set out the general principles respecting discrimination (paras. 447-57), including the three elements of a *prima facie* case of discrimination:

> [447] ... Dr. Kelly must prove that he had, or was perceived to have, a mental disability, that he was treated adversely in his employment (s. 13) or in the provision of a service customarily available to the public (s. 8), and that it is reasonable to infer from the evidence that his disability was a factor in the adverse treatment [citations omitted].

4. The Tribunal's statement of the test in para. 447 is not in issue.

5. With respect to the first element, the Tribunal's finding that Dr. Kelly suffered from disabilities and that UBC was aware of his disabilities from at least December 2005 is not in issue, (paras. 477-80)

6. UBC alleges errors respecting the Tribunal's analytical approach to the second and third elements of the test.

7. With respect to the second element, the Tribunal determined that Dr. Kelly was treated adversely when UBC decided not to provide him with a further opportunity to complete a remedial rotation or to go on probation, and when UBC dismissed Dr. Kelly from the Program, which resulted in his dismissal from employment. (paras. 488-90) In this regard, the Tribunal rejected UBC's argument that its decisions did not amount to adverse treatment, holding that the "reasonableness of the full scope of modifications relied on by UBC are properly considered under the BFOR/BFRJ analysis", and that "it is improper to collapse the analysis and assess the reasonableness of UBC's accommodations within the *prima facie* analysis." (paras. 481-87)

8. With respect to the third element of the test, the Tribunal first addressed an argument advanced by UBC:

> [491] UBC reiterates under this part of the *prima facie* test that the process leading to Dr. Kelly's dismissal from the Program was detailed and based upon "broad consultation and participation by clinical faculty with accompanying review of material from Dr. Kelly's healthcare professionals." It further says that the decision was made based on an assessment of relevant information, performance, identified deficits and Dr. Kelly's inability to meet the Program's standards despite modification to his training program, and that such

an approach is inconsistent with acting in a discriminatory manner "because of' Dr. Kelly's disability.

[492] I consider this argument to reflect another attempt to collapse the BFOR/BFRJ analysis into the *prima facie* analysis. As noted earlier, whether UBC reasonably accommodated Dr. Kelly is a matter to be addressed if Dr. Kelly proves a *prima facie* case of discrimination.

9. The Tribunal next addressed UBC's argument that there was no medical evidence that Dr. Kelly was experiencing symptoms associated with his ADHD at the time of his evaluations or that his performance was adversely affected by his disability, (para. 493-95). The Tribunal accepted that there must be evidence of a connection between Dr. Kelly's disability and his performance in the Program. (para. 496) The Tribunal found:

   (a) "Based on a consideration of the medical evidence as a whole, I find that Dr. Kelly's performance in the Program was affected by his disabilities." (para. 503 and generally paras. 497-503)

   (b) "Dr. Kernahan, the Resident Sub-Committee, the PG Deans and the Appeals Committee all perceived Dr. Kelly's disabilities to negatively impact his ability to successfully learn and practice as a family medicine physician" and that this was "sufficient to establish the necessary connection between his disabilities and the adverse treatment". (para. 504)

   (c) The argument that there was no evidence of a connection was "inconsistent with the conclusion (and perceptions) of Dr. Kernahan, the Sub-Committee, and the Appeals Committee that, at least in part because his deficits were life-long, he could not be accommodated within the Program." (para. 506)

10. The Tribunal next rejected the alternative argument that, if the Tribunal were to find a connection between Dr. Kelly's performance and disability, then it should also conclude that Dr. Kelly was functioning at his optimal level since his symptoms were well controlled. The Tribunal did not accept this argument was "factually sound". (paras. 507-508)

11. The Tribunal stated that there "is a clear, direct and substantive link between Dr. Kelly's disability and the adverse treatment" and that it also relied on the following in reaching this conclusion (para. 510):

   (a) the August 23, 2007 Sub-Committee Minutes, which "specifically considered whether it should recommend Dr. Kelly's termination from training because of his disability" (para. 511);

   (b) Dr. Kernahan's testimony and letter to the PG Deans, that "she recommended Dr. Kelly's termination from the program because of his disability" (para. 513);

   (c) the Appeals Committee conclusion "that if doctor Kelly had not had a disability, then it would have expected him to have been provided with a longer period of time in which to remediate" (para. 514).

[35] The Tribunal concluded that Dr. Kelly's disability was a factor, if not the sole factor, in the adverse treatment, and that he had proven *prima facie* discrimination under both s. 8 and 13 of the *Code*.

[36] With respect to duty to accommodate, the Tribunal's submission (on this review) fairly summarizes (without taking a position) the Decision as follows:

1. The Tribunal set out the legal test respecting the BFRJ and BFOR defences under the *Code,* including that the duty to accommodate to the point of undue hardship has been fulfilled, with discussion of the case law. (paras. 518-525)
2. Next, the Tribunal addressed what are referred to as the "procedural" and "substantive" aspects of the duty to accommodate analysis. (Decision, paras. 526-27) UBC alleges it is an error of law to consider the procedural aspect.
3. The Tribunal then set out a number of considerations:
   (a) "the entire history of the residency relationship" and "the modifications that UBC did make to Dr. Kelly's training program" (para. 528);
   (b) there was no issue between the parties regarding Dr. Kelly not being entitled to a perfect result, or to a "pass", or UBC not being required to lower its practice standards (para. 529);
   (c) "the Program physicians were experienced practitioners and educators, with a sound understanding of Program standards and expectations for a resident to qualify as a family medicine practitioner" (para. 530).
4. There was no dispute respecting the first two elements of the BFRJ/BFOR, in particular, that UBC's regular evaluation standards were reasonable and adopted in good faith, (para. 531)
5. The Tribunal said the issue was "whether UBC could have further accommodated Dr. Kelly, without incurring undue hardship, having regard to the entire context of the relationship between Dr. Kelly and UBC." (para. 535)
6. After setting out UBC's arguments, the Tribunal set out its reasons for concluding that UBC did not discharge its duty to reasonably accommodate Dr. Kelly. The Tribunal's conclusion is at issue on this application.
   (a) The Tribunal found "there was no substantive factual foundation to support a conclusion that the Program would be fundamentally altered or its professional standards lowered if it was to accommodate Dr. Kelly" (para. 536) and was "unable to conclude that further accommodating Dr. Kelly would have resulted in a fundamental change to the Program." (para. 540)

(b) With respect to whether UBC demonstrated that it "had conscientiously turned its mind to whether it could reasonably implement the recommended accommodations", the Program did not follow up on suggested resources, it took an "overbroad and rigid view of some of the suggested accommodations", "failed to explore reasonable possibilities", "did not meet with Dr. Kelly to discuss the Gibbins report, or seek clarifications about any of Dr. Gibbins' recommendations", and "sought no input from Dr. Kelly or PARBC prior to the Sub-Committee meeting, Dr. Kernahan's dismissal recommendation, and the PG Deans' decision." (paras. 541-42)

(c) The Tribunal addressed various facts relied on by UBC respecting the March 1, 2006 meeting, the availability of a mentor, a $1,000 payment to Dr. Kason, accommodations provided to Dr. Kelly, implementation of Dr. Myers' recommendations, the search for a family medicine preceptor, the July 25, 2006 meeting, the Sub-Committee meeting, Dr. Wollard's reliance on Dr. Kelly's "life-long" disorder, and the Appeals Committee. (para. 544) The Tribunal also addressed Dr. Kernahan's explanation as to why she rejected the Gibbins recommendations. (para. 545)

(d) The Tribunal addressed UBC's criticism of the Gibbins report, concluding "it would have been reasonable to more fully consider the suggested accommodations." (para. 546) The Tribunal said:

> [547] The opinions of two specialists in the area of ADHD suggested that, with appropriate accommodation, Dr. Kelly might be successful in the Program. I do not consider it either conscientious or reasonable for the Program to have curtailed Dr. Kelly's access to accommodations that may have been provided to other residents under the Policy, but were not provided to Dr. Kelly because he had ADHD, which is a life-long deficit.

7. The Tribunal then set out further reasons for its conclusion:

(a) UBC did not prove that "the structure or educational philosophy of the Program would have been 'at risk' if it was to have provided Dr. Kelly with a further remedial or probationary period to demonstrate his suitability." (paras. 548-49)

(b) The Program acted on stereotypical assumptions about Dr. Kelly and prematurely dismissed him from the Program, at a time when he had been demonstrating success, (para. 550)

(c) The Tribunal was "not persuaded that the anecdotal observations, unquantified financial costs, organizational inconveniences, or overly broad interpretation of Dr. Gibbins' recommendations demonstrate that UBC has discharged its duty to accommodate Dr. Kelly." (para. 551)

(d) "There was a discernable tone of resistance to accommodating Dr. Kelly once the Program became fully aware of his disabilities." (para. 552)

(e) After reviewing Dr. Kelly's residency, the Tribunal found that "while the Program originally implemented an individualized accommodation process for Dr. Kelly, it then unreasonably truncated it." (paras. 553-61) Before the September email incident, Dr. Kernahan and Dr. Callan were identifying family practice remedial rotation options; there were options considered but not fully explored, (para. 562) After this incident tire Program moved towards dismissal, (para. 563)

(f) "Dr. Kernahan, the PG Deans and the Appeals Committee unreasonably rejected Dr. Gibbins' recommendations for accommodation." "UBC's reliance on the life-long nature of Dr. Kelly's disorder as a reason to conclude that he would not be successful even if the Gibbins' recommendations were implemented ... was unreasonable." (para. 564)

[37] The Tribunal concluded that UBC had not provided reasonable accommodation of his disabilities to Dr. Kelly to the point of undue hardship.

[38] As a result of those findings, the Tribunal made the mandatory order under s. 37(2)(a) of the *Code* that UBC cease the contravention and refrain from committing the same or a similar contravention.

[39] Consequently, the Program reinstated Dr. Kelly prior to the hearing on remedy.

[40] At the risk of oversimplification, the Tribunal concluded as follows:

1. With respect to *prima facie* discrimination:

   (a) that Dr. Kelly suffered from disabilities and that UBC was aware of these disabilities;

   (b) that Dr. Kelly was treated adversely when UBC decided not to provide him with further accommodation/opportunities to proceed, and instead dismissed him; and

   (c) that there was a nexus between (a) and (b).

2. With respect to the duty to accommodate:

   (a) that UBC did not discharge its duty to reasonably accommodate Dr. Kelly.

LEGAL PRINCIPLES

The *Code*

[41] The applicable sections of the *Code* are as follows:

> **Discrimination and intent**
>
> **2** Discrimination in contravention of this Code does not require an intention to contravene this Code.
>
> …
>
> **Discrimination in accommodation, service and facility**
>
> **8(**1) A person must not, without a bona fide and reasonable justification,
>
> (a) deny to a person or class of persons any accommodation, service or facility customarily available to the public, or
>
> (b) discriminate against a person or class of persons regarding any accommodation, service or facility customarily available to the public
>
> because of the race, colour, ancestry, place of origin, religion, marital status, family status, physical or mental disability, sex, sexual orientation or age of that person or class of persons.
>
> …
>
> **Discrimination in employment**
>
> 13 (1) A person must not
>
> (a) refuse to employ or refuse to continue to employ a person, or
>
> (b) discriminate against a person regarding employment or any term or condition of employment
>
> because of the race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation 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.
>
> …
>
> (4) Subsections (1) and (2) do not apply with respect to a refusal, limitation, specification or preference based on a bona fide occupational requirement.

Prima Facie Discrimination

[42] An often cited definition of discrimination is found in McIntyre J.'s reasons in *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 [*Andrews*], a case arising under the *Charter*. Notwithstanding that the case deals with the concept of

"discrimination" under the *Charter*, *Andrews* is acknowledged to be the leading case on the issue of what constitutes discrimination under human rights legislation.

[43] In *Andrews* at 174-175, McIntyre J. adopted the approach set out in *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114 at 1138-1139 where Dickson C.J. made the following comments:

> Discrimination . . . means practices or attitudes that have, whether by design or impact, the effect of limiting an individual's or a group's right to the opportunities generally available because of attributed rather than actual characteristics . . . .
>
> It is not a question of whether this discrimination is motivated by an intentional desire to obstruct someone's potential, or whether it is the accidental by-product of innocently motivated practices or systems. If the barrier is affecting certain groups in a disproportionately negative way, it is a signal that the practices that lead to this adverse impact may be discriminatory.
>
> …
>
> Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.

[44] A determination of what constitutes *prima face* discrimination involves a three-part analysis. An employee must establish:

1. that he or she had (or was perceived to have) a disability;
2. that he or she received adverse treatment; and
3. that his or her disability was a factor in the adverse treatment.

Armstrong v. British Columbia (Ministry of Health), 2010 BCCA 56 at paras 20 - 33 [*Armstrong*].

[45] In the vast majority of cases, it is the third element of the analysis of *prima face* discrimination which is the key consideration. Again, paraphrasing from the Judgment in *Armstrong*, the following observations apply:

1. The third step of the *prima facie* test is whether the protected group or characteristic was a factor in the adverse treatment.

2. The third step of the analysis results from the wording of s. 8(1) of the *Code*, that the denial or discrimination in question must be "because of" one of the enumerated protected characteristics. The use of the phrase "because of" means that there must be a "link or nexus between the protected ground or characteristic and the adverse treatment".
3. There is no separate requirement to show that the adverse treatment was based on arbitrariness or stereotypical presumptions. The goal of protecting people from arbitrary or stereotypical treatment is incorporated in the third element of the analysis. It is not a separate element.

[46] In *Moore v. British Columbia (Education)*, 2012 SCC 61 at para. 33, the Supreme Court of Canada articulated the test as requiring an "adverse impact" instead of "adverse treatment" as set out in *Armstrong*.

[47] The terms "adverse treatment" and "adverse impact" appear to be used interchangeably in the applicable jurisprudence. In *Okanagan College Faculty Association v. Okanagan College*, 2013 BCCA 561 at paras. 59-61 the BC Court of Appeal viewed *Moore* as an endorsement of the three-part framework set out in *Armstrong* and did not indicate that the use of the term adverse treatment versus the term adverse impact was of importance.

[48] The Supreme Court of Canada recently clarified, in a *Charter* case, the complainant's burden of proof in establishing a *prima facie* case of discrimination: *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39. That decision was pronounced after submissions in this matter were completed. Counsel brought the decision to my attention and, at my request, provided submissions in writing with respect to its effect.

[49] The Court in *Bombardier* noted the following at para. 56:

> …even though the proof required of the plaintiff is of a simple "connection" or "factor" rather than of a "causal connection", he or she must nonetheless prove the three elements of discrimination on a balance of probabilities. This means that the "connection" or "factor" must be proven on a balance of probabilities.

[50] The onus of proving *prima facie* discrimination is on Dr. Kelly. Once established, the onus shifts to UBC to establish a *bona fide* and reasonable justification ("BFRJ") or *bona fide* occupational requirement ("BFOR") for the conduct: *Moore* at para. 33.

Duty to Accommodate

[51] In *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union*, [1999] 3 S.C.R. 3 [*Meiorin*], and *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868 [*Grismer*] the Supreme Court of Canada set out three requirements that a respondent must demonstrate to justify its conduct:

> 1. it adopted the standard for a purpose or goal that is rationally connected to the function being performed;
> 2. it adopted the standard in good faith, in the belief that it is necessary to the fulfillment of the purpose or goal; and
> 3. the standard is reasonably necessary to accomplish its purpose or goals.
>
> (*Meiorin*, at para. 54)

[52] The Court in *Meiorin* elaborated on the third step of the analysis as follows:

> To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer. (para. 54)

[53] The Supreme Court clarified the meaning of the word "impossible" in *Hydro-Québec v. Syndicat des employées de techniques professionelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ)*, 2008 SCC 43, where it stated that "impossible" relates to undue hardship. At para. 12, it states that:

> … What is really required is not proof that it is impossible to integrate an employee who does not meet a standard, but proof of undue hardship, which can take as many forms as there are circumstances. …

And in the next paragraph:

> … in the employment context, the duty to accommodate implies that the employer must be flexible in applying its standard if such flexibility enables the employee in question to work and does not cause the employer undue hardship. …

STANDARD OF REVIEW

General

[54] The parties are agreed that decisions of the HRT are not protected by a privative clause. The standards of review in s. 59 of the *ATA* apply to the Tribunal. Section 59 of the *ATA* 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.
>
> (4) For the purposes of subsection (3), a discretionary decision is patently unreasonable if the discretion
>
> (a) is exercised arbitrarily or in bad faith,
>
> (b) is exercised for an improper purpose,
>
> (c) is based entirely or predominantly on irrelevant factors, or
>
> (d) fails to take statutory requirements into account.
>
> (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.

[55] UBC alleges that the Tribunal made a number of errors with respect to various questions before it that played a part in and led to the ultimate erroneous decisions with respect to *prima facie* discrimination and the duty to accommodate.

Questions of Law

[56] The applicable standard of review for questions of law is correctness: *ATA*, s. 59(1).

[57] Where the Tribunal is engaged in interpreting its statute, analyzing the law, choosing which authorities to follow and considering whether conduct is consistent with the their statute, the proper standard of review to be applied is that applicable to questions of law: *Communications, Energy & Paperworkers' Union of Canada (Local 298) v. Eurocan Pulp & Paper Co.,* 2012 BCCA 354 at para. 26.

Questions of Fact

[58] With respect to findings of fact and the drawing of factual inferences:

1. The standard of review is reasonableness: *ATA*, s. 59(2).
2. The Tribunal possesses expertise and is entitled to a high degree of deference: *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825 at para. 29 and *Kinexus v. Bioinformatics Corporation v. Asad*, 2010 BCSC 33 [*Kinexus*].
3. Factual inferences are accorded the same deference as findings of fact: *Victoria Gardens Housing Cooperative v. Nicolosi*, 2013 BCSC 1989 at para. 14.
4. Deference requires a contextual reading of a decision and respectful attention to the reasons given.

[59] With respect to specific questions of fact that have been raised in human rights reviews, courts have held that:

1. Whether there is a nexus between adverse treatment and a prohibited ground of discrimination is a question of fact: *Kemess Mines Ltd. v. International Union of Operating Engineers*, 2006 BCCA 58 at para. 33 [*Kemess Mines*], and *Forsythe v. Coast Mountain Bus Company*, 2013 BCCA 257.
2. It is a question of fact in each case whether the duty to accommodate to the point of undue hardship has been met: *Kemess Mines* at para. 37.

Questions of Mixed Fact and Law

[60] In *J.J. v. School of District No. 43 (Coquitlam)*, 2013 BCCA 67 at paras. 24-28 [*J.J.*], the Court of Appeal noted that the correctness standard applies to questions of law and questions of mixed law and fact. However, "It is important that

courts not be too quick to brand a question as one of mixed fact and law and therefore subject to a standard of correctness."

[61] The Court also noted in *J.J.* that cases where the correctness standard applies to questions of mixed fact and law involve "the application of a legal standard to uncontroverted facts" where there are "no extricable issues of fact" that need to be considered. The Court held that issues of fact extricable from the mixed questions must be reviewed on the deferential standard (s. 59(2)). The court must avoid taking on fact-finding functions that do not properly belong to it.

Discretionary Decisions

[62] Discretionary decisions cannot be set aside unless they are patently unreasonable: *ATA, s.* 59(3). This will be considered under the section of this judgment concerning the Remedy Decision.

[63] Whether a discretionary decision is patently unreasonable is determined by reference to the four factors set out in s. 59(4) of the *ATA*. One of the four factors must be demonstrated to establish that a discretionary decision is patently unreasonable: *Forsyth* at para. 54.

[64] Where a discretionary decision has been founded on an unsupported finding of fact, the court can consider whether the "discretionary decision should be set aside as 'arbitrary' on the basis that it was founded on an unreasonable finding of fact": *J.J.* at paras. 29-30, 33.

The Nature of the Questions

[65] The parties in this proceeding agree with all of the foregoing concerning standards of review. Where they disagree is with respect to whether the questions at hand are those of law, fact, or mixed law and fact.

[66] Determining the correct standard of a review depends solely on the nature of the question.

[67] UBC argues that the Tribunal's finding that UBC discriminated against Dr. Kelly raises a question of law, subject to review on a standard of correctness.

[68] Dr. Kelly submits that determinations of whether there was discrimination or appropriate accommodation are questions of mixed fact and law within the discretion of the HRT. He argues that this discretion attracts a deferential standard, that of reasonableness.

[69] Dr. Kelly categorizes the petitioner's allegations of error into separate categories of errors in law and errors of fact, which he argues, when taken together, form questions of mixed law and fact.

[70] On the issue of *prima facie* discrimination, Dr. Kelly argues that:

1. The following alleged Tribunal errors suggest a question or questions of law:

   (a) in finding that it could look behind UBC's stated reason for termination;

   (b) in failing to consider, at the *prima facie* stage, accommodations that UBC provided;

   (c) in finding that Dr. Kelly satisfied the second step of the *prima facie* analysis by showing an adverse outcome rather than adverse treatment; and

   (d) in failing to find a sufficient causal connection between the disability and the adverse treatment.

2. The following alleged Tribunal error suggest a question of fact:

   (a) in finding that Dr. Kelly's disability played a role in UBC's decision.

[71] On the issue of duty to accommodate, Dr. Kelly argues that:

1. The following alleged Tribunal errors suggest a question or questions of law:

   (a) in separately assessing procedural and substantial elements of the duty to accommodate;

   (b) in finding that something more than a "conscientious and reasonable attempt" to accommodate is required; and

(c) in failing to find that Dr. Kelly needed to establish a reasonable possibility of success if accommodated.

2. The following alleged Tribunal errors suggest a question or questions of fact:

(a) in finding that Dr. Kelly had a sufficient likelihood of success in the Program if he were to be accommodated;

(b) in failing to assess the measures taken by UBC to accommodate;

(c) in accepting Dr. Gibbins' recommendations and report; and

(d) in finding that the proposed accommodations would not cause UBC undue hardship.

[72] The Tribunal disagrees with the positions of both UBC and Dr. Kelly. It disagrees with UBC's position that the finding of discrimination is a question of law subject to the correctness standard. It also disagrees with Dr. Kelly's position that the determination of whether there was discrimination is a question of mixed fact and law, within the discretion of the HRT, thereby attracting the deferential standard of reasonableness.

[73] The Tribunal's position is that:

1. With respect to both the *prima facie* test for discrimination and the duty to accommodate, there are three specific questions of law which give rise to the correctness standard.
2. All other errors alleged by UBC raise questions of fact.

[74] The three questions of law which the Tribunal argues are before me for consideration are (in the words of the Tribunal's written submission) as follows:

1. Regarding the Tribunal's finding that UBC's decision not to provide Dr. Kelly with a further opportunity to complete a remedial rotation or to go on probation and to dismiss Dr. Kelly from the program constituted adverse treatment, did the Tribunal err in law when it held that the reasonableness of the modifications UBC made to Dr. Kelly's Program were properly considered under the *Bona Fide* Occupational Requirement ("BFOR") or *Bona Fide* Reasonable Justification ("BFRJ") analysis. (Decision - paras. 481-487).
2. Regarding the Tribunal's finding that there was a nexus between Dr. Kelly's disability and the adverse treatment, did

the Tribunal err in law when it held that UBC's submission regarding "the process leading to Dr. Kelly's dismissal from the Program" and that "the decision was made based on an assessment of relative information, performance, identified deficits and Dr. Kelly's inability to meet the Program's standards despite modifications to his training program" was to be addressed in the context of whether UBC reasonably accommodated Dr. Kelly? (Decision - paras. 491-492).

3. UBC alleges that the Tribunal erred in determining that the accommodation process was relevant to the consideration of whether UBC satisfied its duty to accommodate. In other words, it argues that it was an error in law to consider a procedural component to the duty to accommodate. In that regard, see para. 527 of the Decision where the Tribunal says that "It is relevant to consider both the accommodation process and the reasons for Dr. Kelly's dismissal in assessing, in a holistic manner, whether UBC satisfied its duty to accommodate."

[75] With respect to the foregoing three questions of law, the Tribunal submits that the proper standard of review is correctness.

[76] UBC alleges a number of other errors in the Decision. UBC's written submission raises them in a variety of different forms, phrases and variations at different places in its written submission. I have attempted to reframe them to avoid repetition, and based upon my understanding of UBC's position. The alleged errors are:

1. whether Dr. Kelly's disability was a factor in the adverse treatment; in determining that there was a nexus between the adverse treatment and the prohibited ground of discrimination;
2. measuring duty to accommodate based on success or failure;
3. relying on the concept of "possibility of further accommodations" in determining the accommodation process was prematurely truncated;
4. accepting and relying on the evidence of Dr. Gibbins;
5. ignoring the unchallenged evidence of Dr. Kernahan;
6. failing to properly take into account the notion of undue hardship to the Program and the impact of further accommodations on other students.

[77] With respect to some of the foregoing questions, UBC argues that they raise questions of law or of mixed fact and law. I disagree with that and am satisfied that they raise questions of fact only, to be reviewed on a standard of reasonableness.

ISSUES ON JUDICIAL REVIEW

[78] I agree with the Tribunal that UBC's submission raises three discrete questions of law which can be easily separated from the other aspects of this case and decided separately. Those three questions, again reframed by me, are as follows:

> Did the Tribunal err in law by:
>
> 1. holding that modifications made by UBC for the benefit of Dr. Kelly were properly considered under the BFOR/BFRJ analysis and not under the second stage of the analysis for *prima facie* discrimination?
> 2. holding that (regarding the finding that there was a nexus between Dr. Kelly's disability and the adverse treatment) the process leading to Dr. Kelly's dismissal (to the extent that it was based on an assessment of performance, identified deficits and an inability to meet the Program's standards despite modifications) was to be addressed in the context of whether UBC had reasonably accommodated Dr. Kelly?
> 3. considering a procedural component to the duty to accommodate?

[79] The three foregoing questions must necessarily be reviewed on the correctness standard.

[80] The alleged errors set out in paragraph 76 of this judgment raise questions of fact.

[81] I agree with the Tribunal that all of the issues and alleged errors concerning questions of fact are reviewable on the reasonableness standard.

[82] If the three questions of law are determined to have been decided correctly, then the ultimate decisions of the Tribunal (for consideration on this review) are also questions of fact reviewable on the reasonableness standard:

1. did the Tribunal err in concluding that Dr. Kelly had proven a *prima facie* case of discrimination; and
2. did the Tribunal err in concluding that UBC had not met the duty to accommodate to the point of undue hardship?

ANALYSIS

The Three Questions of Law

[83] In assessing whether the Tribunal's answers to each of the following questions was correct, it will be useful to "hear" from the Tribunal itself. Consequently, what follows will include significant portions of the Decision. However neither the Tribunal, or the Decision, is entitled to any deference with respect to these questions of law.

Question of Law #1

Did the Tribunal err in law by holding that modifications made by UBC for the benefit of Dr. Kelly were properly considered under the BFOR/BFRJ analysis and not under the second stage of the analysis for prima facie discrimination?

[84] UBC argues as follows:

1. It was proper and fair for UBC to provide modifications to Dr. Kelly and it is proper and fair that those modifications be considered at the second stage of the *prima facie* discrimination analysis.
2. Dr. Kelly was tested and assessed based upon his abilities to meet the standards of the training program. As a result of this assessment, the Program became aware of his learning and functioning difficulties. The consequences of that was not to subject Dr. Kelly to adverse treatment. Rather, modifications were made to his training to provide him with assistance to meet the standards against which he would be assessed.
3. Dr. Kelly was not treated adversely. He was dealt with on his individual merits, and in accordance with his personal abilities. UBC provided modifications in its standards before assessing him on his individual merits. This is not adverse treatment.
4. The Tribunal erred in concluding that Dr. Kelly had received adverse treatment. This is because UBC had made

> accommodations. It would have been adverse if it had not given Dr. Kelly an opportunity by moderating its standards.

[85] Dr. Kelly argues as follows:

1. The Tribunal was correct in concluding that the termination of his employment is sufficient to constitute adverse treatment at step two.
2. The assessment of suitability properly falls within the BFOR or BFRJ element of the assessment and must not be imported into the *prima facie* analysis.
3. UBC is wrong when it argues that treatment of an employee as an individual by providing modified duties is inconsistent with discrimination and cannot constitute adverse treatment. It is further wrong when it says the fact that it provided accommodations is inconsistent with the finding that it acted in a stereotypical or arbitrary manner.
4. UBC is wrong when it argues that accommodations provided by an employer demonstrate an absence of discrimination. If this were true, it could never be the case that a complainant could ever succeed in providing a *prima facie* case against an employer who had provided some but insufficient accommodations.

[86] In the Decision, the Tribunal said this:

> [481] UBC argues that Dr. Kelly was not treated adversely. It says that Dr. Kelly was dealt with on his individual merits, and in accordance with his personal abilities. In this part of its argument, it reviewed in some detail the modifications that it says it made to Dr. Kelly's Program as a result of the medical information it received about him, and stated:
>
> > Treating Dr. Kelly in this manner is consonant with a duty not to discriminate and does not constitute "discrimination." Given that modifications were made in Dr. Kelly's training to provide him with assistance to meet the standards against which he would be assessed, it is clear he was treated as an individual.
>
> [482] It says that had it ignored the information that it had about Dr. Kelly and required him to meet the same standard as everyone else, then he would have been treated adversely. Instead, it says that it built modifications into its standards and then assessed Dr. Kelly on his individual merits. Consequently, it says there was no adverse treatment
>
> [483] I am unable to accept this argument. In my view, the use of the term "modifications" does not change the true character of the steps that UBC took in regard to Dr. Kelly's Program. The steps are properly characterized

> as accommodations and are relied on as such in UBC's argument concerning the duty to accommodate.
>
> [484] In my view, the reasonableness of the full scope of modifications relied on by UBC are properly considered under the BFOR/BFRJ analysis. As noted by the B.C. Court of Appeal in *Coast Mountain Bus Company Ltd. v. CAW-Canada, Local 111*, 2010 BCCA 447:
>
> > ...in my view, a failure to accommodate is not a matter that demonstrates prima facie discrimination. Rather, once prima facie discrimination has been demonstrated, issues of accommodation are considered in determining whether discrimination is justified on the basis of a bona fide occupational requirement. It may be that accommodation will ameliorate the effects of adverse treatment, but a lack of accommodation does not, without more, support a finding of adverse treatment, (para. 66)
>
> [485] Similarly, while positive accommodations may serve as a defence to a finding of *prima facie* discrimination, it is improper to collapse the analysis and assess the reasonableness of UBC's accommodations within the *prima facie* analysis.
>
> [486] The very reason that UBC was implementing modifications was because of Dr. Kelly's disabilities. If I were to consider the reasonableness of the full scope of those modifications in this part of the analysis, and concluded Dr. Kelly had proven a prima facie case of discrimination, such a conclusion would inevitably result in a finding that UBC could not establish a BFRJ/BFOR.
>
> [487] In this regard, it is also important to recognize that it is not in dispute that UBC accommodated Dr. Kelly to some extent. The focus of the issue is whether it fully discharged its duty in all the circumstances.
>
> Conclusion to Question of Law #1

[87] I consider the reasoning of the Tribunal, as set out in the foregoing paragraphs of the Decision, in the context of the entire Decision, the evidence, and the submissions of UBC and Dr. Kelly. Rather than repeating or paraphrasing the comments of the Tribunal, I adopt them and their reasoning and conclusions as correct in law.

> **Question of Law #2**
>
> *Did the Tribunal err in law by holding that (regarding the finding that there was a nexus between Dr. Kelly's disability and the adverse treatment) the process leading to Dr. Kelly's dismissal (to the extent that it was based on an assessment of performance, identified deficits and an inability to meet the Program's standards despite modifications) was to be*

addressed in the context of whether UBC had reasonably accommodated Dr. Kelly?

[88] UBC argues as follows:

1. The decision was not made until Dr. Kelly had been provided additional support and other assistance in his training program. However, even with such assistance and modifications, he did not meet the required standards. He was unable to pass a single core or "on service" rotation in his family practice training.
2. The Tribunal erred in law in saying effectively that "You can't avoid discrimination by moderating your standard." UBC argues that this statement applies to the duty to accommodate, but not to the question of *prima facie* discrimination.
3. The Tribunal erred in focusing on the negative consequences ("adverse impact") of UBC's decision and failed to focus on the treatment of Dr. Kelly by the decision-maker.

[89] Dr. Kelly argues as follows:

1. The Tribunal was correct in concluding that there does not need to be any causation proven of the nexus between the disability and adverse treatment at step three.
2. UBC's argument is flawed on this point because it attempts to insert the question of accommodations into the *prima facie* stage of the analysis, something the courts have rejected.
3. There is no free-standing duty to accommodate. A failure to accommodate is not a matter that demonstrates, or is evidence of, an act of *prima facie* discrimination. A duty to accommodate arises only after *prima facie* discrimination has been proven: *Martin v. Carter Chevrolet Oldsmobile*, 2001 BCHRT 37 at para. 20 and *British Columbia (Public Service Agency) v. British Columbia Government and Service Employees Union*, 2008 BCCA 357 at para. 6. ("*Gooding*").

[90] In the Decision, the Tribunal said this:

> [491] UBC reiterates under this part of the prima facie test that the process leading to Dr. Kelly's dismissal from the Program was detailed and based upon "broad consultation and participation by clinical faculty with accompanying review of material from Dr. Kelly's healthcare professionals." It further says that the decision was made based on an assessment of relevant information, performance, identified deficits and Dr. Kelly's inability to meet the Program's standards despite modification to his training

> program, and that such an approach is inconsistent with acting in a discriminatory manner "because of' Dr. Kelly's disability.
>
> [492] I consider this argument to reflect another attempt to collapse the BFOR/BFRJ analysis into the prima facie analysis. As noted earlier, whether UBC reasonably accommodated Dr. Kelly is a matter to be addressed if Dr. Kelly proves a *prima facie* case of discrimination.

Conclusion to Question of Law #2

[91] I consider the reasoning of the Tribunal, as set out in the foregoing paragraphs of the Decision, in the context of the entire Decision, the evidence, and the submissions of UBC and Dr. Kelly. Rather than repeating or paraphrasing the comments of the Tribunal, I adopt them and their reasoning and conclusions as correct in law.

Question of Law #3

Did the Tribunal err in law by considering a procedural component to the duty to accommodate?

[92] UBC argues that the Tribunal erred in the following ways:

1. In finding that the Program did not meet either the substantive or the procedural component to the duty to accommodate. The law is that there is no separate procedural component to the duty to accommodate to the point of undue hardship: This is an error in law: *Emergency Health and Services Commission v. Cassidy*, 2011 BCSC 1003 at paras. 33-34 [*Cassidy*], and *Canada (Human Rights Commission) v. Canada (Attorney General*), 2014 FCA 131 at paras. 22-24.
2. In finding that the Program failed to meet the requirements of the substantive component of the duty to accommodate because the Tribunal approached the question of the duty to accommodate in a "holistic" manner (which included a procedural component).

[93] Dr. Kelly argues:

1. With respect to UBC's submission that there is no procedural element to the question of duty to accommodate, UBC is only partially correct. *Cassidy* does not stand for the proposition that a tribunal cannot consider procedural elements in the assessment of the employer's attempts to accommodate, but

rather that there is not a separate procedural element to the duty that can be breached.

2. In *Cassidy*, the difficulty was that there was only a breach of the procedural element and not of the substantive element. That is significantly different from this case.

3. The Tribunal merely observed that Dr. Kelly's argument had two elements, then went on to assess UBC's efforts in a holistic manner, which is precisely what *Cassidy* requires.

4. The Tribunal did not determine that there was a separate procedural element. Rather, it expressly recognized the overlapping nature of the procedural and substantive elements and assessed "in a holistic manner" whether UBC met its duty. It determined that UBC failed to implement accommodations that it could have implemented without undue hardship − a substantive element. While the Tribunal did consider procedural elements, such as UBC's failure to allow Dr. Kelly to respond to questions during its decision-making process, those did not form the basis for a breach of the duty separate from the substantive breach. The Tribunal's findings were based on a holistic analysis of all the evidence.

5. It was not an error of law for the Tribunal to merely mention that it will consider procedural elements as part of a holistic, contextual consideration. The Tribunal correctly cited and applied the law on this point. In the alternative, if the Tribunal should not have considered procedural elements, its consideration of this did not materially affect its decision, as it found a breach of the substantive duty which is sufficient on its own to warrant the ultimate finding: *Moore v. British Columbia (Education)*, 2012 SCC 61, at para. 49 [*Moore*].

[94] In the Decision, the Tribunal said this:

> [384] Dr. Kelly was not invited to this meeting, and was not provided any opportunity, either in writing or otherwise, to respond to any questions from any Sub-Committee member. No physician who had treated Dr. Kelly was asked to participate in the meeting, or to provide any clarification or answer any questions from the Sub-Committee members. There was no evidence in the minutes, or in other evidence presented during this hearing, that Dr. Kelly's medical care had been harmful to either a patient or the public. Further, despite the criticism of the preceptors' evaluations, the fact is that qualified physician educators, who had personally observed and assessed Dr. Kelly, had passed him in several rotations (including a remedial rotation).
>
> …
>
> [526] Dr. Kelly also says that the duty to accommodate has both a procedural and a substantive component, and that UBC has met neither. In

> *Kerr v. Boehringer Ingelheim (Canada)(No. 4)*, 2009 BCHRT 296 (appeal dismissed, 2011 BCCA 266), the Tribunal described its approach to a consideration of these aspects of the duty to accommodate as follows:
>
> > Ms. Kerr argued that the duty to accommodate inquiry includes both procedural and substantive aspects. In *Meiorin*, the Court stated that, while there may be an overlap between these two types of inquiries, it is helpful to consider separately the procedure which was adopted to assess the issue of accommodation and the substantive content of an accommodation or the reasons for not offering one. (para. 66; *Parisien v. Ottawa-Carleton Regional Transit Commission*, 2003 CHRT 10, para. 69) In my view, both the procedure of the inquiry, and the substantive results of those inquiries, are the elements that should be considered when determining whether an employer has met its obligations under the *Code* and I follow this approach in this decision, (para. 507)
>
> [527] In my view, it is relevant to consider both the accommodation process and the reasons for Dr. Kelly's dismissal in assessing, in a holistic manner, whether UBC has satisfied its duty to accommodate. My analysis will include a consideration of these relevant factors.

Conclusion to Question of Law #3

[95] I consider the reasoning of the Tribunal, as set out in the foregoing paragraphs of the Decision, in the context of the entire Decision, the evidence, and the submissions of UBC and Dr. Kelly. Rather than repeating or paraphrasing the comments of the Tribunal, I adopt them and their reasoning and conclusions as correct in law.

The Questions of Fact

[96] UBC argues that the Tribunal made a number of errors which had an effect on the Tribunal's ultimate errors concerning *prima facie* discrimination and duty to accommodate. I have already determined that all of those alleged errors concern questions of fact.

[97] With respect to the issue concerning a *prima facie* case of discrimination, those alleged errors were the following:

1. in determining that Dr. Kelly's disability was a factor in the adverse treatment; in determining that there was a nexus between the adverse treatment and the prohibited ground of discrimination.

[98] With respect to the issue concerning a duty to accommodate, those alleged errors include the following:

1. in measuring duty to accommodate based on success or failure;
2. in relying on the concept of "possibility of further accommodations"; in determining the accommodation process was prematurely truncated;
3. in accepting and relying on the evidence of Dr. Gibbins;
4. in ignoring the unchallenged evidence of Dr. Kernahan;
5. in failing to properly take into account the notion of undue hardship to the Program, and the impact of further accommodations on other students.

[99] The Tribunal is entitled to deference when addressing factual matters within its expertise. Deference requires a contextual reading of a decision and respectful attention to the reasons given. Therefore, I will quote extensively from the Decision when discussing how the Tribunal determined each of the issues of fact under consideration.

Issues of Fact Relating to *Prima Facie* Discrimination

In determining that Dr. Kelly's disability was a factor in the adverse treatment; In determining that there was a nexus between the adverse treatment and the prohibited ground of discrimination

[100] UBC argues as follows:

1. While correctly determining (and conceded by UBC) that Dr. Kelly was affected by disability, the Tribunal erred in ignoring that the evidence established that he was largely asymptomatic and well-cared for (medically) during his training. It erred in not concluding that there was no evidence that his performance was adversely affected by his disability and in failing to recognize that there was no nexus at all between his disability and his sub-standard performance.
2. The Tribunal made an unreasonable finding of fact when it found discrimination on the basis of disability, rather than on an individual assessment based on Dr. Kelly's demonstrated merits and capabilities.

3. The decision to dismiss Dr. Kelly was made pursuant to the relevant Policy and was based on an assessment of all information specifically relevant to Dr. Kelly, his performance, his identified deficits and his inability to meet the standards despite significant modifications to his training.

4. The assessment of Dr. Kelly was not based on stereotypical assumptions and was not made in the absence of testing Dr. Kelly's abilities. It was not made "because of" his disability, and therefore, was not made in a discriminatory manner.

5. Dr. Kernahan testified that Dr. Kelly was terminated because he had not "demonstrated" an ability to meet the standards.

6. The Tribunal erred in its determination with respect to the third element of the test on the issue of whether Dr. Kelly's disability was a factor in his adverse treatment.

7. There was no evidentiary nexus between the protected ground or characteristics and the adverse treatment.

[101] Dr. Kelly argues as follows:

1. UBC concedes that Dr. Kelly had (and has) a disability.

2. UBC's argument does not allow for the possibility that the intervening cause (Dr. Kelly's poor performance) was caused by his disability. This position enabled UBC to make what it argues was an "academic judgement" of his abilities without a careful consideration of the disability-related explanations for areas of substantial performance.

3. The adverse treatment can be seen in the following:

   (a) he was not provided with a further opportunity to complete a remedial rotation, or to go on probation; and

   (b) he was dismissed from the Program, and as a result of this dismissal, from employment.

4. There is no element of "intention" required to prove *prima facie* discrimination.

5. The focus is not on whether the disability was a factor in the individual's inability to meet the standard or conform to the rule. The disability will almost certainly be the basis for the inability to meet the standard or conform to the rule. The question is whether, in making the judgement about the individual, the disability rather than the demonstrated abilities of the individual was a factor in the decision-making regarding the individual.

6. His termination on the basis of performance that was impaired by disability is a sufficient nexus for the *prima facie* analysis.

7. The correct statement of the law is that the third stage of the *prima facie* analysis requires only that the disability be a factor, not the sole or overriding factor in the adverse treatment. The analysis is not whether the employer had non-discriminatory reasons for its decision, but rather whether any aspect of its decision was tainted by discrimination: *Kemess Mines* at para. 30.

[102] In the Decision, the Tribunal said this:

> [493] UBC goes on to say that, while Dr. Kelly had a disability, there was no medical evidence that he was experiencing symptoms associated with his ADHD (or any other medical condition) at the time of his evaluations or that his performance was adversely affected by his disability….
>
> [495] UBC says that in the absence of medical evidence, the Tribunal may not infer a connection between Dr. Kelly's inability to meet program standards and his disability, mood or mental state.
>
> [496] I accept that there must be evidence of a connection between Dr. Kelly's disability and his performance. For the following reasons, I find that there is such a connection.
>
> [498] …There is no dispute that throughout the relevant period, Dr. Kelly had a NVLD and ADHD. …
>
> [500] I am able to reasonably infer a connection between Dr. Kelly's disabilities and his performance in the Program based on a consideration of all the information set out in Dr. Gibbins' report.
>
> [502] I also find that Dr. G. Weiss described a connection between Dr. Kelly's disability and his performance in the Program. She was going to discuss strategies for addressing these issues with Dr. Kelly. She also concluded that the accommodations recommended by Dr. Gibbins, if implemented, would enhance Dr. Kelly's ability to "profit" in the Program. I take this to mean that his ability to succeed in the Program would improve if the accommodations were implemented.
>
> [503] Based on a consideration of the medical evidence as a whole, I find that Dr. Kelly's performance in the Program was affected by his disabilities.
>
> [504] … Even if the evidence could have been more substantive on this point (though I do not consider this to be the case), as noted earlier, I find that Dr. Kernahan, the Resident Sub-Committee, the PG Deans and the Appeals Committee all perceived Dr. Kelly's disabilities to negatively impact his ability to successfully learn and practice as a family medicine physician. This is sufficient to establish the necessary connection between his disabilities and the adverse treatment. …
>
> [505] … I note that at the time Dr. Kelly made the comment about feeling better than he ever had before, I have found that he reasonably believed he

was going to pass his family practice rotation, though in fact this did not occur. In my view, Dr. Kelly's feeling at this point in time, taken in context, is not indicative of symptom-free functioning, but reflects optimism about his progress in the Program.

[506] … The argument that there was no evidence that Dr. Kelly's performance was adversely affected by his disability, and that the available medical evidence was that he was largely asymptomatic, is inconsistent with the conclusion (and perceptions) of Dr. Kernahan, the Sub-Committee, and the Appeals Committee that, at least in part because his deficits were life-long, he could not be accommodated within the Program. …

[507] In the alternative, UBC says that if the Tribunal finds a connection between Dr. Kelly's performance and his disability (which I have), then the Tribunal should also conclude that Dr. Kelly was functioning at his optimal level since his symptoms were well controlled.

[508] I cannot accept this argument as factually sound. Dr. Kelly was diagnosed with ^ADHD, a NVLD, and, at various points, anxiety and depression. He required treatment, such as psychological counselling and medication, throughout most of his residency. His medication was adjusted and varied over the material time. Both Dr. Myers and Dr. Gibbins made recommendations to accommodate the limitations that his medical condition presented in his learning and working environment.

…

[510] I find that there is a clear, direct and substantive link between Dr. Kelly's disability and the adverse treatment. …

[511] First, the August 23, 2007 Sub-Committee Minutes specifically considered whether it should recommend Dr. Kelly's termination from training because of his disability:

> Should we as a program move to recommend to the Postgraduate Deans that this resident be dismissed for unsuitability for training? Reason being that the resident has a learning disability and that further accommodation cannot be made to allow him to meet the learning objectives of the Program?

[512] It concluded that it should do so.

…

[514] The Appeals Committee specifically concluded that if Dr. Kelly had not had a disability, then it would have expected him to have been provided with a longer period of time in which to remediate.

[515] Unlike many cases in which the evidentiary link between a prohibited ground of discrimination and adverse treatment is proven by reasonable inference based on a consideration of all the circumstances, in this case I find that there is no factual doubt that Dr. Kelly's disability was a factor, if not the sole factor, in the adverse treatment.

Conclusion

[103] I consider the reasoning of the Tribunal, as set out in the foregoing paragraphs of the Decision, in the context of the entire Decision, the evidence, and the submissions of UBC and Dr. Kelly. I am satisfied that the reasoning of the Tribunal, and its conclusion with respect to this issue of fact, was reasonable.

[104] The Decision on this issue is consistent with the reasoning of the Supreme Court of Canada in *Bombardier*, which was pronounced after submissions in this matter were concluded.

Conclusion with respect to *prima facie* discrimination

[105] The Tribunal summed up its discussion about *prima facie* discrimination in paragraph 516 where it said the following:

> [516] Dr. Kelly had disabilities which were directly connected to his assessment and evaluation, denial of access to remedial and probation options, and ultimate dismissal from his residency and his employment. He has proven a prima facie case of discrimination under both s. 8 and 13 of the *Code*.

[106] The burden of proof with respect to *prima facie* discrimination is on Dr. Kelly. The standard of review is reasonableness.

[107] After consideration of all of the foregoing, including the arguments of UBC and Dr. Kelly and all of the evidence relating the question of *prima facie* discrimination generally, I am satisfied that the conclusion and reasoning of the Tribunal, in concluding that Dr. Kelly had proven a *prima facie* case of discrimination, was reasonable.

Issues of Fact Relating to Duty to Accommodate

In measuring duty to accommodate based on success or failure

[108] UBC argues that:

1. The duty to accommodate is not measured by a determination with regard to whether the accommodative measures were effective.

2. The law does not entitle Dr. Kelly to a standard of perfection. The Program is not required to implement every suggestion recommended by Dr. Gibbins. Nor is it required to demonstrate that a particular suggestion has failed before it can conclude that the accommodation cannot be implemented. Dr. Kelly is entitled to expect the Program to make "a conscientious and reasonable attempt to identify his condition and to address his needs": *British Columbia (Ministry of Education) v.* Moore, 2010 BCCA 478 at para. 177, varied 2012 SCC 61.

3. Notwithstanding the accommodations provided to Dr. Kelly, he was not successful. There is no indication in any of the evidence that any person from, or on behalf of, the Program, took the position that persons with Dr. Kelly's disability can never be family physicians. The Program concluded that Dr. Kelly's deficits were not remediable, and that he was not suitable for further training as a family physician. These conclusions were specific to Dr. Kelly.

[109] Dr. Kelly argues:

1. This argument on behalf of UBC is wrong. The burden of establishing *prima facie* discrimination is on Dr. Kelly. However, once established, the burden shifts to UBC to establish that it met its duty to accommodate to the point of undue hardship. It is not necessary for him to prove that the accommodations proposed by Dr. Gibbins would have guaranteed his success in the Program. Rather, it is incumbent upon UBC to show that implementing Dr. Gibbins' recommendations would have resulted in undue hardship.

2. Neither he nor his physicians can guarantee that particular accommodations will lead him to success, nor are they required to do so. The only way to learn if he can be successful is to allow him to try.

3. The B.C. Court of Appeal has rejected the proposition that an employee must demonstrate his or her ability to be successful despite a disability: *Kerr v. Boehringer Ingelheim (Canada)*, 2010 BCSC 427, aff'd, 2011 BCCA 266.

4. In this regard, the Tribunal noted that Dr. Gibbins had written in his report that:

> … As a result, with proper supports and his own continued drive, focus, enthusiasm and effort, Carl stands a strong chance of

> continuing to improve his adaptive functioning, reaching his educational and personal goals, and making an important contribution to his community.
>
> 5. Indeed, following the Decision, Dr. Kelly returned to the Program and was progressing through his rotations with accommodations.

[110] In the Decision, the Tribunal said this:

> [533] UBC says that it considered Dr. Gibbins' recommendations and determined that it was not able to implement all the recommendations for the reasons set out in its documentation. It says that it is not legally required to demonstrate that a particular recommendation has failed before it can conclude that the accommodation cannot be implemented, or to accommodate to the point where a disabled person can succeed. It says all that Dr. Kelly is entitled to expect is that UBC made "a conscientious and reasonable attempt to identify his condition and to address his needs": *British Columbia (Ministry of Education) v. Moore*, 2010 BCCA 478, para. 177.
>
> …
>
> [535] I agree that the issue is not whether any further accommodation, viewed out of context, was "possible". Rather, the issue is whether UBC could have further accommodated Dr. Kelly, without incurring undue hardship, having regard to the entire context of the relationship between Dr. Kelly and UBC.

Conclusion

[111] I consider the reasoning of the Tribunal, as set out in the foregoing paragraphs of the Decision, in the context of the entire Decision, the evidence, and the submissions of UBC and Dr. Kelly. I am satisfied that the reasoning of the Tribunal, and its conclusion with respect to this issue of fact, was reasonable.

In relying on the concept of "possibility of further accommodations"; in determining the accommodation process was prematurely truncated

[112] UBC argues that:

> 1. It was the consensus of the various Program personnel, whose *bona fides* and credentials were accepted and taken seriously by the Tribunal that Dr. Kelly could not succeed.
> 2. The various evaluations assessing Dr. Kelly's performance occurred in the context of the Program providing a number of

> accommodations designed to address specific deficits demonstrated by him. In addition, the Program sought input from his treating physician and obtained specific recommendations.

[113] Dr. Kelly argues that:

> 1. UBC makes the same argument that it made to the Tribunal. The Tribunal considered UBC's argument and the evidence that it relied on and preferred the evidence on this point which was called by Dr. Kelly. While Dr. Kelly does not argue that UBC's argument is unreasonable, it is also impossible to say that the Tribunal's preference for the evidence called by Dr. Kelly was anything but reasonable.

[114] In the Decision, the Tribunal said this:

> [543] I also note that while UBC may not have been required to demonstrate that a particular accommodation had failed before it could conclude that it could not be implemented, the fact is that the Policy already contemplated, and the Program had already demonstrated, that it was, in fact, able to implement accommodations to support residents who were having difficulty in the Program. It unreasonably truncated that process because of Dr. Kelly's disability, at a point in time when Dr. Kelly had been demonstrating success in the Program.
>
> …
>
> [547] The opinions of two specialists in the area of ADHD suggested that, with appropriate accommodation, Dr. Kelly might be successful in the Program. I do not consider it either conscientious or reasonable for the Program to have curtailed Dr. Kelly's access to accommodations that may have been provided to other residents under the Policy, but were not provided to Dr. Kelly because he had ADHD, which is a life-long deficit.
>
> …
>
> [550] …I find that the Program, in the absence of a solid factual foundation, acted on its stereotypical assumptions about Dr. Kelly and prematurely dismissed him from the Program, at a time when he had been demonstrating success.

Conclusion

[115] I consider the reasoning of the Tribunal, as set out in the foregoing paragraphs of the Decision, in the context of the entire Decision, the evidence, and

the submissions of UBC and Dr. Kelly. I am satisfied that the reasoning of the Tribunal, and its conclusion with respect to this issue of fact, was reasonable.

In accepting and relying on the evidence of Dr. Gibbins

[116] Dr. Gibbins provided a number of recommendations that might reduce Dr. Kelly's symptoms and improve his adaptive functioning. These included, among others:

1. providing him with longer familiarization periods and allowing repeated exposure to new material;
2. giving clear instructions, ideally in written form making clear the specific goals of an activity;
3. encouraging the use of memory aids;
4. reducing time pressure to allow mastery of steps in a task before improving speed and fluency;
5. encouraging him to pursue his interests;
6. he may benefit from working with a counsellor or coach to assist him in developing effective organization and life skills and assist in providing perspective in solving inter-personal problems;
7. providing him with a one-to-one preceptor rotation to improve his skills in family practice.

[117] UBC argues as follows:

1. Dr. Gibbins' report identified areas of deficits generally associated with ADHD. He noted that the most impairing symptoms were inattentiveness, keeping on track with uninteresting work, managing time, retaining or retrieving information as required to complete a task, and organizing information.
2. Many of the accommodations previously implemented by the Program were consistent with recommendations subsequently made by Dr. Gibbins in his report. The details of all of these were before the Tribunal.
3. In preferring Dr. Gibbins' opinions to each and all of the Program doctors, the Tribunal did not sufficiently take into account the following:

   (a) he was not a medical doctor;

(b) he had no first-hand familiarity with the learning environment of the Program when he made his report;

(c) he has no involvement as an educator in the Program.

4. With respect to Dr. Gibbins' evidence:

(a) he testified that all the recommendations may not need to be implemented but it would be necessary to determine what combination of strategies were sufficient and worked for Dr. Kelly;

(b) given his unfamiliarity with the relevant learning environment, he could not identify how Dr. Kelly's deficits or the proposed accommodations exhibited would play out in that environment;

(c) as a result of his limitations in identifying how the accommodations would play out in the environment, the only evidence as to whether this could be accomplished and whether it would have the desired outcome, was provided by the Program; and

(d) the Tribunal rejected the evidence regarding the Program's assessment of the proposed accommodations, and consequently there was no such evidence before the Tribunal.

[118] Dr. Kelly argues as follows:

1. The Tribunal received detailed evidence of the steps taken by UBC in an attempt to accommodate Dr. Kelly, and of the Program's assessment of his deficits and its conclusions regarding his unsuitability.

2. Despite UBC's views of Dr. Gibbins' report, the Tribunal had ample reasons for accepting it:

(a) UBC selected Dr. Gibbins in the first place.

(b) UBC paid for the assessment.

(c) Dr. Gibbins was qualified as "an expert witness in psychology with particular expertise in neuro-developmental disorders, including ADHD".

(d) Dr. Gibbins prepared his report on the basis of substantial testing and extensive interviews with Dr. Kelly.

(e) Dr. Gibbins' observations about Dr. Kelly's deficits were consistent with those observed by others in the Program.

(f) Dr. Gibbins' recommendations were consistent with or supported by Drs. Myers and Weiss.

(g) UBC implemented several of Dr. Gibbins' recommendations with some form with success.

(h) The individuals involved in UBC's rejection of Dr. Gibbins' accommodations and suggestions were not experts in the area of Dr. Kelly's disabilities.

3. The Tribunal had ample factual basis for finding that the accommodations proposed by Dr. Gibbins could be translated into the Program environment:

(a) Many of the accommodations were provided in some form to Dr. Kelly during his time in the Program.

(b) The Program's Policy allowed for some of the requested accommodations which could be provided to other residents.

(c) Dr. Gibbins expected that a counsellor or therapist could assist in particularizing his recommendations.

(d) It is reasonable for the Tribunal to infer that it would be the employer/program provider, not the disability expert, who would be responsible for translating specific restrictions, limitations and accommodations into the work environment.

(e) The Program's physicians were not experts in Dr. Kelly's disability and, just as Dr. Kelly could not say how his proposed accommodations might play out in the Program environment, neither could the Program's physicians say how they might play out, because they were never implemented.

4. UBC is correct in noting that Dr. Gibbins is not an expert in the functioning of a medical program. However, it is equally the case that the UBC doctors who emphatically state that position are not experts in ADHD.

[119] In the Decision, the Tribunal said the following:

> [546] UBC criticizes the Gibbins report because Dr. Gibbins admittedly had no first-hand familiarity with the Program, was not an educator in the Program, and could not say how the deficits exhibited by Dr. Kelly or the proposed accommodation "would play out" in the Program environment. Similarly though, no one in the Program was identified as an expert in ADHD or NVLD, and they also could not say how some of the proposed accommodations would "play out" in the Program environment, since they were not implemented. There was evidence that when certain accommodations were implemented, such as the one-on-one preceptor, Dr. Kelly's performance improved. This is precisely why it would have been reasonable to more fully consider the suggested accommodations. No one from the Program contacted Dr. Kelly to discuss Dr. Gibbins' recommendations and, in my view, it was incumbent upon them to engage in dialogue about the accommodation process.

Conclusion

[120] I consider the reasoning of the Tribunal, as set out in the foregoing paragraphs of the Decision, in the context of the entire Decision, the evidence, and the submissions of UBC and Dr. Kelly. I am satisfied that the reasoning of the Tribunal, and its conclusion with respect to this issue of fact, was reasonable.

In ignoring the unchallenged evidence of Dr. Kernahan

[121] UBC argues that:

1. The Tribunal consistently failed to assess the measures taken by the Program and the Program's assessment of proposed measures in a manner that acknowledged the expertise, and the context within which these decisions were taken.
2. It was beyond dispute that Dr. Kernahan knew more about the Program, and the potential effects of permitting Dr. Kelly to continue, than Dr. Gibbins or anyone else. She also knew more about what attempts Dr. Kelly had made, what accommodations he had been given, and how he had responded. She was an acknowledged expert and the person in the best position to express an opinion about Dr. Kelly's potential for success. Yet, the Tribunal accepted the evidence of Dr. Gibbins, who knew essentially nothing about the Program, over the evidence of Dr. Kernahan.

[122] Dr. Kelly argues that:

1. UBC mischaracterizes the Tribunal's treatment of Dr. Kernahan's evidence. It did not "ignore" her evidence.
2. The Tribunal had before it an abundance of evidence presenting the points of view of UBC and of Dr. Kelly's position. It found all of the witnesses to be credible and well-motivated. It preferred the evidence of Dr. Gibbins, and those who supported his view point, to those of the UBC doctors. The fact that UBC thinks the Tribunal should have preferred its own doctors does not make the decision wrong, or even unreasonable. The Tribunal did what Tribunals do every day – they find facts based on evidence, often conflicting evidence. While there was certainly evidence which might have led some tribunals to come to a different conclusion, here there was an abundance of evidence to support the conclusion that this Tribunal came to.

[123] In the Decision, the Tribunal said this:

> [558] Upon receipt of the Gibbins report, Dr. Kernahan did not accept its recommendations. In my view, she focussed on the limitations that ADHD presented in Dr. Kelly, and not on the positive steps that might have been taken to address those limitations. For example, Dr. Gibbins testified that, while there was no guarantee, he would have expected that, if his recommendations had been implemented, they would have minimized the effect of Dr. Kelly's disorder. …
>
> …
>
> [564] … I have found that Dr. Kernahan, the PG Deans and the Appeals Committee unreasonably rejected Dr. Gibbins' recommendations for accommodation. As well, UBC's reliance on the life-long nature of Dr. Kelly's disorder as a reason to conclude that he would not be successful even if the Gibbins' recommendations were implemented (e.g., see the last page of Dr. Kernahan's August 23, 2007 letter) was unreasonable, particularly in light of Dr. Gibbins' evidence that he would expect the effect of the disorder to be reduced if the accommodations were implemented.

Conclusion

[124] I consider the reasoning of the Tribunal, as set out in the foregoing paragraphs of the Decision, in the context of the entire Decision, the evidence, and the submissions of UBC and Dr. Kelly. I am satisfied that the reasoning of the Tribunal, and its conclusion with respect to this issue of fact, was reasonable.

In failing to properly take into account the notion of undue hardship to the Program and the impact of further accommodations on other students

[125] UBC argues as follows:

> 1. If and only if *prima facie* discrimination has been established, then the Program must demonstrate, on a balance of probabilities, that Dr. Kelly's failure to meet the standards he was obliged to meet was a BFRJ for his termination from the Program. In order to establish this justification, UBC must demonstrate that:
>
> (a) it adopted the standard for a purpose or goal that is rationally connected to the function being performed;
>
> (b) it adopted the standard in good faith, in the belief that it was necessary for the fulfillment of that purpose or goal; and
>
> (c) the standard is reasonably necessary to accomplish its purpose or goal, in the sense that the Program cannot

accommodate persons with the characteristics of Dr. Kelly without incurring undue hardship: *Meiorin*.

2. Step 3 of the *Meiorin* test focuses on the duty to accommodate to the point of undue hardship. This is a duty which should be applied with common sense and flexibility in the context of the factual situation presented in each case.

3. There is no obligation to accommodate to the point where a disabled person can succeed. The obligation is to accommodate to the point of undue hardship.

4. The Tribunal found that the Program could have accommodated Dr. Kelly without incurring undue hardship. UBC argues that, while it may have been possible to provide additional accommodation, an assessment of whether it would have been reasonable to do so, must take into account the context in which the accommodation is being provided. The accommodation must also be measured against the specific needs of the training and the likelihood that the accommodative measures would have a positive effect on Dr. Kelly's performance.

5. UBC could not have done more in terms of providing accommodations for Dr. Kelly without undue hardship.

6. Dr. Kelly's failure to meet the Program standards after accommodations were provided demonstrates that accommodations were unsuccessful in improving performance and that it was unsustainable to continue that approach as it would fundamentally alter the Program.

7. The Tribunal's conclusion that the Program did not meet its duty to accommodate to the point of undue hardship is unreasonable in light of all the evidence.

[126] Dr. Kelly argues as follows:

1. The Tribunal reviewed all of the evidence and found that UBC had not met its duty to accommodate, considering the same arguments that UBC made before this Court.

2. The parties are agreed that the law used to express that accommodation requires "no more than a conscientious and reasonable attempt to identify [the individual's] condition and to address his needs", but that the law now is expressed as a requirement to accommodate "to the point of undue hardship".

3. In *Moore*, at para. 49, the Supreme Court of Canada stated this:

> The *prima facie* discriminatory conduct must also be "reasonably necessary" in order to accomplish a broader goal … an employer or service provider must show "that it could not have done anything else reasonable or practical to avoid the negative impact on the individual" ….

4. The Tribunal correctly concluded that UBC must do more than simply make an attempt to accommodate. It must do so to the point of undue hardship. This finding that UBC did not accommodate Dr. Kelly is entitled to significant deference as it is inextricably linked with the factual circumstances of his involvement in the Program and UBC's attitude.

5. Under the third step of the *Meiorin* analysis, UBC must establish that it could not accommodate Dr. Kelly without incurring undue hardship. This is a fact specific inquiry: *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970; Meiorin, para. 63.

6. The burden of establishing undue hardship is on UBC. Evidence is required. The Tribunal considered the evidence, expressly referred to its analysis of that evidence, and concluded that it did not satisfy the burden that UBC was required to discharge.

[127] In the Decision, the Tribunal said this:

> [536] In this case, UBC says that it has accommodated Dr. Kelly to the point of undue hardship and that any further accommodation "would change the academic program in a fundamental way," However, while there is reference in the Appeals Committee decision to risking the integrity of the Program, and other similar language, there was no substantive factual foundation to support a conclusion that the Program would be fundamentally altered or its professional standards lowered if it was to accommodate Dr. Kelly. There is reliance on a negative impact on other residents and preceptors, and on administrative challenges, but as will be more fully explored, much of the evidence was anecdotal and fell far short of the standard necessary to demonstrate undue hardship or a "conscientious and reasonable" attempt to accommodate Dr. Kelly.
>
> [540] … I am unable to conclude that further accommodating Dr. Kelly would have resulted in a fundamental change to the Program. …
>
> [549] UBC has not proven that either the structure or the educational philosophy of the Program would have been "at risk" if it was to have provided Dr. Kelly with a further remedial or probationary period to demonstrate his suitability. To the contrary, the evidence demonstrated that it was able to provide accommodations, albeit it with some inconvenience, and that its Policy specifically contemplated such accommodations for all residents, whether or not they were disabled

> [551] I am not persuaded that the anecdotal observations, unquantified financial costs, organizational inconveniences, or overly broad interpretations of Dr. Gibbins' recommendations demonstrate that UBC has discharged its duty to accommodate Dr. Kelly. …

Conclusion

[128] I consider the reasoning of the Tribunal, as set out in the foregoing paragraphs of the Decision, in the context of the entire Decision, the evidence, and the submissions of UBC and Dr. Kelly. I am satisfied that the reasoning of the Tribunal, and its conclusion with respect to this issue of fact, was reasonable.

Conclusion with Respect to Duty to Accommodate

[129] The Tribunal noted the following about the duty to accommodate in paragraphs 558 and 564:

> [558] …Whether or not the accommodations would have allowed Dr. Kelly to successfully complete his training and. practice family medicine now remains unknown.
>
> …
>
> [564] …Dr. Kelly was not provided the opportunity to demonstrate his abilities, and be assessed against the Program's professional and patient care standards, with the benefit of reasonable accommodation. …

[130] The burden of proof with respect to the duty to accommodate is on UBC. The standard of review is reasonableness.

[131] After consideration of all of the foregoing, including the arguments of UBC and Dr. Kelly and all of the evidence relating to the duty to accommodate generally, I am satisfied that the conclusion and reasoning of the Tribunal, in concluding that UBC had failed in its duty to accommodate to the point of undue hardship, was reasonable.

CONCLUSION WITH RESPECT TO THE JUDICIAL REVIEW OF THE MERITS DECISION

[132] I have already decided that the three questions of law, which were required to be assessed against a standard of correctness, were decided correctly by the Tribunal.

[133] I have also decided that the individual issues raised by UBC alleging errors of fact were decided reasonably by the Tribunal.

[134] I have also decided that the decision of the Tribunal, in concluding that Dr. Kelly had proven a *prima facie* case of discrimination, was reasonable and that the Tribunal did not err in that regard.

[135] I have also decided that the decision of the Tribunal, in concluding that UBC had not met the duty to accommodate to the point of undue hardship, was reasonable and that the Tribunal did not err in that regard.

[136] There has been an unstated undertone, throughout the written and oral submissions of UBC, of indignation arising from the Tribunal not accepting the expert opinions of those medical personnel responsible for the proper and efficient workings of the Program, and perhaps more importantly, responsible for ensuring that the public ultimately is served by qualified graduates of the Program and other suitable and acceptable programs of the same type.

[137] That concern would be well-founded if a proper reading of the Tribunal's Decision led to the conclusion that Dr. Kelly must be permitted to pass the Program and become qualified to serve the public as a doctor. However, that is not a conclusion that can properly be drawn from the Tribunal's Decision.

[138] Indeed, the Tribunal makes it clear that, even after proper accommodations are provided to Dr. Kelly, there is no guarantee that he will succeed.

[139] What is required is not that he be permitted to graduate from the Program, if he is not able to qualify. Rather, what is required is that he be given a reasonable opportunity to do so by being provided with reasonable accommodations.

[140] In that regard, within the last several paragraphs of the Decision, the Tribunal said this:

> [565] It may be that implementation of the accommodations would have sufficiently reduced the effect of the disorder in Dr. Kelly's learning and work environment to allow him to successfully complete the Program. If he was not successful in his family practice training after having been provided these reasonable accommodations, then the Program would have been in a factually sustainable position to determine that it was unable to reasonably accommodate him within the Program without incurring undue hardship. As it now stands, it made that decision prematurely.
>
> [566] Dr. Kelly was entitled to the reasonable accommodation of his disabilities within the learning and work environment. I appreciate that the physician educators and Committees involved with Dr. Kelly were dealing with a unique situation and reached conclusions they considered to be in the best interest of the Program. However, the decisions to preclude Dr. Kelly access to further remediation or probation, and to dismiss him from the Program, when assessed within the legal framework of UBC's human rights obligations towards Dr. Kelly under the *Code*, were discriminatory.

[141] The application with respect to the merits Decision is dismissed.

THE REMEDY DECISION

Introduction

[142] The Program reinstated Dr. Kelly after the merits Decision and prior to the hearing on remedy.

[143] The Remedy Decision was issued on December 17, 2013. It is 23 pages and 106 paragraphs in length.

[144] As a result of the merits Decision, the Tribunal ordered UBC to pay to Dr. Kelly $385,194.70 as compensation for lost wages, and $75,000 for injury to dignity, feelings and self-respect. The Tribunal also awarded compensation for

expenses incurred as a result of the discrimination, a tax gross-up and pre-and post-judgement interest.

[145] The evidence at the remedy hearing included a number of witnesses. Dr. Kelly and his father Dr. Dominick Kelly, who is the co-owner of family practice clinic and clinical instructor in the Faculty of Family practice at UBC, both testified in support of Dr. Kelly's position. In addition, UBC and Dr. Kelly each called an economist who testified as an expert witness.

[146] The applicable sections of the *Code* are as follows:

> 37 (2) If the member or panel determines that the complaint is justified, the member or panel
>
> (a) must order the person that contravened this *Code* to cease the contravention and to refrain from committing the same or a similar contravention,
>
> (b) may make a declaratory order that the conduct complained of, or similar conduct, is discrimination contrary to this *Code*,
>
> (c) may order the person that contravened this Code to do one or both of the following:
>
> (i) take steps, specified in the order, to ameliorate the effects of the discriminatory practice;
>
> (ii) adopt and implement an employment equity program or other special program to ameliorate the conditions of disadvantaged individuals or groups if the evidence at the hearing indicates the person has engaged in a pattern or practice that contravenes this Code, and
>
> (d) if the person discriminated against is a party to the complaint, or is an identifiable member of a group or class on behalf of which a complaint is filed, **may order the person that contravened this *Code* to do one or more of the following**:
>
> (i) make available to the person discriminated against the right, opportunity or privilege that, in the opinion of the member or panel, the person was denied contrary to this *Code*;
>
> **(ii) compensate the person discriminated against for all, or a part the member or panel determines, of any wages or salary lost, or expenses incurred, by the contravention;**
>
> **(iii) pay to the person discriminated against an amount that the member or panel considers appropriate to compensate that person for injury to dignity, feelings and self respect or to any of them.**
>
> [My emphasis.]

Standard of Review

[147] The comments made about the issue of standard of review in the merits Decision of this judgment (paragraphs 54 to 77) are equally applicable here.

[148] UBC argues that:

1. the Tribunal's awards of compensation for wage loss and for injury to dignity, feelings and self-respect raise extricable questions of law or of mixed fact and law which are "law intensive" and therefore subject to a standard of correctness;
2. in the alternative, if the decision to award compensation is found to be wholly discretionary, then those calculations are "patently unreasonable" and in violation of sections 59(4)(c) and (d) of the *ATA*.

[149] Dr. Kelly argues that the *Code* expressly makes the assessment of compensation discretionary as the Tribunal "may" award compensation for wage loss and injury to dignity, feelings and self-respect: *Code*, s. 37(2).

[150] I am satisfied that:

1. There are no extricable questions of law or of mixed fact and law which are "law intensive" to be addressed arising out of the Remedy Decision with respect to the issue of wage loss or the issue of injury to dignity, feelings and self-respect.
2. The Tribunal's reasoning and decisions concerning wage loss and injury to dignity, feelings and self-respect were discretionary, and must be reviewed on a standard of patent unreasonableness: *ATA* s. 59(3).

[151] With respect to the patent unreasonableness standard of review:

1. Section 59(4) of the *ATA* provides the criteria for establishing a patently unreasonable discretionary decision. The factors identified in that subsection as rendering a discretionary decision patently unreasonable connote a high degree of deference. At least one of those factors must be established before a discretionary decision can be considered patently reasonable: *Evans v. University of British Columbia*, 2008 BCSC 1026 at para. 12.

2. With respect to the meaning of "arbitrary", the Court of Appeal has said that a decision which is not made according to reason or principle is arbitrary. This includes a decision based on no evidence or one where a material consideration is based on no evidence: *Morgan-Hung v. British Columbia (Human Rights Tribunal)*, 2011 BCCA 122.
3. Where a discretionary decision has been found on an unsupported finding of fact, the court can consider whether the "discretionary decision should be set aside as 'arbitrary' on the basis that it was founded on an unreasonable finding of fact": *J.J.* at paras. 29-30, 33.
4. As long as there are reasons which support the Tribunal's decision, the deferential standard is not reviewable by judicial review.

[152] It follows that the questions to be determined on this review are:

1. Was the Tribunal's award for compensation for wage loss patently unreasonable?
2. Was the Tribunal's award for compensation for injury to dignity, feelings and self-respect patently unreasonable?

Wage Loss

Introduction

[153] With respect to wage loss, the Tribunal ordered that UBC compensate Dr. Kelly for wage loss from the date of termination to the delayed labour market entry date of January 1, 2016.

[154] The end date of January 1, 2016 is based on a six-year period of delay into the labour market. The wage loss was subject to:

1. a 10% reduction in the award to reflect the possibility that Dr. Kelly might not complete the Program; and
2. a 20% reduction in the award to reflect the possibility that Dr. Kelly may not maintain a full-time practice, and/or might carry a reduced patient load.

[155] The foregoing reflects the difference between Dr. Kelly's actual and projected earnings from the date of termination from the Program and Dr. Kelly's

projected earnings if he had not been terminated from the Program, less the noted contingencies.

[156] The amount of the award, after deduction of the contingencies, was $385,194.70.

[157] The award flowed from the following findings of the Tribunal:

1. Dr. Kelly's enrolment and employment through the Program terminated on August 23, 2007 and he was reinstated in 2013.
2. If Dr. Kelly not been terminated from the Program he was on course to enter the labour market as a family doctor by January 1, 2010.
3. Dr. Kelly's entry into the labour market as a family doctor had been delayed by six years. He is now on course to enter the labour market by January 1, 2016.
4. While there is a possibility that Dr. Kelly will not complete the Program, the probable outcome is successful completion.
5. There is no evidence that if Dr. Kelly successfully completes the Program, he would not be reasonably accommodated in the licensing process or that there would be a basis for denying Dr. Kelly a license to practice as a physician.
6. The Tribunal rejected the argument that there should be a further contingency for the possibility that the College might deny to Dr. Kelly a license to practice.
7. If the Program and licensing process is successfully completed, Dr. Kelly would have a position at his father's clinic as a family practitioner.
8. Dr. Kelly fulfilled his duty to mitigate by making reasonable efforts to secure alternative employment.
9. Apart from the six-year delayed entry into practice there would be no further ongoing loss to Dr. Kelly's ability to earn income arising from the discrimination. As a result, the Tribunal denied Dr. Kelly's claim past January 1, 2016. It noted that "Apart from the delayed entry into practice, there is no evidence of any impairment, as a result of the discrimination, to Dr. Kelly's ability to earn a living as a family physician."

UBC

[158] UBC argues that the Remedy Decision is patently unreasonable in the determination and calculation of wage loss by:

1. treating Dr. Kelly's loss as a direct denial of employment instead of a lost training opportunity; and
2. awarding delay damages or in the alternative failing to account for contingencies in calculating damages.

Did the Tribunal err by treating Dr. Kelly's loss as a direct denial of employment instead of a lost training opportunity?

[159] UBC argues as follows:

1. The Tribunal erred in failing to apply the appropriate legal principles applicable to a loss of training opportunity and treated the loss as though it were a direct loss or denial of employment.
2. There is a distinction between discrimination that causes the direct loss or denial of employment and discrimination that causes the complainant to lose an employment or training opportunity: *Tahmoupour v. Royal Canadian Mounted Police,* 2008 CHRT 10.
3. Dr. Kelly's loss is, at best, described as a loss of opportunity to complete the Program in a timely fashion.
4. The appropriate remedy for loss of a training opportunity is to provide the lost or denied opportunity with or without financial compensation.

[160] The Tribunal set out the essence of UBC's argument in this regard and in particular was conscious of and considered several prior decisions that UBC relied upon. The Tribunal said this:

> [48] UBC relies on *Tahmoupour…*, where the Canadian Human Rights Tribunal awarded a remedy to an individual dismissed from the RCMP Training Academy, for the proposition that the appropriate remedy is to provide Dr. Kelly with the opportunity to complete the Program:
>
> > The case law makes a distinction between situations where the discrimination has caused a direct loss or denial of employment for which instatement or reinstatement is an appropriate remedy, and

> situations where the discrimination has caused the complainant to lose an employment or training opportunity. In the latter situation, tribunals have felt that the appropriate remedy is to require the respondent to provide the lost or denied opportunity, with or without financial compensation. (see, for example: *McCreary v. Greyhound Lines of Canada* (1987), 8 CHRR D/4184; *Chapdlaine v. Air Canada* (1991), 15 CHRR D/22 at para. 19-22; *Bitonti v British Columbia (Ministry of Health) (No. 4),* 2002 BCHRT 29 at para. 33 and *Chopra...*
>
> [49] UBC notes that, in that case, the Tribunal ordered the complainant be given the opportunity to enrol in the next available training program. It also ordered past wage loss, subject to a contingency discount to reflect the possibility that the complainant may not complete the program. UBC further notes that the Tribunal in that case did not order future wage loss…
>
> [50] As well, UBC notes that, after a portion of the award was remitted back to the Tribunal on appeal, the Tribunal refused to order any damages for matters arising after the date that the training program would have been completed: *Tahmonpour v. Royal Canadian Mounted Police,* 2010 CHRT 34 (CanLII), para. 9.
>
> [51] UBC acknowledges that in *Howard, Bitonti v. British Columbia (Ministry of Health,* 2002 BCHRT 29 and *Gichuru,* the Tribunal concluded that each complainant was removed from a training program for a discriminatory reason and was awarded damages for the delay period in completing training, subject to a discount for contingencies, which varied dependent on individual circumstances. It says, however, that in none of those cases was the complainant awarded damages for time periods subsequent to the delay period.
>
> [52] UBC says that because its relationship with Dr. Kelly ends upon completion of the Program, it should not be liable for any damages beyond the training period… It says the delay in Program completion is a maximum of 6 years.

[161] The Tribunal also noted that there is authority for the proposition that it is not always required or helpful to draw a distinction between loss of employment and loss of training opportunity. At para.143 of the Remedy Decision, the Tribunal referred to the case of *Howard, Bitoni* and set out (in part) the following:

> Some distinction is made in the cases between those situations in which the discrimination results in a direct loss of employment, for which the complainant receives compensation for all lost wages, and those in which the complainant has merely lost an employment opportunity and for which wage loss may be not be awarded … I do not find the distinction to be helpful in this case. A complainant is entitled to be "made whole". In doing so, it may be necessary to consider the effect of the discrimination on a complainant's future income. That calculation is necessarily speculative. In some cases, the evidence may indicate a denial of a specific job at a

> specific wage for a specific period and, therefore, the calculation of lost wages can be relatively precise. In other cases, the evidence may show that, had the discrimination not occurred, the complainant would have competed for a job but the likelihood that the complainant would succeed in the competition was too uncertain to warrant any compensation for wage loss. This case does not fall at either extreme.
>
> The delay faced by the Complainant in changing to a better-paid profession had measureable economic loss. The likelihood and extent of that loss require consideration of future events. In these circumstances, I think the appropriate approach in assessing damages is to calculate the difference between what he likely would have earned as a teacher if his entrance to the profession had not been delayed, and what he will earn if he now proceeds as quickly as possible to obtain his degree and employment as a teacher, then to adjust that figure to allow for uncertainties. This approach is consistent with the reasoning of Marceau J.A. in *Canada (Attorney-General) v. Morgan* (1991), 85 D.L.R. (4th) 473 (F.C.A.). …

[162] The Tribunal then went on to assess and determine if, on the facts of this case, Dr. Kelly had indeed suffered a financial loss. The Tribunal appears to have understood that there is authority for the proposition that the appropriate remedy, in a training program situation, will sometimes be an order that the lost or denied opportunity be provided. However, it also appears to have understood that that does not stand for the principle that financial compensation can never be granted. Rather, each case, and set of circumstances, depends upon the evidence and its own facts. In this case, the Tribunal found that there was a financial loss and that compensation was appropriate. In that regard, it rejected UBC's argument that there should be no compensation, but allowed UBC's argument that it should not be extended farther into the future than the date of Dr. Kelly's delayed entry into practice.

[163] In *Gichuru v. Law Society of British Columbia (No. 9),* 2011 BCHRT 185 at paras. 300-303*,* petition dismissed (one exception on another ground) 2013 BCSC 1325; aff'd 2014 BCCA 396 [*Gichuru BCHRT*]*,* the Tribunal summarized the following principles for assessing a wage loss award:

> [300] First, the purpose of compensation under s. 37(2)(d)(ii) is to restore a complainant, to the extent possible, to the position he or she would have been in had the discrimination not occurred.
>
> [301] Second, the burden of establishing an entitlement to compensation is on the complainant.

> [302] Third, in order to establish such an entitlement, the complainant must show some causal connection between the discriminatory act and the loss claimed.
>
> [303] Fourth, once a causal connection is established, the amount of compensation is a matter of discretion, to be exercised on a principled basis, in light of the purposes of the remedial provisions of the *Code,* and the purpose of the award. (paras. 300-303).

[164] With respect to this wage loss question, the Decision is discretionary. In measuring the Tribunal's reasoning and conclusion against the four factors set out in s. 59(4) of the *ATA*, I am satisfied that none of the concerns expressed by those four factors are applicable here. It follows that the Decision is not patently unreasonable.

Did the Tribunal err in awarding delay damages or in the alternative fail to account for contingencies in calculating damages?

[165] UBC argues as follows:

1. Once the existence of the loss is established, the valuation of the extent of the loss requires an assessment of uncertainties, contingencies and likelihoods − an exercise in foreseeability and remoteness.
2. The Federal Court of Appeal in *Chopra v. Canada (Attorney General*), 2007 FCA 268 at para. 37 noted that there must be a causal link between the discriminatory practice and the loss claimed, and that the discretion given to the Tribunal must be exercised on a principled basis.
3. The Tribunal erred in:

   (a) failing to apply the correct standard to such an award and awarding damages based on the indirect or remote consequences of the discriminatory act;

   (b) assuming completion of the Program and successful entry into the practice of medicine in the absence of evidence of probable success;

   (c) determining the discount applicable for the likelihood that Dr. Kelly would not work full-time. The contingency discounts applied failed to reflect the facts of the case and the evidence of Dr. Kelly's performance; and

   (d) its assessment of the uncertainties and contingencies in evaluating the extent of the loss.

4. UBC challenges the assessment of future wage loss past the completion of the Program asserting that it is unreasonable for UBC to be held accountable for its action when they result in a future wage loss from Dr. Kelly's future employer.

[166] The Tribunal accepted a significant part of UBC's argument in this regard and reflected that in the Remedy Decision. In particular, it rejected Dr. Kelly's claim for future wage loss past January 1, 2016. It also reflected UBC's concerns in allowing certain contingency reductions.

[167] I am satisfied that its reasoning and conclusions in rejecting the balance of UBC's argument was reasonable, in all the circumstances. In that regard, I note the following:

1. The Tribunal correctly set out the principles governing wage loss awards in the human rights context, including the need for a causal connection between the discriminatory act and the loss.
2. The Tribunal's finding that Dr. Kelly's termination from the Program was causally linked to delayed entry into the profession and future loss of earnings was reasonable in light of the facts.
3. Section 37(2)(d)(ii) of the *Code* provides the authority to compensate for lost wages to put a person back in the position they would have been if not for the discrimination.
4. UBC does not challenge the finding that Dr. Kelly faces a delayed entry into his profession due to his termination from the Program.
5. Wage loss due to delayed entry or entry barriers into a profession by regulator or an educator are compensable: *Gichuru (SC)* at para. 30.
6. The Tribunal reviewed and weighed expert evidence with respect to wage loss, including future wage loss.
7. The award for future wage loss is based on the evidence and the submissions which were made. It is also discretionary and authorized under s. 37.
8. The Tribunal accepted UBC's argument that there should be a deduction in the remedy because of the possibility Dr. Kelly may not complete the program and may not practice on a full-time basis and reduced the wage loss award accordingly.
9. UBC argues that the Tribunal erred by assuming that Dr. Kelly would successfully complete the Program and become a doctor. However, it is clear from the Remedy Decision that the Tribunal accepted that

argument and allowed a deduction to reflect it. At paragraph 76, the Tribunal said this:

> In total, had he not been terminated from the Program, I find that Dr. Kelly could have earned … during this period. From this, I have made a total contingency deduction of 30% on the practice earnings commencing in 2010 to reflect the possibility that Dr. Kelly might not have completed the Program and might not have practiced on a full-time basis. Therefore, I have deducted $275,828.10 from total earnings to January 1, 2016. I have also made a further deduction of $16,052.80 which represents a 10% contingency for the period 2007 to 2009 to reflect the possibility that Dr. Kelly might not have completed the Program. …

10. The Tribunal is entitled to significant deference.

[168] With respect to this wage loss question, the Decision is discretionary. In measuring the Tribunal's reasoning and conclusion against the four factors set out in s. 59(4) of the *ATA*, I am satisfied that none of the concerns expressed by those four factors are applicable here. It follows that the Decision is not patently unreasonable.

Injury to Dignity, Feelings and Self-Respect

Introduction

[169] In awarding $75,000 for injury to dignity, feelings and self-respect the Tribunal found that the circumstances were "unique and serious" and "that the gravity of the effects of the discrimination in this case warrants a substantial award for damages for injury to dignity, feelings and self-respect which is beyond the highest award that has yet been made by this Tribunal": at paras. 102, 100.

[170] The Tribunal also noted that "An award of $75,000 is reasonably proportionate to the injury to dignity, feelings and self-respect suffered by Dr. Kelly": at para. 103.

UBC

[171] UBC argues that the Remedy Decision is patently unreasonable with respect to its determination of the award for injury to dignity, feelings and self-respect for the following reasons:

1. The Tribunal erred in its assessment of the quantum of compensation for injury to dignity. Such an award must be made on the basis of relevant facts and cannot be exercised arbitrarily.
2. The Tribunal placed undue emphasis on the fact that Dr. Kelly was engaged in medical training and wrongly concluded that the circumstances of the case were unique and serious.
3. This award creates a two-tiered system − one for professions, and one for mere employees; in placing undue emphasis on the fact that Dr. Kelly was engaged in medical training, as opposed to some other types of training or employment.
4. The highest award for injury to dignity, feelings and self-respect prior to the award in this case, for discrimination on the basis of disability, appears to be $35,000.
5. The award is more than double the previous highest award under this head of damages. There is no principled reason for such a difference and the award is therefore patently unreasonable. The award does not accord with the climate of expectations created by previous awards.

Dr. Kelly

[172] Dr. Kelly argues as follows:

1. The assessment of compensation for injury to dignity is discretionary and the Tribunal is entitled to a high degree of deference. This can only be set aside if this Decision is patently unreasonable.
2. While UBC clearly disagrees with this assessment, there is no compelling argument presented which demonstrates that it was patently unreasonable. As long as there are reasons which support the Decision, the deferential standard insulates the Remedy Decision from judicial review.
3. The Remedy Decision reflects the difference between losing a job and being prevented from entering a profession. It reflects the significance of being terminated from a Program thereby

preventing Dr. Kelly from pursuing his intended and desired profession, leaving to a greater impact on him than if he had lost employment.

4. It is not possible to read the Remedy Decision as indicating that the Tribunal has increased the award for damage to dignity because of Dr. Kelly's professional status. There is no reasoning in the Remedy Decision elevating the human rights of professionals to a higher standard than others.

5. The Remedy Decision reflects the difference between a loss of employment and being prevented from entering a profession, the latter causing greater injury to an individual.

6. The Tribunal set out comprehensive reasons justifying why this award should be significantly higher than any previous award.

[173] The Tribunal said this:

> [100] However, I am also of the view that the gravity of the effects of the discrimination in this case warrants a substantial award for damages for injury to dignity, feelings and self-respect which is beyond the highest award that has yet been made by this Tribunal.
>
> [101] My reasons for this are as follows:
>
> a) Dr. Kelly lost the opportunity to complete his medical residency program, to apply for licensing and to practice in the career of his choosing, and for which he had spent considerable time and resources in pursuing the necessary educational underpinning. While he is now participating in the Program again, the potential completion of the Program and commencement of his medical practice has been significantly delayed.
>
> b) I do not accept UBC's argument that it is not principled to conclude that a person with a life-long passion suffers more than someone without such a passion when they experience discrimination. Each case must be assessed on its individual circumstances. In this case, it is relevant and principled to consider that Dr. Kelly was pursuing an almost life-long desire to become a physician and that the loss of that opportunity had a serious and detrimental impact on him, particularly within the context of his family dynamics.
>
> c) Dr. Kelly suffered deep humiliation and embarrassment as a result of the discrimination, which was ongoing for a significant period of time. He experienced symptoms of depression, including a lack of interest in life, trouble sleeping, and other health-related problems. I accept his evidence about the depth and continuing nature of those symptoms, including his thoughts of "ending it", from the date of his termination in 2007 until his reinstatement to the Program in 2013, including his loss of self-identity and self-esteem, his feelings of worthlessness, and his despair and uncertainty about his future.

> d) Dr. Kelly experienced further embarrassment when applying for jobs and explaining why, with his educational background, he was not pursuing his medical career. As well, he encountered barriers to obtaining employment because of the specialized nature of his skills and education and the perception that he was overqualified.
>
> e) Dr. Kelly lost his source of income and felt compelled to move back in with his parents, losing his independence.
>
> f) Dr. Kelly's relationships with his family and friends became strained, and he isolated himself socially.
>
> g) Dr. Kelly was in a vulnerable position as both a student and resident who suffered from a mental disability, was compliant with the requests for medical information made of him by UBC, and was dependent upon them to reasonably accommodate his disabilities in order to complete his residency.

[174] The Tribunal noted that this was not a case where there was an initial and subsequent act of discrimination, such as retaliation, which might warrant additional damages.

The Law

[175] There is no statutory or *de facto* cap on the amount that can be awarded for injury to dignity, feelings and self-respect. In *Gichuru (BCHRT)*, the Tribunal noted the following at para. 253:

> [253] There is no cap on injury to dignity awards under the *Code*, whether *de facto* or otherwise. At one time, there was a statutory limit on awards of this nature: that $2,000 limit was removed in 1992. Since that time, injury to dignity awards have steadily increased. In *Guzman v. T.* (1997), 27 C.H.R.R. D/349 (B.C.C.H.R.), the Council ordered $6,500. That was the "high water mark" until 2002, when the Tribunal ordered $7,500 in *Nixon v. Vancouver Rape Relief Society*, 2002 BCHRT 1. In *Nixon*, the Tribunal noted that damage awards in B.C. had fallen behind Ontario and, at para. 245, stated that, "while precedent is of some value in determining damage awards, the Tribunal should not be so bound by past damage awards that it cannot adequately compensate a complainant for the actual injury to his or her dignity".

Conclusion

[176] I am satisfied that the Decision to award more than double the previous high of $35,000 for similar discrimination is patently unreasonable in all the circumstances of this case.

[177] Dr. Kelly has provided examples of where more than $35,000 has been awarded but these involve matters such as harassment of a female, mental anguish, and punitive damages.

[178] I am satisfied that, based on the cases that have been provided to me by Dr. Kelly and UBC the previous highest award for discrimination on the basis of mental and/or physical disability is $35,000: *Senyk v. WFG Agency Network (B.C.) Inc.*, 2008 BCHRT 376 at para. 470.

[179] While the circumstances are unquestionably "serious", I see nothing about them that is "unique" in the sense that Dr. Kelly suffered an injury to a greater extent than others who have lost their jobs and/or opportunities as a result of discrimination. Nor do I see anything to indicate why $75,000 is "reasonably proportionate" to Dr. Kelly's injury, but apparently too high for those persons who have previously been awarded $35,000 or less.

[180] The fact that Dr. Kelly was in a medical program is not a reasonable basis for more than doubling the previous highest award for similar discrimination.

[181] It is instructive to note that what the Tribunal calls "unique" circumstances is not only applicable to Dr. Kelly. In that regard, the Tribunal said this within paragraph 566 of the merits Decision:

> … I appreciate that the physician educators and Committees involved with Dr. Kelly were dealing with a unique situation and reached conclusions they considered to be in the best interest of the Program ….

[182] I make the foregoing comments noting that the Tribunal is entitled to great deference, and also noting that it should not be so bound by past damage awards as to prevent it from adequately compensating a complainant.

[183] Having said that, the decision must still be based on evidence and reason and in my view that has not occurred in this case.

[184] I refrain from suggesting that Dr. Kelly's award for this injury should not be more than $35,000. It may well be that a higher award than the previous high is

appropriate in the circumstances of the case. However, I see no evidence, finding, submission, or principle which could support the conclusion that the award for this injury should be more than double the amount of the previous high for a similar injury.

[185] The Tribunal's Decision to award $75,000 is not based on principle and cannot be supported by the evidence. In my view, the discretionary decision which resulted in that award was "exercised arbitrarily" as those words have been interpreted in s. 59(4) of the *ATA*. That section also denotes that such a decision is patently unreasonable.

[186] Therefore, I find that this portion of the Decision was patently unreasonable and must be set aside.

Conclusion with respect to Remedy Decision

[187] The Tribunal's decision with respect to wage loss is not patently unreasonable.

[188] The Tribunal's decision with respect to injury to dignity, feelings and self-respect is patently unreasonable and must be set aside.

DECISION WITH RESPECT TO THE PETITION FOR JUDICIAL REVIEW

[189] With respect to the merits Decision, the application is dismissed.

[190] With respect to the Remedy Decision:

1. The application with respect to wage loss is dismissed.
2. The application with respect to the award for injury to dignity, feelings and self-respect is allowed, and the award is set aside.

[191] The parties are agreed that the general rule is that where a party succeeds on judicial review, the appropriate disposition is to order a reconsideration before the Tribunal, unless exceptional circumstances indicate that the court should make the decision. Those exceptional circumstances are generally where the court

determines that there is only one possible result and where that determination does not involve the court's own assessment of the evidence, findings of credibility, weighing of relevant considerations, or findings of fact: *Allman v. Amacon Property Management Services Inc.*, 2007 BCCA 302 at paras. 14-16.

[192] It is clear that there is more than one possible result here, and that I would be unable to determine the appropriate amount for injury to dignity, feelings and self-respect without hearing submissions from counsel. It follows that the appropriate disposition is to order a reconsideration before the Tribunal with respect to the award for injury to dignity, feelings and self-respect, and I do so order.

[193] With respect to costs, I order that the Tribunal will be responsible for no costs other than its own, and neither of the other parties will be responsible for any of the Tribunal's costs.

[194] With respect to costs concerning UBC and Dr. Kelly, if they are unable to determine this between themselves, they may arrange to have the matter set down before me at their convenience.

"Silverman J."

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The Honourable Mr. Justice Silverman