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BARRISTERS & SOLICITORS

HUMAN RIGHTS UPDATE

NOVEMBER 8, 2024

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HUMAN RIGHTS UPDATE

I. INTRODUCTION

In this paper, we provide an update on the operations of the Human Rights Tribunal (the "Tribunal") and its attempts to address a significant backlog of human rights complaints that has developed over the last few years. We also provide summaries of noteworthy Tribunal decisions involving local governments issued since the beginning of 2023, and discuss an important recent decision of the BC Court of Appeal regarding the protected ground of family status in the employment context.

II. HUMAN RIGHTS TRIBUNAL OPERATIONS UPDATE

In recent years, the Tribunal has experienced a significant increase in the number of complaints filed and has had to deal with the effects of that increase. The Tribunal's Annual Report for the fiscal year April 1, 2023 to March 31, 2024 indicates that the Tribunal received 8,472 complaints, roughly 8 years' worth of complaints, during the three-year period of 2020 to 2023. Approximately 2,500 new complaints were filed during the 2023-2024 fiscal year, and the Tribunal had approximately 5,930 active cases at the end of the fiscal year.

The increase in complaints over the last few years has led to a significant backlog of cases and growing delays at every stage of the complaint process. The Tribunal has increased its staff, and instituted some changes to its processes to address the delays. Eight new tribunal members were appointed in November, 2023 and by June, 2024, the Tribunal had 14 full-time tribunal members and 4 part-time tribunal members. The Tribunal also increased the number of mediators it has on contract, and expanded its registry and legal departments.

The Tribunal has also amended its processes in an attempt to reduce the delays across its system. The Tribunal's initiatives addressed Covid-related complaints, and also included a Screening Backlog Project, a Case Path Pilot Program, an Application to Dismiss Backlog Project, and a Mediation Program.

A. Initiatives to Address Covid-related Complaints

On April 20 2022, the Tribunal announced that it would pause processing Covid-related complaints until 2023-2024, and at that time, those complaints would be resolved under a special project. The Tribunal took that emergency measure so that it could prioritize the remainder of its backlog. Approximately 1,685 Covid-related complaints relating to mask-wearing or vaccines had been filed. In the 2023-2024 fiscal year, the Tribunal initiated a Covid case project that resulted in the resolution of 68% of the Covid-related cases. As of March 31, 2024, there were 547 Covid-related cases remaining open. The Tribunal had closed 1,138 such cases since they were first filed. The Tribunal expects that the remaining Covid-related cases

will either be closed at the screening stage or will proceed to the next stage in the complaint process this fall.

B. Screening Backlog Project

In January, 2024, the Tribunal began a Screening Backlog Project to address the large volume of complaints that had built up at the screening stage of the complaint process. At that stage, the Tribunal screens the complaint to ensure that it has jurisdiction over the complaint and that the facts alleged could constitute a breach of the *Human Rights Code* (the "*Code*") if proven. If the answer to either of those questions is "no", the complaint is dismissed. If the answer to both questions is "yes", then the complaint proceeds to the next step. However, if those issues are unclear, the Tribunal seeks additional information from the complainant. Under the Screening Backlog Project, the Tribunal revised its screening process and added resources to address the backlog of complaints that were at the stage of seeking additional information from complainants to determine if the case would proceed. As a result of the Screening Backlog Project, by March 31, 2024, the Tribunal reduced the backlog of complaints at this stage by about 400 cases.

C. Case Path Pilot Project

On May 6, 2022, the Tribunal issued a practice direction implementing a one-year Case Path Pilot Project regarding its process for handling applications to dismiss complaints without a hearing under Section 27(1) of the *Code*. Section 27(1) of the *Code* gives the Tribunal discretion to dismiss complaints without a hearing to conserve resources and promote the timely resolution of complaints. Pursuant to this Section, the Tribunal has a gate-keeping function to avoid the time and expense of a hearing when no hearing is warranted.

Prior to this practice direction, respondents chose whether to file an application to dismiss. With the significantly increased complaint volumes of the past few years, the practice of permitting respondents to decide whether to file an application to dismiss pursuant to Section 27(1) resulted in the Tribunal dedicating disproportionate resources to handling the applications, and in delays across the Tribunal's systems.

Under the Case Path Pilot Project, the Tribunal more actively applies its discretion in referring cases directly to a hearing or inviting applications to dismiss in certain circumstances. The Case Path Pilot Project has been extended until April 30, 2025.

The Case Path Pilot Project applies to all complaints where the Tribunal did not automatically set dates for an application to dismiss the complaint, including those that were captured by a November 8, 2021 Practice Direction entitled "Emergency Pause on New Applications to Dismiss". That 2021 Practice Direction paused the Tribunal's processing of new applications to dismiss until the beginning of the Case Path Pilot Project.

Under the Case Path Pilot Project, after a complaint has been screened and accepted, and the respondent has filed its response, the Tribunal will then set dates for the disclosure of documents by each party. In doing so, the Tribunal may modify the deadlines for disclosure set by the Tribunal's *Rules of Practice and Procedure*. Once the deadline for document disclosure has passed, the Tribunal will review the complaint and response(s), and determine the appropriate "path" for the complaint to follow. The default path is for a complaint to proceed directly to hearing. The second path is for submissions under Section 27(1) of the *Code* to be made.

When a complaint proceeds directly to a hearing, the Tribunal will notify the parties by letter. The Tribunal will also schedule a case conference meeting of the parties to schedule hearing dates and discuss next steps.

When the Tribunal decides that submissions under Section 27(1) of the *Code* are warranted, it will provide instructions to the parties including a deadline for submissions. Cases may be assigned to the submissions path when:

- The Tribunal may not have jurisdiction over the complaint (Section 27(1)(a));
- The complaint may not have set out an arguable contravention of the *Code* (Section 27(1)(b));
- The factual disputes indicate that the matter may be resolved in a faster and fairer way through written submissions than an oral hearing (Section 27(1)(c)). For example, it appears that the factual disputes could be determined based on documents and would not need the cross-examination of witnesses at a hearing;
- The complaint names individual respondents whose participation may not further the purposes of the *Code* (Section 27(1)(d)(ii));
- The complaint may have been resolved in another proceeding or in a settlement agreement (Sections 27(1)(d)(ii) and (f)); or
- All or part of the allegations in the complaint are filed outside the time limit (Section 27(1)(g)).

The Tribunal may determine that more than one of the above issues under Section 27 applies to a complaint.

Where a case has been assigned to the hearing path, or if a respondent wants to make submissions under Section 27(1) but such submissions are not set out in the Tribunal's instructions, a respondent can still apply to file a dismissal application. The respondent must file a Form 7.5 – Request to File a Dismissal Application based on new information or circumstances. This Request must be filed within 14 days of the letter advising that the complaint will be scheduled for a hearing, or within 14 days of the date on which new

information or circumstances that form the basis of the application come to the respondent's attention. New information must not include information already set out in the complaint or response to the complaint.

D. Application to Dismiss Backlog Project

The Application to Dismiss Backlog Project involved a decision of the Tribunal in June, 2023 to adjourn the majority of hearings scheduled for 2023 for complaints filed in 2020 or later so that it could dedicate tribunal members to deciding outstanding applications to dismiss. The hearings were rescheduled based on the date the complaint was filed from oldest to newest. The Tribunal also paused its review of complaints filed in 2020 or later, under its Case Path Pilot Project, in June, 2023. In mid-December, 2023, the Tribunal lifted the pause and restarted Case Path reviews. At the beginning of the Application to Dismiss Backlog Project, the Tribunal had 314 unassigned applications to dismiss outstanding. By March 31, 2024, there were only 52 unassigned applications left.

E. Mediation Program

Mediation through the Tribunal continues to be an option for resolving a human rights complaint accepted for filing. Previously, if both parties agreed to mediation, the time limit to file the response to the complaint was delayed until after the date of the mediation. The purpose of that delay was to enable the parties to attempt to settle the dispute at an early stage. The Tribunal is not currently delaying the time to respond if the parties agree to attend mediation.

In March, 2022, the Tribunal issued a Practice Directive respecting the Tribunal's mediation services in cases when all parties have legal representation. The Practice Direction states that it is an interim measure to address the significantly increased workload of the Tribunal and the large number of scheduled mediations. In cases in which all parties have legal representation, the Tribunal now expects counsel and legal advocates to make reasonable efforts to resolve the complaint on their own without a Tribunal mediator, if the parties are interested in reaching a settlement. In addition, at least four weeks before the scheduled mediation, the legal representatives must advise the Tribunal to cancel the mediation date, or advise the Tribunal that the legal representatives have made reasonable efforts to resolve the complaint and believe the Tribunal assisted mediation may be beneficial to resolve the complaint, and both parties are motivated to resolve the complaint at the scheduled mediation. If the legal representatives do not notify the Tribunal within the time allowed, the Tribunal will cancel the mediation.

In May, 2022, the Tribunal also launched its internal Mediation Program, by significantly increasing its mediation capacity through the expansion of its mediation team from 5 to 17 contract mediators, and implementation of a revised scheduling and assignment system. Settlement rates for the 2023-2024 fiscal year increased to 68% from 58% the prior fiscal year.

III. HUMAN RIGHTS CASE LAW UPDATE

Since January 2023, the Tribunal has released quite a few decisions involving local governments. A couple involved the Section 8 prohibition on discrimination in the provision of services to the public. Many others involved claims of discrimination in employment contrary to Section 13. Another case was based on the Section 43 prohibition against retaliation. The BC Court of Appeal also issued an important decision regarding the test for family status discrimination under Section 13.

A. Section 8 Cases

Section 8 of the *Code* prohibits discrimination in the provision of services and facilities to the public.

> 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 Indigenous identity, race, colour, ancestry, place of origin, religion, marital status, family status, physical or mental disability, sex, sexual orientation, gender identity or expression, or age of that person or class of persons.

In complaints alleging discrimination in the provision of a service to the public, a complainant must establish a *prima facie* case of discrimination by showing that they have a characteristic protected from discrimination, they have experienced an adverse impact with respect to a service, and the protected characteristic was a factor in the adverse impact.

If the complainant establishes a *prima facie* case of discrimination, the respondent then has the burden to establish a *bona fide* and reasonable justification ("BFRJ") for the adverse impact. To raise a BFRJ, a respondent must prove that:

- It adopted the standard for a purpose rationally connected to the function being performed;
- It adopted the standard in an honest and good faith belief that it was necessary to the fulfillment of that legitimate purpose; and
- The standard is reasonably necessary to accomplish that legitimate purpose, in the sense that the respondent cannot accommodate persons with the characteristics of the complainant without incurring undue hardship.

Exclusion from a service is only justifiable where the service provider has made every possible accommodation short of undue hardship.

1. Section 8 Tribunal Hearings

In *Kovacs v. Maple Ridge (City)*, 2023 BCHRT 158, the Tribunal issued a decision following a full hearing of a Section 8 complaint. The case involved a complaint from an individual who is completely blind. The complainant claimed that the City discriminated against her and other blind pedestrians on the basis of disability when the City reconstructed a major intersection and bus stop to include shared pathways between cyclists and pedestrians, reconstructed a T-intersection into a traffic circle, and reconstructed an area into two roundabouts with pedestrian crossings.

With respect to the intersection and bus stop, the City reconstructed the area such that the two eastern corners of the intersection were converted into multi-use plazas for cyclists and pedestrians to share. The shared area extended north past the intersection to a bus stop and then split into dedicated paths for cyclists and pedestrians. At the intersection, the City also redesigned the crosswalks to include crossings for cyclists. The Tribunal found that these changes created a barrier to the complainant's use of the intersection and bus stop, which has an adverse impact on the complainant because she is blind.

In particular, due to the added cyclist crossings and the fact that one of the streets leading to the intersection is at an angle, the pedestrian crossings were no longer "square" (i.e., at right angles) with each other. This created a problem for people who are blind because they cannot use traffic flow to align themselves properly when crossing the intersection. Moreover, while the City had installed "truncated dome mats" at each corner of the intersection, the mats were not angled directly towards a mat on the other side of the crossing which prevented pedestrians who are blind from knowing what angle to cross at. Additionally, as the bus stop is now located within a shared cyclist-pedestrian pathway, this created a barrier that has an adverse impact to blind pedestrians as they cannot see whether any cyclists are coming and at what speed when stepping on or off a bus.

The Tribunal held that the City could have reasonably anticipated that the lack of tactile alignment information at this intersection and having a bus stop in an area shared with cyclists would create a barrier for people who are blind and that the City would need to implement accommodations up to undue hardship.

The City argued that since the complaint had been filed, it had updated the area and installed score lines in the pavement that could be felt with a cane, thereby meeting their accommodation obligations to blind pedestrians. However, the Tribunal commented that, while the complainant is required to adapt to changes in the City, the complainant is not required to fundamentally change how she navigates or participates in the accommodation. In this case, the complainant uses a guide dog to navigate and therefore, the score lines are of no assistance to her as she cannot feel them. She is not required to fundamentally change her

mobility device from a guide dog to a cane in order to participate in an accommodation. Accordingly, the Tribunal held that the City breached the *Code* and failed to accommodate the complainant.

With respect to the traffic circle and two roundabouts, the Tribunal held that there was no breach of the *Code.* In particular, the Tribunal noted that the traffic circle was in a rural area with no accessible pedestrian facilities and therefore, in these circumstances, it was not reasonable to expect the City to have considered how blind pedestrians would make their way around the traffic circle. As the complainant never brought her concerns with the traffic circle to the attention of the City, the City never had a reasonable opportunity to accommodate the complainant. Additionally, the Tribunal commented that the complainant has an obligation to adapt to changes in the City and in this case, consider alternatives such as walking along the street over which had a sidewalk, instead of walking along the street with the traffic circle.

In respect of the two roundabouts, the Tribunal found that the City had already installed truncated dome mats at each end of the marked pedestrian crosswalks, score lines in the concrete behind the mats, stop signs before the roundabouts, and speed limit signs. The complainant claimed that these efforts did not provide sufficient information to blind pedestrians on alignment, did not provide sufficient indicators to allow blind pedestrians to know when they are in a pedestrian refuge within the crosswalk, and did not provide sufficient cues to alert drivers of pedestrians. However, the Tribunal held that it was not reasonable to expect the City to anticipate these specific concerns raised by the complainant, and since she had failed to bring these concerns to the City's attention, the City did not have a reasonable opportunity to accommodate her.

As the complainant was successful in establishing that the City had discriminated against her in breach of the *Code*, with respect to the reconstruction of the major intersection and bus stop, the Tribunal awarded $35,000 as injury to dignity damages. In coming to this figure, the Tribunal considered the importance to disabled pedestrians of maintaining their independence in navigating their neighbourhood, the history of the complainant's relationship with the City in volunteering her time to assist the City to understand and address barriers that exist for people with disabilities, the complainant's vulnerability as a blind person, and the impact of the reconstruction on the complainant.

A key takeaway from this case is that when a local government is implementing public facilities, failing to consider accessibility barriers that the local government ought to have reasonably anticipated may result in a finding that the local government breached the *Code.* However, for accessibility barriers that are not within the local government's reasonable contemplation, such barriers must be brought to the local government's attention before an obligation to accommodate to the point of undue hardship will be imposed.

2. Section 8 Applications to Dismiss

The *Code* gives respondents to a human rights complaint the ability to apply to the Tribunal in advance of a hearing to have the complaint dismissed without a hearing. Section 27 of the *Code* provides:

> 27(1) A member or panel may, at any time after a complaint is filed and with or without a hearing, dismiss all or part of the complaint if that member or panel determines that any of the following apply:
>
> (a) the complaint or that part of the complaint is not within the jurisdiction of the tribunal;
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> (b) the acts or omissions alleged in the complaint or that part of the complaint do not contravene this Code;
>
> (c) there is no reasonable prospect that the complaint will succeed;
>
> (d) proceeding with the complaint or that part of the complaint would not
>
> (i) benefit the person, group or class alleged to have been discriminated against, or
>
> (ii) further the purposes of this Code;
>
> (e) the complaint or that part of the complaint was filed for improper motives or made in bad faith;
>
> (f) the substance of the complaint or that part of the complaint has been appropriately dealt with in another proceeding;
>
> (g) the contravention alleged in the complaint or that part of the complaint occurred more than one year before the complaint was filed unless the complaint or that part of the complaint was accepted under section 22 (3).

In applications to dismiss under Section 27(1)(b) of the *Code*, the Tribunal has discretion to dismiss a complaint if it does not allege acts or omissions that could, if proven, contravene the *Code*. The Tribunal only considers the allegations in the complaint without reference to any evidence or explanation from the respondents. The threshold for a complaint to allege a possible contravention of the *Code* is low.

In applications to dismiss pursuant to Section 27(1)(c) of the *Code*, the Tribunal is exercising its gate-keeping function to dismiss complaints that do not warrant the time and expense of a hearing. The Tribunal does not make finding of facts, but instead looks at the evidence filed by the parties to decide whether there is no reasonable prospect that the complaint will succeed after a full hearing. The Tribunal decides based on the filed evidence whether there is no reasonable prospect that after a full hearing of the evidence findings of fact would be made that would support the complaint. The Tribunal does not base its decision on speculation about what evidence might be led at the hearing. The threshold to advance a complaint to a hearing is low. The complainant just has to provide evidence that takes their case out of the realm of conjecture.

In *Female Softball Players v. Victoria (City)*, 2023 BCHRT 112, the Tribunal denied an application by the City to dismiss the complaint without a hearing. The case involved a complaint of sex discrimination, filed by female softball players of the Beacon Hill Baseball & Softball Association (the "Association") against the City regarding the City's conduct in approving upgrades to turn Pemberton Park into a proper softball field.

The Association provides youth softball and baseball programs and contracts with the City to use the City's parks for its programming. All of the Association's softball players are girls, whereas 96% of the Association's baseball players are boys. Prior to 2016, the Association held both its baseball and softball programs at Hollywood Diamond, which is actually a baseball field. Baseball fields differ from softball fields in several respects – baseball infields have an elevated pitcher's mound and the sand is of mixed grades, whereas softball infields have a flat pitcher's mound and the sand is of a single grade (called a "skinned infield").

In 2016, the Association wanted to move its softball program to a regulated softball field. This would allow its players to have the opportunity to play on a regulated field thereby increasing their development, attracting higher quality coaches, and increasing the chances to host teams from other municipalities for tournaments. Accordingly, the Association applied to the City to use Pemberton Park for its softball program and asked the City to approve upgrades to the facilities at the park, and to approve the work required to change the baseball field there into a softball field.

From 2017-2018, the first phase of the upgrades (dugout, seating, fencing) was completed. However, in 2019, the work stalled on the second phase which involved the skinned infield and batting cage as the City had not yet approved the work. It was not until 2021 that the City approved the second phase of the Association's project, construction of which would be completed for the 2022 softball season.

The complainants argued that the City's refusal to approve the Association's plan to install a skinned infield and batting cage at Pemberton Park deprived its softball players of opportunities to play softball at a competitive level. This was in contrast with the City's approvals for upgrades to the baseball facilities at Hollywood Diamond, which were occurring during the same time period. As all of the Association's softball players are girls and 96% of the

Association's baseball players are boys, the complainants argued that the disparity in the City's approvals created an adverse impact on the female softball players and constituted discrimination on the basis of sex.

The City filed an application to dismiss the complaint on the grounds that there was no arguable contravention of the *Code* (Section 27(1)(b)), that there was no reasonable prospect of success (Section 27(1)(c)), and that the complaint would not further the purposes of the *Code* (Section 27(1)(d)(ii)). In support of its application, the City argued that any adverse impacts that the Complainants have experienced were because the Association chose to use Pemberton Park rather than the City's other softball facilities to host its softball program. The Tribunal dismissed this argument, finding that there was some evidence to suggest that the other softball facilities were not available or were more costly to use.

The City also argued that the complainants could have played softball at Hollywood Diamond since a skinned infield is not a league requirement. The Tribunal dismissed this argument, finding that softball is best played on a skinned infield and not having access to a field designed for their sport created an adverse impact on the complainants.

The City argued that it was the Association who requested the City to upgrade the baseball facilities at Hollywood Diamond and to prioritize that request. The Tribunal found that there was insufficient evidence regarding the requests for upgrades at Hollywood Diamond to allow this argument, and in any event, it is the City's differential conduct in its approvals between the Hollywood Diamond and Pemberton Park upgrades that form the basis of the complaint.

The City further argued that the impacts experienced by the complainants arose due to the sport that the complainants play, not their sex. The Tribunal dismissed this argument, finding that the statistical evidence presented by the complainants regarding the gendered makeup of each sport was sufficient at that time to take the allegation of discrimination outside the realm of conjecture.

Lastly, the City argued that its approval process is based on its policies that are applied equally and takes into consideration budget, resources, and planning. The Tribunal dismissed this argument, explaining that this justification can be made during the hearing as there was insufficient evidence on these countervailing considerations to dismiss the complaint at this stage. Accordingly, the City's application to dismiss was denied and the case is proceeding to a hearing.

B. Section 13 Cases

Section 13 of the *Code* prohibits discrimination in employment.

> 13(1) A person must not
>
> (a) refuse to employ or refuse to continue to employ a person, or

> (b) discriminate against a person regarding employment or any term or condition of employment
>
> because of the Indigenous identity, race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation, gender identity or expression, or age of that person or because that person has been convicted of a criminal or summary conviction offence that is unrelated to the employment or to the intended employment of that person.
>
> ….
>
> (4) Subsections (1) and (2) do not apply with respect to a refusal, limitation, specification or preference based on a bona fide occupational requirement.

In a complaint alleging discrimination in employment, a complainant must raise a *prima facie* case by showing that they have a characteristic protected from discrimination, they have experienced an adverse impact with respect to their employment, and the protected characteristic was a factor in the adverse impact. If a complainant raises a *prima facie* case of discrimination, the burden then shifts to the respondent to justify the impact as a *bona fide* occupational requirement ("BFOR"). If the impact is justified, there is no discrimination.

To justify an adverse impact as a BFOR, an employer must prove that:

- It adopted a standard for a purpose rationally connected to the performance of the job duties;
- It adopted the standard in an honest and good faith belief that it was necessary to the fulfillment of that legitimate purpose; and
- The standard is reasonably necessary to accomplish that legitimate purpose in the sense that the employer cannot accommodate persons with characteristics of the complainant without incurring undue hardship.

1. Section 13 Tribunal Hearings

One of the Section 13 decisions involving local governments issued by the Tribunal in the last two years followed a full hearing. In *Prosko v. Taylor (District)*, 2024 BCHRT 207, the Tribunal dismissed a complaint of sex discrimination related to an employee's claim that the District did not adequately respond to her complaint of sexual harassment. The complaint arose when, during a senior management meeting, the complainant's co-worker called her a cougar. Although the Tribunal took judicial notice that the term "cougar" in that context referred to a middle-aged woman who dates significantly younger men, it had concluded in an earlier application to dismiss decision that the cougar comment did not rise to the level of sexual

harassment under the *Code*. The only issue to advance to the hearing was whether the District had adequately responded to the complainant's concerns about the comment.

In deciding the case, the Tribunal noted that an employer's failure to adequately or appropriately respond to an internal complaint of discrimination may itself amount to discrimination. The Tribunal held that "the *Code* requires a reasonable and appropriate response to a complaint of discrimination, considering factors such as whether the respondent had an anti-discrimination policy and complaint mechanism in place, whether the respondent treated the complaint seriously (i.e., dealing with it promptly and sensitively), and whether the resolution was reasonable in the circumstances" (para. 58). The Tribunal also noted that a failure to respond adequately may independently cause a complainant harm and held that a complainant must identify deficiencies in the respondent's response to a complaint and the adverse impact of those alleged deficiencies.

The complainant argued that she asked for help from several people but that none of them helped or protected her. She indicated that she expected them to stand up for her by initiating an investigation into the co-worker's conduct and that the failure to do so amounted to discrimination.

The Tribunal found there was no deficiency in a senior manager's response to the complainant's concerns. During their meeting, the senior manager offered support and presented options to the complainant. The first step in the District's Harassment Policy was for the complainant to ask the respondent to stop the offending behaviour. The senior manager encouraged the complainant to speak with the co-worker directly. The complainant had not indicated to the senior manager that she was uncomfortable speaking with him. The senior manager also gave the complainant the options of speaking with the Chief Administrative Officer and also of filing a formal report. The Tribunal also considered it key that the complainant had requested the senior manager to keep her concern confidential. There was nothing inappropriate with the senior manager maintaining the confidentiality requested by the complainant. The complainant never made a formal report under the policy that would have triggered an investigation.

The Tribunal also concluded that the mayor appropriately responded to the complainant's concerns. The mayor promptly brought the issue to the senior manager who assured him that the matter had been addressed at the time it was first raised. The Tribunal found that this was an appropriate response by the mayor, in light of the fact that the mayor was an elected official and not a member of the District's management team.

The Tribunal also considered the District to have appropriately responded to the complainant's later letter to the senior manager six months after their initial meeting. The complainant had asked the senior manager to keep her concerns confidential and there was nothing inappropriate or unreasonable in the senior manager following the complainant's request to put the letter in her personnel file. The complainant had not raised any further concerns or

incidents in the six months following their meeting, and the senior manager had observed the complainant working with the co-worker respectfully on a regular basis.

The Tribunal concluded that any adverse impact the complainant experienced based on the District's failure to initiate a formal investigation was the direct result of her decision not to follow the steps set out in the Harassment Policy, including filing a formal report. The Tribunal held that the District did not discriminate against the complainant on the basis of sex through deficiencies in its response to the cougar comment and dismissed the complaint.

This case highlights the importance of a local government responding in a reasonable and appropriate fashion when an employee raises an internal complaint of discrimination. A failure to do so can itself amount to discrimination contrary to the *Code*.

2. Section 13 Application to Dismiss Decisions

In the last two years, the Tribunal has also issued a number of decisions involving applications by local governments to dismiss Section 13 complaints without a hearing.

The complainant in *Malagoli v. North Vancouver (City)*, 2023 BCHRT 42 alleged that the City and her co-worker discriminated against her on the basis of sex when the co-worker allegedly made inappropriate or threatening comments to her on four occasions over the period of almost one year (the "Comments Allegations"). The complainant also alleged that the respondents discriminated against her on the basis of mental disability, as she said the City did nothing to separate her from the co-worker or to address the co-worker's threats against her or investigate her allegations of bullying and harassment by the co-worker (the "Internal Response Allegation"). She further alleged that the co-worker made false allegations about her (the "False Report Allegation") and that the City failed to follow one of her medical restrictions during a graduated return to work (the "GRTW Allegation"). The complainant also filed a retaliation complaint against the City, alleging that various conduct by the City was retaliation against her for filing the complaint (the "Retaliation Complaint").

The respondents denied discrimination and applied to dismiss the complaint under sections 27(1)(a), (b), (c), (d)(ii), and (g) of the *Code*. The Tribunal dismissed the Comments Allegations under Section 27(1)(b) and (g) of the *Code*. The Tribunal also dismissed the False Report Allegation, the Internal Response Allegation, and the Retaliation Complaint under Section 27(1)(c) of the *Code*. The GRTW Allegation was not dismissed and is proceeding to a hearing. The Tribunal was not satisfied that that allegation had no reasonable prospect of success.

The GRTW Allegation involved a graduated return to work plan prepared by the complainant's doctors and psychologists (the "GRTW Plan") following a period that the complainant took off of work for medical reasons allegedly because she was overwhelmed with fear as a result of her co-worker's treatment of her. The GRTW Plan provided that the complainant was to have no direct communication with the co-worker, and they were not to work on the same files. The complainant was also not to participate in conversations about the co-worker.

The GRTW Allegation claimed that despite the GRTW Plan, and despite a direction from the City to the complainant's supervisor that the supervisor not speak to the complainant about the co-worker, the supervisor repeatedly spoke to the complainant about her dispute with the co-worker. The City argued that the complainant had not shown that her sex or mental disability were a factor in the City's conduct and that her allegations did not rise above conjecture. The City also said that it provided clear directions to the supervisor on multiple occasions, took all reasonable steps to ensure the supervisor understood the City's expectations, and made reasonable efforts to accommodate the complainant at all times.

The Tribunal held that the complainant had a reasonable prospect of establishing that the supervisor spoke to her about her dispute with the co-worker, despite the City's directions not to, and that those conversations had an adverse impact in which her mental disability was a factor. The Tribunal also held that there was a reasonable prospect that the complainant would establish at a hearing that not speaking with the supervisor about the co-worker was a medical restriction that needed accommodation.

The Tribunal also found that it was not reasonably certain that the City could establish that it reasonably accommodated the complainant. The City did not provide a reason why the supervisor did not adhere to the GRTW Plan, it did not argue that it was not liable for the supervisor's conduct, nor did it submit evidence of undue hardship that would have occurred if the supervisor followed the GRTW Plan. Therefore, the Tribunal concluded that the City would not be reasonably certain to establish that it accommodated the complainant to the point of undue hardship.

The City also applied to have the GRTW Allegation dismissed on the basis that proceeding would not further the purposes of the *Code* (Section 27(1)(d)(ii)), because the employer had already made reasonable efforts to provide a safe workplace, including giving the supervisor clear instructions about the complainant's restrictions. The Tribunal held that there was no evidence before it that the City did anything more to address the complainant's concerns, and there was no evidence that management's discussions with the supervisor actually addressed the issue. In those circumstances, the Tribunal found that proceeding with the GRTW Allegation could possibly further the purposes of the *Code*. As a result, the application to dismiss the GRTW Allegation was denied, and that allegation is proceeding to a hearing.

The Tribunal's decision in *Dorman v. Kamloops (City)*, 2023 BCHRT 62, highlights the importance of an employer's duty to inquire when an employee provides information that could indicate that they have a disability for which the employer must provide accommodation. In that case, the complaint alleged the employer had a duty to inquire about the need for accommodation in the context of a job competition.

As held by the Tribunal, generally an employee is expected to tell their employer about their disability and their need for accommodation in order to enable the employer to fulfill its duty to accommodate. However, in some situations the responsibility shifts to the employer to ask an employee if they need accommodation even if the employee has not explicitly disclosed a

disability and requested accommodation. The duty to inquire is triggered if something reasonably alerts the employer that the employee may have a disability that requires accommodation.

In *Dorman*, the complainant alleged that his employer, the City of Kamloops, discriminated against him on the basis of physical and mental disability as it refused to accommodate him when it required him to take a computer test on Microsoft Word and Excel in order to advance in a job competition. The complainant asserted that the employer should have accommodated him by allowing him to forgo the computer test, or to take a course before taking the computer test. The complainant had applied for a promotion and objected when informed that he would have to take the computer test. He initially requested to move past that section of the job competition process without taking the test. The complainant also alleged that he later spoke with the City's Human Resources Advisor about having anxiety about the test and then emailed her refusing to take the test, again mentioning anxiety. The email also mentioned that the complainant had not had the opportunity to take a course before taking the computer test. The complainant did not specifically advise the City that his anxiety was a disability, or that he needed an accommodation in relation to the job competition. Following receipt of the email, the City screened the complainant out of the job competition.

The City denied discriminating against the complainant and filed an application to dismiss the complaint based on physical disability pursuant to Section 27(1)(b) of the *Code*, before a hearing. The City also applied to dismiss the claim based on mental disability pursuant to 27(1)(c) of the *Code*. This paper focusses on the Section 27(1)(c) application.

The Tribunal declined to dismiss the complainant's claim based on mental disability under Section 27(1)(c) of the *Code*. The City had not persuaded the Tribunal that the complainant had no reasonable prospect of proving his health conditions met the definition of mental disability for the purposes of the *Code*, or that he was suffering from a mental disability at the material time. The complainant had proffered medical evidence in the form of a physician's letter that referenced a diagnosis of anxiety and depression. There was also evidence that the complainant's anxiety and depression were exacerbated by a heart attack which had occurred several months before the job competition. There was thus evidence that the complainant's anxiety had a degree of persistence which when coupled with the diagnosis took the matter out of the realm of conjecture.

The City did not dispute that the complainant had taken his allegation that he experienced job related adverse impacts out of the realm of conjecture, and the Tribunal held that he had done so. The adverse impacts asserted by the complainant included "loss of promotion; lost wages; reduced lifetime pension as well as loss of self-respect, dignity and loss of worth within the department".

The Tribunal also held that the City had not persuaded it that the complainant had no reasonable prospect of proving that his alleged mental disability was at least one factor in the adverse impacts he experienced when the City screened him out of the job competition. The

complainant submitted a letter from his doctor stating that the computer test caused him increased anxiety and panic. The complainant also asserted that he had spoken with the Human Resources Advisor about his anxiety in relation to the test and then emailed her about the same.

As the complainant took his case out of the realm of conjecture, the next step was for the Tribunal to determine whether the City was reasonably certain to prove at a hearing that it had no duty to accommodate the complainant. The Tribunal rejected the City's claim that there was no reasonable prospect that the complainant could establish that it knew or reasonably ought to have known that he had a mental disability at the material time. The Tribunal could not find that the City was reasonably certain to prove that it did not have information that triggered the duty to inquire into whether the complainant may have had a disability that required accommodation during the job competition.

The issue in the case was that at the time of the alleged discrimination, the complainant had not previously disclosed any disabilities to the City and had not explicitly requested an accommodation in respect of the job competition. The City submitted that a passing reference to anxiety was not enough to trigger the duty to inquire. The Tribunal held that while a passing reference to anxiety may not trigger the duty to inquire, the complainant alleged that he made more than a passing reference. He alleged that he informed the City of his anxiety issues in the conversation with the Human Resources Advisor and his follow up email to her. The Tribunal also held that as there were competing versions of the extent to which the complainant and the Human Resources Advisor spoke about his anxiety, there was an issue as to credibility on facts that were fundamental to the determination of whether the City had a duty to inquire. That foundational issue of credibility could only be resolved at a hearing where evidence would be given and subjected to cross examination. The Tribunal found that the complainant had taken his allegation that the employer had a duty to inquire out of the realm of conjecture. It held that without a clearer understanding of what the complainant and the Human Resources Advisor spoke about, it was not persuaded that the complaint had no reasonable prospect of success, and denied the City's application to dismiss the complaint based on mental disability under Section 27(1)(c) of the *Code.* As a result, the case is proceeding to a hearing.

Another Section 13 complaint based on mental disability against a local government is also proceeding to hearing. In *Ng v. Vancouver (City)*, 2023 BCHRT 161, the complainant alleged that her employer, the City, failed to accommodate her mental disability when it, on the recommendation of a third-party disability management provider, denied her sick leave. At a meeting to discuss the complainant's return to work, the City also raised some performance concerns and advised her that she could no longer work from home one day a week. The complainant then notified the City that she was going to retire. The complainant did not return to work and retired.

The City applied to dismiss the complaint on the basis that the alleged facts did not contravene the *Code* (Section 27(1)(b)), and that the complaint had no reasonable prospect of success (Section 27(1)(c)).

The Tribunal declined to exercise its discretion under Section 27(1)(b). The Tribunal found that there were allegations that the complainant had a mental disability protected by the *Code*. The Tribunal has interpreted the term "disability" to mean a physiological state that is involuntary, has some degree of permanence, and impairs a person's ability, in some measure, to carry out the normal functions of life. The complainant alleged that she suffered from an anxiety disorder, that events at work caused her to panic and have severe headaches, and that her doctor recommended that she take stress leave of about three months. The Tribunal held that those facts, if proven, could establish that the complainant had a mental disability protected by the *Code*.

The Tribunal also held that the complainant alleged that she was adversely impacted in her employment. She alleged that her sick leave was cancelled without any accommodation for a return to work, that she was no longer allowed to work from home one day a week as punishment for taking sick leave, and that she was forced to retire. The Tribunal held that those allegations, if proven, could establish adverse treatment in employment.

The Tribunal further held that there were allegations that the complainant's mental disability was a factor in the adverse treatment. The complainant alleged the City discriminated against her on the basis of mental disability when it relied on the disability management provider's recommendation, instead of her physician's recommendation and denied her sick leave and forced her to return to work without any accommodations. The complainant also asserted that the City knew or reasonably ought to have known that she suffered from a mental disability that required accommodation, but did not request further medical information to confirm her disability or required accommodation, or engage in its duty to accommodate her. Further allegations included that the City should have requested medical information from the disability management provider and should have investigated her disability-related needs instead of unreasonably relying on the provider's assessment. The Tribunal considered the requirement for allegations that the complainant's mental disability was at least a factor in her adverse treatment to be met. Therefore, the Tribunal concluded that the complainant had alleged facts that if proven could establish that the City contravened the *Code*.

The Tribunal also dismissed the City's Section 27(1)(c) argument that the complaint had no reasonable prospect of success. The Tribunal held that the City had not shown that there was no reasonable prospect of the complainant establishing a *prima facie* case of discrimination at a hearing. Anxiety disorders are a recognized mental disability within the meaning of the *Code*. The City had not shown that there was no reasonable prospect that the complainant could establish that she was adversely impacted in her employment. She alleged that she was so impacted by the experience of being refused sick leave that she retired. The Tribunal also concluded that the City did not establish that the complainant's allegation that the denial of sick leave was connected to her disability had no reasonable prospect of success. At the time of the denial, the disability management provider had medical information diagnosing the complainant with anxiety disorder and indicating that she could not return to work. The City had not provided any evidence about how the provider arrived at its conclusion that sick leave was not medically supported, or why the City felt no further inquiry was necessary despite

knowing that the complainant had a medical condition. The provider's role was only to make recommendations that the City may or not follow. The Tribunal considered that a failure to consider the complainant's disabilities in making decisions about sick leave could ground a finding of discrimination in employment.

The Tribunal also held that the City had not shown that it was reasonably certain to establish that it met its duty to accommodate the complainant to the point of undue hardship when it required her to return to work. The fact that the City relied on the disability management provider to assist with disability management and to provide recommendations did not absolve the City from its accommodation obligations under the *Code*.

The Tribunal held that the duty to accommodate has a procedural and substantive component. The procedural component requires the employer to undertake an individualized investigation of accommodation measures and the employee's needs and imposes a duty to obtain all relevant information about the disability. The substantive component requires the employer to provide necessary accommodation to allow an employee to participate fully in the workplace.

The Tribunal also held that the duty to inquire is triggered where the employer should be reasonably alerted that the employee may have a disability that requires accommodation. The duty can be triggered by unusual behaviour, or poor job performance that could be related to a disability. Once triggered, the employer must investigate.

The Tribunal was tasked with determining whether the City was reasonably certain to prove that no duty to inquire arose, and if it arose that it was satisfied, and that the City's duty to accommodate was satisfied. The City knew of the complainant's disability and relied on the recommendation of the disability management provider that her medical information did not support absence from work. The City failed by not requesting additional medical information or inquiring further into the complainant's need for accommodation once her sick leave had been rejected by the disability management provider. In light of that evidence, the Tribunal held that it was not reasonably certain that at a hearing the City would establish that it met its duty to inquire or its duty to accommodate. The City did not meet its burden to show there is no reasonable prospect of the complaint succeeding. Therefore, the application for dismissal was denied and the case is proceeding to a hearing.

The Tribunal in *C. v. City*, 2023 BCHRT 203 rejected applications to dismiss complaints against a City and a Union alleging sex discrimination in relation to allegations that a City Councillor sexually harassed and sexually assaulted a female employee of the City. The complainant also alleged that when she raised her concerns about the Councillor's conduct with the City and the Union their responses were inadequate and discriminatory.

The City denied discriminating against the complainant and applied to dismiss the complaint against it under Sections 27(1)(c), (d)(ii), (f), and (g) of the *Code*. The Union also denied discriminating and applied to dismiss the complaint against it under Section 27(1)(b) of the *Code*. The Tribunal denied the City's application to dismiss in its entirety, and granted the Union's application to dismiss in part.

The Tribunal held that the complaint was not filed out of time in relation to the allegations of sexual harassment, and dismissed the City's Section 27(1)(g) argument. The Tribunal found that the sexual harassment allegations and the sexual assault allegation, the latter of which was filed in time, together formed an allegation of a continuing contravention of the *Code.* They were all of the same character, as they all involved unwelcome personal conduct which detrimentally affected the complainant's work environment.

The Tribunal also dismissed the City's Section 27(1)(c) argument that the complaint had no reasonable prospect of success. The Tribunal rejected the City's claim that it could reasonably establish that it was not liable for the Councillor's behaviour because he was not an employee. The Tribunal pointed out that pursuant to Section 44(2) of the *Code,* employers are liable for the actions of their employees, officers, directors, officials and agents who were acting within the scope of their authority.

The Tribunal was also not satisfied that the City had accommodated the complainant to the point of undue hardship. The City had investigated the complainant's allegations when she raised them with the City, and had placed restrictions on the Councillor preventing him from interacting with the complainant, moved the complainant to a floor that the Councillor could not access, and required the Councillor to undergo respectful workplace training, among other things. However, the complainant contended that an appropriate accommodation would have been for the City to permit her to work from home. A hearing was necessary to decide whether the City had met its duty to accommodate.

The Tribunal also held that it was not reasonably certain that the City could prove that the confidentiality provisions of the City's Respectful Workplace Policy did not violate the *Code*. The complainant had allegedly suffered a severe anxiety attack after she had warned other employees about the Councillor and then had received a letter from human resources indicating that speaking to people about the incident was a breach of the Respectful Workplace Policy. The Tribunal held that the confidentiality provision could be discriminatory if it restricted the complainant from telling others about the incidents with the Councillor as opposed to restricting her from disclosing what was conveyed to her by the City during the investigation process. The Tribunal considered there to be a nexus between the protected ground of sex (a female alleging sexual harassment and assault) and the adverse impact of the confidentiality provision being anxiety and/or a contribution to a negative work environment from having to withhold telling others about the Councillor's conduct.

The Tribunal also rejected the City's alternative argument that if the confidentiality provision was *prima facie* discriminatory, it was a BFOR. The Tribunal was not convinced that the City could not have accommodated the complainant to the point of undue hardship by applying the provision less restrictively. The City did not provide any evidence that a narrower interpretation of the confidentiality provision could not accomplish its legitimate work-related purposes of encouraging complainants to speak candidly without fear of retaliation and fostering a respectful workplace.

The Tribunal also rejected the City's Section 27(1)(d)(ii) argument that proceeding with the complaint would not further the purposes of the *Code*. The City argued that the complaint should not proceed because it had taken appropriate steps to prevent discrimination under the *Code* and to promote a harassment-free work environment. The Tribunal did not agree. Although it recognized that the City took the complainant's allegations seriously and promptly investigated and placed conditions on the Councillor, there were legitimate questions as to whether the City responded appropriately to the accommodations proposed by the complainant.

The Tribunal also dismissed the City's Section 27(1)(f) argument that the case should not proceed because WorkSafeBC had already addressed the same legal issues. WorkSafeBC had only decided if the complainant was entitled to compensation for a mental disorder that resulted from the incidents with the Councillor. There was no evidence that WorkSafeBC had decided whether there was discrimination under the *Code*.

As the Tribunal dismissed all of the City's arguments in the application to dismiss, the complaint against the City is proceeding to a hearing. The Tribunal did, however, dismiss part of the complaint against the Union, applying Section 27(1)(b) of the *Code* to find that part of the complaint did not allege facts that could if proven, contravene the *Code*. The only part of the complaint against the Union to proceed to a hearing is the allegation that the Union was unresponsive to the complainant's concerns about the City's duty to accommodate her regarding further encounters with the Councillor.

Spangler v. West Vancouver (District) (cob West Vancouver Transit), 2024 BCHRT 68 involved a complaint of employment discrimination based on perceived physical disability, and a claim that the employer failed to accommodate the complainant when it refused to return him to work. The complainant was a community bus driver with a Class 4 commercial license. After a heart attack the complainant was no longer eligible for a Class 4 commercial driver's license. The employer applied to dismiss the complaint pursuant to Section 27(1)(c) of the *Code* on the ground that it had no reasonable prospect of success. The Tribunal granted the application on the basis that it was reasonably certain that the employer could establish that it met its duty to accommodate, and that further accommodation would incur undue hardship.

The Tribunal found that the standard of maintaining a Class 4 commercial license was adopted in good faith and in the honest belief that it was necessary to fulfill the legitimate purpose of safely and lawfully performing the complainant's job duties. Maintaining a Class 4 commercial

license was mandatory for community bus drivers under the BC *Motor Vehicle Act* licensing regime. If the employer waived that requirement, it would not be eligible for insurance coverage which would expose the employer to unacceptable risk of harm and liability.

All but one position that the complainant considered for accommodation required a Class 4 license or higher. Additionally, the employer determined that regardless of physical limitations, the complainant did not have sufficient qualifications for any of the alternate positions.

The Tribunal was persuaded that the employer could not accommodate the employee's disabilities by exempting the complainant from the Class 4 license requirement, without incurring undue hardship. Accordingly, the complaint was dismissed without a hearing.

3. BC Court of Appeal Decision re Section 13 Family Status

The BC Court of Appeal addressed the test for family status discrimination under Section 13 of the *Code* in *British Columbia (Human Rights Tribunal) v. Gibraltar Mines Ltd.*, 2023 BCCA 168 ("*Gibraltar Mines Ltd.*"). Prior to this case, the courts had held that for a *prima facie* case of discrimination in employment on the ground of family status to exist, the employer must have changed a term or condition of employment with the result of serious interference with a substantial parental or other family obligation of the employee. The courts had also confirmed that the responsibility for childcare arrangements was included within the ground of family status. However, not every employment interference with parental duties would be *prima facie* discriminatory. The interference must be serious, and the parental duty must be substantial.

That interpretation arose from the BC Court of Appeal's decision in *Health Sciences Assn. of British Columbia v. Campbell River and North Island Transition Society*, 2004 BCCA 260 ("*Campbell River*"). In that case, an employer had changed an employee's hours of work which resulted in her inability to provide afterschool care for her son who had a major psychiatric disorder that caused severe behavioural problems. The employee's ability to provide afterschool care for her son was extraordinarily important to his wellbeing. The Court of Appeal held that a *prima facie* case of family status discrimination existed in those circumstances.

Since the *Campbell River* decision, the courts had interpreted it to mean that an employer had to change a term or condition of employment for a case of *prima facie* discrimination on the basis of family status to exist, and that it could not arise from a change in the employee's circumstances.

In *Gibraltar Mines Ltd*., the BC Court of Appeal explained that the *Campbell River* decision did not set out the only circumstances in which a *prima facie* case of family status discrimination could exist, and that the Court in its earlier decision was only commenting on the usual circumstances which would lead to a finding of *prima facie* family status discrimination. The BC Court of Appeal in *Gibraltar Mines Ltd.* held that *prima facie* family status discrimination would exist whenever a term or condition of employment results in serious interference with a substantial parental or other family duty or obligation of an employee, whether as a consequence of a change in the term or condition of employment, or a change in the

employee's circumstances. As a result, employees can now make claims of family status discrimination when an employer refuses to change terms and conditions of employment in response to a request for accommodation of their substantial family duties or obligations.

C. Section 43 Retaliation Cases

Section 43 of the *Code* prohibits a person from taking an adverse action against another person for being involved in a complaint proceeding under the *Code*:

> 43 A person must not evict, discharge, suspend, expel, intimidate, coerce, impose any pecuniary or other penalty on, deny a right or benefit to or otherwise discriminate against a person because that person complains or is named in a complaint, might complain or be named in a complaint, gives evidence, might give evidence or otherwise assists or might assist in a complaint or other proceeding under this Code.

A complainant must establish three elements to make out a retaliation complaint under Section 43:

- The respondent was aware that the complainant made or might make a complaint, gave evidence or might give evidence in a complaint, or otherwise assisted or might assist in a complaint;
- The respondent engaged or threatened to engage in conduct listed in Section 43; and
- There is a sufficient connection between the impugned conduct and the previous complaint, which may be established by proving that the respondent intended to retaliate, or may be inferred where the respondent can reasonably have been perceived to have engaged in that conduct in retaliation, with the element of reasonable perception being assessed from the point of view of a reasonable complainant, apprised of the facts, at the time of the impugned conduct.

In *Matus v. Hudson's Hope (District),* 2023 BCHRT 25, the complainant filed a complaint pursuant to Section 43 of the *Code*, alleging that the District had terminated his employment in retaliation for his wife having filed a complaint under the *Code* against the District.

The complainant was employed with the District as Chief Administrative Officer until he was terminated without cause in 2018. Prior to his termination, the complainant's wife had filed a complaint with the Tribunal against the District when the District did not hire her for a position. The complainant was named in his wife's complaint and therefore fell within scope of Section 43 of the *Code*. The District received notice of the wife's complaint in November 2016 and settled the complaint in April 2017.

The District filed an application to dismiss the complainant's retaliation complaint pursuant to Section 27(1)(c) of the *Code* on the ground that it had no reasonable prospect of success. The Tribunal granted the application. The Tribunal found that the District had provided an abundance of evidence to show that the complainant's termination was not related to his wife's human rights complaint but instead, was because of the complainant's job performance. The Tribunal found that there was evidence of complaints regarding the complainant from Councillors and members of the public prior to the District receiving notice of his wife's complaint. In response to these concerns, the Council had conducted a performance review of the complainant in summer 2016 but were dismayed by the complainant's response to the review, as he refused to sign off on the review and disputed the concerns that were raised. Accordingly, the Council agreed to have a second, more structured performance review of the complainant in hopes that the complainant would have a better understanding of their concerns.

However, before the second performance review took place, the District received notice of the complaint from the complainant's wife and therefore, chose to pause the complainant's second performance review until his wife's complaint has been resolved in order to avoid an appearance of retaliation. After his wife's complaint was resolved, the Council conducted the more structured performance review of the complainant in late 2017, which included a self-evaluation and individual evaluations from each Councillor and the Mayor. When the complainant received the results of the performance review, he sent the Council a 14-page rebuttal, disputing the concerns raised. The Council ultimately decided to terminate the complainant's employment given his continued refusal to acknowledge and address the Council's concerns with his performance.

The aforementioned facts were supported by affidavit evidence from every Councillor as well as the former Mayor, documentary evidence, Council Meeting Minutes, letters of complaint regarding the complainant, the 2016 and 2017 performance reviews, and the complainant's 14-page rebuttal.

In contrast to the evidence provided by the District, the complainant did not provide sufficient evidence that would support a conclusion that the District intended to retaliate against the complainant due to his wife's human rights complaint. In fact, the evidence showed that the District tried to avoid a potential perception of retaliation by pausing the complainant's second performance review until his wife's complaint had been resolved. While the timing of events may have supported an inference of retaliation, the Tribunal held that there was not enough evidence to take the complainant's allegation of retaliation outside the realm of conjecture in considering the abundance of evidence provided by the District that showed otherwise.

IV. CONCLUSION

As outlined in this paper, the Tribunal has taken concrete steps to address the backlog of cases that accumulated during and since the COVID-19 pandemic. It has also, in the last couple of years, issued a number of decisions that provide guidance to local governments in relation to their provision of services or facilities to the public, and in relation to their employees. The BC Court of Appeal has also issued an important decision regarding the protected ground of family status in the employment context. Local governments should consider those decisions carefully when deciding how to address matters that potentially raise human rights issues.

NOTES