IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Shin v. British Columbia (Ministry of Public Safety and Solicitor General),* 2026 BCSC 84

Date: 20260120
Docket: S244860
Registry: Vancouver

Between:

Steve Shin

Petitioner

And

His Majesty the King as Represented by the Ministry of Public Safety and Solicitor General (Okanagan Regional Correctional Centre), Denean Barkman, British Columbia Human Rights Tribunal

Respondents

Before: The Honourable Justice Latimer

On judicial review from: An order of the British Columbia Human Rights Tribunal, dated May 23, 2024 (*Shin v. Ministry of Public Safety and Solicitor General and another (No. 2),* 2024 BCHRT 156).

Reasons for Judgment

In Chambers

Counsel for the Petitioner:	M. Freedman C. Lee
Counsel for the Respondents:	J. Gleed J. Mason
Counsel for the B.C. Human Rights Tribunal	S. Monchalin
Place and Dates of Hearing:	Vancouver, B.C. August 5–6, 2025
Place and Date of Judgment:	Vancouver, B.C. January 20, 2026

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Introduction

[1] This is a petition for judicial review of a decision of the British Columbia Human Rights Tribunal ("Tribunal") in which it dismissed the petitioner's complaint pursuant to s. 27(1)(c) of the *Human Rights Code*, R.S.B.C. 1996, c. 210 [*Code*]. The Tribunal dismissed the complaint on the basis that it had no reasonable prospect of success.

[2] In so dismissing a complaint, the Tribunal does not make findings of fact. The background facts that follow are drawn from the materials before me and are largely uncontested, except where I have noted otherwise.

[3] The petitioner, Mr. Shin, is originally from South Korea. His maternal tongue is Korean. He immigrated to Canada in 2007 or 2008.

[4] In May 2016, Mr. Shin was hired on a probationary basis as a Correctional Officer at the Okanagan Regional Correction Centre ("OCC"). The respondent, Ms. Barkman, is an Assistant Deputy Warden at the OCC and was responsible for hiring, training, and labour relations.

[5] Mr. Shin's employment was subject to various requirements including successful completion of an Officer Training Program. The program includes class work, written examinations, and graded role-playing scenarios.

[6] On March 6, 2017, Mr. Shin began training with the sixth cohort of recruits, referred to as Security Officer Training 6 ("SOT6").

[7] During SOT6, Mr. Shin borrowed one of his classmate's notes.

[8] On March 9, 2017, Mr. Shin failed a written test. He retook the test and passed. He failed another test and then passed the retest.

[9] On March 16, 2017, the employer terminated Mr. Shin after he failed a third test ("March Termination").

[10] As I will explain in more detail below, Mr. Shin argues that SOT6 was discriminatory and did not accommodate his English language skills. He further alleges that during SOT6 the respondents targeted him and discriminated against him, including in his evaluations, on human rights grounds. This is all disputed by the respondents.

[11] On March 22, 2017, the employer decided not to proceed with terminating Mr. Shin, and he was allowed to join Security Officer Training 7 ("SOT7").

[12] On April 3, 2017, Mr. Shin began SOT7.

[13] Mr. Shin again borrowed the notebook of his former classmate from SOT6.

[14] Mr. Shin passed written examinations during the first two weeks of SOT7.

[15] On April 18, 2017, the employer informed Mr. Shin that he was being investigated for dishonest behavior related to borrowing his former classmate's notes.

[16] In the third week of SOT7 training, Mr. Shin was required to do graded role-playing scenarios.

[17] The employer says Mr. Shin failed all the role-play scenarios. Mr. Shin disputes the *bona fides* of his evaluations.

[18] On April 24, 2017, the respondents rescinded their offer of employment to Mr. Shin ("April Termination").

[19] As I will explain in more detail below, Mr. Shin argues that SOT7 was discriminatory and did not accommodate his English language skills. He further alleges that during SOT7 the respondents targeted him and discriminated against him, including in his evaluations, on human rights grounds. This is all disputed by the respondents.

[20] On September 15, 2017, Mr. Shin filed a complaint against the respondents with the Tribunal.

[21] He alleged discrimination in employment on the grounds of age, ancestry, place of origin, and race.

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[22] I will not set out every procedural step that occurred before the Tribunal but only those of some significance to this judicial review.

[23] On December 17, 2019, the Tribunal allowed Mr. Shin to amend his complaint to add the ground of mental disability. I will refer to the amended complaint as the "Complaint". The disability alleged was the following:

> 54. The consequences of the Respondent's actions in commencing the formal investigation were severe for the Complainant. He became extremely agitated, anxious and unstable. He was not able to sleep at all, or organize or control his thoughts and emotions. He began having panic attacks. His symptoms at that time were a disability.

[24] On July 11, 2018, the respondents filed an application to dismiss the Complaint under s. 27(1) of the *Code*.

[25] On June 21, 2021, the respondents filed an Amended Application to Dismiss ("ATD") the Complaint under s. 27(1) of the *Code*.

[26] On July 21, 2021, the petitioner filed a Response to the Amended Application to Dismiss ("RATD").

[27] On August 18, 2021, the respondents filed a reply to the RATD.

[28] On September 10, 2021, the respondents filed a revised reply, removing certain paragraphs ("Reply").

[29] On May 23, 2024, the Tribunal rendered a decision ("Decision") in which, among other things, it allowed the respondents' ATD pursuant to s. 27(1)(c) of the *Code* on the basis that the petitioner had no reasonable prospect of success. There was no reasonable prospect that the petitioner could establish that his protected characteristics were a factor in the respondents' decision to terminate his employment. The Tribunal also addressed the alternative argument that the respondents were reasonably certain to establish a *bona fide* occupational requirement based on the need to accurately assess a candidate's qualification for the Correctional Officer job.

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[30] The petitioner sought reconsideration of the Decision before the Tribunal. In a decision dated June 18, 2024 ("Reconsideration Decision"), the Tribunal denied Mr. Shin's application for reconsideration, essentially finding, among other things, that the petitioner sought to repeat and reargue his case on the merits.

[31] The petitioner now applies for judicial review of the Decision.

[32] After filing his petition, the petitioner retained counsel. The arguments advanced orally at the hearing were different than the grounds for judicial review set out in the petition. The respondents did not object to the advancement of the new arguments that had not been pleaded. The petitioner formally abandoned all of the arguments set out in the petition that were not addressed orally. Given the difference between the grounds advanced in the petition and those advanced orally at the hearing, I have filed the petitioner's written argument as Exhibit A in this proceeding so that a record is preserved of what grounds for review were advanced at the hearing.

[33] Briefly, the grounds for judicial review advanced by the petitioner are that the Decision is patently unreasonable for the following reasons:

a) The Tribunal failed to consider whether the March Termination was discriminatory.

b) The Tribunal failed to consider whether the petitioner's protected characteristics were at least one factor in his April Termination.

c) The Tribunal failed to consider or dismissed evidence that the petitioner was targeted and harassed on the basis of his protected characteristics.

d) The Tribunal failed to address all steps of the legal test in respect of the allegation that the respondents failed to accommodate the petitioner.

e) The Tribunal failed to consider an allegation of discrimination based on an imputed or perceived disability.

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[34] The petitioner's position is that if any one of these grounds prevails, the Decision should be quashed so that the Tribunal can reconsider whether the petitioner should be allowed to plead his case at a full hearing. The petitioner also argued, orally, that because each of these grounds relates to a different alleged breach of the *Code,* it was open to the Court to remit only one or some allegations of discrimination for reconsideration.

[35] This application for judicial review is opposed by the respondents. Their position is that the Decision is not patently unreasonable because:

a) either there was no adverse effect from the March Termination or, in the alternative, the March Termination was adequately addressed by the Tribunal;

b) the Tribunal squarely addressed whether a protected characteristic was at least one factor in the adverse treatment;

c) the Tribunal squarely addressed whether the petitioner was targeted and harassed. The Tribunal's assessment of the evidence was not patently unreasonable;

d) the Tribunal's assessment of whether the petitioner was reasonably accommodated was an alternative basis for its decision. Further, it should be assumed that the Tribunal knows the law and is not required to strictly set out the legal test to demonstrate it has considered the issue; and

e) the question of whether the petitioner was discriminated against based on an imputed or perceived disability was not properly raised before the Tribunal.

[36] The Tribunal takes no position on the merits of the application for judicial review. The Tribunal has made submissions in respect of the applicable standard of review. Some evidentiary and procedural issues were identified by the Tribunal

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which were conceded by the petitioner at the hearing. I will address those briefly in my reasons below.

Issues

[37] The following issues are before me for determination:

a) Should the style of cause be amended?

b) Is Exhibit G in the Affidavit #1 of Steve Shin admissible on this judicial review?

c) What is the standard of review?

d) Is the Decision patently unreasonable?

Analysis

Should the style of cause be amended?

[38] The petitioner did not, initially, name the Tribunal as a respondent to this judicial review. However, the petitioner concedes the Tribunal should be added as a respondent and filed an amended petition adding the Tribunal as a respondent.

[39] The Tribunal exercises its right to participate as a party to this application for judicial review under s. 15(1)(b) of the *Judicial Review Procedure Act,* R.S.B.C. 1996, c. 241 [*JRPA*].

[40] The Tribunal is added as a respondent. The style of proceeding is amended accordingly.

Is Exhibit G in Affidavit #1 of Steve Shin admissible on this judicial review?

[41] Affidavit #1 of Steve Shin was made July 19, 2024 (“Shin Affidavit”). It includes a document at Exhibit G that is not part of the Tribunal’s record. The Tribunal submits this exhibit should not form part of the record on judicial review.

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[42] As a general rule, the court's review must be based on the Tribunal's record of proceedings as that term is defined in s. 1 of the *JRPA*.

[43] The court's power to admit evidence beyond the record of proceeding must be exercised sparingly, and only in an exceptional case: *Kinexus Bioinformatics Corporation v. Asad*, 2010 BCSC 33 at para. 17.

[44] Orally, the petitioner submits that he places no reliance on Exhibit G.

[45] Exhibit G is not admissible on this judicial review.

What is the standard of review?

[46] The parties agree that the applicable standard of review is patent unreasonableness.

[47] Section 32(q) of the *Code* provides that s. 59 of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 [*ATA*] applies to decisions of the Tribunal.

[48] Section 59 of the *ATA* provides:

> **Standard of review without privative clause**
>
> 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.

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> (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.

[49] The Tribunal's decision to dismiss a complaint under s. 27 of the *Code* is a discretionary one. Section 27(1)(c) endows a gate-keeping function to the Tribunal, allowing it to assess complaints in a preliminary way to determine if there is sufficient merit to warrant the time and expense of a hearing.

[50] The role was described by the Court of Appeal in *Workers' Compensation Appeal Tribunal v. Hill*, 2011 BCCA 49 as follows:

> [27] It is useful to describe the nature of an application under s. 27 of the *Code* to provide context for the appellants' arguments. That provision creates a gate-keeping function that permits the Tribunal to conduct preliminary assessments of human rights complaints with a view to removing those that do not warrant the time and expense of a hearing. It is a discretionary exercise that does not require factual findings. Instead, a Tribunal member assesses the evidence presented by the parties with a view to determining if there is no reasonable prospect the complaint will succeed. The threshold is low. The complainant must only show the evidence takes the case out of the realm of conjecture. If the application is dismissed, the complaint proceeds to a full hearing before the Tribunal. If it is granted, the complaint comes to an end, subject to the complainant's right to seek judicial review…
>
> [Emphasis added.]

[51] The "highest degree of deference" is extended to determinations made under s. 27(1)(c). This is so even where a different outcome may reasonably have been open to the Tribunal. The petitioner must establish that the decision to dismiss the complaint was patently unreasonable: *Routkovskaia v. British Columbia (Human Rights Tribunal),* 2012 BCCA 141 at para. 29; *Francescutti v. Vancouver (City),* 2017 BCCA 242 at para. 42, citing *Lee v. British Columbia Hydro and Power Authority*, 2004 BCCA 457 at para. 26.

[52] The parties agree that in the wake of *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 this Court has adopted a “reasons first” approach to judicial review, even when the standard to be applied is patent unreasonableness: *University of British Columbia Okanagan v. Hale*, 2021 BCSC 729 at para. 97, citing

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Guevara v. Louie, 2020 BCSC 380 at para. 48. Such an approach does not change the standard of review to be applied.

Is the Tribunal's Decision patently unreasonable?

Did the Tribunal fail to consider whether the March Termination was discriminatory?

[53] The petitioner argues that the Tribunal failed to consider whether the March Termination was discriminatory.

[54] This ground of review requires the Court to consider how the Tribunal interpreted the petitioner's complaint.

[55] The petitioner argues that he raised the question of whether the March Termination was discriminatory in the Complaint at paras. 30–38.

[56] Those paragraphs read:

> 30. On March 16, 2017, the Complainant received a letter from Mr. DiCastri rescinding his job offer effective immediately. The letter stated that the job offer was rescinded due to the Complainant's failure to meet performance levels in exams and his failure to complete IM117.
>
> 31. The Complainant found being terminated traumatic and was very upset by it.
>
> 32. On March 17 and 18, 2017, the Complainant sent a number of emails to Mr. DiCastri protesting his termination. Among other things, he noted that he expected OCC staff to support him in his learning, but that they did not.
>
> 33. In the course of this correspondence, the Complainant also pointed out that other students had helped him. He specifically mentioned having borrowed another student's notebook.
>
> 34. On March 22, 2017, the Complainant met with Mr. DiCastri and Mr. MacLeod, his BCGEU representative. Mr. DiCastri framed this meeting as a fact-finding response to the Complainant's emails.
>
> [paragraph 35 was deleted by amendment]
>
> 36. Mr. DiCastri's focus in the meeting was solely on what the Complainant would do differently if given the opportunity to join SOT 7. Mr. DiCastri did not consider what the OCC might do differently during SOT 7 to better support the Complainant's learning despite his language issues.
>
> 37. Mr. DiCastri indicated that he would consider reinstating the Complainant in SOT 7 because the Complainant should have been given the opportunity to rewrite the failed fourth exam. However, Mr. DiCastri also stressed that the

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> assessments in week 3 (Communications Week) and 4 (Use of Force) of the program must be passed on the first attempt in order to move forward. In taking this position, Mr. DiCastri did not consider whether such a rule was consistent with the Complainant's continuing right to accommodation.
>
> 38. In this meeting, Mr. DiCastri asserted that "this isn't about your human rights".
>
> [Emphasis added.]

[57] The petitioner emphasizes that he raised the question of the failure of the OCC to support him in his learning with respect to SOT6 and that he wanted to receive such support in SOT7. The March Termination was raised with reference to his protected grounds.

[58] The petitioner says this ground was then clarified in the RATD where he argued:

> 28. Respondent Barkman and two instructors took a series of unusual, extraordinary measures to set up the Complainant to fail in the written exams before removing him from the OCC on March 15. They started abusing their managerial/supervisory power to target the Complainant right after his return from the meeting with Respondent Barkman on March 10. He was absent from the class for 40 minutes or longer because of a lengthy meeting with Respondent Barkman, who persistently demanded his voluntary resignation at the earliest time.
>
> a) The written exam, originally scheduled for Monday (March 13), was carried out right after the lunch break. If the exam was set for the day, the Complainant did not dare request the meeting with HR Manager…
>
> b) The instructors allowed an open-book test. However, only the reference of one's notebook, not the textbook, was allowed.
>
> c) The instructors did nothing to fill in the Complainant on the part he had missed. They must have noticed that the Complainant was absent and missed a significant part of the lecture. Consequently, the Complainant was the only one who had no notebook to fall back on. He alone failed the open-book test with a meagre 53%.
>
> d) After that, they arbitrarily changed the exam method from the open-book to the closed book style. As a result, the Complainant had to pass a closed-book retest on March 14 while taking the challenging 12-hour training from 06:20 to 18:40. The Complainant was treated differently from other trainees because he was the only one who passed the exam on the Institutional Safety and Security module in a closed-book style …
>
> e) Respondent Barkman and two instructors removed the Complainant from the center only a few hours after the Wednesday test. They demanded an instant resignation after informing him of the test result. The Complainant, who was made to take the tests requiring strenuous efforts and long hours

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> two days in a row under the demanding 12- hour training circumstance, did his best and was confident that he did well enough to get a minimum of 80 percent. He refused to resign. Then, they took the access fob and the flash drive from the Complainant and practically kicked him out.
>
> f) At the time, they did not give him a chance to rewrite the exam, which was an option for all trainees. Even Warden DiCastri admitted that the Complainant should have been given a second chance during an interview with the Complainant on March 22.
>
> …
>
> h) The exam papers disclosed by the Respondents are hard evidence supporting what the Complainant now testifies. The Complainant took the Institutional Safety and Security module exam in the open-book on March 10 in SOT6. But in SOT7, he took the standard closed-book test on the same module on April 7. Thus, it clearly shows that the Respondents arbitrarily changed the exam schedule and method in SOT6. Also, his exam papers of the retest he took on March 14 show that it was not an open-book test …
>
> 29**.** The Respondents argue in the amended [application to dismiss]:
>
> > 18. Contrary to any suggestion that he was subject to incorrect perceptions or perceived difficulties with English, the Complainant's inability to progress in Security Officer Training ("SOT") 6 is, among other things, substantiated by his written examination papers ...
>
> On the contrary, the Complainants' written examination papers substantiate the Respondents misuse of their managerial/supervisory power in targeting and discriminating against a vulnerable probationary trainee.
>
> [Emphasis added.]

[59] Although the Decision makes specific reference to the March Termination at para. 12, the petitioner argues that this paragraph is simply a recital of background facts. It is argued that the Decision does not grapple with the substantive question of whether the March Termination was discriminatory. Throughout the balance of the Decision, it is argued, the Tribunal draws no distinction between the March Termination and the April Termination.

[60] The petitioner argues that a failure to properly review and consider the submissions of both parties and the failure to consider the totality of a complaint renders the Decision patently unreasonable: *Byelkova v. Fraser Health Authority*, 2021 BCSC 1312 at para. 74, appeal dismissed as moot in 2022 BCCA 205; *Lord v. Fraser Health Authority*, 2021 BCSC 2176 at para. 45; *McNeil v. British Columbia (Human Rights Tribunal)*, 2023 BCSC 481 at para. 97.

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[61] For example, in *McNeil*, the self-represented complainant made two separate allegations of discrimination:

a. the employer failed to accommodate her; and

b. the employer failed to renew her contract because of her disability.

[62] On judicial review, the Court noted that the second allegation was not clearly articulated in the complaint: *McNeil* at para. 92. However, the Court found that the material filed in response to the employer's application to dismiss was clear: *McNeil* at para. 93. The Court further noted that the employer clearly understood that a second ground had been raised because it objected to Ms. McNeil raising a ground for discrimination without applying to amend her complaint: *McNeil* at para. 94.

[63] In *McNeil*, the Court quashed the application to dismiss decision because the Tribunal member dealt only with the accommodation issue and failed to consider the second ground of discrimination or the employer's objection as part of the complaint: *McNeil* at paras. 95–96. The Court found that this failure was an arbitrary exercise of discretionary authority, rendering the decision patently unreasonable: *McNeil* at para. 97.

[64] While I agree that the failure to consider the totality of a complaint may render a decision patently unreasonable, I do not accede to the argument that the Tribunal's failure to consider the March Termination and the April Termination separately rendered the Decision patently unreasonable.

[65] Tribunals are entitled to deference in the interpretation of their own pleadings and proceedings: *Vancouver Island Health Authority v. Safaei and British Columbia Human Rights Tribunal*, 2025 BCSC 340 at para. 82. The petitioner bears the burden to show that the Tribunal's interpretation is patently unreasonable: *Laity v. British Columbia (Financial Services Tribunal)*, 2023 BCSC 1165 at para. 39, citing *Ahmad v. Merriman*, 2019 BCCA 82 at para. 37.

[66] In the present case, the Complaint raised a concern about lack of support of the petitioner's learning despite his language issues during SOT6: Complaint at para. 32.

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The petitioner related this to a concern about the same issue in SOT7: Complaint at para. 36. One of the allegations was that this lack of support led the petitioner to borrow a classmate's notes during SOT6 and a second time in SOT7. The lack of support and the use of borrowing a classmate's notes was linked as between SOT6 and SOT7.

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[67] The petitioner's RATD raised an additional allegation that the petitioner was targeted and discriminated against during SOT6: RATD at para. 28. The specific manner of targeting and discrimination included the respondents taking measures to set up the petitioner to fail in his evaluations such as:

a) The timing of evaluations was arbitrarily changed and/or prejudicial: RATD at paras. 28(a), (d), (h).

b) The manner of evaluation was arbitrarily changed and/or prejudicial: RATD at paras. 28(b), (d), (h).

c) Meetings caused him to, or would have caused him to, miss course content that he was examined on: RATD at paras. 28(a), (c).

d) The respondents demanded that the petitioner resign without offering him a chance to rewrite an exam: RATD at para. 28(e).

[68] The respondents led affidavit evidence specifically addressing, among other things, at para. 28 of the petitioner's submissions where those allegations are raised.

[69] The petitioner further alleged that he was targeted and discriminated against during SOT7. Among others, the complaints raised with respect to SOT7 were similar to those raised with respect to SOT6. Specifically, the petitioner alleged that measures were taken to set him up to fail in his evaluations in SOT7. For example:

a) The timing of interviews was prejudicial: RATD at paras. 51, 53.

b) Interviews caused the petitioner to miss course content: RATD at para. 51.

c) The forum in which course information was provided caused him to miss course content that he was examined on: RATD at para. 45.

d) The respondents failed the petitioner without offering him a chance to repeat role-plays more than once: RATD at para. 57.

[70] The Tribunal addressed the allegations compendiously. The Tribunal's appreciation of the Complaint before it is found throughout the Decision. I highlight the following:

> [3] As I understand it, Mr. Shin says he was terminated from his employment with the Okanagan Regional Correctional Centre due to a discriminatory training program which did not accommodate his English language skills. He alleges the Respondents targeted him and discriminated against him based on assumptions they made about his ancestry, place of origin, race, age, and mental disability.
>
> …
>
> [12] Mr. Shin failed his next exam on March 15, 2017. That same day Mr. Shin met with his supervisors, to discuss his performance issues. The Respondents told Mr. Shin his performance did not meet the standards of a Correctional Officer and terminated the employment.
>
> [13] On March 22, 2017, Mr. Shin and his union shop steward met with representatives of the Correctional Centre. The Correctional Centre decided not to proceed with terminating the employment and to give Mr. Shin an opportunity to restart the Officer Training Program …
>
> [14] Mr. Shin restarted the Officer Training Program on April 3, 2017.
>
> …
>
> [26] Mr. Shin says the Respondents discriminated by requiring him to complete the Officer Training Program without making accommodations for his lack of proficiency in the English language. While Mr. Shin says that he has the necessary level of English proficiency the job requires, he says the Respondents should have accommodated him because he is not a native speaker. He says the way he was assessed was discriminatory and the program caused him stress and anxiety. In his application response Mr. Shin alleges the Respondents targeted and harassed him by forging documents, falsely accusing him of cheating and investigating his conduct, and not assessing his performance fairly.
>
> …
>
> [33] Mr. Shin asserts that the Respondents took "a series of unusual, extraordinary measures to set up [Mr. Shin] to fail." He says the individual assessors colluded and conspired to remove him from the training program. Mr. Shin provides no evidence in support of his belief. As such, I find that Mr. Shin's assertion that the Respondents targeted, harassed, and falsified materials as part of a concerted effort to remove him from his employment has not been taken out of the realm of speculation and conjecture.
>
> [Emphasis added.]

[71] With the exception of paras. 12–13, the Tribunal did not differentiate between the March Termination and the April Termination in its analysis.

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[72] However, many of the comments made, and which I have emphasized in these passages, apply to complaints levelled in respect of both SOT6 and SOT7.

[73] I note that in para. 33 of the quoted passage the allegation that the Respondents took "a series of unusual, extraordinary measures to set up [Mr. Shin] to fail" comes directly from para. 28 of the petitioners' RATD and relates specifically to SOT6 and all the complaints particularized in the sub-paragraphs that follow. Further many of those complaints relate to:

a) the notion, set out in para. 26 of the Decision, that the way in which the petitioner was assessed was discriminatory: RATD at para. 28(a), (b), (d), (h); and

b) the notion, set out in para. 33 of the Decision, that the respondents targeted, harassed and made a concerted effort to remove the petitioner from his employment: RATD at para. 28 (a), (c), (e).

[74] It is not surprising that the Tribunal addressed these complaints together with similar complaints levelled about the petitioner's treatment during SOT7, given that a contravention of the *Code* requires, among other things, an adverse impact. Termination of employment is an adverse impact. However, as the Decision notes at para. 13, the employer decided not to proceed with the March Termination and to give Mr. Shin an opportunity to restart the Officer Training Program. In that context, and given that, as I have outlined above, the complaints with respect to SOT6 and SOT7 had considerable overlap, it was not patently unreasonable to address the complaints together.

[75] The petitioner has not demonstrated that the Tribunal's interpretation of the Complaint was patently unreasonable nor that the Tribunal failed to consider an independent ground of the Complaint.

Did the Tribunal fail to consider whether the petitioner's protected characteristics were at least one factor in the April Termination?

[76] The petitioner argues that the Tribunal applied a heightened burden of proof when it considered whether the employer targeted and harassed him when they terminated him in April.

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[77] As this Court explained in *Byelkova*:

> [90] The bar to survive an application for preliminary dismissal is low. The respondent complainant is only required to "show the evidence takes the case out of the realm of conjecture.": *Hill* at para. 27, cited approvingly with reference to s 27(1)(c) in *Francescutti* at para 50. Ultimately, it is the party applying to dismiss that bears the onus of showing that the complainant has no reasonable prospect of proving the elements of her complaint.

[78] In this case, the Tribunal reasoned as follows:

> [34] Furthermore, the Respondents have provided evidence by way of the job description, recordings of meetings with Mr. Shin, examination results, and contemporaneous notes about Mr. Shin's performance. The materials support their position that the ability to communicate effectively is a necessary skill for the position of Correctional Officer. The Respondents are reasonably certain to prove that Mr. Shin was not able to demonstrate he could communicate to the standard necessary to meet the job requirements, including by showing that he failed the role-play scenarios designed to test those competencies. The materials show Mr. Shin was evaluated by three different assessors and they each came to the same conclusion that Mr. Shin was unable to effectively listen, effectively communicate, or respond appropriately to problems presented in the role-play scenarios.

[79] The petitioner argues that para. 34 of the Decision, above, demonstrates that the Tribunal asked the wrong question. The Tribunal should have directed its mind not to whether there were *good* reasons to terminate Mr. Shin, but whether there were any *bad* reasons tainting the decision to do so.

[80] A similar argument grounded a successful judicial review in *Byelkova* where the Court reasoned:

> [91] Even if there were ample grounds to investigate and terminate the petitioner, the decision was obliged to consider whether the petitioner's protected characteristics could have played any role in that process, and if that process could have been tainted by discrimination. In many circumstances an employer will have adequate grounds to terminate a given employee. But if that termination is, in part or in whole, connected to or motivated by any of the employee's protected characteristics, it may nonetheless constitute discrimination under the *Code*: see, for example, *Bartley v. Eagle Landing Dental Centre*, 2020 BCHRT 186 at para 28.
>
> …
>
> [93] Again, it was not enough to conclude that there were ample grounds for termination such that it must be speculative to imagine sexual harassment

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> or a protected characteristics to be a factor. The question to consider was: "is it possible that a protected characteristic or the sexual harassment was at least one, potentially minor, but one factor connected to the investigation and termination?" The failure to consider this question renders the decision patently unreasonable as an arbitrary exercise of discretion under ATA, s 59(4)(a).
>
> [Emphasis added.]

[81] The Decision under review here is distinguishable from that under review in *Byelkova* because this Decision squarely addresses whether it was possible that a protected characteristic played a role in the decision to terminate.

[82] The Tribunal identified the low threshold that applies to applications to dismiss:

> [23] A dismissal application is not the same as a hearing: *Lord v. Fraser Health Authority*, 2021 BCSC 2176 at para. 20; *SEPQA v. Canadian Human Rights Commission*, [1989] 2 SCR 879 at 899. The threshold to advance a complaint to a hearing is low. In a dismissal application, a complainant does not have to prove their complaint or show the Tribunal all the evidence they may introduce at a hearing. They only have to show that the evidence takes their complaint out of the realm of conjecture: *Workers' Compensation Appeal Tribunal v. Hill,* 2011 BCCA 49 at para. 27.

[83] The crux of the petitioner's complaint was that he had "language proficiency" issues for which he required extra support. By not providing that support and instead taking "a series of unusual, extraordinary measures to set" him up to fail, the petitioner argued he was discriminated against based on ancestry, race, and place of origin.

[84] Language is not a protected characteristic under s. 13 of the *Code*. The Tribunal rejected that discrimination due to race, ancestry, or place of origin could be related to the language of Mr. Shin in this case:

> [28] Language is not, in and of itself, a protected characteristic under the Code. There could be some situations in which, "when scrutinized" discrimination on the basis of language may be based on race, ancestry or place or origin: *Novikova v. Thompson Rivers University and another*, 2012 BCHRT 405 at para. 59 (judicial review denied in 2013 BCSC 2156). However, a requirement that an employee have a certain level of language skill is not inherently discriminatory and a complainant must demonstrate that such a requirement is connected to their protected characteristic by showing, for example: that the requirement is not necessary to do the work; the

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> respondent's view of the language skills of the complainant is not accurate or fair; or if the complainant's accent is criticized in a derogatory way: *Macasiab v. Cypress Railing and Gates Ltd. and another*, 2022 BCHRT 69 at para. 60.
>
> …
>
> [30] It is undisputed that a certain level of English language proficiency is necessary for performing the duties of a Correctional Officer. The job posting states that a candidate must have the equivalent of Grade 12 English with a final grade of 70%. Mr. Shin had the prerequisite English skills, having completed Grade 12 English through BC Continuing Education with a final grade of 79%.

[85] The Tribunal summarized the arguments of the parties at paras. 29 and 31 and then applied the test set out at para. 23 to the record before it:

> [32] Based on the materials and information before me, I am persuaded that there is no reasonable prospect that the Tribunal would find after a full hearing that Mr. Shin's protected characteristics were a factor in the adverse impacts.
>
> [33] Mr. Shin asserts that the Respondents took "a series of unusual, extraordinary measures to set up [Mr. Shin] to fail." He says the individual assessors colluded and conspired to remove him from the training program. Mr. Shin provides no evidence in support of his belief. As such, I find that Mr. Shin's assertion that the Respondents targeted, harassed, and falsified materials as part of a concerted effort to remove him from his employment has not been taken out of the realm of speculation and conjecture.

[86] This same reasoning is repeated in the Reconsideration Decision:

> [8] The issue before me in the Original Decision was whether there was no reasonable prospect Mr. Shin could establish that his protected characteristics were a factor in the Respondents' decision to terminate his employment. I was satisfied, based on the totality of the evidence, that the Respondents were reasonably certain to establish there was solely a non-discriminatory reason for their action. I dismissed the complaint.
>
> [Emphasis added.]

[87] Thus, the Tribunal concluded in this case that language was not itself a protected ground, and that there was no evidence to establish a nexus between language and Mr. Shin’s protected characteristics in this case.

[88] With respect to the protected characteristic of mental disability, the Tribunal determined that the petitioner’s assertion that he felt stress and anxiety during his training was not, on its own, sufficient to establish that he had a disability for the

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purposes of the *Code*. The Tribunal also determined that the petitioner had no reasonable prospect of establishing that he had a mental disability which was either known or should have been known to the respondents during his employment: Decision at para. 43.

[89] The Decision is thus not patently unreasonable as an arbitrary exercise of discretion for failing to consider the question of whether the petitioner's protected characteristics were at least one factor in the April Termination.

Did the Tribunal fail to consider or dismiss evidence that the petitioner was targeted and harassed on the basis of his protected characteristics?

[90] The petitioner argues that the Tribunal member ignored or misinterpreted the evidence that the petitioner was targeted and harassed on the basis of his protected characteristics.

[91] As noted above, the Tribunal member held that "Mr. Shin provides no evidence in support of his belief" that the respondents took "a series of unusual, extraordinary measures to set up [Mr. Shin] to fail" or that the individual assessors colluded and conspired to remove him from the training program": Decision at para. 34.

[92] On this judicial review, Mr. Shin argues that he did lead evidence in support of these beliefs and in particular, he points to the following evidence:

a) First, he says the Tribunal made a finding of fact that the respondents prohibited the sharing of notes. He argues that no party advanced that argument before the Tribunal and there was no evidence of such a rule. There was evidence that note-sharing was widespread. He argues that despite this widespread practice, he was singled out for investigation.

b) Second, he argues there was evidence that Mr. Shin's role-playing was evaluated as a failure before he had even performed it. Mr. Shin deposed that the role-playing assessment started after lunchtime, that he started his

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> first role-play at around 1:00 pm, and that at 1:02 pm, the assessor had already written up a report that he failed, and this was before he performed his first role-play.

[93] Dealing first with the issue of note-sharing, the Tribunal refers to note-sharing as "prohibited" and a "breach of the rules": Decision at paras. 36–39.

[94] Despite this language, the Tribunal clearly understood that its investigation was not concerned with note-sharing *per se* but with the question of whether "Mr. Shin was using another candidate's notes to gain an unfair advantage": Decision at para. 38. The Tribunal was also clearly aware that following the investigation, and despite the admitted note-sharing, "[t]hey ultimately determined that Mr. Shin's use of another candidate's notes did not give him an unfair advantage and was not a breach of the rules": Decision at para. 38 (emphasis added).

[95] The Tribunal accepted the respondents' argument that Mr. Shin's allegation about it being discriminatory to investigate him was bound to fail. The Tribunal accepted that the respondents had a duty to investigate allegations of unfair advantage to ensure the fairness of the program and to accurately assess candidates' qualifications for the Correctional Officer job: Decision at paras. 39–40.

[96] There was no suggestion in the record that Mr. Shin was one of many students *who stood to gain unfair advantage* from note-sharing. That is because, on the record, Mr. Shin alone had notes from a candidate in an earlier cohort. The concern raised in the record was that these notes could potentially contain exam questions and answers. There was no evidence that anyone other than Mr. Shin had notes from a member of an earlier cohort. There was also therefore no evidence that he had been unfairly singled out for investigation.

[97] Turning next to the question of whether there was evidence that Mr. Shin's role-playing was evaluated as a failure before he had even performed it, Mr. Shin's evidence did not prevent the Tribunal from determining the ATD.

[98] Mr. Shin's evidence was that:

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> 64. On April 21st, the last day of Communications Week, Ms. Howard called upon me to inform me that I had failed on the second day of roleplaying. After that, she did not show up throughout the morning, leaving trainees in the muster room to spend time by themselves.
>
> 65. We started roleplaying after lunchtime. I was 3rd out of 6 trainees and participated in the roleplay at around 1300 at Bravo Unit. To my surprise, it did not take me long to reach the solution. I made it through in one-piece without being stuck once. I received an entirely positive evaluation from JIBC Instructor Howard. My polite demeanour, ability to set boundaries along with my problem solving skills were all praised by Ms. Howard. Two other trainees ahead of me, Jake and former police officer from Alberta, gave me a thumbs-up in a gesture of congratulations. I thanked CS Marshall, who played the role of the inmate, for not acting out much. ***She responded, "You didn't even give me a chance."*** …
>
> 66. I was not successful in the second roleplay. Ms. Howard played the role of an inmate and evaluator at the same time. CS Marshall was not there anymore. Ms. Howard stopped me, declaring that I already escalated the situation to a dangerous level. I disagreed with her and had an argument of sorts when she stopped me.
>
> 67. On our way back to the muster room, Ms. Howard gave me her notice that I failed to demonstrate the confidence required for the communications week. I reminded her of my success in the first scenario, but she told me that the first roleplaying was also problematic. It was a complete 180 from her initial evaluation. I could not help but doubt her fairness and impartiality as an evaluator. I suspected that there was a reason that she treated me in such a patently unfair manner.
>
> [Emphasis in original.]

[99] Mr. Shin goes on to describe an e-mail from Ms. Barkman sent at 1:02 pm which attaches Ms. Howard's signed report with respect to Mr. Shin's performance. The report states that Mr. Shin was not successful in demonstrating the competencies required for the successful completion of three modules: the communication skills module, the conflict resolution module, and the crisis intervention module. Mr. Shin states that he did not even begin the role play scenarios for the third module until approximately 1:00 pm.

[100] In response, Ms. Howard deposed:

> 8. I received the feedback/evaluation form for Mr. Shin's role play the morning of Friday April 21, 2017. I wrote the first report dated April 21, 2017, in the morning. This version of the report is not on JIBC letterhead. I do not understand Mr. Shin's apparent insinuation that the report is not genuine. It reflects an accurate assessment of Mr. Shin's competencies at that time. This document was written and submitted after I had received the assessment

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> feedback form and Mr. Shin had completed the communication skills, conflict management, and crisis intervention roleplays.
>
> 9. To be clear, at the time I wrote the report on April 21, 2017, it was based on all the feedback/evaluation material I had and my own assessment at the time I wrote the report, including that morning's role play that he had failed. Contrary to Mr. Shin's suggestion, his performance in the roleplays of the afternoon of April 21, 2017 were not included in my assessment in the April 21, 2017 report that I wrote in the morning.
>
> 10. At the time I wrote the report dated April 21, 2017, I had already informed Mr. Shin verbally that he had not been successful earlier in the week in the communication skills role plays and the conflict management role plays. I informed him that I would allow him to participate in the crisis intervention role plays, but that due to his inability to pass the communication skills or conflict management skills role plays, he would not be found competent in the overall communication module.
>
> 11. I also informed him that because the communication module is a foundational piece for the next training, which would have been force options, it would have been inappropriate and dangerous for him to participate in that training.
>
> [Emphasis added.]

[101] There was therefore a conflict in the evidence as to whether Mr. Shin completed a role-play in the third module during the morning of April 21, 2017.

[102] The fact that there is a conflict in the evidence is not, by itself, a sufficient reason to deny an application to dismiss: *Evans v. University of British Columbia*, 2008 BCSC 1026 at para. 34.

[103] In this case, the conflict in the evidence was not material. That is because Ms. Howard’s uncontradicted evidence was that Mr. Shin’s failures earlier in the week already meant that he would not be found competent in the overall communication module. If he could not complete the communication module, he could not advance to the next module. The decision that he would not advance had already been made before he started the crisis intervention module.

[104] The Tribunal did not set this out in its Decision. However, the Tribunal is entitled to be presumed to have considered all of the evidence and arguments before it, even if the Tribunal member did not consider it necessary or worthwhile to recite all of the evidence and arguments in their decision: *C.S. v. British Columbia*

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(Human Rights Tribunal), 2017 BCSC 1268 at para. 219 (citing *Karbalaeiali v. British Columbia (Human Rights Tribunal)*, 2010 BCSC 1130 at para. 49), aff'd 2018 BCCA 264, leave to appeal to SCC ref'd, 38291 (28 March 2019). It is Mr. Shin's onus to displace this presumption of regularity.

[105] The evidence pointed to by the petitioner does not displace that presumption nor does it render the Tribunal's decision patently unreasonable.

Did the Tribunal fail to address all steps of the legal test in respect of the allegation that the respondents failed to accommodate the petitioner?

[106] The fourth ground for judicial review focuses on the allegation that the Tribunal failed to address all steps of the legal test in respect of the allegation that the respondents failed to accommodate the petitioner.

[107] I reject this argument for two reasons.

[108] First, with respect to the protected characteristics of race, ancestry, and place of origin, the Tribunal addressed the question of accommodation as an alternative to its primary finding, explained above, that there was no evidence of a nexus between the language issues experienced by the petitioner and his protected characteristics. Even if its reasoning with respect to the question of accommodation was flawed, that issue would not render the Decision as a whole patently unreasonable.

[109] As the Court of Appeal explained in *Petro-Canada v. British Columbia (Workers' Compensation Board)*, 2009 BCCA 396:

> [55] The correct approach to the matter was articulated by the Supreme Court of Canada in *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247 at para. 56:
>
> > [The fact that the reviewing court must look to the reasons given by the tribunal to determine reasonableness] does not mean that every element of the reasoning given must independently pass a test for reasonableness. The question is rather whether the reasons, taken as a whole, are tenable as support for the decision. At all times, a court applying a standard of reasonableness must assess the basic adequacy of a reasoned decision remembering that the issue under review does not compel one specific result. Moreover, a reviewing

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> court should not seize on one or more mistakes or elements of the decision which do not affect the decision as a whole.
>
> [56] A court assessing an administrative tribunal's decision on a standard of reasonableness owes the tribunal a margin of appreciation. The court should not closely parse the tribunal's chain of analysis and then examine the weakest link in isolation from the reasons as a whole. It should not place undue emphasis on the precise articulation of the decision if the underlying logic is sound. On the other hand, a court does not have *carte blanche* to reformulate a tribunal's decision in a way that casts aside an unreasonable chain of analysis in favour of the court's own rationale for the result.
>
> [Emphasis added.]

[110] In *Vavilov*, in the context of describing reasonableness review, the Court explained:

> 100 … Any alleged flaws or shortcomings must be more than merely superficial or peripheral to the merits of the decision. It would be improper for a reviewing court to overturn an administrative decision simply because its reasoning exhibits a minor misstep. Instead, the court must be satisfied that any shortcomings or flaws relied on by the party challenging the decision are sufficiently central or significant to render the decision unreasonable.
>
> [Emphasis added.]

[111] The same comments apply with respect to review for patent unreasonableness. Any shortcomings or flaws relied on by the party challenging the decision must be sufficiently central or significant to render the decision patently unreasonable.

[112] The Tribunal's primary finding in this case was that there was no reasonable prospect that the petitioner could establish that his protected characteristics were a factor in the respondents' decision to terminate his employment: Decision at para. 6.

[113] With respect to his argument that the respondents discriminated against him by requiring him to complete the Officer Training Program without making accommodations for his lack of proficiency in the English language, the Tribunal stated at para. 26 of the Decision that it:

a. considered the law in relation to language and the petitioner's protected characteristics: Decision at para. 28;
b. noted that there was no dispute that a certain level of English language proficiency is necessary for performing the duties of a Correctional Officer, and that the petitioner met the job posting requirements: Decision at para. 30;

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c. noted that the evaluations in the SOT are designed to assess a candidate's knowledge of policies and procedures, problem-solving, and conflict resolution skills, ability to communicate effectively—including listening, empathizing, and responding appropriately and that there was no dispute that these were essential attributes for the job: Decision at para. 31;

d. concluded that there was no reasonable prospect that the Tribunal would find, after a full hearing, that Mr. Shin's protected characteristics were a factor in the adverse impacts: Decision at para. 32;

e. concluded that there was no evidence to support the petitioner's assertion that the respondents targeted, harassed, and falsified materials as part of a concerted effort to remove him from his employment: Decision at para. 33.

[114] If, as I have found, the Tribunal's primary train of analysis is not patently unreasonable, a misstep during an alternative argument will not render the whole decision patently unreasonable.

[115] Second, with respect to the protected characteristic of mental disability, as I have set out above, the Tribunal determined that the petitioner's assertions were insufficient to establish that he had a disability for the purposes of the *Code*. They also determined that he had no reasonable prospect of establishing that he had a mental disability which was either known or should have been known to the respondents during his employment: Decision at para. 43.

[116] Thus, any accommodation argument was conducted in the alternative to that primary finding. Again, a misstep during the course of an alternative argument will not render the whole decision patently unreasonable.

Did the Tribunal fail to consider an allegation of discrimination based on an imputed or perceived disability?

[117] The last ground raised on this judicial review is that it was patently unreasonable for the Tribunal to fail to consider an allegation of discrimination based on an imputed or perceived disability.

[118] The respondents argue this issue was never placed squarely before the Tribunal.

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[119] As set out above, decisions are subject to review on the standard of patent unreasonableness based on a failure to properly review and consider the submissions of both parties and the failure to consider the totality of a complaint.

[120] The petitioner concedes that the question of whether he had been discriminated against, based on an imputed or perceived disability, was not raised in the Complaint.

[121] However, he argues that in her affidavit, the respondent Ms. Barkman raised concerns about the Mr. Shin's well-being and linked those concerns to a risk of suicide.

[122] Because of this new information, in his RATD, responding to this affidavit, Mr. Shin argued that the employer's perception of him as a 'suicidal person' was biased and that it was reasonable to infer that this bias affected their treatment of him:

> 25. …Whatever [the respondent Barkman's] mindset was at the time, she cast the Complainant, would-be correctional officer, unduly negatively as a suicidal person."
>
> 26. To recap, Respondent Barkman distorted facts to reflect the Complainant in an unduly negative light. To her, he was **a computer illiterate, potential threat to long-term safety and security, suicidal, to name a few**. CS Anderson and CS McKenna also submitted their reports about the Complainant following his removal on March 15. They contain similar, if not worse, distorted and biased views against the Complainant. They described him as egoistic, disturbing and irresponsible. All of them also submitted affidavits, respectively, which show that they never changed their views. Warden DiCastri and other ranking correctional officers must have shared those negative views. *Thus, it is reasonable to infer that Respondent Barkman and other correctional officers, including her husband, Deputy Warden Jason Heath, abused their managerial/supervisory power against the Complainant based on their unfair, biased perception. It was a toxic and hostile environment for the Complainant.*
>
> [Emphasis in original.]

[123] The respondents argued in their Reply:

> 13. In reply to para. 25, the Respondents are not aware of any of its employees calling the Complainant "suicidal". There is no evidence to support this allegation. Also, the Respondents submit that it is plain and obvious that Ms. Barkman was showing genuine and reasonable concern and compassion …

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[124] I agree with the respondents that the Complaint did not articulate an allegation of discrimination based on an imputed or perceived disability.

[125] I also cannot find that the issue was squarely raised in the RATD.

[126] While the RATD linked Ms. Barkman's evidence to an allegation of bias, it did not clearly distinguish between the allegation of discrimination based on *actual* mental disability raised in the Complaint (which included allegations that the petitioner was "extremely agitated, anxious and unstable" and unable to "control his thoughts and emotions"), and the new ground of discrimination put forward orally on this judicial review, which is discrimination based on a *perceived* mental disability.

[127] The allegation of discrimination based on mental disability was squarely addressed in the Decision at paras. 41–43.

[128] I cannot conclude that in all the circumstances, the Tribunal member exercised their discretion in an arbitrary way by failing to consider a ground of discrimination that was not squarely raised in the materials before the Tribunal. In those circumstances, the Decision was not patently unreasonable for failing to address this issue which has only been raised for the first time orally at the hearing of this judicial review.

Costs

[129] No party sought costs at the hearing of this petition. The parties will bear their own costs.

"Latimer J."

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