

Court of King’s Bench of Alberta

Citation: Dunseith v Calgary French & International School Society, 2026 ABKB 272

Date: 20260409
Docket: 2401 14397
Registry: Calgary

Between:

Nadine Dunseith

Applicant

- and -

**Calgary French & International School Society and The Alberta Human Rights
Commission**

Respondents

**Reasons for Judgment
of the
Honourable Justice N.E. Devlin**

Overview

[1] Nadine Dunseith (“the Applicant”) resigned from her recently secured teaching position at the Respondent Calgary French School (“CFISS”) rather than face an impending suspension without pay, and subsequent termination, for refusal to take the Covid-19 vaccine.

[2] The Applicant submitted a complaint to the Alberta Human Rights Commission (“AHRC”) a few days after her resignation (“the Complaint”), alleging discrimination in employment, contrary to s 7 of the *Alberta Human Rights Act*, RSA 2000, c A-25.5 (“the Act”). She alleged discrimination on grounds of mental disability, backed by a psychologist’s diagnosis of generalized anxiety disorder, together with a notation that this included an “anxiety specific to injections.”

[3] The Director of the Commission dismissed the complaint, and this decision was upheld on a statutory review by a delegate of the Chief of the Human Rights Tribunal (“the Chief’s delegate”). The Applicant now seeks judicial review of the Chief’s decision upholding the termination of her complaint.

[4] For the reasons that follow, this Application is dismissed.

The Facts

[5] The Applicant was a probationary teacher at CFISS. She had been hired in April 2021, with work to commence in August 2021. Just over a month later, in late September 2021, CFISS enacted a Covid-19 vaccination policy. Like most policies of its type introduced in the mid-stages of the pandemic, it required employees to provide proof of immunization before entering the workplace (“the Policy”).

[6] Employees who were yet to be fully vaccinated were allowed a grace period through the end of October, subject to ongoing rapid testing until they could confirm full vaccination status. Employees who did not present proof of full vaccination by November 1, 2021, were to be placed on unpaid leave, and terminated if they did not comply with the vaccination requirement by the end of that month.

[7] The policy contained a medical exemption process for employees who could provide evidence from a physician that satisfied the terms for exemption recommended by the Alberta Health Services Covid-19 Scientific Advisory Group (“SAG”). Under this process, exemptions were limited to individuals whose physicians confirmed that they had suffered either a severe allergic reaction or myocarditis from a previous vaccination. The Applicant does not assert that she fell within either of those narrow medical categories.

[8] The Applicant had communicated to CFISS her objection to vaccinations as early as May 2021. There is an evidentiary dispute over the nature of this conversation, but for the purposes of this review of a summary dismissal, what matters is the Applicant’s assertion of the available evidence. Specifically, she stated in her Complaint that she told CFISS that “I have an adverse history with injections. I did not go into detail around this as it is personal medical information.” She specifically referenced the Covid-19 vaccines as a consequent concern.

[9] She went on to note in the Complaint that, “[m]y anxiety around injections is recent and traumatic (as was summarized in a letter from my counsellor).”

[10] Consequently, the Applicant was obviously displeased when the Policy was announced, and sought an exemption based on her mental health.

[11] By way of support for her exemption request, the Applicant provided letters from two psychologists. The first, authored by Registered Psychologist Robert Hadden, in May of 2021, simply reported that he had met twice with the Applicant earlier in the year and diagnosed her with Generalized Anxiety Disorder, Posttraumatic Stress Disorder (in partial remission), and Adjustment Disorder with Depressed mood, with the first of these being the most prominent.

[12] The second letter, from Lynne Goertzen, also a registered psychologist, was authored in October of 2021, apparently for the express purposes of the Applicant’s exemption request. It recounted that she and the Applicant had met twelve times between November 2020 and June

2021. It further stated that, in the course of that treatment, Ms. Goertzen had diagnosed the same conditions as Mr. Hadden. The most salient portion of the letter read as follows:

Ms. Dunseith's primary diagnosis of generalized anxiety disorder presents in persistent and pervasive anxiety, worry and avoidance in personal, social and occupational settings. Symptomatology has increased with her day-to-day exposure to ongoing Covid-19 stressors and restrictions, and her anxiety specific to injections. While these symptoms cause significant distress and impairment in these settings, she has demonstrated strong motivation in counselling, and consistent application of counselling strategies. She states that family and work are of significant benefit to her mental health and overall quality of life.

...It is my professional recommendation that Ms. Dunseith be supported in her request for consideration of exemption from mandatory vaccination to retain her employment.

[13] Neither letter stated that the Applicant was unable to receive the vaccine nor the expected scope, scale, or nature of the impact upon her if she were to get it. To the contrary, the Goertzen letter observed that the Applicant was actively engaged in therapy and able to use "counselling strategies" to manage symptoms. Self-evidently, the Applicant was able to work successfully, despite suffering "persistent and pervasive anxiety" in the workplace setting, according to the Goertzen letter.

[14] CFISS anonymously reviewed her exemption request and denied it, as it did not meet the SAG guidelines. The Applicant tendered her resignation six days later, on October 19, 2021. She filed the complaint on October 25, 2021.

[15] There was no dialogue between the parties about the nature of the obstacle she asserted to receiving the vaccination, nor the specifics of the injection-related 'trauma' she later adverted to in her complaint. Once refused an exemption, the Applicant simply stepped down from her position.

[16] CFISS defended against the complaint on the basis that it was following SAG guidelines on Covid-19 vaccination, in keeping with its commitment to the safety and wellbeing of its staff and students. It emphasized that the Applicant did not provide letters from duly qualified physicians, as was required, and beyond that provided no proof that she was in any way unable to be vaccinated.

[17] After further exchange of documents and submissions, the Director of the AHRC issued a Decision on December 12, 2023, dismissing the complaint for having no reasonable prospect of success: s 21(1)(a)(i)(iii) of the *Act*. In the Director's Decision, he thoroughly recited the facts and the essential principles of human rights law relevant to the context. He noted the duty to accommodate, and also that reasonable accommodation does not necessarily require allowing an unvaccinated employee on premises.

[18] The Director specifically noted that CFISS had enacted a vaccination policy that followed the best available scientific guidance from Alberta public health officials. Citing the Chief's decision in *Pelletier v 1226309 Alberta Ltd o/a Community Natural Foods*, 2021 AHRC 192, the Director noted that the benefits of limiting spread of a disease that has killed millions of people worldwide offset the "inconvenience and hardship" caused by those measures.

[19] He went on to note the Applicant's failure to meet the medical exemption criteria and failure to pursue a specialist assessment. Observing that she had been accommodated with rapid testing until her resignation, the Director dismissed her Complaint.

[20] The Applicant sought a review of the Director's decision from the Chief Commissioner, pursuant to section 26 of the *Act*. The Chief in turn appointed a member as her delegate to respond. In reasons reported at 2024 AHRC 111, the Chief's delegate conducted a reconsideration of the complaint on its merits and upheld the dismissal.

The Reasons Under Review

[21] After reviewing the facts and the Director's screening function, the Chief's delegate succinctly stated the operative question as whether CFISS had discriminated against the Applicant on the basis of mental disability by denying her an exemption from its vaccination policy.

[22] For the purposes of her decision, the Chief's delegate accepted that a psychologist's attestation may substitute for that of a physician. She then articulated the core reasoning of her decision to uphold the dismissal:

I am confident from the Goertzen note that the complainant preferred not to participate in the Covid-19 vaccination program. Nonetheless, in content, neither of the notes supports the complainant's assertion that her mental disability prevented her from becoming vaccinated or complying with the policy. [emphasis added]

[23] The Chief's delegate accepted that the Applicant had a mental disability. However, relying on *Hogan v Syncrude Canada Ltd*, 2019 AHRC 32 at para 19, she concluded that the Applicant had failed to provide evidence that her disability prevented her from getting vaccinated. In the crux of her decision, she held that:

...even at the low bar of this review, the information before me does not demonstrate a link between the decision to refuse the exemption request and mental disability. The only evidence of mental disability relative to vaccination comes from the Goertzen note encouraging CFISS to support the complainant and it is insufficient to indicate that refusal of the exemption constituted discrimination against the complainant on the ground of mental disability. [emphasis added]

[24] Within the framework of the Supreme Court's test for circumstances giving rise to a duty to accommodate, the complaint was dismissed on the basis that the claimant had failed to demonstrate that a protected characteristic was a factor in the adverse impact: *Moore v British Columbia (Ministry of Education)*, 2012 SCC 61 at para 33.

[25] For completeness, the Chief's delegate also rejected assertions that CFISS could have accommodated the complainant through rapid testing or remote work. The first option was rejected as this was only offered as an additional optional safeguard for employees who were vaccinated, and the hiring of a teacher in Mexico to immediately replace the Applicant was a temporary measure pending that person being allowed to travel to Canada.

[26] The Chief's delegate thus upheld the Director's dismissal of the claim on the basis that no discrimination had been shown.

Standard of Review

[27] Uncontroversially, the standard of review in this case is reasonableness, per the Supreme Court's guidance in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65; *Wojtasiewicz v Alberta (Humans Rights Commission)*, 2020 ABCA 23 at para 10. That said, in considering what is reasonable, the Court must bear in mind that the threshold for referral of a complaint to a tribunal is low: *Mis v Alberta Human Rights Commission*, 2001 ABCA 212 at paras 8-9; *Volpi v Alberta (Human Rights Commission)*, 2024 ABCA 401 at para 10.

The Unreasonableness Alleged

[28] The Applicant's complaint is that the Chief's delegate accepted that her anxiety is a mental disability, and thus a protected characteristic under the *Act*, with a facet specific to injections, but then found no sufficient link between this and her decision to leave her post rather than comply with the vaccination policy. She says that this is unreasonable in the face of the Supreme Court's guidance that rights claimants need only show that there is a "connection" between the protected ground and the adverse effect: *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Bombardier Inc (Bombardier Aerospace Training Center)*, 2015 SCC 39 at para 52.

[29] The Applicant's position, forcefully advanced by her counsel, is that the record showed she was suffering some degree of psychological pain/anguish from the contemplation of taking a vaccine by injection. This must, he argued, be enough to show a direct connection between her diagnosed anxiety disorder and failure to comply with the vaccination policy, triggering a duty to accommodate and making the summary dismissal of her complaint unreasonable.

[30] The Applicant also argues that the record *did* establish that her disability fully prevented her from receiving the injection and argues that her decision to give up her job speaks to the magnitude of the disability she suffered. These facts, she says, establish that characterizing her refusal to be vaccinated as a choice or preference was also unreasonable.

Analysis

[31] This case brings into sharp relief the vexed question of when disabilities, and in particular amorphous disabilities of the mind, are sufficiently "connected" to an adverse outcome for *prima facie* discrimination to arise. Specifically, must the disability objectively or functionally *prevent* compliance with neutral, non-discriminatory workplace requirements for discrimination to be found? Or, is it sufficient that the disability operate as "a factor" in a *decision* not to comply?

No Inability to Comply Was Established

[32] One of the grounds of review may be briefly disposed of, and informs the remainder of the analysis. The Chief's delegate concluded that the evidence proffered in the complaint did not establish that the Applicant was incapable of taking the Covid-19 vaccine. That finding was reasonable. Assessing whether the complaint offered a basis for finding that Ms. Dunseith's disability effectively *prevented* her from taking a vaccine by injection, or if her anxiety was merely a contributing factor in her *choice* not to do so, is very important in resolving this review.

[33] Before this court, the Applicant stated that she: "suffers acute anxiety related to injections....and is therefore unable to receive injections of any kind, including injections for the

purpose of vaccination...” [emphasis added]. If this were the case, the summary dismissal of her complaint would have been unreasonable. However, the Record does not support this contention.

[34] First, nothing in the psychological letters speaks to the acuteness of the Applicant’s injection-specific anxiety. Nothing in the Goertzen letter described this specific anxiety being more disabling than any other part of her affliction. Second, nothing in the letters suggests her diagnoses impose any limits, contra-indications, or concrete incapacities. To the contrary, while the Goertzen letter describes that the Applicant suffers distress and impairment in social and occupational settings, it notes that she had made progress through therapy. Third, the Applicant held herself out as fit to work as a teacher, and performed that work up until her resignation, notwithstanding whatever adversities she faced. The reader is ultimately left with little sense of the Applicant’s actual condition and capacity, beyond knowing she can do her job.

[35] In simple terms, there was no evidence before the Director, or the Chief’s delegate, that the Applicant was “unable” to receive a vaccine. To the contrary, reading between the lines of Ms. Goertzen’s medico-legal letter, one clearly discerns that the therapist is asking for “support” to make the Applicant’s life less anxiety-ridden, rather than describing limits on, or acute adverse outcomes flowing from, her patient taking the Covid-19 vaccine.

[36] Indeed, there was no evidence or information whatsoever describing what receiving a vaccine would do to the Applicant, beyond making her anxious in the moment. The Goertzen letter was a careful and measured professional communication, entreating an exception for her client. However, presumably for reasons of ethical accuracy, it stopped well short of stating that the Applicant could not endure a vaccination or would likely suffer any material, or abiding harm from doing so.

[37] For these reasons, the Chief’s delegate reasonably concluded that the Applicant was not disabled from complying with the vaccine requirement. Consequently, she did not act unreasonably in treating the Applicant’s decision not to get vaccinated as a choice, albeit one informed by the psychological unpleasantness she would experience if she did.

[38] Notably, the same two psychologists’ notes presented in this case were considered by Chief Commissioner Oviatt (as she then was) in *Dunseith v University of Calgary*, 2024 AHRC 9 at paragraphs 26 and 31, which concerned the Applicant’s complaint against her subsequent prospective employer. Following her resignation from CFISS, the Applicant shortly secured an offer of temporary instructional employment at the University of Calgary. This time, she specifically sought accommodation on the basis of her needle anxiety, and the University requested further, more detailed medical information. The Applicant declined, leading to another AHRC Complaint.

[39] In that case, Chief Commissioner Oviatt upheld a further summary dismissal by the Director and made the following findings about the psychologists’ letters, at paras 26, 27, and 30, which I agree with and adopt:

A mental disability is a medical condition that requires medical information to support accommodation requests.

...

The Complainant provided two psychologists’ letters, the first of which did not mention vaccines or injections at all and the second of which related to assessment

several months previously, and was not clear that the accommodation request was based on an objective medical need.

... In short, the medical information the psychologist provided was both dated in terms of last assessment and not clear that the requested accommodation was objectively medically required.

[emphasis added]

[40] This is very much the point articulated, albeit less incisively, by the finding of “insufficiency” of the evidence to establish discrimination in the present case. That finding was eminently reasonable, and dispositive of the complaint.

[41] It is on this factual landscape that the real issue in this case must be considered.

The Test for Adverse Impact Discrimination

[42] The three part test for establishing discrimination in employment conditions was articulated in *Moore* and re-affirmed in *Stewart v Elk Valley Coal Corp*, 2017 SCC 30 at para 24. Specifically, the complainant must show that they have:

- i. a characteristic that is protected from discrimination;
- ii. experienced an adverse impact: and that
- iii. the protected characteristic was a factor in the adverse impact.

[43] The starting point is to identify with some precision the protected characteristic and adverse impact at issue. The Applicant suffered from anxiety sufficiently acute to attract a diagnosis of Generalized Anxiety Disorder. This is a form of mental disability and thus a protected characteristic: *McCormack v Guardian Drugs Elk Point*, 2024 AHRC 85 at para 21.

[44] Importantly, not all self-reported stress and anxiety (a concept that has come to be observably overused) amounts to a protected characteristic. A medically substantiated diagnosis is required: *Rivard v Alberta (Human Rights Commission)*, 2014 ABQB 392 at para 27; *Shin v British Columbia (Ministry of Public Safety and Solicitor General)*, 2026 BCSC 84 at paras 88-89. That criteria, and thus the first step in the test for *prima facie* discrimination, is met in this case, as all parties agree.

[45] The adverse impact in this case was the Applicant’s perception of constructive dismissal, precipitating her resignation: *Amalgamated Transit Union, Local 113 v. Toronto Transit Commission*, 2021 ONSC 7658 at para 50. While the Chief’s delegate described the adverse impact as “the requirement to comply with the policy”, this is largely a semantic difference, as the consequence of job loss was part and parcel of the policy.

[46] Importantly, however, the act of vaccination, or requirement to be vaccinated in the abstract, are not the adverse events in this case. The Applicant was not treated in any way differently in this regard, and those events/requirements are, in themselves neutral and without discriminatory intent. Rather, it was the job loss *resulting from* the choice or inability to comply that was different and worse for the Applicant, and therefore the adverse impact/event under consideration.

[47] Therefore, the real question on this review is whether the evidence on the summary review of the complaint allowed the Chief’s delegate to reasonably find “no connection”

between the Applicant’s anxiety disorder and the fact she lost her job. Though the law on workplace discrimination claims is notionally well settled, this case highlights an area of disagreement and uncertainty.

Defining the line between choice and disability

[48] The root operative principle at the third step of the *Moore* analysis, is that (i) having a protected characteristic plus (ii) experiencing an adverse impact does not equal discrimination. For the impact to be discriminatory, the complainant must also show a “connection” between the two. This case turns on how the nature of that connection – of the protected characteristic playing a factor in the adverse impact – is properly understood.

[49] A clear line has emerged in disability jurisprudence separating employees who are unable to comply with neutral workplace rules and policies due to disability from those whose failure to do so is deemed a choice. This distinction appears to hold even where the employee’s protected condition may make compliance more difficult or uncomfortable. The decision under review epitomizes the application of this distinction.

[50] The leading case supporting this approach is *Elk Valley*, in which an employee had a drug addiction and was fired for drug use. Upholding the dismissal of his claim of discrimination, the majority of the Supreme Court held that, since the employee “had the capacity to comply” with the policy that got him fired, *prima facie* discrimination was not established: *Elk Valley* at para 5. In its reasons, the majority repeatedly drew the line of demarcation between free choice and discrimination at the level of an effective inability to comply with the neutral workplace requirement (in that case to disclose substance use).

[51] The majority restated this principle several times, focussing on the factual finding that, despite his addiction, the employee “was able to make conscious choices regarding his drug use”, that his addiction “did not diminish his capacity to comply with the terms of the Policy” and he “had the capacity to comply with the terms of the Policy”: *Elk Valley* at paras 10, 34-35. [emphasis added]

[52] This led the majority of the Supreme Court to conclude, at para 39, that:

It cannot be assumed that Mr. Stewart’s addiction diminished his ability to comply with the terms of the Policy. In some cases, a person with an addiction may be fully capable of complying with workplace rules. In others, the addiction may effectively deprive a person of the capacity to comply, and the breach of the rule will be inextricably connected with the addiction. Many cases may exist somewhere between these two extremes. Whether a protected characteristic is a factor in the adverse impact will depend on the facts and must be assessed on a case-by-case basis. The connection between an addiction and adverse treatment cannot be assumed and must be based on evidence: *Health Employers Assn. of British Columbia v. B.C.N.U.*, 2006 BCCA 57, 54 B.C.L.R. (4th) 113, at para. 41. [emphasis added]

[53] If the addiction, as the protected ground at issue in *Elk Valley*, is replaced with “anxiety disorder”, this paragraph literally describes what the Chief’s delegate decided in this case. It could not be assumed that Ms. Dunseith’s anxiety disorder diminished her *capacity* to comply with the terms of the Policy, as opposed to her *desire* to do so. In some cases, an anxiety disorder

may effectively deprive a person of the capacity to comply with a policy requiring vaccination. That connection – being a *functional inability* to fulfill a job requirement because of the protected characteristic – has to be proven on the facts. Both here and in *Elk Valley*, it was not.

[54] This is sufficient to dismiss this review, as the Chief’s delegate precisely applied the majority reasoning and approach from *Elk Valley*. The reasoning in that case has continued to correctly inform the AHRC’s decisions, as it has gone on to refine the operative proposition that:

...an individual seeking an accommodation under the *Act*, must, at a minimum, provide medical information certifying a disability, provide the general nature of the disability and set out the nature and scope of the limitations flowing from the disability: *Hart v Condominium Corporation No. 831 0969 o/a Westmount Place Condominium Corporation*, 2025 AHRC 52 at para 10; applying the principle found in *Pelletier v 1226309 Alberta Ltd. o/a Community Natural Foods*, 2021 AHRC 192 at para 25.

[emphasis added]

[55] This is an unquestionably correct application of the majority reasons in *Elk Valley*, and makes solid sense, as will be discussed below.

Resolving the tension in what “a factor in the adverse event” means

[56] Confusion and disagreement arise, however, between the majority’s clearly stated requirement that the rights-claimant show that their protected ground was a factor *in an effective inability* to comply, and language from elsewhere in the Supreme Court’s jurisprudence (repeated in *Elk Valley* itself), that the disability in question need only be a factor *in the adverse event*. This tension is seen in the penultimate paragraph of the majority’s reasons, where they state that there is:

... no need to alter the settled view that the protected ground or characteristic need only be “a factor” in the decision [to fire the employee]. It was suggested in argument that adjectives should be added: the ground should be a “significant” factor, or a “material” factor. Little is gained by adding adjectives to the requirement that the impugned ground be “a factor” in the adverse treatment. In each case, the tribunal must decide on the factor or factors that played a role in the adverse treatment. This is a matter of fact. If a protected ground contributed to the adverse treatment, then it must be material. [emphasis added]

[57] Justices Moldaver and Wagner (concurring in the result) seized on this apparent contradiction, agreeing with Gascon J (in dissent) that *prima facie* discrimination had been made out. Articulating the conflicting principles, they concluded that the failure to find a connection between the disability and the adverse outcome was unreasonable, because:

...we fail to see how the Tribunal could reasonably conclude that because Mr. Stewart had a limited ability to make choices about his drug use, there was no connection between his dependency on cocaine and his termination on the basis of testing positive for cocaine after being involved in a workplace accident.

...We agree with Gascon J. that Mr. Stewart’s exercise of some control over his drug use merely reduced the extent to which his dependency contributed to his

termination — it did not eliminate it as a “factor” in his termination (para. 120). Mr. Stewart’s impaired control over his cocaine use was obviously connected to his termination for testing positive for cocaine after being involved in a workplace accident. In our view, the Tribunal unreasonably focused on Mr. Stewart’s limited capacity to control his choices and behaviour regarding his use of drugs and failed to consider the connection between his drug dependency and his employer’s decision to fire him. *Elk Valley* at paras 49-50. [emphasis added]

[58] The point of divergence, though never clearly articulated by either side, is whether the third step in the discrimination analysis requires that the disability be a factor in a *functional inability* to fulfil a workplace requirement that ultimately leads to a negative consequence (the majority), or merely a factor in a *failure* to comply (the minority).

[59] Transposed to the context of the present case, the majority in *Elk Valley* would insist on evidence supporting that the Applicant was functionally incapable of complying with the vaccine policy. To be clear, “incapacity” in this context includes any proven situation where complying would extort an unacceptable personal cost, physically or psychologically. Just as with a physical disability, an employee with a mental disability is not expected to torture themselves, or risk long-term harm from carrying out a required task before an inability to comply is found. The law will be pragmatic and accommodating once the claimant’s limitations are objectively defined. However, an objectively established incapacity to comply with what is asked of them is the *sine qua non* of the discrimination claim on the majority approach.

[60] On this approach, it is the extent or degree to which the disability factored-in to the incapacity to comply that is not measured, parsed, or subjected to adjectival description. Once her confirmed mental disability was “a factor” in the mix yielding the functional inability to comply with the vaccine requirement, the three components of the *Moore* test would be satisfied in the Applicant’s case. For instance, it would not matter if she was also partially motivated by political, health, or other beliefs around vaccination, so long as her protected medical disability was a contributing factor in the mix generating her incapacity to comply.

[61] This approach can clearly be seen at work in *Complainant v Dr. Bonnie Henry*, 2021 BCHRT 119 at para 12, where the British Columbia Human Rights Commission rejected a claim that Covid 19 vaccination mandates were discriminatory on account of the narrowness of the health exemptions provided. The Commission reasoned that, in disability-based challenges to vaccination requirements, complainants must “establish a connection between having [the disability] and not being fully vaccinated, such as his disability preventing him from being able to get vaccinated. An ideological opposition to or distrust of the vaccine would not be enough.” [emphasis added]

[62] By contrast, for the minority, once there was evidence that the rights-claimant’s diagnosed mental disability contributed to her *failure* to take the vaccine (whether she “could have” or not), the connection test is met. For them, the disability being “one factor” means that the Court will not parse the extent of the disability’s impact on her decision not to get the shot. Once a disability is a contributing factor to a failure to comply with a workplace requirement, leading to an adverse impact (ie: getting fired), *prima facie* discrimination is made out. This is the approach the Applicant says ought to have been followed in this case.

[63] Both approaches are rationally coherent. However, beyond being binding, and making the decision under review necessarily reasonable, the majority approach in *Elk Valley* has much to recommend it from the perspectives of principle and policy.

Equality law is about innate characteristics, not free choices

[64] Equality law is rooted in the principle that people should not suffer worse outcomes or treatment in daily life on account of immutable human characteristics over which they have no control, or which can only be changed or “overcome” at an unacceptable personal cost: see, in the context of s 15 of the *Charter*: *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203, 1999 CanLII 687 (SCC) at para 13; *Egan v Canada*, 1995 CanLII 98 (SCC) at para 5; *Vriend v Alberta*, 1998 CanLII 816 (SCC) at para. 90.

[65] Therefore, if a so-called choice to avoid a consequence “lies beyond the individual’s effective control”, it amounts to an incapacity in the eyes of discrimination law: *Miron v. Trudel*, 1995 CanLII 97 (SCC), [1995] 2 SCR 418 at para 153; *Fraser v. Canada (Attorney General)*, 2020 SCC 28 at paras 87-91.

[66] As Justices McLachlin and L’Heureux-Dubé wrote in *Lavoie v. Canada*, having a “choice” to avoid discrimination by altering one’s behaviour ceases to matter in discrimination analyses where “[t]he very act of forcing some people to make such a choice violates human dignity, and is therefore inherently discriminatory”: 2002 SCC 23 (CanLII), [2002] 1 SCR 769 at para 5 (and adopted by the plurality in *Quebec v A*, 2013 SCC 5 at para 337.

[67] Conversely, the more an asserted ground of discrimination starts to look like a personal or lifestyle choice, marginally connected to protected grounds, the less it will attract human rights protections: *Perren v. Canadian National Railway Company*, 2025 CHRT 110 at para 29; *Canadian National Railway Company v. Seeley*, 2014 FCA 111 at para 41; *R v Malmo-Levine*; *R v Caine*, 2003 SCC 74 at paras 86, 185-186; *Aujla v. Deputy Head (Correctional Service of Canada)*, 2020 FPSLRB 38 at para 151. For instance, intransigent refusal to comply with a workplace requirement will not attract human rights protection, even if the employer perceives a mental disability is present: *Cairns v. PEIHRC and Eastern School District*, 2017 PECA 16 at para 36.

[68] In this vein, it is worth noting that those asserting physical disabilities as the basis for exemption from Covid vaccination have also been required to present evidence that these conditions prevent getting the shot, or make it medically contraindicative: *Land v Canadian Natural Resources Limited*, 2024 AHRC 146 at paras 48-50.

[69] Applied in the context of the Applicant’s refusal to be vaccinated, the choice/discrimination line lay where making her take the vaccine or lose her job became objectively untenable in its impact, as opposed to merely experientially unpleasant. At that point, the compulsion would violate her human dignity by imposing a morally unacceptable cost and take on the character of discrimination.

[70] It fell to the Applicant to put forward evidence in her Complaint that her protected disability had this kind of impact in respect of taking the vaccine. The essence of the Decision was that she had failed to do so. That conclusion was very much reasonable given the modest and restrained medical description of the Applicant’s condition and the probable impact of her taking the vaccine.

The Policy Considerations Embedded in the “connection” Requirement

[71] The nature of the prohibited ground of discrimination will always inform the factors and evidence necessary to establish a *prima facie* case of discrimination: **Canada (Attorney General) v Johnstone**, 2014 FCA 110 at paras 82-92. As wisely observed in that case:

... a *prima facie* case must be determined in a flexible and contextual way, and the specific types of evidence and information that may be pertinent or useful to establish a *prima facie* case of discrimination will largely depend on the prohibited ground of discrimination at issue.

[72] This case, like **Elk Valley**, highlights the challenges of extending human rights protection to situations stemming from conditions of the mind broadly, and the policy considerations present when determining whether an adverse impact is truly connected to such a protected characteristic, as opposed to preferences and mutable facets of personality.

[73] On one hand, circumscribing human rights protections for the mentally ill too tightly is bound to work cruelty on individuals who genuinely deserve compassionate inclusion. Conversely, the ascendant societal tendency to interpret all problematic behaviour as pathology rather than agency has kindness at its root, but untenable results as its occasional fruit. Pathologizing poor choices, illogical fears, and unfounded anxieties as legally protected, equity-worthy characteristics risks shifting an unfair burden to employers, institutions, and society generally, to say nothing of trivializing human rights protections: **Johnstone** at paras 69-70.

[74] As a foundational principle, the duty to accommodate (i.e. not discriminate) is a meaningful obligation, in furtherance of fundamental human dignity, to embrace those who, absent the reasonable accommodation, cannot fulfill job requirements by reason of a protected personal characteristic. Conversely, however, it does not burden employers with a generalized duty to make employees as comfortable and unperturbed as possible. Life is filled with adversity, and neither the *Charter*, nor our various human rights statutes, guarantee otherwise.

[75] Put simply, in a functioning society, not every claim of psycho-emotional frailty can trigger a costly obligation by institutions and businesses to mollify the feelings and experiences of individuals afflicted with irrational beliefs or a want of basic resilience.

[76] Indeed, allowing human rights protections to morph and expand outside their intended ambit runs the risk of discrediting these essential protections in the eyes of the public: **Canadian National Railway Company v Seeley**, 2014 FCA 111 at para 41. The majority approach in **Elk Valley** guards against these concerns by insisting that a rights-claimant seeking exemption from reasonable workplace rules on the basis of something as amorphous as anxiety provide evidence that their disability has interposed a real barrier to complying with the policy at issue.

[77] These considerations further bolster the reasonableness of the decision in this case.

Conclusion

[78] The Chief’s delegate reasonably dismissed the Complaint for failing to establish a functional inability to comply with the workplace requirement of vaccination. Without that, the mere fact that the requirement coincided with her anxiety disorder to an unknown degree was insufficient to establish a case of *prima facie* discrimination.

[79] The application is dismissed, without costs.

Heard on the 24th of February 2026

Dated at the City of Calgary, Alberta this 9th day of April 2026.

N.E. Devlin, JCKBA

Appearances:

James SM Kitchen
for the Applicant

Cassandra Betts and Catherine Hamill
for the Respondent

Melissa Luhtanen
for the Alberta Human Rights Commission Tribunal