

CANADA / JUDGMENT

McNeil v. British Columbia (Human Rights Tribunal)

2025 BCSC 505

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Supreme Court of British Columbia

DECIDED

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2025 BCSC 505 McNeil v. British Columbia (Human Rights Tribunal)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

McNeil v. British Columbia (Human Rights Tribunal),

2025 BCSC 505

Date: 20250320

Docket: 247476

Registry: Victoria

Between:

Dawn Patricia McNeil

Petitioner

And:

British Columbia Human Rights Tribunal and

Telus Employer Solutions

Respondents

Before: The Honourable Justice LeBlanc

Reasons for Judgment

The Petitioner, Appearing on her own

behalf:

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Employer Solutions

J. H. Hoopes

Place and Date of Hearing:

Victoria, B.C.

February 24, 2025

Place and Date of Judgment:

Victoria, B.C.

March 20, 2025

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INTRODUCTION

- [1] The petitioner seeks to set aside the May 29, 2024 decision of the British Columbia Human Rights Tribunal (the "Tribunal") in *McNeil v. Telus Employer Solutions (TES)*, 2024 BCHRT 166 ("Tribunal Decision #2").
- [2] Tribunal Decision #2 dismissed Ms. McNeil's complaint pursuant to s. 27(1)(c) of the Human Rights Code, R.S.B.C. 1996, c. 210 (the "Code").
- [3] Section 27(1)(c) allows a member or panel of the Tribunal, with or without a hearing, to dismiss all or part of a complaint if that member or panel determines that there is no reasonable prospect that the complaint will succeed.
- [4] Having reviewed the materials before the Tribunal, Tribunal Decision #1, Tribunal Decision #2 and the relevant authorities, I find the decision of the Tribunal member and the process that led to it was not patently unreasonable. There was evidence before the Tribunal member and authorities supporting the dismissal of the complaint in the manner that was decided.

PROCEDURAL HISTORY

- [5] This matter has a lengthy procedural history with a prior judicial review proceeding before this court.
- [6] On July 5, 2018 Ms. McNeil filed a human rights complaint alleging that Telus Employer Solutions ("TES") had discriminated against her in her employment on the grounds of mental and physical disability contrary to s. 13 of the Code.
- [7] TES brought an application to dismiss ("ATD") Ms. McNeil's complaint pursuant to s. 27(1)(b) and (c) of the Code. TES argued that Ms. McNeil's allegations, even if proved, would not be a violation of the Code and/or the complaint had no reasonable prospect of success.
- [8] The Tribunal's decision on TES's application, released March 23, 2022, and indexed as *McNeil v. Telus Employer Solutions (TES)*, 2022 BCHRT 46 ("Tribunal Decision #1"), dismissed her complaint under s. 27(1)(c) of the Code.
- [9] On May 20, 2022 Ms. McNeil filed a petition seeking judicial review of Tribunal Decision #1. On November 21, 2022 and January 23, 2023, Justice Young heard the judicial review petition. In reasons indexed at *McNeil v. British Columbia (Human Rights Tribunal)*, 2023 BCSC 481, Young J. concluded that the Tribunal member had exercised her discretion arbitrarily in the following ways:

[139] ...

- a) not considering TES's failure to renew the fixed term contract as a ground for discrimination;
- b) not considering substantial medical evidence provided by Ms. McNeil after the contract was not renewed;
- c) failing to consider the argument that this was a new issue and new evidence requiring an amendment to the complaint;
- d) not considering the employer's duty to give Ms. McNeil reasonable time to investigate her disability before deciding not to renew her fixed term contract when it knew that she alleged mental and physical disabilities and was still investigating their causes.

[10] Justice Young set aside and remitted back to the Tribunal for reconsideration the decision to dismiss Ms. McNeil's claim under s. 27(1)(c) of the Code. Justice Young found that the Tribunal should:

- a) consider whether there is a claim of discrimination arising from TES's failure to renew Ms. McNeil's fixed term contract while Ms. McNeil was still investigating her disability;
- b) consider the medical evidence provided by Ms. McNeil in support of her application for a Person with Disability Designation ("PWD") and in particular consider the impact her disability has on her activities of daily living and work performance;
- c) consider and rule on TES's argument that Ms. McNeil is raising new evidence and should apply for an amendment of her claim; and
- d) further evaluate the bona fide occupational requirement ("BFOR") defence and whether performance speed is a reasonable standard set by TES and whether TES could accommodate someone who could not meet the performance speed standard due to a disability, without suffering undue hardship.

[11] On May 29, 2024, the Tribunal rendered Tribunal Decision #2.

[12] On July 24, 2024, Ms. McNeil filed this proceeding for judicial review of Tribunal Decision #2.

TRIBUNAL DECISION #2

[13] In Tribunal Decision #2, the Tribunal found that Ms. McNeil's complaint had no reasonable prospect of success because it was reasonably certain that TES would be able to establish a BFOR defence at a hearing.

[14] In her decision, the Tribunal member says that she reconsidered Tribunal Decision #1 along with the submissions of the parties concerning Young J.'s decision and the materials originally filed regarding TES's application (paras. 3-4).

- [15] The Tribunal member relied on the factual background contained at paras. 5--30 of Tribunal Decision #1 and paras. 2-23 of Young J.'s decision (para. 5).
- [16] The Tribunal member summarized her findings of Tribunal Decision #1 at para. 6:
- [6] In the Original Decision, I found the ATD was most appropriately dealt with under s. 27(1)(c) of the Code on the basis that the complaint has no reasonable prospect of success. Based on the materials before me, I was not persuaded by TES's arguments that Ms. McNeil had no reasonable prospect of proving that she experienced a disability-related adverse impact when her request to work from home or at another location was denied. I was, however, persuaded it is reasonably certain that TES would be able to prove a bona fide occupational requirement [BFOR] defence. Specifically, I found it reasonably certain that TES would be able to establish that the standard it adopted was rationally connected to the performance of the job. I found it reasonably certain TES would be able to establish that the standard was adopted in good faith and in an honest belief it was necessary to fulfill the legitimate work-related purpose. Lastly, I found it reasonably certain that TES would be able to establish that it met its duty to accommodate Ms. McNeil because it reasonably concluded that the medical information she provided did not support her request.
- [17] The Tribunal member reconsidered Tribunal Decision #1 in accordance with Young's J.'s directions by first considering whether the complaint includes an allegation that TES discriminated against Ms. McNeil when it did not renew her fixed term contract at the end of May 2018 and secondly by undertaking a new BFOR analysis.

Tribunal member findings re: does the complaint include an allegation of discrimination arising from TES's failure to renew Ms. McNeil's fixed term contract while she was still investigating her disability?

- [18] On the matter of failing to consider TES's failure to renew Ms. McNeil's contract as a ground for discrimination, the Tribunal member found that this complaint was a new allegation first raised in response to the ATD and not part of the original complaint (para. 15). In reaching this conclusion, the Tribunal member relied on the detailed allegations against TES which were provided in chronological order and pertained to events that occurred between January and April 2018 (paras. 17-18). The Tribunal member also considered the complaint as a whole, and found that the substance of the complaint was about TES's denial of Ms. McNeil's request to work from home or another location (paras. 18-19).
- [19] The Tribunal member found that Ms. McNeil had not made an application to amend the complaint pursuant to Rule 24(4)(b) while the matter was before the Tribunal and that it would be unfair to allow Ms. McNeil to do so now as it would create a moving target relying on a number of prior Tribunal decisions (paras. 24-27). The Tribunal member considered the character of each of the allegations and found that allowing the amendment would "change the goal post in the middle of the ATD" (para. 25).

- [20] Lastly, the Tribunal member considered Ms. McNeil's failure to respond to TES's arguments about why she should not be permitted to amend her complaint in any of her submissions (para. 24).

Tribunal member's findings on the BFOR defence

- [21] On the matter of not considering the medical evidence, the Tribunal member restated her prior findings that she was not persuaded that Ms. McNeil had no reasonable prospect of proving she had a disability protected under the Code at the material time. She also stated she was not persuaded that Ms. McNeil would not be able to prove her disability was connected to the employment-related adverse impact she experienced of not being allowed to work from home or at another location between January and April 2018 (para. 28).
- [22] The Tribunal member then conducted a new analysis to determine if TES had met its onus of establishing it is reasonably certain to prove a BFOR defence at a hearing (para. 31). The Tribunal member summarized that to be successful at a hearing, TES would need to prove it investigated alternative approaches and "could not have done anything else reasonable or practical to avoid negative impacts on the individual" (para. 34).
- [23] The Tribunal member referred to the new evidence of the PWD form which diagnosed Ms. McNeil with chronic fatigue syndrome, environmental sensitivities, anxiety and said that Ms. McNeil had difficulties with her functional skills, cognitive and emotional functions, and virtually all activities of daily living (para. 48).
- [24] The Tribunal member summarized the three elements of the BFOR defence: 1. the employer must have adopted the standard it applied for a purpose rationally connected to the performance of the job; 2. the employer must have adopted the standard in good faith and in the belief it was necessary to fulfil the legitimate work-related purpose; 3. the standard must be reasonably necessary to accomplish the legitimate work-related purpose, in the sense that the employer could not accommodate persons sharing the complainant's protected characteristics without incurring undue hardship (para. 33).
- [25] The Tribunal member found that TES would likely meet the first two components of the test (paras. 35-39) and focused the analysis on the third part.
- [26] The Tribunal member found, relying on prior Tribunal decisions, that the medical evidence available to the employer at the time is used to assess the employer's accommodation efforts (para. 50). Based on this, the Tribunal member found the new PWD form, obtained after the relevant period under consideration, was not relevant to the third step of the BFOR analysis.
- [27] The Tribunal member found between February 2017 and early January 2018, TES allowed Ms. McNeil to occasionally work from home for both medical and non-medical reasons and when the requests were denied it was because of insufficient staffing levels and insufficient notice and that TES maintained contact with Ms. McNeil requesting medical information to support her request to work from home or at another location (paras. 51-52). Ms. McNeil

kept her employer informed about her efforts to obtain medical information supporting her accommodation request and TES told her that possible options would be considered once she did. The Tribunal member found that TES's request for medical information supporting the accommodation request was reasonable (paras. 52-53).

- [28] The Tribunal member was satisfied that it was reasonably certain that TES would be able to establish that the medical information it had during the material time did not indicate that Ms. McNeil had any disability-related limitations or restrictions that required her to work from home or another location.
- [29] With respect to considering that TES knew that Ms. McNeil was still pursuing a diagnosis when it decided not to renew Ms. McNeil's contract, the Tribunal member found that TES would likely be able to establish that it took all reasonable and practical steps to accommodate Ms. McNeil, for example by keeping her position open and allowing additional time to obtain additional medical information. The Tribunal member noted that accommodation processes may take some time as medical information is obtained, assessments are done, worksites are investigated, and job functions researched (para. 55).

STANDARD OF REVIEW

- [30] A dismissal of a complaint under s. 27(1)(c) of the Code is a discretionary decision.
- [31] Section 59(3) of the Administrative Tribunals Act, S.B.C. 2004, c. 45 prohibits this court from setting aside a discretionary decision of the Tribunal unless it is "patently unreasonable", which is the standard of review to be applied here.
- [32] The court must apply the highest level of curial deference in reviewing decisions made under s. 27(1)(c) and not re-evaluate the evidence before the tribunal: *Franscutti v. Vancouver (City)*, 2017 BCCA 242 at paras. 42, 46.
- [33] Even if the reviewing court would have come to a different conclusion on the evidence before the tribunal, this does not mean that the decision is patently unreasonable: *Franscutti* at para. 47.
- [34] Justice Crerar reviewed the meaning of patently unreasonable in *Byelkova v. Fraser Health Authority*, 2021 BCSC 1312 (appeal dismissed 2022 BCCA 205):
- [14] A patently unreasonable decision is one that is "clearly irrational", "evidently not in accordance with reason", "so flawed that no amount of curial deference can justify letting it stand", "openly, clearly, evidently unreasonable", and that "almost border[s] on the absurd": *Franscutti v. Vancouver (City)*, 2017 BCCA 242 at para 45; *Law Society of New Brunswick v. Ryan*, 2003 SCC 20 at para 52; *Team Transport Services Ltd. v. Unifor*, 2020 BCSC 91 at para 16, *aff'd* 2021 BCCA 211.

ALLEGED ERRORS

[35] Ms. McNeil alleges the following errors as a basis for quashing Decision #2, or alternatively remitting the matter back for determination by a different Tribunal member:

- a) Tribunal member was patently unreasonable in ignoring evidence of disability provided to TES by complaint;
- b) Tribunal member made an error of fact ignoring information provided to TES by Ms. McNeil's doctors;
- c) Tribunal member made an error of law by accepting TES's medical information defence;
- d) Tribunal member was patently unreasonable by making an arbitrary decision; and
- e) Tribunal member was patently unreasonable by making a bad faith decision against Ms. McNeil.

[36] The errors listed above were included in Ms. McNeil's written submissions provided to me at the hearing and expanded the errors alleged in the petition. For example, bad faith was not an error alleged in the petition. The respondents were able to make submissions on the new allegations during the hearing, and as such, I will consider the allegations framed in the written submissions, including the new ones.

[37] In Ms. McNeil's first judicial review, she raised different errors than those raised in this judicial review. For the purposes of this judicial review proceeding, I am confined to consider the errors alleged, as framed by the petition and expanded by the written submissions.

Did the Tribunal member err by ignoring evidence of disability?

[38] Ms. McNeil submits that the Tribunal member made an arbitrary distinction by accepting only unspecified medical evidence provided by doctors as evidence of disability and not accepting other evidence of disability. Ms. McNeil uses examples of immediate disability, such as those experienced from a workplace accident, to say that medical evidence is not always readily apparent; however, the disability is. Ms. McNeil directs me to a series of exchanges she had with TES detailing the symptoms she was experiencing and her ongoing requests to work from home or another location. She says her own experiences should be considered sufficient evidence of the disability. She further says that consideration ought to be given to the difficulties she was experiencing with finding a diagnosis.

[39] The Tribunal member in Tribunal Decision #1 and Tribunal Decision #2 was not persuaded that Ms. McNeil had no reasonable prospect of proving that she experienced a disability-related adverse impact when her request to work from home or at another location was denied. Tribunal Decision #1 informs the finding of Tribunal Decision #2, as the findings of Tribunal Decision #1 were confirmed. In para. 39 of Tribunal Decision #1, the Tribunal member reviews the medical evidence available, including Ms. McNeil's first-hand

account of her symptoms. The Tribunal member proceeded on the assumption Ms. McNeil would have a reasonable prospect of proving her case at a hearing. In making this finding, the Tribunal member considered the evidence as a whole, including the evidence from Ms. McNeil directly concerning her ongoing symptoms.

- [40] TES's application pursuant to s. 27(1)(b) was denied. That section provides that a member or panel can dismiss all or part of a complaint if the acts or omissions alleged in the complaint or that part of the complaint do not contravene the Code.
- [41] I find nothing patently unreasonable in the Tribunal member's consideration of the medical evidence concerning Ms. McNeil's disability.
- [42] To the extent Ms. McNeil's argument pertains to the Tribunal member's decision concerning contract renewal as a basis for discrimination and setting an arbitrary timeline, I address that later in these reasons.

Did the Tribunal member make an error of fact by ignoring information provided to TES by Ms. McNeil's doctors?

- [43] Ms. McNeil says the error occurred at para. 54 of Tribunal Decision #2:

"that the medical information it had during the material time did not indicate that Ms. McNeil had any disability-related limitations or restrictions that required her to work from home or another location".

- [44] In particular, Ms. McNeil says the error occurred when the Tribunal member finds that the Workplace Accommodation Form repeats the same information as the Physician Assessment Form.

- [45] I have reviewed the Workplace Accommodation Form with the Physician Assessment Form.

- [46] The Workplace Accommodation Form, provides, in part, as follows:

The accommodation that Ms. McNeil is currently requesting is: "work from home"

Please list any other relevant limitations, which are not addressed above: "general symptoms head achey + fatigue" "previous anxiety + IBS"

- [47] The Physician Assessment Form provides that Ms. McNeil's condition is permanent with the limitations expressed in Section C and refers back to the Workplace Accommodation Form and letter completed by Dr. Prinsloo. Under Section C, the following is noted:

Medical condition

1. (a) Diagnosis: Current: unexplained vague, general symptoms. Previous: anxiety, IBS, Back Pain.

...

2. Describe the signs and symptoms of the illness/injury of the Team Member: Fatigue, poor sleep, low mood, "brain fog", leg movements & cramps. Worse at work.

[48] Overall, the information on the two forms is consistent. The only relevant distinction that I can find is a notation on the Workplace Accommodation Form that references the request to work from home. Neither form provides recommendations for accommodation. While the symptoms are more fully described in the later Physician Assessment Form, they are not inconsistent. I am unable to find a clear distinction as suggested by Ms. McNeil.

[49] On this alleged error, I am unable to find that the conclusions reached by the Tribunal member were patently unreasonable.

Did the Tribunal member make an error of law by accepting TES's medical information defence?

[50] Ms. McNeil makes two arguments:

- a) With reference to Young J.'s decision she argues that there was a binding decision of this court that TES could not make out the BFOR defence. Ms. McNeil says the Tribunal member was bound by the findings of Young J. in this regard.
- b) Further, even if the Tribunal member was not bound by Young J.'s findings, the Tribunal member erred by finding that medical evidence was required to prove the disability and an arbitrary timeline was imposed.

[51] Justice Young found that there was a reviewable error when the Tribunal member failed to consider in her decision the new diagnosis and the arbitrary cut off date for investigation. Justice Young did not find that TES had failed to make out a BFOR defence; instead, the finding was of a reviewable error in the analysis undertaken by the Tribunal member and a referral back for reconsideration.

[52] I do not find that it was patently unreasonable for the Tribunal member to conduct a new BFOR defence analysis as it was consistent with Young J.'s referral back to her.

[53] The second component of Ms. McNeil's argument rests on an allegation that the Tribunal member erred when she determined that medical proof of a disability requiring accommodation is required at the "material time".

[54] With respect to determining the "material time", the Tribunal member considered whether Ms. McNeil's complaint included an allegation that TES discriminated when it did not review her fixed term contract at the end of May 2018. The Tribunal member concluded that the contract complaint was a new allegation that was added in response. Relying on the chronology provided by Ms. McNeil, the Tribunal member determined the time period of the allegations concluded in April 2018 when her application for EI benefits was approved and that there is no mention of the contract not being renewed in the chronology. The Tribunal member considered additional evidence and concluded that the contract complaint was not part of the original complaint.

- [55] The Tribunal member then considered whether Ms. McNeil ought to be granted leave to amend the complaint to add the contract complaint and after reviewing the procedural history, concluded that permitting the amendment would change the goal post in the middle of the ATD. The Tribunal member based this conclusion on the Tribunal's case law establishing that if new allegations raised in a response create a moving target, they ought to be disregarded.
- [56] Based on this conclusion, the Tribunal member considered the "relevant period" to be the period outlined in the chronology filed by Ms. McNeil and ending in April 2018. I find nothing patently unreasonable with this approach.
- [57] On requiring medical evidence, the Tribunal member referred to *Dunkley v. University of British Columbia*, 2015 BCHRT 100 at para. 455, upheld in 2016 BCSC 1383, which provides that the first step an employer can take when an employee requests accommodation for a disability is to seek medical documentation for the "purpose of ensuring that an appropriate accommodation is provided and verifying that there is a medical basis to the request". With that, the Tribunal member concluded that it was reasonably certain that TES could establish that there was nothing further it could have done between January and April 2018 as it did not have recommendations associated with a diagnosis that it could accommodate.
- [58] The Tribunal member considered whether it was reasonably certain TES would be able to establish its work from home standard and performance standard were adopted in good faith and in an honest belief they were necessary to fulfill the legitimate work-related standard. She concluded at para. 39 of Tribunal Decision #2 that absent any evidence to the contrary, it was reasonably certain that TES would be able to satisfy these standards at a hearing. The Tribunal member then considered whether it was reasonably certain that TES could prove it met its duty to accommodate Ms. McNeil's disabilities to the point of undue hardship. The Tribunal member confined her analysis to the medical and other information available to TES between January and April 2018 and concluded that it was reasonably certain that TES took the necessary steps to inform itself as to the nature of Ms. McNeil's medical condition, prognosis, and any disability-related limitations and restrictions. She also found it was also reasonably certain that TES would be able to establish that the medical information it had during the material time did not indicate that Ms. McNeil had any disability-related limitations or restrictions that required her to work from home or another location. Further, the Tribunal member considered Ms. McNeil's attempts to find a diagnosis and, as stated above, found that it was reasonably certain that TES could demonstrate all reasonable and practical steps to accommodate Ms. McNeil had been taken between January and April 2018.

- [59] Ms. McNeil's position is that TES ought to have accommodated her request to work from home based on her self-described symptoms accompanied with the knowledge that she was trying to find a diagnosis and by accepting TES's position that medical information was required for accommodation, the Tribunal member erred. Ms. McNeil also relies on the January 23, 2018 note from Dr. Prinsloo that provides, without further detail, as follows: "For health reasons a trial of work from home is recommended".
- [60] The Tribunal member considered the medical information available to TES prior to April 2018 and found that it was reasonably certain that TES would be able to establish that the medical evidence did not establish that Ms. McNeil had any disability-related limitations or restrictions that required her to work from home or another location. The Tribunal member relies on the lack of recommendations for what accommodation efforts TES needed to take in her finding that TES's BFOR defence was likely to succeed. In making this determination, the Tribunal member considered the January 23, 2018 note along with the other medical evidence available to TES. The Tribunal member also considered the evidence confirming that Ms. McNeil was permitted to work from home when staffing levels permitted it.
- [61] I can find nothing that rises to the level of being patently unreasonable with the findings of the Tribunal member.

Was the Tribunal member patently unreasonable by making an arbitrary decision?

[62] Ms. McNeil argues two things:

- a) That it was patently unreasonable for the Tribunal member to conclude that there was a cut-off date for providing medical information and the date selected by the Tribunal member was arbitrary. Although not argued by Ms. McNeil, I understand this to also be a criticism of the Tribunal member's decision not to consider the failure to renew Ms. McNeil's contract as a ground of discrimination alleged.
- b) That not accepting Dr. Voyer's diagnosis was patently unreasonable.

[63] These alleged errors repeat the errors alleged above. For the reasons expressed above, I do not find that the Tribunal member's decision was arbitrary.

Was the Tribunal member patently unreasonable by making a bad faith decision against Ms. McNeil?

[64] Ms. McNeil states that the decision as a whole is patently unreasonable relying on there being findings in her favour on her other alleged errors. As Ms. McNeil has failed on the other alleged errors, the basis for this alleged error must fail.

CONCLUSION

- [65] On the evidence before the Tribunal and based on the reasoning in Tribunal Decision #2, Ms. McNeil has not demonstrated that the Tribunal member's decision was patently unreasonable.
- [66] Ms. McNeil has not established that the Tribunal member's decision was arbitrary, made in bad faith, for an improper purpose or that it was based entirely or predominantly on irrelevant factors. Ms. McNeil seeks to have me substitute the Tribunal member's decision with that of my own based on a reconsideration of all of the evidence. That is not my role and I am confined to reviewing the decision of the Tribunal member to determine whether it borders on the absurd in that there was no justification to support the conclusions. I am unable to find such errors.
- [67] Accordingly, I dismiss the petition.
- [68] There will be no order for costs for or against the Tribunal.
- [69] If Ms. McNeil or TES wish to speak to costs, they may do so in writing by forwarding their submissions, which shall be no longer than 7 pages, to the scheduling office, copying all parties within 14 days of this decision. Any responding submissions may be submitted in the same fashion 7 days thereafter and shall be confined to 5 pages.

"LeBlanc, J."

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