

CANADA / JUDGMENT

Parmar v. Translink Security Management Limited

2020 BCSC 1625

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Supreme Court of British Columbia

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2020 BCSC 1625 Parmar v. Translink Security Management Limited

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Parmar v. Translink Security Management Limited,

2020 BCSC 1625

Date: 20201030

Docket: S1911847

Registry: Vancouver

Between:

Arvind Parmar

Petitioner

And

Translink Security Management Limited

Respondent

And

British Columbia Human Rights Tribunal

Respondent

Before: The Honourable Madam Justice D. MacDonald

On judicial review from: An order of the British Columbia Human Rights Tribunal, dated August 20, 2019 (The Officer v. The Force, 2019 BCHRT 171, Docket No. 18977).

Reasons for Judgment

Counsel for the Petitioner:

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Counsel for the Respondent Translink Security Management Limited:

(via teleconference)

J. Hoopes

Place and Date of Hearing:

(via teleconference)

Vancouver, B.C.

September 11, 2020

Place and Date of Judgment:

Vancouver, B.C.

October 30, 2020

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Overview

- [1] The petitioner, Arvind Parmar, is seeking an order quashing a decision of the respondent British Columbia Human Rights Tribunal: *The Officer v. The Force*, 2019 BCHRT 171, issued August 20, 2019 ("Tribunal Decision"). The Tribunal Member rejected Mr. Parmar's complaint because it was filed outside the one-year time limit as specified under s. 22 of the British Columbia Human Rights Code, R.S.B.C. 1996, c. 210 ("Code"). No one appeared at the hearing for the Tribunal.
- [2] Mr. Parmar argues the Tribunal Decision was patently unreasonable in not accepting his late-filed complaint. He argues he did not file his complaint until he had actual evidence that supported his suspicion he had been discriminated against on the basis of mental disability. Mr. Parmar alleges he was suffering from post-traumatic stress disorder ("PTSD") at the time he was terminated from Translink Security Management Limited ("Translink"), Mr. Parmar's former employer.
- [3] Translink submits this is not an appeal and this Court must give respectful attention to the reasons given by the Tribunal Member. Translink argues the Tribunal Member made no reviewable error and the petition must be dismissed.
- [4] Both parties agree the Tribunal Member exercised his discretion in deciding not to accept the late-filed complaint, and therefore the standard of review is patent unreasonableness. Thus, the central question is whether the Tribunal Decision is patently unreasonable. For the following reasons, I do not find that it is, and the petition must be dismissed.

Applicable Law

Standard of Review

- [5] Section 32(q) of the Code stipulates that s. 59 of the Administrative Tribunals Act, S.B.C. 2004, c. 45 ("ATA") applies to the Tribunal. Section 59(3) of the ATA prohibits this Court from setting aside a discretionary decision made by a Tribunal Member unless it is "patently unreasonable". Decisions of the Tribunal addressing late filing are discretionary.
- [6] Section 59(4) defines the patently unreasonable standard:
 - (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.

- [7] For a decision to be found patently unreasonable, at least one of the circumstances set out in s. 59(4) must be demonstrated: *Berezoutskaia v. British Columbia* (Human Rights Tribunal), 2006 BCCA 95 [Berezoutskaia] at para. 27.
- [8] Section 59(2) of the ATA is also relevant because the petitioner alleges the Tribunal Member erred in the conclusion that he was aware in October 2018 of the effect of his PTSD on his employment. He argues this was a factual finding unavailable on the record. Section 59(2) provides:
- (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.
- [9] In *British Columbia (Ministry of Public Safety and Solicitor General) v. Mzite*, 2014 BCCA 220 [Mzite], the Court of Appeal held at para. 51:

The decision to permit a late-filed complaint to proceed does not require the Tribunal to make findings of fact at a full hearing but, rather, mandates a review of the complaint and consideration of the reasons for delay in the course of the exercise of discretion: *Routkovskaia v. British Columbia* (Human Rights Tribunal), 2012 BCCA 141.

- [10] There is no dispute that discretionary decisions of the Tribunal are owed deference by a reviewing court: *A.M. v. British Columbia* (Human Rights Tribunal), 2017 BCSC 89 [A.M.] at para. 20. Screening decisions, such as whether a complaint is late-filed, ought not be set aside unless they are found to be patently unreasonable: *McCulloch v. British Columbia* (Human Rights Tribunal), 2019 BCSC 624 at para. 36.
- [11] Assuming the Tribunal has properly reviewed the complaint and given appropriate consideration of the reasons for delay, I must give respectful attention to the reasons provided by the Member: *Mzite* at para. 50.
- [12] The standard of patent unreasonableness in the ATA differs from the common law standard of reasonableness. Relying on *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22, in *Team Transport Services Ltd. v. Unifor*, 2020 BCSC 91, Justice Gomery articulated the patently unreasonable standard as follows:
- [19] I must begin with the Board's interpretation of s. 38 of the Code. My task is to evaluate the Board's reasoning in the decision at hand, not look for a "correct" conclusion. At the end of the day, I must accept the Board's reasoning and its interpretation unless it "almost borders on the absurd".
- [13] The above definition can be contrasted with the definition of reasonableness articulated in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 [Vavilov] at para. 12 as follows:

- [12] . [T]o fulfill Dunsmuir's promise to protect "the legality, the reasonableness and the fairness of the administrative process and outcomes", reasonableness review must entail a sensitive and respectful, but robust, evaluation of administrative decisions
- [14] After the Tribunal Decision was released, the Supreme Court of Canada released its decision in Vavilov instituting a revised framework for judicial review. There is now a presumption that reasonableness is the applicable standard of judicial review in all but two types of situations. First, the presumption is rebutted where the legislature has indicated that a different standard of review applies. Second, in certain circumstances the rule of law requires the standard of correctness.[1]
- [15] In the case before me, because the ATA governs the judicial review of Tribunal decisions, Vavilov is of limited value. However, Vavilov emphasizes respect for the "institutional design choices" of legislatures: here, that the standard of patent unreasonableness applies to discretionary decisions of the Tribunal. At para. 84 of Vavilov the Court requires me to adopt a "reasons first" approach (examine the decision first to understand the reasoning process), and to review the reasons from a posture of restraint. I must keep these principles in mind as I review the Tribunal Decision.

Timeliness

- [16] Sections 22(1) and (2) of the Code require complaints to be filed within one year of the alleged contravention or, in the case of a continuing contravention, within one year of the last alleged instance of the contravention. Section 22(3) gives the Tribunal the discretion to accept all or part of a late-filed complaint if:
- (a) it is in the public interest to accept the complaint, and
 - (b) no substantial prejudice will result to any person because of the delay.
- [17] The complainant bears the burden of establishing it is in the public interest to accept a late-filed complaint and that no substantial prejudice will result to any person because of the delay in filing the complaint.
- [18] The assessment of the public interest is multi-faceted and context specific. It is in the public interest to accept a late-filed complaint when doing so would promote confidence that the provisions of the Code are accessible to the vulnerable persons it is intended to protect and assure public confidence in the fairness of the system: *Sidhu and Reyes and Bhatti v. Western Forest Products Inc.*, 2006 BCHRT 251.
- [19] While not necessarily determinative, the factors usually considered include the length of the delay, any reasons for the delay, and the public interest in the Tribunal's adjudication of complaints raising unique issues and advancing human rights jurisprudence: *Mzite* at paras. 58--76.

- [20] The discoverability principle, which can suspend the running of a limitation period until the time when a complainant becomes aware of the facts which could ground a complaint, does not extend the time for filing under the Code. It is, however, relevant to the public interest inquiry: *Fullerton v. Rogers Foods*, 2015 BCHRT 49.
- [21] The Tribunal has accepted late-filed complaints where the complainant did not know the material facts upon which the complaint is later based. The Tribunal has found, in the interest of fairness, that a complainant be permitted to file the complaint at the time they become aware of the facts that give rise to a complaint: *Ali v. BC Ministry of Justice*, 2017 BCHRT 262 [Ali] at para. 16.

Background Facts

- [22] The complaint arises out of Mr. Parmar's employment as a transit police officer with Translink.
- [23] Prior to his employment with Translink, Mr. Parmar worked with the Royal Canadian Mounted Police ("RCMP"). Mr. Parmar alleges that he developed PTSD in August 2016 as a result of attending a crime scene where a young man had been killed by a gunshot wound to his head. Mr. Parmar did not become aware of his PTSD until much later.
- [24] Shortly after attending this crime scene, Mr. Parmar resigned from the RCMP.
- [25] Mr. Parmar began working for Translink in October 2016. In March 2017, while Mr. Parmar was working for Translink, he received a subpoena to testify at the preliminary inquiry for the murder trial related to the crime scene he had attended. The Preliminary Inquiry was conducted in April 2017. Following this notice, Mr. Parmar began to experience increased stress and difficulties at work. However, he did not understand that he was suffering from PTSD.
- [26] Mr. Parmar worked as a transit police officer until he was terminated on May 25, 2019. Translink cited performance and conduct issues that occurred between March and May 2017 as the reason for his termination. At the time he was terminated, he was still a probationary employee.
- [27] Mr. Parmar's union grieved his dismissal. The grievance was withdrawn in February 2018.
- [28] On October 17, 2018, Mr. Parmar saw a registered psychologist, Dr. Jeff Morley, who diagnosed him with PTSD. Mr. Parmar states Dr. Morley recommended that he get a further assessment from Dr. Cinny Bubber, a forensic psychologist, and provided a referral. Mr. Parmar states that the reason for the referral was that Dr. Morley could not determine whether he was suffering from PTSD when he was employed with Translink.
- [29] Before Mr. Parmar saw Dr. Bubber, his legal counsel drafted a letter, dated October 25, 2018, to Translink asserting that his rights under the Code had been violated and that she had instructions to file a human rights complaint. She advised that Mr. Parmar was diagnosed with PTSD. She stated Mr. Parmar exhibited symptoms that ought to have triggered

Translink's duty to inquire into the possible need for accommodation. She further stated "Mr. Parmar has a right to have his disability, post-traumatic stress disorder, accommodated in his workplace, up to the point of undue hardship." She concluded that Mr. Parmar "will be pursuing his reinstatement and accommodation directly pursuant to the Human Rights Code."

[30] Due to an error, the letter was not sent to Translink's counsel.

[31] In the same time period, counsel for Mr. Parmar sent two emails to Dr. Bubber. One on November 1, 2018, stated:

Dr. Jeff Morley suggested I contact you to see if you could provide a medical legal report for one of my clients in a human rights complaint. The complaint is yet to be filed and we will need to convince the Human Rights Tribunal to accept its late filing on the basis that it is in the public interest to do so.

.

We need to establish that during the three-month period prior to his termination (March, April and May 2017), he had PTSD and that the concerns about his work performance during that time had a causal link with his medical condition.

[32] On January 3, 2019, Mr. Parmar saw Dr. Bubber for an assessment. On February 1, 2019, Dr. Bubber sent a report to counsel for Mr. Parmar stating he was suffering from PTSD and that he had been experiencing PTSD since August 2016. Dr. Bubber stated she believed these symptoms had a negative impact on Mr. Parmar's work performance in 2017, the time in which he worked for Translink. She opined that Mr. Parmar's coping strategy was avoidance, which was likely the reason he did not earlier recognize he was suffering from PTSD. Dr. Bubber stated the following:

... The only acknowledgement of any emotional distress was in June 2017 when he requested to see a psychologist but even then he was too embarrassed and ashamed to seek help. It was not until he spoke to his physician in September 2018 and Dr. Morley in [October] 2018 that he seemed to understand his presentation was consistent with a PTSD diagnosis.

[33] Dr. Bubber stated it was her opinion that Mr. Parmar's PTSD symptoms were at a higher level between January and May 2017 due to his impending testimony at the pretrial hearing.

[34] Mr. Parmar filed a complaint with the Tribunal on February 21, 2019. He alleged discrimination in employment on the basis of mental disability, contrary to s. 13 of the Code. Mr. Parmar argued he was terminated by Translink because of conduct caused by his disability and that his employer knew, or ought to have known, that he was suffering from a disability that impacted his performance.

- [35] As the complaint was filed more than 12 months after his termination, on March 18, 2019, the Tribunal sought submissions from the parties concerning the timeliness of the complaint.
- [36] Mr. Parmar explained the reason for his delay in filing the complaint was that he had been attempting to get medical information to confirm his suspicion that he was suffering from PTSD at the relevant time. He filed his complaint as soon as he could establish a link between his allegation of discrimination and the conduct in the workplace. His counsel further explained his delay by the fact that Mr. Parmar was "situated at the intersection of multiple cultural and gendered views of mental health" which led him to believe he should be tough enough to take a murder scene in stride and not seek help should he be struggling with difficult emotions following the event.
- [37] The Tribunal considered whether to exercise its discretion to accept a late-filed complaint under s. 22(3) of the Code. The Tribunal determined it was not in the public interest to accept the complaint. Since the complaint was not accepted, the Tribunal did not address the question of whether substantial prejudice would result to any person because of the delay.

Is the Decision Patently Unreasonable?

Parties' Positions

- [38] Mr. Parmar relies on A.M., where this Court ruled it was patently unreasonable to find that the complainant should have filed his complaint as soon as he suspected that he had been discriminated against, rather than waiting until he had evidence to support his suspicion. Mr. Parmar argues this is exactly what occurred here: he did not file his complaint until he had medical evidence to support his suspicion that he was suffering from PTSD at the time he was terminated from Translink.
- [39] Mr. Parmar submits the Tribunal Decision is patently unreasonable because the Tribunal Member misapprehended the material facts by finding that Mr. Parmar knew as of October 2018 that he had experienced discrimination. Mr. Parmar says that the Tribunal's reasoning is arbitrary because the Tribunal Member did not refer to the proper evidence. He further argues the Tribunal's failure to exercise its discretion and allow the complaint was inconsistent with the public interest and is patently unreasonable.
- [40] Translink argues the Tribunal Decision is not patently unreasonable because under s. 22(3) of the Code the Tribunal has broad discretion to determine whether or not to accept a late-filed complaint. Mr. Parmar bears the burden of establishing that it is both in the public interest to accept the complaint and that no substantial prejudice will result to any person because of the delay in filing: *Goddard v. Dixon*, 2012 BCSC 161 [Goddard] at para. 151.

[41] Translink further argues the Tribunal canvassed and applied the relevant tests applicable to s. 22 of the Code. The Tribunal considered A.M. and found the facts distinguishable from the current case because the demand letter sent by counsel established Mr. Parmar knew in October 2018 of his medical condition and its effect on his employment. Translink submits the discretionary Tribunal Decision was not unreasonable, let alone patently unreasonable, and that the petition should be dismissed.

Analysis

[42] The parties agree on the standard of review. The Tribunal Decision not to accept the complaint for filing is a discretionary decision and is afforded the highest degree of curial deference: *Routkovskaia v. British Columbia (Human Rights Tribunal)*, 2012 BCCA 141 [Routkovskaia]; *Mzite*. Therefore, the question before me is whether it was patently unreasonable for the Tribunal not to accept the complaint which was filed nine months after the 12-month deadline.

[43] Each case is fact and context specific, and should be assessed in accordance with the purposes of the Code: *Ali* at para. 11. One purpose is to ensure redress for individuals who are discriminated against, contrary to the Code: s. 3.

[44] The Tribunal Member set out the correct legal tests under s. 22 of the Code. The Member stated at para. 23 that s. 22 "is a substantive provision which is intended to ensure that complainants pursue their human rights remedies diligently: *Chartier v. School District No. 62*, 2003 BCHRT 39. The Member also considered the non-exhaustive factors for allowing late-filed complaints including the length of the delay, the reasons for the delay, and the public interest in the complaint.

[45] Considering these factors, the Tribunal Member accepted that Mr. Parmar was unaware of his PTSD until October 2018. Yet the Member found the delay after October 2018 was not justified because Mr. Parmar was aware of his PTSD and had access to legal counsel. The Member found that while subsequent medical evidence would strengthen his case, Mr. Parmar had sufficient evidence to file his complaint when he discovered he had PTSD in October 2018.

[46] The Tribunal Member held, in these circumstances, the additional four month delay was excessive and it was not in the public interest to accept the complaint. The Member further reasoned that the complaint contained nothing unique, novel, or unusual that had not been addressed in other human rights complaints. This is a relevant factor when determining whether it is in the public interest to accept a late-filed complaint. At para. 39 the Member stated:

I am not persuaded by the reasons he proffered for the subsequent delay. In these circumstances, I conclude there is a limited amount of public interest related to the [petitioner's] reason for delay in filing this complaint.

- [47] Mr. Parmar challenges these findings.
- [48] Mr. Parmar relies on A.M. In A.M. this Court found a Tribunal Member's decision to be arbitrary when they did not take into account the "complete explanation" for filing the complaint beyond the time limits. In A.M. the complainant did not know until approximately two months before filing his complaint that he had a case. In the Tribunal Decision, the Tribunal Member stated the following regarding A.M.:
- [33] the court found that the complainant learned for the first time during the custody hearing after the time limit for filing had expired that there was cogent evidence that the respondent Ministry's actions were based on concerns about his place of origin, which was an immutable characteristic of the complainant. In that case, fairness dictated that the complaint be accepted for filing where the complainant only learned of an evidentiary basis for a complaint at the custody hearing. Before then, the court characterized him as being unaware that he had a case.
- [49] The Member found that Mr. Parmar was aware in October 2018 that he suffered from PTSD. Unlike the facts in A.M., the Member found Mr. Parmar was aware of some evidentiary basis to file a complaint at that time, but nonetheless still waited four additional months before filing.
- [50] Turning to whether the Tribunal Member misapprehended the evidence, Translink argues that the petitioner did not provide adequate additional evidence to substantiate the allegation that he was unaware of his PTSD's impact on his employment with Translink until receiving Dr. Bubber's report. Translink argues there are no sworn statements or affidavits filed in support of Mr. Parmar's complaint to the Tribunal. Although it is preferable to have affidavit evidence in support of a complaint the Tribunal is entitled to considerable sworn evidence and unsworn statements: Goddard at para. 205.
- [51] Mr. Parmar responds that Dr. Bubber's report validates his explanation that Dr. Morley was unable to determine whether he was suffering from PTSD at the time he was terminated from Translink. I do not read Dr. Bubber's report as stating anything regarding Dr. Morley's assessment.[2] Perhaps a report from Dr. Morley could have more fully explained why he could not connect the PTSD to Mr. Parmar's work at Translink. Unfortunately, I can locate no correspondence from Dr. Morley in the record that was before the Tribunal, apart from an email arranging a telephone conference with Mr. Parmar's counsel.
- [52] Since Mr. Parmar relies on a factual finding, I must consider s. 59(2) of the ATA. The test pursuant to s. 59(2) is whether there was "no evidence" to support the Member's finding of fact or whether the finding is otherwise unreasonable in light of all the evidence.

- [53] I note the Tribunal Member did not refer to the emails from Mr. Parmar's counsel that helped explain Mr. Parmar's delay. While troubling, a trier of fact need not advert to every piece of evidence: *Canex Investment Corporation v. 0799701 B.C. Ltd.*, 2020 BCCA 231 at para. 87. In any event, it is obvious the Member understood the reason behind Mr. Parmar's delay in filing the complaint between October 2018 and February 2019 articulated in the emails. This is evident in the Tribunal Decision:
- [36] While there is no doubt that the report from the forensic psychologist in February 2019 contains medical evidence supporting the filing of the complaint, from the information on file I am satisfied that the evidentiary basis of the complaint was known to [Mr. Parmar], as set out by his lawyer in the letter to [Translink], as of October 2018. In my view, there is a difference between learning you have a complaint and moving forward to file a complaint when you receive expert medical evidence supporting the complaint. To conclude otherwise, would allow complainant's to wait to file complaints until they receive expert medical opinion supporting the complaint. It would not further the purposes of the Code to do so.
- [37] In the circumstances of this case, I conclude that [Mr. Parmar] knew that as of October 2018 he had a case of PTSD that may have a connection to his workplace issues with [Translink]. That case may have gotten stronger when he received the forensic psychologist's report in February 2019.
- [38] In summary, it is fair to conclude that [Mr. Parmar's] delay in filing, from the time he was terminated in May 2017 until he was diagnosed with PTSD in October 2018, is reasonably explained by his lack of awareness of his potential case at the Tribunal. However the delay from October 2018 to February 2019 should not, in my view, be accorded any such public interest on this basis. While acknowledging [Mr. Parmar's] decision to refer the medical evidence issues in this case to a forensic psychologist for an opinion would assist with determining the strength of his case, I disagree with his conclusion that he only learned that he had an evidentiary basis for a complaint when he received the report from the forensic psychologist.
- [54] The Tribunal Member found that Mr. Parmar's knowledge of his PTSD and its impact on his work while at Translink went beyond suspicion and that he knew he had the factual basis to file a complaint in October 2018. The Member stated this conclusion was bolstered by the October 25, 2018 demand letter which stated, inter alia, that Mr. Parmar had PTSD, it should have been obvious to Translink he was suffering from PTSD at the time of his termination, and he had instructed his counsel to file a human rights complaint.
- [55] Based on the above reasoning, the Member had evidence before him supporting his decision. The decision does not fall within the "no evidence" part of the test in s. 59(2). I must next consider, in light of all the evidence, if this factual finding is otherwise unreasonable.

- [56] While the demand letter is relevant evidence, a demand letter is not evidence under oath. I would not have placed as much emphasis on the demand letter as did the Member.[3] However, as stated in Vavilov at para. 125, the "reviewing court must refrain from 'reweighing and reassessing the evidence considered by the decision maker.'" I am not to reassess; I am also not permitted to substitute my view of the merits for that of the Tribunal: *Kinexus Bioinformatics Corporation v. Asad*, 2010 BCSC 33 at para. 13. I am not to pursue a "line by line treasure hunt for error": Vavilov at para. 102.
- [57] To the extent s. 59(2) of the ATA applies a reasonableness standard, I find the factual finding of the Member, in light of all the evidence, was reasonable. In any event, I find this finding of fact is inextricably intertwined with the exercise of discretion. Therefore the patently unreasonable standard applies: *Morgan-Hung v. British Columbia (Human Rights Tribunal)*, 2011 BCCA 122; *Berezoutskaia*. This is likely why the petitioner did not rely on s. 59(2) of the ATA.
- [58] The standard of review is patent unreasonableness within the meaning of s. 59(4) of the ATA. As emphasized in *Mzite* and *Routkovskaia*, the Tribunal is entitled to the highest degree of deference when this Court is evaluating a decision to deny a late-filed complaint.

Conclusion

- [59] The Tribunal Member understood that Mr. Parmar delayed in making his complaint because he was waiting for further medical evidence to establish that he was suffering from PTSD while working at Translink. However, the Member was not persuaded that this was a reasonable explanation for the additional four month delay. As a result, the Tribunal Member found the explanation did not meet the test in s. 22(3) to allow a late-filed complaint. The Member found Mr. Parmar did not satisfy the public interest threshold.
- [60] The decision not to accept the complaint was not the only decision the Tribunal Member could have made. Nevertheless, the Member applied the correct legal tests and did not fundamentally misapprehend the evidence. On the evidence before the Tribunal Member, and based on the chain of reasoning in the Tribunal Decision, I cannot find that it is patently unreasonable.
- [61] Mr. Parmar has not met the high burden to establish that the Tribunal Decision was patently unreasonable.

Remedy

- [62] The Petition is dismissed.

"D. MacDonald J."

- [1] Presently, constitutional questions; general questions of law of central importance to the legal system as a whole; and questions regarding the jurisdictional boundaries between two or more administrative bodies.

- [2] Dr. Morley is not referred to in the "Facts and Assumptions" section of Dr. Bubber's report, therefore I assume no report from Dr. Morley was provided to Dr. Bubber.
- [3] I also may have placed more emphasis on the possible consequences of Mr. Parmar filing his complaint without the additional medical evidence. See the discussion in *Chen v. Surrey (City)*, 2015 BCCA 57 where the court discusses the Tribunal's gatekeeping function in the context of whether an allegation of facts which could, if proven, establish a nexus between the alleged conduct and a violation of the Code.
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