IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *University of British Columbia Okanagan v. Hale,* 2021 BCSC 729

Date: 20210422
Docket: S193678
Registry: Vancouver

Between:

University of British Columbia Okanagan

Petitioner

And

Stephanie Hale and British Columbia Human Rights Tribunal

Respondents

Before: The Honourable Mr. Justice Crossin

On judicial review from: An order of the British Columbia Human Rights Tribunal, dated January 31, 2019 (*Hale v. University of British Columbia Okanagan (No. 2),* 2019 BCHRT 23).

Reasons for Judgment

Counsel for the Petitioner:	M.A. Wagner J. Devins
Counsel for the Respondent, Stephanie Hale:	C. Parfitt
Counsel for the Respondent, British Columbia Human Rights Tribunal:	No appearance
Place and Date of Trial/Hearing:	Vancouver, B.C. July 30-31, and November 2, 2020
Place and Date of Judgment:	Vancouver, B.C. April 22, 2021

Overview

[1] On August 30, 2017, Ms. Stephanie Hale filed a human rights complaint with the British Columbia Human Rights Tribunal (the "Tribunal") against the University of British Columbia Okanagan ("UBCO").

[2] On January 31, 2019 the Tribunal issued *Hale v. University of British Columbia Okanagan (No. 2),* 2019 BCHRT 23 (the "Decision") denying an application to dismiss the complaint ("ATD").

[3] This is a petition for judicial review of the Decision.

[4] The complaint of Ms. Hale against UBCO alleges discrimination on the basis of sex and mental disability contrary to s. 8 of the *Human Rights Code,* R.S.B.C. 1996, c. 210 [*Code*], in relation to UBCO's procedures and policies for addressing her allegations of sexual assault and harassment. Section 8 of the *Code* prohibits discrimination in the provision of an accommodation, service or facility customarily available to the public.

[5] UBCO seeks an order that the Decision be quashed, and that Ms. Hale's human rights complaint be dismissed under any or all of ss. 21(1)(c), and/or 27(1)(d)(ii) of the *Code.* In the alternative, UBCO seeks an order that the Decision be quashed and that its ATD be remitted to the Tribunal for reconsideration.

[6] In particular, UBCO alleges the following errors:

> (a) The Tribunal erred in its application of the legal tests, particularly with respect to its analysis of the required nexus for disability and the question of the duty to accommodate.
>
> (b) The Tribunal failed to properly confine itself to the evidence and the Complaint before the Tribunal and misapprehended certain of the evidence before it in coming to its decision.
>
> (c) The Tribunal relied predominantly on irrelevant factors in finding that a nexus existed between sex and the alleged adverse impacts, without engaging in an analysis of the specific alleged adverse impacts and without considering Tribunal jurisprudence directly on point.

The Parties

[7] UBCO is a campus of the University of British Columbia ("UBC"), which is established by the *University Act,* R.S.B.C. 1996, c. 468.

[8] The policies, procedures, and governance structures of UBC apply to UBCO.

[9] The Respondent on this Petition, Ms. Stephanie Hale, is a student at UBCO's Faculty of Engineering. She commenced studies in September 2012 but has been on medical leave since December 2015.

Factual Background

[10] The complaint against UBCO centres on alleged deficiencies in UBCO's processes and policies for addressing her claims of sexual assault and harassment. Ms. Hale alleges that she was sexually assaulted by a fellow student in 2013.

[11] The alleged assault, and UBCO's responses to it up until February 2016, are scoped out of the complaint: 2018 BCHRT 34 ("Time Limit Decision"). The effect of the Time Limit Decision is that Ms. Hale's complaint against UBCO is limited to her interactions with the university's policies and procedures from February 2016 to March 2017.

[12] Ms. Hale says that UBCO's responses to her complaints of sexual assault from February 2016 to March 2017 were extremely harmful to her as a woman and as a person with a disability. I will return to the specifics of Ms. Hale's allegations momentarily.

[13] To appreciate the alleged deficiencies in the processes and procedures of UBCO for handling Ms. Hale's complaint, I will set out in some detail the evidence that was before the Tribunal on the ATD. I will also refer to the subsequent revisions that UBCO has made to several of its processes and policies. The revisions are featured in the submissions of UBCO.

UBCO's Policies and Procedures

[14] UBC agreed that it is a service provider and that it has obligations to provide an environment for working and learning that is free of discrimination and harassment. It recognizes an obligation to provide procedures for handling complaints and remedying situations involving allegations of sexual assault and harassment.

[15] The following are UBCO's relevant policies and procedures.

Equity and Inclusion Office

[16] First, UBC maintains an Equity and Inclusion Office ("EIO"). Faculty, staff, and students experiencing human rights conflicts at UBCO may contact the EIO to receive confidential advice and support. The staff at the EIO can also provide referrals to other appropriate campus services. I will return to the role of the EIO again as it forms a central feature of Ms. Hale's complaint.

Policy 3

[17] UBC and UBCO also maintain a number of policies related to discrimination and harassment. Policy 3: Discrimination and Harassment ("Policy 3"), first approved in 1995, commits UBC to providing an environment that is free of discrimination and harassment for students, faculty, and staff.

[18] Policy 3 applies to discrimination and harassment as defined by the *Code*.

[19] Policy 3 also sets out defined procedures to respond to complaints or concerns of discrimination or harassment. *Concerns* regarding discrimination and harassment can be brought to the University's EIO and to the Administrative Heads of Unit. *Complaints* regarding discrimination and harassment may be initiated by the Director, Equity and Complaint Management, with a copy to the Associate Vice President ("AVP"), Equity and Inclusion. Policy 3 also stipulates that complaint proceedings may be initiated by the AVP, Equity and Inclusion based on information provided to the EIO, or that the EIO becomes aware of. In addition, Administrative Heads of Office may initiate complaints.

[20] Policy 3 further provides that the Director, Equity Complaint Management manages the complaint as that person deems appropriate. The Director may conduct interviews, request submissions, gather documents, and refer the matter for internal or external investigation or mediation.

[21] Finally, Policy 3 stipulates that after addressing the complaint, the Director, may recommend "appropriate measures" with respect to the complaint. Such measures may include remedying the effects of discrimination and imposing discipline. Policy 3 provides that any findings, recommendations, and resolutions by the Director will be communicated in writing to appropriate parties, including Administrative Heads of Unit, and the AVP, EIO. Administrative Heads of Unit determine discipline and appropriate remedial measures.

[22] Ms. Hale says that at the time relevant to the complaint, it is unclear whether UBC had a Director, Equity Complaint Management, where that position was located, or to whom any such person reported.

Statement on Respectful Environment for Students, Faculty and Staff

[23] UBC also publishes a Statement on Respectful Environment for Students, Faculty and Staff (the "Statement"). The Statement envisages an environment in which students, faculty and staff are provided the best climate for learning, researching, and working.

[24] The Statement further prohibits personal harassment, which is harassment not under a protected ground in the *Code.*

Policy 14

[25] Policy 14: Response to At-Risk Behaviour ("Policy 14"), first approved in February 1997, and amended in June 2011, directs UBC's response to at-risk behaviour. At-risk behaviour is defined as behaviour that threatens personal safety or security or property, or disrupts lawful or legitimate activities.

[26] Policy 14 directs those observing non-emergency at-risk behaviour to refer the behaviour to Campus Security. When it is a student engaging in at-risk behaviour, Campus Security will refer the matter to the Associate Vice President, Students ("AVPS"), who will then assume responsibility for responding. The AVPS can impose restrictions on a student, which may include restrictions that affect the student's ability to continue studies at UBC.

[27] The AVPS can either refer the matter to the non-academic misconduct process, which I will return to below, or it can investigate to determine if ongoing restrictions against the student are required. Once the investigation is completed, the AVSP will determine if the student engaged in at-risk behaviour, and if so, what ongoing restrictions are required.

Student Code of Conduct

[28] UBC also maintains a Student Code of Conduct, under which it can discipline a student for non-academic misconduct. The Student Code of Conduct was in place at all times relevant to Ms. Hale's complaint of sexual assault.

[29] The purpose of the Student Code of Conduct is to define the standard of conduct that UBC expects of students, to provide examples of conduct that may be subject to discipline, and to set out processes and procedures that will follow when addressing allegations of non-academic misconduct.

[30] Among other forms of conduct, the Student Code of Conduct explicitly prohibits physically aggressive conduct, assault, harassment, as well as any unwelcome or persistent conduct that a student knows, or ought to reasonably know, would cause another person to feel demeaned, intimidated, or harassed. The Student Code of Conduct expressly covers conduct contemplated by the *Code.*

[31] The Student Code of Conduct contemplates discipline up to and including expulsion from UBC.

[32] The Student Code of Conduct directs that allegations of non-academic misconduct will be reported to Campus Security, which will then in turn bring the matter to the attention of the Student Conduct Manager. The Student Conduct Manager may speak to the student, investigate further by any means the manager deems necessary or appropriate, or they may refer the matter to the President's Non-Academic Misconduct Committee ("NAM Committee").

[33] The NAM Committee investigates allegations of non-academic misconduct pursuant to the NAM Rules created by University counsel. After the investigation, the NAM Committee determines if non-academic misconduct occurred, and reports to the President of UBC. The President of UBC must then issue reasons as well as a description of any disciplinary action imposed.

[34] The NAM Rules stipulate that all members of the NAM Committee are to be students, except for the Chair. Proceedings before the NAM Committee typically take the form of “meetings” before the Chair and two members. The Chair retains discretion over what documents will be presented, what witnesses will be heard, and what questions will be asked. None of the people involved in the NAM Committee process have any special training or familiarity with sexual assault allegations.

[35] Ms. Hale complains that the responding student is a full participant in the NAM Committee process with significant procedural rights. In contrast, witnesses, which include complainants, do not have the same procedural rights and are generally only present when providing information to the NAM Committee.

University Reports on Response Policies and Procedures

[36] UBC has commissioned numerous reports concerning its obligation to prevent and respond to discrimination and harassment effectively. Many of these reports have recognized deficiencies in its processes and policies.

[37] In 2009, UBC commissioned two reports: *Best Practices in Equity and Diversity Programming at UBC Vancouver* (February 2009), and *Best Practices in*

Equity and Diversity: A Survey of Selected Universities (February 2009). In 2010, UBC commissioned an external review of the EIO which it has not disclosed.

[38] In April 2013, UBC received the report, *Implementing Inclusion, A Consultation on Organizational Change to Support UBC's Commitments to Equity and Diversity.* The report concluded that UBC must have the structures necessary to support equity and diversity, and must also ensure that its actions are accessible, coherent, transparent, and accountable.

[39] In October 2013, UBC created the President's Task Force on Intersectional Gender-Based Violence and Aboriginal Stereotypes (the "Task Force"), apparently in response to chants and behaviour promoting rape culture and stereotypes about Indigenous peoples during student-led freshmen activities.

[40] In May 2014, UBC issued *Renewing Our Commitment to Equity and Diversity* ("2014 Report") in response to the Task Force's Report. In the 2014 Report, UBC promised to foster equity and inclusion. UBC also stated that it would review Policy 3 and the Student Code of Conduct.

[41] In or about December 2015, UBC retained lawyer Paula Butler to review its response to complaints of sexual violence of a particular student, unrelated to this matter. In or about February 2016, Ms. Butler produced an executive summary to UBC ("Butler Report"). In her Report, Ms. Butler found that UBC had followed its existing policies and procedures, including Policy 3, the Student Code of Conduct, and the Rules for the NAM Committee. In addition, Ms. Butler found that all of the staff who had responded to the complaints had acted in good faith.

[42] However, the Butler Report indicated a need for clear direction and a more centralized, coordinated approach for students bringing forward complaints of sexual violence. In addition, the Report found that the process of reporting was unclear to students and staff, sporadic communication resulted in little or no action being taken on existing complaints, and that there were unnecessary delays, sometimes caused by human error. Finally, the Report found that there was a lack of clarity within Policy

3 itself, particularly in relation to formal and informal reporting, culminating in “much confusion about the type of complaints being filed”.

Sexual Assault Committee and Panel

[43] In late 2015, following the issuance of the Butler Report, UBC established a committee to develop a sexual assault policy. The committee included representatives and experts from across UBC’s community.

[44] In February 2016, UBC issued a Sexual Assault Response and Support Protocol (the “Protocol”) that is available on its website. The Protocol states, “UBC is committed to moving forward to revise these practices and procedures in a variety of ways” and further observed that knowing what UBC was already doing was “an important prelude to revision and reform”.

[45] The Protocol further noted the need to provide survivors of sexual violence with access to information to guide their decision on whether, and to whom, to make a complaint or to disclose their experience.

[46] The Protocol continued by noting that survivors do not need to make a formal report to access accommodations or support from UBC — including safety planning, residence relocation, changes to class schedule, academic accommodations, and alterative work or activity scheduling. The Protocol noted that it was not unusual for a report of sexual assault to take place a few months, or even years, after an assault occurred.

[47] Finally, the Protocol noted that VP Students Office, Legal Counsel and the Sexual Assault Survivors Centre had collectively identified issues and barriers with the current Student Code of Conduct and non-academic discipline process that may prevent survivors from reporting sexual assaults. This group is also identifying changes to the Student Code of Conduct to address the under-reporting of sexual assault.

[48] Around the same time that it issued the Protocol, UBC created a University Panel on Sexual Assault to make recommendations on UBC's policy and practice (the "Panel"). The Panel also included experts and representatives from various parts of UBC's community.

[49] In April 2016, the Provincial government passed the *Sexual Violence and Misconduct Policy Act,* S.B.C. 2016, c. 23 [the *SVMPA*]. The *SVMPA* requires public post-secondary institutions to institute sexual misconduct polices.

[50] The *SVMPA* does not require a particular form or process for addressing complaints or reports of sexual misconduct. Rather, it requires:

> 2 (1) A post-secondary institution must establish and implement a sexual misconduct policy that
>
> (a) addresses sexual misconduct, including sexual misconduct prevention and responses to sexual misconduct,
>
> (b) sets out procedures for the following:
>
> (i) making a complaint of sexual misconduct involving a student;
>
> (ii) making a report of sexual misconduct involving a student;
>
> (iii) responding to a complaint of sexual misconduct involving a student;
>
> (iv) responding to a report of sexual misconduct involving a student, and
>
> (c) addresses any other matter prescribed by regulation.
>
> (2) A post-secondary institution must make the post-secondary institution's sexual misconduct policy publicly available on an internet site maintained by or on behalf of the post-secondary institution.

[51] The Panel released its report in June 2016 entitled *Sexual Assault and the University of British Columbia: Prevention, Response, and Responsibility* ("June 2016 Panel Report"). On September 12, 2016, the June 2016 Panel Report was made available to the public.

[52] The June 2016 Panel Report recommended, among other things:

> a. Creating a centralized body to coordinate services and provide support and advocacy to survivors in navigating processes after an assault.

> b. Ensuring that survivors are kept informed about the progress of the investigation, what is happening to the person who sexually assaulted them, and whether they are going to see that person again in their classroom, residence or workplace.
>
> c. Creating disciplinary processes that are sexual-assault specific.

[53] As for investigations, the June 2016 Panel Report noted that UBC cannot avoid taking action on complaints of sexual violence involving members of the university community. Concerning the NAM Committee process, however, the June Panel Report noted that it was inappropriate for sexual assault cases, and that many people had said they would not use it. Instead, the June 2016 Panel Report recommended that an expert investigator or adjudicator hear complaints related to sexual assault.

Policy 131

[54] Based on the Panel's June 2016 Panel Report, UBC drafted Policy 131: Sexual Assault. The draft policy was presented to UBC's Board of Governors in June 2016. After the draft policy was presented to the Board of Governors, the Office of University Counsel and the EIO undertook an extensive community consultation exercise, which considered the June 2016 Panel Report. In addition, UBC held information and feedback sessions on both campuses and received written comments from members of the UBC community. Members of the community were invited to provide comments until October 31, 2016.

[55] On September 12, 2016, the President issued an update advising that a small working group had been created to make recommendations to UBC on processes, infrastructure and resources to best serve the community and support survivors. In addition, UBC established a Steering Committee consisting of experts and representatives of the UBC community to assist in reviewing the policy and making further recommendations.

[56] UBC used the comments and feedback in its comprehensive rewrite of Policy 131. On January 25, 2017, a revised draft of Policy 131 was provided to the Board of Governors along with a report noting that the majority of responses to the initial draft

had focused on the need for a central support office, as well as the need for a "separate and distinct investigatory process to investigate allegations of sexual misconduct made against members of the UBC community".

[57] The new draft of Policy 131 applied to all forms of sexual misconduct. In addition, it described new procedures in place for a separate and distinct investigatory process in relation to allegations of sexual violence. These investigatory procedures were to be undertaken by trained and trauma-informed investigators.

[58] The report to the Board of Governors stated:

> The creation of a separate and distinct investigatory process to address allegations of sexual misconduct made against members of the UBC community ensures that the two key concerns our community had with the prior processes - that a student committee would hear allegations made against a student, and that administrative heads of unit would be responsible for addressing allegations of sexual misconduct made against faculty and staff-have been addressed.

[59] Policy 131, substantially in the same form as the revised draft, was approved by UBC's Board of Governors on April 13, 2017. It came into effect on May 18, 2017.

[60] In addition, UBC has now centralized its processes for responding to allegations of sexual violence through the creation of a Sexual Violence Prevention and Response Office. This Office is a single point of content and liaison for UBC students, faculty, and staff who have experienced sexual assault, harassment, or any other forms of sexual violence.

[61] UBC has also hired a Director of the Sexual Violence Prevention and Response Officer and a Sexual Assault Intervention and Prevention Advisor. In addition, UBC has contracted with Peak Resilience, a counselling practice with expertise in supporting survivors of sexual violence.

[62] Finally, UBC has created a Director of Investigations position. This position is to oversee investigations and engage third-party investigators and alternative dispute resolution practitioners as appropriate under Policy 3 and Policy 131.

Complaint against Fellow Student

EP Sexual Assault Allegations

[63] Ms. Hale alleges that on or about January 12, 2013, she was sexually assaulted by a fellow UBCO student ("EP").

[64] As a result of the Tribunal's decision on February 8, 2018, *Hale v. University of British Columbia Okanagan and another,* 2018 BCHRT 34, which I have referred to above, ("Time Limit Decision"), the alleged assault, as well as Ms. Hale's initial disclosure to various members of the UBCO community and UBCO's responses prior to February 2016, are scoped out of her human rights complaint.

Ms. Hale's Complaints to UBC

[65] In February 2016, Ms. Hale was referred to the EIO in Vancouver. The EIO advised her that it was their job to identify resources and processes that would be most appropriate to address her concerns, including mediation. They also advised her that they did not have access to formal investigatory or disciplinary processes, but that the NAM Committee process did.

[66] The EIO referred Ms. Hale to the Security Co-ordinator (Student Conduct and Safety), Troy Campbell. In March 2016, Mr. Campbell told Ms. Hale that he would conduct an investigation of her sexual assault complaint. Mr. Campbell said that his report would be provided to the NAM Committee, which might then address the complaint through a hearing or meeting.

[67] Mr. Campbell interviewed a number of witnesses, including EP, other individuals who were with Ms. Hale on the night of the alleged sexual assault, and individuals with whom Ms. Hale had spoken after the alleged assault. Mr. Campbell also reviewed documents provided by Ms. Hale and others.

[68] On or about April 6, 2016, Mr. Campbell submitted his report to the NAM Committee. Mr. Campbell requested that the NAM Committee review the facts forming the basis of Ms. Hale's allegations and make a determination as to whether EP had breached the Code of Conduct.

[69] By mid-July 2016, Ms. Hale was told that a NAM Committee hearing would take place in the fall but she says that she had not received other information about the process. She says that she found it difficult to obtain information about the process and that she made multiple inquiries that went unanswered. Ms. Hale says that the lack of timely and informative communication substantially increased her distress and anxiety.

[70] On or about September 1, 2016, UBC cancelled the hearing that was scheduled for the next day because one member of the NAM Committee panel became unavailable.

[71] By letter dated September 13, 2016, Ms. Hale's counsel wrote to UBCO and submitted that the NAM Committee process was not suitable to address Ms. Hale's complaint of sexual assault.

[72] The letter requested that UBC appoint a trained, experienced, impartial arms-length investigator to investigate the complaint. The letter also asked UBC to treat Ms. Hale as a full participant in its investigation, with access to documents, interview summaries, and draft reports. The letter stated that Ms. Hale required the ability to comment on any report before it was finalized and that UBCO was required to provide her with financial assistance for legal counsel and counselling.

[73] By letter dated October 7, 2016, counsel for UBC advised that it declined to appoint an investigator or follow a process that Ms. Hale had requested. The letter simply asked Ms. Hale to advise whether she would continue to participate in the NAM Committee process. It advised that if she declined to participate, the NAM Committee process would continue without her.

[74] UBCO wrote to Ms. Hale on October 27, 2016, and again on November 3, 2016, requesting confirmation as to whether Ms. Hale intended to participate in the process.

[75] Counsel for Ms. Hale responded on November 4, 2016 and indicated that Ms. Hale was seeking information from her psychologist concerning her participation in the process.

[76] By letter dated November 18, 2016, counsel for UBCO advised that the NAM Committee hearing would proceed on November 25, 2016.

[77] On or about November 22, 2016, counsel on behalf of Ms. Hale wrote to counsel for UBCO attaching a letter from Ms. Hale's psychologist, Dr. Kim Maertz ("Dr. Maertz letter"). In the letter, Dr. Maertz indicated that as a result of Ms. Hale's lack of trust in the NAM Committee process, he had recommended that Ms. Hale not participate in the process. Dr. Maertz was of the view that the NAM Committee process was inappropriate to deal with the nature of Ms. Hale's complaints.

[78] I will return to the Dr. Maertz letter, as UBCO takes issue with how the Tribunal considered it and alleges error in this regard.

[79] The NAM Committee hearing nevertheless proceeded on November 25, 2016. The NAM Committee heard evidence from EP and others, and received the statements provided by Ms. Hale to Mr. Campbell and others. Ms. Hale did not participate in the hearing.

[80] The NAM Committee concluded that there was insufficient evidence to conclude on a balance of probabilities that EP had engaged in non-academic misconduct contrary to the Student Code of Conduct. The Chair of the NAM Committee communicated that decision to the UBC President on or about February 22, 2017.

[81] On or about March 1, 2017, counsel for UBCO communicated the result of the non-academic misconduct hearing to counsel for Ms. Hale.

Procedural History

Human Rights Complaint

[82] On August 30, 2017, Ms. Hale filed a human rights complaint against EP and the Petitioner. As a result of the Time Limit Decision, EP is no longer a party to the complaint**.**

[83] In the complaint, Ms. Hale alleges that UBC had discriminated against her in relation to the prohibited grounds of (1) sex, and (2) mental disability.

Time Limit Decision

[84] On February 8, 2018, following submissions from UBCO and Ms. Hale, the Tribunal issued the Time Limit Decision referred to above.

[85] Ultimately, the Tribunal accepted Ms. Hale's complaint for filing against UBCO only in relation to "a continuing contravention from February 2016 until March 2017 regarding the processes dealing with Ms. Hale's complaint against [EP].": Time Limit Decision at para. 68.

Application to Dismiss

[86] On June 15, 2018, UBC filed an application to dismiss the complaint without the need for a full hearing on the merits, based on ss. 27(1)(c) and/or 27(1)(d)(ii) of the *Code.*

[87] The relevant sections of the *Code* are:

> Dismissal of a complaint
>
> 27(1) A member or panel may, at any time after a complaint is filed and with or without a hearing, dismiss all or part of the complaint if that member or panel determines that any of the following apply:
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> …
>
> (c) there is no reasonable prospect that the complaint will succeed;
>
> (d) proceeding with the complaint or that part of the complaint would not
>
> …
>
> (ii) further the purposes of this Code;

Tribunal Decision: Application to Dismiss

[88] In its Decision dated January 31, 2019, the Tribunal dismissed UBC's application to dismiss Ms. Hale's complaint under both ss. 27(1)(c) and 27(1)(d).

[89] An ATD serves as a gate-keeping function in which the Tribunal exercises its discretion to dismiss those complaints which do not merit the time or expense of a full hearing. Under s. 27(1)(c), the Tribunal is to determine whether there is no reasonable prospect that the complaint will succeed: *Gichuru v. British Columbia (Workers' Compensation Appeal Tribunal),* 2010 BCCA 191 at para. 31 [*Gichuru*]. The threshold is low and the complainant need not prove the elements of their case. Instead, they need only show that the "evidence takes the case out of the realm of conjecture.": *Workers' Compensation Appeal Tribunal v. Hill,* 2011 BCCA 49 at para. 27. The burden is on the respondent to the complaint to show that it has no reasonable prospect of success: *Stonehouse v. Elk Valley Coal (No. 2),* 2007 BCHRT 305 at para. 11.

[90] Under s. 27(1)(d), the Tribunal can dismiss the complaint if it would not "further the purposes of the *Code*". Such reasons include: "where a complaint has been settled, where the complainant has engaged in misconduct, where it duplicates the substance of an existing complaint by the same complainant, or where a respondent has responded appropriately to the complaint": *Saran v. Santec Consulting and Others,* 2008 BCHRT 372 at paras. 12–13.

[91] An ATD is not a full hearing and the Tribunal makes no findings of fact and does not weigh the evidence: *Gichuru* at para. 25.

Standard of Review

[92] Section 32 of the *Code* provides for the standard of review of decisions applicable to the Tribunal. It is the standard of review set out in s. 59 of the *Administrative Tribunals Act,* S.BC. 2004, c. 45 [*ATA*]:

> 59 (1) In a judicial review proceeding, the standard of review to be applied to a decision of the tribunal is correctness for all questions except those

> respecting the exercise of discretion, findings of fact and the application of the common law rules of natural justice and procedural fairness.
>
> (2) A court must not set aside a finding of fact by the tribunal unless there is no evidence to support it or if, in light of all the evidence, the finding is otherwise unreasonable.
>
> (3) A court must not set aside a discretionary decision of the tribunal unless it is patently unreasonable.
>
> (4) For the purposes of subsection (3), a discretionary decision is patently unreasonable if the discretion
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> (a) is exercised arbitrarily or in bad faith,
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> (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.
>
> (5) Questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly.

[93] The Tribunal's decisions under ss. 27(1)(c) and 27(1)(d)(ii) are discretionary, and thus the standard of patent unreasonableness set out in s. 59(4) of the *ATA* applies.

[94] In *Canada (Minister of Citizenship and Immigration) v. Vavilov,* 2019 SCC 65 [*Vavilov*], the Supreme Court of Canada revisited and clarified the standard of review in relation to judicial review of administrative decision-makers. The Court endorsed a "reasons first" approach, directing reviewing courts to review the decision maker's reasoning process and the outcome. This is to involve inquiring into the reasons provided and "seeking to understand the reasoning process followed by the decision maker to arrive at its conclusion": at paras. 83–85.

[95] *Vavilov* does not alter the statutory standard of review nor does it change the meaning of "patent unreasonableness". The Court in *Vavilov* confirmed that "legislated standard of review should be given effect" and thus patent unreasonableness remains as the applicable standard of review: at para. 34.

[96] Subsequently, decisions of this Court have held that *Vavilov* does not change the law with respect to the meaning of patent unreasonableness under the *ATA:*

College of New Caledonia v. Faculty Association of the College of New Caledonia, 2020 BCSC 384 at para. 33 [*New Caledonia*]. In *New Caledonia* at para. 31, the court cited with approval comments from *Red Chris Development Company Ltd. v. United Steel Workers,* 2019 BCSC 2216 at para. 51 [*Red Chris Development Company Ltd.*], defining the patently unreasonable standard as ""clearly irrational", "evidently not in accordance with reason", or "so flawed that no amount of curial deference can justify letting it stand"".

[97] Although the Court's decision in *Vavilov* was concerned with reasonableness review and does not alter the meaning of patent unreasonableness, this Court has subsequently accepted the "reasons first" approach as applicable to review on the patent unreasonableness standard: *Guevara v. Louie,* 2020 BCSC 380 at para. 48; *Metro Vancouver (Regional District) v. Belcarra South Preservation Society,* 2020 BCSC 662 at para. 26.

[98] The general inquiry to be addressed then concerning the reasons of the Tribunal is: Are they so "clearly irrational" or "so flawed" that this Court cannot justify letting them stand?

Section 27(1)(c)

[99] UBC submits that the Tribunal exercised its discretion in a patently unreasonable manner and the court's intervention is warranted.

[100] Before addressing these submissions, I will note that there are aspects of the Decision with which UBCO takes no issue.

[101] UBCO agrees with the Tribunal's articulation of the legal test that Ms. Hale would need to meet to succeed in her complaint at a hearing, which is the test from *Moore v. British Columbia (Education),* 2012 SCC 61 [*Moore*]:

> [42] To succeed in her complaint at a hearing, Ms. Hale would have to establish that she has the protected characteristics of sex or mental disability, that she experienced an adverse impact regarding UBC's provision of a service customarily available to the public, and that her protected characteristic was a factor in the adverse impact: *Moore v. British Columbia (Education)*, 2012 SCC 61, at para. 33.

[102] UBCO also agrees with the Tribunal's statement of the legal test that it was required to apply to have the complaint dismissed pursuant to s. 27(1)(c):

> [43] However, on this application under s. 27(1)(c), the burden is not on Ms. Hale to prove the elements of her case. She must merely show that the evidence takes her case out of the realm of conjecture: *Hill* at para. 27; *Stonehouse v. Elk Valley Coal (No. 2),* 2007 BCHRT 305; *Purdy v. Douglas College and others,* 2016 BCHRT 117 at para. 50. UBCO has the burden to show there is no reasonable prospect that Ms. Hale could succeed in proving her complaint.

[103] UBCO takes no issue with the Tribunal's identification of UBCO as a service provider within the meaning of s. 8 of the *Code* with an obligation to provide a safe and harassment-free environment.

[104] Finally, UBCO acknowledged the two "streams" of services UBCO provided to students. The identification of these two "streams of services" is consistent with "service customarily available to the public" requirement from the *Moore* test:

> [47] In my view, this case suggests that the services UBCO provides to students in response to allegations of sexual misconduct and other forms of harassment have two streams. The first is providing support including accommodation as necessary to survivors of alleged sexual assault to ensure that they can continue in their studies. There appears to be some recognition of this, at least in the 2016 Protocol, within the materials UBCO has at its disposal to inform its approach to reports of alleged sexual assault. The second is enforcing its policies for providing a safe and harassment free education environment by investigating complaints and disciplining as appropriate those who violate such policies. This complaint involves both of these streams, and I will refer back to them below.

[105] Following these findings, the Tribunal embarked upon an analysis of "adverse impacts" that Ms. Hale complains of. The Tribunal describes the alleged adverse impacts as follows:

> [50] Ultimately, however, I understand the alleged adverse impacts experienced by Ms. Hale to be twofold. First, in her complaint, Ms. Hale references a lack of transparency in and information about the process; delays in communication and in the process including the last minute adjournment of the September 2 hearing; the nature of the process itself and her role (or lack thereof) within it in asserting that her participation in the NAM process exacerbated her disability, and UBCO's failure to take her disability into account led to her inability to participate in the NAM Committee hearing.

[106] Thereafter, UBCO submits the Decision suffers from several flaws which render it patently unreasonable. As set out initially in these reasons, from this point forward, UBCO alleges the following grounds of review:

> (a) The Tribunal erred in its application of the legal tests, particularly with respect to its analysis of the required nexus for disability and the question of the duty to accommodate.
>
> (b) The Tribunal failed to properly confine itself to the evidence and the Complaint before the Tribunal and misapprehended certain of the evidence before it in coming to its decision.
>
> (c) The Tribunal relied predominantly on irrelevant factors in finding that a nexus existed between sex and the alleged adverse impacts, without engaging in an analysis of the specific alleged adverse impacts and without considering Tribunal jurisprudence directly on point.

a) The Tribunal's Application of Legal Tests

[107] There are two facets to the errors UBCO alleges in the Tribunal's application of legal tests. First, UBCO states that the Tribunal engaged in predetermination by concluding that Ms. Hale had brought her complaint beyond the realm of conjecture without considering whether a nexus existed between the complaint and Ms. Hale's disability. Second, UBCO says that the Tribunal improperly collapsed the tests for *prima facie* discrimination and the duty to accommodate by treating the duty to accommodate as a freestanding duty.

[108] The alleged error of predetermination is in para. 52 of the Decision. At this point, after setting out the alleged adverse impacts suffered by Ms. Hale, the Tribunal stated:

> [52] In the abstract, the adverse impacts experienced by survivors of sexual assault are well documented, including in various of the literature submitted in the materials before me. Here, Ms. Hale has clearly been in the care of a psychologist and remains out of school. In the context of a gate-keeping decision, and in the absence of any dispute from UBC as to whether Ms. Hale experienced the adverse impacts I have outlined above, in my view, there is enough evidence in the materials before me to bring Ms. Hale's complaint beyond the realm of conjecture. [Emphasis added.]

[109] It is not apparent to me that the Tribunal had "plainly already decided" (as UBCO submits) that the *entirety* of Ms. Hale's complaint was beyond the realm of conjecture before considering the nexus requirement.

[110] In my view, a sensible and deferential reading suggests that the Tribunal is merely signaling that there is enough evidence before it to bring the *adverse impacts aspect* of the complaint beyond the realm of conjecture. This reading is made apparent by the placement of para. 52 in the Decision, which is beneath the heading "Adverse Impacts". It is at paras. 53–56 and 61–68, the Tribunal then independently considered the nexus requirements for both sex and disability. In my opinion, it is not patently unreasonable for the Tribunal to assess each element of Ms. Hale's complaint independently in this way.

[111] UBCO also alleges error in the treatment of the duty to accommodate as a freestanding duty. In describing this alleged error, UBCO takes particular issue with the Tribunal's treatment of the Dr. Maertz letter.

[112] As previously mentioned, the letter of Dr. Maertz addressed the NAM Committee process and recommended that Ms. Hale not participate in that process as, in the view of Dr. Maertz, it was an inappropriate process to deal with Ms. Hale's complaints.

[113] In its application to dismiss, UBCO argued that this letter was incapable of establishing the requisite nexus between Ms. Hale's disability and the adverse impacts that she alleged. This was because, in UBCO's submissions, it did not establish that Ms. Hale had a medical condition that impacted her ability to participate in the NAM Committee hearing.

[114] The Tribunal did not directly address the argument of UBCO that the letter of Dr. Maertz was incapable of establishing a nexus between Ms. Hale's disability and the adverse impacts it had previously identified. Instead, the Tribunal stated that the letter spoke to the "question of accommodation", which it would "loop back to… in a moment": at para. 56.

[115] In that same paragraph, the Tribunal then acknowledged that UBCO did not dispute that Ms. Hale has a mental disability nor that she experienced an adverse impact. Finally, the Tribunal wrote that:

> … were Ms. Hale to prove that the NAM process exacerbated her disability or created a bar to her participating in the NAM Committee hearing, or that her sex or mental disability was a factor in her inability to return to her studies thereafter, she will have made a case of discrimination.

[116] The Tribunal then stated that the analysis had shifted to considering "whether it is reasonably certain that UBCO would establish that it had reasonably accommodated Ms. Hale up to the point of undue hardship": at para. 57.

[117] UBCO says that the Tribunal erred in proceeding directly to this question of accommodation without first addressing whether a duty to accommodate had arisen based upon the complaint presented by Ms. Hale. To demonstrate that such a duty had arisen, UBCO says, Ms. Hale would have had to put forward some evidence to bring her complaint of *prima facie* discrimination beyond the realm of conjecture. This would include the so-called requirement of showing a nexus between her disability and the adverse impacts she alleged. UBCO argues that in considering this requirement, the Tribunal was required to address whether Ms. Hale had any limitations or restrictions that impacted her participation in the NAM Committee process before it determined whether she required accommodation: *A. v. Law Society of British Columbia,* 2018 BCHRT 256 at para. 106.

[118] In my view, UBCO's argument rests on an unduly narrow reading of the Decision. The Tribunal addressed each element of a *prima facie* case of discrimination separately to determine whether there was no reasonable prospect that Ms. Hale's complaint could succeed. By the time the Tribunal came to discussing the duty to accommodate, as I read the analysis, it had already accepted that there was a reasonable prospect that Ms. Hale could show a nexus between disability and adverse impacts. Having already discussed the other elements of the *Moore* test, there was therefore also a reasonable prospect that Ms. Hale could establish a case of *prima facie* discrimination.

b) Evidence Before the Tribunal

[119] UBCO also says that the Tribunal, in assessing the application, failed, at multiple points throughout the Decision, to properly confine itself to the evidence and the complaint that was before it.

[120] There are three parts to this submission. First, UBCO says that the Tribunal failed to adjudicate on the basis of the information before it and instead speculated as to what "could be established", what was "possible", and what "warrants exploration at a hearing": at paras. 65, 67.

[121] Second, UBCO says the Tribunal erred because it referred to and relied on events that were previously excluded from the complaint due to the Time Limit Decision, and consequently failed to appreciate the nature of the complaint before it.

[122] Finally, UBCO says that the Tribunal misapprehended significant evidence with respect to the duty to accommodate.

[123] Addressing the first branch of these submissions, UBCO points to three parts of the Decision where it says that the Tribunal speculated as to evidence that might become available in the future at a hearing.

[124] In its decision assessing a nexus between sex and the adverse impacts that Ms. Hale alleges; the Tribunal stated, at para. 65:

> [65] In my view, the avenue through which a nexus could be established on the basis of sex is more direct than through arguments of disproportionate representation. First, Ms. Hale says that her mental disability arises from the sexual assault. I cannot on an application to dismiss properly extricate the fact of Ms. Hale's sex from the sexual assault nor, in the circumstances before me, from her mental disability. Second, it would serve no purpose in the context of the nature of the gatekeeping exercise under s. 27(1)(c) to extricate the gendered dynamics of sexual assault and sexual assault response from the rest of the complaint. In my view, the question of what role, if any, Ms. Hale's sex played in the specific adverse impacts she alleges warrants exploration at a hearing in the context of the balance of the complaint. [Emphasis added.]

[125] In addition, at para. 67, the Tribunal stated further:

> [67] It seems to me entirely possible that a nexus could be made between the adverse impact of having to withdraw from one's studies or place of work due to fear or anxiety arising from having to confront or interact with one's alleged attacker – even absent a non-academic misconduct finding – and both sex and disability.

[126] In support of this aspect of their complaint, UBCO relies on *University of British Columbia v. Chan,* 2013 BCSC 942 [*Chan*] and *Envirocon Environmental Services, ULC v. Suen,* 2019 BCCA 46, leave to appeal ref'd [2019] S.C.C.A. No. 108 [*Suen*].

[127] In *Chan,* this Court quashed a decision of the Tribunal on an ATD in part because the Tribunal failed to confine itself to the evidence before it. At para. 77, the court stated:

> [77] Lastly, the Tribunal was not assessing the evidence before it when it stated, at para. 72, that "only after a full hearing" would it be possible to determine whether the selection committee's process was "tainted by prohibited motivations". The fact that it may be difficult to prove racial discrimination does not change the requirement that the application to dismiss must be based on the evidence before the Tribunal at the time of that application, and not based on what evidence might be adduced if the matter proceeded to a full hearing… [Emphasis added.]

[128] The court in *Chan* held that, to the extent the Tribunal based its decision on misapprehended evidence, irrelevant factors, evidence that was not before it, or evidence that *may* be established at a full hearing, the decision was arbitrary and thus patently unreasonable: at para. 78.

[129] It is apparent that a feature of this cluster of errors noted the comment of the Tribunal that "only after a full hearing is it possible to determine whether the committee's process was tainted by prohibited motivations": at para. 72.

[130] I do not read the reasoning or comments of the Tribunal in the case at bar as demonstrating that in assessing the initial evidentiary threshold, it placed reliance on evidence that might be adduced at a full hearing. I read the comments as simply acknowledging that ultimate findings of fact, concerning the role sex played in the

specific adverse impacts alleged, will necessitate a hearing and will be determined on the whole of the evidence. I do not discern that the Tribunal "failed to adjudicate [the issue] on the facts before it".

[131] In *Suen,* the Court of Appeal set aside a decision of a chambers' judge and quashed a decision of the Tribunal declining to dismiss a claim of adverse effects discrimination related to family status. Mr. Suen had been terminated after he refused to accept an out-of-province employment assignment following the birth of his daughter. The Tribunal considered that the facts alleged on the face of Mr. Suen's complaint "could be found to constitute serious interference with a substantial parental or other family duty of obligation"; and that requiring Mr. Suen to be away for a prolonged period "could be found to be "something more" than the usual work/family tensions that every parent faces at some time or another": *Suen* at para. 32, citing *Suen v. Envirocon Environmental Services (No. 2),* 2017 BCHRT 226.

[132] The Court of Appeal allowed the appeal on the basis that "the facts alleged by Mr. Suen are not capable of satisfying the second step of the *Campbell River* test [a serious interference with a substantial parental or other family duty or obligation]".

[133] In my view, the *Suen* case is not particularly instructive. Section 27(1)(c) requires a gatekeeping exercise in which the Tribunal assesses the material before it and determines the likelihood of a complaint's success at a hearing. The discretionary gatekeeping exercise at the ATD stage inherently requires the Tribunal to consider what may be revealed or established at a hearing through the testing of evidence and arguments. This is apparent from the language of *Suen* itself, which notes that the Tribunal was required to assess what "could be found" on the basis of alleged facts. The error in *Suen* was that the alleged facts, even if proven, were simply not sufficient for the Tribunal to find that there had been a "serious interference with a substantial parental or other family obligation".

[134] In my view, UBCO conflates what may be revealed through the testing of evidence and argument, with the information that was before the Tribunal. I would not accede to this ground of review.

[135] The second part of the submissions of UBCO concerns the Tribunal's reference to events that predate the date of February 2016 established by the Time Limit Decision, and thus "its failure to appreciate the nature of the complaint before it".

[136] UBCO first points to para. 54, where the Tribunal noted an email in which Ms. Hale referred to the "stress of seeing [her] rapist on campus for three consecutive years". UBCO submits this represents a misapprehension of the complaint before it because the complaint is not about a period of three years during which Ms. Hale had to see EP on campus. Rather, it is about an alleged continuing contravention through Ms. Hale's interaction with UBCO's policies and procedures from February 2016 until March 2017.

[137] Second, UBCO points to the Tribunal's mention that "Ms. Hale was initially told that she would have to disclose the alleged assault to each of her professors individually in order to avoid or otherwise navigate to deal with [EP] in her classes": at para. 67. Though the Tribunal then mentions that "I appreciate that the period in which that occurred has been scoped out of the complaint", UBCO says that the Tribunal erred by relying on this event in its analysis of a nexus between disability and the alleged adverse impacts.

[138] Again, I would not accede to this ground of review. The fact is liability cannot flow to UBCO in the event it did not act to ensure no contact occurred between Ms. Hale and EP for the "three consecutive years" from the date of Ms. Hale's email. As well, liability cannot arise from the fact that UBCO required Ms. Hale to disclose the alleged assault to her professors to navigate dealing with EP during her classes.

[139] The events from 2013 to 2016 are, however, in my view, still relevant context to the alleged needs they created for Ms. Hale. Ms. Hale says that she developed a

mental disability, including anxiety and depression, from the events from 2013 to 2016. She says this mental disability necessitated a different process than the NAM Committee hearing. I do not read the Tribunal's reasons as finding that liability could flow from the events from 2013 to 2016. In my view, the Tribunal makes these references in light of the needs that they created for Ms. Hale. These needs are relevant to UBCO's management of her complaint after February 2016, including through the NAM Committee process.

[140] Finally, UBCO complains about the Tribunal's consideration of its revised processes, including Policy 131, for addressing allegations of sexual violence in the context of the duty to accommodate. At the hearing of the ATD, UBCO put forward evidence of its revised processes as part of its argument that it would not further the purposes of the *Code* under s. 27(1)(d)(ii) to proceed with Ms. Hale's complaint, since UBC and UBCO have since changed many of the policies Ms. Hale complains about. UBCO did not apparently proffer this evidence to establish that it had reasonably accommodated Ms. Hale in the NAM Committee process. Rather, as previously mentioned, UBCO argued that the duty to accommodate did not arise because Ms. Hale had not identified any restrictions or limitations in respect of the NAM Committee process.

[141] In my opinion, it was not patently unreasonable for the Tribunal to consider the evidence of UBCO's revised processes in the context of the duty to accommodate, though UBCO did not raise it for that purpose. At the hearing of the ATD, UBCO referenced how onerous it would be for it to put in place the precise processes that Ms. Hale had requested. However, the Tribunal noted that the evidence suggested that the processes Ms. Hale had requested would not have necessitated something entirely so different than the revised processes UBCO had already put in place. The Tribunal was entitled to rely on the evidence of the revised processes to draw this connection, although UBCO had raised it in a different context. I see no error in this regard.

c) Reliance on Irrelevant Factors

[142] UBCO submits that the Tribunal erred in relying on irrelevant factors in reaching its Decision, including by:

a) Holding UBCO responsible for the adverse impacts of sexual assault on survivors; and

b) Stating that a nexus existed between sex and the adverse impacts complained of by Ms. Hale on the same basis which has previously been held by the Tribunal not to establish a nexus, i.e., disproportionate accessing of services.

a) Adverse Impacts of Sexual Assault

[143] The Tribunal set out the alleged adverse impacts flowing from Ms. Hale's complaint at paras. 49–52. The Tribunal referred to the adverse impacts experienced by survivors of sexual assault generally. I have already set out para. 52 above but do so here again for ease of reference:

> In the abstract, the adverse impacts experienced by survivors of sexual assault are well documented, including in various of the literature submitted in the materials before me. Here, Ms. Hale has clearly been in the care of a psychologist and remains out of school. In the context of a gate-keeping decision, and in the absence of any dispute from UBC as to whether Ms. Hale experienced the adverse impacts I have outlined above, in my view, there is enough evidence in the materials before me to bring Ms. Hale's complaint beyond the realm of conjecture. [Emphasis added.]

[144] UBCO acknowledges that survivors of sexual assault and violence necessarily experience adverse impacts. However, it says such adverse impacts in relation to sexual assault generally are irrelevant to the determination that the Tribunal was required to make on the ATD pursuant to s. 27(1)(c) of the *Code.* To the extent that Ms. Hale experienced adverse impacts from the alleged sexual assault, UBCO says that they arise from the incident of the alleged assault in 2013 and have thus been scoped out of the complaint.

[145] I do not interpret the Tribunal's comments about the impacts of sexual assault generally as being particularly material to its conclusions on the alleged adverse impacts suffered by Ms. Hale. These conclusions are found at paras. 50–51 of the Decision. I have already set out these paragraphs above. These include, among other things, the lack of transparency and information about the process; delays in communication; the last minute adjournment of the NAM Committee hearing; the nature of the process itself and her role (or lack thereof) in it; and UBCO's failure to take Ms. Hale's alleged disability into account. The alleged adverse impact set out at para. 51 (and again at para. 67) is Ms. Hale having to withdraw from her studies because she does not feel safe. At para. 53, in its consideration of a nexus between the adverse impacts and disability, the Tribunal described these adverse impacts in relation to Ms. Hale's interactions with the EIO and NAM Committee process.

[146] A reviewing court will not necessarily set aside a decision on judicial review because the reasoning exhibits what could be considered a minor misstep. Albeit in the context of reasonableness review, *Vavilov* directs that a shortcoming or flaw must be sufficiently central or significant to render the decision unreasonable. These comments are particularly apposite on a standard of patent unreasonableness. In my view, the role of the Tribunal's reference to the adverse impacts of sexual assault generally was not material to what it found could be the alleged adverse impacts suffered by Ms. Hale, which it had already articulated. As such, in my respectful view, even if the Tribunal fell into error, it is not the type of error that compels quashing the Decision.

b) Nexus between Sex and the Alleged Deficiencies in the UBCO Processes

[147] The remaining issue to be addressed is the alleged nexus between Ms. Hale's sex and the alleged adverse impacts that the Tribunal identified at paras. 50–51.

[148] At paras. 61–63 of the Decision, the Tribunal summarized Ms. Hale's position with respect to this nexus as follows, at para. 61:

> Moving to the ground of sex, Ms. Hale references the fact that women are more likely than men to be subject to sexual misconduct, and frames the nexus as follows:
>
> > The complaint is not that the University's processes were simply 'unfair', but that these processes discriminated against those making complaints to the University of harassment, misconduct and assault, including the complainant. The complaint alleges that the deficiencies in the policies, procedures and specific responses of the University had a differential adverse effect on the complainant as a woman complaining of sexual assault. The deficiencies in the University's response adversely affected her as a woman since her gender was a factor in the sexual assault, which was the reason why she came into contact with the University's policies, procedures and specific responses in the first place. Her experiences in the sexual misconduct process provided to her by the University did not make her safer as a woman, and exposed her to adverse treatment by the University which had a particularly negative impact on her because of her gender, and her gender related exposure to sexual misconduct and sexual violence. This is sufficient to establish the nexus required.

[149] The Tribunal proceeded by acknowledging the position of UBCO, namely, that disproportionate accessing of services is not sufficient to establish that policies aimed at addressing sexual misconduct are necessarily discriminatory on the basis of sex if the individual accessing the policies is "dissatisfied".

[150] In this regard, UBCO relied on *Vancouver Area Network of Drug Users v. Downtown Vancouver Business Improvement Association,* 2018 BCCA 132 [*VANDU*], for the proposition that disproportionate representation among a protected group does not necessarily amount to discrimination. UBCO acknowledged at the hearing of the ATD, and on judicial review, that women are disproportionately impacted by sexual assault and harassment.

[151] However, at para. 65 of the Decision, the Tribunal found that the "avenue through which a nexus could be established on the basis of sex is more direct than through arguments of disproportionate representation." It stated:

> … First, Ms. Hale says that her mental disability arises from the sexual assault. I cannot on an application to dismiss properly extricate the fact of

> Ms. Hale's sex from the sexual assault nor, in the circumstances before me, from her mental disability. Second, it would serve no purpose in the context of the nature of the gatekeeping exercise under s. 27(1)(c) to extricate the gendered dynamics of sexual assault and sexual assault response from the rest of the complaint. In my view, the question of what role, if any, Ms. Hale's sex played in the specific adverse impacts she alleges warrants exploration at a hearing in the context of the balance of the complaint.

[152] Ms. Hale adopts the Tribunal's conclusions in this regard and says that both her sex and disability were clearly "factors" in the specific sexual assault she alleges. She says that it is thus unsurprising that the Tribunal found there was a reasonable prospect she would be able to establish a nexus in respect of both sex and disability at the hearing of her complaint. She points to her need to file a sexual assault complaint and access UBC's sexual response services, the particularly harmful effect that those services had on her, and the mental disability she says that she developed as a result. Ms. Hale further agrees with the Tribunal's statement at para. 66:

> [66] It should not be controversial to say that Ms. Hale would not have required these two particular service streams had it not been for the alleged sexual assault. I cannot at this state separate the fact of Ms. Hale's sex from the circumstances that put her in contact with the NAM process nor, in the context of the materials before me presently, from her disability itself.

[153] At the hearing before me, Ms. Hale submitted and relied upon on a recent decision of the Supreme Court of Canada, *Fraser v. Canada (Attorney General),* 2020 SCC 28 [*Fraser*]. *Fraser* involved a complaint brought under the equality provision of the *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act 1982* (UK), 1982, c. 11, s. 15(1), and not human rights legislation. However, Ms. Hale submits that *Fraser* is particularly relevant to her complaint as it revisits the concept of "adverse impact discrimination" that is also prohibited under the *Code*: see in this regard *British Columbia (Public Service Employee Relations Commission) v. BCGSEU,* [1999] 3 S.C.R. 3. Ms. Hale also submits that *Fraser* clarifies what is required for a complainant to successfully demonstrate a nexus between their protected characteristics and any adverse impacts that they have suffered.

[154] At the conclusion of oral submissions, I allowed UBCO to prepare and file brief written submissions on the impact of *Fraser* on Ms. Hale's complaint. UBCO disputes that *Fraser* has any real impact on Ms. Hale's complaint or in the Tribunal's decision.

[155] I will return to the potential impact of *Fraser*.

[156] In assessing whether the Tribunal's conclusion on the issue of nexus was patently unreasonable, it will be helpful to restate s. 59(4) of the *ATA*:

> (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.

[157] As stated, UBCO's primary position is that the Tribunal's conclusion was patently unreasonable as it relied on an irrelevant factor — the disproportionate representation of women among those sexually assaulted. This submission requires two inquiries. First, are the Tribunal's reasons for finding that a nexus between sex and the adverse impacts Ms. Hale alleges properly read as relying solely, or predominately, on disproportionate representation of women among those who are sexually assaulted? And secondly, if so, is this an irrelevant factor as UBCO submits, which would render the Decision patently unreasonable under s. 59(4)(c)?

[158] UBCO points to several phrases within the Tribunal's reasons which it says demonstrate that the Tribunal rested its conclusion regarding a nexus on disproportionate representation among those sexually assaulted. Some of the references are:

a) Her sex cannot be properly extricated from the sexual assault or her mental disability: at para. 65.

b) Extricating the "gendered dynamics of sexual assault and sexual assault response" would "serve no purpose in the context of the gatekeeping exercise under s. 27(1)(c)": at para. 65.

c) Accordingly, the question of "what, if any" Ms. Hale's sex played in the alleged adverse impacts "warrants exploration at a hearing": at para. 65.

d) "Ms. Hale would not have required [the services provided by UBCO] had it not been for the alleged sexual assault": at para. 66; and

e) "I cannot at this stage separate the fact of Ms. Hale's sex from the circumstances that put her in contact with the NAM process nor, in the context of the materials before me presently, from her disability itself.": at para. 66.

[159] Certainly, while admittedly difficult to place in context, some of these references could possibly be read as an acknowledgement of women's disproportionate representation among those sexually assaulted — for example, the reference to the "gendered dynamics of sexual assault and sexual assault response".

[160] The other references are more difficult to place into context. In considering them it is helpful, at least to me, to consider the Court of Appeal's articulation of the nexus requirement from the *Moore* test in *VANDU*:

> [62] Courts have recognized the equivalency of such words as "connection", "factor", "nexus", and "link" in describing the association that must exist between adverse treatment and prohibited grounds of discrimination. On occasion, they have also used the language of "causation". As indicated in *Bombardier*, however, discussion of "causation" is generally best avoided, lest it be confused with the concept of "causation" in other areas of the law, which may involve "but for" tests and may import issues of the exclusivity, proximity, or dominance of a cause. The link required to found a claim under the *Code* need not satisfy the usual criteria that we associate with causation in other areas of the law. According to the caselaw, the adverse treatment must be "based in part" on the protected characteristics, or, the protected ground "need only have contributed to" the discriminatory acts. While this is not the strict causation applied in cases of civil liability, this

> language does describe an attenuated form of causation. This is what the Code means when it uses the words "because of".

[161] In my view, the remaining references above purport to address the nexus requirement on more direct grounds than women's disproportionate representation among victims of sexual assault generally because they are specific to the situation of Ms. Hale. For example, that "Ms. Hale would not have required [the services provided by UBCO] had it not been for the alleged sexual assault", and "the question of "what, if any" Ms. Hale's sex played in the alleged adverse impacts "warrants exploration at a hearing": at para. 65.

[162] In my opinion, to say that Ms. Hale's sex or disability could be a factor in her specific sexual assault (and the subsequent response) that she alleges, is different than saying that women as a whole are disproportionately impacted among those affected by sexual assault.

[163] However, having considered that at least some of the Tribunal references may be to disproportionate representation generally, is this an irrelevant consideration that would render the decision patently unreasonable?

[164] In *VANDU,* the Court of Appeal squarely addressed the question of whether disproportionate representation among a protected group could give rise to an inference of discrimination. *VANDU* involved a program in which certain "Ambassadors" approached people who were loitering or sleeping in front of businesses, in alcoves of buildings, and in a city park, and pressed them to move along. The program impacted primarily the street homeless population of downtown Vancouver. The Vancouver Area Network of Drug Users filed a representative complaint alleging that, because Aboriginal persons and persons with disabilities were disproportionately represented in the homeless street population, the program discriminated on the basis of race, ancestry, colour, and physical and mental disability.

[165] The primary question before the Court of Appeal was whether the Tribunal had erred in concluding there was not a nexus between the prohibited grounds of

discrimination and the adverse treatment experienced by members of the class represented by the complainant. The court concluded that the Tribunal did not err.

[166] The Court of Appeal noted that there were two types of evidence tendered that attempted to connect the adverse impacts on the street homeless to prohibited grounds of discrimination — expert evidence that attempted to connect the actions of the Ambassadors with Aboriginal ancestry, and statistical information that showed Aboriginal persons and persons with disabilities were disproportionately represented in the street homeless population. The court considered that the Tribunal was entitled to determine what weight to place on the expert evidence. The Tribunal was entitled to find, at para. 651, that Dr. Miller's evidence:

> … raises a clear potential that the actions of Ambassadors may have a differential impact on those of Aboriginal ancestry. However … there is no evidence before me which would move the evidence of Dr. Miller from a conceptual framework to lived reality. In particular, there is no evidence before me from any Aboriginal member of the Class which would support Dr. Miller's report in this regard. I cannot find that Dr. Miller's report, in and of itself, is sufficient to establish the assertion of differential impact.

[167] The court then turned to consider the statistical evidence showing disproportionate representation of the class members, which the Tribunal had accepted, and the role of statistical evidence in cases of systemic discrimination more broadly. The court considered that statistical evidence demonstrating a correlation between membership in a particular group and certain characteristics can, in some cases, point to a connection between adverse treatment and protected grounds: at para. 90. A correlation itself is not sufficient to demonstrate a nexus. The correlation may, however, be indicative of the sort of link that must be shown to draw an inference of *prima facie* discrimination: at para. 91.

[168] The court described the use of statistical evidence as follows:

> [94] Typically, in a human rights case involving systemic discrimination***, a*** decision maker will infer the existence of the requisite connection from statistical information because of an understood theory as to the nature of the connection between the facially neutral law or practice and the prohibited basis of discrimination. In this way, the claim attempts to explain why the law has a disproportionate impact on members of a protected group. This, in turn,

> demonstrates that the protected characteristic "contributed to" the suffering of the adverse treatment.
>
> [95] Various cases referred to by the parties demonstrate the effective use of statistics in showing the presence of the required link. In some cases, the connection between the facially neutral characteristic and the protected ground is simple and straightforward. In these cases, the court or tribunal may have little difficulty inferring from the statistical evidence and common sense that adverse treatment was "based in part on" protected characteristics, or that membership in a protected group "contributed to" the decision or action. In such circumstances, little more than the statistical evidence of correlation may be necessary to draw the requisite inference.
>
> …
>
> [98] In other cases, the links between the adverse treatment and the protected characteristics are more complex, multifaceted, and tenuous. In such cases, courts and tribunals will often have more difficulty using statistical evidence to draw the factual inference that membership in a protected group was a factor in discrimination. These instances may demand that the evidence of statistical correlation is supplemented with additional evidence explaining the connection. Such evidence may take the form of expert reports, direct testimony from members of the affected group, or even judicial (or official) notice. Ultimately, it is for the trier of fact, not a reviewing court, to determine whether to infer from all the evidence, including the circumstantial statistical evidence, that the complainant has established the necessary connection under the third branch of the test.
>
> [Emphasis added.]

[169] It appears to me the comments of the Court of Appeal reveal that evidence of disproportionate representation among a group, *through judicial notice*, or statistical evidence, can be a relevant consideration when assessing the nexus requirement under a case of *prima facie* discrimination (or an ATD). The court notes that statistical evidence of correlation in and of itself may be useful in *drawing an inference* of *prima facie* discrimination. In other cases, additional evidence, or a more clearly articulated theory, may be required to assist in drawing such an inference. The complainants in *VANDU* did not bring sufficient evidence to convince the Tribunal that there was, in reality, such an explanation that could be moved from the realm of theory into reality:

> [100] Before the Tribunal, the complainant did not seek to provide an explanation of the connection between street homelessness and Aboriginal background or between physical and mental disabilities and homelessness. Rather, it simply relied on statistical evidence to show that Aboriginal people and those with disabilities were more prevalent among the street homeless

> than in the general population. Intuitively, the association between homelessness on the one hand and Aboriginal heritage or disability on the other, does not appear to be mere coincidence. It is, however, a complex association. In the absence of evidence or any articulated theory, the Tribunal found the statistical correlations to be insufficient to demonstrate that prohibited grounds of discrimination were "a factor" for the purposes of establishing prima facie discrimination.
>
> [101] On this appeal, it has been suggested that the connection between homelessness and Aboriginal heritage is a result of historical discrimination, displacement, and alienation. While no explicit attempt has been made to show a similar connection between disabilities and homelessness, it is not difficult to understand that such an explanation might be advanced. These various explanations have a strong plausibility, and might, it seems to me – at least if fully articulated – establish the link necessary to connect the adverse treatment in this case with prohibited grounds of discrimination.
>
> [102] The difficulty is that it was for the Tribunal, not this Court, to test and consider these theories and to determine whether they support the inferences suggested by the complainant. These theories were not adequately advanced or proven before the Tribunal. It had no opportunity to test them, or to determine whether they served to establish the requisite link. The Tribunal expressed its conclusion as follows:
>
> > [656] [I]n the circumstances of this case, I find that there is insufficient evidence before me to establish that the actions of the Ambassadors had a disproportionate impact on members of protected groups, within the boundaries of the complaint. [Emphasis added.]

[170] Nonetheless, the statistical evidence showing disproportionate representation in *VANDU* remained relevant.

[171] The recently decided *Fraser* case was obviously not before the Tribunal. It is debatable whether it is appropriate for this decision to be before the court upon judicial review. I do not find it necessary to delve into that. I consider the decision does not impact my analysis. The approach to statistical and expert evidence described in *VANDU* is, in my view, consistent with the description provided by Abella J. concerning the use of such evidence in *Fraser.*

[172] In *Fraser,* Abella J. stated that two types of evidence will be generally helpful in proving that a law has a disproportionate impact on members of a protected group: evidence about the situation of a claimant group, which may come from the claimant, from expert witnesses, or through judicial notice; and evidence about the results of the law: at paras. 56–57. This latter type of evidence may come from

statistics, “especially if the pool of people adversely affected by a criterion or standard includes both members of a protected group and members of more advantaged groups”: at para. 58. While a claim of discrimination will ideally be supported by both types of evidence, neither is required and its use will depend on the circumstances of each case: at para. 61.

[173] This informs my conclusion that even to the extent that the Tribunal’s references to “the gendered dynamics of sexual assault” can be properly read as referring to the disproportionate representation of women among sexual assault survivors, I cannot say that this is an entirely irrelevant consideration to Ms. Hale’s complaint of alleged *prima facie* discrimination, since disproportionate representation among a group may be useful in drawing an inference of *prima facie* discrimination. Consequently, I conclude the Tribunal’s reference in this regard was not patently unreasonable within the meaning of s. 59(4) of the *ATA*.

[174] UBCO, in formulating a slightly different attack, also relied on *Rojas v. EaglePicher Energy Products and CAW Local 114 (No. 2),* 2006 BCHRT 450 [*Rojas*]; *Dalton v. Delta (Corp.),* 2010 BCHRT 9; and *Saroya v. Hudson’s Bay Co.,* 2012 BCHRT 306.

[175] In *Rojas,* the complainant was a man who had been accused of sexual harassment in his workplace and alleged procedural deficiencies in the process. At paras. 51 and 54, the Tribunal observed:

> [51] I begin by observing that these aspects of Mr. Rojas’ complaint can only succeed if his sex or other protected characteristic was a factor in how he was treated. The Code only prohibits discrimination on defined grounds. It does not create a comprehensive code of fair treatment in the workplace. An employer or a union could engage in unfair procedures in the investigation of a complaint of sexual harassment or reach wrong or unreasonable conclusions, without falling afoul of the Code. While unfair procedures might ground some other sort of legal action, including a duty of fair representation complaint against the Union under the Labour Relations Code or a grievance under the collective agreement, they would not be the basis for a complaint under the Code unless there is some connection or nexus to a prohibited ground of discrimination: *Ingram v. Workers’ Compensation Board and others*, 2003 BCHRT 57, at para. 20. I note that Mr. Rojas did not ask the

> Union to file a grievance against EaglePicher, and that he has not filed a duty of fair representation complaint against the Union.
>
> …
>
> [54] While not always the case, complaints of sexual harassment are more often than not brought by women against men. That generality does not give rise to an inference that any problems which may exist in the investigation of a harassment complaint by women against a man are the consequence of discrimination on the basis of sex.
>
> [Emphasis added.]

[176] The Tribunal considered *Rojas* in the context of UBCO's argument that the *Code* does not mandate that any particular processes be in place. It then stated that both *Rojas* (and *Maughan v. University of British Columbia*, 2006 BCHRT 33) and UBCO acknowledged that such processes must not be discriminatory. The Tribunal then stated, in the same paragraph, that it did not find *Rojas* and *Maughan* to be instructive because "Ms. Hale alleges that the processes were indeed discriminatory in that her mental disability and sex factored into the adverse impacts that she experienced through her interactions with the EIO and NAM."

[177] UCBO says that the Tribunal's failure to consider its past precedent in the context of UBCO's argument that disproportionate access among a group does not amount to discrimination renders the Decision arbitrary, and thus patently unreasonable.

[178] In my opinion, *Rojas* can and should be read in a way consistent with both *Fraser* and *VANDU*. While overrepresentation of men as those accused of sexual harassment may not *alone* give rise to an inference of discrimination, this does not change the fact that additional evidence may assist in drawing such an inference.

[179] In *Rojas*, there was no compelling evidence to show that sex was a factor in how EaglePicher addressed complaints of sexual harassment, or indeed that there was any differential impact to Mr. Rojas as a man. The procedures followed EaglePicher's "Creating a Respectful Workplace Program", which clearly communicated that sexual harassment could be perpetrated by persons of all genders against all genders. Although the names of the complainants were not

disclosed to Mr. Rojas, he was given enough information to respond. Indeed, his own affidavits revealed specifics of the allegations. Finally, although the Union representative pressed him to confess to the allegations, this was not in any way related to Mr. Rojas' gender. It was indeed common practice for Union representatives to seek confessions from employees when it had credible evidence to believe that the allegations were true. The practice, it is said, was related to the Union's own ability to seek a better outcome for an employee.

[180] Here, as I appreciate the argument, Ms. Hale says that women are disproportionately subjected to sexual violence and therefore as complainants in the university's processes for addressing allegations of sexual assault, *and* that there is evidence to demonstrate adverse impacts to her as a woman and a person with a disability in her interactions with UBCO's sexual assault response. In this regard, she relies on the Dr. Maertz letter, her own evidence, and the university's own materials detailing deficiencies in its past procedures for addressing sexual assault and harassment allegations. I do not think that it was patently unreasonable for the Tribunal not to conclude that *Rojas* was fatal to Ms. Hale's claim.

[181] Ms. Hale relied on a decision of the Ontario Human Rights Tribunal, *Laskowska v. Marineland of Canada Inc*., 2005 HRTO 30 [*Laskowska*]. Although in an employment context, I read *Laskowska* as standing for the proposition that failure of an institution to adequately investigate and respond to complaints of sexual harassment may constitute an independent breach of the *Code*. This is so regardless of whether the underlying conduct that is the subject of the investigation is found to be discriminatory. *Laskowska* establishes three criteria of "reasonableness" that the court or tribunal may draw upon to determine whether the investigation and response was adequate. These are set out at para. 59:

> (1) Awareness of issues of discrimination/harassment, Policy, Complaint Mechanism and Training: Was there an awareness of issues of discrimination and harassment in the workplace at the time of the incident? Was there a suitable anti-discrimination/harassment policy? Was there a proper complaint mechanism in place? Was adequate training given to management and employees;

> (2) Post-Complaint: Seriousness, Promptness, Taking Care of its Employee, Investigation and Action: Once an internal complaint was made, did the employer treat it seriously? Did it deal with the matter promptly and sensitively? Did it reasonably investigate and act; and
>
> (3) Resolution of the Complaint (including providing the Complainant with a Healthy Work Environment) and Communication: Did the employer provide a reasonable resolution in the circumstances? If the complainant chose to return to work, could the employer provide her/him with a healthy, discrimination-free work environment? Did it communicate its findings and actions to the complainant?

[182] Subsequent decisions of the British Columbia Human Rights Tribunal have adopted and applied the principles in *Laskowska*, including the three factors of reasonableness: *Beharrell v. EVL Nursery Ltd.,* 2018 BCHRT 62 at para. 24; *Jamal v. TransLink Security Management and another (No. 2),* 2020 BCHRT 146; *Denness v. PDK Café and others,* 2020 BCHRT 184 at para. 203; *Cvetkovska v. The University of British Columbia,* 2020 BCHRT 185 at para. 71.

[183] Again, UBCO says that Ms. Hale cannot now rely on *Laskowska* and the line of cases that follow it at this judicial review. This is so because she did not first raise them at the ATD. In any event, says UBCO, the *Laskowska* line of cases does not change the conclusion in *Rojas, Dalton,* and *Saroya* that procedural deficiencies in a sexual harassment or assault investigation do not give rise to an inference of discrimination on the basis of sex.

[184] Once more, I am satisfied that nothing turns on consideration of the *Laskowska* line of cases. Without considering *Laskowska* and the cases that follow it, the Tribunal's decision concerning a nexus between Ms. Hale's sex and the adverse impacts she alleges was not patently unreasonable.

[185] The Tribunal had before it certain evidence about the results of UBC's NAM Committee and EIO processes and the alleged disability that they caused through Ms. Hale and the Dr. Maertz letter. The Tribunal was entitled to conclude that this evidence brought this element of Ms. Hale's complaint beyond the realm of conjecture, and that UBCO had not met its burden to show there was no reasonable prospect that she could be successful in proving a nexus at a hearing.

Conclusion on Section 27(1)(c)

[186] This Court will not intervene on a judicial review of a discretionary decision of the Tribunal on an ATD unless that decision is patently unreasonable. As previously referenced, patent unreasonableness means ""clearly irrational", evidently not in accordance with reason" or "so flawed that no amount of curial deference can justify letting it stand"": *New Caledonia* at para. 31, citing *Red Chris Development Company Ltd.* at para. 51.

[187] UBCO has not convinced me that the Tribunal's Decision reaches this standard. In particular, to s. 59(4) of the *ATA,* the Decision is not exercised arbitrarily or in bad faith, exercised for an improper purpose, based entirely or predominantly on irrelevant factors, and it does not fail to take statutory requirements into account.

[188] UBCO's petition under s. 27(1)(c) is dismissed.

Section 27(1)(d)(ii)

[189] UBCO submits that the Tribunal erred in declining to dismiss any part of the complaint pursuant to s. 27(1)(d)(ii) despite acknowledging, at para. 76 of the Decision, that UBC's changes and review of its sexual assault policies could "address one element of the complaint".

[190] The Tribunal considered UBCO's argument that it would not further the purposes of the *Code* under s. 27(1)(d)(ii) to proceed with Ms. Hale's complaint, because the processes that she complains of have been remedied:

> [72] UBCO argues that it would not further the purposes of the *Code* to proceed with the complaint because the processes about which she complains have been entirely replaced. It points to the comprehensive review of its policies and processes for dealing with claims of sexual harassment and assault that resulted in an entirely new process.
>
> [73] UBC also says that it now has a dedicated policy regarding sexual assault, a sexual violence prevention and response office, a director of the sexual violence prevention and response office, a sexual assault intervention and prevention advisor, and a director of investigations. It notes among other things there is a single point of contact and liaison for UBC and UBCO students, faculty, and staff who have experienced sexual assault, sexual harassment, or any other form of sexual violence. It says that its new policy is

> survivor-centric, and also provides procedural fairness for respondents who may face serious consequences for breaches of the policy.
>
> [74] It notes that after a hearing, neither Ms. Hale nor the Tribunal would draft new policies for UBC, rather such task would be left up to it. In this case, long before the complaint was filed, a thorough and deliberate review of its processes was already undertaken. It argues that in circumstances where the policy and processes about which the complaint is made have been entirely replaced after extensive consultation, it would not further the purposes of the Code to proceed with the complaint.
>
> [75] What UBCO's argument entirely fails to consider is the provision of any meaningful recourse for a complainant who alleges having already experienced discrimination. This complaint is not like B, where the complaint arose from the complainant's need to independently access an elevator and was provided with that exact accommodation. The fact that new policies and processes for addressing sexual assault now exist at UBC and UBCO does little if anything to provide recourse for the experience Ms. Hale says she had under the old policies. I would add it also seems somewhat inconsistent with UBCO's argument that it would have been onerous to provide her with a process other than what it did at the material time.
>
> [76] While amelioration of the impugned policies certainly could address one element of the complaint, it does little to retroactively ameliorate any injury suffered by Ms. Hale with regard to the impact of the former process on her. There has been no assessment or quantification of any loss or injury sustained by her, and she remains out of school. I am not persuaded by UBCO's argument under s. 27(d)(ii) and decline to dismiss the complaint on that basis.

[191] The purposes of the *Code* are set out at s. 3:

> **Purposes**
>
> 3 The purposes of this Code are as follows:
>
> (a) to foster a society in British Columbia in which there are no impediments to full and free participation in the economic, social, political and cultural life of British Columbia;
>
> (b) to promote a climate of understanding and mutual respect where all are equal in dignity and rights;
>
> (c) to prevent discrimination prohibited by this Code;
>
> (d) to identify and eliminate persistent patterns of inequality associated with discrimination prohibited by this Code;
>
> (e) to provide a means of redress for those persons who are discriminated against contrary to this Code.

[192] UBCO placed before the Tribunal *Williamson v. Mount Seymour Housing Cooperative,* 2005 BCHRT 334 at para. 13, for the proposition that "the Tribunal's

ability to ensure that any purpose of the *Code* will be fulfilled is harmed insofar as its resources are taken up with matters that have already been adequately addressed": see also *B. v. Greater Victoria School District No. 61,* 2012 BCHRT 258 at paras. 48–49.

[193] While the Tribunal does not clarify which "one element of the complaint" has been addressed, UBCO suggests that it has plainly addressed any prospective elements of the complaint. This includes the aspects of Ms. Hale's complaint that are focused on requiring UBC to amend its former processes, which it has already taken steps to do.

[194] I consider the submission of UBCO invites a somewhat constricted reading of the Tribunal's Decision. UBCO's revisions of its policies and procedures might resolve the need for the Tribunal to order such revisions. However, the Tribunal also held that the revision of the procedures did not address the alleged harm that Ms. Hale says the previous procedures have caused her. On the basis of the alleged harm caused by the previous procedures and the need to describe such harm, the Tribunal was unable to dismiss the complaint. This was not patently unreasonable and the Tribunal did not ignore any statutory requirements in that regard.

[195] I conclude that the Tribunal's decision to decline to dismiss the complaint under s. 27(1)(d)(ii) was not patently unreasonable.

Conclusion

[196] The petition is dismissed. Ms. Hale is entitled to her costs at Scale 3.

"Mr. Justice Crossin"