Case Name:

Rezaei v. University of Northern British Columbia

IN THE MATTER OF the Human Rights Code, R.S.B.C. 1996, c. 210
(as amended)
AND IN THE MATTER OF a complaint before the British Columbia
Human Rights Tribunal
Between
Siamak Rezaei, Complainant, and
University of Northern British Columbia and University of
Northern British Columbia Faculty Association, Respondents

[2011] B.C.H.R.T.D. No. 118

2011 BCHRT 118

File No. 6934

British Columbia Human Rights Tribunal

Panel: Murray Geiger-Adams, Member

Decision: May 13, 2011.

(86 paras.)

Appearances:

Counsel for the Complainant: Walter Rilkoff.

Counsel for the University of Northern British Columbia: Patrick Gilligan-Hackett.

Counsel for the University of Northern British Columbia Faculty Association: Allan Black, Q.C., Shanti Reda and Stephanie Mayor.

REASONS FOR DECISION

APPLICATIONS TO LIMIT PUBLICATION
APPLICATIONS TO DISMISS

Introduction

1 Dr. Siamak Rezaei filed a complaint in which he alleged that the respondent University of Northern British Columbia ("the University") discriminated against him in his employment because of a mental disability, contrary to s. 13 of the *Human Rights Code* ("the *Code*"), and that the respondent University of Northern British Columbia Faculty Association ("the Association") discriminated against him as a member because of a mental disability, contrary to s. 14 of the *Code*.

2 The respondents deny that they discriminated against Dr. Rezaei, and have both filed applications to dismiss his complaint without a hearing. The respondents' applications to dismiss are supported by numerous affidavits; Dr. Rezaei's response is supported by his own affidavit.

3 On April 29, 2011, while the Tribunal's decision on the dismissal application was pending, the complainant filed an application to limit publication of the nature of his disability and "all comments alluding to it". On the same day, the Association applied for an order that the names of two of its representatives not be published by the Tribunal.

4 This is my decision on the applications to limit publication, and on the applications to dismiss.

5 The background to the complaint is set out in *Rezaei v. University of Northern British Columbia and another*, 2009 BCHRT 406 ("*Rezaei (No. 1*")):

> From September 1, 2003 to August 31, 2006, Dr. Rezaei worked in a tenure-track position as an Associate Professor in the University's Computer Science Program. He was a member of the Association, which was a party to a collective agreement with the University, and his exclusive bargaining agent with respect to the terms and conditions of his employment.
>
> The collective agreement between the University and the Association set out criteria which, if met, entitled Dr. Rezaei to one three-year renewal of his appointment, from September 1, 2006 to August 31, 2009. Two years after that, he would have been entitled to be considered for a tenured appointment.
>
> On February 28, 2006, the University informed Dr. Rezaei that it had decided not to renew his appointment, so that his employment would end August 31, 2006. The University alleged that Dr. Rezaei had not met the criterion of "satisfactory contribution to the life of the academic unit", and in particular alleged that he behaved "in ways which are disruptive and which negatively affect the Program and that behavior has followed a pattern over time."
>
> Dr. Rezaei does not dispute that allegation, but attributes his behaviour to a mental disability, of which he, the University and the Association were all unaware at the time, and which was not diagnosed until May 28, 2008.
>
> On April 28, 2006, Dr. Rezaei filed a grievance against the University's decision not to renew his appointment. On May 25, the University confirmed its decision.
>
> On June 8, 2006, the Association gave the University notice of its intention to arbitrate Dr. Rezaei's grievance. The arbitration was scheduled for March 8, 2007.

The Association and the University engaged in discussions to try to settle the grievance. Dr. Rezaei alleges that on March 2, 2007, the Association told him that if the proposed settlement was not acceptable to him, it would pursue the arbitration.

On or about March 3, 2007, the Association and the University settled Dr. Rezaei's grievance, on terms which included a leave of absence, a payment, and his resignation effective December 31, 2007. Dr. Rezaei did not agree with the settlement. He did not sign a letter of resignation, and did not receive any money.

Later in March 2007, Dr. Rezaei became aware, for the first time, of the possibility that he suffered from a mental disability. He raised with the Association the possibility that his behaviour was a consequence of his mental disability.

On March 28, 2007, the Association's counsel wrote to Mr. Rezaei's counsel, saying that if Dr. Rezaei undertook a medical examination, leading to a written diagnosis and a treatment plan Dr. Rezaei would commit to follow, counsel would write to the Association to determine whether it could consider approaching the University with an alternative to the settlement agreement.

Dr. Rezaei's family doctor referred him to a specialist. The materials do not show when Dr. Rezaei first consulted his family doctor, or when the referral was made. In any event, by the time of the referral, the first available appointment with the specialist was in early February 2008, and Dr. Rezaei saw him on February 4. The specialist suggested a possible diagnosis, but said that further testing was required.

After further testing, a psychologist wrote two reports, on May 28 and July 2, 2008, in which he confirmed the possible diagnosis suggested by the specialist, and expressed the opinion that there was a connection between Dr. Rezaei's diagnosed disability, and the behaviour which had led the University to terminate his employment.

On August 12, 2008, the Association provided the psychologist's reports to the University.

On September 25, 2008, the University acknowledged receipt of "material said to be two confidential psychology reports on Dr. Siamak Rezaei dated May 28, 2008 and July 2, 2008", but said that it had not "reviewed [these] reports in detail nor has it made any assessment of them." Rather, the University took the position that Dr. Rezaei's employment had ended September 1, 2006, that there was an enforceable settlement agreement in place, and that the University remained ready to honour that agreement.

> On October 20, 2008, counsel for Dr. Rezaei wrote to counsel for the Association urging it to pursue his grievance. She said that if the Association was not prepared to grieve, "we will immediately seek instructions to file ... a complaint before the Human Rights Tribunal."
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> On October 21, the Association informed Dr. Rezaei that it would not take Dr. Rezaei's grievance to arbitration.
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> On February 4, 2009, counsel for the University advised counsel for the Association that, in view of communications in January 2009 from counsel for Dr. Rezaei, it assumed that negotiations to resolve issues over the settlement agreement were at an end.
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> Dr. Rezaei filed his complaint with the Tribunal on March 11, 2009.
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> (paras. 5-22)

The Complaint

6 Dr. Rezaei's complaint, as accepted by the Tribunal for filing in *Rezaei (No. 1)*, alleges that the University discriminated against him in his employment on the basis of a mental disability in the following ways:

> * In terminating his employment in 2006, it failed to consider, or inquire into, whether the behaviour which led to the termination of his employment was affected by a mental disability;
> * It entered into the 2007 settlement agreement over Dr. Rezaei's objections, again without considering whether he was suffering from a disability; and
> * On September 25, 2008, it declined to act on, or even consider, evidence that the behaviour which contributed to the termination of his employment in 2006 was caused by his mental disability.
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> (paras. 55 and 61)

7 Dr. Rezaei's complaint, as accepted by the Tribunal for filing in *Rezaei (No. 1)*, alleges that the Association discriminated against him in his membership on the basis of a mental disability in the following ways:

> * It failed in 2006 to consider, and inquire into, whether the behaviour which led to the termination of his employment was affected by a mental disability;
> * It entered into the 2007 settlement agreement over Dr. Rezaei's objections, again without considering whether he was suffering from a disability; and
> * It refused to challenge the settlement agreement on the basis of Dr. Rezaei's disability.
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> (paras. 57 and 61)

The Applications to Limit Publication

Applications to Limit Publication

Dr. Rezaei's application

8 Dr. Rezaei's application to limit publication of the nature of his disability is opposed by both respondents. I have not found it necessary to ask for submissions from them on this issue.

9 Dr. Rezaei acknowledges, citing *Low v. Registered Nurses Association of B.C. and another*, 2004 BCHRT 70, that the burden on an individual seeking a "publication ban" is a heavy one. He nevertheless asserts that making the nature of his disability public would affect his ability to find other academic employment, affect his dealings with potential students, and make it more difficult for persons like him to file complaints.

10 In my view, these potential consequences are speculative. Dr. Rezaei does not say whether he has disclosed the nature of his disability to potential employers, nor does he suggest that their knowledge that he has this particular disability, as opposed to a disability, has any connection to his inability to find other employment.

11 As a result of publication of *Rezaei (No. 1)*, information that Dr. Rezaei has been diagnosed with a disability which may affect his behaviour in an academic environment is already in the public domain. I am not persuaded that identifying the nature of that disability in this decision would add anything to the effect of that publication.

12 As Dr. Rezaei has not met the burden of showing that his interest in limiting publication outweighs the public interest in access to the Tribunal's process, I decline to make the order sought.

13 That said, I have not found it necessary in this decision to refer to the specific nature of Dr. Rezaei's disability.

Association's application

14 The Association's application seeks to limit publication of the names of two of its representatives, who are not named as respondents. Dr. Rezaei opposes the application; the University has not taken a position on it. I have not found it necessary to ask for submissions from Dr. Rezaei or the University on this application.

15 One Association representative is alleged to have "used obscenities and insulted Dr. Rezaei" at a meeting during negotiation of the settlement agreement, and the other is said to have been present at that meeting.

16 Beyond asserting that "the prejudice to these individuals could be severe if the publication ban is not granted", the Association provides no basis for concluding that they "could suffer irreparable harm to their reputation, as well as embarrassment" if their names become public.

17 In the case of the first individual, the material before me indicates that he acknowledged losing his temper with Dr. Rezaei, and apologized. In the case of the second individual, the only allegation is that he was present at the time.

18 I have not found it necessary to refer to either individual in this decision, and, but for the Association's application to limit publication, would not have found it necessary to refer to this alleged incident at all.

19 In all the circumstances, as the Association has not persuaded me that the two individuals' privacy interests outweigh the public interest in access to the Tribunal's process, I decline to make the order sought.

The Applications to Dismiss

20 The University applies to dismiss Dr. Rezaei's complaint without a hearing, pursuant to s. 27(1)(c), (d)(ii), and (f) of the *Code*.

21 The Association applies to dismiss Dr. Rezaei's complaint without a hearing, pursuant to s. 27(1)(b), (c), and (d)(ii) of the *Code*.

22 Those sections provide:

> 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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> ...
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> (b) the acts or omissions alleged in the complaint or that part of the complaint do not contravene this Code;
> (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;
>
> ...
>
> (f) the substance of the complaint or that part of the complaint has been appropriately dealt with in another proceeding.

23 In my view, both applications are most appropriately dealt with under s. 27(1)(c). Accordingly, I need not decide the applications under s. 27(1)(b), (d)(ii), or (f).

Section 27(1)(c) - No reasonable prospect of success

24 In *Workers' Compensation Appeal Tribunal v. Hill*, 2011 BCCA 49 ("*Hill*"), the B.C. Court of Appeal described the Tribunal's approach to applications to dismiss complaints under s. 27(1)(c), as having no reasonable prospect of success:

> That provision creates a gate-keeping function that permits the Tribunal to conduct preliminary assessments of human rights complaints with a view to removing those that do not warrant the time and expense of a hearing. It is a discretionary exercise that does not require factual findings. Instead, a Tribunal member assesses the evidence presented by the parties with a view to determining if there is no reasonable prospect the complaint will succeed. The threshold is low. The complainant must only show the evidence takes the case out of the realm of con-

> jecture. If the application is dismissed, the complaint proceeds to a full hearing before the Tribunal. If it is granted, the complaint comes to an end, subject to the complainant's right to seek judicial review: *Berezoutskaia v. British Columbia (Human Rights Tribunal)*, 2006 BCCA 95, 223 B.C.A.C. 71 at paras. 22-26, leave to appeal ref'd [2006] S.C.C.A. No. 171; *Gichuru v. British Columbia (Workers Compensation Appeal Tribunal)*, 2010 BCCA 191, 285 B.C.A.C. 276 at para. 31.
>
> (para. 27)

25 In *Berezoutskaia*, the Court of Appeal also described the exercise under s. 27(1)(c) as a preliminary assessment of the material submitted in order to decide whether it justifies the time and expense of a full hearing, or whether, in the Tribunal's judgment, "there was no reasonable prospect that findings of fact that would support the complaint could be made on a balance of probabilities after a full hearing of the evidence" (para. 22).

26 In assessing whether Dr. Rezaei's complaint has no reasonable prospect of success, I have applied the standard approved by the Court in *Hill, Berezoutskaia* and *Gichuru* to the materials before me.

27 To succeed in his complaint at a hearing, Dr. Rezaei would have to show that he suffered from a disability, that the respondents treated him adversely, and that there was a connection between the disability and the adverse treatment. On an application under s. 27(1)(c), the burden is not on him to establish a *prima facie* case on these three elements. Rather, the burden is on the respondents to show that he has no reasonable prospect of success: *Stonehouse v. Elk Valley Coal (No. 2)*, 2007 BCHRT 305.

28 In my view, the reasonableness of the prospect that Dr. Rezaei's complaint will succeed turns on whether the respondents can show that, before they entered into the settlement agreement, they did not have, based on the information available to them, a duty to inquire whether or not he had such a disability. Accordingly, I focus on the information put before the Tribunal, and the arguments the parties make, directed at those questions.

University's position

29 The University says that, during Dr. Rezaei's employment between 2003 and 2006, neither it nor he knew that he had a mental disability. It submits that the only question is whether Dr. Rezaei has a reasonable prospect of showing that it either ought to have known that he had a mental disability, or ought to have inquired whether he did.

30 The University cites *Stevenson v. Dave Wheaton Pontiac Buick GMC (No. 2)*, 2010 BCHRT 67, as a recent case in which the Tribunal discussed the circumstances in which an employer ought to know that an employee has a disability. It says that, in that case, even where the employer was aware of a physical disability, which it had accommodated in the past, in the absence of evidence of a change in the employee's behaviour or job performance, the employer had no duty to make further inquiries.

31 The University says that, in *Matheson v. School District No. 53 (Okanagan Similkameen)*, 2009 BCHRT 112, the Tribunal referred to the duty on an employee seeking accommodation to dis-

close sufficient information to her employer to enable it to fulfill its duty to accommodate, and found that her refusal to disclose her disability was fatal to her claim.

32 The University then says that Dr. Rezaei's disruptive behaviour began at the outset of his employment in 2003, and continued through the period when it decided not to renew his appointment in 2006.

33 It refers to a December 11, 2003 memo to Dr. Rezaei from the then-chair of the program, in which the latter warned Dr. Rezaei about engaging in correspondence on academic issues in which Dr. Rezaei's tone is said to have been inappropriate and unwarranted, and for making accusations against the chair which were later acknowledged to be unsubstantiated and unfounded. The chair concluded:

> I encourage you to meet with me so that we can attempt to identify the source of your problems, clear any misunderstandings and try to find a solution that could lead to a more conducive working environment. I look forward to working with you in a collegial atmosphere.

34 The University points to its efforts to address problems, including collegiality, in the program in 2005 and 2006. In February 2005, an external consultant interviewed 18 faculty members, support staff, University administration, and Association representatives, and produced a 25-page report with recommendations, which included conducting a workshop with faculty members to clarify standards of professional conduct, and refraining from using e-mail to conduct personal battles.

35 In April 2005, the University conducted the recommended "building collegiality workshop", which reached consensus on a code of conduct for the program. The author of the 2005 recommendations and a psychologist retained by the University attended the workshop, as did Dr. Rezaei. There was a further meeting of two consultants and faculty members in December 2005.

36 In February 2006, Mr. Leischner, one of the two consultants retained by the University who had attended the December 2005 meeting, and had met individually with Dr. Rezaei, reported to Dr. Brunt, the Vice-President (Academic) and Provost, on his efforts to assist the program. In the course of his report, he described a group of three faculty, including Dr. Rezaei, as "narcissistic".

37 In May 2006, in denying Dr. Rezaei's grievance against the University's decision not to renew his appointment, Dr. Brunt referred to him behaving over time in ways which were disruptive and negatively affected the computer science program, and consisted mainly of attempts to undermine the decision-making process in the program and attacks on the chair. Dr. Brunt concluded:

> [Y]ou sought to excuse your negative communications and behavior based on the fact that your first language is not English and that, as a child, you stuttered. These facts combine, you claim, to make you frustrated and your communications therefore affected in ways that may be mis-interpreted. While I am cognizant of the potential impact these elements may have on a person's communication style, they do not explain the content of what you say, nor do they excuse you from the responsibility of acting in a collegial and professional way.

38 In light of this history, the University submits that none of Dr. Rezaei's explanations for his behaviour in this period referred to a mental disability. It says that, particularly as there was little

change in his behaviour over time, he has no reasonable prospect of showing that it ought to have known that he had a mental disability.

Association's position

39 The Association says that there is no factual basis for Dr. Rezaei's assertion that, in its representation of him leading up to the settlement agreement, it had a duty to inquire into whether he had a disability.

40 It cites *Gardiner v. Ministry of Attorney General*, 2003 BCHRT 41 in support of the propositions that a complainant has an obligation to inform a respondent of the nature of any disability, and that a respondent has no duty to inquire unless it has reason to suspect that a disability is impacting an employee's ability to work.

41 On the information before the Tribunal, the Association says that Dr. Rezaei never informed it that he may have had a relevant disability, and does not refer to any specific facts of which it was aware that would reasonably have led it to suspect the existence of such a disability.

42 The Association relies on *Ryan v. Canada Safeway and others*, 2007 BCHRT 428 as a factually similar case, in which the Tribunal found that, in its representation of an employee accused of theft, her union was not specifically informed that she was an alcoholic, and did not possess facts which would have reasonably led to consideration of whether she had a disability, and whether any disability played a role in the theft.

43 The Association submits, again relying on *Gardiner*, that it is the information it had at the time of an alleged discriminatory act, and not information acquired later, that is relevant to consideration of whether it had a duty to inquire into the possibility that Dr. Rezaei had a disability. It says that subsequently-discovered evidence of Dr. Rezaei's mental disability cannot retroactively create liability.

Dr. Rezaei's position

44 Dr. Rezaei's assertion that the respondents should have known that he had a relevant disability, or had a duty to inquire whether he did, rests on three pieces of information:

* Mr. Leischner's February 1, 2006 report to Dr. Brunt, which he says was disclosed to the Association in preparation for arbitration, in which Mr. Leischner referred to Dr. Rezaei as "narcissistic";
* Dr. Rezaei's May 24, 2006 letter to Dr. Brunt setting out possible explanations, including childhood stuttering, for his behaviour, which the Association helped draft, and of which it received a copy; and
* Dr. Rezaei's behaviour during his employment, which he says would have put the respondents on notice to investigate whether a mental disability might be at issue.

45 Dr. Rezaei refers to *Willems-Wilson v. Albright Drycleaners* (1997), 32 C.H.R.R. D/7, as a case "much closer" to the present one than *Stevenson*, relied on by the University. He says that if the owners of dry cleaning business, as in *Willems-Wilson*, should have been aware that an employee might have a mental disability, "then the highly educated leadership of a University", with the three pieces of information referred to above, must have had a duty to inquire whether Dr. Rezaei did. He

distinguishes *Gardiner* on the basis that it deals with physical, rather than mental disability, and that "the approach must be much more nuanced in the case of mental disabilities."

Analysis

Duty to inquire

46 On the materials the parties have provided, before the University and the Association settled Dr. Rezaei's grievance against the termination of his employment in early March 2007, no party directed its mind to the possibility that Dr. Rezaei's behaviour as an employee of the University was affected by a mental disability. Did either of the respondents have a duty to inquire into this possibility?

47 As noted, the University relies principally on *Stevenson* and *Matheson*; the Association on *Gardiner* and *Ryan*; and Dr. Rezaei on the Tribunal's decision in *Willems-Wilson*.

48 In *Stevenson*, the complainant was a car salesman with a vascular disease which caused pain in his legs. The respondent employer acknowledged that he had a physical disability, but denied that there was a connection between his disability and the poor performance that led to his dismissal. After a hearing, the Tribunal dismissed his complaint, saying:

> Mr. Stevenson said that the other salespeople knew he was in pain. Both Mr. Snow and Mr. Thompson testified that they were not aware of this, and that they did not observe anything in Mr. Stevenson's behaviour which indicated to them that he was in pain. Mr. Stevenson did not call any of the other salespeople to testify as to their knowledge of his pain.
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> In *Williams v. Elty Publications* (1992), 20 C.H.R.R. D/52 (B.C.C.H.R.), the complainant argued that the respondent knew or ought to have known that she was suffering from a mental disability. Because her behaviour had not changed significantly, the Council rejected this argument. (para. 69) In contrast, in *Willems-Wilson v. Allbright Drycleaners* (1997), 32 C.H.R.R. D/71, the Council concluded that, given the nature of complainant's behaviour and the circumstances, and even though the complainant had not requested an accommodation, her need for one was obvious and the employer should have made inquiries. A similar conclusion was reached by this Tribunal in *Mager v. Louisiana-Pacific Canada Ltd.* (1998), 33 C.H.R.R. D/457, para. 56.
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> I conclude that the circumstances in this case are similar to those in *Williams*. There was nothing in Mr. Stevenson's behaviour when he returned to work that did, or should have, alerted the Company to the fact that his physical disability was affecting his ability to do his job. Further, given his low sales previously, the fact that he only sold one car was not so unusual as to impose on them a duty to inquire whether Mr. Stevenson's physical disability was affecting his performance.
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> (paras. 55-57)

49 In my view, in the particular circumstances of this case, the University's emphasis on the lack of change in Dr. Rezaei's behaviour over time is misplaced. Unusual behaviour repeated over time may still, in appropriate circumstances, create a duty to inquire as to the presence of a disability.

50 What is of more significance is the question whether, while his behaviour might have been disruptive to the operation of the department, and less than collegial, it was such a departure from the ordinary norms of human behaviour that it should have alerted the University or the Association to the possible presence of a mental disability. I return to this question below.

51 In *Matheson*, the complainant alleged that she had a history of panic and anxiety attacks, and depression. In dismissing her complaint under s. 27(1)(c), the Tribunal said that she had never disclosed these conditions to her employer, beyond telling them that she suffered from "stress". Her behaviour in resigning, and then quickly rescinding her resignation because of "high stress", caused by her employer's investigation of performance issues, was not enough to put the employer on inquiry that she might be suffering from a disability, nor was a note from her doctor supporting several weeks of medical leave, when she continued to work in other employment.

52 In *Gardiner*, a decision made after a full oral hearing, the Tribunal determined that, notwithstanding prior periods of disability, and conflicting information from the complainant and his treating medical professionals, the employer was entitled to rely on the most recent information available to it, including the result of an independent medical examination, in determining that the complainant was not, for a particular period, disabled in ways which affected his work, or required accommodation.

53 In coming to that conclusion on the facts before it, the Tribunal in *Gardiner* made the following comments about an employer's duty to inquire:

> It is well-established that the employee has a duty to bring to the attention of the employer the facts relating to discrimination: *Central Okanagan School Dist. No. 23 v. Renaud* (1992), 16 C.H.R.R. D/425 (S.C.C.). It is also a generally accepted principle that a respondent must know, or ought reasonably to know, that an employee is suffering from a disability before the duty to accommodate will arise. The obligation is normally on the complainant to communicate the nature of the disability to the Respondent: *Mager v. Louisiana - Pacific Canada Ltd.*, [1998] B.C.H.R.T.D. No. 36 at para. 47. The Complainant is also obliged to participate in the efforts at reasonable accommodation. A Respondent's failure to make inquiries regarding the health of an employee before taking steps that adversely affect that employee's employment situation, where the Respondent has reason to suspect that a medical condition may be impacting in the employee's ability to work, has been found to be discriminatory in certain instances: *Willems-Wilson v. Allbright Drycleaners*, [1997] B.C.H.R.T.D. No. 26; *Martin v. Carter Chevrolet Oldsmobile*, 2001 BCHRT 37; and *Sylvester v. B.C. Society of Male Survivors of Sexual Abuse*, 2002 BCHRT 14. It is important then to determine what was known by the Respondent regarding the Complainant's disability during the February 1995 to April 1998 period.
>
> (para. 164)

54 I am not persuaded by Dr. Rezaei's submission that *Gardiner* involved physical disability, and "the approach must be much more nuanced in the case of mental disabilities". He simply states that proposition without elaboration, and cites no authority for it. The Tribunal in *Gardiner* did not make that distinction, and it cited cases involving both mental and physical disabilities. It is possible that both mental and physical disabilities, and their effect on work performance, may be manifest in some cases, and difficult to detect in others.

55 In *Ryan*, as discussed above, the complainant was an alcoholic who stole a small amount of money from the till at work. In defending against her union's application to dismiss the complaint against it under s. 27(1)(c), she said that the union knew or ought to have known that she had a substance abuse problem, and that it had a duty to inquire whether that problem was related to the theft.

56 On the material before it, the Tribunal in *Ryan* held that the complainant had no reasonable prospect of establishing that she had informed anyone in the union that she was an alcoholic before it settled her termination grievance. The Tribunal also noted that the complainant's own statement at the time attributed the theft to being "stressed and forgetful", and did not mention alcoholism.

57 As in all such cases, the Tribunal's determination in *Ryan* that the complaint against the union had no reasonable prospect of success was heavily dependent on the information on which the complainant relied in attempting to show that the union should have inquired into the existence of a disability, or the possibility of a connection between a disability and the employee's behaviour at work.

58 In *Willems-Wilson*, the complainant worked as a counter person in a drycleaning store. She had a lengthy history of emotional problems, which was not disclosed to her employer. However, the employer was aware that she was receiving counselling for marital problems, and provided relief once a week to enable her to attend the counselling sessions.

59 After several weeks of satisfactory performance, the complainant began experiencing anxiety. Her employer noticed that she became withdrawn and unfriendly at work, and learned from another merchant that she had been seen crying and distraught at the back of the store. The complainant disclosed that she and her husband had marital problems, and that she was under a lot of stress. On one occasion, her employer found her in a sleeping bag at the back of the store. She explained that she felt unsafe at home. Her employer told the social services agency which had placed her that she was under a great deal of stress, and in "personal anguish".

60 After a few weeks, during which the complainant appeared to her employer to be doing fine, he learned that she had been hospitalized for several days for emotional problems, but expected to return to work shortly. When the hospital stay became indefinite, the employer went to the hospital and terminated the complainant's employment for poor work performance, and for not telephoning him directly to report the extended absence.

61 After an oral hearing, the Tribunal determined that the employer, given the information it had about the complainant's emotional state and hospitalization, had an obligation to make inquiries about the possible connection between her manifest disability, and her performance problems at work.

62 I do not agree with Dr. Rezaei's assertion, without elaboration, that the circumstances in the present case are "much closer" to those in *Willems-Wilson* than to those in *Stevenson*. There is no equivalent in Dr. Rezaei's case to Ms. Willems-Wilson's manifest distress, need for ongoing coun-

selling, or lengthy hospitalization for emotional problems - all of which were known to her employer before he decided to fire her.

63 In *Alexander v. Northern Health Authority and others (No. 2)*, 2008 BCHRT 389, a case not cited by any of the parties, the Tribunal dismissed a complaint of discrimination based on mental disability, because it had no reasonable prospect of success. Notably, in that case one of the complainant's difficulties involved her inappropriate communications with her co-workers and supervisors.

64 The Tribunal referred to cases, including *Gardiner* and *Willems-Wilson*, and concluded that, even though the employer knew that the complainant had previously been off work for two months for anxiety and depression, it had no information from which it should have concluded that her current work and communications problems were related to a disability.

65 In reaching that conclusion, the Tribunal said:

> Ms. Alexander does not deny that she did not expressly tell the NHA Respondents upon her return to work, at any of their meetings in May, June or August or in any of her written responses to the issues raised at those meetings, that her work performance or communications were affected or caused by a mental disability. However, she says that the NHA Respondents had a duty to inquire about her mental disability since they were aware she had been absent from work for anxiety disorder and work related stressors for two months commencing November 2006 to January 2007. She says that if the NHA Respondents had inquired about her condition, she would have been accommodated, rather than disciplined.
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> ...
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> In *Zaryski* [*v. Loftsgard* (1995), 22 C.H.R.R. D/256 (Sask. Bd. Inq.)] the complainant was terminated after an uncharacteristically emotional outburst in the workplace. In *Willems-Wilson*, the complainant, amongst other things, displayed distraught behaviour in the workplace and was hospitalized at the time of her termination.
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> Ms. Alexander does not describe any similar behaviour in the workplace after her return to work in January 2007. Rather, she attended at work performing the full range of her job duties and expressed no need for accommodation. She was able to articulately defend both her work performance and communications with her employer, and, in that defence, did not raise a mental disability as a cause or contributing factor to her unsatisfactory performance or inappropriate communications. She was also able to vigorously advance two RIWP complaints and an appeal on her own behalf.
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> As well, Ms. Alexander was not in a particularly vulnerable situation, such as on leave or in the hospital. Further, she was represented by her union throughout her employment with the NHA. There is no suggestion that she was unable to or prevented from bringing any medical condition to the attention of the NHA Respondents.

(paras. 68, 71-74)

66 There are significant parallels between the situations of the complainant in *Alexander*, and that of Dr. Rezaei. Both worked for large, sophisticated employers in jobs which were complex, demanding, and required communication with others. Both were able to continue to perform their jobs over extended periods without asking for, or evidencing any need for, accommodations of any disabilities. The difficulties underlying both complaints included inappropriate communications in the workplace. Both were able to make articulate representations to their employers on their workplace difficulties. Neither was in a "vulnerable situation", in the sense of being absent from the workplace or in hospital. Both were represented by trade unions throughout

67 Arguably, Ms. Alexander was in a better position than Dr. Rezaei to argue that her employer had a duty to inquire into the possibility that her performance and communications were affected by a disability, given that it knew about a previous, lengthy absence for a diagnosed disability.

68 I have reviewed all the material the parties have put before me concerning Dr. Rezaei's communications with his fellow faculty members, supervisors, and representatives of the respondents, and the parties' accounts of his behaviour in the workplace. I express no opinion about whether those communications and that behaviour were proper grounds for the University's decision not to renew his appointment.

69 Rather, the question I have to decide is whether there is no reasonable prospect that Dr. Rezaei will be able to show that the respondents should have known that, or inquired into whether, he had a mental disability related to his conduct.

70 Based on the principles derived from the cases considered above, I do not find anything in those communications that is so far out of the norms of communication among individuals holding firm views on matters of dispute among them, or so indicative of distress, as to have put the respondents on inquiry whether Dr. Rezaei's behaviour was affected by a mental disability.

71 Further, I do not consider Mr. Leischner's report to Dr. Brunt, referring to Dr. Rezaei (and other faculty) as "narcissistic" to have put the respondents on such an inquiry. There is nothing in the materials to suggest that Mr. Leischner had any expertise in diagnosing mental disabilities, or intended to use the term as a matter of psychiatric diagnosis, rather than in its common meaning in ordinary speech.

72 In his affidavit Mr. Leischner specifically says that Dr. Rezaei "said and did nothing that suggested to me he was suffering from a mental disability. ... My perception was that Dr. Rezaei was simply very intolerant of everyone who did not give him his way." Nothing in the materials suggests that Dr. Rezaei's later-diagnosed disability was, or was related, to "narcissism".

73 Finally, I do not regard Dr. Rezaei's reference, through his memo to Dr. Brunt about his childhood stuttering, as information which should have put the respondents on inquiry about the presence of a mental disability related to his disruptive behaviour. That suggestion was, as argued by the University, one of a variety of explanations put forward by Dr. Rezaei at different times to explain his behaviour - none of which suggested a relevant mental disability as the cause. Nothing in the materials suggests that Dr. Rezaei's later-diagnosed disability was related to stuttering.

74 Even considered together, Dr. Rezaei's behaviour over the course of his employment, Mr. Leischner's reference to narcissism, and Dr. Rezaei's memo to Dr. Brunt do not persuade me that the

respondents, before they entered into the agreement to settle Dr. Rezaei's grievance, were obliged to inquire into the possibility that Dr. Rezaei had a relevant disability.

75 Neither his own behaviour, nor his suggestion to Dr. Brunt that he had stuttered as a child, caused Dr. Rezaei himself, before the settlement agreement, to make any inquiry of a doctor, psychologist or counsellor as to whether he might be suffering from a disability affecting his behaviour. In all the circumstances of this case, I do not think that the respondents can be faulted for failing to make inquiries that Dr. Rezaei did not suggest, or undertake on his own behalf.

76 This decision should not be understood as determining that unusual behaviour, which may turn out to be related to an unsuspected, undiagnosed disability, will never trigger a duty on an employer or union to inquire into that possibility. Rather, it is an acknowledgement that all such cases must turn on the details of the information available to potential complainants and respondents.

77 In this case, Dr. Rezaei's assertion that the information available to the respondents should have told them that he had a disability, or that it created a duty on them to inquire whether he did, has no reasonable prospect of success.

Settlement agreement

78 The parties made lengthy submissions on the process which produced the settlement agreement, and which followed it. To the considerable extent that Dr. Rezaei's submissions are premised on the assertion that, before entering into the settlement agreement, the respondents should have known about, or inquired into, the possibility that he had a disability, they are dealt with by my conclusion above, that he has no reasonable prospect of establishing that the respondents had such knowledge, or such an obligation.

79 To the extent Dr. Rezaei's submissions are based on alleged deficiencies in the Association's representation of him, unrelated to a disability, including entering into the settlement over his objections, that is a matter for the Labour Relations Board under s. 12 of the *Labour Relations Code*: *Vieira v. School District No. 42 (Maple Ridge -- Pitt Meadows) and others (No. 2)*, 2005 BCHRT 350.

80 That leaves Dr. Rezaei's submission, unsupported by any relevant authority, that, once it became aware of the possibility that he had a disability, the Association was obliged to pursue his reinstatement in arbitration, that the Association and the University were obliged to re-open the settlement agreement to take account of his disability, and that the failure of the respondents to do so constituted discrimination based on his disability.

81 I do not accept this submission. If correct, every such settlement would lack the finality and certainty which routinely persuade parties to design and implement their own solutions to problems between them, without resort to litigation. Every such settlement would be vulnerable, indefinitely, to being undone if a person later discovered a relevant disability, of which no one was, or could have been, aware at the time of settlement.

82 In this respect, as well, I find that Dr. Rezaei's complaint has no reasonable prospect of success.

Decision

83 Having determined that Dr. Rezaei's complaint against both respondents has no reasonable prospect of success, I exercise my discretion to dismiss it, pursuant to s. 27(1)(c) of the *Code*.

84 The University's application to dismiss Dr. Rezaei's complaint against it is granted.

85 The Association's application to dismiss Dr. Rezaei's complaint against it is granted.

86 Dr. Rezaei's complaint is dismissed.

Murray Geiger-Adams, Tribunal Member

---- End of Request ----
Email Request: Current Document: 1
Time Of Request: Thursday, April 19, 2012 15:32:24