IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Evans v. University of British Columbia,*** 2008 BCSC 1026

Date: 20080731
Docket: S-077069
Registry: Vancouver

In the Matter of the ***Human Rights Code***, R.S.B.C. 1996, c. 210 (as amended)

And In the Matter of a Decision made by the British Columbia Human Rights Tribunal on May 18, 2007

And In the Matter of the ***Judicial Review Procedure Act***, R.S.B.C. 1996, c. 241 (as amended)

Between:

Tracy Evans

Petitioner

And:

The University of British Columbia

Respondent

Before: The Honourable Mr. Justice Macaulay

Reasons for Judgment

(In Chambers)

Counsel for the Petitioner:	T.F. Beasley
Counsel for the Respondent:	M.H. Korbin
Counsel for the Human Rights Tribunal:	J. Connell
Date and Place of Hearing:	20080605-20080606; 20080618-20080619 Vancouver, B.C.

[1] In August 2007, a member of the British Columbia Human Rights Tribunal (the "tribunal") dismissed, pursuant to s. 27(1)(c) of the *Human Rights Code,* R.S.B.C. 1996, c. 210 (the "Code"), the petitioner's complaint that the respondent ("UBC") discriminated against her on the basis of sex (pregnancy) and family status. Section 27(1)(c) permits the dismissal of a complaint "at any time after a complaint is filed and with or without a hearing" if "there is no reasonable prospect that the complaint will succeed".

[2] The first issue relates to the standard of review, in particular, the amount of deference to be accorded the discretionary decision making of the tribunal. There is no privative clause in the Code. Section 59 of the *Administrative Tribunals Act,* S.B.C. 2004, c. 45 (the "ATA"), purports to set out the standard of review to be applied to decisions of tribunals where the enabling legislation does not have a privative clause. Section 59(3) states that the court "must not set aside a discretionary decision of the tribunal unless it is patently unreasonable". Ms. Evans contends that, as a result of the recent decision of the Supreme Court of Canada in *Dunsmuir v. New Brunswick,* 2008 SCC 9, the correct standard of review as it relates to the discretionary aspect of the tribunal's decision is the less deferential one of reasonableness *simpliciter.* UBC and the tribunal disagree and contend that *Dunsmuir* modifies the common law relating to standards of review but does not displace the clear legislative intent in the ATA.

[3] Even if the standard is one of patent unreasonableness, Ms. Evans contends, in light of what she describes as material evidentiary conflicts arising from the affidavit evidence and documents, none of which was tested by cross-examination,

that the decision to dismiss was patently unreasonable. In addition, Ms. Evans contends that the tribunal erred in law on important issues and denied her natural justice by failing to give her an opportunity to be heard on some issues. UBC contends that there is little in dispute that is material and, to the extent that there are disputes, the evidence overwhelmingly supports the position of the university and, ultimately, the decision of the tribunal.

[4] For the reasons that follow, I am not persuaded that the tribunal erred. Accordingly, I dismiss Ms. Evans' petition with costs payable to UBC on Scale B. My reasons are organized as set out below:

1. Standard of review to apply to discretionary decisions of the tribunal;
2. The complaint and the process;
3. The decision of the tribunal;
4. Issues and submissions of the parties;
5. Analysis and Conclusions.

1. <u>Standard of review to apply to discretionary decisions of the tribunal</u>

[5] This is purely a legal issue of broad application and not dependent on the circumstances of this case so it is sensible to deal with it at the beginning. I conclude that the *Dunsmuir* decision does not modify the clear legislative intent underlying s. 59(3) of the ATA.

[6] I already referred to some of the wording in the section but, for completeness, I set out all of s. 59 here:

> **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.
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> (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.
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> (3) A court must not set aside a discretionary decision of the tribunal unless it is patently unreasonable.
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> (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,
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> (c) is based entirely or predominantly on irrelevant factors, or
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> (d) fails to take statutory requirements into account.
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> (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.

The clear legislative intent, in my view, is to codify the applicable standard of review for the various types of tribunal decisions amenable to review.

[7] With the exceptions of findings of fact, addressed separately under subsection (2); discretionary decisions, addressed under subsection (3) and defined under subsection (4); and questions of natural justice and procedural fairness,

addressed under subsection (5); all other questions are reviewed under the least deferential standard of correctness. The most deferential standard, patent unreasonableness, is reserved only for discretionary decisions. Reasonableness, theoretically at least, a less deferential standard, applies to reviewing findings of fact. Finally, the focus in addressing questions of natural justice and procedural fairness is whether, in all the circumstances, the tribunal acted fairly.

[8] In considering the impact of *Dunsmuir* on the ATA, it must be kept in mind that the decision did not address legislated standards of review generally or, in particular, under the ATA. The Supreme Court of Canada did, however, reconsider the need for three standards of review in the current approach to judicial review, ranging "from correctness, where no deference is shown, to patent unreasonableness, which is most deferential to the decision maker, the standard of reasonableness *simpliciter* lying theoretically, in the middle" and concluded that there ought to be just two standards: correctness and reasonableness. See Bastarache and LeBel JJ., for the majority, at para. 34.

[9] The collapsing of the patent unreasonableness and reasonableness *simpliciter* standards into a single standard of reasonableness resulted, in part, from the historical difficulties in distinguishing between them as well as the anomaly created by sometimes applying the patently unreasonable standard to preserve an unreasonable decision (para. 39). Further, the majority concluded from a review of the cases that any actual difference in the operation of the two standards appeared illusory (para. 41).

[10] The majority described the new reasonableness standard, at para. 47, as follows:

> 47. Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[11] The petitioner contends in her written argument that the court should adopt this definition in determining patent unreasonableness under s. 59 of the ATA. In my view, that goes too far and would require me to ignore the clear legislative intent underlying s. 59 as it relates to discretionary tribunal decisions. It is also apparent from a reading of *Dunsmuir* that the courts, in the context of the particular decision under review, must continue identifying the potentially differing levels of deference required to determine if it is reasonable.

[12] The factors identified in s. 59(4) as rendering a discretionary decision patently unreasonable connote a high degree of deference. The case law requires that at least one of those factors must be established before concluding that a discretionary decision of a tribunal is patently unreasonable and to be set aside.

[13] Having said that, the majority decision in *Dunsmuir* is still helpful in considering the contextual interplay between reasonableness and deference in judicial reviews. It reinforces the need for the courts to respect the decision-making process of adjudicative bodies (para. 48), a form of respectful deference. Thus, the move towards a single standard of reasonableness was not intended to "pave the way for a more intrusive review by courts" (para. 48).

[14] In a minority concurring judgment, Binnie J. alerts us to the danger that collapsing the common law standards of patent unreasonableness and reasonableness to a single standard might be seen as also collapsing the degree of deference to a singular approach. He points out that there necessarily remain differing dimensions to the deference owed within a reasonableness standard:

> ... That said, a single "reasonableness" standard will now necessarily incorporate *both* the degree of deference formerly reflected in the distinction between patent unreasonableness and reasonableness *simpliciter*, <u>and</u> an assessment of the range of options reasonably open to the decision maker in the circumstances, in light of the reasons given for the decision. Any reappraisal of our approach to judicial review should, I think, explicitly recognize these different dimensions to the "reasonableness" standard. (para. 149).

This observation is apposite and illustrates the danger in the approach that the petitioner urges.

[15] The petitioner's argument is also bound to fail because of previous appellate authority interpreting s. 59 and, more recently, post-*Dunsmuir*, a decision of the Supreme Court of British Columbia on the three standards of review set out in the section. In *Carter v. Travelex Canada Ltd.,* 2008 BCSC 405, a recent decision,

Hinkson J. concluded that the three standards of review set out in the ATA remain despite *Dunsmuir* (para. 14).

[16] The leading authority respecting the standard of review under s. 59 is *Berezoutskaia v. British Columbia (Human Rights Tribunal),* 2006 BCCA 95, leave to appeal to S.C.C. refused [2006] S.C.C.A. No. 171, even though the decision predates *Dunsmuir*. In *Berezoutskaia,* the chambers judge had applied the law respecting patent unreasonableness taken from a review of case authorities dealing with standards of review in administrative law rather than applying the definition of "patently unreasonable" set out in s. 59(4). The Court of Appeal concluded that cases decided before the enactment of the ATA "are no longer controlling on question[s] of the appropriate standard of review" (para. 19). Instead, the chambers judge should have applied the definition set out in s. 59(4). Later, when I discuss the reasoning process and findings of the tribunal, I will return to *Berezoutskaia* as it is helpful in analyzing the petitioner's criticisms of the approach that the tribunal employed.

2. <u>The complaint and the process</u>

[17] In September 2006, Ms. Evans filed a Complaint with the tribunal alleging that UBC, her employer, had breached the Code. In the Complaint, she set out her work qualifications and details of her employment position at the Snutch laboratory; described becoming pregnant in 2004; arranging at work for pregnancy and parental leave commencing June 19, 2005; continuing work-related responsibilities during her leave; and finally, described the series of events around the time of her return to

work culminating, according to her, in UBC constructively terminating her employment.

[18] Paragraphs 25 to 28 of Appendix A to the Complaint set out Ms. Evans' allegations of discrimination, as follows:

> 25. UBC treated me differently than the other laboratory employees because of my pregnancy and my Leave. They used my Leave as an excuse to permanently split up my duties and not seek work for me when I returned. They constructively terminated my employment by refusing to provide me with work and/or refusing to extend my Leave to allow them more time to find replacement work.
>
> 26. UBC's refusal to extend my Leave without any valid reason when they knew that I did not have daycare until September constitutes discrimination against me on the basis of my family status.
>
> 27. For 12 years I had been a valued member of the department. However, that changed when I became pregnant and took my Leave. It became clear that Dr. Snutch and others did not want me to work after my Leave. In making my role redundant, UBC discriminated against me on the basis of my pregnancy and my Leave.
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> 28. UBC's conduct constitutes discrimination on the basis of sex (pregnancy) and family status within the meaning of section 13(1)(a) and (b) of the *Human Rights Code*.

[19] UBC responded to the Complaint, in part, by filing an Application to dismiss pursuant to ss. 27(1)(b), (c), and (d) of the ATA. In support, UBC relied on an affidavit from Dr. Snutch in which he disputed some of the factual recitals in the complaint. For example, Dr. Snutch agreed with the petitioner's description of her duties, including those relating to the operation of the lab, but disputed that her position included a managerial component. He also disagreed with the petitioner's

contentions respecting the amount of work she performed during her leave as well as her description of the events surrounding her scheduled return to work. As to the allegations of discrimination, he deposed:

> 44. It was my expectation throughout Ms. Evans' leave that she would return to work in the Snutch Lab and it was my intention to fully integrate her back into the workplace with her choice of research projects. At no time before or during her three days at work on July 24, 25 and 26, 2006 did Ms. Evans ever express a concern over the work or the pace with which we were identifying research projects for her.
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> 45. On the morning of July 27, and 28, 2006 I attempted to arrange a meeting with Ms. Evans, Dr. Garcia, Dr. Tyson, and myself to discuss the research projects which we had identified to give her an opportunity to select which project(s) she was most interested in working on. I was however unable to locate Ms. Evans on either of those days and the meeting was never held. Ms. Evans never returned to the Snutch lab after July 26, 2006 and instead she filed the Complaint.
>
> 46. I deny that the University discriminated against Ms. Evans in any way. I deny that we denied her requested leave because of family status or her gender. Rather, we denied her request for an extended leave for operational reasons. I deny that we changed her duties or made her redundant because of family status or her gender. She was not made redundant at all. There was meaningful research work for her to do, but she abandoned her position before we were in a position to offer it to her. We were looking forward to reintegrating Ms. Evans into the Snutch lab after her leave, that is why we wanted her back sooner rather than later, but she frustrated our intentions and efforts by precipitously abandoning her position and opting for litigation.

Dr. Garcia, a Senior Research Associate, working at the Snutch lab, provided an affidavit to corroborate Dr. Snutch's affidavit and to describe her own dealings with the petitioner respecting the matters in dispute. UBC also filed a written submission

with the tribunal primarily focused, under s. 27(1)(c) of the Code, on whether there was a reasonable prospect that the complaint would succeed.

[20] After an agreed upon period for the disclosure and exchange of relevant documents, Ms. Evans swore an affidavit in response to the Snutch and Garcia affidavits. She also attached copies and addressed the implications of various documents disclosed to her by UBC. In addition, her lawyer provided a written submission to the tribunal.

[21] Finally, UBC filed a response submission together with nine affidavits including an additional one from Dr. Snutch. The others included various employees at the Snutch lab, including a post-doctoral fellow, a senior research associate, three graduate students and Dr. Snutch's executive assistant. The final two affidavits were from Human Resources employees of UBC. In general terms, the affidavits disputed Ms. Evans' account of the events surrounding her return to work and supported the evidence of Dr. Snutch.

[22] I observe that the Code and the rules of procedure promulgated for the tribunal do not require the parties to submit affidavits in support of, or in response to, an application to dismiss under s. 27(1) of the Code, although the application and the submissions must be in writing. This is meaningful when considering the manner in which the tribunal deals with factual disputes within the context of deciding whether to dismiss a complaint.

[23] Section 27(1)(c) reads as follows:

> 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;

For the purpose of making a decision or order in respect of a complaint, a member of the tribunal may receive evidence on oath (s. 27.2). Pursuant to s. 27.3, the tribunal may make rules "respecting practice and procedure to facilitate just and timely resolution of complaints". This includes, under subsection (2)(b), making rules:

> Respecting disclosure of evidence, including but not limited to prehearing disclosure and prehearing examination of a party on oath or solemn affirmation or by affidavit.

As a result, absent any rule requiring the parties to rely on sworn evidence, the legislation contemplates that the tribunal may determine whether to dismiss a complaint under s. 27(1)(c) solely on the basis of unsworn materials. In spite of that, as a result of the choices made by the parties, the member of the tribunal assigned the complaint had sworn affidavit evidence to consider in addition to the application and written submissions.

3. <u>The decision of the tribunal</u>

[24] The member of the tribunal assigned the complaint issued a written decision on August 22, 2007. Near the beginning of her reasons, she stated that she had read and considered all of the lengthy submissions of the parties. After setting out the background to the dispute, she indicated that she was dismissing the complaint

for the reasons following in her decision. Those reasons were then organized under headings, as follows:

A. UBC's refusal to extend Ms. Evans' Leave or to allow her to return on a part-time basis

B. Ms. Evans' return to work

1. Lab Manager

2. Ms. Evans' research assistant duties

3. Discussion

As I will set out in the next section, at the core of the petitioner's administrative law challenges are two alleged deficiencies/errors relating to the tribunal's reasons.

4. Issues and submissions of the parties

[25] Ms. Evans alleges numerous errors in law; errors of natural justice and procedural fairness; and finally, that the decision was unreasonable or patently unreasonable. The following are examples of alleged errors of law (and accordingly, subject to review on a standard of correctness):

1. In failing to "follow" the minimum standards of the *Employment Standards Act,* R.S.B.C. 1996, c. 113 (the "ESA"), requiring that Ms. Evans be placed, on her return to work, in the position she held before her leave or in a comparable position;

2. In accepting that it was necessary to reassign Ms. Evans' duties and that no one was identified as lab manager;

3. In failing to require UBC to demonstrate that it could not accommodate Ms. Evans;

4. In failing to conclude that UBC discriminated by refusing to allow Ms. Evans to work part-time hours; and

5. In failing to conclude that the change in terms of Ms. Evans' employment resulted in a "serious interference with [her] substantial parental or other family duty or obligation" and thus constituted a *prima facie* case of discrimination.

She further submits that the tribunal decision to allow the application to dismiss and deny the complaint an opportunity to proceed to a hearing should be set aside on a standard of reasonableness or, alternatively, as patently unreasonable. In this respect, she contends that the tribunal failed to properly address the conflicts in the affidavit material and to conclude that those conflicts could only be resolved by permitting a hearing. In essence, Ms. Evans contends that evidentiary disputes that go to the heart of a complaint cannot be resolved at a preliminary stage, at least not without the opportunity for cross-examination.

[26] Ms. Evans also alleges breaches of natural justice, subject to review on the fairness standard under s. 59(5) of the ATA. These include, according to the petitioner, findings by the tribunal, without giving her the opportunity to be heard or to adduce evidence, that she did not want to return to work on a full-time basis; that she failed to ensure in a timely manner that daycare was available for her son; and that she preferred to put her son in the UBC daycare.

[27] The petitioner's identification of issues according to the applicable standard of review is not uniformly helpful. For example, most of the legal and factual issues are intertwined and form part of the discretionary decision-making process. In that context, legal issues are not parsed out and subject to the standard of correctness. See *Dunsmuir* at para. 53. Similarly, there is an element of fact-finding in the discretionary decision-making process, but the fact-finding is not subject to the separate standard of review set out in s. 59(2) of the ATA; rather, ss. 59(3) and (4) continue to apply. See *Berezoutskaia* at para. 21. In the present case, such intertwined issues are subject to review under the standard of patent unreasonableness as defined in s. 59(4).

[28] As to the issue respecting the tribunal's alleged failure to apply the ESA, I observe that the petitioner never expressly raised any question about minimum standards under the ESA before the tribunal. It is difficult to see how, in the circumstances, that the tribunal could have erred in law in failing to expressly consider its application. Nothing turns on this because the references to the ESA before me were largely to illustrate the discriminatory effect of the alleged constructive dismissal.

[29] The fairness standard under s. 59(5) does not come into play. The tribunal is not required to conduct an oral hearing before deciding whether to dismiss a complaint. The parties chose to submit affidavits to the tribunal for consideration in reaching a decision under s. 27(1)(c) of the Code, but that did not convert the process into an oral hearing. Ms. Evans received and had the opportunity to respond to the UBC affidavits and submissions. Ms. Evans' complaints that the

tribunal decided matters without evidence are not borne out on a reading of the decision.

[30] As I understand the petitioner's written and oral submissions, her main arguments, apart from determining the applicable standards of review, collapse into two, namely that:

1. The tribunal failed to understand and address her contention that she always intended to return to work full-time; and that the discussion of extending her leave or returning to work part-time occurred only as a result of UBC changing her job description when there was not full-time work available to her as a research assistant; and

2. The tribunal erred in law by granting the application without, at least, first directing cross-examination on the affidavits or, alternatively, a full hearing.

I will address these in reverse order.

5. Analysis and Conclusions

The tribunal erred in law by granting the application without, at least, first directing cross-examination on the affidavits or, alternatively, a full hearing.

[31] I earlier pointed out that an application to dismiss under s. 27(1) of the Code may be, but is not necessarily, supported by sworn evidence. As I understand the petitioner's contention, she says that the tribunal is not entitled to resolve material conflicts in affidavit evidence much like a chambers judge is not entitled, on a

Rule 18A summary judgment application, to simply prefer one affidavit over another in the event of conflict. This submission misconceives the task that the tribunal faces under s. 27(1).

[32] In *Berezoutskaia,* at paras. 24–26, the Court of Appeal applied earlier authority under the previous legislative scheme respecting the function of the tribunal assessing applications to dismiss under s. 27(1) as a gate-keeping, or screening, process. This type of preliminary assessment involves, as previously stated in *Lee v. British Columbia (Attorney General)*, 2004 BCCA 457, and approved in *Berezoutskaia,* at para. 25, "the assessment of evidence in a specialized area". It does not involve a finding of fact akin to a summary judgment application. Instead, as set out in *Lee*, at para. 26, the task of the tribunal was to determine whether the evidence takes the case out of the realm of conjecture.

[33] I earlier referred to the distinction between reviewing findings of fact under s. 59(2) of the ATA and reviewing findings made for the purpose of exercising discretion under s. 59(4). In discussing that question, at para. 21 of *Berezoutskaia,* the court reasoned that findings of fact "that were not supported by the evidence or were otherwise unreasonable as the appellant alleges" would be "arbitrary in the sense that it would not have been made according to reason and principle" and therefore patently unreasonable. The petitioner contends that these passages, coupled with the reasoning in *Dunsmuir*, effectively incorporate a reasonableness review standard into s. 59(4). I do not accept that the Court of Appeal intended that result.

[34] Nor do I accept that *Berezoutskaia* precludes the tribunal considering materially conflicting affidavits for the limited purpose of carrying out its gate-keeping function. The court went on to state, at para. 22:

> The [s. 59(2) process] involve findings of fact on a balance of probabilities reached after a weighing of the evidence presented, while the [s. 59(3) and (4) process] involve only a preliminary assessment of the evidence submitted in order to determine whether that evidence warrants going forward to the hearing stage. Thus, in dismissing the appellant's complaint without a hearing, the Tribunal member did not weigh the evidence and make findings of fact that would be subject to review pursuant to s. 59(2). Rather, she merely concluded that the evidence did not justify the time and expense of a full hearing because, in her 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. Accordingly, s. 59(2) is not engaged and the exercise of this discretion falls to be reviewed according to the standard of patent unreasonableness pursuant to s. 59(3).

In my view, the tribunal would risk erring in law if it sent a complaint on for full hearing solely because there was a credibility issue giving rise to a material conflict in the evidence or submissions before it on an application to dismiss under s. 27(1) of the Code.

[35] I take into account that the tribunal has a broad discretion under the Code to "receive and accept on oath, by affidavit or otherwise, evidence and information that the member or panel considers necessary and appropriate" (s. 27.2) and, as a result, could order cross-examination on affidavits filed before deciding whether to dismiss a complaint. I see no indication in the record that the petitioner ever invited the tribunal to direct cross-examination here. Given the corroboration available for Dr. Snutch's evidence, on key issues like the nature and division of lab duties

amongst all employees and whether there was full-time research assistant work available for Ms. Evans, it could not realistically be argued, in the circumstances, that a decision not to direct cross-examination was arbitrary, or otherwise patently unreasonable, under s. 59(4) of the ATA.

[36] At the heart of Ms. Evans' complaints is her contention that the tribunal could not resolve the obvious credibility issue between she and Dr. Snutch in the circumstances.

[37] I disagree. Even if the tribunal was required to determine the facts on a balance of probabilities, which it was not, the tribunal could reasonably resolve the credibility question in favour of Dr. Snutch on the basis of the corroborative affidavit and contemporaneous documentary evidence. The tribunal did not err by granting the application to dismiss, without, at least, first directing cross-examination on the affidavits or a full hearing.

[38] The tribunal is presumed to know the law and understand that it was required to review all the available evidence and determine, where Ms. Evans' evidence conflicted with that of UBC, whether her case went beyond conjecture.

[39] It is apparent, on review of the decision, that the tribunal was alive to the credibility issues and, on each occasion, assessed Ms. Evans' allegations against Dr. Snutch's response, as supported by consistent affidavits from others and corroborative notes or other records created at the time. The assessment of evidence, in the circumstances here, did not require anything more.

The tribunal failed to understand and address her contention that she always intended to return to work full-time; and that the discussion of extending her leave or returning to work part-time occurred only as a result of UBC changing her job description when there was not full-time work available to her as a research assistant.

[40] The petitioner's other main contention is that the tribunal failed to understand and address her contention that she always intended to return to work full time, and that the discussion of extending her leave or returning to work part-time occurred only as a result of UBC changing her job description when there was not full-time work available to her as a research assistant. According to the petitioner, these defects are apparent from the following passages in the Background section of the reasons:

> [13] Ms. Evans and Dr. Snutch met on May 17. Ms. Evans explained that she had intended to return on July 4, after using her accrued vacation time, but that the daycare at UBC did not have a space for her son until September. Ms. Evans suggested that she could use the time accrued while working during her Leave, which she estimated at 30 - 40 working days, to extend her time off until September. Dr. Snuktch asked her to provide a written statement setting out the hours she claimed to have worked. Also discussed was Ms. Evans' return to work on a part-time basis, working Mondays, Tuesdays, and Wednesdays.
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> [14] There is disagreement between the parties as to many of the other parts of their May 17 discussion. Ms. Evans states that Dr. Snutch told her that he did not know what work she would perform upon her return; that he did not have a research project for her to work on; that her lab technician duties had been divided among the other lab members; and that her lab manager role had been taken over by Dr. Garcia.
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> [15] Dr. Snutch maintains that he told Ms. Evans that two new researchers were joining the lab in July, and that she could work with them or with Dr. Garcia on her cancer-related project. He has provided his notes of the meeting which include a reference to an offer to Ms. Evans to work with Dr. Garcia on her cancer project. He states that he asked Ms. Evans if she was interested in supervising the lab

> database. He denies telling Ms. Evans that she would not resume general lab duties upon her return, or that Dr. Garcia had taken over as lab manager. Dr. Snutch states that Ms. Evans told him that she had a lot of paperwork to catch up on when she returned to work.
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> [16] On June 23, Ms. Evans emailed Dr. Snutch, setting out the number of hours she said she had worked during her Leave. She claimed 216 hours based on three hours a month [should read "week"] worked from home and five hours a month worked at UBC. The hours translated to a total of 17 hours a month and approximately 31 working days during her Leave. Using these 31 days and accrued vacation time, Ms. Evans set out two scenarios whereby she would return to work part-time on September 18.
>
> [17] Dr. Snutch questioned the number of hours Ms. Evans claimed to have worked while on Leave. He discussed the hours claimed with other researchers. Michael Hildebrand, a graduate student who joined the Snutch Lab in May 2002, reviewed the number of orders placed by Ms. Evans during her Leave. By checking Ms. Evans' access card, UBC determined that she had not entered the Building where the Snutch Lab was located between June 29 and October 19, 2005.

This illustrates, according to her, that the tribunal never focused on the essence of her complaint, namely that she wanted to return to the same full-time position that she had before the leave commenced. In this regard, she also refers to para. 25 under the heading "Reasons", as follows:

> [25] Ms. Evans has alleged that UBC's refusal to extend her Leave until September 18 amounted to a failure to accommodate her on the basis of her family situation. She has not referred to UBC's refusal to allow her to return on a part-time basis although it appears from her June 23 letter that she did not want to return to full-time work.

The tribunal did not misapprehend the complaint. There were two aspects to it.

[41] First, in para. 26 of the complaint, Ms. Evans stated:

> 26. UBC's refusal to extend my Leave without any valid reason when they knew that I did not have daycare until September

> constitutes discrimination against me on the basis of my family status.

The tribunal was alive to the circumstances necessary to support a finding of *prima facie* discrimination.

[42] The tribunal referred expressly to *Health Sciences Assn. of British Columbia v. Campbell River and North Island Transition Society,* 2004 BCCA 260. There, the court addressed the usual circumstances, absent bad faith on the part of the employer and no governing provision in the Collective Agreement or employment contract, in which a *prima facie* case of discrimination under the Code relating to family status arises, at para. 39:

> ... a *prima facie* case of discrimination is made out when a change in a term or condition of employment imposed by an employer results in a serious interference with a substantial parental or other family duty or obligation of the employee. I think that in the vast majority of situations in which there is a conflict between a work requirement and a family obligation it would be difficult to make out a *prima facie* case.

The tribunal concluded that an employee on maternity or parental leave knows of the responsibility to make suitable childcare arrangements by the date of return to work and that, as a result, there was nothing extraordinary about the petitioner's situation.

[43] The tribunal did not directly address the question whether UBC acted in bad faith. The petitioner's counsel submitted to the tribunal that there is ample evidence of bad faith but did not elaborate. The tribunal clearly preferred the UBC evidence as it related to Ms. Evans' application to further extend her leave. The tribunal recognized that there was a dispute between Ms. Evans and UBC respecting the

amount of work that she performed while on leave which impacted, in turn, on the extent of additional leave that UBC granted to her. I do not accept that as evidence of bad faith on the part of UBC.

[44] Having regard to the factors enumerated in s. 59(4) of the ATA, there was nothing patently unreasonable in the tribunal's conclusion that Ms. Evans' complaint that she was discriminated against on the basis of family status had no reasonable prospect of success.

[45] Second, there was also nothing patently unreasonable in the tribunal's further conclusion that the petitioner's claim that UBC discriminated against her by changing the amount and nature of the work available to her upon returning from her leave had no reasonable prospect of success. This is the full-time/part-time issue.

[46] The tribunal concluded that there was "no significant disagreement" about the nature of Ms. Evans' actual lab duties before she went on leave. There was an issue, however, whether the petitioner was the lab manager, as she described in her complaint. UBC contended, in effect, that the title was one of convenience but it did not reflect any additional supervisory duties.

[47] After considering the nature of the lab duties; the conflicting evidence as to whether the position was a management one; and finally, the nature of the lab duties re-assigned to the petitioner upon returning to work; the tribunal concluded that there was no significant difference between the lab duties Ms. Evans performed before her leave and those that were to be assigned to her upon her return.

[48] The tribunal also concluded that Ms. Evans' allegation that UBC had no research duties for her to perform upon her return to work "was contradicted by several individuals". These included the researchers who joined the lab in July 2006 and had projects that it was proposed Ms. Evans work on.

[49] The tribunal set out its conclusion in its Reasons, at para. 70, as follows:

> [70] Ms. Evans' allegation was contradicted by several individuals. In his affidavit, Dr. Kaja states that, on July 14, he, Dr. Snutch and Dr. Garcia discussed his migraine research project as one Ms. Evans could work on. Further, Dr. Snutch's notes of a July 21 meeting with Dr. Garcia reflect their discussion that Ms. Evans could do genotyping with Mike. Finally, Dr. Snutch's handwritten notes, and the affidavits of those who participated in the July 24 and 26 meetings, make it clear that Dr. Snutch was in the process of identifying research projects on which Ms. Evans could work. Moreover, by her own account, Ms. Evans did not approach either Dr. Snutch or Dr. Garcia to express any concerns about her duties on either July 24, 25 or 26.

The choice of words might have been more explicit but is apparent that the tribunal preferred, for the purpose of its assessment, the UBC evidence that tended to corroborate Dr. Snutch and contradict Ms. Evans.

[50] The tribunal went on to discuss the nature of its role on a preliminary application to dismiss. After referring to *Lee* and *Beretzoutskaia* in that regard, the tribunal also referred to previous tribunal authority describing its task under s. 27(1)(c) as being an assessment whether there is a reasonable prospect the complaint will succeed based on all the information available to it. Applying the procedural law set out in those decisions, the tribunal concluded that there was no reasonable prospect that any of the petitioner's allegations would succeed; granted the application; and dismissed the complaint. It is important to remember that the

tribunal was not asked to make findings of fact on a balance of probabilities for the purpose of its assessment. It follows that we should not expect to see the language of a judgment writer in the Reasons for disposition of applications under s. 27(1)(c).

[51] I have not referred to all the evidence before the tribunal because I do not consider it necessary to do so. I have reviewed the entirety of the record before the tribunal, including all submissions, affidavits and documents before the tribunal, as well as the submissions before me. Applying the criteria set out in s. 59(4) of the ATA, I am not able to conclude that the tribunal exercised its discretion in a patently unreasonable way.

[52] In the result, the petition for judicial review is dismissed. UBC is entitled to its costs against Ms. Evans on Scale B.

"M.D. Macaulay, J."
The Honourable Mr. Justice Macaulay