

COURT FILE NUMBER 2401 14397

COURT COURT OF KING'S BENCH OF ALBERTA

JUDICIAL CENTRE CALGARY

APPLICANT NADINE DUNSEITH

RESPONDENT CALGARY FRENCH AND INTERNATIONAL SCHOOL SOCIETY
and
THE ALBERTA HUMAN RIGHTS COMMISSION

DOCUMENT BRIEF OF THE APPLICANT

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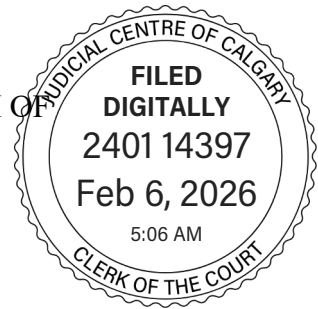


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OVERVIEW

Introduction

1. Nadine Dunseith (the “Applicant”) applies for judicial review of the decision of the Chief of the Commission and Tribunals (“Chief”) of the Alberta Human Rights Commission (“Commission”) upholding the summary dismissal of the Applicant’s human rights complaint.
2. On October 25, 2021, the Applicant submitted a complaint to the Commission against the Calgary French and International School Society (“Respondent”) alleging discrimination in the area of employment on the basis of the protected characteristic of mental disability (the “Complaint”). The Applicant was unrepresented. The Respondent submitted a response to the Complaint through counsel.
3. On December 12, 2023, the Director of the Commission (“Director”) issued a decision to dismiss the Complaint pursuant to section 21 of the Alberta *Human Rights Act* on the purported basis the Complaint has no reasonable prospect of success.
4. On September 12, 2024, the Chief issued the impugned decision pursuant to section 26 of the *Act*, indexed as *Dunseith v Calgary French and International School Society*, 2024 AHRC 111 (the “Decision”).

Summary of Facts

5. The Applicant is an experienced school teacher, who on August 20, 2021, commenced a new full-time teaching position with the Respondent.
6. The Applicant suffers acute anxiety related to injections, at times referred to as “needles”, and is therefore unable to receive injections of any kind, including injections for the purpose of vaccination, including injections for the purpose of covid vaccination.
7. The Respondent was aware of the Applicant’s inability to receive covid vaccines as early as May 2021. At the time, the Respondent indicated to the Applicant that it did not intend to require covid vaccination as a condition of continued employment.

8. In September 2021, the Respondent reversed course, requiring teaching staff to provide proof of vaccination by November 1, 2021, failing which they would be placed on “unpaid leave” followed by termination for cause on December 1, 2021.
9. No government public health order required the Respondent or any other non-healthcare employer to subject any non-healthcare employee to unpaid leave and/or termination as a consequence of abstaining from vaccination.
10. On October 1, 2021, the Applicant submitted a request to the Respondent for accommodation regarding the vaccination requirement on the basis of the protected characteristic of mental disability, in support of which the Applicant provided the Respondent a letter from her treating psychologist dated the same day, October 1, 2021 (the “October 1 Letter”).
11. The Applicant’s psychologist stated the October 1 Letter was prepared for the express purpose of providing the Respondent with relevant information related to her request for accommodation.
12. In the October 1 Letter, the Applicant’s psychologist identified three DSM-5 diagnoses: Generalized Anxiety Disorder, Posttraumatic Stress Disorder (in partial remission), and Adjustment Disorder with Depressed Mood—all of which constitute protected “mental disabilities”.
13. The Applicant’s psychologist specifically noted in the October 1 Letter that the Applicant’s primary diagnosis of Generalized Anxiety presents in persistent and pervasive anxiety, worry and avoidance in occupational settings; that symptomatology has increased with her day-to-day exposure to ongoing covid stressors and restrictions *and her anxiety specific to injections*; and that her work is a significant benefit to her mental health and overall quality of life.
14. The Applicant’s psychologist concluded the letter by stating that the professional recommendation was for the Respondent to support the Applicant in her request for exemption from mandatory vaccination to retain her employment.
15. On October 13, 2021, the Respondent informed the Applicant that it had denied her request

for accommodation. The Respondent effectively took the position that the Applicant had not triggered any duty to accommodate because, in its view, it was not required to accommodate mental disabilities, rather, only specific physical disabilities as determined by Alberta Health Services and as verified by a physician.

16. The Respondent had made it abundantly clear to the Applicant that if she did not receive the covid vaccines, she would be placed on unpaid leave as of November 1 and fired as of December 1, 2021.

17. On October 18, 2021, the Applicant left her employment as a result of the Respondent's discrimination on the basis of the Applicant's mental disability, stating in her letter of "resignation" that she had no choice but to leave her teaching position with the Respondent because her anxiety disorder prevented her receiving covid vaccines and her accommodation request was denied.

18. On October 25, 2021, the Applicant submitted the Complaint to the Alberta Human Rights Commission, claiming discrimination in employment on the basis of mental disability.

19. On December 12, 2023, the Commission issued a decision pursuant to section 21 of the Alberta *Human Rights Act* dismissing the Applicant's Complaint for the stated reason it had no reasonable prospect of success.

20. On September 12, 2024, in response to the Applicant's request for review pursuant to section 26 of the Alberta *Human Rights Act*, the Commission upheld the section 21 decision.

21. On October 16, 2024, the Applicant filed an application for judicial review of the Decision.

LAW

Standard of Review

22. Reasonableness is the standard of review in all but the narrowest of exceptions pursuant to the decision of the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*.¹ A reasonable decision bears the hallmarks of justification,

¹ [2019 SCC 65](#) [*Vavilov*].

transparency and intelligibility, the indicia and criteria of which are various.

23. To be reasonable, a decision must

- be rational and logical, including free of logical fallacies;
- be justified in relation to the constellation of law and facts;
- be constrained by elements of the legal and factual contexts which operate as constraints on the decision maker in the exercise of its delegated powers;
- take account of the evidentiary record and general factual matrix that bears on it;
- not adopt inferior interpretations for the sake of expediency;
- not engage in reverse-engineering;
- not fundamentally misapprehend or fail to account for the evidence before the decision maker;
- not fail to consider relevant facts and evidence before the decision maker;
- not follow an “irrational chain of analysis” or reach a “conclusion” that “cannot follow from the analysis undertaken”;
- meaningfully account for the central issues and concerns raised by the applicant;
- demonstrate the decision maker actually listened to the applicant;
- meaningfully grapple with the key issues and central arguments raised by the applicant;
- demonstrate the decision maker was actually alert and sensitive to the matter before it; and
- grapple with any particularly harsh consequences of a decision.

24. Notwithstanding that prior to *Vavilov*, factors such as expertise weighed in favour of a more deferential standard of review, reasonableness is the single standard and the presumptive

standard post-*Vavilov*. Assertions that human rights tribunals are entitled to “substantial” deference or that the Commissioner as gatekeeper is entitled to “wide latitude” in decision-making are vestiges of the pre-*Vavilov* scheme.²

25. Human rights tribunals are not a special category of administrative decision maker for which there is a different and more lenient standard of reasonableness. Deference is inherent in the reasonableness standard; there is no extra deference based on the nature of the decision maker or type of decision in question. Applied to the present case, *Vavilov* requires the Commissioner to make a reasonable decision; no anachronistic conception of “wide latitude” somehow permits the Commissioner to make an otherwise unreasonable decision.

Human Rights Law

26. The Alberta *Human Rights Act*³ prohibits an employer from discriminating against an employee on certain enumerated grounds except where the employer is able to establish a *bona fide* occupational requirement (“BFOR”). An employer must accommodate an employee’s protected characteristic to the point of undue hardship. Undue hardship and/or a BFOR cannot be established unless and until the employer has discharged its procedural duty to accommodate.

Disability Discrimination

27. The Alberta Human Rights Commission website provides a helpful explanation of the protected ground of disability.⁴

28. The Alberta *Human Rights Act* prohibits discrimination at work based on one or more protected grounds, including physical and mental disability. An employer cannot terminate, refuse to hire, or otherwise negatively impact an employee because of his or her disability, injury, or illness.⁵

29. Disability covers a broad range of conditions, both physical and mental. Employers have a duty to accommodate employees with disabilities to the point of undue hardship. Employees

² *X v Alberta (Human Rights Commission)*, 2022 ABKB 659 at para 19.

³ [RSA 2000, c A-25.5](#) [the *Act*].

⁴ [Alberta Human Rights Commission “Issues at Work: Disability, illness, and injury”](#) (“Disability Page”).

⁵ Disability Page.

requesting accommodation for a disability must inform their employer of their need for accommodation. This often means providing medical information. Employers have a duty to inquire when they are aware or should reasonably be aware that their employees have a disability impacting their work.⁶

30. Physical and mental disability are protected grounds under the *Act*. The *Act* also protects against perceived disability, where others see a person as having a disability and treat them in a discriminatory way.⁷

31. A mental disability is any mental, developmental, or learning disorder. The cause or duration of the disorder does not matter. While there is no exhaustive list of conditions considered to fit the definition of mental disability, the following are examples of mental disabilities pursuant to the *Human Rights Act*: dyslexia; depression; **anxiety disorders**; post traumatic stress disorder; autism spectrum disorder; attention deficit hyperactivity disorder; obsessive compulsive disorder; and schizophrenia.⁸

32. Employees who request accommodation must inform the employer of their need for accommodation. The employee must provide enough information or documentation for their employer to understand what type of accommodation they need, e.g. exemption from a vaccination policy due to an anxiety disorder pertaining to injections.⁹

33. Often an employee with a mental disability will be required to provide documentation from a medical professional, e.g. a psychologist, though generally no requirement exists to disclose a specific diagnosis to the employer.¹⁰

Duty to Accommodate Generally

34. The Alberta Human Rights Commission provides direction on an employer's duty to accommodate in the context of a BFOR, by way of published Human Rights Guides entitled "Duty to Accommodate" ("Accommodation Guide") and Defences to Human Rights Complaints ("Defences Guide").

⁶ Disability Page.

⁷ Disability Page.

⁸ Disability Page.

⁹ Disability Page.

¹⁰ Disability Page.

35. The Commission discloses that “[t]he duty to accommodate is a responsibility of the employer...to adjust the conditions of employment...in order to address any prima facie (on its face) discrimination”¹¹ experienced by the employee, and that despite “inconvenience, disruption, and expense to the employer...accommodation to the point of undue hardship is required by law”.¹²

36. While a “reasonable and justifiable” practice that would otherwise be discriminatory—that is, a *bona fide* occupational requirement—stands as an exception to otherwise prohibited grounds of discrimination, this does not occur until accommodation solutions have been fully canvassed:¹³ “Courts and human rights tribunals have found that the process of accommodation is an important factor in determining whether a standard or policy is reasonable and justifiable”.¹⁴ Indeed, “[t]he ‘reasonable and justifiable’ defence to prima facie discrimination can only be successful if a respondent shows that serious attempts or considerations were given to accommodate a complainant facing the respondent’s prima facie discriminatory standard”.¹⁵

37. The third step of the SCC-devised *Meiorin*¹⁶ test for determining whether a BFOR exists requires that “[i]n demonstrating if the standard is reasonably necessary, the employer must show that they have accommodated the employee to the point of undue hardship”.¹⁷ The Commission further states:

In *Meiorin*, the Court found that even though the employer’s standard was based on safety concerns (step 1) and established in good faith (step 2), the employer had failed to show the requirement was reasonably necessary (step 3)...the Court made it clear that a standard is not reasonably necessary if the employer has not **fully considered** alternative accommodations that *might* allow the affected individual to fill the position.¹⁸ [Emphasis added.]

38. The duty to accommodate includes two distinct components: the duty to accommodate substantively, which is to say, put in place an accommodation, to the point of undue hardship;

¹¹ Accommodation Guide at 2.

¹² Accommodation Guide at 3.

¹³ Accommodation Guide at 12-3; Defences Guide at 7-10, 13.

¹⁴ Defences Guide at 7.

¹⁵ Defences Guide at 7.

¹⁶ *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 SCR 3, 1999 CanLII 652 [*Meiorin*].

¹⁷ Defences Guide at 8; *Meiorin* at para 54.

¹⁸ Defences Guide at 8-9.

and the duty to accommodate procedurally. Undue hardship cannot be established unless and until the **procedural duty** to accommodate has been discharged.

Procedural Duty to Accommodate

39. The Commission states that the duty to accommodate has both a substantive and **procedural** component,¹⁹ with the substantive component referring to the accommodation itself, and the procedural component involving the employer undertaking an individualized assessment of the employee's needs and entertaining flexible and creative solutions in search of an accommodation that meets those needs.²⁰ The employer must meaningfully consult with the employee to identify possible means of accommodation.²¹ Only after the employer has participated in this consultation process and the parties have determined there are no means of accommodating the employee without the employer incurring undue hardship has the employer fulfilled its duty to accommodate.²²

40. The Commission leaves no doubt about an employer's obligations. The employer **must**: determine if the request falls under any of the areas and grounds protected under the Act; be aware that, once a request is received, the onus to accommodate is on the employer; respect the dignity of the person or group requesting accommodation; listen to and consider the needs of the person seeking accommodation and her suggestions for accommodation; be willing to take substantial and meaningful measures to accommodate the needs of the person seeking accommodation; be flexible and creative when considering and developing options; and discuss options with the person who needs accommodation.²³ An employer's duty to accommodate an employee is far reaching and may involve adjusting policies.²⁴

41. The employer **must make every effort** to make a reasonable accommodation for an employee. Some hardship may be necessary in making an accommodation, and only when the point of undue hardship is reached is the employer's duty to accommodate fulfilled.²⁵

¹⁹ Accommodation Guide at 4; see also *Canadian National Railway Company v Teamsters Canada Rail Conference*, [2018 ABQB 405](#) [Teamsters] and *Stewart v Elk Valley Coal Corp*, [2017 SCC 30](#) [Stewart] at para 127.

²⁰ Accommodation Guide at 4.

²¹ Accommodation Guide at 4; *Teamsters* at para 36.

²² Accommodation Guide at 4-5.

²³ Accommodation Guide at 9-10.

²⁴ Accommodation Guide at 11. [Emphasis added.]

²⁵ Accommodation Guide at 5 [Emphasis added].

42. Again, a BFOR stands as an exception to otherwise prohibited grounds of discrimination, but **only once accommodation solutions have been fully canvassed**.²⁶ Courts and human rights tribunals have found that the **process of accommodation** is an important factor in determining whether a standard or policy is reasonable and justifiable.²⁷ Indeed, the **“reasonable and justifiable” defence to prima facie discrimination can only be successful if a respondent shows that serious attempts or considerations were given to accommodate** a complainant facing the respondent’s prima facie discriminatory standard.²⁸ An employee seeking accommodation should suggest appropriate accommodation measures, consider any reasonable accommodation options and cooperate to make the agreement work.²⁹

43. Beyond the Commission’s own specific guidance to employers in Alberta, various courts have weighed in on the procedural component of the duty. The SCC discloses in the seminal case of *Meiorin* that a standard cannot be deemed reasonably necessary unless and until the organization has **fully considered** alternative accommodations that **might** allow the affected individual to continue in the employment.³⁰ The SCC has found that procedurally, an organization has a duty to inquire as to the specific circumstances of a person requiring accommodation before taking adverse action against him.³¹

44. The Ontario Divisional Court has held that a full exploration of the nature of the protected ground, consideration of the extent to which carefully managing the challenges around the protected ground and examination of the roles and responsibilities of various staff in monitoring the situation are required;³² undue hardship cannot be established by relying on impressionistic or anecdotal evidence, or after-the-fact justifications;³³ and **in assessing whether the organization has met the duty, its efforts must be assessed at the time of the alleged discrimination**.³⁴

45. The Ontario Court of Appeal has described satisfaction of the procedural component of the

²⁶ Accommodation Guide at 12-3; Defences Guide at 7-10, 13.

²⁷ Defences Guide at 7.

²⁸ Defences Guide at 7.

²⁹ Accommodation Guide at 8-9.

³⁰ Defences Guide at 8-9. [Emphasis added.]

³¹ *Stewart* at para 133; see also *Grismer*.

³² *Adga Group Consultants Inc v Lane*, [2008] OJ No 3076, 2008 CanLII 39605 [*Adga*] at para 109.

³³ *Adga* at para 118.

³⁴ *Adga* at para 108.

duty thus:

The procedural component typically involves the identification of the process or procedure to be adopted in providing accommodation to the person who would be subject to the discriminatory standard: see *Lane v. ADGA Group Consultants Inc.* (2008), 295 D.L.R. (4th) 425 (Ont. Div. Ct.), at para. 106; *Roosma v. Ford Motor Co. of Canada* (2002), 164 O.A.C. 252 (Div. Ct), at para. 210, per Lax J. (dissenting, but not on this point). Because it requires an understanding of the person's needs, and requires the person to provide information, procedural accommodation is sometimes referred to as the "accommodation dialogue": see *Liu v. Carleton University*, 2015 HRTO 621, at para. 18. Once the institution has an understanding of the claimant's specific needs, it must ascertain and seriously consider possible accommodations that could be used to address those needs, including the option of undertaking an individualized assessment in the case of a discriminatory standard: see *Grismer*, at para. 42; *ADGA*, at para 106. The substantive component of accommodation can refer to the steps taken to implement the accommodation to the point of undue hardship. It involves the consideration of what was actually done in the accommodation process to meet the individual's needs: see *Roosma*, at para. 210.³⁵

46. Where the organization has failed to take any of the steps it could have taken in order to assess and pursue the question of accommodation, and failed to learn what it could have learned had it only made appropriate enquiries, it will not have discharged its procedural duty to accommodate.³⁶

47. The Alberta Court of Queen's Bench likewise determined the crucial nature of the procedural component of the duty, quoting the arbitrator: "procedure is of the essence". The Court explained that engagement with the person requiring the accommodation and making all reasonable efforts to verify whether the person can be accommodated is **not** optional.³⁷

Establishing Disability Discrimination in Employment

48. Disability discrimination is an action, policy, practice, or decision that has a negative effect on an employee and is related to the personal characteristic of disability. The behaviour need not be intentional; the Alberta *Human Rights Act* protects employees from discriminatory impacts however caused.

³⁵ *Longuepée v University of Waterloo*, [2020 ONCA 830](#) at para 70.

³⁶ *Adga* at paras 126-7.

³⁷ *Teamsters* at para 36.

49. Once disability discrimination is established, the duty to accommodate is triggered, including the **procedural** duty to accommodate, which is onerous, and absent which undue hardship **cannot** be found.

Section 26 Grant of Authority

50. On a request for review, the Chief can either uphold the Director's decision to dismiss or overturn the Director's dismissal and refer the matter to the Tribunal for a full hearing, based on a *de novo* assessment the Chief performs without deference to the Director's decision and on the remarkably low "no reasonable prospect of success" threshold, the principles of which include:

- 1) The overarching question is whether there is a genuine issue that needs to be resolved at a hearing;
- 2) Matters that have some chance of success should go on to hearing;
- 3) The Chief must accept the allegations of fact as true except to the extent the allegations are based on assumptions or speculations or where they are patently ridiculous or incapable of proof; and
- 4) The evidence must take the case out of the realm of conjecture.³⁸

ANALYSIS

The Decision Is Unreasonable

51. The Decision fails to be reasonable because the Chief has not "justified" its decision "in relation to the constellation of law and facts that are relevant to the decision" and "that constrain the decision maker", contrary to *Vavilov*.³⁹

52. The Decision fails to be reasonable because the Chief has "fundamentally misapprehended or failed to account for the evidence before it", contrary to *Vavilov*.⁴⁰

53. The Decision fails to be reasonable because the Chief ignored evidence before it while

³⁸ Decision at para 21, CROP at 8.

³⁹ *Vavilov* at paras 85, 105.

⁴⁰ *Vavilov* at para 126.

indulging its own biases, contrary to the seminal administrative law case of *Baker v Canada (Minister of Citizenship and Immigration)*,⁴¹ as well as *Vavilov*.

54. The Decision fails to be reasonable because the Chief drew conclusions untenable in light of its own findings, in contravention of the requirement that decisions be “internally coherent”,⁴² free of “logical fallacies”,⁴³ and in conformity with a “rational chain of analysis”, contrary to *Vavilov*.⁴⁴

55. The Decision fails to be reasonable because the Chief misapprehended and relied on distinguishable precedent.

Evidence Before the Chief

56. The Chief is constrained by the facts before it and by the applicable law, and a fundamental misapprehension of the evidence will be fatal to its decision.

57. The Chief stated in its Decision:

[26] On October 1, 2021, the complainant applied to CFIS for an exemption from the Policy. In making the application, she provided two statements from psychologists... On May 13, 2021, Robert Hadden, a psychologist, provided a letter that described the complainant’s DSM-5 diagnoses. It does not mention vaccination... On October 1, 2021, Lynne Goertzen, a psychologist, provided a letter describing the complainant’s DSM-5 diagnoses, and stating, “It is my professional recommendation that Ms. Dunseith be supported in her request for consideration of exemption from mandatory vaccination to retain her employment.”

58. However, the Chief failed to acknowledge that the second letter, being the October 1 Letter, says much more, and in fact explicitly states that one aspect of the Applicant’s Generalized Anxiety Disorder is “anxiety specific to injections”.⁴⁵

59. Given the Chief’s omission of the above, the general tendency to downplay the letters provided by the Applicant’s medical practitioners, and the baseless conclusion that the information contained therein is somehow inadequate, reproducing the letters will be a

⁴¹ [\[1999\] 2 SCR 817, 1999 CanLII 699](#) [*Baker*].

⁴² *Vavilov* at paras 101-2.

⁴³ *Vavilov* at para 104.

⁴⁴ *Vavilov* at para 103.

⁴⁵ CROP at 23.

worthwhile exercise.

60. On May 13, 2021, Robert Hadden, a registered psychologist who had treated the Applicant, wrote as follows:

Dear Ms. Dunseith:

This letter summarizes the diagnosis we were able to determine based on our meetings held on March 22 and April 16, 2021. Over span of two hours and thirty minutes during those sessions, we conducted an assessment of your history and symptom presentation. The following DSM-5 diagnosis has been rendered:

300.02 Generalized Anxiety Disorder
309.81 Posttraumatic Stress Disorder (in partial remission)
309.0 Adjustment Disorder with Depressed Mood

Your most predominant diagnosis is generalized anxiety disorder. Your adjustment disorder with depressed mood appears to be secondary to the more significant anxiety you suffer. Your background with posttraumatic stress disorder is qualified as “in partial remission” because your history shows this disorder was at one time more prevalent, but is now partially resolved.

It has been a pleasure to work with you. I am able to provide further detail on these diagnoses as required. If you have any further questions about this letter, please to do not hesitate to call me at my office 403-264-6862.

Yours truly, [*et cetera*].⁴⁶

61. On October 1, 2021, Lynne Goertzen, a registered psychologist who had treated the Applicant, wrote as follows:

Dear Sir/Madame:

This letter has been prepared at the request of Nadine Dunseith to provide information required by her employer related to mental health assessment and diagnosis relevant to her request for exemption from a medical directive from the employer re: mandatory COVID-19 vaccination to maintain continued employment. The letter has been reviewed by and provided to Ms. Dunseith.

Ms. Dunseith initiated counselling with me to address and improve management of anxiety and trauma. She reports and has demonstrated exacerbation of symptoms with global and local reports and responses related to the continuing

⁴⁶ CROP at 24.

global pandemic. To date, Ms. Dunseith has attended twelve (12) one-hour individual counselling sessions:

November 17, 2020 Assessment session
December 2, 2020 Assessment session
December 16, 2020 Counselling session
December 29, 2020 Counselling session
January 27, 2021 Counselling session
February 24, 2021 Counselling session
March 16, 2021 Counselling session
April 13, 2021 Counselling session
May 4, 2021 Counselling session
June 1, 2021 Counselling session
June 8, 2021 Counselling session
June 23, 2021 Counselling session

The following DSM-5 diagnoses have been determined, based on my assessment and counselling with Ms. Dunseith:

300.02 Generalized Anxiety Disorder
309.81 Posttraumatic Stress Disorder (in partial remission)
309.0 Adjustment Disorder with Depressed Mood

Ms. Dunseith's primary diagnosis of generalized anxiety disorder presents in persistent and pervasive anxiety, worry and avoidance in personal, social and occupational settings.

Symptomatology has increased with her day-to-day exposure to ongoing COVID-19 stressors and restrictions, and her anxiety specific to injections. While these symptoms cause significant distress and impairment in these settings, she has demonstrated strong motivation in counselling, and consistent application of counselling strategies. She states that family and work are of significant benefit to her mental health and overall quality of life.

Ms. Dunseith's treatment plan includes evidence-based treatment and standard management, including Cognitive Behavioural Therapy, as well as specialized treatment modalities related to her mental health concerns and counselling goals. It is my professional recommendation that Ms. Dunseith be supported in her request for consideration of exemption from mandatory vaccination to retain her employment.

Sincerely, [*et cetera*].⁴⁷

⁴⁷ CROP at 22-3.

62. Emerging from the preceding letters are the following undeniable facts:

- Ms. Dunseith has been under the ongoing care of mental health professionals;
- Ms. Dunseith has attended no fewer than 14 appointments over no fewer than eight months;
- Two psychologists have diagnosed Ms. Dunseith with a Generalized Anxiety Disorder (“GAD”) in two separate assessments;
- Two psychologists are comfortable placing their reputations, credentials and licences on the line by submitting letters stating the same;
- One of those psychologists, and in fact the one under whose care the Applicant was at the relevant time, provided a letter expanding on the functional limitations associated with the diagnosis *as required by the Respondent prior to considering any exemption request*⁴⁸ submitted by the Applicant;
- There is no question that in the professional opinion of Lynne Goertzen, Registered Psychologist, one facet of the Applicant’s GAD is anxiety specific to injections;
- There is no question that in the professional opinion of Lynne Goertzen, Registered Psychologist, the Applicant’s GAD presents in persistent and pervasive anxiety, worry and avoidance, including in occupational settings;
- There is no question that in the professional opinion of Lynne Goertzen, Registered Psychologist, the covid pandemic increased and exacerbated the Applicant’s GAD symptoms;
- There is no question that in the professional opinion of Lynne Goertzen, Registered Psychologist, the covid pandemic increased and exacerbated the Applicant’s GAD symptom specific to anxiety around injections;
- There is no question that in the professional opinion of Lynne Goertzen, Registered Psychologist, the Applicant’s GAD symptoms cause significant distress and

⁴⁸ CROP at 81, 132.

impairment, including significant distress and impairment specifically concerning the Applicant's anxiety specific to injections;

- There is no question that in the professional opinion of Lynne Goertzen, Registered Psychologist, successful management of the Applicant's symptoms includes continuing in her employment, which she finds meaningful;
- The first letter held out an offer to expand on the symptomatology if more information were needed;
- The second letter did expand on the symptomatology when more information was in fact needed.

63. In reducing the October 1 Letter the Applicant provided to "It is my professional recommendation that Ms. Dunseith be supported in her request for consideration of exemption from mandatory vaccination to retain her employment",⁴⁹ the Chief demonstrated that it missed too much to have possibly rendered a reasonable decision. Irrespective of whether an outcome is reasonable, which is denied in the present case, the method by which the Chief arrived at it must also be reasonable:

[I]t is not enough for the outcome of a decision to be *justifiable*. Where reasons for a decision are required, the decision must also be *justified*, by way of those reasons, by the decision maker to those to whom the decision applies. While some outcomes may be so at odds with the legal and factual context that they could never be supported by intelligible and rational reasoning, **an otherwise reasonable outcome also cannot stand if it was reached on an improper basis.**⁵⁰

64. The Chief's statement, "I am confident from the Goertzen note that the complainant preferred not to participate in the COVID-19 vaccination program"⁵¹ does not evince a decision maker that meaningfully grappled with or meaningfully accounted for what the October 1 Letter actually stated.

65. The Chief's statement, "[N]either of the notes supports the complainant's assertion that her

⁴⁹ Decision at para 26, CROP at 9.

⁵⁰ *Vavilov* at para 86. [Emphasis added.]

⁵¹ Decision at para 28, CROP at 9-10.

mental disability prevented her from becoming vaccinated”⁵² does not evince a decision maker that meaningfully grappled with or meaningfully accounted for what the October 1 Letter actually stated.

66. The Chief’s statements, “The only evidence of mental disability relative to vaccination comes from the Goertzen note”⁵³ and “[T]here is no information to suggest that mental disability prevented the complainant from complying”⁵⁴ are in conflict with each other and with other findings of the Chief. Obviously there is information ***“to suggest that mental disability prevented the complainant from complying”*** if ***“evidence of mental disability relative to vaccination”*** was in ***“the Goertzen note”***. Additionally, all other statements of the Chief finding the Applicant’s mental disability was never tied to injection are wiped out with the Chief’s admission that ***“evidence of mental disability relative to vaccination comes from the Goertzen note”***. The Chief’s conflicting findings on the single most crucial point of the case render the decision incoherent, which is to say, unreasonable, on the *Vavilov* standard.

67. Neither does the Chief’s statement, “No other information was forthcoming from the complainant to support her request for an exemption from the Policy”⁵⁵ pass muster. As the Applicant declared many times, she submitted the exemption request, letter and diagnosis ***as required, and was denied outright without a conversation***.⁵⁶

68. The Applicant in fact attempted to satisfy the Respondent’s discriminatory policy by seeking an exemption from the kind of health care provider it would accept—a physician member of the College of Physicians and Surgeons of Alberta—but was unable to obtain a mental health diagnosis or exemption recommendation from an MD.⁵⁷

69. The suggestion that the Applicant somehow failed to provide something she was meant to provide, i.e., “No other information was forthcoming”, is deceitful. The Respondent made clear to the Applicant that the only thing it would accept was a note from a physician member of the College of Physicians and Surgeons of Alberta diagnosing myocarditis or anaphylaxis. As the

⁵² Decision at para 28, CROP at 9-10.

⁵³ Decision at para 31, CROP at 10.

⁵⁴ Decision at para 32, CROP at 10.

⁵⁵ Decision at para 28, CROP at 9-10.

⁵⁶ CROP at 47-56.

⁵⁷ CROP at 47-56.

Applicant suffered a mental disability preventing her receiving injections, and not a heart condition or allergy, there was nothing more she could provide and the Chief's suggestion otherwise is a falsehood.

70. The Chief's take that "no other information" was before it is disingenuous, because nothing the Applicant could have provided would have altered the course of events given the Respondent's discriminatory stance on mental disability and its refusal to accommodate the same—as repeatedly stated in the Applicant's evidence. *Vavilov* makes plain that reasons failing to be responsive to and/or failing to meaningfully grapple with critical evidence before the decision maker call into question whether the decision maker "actually *listened*"⁵⁸ and whether the decision maker was "actually alert and sensitive to the matter before it":

[127] The principles of justification and transparency require that an administrative decision maker's reasons meaningfully account for the central issues and concerns raised by the parties. The principle that the individual or individuals affected by a decision should have the opportunity to present their case fully and fairly underlies the duty of procedural fairness and is rooted in the right to be heard: *Baker*, at para. 28. **The concept of responsive reasons is inherently bound up with this principle, because reasons are the primary mechanism by which decision makers demonstrate that they have actually listened to the parties.**

[128] Reviewing courts cannot expect administrative decision makers to "respond to every argument or line of possible analysis" (*Newfoundland Nurses*, at para. 25), or to "make an explicit finding on each constituent element, however subordinate, leading to its final conclusion" (para. 16). To impose such expectations would have a paralyzing effect on the proper functioning of administrative bodies and would needlessly compromise important values such as efficiency and access to justice. **However, a decision maker's failure to meaningfully grapple with key issues or central arguments raised by the parties may call into question whether the decision maker was actually alert and sensitive to the matter before it.** In addition to assuring parties that their concerns have been heard, the process of drafting reasons with care and attention can alert the decision maker to inadvertent gaps and other flaws in its reasoning: *Baker*, at para. 39.⁵⁹

71. It is unclear what the Chief is "responding" to when it disregards the Applicant's testimony around the rejection of her mental health diagnosis and states there was nothing else before it.

⁵⁸ Emphasis original.

⁵⁹ Emphasis added.

72. Most telling is the Chief’s failure to grapple with the inadequate reasons the *Respondent* cited when denying the Applicant’s human rights accommodation request. The discrimination occurred when Margaret Dorrance denied the human rights ground of mental disability absent pause or inquiry. The Respondent had no authority to pick and choose the human rights law with which it would comply, yet the denial letter finds the Respondent explicitly dictating which laws it will follow and implicitly confessing which ones it will not:

October 13, 2021

Dear Nadine:

Further to your application for a medical exemption under CFIS Policy 26: COVID-19 Employee Vaccination Policy (“Policy 26”), and in accordance with that policy, the Exemption Review Committee has completed its review of your application with diligence, respect, and compassion.

In order to qualify for a medical exemption, you must meet at least one of the criteria outlined by Alberta Health Services’ COVID-19 Scientific Advisory Group, which has been endorsed by the College of Physicians and Surgeons of Alberta (“CPSA”). Those criteria include either a documented severe allergic (anaphylactic) reaction to a first dose of vaccine or to a known vaccine ingredient, or a reaction in the form of myocarditis to the first dose of a vaccine. A review of the supporting documentation that you provided indicates that neither one of these criteria has been met. Moreover, only physicians accredited by the College of Physicians and Surgeons may provide exemption letters in relation to COVID-19 medical exemption applications. The documentation you provided is not from a CPSA-accredited physician.

For the above reasons, your request does not meet the criteria for a medical exemption as outlined in Policy 26 or required by law. Accordingly, your request for a medical exemption must be respectfully declined and you will be required to comply with Policy 26 as a condition of employment with CFIS. Please note that November 1, 2021 is the date set in Policy 26 for unvaccinated employees with no approved medical or religious exemption to begin a period of unpaid leave.

Sincerely,

Margaret Dorrance⁶⁰

73. The moment the Respondent declared it would not even consider a mental disability accommodation, it unlawfully discriminated. Attempts to pull attention toward the adequacy of the psychological documentation do not resolve the problem that the Respondent discriminated

⁶⁰ CROP at 136.

by refusing to accommodate **any** psychological condition protected by human rights legislation.

74. Even the policy itself was discriminatory, providing for accommodation of only two discrete medical conditions—anaphylaxis and myocarditis—in apparent ignorance of the 15 grounds of discrimination the *Human Rights Act* requires the Respondent to accommodate to the point of undue hardship.

75. The Applicant has provided no fewer than two reasons to believe she suffers the condition she claims and is therefore psychologically incapable of submitting to injections, while the Chief has provided zero reasons to disbelieve the Applicant’s evidence.

76. There was no evidence before the Chief that the October 1 Letter was anything other than an accurate disclosure of the Applicant’s mental disability which is protected by the Act. The Chief is not permitted to arrogate to itself powers not granted. The “statutory grant” provides the power to the Chief to dismiss complaints with no reasonable chance of success **given the evidence *actually* before it, not evidence the Chief wishes were before it, and not by way of ignoring evidence the Chief wishes were *not* before it.**

77. That the Chief complains the medical information wants for specificity while ignoring the specifics contained therein suggests nothing the Applicant might have provided would have satisfied the Chief as to the Applicant’s affliction. A decision maker content with neither lack nor plenty is a decision maker that simply refuses to relent.

78. The conclusion that “it has not been demonstrated that mental disability was a factor in the complainant losing her employment”⁶¹—when the Applicant has declared she has an anxiety disorder preventing her from receiving injections,⁶² and when a comprehensive letter provided by her psychologist states that the Applicant’s generalized anxiety disorder includes “anxiety specific to injections”—is nothing short of obtuse, perhaps purposefully so, and in any event, unreasonable.

Resignation Is a Red Herring

79. The Chief’s insistence that the terminology used by the then-unrepresented complainant to

⁶¹ Decision at para 34, CROP at 10.

⁶² CROP at 138.

describe a discrimination event which forced her from her job somehow erases the discrimination is wrong-headed.

80. At best, the Applicant was constructively dismissed from her employment when the Respondent chose to discriminate against her and withhold the accommodation of her protected characteristic, to which she was entitled at law.

81. That the Applicant, who is not legally trained, framed her departure as a result of the Respondent's failure to accommodate as a "resignation" does not signify anything other than the Applicant is not legally trained.

82. The Chief's statement that "the complainant herself says that she left CFIS on her own accord"⁶³ is an unreasonably low resolution take on the Applicant's evidence, which is that she had "no choice but to leave".⁶⁴

83. The Chief's next statement is downright disingenuous: "There is information on the file that she would have been subject to termination, but she did not remain at her employment to explore other options with the employer".⁶⁵

84. There were no options other than to be injected or placed on leave and ultimately fired, as the Respondent made unfailingly clear. The Respondent refused to accommodate the Applicant, which it also made unfailingly clear. The time to discuss any other options as imagined—but not articulated—by the Chief would have been when the Applicant triggered the duty to accommodate.

85. The Chief puts on full display its habit of incoherent reasoning when it reaches the conclusion that termination was not a foregone conclusion⁶⁶ after making findings that termination was a foregone conclusion.⁶⁷

86. No one, except perhaps the Chief, seriously doubts the Applicant would have been fired on December 1. The Applicant maintains that the reasons for which she would have been fired on

⁶³ Decision at para 33, CROP at 10.

⁶⁴ CROP at 138.

⁶⁵ Decision at para 33, CROP at 10.

⁶⁶ Decision at para 33, CROP at 10.

⁶⁷ Decision at paras 9, 13, 25, CROP at 6-7, 9.

December 1 are discriminatory, and the law backs her up.

Hogan Is Distinguishable

87. The Chief’s statement, “This Complaint falls squarely within the principles of the *Hogan* decision” does nothing to improve the reasonability of the Decision, given *Hogan v Syncrude Canada Ltd.*⁶⁸ is about as disparate a precedent from the present matter as could possibly exist.

88. In *Hogan*, an employer’s actions based purely and verifiably on business decisions coincided with an employee’s medical events, creating a situation wherein the employee **suspected** the employer was discriminating against him and wanted the decision maker to pull that inference out of thin air.

89. *Hogan* was **not** a case wherein an employer implemented a neutral-on-its-face policy which adversely affected an employee. It was **not** a case wherein an employer refused to accommodate an employee against such a policy, thereby adversely impacting the employee. It was **not** a case wherein an employer stated its intention to place an employee on unpaid leave for a month, after which the employee would be fired, because of the employer’s refusal to accommodate.

90. The decision maker in *Hogan* stated:

[18] I acknowledge that the complainant **does not believe** the respondent’s position that his reassignment and the cancellation of training were done for business reasons”.

...

[21] Here, the complainant alleges that **given the timing** of his reassignment, there is a **basis to conclude** that his disability played a role in the respondent’s decision. I have no doubt that the complainant makes this allegation honestly and in good faith. I also note that at the time that the crane department was being reorganized, the complainant was off work for a period of time. This no doubt must have left him feeling as an outsider, and anxious. Indeed, in the complaint he stated he **felt he was being “pushed out”**. I am sympathetic to the complainant’s circumstances, having to deal with a serious medical condition, being off work for treatment, and the respondent taking significant business decisions, which may have appeared to the complainant as devaluing his past contributions.

⁶⁸ [2019 AHRC 32](#) [*Hogan*].

[22] However, **the respondent has provided a full explanation, supported by documents.** It has provided **detailed particulars** of what it alleges were the **legitimate business reasons** for the complainant's **reassignment**. It is clear from the record that the complainant was extremely unhappy with the respondent's decision, and he makes arguments why other approaches could have been taken. However, the inquiry under a human rights complaint, if it were heard by a Tribunal, is **not to judge the rationale of a respondent's business decisions**. The inquiry I must ask to support a reasonable basis to proceed is whether there are facts that may demonstrate that a prohibited ground was a factor in the actions.

[23] In addition, **the information and documents provided by the respondent show an employer who was sincere in attempting to address the concerns of a long-standing employee at a point of organizational change.** The respondent's **offer of alternative job options is a significant factor** in this respect.

[24] Given the information before me, **there is no reasonable basis to proceed to a tribunal to test the complainant's suspicion.**

...

[26] The respondent states that **the complainant did not provide any medical documentation that indicated he had work restrictions, or disability-related needs.** His doctor did indicate that he should remain on his previous shift for a period of months **in order that he be able to attend follow-up appointments.** In the same letter, **the doctor confirmed the complainant had no functional limitations.** I agree with the respondent that **the complainant did not provide sufficient information to establish that his job reassignment caused an adverse impact because of his disability.** The information supports that, while the employer did not offer to keep the complainant in his desired position, **it did offer him other positions and did not prevent him from attending his medical appointments.**

...

[29] Here it appears undisputed that the complainant wanted to remain in his position. The respondent said **his need to attend medical appointments could be adequately addressed through scheduling appointments on days off, or by using appropriate leave benefits.** It further provided the complainant **alternative shift options.** The complainant wanted only to retain his previous position. There is no reasonable basis to refer this Complaint to a full hearing before a Tribunal to determine the complainant's claim.⁶⁹

91. In stark contrast to the present case, the *Hogan* employer

- attempted to accommodate and did accommodate the employee, as distinct from

⁶⁹ Emphasis added.

refusing to believe he had the disability he was claiming in the first place;

- sought and provided various accommodation options, as distinct from seeking none and threatening to fire the employee;
- did not threaten to fire the employee because of his disability.

92. In stark contrast to the present case, the *Hogan* employee

- invented purported disability-related reasons he required a different reassignment;
- failed to establish any disability-related need that made his reassignment problematic;
- brought the complaint on a mere suspicion of discrimination, not a discriminatory policy manifestly adversely affecting him.

93. *Hogan* is clear that “[a]n employee who is adversely affected by an employer rule, policy or decision because of a disability, is not necessarily entitled to the particular accommodation they request” and that “[t]he employee must cooperate with the employer to find accommodation that is in accordance with their disability-related needs”⁷⁰—and indeed the *Hogan* employee failed to do so. **The present Applicant was given no opportunity to cooperate with her employer to find accommodation in accordance with her disability-related needs, because the employer decided unilaterally that it did not need to follow human rights law and accommodate mental disabilities.**

94. The Chief’s reliance on one cherry-picked and misleading paragraph of this factually and legally divergent case is not reasonable. Even on its face, the paragraph carefully plucked from a decision packed with substantive differences bears tell-tale signs it will not track with the present matter: “[I]n advancing a claim of discrimination, **in which the complainant seeks to have a decision maker draw an inference**, the complainant must do more than establish that he has a disability, that certain adverse actions were taken, and he **believes that his disability was a factor** in those actions”.⁷¹

95. The Applicant did not ask the Chief to draw an **inference**. What is more, the Applicant did

⁷⁰ *Hogan* at para 28.

⁷¹ *Hogan* at para 19.

not ask the Chief to draw an **inference** based on a **belief**. Neither did the Applicant establish a disability *untethered* to the adverse actions taken against her. **The Applicant both claimed, and pointed to documented evidence of, her specific disability relating to injections, and the Respondent’s stated intention to suspend and fire her as a result of her disability relating to injections.**

96. Perhaps as a function of the factual crevasse preventing the applicable law from transferring smoothly between *Hogan* and the present case, the Chief attempts to cram the present matter into the *Hogan* framework by pretending to misconstrue the Applicant’s evidence.

97. Insisting there is similarity to sell here, the Chief offers a view of the evidence so impoverished as to amount to misstatement: “Here, the complainant has established that: (a) she has a mental disability; (b) she identifies the requirement to comply with the Policy as an adverse event”.⁷²

98. In fact, the Applicant established that she has a mental disability **specific to injections**, and only by pretending that detail does not exist is it possible to pretend there is no genuine link between the protected characteristic and the adverse effect à la *Hogan*.

99. Given the Chief accepts the psychologist’s diagnosis as to the GAD, there is no adequate reason for the Chief to refuse to accept the psychologist’s diagnosis as to the Applicant’s anxiety specific to injections which forms a part of the GAD. The Chief is not free to pick and choose which part of the psychologist’s diagnosis it likes. The Chief is not a mental health professional. It either accepts the mental health professional’s diagnosis, or it does not. Absent good reason to reject the mental health professional’s diagnosis, doing so is not a legitimate exercise of the Chief’s authority. Selectively accepting the mental health professional’s diagnosis, or put another way, ignoring the parts of it the Chief does not like, in order to arrive at a conclusion the Chief apparently desired, raises the spectre of a reverse-engineered decision.

100. A failure “to consider relevant evidence” or drawing “conclusions...not based on the evidence that was actually before [the decision maker]” was how the seminal administrative law

⁷² Decision at para 30, CROP at 10.

decision of *Baker* was found to be unreasonable,⁷³ and one of the ways in which the present Decision is unreasonable.

101. The Chief removed all doubt when it stated: “[T]he information before me does not demonstrate a link between the decision to refuse the exemption request and mental disability”, when the information before it *precisely* evinced a link between the decision to refuse the exemption request and mental disability, because as the Chief *immediately* thereafter accidentally admitted, the psychologist tied the mental disability to anxiety specific to injections. The Chief states, “The only **evidence of mental disability relative to vaccination comes from the Goertzen note**”,⁷⁴ after which the Chief pronounced the psychologist’s diagnosis “insufficient to indicate that refusal of the exemption constituted discrimination against the complainant on the ground of mental disability” **while offering absolutely nothing to support that bald and plainly wrong assertion.**

102. Clearly, if documentation from a mental health professional is required to support a request for accommodation on the basis of mental disability, and that documentation is meaningless, as the Chief decided, then the requirement to provide documentation from a mental health professional is nothing more than a ruse. At a minimum, this cannot be the intention of the legislature with its mandate to protect human rights, and any pretense otherwise is an affront to the work the legislature has done in the commission of protecting persons with mental disabilities.

103. The law is to be applied with an even hand, absent regard for the popularity or lack thereof attending any given protected characteristic.

Chief Demonstrated Lack of Understanding of “Adverse Impact”

104. The Chief continued to demonstrate it lost the plot all the way to the penultimate paragraph of its Decision, in which it denied the existence of fairly obvious adverse effect discrimination in a couple of different ways.⁷⁵

⁷³ *Vavilov* at para 126.

⁷⁴ Decision at para 31, CROP at 10.

⁷⁵ Decision at para 40, CROP at 11.

105. In one instance, the Chief denied that refusing to accommodate the Applicant’s mental disability and instead providing the same accommodation to her replacement, a person a) retired and b) residing out-of-country—neither of which is a protected characteristic pursuant to the Statute—constitutes adverse impact discrimination against the Applicant.⁷⁶

106. It is unclear how the Chief concluded that replacing the disabled Applicant with another person requiring, yet entirely unentitled to, a substantially similar accommodation helps to support its conclusion that the Applicant suffered no adverse impact resulting from the Respondent’s refusal to provide the Applicant with such accommodation on the basis of the protected human rights ground of disability.

107. For further certainty, that a person not entitled to human rights accommodation was accommodated to fill the Applicant’s position while the Applicant, who is a person entitled to human rights accommodation, was denied human rights accommodation to keep her position, rather compellingly suggests adverse impact discrimination.

108. In the other instance, the Chief concluded that refusing to consider an accommodation whereby the Applicant could participate in a regular covid testing regime open only to vaccinated employees did not adversely impact the Applicant, since the program was voluntary and not intended to be a replacement for vaccination.⁷⁷

109. Notwithstanding the program’s intended status as supplementary, recall that part of the procedural duty to accommodate is considering options, canvassing flexible and creative solutions, and at times adjusting policies. Indeed, the prophylactic measure assigned to employees whose human rights were accommodated was provision of negative tests at the Respondent’s expense: “11. Individuals who receive either a Medical or Religious Exemption will be required to provide a negative COVID-19 rapid test prior to entering the school approximately every seventy-two (72) hours. The cost of testing will be covered by CFIS...”.⁷⁸

110. Moreover, given the program was also billed as a means of, to at least some degree, ensuring safety and eliminating spread, whether or not “voluntary”, its very status as open only

⁷⁶ Decision at para 39, CROP at 11.

⁷⁷ Decision at paras 35-8, CROP at 10-1.

⁷⁸ Decision at para 24, CROP at 8-9.

to employees without the Applicant’s mental disability, evidenced by the fact they were able to be vaccinated, is discriminatory. An otherwise neutral-on-its-face standard, policy or requirement that happens to exclude a person on the basis of that person’s protected characteristic is ***categorically discriminatory by way of adverse impact***.

111. Irrespective of whether anything turns on it, the Chief’s denial of the adverse impact attendant to that discriminatory distinction reveals the Chief’s impoverished reasoning ability and calls into question the overall credibility of its Decision.

Conclusion

112. The Chief fundamentally misapprehended the evidence of the Applicant’s ***inability*** to receive covid vaccines due to a mental disability. The Chief projected its own view on the matter, and absent evidence, represented the Applicant’s well-documented inability as a mere “preference”. The Chief chose to misrepresent the Applicant’s ***inability*** as refraining by ***choice*** to “participate in the COVID-19 vaccination program”.⁷⁹ The only preferences and choices, however, are those made by the Chief to ignore the ample evidence before it because it preferred to pretend the Applicant’s matter has no prospect of success.

113. The Chief also drew conclusions that are untenable in light of its own findings.

114. The October 1 Letter provided by the Applicant’s psychologist explicitly discloses the Applicant’s diagnoses, and explicitly ties one of those diagnoses to injections.

115. Specifically, the Chief decided the Applicant failed to support her “assertion” that her mental disability prevented her from receiving covid vaccines or demonstrate a link between the Respondent’s decision to refuse her request for accommodation and her mental disability⁸⁰— this despite the explicit reference in the October 1 Letter to the Applicant’s anxiety specific to injections and despite acknowledging that the standard the Complainant must meet to show some facts linking adverse treatment with a protected characteristic is low.⁸¹

⁷⁹ Decision at paras 22, 28, CROP at 8-10.

⁸⁰ Decision at paras 26-34, CROP at 9-10.

⁸¹ Decision at para 29, CROP at 10.

116. The fact the Applicant *could not*—as opposed to “would not”—receive injections is made plain by the fact she did not “choose” to receive injections in order to keep her job and *then* file a human rights complaint after the fact regarding the refusal to accommodate.

117. The Applicant was at the height of her teaching career and her position with the Respondent was a high-level and well-paid teaching position and a promotion from her previous position. She and her family relied upon her employment income. It is unreasonable, especially absent supporting facts and analysis, to conclude the Applicant simply elected to lose her job because of a mere “preference” against vaccination.

118. In this case, the “link” between the adverse impact—unpaid leave followed by termination for cause—and the protected characteristic of mental disability is rather obvious. The Applicant’s Generalized Anxiety includes “anxiety specific to injections”. On that basis, she requested accommodation regarding the Respondent’s vaccination requirement, which would necessarily require the Applicant to receive an injection, and which she *could not do* as a result of her mental disability. That request was denied, which would have led, without any doubt, to her termination with cause.

119. The Chief failed even to acknowledge, let alone meaningfully grapple with, **the central fact** of the case: the Applicant’s anxiety disorder is specific to injections. In analyzing whether the Applicant had a reasonable prospect of success in establishing at a hearing that she had discharged her onus to demonstrate a *relevant* protected characteristic, this fact was crucial. The failure to address it and meaningfully grapple with this, the central fact of the case, renders the Decision unreasonable.

120. The Chief also failed to grapple with how or why, if it was so apparent that the October 1 Letter provided “no information to suggest that mental disability prevented” the Applicant from receiving the COVID vaccines”, the Applicant’s psychologist had nonetheless prepared the October 1 Letter for the express purpose of providing a “relevant” diagnosis for the Applicant’s request for accommodation, and nonetheless stated the professional recommendation was for the Respondent to grant the Applicant’s request for accommodation. It should go without saying that regulated health professionals do not make professional recommendations lightly and certainly not on the basis of “no information”. The Chief mischaracterized the psychologist’s professional recommendation as mere “encouragement” that the Respondent

grant the Applicant's request for accommodation. The Chief's failure in this regard further renders the Decision unreasonable.

121. The test for a reasonable prospect of success is well-known and was correctly articulated by the Chief. However, the Chief failed to reasonably apply the test to the constellation of law and facts acting as *constraints* on the Decision.

122. Contrary to the Chief's findings, there is a genuine issue as to whether the Applicant's Generalized Anxiety, which includes anxiety specific to injections, is a relevant and protected mental disability that, absent undue hardship, the Respondent was required to accommodate.

123. The Applicant has a reasonable chance of success should the Complaint proceed to a hearing. In the event The Applicant establishes that she did in fact trigger the duty to accommodate on the basis of mental disability, there is far more than a reasonable prospect of success because it is readily apparent that reasonable accommodation solutions were available to the Respondent. It is a high bar indeed for an employer to demonstrate such a degree of undue hardship that it is justified in firing an employee with a protected mental disability, and in fact an **impossible** hurdle for the employer to clear where the **procedural** duty to accommodate was not discharged, as occurred in this case.

124. As the Chief ruled at paragraph 45 of *Lepage v Bosa Development Corp.*, 2024 AHRC 59, if an employee establishes that he or she is unable to receive covid vaccines as a result of a protected characteristic, then there is a genuine issue to be resolved concerning whether the employer accommodated the employee to the point of undue hardship.

REMEDY SOUGHT

125. The Applicant applies to this Honourable Court for the following relief:

- a) An Order quashing the Decision;
- b) An Order directing the Alberta Human Rights Commission to refer the matter to the Tribunal for a hearing of the Applicant's Complaint on the merits;
- c) Costs of this Application; and

d) Such further and other relief as this Honourable Court deems just and equitable.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 5th day of February, 2026.



James SM Kitchen
Counsel for the Applicant,
Nadine Dunseith

LIST OF AUTHORITIES

Cases

1. *Adga Group Consultants Inc v Lane*, [\[2008\] OJ No 3076](#), [2008 CanLII 39605](#)
2. *Baker v Canada (Minister of Citizenship and Immigration)*, [\[1999\] 2 SCR 817](#), [1999 CanLII 699](#)
3. *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [\[1999\] 3 SCR 3](#), [1999 CanLII 652](#)
4. *Canada (Minister of Citizenship and Immigration) v Vavilov*, [2019 SCC 65](#)
5. *Canadian National Railway Company v Teamsters Canada Rail Conference*, [2018 ABQB 405](#)
6. *Hogan v Syncrude Canada Ltd.*, [2019 AHRC 32](#)
7. *Lepage v Bosa Development Corp.*, [2024 AHRC 59](#)
8. *Longuepée v University of Waterloo*, [2020 ONCA 830](#)
9. *Stewart v Elk Valley Coal Corp*, [2017 SCC 30](#)
10. *X v Alberta (Human Rights Commission)*, [2022 ABKB 659](#)

Statutes

11. *Alberta Human Rights Act*, [RSA 2000, c A-25.5](#)

Other Authorities

12. [Alberta Human Rights Commission “Defences to Human Rights Complaints”](#)
13. [Alberta Human Rights Commission “Duty to Accommodate”](#)
14. [Alberta Human Rights Commission “Issues at Work: Disability, illness, and injury”](#)