

Date Issued: January 23, 2009  
File: 4575

Indexed as: Miller v. BCTF (No. 2), 2009 BCHRT 34

IN THE MATTER OF THE *HUMAN RIGHTS CODE*  
R.S.B.C. 1996, c. 210 (as amended)

AND IN THE MATTER of a complaint before  
the British Columbia Human Rights Tribunal

B E T W E E N:

Lisa Miller

**COMPLAINANT**

A N D:

British Columbia Teachers' Federation

**RESPONDENT**

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**REASONS FOR DECISION**

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Tribunal Member:

Lindsay M. Lyster

Counsel for the Complainant:

Marcia McNeil

Counsel for the Respondent:

Morgan Rea (written submissions)  
and Patrick Dickie (at hearing)

Date of Hearing:

August 25, 2008.

Additional written submissions  
September 12 and 15, 2008.

## I INTRODUCTION

[1] Lisa Miller filed a complaint alleging that the British Columbia Teachers' Federation (the "BCTF" or the "Federation"), of which she is a member, discriminated against her on the basis of family status, contrary to s. 14 of the *Human Rights Code*.

[2] The BCTF filed a preliminary application to dismiss the complaint. In *Miller v. BCTF*, 2007 BCHRT 278 ("*Miller No. 1*"), I decided to hold that application in abeyance, pending a BCTF Hearing Panel's decision on a complaint made by another teacher, Sheldon Kushner, against Ms. Miller. After the Hearing Panel's decision, the parties were to have an opportunity to make further submissions to the Tribunal about its significance to Ms. Miller's human rights complaint. The provision of the BCTF's Code of Ethics which Mr. Kushner claimed Ms. Miller had violated, and the BCTF's application of that provision to Ms. Miller, are what the present complaint is about.

[3] There was unexpected delay in the Hearing Panel conducting the hearing into Mr. Kushner's complaint against Ms. Miller, and the resulting receipt of both the Hearing Panel's decision, and an Appeal Panel's decision on Ms. Miller's appeal of it. Rather than make further written submissions to the Tribunal, and have the Tribunal decide the BCTF's preliminary application to dismiss the complaint, all of which would have further delayed the eventual hearing of Ms. Miller's complaint, the parties agreed to have the outstanding application to dismiss dealt with together with the hearing of the merits of the complaint.

[4] At the hearing, the parties agreed to all of the submissions and evidence submitted in the course of the application to dismiss being entered as exhibits. They also submitted an Agreed Statement of Facts, which was supplemented by a few additional documents and Ms. Miller's brief *viva voce* evidence, which focussed on the impact of the alleged discrimination on her. All counsel are commended for the reasonable manner in which they dealt with the unique procedural aspects of this case.

[5] In this decision, I first reproduce large parts of the parties' Agreed Statement of Facts. I address it, and other aspects of the evidence before me, as necessary in the

course of my subsequent analysis of whether Ms. Miller has established that she was discriminated against on the basis of her family status.

## II AGREED STATEMENT OF FACTS

[6] The Agreed Statement of Facts is comparatively lengthy. While I have considered all of it, I reproduce only those portions necessary to put my decision in context. All references to the evidence supporting the facts agreed to are removed.

### *The parties, the email and the Kushner complaint*

1. At the material times Ms. Miller was an English teacher at Oak Bay High School in Victoria, B.C. ...
2. As a public school teacher, Ms. Miller is a member of the [Federation]. The Federation is a provincial union that represents public school teachers in British Columbia in respect of provincial matters.
3. As a member, Ms. Miller is subject to the Federation's Constitution, By-laws, and Policies and Procedures, including its Code of Ethics.
4. Ms. Miller has two children, both of whom are students in the public school system.
5. During the 2004-2005 school year, Ms. Miller's son was a student in a grade 5 classroom in a Victoria elementary school and was taught by Sheldon Kushner. At that time, Mr. Kushner was also a member of the Federation ...
6. In that same year, Ms. Miller was the parent class representative to the Parent Advisory Committee ("PAC") for her son's class.
7. On February 2, 2005, Ms. Miller sent the following email to many of the parents in her son's class:

Subject: grade 5 info from [CT, sometimes also referred to as "C"], Pac President – VERY IMPORTANT

Good afternoon,

As the grade 5 class rep I am passing along some very important information, as requested by [CT].

I believe everyone is aware of the situation in our children's classroom. A parent spoke to [C] today about it and [C]

immediately took her to [TR-J, the School Principal, sometimes also referred to as "T" or "R-J"] and requested a confidential meeting. During the course of this meeting [T] acknowledged knowing about the general concerns parent have had about their children's negative educational environment, but I believe this was the first time she had heard directly from the source how truly awful things have been. She is committed to helping us but she needs to follow protocol to be successful. Below are the steps [C] indicated to me EACH one of us must go through ASAP in order to effect a positive change, as quickly as possible, for our children. What is crucial to note here is that contrary to general assumptions, IT IS POSSIBLE FOR CHANGE TO OCCUR THIS YEAR.

[C] could not emphasize enough how CRUCIAL it is for us ALL to do what is outlined below:

1. Each parent must make an appointment (preferably this week or early next week) with R-J. When you made this appointment over the phone, do NOT specify to what it is pertaining. Simply tell the office staff person it is CONFIDENTIAL. [T] is expecting our calls and will expedite all meetings.
2. You must bring, **in writing**, a specific list of issues you and your child have been struggling with. This can include hours per day spent on homework, peer marking of assignments, lack of specific criteria for marking and for the assignment itself, lack of feedback for improvement, verbal abuse, etc. **MAKE YOUR COMMENTS SPECIFIC TO YOUR CHILD.** They cannot be a "group effort". **YOU DO NOT HAVE TO PUT YOUR NAME ON THIS DOCUMENT.**
3. Before seeing R-J you must have spoken with the teacher at least once during the course of the year. This includes any time you have popped in after school for a quick word, letters you may have written, a parent-teacher interview, phone conversations, anything that had you speaking with the teacher about your child. R-J will ask you if you have done this, and you must be able to say yes. If you haven't done so yet, pop in sometime this week.
4. Before your conversation with R-J begins, you must tell her it is CONFIDENTIAL. After that, **NOTHING YOU SAY OR GIVE TO HER WILL GO TO THE TEACHER.** [C] asked me to stress this point.

5. Once R-J has received several complaints from parents in writing, she can go to [the Associate Superintendent] and start the ball rolling.

NOTHING WILL BE DONE FOR OUR CHILDREN IF WE DO NOT MAKE THE EFFORT TO GO IN AND SEE R-J ABOUT THIS SITUATION. [C] stressed, most emphatically, that R-J is serious about addressing our concerns, but she needs our help. Also, this information must remain inside the circle of PARENTS in this classroom. It must not go any further.

... [I have referred to the persons named in the e-mail by their initials.]

...

9. Although the e-mail does not identify Ms. Miller as a teacher, at least some of the email recipients knew that Ms. Miller was a teacher.
10. The Federation received a complaint from Mr. Kushner, dated February 23, 2005, alleging that Ms. Miller breached Clause 5 of the Federation's Code of Ethics when she distributed the email above to parents of children in his grade 5 classroom.

#### *The Judicial Council process*

11. Complaints under the Federation's Code of Ethics are dealt with by the Federation's Judicial Council. [A description of the Judicial Council process and how it was created by the Federation's membership, and of the BCTF policies relevant to the complaint follows.] ...
19. Policy 31.B sets out the Code of Ethics. The portion of this Code of Ethics that is relevant to Ms. Miller's Complaint is Clause 5. It provides that:

The Code of Ethics states general rules for all members of the BCTF for maintaining high standards of professional service and conduct towards students, colleagues, and the professional union.

...

5. The teacher directs any criticism of the teaching performance and related work of a colleague to that colleague in private, and only then, after informing the colleague in writing on the intent to do so, may direct in confidence the

criticism to appropriate individuals who are able to offer advice and assistance. (See note following #10 and statement 31.B12)

...

NOTE: It shall not be considered a breach of Clause 5 of the Code of Ethics for a member to follow legal requirements of official protocols in reporting child protection issues.

20. The statement at 31.B.12, referred to in Clause 5, provides:

Advice on how to proceed with a concern respecting a colleague's teaching and related work may be sought from Federation staff and/or local officers in good faith. Such discussion will not constitute a breach of clause 5. "Appropriate individuals" in clause 5 of the Code of Ethics shall mean those persons who are able to offer advice and assistance on questions of teaching performance and related work. The first emphasis should at all times be on exploring means of assisting, rehabilitating and correcting.

...

23. Policy 31.C establishes the process for the Judicial Council. Policy 31.D sets the process for the Administration of the Code of Ethics. In particular, if a Screening Panel orders a hearing, "a three-member Hearing Panel shall conduct a full hearing of evidence related to the charge(s)." (Policy 31.D.02(f)) The Hearing Panel is empowered to:

- i. dismiss the complaint in which case the member charged has the right to decide whether or not such a finding is published, or
- ii. where the member who is the subject of the complaint has been found in breach of the Code of Ethics or to have engaged in conduct harmful or prejudicial to the Federation's interests:
  - (1) determine appropriate publication of the finding of such breach.
  - (2) issue a warning to the member.
  - (3) issue a reprimand to the member.
  - (4) impose a monetary fine on the member.
  - (5) [penalty for breaches relating to crossing a picket line]

- (6) [penalty where member receives strike pay]
- (7) suspend the right of the member to hold office or membership in or receive specified benefits from the Federation and/or any subsidiary bodies.
- (8) expel from membership.

or, impose a combination of the foregoing penalties, commensurate with the gravity of the breach found by the Hearing Panel...

### *The Code of Ethics*

*Note – for the purposes of this proceeding, Ms. Miller accepts that the assertions of fact set out under this heading accurately reflect the BCTF’s perspective regarding the intent and purpose of the Code of Ethics and its expectations of teacher conduct, but her acceptance in this regard is without prejudice to her right to argue that the process advanced by the BCTF is discriminatory, or was applied in a discriminatory manner to her.*

- 25. ... teachers, like other professionals, operate under a professional code of conduct and hold themselves responsible and accountable for their professional decisions and actions. The Code of Ethics states general rules for all Federation members for maintaining high standards of professional service and conduct toward the public, students, colleagues and to the Federation and its locals. The rules relating to inter-teacher communication are designed to promote respectful, constructive relationships between teachers ...
- 26. In the broadest terms, the purpose of Clause 5 is to provide a process so that professional communication between teachers is respectful, constructive and problem-solving oriented. Requiring a teacher to first communicate with another teacher relating to criticism of their teaching performance or related work allows for discussion, dialogue, the opportunity for correction of both the impugned conduct and the perception of others, to clarify assumptions or perceptions, and the ability to explain and defend. The process allows the two teachers to seek a resolution in order to resolve the problem before involving other individuals.
- 27. If there is no resolution to the problem, the teacher is then required to inform the teacher with whom they have a conflict, in writing, that they intend to seek assistance from other appropriate individuals to resolve the problem. This provides formal notice to the teacher whose conduct is at issue that no resolution has been found ...

28. Where a teacher has a concern about his or her child's teacher's teaching performance or related work, that parent/teacher is required to follow the standard of Clause 5 ... Clause 5 does not mean that teachers may not have, or may not voice, their concerns about their child's teacher.

...

30. If a teacher is unsure of his or her professional obligations, or is otherwise unsure of how to proceed regarding an inter-teacher conflict, the Federation has several resources available to guide them

...

31. The Federation regularly receives calls relating to the Code of Ethics, the majority of which relate to Clause 5 concerns or issues. The Federation receives about 15 calls a week, on average, relating to the Code of Ethics, of which about 70 percent relate to Clause 5 concerns. The Federation also receives calls from teachers who are parents concerned about their child's teacher...

32. There are also numerous articles in the Federation's publication ...

33. Code of Ethics training is also available ...

...

36. All Federation members must follow this process, whether they are parents or not. The Federation views Clause 5 as an important aspect of a teacher's professional responsibility.

37. The B.C. College of Teachers, which has the power to accept complaints from parents (among others) about teachers (among others) states:

**Where should I go to express a concern or make an inquiry?**

Most concerns are best dealt with at the local level. Before submitting a complaint to the College, you are encouraged to discuss your concerns with the member ...

38. The Greater Victoria School District, Ms. Miller's employer, encourages anyone with a concern about a school board employee, including parents, to express their concerns to the individual involved ...

*The Code of Ethics proceedings in the Kushner complaint*

39. In his complaint dated February 23, 2005, Mr. Kushner alleged that Ms. Miller had breached Clause 5 of the Code of Ethics when she distributed an email to parents of children in his Grade 5 classroom. Mr. Kushner alleges, among other things, that in that email, Ms. Miller “complains about [his] teaching and encourages other parents to complain to the Principal...” He also alleges that the email “has done irreparable damage to my career, character and reputation as a professional member of the [BCTF].” ...
40. On March 2, 2005, the Federation forwarded the Kushner complaint to Ms. Miller and recommended settlement of the complaint with the assistance of the Federation’s Internal Mediation Service. Ms. Miller agreed to participate in a mediation of Mr. Kushner’s complaint, however, Mr. Kushner indicated that he did not want to use the Federations’ Internal Mediation Service.
41. On March 11, 2005, the parties were advised that the Kushner complaint was being placed before the Judicial Council’s Screening Panel. Both parties to the Kushner complaint provided additional documentation for the Screening Panel’s consideration.
42. On May 3, 2005, the Screening Panel issued its report and referred the Kushner Complaint to the Federation’s Ethics Advisory Team to advise and educate the parties about Clause 5 and the Code of Ethics, to review the situation between the parties within the context of the Code of Ethics, to assist to achieve a satisfactory resolution and recommend any such resolution to the Screening Panel for their consideration, and seek to establish a professional relationship between the parties...
43. The Ethics Advisory Team met with the parties on June 16, 2005 and issued their report on November 23, 2005. The Team was unable to resolve the Kushner complaint and recommended that a Hearing Panel be established to resolve the complaint.
44. On January 23, 2006, counsel for Ms. Miller wrote to the Federation arguing that there were fundamental and serious flaws relating to both jurisdiction and process. He wrote again on April 3, 2006 arguing that the Screening Panel was *functus* and therefore had no jurisdiction to proceed ...
45. On June 14, 2005 [*sic*] the Screening Panel issued its second report. It determined that the Kushner complaint be sent to a Hearing Panel *de novo* ... The Screening Panel recommended that the Hearing Panel consider the following questions:

1. Did Ms. Miller write the e-mail of February 12 [*sic*], 2005, as alleged?
  2. Did Ms. Miller forward the e-mail, as alleged on or about February 12 [*sic*], 2005?
  3. If the answers to questions 1 and 2 are yes, did Ms. Miller's actions violate Clause 5 of the BCTF Code of Ethics?
  4. If the answer to question 3 is yes, what is the appropriate penalty pursuant to By-law 7.5(b) and Procedure 31.D.02(f)(ii) ...
46. On July 26, 2006, the Federation advised the parties that the date for the Hearing Panel was September 22, 2006 ...
  47. On August 30, 2006, the Federation received Ms. Miller's complaint to the B.C. Labour Relations Board alleging a breach of s. 10(1) of the *Labour Relations Code* ... Ms. Miller also requested that the Labour Relations Board stay the Hearing Panel's September 22, 2006 hearing to allow for the adjudication of the complaint before the Labour Relations Board ...
  48. On September 6, 2006, counsel for the Federation [agreed to the stay] ...
  49. On November 15, 2006, the Labour Relations Board issued a decision dismissing Ms. Miller's complaint as premature ...
- ...
51. On December 16, 2006, Ms. Miller filed this complaint with the Tribunal ... [The Federation did not agree to Ms. Miller's request for a further stay.]
  52. Since the Labour Relations Board decision ..., the Hearing Panel dates were set several times and each time adjourned due to [a variety of reasons] ...

***The Hearing Panel and Appeal Panel decisions***

53. The Hearing Panel heard the Kushner complaint on November 16, 2007 and rendered a decision on February 29, 2008. The Hearing Panel concluded that Ms. Miller violated Clause 5 of the Federation's Code of Ethics and assessed the following penalties:
  1. Ms. Miller is hereby reprimanded for violating Clause 5 of the BCTF Code of Ethics.

2. Ms. Miller's right to hold office in the BCTF or any of its subsidiary bodies, including local associations, is suspended for a period of one year, commencing 31 days after the issuance of this report.
3. These findings will be publicized in the next appropriate issue of the *Teacher* Newsmagazine ...
54. On March 27, 2008, the Federation received Ms. Miller's appeal of the Hearing Panel decision brought pursuant to Policy 31.D.02(g) of the Federation's Policies and Procedures.
55. The Appeal Panel, in its decision dated May 30, 2008, dismissed Ms. Miller's appeal and upheld both the Hearing Panel decision and the penalties assessed by the Hearing Panel ...
56. The findings of the Hearing Panel have not yet been published in the *Teacher* Newsmagazine. The Federation does not intend to publish these findings prior to the resolution of Ms. Miller's Complaint.
57. The parties agree that there remains a factual dispute between them with respect to some of the findings of fact made by the Hearing Panel and the Appeal Panel, but the parties agree that those factual disputes are not germane to the issues raised in this proceeding.

### III ANALYSIS

#### Has Ms. Miller established a *prima facie* case of discrimination?

##### 1. Relevant statutory provision

[7] Ms. Miller's complaint is brought under s. 14 of the *Code*, which prohibits discrimination by certain organizations, including trade unions, against their members and others, in the following terms:

A trade union, employers' organization or occupational association must not

- (a) exclude any person from membership,
- (b) expel or suspend any member, or
- (c) discriminate against any person or member

because of the race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability,

sex, sexual orientation or age of that person or member, or because that person or member has been convicted of a criminal or summary conviction offence that is unrelated to the membership or intended membership.

**2. What is the appropriate analysis for determining a *prima facie* case of discrimination in this case?**

[8] The parties disagree about what “test” should be employed to determine if Ms. Miller has established a *prima facie* case of discrimination. The term “*prima facie* discrimination” is sometimes used differently in different contexts. By “*prima facie* discrimination”, the parties meant what a complainant must establish to discharge her legal burden to prove discrimination, subject only to a justification defence, in respect of which the respondent would bear the legal burden of proof. It is in that sense that I use the term in this decision.

[9] In their original written submissions on the application to dismiss, the parties joined issue on whether the “test” from *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, was required to prove *prima facie* discrimination. At hearing, a more significant issue was whether the “test” enunciated by the Court of Appeal in *Health Sciences Assn. of British Columbia v. Campbell River and North Island Transition Society*, [2004] B.C.J. No. 922, was required.

[10] In the course of oral submissions, I referred the parties to two recent decisions, one with respect to each of these two issues: *R. v. Kapp*, [2008] S.C.J. No. 42; and *Stephenson v. Sooke Lake Modular Home Co-operative Association*, 2007 BCHRT 341. As requested, the parties provided further written submissions with respect to the impact of these two cases on the appropriate analysis for determining whether Ms. Miller has established *prima facie* discrimination.

[11] While I do not refer to all of the parties’ thorough submissions on this issue, I have considered them all.

*Application of Law and the requirement to establish discrimination in the purposive or substantive sense*

[12] The debate about whether *Law* applies in considering whether *prima facie* discrimination contrary to the *Code* has been established has been largely overtaken by recent jurisprudence, both from the Supreme Court of Canada and this Tribunal.

[13] In *Kapp*, the Supreme Court considered the application of *Law* in its original context of an alleged breach of s. 15 of the *Charter of Rights and Freedoms*. After discussing the Court's seminal decision in *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, the majority stated:

A decade later, in *Law*, this Court suggested that discrimination should be defined in terms of the impact of the law or program on the "human dignity" of members of the claimant group, having regard to four contextual factors: (1) pre-existing disadvantage, if any, of the claimant group; (2) degree of correspondence between the differential treatment and the claimant group's reality; (3) whether the law or program has an ameliorative purpose or effect; and (4) the nature of the interest affected (paras. 62-75).

The achievement of *Law* was its success in unifying what had become, since *Andrews*, a division in this Court's approach to s. 15. *Law* accomplished this by reiterating and confirming *Andrews*' interpretation of s. 15 as a guarantee of substantive, and not just formal, equality. Moreover, *Law* made an important contribution to our understanding of the conceptual underpinnings of substantive equality.

At the same time, several difficulties have arisen from the attempt in *Law* to employ human dignity as a legal test. There can be no doubt that human dignity is an essential value underlying the s. 15 equality guarantee. In fact, the protection of all of the rights guaranteed by the *Charter* has as its lodestar the promotion of human dignity. As Dickson C.J. said in *R. v. Oakes*, [1986] 1 S.C.R. 103:

The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. [p. 136]

But as critics have pointed out, human dignity is an abstract and subjective notion that, even with the guidance of the four contextual factors, cannot

only become confusing and difficult to apply; it has also proven to be an additional burden on equality claimants, rather than the philosophical enhancement it was intended to be. Criticism has also accrued for the way *Law* has allowed the formalism of some of the Court's post-*Andrews* jurisprudence to resurface in the form of an artificial comparator analysis focussed on treating likes alike.

The analysis in a particular case, as *Law* itself recognizes, more usefully focuses on the factors that identify impact amounting to discrimination. The four factors cited in *Law* are based on and relate to the identification in *Andrews* of perpetuation of disadvantage and stereotyping as the primary indicators of discrimination. Pre-existing disadvantage and the nature of the interest affected (factors one and four in *Law*) go to perpetuation of disadvantage and prejudice, while the second factor deals with stereotyping. The ameliorative purpose or effect of a law or program (the third factor in *Law*) goes to whether the purpose is remedial within the meaning of s. 15(2). (We would suggest, without deciding here, that the third *Law* factor might also be relevant to the question under s. 15(1) as to whether the effect of the law or program is to perpetuate disadvantage.)

Viewed in this way, *Law* does not impose a new and distinctive test for discrimination, but rather affirms the approach to substantive equality under s. 15 set out in *Andrews* and developed in numerous subsequent decisions. The factors cited in *Law* should not be read literally as if they were legislative dispositions, but as a way of focussing on the central concern of s. 15 identified in *Andrews* — combatting discrimination, defined in terms of perpetuating disadvantage and stereotyping.

The central purpose of combatting discrimination, as discussed, underlies both s. 15(1) and s. 15(2). Under s. 15(1), the focus is on *preventing* governments from making distinctions based on the enumerated or analogous grounds that: have the effect of perpetuating group disadvantage and prejudice; or impose disadvantage on the basis of stereotyping. Under s. 15(2), the focus is on *enabling* governments to proactively combat existing discrimination through affirmative measures. (paras. 19 – 25, footnotes omitted) (emphasis added)

[14] I agree with the BCTF's submission that the Supreme Court's approach in *Kapp* is the approach this Tribunal has been taking in cases such as *Esposito v. B.C. (Ministry of Skills, Development and Labour)* (No. 2), 2006 BCHRT 300; *Preiss v. B.C. (Ministry of Attorney General)* (No. 3), 2006 BCHRT 587; *Stopps v. Just Ladies Fitness (Metrotown and D.)* (No. 3), 2006 BCHRT 557; and *Stone v. B.C. (Ministry of Health)* (No. 7), 2007 BCHRT 55.

[15] In short, in order to establish a *prima facie* case of discrimination there must be discrimination in a substantive or purposive sense. In many cases, *prima facie* discrimination in this sense will be readily established on proof of the existence of adverse treatment related to a ground prohibited under the *Code*. In others, particularly those where competing valid public policies or values are in issue, something more may be required, and the *Law* factors, and the focus they bring on human dignity, may be of assistance in deciding whether *prima facie* discrimination has been established: see, for example, *Preiss* at paras. 234 – 235.

***Application of Health Sciences Assn. and what is necessary to establish discrimination on the basis of family status***

[16] I turn to an examination of the Court of Appeal’s decision in *Health Sciences Assn.*, and this Tribunal’s consideration of it in *Stephenson*. In the former decision, the Court of Appeal grappled with the question of what is necessary to establish discrimination on the basis of family status. The case involved an appeal of a labour arbitrator’s decision denying a grievance brought by a union on behalf of an employee. The employee was the parent of four children, one of whom had severe behavioural problems. The employer unilaterally altered the employee’s work schedule. The new work schedule would impair the employee’s ability to care for her child’s special needs. The arbitrator concluded that the employer’s action was not discrimination on the basis of family status.

[17] The Court stated the question before it as “what then needs to be established in order to prove *prima facie* discrimination based on family status?”: para. 36. It answered that question as follows:

The parties have cited no other cases that assist in providing a working definition of the parameters of the concept of family status as the term is used in the *Code*. In my opinion, it cannot be an open-ended concept as urged by the appellant for that would have the potential to cause disruption and great mischief in the workplace; nor, in the context of the present case, can it be limited to “the status of being a parent per se” as found by the arbitrator (and as argued by the respondent on this appeal) for that would not address serious negative impacts that some decisions of employers might have on the parental and other family obligations of all, some or one of the employees affected by such decisions.

If the term “family status” is not elusive of definition, the definition lies somewhere between the two extremes urged by the parties. Whether particular conduct does or does not amount to *prima facie* discrimination on the basis of family status will depend on the circumstances of each case. In the usual case where there is no bad faith on the part of the employer and no governing provision in the applicable collective agreement or employment contract, it seems to me that 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. (paras. 38 – 39)

[18] Applying that analysis to the appeal before it, the Court held that the arbitrator erred in not finding a *prima facie* case of discrimination on the basis of family status: para. 40. It held that the employee had a “substantial parental obligation” to look after her child, who had significant special needs, after school. Further, it held that the employer’s decision to change the employee’s work schedule was a “serious interference” with her discharge of that obligation: para. 40. In the result, the Court remitted the grievance to the arbitrator to consider whether the employer had fulfilled its duty to accommodate the employee, and any remedy if he found against the employer on that issue.

[19] In *Stephenson*, this Tribunal considered the applicability of the *Health Sciences Assn.* formulation of the test for discrimination on the basis of family status in the context of an application to dismiss a complaint of discrimination in the area of services customarily available to the public. The Tribunal held that the *Health Sciences Assn.* test is inapplicable outside of the employment context, for the following reasons:

The Court’s decision in the *Health Sciences Association* case is exclusively concerned with assessing whether there is a violation of the *Code* in circumstances where there is a conflict between an employee’s work and family obligations. In my view, it has no application outside of the employment context, and the unique considerations which arise in that context as a result of potentially competing employment and familial obligations. Given that the present complaint arises in a different legal and factual context, it is therefore not necessary to determine whether the Association’s actions constitute “a serious interference with a substantial parental or other family duty or obligation”. (para. 37)

[20] More recently, the Tribunal has adopted the same interpretation of the scope of the application of the *Health Services Assn.* case, declining to apply it outside the context of complaints of discrimination in employment: see *Rodriguez and others v. Coast Mountain Bus Company and another (No. 3)*, 2008 BCHRT 427, paras. 176 – 181, and the cases cited therein.

[21] The BCTF submits that I must depart from this approach. It submits that the term “family status” must be given the same meaning wherever it appears in the *Code*, and that that meaning is the one attributed to the term by the Court of Appeal in *Health Services Assn.*

[22] I tend to agree with the BCTF that the term “family status” ought, absent textual or other indications of a contrary legislative purpose, to be given the same meaning wherever it appears in the *Code*. Further, had the Court of Appeal defined “family status”, that definition would be binding on this Tribunal.

[23] The difficulty with the BCTF’s submissions, however, is that the Court of Appeal did not define “family status” in *Health Services Assn.* The Court of Appeal did refer to the “definition” of “family status” in saying that “if the term ‘family status’ is not elusive of definition, the definition lies somewhere between the two extremes urged by the parties”: para. 39. But the Court of Appeal did not, in fact, go on to define “family status”.

[24] Rather, what the Court of Appeal did was to describe the circumstances in which a *prima facie* case of discrimination in family status in employment would be established, stating “it seems to me that a *prima facie* case of discrimination is made out when a change in a term of 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”: para. 39. That this description of the elements of a *prima facie* case of discrimination is limited to complaints of family status discrimination in employment is apparent, not only from the sentence just quoted, but also from the next sentence in the judgment, which reads: “I think that in the vast majority of situations in which there is a conflict between a work environment and a family obligation it would be difficult to make out a *prima facie* case”: para. 39.

[25] This reading of *Health Sciences Assn.* is entirely consistent with *Kapp* and this Tribunal's case law about what is necessary to establish discrimination in the purposive or substantive sense. The law has always been clear that not every distinction or every negative impact experienced by a member of a protected group amounts to discrimination: see *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4, [2007] 1 S.C.R. 161, at paras. 47 – 50, citing *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143.

[26] In the employment context, almost every work-related requirement has the potential to interfere, to some degree, with an employee's family obligations. Yet there are obvious societal and economic reasons why employers must be able to require their employees to work, and to do so at certain times and in certain places, regardless of the fact that employees might have conflicting childcare or other family responsibilities. Something more is necessary, in that context, to establish discrimination, and the Court of Appeal defined that something more as "a serious interference with a substantial parental or other family duty or obligation". This is a way of defining, in that context, what is necessary to establish discrimination in the substantive or purposive sense.

[27] The BCTF has not persuaded me that I should depart from the Tribunal's case law about the scope of *Health Sciences Assn.*, as established in *Stephenson*, and applied in the cases following it. The *Health Sciences Assn.* formulation of what is necessary to establish discrimination on the basis of family status in the context of competing employment and family obligations is not to be applied mechanically in all cases of alleged discrimination on the basis of family status.

[28] In this case, Ms. Miller need not necessarily establish that Clause 5 of the BCTF's Code of Ethics, and its application to her in the circumstances of the Kushner complaint, resulted in a significant interference with a substantial familial obligation.

[29] What Ms. Miller must do to establish a *prima facie* case is show that Clause 5, and its application to her, resulted in discrimination on the ground of family status in the substantive or purposive sense. What is necessary to do that must be considered in the specific context in which her complaint arises.

### 3. Has Ms. Miller established discrimination in the substantive or purposive sense?

[30] In order to establish discrimination in the substantive or purposive sense in the circumstances of this case, Ms. Miller must demonstrate that:

- a. she is a member of a group characterized as having a particular “family status”;
- b. she experienced adverse treatment;
- c. that adverse treatment was related to her family status; and
- d. it constituted discrimination in the substantive or purposive sense.

#### *Is family status engaged?*

[31] That Ms. Miller is a member of the group characterized as having a particular family status is not in issue. She is a parent of children, which is clearly a “family status”.

[32] As submitted by the BCTF, the ground of family status “applies to virtually everyone, right now. Virtually all of us are members of families, whether we have siblings or parents, aunts or uncles, grandparents or children...” Contrary to the BCTF’s submission, however, family status is not unusual among prohibited grounds of discrimination in having this universal character. Like family status, we all have a gender, sexual orientation, age, marital status, race, colour, ancestry and place of origin. If we do not have religious or political beliefs, we may well have the absence of any. Perhaps only unrelated criminal conviction, physical disability, and mental disability are grounds which not all of us share at any given moment. The universality of most prohibited grounds of discrimination is one of the reasons why more than membership in a group characterized by a prohibited ground is required in order to establish a *prima facie* case.

#### *Is there adverse treatment?*

[33] The second question is whether Ms. Miller experienced adverse treatment. In my view, it is clear that she did. Clause 5 of the BCTF’s Code of Ethics prohibits all teachers from criticizing a fellow teacher, except in accordance with the protocol set out therein.

This prohibition, except in accordance with the protocol, represents a limitation on any teacher's right to freedom of expression. Further, in Ms. Miller's case, the pending application of Clause 5 has resulted in stress, and the Hearing Panel's conclusion that she breached Clause 5 means that she is subject to certain penalties, specifically being unable to hold office within the BCTF for a period of one year, and publication of the Hearing Panel's findings in the *Teacher* magazine. The stress of being subject to a complaint process, and possible penalties are also adverse treatment which all teachers who run afoul of Clause 5 share. All of this constitutes adverse treatment. The nature of that adverse treatment is considered in more detail below.

*Is the adverse treatment related to family status?*

[34] The third question is whether this adverse treatment is related to Ms. Miller's status as a parent. The BCTF argues that it is not. It submits that Ms. Miller is not treated differently because she is a parent, but because she is a teacher. Clause 5 applies to all teachers, whether they are parents or not. All teachers, regardless of whether they are parents, are expected to comply with Clause 5. As the BCTF says, being a teacher is not a prohibited ground of discrimination.

[35] In response, Ms. Miller submits that the adverse treatment was related to her status as a parent. She submits that she was treated differently from other parents, in that other parents who are not teachers are not subject to Clause 5. Further, and more significantly, Ms. Miller submits that Clause 5 has an adverse effect on her as a parent, as compared to other non-parent members of the BCTF, because it denies her the ability as a parent to act in her child's best interests.

[36] I agree with Ms. Miller that the BCTF's submission on this point fails to recognize that the BCTF created and applies Clause 5 to all teachers, without regard to their status as parents. Teachers who are parents may have a uniquely parental interest in advocating for their children's educational interests by criticizing their teachers which is not shared by teachers who are not parents. In other words, Clause 5 has an adverse or differential effect on Ms. Miller because of her status as a parent. This is sufficient to establish the third element of the *prima facie* case. It remains to be seen whether this

adverse effect is substantial enough, when considered in its context, to establish discrimination in the substantive or purposive sense.

***Is there discrimination in the substantive or purposive sense?***

[37] I have chosen to consider whether the adverse treatment Ms. Miller experienced constitutes discrimination in a substantive or purposive sense as a fourth element of the *prima facie* analysis. It is not always necessary to consider this issue separately, as in many cases, as I have already discussed in considering the Supreme Court's decisions in *Law* and *Kapp* and this Tribunal's decisions, substantive discrimination will be obvious upon establishing the first three elements. This is not such a case, and it is necessary to consider the purpose of Clause 5 of the Code of Ethics, and the nature and extent of its adverse effect on teacher-parents, in some greater detail.

[38] The majority of the parties' submissions related in some way to the question of whether Clause 5, and its application to Ms. Miller, resulted in substantive discrimination on the basis of family status. In defence to Ms. Miller's position that there was substantive discrimination, the BCTF's primary position was that there was not. In the alternative, the BCTF submitted that, if Ms. Miller had established discrimination, it had a defence, in that it had accommodated her. Ms. Miller, in reply, submitted that the BCTF had not established a *bona fide* occupational requirement, and as part of that submission, that it had not accommodated her to the point of undue hardship.

[39] In considering whether discrimination in the substantive or purposive sense has been established, I have considered all of the parties' arguments, including those made in the context of submissions about whether the BCTF's conduct, if *prima facie* discriminatory, could be justified as either *bona fide* and reasonably justified (a "BFRJ") or a *bona fide* occupational requirement (a "BFOR"). Unlike s. 8 of the *Code*, dealing with services, which has a statutory BFRJ defence, and s. 13, dealing with employment, which has a statutory BFOR defence, s. 14 does not include a statutory justification defence. Despite the absence of a BFRJ or BFOR defence on the face of s. 14, and without making any arguments about whether such a defence exists as a matter of law, both parties' alternative submissions assumed the availability of such a defence,. It may

be that a BFRJ or BFOR defence should be “read-in” to s. 14; on this issue there is a dearth of case law, and I express no opinion. In this case, it is unnecessary to consider that question, as all of the parties’ arguments about whether the BCTF’s policies and conduct were reasonably justified can be fairly and appropriately considered within the context of determining whether discrimination in the substantive or purposive sense has been established.

[40] This is not the first time Clause 5 of the BCTF’s Code of Ethics has been considered in a legal forum. It was considered by the Court of Appeal in the context of a *Charter* claim that it violated a teacher-parent’s freedom of expression in *Cromer v. B.C.T.F.*, [1986] B.C.J. No. 593. That case arose out of Mrs. Cromer’s public criticism of another teacher, Ms. Sauvé, at a PAC meeting. Ms. Sauvé was the guidance counsellor at the school attended by one of Mrs. Cromer’s children, and a controversy had developed with respect to Ms. Sauvé’s teaching methods. Ms. Sauvé filed a complaint with the BCTF, alleging that Mrs. Cromer had violated Clause 5, which was found to be valid on a preliminary basis by the BCTF’s Judicial Committee. Mrs. Cromer filed a petition in Supreme Court, seeking, among other things, a declaration that the BCTF’s proceedings violated her right to freedom of expression under s. 2 of the *Charter*. The petition was dismissed, and Mrs. Cromer appealed.

[41] The Court’s *Charter* analysis has been subsequently overtaken in the jurisprudence. What is significant for present purposes are the Court’s comments about Clause 5, and its application to teacher-parents:

The first point made on behalf of Mrs. Cromer does not depend on the *Charter*. Mrs. Cromer does not repudiate the Code of Ethics of the British Columbia Teachers’ Federation. She concedes that they apply to her as a teacher, as she would have them apply to all other teachers. But she says that she did not speak as a teacher when she spoke at the continuation of the Parents’ Advisory Committee meeting on 18 January, 1983; she says she spoke as a parent, and as a very concerned parent at that. To bring this charge against her is an attempt to make her subject to discipline as a teacher for something she did as a parent. In essence, her argument on this point is that the Code of Ethics had no application to her at the time she spoke out at the adjourned meeting of the Parents’ Advisory Committee.

I don’t think people are free to choose which hat they will wear on what occasion. Mrs. Cromer does not always speak as a teacher, nor does she

always speak as a parent. But she always speaks as Mrs. Cromer. The perception of her by her audience will depend on their knowledge of her training, her skills, her experience, and her occupation, among other things. The impact of what she says will depend on the content of what she says and the occasion on which she says it.

...

The Code of Ethics is designed to avoid disharmony among teaching colleagues, and to promote professional standards, all in the interests of creating an environment where the children being taught will receive the best educational opportunity possible. As both the trial judge and the Judicial Committee noted, Clause 5 of the Code of Ethics does not preclude criticism by one teacher of another; it sets out a procedure for making criticism that is intended to increase the beneficial effects of the criticism and minimize harmful effects.

On the other side of the balance lies the importance of Mrs. Cromer being able to speak her mind. (paras. 56 – 62)

[42] The Court went on to consider Mrs. Cromer's particular statements about Ms. Sauvé, in light of its opinion that if her comments had been directed to the subject matter of the meeting, rather than a personal criticism of Ms. Sauvé, the public interest in Mrs. Cromer being able to speak her mind would have overridden the Code of Ethics. The Court held, however, that Mrs. Cromer's statements were entirely personal criticisms of Ms. Sauvé, and therefore came squarely within the public interest that brought Clause 5 into being. In the result, the Court held that Mrs. Cromer had not established a breach of her right to freedom of expression: paras. 62 – 68.

[43] In *Ross v. New Brunswick School District No. 15*, [1996] S.C.J. No. 40, another freedom of expression case, the Supreme Court of Canada commented with approval upon the salient aspect of the Court of Appeal's decision in *Cromer* in the following terms:

By their conduct, teachers as "medium" must be perceived to uphold the values, beliefs and knowledge sought to be transmitted by the school system. The conduct of a teacher is evaluated on the basis of his or her position, rather than whether the conduct occurs within the classroom or beyond. Teachers are seen by the community to be the medium for the educational and because of the community position they occupy, they are not able to "choose which hat they wear on what occasion" (see *Re Cromer and British Columbia Teachers' Federation* (1986), 29 D.L.R.

(4<sup>th</sup>) 641 (B.C.C.A.), at p. 660); teachers do not necessarily check their teaching hats at the school yard gate and may be perceived to be wearing their teaching hats even off duty. (para. 44)

[44] In response to this jurisprudence, Ms. Miller referred to a decision of the Alberta Court of Appeal, *Eggertson v. Alberta Teachers' Assn.*, [2002] A.J. 1358, in which that Court overturned a decision of the Alberta Teachers' Association that a teacher-parent had breached the analogous provision in its Code of Professional Conduct. In doing so, the Court emphasized that the context in which a teacher-parent criticizes their child's teacher is significant in interpreting the scope of the provision, and that the context in which that teacher-parent had criticized their child's teacher meant that the provision did not apply.

[45] I did not find *Eggertson* of much assistance in this case. First, it was not a human rights case, but a judicial review of the Alberta Teachers' Association's decision on administrative law principles. Second, it is based upon the finding that the provision in the Association's Code, properly interpreted, did not apply in the context before the Court. There is no question that Clause 5 of the BCTF's Code of Ethics applies in the context before me; the question is whether its application is discriminatory. Third, *Eggertson* is a decision of the Alberta Court of Appeal. To the extent, if any, that it can be said to be inconsistent with *Cromer*, *Cromer* remains, as a decision of the British Columbia Court of Appeal, the law in this province.

[46] As stated by the Court of Appeal in *Cromer*, "The Code of Ethics is designed to avoid disharmony among teaching colleagues, and to promote professional standards, all in the interests of creating an environment where the children being taught will receive the best educational opportunity possible": para. 57. These are legitimate purposes, which serve substantial societal interests.

[47] Clause 5 seeks to further these purposes by regulating the manner in which teachers may criticize other teachers. It does not prohibit such criticism, but establishes a protocol which must be followed should a teacher wish to criticize another teacher. To repeat, Clause 5 states:

The teacher directs any criticism of the teaching performance and related work of a colleague to that colleague in private, and only then, after

informing the colleague in writing on the intent to do so, may direct in confidence the criticism to appropriate individuals who are able to offer advice and assistance.

[48] Clause 4 of the Code of Ethics is also important in considering Clause 5, as it provides that:

The teacher is willing to review with colleagues, students, and their parents/guardians the quality of service rendered by the teacher and the practices employed in discharging professional duties.

[49] In other words, a teacher who is critical of another teacher is obligated first to speak privately with the other teacher, and that teacher is obligated to review with him or her the quality of service and practices employed by them in the discharge of their professional duties. If the teacher who is critical wishes to pursue the matter further, he or she must inform the other teacher in writing, and then direct the criticism to an appropriate individual for advice and assistance. These steps are designed to prevent the breakdown of professional relationships, and unnecessary harm to professional reputations, while at the same time permitting teachers with concerns about their colleagues to voice them in a manner most likely to resolve their concerns in a constructive fashion. As put by the Court of Appeal in *Cromer*, Clause 5 “does not preclude criticism by one teacher of another; it sets out a procedure for making criticism that is intended to increase the beneficial effects of the criticism and minimize harmful effects”.

[50] Clause 5, on its face and in its application to Ms. Miller, does not permit any exceptions to its protocol, other than in the case of child protection concerns. In particular, there is no exception for teachers who are also parents. Teacher-parents are expected to abide by its terms, even when addressing concerns relating to their own children’s education. This is made clear in the literature the BCTF has created and provides to its members about their obligations under the Code of Ethics.

[51] The application of Clause 5 to teacher-parents is in keeping with the comments of both the Court of Appeal in *Cromer* and the Supreme Court of Canada in *Ross*: teachers are not free to decide which hat they are wearing on which occasion.

[52] There is a sound policy rationale for requiring teacher-parents to abide by Clause 5. Teachers, like other professionals, enjoy a degree of credibility and authority when they speak on matters related to their profession. Such heightened credibility and authority bring with them heightened responsibility, and may entail some limitation on the freedom they would otherwise enjoy as members of the public to speak their minds.

[53] As I have already discussed, as such, Clause 5 has some adverse effect on teacher-parents such as Ms. Miller, who must abide by its terms or face the possibility of sanction by their union. In her submissions, Ms. Miller focussed on what she said the adverse and thus discriminatory effect of Clause 5 is: that she, because she is a teacher, must stay silent in the face of other parents' criticisms of a teacher.

[54] The extent of the adverse effect is not, in my opinion, particularly substantial. That is because, provided they abide by the protocol established in Clause 5, teacher-parents remain free to criticize other teachers. They may speak their minds, and take effective steps to resolve any concerns they may have about their children's education, provided they do so in accordance with its terms. To the extent Clause 5 requires them to stay silent in the face of other parents' criticisms, that restriction is not closely related to their uniquely parental interest in acting in their own children's best interests, including, as they may think necessary, being critical of their child's teacher.

[55] The BCTF's policies, including the Code of Ethics and the procedures for addressing complaints under Clause 5, are the result of its internal democratic processes. Members of a trade union, who receive the benefits of membership, can reasonably be expected to abide by the results of the democratic decision-making of their union: see *Manning v. Sooke Teachers' Association and others*, 2004 BCHRT 281, para. 15.

[56] The procedures in issue here provide for multiple opportunities for informal resolution of complaints. Where no informal resolution is possible, and a Screening Panel orders a hearing to be held, "a three-member Hearing Panel shall conduct a full hearing of evidence related to the charge(s)."

[57] According to the BCTF's policies, a Hearing Panel is empowered either to dismiss the complaint or, if it finds the complaint to be justified, determine appropriate remedies. Hearing Panels have a range of possible remedies they may order, including

publication of the finding that a breach of the Code of Ethics occurred, a warning, a reprimand, a fine, suspension of the right to hold office or membership in the BCTF, and expulsion from membership. The most serious of these potential remedies would be suspension or expulsion from membership in the Federation, as that could entail the loss of one's teaching position. A monetary fine could also, depending on the amount, be a significant penalty.

[58] Following the release of a Hearing Panel's decision, an unsuccessful party can appeal the decision to an Appeal Panel.

[59] Turning to Ms. Miller's situation, the parties have agreed that at least some of the parents to whom she wrote the e-mail knew her to be a teacher. This would have tended to give her comments credibility and an imprimatur of authority in the minds of at least some of her audience.

[60] Ms. Miller submitted that, in assessing the context for the complaint, it was significant that she was acting in her role as the PAC representative for her child's class, passing on information given to her by the PAC president. In this way, she attempted to diminish her responsibility for the critical comments contained in the e-mail. This argument is a double-edged sword, because, to the extent it is accurate to say that Ms. Miller was acting in the capacity of a PAC representative, merely passing on information given to her by another, that would mean that her conduct was at least one step removed from any uniquely parental obligation or interest in advocating for her child's interests. That would render the role of her family status in any adverse treatment she experienced somewhat remote.

[61] Nor was Ms. Miller, on the face of the e-mail, acting as a mere conduit for information between the PAC President and the parents of the other students in her child's class. In this regard, it is significant that she spoke in the first person singular, for example stating that "I believe everyone is aware of the situation in our children's classroom", and "I believe this was the first time she had heard directly from the source how truly awful things have been". Ms. Miller was clearly expressing her own view about "how truly awful things have been", and the need for and possibility of "positive change". Further, while Ms. Miller appears to have been passing on information about

the procedure to be followed, it is striking that she specifically, and with considerable emphasis, told the other parents that they could and must keep that information confidential. While parents were told they must “pop in” to speak to the teacher before speaking to the Principal, if they had not already spoken to him once during the school year, that was clearly a merely *pro forma* requirement, and did not include informing the teacher that the next step would be to speak to the Principal. Ms. Miller’s communication was completely at odds with the Clause 5 requirement to give the teacher notice that criticisms would be directed to his superior, the Principal.

[62] When Mr. Kushner found out about the e-mail, he filed his complaint against Ms. Miller with the BCTF. Attempts at informal resolution were unsuccessful. A Screening Panel referred the matter to hearing, and the Hearing Panel concluded that Ms. Miller had violated Clause 5. It did not, however, order any of the most significant penalties available under the BCTF’s policies. It reprimanded Ms. Miller, suspended her right to hold office for a year, and ordered publication of its finding in the *Teacher*. The BCTF chose to delay publication in the *Teacher* pending this Tribunal’s decision.

[63] Ms. Miller testified that she lives in dread of the finding being published and feared what it would do to her reputation. While I accept that she is concerned about publication and its effect on her reputation, the fact remains that the penalties ordered by the Hearing Panel are less serious than those which were potentially available to it. Further, Ms. Miller’s concern with her reputation, while understandable, is likely one which was shared by Mr. Kushner about his own reputation. Her concern about her reputation is, it must be said, somewhat ironic in light of the damage her e-mail may have done to Mr. Kushner’s reputation, and the fact that one of the underlying purposes which Clause 5 seeks to further is the protection of teachers’ professional reputations from the harmful effects of public criticism by their colleagues.

[64] Ms. Miller agreed in cross-examination that the Hearing Panel held a hearing at which it heard her and her arguments. She further agreed that she had prior notice of the nature of the complaint made against her. Ms. Miller appealed the Hearing Panel’s decision to an Appeal Panel. The Appeal Panel upheld the Hearing Panel’s decision, and penalties.

[65] The BCTF's hearing policies, and their application in Ms. Miller's case, are designed to ensure that persons who are alleged to have breached the Code of Ethics receive a fair hearing. Ms. Miller received notice of the complaint against her, a fair opportunity to give evidence and make submissions to the Hearing Panel, and to appeal its decision to an Appeal Panel.

[66] In order to determine whether discrimination in the substantive or purposive sense has been established, the matter must be considered as a whole, including: the context in which Ms. Miller's complaint arose; the purposes for which Clause 5 of the Code of Ethics was created; the nature, extent and effect of the limitation on teachers' ability to criticize other teachers, and more importantly, the nature, extent and effect of the limitation on teacher-parents' ability to criticize their children's teachers; the nature of Ms. Miller's conduct giving rise to Mr. Kushner's complaint against her, and how closely related it was to her parental obligations; the hearing and appeal procedures adopted and applied by the BCTF; the range of penalties available to the BCTF where a breach of Clause 5 is found; and the actual penalties imposed on Ms. Miller for her breach.

[67] While Ms. Miller believes that Clause 5 should not apply to her at all in her communications relating to the teacher of her child, and is distressed both to have had a complaint filed against her, and to have been unsuccessful in her attempts to have that complaint dismissed, it cannot be said that her human dignity has been negatively affected by any of these events. Nor can it be said that she has been subjected to arbitrary treatment that failed to respect her parental status or obligations. She could have expressed her own concerns about Mr. Kushner's teaching, whatever they may have been, to an appropriate authority, had she complied with Clause 5. She could thereby have fulfilled any parental obligation she had to advocate for her child's education. Having failed to comply with Clause 5, she was subject to processes which were the result of the democratic decision-making of the union of which she is a member. Those processes were designed to and did give her a fair hearing. The penalties imposed upon her were relatively minor, particularly in comparison to others available to the BCTF. In all of these ways, Ms. Miller's human dignity, including her status as a parent, was respected.

[68] Taking all of these factors into account, I conclude that Ms. Miller has not established that Clause 5 of the BCTF's Code of Ethics, or its application to her, resulted in discrimination on the ground of family status in the substantive sense required to establish a *prima facie* breach of s. 14 of the *Human Rights Code*. While the application of Clause 5 to Ms. Miller's conduct in sending the e-mail to the other parents of children in her child's class had some adverse effect on her because of her dual status as a teacher and parent, the magnitude of that adverse effect, when considered in light of the salutary purposes and effects of Clause 5, is insufficient to establish discrimination.

#### **IV CONCLUSION**

[69] The complaint is dismissed.

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Lindsay M. Lyster, Tribunal Member