IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Gardezi v. Positive Living Society of British Columbia,* 2017 BCSC 1883

Date: 20171020
Docket: S1510156
Registry: Vancouver

Between:

Shella Gardezi

Petitioner

And

The Positive Living Society of British Columbia, Ross Harvey, Alexandra Regier, Canadian Union of Public Employees Local 3495

Respondents

Before: The Honourable Madam Justice Burke

Reasons for Judgment

Appearing on her own behalf:	S. Gardezi
Counsel for the Respondent The Positive Living Society of British Columbia:	J.D. Wiegele
Counsel for the Respondent Canadian Union of Public Employees Local 3495:	M. Shapiro
Place and Date of Hearing:	Vancouver, B.C. March 30 and 31, 2017
Place and Date of Judgment:	Vancouver, B.C. October 20, 2017

INTRODUCTION

[1] Ms. Gardezi filed a petition for judicial review on December 8, 2015, seeking to set aside two decisions of the BC Human Rights Tribunal (the "Tribunal"), respectively dated September 11, 2015, and October 27, 2015.

[2] On April 22, 2015, Ms. Gardezi filed a complaint with the Tribunal alleging her former employer, the Positive Living Society of British Columbia (the "Employer"), the Canadian Union of Public Employees, Local 3495 (the "Union"), and two employees of the Employer had discriminated

against her on the basis of mental disability.

[3] On September 11, 2015, the Tribunal dismissed the complaint as untimely on the basis that Ms. Gardezi was aware she had grounds to file a complaint prior to October 23, 2014, the six-month time limit to file a complaint, but did not do so. Ms. Gardezi had asserted she had later discovered additional facts she believed supported her complaint. The Tribunal did not find this to be a sufficient basis to alter the conclusion it was not in the public interest to accept the late-filed complaint. As part of its analysis, the Tribunal also concluded allegations concerning the forwarding of emails by the Union on March 10, 27, and April 7, 2015, did not constitute a continuing contravention under s. 22(2) of the *Human Rights Code*, R.S.B.C. 1996, c. 210 [*Code*] (at para. 34).

[4] On September 14, 2015, Ms. Gardezi filed a request for reconsideration of the September 11, 2015 decision, including in that request new evidence in the form of a doctor's letter dated September 14, 2015.

[5] On October 27, 2015, the Tribunal issued its Reconsideration Decision and denied the request to accept the late-filed complaint. It concluded the application did not concern procedural fairness but rather sought a different result and it was not in the public interest to accept it under s. 22(3) of the *Code*.

BACKGROUND

[6] The petitioner was hired in the communications department by the Employer, a respondent in this matter. At the commencement of her employment she became a member of the Union, another respondent.

[7] On March 19, 2014, the petitioner filed a complaint of bullying and harassment in the workplace (the "Harassment Complaint") against the Employer. The Employer retained an independent investigator to conduct an investigation of the Harassment Complaint. The investigator's report dated June 13, 2014, concluded that the complaints contained in the Harassment Complaint were not substantiated.

[8] On June 17, 2014, the Employer terminated the petitioner's employment. The Union grieved the petitioner's termination.

[9] On September 26, 2014, the Union advised the petitioner that it had entered into a settlement agreement on her behalf. The settlement did not include reinstatement of employment. On October 29, 2014 the settlement was upheld by the Union's appeal committee. The settlement agreement was executed on November 5, 2014.

[10] On November 3, 2014, the petitioner filed a complaint with the British Columbia Labour

Relations Board (the “LRB”), alleging a breach of the duty of fair representation by the Union. That complaint is described by Greyell J. in his decision at 2016 BCSC 421 as follows:

> [6] The origin of this dispute arises from Ms. Gardezi’s employment and her assertion the Union failed to properly represent her in a dispute with PLSBC. The dispute with PLSBC arose from a series of issues including allegations concerning her relationship with other employees; that she was improperly placed on probation when she was transferred to another position; that PLSBC improperly assigned certain job duties she says she should have performed to another employee; and PLSBC’s and the Union’s responses to these allegations. Ms. Gardezi made various complaints of bullying against representatives of PLSBC and then against the Local President of the Union.
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> [7] On March 16, 2014, Ms. Gardezi filed a formal bullying complaint against PLSBC. PLSBC appointed an independent investigator who interviewed a number of employees as well as Ms. Gardezi. The investigator issued a 64-page Harassment & Bullying Investigation Report on June 13, 2014 dismissing Ms. Gardezi’s bullying complaint (the “Report”). I will return to the Report later in these reasons.
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> [8] Ms. Gardezi says she was suspended with pay from her employment on April 17, 2014 for filing the bullying complaint and that on June 17, 2014, she was fired for filing the complaint. She says she was dismissed in retaliation for filing the bullying complaint.
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> [9] The Union filed a grievance on her behalf but refused to take the termination to arbitration after reaching a potential monetary settlement with PLSBC which Ms. Gardezi refused to accept.

[11] Ms. Gardezi’s complaint was dismissed on March 14, 2015, and her application for leave and reconsideration was dismissed on June 18, 2015. The petitioner unsuccessfully sought judicial review of the LRB’s reconsideration decision. The petitioner is now pursuing an appeal to the British Columbia Court of Appeal: *Positive Living Society of British Columbia (Re)* BCLRB No. B45/2015; *Positive Living Society of British Columbia (Re)* BCLRB No. B114/2015; *Gardezi v. Canadian Union of Public Employees, Local 3495*, 2016 BCSC 421; *Gardezi v. Canadian Union of Public Employees Local 3495*, 2016 BCCA 462, leave to appeal to S.C.C. requested.

[12] On April 22, 2015, the petitioner filed a complaint with the Tribunal alleging discrimination by the Employer, the Union, and two employees of the Employer on the basis of mental disability. The petitioner alleged that the dismissal, and the alleged conduct by managers and employees prior to that dismissal, constituted discrimination on the basis of disability. The complaint against the Union also alleged harassment by email in the course of, and immediately following, the settlement of the grievance, and contained additional allegations concerning emails exchanged in March - April 2015.

[13] On September 11, 2015, the Tribunal issued 2015 BCHRT 143 (the “Original Decision”). The Tribunal concluded as follows:

- Allegations concerning the circumstances that formed the basis of the Harassment Complaint were late-filed. Allegations concerning the investigation and the subsequent termination of the petitioner’s employment were also late-filed.

- Allegations concerning the Union's failure to support the petitioner during the investigation and the alleged email harassment during the settlement of her grievance were late-filed.

- Allegations concerning emails sent on March 10, 27, and April 7, 2015, could not, if proven, amount to a contravention of the *Code*. As such, they did not constitute continuing violations under s. 22(2) of the *Code*.

- The Tribunal was not persuaded that it was in the public interest to accept the petitioner's late-filed complaint.

[14] On September 14, 2015, the petitioner filed a request for reconsideration of the Original Decision.

[15] On October 27, 2015, the Tribunal issued 2015 BCHRT 163 (the "Reconsideration Decision"). The petitioner's request to reconsider the Original Decision's denial of the application to limit publication of personal information was granted on consent. The petitioner's request to reconsider the Original Decision's time limit decision was denied. The Tribunal concluded that the petitioner's application was not about procedural fairness, but rather sought a different result. The Tribunal was not persuaded that any unfairness occurred that would justify the reconsideration of the timeliness decision.

Legal Principles

[16] *Legere v. The Provincial Health Services Authority*, 2013 BCSC 306, states the standard of review of Tribunal decisions as follows:

> [22] The standard of review of HRT decisions is set out in section 59 the *Administrative Tribunals Act*, S.B.C. 2004, c. 45:
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> > **59** (1) In a judicial review proceeding, the standard of review to be applied to a decision of the tribunal is correctness for all questions except those respecting the exercise of discretion, findings of fact and the application of the common law rules of natural justice and procedural fairness.
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> > (2) A court must not set aside a finding of fact by the tribunal unless there is no evidence to support it or if, in light of all the evidence, the finding is otherwise unreasonable.
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> > (3) A court must not set aside a discretionary decision of the tribunal unless it is patently unreasonable.
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> > (4) For the purposes of subsection (3), a discretionary decision is patently unreasonable if the discretion
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> > (a) is exercised arbitrarily or in bad faith,
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> > (b) is exercised for an improper purpose,
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> > (c) is based entirely or predominantly on irrelevant factors, or
> >
> > (d) fails to take statutory requirements into account.

> (5) Questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly.
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> [Emphasis in original.]

[17] Savage J. (as he then was) also succinctly sets out the principles dealing with time limits to bring a complaint under the *Code* in that case:

> [4] Section 22 of the *Human Rights Code*, R.S.B.C. 1996, c. 210 sets out a time limit for bringing complaints:
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> 22 (1) A complaint must be filed within 6 months of the alleged contravention.
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> (2) If a continuing contravention is alleged in a complaint, the complaint must be filed within 6 months of the last alleged instance of the contravention.
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> (3) If a complaint is filed after the expiration of the time limit referred to in subsection (1) or (2), a member or panel may accept all or part of the complaint if the member or panel determines that
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> (a) it is in the public interest to accept the complaint, and
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> (b) no substantial prejudice will result to any person because of the delay.
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> [5] The Human Rights Tribunal rendered a decision May 3, 2012 which dismissed part of the complaint based on timeliness. It reviewed the facts and determined that the facts giving rise to the complaint crystallized in August 2010. The complaint filed was therefore out of time, unless there was a "continuing contravention".
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> [6] The HRT determined that there was no continuing contravention. However, subsection 22(3) allows that the HRT may accept a late complaint if it is in the public interest and there is no substantial prejudice. The HRT found that it was not established that accepting the late complaint was in the public interest. The petitioner then commenced this application for judicial review.

[18] As set out in *Kinexus Bioinformatics Corporation v. Asad,* 2010 BCSC 33, while the standard of review applicable to findings of fact is reasonableness or as set out in the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 [*ATA*], a lack of evidence to support a finding of fact, that standard requires a high level of deference towards a Tribunal acting in its fact-finding capacity.

[19] The reasonableness standard does not apply when the Tribunal's finding of fact is inextricably connected with that Tribunal's discretionary decision-making function. Rather, the question is whether the discretionary decision as a whole is patently unreasonable: see *Morgan-Hung v. British Columbia (Human Rights Tribunal)*, 2011 BCCA 122; *Berezoutskaia v. British Columbia (Human Rights Tribunal),* 2006 BCCA 95; and *Gichuru v. British Columbia (Workers Compensation Appeal Tribunal),* 2010 BCCA 191. The Court may not set aside a discretionary decision of the Tribunal unless the discretionary decision as a whole is patently unreasonable.

[20] Section 22(1) of the *Code* requires a complaint to be filed within six months of the alleged contravention. The Tribunal, however, has the discretion under s. 22(3) to accept a late-filed complaint if the Tribunal member or panel determines that it is in the public interest to accept the

complaint and that no substantial prejudice will result to any person because of the delay. The Tribunal also has the discretion under s. 27(1)(g) of the *Code* to dismiss a complaint on the ground that it was filed late.

[21] The Tribunal's decision to accept a late-filed complaint is therefore discretionary and subject to the standard of review of patent unreasonableness.

[22] With respect to the Tribunal's discretion to accept a late-filed complaint, the Court stated as follows in *Goddard v. Dixon*, 2012 BCSC 161 at para. 151:

> [151] The Tribunal has held that the six month time limit in s. 22 of the *Code* is a substantive provision designed to ensure that complainants pursue human rights remedies with some diligence, and to protect respondents from having to address dated complaints. However, s. 22(3) gives the Tribunal discretion to accept late-filed complaints if it is in the public interest to do so, and where no substantial prejudice will result to any person because of the delay. The onus is on the complainant to establish that both of these requirements are met …

[23] The scope of the inquiry conducted by the Tribunal at this preliminary state is limited in nature.

Issue

[24] Was the Tribunal's Original Decision patently unreasonable?

[25] I note issues raised with regards to the Reconsideration Decision, the timeliness of the judicial review, and anonymization will also be addressed.

Petitioner's Position

[26] Ms. Gardezi maintains the decision is procedurally unjust and patently unreasonable. She maintains it was patently unreasonable as there was no evidence before the Tribunal to support the finding she knew about the mental health allegations prior to October 23, 2014.

[27] The petitioner's fundamental point is the Tribunal made an unreasonable finding of fact when it concluded the petitioner was aware she may have had grounds for a Human Rights complaint prior to October 23, 2014. Her bullying complaint did not refer to mental illness, so she maintains it was not reasonable to reach this conclusion based on that complaint. The petitioner maintains information about the mental illness discrimination first came to light on October 23 and December 10, 2014—within six months of the filing of her complaint on April 22, 2015.

[28] The petitioner points to a disclosure file from WorkSafeBC which she received on October 23, 2014 that contained: a letter to her employer of April 24, 2014, stating the petitioner should be removed from office because she had a mental illness, another letter of April 25, 2014 by the petitioner's shop steward, "describing personal characteristics stereotypically associated with depression" as threatening, and an email of April 1, 2014 from the shop steward stating the

petitioner was mentally unstable and therefore it was “unsafe” for the petitioner to be in contact with her.

[29] The Tribunal’s finding was therefore not within the range of reasonable options. The petitioner maintains the finding was procedurally unjust and incorrect as the Tribunal relied on a bullying complaint which contained no reference to mental illness as evidence that the petitioner was aware of the mental health allegations.

[30] Ms. Gardezi also says the Tribunal provides no reasons for its decision that the continuing forwarding of emails between the Employer and Union was not a continuing contravention. She points out a finding of “continuing contravention” under s. 22 would have extended the time limit for filing her claim.

[31] Section 22(2) of the *Code* reads:

> If a continuing contravention is alleged in a complaint, the complaint must be filed within 6 months of the last alleged instance of contravention.

[32] Ms. Gardezi identifies five incidents which she says makes the alleged discrimination a “continuing contravention.” They are:

1) An email from Terry Howard;

2) The signing of the termination agreement;

3) The continued forwarding of personal information on the presumption of a threat with which was devised based on mental illness stigma;

4) The refusal to provide representation; and

5) The appeal committee decision of the Board of Directors.

Application of the Principles

[33] The Tribunal outlined the petitioner’s complaint as follows:

> *The Complaint*
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> [23] A sets out her complaint in a 15-page chronology of events covering the time span September 5, 2013 to April 7, 2015. Some of the entries contain only contextual information. In summary, A alleges that the Society discriminated against her by discrediting her feelings and her bullying complaint based on the Society’s perception that she had a mental illness. Further, the Society allowed other employees to treat her poorly, did not deal with her complaints and failed to recognize its duty to accommodate her. Her allegations against the individual Society employees are similar and further allege that they said that she impacted the safety and well-being of others which was stigmatizing for her. She specifically alleges that being suspended during the investigation of her complaint had an adverse impact on her.

[34] The Tribunal then said:

> [30] A timely continuing contravention under s. 22(2) of the *Code* requires successive allegations of discrimination of the same character, at least one of which must have occurred within six months of filing: *Lynch v. B.C. Human Rights Commission*, 2000 BCSC 1419, adopting the definition in *Re The, Queen in Right of Manitoba and Manitoba Human Rights Commission et al* (1984). 2 D.L.R. (4th) 759 (Man. C.A.) (para. 35).
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> [31] The portion of the complaint that refers to matters after October 22, 2014 are as follows:
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> - October 25. 2014: A refers to a disclosure package from WorkSafe BC with included material dated April I, 8, 23 and 24, 2014. A states that this disclosure provided her with new information about the role a perception that she had a mental disability played in how she was treated. A also states that on October 25, 2014 she filed a Freedom of Information request. She then refers to comments in the material (the Investigative Report) that she later received.
> - March 10, 2015: A states that she informed her Union that she had new evidence respecting her bullying complaint and would like to file a grievance.
> - March 27, 2015: A sent an e-mail to B to ask a question. She received an automatic reply which led her to question both B and C whether her Union e-mails were being sent to C without her knowledge.
> - On April 7, 2015: B responded to her question.
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> [Emphasis added.]

[35] A critical finding of the Tribunal was:

> [32] … The Union is correct in its submission that A's discovery of new information in October 2015 and later relates to the portion of her complaint that is out of time "does not restart the clock for the time limit". The new information is a factor relevant to whether it is in the public interest to accept a late-filed complaint under s. 22(3): *Hunter v. Richmond School District No. 38,* 2009 BGHRT 224.
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> [33] Further, a complaint is only accepted for filing if the acts as alleged, if proven, could amount to a contravention of the *Code: Baron and Reardon v. B.C. (Ministry of Social Development),* 2012 BCHRT 73, para. 30. The March 10 and 27 and April 7 events arc A's chronology' of what happened. There is no information about a connection to a protected ground or statement of adverse impact. The remainder of the events alleged in the complaint that occurred after October 22, 2014 could not, if proven, amount to a contravention of the *Code* and are therefore not accepted for filing.
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> …
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> [40] A has not persuaded me that the circumstances of her case should lead to a different conclusion regarding her delay in filing a complaint under the *Code* because she was waiting to hear the outcome on a s. 12 complaint against her Union. A was fully able to file a timely complaint against the Union under the *Code.* As the Respondents have pointed out, A has filed other complaints under the *Code* and can be presumed to be knowledgeable about its lime limitations.
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> [41] A argues that, had she had the information in the documents she accessed .on October 23 and later, she would have had further proof that she had suffered discrimination by the Society, the individually-named Respondents and the Union based on a perception that she had a mental disability respecting her bullying and harassment complaint, the course of tire investigation, and her termination.

> [42] The question is whether this is a circumstance where late-acquired evidence should weigh in the public interest to accept a late-filed complaint. In *Reyes and Bhatti v. Western Forest Products Inc*., 2006 BCHRT 251, the Tribunal found that the complainants did not know the material facts upon which their complaint may be based and could not, with reasonable diligence, have discovered those facts. This is not the case for A who was aware that she may have had grounds for a complaint and, indeed, did file an internal complaint of bullying and harassment due to a perception of a mental disability. In addition, had A filed a timely complaint, she would have been entitled to disclosure of documents that may be relevant to her complaint under the *Tribunal Rules of Practice and Procedure*.
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> [43] The Tribunal has held the six-month time limit under s. 22 of the *Code* is a substantive provision that serves the purpose of ensuring that complainants pursue their human rights remedies with some speed and allowing respondents the comfort of performing their activities without the possibility of dated complaints: *Chartier v. School District No. 62*, 2003 BCHRT 39, para. 12. I am not convinced that A's circumstances weigh in favour of accepting her late-filed complaint because she later found more evidence.
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> [Emphasis added.]

[36] Essentially the Tribunal concluded the discovery of new evidence in furtherance of a complaint, such as occurred here, did not "restart the clock for a time limit." Ms. Gardezi was aware she may have grounds for a complaint; indeed filed an internal complaint of harassment due to a perception of mental disability but did not file a complaint with the Human Rights Tribunal.

[37] Furthermore, I note the petitioner's complaint itself to the Tribunal dated April 22, 2015 stated that the petitioner was, in fact, aware of the alleged discrimination prior to October 23, 2014. In that complaint she says:

> In October I received a letter and three emails that revealed the extent to which mental illness played a role in the adverse treatment I received. Although I was aware of discrimination, I did not have enough evidence of grounds. [Emphasis added.]

[38] The petitioner also maintains the Tribunal provided no reasons for its conclusion that the forwarding of certain emails did not constitute a continuing violation. On this point, *Leger v. Provincial Heath Services Authority*, 2013 BCSC 306, points out at para. 23:

> … based on the authorities, such as *I.J. v. J.A.M.*, 2012 BCSC 892 at para. 41, and *Goddard v. Dixon*, supra, at para.150-159, that the question of whether a contravention is a continuing contravention is a question of fact or a matter involving a discretionary decision.

[39] The Court then went on to say:

> [24] In general, the question of whether something falls within the definition of its term is a question of fact, not law. Although the HRT does not make findings of fact in this application, it treated the issue before it in the same way, requiring a determination if a thing falls within the definition of its term. Based on the authorities, under this legislation, that involves an exercise of discretion.

[40] Contrary to this argument, however, the Tribunal did provide reasons. It said:

> 33 Further, a complaint is only accepted for filing if the acts as alleged, if proven, could amount to a contravention of the Code: Baron and Reardon v. B.C. (Ministry of Social Development), 2012 BCHRT 73, para. 30. The March 10 and 27 and April 7 events are A.'s

> chronology of what happened. There is no information about a connection to a protected ground or statement of adverse impact. The remainder of the events alleged in the complaint that occurred after October 22, 2014 could not, if proven, amount to a contravention of the Code and are therefore not accepted for filing.
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> 34 Because there is no timely allegation of discrimination, A.'s complaint does not constitute a continuing contravention of the Code under s. 22(2). The complaint does not constitute a continuing contravention of the Code under s. 22(2). The complaint is late-filed.
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> [Emphasis in original.]

[41] The Tribunal explained that, given the lack of connection to a protected ground or statement of adverse impact, the forwarding of emails, if proven, could not amount to a contravention of the *Code*.

[42] A court can only set aside a discretionary decision if it is patently unreasonable. That requires a finding of arbitrariness, bad faith, improper purpose, the consideration of irrelevant factors, or failing to consider relevant statutory provisions. The court can only set aside a finding of fact if there is no evidence to support it or if, considering all of the evidence, it is unreasonable.

[43] The Tribunal provided reasons and its conclusion that the email forwarding did not constitute a continuing violation was not patently unreasonable. There is nothing before me that supports the argument that the Tribunal acted in any of the required improper ways, or acted without evidence, or unreasonably. Even if one would not have come to the same decision, that alone is not sufficient to conclude the decision was potentially unreasonable such that it should be overturned.

Reconsideration Decision

[44] The petitioner only identifies issues with respect to the original decision. While disagreeing with the Reconsideration Decision, she has not pointed out anything in that decision that amounts to an improper exercise of the Tribunal's decision such that it is patently unreasonable.

Timeliness

[45] Both respondents argued the petition for review of the original decision was untimely as a judicial review of a final decision of a Tribunal must be commenced within 60 days pursuant to s. 57(1) of the *ATA*.

[46] The original decision was rendered on September 22, 2015. A timely application for judicial review should have been brought no later than November 11, 2015. The petition was filed on December 8, 2015, therefore being 26 days late. No explanation for delay was proffered and no serious grounds for review exist. Rather than dismiss the matter on timeliness, and given the unusually convoluted history of this matter, I have dealt with the matter on its merits to provide some closure to the parties.

Anonymization

[47] Finally, Ms. Gardezi sought an order that the names be anonymized due to the assertion of mental illness. The respondents take no issue with this. While I am sympathetic to the petitioner's rationale, as concluded in 2016 BCSC 421, I do not find the facts to be so sensitive as to depart from the court's longstanding policy of openness and access to the court's process. That application is also denied.

COSTS

[48] The Employer and the Union are seeking costs. Neither are seeking special costs. The petitioner argues they would be inappropriate in this case, given evidence of the alleged discrimination. That is, however, not the question before me on this judicial review. I therefore award costs.

The Honourable Madam Justice E. Burke