IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Providence Health Care v. Dunkley,* 2016 BCSC 1383

Date: 20160726
Docket: S157131
Registry: Vancouver

Between:

Providence Health Care

Petitioner

And

Jessica Dunkley and British Columbia Human Rights Tribunal

Respondents

- and -

Docket: S157143
Registry: Vancouver

Between:

University of British Columbia

Petitioner

And

Jessica Dunkley and British Columbia Human Rights Tribunal

Respondents

Before: The Honourable Mr. Justice Ehrcke

Reasons for Judgment

Counsel for the Petitioner Providence Health Care:	P.A. Washington E.L. Lambert-Schirzad
Counsel for the Petitioner University of British Columbia:	D.J. Jordan, Q.C.
Counsel for the Respondent J. Dunkley:	D. Tarasoff J.K. Hadley
Counsel for the Respondent British Columbia Human Rights Tribunal:	K.A. Hardie
Place and Date of Hearing:	Vancouver, B.C. June 14-17 and 28, 2016
Place and Date of Judgment:	Vancouver, B.C. July 26, 2016

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1. INTRODUCTION

[1] The respondent, Jessica Dunkley, is a medical doctor. Despite having a profound hearing loss in her right ear and moderate to profound hearing loss in her left ear, she obtained her M.D. degree from the University of Ottawa in 2010.

[2] In Canada, medical school graduates must successfully complete an accredited residency program and pass licencing examinations before being permitted to practice medicine.

[3] Dr. Dunkley interviewed with prospective universities that offered residencies, and in March 2010, the petitioner, the University of British Columbia ("UBC"), offered her a residency position in dermatology, with a start date of July 1, 2010.
Dr. Dunkley advised that she required accommodation for her hearing loss through the use of sign language interpreters. She was placed at St. Paul's Hospital, which is operated by the petitioner, Providence Health Care ("PHC"). As a resident at UBC, Dr. Dunkley became an employee of PHC.

[4] When the start date of July 1, 2010 arrived, arrangements had not yet been put in place to provide interpreter services. Following a series of meetings with representatives of UBC and of PHC, Dr. Dunkley filed a complaint with the British Columbia Human Rights Tribunal (the "Tribunal").

[5] On October 12, 2010, Dr. Dunkley was placed on paid leave, and on January 20, 2011, she was placed on unpaid leave.

[6] On February 2, 2011, Dr. Dunkley was informed that the requested accommodation could not be provided, and she was dismissed from the residency program by UBC and dismissed as an employee by PHC.

[7] In her complaint to the Tribunal, Dr. Dunkley alleged that she had been discriminated against on the basis of her physical disability, by PHC with respect to her employment, and by UBC with respect to a service customarily available to the public, namely, the residency training.

[8] UBC and PHC took the position that Dr. Dunkley could not make out a *prima facie* case of discrimination, and in the alternative, that their conduct was justified because it would be an undue hardship for them to pay the cost of the interpreter services Dr. Dunkley's accommodation required.

[9] The hearing before the Tribunal lasted nine days. In addition to an agreed statement of facts, a number of witnesses testified.

[10] Dr. Dunkley testified on her own behalf and called three other witnesses: Denise Sedran, Todd Agan, and Dr. Debra Russell.

[11] The Tribunal Member who heard the complaint, Member Geiger-Adams, made a ruling accepting Dr. Russell as an expert witness, with reasons to follow.

[12] PHC called four witnesses: Dr. Maria Corral, Rebecca Knowles, Sandy Coughlin, and Mary Proctor.

[13] UBC called two witnesses: Dr. Kamal Rungta and Janet Mee.

[14] The record before the Tribunal is contained in Affidavit #1 of Nikki C. Mann, sworn November 17, 2015, which was filed on these petitions (the "Mann Affidavit").

[15] Member Geiger-Adams was unable to render the decision, following which the Tribunal Chair had discussions with the parties about the completion of this matter. In March 2015 the Chair assigned the complaint to a new Tribunal Member, Member Tyshynski, to determine if the complaint was justified, and if so, to make an order under s. 37 of the *Human Rights Code,* R.S.B.C. 1996, c. 210 [*Code*], based on hearing the audio recordings, transcripts, and the documents entered at the hearing.

[16] The Tribunal rendered a decision on June 30, 2015 finding Dr. Dunkley's complaints against both UBC and PHC to be justified (the "Decision"). The Decision is indexed at 2015 BCHRT 100. The Tribunal summarized the evidence that was before it at pp. 5-72 of the Decision. Attached as Appendix "A" to the Decision are the reasons of Member Geiger-Adams with respect to the evidence of Dr. Russell.

[17] The petitioners, PHC and UBC, have each brought separate petitions for review of the Decision under the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241. In accordance with a consent order filed April 21, 2016, the two petitions were heard together.

2. THE EVIDENCE

[18] As noted above, the evidence presented to the Tribunal during the nine-day hearing included the testimony of Dr. Dunkley, Denise Sedran, Todd Agan, Dr. Debra Russell, Dr. Maria Corral, Rebecca Knowles, Sandy Coughlin, Mary Proctor, Dr. Kamal Rungta and Janet Mee.

[19] Numerous exhibits were filed, which are all contained in the Mann Affidavit.

[20] As well, there was an agreed statement of facts, which read as follows:

> 1. Dr. Jessica Dunkley attended the University of Ottawa in the Faculty of Medicine from August 2006 to May, 2010 when she received her Doctorate of Medicine degree.

2. Dr. Dunkley is Deaf. She has profound hearing loss in the right ear and moderate to profound hearing loss in the left ear. She wears a hearing aid in her left ear. Dr. Dunkley is also Metis.

3. Although Dr. Dunkley is adept at lip reading she required American Sign Language ("ASL") interpreters in many settings throughout her 4 years of medical studies, including interpreters for lectures, extracurricular activities, information sessions, clinical duties and professional courses. Dr. Dunkley is fluent in ASL. The interpreters were provided by the University of Ottawa.

4. After she obtained her Doctorate of Medicine degree, Dr. Dunkley wished to pursue post graduate medical training in dermatology at the University of British Columbia (the "University").

5. The University is a university under the *University Act*, RSBC 1996, c. 468 and is composed of a chancellor, a convocation, a board, a senate and faculties, including a Faculty of Medicine.

6. The University Board of Governors has implemented a policy respecting "Academic Accommodation for Students with Disabilities" (no. 73). "Academic accommodation" is defined (in part) as "a change in the allocation of University resources…which is designed to meet the particular needs of a student with a disability."

7. The University sponsors postgraduate medical training though Postgraduate Medical Education ("PGME") in the Faculty of Medicine at the University. PGME programs are accredited by the College of Family Physicians of Canada ("CFPC") or the Royal College of Physicians and Surgeons of Canada ("Royal College"). PGME provides postgraduate training in family medicine and specialty and sub-specialty residency programs including a dermatology program. Residency training is offered through various teaching hospitals in the province that are affiliated with the University, including St. Paul's Hospital.

8. The Royal College sets national standards by which residency programs offered by universities are assessed, including (Minimum) Specialty Training Requirements in Dermatology.

9. Application by medical doctors for entry level post graduate positions in the various residency programs is made to Canadian Resident Matching Services ("CaRMS").

10. CaRMS applicants are invited to interviews at the institution(s)/programs that they have expressed an interest in attending. Following the interviews, the applicants rank the programs and the programs rank the applicants. A computer then generates a "match". Applicants are matched to one program only and must accept the offer from Program to which they are matched through CaRMS.

11. Once a resident is matched to a residency program, the residency program assigns the resident to specific rotations within the various affiliated teaching hospitals or other designated sites.

12. PGME operates a Postgraduate Training Program in Dermatology (the "Program") in the Department of Dermatology and Skin Science at the University. At the relevant time, Dr. Laurence Warshawski, Clinical Professor of Dermatology, was the Program Director.

13. As Program Director, Dr. Warshawski reports to the Associate Deans of Medicine in PGME in the Faculty of Medicine at the University.

14. As Program Director, Dr. Warshawski also sits on the Residency Training Education Committee.

15. In March, 2010, Dr. Dunkley submitted an application to CaRMS with the intention of securing an entry level post-graduate position in the Program. Dr. Dunkley attended interviews at various medical schools with the assistance of interpreters provided by the University of Ottawa, including an interview with the Program.

16. Ultimately, Dr. Dunkley was "matched" to the Program with a start date of July 1, 2010 and was offered and accepted a position.

17. (On May 5, 2010, the BC Residents and Interns Paying Agency and the University formally offered Dr. Dunkley a position in Dermatology as a resident PGY1 from July 1, 2010 to June 30, 2011. She formally accepted the offer on or about May 21.)

18. In March, 2010, having been matched to the Program, Dr. Dunkley made a request of the Program through the Director of Administration of PGME, Lois Moen. She asked the Program if she could be placed at St. Paul's Hospital in Vancouver for the first year ("PGY 1") of her Residency to allow for easier access to the resources at the Hearing Clinic located at St. Paul's Hospital. This request was granted.

19. Dr. Maria Corral is Site Director for PGY 1 residents at St. Paul's Hospital and in this capacity reports to Dr. Warshawski regarding residents in his Program.

20. Dr. Dunkley was scheduled to work through a number of 4 week rotations or "blocks" in her first year of residency at St. Paul's. These blocks were required to meet the minimum specialty training requirements in Dermatology required by the Royal College which include two years of basic clinical training. Dr. Dunkley was scheduled for rotations in the following services: internal medicine, pediatrics, emergency medicine, psychiatry, obstetrics/gynecology, general surgery, plastic surgery and family practice.

21. Because she is a Resident at the University, Dr. Dunkley became an "employee" of Providence Health Care ("PHC") when she was assigned there by the Program. PHC is the organization which operates St. Paul's Hospital and other facilities.

22. As an employee of PHC, Dr. Dunkley is a member of the Professional of Residents of British Columbia ("PAR-BC"). PAR-BC is a trade union certified under the *Labour Relations Code* as bargaining agent for residents in the province.

23. PAR-BC is party to a collective agreement with PHC and other health employers in the province, who are members of the Health Employers' of British Columbia ("HEABC").

24. In e-mail correspondence dated March 18, 2010, Dr. Dunkley advised the Program through Lois Moen that "I use sign language interpreters in the medical setting and just had a meeting the UBC Access office yesterday to start the process."

25. The University maintains an Access and Diversity Office. Ruth Warick is a Senior Diversity Adviser (Disability) who met with Dr. Dunkley in March.

26. On March 25, 2010, Lois Moen replied that PGME and PHC and the University were "in discussions" regarding her requirements for an interpreter and "…will most likely have some questions for you shortly so that the resources can be in place for July 1."

27. In early April, 2010, Dr. Dunkley posted a notice through the of Visual Language Interpreters of Canada and West Coast of Visual Language Interpreters listserv. to solicit applications from sign language interpreters interested in working with her during her residency. She provided a brief description of the residency experience. Dr. Dunkley received expressions of interest from several interpreters in Canada.

28. In e-mail correspondence dated April 7, 2010, Dr. Dunkley advised Lois Moen of these efforts to recruit an interpreter(s). She also suggested that initially at least, her interpreter Janet Null might be flown in from Toronto to because of her skill with medical terminology to transition to the new team of interpreters.

29. Lois Moen replied that the University's Access and Diversity Office would "be taking the lead in assessing your accommodation requirements and you should discuss your interpreter requirements and your efforts to recruit one directly with them." Lois Moen also suggested contacting Dr. Corral regarding any accommodations she may require in the clinical setting.

30. On April 23, 2010, Lois Moen wrote to [the Administrative Assistant] (Program Assistant, Royal College, PGY 1 Program, St. Paul's Hospital i.e. assistant to Dr. Corral) and Dr. Corral "to give you the heads up regarding Jessica Dunkley." Lois Moen advised that Dr. Dunkley is Deaf and requires an interpreter.

31. On May 4, 2010, Dr. Dunkley advised [the Administrative Assistant] about the need for an interpreter in the OR because the surgical masks preclude lip reading and pointed out that her interpreter would require a call room. On May 5 and again on May 12, [the Administrative Assistant] sought a more comprehensive list of requirements from Dr. Dunkley, but there was some delay in receiving a response as Dr. Dunkley was out of the country for nine days in May.

32. In an e-mail message to Dr. Corral and [the Administrative Assistant] dated May 11, Lois Moen pointed out that the parties had not

determined who is responsible for the cost of the interpreters. She raised this point again in a message to Dr. Corral and [the Administrative Assistant] dated May 26. Dr. Corral also alluded to "potential financial burden" in her correspondence to Lois Moen on that same date.

33. Having received several expressions of interest from sign language interpreters, Dr. Dunkley held an "information night" for interested candidates on May 6, 2010 and for that purpose, prepared a document entitled "Dermatology Interpreter FAQ" outlining the work required of the team of interpreters during her residency.

34. Dr. Dunkley described her vision or understanding of how her Residency Program would unfold with the assistance of interpreters in the FAQ document.

35. On May 18, Dr. Dunkley responded to [the Administrative Assistant's] request for a comprehensive list and advised that she would "only mention the most important ones in the next few days" due to other matters she was attending to at the time. On May 23, Dr. Dunkley wrote to Lois Moen with "a quick list of things" and identified the following "accommodation requirements" in addition to sign language interpreters:

    - Call room for the interpreter with 2 beds
    - Memorandum to rotation director advising that she uses sign language
    - Lecture contents provided to interpreter in advance
    - Locating to "page" her rather than PA system, including for codes

36. In correspondence to Dr. Dunkley dated June 1, 2010, Dr. Kamal Rungta, Associate Dean, PGME, requested medical documentation supporting the requested accommodations, details as to what services are required of an interpreter, and the estimated cost of the interpreter.

37. Dr. Dunkley continued to correspond with Ruth Warick at the Access and Disability office in June. However, in mid-June, Ruth Warick advised that because Dr. Dunkley is a "resident" and not a "student", her office would no longer be involved in the matter.

38. In an e-mail message to PGME dated June 7, 2010, Dr. Dunkley advised that she would require "at least two full time interpreters" and that for "any interactions that is not one on one scenarios I will require them." She was not able to comment on the cost of such services.

39. In mid-June, 2010, PAR-BC contacted HEABC and urged PHC to provide the necessary sign language interpreter services. PAR-BC filed a grievance on July 5, 2010. PAR-BC also communicated with Dr. Rungta at that time, who said the University was not committed to funding the cost of the interpreters.

40. On June 21, 2010, Dr. Dunkley communicated with HEABC to allow for sharing of information between PHC and the University.

41. On June 21, Dr. Rungta advised Dr. Dunkley that her clinical duties would be postponed (though she would be paid as a PGY 1). She was initially scheduled to do her Psychiatry rotation from July 1 to 25, 2010 and her ICU rotation from July 26 to August 22, 2010. She was also on the on call schedule for July, 2010 and scheduled for her General Surgery rotation from September 20, 2010 to October 17, 2010. It was anticipated she would do her Plastic Surgery rotation from June 6 to 30, 2011.

42. Dr. Dunkley attended the PGY 1 orientation ("New Resident Orientation") at St. Paul's on June 29, 2010 with the assistance of an interpreter paid for by the University. Dr. Dunkley did not attend orientation on July 2 at Children's Hospital but did attend the Neonatal orientation and the Dermatology orientation with an interpreter.

43. On June 29, 2010, Dr. Eric Webber, Dr. Rungta's successor as Associate Dean PGME, advised Dr. Warshawski that the issue of paying for the cost of interpreters remained outstanding.

44. Instead of the clinical rotations referred to above, Dr. Dunkley and the Program arranged for her to do rotations that would not require interpreter services. She was scheduled for a Research Elective in Block 1 for 4 weeks commencing July 2, 2010 and another such rotation in Block 2 from August 2 to 22 and Family Medicine in Block 3.

45. On July 13, 2010, Dr. Dunkley was contacted by Dr. Corral, the Site Director at St. Paul's. Dr. Corral explained that she had been contacted by Rebecca Knowles, a human resources officer with the Employer and was asked to participate in the accommodation process.

46. A meeting was held on July 20 between PHC, PAR-BC, the University and Dr. Dunkley. It was agreed that:

    - PHC would assist with making arrangements for Dr. Dunkley to see an ENT specialist to assess the extent of her disability and the medical basis for the request for accommodation and its extent
    - Dr. Corral would examine the possibility of scheduling a Family Practice rotation or others wherein it was not anticipated that Dr. Dunkley required interpreters because most patient contact is direct and "one on one"
    - further examination of the extent of the required accommodation was necessary

47. Dr. Rungta summarised the issues raised in the meeting in a letter to Dr. Dunkley dated July 21, 2010.

48. In July, 2010, [the Administrative Assistant] endeavoured to find a preceptor for a Family Practice rotation for Dr. Dunkley.

49. Dr. Dunkley completed a one week outpatient rotation at a rheumatology clinic (elective) from July 26, 2010 to August 1, 2010 with Dr. [HD]. She did a research elective from August 2 to 22 (Block 2) that was supervised by Dr. [R].

50. Starting July 6, 2010, she attended academic half day ("AHD") sessions on Tuesdays, with an interpreter. She continued to attend AHD sessions with the assistance of an interpreter until about November 30.

51. Further to the "accommodation meeting" held on July 20, 2010, Rebecca Knowles wrote on August 13 that "once the [ENT] specialist has completed his/her assessment, the Employer can begin to review the parameters of a reasonable accommodation. VCH Disability Management can provide a more accurate estimate of how long this review process might take…".

52. Sandy Coughlin was the Team Lead, Disability Management Services at Vancouver Coastal Health ("VCH") at the material time until February 2011 when she became the Manager of Occupational Health at PHC. In her role as the Team Lead of Disability Management at VCH, she provided advice to PHC, Vancouver Coastal Health Authority ("VCHA") and Provincial Health Services Authority through the Integrated Human Resources initiative.

53. On July 20, 2010, Dr. Dunkley filed a complaint under the *Human Rights Code* of British Columbia against the University, PHC and HEABC (amended on April 4, 2011). The complaint against HEABC was withdrawn on or about April 14, 2011.

54. Dr. Dunkley attended a 15 minute "residents meeting" or interview on August 10, 2010 with Dr. Corral (as did all other residents).

55. Dr. Dunkley commenced her Family Practice rotation with preceptor Dr. [K] at the Mariners Clinic on August 23 to September 19, 2010. On September 15, 2010, Dr. [K] raised concerns about Dr. Dunkley's performance and suggested that she stay on to do another 4 weeks in Family Practice at his clinic to assess her skill level. Consequently, Dr. Dunkley completed another block of rotation in Family Practice from September 20 to October 17, 2010 instead of her scheduled surgery rotation which was cancelled due to the outstanding issues with respect to accommodation.

56. A meeting was held on August 31, 2010. Dr. Rungta was in attendance for the University and Pria Sandhu, Executive Director of PAR-BC, attended with Dr. Dunkley. Dr. Rungta noted that:

    - The examination by the ENT specialist would soon be complete
    - Certain rotations had been reorganized to allow Dr. Dunkley to pursue the Program
    - Dr. Dunkley was able to attend AHDs with interpreters paid for by PGME

- That he had contacted the Indigenous Physicians of Canada

57. According to Dr. Rungta's notes, Dr. Dunkley noted that:

- She was engaged in a research project with Dr. [R]
- She was currently doing her Family Practice rotation without interpreters
- Interpreters worked only booked hours and would not be held on retainer
- It would take 2 to 3 months to secure suitable interpreters
- She would require the services of 2 interpreters and another interpreter to fill in
- On average, she would require 1.5 interpreters over the term of her residency
- Interpreters cost $40 to $65 per hour

58. On that basis, Dr. Rungta calculated that if 1.5 interpreters worked a 60 hour work week, the cost would be $259,200 per year, that is, 1.5 X 60 hours X $65 per hour X 48 weeks.

59. Dr. Dunkley saw the ENT Specialist, [the ENT Specialist], at the St. Paul's Rotary Hearing Clinic on August 30, 2010 and then again on September 1. Following tests conducted on the first, [the ENT Specialist] reported that with respect to her left ear, Dr. Dunkley experiences "moderate falling to profound sensorineural hearing loss" and "no measurable hearing thresholds across frequency range to limits of audiometer" in her right ear. That is, Dr. Dunkley experiences "significant hearing loss in her left ear and no usable hearing in her right ear."

60. In a report dated September 7, 2010, [the ENT Specialist] concluded that:

- Dr. Dunkley has a profound hearing loss
- She functions well in one on one situations, relying on her hearing aid and lip reading, and would be able to deal effectively with patients "one on one"
- There is a potential risk of miscommunication, esp. in emergency situations
- It would not be possible for her to complete the Program without "liberal access" to a sign language interpreter
- A sign language interpreter would be required a substantial amount of the time, esp. in team situations

61. On September 15, 2010, Sandy Coughlin wrote to Dr. Dunkley and advised that following [the ENT Specialist's] report, she discussed

certain issues relating to accommodation with the physicians involved in the Program, viz.

- Whether or not the Program itself requires modification
- Costs associated with services provided by interpreters
- Patient safety and acceptable risk

62. Dr. Dunkley replied that same day and urged Sandy Coughlin to involve her in the process of selecting an interpreter(s). Dr. Dunkley also noted the importance of retaining an interpreter with knowledge of medical terminology. Sandy Coughlin replied that the Employer was simply assessing the cost of hiring interpreters which it currently estimated at $40 to $65 per hour or more, according to Dr. Rungta.

63. In mid-September, various physicians at St. Paul's/PHC communicated certain concerns to Dr. Corral, namely:

- Nuanced communications through a third party in situations ranging from the mundane to emergent
- Ensuring interpreters are qualified (medical terminology)
- Communication when scheduled on call
- Interpreter unavailable?
- Surgical masks
- Interpreter in OR (positioning and patient consent)
- Confidentiality

64. In mid-September, certain VCHA physicians were involved in the process. It was concluded that "…patient risk would be mitigated by having rotations modified if necessary and accommodations made (i.e. interpreters etc) to minimize the potential for patient risk – if this is done then the patient risk would presumably be no higher than what we would expect for any resident in our health authorities."

65. As for modified rotations, the VCHA physicians noted that while the Royal College expects Dermatology Residents to manage dermatologic issues arising in an emergent setting, the Royal College requirements only recommend rotations in Emergency and an ER rotation could be modified so that the Resident is not required to do every aspect of it (not first responder for acute resuscitations).

66. It was also noted that the Royal College standards for Dermatology do not require rotations in general surgery, obstetrics, or psychiatry in the first two years.

67. Dr. Patrick O'Connor said that "we certainly should be splitting any costs (I hope yet to be determined and made as efficient as possible) as at this cost level all sorts of impacts will be felt both at UBC and VCH/PHC.

68. Sandy Coughlin met with the physician group on September 13, 2010. She wrote that Rebecca Knowles (VCH human resources) would

gather costs, and that the current rough estimate was $2.5 to $3.0 million over the 5 years. She also noted that 3 interpreters were needed.

69. In e-mail correspondence dated September 21, Dr. Corral set out certain issues that require consideration:

- Patient consent
- Ensuring interpreters are qualified (medical terminology)
- Who employs the interpreters?
- On call (extra call rooms, answering pages)
- Interpreter in OR (positioning and resident looking up from case/surgical field)

70. Dr. Dunkley's General Surgery rotation (Block 4) was scheduled from September 20, 2010 to October 17, 2010 but was cancelled due to the outstanding issues with respect to accommodation.

71. In mid to late September, 2010, Dr. Dunkley set e-mail messages to Sandy Coughlin (copy to the University) to provide her with the names of persons who might be able to assist or inform her about the nature of the accommodation, namely:

- Dr. Wendy Osterling, pediatric neurologist, Spokane, WA
- Dr. Chris Moreland, intern, internal medicine, San Antonio, TX
- Dr. G. Moineau, Dean of Medical Education, University of Ottawa, Ottawa, ON
- Dr. Micheal McKee, Family Medicine, Rochester, NY
- Dr. Bressler, Family Medicine, Toronto ON
- Janet Null, sign language interpreter, Toronto, ON
- Dr. Debra Russell, University of Alberta, David Peikoff Chair of Deaf Studies, Edmonton, AB
- Gary Malkowski, Canadian Hearing Society, Toronto, ON
- Deaf Access Office, Provincial Services for the Deaf and Hard of Hearing, Vancouver, BC

72. These potential resource persons were listed in an e-mail message from Bonnie Kwan (PAR-BC) to Sandy Coughlin dated October 7, 2010. Bonnie Kwan also sought an update and urged the parties to move toward accommodation more expeditiously.

73. A meeting was held on October 12 between Drs. Corral, Warshawski, Rungta, Kernahan, and Dr. Dunkley and her interpreter. A range of issues were discussed, including:

- differences between clinical rotations in undergraduate studies and postgraduate residency
- Interpreters and associated costs
- Issues potentially arising from surgical rotations
- Issues potentially arising from ER/ICU/trauma rotations
- Issues potentially arising from periods on call
- Non-verbal auditory cues

74. At this meeting Dr. Rungta also advised that the issue of payment for interpreter services had not yet been resolved. The Program cancelled Dr. Dunkley's rotations for the remainder of 2010 pending resolution of the interpreter services issue. Dr. Dunkley was placed on paid leave on October 18, 2010. She did not commence her Medicine rotation (Block 6) on November 15 as scheduled.

75. Dr. Dunkley continued to work on her research elective with Dr. [R].

76. In response to a request from Dr. Dunkley, Dr. Debra Russell of the University of Alberta (Department of Educational Psychology/David Peikoff Chair of Deafness Studies) wrote a letter to the Employer (Sandy Coughlin) dated October 19, 2010.

77. On October 27, Sandy Coughlin advised PAR-BC that the Ministry of Health was now involved in Dr. Dunkley's case.

78. Dr. Dunkley worked with Dr. [K] at his clinic from November 22 to December 3, 2010 and then travelled to Haiti to provide medical assistance in the aftermath of that country's earthquake. These activities were neither arranged though nor approved by the Program. When she completed these activities, she sought, but was denied, academic credit for these activities.

79. In early January, 2011, Dr. Rungta wrote to Dr. Dunkley to advise that "I am now in a position to respond to your request for accommodation" and a meeting was arranged for January 20.

80. Dr. Kernahan and Dr. Webber wrote to the Ministry of Health (Libby Posgate) on January 6, 2011 and stated that the costs of the accommodation proposed by Dr. Dunkley were "prohibitive and cannot be borne by this office [PGME] unless the Ministry is prepared to provide the additional funding…"

81. On January 10, 2010, PAR-BC advanced the grievance filed on behalf of Dr. Dunkley to stage 2 of the grievance procedure.

82. On January 17, 2011, Sandy Coughlin shared the following calculations with Libby Posgate of the Ministry of Health:

- Hourly rate for interpreter = $60.00 per hour for the first 7.5 hours, then $90.00 for the next 4 hours and then $120.00 per hour thereafter
- 2 interpreters required

- For a 12 hour day, the cost is $1620 (or $810 per interpreter)
- For on call days (24 hours), the cost is $4500 (or $2250 per interpreter)
- So, for 2 days on call and 3 regular days, cost = $13,860
- So, for 48 weeks per year, cost = $665,280

83. Sandy Coughlin described these calculations as "rough numbers."

84. At a meeting with Dr. Rungta and Dr. Kernahan and Dr. Webber on January 20, 2011, Dr. Dunkley and Pria Sandhu, were advised that neither PHC nor the University could accommodate her needs because the cost of the accommodation constituted undue hardship. Dr. Rungta advised that Dr. Dunkley would be placed on unpaid leave effective that date and could no longer participate in any residency activities, including academic days and clinical activities.

85. At that meeting, Dr. Rungta said that interpreters required would cost $500,000 per year for a total of $2,500,000 over the term of Dr. Dunkley's residency.

86. On or about January 27, 2011, Dr. Dunkley applied to the University's Faculty of Graduate Studies (School of Population and Public Health) to pursue a MHSc Degree in Public Health. She was admitted to the program on March 7, 2011 with a start date of September 6, 2011. As Dr. Dunkley is a student of the University while registered in a graduate studies program, University Access and Diversity has provided and funded the interpreter services required by Dr. Dunkley.

87. In a letter to the Vice President of Clinical Quality and Safety (VCHA) dated February 2, 2011, Drs. Webber and Kernahan wrote that neither the University nor the Employer could accommodate Dr. Dunkley's needs "…based on the projected costs of the interpreter services that Dr. Dunkley will require throughout her training…"

88. Dr. Dunkley remains on unpaid leave from the Program to date.

89. In March, 2012, Dr. Dunkley applied to CaRMS and thereby arranged interviews with the University of Alberta Residency Program. Dr. Dunkley attended an interview regarding the Public Health Residency Program on March 20. In addition, she interviewed for the Family Practice Residency in Grand Prairie on March 21 and in Edmonton on March 23.

90. In addition, through CaRMS, Dr. Dunkley arranged interviews with the McMaster University Residency Program and the Public Health Program on March 28, 2012.

91. The various programs submitted their ranked list of candidates to CaRMS by April 4, 2012 and the would-be residents submitted a ranked list of programs to CaRMS by that date as well. CaRMS will then "match" residents to programs.

> 92. On April 18, 2012, CaRMS will advise Dr. Dunkley and the other applicants which program they have been assigned to.
>
> [Emphasis in original.]

3. THE STATUTORY FRAMEWORK

[21] The allegation against UBC is that it discriminated against Dr. Dunkley contrary to s. 8 of the *Code*. The relevant portions of s. 8 provide:

> 8 (1) A person must not, without a bona fide and reasonable justification,
>
> (a) deny to a person or class of persons any accommodation, service or facility customarily available to the public, or
>
> (b) discriminate against a person or class of persons regarding any accommodation, service or facility customarily available to the public
>
> because of the … physical or mental disability … of that person or class of persons.

[22] The allegation against PHC is that it discriminated against Dr. Dunkley contrary to s. 13 of the *Code*. The relevant portions of s. 13 provide:

> 13 (1) A person must not
>
> (a) refuse to employ or refuse to continue to employ a person, or
>
> (b) discriminate against a person regarding employment or any term or condition of employment
>
> because of the … physical or mental disability… of that person ...
>
> ...
>
> (4) Subsections (1) and (2) do not apply with respect to a refusal, limitation, specification or preference based on a bona fide occupational requirement.

[23] The remedies available where there is a finding that a complaint is justified are set out in s. 37 of the *Code*.

4. ISSUES

[24] The petitioner UBC alleges the following errors as a basis for quashing the Decision of the Tribunal:

a. The Tribunal erred in admitting into evidence the report of Dr. Debra Russell. Alternatively, the Tribunal failed to act fairly with regard to the admission of the report of Dr. Russell. In the further alternative, the Tribunal erred in placing any weight on Dr. Russell's report subsequent to its admission or failed to act fairly in placing any weight on Dr. Russell's report subsequent to its admission;

b. The Tribunal erred in finding that UBC discriminated against Dr. Dunkley contrary to s. 8 of the *Code*;

c. The Tribunal erred in finding that UBC had not provided a *bona fide* and reasonable justification as that term is used in s. 8 of the *Code* for the manner in which it addressed Dr. Dunkley's request for interpreter services. Alternatively, the Tribunal's finding that UBC had not provided a *bona fide* and reasonable justification for its conduct was unreasonable in light of all the evidence;

d. The following findings of the Tribunal were unreasonable in light of all of the evidence:

i. UBC did not offer a reasonable accommodation involving the modification of Dr. Dunkley's program (para. 505 of the Decision).

ii. UBC repeatedly failed to take obvious first steps to educate itself about accommodating deaf medical professionals (para. 574 of the Decision).

iii. UBC did not reasonably conclude that Dr. Dunkley would require interpreter services in every rotation of Dr. Dunkley's residency program (para. 584 of the Decision).

iv. UBC did not establish that the cost of providing interpreter services for each year of Dr. Dunkley's residency program would be far

in excess of that incurred for providing interpreter services for a deaf fourth year medical student (paras. 602-612 of the Decision).

v. That Dr. Dunkley did not impede the process of accommodation was unreasonable in light of all of the evidence.

e. The Tribunal erred in finding that Dr. Dunkley had fulfilled her obligations arising under the duty to accommodate. Alternatively, the Tribunal's finding that Dr. Dunkley had met her obligations under the duty to accommodate was unreasonable in light of all of the evidence.

[25] Initially, UBC also advanced the submission that the Tribunal erred in failing to specify the financial responsibility of each of UBC and PHC to pay for the costs of reinstating Dr. Dunkley in the residency program, but counsel subsequently advised that this issue is not being pursued.

[26] The petitioner PHC seeks an order quashing the Decision on the basis of these alleged errors:

a. The Tribunal erred in deciding that Dr. Russell's evidence was admissible under s. 27.2(1) of the *Code*. In the alternative, if the Tribunal did not err in this regard, the Tribunal erred in giving significant weight to Dr. Russell's recommendation that the "designated interpreter" model was a suitable and probably cost efficient model to consider for the provision of interpreting services to a deaf resident;

b. The Tribunal erred in deciding that PHC discriminated against Dr. Dunkley contrary to s. 13 of the *Code*;

c. The following findings of the Tribunal were unreasonable in light of all the evidence:

i Dr. Dunkley fulfilled her duty to assist in securing appropriate accommodation (para. 497 of the Decision).

ii. The cost estimate relied upon by PHC to assess the financial impact of the cost of accommodating Dr. Dunkley was not reliable or reasonable (para. 715 of the Decision).

iii. The Tribunal Member could not give weight to Ms. Knowles' cost calculation because Ms. Knowles described her cost calculation as a "rough estimate" (paras. 561 and 562 of the Decision).

iv. PHC repeatedly failed to take obvious first steps to educate itself about accommodating deaf medical professionals (para. 574 of the Decision).

v. The 200 hour per week interpreter services requirement at the high end of Ms. Knowles' cost calculation was unreasonably high (para. 591 of the Decision).

vi. The evidence did not establish that the costs of training interpreters and paying them for preparation time would have added significantly to the cost of accommodating Dr. Dunkley (para. 594 of the Decision).

vii. There was a reasonable possibility that a "designated interpreter" model may have been more cost effective than contract interpreters (para. 601 of the Decision).

viii. PHC failed to explore the "designated interpreter" model (para. 601 of the Decision).

d. The Tribunal erred in deciding that PHC's failure to explore the "designated interpreter" model meant that it could not establish the legal test for undue hardship set out in *Moore v. British Columbia (Education),* 2012 SCC 61 [*Moore*];

e. The Tribunal erred in deciding that the financial resources of VCHA, UBC and/or the Ministry of Health were relevant to assessing PHC's claim of undue hardship;

f. The Tribunal erred in deciding that, given the nature of the evidence regarding costs and the lack of evidence regarding the resources available through VCHA or the reasonable alternative of sharing the costs, PHC could not establish the legal test for undue hardship set out in *Moore*.

5. STANDARD OF REVIEW

[27] The *Code* contains no privative clause. Pursuant to s. 32(q) of the *Code*, the standard of review applicable to the Tribunal is determined by s. 59 of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 [*ATA*], which provides:

> 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.
>
> (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.
>
> (3) A court must not set aside a discretionary decision of the tribunal unless it is patently unreasonable.
>
> (4) For the purposes of subsection (3), a discretionary decision is patently unreasonable if the discretion
>
> (a) is exercised arbitrarily or in bad faith,
>
> (b) is exercised for an improper purpose,
>
> (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.

[28] As held in *British Columbia v. Bolster*, 2007 BCCA 65 at para. 124 and in *Lavender Co-Operative Housing v. Ford*, 2011 BCCA 114 at para. 58, the Tribunal's findings on questions of mixed fact and law are to be reviewed on the standard of correctness. However, our Court of Appeal cautioned in *J.J. v. School District No. 43*

(Coquitlam), 2013 BCCA 67 at paras. 27-28 that care must be exercised in determining whether a question is one of mixed fact and law:

> [27] It is important to note that in both *Bolster* and *Lavender*, the Court was considering the application of a legal standard to uncontroverted facts. The mixed questions of fact and law referred to by the Court were well-suited to a standard of correctness, and there were no extricable issues of fact that needed to be considered.
>
> [28] A court on judicial review will not, of course, have heard the witnesses who testified before the tribunal. Many tribunals do not record their proceedings, so the court may have no record at all of the testimony. It will, therefore, be practically impossible for the court to fairly or efficiently make findings of fact. For that reason, it is important that courts not be too quick to brand a question as one of mixed fact and law and therefore subject to a standard of correctness. If there is an extricable issue of fact involved in the "mixed" question, the court must defer to the tribunal in respect of that issue in accordance with s. 59(2) of the *Administrative Tribunals Act*.

6. DISCUSSION

Issue 1: Dr. Russell's Evidence

[29] At the Tribunal hearing, Dr. Dunkley tendered Dr. Russell as an expert witness on "the means by which deaf people overcome barriers and access the services and benefits society offers, including models of interpretation services, their costs, the relationship of models to the quality of services, and interpreter availability."

[30] The Tribunal heard evidence on Dr. Russell's qualifications, including the fact that she is a professor at the University of Alberta whose studies have focused on the accuracy and effectiveness of American Sign Language ("ASL") interpretation in a variety of settings including specialized professional discourse. She is a professional ASL interpreter and has experience interpreting in medical settings. She has interpreted for a deaf pharmacist, a deaf chiropractor, and a deaf medical student, as well as deaf patients.

[31] Dr. Russell was cross-examined on her *curriculum vitae* and there were extensive arguments on the admissibility of her evidence. UBC and PHC argued that Dr. Russell's opinion was not a proper subject of expert evidence, that Dr. Russell's

opinion was not within her stated expertise and that Dr. Russell was partial to Dr. Dunkley's position in the hearing rather than a neutral expert.

[32] The Tribunal found that Dr. Russell was qualified to give expert opinion evidence in the areas tendered and admitted her evidence.

[33] The petitioners submit that the Tribunal erred both with respect to the admission and to the weight accorded the evidence of Dr. Russell.

[34] The admissibility of evidence by the Tribunal is governed by s. 27.2 of the *Code*, which provides:

> 27.2 (1) A member or panel may receive and accept on oath, by affidavit or otherwise, evidence and information that the member or panel considers necessary and appropriate, whether or not the evidence or information would be admissible in a court of law.
>
> (2) Nothing is admissible in evidence before a member or panel that is inadmissible in a court because of a privilege under the law of evidence.
>
> (3) Despite section 4, subsection (1) of this section does not override an Act expressly limiting the extent to which or purposes for which evidence may be admitted or used in any proceeding.
>
> (4) A member or panel may direct that all or part of the evidence of a witness be heard in private.

[35] By virtue of s. 27.2(1), the Tribunal may receive and accept evidence that it considers necessary and appropriate. I take the word “receive” to relate to the admission of evidence, and “accept” to relate to placing weight on the evidence. The decision whether to admit evidence and the decision regarding the weight to accord it are both, therefore, discretionary, and the standard of review is patent unreasonableness.

[36] Tribunal Member Geiger-Adams’ reasons demonstrate that he considered and properly applied the law as set out in the leading Supreme Court of Canada decision on expert evidence, *R. v. Mohan*, [1994] 2 S.C.R. 9.

[37] The Tribunal Member determined that Dr. Russell’s evidence satisfied the four *Mohan* criteria, that is, the evidence was relevant to the issues before the

Tribunal, it was necessary to assist the Tribunal in areas outside of its experience and knowledge, Dr. Russell had the required expert qualifications by reason of her specialized training and experience, and the evidence was not otherwise inadmissible.

[38] The petitioners argued before the Tribunal that Dr. Russell's evidence should be excluded because of an appearance of bias. They repeat that submission on these petitions.

[39] They object to the fact that Dr. Russell provided a letter of support for Dr. Dunkley on October 19, 2010, having previously sent her a draft and asking for her comments.

[40] The petitioners point to other correspondence and email-strings in support of their submission that Dr. Russell was favourably disposed towards Dr. Dunkley and had formed preconceived opinions prior to being asked to give expert evidence. For example, on June 14, 2011 Dr. Dunkley sent an email stating that UBC had been quoted as saying that interpretation for her would cost $250,000 per year. Dr. Russell responded with an email later that day, indicating that the estimate of $250,000 sounded incredible to her and that she would be happy to help Dr. Dunkley and her counsel work through the estimates "if that is useful". In closing her email, Dr. Russell wrote: "I just am SO SO sorry that you are in this position - you are so incredibly talented and this form of discrimination is just unfathomable."

[41] Tribunal Member Geiger-Adams heard all this evidence, but concluded that Dr. Russell's evidence should not be excluded for appearance of bias. The Tribunal Member wrote at para. 18 of his ruling:

> [18] Finally, I was satisfied that Dr. Russell was not disqualified from giving opinion evidence in her areas of expertise because of an appearance of bias. The Respondent's position on this issue rests on emails exchanged between Dr. Russell and Dr. Dunkley in 2010 and 2011, and a letter of support Dr. Russell wrote on Dr. Dunkley's behalf to Providence Health Care in 2010. The overwhelming tenor of these communications is that Dr. Russell, while supportive of Dr. Dunkley as the first deaf student in Canada to successfully complete medical school, was offering her assistance to the Respondents to address two issues: the risk of miscommunication in the interpretation

> process and the costs associated with interpreters in a medical residency program. For her part, Dr. Dunkley was seeking information from Dr. Russell, who she knew only slightly, based on her professional experience, that might assist UBC and PHC in fairly evaluating her requirements for interpreters. Nothing in these materials suggests to me that Dr. Russell had become Dr. Dunkley's advocate, or that her wish for Dr. Dunkley's success in her program (to which she had already been admitted) was a danger of distorting her opinions. [Emphasis in original.]

[42] I am satisfied that the decision to admit Dr. Russell's evidence was not patently unreasonable. The Tribunal Member did not exercise his discretion arbitrarily, in bad faith, or for an improper purpose. His decision was not based entirely or predominantly on irrelevant factors, nor did it fail to take statutory requirements into account.

[43] In the alternative, if the decision to admit Dr. Russell's evidence were considered to be a finding of fact attracting a reasonableness standard of review, then I am satisfied that it was not unreasonable.

[44] The Tribunal Member considered and applied the correct legal test as set out in *Mohan*. He considered and gave cogent reasons for rejecting each of the arguments advanced by UBC and by PHC. There was no error in the admission of Dr. Russell's evidence.

[45] In addition to their argument about admissibility, the petitioners also argue that the Tribunal erred in placing weight on Dr. Russell's evidence. They rely on many of the same points that they advanced in opposing the admission of the evidence. They claim that Dr. Russell was biased; that she did not have specific expertise in ASL interpretation for post-graduate medical students; and that her evidence on the provision of ASL interpreter services was "all based on hearsay".

[46] In its Decision, the Tribunal considered once again the qualifications and expertise of Dr. Russell. The Tribunal again considered and rejected the argument that she was biased or partisan.

[47] On the first page of her report, Dr. Russell wrote:

> I acknowledge that I am not an advocate for any party in this matter, and my role is to assist the Tribunal. My report is made in conformity with this duty and if called upon to give testimony, I will conform with that duty. I am the person primarily responsible for the opinions contained in this report.

[48] In *White Burgess Langille Inman v. Abbott and Haliburton Co*., 2015 SCC 23, the Court observed that such an acknowledgment of the duty to be impartial is a factor that can be considered in determining an issue of bias.

[49] In its Decision, the Tribunal found, at paras. 301-303 that the Russell Report was not partisan, and although Dr. Russell is sympathetic to Dr. Dunkley in her goal to do her residency, this has not diminished her professionalism in authoring her expert opinion. If this is considered a discretionary decision, it was not patently unreasonable. If it is a finding of fact, I am satisfied it was not unreasonable.

[50] The petitioners argue that Dr. Russell lacked experience with the provision of interpretation services in a post-graduate medical residency context. However, the Tribunal did not take Dr. Russell to be specialized in ASL interpretation for post-graduate medical residents in particular, but rather in the broader subject of “the means by which deaf people overcome barriers and access the services and benefits society offers, including models of interpretation services, their costs, the relationship of models to the quality of services, and interpreter availability”.

[51] In any event, the Tribunal relied on Dr. Russell’s evidence only with respect to four specific points, and explicitly did not rely on it for others.

[52] The Tribunal stated that it gave no weight to Dr. Russell’s estimate of the cost for accommodating Dr. Dunkley during her residency.

[53] At para. 299 of the Decision, the Tribunal wrote:

> [299] I have not found the consideration of the Russell Report necessary to my decision. To be clear, I would have rendered the decision with the same results without the Russell Report.

[54] This apparently sweeping comment must be read in context; it comes immediately following a review of Dr. Russell's evidence concerning cost estimates at paras. 270-298.

[55] That the comment at para. 299 relates only to cost estimates, is made clear at paras. 304-305, where the Tribunal wrote:

> [305] However, I have not relied on the actual number stated in the Russell Report as the cost of meeting Dr. Dunkley's interpreter requirements over the five year residency.

[56] Nevertheless, the Tribunal did place weight on four specific aspects of Dr. Russell's evidence:

- The Tribunal found at para. 307 that some of the academic materials Dr. Russell attached to her report provided "informative contextual background";

- The Tribunal found at para. 308 that Dr. Russell's commentary on models of interpreter services, the quality of the services and their respective costing approaches to be "informative contextual information";

- The Tribunal took note at para. 309 of the investigative approach Dr. Russell took in her report, as it demonstrated the many sources of information available regarding Dr. Dunkley's interpreter requirements; and

- At para. 310, the Tribunal gave "significant weight" to Dr. Russell's recommendation that the designated interpreter model was a suitable and probably cost efficient model to consider for the provision of interpreting services to a deaf resident.

[57] It was neither unreasonable nor patently unreasonable for the Tribunal to place weight on Dr. Russell's evidence with respect to those matters.

[58] The petitioners also submit that Dr. Russell's evidence on the provision of ASL interpreter services was "all based on hearsay evidence obtained in interviews, literature reviews, and extrapolations from documents". The petitioners rely on *R. v. Abbey,* [1982] 2 S.C.R. 24, and *R. v. Lavallee*, [1990] 1 S.C.R. 852 for their submission that the Tribunal erred in giving Dr. Russell's evidence any weight when the factual basis for some of her opinions was not proved by independent non-hearsay evidence.

[59] Mr. Justice Sopinka dealt with a similar issue in his concurring judgment in *Lavallee*. At p. 899 he drew a distinction between "evidence that an expert obtains and acts upon within the scope of his or her expertise (as in [*City of St. John v, Irving Oil Co.,* [1966] S.C.R. 581]), and evidence that an expert obtains from a party to litigation touching a matter directly in issue (as in *Abbey*)."

[60] He went on to state that in the former case, the evidence is admissible and entitled to appropriate weight. He wrote at pp. 899-900:

> In the former instance, an expert arrives at an opinion on the basis of forms of enquiry and practice that are accepted means of decision within that expertise. A physician, for example, daily determines questions of immense importance on the basis of the observations of colleagues, often in the form of second- or third-hand hearsay. For a court to accord no weight to, or to exclude, this sort of professional judgment, arrived at in accordance with sound medical practices, would be to ignore the strong circumstantial guarantees of trustworthiness that surround it, and would be, in my view, contrary to the approach this Court has taken to the analysis of hearsay evidence in general, exemplified in *Ares v. Venner*, [1970] S.C.R. 608. In *R. v. Jordan* (1984), 39 C.R. (3d) 50 (B.C.C.A.), a case concerning an expert's evaluation of the chemical composition of an alleged heroin specimen, Anderson J.A. held, and I respectfully agree, that Abbey does not apply in such circumstances. (See also *R. v. Zundel* (1987), 56 C.R. (3d) 1 (Ont. C.A.), at p. 52, where the court recognized an expert opinion based upon evidence "... of a general nature which is widely used and acknowledged as reliable by experts in that field.")
>
> Where, however, the information upon which an expert forms his or her opinion comes from the mouth of a party to the litigation, or from any other source that is inherently suspect, a court ought to require independent proof of that information. The lack of such proof will, consistent with *Abbey*, have a direct effect on the weight to be given to the opinion, perhaps to the vanishing point. But it must be recognized that it will only be very rarely that an expert's opinion is entirely based upon such information, with no independent proof of any of it. Where an expert's opinion is based in part upon suspect information

> and in part upon either admitted facts or facts sought to be proved, the matter is purely one of weight. In this respect, I agree with the statement of Wilson J. at p. 896, as applied to circumstances such as those in the present case:
>
> > ... as long as there is some admissible evidence to establish the foundation for the expert's opinion, the trial judge cannot subsequently instruct the jury to completely ignore the testimony. The judge must, of course, warn the jury that the more the expert relies on facts not proved in evidence the less weight the jury may attribute to the opinion.

[61] Sopinka J.'s dicta in *Lavallee* was mentioned in *R. v. S.A.B.*, 2003 SCC 60 and has been cited with approval in *Prosser v. R.*, 2015 NBCA 7 at paras. 35-42, and in *R. v. Awer*, 2016 ABCA 128 at paras. 46-49.

[62] Dr. Russell's evidence falls into the first category of expert evidence mentioned by Sopinka J. in *Lavallee*. As a professional called upon to give expert evidence, she was entitled to base her opinion on her professional experience, her knowledge of the relevant academic literature, and her interviews with other professionals with expertise in the relevant subject area. Her opinion evidence was not rendered inadmissible or of no weight on this account.

[63] To summarize, neither the admission of Dr. Russell's evidence nor the weight accorded it by the Tribunal can be characterized as unreasonable or patently unreasonable.

[64] I must deal with two additional arguments.

[65] First, PHC submitted that Dr. Russell's "estimate of the cost of Dr. Dunkley's requested accommodation based on the 'designated interpreter' model, is based on assumptions which are unsupported and often contradicted by the evidence and does not account for a variety of costs which should clearly be accounted for." There is no force to this submission in light of the fact that the Tribunal placed no weight on Dr. Russell's cost estimates.

[66] Second, UBC submitted that the Tribunal "failed to act fairly with regard to the admission of the report of Dr. Debra Russell" and that it "failed to act fairly in placing any weight on Dr. Debra Russell's report subsequent to its admission."

[67] It is unclear how this submission differs in substance from the other submissions of the petitioners regarding admissibility and weight. In accordance with the standard of review set out in s. 59(5) of the *ATA*, I am satisfied that in all of the circumstances, the Tribunal acted fairly.

Issue 2: *Prima Facie* Discrimination

[68] In its Decision, the Tribunal found a *prima facie* case of discrimination by UBC contrary to s. 8 of the *Code*, and a *prima facie* case of discrimination by PHC contrary to s. 13 of the *Code*. The petitioners submit that the Tribunal erred in these findings.

[69] The Tribunal correctly described the test for discrimination at para. 348 of the Decision:

> [348] The test for discrimination under the *Code* is as follows. First, the complainant bears the onus of proving a *prima facie* case of discrimination. If the complainant fails to do so the complaint is dismissed. If the complainant establishes a *prima facie* case, then the onus shifts to the respondent to prove a justification. If the respondent fails to do so the complaint is justified. If the respondent establishes a justification there is no discrimination and the complaint is dismissed.

[70] At para. 353, the Tribunal appropriately cited *Moore*, the leading Supreme Court of Canada authority:

> [353] In *Moore v. British Columbia (Education)* 2012 SCC 61, the Supreme Court of Canada stated:
>
> > As the Tribunal properly recognized, to demonstrate *prima facie* discrimination, complainants are required to show that they have a characteristic protected from discrimination under the *Code*; that they experienced an adverse impact with respect to the service; and that the protected characteristic was a factor in the adverse impact. Once a *prima facie* case has been established, the burden shifts to the respondent to justify the conduct or practice, within the framework of the exemptions available under human rights statutes. If it cannot be justified, discrimination will be found to occur. (para. 33)

[71] The Tribunal correctly articulated the three-part test from *Moore* as it applies to this case at para. 357:

> [357] I apply the test set out in *Moore* for a *prima facie* case of discrimination. In order to establish a *prima facie* case of discrimination, Dr. Dunkley must show: (1) that she has a characteristic protected from discrimination under the *Code*; (2) that she experienced an adverse impact with respect to the service and her employment; and (3) that the protected characteristic was a factor in the adverse impact. If she does so, the burden shifts to the Respondents to justify their conduct.

[72] There is no question that Dr. Dunkley established the first element. Her deafness is clearly a physical disability that is a characteristic protected from discrimination under the *Code*.

[73] As to the second element, the Tribunal found that Dr. Dunkley experienced an adverse impact with respect to a service because she lost her place in UBC's residency program, and she lost her employment at St. Paul's Hospital with PHC.

[74] UBC does not take issue with the finding on the second element, but PHC submits that the Tribunal erred in finding adverse impact with respect to employment.

[75] PHC submits that it did not cause Dr. Dunkley to lose her employment, as she only became PHC's employee because of her request to be placed at St. Paul's Hospital during her residency, and she only lost that employment because of the actions of UBC. PHC submits that it was UBC that had responsibility for coordinating the accommodation of Dr. Dunkley, it was UBC that decided to place her on paid leave in October 2010, and it was UBC that decided to place her on unpaid leave in January 2011. PHC therefore submits that it was unreasonable for the Tribunal to find that PHC was sufficiently involved in the suspension and dismissal to constitute adverse treatment by PHC with respect to employment.

[76] The Tribunal considered this argument, but based on the evidence it found that PHC was sufficiently involved in Dr. Dunkley's suspension and dismissal to constitute adverse treatment with respect to employment. At paras. 366-370 of the Decision, the Tribunal wrote:

> [366] The evidence is that on January 20, 2011, Dr. Dunkley was invited to attend a meeting with the PGME Office Associate Deans, Dr. Rungta, a PAR-

> BC representative, an interpreter and a scribe at which time she was placed on unpaid leave. At this meeting, as set out in his letter of the same date, Dr. Rungta explained that he fully recognized the obligation of the UBC PGME Office to accommodate Dr. Dunkley's disability, but stated that the requirement to do so is only to the point of undue hardship. Given the cost of providing the interpreter services that Dr. Dunkley would require, UBC had concluded that this represented undue hardship as UBC could not provide the accommodation she had requested. Dr. Rungta further explained that Dr. Dunkley's request for accommodation had been discussed with the "Health Authority" and it was his understanding that they would not be able to fund the cost of interpreter services required.
>
> [367] Dr. Dunkley testified that in response to the question of how he could put Dr. Dunkley on unpaid leave if he was not the employer Dr. Rungta said that he believed that the hospital had come to the same decision about declining to accommodate her.
>
> [368] The February 2, 2011 letter from the Associate Deans of Postgraduate Education, Faculty of Medicine, UBC to Dr. Patrick O'Connor, Vice President Clinical Quality & Safety, VCHA advised that Dr. Dunkley was placed on unpaid leave. The letter is set out at paragraph 257.
>
> [369] Dr. Corral provided evidence about the three hospital sites that provided PGY 1 programs. I accept her undisputed evidence that UBC made the decisions about the placement of residents in the PGY 1 program. However, PHC did not argue that it had no effective role in the suspension of Dr. Dunkley's residency and the effective termination of her employment. PHC provided no evidence and did not dispute that the decision to end Dr. Dunkley's residency was made in conjunction with UBC.
>
> [370] Thus, I find that, while UBC took the lead on these matters, PHC was sufficiently involved in the suspension and effective dismissal of Dr. Dunkley from employment to amount to adverse treatment of Dr. Dunkley by it in relation to her employment.

[77] These findings of fact are reasonable and are supported by the evidence before the Tribunal. The conclusion that PHC was implicated in the dismissal of Dr. Dunkley from her employment is also supported by the testimony of Sandra Coughlin (Mann Affidavit, Ex. 149) and of Rebecca Knowles (Mann Affidavit, Ex. 150), which shows that both of them, while working for PHC or for Vancouver Coastal Health Authority with responsibility for PHC, were involved in assessing the cost of providing ASL interpreters for Dr. Dunkley.

[78] Turning to the third element of the test for *prima facie* discrimination, both UBC and PHC submit that the Tribunal erred in finding that Dr. Dunkley's hearing loss was a factor in the adverse impact. They submit not just that the finding is

unreasonable, but that the Tribunal engaged in a legally flawed analysis, attracting a correctness standard of review.

[79] The Tribunal's finding with respect to the third element of *prima facie* discrimination is found at para. 388:

> [388] In my view, the Respondents' removal of Dr. Dunkley from her residency program and the effective end of her employment are inextricably linked to her disability. She required sign language interpreters, at a cost the Respondents judged to be too great, to access the residency training and employment offered, only because she is Deaf. [Emphasis added.]

[80] The petitioners submit that the underlined portion of that paragraph indicates that the Tribunal improperly injected into the *prima facie* discrimination analysis, considerations that are irrelevant at that stage, namely the failure to accommodate.

[81] In this regard, the petitioners also refer to paras. 394-396 of the Decision:

> [394] The Respondents' position on the *prima facie* case is ultimately untenable in that it would prohibit discrimination on the basis of disability only where a respondent takes the disability into account in a discriminatory fashion. If, for example, Dr. Dunkley were an individual who required a wheelchair for mobility, and who, if she obtained access to an educational/training institution, would perform as well as any other student, but could not access the institution because the only entrance was a set of stairs, the Respondents' approach would result in no *prima facie* discrimination as long as they stood at the top of the stairs and invited her to enter. In other words, so long as a service provider or employer says its reasons for declining to provide accommodation is not the disability *per se* but some other reason (e.g. cost), then there is no duty to accommodate and no corresponding scrutiny of whether any attempts at accommodation are sufficient to justify the exclusion.
>
> [395] The approach advocated by the Respondents is inconsistent with the purposes of the *Code*, and in particular with the purposes of fostering a society "in which there are no impediments to full and free participation", and promoting "a climate of understanding and mutual respect where all are equal in dignity and rights". To deny Dr. Dunkley the opportunity to continue in her program, without considering whether she could be accommodated without undue hardship, would be to perpetuate the historical disadvantage that the Supreme Court of Canada, in *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, [1997] S.C.J. No. 86 ("*Eldridge*"), paras. 54-57, recognized as one of the indicia of discrimination against people with disabilities in general, and against Deaf people in particular.
>
> [396] I find that Dr. Dunkley has made out a *prima facie* case of discrimination on the basis of physical disability against both Respondents.

[Emphasis added.]

[82] Relying on *British Columbia (Public Service Agency) v. British Columbia Government and Service Employees Union*, 2008 BCCA 357 at para. 6, and *Health Employers of B.C. (Kootenay Boundary Regional Hospital) v. B.C. Nurses' Union*, 2006 BCCA 57 at paras. 34-35, the petitioners submit that a failure to accommodate is not a factor that can be relied upon to prove *prima facie* discrimination, and that a duty to accommodate arises only after *prima facie* discrimination has been proven.

[83] While I agree with the petitioners that it would be an error in law to conflate the issue of *prima facie* discrimination with that of accommodation, I do not agree that the Tribunal committed that error in this case. Reading the impugned paragraphs of the Decision in context, it is clear that the Tribunal did not base its finding of *prima facie* discrimination on a failure to accommodate, but rather on the finding that there was a nexus between Dr. Dunkley's disability (her deafness) and her adverse treatment (loss of residency and termination of employment).

[84] The petitioners' argument focuses on the three underlined sentences set out above.

[85] In para. 388, the Tribunal was simply stating a fact that appears obvious, namely, that there is a link or nexus between Dr. Dunkley's disability of deafness, and her removal from the residency program and termination of her employment. In the underlined sentence, the Tribunal was making the point that if it had not been for her deafness, Dr. Dunkley would not have required sign language interpreters, and if she had not required sign language interpreters (at a cost the petitioners found too great) she would not have been terminated. There was no error in that finding.

[86] As for the underlined sentences in paras. 394-395, it is important to understand that those paragraphs were the Tribunal's response to an argument put forward by UBC and PHC at the hearing, to the effect that in order to show the nexus required for *prima facie* discrimination, the complainant must show that the actions of UBC and PHC were motivated by arbitrary or stereotypical distinctions.

[87] Indeed, PHC appears to repeat that argument in its written submissions on this petition. PHC states at paras. 67-69:

> 67. PHC did not make any arbitrary or stereotypical distinction because of Dr. Dunkley's deafness which had the effect of imposing burdens, obligations, or disadvantages on Dr. Dunkley which were not imposed upon other residents, or which withheld or limited Dr. Dunkley's access to opportunities, benefits, and advantages available to other residents. Furthermore, PHC did not impose any workplace practice, standard, or requirement which disadvantaged Dr. Dunkley by attributing stereotypical or arbitrary characteristics to her because of her deafness.
>
> 68. PHC always accepted that Dr. Dunkley, as a deaf person, is fully capable of participating in the residency training which takes place in its hospitals. Indeed, from the beginning of its relationship with Dr. Dunkley, PHC sought to ensure that Dr. Dunkley had access to the opportunities, benefits and advantages available to other residents and that no discriminatory distinction was made with regard to Dr. Dunkley because of her deafness.
>
> 69. PHC did not decide that the cost of Dr. Dunkley's requested accommodation constituted undue hardship because Dr. Dunkley is deaf. PHC decided that the cost of Dr. Dunkley's requested accommodation constituted undue hardship because the costs were prohibitively high.

[88] At paras. 394-395 of the Decision, the Tribunal was explaining why it is untenable for UBC and PHC to maintain that *prima facie* discrimination requires the complainant to show that the petitioners relied on arbitrary or stereotypical distinctions.

[89] In this regard, the Tribunal was clearly correct, as is evident from the following passage at para. 24 of the recent decision of our Court of Appeal in *University of British Columbia v. Kelly*, 2016 BCCA 271:

> [24] I would add to these reasons the following observations. Discrimination is not contrary to the Code unless a distinction that has been found *prima facie* discriminatory is not justified. There is no requirement to establish a mental element, a guilty mind, or an intention to discriminate at the third step of the *prima facie* discrimination test. I quote again from *Armstrong* at para. 27:
>
> > [27] The parties made extensive submissions to us with respect to the issue of whether, on the basis of *McGill University Health Centre and Gooding [British Columbia (Public Service Agency) v. British Columbia Government and Service Employees' Union*, 2008 BCCA 357, 298 D.L.R. (4th) 624], there is now a requirement to show that the adverse treatment was based on arbitrariness or stereotypical

> presumptions. In my view, such separate requirement does not exist, and the goal of protecting people from arbitrary or stereotypical treatment is incorporated in the third element of the *prima facie* test. After making reference to stereotyping and arbitrariness in para. 48 of *McGill University Health Centre*, Abella J. went on to explain in para. 49 that the test for *prima facie* discrimination therefore requires that there be a link between the group membership and the adverse treatment. In any event, the adjudicator in this case only required Mr. Armstrong to satisfy the three steps of the *prima facie* test and did not require him to also prove that the Province's decision not to fund PSA screening tests was based on arbitrariness or stereotypical presumptions.
>
> See also *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39, [2015] 2 S.C.R. 789 at para. 40.

[90] Applying the standard of correctness, I find that the Tribunal did not commit the error of conflating the question of *prima facie* discrimination with the question of whether there was a failure to accommodate.

[91] Both UBC and PHC also argue that the Tribunal erred in finding the nexus required for *prima facie* discrimination. Relying on *Health Employers Association of B.C. (Kootenay Boundary Regional Hospital) v. British Columbia Nurses' Union*, they submit that there is no “free standing” duty to accommodate.

[92] At paras. 387, 389 and 393 of its Decision, the Tribunal agreed that there is no free standing duty to accommodate, but concluded that Dr. Dunkley was denied the benefit of her residency and employment because of her disability:

> [387] Further, both Respondents also argue that “there is no freestanding” duty to accommodate. I agree that the duty to accommodate would not arise in circumstances where there was no nexus between the protected ground and the adverse impact. A complainant must establish a nexus between the protected characteristic and the adverse impact. The fact that Dr. Dunkley has a disability and was treated adversely does not, on its own, automatically establish a nexus between the two. If, for example, Dr. Dunkley had been removed from the program or terminated from employment for academic deficiencies which had no connection to her deafness, her complaint would fail at the third step of proving a *prima facie* case.
>
> ...
>
> [389] Abella J. said in McGill, “The essence of discrimination is in the arbitrariness of its negative impact, that is, the arbitrariness of the barriers imposed, whether intentionally or unwittingly.” While it is not necessary to

> specifically identify arbitrariness or stereotyping, the negative impact on Dr. Dunkley is arbitrary in that it results solely from a program designed only for a hearing population. While I accept that neither UBC nor PHC attributed stereotypical attributes to Dr. Dunkley because of her deafness, the norm of oral communication is oriented to persons who can hear and imposes a burden on persons who are Deaf that is not imposed on others.
>
> ...
>
> [393] Dr. Dunkley was offered a residency in dermatology at UBC because of her merits and capacities. As Dr. Warshawski wrote, "Dr. Dunkley was accepted into the program based on her outstanding CV". She was denied the benefit of the residency training and employment, based not her merits and capacities, but entirely on her disability. In short, because she is Deaf.

[93] The petitioners argue that the evidence fails to show any tangible connection between their conduct and the adverse treatment of Dr. Dunkley. They cite *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4; *British Columbia (Public Service Agency) v. British Columbia Government and Service Employees' Union*, 2008 BCCA 357; and *Armstrong v. British Columbia (Ministry of Health)*, 2010 BCCA 56. They rely particularly on *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39, where the Court wrote at para. 88:

> [88] It cannot be presumed solely on the basis of a social context of discrimination against a group that a specific decision against a member of that group is necessarily based on a prohibited ground under the *Charter*. In practice, this would amount to reversing the burden of proof in discrimination matters. Evidence of discrimination, even if it is circumstantial, must nonetheless be tangibly related to the impugned decision or conduct. [Emphasis added.]

[94] It would be a mistake, in my view, to read this paragraph as effecting a change in the test for *prima facie* discrimination set out in *Moore*. The third part of that test remains whether the complainant can show that there was a connection or nexus between the protected characteristic and the adverse impact. The connection need not be a causal connection. It is sufficient if the complainant can show that the protected characteristic was a factor in the adverse impact. As the Court expressed it in *Bombardier* at para. 56:

> [56] In our opinion, even though the plaintiff and the defendant have separate burdens of proof in an application under the *Charter*, and even though the proof required of the plaintiff is of a simple "connection" or "factor" rather than of a "causal connection", he or she must nonetheless prove the three elements of discrimination on a balance of probabilities. This means that the "connection" or "factor" must be proven on a balance of probabilities.

[95] This is in line with what our Court of Appeal recently observed in *Kelly* at para. 25:

> The complainant discharges its onus when it proves the three steps, the third of which is simply to establish a connection between the disability and the decision, without regard for any consideration of the position of the decision-maker, such as hardship, or the motive or state of mind of the decision-maker.

[96] In my view, there was a connection or nexus between Dr. Dunkley's deafness and her adverse treatment. If she had not been deaf, she would not have lost her employment and her residency. Her deafness was clearly a factor in the adverse impact that she suffered. Applying a standard of correctness, I find that the Tribunal was correct in finding that Dr. Dunkley had satisfied the onus that was on her to show *prima facie* discrimination by both UBC and PHC.

Issue 3: Dr. Dunkley's Cooperation in Accommodation Process

[97] In *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970 the Supreme Court of Canada held that the search for accommodation is a multi-party inquiry, and there is a duty on the complainant to assist in securing an appropriate accommodation. As the Court held at pp. 994-995, this does not mean that the complainant must originate a solution, but she must not reject a reasonable proposal:

> This does not mean that, in addition to bringing to the attention of the employer the facts relating to discrimination, the complainant has a duty to originate a solution. While the complainant may be in a position to make suggestions, the employer is in the best position to determine how the complainant can be accommodated without undue interference in the operation of the employer's business. When an employer has initiated a proposal that is reasonable and would, if implemented, fulfil the duty to accommodate, the complainant has a duty to facilitate the implementation of the proposal. If failure to take reasonable steps on the part of the complainant causes the proposal to founder, the complaint will be dismissed. The other

> aspect of this duty is the obligation to accept reasonable accommodation. This is the aspect referred to by McIntyre J. in *O'Malley*. The complainant cannot expect a perfect solution. If a proposal that would be reasonable in all the circumstances is turned down, the employer's duty is discharged.

[98] In its Decision at para. 497, the Tribunal found that Dr. Dunkley fulfilled her duty to assist in securing appropriate accommodation. Among other things, she compiled a list (the "List") of useful persons and organizations who could provide information about the accommodation needs of deaf people, and particularly in a medical context:

> [497] In *Renaud*, the Supreme Court of Canada stated that the search for accommodation is a multi-party inquiry. Along with the employer and the union, there is also a duty on the complainant to assist in securing an appropriate accommodation. I do not find that the Respondents established that Dr. Dunkley did not assist. To the contrary, I find that Dr. Dunkley took initiative, for instance, in immediately contacting the A&D Office upon notification of her CaRMS match, in providing Dr. Forgie as a resource, in advertising for interpreters, in holding an information session for interpreters, and in getting an appointment for herself with the ENT Specialist. Dr. Dunkley promptly responded to the Respondents' inquiries about her accommodation requirements. I find that she suggested resources such as the List and repeatedly asked to be included and involved in the accommodation process. In addition, Dr. Rungta's e-mails and testimony only compliment Dr. Dunkley on her efforts. In response to Dr. Dunkley provision of the List, Dr. Rungta testified that "[He] was happy that … Dr. Dunkley was doing everything in her power to provide us with helpful information".

[99] The Tribunal correctly articulated the legal principles in relation to the complaint's duties. There is no error of law in its finding.

[100] The petitioners submit that the Tribunal's finding was unreasonable, as in their submission, Dr. Dunkley failed to provide them with relevant information in a timely manner.

[101] They point to a March 26, 2010 email from Dr. Melissa Forgie of the University of Ottawa to PARBC outlining Dr. Dunkley's interpreter requirements in her medical undergraduate degree, which was not provided to Lois Moen until May 12, 2010. They say Dr. Dunkley failed to provide UBC or PHC with the information she provided to prospective interpreters in respect of her interpreting needs in a postgraduate medical context, and did not provide the information she obtained from

Dr. Christopher Morland regarding the number of interpreter hours he required in his residency, and the cost of paying for those hours. Moreover, they submit that Dr. Dunkley unreasonably expressed disagreement with the idea of removing rotations in general surgery, obstetrics, and psychiatry from the first two years of her residency program. She said that she felt she should have access to different rotations just like other residents.

[102] The Tribunal dealt with this issue at length at paras. 492-505 of its Decision. Having considered all the evidence, the Tribunal concluded that Dr. Dunkley had fulfilled her duty to cooperate in the accommodation process. That finding of fact cannot be overturned unless it was unreasonable. In my view, it was not unreasonable. It is supported by the following evidence.

[103] On March 18, 2010, Dr. Dunkley met with UBC's Access and Diversity Office to let them know about her disability and her need to be accommodated with ASL interpreters, and she advised UBC's Postgraduate Medical Education ("PGME") office of her need for interpreters. On March 28, 2010, Dr. Dunkley suggested the PGME office contact staff at the University of Ottawa who had experience accommodating her there and could speak to the likely cost of accommodation. Starting in April 2010, Dr. Dunkley sought out interpreters who might be qualified to work with her, and kept UBC and PHC informed about her work in that regard. She willingly attended and participated in all of the meetings that UBC and PHC requested to gather information about her accommodation requests. She agreed to rearrange her program so that rather than starting with clinical duties she would instead do a research elective, followed by other electives that did not require interpreters. She complied with UBC and PHC's request that she see an independent ENT specialist to formally document her hearing impairment, and she made the appointment herself when UBC and PHC failed to do so as promised. She provided UBC and PHC with a list of contact people they could speak to for more information about the question whether her deafness posed a safety risk to patients. She suggested alternative funding sources UBC and PHC could seek out.

[104] It is noteworthy that in October 2010, Dr. Rungta indicated that “Dr. Dunkley was doing everything in her power to provide us with helpful information."

[105] Considering the evidence as a whole, it cannot be said that the Tribunal’s finding that Dr. Dunkley met her duty in the accommodation process was unreasonable.

[106] UBC argues that the Tribunal erred at para. 505 of the Decision in finding that it did not offer a reasonable accommodation involving the modification of Dr. Dunkley's program.

[107] The Tribunal found that although “the idea of modifications was raised”, the manner in which this was done did not amount to an actual proposal put to Dr. Dunkley which would, if implemented, have constituted adequate accommodation. On the basis of the evidence, that finding was not unreasonable.

Issue 4: *Bona Fide* Reasonable Justification

[108] A service provider may displace a *prima facie* finding of discrimination by showing that there is a *bona fide* and reasonable justification for the denial of service: *Code* s. 8(1).

[109] An employer may displace a *prima facie* finding of discrimination by showing that the standard found to be discriminatory is a *bona fide* occupational requirement: *Code* s. 13(4).

[110] The test for the existence of a *bona fide* occupational requirement and a *bona fide* and reasonable justification is the same: *Council of Canadians with Disabilities and VIA Rail Canada Inc.*, 2007 SCC 15, at paras. 119-120.

[111] The petitioners submit that the Tribunal erred in deciding that they had not provided a *bona fide* and reasonable justification.

[112] In *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868 [*Grismer*] and *British Columbia*

(Public Service Employer Relations Commission) v. BCGSEU, [1999], 3 S.C.R. 3 [*Meiorin*], the Supreme Court of Canada established a three-step test for determining whether a *prima facie* discriminatory standard is a *bona fide* reasonable justification or a *bona fide* occupational requirement. A service provider or an employer may justify the impugned standard by establishing, on a balance of probabilities:

> 1. that it adopted the standard for a purpose or goal that is rationally connected to the function being performed;
>
> 2. that it adopted the standard in good faith, in the belief that it is necessary to the fulfilment of the purpose or goal; and
>
> 3. that the standard is reasonably necessary to accomplish its purpose or goals, in the sense that the respondent cannot accommodate the complainant and others adversely affected by the standard without incurring undue hardship.

[113] In the present case, the parties agree that the first two steps are not in contention and that the only issue is whether Dr. Dunkley could be accommodated without undue hardship. The Tribunal found at paras. 405-406 of the Decision:

> [405] I find that the Complainant's statement of the relevant standard more accurately reflects the basis for her exclusion from the residency program. UBC's ultimate goal or purpose was to ensure that the participants in PGME meet the requirements of the relevant licensing body, in this case the Royal College of Physicians and Surgeons. The goal of ensuring patient safety could well be another goal. In order to achieve either or both goals participants in PGME must communicate effectively in English. The absence of ASL interpreters was a barrier to Dr. Dunkley meeting this standard because she is Deaf.
>
> [406] The parties agree that the only issue I am required to determine is whether UBC and/or PHC have established on a balance of probabilities that they cannot accommodate Dr. Dunkley without incurring undue hardship due to the cost of the interpreter services she required.

[114] At para. 410 of its Decision, the Tribunal correctly referred to the decision of the Supreme Court of Canada in *Hydro-Quebec v. Syndicat des employé-e-s de*

technique professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ), 2008 SCC 43 for the proposition that UBC and PHC are not required to prove that it was "impossible" to accommodate Dr. Dunkley, but only that to do so would involve undue hardship.

[115] At para. 419, the Tribunal correctly set out the issue in these terms:

> [419] In order to discharge the burden placed on them by the third prong of the *Meiorin/Grismer* test the Respondents are required to prove that the cost of providing the interpreter services Dr. Dunkley required would result in UBC and/or PHC suffering undue hardship.

[116] The Tribunal went on to discuss the procedural and substantive components of the analysis at paras. 420-422:

> [420] It is recognized that there is a procedural and a substantive component to the determination of undue hardship. In *Meiorin* the Court stated:
>
> > Notwithstanding the overlap between the two inquiries, it may often be useful as a practical matter to consider separately, first, the procedure, if any, which was adopted to assess the issue of accommodation and, second, the substantive content of either a more accommodating standard which was offered or alternatively the employer's reasons for not offering any such standard: see generally *Lepofsky, supra*. (para. 66)
>
> [421] The procedural component relates to the procedure, if any, adopted to assess the issue of accommodation. For example, relevant considerations include the efforts the Respondents made, the options they explored and offers they made to accommodate Dr. Dunkley's deafness. The substantive component relates to the substantive content of either a more accommodating standard offered by the Respondents or their reasons for not offering any such standard. (*Meiorin*, para. 66) Both components are considered in determining whether the Respondents have proven that they could not otherwise accommodate Dr. Dunkley without experiencing undue hardship.
>
> [422] In *Emergency Health and Services Commission v. Cassidy*, 2011 BCSC 1003, the BC Supreme Court found the Tribunal erred in interpreting *Meiorin* to require an employer to establish that it treated the employee "fairly, and with due respect for his or her dignity, throughout the accommodation process". (para. 37) The Court said that *Meiorin* did not create a separate duty that can be breached and, "The single question remains of whether the employer could accommodate the employee without experiencing undue hardship." (para. 24)

[117] At para. 423 the Tribunal agreed with UBC's submission that if it proved the three prongs of the test, then the fact that there could have been further inquiries would be irrelevant, but the Tribunal went on to say that the question of further inquiries could be relevant to the third prong of the test.

> [423] UBC argues that "if a respondent has made good faith and reasonable inquires which result in a conclusion of undue hardship, then the fact that there might be further inquiries which could be made is simply not relevant." To the extent that UBC argues that once it proves the three prongs of the test (including undue hardship), that is the end of the analysis, I agree. I also agree that just because something is "possible" does not mean it must be done. However, the question of further inquiries or possible solutions (in the sense of reasonable and practical steps) is relevant to the determination of the third prong of the test. [Emphasis added.]

[118] UBC submits that the underlined portion of para. 423 demonstrates that the Tribunal committed a legal error in its analysis. It submits that the Tribunal imposed an independent procedural duty to accommodate, when the only relevant issue was the substantive one of whether Dr. Dunkley could be accommodated without undue hardship. The relevant standard of review for such an alleged legal error is correctness.

[119] UBC put it this way at para. 86 of its written argument:

> 86. The Tribunal's position seems to be that UBC's failure to implement proper procedures for cost estimates meant that Dr. Dunkley's accommodation would not have had any impact UBC's resources. By failing to consider this impact, and merely stating certain steps that UBC ought to have taken, the Tribunal failed to consider the single question of whether UBC could accommodate Dr. Dunkley without experiencing undue hardship. The Tribunal's conclusion attempts to ground a discrimination complaint solely on an independent procedural duty to accommodate and is therefore an error of law.

[120] PHC makes a similar submission with respect to paras. 715-716 of the Decision, where the Tribunal wrote:

> [715] Furthermore, as with UBC, the cost estimate relied on by PHC to assess the impact of the cost of interpreter services was not reliable or reasonable. Nor did PHC show that other reasonable models of service where explored or costed.
>
> [716] Given the nature of the evidence regarding costs and the lack of evidence regarding the resources available through VCHA or the reasonable

> alternative of sharing the costs, it is not possible to prove that the cost of interpreter services constituted undue hardship to PHC. PHC's evidence regarding its budget and forecasted finances cannot, in these circumstances, substantiate its claim of undue hardship.

[121] PHC submits that these paragraphs demonstrate the same error of law that UBC identified. PHC put it this way at para. 115 of its written argument:

> 115. As discussed in paragraphs 85 to 96 hereof, the fact that an employer failed to undertake a thorough accommodation investigation is not sufficient, in and of itself, to establish that it failed to accommodate its employee to the point of undue hardship. PHC maintains that it undertook a thorough accommodation investigation. However, even if this Court finds that it did not, the Tribunal Member's decision that PHC's failure to undertake a thorough investigation was not sufficient, in and of itself, to establish that PHC failed to accommodate Dr. Dunkley to the point of undue hardship was incorrect. The Tribunal Member was obligated to consider the substantive component of PHC's claim of undue hardship - PHC's evidence that the cost of accommodating Dr. Dunkley constituted undue hardship in light of its budget and forecasted finances - and her failure to do so was an error of law.

[122] I do not agree with the petitioners' contention that the Tribunal erred in law in its analysis of *bona fide* reasonable justification and *bona fide* occupational requirement. The issue before the Tribunal was whether UBC and PHC had proven that Dr. Dunkley could not be accommodated without undue hardship. The Tribunal correctly held that the onus was on UBC and PHC to prove this on a balance of probabilities.

[123] In the impugned paragraphs of the Decision, the Tribunal was not, as UBC and PHC allege, making a finding that because UBC and PHC had failed to undertake a sufficient investigation into costs, they therefore had breached their duty to accommodate to the point of undue hardship. Rather, the Tribunal was saying that UBC and PHC had failed to satisfy the onus upon them of demonstrating that the cost of accommodation would amount to undue hardship. Applying the standard of correctness, I find that the Tribunal did not err as alleged. I agree with the Tribunal that the failure of UBC and PHC to take reasonable steps to discover accurately the true cost of providing the required accommodation to Dr. Dunkley shows that neither UBC nor PHC has proven on a balance of probabilities that the cost of accommodation would amount to undue hardship.

[124] PHC raises an additional issue. It submits that the Tribunal erred in deciding that the financial resources of VCHA, UBC and/or the Ministry of Health were relevant to assessing PHC's claim of undue hardship and that the Tribunal erred in deciding that, given the nature of the evidence regarding costs and the lack of evidence regarding the resources available through VCHA or the reasonable alternative of sharing the costs, PHC could not establish the legal test for undue hardship set out in *Moore*.

[125] PHC argues that it is a separate legal entity and that its obligation to accommodate its employees to the point of undue hardship must be assessed only against its own finances, without regard to whether other resources might be available through VCHA or the Ministry of Health, or whether cost sharing might be possible with UBC.

[126] PHC did not explain why it was unable even to explore the possibility of cost sharing or obtaining additional resources from VCHA, the Ministry of Health and UBC, even though they are separate legal entities.

[127] Although PHC and VCHA are separate legal entities, they are not strangers. Both Dr. Corral and Sandy Coughlin described PHC as an affiliate of VCHA (Mann Aff. Ex. 149 p. 941 and Ex. 149, p. 1013).

[128] Mary Proctor, VP of Finance and Planning for PHC, testified (Mann Aff. Ex. 150, p. 1093):

> We are an affiliate of Vancouver Coastal Health and a signatory to a document that's called a Master Denominational Agreement. What that allows us to do is maintain our separate legal and society status and yet we must – all of our funding comes under the Vancouver Coastal Health region. So all of our information is consolidated with Vancouver Coastal Health and submitted to the government.

[129] Ms. Proctor went on to testify (Mann Aff. Ex. 150, p. 1093):

> Q: All right. And can you explain to the Chair what – where you get your money from?
>
> A: All – the bulk of our money comes from Vancouver Coast Health, who is funded through the Ministry of Health.

[130] As for UBC, it had entered into a Memorandum of Understanding with the Ministry of Health for funding of the Residency Program. This included funds for the third party agencies that employ residents, including PHC (Mann Aff., Ex. 136).

[131] PHC relies on *HMTQ et al v. Emergency Health Services commission et al*, 2007 BCSC 460, and *Fasken Martineau DuMoulin LLP v. British Columbia (Human Rights Tribunal)*, 2012 BCCA 313, but both those cases are distinguishable, since in the present case, the Tribunal never suggested that Dr. Dunkley might be considered an employee of an entity other than PHC.

[132] I find, therefore, that the Tribunal's conclusion that PHC could not rely simply upon its own budgetary restrictions in light of its failure to take reasonable and practical steps to explore other sources of funding was reasonable and correct.

Issue 5: Alleged Factual Errors

[133] The remaining issues are factual ones, to be assessed on a standard of reasonableness.

[134] UBC alleges that the Tribunal's finding that it had not provided a *bona fide* and reasonable justification for its conduct was unreasonable. In particular, it submits that the following findings of the Tribunal were unreasonable in light of all of the evidence:

- UBC repeatedly failed to take obvious first steps to educate itself about accommodating deaf medical professionals (para. 574 of the Decision).

- UBC did not reasonably conclude that Dr. Dunkley would require interpreter services in every rotation of Dr. Dunkley's residency program (para. 584 of the Decision).

- UBC did not establish that the cost of providing interpreter services for each year of Dr. Dunkley's residency program would be far in excess

of that incurred for providing interpreter services for a deaf fourth year medical student (paras. 602-612 of the Decision).

[135] PHC alleges that the following findings of fact were unreasonable in light of all the evidence:

- The cost estimate relied upon by PHC to assess the financial impact of the cost of accommodating Dr. Dunkley was not reliable or reasonable (para. 715 of the Decision).

- The Tribunal Member could not give weight to Ms. Knowles' cost calculation because Ms. Knowles described her cost calculation as a "rough estimate" (paras. 561 and 562 of the Decision).

- PHC repeatedly failed to take obvious first steps to educate itself about accommodating deaf medical professionals (para. 574 of the Decision).

- The 200 hour per week interpreter services requirement at the high end of Ms. Knowles' cost calculation was unreasonably high (para. 591 of the Decision).

- The evidence did not establish that the costs of training interpreters and paying them for preparation time would have added significantly to the cost of accommodating Dr. Dunkley (para. 594 of the Decision).

- There was a reasonable possibility that a "designated interpreter" model may have been more cost effective than contract interpreters (para. 601 of the Decision).

- PHC failed to explore the "designated interpreter" model (para. 601 of the Decision).

[136] I do not agree that those findings were unreasonable. On the contrary, for the reasons set out below, they were reasonably supported by the evidence.

[137] At paras. 490-491 of the Decision, under the heading, “The Substantive Outcome of the Accommodation Process”, the Tribunal summarized the reasons given by UBC for not accommodating Dr. Dunkley, which was that ASL interpreters would cost at least $500,000 per year for a total cost of $2,500,000 for the five-year program, which UBC considered to amount to undue hardship.

[138] The evidence in this regard is set out in para. 249:

> [249] January 20: Dr. Dunkley was invited to attend a meeting with the postgraduate associate deans. Attending the meeting were Dr. Rungta, Dr. Webber, Dr. Kernahan, Dr. Dunkley, a PAR-BC representative, an interpreter and a scribe. At the end of the meeting Dr. Dunkley was placed on unpaid leave. Afterward, UBC provided Dr. Dunkley a summary of the meeting. It stated that Dr. Rungta opened the meeting and stated the following (in part):
>
> > …It had been estimated that the costs involved in providing interpreter services necessary to accommodate Dr. Dunkley’s training requirements in the program would be at least $500,000/ year for a total cost of 2.5 million dollars for the five year program. Dr. Rungta explained that he fully recognized the obligation of UBC Postgraduate Medical Education to accommodate Dr. Dunkley’s disability, but stated that the requirement to do so is only to the point of undue hardship. Given the cost of providing the interpreter services that Dr. Dunkley will require, UBC has concluded that this represents undue hardship as UBC cannot provide the accommodation she has requested....

[139] The Tribunal embarked on an examination of UBC’s cost calculations in order to determine whether UBC’s reason for refusing to accommodate was sound.

[140] The Tribunal considered the cost estimate of Dr. Kamal Rungta, the Senior Advisor on Medical Education to UBC’s Dean of the Faculty of Medicine, who said he did a crude calculation that ASL interpreters would cost $280,000 per year. He testified that this was the first time PGME had ever encountered this kind of disability and accommodation request. He said he was unaware of other estimates of $665,280 and $500,000 per year. He testified that he understood them to be worst case scenarios.

[141] At paras. 530-541, the Tribunal referred to the evidence of Rebecca Knowles, Human Resources Advisor with PHC, who provided an estimate of $300,000 to

$500,000. She explained that it was a “rough estimate” because it was a five-year program and she did not have all the rotations. She testified that her estimate “was just intended to be a ballpark so we could have a rough idea of what we were – were looking at.” Ms. Knowles spoke to only one interpreter, an acquaintance named Denise Sedran, with whom she spoke at a coffee shop for as much time as it takes to drink a cup of tea. She said she based her estimate on “Dr. Dunkley’s request for accommodation, which would have involved more than one interpreter, and anything that involved group interaction, as well as the costing information provided by Denise [Sedran]”. She assumed 12 to 16 hour shifts, based on her “not extensive but limited understanding of PAR hours”, that is, the union’s collective agreement.

[142] Ms. Knowles said she did not consider a salaried model for interpreters, only an hourly rate. She testified that although Ms. Coughlin was apparently expecting her “to gather costs” she did not believe that she was expected to gather more information on September 16, 2010. She did not gather more costs in the period between her meeting with Denise Sedran in July and September 16, 2010, notwithstanding Sandy Coughlin’s apparent expectation that she would do so. She agreed that she was one of the recipients of the e-mail from Ms. Dunkley’s union representative dated October 7, 2010 inquiring whether they had contacted the persons on Dr. Dunkley’s List of contacts, but she said she was not tasked with that.

[143] At paras. 542-556, the Tribunal considered the calculations of Sandra Coughlin, who was at the relevant time, Team Lead for Disability Management for Vancouver Coastal Heath and PHC. She said she “relied heavily on human resources helping out with the costing fact of it and just gathering medical information, but it was a highly unique situation for us.” Ms. Coughlin testified that she was asked to come up with an estimate by Libby Posgate, Ministry of Health, and she did so. She said, “I really just did the simple math on this one”. Ms. Coughlin estimated that the cost of providing interpreter services to Dr. Dunkley was approximately $665,000 per year which, over a five-year period amounted to roughly $2,500,000 to $3,000,000, assuming Dr. Dunkley completed her residency in five years.

[144] Ms. Coughlin said her estimate was a "worst case scenario" because "when we're looking at an accommodation and what might be involved, I mean, this is very outside the realm, but if we're looking at budgetary purposes, for example, equipment purchasing, that sort of thing, we may need to do, we – we look at the outside costs. So if we're trying to determine if it's feasible, we have to look at the outside costs, not the minimum cost."

[145] Sandy Coughlin did not know about Rebecca Knowles' estimate of $300,000 to $500,000 per year until the end of the meeting on July 20, 2010 and that Ms. Knowles had not provided "further explanations" or "gathered the costs" as requested by September 16, 2010. She said the information she used came from Rebecca Knowles and "I did not gather any costs ever."

[146] Ms. Coughlin testified that calculating the cost of providing interpreters for Dr. Dunkley was not within the scope of her role. She stated that in her role in Disability Management they do not normally gather costs. They interpret the medical evidence and determine whether or not an accommodation is necessary. She admitted that this accommodation request was brand new to her and uncharted territory, and so it posed certain challenges.

[147] In a September 17, 2010 email to the associate deans, Ms. Coughlin wrote, "In order to prove undue hardship, we have to ensure that we cover all costs, not so much on the conservative side, but on a worst case scenario."

[148] At para. 557 the Tribunal stated that it would give little weight to the cost calculations made by Dr. Rungta, Ms. Knowles or Ms. Coughlin. PHC argues that this finding was unreasonable. The Tribunal explained its reasons at paras. 558-562:

> [558] Dr. Rungta based his calculation on the information Dr. Dunkley provided in response to his questions at the August 31 meeting and his understanding that in general residents worked an average of 60 hour per weeks. Ms. Knowles based her calculation on a brief conversation with one interpreter and the hours allowed under the Collective Agreement. Ms. Coughlin produced her calculation in response to a requirement that she do so in rushed circumstances and the limited information she had available to her at the time.

> [559] None of the three had any experience in calculating the cost of providing ASL interpreters. Ms. Coughlin testified that calculating accommodation costs was not within the scope of her job. Only Ms. Knowles made an effort, although minimal, to get some information from a person who had actual knowledge about the provision of interpreter services based on personal experience. However, the "cup of tea" conversation with one interpreter in my view did not amount to sufficient investigation or the best resource for information.
>
> [560] Ms. Knowles and Ms. Coughlin admitted that they were not informed about what Dr. Dunkley's interpreter requirements would be in a particular rotation. Both admitted that they had been informed that Dr. Dunkley did not require interpreters for all rotations. Although Dr. Rungta may have been in a better position to know the nature of the dermatology program rotations, the evidence indicates that he put questions of that nature to Dr. Warshawski and then did not take them into account in his calculation or provide Dr. Warshawski's information to Ms. Knowles or Ms. Coughlin.
>
> [561] All three described their calculations as rough estimates.
>
> [562] In these circumstances, I cannot give more weight to the calculations then the authors do themselves. The estimates were rough and not reliable. I give them little weight. However, they did not need to be so as I will set out.

[149] It was entirely reasonable for the Tribunal to give little weight to the cost estimates in light of the fact that, for the reasons stated, they were unreliable. As the authors of the estimates themselves considered them only to be rough estimates, it was appropriate for the Tribunal to conclude that it should not accord them more weight than their authors did.

[150] PHC also argues that it was unreasonable for the Tribunal to find that the cost estimate relied upon by PHC to assess the financial impact of the cost of accommodating Dr. Dunkley was not reliable or reasonable. What the Tribunal said at para. 715 of the Decision is this:

> [715] Furthermore, as with UBC, the cost estimate relied on by PHC to assess the impact of the cost of interpreter services was not reliable or reasonable. Nor did PHC show that other reasonable models of service where explored or costed.

[151] For the reasons set out above, this finding was not unreasonable.

[152] UBC and PHC argue that the Tribunal erred in finding that they failed to take obvious first steps to educate themselves about accommodating deaf medical professionals.

[153] At para. 574 of the Decision the Tribunal wrote:

> [574] I find that the Respondents' repeated failure to take obvious first steps to educate themselves about accommodating Deaf medical professionals weighs against a conclusion that they made all reasonable and practical efforts to accommodate Dr. Dunkley.

[154] The Tribunal's reasons for coming to that conclusion were set out in the preceding paragraphs, 563-573. The Tribunal observed that UBC and PHC had obvious and appropriate resources available to them that could have provided relevant, timely information about the cost of engaging interpreters for Dr. Dunkley's residency, including Dr. Forgie at the University of Ottawa Medical School, Dr. Dunkley's former interpreter at medical school, UBC's "obvious, internal expert" Dr. Warick, and Dr. Russell.

[155] Moreover, Dr. Dunkley had provided the List, which, as the Tribunal noted, potentially provided a wealth of information. Neither Dr. Rungta, nor Ms. Coughlin, nor Ms. Knowles contacted anyone on the List, in spite of the fact that, as Dr. Rungta testified, "this was the first time we in the Postgraduate office had ever encountered this kind of disability and accommodation request."

[156] The Tribunal's finding that UBC and PHC failed to take obvious first steps to educate themselves about accommodating deaf medical professionals is a not unreasonable.

[157] UBC objects to the Tribunal's finding that UBC did not reasonably conclude that Dr. Dunkley would require interpreter services in every rotation of her residency program. The Tribunal found at para. 575:

> To the extent that the calculations assumed that Dr. Dunkley required an interpreter in all rotations, this was not reasonable.

[158] At para. 582, the Tribunal accepted that Dr. Dunkley had commented that she wanted to have interpreter services in future rotations, but it found that despite that, the subsequent actions of UBC and PHC demonstrate that they did not believe interpreters would always be needed. In particular, they did not provide interpreters for Dr. Dunkley in certain Family Practice rotations.

[159] Moreover, Dr. Rungta testified that the ENT specialist told him that "…interpreters would be required through much of Dr. Dunkley's training. The few occasions where it might not be required was one to one situations but even there he made some statements about that it would be necessary, for instance in the field of psychiatry, to have interpreter services even though there may be one to one contact."

[160] Dr. Dunkley's evidence was that she generally requires interpreter services for group interactions and generally she does not require interpreter services for one on one interaction.

[161] Dr. Warshawski gave his view that the last three years of the dermatology residency was primarily one on one communication, circumstances for which he understood Dr. Dunkley did not require interpreters.

[162] In light of that evidence, the Tribunal's finding was not unreasonable.

[163] UBC argues that it was unreasonable for the Tribunal to find at paras. 602-612 that UBC did not establish that the cost of providing interpreter services for each year of Dr. Dunkley's residency program would be far in excess of that incurred for providing interpreter services for a deaf fourth year medical student.

[164] Although the Tribunal concluded that there is a difference between medical school and residency, the evidence was that learning to become a practicing physician is a continuum. According to the testimony of Dr. Rungta and Dr. Corral, the major difference between medical school and residency is the amount of responsibility borne.

[165] Dr. Dunkley testified that an increase in responsibility does not necessarily mean that more interpreter services are required.

[166] The only witness who had personal experience of interpreting for a deaf medical student and resident was Todd Agan. He gave evidence that his role as interpreter remained "essentially the same" without "much difference at all" in the transition from medical school to residency.

[167] In light of this evidence, the Tribunal's finding was not unreasonable.

[168] PHC takes issue with the Tribunal's finding at para. 601 of the Decision that there was a reasonable possibility that a designated interpreter model may have been more cost effective than contract interpreters and that PHC failed to explore the designated interpreter model.

[169] Rebecca Knowles testified that the reason she did not explore the designated interpreter model is that a salaried interpreter was not a good fit with existing union job descriptions. She testified (Mann Aff. Ex. 150, p. 1122):

> Q: In considering the question of cost, did you consider proposing a salaried model, where the – where Providence might hire an individual?
>
> A: As -- as I said, I had consulted our existing job descriptions. I had thought that a determination would – would need to be made whether it fell under the paramedical or the facility's certification, but that was not – because we didn't have anything that fit, the costing was based on a contract of employment model.
>
> ...
>
> A: I – I think it's under facilities, but again, it wasn't a fit.
>
> Q: So because you couldn't find a fit, a job description, you put aside the question of a salaried model?
>
> A: I worked with the information I had on interpreter costings at the level that Dr. Dunkley was requesting.

[170] Janet Mee testified (Mann Aff. Ex. 149, pp. 1000-1001) that UBC had experience with a full-time interpreter, who was paid a salary as a CUPE staff member. She acknowledged that this was a very different sort of model than the contract model.

[171] Dr. Russell's opinion was that a designated interpreter model is "probably" more cost efficient.

[172] Denise Sedran gave evidence that she worked as a staff interpreter at the University of Winnipeg and would expect that the cost to UBC or the hospital would be less if she was employed as a designated staff interpreter instead of a contract interpreter.

[173] Todd Agan gave evidence of his experience as designated interpreter to a deaf doctor in Texas.

[174] In light of this evidence, the Tribunal's findings that PHC failed to explore the designated interpreter model and that there was a reasonable possibility that this might be more cost efficient are not unreasonable.

[175] PHC submits that it was unreasonable for the Tribunal to find at para. 591 of the Decision, that the 200 hour per week interpreter services requirement at the high end of Ms. Knowles' cost calculation was unreasonably high.

[176] The Tribunal summarized the evidence upon which this conclusion was based, at paras. 585-590. Dr. Rungta's estimate, based on his discussions with Dr. Dunkley, was that 90 hours of interpreter services would be required per week. Ms. Coughlin based her cost estimates on a total of 168 hours per week. Dr. Russell assumed 92.5 hours per week for the first two years of the residency. Mr. Agan and Dr. Moreland's estimate was about 85 hours per week, although the Tribunal noted at para. 589 that this estimate may be somewhat low. Dr. Dunkley testified that she would not need interpreters for all her hospital hours, as she did not need interpreters on call for some rotations.

[177] In light of this evidence, it was reasonable for the Tribunal to find that Ms. Knowles' estimate of 200 hours per week was unreasonably high.

[178] Next, PHC submits that it was unreasonable for the Tribunal to find (at para. 594 of the Decision) that the evidence did not establish that the costs of

training interpreters and paying them for preparation time would have added significantly to the cost of accommodating Dr. Dunkley.

[179] It is important to observe that the Tribunal did not find that the cost of training and preparation time for interpreters would not add to costs, but only that PHC's evidence failed to establish how much, if any, training and preparation time would add to costs.

[180] What the Tribunal said at para. 594 of the Decision is this:

> The Respondents also note that the calculations did not take into account such matters as training and preparation time. However, they did not themselves attempt to calculate these costs and the evidence does not establish that such costs would have added significantly to the cost calculations.

[181] Although PHC argues that training and preparation time would likely have increased PHC's cost estimate, this remains a matter of speculation. As no evidence was called by PHC to show what these costs might have been, the Tribunal cannot be faulted for failing to draw any conclusions as to alleged additional costs. The Tribunal's finding at para. 594 is not unreasonable.

7. CONCLUSION

[182] Applying the appropriate standard of review to each of the points raised by the petitioners, I find that they have not demonstrated any error by the Tribunal. Both petitions for judicial review are dismissed, with costs to Dr. Dunkley.

The Honourable Mr. Justice W.F. Ehrcke