

Federal Court



Cour fédérale

**Date: 20161012**

**Docket: T-1878-15**

**Citation: 2016 FC 1137**

**Ottawa, Ontario, October 12, 2016**

**PRESENT: The Honourable Madam Justice Mactavish**

**BETWEEN:**

**ROBERT DUPUIS**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

**JUDGMENT AND REASONS**

[1] Robert Dupuis seeks judicial review of a decision of the Canadian Human Rights Commission dismissing the discrimination complaint that he brought against his employer, Statistics Canada. Mr. Dupuis had alleged that Statistics Canada had discriminated against him in the course of his employment on the basis of his disability.

[2] Mr. Dupuis submits that the Commission treated him unfairly in the investigation process by refusing to allow him to provide a significant number of additional documents to support his complaint. He further submits that the Commission erred in concluding that he had been

reasonably accommodated by Statistics Canada. Finally, Mr. Dupuis says that the settlement offer made by Statistics Canada during the conciliation process was not a reasonable one, with the result that the Commission erred in relying on that offer as a further basis for concluding that further inquiry into Mr. Dupuis' complaint was not warranted.

[3] For the reasons that follow, I have concluded that the Commission decision lacks the justification, transparency and intelligibility required of a reasonable decision. Consequently, Mr. Dupuis' application for judicial review will be granted.

### **I. Background**

[4] Mr. Dupuis was first hired by the Public Service of Canada in 1988, and he joined Statistics Canada in 1990. A former Statistics Canada employee who served as Mr. Dupuis' Unit Head while he occupied a position at the SI-02 classification level in the period around 1999 to 2000. According to this witness, during this time Mr. Dupuis performed "in capacity", fulfilling all of his duties. The witness further stated that there were no negative issues identified with respect to Mr. Dupuis' performance, nor were any negative comments contained in his performance appraisals.

[5] In 2000, Mr. Dupuis won a competition for a position as a Subject Matter/Information Technology Officer at Statistics Canada, at the SI-03 classification level.

[6] Mr. Dupuis was assigned a new supervisor in 2003. While Mr. Dupuis insists that he continued to perform well, concerns subsequently developed on the part of his new supervisor with respect to Mr. Dupuis' job performance. Following discussions with Mr. Dupuis, the supervisor became concerned that Mr. Dupuis might be suffering from a disability that was

affecting his performance. Consequently, in 2004, Mr. Dupuis was referred to Health Canada to assess whether there were any health-related conditions or restrictions that were affecting his job performance.

[7] In October of 2004, Health Canada determined that Mr. Dupuis suffered from Asperger's Syndrome. In its report to Statistics Canada, Health Canada did not identify Mr. Dupuis' disability by name, but stated that he suffered from a "chronic condition" that "could impact on his ability to carry out his duties in the areas of comprehension and task completion".

[8] While Mr. Dupuis was considered to be fit to work, Health Canada stated that certain accommodative measures could improve his work performance. These measures included:

1. Ensuring that Mr. Dupuis was in a position where he had support from his supervisors;
2. Having Mr. Dupuis in a position that did not involve social demands, time pressures, or the need to improvise quickly or generate solutions to new situations; and
3. Ensuring that Mr. Dupuis' job description not be changed, as individuals with his (unidentified) condition do best with familiar tasks.

[9] Mr. Dupuis was evidently shocked by the Asperger's diagnosis, and did not agree that he suffered from a disability. Statistics Canada nevertheless took steps to accommodate his needs in accordance with Health Canada's recommendations.

[10] In the period between December of 2004 and August of 2005, Mr. Dupuis was assigned reduced duties at the SI-03 level, and was given additional training and supervisory support. However, despite being provided with these accommodation measures, Mr. Dupuis continued to receive unsatisfactory performance reviews. Mr. Dupuis attributes this to his supervisor not understanding how to properly accommodate an employee with Asperger's Syndrome.

[11] Statistics Canada was of the view that it was difficult to accommodate someone in Mr. Dupuis' position, given that all SI positions require social interaction, and Health Canada had specifically noted that a change in Mr. Dupuis' job description was not recommended.

[12] In a 2005 follow-up report, Health Canada stated that Mr. Dupuis was "likely to experience difficulties when the tasks to be completed are highly visual in nature or dependant on the processing of novel or ambiguous materials". This report provided the following additional suggestions for accommodating Mr. Dupuis:

1. That Mr. Dupuis be taught new skills or provided with new projects in a verbal manner, emphasizing tasks that can be learned by rote, and avoiding conveying information in a visual manner;
2. That tasks requiring a high degree of mental flexibility and rapidly changing objectives should be avoided;
3. Familiar tasks should be emphasized, as persons with Mr. Dupuis' condition perform best with structure and repetition; and

4. That Mr. Dupuis may benefit from a consultant coming into the workplace to assist with his reintegration.

[13] Between August of 2005 to March of 2007, Mr. Dupuis was assigned reduced duties, initially at the SI-02 level, and then at the SI-01 level, as well as additional training and supervisory support. No consultant was retained to assist Mr. Dupuis during this period, however, and his performance reviews continued to record his work performance as being unsatisfactory.

[14] From April of 2007 until December of 2008, Mr. Dupuis was assigned one task at a time, with the tasks being those associated with positions ranging from the SI-03 to SI-01 levels. Once again, Mr. Dupuis' job performance was found to be unsatisfactory. At this point, Mr. Dupuis was informed that he must improve his job performance within the next three months, or he would be demoted or terminated.

[15] Beginning in August of 2008, Mr. Dupuis was slowly assigned duties at the CR-04 level. Mr. Dupuis was given satisfactory job performance reviews for the tasks that he performed at this level. As a result, in January of 2009, Mr. Dupuis was demoted to the CR-04 level and was given these tasks to perform on a full-time basis. Mr. Dupuis did not report for work in his new position, but instead went on medically-approved stress leave.

[16] Mr. Dupuis returned to work in 2012. However, in the meantime, on February 28, 2011, he filed a complaint against Statistics Canada with the Canadian Human Rights Commission, claiming that Statistics Canada had discriminated against him on the basis of his disability, and that it failed to properly accommodate him.

## **II. Events Subsequent to Mr. Dupuis' Human Rights Complaint**

[17] In 2011, Mr. Dupuis obtained a report from a psychiatrist named Dr. Robert Milin. This report identified Mr. Dupuis' disability as being Asperger Syndrome, which Dr. Milin described as being a "pervasive developmental disorder". Dr. Milin further outlined the accommodation measures that he believed should be put into place before Mr. Dupuis returned to work.

[18] Dr. Milin's recommended accommodation measures included the following:

1. That Mr. Dupuis receive a workplace assessment by a consultant with experience working with persons with Asperger's in order to develop and implement the necessary accommodations;
2. That Mr. Dupuis receive a speech language pathology assessment for a potential speech impediment; and
3. That Mr. Dupuis receive social skills counselling and further education on Asperger's syndrome.

[19] Upon his return to work in 2012, Mr. Dupuis was briefly assigned an occupational consultant with experience working with persons with Asperger's to assist him in integrating into the workplace in his new position at the CR-04 level.

[20] Mr. Dupuis states that the consultant's involvement with him ended after just two weeks - before she was able to make any recommendations as to the appropriate accommodative measures that should be put into place to assist him in his position. Mr. Dupuis provides information in his affidavit as to his understanding of the circumstances that led to the

termination of the consultant's services. The respondent objects to this portion of Mr. Dupuis' affidavit on the basis that it contains hearsay evidence. I agree with the respondent that Mr. Dupuis' evidence on this point constitutes inadmissible hearsay and it will thus be disregarded.

[21] I would further note that although the Commission investigator interviewed the consultant in question, there is no discussion in the report as to the length of time that the consultant worked with Mr. Dupuis, any recommendations that she may have made to assist him in reintegrating into the workplace, or the circumstances under which her services were terminated.

[22] As I understand it, Mr. Dupuis continues to work for Statistics Canada, occupying a position at the CR-04 level.

### **III. The Commission's Investigation**

[23] The Canadian Human Rights Commission initially put its investigation on hold, pending Mr. Dupuis exhausting the grievance processes that were available to him. Once this was done, the Commission commenced its investigation. The investigation was completed in May of 2014.

[24] The Commission did not initially accept the investigator's recommendation that Mr. Dupuis' human rights complaint be dismissed. The Commission instead referred the matter to conciliation.

[25] Mr. Dupuis and Statistics Canada exchanged a number of settlement offers. They were, however, unable to agree on a resolution to Mr. Dupuis' complaint. Mr. Dupuis' complaint was

then referred back to the Commission on January 23, 2015, for a determination as to whether the complaint should be dismissed, or referred to the Canadian Human Rights Tribunal for a hearing.

[26] On September 30, 2015, the Commission decided to dismiss Mr. Dupuis' complaint. Its decision noted that the investigation had found that the evidence indicated that Statistics Canada had implemented the accommodation measures recommended by Health Canada, and had attempted to accommodate Mr. Dupuis in his SI-03 position for several years before moving him to a position that met his medical restrictions. The Commission further found that Statistics Canada had made a reasonable offer of settlement during the conciliation process. As a consequence the Commission came to the conclusion that further inquiry into Mr. Dupuis' human rights complaint was not warranted.

#### **IV. The Issues**

[27] Mr. Dupuis raises three issues in his application for judicial review.

[28] Firstly, he says that he was treated unfairly in the investigation process, as the Commission refused to allow him to provide additional documentary materials that he and his brother had been assembling that Mr. Dupuis says would have substantiated his complaint. This involves a question as to the thoroughness of the investigation, which is a question of procedural fairness. Questions of procedural fairness are reviewable on the standard of correctness: *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 at para. 43, [2009] 1 S.C.R. 339.

[29] Secondly, Mr. Dupuis says that the Commission unreasonably concluded that Mr. Dupuis had been reasonably accommodated by Statistics Canada. I agree with the parties that the substantive findings of the Commission are to be reviewed on the reasonableness standard.



[30] Finally, Mr. Dupuis says that the Commission's finding that Statistics Canada had made a reasonable offer of settlement during the conciliation process was also unreasonable, as it was tainted by the finding that Statistics Canada had made reasonable efforts to accommodate him.

**V. Legal Principles Governing the Review of Commission Decisions**

[31] Before considering the issues raised by Mr. Dupuis, I will start by examining the nature and extent of the Canadian Human Rights Commission's obligations when investigating a human rights complaint.

[32] The Supreme Court of Canada discussed the role of the Canadian Human Rights Commission in *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854, 140 D.L.R. (4th) 193. There, the Supreme Court observed that the Commission is not an adjudicative body, and that the adjudication of human rights complaints is reserved to the Canadian Human Rights Tribunal. The Commission's duty "is to decide if, under the provisions of the Act, an inquiry is warranted having regard to all the facts. The central component of the Commission's role, then, is that of assessing the sufficiency of the evidence before it": at para. 53. See also *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Human Rights Commission)*, [1989] 2 S.C.R. 879, [1989] S.C.J. No. 103 ("SEPQA").

[33] The Federal Court of Appeal has described the Commission's role as being analogous to that of a judge conducting a preliminary inquiry. That is, the Commission's function is not to adjudicate a complaint, but to determine on the basis of the investigation report and any submissions made by the parties, whether there is a reasonable basis in the evidence for proceeding to an inquiry: *Richards v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FCA 341 at para. 7, [2008] F.C.J. No. 1526.

[34] The Commission has a broad discretion to determine whether “having regard to all of the circumstances” further inquiry is warranted: *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2012 SCC 10, [2012] 1 S.C.R. 364 at paras. 21 and 25; *Mercier v. Canada (Human Rights Commission)*, [1994] 3 F.C. 3, [1994] 3 F.C.J. No. 361 (F.C.A.). Indeed, in *Bell Canada v. Communications, Energy and Paperworkers Union of Canada*, [1999] 1 F.C. 113, [1998] F.C.J. No. 1609, the Federal Court of Appeal noted that “[t]he Act grants the Commission a remarkable degree of latitude when it is performing its screening function on receipt of an investigation report”: at para. 38, (my emphasis).

[35] However, when deciding whether further inquiry is warranted, the process followed by the Commission must be fair: *Slattery v. Canada (Canadian Human Rights Commission)*, [1994] 2 F.C. 574, [1994] F.C.J. No. 181; aff’d 205 N.R. 383 (F.C.A.).

[36] Where, as here, the Commission adopts the recommendations of an investigation report and provides limited reasons for its decision, the investigation report will be viewed as constituting the Commission’s reasoning for the purpose of a decision under section 44(3) of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6: see *SEPQA*, above at para. 35; *Bell Canada*, above at para. 30.

[37] However, if the Commission decides to dismiss a complaint based upon a deficient investigation, that decision will be deficient because “[i]f the reports were defective, it follows that the Commission was not in possession of sufficient relevant information upon which it could properly exercise its discretion”: see *Grover v. Canada (National Research Council)*, 2001 FCT 687 at para. 70, 206 F.T.R. 207; see also *Sketchley v. Canada (Attorney General)*, 2005 FCA 404, [2006] 3 F.C.R. 392, at para. 112.

[38] With this understanding of the Commission's role and responsibilities in dealing with complaints of discrimination, I will next consider Mr. Dupuis's arguments as to the alleged unfairness of the investigation process in this case.

**VI. Was Mr. Dupuis' Treated Unfairly in the Investigation Process?**

[39] Mr. Dupuis asserts that he was treated unfairly in the investigation process as the investigator denied him the opportunity to provide documentation that he says would have assisted him in establishing that his human rights complaint had merit.

[40] Mr. Dupuis filed his human rights complaint in February of 2011. An investigator was appointed in April of 2013, and in June of 2013, Mr. Dupuis was provided with a copy of Statistics Canada's response to his complaint. In July of 2013, through the counsel then representing him, Mr. Dupuis provided the investigator with a 32 page rebuttal to Statistics Canada's response.

[41] Mr. Dupuis was interviewed by the Commission investigator in February of 2014. At the end of his interview, Mr. Dupuis says that he informed the investigator that he and his brother were compiling a large amount of additional information that they believed would help substantiate Mr. Dupuis' complaint. Mr. Dupuis says that he offered to send the investigator this information, if the investigator wanted to see it.

[42] A few days later, Mr. Dupuis' counsel provided the investigator with a copy of a 2011 psychiatric report from Dr. Milin, as well as a copy of Statistics Canada policies dealing with demotions and the duty to accommodate disabled employees. A further email was sent by counsel to the Commission investigator on April 1, 2014, in which counsel indicates that she

would be sending the investigator copies of various emails from Mr. Dupuis' supervisors, one of which stated that removing Mr. Dupuis from his Division would assist in dealing with budgetary constraints.

[43] On May 23, 2014, counsel for Mr. Dupuis sent the investigator a seven page letter responding to information that had been obtained by the investigator through interviews with Statistics Canada's witnesses. In this letter, counsel notes that Mr. Dupuis had additional information and documentation "to support and expand on the submissions made". Counsel states that "[i]f you have any fact specific questions or wish to view any of the additional information [...] please do not hesitate to contact me".

[44] It is noteworthy that counsel did **not** ask the investigator to put the investigation on hold until such time as the investigator could examine this additional information. Rather, counsel left it to the discretion of the investigator to determine whether the information needed to be reviewed. Neither Mr. Dupuis nor his counsel ever received a response to this email from the investigator.

[45] In mid-June of 2014, the investigator spoke to Mr. Dupuis' counsel, advising her that he was in the process of finalizing his investigation report. According to an internal Commission email, counsel advised the investigator that Mr. Dupuis and his brother had been working on some 20 binders of additional information that they wished to have considered in the course of the investigation. The investigator responded to counsel's inquiry by stating that Mr. Dupuis would have an opportunity to respond to the investigation report, but that his response could not exceed 10 pages in length.

[46] The investigator released his report on August 6, 2014, recommending that the Commission dismiss Mr. Dupuis' complaint. Through his counsel, Mr. Dupuis then provided the Commission with a 10 page written response to the investigation report. In November of 2014, the Commission referred Mr. Dupuis' complaint to conciliation.

[47] Before addressing Mr. Dupuis' procedural fairness argument, it is helpful to have regard to what the Courts have said with respect to the need for thoroughness in human rights investigations.

[48] In *Slattery*, above, this Court discussed the content of the duty of fairness required of Commission investigations. The Court observed that in fulfilling its statutory responsibility to investigate complaints of discrimination, the Commission's investigations have to be both neutral and thorough.

[49] Insofar as the requirement of thoroughness is concerned, the Court observed in *Slattery* that "deference must be given to administrative decision-makers to assess the probative value of evidence and to decide to further investigate or not to further investigate accordingly": at para. 56. The investigator is not obliged to interview each and every person suggested by the parties: *Slattery*, above, at para. 69. It is only "where unreasonable omissions are made, for example where an investigator failed to investigate obviously crucial evidence, that judicial review is warranted": *Slattery*, above, at para. 56.

[50] As to what will constitute "obviously crucial evidence", this Court has stated that "the 'obviously crucial test' requires that it should have been obvious to a reasonable person that the evidence an applicant argues should have been investigated was crucial given the allegations in

the complaint”: *Gosal v. Canada (Attorney General)*, 2011 FC 570 at para. 54, [2011] F.C.J. No. 1147; *Beauregard v. Canada Post*, 2005 FC 1383 at para. 21, 294 F.T.R. 27.

[51] In this case, the human rights investigation took place over a period of approximately 15 months during which time Mr. Dupuis had ample opportunity to provide the investigator with whatever documents he believed would support his human rights complaint. While he now argues that the documents in issue were crucial in nature, and that he thought it essential that they be reviewed by the investigator, that is not the message that was being communicated to the investigator during the investigation.

[52] It will be recalled that at the time of his interview with the investigator, Mr. Dupuis offered to send the investigator information that was supportive of various aspects of his complaint. Nothing prevented Mr. Dupuis sending the documents to the investigator if he believed that they were important to his complaint. Instead, Mr. Dupuis simply left it to the investigator’s discretion as to whether he felt it was necessary to review the documents in question.

[53] Similarly, when counsel for Mr. Dupuis wrote to the investigator in May of 2014, she indicated that Mr. Dupuis had additional documentation to support his complaint, but again counsel left it to the discretion of the investigator as to whether he wanted to view any of the additional information. It would, however, have been open to counsel to provide the investigator with this additional documentary material, if counsel was of the view that it was crucial to Mr. Dupuis’ complaint.

[54] Indeed, it was only at the eleventh hour, when the investigator was in the process of wrapping up his investigation after the investigation had been underway for many months, that counsel for Mr. Dupuis indicated unequivocally that she wanted the investigator to review the documentation in issue.

[55] In my view, it was neither unreasonable nor unfair for the investigator to refuse to accept Mr. Dupuis' additional documentation at that late date. This was especially so given that Mr. Dupuis would be afforded the opportunity to provide comments on the adequacy of the human rights investigation after the investigation report had been disclosed to him.

[56] Mr. Dupuis submits that he had a legitimate expectation that he would be able to provide his additional documents to the investigator. However, as the Supreme Court observed in *Canada (Attorney General) v. Mavi*, 2011 SCC 30, [2011] 2 S.C.R. 504, to give rise to a legitimate expectation that a certain process will be followed, there must be "clear, unambiguous and unqualified" representations to that effect: at para. 68. Mr. Dupuis has not demonstrated the existence of any representations by the Commission that could reasonably have created such a legitimate expectation on his part.

[57] Moreover, as the Federal Court of Appeal observed in *Tahmourpour v. Canada (Solicitor General)*, 2005 FCA 113 at para. 39, [2005] F.C.J. No. 543, "[a]ny judicial review of the Commission's procedure must recognize that the agency is master of its own process and must be afforded considerable latitude in the way that it conducts its investigations".

[58] The Court went on in *Tahmourpour* to hold that an investigation into a human rights complaint "cannot be held to a standard of perfection; it is not required to turn every stone". This

is because “[t]he Commission’s resources are limited and its case load is heavy. It must therefore balance the interests of complainants in the fullest possible investigation and the demands of administrative efficacy”: above at para. 39.

[59] The jurisprudence has also established that some defects in the investigation may be overcome by providing the parties with the right to make submissions with respect to the investigation report: *Slattery*, above at para. 57. As the Federal Court of Appeal observed in *Sketchley*, above, the only errors that will justify the intervention of a court on review are “investigative flaws that are so fundamental that they cannot be remedied by the parties’ further responding submissions”: at para. 38.

[60] Mr. Dupuis identified two areas where he submits that obviously crucial evidence was ignored by the investigator. The first relates to the existence of budgetary constraints within Mr. Dupuis’ area, and the link between those pressures and the disposition of Mr. Dupuis’ case.

[61] It will, however, be recalled that this issue had already been drawn to the investigator’s attention in an email sent by Mr. Dupuis’ counsel to the investigator on April 1, 2014. At that time, counsel indicated that she would be sending the investigator copies of emails from Mr. Dupuis’ supervisors suggesting that removing Mr. Dupuis from his position would assist in dealing with budgetary constraints. While it appears that counsel failed to follow through on her commitment at that time, the investigator was nevertheless made aware of the concern.

[62] Mr. Dupuis did, moreover, specifically draw the Commissioners’ attention to the existence of these emails in his September 16, 2014 response to the investigation report, thereby making Commissioners aware of his claim that budgetary considerations may have been behind



the decision to demote him. Mr. Dupuis thus had the opportunity to remedy any alleged defect in the investigative process.

[63] The second area where Mr. Dupuis submits that obviously crucial evidence was ignored by the investigator relates to the alleged failure of Statistics Canada to properly accommodate him. While it is true that Mr. Dupuis was not expressly invited to provide the full text of all of his additional documents to the investigator prior to the completion of the investigation, he was given the chance to summarize his additional evidence in his response to the Investigation Report. The Commissioners were, therefore, aware of the nature of the additional information that was in Mr. Dupuis' possession. They nevertheless determined that further investigation of his complaint was not warranted.

[64] The additional information that Mr. Dupuis wanted to provide to the investigator did not raise any new issues, but simply provided a greater depth of information regarding the issues that were already before the investigator. As a result, it is my view that this information cannot be considered to be "obviously crucial evidence". Consequently, I am of the view that the investigator did not breach the principles of procedural fairness by failing to follow up on this evidence with Mr. Dupuis.

## **VII. Was the Commission Decision Unreasonable?**

[65] Mr. Dupuis also submits that the Commission's decision is unreasonable because the investigator failed to consider relevant information, and misapprehended the evidence that was before him.

[66] In particular, Mr. Dupuis submits that the investigator erred by only considering the recommendations made by Health Canada, in assessing the sufficiency of Statistics Canada's attempts to accommodate him, and by failing to have regard to the accommodation measures recommended by Mr. Dupuis' own expert, Dr. Milin.

[67] A major focus of Mr. Dupuis' submissions regarding Statistics Canada's alleged failure to accommodate him was on the failure of his employer to follow the recommendations of Dr. Milin, in attempting to accommodate him.

[68] It will be recalled that Dr. Milin's report identified Mr. Dupuis' disability as being Asperger Syndrome. Dr. Milin further recommended that, amongst other things, Mr. Dupuis receive a workplace assessment by a consultant with experience working with persons with Asperger's in order to develop and implement the necessary accommodations.

[69] Mr. Dupuis saw Dr. Milin in the autumn of 2011, in anticipation of his return to work at Statistics Canada after a lengthy period of medical leave. It appears that Dr. Milin's report was completed on September 26, 2011, although it is not clear when it was provided to Statistics Canada.

[70] Mr. Dupuis' human rights complaint against Statistics Canada initially covered the period between March 20, 2007 and February 28, 2011. However, as was noted in paragraph 5 of the investigation report, the complaint was subsequently amended, and the amended complaint covered the period from March 20, 2007 to September 2009.

[71] While Mr. Dupuis is correct in stating that the duty to accommodate is an ongoing one, Statistics Canada did not have the Milin report during the period under review in this case, and it cannot therefore be faulted for failing to comply with Dr. Milin's recommendations.

[72] That said, it is clear from the record that Statistics Canada did not follow all of the recommendations as to how Mr. Dupuis should be accommodated that had been made by Health Canada during the period that is covered by Mr. Dupuis' human rights complaint.

[73] It will be recalled that in its 2005 assessment, Health Canada advised Statistics Canada that, amongst other things, "Mr. Dupuis may benefit from a consultant coming into the workplace to assist with his reintegration". I understand it to be common ground that Statistics Canada never hired an expert to assist it in accommodating Mr. Dupuis in his SI-03 position. Rather, counsel for Statistics Canada submits that Health Canada's comment with respect to engaging the services of a workplace consultant was merely a suggestion, and not a mandatory requirement.

[74] Statistics Canada has not suggested that retaining the services of an expert would have caused it undue hardship. Engaging the services of such an expert would, moreover, have been a logical next step when Statistics Canada's own efforts at accommodation were proving to be unsuccessful at the SI-03, SI-02 and SI-01 levels. This was especially so in light of the fact that Mr. Dupuis had previously been able to satisfy the requirements of an SI-02 position.

[75] It is true that Health Canada never identified the precise nature of Mr. Dupuis' disability in its 2004 and 2005 assessments. This could potentially have made it difficult for Statistics Canada to identify a consultant with the appropriate expertise, although I have not been directed

to any evidence in the record suggesting that this was the reason for Statistics Canada failure to hire an expert.

[76] Had that been the case, however, it would have been open to Statistics Canada to ask Mr. Dupuis for that information. While Mr. Dupuis would not have been obliged to inform his employer as to the nature of his disability, his failure to do so would have been a significant consideration in assessing the sufficiency of Statistics Canada's accommodation efforts. That is because the search for accommodation is a two-way street, and there is a duty on complainants to assist in securing appropriate accommodation by bringing the facts relating to the alleged discrimination to the attention of the employer: see *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970 at para. 43, [1992] S.C.J. No. 75.

[77] The sufficiency of Statistics Canada's efforts to accommodate Mr. Dupuis was front and centre in Mr. Dupuis' human rights complaint. However, the Commission investigator never addressed Statistics Canada's failure to hire a consultant to assist it in accommodating Mr. Dupuis in his SI-03 position in the investigation report, notwithstanding Health Canada's recommendation to that effect. Rather, the investigator simply concluded that Statistics Canada had done everything that it could to try to accommodate Mr. Dupuis' disability, without success, leaving it with no alternative but to demote him to a clerical position, three levels below his SI-03 position.

[78] Nor did the investigator consider why it was that Mr. Dupuis was unable to perform at the SI-02 level in a satisfactory manner when he had been able to do so some years before. Consequently, we do not know whether the requirements of the job had changed, whether

Mr. Dupuis' condition had deteriorated, or whether there was some other impediment to his being able to meet the requirements of his job.

[79] The failure of the investigator to engage with this key evidence means that the Commission decision lacks the justification, transparency and intelligibility required of a reasonable decision. Nor can it safely be said that the decision falls within a range of possible acceptable outcomes which are defensible in light of the facts and the law: *see Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 47, [2008] 1 S.C.R. 190.

### **VIII. The Reasonableness of Statistics Canada's Offer to Settle**

[80] A second reason cited by the Commission for dismissing Mr. Dupuis' human rights complaint was that Statistics Canada had made a reasonable offer of settlement during the conciliation process. The Commission's assessment of the reasonableness of Statistics Canada's offer was, however, based upon the investigator's finding that Statistics Canada had fully implemented the accommodative measures that had been recommended by Health Canada.

[81] The fact that the Commission investigator never considered or addressed Statistics Canada's failure to hire a consultant to assist it in accommodating Mr. Dupuis, as Health Canada had suggested in its 2005 assessment, undermines the reasonableness of the investigator's finding that Statistics Canada had fully discharged its duty to accommodate Mr. Dupuis. This in turn calls into question the reasonableness of the Commission's assessment of Statistics Canada's offer of settlement.

**IX. Conclusion**

[82] As a consequence, Mr. Dupuis' application for judicial review will be granted. The Commission's October 8, 2015 decision dismissing Mr. Dupuis' human rights complaint will be set aside, and the matter will be remitted to the Commission for further investigation in accordance with these reasons.

**X. Costs**

[83] Mr. Dupuis shall be entitled to his costs, which are fixed on the amount of \$5,000.00, inclusive of disbursements.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that:**

1. This application for judicial review is granted and the Commission's decision dated October 8, 2015 dismissing Mr. Dupuis' human rights complaint will be set aside, and the matter will be remitted to the Commission for further investigation in accordance with these reasons;  
and
2. Mr. Dupuis shall have his costs of this application fixed in the amount of \$5,000.00, inclusive of disbursements.

"Anne L. Mactavish"

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-1878-15

**STYLE OF CAUSE:** ROBERT DUPUIS v ATTORNEY GENERAL OF CANADA

**PLACE OF HEARING:** OTTAWA, ONTARIO

**DATE OF HEARING:** SEPTEMBER 7, 2016

**JUDGMENT AND REASONS:** MACTAVISH J.

**DATED:** OCTOBER 12, 2016

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