Federal Court Cour fédérale

Date: 20190215

Docket: T-955-18

Citation: 2019 FC 196

Ottawa, Ontario, February 15, 2019

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

ERIC ALLEN KIRKPATRICK

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] This judicial review application is concerned with a chair. Eric Allen Kirkpatrick is an inmate in the maximum security penitentiary of Kent, in British Columbia. He suffers from epilepsy which requires, he claims, that he eat his meals sitting in his chair in his cell. However, for a period of time in 2015 his chair was removed from his cell, such that he had to eat his meal standing up or sitting on his bed in his cell, with the result that a significant portion of his food was spilled.

[2] He complained to the Canadian Human Rights Commission which concluded that, pursuant to section 44(3)(b)(i) of the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6) [CHRA] that the complaint was to be dismissed. The provision reads as follows:

44 (3) On receipt of a report referred to in subsection (1), the Commission … **(b)** shall dismiss the complaint to which the report relates if it is satisfied **(i)** that, having regard to all the circumstances of the complaint, an inquiry into the complaint is not warranted, or **…**	**44 (3)** Sur réception du rapport d'enquête prévu au paragraphe (1), la Commission […] **b)** rejette la plainte, si elle est convaincue : **(i)** soit que, compte tenu des circonstances relatives à la plainte, l'examen de celle-ci n'est pas justifié, **[…]**

[3] Mr. Kirkpatrick sought the judicial review of that decision. For the reasons that follow, his application must be dismissed.

I. Facts

[4] The area of the penitentiary which houses Mr. Kirkpatrick (POD1) was the only one at the time that was equipped with plastic chairs that were in the cells as well as in the common living area. In the other areas of the penitentiary, the chairs were either bolted or welded to the floor and they are made of material that is tamper-resistant.

[5] Towards the end of 2014, the authorities at the penitentiary noted that a weapon had been fashioned, using pieces of a plastic chair that had been in an inmate's cell. A decision was

therefore taken to confiscate the chairs on or around December 31, 2014. That was evidently in response to these chairs being capable of being used to fabricate a weapon.

[6] The applicant serves a life sentence for murder. He was 67 years old and suffered from epilepsy. The applicant's medication had side effects which resulted in loss of balance, loss of hand to eye coordination and fluctuation pain thresholds. Not being able to use this chair in his cell to have his meals, the applicant had to find a different way of eating his meals. He says that he spilled significant portions of the food because he could not use a chair at his desk. That, he claimed, resulted in significant embarrassment and injury to his dignity.

[7] He made an institutional grievance as early as January 2, 2015. He suggested that he be permitted to eat in the common room where 2 plastic chairs remained.

[8] Instead, the evidence shows that a document was posted in the common area where the applicant was living. That document posted on January 5, 2015 was the so-called "Plastic Chair Protocol". The said Protocol is reproduced hereafter:

> Safekeeping of the Plastic Chair is the responsibility of the inmate and the chair is to remain in the assigned inmate's cell. Chairs are assigned to the inmate, not the cell. The above named inmate will be required to present their chair, setting it upside down with the legs up, with their cell overhead light on during the 06:45 Count and a second time at the 22:10 Stand to Count.
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> - Staff will inspect the chair for any damage or alterations.
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> - If any damage or alterations have been made, to the chair, the inmate will be charged (designated as Serious), maybe [sic], subject to Segregation, chair will be disposed of and restitution for the chair will be sought, through the Charge, at a cost of $98.00.

- Chairs brought out of the assigned inmate's cell, or damaged, will be removed and the inmate will give up his right to a chair.

- The assigned chair will be returned, to staff, when the inmate leaves POD1.

[9] It is not disputed that once a "plastic chair issue form" was signed by an inmate, the chair was to be returned to the inmate's cell.

[10] The evidence as to when the applicant became aware of the Plastic Chair Protocol and the possibility of getting his chair back upon signing a plastic chair issue form is less than clear. It seems that he knew early in January 2015 about the existence of the Chair Protocol since it was posted in the common living area. However, he claims that he was not made aware that he could sign the plastic chair issue form until January 27 when he received a response to his January 2 grievance. To say the least, the applicant had taken a very passive approach between January 5 and January 27. Be that as it may, he declined to sign the plastic chair issue form which could benefit any inmate in POD1 and constituted an accommodation for Mr. Kirkpatrick given his physical condition. He went without a chair in his cell until February 2016 when metal chairs were installed in all the cells in the applicant's living unit. The record indicates that the said chairs were welded down to the floor of the cells.

[11] According to the copy of the complaint that is found in the record, a complaint with the Canadian Human Rights Commission was filed on November 2nd, 2015. A two page document, which does not bear a date and is simply entitled "Facts", reveals that on April 14, 2015, the then applicant's counsel "drafted a letter to the Institution's warden asking that the chair be returned as it was a health care concern and that the respondent's actions may constitute a human rights

breach". Furthermore, paragraph 9 of that document states that "a memo (backdated to January 5th, 2015) was distributed throughout the institution that a plastic chair protocol was now in place and that if inmates wished to receive a chair, they would be required to sign a "plastic chair issue form" and would be required to present the chair for inspection, twice daily".

[12] In what appears to be the basis for the complaint, one reads at paragraph 10:

> Notwithstanding that all inmates are already deemed to be responsible for the contents of their cells by virtue of the Corrections and Conditional Release Regulations and that this contract is unenforceable given the duress between the parties, the complainant also took issue with the fact that his chair was taken away in the first place, an action that he believed not only undermined his dignity but also ran contrary to section 87 of the Corrections and Conditional Release Act ("CCRA") […].

The complaint form identifies that the complainant suffered from discriminatory policy or practice by reason of his disability.

II. The Complaint to the Human Rights Commission

[13] The complaint was made the subject of an investigation which was completed by December 2017. An Investigation Report in draft form was circulated to the parties for comments. The applicant offered a response to the Investigation Report which appears to have been made on January 17, 2018. The respondent produced its contribution to the investigation on January 10 and February 8, 2018.

[14] After describing the various steps in the investigation process, the Investigation Report notes that the respondent has not disputed that removing the chair from the cell may have

affected the complainant negatively based on his disability. The respondent does not dispute that the complainant required some accommodation by reason of his disability. The accommodation, it seems, is for a chair to be in the cell in order to allow the inmate to sit at his desk in order to eat. Finally, the respondent did not dispute that Mr. Kirkpatrick advised that he needed a chair in his cell. The disagreement turns on the issue of accommodations that were offered to the applicant by way of the Plastic Chair Protocol.

[15] The Investigation Report specifies that "(a)ccording to the respondent, the complainant refused to sign the chair protocol because he believed the respondent should provide the chair to him "unconditionally" " (para 20 of the Investigation Report). The Report also states the position of the complainant. It is noteworthy that the record before the Court does not have any other facts that relate to the accommodations offered to Mr. Kirkpatrick. Thus, we learn from the Report that he engaged a staff at the institution in informal discussions almost immediately after his chair was removed from his cell, although the applicant claims not remembering the names of the employees he spoke with. He also spoke, he says, to the "unit representative" about his concerns. He says that he offered the institution "the option of returning his chair or being permitted to eat in the common area in this complaint" (para 25 of the Investigation Report). As we shall see, that is the preferred option of the complainant, preferred option that did not meet the agreement of the Institution.

[16] It appears that the complainant, the applicant in this Court, acknowledged that the Protocol was posted on the wall in the common area around January 5, 2015 but, according to him, it was taken down shortly thereafter. According to the Investigation Report, Mr. Kirkpatrick

has acknowledged that, “had he signed the protocol, he would have received a chair back” (para 32 of the Investigation Report). It would seem that the gravamen of the complaint that was before the Human Rights Commission is found at paragraphs 28 and 29 of the Investigation Report. I reproduce them in their entirety:

> 28. The complainant states that he did not sign the protocol because he “did not think it was in accordance with the Respondent’s [sic] legal obligations”. As a result, the complainant says that he did not receive seating for his cell until February 2016 (over a year later) when the respondent welded chairs in POD1 cells to the desks as in other units at Kent Institution.
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> 29. When interviewed, the complainant said the other reasons he did not want to sign the protocol were:
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> - Its wording “removed the Institution of any blame” if anything were to happen to the chair. The protocol said that the chair was the complainant’s responsibility and, if there was any “wear and tear” to it, the respondent could fine him $100.
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> - It was redundant because guards regularly checked inmates’ cells and they did a complete inspection of all cells monthly.
>
> - In the three years at Kent Institution, he “was never once found to have any contraband, or to show that [he’d] done anything like that” [i.e., try to make weapons out of pieces of the plastic chair].
>
> - He felt that by signing he was signing away his rights to any further complaint/grievance on the issue.

[17] As already indicated, the parties were allowed to comment on the Investigation Report. It is not easy to understand the position taken by the applicant in his response to the Investigation Report. One thing is clear. The respondent has not discharged its duty to accommodate in the view of the applicant. But the reasons for that argument appear to be based on two themes that are weaved throughout the four-page response. First, there was another accommodation that was

available, that of allowing the inmate, and presumably other inmates, to have their meals in the common area where two chairs were available. I note that the respondent commented further on that suggestion in its response of February 8, 2018 by stating that the Kent Institution "is a maximum security institution and, as such, accommodating inmates to eat all three (3) of their meals in the common area is not feasible". As previously stated, Mr. Kirkpatrick was offered the ability to have a plastic chair in his cell if he agreed to take reasonable responsibility for the chair. The second prong is the redundancy of the Chair Protocol. The applicant refused to sign the plastic chair issue form because the Protocol itself is redundant. We find that reference in four different areas in what is a short document that constitutes the four-page response to the Investigation Report.

[18] Thus, paragraph 4 states that:

> Furthermore, the Respondent has broad statutory authority to search the contents of cells and to take administrative and/or disciplinary action in response to damage, regardless of the Chair Protocol. As such, the Chair Protocol was effectively meaningless as it only confirmed the pre-existing statutory authority of the Respondent.

At paragraph 11, its first sentence reads:

> However, in the face of the options proposed by the Complainant, the evidence indicates that the Respondent explored only a single option to address the Complainant's disability, i.e. requiring him to sign the redundant Chair Protocol.

Paragraph 12 states in part:

> What is more, the investigator failed to adequately grapple with whether or not the Chair Protocol was a reasonable

> accommodation in all of the circumstances. As set out above, the Chair Protocol was meaningless in the face of the Respondent's existing statutory authority.

Finally, paragraph 14 states in part:

> Rather, the evidence suggests that the Respondent did not make more than a negligible effort in the search for accommodation, settling on a single response that was ultimately unnecessary and redundant in the face of existing statutory authority. In spite of the Complainant's efforts to discuss alternative options, such as eating in the common area, there is no indication Respondent meaningfully considered this option.

[19] I note that the complainant's response refers to a refusal to sign the Chair Protocol because the applicant believed that "it negatively impacted his legal rights" (para 10), without, however, any elaboration. That comment was addressed by the respondent in its response of February 8, where it says that "(t)he Protocol does not indicate that Mr. Kirkpatrick would be barred in any way from pursuing the matter legally should he have chosen to do so. Further, the Protocol does not indicate that inmates would be responsible for the chair if it was damaged due to regular "*wear and tear*" or if it was broken inadvertently".

[20] Faced with such a record, the investigator concluded at paras 34 and 35 of her Report:

> 34. The evidence indicates that the complainant failed to cooperate in the accommodation process. Human rights law entitles individuals to a reasonable accommodation, not their preferred accommodation. The evidence indicates that the respondent offered the complainant a reasonable accommodation option (i.e., the return of a chair to his cell it he signed the protocol). The complainant refused this option because he wanted his preferred option (i.e., to have the respondent return a chair to his cell without him having to sign the protocol).

> 35. Based on the above, the analysis of the complaint did not proceed beyond Step 2(c).

The recommendation, pursuant to subparagraph 44(3)(b)(i) of the CHRA, to dismiss the complaint was endorsed by the Commission.

[21] For greater clarity, it should be noted that the investigation process of the Commission involves three steps with step 2(c) being whether the complainant did cooperate with the respondent in the search for accommodation. Obviously, the conclusion was that it was the refusal to cooperate with the implementation of a reasonable accommodation that justified dismissing the complaint.

III. Standard of Review

[22] The parties agree, and the Court concurs, that the standard of review is that of reasonableness. There is considerable case law that unanimously has come to that conclusion (*Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, 2012 SCC 10, [2012] 1 SCR 364; *Canada (Human Rights Commission) v Saddle Lake Cree Nation*, 2018 FCA 228; *Mansley v Canada (Attorney General)*, 2016 FC 389; *Attaran v Canada (Attorney General)*, 2015 FCA 37; *Canada (Attorney General) v Emmett*, 2013 FC 610).

[23] That implies that the Court will show deference to the Commission's conclusions to the extent that the decision is justified, transparent and intelligible in the decision-making process and the outcome fits comfortably within acceptable possible outcomes in view of the facts and the law.

IV. Analysis

[24] The Commission's decision to dismiss the complaint is in my view eminently reasonable.

[25] All that was needed on the part of Mr. Kirkpatrick was for him to sign the plastic chair issue form which puts on notice the inmate that he must take his responsibility for the chair that will be left in his cell. The applicant claimed that the Protocol was redundant such that he should not sign the form. It is difficult to see how this does not constitute a refusal to participate in finding a reasonable accommodation. If it is true that the document is purely redundant, and is simply a way to make sure that an inmate is on notice that the chair is his responsibility, how can that not be reasonable in the circumstances of this case?

[26] Mr. Kirkpatrick is not entitled to the accommodation of his choice. But at the end of the day, he faults the respondent for refusing to accept his preferred accommodation to be allowed to have his meals in a common area where a chair is available. There is no requirement to accept the complainant's preferred accommodation as long as a reasonable one is offered. The Commission considered that the accommodation offered was reasonable and, accordingly, an inquiry into the complaint is not warranted.

[27] The Commission's role is well known. The Commission is acting as an administrative and screening body when deciding whether or not to refer a complaint to the tribunal for an inquiry. In *Cooper v Canada (Human Rights Commission)*, [1996] 3 SCR 85, La Forest J., for the majority, examined carefully the scheme of the CHRA (paras 48 to 58) and described the role

of the Commission "as an administrative and screening body, with no appreciable and adjudicative role …" (para 58). La Forest J. described that role as "(l)ooking at the Act as a whole it is evident that the role of the Commission is to deal with the intake of complaints and to screen them for proper disposition" (para 52). How is that screening to be performed? The majority finds support in the decision in *Syndicat des Employés de Production du Québec et de l'Acadie v Canada (Canadian Human Rights Commission),* [1989] 2 SCR 879 to draw an analogy between the screening function of the Commission and the role of a judge at a preliminary inquiry who must determine if there is sufficient evidence for the matter to go to trial. In the case of the Commission, it is not its job "to determine if the complaint is made out. Rather its duty is to decide if, under the provision 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" (para 53).

[28] That of course suggests that the Commission is not to weigh the evidence carefully as if it was to decide a complaint on its merits. As the Federal Court of Appeal put it in *Bell Canada v Communications, Energy and Paperworkers Union of Canada*, [1999] 1 FC 113 [*Bell Canada*] , at paragraph 35, in order to send the complaint to the tribunal "(i)t is sufficient for the Commission to be "satisfied that, having regard to all the circumstances of the complaint, an inquiry into the complaint is warranted" (subsections 44(3) and 49(1)). This is a low threshold and the circumstances of this case are such that the Commission could have validly formed an opinion, rightly or wrongly, that there was "a reasonable basis in the evidence for proceeding to the next stage" (*Syndicat des employés de production du Québec et de l'Acadie v. Canada*

(Human Rights Commission), *supra*, para 30 at 899, Sopinka J., approved by La Forest J. in *Cooper*, *supra*, at 891)".

[29] Nevertheless, whether it is to find that an inquiry into the complaint is warranted or not, the Court of Appeal in *Bell Canada* found that the commission has "a remarkable degree of latitude":

> [38] The Act grants the Commission a remarkable degree of latitude when it is performing it screening function on receipt of an investigation report. Subsections 40(2) and 40(4) and sections 41 and 44 are replete with expressions such as "is satisfied", "ought to", "reasonably available", "could more appropriately be dealt with", "all the circumstances", "considers appropriate in the circumstances" which leave no doubt as to the intent of Parliament. The grounds set out for referral to another authority (subsection 44(2)), for referral to the President of the Human Rights Tribunal Panel (paragraph 44(3)(a)) or for an outright dismissal (paragraph 44(3)(b)) involve in varying degrees questions of fact, law and opinion (see *Latif v. Canadian Human Rights Commission*, [1980] 1 F.C. 687 at 698 (F.C.A.), Le Dain J.), but it may safely be said as a general rule that Parliament did not want the courts at this stage to intervene lightly in the decisions of the Commission.

[30] In making that kind of decision, a measure of deference is owed to the administrative decision maker. The Supreme Court in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*] stated that "deference requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system" (para 49). The Court in *Halifax* did not depart from the earlier case law, including of course *Dunsmuir* (see *Halifax*, para 44).

[31] Nevertheless, the *Halifax* decision was concerned with a judicial review application about a Commission decision to request the Chairperson of the Tribunal to institute an inquiry because an inquiry into the complaint was deemed warranted. There would be a further possibility to explore the issue as the case would continue before the Tribunal. Here, we have the exact opposite as the complaint is dismissed because the inquiry is not warranted: there has been a final determination of sort. Our Court of Appeal saw the difference between the Commission requesting an inquiry, leading to a further exploration of issues, and dismissing a complaint, which is a final determination, because the inquiry is not warranted; a more probing examination for reasonableness than the other would be in order. The Court of Appeal did not see that there was a need to apply the exact same degree of reasonableness as reasonableness takes its color from the particular context. A more probing review should be carried out when the decision is based on section 44(3)(b)(i).

[32] In *Keith v Canada (Correctional Service)*, 2012 FCA 117, 431 NR, the Court of Appeal found as follows:

> [46] Cromwell J. was careful to point out that the conclusion reached in *Halifax* only extends to cases where the complaint is referred for further inquiry. In such cases, any interested party may raise any arguments and submit any appropriate evidence at the second stage of the process; consequently, no final determination of the complaint is reached by referring it to further inquiry. As noted at paragraph 15 of *Halifax*, "[a]ll the Commission had done was to refer the complaint to a board of inquiry; the Commission had not decided any issue on its merits" (see also paras. 23 and 50 of *Halifax*). In the case of a dismissal under paragraph 44(3)(b) of the Act, however, any further investigation or inquiry into the complaint by the Commission or the Tribunal is precluded
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> [47] The decision of the Commission to dismiss a complaint under paragraph 44(3)(*b*) of the Act is a final decision made at an early stage, but in such case – contrary to a decision refusing to deal with a complaint under section 41 – the decision is made with the

> benefit and in the light of an investigation pursuant to section 43. Such a decision should be reviewed on a reasonableness standard, but as was said in *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at paragraph 59, and recently reiterated in *Halifax* at paragraph 44, reasonableness is a single concept that "takes it colour" from the particular context. In this case, the nature of the Commission's role and the place of the paragraph 44(3)(*b*) decision in the process contemplated by the Act are important aspects of that context, and must be taken into account in applying the reasonableness standard.
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> [48] In my view, a reviewing court should defer to the Commission's findings of fact resulting from the section 43 investigation, and to its findings of law falling within its mandate. Should these findings be found to be reasonable, a reviewing court should then consider whether the dismissal of the complaint at an early stage pursuant to paragraph 44(3)(b) of the Act was a reasonable conclusion to draw having regard to these findings and taking into account that the decision to dismiss is a final decision precluding further investigation or inquiry under the Act.
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> [My emphasis.]

[33] Thus, although reasonableness is the standard of review, the more probing examination was carried out. Applying this standard of reasonableness to the facts of this case, the Court must conclude that the decision to dismiss the complaint because an inquiry was not warranted is eminently reasonable in spite of the fact that such decision constitutes a final determination. The respondent offered an accommodation that was reasonable. The main reason given to decline the accommodation offer was basically that the "Chair Protocol" was redundant, that the respondent could do what was required under the Protocol. The applicant chose to deny himself the benefit of having a chair in his cell for one year because the respondent could do what was provided for in the Chair Protocol without the existence of the Protocol. The other reason invoked in the applicant's response to the Investigation Report was his belief that accepting the Chair Protocol "negatively impacted his legal rights". There is no indication as to what those legal rights might

be and how they can be impacted by a Chair Protocol the applicant claimed four times was redundant. Instead, the applicant argued that he offered a different accommodation, his preferred accommodation, to take his meals in the common area. The corollary is that his preferred accommodation ought to have been accepted by the Institution.

[34] In *Central Okanagan School District No. 23 v Renaud*, [1992] 2 SCR 970 [*Renaud*], the Supreme Court provided guidance as to the nature and extent of the duty to accommodate: the duty requires that measures short of undue hardship be taken. The law does not impose undue hardship on those who have to accommodate. No one argues that the accommodation offer made by the Institution through its Chair Protocol constitutes undue hardship for the respondent; indeed, the Chair Protocol is its doing.

[35] *Renaud* discusses at some length what constitutes undue hardship, rejecting the "*de minimis*" standard established at the time in American jurisprudence (*Trans World Airlines, Inc. v Hardison*, 432 U.S. 63 (1977)). Here, we know that the accommodation offered will not constitute undue hardship on the Institution. The discussion around the parties' obligations is more apposite. The only issue is rather whether the proposed accommodation is reasonable. If it is, the duty to accommodate has been meet.

[36] Thus, the complainant must do his part in the search for an accommodation, reaching the point that "in determining whether the duty of accommodation has been fulfilled the conduct of the complainant must be considered" (*Renaud*, p. 994). The initial obligation was on the Institution to offer an accommodation that is reasonable. The complainant must there try to

facilitate the proposed accommodation. That does not rise to the level of originating a solution, although suggestions by a complainant may be made. But the suggestions, such as having the meals in a common area as in the case at hand, are only that, suggestions, because the party accommodating is best situated to make a final determination in view of its own operational constraints. What counts at the end of the day is that the accommodation be reasonable. The following passage is taken from pages 994 and 995 of *Renaud*:

> 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.
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> [My emphasis.]

[37] The evidence in this case is that the applicant refused to accept the accommodation proposal made by the respondent because it was redundant. Had the applicant signed the form which he claims was redundant of the power the respondent has, he would have benefited from a chair being made available to him. The other reason given, that he believed his legal rights would be negatively impacted, is too shallow to be seriously considered by the Commission, especially after the applicant indicated repeatedly that the Chair Protocol was redundant. There was not any articulation of the legal rights that were jeopardized.

[38] There is no evidence on this record that the applicant, or his counsel, raised any other objection before the Commission either during the investigation or in responses to the invitation to comment on the draft Investigation Report. The matter of what was actually presented to the Commission was explored at the hearing before the Court and nothing more emerged. Accordingly, there is no basis to conclude that the decision to dismiss the complaint as not warranting an inquiry was not reasonable. The Chair Protocol constitutes on the part of an inmate an acknowledgement that he takes responsibility for the chair that will be located in his cell for his use. That is all that is requested of him. It was not unreasonable to conclude, as did the Commission by accepting the Investigation Report, that the applicant did not cooperate in the search for accommodation. In the words of the Supreme Court in *Renaud*, "(i)f failure to take reasonable steps on the part of the complainant causes the proposal to founder, the complaint will be dismissed" (p. 995). In my view, the screening mechanism of the CHRA exists for the purpose of vetting these kinds of complaints. There was nothing to inquire about after an opportunity was given to the applicant to comment on the events as reported by the Commission's investigation.

[39] The preferred solution, from the standpoint of the applicant, does not constitute participation in the accommodation process. It is rather what he would consider to be his perfect solution. However, as pointed out in *Renaud*, a complainant is not entitled, and he cannot expect, a perfect solution. Mr. Kirkpatrick argues before this Court that the respondent never provided him with an explanation for the refusal to allow him access to the common area to eat. No authority is offered to support the contention that an explanation was owed, in the face of the passage of *Renaud* as quoted in paragraph 36. If a reasonable accommodation is offered, the

complainant must facilitate the implementation of the proposal. Hence, if there are particular issues with the Protocol, they must be raised so that they may be addressed if appropriate. That was not done.

Arguments made after the Commission's decision was made

[40] At the hearing of the judicial review application, the applicant sought to make an argument around the wording of the Chair Protocol. It became clear that the argument was not raised by the applicant with the Commission at the time it was investigating the complaint; indeed, it is not found in the applicant's response to the Investigation Report. I fail to see how an issue not raised in the accommodation process or during the investigation can become *ex post facto* a reasonableness issue since the decision maker could not have considered the issue. Not only the applicant did not participate in the accommodation process, considering rather that the Chair Protocol was redundant, but the issue was never raised. The Commission's decision can hardly be faulted for not agreeing with arguments that were not raised.

[41] Be that as it may, as I understand the new argument, the applicant claims to be prejudiced by the Protocol. The Investigation Report states that the applicant complained that the Protocol's wording "removed the Institution of any blame" and requires that the applicant sign away "his rights to any further complaint/grievance on this issue". That, the new argument goes, is problematic.

[42] In the judicial review, that becomes that the applicant, even if not blameworthy, is responsible because the blame is put solely on him. The signing away of his rights to further

complaints or grievances on the issue morphs into other alleged rights such as the right not to be charged if he is not blameworthy or the "charge is otherwise not appropriate in the circumstances" (Memorandum of fact and law, para 32). The applicant expands by claiming that being charged is inherently prejudicial. The simple "wear and tear" could open him to a charge and restitution.

[43] The text of the Chair Protocol is not a model that would not have benefited from some editing. But regardless of possible improvements to the text which could have been offered before as part of the participation in the accommodation process, a fair reading of it confirms that the concerns expressed by the applicant *ex post facto* are not well placed.

[44] The form that was to be signed, which would have made the chair available, is an acknowledgement that the chair is the responsibility of the inmate: "Safekeeping of the Plastic Chair is the responsibility of the inmate". These are the first words appearing on the form. Furthermore, it is not the "wear and tear" that is covered by the acknowledgement. It is only the damage or alterations that "have been made" to the chair, a clear signal in my view that the damage must be the result of a conscious action. As the Canadian Oxford Dictionary (2nd Edition) states, the verb "make" means, among other things, "cause to exist, create, bring about". As for the charge that may be laid according to the form, it must be one of the disciplinary offences found in section 40 of the *Corrections and Conditional Release Act* (S.C. 1992, c. 20) [CCRA]. It would appear that the most relevant offence is found at section 40(c) and it reads:

40 An inmate commits a disciplinary offence who	**40** Est coupable d'une infraction disciplinaire le détenu qui :
…	[…]

(c) wilfully or recklessly damages or destroys property that is not the inmate's; …	**c)** détruit ou endommage de manière délibérée ou irresponsable le bien d'autrui; […]

[45] Obviously, the offence provides for a *mens rea*; the damage caused by the inmate must be willful or reckless. Blameworthiness is an essential element of the charge that must be proven beyond a reasonable doubt (section 44(3) of CCRA). Neither the form nor the CCRA support the applicant's contention that the acknowledgement of responsibility includes anything other than damages caused by him in a blameworthy way. "Wear and tear" is out of bounds.

[46] Finally, the applicant argues that the Commission's decision that the inquiry into the complaint is not warranted constitutes an adjudication. The Court fails to see how there was adjudication. The decision is couched in terms of the evidence showing a failure to cooperate in the accommodation process and an offer of reasonable accommodation. Refusing the accommodation because it is not the preferred option does not constitute cooperation. It is in my view the very screening function that the Commission must perform pursuant to section 44(3) of CHRA to vet this kind of complaint (*Cooper, supra*). It has to be satisfied that there was insufficient evidence to warrant an inquiry. There was no weighing of the evidence that was conducted by the Commission: it was plainly insufficient. The accommodation that was offered was reasonable; acknowledging responsibility for the chair brings home the significance of the undertaking; it might be redundant, but if it is, why not sign the form? For reasons that remain unknown, the applicant refused to participate. As stated in *Renaud*, the complainant must take steps to assist in the implementation of the accommodation; if the failure to do so makes the proposal to founder, "the complaint will be dismissed" (p. 995).

[47] Here there is no evidence that the applicant took reasonable steps in spite of a proposal that was reasonable. He chose to refuse to accept any accommodation other than his preferred accommodation. The Commission's decision is not an adjudication following a careful weighing of the evidence, but rather it is the reasonable performance of its screening duty. Its decision falls very comfortably within the range of possible acceptable outcomes (*Dunsmuir*, para 47). In the words of Binnie J. in *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339, "as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome" (para 59).

[48] The Investigation Report, which became the Commission's decision, amply justifies the decision taken. Contrary to the suggestion made by the applicant that the decision lacked in that the reviewing court could not "understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes" (Memorandum of fact and law, para 25), we are far from a case where it is entirely unclear why the decision was reached. There is no reason to claim that the reviewing court has to speculate as to what the tribunal was thinking or guess as to what the decision is.

[49] The adequacy of the tribunal's reason is not a stand-alone basis for quashing a decision. The Court readily agrees that an absence of reasons might make a decision unreasonable (although, depending on the case, that may not be automatic, *Bonnybrook Industrial Park Development Co. Ltd. v Canada (National Revenue)*, 2018 FCA 136). The Supreme Court gave the direction in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador*

(Treasury Board), 2011 SCC 62, [2011] 3 SCR 708 [*Newfoundland and Labrador Nurses' Union*] :

> [15] In assessing whether the decision is reasonable in light of the outcome and the reasons, courts must show "respect for the decision-making process of adjudicative bodies with regard to both the facts and the law" (*Dunsmuir*, at para. 48). This means that courts should not substitute their own reasons, but they may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome.

[50] In the case at bar, there is no need to delve into the record. The Commission looked at the evidence and concluded that the proposal made by the respondent in order to accommodate the applicant's need to be seated on a chair to eat his meals in his cell was reasonable: he would have to acknowledge responsibility for his chair. The applicant refused to do so, arguing in response to the Investigation Report that the measure was redundant. The conclusion that the applicant did not participate, as he had to, in the accommodation process followed logically. In view of the thin evidence offered by the applicant, it was reasonable to be satisfied that an inquiry into the complaint is not warranted. What is required is that "the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes " (*Newfoundland and Labrador Nurses' Union*, para 16). Such is the case.

V. Conclusion

[51] Accordingly, the judicial review application is dismissed.

[52] Costs are granted to the respondent. At the hearing, the Court inquired as to an amount that would be reasonable. Respondent's counsel indicated that approximately $1,500 on account of counsel fees might be expected, to which disbursements would be added. The applicant's counsel spoke in terms of a lump sum of $1,000, irrespective of who would be the successful party. Given the limited ability to earn income for an inmate, the Court orders that a lump sum of $1,000, all inclusive, be granted as costs to the respondent.

JUDGMENT in T-955-18

THIS COURT'S JUDGMENT is:

1. The judicial review application is dismissed.

2. Costs in the amount of $1,000, inclusive of taxes and disbursements, are ordered in favour of the respondent.

"Yvan Roy"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-955-18
STYLE OF CAUSE:	ERIC ALLEN KIRKPATRICK v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	JANUARY 21, 2019
JUDGMENT AND REASONS:	ROY J.
DATED:	FEBRUARY 15, 2019

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