Federal Court  Cour fédérale

Date: 20190311

Docket: T-393-18

Citation: 2019 FC 294

Ottawa, Ontario, March 11, 2019

PRESENT: The Honourable Madam Justice Walker

BETWEEN:

JAMES SABOURIN

Applicant

and

CANADA (ATTORNEY GENERAL)

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Mr. James Sabourin, seeks judicial review of a decision (Decision) of the Canadian Human Rights Commission dismissing his complaint against his employer, the Canadian Armed Forces (CAF). The Applicant alleged in his complaint that the CAF discriminated against him and failed to provide reasonable workplace accommodation for his medical disability prior to his release from service in 2015. The application for judicial review is brought pursuant to section 18.1 of the *Federal Courts Act*, RSC 1983, c F-7.

[2] The Applicant argues that the Commission breached his right to procedural fairness by relying solely on the investigation report prepared by one of its investigators when making the Decision and by failing to provide reasons for the Decision. The Applicant also argues that the Decision was unreasonable because the Commission did not properly assess the CAF's duty to accommodate his medical disability.

[3] While I have carefully considered his submissions, the Applicant has not persuaded me that there is a basis for this Court to intervene in the Decision. Consequently, the application for judicial review will be dismissed.

I. Background

[4] The Applicant joined the CAF on March 8, 2006 as an infantryman. While deployed in Afghanistan in 2007, he was seriously injured by an improvised explosive device and developed service-related mental health injuries.

[5] In September 2009, the Applicant was assigned a temporary medical category and medical employment limitations (MELs) as a result of the injuries he suffered in Afghanistan. The MELs were removed in January 2010. The Applicant suffered a recurrence of his previous medical issues in 2013 and was assigned new MELs.

[6] In March 2014, the Applicant was assigned the following permanent MELs:

- Requires regular specialist follow-up more frequently than every six months;
- Medically unfit to work in a military operational environment;

- Unable to safely handle and effectively operate a personal weapon;
- Medically unfit driving military vehicles;
- Requires specialized hearing and protection.

[7] The Applicant's chain of command then requested that the Applicant be posted to the Joint Personnel Support Unit (JPSU) as a workplace accommodation. The JPSU is a non-operational unit which provides support to injured CAF members and assists a return to duty where possible. On May 27, 2014, the Applicant's requested transfer to JPSU was denied by his Career Manager because the Applicant was able to perform general duties as a cook within a military unit. The Applicant was transferred to the 3rd Canadian Division Support Base (3CDSB), Edmonton, to work as a cook as this unit does not deploy and was accommodating other CAF members with similar MELs.

[8] I note that becoming a fully-trained cook in the CAF requires the completion of three qualification levels: (1) QL3 training course; (2) QL4 on-the-job training; and (3) QL5 leadership training. The leadership training course requires the member to meet a minimum standard of fitness. Due to his permanent MELs, the Applicant was unable to attend and complete this course.

[9] In August 2014, the CAF reviewed the Applicant's permanent MELs to determine whether he was in breach of its principle of Universality of Service. The Applicant was found to be in breach of the principle and the Director of Military Careers – Administration (DMCA) recommended that he be released from the CAF for medical reasons. The Applicant's medical release date was set for August 2015.

[10] The role of the principle of Universality of Service in the Applicant's release from the CAF is central to this application and I will address its content and effect in my analysis of the Applicant's argument that the Decision was unreasonable. Briefly, the principle or requirement mandates that all members of the CAF be at all times able to perform the operational duties required of them.

[11] The Applicant requested that he be retained temporarily until March 2016 so that he could access pension benefits based on ten years of service. His request was denied because he could not obtain the QL5 cook qualification. On November 27, 2014, the Applicant notified his chain of command that he no longer wished to be retained past his medical release date.

[12] In December 2014, the Applicant was temporarily posted to the JPSU so that he could attend university and transition to civilian life.

[13] In August 2015, the Applicant requested a reassessment of his permanent MELs. An independent review by two doctors determined that there was no new medical information that would justify a delay of the Applicant's medical release.

[14] On August 25, 2015, the Applicant was released from the CAF for medical reasons.

II. The Applicant's Complaint to the Commission

[15] On February 1, 2016, the Applicant filed a complaint (Complaint) with the Commission, alleging that the alternate workplace accommodation (as a cook posted to 3CDSB) proposed by

the CAF was unreasonable and that his release due to medical disability was discriminatory. The Applicant argued that the JPSU posting should have been approved as it was recommended by the Deputy Base Surgeon. The Applicant also alleged that the CAF had misled him with respect to the retention process and denied him access to certain services. These latter allegations are not in issue in this application.

[16] The Commission accepted the Complaint and, on May 19, 2016, appointed an investigator. The investigator interviewed twelve witnesses, including the Applicant, and reviewed the parties' submissions and the documentary evidence. The investigator completed an investigation report (Investigation Report) which recommended that the Commission dismiss the Complaint.

[17] In October 2017, the Commission forwarded the Investigation Report to the parties and invited them to make submissions. The Applicant and the CAF both did so. The Applicant submitted that the Investigator had failed to understand the duty to accommodate and the principle of undue hardship. He argued that the principle of Universality of Service is not a *bona fide* occupational requirement that exempts the CAF from the obligation to accommodate its personnel to the point of undue hardship in accordance with established jurisprudence.

III. Decision under review

[18] The Decision is dated February 9, 2018. Following its review of the Investigation Report and the submissions filed in response to the report, the Commission concluded that the Applicant's complaint should be dismissed pursuant to subparagraph 44(3)(b)(i) of the Canadian

Human Rights Act (Act) on the basis that further inquiry was not warranted. The Commission provided very brief reasons for its decision and I will treat the Investigation Report as constituting the Commission's reasoning (*Sketchley v Canada (Attorney General)*, 2005 FCA 404 at para 37 (*Sketchley*); *Majidigoruh v Jazz Aviation LP*, 2017 FC 295 at para 14 (*Majidigoruh*)).

[19] The Investigator summarized the Complaint as follows:

> At issue in this complaint is whether the respondent treated the complainant in an adverse differential manner, failed to provide accommodation measures he required due to his medical employment limitations and ultimately terminated his employment due to his disability, Post-traumatic stress disorder (PTSD).

[20] The Investigation Report addressed the CAF's alleged failure to accommodate the Applicant by denying his requested posting to JPSU; the CAF's alleged treatment of the Applicant in an adverse differential manner in failing to extend his retention period; and, the termination of the Applicant's employment by the CAF due to his medical disability in August 2015.

[21] In assessing the CAF's refusal of the Applicant's request for a posting to JPSU, the Investigation Report noted that both parties accepted that the Applicant had a medical disability and required accommodation. The Applicant contended that his posting as a cook to 3CDSB meant that he was being employed outside of his MELs as he was in a military operational environment. The CAF disagreed, stating that 3CDSB was a support unit that did not deploy and was not considered an operational unit. The investigator concluded that the Applicant was accommodated as a cook at 3CDSB within his MELs and that a JPSU posting was not the only

appropriate workplace accommodation available to the CAF. The investigator referred to the fact that the CAF had accommodated other members by posting them to work in the 3CDSB base kitchen instead of JPSU. The investigator also noted that the Applicant had not raised with his medical officer or chain of command that he was being employed outside of his MELs at 3CDSB. The investigator concluded that the Applicant was not denied a medically-required accommodation by the CAF, nor was he employed outside of his MELs.

[22] With respect to the denial of the Applicant's requested period of retention until March 2016, the Investigation Report noted that the parties accepted that the Applicant was not a fully qualified military cook as he could not complete the QL5 leadership training due to his MELs. The investigator stated that "since [the Applicant] was not military qualified in his occupation, he was not eligible for retention in accordance with the respondent's policy DAOD 5023-1 *Minimum Operational Standards related to Universality of service*". The Investigation Report concluded that the CAF had provided a reasonable explanation for its denial of the Applicant's extended retention request and that its decision was not a pretext for discrimination.

[23] Finally, the Investigation Report addressed the Applicant's termination of employment due to his medical disability. The critical element of the analysis was whether the CAF's principle of Universality of Service set forth in its policy, DAOD 5023-1, *Minimum Operational Standards Related to Universality of service* (DAOD 5023-1), was a *bona fide* operational requirement within the meaning of the Act. The investigator relied on subsection 15(9) of the Act which provides that Universality of Service is a *bona fide* operational requirement and an exception to the requirement to accommodate affected individuals to the point of undue hardship

pursuant to subsection 15(2). The investigator concluded that the Universality of Service principle had been adopted by the CAF in good faith for a purpose rationally connected to the performance of jobs within the CAF. As the Applicant could not be deployed and was in breach of the principle with no prognosis for improvement, the investigator stated:

> 134. The respondent has established that it is a *Bona Fide* Occupational Requirement for it to require its members to be fit and deployable at all times and that it is impossible for it to accommodate individual employees sharing the characteristics of the complainant without imposing undue hardship upon itself. For these reasons further inquiry is not warranted.

[24] The investigator concluded the Investigation Report by recommending that the Commission dismiss the Complaint as no further inquiry was warranted in the circumstances.

IV. Issues

[25] The Applicant raises two issues in this application:

1. Whether the Commission arrived at the Decision in a procedurally fair manner?
2. Whether the Decision, based on the findings of the Investigation Report, was reasonable?

V. Standard of review

[26] The parties agree that the issue of whether the Commission's process was fair must be reviewed for correctness and that the Commission's findings of fact and decision to dismiss the Complaint are reviewable against the standard of reasonableness. The parties cite the decision of my colleague, Justice Elliott, in *Blackbird v Maskwacis Health Services*, 2018 FC 239 at paragraphs 31-32 (*Blackbird*) (see also *Ritchie v Canada (Attorney General)*, 2017 FCA 114 at

para 16 (*Ritchie*)). A review for reasonableness requires the Court to assess whether the Decision is justified, transparent and intelligible and whether the Commission's decision to dismiss the Complaint falls within the range of possible, acceptable outcomes which are defensible on the particular facts of the Applicant's case and in law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

VI. Analysis

1. *Whether the Commission arrived at the Decision in a procedurally fair manner?*

[27] The Applicant raises two issues regarding the fairness of the Commission's process. First, he submits that the materials before the Commission were grossly deficient. The Certified Tribunal Record shows that the reference materials upon which the Investigation Report was based - the relevant laws, regulations and policies - were not provided to the Commission. Further, the Commission did not request copies of the materials prior to issuing the Decision. Rather, it relied solely on the Investigation Report, thereby depriving the Applicant of his right to be heard by an independent tribunal. He argues that his objections and representations were not adequately considered by the Commission itself. Second, the Applicant submits that his right to procedural fairness was breached as the Decision was merely two sentences long and, therefore, the Commission failed to provide reasons for its decision.

A. The Commission's reliance on the Investigation Report

[28] The Applicant submits that the Commission had a duty to independently consider the laws, statutes and policies which formed the legal framework for the Complaint and the

Investigation Report. His submission requires consideration of the relationship between the Commission and its investigators. In *Sketchley*, the Federal Court of Appeal described the relationship as follows (at para 37):

> [37] … While it is true that the investigator and Commission do have "mostly separate identities"(*Canada (Human Rights Commission) v. Pathak* (1995), 180 N.R. 152, [1995] 2 F.C. 455 at para. 21, *per* MacGuigan J.A., (Décary J.A. concurring)), it is also well-established that, for the purpose of a screening decision by the Commission pursuant to section 44(3) of the *Act*, the investigator cannot be regarded as a mere independent witness before the Commission (*Syndicat des employés de production du Québec et de l'Acadie v. Canada (Human Rights Commission)*, [1989] 2 S.C.R. 879 at para. 25 [*SEPQA*]). The investigator's Report is prepared *for* the Commission, and hence for the purposes of the investigation, the investigator is considered to be an extension of the Commission (*SEPQA, supra* at para. 25). When the Commission adopts an investigator's recommendations and provides no reasons or only brief reasons, the Courts have rightly treated the investigator's Report as constituting the Commission's reasoning for the purpose of the screening decision under section 44(3) of the *Act* (*SEPQA, supra* at para. 35; *Bell Canada v. Communications, Energy and Paperworkers Union of Canada* (1999) 167 D.L.R. (4th) 432, [1999] 1 F.C. 113 at para. 30 (C.A.) [*Bell Canada*]; *Canadian Broadcasting Corp. v. Paul* (2001), 274 N.R. 47, 2001 FCA 93 at para. 43 (C.A.)).

[29] The Applicant has raised no issue regarding the thoroughness or adequacy of the investigation or the Investigation Report. He does not argue that the investigator failed to review and consider the relevant laws, regulations and policies. His fairness argument centres on the fact that the Commission did not itself review those materials and make an independent decision.

[30] With respect, I do not agree with the Applicant. As Justice Linden stated in *Sketchley*, the investigator is viewed as an extension of the Commission in undertaking the investigation of a complaint and preparing a report. It is expected that the Commission will rely on the

investigator's report in discharging its obligations pursuant to the Act. In the present case, the Investigation Report was detailed and correctly referenced the laws and policies that governed the Applicant's employment with and eventual release from the CAF. The investigator set forth the Applicant's history with the CAF and relevant excerpts from the interviews conducted with witnesses. The investigator's analysis of each of the factual and legal issues raised in the Complaint is documented in the report. In the absence of alleged or apparent errors or omissions in the report, I find that the Commission's reliance on the Investigation Report in arriving at its Decision was procedurally fair. The Complaint was considered in accordance with the Act and the jurisprudence. In addition, the Commission stated in its brief reasons that it had considered the Applicant's submissions filed in response to the Investigation Report. Therefore, the Applicant's argument that his representations had not been adequately considered by the Commission itself is contradicted in the Decision.

B. The Commission's duty to provide reasons for the Decision

[31] The Applicant's argument that the Commission failed to provide reasons is not supported in the jurisprudence. Where the Commission provides only brief reasons for a decision, it is well-established that the investigation report constitutes the Commission's reasoning (*Sketchley* at para 37; *Majidigoruh* at para 14; *Blackbird* at para 35). In other words, the reasons for the Decision are set out in the Investigation Report, which forms part of the record before the Commission (*Stukanov v Canada (Attorney General)*, 2019 FCA 38 at para 8, citing *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 2 SCR 708).

2. *Whether the Decision, based on the findings of the Investigation Report, was reasonable?*

[32] Before I address the issues raised by the Applicant regarding the reasonableness of the Decision, it is first helpful to review the role of the Commission in the investigation of a human rights complaint. The obligations of the Commission upon receipt of a report from one of its investigators are set out in section 44 of the Act, the full text of which is set out in Annex A to this judgment. The provision requires the Commission to assess whether the complaint in question should be: (1) referred for further action through another available process (subsection 44(2)); (2) referred to the Canadian Human Rights Tribunal (Tribunal) for an inquiry (paragraph 44(3)(a)); or (3) dismissed without further inquiry (paragraph 44(3)(b)).

[33] The nature and extent of the Commission's role has been described in the jurisprudence many times. The Supreme Court of Canada (SCC) considered the Commission's role in *Cooper v Canada (Human Rights Commission)*, [1996] 3 SCR 854 (*Cooper*). The SCC described the Commission as a screening and administrative body that has no appreciable adjudicative role. The Commission does not determine whether discrimination has occurred but whether further inquiry by the Tribunal into a complaint is warranted. The central component of the Commission's role is to assess the sufficiency of the evidence before it (*Cooper* at para 53; *Ritchie* at para 38; *Majidigoruh* at para 23).

[34] In determining whether further inquiry into a complaint is warranted, the Commission has broad discretion. In *Bell Canada v Communications, Energy and Paperworkers Union of Canada* (1998), [1999] 1 FC 113, [1998] FCJ 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). It follows that the review of a decision of the Commission in the exercise of its discretion under the Act is owed deference (*Ritchie* at para 39).

A. Parties' submissions

[35] Turning to the case before me, the Applicant submits that the findings set forth in the Investigation Report concerning workplace accommodation were not reasonable and that the Commission did not properly consider the CAF's duty to accommodate. In his written submissions to the Court, he states that all employees in Canada, including those in the CAF, must be accommodated to the point of undue hardship, a significant threshold established by the Supreme Court of Canada in *Hydro-Québec v Syndicat des employés de techniques professionnelles et al*, [2008] 2 SCR 561 at paragraphs 18-19. In oral argument, the Applicant conceded that the principle of Universality of Service is recognized as a *bona fide* occupational requirement for purposes of the Act but argued that the principle was applied by the CAF in a prejudicial and discriminatory manner.

[36] The Applicant argues that it was unreasonable for the CAF to deny him an extended retention period prior to his release, as contemplated by DAOD 5023-1. He submits that neither the investigator nor the CAF turned their minds to the possibility that he could continue to work as a QL3 cook, with the result that the Decision was critically flawed. The Applicant states that, by posting him to 3CDSB, a unit in which he was required to complete the QL5 leadership training, the CAF set him up to fail. His superiors knew he would be unable to achieve the QL5 qualification and he was prematurely released. In the Applicant's view, the 3CDSB posting was

not appropriate accommodation, the CAF's application of Universality of Service was discriminatory and the investigator's conclusion in the Investigation Report to the contrary was unreasonable.

[37] The Respondent submits that the Commission's conclusion that the Complaint did not warrant further inquiry by the Tribunal was supported by the record and was reasonable. The Investigation Report reflects a careful analysis of the evidence and legal tests relevant to the CAF's duty to accommodate and demonstrates that the investigation into the Applicant's Complaint was thorough. The Respondent also submits that Universality of Service is a *bona fide* occupational requirement and that, once a CAF member no longer meets the requirements of the principle, any further accommodation to facilitate the member's ongoing service without undue hardship is impossible. The Respondent relies on subsection 15(9) of the Act and jurisprudence of this Court that recognizes the principle of Universality of Service as a *bona fide* occupational requirement and an exception to the duty of an employer to accommodate (*Best v Canada (Attorney General)*, 2011 FC 71 at para 26 (*Best*)).

[38] The Respondent argues that, in any event, the investigator addressed the issue of undue hardship and accommodation prior to the Applicant's medical release and concluded that his posting as a cook at 3CDSB was a reasonable accommodation. There was no evidence to suggest that the Commission was unaware of or failed to apply these principles as the Applicant suggests.

B. Overview – Universality of Service

[39] The Universality of Service principle, as set forth in DAOD 5023-1, forms the foundation of the investigator's analysis of the CAF's treatment of both the Applicant's request for an extended retention period and his release from service. The principle requires that all CAF members must, at all times, be physically fit and ready for operational duty, including deployment.

[40] Subsection 15(9) of the Act recognizes the fundamental importance of the principle of Universality of Service to the ability of the CAF to fulfil its military role in the service of Canada. The subsection must be read in conjunction with paragraph 15(1)(a) and subsection 15(2) of the Act. The full text of these provisions is set out in Annex A to this judgment but, briefly, paragraph 15(1)(a) provides that any exclusion, limitation or requirement imposed by an employer is not a discriminatory practice if it is a *bona fide* occupational requirement. Pursuant to subsection 15(2), in order for such a practice to be a *bona fide* occupational requirement, the employer must establish that accommodation of the individual, or class of individuals, affected would impose undue hardship. Subsection 15(9) is an exception to subsection 15(2). For ease of reference, subsection 15(9) of the Act reads as follows:

Universality of service for Canadian Forces	**Universalité du service au sein des Forces canadiennes**
(9) Subsection (2) is subject to the principle of universality of service under which members of the Canadian Forces must at all times and under any circumstances perform any functions that they may be required to perform.	(9) Le paragraphe (2) s'applique sous réserve de l'obligation de service imposée aux membres des Forces canadiennes, c'est-à-dire celle d'accomplir en permanence et en toutes circonstances les fonctions auxquelles ils

peuvent être tenus.

[41] In *Best*, Justice Martineau of this Court acknowledged that Universality of Service is a *bona fide* occupational requirement and an exception to the requirement in subsection 15(2) of the Act that requires employers to establish that accommodation would impose undue hardship. He then stated (*Best* at para 27):

> [27] [Subsection 15(9)] means that the [Universality of Service] policy itself cannot be challenged as discriminatory. However, the application of the policy can be. To this end, the investigator confirmed that the policy was adopted for a purpose rationally connected to the performance of the job, that the policy is based on an honest and good faith belief that is necessary for fulfillment of that legitimate work-related purpose, and that the policy is necessary to achieve the legitimate work-related purpose.

C. Analysis

[42] The issue before me is whether the Commission's decision to dismiss the Complaint without further inquiry was reasonable. My analysis has two related parts. I will first address whether the Commission reasonably assessed the Applicant's claim that the CAF discriminated against him in denying his request for an extended retention period. Second, I will address the Applicant's arguments concerning his eventual release from the CAF.

I. The Applicant's request for an extended retention period

[43] By way of summary, in August 2014, the DCMA recommended that the Applicant be released from the CAF as he was in breach of the Universality of Service principle due to his permanent MELs. At that time, the Applicant was posted to 3CDSB and working as a cook. The

date of release was set for August 2015. The Applicant requested that he be retained until March 2016 in order to access certain pension benefits. His request was denied because he was not a fully-trained cook and could not obtain the QL5 qualification.

[44] In the Investigation Report, the investigator considered the Applicant's request for a period of retention until March 2016 against the evidence provided by certain witnesses during the course of the investigation and the requirements of DAOD 5023-1. The CAF's denial of the Applicant's request was based on his inability to obtain the QL5 qualification which prevented him from becoming a fully-trained cook. The CAF explained that, in order for an extended retention request to be approved, there must be a critical shortage within the particular military occupation and the member in question must be military-qualified for the occupation. These requirements are set forth in sections 4.1 and 4.2 of DAOD 5023-1:

> **4. Applicability of Minimum Operational Standards to Individuals**
>
> **Retention Subject to Employment Limitations**
>
> **4.1** If the recommendation of an AR is the release of a CAF member because the CAF member is in breach of the minimum operational standards, the CAF member may be retained subject to employment limitations only on a temporary, transitional basis if there is:
>
> a. a critical shortage in the CAF member's military occupation; or
>
> b. a requirement for a specific skill set.
>
> **4.2** A CAF member who is not military-occupation qualified and is in breach of the minimum operational standards is not to be retained.

[45] The CAF acknowledged that it had a critical shortage of cooks at the relevant time but stated that the Applicant was not fully trained as a military cook. At paragraph 87 of the Investigation Report, the investigator wrote:

> On the evidence, the complainant was unable to complete his QL5 qualification due to his medical employment limitations; therefore he was not considered as a fully trained cook and since he was not military qualified in his occupation, he was not eligible for retention in accordance with the respondent's policy DAOD 5023-1 *Minimum Operational Standards related to Universality of service*.

[46] The investigator concluded that the Applicant was ineligible for retention in accordance with CAF policy and that the CAF's denial of his request was not a pretext for discrimination.

[47] The Applicant's argument that he should have been retained as a QL3 cook ignores the Universality of Service principle. The CAF was not obligated to accommodate the Applicant as a QL3 cook. Put simply, he was unable to satisfy the requirements of Universality of Service due to his permanent MELs and was subject to release by the CAF. Within its policy establishing Universality of Service, DAOD 5023-1, the CAF made provision for the temporary but extended retention in certain circumstances of members who cannot meet the requirements of the policy. The circumstances in which a member may qualify for extended retention are set out in sections 4.1 and 4.2 of DAOD 5023-1. The fact that the CAF may extend a limited form of accommodation to members in specific circumstances does not mean that the CAF is required to extend further accommodation in derogation of the Universality of Service principle.

[48] The Applicant could not fulfil the requirement set forth in section 4.2 of DAOD 5023-1. There is no dispute in this regard. In the course of the investigation, the investigator questioned

witnesses regarding the denial of the Applicant's request for an extended retention period and the CAF's application of the requirements of sections 4.1 and 4.2, including the CAF's treatment of another member within the cook occupation. The investigator concluded that the denial of the Applicant's request was not a pretext for discrimination. The denial was consistent with the CAF's policy requirements and practice.

[49] Having reviewed the Investigation Report and the underlying CAF policy, I find that the investigator's analysis of this issue was consistent with the Act, DAOD 5023-1, and the evidence in the record. It was reasonable for the investigator to conclude that the CAF did not discriminate against the Applicant in applying the principle of Universality of Service. The Commission's reliance on the investigator's conclusion in support of its decision to dismiss the Complaint was similarly reasonable.

[50] The Applicant also argues that, in posting him to 3CDSB as a QL3 cook in May 2014, the CAF did not provide him reasonable accommodation and applied the principle of Universality of Service in a discriminatory manner. He states that the CAF knew he was destined to fail because he could not obtain the QL5 qualification.

[51] I note that this argument was not raised in the Complaint and that the timeline of events does not support the Applicant's submission. The Applicant was posted to 3CDSB in May 2014, prior to a determination that he was unable to comply with the requirements of Universality of Service. He had been assigned permanent MELs in March of 2014. The CAF was required to respect the MELs and to accommodate the Applicant. It did so by posting him in an occupation

that accommodated his MELs and to a unit that did not deploy. The only question raised in the Complaint regarding the duty to accommodate the Applicant at this stage was whether the CAF was required to post him to JPSU. This question was fully considered in the Investigation Report. The investigator noted that the CAF had posted other members with similar MELs to work in the kitchen in the same unit. The investigator concluded that a posting to JPSU was not the only way in which the CAF could accommodate the Applicant and that the 3CDSB posting respected his MELs. By virtue of its reliance on the report, the Commission was clearly aware of the nature of the CAF's accommodation during this period.

[52] Subsequently, in August 2014, the Applicant was found by the DCMA to be in breach of the principle of Universality of Service. The CAF's application of the principle to the Applicant must be assessed as of this date. Once the DCMA made its determination, the Applicant was subject to release. The question was whether an extended retention period would be approved pursuant to DAOD 5023-1. This question too was addressed in the Investigation Report.

II. The Applicant's release from service

[53] The second issue raised by the Applicant regarding the reasonableness of the Decision centres on his release from the CAF due to his medical disability. The analysis in this section of the Investigation Report relies on subsection 15(9) of the Act. As was the case before Justice Martineau in *Best*, the investigator in the present case acknowledged that DAOD 5023-1 and the principle of Universality of Service were adopted by the CAF in good faith for a purpose rationally connected to the performance of the military's duties and responsibilities in the service of Canada. As a result, the investigator accepted the principle as a *bona fide* occupational

requirement. Based on the medical evidence before the investigator, which is unquestioned, the Applicant was in breach of the Universality of Service requirements of DAOD 5023-1 with no prognosis for improvement. He could no longer be employed by the CAF. On this basis, the investigator concluded that no further inquiry was warranted.

[54] In my opinion, the investigator's conclusion was well within the range of possible outcomes for this issue and the analysis of the issue in the Investigation Report was adequately justified and intelligible. The conclusion is consistent with the provisions of the Act and DAOD 5023-1, the evidence regarding the CAF's application of the policy generally and to the Applicant, and the jurisprudence regarding Universality of Service. I find no reviewable error in the Decision in this regard.

D. Summary

[55] My role in this application is to assess whether the Commission reasonably discharged its obligations under the Act and I am mindful that the Commission's exercise of its screening function is to be accorded significant latitude. In my view, the Investigation Report addressed each of the issues raised by the Applicant in the Complaint. The findings of fact set out in the report are consistent with the evidence in the record. The Investigation Report and the Commission's Decision reflect a thorough consideration of the Complaint and the relevant law and policy. I find that the Commission's Decision to dismiss the Complaint without further inquiry was reasonable.

VII. Conclusion

[56] I have found that the Commission did not err procedurally in basing the Decision on the Investigation Report or in providing only brief reasons in its letter of February 9, 2018. I have also found that the Commission's Decision pursuant to subparagraph 44(3)(b)(i) of the Act to dismiss the Complaint without further inquiry by the Tribunal was reasonable. Therefore, this application will be dismissed.

[57] Having regard to all the circumstances of this matter and the parties, and upon consideration of the factors set forth in Rule 400(3) of the *Federal Courts Rules*, SOR/98-106, there will be no award of costs.

JUDGMENT in T-393-18

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. There will be no award of costs.

"Elizabeth Walker"

Judge

ANNEX A

Canadian Human Rights Act, RSC 1985, c H-6

Exceptions	**Exceptions**
15(1) It is not a discriminatory practice if	15(1) Ne constituent pas des actes discriminatoires :
(a) any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based on a bona fide occupational requirement;	a) les refus, exclusions, expulsions, suspensions, restrictions, conditions ou préférences de l'employeur qui démontre qu'ils découlent d'exigences professionnelles justifiées;
[…]	[…]
Accommodation of needs	**Besoins des individus**
(2) For any practice mentioned in paragraph (1)(a) to be considered to be based on a bona fide occupational requirement and for any practice mentioned in paragraph (1)(g) to be considered to have a bona fide justification, it must be established that accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost.	(2) Les faits prévus à l'alinéa (1)a) sont des exigences professionnelles justifiées ou un motif justifiable, au sens de l'alinéa (1)g), s'il est démontré que les mesures destinées à répondre aux besoins d'une personne ou d'une catégorie de personnes visées constituent, pour la personne qui doit les prendre, une contrainte excessive en matière de coûts, de santé et de sécurité.
Universality of service for Canadian Forces	**Universalité du service au sein des Forces canadiennes**
(9) Subsection (2) is subject to the principle of universality of	(9) Le paragraphe (2) s'applique sous réserve de

service under which members of the Canadian Forces must at all times and under any circumstances perform any functions that they may be required to perform.

l'obligation de service imposée aux membres des Forces canadiennes, c'est-à-dire celle d'accomplir en permanence et en toutes circonstances les fonctions auxquelles ils peuvent être tenus.

Report

44(1) An investigator shall, as soon as possible after the conclusion of an investigation, submit to the Commission a report of the findings of the investigation.

Rapport

44(1) L'enquêteur présente son rapport à la Commission le plus tôt possible après la fin de l'enquête.

Action on receipt of report

(2) If, on receipt of a report referred to in subsection (1), the Commission is satisfied

Suite à donner au rapport

(2) La Commission renvoie le plaignant à l'autorité compétente dans les cas où, sur réception du rapport, elle est convaincue, selon le cas :

(a) that the complainant ought to exhaust grievance or review procedures otherwise reasonably available, or

a) que le plaignant devrait épuiser les recours internes ou les procédures d'appel ou de règlement des griefs qui lui sont normalement ouverts;

(b) that the complaint could more appropriately be dealt with, initially or completely, by means of a procedure provided for under an Act of Parliament other than this Act,

b) que la plainte pourrait avantageusement être instruite, dans un premier temps ou à toutes les étapes, selon des procédures prévues par une autre loi fédérale.

it shall refer the complainant to the appropriate authority.

Idem

(3) On receipt of a report referred to in subsection (1),

Idem

(3) Sur réception du rapport d'enquête prévu au paragraphe

the Commission	(1), la Commission :
(a) may request the Chairperson of the Tribunal to institute an inquiry under section 49 into the complaint to which the report relates if the Commission is satisfied	a) peut demander au président du Tribunal de désigner, en application de l’article 49, un
(i) that, having regard to all the circumstances of the complaint, an inquiry into the complaint is warranted, and	(i) d’une part, que, compte tenu des circonstances relatives à la plainte, l’examen de celle-ci est justifié,
(ii) that the complaint to which the report relates should not be referred pursuant to subsection (2) or dismissed on any ground mentioned in paragraphs 41(c) to (e); or	(ii) d’autre part, qu’il n’y a pas lieu de renvoyer la plainte en application du paragraphe (2) ni de la rejeter aux termes des alinéas 41c) à e);
(b) shall dismiss the complaint to which the report relates if it is satisfied	b) rejette la plainte, si elle est convaincue :
(i) that, having regard to all the circumstances of the complaint, an inquiry into the complaint is not warranted, or	(i) soit que, compte tenu des circonstances relatives à la plainte, l’examen de celle-ci n’est pas justifié,
(ii) that the complaint should be dismissed on any ground mentioned in paragraphs 41(c) to (e).	(ii) soit que la plainte doit être rejetée pour l’un des motifs énoncés aux alinéas 41c) à e).

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-393-18
STYLE OF CAUSE:	JAMES SABOURIN v CANADA (ATTORNEY GENERAL)
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	SEPTEMBER 17, 2018
JUDGMENT AND REASONS:	WALKER J.
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APPEARANCES:

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