Federal Court  Cour fédérale

Date: 20190725

Docket: T-1630-18

Citation: 2019 FC 997

Ottawa, Ontario, July 25, 2019

PRESENT: Mr. Justice Brown

BETWEEN:

RAY DAVIDSON

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] The Applicant applies pursuant to subsection 18.1(1) of the *Federal Courts Act*, RSC, 1985, c F-7 for judicial review of the Canadian Human Rights Commission's [Commission] decision to dismiss his complaint, dated August 17, 2018 [Decision]. The Applicant's basic complaint pertains to Global Affairs Canada [GAC] allegedly refusing to re-engage the Applicant, and GAC allegedly pursuing an employment policy or practice of discriminating on

the basis of race, colour, and national or ethnic origin, per sections 7 and 10 of the *Canadian Human Rights Act*, RSC 1985, c H-6 [*Act*].

[2] The Applicant's complaint was investigated by an Investigator of the Commission. In due course, the Investigator prepared an Investigation Report [Report]. The Investigator gave the Report to both the Applicant and GAC, and invited their responses. Both parties filed responses which were sent to the Commission for a decision, along with the Report and the initial complaint. The Commission upon reviewing the complaint, the Report, and the comments of the parties on the Report, decided to dismiss the Applicant's complaint. In doing so, the Commission accepted the Report and concluded an inquiry into the complaint was not warranted per subparagraph 44(3)(b)(i) of the *Act*. It is from this Decision that the Applicant seeks judicial review.

[3] Judicial review will be granted because in my respectful view, and in the circumstances of this case, the Investigator and by extension the Commission itself breached the duty of fairness owed to the Applicant by failing to disclose relevant and material documents relied upon by both the Investigator and the Commission in concluding there were performance issues with the Applicant. The Applicant's alleged "poor work performance" was the position advanced by the Respondent as to why the complaint should be dismissed. The failure to disclose these relevant documents resulted in the Applicant not knowing the case he had to meet, and of course deprived him of his ability to properly respond to the case against him. My reasons are as follows.

II. Facts

[4] The Commission received the Applicant's complaint against GAC, on October 31, 2016.

It is summarized in the Commission's Report dated May 3, 2018:

> At issue in this complaint is whether the respondent refused to employ the complainant because of his race and colour (black) and his national or ethnic origin ("African Canadian") and whether, in the hiring of Access to Information and Privacy ("ATIP") Consultants, the respondent pursues a policy or practice in which it prefers to hire White French Canadians. The dates of alleged discrimination are November 2015 and ongoing.

[5] I accept these background facts contained in the Report and adopted by the Commission:

> [3] The respondent, Global Affairs Canada, is the Canadian federal department that manages Canada's diplomatic and consular relations, promotes the country's international trade and leads Canada's international development and humanitarian assistance.
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> [4] The complainant, who self-identifies as Black and "African Canadian," has been employed as an Access to Information and Privacy ("ATIP") Officer with Immigration Refugee and Citizenship Canada since 2009 and continues to be employed by them at this time.
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> [5] In or around the beginning of 2013, the complainant took a leave of absence from his substantive position. During his leave of absence, the complainant registered with a recruiting agency, Altis Professional Recruiting ("Altis"). Through that agency, the complainant was hired by Global Affairs Canada - the respondent department - as an ATIP Consultant on a 3-month contract beginning January 2013. The contract was extended until November 28, 2013, for a total working assignment of 48 weeks.
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> [6] The complainant said that in November 2013, when the respondent's Standing Offer came up for renewal, neither he nor R.E., a White French Canadian colleague were hired because Altis agency fees were too high. However, the complainant said that one month later, in December 2013, RE, a former ATIP Director, was offered another contract with the respondent.

> [7] The Commission investigator interviewed Ana Palomino, the Director of Altis Professional Recruiting who confirmed that in November 2013, Altis lost the Standing Offer contract at Global Affairs because of cost. As explained by Ms Palomino, in December 2013, another Altis Consultant could not complete her contract at Global Affairs. R.E. was brought back as a replacement to fulfill the remaining time on the old contract. R.E. was not offered another contract, as alleged by the complainant.
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> [8] Two years later, in November 2015, the respondent put out another Standing Offer for ATIP Consultants. At this time, a different recruiting agency, Lannick LRO represented the complainant and submitted his resume to the respondent for consideration. In this Standing Offer Process, Lannick LRO was a successful bidder and proposed two of its qualified individuals (resources) to the respondent for the 2015 ATIP contract. One of the resources was the complainant. He was not hired. The other resource proposed by Lannick LRO was deemed acceptable and hired by the respondent.
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> [9] According to the complainant, in fulfilling its need for ATIP Consultants, the respondent tends to hire retired ATIP Directors, Coordinators, Managers and other senior ATIP administrators. The complainant also said that all of those retired senior executives are White and French Canadian. The complainant says that while it makes sense to hire retired senior people who possess a wide range of ATIP experience, doing so puts him at a disadvantage.

A. *Submissions to the Investigator pre-Report*

[6] GAC responded to the complaint by letter dated March 13, 2017, which said the Applicant's "poor work performance" was the only reason he was not re-engaged in 2015. The letter stated among other things: "Race, colour and ethnic origin are not, and have never been, factors in the selection and hiring of consultants and employees of the ATIP Division of Global Affairs Canada. Hiring decisions of consultants are made exclusively on the selection criteria indicated in the Temporary Help Services (THS) and a determination of whether the individual is capable of doing work." GAC said that more than 10 percent of its ATIP Division is composed

of minority or employment equity groups. Further, the Applicant was hired for a three-month contract from December 2012 to March 2013, which was subsequently extended to a total of 48 weeks. This extension undermines his complaint. There was also an email from the Applicant sent to his team leader, and seen by several colleagues, acknowledging his own underperformance; but GAC could not locate a copy of this email. Moreover, feedback from the Applicant's team leader and deputy director was that "he did not perform well and that most of his files had to be redone." GAC submitted it "did not discriminate against Mr. Davidson based on any prohibited grounds when he was not hired as a consultant. Mr. Davidson's poor work performance was the only reason."

[7] The Applicant responded to GAC's submissions by letter dated September 9, 2017. Among other things, the Applicant said his complaint is not a statistical representation [in response to GAC's submission re more than 10 percent of ATIP staff being minority groups]. He said that the comments from his supervisor simply do not exist, and if they do, they were subsequently added to support GAC's decision not to hire him. The Applicant said he has no recollection of sending an email about his underperformance, noting GAC did not provide a copy. The Applicant said he is unaware why his files required reprocessing. He emailed his former team leaders/supervisors and they did not provide a reply. He also submitted a *Privacy Act*, RSC 1985, c P-21 [*Privacy Act*] request, which resulted in the production of only one document. The Applicant then sent the Investigator an email on March 26, 2018, with records prepared by him on the files he worked on at GAC.

[8] Materially on the issue of procedural fairness, the Investigator interviewed two GAC officers in connection with certain case management tracking documents maintained by GAC on ATIP files worked on by the Applicant in 2013. As a result of the Investigator's investigation, GAC provided the Investigator with 131 pages of case management documents.

[9] It seems that the Investigator went over these case management tracking documents in further interviews with two members of GAC management [Mr. McNeil and Mr. Friberg] and did so in some detail.

[10] Also materially to the Court's conclusion, the Investigator, for unknown reasons, failed to provide copies of these case management tracking documents to the Applicant. In addition, the Investigator did not go over these documents with the Applicant to hear his side of the matter.

[11] The Report concludes - among other things - that the case management documents are "replete with comments related to files needing reassessment or correction. Issues, concerns, questions and difficulties the complainant encountered on each file were recorded, either at the time the complainant worked on the file, or subsequently when the file was reassigned and had to be redone by another Consultant."

[12] Moreover, the Report says Mr. Friberg, one of the two senior GAC officer interviewed by the Investigator, "highlighted numerous examples in its Case Management tracking system of issues in the complainant's work where files were re-evaluated and had to be redone." See the Report, paras 44 to 49:

[44] In its written defence, the respondent provided more than 130 pages from its Case Management Tracking System detailing ATIP requests that were worked on by the complainant during his 2013 contract.

[45] The complainant suggested that the Commission investigator carry out a comprehensive comparison of his data against that provided by the respondent to prove that that the respondent's defense is a pretext.

[46] Mr. McNeil reviewed the Case Management Tracking document with the Commission investigator. Mr. McNeil explained that a file is divided into groups of pages (either by theme, topic, or the originating source) and then sub-divided into individual pages. Each page must be thoroughly reviewed for a determination as to what information is unrestricted and can be released and what information must remain restricted. A justification has to be provided for each decision. Mr. McNeil explained how the comments in the tracking system are made, by whom, and why. Mr. McNeil said he used this tracking system to review conversations, comments and decisions to ensure that specific issues had been considered by those working on the files.

[47] The complainant cautions that anyone can add or delete comments on the respondent's Case Management Tracking system and thus, he says, the documents are not a "credible medium" to assess his work. Moreover, the complainant says comments about employee performance are not reflected in the tracking system and thus, such comment "simply did not exist" or were "added subsequently in an effort to support the respondent's decision not to hire me...and to help the respondent refute the allegations of my complaint." ln summation, the complainant says that the respondent provided "hearsay" and created documents "after the fact" but does not have "a single piece of evidence" to support that his performance was at issue.

[48] The Commission investigator reviewed the Case Management Tracking documents. While the complainant is correct in that performance comments are not contained in the reports, the respondent's case tracking file is replete with comments related to files needing reassessment or correction. Issues, concerns, questions and difficulties the complainant encountered on each file were recorded, either at the time the complainant worked on the file, or subsequently when the file was reassigned and had to be redone by another Consultant.

> [49] A notation contained in the respondent's file about the complainant's candidacy for the 2015 rehire reads: "last contract most files had to be redone." The Commission investigator interviewed the current Deputy Director Jonathan Friberg, who highlighted numerous examples in its Case Management tracking system of issues in the complainant's work where files were re-evaluated and had to be redone.

[13] The Report also included the following references to the Applicant's job performance:

> [23] Based on the information, the candidates who were chosen appear to have been more senior to and possessed more experience than did the complainant and thus, may have been better qualified than he.
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> ...
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> [68] On the evidence, the complainant's work was not poor. Rather, given his experience and pay range, his work performance did not meet the standard for a senior Consultant that was expected by the respondent but was more reflective of a junior analyst.

[14] While I will return to the issue of procedural fairness, that discussion should be placed in context. As noted, GAC took the position there was no prohibited discrimination against the Applicant, nor did it have a policy to that effect. GAC said that: "Mr. Davidson's poor work performance was the only reason" he was not re-engaged.

B. *Responses of the parties to the Report*

[15] The Applicant responded to the Report by letter dated May 22, 2018 submitting that the Report "is incomplete and entirely one-sided." He detailed many alleged factual inaccuracies and inconsistencies in the Report. His response letter repeatedly requested an opportunity to review the case management tracking documents GAC gave the Investigator, and which the Investigator

went over with GAC officials. He also attached a chart allegedly summarizing his actions on the files he worked on.

[16] GAC responded by letter dated June 26, 2018. It submitted that the Report is "factual and reflective of the circumstances surrounding the complaint" and asked that the complaint be dismissed.

III. Decision Under Review

[17] The Commission dismissed the Applicant's complaint by letter dated August 17, 2018, saying:

> Before rendering the decision, the Commission reviewed the report disclosed to you previously and any submission(s) filed in response to the report. After examining this information, the Commission decided, pursuant to subparagraph 44(3)(b)(i) of the *Canadian Human Rights Act*, to dismiss the complaint because having regard to all the circumstances of the complaint, further inquiry is not warranted.

IV. Rule 318 Motion and Order

[18] The Applicant filed an application for judicial review of the Commission's Decision. The Applicant then moved under the *Federal Courts Rules*, SOR/98-106 [Rules] to require the Commission to produce the 131 pages of case management tracking documents not disclosed to him, but which the Investigator shared and went over in some detail with GAC officials, and which in part at least formed the basis for the Decision under judicial review.

[19] Prothonotary Aylen heard the Applicant's Rule 317 and 318 Motion, and on November 7, 2018, ordered the Commission to produce the 131 pages of case management tracking documents. In her reasons, the Prothonotary said:

> [10] The Applicant asserts that as part of the investigation, he was never given an opportunity to review any of the aforementioned documents, notwithstanding that they were heavily relied upon by the Investigator in reaching her conclusions.
>
> [11] Only information that is relevant to the underlying judicial review application must be produced under Rule 317. A document is relevant to an application for judicial review if it may affect the decision the Court will make. Relevance is to be determined by reference to the grounds of review set out in the originating Notice of Application and the Applicant's supporting affidavit [see *Pathak v Canada (Canadian Human Rights Commission)(re Royal Bank of Canada)*, [1995] 2 FCR 455 (FCA.) at para 10; leave to appeal denied, [1995] SCCA No 306]. Only documents which were actually before the federal board when it made its decision need to be produced under Rule 318 [see *118570 Ontario Ltd v Canada (Minister of National Revenue)*(1999), 247 NR 287 (FCA)].
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> [12] It is critical to keep in mind that Rule 317 does not serve the same purpose as documentary discovery in an action. As stated by the Honourable Mr. Justice Pelletier in *Access to Information Agency Inc v Canada (Transport),* 2007 FCA 224 at para 21:
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> > …The purpose of the rule is to limit discovery to documents which were in the hands of the decision-maker when the decision was made and which were not in the possession of the person making the request and to require that the requested documents be described in a precise manner. When dealing with a judicial review, it is not just a matter of requesting the disclosure of any document that could be relevant in the hopes of later establishing relevance. Such a procedure is entirely inconsistent with the summary nature of judicial review. If the circumstances are such that it is necessary to broaden the scope of discovery, the party demanding more complete disclosure has the burden of advancing the evidence justifying the request. It is this final element that is completely lacking in this case.

[13] There are exceptions to this principle. Materials that were not before the decision-maker may be considered relevant if there is an allegation that the decision-maker breached procedural fairness, committed jurisdictional error or where there is an allegation of a reasonable apprehension of bias [see *Canadian National Railway Co v Louis Dreyfus Commodities Ltd*, 2016 FC 101 at para 27].

[14] In order to obtain disclosure of material that was not before the decision-maker at the time the decision was made, an applicant must raise a ground of review that would allow the Court to consider evidence that was not before the decision-maker, and then demonstrate to the Court that this ground of review has a factual basis supported by appropriate evidence [see *Canadian National Railway Co Louis Dreyfus Commodities Ltd, supra*, at para 27].

[15] In the 2018 decision of the Federal Court of Appeal in *Humane Society of Canada Foundation Canada (Minister of National Revenue)*, 2018 FCA 66, Justice Webb held that documents in addition to those that were before the decision-maker may be considered relevant and subject to disclosure where there is an allegation of procedural fairness or an allegation of a reasonable apprehension of bias, although even allegations of that nature do not entitle a requesting party to engage in a fishing expedition in hopes of discovering some documents to establish the claim. In that case, the documents sought were in the possession of the decision-maker.

[16] In this case, the documents sought by the Applicant have been clearly identified and his request cannot be characterized as a fishing expedition, as he seeks documents that were before the Investigator (as confirmed in the Investigation Report) and expressly relied upon by her in reaching her conclusions. While the certificate from the Commission confirms that the requested documents were not before the Commission when it made its decision, I find that the Notice of Application and the submissions of the Applicant adequately explain how the documents are relevant to the grounds of judicial review – namely, that (i) the Commission breached procedural fairness by failing to provide the Applicant with the requested documents and an opportunity to provide evidence and submissions to the Commission in relation thereto; and (ii) there is an allegation of a reasonable apprehension of bias in failing to afford the Applicant an equal opportunity to submit evidence and an explanation of the complexities and nuances of the position at issue, so as to rebut the allegations regarding the quality of his past performance. As the documents may affect the decision the Court will make on the grounds of

> review raised by the Applicant, I find that the requested documents are relevant and are producible under Rule 317.
>
> [17] Accordingly, the Commission shall, subject to the redaction of any third-party information therefrom, transmit to the Registry and the Applicant a copy of the requested records.

[20] The Respondent contested the Applicant' motion. No appeal was taken from Prothonotary Aylen's Order. I was pointed to no error in the Prothonotary's reasons or decision which I accept as a very fair and accurate statement of the law in cases where material is requested to supplement the certified tribunal record on an issue of procedural fairness, as in this case.

[21] The public version of the 131 pages of case management tracking information was therefore provided to the Applicant and to the Court.

[22] The first time the Applicant saw these documents was when they were served on him pursuant to Prothonotary Aylen's Order.

V. Issue

[23] In my respectful view, the determinative issue on this application is whether the Applicant was denied procedural fairness in not being provided with the case management tracking documents relied upon by the Investigator, and by extension, the Commission.

VI. Standard of Review

[24] Questions of procedural fairness, including those arising in the context of Commission decisions are reviewed on the correctness standard: *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43. Specifically in the context of investigations, this Court's frequently cited decision in *Miller v Canada (Human Rights Commission)* (1996), 112 FTR 195, per Dubé J [*Miller*] at para 11 is instructive in requiring Commission decision to have a fair basis and to be neutral and thorough:

> [11] ... procedural fairness requires that the Commission have an adequate and fair basis upon which to evaluate whether there was sufficient evidence to warrant the appointment of a Tribunal. The investigations conducted by the investigator prior to the decision must satisfy at least two conditions: neutrality and thoroughness. ...

[25] Likewise, the frequently cited decision of *Slattery v Canada (Human Rights Commission)* (1994), 73 FTR 161, per Nadon J as he then was [*Slattery*], at para 50, also recognizes the duty to be neutral and thorough: "In order for a fair basis to exist for the CHRC to evaluate whether a tribunal should be appointed pursuant to paragraph 44(3)(a) of the Act, I believe that the investigation conducted prior to this decision must satisfy at least two conditions: neutrality and thoroughness."

[26] I note that in *Bergeron v Canada (Attorney General)*, 2015 FCA 160 at para 69, the Federal Court of Appeal says that a correctness review may need to take place in "a manner 'respectful of the [decision-maker's] choices' with 'a degree of deference': *Re: Sound v. Fitness Industry Council of Canada*, 2014 FCA 48, 455 N.R. 87 at paragraph 42." [Re: Sound].

[27] I also acknowledge *Canadian Pacific Railway Co v Canada (Attorney General), 2018 FCA 69*, per Rennie JA at para 54 where the Federal Court of Appeal holds:

> [54] A court assessing a procedural fairness argument is required to ask whether the procedure was fair having regard to all of the circumstances, including the *Baker* factors. A reviewing court does that which reviewing courts have done since *Nicholson*; it asks, with a sharp focus on the nature of the substantive rights involved and the consequences for an individual, whether a fair and just process was followed. ...

[28] In *Dunsmuir v New Brunswick*, 2008 SCC 9 para 50, the Supreme Court of Canada explains what is required of a court reviewing on the correctness standard of review:

> [50] When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

VII. Law

[29] Subsection 44(1) and subparagraph 44(3)(b)(i) of the *Act* provides:

Report	**Rapport**
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.	44 (1) L'enquêteur présente son rapport à la Commission le plus tôt possible après la fin de l'enquête.
…	…
Idem	**Idem**
(3) On receipt of a report referred to in subsection (1), the Commission	(3) Sur réception du rapport d'enquête prévu au paragraphe (1), la Commission :
…	…

(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, ...	(i) soit que, compte tenu des circonstances relatives à la plainte, l'examen de celle-ci n'est pas justifié, ...

VIII. Analysis

[30] The Applicant, a self-represented litigant, in essence submits that his right to procedural fairness (natural justice and right to be treated fairly) was denied. He submits - and it is the case - that neither the Investigator nor the Commission disclosed to him the case management tracking documents the Investigator obtained from GAC. I add that it seems the Investigator went over these case management documents in some detail with two senior officers of GAC.

[31] As noted above, I also find the Investigator and the Commission by extension through its adoption of the Investigator's Report, relied on these case management tracking documents to the detriment of the Applicant in terms of considering his job performance - which was very central to GAC's defence to the complaint. The relevance of these documents was not disputed in written or oral submissions and I accept it as a given. This was certainly the position of the Investigator, which the Respondent supported in written and oral submissions.

[32] The problem with what happened here is that the Applicant was not afforded the right to know the case against him. This is a basic principle of administrative law. In addition, his right to respond to documents relied upon by the Investigator (and by extension, by the Commission's adoption of the Report) was denied because he did not have the documents that were relied upon

by the Investigator, GAC, and ultimately, by the Commission itself. The general principles regarding the content of the duty of fairness in this connection are set out in *Re: Sound*, where the Federal Court of Appeal states:

> [54] However, agencies must ensure that, if they obtain information from third parties, they do not thereby jeopardize parties' participatory rights: to know and to comment on material relevant to the decision; to have notice of the grounds on which the decision may be based; and to have an opportunity to make representations accordingly. The ultimate question for a reviewing court in every case is whether, in all the circumstances (including respect for administrative procedural choices), the tribunal's decision-making procedure was essentially fair. This involves a contextual and fact-specific inquiry.
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> [Emphasis added]

[33] In this connection and before the hearing, the following direction was sent to the parties alerting counsel of the importance of this issue:

> The Court has questions regarding the 131 pages of documents in the Supplementary Certificate dated 29 November, 2018, stated to be contained in the "Commission's investigation file" in respect of the Applicant's complaint.
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> Were these documents disclosed to the Applicant, and if so when and by whom?
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> If not, was the Applicant entitled to see them given the Investigator relied on them, and the Investigator's Report constitutes the reasons of the Commission?
>
> In other words, if these documents were not provided to the Applicant was there not a breach of procedural fairness in terms of knowing the case against him?

[34] It is common ground these documents were not provided to the Applicant. However, the Respondent provided a number of reasons why that was procedurally fair. However and with respect I am not persuaded they have merit.

[35] The Respondent submitted the Applicant could respond to what was said in the Report by addressing the Report's conclusions, which to recall, included many observations critical of the Applicant's performance including that the case management documents were "replete with comments related to files needing reassessment or correction. Issues, concerns, questions and difficulties the complainant encountered on each file were recorded, either at the time the complainant worked on the file, or subsequently when the file was reassigned and had to be redone by another Consultant." The Report also stated Mr. Friberg, an officer of GAC, had discussed the case management tracking documents with the Investigator and "highlighted numerous examples in its Case Management tracking system of issues in the complainant's work where files were re-evaluated and had to be redone." At the hearing I asked several times how the Applicant could respond to these findings when he had not been given the documents referred to. In my respectful opinion, and notwithstanding counsel's valiant efforts, the Court did not receive an answer except to the effect that he could respond to the Report without knowing what was in the underlying documents all he had to do was respond to the Report.

[36] The Respondent submitted the Applicant was not denied procedural because "[p]rocedural fairness requires only that the investigator's report address the fundamental or essential aspects of the applicant's alleged incidents of discrimination": *Rabah v Canada (Attorney General),* 2001 FCT 1234, per McKeown J at para 10. There is no disagreement with

this general statement. These reasons should not be taken to stand for the proposition that a party challenging a section 44 decision of the Commission is entitled to see every document reviewed by an Investigator. However in this case these case management tracking documents were fundamental and essential. The issue was the Applicant's job performance. The documents were made contemporaneously with his previous work for GAC in 2013, and were of such sufficient importance to the Investigator that he went over them in some detail with two senior officials at GAC.

[37] Moreover, it is apparent these documents played a fundamental role in the Investigator's conclusion - and by extension the Commission's Decision - not to deal further with the complaint. In my view they addressed the core of the case, that is, whether or not the Applicant's alleged poor work performance was the reason he was not re-engaged in 2015. Redacted versions were supplied to the Court after the Order of Prothonotary Aylen, and admittedly could easily have been given to the Applicant at the time. I was pointed to no privilege or statutory or other basis for not doing so at the time.

[38] The Respondent further submits there was no breach of procedural fairness because the Commission only plays a screening role, and is not ruling on the merits of a complaint. Only the Tribunal may rule on the merits: *Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, 2012 SCC 10, per Cromwell J at paras 19, 23:

> [19] I respectfully agree with the Court of Appeal. The Commission's decision to refer a complaint to a board of inquiry is not a determination of whether the complaint falls within the Act. Rather, within the scheme of the Act, the Commission plays an initial screening and administrative role; it may, for example,

> decide to refer a complaint to a board of inquiry so that the board can resolve a jurisdictional matter.
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> ...
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> [23] What is important here is that a decision to refer a complaint to a board of inquiry is not a determination that the complaint is well founded or even within the purview of the Act. Those determinations may be made by the board of inquiry. In deciding to refer a complaint to a board of inquiry, the Commission's function is one of screening and administration, not of adjudication.

[39] What is said is certainly good law. However, and with respect, the Supreme Court of Canada was not dealing with an issue of procedural fairness as is now before this Court; it was dealing with the role of the court's intervention into an administrative proceeding at a preliminary stage. With respect the case at bar is judicial review of a final decision, not a preliminary matter, and the issue is the right to disclosure of the case to answer. It is a very different matter from that before the Supreme Court of Canada.

[40] The Respondent submits the level of procedural fairness owed by the Commission and its Investigator to the parties is commensurate to its investigative role. With respect, I agree that the level of procedural fairness is proportionate; the duty to disclose arises in this case in large part because the documents in question go to a very central if not the key issue in the complaint namely the Applicant's alleged poor work performance when at GAC in 2013; this was GAC's answer to the Applicant's complaint regarding racial discrimination. In my view, the importance of the matter and of his performance in particular are factors pointing to heightened procedural fairness as required by *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 25:

> [25] A third factor in determining the nature and extent of the duty of fairness owed is the importance of the decision to the individual or individuals affected. The more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated.

[41] The Respondent says the Report and the Applicant's response to the Report were provided to, and considered by, the Commission. The Respondent says the Applicant's response letter constituted the Applicant's opportunity to be heard. Again, I am not persuaded. No doubt the Applicant had an opportunity to respond to the Report, and he did. But the essence of his response insofar as the case management tracking documents were concerned was that he needed to see the documents, because without them he could not answer whatever it was they contained that spoke negatively about his performance. In his response the Applicant repeatedly asked to see them. The Commission implicitly refused his request in dismissing the complaint. I asked at the hearing how the Applicant could respond to the performance-related conclusions found in the Report based or partially based on the documents, without seeing the documents.

[42] The Respondent also submitted the Commission's failure to interview the Applicant on the documents, which the Investigator went over with two senior officers of GAC, was not a breach of procedural fairness, because "[t]here is no obligation on an investigator to interview each and every person suggested by the parties": *Canadian Union of Public Employees (Airline Division) v Air Canada*, 2013 FC 184, per Mactavish J, as she then was, at para 89. This law is good law. However, the Investigator also has duties of neutrality and fairness: *Miller* at para 11; *Slattery* at para 50. The Investigator went over these documents with GAC in some detail and

clearly relied upon them; they were not even disclosed to the Applicant who was never made aware even of their existence.

[43] The Respondent submits that "[o]nly where unreasonable omissions have been made, such as the failure to investigate obviously crucial evidence, is judicial review warranted": *Dubé v Canadian Broadcasting Corp*, 2015 FC 78, per Gagné J as she then was [*Dubé*] at para 26. And see *Dubé* at para 28:

> [28] As my colleague Justice Strickland noted, "[t]his Court is concerned, not with perfection, but with ensuring that the Applicant was treated fairly in the investigation and his discrimination complaint was considered" (Attaran at para 100). She also pointed out that "[t]he Court should not dissect the investigator's report on a microscopic level or second-guess the investigator's approach to his task.

[44] I agree. This law applies to this case; by failing to let the Applicant see and respond to the case management documents, the Investigator, and by extension the Commission, failed to investigate evidence lying at the core of its Decision. Faulting the Commission in this respect is not asking for perfection; rather it asks to let the Applicant know and comment on relevant material on which a decision might be based.

[45] To this point, I have considered the matter on the basis of procedural fairness. I also consider the decision of Prothonotary Aylen to be significant in this matter. Her decision states in part:

> [16] In this case, the documents sought by the Applicant have been clearly identified and his request cannot be characterized as a fishing expedition, as he seeks documents that were before the Investigator (as confirmed in the Investigation Report) and expressly relied upon by her in reaching her conclusions. While the

> certificate from the Commission confirms that the requested documents were not before the Commission when it made its decision, I find that the Notice of Application and the submissions of the Applicant adequately explain how the documents are relevant to the grounds of judicial review – namely, that (i) the Commission breached procedural fairness by failing to provide the Applicant with the requested documents and an opportunity to provide evidence and submissions to the Commission in relation thereto; and (ii) there is an allegation of a reasonable apprehension of bias in failing to afford the Applicant an equal opportunity to submit evidence and an explanation of the complexities and nuances of the position at issue, so as to rebut the allegations regarding the quality of his past performance. As the documents may affect the decision the Court will make on the grounds of review raised by the Applicant, I find that the requested documents are relevant and are producible under Rule 317.

[46] I do not take the Prothonotary's decision as concluding the issue of procedural fairness before me. Her Order does however place before me material that was not before the Commission; technically speaking the Commission had nothing before it but the complaint, the Report, and the two responses.

[47] For the reasons already given, I have concluded that the 131 pages of case management tracking documents do indeed address issues of procedural fairness and are therefore properly before the Court under *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency*, 2012 FCA 22, per Stratas JA [*Association of Universities*]. If the case management documents did not address an issue of procedural fairness or some other exception, Justice Roussel's decision in *ES v Canada (Attorney General)*, 2017 FC 1127 at paras 34 and 42 would apply and the documents were not be admissible on judicial review. Specifically, these case management tracking documents come within the second exception [b] identified by the Federal Court of Appeal in *Association of Universities* at para 20:

[20] There are a few recognized exceptions to the general rule against this Court receiving evidence in an application for judicial review, and the list of exceptions may not be closed. These exceptions exist only in situations where the receipt of evidence by this Court is not inconsistent with the differing roles of the judicial review court and the administrative decision-maker (described in paragraphs 17-18, above). In fact, many of these exceptions tend to facilitate or advance the role of the judicial review court without offending the role of the administrative decision-maker. Three such exceptions are as follows:

> (a) Sometimes this Court will receive an affidavit that provides general background in circumstances where that information might assist it in understanding the issues relevant to the judicial review: see, *e.g.*, *Estate of Corinne Kelley v. Canada*, 2011 FC 1335 at paragraphs 26-27; *Armstrong v. Canada (Attorney General)*, 2005 FC 1013 at paragraphs 39-40; *Chopra v. Canada (Treasury Board)* (1999), 168 F.T.R. 273 at paragraph 9. Care must be taken to ensure that the affidavit does not go further and provide evidence relevant to the merits of the matter decided by the administrative decision-maker, invading the role of the latter as fact-finder and merits-decider. In this case, the applicants invoke this exception for much of the Juliano affidavit.
>
> (b) Sometimes affidavits are necessary to bring to the attention of the judicial review court procedural defects that cannot be found in the evidentiary record of the administrative decision-maker, so that the judicial review court can fulfil its role of reviewing for procedural unfairness: *e.g, Keeprite Workers' Independent Union v. Keeprite Products Ltd.* (1980) 29 O.R. (2d) 513 (C.A.). For example, if it were discovered that one of the parties was bribing an administrative decision-maker, evidence of the bribe could be placed before this Court in support of a bias argument.
>
> (c) Sometimes an affidavit is received on judicial review in order to highlight the complete absence of evidence before the administrative decision-maker when it made a particular finding: *Keeprite*, *supra*.
>
> [Emphasis added]

[48] For these reasons, I have therefore concluded that the Decision is fatally flawed by procedural unfairness and must be set aside.

IX. Additional Matters

[49] Given my finding of procedural unfairness, I need not deal with the other substantive issues raised by the Applicant

[50] However, I must deal with two further issues.

[51] First, the Respondent submits that what is called “Exhibit P” in the Applicant’s Record (pages 230 to 292) should be struck. This is a covering letter from Foreign Affairs, Trade and Development Canada to the Applicant followed by a number of records he requested under a *Privacy Act* request.

[52] Briefly, these records were neither part of the Certified Tribunal Record, nor part of the Applicant’s Affidavit and do not fall under any of the exceptions in *Association of Universities* at para 20 cited above. Specifically, so-called “Exhibit P” was not before either the Commission or the Investigator. The transmittal letter sending the Applicant these documents is dated October 5, 2018, a date after the date of Decision which was August 17, 2018. In addition, “Exhibit P” is neither referred to nor identified in the Applicant’s Affidavit - in fact there is no “Exhibit P”. Filing documents without an affidavit contravenes Rule 309(2). More substantively, these documents meet none of the exceptions to the rule that judicial review is a review of what was before the tribunal below, and nothing else, discussed in *Association of Universities* at para 20

and set out at paragraph 47 above. Therefore so-called “Exhibit P” is struck from the Applicant’s Record.

[53] Second, the Respondent asks that the style of cause be amended to name the Attorney General of Canada instead of the Deputy Minister of Global Affairs Canada. The Applicant did not object to this request which in my view has merit. Having regard to subsections 303(1) and (2) of the Rules, I agree and will so order effective immediately.

X. Costs

[54] The Applicant did not seek costs in his submissions orally or in writing. The Respondent asked for costs in his written and oral submissions, and when asked to quantify them on an all-inclusive basis, counsel advised $750.00 would be accepted. Upon hearing that, the Applicant asked for leave to request costs. The Respondent then asked if leave could be granted to reconsider the quantification of costs and if so asked for $1,500.00. I granted leave to the parties to address these issues. The Respondent confirmed his request for $750.00 all-inclusive if successful, and also advised that he agreed that if the Applicant was successful he should be awarded all-inclusive costs of $1,500.00. The Applicant had no additional comment to make.

[55] Based on the foregoing and on the fact that the Applicant has been successful, costs will be awarded to the Applicant payable by the Respondent in the all-inclusive amount of $1,500.00.

JUDGMENT in T-1630-18

THIS COURT'S JUDGMENT is that:

1. The style of cause is amended immediately to name the Attorney General of Canada as Respondent instead of the Deputy Minister of Global Affairs Canada.
2. So-called "Exhibit P" being pages 230 to 292 is struck from the Applicant's Record.
3. Judicial review is granted.
4. The Decision of the Commission is set aside.
5. The matter is remanded for redetermination.
6. The Respondent shall pay costs to the Applicant in the all-inclusive amount of $1,500.00.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1630-18
STYLE OF CAUSE:	RAY DAVIDSON v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	JULY 22, 2019
JUDGMENT AND REASONS:	BROWN J.
DATED:	JULY 25, 2019

APPEARANCES:

Ray Davidson	FOR THE APPLICANT (ON HIS OWN BEHALF)
Vanessa Wynn-Williams	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT