

Federal Court



Cour fédérale

Date: 20191212

Docket: T-1540-18

Citation: 2019 FC 1597

Ottawa, Ontario, December 12, 2019

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

CHRISTINE HOLDER

Applicant

and

UBS BANK (CANADA)

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] The Applicant, Ms. Christine Holder, has applied for judicial review pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 of the screening decision of the Canadian Human Rights Commission [Commission] in which the Commission decided not to refer her complaint to the Canadian Human Rights Tribunal [Tribunal].

[2] The Applicant filed a complaint with the Commission alleging that the Respondent, UBS Bank (Canada), discriminated against her in the course of her employment on the basis of sex, race, national or ethnic origin, colour, and family status. An Investigator drafted a Report in which she concluded that an inquiry into the complaint was not warranted and recommended that the Commission dismiss the complaint. The Commission approved the Report and decided not to refer the complaint to the Tribunal under subparagraph 44(3)(b)(i) of the *Canadian Human Rights Act*, RSC 1985, c H-6 [Act].

[3] The Applicant seeks an order quashing the Commission's decision and requiring the Commission to refer the complaint to the Tribunal under subsection 49(1) of the Act. Alternatively, the Applicant asks this Court for an order remitting this matter back to the Commission requiring that the matter be investigated by a different investigator.

[4] For the following reasons, the judicial review is dismissed. I find that the Commission conducted a thorough and neutral investigation and therefore did not breach the Applicant's right to procedural fairness. In addition, the reasons of the Investigator and the Commission were sufficiently transparent, justified, and intelligible and the decision not to refer the matter to the Tribunal falls within a range of reasonable outcomes which are defensible in respect of the facts and the law (*Dunsmuir v New Brunswick*, [2008] 1 SCR 190 at para 47).

II. Background and Procedural History

[5] Many of the underlying facts of this matter are disputed by the parties. That said, the following background and procedural facts are generally accepted.

[6] The Applicant is licensed as a Certified Public Accountant in the United States and worked for UBS Bank (Bahamas) (the Respondent's office in the Bahamas) from March 2005 until November 2007. At that time, she states that she resigned to "become a homemaker" and "run a small home-based business".

[7] On January 30, 2012, the Applicant began employment in Canada with the Respondent's Finance and Controlling Department as a Financial Reporting Specialist with the rank of "Authorized Officer" (AO). There were three higher ranked Officer titles within the Respondent's organization: Associate Director, Director, and Executive Director. During her employment, seven employees worked in the Applicant's department, including one other woman employed as an administrative assistant while the other five employees were male. Of these male employees, one was an Authorized Officer, two were Associate Directors, one was a Director, and one was the department's Executive Director.

[8] The Applicant and her husband had four young children who were born before she began her employment with the Respondent.

[9] In February 2012, the Applicant requested a "flexible working arrangement" to fulfill her family obligations and was permitted to work from 7:30 AM to 4:30 PM. In September 2013, the parties agreed to reduce the Applicant's hours to 7:30 AM to 1:00 PM and treat her as a part-time employee. Under this agreement, the Applicant's salary was reduced to reflect her reduced hours but she maintained the same number of vacation days.

[10] The Applicant tendered her resignation on March 17, 2014 and formally ceased her employment with the Respondent on April 4, 2014.

[11] On September 8, 2014, the Applicant filed a complaint with the Commission alleging a number of incidents of discrimination committed by the Respondent throughout the term of her employment (sections 3 and 7 of the Act). The Respondent filed submissions in response on February 18, 2015 and the Applicant filed further submissions on August 27, 2015.

[12] On July 6, 2015, the Commission referred the complaint to the Investigator. After investigating the matter, the Investigator completed a Report, dated February 8, 2018, in which she concluded that further inquiry into the complaint was not warranted and recommended that the Commission dismiss the complaint. On June 20, 2018, the Commission rendered a brief decision in which it endorsed the Investigator's recommendation, concluded that no inquiry into the complaint was warranted, and accordingly decided not to refer the complaint to the Tribunal.

III. The Complaint

[13] In her complaint and further submissions, the Applicant made the following allegations of discrimination:

- she was generally excluded from meetings (such as meetings regarding the preparation of HST and QST tax returns) while her male colleagues were not;
- the Executive Director of her department, Mr. Anurag Deep, customarily held a weekly one-on-one meeting with each employee of the department. Eventually, Mr. Deep did not

attend a number of his scheduled meetings with the Applicant but continued to attend these meetings with her male colleagues;

- in December 2012, she prepared a binder for a presentation to the Respondent's executive committee regarding regulatory reports to be submitted to various regulators. A male employee in her department, Mr. Geoffrey Ng, ultimately conducted the presentation even though he had no part in preparing the binder;
- her performance evaluation of January 2013 graded her as "needs improvement" despite the positive feedback that she received from co-workers. She believed that her manager gave her a lower grade to justify giving a male employee a strong evaluation to improve his promotion prospects. She was assured that her evaluation would not impact her bonus but did not receive a bonus in 2013;
- in January 2014, she received a positive performance evaluation. However, she received a bonus of \$1000 which was less than that of her male colleagues and significantly less than the annual bonus of \$17,000 that she received in the Bahamas. She stated that she received only 1/74th of the bonus pool that the five male employees of her department "split amongst themselves". The Applicant alleged that this amounted to systemic discrimination;
- in her part-time agreement of September 2013, a term was included stating that "[s]hould you be late arriving to work for whatever reason, you must make up the time that day so that the full five hours are worked". None of her male colleagues was subject to this requirement;

- co-workers mocked her flexible work arrangement and regularly stated that they were “pulling a Christine” when they would leave work early;
- she was required to use vacation days to take dental or medical appointments and was not otherwise permitted to take appointments during work hours. Her male colleagues were permitted to take such appointments during work hours without using vacation days;
- she was excluded from “training handover meetings” between her resignation and departure in March and April 2014 and did not receive an exit interview.

[14] In her further submissions, the Applicant requested that the Investigator interrogate the following witnesses for the reasons set forth below:

- Mr. Daniel Fritschi: her manager when she worked at UBS Bank (Bahamas). The Applicant stated that she expressed concerns with him about differential treatment on the basis of sex while employed with the Respondent in Canada;
- Ms. Celeste Jobe: the Applicant’s predecessor of the same role. The Applicant stated “I have no idea what Celeste will say...I would find it very hard to believe that she didn’t experience the same as I”;
- Ms. Debbie Baran: an administrative assistant working in the Applicant’s department. The Applicant shared her experience of differential treatment with her during the course of her employment;
- Mr. Joe Mazzona: (an IT support worker employed by the Respondent) the Applicant told him she resigned because she believed she was treated differently due to her sex;

- Mr. Geoffrey Ng: (a co-worker in the Applicant's department ranked as a Director) the Applicant shared her experience of differential treatment with him and he would confirm the "pulling a Christine" jokes;
- Ms. Jing He: a co-worker who sat next to the Applicant's cubicle. The Applicant shared her experience with her and she would also confirm the "pulling a Christine" jokes.

[15] In her complaint, the Applicant claimed lost wages, medical and dental expenses, \$20,000 in general damages under paragraph 53(2)(e) of the Act and an additional \$20,000 for willful or reckless discrimination under subsection 53(3) of the Act.

IV. Investigator's Report and the Parties' Submissions on the Report

[16] The Investigator first remarked that while the Applicant alleged multiple other prohibited grounds of discrimination, she admitted during an interview that she believed she suffered discrimination because she is female and was unsure about the other grounds. The Investigator then rejected the Applicant's allegations of systemic discrimination given that the only evidence presented related to her own experience, which is insufficient to establish a widespread policy or practice.

[17] The Investigator interviewed the following five individuals:

1. The Applicant;
2. Mr. Geoffrey Ng: (another Financial Reporting Specialist on the Applicant's team ranked as a Director);

3. Mr. Anurag Deep (the Executive Director of the Applicant's team and the Respondent's CFO);
4. Ms. Kelly McMillan: the Respondent's head of human resources;
5. Mr. Joe Mazzona (an IT support employee of the Respondent).

[18] The Investigator then explained why she did not interview the four other witnesses proposed by the Applicant:

- Mr. Fritschi did not work with the Applicant in Canada, did not witness any of the alleged incidents, and his knowledge was limited to the information that the Applicant shared with him;
- The Investigator attempted to contact Ms. Jobe using the information provided by the Applicant (the phone number of Ms. Jobe's brother). The phone number led to a voicemail box that was full throughout the investigation process and she could not locate Ms. Jobe through an internet search. The Investigator could not reach Ms. Jobe's mail address as she had apparently moved;
- Ms. He no longer worked for the Respondent at the time of the investigation. A phone number provided by the Respondent was no longer Ms. He's number. The Investigator could not locate Ms. He through an internet search;
- The Respondent informed the Investigator that Ms. Baran is deceased.

[19] The Investigator addressed the Applicant's allegation that she was generally excluded from meetings and discussions and set forth the following findings from the investigation:

- Ms. McMillan stated that she met with the Applicant in June 2012 at which time the Applicant said that team members sometimes did not include her in communication. Ms. McMillan asked if the Applicant wanted her to get involved and offered other suggestions to address the issue. However, the Applicant wished to address this with Mr. Deep herself and the Applicant did not raise further issues about how the team treated her. The Applicant admitted that she did not address the issue with Ms. McMillan following that meeting;
- Mr. Deep stated that the team communicated openly and frequently and he did not believe information was withheld from the Applicant. He further stated that the whole team met daily and also had weekly and monthly meetings in which every member of the team could share information, in addition to individual meetings with team members. Mr. Deep did not recall the Applicant raising issues with him about feeling excluded;
- Mr. Deep stated that both Mr. Ng and the Applicant prepared the Executive Committee presentation and that they presented it together, though Mr. Ng was more involved in the presentation as he was more senior;
- Mr. Ng stated that the Applicant said she wanted him to present their work because she "felt shy about presenting to the EC" and that she never said she was upset that he presented;

- The Applicant disputed their versions and stated that Mr. Deep tasked Mr. Ng with conducting the presentation and that this humiliated her;
- Mr. Deep stated that tax filings were a learning process for the Applicant and that Mr. Ng was the “tax expert” and was responsible for tax preparation while she was responsible for regulatory reports;
- Mr. Ng stated that HST preparation was a joint role between himself and the Applicant, although she did the bulk of the work. He would have welcomed the Applicant at any meeting he was attending that was relevant to her;
- Mr. Deep stated that he did not recall being unavailable for the one-on-one or “bilateral” meetings. However, he acknowledged that on occasion he would miss meetings because work would take over.

[20] The Investigator concluded that the Applicant raised concerns about being excluded with Ms. McMillan and Mr. Deep but admitted that she did not raise the issue thereafter. The evidence regarding the EC presentation and the HST meetings was conflicting. While the parties agree that Mr. Deep missed their scheduled bilateral meetings, there was no indication that she was treated differently in that regard and Mr. Deep’s explanation was reasonable. The evidence does not suggest that any of these incidents occurred due to a prohibited ground.

[21] The Investigator then turned to bonus and performance evaluation related allegations and set forth the following findings from the investigation:

- A. The Investigator remarked that the Respondent used a “forced ranking system” in which the performance evaluations of all North-American employees is determined on a comparative basis;
- B. Mr. Ng stated that he also received a “needs improvement” ranking and was told that he was compared to others at his level across the region who received better assessments that year. Mr. Ng stated that he also did not receive a bonus in 2012. Mr. Ng stated that he and the Applicant received a “satisfactory” rating in 2013 and that he was awarded a bonus of \$2000;
- C. Both Mr. Deep and Ms. McMillan stated that since the economic crisis of 2008, bonuses have generally decreased;
- D. Mr. Deep stated that the value of bonuses awarded to employees is determined by a committee who would not know the Applicant personally;
- E. Regarding the allegation that she only received 1/74th of the 2013 bonus and that the rest was divided amongst the male employees, Ms. McMillan stated that the Applicant would have had to consult the company’s general ledger to obtain that information. Ms. McMillan believed that the majority of this amount would have been given to Mr. Deep but was not divided amongst all male colleagues to the Applicant’s detriment.

[22] The Investigator concluded that in 2012, both the Applicant and Mr. Ng received a “needs improvement” ranking due to the forced ranking system and neither received a bonus that year. Both received positive evaluations but low bonuses the subsequent year. While Mr. Ng

received a higher bonus than the Applicant, it does not appear to be his piece of the larger sum that she alleges was divided amongst male team members. That allegation appears to be speculative as compensation is confidential. While it appears likely that performance evaluations affect bonuses, there was no evidence to suggest that the bonuses she received or her performance evaluations were the result of discrimination.

[23] The Investigator then addressed the allegations of differential treatment due to the Applicant's flexible work schedule and made the following findings:

- Ms. McMillan stated that the term in the Applicant's part-time agreement about making up lost time was stipulated due to her pattern of late arrivals and was unrelated to family status;
- Mr. Deep stated that he is flexible with all staff regardless of sex and he did not treat the Applicant's leave requests differently than those of her male colleagues. The Respondent provided many emails from April 2012 to February 2014 in which the Applicant's requests for time off due to illness and other reasons were accepted by Mr. Deep without qualification;
- Mr. Ng stated that he did not believe male colleagues are treated more favourably. He and many others work late or come in on weekends to make up lost time;
- Both Mr. Ng and Mr. Deep stated that they never heard the phrase "pulling a Christine" used and that they would not have tolerated the remark.

[24] The Investigator concluded that Mr. Deep accepted requests for flexibility or personal time and emails between him and the Applicant support that she was entitled to the same flexibility as male workers. The evidence suggested that the Applicant's male colleagues made arrangements to make up the personal time spent away from work and the Applicant did not present evidence suggesting they were not required to do so. While the Applicant's agreement stipulated that she had to make up lost time that same day, the evidence suggested that Mr. Deep was more flexible about lateness in practice, and the stipulation did not appear to result in differential treatment. The witnesses denied hearing the "pulling a Christine" phrase and denied that the Applicant ever raised concerns about it. Even if these comments were made, the Applicant did not suffer adverse consequences as a result.

[25] Finally, the Investigator turned to allegations regarding the circumstances of the Applicant's resignation and made the following findings:

- The Applicant took issue with an assumption of Ms. McMillan that she resigned due to family reasons (taken from an email of March 24, 2014);
- Mr. Deep stated that the Applicant told him she was resigning to spend more time with her family;
- Ms. McMillan stated that Mr. Deep told her the Applicant resigned for family reasons;
- Mr. Ng stated that the Applicant told him she resigned to be closer to home and to move closer to her children's school;

- Mr. Mazzonna stated that the Applicant told him that she was unsatisfied with her most recent performance review and her bonus. He stated that she never told him that she was treated differently because she is a woman;
- Ms. McMillan stated that she tried to schedule an exit interview but did not do so because “something urgent came up”. However, she did not feel an exit interview was necessary because she believed that she understood the Applicant’s reasons for leaving. Moreover, in an email from the Applicant to Mr. Deep, dated April 2, 2014, the Applicant stated that she was not happy with her compensation;
- Ms. McMillan stated that the Applicant could have raised issues with her, the Respondent’s CEO, or head of legal (who were all women), Ms. McMillan’s boss, or the Applicant’s former boss in the Bahamas (Mr. Fritschi).

[26] The Investigator concluded that, according to the evidence, the Applicant resigned because she was dissatisfied with her compensation and not due to differential treatment on a prohibited ground. Mr. Mazzonna stated that she resigned due to her compensation while other witnesses stated that she told them that she resigned for family reasons. The Investigator found that the evidence does not support that she was treated differently due to a prohibited ground.

[27] On March 5, 2018, the Applicant filed a response in which she challenged the Investigator’s process and findings. Essentially, she submitted that the Report raised a number of disputed credibility issues that ought to have been tested by further investigation. The Applicant further challenged the Investigator’s decision not to interview Mr. Fritschi, Ms. Jobe, and Ms.

He. The Applicant argued that Mr. Fritschi was an important witness because she had complained to him about discrimination during her employment with the Respondent in Canada. She submitted that Ms. Jobe and Ms. He could have been located through an internet search and that the Investigator did take adequate measures to contact them.

[28] On April 13, 2018, the Respondent filed submissions in reply disputing the Applicant's arguments.

V. Commission's Decision

[29] On June 20, 2018, the Commission held that no further inquiry into the complaint was warranted. The Commission found no evidence that the Investigator was biased and further dismissed the Applicant's argument that the investigation was not thorough. The alleged contradictions in statements of the Respondent's representatives were fairly minor and do not undermine the Report's overall conclusions.

[30] The Commission dismissed the Applicant's argument that the Report was defective because certain witnesses that she suggested were not interviewed. The Commission stated that an investigator is under no obligation to interview every witness suggested by a party, as the standard is that of "obviously crucial evidence". The Investigator turned her mind to the question as to whether Mr. Frischi would provide obviously crucial evidence before deciding not to interview him. The Investigator appeared to make reasonable efforts to contact Ms. Jobe but was unable to reach her at the time of the investigation. In any event, given the Report's findings, interviewing Ms. Jobe would not have affected the case's outcome.

[31] Finally, the Commission remarked that the Applicant made serious allegations that the Respondent and its representatives fabricated email evidence and that witnesses fabricated evidence. The Commission noted that these are bald allegations not supported by the evidence.

VI. Issues and standard of review

[32] The parties are in agreement that both the reasons contained in the Report and the Commission's decision form the decision under review before this Court. When the Commission's reasons for adopting an Investigator's report are brief, Courts have treated the Report as constituting the Commission's reasoning for the screening decision (*Sketchley v Canada (Attorney General)*, 2005 FCA 404 at paras 36-39; *Sabourin v Canada (Attorney General)*, 2019 FC 294).

[33] The parties also agree that review of whether the Commission's process was fair, namely whether the investigation was sufficiently thorough and neutral, raises issues of procedural fairness which are reviewable on a correctness standard (*Harvey v VIA Rail Canada Inc.*, 2019 FC 569 at para 20; *Joshi v Canadian Imperial Bank of Commerce*, 2015 FCA 92 at para 6). That said, correctness review of whether the investigation was appropriately thorough may require some deference to the Commission's fact-based judgment (*Blackbird v Maskwacis Health Services*, 2018 FC 239 at para 31; *Georgoulas v Canada (Attorney General)*, 2018 FC 863 at para 19).

[34] Issues regarding the Commission's factual findings and weighing of the evidence shall be reviewed on a reasonableness standard (*Georgoulas v Canada (Attorney General)*, 2018 FC 652

at para 46; *Halifax Regional Municipality v Nova Scotia (Human Rights Commission)*, 2012 SCC 10 at para 17).

[35] I find that this matter raises two issues:

1. Did the Investigator breach the Applicant's right to procedural fairness by failing to complete a thorough or neutral investigation?
2. Was the Commission's screening decision reasonable?

VII. Analysis

A. *Preliminary matter*

[36] Before turning to the merits of this case, I would first address a preliminary matter. Both parties have attempted to put forth evidence not contained in the certified tribunal record through affidavits (the Applicant through her own affidavit and the Respondent through the affidavit of Ms. McMillan). However, this Court has held that documents not before the Commission when it made its decision are not properly before this Court on judicial review, even if those documents were before the Investigator upon drafting the report (*E.S. v Canada (Attorney General)*, 2017 FC 1127 at para 42; *Drew v Canada (Attorney General)*, 2018 FC 553 at para 15). That said, this Court has admitted evidence not before the Commission where one of three exceptions is met: 1) it contains general background information that may help the Court understand the issues on judicial review; 2) the information serves to demonstrate procedural defects not in the tribunal record; 3) the documents reveal an absence of evidence available to the Commission when it

made a given finding (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para 20).

[37] In this case, one document has been mutually filed in both the affidavits of McMillan and the Applicant, others were explicitly referenced and quoted by the Investigator in her report, while some documents appear to be contained in the tribunal record and were therefore before the Commission when it rendered its decision. Other documents were not mentioned and there is no indication that they were before the Commission let alone the Investigator.

[38] With this in mind, I find that the mutually filed documents and those explicitly referenced or quoted by the Investigator can be considered as background information in this judicial review (Ms. McMillan's affidavit: exhibit 10 (September 2013 part-time contract); Applicant's affidavit: exhibit 1 (Investigator's Report), exhibit 3 (September 2013 part-time contract), exhibit 6 (Ms. McMillan's email dated March 24, 2014 regarding the Applicant's resignation), exhibit 7 (email from the Applicant to Mr. Deep regarding her resignation), exhibit 10 (complaint to the Commission), exhibit 11 (Respondent's response to the complaint), exhibit 12 (Applicant's reply to the response), exhibit 13 (Applicant's response to the Report), exhibit 15 (decision of the Commission). None of the other exhibits filed in either affidavit are properly before this Court in this judicial review and they will not be considered.

B. *Thoroughness and neutrality of the Commission's decision*

[39] The Applicant submits that the investigation was not sufficiently thorough or neutral for three reasons:

- 1) the Investigator did not speak to three of her key witnesses;
- 2) the Commission failed to consider inconsistencies in the Respondent's evidence and did not meaningfully assess the credibility of that evidence;
- 3) the Commission did not address her submissions in response to the Report.

[40] While the Applicant has framed each of these arguments as both issues of thoroughness and neutrality, they all appear to relate to the issue of whether the investigation was sufficiently thorough. Arguments of neutrality require the assessment of whether or not the Commission “approached the case with a closed mind” or had “pre-determined the case” (*Abi-Mansour v Canada (Revenue Agency)*, 2015 FC 883 at para 51). While not as rigorous as the test for reasonable apprehension of bias – as the Commission is not an adjudicative body – this is nevertheless a steep threshold to meet and must be based on more than a mere suspicion (*Hughes v Canada (Attorney General)*, 2010 FC 837 at paras 23-24).

[41] I find that the Applicant has not pointed to evidence or any particular reason as to why this Court should find that either the Commission or the Investigator exercised their function with a closed mind. Rather, the Investigator addressed each of the Applicant's arguments, interviewed the Applicant and a number of other witnesses, and, by all accounts, appeared to approach the case with an open mind. The Applicant's argument that the Commissioner could have gone further does not reach the threshold required by the test for a lack of neutrality.

[42] I will address each of these arguments regarding the thoroughness of the investigation in turn.

(1) Witnesses not Interviewed by the Investigator

[43] First, the Applicant submits that the Investigator failed to interview three obviously crucial witnesses. She submits that Mr. Fritschi was an obviously crucial witness because the Applicant stated that she spoke to him regarding her experience of discrimination and Ms. McMillan had told the interviewer that the Applicant could have spoken to Mr. Fritschi. Moreover, Mr. Fritschi could have established that the Applicant reported discrimination. The Applicant submits that this would be obviously crucial evidence because the Investigator stated that her failure to report discrimination was one of the reasons for dismissing her complaint.

[44] The Applicant further submits that the Investigator took inadequate steps to locate Ms. Jobe and Ms. He. In particular, Ms. Jobe could speak to systemic issues and Ms. He could speak to the Applicant's personal experience of discrimination and both witnesses therefore would have provided obviously crucial evidence.

[45] The Respondent counters that Ms. McMillan stated that the Applicant could have reported a breach of the Respondent's harassment policy to multiple management or human resources personnel, including Mr. Fritschi. However, the Applicant did not state that she had asked Mr. Fritschi to convey her concerns to the Respondent in Canada, that she had reported a breach of the harassment policy to him, or that she had otherwise asked him to take action.

[46] The Respondent further submits that the Investigator made efforts to contact Ms. Jobe even though she had no obligation to do so. According to the Report, the Applicant admitted that she never spoke to Ms. Jobe about her experience working for the Respondent and could not confirm her suspicions about Ms. Jobe's possible experience of discrimination. The Respondent submits that the Applicant could not extrapolate systemic discrimination based only on her own experience. In the Respondent's view, the request to interview Ms. Jobe was a "fishing expedition" based on speculation.

[47] The Respondent argues that there was no need to interview Ms. He, as she would only be able to report what the Applicant had told her. The Respondent remarks that the Applicant had stated that Ms. He could have spoken about her relationship with the Respondent. However, the other witnesses were able to provide testimony about her relationship with the Respondent.

[48] In summary, the Respondent argues that the investigation was sufficiently thorough for the Commission to fulfil its duty of fairness.

[49] Only witnesses who were "obvious/central players" must be interviewed as the failure to do so may amount to a failure to examine "obviously crucial evidence" (*Wong v Canada (Public Works and Government Services)*, 2018 FCA 101 at paras 14, 23 [*Wong FCA*]). An "obviously crucial" witness generally describes a witness who was directly involved with an applicant's work related experiences, including supervisors and similarly situated co-workers (*Harvey v VIA Rail Canada Inc.*, 2019 FC 569 at para 39). It is well-established that an investigation will not be found to be lacking in thoroughness merely because the investigator did not interview each

witness put forward by a party, as perfection is not the standard (*Slattery v Canada (Human Rights Commission)*, [1994] 2 FC 574; *Drew v Canada (Attorney General)*, 2018 FC 553 at para 35).

[50] The “obviously crucial test” requires that it should have been obvious to a reasonable person that the evidence the Applicant argues should have been investigated was crucial given the allegations contained in the complaint; to make this determination, the Court must place itself at the time of the investigation and consider the information provided to the investigator (*Gosal v Canada (Attorney General)*, 2011 FC 570 at para 54).

[51] In my view, Mr. Fritschi was not an “obvious player” that the Investigator was required to interview. To the contrary, as the Investigator and the Commission remarked, his evidence would have amounted to hearsay statements as to what the Applicant told him at the time she was employed by the Respondent in Canada, while he was working in the Bahamas. At best, Mr. Fritschi could have confirmed that the Applicant stated that she suffered discrimination during conversations between 2012 and 2014, but could not have attested to the truth of those statements, as he would not have personally ascertained how she was treated; and the Applicant did not allege that he spoke to anyone who did. Conversely, the Investigator did interview the Applicant’s immediate supervisor Mr. Deep, the head of Human Resources Ms. McMillan, and a co-worker in her department Mr. Ng—all of whom worked closely with the Applicant in Canada and had first-hand knowledge of the relevant facts. Accordingly, the Commissioner did not fail to conduct a thorough investigation by deciding not to interview Mr. Fritschi.

[52] With respect to Ms. Jobe and Ms. He, I note that the Investigator stated that she attempted to contact each of them through multiple channels and could not reach them. Moreover, neither of Ms. Jobe nor Ms. He was employed by the Respondent at the time of the investigation. The Commission cannot be expected to interview individuals who are not available throughout the period of the investigation, and are no longer employed by the Respondent, especially when the Investigator provides a reasonable justification for not interviewing a given witness (*Wong v Canada (Public Works and Government Services)*, 2017 FC 633 at paras 29-42; aff'd *Wong FCA*; *Brosnan v Bank of Montreal*, 2015 FC 925 at paras 32-37 [*Brosnan*]).

[53] I agree with the Respondent that the Applicant's predecessor Ms. Jobe was not an "obviously crucial witness". In her submissions before the Commission, the Applicant admitted that she had "no idea" what Ms. Jobe would say, but speculated that she also would have experienced differential treatment due to her sex. I agree that this would have amounted to a "fishing expedition" as there was no indication as to what could be expected from an interview with Ms. Jobe. Considering these circumstances and the fact that the Commission is the master of its own process, this was not a stone it was required to turn (*Demitor v Westcoast Energy Inc. (Spectra Energy Transmission)*, 2017 FC 1167 at para 71; aff'd *Demitor v Westcoast Energy Inc. (Spectra Energy Transmission)*, 2019 FCA 114).

[54] With respect to Ms. He – an employee of a different department whose cubicle was situated near the Applicant – it is doubtful that her evidence would be obviously crucial. In her submissions, the Applicant stated that Ms. He could attest to her relationship with the

Respondent and could confirm that the “pulling a Christine” comments had been made. However, both Mr. Deep and Mr. Ng who worked in the Applicant’s department stated that they never heard these remarks and would have condemned them if they did. Moreover, as the Investigator stated, even if these remarks had been made by the Applicant’s co-workers, it is difficult to see how they would amount to differential treatment in and of themselves. Finally, given that Ms. He was not in the Applicant’s department, she presumably would not have been able to comment on the Applicant’s other material allegations, namely whether or not she had been excluded from communication, had received different bonuses and performance evaluations due to her gender, or was otherwise treated differently than male employees.

[55] Accordingly, I find that the Commission did not fail to complete a thorough investigation by not interviewing three of the five living witnesses that the Applicant had proposed.

(2) Failure to address credibility and inconsistencies

[56] The Applicant submits that the investigation was not sufficiently thorough because the Investigator concluded that there was no need for further inquiry due to conflicting evidence. In the Applicant’s view, when there is conflicting evidence, further inquiry is required.

[57] The Respondent submits that the Investigator appropriately considered the evidence before her and addressed each of the fundamental factual issues raised in the complaint.

[58] I am not persuaded by the Applicant’s submission. In this case, the inconsistencies appeared to arise principally from the Applicant’s testimony and the generally consistent

testimony of each other person interviewed by the Investigator, which were at odds with her own.

[59] However, I agree with the Commission that the internal inconsistencies among the Respondent's witnesses appeared to be relatively insignificant, as they related only to alleged exclusion from meetings and communication, and did not appear to justify further inquiry. Namely, inconsistencies between the statements of Mr. Deep and Mr. Ng about who presented to the Executive Committee (whether it was a shared presentation or entirely given by Mr. Ng) was not particularly material to their credibility or the issue as to whether or not the Applicant was treated differently due to her sex or any other prohibited ground. Similarly, Mr. Ng and Mr. Deep differed somewhat in their statements about who was more involved in the preparation of HST returns. However, both the Commission and the Investigator acknowledged that there were some inconsistencies with the evidence on these specific issues, but found that these issues nevertheless did not merit further investigation. Given the apparent immateriality of these issues, I find that this did not hamper the thoroughness of the investigation.

(3) Failure to address the Applicant's response to the Report

[60] Finally, the Applicant argues that the Commission breached her right to procedural fairness by disregarding her response to the Report. In the response, the Applicant pointed to inconsistencies in the Respondent's evidence, made further submissions about the importance of the three unquestioned witnesses, and suggested other means of contacting them. In her view, these statements seriously challenged the Report and the Commission could not fairly dismiss her complaint without providing a response (*Carroll v Canada (Attorney General)*, 2015 FC 287 at paras 68-71 [*Carroll*]; *Brosnan*).

[61] The Applicant further submits that the Commission unfairly did not give her an opportunity to respond to the Respondent's final reply submissions before rendering its decision.

[62] The Respondent disputes the Applicant's argument that the Commission failed to consider her response to the Report. The Applicant's submissions misconstrued the evidence, were speculative, and accused the Respondent of fabricating evidence and pressuring witnesses. The decision addressed these submissions and found that they were baseless. The Commission was not required to address each of the Applicant's submissions as it addressed the fundamental issues raised in her submissions.

[63] The Respondent further submits that the Applicant's right to fairness was not breached by a lack of opportunity to respond to the Respondent's final submissions. The Applicant did not point to any submissions that took her by surprise and she was aware of the case to meet when challenging the Report.

[64] In my view, though its reasons were brief, the Commission adequately responded to the Applicant's submissions regarding the Investigator's Report. While the Applicant relies on the decisions of *Caroll* and *Brosnan*, they stand for the principle that the Commission may fail to conduct a thorough investigation if it does not respond to submissions that "seriously challenge" the findings of an investigator's Report or "go to the heart" of those findings. However, in this case, the Applicant's submissions did not seriously challenge the Report or go to the heart of its findings. Rather, this response reiterated her position that the three proposed witnesses should have been interviewed, and essentially disagreed with the Commission's findings regarding her

exclusion from meetings, the circumstances of the EC presentation, regarding the “pulling a Christine” comments, and the statement that she resigned due to family reasons, in addition to stating that the Respondent had fabricated emails regarding her late arrivals to work. Much of these submissions requested that the Commission delve deeper into the matter by requesting further documents from the Respondent, such as evidence of how bonuses were allocated during her employment and FOB key records to establish her actual arrival times at the office.

[65] In its brief decision, the Commission explained the decision not to examine the witnesses, stated that the alleged contradictions in the Respondent’s evidence were relatively minor, and condemned the Applicant’s allegations of fabricating evidence. It is clear from these conclusions that the Applicant’s submissions were considered and rejected. Moreover, the Commission was not obligated to dig deeper and expend additional resources in demanding evidence from the Respondent when several witnesses who worked with the Applicant categorically contradicted her material allegations.

[66] Moreover, the large majority of contradictions raised by the Applicant were between her own oral evidence and submissions and the evidence of the other witnesses interrogated by the Investigator. Evidently, the fact that an applicant expresses disagreement with the findings of an Investigator cannot be enough to require a referral before the Tribunal under subsection 44(3)(a) of the Act without further evidence to support an applicant’s contentions. If that were the case, the Commission’s screening function would lose all practical purpose.

[67] Finally, I agree with the Respondent that no breach of procedural fairness arises from the fact that the Applicant did not respond to the Respondent's final submissions on the Report. I note that these submissions were filed on April 13, 2018 and the Commission did not render a decision for nearly two months thereafter. While nothing in the Respondent's submissions appeared to take the Applicant by surprise, she would have had every opportunity to make further submissions in response before the Commission formally dismissed her complaint.

C. *Reasonableness of the Commission's decision*

[68] The Applicant submits that the Commission did not provide justified, transparent, and intelligible reasons for dismissing her complaint. The Report and Decision do not allow this Court to determine how the evidence was assessed to reach the conclusion that no discrimination occurred, given the "he-said she-said nature of the complaint". In her view, it was unreasonable for the Commission not to recognize that further inquiry is warranted in spite of the inconsistencies in the Respondent's evidence, which remains in dispute between the parties.

[69] The Respondent submits that the Commission's decision is reasonable. The fundamental issues cannot be characterized as "he-said she-said", as the Investigator found evidence to contradict the Applicant's allegations of discrimination. Moreover, the contradictions raised by the Applicant's evidence and the Respondent's evidence were not material to the issue as to whether the Applicant suffered discrimination.

[70] In this regard, the Commission's role is that of an administrative screening body when it decides whether or not to refer a complaint to the Tribunal for further inquiry. It does not have an

adjudicative role. The Commission's function is not to "determine if the complaint is made out" but it is rather to decide if, under the provision of the Act at issue, an inquiry is warranted having regard to all the facts. The Commission's central function is to assess the sufficiency of the evidence before it (*Kirkpatrick v Canada (Attorney General)*, 2019 FC 196 at para 27; *Cooper v Canada (Human Rights Commission)*, [1996] 3 SCR 85). However, one must also have regard for the difference between a decision of the Commission to refer to the Tribunal and a decision to dismiss the complaint without further inquiry: the latter has been held to require more probing examination to withstand this Court's intervention, as it is a final decision that precludes further inquiry (*Keith v Canada (Correctional Service)*, 2012 FCA 117 at paras 46-48).

[71] I find that the Commission's decision not to refer the complaint to the Tribunal falls within a range of reasonable outcomes that are defensible in respect of the facts and the law. The Commission conducted a probing examination and addressed sufficient evidence to arrive at its determination not to refer the matter to the Tribunal.

[72] Ultimately, the Investigator drafted a detailed Report in which it assessed the evidence on each material issue that the Applicant had raised as a form of differential treatment based on a prohibited ground. However, in each case the Investigator found that the Applicant's contentions were either categorically contradicted by the other witnesses or that there simply was no basis to conclude that they related to a prohibited ground. Namely, the evidence did not provide a basis for concluding that the Applicant could have been excluded from meetings as both her manager and a co-worker in her department contradicted these allegations (Mr. Deep and Mr. Ng); nor did the evidence suggest that her performance evaluations or bonuses were adversely affected due to

her gender (as Mr. Ng received similar performance evaluations and bonuses despite his higher ranking). Moreover, the evidence of Mr. Deep, Mr. Ng, and Ms. McMillan was to the effect that the Respondent was open to accommodating the Applicant's needs for flexibility and reduced hours and that she and her male colleagues did not receive preferential treatment in this regard.

[73] Based on the absence of evidence supporting the Applicant's allegations of discrimination on a prohibited ground and the presence of substantial evidence to the contrary, it was reasonable for the Commission to find that none of the grounds raised in the Applicant's complaint warranted further inquiry.

VIII. Conclusion

[74] The Commission did not breach the Applicant's right to procedural fairness and its decision was reasonable. Accordingly, the application for judicial review is dismissed.

JUDGMENT in T-1540-18

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

The Respondent is entitled to costs.

“Paul Favel”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1540-18

STYLE OF CAUSE: CHRISTINE HOLDER v UBS BANK (CANADA)

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: MAY 28, 2019

JUDGMENT AND REASONS: FAVEL J.

DATED: DECEMBER 12, 2019

APPEARANCES:

Wade Poziomka
Samantha Kompa

FOR THE APPLICANT

Dan J. Shields
Brandin O’Connor

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Ross & McBride LLP
Barristers and Solicitors
Hamilton, Ontario

FOR THE APPLICANT

Shields O’Donnell MacKillop LLP
Barristers and Solicitors
Toronto, Ontario

FOR THE RESPONDENT