

Federal Court



Cour fédérale

**Date: 20200420**

**Docket: T-792-19**

**Citation: 2020 FC 536**

**Ottawa, Ontario, April 20, 2020**

**PRESENT: Madam Justice Simpson**

**BETWEEN:**

**KEVIN HAYNES**

**Applicant**

**and**

**THE ATTORNEY GENERAL OF CANADA**

**Respondent**

**JUDGMENT AND REASONS**

[1] The Applicant has applied for judicial review of a decision dated March 20, 2019 made by a Designated Official at Employment and Social Development Canada [the Decision], in which she accepted four final investigation reports made by an independent investigator [the Investigator] between January and March 2019 [collectively the Reports]. The Applicant had complained that members of management in his workplace had harassed him and discriminated against him primarily by reducing his workload and by failing to put accommodations in place for his autism. This application was brought pursuant to subsection 18.1(1) of the *Federal Courts*

Act, R.S.C. 1985, c. F-7. The self-represented Applicant asks that the decision to accept the Reports be set aside.

[2] For the following reasons, the application for judicial review will be dismissed.

I. **Definitions and Policies**

[3] The definition of harassment is described in the *Policy on Harassment Prevention and Resolution – Treasury Board of Canada Secretariat*. It reads:

**Harassment:** any improper conduct by an individual, that is directed at and offensive to another individual in the workplace, including at any event or any location related to work, and that the individual knew or ought reasonably to have known would cause offence or harm. It comprises objectionable act(s), comment(s) or display(s) that demean, belittle, or cause personal humiliation or embarrassment, and any act of intimidation or threat. It also includes harassment within the meaning of the *Canadian Human Rights Act* (i.e. based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and pardoned conviction).

Harassment is normally a series of incidents but can be one severe incident which has a lasting impact on the individual.

[4] The *Canadian Human Rights Act*, R.S.C., 1985, c. H-6 states the following with respect to discrimination and harassment in the workplace:

**7** It is a discriminatory practice, directly or indirectly,

**(a)** to refuse to employ or continue to employ any individual, or

**7** Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait, par des moyens directs ou indirects :

**a)** de refuser d'employer ou de continuer d'employer un individu;

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|---|--|
| <p><b>(b)</b> in the course of employment, to differentiate adversely in relation to an employee,</p> <p>on a prohibited ground of discrimination.</p> <p><b>14 (1)</b> It is a discriminatory practice,</p>  | <p><b>b)</b> de le défavoriser en cours d'emploi.</p> <p><b>14 (1)</b> Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait de harceler un individu :</p>   |
| <p><b>(a)</b> in the provision of goods, services, facilities or accommodation customarily available to the general public,</p> <p><b>(b)</b> in the provision of commercial premises or residential accommodation, or</p> <p><b>(c)</b> in matters related to employment,</p> <p>to harass an individual on a prohibited ground of discrimination.</p> | <p><b>a)</b> lors de la fourniture de biens, de services, d'installations ou de moyens d'hébergement destinés au public;</p> <p><b>b)</b> lors de la fourniture de locaux commerciaux ou de logements;</p> <p><b>c)</b> en matière d'emploi.</p> |

[5] In her Reports, the Investigator listed the following policies, legislation, and documents as reference materials:

- Policy on Harassment Prevention and Resolution – Treasury Board of Canada Secretariat
- Investigation Guide for the Policy on Harassment Prevention and Resolution and Directive on the Harassment Complaint Process – Treasury Board of Canada Secretariat
- Guide on Applying the Harassment Resolution Process – Treasury Board of Canada Secretariat
- Directive on Applying the Harassment Resolution Process – Treasury Board of Canada Secretariat

- Values and Ethics Code for the Public Sector – Treasury Board of Canada Secretariat
- Policy Framework for People Management – Treasury Board of Canada Secretariat
- Directive on Performance Management – Treasury Board of Canada Secretariat
- Policy on the Duty to Accommodate Persons with Disabilities in the Federal Public Service – Treasury Board of Canada Secretariat
- Telework Policy – Treasury Board of Canada Secretariat
- Canadian Human Rights Act – Parliament of Canada
- Collective Agreement between the Treasury Board and the Professional Institute of the Public Service of Canada
- Duty to Accommodate 5-Step Process – Employment and Social Development Canada (provided by the Applicant)

## II. **Background**

[6] The Applicant accepted employment with Employment and Social Development Canada [ESDC] in 2008. He is a software developer, level CS-02, and from 2010 to May 2018 was a member of one of ESDC's teams called the Corporate Payment Management System Web Service Team [the CPMS Team].

[7] The Applicant says that since he had worked on it since its creation in 2010, he was the most senior member of the CPMS Team.

[8] The Applicant filed the following complaints in March and May of 2018:

- A complaint of harassment against Mr. Patrick Norman [Mr. Norman], the Team Lead of the CPMS Team after September 2017.

- A complaint of harassment and discrimination against Mr. Michael Bungay [Mr. Bungay], the Team Lead of the CPMS Team from early 2013 to April 2016, and from June to late August 2017, and the Applicant's Manager after September 2017.
- A complaint of harassment and discrimination against Ms. Nada Noujaime [Ms. Noujaime], the Applicant's Manager from 2013 to the summer of 2017 and the Acting Director responsible for the CPMS Team after the summer of 2017.
- A complaint of harassment and discrimination against Ms. Vidya Shankarnarayan [Ms. Shankarnarayan], the Director General responsible for 700 employees, including the Applicant, after 2016.

### III. **The Decision and the Reports**

[9] The Investigator reviewed the complaints and wrote the allegations and related claims. They defined the scope of her investigation. In so doing, she would have been guided by the limitation period in the *Guide on Applying the Harassment Resolution Process – Treasury Board of Canada Secretariat*, which appears under “Step 1 – Acknowledging Receipt of the Complaint”. It provides that incidents which occur more than one year before the filing of a complaint are not to be investigated. The complaint form provided to and filled out by the Applicant also sets out this 12-month limitation period.

[10] The Reports will be referred to as the Norman Report, the Bungay Report, the Noujaime Report and the Shankarnarayan Report. The Investigator accepted portions of the complaints and concluded that the Applicant's claims against Mr. Norman and Mr. Bungay were partially founded. She also concluded that his complaints about Ms. Noujaime and Ms. Shankarnarayan were not founded.

[11] In April 2019, the Applicant received the Decision, advising him that the Designated Official had reviewed the Reports and had accepted the conclusions contained therein in their entirety.

IV. **The Issues**

[12] Five issues were before the Court:

The Respondent's preliminary issue:

Should certain exhibits produced by the Applicant be struck from his Record because they were not before the Investigator?

The Applicant's issues:

1. Was the Investigator qualified?
2. Did the Reports give rise to a reasonable apprehension of bias?
3. Did the Investigator breach the Applicant's right to procedural fairness?
4. Were the Reports' conclusions reasonable?

V. **The Standard of Review – Applicant's Issues**

[13] The standard of review on issue 4 is reasonableness. Issues 1, 2 and 3 will be considered on a correctness standard.

VI. **Discussion**

A. *The Respondent's Preliminary Issue:*

Should certain exhibits produced by the Applicant be struck from his Record because they were not before the Investigator?

[14] The Respondent relies on the Affidavit of Amelie Hillman dated July 7, 2019. She is an Advisor at the Harassment Centre of Expertise at ESDC. She stated that the following items were not before the Investigator:

- Exhibit A – “Work tasks/items that I received from managers/supervisors dated June 2016 to September 2017” at pages 56-63 and 67-288;
- Exhibit B – “Performance Agreement related dates from June 2015 to April 5, 2018” at pages 302 to 348;
- Exhibit G – “Meeting notes ranging in dates from June 2016 to December 2017” at pages 519 to 550 and 554-559;
- Exhibit H – “Work Related Emails ranging in dates from September 2016 to May 2018” in its entirety;
- Exhibit I – “Performance Agreement Evaluations 2014 to 2019” from pages 892 to 917;
- Exhibit K – “Images of Human Resource Investigator companies taken on June 6, 2019” in its entirety;
- Exhibit P – “Speaking Notes I received from my union representative on December 6, 2017” in its entirety; and
- Exhibit R – “An email exchange between myself, Mr. Larabie where Mrs. Noujaime was carbon copied ranging in dates from March 1, 2017 to March 2, 2017” in its entirety.

[15] The Applicant stated in his Memorandum of Fact and Law that “Mr. Haynes provided the investigator all of Exhibits A-J, O-R in a binder and email format”. However, I note that there was no affidavit evidence from the Applicant to this effect.

[16] In these circumstances, I accepted Ms. Hillman's evidence and found that these exhibits could only be considered if they related to issues of bias or procedural fairness. For all other purposes they were struck. Neither party suggested that the exhibits were relevant to bias or fairness.

B. *The Applicant's Issues*

1. Was the Investigator qualified?

[17] The Applicant submits that the Investigator was not qualified because her curriculum vitae does not list discrimination or disability as her areas of expertise. He says that in this case she did not refer questions about discrimination and disability to an expert, and noted that there are more qualified investigators for this type of case.

[18] The Respondent submits that the Investigator was qualified. The Investigator's curriculum vitae indicates that she has conducted over 300 workplace investigations and has delivered training to more than 800 investigators on harassment and violence. The Investigator has helped develop policies for fair workplace practices in the area of human rights for multiple government departments. She has worked as a mediator and facilitator on workplace issues. She was also Director of Employment Equity at Algonquin College, where she was responsible for ensuring services would be compatible with the needs of four target groups: women, visible minorities, aboriginal people and persons with disabilities.

[19] In my view, the Investigator's experience in investigating harassment complaints and in developing human rights policies qualified her to conduct the investigation into the Applicant's



complaints. She did not require expertise about autism to consider whether the Applicant was denied work and accommodations.

2. Did the Reports give rise to a reasonable apprehension of bias?

[20] The Respondent set the stage on this issue by referring to *Patanguli v. Canada (Citizenship and Immigration)*, 2015 FCA 291, paragraphs 49-50, wherein the Federal Court of Appeal states:

The Supreme Court of Canada propounded the relevant test to assess the existence of an apprehension of bias in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, at para. 19; it consists in this question: "what would an informed person, viewing the matter realistically and practically — conclude?" about an apprehension that a decision made is biased.

Since decision-makers are presumed impartial, the above-described standard must be rigorously applied. I note that neither the appellant nor his representative raised any objection about the adjudicator's neutrality before she rendered her decision. The points that the appellant is complaining about and all the elements he raised in his memorandum have not convinced me of the existence of an apprehension of bias in the case at bar, both in terms of the investigation committee and the adjudicator.

[21] The Respondent submits that the Applicant has not met the test for bias. The Respondent also submits that the Applicant did not raise bias during the investigation or at any point prior to applying for judicial review.

[22] The Respondent further relies on *Bergeron v. Canada (Attorney General)*, 2015 FCA 160 [*Bergeron*], where an applicant claimed as a matter of procedural fairness that an investigation

into her human rights complaint was not sufficiently thorough. The Federal Court of Appeal states at paragraphs 74 and 76:

[...] While an investigation must be thorough, an investigator need not pursue every last conceivable angle [...]

[...]

- Only “fundamental issues” need be investigated so that complaints can receive the “broad grounds” of the case against them.

[...] The test in *Slattery* (T.D.), above, aff'd C.A., above, is whether there is an "unreasonable omission" in the investigation or the investigation is "clearly deficient." The investigator's report need not be an encyclopaedia of everything submitted. The focus must be on the substance of the investigator's findings, not matters of form.

[23] The Applicant submits that the Investigator was biased. He stated the issue in this way:

Whether the investigator tried to exonerate the respondents of Mr. Haynes's allegations by way of bias, personal prejudice, ignoring documentary evidence, believing perjured testimony?

[24] In his Memorandum of Fact and Law, the Applicant outlines several alleged instances of bias. For example, under the heading “Submissions”, in paragraph 22, he submits that:

The investigator shows her blatant bias and disregard for the evidence, facts, information and testimony where she has concluded that Mr. Haynes was accommodated by his management.

As well, in paragraph 101 of his Memorandum, he provides the following second example:

In point 86 the investigator demonstrated that the investigator was unable to complete her investigation on the direction Mr. Bungay gave Mr. Norman. The investigator demonstrated her bias in making a conclusion on this allegation despite the fact she was unable to determine Mr. Bungay's role and impact on how Mr. Norman managed and supervised Mr. Haynes.

[25] Regarding the Applicant's first example, I have reviewed the Investigator's conclusions in each Report and I note that at page 33, paragraph 150 of the Noujaime Report, the Investigator concluded that the Applicant was "unofficially accommodated by allowing him to work from home whenever necessary". In my view, this conclusion accurately reflected the evidence given by Ms. Noujaime and recorded at page 24, paragraph 45 of the Report. The Applicant has overstated the Investigator's conclusion. There was no suggestion that the accommodation was complete or final. It was unofficial and only involved working from home. In my view, this conclusion does not indicate bias.

[26] Regarding the Applicant's second example, point 86 at page 41 of the Bungay Report reads:

No witness or documentary information available impugns either Mr. Norman or Mr. Bungay's credibility and therefore, information available is inconclusive on the direction Mr. Bungay gave to Mr. Norman regarding the supervision of Mr. Haynes.

[27] In my view, this conclusion does not demonstrate bias. The Investigator was faced with conflicting evidence in that Mr. Norman said he was directed by Mr. Bungay not to assign work to the Applicant and Mr. Bungay denied giving Mr. Norman those instructions. The Investigator was simply concluding that, because she had no other basis for reaching a finding about the credibility of each witness, she could not prefer one over the other and could not decide whether or not the direction had been given.

[28] I should note that notwithstanding her conclusion that she could not determine whether Mr. Norman was told by Mr. Bungay not to give work to the Applicant, the Investigator

ultimately upheld the Applicant's complaint and found Mr. Norman responsible for failing to assign work to the Applicant. The Norman Report at pages 37-38, paragraph 220 reads in part:

... harassment ... has occurred as follows:

- a) Mr. Norman failed to maintain an appropriate supervisor-subordinate relationship by withholding taskings . . .

[29] At the hearing, the Applicant also submitted that the Investigator showed bias when she found certain allegations constituted "double jeopardy" even though they were not identical. The Applicant illustrated his point with reference to Claims A, C, and D under Allegation One in the Noujaime Report.

[30] Those claims read as follows:

- A. "From January 2017 to May 2018 Nada has not observed the accommodations for my disability. My doctor's note stipulates: 1) that I need to have work to keep busy at work and 2) I need to be made aware of any mistakes or issues, so that they could be addressed and resolved."
- C. "From August 2017 to May 2018 Nada as my Director oversaw a decline in my workload to the point I no longer had any work being assigned to me. Therefore, I was not able to participate and contribute to the project that I had worked on. In May 2018 at an all staff meeting, Nada said we have a lot of work and need to hire more people."
- D. "From January 2017 to May 2018, Nada has I [sic] have been devalued, unrecognized and unrewarded by being excluded from work activities. This has left me unengaged, unmotivated, experiencing high levels of anxiety, isolated and feeling worthless whenever I go to work. Because I watch the rest of my team working, while I have no work assigned to me. During this period of time, I have seen new staff being hired on my current team and given work that I could have done."

[31] The Investigator concluded that Claims C and D overlapped with Claim A so that to consider C and D would amount to double jeopardy.

[32] In considering Claim A, the Investigator thoroughly explored the Applicant's assertion that he was not kept busy at work. This issue arose again in Claim C and to that extent the claims were similar. However, Claim C also raised a new matter dealing with a staff meeting at which new hiring was discussed. The Investigator separately considered this matter at page 36, paragraphs 193-196. This was reasonable and not indicative of bias.

[33] The Investigator considered most, but not all, of Claim D. As in Claim A, the focus of Claim D was again the Applicant's lack of work. However, his claim to have seen new staff hired on his CPMS Team and given work he could have done was new and the Applicant is correct, it was not considered by the Investigator.

[34] However, the difficulty I have is that the Applicant never provided specific evidence to support his claim of new staff being hired for his CPMS team. The CPMS Team was an 8-person team. If the allegation had been true it would have undermined management's allegation that the CMPS Team's work changed and slowed to some degree in the fall of 2016. It is, therefore, reasonable to expect that the Applicant would have identified any new team members by name and would have provided a description of the assignments they received which he allegedly could have completed. In the absence of any such evidence and in light of the decision in *Bergeron*, there was no need for the Investigator to pursue this aspect of the claim and her failure to do so is not indicative of bias.

3. Did the Investigator breach the Applicant's right to procedural fairness?

[35] The Applicant raises an issue of procedural fairness based on the fact that the Investigator only interviewed him once, for two hours, during an eight month investigation.

[36] The Respondent submits that the Applicant was provided a meaningful opportunity to be heard and participate in the investigative process. The Investigator interviewed the Applicant and the witnesses he identified, considered his documentary evidence and provided him with copies of her preliminary reports and the policies on which she relied, and gave him an opportunity to comment. The Applicant did in fact respond to the preliminary reports on January 7, 2019.

[37] The Investigator stated that she considered his comments on the preliminary reports in preparing her final reports. An example can be found in the Norman Report at page 79, paragraph 175, where the Investigator states "In his response to the preliminary report, Mr. Haynes reported that he did not inform Mr. Norman personally of his disability or required accommodations (Reference 1)." She also considered the documentary evidence submitted by the Applicant.

[38] There is nothing before me to indicate that the Applicant complained about his interview length or raised any other issues of procedural fairness during the Investigation.

[39] In my view, in all these circumstances, the duration of the Applicant's interview does not suggest that there was a breach of procedural fairness.

4. Were the Reports reasonable?

(a) ***General Observations***

[40] The Applicant raises numerous issues in his Memorandum of Fact and Law. However, his concerns are sometimes rooted in a misunderstanding of the Investigator's task.

[41] For example, the Applicant takes issue with the Investigator's preference for the evidence of one witness over that of another as she decided the factual issues. He is also concerned with her application of the presumption of innocence where the accused person asserts one thing and the complainant asserts something different. However, the Investigator must make judgments about conflicting evidence to make findings. Doing so is not in itself unreasonable.

[42] The Applicant also frequently alleges that the Investigator failed to take into account the negative emotional impacts he experienced and failed to interview him about these impacts. However, the Investigator did take into account these negative emotional effects in her conclusions. See for example the Norman Report, page 37, paragraph 213 where she said "Mr. Haynes said Mr. Norman's actions made him feel excluded and increased his feelings of anxiety, worthlessness and confusion." As well, in the Bungay Report, page 34, paragraph 194 she stated "Mr. Haynes said Mr. Bungay's actions elevated his feelings of stress and lowered his self-esteem, made him feel unengaged, unmotivated, anxious and isolated."

[43] More importantly, the negative emotional impacts he experienced were never questioned by any of the witnesses. Accordingly, the Investigator quite properly did not ask the Applicant to elaborate about these negative emotional effects. To do so would have been unnecessary.

[44] Additionally, the Applicant often alleges that the Investigator ignored certain evidence. However, in most of these instances, she considered the evidence but found that it was outweighed by other evidence or was not material to her conclusions. For example, the Applicant alleges in his Memorandum of Fact and Law at paragraph 103:

The investigator ignores Mr. Haynes doctor's note (Exhibit E page 435) that states Mr. Haynes needs to be told in writing why he does not have work. Mr. Bungay did not tell Mr. Haynes why he had no work in writing, which demonstrated Mr. Bungay's failure to accommodate Mr. Haynes.

The Investigator did not ignore the doctor's note. Instead, her conclusion was that Mr. Bungay did not receive the note. For this reason the Applicant's allegation that Mr. Bungay failed to follow the accommodations required by the doctor's note was determined to be unfounded.

[45] Ultimately, the Applicant's allegations and claims and the Investigator's Reports are concerned with two fundamental questions being whether the members of management improperly reduced his workload, and whether they failed to respond appropriately to his request for accommodations. I discuss these concerns in my analysis of the Reports.

(b) ***The Norman Report***

[46] As noted above, Mr. Norman became the leader of the Applicant's CPMS Team in September 2017. In that role, he would normally have been responsible for assigning work to the Applicant and for reviewing his performance. The Investigator concluded that Mr. Norman had harassed the Applicant by failing to provide him with work and by failing to hold performance related discussions.



[47] Allegation One read:

The complainant, Mr. Kevin Haynes alleges that he was harassed by the respondent, Mr. Patrick Norman when he failed to accommodate his disability as follows:

[48] The Claims under Allegation One read as follows:

- A. “Ever since I disclosed to management that I had a disability and I needed accommodation in July 2016, work conditions for myself had started to deteriorate and I have had numerous meetings with management to try and resolve this matter to no avail. I presented management with a doctor’s note to give them guidelines on what accommodations would help me at work, unfortunately management had largely ignored most of the accommodations and stuck to the claims they do not know how to manage me because of my disability. Patrick Norman has not made no effort to be even [sic] try to be fair, manage, accommodate, support, and encourage myself since becoming a team leader in August 2017 until the present.”
- B. “Management has consistently used my disability as a basis for barely interacting with me, giving me little to no work, isolating me from the team, giving me a negative PA evaluation and not knowing how to manage due to my disability. Currently I am experiencing symptoms from being harassed and bullied such as: Low self-esteem, anxiety, stress, feeling of worthlessness, confusion, hurt, betrayal and discriminated for having a disability.”  
  
[PA as used above and elsewhere in these reasons means performance assessment].
- C. “Patrick has not distributed work amongst the team fairly, where some members on the team has had work tasks assigned to them throughout the year and I have been assigned no work all year long. My doctor’s note stipulates: 1) that I need to have work to keep busy at work and 2) I need to be made aware of any mistakes or issues, so that they could be addressed and resolved. Patrick has not assigned me any work items since become team leader in August 2017. Patrick has assigned work to other members on my team throughout the course of the year. Patrick has not built a culture of teamwork where he has purposely

excluded me from teamwork activities by assigning little to no work since he became a team leader from August 2017 to present. Patrick has not shown me any encouragement or respect since he became a team leader from August 2017 to the present. Patrick has excluded me from being able to contribute to the team by not assigning me any team related activities throughout the course of the year.”

- D. “I am a visible minority with a disability and Patrick has not demonstrated understanding nor acceptance of me by not discussing my work accommodations, meeting with me to understand how he would best be able to work with my disability. Patrick has avoided me by not having any conversations with myself throughout the course of the year, with regards to work related matters such as performance, expectations, accommodations for my disability.”

[49] Allegation Two states:

The complainant, Mr. Kevin Haynes alleges that he was harassed by the respondent, Mr. Patrick Norman when he undermined his performance and excluded him from his team as follows:

[50] The Claims under Allegation Two read as follows:

- A. “Since Patrick has become a team leader in August 2017 to the present, I have had little to no opportunities to participate and contribute to our team’s work environment by receiving little to no work, work related tasks and/or goals.”
- B. “Since Patrick has become a team leader in August 2017 I have been devalued, unrecognized and unrewarded by being excluded from work activities. This has left me feeling unengaged, unmotivated, experiencing high levels of anxiety, isolated and feeling worthless whenever I go to work. Because I watch the rest of my team working, while I have no work assigned to me.”
- C. “Patrick has not met with me even once throughout the time he has started at team leader in August 2017 to the present in order to see what my qualities and strengths are. Since becoming team leader in August 2017 to the present, Patrick has not met with me to discuss my work

environment, to discuss any issue/problems that may have arisen during the course of the work year. Since becoming team leader in August 2017 to the present, Patrick has shown me no support in any form, where he has not spoken to me about my work, his expectations for me, establishing goals to strive for during the course of the year.”

[51] In Allegation One, Claims A, B, and D, and Allegation Two, Claim D, the Applicant alleged that Mr. Norman ignored and failed to accommodate his disability, failed to discuss his accommodations with him, and used his disability as a basis to limit interacting with him.

[52] In my view, the Investigator reasonably found that the evidence did not support Allegation One, Claims A, B, and D. She noted that the Applicant wrote in his response to the Norman preliminary report that he did not inform Mr. Norman of the accommodations he required. The Investigator found no evidence to demonstrate that Mr. Norman was included in correspondence regarding the Applicant’s accommodation. Further, there was no evidence that the Applicant’s functional limitations were disclosed to Mr. Norman. The Investigator found that the only accommodation known to Mr. Norman was that the Applicant was to work from home as necessary.

[53] The Investigator concluded that it was more likely than not that Mr. Norman was unaware of the Applicant’s autism, accommodations, and functional limitations. Accordingly, she found there was no evidence that Mr. Norman used the Applicant’s disability as a basis for not providing him work and for not holding performance-related discussions. It also reasonably follows, as the Investigator concluded, that since Mr. Norman was unaware of the Applicant’s

autism, Mr. Norman did not say that he did not know how to manage the Applicant because of his disability.

[54] In Allegation One, Claim C, and Allegation Two, Claims A, B, and C, the Applicant alleged that Mr. Norman withheld work from the Applicant and did not have conversations with him about his performance. In other words, these claims relate to work assignments and feedback on performance.

[55] The Investigator found that these claims were partially founded and, in my view, her conclusions were reasonable for the following reasons.

[56] The Investigator found that as CPMS Team Lead, Mr. Norman was the primary management contact for employees and was responsible for monitoring their work. The Investigator also found that the evidence was inconclusive about whether Mr. Bungay told Mr. Norman that he would manage the Applicant instead of Mr. Norman. However, if such an arrangement had been made, the Applicant was not made aware of the change, and he therefore believed that Mr. Norman was responsible for assigning him work. The Investigator concluded that Mr. Norman committed harassment in that he knew or ought to have known that failing to provide the Applicant with work and failing to hold performance-related discussions would cause him to feel isolated and confused.

[57] However, the Investigator found there was no evidence that Mr. Norman purposely excluded the Applicant from teamwork activities or that he failed to treat the Applicant with

respect. Lastly, she concluded that Mr. Norman's actions were mitigated by the fact that it was his first leadership role, and that he had not been provided with training about his new supervisory role.

[58] Allegation Three states:

The complainant, Mr. Kevin Haynes, alleges that he was harassed by the respondent, Mr. Patrick Norman when he used Mr. Haynes' PER as a tool of discrimination on the basis of disability:

[59] The Claims under this allegation state:

- A. "Prior to telling my management about my disability in July 2016, management had no issues with my work performance. Then in 2017 management gave me a PA rating of Succeeded minus which indicates that I was no longer able to successfully perform in my position anymore. Then when I grieved the succeeded minus rating, they changed by rating to cannot assess because my accommodations have not been in place. To my knowledge my accommodations are still not in place and therefore I will still not be able to be assessed; this has negatively impacted my career by not being able to go on training, act and use the PA to develop my skills and abilities."
- B. "There are team meetings and I am invited to all of them. Up to my last PA evaluation (2016) I have asked for work before and I thought I was showing initiative. Then in my PA evaluation, one of the reasons for me receiving a failing evaluation (succeeded minus) was because I asked for work, instead of finding work on my own. That's why I did not ask for work, because it would impact my PA negatively, which works against my goal for receiving a very good PA evaluation of at least succeeded plus or higher. Therefore, being penalized for asking for work and not receiving work has put me in a very vicarious position; where either asking for work or not asking for it impacts me negatively. I have a social disability really [sic] puts me at a disadvantage of knowing how to handle this type of situation."

[60] The Investigator found that Mr. Norman played no role in the Applicant's performance review. In my view, she reasonably found that Mr. Norman was not the Applicant's CPMS Team Lead when the Applicant received a rating of "cannot assess" on his 2016-2017 Performance Assessment. Instead, the Investigator found that Mr. Bungay, Mr. Larabie, and Ms. Noujaime were responsible for the "cannot assess" rating on the 2016-2017 Performance Assessment. Further, the Investigator found that Mr. Norman did not provide input about the Applicant's performance assessments prior to becoming Team Lead in September 2017.

[61] Allegation Four provides as follows:

The complainant, Mr. Kevin Haynes alleges that he was harassed by the respondent, Mr. Patrick Norman when he retaliated against him for filing a grievance (re: PER) by removing duties assigned to him as follows:

[62] The Claims under Allegation four are:

- A. "Filing a grievance over my 2016-2017 performance assessment [...] has resulted in my workload declining to the point where I no longer get any work assigned to myself."
- B. "In late July 2017 after my PA grievance hearing with management; my workload started to diminish. From October 2, 2017 to April 4, 2018 I have not received any work during that span of time. The number of work-related emails and items reflect this."

[63] The Investigator concluded that Mr. Norman did not retaliate against the Applicant as a result of the Applicant's grievance, since there was no evidence to suggest that Mr. Norman was seeking revenge. In my view, this conclusion was reasonable particularly since the Investigator had earlier concluded that Mr. Norman did not participate in the performance evaluation which the Applicant grieved in October 2017.

(c) ***The Bungay Report***

[64] Mr. Bungay was the Applicant's Team Lead from early 2013 to April 2016, and from June to late August 2017, and the Applicant's Manager after September 2017. As Manager, Mr. Bungay would normally have been responsible for putting in place the Applicant's permanent accommodations and ensuring he had performance expectations and goals. The Investigator found that he had harassed the Applicant by failing to follow up on his request for accommodation and failing to hold performance-related discussions.

[65] Allegation One states:

The complainant, Mr. Kevin Haynes alleges that he was harassed by the respondent, Mr. Michael Bungay when he failed to accommodate his disability as follows:

[66] The related Claims are as follows:

- A. "From July 2017 to December 2017 Michael has not observed the accommodations for my disability. My doctor's note stipulates: 1) that I need to have work to keep busy at work and 2) I need to be made aware of any mistakes or issues, so that they could be addressed and resolved."
- B. "From August 2017 to December 2017 Michael has [not] been transparent, candid, honest and fair with me. In July-August 2017, Michael assigned me work which I completed but then in September-December 2017 my workload declined to nothing for reasons unknown to me. From August-December 2017 my roles and responsibilities within diminished to the point where I was no longer being utilized."
- C. "From September 2017 to December 2017 as my acting manager Michael oversaw to my work load eventually being reduced to nothing, oversaw a decline in my workload to the point I no longer had any work being

assigned to me and avoided contact with me in person and email once he started to reduce my workload.”

- D. “From September 2017 to December 2017 Michael stopped utilizing me despite the fact that I have been on CPMS from the inception of the project. Where I have gained a lot of skills and abilities that are very useful to the CPMS Web Service project. From September 2017 to December 2017 Michael limited my contributions to the team by reducing my workload to nothing over time. Michael devalued myself as being an asset to the team.”
- E. “I am a visible minority and Michael has not demonstrated understanding nor acceptance of me by not discussing my work accommodations, meeting with me to understand how he would best be able to work with my disability. Michael has not discussed my performance and to set performance goals and expectations from July 2017 to December 2017. From July 2017 to December 2017 has [sic] not discussed my workplace accommodation with myself and thus he is not able to understand how this impacts me and my work environment.”

[67] Some background is needed for Claim A. In the timeframe under consideration (roughly 2016-2018) there were 2 occasions on which the Applicant’s doctor suggested accommodations. The first was on December 1, 2016 when he provided a handwritten note listing nine accommodations [the 2016 Note] and the second was in September 2017 when he was asked to provide comments on two of his earlier accommodations on a Fitness to Work and Functional Abilities Assessment Form [the Fitness and Function Form].

[68] It is important to understand that if the only document one saw was the Fitness and Function Form one would conclude that only two accommodations had been recommended on the 2016 Note. They were the ability to work from home and optional participation in social functions. The reader would not understand that seven other means of accommodation were also



included in the 2016 Note. Among them was a request to keep the Applicant busy at work and to inform him if he made mistakes associated with his work.

[69] Against this background, it is my view that the Investigator reasonably found that the evidence did not support Claim A. There was no evidence that Mr. Bungay ever received the 2016 Note which set out the accommodations referred to in Claim A. The Investigator found instead that Mr. Bungay only received medical information from the Applicant's doctor in the Fitness and Function Form. It only said that the Applicant should be allowed to avoid social functions and work from home. Further there was no evidence that Mr. Bungay failed to provide those accommodations on an informal basis.

[70] The Investigator found that there was no evidence from the Applicant or others that he ever made any mistakes.

[71] The Investigator's conclusions regarding Claims B, C and D were reasonable for the following reasons.

[72] The Investigator found there was no evidence that Mr. Bungay reduced the Applicant's workload. She noted that Mr. Bungay sent an email on September 8, 2017 to the Applicant and his colleagues outlining the workload and expectations for the CPMS Team. The Investigator found that there was no evidence which demonstrated that Mr. Bungay oversaw the reduction of the Applicant's workload. This was a reasonable conclusion.

[73] The Investigator concluded that since the Applicant was working remotely from home two or three days per week, and since Mr. Bungay had become his Manager and was no longer his Team Lead, it was reasonable to believe their interactions reduced in number after Mr. Bungay's promotion to Manager in late August 2017.

[74] The Investigator found that no evidence showed that Mr. Bungay failed to demonstrate acceptance of the Applicant.

[75] Regarding Claim E, the Investigator did conclude that Mr. Bungay committed harassment. She found that as Manager of the CPMS Team, Mr. Bungay was responsible for discussing the Applicant's accommodation request with him and ensuring the Applicant had performance expectations and goals. However, he failed to follow-up on the Applicant's request for permanent accommodation and failed to hold performance-related discussions with him, which he knew or ought reasonably to have known would cause the Applicant to feel isolated, anxious and unengaged. In my view, this conclusion was reasonable.

[76] Allegation Two provides:

The complainant, Mr. Kevin Haynes alleges that he was harassed by the respondent, Mr. Michael Bungay when he undermined his performance and excluded him from his team as follows:

- A. "From July 2017 to December 2017, Michael has not shown me any encouragement, his attitude toward me has not helped me to succeed/adept[sic]/integrate in the team, nor has given me any opportunities to learn new skills and/or abilities, and to be innovative in my work environment. I feel discouraged when I have not had any conversations with my manager about my work, performance and workplace."

- B. “When Patrick Norman became my team leader in late August 2017, he never spoke to me or even assigned me work until April 2018. Michael was his supervisor from late August 2017 to December 2017, which I believe played a part in the way he treated and harassed me. Because I had very little contact with Patrick before August 2017.”

[77] The Investigator found that the documentary evidence indicated that Mr. Bungay assigned tasks to the Applicant from July to September 2017. The Investigator noted that Mr. Bungay stated that in September 2017, the CPMS Team experienced a decline in developmental work and instead became responsible for reviewing the requirements for the OAS-SIS system and providing feedback. As noted above, the Investigator found that Mr. Bungay sent an email on September 8, 2017 to the Applicant and his Team colleagues outlining the workload for the CPMS Team and offering opportunities to employees with aspirations to move to the next level by assisting the Team Lead. The Investigator found that no evidence demonstrated that Mr. Bungay was not respectful and polite in email communications with the Applicant. On the record before me, these conclusions were reasonable.

(d) ***The Noujaime Report***

[78] Ms. Noujaime was the Applicant’s Manager until July 2017 when she was promoted to Acting Director and became indirectly responsible for 80 employees. As Manager, she would have been expected to take steps to establish his permanent accommodations. However, this would not have been a normal part of her role as Acting Director. The Investigator found that none of the Applicant’s claims against Ms. Noujaime were founded.

[79] The Investigator considered the Applicant's allegations concerning failure to observe his accommodations, an alleged statement by Ms. Noujaime that he could not get acting opportunities because of his disability, and retaliation for filing a grievance.

(i) Allegation One

[80] The allegation was that Ms. Noujaime harassed the Applicant by failing to accommodate his disability.

[81] The Claims under this allegation read:

- A. "From January 2017 to May 2018 Nada has not observed the accommodations for my disability. My doctor's note stipulates: 1) that I need to have work to keep busy at work and 2) I need to be made aware of any mistakes or issues, so that they could be addressed and resolved."
- B. "I have not heard anything else about this process nor been contacted by management to discuss my accommodations. I am still waiting to ensure that my accommodations are permanently put in place up to the time I am writing this, May 2018."
- C. "From August 2017 to May 2018 Nada as my Director oversaw a decline in my workload to the point I no longer had any work being assigned to me. Therefore, I was not able to participate and contribute to the project that I had worked on. In May 2018 at an all staff meeting, Nada said we have a lot of work and need to hire more people."
- D. "From January 2017 to May 2018, Nada has I [sic] have been devalued, unrecognized and unrewarded by being excluded from work activities. This has left me unengaged, unmotivated, experiencing high levels of anxiety, isolated and feeling worthless whenever I go to work. Because I watch the rest of my team working, while I have no work assigned to me. During this period of time, I have seen new staff being hired on my current team and given work that I could have done."

- E. “From January 2018 to February 2018, as my Director Nada continued to the [sic] practice of not utilizing me despite the fact that I have been on CPMS from the inception of the project. Where I have gained a lot of skills and abilities that are very useful to the CPMS Web Service project. In an all-staff meeting in May 2018, Nada said that the teams are very busy and that they are continuing to hire new staff. Given the fact, I do not have any work, I was very hurt and disappointed to hear that there is a lot of work available, but I am purposely being isolated from the project duties, activities and responsibilities of my current team.”
- F. “From May 2017 to May 2018, Nada had not demonstrated understanding nor acceptance of me by not discussing my work accommodations, meeting with me to understand how he [sic] would best be able to work with my disability.”

[82] I have found that the Investigator’s conclusions about Claims A to F are reasonable.

[83] Regarding Claim A, two matters are raised; adequate work and discussion about mistakes. The Applicant acknowledges that he had adequate work while Ms. Noujaime was his Manager and responsible for his assignments. His shortage of work did not become acute until October 2017 at a time when Ms. Noujaime was no longer his Manager. She became his Acting Director in the summer of 2017 and remained in that position until he left the CPMS Team in May 2018. In my view, it was reasonable of the Investigator to conclude that the Applicant’s claim that she had not provided adequate work had not been demonstrated. The Investigator also concluded that there was no evidence to substantiate the allegation that Ms. Noujaime failed to advise the Applicant of any mistakes he may have made while she was his Manager.

[84] Claim B deals with the provision of permanent accommodations.

[85] The Investigator addressed this issue and concluded at page 36, paragraph 190 that Claim B did not attribute the conduct to Ms. Noujaime and for that reason, it could not be harassment on her part. This was a reasonable conclusion.

[86] Claims C, D and E deal with workload, and I considered them above. However, comments made by Ms. Noujaime at the all staff meeting in May 2018 caused the Applicant distress because he perceived that others were busy and new staff members were being hired while he had no work. Ms. Noujaime explained to the Investigator that the meeting involved 80 staff members, most of whom were not on the Applicant's team. She acknowledged that she said that tight deadlines and a lot of work were on the horizon and that new people had to be hired. However, her evidence was that these comments were not directed at the CPMS Team because its work was in "an incredibly good state." The Investigator accepted her evidence, and in my view this was reasonable.

[87] With regard to Claim F, the evidence shows that from May 2017 until she became Director in July 2017, Ms. Noujaime was actively communicating with the Applicant with regard to the letter to be sent to his doctor and his making an appointment with his doctor to consider the Fitness and Function Form. After she became Director, the ESDC policy, titled Duty to Accommodate Five Step Process, which gave responsibility for accommodations to Managers, no longer applied to Ms. Noujaime.

(ii) Allegation Two

[88] This allegation reads as follows:

The complainant, Mr. Kevin Haynes alleges that he was harassed by the respondent, Ms. Nada Noujaime, in a meeting on July 20, 2017 when she discriminated against him on the basis of disability as follows:

“ . . . Nada said that she did not know how to manage me because of my disability and that she did not give me an acting opportunity because of my disability.”

[89] The Applicant said that this statement was allegedly made by Ms. Noujaime at a meeting when four others were present. The Investigator learned that:

- Ms. Noujaime denied making the statement;
- Ms. Chartier declined to comment about whether the statement had been made;
- Mr. Desilets was present and said that this statement was not made;
- Mr. Ladouceur said he was not at the meeting.

[90] In these circumstances, it was reasonable of the Investigator to conclude that the allegation had not been supported.

(iii) Allegation Three

[91] This allegation reads:

The complainant, Mr. Kevin Haynes alleges that he was harassed by the respondent, Ms. Nada Noujaime when she retaliated against him for filing a grievance (re: PER) by impressing a negative predisposition of him to his superiors and encouraging his coworkers not to communicate with him as follows:

[92] The Claims are as follows:

- A. “Ever since the grievance I filed against Ben and Nada in May 2017; Patrick Norman, Eric Nolet and Michael Bungay has subsequently avoided me and tried to have as contact [sic] with me as possible. I have also had no contact with Nada after I filed my grievance in May 2017.”
- B. “When Patrick Norman and Michael Bungay became my team leader and manager, they had a negative predisposition towards me. In June 2017 to August 2017 I have seen Patrick and Michael speaking to Ben and Nada. I was negatively impacted by the way they ended up treating me in the future.”
- C. “From May 2017 to May 2018, Nada avoided contact with me in person. Nada’s staff who has or had managed me ignored me which leads to me being isolated.”

[93] The Investigator concluded that Ms. Noujaime had no supervisory role in connection with the Applicant after she was promoted in the summer of 2017 and accepted her evidence that she had an increased workload, took leaves for vacation and training, and worked different hours from the Applicant when he was in the office. As well, he frequently worked remotely. In my view it was reasonable of the Investigator, in the absence of any evidence to the contrary (apart from the Applicant’s opinion), to conclude that the reduced contact between Ms. Noujaime and the Applicant was not as a result of his filing a grievance of his PA for 2016-2017.

[94] Similarly, there was no testimony or documentary evidence to support Claims B and C. Ms. Noujaime denied speaking negatively about the Applicant to Mr. Bungay or Mr. Norman and she repeated her earlier evidence about the reasons for her reduced contact with the Applicant.



[95] In my view, these conclusions were reasonable because the evidence shows that Ms. Noujaime did have normal contact with the Applicant before the summer of 2017 while she was still his Manager.

(e) ***The Shankarnarayan Report***

[96] Ms. Shankarnarayan was a Director General at a department within ESDC and was responsible for 800 employees. She met with the Applicant once following his grievance hearing on December 8, 2017 [the Meeting]. As noted above, the grievance dealt with the Applicant's objections to the performance assessment he had received for 2016-2017. The Meeting was attended by the Applicant, Ms. Shankarnarayan, Nicolas Desilets, who was a Labour Relations Advisor, and Marie-Claude Chartier, who was the Applicant's union representative. The Investigator found that the Applicant's allegation that Ms. Shankarnarayan had harassed him was not founded.

[97] The Applicant's allegation was as follows:

The complainant, Mr. Kevin Haynes alleges that he was harassed by the respondent, Ms. Vidya Shankarnarayan when she failed to accommodate his disability as follows:

[98] The related Claims state:

A. "During the course of a meeting I had with Vidya, Nicolas Desilets (Human Resource [sic] representative), Marie-Claude Chartier (my union representative) at a grievance hearing in December for my PA, I had disclosed to her that I was being harassed, my accommodations for my disability has been violated. In that meeting we reviewed my accommodations for my disability and she concluded that a lot of those accommodations had not been observed by management staff. She did offer to find me another

position on another team, but I told my union representative that I do not want to switch teams because of the issues and concerns I brought to Vidya's attention. Subsequently she told me that she would look into this matter and it has been more than three months and I have not been contacted by her to be informed about the status of her investigation."

- B. "I told Vidya, that I was not receiving any more work from my team leader and manager. I told Vidya that I have been trying to get accommodation for my disability from management and I have been unsuccessful from July 2016 to present December 2018. I told Vidya, that management has not followed nor implemented various steps from the policy on duty to accommodate. I told Vidya that management has refused to following the accommodations prescribed in my doctor's note that I gave to management in December 2016. I went through the doctor's note with her to tell her which accommodations management has not followed. It was concluded that management has not followed most of the accommodations in my doctor's note. I told Vidya that management told me that I could not act because I had disability [sic] and they did not think that I could handle acting because of my disability."

[99] Ms. Shankarnarayan said that the Applicant never mentioned that he experienced harassment in the workplace due to a reduced workload and that she did not offer to follow-up or investigate that issue. Her evidence on these matters was corroborated by Mr. Desilets. Accordingly, the Investigator's conclusion that harassment had not been discussed was reasonable.

[100] The Investigator also concluded that Ms. Shankarnarayan and the Applicant discussed the list of accommodations in the 2016 Note and the fact that most of his doctor's suggestions had been ignored. In response, she offered to move him to another position but he declined her offer. Again Mr. Desilets provided corroborating evidence. I am persuaded that the Investigator reasonably concluded that this conduct did not constitute harassment.

**JUDGMENT IN T-792-19**

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

1. The Application for judicial review of the Decision is hereby dismissed.
2. Since the Respondent did not seek costs, there is no order as to costs.

"Sandra J. Simpson"

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Judge

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

**DOCKET:** T-792-19

**STYLE OF CAUSE:** KEVIN HAYNES v THE ATTORNEY GENERAL OF CANADA

**PLACE OF HEARING:** OTTAWA, ONTARIO

**DATE OF HEARING:** FEBRUARY 25, 2020

**JUDGMENT AND REASONS:** SIMPSON J.

**DATED:** APRIL 20, 2020

**APPEARANCES:**

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FOR THE APPLICANT  
(ON HIS OWN BEHALF)

Julie Chung

FOR THE RESPONDENT

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FOR THE RESPONDENT