Federal Court  Cour fédérale

Date: 20200508

Docket: T-596-19

Citation: 2020 FC 604

Ottawa, Ontario, May 8, 2020

PRESENT: Mr. Justice Russell

BETWEEN:

RAYMOND TONE

Applicant

and

CANADA POST CORPORATION

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] This is an application under s 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, for judicial review of the decision [Decision] of the Canadian Human Rights Commission [Commission], dated March 7, 2019, to dismiss the Applicant's complaint against Canada Post Corporation [CPC] pursuant to s 44(3)(b)(i) of the *Canadian Human Rights Act*, RSC 1985, c H-6 [*CHRA*].

II. BACKGROUND

[2] The Applicant is a male in his fifties. From 1997 until the Respondent terminated his employment on June 22, 2016, he was employed by the Respondent as a Delivery Agent, primarily based out of Depot 3 in Toronto. During this time, the Applicant was a member of the Canadian Union of Postal Workers [CUPW]. Over the years, the Applicant also occasionally worked as a substitute teacher.

[3] Between April 2014 and April 2015, the Applicant experienced marital issues with his wife, who was also an employee of the Respondent. The Applicant says that this led to his wife making unfounded allegations against him that resulted in criminal charges. These charges were subsequently dismissed. However, the Applicant says that, from then on, he was viewed by the Respondent's employees as the "transgressor" and he took a leave of absence.

[4] In June 2015, the Applicant returned to the workplace from his leave of absence. Shortly after his return, his estranged wife, who was on maternity leave at the time, approached the Applicant while he was on his regular mail route on July 2, 2015, and began accosting him and calling him names. The Applicant called the police, who cautioned his wife with regard to criminal harassment. The Applicant reported the incident to one of his supervisors, Mr. Doug McCurdy. The following day, Mr. McCurdy advised the Applicant that he would be removed from his regularly assigned route due to the incident with his wife. The Applicant states that Mr. McCurdy told him that he could only go back to his regular route if he obtained a restraining order against his wife. The Applicant refused to work any alternate routes and did not

obtain a restraining order. On July 13, 2015, after intervention by CUPW, the Applicant reported to work and returned to his regular route without a restraining order.

[5] On August 21, 2015, the Applicant met with Mr. McCurdy and another supervisor regarding an allegation of sexual misconduct made against him. He was told that a third party had witnessed him engaging in inappropriate conduct with a female colleague in the workplace. No formal investigation of this allegation took place.

[6] On September 13, 2015, the Applicant emailed a harassment complaint against Mr. McCurdy and his supervisors from Depot 3 to Mr. Deepak Chopra, who was Chief Executive Officer of CPC at the time. In this email, the Applicant alleged that CPC administration and management, primarily through Mr. McCurdy; had "implemented an unprecedented, protracted, targeted and malicious campaign of intimidation and harassment against [him] particularly with its approach to investigation and discipline." The email listed 25 examples of targeted investigation and discipline. Twelve of the incidents predated the altercation with his wife on July 2, 2015. The Respondent investigated the complaint and sent a response to the Applicant on May 3, 2016, replying to each allegation.

[7] On September 18, 2015, the Respondent received another workplace violation and sexual harassment complaint against the Applicant from two of its employees. The Applicant was subsequently notified on September 21, 2015, that he was accused of wrongdoing and was "walked off" the premises. The following day, the Applicant was directed to report to a different postal station pending an investigation.

[8] Instead of reporting to the postal station assigned to him, the Applicant took a medical leave of absence beginning on September 23, 2015. He cited the serious impacts of the alleged continued harassment by management to his health and well-being as the reason for his leave of absence. The Applicant made a claim for short-term disability benefits in October 2015 to the Respondent's third-party disability insurance provider, and provided two letters from his physician and a report dated October 14, 2015, stating: (1) that the Applicant expressed concern about his return to work as he was "afraid of being subject to more harassment"; (2) that "absent resolution of issues regarding harassment that are causing stress, [the Applicant] cannot return to work"; and (3) that the Applicant could participate in modified work "as long as it does not adversely impact their injury/illness, or their recovery."

[9] On December 1, 2015, the Applicant's short-term disability claim was denied because the medical evidence did not support the Applicant's absence from work. The Applicant's appeal to the Independent Medical Physician was also denied in March 2016.

[10] On March 15, 2016, the Applicant advised the Respondent that he was able to return to work if appropriate actions were taken to accommodate his disability. He asked the Respondent to advise him of its intention to facilitate his return to work and "outline the accommodations that would accompany such a return." He sent the same message to the Respondent on approximately six other occasions between April and May 2016.

[11] Meanwhile, between March and May 2016, the Respondent directed the Applicant several times to either return to work at the alternate location he had been advised to report to on

September 23, 2015, or to provide documentation to substantiate his absence. The Respondent did not outline any further potential accommodation options in these communications with the Applicant. On May 31, 2016, the Applicant signalled his intent to file a grievance or a *CHRA* complaint.

[12] Finally, on June 22, 2016, the Respondent terminated the Applicant's employment for failure to report to work. On June 30, 2016, the Applicant filed his complaint with the Commission in which he alleged that, over the period from July 2015 to June 22, 2016, the Respondent had discriminated against him with respect to employment contrary to s 7 of the *CHRA* and had subjected him to harassment contrary to s 14 of the *CHRA*. He stated that this adverse differential treatment was based on his disability, and his marital status and sex. He also claimed that he had been subjected to retaliation.

[13] Following submissions, the complaint was referred for investigation on May 12, 2017. On November 14, 2018, Ms. Kellie Leclerc [Investigator], concluded her investigation report [Report] and recommended to the Commission that, pursuant to s 44(3)(b)(ii) of the *CHRA*, the complaint be dismissed because further inquiry was not warranted.

[14] On December 18, 2018, and January 9, 2019, respectively, the parties filed submissions with the Commission regarding the Report. In the Applicant's submissions, he raised issues with: (1) the Report's failure to assess harassment pursuant to s 14 of the *CHRA*; (2) factual errors and concerns regarding the pertinence of certain testimony relating to the Report's findings on the sex- and marital status-based allegations; and (3) errors pertaining to the way in which, given his

disability, the Investigator had assessed his testimony, as well as the errors in the negative inferences drawn concerning his disability-based allegations.

[15] On March 7, 2019, the Commission dismissed the Applicant's complaint.

III. DECISION UNDER REVIEW

[16] In letters to the parties dated March 7, 2019, the Commission stated:

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

[17] This Decision was consistent with the Report's recommendations. The Investigator summarized her findings as follows:

> 158. The complainant alleges that the respondent subjected him to adverse differential treatment based on his sex, marital status and/or disability.
>
> 159. Specifically, he alleges that the respondent's response to an altercation with his wife amounted to differential treatment based on sex and marital status and that subsequent to this altercation, the respondent targeted him for harassment and reprisal in the form of unjust discipline and workplace violence/sexual harassment complaints against him.
>
> 160. The evidence indicates that the respondent may have unfairly targeted the complainant for discipline, but the start of the alleged harassment predated the incident with his wife and were not linked to a prohibited ground of discrimination, but rather to other issues taking place in the workplace.

> 161. The complainant further alleges that the respondent did not accommodate his disability requests when it directed him to return to work, subsequent to the denial of his disability claim.
>
> 162. The temporary work location to which the respondent directed the complainant addressed his stated need for a harassment-free environment, given that that location had a different management team than those he alleged had targeted and harassed him. The evidence indicates that the respondent did not engage the complainant in any dialogue about accommodation, but requested information to substantiate his absence and, in the absence of such information, it directed him to report. Given that the complainant made no specific accommodation requests that the respondent refused, it cannot be concluded that the respondent refused to accommodate his disability. In fact, the alternate location addressed the conditions identified by his doctor's treatment plan.
>
> 163. The complainant did not report to the work site as directed and after the parties corresponded from March to May 2016, with the respondent directing the complainant to report and the complainant asserting he required accommodation that was being refused, the respondent terminated the complainant's employment.
>
> 164. Given the above, the complaint should be dismissed.

[18] The Report notes that, during her investigation, the Investigator reviewed the positions of all parties and all the documentary evidence submitted. The Investigator also interviewed: the Applicant; Ms. Megan Whitfield (CUPW local president); Ms. Joanne Leader (Vice President – Grievances – CUPW local); Ms. Simone Petronis (Disability Management Specialist for CPC); Mr. Doug McCurdy (Former Superintendent for Depot 3); Mr. Christopher Shirley (Supervisor for Depot 3); Ms. Susan Becerra (Supervisor for Toronto West Delivery Centre); Mr. Fab Falconi (Mail Carrier for CPC); and Ms. Valerie Bertrand (Mail Carrier for CPC). The Investigator noted that some of the witnesses proposed by the Applicant were not interviewed as they either could not be reached or declined to be interviewed for health reasons. Moreover, the

Investigator made it clear that Mr. Mark Lubinski and Mr. Doug Warren were not interviewed because their roles in the Applicant's route had been noted.

IV. ISSUES

[19] The issues raised in the present application are as follows:

1. Did the Commission breach the Applicant's right to procedural fairness?

2. Did the Investigator apply the correct legal test when assessing the Applicant's complaint pursuant to ss 7 and 14 of the *CHRA*?

3. Did the Commission act in excess of jurisdiction?

4. Did the Commission err in dismissing the Applicant's sex- and marital status-based allegations? This issue was withdrawn at the oral hearing.

5. Did the Commission err in dismissing the Applicant's disability-based allegations?

V. STANDARD OF REVIEW

[20] The memoranda of the parties in this case were provided prior to the Supreme Court of Canada's recent decisions in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] and *Bell Canada v Canada (Attorney General)*, 2019 SCC 66. The parties' submissions on the standard of review were therefore made under the *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] framework. At the hearing of this matter, the Court asked the parties whether they wished to modify their submissions on the applicable standards of

review in this matter. They agreed that *Vavilov* did not affect the standard of review for procedural fairness although Respondent's counsel questioned whether the issues raised in this case were truly procedural fairness issues and advised that, if they are not, they should be reviewed on a standard of reasonableness. Both parties agreed that the balance of the issues raised attracted a standard of reasonableness and Applicant's counsel directed the Court to paragraphs of *Vavilov* that he thought were important to the facts of this case. I have taken this advice into account in my reasons. Therefore, apart from the procedural fairness issues, I have applied the *Vavilov* framework in my consideration of the application.

[21] In *Vavilov*, at paras 23-32, the majority sought to simplify how a court selects the standard of review applicable to the issues before it. The majority rejected the contextual and categorical approach taken in *Dunsmuir* in favour of instating a presumption that the reasonableness standard applies. However, the majority noted that this presumption can be set aside on the basis of (1) clear legislative intent to prescribe a different standard of review (*Vavilov*, at paras 33-52), and (2) certain scenarios where the rule of law requires the application of the standard of correctness, such as constitutional questions, general questions of law of central importance to the legal system as a whole and questions regarding the jurisdictional boundaries between two or more administrative bodies (*Vavilov*, at paras 53-64).

[22] In his memorandum, the Applicant submits that the standard of correctness applies to this Court's review of the alleged breach of procedural fairness and to the question as to whether the Commission acted in excess of jurisdiction. Otherwise, the Applicant submits that the standard

of reasonableness applies to this Court's review of the Commission's findings and application of ss 7 and 14 of the *CHRA*.

[23] Meanwhile, the Respondent argues that the standard of reasonableness applies to this Court's review of all of the issues in this case. The Respondent states that the Applicant's breach of procedural fairness allegations concern the adequacy of the Commission's reasons and must be assessed on the standard of reasonableness. Similarly, the Respondent states that there is no true question of "jurisdiction" in this case as there is no question that the Commission can dismiss a complaint pursuant to s 44(3)(b)(ii) of the *CHRA*. As such, the standard of reasonableness applies. However, the Respondent states that, should the standard of correctness be applied to the above noted issues, the result would be the same. Finally, the Respondent agrees that the standard of reasonableness applies to this Court's review of the Commission's findings.

[24] I find that the standard of reasonableness applies to this Court's review of the issues in this case, except for issues of true procedural fairness as set out in my reasons.

[25] Some courts have held that the standard of review for an allegation of procedural unfairness is "correctness" (*Mission Institution v Khela*, 2014 SCC 24 at para 79; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 59 and 61 [*Khosa*]). The Supreme Court of Canada's decision in *Vavilov* does not address the standard of review applicable to issues of procedural fairness (*Vavilov*, at para 23). However, a more doctrinally sound approach is that no standard of review at all is applicable to the question of procedural fairness. The

Supreme Court of Canada in *Moreau-Bérubé v New Brunswick (Judicial Council)*, 2002 SCC 11 stated that the issue of procedural fairness:

> requires no assessment of the appropriate standard of judicial review. Evaluating whether procedural fairness, or the duty of fairness, has been adhered to by a tribunal requires an assessment of the procedures and safeguards required in a particular situation (*Moreau-Bérubé*, para 74).

[26] As for this Court's review of the remaining questions, there is nothing to rebut the presumption that the standard of reasonableness applies in this case. The application of the standard of reasonableness to these issues is also consistent with the existing jurisprudence prior to the Supreme Court of Canada's decision in *Vavilov*. See, for example, *Kirkpatrick v Canada (Attorney General)*, 2019 FC 196 at paras 30-32.

[27] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with whether it "bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov*, at para 99). Reasonableness is a single standard of review that varies and "takes its colour from the context" (*Vavilov*, at para 89 citing *Khosa*, at para 59). These contextual constraints "dictate the limits and contours of the space in which the decision maker may act and the types of solutions it may adopt" (*Vavilov*, at para 90). Put in another way, the Court should intervene only when "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" (*Vavilov*, at para 100). The Supreme Court of Canada lists two types of fundamental flaws that make a decision unreasonable: (1) a failure of rationality internal

to the decision-maker's reasoning process; and (2) untenability "in light of the relevant factual and legal constraints that bear on it" (*Vavilov*, at para 101).

VI. STATUTORY PROVISIONS

[28] The following statutory provisions of the *CHRA* are relevant to this application for judicial review:

Employment	**Emploi**
7 It is a discriminatory practice, directly or indirectly, (a) to refuse to employ or continue to employ any individual, or (b) in the course of employment, to differentiate adversely in relation to an employee, on a prohibited ground of discrimination.	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; b) de le défavoriser en cours d'emploi.
…	…
Harassment	**Harcèlement**
14 (1) It is a discriminatory practice, (a) in the provision of goods, services, facilities or accommodation customarily available to the general public, (b) in the provision of commercial premises or residential accommodation, or	14 (1) Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait de harceler un individu : a) lors de la fourniture de biens, de services, d'installations ou de moyens d'hébergement destinés au public; b) lors de la fourniture de

(c) in matters related to employment,

to harass an individual on a prohibited ground of discrimination.

locaux commerciaux ou de logements;

c) en matière d'emploi.

Sexual harassment

(2) Without limiting the generality of subsection (1), sexual harassment shall, for the purposes of that subsection, be deemed to be harassment on a prohibited ground of discrimination.

Harcèlement sexuel

(2) Pour l'application du paragraphe (1) et sans qu'en soit limitée la portée générale, le harcèlement sexuel est réputé être un harcèlement fondé sur un motif de distinction illicite.

…

…

Retaliation

14.1 It is a discriminatory practice for a person against whom a complaint has been filed under Part III, or any person acting on their behalf, to retaliate or threaten retaliation against the individual who filed the complaint or the alleged victim.

Représailles

14.1 Constitue un acte discriminatoire le fait, pour la personne visée par une plainte déposée au titre de la partie III, ou pour celle qui agit en son nom, d'exercer ou de menacer d'exercer des représailles contre le plaignant ou la victime présumée.

…

…

Report

44(3) On receipt of a report referred to in subsection (1), the Commission

(b) shall dismiss the complaint to which the report relates if it is satisfied

(i) that, having regard to all the circumstances of the complaint, an inquiry into

Rapport

44(3) Sur réception du rapport d'enquête prévu au paragraphe (1), la Commission :

b) rejette la plainte, si elle est convaincue :

(i) soit que, compte tenu des circonstances relatives à la plainte, l'examen de

the complaint is not warranted, or	celle-ci n’est pas justifié,
…	…

VII. ARGUMENTS

A. *Applicant*

[29] In written submissions, the Applicant argued that the Commission erred in its Decision by: (1) breaching his right to procedural fairness by failing to thoroughly consider his submissions following the Report; (2) failing to apply the correct legal test for assessing complaints made pursuant to ss 7 and 14 of the *CHRA*; (3) acting in excess of its jurisdiction by going beyond its administrative screening function; (4) unreasonably preferring the Respondent’s evidence on the sex- and marital status-based allegations; and (5) unreasonably failing to assess the disability-related complaint according to the Respondent’s obligations with respect to accommodation, and unreasonably ignoring critical evidence. However, at the oral hearing of this matter, the Applicant abandoned his sex- and marital status-based position and relied solely upon his disability-based claim which included procedural fairness and reasonableness grounds.

[30] The Applicant argues that this application for judicial review should be allowed, the Decision should be quashed, and the Court should issue an Order directing the Commission to request that the Chairperson of the Canadian Human Rights Tribunal institute an inquiry pertaining to the Applicant’s complaints. Alternatively, the Applicant asks that this Court refer the matter back to the Commission for a new investigation. The Applicant also seeks costs of his application.

(1) Breach of Procedural Fairness

[31] The Applicant argues that the Commission breached his right to procedural fairness by dismissing his complaint in a biased and incomprehensive manner. He says that the Commission simply disregarded or arbitrarily rejected his concerns and arguments raised in his submission following the Report; notably his concern that the investigation was deficient for a lack of thoroughness. The Applicant argues that this is evident when one reviews the Commission's Decision, which does not make specific mention of any of the concerns raised by the Applicant with regard to the Report except for a general statement that "the Commission reviewed the report disclosed to you previously and any submission(s) filed in response to the report."

(2) Disability-Based Allegations

[32] The Applicant argues that the Investigator unreasonably failed to recognize that the Respondent had the primary duty with respect to the accommodation of the Applicant's disability-related needs. The Applicant notes that employees are not always capable of, or in the best position to, specifically articulate the full scope of their disability-related needs to their employers.

[33] In the case at bar, the Applicant notes that he communicated his needs to the best of his ability and the Respondent failed to use its established accommodation process, or even engage in discussions with the Applicant, with regard to his request for accommodation, despite its substantive requirement to do so. See *Hoyt v Canadian National Railway*, 2006 CHRT 33 at paras 54-55.

[34] The Applicant submits that the only reasonable conclusion the Commission could have reached was that, given the evidence before it, the relevant legal principles, the screening nature of the Decision, and the Commission's administrative role as opposed to an adjudicative role, his complaint warranted further inquiry.

[35] The Applicant also notes at para 51 of his memorandum of argument that the Commission made a plethora of other errors:

> […] the [Commission] (1) placed an unreasonable burden on Mr. Tone to articulate, in a specific and exhaustive fashion, the full-scope of his disability-related needs in his communications with CPC, and drew an adverse inference when he did not, (2) placed an unreasonable burden on Mr. Tone to provide CPC with further medical information, and drew an adverse inference when he did not, even though CPC refused to respond to Mr. Tone's repeated requests for accommodation and did not ask for further accommodation-related information, (3) unreasonably found that CPC could not have refused to accommodate Mr. Tone's disability-related needs because Mr. Tone had not made specific accommodation requests that CPC refused; (4) unreasonably found that CPC's accommodation process did not apply to Mr. Tone; (5) unreasonably conflated CPC's request for Mr. Tone's [*sic*] to justify his absence from work, with CPC having taken steps to respond to Mr. Tone's requests for disability-based accommodation; (6) ignored, without reasonable explanation, the probative value of the evidence before it that CPC failed to request information from Mr. Tone's doctor or specialist about the scope of his disability-related needs and requests for accommodation (i.e., if it had concerns about the medical information that it had received from Mr. Tone), (7) ignored, without reasonable explanation, the probative value of CPC's failure to take the lead in the accommodation process, and provide Mr. Tone with accommodation-related direction, once its duty to accommodate Mr. Tone's disability-related needs had been triggered; (8) unreasonably found the work that CPC directed Mr. Tone to perform at the Toronto West Delivery Centre constituted work that would have accommodated due full scope of his disability-related needs, without addressing Mr. Tone's claim about his substantive need for a communication process capable of fostering trust, and quelling his deeply held and debilitating

> anxiety-based suspicions about the *mala fides* of CPC's intentions, (9) dismissed the complaint, without reasonable explanation, in the absence of any evidence that CPC communicated a proposal to Mr. Tone that he would or could reasonably be expected to understand as constituting an accommodation proposal or a response to his request for accommodation, (10) dismissed the complaint, without reasonable explanation, in the absence of any evidence that CPC would have experienced undue hardship had it attempted to respond to, or engage with, Mr. Tone about his accommodation requests; (1 l) dismissed the complaint, without reasonable explanation, in the absence of any evidence that CPC would have experienced undue hardship had it accommodated the full scope of Mr. Tone's disability-related needs; (12) ignored and/or failed to address, without reasonable explanation, the factual concerns that Mr. Tone raised about the Investigation Report in his submission in response to the Investigation Report; (13) ignored and/or failed to address, without reasonable explanation, well-established legal principles that the applicant made reference to in his submission in response to the Investigation Report; and (14) ignored, without reasonable explanation, the probative value of the evidence provided by Kathryn Edgett, a Human Rights Officer employed by Canada Post, who told the Investigator that "[. . .] the complainant was not being accommodated for a disability. There was no medical info that supported that he required accommodation for a disability. [. . .] he was moved as a preventative safety measure while he was pursuing civil action against his wife and while the workplace violence investigation was being undertaken".
>
> [References omitted, emphasis in original.]

B. *Respondent*

[36] The Respondent states that the Decision was entirely reasonable. In particular, the Respondent argues that: (1) there was no breach of procedural fairness as the Decision was based on a neutral and thorough investigation; and (2) the Commission's findings regarding the disability-based allegations were reasonable. The Respondent therefore asks the Court to dismiss this application for judicial review with costs.

(1) Breach of Procedural Fairness

[37] The Respondent argues that it is plain and obvious that the Investigator met the requirement of neutrality and thoroughness as she properly canvased the considerable volume of documentary evidence, witness testimony, and positions put forward by the parties. The Respondent notes that the Applicant was provided with, and took advantage of, many opportunities to address the Respondent's position and respond to the Report.

[38] The Respondent also says that the Applicant's argument that the Commission referred to a "limited scope of the documents" is misguided as the Commission clearly stated in its Decision that it reviewed the Report, and any submissions filed in response to the Report, before making its Decision. The Respondent states that it is trite law that Courts will treat an investigator's report as constituting the Commission's reasoning for the purpose of screening decisions under s 44(3) of the *CHRA*. See *Sketchley v Canada (Attorney General)*, 2005 FCA 404 at paras 36-39 [*Sketchley*].

[39] Moreover, in response to the Applicant's argument that the Commission did not specifically address the issues raised in his response to the Report, the Respondent states that the Supreme Court of Canada has recognized that reasons are not to be reviewed in a vacuum, but rather looked at in their context. Reasons do not have to be perfect, nor do they have to be comprehensive. See *Guerrier v Canadian Imperial Bank of Commerce (CIBC)*, 2013 FC 937 at para 11. Furthermore, the Respondent says that the majority (if not all) of the Applicant's concerns raised in his responses to the Report were based on his disagreement with the

Investigator's findings of fact and/or conclusions in the Report. The Applicant raised no substantial or material omissions in his submissions to the Commission following the Report. *Hebert v Canada (Attorney General)*, 2008 FC 969 states that:

> [26] […] Where the parties' submissions on the report take no issue with the material facts as found by the investigator but merely argue for a different conclusion, it is not inappropriate for the Commission to provide the short form letter-type response. However, where these submissions allege substantial and material omissions in the investigation and provide support for that assertion, the Commission must refer to those discrepancies and indicate why it is of the view that they are either not material or are not sufficient to challenge the recommendation of the investigator; otherwise one cannot but conclude that the Commission failed to consider those submissions at all. Such was the situation in *Egan v. Canada (Attorney General)*, 2008 FC 649, [2008] F.C.J. 816; 2008 FC 649.

(2) Disability-Based Allegations

[40] The Respondent states that the Commission reasonably concluded there was sufficient evidence that the temporary work location to which the Respondent directed the Applicant to report following the denial of his short-term disability claim was an accommodation that addressed the Applicant's stated needs. It meant that he would be working under different management, and free of the harassment to which he claimed to have been subjected.

[41] The Respondent notes that there is no separate or independent procedural duty to accommodate under the *CHRA*, nor any remedy for a procedural breach where it can be shown that a claimant was substantially accommodated. See *Canada (Human Rights Commission) v Canada (Attorney General)*, 2014 FCA 131 at paras 14-16, 21. As such, it was reasonable for the Investigator to focus on whether the alternate work location was sufficient to reasonably

accommodate the Applicant's stated needs as opposed to dissecting the procedural steps taken by the Respondent. In doing so, the Investigator did not ignore the evidence that the Respondent did not explicitly engage with the Applicant's accommodation requests.

[42] The Respondent notes that the Applicant has not pointed to any objective evidence that would support his contention that reporting to the alternate work location was not a reasonable accommodation measure.

VIII. ANALYSIS

A. *Scope of Review*

[43] At the hearing of this matter in Toronto on February 11, 2020, Applicant's counsel informed the Court that the Applicant had decided to withdraw those aspects of this application dealing with his sex- and marital status-based allegation. This left the Court to deal with his disability-based allegations.

[44] In effect, the present application has been amended and the Court is left to deal with the Applicant's allegations of procedural unfairness and unreasonableness with regard to the Commission's analysis and disposition of his disability-based allegations.

B. *Procedural Unfairness*

(1) Standard of review

[45] The Applicant says that the Commission dismissed his disability-based complaint in an unfair manner and this requires the Court to review this issue on a standard of correctness.

[46] It is true that the Court has often applied some version of a correctness standard when reviewing allegations of procedural unfairness. In a context where the Court is being asked to assess the thoroughness and neutrality of the Commission's investigations, correctness may be the applicable standard, but the allegations in the present case are that the Commission itself failed to consider his response to the Report and failed to provide adequate reasons for not addressing the issues he raised in his response to the Report.

[47] In the end, the Court is being asked to assess whether the Commission even considered the Applicant's response submissions and if it did, then was it reasonable for the Commission to simply rely upon the Investigator's Report given the issues that the Applicant had made in his response submissions. Given this situation, it is my view that the Court should apply a correctness standard to the issue of whether the Commission even considered the Applicant's response submissions because this is a true issue of procedural fairness. However, assuming the Commission did consider the Applicant's response submissions, then I think I must apply a reasonableness standard to the issue of whether the Commission was justified in relying upon the Report given the content of those submissions. In other words, this issue then ceases to be one of

procedural fairness and becomes a question of whether it was reasonable for the Commission to rely upon the Report given the specific response submissions of the Applicant.

(2) Did the Commission consider the Applicant's response submissions?

[48] The Applicant says that it isn't clear whether the Commission even considered his response submissions:

> 42. In its decision dated March 7, 2019, the CHRC did not address the substance of the allegations that Mr. Tone made reference to, or indicate why it was of the view that they were immaterial or insufficient to challenge the recommendation of the Investigator. Other than a general reference to the CHRC having considered the parties' submissions, absent from its decision, and from the Investigation Report that formed part of the CHRC's reasons for decision, was any indication that the CHRC considered, accepted, or rejected the substance of Mr. Tone's submissions, or the relevance and probative value of the evidence that he made reference to, and believed was key to assessing whether or not there was sufficient evidence before the CHRC to warrant further inquiry. These facts, together with the CHRC's statement about the limited scope of the documents that it considered, militate strongly in favour of the conclusions that the CHRC simply disregarded or arbitrarily rejected Mr. Tone's concerns, the CHRC failed to thoroughly consider the circumstances of Mr. Tone's complaint, and the CHRC's investigation was deficient for lack of thoroughness.
>
> [References omitted.]

[49] The Commission's Decision of March 7, 2019 specifically says that "Before rendering the Decision, the Commission reviewed the report disclosed to you previously and any submissions(s) filed in response to the report."

[50] This is clearly a decision embodied in a form letter. However, the Applicant has provided no reason to doubt these words other than the fact that the Commission does not address his response submissions directly, but chooses to rely upon the Report for its reasons.

[51] The jurisprudence is clear that, where the Commission provides no reasons, or only brief reasons, of its own, it can be assumed that the Commission is adopting and relying upon the reasons found in the Investigator's Report. See *Sketchley*. So, even applying a standard of correctness, I cannot say that the Applicant has established that the Commission "arbitrarily disregarded" his response submissions.

> (3) Was it reasonable for the Commission to rely upon the Investigator's Report given the Applicant's response submissions to that Report?

[52] It seems to me that the Applicant's response submissions are principally concerned with why the Applicant disagrees with the Investigator's findings and conclusions. In his response submissions, he sets out what the Investigator should have done, or had failed to consider, and he sets out the conclusions the Investigator should have reached based upon the way the Applicant feels the evidence should have been interpreted. Hence, the issue of whether the Commission should have adopted the Report as an adequate response to the Applicant's submissions, is subsumed under the issue of whether the Report itself is reasonable.

[53] Justice Martineau provided the following account of the Commission's role in *Dupuis v Canada (Attorney General)*, 2010 FC 511:

> [12] The Commission's role is well known. Essentially, it is to assess the sufficiency of the evidence prior to referring a complaint

to the Tribunal. The Commission's role is very modest: it is not to determine whether the complaint has merit, but, rather, whether an inquiry is warranted having regard to all the facts. Thus, the threshold is rather low, and questions related to the credibility of witnesses are normally left to the Tribunal to assess. See *Canadian Broadcasting Corporation v. Paul*, 2001 FCA 93 at paragraphs 76 and 77 (*Paul*); *Bell Canada v. Communications, Energy and Paperworkers Union*, [1999] 1 F.C. 113 at paragraph 35 (C.A.) (*Bell Canada*); *Bell v. Canada (Canadian Human Rights Commission)*; *Cooper v. Canada (Canadian Human Rights Commission)*, [1996] 3 S.C.R. 854 at paragraphs 52 and 53; and *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Canadian Human Rights Commission)*, [1989] 2 S.C.R. 879 at 898 and 899 (*SEPQA*).

[13] The dismissal of a complaint by the Commission is final and has far-reaching consequences for a person who claims to be the victim of a discriminatory practice. Consequently, a complainant is entitled to expect that the investigation conducted by the person designated by the Commission under subsection 43(1) of the Act to investigate the complaint (referred to by the Act as an "investigator") satisfies two fundamental conditions: neutrality and thoroughness. See *Slattery v. Canada (Human Rights Commission)*, [1994] 2 F.C. 574 at paragraph 49 et seq. (T.D.) (*Slattery*), affirmed (1996), 205 N.R. 383 (F.C.A.).

[14] In order to determine the requisite degree of thoroughness, one must consider not only the parties' interests, but also the Commission's interest in preserving a workable and administratively effective system (*Slattery*, at paragraph 55). That being said, an investigation can lack the legally requisite degree of thoroughness where, for example, the investigator has "failed to investigate obviously crucial evidence" (*Slattery*, at paragraph 56; *Tahmourpour v. Canada (Solicitor General)*, 2005 FCA 113 at paragraph 8).

[15] In practice, the investigator's report is submitted to the parties for comments, so when the Commission chooses to follow the investigator's recommendations, the question of whether the decision is reasonable will depend mainly on the rationality of the reasoning and the conclusions in the investigation report, unless, of course, the Commission has provided supplementary reasons. See *Sketchley v. Canada (Attorney General)*, 2005 FCA 404 at paragraph 37; *SEPQA*, above, at paragraph 35; *Bell Canada*, above, at paragraph 30; and *Paul*, above, at paragraph 43.

> [16] Lastly, as the Court noted in *Herbert v. Canada (Attorney General)*, 2008 FC 969 at paragraph 26 (*Herbert*), if the Commission chooses to dismiss the complaint for reasons other than those given by the investigator, it must state those reasons in its decision. Moreover, where a party's submissions allege substantial and material omissions in the investigation and provide support for that assertion, the Commission must refer to those discrepancies and indicate why it is of the view that they are either not material or are not sufficient to challenge the recommendation of the investigator; otherwise one cannot but conclude that the Commission failed to consider those submissions at all. See *Herbert*, at paragraph 26 and *Egan v. Canada (Solicitor General)*, 2008 FC 649 at paragraph 5.

[54] In the present case, I don't see that the Applicant alleged "substantiated and material omissions in the investigation" or provided support for such an assertion. His general complaint was that "there is no reasonable factual basis, nor is there any principal legal basis, to support the Investigator's conclusions that there is insufficient evidence and other considerations to warrant further inquiry into my Complaint by CHRT." With regard to the disability-based claims, the Applicant's position was that:

> a. The Respondent failed to accommodate my disability related needs when it failed to provide me with an open and constructive mechanism to communicate with it about my accommodation request;
>
> b. There is no evidence before the CHRC that the Respondent proposed to accommodate me by assigning me to work that was consistent with my disability related needs, or that I understood that the assignment that it directed me to return to work in was an accommodation;
>
> c. My communications with my Union in no way detract from the conclusions that sufficient evidence and other considerations exist to warrant further inquiry into my complaint;
>
> d. The adverse inferences that the Investigator drew because I did not provide information about my disability-related needs with greater specificity were unreasonable.

[55] These assertions express disagreement with the Investigator's findings and conclusions. They essentially argue for a different conclusion. The Commission's Decision was to approve and stand by the Investigator's findings and conclusions. There is no evidence that the Commission simply disregarded the Applicant's submissions. I can find no lack of procedural fairness in this approach.

(4) Was the Report unreasonable?

[56] With regard to his disability-related claims, the core of the Applicant's argument is as follows:

> 46. Employees may not always be capable of, or in the best position to, articulate or bring the full scope of their disability-related needs to the attention of their employers. Sometimes employees require guidance from, and the assistance of, their employers and/or doctors in navigating the accommodation process and gathering further information. This was the case with Mr. Tone. He communicated his needs to the best of his ability in his communications with CPC but, absent communication between himself, CPC, and his doctor, he could not bring the full scope of' those needs to CPC's attention. Years later, with considerable effort, he was able to bring the full scope of those needs to the CHRC's attention.
>
> 47. After Mr. Tone requested disability-based accommodation, CPC did not violate section 7 of the *CHRA* simply because it did not take any positive steps to inquire about, and gather information about, Mr. Tone's disability-related needs in a procedural sense. But the CHRC had evidence before it that Mr. Tone's need for an accommodation-specific response from CPC was not a matter of procedure. Rather, his disability-related needs included a substantive requirement that CPC communicate with him in a manner capable of fostering trust, and quelling his deeply held and debilitating anxiety-based suspicions about the *mala fides* of CPC's intentions. As discussed in the preceding section on procedural fairness, the CHRC failed to address that evidence and its implications for its accommodation assessment.

48. Having found that there was sufficient evidence of Mr. Tone having a disability that adversely affected his employment, and that he had requested accommodation, the CHRC's turned its focus to the question of whether or not the parties cooperated in the accommodation process and the question of whether or not the required accommodation was provided. Relevant and highly probative in the context of cooperation was the process, if any, that CPC used in responding to Mr. Tone's accommodation request, and, in particular, whether or not CPC responded at all, or whether or not it communicated a proposal that: Mr. Tone could reasonably understand constituted an accommodation proposal; would fully accommodate Mr. Tone's needs or restrictions, and was reasonable in the circumstances.

49. The only evidence of relatively high probative value before the CHRC in that regard was that CPC: had an accommodation process, did not use its accommodation process to communicate with Mr. Tone, did not engage in dialogue with Mr. Tone about accommodation, and never communicated any accommodation proposal, much less a proposal of the nature described in *Hoyt*, to Mr. Tone. Notably, the position of CPC as communicated in response to Mr. Tone's complaint, in management employees interviews with the Investigator, and in its submissions in response to the Investigation Report, remained consistent throughout the CHRC process. CPC claimed that Mr. Tone did not have any disability-related needs that required accommodation, it did not communicate with Mr. Tone about accommodation, and that its duty to accommodate him had never been engaged.

50. When the CHRC confirmed that CPC's positions on those critical points was not sufficient to persuade it to dismiss Mr. Tone's complaint, the range of possible, acceptable outcomes which would have been defensible in respect of the facts and law became extremely narrow. Short of finding that it would have imposed undue hardship on CPC to provide Mr. Tone with the accommodation he required, the only reasonable conclusion that the CHRC could have reached given the evidence that was before it, the legal principles that were relevant to its analysis, the nature of the screening decision that the CHRC was required to make, and its administrative as opposed to adjudicate role in the human rights complaints process set out in the *CHRA*, was that the circumstances of Mr. Tone' s complaint were sufficient to warrant further inquiry.

[References omitted.]

[57] The Commission found that the "evidence does not support a link between the respondent's alleged targeted actions against the complainant and his marital status and/or sex" (para 111). The Applicant no longer takes issue with this finding.

[58] The Commission then goes on to find as follows:

> 113. The evidence supports that the respondent's treatment of the complainant was related to a number of factors, other than a prohibited ground of discrimination. Witness evidence from colleagues who were close to the complainant, and his complaint at the time, indicate that conflict arose between the complainant and the respondent after the "postal transformation" and the complainant began to speak out about and challenge work practices and respondent directives he disagreed with. He also linked the respondent's alleged harassment/retaliation against him to his harassment complaint to Mr. Chopra. In addition, his former supervisor surmises that when the respondent stopped allowing the complainant to take leaves of absence to attend his teaching job, in the month before the altercation with his estranged wife, the conflict with the respondent increased.

[59] The Commission then turned its mind to the disability-related claims and accommodation and concluded that the Applicant required accommodation and that he communicated his need for accommodation, but that communication was limited in scope:

> 130. The parties dispute whether the complainant required accommodation for reasons related to a disability. The respondent's insurance provider denied the complainant's disability claim based on its assessment of his medical information and concluded that there was no disability or need for accommodation. Despite the denial of medical leave, it is reasonable that an individual who alleges harassment may assert that they require accommodation as it relates to a specific work environment they perceive as harassing or exacerbating a medical condition.
>
> 131. The complainant communicated his need for accommodation through the submission of letters and medical documentation that specified avoiding an environment that could

> negatively impact his diagnosed anxiety and/or depression and referred to avoiding the environment where he alleged he experienced harassment. Beyond this, the complainant did not articulate what he sought or required with regard to specific accommodations; he instead asked the respondent what accommodations it would provide.

[60] The Commission then goes on to consider the Applicant's assertions that the Respondent had failed to inquire about his accommodation, and that the alternative assignment away from Depot 3 to the Toronto West Delivery Centre granted by CPC was not adequate accommodation.

[61] The Commission's conclusions on this issue are as follows:

> 154. The complainant asserted that the alleged harassment by Depot 3 management led to his disability. As noted in the previous section, his doctor's treatment plan identified necessary conditions for a return to work (i.e. a "harassment-free work environment") but no other specific accommodations based on his submitted medical information.
>
> 155. The respondent did not direct the complainant to return to Depot 3 at the material time, but to an alternate work location, Toronto West Delivery Centre. This assignment removed the complainant from the alleged harassment at Depot 3 and offered him a different environment to return to work. While not a formal accommodation arrangement, this work assignment was a reasonable temporary option that would allow the complainant to return to work at a location that met his stated needs, given none of the alleged harassers were at that location. Thus the respondent did not deny an accommodation. Given the circumstances, the complainant's union representatives advised him to report to work, but he did not.
>
> 156. The medical note submitted on the final deadline to report, May 24, 2016, did not provide any further clarity with regard to any required accommodations or any indication that the work assignment was not appropriate, based on his medical needs, to preclude his reporting to work. The complainant submits that the assignment to the alternate location did not address his accommodation needs and was not suitable for a number of

> reasons, as noted, but did not provide any specific supporting medical information to that effect.
>
> 157. A return to his original position at Depot 3 was not possible at the time, due to the impeding harassment investigation. It would be speculative to consider what could have or would have been arranged after the conclusion of the harassment investigation. Given the circumstances, specifically the complainant's failure to report to work, the respondent terminated the complainant's employment.
>
> …
>
> 162. The temporary work location to which the respondent directed the complainant addressed his stated need for a harassment-free environment, given that that location had a different management team than those he alleged had targeted and harassed him. The evidence indicates that the respondent did not engage the complainant in any dialogue about accommodation, but requested information to substantiate his absence and, in the absence of such information, it directed him to report. Given that the complainant made no specific accommodation requests that the respondent refused, it cannot be concluded that the respondent refused to accommodate his disability. In fact, the alternate location addressed the conditions identified by his doctor's treatment plan.

[62] The Applicant's present position is to the effect that his specific accommodation needs were not addressed because CPC did not "communicate with him in a manner capable of fostering trust, and quelling his deeply held and debilitating anxiety-based suspicions about the *mala fides* of CPC's intentions" and the Commission overlooked this "substantive requirement."

[63] First of all, I think the Commission does not overlook this issue:

> 153. Nonetheless, the complainant repeatedly asserted that he required accommodation to return to the workplace but did not provide any additional medical information that substantiated this claim, beyond what was previously provided in his medical claim. His letters to the respondent simply repeated:

> The issues that led to my disability remain unaddressed and represent barriers to a healthy and safe workplace.
>
> This fact, as well as [respondent]'s refusal to accommodate my disability have adversely impacted any potential for me to return to work.

[64] In other words, if the Applicant had "deeply-held and debilitating anxiety-based suspicions about the *mala fides* of CPC's intentions," he did not provide any medical information to substantiate this further claim or communicate it in any other way. And the medical evidence that was available simply stressed the need for a "harassment-free work environment."

[65] It would appear that, at the material time, the Applicant was consulting with, and taking advice from his union, but there is no evidence that he told them about deeply-held and debilitating anxiety-based suspicions about the *mala fides* of CPC. The evidence before the Commission was that Ms. Whitfield said that she and the union representatives told him that he had to make an attempt to report to the Toronto West location until after the investigation, or at least to go and see the environment, but he refused. And Ms. Leader said she told him that, in the absence of new medical information, he should report.

[66] The Commission also took note of what the Applicant had said were the reasons he had refused to report to Toronto West:

> 145. The complainant submits that the alternate assignment was not an adequate accommodation. He states that the alternative location was further away than his regular work location and it was a different start time. It was a different position, a demotion where he would be considered as a term or a new employee. He felt that the respondent assigning him to that location was punitive and constituted a reprisal.

[67] The Commission also noted with regard to the Applicant's stated objection that the assignment to Toronto West was not necessarily a full answer to his accommodation needs. It was not a "formal accommodation arrangement;" it was a "reasonable temporary option that would allow the complainant to return to work at a location that met his stated needs…" (para 155, emphasis added).

[68] In other words, this reasonable temporary accommodation did not (a) prevent the Applicant from raising further needs that the new location did not meet, or (b) prevent the Applicant from alerting CPC as to its unsuitability to his stated needs once he had given Toronto West a try. But, against the advice of union representative, he would not do the reasonable thing and now raises "deeply-held and anxiety-based suspicions about the *mala fides* of CPC" that he did not raise at the time and for which there is no medical evidence. Nor has the Applicant provided any evidence to support his position that reporting to Toronto West was not reasonable temporary accommodation.

[69] I think the jurisprudence is clear on this issue. The Applicant was entitled to reasonable accommodation and not perfect or preferred accommodation. See *Renaud v Central Okanagan Central District No 23*, [1992] 2 SCR 970 at para 51.

[70] The Applicant was free to communicate any specific accommodation needs that could not be met by reporting to Toronto West either personally, through his union, or through his doctors. Rather than do this, he now says that, in effect, CPC was obliged to consult with him as to any specific needs that had not been articulated at the time.

[71] The Commission acknowledged this issue and, in my view, dealt with it reasonably:

> 156. The medical note submitted on the final deadline to report, May 24, 2016, did not provide any further clarity with regard to any required accommodations or any indication that the work assignment was not appropriate, based on his medical needs, to preclude his reporting to work. The complainant submits that the assignment to the alternate location did not address his accommodation needs and was not suitable for a number of reasons, as noted, but did not provide any specific supporting medical information to that effect.
>
> …
>
> 162. The temporary work location to which the respondent directed the complainant addressed his stated need for a harassment-free environment, given that that location had a different management team than those he alleged had targeted and harassed him. The evidence indicates that the respondent did not engage the complainant in any dialogue about accommodation, but requested information to substantiate his absence and, in the absence of such information, it directed him to report. Given that the complainant made no specific accommodation requests that the respondent refused, it cannot be concluded that the respondent refused to accommodate his disability. In fact, the alternate location addressed the conditions identified by his doctor's treatment plan.

[72] The Applicant does not explain why he could not have delved further into what he thought was needed either through his doctors, his union or in his own responses to CPC's requests that he return to work, which he simply answered by a general statement that his needs had not been met. He also has not fully explained why he did not respond to CPC's repeated requests for information that would substantiate his absence from work. Surely, this was the opportunity he says he was never given to delve into what specific accommodation needs he required before he could return to work. Or he could easily have explained that, at that time, he could not fully articulate what his needs were and needed assistance in understanding them.

[73] There is some suggestion in the Applicant's submissions for this review application that he was not, in fact, aware of what his needs were at the material time and that he has only been able to understand them "years later":

> 46. Employees may not always be capable of, or in the best position to, articulate or bring the full scope of their disability-related needs to the attention of their employers. Sometimes employees require guidance from, and the assistance of, their employers and/or doctors in navigating the accommodation process and gathering further information. This was the case with Mr. Tone. He communicated his needs to the best of his ability in his communications with CPC but, absent communication between himself, CPC, and his doctor, he could not bring the full scope of" those needs to CPC's attention. Years later, with considerable effort, he was able to bring the full scope of those needs to the CHRC's attention.

[74] This suggests that CPC is to be faulted for failing to assist him to understand and develop accommodation needs that he did not, at the material time, know that he had, and it was unreasonable for the Commission to overlook this matter.

[75] There is no medical or other evidence to support such a contention, and no explanation as to why the Applicant did not consult with his doctors on this issue if he felt that he had further accommodation needs. The Commission dealt with the Applicant's accommodation needs on the basis of the evidence before it at the material time.

C. *Conclusion*

[76] I think I have to find on this issue that the Investigator's finding that the Applicant was substantively accommodated was reasonable.

[77] The parties informed the Court at the hearing of this matter that they had reached an agreement regarding costs. The parties agreed that lump sum costs inclusive of all disbursements will be awarded to the successful party in the amount of $7,000.00 plus HST.

JUDGMENT IN T-596-19

THIS COURT'S JUDGMENT is that

1. The application is dismissed.

2. Costs are payable by the Applicant to the Respondent in the lump sum of $7,000.00 plus HST, inclusive of disbursements.

"James Russell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-596-19
STYLE OF CAUSE:	RAYMOND TONE v CANADA POST CORPORATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	FEBRUARY 11, 2020
JUDGMENT AND REASONS:	RUSSELL J.
DATED:	MAY 8, 2020

APPEARANCES:

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Jennifer Hodgins	FOR THE RESPONDENT

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