Federal Court Cour fédérale

Date: 20210212

Docket: T-741-20

Citation: 2021 FC 145

Ottawa, Ontario, February 12, 2021

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

HALIFAX EMPLOYERS ASSOCIATION

Applicant

and

GRAHAM FARMER

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a June 3, 2020 decision [the Decision] of the Canadian Human Rights Commission [the Commission]. The Commission decided to request that the Chairperson of the Canadian Human Rights Tribunal [the Tribunal] institute an inquiry into a complaint dated July 17, 2018 [the Complaint] submitted by the Respondent, Graham Farmer, against the Applicant, the Halifax Employers Association [HEA].

[2] In the Complaint, Mr. Farmer alleged that HEA discriminated against him on the basis of race or colour in connection with its hiring processes in 2017 and 2018, in addition to advancing allegations of systemic discrimination in those processes. A Human Rights Officer [the Investigator] investigated Mr. Farmer's allegations and issued a report dated July 17, 2018 [the Report], characterizing the Complaint as based on the grounds of disability, colour, family status, race, and national or ethnic origin. The Report recommended that the Commission dismiss the Complaint. The Commission reviewed the Report but, contrary to the recommendation, decided pursuant to s 44(3)(a) of the *Canadian Human Rights Act,* RSC 1985, c H-6 [the CHRA] that the Complaint warranted inquiry by the Tribunal.

[3] On July 13, 2020, HEA filed a Notice of Application, seeking judicial review of the Decision by the Commission. HEA alleges reviewable errors by the Commission, surrounding its departure from the Investigator's recommendation and the fact that the Commission dismissed a related complaint made by Mr. Farmer against the International Longshoremen's Association, Local 269 [ILA] with similar allegations of systemic discrimination.

[4] As explained in greater detail below, this application is allowed, because the Decision does not explain how, in the face of the Investigator's recommendation to the contrary, the Commission arrived at a conclusion that an inquiry into Mr. Farmer's allegations of individual discrimination, in relation to HEA's 2017 and 2018 hiring processes, was warranted. In that respect, I agree with HEA's position that the Decision lacks justification and intelligibility and is unreasonable. I disagree with HEA's position that the Decision is similarly unreasonable in its treatment of Mr. Farmer's allegations of systemic discrimination.

II. Background

A. *Hiring Process in the Longshore Industry in the Port of Halifax*

[5] HEA is the designated representative of various companies [Member Employers] engaged in the longshore industry in the Port of Halifax. HEA negotiates and administers various collective agreements and, in consultation with unions with bargaining rights at the Port, recruits and trains individuals who will perform work for the Member Employers. Pursuant to the collective agreements administered by HEA, unions agree to supply labour based on fluctuating employment needs of Member Employers. One such union is ILA, which represents longshore workers, forepersons and walking bosses in the longshore industry.

[6] In order to meet its obligation to supply sufficient labour to HEA, ILA operates a hiring hall. When labour needs of a Member Employer exceed their regular workforce, or when members of the regular workforce are absent, the Member Employer will contact the hiring hall and request workers. The hiring hall also provides work to non-unionized workers through what are referred to as the "cardboards" and the "bullpen." The cardboards are lists of employees who are given priority over casual employees for shift assignments. Workers on the cardboards are not union members, but they may become members when ILA is taking new members. The bullpen is a backup pool of untrained, unskilled, casual labour.

[7] When there is insufficient labour to meet the needs of Member Employers, ILA and HEA work together to establish a cardboard. ILA and HEA work together to complete the hiring process for cardboards through the following steps:

A) ILA receives and reviews applications from interested persons and then selects applicants who will be referred to HEA for consideration, subject to HEA's obligations under the *Employment Equity Act*, SC 1995, c 44 [EEA] (as further explained below);

B) HEA undertakes a training and evaluation process for those applicants, in three stages:

i) Applicant Status: To move past this stage, applicants must successfully complete: (i) a practical lashing strength and endurance test, (ii) an aptitude test, (iii) a test of workplace essential skills, and (iv) an interview and reference check;

ii) Trainee Status: To move past this stage, applicants must successfully complete: (i) emergency first aid training, (ii) a training session on employment equality legislation and the employee assistance program, (iii) a medical examination including vision, and (iv) an orientation course; and

iii) Trainee on the Dispatch List: In order to complete the hiring process and move to the cardboard, an applicant must successfully complete: (i) six months of probation, (ii) yard tractor training, and (iii) forklift training.

[8] As a federal employer, HEA is subject to the EEA, pursuant to which it collects statistical information on certain designated groups and provides it annually to Employment and Social Development Canada. Under the EEA, the designated groups are women, persons with

disabilities, aboriginal people, and members of visible minorities. The application form for referral by ILA to HEA for possible employment includes a section addressing employment equity, explaining that self-identification of membership in a designated group is voluntary and confidential and that members of designated groups who wish to take the benefit of the EEA should self-identify.

B. *Events Leading to Mr. Farmer's Human Rights Complaints*

[9] Mr. Farmer obtained casual work out of the hiring hall as a bullpen worker beginning in June of 2016. In March 2017, he submitted an application to ILA for the cardboard hiring process. In that application, Mr. Farmer self-identified as a member of a designated group, namely a member of a visible minority. He was selected by ILA and referred to HEA. He completed all of the evaluations in the first two stages of training, but he was removed from the 2017 hiring process when he did not pass the yard tractor training and evaluation in the third stage.

[10] After being removed from the 2017 hiring process, Mr. Farmer continued to work on a casual basis through the ILA hiring hall. He submitted a cardboard application to ILA again in March 2018. Again, he self-identified as a member of a visible minority. Mr. Farmer was selected by the ILA and referred to HEA. However, he failed an aptitude test during the first stage of training and evaluation and was removed from the 2018 hiring process.

[11] Mr. Farmer was involved in a motor vehicle accident two days before he wrote the aptitude test in 2018, but he did not inform the test invigilator of his accident, and he signed a

Declaration before he wrote the test, indicating that he was in good physical and mental condition. After he learned that he failed the test, Mr. Farmer sent an email to HEA explaining that he had not been fit to write the aptitude test due to the motor vehicle accident and attached a physician's note and photos of his vehicle. However, HEA did not permit him to retake the test.

C. *Mr. Farmer's Human Rights Complaints*

[12] Mr. Farmer filed the Complaint against HEA in July 2018. In the Complaint, Mr. Farmer self-identifies as Black and as having possessed a disability. He advances allegations in the Complaint including: (a) that he was discriminated against in the 2017 and 2018 hiring processes, (b) that HEA failed to reasonably accommodate his disability in the 2018 hiring process, and (c) that the hiring process for permanent, union-eligible longshore positions at the Port of Halifax is marked by systemic discrimination against African-Canadian applicants.

[13] In the Complaint, Mr. Farmer alleges that when he began yard tractor training, he was informed by the HEA Superintendent of Training, Graham MacKillop, that he would have to undergo testing on the equipment after 3 ½ days of training. Mr. Farmer states that he raised concerns about the brief training time and was given the option to opt-out of the testing and instead receive a recommendation from Mr. MacKillop for the next cardboard application cycle. He also alleges that other non-Black applicants with poorer performance in hands-on training were allowed to continue through the training process and were afforded significantly more time than him to train on the equipment before testing.

[14] Mr. Farmer alleges that Mr. MacKillop did not subsequently recommend him for the next cardboard application cycle. As a result, when he re-applied for the cardboard hiring process in 2018, he was required to start from the beginning.

[15] Mr. Farmer also alleges that there is systemic discrimination against African-Canadians in the hiring process for the longshore industry at the Port of Halifax. He states that Black people are significantly underrepresented in the unionized and union-eligible positions at the Port. Mr. Farmer alleges that HEA and ILA give preferential treatment to relatives and associates of union members, such that applicants with such connections have been advanced through the application process and accepted onto a cardboard and ultimately into the union with work experience and qualifications inferior to other candidates including himself.

[16] Mr. Farmer alleges that this preferential treatment perpetuates exclusion of African-Canadian applicants from longshore positions. He also asserts that those African-Canadians who have been accepted onto the cardboard and ultimately into the union attained that status at a more advanced age than other applicants.

[17] Mr. Farmer also filed a human rights complaint against the ILA, alleging largely the same facts as those raised in the Complaint against HEA.

D. *Investigation of the Complaints*

[18] The two complaints were investigated together, but the Investigator prepared separate reports for each complaint. The following is a brief summary of the investigative process and the

Investigator's conclusions in the two reports. Further details on information and findings in the reports relevant to the issues in this application will be canvassed later in these Reasons.

[19] In the Report on his investigation into the Complaint against HEA, the Investigator explained that she interviewed Mr. Farmer, Mr. MacKillop, the three HEA trainers who were involved in the training process during Mr. Farmer's yard tractor training, and a cardboard member who had been part of Mr. Farmer's training group. With respect to the allegations surrounding the 2017 hiring process, the Investigator's conclusions included the following:

A) The evidence was that the yard tractor training was divided into two phases. Week one consisted of basic training and maneuvering an obstacle course. The trainees were tested at the end of week one and, if they passed, they moved to week two, where they drove around the working terminal. As the evidence was that all applicants in Mr. Farmer's yard tractor training group were tested at the end of the first week of training, it did not suggest that he was treated differently with respect to the timing of that testing;

B) There was some dispute as to the number of individuals in the training group. However, in any event, the evidence was that Mr. Farmer actually received more – not less – hands-on training than the other trainees in his group;

C) As Mr. Farmer was removed from the hiring process after the first week of yard tractor training, while the others were allowed to complete the second week, he

was treated differently. It was therefore necessary to examine the evidence related to the reason for his removal;

D) Turning to that evidence, the Investigator identified issues with Mr. Farmer's driving of the yard tractor during the first week, including Mr. Farmer's acknowledgment that he had a few "close calls," that he drove into a section of the yard where tractors were not allowed to go, and that on the last day he hit a pylon and dragged it a number of feet;

E) There was a contradiction in the evidence as to whether Mr. MacKillop offered Mr. Farmer additional training on his last day. Mr. MacKillop said he made that offer and Mr. Farmer declined, while Mr. Farmer says that he requested the training and it was declined by Mr. MacKillop. However, the Investigator found that, as there was no evidence that other trainees were offered additional training, nothing turned on this contradiction; and

F) While Mr. Farmer alleged that Caucasian trainees with worse driving performance than him were allowed to continue in the training process while he was removed, he declined to provide the names of those trainees. He only provided the identity of a trainee who was repeatedly late and broke a remote control. The Investigator concluded those facts did not present the same safety concerns as did Mr. Farmer's driving. In the absence of evidence to support his allegation, and taking into account the HEA witness' evidence surrounding Mr. Farmer's driving, the

Investigator concluded there did not appear to be sufficient evidence to suggest that his removal was in any way linked to a prohibited ground of discrimination.

[20] With respect to the allegations surrounding the 2018 hiring process, the Investigator's conclusions included the following:

A) The evidence did not support that Mr. Farmer was treated differently than others when he was required to start over at the beginning of the hiring process in 2018 by writing the aptitude test;

B) In relation to HEA's denial of his request to rewrite the test, the evidence indicated that, at the time of the test, Mr. Farmer signed a Declaration indicating that he was in good physical and mental health to write the test and required no accommodation at the time;

C) As such, it did not appear that HEA treated Mr. Farmer differently than others during the 2018 process. There was therefore no need to proceed with further analysis.

[21] Finally, in relation to Mr. Farmer's allegation of systemic discrimination, the Investigator concluded as follows:

A) A complaint cannot proceed based solely on statistical evidence of underrepresentation;

B) Mr. Farmer could not provide the names of any individuals who could corroborate his allegation that trainees with connections to the union have access to upwards of 6-8 weeks of additional training;

C) The other witnesses' evidence was that HEA does not provide any informal training opportunities outside of the formal process;

D) Although Mr. MacKillop commented that he had heard rumours of individuals having informal opportunities to practice on the equipment, this did not appear to be a practice facilitated or promoted by HEA;

E) In the absence of any evidence corroborating Mr. Farmer's allegation, and based on the substantial evidence to the contrary, it did not appear that HEA had a practice of providing applicants with 6-8 weeks of informal training. Therefore, there was no need to proceed with further analysis of the allegation.

[22] In the Report on his investigation into the complaint against ILA the Investigator explained that she interviewed Mr. Farmer, several union members, and a cardboard member who had been part of Mr. Farmer's training group. With respect to the allegations surrounding the 2017 and 2018 hiring processes, the Investigator concluded that Mr. Farmer was removed from the hiring processes by HEA, not by ILA, and that any allegations of discrimination regarding the removal were more appropriately directed against HEA. Mr. Farmer had also alleged that, for reasons of racial discrimination, he was selected from the bullpen for casual

work less frequently in 2018 than in the past. The Investigator found insufficient evidence to suggest that Mr. Farmer had been treated as alleged.

[23] With respect to the complaint of systemic discrimination against ILA, related to allegations of an informal practice whereby trainees with connections to the union would have access to additional training, the Investigator noted that Mr. Farmer was unable to provide the names of any individuals who could corroborate this allegation. Also, as the applicable collective agreement provided that it was HEA, not ILA, that was responsible for training, the Investigator concluded that it did not appear ILA had a policy or practice regarding training that could be the basis of systemic discrimination. There was therefore no need to proceed with further analysis of that aspect of the complaint against ILA.

[24] The Investigator therefore recommended that the Commission dismiss the complaints against both HEA and ILA. Her reports were provided to the parties for comment. Following Mr. Farmer's identification of an additional witness, the Investigator interviewed that witness and issued supplementary reports, in which her recommendations were unchanged.

E. *Decisions by the Commission*

[25] In a brief decision dated June 3, 2020, the Commission noted that it had reviewed the Investigator's report related to Mr. Farmer's complaint against ILA and any submissions filed by the parties in response to the report. Based thereon, the Commission decided pursuant to s 44(3)(b)(i) of the CHRA to dismiss the complaint against ILA because, having regard to all the circumstances of the complaint, further inquiry was not warranted.

[26] However, the Commission reached a different decision with respect to the Complaint against HEA. In the Decision that is the subject of this application for judicial review, the Commission noted that it had reviewed the Report and the parties' submissions and decided that Mr. Farmer's Complaint warranted further inquiry by the Tribunal.

[27] In its reasons for this Decision, the Commission noted that Mr. Farmer raised allegations of both individual and systemic discrimination in the context of HEA's hiring process. The Commission also observed that the Report had correctly noted that an allegation of systemic discrimination must be supported by more than mere statistical evidence with respect to underrepresentation in the workplace. However, the Commission also observed that Mr. Farmer had made an allegation of favoritism towards individuals with family and personal connections to current union members and an allegation that the African Canadians who are accepted onto the cardboard list and into the union tend to achieve this status at a later age. The Commission then analyzed the evidence related to these allegations as follows:

> All of these allegations are purportedly based on the observations of the complainant. If proven, they are directly relevant to a finding of systemic discrimination. While the respondent broadly disputes the allegation of systemic discrimination, the Report does not cite any information which refutes or contradicts the complainant's observations. The Report further cites comments at pages 24 and 25 which support the allegations made with regard to family connections and friends being given additional informal opportunities to practice on the equipment used for testing.
>
> The respondent gathers statistical information as mandated by the *Employment Equity Act*. This information pertains to visible minorities, rather than African Canadians, who are a subset of the visible minority community. The statistical information presented by the respondent is not inconsistent with the observations which support the complainant's various systemic discrimination allegations, including the allegations which go beyond the statistical composition of the workplace. While the respondent has taken steps in respect of its *Employment Equity Act* obligations,

> these steps are not proof of the absence of systemic discrimination, especially given that under-representation continues to exist within the respondent's workforce.
>
> As such, some of the complainant's evidence with regard to systemic discrimination is undisputed. The inadequacy of the respondent's statistical information for the purpose of refuting or proving the complainant's allegations does not invalidate those allegations. In light of the above, there is a reasonable basis in the evidence to support the allegations of the complainant that there is systemic discrimination in the workplace. The Canadian Human Rights Tribunal will best be able to inquire into these allegations through documentary and oral evidence, which will also be required in order to further explore the differing accounts as to how the 2017 hiring process unfolded and ended for the complainant.

[28] Lastly, in relation to the allegation of discrimination based on disability, the Commission commented on submissions that had been made by HEA to the Investigator as follows:

> The comments of the respondent with respect to disability as reported at paragraph 53 of the Report are inconsistent with the *Canadian Human Rights Act*. These comments sharply call into question whether the respondent understands its duty to accommodate, and further call into question whether any request for arrangements for special testing considerations would be received in a manner consistent with the *Canadian Human Rights Act*, at whatever time such a request might have been made.

[29] The evidence and submissions reflected in particular portions of the Report, to which the Commission refers in the above extracts from its Decision, will be explained later in these Reasons.

F. *Record Supporting this Application for Judicial Review*

[30] The record before the Court on this application is that filed by HEA. It consists of the Decision under review, an affidavit sworn by Richard Moore (the President and CEO of HEA), the records that were before the Commission in making both the Decision under review and the decision related to the complaint against ILA, and HEA's Memorandum of Fact and Law.

[31] Mr. Farmer is represented by counsel but did not file a record in response to this application. A representative of his counsel's firm attended the hearing of this application, which was held by videoconference employing the Zoom platform on February 1, 2021. However, this representative did not actively participate in the hearing.

III. Issues and Standard of Review

[32] HEA submits that this application raises the following issues for the Court's consideration:

A) What is the standard of review?

B) Is the Decision unreasonable because the Commission:

i) failed to justify why it referred Mr. Farmer's entire Complaint to the Tribunal, particularly in light of the Investigator's recommendation to dismiss Mr. Farmer's Complaint in its entirety?

ii) failed to justify or provide an intelligible reasoning path as to why it referred the systemic discrimination allegations made by Mr. Farmer to the Tribunal, contrary to the Investigator's recommendation?

iii) failed to justify why it referred Mr. Farmer's Complaint to the Tribunal in light of the Commission's decision to dismiss a related complaint by Mr. Farmer alleging nearly identical facts against ILA?

IV. Analysis

A. *Standard of Review*

[33] As suggested by HEA's articulation of the issues, it takes the position that the issues it raises are reviewable on a standard of reasonableness. I agree (see *Ennis v Canada (Attorney General)*, 2020 FC 43 [*Ennis*] at para 18).

[34] HEA relies on the explanation in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] that, in examining the reasonableness of the decision, it is not enough for its outcome to be *justifiable*. Rather, where reasons for decision are required, the decision must also be *justified* by the decision-maker through those reasons (at para 86). In determining whether a decision as a whole is reasonable, a reviewing court must develop an understanding of the decision-maker's reasoning process, assessing whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility (at para 99).

[35] I accept that these principles should guide the Court in its review of administrative decision-making and will apply them in my analysis of the issues raised by HEA.

B. *Did the Commission fail to justify why it referred Mr. Farmer's entire Complaint to the Tribunal, particularly in light of the Investigator's recommendation to dismiss Mr. Farmer's complaint in its entirety?*

(1) Jurisprudential Principles

[36] HEA observes that the Commission has the discretion to refer only a portion of a complaint to the Tribunal (see *Kanagasabapathy v Air Canada*, 2013 CHRT 7 at para 30; *Bentley v Air Canada and Air Canada Pilots Association*, 2016 CHRT 17 at para 2). I accept this proposition, and I agree with HEA that the Decision represents a referral of Mr. Farmer's entire Complaint to the Commission. In the Decision, the Commission decided that the Complaint warrants further inquiry by the Tribunal. There is nothing in the Decision suggesting that only some of Mr. Farmer's allegations were the subject of the Commission's referral.

[37] HEA further submits that, in a case where the Commission wishes to depart from an investigator's report, it must show on what basis it decided to do so (see *Moore v Canada (Attorney General)*, 2005 FC 13 at para 26). Indeed, this obligation on the part of the Commission has, if anything, been heightened by the explanation in *Vavilov* of the importance of an administrative decision-maker justifying its decision. Post-*Vavilov*, this Court quashed a decision by the Commission, where it departed from the conclusions of the investigator without an explanation for that departure (see *Ennis* at para 35). Justice Phelan concurred with previous jurisprudence of this Court to the effect that such a circumstance is deserving of careful scrutiny

by a reviewing court and that, as pointed out in *Vavilov*, for a decision to be reasonable, it must be justifiably and demonstrably so (see *Ennis* at para 31).

[38] Again, I concur with the jurisprudential principles upon which HEA relies. As such, the question for the Court's consideration under the first issue raised by HEA is whether the Decision demonstrably justifies the Commission's decision to depart from the recommendation of the Investigator and refer the entirety of Mr. Farmer's Complaint to the Tribunal. As I understand HEA's position, it submits the Decision was unreasonable in this respect because the analysis contained therein engages almost entirely with Mr. Farmer's allegations of systemic discrimination and very little with his allegations of individual discrimination. HEA therefore argues that the Decision provides no justification for referring the individual discrimination allegations to the Tribunal.

(2) Allegations of Individual Discrimination in the 2017 Hiring Process

[39] At the beginning of the Decision, the Commission noted that the Complaint raises allegations of both individual and systemic discrimination in the context of the hiring process in which Mr. Farmer participated. I accept HEA's characterization of the Decision's subsequent analysis as focusing almost entirely on the systemic discrimination allegations. However, as HEA acknowledges, that analysis includes the following conclusion, which does reference the 2017 hiring process to which a portion of the individual allegations relate:

> … The Canadian Human Rights Tribunal will best be able to inquire into these allegations through documentary and oral evidence, which will also be required in order to further explore the differing accounts as to how the 2017 hiring process unfolded and ended for the complainant.

[40] I have therefore considered whether this sentence in the Decision, referencing "differing accounts" of the 2017 hiring process, represents reasoning for the Commission's departure from the recommendation in the Report that withstands the necessary reasonableness review.

[41] The Commission did not identify the particular differing accounts to which it was referring. However, relying on the Report, there appear to be three areas in which there were divergences in the evidence:

A) The size of Mr. Farmer's training group – The Investigator noted Mr. Farmer gave evidence that the group was between 10 and 12 individuals, split into two smaller groups (which would result in 5 to 6 people per small group). However, the evidence of all the other witnesses, including a fellow trainee, was that there were only 3 individuals in Mr. Farmer's small group;

B) Whether Mr. MacKillop offered Mr. Farmer an additional day of training – Mr. MacKillop said he made that offer and Mr. Farmer declined, while Mr. Farmer says that he requested the training and it was declined by Mr. MacKillop; and

C) Whether trainees with poorer performance advanced past the yard tractor evaluation – Mr. Farmer alleged that Caucasian trainees with worse driving performance than him were allowed to continue in the process while he was removed. However, he declined to provide the names of any such trainees.

[42] The Investigator's conclusions, in relation to these three areas in which the evidence diverged, can be summarized as follows:

A) The evidence of all the trainers, and the other trainee who was interviewed, was that Mr. Farmer actually received more hands-on training than the other trainees. Mr. Farmer himself acknowledged that he received additional training time with Mr. MacKillop, which was not offered to the other trainees in his immediate group. Therefore, regardless of the number of trainees in Mr. Farmer's small group, it appeared that he was given more – not less – hands-on training time than the other trainees;

B) While there was a conflict in the evidence regarding the offer of additional training by Mr. MacKillop, there was no evidence that other trainees were offered an additional day of training to pass the course. Therefore, nothing appeared to turn on this contradiction; and

C) In the absence of any corroborating evidence of drivers worse than Mr. Farmer being allowed to proceed with training, and taking into account the substantial evidence from HEA as to the concerns with Mr. Farmer's driving, there did not appear to be sufficient evidence to suggest that his removal from the training process was in any way linked to prohibited grounds of discrimination.

[43] Against the backdrop of the Investigator's analysis of the conflict in the evidence, I agree with HEA's position that it is not intelligible why the Commission determined that these

differing accounts of the 2017 hiring process warranted further inquiry into Mr. Farmer's allegations of individual discrimination in connection with that process.

[44] As explained by the Supreme Court of Canada in *Cooper v Canada (Human Rights Commission),* [1996] 3 SCR 854 at para 53, the Commission's role is to assess whether the evidence before it is sufficient to warrant referring a complaint to the Tribunal. The Investigator identified some conflicts in the evidence. However, even if those conflicts were resolved in favour of Mr. Farmer, I see no basis for a conclusion that the evidence would be sufficient to suggest that Mr. Farmer's removal from the training process was linked to a prohibited ground of discrimination. More to the point, the Decision articulates no basis for such a conclusion. As such, I find that aspect of the Decision unreasonable, in that it fails to justify a departure from the conclusions of the Investigator in relation to the 2017 hiring process.

(3) Allegations of Individual Discrimination in the 2018 Hiring Process

[45] Turning to the 2018 hiring process, HEA submits that the Decision contains no analysis whatsoever supporting a departure from the conclusion of the Investigator that there was insufficient evidence to suggest Mr. Farmer was treated differently in connection with that process. I agree with that submission.

[46] I should note that I have considered the possible relevance of the Commission's statement of its concerns as to whether HEA understands its duty to accommodate persons with disability. For ease of reference, that statement reads as follows:

> The comments of the respondent with respect to disability as reported at paragraph 53 of the Report are inconsistent with the *Canadian Human Rights Act*. These comments sharply call into question whether the respondent understands its duty to accommodate, and further call into question whether any request for arrangements for special testing considerations would be received in a manner consistent with the *Canadian Human Rights Act*, at whatever time such a request might have been made.

[47] Paragraph 53 of the Report, to which the Commission refers in the above statement, reads as follows:

> The respondent further argues that whatever the impact of the motor vehicle accident may have had on his health, such an impact does not equate to a disability. The respondent states that the complainant had a temporary medical situation, and that accepting this as a disability would trivialize the protections under the Act.

[48] At the hearing of this application, HEA's counsel emphasized that, in this paragraph of the Report, the Investigator was paraphrasing HGA's submissions to the Investigator, which were not part of the record before the Commission when it issued the Decision with the above statement. Mr. Moore's affidavit provides excerpts of those submissions as follows:

> Notably whatever impact his motor vehicle accident may have had on Mr. Farmer's health, such an impact does not necessarily translate into a "disability" for the purposes of accommodation. In a decision of the Ontario Human Rights Tribunal in *Kalam v The Brick Warehouse* (2011 HRTO 1037) the Tribunal considered whether the circumstances giving rise to the employee's dismissal following a three-day absence amounted to discriminatory treatment. The Tribunal reviewed prior cases noting that not all illnesses have been found to be a disability; for example, the flu is a temporary illness experienced from everyone from time to time.
>
> Ultimately the Tribunal found in *Kalam* that the complainant was not a person with a disability at any material time, nor was he perceived to be a person with a disability. It went on to say that finding commonplace illnesses were disabilities would have the effect of trivializing the Code's protections. In this case, HEA says

> that accepting Mr. Farmer's temporary medical situation, which he did not tell HEA about until after he failed the Aptitude Test, was a "disability" would similarly trivialize the protections under the *Canadian Human Rights Act*.
>
> […]
>
> HEA cannot be faulted for not providing accommodation to applicants who do not request accommodation but, upon learning they failed the test, request a second chance. This point was made by Justice Zinn (author of the text, *The Law of Human Rights in Canada*) in *Kandola*:
>
> 1. An employee who requires accommodation for a disability must inform his employer of the fact of the disability, unless it is self-evident, and then cooperate in the accommodation process; if not, it is he who must bear the consequences. Admitting to a disability and seeking the employer's assistance is difficult for some. However, when disclosure and request for accommodation have not been made, the employe[e] cannot later ask that the employer's assessment of his performance, made in ignorance of the disability, be set aside, nor can it reasonably be asked that the employer retrospectively assess what the employee's performance might have been if the disability was known and the employee accommodated in the workplace.

[49] HEA does not assert a reviewable error by the Commission in connection with its reliance on the Investigator's paraphrasing of HEA's submissions in paragraph 53 of the Report. As noted above, the Commission did not have the benefit of the submissions themselves. However, HEA wanted the Court to have the benefit of the context in which HEA made the comments about disability that were impugned by the Commission.

[50] In my view, nothing turns on this particular aspect of the Decision. While the comments by HEA that the Commission referred to were made in relation to Mr. Farmer's allegations surrounding the 2018 hiring process, the Commission's concerns about those comments do not appear to represent a basis for its conclusion that those allegations warranted referral to an

inquiry by the Tribunal. The Investigator's overall conclusion in relation to those allegations reads as follows:

> 124. Regarding the 2018 Hiring Process, the evidence does not support that the complainant was treated differently when he was required to "start over" from the beginning of the process. He appears to have been treated the same in this regard. In terms of the denial of his request to rewrite the test; the evidence indicates that at the time of the test, the complainant signed a Declaration indicating that he was in good physical and mental health to write the test and required no accommodation at the time. It was not until after the results of the test did the complainant raises concern over the vehicle accident and its impact on his ability to complete the test. As such, there is insufficient evidence to suggest he was treated differently.

[51] The Commission's concerns, as to HEA's understanding of its duty to accommodate, do not engage with any of the evidence or conclusions identified in the Report surrounding the 2018 hiring process.

[52] Against the backdrop of the evidence identified by the Investigator, I see no basis for a conclusion that the concerns identified by the Commission would be sufficient to suggest that Mr. Farmer's removal from the hiring process in 2018 resulted from a failure to accommodate or otherwise from differential treatment linked to a prohibited ground of discrimination. Again, more to the point, the Decision articulates no basis for such a conclusion. As such, I find that it was unreasonable for the Commission to refer Mr. Farmer's allegations surrounding the 2018 hiring process to the Tribunal for further inquiry.

[53] HEA therefore succeeds in its first ground of review, surrounding the referral of the allegations of individual discrimination to the Tribunal.

C. *Did the Commission fail to justify or provide an intelligible reasoning path as to why it referred the systemic discrimination allegations made by Mr. Farmer to the Tribunal, contrary to the Investigator's recommendation?*

[54] In challenging the Commission’s decision to refer the allegations of systemic discrimination to the Tribunal, HEA relies on the same jurisprudential principles that were canvassed earlier in these Reasons. It argues that the Decision fails to articulate an intelligible line of analysis supporting its conclusion that these allegations warranted further inquiry.

[55] HEA notes that the Commission agreed with the Investigator’s conclusion that an allegation of systemic discrimination must be supported by more than mere statistical evidence with respect to underrepresentation in the workplace. This conclusion reflects the operation of s 40.1(2) of the CHRA. The Commission’s decision to refer the allegations of systemic discrimination to the Tribunal turns on the fact Mr. Farmer based this allegation on grounds other than the statistical composition of the workforce at the Port.

[56] As observed earlier in these Reasons, the Commission noted that Mr. Farmer alleged that applicants with family and personal connections to current ILA members have been advanced through the application process and accepted onto a cardboard with work experience and qualifications inferior to other candidates, including Mr. Farmer. The Commission also noted the allegation that the few African Canadians who are accepted onto the cardboard, and who ultimately become members of the ILA, tend to attain the status at a more advanced age than other applicants. Following references to the evidence, the Commission concluded that there is a

reasonable basis to support the allegations in the Complaint that there is systemic discrimination in the HEA workplace.

[57] Therefore, unlike with respect to the allegations of individual discrimination, the Decision provides an explanation of the Commission's conclusion that the systemic discrimination allegations warrant further inquiry. The question for the Court to assess is whether that explanation is a reasonable one, free of any fatal flaws in its overarching logic or other reviewable errors in the Commission's treatment of the evidence (see *Vavilov* at para 102).

[58] In challenging this aspect of the Decision, HEA first focuses upon what it refers to as the age allegation, i.e. that the few African Canadians who are accepted onto the cardboard and who eventually become union members tend to attain this status at a more advanced age than other applicants. HEA argues that, in relying on this allegation, the Decision is unreasonable for several reasons:

A) The age allegation was directed at ILA, not HEA, as it is solely ILA that determines who becomes a member of the union;

B) The age allegation is a bald assertion of discrimination, unsupported by any facts; and

C) The Report demonstrates no investigation of the age allegation.

[59] In considering these arguments, I note that HEA's counsel confirmed at the hearing of this application that HEA does not interpret the Complaint or Decision as related to an allegation of discrimination on the basis of age. Rather, the allegation is that one of the effects of systemic racial discrimination in hiring practices is that it takes longer for African-Canadians to progress to union membership. I agree with this characterization of the allegation.

[60] I also read the Commission's references to the age allegation as consistent with this characterization. While the Commission referenced the age allegation as one of the allegations purportedly based on Mr. Farmer's observations, it then referred to the evidence and noted particular comments cited in the Report, which the Commission considered to support Mr. Farmer's allegation about family connections and friends being given additional opportunities to practice on equipment. I read the Decision as based on the evidence related to that allegation, not the age allegation, which is simply an effect of the alleged additional access to training. I therefore find no reviewable error raised by HEA's arguments surrounding the age allegation.

[61] Turning to the allegation of systemic discrimination arising from additional training opportunities for family and friends, HEA argues it was unreasonable for the Commission to find that this allegation was undisputed and that it could be a basis on the evidence to make a finding of discrimination.

[62] HEA notes that systemic discrimination under s 10 of the CHRA requires the existence of a policy or a practice that deprives or tends to deprive an individual or class of individuals of employment opportunities on a prohibited ground of discrimination. HEA submits that the

Investigator clearly found that the evidence did not suggest the existence of such a practice and that the Commission failed to justify why it departed from the Investigator's conclusion.

[63] I accept HEA's characterization of the Investigator's finding. However, on this ground of review, I disagree with HEA's position that the Commission failed to justify its departure from that finding. In arriving at that decision, the Commission clearly relied on what it refers to as the comments cited at pages 24 and 25 of the Report, which the Commission considers to support Mr. Farmer's allegations. HEA submits, and I agree, that this is a reference to the following paragraphs of the Report:

> 99. Graham MacKillop, Superintendent of Training, states that he has *"heard stories"* of candidates with family connections having informal opportunities to practice on use of equipment used for testing. However, these rumours did not arise *"until after all this happened."* He states that he himself has not seen this happening: *"definitely not from me ... It definitely would not be any of my trainers…."* Mr. MacKillop states that when he first heard these rumours, he had first thought that if it was happening it was *"really not fair."* However, he states *"then again it's not any different than getting outside experience from another training company or friend who drives tractor trailers."* Mr. MacKillop states that after the complainant was removed from the training process he provided the complainant with names of outside trucking companies and recommended that the complainant get more experience in this regard. The complainant confirms that Mr. MacKillop did so.
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> 100. Ryan Hill, Trainer, states that he has worked on the waterfront since 1989 and has been a Trainer for the past 3 years. He states that he has family on the waterfront and he *"used to go down and see how it was done when my family was there. I saw what my family did. But I have never given anyone any informal training."*

[64] As I read the Decision, it demonstrates that the Commission considered this evidence from two of the witnesses involved in HEA's training process to support Mr. Farmer's

allegations and therefore to warrant referring the allegations of systemic discrimination to the Tribunal. Therefore, unlike in relation to the allegations of individual discrimination, the Commission has explained this aspect of its Decision.

[65] HEA argues that the Commission unreasonably apprehended the evidence when it concluded the Report contained no information which refutes or contradicts Mr. Farmer's observation on the family connection allegation. In that regard, HEA notes that the Report describes its conclusion, that HEA had no practice of providing additional training opportunities, as based on both the absence of any corroborating evidence and substantial evidence to the contrary.

[66] I read the Report's reference to the absence of any corroborating evidence as related to Mr. Farmer being unable to provide the names of any individuals who could corroborate his allegation. While the Investigator appears not to have considered the evidence of Mr. MacKillop and Mr. Hill to represent corroborating evidence, the Decision indicates that the Commission reached the opposite conclusion. Conscious of the deference owed by the Court when applying the reasonableness standard to administrative tribunals' treatment of the evidence before them, which precludes reweighing and reassessing such evidence (see *Vavilov* at para 125), there is no basis for the Court to interfere with that conclusion.

[67] With respect to the Commission's finding that the Report cites no information that refutes or contradicts Mr. Farmer's observations, HEA argues that the Report actually contains extensive

information refuting or contradicting the family connections allegation, referring to the witnesses' evidence and HEA's documentary evidence.

[68] The evidence of the witnesses involved in the provision of training is to the effect that they have never been personally involved in the provision of informal training. Some also stated that they were not aware of informal training taking place. The Commission noted that HEA broadly disputed the allegation of systemic discrimination. However, the witnesses' evidence relates only to their own individual experiences. For instance, Mr. McKillop stated that he and his trainers were not involved in providing informal training but, when he first heard the relevant rumours, he thought that, <u>if it was happening</u>, it was not really fair (my emphasis). I cannot conclude that the Commission misapprehended the witnesses' evidence in finding that there was no evidence refuting Mr. Farmer's allegations.

[69] The documentary evidence provided by HEA reflected all the additional time that trainees received in the years between 2000 and 2017, which demonstrated additional time in 2000 and almost no such time subsequently. However, I understand Mr. Farmer's systemic discrimination allegations to relate to training opportunities of an informal nature that would not necessarily be captured in HEA's records. Again, the Commission's conclusion that HEA's evidence does not refute the allegations is not unreasonable.

[70] HEA argues that the Decision reverses the onus upon Mr. Farmer to establish that there is a reasonable basis for his Complaint to be referred to the Tribunal. It submits that the Commission erred by placing that onus upon HEA, requiring it to disprove the Complaint. HEA

takes the position that the comments made by Mr. MacKillop and Mr. Hill relate at most to historical events that do not bear on current practices and HEA's commitment to employment equity.

[71] I do not agree that the Decision represents a reversal of the applicable onus. While I agree with HEA that Mr. Farmer offered no corroboration in support of his allegation of a practice of offering informal training opportunities to friends and family, the statements of the witnesses involved in training provided what the Commission considered to be evidence supporting that allegation. While HEA's position, that this evidence relates to a historical practice, may turn out to be accurate, that is not a determination for the Court to make on judicial review of the Commission's Decision. I cannot conclude that the Commission's reliance on this evidence, in deciding that referral to a Tribunal was warranted, undermines the reasonableness of that aspect of the Decision.

D. *Did the Commission fail to justify why it referred Mr. Farmer's Complaint to the Tribunal in light of the Commission's decision to dismiss a related complaint by Mr. Farmer alleging nearly identical facts against ILA?*

[72] The Commission noted that there is no overlap between Mr. Farmer's allegations against HEA and ILA of individual discrimination related to the 2017 and 2018 hiring processes. However, with respect to systemic discrimination, the allegations in the two complaints are almost identical. HEA therefore argues that the Commission failed to justify why it referred the Complaint against HEA to the Tribunal while dismissing the complaint against ILA.

[73] Indeed, HEA argues that, if anything, the evidence was more supportive of the allegation against ILA. In her report regarding the allegation against ILA, the Investigator noted that ILA is aware that on occasion a union member has provided a relative, friend or girlfriend, who is a trainee, with the opportunity to try lashing or to operate a machine.

[74] HEA refers to the Court to *Public Service Alliance of Canada v Canada (Attorney General)*, 2018 FC 33 as authority for quashing a decision that is inconsistent with a decision on a related complaint (see para 31). In that case, in the absence of reasons for the inconsistent decisions, Justice Phelan explained the principles underlying the required reasonableness review as follows (at paras 24-26):

> 24. It is obvious and clearly accepted by the Federal Court of Appeal that a court must be able to understand the basis on which a decision was made to determine whether it falls within the range of reasonable outcomes. In *Lloyd v Canada (Attorney General)*, 2016 FCA 115 at para 24, 265 ACWS (3d) 1036, the Federal Court of Appeal noted that a decision cannot be justified on judicial review through speculation and rationalization and quoted as follows from *Komolafe v Canada (Citizenship and Immigration)*, 2013 FC 431 at para 11, 16 Imm LR (4th) 267:
>
> > [11] *Newfoundland Nurses* is not an open invitation to the Court to provide reasons that were not given, nor is it licence to guess what findings might have been made or to speculate as to what the tribunal might have been thinking. This is particularly so where the reasons are silent on a critical issue. It is ironic that *Newfoundland Nurses*, a case which at its core is about deference and standard of review, is urged as authority for the supervisory court to do the task that the decision maker did not do, to supply the reasons that might have been given and make findings of fact that were not made. This is to turn the jurisprudence on its head. *Newfoundland Nurses* allows reviewing courts to connect the dots on the page where the lines, and the direction they are headed, may be readily drawn. Here, there were no dots on the page.

> 25. Under this aspect of reasonableness, the Court must engage in reasoned contemplation of what the decision maker was thinking. It would be a triumph of form over substance to quash a decision if it was crystal clear, by intelligent observation, as to what the decision maker was thinking but which was not clearly or adequately expressed.
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> 26. “Connecting the dots” requires dots which are clear and which lead inexorably to one conclusion. In the present case, I see no dots and if they are there, they are too opaque.

[75] This interpretation of *Newfoundland and Labrador Nurses’ Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, was subsequently endorsed in *Vavilov* (at paras 96-97).

[76] In the present case, the Decision related to the Complaint against HEA contains no express explanation of why that Complaint resulted in a different conclusion than the complaint against ILA. I have, however, considered whether comparing the Decision to the decision in the complaint against ILA allows the Court to “connect the dots” in the manner described in the jurisprudence.

[77] As previously noted, the Commission’s decision to dismiss the complaint against ILA is very brief. The Commission explained that it had reviewed the Investigator’s report related to Mr. Farmer’s complaint against ILA and any submissions filed by the parties in response to the report. Based thereon, the Commission decided to dismiss the complaint against ILA because, having regard to all the circumstances of the complaint, further inquiry was not warranted. The jurisprudence is clear that, where the Commission adopts the Investigator’s recommendations,

the reasons of the Investigator become the reasons of the Commission for its decision (see *Sketchley v Canada (Attorney General)*, 2005 FCA 404 at para 37).

[78] The Investigator's report of the complaint against ILA states the Investigator's conclusion with respect to the allegations of systemic discrimination as follows:

> The complaint alleges that there is an informal practice whereby trainees with *"connections"* to the union have access to additional training – upwards of 6-8 weeks. However, the complainant was unable to provide any names of individuals who could corroborate this allegation. According to the Collective Agreement, the HEA – not the respondent – is responsible for training of longshorepersons. As such, it does not appear that the respondent has a policy or practice regarding training. Accordingly, there is no need to proceed with the analysis.

[79] In relation to the evidence which HEA has referenced in raising this ground of review, the Investigator states as follows;

> The respondent states that it is aware that on occasion a member *"has provided a relative, friend or girlfriend who is a trainee"* with the opportunity to try *"lashing"* or to operate a machine. However, the respondent states that this is done on Employer property and on Employer equipment. The respondent states that it does not encourage, arrange, condone or authorize this practice.

[80] In my view, the Investigator's report contains the "dots" necessary to understand why the Commission decided to dismiss the complaint against the ILA, while referring the complaint against the HEA to the Tribunal. The evidence before the Investigator, and the Investigator's conclusion, was that it was HEA, not ILA, that is responsible for training. While it may be that the trainers are union members, the fact that HEA has responsibility for training underlies the

Commission's decision to refer the allegation of systemic discrimination surrounding training, as against HEA only, to the Tribunal for further inquiry.

[81] I therefore do not find the Decision unreasonable based on the Commission's different decisions with respect to the two complaints.

V. Conclusion

[82] I have found the Decision unreasonable based on the first ground of review raised by HEA. Even though I have not found merit in the other two issues HEA raised, the result is that the Decision must be quashed.

[83] In its Notice of Application, HEA seeks an order quashing the Decision and either (a) dismissing Mr. Farmer's Complaint based on the record before the Court, or (b) referring the matter back to the Commission for redetermination by different commissioners in accordance with the directions of the Court. However, HEA did not press the request that the Court dismiss the Complaint, in either its written or its oral submissions. In any event, I do not find a basis to grant such relief on the facts of this case.

[84] My Judgment will therefore quash the Decision and order the matter returned to the Commission to be redetermined by different members of the Commission in accordance with these Reasons.

[85] While the Commission's redetermination must address the reviewable error identified in these Reasons with respect to the allegations of individual discrimination, it may also, with the benefit of any further submissions from the parties that may be sought by the Commission, address afresh the allegations of systemic discrimination.

[86] Neither party sought any costs in this application, and none are awarded.

JUDGMENT IN T-741-20

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is allowed.

2. The decision of the Canadian Human Rights Commission dated June 3, 2020, requesting that the Chairperson of the Canadian Human Rights Tribunal institute an inquiry into a complaint dated July 17, 2018, submitted by the Respondent, Graham Farmer, against the Applicant, the Halifax Employers Association, is hereby quashed.

3. The matter is referred to different members of the Canadian Human Rights Commission for redetermination in accordance with the Court's Reasons.

4. There is no order as to costs.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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DATED:	FEBRUARY 12, 2021

APPEARANCES:

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