

Federal Court



Cour fédérale

**Date: 20220225**

**Docket: T-2031-19**

**Citation: 2022 FC 265**

**Ottawa, Ontario, February 25, 2022**

**PRESENT: The Honourable Mr. Justice Manson**

**BETWEEN:**

**ADAM CHOI**

**Applicants**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

**JUDGMENT AND REASONS**

**I. Introduction**

[1] This is an application for judicial review of a decision of the Canadian Human Rights Commission [the “Commission”], dated November 14, 2019, dismissing the Applicant’s human rights complaint no. 20160608 against the Canadian Armed Forces [the “Complaint”] pursuant to subparagraph 44(3)(b)(i) of the *Canadian Human Rights Act*, RSC, 1985, c H-6 [the “Act”], [the “Decision”].

## II. Background

[2] The Applicant, Adam Choi, has been a Canadian Armed Forces [CAF] member since 2001. At all material times, the Applicant was serving in the Royal Canadian Navy as a junior non-commissioned member at the rank of Master Seaman.

[3] The Applicant was born in Calgary, Alberta and lived in Hong Kong between the ages of 1 and 13.

### A. *The Applicant's Complaint*

[4] On May 19, 2016, the Applicant filed the Complaint, which alleges that he was the victim of discrimination in the areas of i) employment, ii) a discriminatory policy or practice, and iii) harassment based on the prohibited grounds of race, national and ethnic origin (Chinese descent), disability (dental health issues), and family status (married) from February 14, 2014 to May 21, 2015, and an incident in October 2015, by his employer, the CAF.

[5] The Applicant's Complaint alleges various instances of discrimination:

- i. Between February 14, 2014 and May 21, 2015, the Applicant was posted onboard the HMCS Calgary in the Royal Canadian Navy as a Master Seaman Weapons System Engineering Technician. During this time, the Applicant alleges he was treated differently than others and eventually removed in response to an incident where four officers made comments about how they thought recruiting had made

a mistake in hiring more people of Asian descent to the Combat Systems Engineering trade due to their poor English language skills.

- ii. Several instances between October 16, 2014 and May 2015 where the Applicant alleges he was treated differently than others, particularly when exercising his seniority in reporting alcohol incidents and workplace harassment incidents, as well as requesting work product from subordinates.
- iii. Several instances between May 2014 and October 2015, where the Applicant claims he was harassed by his employer, including being denied medical leave to be with his wife who suffered a miscarriage, being laughed at while describing his medical condition and treatments, and told to “shut up” when recommending a location for training.

[6] The Applicant claims that the above instances of discrimination demonstrate that his chain of command abused their authority, that he was set up to fail at his job, and labeled an antagonist in his workplace. He states that his subordinates lost confidence in him, that he lives in fear of retaliation, and no longer feels safe working on a ship.

[7] As a result of the alleged discrimination, the Applicant claims he suffered from depression and anxiety, and that his career advancement has also been significantly affected.

[8] Furthermore, the Applicant submitted internal harassment complaints; however, no investigation was conducted because it was deemed that there would be no constructive result.

[9] On February 15, 2019, the Complaint was referred to investigation, which was completed six months later.

B. *The Commission's Investigation*

[10] On July 26, 2019, an investigator for the Commission released its Investigation Report, which found that:

- i. With respect to the Applicant's allegation of adverse differential treatment in employment, the evidence does not support that the Applicant was treated negatively on the basis of the prohibited grounds cited in his Complaint;
- ii. With respect to the allegations of harassment, it appears that the Respondent took appropriate action to deal with the harassment shortly after being notified of the harassing events and took effective steps to prevent the conduct from recurring;
- iii. Internal mediation settlements were reached in three out of four harassment complaints, however, the Applicant was dissatisfied with the processes and he filed the Complaint with the Commission; and
- iv. In terms of remedy, the Applicant requested that he be compensated for his lack of promotion and for his distress. The CAF requested that the Complaint be dismissed.

[11] Based on their investigation and the above findings, the investigator recommended that the Commission dismiss the Complaint pursuant to subparagraph 44(3)(b)(ii) of the *Act* because, having regard to all the circumstances of the Complaint, further inquiry would not be warranted.

[12] The Applicant and the CAF both submitted responses to the Commission's Investigation Report. In his response, the Applicant disagreed with a number of the findings of the investigator and requested that the Commission continue with further inquiry. The CAF agreed with the investigator's recommendation to dismiss the Complaint and provided responses to the Applicant's comments in regards to the Investigation Report.

[13] Upon review of the Investigation Report and the additional submissions of the Applicant and the CAF, the Commission dismissed the Applicant's Complaint in the Decision, which was communicated to the Applicant on November 19, 2019.

[14] The Applicant seeks an Order:

- i. Setting aside the Commission's Decision;
- ii. Reconvening the investigation into the Applicant's Complaint; and
- iii. Such further and other relief as this Honourable Court may deem appropriate and just in the circumstances.

III. Decision Under Review

[15] As stated above, upon review of the Investigation Report and the additional submissions of the Applicant and the CAF, the Commission dismissed the Applicant's Complaint pursuant to subparagraph 44(3)(b)(i) of the *Act* because, having regard to all the circumstances of the Complaint, further inquiry was not warranted.

[16] The Decision notes that the extensive comments provided by the Applicant in his response to the Investigation Report did not provide sufficient evidence to show an alleged connection between the prohibited grounds of discrimination and the allegations concerning dental health issues, compassionate leave, and promotion.

[17] In addition, the Decision highlights the CAF's acknowledgment that some harassment took place and that steps have been taken to prevent the conduct from recurring.

IV. Issues

[18] The issues to be decided on this judicial review are:

- (1) Was the Decision reasonable?
- (2) Was the Decision procedurally fair?

V. Standard of Review

[19] Where a Court reviews the merits of an administrative decision the standard of review is reasonableness [*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at paragraph 23].

[20] Issues that relate to a breach of procedural fairness are reviewed on the standard of correctness or a standard with the same import [*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at paragraphs 34-35 and 54-55, citing *Mission Institution v. Khela*, 2014 SCC 24 at paragraph 79].

VI. Analysis

A. *Preliminary Issue – Admissibility of the Applicant’s Affidavit*

[21] There is no absolute right to produce evidence on an application for judicial review. The evidentiary record is usually limited to what was before the administrative decision-maker [*Rosianu v. Western Logistics Inc.*, 2019 FC 1022, citing *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 [AUCC] at paragraph 19, aff’d in *Rosianu v. Western Logistics Inc.*, 2021 FCA 241 [*Rosianu*]].

[22] There are three exceptions to this rule and affidavits may be received by the Court i) to provide background information that may assist in the understanding of the relevant issues, ii) to provide material information necessary to determine whether there has been a breach of

procedural fairness, and/or iii) to highlight the lack of evidence before the decision-maker when it made its decision [AUCC at paragraph 20].

[23] Further, while some of the exhibits may have been before the investigator, this Court has held that documents before an investigator, but not before the Commission when it made its decision, are not admissible on judicial review unless it is shown that they fit one of the exceptions outlined above [*Drew v. Canada*, 2018 FC 553 at paragraph 15].

[24] Upon review, I find that the Applicant's affidavit is inadmissible. It is rife with the Applicant's personal opinion and is argumentative. In addition, the Applicant's affidavit does not fall into any of the three exceptions outlined above. Further, the affidavit repeats the submissions that the Applicant made in response to the Investigation Report (which was before the Commission when it made its Decision), as well as the Applicant's submissions for this application.

B. *Was the Decision reasonable?*

[25] The Commission has the discretion to dismiss a complaint if it is satisfied "that, having regard to all the circumstances of the complaint, an inquiry into the complaint is not warranted" [subparagraph 44(3)(b)(i) of the *Act*]. The Commission is owed deference in respect of its decision [*Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2012 SCC 10].



[26] The role of the Commission is that of assessing the “sufficiency of the evidence” before it and determining whether there is a reasonable basis in the evidence to proceed further [*Syndicat des Employés de Production du Québec et de l'Acadie v. Canada (Canadian Human Rights Commission)*, [1989] 2 SCR 879 at page 899].

[27] The Commission is not an adjudicative body; that is the role of a tribunal appointed under the *Act*. When deciding whether a complaint should proceed to inquiry by a tribunal, the Commission fulfills a screening analysis. It is not the job of the Commission to determine if the complaint is made out; rather its duty is to decide if, under the provisions of the *Act*, an inquiry is warranted having regard to all the facts. The central component of the Commission’s role is that of assessing the sufficiency of the evidence before it [*Cooper v. Canada (Human Rights Commission)*, [1996] 3 SCR 854].

[28] A sufficiency analysis is not designed to take sides or determine points in a complaint. This is not a balance of probabilities matter but a question of whether a reasonable basis for a referral to the tribunal exists; credibility and weight are usually the preserve of the tribunal [*Ennis v. Canada (Attorney General)*, 2020 FC 43, rev’d on other rounds in *Canada (Attorney General) v. Ennis*, 2021 FCA 95 [*Ennis FCA*]].

[29] In screening complaints, the Commission relies upon the work of an investigator who typically interviews witnesses and reviews the available documentary record. Where the Commission renders a decision consistent with the recommendation of its investigator, the

investigator's report has been held to form a part of the Commission's reasons [*Tutty v. Canada (Attorney General)*, 2011 FC 57 [*Tutty*] at paragraphs 13].

[30] The Commission's decision to dismiss or refer a complaint inevitably requires some weighing of the evidence to determine if it is sufficient to justify a hearing on the merits. It is this aspect of the process that has been said to require deference on judicial review. Deference is not required, however, in the context of a review of the fairness of the process including the thoroughness of the investigation. For such issues the standard of review is correctness [*Tutty* at paragraph 14].

[31] The Applicant argues that the investigator (and by extension, the Commission) ignored or improperly assessed evidence. The Applicant argues that the Commission's Decision to dismiss his Complaint was unreasonable because it was made on "improper findings." In support of this claim, the Applicant baldly asserts that his "former chain of command gave false statements" to the investigator. The Applicant further alleges that the Commission erred in finding that the CAF reached a resolution with him and took steps to prevent harassment from recurring.

[32] The Investigation Report was based on a full and reasonable consideration of the evidence, and was responsive to the submissions of both Parties. The thrust of the Applicant's submissions appears to be an attempt to have this Court reweigh and reconsider evidence in order to reach a different conclusion from that of the investigator. It is not the role of the Court to reweigh evidence in a judicial review.

[33] The findings of the Investigation Report relied on by the Commission in its Decision were reasonable and open to the Commission. The investigator explicitly noted that the CAF took the Applicant's harassment complaint, looked into it, accepted that some harassing behaviour was present, and facilitated internal mediation to reach agreement and settlement on three out of four issues between the Applicant and other members. The investigator reasonably determined this was appropriate action. The fact that the Applicant was dissatisfied on the outcome of his Personal Evaluation Report does not detract from the CAF's action in addressing his harassment complaint. Disagreement with an investigator's conclusions is not sufficient to quash the Commission's acceptance of an Investigation Report.

[34] The Investigator was fully alive to the issues, addressed the evidence on both sides in a thorough and impartial way, and provided clear conclusions. Apart from expressing his disagreement with the investigator's conclusions and the Commission's Decision, the Applicant points to nothing in the investigation and analysis that is unreasonable.

C. *Was the Decision procedurally fair?*

[35] In the context of proceedings before the Commission, the Commission must act in accordance with natural justice. This requires that the investigation report upon which the Commission relies be neutral and thorough and that the parties be given an opportunity to respond to it [*Ennis FCA* at paragraph 76, citing *Canada (Attorney General) v. Davis*, 2010 FCA 134 at paragraph 6].

[36] Similarly, procedural fairness dictates that the parties be informed of the substance of the evidence obtained by the investigator which will be put before the Commission and that the parties be provided the opportunity to respond to this evidence and make all relevant representations in relation to it [*Ennis FCA* at paragraph 77, citing *Deschênes v. Canada (Attorney General)*, 2009 FC 1126 at paragraph 10].

[37] The Commission's investigative process is not akin to a hearing and the parties are thus not entitled as of right to insist that a Commission investigator will interview every witness that they put forward. An investigation will not be found to be lacking in thoroughness and result in a breach of procedural fairness merely because the investigator did not interview all of the witnesses proposed by a party. To conclude that there was a breach of procedural fairness, the Court must be persuaded that the investigator failed to interview "obvious players" that had important information in support of his complaint [*Rosianu* at paragraph 33].

[38] The Commission and the investigator are entitled to control their own process subject only to the requirement of fairness; they are "masters of their own procedure" [*Rosianu* at paragraph 34]. Moreover, the Commission has a wide degree of latitude in conducting investigations. The investigator is not required to pursue every possible tangential or unrelated issue. The investigation can be thorough without being exhaustive; the issue is whether obviously crucial evidence has been overlooked [*Desgranges v. Canada (Administrative Tribunals Support Services)*, 2020 FC 315 at paragraphs 74 to 75].

[39] The Applicant's allegations regarding procedural fairness appear to be focused on the CAF's internal grievance proceedings, not the Commission's Decision. The Applicant does not appear to allege that the Commission breached his right to procedural fairness – only that the Commission made erroneous findings.

[40] To the extent that the “erroneous findings” allegation engages procedural fairness, I find that the investigation was sufficiently thorough.

[41] In this case, the investigator gathered and considered the relevant evidence to address the Applicant's allegations, and did not fail to examine “obviously crucial evidence.” The Investigation Report demonstrates a thorough review and consideration of the Parties' positions, documentary evidence, witness interviews, and organizational structure and policy of the CAF.

[42] The Applicant had the opportunity to respond to the Investigation Report and did so, making detailed and extensive submissions. The Commission reviewed these submissions, as well as the Investigation Report, in coming to its Decision.

[43] The Applicant was afforded procedural fairness.

[44] For the reasons above, this Application is dismissed.

**JUDGMENT in T-2031-19**

**THIS COURT'S JUDGMENT is that**

1. The Application is dismissed.
2. Costs to the Respondent in the amount of \$2000, inclusive of disbursements and taxes.

"Michael D. Manson"

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Judge

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

**DOCKET:** T-2031-19

**STYLE OF CAUSE:** ADAM CHOI v ATTORNEY GENERAL OF CANADA

**PLACE OF HEARING:** HELD BY VIDEOCONFERENCE

**DATE OF HEARING:** FEBRUARY 23, 2022

**JUDGMENT AND REASONS:** MANSON J.

**DATED:** FEBRUARY 25, 2022

**APPEARANCES:**

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COURTENAY LANDSIEDEL FOR THE RESPONDENT

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