Date: 20091104

Docket: T-383-08

Citation: 2009 FC 1127

Ottawa, Ontario, November 4, 2009

PRESENT: The Honourable Mr. Justice Mainville

BETWEEN:

AYMAN MERHAM

Applicant

and

ROYAL BANK OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This case concerns a judicial review application challenging a refusal to reconsider a prior decision of the Canadian Human Rights Commission (the "Commission"). The refusal was communicated by letter dated February 7, 2007 from the Director of the Investigations Branch of the Commission.

[2] The judicial review application is based on alleged breaches of the rules of procedural fairness by the Director of the Investigations Branch of the Commission in failing to properly consider the request for reconsideration and to provide adequate reasons for its denial.

Background

[3] Mr. Ayman Merham, ("the Applicant") was employed by the Royal Bank of Canada ("the Respondent") as of September 1998. On December 31, 2001 the Applicant submitted a complaint (the "Complaint") to the Commission alleging that since July 25, 2000 the Royal Bank of Canada had discriminated against him on the grounds of race, national or ethnic origin and disability by treating him adversely in the course of employment, by failing to provide a workplace free of harassment, by failing to accommodate him and by threatening to terminate his employment contrary to sections 7 and 14 of the *Canadian Human Rights Act* (the "Act").

[4] An investigation was carried out on this complaint by Deborah Olver (the "Investigator") pursuant to subsection 43(1) of the Act. The Investigator interviewed the Applicant and numerous employees and representatives of the Royal Bank of Canada. The Investigator prepared a detailed seventeen page report on her findings dated August 5, 2004 (the "Report") and submitted it to the Commission pursuant to subsection 44(1) of the Act. In this Report, the Investigator recommended that the Commission dismiss the Complaint pursuant to paragraph 44(3)(b) of the Act.

[5] The Commission reviewed the Report and decided to follow its recommendation to dismiss the Complaint. This decision was communicated to the parties on December 3, 2004.

[6] The Applicant brought an application for judicial review of the December 3, 2004 decision of the Commission before the Federal Court based on alleged breaches of procedural fairness and errors of fact and law in considering the evidence. A hearing was held for this purpose, and in a

judgment dated February 22, 2006, the Honourable Mr. Justice Blais (now Chief Justice of the Federal Court of Appeal) dismissed the application. No appeal was made from this judgment, which is thus final.

[7] Following this judgment, the Applicant commenced an Ontario small claims court action on March 20, 2006, against Mr. Paul Singh, his former immediate supervisor at the Royal Bank of Canada and one of the persons referred to in the Report. The action alleged that Mr. Singh had signed a promissory note in the amount of $2,000 in favour of the Applicant and had refused to pay the amount owed.

[8] In the course of this Ontario small claims court action, an expert handwriting report was submitted. This expert report dated March 12, 2007 was prepared at the request of the Applicant and it concluded with an opinion that Mr. Paul Singh had signed the promissory note.

[9] On March 21, 2007 a representative of the Applicant sent a letter to the Canadian Human Rights Commission enclosing a copy of the expert handwriting report dated March 12, 2007, and on this basis, made the following petition:

> This proves that Mr. Singh was untruthful with the commission's investigator and the commission.
>
> In light of this new evidence and on behalf of Mr. Merham I hereby petition the commission to reopen this matter for the purpose of considering the new evidence.

[10] This matter of the $2,000 loan was deemed related to the Report since one of the issues set out in the Complaint was the following, as described in paragraph 9 of the Report:

> The complainant also alleges that Mr. Singh harassed him by telling him that if he wanted to become a CB22 (Compensation Band 22 pay level) and stay with the Bank, he should pay him $20,000.00 ($20K). The complainant alleges that due to fear of retaliation and Mr. Singh's continued harassment (not specified), he agreed to loan Mr. Singh $2000.00 ($2K) temporarily. The complainant states that after repeated requests to Mr. Singh, both personally and through other senior managers, Mr. Singh has not repaid the loan.

[11] The Investigator had dealt with this claim as follows in her Report [Emphasis added]:

> 11. Mr Singh denies ever asking for $20K and denies ever taking a loan from Mr. Merham. […]
>
> […]
>
> 16. With the complainant's rebuttal, his legal counsel enclosed a copy of what was described as a "true copy" of an agreement signed by Mr. Paul Singh, stating:
>
> > Agreement for paying money back
> >
> > I am Singh, P.S. (Paul) will pay $2000 (only two thousand dollars) to Merham Ayman when he needed. As of 2000, July 25 [sic]"
>
> The investigator showed Mr. Singh a copy of this "agreement" when he was interviewed. He was shocked to see the document; he had never seen it before. <u>He stated it is his signature and printing</u>, but acknowledged this could easily been transferred on to the document and photocopied. Mr. Singh states it is definitely not his grammar and he would not, 1) write a contract in this fashion (i.e., poor grammar), and 2) would never sign anything on paper that stated he took money from an employee.
>
> 17. The investigator requested to have the "original copy" of the agreement signed by Mr. Singh to be sent to the Commission on 15 December 2003, however, the complainant's legal counsel did not

> respond. The document in question is not certified as a "true copy" by a Notary Public or lawyer. It is simply typed text at the top of an 8x14" legal paper with a signature below the typed text. Because it is a photocopy, it is not known if the signature was imposed on the page by simply copying it from another signature or if Mr. Singh did indeed sign the agreement. Taken his objection to the validity of the document, and the vernacular it is written in, it appears suspicious.
>
> […]
>
> 19. The evidence does not support that Mr. Singh asked Mr. Merham for $20K or $2K. The witness, Mr. Piscuineri, states that Mr. Singh and Mr. Merham discussed money at work regularly, but he never witnessed any exchange of money between the two and he thought the discussion of $20K was a joke. Furthermore, as Team Leader, Mr. Singh's position does not give him the authority to change staffing levels (to a CB 22 position), so he could not change any staff members position even if he wanted to.
>
> 20. The new allegation of the signed "Agreement" from Mr. Paul Singh to Mr. Merham stating Mr. Singh owed him $2K, seems suspicious. This was neither part of the original complaint nor part of the background information provided by the complainant when he initially filed his complaint. It was received with his rebuttal where a number of new versions of allegations arise. In any case, the allegation has nothing to do with Mr. Merham's race, national or ethnic origin or disability. [Emphasis added]

[12] On August 9,2007, the then Acting Director of the Investigations Branch of the Commission responded to the March 21, 2007 petition for reconsideration as follows:

> We wish to inform you that Commission decisions are final. However, we have reviewed the material submitted and are of the view that the circumstances of this file do not warrant reconsideration by the Commission. Consequently we are unable to comply with your request and consider this matter to be closed.

[13] Concurrently, following the submission to the Commission of the March 12, 2007 expert handwriting report, the attorneys for Mr. Singh also requested a third party expert handwriting report. That expert report also concluded on April 2, 2007 with an opinion that there was strong support for the view that Mr. Singh had signed the note.

[14] The record shows that the Ontario small claims action was finally settled on July 6, 2007 on terms favourable to the Applicant.

[15] Following this settlement, on November 6, 2007, the attorney representing the Applicant wrote to the Commission again seeking a reconsideration of the Commission's prior decision of December 3, 2004. In this second request for reconsideration, the Applicant's attorney attached the expert handwriting report dated March 12, 2007 which hade been previously sent to the Commission with the first request for reconsideration. He also added new information, including the second expert handwriting report dated April 2, 2007 as well as various documentation related to the settlement of the Ontario small claims action. In light of this new information, the Applicant's attorney concluded as follows:

> It has now been objectively determined by expert reports, and conceded by Mr. Singh by his payment of the amount of the loan and damages to Mr. Merham, that he willfully [sic] misled the Commission's investigator on the very issues upon which he was questioned. Therefore his statement must be entirely disregarded. It is submitted then that the Commission must reconsider Mr. Merham's complaint with respect to the three allegations in which Mr. Singh figured prominently, pursuant to its authority to do so, in order that there be a proper and fair proceeding and assessment of Mr. Merham's complaints.

[16] In a letter dated February 7, 2007, from the Director of the Investigations Branch of the Commission, this second request for reconsideration was refused on the following grounds:

> In his Complaint Form, Mr. Merham alleges that the Royal Bank of Canada discriminated against him in various ways "on the grounds of race (dark skinned Egyptian), national and-or ethnic origin (Egyptian) and disability (back injury). Considering all the evidence, the Investigator and the Commission did not see a link between the alleged discrimination and the claimed grounds. We have reviewed the material that you have submitted and the new information would not modify the recommendation as it does not demonstrate a link to a prohibited ground under the *Canadian Human Rights Act*. For this reason, the complaint does not warrant reconsideration by the Commission and the Commission's decision of December 3, 2004 will stand.

[17] It is from this Refusal that the Applicant now seeks relief by way of judicial review.

Position of the parties

[18] The Applicant argues that the Commission has the authority to reconsider prior decisions. In exercising this authority, the Commission acted improperly by refusing to reconsider its prior decision since the new evidence submitted to it impugned the credibility of an important witness in the investigation which necessarily casts into doubt the legitimacy of the decision which was based on that false evidence.

[19] The Applicant further argues that the Commission has a duty to provide adequate or sufficient reasons justifying its decision to refuse to reconsider a prior decision. This duty flows from procedural fairness and natural justice principles. The Applicant argues that in this case the

reasons for refusing to reconsider are set out in one paragraph and do not consequently constitute adequate or sufficient reasons.

[20] The Respondent submits five principal arguments for this Court to reject this Application, which I summarize as follows:

> a. The Commission's refusal was simply a courtesy letter and is consequently not properly the subject of judicial review;
>
> b. The Application for judicial review is out of time since the timelines for seeking judicial review should be calculated from the date of the refusal of the first petition for reconsideration. The second request for reconsideration submitted to the Commission was simply an attempt to restart the timelines and such tactics are inappropriate;
>
> c. The Commission was *functus officio* and did not possess the jurisdiction to reconsider prior decisions;
>
> d. Alternatively, the Commission's refusal to reconsider must be reviewed on a standard of reasonableness *simpliciter*. In this case that decision was correct and certainly reasonable in the circumstances of this case. Moreover adequate reasons for the refusal were provided by the Commission; and
>
> e. The Application is part of a course of vexatious litigation by the Applicant against the Respondent and an abuse of process. Consequently this Court should refuse to exercise its discretion to consider the Application. As well, an order for costs should be made against the Applicant on a solicitor-client basis.

The issues

[21] Though stated differently by the parties, the issues at stake here are the following:

a. Can the Canadian Human Rights Commission reconsider a prior decision?

b. Is the Application timely?

c. If so, what is the standard of judicial review applicable in such a case?

d. Were sufficient reasons provided for refusing to reconsider a prior decision of the Commission?

e. Was the refusal to reconsider the prior decision reasonable?

The authority of the Canadian Human Rights Commission to reconsider a prior decision

[22] In *Kleysen Transport Ltd. v. Hunter*, 2004 FC 1413, [2004] F.C.J. No.1723 (QL) [*Kleysen*], Mr. Justice O'Reilly found that the Commission "has the power to reconsider its decisions" (at para. 4) even though no specific statutory provision provides for such reconsideration. Justice O'Reilly found that under the *Canadian Human Rights Act*, the Commission clearly possessed a very broad discretion to screen and process complaints which supported the conclusion that it could reconsider its decisions, *Kleysen*, *ibid* at para. 8.

[23] This conclusion was based, *inter alia*, on the decision of the British Columbia Court of Appeal in *Zutter v. British Columbia (Council of Human Rights)*, (1995) 122 D.L.R. (4th) 665, [1995] B.C.J. No. 626 (QL), leave to appeal to the S.C.C. dismissed on Dec. 21, 1995, [1995] S.C.C.A. No. 243 (QL) where a similar question was raised in regard to the power of the British Columbia Council on Human Rights to reconsider its own decisions where no statutory authority to do so existed. Noting the remedial nature of human rights legislation, the British Columbia Court of Appeal stated the following (at para. 31-32):

> I do not accept the argument of the appellants that the equitable jurisdiction described by Martland J. in Grillas [*Grillas v. Minister of Manpower and Immigration*, [1972] S.C.R. 577] must be viewed as subservient to the doctrine of *functus officio*, in the case of all administrative tribunals except those where such jurisdiction is expressly stated to exist, in order to give effect to the "sound policy" of finality in the proceedings of such tribunals. That policy will necessarily govern the manner in which the jurisdiction to reconsider is exercised by the Council, thus ensuring its restrictive application, just as the power of this Court to admit fresh evidence is carefully and restrictively exercised in deference to the same policy.
>
> The equitable jurisdiction to reconsider was recognized to exist in, and found to have been properly exercised by, the administrative tribunals under consideration in Re Lornex Mining Corporation Ltd., [1976] 5 W.W.R. 554 (B.C.S.C.), in Re Ombudsman of Ontario and the Minister of Housing (1979), 103 D.L.R. (3d) 117 (Ont.H.C.), aff'd, (1980), 117 D.L.R. (3d) 613 (Ont.C.A.), and more recently in Attorney General of Canada v. Grover and Canadian Human Rights Commission (4 July, 1994), T-1945-93 (F.C.T.D.). In each case, the jurisdiction was exercised notwithstanding the absence of any express acknowledgement of its existence in the tribunal's enabling statute. The judge below applied the first two of these authorities when reaching his conclusion that the Council had jurisdiction to reconsider its decision to discontinue Zutter's complaints in the circumstances of this case, and I am of the view that he was right to do so.

[24] Moreover, Mr. Justice Sopinka stated the following in *Chandler et al. v. Alberta Association of Architects et al.*, [1989] 2 S.C.R. 848 at p. 862:

> To this extent, the principle of *functus officio* applies [to decisions of administrative tribunals]. It is based, however, on the policy ground which favours finality of proceedings rather than the rule which was developed with respect to formal judgments of a court whose decision was subject to a full appeal. For this reason I am of the opinion that its application must be more flexible and less formalistic in respect to the decisions of administrative tribunals which are subject to appeal only on a point of law. Justice may require the

> reopening of administrative proceedings in order to provide relief which would otherwise be available on appeal.
>
> Accordingly, the principle should not be strictly applied where there are indications in the enabling statute that a decision can be reopened in order to enable the tribunal to discharge the function committed to it by enabling legislation. This was the situation in *Grillas, supra*.
>
> Furthermore, if the tribunal has failed to dispose of an issue which is fairly raised by the proceedings and of which the tribunal is empowered by its enabling statute to dispose, it ought to be allowed to complete its statutory task. If, however, the administrative entity is empowered to dispose of a matter by one or more specified remedies or by alternative remedies, the fact that one is selected does not entitle it to reopen proceedings to make another or further selection. Nor will reserving the right to do so preserve the continuing jurisdiction of the tribunal unless a power to make provisional or interim orders has been conferred on it by statute.

[25] Consequently, the above case law leads me to conclude that the Commission has the power to reconsider its decisions, but this is a discretionary power which must be used sparingly in exceptional and rare circumstances.

Is the Application timely?

[26] The Respondent argues that the first petition for reconsideration, which was submitted to the Commission on March 21, 2007 and which was refused on August 9, 2007, is in substance almost identical to the Applicant's November 6, 2007 second request for reconsideration. Consequently, the Respondent argues that the 30 day time limit to make an application to this Court pursuant to subsection 18.1(2) of the *Federal Courts Act* commenced to run on August 9, 2007, the date of the first refusal to reconsider.

[27] I have some difficulties with the Respondent's arguments in this regard.

[28] The first petition for reconsideration dated March 21, 2007 was based on one of the expert handwriting reports, while the second request for reconsideration dated November 6, 2007 provided new factual elements for consideration by the Commission, including a copy of the second expert handwriting report and the settlement of the Ontario small claims action. Consequently the first and second requests for reconsideration were not identical and raised different factual considerations.

[29] Moreover, the jurisprudence of this Court has determined that in the event of a decision to reconsider a prior decision, the decision to reconsider is itself subject to judicial review even if it was preceded by prior reconsideration determinations. The determining factor to consider is if the concerned administrative body or tribunal has made a decision to reconsider or not to reconsider, as opposed to simply reiterating a prior decision through a "courtesy" letter: *Corbett v. Canada (Attorney General)*, 2007 FCA 292, [2007] F.C.J. No. 1220 (QL); *Besner v. Canada (Public Service Commission)*, [2000] F.C.J. No. 1684 (QL) at para. 20: "I am of the opinion that Ms. McCusker's letter of October 8, 1999, constitutes the decision, even though it was the second letter precising that the Commission had no intention to re-open the case." at para. 20; *Dumbrava v. Canada (Minister of Citizenship and Immigration)*, [1995] F.C.J. No. 1238 (QL), at para. 15:

> […] Whenever a decision-maker who is empowered to do so agrees to reconsider a decision on the basis of new facts, a fresh decision will result whether or not the original decision is changed, varied or maintained. What is relevant is that there be a fresh exercise of discretion, and such will always be the case when a decision-maker agrees to reconsider his or her decision by reference to facts and submissions which were not on the record when the original decision was reached.

[30] In this case, in her letter of February 7, 2008 refusing the second request for reconsideration, the Director of the Investigations Branch of the Commission clearly indicates that the material submitted by the Applicant in support of his request for reconsideration was reviewed. Moreover, following this review of the material, a decision is clearly made not to proceed with a reconsideration of the December 3, 2004 decision of the Commission.

[31] In these circumstances, the February 7, 2008 refusal constitutes a decision subject to judicial review pursuant to section 18.1 of the *Federal Courts Act*. Consequently, the Application submitted in this case is timely and can proceed.

The standard of review

[32] The decision by the Commission to reconsider a prior decision is discretionary. In judicial review proceedings concerning discretionary decisions of administrative bodies, the standard to apply is usually one of reasonableness: "[w]here the question is one of fact, discretion or policy, deference will usually apply automatically (*Mossop*, at pp. 599-600; *Dr. Q* at para. 29; *Suresh* at paras. 29-30)." *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, at para. 53. [Emphasis added].

[33] In determining the applicable standard of review, I must take into account various factors: *Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339, at para. 54. In this case, though the Commission is not protected by a privative clause, the very nature of a reconsideration of a prior decision is such as to confer a large degree of deference on the Commission in such a matter. It is the Commission which is in the best position to determine whether or not in exceptional and

rare circumstances it should proceed to a reconsideration of one of its decisions, and this militates in favour of deference. The Commission has the required expertise to decide in which exceptional circumstances reconsideration is warranted, and it is in a much better position than the Court in deciding such an issue.

[34] Consequently I will apply a standard of reasonableness in reviewing the decision of the Commission to refuse to reconsider its prior decision in this case.

[35] Though the reconsideration of a prior decision is a discretionary exercise of power by the Commission which should be reviewed on a standard of reasonableness, the decision to proceed or not with such a review must nevertheless be carried out fairly and in accordance with the principles of natural justice. As a general rule, principles of natural justice and procedural fairness issues are to be reviewed on the basis of a correctness standard of review: *Khosa supra*, at para. 43. As noted by the Federal Court of Appeal in *Skechtley v. Canada (Attorney General)*, 2005 FCA 404, [2005] F.C.J. No.2056 (QL) at para. 53:

> CUPE [*Canadian Union of Public Employees v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, 2003 SCC 29] directs a court, when reviewing a decision challenged on the grounds of procedural fairness, to isolate any act or omission relevant to procedural fairness (at para. 100). This procedural fairness element is reviewed as a question of law. No deference is due. The decision-maker has either complied with the content of the duty of fairness appropriate for the particular circumstances, or has breached this duty.

[36] Here the Applicant has raised an issue of procedural fairness based on the allegation that the reasons of the Commission rejecting his request for reconsideration are non-existent or insufficient. I will consequently review this matter on a standard of correctness.

The sufficiency of the reasons provided in regard to the duty of fairness

[37] The Applicant argues that the reasons provided are insufficient to meet the applicable standards of procedural fairness and natural justice.

[38] The Supreme Court of Canada has stated in a number of decisions that the obligations imposed by the duty of fairness vary with the circumstances: *Knight v. Indian School Division No. 19*, [1990] 1 S.C.R. 653, at p. 682; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 21.

[39] In regard to the provision of reasons, the leading case remains the decision of the Supreme Court of Canada in *Baker, ibid*. It is useful for our purposes to quote from para. 39 and 40 of this decision:

> Reasons, it has been argued, foster better decision making by ensuring that issues and reasoning are well articulated and, therefore, more carefully thought out. The process of writing reasons for decision by itself may be a guarantee of a better decision. Reasons also allow parties to see that the applicable issues have been carefully considered, and are invaluable if a decision is to be appealed, questioned, or considered on judicial review […] Those affected may be more likely to feel they were treated fairly and appropriately if reasons are given […]. I agree that these are significant benefits of written reasons.

> Others have expressed concerns about the desirability of a written reasons requirement at common law. In *Osmond*, *supra*, Gibbs C.J. articulated, at p. 668, the concern that a reasons requirement may lead to an inappropriate burden being imposed on administrative decision-makers, that it may lead to increased cost and delay, and that it "might in some cases induce a lack of candour on the part of the administrative officers concerned". Macdonald and Lametti, *supra*, though they agree that fairness should require the provision of reasons in certain circumstances, caution against a requirement of "archival" reasons associated with court judgments, and note that the special nature of agency decision-making in different contexts should be considered in evaluating reasons requirements. In my view, however, these concerns can be accommodated by ensuring that any reasons requirement under the duty of fairness leaves sufficient flexibility to decision-makers by accepting various types of written explanations for the decision as sufficient. [Emphasis added]

[40] I find that reasons were provided to the Applicant for the refusal to reconsider the prior decision of the Commission and that, in the circumstances of this case, these reasons were sufficiently set out in the February 7, 2008 letter to meet the standards of procedural fairness and natural justice.

[41] The Director of the Investigations Branch of the Commission notes that new information was provided on behalf of the Applicant and that this new information, and the material submitted in relation thereto, was reviewed. The reasons provided to explain why this new information and this material were insufficient to warrant a reconsideration of the Commission's prior decision are succinctly, but nevertheless cogently, expressed as follows:

> Considering all the evidence, the Investigator and the Commission did not see a link between the alleged discrimination and the claimed grounds. We have reviewed the material that you have submitted and the new information would not modify the recommendation as it

> does not demonstrate a link to a prohibited ground under the *Canadian Human Rights Act*.

[42] These reasons are of course to be read in the context of the Investigator's seventeen page Report, and when read together with this Report, they provide a complete and clear answer for refusing to reconsider the prior decision. Indeed, as further discussed below, the Investigator concluded in her Report that there was no link between the facts alleged in the Applicant's Complaint to the Commission and any prohibited grounds of discrimination under the Act. This conclusion was made irrespective of whether or not the allegations of facts were true. Thus the new information and material submitted by the Applicant "would not modify the recommendation as it does not demonstrate a link to a prohibited ground" under the Act.

[43] The Applicant is not satisfied with these reasons. However reasons were provided and are certainly sufficiently clear and cogent to understand. The fact the reasons given are brief does not mean they are unintelligible or deficient: *MacLean v. Marine Atlantic Inc.*, 2003 FC 1459, [2003] F.C.J. No. 1854 (QL) at para. 47.

[44] In *Lake v. Canada (Minister of Justice)*, [2008] 1 S.C.R. 761, which concerned an extradition matter, the Supreme Court of Canada addressed the issue of the adequacy of reasons and outlined the basic duty in the provision of reasons. Paragraph 46 of this *Lake* decision reads:

> As for the adequacy of the Minister's reasons, while I agree that the Minister has a duty to provide reasons for his decision, those reasons need not be comprehensive. The purpose of providing reasons is twofold: to allow the individual to understand why the decision was made; and to allow the reviewing court to assess the

> validity of the decision. The Minister's reasons must make it clear that he considered the individual's submissions against extradition and must provide some basis for understanding why those submissions were rejected. Though the Minister's Cotroni analysis was brief in the instant case, it was in my view sufficient. The Minister is not required to provide a detailed analysis for every factor. An explanation based on what the Minister considers the most persuasive factors will be sufficient for a reviewing court to determine whether his conclusion was reasonable.

[45] The reasons provided in this case by the Director of the Investigations Branch of the Commission meet the criteria laid down by the Supreme Court of Canada in *Lake, ibid*.

Is the refusal reasonable?

[46] In order for a complaint to succeed under the *Canadian Human Rights Act*, there must be a link between the facts alleged and a prohibited ground of discrimination under the Act. This flows from subsection 3(1), sections 4 and 7, paragraph 14(1)(c), section 39, and subsections 40(1) and 44(3) of the Act reproduced in the schedule to these reasons for judgment.

[47] In her Report, the Investigator reviewed the five principal allegations made by the Applicant in his Complaint, of which particularly the allegation related to Mr. Singh requesting or receiving money from the Applicant in order to secure his advancement or continued employment with the Respondent. She concluded on this matter as follows at paragraph 20 of her report the "[i]n any case, the allegation has nothing to do with Mr. Merham's race, national or ethnic origin or disability".

[48] In regard to another allegation in the Complaint concerning the assessment performance of the Applicant and whether or not he had signed it, the Investigator concluded at paragraph 48 of her Report that "[s]ignature or no signature, it's effect would not have anything to do with discrimination or harassment based on race, disability or national-ethnic origin".

[49] The other allegations in the Complaint did not involve Mr. Singh or involved him only as a minor player in the alleged events.

[50] The new information brought forward by the Applicant to justify a reconsideration of the Commission's prior decision all relate to the lack of credibility of Mr. Singh in regard to his denial of having signed a promissory note for $2,000. The letter of refusal dated February 7, 2008 states that this new information does not demonstrate a link to a prohibited ground of discrimination under the Act. Indeed it is difficult to understand what link exists between the facts alleged by the Applicant and any prohibited ground of discrimination under the Act. In these circumstances, the refusal to reconsider the prior decision of the Commission is reasonable since it "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." (*Dunsmuir*, *supra*, at para. 47).

[51] Consequently this Application for judicial review is dismissed.

Costs

[52] The Respondent has sought costs on a solicitor-client basis. Costs on a solicitor-client basis are awarded only in very rare circumstances, such as when a party has displayed reprehensible, scandalous or outrageous conduct: *Mackin v. New-Brunswick (Minister of Justice)*, [2002] 1 S.C.R. 405, at para. 86; *Louis Vuitton Malletier S.A. v. Yang*, 2007 FC 1179, at para. 59.

[53] I find no such circumstances here. The Applicant submitted and pursued vigorously a complaint before the Commission and subsequently sought judicial review of the dismissal of his complaint. He subsequently sued and settled on favourable terms a claim regarding one of the persons involved in his complaint. Based on this new fact, he sought reconsideration by the Commission of its prior decision and is now seeking a review of the refusal to reconsider. I do not consider the Applicant's conduct in proceeding with this Application as reprehensible, scandalous or outrageous or otherwise justifying an order of costs.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that the Application for judicial review is dismissed.

"Robert M. Mainville"
Judge

SCHEDULE

Canadian Human Rights Act

3.(1) For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for which a pardon has been granted.

[…]

4. A discriminatory practice, as described in sections 5 to 14.1, may be the subject of a complaint under Part III and anyone found to be engaging or to have engaged in a discriminatory practice may be made subject to an order as provided in sections 53 and 54.

[…]

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.

14. (1) It is a discriminatory practice,

[…]

(*c*) in matters related to employment, to harass an individual on a prohibited ground of discrimination.

3.(1) Pour l'application de la présente loi, les motifs de distinction illicite sont ceux qui sont fondés sur la race, l'origine nationale ou ethnique, la couleur, la religion, l'âge, le sexe, l'orientation sexuelle, l'état matrimonial, la situation de famille, l'état de personne graciée ou la déficience.

[…]

4. Les actes discriminatoires prévus aux articles 5 à 14.1 peuvent faire l'objet d'une plainte en vertu de la partie III et toute personne reconnue coupable de ces actes peut faire l'objet des ordonnances prévues aux articles 53 et 54.

[…]

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.

14. (1) Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait de harceler un individu :

[…]

c) en matière d'emploi.

[…]

39. For the purposes of this Part, a "discriminatory practice" means any practice that is a discriminatory practice within the meaning of sections 5 to 14.1.

40. (1) Subject to subsections (5) and (7), any individual or group of individuals having reasonable grounds for believing that a person is engaging or has engaged in a discriminatory practice may file with the Commission a complaint in a form acceptable to the Commission.

[…]

43. (1) The Commission may designate a person, in this Part referred to as an "investigator", to investigate a complaint.

[…]

44. (1) An investigator shall, as soon as possible after the conclusion of an investigation, submit to the Commission a report of the findings of the investigation.

[…]

(3) On receipt of a report referred to in subsection (1), the Commission
(*a*) may request the Chairperson of the Tribunal to institute an inquiry under section 49 into the complaint to which the report relates if the Commission is satisfied

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

(ii) that the complaint to which the report relates should not be referred pursuant to subsection (2) or dismissed on any ground mentioned in paragraphs 41(*c*) to (*e*); or

[…]

39. Pour l'application de la présente partie, « acte discriminatoire » s'entend d'un acte visé aux articles 5 à 14.1.

40. (1) Sous réserve des paragraphes (5) et (7), un individu ou un groupe d'individus ayant des motifs raisonnables de croire qu'une personne a commis un acte discriminatoire peut déposer une plainte devant la Commission en la forme acceptable pour cette dernière.

[…]

43. (1) La Commission peut charger une personne, appelée, dans la présente loi, « l'enquêteur », d'enquêter sur une plainte.

[…]

44. (1) L'enquêteur présente son rapport à la Commission le plus tôt possible après la fin de l'enquête.

[…]

(3) Sur réception du rapport d'enquête prévu au paragraphe (1), la Commission :
a) peut demander au président du Tribunal de désigner, en application de l'article 49, un membre pour instruire la plainte visée par le rapport, si elle est convaincue :

(i) d'une part, que, compte tenu des circonstances relatives à la plainte, l'examen de celle-ci est justifié,

(ii) d'autre part, qu'il n'y a pas lieu de renvoyer la plainte en application du paragraphe (2) ni de la rejeter aux termes des alinéas 41*c*) à *e*);

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

b) rejette la plainte, si elle est convaincue :

(i) that, having regard to all the circumstances of the complaint, an inquiry into the complaint is not warranted, or

(i) soit que, compte tenu des circonstances relatives à la plainte, l'examen de celle-ci n'est pas justifié,

(ii) that the complaint should be dismissed on any ground mentioned in paragraphs 41(*c*) to (*e*).

(ii) soit que la plainte doit être rejetée pour l'un des motifs énoncés aux alinéas 41*c*) à *e*).

(4) After receipt of a report referred to in subsection (1), the Commission

(4) Après réception du rapport, la Commission :

(*a*) shall notify in writing the complainant and the person against whom the complaint was made of its action under subsection (2) or (3); and

a) informe par écrit les parties à la plainte de la décision qu'elle a prise en vertu des paragraphes (2) ou (3);

(*b*) may, in such manner as it sees fit, notify any other person whom it considers necessary to notify of its action under subsection (2) or (3).

b) peut informer toute autre personne, de la manière qu'elle juge indiquée, de la décision qu'elle a prise en vertu des paragraphes (2) ou (3).

Federal Courts Act

18.1 (1) An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.

(2) An application for judicial review in respect of a decision or an order of a federal board, commission or other tribunal shall be made within 30 days after the time the decision or order was first communicated by the federal board, commission or other tribunal to the office of the Deputy Attorney General of Canada or to the party directly affected by it, or within any further time that a judge of the Federal Court may fix or allow before or after the end of those 30 days.

[…]

(4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal

(*a*) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;

(*b*) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;

(*c*) erred in law in making a decision or an order, whether or not the error appears on the face of the record;

(*d*) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;

(*e*) acted, or failed to act, by reason of fraud or perjured evidence; or

18.1 (1) Une demande de contrôle judiciaire peut être présentée par le procureur général du Canada ou par quiconque est directement touché par l'objet de la demande.

(2) Les demandes de contrôle judiciaire sont à présenter dans les trente jours qui suivent la première communication, par l'office fédéral, de sa décision ou de son ordonnance au bureau du sous-procureur général du Canada ou à la partie concernée, ou dans le délai supplémentaire qu'un juge de la Cour fédérale peut, avant ou après l'expiration de ces trente jours, fixer ou accorder.

[…]

(4) Les mesures prévues au paragraphe (3) sont prises si la Cour fédérale est convaincue que l'office fédéral, selon le cas :

a) a agi sans compétence, outrepassé celle-ci ou refusé de l'exercer;

b) n'a pas observé un principe de justice naturelle ou d'équité procédurale ou toute autre procédure qu'il était légalement tenu de respecter;

c) a rendu une décision ou une ordonnance entachée d'une erreur de droit, que celle-ci soit manifeste ou non au vu du dossier;

d) a rendu une décision ou une ordonnance fondée sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments dont il dispose;

e) a agi ou omis d'agir en raison d'une fraude ou de faux témoignages;

(*f*) acted in any other way that was contrary to law.

f) a agi de toute autre façon contraire à la loi.

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Yehuda Levinson	FOR THE APPLICANT
Richard Charney	FOR THE RESPONDENT

SOLICITORS OF RECORD:

LEVINSON & ASSOCIATES Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANT
OGILVY RENAULT LLP Barristers and Solicitors Toronto, Ontario	FOR THE RESPONDENT