Federal Court  Cour fédérale

Date: 20140414

Docket: T-2005-12

Citation: 2014 FC 358

Ottawa, Ontario, April 14, 2014

PRESENT: The Honourable Mr. Justice Annis

BETWEEN:

ION DAVID

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] The applicant seeks judicial review of a Canadian Human Rights Commission [the CHRC or the Commission] decision rendered on October 2, 2012, dismissing his complaint against the Canadian Forces regarding adverse differential treatment on the ground of his national or ethnic origin as a Romanian. He requests that this Court remit the complaint for redetermination.

[2] For the reasons which follow, the application is dismissed.

II. Facts

[3] The CHRC Investigation Report dated June 20, 2012, reviewed the complaint and its background. Mr. David was born in Romania in 1952 and became a Canadian citizen in 1997. He received an engineering degree in Romania in 1978 and worked as an engineer in a dairy plant and for IMSAT in Romania, including spending two years in Al Qaim, Iraq, as a consultant for IMSAT during the 1990s. He speaks fluent Romanian and English and understands French and Italian. After moving to Canada, he worked in Vancouver as an engineer and a technician for security companies and as a Romanian interpreter, then served as an overseas representative for Canadian contractors in Romania from late 1995 to autumn 2002. He then worked as a real estate agent for RE/MAX in Victoria, B.C.

[4] The CHRC investigator found that Mr. David had joined the Canadian Forces in 2001 as a Primary Reserve artillery officer with the 5th (British Columbia) Field Artillery Regiment based in Victoria, B.C. He was promoted to Lieutenant on September 9, 2004. He then sought to move into Civil-Military Cooperation [CIMIC].

[5] In an interview with the Commission investigator, Mr. David stated that "I applied to CIMIC with strong encouragement from the local detachment", presumably meaning the local CIMIC detachment.

[6] A letter from Mr. David's battery commander dated September 27, 2004 states:

> [. . .] Ion has asked me to provide a letter of reference in regards to possible civilian employment with CIMIC overseas.
>
> [. . .]
>
> I can not recommend him as a CIMIC officer or in a military capacity in CIMIC due to his lack of experience as a member of the CF and specifically as a combat arms officer. Perhaps in a few years he will be experienced enough to transfer to CIMIC or take a CIMIC military tour.
>
> [. . .]
>
> Based on Ion previous experience and his current deportment I can recommend him to work in a civilian capacity on a CIMIC tour or assignment.

[7] Nonetheless, in late 2004 Mr. David applied to become a military CIMIC operator. He was accepted in July 2005 and attached to a London, Ontario, CIMIC team effective in January 2006. He quit his job with RE/MAX, sold his property in Victoria, and relocated to London with his family. There he found work as a self-employed general contractor. Reserve service is part-time; personnel train on evenings and weekends and are only required to accumulate a minimum of 14 full days of service per year in order to remain on strength. Only reservists on term contracts are employed full-time.

[8] An officer from the London CIMIC team explained to the CHRC investigator that the CIMIC organization was not a formal unit with a unit identification code [UIC] but a composite group of specialists preparing to be deployed; in other words, CIMIC is not an occupation but an assignment. The officer stated that the normal rotation for reservists coming to CIMIC was a three-year cycle. In the first year, they were trained; in the second year they were deployed; and

in the third year they shared their knowledge by teaching other reservists. They then returned to their home units.

[9] The Canadian Forces further explained to the investigation that in order to be deployable, officers must first be qualified in their own occupation (in the applicant's case, artillery). Each officer's Military Occupation Code [MOC] indicates "A" for trained or "U" for untrained. Major Atherley of the Canadian Forces told the Commission investigator by email that Mr. David had been occupation-qualified in 2004 but that "When CIMIC uses the terminology 'untrained', they are looking at more than just the 'MOC trained'. [. . .]. In summation, David was a trained Primary Reserve Artillery Officer (DP1 [Development Period 1]), however he did not have the RAOC [Reserve Army Operations Course] which made him less competitive for certain positions and deployments under CIMIC."

[10] CIMIC as a Reserve task evolved over the time of the applicant's service with the London group. Initially reservists were accepted with minimal training, then developed both as CIMIC operators and in their own MOC. Under the previous officer commanding, Major Chadwick, acceptance into a CIMIC team was fairly informal. The selection process was then made more formalized and aimed at making sure that CIMIC reservists would be deployable to Afghanistan.

[11] The applicant was initially satisfied with his CIMIC assignment. He stated in his complaint that he had been involved in training in Canada, Italy, and Turkey, and had been registered for a "captains' course" – the RAOC.

[12] After June 2006, however, Mr. David became discontented. He complained that he did not receive desired nominations for a "captains' course", overseas training and exercises, or a deployment. He alleged that this was due to discrimination. He told the investigator:

> How do you link the refusal of the training to your national ethnic origin?
>
> All the time I request it, they pay less attention to me than the others. All the time, I feel that it is my accent, my language. I feel this because I am the only one who speaks with such an accent. I tell them my point of view. I felt no value. When I went to Turkey and Italy, everybody shared my experience and was interested in my point of view. I feel very frustrated, humiliated as my applications were put aside.
>
> [. . .]
>
> When Bindon arrived in August 2006, no one will talk to me. The situation got worse and worse. Initially there were delays on registration, no nominations for continued training, no response to my ROG. They took me out of the payment system, the payroll and completely segregated me. I refuse completely to talk to him. I went to see Riddell – his response was that "you don't come to me without an appointment." I said to him, you never answered my emails.
>
> [. . .]
>
> What remedy do you seek?
>
> [. . .] I want the rank and full time jobs and I use as my reference, the career of Captain Riddell who is now a Major. His career is what I wanted. I was the only one treated this way. I have no witnesses.

[13] On March 27, 2007, the applicant was listed among CIMIC members to be returned to their home units, a year and two months after he had transferred to the London CIMIC group.

[14] He then stopped attending training nights with CIMIC. In June 2008 Major Bindon directed that he be contacted as soon as possible to resume parading to correct his non-effective strength [NES] status. Mr. David refused to attend parades and refused to sign pay sheets for January-July 2008, emailing on July 4, 2008 to say "I believe that the present situation is complex and that it requires assistance from HRC [the Human Rights Commission]." He went to the CIMIC offices on July 18, 2008 but again refused to sign the pay sheets. On July 30, 2008, he emailed that "[. . .] because for one year I was not involved in any activity, including parading. I cannot sign that I participated in an activity when I was omitted from all of CIMIC's activities. [. . .] From the e-mail Sgt Mercier sent you, I deduce that 'the whole NES thing' which she tried to explain to me (but she did not) is an important issue. Please clarify for me the situation."

[15] Mr David complained to the CHRC on March 4, 2008. The Commission at first dismissed his complaint on October 20, 2008, and again on January 21, 2010, finding that the allegations of discrimination could be dealt with through the military grievance procedures. On March 6, 2011, the CHRC decided that the grievance procedure appeared to be complete and yet eight of the nine allegations had not been dealt with. It therefore proceeded with his complaint. The investigator issued her report on June 20, 2012. The gist of the findings follows.

A. *The "captains' course"*

[16] In May 2006, the applicant went on the Reserve Army Operations Course [RAOC] in Meaford, Ontario. This course was a prerequisite for promotion and completing it was also

necessary in order to attend overseas training and exercises and eventually to deploy as a CIMIC officer.

[17] Three days into the RAOC training, it was identified that Mr. David had not completed the mandatory online portion of the course before attending. He was therefore removed from the course on May 30, 2006 and returned to unit [RTU'd]. His course report noted that he had been classified as a training failure due to "academic non-performance (motivation)" ; "Lt David demonstrated a low level of motivation in ensuring that his staff work was complete and to an acceptable standard." A follow-up memo from the Land Force Central Area Training Centre's commanding officer to the applicant's commanding officer added that the decision to RTU had been "based upon his academic grading on homework submitted, his overall course performance, and from information he provided".

[18] The applicant asserts that he was treated differently from another officer in the same situation, Lieutenant Johnson. On June 8, 2006, he reviewed the situation with Major Chadwick, who told him to submit a redress of grievance and apply for the next available RAOC, likely to take place in September 2006. Major Chadwick was then replaced at the CIMIC group by Major Bindon. The applicant states that he was promised "reloading into the next available course" by Major Bindon. In fact, Major Bindon did not re-nominate him for the course until May 2007, after the applicant had already been listed to leave the CIMIC team.

[19] Major Bindon stated to the Commission investigation that he regretted that the matter had not been handled well enough, but noted that at that time, the team was heavily involved in the

repatriation of dead soldiers from Afghanistan, and this had become a higher priority than loading officers on the RAOC.

[20] In an interview with the Commission investigator, Major Bindon discussed the aftermath of Mr. David's RTU from the RAOC:

> I offered to nominate him for the next course. I then discovered that he was under the impression that he was going to be deployed to Afghanistan. He wasn't qualified in his MOC, he had to do artillery training. He didn't want to do artillery training. I couldn't deploy him or put him on Class B until he was MOC qualified. I nominated him for the next course.
>
> Explain the ROG [redress of grievance] in this case?
>
> The ROG was not administered properly and I was at fault. He had to get his trade qualifications in artillery – it's his MOC. His status as artillery officer was not been completed out west. He should have been qualified before he got into CIMIC. He was not trade qualified. David said that he had been promised deployment by Major Chadwick – it became confusing. There was no reason for him to move to Ontario, it didn't make any sense. It was in the early part of the redress process that I realized he wasn't qualified.

[21] The applicant stated that between August 2006 and February 2008, he requested on nine separate occasions to be sent on the "captains' course". When Major Bindon did nominate him in May 2007, he was not selected. Mr. David asserts that he was denied the training due to his national or ethnic origin, being the only person born in Romania who was attached to the London CIMIC group. He noted that another officer who had been selected for CIMIC more recently than him, Lieutenant Baker, was nominated for the course in March 2007, before him.

[22] The applicant stated that the team nominal roll identified places of birth for all staff. The Chief Clerk for the CIMIC team declared that CIMIC reservists' national or ethnic origins were

not tracked. The certified court record includes a copy of the CIMIC nominal roll, which is a basic personnel record sheet containing various items of personal data including the date and place of birth of every person on the team. The CHRC investigator made a finding that (para 33 of the report):

> Given that the parties disagree and that there is no documentation, the investigator is unable to reach a conclusion as to whether the conduct the complainant is alleging, was related to a prohibited ground.

[23] The Canadian Forces explained that the applicant was not automatically entitled to attend a "captains' course". There were more candidates than spaces available and attending was regarded as a special opportunity. As military operations became more and more centered on providing reservists for the Afghanistan mission, selection became more and more competitive. The Forces noted that Lt Baker was occupation-trained and therefore deployable, and indeed was deployed to Afghanistan in 2008. They asserted that the applicant was not qualified in his occupation (artillery) and thus was not eligible for deployment. Furthermore, the CIMIC major was not in charge of selection, only of nomination. A panel located in either Kingston or Toronto conducted the selection from among nominated candidates.

[24] Major Bindon commented to the investigation that CIMIC reservists were expected to maintain their skills in their military occupation and that Mr. David had not worked at improving his skills as an artillery officer, but had focussed on requesting courses that would allow him to be deployed overseas. CIMIC candidates for the "captains' course" were assessed based on their training, readiness to work in a difficult environment, capabilities, and rank. Mr. David at one point volunteered to assist with repatriations, but he was unable to organize the necessary

services and the mortician asked that he not return to assist again. Major Bindon stated that in his opinion the applicant required further military training before being trained for deployment or deployed.

[25] The CHRC investigator concluded that the lack of selection for a "captains' course" was not related to a prohibited ground.

B. *Other training and exercise opportunities*

[26] Mr. David also stated that he had been denied other training and exercise opportunities. These included a training course in Moldova in September 2006 and a CIMIC course in Germany in January 2007. Another reservist, Lieutenant Breton, was sent on a March 2007 course in Germany. The applicant was only sent on a two-week course in Wainwright, Alberta in April 2007. In further submissions to the CHRC, he added that he had attended this training as support staff for the senior officers taking the course, and that it did not consist of training for him. The Canadian Forces commented that the CIMIC officers on the exercise were playing CIMIC officers and were evaluated on their performance in that capacity, and that this was considered to have training value.

[27] Major Bindon explained to the CHRC investigator that all reservists who volunteered to attend training abroad were reviewed by a selection board of five people. He had been asked to provide his evaluation of the applicant's readiness for deployment following the Wainwright training. He reported that the complainant had many civilian skills but lacked military training and would not be suitable for deployment to Afghanistan without further military training. The

Canadian Forces further similarly explained that at the time, Lt Breton was trained in his own occupation (infantry) to a level where he was deployable, and did in fact deploy to Afghanistan in 2008. The applicant was not sufficiently qualified in his occupation and was not eligible for deployment.

[28] At his interview, Major Bindon said:

> Was he nominated or allowed to go on other training?
>
> Well, Moldova was a big issue for him. Nobody from our organization went. NDH – National Defence Headquarters sent some people. No CIMIC people went to Moldova.
>
> Is there documentation on the fact that no one went?
>
> No. Not when they don't go. When they go, there is documentation.
>
> Was he made aware of other training?
>
> Yes he was. He put his hand up for everything. Remember it was all voluntary. At this time we took over repatriation for the soldiers who were killed overseas. We escorted the bodies. David did it once and it didn't go well for him. The mortician asked that he not go back. He was out of his depth. He couldn't organize the police, the escort services and the family detail.

[29] Major O'Neill commented:

> To your knowledge was he informed of training opportunities in 2006 to 2008?
>
> Yes – he came out to Wainwright with me in 2007 to the Combat Team Commander's Course run by the Tactic school. He would have been Class B. So, yes, David received notices and went to training. We went together – there were 5 or 6 of us from CIMIC. They needed us for role playing for the Regular Force – so we were acting as the CIMIC group. I was asked by Chadwick to keep an eye on Ion David – in that environment and do an assessment. I did it, getting a feel for how he operated. I said to

> Major Chadwick – in a kinetic environment, he (David) lacked the military experience to operate in a combat role. At CIMIC, we were still soldiers first. Afghanistan is dangerous, it was a high risk, dangerous environment. He had a lot of civilian skills and experience. But I was very clear with Chadwick – in a field of conflict, he would be leading men and he lacked military training. Going back to his MOC, the U needed to be taken away – he was untrained at artillery.
>
> Was this explained to Ion David?
>
> Yes, I believe so. There was a recommendation made that he should receive more military training before being deployed overseas.

[30] The CHRC investigator concluded that the denial of overseas training was not linked to a prohibited ground.

C. *Deployments*

[31] The applicant alleged that he was not offered a deployment, while other CIMIC reservists were. He was therefore denied employment opportunities and had to declare personal bankruptcy. He claimed that the denial of opportunity was directly related to his Romanian origin.

[32] Major Riddell, who was offered a deployment, stated that selection for deployments was based on merit and a thorough assessment of the person's civilian occupation, soft skills, and military training, and that CIMIC reservists with an ability to work in a multi-ethnic situation and display cultural sensitivity were sought. Appointment for a deployment depended on meeting a Canadian Forces need and on being able to operate in a combat-ready environment.

[33] The investigator found that the Canadian Forces had provided documentation showing that the applicant had been evaluated and found lacking in military experience and merit. She did not find that the denial of deployment opportunities was linked to a prohibited ground.

D. *Redress of grievance*

[34] The applicant submitted a redress of grievance on November 20, 2006, and requested reviews of his grievance on three occasions during 2007 and again in January 2008. Major Bindon stated that he had entered into discussion with the applicant between November 2006 and spring 2007, and believed that a satisfactory outcome had been reached. He therefore did not pass the grievance up to the next level. When interviewed by the Commission investigator, he acknowledged that it had been mishandled and took responsibility.

[35] The Canadian Forces agreed that the grievance had not been correctly administered. Mr. David said that the consequence was that he was put on a March 27, 2007 list to leave CIMIC and return to his home unit.

[36] However, the investigator noted that evidence was provided that he had received significant guidance and support from a long list of staff involved with CIMIC, and that there was ongoing dialogue to try to resolve the substance of the grievance. She did not find that the conduct appeared to be linked to a prohibited ground.

E. *The transfer out of CIMIC*

[37] On March 27, 2007, Major Bindon scheduled the applicant to be returned to his home unit from CIMIC, after only a year and two months in London. The applicant stated that three officers with less training than him were not on the list of people to be returned to their home units. Mr. David was advised by letter on May 16, 2007 that the rationale for his transfer back was the CIMIC commitment to other army units not to keep attached personnel for more than 3-4 years depending on the number of times they deployed.

[38] At the interview, however, Major Bindon stated:

> Why was he RTU?
>
> David never showed up for any training and for months he never showed up, he wouldn't sign the pay sheets for CIMIC and he was transferred out to his home unit.

[39] Major Riddell told the interviewer:

> Were you involved in Ion David's complaint?
>
> I didn't inherit his case. He was in the middle of the ROG process. He came in shortly after I took command and he explained his issues to me. I said "let me try and take care of this" – I went to Tom Bindon. The answer came back – "Colonel Lawrence is addressing the ROG.". By this time, David was at "non-effective" status – this is for a reservist who has not paraded in 30 days. I was trying to get him into a strength force in southern Ontario. He was a reservist and I was trying to get him paid. After 60 days a second letter goes out and after 180 days, the reservist is released for not showing up. He would have been adversely affected as he was about to be released under 5D or 5F – both a black mark.

[40] Mr. David stated that he had not completed the normal three-year cycle of train-deploy-teach. He was told to find a home unit to transfer back to, but he asserted that since his attachment to CIMIC in January 2006, his home unit had been the CIMIC group in London, Ontario. He noted that he was the only London CIMIC reservist born in the Eastern bloc.

[41] Major Bindon stated that the applicant did not have the skills, experience, and qualifications to be deployed. Major Bindon had therefore requested assistance in career planning for him and sought a unit to which he could transfer in order to gain military experience.

[42] The CHRC investigator did not find that the transfer was linked to a prohibited ground.

F. *The investigator's recommendation and the complainant's reply submissions*

[43] The investigator recommended that the CHRC dismiss the human rights complaint because the allegations of adverse differential treatment in training and employment based on a proscribed ground were not supported by the evidence.

[44] In reply submissions, Mr. David took issue with the investigator's acceptance at paragraph 37 of Major Bindon's statement that he had not been re-nominated for the "captains' course" because he had not worked to improve his military skills but instead had focussed on requesting courses that would lead to a full-time overseas deployment. He provided a Master Events List giving training opportunities available for the CIMIC team between 5 February 2007

and 30 March 2008, i.e. in the two months before he was placed on the list to rotate out and the following twelve months, none of which had been offered to him.

[45] He also complained that Major O'Neill had been nominated for all activities even while he was nominated for none. He provided a spreadsheet listing fourteen NATO course opportunities between February 13, 2006 and December 1, 2006. The list is:

a. 5 serials of the NATO Tactical Basic CIMIC Course
b. 2 serials of the NATO CEP CIMIC Course – Regional
c. 2 serials of the NATO Operational Liaison CIMIC Course
d. 1 serial of the NATO Operational Liaison CIMIC Course – Regional
e. 1 serial of the NATO Operational CIMIC Course – Regional
f. 1 serial of the NATO CIMIC Op Staff Course;
g. 1 serial of the NATO Strategic/Operational CIMIC Course; and
h. 1 serial of the NATO Strategic Planners CIMIC Course – Regional.

[46] The spreadsheet shows a Lt David nominated for the NATO Tactical Basic CIMIC Course in Ankara, Turkey, 8-18 May 2006. It shows Major O'Neill nominated for a serial of each of the eight courses (including twice, on two different serials, for the NATO Tactical Basic CIMIC Course) and two other officers nominated for one course each. The Nominal Roll sheet notes however, that Major O'Neill was designated as Team Leader of the London unit.

[47] The applicant drew the investigator's attention to the team nominal roll showing the date and place of birth of all personnel. He stated that both he and the only other foreign-born

member of the 12-member London team were included on the list of personnel to be transferred out.

[48] The applicant also took issue with the statement at paragraph 81 of the investigation report, relating to the team's choice not to offer him a deployment to Afghanistan, was that "The respondent provided documentation that the complainant was evaluated and found lacking in military experience and merit." He argued that he had never been made aware of any deficiencies in performance.

III. Contested decision

[49] Before the CHRC, the applicant sought to be promoted to captain, retroactively to September 2006, and awarded a sum corresponding to captain's pay in a full-time position since September 2006.

[50] The CHRC reviewed the investigation report and decided to dismiss the complaint rather than referring to the Canadian Human Rights Tribunal [the CHRT or the Tribunal] because the allegations of adverse differential treatment in training and employment due to a proscribed ground were not supported by the evidence.

IV. Issues

[51] The applicant proposes two issues:

a. What is the applicable standard of review of the thoroughness of an investigation?

b. Was the Commission's decision to dismiss the complaint reasonable?

V. Analysis

A. *Standard of review*

[52] The parties acknowledge that the decision to dismiss the complaint pursuant to section 44 of the CHRA is reviewable on a standard of reasonableness. They are also in agreement that the question of whether an investigation and the Commission's decision-making have been conducted in accordance with procedural fairness is to be reviewed on a standard of correctness: *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*]; *Dupuis v Canada (AG)*, 2010 FC 511 at para 10; *Sketchley v Canada (AG)*, 2005 FCA 404 at paras 53-55, 111 [*Sketchley*].

[53] Where the parties in this case differ, however, is in regards to whether the acknowledged requirement of thoroughness of an investigation by the Commission is to be considered as part of the reasonableness analysis or whether it is a matter of procedural fairness subject to a correctness standard of review. The respondent states that determining whether the investigator's investigation was thorough is reviewable on a standard of reasonableness. This happens to be in accord with my recent decision in *MTS Inc v Eadie*, 2014 FC 61 [*MTS*].

[54] The applicant argued that the Court of Appeal in *Sketchley*, *supra*, concluded that the standard of review analysis does not apply when reviewing a decision on grounds of procedural fairness. Instead the issue is the content of the duty of procedural fairness in the circumstances. Accordingly, he argued that alleged inadequacies, errors and omissions, and a failure to investigate obviously crucial evidence, all factors that I view as matters relating to the thoroughness of an investigation, constituted breaches of the Commission's duty of procedural

fairness. These were therefore subject to a substantive correctness review, which would require the decision to be quashed if a breach of the duty was found to have occurred.

[55] Based on the Court's analysis in *Sketchley*, I cannot disagree with the applicant's submissions. However, in my view, the analysis of the Court in that matter has been superseded by *Dunsmuir*, which as noted by Justice Stratas in the very recent decision *Maritime Broadcasting System Limited v Canadian Media Guild*, 2014 FCA 59 [*Maritime Broadcasting*] at paragraph 51, "changed the direction of Canadian administrative law."

[56] This may be a distinction without a difference inasmuch as the manner of application of the result in *Sketchley* speaks of deference towards the investigator and the need for an unreasonable failure to follow through with an investigation in order to set the impugned decision aside, which are hallmarks of the reasonableness standard. Nevertheless the "pragmatic and functional" analysis followed by the Court in *Sketchley* in terms of defining the content of the duty of fairness based on reasonableness has been superseded and continuing reference to it only adds confusion to the new standard of review regime enunciated in *Dunsmuir*, which was intended to eliminate such an analysis.

[57] While I concluded in *MTS* that thoroughness was an issue to be determined in accordance with a reasonableness analysis, given the nature of the applicant's arguments it is necessary to look at the matter from first principles to determine whether there could be any vestige of procedural fairness left in an analysis of the thoroughness requirement of an investigation. *Sketchley* dealt with this issue, with the Court ultimately relying upon the statement of principle

from *Slattery v Canada (Human Rights Commission)*, [1994] 2 FC 574. I set out below selected passages from *Sketchley*:

> 5. Procedural Fairness in the Commission's Investigation
>
> [110] The applications Judge treated the review of the respondent's HRDC complaint as a question of procedural fairness, and held that the investigation with respect to this complaint was flawed for lack of thoroughness, as the investigator was found to have failed to "address at all the substance of the complaint" (at paragraph 52) and "dismissed perfunctorily" the "serious allegations" made by the respondent (at paragraph 58).…
>
> [112] It is clear that a duty of procedural fairness applies to the Commission's investigations of individual complaints, in that the question of "whether there is a reasonable basis in the evidence for proceeding to the next stage" (SEPQA, at page 899) cannot be fairly considered if the investigation was fundamentally flawed.…
>
> [113] The existence of the duty of fairness in this case does not, however, determine what requirements are applicable in this context, as the content of procedural fairness is variable and must be determined in the specific context of each case (Baker, at paragraph 21). In Baker, L'Heureux Dubé, J. set out at paragraphs 22 28 a non exhaustive list of factors to consider in determining the content of procedural fairness in any given context; these factors have been affirmed by the Supreme Court of Canada and this Court [2000 CanLII 17101 (FCA), [2000] 2 F.C. 592 (C.A.)] in Suresh and Canada (Attorney General) v. Fetherston (2005), 332 N.R. 113, leave to appeal to S.C.C. refused, [2005] S.C.C.A. No. 239.
>
> [114] The issue of the content of the duty of fairness in the context of a decision by the Commission to dismiss a complaint has been addressed in a number of cases, most notably SEPQA, Radulesco v. Canadian Human Rights Commission, 1984 CanLII 120 (SCC), [1984] 2 S.C.R. 407 (Radulesco) and Latif. <u>In addition, the content of the duty in the particular context of an investigation leading to a dismissal under paragraph 44(3)(b) was carefully considered by the Federal Court of Canada in *Slattery*</u>, in a decision which was recently cited by this Court as "the leading case on this issue" (Tahmourpour, at paragraph 8; see also Singh, at paragraph 4). These cases were all decided before the law concerning procedural fairness was summarized and restated by the Supreme Court in Baker. However, the conclusion in these cases, as to the content of the duty in this context, remains valid.

> [115] In order to determine the degree of investigative thoroughness required in this context, the factors from Baker must be applied. First,…
>
> [120] In *Slattery*, the applications Judge considered the degree of thoroughness of investigation required to satisfy the rules of procedural fairness in this context. He noted the "essential role that investigators play in determining the merits of particular complaints" (at page 599), and also the competing interests of individual complainants and the administrative apparatus as a whole (at page 600). He concluded as follows (at pages 600-601):
>
> > Deference must be given to administrative decision makers to assess the probative value of evidence and to decide to further investigate or not to further investigate accordingly. It should only be where unreasonable omissions are made, for example where an investigator failed to investigate obviously crucial evidence, that judicial review is warranted.
>
> [Emphasis added]

[58] The quoted last paragraph from *Slattery* in *Sketchley* well describes the nature of the analysis to determine whether an investigation meets the requirements of thoroughness. It also fits perfectly with the characteristics pertaining to a decision where a reasonableness analysis is required as described in *Dunsmuir*.

[59] Firstly, deference is owed to the decision-maker. Deference is of course a hallmark of the reasonableness analysis as opposed to the correctness test, which generally permits the Court to substitute its opinion for that of the administrative decision-maker on what constitutes fairness. Admittedly, the Court of Appeal has recently recognized that deference plays a role in determining the boundary of correctness; see *Re: Sound v Fitness Industry Council of Canada*, 2014 FCA 48 and *Maritime Broadcasting*, *supra*. However, these decisions arose in a context of what I would describe as true procedural fairness issues concerning bias or a lack of opportunity

to be heard, not on the issue of failure to go far enough or of errors in an investigation. In other words, there was no issue in those cases about determining which standard of review applies.

[60] Secondly, an investigator clearly exercises a large measure of discretion in how the investigation should be conducted. Based on the evidence and information gleaned so far, should a matter be followed up further? Alternatively, should the investigator rely upon the information obtained, or is it irrelevant? Conversely, is the investigator relying upon an irrelevant factor which significantly skews the reasonableness of the decision? Has the investigator properly articulated the findings and recommendations; are the conclusions justified and intelligible; is it transparent in terms of all of the statements obtained from witnesses? These are all factors applied in a reasonableness analysis, which do not bear on whether procedural fairness was accorded.

[61] Thirdly, and in contradistinction to a correctness analysis, when reasonableness is the standard of review, the decision itself is the focus of the reviewing court. It is the starting point which must first be analyzed and thereafter held up to examination against the information obtained or not obtained and the manner in which the conclusions have been expressed in relation to the information obtained. All of the issues described above relate to an analysis of the decision and the logical connections between the information obtained or not, and the way that they are set out in the decision in relation to its conclusions.

[62] Fairness, on the other hand, deals with the procedure followed in allowing parties to participate in the process or with the characteristics of neutrality of the decision-maker. The

decision itself is irrelevant. It will be set aside regardless of its merit, unless it would be futile to do so in light of other factors having nothing to do with fairness considerations. It is precisely because in matters of procedural fairness the decision is irrelevant - meaning that there is no need to undertake the challenging analysis of the reasonableness of an exercise of discretion - that the reviewing court is permitted to substitute its opinion for that of the decision-maker.

[63] Moreover, I would like to think that *Dunsmuir* was intended to overcome much of the inordinate complexity that had weighed down the whole issue of standard of review and administrative law generally. To introduce fuzzy concepts of procedural fairness based on the contents of the duty into the exercise of a discretion said to be measured in terms of its reasonableness, or *vice versa* to permit deferential reasonableness to be a factor in determining the boundaries of correctness, would be moving away from the relatively bright lines established by *Dunsmuir*.

[64] If I may speak out of turn, I am a very strong believer that courts should make an effort to apply the KIS (Keep It Simple) principle whenever possible. The issue of our times is access to justice. We need to make our legal system more simple, user-friendly, and thereby more accessible. It is time to return to bright lines where possible, while loosening up the court's prerogative to intervene when the interests of justice require. When Justice Stratas speaks (in *Maritime Broadcasting* at para 51) of the changed direction of Canadian administrative law brought about by *Dunsmuir*, I consider that decision's principal contribution to be its implicit recognition of the need for adherence to the KIS principle in formulating our legal maxims.

[65] Accordingly, I accept the respondent's submission, which happens to coincide with my earlier views expressed in *MTS*, that the standard of review of the thoroughness of an investigation is one of reasonableness in accordance with *Dunsmuir*.

B. *The Commission's decision to dismiss the complaint*

[66] Speaking further of *Dunsmuir* as a clarion call to adopt a more pragmatic, and indeed common sense approach, in the review of administrative decisions by directing the reviewing court's attention to a range of reasonable acceptable outcomes, I suggest that *Dunsmuir* proposes a more generalized approach - looking at the forest and not the trees - as a starting point in the analysis of a decision.

[67] I believe this to be the process first followed by a judge when he or she first reflects on the decision to be reviewed. Considering generally all the facts together in light of the central issue, the nature of the allegations, the functions of the Commission and its investigator, and the main points that the applicant relies on, does the judge find that they suggest the decision is sufficiently unreasonable as to fall outside the range of possible acceptable outcomes?

[68] The central issue in the matter before me is the investigator's failure to find any relation between the alleged discrimination which prevented the applicant from succeeding in the CIMIC program and his Romanian ethnicity.

[69] Very large numbers of persons of all types of different ethnicities immigrate to Canada and this country has a solid history of good integration. That is not to say that there are no

instances of discrimination on the basis of ethnicity, and certainly that has occurred against ethnic groups. This, however, is not a case that fits into a systemic pattern of a known group whose members are currently or in the past victims of discrimination to any degree. In terms, therefore, of a claim of discrimination being made against the Forces and its officers who were running the CIMIC program in Ontario, the Court is not put on a heightened alert of dealing with a history of discrimination against Romanians such as with regard to race, religion or gender.

[70] Secondly, a claim of not succeeding in a competitive job environment is difficult to make in the best of instances without cogent evidence of some kind to back up the claim. There are simply so many factors that go into securing a position in today's employment market that attributing the problem to others as opposed to the requirements of the position or one's skills, experience and character, particularly in the Canadian Armed Forces where leadership and other human factors play a role, is a difficult case to make.

[71] In this matter there is no objective evidence that the applicant's ethnicity played any role in any of the alleged unmerited acts of differential treatment. That is, I find no conduct, comments or inferences in the evidence which could connect the applicant's treatment to his ethnicity. The investigator based her decision on the lack of connection between the applicant's ethnicity and his alleged mistreatment. Most of the evidence introduced in this matter had to do with differential treatment by the applicant not succeeding in gaining access to programs or assignments, which by definition is an outcome in every competitive employment situation. Apart from his own subjective feelings, there are no demonstrated links between any of these results and his ethnicity.

[72] The only two elements of evidence relating to ethnicity are a document of the respondent - the nominal roll of the Ontario members of CIMIC – and the suggestion that it forms the basis for the alleged misrepresentation by the respondent that it did not track ethnicity.

[73] The Commission was obviously aware of the document, including by the applicant's bringing it forward. It quite correctly did not see it as evidence of a possible suggestion that ethnicity played any role in the applicant's employment circumstances with CIMIC. Besides deference being owed to this assessment of the insufficiency of the probative value of the existence of the nominal roll, I am in agreement with it.

[74] The nominal roll in question is a typical summary document containing the type of personal information one would expect to find about members of an organization, such as home addresses, contact numbers and in the case of persons serving with CIMIC, the country of birth. This is standard information contained on many documents such as passports. There is nothing suspicious about an organization that sends personnel around the world having information on the countries of birth of its members.

[75] The document also confirms the highly improbable conclusion that the applicant was discriminated against based on his Eastern European ethnicity. It lists a person born in the Philippines as another member of the 12 member London CIMIC unit and no evidence has been presented that this person was barred from access to training and deployments. Moreover, the document contains the names of CIMIC members across Ontario including one born in Poland,

as well as several members with places of birth outside of Canada. It does not indicate the ethnicity of either persons born outside Canada or the persons born in Canada.

[76] In addition, the fact that the document pertains to members across Ontario, and not just in the London unit, deflates the suggestion that it was being used to discriminate against the applicant personally in London.

[77] It is also of some importance that the applicant did not present support from any other persons of foreign ethnicity in the program complaining about being treated differently because of their ethnicity.

[78] The case for a *prima facie* finding of discrimination is particularly difficult to discern in the context of the CIMIC organization. CIMIC is tasked with deploying Canadian soldiers into foreign communities with the hope of gaining their sympathy or allegiance to causes being supported by the Canadian Forces. Cultural and linguistic diversity would appear to be an asset to CIMIC in assisting it to achieve its goals.

[79] In summary, there is no evidence that the information on place of birth was used as a determinant of outcome in relation to any of the alleged instances of discrimination. In the context of this complaint involving a competitive employment situation where there is simply no objective evidence demonstrating a nexus between the alleged discriminatory differential treatment and the prohibited ground of the applicant's Romanian ethnicity, the decision not to proceed with the complaint was one falling within the range of reasonable acceptable outcomes.

[80] Apart from the lack of evidence of ethnicity playing any role in this matter, there is also little in the evidence to suggest that the applicant was not treated fairly on the basis of merit in his rejection from the various programs that he sought to undertake.

[81] The applicant fails to consider that he was enrolled in a competitive program where he had failed at the first step in a multistep training program as part of a three-year term. He was at a competitive disadvantage because he did not have the Reserve Army Operations Course which made him less suitable for certain positions and deployments under CIMIC. He had not done well on a repatriation tasking, resulting in negative comments from a supervisor outside the program, and had failed to impress in a CIMIC role-playing simulation conducted for regular forces.

[82] I do not find that there is evidence to support an allegation that he was unfairly rejected from the "captains' course" particularly as he was only a Lieutenant. He was the author of his own initial failure by not completing the program, and after that it is a difficult case to make against others that he did not get back into the competitive program.

[83] I also see no case that Major Bindon treated him differentially on any improper basis. Major Bindon freely acknowledged that the complainant had many civilian skills, but reported that he lacked military training and was therefore not suitable for deployment, which appears reasonable. References to other persons who were deployed were explained on this basis. In any event the decision to deploy the applicant was made by a panel of officers and not by Major Bindon.

[84] For all of the foregoing reasons, I do not find that there was any failure in the thoroughness of the investigation. The decision concluding that there was insufficient evidence that the applicant was the subject of discrimination to refer the matter to the CHRT was well articulated and within the range of reasonable acceptable outcomes.

VI. Conclusion

[85] The application is therefore dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is dismissed.

"Peter Annis"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2005-12
STYLE OF CAUSE:	ION DAVID v THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	FEBRUARY 3, 2014
REASONS FOR JUDGMENT AND JUDGMENT:	ANNIS J.
DATED:	APRIL 14, 2014

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