

Federal Court



Cour fédérale

**Date: 20140606**

**Docket: T-270-13**

**Citation: 2014 FC 552**

**Ottawa, Ontario, June 6, 2014**

**PRESENT: The Honourable Madam Justice Kane**

**BETWEEN:**

**NAVIN JOSHI**

**Applicant**

**and**

**CANADIAN IMPERIAL BANK OF  
COMMERCE**

**Respondent**

**JUDGMENT AND REASONS**

[1] The applicant, Navin Joshi, seeks judicial review of the decision of the Canadian Human Rights Commission (the “Commission”) dated October 31, 2012, in which it decided not to refer his complaint to the Canadian Human Rights Tribunal pursuant to subparagraph 44(3)(b)(i) of the *Canadian Human Rights Act*, RSC 1985, c H-6 (the “Act”), because it found the evidence did not establish that the respondent, the Canadian Imperial Bank of Commerce [“CIBC”], had failed

to provide him with an employment opportunity or had otherwise terminated or treated him in an adverse differential manner due to his disability, which was an undiagnosed back problem.

### *Overview*

[2] The applicant submits that his application for judicial review should be allowed because the Commission erred in dismissing his complaint by: basing its decision on erroneous findings of fact; making an error of law; failing to observe procedural fairness and principles of natural justice, including bias; and acting or failing to act by reason of fraud or perjured evidence.

[3] The applicant elaborated upon his original complaint to the Commission in his oral submissions. He now submits that the Commission did not address his complaints as he described them, and states that he never complained that he was terminated due to discrimination, only that he was denied training due to discrimination and that this lack of training led to his ongoing poor performance which, in turn, led to his termination.

[4] The applicant submits that the Commission's investigation was incomplete and "shoddy" and that the Investigator was biased against him. He submits that the Investigator preferred the evidence of CIBC and did not probe further or seek out other witnesses to assess how the lack of training provided to him affected his performance or to assess whether he had the skills required for the position of the Financial Analyst which he sought compared to the skills of those who were offered that position.

[5] The applicant's position is that because he was hired by CIBC after participating in a pre-employment training program for disabled persons, he has established that he was a member of a

protected group. He argues that membership in a protected group, coupled with the Investigator's finding that he was treated in an adverse manner regarding training, should be sufficient to establish that he was discriminated against on the grounds of disability.

[6] The applicant emphatically argued that the Investigation was not thorough or fair and that the decision of the Commission was not reasonable. His submissions have been carefully considered, but cannot succeed.

[7] The Investigation was procedurally fair and there is no hint of bias. The Investigator's Report demonstrates that a thorough investigation was conducted. The Investigator addressed each allegation as framed by the applicant in his original complaint along with the information provided by both the applicant and CIBC, including the additional responses provided by CIBC to specific questions posed by the Investigator, as well as the information provided by the witnesses interviewed. The Commission then considered the Report and the submissions of the parties. The applicant's submissions to the Commission were critical of the investigation and expanded on some aspects of his complaint. The Commission reasonably concluded, based on the Report and the submissions that the complaint should not be referred to the Tribunal.

[8] The applicant cannot simply demonstrate that he fit into a protected group and that he experienced different treatment than other employees in order to succeed in a claim under the Act. The evidence must establish that the differential or adverse treatment is because of a disability or other prohibited ground. The Commission investigated the complaints, and found that the applicant did not establish the crucial causal link between adverse treatment and his disability. Therefore, no discrimination occurred.

[9] For the more detailed reasons that follow, the application for judicial review is dismissed.

### ***The Background***

#### *The Facts as recounted by the Applicant*

[10] In March 2006, the applicant responded to an advertisement in his local newspaper by CIBC seeking applications from disabled individuals to participate in a six-week pre-employment training program run for CIBC by the Jewish Vocational Service of Metropolitan Toronto [“JVS”]. The applicant characterised the advertisement as being recruited by the CIBC.

[11] After successful completion of the program, he was interviewed by JVS. He submits that JVS determined that he was best suited for the position of Financial Analyst. He was first offered a temporary contract position by the respondent, contrary to his expectations. Upon complaining to JVS, he was offered full-time employment.

[12] The applicant began his employment on May 6, 2006 but was given odd jobs because there were no opportunities to perform the specific tasks of an Analyst. A year later he reluctantly took a Security Analyst position. This required him to review security documents with a high degree of accuracy. A two week training program was mandatory. However, he could only attend the training on a part-time basis because he was covering for a promoted employee as well as performing his regular duties. The applicant noted that there were other opportunities for the respondent to provide him with adequate training but it did not do so.

[13] In December 2009, the applicant filed a grievance against the respondent. Before the grievance process was concluded, he was fired for failing to make “significant improvement” to his work. Following his dismissal, he filed a complaint with the Commission.

[14] He submits that the respondent misrepresented his reasons for leaving its employ. Instead of indicating he was terminated, his record of employment states that he left due to “a leave of absence”, which was later amended to “retirement”.

*The Facts as Recounted by the Respondent*

[15] The respondent submits that many relevant facts were omitted by the applicant.

[16] The respondent states that the extent of its knowledge of the applicant’s disability was that he had a physical restriction and could not lift more than 20 pounds. This never became an issue as the applicant was never required to do any lifting during his employment. The applicant never self-identified as disabled, did not request accommodation, and did not provide any medical documentation to support his disability. In fact, his back problem had not been diagnosed by a medical professional and he had not been given any restrictions or limitations by a medical professional since 1992, more than 10 years before his employment with the respondent.

[17] The respondent notes that prior to being terminated, the applicant was given two written warnings about his unsatisfactory performance. His physical abilities had no relevance to his responsibilities as a Security Analyst, and his disability was not a reason for his dismissal. The

respondent further highlights that the applicant never raised his concerns during his four years of employment prior to his human rights complaint.

[18] The respondent explained, in response to the Investigator's inquiry regarding the notation on his record of employment, that this record did not indicate he was terminated in order to ensure the applicant remained eligible for his retiree benefits. However, the respondent provided the necessary information to the Employment Insurance Officer to permit his eligibility for those benefits.

### *The Complaint*

[19] In his oral submissions, the applicant argues that he made seven complaints. He also now submits that he did not allege that he was terminated due to discrimination. Given these submissions, it is helpful to set out exactly what the applicant stated in his complaint to the Commission, dated June 16, 2010.

[20] The complaint stated:

1. My name is Navin Joshi and my complaint is against CIBC. I am a disabled person and I believe I was subjected to discrimination due to my disability.
2. I have a Bachelor of Commerce degree in finance and qualified to perform the duties of Risk Analyst. On May 30, 2006 CIBC recruited me from a training program run by JVS Toronto which assists disabled individuals obtain meaningful employment.
3. The training program commenced on or around April 16, 2006 and upon successful completion CIBC undertook to offer the trainees full-time employment based on the trainee's skills and expertise which was determined by the JVS instructor.

4. The JVS training instructor recommended that I be offered the position of Financial Analyst which CIBC accepted and on that basis made me an employment offer. However, CIBC never made good on the offer and instead gave me odd jobs here and there. At first I didn't mind since there was the prospect of CIBC fulfilling its obligation to train me for the position of Risk Analyst but it didn't happen. Despite numerous vacancies my application for the Risk Analyst position were continuously rejected by CIBC. Often less qualified applicants from outside were hired when the normal CIBC practice was to hire from within. Hence, I was forced to settle for the position of Security Analyst to which I was not suited resulting in my dismissal. Though CIBC had the option and the duty to offer me a more suitable position, it fired me on April 8, 2010 yet offered Rhoda Jno-Baptiste another position when faced with a similar situation.

4. I believe I was denied the position of Risk Analyst and treated differently because of my disability.

### *The Commission's decision*

[21] The Commission dismissed the complaint pursuant to sub-paragraph 44(3)(b)(i). The Commission found that the evidence did not support that the respondent failed to provide the applicant with an employment opportunity, treated him in an adverse manner, or terminated his employment on the basis of disability or perceived disability. The Commission concluded that further inquiry into the complaint by the Canada Human Rights Tribunal did not appear warranted.

[22] The Commission's decision was based on the Investigation Report and the submissions of the parties.

***The Investigation Process and Report***

[23] The Report outlined the investigative process in detail. The process included a review of the parties' submissions along with all documentary evidence provided. The Investigator conducted telephone interviews with Mr Joshi, the applicant; Mike Leicester, Senior Director at CIBC; Armando Santos, Manager at CIBC; and Carol Hacker, Director of Disability Services at JVS.

[24] The Report noted that both parties agreed that the Commission should investigate the complaint.

[25] The Investigator set out the methodology that would be used to investigate the complaint and set out each question to be answered. The Investigator then reiterated the process undertaken and the questions asked, as she addressed each aspect of the complaint, considered the evidence related to each aspect, and made her conclusions.

[26] The Investigator set out the key issue in the first paragraph of the report: whether the respondent failed to provide the complainant a job, promotion or acting assignment, treated the complainant in an adverse differential manner, and/or terminated his employment on the basis of disability or perceived disability (undiagnosed back pain).

[27] The Investigator reviewed the background, noting that the applicant participated in the pre-employment training program in April and May 2006, which CIBC offered with JVS in order to provide persons with disabilities a chance to obtain employment.



*The disability*

[28] The Investigator noted that the applicant's back pain has never been diagnosed by a medical professional and that the applicant has not been given any restrictions or limitations by a medical professional since 1992. The applicant has never provided the respondent with medical documentation, and his back problem has never been an issue during his employment. While the existence of the applicant's disability was disclosed to JVS for the 2006 recruitment program, he was not required to provide any details to JVS in order to participate. The Investigator noted that Mr Joshi had indicated his back problem was not an issue, he needed only some support in his chair from time to time and his job did not involve lifting.

*The Failure to Receive a Job or Promotion*

[29] With respect to the applicant's allegation that the respondent "never made good" on its promise to hire him as a Financial/Risk Analyst and then, once he was employed, never fulfilled its obligation to train him for the position, the Investigator found that the applicant answered an advertisement for a position with CIBC and applied for the job opportunity under the broad categories of Operator/Processor and/or Analyst. Both CIBC and JVS denied that a Financial/Risk Analyst was one of the positions advertised.

[30] The Investigator concluded that while the applicant was qualified for a job under the Analyst stream because of the pre-employment training program, CIBC had the final say about which position to offer, and was not bound by the recommendation of JVS. The Investigator found that the applicant was ultimately offered the position of Analyst, not Financial/Risk Analyst.

[31] The Investigator noted that the applicant did not provide any documentary evidence to support his allegation that the respondent had an obligation to train him for the Financial/Risk Analyst position. The applicant stated that this was the job he was best suited for, but he acknowledged that no one at CIBC had ever promised him an offer for the position of Financial/Risk Analyst.

[32] The Investigator concluded that although Mr. Joshi did not receive the opportunity he thought he was qualified for, he did receive full time employment as an Analyst, in line with the pre-employment training program. Mr Joshi was of the view that he was not doing the actual work of an Analyst, but he provided no evidence to support this allegation. Therefore, the Investigator concluded that this allegation would not be investigated further.

[33] Regarding the applicant's allegation that despite numerous vacancies, his applications for the Financial/Risk Analyst position were continuously rejected, the Investigator concluded that Mr Joshi had applied for the position on a few occasions. CIBC advised the Investigator that Mr Joshi did not possess the skills and abilities required for the position of Financial/Risk Analyst, as the position was at a higher level than the position he currently occupied and required a higher degree of understanding of financial accounting. The Investigator concluded "it appears that the parties disagree about whether the complainant was qualified or otherwise eligible for the employment opportunity. As such, for the sake of thoroughness, the investigation will proceed."

[34] With respect to whether the applicant was denied this employment opportunity on the basis of his disability, the Investigator considered the evidence and concluded that CIBC hiring personnel would only have been aware of individuals who self-identify as having a disability for

the job postings that Mr Joshi claims were offered to others; i.e., if those persons had self-identified as having a disability or made accommodation requests. The Investigator noted that the complainant had not done either. She concluded the complainant's disability or perceived disability was not a factor in him not being successful in obtaining other positions.

[35] As a result, the Investigator concluded that this aspect of the complaint would not proceed further.

#### *Adverse Differential Treatment*

[36] With respect to the key issue of whether the applicant was subjected to adverse differential treatment due to a disability, the Investigator addressed each of the applicant's allegations.

[37] Regarding the allegation that he was not given the two-week training required for the position of Security Analyst (which he assumed in 2007) and that the other six employees had received the training, the Investigator concluded that the applicant may have been treated in a different manner compared to other employees.

[38] The Investigator noted that the parties disagreed about the value and importance of the training, and concluded that it was "unclear whether the treatment involved negative consequences for the complainant or not. As such the investigation into this allegation will proceed."

[39] With respect to the fundamental issue—whether the applicant was treated differently based on characteristics that relate to one or more prohibited grounds of discrimination—the Investigator concluded that it did not appear that Mr Joshi received less training due to a disability or perceived disability. The Investigator found that the lack of training was due to operational requirements, which prevented him from being relieved from his prior assignment.

[40] The Investigator noted Mr. Joshi's own evidence, set out in his letter to the Human Resources Development Canada Early Resolution Officer, stated he did not get the training because he was required to cover for his colleague, Jennifer Chen. The applicant also set this out in his letter to Mr Leicester at CIBC, which stated he could not attend the training because he was covering for Ms Chen.

[41] The Investigator concluded that it did not appear that Mr Joshi was treated in an adverse differential manner on the basis of disability or perceived disability and, therefore, the investigation into this allegation would not proceed further.

#### *Wrongful Termination of Employment*

[42] The Investigator concluded that Mr Joshi had not provided sufficient evidence to support his allegation that his employment was terminated on the basis of disability or perceived disability. However, the Investigator stated that, "for the sake of thoroughness, the investigation will proceed to Step 2 in order to provide the respondent an opportunity to explain its actions."

[43] The Investigator then explored whether the respondent could provide a reasonable explanation for its actions that was not a pretext for discrimination on a prohibited ground. The

Investigator considered the evidence of CIBC regarding the warnings provided to the applicant about his performance. This included his performance reviews, two written warnings, and the evidence of Mr Leicester. Mr Leicester stated that he had worked with the applicant on these performance issues for more than two years, and that the applicant made excuses and was not responsive. The evidence of Mr Santos explained that training is usually done on the job and most employees are able to advance after about six months. The Investigator also considered the applicant's evidence, including that he felt he was better suited for another position, that he was set up to fail because he was viewed as inferior due to his entry into employment from a disability program, and was not provided with the needed training.

[44] The Investigator concluded that it appears the respondent terminated the complainant's employment due to well-documented ongoing performance issues. There was no pretext for discrimination.

### ***The Applicant's Position***

[45] The applicant submits that the Commission failed to observe principles of natural justice and procedural fairness: it failed to conduct a fair, impartial and thorough investigation; it relied entirely on perjury and fraudulent claims of the respondent; and it demonstrated bias.

[46] The applicant further submits that the Commission based its decision on an erroneous finding of fact: specifically, that it disregarded that he was the only one of the seven Security Analysts hired who did not receive the mandatory two week training, that it instead chose to justify the discrimination as an operational requirement rather than acknowledging that the

respondent viewed the applicant as an inferior employee incapable of performing his job due to his disability.

[47] The applicant submits that he was recruited under a disability program and was discriminated against from “day one”.

[48] As noted above, in his oral submissions the applicant sought to elaborate on his complaint and expand his arguments regarding the thoroughness of the Investigation and the reasonableness of the decision.

[49] The applicant now submits that he had seven complaints:

1. CIBC failed to assign him the duties of an Analyst but gave him odd jobs;
2. CIBC failed to consider him for the Risk Analyst position as recommended by JVS;
3. CIBC treated him differently or wrongfully by assigning him the duties of two employees;
4. CIBC wrongfully scheduled his training for two hours per day rather than the full two weeks required (i.e. CIBC did not re-assign his other duties to other employees to permit him to go to training);
5. CIBC failed to provide him with the training required (even at a later date);
6. CIBC failed to promote him to the Risk Analyst position even though two positions became available in 2009-2010; and,
7. CIBC failed to offer him an alternative position rather than dismissing him, as it did for another employee, Ms Baptiste.

[50] Although this description does not mirror his original complaint set out above at para 20, the Investigator explored all of this alleged conduct. The Investigator requested the respondent, CIBC, provide additional information and to respond to several of these allegations, and it did so.

### *Issues*

[51] Although the applicant has raised several arguments, some of which relate to more than one issue, there are three main issues:

1. Did the Commission breach its duty of procedural fairness?
2. Was the Commission's investigation of the complaint thorough?
3. Was the Commission's decision reasonable?

### *Standard of review*

[52] The applicant did not address the standard of review. He would prefer that the Court provide a forum to reconsider whether his complaint should be referred to the Canadian Human Rights Tribunal. However, this is not the role of the Court. The role of the Court is to assess whether the decision of the Commission is reasonable, and with respect to the allegations of breach of procedural fairness and bias, whether the Commission's process was fair and whether there was bias.

[53] As I noted at the hearing, the role of the Court on judicial review where the standard of reasonableness applies is not to substitute its own decision, but rather to determine whether the Commission's decision "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1

SCR 190 [*Dunsmuir*] at para 47. The Court does not consider the complaint anew, does not make credibility findings, nor does it re-weigh evidence. The Court is focused on whether the Commission's decision was reasonable. In the event the Court were to find that the decision was not reasonable, the matter would be referred back to the Commission for reconsideration.

[54] It is important to remember that the role of the Commission is to investigate complaints and determine whether the complaint should be considered by the Canadian Human Rights Tribunal. In reviewing a decision of the Commission to refuse to deal with a complaint—in other words, to not refer the complaint to the Tribunal—the Court can only consider whether the Commission's “screening” decision was reasonable.

[55] As the respondent noted, a good analysis of the jurisprudence regarding the standard of review of the Commission's decision in circumstances similar to this case was provided by Justice Barnes in *Tutty v Canada (Attorney General)*, 2011 FC 57 (at paras 12-14):

12 The Commission's screening function under s 44 of the Act has been compared to the role of a judge presiding over a preliminary inquiry. The role was described by the Supreme Court of Canada in *Cooper v Canada (Human Rights Commission)*, [1996] 3 SCR 854, 140 DLR (4th) 193 at para 53 as follows:

53 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 be inquired into by a tribunal, the Commission fulfills a screening analysis somewhat analogous to that of a judge at a preliminary inquiry. 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, then, is that of assessing the sufficiency of the evidence before it. Justice Sopinka emphasized this



point in *Syndicat des employés de production du Québec et de L'Acadie v. Canada (Canadian Human Rights Commission)*, [1989] 2 S.C.R. 879, at p. 899:

The other course of action is to dismiss the complaint. In my opinion, it is the intention of s. 36(3)(b) that this occur where there is insufficient evidence to warrant appointment of a tribunal under s. 39. It is not intended that this be a determination where the evidence is weighed as in a judicial proceeding but rather the Commission must determine whether there is a reasonable basis in the evidence for proceeding to the next stage.

[Emphasis added]

13 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: see *Sketchley v Canada (Attorney General)*, 2005 FCA 404, [2006] 3 FCR 392 at para 37.

14 As noted in the above authorities, 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.

### ***Did the Commission Breach its Duty of Procedural Fairness?***

[56] The applicant submits that the Commission did not conduct a fair, impartial and thorough investigation of his complaint. The Commission ignored key material evidence, such as his allegation that two new recruits for Financial/Risk Analyst positions were less qualified than the

applicant, and that his poor performance as a Security Analyst was because of a denial of training.

[57] The applicant also submits that the Commission, specifically the Investigator, was biased. He asserts that the methodology of the Investigator was tailored to lead to a pre-determined outcome. He asserts that the Investigator had a closed mind and ignored evidence in order to deny him the benefit of the Act. Further, he states the Investigator made excuses for the conduct of CIBC, including that CIBC was not bound by the recommendation of JVS regarding his suitability as a Financial Analyst. He also asserts that the Investigator failed to seek out the truth regarding the qualifications needed for the position of Financial Analyst and accepted CIBC's information as "evidence" yet referred to his information as "allegations".

[58] The respondent submits that the Commission adhered to the principles of procedural fairness. The Investigator gave the benefit of any doubt to the applicant, for example, by accepting that he may have been treated differently regarding training and accepting there was a difference of views regarding the importance of training, and further considering whether the applicant was qualified for the Financial/Risk Analyst position. However, his employment experiences did not result from his disability.

[59] The respondent notes that the onus of proving bias rests on the applicant and that the threshold of proof is high, given that the standard of impartiality of a non-adjudicative investigator is less than what is required of the courts (*Hughes v Canada (Attorney General)*, 2010 FC 837 at paras 20-23). Given that the Investigator considered the applicant's submissions,

addressed all his allegations and interviewed him and others, the respondent submits that the applicant's allegation of bias is really dissatisfaction with the outcome.

***The Investigation was Procedurally Fair and there was No Bias***

[60] There was no breach of procedural fairness by the Commission in the investigation of the complaint, nor was any bias shown.

[61] The duty of procedural fairness requires that Commission investigations be neutral and thorough (*Slattery v Canada (Human Rights Commission)*, [1994] 2 FC 574; affirmed (1996), aff'd 205 NR 383 (FCA)).

[62] The applicant argues that the investigation into his complaint was analogous to the decision in *Hughes*, above, where Justice Mactavish found that the investigation was not thorough and that the complaint should, therefore, be re-determined. Although Justice Mactavish also addressed allegations of bias, no bias was found.

[63] I do not agree that the facts of the applicant's case are analogous to the facts in *Hughes*. However, the principles set out by Justice Mactavish with respect to bias and with respect to thoroughness (which is addressed later in these reasons) provide guidance (*Hughes*, above at paras 20-24):

20 The test for determining whether actual bias or a reasonable apprehension of bias exists in relation to a particular decision-maker is well known: that is, the question for the Court is what an informed person, viewing the matter realistically and practically - and having thought the matter through - would conclude. That is, would he or she think it more likely than not that the decision-maker, either consciously or unconsciously, would not decide

fairly: see *Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369, at p. 394. See also *Wewaykum Indian Band v. Canada*, [2003] 2 S.C.R. 259 at paragraph 74.

21 The burden of demonstrating either the existence of actual bias, or of a reasonable apprehension of bias, rests on the person alleging bias. An allegation of bias is a serious allegation, which challenges the very integrity of the decision-maker whose decision is in issue. As a consequence, a mere suspicion of bias is not sufficient: *R. v. R.D.S.*, [1997] 3 S.C.R. 484 at para. 112; *Arthur v. Canada (Attorney General)* (2001), 283 N.R. 346 at para. 8 (F.C.A.). Rather, the threshold for establishing bias is high: *R. v. R.D.S.*, at para. 113.

22 The Canadian Human Rights Commission is clearly subject to the duty of fairness when it is exercising its statutory powers to investigate human rights complaints: *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Human Rights Commission)*, [1989] 2 S.C.R. 879 ("SEPQA"). This requires that the Commission and its investigators be free from bias.

23 That said, because of the non-adjudicative nature of the Commission's responsibilities, it has been held that the standard of impartiality required of a Commission investigator is something less than that required of the Courts. That is, the question is not whether there exists a reasonable apprehension of bias on the part of the investigator, but rather, whether the investigator approached the case with a "closed mind": see *Ziindel v. Canada (Attorney General)* (1999), 175 D.L.R. (4th) 512, at paras. 17-22.

24 As the Court stated in *Broadcasting Corp. v. Canada (Canadian Human Rights Commission)*, (1993), 71 F.T.R. 214 (F.C.T.D.), the test in cases such as this:

[I]s not whether bias can reasonably be apprehended, but whether, as a matter of fact, the standard of open-mindedness has been lost to a point where it can reasonably be said that the issue before the investigative body has been predetermined.

[64] The applicant has not provided any evidence in support of his allegation of bias. He has not even provided support for a suspicion of bias. Besides his own bare allegations, he has not shown that the Investigator predetermined his complaint or had a closed mind.

[65] His assertion that the methodology employed by the Investigator was used to reach a predetermined outcome is baseless. The Investigator painstakingly set out the methodology and proceeded to follow that methodology and address each issue. The Investigator dissected the applicant's complaint and considered all the conduct that the applicant now refers to as the seven parts of his complaint.

[66] The Investigator demonstrated an open mind by accepting the applicant's allegations, to the extent the evidence allowed, before concluding that his experiences at CIBC were not in any way connected to his alleged disability. It was open to the Investigator to reach this conclusion. The evidence clearly indicated that the applicant's disability was not an issue during his employment, particularly since he did not self-identify as having a disability and did not make accommodation requests.

[67] The applicant's concern about the Investigator referring to his submissions as "allegations" and CIBC's submissions as "evidence" is not an indication of bias. The language is customary: the applicant's complaint consists of a series of allegations and the information gathered by the Investigator, including the answers provided by CIBC in response to specific questions of the Investigator, the information provided by JVS, and the information provided by the applicant was all referred to as evidence.

[68] As noted in *Hughes*, allegations of bias are serious allegations which should not be made lightly. In this case there was absolutely nothing to support such an allegation.

***Did the Commission conduct a thorough investigation?***

[69] The applicant submits that the Commission failed to conduct a thorough investigation as evidenced by its initial reluctance to conduct an investigation at all, because it attempted to refer the complaint to the Canada Labour Board [CLB], and only agreed to conduct an investigation at the insistence of the parties.

[70] The applicant also argued that the Investigator failed to address aspects of his complaint, including that he was terminated rather than offered an alternative position, as was another employee with performance issues, and further that the Investigator failed to probe further or interview other witnesses about the need for training, the need for accuracy by Security Analysts, and the qualifications required for a Financial Analyst.

[71] With respect to the allegation that the Investigator did not probe the training issue, the respondent notes that the Investigator accepted that the applicant may have experienced adverse treatment related to training, pursued the investigation and concluded that this was not related to a disability.

[72] With respect to the allegation that the Investigator did not delve into the skills required for a Financial/Risk Analyst, or whether the applicant did not have those skills and whether the successful candidates did have those skills, the respondent notes that the Investigator made no

findings about the applicant's skills. Rather, she accepted that there was a difference of views and continued to investigate and then concluded that this was not linked to a disability.

[73] With respect to the allegation that JVS had recommended that the applicant be hired as a Financial Analyst, the respondent notes that the evidence is clear that CIBC made the hiring decisions, not JVS. The letter of offer made no promise of this position. The applicant was hired as an Analyst. Moreover, the applicant's own evidence to the Investigator acknowledged this.

[74] With respect to the applicant's assertion that he was relegated to odd jobs, rather than the jobs of an Analyst in the early days, the respondent notes that there was no evidence provided to support this. The terms of his employment were set out in the offer which he accepted.

[75] With respect to the allegation that the investigation was shoddy because the Commission would have preferred to refer the complaint to the CLB, the respondent notes that the investigation was very thorough and addressed all complaints.

[76] The respondent submits that there was no flaw in the investigation that was so fundamental that it could not be remedied by the applicant's further responding submissions and that the applicant did not provide any additional facts to the Investigator in his responding submissions.

[77] Although the applicant now claims that the Commission investigated the wrong complaints, the respondent submits that the complaint as submitted framed the investigation and the Commission investigated that complaint.

### ***The Investigation was Thorough***

[78] The principles governing the Commission's role, including the duty of procedural fairness and the duty of thoroughness, were addressed by Justice Mactavish in *Hughes*, above at paras 30-34:

30 The role of the Canadian Human Rights Commission was described by the Supreme Court of Canada in *Cooper v. Canada (Human Rights Commission)* (1996), 140 D.L.R. (4th) 193. There, the Supreme Court observed that the Commission is not an adjudicative body, and that the adjudication of human rights complaints is reserved to the Canadian Human Rights Tribunal. Rather, the duty of the Commission "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, then, is that of assessing the sufficiency of the evidence before it": at para. 53. See also [*Syndicat des employés de production du Québec et de l'Acadie v. Canada (Human Rights Commission)*, [1989] 2 S.C.R. 879.]

31 The Commission has a broad discretion to determine whether "having regard to all of the circumstances" further inquiry is warranted: *Mercier v. Canada (Human Rights Commission)*, [1994] 3 F.C. 3 (FCA). However, in making this determination, the process followed by the Commission must be fair.

32 In *Slattery v. Canada (Canadian Human Rights Commission)*, [1994] 2 F.C. 574; affirmed (1996), aff'd 205 N.R. 383 (F.C.A.) this Court discussed the content of procedural fairness required in Commission investigations. The Court observed that in fulfilling its statutory responsibility to investigate complaints of discrimination, investigations carried out by the Commission must be both neutral and thorough.

33 Insofar as the requirement of thoroughness is concerned, the Court in *Slattery* observed that "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". As a consequence, "[i]t should only be where unreasonable omissions are made, for example where an investigator failed to investigate obviously crucial evidence, that judicial review is warranted": at para 56.



34 The requirement for thoroughness in investigations must also be considered in light of the Commission's administrative and financial realities. With this in mind, the jurisprudence has established that some defects in the investigation may be overcome by providing the parties with the right to make submissions with respect to the investigation report. As the Federal Court of Appeal observed in [*Canada (Attorney General) v. Sketchley*, 2005 FCA 404], the only errors that will justify the intervention of a court on review are "investigative flaws that are so fundamental that they cannot be remedied by the parties' further responding submissions": at para. 38.

[79] Although the principles in *Hughes* apply to the present case, the facts of this case do not lead to the same conclusion.

[80] Here, the Investigator conducted a thorough investigation, including consideration of all aspects of the complaint, the submissions of the applicant and respondent, the evidence provided by the parties and the four witnesses who had direct knowledge of the allegations central to the complaint. Where there were differing views, the Investigator continued to investigate.

[81] The Investigator called upon CIBC to respond to several specific questions arising from the applicant's allegations, including his allegation that he was terminated due to his poor performance rather than being offered a different position, whereas another employee with poor performance was given a different position. CIBC responded that the two situations were different; the other employee, Ms Baptiste, was returned to her previous job where she had performed well, but Mr Joshi had not performed well and there was no previous job to return him to.

[82] Further, there was no obligation on the Investigator to interview all the witnesses proposed by the applicant, given that the four witnesses she interviewed had direct knowledge of information that would address all the fundamental issues raised in the complaint.

[83] As Justice Martineau held in *Best v Canada (Attorney General)*, 2011 FC 71 at paras 21 and 22:

21 The practical effect of the duty of thoroughness is canvassed by Justice Nadon in *Slattery*, above, at paras 56 and 57:

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.* Such an approach is consistent with the deference allotted to fact-finding activities of the Canadian Human Rights Tribunal by the Supreme Court in the case of *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554.

*In contexts where parties have the legal right to make submissions in response to an investigator's report, such as in the case at bar, parties may be able to compensate for more minor omissions by bringing such omissions to the attention of the decision-maker. Therefore, it should be only where complainants are unable to rectify such omissions that judicial review would be warranted. Although this is by no means an exhaustive list, it would seem to me that circumstances where further submissions cannot compensate for an investigator's omissions would include: (1) where the omission is of such a fundamental nature that merely drawing the decision-maker's attention to the omission cannot compensate for it; or (2) where fundamental evidence is inaccessible to the decision-maker by virtue of the protected nature of the information or where the decision-maker explicitly disregards it.*

[Emphasis added]

22 The investigator's duty of thoroughness clearly does not require the investigator to interview every person proposed by the applicant (*Miller v. Canada (CHRC)*, [1996] F.C.J. No. 735 (QL), at paragraph 10). Rather, the investigator must simply ensure that all of the fundamental issues raised in the complaint were all dealt with in the report ([*Bateman v. Canada (Attorney General)*, 2008 FC 393], above, at paragraph 29).

[84] The applicant had the opportunity to make submissions in response to the Investigation Report and he did so. The Commission was aware of those submissions which included his criticism of the Investigation, the importance of training, his view that operational requirements were an excuse for discrimination, that JVS had recommended him for another position he was better suited for, that the Investigator should have interviewed other witnesses and that the investigation was “fraudulent”. These are very similar arguments to those he now raises.

[85] Although the applicant submits that several other employees should have been interviewed to assess the importance of the training, and the skills required of a Financial Analyst, the Investigator reasonably assessed the probative value of the evidence gathered and reasonably determined that she had sufficient evidence and information to assess whether the complaint should be referred to the Tribunal or not.

***Was the Commission’s decision to dismiss the complaint reasonable?***

[86] The applicant submits that the Commission unreasonably disregarded his evidence that he was the only one of the seven newly hired Security Analysts that did not receive the mandatory training. He submits that his treatment cannot be attributed to an operational requirement, because operational requirements were within the control of the respondent and the respondent could have delayed the transfer of his colleague, Ms Chen, to avoid the need for him

to do the work of two employees during his training. He submits that he was perceived to be an inferior employee from the beginning, despite his academic qualifications and credentials.

[87] The applicant also submits that the Commission relied on the fraudulent claims of CIBC that the initial training was not mandatory, and that he was not qualified to perform the duties of a Financial/Risk Analyst. The applicant submits that he was more qualified than the candidates who were ultimately chosen for that position.

[88] The applicant points to what he characterizes as contradictions between the evidence of Mr Leicester and Mr Santos as noted in the Investigator's report, which suggests that the two week training was not mandatory and that on-the-job training was customary. He submits that this is "fraudulent" and should have alerted the Investigator to probe further.

[89] The applicant also submits that the Commission erred by failing to recognize the discrimination. He provided *prima facie* evidence that he was recruited under a disability program and no evidence was provided by the respondent to show that an able-bodied employee was subjected to the same treatment. He argues that he was best suited for the Financial/Risk Analyst position, and he would have excelled, but did not get this position due to discrimination.

[90] Although no evidence was provided, the applicant submits that he asked for training four times. As a result of lack of training, his performance was poor and he was terminated. He asserts that he never claimed he was terminated due to his disability, only that he was denied training and the Financial/Risk Analyst position due to discrimination. However, he did concede

at the hearing that he had alleged that discrimination contributed to his termination because his poor performance was the result of lack of training which was due to discrimination.

[91] The respondent notes that the Investigator evaluated the evidence and found that the applicant may have been affected by differential treatment and continued to investigate, but ultimately concluded that any differential treatment with respect to training was not due to the applicant's alleged disability. This analytical approach is reasonable (*Canada (Human Rights Commission) v Canada (Attorney General)*, 2012 FC 445 at para 254 [*CHRC v AG*]).

[92] The respondent states that it was the applicant's own evidence that he did not attend training due to operational requirements.

[93] With respect to not being offered the Financial Analyst position, the respondent points out that the Investigator did not make any findings about the applicant's skills. The Investigator acknowledged that there were differing views and then considered whether he did not get this position due to a disability and found that there was no link to a disability. The evidence of both CIBC and the applicant was that his disability was never an issue; CIBC was not even aware of his disability following the initial interview.

[94] Regarding his allegation that the Investigator based her findings on fraudulent and perjured evidence provided by CIBC, the respondent submits that the applicant did not provide clear, cogent and convincing evidence—or any evidence—to support this serious allegation.

[95] In response to the applicant's assertion that he never complained that he was terminated due to discrimination, the respondent pointed to the applicant's own submissions to the Commission and his affidavit in support of this application for judicial review which alleges that he was terminated due to discrimination.

***The Commission's decision was reasonable***

[96] As noted above, the Commission's decision was based on a thorough evidentiary foundation provided by the Investigator and the submissions of the parties. The Investigator applied the correct analytical framework, investigated each aspect of the complaint, requested additional information from CIBC, and considered all the evidence.

[97] Although the applicant relied on *CHRC v AG*, above at para 254 to support his argument that he was part of a protected group and that he experienced adverse or differential treatment, he does not acknowledge the most significant part of the passage he relies on: the differential treatment must be linked to membership in the protected group.

[98] In *CHRC v AG*, Justice Mactavish noted (at para 253 and 254):

[253] Subsection 7(b) of the Act similarly makes it a discriminatory practice "in the course of employment, to *differentiate adversely* in relation to an employee" on the basis of a prohibited ground [emphasis added].

[254] In my view, the ordinary meaning of the phrase "*differentiate adversely* in relation to any individual" on a prohibited ground of discrimination is to treat someone differently than you might otherwise have done *because* of the individual's membership in a protected group. This interpretation is one that

accords with the purpose of the Act and the intention of Parliament in enacting the *Canadian Human Rights Act*.

[99] The Investigator reasonably found that the applicant was not treated differently in terms of training, job promotion or his termination *because* of his disability. It is not enough to establish that he had a disability or that he was a member of a protected group and that he may have been treated differently. The causal link is crucial. In this case it simply did not exist.

[100] It was reasonable for the Investigator to conclude that the applicant was not denied a position as a Financial/Risk Analyst on the basis of his disability. The Investigator considered the evidence and found that CIBC hiring personnel would not have been aware of the applicant's back problem, since the applicant never self-identified as a disabled person or disclosed the nature of his back problem, nor did he seek accommodation. The applicant was referred to CIBC following a program designed to attract disabled persons and provide pre-employment training. The applicant had acknowledged that JVS did not ask for any particulars, corroboration or details of his disability as their policy was not to do so. JVS only informed CIBC that the applicant was restricted to lifting no more than 20 pounds which was never a job requirement. The applicant did not raise his disability at any time with CIBC, nor did he request any accommodation. Although the applicant was hired through a program which targeted disabled persons, the Investigator determined that once the applicant was hired, this fact was insufficient on its own to support an allegation of discrimination.

[101] The Investigator reasonably concluded that the applicant was not denied training as a Security Analyst on account of his disability, but due to operational requirements, which the applicant acknowledged in his own evidence.

[102] In addition, the applicant's allegation that his lack of training was the cause of his poor performance as a Security Analyst is inconsistent with the evidence he provided to the Investigator that a Security Analyst was an inferior position to a Financial/Risk Analyst, and that "you can take any person from the street and make him do that job [a Security Analyst] like he's doing hamburgers".

[103] Although the applicant is now adamant that he never alleged that his termination was due to discrimination, and that the Investigator focussed on the wrong issues, he did not raise this issue in his submissions to the Commission in response to the Investigation Report, which clearly included findings regarding his termination. His further submissions focussed extensively on his allegations of lack of training.

[104] The applicant's initial complaint was based on discrimination and included his complaint that "... I was forced to settle for the position of Security Analyst to which I was not suited *resulting in my dismissal*" [my emphasis].

[105] In his submissions to the Commission in response to the Investigation report, in September 2011, he stated:

*My dismissal occurred because of prior discrimination which prevented me from getting the Financial Analyst position I was qualified for. During the pre-employment training program run by JVS in conjunction with CIBC, in April-May 2006, the instructor identified my skills to fit the position of Financial Analyst and recommended that I be offered the position of Financial Analyst. Likewise, that is where my skills and interest lay as finance major.*



[106] In the applicant's affidavit filed in support of his application for judicial review, he stated at para 14:

*The cumulative effect of persistent discrimination by CIBC, its failure to provide me the necessary training and its reckless grading of my work resulted in my performance not meeting its 91% accuracy level. Hence, I was fired by CIBC.*

[107] At para 29, he added:

*The two errors I had made during the two-year period because of the lack of training, CIBC penalized me by withholding my year-end Christmas bonus for each of the two years. Hence, I was adversely affected by the discriminatory practice of CIBC when it failed to train me properly which ultimately led to my dismissal.*

[108] The applicant's complaint clearly included the allegation that his ultimate termination was due to discrimination. The Commission did not err in any way in investigating whether his termination was due to discrimination. Nor did the Commission err in concluding that his termination was not due to discrimination but rather due to well-documented poor performance.

[109] The Commission explored all three aspects of his complaint: whether the respondent failed to provide the complainant a job, promotion or acting assignment, treated him in an adverse differential manner, and/or terminated his employment on the basis of disability or perceived disability and the specific allegations.

[110] The applicant's submission that the Commission focussed on his termination rather than fully exploring his allegations regarding lack of training and the qualifications required for the Financial/Risk Analyst position are without merit and were addressed above regarding the thoroughness of the Investigation. The conduct the applicant complained about was all related,

and he indicated if he had not been terminated he may not have pursued this complaint.

Moreover, none of the conduct complained of, to the extent it was differential treatment, was because of his disability. These were reasonable findings.

[111] Finally, the applicant's allegation that Commission relied on fraudulent or perjured evidence provided by CIBC is completely baseless. The fact that the evidence of two CIBC representatives regarding the training required is not identical does not mean that it is fraudulent or perjured, nor does it mean it is inconsistent or contradictory. The evidence provided addressed two types of training at two different stages of an employee's progress. Mr Leicester's evidence that the applicant did not have the skills required for the Financial Analyst position was his informed view as the applicant's superior. The Investigator noted that the applicant disagreed and continued to investigate. This evidence can hardly be characterised as fraudulent or perjured.

[112] Perhaps the applicant is not familiar with the serious nature of such allegations or of their legal definition, or raised these allegations only as an additional ground to seek judicial review pursuant to section 18(4) of the *Federal Courts Act*, RSC 1985 c F-7, but such bald allegations should not be made without proof.

[113] As the respondent noted, in *Construction and Specialized Workers' Union Local 611 v Canada (Minister of Citizenship and Immigration)*, 2013 FC 512, Justice Zinn commented on allegations of misrepresentation, which are arguably not as egregious as allegations of fraud or perjury, and while noting that misrepresentation was not pleaded, he stated (at para 90):

[90] Further, even if these affidavits were in evidence, they would have been given very little weight for the reasons set out in ruling them inadmissible, namely their hearsay character, their incompleteness, and concerns regarding the accuracy of the

information contained therein. Misrepresentation, like fraud, requires clear, cogent, and convincing evidence if it is to be found. The evidence tendered by the Applicants falls well short of that high standard. [My emphasis]

[114] The applicant did not provide any evidence, but for his submission that because his position differed from that of CIBC, the Investigator should have sought out other witnesses to find the truth. This argument was addressed above regarding the thoroughness of the Investigation.

[115] As noted above, the standard of review of the Commission's decision is that of reasonableness. The Commission has a broad discretion to determine whether further inquiry by the Tribunal is necessary. As noted in *Tutty*, above, this requires some weighing of the evidence, and this weighing is owed deference on judicial review (at para 14). In the present case, the Commission weighed the evidence and reached a reasonable conclusion that is clearly supported in well-articulated reasons.

[116] I do not find that the Commission erred in any way. The process was procedurally fair, there was no bias at all, the investigation was thorough, and the decision to dismiss the complaint falls well within the range of possible acceptable outcomes.

[117] For these reasons, the application for judicial review is dismissed.

[118] Costs would normally be ordered against an unsuccessful applicant, particularly where bare allegations of bias, fraud and perjury are made that are without merit.

[119] In the present case, Mr Joshi has pursued all available remedies in his belief that he was treated in an unfair manner. Although the Commission reasonably concluded that he was not discriminated against, and the respondent has incurred expenses in responding to this judicial review, an award of costs against Mr Joshi could be regarded by him as additional unfairness.

[120] I decline to award costs against Mr Joshi in these proceedings.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that:**

1. The application for judicial review is dismissed.
2. No costs are awarded.

"Catherine M. Kane"

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Judge

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

**DOCKET:** T-270-13

**STYLE OF CAUSE:** NAVIN JOSHI v  
CANADIAN IMPERIAL BANK OF COMMERCE

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** APRIL 14, 2014

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**DATED:** JUNE 6, 2014

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