Federal Court  Cour fédérale

Date: 20150306

Docket: T-1420-14

Citation: 2015 FC 287

Ottawa, Ontario, March 6, 2015

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

CECILIA CARROLL

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review pursuant to sections 18 and 18.1 of the *Federal Courts Act*, RSC 1985, c F-7. Ms Carroll challenges a decision of the Canadian Human Rights Commission [the Commission] which dismissed her complaint as "vexatious" within the meaning of paragraph 41(1)(d) of the *Canadian Human Rights Act*, RSC 1985, c H-6 [the Act].

[2] For the reasons that follow, I have concluded that the Commission's decision was both procedurally unfair and unreasonable. This application is granted and the complaint referred back to the Commission.

I. **Facts**

[3] The applicant was employed with the Department of Employment and Social Development Canada, formerly known as Human Resources and Skills Development Canada [the employer]. On February 8, 1993, she went on sick leave without pay due to back pain. She has never since returned to the workplace.

[4] In 2007, the employer contacted the applicant and demanded that she either return to work or retire on medical grounds. The employer informed her that she would otherwise be dismissed due to medical incapacity. The applicant replied that she would prefer to stay on long-term disability leave until she could receive medical clearance to return to work. Further action on the matter was postponed until 2011 due to issues which arose with the applicant's superannuation plan.

[5] The employer renewed the request on October 5, 2011. Some later time that month, the applicant advised the employer that she would apply for medical retirement under duress, effective December 29, 2011.

[6] On October 7, 2011, the applicant filed a first level grievance with the employer. Under the "Grievance details" section of the complaint form, the applicant wrote the following:

> I grieve the employer's letter of October 5, 2011 which requests that I either return to work or in some manner, terminate my employment. This is intimidation and discrimination based on disability. It is contrary to the employer's obligations under the collective agreement and the Canadian Human Rights Act.

[7] The applicant requested the following corrective action:

> 1. That the employer withdraw its request and not make similar requests in the future.
>
> 2. That I be accommodated by being allowed to remain on LWOP [leave without pay] status until I am able to return to work.
>
> 3. That I be made whole.

[8] On November 28, 2011, the employer denied the grievance. Among other things, the reply letter stated the following:

> You have been on sick leave without pay since February 1993. Expecting you to make a decision in regards a separation option following more than eighteen years of sick leave without pay is neither discriminatory, an act of intimidation nor in contravention of your collective agreement or the Canadian Human Rights Act. Rather, requiring you to make a decision in regards a separation option is fully in accord with Treasury Board's *Directive on Leave and Special Working Arrangements*. And, since you cannot return to work within the foreseeable future, you cannot be accommodated in the workplace.
>
> [Emphasis added]

[9] That same day, the applicant filed a second level grievance. Her union representative submitted five pages of argument on her behalf alleging, in particular, that the *Policy on Leave without Pay* (afterwards replaced with the *Directive on Leave and Special Working Arrangements*) unlawfully discriminates against employees who are on leave for medical reasons and have been in receipt of SunLife disability benefits for over two years. This is because the employer targets only these employees, the representative argued. Employees on leave for other reasons are not similarly affected, nor are disabled employees who are not insured by SunLife.

[10] On December 8, 2011, the applicant contacted the Commission for the first time and explained that she wanted to file a complaint against the employer. She eventually filed a complaint on February 17, 2012. By letter dated March 5, 2012, the Commission informed her that she would have to exhaust the grievance procedures before it would consider her complaint.

[11] On March 26, 2012, the employer denied the second level grievance. Its letter repeated the text of the one which had denied her first grievance almost *verbatim*.

[12] On April 12, 2012, the applicant filed a third level grievance. Her union representative submitted a one page letter on her behalf which stated, among other things:

> As previously pointed out, the Federal Courts have ruled the Treasury Board *"leave Without Pay"* policy as discriminatory. […] That fact remains and as the only authority referenced by the employer as the basis for forcing Ms. Carroll to apply for a medical retirement, the employer's actions are inappropriate and a violation of a federal court ruling.

[13] On July 5, 2013, the employer denied the third level grievance. This time, the reply letter was different. It stated that the applicant never provided the employer with information about a potential return to work. Therefore, the employer could not accommodate her. The decision-maker continued:

> Based on this information, I find that the Employer respected the intent of the *Policy on Leave Without Pay* (since replaced by the *Directive on Leave and Special Working Arrangements*) in this matter.
>
> [Emphasis added]

[14] The decision-maker then considered whether the employer's letter constitutes discrimination in relation to the "application of the *Policy*". She wrote that

> The intent of this Directive is for departments to manage paid and unpaid absences from work in a sound, consistent and effective manner. As you were approved for a medical retirement, it was clear that a return to work in a foreseeable future was not probable and as such, I believe the Employer applied the *Policy* correctly.
>
> Furthermore, I could not find any evidence of any discrimination on the part of the Employer.
>
> [Emphasis added]

[15] On July 30, 2013, the applicant received a letter from her union stating that it would not be referring her grievance for adjudication at the Public Service Labour Relations Board [PSLRB], and therefore that the grievance process had been exhausted.

[16] On September 9, 2013, the applicant faxed an updated complaint to the Commission. At the first paragraph of her complaint, she stated:

> I am a person with a disability and feel that I was discriminated against due to my disability. I believe that Service Canada's use of Treasury Board's Directive on Leave and Special Working Arrangements is discriminatory against people with Disabilities.

[17] On October 28, 2013, the Commission sent a letter to the applicant advising that her complaint might be "vexatious" within the meaning of the Act because it had already been dealt with through another process. It further advised that the Commission would prepare a section 40/41 report to decide whether to deal with the complaint. Ms Carroll was provided with a questionnaire and invited to submit her answers to the Commission. Upon obtaining an extension of time, she did so on December 13, 2013.

[18] The section 40/41 report was prepared on February 6, 2014. In short, it recommended that the Commission dismiss the complaint. On February 13, 2014, the applicant received a copy of the report and was invited to make submissions in reply.

[19] On March 10, 2014, the Commission received submissions (six pages of detailed argument) sent on the applicant's behalf by a lawyer. In particular, the applicant presented the following concerns:

- Although she did raise all her human rights issues in her grievances, at no time did the employer specifically address all these issues. In particular, the employer never addressed the question of whether the policy itself was discriminatory.

- The grievances were decided by the employer without assistance from a third party. The employer is not an independent and impartial adjudicator for human rights matters.

- In *Berberi v Canada (Attorney General)*, 2013 FC 99, the Federal Court held that the Commission should only filter out complaints in "plain and obvious cases". It further noted that the Commission "cannot abdicate its responsibility to independently consider any decision that resulted from [another] process and the reasons for it". This is not a plain and obvious case for dismissal. The section 40/41 report does not address the merits of the complaint, does not review the directive in question, does not consider the actions or motives of the employer, and does not investigate the complaint independently.

- The report inaccurately states that the complaint did not raise the question of whether the directive is discriminatory. In fact, the first paragraph of the complaint refers to the directive.

- The report states that the directive was issued by the Treasury Board, and so the complainant cannot have it overturned by filing a complaint against her employer. However, the employer applied this discriminatory directive with respect to the applicant. The origin of the directive is irrelevant. The employer's use of this policy may be reviewed.

[20] That same day, the Commission also received brief submissions from the respondent expressing agreement with the report. It received more detailed submissions on April 11. On April 17, the Commission forwarded a copy of the respondent's two sets of submissions to the applicant for her records.

[21] The Commission rendered a decision dismissing the complaint on April 30, 2014. On May 13, Ms Carroll received a copy of the decision. She then applied for judicial review.

II. **Issues**

[22] This application raises two issues:

1. Did the Commission breach the duty of procedural fairness?
2. Did the Commission err by finding the complaint to be vexatious?

III. **Standard of Review**

[23] The first question is reviewable on the standard of correctness: *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 129; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC

12 at para 43 [*Khosa*]; and *Mission Institution v Khela*, 2014 SCC 24 at para 79. The Court must "undertake its own analysis of the question" and, if it concludes that the decision-maker behaved unfairly, override the decision-maker's procedural choices: *Dunsmuir*, above, at para 50.

[24] The second issue touches upon a question of mixed fact and law involving the agency's home statute. The standard of reasonableness applies: *Dunsmuir*, above, at para 54.

IV. **Decision under Review**

A. *The Commission's Decision*

[25] The Commission's decision, signed on April 30, 2014, reads as follows:

> The Commission decided, for the reasons identified below, not to deal with the complaint, under paragraph 41(1)(d) of the *Canadian Human Rights Act*.

[26] The decision lists the documents which the Commission reviewed. These include the complaint forms, the section 40/41 report, the complainant's submissions and the respondent's submissions.

[27] Under the "Reasons for decision" section, the decision states the following, *verbatim*:

> The Commission adopts the following conclusion set out in the Section 40/41 Report:
>
> *The complainant's human rights allegations have been addressed by an alternate decision maker with authority to consider human rights issues. The allegations raised in the complaint before the Commission are the same as those addressed in the final level grievance response. Given that the alternate decision-maker dealt with the human rights issues raised in this complaint and that*

> *process was fair, the Commission must respect the finality of that decision and should not deal with this complaint. It is therefore plain and obvious that this complaint is vexatious within the meaning of section 41(1)(d) of the Act.*

B. *The Section 40/41 Report*

[28] The respondent submits that the section 40/41 report should be treated as constituting the Commission's reasons. He argues that this is appropriate when the Commission adopts an investigator's recommendations and provides no reasons or only brief reasons, pointing to *Vos v Canadian National Railway Company*, 2010 FC 713 at para 36. The respondent is correct, so it is necessary to review that report.

[29] The report begins with a brief summary of the complaint and a background of the Commission's actions up to that point in time. It then reproduces subsection 41(1) of the Act.

[30] The report then explains in detail the factors relevant to deciding whether a complaint is "vexatious" under paragraph 41(1)(d). At paragraph 10, it explains that: "The Commission can refuse to deal with a complaint if an independent decision-maker has already addressed the human rights issues. Section 41(1)(d) of the Act calls such complaints 'vexatious'".

[31] The report references relevant case law. In *Boudreault v Canada (Attorney General)*, [1995] FCJ No 1055 (TD), the Federal Court concluded that the Commission cannot refuse to entertain a complaint simply because it has already been dealt with by another process. The Commission must review the evidence itself but it can use evidence gathered through the other process. However, in *Canada Post Corp v Barrette*, [2000] FCJ No 539 (FCA) [*Barrette*], the

Federal Court of Appeal stated that the Commission must turn its mind to the decision of the alternative decision-maker and determine whether the complaint might attract the application of paragraph 41(1)(d).

[32] The report mentions that the Supreme Court considered this issue in two recent cases. In *British Columbia (Workers' Compensation Board) v Figliola*, 2011 SCC 52 [*Figliola*], the Court held that human rights tribunals must respect the finality of decisions rendered by other decision-makers with concurrent jurisdiction over human rights legislation, where "the previously decided legal issue was essentially the same as what is being complained of". In *Penner v Niagara (Regional Police Services Board)*, 2013 SCC 19, the Court stated that, when a case has already been resolved through another process, the decision-maker must look at the circumstances to decide whether it would be fair to let the second process continue.

[33] The report lists several factors to be considered in deciding whether or not a complaint is vexatious. It then summarizes the positions of the parties.

[34] The report proceeds to analyze the complaint. At paragraph 39, the investigator states that "the complainant has pursued her human rights issues through the grievance process and the other process dealt with all of her human rights allegations." As such, adjudication of the complaint would not advance the purposes of the Act.

[35] At paragraph 40, the investigator states that "[t]here is no significant difference between the grievance process and the Commission process and in particular, an adjudicator appointed

under the *Public Service Labour Relations Act* has the authority to interpret and apply the *Canadian Human Rights Act*."

[36] At paragraph 41, the investigator concludes that there is no evidence that the complaint was filed to "annoy, embarrass or harass the respondent", but that it is "vexatious" because the allegations have been "fully addressed through the grievance process".

[37] At paragraph 42, the investigator takes aim at the complainant's submission that the *Directive on Leave and Special Working Arrangements* is discriminatory. He writes:

> This is a new allegation that was not contained in the complaint form. It should be noted that the policy that the complainant feels is discriminatory is not an HRSDC policy but rather a Treasury Board policy. If the complainant is seeking to have the Directive invalidated, this cannot be achieved by filing a complaint against HRSDC.

[38] At paragraph 43, the investigator concludes that it is "plain and obvious that this complaint is vexatious within the meaning of section 41(1)(d) of the Act".

V. **Submissions of the Parties**

A. *Did the Commission breach the duty of procedural fairness?*

[39] The applicant argues that the Commission breached the duty of fairness by failing to consider the submissions she provided, which disputed several key facts upon which the investigator relied. The Commission neither addressed these submissions nor provided any reasons for rejecting them. It merely adopted the conclusion of the section 40/41 report.

[40] In *Kollar v Canadian Imperial Bank of Commerce*, 2002 FCT 842 at para 36, the Federal Court acknowledged the importance of submissions provided in response to investigators' reports. The applicant contends that, in the present case, the report mischaracterized the facts. Since her submissions disputed several of these facts, the Commission should have declined to endorse the report on the strength of her submissions, or should have exercised its discretion to hold an oral hearing to receive additional submissions.

[41] The applicant further argues that the Commission breached the duty of fairness by failing to give adequate reasons. It simply adopted a flawed report without providing its own reasons for decision. In *Sketchley v Canada (Attorney General)*, 2004 FC 1151 at para 61 [*Sketchley FC*], the Court stated that judicial intervention is warranted where an applicant provides detailed submissions but the Commission does not address them in its decision. This case was upheld on appeal: 2005 FCA 404 [*Sketchley FCA*].

[42] The respondent counters that there is no basis to conclude that the Commission failed to consider the applicant's submissions. The decision states that the Commission reviewed the complaint form, the section 40/41 report, the applicant's submissions and the respondent's submissions. Receiving a negative decision is an insufficient ground for concluding that submissions were not considered. The Commission was entitled to consider and weigh the evidence before it in the manner which it did.

[43] The respondent also contends that the Commission's reasons were adequate. The investigator's lengthy report constitutes the Commission's reasons: *Vos*, above, at para 36; *Sketchley FCA*, above, at para 37.

[44] The respondent disputes the allegation that the report is flawed. The applicant's disagreement with its findings does not mean that it is procedurally unfair. In order to be fair, the investigation had to be thorough and neutral. It was neutral because the investigator was not biased and kept an open mind: *Canada (Attorney General) v Davis*, 2010 FCA 134 at para 6 [*Davis FCA*]; *Vos*, above, at para 44.

[45] According to the respondent, thoroughness requires that the parties be given a reasonable opportunity to comment on the case: *Davis FCA*, above, at para 6. The applicant was given the opportunity to provide the investigator with information supporting her claim and to comment on his report. Moreover, the applicant was given copies of the respondent's submissions and did not seek the opportunity to make further comments: *Hérold v Canada Revenue Agency*, 2011 FC 544 at para 42.

[46] The respondent argues that the evidence does not support the allegation that the grievance decision-makers were not impartial. In any event, the alleged lack of independence in the grievance process does not affect the fairness of the process followed by the Commission: *Bergeron v Canada (Attorney General)*, 2013 FC 301 at para 43.

B. *Did the Commission err by finding the complaint to be vexatious?*

[47] The applicant contends that the Commission erred in fact and in law when it found her complaint to be vexatious within the meaning of paragraph 41(1)(d). Even though the Commission has a discretionary power to screen complaints, that power must be exercised reasonably and that did not occur.

[48] In the applicant's view, the decision is neither justified nor intelligible and does not fall within a range of reasonable outcomes. It was not reasonable for either the investigator or the Commission to find that the complaint was plainly and obviously vexatious.

[49] Furthermore, the applicant alleges that the Commission relied on numerous erroneous findings of fact, which rendered its decision indefensible. In particular:

1. The report found that the issues raised in the grievance were the same as those in the complaint – even though the applicant specifically noted in her submissions that the three grievance responses never addressed the issue of whether the directive itself is discriminatory.

2. The report found that a final decision had been rendered – when the case had never been heard on its merits and no decision was ever made by an independent or neutral body.

3. The report found that the decision-maker had the authority to interpret human rights legislation – when that power belongs to a PSLRB adjudicator, not to employer representatives in the grievance process.

4. The report found that the applicant raised new allegations which were not contained in the complaint form – when the applicant had in fact referred to those allegations in her complaint.

5. The report found that the employer was the wrong party to a complaint regarding a Treasury Board policy – when it is clear that the employer applies this policy to its workplace.

[50] The respondent counters that the Court must keep in mind the gate-keeping role of the Commission. Subsection 41(1) instructs the Commission to dismiss vexatious proceedings in order to avoid wasting institutional and party resources. Parliament has expressly conferred this discretion upon the Commission. Unless it is exercised without reasonable grounds, the courts should not intervene.

[51] The respondent continues that the Commission's role during the screening stage is to assess the sufficiency of the evidence before it and to decide whether it is reasonable to proceed to the next stage. The Commission does not have to look behind the facts and determine if the complaint has been made out: *Davis v Canada (Attorney General)*, 2009 FC 1104 at para 53 [*Davis FC*]; *Vos*, above, at para 39; *Khapar v Air Canada*, 2014 FC 138 at para 64.

[52] According to the respondent, the decision was reasonable. The section 40/41 report looked at the totality of the circumstances and determined that further inquiry by the Commission was not warranted. The evidence supports that decision.

[53] The respondent argues that the *Sketchley* decisions, on which the applicant relies for the proposition that the Treasury Board policy is discriminatory, are no longer good law on that point. They have been overtaken by the Supreme Court of Canada's decision in *Hydro-Québec v Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ)*, 2008 SCC 43 [*Hydro-Québec*]. In that case, the Court considered the duty to accommodate an employee who was chronically absent due to medical issues and unanimously concluded that, if an employee is unable to resume her work in the foreseeable future, the employer has established undue hardship.

[54] The respondent recalls that the applicant has missed work for 18 continuous years. There is no prospect that she can return in the foreseeable future. Therefore, the grievance decisions were consistent with the law: *Hydro-Québéc*; *Panula v Canada (Attorney General)*, 239 ACWS (3d) 165.

VI. **Analysis**

[55] The decision under review contains several flaws that would justify the Court's intervention. In light of the excellent submissions made by the parties, I will address all of the reasons for which this decision cannot stand.

A. *Did the Commission breach the duty of procedural fairness?*

[56] In *Davis FCA*, above, at para 6, the Federal Court of Appeal identified the content of the duty of fairness in cases where the Commission relies on an investigator's report:

> The Commission must act in accordance with natural justice. This requires that the investigation report upon which the Commission relies be neutral and thorough and that the parties be given an opportunity to respond to it [references omitted].

[57] In addition, this Court recognized the twin requirements of neutrality and thoroughness in *Vos*, above, at para 44.

[58] In the case at bar, the applicant has not alleged that the investigation lacked neutrality. There is no evidence in the record that might support a finding that the investigator was biased or failed to keep an open mind.

[59] Rather, the applicant's allegations of unfairness must be understood as going to the other requirement of an investigation: namely, thoroughness. Ms Carroll accuses the investigator of failing to consider the submissions she made before he wrote his report and the Commission of failing to consider the submissions she made as a response to that report. Likewise, her complaint that the Commission did not provide adequate reasons really challenges its failure to address her specific submissions. It is related to the allegation that she was ignored without good reason.

[60] What does thoroughness require? The Attorney General argues that an investigation is thorough if the parties are given an opportunity to comment on the investigator's report, relying on *Davis FCA*, above, at para 6. However, that passage does not stand for that proposition. It states that an investigation must be "neutral and thorough and that the parties be given an opportunity to respond" to its findings [emphasis added]. The word "and" separates the

requirement of thoroughness from the requirement that the parties be given a chance to state their case. These are discrete requirements – just like neutrality, which is also connected to thoroughness with the word "and". If any one of these principles completely subsumed the others, the Court of Appeal would not have listed all three when elucidating the content of the duty of fairness.

[61] Various cases have spoken to the meaning of thoroughness. In *Kollar*, above, at para 36, Justice O'Keefe stated:

> Therefore, I must now determine whether in the case before me, sufficient thoroughness existed. As part of that determination, I must be satisfied that the reports dealt with all of the most fundamental issues raised in the applicant's complaint.

[62] Because the impugned report did not deal with the applicant's complaint of sexual harassment, Justice O'Keefe determined that it was not thorough. Since the Commission had accepted the recommendations of that report, that deficiency tainted its decision as well: *Kollar*, above, at paras 39-40.

[63] *Kollar* was cited in *Sketchley FC*, above, where Justice Beaudry held that "failure to address the substance of the complaint will lead to the conclusion that the investigation was flawed for lack of thoroughness", at para 51. The Court of Appeal agreed that the investigation lacked thoroughness because it had failed to examine a question and misapprehended the complainant's request: *Sketchley FCA*, above, at paras 122-123. Justice Linden made clear that that defect contravened procedural fairness. Therefore, at para 125, he deemed it unnecessary to conduct substantive review of the Commission's decision.

[64] Furthermore, in *Vos*, above, at para 44, Justice Lemieux stated: "One instance of lack of thoroughness is the failure to investigate crucial evidence".

[65] Finally, in *Davis FC*, above, at para 56, Justice Harrington entertained the idea that, where the Commission ultimately decides to dismiss a complaint, thoroughness may require it to respond to submissions sent in reply to an investigator's report. Since the Commission had referred the matter to the Tribunal in that case, he did not deem as unfair its failure to provide a response.

[66] However, the cases to which Justice Harrington referred did find that the Commission should have responded to submissions before dismissing complaints. For instance, in *Herbert v Canada (Attorney General)*, 2008 FC 969 at para 26, Justice Zinn wrote that

> …where these submissions allege substantial and material omissions in the investigation and provide support for that assertion, the Commission must refer to those discrepancies and indicate why it is of the view that they are either not material or are not sufficient to challenge the recommendation of the investigator; otherwise one cannot but conclude that the Commission failed to consider those submissions at all.
>
> He made clear that such a failure is a procedural defect warranting judicial review.

[67] The case law clearly establishes that an investigation which does not deal with the substance of a complaint, fails to investigate a relevant question, or fails to consider crucial evidence is unfair because it is not thorough. That unfairness carries over to any eventual dismissal decision rendered by the Commission. Whether the complainant has been able to make

submissions is irrelevant. If submissions were made but disregarded, that does not increase the thoroughness of the investigation – it decreases it.

[68] Two clarifications are in order. First, the law is unequivocal that investigators acting on behalf of the Commission must conduct thorough investigations in the sense just explained. However, complainants commonly make reply submissions to investigators' reports, which are reviewed by the Commission before it makes a final decision. Does the thoroughness requirement extend to the Commission at that stage of the process, compelling it to give proper regard to these submissions before rendering a decision?

[69] It is my opinion that it does. As the Court of Appeal explained in *Sketchley FCA*, above, at para 37, the reason that the Commission is entitled to rely on an investigator's report as the reasons for its own decision is that

> …for the purpose of a screening decision by the Commission pursuant to section 44(3) of the *Act*, the investigator cannot be regarded as a mere independent witness before the Commission [...] for the purposes of the investigation, the investigator is considered to be an extension of the Commission [references omitted].

[70] Since a procedural duty attaches to the extension, it would be artificial to deny that it also attaches to the whole. The idea that an investigator must behave thoroughly, but that the Commission can afterwards toss thoroughness out the window, is entirely counterintuitive and would undermine the proper administration of the Act. It must be accepted that complainants should be treated fairly throughout the decision-making process. This is especially important because they are permitted to make submissions, whose content may vary, at various stages of

that process. A requirement of thoroughness which survives the filing of the investigator's report ensures that every submission made by a complainant is given the consideration it deserves.

[71] *Davis FC*, above, at para 56, and *Herbert*, above, at para 26, suggest that this is the correct approach. They state that procedural fairness prevents the Commission from endorsing an investigator's report without responding to submissions which seriously challenge its findings. Although these cases do not explicitly say that this rule is an extension of the thoroughness requirement imposed on investigators, it would be natural to read them that way for the reasons just given.

[1] Of course, thoroughness will direct different behaviour from the investigator and the Commission. A thorough investigator must investigate every issue and collect relevant evidence – for example, by interviewing witnesses. The Commission does not have such an active role to play at the screening stage. What the Commission must do in each case is read the investigator's report and the complainant's submissions with diligence, in order to obtain a careful understanding of the circumstances before rendering a decision.

[72] Some recent cases suggest that decisions which disregard submissions ought to be overturned on substantive review. The idea is that decisions which do not address the relevant issues or evidence are unreasonable.

[73] In *Berberi*, above, at para 24, Justice Manson found that

> …there is very little in the section 40/41 Report of the Commission to support any reasonable finding that the Commission turned its

> mind to any of the underlying reasons for the complaint, or that the grievance process did in fact even deal with the applicant's complaints.

[74] On the strength of this finding, Justice Manson concluded that the Court's intervention was warranted. But this was not because he viewed the decision as procedurally unfair – rather, at para 25, he concluded that "the reasons provided by the Commission through its investigator were not justified, transparent or intelligible".

[75] Similarly, in *Khapar*, above, at para 78, Justice Kane accepted that "the Commission's reasons must leave the complainant with the impression that it considered his allegations before rejecting them". However, this figured in her analysis of the decision's reasonableness, as opposed to its fairness.

[76] I note, however, that in *Sketchley FCA*, Justice Linden declined to conduct substantive review altogether upon finding that an investigation lacked thoroughness: see para 125. This, in my view, remains the correct approach. It is not necessary to modify it in light of the Supreme Court's decision in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 [*Newfoundland Nurses*]. What the Supreme Court held in that case is that inadequate reasons, by themselves, do not suffice to quash a decision that otherwise finds reasonable support in the record before the Court.

[77] In the case at bar, and others which are similar to it, a breach of procedural fairness will not be found simply because the Commission has offered reasons which are inadequate in the sense that they are brief or do not appropriately reference certain pieces of evidence. A breach of

procedural fairness occurs when the Commission (or its investigator) clearly ignores the submissions made by a complainant.

[78] Reasons which omit any mention of these submissions might constitute evidence that they were ignored, yet the procedural flaw remains the fact that the decision-maker ignored submissions – not that he issued reasons of a poor quality. This procedural flaw might be proven through other means, although reference to the reasons will probably be the easiest method in most cases. In any event, this is a meaningful distinction between procedure and form, which allows the Court to reconcile *Sketchley FCA* with *Newfoundland Nurses*.

[79] Turning to the facts of this case, the applicant has made out her allegation of procedural unfairness. The investigator's report, which also stands as the Commission's reasons, convincingly illustrates that her various submissions were ignored.

[80] When answering questions sent to her by the Commission, the applicant explained that the employer never addressed one of her human rights issues – whether the Treasury Board directive is discriminatory – in its three responses to her grievances. Despite this, the investigator found that the grievance process had resolved all of the issues raised by the applicant.

[81] A cursory reading of these responses shows that the applicant is correct. The first and second responses – which are worded similarly – state that the employer did not discriminate against the applicant because its actions were "fully in accord" with the impugned policy. Likewise, the third response dismisses the complaint on the basis that "the Employer respected

the intent" of the policy and "applied the Policy correctly". The grievance adjudicators never entertained the idea that the policy might be discriminatory, and so that respecting it and applying it correctly might amount to discrimination. The situation is analogous to that in the *Sketchley* cases, where the investigator misapprehended the nature of a complaint alleging that a similar policy was discriminatory. Since the applicant clearly pointed to this distinction in her submissions, the Court can only reckon that the investigator did not give them any consideration.

[82] In addition, I reject the respondent's argument that either the grievance adjudicators or the investigator implicitly considered the *Hydro-Québec* decision. Although the Court owes deference to administrative decision-makers, it need not pretend that they applied jurisprudence which they did not cite in their decisions. The Court can not impute ideas to decision-makers in the absence of any evidence. Moreover, *Hydro-Québec* addressed the question of undue hardship in workplace accommodation – not the question of whether policies such as the one at issue are discriminatory. The respondent misconstrues the applicant's complaint. *Hydro-Québec* has not overturned the *Sketchley* cases on the actual issue before the Court.

[83] I observe that neither the grievance adjudicators nor the investigator reproduced or commented upon the text of the policy. That text is not even before the Court because it was never addressed at all in the decisions below. The task of the Court is not to determine whether the policy – of which it has no direct knowledge – is discriminatory. It is to determine whether the administrative decision-makers turned their mind to it. Plainly they did not.

[84] In fact, the investigator wrote that the allegation that the policy is discriminatory was not originally contained in Ms Carroll's complaint. However, the first paragraph of her complaint states in plain English: "I believe that Service Canada's use of the Treasury Board's Directive on Leave and Special Working Arrangements is discriminatory against people with Disabilities". It is difficult to understand how this statement could be misunderstood. The investigator either did not read it or read it so carelessly that he did not understand it. In *Sketchley FCA*, at para 122, misapprehension of a complaint was found to constitute a lack of thoroughness which justifies judicial review.

[85] The problems did not end when the investigator completed his duties. The applicant submitted six pages of argument in reply, pointing to blatant errors in the report and citing relevant case law (*Berberi*). This had no effect on the Commission, which simply endorsed the report and dismissed the complaint. In these circumstances, it would appear that the Commission utterly ignored the applicant's submissions. That evinces want of thoroughness: *Herbert*, above, at paras 26 and 30-31. This flaw compounds the previous flaws and renders the decision untenable.

[86] I pause to note that the present case is distinguishable from *Bergeron*, where Justice Zinn found that the Commission did not err by failing to consider an allegation that another Treasury Board policy was discriminatory. He explained, at para 42, that he came to that conclusion because the applicant did not "seriously pursue" the question in that case. Here, Ms Carroll made repeated submissions on the question in her second and third level grievances, in her complaint form to the Commission and in her reply submissions to the section 40/41 report.

[87] In passing, I do not accept the applicant's suggestion that the Commission should have afforded her an oral hearing before endorsing the report – just as I reject the respondent's argument that she should have sought the opportunity to submit further reply submissions. The problem is not that the Commission did not receive submissions from the applicant: it received several and they were strong. The problem is that the Commission plainly disregarded these submissions. It is far from certain that the Commission would have given greater weight to oral submissions when it could already find everything that could have been said in the written record before it.

[88] For the above reasons, the decision was rendered unfairly. It must be quashed for this reason. However, I will now show that the decision is also unreasonable. And so even if there is some error in my analysis of procedural fairness, the decision cannot be permitted to survive.

B. *Did the Commission err by finding the complaint to be vexatious?*

[89] The investigator committed several reviewable errors when he concluded that the complaint was vexatious. Taken alone or in combination, they render the decision unreasonable.

(1) The degree of deference

[90] Before reviewing this decision, I believe that something must be said about the level of deference owed to the Commission. Although *Dunsmuir* established a single standard of reasonableness for judicial review, it is settled law that the application of this standard is sensitive to context. Sometimes only one administrative outcome is rationally defensible; at other

times, two or more outcomes could be justified. In practice, different situations call for a different degree of probing into the decision-maker's reasons.

[91] Indeed, in *Khosa*, above, at para 59, Justice Binnie stated that "[r]easonableness is a single standard that takes its colour from the context." In *Mills v Ontario (Workplace Safety and Insurance Appeals Tribunal)*, 2008 ONCA 436 at para 22, Justice Rouleau commented on the *Dunsmuir* standard of reasonableness as follows:

> Applying the reasonableness standard will now require a contextual approach to deference where factors such as the decision-making process, the type and expertise of the decision-maker, as well as the nature and complexity of the decision will be taken into account.

[92] There is some inconsistency in the jurisprudence about the appropriate degree of deference in cases such as this. On the one hand, the law is settled that the Commission should only decline to deal with a complaint in "plain and obvious" cases at the screening stage: *Canada Post Corp v Canada (Canadian Human Rights Commission)*, [1997] FCJ No 578 (TD) at para 3, aff'd [1999] FCJ No 705 (FCA), cited in *Khapar*, above, at para 46. In *Sketchley FCA*, above, at paras 79-80, the Court of Appeal explained that decisions to dismiss have a final impact on the parties' rights, unlike decisions to refer complaints to the Tribunal – where they may be upheld or dismissed after adjudication. Because a dismissal decision is final, the Court instructed, at para 80, that it "should be subject to a less deferential standard of review". Admittedly, this statement was made before *Dunsmuir*, when there were three standards of review. Yet the idea of limited deference is consistent with the "plain and obvious" test, which remains good law.

[93] On the other hand, the jurisprudence suggests that these decisions deserve broad deference because they are discretionary. *Hérold* and *Khapar* both involved complaints whose dismissal was justified under paragraph 41(1)(d). In *Hérold*, at para 32, Justice Rennie stated that paragraph 41(1)(d) vests "discretion" in the Commission. For this reason, he wrote at para 33 that "Parliament did not intend the Court to intervene lightly in the [screening] decisions of the Commission". In a similar vein, Justice Kane stated the following in *Khapar*, at para 47:

> However, section 41 of the Act confers on the Commission ample discretion to decide when not to deal with a complaint at the preliminary stage (*Maracle*, *supra* at para 47). Decisions made pursuant to section 41 of the Act are, therefore, accorded significant deference by a reviewing court and accordingly, the scope of judicial review is narrow.

[94] In my view, this inconsistency can be resolved to some extent by clarifying that not every aspect of a screening decision involves the exercise of discretion. It must be kept in mind that it is not subsection 41(1) but rather subsection 44(3) of the Act which confers a screening power to the Commission.

[95] How then does subsection 44(3) operate? Paragraph (b) states that the Commission may dismiss a complaint if it is satisfied either "that, having regard to all of the circumstances of the complaint, an inquiry into the complaint is not warranted" or "that the complaint should be dismissed on any ground mentioned in paragraphs 41(1)(c) to (3)".

[96] This power is discretionary because the Commission may elect to dismiss a complaint which does not fall within any of the categories set out in paragraphs 41(1)(c) to (e). In theory, it is arguable that the power to dismiss a complaint which has been found to fall within these

categories is also discretionary – so that the Commission might, for example, decide against dismissing a vexatious complaint.

[97] These decisions are also discretionary because the Commission must consider a host of factors and weigh them. This is a case-by-case exercise whose methodology is not set in stone. As such, the law's demand that the Commission exercise this discretion to dismiss non-vexatious complaints only in "plain and obvious" cases is intelligible. However, the idea that the Commission should exercise discretion to determine whether a complaint is plainly and obviously vexatious is less easy to comprehend.

[98] Indeed, in order to use its power to filter out a complaint under the second branch of paragraph 44(3)(b), the Commission must have previously found a complaint to fall within one of the categories listed under subsection 40(1).

[99] I limit the following comments to a finding of vexatiousness under paragraph 40(1)(d). When deciding whether a complaint is vexatious, it seems to me that the Commission does not exercise any discretion. Rather, it applies a set of legal standards to the facts before it. For instance, it must query whether the complaint is malicious or abusive. These are questions of mixed fact and law, not questions calling for discretion. Once the Commission has answered the question of whether a complaint is vexatious, it must then exercise its discretion to dismiss or refer that complaint, pursuant to subsection 44(3). Accordingly, a non-vexatious complaint may still be dismissed.

[100] I draw a simple analogy with immigration law to illustrate the difference between discretionary and non-discretionary decisions. When deciding whether an individual is a Convention refugee, an immigration officer does not exercise discretion. He applies fixed legal tests to the facts. His decision might deserve deference but it cannot be called discretionary. By contrast, an immigration officer reviewing a humanitarian and compassionate application for permanent residence must exercise discretion. There are no settled rules that he must apply mechanically when weighing the various relevant factors.

[101] In the same way, the Commission does not exercise discretion when deciding whether a complaint is plainly and obviously vexatious. However, it does exercise discretion afterwards, when deciding whether dismissal or referral would better serve the interests of justice.

[102] In this case, the Commission found that "it is plain and obvious that this complaint is vexatious". In my view, this issue should be reviewed on the standard of reasonableness just like any other mixed question of fact and law.

(2) The Meaning of Vexatiousness

[103] The investigator's report attributes the following meaning to vexatious complaints:

> The Commission can refuse to deal with a complaint if an independent decision-maker has already addressed the human rights issues. Section 41(1)(d) of the Act calls such complaints "vexatious".

[104] The investigator conceded that the applicant did not file her complaint to "annoy, embarrass or harass the respondent". Yet he still found that the complaint was vexatious because her allegations had been "fully addressed through the other grievance process".

[105] I take issue with this finding. The following definition of "vexatious" can be found in *Black's Law Dictionary*, 9th ed (St Paul, MN: Thomson Reuters, 2009):

> (Of conduct) without reasonable or probable cause or excuse; harassing; annoying.

[106] The same dictionary defines a "vexatious suit" as follows:

> A lawsuit instituted maliciously and without good grounds, meant to create trouble and expense for the party being sued.

[107] These definitions accord with the common legal understanding in Canada that a proceeding must be brought for malicious or otherwise inappropriate reasons in order to qualify as vexatious. Since the applicant did not have any intention to "annoy, embarrass or harass the respondent", the investigator's conclusion that her complaint was plainly and obviously vexatious is unreasonable.

[108] The case law on subsections 41(1) and 44(3) of the Act lends support to this view. In *Khapar*, above, at para 98, this Court stated: "The Commission cannot simply rely on the fact that there has been a previous decision to refuse to consider a complaint under paragraph 41(1)(d) of the Act."

[109] In *Barrette* – a case cited by the investigator – the Federal Court of Appeal merely contemplated that a complaint might attract paragraph 41(1)(d) if the complainant had previously used a grievance process. At para 28, it ordered the Commission to turn its mind to the issue, without deciding the matter. As such, *Barrette* does not classify all complaints that were previously dealt with by way of grievances as vexatious. Every case calls for its own analysis.

[110] Interestingly, in many cases where this Court upheld the Commission's decision to dismiss a complaint under paragraph 41(1)(d), the complainant had behaved maliciously or abusively. In *Hérold*, the applicant had created toxic relationships with most of the people at her workplace and the investigator found no evidence of discrimination. The fact that the applicant then sought over 15 million dollars in damages in her judicial review application buttresses the Commission's finding that her complaint itself was vexatious. Similarly, in *Khapar*, the applicant had been given multiple opportunities to raise human rights concerns in prior proceedings, yet he failed to do so without explanation. He only approached the Commission once these other avenues had failed, in order to get another chance at a favourable decision. The Court clearly thought that his tactics were abusive.

[111] In sum, the investigator adopted an unreasonable definition of the term "vexatious" and applied it to Ms Carroll's complaint. Common legal usage and the case law on the Act make it impossible to reconcile his finding that Ms Carroll did not file her complaint for inappropriate reasons with his determination that it was vexatious. This error alone renders the decision unreasonable. Yet even if the investigator were permitted to rely on such a definition, the decision would still be deficient.

(3) The Principle of Finality

[112] Proceeding from the assumption that a complaint can be dismissed as vexatious simply because it has been dealt with through another process, I turn to the question of whether the investigator could reasonably determine that "the complainant's human rights allegations have been addressed by an alternate decision maker with authority to consider human rights issues". According to the investigator, this meant that the complaint should be dismissed so as to "respect the finality of that decision". In my view, this conclusion is unreasonable in light of the law and the evidence.

[113] To begin, the investigator cited two recent Supreme Court cases, *Figliola* and *Penner*. Therein two camps of Supreme Court justices conducted a lively debate about the principle of finality in the context of administrative decisions. It is worth delving into the particulars of each case so as to learn the right lessons.

[114] In *Figliola*, all nine justices agreed in the result, yet there was a marked methodological disagreement between the majority and the concurrence. The facts were as follows. The complainants had initially brought their cases to the British Columbia Workers' Compensation Board. Unsatisfied with the outcome, they filed an internal review which was dismissed by a Review Officer. The complainants could not file a further internal appeal due to a legislative amendment. However, they could have sought judicial review of the Review Officer's decision. They did not do that. Instead, they filed fresh complaints at another tribunal – the Human Rights Tribunal – which accepted to hear them over the employer's objection. The British Columbia

Human Rights Code, RSBC 1996, c 210, granted the Tribunal a power to screen out complaints that had been "appropriately dealt with in another proceeding".

[115] According to the majority, at paras 24-25, this legislation reflected three common law doctrines of finality: issue estoppel, collateral attack and abuse of process. However, a decision-making body does not have to apply any one of these doctrines in a technical fashion. Rather, it should ask three questions, listed at para 37, and decline to hear the complaint if they are all answered in the positive: (1) Did the alternate decision-maker have concurrent jurisdiction to decide the issues? (2) Were the previously decided legal issues essentially the same? and (3) Was there an opportunity for the complainants or their privies to know the case to be met and to have the chance to meet it? The purpose of dismissing complaints that were dealt with in this sense is to ensure "territorial respect" between various tribunals, so as to avoid unnecessary relitigation of similar issues before different decision-makers: see paras 38-46.

[116] The concurring justices disagreed with the majority's characterization of the purpose of the common law finality doctrines. In their view, these doctrines aim to strike a balance between the twin objectives of finality and fairness through the exercise of discretion. As Justice Cromwell wrote at para 58, "Finality is one aspect of fairness, but it does not exhaust that concept or trump all other considerations". In his view, the legislation conferred a broad discretion to the Tribunal, which should be exercised to avoid injustice. However, it was unreasonable for the Tribunal to accept the complaints in the circumstances of the case.

[117] In *Penner*, the *Figliola* concurrence became the majority and the *Figliola* majority became the dissent. *Penner* was not about two competing tribunals but about the relationship between an administrative decision and a civil action. Mr Penner had alleged misconduct on the part of police officers and initiated disciplinary proceedings against them, which were ultimately dismissed. He also instituted a civil action against them. Relying on the disciplinary decision, the Ontario Superior Court of Justice employed the doctrine of issue estoppel to strike out most of his statement of claim.

[118] The majority of the Supreme Court endorsed the framework for issue estoppel set out in *Danyluk v Ainsworth Technologies Inc*, 2001 SCC 44. Even if the criteria for issue estoppel are found to exist, courts retain the discretion to refuse to apply the doctrine so as to prevent unfairness. Unfairness can arise either from the conduct of the prior proceedings, or from using their results in the subsequent proceedings: see paras 39-48. At para 49, the majority found that the disciplinary process was fair but that importing its results to the civil action would be unfair, since these two proceedings were significantly different in purpose and scope. Furthermore, the first-level decision-maker in the disciplinary process had been appointed by the Chief of Police. At para 66, the majority claimed that allowing him to exonerate the Chief from civil liability would amount to transforming the Chief of Police into "the judge of his own case" and constitute "a serious affront to basic principles of fairness".

[119] By contrast, at paras 75-76, the dissent stated that *Figliola* signalled a move away from *Danyluk*, so that curial discretion should be exercised only rarely. Otherwise, issue estoppel becomes a "free-floating inquiry" into the conduct of administrative tribunals and undermines

the finality of their decisions: see para 78. The dissent did not see finality and fairness as competing values. In fact, at para 99, it stated that the function of issue estoppel is to achieve fairness by protecting finality.

[120] The investigator's report is unreasonable in view of these decisions. To begin, none of the four sets of reasons suggest that finality prevents a decision-maker from considering a complaint just because another decision-maker previously considered a complaint between the same parties. Even the *Figliola* majority – which adopted a stricter view of finality than the *Penner* majority – affirmed that finality applies only when the "previously decided legal issue" is "essentially the same as what is being complained of to the Tribunal": *Figliola*, above, at para 37.

[121] During the grievance process, Ms Carroll complained that the Treasury Board policy is discriminatory. However, as was explained in my discussion of procedural fairness, the three grievance replies did not decide this issue. Consequently, there is no decision to the complaint to which the Commission is entitled to defer.

[122] Paragraph 40(1)(d) of the Act is not an escape hatch permitting the Commission to shirk its obligations simply because some other institution had a first look at a complaint, regardless of how it approached it. Once again, I draw attention to the *Sketchley* cases, which clearly recognize that a complaint that a policy is discriminatory is different from a complaint that specific actions by the employer are discriminatory.

[123] The respondent contends that this Court upheld a similar decision as reasonable in *Panula*. However, in that case the complainant alleged that he had been harassed in the workplace and terminated in a discriminatory fashion. He did not allege that the employer had applied a discriminatory policy against him. It is true that the Commission dismissed his complaint as "frivolous" because it found that he was terminated after 7 years of sick leave, that there was no prospect that he would return to work in the foreseeable future and that "the offer of medical retirement amounted to reasonable accommodation": see para 15. It is unclear whether the Court endorsed this rationale.

[124] The case at bar is distinguishable from *Figliola* because Ms Carroll could not seek judicial review of the final grievance decision. Nor could she bring an appeal to the PSLRB without her union's approval: see subsection 209(2) of the *Public Service Labour Relations Act*, SC 2003, c 22, s 2. Consequently, there is no issue of "territorial respect" between competing tribunals, as in *Figliola*, above, at para 38.

[125] It is true that the Commission would be looking behind the employer's decision-making process by investigating the complaint. Although I do not agree with the applicant that this process necessarily lacks independence, I also believe that it is troubling for the Commission to reflexively defer to it. Ms Carroll has been waiting for an answer to her question of whether the impugned policy is discriminatory for over three years now. Adjudicators appointed by the employer refused to answer the question and she could not bring further internal appeals. By deferring to their decisions, the Commission risks jettisoning its all-important mandate "to give effect, in the federal sphere, to the principle that all should be able to make for themselves the

lives thay are able to and wish to make, without being hindered or prevented by discriminatory practices": *Davis FC*, above, at para 15.

[126] Finally, it is clear that *Penner* takes precedence over *Figliola*. As such, decision-makers retain residual discretion to refuse to give effect to the principle of finality where that would work unfairness. The *Penner* majority espoused this view and the *Figliola* majority never clearly said that finality must override fairness. And so, even if the substance of a complaint has been appropriately addressed in another process, the Commission must exercise its discretion under subsection 44(3) of the Act to decide whether to refer the complaint to the Tribunal.

[127] Here, there is no evidence that the Commission ever gave thought to exercising that discretion. It did not grapple with the issue of whether dismissing the complaint might be unfair to Ms Carroll. In particular, it did not consider whether allowing adjudicators appointed by the employer to have the final say might turn the employer into the "judge of his own case": *Penner*, above, at para 66. To use a classic term, the Commission seems to have fettered its discretion in the belief that a complaint which has been dealt with elsewhere simply must be dismissed. The law is clear that a decision-maker which fetters its discretion behaves unreasonably: see e.g. *Stemijon Investments Ltd v Canada (Attorney General)*, 2011 FCA 299 at paras 22-25.

(4) More Errors

[128] Before concluding, I wish to draw attention to two additional errors which contribute to the unreasonableness of the decision under review.

[129] First, the investigator found that the issues raised by Ms Carroll had been decided by a decision-maker with the authority to interpret and apply the Act. This was one of the factors which led him to recommend deferring to the previous process. However, subsection 226(6) of the *Public Service Labour Relations Act* grants this power to adjudicators at the PSLRB – not to adjudicators appointed by the employer to review grievances beforehand. Here, the applicant's union did not refer her grievance to the PSLRB, so that the decision-makers who dealt with it did not have any explicit statutory power to interpret and apply the Act.

[130] Second, the investigator indicated that the employer was not the proper party to the complaint because the impugned policy had been crafted by the Treasury Board. This statement is unreasonable because the employer clearly applied the Treasury Board policy to Ms Carroll. Consequently, she is entitled to complain that the employer discriminated against her by applying a discriminatory policy, regardless of its source.

VII. **Remedy**

[131] I grant this application for judicial review with costs to the applicant. The parties have agreed that a lump sum award of $1500 is appropriate.

[132] I asked the parties to provide post-hearing submissions on the question of whether I should return the matter to the Commission with directions. Upon reading their submissions, I have decided to exercise my discretion to issue directions pursuant to paragraph 18.1(3)(b) of the *Federal Courts Act*.

[133] The respondent correctly submits that the Court should only issue directions in the "clearest of circumstance" (see e.g. *Canada (Minister of Human Resources Development) v Rafuse*, 2002 FCA 31 at para 14). The respondent further submits that directions are inappropriate in this case because the dispute between the parties is essentially factual and there is no one clear answer on the face of the record.

[134] The record is not incomplete on the question of whether Ms Carroll's complaint is vexatious. The investigator made a finding of fact, amply supported by the evidence, that Ms Carroll did not file her complaint to "annoy, embarrass or harass" her employer. As I explained above, it is impossible to reconcile this finding with the conclusion that her complaint is vexatious. Such an outcome is barred by the meaning of the word "vexatious" and the fact that the grievance reply letters never addressed the human rights issues central to the complaint, as becomes obvious on a plain reading of those documents.

[135] The inevitable answer, on the face of the record, is that the complaint does not fall into any of the categories listed at paragraphs 41(c) to (e) of the Act. The complaint is not beyond the Commission's jurisdiction; it is not trivial, frivolous, vexatious or made in bad faith; and it is not time-barred.

[136] By issuing directions, the Court will not usurp the Commission's fact-finding role. It will simply prevent another potential decision that cannot be supported by the facts, thereby reducing expense and delay for both parties. For these reasons, the Court will direct that the Commission shall not dismiss the complaint pursuant to subparagraph 44(3)(b)(ii) of the Act.

[137] This does not mean that the Commission must refer the complaint to the Tribunal. As in *Berberi*, the Commission will have to investigate the complaint anew and decide whether to refer it to the Tribunal or to dismiss it pursuant to subparagraph 44(3)(b)(i) of the Act. In making this decision, the Commission must rely on the full record concerning the applicant's grievances and its own consideration of the merits of those grievances.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application for judicial review is granted and the decision under review is quashed;
2. The matter is referred back to the Commission to conduct an investigation of the applicant's complaint and to render a decision based on the full record concerning the applicant's grievances and its own consideration of the merits of those grievances;
3. For greater certainty, the Commission shall not dismiss the complaint pursuant to subparagraph 44(3)(b)(ii) of the *Canadian Human Rights Act*; and
4. Costs to the applicant in the fixed sum of $1500.

"Richard G. Mosley"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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