Federal Court  Cour fédérale

Date: 20150602

Docket: T-798-14

Citation: 2015 FC 704

Toronto, Ontario, June 2, 2015

PRESENT: The Honourable Mr. Justice Campbell

BETWEEN:

CANADIAN NATIONAL RAILWAY COMPANY

Applicant

and

DONNA CASLER

Respondent

ORDER AND REASONS

[1] In the present Application, the Applicant (CN) challenges a decision of the Canadian Human Rights Commission (Commission) acting under the authority of the *Canadian Human Rights Act*, RSC 1985, c H-6 (*Act*), rejecting the Applicant's argument that prejudice caused by processing delay should result in the final dismissal of a complaint of gender based discrimination (Complaint) without a hearing of the Complaint on its merits. The argument engages the relative authority of the decision-makers acting under the *Act*.

[2] The state of the law is not in issue. Processing delay standing alone does not necessarily ground a finding of dismissal of a complaint. However, delay causing "significant prejudice" to hearing fairness, or that amounts to an abuse of process, is capable of grounding a finding of dismissal (*Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 at paragraphs 101 and 115). The overriding issue in the present case is whether the Commission or the Canadian Human Rights Tribunal (Tribunal) is best suited to make a determination at the final stage of the decision-making process. The specific issue for determination is whether the Commission's decision to refer the Complaint to the Tribunal to reach the final decision was reasonable and fair. For the reasons that follow, I find that it was reasonable and fair.

I. The Details of Ms. Casler's Complaint and its Processing

[3] The most recent investigation report (Report) with respect to the Complaint cites Ms. Casler's position on the merits and the processing details (see: Affidavit of Sheila Marie Tracy, dated May 1, 2014 (Vol. 1 of 1, Application Record of the Applicant) (Affidavit), Exhibit P).

[4] The basis of the Complaint is as follows:

> 1. At issue in this complaint is whether the respondent treated the complainant in an adverse differential manner and did not accommodate her in employment. The complainant also alleges that she was treated differently in accommodation, as compared to other employees requiring accommodation, because of the nature of her disability and because she is a female. The complainant informed the investigator when interviewed on 14 May 2013, that she is not pursuing an allegation based on the nature of her disability, nor did she allege systemic discrimination based on sex, but rather, the adverse treatment was based on her being a female. Therefore, this allegation will be investigated under s.7 rather than

> s. 10 because the allegation is focussed on the treatment of the complainant rather than a general practice within the workplace.
>
> 2. The alleged discriminatory practices are based on the prohibited grounds of disability (Fibryomyalgia, Myalgic Encephalomyelitis (ME) or Chronic Fatigue Syndrome) and Sex (Female).

[5] To date, the Complaint has taken over 14 years to process. The basis of the Complaint stems back to 1998 when Ms. Casler was diagnosed with fibromyalgia. She maintains that in 1999, she was told to go on sick leave because CN did not have any available positions to accommodate her disability.

[6] In March 2000, Ms. Casler's sick leave entitlements ran out. At that time, CN provided her with a different position, but, as a result of her disability, she found this position too physically demanding. In August 2000, she was informed that there were no other positions available to accommodate her restrictions and limitations, which left her with no choice but to go on disability leave.

[7] After Ms. Casler's disability entitlements ran out in March 2001, she continued to request accommodation from CN but was told there were no available positions. Ms. Casler subsequently sought the assistance of her union, which initially declined to assist her. However, following a complaint to the Canadian Industrial Relations Board, her union eventually filed a grievance on her behalf in August 2004.

[8] In September 2004, Ms. Casler filed the Complaint with the Commission, alleging that CN had failed to accommodate her disability because of her gender. At that time, the

Commission decided not to deal with the Complaint until the grievance procedure had been exhausted.

[9] In May 2008, Ms. Casler contacted the Commission to reactivate the Complaint. The Commission subsequently agreed to proceed with the Complaint because it was satisfied that the grievance procedure had been exhausted.

[10] The initial investigation into the Complaint commenced in October 2008. That investigation resulted in a report, dated March 27, 2009, that recommended the Commission dismiss the Complaint pursuant to s. 44(3)(*b*) of the *Act*. That recommendation was subsequently adopted by the Commission, which dismissed the Complaint in June 2009.

[11] In July 2009, Ms. Casler filed an application for judicial review of the Commission's decision to dismiss her complaint. In February 2011, the application was dismissed. She subsequently filed an appeal of that decision. In October 2011, Ms. Casler was found to be in default for failing to file her memorandum of fact and law within the prescribed timeline.

[12] On December 16, 2011, the Federal Court of Appeal ordered that Ms. Casler's appeal continue, provided that she filed her memorandum of fact and law by December 21, 2011. On May 3, 2012, the Federal Court of Appeal allowed Ms. Casler's appeal and ordered the Complaint to be referred back to the Commission for a new investigation and report.

[13] The Report was rendered on January 15, 2014 and recommended that the Complaint be referred to the Tribunal. In March, 2014, the Commission adopted the recommendation and informed the parties by letter that the Complaint would be referred to the Tribunal for a hearing.

[14] CN filed for judicial review of the Commission's decision on April 1, 2014.

II. The Decision Under Review

[15] Following the delivery of the Report, the Commission rendered two decisions: the imposition on the parties of a ten-page argument limit; and the subsequent decision to refer the Complaint to the Tribunal for a hearing (Decision).

[16] As to the argument limit, by letter dated January 15, 2014, the Commission sent the Report to CN and advised that its comments on the Report should not exceed ten pages in length, including attachments, and be filed by February 7, 2014 (Affidavit, Exhibit P). By letter dated February 7, 2014, CN filed a ten-page submission (Submissions), with 64 pages of attachments (Affidavit, Exhibit Q). By letter dated February 11, 2014, the Commission advised CN that "any pages over the ten page limit will not be placed before the Commission" (Affidavit, Exhibit S). By letters dated February 18 and 27, 2014, CN objected to the argument limit (Affidavit, Exhibits T and U) to which the Commission provided a formal response on March 3, 2014 as follows:

> This is further to your letter dated February 27, 2014 in the matter of the complaint of Donna Casler against Canadian National Railway. You have requested that I confirm in writing our decision

> to limit Canadian National Railway's submission on the report to 10 pages.
>
> The Commission has a practice of limiting submissions on investigation reports to 10 pages. This practice is confirmed in the Commission's Dispute Resolution Operating Procedures (http://www.chrcccdp.gc.ca/eng/content/dispute-resolution-operating-procedures) and has been a longstanding practice. Section 9.4 of the Operating Procedures states:
>
> > *Subject to 9.6, a submission will not exceed ten (10) pages in length, including attachments. The Commission, on notice to the party, may refuse to place those parts of the submission in excess of ten pages before the Commissioners for consideration. Where the Commission places submissions longer than ten pages before the Commissioners for consideration, it shall provide notice to the other parties and give them the opportunity to file submissions of equal length and then place those submissions before the Commission.*
>
> In addition, this limit was clearly stated in the disclosure letter addressed to the respondent on January 15, 2014.
>
> On February 7, 2014, the Commission received Canadian National Railway's submission on the above noted complaint. The submission consisted of a 10 page letter as well as a number of attachments. The total number of pages received by fax was 74 pages. As such, you were advised that only the first 10 pages (the letter) would be placed before the Commission. The attachments would not be included. This is consistent with the Commission's practice. [...]
>
> (Affidavit, Exhibit Y)

[17] The Decision under review directed to both Ms. Casler and CN reads as follows:

> I am writing to inform you of the decision taken by the Canadian Human Rights Commission in the complaint (20040537) of Donna Casler against Canadian National Railway.
>
> Before rendering the decision, the Commission reviewed the report disclosed to you previously and any submission(s) filed in response to the report. After examining this information, the

> Commission decided, pursuant to paragraph 44(3)(a) of the *Canadian Human Rights Act*, to request that the Chairperson of the Canadian Human Rights Tribunal institute an inquiry into the complaint because:
>
> > • the evidence indicates the respondent may have failed to accommodate the complainant to the point of undue hardship;
> >
> > • the evidence indicates the respondent may have discriminated against the complainant based on the ground of sex; and
> >
> > • further inquiry into this matter is warranted.
>
> Further information will be provided to you by the Tribunal regarding the conduct of proceedings.
>
> (Affidavit, Exhibit X)

III. CN's Argument

[18] CN requests an order setting aside the Commission's decision to refer the Complaint to the Tribunal, and also requests that an order be made prohibiting the Commission from proceeding to determine the Complaint.

[19] There are two components to CN's argument. First, the Commission's decision is unreasonable because it is based on a flawed investigation report. Second, the Commission's decision was rendered in breach of a duty of fairness owed to CN due to the Commission's failure to allow an argument beyond the ten-page limit on the delay-causing prejudice issue, and the Commission's failure to give reasons on the argument presented.

A. *The Reasonableness of the Decision*

[20] CN argues that the Commission's decision to refer the Complaint to the Tribunal is unreasonable because it adopts the recommendation of the Report, which in CN's view is fundamentally flawed for two reasons: the Report fails to connect the alleged discrimination to a prohibited ground, and includes erroneous findings of fact that are based on an absence of evidence or on the faded memory evidence of key witnesses.

[21] In the Submissions, CN highlighted these concerns and urged the Commission not to rely on the Report as a result:

> 5. The conclusions of the Report contain errors of fact and law, omissions and inconsistencies that indicate a lack of neutrality or thoroughness in the investigation. In light of these shortcomings, CN submits that the Report ought not to be relied upon as the reasons of the Commission. Moreover, based on the facts on the record before the Commission, the Complaint ought to be dismissed and not referred to the Tribunal for further consideration.
>
> […]
>
> 7. In considering whether any "requirements, conditions or distinctions" were imposed on the Complainant the Investigator fails to link such "requirements, conditions or distinctions" to a prohibited ground of discrimination. This misapplication of section 7 results in erroneous conclusions being drawn by the Investigator that should not be followed by the Commission. The conclusions at paragraphs 22, 25, 26 or 27 of the Report make no mention of any differential treatment of the Complainant based on a prohibited ground, despite the clear language of section 7 of the CHRA which requires such an analysis. By failing to consider whether the differentiation itself is related to a prohibited ground of discrimination, the Investigator erroneously applies section 7 of the CHRA and commits an error in law.
>
> 8. Moreover, the conclusions drawn by the Investigator at paragraphs 22, 25, 26 and 27 are made in the absence of any

evidence and solely on the basis of the Complainant's allegations with no consideration given to contradictory evidence that was on the record before the Investigator.

9. For example, paragraph 22 of the Report states that the "flag person" role lasted for only two months and that there is evidence the Respondent continued to employ a man in the flag person position thereafter. These conclusions are not based on any evidence before the Investigator and are in fact contradicted by the evidence on the record. In reaching such conclusions, the Investigator ignores the evidence (including as referenced at paragraph 34 of the Report) that the flag position in question was no longer available after August 25, 2000. The conclusion that "a man" continued in the position is also not based on any evidence before the Investigator. In fact, the Report at paragraph 72 contradicts the complainant's allegations that Mr. Bill Selby continued in the flag person role, citing Mr. Selby's interview with the Investigator where he claimed he had "completed a labour job from August 2000 to January 2001." If Mr. Selby was in a labour job he could not have also been in a flag person role as the Investigator erroneously concludes in paragraph 22. There was no other evidence before the Investigator of another "man" in that flag person role, meaning that the conclusion of paragraph 22 is based on no evidence and is a factual error. The error leads to false conclusions of differential treatment on the basis of gender that have no basis in the evidence.

[…]

16. Moreover, the conclusions related to "Step 2" of the investigation Report, set out at paragraphs 29, 37-41, 55-56 and 64-69 thereof, are based on little or no evidence (as indicated in paragraphs 33, 34, 36, 39, 40, 49, 55, 59 of the Report), interview with witnesses whose recollection of events is "poor" (as noted by the Investigator at paragraph 68 of the Report) or even based on total hearsay (paragraph 51 of the Report). The lack of evidence or recollection of key witnesses is indicative of prejudice and a breach of natural justice experienced by CN in the Commission's investigation process which will be perpetuated should this matter proceed to a hearing before the Tribunal. For these reasons, the conclusions of Step 2 are fundamentally flawed and ought not be adopted by the Commission.

[…]

37. As this timeline illustrates, there has been a delay in these proceedings of almost 14 years. The delays are entirely attributable

to either the Complainant or the Commission's investigative process. The existing delay will only lengthen before any inquiry can take place. The record shows that there is little or no documentation in existence regarding the issue of the availability of accommodated positions at CN 14 years ago. The impact of the delay in these proceedings is therefore made worse by the fact that this complaint is wholly dependent upon the recollections of witnesses whose memories are unreliable due to the passage of time (as recognized by the Investigator in the Report). Particularly in such circumstances, the excessive delay in these proceedings is, by any rational assessment, inordinate and unacceptable. These facts must lead the Commission to conclude that a fair hearing is not possible, through no fault of the Respondent, and that the Respondent will be prejudiced by a decision to refer this matter to the Tribunal.

38. The submissions of the Respondent to the Investigator dated December 17, 2012 made clear that the memories of key witnesses had faded due to the passage of time. This was illustrated in notes from interviews with such persons appended to that submission. Such poor recollections, on the face of the evidentiary record, are evidence of the prejudice the Respondent will face in defending against the allegations of the Complaint. A Tribunal referral and hearing in these circumstances would violate the principle of natural justice and fairness.

39. The Report is replete with references to vague witness statements and poor or even no recollection of events by key witnesses. This should come as no surprise. A shorter delay (13 years) was found by the Federal Court in *Grover* to be prejudicial on the basis that "[a]ny recollection that [a witness] may claim to have after so many years would likely be highly unreliable." The same is true in relation to the Complaint. It is highly suspect that the only witness who appears to have certainty in their recollection is the Complainant herself. It is even more surprising that this certitude extends not only to the Complainant's own circumstances but also to hearsay information regarding other employees' circumstances, medical restrictions and employment history. These unreliable assertions of the Complainant are accepted without question by the Investigator. The Respondent submits that such recollections are self-serving and ought to be considered quite unreliable and highly prejudicial to the Respondent.

40. These examples provide the evidentiary record necessary for the Commission to identify the likelihood of prejudice, unfairness and breach of natural justice that will be experienced by the Respondent if the Complaint is referred to the Tribunal and

> allowed to proceed in the circumstances. In light of the clear prejudice caused by the inordinate delay in these proceedings of almost 14 years, the Complaint ought to be dismissed immediately.
>
> [Emphasis added]
>
> (Affidavit, Exhibit Q)

During the hearing of the present Application, Counsel for CN argued that the Commission's failure to engage the quoted Submissions demonstrated a lack of thoroughness in the exercise of its decision-making authority, and had these Submissions been considered, the Commission would have concluded that there was no rational basis for the referral to the Tribunal.

B. *Breach of the Duty of Fairness*

[22] As mentioned, the faded memory causing prejudice argument is coupled with a two-part breach of fairness argument with respect to the Commission's decision-making process. First, the Commission breached a duty of procedural fairness owed to CN by limiting its right to argue the prejudice issue to a ten-page submission, according to the Commission's usual procedure. And second, the Commission's failure to explicitly refer to CN's ten-page argument in its decision to refer the Complaint to the Tribunal constitutes a further breach of fairness in the face of CN's objection.

IV. Determination of CN's Arguments

A. *The Commission's Response to CN's Error and Fairness Arguments*

[23] In my opinion, CN's argument on these issues is based on a misapprehension of the role of the Commission in relationship to the Tribunal as prescribed in the scheme of the *Act*.

[24] The Commission has a primary gate keeping authority. From the outset, it can terminate a complaint for one of the reasons outlined in s. 41(1) of the *Act*, such as where a complaint is found to be "trivial, frivolous, vexatious or made in bad faith" (s. 41(1)(*d*)). If the Commission finds a complaint is substantiated, it may direct an investigation (s. 43(1)). The investigator has no decision-making authority, only the obligation to investigate, report, and recommend a course of action to the Commission on the issue of whether the complaint should be terminated or referred to the Tribunal for hearing.

[25] The Commission also has an important secondary gate keeping authority. Upon an investigation being conducted resulting in a report and recommendation, the Commission has authority to accept or reject the recommendation and to take action accordingly. At this stage of the process, the Commission has the discretion to dismiss a complaint or refer it to the Tribunal for a hearing (s. 44(3)). When the Commission adopts the recommendation of the investigator, the investigation report is considered to be part of the reasons for the Commission's action taken as a result (*Sketchley v Canada (AG)*, 2005 FCA 404 at paragraph 37).

[26] In screening a complaint under s. 44, the Commission does not act as an adjudicative body. Rather, its primary role is "assessing the sufficiency of the evidence before it" to determine whether a further inquiry by the Tribunal is warranted (*Cooper v Canada (Human Rights Commission)*, [1996] 3 SCR 854 at paragraph 53).

[27] The Tribunal is authorized to receive complaints from the Commission for hearing on their merits. Of critical significance to the present Application is the fact that the Tribunal is authorized to decide that it lacks jurisdiction to conduct a hearing where prejudice due to delay exists in the process leading to the final decision-making stage, which is the hearing before the Tribunal (see: *Grover v National Research Council of Canada*, 2009 CHRT 1 (*Grover*)).

[28] In my opinion, CN's error argument advanced to the Commission is contrary to the scheme of the *Act*. It is significant that in paragraph 5 of its Submission to the Commission, quoted above in paragraph 20 of these reasons, CN argues that, in coming to a decision on whether to refer the Complaint to the Tribunal, the Report should not be relied upon as the reasons of the Commission because of its shortcomings: errors of fact and law, omissions and inconsistencies that indicate a lack of neutrality or thoroughness in the investigation. The argument is apparently advanced to put the Commission in the position of a critic of the Report, thus allowing the Commission to effectively assume an adjudicative role to set aside the Report for error, resulting in the dismissal of the Complaint. In making this submission, CN was essentially asking the Commission to step into the shoes of the Tribunal to resolve an evidentiary dispute on the issue of discrimination and to assess the quality of the faded memory evidence. I

find that neither role is within the purview of the Commission; that role is reserved for the Tribunal.

[29] In my opinion, CN's expectation that the Commission would receive its lengthy arguments on the merits of its position *vis à vis* the Complaint and the Report was misplaced. As outlined above, in its non-adjudicative role, the Commission's interest is focussed on whether there is sufficient evidence to refer a complaint to the Tribunal rather than on resolving disputes on detailed findings of fact. Therefore, I find that the Commission's ten-page limit was fairly enforced with respect to the argument it received from CN well in excess of its established limit. The Commission did not agree to make an exception in CN's case; it had every right to do so.

[30] As the Decision describes, the Commission received CN's Submissions and considered them in reaching the Decision. I find that it was reasonable substantively, and fair procedurally, for the Commission to refer the Complaint on to the Tribunal without explicitly engaging CN's arguments concerning the adequacy of the Report because the Commission is not an adjudicative body designed for the purpose of evaluating evidence in conflict; the Tribunal is the body designed for this purpose.

[31] Inferentially, the Commission concluded that it is critical that the evidentiary issues in the Report be properly resolved because they go to the allegations of discrimination at the heart of the Complaint. This result cannot be achieved without a hearing because the worth of evidence is arguable, and in order to establish the truth, it must be tested under examination. On this basis I find that the Commission's decision to refer to the Tribunal was reasonable.

B. *The Commission's Response to CN's Prejudice Argument*

[32] CN argues that the Commission should have terminated the Complaint on an assumption that any faded memory found to exist by the investigator will necessarily result in Ms. Casler being unfairly successful before the Tribunal. The argument is advanced because, apparently, Ms. Casler is the only witness whose memory has not faded, as CN argued in paragraph 39 of its Submissions to the Commission quoted above. In my opinion, this assumed outcome is speculation based on evidence that has not been tested in an adjudicative process. The decision on whether to dismiss a complaint without considering its merits should not be based on speculation about the existence of prejudice due to faded memory evidence. The only way to eradicate the speculation is to have an adjudicative decision-maker hear the witnesses and then decide whether the faded memory is significant enough to make a finding of prejudice.

[33] Counsel for CN argues that the Commission should have determined the prejudice issue on the basis of the opinions reached by the investigator. In my opinion, for the Commission to have so decided would have constituted an avoidable fundamental injustice to Ms. Casler. That is, the investigator's opinion of the quality of the witnesses' evidence should not be the evidence relied upon to ground such an important decision as the dismissal of a complaint before it reaches the Tribunal. The ultimate decision-maker must hear the witnesses tested under cross-examination to fairly make such a determination. Since the Commission is not an adjudicative body that decides on evidence produced at a hearing involving the checks and balances of a hearing procedure, the task of fairly deciding falls to the Tribunal. As mentioned above, the Tribunal decision in *Grover* establishes this point.

[34] In the following passage from the Tribunal decision in *Grover*, at paragraphs 100-101, the importance of actually considering the evidence of witnesses at the hearing, and then concluding on the state of their memory, is emphasized:

> Has this unacceptable and undue delay so impaired the NRC's ability to make a full answer to the complaint that there has been an impact on the fairness of the hearing (*Blencoe, supra* at paras. 102, 104)? In my view, the answer is yes. The NRC is no longer able to fully respond to the allegations made against it due to the fact that so many of its witnesses, through the passage of time, are unable to independently recollect the incidents alleged in the complaints. This case is not like others, where evidence of prejudice to the fairness of the hearing was lacking. In *Blencoe*, at para. 103, the Supreme Court adopted the trial judge's finding regarding the respondent's complaints that his witnesses' memories had been impaired with the passage of time. The lower court had found that those were vague assertions falling short of establishing an inability to prove facts necessary to respond to the complaints. Similarly, in *Gagne, supra* at paras. 12-14, there was no evidence that the memories of witnesses had "necessarily" faded. In the present case, however, eight potential witnesses actually gave evidence of their faded memories. These are individuals who the NRC would reasonably be expected to call to give evidence in answer to Dr. Grover's allegations. The prejudice claimed by the NRC (namely, its witnesses' loss of memory) is thus not just comprised of "vague assertions".
>
> It is significant that the Tribunal has heard the testimonies of most of these people, including those whose role was particularly highlighted in the complaints (e.g. Dr. Vanier, Dr. Bedford, and Dr. Perron). In *Chan, supra*, the Ontario Board of Inquiry found that only by hearing evidence from the respondent's witnesses, would it have been able to gauge the respondent's assertions about its witnesses' lack of recall about the events. In contrast, I have actually had the benefit to have heard from many of the potential witnesses for the NRC and their memory loss has indeed been established.
>
> [Emphasis added]

[35] On judicial review of the Tribunal's decision, Justice de Montigny found no error in the Tribunal's approach or in the result reached:

> Assessing the credibility of witnesses is the very role of the Tribunal, which is in a better position to assess credibility and reliability than is the court on an application for judicial review. The Tribunal set out the underlying basis for having found the witnesses' evidence regarding their memory loss and lack of independent recollection persuasive. It took note of the fact that the previous interviews had taken place six to eight years ago, that the witnesses are in their 70's and well into their retirement, and that Dr. Vanier was unequivocal in his reply that there was no connection between his desire not to be involved in this "unpleasant" matter again and the truthfulness of his testimony. The Tribunal was entitled, in assessing credibility, to rely on criteria such as rationality and common sense. Its findings were not perverse, capricious or unreasonable, and it is thus entitled to deference in regard to its credibility determinations.
>
> (*Grover v Canada (Attorney General)*, 2010 FC 320 at para. 57 (*Grover v Canada*))

[36] It is critical to note that by the Commission's referral to the Tribunal, CN did not lose its opportunity to succeed on the faded memory prejudice argument. As already found, the Tribunal is in the best position to make a finding on the issue of prejudice because it is the adjudicative body that is authorized to conduct a hearing to make findings of fact, and, as such, is in the best position to judge the quality of the faded memory evidence first hand and free of speculation. This fact is very important when viewed from Ms. Casler's perspective.

[37] While the outcome of a hearing before the Tribunal will be disappointing to either Ms. Casler or CN, I find that the Commission chose the fair, just, and reasonable course in referring the Complaint to the Tribunal because to do so will ensure that the result will be on a full examination of the evidence. With respect to the result thereby achieved, Justice de Montigny had this to say at paragraph 58 of the judicial review decision in *Grover v Canada:*

> For all of the foregoing reasons, this application for judicial review must therefore be dismissed. While the Court understands the

> frustration Mr. Grover may feel as a result of this outcome, which effectively puts an end to his protracted dispute with the NRC, it is no reason to quash the decision of the Tribunal. Its finding that his complaints must be dismissed because the delay in the hearing of those complaints had significantly impaired the NRC's ability to provide a full answer and defence is unassailable and reasonable on the basis of the record that was before it. Harsh as it may be, this result is entirely compatible with the principles of natural justice and fairness.

[38] Thus, I find that the Commission's rejection of CN's argument that the Commission should have engaged the prejudice issue without referral to the Tribunal was reasonable.

V. Result

[39] For the reasons provided, the present Application is dismissed.

ORDER

THIS COURT ORDERS that the present Application is dismissed.

I award costs to the Respondent.

"Douglas R. Campbell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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