Federal Court  Cour fédérale

Date: 20150622

Docket: T-2022-14

Citation: 2015 FC 780

Ottawa, Ontario, June 22, 2015

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

WARRANT OFFICER TIMOTHY ANDREWS

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of two decisions of the Canadian Human Rights Commission (the Commission), both dated August 27, 2014, declining to deal with the Applicant's complaints, pursuant to s 41(1)(a) of the *Canadian Human Rights Act*, RSC 1985, c H-6 (*CHR Act*), because the Applicant had not exhausted grievance or review procedures otherwise reasonably available to him. The application for judicial review is brought pursuant to s 18.1 of the *Federal Courts Act*, RSC 1985, c F-7.

Background

[2] The Applicant is a member of the Canadian Forces (CF), the Respondent herein as represented by the Attorney General of Canada. He alleges that in 2010, while he was serving in Haiti, his immediate superior officer discriminated against him, largely on racial grounds. In June 2010, the Applicant filed a complaint with the CF Ombudsman who decided not to deal with the case because other avenues of redress had not yet been exhausted.

[3] In August 2010 the Applicant met with his Commanding Officer (CO) and the harassment complaint was discussed. His CO subsequently wrote to him on two occasions in September 2010, requesting additional information so as to determine whether the Applicant's allegations constituted a harassment complaint pursuant to the *Harassment Prevention and Resolution Guidelines*. No response was received from the Applicant.

[4] By letter of October 5, 2010 counsel for the Applicant advised the CO, amongst other things, that the Applicant did not intend to avail himself of a harassment complaint pursuant to the Department of Nation Defence/CF Harassment Prevention and Resolution policy but reserved his right to make any such complaints in another forum.

[5] In December 2010 the Applicant filed a complaint with the Commission. By decisions dated July 6, 2011 the Commission decided not to deal with the complaint at that time, pursuant to s 41(1)(a) of the *CHR Act*, as the Applicant ought first to exhaust grievance or review procedures otherwise reasonably available to him. It stated that at the end of the grievance or

review process, the Applicant could ask the Commission to reactivate the complaint. The Commission's decisions of July 6, 2011 are not under review.

[6] The Applicant then engaged in the CF Redress of Grievance process. On November 29, 2011 the Commander of Canadian Forces Joint Support Group released terms of reference, thereby convening an administrative investigation into the Applicant's allegations of racist conduct, discrimination and harassment. The Administrative Investigation report of the Initial Authority (IA) was released on April 20, 2012. The Applicant was dissatisfied with the IA decision and requested that his grievance be forwarded for determination by the Final Authority (FA).

[7] On July 4, 2012 the Applicant's grievance was referred to the Canadian Forces Grievance Board (CFGB) which released its findings and recommendations on September 14, 2012. By letter of March 4, 2013, the Chief of the Defence Staff advised that he concurred with the CFGB findings and recommendations, which included that there were important evidentiary omissions and procedural errors that compromised the integrity of the process and resulted in a fatally flawed Administrative Investigation and, therefore, an equally flawed IA decision. The Chief of the Defence Staff also stated that he was concerned that the Applicant had chosen not to avail himself of the CF harassment process and that this had contributed to the CFGB's findings. Given his finding that the IA decision was invalid, the Chief of the Defence Staff concluded that he could not make a properly informed decision on the validity of the allegations and, therefore, that it was imperative that the Applicant initiate the harassment investigation process. The Applicant was given 90 days to do so. The Chief of the Defence Staff stated that when the

investigation was complete the Applicant could grieve its outcome if its conclusions and recommendations were not to his satisfaction.

[8] On May 14, 2013 the Applicant submitted a copy of his original grievance, not a harassment complaint. The Responsible Officer (RO) wrote to the Applicant on May 22, 2013, requesting submission of a proper complaint and inclusion of any information necessary to enable the conduct of a thorough and complete investigation of the allegations of harassment. The RO sent a second letter on July 19, 2013. The Applicant did not respond to either letter.

[9] On December 24, 2012, while the grievance process was in progress, the Applicant requested the Commission to reactivate his complaint. While the Commission was considering whether s 41(1)(a) applied to the complaint, the FA decision was issued. The Applicant filed an application for judicial review of the FA on April 24, 2012. A November 4, 2013 Section 40/41 Report recommended that the Commission not deal with the complaint while the judicial review was before this Court. On January 23, 2014, before the Commission decided that matter, the Applicant discontinued his application for judicial review of the FA and asked the Commission to deal with his complaint.

[10] On May 6, 2014 two Section 40/41 Reports were prepared. The first concerned the Applicant's complaint against the CF (file no 20101251) and the second concerned his complaint against his CO (file no 20101252) (collectively, the Section 40/41 Report). Substantially similar Records of Decision Under Section 40/41 were issued by the Commission on August 27, 2014, for both matters (collectively, the Decision). For the purposes of this judicial review, all

references shall be to the Section 40/41 Report and decision of the Commission pertaining to the complaint against the CF.

[11] On September 26, 2014 the Applicant filed his application for judicial review of the Commission's Decision.

Decision Under Review

[12] The Commission decided not to deal with the complaint pursuant to s 41(1)(a) of the *CHR Act*, as the Applicant ought to have exhausted grievance or review procedures otherwise reasonably available to him. A decision under s 41(1)(d) of the *CHR Act* was, therefore, unnecessary. The Commission adopted the conclusion of the May 6, 2014 Section 40/41 Report:

> The complainant's allegations are serious, and in the public interest. On the other hand, the harassment complaint process was reasonably available to the complainant after the Final Authority decision in 2013. The Final Authority decision included measures to be taken as part of the harassment complaint process in order to address the concerns with timeliness and fairness from the preceding administrative investigation. The complainant was provided multiple opportunities to participate in this harassment complaint process, but he chose not to. He was clearly aware of the inadequacies of the grievance form to initiate a harassment complaint as several attempts were made to obtain the correct information from him. Based on the above, the failure to exhaust that process was attributable to him.

[13] In rendering its decision the Commission reviewed the December 8, 2010 complaint form, the Section 40/41 Report of May 6, 2014 and Supplemental Section 40/41 Report of June 12, 2014, the Applicant's submissions of June 17, 2014, the CF's submissions of July 2, 2014, and cross-disclosure submissions of the CF dated July 25, 2014.

[14] The Section 40/41 Report set out the background to the complaint and summarized the positions of the parties based on their submissions. It noted that, based on the CF's position, it appeared that the remaining alternative redress process, the CF's harassment complaint process, was no longer available to the Applicant because he did not file a formal harassment complaint prior to the deadline set out in the FA. The question to be answered was whether the harassment complaint process was reasonably available to the Applicant and, if so, whether he should have exhausted that procedure. And, if that process ought to have been exhausted, whether the failure to do so was solely attributable to the Applicant in accordance with s 42(2) of the *CHR Act*.

[15] On the first point, it is expedient to reproduce particular paragraphs of the report as it sets out relevance background information as well as its analysis:

> *Was the harassment complaint process reasonably available to the complainant?*
>
> 64. Some relevant background information can be found in the "Findings and Recommendations" of the Canadian Forces Grievance Board ("CFGB"), dated September 14, 2012, which was provided by the complainant. In August 2011, after the Commission's decision not to deal with his complaint at that time, the complainant filed a grievance with the respondent. In March 2012, a final report on the Administrative investigation of the complainant's grievance was issued and disclosed to the grievor who provided comments. On April 20, 2012, the Initial Authority decision was rendered, finding "professional shortcomings" on the part of the superior officer but not granting the grievor's requests for apologies, damages, or legal fees. The complainant was unsatisfied with this decision and asked for a decision by the Final Authority. The matter was referred to the CFGB for review and recommendations.
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> 65. The CFGB found that because a harassment investigation did not occur, the Initial Authority did not have adequate information upon which to make his decision, even though he attempted to insert elements of a harassment investigation into the grievance process. This investigation was found to have various defects, such as not all witnesses were interviewed, not all relevant

information appeared to be considered, and the fact that the superior officer, alleged to be the harasser, was not provided an opportunity to respond to the investigation. For these reasons, the CFGB recommended that the Final Authority not make a final decision on the matter, but order a new harassment investigation be initiated. It also noted that the respondent's policies should be amended to ensure that harassment complaints are required to be dealt with under the harassment policy prior to resorting to the grievance process, given that neither the CFGB nor the CDS is equipped to conduct its own investigation in such situations.

66. On March 4, 2013, the Final Authority rendered his decision. Referring to the CFGB findings and recommendations, the CDS found that there were "*important evidentiary omissions and procedural errors that compromised the integrity of the process and resulted in what the CFGB quite rightly referred to as a 'fatally flawed' administrative investigation and consequently led to an equally flawed IA decision based solely on that investigation."* The CDS determined that due to these errors and the incompleteness of the underlying investigation, he could not render "*...a properly informed decision on the validity and reliability of the allegations...*"

67. The CDS also raised concerns that a harassment investigation did not occur. In the Final Authority decision, the CDS stated:

> Yet, I am troubled by your allegations and most particularly, by the lack of a proper investigation into their validity. As I mentioned, the CF takes this issue very seriously and consequently, it is imperative that you initiate the harassment investigation process by submitting a formal harassment complaint to the CO of 4 CFMCU. You have 90 days from the receipt of this letter to make your submission. The CO of 4 CFMCU shall, upon receipt of your harassment complaint, initiate a harassment investigation into the allegations therein. Let me be very clear on this point: an investigation will not commence until there is a formal harassment complaint submitted to the CO of 4 CFMCU and you commit, in writing, that you will fully participate in such an investigation to ensure that a thorough and impartial analysis may determine the legitimacy of your allegations. If you do not respond within 90 days, there will be no further action taken on your alleged complaints.

> Given the complexities of this case, compounded by the length of time that has elapsed since the alleged incidents, the CO of the 4 CFMCU might consider engaging a private consulting firm to assist with the investigation. Such corporations specialize in the investigation of harassment cases. Additionally, a monthly situation report will be sent to the Director General Canadian forces [*sic*] Grievance Authority (DGCFGA) Implementation Officer on the status of the forthcoming harassment investigation. When the investigation has been completed, you may grieve its outcome if the conclusions and recommendations are not to your satisfaction.

68. The CDS suggested that a private consulting firm be engaged to investigate the matter. The complainant is of the view that this demonstrates that the respondent is unable to investigate a complaint of this complexity. He suggests that this is further supported by the finding of the CFGB that the initial administrative investigation to be [*sic*] '*fatally flawed*'.

69. The lack of procedural fairness in the IA decision was acknowledged in the Final Authority decision. The CDS attempted to address the concerns for procedural fairness and expediency with his recommendations: a) that the matter be dealt with through a formal harassment complaint; and, b) that they hire an outside firm to investigate the matter.

70. The respondent's "Harassment Prevention and Resolution Guidelines" (the Guidelines) outline a complaint process which is overseen by Responsible Officers (ROs) in the respondent's organization. The Guidelines define harassment the same as it is defined under the Act. The Guidelines further provide that other workplace harassment may also be addressed through this process. Once a formal harassment complaint is received, the RO oversees a situational assessment to determine whether or not the complaint is related to harassment – if it is, efforts are made to resolve the matter, identify other possible redress avenues such as mediation, and the appropriate action(s) will be initiated. If mediation is not appropriate, an administrative investigation is to be undertaken by a harassment investigator. The harassment investigator prepares a draft report on which both parties may comment before the final report is completed and submitted to the RO for decision. If any person is not in agreement with the RO's decision, they may file a grievance. Although the harassment and grievance processes do not provide for an independent third party decision-maker, matters dealing with harassment and racist conduct are referred to an

independent body (the CFGB, now the MGERC) for findings and recommendation prior to the Final Authority decision being rendered. In addition, a review by the Federal Court is also available.

71. The complainant states that only the Commission will be able to fully deal with all of the matters in his complaint. While the complaint deals with harassment, there are also allegations of adverse differential treatment within the workplace. If the harassment complaint process were still available to him, it is not clear whether it could deal with the allegations with respect to the transfer occurring as a result of his marital status, for example. However, it could have dealt with much [*sic*] of the substantive allegations in the complaint.

72. Timeliness is another consideration with respect to this complaint, which is nearly four years old. It appears that both parties bear some responsibility for the delays in the process. In 2010, the complainant did attempt to speak to his superiors about his allegations, but he did not provide them with the requested information when asked in September 2010. As outlined in paragraph 64, the respondent's process is lengthy, and there appears [*sic*] to have been delays in the processing of the complainant's grievance.

73. In terms of delay, it is not clear that the Commission's process would be more expedient than that of the respondent's internal harassment complaint process, if it were still available. Nonetheless, it appears at this stage, the Commission's process is the only remaining process available to him.

74. The complainant's human rights allegations, if proven, are serious; this is acknowledged by the respondent. The complainant has not provided any information to indicate that he is vulnerable personally, but there is a public interest in investigating allegations of racism in Canadian government institutions such as the Canadian Forces. Although the complainant describes the complaint as one of systemic discrimination, no policy or practice has been identified in the summary of complaint. There is no indication that there is or was any potential for harm to anyone if the respondent's harassment complaint process had been used.

75. The complainant suggests that that [*sic*] requiring him to engage in the harassment complaint process is unfair. Although the complainant's scepticism may be understandable given the results of the IA decision, there is no indication that the respondent's alternate redress procedures overall are so flawed that it could not

> have dealt with the complainant's allegations within its harassment complaint process. In this instance, the Final Authority made recommendations in order to specifically address the issues that occurred previously, including any potential unfairness and the issue of delay.
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> 76. Having regard for all of the above, it appears that the complainant had another review procedure, the harassment complaint process, reasonably available to him after the Final Authority decision in 2013.

[16] On the question of whether the failure to exhaust the CF's harassment complaint process was attributable to the Applicant and not another, as set out in s 42(2) of the *CHR Act*, the Section 40/41 Report noted that the history of the complaint illustrated that much of the discord related to the appropriate process for addressing a complaint that raises a variety of issues such as was the case in this matter, which involved allegations of harassment, abuse of authority and adverse differential treatment.

[17] Ultimately, however, it concluded that:

> 80. The complainant acknowledged the internal harassment complaint process. After the Final Authority decision, the complainant sent in his grievance form in lieu of a harassment complaint. In his letter to the complainant dated May 22, 2013, the RO responded to the complainant to explain that the grievance form did not provide the information necessary to initiate a harassment complaint. The letter described what was required in order to file a harassment complaint and also offered assistance to the complainant. On July 19, 2013, the RO sent a follow-up letter to the complainant requesting additional information, but the complainant did not provide it. Therefore, while he acknowledged this process, he refused to participate by not providing the appropriate material in order for it to have any possibility of success. This is solely attributable to the complainant.

Relevant Legislation

[18] The relevant sections of the *CHR Act* are as follows:

Commission to deal with complaint	**Irrecevabilité**
41. (1) Subject to section 40, the Commission shall deal with any complaint filed with it unless in respect of that complaint it appears to the Commission that	41. (1) Sous réserve de l'article 40, la Commission statue sur toute plainte dont elle est saisie à moins qu'elle estime celle-ci irrecevable pour un des motifs suivants :
(a) the alleged victim of the discriminatory practice to which the complaint relates ought to exhaust grievance or review procedures otherwise reasonably available;	a) la victime présumée de l'acte discriminatoire devrait épuiser d'abord les recours internes ou les procédures d'appel ou de règlement des griefs qui lui sont normalement ouverts;
[…]	[…]
Notice	**Avis**
42. (1) Subject to subsection (2), when the Commission decides not to deal with a complaint, it shall send a written notice of its decision to the complainant setting out the reason for its decision.	42. (1) Sous réserve du paragraphe (2), la Commission motive par écrit sa décision auprès du plaignant dans les cas où elle décide que la plainte est irrecevable.
Attributing fault for delay	**Imputabilité du défaut**
(2) Before deciding that a complaint will not be dealt with because a procedure referred to in paragraph 41(a) has not been exhausted, the Commission shall satisfy itself that the failure to exhaust the procedure was attributable to the complainant and not to	(2) Avant de décider qu'une plainte est irrecevable pour le motif que les recours ou procédures mentionnés à l'alinéa 41a) n'ont pas été épuisés, la Commission s'assure que le défaut est exclusivement imputable au plaignant.

another.

Issues and Standard of Review

[19] The sole issue in this application for judicial review is whether the Commission's interpretation and application of s 41(1)(a) were reasonable.

[20] Jurisprudence has previously held that the appropriate standard of review with respect to decisions of the Commission not to deal with a complaint pursuant to s 41(1) of the *CHR Act* is reasonableness (*Chan v Canada (Attorney General),* 2010 FC 1232 at paras 14-15; *English-Baker v Canada (Attorney General),* 2009 FC 1253 at para 13; *Lawrence v Canada Post Corporation*, 2012 FC 692 at paras 17-19; *Mulligan v Canadian National Railway Company*, 2015 FC 532 at paras 13-14).

[21] Reasonableness is concerned with the existence of justification, transparency and intelligibility within the decision-making process. It is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 45, 47-48 [*Dunsmuir*]; *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 59, 62).

Preliminary Issue

[22] A preliminary issue that has been raised by the Respondent is the admissibility of the affidavit of Nathalie Bui sworn October 24, 2014 (the Bui Affidavit). It attaches what the affiant

describes as the entire record of official correspondence between the Commission and the Applicant concerning files 20101251 and 20101252.

[23] As noted by the Respondent, this is the Applicant's second attempt to place this material before the Court. The Applicant previously brought a motion, pursuant to Rule 317 of the *Federal Courts Rules*, SOR/98-106 [*FC Rules*], seeking to have the Commission's entire file produced as part of the Certified Tribunal Record (CTR).

[24] By Order dated November 26, 2014, Prothonotary Tabib refused that request on the basis that the Applicant was not entitled to further production, noting, in particular, that the Applicant had not identified any document that might have been considered by the Commission, or might be relevant to the determining of the issues before the Court, and which had not been included in the CTR.

[25] Therefore, in my view, this Court has already ruled on this issue. The conduct of this judicial review on the merits of the Applicant's claim does not serve as an appeal of the Prothonotary's decision. An appeal of a prothonotary's decision must be brought by motion to the Federal Court (*FC Rules*, R 51(1), the Applicant did not bring such a motion and the time within which he was required to do so has elapsed. On that basis alone the Bui Affidavit is inadmissible and submissions made in reliance on it or in reference to it are to be disregarded.

[26] In any event, this Court has also previously held that material that was not before the decision-maker should generally be excluded for purposes of judicial review (*Love v Officer of*

the Privacy Commission of Canada, 2014 FC 643 at para 85; *Johnson v Canada (Correctional Service)*, 2014 FC 787 at para 129; *Tl'azt'en Nation v Joseph*, 2013 FC 767 at para 16). And in this case, the Bui Affidavit does not fall under any of the recognized exceptions to this rule (*International Relief Fund for the Afflicted and Needy (Canada) v Canada (National Revenue)*, 2013 FCA 178 at para 10; *Gagliano v Canada (Commission of Inquiry into the Sponsorship Program and Advertising Activities)*, 2006 FC 720 at para 50).

[27] The Commission listed the documentation that was reviewed when making its decision, which was contained in the CTR. Accordingly, the additional material contained in the Bui Affidavit is not relevant to the issue before this Court, being whether the Commission's Decision was reasonable based on the record that was before it.

[28] Further, the May 6, 2014 Section 40/41 Report specifically acknowledges that the parties had raised facts in their submissions that had occurred prior to the original Section 40/41 Report of July 6, 2011. The May 6, 2014 Section 40/41 Report stated that, because the Commission had already dealt with the alternative redress procedures available to the Applicant prior to July 2011, its current analysis would be based only on information arising after the Commission's original decision (para 61). As seen from the analysis contained in the May 6, 2014 Section 40/41 Report, prior facts which were set out in the parties' submissions do not constitute a part of the analysis.

[29] For all of these reasons, it is my view that the Bui Affidavit is inadmissible. Accordingly, the Applicant's submissions made in reliance on or in reference to that affidavit have not been considered in this judicial review.

Position of the Parties

[30] The Applicant's position is that he has spent years attempting to satisfy the CF grievance system and acted in good faith including through a CF led biased and fatally flawed investigation and ensuing administrative investigation report. He characterises as cyclical, absurd and unreasonable the suggestion that to satisfy all reasonable steps he should now engage the harassment procedure and, if unsatisfied, pursue a new grievance, potentially all the way to judicial review. That process would create an endless procedural loop that would prevent the Applicant from exercising his right to complain under the *CHR Act*. Accordingly, the Commission unreasonably concluded that the CF's internal process was reasonably available to him.

[31] The Applicant further submits that the Commission ought to have accepted his complaint. The CF grievance process was exhausted because the Chief of the Defence Staff failed to make a decision on the grievance and instead passed it off, requiring the harassment procedures to be initiated. Further, the CF has demonstrated an unwillingness and an inability to handle this complex matter.

[32] The Respondent submits that a review of the reasonableness of the Commission's Decision should include an examination of some or all of the relevant factors (*Chopra v Canada*

(Treasury Board), [1995] 3 FCR 445; *Bagnato v Canada Post Corp*, 2014 FC 914 [*Bagnato*]), including any delay attributable to the Applicant. It should not include the Applicant's subjective and unsubstantiated view that the harassment process is not reasonably available and inadequate because the Applicant has never engaged the process.

[33] The Respondent further submits that the Commission's Decision that the Applicant ought to have used the appropriate CF internal process, which was reasonably available, falls within a range of possible acceptable outcomes. Any circularity in the process, as alleged by the Applicant, is purely attributable to his own refusal to utilize the process that the CF, the FA and the Commission all found to be the appropriate avenue for redress.

Analysis

[34] In this matter the Commission adopted the recommendations made in the Section 40/41 Report, which, in that circumstance, constitute the reasons of the Commission (*D'Angelo v Canada (Attorney General)*, 2014 FC 1120 at para 24 [*D'Angelo*]; *Herbert v Canada (Attorney General)*, 2008 FC 969 at para 26). The Applicant takes no issue with the Commission's form of response.

[35] The Section 40/41 Report stated that s 41(1)(a) and s 42 together mean that the Commission can decide not to deal with a complaint under s 41(1)(a) if it finds that the complainant chose not to finish another process that was reasonably available to him or her. This is not an unreasonable interpretation of these provisions. In *D'Angelo*, Justice Hughes stated:

> [31] Struggling through all the double negatives, section 41(1)(a) of this *Act*, when read in conjunction with section 42(2), means that the Commission *shall* hear a matter *unless* it appears to the Commission that the complainant *ought* to seek other remedies and where the failure to seek those remedies is the fault of the complainant. Even in such a case, it appears that the commission *may*, nonetheless, hear the matter.
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> [32] There is little jurisprudence dealing with section 42(2). In *Guydos v. Canada Post Corp.*, 2012 FC 1001 (F.C.), Justice Mandamin, of this Court, wrote at paragraph 54:
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> > [54] Section 42(2) requires the Commission, prior to determining that a complaint will not be dealt with pursuant to s. 41(1)(a), to satisfy itself that the failure to exhaust the procedure was attributable to the complainant and not to another. As stated in Bell Canada, the term "satisfy itself" indicates Parliament intended to grant significant deference to the Commission's decision that it was satisfied.
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> […]
>
> [35] Section 42(2) of the *Act* is clearly a safeguard so that the Commission should not be forced into hearing a matter where the complainant, him or her self, is the causes of the delay. Section 42(2) should not be read so that the Commission may refuse to hear a matter where those who administer the alternative procedures are themselves the cause of delay. Quite the reverse. The Commission should hear the matter.
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> [emphasis in original]

[36] The Section 40/41 Report then listed factors that may be considered when deciding under s 41(1)(a) whether or not a complainant should keep using the other complaint or grievance process. These were: why the parties did not finish the other process; how much longer that process was likely to take; whether there is new information in that regard; and whether there is anything other than the amount of time the other process may take, such as vulnerability arising from the complainant's current situation or a risk of harm to any participant, that makes it not

"reasonably available" to the complainant such that the Commission should deal with the complaint. The Section 40/41 Report also summarized the CF's submissions of February 20, 2014, and the Applicant's submissions of February 21, 2014 and April 10, 2013.

[37] The question of whether the harassment complaint process was reasonably available to the Applicant is largely a factual question. In my view, there is no question that it was available. The only question being was it reasonably so.

[38] In July 2011 the Commission decided not to deal with the complaint at that time under s 41(1)(a); instead, it asked the Applicant to use another complaint or grievance process first. At the end of that process the complainant could come back to the Commission and ask it to reactivate the complaint.

[39] Given this, the Applicant then filed a grievance pursuant to s 29 of the *National Defence Act*, RSC 1985, c N-5. The process thus engaged is set out in the Queen's Regulations and Orders for the Canadian Forces (QROCF) (online: <http://www.forces.gc.ca/en/about-policies-standards-queens-regulations-orders/index.page>). This envisions consideration and determination of the grievance by the IA (s 7.15). If the complainant is not satisfied with the IA decision, he or she may request that the matter be referred to the FA (s 7.18). The FA for all grievances is the Chief of the Defence Staff (*National Defence Act*, s 29) or his delegate (QROCF, s 7.17). Pursuant to s 29.12 of the *National Defence Act*, the Chief of the Defence Staff shall refer every grievance that is of a type prescribed by regulation to the Grievances Committee for its findings and recommendations before the Chief of the Defence Staff considers

and determines the grievance. These types of grievances are set out in s 7.21 of the QROCF. They include any decision of the Chief of the Defence Staff in respect of a particular officer or non-commissioned officer.

[40] In March 2012 the IA decision was issued. As the Applicant was unsatisfied with that decision, in May 2012 he sought an FA decision. As seen from the March 4, 2013 letter from the Chief of the Defence Staff, the grievance was submitted to the CFGB which conducted an independent review of the grievance and provided findings and recommendations which were disclosed to the Applicant.

[41] The Chief of the Defence Staff stated that the CFGB had analysed each of the contentions in the grievance file and found that the administrative investigation on which the IA had based its decision was "fatally flawed" on several levels.

[42] He also stated:

> The CF's policies on racist conduct and on harassment prevention and resolution are outlined in Canadian Forces Administrative Order 19-43 (Racist Conduct) and Defence Administrative Order and Directive (DAOD) 5012-0 (Harassment Prevention and Resolution). Both are unequivocal in their condemnation of any conduct that causes offence or harm to any person through acts, comments, or displays that demean, belittle, and cause personal humiliation or embarrassment, and any act of intimidation or threat. As much as we in the CF would like to think that we are immune from such behaviours, as a microcosm of the society that we serve, we would be very naïve to think that we, as an organization, would not be subject to instances of this insidious conduct. Accordingly, the CF has a comprehensive framework to deal with such instances in the form of the *Harassment Prevention and Resolution Guidelines*. The CF policy and guidelines flow directly from and are consistent with the Treasury Board's *Policy*

> *on Harassment Prevention and Resolution in the Workplace* and go beyond the requirements of the *Canadian Human Rights Act* in their scope.

[43] The Chief of the Defence Staff expressed concern that the Applicant had chosen not to avail himself of the CF harassment process. His lack of cooperation by failing to fulfil the obligation to provide full written details of his complaint was an impediment to the fair, impartial and expedient harassment investigation and contributed to the "procedural morass" that followed. The Chief of the Defence Staff went on to say that there had been important evidentiary omissions and procedural errors that compromised the integrity of the administrative investigation process resulting in what the CFGB had rightly referred to as a fatally flawed administrative investigation; consequently, the IA decision that was based on that investigation was equally flawed.

[44] Although the Chief of the Defence Staff had identified his role as being to determine whether the harassment occurred and whether the Applicant was a victim of mistreatment at the hands of a superior officer, he concluded that in light of the CFGB findings, he could not render a properly informed decision. He therefore decided to order a new harassment investigation.

[45] The Chief of the Defence Staff's reference to a lack of clarity as to the order in which the CF harassment and grievance processes are to be utilized is of note. He stated that the CFGB had highlighted that there was lack of clear policy direction regarding the relationship between the harassment and grievance processes. DAOD 2017-1 states:

> The following are situations in which other complaint and mechanisms should be used prior to proceeding with a grievance:

• a complaint of harassment or abuse of authority

[46] While s 4.10 (Coincidental Complaints and Grievances) of the *Harassment Prevention and Resolution Guidelines* states:

> If an individual decides to file a grievance on the same issue as a harassment complaint, the applicable grievance mechanism will apply and the harassment complaint will be closed.

[47] The Chief of the Defence Staff stated that determination of misconduct, as it pertains to harassment or acts of racism, must be ascertained through a procedurally fair and impartial investigation process, such as that outlined in the *Harassment Prevention and Resolution Guidelines*. The grievance process should be engaged only if the complainant feels they have been wronged as a result of the outcome of the investigation process or if there is an excessive and unjustifiable delay in handling the complaint.

[48] The Chief of Military Personnel (CMP), in consultation with the Assistant Deputy Minister Human Resources – Civilian, "will harmonize the *Harassment Prevention and Resolution Guidelines* with DAOD 2017-1 so that it is very clear that harassment complaints or grievances containing allegations of harassment must be dealt with first under the harassment policy and only after a proper harassment investigation has been completed".

[49] The Chief of the Defence Staff decided that:

> I am not prepared to grant the redress that you seek. Yet, I am troubled by your allegations and most particularly, by the lack of a proper investigation into their validity. As I mentioned, the CF takes this issue very seriously and consequently, it is imperative that you initiate the harassment investigation process by submitting

> a formal harassment complaint to the CO of 4 CFMCU. You have 90 days from the receipt of this letter to make your submission. The CO of 4 CFMCU shall, upon receipt of your harassment complaint, initiate a harassment investigation into the allegations therein. Let me be very clear on this point: an investigation will not commence until there is a formal harassment complaint submitted to the CO of 4 CFMCU and you commit, in writing, that you will fully participate in such an investigation to ensure that a thorough and impartial analysis may determine the legitimacy of your allegations. If you do not respond within 90 days, there will be no further action taken on your alleged complaints.
>
> Given the complexities of this case, compounded by the length of time that has elapsed since the alleged incidents, the CO of 4 CFMCU might consider engaging a private consulting firm to assist with the investigation… When the investigation has been completed, you may grieve its outcome if the conclusions and recommendations are not to your satisfaction.

[50] In my view, regardless of the factual background prior to the Chief of the Defence Staff's decision and regardless of the lack of clarity as to the order in which harassment complaints or grievances containing allegations of harassment were to be dealt with and any delay or confusion that this may have previously caused, as of March 13, 2013, the Applicant was on clear notice of what was required of him, and that was that he initiate a harassment complaint within 90 days. He was also aware that if he failed to do so, there would be no further action taken with respect to the allegations.

[51] The CF's submission, as summarized by the Section 40/41 Report, stated that on May 14, 2013 it received from the Applicant a photocopy of his original grievance, not a formal harassment complaint as required by the Chief of the Defence Staff. On May 22, 2013, the RO sent the Applicant a letter requesting that he redraft his submission, explain each allegation specifically and provide any information that would enable the harassment investigation to be

thorough and complete. The RO also notified the Applicant's current CO in order to ensure that an assistant could be appointed for the Applicant to help him with the process. The Applicant did not respond to the RO's request. The RO sent another letter to the Applicant on July 19, 2013 requesting an update on the preparation of this harassment complaint but again did not receive a response.

[52] The Section 40/41 Report noted the other factors that were considered in reaching its recommendation, including the attempt of the Chief of the Defence Staff to address the procedural fairness and other concerns by having the matter dealt with by a formal harassment complaint, with an outside firm being hired to investigate. Further, as to timeliness, that both parties bore some responsibility for the prior delays in the process and that it was not clear that the Commission's process would be more expedient than the CF's harassment policy, if it were still available to the Applicant. However, at this stage, the Commission's process was the only one still available to the Applicant. Further, that the Applicant had provided no information to indicate that he was personally vulnerable.

[53] The Applicant's position is that the harassment complaint process as proposed by the Chief of the Defence Staff cannot be considered to be reasonably available. The Applicant submits that there has already been a considerable delay, that he commenced the grievance process and that, at the end of that process, rather than rendering a decision, the Chief of the Defence Staff instead attempted to effect a harassment investigation. This is "cyclical" because he was required to commence the grievance process, which now requires a harassment

investigation, which in turn can be grieved, and that this has the potential of becoming an endless loop.

[54] In my view, this argument cannot succeed. Although the CFGB's report was not in the CTR, it is clear from the Chief of the Defence Staff's letter that there was a lack of clarity regarding the relationship between the harassment and grievance processes. This may well have contributed to the prior delay and procedural missteps in this matter. And, unless the relationship is clarified, it may have the same impact on other matters in the future.

[55] Regardless, in this case, the decision by the Chief of the Defence Staff had the effect of resetting the clock. While it is true that a grievance from the conclusions and recommendations of the harassment investigation would have been available to the Applicant, this did not mean that an endless procedural circle would follow. The problem identified in the original grievance process initiated by the Applicant was that there was insufficient information to deal with the harassment complaint. This led to the Chief of the Defence Staff's decision that a harassment investigation was required. Had that been carried out, any further grievance process then open to the Applicant would have been based on the findings of the harassment investigation, not the absence of one, and would not have resulted in a decision that a harassment investigation was required. Thus, this does not result in an endless cycle, nor does it establish that the process proposed by the Chief of the Defence Staff was not "reasonably available" to the Applicant.

[56] Further, the original grievance process would have been exhausted if the Applicant had participated in the proposed harassment investigation. The Applicant does not submit that it was

beyond the authority of the Chief of the Defence Staff to proceed as he did, by requiring the harassment investigation. In addition, he discontinued his judicial review of the FA.

[57] I also do not agree with the Applicant's submission that the Chief of the Defence Staff admitted that the CF is unable or unwilling to fully and objectively determine a complaint of racial discrimination when he stated the CO "might consider engaging a private consulting firm to assist the investigation" in his letter given the complexity of the case, compounded by the length of time that had elapsed since the alleged incidents. A suggestion that an independent third party with experience in the investigation of harassment complaints could be utilized, if anything, would seem to suggest the incorporation of an additional measure to ensure procedural fairness in the process.

[58] The Applicant also submits that the Chief of the Defence Staff's statement quoted at paragraph 42 above is an acknowledgment that racism exists within the CF, at least to some degree, and that his inaction to combat racism may mean that it will only continue to exist. However, read in whole, the statement clearly expresses that the CF *Harassment Prevention Resolution Guidelines* are intended to deal with any instance of racism and harassment.

[59] As to systemic discrimination, the Section 40/41 Report stated that although the Applicant described the complaint as one of systemic discrimination, no policy or practice had been identified in the summary of complaint. A review of the complaint confirms that the complaint clearly pertained to the Applicant's CO and made no allegation of systemic

discrimination. At the hearing before me, the Applicant confirmed that this was the case and that systemic discrimination was therefore not pursued as an issue in this matter.

[60] In summary, the Commission considered the factual basis of this matter and found that there was a review procedure that was reasonably available to the Applicant and that had not been exhausted by the Applicant prior to the expiry of the 90 day deadline set by the Chief of the Defence Staff. Based on the record, this finding was reasonably open to it.

[61] The Commission also recognised that this finding would leave the Applicant without recourse. However, as noted by the Respondent, this Court has held that the reasonableness of a decision is not affected by the absence of the "safety net" of renewed access to the Commission (*Bagnato* at para 19). In this case, while the CF review process itself is no longer available to the Applicant, nor is there a safety net, the Commission recognized this outcome when making its decision.

[62] In the circumstance of this matter, the Commission's finding that the Applicant was aware of, but refused to participate in, the CF's internal harassment complaint process and that the failure to exhaust the procedure was solely attributable to the Applicant is to be afforded deference (*D'Angelo* at para 32) and also fell within a range of possible acceptable outcomes defensible in respect of the facts and law (*Dunsmuir* at para 47).

[63] For these reasons the application is dismissed. The parties have agreed to costs in the amount of $2,500.00, accordingly, the Respondent shall have its costs in that amount.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed.

2. The Respondent shall have its costs in the amount of $2,500.00.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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