Federal Court  Cour fédérale

Date: 20150911

Docket: T-2495-14

Citation: 2015 FC 1071

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, September 11, 2015

PRESENT: Mr. Justice Roy

BETWEEN:

LAURENT DUVERGER

Applicant

and

2553-4330 QUÉBEC INC. (AÉROPRO)

Respondent

JUDGMENT AND REASONS

[1] The applicant, Laurent Duverger, seeks to have the Canadian Human Rights Commission's decision not to rule on the complaint filed by him set aside. The application for judicial review is made under section 18.1 of the *Federal Courts Act*, (RSC, 1985, c F-7).

[2] The issue here is the decision by the Canadian Human Rights Commission (the Commission) of October 29, 2014. The applicant, who self-represented, alleged that his complaint is not vexatious within the meaning of paragraph 41(1)(*d*) of the *Canadian Human*

Rights Act, RSC(1985), c H-6 (the Act), as the Commission decided. This paragraph reads as follows:

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 :
. . .	[…]
(d) the complaint is trivial, frivolous, vexatious or made in bad faith;	d) la plainte est frivole, vexatious ou entachée de mauvaise foi;

[3] The applicant alleged in his application for judicial review of December 8, 2014, that the [TRANSLATION] "complaint is not vexatious within the meaning of paragraph 41(1)(*d*) of the *Canadian Human Rights Act* because my complaint mainly concerns moral prejudice caused by defamation and discriminatory harassment after my resignation on June 21, 2010, and, in particular, wage discrimination, which does not fall under the jurisdiction of the Commission de la santé et sécurité au travail (CSST), the Commission des lesions professionnelles (CLP) or Labour Canada."

[4] As the Court repeated a number of times during the hearing, the application for judicial review is to be examined on a limited basis. The applicant has attempted to widen the debate to deal with the merit of his complaint, which was not appropriate.

[5] Moreover, the Court finds that leave for judicial review must be granted because the complaint—based on two issues raised with the Commission by Mr. Duverger—cannot be construed as vexatious within the meaning of paragraph 41(1)(*d*) of the Act.

I. The Commission's decision

[6] The Commission adopted the findings of the report dated July 21, 2014, on sections 40 and 41 of the Act (the Section 40/41 Report) and decided not to deal with the complaint filed on October 29, 2014. Two reasons emerge from those findings. First, a decision by the Commission des lésions professionnelles (CLP) of Quebec contained essentially the same allegations as those filed with the Commission. According to the Commission, the CLP decision reviewed the issues related to the complainant's disability, his employment history, allegations of harassment and his attempts to voice his issues and concerns with management related to workplace harassment (para 34, Section 40/41 Report).

[7] The second reason, related to the first, was that it was possible for another administrative tribunal to deal with human rights allegations with similar remedies to those of the Commission. Not being satisfied with a decision made by another tribunal is not sufficient grounds for having his case heard by Commission if this other tribunal exercises concurrent jurisdiction through a fair process and considers human rights concerns. Consequently, the Commission agrees that [TRANSLATION] "since the complainant's allegations of discrimination were dealt with as part of the CLP appeal process, the complaint is therefore vexatious within the meaning of the Act." The complaint is said to be "vexatious" because it was already dealt with before another tribunal. Issue estoppel is allegedly applied in accordance with the prescriptions of *Figliola* and *Penner*, two Supreme Court of Canada decisions.

[8] On closer inspection, it is clear that the Commission's findings on October 29, 2014, are derived from the analysis made in the Section 40/41 Report. In fact, the Commission's decision

is based on the Report's findings. The Report only covers the issue of whether to accept the complaint.

[9] Mr. Duverger complained about job discrimination and sections 7 and 14 of the Act were cited. They read as follows:

7. It is a discriminatory practice, directly or indirectly, (a) to refuse to employ or continue to employ any individual, or	7. Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite :
(a) to refuse to employ or continue to employ any individual, or	a) l'utilisation ou la diffusion d'un formulaire de demande d'emploi
(b) in the course of employment, to differentiate adversely in relation to an employee, on a prohibited ground of discrimination.	b) la publication d'une annonce ou la tenue d'une enquête, oralement ou par écrit, au sujet d'un emploi présent ou éventuel.
14. (1) It is a discriminatory practice,	14. (1) Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait de harceler un individu:
(a) in the provision of goods, services, facilities or accommodation customarily available to the general public,	a) lors de la fourniture de biens, de services, d'installations ou de moyens d'hébergement destines au public;
(b) in the provision of commercial premises or residential accommodation, or	(b) lors de la fourniture de locaux commerciaux ou de logements
(c) in matters related to employment,	(c) en matière d'emploi,
(2) Without limiting the	(2) Pour l'application du

generality of subsection (1), sexual harassment shall, for the purposes of that subsection, be deemed to be harassment on a prohibited ground of discrimination.	paragraph (1) et sans qu'en soit limitée la portée générale, le harcèlement sexuel est réputé être un harcèlement fondé sur un motif de distinction illicite.

[10] Clearly, paragraph 7(*b*) and paragraph 14(1)(*c*) are applicable to the case at hand.

[11] The issue to be decided shall first be set out. Since human rights issues may be ruled on by other decision-makers than the Commission, have they been appropriately dealt with elsewhere such that the Commission was not wrong to not deal with the complaint?

[12] Based on *British Columbia (Workers' Compensation Board) v Figliola*, 2011 SCC 52, [2011] 3 SCR 422 (*Figliola*) and *Penner v Niagara (Regional Police Services Board)*, 2013 SCC 19, [2013] 2 SCR 125 (*Penner*), the Commission determined that the test to be applied is to see whether, to cite *Figliola*, "the previously decided legal issue was essentially the same as what is being complained of." It is worthwhile to cite paragraph 37 of *Figliola* in its entirety:

> [37] Relying on these underlying principles leads to the Tribunal asking itself whether there was concurrent jurisdiction to decide human rights issues; whether the previously decided legal issue was essentially the same as what is being complained of to the Tribunal; and whether there was an opportunity for the complainants or their privies to know the case to be met and have the chance to meet it, regardless of how closely the previous process procedurally mirrored the one the Tribunal prefers or uses itself. All of these questions go to determining whether the substance of a complaint has been "appropriately dealt with." At the end of the day, it is really a question of whether it makes sense to expend public and private resources on the relitigation of what is essentially the same dispute.

Moreover, the Commission must also decide whether the issue was dealt with fairly at a procedural level.

[13] The Report was then used to conduct a certain analysis of the decision rendered by the CLP to eventually find that the test was satisfactory, at a procedural level and based on the merits of the case.

[14] Being satisfied that the CLP is an independent tribunal acting impartially, which is moreover not contested by anyone, the Commission found that the issues in the complaint before it are essentially the same as those that would have been dealt with by the CLP as they are related to unfavourable treatment and harassment on the grounds of national or ethnic origin or disability referred to by Mr. Duverger. Consequently, the Report determines that [TRANSLATION] "the discriminatory practices alleged in the complaint led to a work-related injury of a mental health nature" (Section 40/41 Report, para 28). It may be useful to reproduce below the two paragraphs from the CLP decision cited by the Commission to establish that, according to it, actions violating human rights were noted by the CLP: [TRANSLATION]

> [58] The undersigned noted that threatening, hostile and degrading gestures were made, putting the worker's health and safety at risk and that humiliating vexatious language was used many times, the whole undermining the worker's sense of dignity. All of the events and the cruelty surrounding them were very different from what is likely to occur in in a normal work environment.
>
> [62] … not only did the employer not support the worker, but the employer apparently failed his obligations to his protect health, safety and physical integrity therefore infringing upon the provisions of the *Occupational Health and Safety Act*. The facts show that the worker's fundamental rights under the *Canadian Charter of Rights and Freedoms* were also violated …

[15] The Commission easily concluded that the parties in this case were afforded a fair hearing before the CLP in order to [TRANSLATION] "raise all the human rights issues" (para 38 of the Section 40/41 Report). In fact, in the Commission's opinion, the procedure followed by the CLP and that relating to a complaint before the Commission do not demonstrate any significant differences. The CLP reviewed the employment history, harassment allegations related to the applicant's disability and his national or ethnic origin, and the respondent's inaction in this case, despite the applicant's attempts to raise issues and concerns in this regard.

[16] Given the fact that Mr. Duverger stated that he had filed a complaint with the Commission because he was dissatisfied with the amount awarded by the CLP, the Commission could not sit in appeal of the CLP decision. Remedies had been provided for human rights violations.

II. Standard of review

[17] Case law is consistent that the Commission's decisions to accept a complaint are reviewable under the reasonableness standard. Madam Justice Bédard, then of this Court, identified in paragraph 15 of her decision in *Conroy v Professional Institute of the Public Service of Canada*, 2012 FC 887, [2012] FCJ 942, the case law which held that the jurisprudence decisions made by the Commission under sections 40 and 41 of the Act were reviewable under the reasonableness standard. Far from retracting, the Court has continued in this direction as confirmed by the Federal Court of Appeal in *Bergeron v Canada (Attorney General)*, 2015 FCA 160 in para 41, and in the *Public Service Alliance of Canada v Canada (Attorney General)*, 2015 FCA 174, at paras 26 to 29. It is always useful to remember what this standard is and the

now famous paragraph of *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, is worthwhile being cited at length:

> [47] Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquiries into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But 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 law.

[18] Mr. Duverger must therefore satisfy this Court that the Commission's decision not to deal with his complaint about a violation of sections 7 and 14 of the Act was not reasonable because the complaint was not adequately dealt with. The issue heard before the CLP was not basically the same as that raised by the complaint. The bar is set high. Were the justification given by the Commission, the transparency and the intelligibility of the decision-making process adequate? Was the Commission's decision not to deal with the complaint a possible, acceptable outcome?

III. The parties' positions

[19] The role of a court of justice in an adversarial system such as ours is obviously to hear the parties and settle issues opposing them on the basis of the evidence and arguments presented. When one of the parties in a dispute is not represented by counsel, the Court could try to provide some assistance and show leniency with respect to procedural lapses, but it cannot substitute for the applicant. Otherwise, the Court would become a party to the dispute that it is tasked with

settling: it is not possible to be both a judge and a party. Therefore, the issue must be dealt with based on the applicant's pleading. Guided by case law, the Court makes a generous reading of it, taking into account deficiencies inherent in a case where a party is not represented by an counsel in an effort to understand the arguments made (see *Biladeau v Ontario (Attorney General)*, 2014 ONCA 848).

[20] It is not a simple matter to grasp the applicant's argument. At the outset, in the application for judicial review filed on December 8, 2014, the applicant states that his [TRANSLATION] "complaint concerned, in particular, the pain and suffering caused by defamation and discriminatory harassment subsequent to my resignation on June 21, 2010, as well as wage discrimination, which did not fall under the jurisdiction of the CSST, the CLP and Labour Canada."

[21] In an affidavit dated December 17, 2014, mainly addressed to the respondent's representatives, the applicant complains about discriminatory defamation and post-employment harassment. Although, there is no longer an employer-employee relationship, Mr. Duverger is still pleading that the Act still applies in his case.

[22] The said affidavit, in addition to alleging defamation and discriminatory harassment, is an agglomeration of paragraphs describing Mr. Duverger's medical condition, case law, his employment history, various steps taken with the provincial and federal authorities (CSST and CLP) and (Employment Insurance and Labour Canada). One of the parts of the affidavit tends to discuss wage discrimination which the applicant is complaining about and that he alleged before

the CLP. The CLP had to conclude that it did not have jurisdiction to rule on the wages paid on hiring.

[23] Fortunately, at the hearing, the applicant clearly explained that his complaint to the Commission was exclusively related to two points: he suffered from wage disparity because of his national origin and his disability and he was allegedly the victim of post-employment discriminatory harassment for the same reasons. Undoubtedly, this is the subject of his complaint to the Commission, which the Commission refused to take up.

[24] His employment at the meteorological station in Chibougamau, Quebec, which is at the source of the conflict, began on October 17, 2007, with a company called ATS Services. This company, whose mandate ended on May 11, 2008, was replaced by Aéropro, the respondent, on May 12, 2008. Mr. Duverger was then employed by Aéropro, and he resigned on June 21, 2010.

[25] In fact, most of the affidavit of December 17, 2014, discusses the applicant's situation after his departure in June 2010, including his employment history and the steps he took in the following months. Much of this information appears to be justifications explaining why he was late filing his claims. This tardiness is not the subject of the judicial review currently before this Court.

[26] The file also shows that the complaint was submitted to the Canadian Human Rights Commission on November 26, 2013. It is, of course, the fundamental document setting out the complaints. Far from being clear, it seems to focus on three topics. First, the applicant complains

of post-employment discrimination. He also discusses the deadlines for applying for remedies. Finally, the applicant refers to the salary and wages that he allegedly received from the respondent. As indicated above, the subject of the complaint was set forth by the applicant at the hearing for the application for judicial review in a much clearer manner than in the documents filed. Nevertheless, these documents illustrate the basis of the complaint. As we will see, the Commission does not seem to have analyzed the complaint's content.

[27] The salary issue consists of two components, which in my opinion, have created some confusion. The first component is related to incorrectly paid overtime and statutory holidays. The second relates to salary increases that the applicant claims not to have received. However, the applicant's allegations about pay raises are based on comparisons he made with two other employees about whom we have no information. The applicant is complaining that another employee received a raise of $0.50 per hour, but before him (November 14, 2009, rather than on January 8, 2010), bringing his hourly salary to $12.00, whereas that employee made more errors at work than the applicant. In the other case, Mr. Duverger complains that, when his salary increased on January 8, 2010, to $12.00, it was less than that of another employee. While the applicant's salary rose to $12.00 on January 8, 2010, and that of the other employee, who had also earned $11.50/hour previously, rose to $12.25. The applicant claimed that this disparity was related to his national origin and his disability. The Court notes that the applicant believes that his salary should have been $12.00 on May 12, 2009, and $12.25 on November 14, 2009. Given the dates referred to by the applicant regarding his two co-workers, it is unclear on what basis this statement was made.

[28] The applicant seems to allege discrimination based on ethnic epithets addressed to him when he complained and on references to his fragile mental state. The other two employees involved are of a different ethnic origin than the applicant, and we do not know why they might be paid different salaries by the employer, nor do we know anything about their employment history, experience, academic background or duties assigned to them. The reality is that the allegation is general at best. However, it was made. Mr. Duverger claims to have suffered from wage discrimination while employed by Aéropro.

[29] The other allegation made by the applicant is that he was subject to defamation and discriminatory harassment after he left his employment.

[30] The applicant alleges that neither component of his complaint to the Commission was dealt with in any way whatsoever or dealt with by the CLP. The Commission was mistaken to find that the matter had been considered elsewhere by another administrative tribunal that would have dealt with the human rights issues. Contrary to the Commission's finding, the CLP did not deal with the same allegations as those raised in the complaint. The two were expressly or implicitly excluded.

[31] The respondent, Aéropro, answers that the applicant is seeking many different remedies for the purpose of founding an acrobatic flight company. We learn that the applicant received over $125,000 in compensation from the CLP and that he had sent a demand letter asking for $1 million, referring to, among other things, discriminatory treatment after he resigned and wage discrimination. The applicant's motivation would have been financial gain.

[32] The respondent argues that the issues raised by the applicant before the Commission had already been the subject of adjudication. The criteria set out in *Figliola* and *Penner* had been met and the Commission had been correct to declare the complaint vexatious under paragraph 41(1)(*d*) of the Act.

IV. Analysis

[33] This case is made more difficult than necessary because of the quality of the file, on each side. The file not only appears incomplete and confused, but the arguments presented were also deficient. It is not an illustrious example of the adversary system, defined as follows in *Black's Law Dictionary*, 7th ed.:

> **adversary system**. A procedural system, such as the Anglo-American legal system, involving active and unhindered parties contesting with each other to put forth a case before an independent decision-maker. – Also termed adversary procedure and (in criminal cases) accusatorial system or accusatory procedure.

This judicial review was therefore conducted based on the thorough review of the documentation provided and on rigorous questioning of the parties before this Court.

A. *The Commission's decision*

[34] I will begin by analyzing the Commission's refusal to deal with the complaint. This decision only confirms the conclusion of the Section 40/41 Report. The Commission states that the complaint was vexatious because, in its opinion [Translation] "the appeal filed with the CLP essentially contains the same allegations as those raised in this complaint. By rendering her decision, the administrative judge reviewed the main substance of the allegations raised in this

complaint." On the basis of Supreme Court jurisprudence in *Tranchemontagne v Ontario (Director, Disability Support Program)*, 2006, SCC 14 and *Figliola* and *Penner*, the Commission said that it had the duty to respect the finality of decisions already made.

[35] It is rather surprising that I could not find in the Section 40/41 Report the issues that were raised and settled by the CLP that would have been necessary for the Commission to respect the finality of the decision. In other words, the Commission stayed very general and was content to state in paragraph 34 that [TRANSLATION] "the administrative judge reviewed issues relative to the complainant's disability, employment history, harassment allegations and attempts to raise his issues and concerns with management about the harassment."

[36] The Report referred to a significantly tighter analysis grid in paragraph 17. However, this analysis has not been made. In fact, the Report describes none of the specific grievances raised in the complaint. It simply says that the CLP decision has the same issues as those that the applicant wished to submit to the Commission, without elaborating further.

[37] After a careful review of the documentation, however, the Court can only observe that the complaint relates to two specific issues. The applicant complains of the treatment he received from the respondent, through its agents, after his resignation on June 21, 2010. He describes it as defamation and discriminatory harassment. He also complains of the hourly rate given to him in 2009 and 2010. As already stated above, his hourly rate was increased by $0.50/hour as of January 9, 2010, whereas the rate of $12.00/hour had been given to another employee as of November 2009. Moreover, this increase in January 2010 was lower than that given to another

employee who earned a salary equal to that of Mr. Duverger in January 2010, that is, $11.50/hour, but whose raise had been $0.75 instead of $0.50/hour.

[38] To allow the Commission to claim that it must respect the CLP's decision, it is still necessary to deal with the two issues that the CLP decided. The test to be applied is ". . . whether the previously decided legal issue was essentially the same as what is being complained of to the Tribunal…" (*Figliola*, at para 37). The Commission should have determined which legal issues were decided by the CLP to see whether they were essentially the same as those raised in the complaints before it. Therefore, the Commission should have verified whether the CLP had dealt with wage discrimination and post-employment discriminatory harassment. The Commission had to make this determination in a reasonable manner. This review was not made.

[39] In its Section 40/41 Report, the Commission barely alluded to the issue of the salary and wages paid to the applicant, noting in paragraph 4 that a complaint was pending under the *Canada Labour Code*. It noted in paragraph 21 that Aéropro indicated that $6,889.11 was owed in [TRANSLATION] "unpaid overtime and statutory holidays." Whatever the case may be, I did not find any reference to the subject of the complaint anywhere else, e.g., the setting of the hourly rate for Mr. Duverger that he alleges was discriminatory. The issue of unpaid statutory holidays and overtime was not what Mr. Duverger was complaining about before the Commission. Moreover, the merits of that case remain unclear because the payment order of July 3, 2014, issued under the *Canada Labour Code* for a total amount of $6,730.64 to Aéropro would have been contested. I believe that litigation in that regard is continuing on another path, which never intersects with the complaint made to the Commission. As we will see later, the CLP never

talked about the issue of overtime and statutory holidays, or the setting of discriminatory hourly rates. We have difficulty seeing how the Commission could reasonably claim that it must be respectful of the CLP's decision in this regard. We will come back to this later.

[40] With regard to the issue of harassment after June 21, 2010, the day when Mr. Duverger left his employment, it is also surprising that the Commission alleges that the claim is vexatious because it was already the subject of an adjudication by an administrative tribunal. In fact, it was not adjudicated by the CLP. I will now consider the CLP's decisions.

B. *Decisions of the CLP on June 27, 2013 and July 15, 2014*

[41] After finding that Mr. Duverger's application was admissible, the CLP held a hearing on June 25, 2013. Aéropro apparently chose not to participate in the process because it was not represented and did not provide written arguments (the CLP's decision, June 27, 2013). Therefore, only Mr. Duverger's version was presented before the CLP which was convinced by his testimony that [TRANSLATION] "was full of measurement and restraint, devoid of ambiguity, exaggerations, reluctance and contradictions" (para 14).

(1) Post-employment wage discrimination

[42] The CLP concluded that the work injury for which compensation was sought occurred on June 21, 2010, the day that Mr. Duverger resigned. His resignation was the outcome of events that began on October 17, 2007. The CLP noted in paragraph 31 that the company for which Mr. Duverger worked starting on October 17, 2007, had changed in May 2009, but that the station supervisor had stayed the same. The contracts of employment were renegotiated in May

2009, but we do not know what their content was. In any case, the file does not reveal anything about the tasks assigned to various employees, the conditions of employment, schedules, classifications or required experience.

[43] The problem is that the complaint filed with the Commission is related to actions occurring after June 21, 2010. The decision whose finality the Commission wants to respect does not deal with anything that occurred after June 21, 2010, whereas it is only the period after June 21, 2010, which is addressed by the complaint. The Commission does not explain in any case how a decision on the period before June 21, 2010, may constitute a decision on the period after June 21, 2010 (assuming, of course, that the alleged actions occurring after June 21, 2010, may constitute prohibited discrimination under the Act). The only issue dealt with by the CLP's decision was harassment before June 21, 2010, which led to a work injury. The harassment alleged to have happened after June 21, 2010, whether it was discriminatory or not, could not have been the subject of the CLP's decision: it could not have decided this issue.

[44] Of course, this does not mean that the allegation of post-employment discriminatory harassment will force the Commission to rule on the complaint. There could be other reasons why the complaint would be inadmissible. It would have been up to the Commission to determine whether the Act targets post-employment discriminatory harassment. The important thing to do at this stage is to determine whether the decision to refuse to rule on the complaint because it is vexatious, within the meaning of paragraph 41(1)(*d*), is reasonable.

[45] I do not believe that it is reasonable because the reason given, namely that the CLP's decision essentially dealt with the same allegation as the one before the Commission, is unsustainable. A decision dealing with discriminatory harassment during the employment period may not also be a decision affecting post-employment actions.

[46] The important point for our purposes is the fact that the work injury, which is the subject of the compensation is crystallized [TRANSLATION] "because of a work accident on June 21, 2010." The CLP did not deal with the events subsequent to June 21, 2010, other than to seek confirmation or substantiation of the alleged events that occurred before June 2010. The work injury for which compensation was paid is recognized to be the one that occurred on June 21, 2010.

(2) Wage discrimination

[47] The assessment of adequacy, based on a comparison made by the Commission between the CLP's decision on June 27, 2013, and the complaint submitted to the Commission, relates only to the alleged discriminatory harassment. The only conclusion reached by the CLP was that Mr. Duverger [TRANSLATION] "suffered a work injury because of a work accident on June 21, 2010." As I have noted, no decision was made about wage discrimination. The rest of the information confirms this conclusion. Further to the decision of the CLP of June 27, 2013, concluding that a work injury had been suffered, it was necessary to determine the compensation to be granted. The CSST had to make this determination and it was completed on September 28, 2013. Mr. Duverger also contested the decision by the Commission de la santé et de la sécurité du travail (CSST) of September 28, 2013 before the CLP.

[48] As I mentioned before, the June 27, 2013, decision of the CLP confirmed the existence of a work injury, but did not touch on the calculation to determine the compensation. It was only on July 15, 2014, that the CLP determined, in the appeal from the CSST, on the amount of the compensation. In the shambles of the applicant's proceedings, his affidavit of December 17, 2014, refers to it. However, it could not be contested in my opinion that he had notified the Commission, in response to the Section 40/41 Report dated July 21, 2014, of the existence of this new decision by the CLP of July 15, 2014, and well before October 29, 2014. He did so in the comments made on the Report of June 21, 2014, submitted on or about July 31. In other words, the applicant informed the Commission after the Report of July 21 of the existence of a decision by the CLP dated July 15, 2014.

[49] This decision of July 15, 2014, is important. Let us review the facts. Mr. Duverger complained on November 28, 2013, of post-employment discriminatory harassment (i.e. after June 21, 2010) and wage discrimination in 2009 and 2010. This was the complaint before the Commission, on which a report was prepared on July 21, 2014, and whose recommendation was not to rule on the complaint under paragraph 41(1)(*d*) of the Act was accepted on October 29, 2014. This recommendation covers both complaints, including the one on wage discrimination that the CLP did not deal with. The CLP's decision of June 27, 2013, does not cover wage discrimination. The Report of July 21, 2014, does not say anything further on this topic.

[50] The issue comes up again in the CLP decision of July 15 because Mr. Duverger wanted to include the compensation he was claiming to be owed for unpaid statutory holidays, overtime and wage discrimination in the basis of calculation.

[51] The CLP denied the application related to leave and overtime because the matter was still subject to litigation before another federal court. The CLP indicated that it would be up to Mr. Duverger to adjust the basis of calculation when the dispute reached an outcome (para 34 of the CLP decision of July 15, 2014). With regard to wage discrimination, the CLP stated that it could not render a decision. We read the following in paragraph 35 of the July 15 decision:

> [TRANSLATION]
>
> [35] With regard to the worker's application related to salary he claims not to have been paid since he was hired because of discrimination, the Commission des lésions professionnelles determines that it cannot render a decision on this issue.

[52] This decision of July 15, 2014, brought to the Commission's attention after the Section 40/41 Report, states that the wage discrimination allegation, which was the subject of the complaint before the Commission could not be decided by the CLP. Therefore, this decision of July 15, 2014, did two separate things. The CLP said it could not render a decision on wage discrimination and it denied the request for an adjustment with respect to unpaid overtime and statutory holidays (in addition to a few payroll deduction errors) because the dispute between Mr. Duverger and Aéropro before Labour Canada had not been resolved at the time of the July 15, 2014, decision.

[53] The applicant did not complain to the Commission about deficiencies regarding unauthorized payroll deductions, unpaid overtime and unpaid statutory holidays. It was dealt with by Labour Canada which could have an impact on the salary to be adjusted by the CSST. He complained exclusively about wage discrimination.

[54] The Section 40/41 Report is dated July 21, 2014. It does not make any reference to the CLP decision of July 15, 2014, which states that the CLP cannot rule on the wage discrimination complaint. In fact, the Report, which tries to assess the overlap between the CLP decision and the complaints before the Commission, states that the [TRANSLATION] "other proceeding," the one in which the two complaints allegedly were decided, was the CLP decision of June 27, 2013 (Section 40/41 Report, para 18). The decision of the Canadian Human Rights Commission to refuse to rule on the complaint of November 28, 2013, has only adopted the conclusions of the Report. These conclusions are only the outcome of the CLP decision of June 27, 2013, which does not have any bearing on the wage discrimination allegation.

[55] This allegation is instead commented on in the decision rendered one year later, on July 15, 2014, where the CLP [TRANSLATION] "determines that it cannot render a decision on this issue" (para 35 of the CLP decision of July 15, 2014). How can you then characterize the Commission's decision as reasonable when the reason given is that the matter was heard and decided by the CLP, despite the fact that it was not part of the decision of June 27, 2013, and that the CLP found that it could not rule on this issue in its decision of July 15, 2014? Although it is understandable that the Section 40/41 Report of July 21 omitted to note the CLP decision of July 15 rendered only six days earlier, the fact remains that the Report established that the CLP decision of June 27, 2013, dealt with the complaints. That could not have been the case for the alleged wage discrimination because the decision of June 27, 2013, did not touch on it at all. Moreover, the CLP decision of July 15, 2014, was brought to the attention of the Commission which seems to have ignored it because the Commission deferred to the conclusions of the

Report of July 21, 2014. In any case, it cannot be said that an issue was decided when the decision-maker determines that it cannot render a decision.

C. *Scope of the decision on the judicial review*

[56] The scope of the decision on the judicial review needs to be well defined. The Court limits its finding on discrimination to observe that the Commission could not reasonably refer to the CLP decision to claim that this other administrative tribunal had decided a legal issue that was essentially the same as the one raised in the complaint. The decision of June 27, 2013, does not refer to it. The decision of July 15, 2014, notably states that it cannot rule on the issue. However, this observation does not in any way suggest that any conclusion was reached about the existence, or not, of wage disparity, or wage disparity prohibited by the Act. These are issues for the Commission. The judicial review is only intended to ensure that the decision made under paragraph 41(1)(*d*) of the Act is legal because it constitutes a reasonable decision.

[57] Contrary to what is stated by the Commission, the CLP decision of June 27, 2013, does not contain the same allegations as those raised in the complaints. The subject of wage discrimination was dealt with in the decision of July 15, 2014, in which the CLP wrote that it was unable to render a decision on the issue. To reiterate and paraphrase the majority decision in paragraph 37 in *Figliola*, the issue addressed by the previous decision (that of the CLP) is simply not essentially the same as that raised in the complaint. The complaint refers to wage discrimination and the CLP states that it cannot rule on the issue.

[58] Similarly, the Court has not ruled on the existence of harassment or discriminatory harassment, which would be prohibited by the Act according to the applicant, even after the employment relationship is broken. Based on experience, it is better to hear the parties on these issues that may have numerous facets. Moreover, the applicant's file contained a letter from Aéropro, dated September 8, 2014, intended for the Commission. In this letter, Aéropro alleged that it was instead the applicant who had contacted Aéropro employees [TRANSLATION] "in order to infuriate and harass." It will be up to the Commission to sort out this matter.

V. Conclusion

[59] The Canadian Human Rights Commission refused to take up the two-tiered complaint submitted by the applicant. Whereas the applicant was complaining of wage disparity prohibited under the Act and post-employment discriminatory harassment by his ex-employer, the Commission found that a decision rendered by the Commission sur les lésions professionnelles du Québec contained basically the same allegations as in the complaint. This was not the case.

[60] With regard to post-employment harassment, the CLP decision only deals with actions at the end of employment; it did not settle the post-employment harassment issue in any way. Wage discrimination was not the subject of the decision cited by the Commission for refusing to take up the complaint. In fact, in July 2014, the CLP stated that it was incapable of rendering a decision on this type of allegation.

[61] It follows that the Commission's decision of October 29, 2014, must be set aside and that the review of the applicant's two-tiered complaint must be returned to the Commission. This

Court's decision must not in any way be interpreted as an opinion on the existence of prohibited wage disparity or on the Commission's jurisdiction to deal with the allegation of discriminatory harassment after the employment relationship has been broken. This is not the objective of a judicial review. It will be up to the Commission to consider the scope of sections 7, 11 and 14, among others.

VI. Costs

[62] The applicant had not made any requests for costs in the documentation submitted. At the hearing, after counsel for the respondent orally confirmed his request for costs in writing, the applicant also made an oral request.

[63] Assuming, for the purposes of this case, that a *viva voce* request would suffice (*Balogun v Canada*, 2005 FCA 350, at para 2, [2005] FCJ No 1780), the Court must exercise discretion, as confirmed by section 401 of the *Federal Court Rules*, SOR/98-106.

[64] There was a time when parties not represented by counsel had no rights to costs (Mark M. Orkin, *The Law of Costs*, second edition, Aurora: Canada Law Book, 1987). This no longer seems to be automatic.

[65] The Federal Court of Appeal concluded in *Yu v Canada (Attorney General)*, 2011 FCA 42 (*Yu*) that costs may be ordered "for the time and effort devoted to preparing and presenting a case insofar as the successful self-represented litigant incurred an opportunity cost by foregoing

remunerative activity" (para 37). In this case, the applicant has no gainful employment, as in *Yu*. The Court thus finds, as in *Yu*, that it is not worth exercising authority to award any costs.

[66] However, reasonable disbursements incurred by the applicant in this Court must be reimbursed by the respondent.

JUDGMENT

THIS COURT'S JUDGMENT IS that the application for judicial review be allowed. No costs are awarded, but it is ordered that reasonable disbursements incurred by the applicant be reimbursed to him by the respondent.

"Yvan Roy"
Judge

Certified true translation
Barbara McClintock, Certified Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2495-14
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APPEARANCES:

Laurent Duverger acting on his own behalf	FOR THE APPLICANT
Steven Côté	FOR THE RESPONDENT

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