Federal Court Cour fédérale

Date: 20161117

Docket: T-363-16

Citation: 2016 FC 1278

Ottawa, Ontario, November 17, 2016

PRESENT: The Honourable Mr. Justice Annis

BETWEEN:

VIA RAIL CANADA INC.

Applicant

and

MARCIA CANNON

Respondent

JUDGMENT AND REASONS

[1] This is a judicial review, pursuant to subsection 18.1(1) of the *Federal Courts Act*, RSC 1985, c F-7, of an interlocutory decision of the Canadian Human Rights Commission [the Commission] dated January 13, 2016 [the Revised Decision] determining it would exercise its discretion to deal with the Respondent's late-filed complaint pursuant to paragraph 41(1)(e) of the *Canadian Human Rights Act*, RSC 1985, c H-6 [the Act].

[2] The Applicant, VIA Rail Canada Inc. [VIA] argues that the Commission misapprehended the facts and misapplied the law in determining whether to exercise its discretion to deal with the late-filed complaint.

[3] A review of the Commission's decision reveals no error and, as such, the application is dismissed.

I. Background

[4] This application stems from an incident occurring on April 22, 2012 between the Respondent and one of VIA's employees. The Respondent, who identifies as part of the Transgender spectrum, was interrupted by a male employee while in the women's washroom.

[5] On April 26, 2016, the Respondent sent a letter of complaint to VIA describing the incident. In this letter she concludes:

> I would like to know what procedures are in place, if any, for staff to deal with situations such as I encountered – in my case a degrading and humiliating over reaction to my gender expression – and what Via Rail Canada proposes to see that this does not happen again. I am seeking general damages.

[6] On July 23, 2012, the Respondent mailed a completed Complaint Form and narrative to the Commission. It arrived at the Commission's office on or around August 1, 2012.

[7] Shortly thereafter, the Commission contacted the parties and recommended Preventive Mediation. The parties signed a Preventive Mediation Agreement [the Agreement], which notably acknowledged that a complaint had not yet been filed and that, should Preventive Mediation fail, the parties retained their right to contest the subsequent filing of a complaint on grounds of timeliness. The parties held mediation sessions on December 13, 2012 and April 15, 2013, but no resolution was reached.

[8] On April 15, 2013, after the second and final mediation session, the Respondent's lawyer requested an extension of time to provide a settlement offer. VIA's lawyer wrote to Counsel for the Respondent:

> I wish to confirm that VIA Rail Canada Inc. undertakes not to raise any objection concerning the timeliness of your client's complaint until after June 30, 2013. This complaint is outlined in your client's letter dated April 26, 2012, addressed to VIA's Ms. Karry Murphy and Ms. Jean Tierney.
>
> Beginning July 1, 2013, and pursuant to section 41(1)(e) of the *Canadian Human Rights Act*, VIA will be entitled to invoke the provisions of section 41(1)(e) limitation period with respect to the incident Ms. Cannon encountered on April 20, 2012.

[9] VIA copied the Commission's mediator on this email.

[10] On July 11, 2013, VIA received a settlement proposal from Ms. Cannon dated July 8, 2013. VIA acknowledged receipt of this proposal on July 18, 2013 and added:

> Subject to the Mediation Agreement dated December 13, 2012 and VIA's email dated April 15, 2013, with respect to timeliness, your

> request to examine the Offer to Settle dated July 8, 2013, shall not be construed to mean that VIA directly or indirectly waives any of the terms and/or conditions (past, present or future) of VIA's email dated April 15, 2013
>
> VIA will therefore examine the Offer to Settle under reserve of VIA' email dated April 15, 2013. I will be back in touch with you and the Commission before July 31, 2013.

[11] VIA again copied the Commission's mediator on this email. No resolution was reached and the Commission's mediator closed the mediation file towards the end of July 2013.

[12] On August, 1, 2013, the Commission accepted the Respondent's complaint for filing and, on August 6, 2013, informed VIA that a complaint had been filed. The summary of complaint form sent to VIA stated that the complaint was received August 1, 2013 and the complaint form and narrative dated July 23, 2012 were attached.

[13] VIA objected to the timeliness of the complaint arguing that it was filed more than one year after the alleged act of discrimination. The Commission considered and rejected that objection concluding that the complaint had been filed by the Respondent on August 1, 2012. As such, the Commission accepted to deal with the complaint. VIA applied for judicial review of this decision.

[14] In a decision released August 19, 2015, Justice Diner allowed this application for judicial review (*Via Rail Canada Inc v Cannon*, 2015 FC 989 [First Judicial Review Decision]). The Court found that the Commission had breached its duty of procedural fairness by denying VIA's challenge to the timeliness of the complaint by backdating it to August 1, 2012.

[15] The Court ordered:

> The Decision to investigate should be quashed and remitted back to the Commission for redetermination in accordance with these reasons. Having rectified the breach of procedural fairness outlined above, the Commission is free to exercise its discretion over whether to move forward with the complaint as it sees fit. (First Judicial Review Decision at para 26)

II. The Impugned Decision

[16] A Revised Section 40/41 Report [the Revised Report] dated September 25, 2015 recommended that the Commission deal with the complaint. The Commission received submissions from both parties responding to the Revised Report. After considering the Revised Report as well as the parties' submissions, the Commission accepted the Revised Report's recommendation and decided to deal with the complaint under subsection 41(1)(e) of the Act.

[17] The Revised Decision reproduced the Revised Report's chronology of the complainant's contact with the Commission:

- April 22, 2012: date of alleged discrimination
- April 26, 2012: complainant first contacts the Commission
- June 21, 2012: staff send a complaint kit, requesting that it be returned by July 23
- August 1, 2012: complaint received by the Commission but not accepted for filing (i.e., complaint narrative and consent/information forms received but respondent not yet notified)

- August 15, 2012: Commission staff contact the complainant to discuss preventive mediation

- August 2012 to July 2013: preventive mediation process

- July 30, 2013: file returned by mediator

- August 1, 2013: complaint accepted for filing

- August 6, 2013: respondent formally notified that the complaint was filed

[18] In light of these facts, the Commission concluded that while the complaint was late-filed on August 1, 2013, it was appropriate for it to exercise its discretion to deal with the late-filed complaint as the Respondent had contacted the Commission within one year of the alleged discrimination and any delay in filing the complaint was attributable to the Commission as it would only accept the complaint for filing upon conclusion of the Preventive Mediation process on July 30, 2013. In summarizing the reasons for its decision, it adopted the Revised Report's analysis of relevant factors to be weighed in deciding whether to exercise its discretion:

> Those factors include the nature of the allegations, any public interest concerns, the length of the delay, whether it was in the complainant's control, and any prejudice to the respondent. In this case, the delay was not in the complainant's control. Rather, the delay resulted from the Commission's efforts to resolve the matter without a complaint needing to be filed. The delay is approximately 16 months, some four months longer than the one-year deadline in paragraph 41(1)(e). Throughout most of that time period, the respondent was aware that the complainant intended to raise the human rights issues in this complaint and it was engaged in the preventive mediation process to try and resolve those issues… (Revised Report at para 23).

III. Relevant Legislation

Complaints	*Plaintes*
40 (1) Subject to subsections (5) and (7), any individual or group of individuals having reasonable grounds for believing that a person is engaging or has engaged in a discriminatory practice may file with the Commission a complaint in a form acceptable to the Commission.	**40 (1)** Sous réserve des paragraphes (5) et (7), un individu ou un groupe d’individus ayant des motifs raisonnables de croire qu’une personne a commis un acte discriminatoire peut déposer une plainte devant la Commission en la forme acceptable pour cette dernière.
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 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 :
[…]	[…]
(e) the complaint is based on acts or omissions the last of which occurred more than one year, or such longer period of time as the commission considers appropriate in the circumstances, before receipt of the complaint.	**e)** la plainte a été déposée après l’expiration d’un délai d’un an après le dernier des faits sur lesquels elle est fondée, ou de tout délai supérieur que la commission estime indiqué dans les circonstances.

IV. Issues

[19] VIA argues that the Commission misconstrued the facts in its Revised Decision: it treated the Complaint as having been received on August 1, 2012 and ignored Justice Diner’s finding

that it was only filed August 1, 2013; and it concluded Preventive Mediation was ongoing until July 30, 2013 when VIA argues its consent for the Preventive Mediation was withdrawn effective June 30, 2013. VIA also argues that the Commission overlooked and ignored factors raised by it that were relevant to the decision. Finally, it argued that given the Commission's repeated failure to discharge its obligation neutrally, the Court should issue a directed verdict determining that the only reasonable outcome is to refuse to deal with the Respondent's Complaint.

[20] The Respondent submits that the Commission's exercise of discretion must be granted deference and that, contrary to VIA's arguments, the Commission correctly identified the legal test, the relevant facts, and Justice Diner's holding in the First Judicial Review Decision.

[21] As such, the following issues arise in this application:

1. Did the Commission err in its assessment of the procedural facts?
2. Did the Commission err in its exercise of discretion?
3. Should a directed verdict be issued?

[22] In finding that the Commission's exercise of its discretion was reasonable, I need only address the first two issues.

V. Standard of Review

[23] VIA seeks to have the Commission's decision reviewed on a correctness standard. VIA argues that in finding that the complaint had been received on August 1, 2012, the Commission misapplied Justice Diner's holding in the first Judicial Review Decision, a question of jurisdiction reviewable on a standard of correctness (*Canada (Commissioner of Competition) v Superior Propane Inc*, 2003 FCA 53 at para 53). VIA further argues that as the Commission has made "perverse or capricious findings of fact that fail to refer to contradictory facts or evidence" it has lost its entitlement to deference on its finding that Preventive Mediation was ongoing until July 30, 2013. VIA also argues that a failure to recognize and apply the proper test for an exercise of discretion is due no deference (*Markis v Canada (Citizenship and Immigration*), 2008 FC 428 at para 19. Finally, VIA argues that the Commission's failure to discharge its obligation to fulfill its mandate thoroughly and neutrally is a breach of procedural fairness reviewable on a standard of correctness (*Khosa v Canada (Minister of Citizenship and Immigration)*, 2009 SCC 12 at para 43).

[24] In finding that the Commission correctly interpreted and applied the First Judicial Review Decision's findings and, that in making its decision, applied the proper legal test for its exercise of discretion, I conclude that the Commission's decision must be reviewed on a reasonableness standard. The Commission's exercise of discretion in applying Justice Diner's decision is one of that is entitled to deference within the limits described in *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 53.

VI. Analysis

A. *Introduction*

[25] I find that, on or around August 1, 2012, the Respondent clearly filed a complaint "in a form that was acceptable to the Commission" for the purposes of section 40 of the Act. On July 23, 2012, the Respondent mailed a completed complaint form and narrative to the Commission. We know this complaint was in a form acceptable to the Commission as this same complaint form and narrative were reproduced in the complaint filed August 1, 2013 and served on VIA August 6, 2013.

[26] After this initial filing, the Commission convinced the parties to proceed with a Preventive Mediation. In initiating this process, the Commission and the parties had to sign the Agreement saying that, among other things, no complaint had been filed.

[27] Indeed, during the Preventive Mediation, the Respondent by her lawyer proceeded on the basis that a complaint had not been filed. She obtained consent from VIA to extend time to file a complaint to a fixed date of June 30, 2013. This was some three months beyond the one year period fixed by section 41(1)(e) of the Act.

[28] The Preventive Mediation did not prove fruitful, however, and concluded after the expiration of the statutory period of one year. In deciding, for the first time, whether to deal with the Respondent's complaint, the Commission chose to abandon the terms of the Agreement,

instead relying on the fact that the Respondent had, in actuality, filed her complaint on August 1, 2012.

[29] This approach resolved the limitation issue for the Commission, but was unfair to VIA. Justice Diner quite correctly concluded that it was procedurally unfair because VIA had relied upon being able to contest the timeliness of the complaint after June 30, 2013, based on its understanding that no complaint had been filed prior to or during Preventive Mediation. Justice Diner rejected the filing date of August 1, 2012 and instead found that filing must have occurred after the completion of Preventive Mediation. Depending on which submission is accepted, this occurred either June 30 or July 30, 2013, in either case, not before April 22, 2013, and therefore out of time.

[30] This set of circumstances placed the Commission in a difficult situation in applying Justice Diner's decision. With Justice Diner having decided that the complaint must have been filed after the Preventive Mediation, it exercised its discretion to deal with the late-filed complaint. In doing so, it noted that the complaint was actually filed some 15 months earlier, but relied on the Preventative Mediation to explain the delay while also noting that VIA was generally aware of the complaint's contents via the Preventive Mediation.

[31] This leads VIA to challenge, before this Court, how the Commission could base its exercise of discretion on two conflicting findings: that the filing of the complaint occurred August 1, 2013 (a date after the completion of Preventive Mediation as found by Justice Diner);

and that the complaint was received in an acceptable form in accordance with the Act around August 1, 2012.

[32] VIA challenges the Commission's factual conclusions, notably its reliance on the August 1, 2012 date and the conclusion that Preventive Mediation was ongoing until the end of July 2013. Moreover, it argues that the Commission failed to reasonably exercise its discretion and to consider contradictory evidence. I find against it on each of these arguments, as discussed below.

B. *Three Alternatives in Rejecting VIA's Application*

[33] In what is admittedly a novel set of circumstances, the Court finds three alternative solutions to the Commission's conundrum. These serve as alternative grounds on which to reject VIA's application, either independently or working together. First, the Commission was justified in correcting an administrative error of its own making, as it caused no prejudice to VIA. Second, Justice Diner directed the parties, in the remedies section of his decision, to move to the issue of considering the Commission's exercise of discretion to allow the complaint to be dealt with when late-filed. Third, the proper characterization of the facts is that the Respondent filed and then withdrew her complaint in or around August 2012, so as to be able to participate in the Preventive Mediation. I consider each of these conclusions in turn.

(1) The Commission was justified in correcting an administrative error of its own making, as it caused no prejudice to VIA

[34] In the Revised Decision, the Commission acknowledged that it was solely responsible for the delay in filing. While the delay can be attributed to Preventive Mediation, the Commission also failed to clear up confusion as to whether the complaint had been filed. The Commission should have advised the complainant in writing that engaging in Preventive Mediation would require her to withdraw her complaint as a condition of participation and should have obtained her express consent to do so. In any case, the circumstance the Respondent finds herself in is largely due to the Commission's actions, not her own.

[35] The Commission is an administrative tribunal in charge of, and responsible for its own procedures. If it finds that its actions in pursuing a legitimate solution to a complaint between the parties creates an unforeseen issue of timeliness, I conclude that it is entitled to correct its errors, unless to do so would cause prejudice to the parties. In this case, the Respondent would suffer substantive prejudice if the Committee were to refuse do deal with her complaint, while any procedural unfairness that VIA has suffered is resolved by applying Justice Diner's decision.

[36] In accordance with what it understood to be the direction of Justice Diner, the Commission found the complaint was filed August 1, 2013. This finding sets the maximum delay in filing as neither party has put forward a later filing date. The Commission then considered whether it should exercise its discretion to nevertheless deal with the complaint. Central to the Commission's decision to do so was the fact that the Respondent had initially raised an issue

with VIA and brought it to the attention of the Commission, which proceeded to engage the parties in a Preventive Mediation.

[37] The Commission found that the resulting Preventive Mediation was the principal cause of the delay in filing the complaint. In accordance with the Agreement, acquiesced to by both parties and the Commission, no complaint could be filed prior to its termination. Also in accordance with the Agreement, the Commission found that VIA understood that a complaint in respect of the initial incident was likely, unless the mediation was successful.

[38] I find no prejudice to VIA by the Commission's actions. They were taken with the best interests of the parties in mind and properly considered the factors that support allowing the complaint to proceed to a hearing, although out of time.

(2) The Commission Reasonably Applied Justice Diner's Decision as to the Remedy for Procedural Unfairness

[39] I also conclude that the Commission did not err in deciding that it was appropriate for it to conduct an analysis to determine whether it should exercise its discretion and accept to deal with the late-filed complaint. To do so was in general accordance with Justice Diner's conclusion on the appropriate remedy, so long as the Commission did not prevent VIA from challenging the timeliness of the complaint.

[40] The Commission found that the filing occurred on August 1, 2013, after the termination of the Preventive Mediation, as directed by the Court. As previously noted, this is also the most

favourable date to VIA as it affords the longest delay. As no date later than August 1, 2013 has been put forward for the filing of the complaint, it is unclear how identifying this date could be unreasonable.

[41] In addressing the remedy, Justice Diner stated that “[h]aving rectified the breach of procedural fairness”, which the Commission did by accepting that the Complaint was filed after the Preventive Mediation and that VIA could thus contest the timeliness of the filing, “the Commission is free to exercise its discretion over whether to move forward with the complaint as it sees fit.” (First Judicial Review Decision at para 27)

[42] I find VIA’s arguments to be of a technical nature intended to prevent the Commission from discharging its functions, and, in particular, with the view of preventing it from relying upon the historical facts that support allowing the complaint to proceed.

[43] By this I refer to the fact that the Respondent filed the same complaint only 3 ½ months after the incident and that the generalities of the complaint were the subject of a Preventive Mediation. The only reason the Commission did not accept it for filing and notify VIA was because it thought it was in the parties’ best interests to attempt to resolve the matter by Preventive Mediation to avoid the expense, delay, and some of the consequences arising from a full-blown hearing into the matter (something the parties agreed with).

[44] On this basis, the only issue for consideration should be whether the Commission properly exercised its discretion in accepting to deal with the Respondent's late-filed complaint, pursuant to Justice Diner's decision on remedy.

(3) The Respondent Withdrew her Complaint in Order to Participate in the Preventive Mediation

[45] The third alternative basis upon which to reject VIA's application is that the facts support the conclusion that the Respondent had withdrawn her complaint filed in or around August 1, 2012 upon accepting to proceed with Preventive Mediation. This conclusion circumvents VIA's argument that the Commission cannot find that the complaint was filed in August 2013, when it acknowledges that it was also filed in August 2012.

[46] Justice Diner recognized and did not question or comment on the fact that the Commission had received a complaint in acceptable form in 2012 when he stated at paragraph 12 of his decision that "[t]he Report stated that the Complaint had been received in a form acceptable to the on August 1, 2012, that it had been date-stamped by the Commission on the same date, …".

[47] The effect of the Respondent and Commission signing the Agreement had to be that both considered the complaint to be withdrawn, whether VIA was aware of this or not. This must have been Justice Diner's understanding as he specifically underlined the following words in the Agreement: "The participants understand that no complaint has been filed with the Commission under the *Canadian Human Rights Act*".

[48] Justice Diner also found that the Respondent, through her lawyer, recognized the one year limitation period would expire during Preventive Mediation and requested an extension of time from VIA. This extension was granted by VIA's letter of April 15, 2013, subject to it being able to challenge the timeliness of the complaint, if filed after June 30, 2013. This could only occur if no complaint was extant.

[49] I conclude that by signing the Agreement, the Respondent effectively agreed with the Commission to withdraw her complaint. This is confirmed by the Respondent later recognizing the need to extend the filing deadline. This reasoning is implicit in Justice Diner's reasoning. It could only be on this basis that he concluded that the procedural fairness issue was resolved so long as the date of filing of the complaint came after June 30, 2013, to allow VIA to contest the timeliness of the complaint.

[50] I recognize that the Respondent states this scenario is not accurate. She and her lawyer agreed in considering VIA's letter of April 15, 2013 that she did not have to file another complaint if the mediation was unsuccessful, because one was already filed. However, this evidence was not before Justice Diner. To succeed on this argument, the Respondent would have to explain why she signed the Agreement and submit that her lawyer erred in raising, on two different occasions, the issue of extending the one year limitation period with VIA and requesting an extension of time giving rise to its letter of April 15, 2013.

[51] This understanding of the facts also explains why the Commission ignores the filing date of the original complaint in its Revised Decision. The original filing is not used as a justification

for allowing the complaint to proceed. The 11-month Preventive Mediation that precluded filing a complaint was a sufficient enough reason for the Commission to extend the time.

[52] Once the Preventive Mediation was completed around the end of July 2013, the Commission reasonably used the original complaint filed in 2012, which had been withdrawn for the purposes of Preventive Mediation, as the basis for refiling the complaint. The complaint was refiled on August 1, 2013, the earliest possible date for this to occur.

[53] On these facts, it is correct that the filing date was August 1, 2013, after Preventive Mediation concluded at the end of July 2013. This is more than three months after the expiration of the one year limitation period. As such, the Commission was required to exercise its discretion to determine if it should deal with the late-filed complaint.

[54] Of equal importance to this case, though apparently not accepted by VIA, is the fact that in exercising its discretion to extend the filing date, the Commission was entitled to consider historical facts in order to determine whether it was in the interests of justice for it to exercise its discretion to extend time. One key historical fact that had to be considered is that any misunderstanding by the Respondent concerning the status of her complaint could be attributed to the Commission's handling of the original complaint and the Preventive Mediation.

C. *Considering VIA's Submissions*

[55] With these introductory explanations provided, I will now consider VIA's specific submissions. These can be categorized under two headings: that the Commission erred in its

assessment of the procedural facts; and that the Commission misapprehended and misapplied the test under paragraph 41(1)(e). The first is largely met by the above analysis, subject to some factual findings that VIA challenges.

(1) The Commission did not err in its assessment of the procedural facts

(a) *No inconsistency in finding complaint had been received in August 2012 and filed in August 2013*

[56] This section of VIA’s submissions is largely responded to by the above-related discussion. The submission alleges that the Commission failed to apply Justice Diner’s decision. Even if this would constitute a jurisdictional failure subject to the standard of review of correctness, on the basis of my discussion above, I disagree that the Commission failed to correctly apply Justice Diner’s decision.

[57] Particularly, I disagree with the submission at paragraph 52 of VIA’s memorandum that Justice Diner found that no complaint had been received by the Commission before June 30, 2013. The Court made no such finding; indeed, it specifically referred to this fact without refuting it. Nor was it the essence of the procedural fairness issue.

[58] Justice Diner’s decision focused on how the Agreement and exchanges between the lawyers had created an equitable reliance situation when VIA agreed that a complaint could be filed after (and not before by the terms of the Agreement) the mediation was completed. This equitable promise was breached when the Commission reverted to accepting that the complaint had been filed on August 1, 2012 despite the Agreement and the negotiated terms of the

extension of time. The Commission could not do this fairly as the Agreement stated that the filing of a complaint after the mediation, if out of time, would be subject to the Commission's exercise of discretion. Justice Diner's decision was not a finding that no complaint had been received in August 2012.

[59] In summary, this Court's conclusion is that the distinction between the receipt of the complaint by the Commission and when it was agreed to be filed by the parties to the Agreement is resolved by Justice Diner's implicit finding that the complaint of 2012 was withdrawn for the purposes of the mediation.

[60] I again point out that it is necessary to distinguish between filing the complaint for the purpose of calculating the timeliness of the filing, as opposed to whether the Commission's discretion should be exercised based upon the historical fact of when a complaint was originally filed and the resulting mediation in determining the prejudice to the parties.

(b) *The Complaint was Originally Filed on August 1, 2012*

[61] Under the jurisdictional heading, VIA implicitly argues that there is no, or insufficient evidence that a complaint was received by the Commission on August 1, 2012. The only evidence that VIA can point to in support of this submission is the absence of the date-stamped complaint, a copy of which was not provided in the certified record. I have already found that Justice Diner accepted that the complaint was filed in a form acceptable to the Commission on that date.

[62] The complaint form and attached narrative dated July 26, 2012 are the substantive documents that accompanied the cover sheet of the Respondent's complaint dated August 1, 2013. The Respondent also provided an affidavit indicating that she prepared the complaint in July and filed it sometime around August 1, 2012.

[63] VIA argues that the Court should not take cognizance of the affidavit evidence because it was not before the decision-maker. The Commission does not appear to have filed its usual running chronological notes of events occurring on its file. In its absence, I conclude that VIA is entitled to provide historical facts as to when she filed the document. These are corroborated by statements of the Commission and reflect the dates on the complaint form and narrative attached to the cover page of the complaint, although dated August 1, 2013. The Court is certainly not going to accept that the Commission fraudulently allowed a mis-dated document to be used to justify its position without a full frontal attack of such serious allegations by VIA.

[64] In addition, the circumstantial evidence strongly supports the fact that the Commission received a document in the nature of a complaint in 2012, prior to the Preventive Mediation being undertaken. It is clear from the record that in October 2012 VIA was contacted by the Commission and it agreed to enter into a Preventive Mediation with the Respondent, under the supervision of the Commission. VIA had already received Respondent’s letter dated April 26, 2012 relating an incident that spoke to gender issues.

(c) *The Respondent's Letter of Complaint Dated April 26, 2012 Raises Potential Human Rights Issues*

[65] On a related issue, VIA argues that the original letter of April 26, 2012 it received from the Respondent reporting the incident does not give rise to concerns about human rights issues. I disagree with the argument that the incident as described could not potentially raise human rights issues. The Respondent describes herself as being mis-gendered in the washroom and at the kiosk, finding the events "unacceptable, degradingly offensive and humiliating", with a further description of the effect the event had on her, along with the demand for compensation.

[66] In any event, it would be facetious to suggest that the Canadian Human Rights Commission would be contacting VIA to enter into a Preventive Mediation with the Respondent with respect to that incident, if it was not in terms of a potential human rights complaint.

(d) *VIA was Aware that the Respondent had Raised the Incident of April 26, 2012 in the Context of a Human Rights Complaint and Intended to Proceed with the Complaint if the Preventive Mediation Failed*

[67] Nevertheless, in support of this argument, VIA also argues at a later point in its submissions that it was unaware that the Respondent intended to proceed with its complaint to the Commission if a settlement was not reached.

[68] VIA did not file an affidavit attesting to its lack of knowledge of the Respondent having filed a complaint or advancing human rights issues during the Preventive Mediation.

[69] VIA also argues that discussions during the Preventive Mediation process are privileged given that they relate to discussions of settlement. I disagree on this point if the information sought is for the limited purpose of being available to instruct the Court in this matter. The only relevant concern in exposing settlement discussions is their impact on the <u>final decision-maker</u> in the substantive context of whether a violation of the Act occurred. There is no reason that this Court cannot be apprised of what was discussed during the settlement discussions in determining whether VIA was prejudiced or misled by not understanding that they concerned a potential human rights complaint. The Court is only interested in whether the human rights issues relating to the complaint, as eventually filed, were discussed during the mediation process.

[70] VIA agreed to enter into a Preventive Mediation, which could only be “Preventive” in so far as it prevented the Respondent from proceeding with a human rights complaint. In addition, by its letter of April 15, 2013, VIA acknowledged that it retained the right to contest the timeliness of any complaint filed by the Respondent under section 41 of the Act. It further agreed in the letter to consider an offer made in the context of the Preventive Mediation to resolve the matter, without jeopardizing its right to contest the timeliness of a complaint, if filed.

[71] VIA is a large, sophisticated, unionized public transportation enterprise offering rail services to the public across Canada with extensive experience in dealing with human rights issues. It cannot pretend that the Respondent’s letter did not raise human rights issues on the very topical issue of the treatment of members of the transgender community, or that it did not enter into the Preventive Mediation with the Commission without being fully apprised of what was involved. Particularly, as the Respondent’s letter and VIA’s participation in Preventive

Mediation presume its knowledge of the potential for a human rights complaint, VIA must provide evidence if it intends to argue that it ignored or misapprehended this fact.

[72] All of these facts demonstrate on the balance of probabilities that VIA was aware that the Respondent was pursuing a human rights issue, that it was involved in a potential human rights complaint, and that it was aware that the Respondent likely intended to proceed with its complaint to the Commission if a settlement was not reached.

(e) *The Preventive Mediation Process Terminated on or around July 30, 2013*

[73] VIA submits that the Commission erred in its conclusion that the Preventive Mediation was ongoing until July 30, 2013. In this argument, it attempts to rely upon its letter of April 15, 2013 advising the Respondent that after June 30, 2013, if no complaint was filed, it would have the right to oppose the timeliness of the filing of any subsequent complaint.

[74] I find that the effect of the letter was only to retain the right to oppose the complaint if filed after June 30, 2013. This right existed upon August, 1, 2013, the date of the filing of the complaint and August 6, 2013, when the original complaint was finally provided to VIA.

[75] Despite its letter of April 15, 2013, VIA nevertheless agreed to consider the Respondent’s offer delivered on or around July 7, 2013, which it rejected sometime later in the month. Based on these facts, the Commission’s mediator reported that the Preventive Mediation was closed effective the end of July 2013.

[76] I find it illogical for VIA to argue that the mediation was terminated on June 30, 2013 when it subsequently agreed to consider an offer made after that date. The mediation continued until around or about July 30, 2013.

(2) The Commission did not Misapprehend or Misapply the Test under paragraph 41(1)(e)

[77] VIA argues that the Commission failed to consider and respond to its submissions alleging substantial and material omissions in the decision, citing the decision of *Herbert v Canada (Attorney General)*, 2008 FC 969 at para 26. The crux of the Commission's reasoning is summarized at paragraph 75 of the Revised Decision as follows:

> In deciding whether to exercise its discretion to deal with a complaint that is filed late, the weighs a number of factors… Those factors include the nature of the allegations, any public interest concerns, the length of the delay, whether it was in the complainant's control, and any prejudice to the respondent. In this case, the delay was not in the complainant's control. Rather, the delay resulted from the Commission's efforts to resolve the matter without a complaint needing to be filed. The delay is approximately 16 months, some four months longer than the one-year deadline in paragraph 41(1)(e). Throughout most of that time period, the respondent was aware that the complainant intended to raise human rights issues in this complaint and it was engaged in the preventive mediation process to try and resolve those issues…

[78] This brief summary of the Commission's reasons highlights the correct legal test and also explains how the Commission weighed the relevant factors in light of its factual findings with regard to the dates of receipt, filing and the length of the Preventive Mediation. I find that the

Commission applied the correct legal test in exercising its discretion and did not fail to address any relevant submission by VIA.

[79] In large part, VIA pursues the line of submissions based upon arguments considered above intended to show that the August 1, 2012 complaint either was never made, or cannot be considered in light of Justice Diner's decision. I have already responded to these and several of its other submissions. I consider VIA's other submissions as presented to the Court below.

(a) *The Commission failed to determine the length of the delay and to require an explanation for the Respondent's delay and excused the delay for reasons that have no basis on the record*

[80] Both of these submissions relate to issues already dealt with by the Court whereby VIA attempts to argue that the Respondent did not file a complaint on August 1, 2012, or that the Commission erred in finding that the Preventive Mediation continued into July 2013.

[81] I fail to understand VIA's submission that "in order to engage this discretion, the Commission must first determine when time started to run (the date of the alleged incident) and when time stopped running (when a complaint in a form acceptable was filed with the Commission by the complainant)" and that the Commission failed to do this. It is obvious that the incident occurred on April 22, 2012 and the complaint was considered to be filed in an acceptable form on August 1, 2013 with notice provided to VIA on August 6, 2013.

[82] The Respondent's delay in filing a complaint, if it can even be called that, was explained by the Commission's efforts to resolve the matter and, therefore, it is solely responsible for any

delay that is occasioned. The Court also disagrees that there is any contradiction between the conclusions and findings of Justice Diner and the Commission's conclusions, as described above.

(b) *The Commission overlooked the fact that the Respondent was represented by legal counsel*

[83] The Respondent being represented by Counsel had nothing to do with the delay to proceed with the complaint. It resulted mainly from the Preventive Mediation which began in September 2012 and ended on or around July 30, 2013. By the terms of the Agreement, the parties could not file a complaint without terminating the mediation.

(c) *The Commission overlooked the insufficiency of the Complaint and VIA's concerns for the Commission's characterization of the Complaint as raising "systemic" issues*

[84] The Court does not find the issue of concerns about raising "systemic issues" in VIA's submissions to the Commission. In any event, VIA is asking the Court to review the weight the Commission attributed to the evidence supporting a preliminary decision of whether to entertain the complaint. Justice Diner rejected the request for a directed verdict as being inappropriate because of the "importance of the rights at stake" and since the incident arose due to the application of VIA's broader security policy.

[85] There is no reason to conclude that the issues raised may not apply to other individuals in similar circumstances to the complainant. Additionally, there is no reason to rule out systemic considerations given that incidents of this nature involving transgendered persons raise issues of

considerable public interest and discussion at this time. It would be premature to challenge the decision to proceed with the complaint for either of these reasons advanced by VIA.

(d) *The Commission erred in concluding that VIA was aware during Preventive Mediation that the Respondent intended to raise human rights issues*

[86] This contention is rejected for the reasons described above. While the Commission did not directly respond to this contention, for the reasons provided above, including its letter of April 15, 2013 and the Agreement, it is entirely without merit. The fact that VIA would anticipate the Respondent filing a complaint upon the failure of Preventive Mediation is indicative of its lack of prejudice by the Commission proceeding to consider the complaint.

(e) *The Commission ignored VIA's submissions regarding prejudice*

[87] Prejudice in this context is the procedural prejudice caused by the delay in filing the complaint. The only prejudice raised by VIA was that its only witness had retired and might not communicate with VIA, short of being compelled to testify. This claim is speculative and does not demonstrate actual prejudice. There is no evidence offered as to why the witness would not be available, assuming the complaint proceeds without further delay. It is also difficult to imagine that VIA would not have obtained the witnesses' evidence as part of an internal investigation while he was its employee.

[88] In any event, whether the witness was compelled to provide his testimony or provided it willingly to VIA should make no difference to the content and character of the evidence that results.

VII. Conclusion

[89] In conclusion, the Commission's exercise of discretion was reasonable and should not be interfered with. The application for judicial review is dismissed without costs. No costs were awarded to the Respondent in the matter before Justice Diner.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is dismissed without costs.

"Peter Annis"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Monica Song	FOR THE APPLICANT
Marcus McCann	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Dentons Canada LLP Barristers & Solicitors Ottawa, Ontario	FOR THE APPLICANT
Symes Street & Millard Toronto, Ontario	FOR THE RESPONDENT