Federal Court  Cour fédérale

Date: 20170119

Docket: T-1965-14

Citation: 2017 FC 57

Ottawa, Ontario, January 19, 2017

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

MICHÊLE BERGERON

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] This is an application for judicial review by Michêle Bergeron [the Applicant], pursuant to s. 18.1 of the *Federal Courts Act*, RSC, 1985, c F-7, of a decision by the Canadian Human Rights Commission [the Commission] dated August 13, 2014, in which the Applicant's human rights complaint of April 27, 2009, alleging retaliation contrary to s. 14.1 of the *Canadian*

Human Rights Act, RSC, 1985, c H-6 [*CHRA*], was dismissed pursuant to paragraph 41(1)(d) of the *CHRA*.

[2] Judicial review must be granted because of avoidable, but nonetheless fatal, breaches of procedural fairness.

[3] The Applicant, who suffers from Chronic Fatigue Syndrome, initially filed a complaint with the Commission against her employer, the Department of Justice [DOJ], for its failure to accommodate her in her efforts to return to work, culminating in the employer's decision to vacate her position [Vacating Complaint]. The Applicant subsequently filed a second complaint alleging several incidents of retaliation by her employer for filing the first complaint [Retaliation Complaint].

[4] Commission staff prepared separate Section 40/41 Reports [40/41 Reports] concerning both the Retaliation and Vacating Complaints, and asked the parties to comment on them. The Applicant made comments on both, which comments were filed separately and differed. Commission staff then sent the two 40/41 Reports to the Commission, along with the submissions of the Applicant on both.

[5] The Commission decided not to deal with either complaint under paragraph 41(1)(d) of the *CHRA* on the basis that the issues in both complaints were adequately addressed in the grievance process.

[6] This Court thereafter considered judicial review of both decisions: 2013 FC 301 [*Bergeron (FC)*]. Judicial review was granted regarding the Retaliation Complaint, and ordered the Commission to reconsider it. Judicial Review was dismissed in respect of the Vacating Complaint; the decision of this Court was upheld by the Federal Court of Appeal [FCA]: *Bergeron v Canada (Attorney General)*, 2015 FCA 160 [*Bergeron (FCA)*], leave to appeal to the SCC denied, 36701 (14 April 2016).

[7] The Retaliation Complaint was reconsidered but dismissed by the Commission. This application arises from the Commission's dismissal.

[8] The Commission's original dismissal of the Retaliation Complaint was set aside because the Commission mistakenly relied upon and adopted the 40/41 Report prepared in respect of the wrong matter; the Commission erroneously relied on a 40/41 Report prepared in respect of the Vacating Complaint [Vacating Report] when it should have considered and had before it the 40/41 Report for the Retaliation Complaint [Retaliation Report].

[9] Thereafter, staff of the Commission prepared a second 40/41 Report [Supplementary 40/41 Report]. The Supplementary 40/41 Report was sent to the parties for comment by Commission staff.

[10] The Applicant and Respondent both filed comments on the Supplementary 40/41 Report. In her supplementary submissions, the Applicant stated that the record prepared for review by the Commission contained the wrong submissions: it contained the Applicant's submissions on

the Vacating Complaint when it should have contained her submissions on the Retaliation Complaint. Further, the Applicant noted that the Supplementary Report failed to contain certain conciliation material concerning the Retaliation Complaint, which was part of the record before the Commission on its original consideration.

[11] Counsel for the Respondent specifically agreed with the Applicant on this point. Counsel for the Respondent wrote to Commission staff stating not only that it "agrees" with the Applicant's request that the appropriate submissions should be put before the Commission, but added that "… the Commission should have before it all of the relevant submission of both parties and the complete Supplementary Section 40/41 Report."

[12] Notwithstanding these agreed objections from both parties, staff of the Commission sent an unamended and unrevised record and the Supplementary 40/41 Report to the Commission for determination. The Commission staff also sent to the Commission the Applicant's and Respondent's submissions on the Supplementary 40/41 Report, each of which noted the defective record and asked that it be corrected.

[13] On the basis of the unamended record, and notwithstanding the submissions of both parties that the record was defective, the Commission made a decision not to deal with the Applicant's complaint on the ground it was vexatious under paragraph 41(1)(d) of the *CHRA*, in that the issues in the subject matter of the complaint had already been properly addressed through the internal grievance process at DOJ.

[14] In my respectful view, the Commission had a duty to consider the submissions the Applicant made on 40/41 Report prepared in respect of the original Retaliation Complaint. This is because the Commission was Ordered to reconsider the Retaliation Complaint, which of course, necessitate its review of the Applicant's submissions on the Commission's staff 40/41 Report dealing with the Retaliation Complaint. There is no evidence that it did. To the contrary, the uncontradicted evidence is that the Commission completely failed its duty in this regard.

[15] The Applicant's submissions in relation to the Vacating Complaint (which were mistakenly placed before the Commission) were clearly irrelevant to the Commission's decision on the Retaliation Complaint. Furthermore, the Commission did not have before it the Applicant's submissions in relation to the Retaliation Complaint and, therefore, those submissions were not considered when the Commission made its decision.

[16] The Commission failed in its duty to hear both sides of this dispute: it only heard from the Respondent and did not hear from the Applicant. As detailed below, I am compelled to conclude that the Commission not only failed to consider the Applicant's initial submissions on the Retaliation Complaint, which it simply did not have before it; it also failed to consider the Applicant's and the Respondent's submissions on the Supplementary 40/41 Report.

[17] This unfortunate result was avoidable. Commission staff could have revised the record and included the correct version of the Applicant's submissions. Inexplicably, this did not happen. The Commission itself, if it read the submissions of either party, would have seen the defect in the record and could have sent it back for correction. Again, it failed to do so.

[18] The Respondent urges the Court to exercise its discretion and determine the matter itself on the basis that having the Applicant's submissions in hand would not have made any difference to the result. The Respondent also urges the Court to dismiss judicial review because, in any event, the Commission's decision is reasonable. For reasons outlined later, I am not prepared to allow the waiver of so fundamental a procedural error; the procedural unfairness issue is determinative of this application. The Commission must hear both sides of the Applicant's complaint before making a fresh decision in this case, which I am ordering it to do.

[19] A more detailed consideration of the facts and my reasons follow.

II. Facts

[20] The Applicant, who suffers from Chronic Fatigue Syndrome, was hired as a lawyer at the DOJ in 1999. In May 2001, she took leave without pay [LWOP] for medical reasons. Several years later, after attempting to negotiate a return to work plan with her employer, she filed both a grievance and a human rights complaint alleging discrimination on the basis of disability. The Applicant alleges that her employer engaged in retaliatory conduct against her following the filing of this complaint, contrary to section 14.1 of the *CHRA*.

[21] In December 2005, the Applicant elected to return to work after an almost 4-year leave of absence. A return to work plan was drafted in consultation with Health Canada. The return to work plan took over two years to conclude. Two issues arose from the plan that was drafted: the inclusion of a "work stoppage" clause and reference to achieving the goal of full-time work. These issues became the subject of correspondence between the Applicant and her employer.

The Assistant Deputy Attorney General at the time responded to these issues on May 16, 2008, agreeing to remove the reference to full-time work and explaining why the work stoppage clause had been included.

[22] In July 2008, the Applicant filed a grievance, pursuant to section 208 of the *Public Service Labour Relations Act*, SC 2003, c 22, s 2 [*PSLRA*], in relation to DOJ having declared her position vacant [First Grievance]. She also filed the aforementioned Vacating Complaint with the Commission, on the same grounds. Both the grievance and the complaint alleged a failure to accommodate on the part of her employer. The Applicant's union, the Association of Justice Counsel [ACJ], took carriage of the Applicant's file on August 18, 2008, but only in regards to her grievance under the *PSLRA* and not in relation to the *CHRA* complaint. The Vacating Complaint was filed with the Commission on October 1, 2008.

[23] On March 3, 2009, the Applicant filed a second grievance, pursuant to s. 208 of the *PSLRA*, alleging retaliation by DOJ because she had filed a complaint with the *CHRC* [Second Grievance]. On April 27, 2009, the Applicant filed a Retaliation Complaint with the Commission.

[24] It is this Retaliation Complaint that is now before the Court.

[25] In the Retaliation Complaint, the Applicant's alleges the following retaliatory conduct:

- **May and July 2008:** DOJ informs Applicant of its intent to vacate her position; DOJ proceeds to do so; Applicant's LWOP is shortened by approximately 2.5 months;

- **June 2008:** Applicant's compensation advisor loses authorization to speak with her regarding staffing or any other issues;
- **October and December 2008:** DOJ refuses to accept or process the Applicant's cheques for extended health benefits with Sun Life. Applicant loses her extended health benefits as of January 1, 2009;
- **February 2009:** DOJ refuses to accept Applicant's attempts to pay back her pension deficiencies dating back to 2001 and fails to provide information regarding why it vacated her position and ceased to pay her LSUC membership fees; DOJ makes Applicant an offer to settle that she alleges is really a retaliatory "return to work ultimatum";
- **March 2009:** DOJ informs the ACJ that the Applicant will be placed on priority status as of April 2009 due to her failure to accept their offer to settle.

[26] On May 6, 2009, the Step 3 Decision Maker in the grievance process, who was also the Associate Deputy Minister of the Department of Justice [the ADM], provided a final grievance response to the Applicant's First Grievance [First Grievance Decision]. On September 9, 2009, the ADM provided a final decision regarding the Applicant's Second Grievance [Second Grievance Decision]. In both Step 3 Decisions, the Applicant's grievances were partially upheld.

[27] On September 1, 2009, the ACJ contacted the Applicant's counsel, informing her that the grievance was concluded but would not be referred to arbitration. As a result of this decision, the First and Second Grievance Decisions regarding the Applicant's matter constitute the final decision in the individual grievance process.

[28] On September 24, 2010, the Retaliation Report and the Vacating Report were separately prepared by staff of the Commission. The purpose of these 40/41 Reports is for Commission staff to provide information to the Commission upon which it may decide "whether the Commission should refuse to deal with the complaint under subsection 41(1) of the *CHRA*".

[29] Both the Retaliation Report and the Vacating Report discussed whether the Applicant's complaint should be dismissed under paragraph 41(1)(d) of the *CHRA*, "as the allegations of discrimination in the complaint were addressed through a review procedure otherwise reasonably available to the complainant". Under paragraph 41(1)(d), a complaint may be dismissed should it appear to the Commission that the complaint is "trivial, frivolous, vexatious or made in bad faith."

[30] The Retaliation Report recommended that the complaint be dismissed, stating:

> 25. It would appear that the complainant is recasting the same set of circumstances that were alleged to be discriminatory as being retaliatory for the purposes of the second grievance and the current complaint. It would appear that a substantial portion of these issues were considered and addressed in the first grievance decision and the remedy offered, regarding a return to work, was reiterated in the second grievance decision. It appears that the remaining issues of processing ongoing pension deficiencies and Supplementary Death Benefit premiums were addressed and remedy was provided in the second grievance decision.
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> 26. Taken as a whole, it appears that the subject matter of the complaint has been addressed through the respondent's internal grievance process.

[31] The Retaliation Report and the Vacating Report were put before the Commission in May 2010. The parties were invited to provide submissions responding to the two Reports, which

were to be considered by the Commission in coming to its decision. Both parties did so in 2011, in response to the original two 40/41 Reports prepared in 2010.

[32] On October 22, 2010, the Applicant's employment was terminated on the grounds of medical incapacity. The Applicant was advised of her impending termination on October 4, 2010.

[33] On May 25, 2011, the Commission appointed a conciliator pursuant to s. 47 of the *CHRA* in connection with her Retaliation Complaint; however, conciliation failed. As a result of the failed conciliation, the matter returned to the Commission for a determination. The Commission adopted the analysis of the Vacating Report and on January 9, 2012, simultaneously dismissed both the Applicant's Vacating and Retaliation Complaints.

[34] The Applicant sought judicial review of the Commission's decisions dismissing both complaints.

Federal Court Decision – March 25, 2013

[35] The Federal Court decision, delivered on March 25, 2013 by Justice Zinn, dismissed judicial review of the Vacating Complaint but granted judicial review of the Retaliation Complaint. As mentioned earlier, Justice Zinn's decision in the Vacating Complaint was upheld by the FCA in *Bergeron (FCA)* and leave to the Supreme Court of Canada was denied.

[36] Justice Zinn's judgment ordering judicial review of the Retaliation Complaint was not appealed; that matter was therefore sent back to the Commission for re-determination. In providing reasons for granting review, the Court stated:

> As mentioned above, and for reasons that have no explanation other than possible inadvertence or because it did not properly turn its mind to the issue, the Commission excerpted the "Analysis" section from the report made for the First Complaint [the Vacating Complaint, ed.] as the reasons for dismissing the Second Complaint [the Retaliation Complaint, ed.]. Because the issues were different in the two complaints, the Commission's overt reasons in the second part of the Second Decision are, on their face, irrelevant and unintelligible. The third part of the Second Decision also contains no analysis which is on point; there is no mention, let alone analysis, of whether Ms. Miller's decision on the Second Grievance adequately dealt with whether Ms. Bergeron was retaliated against for having filed the First Complaint, such that the Second Complaint had become "trivial, frivolous, vexatious or ... in bad faith (at para 30).
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> [emphasis added]

[37] The Court noted that although "roughly a third" of the incidents alleged as retaliatory conduct had occurred before the Applicant had filed her first complaint, the Commission had not dealt with the adequacy of the grievance decision regarding the remainder of the Applicant's allegations. The Court therefore quashed the Commission's decision regarding the Second Complaint and remitted it to the Commission for reconsideration.

III. Decision

[38] On August 13, 2014, the Commission reconsidered the Applicant's Retaliation Complaint and dismissed it pursuant paragraph 41(1)(d) of the *CHRA* [Reconsideration Decision]. Before that took place, a Supplementary 40/41 Report was prepared, dated June 24, 2013. This is a

customary step where Commission staff consider that early resolution is appropriate. As mentioned earlier, the parties received the Supplementary 40/41 Report concerning the Retaliation Complaint and were allowed to make supplementary submissions. The Applicant made her submissions on June 27, 2014; the Respondent made submissions on July 23, 2014.

[39] In her submissions, the Applicant specifically pointed out that the wrong 2011 submissions had been sent to the Commission for consideration: the Supplementary 40/41Report proposed to send the Applicant's 2011 submissions on the *Vacating* Report, not her submissions on the *Retaliation* Report. However, there is no dispute that what the Commission would be looking at was the Retaliation Report and the *Applicant's submissions on the Retaliation Report*. The *Vacating Report* was spent with the dismissal of judicial review and dismissal of its subsequent appeal. The *Applicant's Submissions on the Vacating Report* were no longer in issue.

[40] In addition, the Applicant stated that certain material concerning an unsuccessful conciliation effort, including her submissions in that process, was missing from the Supplementary 40/41 Report staff intended to send to the Commission, even though these conciliation materials had been before the Commission on its original consideration. She also raised an issue of possible bias by certain Commission staff responsible for preparing the material for consideration by the Commission.

[41] Counsel for the Respondent, in its letter of July 23, 2014, specifically agreed with the Applicant that the correct submissions - *Applicant's submissions on the Retaliation Report* - should be put before the Commission, stating that "… the Commission should have before it all

of the relevant submission of both parties and the complete Supplementary Section 40/41 Report." Both parties therefore alerted Commission staff that the proposed record on the reconsideration was defective in not changed.

[42] Notwithstanding the written submissions of both parties pointing out these defects in the record, the Supplementary 40/41 Report was mistakenly sent to the Commission with the wrong 2011 submissions, i.e., the Applicant's Submissions on the *Vacating Report*, instead of her submissions on the *Retaliation Complaint*. Commission staff did send the Applicant's 2014 submissions pointing out the (uncorrected) error in the record. They also sent the Respondent's letter agreeing the Commission need to have before it the Applicant's submissions on the Retaliation Report.

[43] On August 13, 2014, the Commission decided [Reconsideration Decision] not to deal with the Applicant's Retaliation Complaint, and did so by adopting the analysis from the original Retaliation Report.

[44] However it did so without having the benefit of the Applicant's submissions on the 40/41 Report regarding her Retaliation Complaint; it only had her submissions on the Vacating Complaint.

[45] The Reconsideration Decision stated that "the following documents were reviewed" and listed, among other documents, the "Complainant's submission dated March 29, 2011" and the "Complainant's submission dated June 27, 2014". This is misleading. Unfortunately, the

Commission did not have the Applicant's March 29, 2011 submissions on the *Retaliation* 40/41 Report. The only submissions written by the Applicant dated March 29, 2011 before the Commission were her submissions on the *Vacating* 40/41 Report which was no longer in issue.

[46] The Retaliation Report's analysis was cited and relied upon by the Commission in its Reconsideration Decision:

> The AJC decided not (sic) refer the complainant's grievance to arbitration before the PSLRB three (3) days prior to receiving the Step 3 response and did not reverse its decision upon receipt of the Step 3 response dated September 4, 2009. As well, the respondent elected not to refer the complainant's first grievance to arbitration.
>
> A careful review of the Complaint Form shows that the first four (4) incidents listed in the complaint occurred prior to the respondent having been notified of the complainant's first complaint (File # 2008 0784) and therefore, would not constitute retaliation under the CHRA.
>
> The remaining five (5) allegations were addressed in the first grievance response that was rendered on May 6, 2009. Where there was a continuation of issues from the first grievance to the second, those issues were provided with remedy in the second grievance decision dated September 4, 2009.
>
> In terms of remedy with respect to the remaining allegations, Ms. Miller, the ADM, and Step 3 decision maker, authorized the following: a further period of leave without pay until October 2, 2009 for the parties time to come to an agreement to the mutual satisfaction of both parties. As well, the ADM partially upheld the complainant's grievance in allowing for her to make pension arrears and Supplementary Death Benefits on a monthly or a quarterly basis until the complainant returned to work and/or until a decision regarding the complainant's employment relationship has been made.
>
> The ADM concluded that the respondent's actions did not constitute discrimination, disciplinary or retaliatory acts nor constructive dismissal. Consequently, she did not award any financial remedy flowing from the CHRA nor the non-monetary corrective measures related to the complainant's allegations.

> The AJC's written submission for this grievance dated July 7, 2009 contains much of the same information that was presented during the first grievance. It would appear that the complainant is recasting the same set of circumstances that were alleged to be discriminatory as being retaliatory for the purposes of the second grievance and the current complaint. It would appear that a substantial portion of these issues were considered and addressed in the first grievance decision and the remedy offered, regarding a return to work, was reiterated in the second grievance decision. It appears that the remaining issues of processing ongoing pension deficiencies and Supplementary Death Benefit premiums were addressed and remedy was provided in the second grievance decision.
>
> Taken as a whole, it appears that the subject matter of the complaint has been addressed through the respondent's internal grievance process.

[47] On September 17, 2014, the Applicant brought this application for judicial review of the Reconsideration Decision dated August 13, 2014.

IV. Issues

[48] This application raises the following issues:

1. Did the Commission breach its duty of procedural fairness by failing to consider the Applicant's submissions on the Retaliation Report when rendering its decision?
2. Did the comments of the Early Resolution Officer indicate bias on the part of the Commission?
3. Should the Court exercise its discretion and decline to remand this matter for reconsideration because sending this matter for reconsideration would inevitably result in the same outcome for the Applicant, namely, the dismissal of her complaint?

V. Standard of Review

[49] In *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 57, 62 [*Dunsmuir*], the Supreme Court of Canada held that a standard of review analysis is unnecessary where "the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question." It was determined at both the Federal Court and Federal Court of Appeal levels of related proceedings for this case that the standard of review for a decision by the Commission is reasonableness: *Bergeron (FC)* at para 27, *Bergeron (FCA)*. Per *Bergeron (FC)*: "The jurisprudence is clear that the Commission is to be afforded great latitude in exercising its judgment and in assessing the appropriate factors when considering the application of paragraph 41(1)(d) of the *CHRA* and performing this 'screening function'": citing *Sketchley v Canada*, 2005 FCA 404 at para 38. In *Bergeron (FCA)*, Justice Stratas said: "The Commissioner's decision was a preliminary screening decision involving fact-based discretion with elements of expertise and specialization…For present purposes, decisions of that sort are presumed to be subject to reasonableness review…." The Federal Court of Appeal noted that the Supreme Court of Canada had applied the reasonableness standard to a review of a provincial human rights commission's preliminary screening decision: *Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, 2012 SCC 10.

[50] Questions of procedural fairness on the other hand are reviewed on the correctness standard: *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43. In *Canada Post Corp v CPAA*, 2016 FC 882, Justice Gleeson summarized the review of procedural fairness issues as relates to the Commission's screening function under subsection 41(1) of the *CHRA*:

> 30. Where a question of procedural fairness arises the matter is to be reviewed on a standard of correctness. Procedural fairness concerns may arise where it is alleged the CHRC failed to consider the submissions of a party (*Canadian Museum of Civilization v. PSAC*, 2014 FC 247 (F.C.) at para 40, (2014), 450 F.T.R. 161 (F.C.) [*Canadian Museum of Civilization*]). However, in the subsection 41(1) context: "Procedural fairness dictates that the parties be informed of the substance of the evidence obtained by the investigator which will be put before the Commission and that the parties be provided the opportunity to respond to this evidence and make all relevant representations in relation thereto" (*Deschênes c. Canada (Procureur général)*, 2009 FC 1126 (F.C.) at para 10).
>
> [emphasis added]

[51] In *Dunsmuir* at para 50, the Supreme Court of Canada explained what is required when conducting a review on the correctness standard:

> When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

VI. Relevant Provisions

[52] Pursuant to paragraph 208(1)(b) of the *PSLRA*, an employee may file an individual grievance "as a result of any occurrence or matter affecting his or her terms and conditions of employment." Subsection 208(2) limits individual grievances presented by employees as follows: "an employee may not present an individual grievance in respect of which an administrative procedure for redress is provided under any Act of Parliament, other than the *Canadian Human Rights Act*" [emphasis added].Therefore, the existence of redress pursuant to

the *CHRA* does not exclude a claim from being made through the independent grievance process under the *PSLRA*.

[53] An individual grievance may be referred to adjudication under certain circumstances prescribed by subsection 209(1) of the *PSLRA*:

209 (1) An employee may refer to adjudication an individual grievance that has been presented up to and including the final level in the grievance process and that has not been dealt with to the employee's satisfaction if the grievance is related to	**209 (1)** Après l'avoir porté jusqu'au dernier palier de la procédure applicable sans avoir obtenu satisfaction, le fonctionnaire peut renvoyer à l'arbitrage tout grief individuel portant sur :
…	…
(b) a disciplinary action resulting in termination, demotion, suspension or financial penalty; …	b) soit une mesure disciplinaire entraînant le licenciement, la rétrogradation, la suspension ou une sanction pécuniaire; …

[54] Section 214 of the *PSLRA* deals with finality of the internal grievance decision:

214 If an individual grievance has been presented up to and including the final level in the grievance process and it is not one that under section 209 may be referred to adjudication, the decision on the grievance taken at the final level in the grievance process is final and binding for all purposes of this Act and no further action under this Act may be taken on it. [emphasis added]	**214** Sauf dans le cas du grief individuel qui peut être renvoyé à l'arbitrage au titre de l'article 209, la décision rendue au dernier palier de la procédure applicable en la matière est définitive et obligatoire et aucune autre mesure ne peut être prise sous le régime de la présente loi à l'égard du grief en cause. [soulignements ajoutés]

[55] Furthermore, interplay between the Commission and the individual grievance process – albeit at the adjudication stage – is contemplated by section 210 of the *PSLRA*:

Notice to Canadian Human Rights Commission	**Avis à la Commission canadienne des droits de la personne**
210 (1) When an individual grievance has been referred to adjudication and a party to the grievance raises an issue involving the interpretation or application of the Canadian Human Rights Act, that party must, in accordance with the regulations, give notice of the issue to the Canadian Human Rights Commission.	**210 (1)** La partie qui soulève une question liée à l'interprétation ou à l'application de la Loi canadienne sur les droits de la personne dans le cadre du renvoi à l'arbitrage d'un grief individuel en donne avis à la Commission canadienne des droits de la personne conformément aux règlements.
Marginal note: Standing of Commission	**Observations de la Commission**
(2) The Canadian Human Rights Commission has standing in adjudication proceedings for the purpose of making submissions regarding an issue referred to in subsection (1).	**(2)** La Commission canadienne des droits de la personne peut, dans le cadre de l'arbitrage, présenter ses observations relativement à la question soulevée.

[56] Section 7 of the *CHRA* sets out discriminatory practices in relation to employment:

Employment	**Emploi**
7 It is a discriminatory practice, directly or indirectly,	**7** Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait, par des moyens directs ou indirects :
(a) to refuse to employ or continue to employ any individual, or	a) de refuser d'employer ou de continuer d'employer un individu;
(b) in the course of employment, to differentiate adversely in relation to an employee,	b) de le défavoriser en cours d'emploi.
on a prohibited ground of discrimination.	

[57] Section 14.1 of the *CHRA* sets out the discriminatory practice of retaliation:

Retaliation	**Représailles**
14.1 It is a discriminatory practice for a person against whom a complaint has been filed under Part III, or any person acting on their behalf, to retaliate or threaten retaliation against the individual who filed the complaint or the alleged victim.	**14.1** Constitue un acte discriminatoire le fait, pour la personne visée par une plainte déposée au titre de la partie III, ou pour celle qui agit en son nom, d'exercer ou de menacer d'exercer des représailles contre le plaignant ou la victime présumée.
[emphasis added]	[soulignements ajoutés]

[58] An individual who believes he or she is subject to a discriminatory practice may file a complaint with the Commission pursuant to subsection 40(1) of the *CHRA*. The Commission is required to consider any matter referred to it unless the matter falls under one of the five categories provided in subsection 41(1) of the *CHRA*:

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;
(b) the complaint is one that could more appropriately be dealt with, initially or completely, according to a procedure provided for under an Act of Parliament other than this Act;	b) la plainte pourrait avantageusement être instruite, dans un premier temps ou à toutes les étapes, selon des procédures prévues par une autre loi fédérale;
(c) the complaint is beyond the jurisdiction of the	c) la plainte n'est pas de sa compétence;

Commission;	
(d) the complaint is trivial, frivolous, vexatious or made in bad faith; or	d) la plainte est frivole, vexatoire ou entachée de mauvaise foi;
(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.
[emphasis added]	[soulignements ajoutés]

[59] Where the Commission decides not to deal with a complaint, subsection 42(1) requires that it send written notice and reasons for its decision to the complainant.

VII. Analysis

[60] On the first issue, and in my respectful view, the determinative issue is the failure of the Commission to hear both sides before coming to its decision. As the Applicant succinctly argues, "[I]t is trite that a human rights complainant has the right to be heard before her complaint is dismissed." Indeed, one may with considerable confidence say that little if anything is more fundamental in administrative law than the requirement that a decision-maker hear both sides of a dispute. Yet here the Commission breached this fundamental rule of natural justice.

[61] The Commission did not have the *Applicant's* submissions, filed in 2011 in response to Commission staff's original 40/41 Report prepared in relation to the Retaliation Complaint. In my respectful view, by failing to have before it and therefore failing to consider the Applicant's

submissions on the Retaliation Report when deciding the Retaliation Complaint, the Commission breached its fundamental duty to hear both sides in this dispute.

[62] The Federal Court of Appeal addressed this situation, where submissions were requested but then not considered, stating: "[T]o solicit the representations of a party and, subsequently, to fail to consider them, renders hollow the hallowed principle of the right to be heard": *Tiedman v Canada (Canadian Human Rights Commission)* (1993), 66 FTR 15, [1993] FCJ No 667 at para 11 [*Tiedman*].

[63] Moreover, while the Commission did have the correct Applicant's *2014* submissions in response to the Supplementary 40/41 Report on the Retaliation matter, I am not persuaded that the Commission actually considered them. If it had considered the Applicant's 2014 submissions, in my respectful view, the Commission would have known it was proceeding without benefit of the Applicant's 2011 submissions in the Retaliation Complaint; her 2014 submissions stated this. Importantly, so did the Respondent's 2014 submissions. Both sides told the Commission it should consider the Applicant's submissions on the 40/41 Report prepared for the matter at hand, namely the Retaliation Report. With respect, in my view it is inconceivable that, in such circumstances, the Commission would continue to consider - let alone decide - this case without first obtaining the missing Applicant's submissions on the case. As stated in *Herbert v Canada (Attorney General)*, 2008 FC 969 at para 26 [*Herbert*], above at para 26:

> However, where these submissions allege substantial and material omissions in the investigation and provide support for that assertion, the Commission must refer to those discrepancies and indicate why it is of the view that they are either not material or are not sufficient to challenge the recommendation of the investigator;

> otherwise one cannot but conclude that the Commission failed to consider those submissions at all.

And see *Egan v Canada (Attorney General)*, 2008 FC 649 at paras 4-5 [*Egan*]; *Dupuis v Canada (Attorney General)*, 2010 FC 511 [*Dupuis*]; *Taticek v Canada (AG)*, 2009 FC 366 at paras 29-31 [*Taticek*]. Similarly, in these circumstances, I may only conclude that the Commission failed to consider not only the Applicant's 2014 submissions, but those of the Respondent as well.

[64] Therefore, I find that the Commission breached procedural fairness in two respects: it acted without hearing from the Applicant in that it did not consider her 2011 submissions on the relevant 40/41 Report on her Retaliation Complaint (because her submissions were not before it) and, further, it also failed to consider her (and the Respondent's) 2014 submissions on this point in response to the Supplementary 40/41 Report. In my view, both breaches constitute reviewable errors.

[65] Cumulatively, in these circumstances, the Court is under a *prima facie* duty to grant judicial review.

[66] However, I am asked to address three additional matters before concluding: (1) was Commission staff biased against the Applicant in indicating they would only do a "cut and paste" job, such that the same result would obtain as previously; (2) did the failure of Commission staff to put the conciliation report to the Commission constitute a separate breach of procedural fairness; and, (3) whether there is any point in ordering reconsideration, since dismissal of the Applicant's complaint is inevitable as the final result would be the same.

(1) *Did Commission staff commit reviewable bias towards the Applicant in indicating they would only do a "cut and paste" job, such that the same result would obtain as previously?*

[67] This alleged breach of procedural fairness was set out in the Applicant's submissions in response to the Supplementary 40/41 Report. Specifically, the Applicant asked that the Early Resolution Team Leader be removed from the file because she appeared not to take seriously the reconsideration ordered by the Federal Court. The submissions stated: "Indeed, we understand that you have essentially advised [the Applicant] that the decision has corrected an administrative oversight ("a cut and paste" error as you called it). You have further advised Ms. Bergeron that you will just resubmit the case to the Commissioners, with the correct analysis section ending up in the appropriate case this time." In submissions, Applicant's Counsel pointed out that these comments showed that the Early Resolution Team Leader had prejudged the issues and was not open to a fair and thorough consideration of the Applicant's concerns.

[68] These allegations are repeated in the Applicant's affidavit on judicial review. They are not contested.

[69] However, while these comments do not describe conduct I would expect from staff of the Commission, I am not persuaded that they constitute bias given the low level of procedural fairness owed at the screening stage: *Zündel v Canada (Attorney General)*, [1999] 4 FCR 289 at para 19. Commission staff should avoid appearing dismissive as was the case here.

[70] That said, an allegation of Commission staff bias should be brought to the Commission's attention directly where the alleged bias may implicate those individuals preparing material for the Commission's review, as here.

(2) *Did the failure of Commission staff put the conciliation material to the Commission constitute a separate breach of procedural fairness?*

[71] In my view, this matter need not be decided because I am ordering a reconsideration of the Retaliation Complaint.

(3) *Whether there is any point in ordering reconsideration, since dismissal of the Applicant's complaint is inevitable as the final result would be the same?*

[72] The Respondent's final submission is that there is no point in sending this matter back to the Commission for reconsideration because the result would be the same, which submission is tied to a submission that the decision is reasonable. To this end the Respondent argued that, based on the defective record that was before the Commissioner (defective because it did not include the Applicant's 2011 submissions re the Retaliation Report), coupled with a review of the record (which contained her submissions on the Vacating Complaint) and the decision of Justice Zinn on judicial review of the now-spent Vacating Complaint, the result would be the same, that is, the Retaliation Complaint would be dismissed under paragraph 41(1)(d).

[73] I agree that the Court has the discretion, in appropriate circumstances, to dismiss judicial review notwithstanding a breach of procedural fairness where, if judicial review were granted, the result would nonetheless be the same: *Mobil Oil Canada Ltd v Canada-Newfoundland*

Offshore Petroleum Board, [1994] 1 SCR 202. This discretion may be exercised where a particular decision on the merits is inevitable: *Renaud v Canada (Attorney General)*, 2013 FCA 266 at para 5; and see *Yassine v Canada (Minister of Employment and Immigration)*, [1994] FCJ No 949 (FCA) at para 9; *Vézina v Canada (Attorney General)*, 2003 FCA 67, citing *Cartier v Canada (Attorney General)*, 2002 FCA 384 at paras 31-33; and *Canada (Attorney General) v Canadian Human Rights Commission*, 2013 FCA 75 at para 26.

[74] However, even if I were to find the underlying decision reasonable or even inevitable, in my respectful view this Court should not exercise its discretion to leave this decision in place; in my view it must be set aside. There are several reasons for coming to this conclusion. First, the record does not contain the Applicant's 2011 submissions on her Retaliation Report. For this Court to conduct this sort of analysis, and uphold the decision on this record, I would have to consider the matter without benefit of the Applicant's submissions. This is untenable; the Court cannot be expected to proceed in such a procedurally unfair manner: the Applicant must be heard. To proceed in the manner suggested by the Respondent, i.e., without hearing on the merits from the Applicant, is also inconsistent with the Respondent's request to Commission staff to place the Applicant's submissions before the Commission; if the Commission should have had them (which it should) so too should this Court, but they are not in the Court's record. In addition, the Applicant is entitled to have her submissions heard and decided by the *Commission*; it is the *Commission's* duty to properly hear and decide this matter, which duty it has not yet performed. Further, as the Respondent submitted and this Court has accepted, the Commission is given a great deal of discretion in determining the disposition of 40/41 Reports. This discretion derives from judicial recognition of the Commission's expertise in performing its important

screening and gate-keeping role. That relative expertise and discretion further suggests that it is the Commission, not the Court, which should decide the as yet unresolved Retaliation Complaint on its merits.

[75] There is a further and in my view important reason to remand this complaint back to the Commission: a previous mistake by Commission staff has already caused one successful judicial review. Now, a second procedural mistake in the same file has led to a second finding of procedural unfairness. It appears to me, with all due respect, that there is room for improvement in the Commission's Early Resolution procedures; it is hoped that remanding this matter to the Commission is more likely to lead to a better procedural outcome than would occur if this Court undertook a *de novo* review - particularly without hearing from the Applicant.

[76] The Respondent also says that "mere technicalities or errors that are immaterial to the decision or that do not affect the outcome will not generally undermine the decision overall": citing to Sara Blake, *Administrative Law in Canada*, 5th ed. (Markham: Butterworths, 2001) at 221; *Sardar v University of Ottawa*, 2014 ONSC 3562 at para 26. With respect, I am not persuaded this test assists the Respondent; failure of the Commission to consider the Applicant's submissions is not a "mere technicality" or an "immaterial" error: it is a serious breach of procedural fairness.

[77] Having decided against exercising this Court's discretion not to grant judicial review, this application for judicial review must be granted on grounds of the Commission's procedural unfairness.

VIII. Remedy

[78] The Applicant requests an order remanding this complaint back to the Commission with a direction that the Commission refer the Applicant's complaint for an inquiry before the Canadian Human Rights Tribunal or, in the alternative, that the Commission appoint a new investigator to complete an investigation pursuant to section 43 of the *CHRA* prior to rendering a decision in her complaint pursuant to section 44 of the *CHRA*.

[79] I am not persuaded either special remedy should be granted. While I appreciate the Applicant's frustration in seeing two successive considerations of her Retaliation Complaint set aside because of procedural unfairness at the hands of the Commission and its staff, in my view, her application should be remanded for reconsideration by the Commission. I am influenced in this decision by the comments concerning the "cut and paste" discussed above and, of course, by the fact that this will be the second Court-ordered reconsideration – and third assessment overall – of the Applicant's Retaliation Complaint. It should be done properly this time. More generally, I accept that the Commission is the proper body to reconsider this complaint because of its expertise and the importance of its gate-keeper role.

IX. Costs

[80] Both parties requested time to file cost submissions once they had the Court's decision, which request I accept and therefore I make no comment on costs at this time. The parties shall have 15 days from the date of this judgment to either agree on costs or to file cost submissions.

X. Conclusions

[81] The application for judicial review is granted, the Applicant's complaint is remanded for reconsideration. The parties will have 15 days from the date of this judgment to either agree on costs or to file their respective cost submissions.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. Judicial review is granted.
2. The decision of the Canadian Human Rights Commission, dated August 13, 2014, is set aside.
3. The Applicant's Retaliation Complaint is remanded for reconsideration.
4. The parties will have 15 days from the date of this judgment to either agree on costs or to file respective cost submissions.

"Henry S. Brown"
Judge

APPENDIX

Canadian Human Rights Act, RSC, 1985, c H-6

Complaints **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.	**Plaintes** **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.
…	…
Marginal note: No complaints to be considered in certain cases **(5)** No complaint in relation to a discriminatory practice may be dealt with by the Commission under this Part unless the act or omission that constitutes the practice	**Note marginale : Recevabilité** **(5)** Pour l'application de la présente partie, la Commission n'est validement saisie d'une plainte que si l'acte discriminatoire :
(a) occurred in Canada and the victim of the practice was at the time of the act or omission either lawfully present in Canada or, if temporarily absent from Canada, entitled to return to Canada;	a) a eu lieu au Canada alors que la victime y était légalement présente ou qu'elle avait le droit d'y revenir;
(b) occurred in Canada and was a discriminatory practice within the meaning of section 5, 8, 10 or 12 in respect of which no particular individual is identifiable as the victim;	b) a eu lieu au Canada sans qu'il soit possible d'en identifier la victime, mais tombe sous le coup des articles 5, 8, 10 ou 12;
(c) occurred outside Canada and the victim of the practice was at the time of the act or omission a Canadian citizen or an individual lawfully admitted to Canada for permanent residence.	c) a eu lieu à l'étranger alors que la victime était un citoyen canadien ou qu'elle avait été légalement admise au Canada à titre de résident permanent.
…	…

Notice
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.

Marginal note: Attributing fault for delay
(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 another.

Conciliator
Marginal note: Appoint of conciliator
47 (1) Subject to subsection (2), the Commission may, on the filing of a complaint, or if the complaint has not been

(a) settled in the course of investigation by an investigator,
(b) referred or dismissed under subsection 44(2) or (3) or paragraph 45(2)(a) or 46(2)(a), or
(c) settled after receipt by the parties of the notice referred to in subsection 44(4),

appoint a person, in this Part referred to as a "conciliator", for the purpose of attempting to bring about a settlement of the complaint.

Avis
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.

Note marginale : Imputabilité du défaut
(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.

Conciliation
Note marginale : Nomination du conciliateur
47 (1) Sous réserve du paragraphe (2), la Commission peut charger un conciliateur d'en arriver à un règlement de la plainte, soit dès le dépôt de celle-ci, soit ultérieurement dans l'un des cas suivants :
a) l'enquête ne mène pas à un règlement;

b) la plainte n'est pas renvoyée ni rejetée en vertu des paragraphes 44(2) ou (3) ou des alinéas 45(2)a) ou 46(2)a);
c) la plainte n'est pas réglée après réception par les parties de l'avis prévu au paragraphe 44(4).

…

Marginal note:
Confidentiality

(3) Any information received by a conciliator in the course of attempting to reach a settlement of a complaint is confidential and may not be disclosed except with the consent of the person who gave the information.

…

Note marginale :
Renseignements confidentiels

(3) Les renseignements recueillis par le conciliateur sont confidentiels et ne peuvent être divulgués sans le consentement de la personne qui les a fournis.

FEDERAL COURT

SOLICITORS OF RECORD

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