Federal Court  Cour fédérale

Date: 20170503

Docket: T-1203-15

Citation: 2017 FC 438

Ottawa, Ontario, May 3, 2017

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

DANUSIA KLIMKOWSKI

Applicant

and

CANADIAN PACIFIC RAILWAY

Respondent

JUDGMENT AND REASONS

I. Overview

[1] In 1986 Ms. Danusia Klimkowski, the applicant, began working for the respondent Canadian Pacific Railway Limited [CPR]. In 1995 she suffered an injury to her left ankle. She did not return to work until 2001. In 2006 she re-injured her ankle and was off work until 2012. After commencing a return-to-work program, her employment was terminated for cause on August 15, 2013.

[2] The Teamsters Canada Rail Conference [the Union], grieved the termination on her behalf. The grievance was referred to arbitration. In July 2014 the arbitrator upheld the termination and dismissed the grievance. In August 2014 Ms. Klimkowski submitted a compliant [Complaint] to the Canadian Human Rights Commission [CHRC or Commission] alleging the CPR had discriminated against her.

[3] In a decision dated June 10, 2015, the CHRC declined to deal with the Complaint [the CHRC decision]. The CHRC held that the essence of the Complaint had been dealt with in the arbitration process where the arbitrator had concluded that there was no discrimination and the termination was justified.

[4] In seeking judicial review of the CHRC decision Ms. Klimkowski argues that the CHRC erred in fact and law, and the process was unfair. She submits the Commission improperly evaluated and applied paragraph 41(1)(d) of the *Canadian Human Rights Act*, RSC 1985, c H-6 [CHRA].

[5] Having reviewed the record and having considered the parties oral and written submissions I am unable to conclude that the CHRC committed a reviewable error. The decision was reasonable and there was no breach of procedural fairness. For the reasons that follow the application is dismissed.

II. Issues

[6] The application raises the following issues:

A. Was there a breach of procedural fairness?

B. Was the decision reasonable? This issue engages two sub-issues:

i. Did the Commission err by finding the Complaint to be "vexatious" within the meaning of paragraph 41(1)(d) of the CHRA; and

ii. Did the Commission err by finding the Complaint to be "frivolous" within the meaning of paragraph 41(1)(d) of the CHRA?

III. Standard of Review

[7] The parties agree that questions of fairness, including whether submissions were considered by a decision-maker, are to be reviewed against a standard of correctness (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 129 [*Dunsmuir*]; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43 [*Khosa*]; *Carroll v Canada (Attorney General*), 2015 FC 287 at para 23 [*Carroll*]; *Canadian Museum of Civilization v Public Service Alliance of Canada*, 2014 FC 247 at para 40).

[8] In *Public Service Alliance of Canada v Canada (Attorney General)*, 2015 FCA 174 at para 28, Justice Near, writing for a unanimous Federal Court of Appeal held that "Reasonableness is presumed to be the standard of review applicable to the Commission's decision, which involved the application of the legal standards set out in the CHRA – its home statute – to a set of facts". The jurisprudence further establishes that in the exercise of its screening function under sections 40, 41 and 44 of the CHRA the Commission has been granted

"a remarkable degree of latitude" (*Bell Canada v Communications, Energy and Paperworkers Union of Canada*, [1998] FCJ No 1609 at para 38, 167 DLR (4th) 432 (CA) [*Bell Canada*]; also see *Canada (Attorney General) v Davis*, 2010 FCA 134 at para 5; *Tsui v Canada Post Corp*, 2010 FC 860 at para 21).

[9] It is against this standard that I will consider the reasonableness of the Commission's decision not to deal with the Complaint.

IV. Role of the Commission

[10] At the outset it will be of some value to review the role and function of the Commission in the complaint screening process established under the CHRA.

[11] The Commission is established under section 26 of the CHRA and consists of a Chief Commissioner, a Deputy Chief Commissioner and three to six members. Section 32 provides for the appointment of such officers and employees as necessary for the proper conduct of the work of the Commission in accordance with the *Public Service Employment Act*, SC 2003, c 22, ss 12, 13.

[12] Subsection 40(1) of the CHRA provides, subject to prescribed limitations and exceptions, any individual having reasonable grounds for believing that a person is engaging or has engaged in a discriminatory practice, as that term is defined at section 39, may file a complaint with the Commission. Subsection 41(1) in turn requires the Commission to deal with any complaint filed, but enumerates prescribed grounds where the Commission may decide not to deal with a

complaint including, for the purpose of this judicial review application, where it finds the complaint to be trivial, frivolous, vexatious or made in bad faith (Paragraph 41(1)(d) of the CHRA).

[13] As noted at paragraph 35 of *Bell Canada* the role of the Commission is one of "an administrative and screening body" (citing *Cooper v Canada (Human Rights Commission)*, [1996] 3 SCR 854 at para 58 [*Cooper*]). It does not decide a complaint on its merits. The primary function of the Commission is the assessment of the sufficiency of the evidence before it for the purpose of determining whether the complaint should proceed to the next stage (*Cooper* at para 53). In this case that assessment was undertaken in the completion of a section 40/41 report to assist the Commission in determining whether it should refuse to deal with the Complaint under paragraph 41(1)(d) of the CHRA.

V. Background

A. *Circumstances Leading to the Termination of Employment*

[14] After suffering a severe left ankle sprain in 1995, a work related injury, and after a number of unsuccessful attempts to return to her pre-injury position Ms. Klimkowski returned to work in 2001 and was re-trained as a Locomotive Engineer. She achieved that qualification in the 2002/2003 period and then commenced maternity leave. She remained off work until 2005. In 2006 she re-injured her left ankle and was once again off work until 2012 when she commenced a return to work program. That program was suspended in the fall of 2012 due to a related medical issue. She recommenced the return to work program in May or June 2013.

[15] In May of 2013 the CPR received reports that Ms. Klimkowski had been observed performing activities outside the workplace that were inconsistent with her employment limitations. Based on these reports the CPR undertook video surveillance of Ms. Klimkowski between May 16, 2013 and June 24, 2013. After an internal investigation that relied on the video surveillance evidence Ms. Klimkowski's employment was terminated on the grounds that she had misrepresented her functional abilities.

B. *The Grievance Arbitration*

[16] The Union grieved the termination contending that it had not been conducted in a fair and impartial manner. The Union alleged the termination was in breach of the Collective Agreement and the CHRA. The Union argued the termination was contrary to the duty to accommodate Ms. Klimkowski's disability and ensure a discrimination and harassment free work environment. The grievance was referred to arbitration where the issues were argued.

[17] The Union's submissions before the arbitrator included the following: (1) the video surveillance evidence was not admissible; (2) that the CPR had made untrue and defamatory comments to the Workplace Safety and Insurance Board [WSIB] and those statements constituted discrimination and harassment based on Ms. Klimkowski's disability; and (3) the termination was without cause, discriminatory and contrary to the CHRA.

[18] The CPR submitted that: (1) the video surveillance evidence was admissible; (2) subsequent to the original injury Ms. Klimkowski had been accommodated or attempts had been made to do so; and (3) the company's actions were not in violation of the CHRA.

[19] The arbitration decision set out Ms. Klimkowski's work and injury history in some detail with a particular focus on events between March 2012 and her termination in the summer of 2013. In particular the decision highlighted:

A. A series of Functional Ability Forms reflecting adjustments and changes to Ms. Klimkowski's injury related restrictions completed by her physician in the May 2012 to May 2013 period;

B. WSIB correspondence reviewing Ms. Klimkowski's obligations while in receipt of WSIB benefits;

C. Workplace assessments completed by occupational therapists in June 2012, March 2013 and May 2013 resulting in recommendations to accommodate Ms. Klimkowski's limitations and concluding in March 2013 that "…the greivor was able to demonstrate safely climbing up and down the stairs of two locomotives while wearing [an ankle foot and lower leg brace]".

D. That the CPR was of the view that Ms. Klimkowski had prolonged her recovery and delayed her return to work and based on reports from employees and knowledge of improperly claimed WSIB expenses, the CPR engaged an investigator to undertake video surveillance which spanned a 9 day period between May 16 and June 24, 2013 collecting 2 hours and 31 minutes of video.

[20] The arbitrator considered and rejected the Union's argument that the CPR investigation had been biased. The arbitrator then considered the Union objections to the admissibility of the

video evidence. The arbitrator concluded, upon consideration of the record as a whole, that it would have been difficult for the CPR not to suspect Ms. Klimkowski had prolonged her recovery and delayed her return to work process. The arbitrator further concluded the surveillance was not unduly intrusive and that the accuracy of the video had been confirmed by Ms. Klimkowski. The arbitrator found that the only conclusion to be drawn from the video was that Ms. Klimkowski had misrepresented her physical abilities to the CPR and her termination was an appropriate penalty.

[21] The Union did not seek judicial review of the arbitration decision and Ms. Klimkowski did not initiate a complaint against the Union pursuant to the latter's duty of fair representation.

C. *The Complaint to the Canadian Human Rights Commission*

(1) The Complaint

[22] Ms. Klimkowski submitted the Complaint to the CHRC in August 2014, alleging that the CPR had discriminated against her in that it had:

A. Terminated her employment contrary to the employment provisions of the CHRA;

B. Treated her unfairly in the workplace contrary to the employment provisions of the CHRA;

C. Sent her letters and communicated with the WSIB in a discriminatory manner and in a manner that provoked the WSIB to discriminate against her; and

D. Harassed her on the basis of disability and sex.

[23] Counsel for Ms. Klimkowski submitted an amendment to her Complaint on October 14, 2014 [the Amended Complaint]. The Amended Complaint included allegations with respect to systemic and personal discrimination on the basis of disability and sex, as well as harassment on the basis of disability.

[24] On September 8, 2014, the CHRC investigator advised the parties that paragraph 41(1)(d) of the CHRA may apply as the human rights issues raised in the Complaint may have already been dealt with through the arbitration process. The investigator advised the parties that a section 40/41 report would be prepared to assist the CHRC in deciding whether to deal with the Complaint. The parties were invited to provide their positions on this issue by October 15, 2014.

[25] In responding, the CPR argued that the Complaint was indeed vexatious within the meaning of the CHRA as "…another legitimate procedure has appropriately dealt with essentially the same issues and substance of the alleged discrimination and that the Commission should, therefore, not deal with the Complaint per Section 41(1)(d) of the Act". The CPR noted that the *Canada Labour Code*, RSC 1985, c L-2 vests an arbitrator with jurisdiction over all aspects of a dispute including those arising from a company's statutory obligations. The CPR submitted that there was no substantial divergence between the issues addressed in the arbitration and the Complaint initiated, and there had been ample opportunity to raise all relevant human rights issues in the arbitration process.

[26] Ms. Klimkowski submitted that it was the Union, not her, who had carriage of the arbitration process and the Union had not raised any argument or led any evidence with respect to the CHRA issues raised in her Complaint and her Amended Complaint. She submitted that the arbitration decision only addressed the fairness of the investigation leading to her termination, but did not address the core issues underlying the Complaint as they related to her allegations of systemic and personal discrimination and harassment on the basis of sex and disability.

[27] On February 16, 2015 the investigator provided the parties with the completed 40/41 report and the opportunity to make submissions in response to the report [Section 40/41 Report].

(2) The Section 40/41 Report

[28] The Section 40/41 Report first addressed whether the Complaint was vexatious under paragraph 41(1)(d) of the CHRA. In doing so the investigator noted that the allegations relating to harassment and systemic discrimination were not supported by particulars. The Section 40/41 Report does not further assess these particular allegations.

[29] The Section 40/41 Report noted that the arbitrator was an independent third party and the arbitration decision extensively considered Ms. Klimkowski's employment from 2001 onwards. The investigator, relying on the Supreme Court of Canada's decision in *British Columbia (Workers' Compensation Board) v Figliola*, 2011 SCC 52 [*Figliola*] concluded that there is a requirement that the CHRC respect the finality of decisions made by other administrative decision-makers with concurrent jurisdiction.

[30] The Section 40/41 Report then considered Ms. Klimkowski's submission that the arbitrator did not address her human rights related allegations. The investigator again found insufficient particulars to support allegations of systemic discrimination. With respect to the allegations of personal harassment and discrimination on the ground of disability the investigator determined these allegations had been addressed in the arbitration process. The investigator then concluded that allegations related to personal harassment and discrimination based on the prohibited ground of sex had not been directly addressed in the arbitration decision. However, the investigator held that there had been an opportunity to raise these issues in the arbitration and the allegations of discrimination based on sex were interrelated to the disability complaint. The Section 40/41 Report concluded that the essence of the Complaint was dealt with by the arbitrator.

[31] In reaching this conclusion the Section 40/41 Report recognized, relying on *Penner v Niagara (Regional Police Services Board)*, 2013 SCC 19 [*Penner*], that where there had been a previous process there is a requirement for the decision-maker in the second process to consider the circumstances and decide whether it would be fair to let the second process continue. In doing so there is a need to consider if the first process was procedurally fair. Further, even if the first process had been fair it is necessary to consider if it would be nonetheless unfair to use the result of the first process to halt the second process. In this regard the Section 40/41 Report noted the absence of practical remedies in light of the arbitrator's finding of no discrimination and that the termination was justified.

[32] The Section 40/41 Report found the grievance procedure and arbitration were procedurally fair and that Ms. Klimkowski's issues with Union representation did not render the process unfair. The investigator concluded that Ms. Klimkowski's dissatisfaction with the outcome is not sufficient to trigger a requirement for the CHRC to deal with the Complaint. It noted the CHRC is not an appeal body and that adjudication of the Complaint will not advance the purpose of the CHRA. The investigator found that justice does not require the CHRC deal with the Complaint. The Section 40/41 Report determined the Complaint to be vexatious pursuant to paragraph 41(1)(d) of the CHRA as the essence of the Complaint had been dealt with in the grievance/arbitration process and that there was no information to suggest that it would be unfair for the CHRC to refuse to deal with the Complaint.

[33] The Section 40/41 Report also determined that the Complaint, as it relates to harassment and discrimination on the basis of sex was frivolous pursuant to paragraph 41(1)(d) of the CHRA. The Section 40/41 Report found that there is no reasonable grounds to believe that the allegations of discrimination set out in the Complaint are linked to the prohibited ground of sex under the CHRA.

D. *Decision under Review*

[34] On June 10, 2015, the Deputy Chief Commissioner of the CHRC [Commissioner] cited and adopted the conclusions of the Section 40/41 Report, finding that the Complaint was vexatious and the allegation of discrimination based on the prohibited ground of sex was frivolous pursuant to paragraph 41(1)(d) of the CHRA.

[35] In adopting the Section 40/41 Report, the latter becomes the Commissioner's reasons (*Canada (Attorney General) v Davis,* 2009 FC 1104 at para 52 [*Davis* FC]; *Vos v Canadian National Railway Company,* 2010 FC 713 at para 36)**.**

VI. Analysis

A. *Was there a breach of procedural fairness?*

[36] Ms. Klimkowski argues that the Commission acted unfairly in failing to conduct a thorough investigation of the Complaint. First the Commission ignored her Amended Complaint. She further argues that she was unfairly denied a copy of the position statement prepared by the CPR in response to the investigator's September 8, 2014 request to the parties for a position statement in advance of preparing the Section 40/41 Report. In addition she argues that her April 6, 2015 reply to the Section 40/41 Report was ignored as were unsolicited submissions dated June 18, 2015 and the reasons given in refusing to deal with the Complaint were inadequate. She also argues that in blindly adopting the findings of the grievance arbitrator the process was procedurally unfair. This final argument does not, in my opinion, raise an issue of fairness but rather a question of mixed fact and law relating to the reasonableness of the CHRC decision. This issue is addressed in the second part of this analysis.

[37] At the outset I note that Ms. Klimkowski's written submissions make reference to both natural justice and procedural fairness. In this regard I am in agreement with the respondent, the CHRC is not bound by the formal rules of natural justice but is bound by the principles and rules of procedural fairness (*Syndicat des employés de production et de l'Acadie v Canada (Human*

Rights Commission), [1989] 2 SCR 879 at para 27 and *Robinson v Canada (Human Rights Commission)*, [1995] FCJ No 16 at para 14, 90 FTR 43 (TD)). This distinction is relevant when one recognizes that content of the duty of procedural fairness is contextually driven.

[38] In *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 21 [*Baker*], Justice L'Heureux-Dubé reaffirmed that the content of the duty of procedural fairness varies based on the context of the case. Justice L'Heureux-Dubé set out five non-exhaustive factors for determining the content of the duty of procedural fairness owed: (1) the nature of the decision being made and the process followed in making it; (2) the nature of the statutory scheme; (3) the importance of the decision to the individual or individuals affected; (4) the legitimate expectations of the person challenging the decision; and (5) "the choices of procedure made by the agency itself" (*Baker* at paras 23-27). The *Baker* list is non-exhaustive and reflects "the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decision" (*Baker* at para 28).

[39] Jurisprudence in the CHRC context has considered the *Baker* factors and noted that the content of the duty of procedural fairness may differ where the Commission is dismissing a complaint as opposed to allowing the complaint proceed to the next stage in the complaint process (*Davis* FC at para 56; *Canada Post Corp v Canadian Postmasters and Assistants Assn*, 2016 FC 882 at para 37). This, in my view acknowledges the varying nature of the content of the

duty of procedural fairness and affirms the principle that the extent of the duty is defined by context, including the impact of the decision on the affected individual.

[40] Ms. Klimkowski alleges that the failure to acknowledge and address the Amended Complaint was procedurally unfair. She relies on *Carroll* to advance the position that ignoring a complainant's submissions amounts to a breach of procedural fairness and where the reasons omit any mention of those submissions this might constitute evidence that they were ignored (*Carroll* at paras 77 and 78).

[41] In this case I am unable to conclude that Ms. Klimkowski's submissions, including her Amended Complaint were ignored. Although the Section 40/41 Report does not does not make direct reference to the Amended Complaint and the latter was not included in the documents placed before the Commissioner the contents of the Amended Complaint are reflected in the substance of the Section 40/41 Report.

[42] In her October 15, 2014 position statement, provided in response to the investigator's invitation to provide submissions on the applicability of section 41(1)(d), Ms. Klimkowski substantially reproduced the contents of the Amended Complaint. The 40/41 Report references and quotes from that position statement. In doing so the Section 40/41 Report reproduces, in part, the allegations of harassment and systemic discrimination from the Amended Complaint and then directly addresses the allegations.

[43] While it may have been preferable in the circumstances of this case for the investigator to have made express reference to the October 14, 2014 amendment to the Complaint, it is clear that the contents of the Amended Complaint were known to the investigator. The content of the Amended Complaint is reflected in the Section 40/41 Report and the Commissioner was aware of that content through both the 40/41 Report and through Ms. Klimkowski's response to that Report.

[44] Unlike *Carroll*, where Justice Mosely concluded at paragraph 79 that the submissions of the complainant had been ignored, Ms. Klimkowski's allegations of discrimination were acknowledged and addressed in the Section 40/41 Report. The crux of the issue raised by Ms. Klimkowski was not a lack of awareness of the nature and extent of her Complaint, the issue in *Carroll*, rather, Ms. Klimkowski took issue with the conclusion reached in the Section 40/41 Report and adopted by the Commissioner – her allegations of harassment and systemic discrimination were unsupported by particulars. This disagreement does not render the process procedurally unfair.

[45] With respect to Ms. Klimkowski's argument that she was unfairly denied the opportunity to review and comment on submissions provided by the CPR, I am similarly unable to conclude that the circumstances disclose any breach of fairness.

[46] Ms. Klimkowski was given the opportunity to make submissions in advance of the completion of the Section 40/41 Report, as was the CPR. Neither party was provided the opportunity to review or reply to the other party's submissions in advance of the completion of

the Section 40/41 Report. Instead the parties were provided with the Report. In providing the Report to the parties for comment the investigator disclosed the submissions that had been made and relied upon in the completion of the Report. The parties were extended the opportunity to make submissions on the Section 40/41 Report.

[47] The CPR did not provide a substantive reply to the Report and merely expressed its full agreement with the recommendation that the CHRC not deal with the Complaint. Ms. Klimkowski did provide a substantive reply and the latter was placed before the Commissioner. The investigator also provided the CPR with an opportunity to respond to Ms. Klimkowski's substantive response to the Section 40/41 Report, which it did on May 13, 2015. Presumably a similar opportunity would have been provided to Ms. Klimkowski had the CPR provided a substantive initial reply. Ms. Klimkowski argues that procedural fairness required she be given the opportunity to provide a sur-reply in response to the CPR submissions before the Commissioner.

[48] In *Madsen v Canada (Attorney General)*, [1996] FCJ No 99, 106 FTR 181 (TD), Justice Darrel Heald states at paragraph 28 that:

> Applying the *Mercier* test to the facts in the case at bar, I am of the view that if either party's second submissions contained facts that differed from those set out in the Investigation Report, Conciliation Report or earlier submissions, then the rules of procedural fairness may have required the CHRC to cross-disclose the second set of submissions and to permit the parties to file a third set of submissions. **However, I must also express my agreement with the Federal Court of Appeal, that the rules of procedural fairness do not require the CHRC to "systematically disclose to one party the comments it receives from the other"**. Otherwise, the submissions/reply process could conceivably continue ad infinitum. [Emphasis added]

[49] In *Gosal v Canada (Attorney General)*, 2011 FC 570, Justice Gauthier states at paragraphs 58 to 60:

> [58] Finally, in respect of the obligation to provide to a particular complainant every piece of documentation exchanged between an investigator and an interested party, the Federal Court of Appeal in *Hutchison v Canada (Minister of the Environment)*, 2003 FCA 133 at paras 49-50, made it clear in reviewing the past jurisprudence that
>
> > [t]here is nothing in any of these cases which would support the proposition that every exchange between an investigator and an interested party must be disclosed to the other party. The right to know the case to be met and to respond to it arises in connection with material which will be put before the decision maker, not with respect to material which passes through an investigator's hands in the course of the investigation.
>
> To the extent that the investigation report discloses information contained in a letter or document, the applicant amply exercised her right of response. To the extent that information in a letter or document was not contained in the investigation report, and was not otherwise before the Commission, the right to respond did not arise.
>
> [59] In the same vein, the Federal Court of Appeal in *Gardner v Canada (AG)*, 2005 FCA 284 at paragraph 18, indicated:
>
> > In any event, the Commission was not obliged to produce the new evidence to Ms. Gardner simply because it was never put to the Commission itself. What Ms. Gardner was owed and that which she was accorded, was the opportunity to comment on [the] Treasury Board's submissions which as it turned out, contained the substance of the information in the new evidence.
>
> [60] Finally, administrative tribunals such as the Commission are presumed to have considered all the evidence submitted and are not required to expressly refer to all pieces of evidence upon which their reasons were founded. That said, the more important the evidence that is not specifically mentioned in the tribunal's reasons, the more willing a court may be to infer that the tribunal made an erroneous finding of fact without regard to the evidence

(*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration*), [1998] FCJ No 1425, 157 FTR 35, at paras 14-17).

[50] Ms. Klimkowski was given the opportunity to respond to the CPR's submissions as they were summarised and set out in the Section 40/41 Report and placed before the Commissioner for a decision. In the circumstances the investigator was under no obligation to disclose the submissions to Ms. Klimkowski.

[51] Similarly the CPR reply to Ms. Klimkowski's response to the Section 40/41 Report did not raise issues or set out information not already reflected in the record placed before the Commissioner. As such there was no obligation to provide Ms. Klimkowski with the opportunity to provide a sur-reply.

[52] In reaching this conclusion I also note the respondent's arguments to the effect that even if there was a flaw in the procedure, that flaw is insufficient to find a reviewable error where an applicant is unable to demonstrate prejudice or an impact on the decision or outcome (*Maritime Broadcasting System Ltd v Canadian Media Guild*, 2014 FCA 59 at paras 70, 74; *Uniboard Surfaces v Kronotex Fussboden GmbH and Co*, 2006 FCA 398 at para 24; *Canadian Union of Public Employees (Airline Division) v Air Canada*, 2013 FC 184 at para 120). Ms. Klimkowski's counsel had taken the position with the investigator that procedural fairness required the right to a sur-reply. A sur-reply was provided but was not placed before the Commissioner. However Ms. Klimkowski has not argued that the sur-reply contained new information that would have been relevant to the decision and review of the sur-reply provided does not disclose any such information.

[53] Finally, in response to Ms. Klimkowski's argument that the Commission's reasons were inadequate I would note that that the adequacy of reasons is not a stand-alone basis for quashing a decision. Where reasons are provided there is no breach of procedural fairness, rather the reasons are to be assessed within any reasonableness analysis (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paras 14 and 22).

[54] The Commission did not act unfairly in assessing the Complaint or in concluding it would not deal with the Complaint. There was no breach of procedural fairness.

B. *Was the decision reasonable?*

(1) Did the Commission err by finding the Complaint to be "vexatious" within the meaning of paragraph 41(1)(d) of the CHRA?

[55] Ms. Klimkowski argues that the determination that the Complaint was vexatious on the basis that "the essence of the human rights complaint was dealt with in the grievance brought forward to the arbitrator" was unreasonable. She argues that the grievance arbitration did not deal with any of the human rights ramifications of the CPR termination decision. Specifically she submits the grievance arbitration did not address her allegations of personal and systemic harassment and discrimination on the basis of sex and disability. She argues that in the circumstances her only available recourse is the Complaint to the CHRC.

[56] The Section 40/41 Report cites the jurisprudence relevant to an assessment of whether a complaint might be vexatious on the basis that the complaint has been addressed in the grievance

process. The Section 40/41 Report notes that the Commission cannot decline to deal with a complaint pursuant to paragraph 41(1)(d) of the CHRA simply on the basis that another process has dealt with the matter. Instead the Commission must review the evidence and examine the decision arising out of the prior process in reaching its own decision on the application of section 41(1)(d) (*Boudreault v Canada (Attorney General)*, [1995] FCJ No 1055 at paras 15-17, 99 FTR 293 (TD), *Canada Post Corp v Barrette*, [2000] FCJ No 539 at paras 27-28, 27 Admin LR (3d) 68 (CA)).

[57] As discussed earlier in this decision, the Section 40/41 Report then engaged with the Supreme Court of Canada's decisions in *Figliola* and *Penner*. The Section 40/41 Report recognized that the Commission has a duty to respect the finality of decisions arising out of prior processes where the issues are essentially the same but must also consider the fairness of the prior process (*Figliola* at paras 36-37).

[58] In *Figliola* at paragraph 37, the majority of the Supreme Court of Canada concluded that a decision making body should ask three questions in determining whether the substance of a complaint has been "appropriately dealt with":

a) Whether there was concurrent jurisdiction to decide human rights issues;

b) Whether the previously decided legal issue was essentially the same as what is being complained of to the Tribunal; and

c) Whether there was an opportunity for the complainants or their privies to know the case to be met and have the chance to meet it, regardless of how closely the previous process procedurally mirrored the one the Tribunal prefers or uses itself.

[59] Ms. Klimkowski appears to rely on the absence of any specific reference in the arbitration decision to the human rights allegations advanced on her behalf by the Union to argue the determination that the Complaint is vexatious under paragraph 41(1)(d) of the CHRA is unreasonable. However, the allegations of harassment and discrimination based on disability were advanced and responded to by the parties in their submissions to the arbitrator. In reviewing the arbitration decision as a whole and considering the arbitrator's conclusion that the termination for cause was justified one cannot reasonably conclude that the arbitrator was not satisfied that the CHRA related allegations were unfounded. The absence of an express consideration of these allegations in the arbitration decision does not, in my opinion, detract from the reasonableness of the Section 40/41 Report conclusion that the essence of the Complaint had been addressed by the arbitrator.

[60] In the substance of the reasons, the Section 40/41 Report reasonably concluded based on the evidence, including a consideration of Ms. Klimkowski's Complaint and the submissions made, that the three questions identified in *Figliola* were to be answered in the affirmative.

[61] However, regarding the third question from *Figliola*, the Section 40/41 Report did not confine its analysis to *Figliola* when addressing the question and concept of fairness. The Section 40/41 Report also addressed the *Penner* test where the majority of the Supreme Court of

Canada adopted an issue estoppel analytical framework. In so doing in that case, the majority of the Supreme Court of Canada at paragraph 29 recognized that doctrine "balances judicial finality and economy and other considerations of fairness to the parties." In discussing this balance the majority first acknowledged the importance of finality: "a party is expected to raise all appropriate issues and is not permitted multiple opportunities to obtain a favourable judicial determination. Finality is important both to the parties and to the judicial system" (*Penner* at para 42). The majority then discussed the issue of fairness and required a decision maker to address unfairness in a prior proceeding and where a prior proceeding is found to be fair to consider if it would be unfair to rely on the results of the first proceeding to preclude the second proceeding from occurring (*Carroll* at para 118, citing *Penner* at paras 39-48).

[62] Therefore, in considering fairness the CHRC noted it should also consider whether it would be unfair to not deal with the Complaint based on significant differences between the two proceedings, which includes a consideration of the purpose of the prior process and the CHRA complaint process (*Penner* at paras 42, 45). The Section 40/41 Report then sets out a detailed list of factors that the Commission may consider under paragraph 41(1)(d) and proceeds to address those factors.

[63] A review of the Section 40/41 Report demonstrates the CHRC conducted a detailed and thorough consideration of those factors in determining whether or not to deal with the Complaint under paragraph 41(1)(d). That analysis acknowledged and addressed the allegations of personal and systemic discrimination on the basis of sex and disability in the Complaint but concluded that the essence of those allegations were dealt with in the grievance brought before the

arbitrator. The CHRC also considered the role and jurisdiction of the arbitrator as an independent and neutral third party and found there was not a significant difference between the arbitration process and the CHRC's complaint process. Moreover, the CHRC addressed and found the arbitration process to be fair and noted Ms. Klimkowski's concerns with the adequacy of Union representation and her failure to pursue remedies available to address these concerns, and found those concerns did not render the arbitration process procedurally unfair. Rather Ms. Klimkowski's concern with her Union representation was relevant to the duty of fair representation, of which Ms. Klimkowski did not bring a complaint. Finally the Section 40/41 Report identified and addressed Ms. Klimkowski's assertions that the arbitration had failed to address her human rights related allegations and found Ms. Klimkowski had the opportunity to raise all human right allegations in the arbitration process that she raised in the Complaint. As the Commission noted, "Justice does not require that the Commission deal with the complaint even though the complainant is dissatisfied with the outcome. The Commission is not an appeal mechanism for arbitration decisions and the adjudication of the complaint will not advance the purpose of the act".

[64] In response to those conclusions, Ms. Klimkowski relies upon *Carroll* to advance her argument that the decision was unreasonable, but as I noted above *Carroll* is distinguishable. In this case, unlike *Carroll*, Ms. Klimkowski's allegations of systemic and personal discrimination were neither ignored nor misapprehended. These arguments were acknowledged and addressed in the Section 40/41 Report. *Carroll* is also distinguishable in relation to the duty to respect the finality of decisions arising out of prior processes. In *Carroll* the complainant's union had refused to refer the grievance to arbitration (*Carroll* at para 15). As such there had been no

independent hearing or decision from an impartial decision-maker in a prior process. It is on this basis the Justice Mosely concluded that "…there is no issue of territorial respect between competing tribunals as in Figliola…" (*Carroll* at para 124). Moreover, unlike *Carroll* where Justice Mosley found at paragraph 127 that "there is no evidence that the Commission ever gave thought to exercising that discretion. It did not grapple with the issue of whether dismissing the complaint might be unfair to Ms. Carroll", the opposite occurred in this case. The Section 40/41 Report grappled with the issue of whether dismissing the Complaint might be unfair to Ms. Klimkowski, but determined based on the record that there is no information suggesting such unfairness would occur. This was reasonable.

[65] Hence, while I note that the respondent argues that the issue estoppel doctrine and in turn the *Penner* test are unique to the civil law context and inapplicable to the administrative law context where the abuse of process doctrine applies, I need not address this issue.

[66] I am satisfied that the Section 40/41 Report addressed and reasonably concluded that the arbitration process was procedurally fair, and that no unfairness arose out of relying on that proceeding to not deal with the Complaint under the CHRA process. In reaching this conclusion the Section 40/41 Report noted the absence of significant differences between the arbitration and CHRA complaint processes and that the arbitration process was "fully capable of dealing with the complainant's human rights issues and of providing Ms. Klimkowski with redress for the alleged human rights violations". The Commissioner did not, as Ms. Klimkowski argues, blindly adopt those reasons but instead engaged in an inquiry as to whether it should exercise its discretion to deal with the Complaint.

[67] In summary, it was open for the Commission in performing its screening function, to conclude that the essence of Complaint was already dealt with in the grievance arbitration process, a process under which Ms. Klimkowski had the opportunity to raise all relevant human rights issues, including those pertaining to sex and that no unfairness would arise in refusing to deal with the Complaint. Therefore, I am satisfied that the Commission's determination that the Complaint was vexatious, within the meaning of that term under paragraph 41(1)(d) of the CHRA reflects the elements of justification, transparency and intelligibility and falls within the range of possible, acceptable outcomes defensible in respect of the facts and law (*Dunsmuir* at para 47).

(2) Did the Commission err by finding the complaint to be "frivolous" within the meaning of paragraph 41(1)(d) of the CHRA?

[68] In light of my finding that the Commission reasonably concluded the Complaint was vexatious it is unnecessary to address the reasonableness of the finding that the allegation of adverse differential treatment on the basis of sex was frivolous within the meaning of paragraph 41(1)(d) of the CHRA. I will however note that I am similarly unpersuaded that this determination was unreasonable.

VII. Conclusion

[69] The application is dismissed.

[70] With respect to the question of costs, the parties have agreed that that the amount of $10,477.86 inclusive of disbursements and HST would be appropriate. I am satisfied that this is a reasonable award in light of the complexity of the matters raised.

JUDGMENT IN T-1203-15

THIS COURT'S JUDGMENT is that:

1. The application is dismissed;

2. Costs to the respondent in the amount of $10,477.86 inclusive of all disbursements and HST.

"Patrick Gleeson"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1203-15
STYLE OF CAUSE:	DANUSIA KLIMKOWSKI v CANADIAN PACIFIC RAILWAY
PLACE OF HEARING:	TORONTO, ONTARIO
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JUDGMENT AND REASONS:	GLEESON J.
DATED:	MAY 3, 2017

APPEARANCES:

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