Federal Court  Cour fédérale

Date: 20180409

Docket: T-1417-17

Citation: 2018 FC 377

[ENGLISH TRANSLATION]

Ottawa, Ontario, April 9, 2018

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

2553-4330 QUÉBEC INC.

Applicant

and

LAURENT DUVERGER

Respondent

JUDGMENT AND REASONS

[1] The applicant, 2553-4330 Québec Inc. [Aéropro or the employer], is challenging the lawfulness of a decision rendered on August 30, 2017, by the Canadian Human Rights Commission [Commission]. The Commission is asking the Chairperson of the Canadian Human Rights Tribunal [Tribunal] to designate a member to institute an inquiry into part of the consolidated complaint of discriminatory practices brought against Aéropro by the respondent, Laurent Duverger, on November 26, 2013. The respondent alleges that he was subject to

harassment in matters related to employment in the spring of 2012 because of his national origin and his disability.

[2] For the reasons that follow, this application for judicial review is dismissed and, consequently, there is no need to set aside the impugned decision and refer the case back for reconsideration, as the applicant is requesting.

I *Legal framework*

[3] Pursuant to the *Canadian Human Rights Act*, RSC 1985, c H-6 [CHRA], national or ethnic origin, as well as an individual's mental or physical disability, are prohibited grounds of discrimination (subsection 3(1) and section 25). Adversely differentiating an individual in the course of employment and harassing an individual in matters related to employment are distinct discriminatory practices, if they are based on a prohibited ground of discrimination (paragraphs 7(b) and 14(1)(c)). Moreover, if the acts in question are committed by an officer, a director, an employee or an agent of any person, association or organization in the course of the employment of the officer, director, employee or agent, they are deemed to have been committed by that person, association or organization (subsection 65(1)). However, that presumption can be displaced if it is established that the person, association or organization did not consent to the commission of the act or omission and exercised all due diligence to prevent the act or omission from being committed and, subsequently, to mitigate or avoid the effect thereof (subsection 65(2)).

[4] In accordance with the provisions of Part III of the CHRA, the Commission has the power to receive and address complaints of discriminatory acts—including any act listed in sections 5 through 14.1 of the CHRA—that are not inadmissible on other grounds (subsections 40(1), (5) and (7) and sections 41 and 42). In particular, the Commission may refuse to deal with a complaint if: (1) the victim has not exhausted all of the recourse available (paragraph 41(1)(a)); (2) the complaint could more appropriately be dealt with under an Act of Parliament other than the CHRA (paragraph 41(1)(b)); (3) the complaint is beyond its jurisdiction (paragraph 41(1)(c)); (4) the complaint is trivial, frivolous, vexatious or made in bad faith (41(1)(d)); (5) 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 (41(1)(e)) [grounds for not dealing with the complaint].

[5] It has already been stated more than once but merits repeating once again: the Commission is not a decision-making body and instead plays a review and screening role (see *Cooper v Canada (Human Rights Commission)*, [1996] 3 SCR 854 at paragraph 53, 140 DLR (4th) 193 [*Cooper* cited to SCR]; *Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, 2012 SCC 10 at paragraph 23 [*Halifax*]). Although the Commission may designate a person to investigate a complaint [the investigator] (subsection 43(1)), there is nothing to prevent it, at any stage after the complaint is filed, from requesting that the Chairperson of the Tribunal designate a member to institute an inquiry into the complaint if the Commission is satisfied that, having regard to all the circumstances of the complaint, an inquiry is warranted (subsection 49(1)). In the latter case, it may refer the

complaint to the Tribunal without further investigation (see *Canada Post Corporation v Canadian Postmasters and Assistants Association (CPAA)*, 2016 FC 882 at paragraphs 4, 20–22, 46–47, 78–79, 84–91 [*Canada Post Corporation*]; *Canada (Attorney General) v Skaalrud*, 2014 FC 819 at paragraphs 25–30, 39 [*Skaalrud*]).

[6] In the event that the Commission has designated an investigator, the investigator submits a report of the findings as soon as possible after the conclusion of the investigation (subsection 44(1)). On receipt of the investigation report, at least three outcomes are possible. The Commission may: (1) refer the complainant to another appropriate authority if the complainant ought to exhaust other available recourse or if the complaint could more appropriately be dealt with otherwise (subsection 44(2)); (2) request the Chairperson of the Tribunal to institute an inquiry into the complaint if the Commission is satisfied that an inquiry into the complaint is warranted and the complaint is not otherwise inadmissible (paragraph 44(3)(a)); or (3) dismiss the complaint if it is satisfied that, having regard to all the circumstances of the complaint, an inquiry into the complaint is not warranted or the complaint is otherwise inadmissible (paragraph 44(3)(b)).

[7] To summarize, it can be said that "[w]hen deciding whether a complaint should proceed to be inquired into by a tribunal, the Commission fulfills a screening analysis somewhat analogous to that of a judge at a preliminary inquiry. It is not the job of the Commission to determine if the complaint is made out" (*Cooper* at paragraph 53). In other words, the Commission does not in fact decide the complaint on the merits (see *Halifax* at paragraphs 23–24). The Commission must simply determine whether an inquiry into the complaint is warranted,

that is, “determine whether there is a reasonable basis in the evidence for proceeding to the next stage” (*Syndicat des employés de production du Québec et de l’Acadie v Canada (Canadian Human Rights Commission)*, [1989] 2 SCR 879 at page 899, 62 DLR (4th) 385).

[8] Lastly, when the Commission makes a final decision at the end of its inquiry, the reviewing courts will not intervene in the exercise of the discretion set out in section 44 or section 49 of the CHRA unless there was a breach of a principle of procedural fairness or a reviewable error was otherwise made (see, in general, *Bell Canada v Communications, Energy and Paperworkers Union of Canada*, [1999] 1 FC 113, 167 DLR (4th) 432 (FCA); *Canada Post Corporation* at paragraphs 26–30; see also *Skaalrud*). In this regard, it must be presumed that the standard of review that applies to the decision of an administrative tribunal interpreting its enabling statute is that of reasonableness (see *Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 146 [*Dunsmuir*]; *Alberta (Information and Privacy Commissioner) v Alberta Teachers’ Association*, 2011 SCC 61 at paragraph 39). The exceptions are the questions that require the application of the correctness standard, including true questions of jurisdiction (see *Dunsmuir* at paragraph 59).

II ***Background***

[9] The circumstances surrounding the filing of the complaint are not really the subject of debate.

[10] The applicant has more than 250 employees throughout the province of Quebec. It offers aircraft maintenance and management, wildlife inventory and forest fire detection services. It is

also involved in meteorological and upper air observation programs with various partners (e.g. NAV Canada, Environment Canada, and Hydro-Québec) and has weather observation stations in Sept-Îles, Gaspé, Chibougamau, Dorval and Quebec City.

[11] The respondent is from France. He immigrated to Canada in 2007 with a temporary work permit, which was later renewed. He held the position of weather technician at the Chibougamau weather station from October 17, 2007, until June 21, 2010 [employment period]. In the meantime, he was granted permanent resident status in May 2009 and became a Canadian citizen in July 2013.

[12] On March 8, 2012, the respondent asked the Quebec Commission de la santé et de la sécurité du travail [CSST] to recognize that he had suffered a psychological employment injury as a result of the events that occurred during the employment period at the Chibougamau weather station. Shortly after he sent a copy of the claim that he was preparing to send to the CSST (email dated March 26, 2012) in accordance with section 270 of the *Act respecting industrial accidents and occupational diseases*, CQLR, c A-3.001, the respondent received a number of threatening and insulting emails from his former supervisor, Raymond Dallaire. However, he had not had any contact with that supervisor since his employment ended in June 2010.

[13] Below are a few excerpts of the emails that the supervisor, Mr. Dallaire, sent to the respondent in the spring of 2012:

> [TRANSLATION]
> You are the biggest idiot that I have had to work with in 25 years. So go back to your country because here you're nothing but a parasite (April 23, 2012)

> . . . You're just a damned idiot (April 23, 2012)
>
> The only thing I'd give you is a kick in the backside that would send you back to Paris (April 25, 2012)
>
> I suggest you make your stupid complaint to the UN, and if they call me, I'll be there (April 25, 2012)
>
> To His Royal Highness; Laurent the First
>
> Since you need to take full advantage of Quebec's and Canada's social programs . . . I suggest you do the following.
>
> You can find a room in the psychiatric wing of the hospital of your choice. You will be housed, fed, medicated and treated by a psychiatrist. And all that without it costing you a cent. It's more lucrative than the CSST and would make you a very honourable citizen who will undoubtedly receive the Order of Canada.
>
> With my deepest respect,
>
> Raymond Dallaire, mere descendent of farmers, from father to son, since 1640 . . . (May 2, 2012)
>
> Go back to your country. To your mommy and/or daddy. Because here you have no future and you get depressed with no one able to help you (May 7, 2012)

[14] It is established that Mr. Dallaire sent these emails using his employer's computers and email address. During that time, the respondent forwarded the emails to other Aéropro employees, including to Mr. Dallaire's superior, Richard Légaré, and Aurèle Labbé, Aéropro's owner. He did not receive a satisfactory answer and, in fact, the employer did not follow-up at all. We will see later on that the failure to resolve the issue of post-employment harassment will become one of the two bases for the consolidated complaint of discriminatory practices. When questioned by the Commission's investigator, Mr. Dallaire justified his behaviour by saying that he thought the respondent was trying to make him look like a racist and to tarnish his reputation with the CSST, while the management of Aéropro felt that nothing was required of it since the respondent was no longer employed there.

[15] On June 21, 2012, following an administrative review, the CSST rejected the respondent's claim because it was allegedly filed out of time. However, the Commission des lésions professionnelles [CLP] decided that the claim was admissible. On January 27, 2013, it allowed the claim, since the respondent had suffered a psychological employment injury on June 21, 2010, as a result of the various events that had occurred at work during the employment period (*L.D. et Compagnie A*, 2013 QCCLP 3939 [*L.D.*]).

[16] The respondent was therefore entitled to income replacement benefits (of more than $100,000 in this case). According to the evidence considered by the CLP, the respondent had worked in particularly degrading conditions and had been the victim of mockery, threats and humiliation on a daily basis at the hands of his colleagues and particularly Mr. Dallaire. These unlivable conditions led him to resign and left him with serious psychological sequelae, including a diagnosis of post-traumatic stress and an adjustment disorder with depressed mood. In conclusion, the CLP mentioned in passing that the applicant had clearly breached its obligations to protect the respondent's health, safety and integrity, while [TRANSLATION] "the worker's fundamental rights . . . were also violated, as well as his right to integrity of the person" (*L.D.* at paragraph 62).

[17] In August 2013, the respondent decided to file a complaint with the Commission. Moreover, counsel for the applicant informed the Court at the hearing that the respondent had also filed a harassment complaint with Quebec's Commission des droits de la personne against Mr. Dallaire personally, but that most recent complaint was suspended pending a final resolution of the consolidated complaint of discriminatory practices against Aéropro.

III *History of the file*

[18] The consolidated complaint the respondent brought before the Commission on November 28, 2013, joins complaints I1301995 and I1302143, dated August 23 and August 26, 2013, respectively. The consolidated complaint concerns two separate series of discriminatory acts:

a) The adverse differentiation that the respondent reports having been subjected to because of his national origin during the employment period with regard to his remuneration and various salary conditions [discriminatory treatment]; and

b) The psychological harassment that the respondent reports having been subjected to from Mr. Dallaire because of his national origin and his disability (depression) after he had left his employment in June 2010 and filed a claim for an employment injury with the CSST [harassment in matters related to employment].

[19] First, the applicant objected to the admissibility of the complaint, alleging that it was trivial, frivolous, vexatious or made in bad faith (paragraph 41(1)(d)), since the CLP had disposed of essentially the same allegations. However, a review of the CLP's decision does not support that interpretation, or the Commission's decision to reject the claim (see *Duverger v 2553-4330 Québec Inc (Aéropro)*, 2015 FC 1071 at paragraphs 43, 46, 49, 51–53, 59–61 [*Duverger 2015*]). The Federal Court therefore allowed the respondent's application for judicial review and referred the file back to the Commission.

[20] Before the Commission, the applicant raised two new grounds for not dealing with the complaint: (1) the complaint was filed outside the one-year time limit and there is no reason to grant an extension of time (paragraph 41(1)(e)); and (2) the Commission does not have the jurisdiction to deal with the allegations of harassment in matters related to employment because the respondent was no longer employed by the applicant at the time Mr. Dallaire committed the acts in question (paragraph 41(1)(c)). On March 30, 2016, the Commission decided to deal with the complaint: (1) if the applicant suffered irreparable harm as a result of the delay, it could provide evidence of this during the investigation; and (2) the applicant could argue as a defence that the alleged harassment does not fall within paragraph 14(1)(c) of the CHRA. On February 2, 2017, the Federal Court confirmed the lawfulness of that interlocutory decision by the Commission (*2553-4330 Québec Inc v Duverger*, 2017 FC 128 [*Duverger 2017*]).

[21] On June 9, 2017, the designated investigator, Philipe Harpin, prepared an investigation report setting out his findings and recommendations. The parties had the opportunity to comment on the report before it was submitted to the Commission with their written submissions.

IV *Impugned decision*

[22] On August 30, 2017, the Commission requested that the Chairperson of the Tribunal designate a member of the Tribunal to institute an inquiry into the part of the complaint regarding the harassment in matters related to employment [impugned decision]. The Commission's brief reasons should be read in light of the analysis conducted by the investigator in his report (see *Canada (Attorney General) v Sketchley*, 2005 FCA 404 at paragraph 37).

[23] First, with regard to the allegations of discriminatory treatment in the course of employment, the evidence does not support the existence of a causal link between any alleged adverse differentiation (e.g. denied wage increases, unpaid overtime and unauthorized deductions) and a prohibited ground of discrimination, in this case, the respondent's national (or ethnic) origin. This conclusion is not being challenged in these proceedings.

[24] Second, the allegations of harassment in matters related to employment are supported by the evidence in the record. The content of the harassing emails refers to the complainant's national or ethnic origin and his disability. They were sent following the respondent's claim to the CSST. Mr. Dallaire used the employer's email and equipment at the weather station. These persistent emails were inappropriate and hurtful. The respondent complained about the emails promptly by forwarding them to Aéropro's management (Mr. Légaré and Mr. Labbé). However, even though the employer has an internal harassment policy and the respondent reported the emails, no appropriate measure was taken to address the harassment and prevent it from continuing. An in-depth inquiry by the Tribunal is therefore warranted.

[25] It is this second finding that the applicant is challenging today.

[26] In passing, note that on February 6, 2018, Gabriel Gaudreault, the Tribunal member who was designated by the Chairperson to institute an inquiry on the part of the complaint regarding harassment in matters related to employment, dismissed Aéropro's motion to stay the proceedings. He instead decided that the Tribunal's proceedings should follow their course, especially since the consolidated complaint of discriminatory practices had been filed with the

Commission on November 28, 2013, over four years earlier (*Laurent Duverger v 2553-4330 Québec Inc* (February 6, 2018), T2230/5217 (CHRT)).

V *Analysis*

[27] This is the third time that this Court has been called upon to decide on the lawfulness of a decision by the Commission in connection with the consolidated complaint of discriminatory practices. Contrary to what the applicant might have argued, this case raises no questions of jurisdiction, and the Commission did not make a reviewable error or otherwise act unreasonably by referring the part of the complaint concerning harassment in matters related to employment to the Tribunal.

(1) *The Commission had full jurisdiction to deal with the consolidated complaint of discriminatory practices*

[28] First, in its written memorandum, the applicant submits that the issue in this application for judicial review is one of "jurisdiction", within the meaning of *Dunsmuir*. It restates the inadmissibility argument based on the fact that it was no longer the respondent's employer at the time when the alleged harassment took place, meaning that the Commission overstepped its jurisdiction in making the impugned decision. The applicable standard of review would therefore be that of correctness.

[29] Note also that the applicant never argued and is not arguing now that as an employer it is not subject to the CHRA or any other Act of Parliament pertaining to employment (see *Duverger 2015*; *Duverger 2017*; *Duverger v 2553-4330 Québec Inc (Aéropro)*, 2015 FC 1131,

aff'd by 2016 FCA 243; see also *Shmuir v Carnival Cruise Lines*, 2009 CHRT 39 at paragraph 7; *Canada (House of Commons) v Vaid*, 2005 SCC 30 at paragraph 81, *a contrario*), which may apply concurrently to the regimes for compensating victims of industrial accidents or employment injuries (see *Bell Canada v Quebec (Commission de la Santé et de la Sécurité du Travail)*, [1988] 1 SCR 749 at pages 851–52, 51 DLR (4th) 161).

[30] Conversely, the respondent contends that the reasonableness standard should be applied, as the jurisprudence has clearly established that the Commission's decisions as to whether or not to deal with a complaint are reviewable according to that standard. I agree with the respondent. At the start of the hearing, counsel for the applicant informed the Court that it was abandoning any argument that the correctness standard should apply to the review of the impugned decision. In fact, any argument that the issue to be determined in this judicial review is one of "jurisdiction" must be rejected. A similar misconception—that in practice would lead the Court to supplant the Commission—has in fact been rejected by the jurisprudence (see *Halifax* at paragraphs 19, 33–41, 45–50; *Duverger 2015* at paragraphs 17 and 18; *Duverger 2017* at paragraphs 44 and 45; *Skaalrud* at paragraph 30).

[31] At paragraph 59 of *Dunsmuir*, the Supreme Court provided a restrictive definition of the word "jurisdiction":

> "Jurisdiction" is intended in the narrow sense of whether or not the tribunal had the authority to make the inquiry. In other words, true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter. The tribunal must interpret the grant of authority correctly or its action will be found to be *ultra vires* or to constitute a wrongful decline of jurisdiction . . .

[32] Yet, in principle, a federal employer is liable for any discriminatory acts committed by one of its employees—in this case, Mr. Dallaire—in the course of their employment, unless it establishes that it did not consent to the commission of the act, that it exercised all due diligence to prevent the act from being committed and that, subsequently, it tried to mitigate or avoid the effects (see section 65 of the CHRA; see also *Robichaud v Canada (Treasury Board)*, [1987] 2 SCR 84, 40 DLR (4th) 577 [*Robichaud* cited to SCR]). In this case, the Commission had full jurisdiction under sections 40 and 44 of the CHRA to review the consolidated complaint of discriminatory practices, to determine whether it could deal with it and, finally, to determine whether or not an in-depth inquiry by the Tribunal was warranted.

(2) *The referral to the Tribunal is an acceptable outcome in light of the circumstances of the complaint*

[33] In the alternative, the applicant submits that referring the harassment allegations to the Tribunal is otherwise unreasonable because there is no indication that the Commission (or the investigator) had considered the scope of the words "in matters related to employment" within the meaning of paragraph 14(1)(c) of the CHRA. Moreover, the investigator did not determine whether the harassment had contributed to creating a hostile or poisoned work environment (see, for example, *Siddoo v International Longshoremen's and Warehousemen's Union, Local 502*, 2015 CHRT 21; *Stanger v Canada Post Corporation*, 2017 CHRT 8).

[34] Therefore, according to the applicant, the expression "in matters related to employment" ("en matière d'emploi") must be "in the course of employment" ("au cours de la période visée par l'emploi") (see also the definition of the word "employment"—"emploi"—in section 25 of

the CHRA), whereas the employer has no legal obligation to protect an individual from any harassment by another employee that occurs outside the workplace (see *Cluff v Canada (Department of Agriculture)* (1993), [1994] 2 FCR 176, 1993 CarswellNat 250F (FCTD) [*Cluff* cited to CarswellNat]). It is this restrictive interpretation of paragraph 14(1)(c) of the CHRA that the applicant is asking the Court to apply.

[35] On the contrary, the respondent submits that the impugned decision—which is clear and transparent—falls within the discretion vested in the Commission pursuant to paragraph 44(3)(a) of the CHRA. The expression "in matters related to employment" should be interpreted liberally. The expression applies broadly to any harassment on a prohibited ground "in matters related to employment", which is supported by the English version of paragraph 14(1)(c) of the CHRA and by the jurisprudence (see, *inter alia*, *Cluff*; *Robichaud*). Accordingly, the referral to the Tribunal is an acceptable outcome under the circumstances.

[36] In this case, the respondent argues that the harassment on a prohibited ground that he was subject to in the spring of 2012 was in fact "in matters related to employment". The harassing emails from Mr. Dallaire were intended to dissuade him from pursuing his claim against Aéropro before the CSST, by repeating the previous threats and insults of which he had already been a victim during the employment period. Mr. Dallaire is a representative of the employer, and management did nothing to prevent the harassment from continuing. It was therefore not unreasonable for the Commission to find that the complaint was founded, especially since the threatening and insulting emails had been sent using the employer's computers and email address.

[37] I cannot agree with the applicant's claim that its restrictive interpretation of paragraph 14(1)(c) is the only possible outcome.

[38] Firstly, the jurisprudence is far from being as clear as the applicant would like to suggest. None of the decisions the applicant cites concern similar facts, and they all involve decisions by the Tribunal and not the Commission. In each case, the complainants were still employed by the employer but had been victims of harassment outside the usual context of employment. The applicant also submits that the objective of harassment legislation is to provide a healthy work environment, but that alone is not a sufficient reason to apply a restrictive interpretation of paragraph 14(1)(c) of the CHRA. For example, in *Robichaud*, which was decided before the adoption of section 65 of the CHRA (formerly subsections 48(5) and (6), added in 1983; see SC 1980-81-82-83, c 143, section 23 as cited in *Robichaud* at page 87), the Supreme Court found that the CHRA was intended to make employers liable "for all acts of their employees 'in the course of employment'" (*"dans le cadre de leurs emplois"*) by interpreting that expression based on the objective of the CHRA, that is, "in some way related or associated with the employment" (*Robichaud* at page 95).

[39] Secondly, it appears that the existence of a *de facto* employment relationship is not always necessary with respect to discrimination or harassment: it all depends on the legislative context. A restrictive approach based on *relationships* must be rejected in favour of a *contextual* approach that accounts for the quasi-constitutional, preventive and remedial nature of human rights legislation (see *British Columbia Human Rights Tribunal v Schrenk*, 2017 SCC 62 at paragraph 31 [*Schrenk*]). In this case, subsection 14(1) of the CHRA, which prohibits harassment

based on a prohibited ground of discrimination, uses the word “individual” (“individu”), which suggests that the existence of an employment relationship is unnecessary, even if the individual may indeed be in an employment relationship.

[40] At this stage of the case, the only question is whether it was reasonable for the Commission to find that an in-depth inquiry into the post-employment harassment allegations was warranted, that is, whether there was a reasonable basis in the evidence to pursue the inquiry (see *Halifax* at paragraph 21). The investigation report demonstrates how the respondent’s allegations are supported by the evidence on record. Despite the termination of the employment relationship, the emails sent by Mr. Dallaire could amount to harassment in matters related to employment, since Mr. Dallaire used the employer’s computers and email address after having found out that the respondent had filed a claim with the CSST. The persistent emails were inappropriate and hurtful and referred to the respondent’s national origin and disability, and the employer took no action to stop the harassment in question.

(3) *The Tribunal is the most well-positioned specialized authority to decide on the issue of interpreting the scope of the legislation*

[41] It is inappropriate to undertake today the interpretative exercise that the applicant is requesting. Rather, it is for the Tribunal to do so on the merits. The referral to the Tribunal was the result of the Commission’s request for an inquiry into the complaint (paragraph 44(3)(a) or subsection 49(1)). It is therefore for the Tribunal member conducting the inquiry to determine whether or not the complaint is substantiated at the conclusion of the inquiry (section 53). That said, without intending to bind the Tribunal in any way, at this stage, the interpretation proposed

by the respondent does not seem to me to be entirely without legal or factual merit. I will therefore make a few general observations.

[42] First, it is difficult to believe that Parliament intended for the words “in matters related to employment” in paragraph 14(1)(c) of the CHRA to mean “in the course of employment”, since these are not the words that it used when it was open for it to do so. In fact, the words “in the course of employment” appear in paragraph 7(b) of the CHRA. The presumption of consistent expression requires us to assume that Parliament’s intent is to enact consistent laws. Parliament, therefore, uses the same words if it wants two expressions to have the same meaning. Conversely, different language will be used if Parliament intended that two expressions be interpreted differently (see, in general, Ruth Sullivan, *Statutory Interpretation*, 3rd ed., Toronto, Irwin Law, 2016 at pages 43–44).

[43] Second, the respondent correctly pointed out that the notion of harassment “in matters related to employment” tends to receive a liberal statutory interpretation that considerably broadens its scope. For example, in the recent decision in *Schrenk*, the Supreme Court, called upon to interpret the scope of the words “regarding employment” in paragraph 13(1)(b) of British Columbia’s *Human Rights Code*, RSBC 1996, c 10, recognized that an employee could be a victim of discrimination at the hands of another employee working at the same workplace but reporting to a different employer.

[44] Justice Rowe, speaking on behalf of the majority, clearly states the following at paragraph 3:

> The scope of s. 13(1)(b) of the Code is not limited to protecting employees solely from discriminatory harassment by their superiors in the workplace. Rather, its protection extends to all employees who suffer discrimination with a sufficient connection to their employment context.
>
> [Emphasis added.]

[45] Although the provisions at issue and the facts may be different, the fact remains that the Supreme Court wanted to broaden the protection against discriminatory harassment and employer liability for discriminatory acts in matters related to employment committed by its employees. Thus, in the absence of a clear interpretation of paragraph 14(1)(c) of the CHRA, and without stating that it is the only possible interpretation, it was certainly not unreasonable for the Commission to infer that Mr. Dallaire's alleged acts could have arisen "in matters related to employment".

[46] Third, the applicant relies on the Federal Court's 1993 decision in *Cluff* to suggest that it is the complainant who must be "in matters related to employment" and not the employer or the "harasser". With respect for the opposing opinion, I read that decision differently. It indicates rather that the employer must be liable for discriminatory practices carried out by its employees in the course of their employment. With respect to the issue of whether an employer may be liable for harassment carried out by an employee outside the workplace (in this case, the employer's email address and computers were used to send the harassing emails), it seems to me that the current value of *Cluff* as a precedent has been considerably diminished. This is confirmed when the Federal Court's restrictive view is contrasted with the broader approach of other courts and tribunals in more recent matters (see, for example, *Simpson v Consumers' Association of Canada* (2001), 57 OR (3rd) 351, 209 DLR (4th) 214 at paragraphs 57–61

(CA Ont); *Woiden v Lynn* (2002), 2003 CLLC 230-005, 2002 CanLII 8171 at paragraphs 1, 69–71, 86, 104 (CHRT); *Syndicat des travailleurs et travailleuses Canam Structal (CSN) et Groupe Canam pour son établissement Structal (CSN)*, 2016 QCTA 736 at paragraphs 227–234).

[47] In closing, it must be noted that the application of paragraph 14(1)(c) of the CHRA is inextricably connected to the facts and the law. The existence of a sufficient connection with the employment context falls within the Tribunal's specialized expertise. The Tribunal is in a better position than the Commission or this Court to make a final decision on the interpretation of the words "matters related to employment" and "en matière d'emploi" (French version) that were used by Parliament. Moreover, subsection 50(2) of the CHRA enables the Tribunal to decide questions of law and questions of fact in the matters before it, which includes the scope of paragraph 14(1)(c) of the CHRA.

VI *Conclusion*

[48] For these reasons, the application for judicial review is dismissed. The respondent is entitled to reasonable disbursements, which are set at $200.

JUDGMENT in T-1417-17

THE COURT ORDERS AND ADJUDGES that the application for judicial review be dismissed and that the amount of $200 be awarded to the respondent for liquidated disbursements.

"Luc Martineau"
Judge

Certified true translation
This 14th day of February 2020

Lionbridge

FEDERAL COURT

SOLICITORS OF RECORD

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