

Federal Court



Cour fédérale

**Date: 20190924**

**Docket: T-2190-18**

**Citation: 2019 FC 1224**

**Ottawa, Ontario, September 24, 2019**

**PRESENT: The Honourable Madam Justice Fuhrer**

**BETWEEN:**

**AAREN JAGADEESH**

**Applicant**

**and**

**CANADIAN IMPERIAL BANK OF  
COMMERCE (CIBC)**

**Respondent**

**JUDGMENT AND REASONS**

**I. Introduction**

[1] This is an application for judicial review of the decision of the Canadian Human Rights Commission (the “Commission” or “CHRC”), dated November 21, 2018, dismissing the Applicant’s complaint of discrimination against the Canadian Imperial Bank of Commerce (“CIBC”) under paragraph 44(3)(b)(i) of the *Canadian Human Rights Act*, RSC 1985, c H-6

(“CHRA”). The Commission determined that an inquiry into the complaint was not warranted and declined to refer the complaint to the Canadian Human Rights Tribunal.

[2] For the reasons that follow, this application for judicial review is granted and the matter is returned to the Commission for a fresh investigation, with a different investigator, and new decision.

## II. Background

### A. *Complaint to the CHRC*

[3] On April 21, 2017, the Applicant Mr. Jagadeesh filed a complaint with the CHRC. He alleged discrimination by CIBC because of his disability and sexual orientation, resulting in his eventual termination on May 10, 2016.

#### (1) Sexual Orientation

[4] Mr. Jagadeesh alleged that he had a one-on-one meeting on September 15, 2015 with his then Manager/Team Leader, Mr. Anoop Jayagopal, to discuss his medical concerns and qualifications. During the meeting, Mr. Jayagopal advised him that unless Mr. Jagadeesh joined their “group”, there was “no hope” for him. Mr. Jayagopal explained that every male Manager in both his office and headquarters were either gay or bisexual and he advised Mr. Jagadeesh this was why young employees with little qualifications were promoted. He advised that Mr. Jagadeesh should “be smart and learn”. He then allegedly asked Mr. Jagadeesh what he thought of him. Mr. Jagadeesh responded, stating that he thought of Mr. Jayagopal as just his

Manager; he was willing to work with anyone at anytime but he was not gay or bisexual. Mr. Jayagopal allegedly requested Mr. Jagadeesh not discuss their conversation with anyone anytime.

[5] Mr. Jagadeesh believed the above encounter was the primary reason for his discrimination and explained why, despite his qualifications, experience, and excellent performance, he was denied workplace accommodation for his disability, and not offered any alternative position. He concluded by stating the above added to his mental stress and self-dignity negatively. Mr. Jagadeesh requested reinstatement in a suitable position that matched his qualifications and experience, full back pay and benefits, and monetary compensation.

(2) Disability

[6] Mr. Jagadeesh explained his work involved calling 60-70 customers every day to sell them products, which required him to read 4-6 pages of product information and legal disclosures. CIBC evaluated his performance, and therefore his ability to receive bonuses, by measuring two metrics: wrap time (the time between calls which must be less than 30 seconds) and adherence targets (operators must be on calls 96%+ of the time of their shift). He further explained that due to several months of continuous outbound calling under a high stress environment, he developed severe throat and vocal cord pain. Mr. Jagadeesh alleged his family doctor (Dr. Greenwood) recommended modified duties, including not speaking on the phone, to help his pain.

[7] Mr. Jagadeesh further alleged that despite his own doctor's recommendation and his qualifications, experience, and excellent performance, CIBC refused to accommodate him by offering him another position. Instead, his Senior Manager asked him to go on short-term disability (STD). CIBC referred him to its doctor, Dr. Brown, who in turn referred Mr. Jagadeesh to a specialist, Dr. Hands. On June 29, 2015, Dr. Hands concluded Mr. Jagadeesh suffered from "Muscle Tension Disphonia" and advised Mr. Jagadeesh required accommodation, including regular medical breaks, to achieve maximum recovery.

[8] Mr. Jagadeesh alleged CIBC started to discriminate against him soon after the specialist's diagnosis. Among other things, his basic pay was cut and he was not given any sales incentives or annual bonuses under this standard evaluation scheme because his disability required he take essential medical breaks, which neither his daily statistics nor his Managers properly took into account.

[9] Mr. Jagadeesh alleged various CIBC Managers consistently watched him to ensure he never spoke about his disability with his colleagues. Mr. Jagadeesh further alleged his Managers (Mr. Chartier, Mr. Kirkwood) de-activated his pass while he was still an employee (which coincided with his return from STD); threatened him with disciplinary action (including pay cuts) if he continued to take medical breaks; manipulated his daily performance statistics; demanded he sign warning letters/disciplinary papers; and delayed his pay after he returned to active status from STD.

[10] Mr. Jagadeesh also alleged upon his termination, CIBC advised Service Canada via his Record of Employment that he was terminated within a probationary period, not as a full-time employee. This meant he was not eligible for any Ontario Programs for unemployment. He also alleged CIBC never gave him a reference letter; so he since has been unable to acquire another job despite his qualifications and experience.

[11] Finally, Mr. Jagadeesh explained that because of his termination, he lost all of his employee benefits, including medical coverage, life insurance, pension, stock options, and employee discounts. He further alleged he was never given severance nor retirement pay.

*B. CHRC Investigation and Report*

[12] On April 24, 2017, the CHRC accepted Mr. Jagadeesh's complaint for investigation. The assigned Investigator conducted her investigation from July 26, 2017 to July 31, 2018. She issued her report on August 1, 2018 ("Investigation Report" or "IR"). To prepare the IR, the Investigator considered Mr. Jagadeesh's initial claim and supplementary submissions (which she refers to as his "Rebuttal") and all documentary evidence submitted during the investigation. The Investigator also interviewed Mr. Jagadeesh and other relevant CIBC employees, with the exception of Mr. Jagadeesh's Manager, Mr. Anoop Jayagopal who was on an "extended leave of absence". The other employees interviewed were: Dr. David Brown (CIBC Doctor), Mr. Alain Chartier (CIBC Senior Manager), Mr. Li Kirkwood (CIBC Senior Manager), Mr. Sonia Sahota (Team Leader), and Ms. Jennifer Savage (HR Business Partner).

[13] The Investigator noted Mr. Jagadeesh's allegations of discrimination on the basis of sexual orientation, but declined to investigate further:

“Aside from the complainant's feelings in this regard, the complainant did not provide any other evidence to support his allegations that the respondent differentiated against him in employment based on sexual orientation. Without any additional evidence to support the complainant's allegations in this regard, there is no reasonable inference that the negative treatment alleged links to his sexual orientation.”

[14] The Investigator notes that in his Rebuttal, Mr. Jagadeesh alleged younger employees received promotions, awards, and favours because they were sexually exploited, and that he was never considered for alternative jobs on this basis. The Investigator concluded she was unable to investigate these matters because he did not include these allegations in his Complaint Form:

*Manfoumbimouity v Canada (Attorney General)*, 2016 FC 988 [*Manfoumbimouity*].

[15] The Investigator next considered Mr. Jagadeesh's allegations of discrimination on the basis of his disability. She summarized Mr. Jagadeesh's background and then proceeded through her analysis having found:

- Mr. Jagadeesh worked as a Financial Services Representative in CIBC's Outbound Contact Centre;
- Mr. Jagadeesh began STD leave on March 7, 2015. He collected benefits at 100% of his salary entitlement until May 1, 2015. After that, he received benefits at 75% of his pay until he returned to work full-time. In addition to collecting STD benefits, Mr. Jagadeesh also worked part-time;
- Mr. Jagadeesh returned to work full-time on September 18, 2015; and
- CIBC terminated Mr. Jagadeesh on May 9, 2016.

[16] The Investigator summarized the parties' positions, witness evidence and applicable documentary evidence. She concluded there was evidence to support that the negative treatment occurred and it was clearly linked to his disability. She also concluded that Mr. Jagadeesh communicated he required accommodation and his accommodation needs, and further, that he cooperated in his search for accommodation until September 2015. She noted CIBC provided accommodation in the form of STD leave/benefits, microbreaks, reduced hours, and modified work as required by the medical evidence from March 7 - September 17, 2015. She concluded, however, there was no evidence to support that, despite Mr. Jagadeesh's assertions, he required accommodation with work in an alternative position prior to September 2015. She also concluded Mr. Jagadeesh agreed to take STD between February and September 2015. She clearly noted the parties disagreed about the nature of the required accommodations after Mr. Jagadeesh's return to full-time work in September 2015. She found, however, that the medical and other evidence supported CIBC's position that Mr. Jagadeesh did not require accommodation to full-time work after September 2015. She also found CIBC was willing to accommodate future requests so long as Mr. Jagadeesh provided additional information to support them.

[17] Having reviewed the Records of Employment ("ROEs") and applicable computer codes, in addition to the parties' positions and witness evidence, the Investigator concluded that, although there were administrative errors in the ROEs related to Mr. Jagadeesh's STD, he had suffered no negative consequences as a result. She found the deactivation of his ID card was an error also related to his STD, and that he continued to earn his regular wage despite some errors

in the ROEs. She found CIBC used the correct computer code for dismissal (*i.e.* Code M), notwithstanding the reference to the dismissal having occurred within the probationary period.

[18] The Investigator next concluded Mr. Jagadeesh did not provide any specific evidence to support his allegation that the respondent intentionally did not code his “off the phone” work, such that it manipulated his performance statistics and resulted in disciplinary measures and termination. She instead found it was Mr. Jagadeesh’s own actions (such as his failure to provide exception codes to his Manager to cover time away from the phone) that detrimentally affected his statistics. She based this conclusion on the following witness evidence, which she summarized in the Investigation Report:

76. Mr. Chartier states that if employees provide an exception code to their manager to cover their time away from the phone, the time away does not affect their adherence statistics (% of time the respondent requires employees to be on the phone). Mr. Chartier states that if employees do not provide an exception code to cover off their time away from the phone to their manager, it affects their adherence statistics because the respondent’s system does not have anything to explain why the employee was not on the phone and does not update the employee’s availability in this regard.

77. Mr. Chartier states that after he and the complainant’s team manager explained to the complainant how the exception codes for his time away from the phone for medical breaks affected his pay (*i.e.* the respondent did not pay him for this time), the complainant began not reporting these codes to his manager as often. As a result, it affected the complainant’s adherence statistics because the respondent’s system could not account for his time away from the phone.

78. Ms. Sonia Sahota, Team Leader, reiterates Mr. Chartier’s position. Ms. Sahota states that when she met with the complainant on April 15, 2016, to discuss that he was not meeting his performance targets, the complainant advised that he was taking microbreaks after he “wrapped” calls and was not reporting it. Ms. Sahota states that the complainant said he felt that the respondent “owed it” to him.



[19] Finally, the Investigator reiterated her main points, namely:

1. Mr. Jagadeesh did not provide sufficient evidence to support his allegations of discrimination due to sexual orientation to justify any additional investigation.
2. The evidence supported that CIBC had accommodated Mr. Jagadeesh for his disability: he received STD leave and benefits and modified work for as long as it was medically required.
3. Various administrative errors did not have a negative consequence on Mr. Jagadeesh.
4. The evidence did not support that Mr. Jagadeesh's performance statistics were manipulated.

[20] Both parties were supplied a copy of the Investigation Report and given an opportunity to respond.

C. *Mr. Jagadeesh's Reply Submissions*

[21] Mr. Jagadeesh responded to the IR on August 24, 2018, stating he "totally disagree[d] with the report, not only on the entire content of the report but also on the way the Investigator has tried to mislead the Honourable Commission." In his Reply, he explicitly pointed to documents in additional Rebuttal submissions he provided to the Investigator outside the formal complaint.

(1) Sexual Orientation

[22] Mr. Jagadeesh challenged the cover summary page of the IR, which showed only “disability” as the form of discrimination alleged. He felt the summary also should refer to “sexual orientation” given his testimony against Mr. Anoop Jayagopal.

[23] Mr. Jagadeesh argued the Investigator decided not to deal with “sexual orientation” as a valid ground by only referring to select information, thus allowing her to dismiss his complaint. He alleged the Investigator did so in order to paint an erroneous image and dismiss parts of his complaint. For example, Mr. Jagadeesh asserts (emphasis added):

B5) In point 2 of IR the Investigator removes all important “Key Phrases” of point 1 (of my complaint – meeting with my Manager Mr. Jayagopal) related to Sexual Orientation / Exploitation, Jobs, and ‘Promotions in Jobs’ to young guys with very little qualifications. By just typing only the “shell of the paragraph with selected phrases”, the Investigator misguides the Commission. At the same time cleverly the Investigator uses these missing “Key Phrases” in points 5, 6, & 7 of IR to falsely claim that they never existed in the Complaint at all and that they are brand new allegations. Unbelievable!

...

B11) As shown in Section A & B (all points), **the Investigator successfully gets rid of more than “Ninetey Percent (90%) of my Discrimination Complaint in one-shot right on Page 2. Analyzing the points from Page 3 onwards becomes meaningless** as the Investigator now goes on to Page 3 with the remaining “very small part of my Discrimination (Request for Alternate Position)” & again Misguides the Commission, by restricting my Discrimination up to Sept 2015 only. Investigator Conceals the fact that my Discrimination went on up to my Termination, and “as on my Complaint”, the harassment (from CIBC) continued even after my Termination. \*\*\*Ref: [F] Finally the Investigator dismisses my Entire Complaint which was Valid, Honest, & with Full Proof. \*\*\*Ref: [C7 & C8]

[24] Mr. Jagadeesh also challenged the Investigator's refusal to examine whether he did not receive promotions or advances due to discrimination on the basis of sexual orientation, stating that it did fall within his Complaint and therefore should have been considered (emphasis added):

B10) In points 5 & 6 of IR the Investigator combines two important issues of my complaint and creates confusing statements. "Sexual Exploitation at CIBC" & "14 jobs..." After doing all the misleading work as described above (in B5), now the **Investigator says in point 7 of IR that these are new allegations & were not in the Complaint! (Even though they are clearly visible in my Complaint).** With this wild assumption Investigator decides not to deal with two important issues of my complaint.

[25] He further explained he provided additional documentary evidence in the Rebuttal, and argued this evidence (emails, letters, pay slips, career submissions, medical reports, and ROEs) sufficiently linked his complaint to his discrimination. Mr. Jagadeesh clarified the discrimination he detailed in his complaint form stemmed from discrimination both on the grounds of disability and sexual orientation, and therefore the Investigator should have looked at both grounds of alleged discrimination as a source. He further pointed to specific pages of his submitted 102-page Rebuttal as evidence. Of note, he did not provide the Rebuttal evidence anew in his Reply, but explained that the CHRC had the evidence in its possession.

[26] Mr. Jagadeesh further alleged that he had heard colleagues openly discussing "SEX for promotion, SEX for Awards and Recognition, SEX for favors etc..." but he was not paying attention before his meeting with his Manager, Mr. Jayagopal. In Mr. Jagadeesh's view, many employees especially younger employees are sexually exploited by Senior Managers and Managers.

(2) Disability

[27] Mr. Jagadeesh challenged the Investigator's conclusions regarding a lack of discrimination on the basis of his disability. He began by detailing how CIBC overlooked him for several alternative positions for which he believed he was qualified and his belief this was due to his disability. He pointed to emails in his Rebuttal evidence, which he alleged demonstrated that CIBC's justification for not hiring him was based on erroneous information (*i.e.* he was not eligible as an internal candidate, when in fact he was). He alleged these errors were intentional mistakes made to his ROEs because of discrimination. He submitted the Investigator's failure to consider his not being hired for other positions under such circumstances was an error, as it was within the scope of his original complaint:

E3) Now, the Investigator is "Contradicting both the original Complaint & also the Respondent CIBC" and says that Company never included 14 Jobs applied, and this is a new allegation. This is how the Investigator is Insincere, and Misleading CHRC and also Readers of the Report.

[28] Mr. Jagadeesh reiterated how CIBC's work practices caused his disability, how the various doctors recommended accommodations, and how his Managers instead manipulated his performance statistics by failing to consider the necessity of these accommodations. He further reiterated both the impact his termination has had on his life, and his requested remedies.

D. *CIBC's Reply Submissions*

[29] CIBC responded to the Investigation Report and Mr. Jagadeesh's Reply submissions on September 21, 2018. CIBC submitted the Investigator had no reason to mislead the Commission,

and that Mr. Jagadeesh provided no evidence to demonstrate the Investigator did otherwise. CIBC agreed with the Investigator's conclusion that nothing linked the negative treatment he allegedly experienced to Mr. Jagadeesh's sexual orientation. As such, CIBC agreed the Investigator was not required to conduct further investigation into such.

[30] CIBC further agreed the Investigator correctly excluded, on the basis they were not in the original complaint, Mr. Jagadeesh's claims that: (1) employees were being sexually exploited for promotions, awards, recognition or favours; and (2) CIBC did not consider Mr. Jagadeesh for alternative roles. Further, CIBC argued that even if the latter was found to be included in the scope of the initial complaint, Mr. Jagadeesh had not provided any evidence to suggest that he was not considered for alternative roles because of discrimination. Instead, CIBC argued Mr. Jagadeesh was simply unqualified, and that this was a reasonable alternative explanation.

### III. Decision under Review

[31] On November 21, 2018, the Commission informed Mr. Jagadeesh by letter of its decision as follows:

“Before rendering the decision, the Commission reviewed the report disclosed to you previously and any submission(s) filed in response to the report. After examining this information, the Commission decided, pursuant to subparagraph 44(3)(b)(i) of the Canadian Human Rights Act, to dismiss the complaint because, having regard to all of the circumstances of the complaint, further inquiry is not warranted.”

[32] The Commission provided no additional reasons and stated “the file on this matter now has been closed”.

IV. Issues

- A. *Preliminary Issue: Is Mr. Jagadeesh's affidavit admissible?*
- B. *What is the appropriate standard of review?*
- C. *Was the CHRC's investigation and decision procedurally fair?*
- D. *Was the CHRC's decision reasonable?*

V. Relevant Provisions

[33] Discrimination based on sexual orientation and disability are both prohibited grounds of discrimination: *Canadian Human Rights Act*, RSC 1985, c H-6 [**CHRA**], s 3(1).

[34] It is discriminatory to directly or indirectly adversely differentiate an employee in the course of employment: CHRA s 7(1)(b).

[35] Any individual who has reasonable grounds to believe that discriminatory practices are occurring may file a complaint with the CHRC: CHRA s 40(1).

[36] The Commission shall deal with any complaint filed, unless it falls within one of the excluded grounds: CHRA s 41(1).

[37] An Investigator shall provide a report summarizing the outcome of their investigation. This also is commonly known as a "Section 40/41 Report": CHRA s 44(1).

[38] The Commission may dismiss a complaint if it feels no further inquiry is necessary:  
CHRA s 44(3)(b)(i).

VI. Analysis

A. *Is Mr. Jagadeesh's affidavit admissible?*

[39] Mr. Jagadeesh has filed an affidavit dated February 6, 2019 with his application for judicial review. In his affidavit, he clarifies the scope of his complaint to the Commission, and reiterates and further explains his grounds for / the background of his complaint. He further argues the Investigator, and therefore the Investigation report, were biased; and that the Commission failed to examine the entirety of his claim and supporting evidence.

[40] He also includes several documentary exhibits, including:

- a) Dr. Brown's letter;
- b) CIBC's Pre-Employment Screening Email;
- c) September 2015 emails between Mr. Jagadeesh and CIBC;
- d) Mr. Jagadeesh's final pay stub;
- e) A Copy of CIBC's secondary warning letter;
- f) Mr. Jagadeesh's termination letter; and
- g) Mr. Jagadeesh's CIBC Records of Employment.

[41] Judicial reviews traditionally are restricted to the material on record before the decision maker: *Association of Universities and Colleges of Canada v Canadian Copyright Licensing*

*Agency (Access Copyright)*, 2012 FCA 22 [*Association of Universities and Colleges*] at para 19; *Bernard v Canada Revenue Agency*, 2015 FCA 263 at para 17. Exceptions exist, however, where the material assists the Court to understand the general background circumstances of the judicial review, where it is relevant to an issue of procedural fairness or natural justice, or where the material highlights a complete absence of evidence before the decision maker when making their own decision: *Association of Universities and Colleges, supra*, at para 20.

[42] I find the contents of Mr. Jagadeesh's affidavit do not fit within any of the above exceptional categories. Mr. Jagadeesh treats his affidavit as an additional venue for making submissions. Given that the CHRC adopted the Investigation Report (sometimes also referred to as the Section 40/41 Report) as its reasons, however, and the exhibits were before the Investigator, I admit the exhibits but only to the extent necessary to examine the underlying thoroughness/reasonableness of the Investigator's conclusions.

B. *What is the appropriate standard of review?*

(1) Mr. Jagadeesh's Submissions

[43] Mr. Jagadeesh submits there are eight issues for review, which he separates into two categories. **Category 1** attracts the correctness standard. This includes examining whether (a) the investigation was procedurally fair; (b) the investigation was not biased; (c) the Commission failed to address the Investigator's bias; (d) the Commission was biased simply by adopting the Investigation Report; (e-f) the Commission erred in law and acted contrary to law. **Category 2** attracts the reasonableness standard. This includes examining whether (g) the Investigator and Commission



based their decisions on erroneous findings of fact / mixed fact and law, or make unreasonable inferences; and (h) the Commission based its decision on an erroneous findings of fact.

(2) CIBC's Submissions

[44] CIBC asserts the appropriate standard of review when assessing the CHRC's decision on whether or not to launch an inquiry is reasonableness. CIBC explains the role of the Commission is comparable to the role of a judge presiding over a preliminary inquiry: *Cooper v Canada (HRC)*, [1996] 3 SCR 854 at para 53; *Tutty v AG Canada*, 2011 FC 57 [*Tutty*] at para 12. CIBC further explains the Commission has broad discretion to determine whether a further inquiry is warranted: *Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, 2012 SCC 10 at paras 19-21; *Keith v Canada (Correctional Services)*, 2012 FCA 117 at para 43; *Hughes v Attorney General of Canada*, 2010 FC 837 [*Hughes*] at para 33.

[45] CIBC agrees that issues of procedural fairness and bias are reviewable on a standard of correctness, but argue these must be assessed against the context of the procedure itself: *Best v Attorney General of Canada*, 2011 FC 71 at para 16.

(3) Analysis

[46] Matters of procedural fairness are reviewable on a standard of correctness: *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 43-45; *Mission Institution v Khela*, 2014 SCC 24 at para 79. Parties are entitled to both a fair and neutral process. In the context of CHRC complaints, this means the correctness standard applies when assessing the

thoroughness (*i.e.* all obviously crucial evidence is considered) and neutrality (*i.e.* no bias) of the Investigation Report, as well as the CHRC's final decision: *Sketchley v Canada (Attorney General)*, 2005 FCA 404 [*Sketchley*] at para 37; *Tutty, supra* at para 14; *Carroll v Canada (AG)*, 2015 FC 287 [*Carroll*] at paras 69-70.

[47] The Commission's decision to dismiss the complaint is reviewable on the standard of reasonableness: *Ritchie v Canada (AG)*, 2017 FCA 114 at para 16. Adequacy of reasons is not a stand-alone basis to quash or set aside the decision, so long as the reasons allow the Court to understand why the Commission decided as it did: *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (TB)*, 2011 SCC 62 [*NL Nurses*] at para 14. In the context of CHRC complaints, Section 40/41 Reports are deemed to be part of the final decision and as such constitute part of the reasons: *Sketchley, supra* at para 37.

C. *Was the CHRC's investigation and decision procedurally fair?*

(1) Mr. Jagadeesh's Submissions

### **Investigator Flaws**

[48] Mr. Jagadeesh alleges the Investigator failed to consider crucial evidence related to discrimination on the basis of sexual orientation and disability when writing the Section 40/41 Report. He refers to the various evidence he submitted, including emails and ROEs. He further asserts that the Investigator failed to look into whether he did not receive alternative job offers due to this discrimination on both grounds.

[49] Mr. Jagadeesh also alleges the Investigator was biased in her Section 40/41 Report. He asserts she intentionally removed key phrases concerning both his sexual orientation and disability complaints to justify her false claim that they never existed in the complaint at all. He further asserts she mischaracterized his willingness to go on STD, as the equivalent of not “disputing” the STD, and to seek referral to CIBC’s corporate doctor; and further she erroneously summarized CIBC’s false entries on his ROEs as “administrative errors”.

### **Commission Flaws**

[50] Mr. Jagadeesh asserts the Commission never examined his evidence. He explains he raised his concern that the Investigator failed to conduct an investigation into his sexual orientation complaint and failure to be interviewed for other positions in his Reply submissions, but the Commission failed to follow up on this and instead erroneously adopted the Section 40/41 Report on its face without justification for doing so: *Carroll, supra*, at paras 62-63, 69-70, 81; *Peterkin v Toronto Dominion Bank of Canada TD Canada Trust*, 2019 FC 579 [*Peterkin*] at para 28.

#### **(2) CIBC’s Submissions**

[51] CIBC submits the Investigator conducted a thorough investigation. CIBC argues the Commission has considerable latitude in the way it conducts investigations, and that perfection is not required: *Ritchie v Canada (AG)*, *supra*, at para 30. Only fundamental issues need to be investigated; the Investigator need not refer to everything: *Georgoulas v Canada (AG)*, 2018 FC 652 at para 87. This means the Court should show deference to the investigation, except where

parties can demonstrate the Investigator made such fundamental flaws that parties' further responding submissions could not remedy the errors: *Hughes, supra*, at para 33-34. CIBC submits this did not occur here.

[52] CIBC describes Mr. Jagadeesh's procedural fairness arguments as the CHRC's failure to investigate: (a) his claim of discrimination concerning his sexual orientation; and (b) whether discrimination on either ground led to Mr. Jagadeesh not being offered one of the 17 jobs for which he applied. CIBC submits the Investigator did consider (a), but found insufficient evidence to ground the claim. Without the necessary link, the Investigator was not obligated to consider the claim further: *Hartjes v Canada (AG)*, 2008 FC 830 at para 23. CIBC submits, however, the Investigator did investigate Mr. Jagadeesh's complaints in the context of his disability, where the Investigator found no evidence of any negative impact, as is required under the CHRA. CIBC further submits Mr. Jagadeesh failed to raise (b), and therefore the Commission was not required to investigate these allegations: *Manfoumbimouity, supra*, at para 19. CIBC notes Mr. Jagadeesh's use of headings in his Complaint (such as "4. CIBC Managers were aware of my Discrimination" on the second page of narrative), and argues the heading "Qualifications" (on the third page of narrative) does not clearly demonstrate he included these 17 jobs as part of the complaint. CIBC submits, however, that even if this Court concludes the Investigator erred in not addressing this ground, this flaw was not so fundamental that it could not be remedied by further submissions. The CIBC further contends that Mr. Jagadeesh raised the same issues and same submissions in response to the Investigation Report as he did in the judicial review application.

[53] CIBC submits the Investigator conducted a neutral investigation. Because of the non-adjudicative nature of the Commission's responsibilities, the standard of impartiality is restricted to whether the Investigator conducted their investigation with a closed mind: *Hughes, supra* at para 23. CIBC argues Mr. Jagadeesh provides no evidence to substantiate his allegations of bias. Moreover, the Investigator gave Mr. Jagadeesh the benefit of the doubt notwithstanding the lack of evidence in several instances. In other words, it's not so much that the Investigator failed to consider the issues, but rather she was of the view there was a lack of supporting evidence. For example, there was no evidence of any negative consequences to the Mr. Jagadeesh because of CIBC's administrative type errors on his ROEs.

(3) Analysis

[54] Mosley J. has commented recently on the duty of procedural fairness owed within the initial CHRC complaint process: *Pedroso v WestJet Airlines*, 2019 FC 878 [*Pedroso*] at paras 28-30:

[28] The Applicant misunderstands the Commission's process in assessing complaints. The process, outlined in the CHRA, calls for the investigator to review all the materials submitted and for the Commission to review the report generated by the investigator's review. An investigation is thorough so long as it is not clearly deficient and does not fail to assess any obviously crucial evidence: *Slattery v Canada (Human Rights Commission)*, 1994 CanLII 3463 (FC), [1994] 2 FC 574 at 600, 605, 73 FTR 161 (TD) [*Slattery*].

[29] In this instance, the investigator interviewed the relevant persons, including persons who were present during the hiring event. The Report details the investigator's assessment of the Respondent's hiring process and her consideration of the Applicant's application in particular.

[30] The investigation does not need to be perfect; the Commission must balance the Applicant and the Respondent's

procedural fairness interests with the Commission's interest in "maintaining a workable and administratively effective system": *Slattery*, above at 600; *Wong v Canada (Public Works and Government Services)*, 2017 FC 633 (CanLII) at para 40; *Tahmourpour v Canada (Solicitor General)*, 2005 FCA 113 (CanLII) at para 39. There is no requirement under the CHRA that, in determining whether to dismiss the complaint, the Commission receive and review all of the Applicant's original materials and submissions.

[55] Because the Commission, in deciding whether to adopt the Investigation Report, is not obliged to consider underlying evidence submitted to the Investigator (contrary to Mr. Jagadeesh's suggestion that they must), CIBC's submissions focused on the thoroughness and fairness of the investigation, as well as the resulting reasonableness of the Investigation Report itself.

[56] These submissions, however, do not take into account the scope of the entire complaint process. Prior to making a final decision, the Commission reviews not only the Section 40/41 Report, but also parties' submissions in reply to the Section 40/41 Report. In *Carroll*, Mosley J. explains the Commission's procedural fairness obligations therefore extend to the Commission's consideration of parties' reply submissions: *Carroll, supra*, at paras 68-70, 77-78 (emphasis added):

[68] Two clarifications are in order. First, the law is unequivocal that investigators acting on behalf of the Commission must conduct thorough investigations in the sense just explained. **However, complainants commonly make reply submissions to investigators' reports, which are reviewed by the Commission before it makes a final decision. Does the thoroughness requirement extend to the Commission at that stage of the process, compelling it to give proper regard to these submissions before rendering a decision?**

[69] **It is my opinion that it does.** As the Court of Appeal explained in *Sketchley FCA*, above, at para 37, the reason that the Commission is entitled to rely on an investigator's report as the reasons for its own decision is that

...for the purpose of a screening decision by the Commission pursuant to section 44(3) of the *Act*, the investigator cannot be regarded as a mere independent witness before the Commission [...] for the purposes of the investigation, the investigator is considered to be an extension of the Commission [references omitted].

[70] Since a procedural duty attaches to the extension, it would be artificial to deny that it also attaches to the whole. The idea that an investigator must behave thoroughly, but that the Commission can afterwards toss thoroughness out the window, is entirely counterintuitive and would undermine the proper administration of the Act. **It must be accepted that complainants should be treated fairly throughout the decision-making process. This is especially important because they are permitted to make submissions, whose content may vary, at various stages of that process. A requirement of thoroughness which survives the filing of the investigator's report ensures that every submission made by a complainant is given the consideration it deserves.**

...

[77] In the case at bar, and others which are similar to it, a breach of procedural fairness will not be found simply because the Commission has offered reasons which are inadequate in the sense that they are brief or do not appropriately reference certain pieces of evidence. **A breach of procedural fairness occurs when the Commission (or its investigator) clearly ignores the submissions made by a complainant.**

[78] Reasons which omit any mention of these submissions might constitute evidence that they were ignored, **yet the procedural flaw remains the fact that the decision-maker ignored submissions – not that he issued reasons of a poor quality.** This procedural flaw might be proven through other means, although reference to the reasons will probably be the easiest method in most cases. In any event, this is a meaningful distinction between procedure and form, which allows the Court to reconcile *Sketchley, FCA* with *Newfoundland Nurses*.

[57] In *Carroll*, the Applicant in her reply submissions alleged “the report inaccurately states that the complaint did not raise the question of whether the directive is discriminatory. In fact, the first paragraph of the complaint refers to the directive”: *Carroll, supra* at para 19. Applying the above, Mosley J. found the Commission failed its duty of procedural fairness by simply adopting the Section 40/41 Report’s conclusions without turning their mind to her reply submissions: *Carroll, supra* at para 79:

[79] Turning to the facts of this case, the applicant has made out her allegation of procedural unfairness. The investigator’s report, which also stands as the Commission’s reasons, convincingly illustrates that her various submissions were ignored.

[58] Similarly in *Peterkin, supra*, this Court found the Commission failed to examine the Applicant’s complaint thoroughly when it did not mention any of the Applicant’s “obviously crucial” evidence supporting her complaint contained in her reply submissions. Campbell J. concluded this evidence, comprised of her testimony concerning the differential treatment she experienced, went to the “heart of her Complaint” and that by failing to address it, the Commission erred: *Peterkin, supra* at paras 27-28.

[59] Here, the Section 40/41 Report expressly states (at the bottom of page 2 of 14 in numbered paragraph 7) the Investigator did not investigate whether Mr. Jagadeesh did not receive promotions or interviews for alternative positions because of his sexual orientation or disability, as in her view these were new allegations:

“The complainant does not refer to the alleged sexual exploitation of employees and that they are subsequently promoted instead of him, or that the respondent did not consider him for 14 positions after June 23, 2015, in his Complaint Form. The investigator will not therefore, deal with these allegations in the context of the present complaint.”



Instead, she investigated whether Mr. Jagadeesh required accommodation in the form of another position, which she concluded was not the case.

[60] In his Reply submissions, Mr. Jagadeesh submitted these were within the scope of his initial complaint, and asserted the Investigator erred in concluding they were not or that they were new. In his view, the following lines from his original complaint (under the heading “Brief details are as below” and the subheadings indicated below) demonstrate the appropriate scope:

1. My Manager / Team Leader (Mr. Anoop Jayagopal)

“...unless I join their “group”, there is NO hope for me. He asked me to look around & see how all these young guys with very little qualifications are getting promoted. He asked me to be ‘smart & learn’ ... Even though I did not think about that at that time, and took it casually, later on I did feel that it may be the primary reason for all of my problems & discrimination in CIBC.”

2. CIBC denied me Workforce Accommodation

“CIBC refused to offer me any other position even in the call centre I was working, even though I had ‘Canadian Experience’ of more than 10 years in hi-technology ‘Canadian Call Centre environment.’”

...

4. CIBC Managers were aware of my Discrimination

...

[see – Qualifications – below]

...

[Qualifications]

“I had applied for 17 different jobs within the company on CIBC website & kept my Managers informed. My Managers & HR personnel had direct access to my profile on HR website.”

[61] Mr. Jagadeesh's complaint form is not organized as clearly as it could have been, and on that basis the Investigator reasonably could have misconstrued the original scope of the complaint. Upon the Court's review of the original complaint in the context of his reply submissions, it is clear Mr. Jagadeesh did allege in his original complaint he was not hired for alternative positions because of discrimination based on sexual orientation and/or disability. Putting them under the headline "Qualifications" - a headline he created - does not shield these allegations from the CHRC's review. Moreover, on the first page of the complaint form, Mr. Jagadeesh had checked the boxes beside "Sexual Orientation" and "Disability" as the applicable grounds on which he believes CIBC discriminated against him. As such, these complaints should have been addressed by the Commission, as they are obliged to consider not only the Section 40/41 Report but also the Reply submissions. The Commission failed to do so, and instead adopt the conclusions in the Section 40/41 Report without further reasons. In doing so, the Commission, in my view, conducted the same error as occurred in *Carroll, supra* and *Peterkin, supra*.

[62] CIBC argues the Investigator's flaw in not investigating these grounds was not so fundamental that it could not be remedied by further submissions: *Sketchley, supra* at para 38. While that may be true, it is clear this defect was not remedied through further submissions, as the Commission did not turn its mind to Mr. Jagadeesh's submissions nor evidence at all. Despite having a second opportunity to review Mr. Jagadeesh's evidence and provide adequate justification for not investigating or otherwise proceeding on his complaint, the Commission remained silent and fully adopted the under-inclusive Section 40/41 Report. Doing so resulted in a breach in procedural fairness.

[63] Further, it must be noted the Commission did not review any of Mr. Jagadeesh's evidence itself, instead relying exclusively on the Investigator's summarization of this evidence. This is evident because the Commission, though it acknowledged the allegations of breach of procedural fairness and natural justice in Mr. Jagadeesh's Notice of Application, declined to provide Mr. Jagadeesh's rebuttal evidence as part of the certified tribunal record, asserting it was not before the decision maker and therefore shielded from review. As discussed in *Pedroso, supra*, the Commission is not obligated to consider all underlying evidence submitted to the Investigator when reviewing Section 40/41 Reports and making a decision. In my view, however, this case is distinguishable from *Pedroso, supra*, because Mr. Jagadeesh explicitly referred to portions of this evidence - which he did not resubmit under the assumption it was already in the CHRC's possession - in his Reply evidence to substantiate his allegations that the investigation was not thorough. Mr. Jagadeesh was not asking the Commission to re-conduct the investigation; instead, he directly pointed to parts of his Reply submissions he believed the Investigator overlooked or otherwise misconstrued, and requested the Commission consider this. In such circumstances, where the Applicant alleges the Investigator's Section 40/41 Report is under-inclusive and where the Applicant points to evidence previously provided to substantiate that allegation, the Commission is required to consider the evidence. Failing to do so is further evidence that their review of his Reply submissions was not thorough.

[64] Accordingly, the question of whether the CHRC's investigation and decision were procedurally fair must be answered in the negative.

D. *Was the CHRC's decision reasonable?*

[65] In light of the finding of a reviewable error in the Commission's decision and the underlying investigation, it is unnecessary to consider this issue.

## VII. Conclusion

[66] Based on the Commission's lack of thoroughness in reviewing the grounds of Mr. Jagadeesh's complaint, I grant the application for judicial review. The decision under review is set aside and the matter is returned to the Commission to conduct a fresh investigation, with a different investigator, of Mr. Jagadeesh's complaint and render a new decision based on the full record. Costs are awarded in favour of the Applicant.

## VIII. Amount of Costs

[67] The parties made brief costs submissions at the oral hearing. Mr. Jagadeesh seeks, minimally, costs of \$438.10 to cover his direct disbursements. Based on the presumption that losers pay, CIBC seeks partial indemnity costs estimated to be \$5,000.00. Given the divergence in their respective starting positions, the parties have 30 days of the date of this Judgment to agree on costs and to inform the Court of the agreed upon amount or, failing agreement, to make additional costs submissions in writing no longer than 5 pages in length. An Order regarding the amount of costs to be awarded to the Applicant will follow based on the agreement between the parties or their written costs submissions.

**JUDGMENT in T-2190-18**

**THIS COURT’S JUDGMENT is that:**

1. The judicial review application is granted and the CHRC’s November 21, 2018 decision is set aside.
2. The matter is returned to the Commission for a fresh investigation, with a different investigator, and a new decision based on the full record.
3. Costs are awarded to the Applicant. The parties have 30 days of the date of this Judgment to agree on costs and to inform the Court of the agreed upon amount or, failing agreement, to make additional costs submissions in writing no longer than 5 pages in length; an Order regarding the amount of costs to be awarded to the Applicant will follow based on the agreement between the parties or their written costs submissions.

“Janet M. Fuhrer”

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-2190-18

**STYLE OF CAUSE:** AAREN JAGADEESH v CANADIAN IMPERIAL BANK OF COMMERCE (CIBC)

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** SEPTEMBER 18, 2019

**JUDGMENT AND REASONS:** FUHRER J.

**DATED:** SEPTEMBER 24, 2019

**APPEARANCES:**

Aaren Jagadeesh

FOR THE APPLICANT  
(ON HIS OWN BEHALF)

Elisha Jamieson-Davies

FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Attorney General of Canada  
Toronto, Ontario

FOR THE RESPONDENT