Federal Court  Cour fédérale

Date: 20210106

Docket: T-1427-19

Citation: 2021 FC 16

Ottawa, Ontario, January 6, 2021

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

CHRISTOPHER FRANK ERNST

Applicant

and

CANADIAN NATIONAL RAILWAY COMPANY

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is an application for judicial review of a decision by the Canadian Human Rights Commission [Commission] dated July 25, 2019 [Decision]. The Commission dismissed the Applicant's complaint [Complaint] that his employer, Canadian National Railway Company [CN] discriminated against him by terminating his employment based on family status, contrary to section 7 of the *Canadian Human Rights Act*, RSC 1985, c H-6 [*Act*]. In addition, the

Applicant made an allegation of related discrimination against him by his employer on the basis CN investigated and assessed additional demerit points against him because he asked to be accommodated on the basis of his family status childcare needs.

II. Facts

[2] The Applicant was employed as a locomotive engineer with CN from August 20, 2007 until September 26, 2016 when he was terminated. The Applicant's wife was also employed with CN as a locomotive engineer at the time of the Applicant's termination.

[3] The Applicant and his wife worked in Grande Cache, Alberta but lived approximately two hours away, in Grand Prairie, Alberta. The Applicant said he worked Saturday, Sunday and was on-call on Mondays and his wife worked every-other Monday, Tuesday and Wednesday. When the Applicant and his wife had overlapping shifts, they had a caregiver look after their two young children from Sunday evening until Tuesday morning.

[4] This arrangement was in place for one year until the caregiver told the Applicant and his wife that she was quitting "on short notice". The Applicant attempted to find a substitute on short notice but was unsuccessful in finding childcare for the shift from the evening of Sunday, September 4, 2016 until the morning of Tuesday, September 6, 2016.

[5] On Saturday, September 3, 2016, the Applicant said he contacted his shift supervisor [Supervisor] and advised him that he could not work on Monday, September 5, 2016. The Applicant requested to book the day off using banked time or be granted a leave of absence due

to his family emergency. The Supervisor refused the request because there was insufficient notice and the Supervisor had "been in trouble" before for accommodating other employees with similar childcare related issues.

[6] The Applicant said he further requested his Supervisor accommodate his request and the Supervisor responded, "he could not make any promises". The Applicant obtained the contact information for the Supervisor's manager, but was unsuccessful in reaching him.

[7] On Monday, September 5, 2016, the Applicant contacted CN's Attendance Management Department to book the day off. The Applicant was told "he could not book off because his failure to secure childcare did not constitute a family emergency". The Applicant said he contacted his Supervisor again requesting accommodation but was once again refused.

[8] The Applicant did not attend work on Monday, September 5, 2016.

[9] CN uses the Brown and Beatty System of progressive discipline for assessing disciplinary penalties or demerits for employees. Under this system, when a CN employee reaches 60 demerit points, they are automatically dismissed.

[10] On September 10, 2016, CN investigated the Applicant for "abandonment of assignment" on Monday, September 5, 2016. I will refer to this as the "childcare issue."

[11] At the same time, CN also investigated the Applicant for his failure to provide a doctor's note to support previous absences two months earlier, on July 15 and 16, 2016. I will call this the "absence issue."

[12] The Applicant contacted his representative [Local Representative] at Unifor [Union] to present an accommodation plan to CN that would involve dropping his seniority level. The Local Representative said he would draft a proposal and submit it to CN but never did. I note the specific date of contact is not provided in the record.

[13] On September 26, 2016, CN assessed the Applicant 25 demerit points for the childcare issue, namely "abandonment of assignment" on Monday, September 5, 2016.

[14] On the same day CN assessed an additional 20 demerit points on the July absence issue regarding his failure to provide a doctor's note for absences two months earlier, on July 15 and 16, 2016.

[15] Before these two assessments took place the Applicant had 55 demerit points. The Applicant had previously received a suspension which "in the eyes of an Arbitrator are similar to last chance agreements and are usually substituted in lieu of terminations."

[16] As a result of the two additional demerit point assessments, the Applicant's total demerit points reached 100, well above the 60-demerit point termination threshold. CN terminated the Applicant on the same day, September 26, 2016.

[17] On October 6, 2016, the Applicant's Union filed grievances for both the assessment of 20 demerit points for the absence issue and the assessment of 25 points for the childcare issue.

[18] On May 10, 2017, without taking the grievances to arbitration, the Union closed the Applicant's grievances because it believed "there [were] no mitigating factors which the Union could use in supporting a reasonable explanation for [the Applicant's] actions."

[19] Unless otherwise noted, the foregoing is taken from the report [Report] of an investigator of the Commission [Investigator].

[20] CN later on, and after the Applicant filed his Complaint with the Commission, rescinded the 25 demerit points related to the childcare discrimination issue. In this respect, CN told the Investigator in its letter in response to the Complaint that the childcare issue points were removed "effective February 2, 2018". On the other hand, the Union's regional representative, Mr. Shore [Regional Representative] said these demerit points were removed October 19, 2016. It is not clear what, if any, authority Mr. Shore had to contradict the Respondent in this respect. Mr. Shore was not an employee of CN.

III. Decision under review

[21] The Applicant filed his Complaint under the *Act* on or about March 17, 2017. He alleged that CN had discriminated against him because of family status contrary to section 7 of the *Act*:

Employment **Emploi**

7 It is a discriminatory practice, directly or indirectly,	**7** Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait, par des moyens directs ou indirects:
(a) to refuse to employ or continue to employ any individual, or	**a)** de refuser d'emp loyer ou de continuer d'employer un individu;
(b) in the course of employment, to differentiate adversely in relation to an employee,	**b)** de le défavoriser en cours d'emploi.
on a prohibited ground of discrimination	
…	…
Prohibited grounds of discrimination	**Motifs de distinction illicite**
3 (1) For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, gender identity or expression, marital status, family status, genetic characteristics, disability and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.	**3 (1)** Pour l'application de la présente loi, les motifs de distinction illicite sont ceux qui sont fondés sur la race, l'origine nationale ou ethnique, la couleur, la religion, l'âge, le sexe, l'orientation sexuelle, l'identité ou l'expression de genre, l'état matrimonial, la situation de famille, les caractéristiques génétiques, l'état de personne graciée ou la déficience.
[Emphasis added.]	[Je souligne.]

[22] The Federal Court of Appeal has confirmed that the prohibited ground of "family status" in the *Act* includes parental obligations, such as childcare obligations: *Canada (Attorney General) v Johnstone,* 2014 FCA 110 [Mainville JA] at para 74.

[23] The Commission appointed an Investigator who began an investigation into the Complaint on June 7, 2017. The Investigator invited CN to respond to the Complaint. On February 14, 2018, CN filed its response letter to the Complaint which stated it had removed 25 demerit points from the Applicant's disciplinary record "effective February 2, 2018." CN submitted that regardless of the removal of 25 demerit points, the Applicant's total demerit points of 75 still exceeded 60 points and therefore he was properly dismissed. CN did not discuss the 20 demerit points allegedly assessed as a result of the July absence issue.

[24] The Investigator interviewed the Applicant and his Union's Regional Representative. No one from CN was interviewed.

[25] The Investigator completed a Report dated March 4, 2019. The Investigator recommended the Complaint be dismissed pursuant to subparagraph 44(3)(b)(i) of the *Act* because the evidence adduced did not support the allegation that CN had discriminated against the Applicant based on family status when it dismissed the Applicant. Rather, the Investigator found the Applicant's dismissal was based on his discipline history which included incidents "unrelated to" the Applicant's family status and childcare issues.

Report	**Rapport**
44 (1) An investigator shall, as soon as possible after the conclusion of an investigation, submit to the Commission a report of the findings of the investigation.	**44 (1)** L'enquêteur présente son rapport à la Commission le plus tôt possible après la fin de l'enquête.
Action on receipt of report	**Suite à donner au rapport**

(2) If, on receipt of a report referred to in subsection (1), the Commission is satisfied

(2) La Commission renvoie le plaignant à l'autorité compétente dans les cas où, sur réception du rapport, elle est convaincue, selon le cas :

(a) that the complainant ought to exhaust grievance or review procedures otherwise reasonably available, or

a) que le plaignant devrait épuiser les recours internes ou les procédures d'appel ou de règlement des griefs qui lui sont normalement ouverts;

(b) that the complaint could more appropriately be dealt with, initially or completely, by means of a procedure provided for under an Act of Parliament other than this Act,

b) que la plainte pourrait avantageusement être instruite, dans un premier temps ou à toutes les étapes, selon des procédures prévues par une autre loi fédérale.

it shall refer the complainant to the appropriate authority.

Idem

Idem

(3) On receipt of a report referred to in subsection (1), the Commission

(3) Sur réception du rapport d'enquête prévu au paragraphe (1), la Commission :

(a) may request the Chairperson of the Tribunal to institute an inquiry under section 49 into the complaint to which the report relates if the Commission is satisfied

a) peut demander au président du Tribunal de désigner, en application de l'article 49, un membre pour instruire la plainte visée par le rapport, si elle est convaincue :

(i) that, having regard to all the circumstances of the complaint, an inquiry into the complaint is warranted, and

(i) d'une part, que, compte tenu des circonstances relatives à la plainte, l'examen de celle-ci est justifié,

(ii) that the complaint to which the report relates should not be referred

(ii) d'autre part, qu'il n'y a pas lieu de renvoyer la plainte en application du

pursuant to subsection (2) or dismissed on any ground mentioned in paragraphs 41(c) to (e); or

paragraphe (2) ni de la rejeter aux termes des alinéas 41c) à e);

(b) shall dismiss the complaint to which the report relates if it is satisfied

b) rejette la plainte, si elle est convaincue :

(i) that, having regard to all the circumstances of the complaint, an inquiry into the complaint is not warranted, or

(i) soit que, compte tenu des circonstances relatives à la plainte, l'examen de celle-ci n'est pas justifié,

(ii) that the complaint should be dismissed on any ground mentioned in paragraphs 41(c) to (e).

(ii) soit que la plainte doit être rejetée pour l'un des motifs énoncés aux alinéas 41c) à e).

…

…

Commission to deal with complaint

Irrecevabilité

41 (1) Subject to section 40, the Commission shall deal with any complaint filed with it unless in respect of that complaint it appears to the Commission that

41 (1) Sous réserve de l'article 40, la Commission statue sur toute plainte dont elle est saisie à moins qu'elle estime celle-ci irrecevable pour un des motifs suivants :

(a) the alleged victim of the discriminatory practice to which the complaint relates ought to exhaust grievance or review procedures otherwise reasonably available;

a) la victime présumée de l'acte discriminatoire devrait épuiser d'abord les recours internes ou les procédures d'appel ou de règlement des griefs qui lui sont normalement ouverts;

(b) the complaint is one that could more appropriately be dealt with, initially or completely, according to a procedure provided for under an Act

b) la plainte pourrait avantageusement être instruite, dans un premier temps ou à toutes les étapes, selon des

of Parliament other than this Act;	procédures prévues par une autre loi fédérale;
(c) the complaint is beyond the jurisdiction of the Commission;	**c)** la plainte n'est pas de sa compétence;
(d) the complaint is trivial, frivolous, vexatious or made in bad faith; or	**d)** la plainte est frivole, vexatoire ou entachée de mauvaise foi;
(e) the complaint is based on acts or omissions the last of which occurred more than one year, or such longer period of time as the Commission considers appropriate in the circumstances, before receipt of the complaint.	**e)** la plainte a été déposée après l'expiration d'un délai d'un an après le dernier des faits sur lesquels elle est fondée, ou de tout délai supérieur que la Commission estime indiqué dans les circonstances.

[26] Significantly in my view, the Report confirms that the Applicant raised an additional or connected claim of discrimination related to the July absence issue. This claim of discrimination and alleged retaliation does not seem to have been investigated or grappled with by the Investigator. While the Report discusses an allegation he was entitled to the time off under the collective agreement, it make no mention of the allegation of additional discrimination and retaliation. The Report refers to this discrimination as follows:

> 21. The complainant argues that the respondent's decision to remove 25 demerits from his record strongly suggests that it also discriminated against him when it disciplined him 20 demerits on September 26, 2016 for failure to provide documentation to support his absence from his assignment from July 15 to 16, 2016. He maintains that his collective agreement entitles him to five paid sick leave days every calendar year, and that this is not conditional. However, between January 1, 2016 and September 26, 2016, he had only booked a total of five days. As soon as he mentioned the respondent's duty to accommodate, it "scrambled" to terminate his employment and give him as much discipline as possible. He states:

> Had they removed the 25 demerits in the beginning, or not applied them at all, then the worst case scenario, my Union and I would have been dealing with a manageable amount of discipline. Sadly that wasn't the case, and removing 25 demerits now, at this stage, is too little, too late.

[Emphasis added.]

[27] The Investigator send the Report to both parties who were invited to comment. The Applicant provided the Commission with additional submissions on April 2, 2019 and July 12, 2019. He highlighted several alleged errors, contradictions and omissions in the Report, supported by additional documents including work records and character references.

[28] In his response, the Applicant also stated that during the grievance process the Regional Representative "had argued that I had received back to back investigations for the sole purpose of assessing excessive discipline." This appears to support the Applicant's allegation of discrimination and possible retaliation related to the July absence issue.

[29] On April 25, 2019, CN submitted its response to the Applicant's submissions and to the Report.

[30] The Report, the submissions of both parties and the Complaint were sent to the Commission on July 25, 2019.

[31] The Commission accepted the recommendation of the Investigator and dismissed the Complaint pursuant to subparagraph 44(3)(b)(i) of the *Act.*

IV. Issues

[32] The issues are:

1. Did the Adjudicator breach principles of natural justice and/or procedural fairness?
2. Is the Decision reasonable?

V. Standard of Review

A. *Principles of natural justice and/or procedural fairness*

[33] With regard to the first issue, questions of procedural fairness are reviewed on the correctness standard: *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, per Binnie J at para 43. That said, I wish to note that in *Bergeron v Canada (Attorney General)*, 2015 FCA 160 [*Bergeron*], per Stratas JA at para 69, the Federal Court of Appeal says a correctness review may need to take place in "a manner 'respectful of the [decision-maker's] choices' with 'a degree of deference': Re: *Sound v Fitness Industry Council of Canada*, 2014 FCA 48, 455 N.R. 87 at paragraph 42." But, see *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 [Rennie JA]. In this connection I also note the Federal Court of Appeal's recent decision of November 13, 2020 which held judicial review of procedural fairness is conducted on the correctness standard: see *Canadian Association of Refugee Lawyers v. Canada (Immigration, Refugees and Citizenship*), 2020 FCA 196 per de Montigny JA (Near and LeBlanc JJA) concurring:

> [35] Neither *Vavilov* nor, for that matter, *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, have addressed the standard for determining whether the decision-maker complied with the duty of procedural fairness. In those circumstances, I prefer to rely on the long line of jurisprudence, both from the

> Supreme Court and from this Court, according to which the standard of review with respect to procedural fairness remains correctness.

[34] I also conclude from the Supreme Court of Canada's teaching in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 23 that the standard of review for procedural fairness is likely correctness:

> [23] Where a court reviews the merits of an administrative decision (i.e., judicial review of an administrative decisions other than a review related to a breach of natural justice and/or the duty of procedural fairness), the standard of review it applies must reflect the legislature's intent with respect to the role of the reviewing court, except where giving effect to that intent is precluded by the rule of law. The starting point for the analysis is a presumption that the legislature intended the standard of review to be reasonableness.
>
> [Emphasis added.]

[35] In *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 50, the Supreme Court of Canada explains what is required of a court reviewing on the correctness standard of review:

> [50] When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

B. *Reasonableness*

[36] With regard to the reasonableness standard of review, in *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, majority reasons by Justice Rowe [*Canada Post*], which

was issued at the same time as the Supreme Court of Canada's decision in *Vavilov*, the majority explains what is required for a reasonable decision, and importantly for present purposes, what is required of a court reviewing on the reasonableness standard:

> [31] A reasonable decision is "one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov*, at para. 85). Accordingly, when conducting reasonableness review "[a] reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with 'respectful attention' and seeking to understand the reasoning process followed by the decision maker to arrive at [the] conclusion" (*Vavilov*, at para. 84, quoting *Dunsmuir*, at para. 48). The reasons should be read holistically and contextually in order to understand "the basis on which a decision was made" (*Vavilov*, at para. 97, citing *Newfoundland Nurses*).
>
> [32] A reviewing court should consider whether the decision as a whole is reasonable: "what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review" (*Vavilov*, at para. 90). The reviewing court must ask "whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov*, at para. 99, citing *Dunsmuir*, at paras. 47 and 74, and *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 13).
>
> [33] Under reasonableness review, "[t]he burden is on the party challenging the decision to show that it is unreasonable" (*Vavilov*, at para. 100). The challenging party must satisfy the court "that any shortcomings or flaws relied on ... are sufficiently central or significant to render the decision unreasonable" (*Vavilov*, at para. 100).
>
> [Emphasis added.]

[37] In the words of the Supreme Court of Canada in *Vavilov*, a reviewing court must be satisfied the decision maker's reasoning "adds up":

> [104] Similarly, the internal rationality of a decision may be called into question if the reasons exhibit clear logical fallacies, such as circular reasoning, false dilemmas, unfounded generalizations or an absurd premise. This is not an invitation to hold administrative decision makers to the formalistic constraints and standards of academic logicians. However, a reviewing court must ultimately be satisfied that the decision maker's reasoning "adds up".
>
> [105] In addition to the need for internally coherent reasoning, a decision, to be reasonable, must be justified in relation to the constellation of law and facts that are relevant to the decision: *Dunsmuir*, at para. 47; *Catalyst*, at para. 13; *Nor-Man Regional Health Authority*, at para. 6. Elements of the legal and factual contexts of a decision operate as constraints on the decision maker in the exercise of its delegated powers.
>
> [Emphasis added.]

[38] The Supreme Court of Canada in *Vavilov* at para 86 also states, "it is not enough for the outcome of a decision to be justifiable. Where reasons for a decision are required, the decision must also be justified, by way of those reasons, by the decision maker to those to whom the decision applies," and provides guidance that the reviewing court review decide based on the record before them:

> [126] That being said, a reasonable decision is one that is justified in light of the facts: *Dunsmuir*, para. 47. The decision maker must take the evidentiary record and the general factual matrix that bears on its decision into account, and its decision must be reasonable in light of them: see *Southam*, at para. 56. The reasonableness of a decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it. In *Baker*, for example, the decision maker had relied on irrelevant stereotypes and failed to consider relevant evidence, which led to a conclusion that there was a reasonable apprehension of bias: para. 48. Moreover, the decision maker's approach would *also* have supported a finding that the decision was unreasonable on the basis that the decision maker showed that his conclusions were not based on the evidence that was actually before him: para. 48.
>
> [Emphasis added.]

VI. Analysis

A. *Procedural fairness*

[39] The Applicant submits the principles of procedural fairness were breached because: (i) the Report did not bear the hallmarks of neutrality and thoroughness because the Investigator (a) was biased and (b) failed to investigate key points regarding the Complaint including the Applicant's allegation of discrimination regarding the July absence issue and subsequent investigation and assessment of additional demerit points; (ii) the Investigator did not interview witnesses the Applicant suggested; and (iii) the Applicant was not provided an opportunity to respond to adverse witness statements given to the Investigator by the Regional Representative and provide rebuttal evidence.

[40] The Respondent submits there was no procedural unfairness and the Investigator's investigation was fair, neutral and thorough.

[41] The Applicant filed an affidavit before this Court. In terms of new evidence on judicial review, I rely upon *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright*), 2012 FCA 22 [Stratas JA] at para 20. I was not asked to strike any particular portion of the Applicant's affidavit. However I will approach the affidavit as determined by the Federal Court of Appeal.

[42] The Applicant further submits and I agree that when a Commission adopts an Investigator's recommendations and provides no, or only brief reasons, the Investigator's Report

should be treated as the Commission's reasons: *Vos v Canadian National Railway Company*, 2010 FC 713 [Lemieux J] [*Vos*] at para 36.

[43] I should note the Applicant was self represented before the Commission. However, he was represented by counsel at the hearing before the Court.

[44] I will now deal with the Applicant's submissions on procedural fairness.

(1) Neutrality and Thoroughness

[45] The Applicant submits the Investigator was not sufficiently thorough during the investigation process and did not approach the Complaint with an open mind. I agree; this Court in *Slattery v Canada (Human Rights Commission)*, [1994] 2 FC 574 [*Slattery No. 1*] [Nadon J as he then was] at para 50 recognized that neutrality and thoroughness are required by investigators: "[i]n order for a fair basis to exist for the CHRC to evaluate whether a tribunal should be appointed pursuant to paragraph 44(3)(a) of the *Act*, I believe that the investigation conducted prior to this decision must satisfy at least two conditions: neutrality and thoroughness."

(a) *Bias or a reasonable apprehension of bias*

[46] The Applicant submits that "neutrality means an absence of bias or presence of an open mind by the investigator and thoroughness is the essential role that investigators play in making recommendations to the Commission: *Vos*, above, at para 44". I agree.

[47] The Applicant submits the Investigator had a closed mind, evidenced by not interviewing any further witnesses despite a phone call with the Applicant discussing further witnesses and by not providing the Applicant an opportunity to respond to any evidence prior to finalizing the Report. For similar reasons, the Applicant submits the Investigator was not thorough because she did not interview additional witnesses, did not highlight any contradictions in CN's position, did not consider further submissions by the Applicant or provide him with the opportunity to respond prior to the sending of the Report to the Commission.

[48] However, as CN submits, the Applicant failed to demonstrate there was any bias or lack of neutrality in the Decision. This Court in *Lubaki v Bank of Montreal*, 2020 FC 526 [Russell J], states:

> [52] The Applicant also alleges that the whole Decision is tainted by a lack of impartiality and bias. The Applicant, however, has provided the Court with no evidentiary basis for these serious accusations. He appears to be of the view that because the Investigator did not conduct a thorough enough investigation from his perspective and did not confirm his own views, the whole process was therefore biased.

[49] That is my view of the Applicant's bias allegation in this case as well.

[50] I also note and agree, as CN submits, that an allegation of bias against an Investigator is a serious allegation and should not be made lightly. The allegation cannot be made on mere suspicion, conjecture, insinuations, or a mere impression of an applicant. The burden of demonstrating the existence of bias or a reasonable apprehension of bias rests on the person making the allegation: *Arthur v Canada (Attorney General)*, 2001 FCA 223 [Létourneau JA] at

para 8 and *Hughes v Canada (Attorney General)*, 2010 FC 837 [Mactavish J as she then was] at para 21.

[51] In my view, the proper test for bias is set out by Justice de Grandpré in *Committee for Justice & Liberty v Canada (National Energy Board)*, [1978] 1 SCR 369:

> 40 The proper test to be applied in a matter of this type was correctly expressed by the Court of Appeal. As already seen by the quotation above, the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."

[52] Each such case depends on the facts. I need not review various cases cited to me as they are examples of decisions one way or another. In my view the Applicant has failed to persuade me that the investigation was conducted with a closed mind. Neither individually nor cumulatively do his submissions persuade me otherwise.

(b) *Thoroughness and the failure to investigate alleged discrimination regarding the July absence issue*

[53] The Respondent submits the Commission is to be afforded considerable deference in determining its procedure. Generally, I agree.

[54] However, as noted, the jurisprudence on procedural fairness in a case like this also requires the Commission to act with thoroughness. This means it must consider crucial or critical

issues, and that the Decision must not be clearly deficient. In *Slattery No. 1* at para 70, Justice Nadon states: “judicial review of an allegedly deficient investigation should only be warranted where the investigation is clearly deficient”, see also: *Greaves v Air Transat Inc.*, 2009 FC 9 [Teitelbaum J] at para 14, *Miller v Canada (Human Rights Commission)*, [1996] FCJ No. 735 [*Miller*] [Dubé J] at para 13.

[55] In his Complaint, the Applicant stated he had been assessed demerits on the absence issue, and that this was done at the same time he was assessed demerits on the childcare issue. There is no disagreement on the concurrent timing of the two investigations and two assessments. However, in his Complaint the Applicant did not ask for an investigation regarding the July absence issue nor did he directly impugn the assessment of demerits on the absence issue. He put it this way in his Complaint:

> At the time of this discipline, I also received discipline for not producing a doctors note for booking off sick. I was at 50 (*sic*) demerits before all of this. It takes 60 demerits to get fired. The company gave me 25 demerit for the doctors note and 20 demerits for the abandonment of assignment. The Union told me that they will not take my case to arbitration, based on, they can only take one of my cases to arbitration and even if they win, I would still be fired for the sick note demerits. The Union has said that there is nothing they can do for me now.

[56] As mentioned, the Applicant was self-represented before the Commission.

[57] However, the Applicant did raise discrimination related to the July absence issue in his interview with the Investigator. This is confirmed in the Report itself. There it states the Applicant specifically alleged discrimination in relation to the July absence issue as being related to the childcare issue investigations and assessment of demerit points. The Report states:

> 21. The complainant argues that the respondent's decision to remove 25 demerits from his record strongly suggests that it also discriminated against him when it disciplined him 20 demerits on September 26, 2016 for failure to provide documentation to support his absence from his assignment from July 15 to 16, 2016. He maintains that his collective agreement entitles him to five paid sick leave days every calendar year, and that this is not conditional. However, between January 1, 2016 and September 26, 2016, he had only booked a total of five days. As soon as he mentioned the respondent's duty to accommodate, it "scrambled" to terminate his employment and give him as much discipline as possible. He states:
>
> > Had they removed the 25 demerits in the beginning, or not applied them at all, then the worst case scenario, my Union and I would have been dealing with a manageable amount of discipline. Sadly that wasn't the case, and removing 25 demerits now, at this stage, is too little, too late.

[58] The Report states and I accept that the Applicant alleged he had been "discriminated against" in having the absence issue related demerits investigated and assessed against him at the same time as the childcare issue.

[59] In my respectful view, a fair reading of the Applicant's statement to the Investigator reveals a definite allegation that there was a link between the two disciplinary investigations (conducted the same day - September 16, 2016), and a link between the two demerit assessments (also imposed the same day - September 26, 2016).

[60] The alleged link between the two was the employer's reaction to his claim that CN had a duty to accommodate his childcare issue.

[61] The Report confirms not only that the Applicant told the Investigator he had been "discriminated against" in having the absence issue simultaneously investigated and 20 additional demerit points assessed, but that CN's actions were directly motivated because the Applicant requested his childcare situation be accommodated. The Report quotes the Applicant as stating: "[a]s soon as he mentioned the respondent's duty to accommodate, it [CN, his employer] "scrambled" to terminate his employment and give him as much discipline as possible."

[62] The Report also confirms the Applicant told the Investigator that the two being linked resulted in his dismissal, even though CN some time later removed the 25 demerit points it had assessed on the childcare issue.

[63] The Report says the Applicant told the Investigator: "[h]ad they removed the 25 demerits in the beginning, or not applied them at all, then the worst case scenario, my Union and I would have been dealing with a manageable amount of discipline. Sadly that wasn't the case, and removing 25 demerits now, at this stage, is too little, too late."

[64] If the additional investigation together with the demerit point assessment on the absence issue were linked to his request to be accommodated on the childcare issue, and both were to be reversed, the Applicant would indeed have had only 55 demerit points.

[65] If he only had 55 demerit points he would not have been dismissed because that is less than the 60 required to trigger dismissal.

[66] The question becomes whether the Investigator should have investigated or grappled with this additional or connected claim of discrimination which allegedly relates to the childcare discrimination issue.

[67] I say “should have”, because the Investigator’s Report makes no finding in this regard; I am unable to determine whether the Investigator grappled with this allegation. There is nothing to clearly indicate that this alleged ground of discrimination was investigated at all.

[68] In my respectful view, the allegation that the Applicant was discriminated against by CN investigating his absence in July for the purposes of increasing the disciplinary consequences of his childcare issue in September, is very serious.

[69] It is serious for a number of reasons. First of all, it is possible that bringing forward the old July absence issue may be in itself be family status discrimination contrary to section 7 of the *Act*. We don’t know because the allegation was not investigated. It is also possible, if this allegation had been investigated, that the additional alleged discrimination was simply part and parcel of a larger discriminatory action on the childcare issue itself. We don’t know; what we know is this was a very serious allegation, and it was not clearly and expressly investigated.

[70] I note as well the element of retaliation in the Applicant’s additional allegation of discrimination; not retaliation after filing of a Complaint as set out in section 14.1 of the *Act*, but retaliation by the employer against the employee simply for asking to be accommodated at the outset of the childcare issue. He was made to face not one but two investigations, and had not

one but two sets of demerit points assessed against him when perhaps none should have been awarded, which would be the case if there was childcare discrimination on the September absence, and if proceeding after a two month delay re the July absence issue was irregular.

[71] In my view the Investigator should have meaningfully grappled with and followed up on these serious allegations (discrimination and retaliation) and not left them hanging. I say this because the right not to be discriminated against is protected not only by a statute of Parliament, namely the *Act*, but is also quasi-constitutional in nature; the protections these rights afford are fundamental to our society.

[72] The Supreme Court of Canada declared that these human rights are quasi-constitutional in nature in *Newfoundland Association of Public Employees v Newfoundland (Green Bay Health Care Centre)*, [1996] 2 SCR 3 at para 20 [Major J] and *McCormick v Fasken Martineau Dumoulin LLP*, 2014 SCC 39 [Abella J]:

> 17 The Code is quasi-constitutional legislation that attracts a generous interpretation to permit the achievement of its broad public purposes: *Craton v. Winnipeg School Division No. 1*, [1985] 2 S.C.R. 150 (S.C.C.); *O'Malley v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536 (S.C.C.), at p. 547, per McIntyre J.; *Canadian National Railway v. Canada (Human Rights Commission)*, [1987] 1 S.C.R. 1114 (S.C.C.), at pp. 1133-36; *VIA Rail Canada Inc. v. Canadian Transportation Agency*, [2007] 1 S.C.R. 650 (S.C.C.).

[73] The Federal Court of Appeal recently held the protections afforded by the *Act* are fundamental to our society:

> [7]…We do not agree with the Federal Court's statement at paragraph 20 of its reasons that Mr. Konesavarathan's procedural rights "fall at the low end of the spectrum" referred to in *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII

> 699 (SCC), [1999] 2 S.C.R. 817 at 837, 174 D.L.R. (4th) 193. The factors *Baker* sets out for determining the degree of fairness to which a party is entitled include "the nature of the statutory scheme and the terms of the statute pursuant to which the body operates" (*Baker* at 838). Human rights legislation like the *Canadian Human Rights Act* is quasi-constitutional in nature, and the protections it affords are fundamental to our society: *British Columbia Human Rights Tribunal v. Schrenk*, 2017 SCC 62 at para. 31, [2017] 2 S.C.R. 795.
>
> [Emphasis added.]

[74] While I agree not every issue raised by a complainant needs to be investigated, those that are crucial to the complaint, i.e., key issues or central arguments, must be investigated and meaningfully grappled with. As the Supreme Court of Canada recently confirmed in *Vavilov*:

> [128] Reviewing courts cannot expect administrative decision makers to "respond to every argument or line of possible analysis" (*Newfoundland Nurses*, at para. 25), or to "make an explicit finding on each constituent element, however subordinate, leading to its final conclusion" (para 16). To impose such expectations would have a paralyzing effect on the proper functioning of administrative bodies and would needlessly compromise important values such as efficiency and access to justice. However, a decision maker's failure to meaningfully grapple with key issues or central arguments raised by the parties may call into question whether the decision maker was actually alert and sensitive to the matter before it. In addition to assuring parties that their concerns have been heard, the process of drafting reasons with care and attention can alert the decision maker to inadvertent gaps and other flaws in its reasoning: *Baker*, at para. 39.
>
> [Emphasis added.]

[75] In *Alkoka v Canada (Attorney General)*, 2013 FC 1102, Justice Kane put it this way:

> [41] In summary, the following principles are applicable in this case: the Commission carries out an administrative and screening function; the Commission has broad discretion to determine, "having regard to all of the circumstances", whether further inquiry is warranted; the Commission must thoroughly and neutrally

> investigate complaints of discrimination; Commission investigations do not need to be perfect; only where unreasonable omissions are made, such as where an investigator failed to investigate "obviously crucial evidence", will judicial review be warranted; and, "obviously crucial evidence" means that it should have been obvious to a reasonable person that the evidence an applicant argues should have been investigated was crucial given the allegations in the complaint.
>
> [Emphasis added.]

[76] In my respectful view, the Investigator should have investigated this serious allegation of discrimination and possible retaliation. In terms of the tests *Vavilov* lay out, I am of the view the Investigator and Commission did not "meaningfully grapple with" this serious and key issue or central argument raised by the Applicant, namely that he was subject to discrimination and retaliation by having the July absences assessed against him at the same time as the September childcare issue. In my respectful view, the reasons below indicate the decision maker was not actually alert and sensitive to these additional related allegations.

[77] I note these allegations have nothing to do with a right to a day off for medical leave under the collective agreement, which the Investigator did at least investigate and decide further inquiry was not warranted.

[78] In my respectful view, this allegation of discrimination might constitute serious infringements of rights that the Commission and its staff were entitled to and should have investigated. As mentioned, the charge of retaliation is also most serious. I appreciate retaliation after a Complaint is filed is prohibited discrimination under *Act* per section14.1. In my respectful view, immediate retaliation consequential to asking to be accommodated, if it occurred here, is

also a serious on the protections afforded by the *Act* and might be prohibited discrimination itself. Only an investigation could help answer this issue, and perhaps an investigator would recommend the matter be pursued by the Tribunal. Again we do not know because the investigation was not thorough in the sense required by *Vavilov* and related jurisprudence.

[79] Because I am ordering judicial review and there will be a new investigation, I am reluctant to say more. However, for example, it may be that the simultaneous investigations and assessments of two unrelated matters were coincidental, we do not know. It may be normal to have proceeded quickly with the childcare dispute (within days) and not investigate the July absence issue for two months after it arose. The actions of CN could also amount to adverse differential treatment if it is not common practice for this employer to assess damages for conduct two months after the conduct occurs; we do not know because these issues weren't grappled with.

[80] In defence, the Respondent submitted there was nothing on the record regarding the July absence issue. I cannot accept this submission given what I have quoted directly from the Report. The Respondent said the case was confined to the record before the Investigator and there was nothing before the Investigator on this issue. For the same reasons, I respectfully disagree: the Report itself confirms the inaccuracy of this submission.

[81] CN further asserted that "we are not here to discuss the merits of discipline from July 15-16 that is not part of this case." Again, I disagree; the Report demonstrates the Applicant said he was discriminated against in relation to the July absence issue in addition to the September

childcare issue. The fact is this allegation was not grappled with, and in particular there is neither a recommendation nor decision respecting the allegations of discrimination and retaliation.

[82] To emphasize, I am not deciding the case one way or the other. I am deciding that this case must go back to the Commission for a procedurally fair, i.e. thorough, investigation for what I consider to be disturbing allegations of prohibited discriminations, and possible retaliation (not under section 14.1 of the *Act*).

(2) Additional grounds raised

[83] The Applicant raised a number of other procedural unfairness issues which I respectfully decline to determine, given there will be a reconsideration in this matter. Likewise, while reasonableness was also argued both in written and oral submissions, it is not necessary to review this aspect of the case.

VII. Conclusion

[84] The failure by the Investigator to meaningfully engage or grapple with the serious and crucial allegation of additional or related and retaliatory discrimination, results in a Report and Decision which, assessed together, are clearly deficient. I have concluded that the Report does not meet the legal requirement that it be thorough as set out in *Miller* at para 11 and in *Slattery No. 1* at para 70. Put another way, there has been a failure to meaningfully grapple with key issues in this case, such that I find the decision maker was not actually alert and sensitive to the matter before the Investigator and the Commission, per *Vavilov* at para 128. Therefore judicial

review will be granted. I would make the same order if I had applied the *Bergeron* test and given a ‘degree of deference’ to the Commission, based on the seriousness of the allegations and the rights concerned. I have attempted to avoid commenting as much as possible on either the childcare or July absence issues: both will likely arise on the reconsideration I am ordering. Likewise, I decline to deal with other issues of procedural unfairness or issues of alleged unreasonableness.

VIII. Costs

[85] Pursuant to the practices of the Federal Court and the Practice Direction of Chief Justice Lufty dated April 30, 2010 titled “Costs in the Federal Court”, and while the parties did not advise the Court on the quantum of costs at the hearing, each requested costs if they succeeded and subsequently made written cost requests. Each, if successful, seeks an all inclusive award of costs in the amount of $1,500. I see no reasons why costs should not follow the event. In my discretion, a reasonable amount of costs would be that the Respondent pay to the Applicant the all inclusive sum of $1,500.

JUDGMENT in T-1427-19

THIS COURT'S JUDGMENT is that:

1. Judicial review is granted.
2. This matter is remanded back to the Commission at the commencement of the investigative stage, with a Report to be prepared by a different Investigator.
3. The Respondent shall pay to the Applicant the sum of $1,500 as an all inclusive award of costs.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1427-19
STYLE OF CAUSE:	CHRISTOPHER FRANK ERNST v CANADIAN NATIONAL RAILWAY COMPANY

HEARING HELD BY VIDEOCONFERENCE ON DECEMBER 14, 2020 FROM OTTAWA, ONTARIO (COURT) EDMONTON, ALBERTA, AND TORONTO, ONTARIO, (PARTIES)

JUDGMENT AND REASONS:	BROWN J.
DATED:	JANUARY 6, 2021

APPEARANCES:

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