Federal Court Cour fédérale

Date: 20220513

Docket: T-2056-19

Citation: 2022 FC 708

Ottawa, Ontario, May 13, 2022

PRESENT: The Honourable Madam Justice Aylen

BETWEEN:

AARON ALCOCK

Applicant

and

CANADIAN ARMED FORCES

Respondent

JUDGMENT AND REASONS

[1] The Applicant, a former member of the Canadian Armed Forces, filed a complaint with the Canadian Human Rights Commission [Commission] on August 19, 2017 alleging that the Respondent, the Canadian Armed Forces, discriminated against him in employment on the grounds of race, national or ethnic origin, colour, religion, marital status, family status, disability and a conviction for which a pardon has been granted or a record suspended by treating him in an adverse

differential manner and by failing to provide him with a harassment-free work environment, contrary to sections 7 and 14 of the *Canadian Human Rights Act*, RSC 1985, c H-6 [*CHRA*].

[2] The Commission found that the Applicant's complaint was based, in part, on allegations which occurred more than one year before receipt of the complaint and that, in relation to the entirety of the complaint, the Applicant had failed to exhaust grievance procedures that were otherwise reasonably available to him. The Commission accordingly declined to deal with the Applicant's complaint pursuant to sections 41(1)(a) and (e) of the *CHRA*. On this application, the Applicant seeks judicial review of the Commission's refusal to deal with his complaint on the basis that the decision was both unreasonable and procedurally unfair.

[3] For the reasons that follow, this application for judicial review shall be dismissed.

I. Background and Decision at Issue

[4] The Applicant's complaint was made in the form required by the Commission and was confined to four pages. In his complaint, the Applicant stated that the Department of National Defence/Canadian Armed Forces discriminated against him from June 9, 2009 until August 19, 2017 on the basis of his race/colour, national or ethnic origin, religion, marital status/family status, disability and a conviction for which a pardon has been granted or a record suspended. Specifically, the Applicant stated that:

A. In relation to his race/colour as a black person, racial discrimination was evident in the attitudes, values and stereotypical comments of his peers and superiors, such as referring

to him as “you people” and sending him emails displaying graphic pictures and comments that discriminated against him. The Applicant described various events of discrimination and retribution that occurred while he was deployed in Afghanistan in 2010, including being removed from his accommodations, being escorted by Military Police, being denied personal protective equipment in a war zone and being repatriated back to Canada early and with an escort in June of 2010, and on arrival, being denied the opportunity to meet his family at the airport. The Applicant stated that he was also improperly investigated numerous times by Military Police for making complaints about his treatment, which ultimately resulted in charges being unfairly laid against him.

B. In relation to his ethic origin/religion, the Applicant received unequal treatment based on the fact that he is Jewish and was often made fun of and called “the Black Jew”.

C. In relation to his marital/family status as a single father, on unknown dates “in the past”, he was: (a) asked whether his children had the same mother because “black people normally have a couple of baby moms for each child”; (b) was told to obtain approval for housing and work, which approval was not required by others; and (c) was threatened with eviction from military family housing for not being allowed to work.

D. In relation to his disability as a sufferer of various mental health disorders, after returning from Afghanistan and after receipt of his diagnosis, he was: (a) not accommodated for his mental health disorders; (b) not provided with a suitable return to work program; (c) denied a posting and a promotion; (d) relegated to janitorial-type duties; (e) forced to stand trial at

> his Court Martial hearing notwithstanding his mental health issues and the fact that he was medically unfit to stand trial was ignored. A decision was ultimately made in June 2017 to medically release the Applicant from the military and the decision was made effective on February 14, 2018.

[5] Upon receipt of the Applicant's complaint, the Commission notified the parties that section 41(1)(e) of the *CHRA* may apply to the complaint because some of the allegations occurred more than one year before the complaint was filed and that such allegations may be severed if they were separate and independent from the remaining allegations. The parties were invited to provide their positions on the issues for decision.

[6] A Commission investigator prepared a Section 40/41 Report, dated May 29, 2019, recommending that the Commission not deal with the Applicant's complaint pursuant to section 41(1)(a) and (e) of the *CHRA*.

[7] Both parties were given an opportunity to provide the Commission with submissions in response to the Section 40/41 Report.

[8] By letter dated July 24, 2019, the Respondent advised that it supported the Commission investigator's recommendation and had no further comments.

[9] By letter dated August 27, 2019, the Applicant provided a four-page submission in response to the Section 40/41 Report, together with a one-page exhibit.

[10] By letter dated September 19, 2019, the Applicant provided his reply to the Respondent's letter dated July 24, 2019.

[11] By letter dated October 18, 2019, the Respondent provided its reply to the Applicant's letter dated September 19, 2019.

[12] By letter dated November 8, 2019, the Commission advised the Applicant that, after reviewing the Section 40/41 Report and the submissions filed by the parties in response thereto, the Commission decided, pursuant to section 41(1)(a) and (e) of the *CHRA*, not to deal with the complaint because: (a) the Applicant had failed to exhaust grievance or review procedures that were otherwise reasonably available to him with regard to the allegations related to his disability; and (b) the allegations related to the grounds of race, colour, national or ethnic origin and family status were based on acts which occurred more than one year before the complaint was filed and which were separate and independent of the remaining allegations related to disability, and the Applicant had not provided a reasonable explanation for the delay in filing.

I. Preliminary Issues

A. Objections to the Applicant's Affidavit

[13] The Respondent asserts that large portions of the Applicant's affidavit sworn July 12, 2021 consist of evidence that was not before the decision-maker and are therefore improper and should be struck or disregarded by this Court. The Applicant did not respond to this preliminary issue.

[14] The Federal Court of Appeal in *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22, has provided clear guidance on the scope of proper evidence on an application for judicial review:

> …as a general rule, the evidentiary record before this Court on judicial review is restricted to the evidentiary record that was before the [decision-maker]. In other words, evidence that was not before the [decision-maker] and that goes to the merits of the matter before the [decision-maker] is not admissible in an application for judicial review in this Court…
>
> There are a few recognized exceptions to the general rule against this Court receiving evidence in an application for judicial review, and the list of exceptions may not be closed. These exceptions exist only in situations where the receipt of evidence by this Court is not inconsistent with the differing roles of the judicial review court and the administrative decision-maker…In fact, many of these exceptions tend to facilitate or advance the role of the judicial review court without offending the role of the administrative decision-maker. Three such exceptions are as follows:
>
> (a) Sometimes this Court will receive an affidavit that provides general background in circumstances where that information might assist it in understanding the issues relevant to the judicial review….Care must be taken to ensure that the affidavit does not go further and provide evidence relevant to the merits of the matter decided by the administrative

> decision-maker, invading the role of the latter as fact-finder and merits-decider…
>
> (b) Sometimes affidavits are necessary to bring to the attention of the judicial review court procedural defects that cannot be found in the evidentiary record of the administrative decision-maker, so that the judicial review court can fulfil its role of reviewing for procedural unfairness…
>
> (c) Sometimes an affidavit is received on judicial review in order to highlight the complete absence of evidence before the administrative decision-maker when it made a particular finding…

[15] Having reviewed the Applicant's affidavit and the entirety of the certified tribunal record, I am satisfied that the majority of the affidavit and all of the exhibits thereto (with the exception of Exhibit K) consists of information and documentation that was not before the Commission at the time that it made its decision. I find that, while a small number of paragraphs of the Applicant's affidavit can properly be characterized as providing general background information and others repeat information contained in the certified tribunal record, the balance of the affidavit and all exhibits (other than Exhibit K) do not fall within any of the exceptions articulated in *Association of Universities and Colleges of Canada* and accordingly, those latter portions of the Applicant's affidavit will not be considered by the Court.

B. Applicant's Memorandum of Fact and Law

[16] At the commencement of the hearing, I raised with the parties my concern that the memorandum of fact and law included by the Applicant in his application record appeared to be directed towards an earlier motion brought in the context of this application and therefore did not provide the Applicant's submissions on the merits of the application. The Respondent did not raise

an objection to the Applicant's memorandum of fact and law in advance of the hearing and filed a memorandum of fact and law addressing the merits of the application, notwithstanding the absence of legal submissions from the Applicant to which to respond.

[17] At the hearing of the application, counsel for the Respondent advised that the Respondent consented to the Applicant making oral submissions on the merits of the application notwithstanding the absence of any written submissions. Given the consent of the Respondent, I permitted the Applicant to make oral submissions.

C. New Notice of Application for Judicial Review

[18] The Applicant included as part of his application record a new Notice of Application (although bearing the original Court file number) seeking entirely different relief (primarily damages of over $22,000,000.00) and asserting different grounds of review. However, this pleading was never properly filed with the Court. Accordingly, the Court will not consider this new pleading and will determine the application based on the Notice of Application issued on December 20, 2019. In any event, as I indicated to the Applicant at the hearing, this Court lacks jurisdiction to award damages on an application for judicial review.

II. Issues and Standard of Review

[19] The following issues arise on this application:

A. Whether the Commission's decision declining to deal with the Applicant's complaint pursuant to section 41(1)(a) and 41(1)(e) of the *CHRA* was reasonable; and

B. Whether there was a breach of procedural fairness.

[20] With respect to the first issue, when the Court reviews the merits of an administrative decision, the presumptive standard of review is reasonableness. No exceptions to that presumption have been raised nor apply [see *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 23, 25]. Moreover, this Court has consistently held that the appropriate standard of review with respect to decisions of the Commission not to deal with a complaint under section 41(1) of the *CHRA* is reasonableness [see *Andrews v Canada (Attorney General)*, 2015 FC 780 at para 20].

[21] As the Commission adopted the recommendation contained in the Section 40/41 Report and did not provide separate reasons for doing so, the Section 40/41 Report constitutes the Commission's reasons for decision and the Section 40/41 Report will be the focus of the Court's reasonableness review [see *Syed v Canada (Attorney General)*, 2020 FC 608 at para 42].

[22] When reviewing for reasonableness, the Court must determine whether the decision under review, including both its rationale and outcome, is transparent, intelligible and justified. 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. The burden is on

the party challenging the decision to show that it is unreasonable [see *Vavilov*, supra at paras 15, 83, 85, 99, 100]. The Court will intervene only if it is satisfied there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency [see *Adenjij-Adele v Canada (Minister of Citizenship and Immigration)*, 2020 FC 418 at para 11].

[23] With respect to the second issue, the Court's review of procedural fairness issues involves no deference to the decision-maker. The question is whether the procedure was fair having regard to all of the circumstances, focusing on the nature of the substantive rights involved and the consequences for the individual affected [see *Canadian Pacific Railway Company v Canada (Transportation Agency)*, 2021 FCA 69 at paras 46-47]. The ultimate question is whether the Applicant knew the case to meet and had a full and fair chance to respond [see *Laag v Canada (Minister of Citizenship and Immigration)*, 2019 FC 890 at para 10].

III. Analysis

[24] Before turning to the two issues raised in this application for judicial review, it is important to consider the applicable regulatory framework.

[25] The Commission has a statutory mandate to receive and deal with complaints of discriminatory practices on the basis of, *inter alia*, race, national or ethnic origin, colour, religion, family status or disability. The role of the Commission is to deal with the intake of complaints and to screen them for proper disposition. In conducting their screening function, it is not the role of the Commission to determine if a complaint has been made out. Rather, the Commission's role is

confined to determining whether, under the provisions of the *CHRA*, an inquiry is warranted having regard to all of the facts [see *Cooper v Canada (Human Rights Commission)*, [1996] 3 SCR 854 at paras 52-53].

[26] Pursuant to section 41 of the *CHRA*, the Commission may decline to deal with a complaint if the complaint meets one of the grounds set out in section 41(1):

41 (1) Subject to section 40, the Commission shall deal with any complaint filed with it unless in respect of that complaint it appears to the Commission that	41 (1) Sous réserve de l'article 40, la Commission statue sur toute plainte dont elle est saisie à moins qu'elle estime celle-ci irrecevable pour un des motifs suivants :
(a) the alleged victim of the discriminatory practice to which the complaint relates ought to exhaust grievance or review procedures otherwise reasonably available;	a) la victime présumée de l'acte discriminatoire devrait épuiser d'abord les recours internes ou les procédures d'appel ou de règlement des griefs qui lui sont normalement ouverts;
(b) the complaint is one that could more appropriately be dealt with, initially or completely, according to a procedure provided for under an Act of Parliament other than this Act;	b) la plainte pourrait avantageusement être instruite, dans un premier temps ou à toutes les étapes, selon des procédures prévues par une autre loi fédérale;
(c) the complaint is beyond the jurisdiction of the 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.
[emphasis added]	[nous soulignons]

[27] In circumstances where the Commission determines that section 41(1)(a) may apply to a particular complaint, section 42(2) of the *CHRA* requires that before deciding that the complaint will not be dealt with, the Commission must satisfy itself that the failure to exhaust the grievance or review procedure was attributable to the complainant and not to another.

A. The Commission's Decision Declining to Deal with the Applicant's Complaint Pursuant to Section 41(1)(a) and 41(1)(e) of the *CHRA* Was Reasonable

(1) Section 41(1)(a)

[28] As noted above, pursuant to section 41(1)(a) of the *CHRA*, the Commission has the discretion to refuse to deal with a complaint if it determines that there is another process reasonably available to the complainant to pursue their human rights claim. In making a decision under section 41(1)(a), the Commission makes two determinations: (i) whether the grievance or review procedure was "reasonably available"; and (ii) whether the complainant "ought" to exhaust the procedure before filing a complaint under the *CHRA* [see *Mun v Canada (Attorney General)*, 2016 FC 94 at para 17].

[29] In this case, the Commission determined that the Canadian Armed Forces' internal grievance process [CFGS] established under section 29(1) of the *National Defence Act*, RSC 1985, c N-5 was another process reasonably available to the Applicant. The Commission found that the Applicant was aware of the CFGS process, that he had not filed a grievance under the CFGS process and that the Applicant was solely responsible for not using the CFGS process.

[30] The Applicant asserts that the Commission erred in making this determination as an order issued by his commanding officer effectively took away the Applicant's right to grieve through the CFGS as long as the order remained in place and it has never been rescinded. Specifically, the Applicant relied on an "Order to Cease and Desist Making Inappropriate Comments" [referred to by the Applicant as a 'Gag Order'] issued July 27, 2020 by his Commanding Officer, which stated:

> Effective immediately, I order you [the Applicant] to refrain from making any and all inappropriate and insubordinate communications regarding any TF 1-10 personnel, especially MP Coy. This includes any accusations, innuendos, slander, inflammatory comments, and the like, in connection with any TF 1-10 personnel.

[31] The Applicant has not pointed to a specific error made by the Commission in its consideration of section 41(1)(a), but rather simply repeats the same submissions made before the Commission – namely, that he could not file a grievance under the CFGS process as to do so would be to disobey a direct order, which could result in imprisonment for life.

[32] I find that the Commission's determination that the CFGS process was reasonably available to the Applicant and that he ought to have exhausted that procedure before filing a complaint under the *CHRA* was reasonable.

[33] Section 29(1) of the *National Defence Act* provides:

An officer or non-commissioned member who has been aggrieved by any decision, act or omission in the administration of the affairs of the Canadian Forces for which no other	Tout officier ou militaire du rang qui s'estime lésé par une décision, un acte ou une omission dans les affaires des Forces canadiennes a le droit de déposer un grief dans le cas où aucun

process for redress is provided under this Act is entitled to submit a grievance	autre recours de réparation ne lui est ouvert sous le régime de la présente loi.

[34] A plain reading of section 29(1) demonstrates that the Applicant's complaints could have, on its face, been dealt with using the CFGS process. I note that the Applicant does not deny the general suitability of the CFGS process and this Court has repeatedly found that the CFGS process is "another process reasonably available to complainants" [see *Mun, supra* at para 31]. However, the Applicant asserts that he was foreclosed from using the CFGS process by virtue of the Gag Order. The Commission rejected this argument, stating:

> The complainant did not file a grievance on the issues raised in this complaint, even though that process was reasonably available to him. His explanation that he was under a "gag order" is not reasonable. As explained in the analysis under section 41(1)(e) earlier in this report, the complainant had received a cease and desist order in July 2010 against making "inappropriate comments". Filing a grievance about legitimate human rights concerns is not the same thing as making inappropriate comments. Furthermore, the cease and desist order appears to be related to events in Afghanistan and to the complainant's repatriation in 2010. There is no indication that it applied to later events related to the complainant's disability. The complainant could have filed a grievance regarding the issues related to his disabilities, but he did not do so.

[35] I see no error in the Commission's consideration of this issue and find that the Commission's determination that the Gag Order did not prohibit the Applicant from filing a grievance under the CFGS process was reasonable. Moreover, the Applicant's assertion that he would be seriously penalized were he to file a grievance is contradicted by the clear language of section 29(4) of the *National Defence Act*, which provides that "an officer or non-commissioned member may not be penalized for exercising the right to submit a grievance".

[36] It is not disputed that the Applicant was aware of the CFGS process and failed to file a grievance thereunder. Having determined that the Gag Order did not prohibit the Applicant from using the CFGS process, I find that it was reasonable for the Commission to find that the Applicant was the only one responsible for the fact that the CFGS process was not used. Even though the CFGS is now no longer available to the Applicant due to his discharge from the military, the Commission's decision to decline to entertain the Applicant's complaint was reasonable in the circumstances and is entitled to deference [see *Andrews v Canada (Attorney General),* 2015 FC 780 at para 62].

(2) Section 41(1)(e)

[37] Pursuant to section 41(1)(e) of the *CHRA*, the Commission is vested with the power to decline to deal with complaints that are filed more than one year after the last alleged act of discrimination. In this case, the Commission found that there was no dispute that the complaint was filed within one year of the last alleged act of discrimination on August 19, 2017 and noted that the issue before it was whether the Commission should sever older allegations that occurred more than one year before the complaint was filed and that may be separate and independent from the most recent allegation.

[38] After reviewing the evidence before it and noting that the complaint narrative contained very few dates, the Commission determined that:

A. The allegations related to the Applicant's race, colour, religion and ethnic origin occurred while he was in Afghanistan between June 2009 and June 2010;

B. The allegation related to the Applicant not being able to meet his family at the airport upon being repatriated to Canada occurred in June 2010;

C. The allegations about being told to obtain approvals for housing and work at some undefined point "in the past" were found to have occurred more than one year before the complaint was filed; and

D. The allegations related to his disability (which also lacked dates) occurred after the Applicant's return from Afghanistan.

[39] The Commission found that:

> It is clear that this complaint involves allegations from two separate time periods that occurred in different places, involved different individuals, and are based on different prohibited grounds. The allegations related to race, colour, and ethnic origin occurred in Afghanistan up to June 23, 2010, while the allegations related to family status occurred "in the past" and in June 2010. The allegations related to the complainant's disability occurred in Canada and were ongoing at the time he filed his complaint. It is plain and obvious that the allegations based on the grounds of race, colour, ethnic origin and family status are separate and independent from the allegations related to the complainant's disabilities.

[40] The Commission concluded that the Applicant's allegations related to race, colour, religion, national or ethnic origin and family status occurred in or around 2010 and should be severed from his allegations related to his disability on the basis that the earlier allegations were separate and independent, the Applicant was not diligent in filing a complaint about those

allegations and the Applicant had not provided a reasonable explanation for the delay (as the Commission had rejected his assertion regarding the impact of the Gag Order).

[41] The Applicant asserts that the Commission erred in its determination that certain discrimination complaints were more than a year old, as there was clear evidence before the Commission that the discrimination was ongoing from 2009 until the Applicant was released from the Canadian Armed Forces in 2018. While some events occurred in Afghanistan and others in Canada, the Applicant asserts that both locations constitute his workplace and the problems followed him from Afghanistan to Canada.

[42] When incidents form a continuous pattern of discrimination, it may be unreasonable for the Commission to decline investigating such incidents, even when they fall outside the one-year time frame prescribed by section 41(1)(e) [see *Khanna v Canada (Attorney General)*, 2008 FC 576 at paras 27-29; *Heiduk v Whitworth*, 2013 FC 119 at paras 17 and 28; *Syed, supra* at para 43]. However, the Commission is vested with discretion to sever complaints where there are breaks in the continuum of events in the workplace, such as events involving different people, facilities or circumstances [see *Cheng v Canada Post Corp*, 2006 FC 1304 at para 7]. Contrary to the submissions of the Applicant, it was therefore reasonable for the Commission to take into consideration whether the various alleged incidents of discrimination occurred in different countries, so as to determine if there was a break in the continuum of events.

[43] While the Applicant asserts that the Commission ignored clear evidence of on-going discrimination (presumably in relation to his allegations of discrimination on the basis of race,

colour, religion, national or ethnic origin and family status), the Applicant has not pointed the Court to the specific evidence that he asserts was overlooked by the Commission.

[44] Moreover, I find that the Commission's determination to sever the Applicant's complaints of discrimination on the basis of race, colour, religion, national or ethnic origin and family status was reasonable. These earlier allegations involved different people, facilities and circumstances (such as stereotypical comments, discriminatory emails, harassment and removal from accommodations and deprivation of rights in Afghanistan) from the allegations related to his disability, which focused on workplace accommodation, return to work programs, denial of postings and promotions and the assignment of duties to the Applicant in Canada. I find that sufficient breaks in the continuum of events existed as between these earlier allegations and the allegations related to the Applicant's disability so as to render the Commission's decision to decline to deal with the Applicant's earlier complaints reasonable.

[45] Moreover, for the same reasons as noted above regarding the Gag Order, I see no error in the Commission's consideration of the Applicant's explanation for his delay in bringing these earlier complaints forward.

[46] Accordingly, I find that the Commission's decision to refuse to deal with the Applicant's complaint under section 41(1)(a) and (e) of the *CHRA* was reasonable, as it was based on an internally coherent and rational chain of analysis and was justified in relation to the evidence before it and the applicable legal principles.

B. There Was No Breach of Procedural Fairness

[47] In his Notice of Application, the Applicant asserts that:

> The CHRC failed to investigate the complaint of the Applicant properly, the Applicant has reasonable apprehension of bias based on the fact that the investigator for the Commission had made up their mind without considering glaring facts of the very unique situation the Applicant was put under by the Respondent in reference to this issue.

[48] At the hearing of the application, the Applicant also asserted the Commission failed to recognize that the Chief of Defence Staff was his Task Force commander in Afghanistan, such that the Applicant's complaints of discrimination included the conduct of the Chief of the Defence Staff. The Applicant asserts that the submissions made by the Respondent in response to the complaint were effectively made by the Chief of Defence Staff who had a conflict of interest. By accepting the submissions of the Respondent that the Applicant had enough time to complain by way of a grievance, the Applicant asserts that the Commission's investigator also demonstrated bias against the Applicant.

[49] As this Court stated in *Zhou v Canada (Citizenship and Immigration)*, 2020 FC 633 at paragraph 39, the burden is on the party alleging a reasonable apprehension of bias (actual or perceived) to show that a reasonable and informed person, viewing the matter realistically and practically, and having thought the matter through, would conclude that it is more likely than not that the decision-maker, whether consciously or unconsciously, would not decide the matter fairly. In the absence of such evidence, members of administrative tribunals, like judges, are presumed to have acted fairly and impartially. The threshold for a finding of bias is therefore high and mere

suspicion is insufficient to meet that threshold [see *Sagkeeng First Nation v Canada (Attorney General)*, 2015 FC 1113 at para 105; *Committee for Justice and Liberty et al v National Energy Board et al*, [1978] 1 SCR 369].

[50] An allegation of reasonable apprehension of bias must be supported by material evidence demonstrating conduct that derogates from the standard. It cannot rest on mere suspicion, insinuations or mere impressions of a party or their counsel [see *Arthur v Canada (Attorney General)*, 2001 FCA 223 at para 8; *Ramirez v Canada (Minister of Citizenship and Immigration)*, 2012 FC 809 at para 11; *Maxim v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1029 at para 30].

[51] I am not satisfied that the Applicant has met the high threshold of demonstrating a reasonable apprehension of bias. Contrary to the assertion of the Applicant, I find that the Commission's investigator addressed, in detail, the factual context giving rise to the complaint and the Applicant has not pointed the Court to any evidence that would support his assertion that the Commission's investigator approached his complaint with a closed mind. Moreover, the submissions submitted by the Respondent to the Commission were not sent by the Chief of Defence Staff, but rather the Director – Directorate External Review at the National Defence Headquarters.

[52] Further and equally fatal to the Applicant's argument, the Applicant did not raise his allegations of bias regarding the Commission's investigator with the Commission when he was given an opportunity to comment on the Section 40/41 Report. Having failed to raise the issue with

the Commission, I find that the Applicant is precluded from raising it on this application [see *Aloulou v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1236 at para 32].

[53] In the circumstances, I am not satisfied that the Applicant has demonstrated that any of his procedural fairness rights were breached.

IV. Conclusion

[54] For the reasons set out above, I find that the Applicant has not demonstrated that the Commission's decision was unreasonable or that any breach of his procedural fairness rights occurred. Accordingly, the application for judicial review shall be dismissed.

[55] The Respondent does not seek their costs of the application and accordingly, no costs will be awarded.

JUDGMENT in T-2056-19

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. There shall be no award of costs on this application.

"Mandy Aylen"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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