

Federal Court



Cour fédérale

Date: **20221026**

Docket: **T-1942-21**

Citation: **2022 FC 1361**

Ottawa, Ontario, October 26, 2022

**PRESENT:** The Honourable Mr. Justice Manson

**BETWEEN:**

**MICHAEL FURLONG**

**Applicant**

**and**

**SHAW COMMUNICATIONS INC.**

**Respondent**

**AMENDED JUDGMENT AND REASONS**

I. Introduction

[1] This is an application for judicial review of a decision of the Canadian Human Rights Commission [the “Commission”], dated November 17, 2021, dismissing the Applicant’s human rights complaint no. 20190024 against the Respondent [the “Complaint”] pursuant to

subparagraph 44(3)(b)(i) of the *Canadian Human Rights Act*, RSC, 1985, c H-6 [the “Act”], [the “Decision”].

[2] ~~In this case, only the Applicant has made submissions to the Court. The Respondent was apparently unable or unwilling to assist the Court by providing timely written submissions.~~

## II. Background

[3] The Applicant, Michael Furlong, is a resident of Richmond, British Columbia. He began working for the Respondent, Shaw Communications Inc. (“Shaw”), as a Technical Field Representative (“TFR”) in the Vancouver area in 2001.

[4] The Respondent’s workplace is unionized and work conditions are subject to a Collective Bargaining Agreement (the “CBA”) between Shaw and USW Local 1944 (the “Union”).

[5] The Respondent employs a third-party claims adjudicator, Morneau Shepell, to review and process employee claims for health benefits, sick leave, disability benefits and programs. Morneau Shepell also reviews the medical treatment of sick and injured workers and facilitates their return to the workplace.

### A. *The Applicant’s Complaint*

[6] On January 9, 2019, the Applicant filed the Complaint, which alleges that Shaw discriminated against him in his employment on the basis of a mental disability, contrary to

section 7 of the *Act*. Namely, the Applicant claims the Respondent failed to accommodate him to the point of undue hardship and then terminated his employment because of his mental disability.

[7] In support of the Complaint, the Applicant alleged:

- i. He applied for short-term disability leave in July 2018;
- ii. Morneau Shepell did not contact him until August, 2, 2018, when they sent him a letter advising him that his claim was closed;
- iii. He provided a medical note to the Respondent that indicated he was medically unfit to work the day before the Respondent fired him.

B. *The Commission's Report*

(1) Timeline of Events

[8] A Human Rights Officer (the “Investigating Officer”) investigated the Applicant’s Complaint and issued an undated report that included several factual findings and recommendations. Before evaluating the merits of the Applicant’s claim, the Report established a timeline of events leading to the Respondent terminating the Applicant’s employment.

[9] In 2012, the Applicant sustained a non-work related physical injury. Due to the limitations resulting from this injury, he was unable to return to his regular duties as a TFR.

[10] Since this time, the Respondent accommodated the Applicant's medical limitations by employing him in various positions. However, these other positions paid less than a role as a TFR. The Applicant disagreed with this and believed that he the Respondent should pay him at the same rate as a TFR. He attempted to grieve this matter, but the Union did not support him.

[11] On February 7, 2018, the Applicant sent a lengthy harassment complaint to three Shaw executives. Among other issues outlined in this complaint, the Applicant alleged that Shaw had underpaid him for his work since 2012.

[12] Ms. Paisley, a human resources officer assigned to investigate the complaint, scheduled an in-person meeting on April 26, 2018 with the Applicant and the president of the Applicant's union to share her findings with them. The Applicant arrived at the incorrect boardroom and, seeing nobody there, he left.

[13] On April 29, 2018, the Applicant called in sick from work. On May 1, 2018, the Applicant submitted a medical note from Dr. Jack Kilman that stated the Applicant was unable to work from May 1, 2018 to May 11, 2018 due to medical reasons.

[14] On the same day, the Applicant emailed his supervisor, Mr. James Li, telling him not to contact him directly. Mr. Li responded to the email, informing the Applicant that this was not the correct procedure and was contrary to Shaw's policy. Mr. Li requested the Applicant call him directly and advise whether he would be applying for workers compensation or short-term

disability leave. The Applicant did not contact Mr. Li. Mr. Li tried calling the Applicant on May 3, 2018 but was not able to reach him.

[15] On May 14, 2018 WorkSafeBC advised the Respondent that the complainant had filed a claim for a mental disorder resulting from workplace incidents “which occurred from 2012 through April 26, 2018” (this claim was denied on June 14, 2018). Mr. Li tried calling the Applicant, without success, to discuss this complaint several times over the next few weeks. On May 25, 2018 and May 28, 2018, Mr. Li and the Applicant exchanged text messages. After Mr. Li told the Applicant that text messages were not the appropriate form to discuss the reasons for the Applicant’s absence and requested that the Applicant call him. The Applicant did not do so.

[16] On May 28, 2018 the Applicant submitted a new medical note to the Respondent, stating that the Applicant would be unable to work “due to medical reasons” from May 26, 2018 to June 28, 2018.

[17] On each of June 12, 13 and 14, 2018, Morneau Shepell representatives called the Applicant to discuss his absence from work and to help him file a short-term disability leave application. The Applicant did not answer. Moreover, on June 14, 2018, Morneau Shepell sent the Applicant a letter advising him:

- i. WorkSafeBC had denied his claim for a workplace injury;
- ii. Morneau Shepell had made several attempts without success to contact him;
- iii. The Applicant could either apply for short-term disability benefits or elect to go on unpaid leave;

- iv. Morneau Shepell had insufficient information to justify the Applicant's continued absence from work and he must advise them by June 20, 2018 whether he would apply for leave or report to work;
- v. Pursuant to clause 3.04 of the CBA, the Respondent can consider an employee to have voluntarily terminated his employment if he is absent from work for more than three working days without leave.

[18] On June 14, 2018 the Respondent's Operational Manager, Mr. Brad Weller, sent the Applicant a letter advising the Applicant that he was required to contact the Respondent to discuss his absence or return to work by June 21, 2018. After the Applicant failed to do so, on June 22, 2018 Mr. Weller sent another letter by courier reiterating his request that the Applicant contact the Respondent.

[19] The WorkSafeBC board denied the Applicant's claim on June 15, 2018 because the WorkSafeBC board found that the Applicant did not have a compensable mental disorder. The Applicant appealed and requested reconsideration of this decision. After reviewing additional documentation submitted by the Applicant, the WorkSafeBC board affirmed its initial determination that the Applicant did not have a compensable mental disorder.

[20] On June 29, 2018, the Applicant faxed another medical note to the Respondent. It similarly stated that the Applicant is unable to work "due to medical reasons" from June 28, 2018 to July 28, 2018.

[21] On July 5, 2018, the Respondent sent another letter by courier, requesting that the Applicant contact them no later than July 17, 2018 to discuss the reasons that preclude him from

being at work and that failure to do so would result in termination with cause. In response, on July 13, 2018, the Applicant sent the Respondent a message advising that, he is unable to attend work because of his February 2018 internal harassment complaint. He directed the Respondent to complete a disability leave form on his behalf.

[22] On July 19, 2018, the Applicant was requested in writing to communicate with Morneau Shepell to complete the disability claim process. He was advised that failure to do so would lead to termination of his employment. On July 27, 30 and 31, 2018, Morneau Shepell attempted to speak with the Applicant without success. They left voice messages, which the Applicant did not return.

[23] On August 2, 2018, Morneau Shepell advised the Applicant that they would be informing the Respondent that it would be closing his file due to his non-compliance.

[24] Mr. Weller called the Applicant on August 2, 2018 to inform him that he must report to work on the next day and that, if he failed to do so, his employment would be terminated. Mr. Weller was not able to reach the Applicant, but left a voicemail asking the Applicant to call him back as soon as possible. The Applicant did not return Mr. Weller's call.

[25] On August 3, 2018, the Applicant did not report to work. In the late morning of the same day the Respondent, sent the Applicant a letter by courier advising that his employment had been terminated for cause.

[26] In the late afternoon of August 3, 2018, the Applicant faxed a medical certificate, dated August 2, 2018 which read:

Mr. Furlong is suffering from PTSD, and is unable attend any work related events / meetings for now. He will be seen in clinic regularly for follow up for continuing assessment.

(2) Analysis of Alleged Discrimination

[27] The determinative issue in evaluating the Complaint was if Shaw had provided an explanation for the termination and whether there was a reasonable basis in the evidence to question whether that explanation was reasonable, rational, consistent, credible and non-discriminatory.

[28] The Report included a conclusion and recommendation that there was such a reasonable explanation. The Investigating Officer found that the Respondent was not aware of the Applicant's medical disability. In coming to this conclusion, the Report outlined the Investigating Officer's relevant findings:

- i. A registered letter that Morneau Shepell sent the Applicant on June 14, 2018, contradicting the Applicant's assertion that Morneau Shepell did not contact him until August 2, 2018,
- ii. Medical notes the Applicant sent prior to his termination stated he could not work due to "medical reasons"; they do not mention any medical disability. Moreover, the Applicant declined to respond to the Respondent's repeated attempts to follow-up with him about his absence.
- iii. The only medical note which stated that the Applicant had a disability was a note dated August 2, 2018. The Applicant claimed he sent the note on that same date,



however the fax cover sheet indicates the note was sent on August 3, 2018 at 4:00 PM to a Calgary area number. The Respondent fired the Applicant on this same day. The intended recipient was Mr. Weller, whose office is in Richmond, BC. The Respondent claimed that they did not receive the complainant's fax and first learned of the medical disability when he lodged the Complaint.

- iv. It did not appear the Respondent knew of the Applicant's PTSD diagnosis when it sent him a letter on August 3, 2018 terminating his employment.

[29] As such, the Investigating Officer concluded that the Respondent had a reasonable and non-discriminatory explanation for terminating the Applicant's employment. Consequently, he recommended dismissing the complaint.

#### C. *Post-Report Submissions*

[30] In response to the Report, the Respondent submitted a letter, dated August 13, 2021. The Respondent agreed with the Investigating Officer's conclusion but added that not only was the Respondent unaware of the Applicant's disability at the time he was terminated, but there was, in fact, no disability. In response, the Applicant submitted his own letter, expressing his disagreement with this claim.

[31] The Applicant also sent a letter dated August 18, 2021. In this letter, the Applicant takes issue with many aspects of the Report.

III. Decision Under Review

[32] Upon review of the Complaint, the Report and the additional submissions of the parties, the Commission accepted the Investigating Officer's recommendation, dismissing the Complaint pursuant to subparagraph 44(3)(b)(i) of the *Act* because, having regard to all the circumstances of the Complaint, further inquiry was not warranted.

IV. Issues

A. *Was the Decision reasonable?*

B. *Did the Commission violate the duty of procedural fairness?*

V. Standard of Review

[33] The standard of review for the substance of an administrative decision is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paragraph 23).

[34] Issues relating to a breach of procedural fairness are reviewed on the standard of correctness or a standard with the same import (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at paragraphs 34-35 and 54-55, citing *Mission Institution v Khela*, 2014 SCC 24 at paragraph 79).

VI. Analysis

A. *Was the Decision reasonable?*

[35] The Applicant argues the Report is unreasonable for several reasons. The Applicant disputes that he received much of the communication from the Respondent or Morneau Shepell prior to the eve of his dismissal. As such, he claims the Investigating Officer illogically required the Applicant to reply to communication he did not receive. The Applicant further claims that the Report placed an obligation on him to confirm that Shaw received the medical note, dated August 2, 2018, but did not place the same obligation on Shaw to confirm that he had received communication that they had sent him.

[36] The Report does not require the Applicant to have responded to correspondence he never received. Rather, after reviewing the record of several attempts by both the Respondent and Morneau Shepell to contact the Applicant through various means – including registered mail and letters sent by courier – the Investigating Officer reasonably concluded that the Respondent and Morneau Shepell sent the Applicant various correspondence over his three-month absence. He just elected not to respond to that correspondence.

[37] The Report also does not place an obligation on the Applicant to confirm that the Respondent received his August medical note. The Report merely concludes that the Respondent did not know of the Applicant's PTSD diagnosis at the time of his termination. The Respondent terminated the Applicant through a letter sent on August 3, 2018. The fax cover page indicated

that the Applicant had sent the medical note to the Respondent's Calgary office on the same day at 4:00 PM. In light of this, it was reasonable for the Investigating Officer to conclude that the Respondent had no knowledge of the Applicant's alleged mental disability at the time of his dismissal.

B. *Did the Commission violate the duty of procedural fairness?*

[38] The Applicant makes two arguments about how the Commission violated the duty of procedural fairness. First, he claims that the reasons provided by the commission are inadequate. Second, he claims the Commission did not ensure that the Applicant knew the case against him.

[39] In cases where the Commission accepts the recommendation of an investigating officer, such as this, the investigation report will become part of the Commission's reasons (*Sketchley v Canada (Attorney General)*, 2005 FCA 404 at paragraph 37). In this case, the Report provides adequate reasons. It is comprehensive and detailed, and sets out the Investigating Officer's factual and legal determinations that the Commission subsequently endorsed.

[40] The Applicant further argues that the reasons are inadequate that the Report contains inaccuracies and logical errors. These criticisms do not relate to procedural fairness but rather to the reasonableness of the decision, and in any event, are not supported by the evidence before the Court. The Applicant was aware of the case to meet.

[41] The Applicant would have been aware prior to filing the Complaint that the Respondent would dispute his version of events, such as his claim that Morneau Shepell had not contacted

him prior to August 2, 2018. The Investigating Officer was entitled to weigh the evidence submitted by the parties and come to a conclusion without consulting the Applicant's opinion on each piece of evidence. Moreover, the Commission gave both the Respondent and Applicant opportunity to respond to the Report after it had been completed. The Commission reviewed these post-Report submissions, along with the Complaint and the Report before rendering the Decision.

[42] There was no procedural unfairness.

## VII. Conclusion

[43] The Application is dismissed.

**JUDGMENT in T-1942-21**

**THIS COURT'S JUDGMENT is that:**

1. The application is dismissed.
2. No costs are awarded.

"Michael D. Manson"

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Judge

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

**DOCKET:** T-1942-21

**STYLE OF CAUSE:** MICHAEL FURLONG v SHAW COMMUNICATIONS  
INC.

**PLACE OF HEARING:** WRITTEN SUBMISSIONS ONLY

**DATE OF HEARING:** SEPTEMBER 26, 2022

**JUDGMENT AND REASONS:** MANSON J.

**DATED:** SEPTEMBER 29, 2022

**AMENDED:** OCTOBER 26, 2022

**APPEARANCES:**

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