Federal Court Cour fédérale

Date: 20221212

Docket: T-1314-21

Citation: 2022 FC 1714

Ottawa, Ontario, December 12, 2022

PRESENT: The Honourable Madam Justice Furlanetto

BETWEEN:

MAGGIE CARRASQUEIRAS

Applicant

and

SUNWING AIRLINES INC.

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a July 21, 2021 decision [Decision] of the Deputy Chief Commissioner [Commissioner] of the Canadian Human Rights Commission [Commission] dismissing a complaint [Complaint] by the Applicant against the Respondent under subparagraph 41(1)(d) of the *Canadian Human Rights Act,* RSC 1985, c H-6 [CHRA] as being vexatious. The Commission found that the Applicant's allegations of discrimination were already addressed, or could have been addressed, through the grievance and arbitration process.

[2] For the reasons set out below, I find that the Decision was reasonable and that the application should be dismissed.

II. Background

[3] The Applicant, Maggie Carrasqueiras, was employed by the Respondent, Sunwing Airlines Inc., as a Cabin Safety Manager and In-Charge Flight Attendant from 2005 to 2018.

[4] In March 2016, the Applicant had a meeting without union representation with two of the Respondent's managers regarding the tone of emails she had sent relating to alleged outstanding vacation pay [Meeting]. She asserts that the managers "belittled, ridiculed, bullied, harassed and threatened" her during the Meeting. The Applicant submitted a complaint to the Respondent's human resources department [HR Complaint]. In April 2016, an internal investigator concluded that the HR Complaint was unsubstantiated and that the Applicant's emotional response to the Meeting was disproportionate.

[5] The Applicant was subsequently removed from two flights with pay and went on a three-week medical leave after being diagnosed with Adjustment Disorder. She received approval from her doctor to return to work at the end of May 2016. However, after a further meeting, the Respondent indicated that it needed additional medical information and asked the Applicant to complete a further medical assessment from an aviation medical specialist, Dr. Gillmore [Assessment]. The Applicant initially agreed, then refused to see Dr. Gillmore. In July 2016, she was placed on "out of service" status without pay until the matter was resolved [Suspension].

[6] In June 2016, the Union filed a grievance regarding the Meeting and the Respondent's decision to prevent the Applicant from returning to work after receiving clearance from her doctor [First Grievance]. In July 2016, the Union filed a second grievance relating to the Assessment and the Respondent's decision to suspend the Applicant without pay [Second Grievance].

[7] In March 2017, the Arbitrator issued a preliminary decision directing the Applicant to disclose her medical records to Dr. Gillmore for the purpose of the arbitration. The Applicant complied and after an initial unfavourable report from Dr. Gillmore, underwent an additional psychological assessment by a further doctor. As a result of the information from the further assessment, in September 2017, Dr. Gillmore agreed the Applicant could return to work; however, the Respondent maintained its position that the Applicant should be held out of service and the parties attempted to resolve the issue through further mediation-arbitration.

[8] In February 2018, the Applicant's employment with the Respondent was terminated [Termination]. The termination letter stated as follows:

> The decision is based upon a review of your behaviour and the allegations and comments made by you prior to the commencement of your current extended leave. Without dealing these events, [*sic*] I note that your words and actions at the time and since have made it clear that our working relationship must end.
>
> The termination is based on the existence of disciplinary just cause as a result of your false and overzealous complaint and allegations of physical threats, intimidation and conspiracy against members of management. Alternatively, it is by way of frustration of contract as your unfounded allegations and the maintenance of this

> position has broken the trust essentially to our customer safety based relationship and made continued employment untenable.
>
> [footnotes removed]

[9] The Union grieved the Termination [Third Grievance].

[10] Prior to Dr. Gillmore's September 2017 assessment and the Termination, in April 2017, the Applicant also filed the Complaint with the Commission, alleging that the Respondent had discriminated against her on the basis of a perceived disability by refusing to allow her to return to work before completing the Assessment. The Complaint was amended after Dismissal to include allegations that her perceived disability was a factor in the Termination, which the Applicant asserted was in retaliation to her bringing the Complaint.

III. The Arbitration Decision

[11] The First Grievance, Second Grievance and Third Grievance were considered together [collectively Grievances] before the same arbitrator [Arbitrator] who dismissed the Grievances on January 17, 2019 [Arbitration Decision].

[12] Before the Arbitrator, the Applicant alleged that: a) she had been held out of work since June 2016 without just cause, despite providing medical evidence of her fitness to return to work; b) it was unfair and punitive for the Respondent to request that she be required to seek confirmation of her fitness from the Respondent's aviation medical specialist; and c) the Applicant's termination constituted an abuse of managerial rights.

[13] In its decision, the Arbitrator concluded that:

> ...the Employer had just cause to terminate the Grievor's employment and that the Union has not established that the Employment violated the collective agreement either in the termination or in the requests for medical evidence to establish the Grievor's fitness for duty. Furthermore, neither the Union nor the Grievor have proven that the Employer or its representatives engaged in harassment of the Grievor at any point over the course of the events that were the subject of the harassment complaint and grievances ...

IV. Decision under Review

[14] The Decision to dismiss the Complaint was made by the Commissioner on July 21, 2021 and communicated on July 26, 2021. In coming to the Decision, the Commissioner adopted in full the analysis and recommendations made in two reports by a Human Rights Officer [HRO] with the Commission.

[15] The HRO's first report was completed on March 4, 2019 [First Report] and recommended that the Commission not deal with the Complaint because the arbitration procedure had addressed the allegations of discrimination overall. The HRO concluded that the Arbitrator had dealt with the Applicant's grievances and harassment complaint and had the authority and responsibility to enforce the basic rights and responsibilities flowing from the CHRA and additional arguments raised by the Applicant on the basis of procedural fairness.

[16] On June 16, 2021, the HRO issued a supplementary report [Supplementary Report] arising from a request by the Commissioner after receiving submissions on the First Report from the parties. The Commissioner asked the HRO to analyze the specific wording of the Grievances. The Applicant's position was that neither the wording of the Grievances nor the

parties' submissions raised the relevant human rights issues and that the Complaint demonstrated that her termination was connected to her Adjustment Disorder.

[17] The HRO concluded that the Arbitrator had addressed the essence of the Complaint in the Arbitration Decision.

[18] The Applicant obtained new counsel who made further submissions on the Supplementary Report. The Applicant contended that the process was unfair and argued that the Arbitration Decision focussed on the workplace issues raised by the Grievances and not on the issue of discrimination.

[19] The Commissioner issued the Decision on July 21, 2021, adopting the HRO's analysis in the First Report and the Supplementary Report in full and rejecting the Applicant's procedural fairness arguments and arguments made in respect of the merits of the Supplemental Report.

V. Issues and Standard of Review

[20] The only issue on this application is whether the Decision to dismiss the Complaint as vexatious was reasonable.

[21] The parties assert, and I agree, that the Decision is to be assessed on the reasonableness standard. None of the situations that would rebut the presumption that all administrative decisions are reviewable on a standard of reasonableness are present in this case: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paras 16-17.

[22] A reasonable decision is “based on an internally coherent and rational chain of analysis” that is “justified in relation to the facts and law that constrain the decision maker”: *Vavilov* at paras 85-86; *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 at paras 2, 31. A decision is reasonable if, when read as a whole and taking into account the administrative setting, it bears the hallmarks of justification, transparency, and intelligibility: *Vavilov* at paras 85, 91-95, 99-100.

[23] The principles of transparency and justification require that a decision-maker meaningfully grapple with the key issues and central arguments raised by the parties; otherwise, the parties may call into question whether the decision-maker was alert and sensitive to the matter: *Vavilov* at para 128. This is no different for a human rights complaint: *Northcott v Canada (Attorney General)*, 2021 FC 289 [*Northcott*] at para 42.

[24] However, before a decision is set aside for being unreasonable, the reviewing court must be satisfied that “there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency”. This requires more than superficial flaws or those that are peripheral to the decision; rather, they must be sufficiently central or significant to render the decision unreasonable: *Vavilov* at para 100.

[25] In this case, where the Commissioner has followed the recommendations of the HRO’s reports, without providing their own supplementary reasons, the reasonableness of the Decision depends upon the rationality of the underlying reports’ reasoning and conclusions: *Northcott* at para 14.

VI. Analysis

A. *Paragraph 41(1)(d) of the CHRA and the arguments of the parties*

[26] Section 41 of the CHRA sets out the limited circumstances when the Commission may decline to deal with a human rights complaint. As set out in paragraph 41(1)(d), one of those situations is where the complaint is found to be trivial, frivolous, vexatious, or made in bad faith:

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 … **(d)** the complaint is trivial, frivolous, vexatious or made in bad faith…	**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 : … **d)** la plainte est frivole, vexatoire ou entachée de mauvaise foi;

[27] Where a complaint has been dismissed for vexatiousness without a section 43 investigation, the Commissioner can only decline to deal with the complaint in plain and obvious cases: *Keith v Canada (Correctional Service)*, 2012 FCA 117 at para 50.

[28] As held in *Penner v Niagara (Regional Police Services Board)*, 2013 SCC 19 at paragraph 29, dismissing a complaint for vexatiousness is an extension of the doctrine of issue estoppel. It balances judicial finality and economy with other considerations of fairness to the parties to ensure that issue estoppel is not applied where it would work an injustice to the parties.

[29] The Commission has created a list of factors relevant to determining whether a complaint is "vexatious" within the meaning of paragraph 41(1)(d), one of which is whether the substance or essence of a complaint has been previously considered.

[30] As held in *Yue v Bank of Montreal*, 2020 FC 468 at paragraph 24, with reference to *Zulkoskey v Canada (Employment and Social Development)*, 2016 FCA 268 [*Zulkoskey*] at paras 17, 18, 23-24, "vexatious" has been interpreted to mean that the matter has or could have been appropriately dealt with in another proceeding (see also a recent statement of this principle in *Bergeron v Canada (Attorney General)*, 2022 FCA at paras 28-29 [*Bergeron #2*]). It is to be interpreted broadly and flexibly to prevent a multiplicity of proceedings and a waste of judicial resources that are associated with re-litigation: *Zulkoskey* at para 23; *Bergeron v Canada (Attorney General)*, 2015 FCA 160 [*Bergeron*] at para 45; *Bergeron #2* at para 30.

[31] In *British Columbia (Workers' Compensation Board) v Figliola*, 2011 SCC 52 [*Figliola*], the Supreme Court concluded that a similar provision in British Columbia's human rights legislation reflected the common law doctrines of issue estoppel, abuse of process, and the rule against collateral attack. The goal of such provision was not to codify these doctrines, but to achieve the goals of fairness and finality in decision-making and avoid re-litigation: *Figliola* at paras 26-36. The key factors in determining whether a human rights complaint had been dealt with in a prior proceeding was summarized in *Figliola* at paragraph 37 as:

1. Was there concurrent jurisdiction to decide human rights issues?
2. Was the legal issue in the alternate forum essentially the same as the legal issue in the human rights complaint?
3. Did the complainant have the opportunity to know the case to meet and have a chance to meet it?

[32] In this case, there does not appear to be a dispute with respect to the first and third of the *Figliola* factors. The Applicant agrees that the Commissioner and Arbitrator have concurrent jurisdiction to decide human rights issues arising from collective agreements, and I do not understand her to be arguing that she did not know the case that she had to meet or that she did not have a chance to meet it. The Applicant had an opportunity to provide written submissions with respect to her Grievances and to raise supplementary arguments before the HRO. The argument in this judicial review centers around whether the second *Figliola* factor has been met.

[33] The Applicant argues that the HRO erred by leaping to the conclusion that because the Arbitrator found there was termination for cause and it was determined that there was no abuse of managerial rights, this meant that the Arbitrator implicitly conducted a human rights analysis. She asserts that the Commission failed to define the substance or essence of the human rights issues raised by the Complaint, to provide a rational chain of analysis, to grapple with the key issues under human rights law, and to assess the Complaint against established benchmarks.

[34] The central theme of the Applicant's argument relates to the sufficiency of the Decision. The Applicant asserts that in finding a decision reasonable, the Court cannot read into the reasons of an administrative decision-maker or rely on their expertise to assume that issues were considered and an analysis was conducted. The Applicant asserts that the Decision is not reasonable as it simply relies on the Arbitrator's findings and the expertise of the Arbitrator, with an assumption that the Applicant's assertions of discrimination were considered.

[35] The Applicant refers to a passage from the Supplementary Report where the HRO, relying on *Klimkowski v Canadian Pacific Railway*, 2017 FC 438 [*Klimkowski*], states that "[a]lthough the Union, respondent and Arbitrator did not use the same language that would be used in a human rights Tribunal process, this is inconsequential; the human rights issues were raised and were clearly addressed through the grievance arbitration process." The Supplementary Report refers to the responsibility to apply and enforce basic rights that flow from the CHRA (*Parry Sound (District) Social Services Administration Board v OPSEU*, Local 324, 2003 SCC 42), and concludes that this means that "a labour arbitrator <u>must</u> consider human rights issues". The Applicant contends that these statements indicate that the HRO read-in a human rights analysis where none occurred.

[36] The Respondent emphasizes that the role of the Commissioner is limited to a screening role and that a review of the Decision should not deal with the merits of the human rights allegation (*O'Grady v Bell Canada*, 2012 FC 1448 at para 37; see also *Yue* at para 33):

> [37] The Commission plays a "screening" role; it investigates complaints to determine whether the complaint should be considered by the Canadian Human Rights Tribunal. The Tribunal's role is to examine the complaint on its merits; to determine whether the complaint has been established and the appropriate remedy. The Commission does not perform this function. In reviewing a decision of the Commission to refuse to deal with a complaint, the Court cannot go beyond the Commission's role and explore the merits of the complaint. The Court can only consider whether the Commission's "screening" decision was reasonable.

[37] The Respondent contends that, in this case, the HRO reasonably concluded that the Arbitrator had considered the human rights concerns in her decision. The Respondent highlights that after the First Report, the Commissioner returned the matter to the HRO to look into the

substance of the Grievances to further satisfy itself that the human rights issues had been dealt with in the Arbitration, including receiving and considering further submissions from the parties. The Respondent contends that the analysis conducted was robust, transparent and sufficiently justified.

B. *Was the Decision reasonable?*

[38] The Applicant defines the human rights issues as: a) did the Respondent discriminate against the Applicant in terminating her employment for cause; b) did the Respondent discriminate against the Applicant by requesting further medical information and refusing to allow her to return to work before the Assessment; and c) did the Respondent retaliate against the Applicant by dismissing her for cause after she filed the Complaint.

[39] The Applicant argues that in finding that the essence of the human rights issues had been addressed by the Arbitrator, the HRO emphasized that the Arbitrator's decision was based on the Applicant's disgraceful behaviour, which led to the destruction of the employment relationship and glossed over the issue of disability discrimination.

[40] However, I do not read the HRO's Reports as being so limited. The HRO specifically concluded that the Arbitrator found discrimination was not a factor in the termination of the Applicant. As noted in the First Report:

> As evidenced by her decision, Arbitrator Webster considered the complainant's issues and allegations from both a human rights perspective and a labour law perspective. Specifically, Arbitrator Webster found the following [...]
>
> a. That neither the respondent nor its employees harassed the complainant;

> b. That the respondent's decision to not return the complainant to work following her medical leave was reasonable, as was its request for more medical information and an assessment by an aviation specialist, particularly given its duty to accommodate and the complainant's safety sensitive position;
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> c. The respondent had just cause to terminate the complainant's employment;
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> d. That discrimination was not a factor in the termination; and,
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> e. That the employment relationship is broken.

[41] The Applicant argues the Arbitrator only considered the conduct of the employer in disciplining her, instead of asking if there was *prima facie* discrimination. She asserts that to address *prima facie* discrimination, the Arbitrator would need to have considered whether: a) the Applicant had a disability; b) the disability contributed to the allegations at issue; and c) there was any adverse impact flowing from the discrimination.

[42] The reasons of the Arbitrator stated as follows:

> 43. The burden of proof in a discipline arbitration rests with the Employer. The onus is on the Employer to establish on a balance of probabilities that the employee has engaged in some form of misconduct. In evaluating all of the evidence before me, including the documents, medical records and testimony of the witnesses, I find that the Employer has established the Grievor engaged in misconduct by persistently asserting that her managers were engaged in harassment, conspiracy and threats where there was no foundation for those assertions. The Employer conducted an investigation into the Grievor's claims and found no evidence to support them. The Employer sought medical information to explain the Grievor's conduct and no physical or psychiatric explanation was provided. The Employer had just cause to discipline the Grievor for her misconduct. [emphasis added]

[43] The Arbitrator notes that the Applicant's conduct was not impulsive, but was maintained and repeated over a period of years, including from the initial Meeting (Arbitration Decision at paras 40, 45). This extended beyond the period during which she alleges she had Adjustment Disorder.

[44] The Arbitrator found that there was "no reasonable basis, <u>medical or otherwise</u>, for [the Applicant's] claims of harassment, conspiracy and threats" [emphasis added] (Arbitration Decision at para 46; see also para 43). The Employer terminated the Applicant's employment once it became apparent that there was no medical explanation for her complaints of harassment and threats (Arbitration Decision at para 40).

[45] In my view, it can be reasonably inferred from the Arbitrator's findings that she did not consider the Applicant's conduct to be related to her Adjustment Disorder or to any medical condition nor did she consider the Employer to have terminated the Applicant's employment because of a medical condition. As determined by the HRO, there was no foundation for concluding that discrimination was a factor in the termination.

[46] There is no basis to dispute the Arbitrator's assessment of the evidence. While the Applicant appears to disagree with the Arbitrator's finding that there was no medical explanation perceived for the Applicant's claims of harassment and threats, this criticism relates to the merits of the Arbitration Decision and does not amount to a reviewable error on this judicial review.

[47] A connection between the Applicant's Adjustment Disorder and her termination was not made out or supported by the evidence. As noted in the HRO's Supplementary Report:

> 82. Arbitrator Webster's decision clearly notes that it was the complainant's *continued* assertions about physical threats, intimidation and conspiracy of sabotage against her, *through to her testimony at arbitration, without medical explanation* and her fervent belief that her conduct was justified and not wrong that caused her to destroy her employment relationship with the respondent.
>
> 83. The complainant's assertion that the respondent's justification for her termination for cause was connected, in whole or in part, to behaviour related to her diagnosed Adjustment Disorder is not supported by a review of Arbitrator Webster's decision. Based on the information provided during the grievance arbitration process, the complainant and her union argued that her Adjustment Disorder was temporary, and was not impacting her in any way once she was declared fit for work.

[48] Further, the argument raised now appears to run counter to the arguments before the Arbitrator and in the Complaint as to the duration and impact of the Applicant's Adjustment Disorder. Before the Arbitrator, the Applicant argued that her Adjustment Disorder was temporary and in the Complaint that it was improperly perceived as a disability (para 4, Schedule A to Complaint). In her argument now, the Applicant criticizes the Arbitrator for allegedly not considering whether she had a disability at some point prior to her termination (para 39ff of written representations).

[49] The Applicant's further argument that the HRO failed to consider whether the Respondent acted in accordance with a *bona fide* occupational requirement to address the *prima facie* discrimination is also not persuasive. It would only be applicable if discrimination were found. In this case, where there was no finding of *prima facie* discrimination, the HRO cannot be faulted for not considering whether the Arbitrator conducted this analysis.

[50] In my view, it was similarly reasonable for the HRO to find that the Arbitrator considered the request for further medical information and the Assessment from a human rights perspective in view of the Arbitrator's analysis and the fact that the entire medical record was before the Arbitrator.

[51] As noted by the HRO in her First Report, "the respondent's decision to not return the complainant to work following her medical leave was reasonable, as was its request for more medical information and an assessment by an aviation specialist to determine fitness for duty, particularly given its duty to accommodate and the complainant's safety sensitive position."

[52] The Arbitrator considered that the Applicant's safety sensitive employment role, her requirement to work productively and cooperatively with co-workers in emergency, her past reactions and allegations, combined with the existing medical information, provided the Respondent with insufficient assurance that her condition did not pose a risk to flight safety. As such, the Arbitrator found that the request for an opinion from an aviation specialist was justified. In her reasons, the Arbitrator highlighted the Employer "was also concerned that there might be a medical issue that would require accommodation and wanted to fulfill its procedural and substantive obligations to accommodate medical restrictions in [her] safety sensitive role."

[53] While the Applicant references *Bottiglia v Ottawa Catholic School Board*, 2017 ONSC 2517 at paragraphs 76-78 to suggest that the Arbitrator's reasons were deficient, I do not find this argument persuasive. As noted by the Arbitrator, Dr. Gillmore ultimately reviewed the medical information from the Applicant's doctor and concluded that there was insufficient

information to complete his analysis. It was only after he received further medical information (psychological assessment report) that he agreed the Applicant was fit to return to work. While the Arbitrator does not delve into the additional information that was needed to satisfy Dr. Gillmore, it is apparent that the request for further information was made after considering the medical information that was available and being of the view that insufficient information was provided by the Applicant's doctor such that a specialist was needed. In my view, it was reasonable for the HRO to conclude that the Arbitrator considered the issue of discrimination, particularly as the Arbitrator considered how the Employer handled the medical information and the issue of accommodation.

[54] The Applicant's further argument that the HRO erred by inferring that the Arbitrator considered the issue of retaliation and reprisal when it was not specifically discussed in the Arbitration Decision is also not persuasive.

[55] As noted by the HRO in the First Report:

> 59. As evidenced in the... decision ..., Arbitrator Webster found that the respondent had just cause to terminate the complainant's employment for misconduct. The termination of employment was due to the complainant's behaviour which destroyed her employment relationship with the respondent "through repeated and escalating assertions that her managers present[ed] a threat to her safety and that of her family when there was no evidence of a real threat". By arriving at these findings, Arbitrator Webster addressed the complainant's allegations of discrimination on the basis of disability and perceived disability; she found no basis for the allegations of discrimination. Arbitrator Webster's finding also do not support the complainant's allegations that the filing of her human rights complaint was a factor in her termination of employment (i.e. the findings do not support that the complainant's termination of employment was in reprisal/retaliation for filing the present complaint).

[56] While a reviewing body may not provide reasons that were not given, they may connect the dots where conclusions can be readily drawn: *Vavilov* at paras 96, 97.

[57] In my view, it was reasonable for the HRO to conclude that the Arbitrator did not need to specifically mention retaliation and reprisal once there was a finding of termination with cause as by finding termination with cause there would be no foundation for this argument.

[58] The Applicant asserts that this Court must conduct a probing review of the Decision. She argues there was a heightened responsibility on the Commissioner to ensure that the human rights issues were addressed, and that the reasons should reflect the stakes at issue for the Applicant: *Vavilov* at para 133. The Applicant asserts that human rights law is quasi-constitutional and that clear reasons that show the human rights analysis is necessary to ensure certainty and consistency in the law: *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31 at para 86.

[59] The Respondent asserts that the facts here parallel those in *Klimkowski v Canadian Pacific Railway*, 2017 FC 438 [*Klimkowski*] in which the Court found that the absence of specific reference in the arbitration decision to the human rights allegations did not support a conclusion that a paragraph 41(1)(d) finding was unreasonable:

> [59] Ms. Klimkowski appears to rely on the absence of any specific reference in the arbitration decision to the human rights allegations advanced on her behalf by the Union to argue the determination that the Complaint is vexatious under paragraph 41(1)(d) of the CHRA is unreasonable. However, the allegations of harassment and discrimination based on disability were advanced and responded to by the parties in their submissions to the arbitrator. In reviewing the arbitration decision as a whole and

> considering the arbitrator's conclusion that the termination for cause was justified one cannot reasonably conclude that the arbitrator was not satisfied that the CHRA related allegations were unfounded. The absence of an express consideration of these allegations in the arbitration decision does not, in my opinion, detract from the reasonableness of the Section 40/41 Report conclusion that the essence of the Complaint had been addressed by the arbitrator.

[60] The Applicant asserts that the facts in *Klimkowski* are distinguishable as in that case, the Commissioner noted that the substance and essence of the discrimination complaint was dealt with in the section 40/41 report. As stated at paragraph 63 of that decision:

> [63] A review of the Section 40/41 Report demonstrates the CHRC conducted a detailed and thorough consideration of those factors in determining whether or not to deal with the Complaint under paragraph 41(1)(d). That analysis acknowledged and addressed the allegations of personal and systemic discrimination on the basis of sex and disability in the Complaint but concluded that the essence of those allegations were dealt with in the grievance brought before the arbitrator. The CHRC also considered the role and jurisdiction of the arbitrator as an independent and neutral third party and found there was not a significant difference between the arbitration process and the CHRC's complaint process. Moreover, the CHRC addressed and found the arbitration process to be fair and noted Ms. Klimkowski's concerns with the adequacy of Union representation and her failure to pursue remedies available to address these concerns, and found those concerns did not render the arbitration process procedurally unfair. Rather Ms. Klimkowski's concern with her Union representation was relevant to the duty of fair representation, of which Ms. Klimkowski did not bring a complaint. Finally the Section 40/41 Report identified and addressed Ms. Klimkowski's assertions that the arbitration had failed to address her human rights related allegations and found Ms. Klimkowski had the opportunity to raise all human right allegations in the arbitration process that she raised in the Complaint. As the Commission noted, "Justice does not require that the Commission deal with the complaint even though the complainant is dissatisfied with the outcome. The Commission is not an appeal mechanism for arbitration decisions and the adjudication of the complaint will not advance the purpose of the act".

[61] However, I do not agree that *Klimkowski* is not applicable. First, I note that the section 40/41 report from *Klimkowski* is not before the Court. Second, like *Klimkowski,* in this case, the HRO acknowledged and considered the allegations of discrimination raised in the Complaint, but concluded that the essence of those allegations were dealt with in the grievance brought before the Arbitrator. The HRO concluded that the Grievances raised the same allegations raised in the Complaint.

[62] The Applicant further refers to *Gregg v Air Canada Pilots Association*, 2019 FCA 218 [*Gregg*] at paragraph 14, which was decided after *Klimkowski*:

> [14] Dismissing a complaint on the basis that it is plain and obvious that it cannot succeed requires an assessment of the complaint against objective benchmarks or criteria. Those include the facts, statutory and jurisprudential requirements and precedent...

[63] However, I do not consider the standard set out in *Gregg* to be contravened. In this case, I disagree with the Applicant that the Commissioner failed to provide meaningful reasons in support of the Decision. In adopting the First Report and the Supplementary Report, the Commissioner, through the HRO, engaged in a thorough analysis of the matters raised by the Applicant and considered by the Arbitrator. The Commissioner's role in undertaking an analysis under paragraph 41(1)(d) is to determine whether the issues were or could have been adequately addressed under a prior process, not to undertake a review of the merits of the Complaint: *Klimkowski* at para 13.

[64] However, even if it were concluded that the Arbitrator did not fully address all of the allegations of discrimination, I agree with the HRO that this results from the fact that the

Applicant failed to articulate all of her human rights arguments before the Arbitrator, despite having the opportunity to do so. As stated at paragraphs 89-90 of the Supplementary Report:

> 89. The analysis in this report found that the additional documentation and information submitted by the parties does not change the analysis or recommendation in the March 4, 2019 report – it still appears that the essence of this human rights complaint was considered and decided on by Arbitrator Webster. The analysis found that it would not be unfair to use the result of the grievance arbitration process to stop the Commission's process and it does not appear that justice requires that the Commission deal with this complaint. It is recommended that the Commission not deal with this complaint because the grievance arbitration procedure has addressed the allegations of discrimination overall.
>
> 90. If the Commission decides that the grievance arbitration procedure has not addressed all of the allegations of discrimination, it is recommended that the Commission decide not to deal with this complaint because it is vexatious within the meaning of the Act. The complainant had "extensive" opportunities to raise all of her human rights allegations during the grievance arbitration; therefore, she could have had all of her human rights issues dealt with. Her failure to raise her "underlying" human rights allegations, despite fully participating in a multi-year grievance arbitration process, with representation, suggests that this complaint could also be vexatious within the meaning of the Act.

[65] Consistent with paragraph 41(1)(d) of the CHRA, the Commissioner should not devote resources to matters that have been, or could have been, addressed in substance elsewhere (*Bergeron* at para 47) as to do so would be tantamount to an abuse of process (*Khapar v Air Canada*, 2014 FC 138 at para 41).

[66] In this case, the Applicant had various opportunities to raise her allegations of discrimination during the grievance process. As noted in the Supplementary Report:

> 66. The March 14, 2019 report found that the essence of the human rights issues alleged in the present complaint was raised in the grievance arbitration process and decided on. The first report

> also found that although the union did not expressly state in the grievances and supplementary documents that the respondent's actions were a violation of the Act, it is clear that the union raised the same allegations at the arbitration as alleged in the present complaint. In support of this, both [the union representative and the union president] reported that all of the complainant's human rights issues were before Arbitrator Webster and that "extensive testimony' from the complainant had been heard.
>
> [...]
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> 68. In addition, if the complainant believed at the time that her underlying human rights issues were not being raised or examined, she could have raised the issues herself during the "extensive testimony" she provided at arbitration. It is clear that the complainant had many opportunities to raise all of her human rights issues: in her grievances; in the documents submitted as part of the grievance arbitration process; and at the arbitration itself. A complainant's failure to raise their human rights allegations during the grievance arbitration process can be considered "vexatious" within the meaning of section 41(1)(d) of the Act.

[67] If the Applicant was dissatisfied with the outcome of the Arbitration, she could have brought a judicial review of that decision. The HRO reasonably found that attempting to use this judicial review to re-litigate issues already addressed, or that could have been addressed, through the grievance and arbitration process should not be permitted.

VII. Conclusion

[68] For all of these reasons, it is my view that the Applicant has not demonstrated that the Decision is unreasonable. As such, the application for judicial review is dismissed.

[69] While the parties each submitted that if they were successful that costs should be awarded on a substantial indemnity basis and should represent a lump sum of the actual costs incurred for the proceeding, I am not satisfied based on the issues and arguments before me that an award of

costs should deviate from that set out in the Tariff. Accordingly, I will award the Respondent its costs of the application in accordance with column III of Tariff B.

JUDGMENT IN T-1314-21

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed.

2. The Respondent is awarded its costs of the application to be assessed at the middle of column III of Tariff B.

"Angela Furlanetto"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1314-21
STYLE OF CAUSE:	MAGGIE CARRASQUEIRAS v SUNWING AIRLINES INC.
PLACE OF HEARING:	HEARD BY VIDEOCONFERENCE
DATE OF HEARING:	MAY 31, 2022
JUDGMENT AND REASONS:	FURLANETTO J.
DATED:	DECEMBER 12, 2022

APPEARANCES:

Nastaran Roushan	FOR THE APPLICANT
Sunny J. Khaira Michael A. Jaworski	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Nastaran Roushan Barrister and Solicitor Toronto, Ontario	FOR THE APPLICANT
Hicks Morley Hamilton Steward Storie LLP Barristers and Solicitors Toronto, Ontario	FOR THE RESPONDENT