Date: 20080421

Docket: T-2262-06

Citation: 2008 FC 516

Ottawa, Ontario, April 21, 2008

PRESENT: The Honourable Justice Johanne Gauthier

BETWEEN:

HALIFAX EMPLOYERS ASSOCIATION

Applicants

and

ELIZABETH TUCKER

Respondent

REASONS FOR ORDER AND ORDER

[1] The Halifax Employers Association (HEA) is seeking judicial review of the decision of the Canadian Human Rights Commission (the Commission) to refer the complaint of Ms. Elizabeth Tucker to conciliation, and failing settlement, to the Canadian Human Rights Tribunal (the Tribunal). In addition to alleged errors of mixed fact and law, the HEA argues that the Commission breached its duty of procedural fairness. This is one of very few cases where the precise content of the duty of procedural fairness has arisen in the context of a decision to refer a complaint to the

Tribunal pursuant to paragraph 44(3)(a) of the *Canadian Human Rights Act*, R.S., 1985, c. H-6 (the Act).

[2] For the reasons that follow, the Court finds that this decision contains no reviewable error.

Facts

[3] The HEA represents various companies involved in the longshore industry in the port of Halifax. Those companies provide loading services for shipping lines calling at the port. The HEA, in consultation with the unions (including the Halifax Longshoremen's Association, Local 269 of the International Longshoremen's Association) having bargaining rights to the waterfront, initiates new hiring when required.

[4] In 2002, the companies represented by the HEA called for an increase in the workforce, and the need to train a back up labour supply. The HEA advertised for new longshore workers, and Local 269 was responsible for receiving and reviewing applications from interested persons. Local 269 referred desirable candidates to the HEA, which was responsible for their testing and training.

[5] Ms. Tucker submitted an employment application to Local 269, which application was forwarded to the HEA on November 18, 2004. On February 4, 2005, Ms. Tucker underwent an ARCON test (a pre-employment screening test used to determine whether applicants for positions as longshore workers can safely and efficiently perform their duties, including "lashing" duties) which she failed, particularly with respect to the Dynamic Listing Capacity Test, which consists of

repeatedly lifting a weighted box (weight ranging from 10 to 50 pounds) onto a shelf during a fixed interval during which time the individual's heart rate is measured continuously. Ms. Tucker did not reach the maximum lifting weight of 50 pounds before her maximum heart rate was exceeded, such that it would be unsafe for her to continue lifting. The maximum heart rate of a participant is calculated on the basis of a formula that applies to all participants (220 minus the participant's age x 75%).[1] Ms. Tucker was subsequently removed from the hiring process.

[6] On April 27, 2005, she filed a complaint with the Commission wherein she states that she was "subject to discrimination due to her sex" and that she believes that "the ARCON testing method used by the HEA [does] not represent a *bona fide* occupational requirement". In her one page complaint, Ms. Tucker notes particularly that she was advised by the physiotherapist during the test that her maximum allowable heart rate was based on a formula that did not differ or account for gender[2]. This in her view was contrary to "the law that women cannot be measured against male norms that have a disproportionately negative effect on them as group''. The rest of her complaint deals with her allegation that the testing method is not a *bona fide* occupational requirement.

[7] On August 24, 2005 the parties were informed that the complaint was being investigated. The HEA provided its initial submission to the investigator on September 24, 2005. At the request of the investigator, the HEA provided more information on the ARCON test on May 10 and June 7, 2006. It is to be noted that on April 3rd, 2006 the investigator had requested the HEA's position as

[1] Certain parts of the test appear to call for 85% or 75% for at least one minute.
[2] Some of the applicant's documentation about the ARCON test refers to 75 % of maximal heart rate for the individual's age and gender. See for example the document entitled Exercise Protocol For Lashers at tab 5 of the applicant's record (third page).

to why a higher proportion of women than men failed the test and to provide her with exact statistics in that respect. In its letter of May 10, 2006 the HEA notes that it has no conclusive reasons explaining the difference in the rate of failures, noting that it is difficult to generalize given the number of reasons that could explain individual failures. Among other things, the HEA noted that they were not testing against a male norm but rather that the ARCON test replicates actual work that Ms. Tucker would be asked to do. It is also worth noting that with its submission of June 7, 2006, the HEA included a document entitled "Ergonomic Review for Lashers," that will be referred to later on.

[8] On June 23, 2006, the HEA received a copy of the investigator's report which concluded with a recommendation that a conciliator be appointed pursuant to section 47 of the *Canadian Human Rights Act*, and that a Tribunal be appointed to inquire into the complaint failing settlement, pursuant to subparagraph 44(3)(a) of the Act.

[9] On July 7, 2006, the HEA wrote to the manager of investigations at the Commission seeking amendments to the report on the basis that i) it dealt with an issue that had not been raised in the complaint (body kinetics) without seeking the position of the HEA; that ii) it contained contradictions (i.e., paragraph 26 of the report contradicts paragraph 88); and that iii) it made use of confusing and inappropriate language (direct vs. adverse effect discrimination). With respect to body kinetics, the HEA simply notes that had it been consulted on this issue, it could have said that

the test is adapted to each individual, as each person lifts to his or her own shoulder height[3], and that the investigator should have had the benefit of its thoughts on whether lashing was a task that could be adapted to accommodate persons who cannot lift 50 pounds. Although the HEA specifically refers to the Messing article[4] discussed in the report, it does not offer specific comments in that respect. Alternatively, the HEA sought an extension of time to file its submissions.

[10] Having been told that no amendments would be made, the HEA was advised on July 28, 2006 that it would have until August 28, 2006 to provide its submissions on the report. This delay was further extended to August 29, 2006 at the request of the HEA. In its August 29, 2006 submissions, the HEA described the report as "fundamentally flawed" and raised the same three issues[5]. It concluded that the Commission should reject the report, or at the very least disregard offending paragraphs. However, in part three of its submissions, the HEA offered a "substantive response" to the report, wherein it specifically addresses the content of paragraphs 30, 31, 32, 34, 40, 68, 69, 77, 82, and 84 of the report. The HEA also reiterated and expanded upon its earlier comments with respect to body kinetics.

[11] Ms. Tucker commented on the report and the submissions of the HEA in a letter dated October 6, 2006, wherein she emphasizes that she is an experienced lasher with a good work record

[3] It is not clear what this would have added, as the documentation before the investigator indicated that the standard height for the knuckle to shoulder lift performed by Ms. Tucker was 47" (see tab 9, pp. 5, 6), whereas the standard height was set at 54" for another subject (see tab E(24)).

[4] At paragraph 34 the report cites an article by Karen Messing entitled "One-Eyed-Science – Occupational Health and Women Workers."

[5] These being i) failure to provide HEA an opportunity to comment on the "new" issue; ii) contradictory conclusions on existence of direct discrimination; and iii) inappropriate distinction between direct and adverse effect discrimination.

in the bullpen[6] (the most longshoring hours by a women in the prior two-year period on a casual basis), to which the HEA responded by sending further material to the Commission on October 12, 2006.

[12] On December 1, 2006 the HEA was informed that Ms. Tucker's complaint would be referred to the Tribunal within 90 days unless the parties reached a settlement through conciliation during that time. On December 22, 2006 the HEA filed its Notice of Application in the present proceedings.

Analysis

[13] In its memorandum, the applicant raises many of the same issues it raised in its submissions to the Commission. First, in respect of the procedural fairness issue, the HEA says that the investigation was not neutral, as the investigator "strayed into the wilderness" by investigating the new issue of body kinetics and failing to consult it in that respect. The HEA further says that it was denied the opportunity to provide proper submissions and material on the issue of body kinetics and that the limited opportunity it was afforded after the issuance of the report itself did not cure this flaw in the investigation. The applicant submits moreover that because the Commission adopted the investigator's recommendation without providing detailed reasons, its decision is tainted by the same flaws and was not made on a fair basis.

[6] The "bullpen" is operated by Local 269 and consists of casual workers who attend at the union hiring hall in the hope of obtaining work in the event that there is still work available after all union members have been dispatched.

[14] It is not necessary to proceed to a pragmatic and functional analysis with respect to those alleged errors. If a breach of procedural fairness occurred, the Court will intervene (*Canadian Union of Public Employees (C.U.P.E.) v. Ontario (Minister of Labour),* [2003] 1 S.C.R. 539 at paras. 100-104, *Sketchley v. Canada (Attorney General)* 2005 F.C.A 404 at para. 111).

[15] In its written submissions, the HEA also argued [7] that the overall decision was patently unreasonable. At the hearing, it noted that in light of the new decision of the Supreme Court of Canada in *Dunsmuir v. New Brunswick,* 2008 SCC 9, it was even more clear that the decision contained a reviewable error, having regard to the reasonableness standard that now applies in respect of the Commission's findings of fact and mixed fact and law. Particularly, the HEA noted that:

> i) the investigator misstated or misapplied the test articulated in *British Columbia (Public Service Employee Relations Commission) v. B.C.G.E.U.*, [1999] 3 S.C.R. 3 ("Meiorin") by relying upon an inappropriate distinction between direct and adverse effect discrimination, by reaching totally opposite conclusions in that respect (paragraph 26 versus paragraph 88 of the report), and by failing to first determine whether Ms. Tucker had establish a *prima facie* case of discrimination;

[7] Despite the fact that it advanced arguments to support a conclusion that the applicable standard of review is reasonableness simpliciter, the HEA appears to have recognized that the cases on which it relied (*Canada Post Co. v. Wighton,*2006 FC 275, and *Kennedy v. Canadian National Railway* [2006] FC 697) could be distinguished on their facts: *Wighton* involved a decision pursuant to section 41 of the Act (not s. 44, let alone s. 44 (3) (a)) while *Kennedy* involved a decision under 44 (3) (b) (dismissal of the complaint).

ii) the investigator also ignored evidence produced by the HEA, and proceeded to a flawed conclusion that women like Ms. Tucker were discriminated against because of the HEA's failure to consider differences in body kinetics as between men and women, whereas there is simply no evidence that body kinetics has any impact on the heart rate of an applicant, and heart rate is the only standard taken into account, together with the amount of weight to be lifted during the relevant portion of the ARCON test.

[16] As the parties did not raise or discuss the potential impact of section 18.1(4) of the *Federal Courts Act*, the Court agrees that based on *Dunsmuir* and the two standards discussed therein, all of these questions should be reviewed on what is now simply referred to as the standard of reasonableness.

A) Procedural Fairness

[17] In *Sketchley*, the Federal Court of Appeal indicated that it is now well settled that a duty of procedural fairness applies to the Commission's investigations of individual complaints, "in that the question of "whether there is a reasonable basis in the evidence for proceeding to the next stage" (SEPQA, supra at para. 27) cannot be fairly considered if the investigation was fundamentally flawed" (see paragraph 112).

[18] But as noted in *Uniboard Surfaces Inc. v. Kronotex Fussboden GmbH and Co.*, 2006 FCA 398 at paragraph 7;

> The duty of procedural fairness is better described by its objective -- which is essentially to ensure that a party is given a meaningful opportunity in a given context to present its case fully and fairly -- than by the means through which the objective is to be achieved for the simple reason that those means will depend on an appreciation of the context of the particular statute and the rights affected (see *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 22). There is no rigid test or formula. There is no list of items to be checked out. The duty, to use the words of a former era, is to ensure fair play in action.

[19] As mentioned, up until now the content of the Commission's duty of procedural fairness has been examined mainly in the context of decisions where the complaints were actually dismissed.[8] Given the difference in context here, an analysis of the factors referred to in *Baker* is required.

[20] In respect of the first factor, which is the degree to which the administrative process resembles the judicial process, it is clear that the comments of the Federal Court of Appeal in *Sketchley* at paragraph 115 remain applicable here.

> "… as the Supreme Court stated in *SEPQA*, at the screening phase under section 44(3) "[i]t is not intended that this be a determination where the evidence is weighed as in a judicial proceeding"; rather, the Commission must determine "whether there is a reasonable basis in the evidence for proceeding to the next stage" (para. 27). In this context of the Commission's screening function, the investigator must be considered "as an extension of the Commission" who "prepares a report for the Commission" (*SEPQA*, supra at para. 25).

[8] Exceptions include *Zündel v. Canada (Attorney General) (*1999), 175 D.L.R. (4th) 512, aff'd 195 D.L.R. (4th 394), which dealt with bias, and *Canadian Broadcasting Corp. v. Paul* [1999] 2 FC 3, appeal allowed in part, 2001 FCA 93. which is discussed further along.

> The investigator's recommendations are often adopted by the Commission at this stage. However, the parties are provided with a copy of the investigator's report, and are entitled to make submissions in writing before a decision is made (*SEPQA*, supra at para. 27; *Radulesco*, supra at 410). This consideration thus points towards a weaker level of procedural protection.

[21] In the same way, in my view the analysis of the nature of the statutory scheme found in *Sketchley* at paragraph 116 is still applicable, except for the fact that here, the Commission's decision is not determinative of the issue raised in the complaint and in the investigation report. Accordingly, where this factor was ascribed a neutral weight in *Sketchley*, here it points towards a somewhat weaker degree of procedural protection.

[22] In respect of the third factor - the importance of the decision to the individual affected - the applicant relied on the decision of the Divisional Court of Ontario in *Batson and St-Laurence College v. The Ontario Human Rights Commission*, [2007] O.J. No. 2233, for the proposition that the same duty of fairness applies whether a complaint is dismissed or referred for adjudication, on the basis that referring the matter to the Tribunal means that it now faces proceedings and costs associated therewith.

[23] Having reviewed *Batson*, I believe that it stands only for the proposition that a duty of procedural fairness applies whatever the result of the investigation and the decision of the

Commission (paragraphs 14 and 15), which was already clear from *Sketchley* [9]. The Court in *Batson* does not analyze the exact content of that duty and does not comment on whether it may differ depending on whether the decision was determinative of the merits or not.

[24] Although the Court agrees that a decision to refer the matter to the Tribunal is still important to the HEA because it leads to a Tribunal hearing with attendant expenses and the possibility of an adverse ruling, it does not carry the same importance as a decision determinative of the merits. This is especially so when one considers that the Tribunal starts afresh and does not normally review the investigation report. The applicant will therefore have an opportunity to set the record straight from the beginning of the new hearing, by presenting its evidence to the Tribunal. Accordingly, this points towards a relatively lesser degree of procedural protection.

[25] The fourth *Baker* factor relates to the legitimate expectations of the person challenging the decision. In this respect, the applicant pointed to two particular passages from the Commission's website which read as follows:

> The investigator gathers the information and evidence needed to prepare a report and makes a recommendation to the Commissioners. The investigator gives the respondent an opportunity to reply to the allegations. The investigator may interview witnesses or ask the respondent and complainant for documents or information. Both sides have a chance to review the investigator's report and make submissions before the investigator presents the report to the Commissioners. Of course, the complainant and respondent may also reach a settlement during the investigations.
>
> http://www.chrc-ccdp.ca/complaints/what_happens_now-en.asp

[9] See also *Zündel*(above, note 8) at paras. 17-20 (trial decision), confirmed on appeal.

> **What to expect if you file a complaint…**
>
> **After the Commission Accepts a Complaint…**
>
> If the matter remains unresolved, an officer investigates the allegations and prepares a report to the Commissioners on the investigation findings.
>
> The parties are given the opportunity to comment on the investigation report before it is submitted to the Commissioners.
>
> http://www.chrc-ccdp.ca/complaints/what_to_expect-en.asp

In my view these passages indicate that the HEA could expect to be informed of the substance of the case, to be permitted to respond to the main allegations during the investigation, and to make submissions on the investigation report prior to its submission to the Commissioners. They do not promise a right before the issuance of the report to receive communications or to comment on each and every piece of evidence or factual allegation provided by the complainant, or used by the investigator in her report. Hence these statements cannot be taken to augment the intensity of duty of procedural fairness incumbent upon the Commission here.

[26] The fifth and last factor is the choice of procedure made by the administrative decision maker. As noted by the Court of Appeal in *Sketchley* at paragraph 119, the statute is silent on this issue, and there is no reason here to distinguish the conclusion reached in that case, that is, that this criterion points to a lesser degree of procedural protection.

[27] Overall, this analysis indicates that the content of the Commission's duty of procedural fairness when it decides to refer a matter to the Tribunal is similar to its duty when it dismisses a complaint under paragraph 44(3)(b), but is somewhat less onerous.

[28] Having considered the above, and the reasoning of the Courts in *Slattery v. Canada (Human Rights Commission)*, [1994] 2 F.C. 574, aff'd [1996] F.C.J. No. 385, and subsequent cases applying its principles (particularly those of the Federal Court of Appeal), the Court is satisfied that in fulfilling its statutory responsibility to investigate complaints, the Commission has the duty to carry out an investigation that is both neutral and thorough in all cases. But when assessing the thoroughness required in any given case, the Court will consider the nature and impact of the Commission's decision. Likewise, when assessing the importance of evidence allegedly not investigated and whether the defect or flaw can be cured through submissions to the Commission, the Court will also consider the nature of the decision.

1) Neutrality

[29] As noted in *Sanderson v. Canada (Attorney General)* 2006 FC 447 at para.75, [10] when assessing the neutrality of the investigation, in light of the non-adjudicative nature of the Commission's responsibilities, it has been held that the standard of impartiality required of a Commission investigator is something less than that required of the Courts. This means that the question, as noted by Justice Ann Mactavish, is therefore "not whether there exists a reasonable

[10] See also *Zündel*, note 8, at paras 17-22.

apprehension of bias on the part of the investigator, but rather, whether the investigator approached the case with a 'closed mind'"

[30] The applicant did not spend much time on this argument at the hearing, probably because it recognized that there is no evidence to contradict the information contained in paragraph 28 of the investigation report, that it was Ms. Tucker who raised as a possible explanation for why significantly more women than men failed the ARCON test that the test does not allow for or account for variance in body type and the associated body kinetics of males and females. Thus, the applicants have not established that the investigator "strayed into the wilderness".

[31] That said, as the applicant raised this issue, the Court wishes to note that it was the investigator's duty to investigate the substance of the subject matter of the complaint, and this means that she was not limited by the specific allegations of fact found in said complaint. The applicant conceded this point at paragraph 77 and 80 of its memorandum and at the hearing (see *Toneguzzo v. Kimberly-Clark Inc. (No.3),* (2005), 55 C.H.R.R. D/49 at paras.53-59).

[32] The Court cannot accept the applicant's position that in this particular case, the complaint has been a moving target and that the "new allegation" in respect of body mechanics or body kinetics has changed the nature of the subject matter of the complaint. The Court has carefully considered other authorities relied upon by the applicant (*Halliday v. Michelin* 58 C.H.R.R. D/91 and *Gaucher v. Canada (Armed Forces),* 2005 CHRD No.1) and is satisfied that the applicant's limitation of the subject matter of the complaint to the specific allegations contained therein is too

narrow. This was a complaint made under sections 7 and 10 of the Act, alleging personal as well as systemic discrimination against women by the imposition of the ARCON test as a standard for hiring whereas the latter allegedly does not constitute a *bona fide* occupational requirement (BFOR).

[33] As noted in *Gaucher*, above, it is almost inevitable that new facts or circumstances will come to light during investigations and that complaints will be refined accordingly. Thus, even if the issue had not been raised by Ms. Tucker herself, the Court would not have concluded that there was any misconduct on the part of the investigator in that respect.[11]

[34] As to the investigator's failure to seek specific comments on Ms. Tucker's purported explanation of the statistics, the Court does not believe that she had the duty to do so. In this particular case and as will be explained, the Court does not believe that the Commission breached its duty of fairness, and this means that there is nothing more to say about the allegation of bias or lack of neutrality. However, even if the Court had found that the investigator should have consulted with the employer on this specific issue prior to the issuance of the report, this fact alone would not have been enough in this case for the Court to conclude that the investigator had a closed mind. In effect, a review of the report in its entirety indicates that it is otherwise very well-balanced. Ms. Tucker's insistence at the hearing that there was evidence before the investigator

[11] Also noteworthy is that the document entitled Ergonomic Review For Lashers produced by the HEA during the investigation does mention body mechanics; in the Protocol For Pre-Placement Assessment for Lashers attached thereto it is stated that the test must be performed with proper body mechanics.

suggesting that women's maximal heart rates are different from men's[12] points away from the existence of any bias in her favor, for in that respect the investigator found at paragraph 26 of her report that the evidence suggested that there was no direct discrimination stemming from "the manner in which heart rate is calculated when undergoing the ARCON test." [13]

[35] To conclude on this issue, the applicant has failed to convince the Court that the outcome of the investigation was predetermined because the investigator had a "mind so closed that any submissions would be futile," to adopt the language of the Supreme Court of Canada in *Newfoundland Telephone Co. Ltd. V. Newfoundland (Board of Commissioners of Public Utilities),* [1992] 1 S.C.R. 623, at para.34. Thus, no breach in respect of neutrality has been established.

2) Thoroughness

[36] In its memorandum, the applicant has given little detail as to what additional evidence if any it would have been able to bring to the attention of the investigator or the Commission had it been consulted in respect of the Messing article cited at paragraph 34 of the report, and the issue of gender based variations in body mechanics.

[37] Nor did the applicant spend much time on this issue at the hearing. It simply reiterated its position that this was obviously a crucial factor in the investigator's report (as will be discussed

[12] The document produced by the HEA at tab E(16) of its record indicates a gender difference in average resting heart rate.
[13] The investigator made similarly favorable findings for the HEA in respect of certain parts of the *Meiorin* test.

later on when reviewing the reasonableness of the decision, this is not necessarily so, at least in respect of a *prima facie* case of adverse effect discrimination).

[38] Normally in proceedings on judicial review, the Court will only consider evidence that was before the decision maker. An exception to this rule arises when issues of procedural fairness are raised, as it may be necessary for the applicant to present evidence that will enable the Court to determine whether an actual breach occurred. Here, given the principles established in *Slattery* and subsequent decisions adopting its reasoning, it was to be expected that the Court would not recognize a breach unless the evidence not considered or put before the Commission was crucial, and the failure or flaw in the investigation could not be cured by the process adopted by the Commission (that is, the opportunity afforded the parties to make submissions after disclosure of the report).

[39] However here, there is no affidavit explaining[14] how and why the evidence in possession of the HEA could be viewed as "crucial" at the investigative stage. It appears that the information related by the applicant to the Commission in its letter of July 7, 2006 was not found to warrant an amendment to the report.

[40] At the hearing, the applicant added (albeit without evidence to support its statement) that had it been consulted, it could have put forward evidence as to how Ms. Tucker i) lifted the boxes

[14] The applicant filed the affidavit of Mr. More, President of the HEA, but it does deal with this issue at all.

during her test (if Ms. Langley remembered[15]); ii) the way people (women presumably) lifted during their tests; and iii) scientific or expert evidence contradicting the views expressed in the Messing article. This in fact is the type of evidence one would expect the employer to present to the Tribunal, which is the body entitled to actually weigh all the evidence.

[41] All the case law relied upon by the applicant (such as *Sketchley,* above, *Sanderson,* above, and *Forster v. Canada (Attorney General),* 2006 FC 787) as well as other Federal Court of Appeal decisions where an investigation was found to have been lacking in thoroughness, such as *Tahmourpour v. Canada (Solicitor General),* 2005 FCA 113, apply the same principles, but these cases are not very helpful when it comes time to consider the applicability of these principles to the specific facts of a given case, especially when one takes into account that they all involved decisions to dismiss complaints .[16]

[42] It is one thing to consider that there was an actual breach of the Commission's duty when the investigator failed to bring to its attention the evidence of key witnesses to the events giving rise to a complaint or to mention and investigate issues clearly raised in documentary evidence provided by the complainant (such as the racial and ethnicity aspect of the harassment complaint in

[15] The investigator did interview Ms. Langley, the co-author of the ARCON Test, who was present during the testing of Ms. Tucker.

[16] The Court also carefully considered the decision of the Federal Court of Appeal in *Canadian Broadcasting Corp. v. Paul,* 2001 FCA 93, noting particularly that the Court did not confirm Justice Tremblay-Lamer's finding that some information should have been disclosed to the employer. Rather, the Court of Appeal decided the case solely on the basis that the Commission had considered privileged or confidential information (by reviewing the conciliation report), and it was unclear if it had actually considered the investigation report and all of the parties' submissions, given the particular wording of the decision itself. Also relevant were the particular reasons of Justice Strayer at paragraphs 76-78.

Sanderson, or the employer's failure to accommodate the complainant's documented inability to multitask in *Foster*) before finally dismissing the complaint. It is another, in my view, to say that the Commission cannot have a fair basis for its decision to refer a matter for further inquiry to the Tribunal because the investigator failed to fully investigate all possible explanations contradicting the one put forth by an applicant to link significant statistics to discrimination on the basis of her gender.

[43] It is clear that the investigator did not simply take Ms. Tucker's views at face value (bald allegation), she also looked at information available on the internet and at the documentation already provided by the HEA in respect of the ARCON test.

[44] So here, the applicant essentially says that it should have been asked for its thoughts on the issue of body mechanics and on the evidence considered by the investigator, which apart from the Messing article, as noted, was in the main documentation provided by the HEA or relating to the ARCON test itself.

[45] As noted in *Slattery* at paragraph 68, in this particular context the rules of procedural fairness require only that a party know the essence of the case to be met, and be afforded a fair opportunity of answering it.

[46] In *Paul*, above[17], Justice Edgar Sexton speaking for the majority noted at paragraph 43 that the Commission is required to inform the parties of "the substance of the evidence obtained by the investigation" and placed before it. This requirement is met by the disclosure of the investigation report to the parties. The Commission is also required to provide the parties with the opportunity to make all relevant representations in response to the report, and to consider these representations in making its decision.

[47] In contrast, at paragraphs 50 of its memorandum, the applicant says that it was denied the opportunity to respond "to all elements" that the investigator considered, in particular, the investigator's consideration of body kinetics, and at paragraph 51, that it was not accorded an opportunity to respond fully "to the facts upon which the investigator relied upon in creating her report" prior to her issuing the report. It further says that its opportunity to provide submissions to the Commission after the issuance of the report was "very limited" and "narrow", and added at the hearing that it had insufficient time to do so and was limited in the amount of material it could submit.

[48] As noted earlier, the Commission acceded to the HEA's request for an extension of time to file its submission, and granted it the time which the HEA itself had set in its letter of July 27, 2006. It also granted a request for a further extension from August 24th to the 29th. There is no indication whatsoever in the file that the HEA could not gather all of the evidence it intended to present or could have presented on this issue prior to that time (the report was disclosed to it on

[17] See note 16.

June 23, 2006) or that it would have been refused a further extension if one had been sought on the basis of specific difficulties encountered in gathering the evidence.

[49] This case is very different from those where the Court has had to consider whether submissions to the Commission could remedy the particular flaws identified (see for example *Sketchley*, at para. 124).

[50] As it was stated in *Beauregard v. Canada Post Co.*, 2005 FC 1383, at para. 19, "[w]hen applying previously developed principles to a given situation, the Court must bear in mind that it is the Commission that decides whether to dismiss a complaint [or refer it to the Tribunal]. The Act simply gives it the power to delegate the investigation to an investigator; ultimately it is the Commission's duty to ensure that it has an adequate and fair basis on which to evaluate whether the circumstances warrant the appointment of a Tribunal. While the investigation is a crucial step in this context, it is not the only stage where the Commission has an opportunity to gather information that, together with the investigation report, will form the basis of its assessment."

[51] It is also of interest to note that at paragraph 60 of its memorandum, the applicant states that "the applicant presented compelling evidence that body kinetics had no impact on the particular tasks performed by the Complainant during the ARCON test". This very statement implies that the applicant did have the ability to respond fully to this issue.

[52] In conclusion, the Court must be circumspect in its analysis of what constitutes an incurable flaw in the investigation, especially when the Commission's decision is not finally determinative of any party's right.

[53] In this particular case, having reviewed all of the circumstances, the Court is not convinced that the applicant was deprived of a meaningful opportunity to know the case it had to meet and to present its views fully to the Commission, the decision maker here, or that the Commission lacked a fair basis for its decision. Thus, the Court must conclude that there was no breach of procedural fairness in this matter.

3) Reasonableness

[54] It is appropriate at this stage to reproduce the provisions under which Ms. Tucker filed her complaint. Provisions 7 and 10 of the Act read as follows:

7. It is a discriminatory practice, directly or indirectly, (*a*) to refuse to employ or continue to employ any individual, or (*b*) in the course of employment, to differentiate adversely in relation to an employee, on a prohibited ground of discrimination.	7. Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait, par des moyens directs ou indirects : *a*) de refuser d'employer ou de continuer d'employer un individu; *b*) de le défavoriser en cours d'emploi.
10. It is a discriminatory practice for an employer, employee organization or employer organization (*a*) to establish or pursue a	10. Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite et s'il est susceptible d'annihiler les chances

policy or practice, or (*b*) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment, that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.	d'emploi ou d'avancement d'un individu ou d'une catégorie d'individus, le fait, pour l'employeur, l'association patronale ou l'organisation syndicale : *a*) de fixer ou d'appliquer des lignes de conduite; *b*) de conclure des ententes touchant le recrutement, les mises en rapport, l'engagement, les promotions, la formation, l'apprentissage, les mutations ou tout autre aspect d'un emploi présent ou éventuel.

[55] The investigator thus had to determine whether requiring all applicants for employment as longshore workers to pass an ARCON test was a practice that "directly or indirectly" discriminated against Ms. Tucker, or systematically against women.

[56] Given the lack of distinct reasons in the decision of the Commission itself, the Court must consider the investigation report as part of the Commission's reasons: *Sketchley,* at para. 37.

[57] It is clear that pursuant to paragraph 44(3)(a), the Commission's role was to determine whether there was a reasonable basis in the evidence (and having regard to all of the circumstances of the complaint) for proceeding to the next stage by referring the matter to the Tribunal for further inquiry (*Sketchley*, para. 115). As it is stated on the first page of the investigation report, the Commission members do not have to determine whether discrimination has actually occurred. As mentioned in *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Canadian*

Human Rights Commission), [1989] 2 S.C.R. 879 (*SEPQA*), at para. 27, it is not for the Commission to weigh evidence as in a judicial proceeding.

[58] It is with these principles in mind that the Court must evaluate the applicant's contention that the Commission's decision to refer the matter to the Tribunal was unreasonable. The reasonableness standard of judicial review was recently described by the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, at para. 47:

> Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law.

[59] Moreover, as noted by the Supreme Court in *Canada (Director of Investigations and Research) v. Southam Inc.*,[1997] 1 S.C.R. 748, at para. 56, so long as one of the reasons stated to support the decision is tenable (as opposed to all of the reasons given), the decision will meet the reasonableness standard of review, even if the reasoning would not have convinced the reviewing court.

[60] At the beginning of her report, the investigator states that she must proceed in two steps, citing *Meiorin*. The first step required looking at whether the employer was applying a standard or policy, and if so, whether this standard or policy discriminated either "directly or indirectly" on the basis of a prohibited ground of discrimination. In the second step, she had to focus on whether the standard or policy was rationally connected to its purpose, and if so, whether it was adopted in good faith, and finally, whether the standard or policy is reasonably necessary, in that it would be impossible to accommodate the complainant and others similarly situated without causing undue hardship.

[61] Contrary to the applicant's allegation, by performing the first step described above, the investigator was clearly assessing whether there was evidence that could reasonably be the basis of Ms. Tucker's "prima facie case" before a Tribunal. The investigator does not use the phrase "*prima facie* case of discrimination", but she did not have to.

[62] In respect of that first step, the investigator concludes at paragraph 26 of her report that the information provided by the HEA suggests that there is no direct discrimination, because the manner in which heart rate is calculated appears to make no distinction on the basis of gender. However, in respect of "indirect/adverse effect discrimination", she concludes at paragraph 33 that "the statistics provided by the HEA suggest that women are adversely affected by the requirement to pass the ARCON test." She then goes on to say that the complainant's assertion that this may be so because the different body kinetics of men and women are not considered in tests such as the

ARCON is supported by her independent research (Messing article). This in her view is the reasonable basis for the complaint (first step).

[63] The applicant challenges the investigation report and the decision on the basis *inter alia* that the Supreme Court of Canada has abandoned the conventional distinction between direct and adverse effect discrimination in favour of a single unified approach.

[64] In *Meiorin,* above, the Supreme Court of Canada did not state that one could not distinguish between direct or indirect/adverse effect discrimination any longer[18]. Rather, the ratio of *Meiorin* is that once a *prima facie* case of either form of discrimination has been established, the subsequent analysis as to whether the discriminatory standard was a BFOR is no longer contingent on which type of discrimination occurred (at paragraphs 19-24). That is to say that the unified approach developed by the Supreme Court in that case is only engaged at step 2, the investigator's description of which is perfectly in line with the test set out by the Supreme Court.

[65] It is also recognized in *Meiorin*, at para. 29, that discrimination in the present day mostly takes an indirect form, especially systemic discrimination.

[66] This being the case, there is nothing in the fact that the investigator separately analysed direct and indirect / adverse effect discrimination that would constitute by itself a reviewable error.

[18] Section 7 of the Act expressly refers to "indirect discrimination."

[67] As to the reasonableness of the Commission's finding that there was sufficient evidence of a *prima facie* case here to warrant further inquiry, the Court cannot agree with the applicant's contentions that the only threshold question had to be whether sex is a factor which affects maximum allowable heart rate, and that there was absolutely no evidence linking the adverse effect to a prohibited ground of discrimination.

[68] Recognizing that it is often difficult to bring sufficient evidence to support a complaint of systemic discrimination complaint or even personal discrimination based on a standard, human rights tribunals have previously accepted that statistical evidence of disparity in hiring may, in some cases, suffice to discharge the initial burden of the complainant (see p. 15-73 of Tarnopolsky, *Discrimination and the Law*, 2006, as well as *Blake v. Ontario v. Ministry of Correctional Services)* (1984), 5 C.H.R.R. D/2417 and *Angeconeb v. 517152 Ontario Ltd.* (1993), 19 C.H.R.R. D/452)[19].

[69] It should also be remembered that that the question of whether or not a complainant has made out a *prima facie* case turns on the sufficiency of the complainant's evidence on its own, independently of contradictory evidence or answers adduced by the employer. (*Lincoln v. Bay Ferries Ltd.*, 2004 FCA 204, at para. 22)

[19] The Court notes that the reference to *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital general de Montréal*, 2007 SCC 4 at paragraph 17 of *Corbiere v. Wikwemikong Tribal Police Services*, 2007 FCA 97, is to the opinion of Justice Abella at para. 49, and that in her reasons, the learned judge was in disagreement with the majority of the Court that automatic termination clauses automatically represent *prima facie* discrimination.

[70] That said, the HEA says that the statements of Linda Langley recorded in the investigation report explain the statistical disparity, and should have been considered by the Commission. However, Langley is only reported as saying that “applicants” fail because they are not fit enough, and that “they have not figured out why applicants are not strong enough. They receive information six weeks prior to the test on how to prepare.” (at paragraph 55) This is not an explanation as to why, having been provided with the same information and made to undergo the same exercise protocol, women fail at a much greater rate than men. That very question was asked of the HEA. If the answer was as simple as that suggested by the applicant at the hearing - they are simply not fit enough - one would have expected that answer from the HEA much earlier. However, it was not the answer provided in its letter of May 10, 2006 to the investigator. As noted, the HEA could not give a precise answer to that question and implied that further analysis would be required.

[71] That the Commission did not draw the inference urged by the applicant, that is, that women’s excessive failure rate in performing the Dynamic Lifting Component of the ARCON test was necessarily imputable to poor fitness, cannot be considered a reviewable error. In fact, the lack of a definite explanation for the statistical disparity, and the many conceivable answers to the complainant’s own assertion, only supports a conclusion that there was sufficient evidence to support the first part of the test. The Court is satisfied that given the Commission’s limited role at that stage, its conclusion in respect of indirect/adverse effect discrimination is a defensible outcome in terms of the facts and the law.

[72] With regard to the contradiction raised by the applicant with respect to paragraphs 26 and 88 of the report, the Court is not convinced that this is anything but a typographical error. In effect, the findings in respect of direct discrimination are clear at section 26. The investigator again makes it clear that paragraph 88 is only included as a closing summary, and nothing in the report indicates any intention to change the initial finding. This issue, and any confusion that may arise from it, was clearly before the Commission. The Court finds that read with a mind willing to understand, the report stands only for the proposition that there is sufficient evidence supporting the complaint in respect of indirect / adverse effect discrimination. Thus the error at paragraph 88 is not sufficient to vitiate the decision.

[73] That covers all of the issues raised by the applicant with respect to the alleged flaws of the decision.

[74] Having considered all of the circumstances, including the statement at paragraph 94 of the report that "[t]he public interest is engaged by this complaint to the extent that it raises an issue of systemic discrimination against women in strength testing in a male-dominated employment field," the Court is satisfied that the final conclusion of the Commission was open to it. That Ms. Tucker's complaint should be referred to the Tribunal was one of the possible outcomes based on the facts of this case and the law.

[75] As noted earlier, the Court is satisfied that the decision was taken on a fair foundation and it is worth noting that like the Court, the parties should be wary of frustrating the pursuit of the

process before the Tribunal by making too fine an inquiry into the details of the investigation at this screening stage.

[76] The application shall be dismissed.

ORDER

THIS COURT ORDERS that:

1. The application is dismissed, with costs.

"Johanne Gauthier"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2262-06
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