Federal Court  Cour fédérale

Date: 20100630

Docket: T-1088-08

Citation: 2010 FC 713

Ottawa, Ontario, June 30, 2010

PRESENT: The Honourable Mr. Justice Lemieux

IN THE MATTER OF A DECISION OF THE CANADIAN HUMAN RIGHTS COMMISSION AND A DETERMINATION PURSUANT TO SS. 41(1) AND SS. 44(3)(B) OF THE *CANADIAN HUMAN RIGHTS ACT*

BETWEEN:

WILLIAM VOS

Applicant

and

CANADIAN NATIONAL RAILWAY

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction and Background facts

[1] Paragraphs 44(3)(b)(i) of the *Canadian Human Rights Act*, R.S. 1985, c. H-6 (the Act) enables the Canadian Human Rights Commission (CHRC) on the receipt of an Investigator's report

"to dismiss the complaint to which the report relates if it is satisfied that having regard to all of the circumstances of the complaint an inquiry into the complaint is not warranted". On June 2, 2008, the CHRC dismissed the applicant's complaint dated October 3, 2005 for the following two reasons relevant to this judicial review application which challenges that decision:

- The evidence shows the complainant was not entitled to disability benefits while he was not actively working in accordance with the provisions of the Enhanced Supplemental Unemployment Benefits package he selected;
- The evidence does not establish that the respondent pursues policies or practices that discriminate against disabled employees in receipt of Employment Security benefits.

[2] Counsel for Canadian National Railway (CN) submits the applicant's complaint fits best for analysis under Section 10 of the Act and, in substance, the Investigator's report proceeded on the basis that section, as opposed to section 7 (see transcript of argument at pages 69 and 79). I am in agreement with this submission. Section 10 of the Act reads:

Discriminatory policy or practice	**Lignes de conduite discriminatoires**
10. It is a discriminatory practice for an employer, employee organization or organization of employers	**10.** Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite et s'il est susceptible d'annihiler les chances 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) to establish or pursue a policy or practice, or	a) de fixer ou d'appliquer des lignes de conduite;
(b) to enter into an agreement affecting recruitment, referral, hiring, promotion, training,	b) de conclure des ententes touchant le recrutement, les mises en rapport, l'engagement,

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.	les promotions, la formation, l'apprentissage, les mutations ou tout autre aspect d'un emploi présent ou éventuel.

[Emphasis added]

[3] William Vos is a self-represented litigant who worked for the CN from 1982/83 until June 2001 when he was laid off as a car inspector. In October 2004 he was terminated as an employee of CN pursuant to the provisions of the Employment Security and Income Maintenance Agreement entered into between CN and the National Automobile, Aerospace, Transportation and General Workers Union of Canada, (CAW-Canada, Local 100 (the ES Agreement)). The option he selected was the Enhanced Supplemental Unemployment Benefits package (ESUB). In February 2005, Mr. Vos was re-hired by CN to work at BC Rail, its newly acquired subsidiary, first an apprentice and, if he qualified which he did, as a full-time Heavy Duty Mechanic. He is currently employed in this capacity. However, when he was terminated at CN in October 2004 he lost 23 years of seniority, enhanced vacation entitlement, extended health benefits and had to start a new pension plan. The remedy he seeks in his memorandum of argument is the restoration of these employment rights he lost on termination of employment (see amended memorandum of argument filed October 29, 2009 under Order requested paragraph 10; see also certified tribunal record page 22, 4th paragraph).

[4] Under the ES Agreement, the following conditions applied:

i. The ESUB benefits (principally a percentage of his salary) had a three year term;

ii. Mr. Vos had to remain available for work recall. If he was recalled for temporarily work at CN (as he was for two short periods in 2001 and 2002) or obtained temporary work with another employer (which he did not), payment of the ESUB benefits would be suspended while he was receiving a salary but those benefits would be reinstated when his work period ended.

iii. If Mr. Vos was not recalled for work or was unable to obtain work with another employer for a continuous period of two years and had been in receipt of ESUB three years, his ESUB benefits would lapse and CN was entitled to terminate him as an employee. Those circumstances were met in October 2004 when he was terminated by CN.

iv. The suspension of the ESUB benefits when working on lay off status had the practical effect of pushing out the date when that employee could be terminated. For example, if a CN employee on ESUB benefits was laid off on June 1, 2001 and was not recalled or found other work that person could be terminated on June 1, 2004 because the ES clock was always ticking. However, if that person found work for one year CN could not terminate him before June 1, 2005 because the ES clock would have stopped ticking during that period of one year when he was not receiving ESUB benefits.

[5] During the time he was receiving ESUB benefits, Mr. Vos was hospitalized twice on account of bipolar mood disorder and depression. Those periods were from November 24, 2003 to December 2003 and from July 1, 2004 to August 4, 2004. He claimed not to be able to work from

just prior to his first hospitalisation until after his release from his second hospitalization (a period of approximately 10 months). He could not, he claims, stop the ES clock from ticking.

[6] After his termination by CN and rehire at BC Rail, Mr. Vos, on May 27, 2005, wrote a letter to CN concerning his dental benefits in which he indicated that just before his October 2004 termination, he had just been released from hospital, and because of the medication, was unable to care for many of his affairs. He added "In addition and unfortunately for me, due to my disability, I was unable to extend my ES benefits by securing employment outside de company for the 3 years of my lay off" (emphasis added). Moreover, he added in his letter the following:

> I believe this further advantage offered to employees of extending E.S. benefits by finding work outside the company to be discriminatory in nature against people with a medical disability. As a result of my mental disability, I was unable to extend my E.S. benefits and subsequently was cut of my benefits in Oct 2004.
>
> Had there been no lapse in my service time my dental would have carried out without interruption. I want my service uninterrupted from October 2004 to February 2005 so my benefits will continue. I appreciate any assistance I can get in resolving these issues.
>
> [Emphasis added]

[7] On October 3, 2005, Mr. Vos filed his complaint with the CHRC. In his complaint he wrote:

> On Oct 04 2004 my employment was terminated due to the fact I had exhausted my ES benefits. I believe CN's ES policy to be discriminatory and I grieved this termination with limited results. I returned to work as a new employee on Feb 14 2005 loosing [*sic*] 23 years service, vacation entitlement as well as extended health benefits and had to start a new position. Due to my illness I was unable to secure employment outside the company, which would extend my ES benefits beyond three years, which would have bridged me from October 7, 2004 termination until my recall on February 14, 2005 preserving all my benefits, seniority, vacation

> entitlement reinstated as well as credit for the six weeks vacation I had taken over the course of my ES.
>
> I believe CN's ES policy is discriminatory against people with disabilities or illness that may limit or restrict ability to extend their employment. I further believe that people with disabilities or illness do not have the same opportunity as able-bodied employees to extend benefits.
>
> [Emphasis added]

[8] In February 2006, the CHRC decided not to deal with his complaint because the applicant had not exhausted the grievance or review procedures available to him. The CHRC reactivated the consideration of his complaint in May 2007 with the appointment of an Investigator who interviewed by telephone Mr. Vos on December 10 and 11, 2007; interviewed via telephone Ms. Patricia Payne, CN's Human Resources Manager on December 21, 2007 and in 2008 on January 14 and February 11. CN's Director of Human Resources, Douglas Fisher was interviewed on January 14, 2008. The Investigator prepared a preliminary report and invited comments from the parties. The Certified Tribunal Record (CTR) shows Mr. Vos provided his comments in writing to the Investigator but CN did not. On February 12, 2008, the Investigator submitted her report to the CHRC in which she recommended pursuant to paragraph 44(3)(b)(i), Mr. Vos's complaint be dismissed. At the beginning of her report the Investigator identified sections 7 and 10 of the Act as relevant legislative provisions.

II. Relevant statutory scheme

[9] Before summarizing the Investigator's report it is useful to have in mind sections 7, 10 and 15 of the Act which I set out in both official languages in the Annex to these reasons.

[10] Paragraph 44(3)(b) of the Act, upon which CHRC relied to dismiss Mr. Vos's complaint, reads:

Report	**Rapport**
44. (3) On receipt of a report referred to in subsection (1), the Commission	**44. 3)** Sur réception du rapport d'enquête prévu au paragraphe (1), la Commission :
[…]	[…]
(b) shall dismiss the complaint to which the report relates if it is satisfied	b) rejette la plainte, si elle est convaincue :
(i) that, having regard to all the circumstances of the complaint, an inquiry into the complaint is not warranted, or	(i) soit que, compte tenu des circonstances relatives à la plainte, l'examen de celle-ci n'est pas justifié,
(ii) that the complaint should be dismissed on any ground mentioned in paragraphs 41(c) to (e).	(ii) soit que la plainte doit être rejetée pour l'un des motifs énoncés aux alinéas 41c) à e).
[Emphasis added]	

III. The Investigator's Report

[11] The Investigator under the heading "Complaint" identified four issues. I only need to deal with two of them as relevant:

A. Whether or not the respondent refused to accommodate the complainant on the ground of disability (bipolar disorder and depression) resulting in premature termination of his employment and then failed to give him credit for his previous service when they rehired him six months later.

B. Whether or not the respondent pursues policies and practices that discriminate against disabled employees in receipt of Employment Security benefits.

[12] Under the heading "Investigation Process", the Investigator set out four steps in the investigation of the complaint. Only steps 2 and 3 are relevant to this case. They are as follows:

> Step 2:
>
> 3. The investigation will examine whether there is support for the complainant's allegation of a failure to accommodate by considering:
>
> a. did the complainant require accommodation for reasons related to one or more prohibited grounds of discrimination;
> b. did the complainant communicate his/her need for accommodation to the respondent or should the respondent ought to have known of his/her need for accommodation from the circumstances;
> c. did the complainant cooperate with the respondent in the search for accommodation; and
> d. was the request for accommodation denied.
>
> Step 3:
>
> 4. Depending upon the investigator's finding in Step 2, then the investigation may also consider:
>
> a. does the respondent rely on a policy, rule, practice, or standard as the basis for the refusal to accommodate;

> b. was policy, rule, practice or standard adopted for a purpose that is rationally connected to the performance of the job by considering:
> i. What is the purpose of the policy?
> ii. What aspect of the job is it specifically related to?
> c. is the policy, rule, practice or standard based upon an honest and good faith belief that it is necessary to the fulfilment of that legitimate work-related purpose by considering:
> i. How was the policy, rule, practice or standard developed?
> ii. What other options were considered and rejected? Why?
> d. is the policy, rule, practice or standard reasonably necessary to achieve the legitimate work-related purpose by considering:
> i. What efforts have been taken to accommodate?
> ii. Does the evidence show that it is impossible to accommodate the complainant without undue hardship, taking into consideration the factors of cost, or risk to health and safety?
>
> [Emphasis added]

[13] I set out below the principal findings and answers the Investigator gave to the questions she said were relevant.

A. *Step 2*

[14] Under the heading "the Investigation" the Investigator set out her findings and made the following determination to the question "Did the complainant require accommodation for reason related to a disability?":

> Findings:
>
> 22. The complainant states he required accommodation in the form of disability benefits because he was unable to work as a result of bipolar mood disorder and depression for the approximate period November 2003 to August 2004. The complainant does not have

> medical documentation to support his position, but states he can obtain it if required.
>
> [Emphasis added]

[15] To the question in step 2 "Did the complainant communicate his need for accommodation to the respondent, or should the respondent have known his need for accommodation from the circumstances?", the Investigator found:

> 38. The complainant states he informed Ms. Payne of his disability and requested sick/disability benefits during a telephone conversation in November or December 2003. He states she told him he was not entitled to sick/disability benefits because he was on ES at the time. He did not obtain or provide medical documentation regarding accommodation requirements for the period November 2003 to August 2004 because Ms. Payne told him he was not entitled to benefits. He states he did not inform the respondent he required disability accommodation after his 2003 discussion with Ms. Payne for fear it would not recall him if a work recall arose.
>
> 39. Ms. Payne states the complainant did not inform her he was ill or required disability benefits and she did not tell him he was not entitled as alleged. She states that if the complainant had informed her he was unable to work due to disability, she would have told him to submit a claim for disability benefits the same as a working employee.
>
> 40. There is no documentation evidence to show the respondent was aware of the complainant's disability, accommodation requirement or inability to work while he was in receipt of ES benefits.
>
> [Emphasis added]

[16] The questions and answers to the final two questions posed in Step 2 are:

> A. Did the complainant cooperate with the respondent in the search for accommodation?

Answer: This issue is not in dispute. What is in dispute is whether or not the complainant notified the respondent that accommodation was required.

B. Was the complainant's request for accommodation denied?

Answer: The issue is not in dispute. What is in dispute is whether or not the complainant notified the respondent that accommodation was required.

B. Step 3

[17] The Investigator's Step 3 is entitled "Policy" and the question she framed was "Did the respondent rely on a policy, rule, practice or standard as the basis for the refusal to accommodate or did the policy never became relevant to his particular situation?" She framed this question on the basis that Mr. Vos' position on this issue was:

> The complainant alleges the respondent's policy is discriminatory to employees who become ill while on ES because there are no allowances for these employees to access disability benefits and have their ES held in abeyance while they are receiving disability benefits.
>
> [Emphasis added]

[18] The Investigator then outlined the interviews conducted with two CN officials (Ms. Payne and Mr. Fisher). She found that:

> The evidence shows that Ms. Payne, the Human Resources contact for the complainant, believed he would be entitled to disability benefits while on ES if he applied and met medical requirements as determined by the respondent's insurance carrier. Ms. Payne states that if the complainant had informed her of his circumstances and/or requested information regarding disability benefits, she would have informed him accordingly.
>
> The evidence also shows Ms. Payne's understanding was incorrect. The complainant was not entitled to disability benefits while he was

> not actively working. However, this policy was not relied upon as the basis of refusal to accommodate. The respondent states it never refused as it was not aware of the complainant's requirement for disability accommodation.
>
> [Emphasis added]

[19] To the questions "What are the positions of the parties with respect to an appropriate remedy to the complaint, if the parties do take a position? What remedies may be available to the parties?", the Investigator answered:

> The complainant requests that he be granted disability benefits for the period he was ill while on ES which would then bridge him from the time his employment was terminated in October 2004 to the time he was hired as a new employee in February 2005. He requests his medical and dental benefits, pension, vacation, and seniority all be reinstated as well as credit for the six weeks vacation he has taken over the course of his ES.
>
> The respondent states that it was not notified of the complainant's illness while he was on ES at the time the illness occurred, before the complainant's ES benefits ran out and his employment was terminated in October 2004, or when it hired the complainant again in February 2005. It states it was not notified of the complainant's illness while on ES until it received a letter form the complainant dated May 27, 2005.
>
> [Emphasis added]

[20] The Investigator's Report was amended by CHRC's Manager of Investigations in the following circumstances.

[21] Her original recommendation to the CHRC in respect of paragraph 44(3)(b)(i) were:

> It is recommended, pursuant to section 44(3)(b)(i) of the *Canadian Human Rights Act*, that the Commission dismiss the complaint because:

- the evidence does not establish the respondent was aware of the complainant's accommodation requirement or that the complainant provided the respondent with medical evidence regarding a request for accommodation.

- the evidence shows the complainant was not entitled to disability benefits while he was not actively working in accordance with the provisions of the Enhanced Supplemental Unemployment Benefits package he selected;

[22] The Investigator's report is dated February 12, 2008. That report was amended by the Manager of Investigation at the CHRC who advised Mr. Vos by letter dated April 15, 2008, he had noticed the Investigation Report recommended in paragraph 64 "does not address the allegation of a discriminatory policy or practice" and "therefore, I have amended the Investigation Report to add the following bullet to paragraph 64: the evidence does not establish that the respondent pursues policies or practices that discriminate against disabled employees in receipt of Employment Security benefits" [Emphasis added].

[23] The last paragraph of the Manager's letter to Mr. Vos reads:

> The complaint form, the investigator's report and submissions which we receive from the parties will be submitted to the Commission at one of its upcoming meetings. After reviewing these documents, the Commission will make a decision on the disposition of the case. The Commission can accept or reject the recommendation in the report. You will be advised of the Commission's decision as soon as it is rendered.

[24] I note the materials contained in the CTR of documents which were before the CHRC when it made its decision did not contain the letter of April 15, 2008.

IV. The position of the parties

A. *The applicant*

[25] The applicant's principal issue is that the ES Agreement is invalid because it is systematically discriminatory against disabled employees; the Investigator and the CHRC erred in failing to investigate that allegation. He states the ES Agreement contains specific provisions to protect the rights and benefits of able bodied employees but contains no provisions to protect the rights and benefits of employees who become disable while on ES.

[26] The reason this is so, Mr. Vos argues, is because the ES Agreement specifically states ES status employees can suspend their ES clock from ticking "by the act of finding work and thereby extend their benefit period". He argues this provision in the ES Agreement provides a method for able bodied employees on ES status to protect their employment rights and benefits while on ES which is not the case if an employee becomes disabled and unable to work while on ES. He submits there is no way for the disabled employee to stop his ES clock thereby and maintain the same employment benefits as able-bodied employees because employees disabled while on ES are unable to work during that time. In short, a disabled employee will lose his/her employment benefits on termination (seniority etc) while able-bodied employees, who by definition are able to work, may not. In sum, Mr. Vos submits the Investigator misconstrued his case and the CHRC erred in accepting her views and recommendations.

[27] Mr. Vos also challenges the thoroughness and neutrality of the Investigator's report.

B. *The CN*

[28] During oral argument counsel for CN advanced the following propositions in support of the Investigator's recommendation that Mr. Vos complaint should be dismissed. Moreover, the CHRC's decision to accept the recommendation was reasonable:

(1) Prior to his termination under the ES, Mr. Vos never informed anyone at CN he had been hospitalized, could not work for a period of time and needed accommodation to stop the ES clock from ticking. The first time CN knew anything was via Mr. Vos's May 27, 2005 letter;

(2) If Mr. Vos had informed CN of his disability and need for accommodation, CN would have attempted to accommodate him notwithstanding the fact the ES contains no procedure to stop the ES clock from ticking. No written procedure for accommodation was necessary because the Act has quasi-constitutional status which obliged CN to attempt to accommodate his disability to fit his particular circumstances. However, since Mr. Vos never asked for accommodation there is no way of knowing whether CN would be able to achieve accommodation, which would depend on a number of factors such as the nature of his disability and his inability to work.

(3) Counsel for CN asserts Mr. Vos is asking the Court to assess the ES Agreement in a vacuum i.e. without the ES Agreement having been put to the test. This is particularly so because there is nothing in the ES about disability and nothing in that agreement which says a disabled person cannot stop the ES clock from ticking. In

sum, Mr. Vos assumes CN would have denied him accommodation. CN was not given a chance to accommodate him despite Ms. Payne's evidence she believed he had a right to make application to CN for accommodation.

(4) He submits the factual basis for Mr. Vos' allegations were very thoroughly investigated but that the circumstances of his complaint (no request by Mr. Vos for accommodation) did not allow the investigator to analyse CN's policy. Simply put, without a set of facts, CN's policy could not be reviewed (transcript, page 52 and 53).

(5) He submits CN's ES policy cannot be analysed in the abstract. Facts are needed to assess the policy; that policy had to have been put to a test but was not.

(6) Mr. Vos' complaint of discrimination is not tenable because he presumes that all disabled employees are entitled to stop the ES clock for that reason alone, that any disability prevents an individual from working, even without medical confirmation, and that an able-bodied employee can automatically find a job if he wants one (transcript, page 80 and 81).

(7) In terms of the thoroughness of the investigation and its neutrality, counsel for CN argues the fact certain witnesses were not interviewed does not demonstrate that the investigator ignored crucial evidence and Mr. Vos' allegation of bias is not supported by the evidence.

[29] It should be mentioned at this point that CN's position on this judicial review application was supported by the affidavit of Ms. Payne dated December 16, 2008 on which she was cross-examined by answering written questions posed by Mr. Vos.

[30] In her December 16, 2008 affidavit, she writes at paragraph 9 the following:

> The essence of his complaint, as I understand it, is that he was not eligible to receive weekly indemnity benefits for a short or a long term disability from CN for a period of months in the year 2004 when he was receiving ESUB benefits; He now claims to have been disabled from working due to a mental illness for a period of months in 2004.
>
> [Emphasis added]

[31] At paragraph 12 of her affidavit, she confirms that between the time Mr. Vos was laid off to the time he was terminated she has numerous discussions with him and with his Union representative, John Burns, concerning several benefit issues but none relating to "his alleged inability to work" adding "at no time was there even a mention that Mr. Vos had allegedly fallen ill and was hospitalized" also adding "no request for accommodation was even submitted during his ES duration and no enquiries were made as to his eligibility for Short Term Disability payments".

[32] She further deposed that Mr. Vos never, at the relevant time, produced to CN evidence of his illness, hospitalisation or disability. She acknowledges the first and only information she had about his alleged disability was the May 27 2005.

[33] She comments on Mr. Vos' affidavit in support of his judicial review application and expresses her disagreement with him. She does acknowledge the receipt from B.R. McDonagh, National Representative Rail Division CAW Canada, which she says should be dated January 2, 2006. In that letter, Mr. McDonagh says he was aware Mr. Vos had been sick and hospitalized at least twice over the course of the ES term "but did not receive a response to his allegation that the CN ES policy is discriminatory in that it did not allow for an extension of benefits when an individual falls sick".

[34] Her answers to questions 13, 14 and 23, were:

> **Question 13:** Where are the procedures located in the ES agreement for a disabled employee to allow in applying for the accommodation that you suggest is available?
> **Answer to Question 13:** My affidavit makes no such suggestion.
>
> **Question 14:** What actual accommodation, under the ES agreement, could the Respondent supply to stop a disabled employee's ES clock, since the Respondent has admitted that such disabled employee has no eligibility for weekly indemnity or disability benefits?
> **Answer to Question 14:** You were ineligible for disability benefits while not actively at work further to the benefit options chosen upon your layoff in 2001, rather than due to the ES agreement.
>
> **Question 23:** Finally, after reviewing your affidavit I have noted that you failed to address any of the concerns I have raised over the ES policy. Ms. Payne, where is your actual documentation evidence that the ES policy is not structurally discriminatory against employees who become disabled while on ES?
> **Answer to Question 23:** In light of your ineligibility for disability benefits at the time of your layoff, it remains the position of the Respondent that the structure of the ES policy itself was not discriminatory.

V. Some applicable principles

[35] At this juncture, it is appropriate to set out some applicable principles established in the jurisprudence relating to CHRC investigation of discrimination complaints, its role in that task, in particular, when exercising its powers under paragraph 44(3)(b)(i) of the Act and the required test or steps in the determination of a breach of section 10 of the Act.

[36] First, it is well accepted when the CHRC adopts an investigator's recommendations and provides no, or only brief, reasons (as in the case here) the investigator's report is treated as constituting the Commission's reasoning for the purpose of the screening decision under section 44. The consequence in that if the report which the CHRC adopted is flawed, it follows the CHRC's decision itself is equally flawed (see, *Sketchley v. Canada (Attorney General)*, 2005 FCA 404, [2005] F.C.J. No. 2056 at paras. 37 and 38 ["*Sketchley*"]).

[37] Second, the test to be applied by the CHRC when exercising its power under paragraph 44(3)(b)(i) of the act namely "to dismiss a complaint to which the report relates if it is satisfied having regard to all of the circumstances an inquiry [by the Canadian Human Rights Tribunal] (the Tribunal) into the complaint is not warranted" is also settled with the leading cases being *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Human Rights Commission)*, [1989] 2 S.C.R. 879 and *Bell v. Canada (Canadian Human Rights Commission); Cooper v. Canada (Canadian Human Rights Commission)*, [1996] 3 S.C.R. 854 (per La Forest) [*Cooper*].

[38] This test was developed by the Supreme Court of Canada, recognizing the Commission's function under the Act is not as an adjudicative body (that is the role of the Tribunal) but the administrative statutory body which administers the Act and, in particular, is the statutory body entrusted with accepting, managing and processing complaints of discriminatory practices (*Cooper*, above, at page 889).

[39] Justice Gérard La Forest framed the test in the following way at page 891 in *Cooper*:

> The Commission is not an adjudicative body; that is the role of a tribunal appointed under the Act. When deciding whether a complaint should proceed to be inquired into by a tribunal, the Commission fulfills a screening analysis somewhat analogous to that of a judge at a preliminary inquiry. It is not the job of the Commission to determine if the complaint is made out. Rather its duty is to decide if, under the provisions of the Act, an inquiry is warranted having regard to all the facts. The central component of the Commission's role, then, is that of assessing the sufficiency of the evidence before it. Justice Sopinka emphasized this point in Syndicat des employés de production du Québec et de L'Acadie v. Canada (Canadian Human Rights Commission), [1989] 2 S.C.R. 879, at p. 899:
>
> > The other course of action is to dismiss the complaint. In my opinion, it is the intention of s. 36(3)(b) that this occur where there is insufficient evidence to warrant appointment of a tribunal under s. 39. It is not intended that this be a determination where the evidence is weighed as in a judicial proceeding but rather the Commission must determine whether there is a reasonable basis in the evidence for proceeding to the next stage.

[40] Third, it is also recognized in this jurisprudence there are two fundamentally separate phases to determine whether a complaint of discrimination has been made out before the adjudicative tribunal (see *British Columbia (Public Service Employee Relations Commission) v. British*

Columbia Government and Service Employees' Union (B.C.G.S.E.U.) (Meiorin Grievance), [1999] 3 S.C.R. 3 [“*Meiorin*”]).

[41] In the first phase of a section 10 complainant, the complainant has the burden of establishing a “*prima facie* case of discrimination”, a burden which is met if that case “covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant’s favour in the absence of an answer from the respondent-employer” (see *Sketchley*, above, at para. 86). If a complainant satisfies his/her burden, the second phase is engaged where the employer has the onus to justify that discrimination as a *bona fide* occupational requirement (BFOR).

[42] In *Sketchley*, above, Justice Allen MartinLinden explained at paragraph 87 the three step process which an employee had to establish in order to make out a BFOR:

> 87 A BFOR is not a "cleansing agent", but a defence to a prima facie case that relieves the employer from liability. (See Robertson J.A. in Canada (Human Rights Commission) v. Toronto Dominion Bank, [1998] 4 F.C. 205 (F.C.A.) at para. 130.) A BFOR is established by proof on a balance of probabilities of the requisite elements as set out in the Meiorin test: first, that the purpose is rationally connected to the performance of the job; second, that the standard was adopted in an honest and good faith belief that it was necessary to the fulfilment of the legitimate work-related purpose; and third, that the standard is reasonably necessary to accomplish that purpose, in that accommodation is not possible short of undue hardship (Meiorin, supra at para. 54).
>
> [Emphasis added]

[43] Fourth, discrimination is not defined in the Act. Inevitably, the question arises as to what it means. In *Law Society British Columbia v. Andrews*, [1989] 1 S.C.R. 143 at page 173, the Court adopted the definition of discrimination which Justice Walter Tarnopolsky had set out in his textbook:

> What does discrimination mean? The question has arisen most commonly in a consideration of the Human Rights Acts and the general concept of discrimination under those enactments has been fairly well settled. There is little difficulty, drawing upon the cases in this Court, in isolating an acceptable definition. In Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd., [1985] 2 S.C.R. 536, at p. 551, discrimination (in that case adverse effect discrimination) was described in these terms: "It arises where an employer ... adopts a rule or standard ... which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force". It was held in that case, as well, that no intent was required as an element of discrimination, for it is in essence the impact of the discriminatory act or provision upon the person affected which is decisive in considering any complaint. At page 547, this proposition was expressed in these terms:
>
> > The Code aims at the removal of discrimination. This is to state the obvious. Its main approach, however, is not to punish the discriminator, but rather to provide relief for the victims of discrimination. It is the result or the effect of the action complained of which is significant. If it does, in fact, cause discrimination; if its effect is to impose on one person or group of persons obligations, penalties, or restrictive conditions not imposed on other members of the community, it is discriminatory.
>
> […]
>
> [Emphasis added]

[44] Fifth, it is also settled law the rules of procedural fairness apply to a decision by the CHRC to dismiss a complaint. The leading case is that of *Slattery v. Canada (Human Rights Commission) (T.D.)*, [1994] 2 F.C. 574 (T.D.) [*Slattery*], a decision of Justice Marc Nadon, then a judge of the Trial Division. The principles in *Slattery* have been adopted by the Federal Court of Appeal in a number of cases including *Sketchley* and *Canadian Broadcasting Corp. v. Paul*, 2001 FCA 93, [2001] F.C.J. No. 542. The content of procedural fairness in the conduct of an investigation which the CHRC adopts are measured by two factors: (1) neutrality and (2) thoroughness. Neutrality in the context of this case means absence of biais or presence of an open mind by the Investigator. Thoroughness stems from the essential role that investigators play in making recommendations to the CHRC and pertains to the conduct of the investigation. One instance of lack of thoroughness is the failure to investigate crucial evidence. Justice Linden in *Sketchley* put it this way at paragraph 38:

> This approach is not, as the appellant claims, incompatible with the well-accepted notion that flaws in the investigator's Report will not vitiate a Commission's decision, so long as such flaws are not so fundamental that they cannot be remedied by further responding submissions by the parties (Slattery v. Canada (Human Rights Commission) (1994), 73 F.T.R. 161, [1994] 2 F.C. 574 (T.D.), affirmed (1996), 205 N.R. 383 (C.A.) [Slattery]). A reviewing Court's focus under this approach ultimately remains upon the Commission's screening decision, which is reviewed with a high degree of deference with respect to fact-finding activities: only errors evincing an error of law, patent unreasonableness in fact-finding, or a breach of procedural fairness will justify the intervention of a Court on review (Bell Canada, supra at para. 38; Connolly v. Canada Post Corp., [2002] F.C.J. No. 242, 2002 FCT 185 (T.D.) at para. 28, affirmed (2003), 238 F.T.R. 208, 2003 FCA 47 (C.A.) [Connolly]). Such errors belong, virtually by definition, to the category of investigative flaws that are so fundamental that they cannot be remedied by the parties' further responding submissions. The applicable standard for reviewing investigative thoroughness is therefore equivalent to that which applies on review of the

> Commission's decision under section 44(3). As a result, there is no necessary inconsistency if, in appropriate circumstances like those of the case at bar, the investigator's Report is treated as constituting the Commission's reasoning.

VI. Standard of review

[45] It is well known the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, reformed the standard of review analysis, by eliminating the illusive standard of patent unreasonableness, thus reducing from three to two standards of review, namely, correctness and reasonableness.

[46] What is the appropriate standard of review of a decision by the CHRC to dismiss a complaint of discrimination on the basis a further inquiry (by the Tribunal) is not warranted taking into account all of the facts? *Dunsmuir*, above, teaches that a reviewing court in considering an application for judicial review need not conduct a fullsome standard of review analysis if the jurisprudence prior to that case had satisfactorily decided the issue which is the situation here.

[47] In *Sketchley*, Justice Linden noted while the application judge had accepted the view of the parties the appropriate standard of review was reasonableness the judge in fact applied the standard of correctness to decide the two questions of law determinative before him. Those questions were (1) whether the CHRA had erred in deciding the complainant had not made out a case of *prima facie* discrimination in respect of Treasury Board's policy on leave without pay for medical reasons and (2) whether the decision of the Department of Human Resources and Development Canada had

breached procedural fairness in determining the question whether it failed had failed to accommodate his disability.

[48] Justice Linden held, in the particular circumstances of the case before him, the judge was right to have applied the correctness standard to these two questions. He viewed as a question of law whether the CHRC erred in determining the complainant had not made out a case of *prima facie* discrimination. Issues of procedural fairness, according to the jurisprudence, were also to be decided on the correctness standard. Justice Linden, however, at paragraph 44 of his reasons, noted that generally the jurisprudence had applied the reasonableness standard to a review the merits of a decision of the CHRC to dismiss a complaint because of the well accepted view that, in such cases, the CHRC enjoys a very high level of deference unless there is a breach of procedural fairness or unless the decision is not sustainable on the evidence before it. See *Hutchinson v. Canada (Minister of the Environment)*, 2003 FCA 133, [2003] F.C.J. No. 439, at paras. 64 to 67 [*Hutchinson* cited to F.C.], where Justice Denis Pelletier applied the reasonableness standard to the determinative questions before him having previously ruled the investigation had been adequately carried out on the *Slattery* principles of thoroughness and partiality (see paragraph 45 to 61).

[49] In *Sketchley*, Justice Linden cautioned that the level of deference owed when the CHRC dismisses a complaint is different that the level of deference owed when it decides to send a complaint to the Tribunal for inquiry and decision. He wrote the following at paragraphs 79 and 80:

> 79 It is also important in this context to distinguish between screening decisions of the Commission to dismiss a complaint pursuant to section 44(3)(b), and decisions to accept a complaint and refer it to a Tribunal pursuant to section 44(3)(a). In decisions of the

> latter type, the Commission is not acting as an adjudicative body making conclusive determinations as to whether a complaint has been made out (Cooper v. Canada (Human Rights Commission), [1996] 3 S.C.R. 854 at para. 54). In these circumstances, the "legal assumptions made by the Commission in deciding to request the formation of a Tribunal do not amount to decisions as to the state of the law or its impact on those concerned" (Zündel v. Canada (Attorney General) (2000), 267 N.R. 92 at para. 4).
>
> 80 However, when the Commission decides to dismiss a complaint, its conclusion is "in a real sense determinative of rights" (Latif v. Canadian Human Rights Commission, [1980] 1 F.C. 687 at para. 24 (F.C.A.) [Latif]). Any legal assumptions made by the Commission in the course of a dismissal decision will be final with respect to its impact on the parties. Therefore, to the extent that the Commission decides to dismiss a complaint on the basis of its conclusion concerning a fundamental question of law, its decision should be subject to a less deferential standard of review.

[50] In this case, for reasons which I explain in the conclusion to these reasons, the standard of correctness applies to questions of law and procedural fairness and the reasonableness standard applies to the other questions.

VII. Conclusions

A. *Preliminary issue*

[51] During oral argument, Mr. Vos referred to documentation which was not in the CTR and which was not before the Investigator or the CHRC. I took the matter into reserve. This documentation cannot be accepted (see *Hutchison*, above, at para. 44).

B. *Discussion and conclusions*

[52] In my view, there are a number of reasons why this judicial review must succeed.

[53] First and foremost, the Investigator's report of employer/employee discrimination complaint on the prohibited ground of disability was fatally flawed. The Investigator did not examine nor decide whether Mr. Vos had discharged his burden of establishing a *prima facie* case of discrimination in respect of the ES clause. That clause requires a laid off employee to have worked in order to stop the ES clock from arriving at its three year cut off date which enables CN to terminate an employee who, like Mr. Vos, was unable to work on account a disability which is not the case of an able-bodied laid off worker able to work.

The answer to that question was essential before the burden shifted to CN to establish its work rule was a *bona fide* occupational requirement which the jurisprudence establishes has three components the third one being the employer, in order to demonstrate the work rule is reasonably necessary, must show it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship on the employer (see *Meiorin*, above, at paragraphs 55 and 56). None of this required analysis was engaged in because the Investigator concluded CN had not relied on the work rule "as the basis of a refusal to accommodate" because CN was not aware of Mr. Vos' requirement for disability accommodation. Even if the statement was correct, in my view, was not sufficient to complete a proper BFOR analysis.

[54] Second, the Investigator never identifies what is the relevant time frame to fix CN's knowledge of Mr. Vos' need for accommodation. The record shows CN knew that fact at least from May 27th 2005 when Mr. Vos sent his letter to CN. CN certainly knew that fact when he made his

complaint to the Tribunal on October 3rd 2005. That knowledge of what employment rights he lost on termination and the need for accommodation by restoring his lost employment benefits on termination were also spelled out in his complaint and further reiterated by Mr. McDonagh's, CAW's Rail National Representative, letter to Ms. Payne of CN dated January 2nd 2006. In this context, the fact that CN did not know prior to termination Mr. Vos had been ill and hospitalized has no relevance to CN's defence particularly when CN's counsel did not show this Court in what manner CN could have accommodate him by stopping the ES clock. This point is enhanced by the CHRC itself which did not rely on a third ground which the Investigator had advanced to the CHRC for dismissing his complaint namely "the evidence does not establish the respondent was aware of the complainant's accommodation requirement or that the complainant provided the respondent with medical evidence regarding a request for accommodation". Put another way, it would appear that the CHRC itself did not accept that knowledge of his disability and need for accommodation were relevant factors. The Court's view is substantiated by judicial and arbitral decisions. (For example, see a recent decision by Justice Anne L. MacTavish of this Court, *Canada (Attorney General) v. Walden*, 2010 FC 490, wherein the Court affirms that knowledge that a practice is discriminatory is not relevant in regard to a determination of liability under s.10 of the Act but goes to remedy. It should be noted this decision is currently the subject of an appeal to the Federal Court of Appeal; See also, on the relevancy of knowledge of a disability, *Ottawa Civic Hospital and O.N.A. (Hodgins), Re*, 48 L.A.C. (4th) 388 (OLRB)).

[55] Third, the CHRC reliance on the fact Mr. Vos was not entitled to disability benefits when he was not actively working (which was in accordance with the ESUB package he selected) to dismiss

his complaint is also problematic. Neither the Investigator nor the CHRC explain why this factor justifies a dismissal of his complaint particularly since the Investigator at paragraph 51 of her report concludes CN did not rely on this factor. I find in the circumstances relying on this reason constitutes a reversible error as it is without foundation and certainty could not be advanced as a BFOR.

[56] In any event, the investigator misapprehended the accommodation Mr. Vos was seeking. He was not seeking disability benefits *per se* but as a method to stop the ES clock from ticking.

[57] Fourth, the second reason relied upon by the CHRC to dismiss Mr. Vos' complaint is its conclusion that the evidence does not establish that CN pursues policies or practices that discriminate against disabled employees in receipt of Employment Security Benefits. This is without foundation for the simple reason that the Investigator never made this finding. The finding the Investigator made was that the policy never became relevant to the case she was investigating. As noted, this reason was added to the Investigator's recommendations by the Manager of Investigations. Nowhere in the Investigator's report is there any analysis whether Mr. Vos had established a *prima facie* case of discrimination in respect of the work rule in the ES Policy and the inability for a disabled person to stop the ES clock from ticking.

[58] In the circumstances, I do not propose to comment on the issue of procedural fairness.

[59] In sum, the case before me has many similarities to the *Sketchley* case and I also find support for my conclusions in the Alberta Court of Appeal's decision in *United Food and Commercial Workers, Local 401 v. Alberta Human Rights and Citizenship Commission*, 2003 ABCA 246, [2003] A.J. No. 1030.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this judicial review application is allowed, the CHRC's decision is set aside and the matter of the applicant's complaint is returned to the CHRC for redetermination. The applicant is entitled to his taxable disbursements in the conduct of these proceedings.

"François Lemieux"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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