

Federal Court



Cour fédérale

**Date: 20130626**

**Docket: T-1862-11**

**Citation: 2013 FC 711**

**Toronto, Ontario, June 26, 2013**

**PRESENT: The Honourable Madam Justice Heneghan**

**BETWEEN:**

**CHRISTINA LOUISE SHAW**

**Applicant**

**and**

**ROYAL CANADIAN MOUNTED POLICE**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

**I. Introduction**

[1] Ms. Christina Louise Shaw (the “Applicant”) seeks judicial review of a decision made on October 6, 2011, by the Canadian Human Rights Commission (the “CHRC” or “Commission”) dismissing her complaint that the Royal Canadian Mounted Police (the “RCMP” or the “Respondent”) had discriminated against her on the grounds of disability, contrary to subsection 3(1) and paragraph 7(b) of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (the “Act”).

## **II. Background**

[2] The Applicant was employed by the RCMP from an unknown date in 2003 until May 6, 2009. She began her employment on a contract, as a temporary Information Administrator (“IA”). In 2008, she applied for a permanent position as an IA. She was successful at all stages of the application process, except for negative performance reviews she received from the individuals whose names she had provided as references.

[3] The Applicant was told on December 17, 2008, that she would be placed on six months probation. The Respondent was not satisfied that the Applicant’s performance sufficiently improved during that six month period. In May 2009, her contract was not extended.

[4] The Applicant filed her complaint with the Commission in February 2010, alleging that she had received adverse differential treatment that resulted in denial of employment due to her disability. She claimed to suffer from severe migraine headaches, anxiety and depression.

[5] The Commission assigned an investigator to look into the complaint. An investigation was conducted over the period March 2010 to June 2011. The investigator prepared a report, dated June 27, 2011, and recommended that the Commission dismiss the complaint.

[6] In a decision dated October 6, 2011, the Commission dismissed the complaint pursuant to subparagraph 44(3)(b)(i) of the Act, on the basis that the evidence did not appear to support the allegation that the Applicant had been denied employment on the basis of disability. The decision provided, further, as follows that:

...given all of the circumstances of the complaint, an inquiry into the complaint by the Canadian Human Rights Tribunal does not appear warranted.

### **III. Issues**

[7] The Applicant addresses three issues in her Memorandum of Fact and Law:

1. Did the Commission err in law by failing to observe the principles of procedural fairness?
2. Did the Commission base its decision on erroneous findings of fact?
3. Did the Commission err in law by failing to consider the applicable legal principles?

[8] The Respondent proposes a fourth issue: was the Commission's decision reasonable?

### **IV. Submissions**

(i) The Applicant's submissions

[9] The Applicant argues that the Commission erred by failing to observe the principles of procedural fairness and natural justice. First, she submits that it ignored material conflicts in the evidence before it and points to twenty-three examples in the investigation report, of what she claims are material conflicts in the evidence. As one example, she says that one of her former managers was aware that she had a disability. She further argues that the Commission erred by simply adopting the flawed investigation report and that its failure to address the "material omissions" amounts to a breach of procedural fairness.

[10] The Applicant submits that the investigation report lacked thoroughness. She says that the investigator failed to interview key witnesses who were vitally important to her claim of discrimination and that the Commission failed to investigate whether the Respondent had presented non-discriminatory reasons for its decision not to renew her employment contract.

[11] Finally, under this heading, the Applicant argues that the Commission did not provide adequate reasons for dismissing her complaint.

[12] The Applicant submits that the Commission based its decision on erroneous findings of fact made in a perverse and capricious manner without regard to the material before it. In this regard, she argues that the investigation report and decision contained internal inconsistencies having regard to the evidence.

[13] In particular, the Applicant refers to the allegedly divergent evidence relating to the Respondent's claim that the Applicant performed poorly.

[14] Finally, the Applicant argues that the Commission erred by failing to consider human rights jurisprudence, in particular the jurisprudence relating to the impact that a disability can have on work performance. She submits that since she indicated that she suffered from a range of symptoms that suggested depression, the Commission should have considered how these symptoms would have affected her work performance, as a person suffering from depression. In particular, she notes that her complaint alleges that there were several individuals at the RCMP who were aware of her mental illness, for example Inspector Shinkaruk.

(ii) The Respondent's submissions

[15] The Respondent argues that the investigator's report and its recommendation constitute the Commission's reasons for dismissing the complaint. Referring to the decision in *Slattery v. Canada (Human Rights Commission)*(T.D.), [1994] 2 F.C. 574 at para. 67, the Respondent argues that the Commission is not required to consider every one of the Applicant's allegations.

[16] As for the arguments concerning an alleged breach of procedural fairness, the Respondent submits that in assessing these submissions, the Court must consider the neutrality of the investigation into the complaints, the thoroughness of that investigation, and whether the parties to the complaint, that is the Applicant and the employer, were provided with an opportunity to reply to the investigator's report.

[17] In response to the Applicant's arguments that there are material conflicts in the evidence and unreasonable omissions in the Commission's reasons, the Respondent submits that those arguments are no more than assertions that are not supported by the evidence.

[18] In particular, the Respondent submits that the Commission did not err in declining to interview two of the people suggested by the Applicant. It notes that the investigator heard from eight individuals, including the Applicant, and former supervisors and coworkers. It argues that the Commission reasonably found that interviewing two more persons would not have provided any further probative or new evidence relative to the complaint.

[19] The Respondent also submits that the investigator appropriately questioned the interviewees on the topics of disability and work performance. Concerning questions about disability, the Respondent provides three examples of direct questions on the topic. The Respondent notes that the investigator asked Inspector Shinkaruk about his comments related to sick leave, and also asked three other individuals about the Applicant's disability.

[20] The Respondent submits that the Commission gave the Applicant an adequate opportunity to reply to the investigation report. It argues that when the Applicant did reply, her submissions were a repetition of allegations made in the original complaint and not substantiated by documentation.

[21] As for alleged errors of fact and law, the Respondent argues that the investigator appropriately reviewed witness statements and documents. While agreeing that the Applicant received positive performance reviews in the past, the Respondent submits that this does not conflict with the employer's later finding that the Applicant's work performance was poor.

[22] The Respondent says that the investigator adequately canvassed the question of the Applicant's disability and reasonably concluded that the reason the Applicant was dismissed was due to poor performance, rather than her disability.

## V. Discussion and Disposition

[23] The first matter to be addressed is the applicable standard of review. Issues of procedural fairness are reviewable on the standard of correctness; see the decision in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 at para. 129.

[24] Questions of fact are reviewable on the standard of reasonableness; see *Dunsmuir, supra*, at para. 51. Pursuant to paragraph 18.1(4)(d) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, findings of fact must be made with “regard for the material” before a tribunal.

[25] The Supreme Court in *Dunsmuir, supra*, para. 62 explained that a standard of review analysis is not required where the jurisprudence has already determined the appropriate standard of review. It is settled that the Commission’s decision to dismiss a complaint is reviewable on the standard of reasonableness; see the decisions in *Vos v. Canadian National Railway* (2010), 373 F.T.R. 124 at paras. 45-50, and *Balogun v. Canada (Minister of National Defence)* (2009), 345 F.T.R. 67 at para. 55.

[26] The first issue raised by the Applicant is an alleged breach of procedural fairness arising from the failure of the investigator to pay attention to the evidence submitted. By way of illustration she points to twenty-three examples in the investigation report that she characterizes as material conflicts in the evidence, including the “fact” that one of her former managers was aware that she had a disability.

[27] I am not persuaded that the investigator ignored the evidence that was before him. The investigator is not obliged to refer to all of the evidence that was submitted. The Applicant has not shown that any evidence was ignored.

[28] The Applicant's submissions about a breach of procedural fairness respecting the neutrality and thoroughness of the investigation are another aspect of her argument about a breach of procedural fairness. Insofar as these questions are to be reviewed independently, the applicable standard of review is correctness.

[29] The content of "neutrality" was reviewed in *Miller v. Canada (Canadian Human Rights Commission)* (1996), 112 F.T.R. 195 where the Court said the following at page 202:

...The basic test to insure fairness and to avoid a reasonable apprehension of bias has been enshrined in the jurisprudence: it is whether reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information, would perceive bias on the part of an adjudicator. The grounds of apprehension must be substantial. Mere suspicions are not sufficient.  
[Footnote omitted]

[30] The Applicant's complaint about a lack of thoroughness arises from the fact that two witnesses which she had suggested for interviews were not interviewed by the investigator.

[31] In *Slattery, supra*, at page 600, this Court considered the requirement of thoroughness in assessing the completeness of an investigation pursuant to the Act. Justice Nadon (as he then was) said the following:

In determining the degree of thoroughness of investigation required to be in accordance with the rules of procedural fairness, one must be mindful of the interests that are being balanced: the complainant's



and respondent's interests in procedural fairness and the CHRC's interests in maintaining a workable and administratively effective system. Indeed, the following words from Mr. Justice Tarnopolsky's treatise *Discrimination and the Law* (Don Mills: De Boo, 1985), at page 131 seem to be equally applicable with regard to the determination of the requisite thoroughness of investigation:

With the crushing case loads facing Commissions, and with the increasing complexity of the legal and factual issues involved in many of the complaints, it would be an administrative nightmare to hold a full oral hearing before dismissing any complaint which the investigation has indicated is unfounded. On the other hand, Commission should not be assessing credibility in making these decisions, and they must be conscious of the simple fact that the dismissal of most complaints cuts off all avenues of legal redress for the harm which the person alleges [*sic*].

[32] The Applicant, as complainant, had no right to choose the witnesses to be interviewed. She had the right to a thorough investigation. In *McConnell v. Canada (Human Rights Commission)*, 2005 FCA 389 at para. 8, aff'g (2004), 51 C.H.R.R. D/228 (F.C.), the Federal Court of Appeal stated that:

With respect to the alleged breach of procedural fairness by the Commission, I am of the opinion that the Applications Judge committed no reversible error in her analysis. The Applications Judge began her analysis of this issue by observing that "[t]he requirements of procedural fairness are to be assessed relative to the nature of the decision in issue" (para. 89). She then correctly identified the content of the duty of fairness appropriate in this case, as follows:

90 In the present case, the decision in issue is the discretionary, administrative decision of the Commission to dismiss the Applicant's complaint, following an investigation. The investigation was undertaken pursuant to section 41 of the Act. The investigation process is not intended to provide the full range of natural justice to a complainant. There is no obligation to interview each witness proposed by

the Applicant or to permit cross-examination of witnesses or to choose the Investigator. There are procedural matters and the Commission is entitled to control its own process subject to the requirements of fairness.

[33] In this case, the investigator interviewed seven witnesses, including one witness who was suggested by the Applicant. The Respondent submits that the investigator's decision not to interview other persons suggested by the Applicant was reasonable since those persons could not have provided new and probative evidence. In the circumstances of this complaint that decision was reasonable.

[34] The Applicant's argument that the investigator failed to address whether there was contradictory evidence regarding a record of "poor performance" is also rejected. There are several examples in the investigation report where the investigator asked interviewees directly about their awareness of the Applicant's alleged depression. I refer to the interviews conducted with Inspector Shinkaruk, Mr. Holmes and Corporal Allemekinders.

[35] In my opinion, the interviewees showed that they were aware that the Applicant was undergoing some personal trouble but their evidence does not suggest that they had particular knowledge of any medically confirmed depressive state of the Applicant nor that such knowledge affected their negative performance reviews of the Applicant.

[36] The Applicant also had the opportunity to reply to the investigation report, which she did on August 19, 2011.

[37] In the result, I am satisfied that the investigation report was conducted with an adequate degree of thoroughness.

[38] The Applicant further argues that the Commission erred in making a decision that contained fundamental internal inconsistencies relative to the evidence before it. She relies on the decision in *Kennedy v. Canadian National Railway Co.*, 2006 FC 697, to argue that the Commission cannot rely on a report that is internally inconsistent.

[39] In my view, this decision does not assist the Applicant. In *Kennedy, supra*, the Court found that the report recorded that Mr. Kennedy held more seniority than those he was seeking to replace, while at the same time the investigator found that Mr. Kennedy had less seniority.

[40] In any event, an inconsistent finding about seniority is objectively different from an apparently inconsistent performance review. The positive performance reviews provided to the Applicant are not truly inconsistent with the negative performance reviews in the present case.

[41] Any positive performance reviews that the Applicant received in the past in connection with other positions are not inconsistent with the investigator's finding that when the Applicant was under consideration for the IA position, her supervisors found her performance was poor. Although the Applicant received positive feedback from one trainer during the probationary period, this one e-mail does not overshadow the other negative reviews.

[42] The decision of the Commission meets the standard of reasonableness, that is one that “falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law”; see *Dunsmuir, supra*, at para. 47.

[43] I am satisfied, on the basis of the record, that the investigator conducted a neutral and thorough investigation of the Applicant’s complaint, including interviews of people who were familiar with the substance of the complaint and review of relevant documents. The investigator reasonably concluded that there was no basis for referring the complaint to the Commission.

[44] In its decision in *Sketchley v. Canada (Attorney General)*, [2006] 3 F.C.R. 392 at paras. 36-37, the Federal Court of Appeal held that the recommendation of the investigator concerning dismissal of a complaint can be adopted as the reasons of the Commission in its decision to dismiss a complaint. Having regard to the record before me and the submissions of the parties, I am satisfied that the Commission’s decision here meets the relevant standard of reasonableness and discloses no breach of procedural fairness or other error of law.

[45] In the result, the application is dismissed with costs to the Respondent.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** the application is dismissed with costs to the Respondent.

“E. Heneghan”  
\_\_\_\_\_  
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

**DOCKET:** T-1862-11

**STYLE OF CAUSE:** CHRISTINA LOUISE SHAW v. ROYAL CANADIAN MOUNTED POLICE

**PLACE OF HEARING:** Vancouver, British Columbia

**DATE OF HEARING:** December 12, 2012

**REASONS FOR JUDGMENT AND JUDGMENT:** HENEGHAN J.

**DATED:** June 26, 2013

**APPEARANCES:**

Ms. Kelly Slade-Kerr FOR THE APPLICANT

Mr. Graham Stark FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Hamilton Howell Bain & Gould FOR THE APPLICANT  
Employment Lawyers  
Vancouver, British Columbia

William F. Pentney FOR THE RESPONDENT  
Deputy Attorney General of Canada  
Vancouver, British Columbia