

Federal Court



Cour fédérale

**Date: 20140911**

**Docket: T-1426-12**

**Citation: 2014 FC 865**

**Ottawa, Ontario, September 11, 2014**

**PRESENT: The Honourable Madam Justice Heneghan**

**BETWEEN:**

**CLAUDIO LUBAKI**

**Applicant**

**and**

**BANK OF MONTREAL FINANCIAL GROUP**

**Respondent**

**JUDGMENT AND REASONS**

**I. INTRODUCTION**

[1] Mr. Claudio Lubaki (the “Applicant”) seeks judicial review of the decision of the Canadian Human Rights Commission (the “Commission”), dismissing his complaint of racial discrimination against his employer, the Bank of Montreal Financial Group (the “Respondent”). The complaint was dismissed by the Commission pursuant to subparagraph 44(3)(b)(i) of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (the “Act”).

## II. BACKGROUND

[2] The following facts are taken from the materials filed by the Applicant and Respondent, as well as the materials provided by the Commission pursuant to Rule 317 of the *Federal Court Rules*, SOR/98-106 (the “Rules”).

[3] A Tribunal Record was filed by the Commission under cover of a letter dated August 23, 2012. According to that letter, the documents before the Commission, prior to making its decision, were the Investigation Report, the complaint form and the submissions of the parties in response to the Investigation Report.

[4] Upon the written request of Counsel for the Respondent, the Commissioner delivered a Supplementary Record under cover of a letter dated November 1, 2012. This Supplementary Record contains “documents” that were in the possession of the Commission relative to the Applicant’s complaint. Not all of these documents were before the Commissioner when the decision was made and this material was not considered for the purpose of the within proceeding.

[5] The Applicant is employed by the Respondent in a Call Centre. He identifies himself as a Black African. He is bilingual and has assisted customers in French in the course of his employment.

[6] The Applicant began his employment with the Respondent in September 2006 as a contractual employee on a temporary basis. He was hired in July 2007 on a permanent basis as a

Call Centre Agent I. The Applicant characterizes the Agent I post as an entry level position that could lead to promotion to an Agent II position after 6 – 10 months. According to the Call Centre career ladder, after holding the position as the Agent II level, an employee could be promoted to Collector, after approximately four months.

[7] By September 2008, the Applicant was still holding the Agent I position, although others who had been hired at the same time had been promoted. The Applicant contacted the Human Resources Department of the Respondent to allege that his lack of promotion was the result of discrimination.

[8] The Human Resources Department investigated and determined that the Applicant was not the victim of discrimination. The Investigator found that the lack of promotion was attributed to the fact that the Applicant did not meet the required performance criteria. According to the Applicant, he was told, after the internal investigation, that he needed to complete Computer Based Training (“CBT”), after which he would be promoted.

[9] The Applicant completed the CBT in October 2009. He was not promoted after finishing the training. His work performance deteriorated in 2010. The Applicant attributes this deterioration to manipulation of his performance evaluation by his manager.

[10] The Applicant filed a complaint with the Commission on August 5, 2010, alleging adverse differential treatment and denial of an employment opportunity on the basis of his race,

colour, or national or ethnic origin contrary to Section 7 of the Act. He also complained that his salary was the same as that of the unilingual Call Centre Agents.

[11] The Applicant alluded to “serious systemic discrimination” on the basis of race and claimed that black employees were being “forced” to quit either directly or indirectly. In his response to the Investigation Report, he also alleged those who wish to progress in the Call Centre had to “bribe” the manager by bringing gifts and the like, and referred to “psychological” bribery.

[12] A corrective action was issued to the Applicant in September 2010, concerning his work performance. The Applicant alleges that this step was taken in response to his complaint to the Commission. In any event, by April 2011, he was promoted to a position as Agent II.

### III. THE INVESTIGATOR’S REPORT

[13] The Commission investigated the Applicant’s complaint and interviewed the Applicant as well as employees of the Respondent including Richard Elliott, legal counsel to the Respondent; Mario Bruno, former Senior Manager of the Applicant; Andrew Callahan, the Applicant’s current Senior Manager; Eshwari Sukhdeo, the Applicant’s current Unit Manager; and Mary Dorn, another Unit Manager in the Call Centre.

[14] Both the Applicant and the Respondent were given the opportunity to comment on the evidence, their respective submissions and the Investigator’s Report. The final Investigation

Report was issued on March 12, 2012, recommending that the complaint be dismissed pursuant to subparagraph 44(3)(b)(i) of the Act.

[15] The Investigator reviewed the evidence of employee evaluation and performance metrics, the promotion process, the Bravo Points Incentive System and CBT, as well as the Applicant's evaluation and metrics. The Investigator found that it did not appear that the Applicant had been denied promotion on the basis of discrimination.

[16] The Investigator reviewed the Applicant's own performance metrics and concluded that while he met most of the metrics, his performance was inconsistent and he did not perform significantly better than his peers. The Investigator concluded that the Applicant had not met the performance criteria.

[17] The Investigator found that statistics submitted by the Respondent showed that Black or African employees were promoted in a higher proportion than is representative of the workforce. It did not appear that a disproportionately high number of Black or African employees resigned or were terminated by the Respondent.

[18] The Investigator also commented on the Applicant's allegation about other employees who left their employment with the Respondent as the result of treatment similar to his experiences. The Investigator concluded that several employees could not be identified and that there was a reasonable expectation for the departure of other employees. The Investigator

concluded that the evidence did not support the Applicant's allegations regarding discriminating treatment of the employees.

[19] The Investigator found no support for the Applicant's claim that the Respondent did not pay a bilingual bonus because most bilingual employees were Black or African. The Investigator noted that the Respondent employed bilingual agents who were not Black or African, and in any event, there was a policy that no employees received bilingual bonuses. The Investigator found that the evidence did not support the Applicant's allegation about non-payment of a bilingual bonus on a prohibited ground of discrimination.

[20] Finally, the Investigator found no evidence to support the Applicant's claim that promotion required bribery of managers. Accordingly, the Investigator concluded that the evidence did not establish a finding of discrimination.

#### IV. SUBMISSIONS

##### A. *The Applicant's Submissions*

[21] The Applicant now challenges the conduct of the Investigation and argues that it does not meet the required standards of neutrality and thoroughness. In particular, he submits that the Investigator failed to interview witnesses whose names he provided, failed to review available information about his allegations concerning misreporting to the managers about certain calls to customers, and failed to sufficiently investigate his allegations about denial of a promotion.

[22] The Applicant also argues that the Investigation is flawed because the Investigator did not thoroughly investigate his complaint about having been denied a promotion on the basis of a prohibited ground of discrimination.

B. *The Respondent's Submissions*

[23] The Respondent takes the position that the Investigator considered all of the Applicant's allegations. In spite of the comment in the Investigation Report that the complaint would be assessed only on the basis of denial of a promotion, that is, the denial of "an employment opportunity", it is clear that the Investigator considered all allegations raised and indeed, broadened the scope of the investigation to address the issue of systemic discrimination.

[24] It submits that the Applicant's allegation that his pay was not commensurate with his skill relates primarily to the lack of a bilingual bonus, and that this issue was addressed by the Investigator.

[25] The Respondent argues that the Investigator did not ignore the claim that the Applicant's managers had improperly reported conversations with customers but addressed this issue.

[26] Further, the Respondent submits that if the investigation was limited, it was in response to the Applicant's request that an appropriate remedy would be to promote him with back-pay to 2008 when he says that he should have been promoted.

[27] As well, the Respondent argues that in complaining about the lack of thoroughness in the investigation, the Applicant is essentially complaining about the investigative process. The Respondent suggests that this issue should be reviewed on the standard of reasonableness.

[28] Further, the Respondent submits that the Commission is entitled to deference in deciding the scope of an investigation. In light of the Investigator's conclusion that the Applicant's performance metrics did not support a promotion, it was not necessary that the CBT issue be further investigated.

[29] The Respondent argues that the Investigator adequately considered the Applicant's allegation about the misreporting about customer calls. The Investigator interviewed a witness whose only evidence would have been comment on this issue.

[30] Finally, the Respondent submits that the Investigator is entitled to deference about the choice of witnesses to be interviewed. The key witnesses were those employees of the Respondent who were responsible for assessing the Applicant's performance and these employees were interviewed.

## V. DISCUSSION AND DISPOSITION

[31] The decision in issue here was made pursuant to paragraph 44(3)(b)(i) of the Act which provides as follows:

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,
...	...

[32] The original Summary of Complaint identifies the grounds of the complaint as discrimination on the basis of race, colour, national or ethnic origin contrary to Section 7 of the Act, as well as an alleged practice of adverse differential treatment and denial of employment opportunity.

[33] The Revised Summary of Complaint repeats the claim of discrimination contrary to Section 7 of the Act but the “alleged discriminatory practice” refers only to the denial of employment opportunity.

[34] The Act sets out the prohibited grounds of discrimination in subsection 3(1) as follows:

3. (1) For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.	3. (1) Pour l'application de la présente loi, les motifs de distinction illicite sont ceux qui sont fondés sur la race, l'origine nationale ou ethnique, la couleur, la religion, l'âge, le sexe, l'orientation sexuelle, l'état matrimonial, la situation de famille, l'état de personne graciée ou la déficience.
---	---

[35] Section 3.1 is relevant and provides as follows:

3.1 For greater certainty, a discriminatory practice includes a practice based on one or more prohibited grounds of discrimination or on the effect of a combination of prohibited grounds.	3.1 Il est entendu que les actes discriminatoires comprennent les actes fondés sur un ou plusieurs motifs de distinction illicite ou l'effet combiné de plusieurs motifs.
---	---

[36] Section 7 describes “discriminatory practice” as follows:

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

[37] A decision not to refer a complaint to a tribunal is a discretionary one, reviewable on the standard of reasonableness; see the decision in *Balogun v. Canada (Minister of National Defence)* (2009), 345 F.T.R. 67 (F.C.).

[38] The content of the standard of reasonableness is set out in *Dunsmuir v. New Brunswick*,

[2008] 1 S.C.R. 190 at paragraph 47 as follows:

...In judicial review, reasonableness is concerned mostly with the existence of [page221] 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 law.

[39] The Applicant frames the issue in this application as one of procedural fairness, that is, the failure of the Investigator to conduct a thorough and neutral investigation. The thoroughness and neutrality of an investigation are aspects of procedural fairness; see the decision in *Sketchley v. Canada (Attorney General)*, [2006] 3 F.C.R. 392 (F.C.A.) at paragraph 112. An investigation will lack thoroughness and breach procedural fairness where unreasonable omissions are made or fundamental evidence is ignored or is not accessible; see the decision in *Slattery v. Canada (Human Rights Commission)*, [1994] 73 F.T.R. 161 (F.C.T.D.) at paragraphs 55 – 57.

[40] In general, questions of procedural fairness are reviewable on the standard of correctness; see the decision in *Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339 at paragraph 43.

[41] In this case, the issue of procedural fairness will be reviewed on the standard of correctness and the decision under paragraph 44(3)(b) on the standard of reasonableness.

[42] According to the decision of the Federal Court of Appeal in *Sketchley, supra*, an investigation will not meet the required standard of “thoroughness” if allegations are not investigated. At paragraph 124, the Court said the following:

The identified investigative omissions are not, as the appellant argues, merely minor flaws that cannot upset the ultimate “reasonableness” of the Commission’s decision. Rather, the evidence omitted is so obviously crucial and of such a fundamental nature that the respondent could not conceivably compensate for its absence through her responding submissions, although her

detailed submissions display a laudable effort to do so. For example, how could the respondent establish the alleged failure to accommodate after her leave commenced, when the investigator had not investigated this allegation at all? Similarly, how could the respondent prove her allegation that the TB policy was [page445] applied in a discriminatively strict manner in her case, when the investigator had not investigated how the policy was applied in the case of other similarly situated employees?

[43] Upon reviewing the Record and the submissions of the parties, I am satisfied that the investigation was sufficiently thorough. I reject the Applicant's argument that the Investigator did not consider the complaint about differential treatment.

[44] Although much of the investigation related to denial of promotion, the Applicant also complained about differential treatment, including the allegation that he was paid less than other people holding the Agent II position. While the Investigator did not specifically identify this issue as one of differential treatment on a prohibited ground, I am satisfied that this aspect of the complaint was investigated and considered.

[45] The allegation about prohibited differential treatment in the course of his employment is founded upon the allegation of discrimination on the basis of race. This element of the Applicant's complaint relates to his claim that he was not promoted for racial reasons, that he did not receive a bilingual bonus for the same reason, and that he did not receive a salary commensurate to his abilities on the basis of race.

[46] The matter of salary is inextricably related to the complaint about lack of promotion and the lack of a bilingual bonus. The Applicant sought, as a remedy, a promotion to the position of

Collector, together with retro-active payment to 2008, the time he says that he should have been promoted.

[47] In finding that there was no discrimination relative to the non-promotion of the Applicant, in my opinion, the Investigator also addressed the complaint of differential treatment on a prohibited ground. It seems to me, having regard to the record, that the Investigator investigated all aspects of the complaint by reference to race, including the complaint of differential treatment.

[48] The Investigator made the following statement at paragraph 3 of the Investigation Report:

It appears that the whole of the complainant's allegations concern his lack of promotion. Even though the complainant identified differential treatment in his complaint form, the issues will be examined only through the lens of denial of an employment opportunity.

[49] In my opinion, the Investigator implicitly explored and considered the allegation of differential treatment in addressing the issue of denial of promotion. Both complaints are grounded in race or national origin, as the prohibited ground of discrimination.

[50] In *Canadian Human Rights Commissioner v. Canada (Attorney General) et al* (2012), 411 F.T.R. 14 (F.C.), Justice Mactavish, at paragraph 358, commented on the meaning of "differentiate adversely" in subsection 5(b) of the Act as follows:

The ordinary meaning of the phrase "*differentiate adversely* in relation to any individual" on a prohibited ground of discrimination is to treat an individual or group differently than one might otherwise have done on the basis of a prohibited ground.

[51] Section 5 of the Act addresses discriminatory practices in the provision of goods, services, facilities or accommodation available to the general public. Section 7 of the Act refers to discriminatory practices in the area of employment. Subsection 7(b) uses the words “differentiate adversely”.

[52] Insofar as the Applicant’s complaint of differential treatment in the matter of his employment with the Respondent is based on race, a prohibited ground of discrimination, I am satisfied that this aspect of his complaint was addressed by the Investigator according to the required standards of neutrality and thoroughness. The substance of the Applicant’s complaint about differential treatment was addressed, as per the decision in *McNabb v. Canada Post Corp.* (2006), 300 F.T.R. 57 (F.C.) at paragraph 63. The Investigator specifically found that there was no discrimination relative to payment of a bilingual bonus since the Respondent did not pay such a bonus.

[53] There is no support in the record for allegations of bias or partiality.

[54] I am satisfied that the Investigator conducted a neutral and thorough investigation into all grounds raised by the Applicant in his complaint. There was no breach of procedural fairness.

[55] The Investigator concluded that the Applicant’s complaint of denial of a promotion for discriminatory reasons, that is race, was not established. This conclusion is reviewable on the standard of reasonableness, that is it must be justifiable, transparent and intelligible; see *Dunsmuir, supra*, at paragraph 47.

[56] Having regard to the record, I am satisfied that the Investigator's conclusion meets the reasonableness standard. It follows that there is no basis to intervene in the Commission's decision regarding the complaint of discrimination. That complaint was fully investigated and the Investigator's conclusion is reasonable.

[57] The recommendations of an investigator, when adopted by the Commission, become the reasons of the Commission in making a decision pursuant to paragraph 44(3)(b); see *Sketchley, supra*, at paragraph 37.

[58] In the result, the application for judicial review is dismissed with costs to the Respondent.

**JUDGMENT**

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

"E. Heneghan"

---

Judge



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

**DOCKET:** T-1426-12

**STYLE OF CAUSE:** CLAUDIO LUBAKI v BANK OF MONTREAL  
FINANCIAL GROUP

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** MARCH 11, 2014

**JUDGMENT AND REASONS:** HENEGHAN J.

**DATED:** SEPTEMBER 11, 2014

**APPEARANCES:**

Jayson W. Thomas

FOR THE APPLICANT

Christopher J. Hunter and Michael  
Torrance

FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Thomas Law P.C.  
Barristers and Solicitors  
Toronto, Ontario

FOR THE APPLICANT

Norton Rose Canada LLP  
Barristers and Solicitors  
Toronto, Ontario

FOR THE RESPONDENT