Federal Court of Appeal | Cour d'appel fédérale

Date: 20230707

Docket: A-125-20

Citation: 2023 FCA 158

CORAM: **STRATAS J.A.**
DE MONTIGNY J.A.
MACTAVISH J.A.

BETWEEN:

KEVIN HAYNES

Appellant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

Heard at Ottawa, Ontario, on April 26, 2023.

Judgment delivered at Ottawa, Ontario, on July 7, 2023.

REASONS FOR JUDGMENT BY: MACTAVISH J.A.

CONCURRED IN BY: STRATAS J.A.
DE MONTIGNY J.A.

Federal Court of Appeal  Cour d'appel fédérale

Date: 20230707

Docket: A-125-20

Citation: 2023 FCA 158

CORAM: **STRATAS J.A.**
DE MONTIGNY J.A.
MACTAVISH J.A.

BETWEEN:

KEVIN HAYNES

Appellant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT

MACTAVISH J.A.

[1] Kevin Haynes is a software developer and a long-time employee of Employment and Social Development Canada. Mr. Haynes is also a person with autism.

[2] Mr. Haynes did not ask for any accommodation when he started working at ESDC in 2008. As he explained to us, he "wanted to be normal" and to be treated like everyone else. By 2009, however, he realized that some accommodation was necessary and he advised his

employer accordingly. Mr. Haynes's family doctor advised ESDC that Mr. Haynes "would benefit from very clear, unambiguous communication and clear feedback". The doctor further stated that as long as Mr. Haynes was communicated with clearly, "there should be no limitations on his ability to be productive in his work environment".

[3] After several more years, Mr. Haynes realized that "things were not working out". On July 12, 2016, he advised his current supervisors that he had a disability and asked for accommodation. When he heard nothing from his employer for several months, Mr. Haynes sent a follow-up email seeking a response to his accommodation request. What followed was an exchange of communications between Mr. Haynes and representatives of his employer over the ensuing months.

[4] Dissatisfied with the employer's handling of his request for accommodation, Mr. Haynes ultimately filed four complaints under ESDC's harassment policy, alleging that four members of management had subjected him to harassment and discrimination. A primary focus of Mr. Haynes' complaints was his superiors' alleged failure to put any measures in place to accommodate his autism. He also alleged that his workload was reduced to virtually nothing following the disclosure of his disability, leaving him feeling confused, marginalized and humiliated.

[5] An investigation by an independent investigator concluded that Mr. Haynes' complaints against his team leader and his manager had been substantiated, in part. The investigator further concluded that Mr. Haynes' complaints against his Director and his Director General were not

well-founded. The official within ESDC designated to receive harassment complaints (the designated official) accepted the findings of the investigator.

[6] Mr. Haynes sought judicial review of the designated official's decision to accept the findings of the investigator. In a decision reported as 2020 FC 536, the Federal Court dismissed Mr. Haynes' application for judicial review. This is an appeal from that decision.

[7] While we have determined that Mr. Haynes' appeal should be dismissed, this case nevertheless provides a useful opportunity to remind courts of their obligation to ensure that litigants with disabilities are able to access the same fair justice system that is available to other Canadians, reflecting the equal worth and dignity of all persons appearing before the courts.

I. The Alleged Procedural Unfairness in the Federal Court Process

[8] The primary focus of Mr. Haynes' written submissions was on the alleged unfairness of the Federal Court process. In particular, he notes that the Federal Court only set one day for the hearing of his application for judicial review, rather than the three days that he requested. The result of this, he says, was that he was unable to properly present his case.

[9] Mr. Haynes points out that he had advised the Court in his requisition for hearing that he was autistic, that he required additional time to process information, and that he believed that he required three days of hearing time to fully present his case. The Court nevertheless chose to allocate just a single day for the hearing.

[10] When Mr. Haynes learned that only one day had been set aside for the hearing of his application for judicial review, he wrote the Court, again explaining that his autism affected his ability to process information quickly. He further pointed out that he was seeking to review four separate decisions, submitting that he would be "severely disadvantaged" unless the Court allocated more time for his hearing.

[11] Mr. Haynes' second request was sent to a Federal Court judge for consideration. The judge issued a Direction stating that after reviewing the matter, and taking Mr. Haynes' disability into account, the judge was satisfied that one day was sufficient for the hearing of his application. Mr. Haynes contends that this was insufficient, submitting before us that this was the "central issue" in his appeal.

[12] Mr. Haynes also takes issue with what transpired at the Federal Court hearing. He notes that the Court permitted counsel for the Attorney General to bring a motion at the outset of the hearing to strike documents contained in Mr. Haynes' affidavit, without advance notice to him. Not only did the hearing of the motion eat into the limited time available for the hearing into the merits of Mr. Haynes' application, he also says that it overwhelmed him, and that he was unable to process the "overload of information" coming at him. This caused him to have a panic attack, and to break down in tears in the courtroom, further compromising his ability to present his case.

[13] Mr. Haynes thus says that the Federal Court decision should be set aside, because it was arrived at in a procedurally unfair manner. He further alleges bias on the part of the application judge.

[14] We understand that Mr. Haynes feels very strongly that the Federal Court treated him unfairly, that it was biased against him, and that it ignored his disability and its impact on his ability to present his case. However, as we explained to Mr. Haynes at the hearing of his appeal, our role in an appeal such as this is to determine whether the Federal Court identified the correct standard of review – correctness or reasonableness – and whether it properly applied that standard in reviewing the administrative decisions in issue: *Northern Regional Health Authority v. Horrocks*, 2021 SCC 42 at paras. 10-12; *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paras. 45-47.

[15] This has been described as requiring us to "step into the shoes" of the Federal Court judge, focusing on the administrative decision below rather than on the decision of the Federal Court: *Horrocks*, above at para. 10, citing *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3.

[16] That is, Mr. Haynes essentially gets a "do-over" – a fresh review of the administrative decisions made with respect to his harassment complaints. Because he had a full and fair opportunity to present his case to this court, it is not necessary for us to make a determination as to the fairness of the hearing afforded to Mr. Haynes by the Federal Court. Any procedural unfairness that may have occurred in the Federal Court process in this case can be cured by our review of the administrative decisions in question.

[17] That said, before moving on to consider the merits of Mr. Haynes' appeal, it may be helpful to remind courts of their obligations when dealing with litigants with disabilities.

II. The Courts' Obligation to Accommodate Litigants with Disabilities

[18] Equality before the law for individuals with disabilities is guaranteed by the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. Subsection 15(1) of the Charter provides that "[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination […] based on […] mental or physical disability".

[19] Similarly, section 5 of the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6, makes it a discriminatory practice to discriminate in the provision of services that are customarily available to the general public (such as those offered by the Courts Administration Service) on a prohibited ground of discrimination. Section 3 of the Act identifies "disability" as one of the prohibited grounds of discrimination.

[20] Discrimination does not have to be direct: a rule (such as the time allocated for a hearing) may be neutral on its face, but may nevertheless have an adverse effect on members of protected groups: *Fraser v. Canada (Attorney General)*, 2020 SCC 28, 450 D.L.R. (4th) 1 at paras. 30-31. For example, individuals with a neurological condition such as autism may require additional time to process information. In either case, however, a service provider is required to accommodate the needs of the individual service recipient to the point of undue hardship: see, for example *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union*, [1999] 3 S.C.R. 3.

[21] Even if a person with a disability is treated in exactly the same way as others, there may still be discrimination. Indeed, identical treatment may in some cases result in serious inequality: see, for example, *Fraser*, above at paras. 32-36; *Law Society British Columbia v. Andrews*, [1989] 1 S.C.R. 143 at para. 26. It is therefore sometimes necessary to treat people with disabilities differently than others, in order to achieve substantive equality: *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, at para. 46.

[22] A simple example illustrates the point: it is no answer to a claim of discrimination from a litigant in a wheelchair to say that everyone is expected to climb the stairs in front of a courthouse to have their day in Court, and that the wheelchair-bound litigant was treated no differently than anyone else. Facially neutral legislation can be discriminatory: *R. v. Sharma*, 2022 SCC 39 at para. 42. For more on this, see the Supreme Court's extensive analysis in *Fraser* at paras. 29-55.

[23] Similar obligations are imposed on service providers (such as Courts Administration Service) by the *Accessible Canada Act*, S.C. 2019, c.10. This is a relatively new Act designed to proactively identify, remove and prevent barriers to accessibility for people with disabilities, so as to, amongst other things, allow them to fully exercise their rights and responsibilities in a barrier-free Canada. One of the guiding principles underlying the Act is that service providers must take into account the disabilities of persons, the different ways that persons interact with their environments and the multiple and intersecting forms of marginalization and discrimination faced by persons with disabilities: see section 6(e).

[24] Insofar as judges are concerned, these principles are reflected in the *Ethical Principles for Judges* (Ottawa: The Canadian Judicial Council, 2021). Part IV of the *Ethical Principles* provides that judges are to "conduct themselves and the proceedings before them to ensure equality according to law". Judges are further counselled to carry out their duties with respect for all persons, without discrimination or prejudice.

[25] The *Ethical Principles* further observe that the law's commitment to substantive equality seeks to protect individuals from both direct and adverse effect discrimination, and that "this approach to equality seeks to acknowledge the equal worth and dignity of all persons". Equality, is, moreover, "fundamental to justice and is strongly linked to judicial impartiality and to public confidence in the administration of justice". Consequently, judges are advised to ensure that their commitment to equality is unwavering, and that their conduct is such that any reasonable and informed member of the public would have confidence in the judge's respect for and commitment to equality.

[26] Related to this is the judge's obligation to ensure that those appearing in court receive a procedurally fair hearing. Indeed, counsel for the Attorney General acknowledged at the hearing before us that the duty to accommodate litigants (or counsel) in the courtroom setting finds its voice in the judicial setting through the principles of procedural fairness.

[27] As the Supreme Court of Canada held in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, the values underlying the duty of procedural fairness reflect the principle that individuals should have the opportunity to present their case fully and fairly.

Moreover, decisions that affect their rights, interests, or privileges should be made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decision: *Baker*, above at para. 28.

[28] The Supreme Court identified a number of factors that can assist a court in determining whether the procedures followed in a specific case respected the duty of fairness. That said, the list of factors relevant to determining whether the common law duty of procedural fairness has been respected in a given set of circumstances is not exhaustive, and other considerations may also be important in a given case: *Baker*, above at para. 28.

[29] One such consideration is the accommodation needs of litigants with disabilities.

[30] The steps necessary to accommodate a litigant with a disability will obviously depend on the nature of the disability in question and the unique needs of the individual litigant. There is, moreover, an obligation on individuals seeking accommodation to assist in securing appropriate accommodation: *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970 at para. 43.

[31] Courts must, however, remain mindful of their duty to accommodate the needs of the disabled so as to ensure that they receive the same level of procedurally fair justice as that accorded to other Canadians.

[32] Lastly, it is perhaps important to state that these principles have nothing to do with political correctness or wokeness. They are not a bow in the direction of what might be trendy or in vogue at the moment. They are about something far more fundamental, far more enduring, far more essential. They are about making our fellow human beings feel included, welcome and empowered in one of the most fundamental institutions of our democratic state.

III. What this Court did to Ensure that Mr. Haynes Received a Fair Hearing

[33] The steps taken by this Court in relation to Mr. Haynes' appeal may serve as an example of the type of measures that may be necessary to accommodate an individual with a neurological condition such as autism. Obviously, not all of these steps will be required in every case, and different or additional steps may be necessary to accommodate the needs of individual litigants with disabilities so as to ensure that they are able to fully present their cases and receive a fair hearing.

a) Steps Taken in Advance of the Hearing

1. An appeal such as that of Mr. Haynes' would ordinarily be set down for a two-hour hearing. However, after consulting with the parties with respect to Mr. Haynes' needs, the Court allocated a full day for the appeal.

2. In response to a request from Mr. Haynes, he was advised that his mother could sit with him at the counsel table.

3. On their own initiative (and to their credit), Registry staff took steps to avoid disruptive and distracting noises during the hearing by modifying recording and sound equipment to avoid auditory distractions.

4. Information technology staff completed their setup before the parties arrived, and were asked to ensure that communication or troubleshooting necessary during the hearing was done quietly.

5. The Registry Officer and Usher were asked to speak clearly but not excessively loudly during the hearing.

6. The panel assigned to the appeal reviewed information relating to autism in advance of the hearing to educate ourselves as to how to best ensure that Mr. Haynes received the fair hearing to which he was entitled.

b) Steps Taken During the Hearing

1. As would be the case with any self-represented litigant, the hearing process was explained to Mr. Haynes at the outset of the hearing by the Court, albeit in somewhat greater detail than would ordinarily be the case, so as to avoid any process-related surprises for him.

2. We advised Mr. Haynes that his mother could assist him in organizing his submissions, that he could consult with her whenever he wanted to, and that

she could speak on his behalf if he wanted her to do so at any point in the hearing.

3. We asked counsel for the respondent to estimate the time that he required for his submissions. After advising the Court that he would need approximately 45 minutes to an hour to make his case, the remainder of the day was allocated to Mr. Haynes for his submissions (with the agreement of counsel for the respondent).

4. We advised Mr. Haynes that he could take a break whenever required, and that he should let us know how long a break he needed on each occasion.

5. Mr. Haynes was given the option of sitting at counsel table during his submissions or standing at the podium.

6. In framing its questions and engaging with Mr. Haynes, the Court endeavoured to respond to his stated need for clear and unambiguous communications.

7. We asked Mr. Haynes to advise us if any of our questions needed clarification, or to ask us to repeat or re-phrase any questions that he did not understand. He was also asked to let us know if he needed additional time to answer any of our questions or if he required a break before doing so.

8. Again, as would be the case with any self-represented litigant, procedural issues raised by counsel for the respondent were explained to Mr. Haynes in layman's terms.

9. We checked in with Mr. Haynes on a regular basis to see if he had any questions regarding the proceedings, and to respond to any questions that he may have had in this regard.

[34] The hearing of Mr. Haynes' appeal took the better part of the day, during which he was able to complete his submissions without incident. Indeed, Mr. Haynes confirmed to us at the end of the hearing that he believed that he had received a fair hearing with respect to his appeal.

IV. Other Issues

[35] As noted earlier, Mr. Haynes' memorandum of fact and law focussed almost exclusively on the alleged unfairness of the Federal Court process, making only limited submissions with respect to the substantive reasonableness of the decision under review. He did, however, raise a number of other issues during the hearing before us with respect to the administrative decision under review, without objection from counsel for the Attorney General.

[36] While we have carefully considered all of the issues raised by Mr. Haynes, it is only necessary to address some of them.

V. The Striking Out of Documents

[37] One issue raised before the Federal Court that we do need to address relates to the content of the record that was before the Federal Court on Mr. Haynes' application for judicial review. We need to address this issue as it has a bearing on the documents that are properly before us on this appeal.

[38] In the memorandum of fact and law filed on the application for judicial review in the Federal Court, counsel for the Attorney General submitted that certain of the documents contained in the affidavit that Mr. Haynes had submitted in connection with his application were not before the investigator when she investigated Mr. Haynes' complaints. The documents in issue were specifically identified in the memorandum.

[39] Counsel for the Attorney General further submitted that the documents in question did not fall within any of the recognized exceptions to the principle that applications for judicial review are to be decided on the basis of the record that was before the original decision maker and that they were thus inadmissible.

[40] This submission was supported by the affidavit of an advisor in the ESDC Harassment Centre of Expertise who had been assigned to manage Mr. Haynes' harassment complaints. From her review of the files relating to Mr. Haynes' complaints, she affirmed that the documents identified in the respondent's memorandum of fact and law were not before the investigator during the course of the investigation.

[41] This issue was addressed at the commencement of the hearing of Mr. Haynes' application. The Federal Court judge observed that while Mr. Haynes disagreed with the Attorney General's contention that the documents in question had not been provided to the investigator, he had not filed an affidavit to this effect. The judge chose to rely on the sworn evidence provided by the respondent's witness rather than on Mr. Haynes' unsworn submissions, finding that the documents in question did not properly form part of the record and should be struck.

[42] A discretionary decision such as this cannot be set aside on appeal unless Mr. Haynes can establish that the Federal Court committed what is called a "palpable and overriding error". A palpable error is one that is obvious or plainly seen. An overriding error is one that affects the result. This is a very difficult standard to meet: *ADIR v. Apotex Inc.*, 2020 FCA 60, at paras. 71-73.

[43] I appreciate that Mr. Haynes believes that the Federal Court judge "got it wrong" and that the documents in question were in fact provided to the investigator in the course of the investigation. It was, however, open to the Federal Court judge to prefer sworn evidence contained in an affidavit to the unsworn submissions provided by Mr. Haynes to this effect, and no palpable or overriding error has been established in this regard.

[44] As relates to the fairness of the way that the Federal Court dealt with this issue, Mr. Haynes was made aware that there was an issue with the admissibility of some of the documents that he sought to include in his application record some four months before the hearing of his

application for judicial review. The issue was flagged in the memorandum of fact and law that the respondent served on him on October 25, 2019, and in the affidavit contained in the respondent's record that was served on Mr. Haynes that same day. If Mr. Haynes wanted to contest the evidence provided in the respondent's affidavit, it would have been open to him to file an affidavit of his own in advance of the hearing.

[45] Mr. Haynes also submits that the Attorney General should have brought a formal motion in advance of the hearing to deal with the documents issue. However, applications for judicial review are intended to be summary proceedings, and preliminary motions of this sort add greatly to the cost and time required to deal with such matters and are therefore to be discouraged: *David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.*, [1995] 1 F.C. 588 at page 600 (F.C.A.); *Rosianu v. Western Logistics Inc.*, 2021 FCA 241 at paras. 23, 27-30.

[46] It was therefore open to the Federal Court judge to deal with the documents issue at the commencement of the hearing, and the decision to do so is not evidence of bias on the part of the judge. No procedural unfairness has thus been established in this regard.

VI. The Failure of the Federal Court to Appoint a Solicitor to Act on his Behalf

[47] Another issue identified in Mr. Haynes' memorandum of fact and law relates to the alleged failure of the Federal Court to appoint a solicitor to act on his behalf, as he submits was required by Rule 121 of the *Federal Court Rules,* SOR/98-106.

[48] Rule 121 provides that "[u]nless the Court in special circumstances orders otherwise, a party who is under a legal disability […] shall be represented by a solicitor". As we explained to Mr. Haynes at the hearing, the reference to a party "under a legal disability" refers to someone who does not have the legal capacity to represent themselves. There is no suggestion that Mr. Haynes lacks the legal capacity to represent himself, and indeed, he provided the Court with fulsome and articulate submissions in support of his appeal. No error on the part of the Federal Court has thus been established in this regard.

VII. Issues Going to the Reasonableness of the Employer's Decision

[49] Given the factually-suffused nature of the matters at issue in this case, the Federal Court correctly identified reasonableness as the standard of review that it should apply in reviewing the designated official's decision to accept the findings of the investigator. The question to be determined is thus whether the Court applied that standard correctly.

[50] Mr. Haynes submits that the employer's decision was unreasonable. Before addressing Mr. Haynes' arguments, however, it is first necessary to explain what makes a decision reasonable.

[51] Much has been written about what constitutes a reasonable administrative decision. The most recent guidance from the Supreme Court of Canada tells us that a reasonable decision is one that is justified, transparent and intelligible, and one that contains internally coherent

reasoning justifying its findings: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at paras. 85 and 102-103.

[52] The Supreme Court has also told reviewing courts that the reasons of administrative decision makers are to be read holistically and contextually in light of the record, with due sensitivity to the administrative regime in which they were given: *Vavilov*, above at paras. 97 and 103.

[53] Administrative decisions, such as the designated official's decision to accept the findings of the investigator in this case, are not to be assessed against a standard of perfection: *Vavilov*, above at paras. 91 and 104. Such decisions also need not refer to all of the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred to see in the decision, and that, on its own, the failure to do so is not a basis for setting aside the decision: *Vavilov*, at para. 91. Ultimately, we must be satisfied that the reasoning in the decision "adds up": *Vavilov*, above at para. 104.

[54] Before addressing Mr. Haynes' arguments with respect to the reasonableness of the designated official's decision, one additional point must be made.

[55] In cases such as this, where the designated official's decision was cursory, simply adopting the findings of the investigator, the investigation reports must be read as the reasons for the decision: *Sketchley v. Canada (Attorney General)*, 2005 FCA 404, at para. 37.

[56] With these principles in mind, I will next address certain of Mr. Haynes' arguments as to why he says that the designated official's decision was unreasonable.

VIII. The Application of the 12-month Limitation Period

[57] Mr. Haynes submits that the Federal Court erred in its reliance on the employer's *Guide on Applying the Harassment Resolution Process Policy*, which provides that incidents that occur more than one year prior to the filing of a complaint are not to be investigated. Mr. Haynes notes that there are exceptions to this rule, however, and that allegations of harassment can go back more than 12 months in time in certain specified circumstances.

[58] That is, the *Guide* states that once a complainant can demonstrate that an incident of harassment occurred within the twelve months preceding the filing of the complaint, the allegations can go back further in time and behaviours or events may be considered if they are directly related to the complaint. The *Guide* further notes that this is especially necessary where, as here, the complainant intends to demonstrate a pattern of events.

[59] Mr. Haynes filed his harassment complaints in the spring of 2018. Two of his complaints make passing reference, by way of background, to his lack of advancement opportunities in the period between 2013 and 2016. However, the focus of all four complaints is on events starting in July of 2016 - outside the 12-month limitation period - when he disclosed the fact that he had a disability to his employer. Mr. Haynes submits that the failure of the Federal Court to recognize

the exception to the 12-month limitation period meant that it failed to have regard to the totality of his complaints and their full context.

[60] As noted earlier, the focus of this Court on an appeal such as this is on the reasonableness of the designated official's decision, rather than that of the Federal Court.

[61] The difficulty with Mr. Haynes' submission with respect to the limitation issue is that there is nothing in the investigator's reports that suggests that she was not aware of, or that she failed to consider all of Mr. Haynes' allegations of harassment and discrimination, going back to July of 2016.

[62] The investigator prepared four separate investigation reports – one for each of Mr. Haynes' complaints. Each investigation report follows the same basic structure. In each report, the investigator identifies each of the specific allegations made by Mr. Haynes, and she then reviews the information that was available for analysis with respect to the allegation in question. This included information going back at least as far as July of 2016, when Mr. Haynes disclosed his disability to his employer.

[63] At the outset of her analysis of each allegation, the investigator stated that she had reviewed "all of the information and documentation available for analysis" with respect to the allegation in question, and that her analysis of each of Mr. Haynes' allegations was based on "the totality of such information and documentation". This would have included information going back to July of 2016.

[64] Indeed, where the investigator was not prepared to consider something, she expressly said so in her analysis: see, for example, Appeal Book, Vol. 10, p. 3102, at para. 135. Mr. Haynes has not directed us to anything in the investigation reports that would suggest that the investigator limited her consideration to events occurring within the 12 months immediately preceding the filing of Mr. Haynes's complaints, nor has he pointed to any incidents identified in his complaints going back to July of 2016 that were not considered by the investigator.

[65] There is thus no basis to intervene in the decision of the designated official to accept the findings of the investigator based on the improper application of the 12-month limitation period provided for in the employer's *Guide on Applying the Harassment Resolution Process Policy*.

IX. The Failure of Mr. Haynes' Superiors to Assign him Work

[66] A core component of Mr. Haynes' harassment complaints was the alleged failure of his team leader and his manager to provide him with work. He alleged that his workload was reduced to virtually nothing following the disclosure of his disability, and that this left him feeling confused, marginalized and humiliated.

[67] Mr. Haynes points out that his team leader provided a statement to the investigator in which he acknowledged that he had not provided Mr. Haynes with any work assignments in the period between August of 2017, when he became the team leader, and the spring of 2018. Mr. Haynes says that the investigator nevertheless found that the evidence was "inconclusive" as to whether or not he had been provided with work during this period. He asks rhetorically how an

investigation could possibly be deemed to have been thorough when the investigator was unable to make a finding with respect to this issue, notwithstanding the clear admission on the part of his team leader that this had occurred.

[68] However, a review of the investigator's reports with respect to the complaints against Mr. Haynes' team leader and his manager explains this alleged incongruity.

[69] Mr. Haynes' team leader did indeed acknowledge that he had not assigned any work to Mr. Haynes after he started acting as Mr. Haynes' supervisor in August of 2017. The investigator accepted that this had been the case, finding that Mr. Haynes' complaint against his team leader with respect to the non-assignment of work was well-founded.

[70] However, Mr. Haynes' team leader also stated that he had never been provided with any official information about Mr. Haynes' disability, his request for accommodation or his accommodation needs. The team leader says that what information he had with respect to these matters, he had gleaned through informal conversations with managers, leaving him to "connect the dots and read between the lines". The team leader further stated that he was never provided with any guidance or training as to how to deal with Mr. Haynes' situation.

[71] The investigator concluded that, on a balance of probabilities, it was more likely than not that the team leader was never told about Mr. Haynes' disability or his need for accommodation. Consequently, the investigator concluded that the evidence did not support Mr. Haynes' claim that the team leader had largely ignored his accommodation needs and had stuck to the

employer's claim that "they do not know how to manage [him] because of [his] disability". This was a finding that was reasonably open to the investigator on the record before her.

[72] Where the evidence became murkier was with respect to the reason *why* Mr. Haynes was not assigned work during the period in question, and whether his disability was a factor in the decision not to give him work.

[73] Mr. Haynes' team leader advised the investigator that when he began acting as Mr. Haynes' supervisor in August of 2017, he had been told by his manager not to give Mr. Haynes any work as he had existing work that had been assigned to him by previous supervisors. Mr. Haynes' team leader further stated that he was told that he should not give work to Mr. Haynes until such time as his outstanding performance appraisal had been completed, and concrete work objectives had been set for him.

[74] As noted above, the team leader says that he was not aware of Mr. Haynes' disability or his accommodation needs, and that, consequently, this was not a factor in his decision to not assign him work.

[75] In contrast, Mr. Haynes' manager denied ever telling Mr. Haynes' team leader not to give work to Mr. Haynes. The manager told the investigator that he expected the team leader to "maintain appropriate communication with Mr. Haynes about his work and expectations".

[76] It was in this context that the investigator noted that no witnesses or documentary evidence was available that would impugn the credibility of either Mr. Haynes' team leader or his manager, and that the evidence was therefore inconclusive as to whether or not the team leader had been told by the manager not to give work to Mr. Haynes. The investigator did find, however, that there was "likely a miscommunication" between Mr. Haynes' team leader and his manager in this regard.

[77] The investigator also found that Mr. Haynes' manager had failed to discuss Mr. Haynes' disability, accommodation needs, performance and expectations with him, and that this breached the *Directive on Performance Management, Values and Ethics Code* for the Public Service and the *Policy on the Duty to Accommodate*. The investigator further found that the manager knew, or ought to have known, that failing to follow up on Mr. Haynes' accommodation request and to hold performance-related discussions with him would cause Mr. Haynes to feel isolated, anxious and unengaged, and that this conduct constituted harassment.

[78] The jurisprudence acknowledges that in dealing with investigations of the sort at issue in this case, it is for the investigator to assess the evidence and make findings of fact. Reviewing courts are required to defer to administrative decision makers' assessment of the probative value of the evidence: *Slattery v. Canadian Human Rights Commission*, [1994] F.C.J. No. 181 at para. 56.

[79] Faced with conflicting evidence on the question of whether Mr. Haynes' manager directed that he not be given any work, the investigator found that the evidence before her did

not support such a finding. This was a conclusion that was reasonably open to the investigator on the basis of the record before her.

[80] Moreover, the failure of the investigator to make findings of fact where there was conflicting evidence before her is not indicative of bias on her part. The investigator's assessment of the evidence in this case was, rather, justified, transparent and intelligible, and Mr. Haynes has failed to show that the investigator's findings in this regard were either unfair or unreasonable.

X. Conclusion

[81] Mr. Haynes has not identified any witnesses who were not interviewed by the investigator, nor has he established any bias on the part of the investigator. The investigation reports are lengthy, comprehensive and detailed. While Mr. Haynes would undoubtedly have wanted the investigator to draw different conclusions from the evidence before her, he has not established that the decision in issue was substantively unreasonable, or that he was treated unfairly by the investigator.

[82] Consequently, I would dismiss Mr. Haynes' appeal. In the exercise of my discretion, I would not make any order for costs.

XI. A Final Comment

[83] Before closing, the Court would like to thank Mr. Haynes for his articulate and comprehensive submissions, and to compliment and thank Mr. Stelpstra for the courtesy, cooperation and professionalism that he exhibited throughout the hearing.

"Anne L. Mactavish"
J.A.

"I agree.
David Stratas

"I agree.
Yves de Montigny J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-125-20
STYLE OF CAUSE:	KEVIN HAYNES v. THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	APRIL 26, 2023
REASONS FOR JUDGMENT BY:	MACTAVISH J.A.
CONCURRED IN BY:	STRATAS J.A. DE MONTIGNY J.A.
DATED:	JULY 7, 2023

APPEARANCES:

Kevin Haynes	ON HIS OWN BEHALF
Joel Stelpstra	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Shalene Curtis-Micallef Deputy Attorney General of Canada	FOR THE RESPONDENT