SUPREME COURT OF NOVA SCOTIA

Citation: *Matheson v. Nova Scotia (Human Rights Commission)*, 2017 NSSC 178

Date: 20170629
Docket: Hfx., No. 456951
Registry: Halifax

Between:

Lynn Matheson

Applicant

v.

Nova Scotia Human Rights Commission, the Halifax Regional Municipality, and The Attorney General (Nova Scotia)

Respondent

Judge:	The Honourable Justice D. Timothy Gabriel
Heard:	April 11th and 12th, 2017, in Halifax, Nova Scotia
Oral Decision:	April 12, 2017
Written Release:	June 29, 2017
Counsel:	Barry J. Mason, Q.C., for the Applicant Kimberly Franklin, for the Defendant NSHRC Randolph Kinghorne, for the Defendant HRM

By the Court (Orally):

[1] The applicant, Lynn Matheson, seeks Judicial Review of a decision of the Nova Scotia Human Rights Commission rendered on September 21st, 2016.

[2] In that decision, the Nova Scotia Human Rights Commission (hereinafter either referred to as "the Commission" or "NSHRC") dismissed Ms. Matheson's complaint against her employer (the respondent, Halifax Regional Municipality, herein after referred to either as the respondent or "HRM") without reasons.

[3] Although named as a respondent in this proceeding, the Attorney General of Nova Scotia has provided notice that it would not be participating.

[4] Ms. Matheson has applied to this court seeking to set aside the decision and have it returned to the Commission for reconsideration. The grounds specified in her Notice for Judicial Review are (specifically) twofold:

> 1. That HRC breached the applicant's right to procedural fairness when it failed to provide her with reasons as to why her complaint was dismissed or not referred to a board of inquiry;
>
> 2. That the Commission's decision was unreasonable given the evidence which was before it; and,
>
> 3. Such other grounds as may appear.

Background

[5] Ms. Matheson entered the employ of HRM in June of 2005. Her position was that of a Council Constituency Co-ordinator.

[6] In 2007, Cathie Barrington became the applicant's supervisor. The applicant alleges that she began to experience anxiety and depression within a few years of this occurrence. She attributes this development to the treatment that she received in the workplace from Ms. Barrington.

[7] It is convenient to quote from paras. 4 and 5 of the applicant's brief in this respect:

> In May of 2010, Ms. Matheson was diagnosed with a brain tumour. She missed time from work as a result of her medical appointments. Ms. Barrington became resentful toward her for having to miss time from work due to her medical appointments, and Ms. Matheson began to feel that she was getting the "cold shoulder" from Ms. Barrington. Thereafter, Ms. Matheson was told to "shut up and go on Facebook" while at work, was micromanaged due to her medical and bereavement absences, and was forced to listen to cruel gossip about her colleagues.
>
> Ms. Matheson's anxiety and depression became overwhelming to the point that she could no longer work. Her family physician, Dr. Renée Hart, put Ms. Matheson off work on October 21st, 2014 **[Record, Tab 6E, p. 262**]. Dr. Hart is of the view that Ms. Matheson's anxiety and depression is work related and specifically triggered by the presence of Ms. Barrington.

[8] Dr. Renée Hart is Ms. Matheson's family physician as indicated. Ms. Matheson went to see her on October 21st, 2014 and was put off of work "for medical reasons. Will re-evaluate in two weeks". This notation is hand written on a prescription pad form.

[9] On November 10th, 2014, Ms. Matheson filed "an internal harassment, or workplace rights complaint" with HRM against Ms. Barrington. On November 20th, 2014, Dr. Hart provided another hand written note which certified that the applicant has been under her care and "remains unable to work, will re-evaluate in one month".

[10] In December of 2014, Ms. Matheson spoke with the HRM employee who was responsible for the management of her sick time. This individual was Karen Steeves. She alleges that Ms. Steeves made the comment that she (Ms. Matheson) was "not really sick". The applicant says that, when challenged, Ms. Steeves elaborated to the effect that it was not as though the applicant had sustained "a broken leg".

[11] This caused her to feel belittled, and the applicant states that she was left with the impression that HRM did not take her illness seriously. Ms. Steeves did (later) apologize for the comment.

[12] On December 18th, 2014, Dr. Hart wrote another terse note stating that her patient was "not ready to return to work, will re-evaluate on January 6th, 2015".

[13] On January 6th, 2015, Dr. Hart was marginally more forthcoming. She certified that Ms. Matheson has been under her care and that:

> "Lynn is capable to return to work at this time provided the stressor has been removed. Furthermore, any perceived demotion could exacerbate her medical condition".

[14] Because she was off work for health reasons Ms. Matheson was requested by her employer to provide a Functional Abilities Report (FAR). This report was completed by Dr. Hart on January 17th, 2015, and identified no physical limitations. Dr. Hart went on to note that, *inter alia* she (the applicant) "has filed a complaint. Awaiting resolution of same." This referred to the workplace rights complaint which the applicant had filed with HRM, more on which will be said later.

[15] When responding to the query "expected return to work date", Dr. Hart noted that the applicant was "awaiting resolution of the investigation" and "when trigger of work removed patient not anxious or depressed". This was the first time reference to either anxiety or depression was made by Dr. Hart in her correspondence with HRM.

[16] Finally, in her concluding paragraph, Dr. Hart reiterated:

> "Awaiting resolution of the investigation. Now able to work provided stressor is removed. Also any perceived demotion would exacerbate condition".

The Efforts to Accommodate

[17] By letter dated January 19th, 2015, the applicant was offered two positions by HRM, both at the same pay rate that she had received as Council Constituency Coordinator. In this letter she was told:

> You departed the work place on sick leave and subsequently filed a harassment complaint. In this instance the investigator recommended an alternate work arrangement which would enable you to continue working during the course of the investigations.

[18] To repeat, the "harassment complaint" was a workplace rights complaint, which prompted an investigation by HRM, and which was assigned to an independent external investigator.

[19] Two temporary positions were offered to the applicant pending the conclusion of the investigation of her internal complaint. One would have placed her for 60 days as an administrative assistant with the Fire Department. Her duties would have been conducted in completely different premises than those in which she was situate prior to leaving the work place. The second offer of placement was that of a legislative assistant position located in the same building as that in which she had been previously situate. It would have involved no direct working relationship between the applicant and Ms. Barrington.

[20] Ms. Matheson's reply came the next day in the form of another note from Dr. Hart, this one dated January 20th, 2015. This is one instance where the Commission's record is disjoint, as the two pages comprising this letter are not sequential . Page one is at p. 270 (Tab 6) of the Record, while the second page precedes it at p. 263. In any event, Dr. Hart stated as follows:

> As per my previous note, it is my opinion that the offered positions are not suitable.
>
> The first offer is a lower level position (ie. demotion) while the second position offered would involve contact with the stressor (same business unit).
>
> Ms. Matheson remains eager to return to work when an appropriate positon is found.
>
> [Emphasis added]

[21] No further offers were made by HRM of alternate placements.

[22] On April 2nd, 2015, Ms. Matheson sent an email to Natasha Gibb referencing a belief that there had been some posted and unposted temporary positions that had been filled since they had last been in contact. She continues in that email:

> …I am eager to return to work in an environment which will not put my health at risk and I depend upon my doctor's guidance for that. As a long term employee with over a decade of service I have shown my commitment to HRM as a hard worker and as someone who is committed to upgrade my skills…).

The Human Rights Complaint

[23] Ms. Matheson filed her Human Rights complaint (as distinct from the workplace rights complaint previously filed with HRM) on July 2nd, 2015. She alleged discrimination based on mental and/or physical disability and/or sexual harassment.

[24] She points out in that document at para. 2 , that:

> …the discrimination began on or about May of 2010, after I'd been diagnosed with a brain tumor. In the two years leading up to this diagnosis and after the diagnosis I had missed time for testing and physicians appointments Cathie Barrington (office manager) would ignore me and give me the cold shoulder after these medical appointments.

[25] Concerns were expressed therein about Ms. Barrington gossiping about colleagues in the applicant's presence. She also alleged ostracism by Ms. Barrington and referred to the latter as "engaging in a manner of conduct that was inappropriately targeting me for negative treatment." The applicant indicated that she was told to shut up on one occasion, that she was asked if she had ADHD or was depressed on one other occasion, and that Ms. Barrington once made disparaging comments about a colleague's breasts in her presence, and on another occasion, theorized about the possibility of a correlation between individuals who used a certain feminine product and whether they had had children. She also referenced criticism directed at her for taking too much sick time off of work.

[26] The applicant alleges that these behaviours caused a build up of tension and anxiety over time, which culminated on October 21st, 2014. On that date, it became so unmanageable that she had to visit her physician, who placed her on medical leave for anxiety and depression.

[27] Earlier, on April 23rd, 2015, Ms. Matheson had filed a disability claim with Desjardins, her disability insurer. An "Attending Physician Statement" was required.

[28] That statement was comprised of what is described as a psychiatric/psychological form. It was filed out by Dr. Hart who describes Ms. Matheson as suffering from (in DSM-IV criteria parlance) "an Axis I adjustment disorder with anxiety, [and] an AXIS III acoustic neuroma (2011)". Dr. Hart also says that the applicant was possessed of a current "GAF score" of 61-70.

[29] Neither of these latter notes (the acoustic neuroma or the GAF score) were mentioned in any of the other materials that were before the Board, nor were they addressed by counsel in either their briefs or oral submissions before me. For this reason, and also because of the fact that Dr. Hart goes on to describe the relevant subjective problems being experienced by the applicant in the workplace, my conclusion is that is it not necessary to parse these words for further significance. Nor is it appropriate that I conduct my own research into their meaning and speculate as to their possible relevance to the case before me.

[30] Since this form was part of the record of the materials that were before the Commission, it and the other constituent contents of that record are what is being considered.

[31] Dr. Hart continues on (in the Initial Attending Physician Statement) to the effect that symptoms have been "progressive over the years", and when asked whether the problems in fact led to the development of Ms. Matheson's disorder, she answers in the affirmative and adds "specifically as a consequence of work stress, bullying from manager". She also adds that she has seen her patient "eight times since October 21st, 2014, most recently on April 21st, 2015".

[32] As for the course of treatment for the applicant, Dr. Hart states flatly: "Remove Stressor". (The context makes it plain that by "stressor" she means Ms. Barrington) and she adds the words "seeing counsellor".

[33] At this juncture, I pause to note that there was an earlier reference in the Attending Physician's Statement to the effect that Ms. Matheson was not being referred to a psychologist, but that she had been seen by Ann Dobson (EAP) who recommended a therapist, Denise Perron. No reference was made by counsel to any further materials available from Ms. Dobson or Ms. Perron in either their submissions or briefs. I have been unable to find in the record any such further references. As such it is unclear whether the applicant ever followed through with the recommendations and saw Ms. Perron.

[34] There is also reference therein that Ms. Matheson had started on a trial of "Ciprolex, 10 mg per day" and that Dr. Hart "will re-evaluate on May 11th, 2015."

[35] As to Ms. Matheson's return to work plans, her prognosis is described by Dr. Hart as: "…good if changes to work environment". The date of Ms. Matheson's return is described by the doctor as: "…unknown, requires changes in work environment. Complaint has been filed".

[36] And finally:

> Lynn is able to return to work at this time provided the stressor is removed. Furthermore, any perceived demotion could exacerbate her medical condition.

[37] In or around August of 2015, HRM forwarded further inquires to Dr. Hart, which led to a response. Reiterated by Dr. Hart in that response was the position that:

> … the Applicant is able to return to work <u>if</u> the stressor <u>is</u> removed. (emphasis in original)

[38] Dr. Hart further notes that Ms. Matheson:

> remains unable to return to her position because the stressor remains at that position. (emphasis in original)

[39] This time, when Dr. Hart is asked what medical treatment has been undertaken to assist in the resolution of symptoms, she does not mention counselling or medication. She indicates that:

> … the treatment was removal of the stressor (leave of absence from work).

[40] Other comments, such as the fact that there were no "workplace limitations without the stressor" and that further treatment or referral "are not indicated or planned. Patient is able to work provided stressor is removed."

[41] When speaking of efforts by HRM to accommodate the applicant and the decision of the applicant to refuse the proffered temporary positions, Dr. Hart opined:

> These decisions were made based on the fact that the stipulations were not met. The first position offered was a demotion. The second offered position was in the same building as her previous positon and therefore, the possibility of contact with the stressor, (her former manager Cathie Barrington) existed.

[42] Prior to this exchange with Dr. Hart (specifically, on June 19th, 2015) the Workplace Rights Investigation complaint that Ms. Matheson had earlier filed with HRM was dismissed as being without merit. It was dismissed on the basis that the complaint did not raise a *prima facie* case of harassment or a violation of HRM's anti-harassment policy.

The NSHRC Investigation & Report

[43] On September 4th, 2015, the Nova Scotia Human Rights Commission wrote to Ms. Matheson and told her that her complaint and information had been referred to Sharon Tarr ,who was a Human's Rights Officer. She was further advised that contact from Ms. Tarr within two weeks to discuss the next aspects of the Commission's work could be anticipated.

[44] Ms. Tarr wrote to HRM on September 30th, 2015, enclosing particulars of the complaint, and recommended that the Respondent's representative contact her in relation to it.

[45] Her subsequent investigation included contacts with the parties, and consideration of information provided through such meetings, as well as an analysis of the information and materials that were provided to the Commission from other sources. It began with materials generated contemporaneous with the Complainant's last work day in October 2014. It ended on June 22, 2016.

[46] On June 22nd, 2016, Mr. Tarr wrote to the parties advising that she had completed her investigation and had concluded that she would be recommending to the Commissioners that the complaint be dismissed pursuant to the s. 29(4) b of the *Human Rights Act*. She also advised the parties of their right to make submissions with respect to her recommendations which would be placed before the Commissioners at the same time as her recommendation. Submissions were due by July 13th, 2015, and were to be legible and no greater than five single-sided letter sized pages.

[47] The parties availed themselves of this opportunity. The Complainant retained counsel, who furnished a letter to the Commission dated July 13th, 2016. In its original form it was replete with not only case citations and legal argument, but it also had several schedules appended to it. The arguments were, for the most part, those that the applicant has reiterated in this court through the written and oral submissions of her counsel.

[48] Documentary evidence including the emails and some of the medical reports had been appended by the applicant's counsel as schedules to these written submissions to the Commission. The schedules were neither reviewed or forwarded to the Commission by Ms. Tarr because they brought the length of the submission beyond the stipulated five page limit. In effect, she forwarded the submissions to the Commissioners, not the schedules.

[49] I am satisfied the material in these schedules was nonetheless available to, and considered by, the Commission, as it is to be found in other parts of the record which counsel for the Commission filed with this Court. Moreover, neither counsel for the applicant or the respondents has referred in their briefs or submissions to extraneous medical or other information that was not in the record.

[50] Finally, I am satisfied that this material was considered by Ms. Tarr before her recommendations were delivered to the Commission, because she made reference in her report to some of the emails and medical evidence (particularly in Schedules G and "I" thereof) that had comprised the schedules appended to the applicant's counsel's submissions.

[51] Ms. Tarr's report is dated July 2nd, 2015. In the course of recommending dismissal of the complaint as being without merit under s. 29(4) b of the *Nova Scotia Human Rights Act*, she noted:

> The Complainant in her complaint form made reference to being exposed to comments of a sexual nature in the workplace. No other information has been provided by the Complainant to support her allegation of sexual harassment.

[52] Paragraph 29:

> The Respondent has Mediation and Conflict Resolution available to assist the parties in repairing their working relationship. This was offered to the Complainant as an option to resolving the matter but was not accepted. The Complainant's physician recommended no contact between the Complainant and "stressor".

[53] At para. 30 she indicated:

> On April 21st, 2016, as a result of settlement talks between the parties the Respondent made a settlement proposal to the Complainant. The offer was:
>
> - $5,000.00 general damages
> - A letter of reference (contents to be mutually agreed upon)
> - The Complainant could resign from her employment as opposed to quitting or being terminated.
>
> (The Complainant has been off work since October 2014) The Complainant declined the offer".

[54] In para. 31 she stated:

> In order for the complaint to proceed further there must be some evidence to establish a case of discrimination based on a protected characteristic. The evidence must demonstrate a link between the protected characteristics (perceived physical/mental disability, and sexual harassment) and the actions alleged to cause the discrimination (being denied an accommodation).

[55] In para. 35 of the report Ms. Tarr suggests that the duty to accommodate involves a fluid reciprocity and cooperation between the parties. She concludes the paragraph by saying:

> In this case the Respondent offered the Complainant two alternate positions as a form of accommodation and the Complainant declined both and did not seek alternate positions that may be available with HRM.

[56] In para. 36 she continued:

> The Complainant's physician confirmed that the Complainant does not have any limitations to returning to work if the "stressor" (her supervisor) is removed from working with the Complainant. Dr. Hart states that "*referrals for treatment are not indicated or planned as the Complainant is able to work provided stressor is removed*." Based on this information it would appear that the Complainant does not have a mental disability as defined under *Nova Scotia Human Rights Act* but rather a broken relationship with her supervisor. Offers by the Respondent to have mediation and/or conflict resolution meetings between the parties were declined by the Complainant.

[57] In paras. 38 and 39 she concludes this point as saying:

> In order for the complaint to proceed further there must be some evidence to establish a case of discrimination based on a protected characteristic. The evidence must demonstrate a link between the protected characteristic (perception of a mental disability) and the actions alleged to cause the discrimination (being denied an accommodation to return to work). The evidence appears to indicate that the Respondent attempted to work with the Complainant in finding a resolution to the workplace concerns (offered her two accommodated positions, and offered mediation/conflict resolution sessions). The Complainant declined all offers made by the Respondent and did not appear to seek other positions within HRM to work at but rather advised the Respondent she could return to work if the stressor is removed (her supervisor, was removed from her position).
>
> In conclusion, I recommend that the complaint of discrimination on the basis of perception of a physical/mental disability be dismissed as there is insufficient evidence to support the allegation".

[58] Finally, as there was no evidence of sexual harassment with respect to that aspect of Ms. Matheson's complaint, it was also dismissed.

[59] On September 21st, 2016, the Commissioners met and accepted Ms. Tarr's recommendation and dismissed her complainant under section 29(4)(b) as being without merit. The record is sparse and consists of the following:

> HRO Tarr joined the meeting by phone to provide an overview of items D1 – D5 inclusive. Following her explanation of these items, she ended the call.

[60] There is then a reference to Commissioner Blumenthal excusing himself from the meeting. Next it goes on to say:

> It was moved by B. Persaud And seconded by K. Armour that the complaint be dismissed pursuant to section 29(4)(b) of the *Human Rights Act* because the complaint is without merit.

[61] It goes on to refer to the fact that Mr. Blumenthal then returned to the meeting, and that the action to be taken consisted of "letters to be sent to the parties notifying them of the decision."

[62] What items D1 – D5 refer to when considered alongside Ms. Tarrs' report is unclear. There are no corresponding items D1-D5 in that report which bear ready comparison.

Analysis:

1. Did the Nova Scotia Human Rights Commission breach the Applicant's right to procedural fairness when it failed to provide her with the reasons why the complaint was dismissed?

[63] The applicant argues that without reasons she has been placed at a significant disadvantage. For example, she asks whether the Commission came to its conclusion based on Ms. Tarr's report of July 2nd, 2016? If so, what aspects of it were considered critical to the decision? To what extent (if at all) did it rely upon the findings of the internal Investigation reports authored by Gilles Deveau in connection with her workplace rights complaint in June of 2015? Would it not always be advantageous to the Commission to couch its' determinations in vague conclusionary statements such as these so as to frustrate the very type of analysis in which the applicant is attempting to engage here?

[64] Implicit in the manner in which I have framed the issue above (and as the parties concede) we are dealing with a matter of procedure. To be more specific, the procedure adopted by the Commission. The applicable standard of review is correctness. Either the process followed by the Commission was fair to all parties, or it was not.

[65] Recourse is often had to *Baker v. Canada* (*Minister of Citizenship and Immigration*), [1999] 2 SCR 817 in this context. *Baker* sets out five non exhaustive factors that are relevant to a determination of the content of the duty of fairness. They consist of:

1. The nature of the decision;
2. The nature of the statutory scheme;

3. The importance to the individual's affected;
4. The legitimate expectations of the person challenging the decision; and,
5. The choices of procedure made by the agency itself.

[66] In *Cape Breton Regional Municipality v. Nova Scotia Human Rights Commission,* 2013 NSSC 193, Bourgeois, J. (as she was then) reviewed a Commission decision to refer a matter directly to a Board of Inquiry without first conducting an investigation. She concluded that a low level of procedural fairness was required.

[67] In so doing, she reasoned that the Commission was not, in the circumstances before her, making a final decision with respect to the complaint, whose merits would be heard by the Board at a later date. This, therefore, required a lower threshold or level of fairness when the first and second of the *Baker* criteria were considered.

[68] While not specifically addressed by counsel, implicit in the applicant's arguments is that (in the case at bar) the Commission's decision was dispositive. Because of it there will not be a decision on the merits, which is a fact that significantly distinguishes Ms. Matheson's case from the one in *Cape Breton Municipality v. NSHRC (supra).*

[69] Justice LeBlanc confronted this point directly in *MacDougall v. Nova Scotia (Human Rights Commission)* 2016 NSSC 118 where, at paras. 18–19, he stated:

> Given the focus of the above cases finding a low level of fairness based largely on the fact that the merits of the complaint will be assessed at a later stage, it is reasonable to conclude that the same logic does not apply where the Commission's decision effectively precludes any further consideration. This in turn may effect the amount of procedural fairness required at this stage of the proceeding. Brown v. Evans write in *Judicial Review of Administrative Action in Canada* (Carswell loose-leaf) at 7:2554:
>
> On completion of an investigation, a body may be required to decide whether there is sufficient evidence to warrant referring a matter for a full hearing... In these circumstances where the investigation body *rejects* a complaint, it will usually be found to owe a duty of fairness to the complainant, since rejection of the complaint will effectively preclude the Complainant from obtaining redress. However, the content of the duty is likely to fall toward the low end of the spectrum. (emphasis added)

[70] Then at para. 21 Justice LeBlanc continues:

> Reconciling this with the statements by Cromwell J. in *Comeau*, and reiterated by the Nova Scotia Court of Appeal in *Green v. Nova Scotia (Human Rights Commission)*, 2011 NSCA 47, [2011] N.S.J. No. 260, that the decision is essentially administrative, is difficult, but in all the circumstances, the level of procedural fairness due likely remains on the lower end of the spectrum. As will be discussed below, the facts of this case are such that a finely tuned differentiation of the exact degree of procedural fairness does not have a significant bearing on the outcome, and even a low-to-moderate degree of fairness was met by the investigation and the Commission decision-making process. (emphasis added)

[71] In the latter two sentences Justice LeBlanc was commenting on the particular situation that was before him in that case.

[72] The applicant argues that it is difficult to follow and, hence, challenge what exactly precipitated the Commission's decision in this instance. She also points out that, if reliance upon the Commission Investigator's Report is to be assumed, there were several errors or misstatements in that report. For example in para. 42 of the report, Ms. Matheson takes issue with Ms. Tarr when the latter states:

> An Investigation Report does not determine whether or not there has been discrimination. It determines if there are allegations which, if proven on a balance of probabilities, would establish discrimination on the grounds alleged in the complaint.

[73] Counsel for Ms. Matheson argues that this is not the test. Rather (he says) the test is whether the complaint "could succeed" at a Board of Inquiry.

[74] With respect, I am not satisfied that there is any practical distinction between what the applicant submits is the appropriate test and the manner in which Ms. Tarr directed her focus. There are myriad ways in which the test has been expressed in the case authorities to which counsel has referred, as well as in some others which I have also reviewed.

[75] For example, in *Lee v. British Columbia (Attorney General)* 2004 BCCA 457, the British Columbia Court of Appeal distilled a number of authorities and concluded that the test is whether the evidence presented takes the case "out of the realm of conjecture".

[76] The applicant expressed concern that the investigative report was contradictory and internally inconsistent and cited the fact that Ms. Tarr refers in para. 4 thereof to the fact that:

> On October 21st, 2014, the Applicant went on medical leave after being diagnosed with anxiety and depression.

[77] Ms. Matheson points out that since this appears under the heading "Undisputed Background Information" it is inconsistent with the investigator's later statement at para. 36 of her report which states that:

> …it would appear that the Complainant does not have a mental disability as described under the Nova Scotia Human Rights Act but rather a broken relationship with her supervisor.

[78] However, as counsel for the Commission pointed out, "Undisputed Background Information" does not denote acceptance of the fact as proven from the Commission's standpoint. Rather, it merely signifies information that neither side took the time to dispute in the material that was before the Investigator. This point acquires more force when it is recalled that there was no mention of anxiety and depression in any of the medical information supplied by Dr. Hart until well after October 21st, 2014. So it cannot be said to have been established or accepted "as a given" by anybody that this was the basis upon which Ms. Matheson was granted medical leave on October 21, 2014.

[79] The applicant also takes issue with the statements in para. 35 of the report which suggests that she, after declining the two positions that were offered to her by way of temporary accommodation, did not seek alternate positions that may be available within HRM. With respect, while the use of the phrase "did not seek" may have been (to borrow the language of the British Columbia Court of Appeal in *Lee, supra*) "unfelicitous", this particular statement followed a passage where Ms. Tarr observed that the process of accommodation:

> …is a fluid back and forth process where responsibilities shift from one party to the other and back again. The Complainant has a obligation to discuss solutions with the employer and cooperate with experts to find an accommodation…

[80] The investigator was alive to the applicant's assertion that she was making efforts to seek accommodation within HRM, and seeking other employment within HRM. In fact, she quoted Ms. Matheson's email of April 2nd, 2015 to Karen Steeves (previously referenced) in its entirety. Clearly what was meant in this context was nothing more than a commentary on the sufficiency of the applicant's efforts to hold up her end of the "fluid" accommodation process.

[81] Finally, the applicant points to para. 38 of Ms. Tarr's report, and the author's apparent satisfaction with the efforts of the employer to accommodate. She argues that there is a paucity of evidence that the employer reached the point of "undue hardship" in its efforts to accommodate her.

[82] This point is more appropriately addressed when I deal with the second issue, which concerns whether the decision reached by the Commission was reasonable in the circumstances.

[83] For the present, there does not appear to be any evidence that Ms. Tarr's report was other than through and neutral. Moreover, it appears that the Commission relied largely, but not exclusively, on Ms. Tarr's report.

[84] This is, after all, implicit in the earlier referenced minutes of the Board meeting on September 21st, 2016, where we see in the column headed by the word "discussion":

> HRO Tarr joined the meeting by phone to provide an overview of items D1 to D5, inclusive. Following her explanation of these items, she ended the call.

[85] As I noted earlier, while it is difficult to correlate the reference to "items D1 to D5" with a specific portion of the report, it is clear that Ms. Tarr's report was under discussion and that she was queried with respect to it.

[86] This does not mean that the Commission relied exclusively upon this report. The other materials which form part of the record are there as well. Justice LeBlanc has observed in *MacDougall*, supra, at para. 28:

> …where the Record is complete, the administrative decision maker should be given the benefit of the doubt that they reviewed the entirety of the record in reaching their decision. The Court will interfere only if there is a "manifest unfairness" amounting to denial of procedural fairness. Here, the Record provided an opportunity for the Applicant to respond to the report, and is assumed to have been considered by the Commission. [Emphasis added]

[87] In *Slattery v. Canada (Human Rights Commission)* (1994) 73 FTR 161 (CA) Justice Nadon's view was that for an administrative investigation to be procedurally fair, what was required was that it be "thorough and neutral". He opined further at para. 56 that:

> …it should only be where unreasonable omissions were made, for example, where an investigator failed to investigate obviously crucial evidence that judicial review is warranted.

[88] While the Applicant has taken issue with some of the conclusions at which Ms. Tarr arrived on the basis of her investigation, there is no indication of procedural unfairness in the manner in which she conducted it. She met with the parties, she reviewed the material with which she had been provided, she gave advance notice to the parties of the conclusion that she had reached, and advised them of their right to make submissions to the Commission in relation to the recommendations that she would be making to that body. Both parties availed themselves of that opportunity.

[89] I see that nothing in Ms. Tarr's report, or in the record itself (which was presumptively relied upon by the Commission) which suggests procedural unfairness.

[90] In such a context, the failure of the Commission to provide written reasons does not serve to transform the process into one which was unfair to the applicant. There is nothing in the *Nova Scotia Human Rights Act* which requires that written reasons be provided by the Commission in the exercise of its "gatekeeper function" as in this case.

[91] One of the Applicant's stated concerns was to the effect that it may become tactically advantageous for the Commission to provide "bottom line decisions" without elaboration. She argues that such a practice places people at an disadvantage when the time comes to attempt to identify why the Commission concluded the way they did upon judicial review of the decision. This concern is met by the observation of Bryson, J. (as he then was) in *Green v. Nova Scotia (Human Rights Commission)* 2010 NSSC 242 affirmed 2011 NSCA 47, where at para.21 – 23 he indicates:

> Ms. Green acknowledges that in decisions rendered by Human Rights Commissions – which are often known as "screening" decisions – the obligation to provide reasons is less compelling than in other cases. However, she refers to the Federal Court decision in Johnston v. Canada (Attorney General) 2007 F.C.J. No. 43, affirmed 2008 F.C.J. 101 an in particular:
>
> Although in Bell Canada v. Communications, Energy and Paperworkers' Union of Canada 1998 CanLII 8700 (FCA), [1999] 1 F.C.113, [1998] F.C.J. No. 1609, the Federal Court of Appeal observed that a reviewing Court ought not to "intervene lightly" in a screening decision, it has also said that such a decision must have a discernable rational basis of support: See Gee v. Canada (Minister of National Revenue), [2002] F.C.J. No. 12, 2002 FCA 4 (CanLII) at para. 13 and Kidd v.

> Greater Toronto Airports Authority, [2004] F.C.J. No. 859, 2004 FC 703 (CanLII) at para. 22 aff'd. [2005] F.C.J. No. 377, 2005 FCA 81 (CanLII). The Federal Court has also noted that a dismissal of a complaint at the screening stage "adds to the seriousness of the decision" and therefore justifies a careful review: see Sketchley v. Canada (Attorney General), [2004] F.C.J. No. 1403, 2004 FC 1151 (CanLII) at par. 51. I would add that a decision by the Commission to dismiss a complaint without convincing reasons and contrary to the findings and recommendation of the Commission's investigator warrants a particularly careful review."
>
> Notably, the Court did not say that procedural fairness obliged the Commission to give reasons; rather, what Johnstone seems to say is that if the Commission fails to give reasons when its decision appears otherwise unreasonable, the Court will not accept that outcome. But Johnstone itself and the other cases cited by the applicant do not establish that failure to give reasons alone renders a process procedurally unfair.
>
> The respondents argue here that the Commission did provide reasons, albeit brief. The Commissions dismissed the applicant's complaint on the basis that it was without merit. There was no elaboration. What this means is that the Commission's decision is at risk of being held unreasonable if, on the basis of all the materials before it, the dismissal cannot be reasonably sustained. However, it does not mean that the failure of the Commission to give reasons – or elaborate on its brief reasons – itself constitutes procedural unfairness. (emphasis added)

The Commission has provided no reasons as to why the Application was dismissed. I conclude, however, that this omission does not, in and of itself, in these circumstances, equate to procedural unfairness. What it does, however, is render the decision vulnerable in the event that I conclude that it appears to be unreasonable "on the basis of all the materials" (per *Green, supra*, para. 23) that were before the Commission. This consideration directly engages the second substantive issue raised by the applicant.

2. Was the Commission's decision reasonable?

[92] Section 29(1) a of the *Human Rights Act* provides a complainant, in this case Ms. Matheson, with the right to make a complaint in writing to the Director in the prescribed form. Where such a complaint is made the Commission is required to inquire into it and attempt to "effect a settlement of any complaint of an alleged violation of the *Act*".

[93] Section 29(4)(b) says that the Commission or the Director "may dismiss a complaint at any time…if it is without merit". Section 32A (1) says that the

Commission "may" appoint a Board of Inquiry to inquire into the complaint "at any stage" after it is filed.

[94] The Board of Inquiry Regulations, OIC 91-122 Nova Scotia Regulations 221/91, offer some clarification of the Commission's role in exercising the discretion bestowed upon it:

> The Nova Scotia Human Rights Commission may, at any stage after filing a compliant, request the Chief Judge of the Provincial Court to nominate a person or persons for appointment by the Commission to a Human Rights Board of Inquiry to inquire into the complaint if the Commission is satisfied that, having regard to all circumstances of the complaint, an inquiry thereinto is warranted.

[95] Justice Bryson noted in *Green,* at paras. 29 to 31:

> It is clear from the Act and Regulations that the Commission enjoys a discretion concerning whether nor not to refer a complaint to a Board of Inquiry. The Commission's decision is entitled to a substantial degree of deference particularly in view of the specialized human rights regime and the establishment of the statutory scheme for examining and vindicating those rights where appropriate. (Halifax v. Nova Scotia, 2010 Carwell NSCA 8 and following).
>
> In exercising its discretion, the Commission is not required to follow the recommendation of its investigator. If it were otherwise, there would be no need for a Commission. The Commission's mandate is obviously broader than that of an investigator. The Commission must consider the public interest and policy issues which can involve factors other than those relating to the parties alone (Garnthum v. Canada, AG, (1996), 30 C.H.R.R. D/152 (F.C.T.D.) at 30).
>
> Where the appropriate standard of review is reasonableness, a court should not interfere unless the applicant positively demonstrates that the decision under review was unreasonable (Ryan, supra, at 48).

[96] Then in paras. 33 to 36 of *Green*, he continues:

> In Rogers v. British Columbia (Counsel of Human Rights) (1993), 21 C.H.R.R. D/67 (B.C.S.C.), the court formulated the following test after reviewing the appropriate jurisprudence:
>
> In my opinion, the test which is better suited to the scheme of the Human Rights Act is one which may be derived from S.E.P.Q.A. v. Cohen, supra. I would articulate it as follows: The Human Rights Council may discontinue the proceedings on a complaint if it determines that there is no reasonable basis in the evidence to warrant taking on the complaint to the next stage. In making this determination the council may evaluate the information in the investigator's report and in doing so, may use the collective experience and common sense of its

> members. The scope of the evaluation is limited to that which is necessary to determine whether there is a reasonable basis in the evidence for carrying on the claim to the next stage.
>
> The foregoing was approved in Lee v. British Columbia (Attorney General) (2004), 50 C.H.R.R. D/295, 2004 BCCA 457 (CanLII), 2004 B.C.C.A. 457 at – 26, where the court noted that the mere possibility of discrimination cannot be enough to require a hearing.
>
> It is not the role of this court to determine whether or not Ms. Green suffered discrimination, but rather, to review the Commission's decision to determine whether its refusal to move Ms. Green's complaint to the next stage of a Board of Inquiry, was within a reasonable set of outcomes, (Dunsmuir – 47).
>
> An absence of reasons does not frustrate judicial review where the record allows the court to discern whether the decision was reasonable in all of the circumstances (Hiscock, Gardner). Deference extends to reasons that could be offered in support of the Commission's decision (Dunsmuir 48).
>
> [Emphasis added]

[97] Of course, the reference to "Dunsmuir" is *Dunsmuir v. New Brunswick,* 2008 SCC 9, wherein the Supreme Court of Canada observed that in most cases where the administrative body in question is engaged in interpreting its' home statute, a deferential standard of reasonableness applies.

[98] Fichaud, J.A., helpfully summarized the effect of *Dunsmuir* in *Casino Nova Scotia v. Nova Scotia Labour Relations*, 2009 NSCA 4, at paras. 29 to 31:

> In applying reasonableness, the court examines the tribunals' decision, first for process to identify a justifiable, intelligible and transparent reasoning path to the tribunal's conclusion, then second and substantively to determine whether this tribunal's conclusion lies within the range of acceptable outcomes.
>
> …
>
> Under the second step, the court assesses the outcome's acceptability, in respect of the facts and law, through the lens of deference to the tribunal's "expertise or field of sensitivity to the imperatives or nuances of the legislative regime". This respects the legislator's decision to leave certain choices within the tribunal's ambit, constrained by the boundary of reasonableness. Dunsmuir, par. 47-49; Lake, para. 41; PANS Pension Plan, para 63; Nova Scotia v. Wolfson, para. 34.
>
> [Emphasis added]

[99] What is reasonableness? *Dunsmuir* says, at para. 47, that it consists of:

> …a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquiries into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes.

[100] All parties agree that the reasonableness standard is applicable here. Moreover, as counsel for the applicant stated at the outset of his submissions "this is an accommodation case". Ms. Matheson contends that she has a disability and that her employer failed in its duty to accommodate her.

[101] There does not seem to be much, if any, disagreement with respect to the applicant's submission that <u>if</u> the matter had proceeded to a Board of Inquiry, the applicant's duty would have been to first establish that she has a disability and second, that she received adverse treatment related, in whole or in part, to the fact of that disability.

[102] The *Human Rights Act*, RS, c. 214, c.1 defines physical or mental disability to mean:

> 3(1) "physical disability or mental disability" means an actual or perceived
>
> i. loss or abnormality of psychological, physiological or anatomical structure or function,
>
> ii. restriction or lack of ability to perform an activity,
>
> iii. physical disability, infirmity, malformation or disfigurement, including, but not limited to, epilepsy and any degree of paralysis, amputation, lack of physical co-ordination, deafness, hardness of hearing or hearing impediment, blindness or visual impediment, speech impairment or impediment or reliance on a hearing-ear dog, guide dog, a wheelchair or remedial appliance or device,
>
> iv. learning disability or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language,

v. condition of being mentally impaired,

vi. mental disorder, or

vii. dependency on drugs or alcohol.

[103] In the event of a Board Inquiry hearing, if the applicant discharges the duty noted above, the onus shifts to the Respondent to demonstrate that it has discharged its duty to accommodate Ms. Matheson in the workplace with respect to that disability, short of undue hardship.

[104] This duty to accommodate has two components, both a procedural and a substantive one. The former has been interpreted to require the employer to take the employee's disability related needs, investigate and consider individualized accommodation measures to address those needs. The latter duty has been interpreted to require an employer to modify and accommodate, if necessary, in order to allow a disabled employee to participate in the workplace.

[105] All of this is what would have concerned the Board of Inquiry had the Commission exercised its' discretion to appoint one. Recall however, that the Commission's responsibility at the screening stage (although various cases have described it in a variety of ways) is different. I return to the British Columbia Court of Appeal in *Lee* supra, paras. 26 and 27 as representative:

> The HRC"s use of the phraseology: "not any evidence" was unfelicitous, it would have been better to say there was not *sufficient* evidence. As other judges have observed, there will almost always be some evidence of the possibility of discrimination when a member of a minority group is passed over in favour of a member of the majority group. But a mere possibility surely cannot be enough to require a hearing. The scheme of the statute involves a screening process so that only complaints with sufficient merit will proceed to a hearing. The HRC was assigned the role of gate keeper. Thus the HRC had to assess this case in a preliminary way and make a judgement whether the matter warranted the time and expense of a full hearing. The threshold is not particularly high: whether the evidence takes the case "out of the realm of conjecture": *Onischak v. British Columbia (Council of Human Rights)* (1989), 38 Admin, L.R. 258 (B.C. S.C.), at 266 per Huddart J. (as she then was), followed by Shaw J. *in Rogers v. British Columbia (Council of Human Rights)* (1993), 21 C.H.R.R. D/67 [1993] B.C.J. No. 698 (B.C.S.C.) at para. 18, which in turn was applied by this Court in *Kratoska v. British Columbia (Human Rights Council)* (1997), 88 B.C.A.C 241, [1997] B.C.J. No. 638 (B.C.C.A.) at para. 11. As the tribunal is assumed to know the law, the HRC must be taken to have applied this test.

> In my view the evaluation of the complaint at the gate keeping stage attracts the highest degree of curial deference. It involves the assessment of evidence in a specialized area. I do not think it can be said that the decision to dismiss the complaint was patently unreasonable. Mr. Lee said racism influenced BC Hydro's decisions relating to his career. BC Hydro said racism played no part in the matter. It was open to the HRC to decide that there was nothing in the evidence that moved the allegation from speculation to inference: see *Jacques v. British Columbia (Council of Human Rights)* (1998), 51 B.C.L.R. (3d) 111, 161 D.L.R. (4th) 137 (B.C. C.A.) at para. 25. Before us, Mr. Lee was unable to bring out anything that takes the case over the line in an obvious way so that it can be said that he dismissal of his complaint was patently unreasonable. As I said in my introductory remarks, the reviewing judge appears to have substituted her own view of the evidence for that of the HRC contrary to the approach set out in *Q. v. College Physicians & Surgeons (British Columbia)*, [2003] 1 S.C.R. 226, 2003 SCC 19 (S.C.C.) at para. 42. It is clear that the legislature intended the screening to be done by the HRC, not the courts.
>
> [Emphasis added]

[106] In this case, and regardless of whether the descriptors used by Dr. Hart in some of her reports were "anxiety", "depression", or nothing at all, when she got around to the specifics of what was afflicting the applicant she was clear (almost from the beginning) that Ms. Matheson could return to work if the stressor (Ms. Barrington) was removed. It is a theme reiterated by the physician in almost every document.

[107] It is further clear from the doctor's last report that the only way to address what was afflicting Ms. Matheson was to remove the stressor, which is to say, to fire or transfer her boss (Ms. Barrington). In fact, Dr. Hart went so far as to indicate that the removal of Ms. Barrington was the treatment for Ms. Matheson - the only one which could result in the applicant's return to her (former) workplace.

[108] Lesser measures were broached by HRM. References have earlier been made to the attempts to offer conciliation, mediation or other measures. A positive response was not forthcoming from the applicant or her counsel. Similarly, a request by HRM for an independent medical examination of the applicant met with no discernable response.

[109] Moreover, HRM commissioned its own independent investigation into the applicant's workplace complaint, which concluded that the issues raised by the applicant had no merit.

[110] All of the foregoing form part of the efforts by HRM to discharge the procedural and substantive duties encompassed by its duty to accomodate.

[111] Taken in tandem with the two temporary positions that were offered to the applicant, HRM's attempts at accommodation could be taken to have satisfied its duty to the applicant any event. It will be recalled that when the offer of two temporary positions were made, one was declined by the Applicant because of the possibility of incidental contact with Ms. Barrington (even though Ms. Matheson would not have been under her supervision) and the other was declined because she perceived it to be a demotion.

[112] It is true that only two (temporary) positions were offered to the applicant. That said, it would have indeed been difficult for HRM to comprehend what benefit a temporary placement would have served for Ms. Matheson in any event, in the face of repeated statements from her, through her doctor, that she would not ever consider a return to her original workplace until the stressor was removed.

[113] The applicant was uncompromising in the position that she took with HRM. It could be summed up as "it's either her (Ms. Barrington) or me". She was backed up, unequivocally, by her physician. Such a demand could not be accommodated by the employer, let alone to the point of hardship.

[114] It is certainly true that little to no evidence was proffered by any party as to the substantive duties that were encompassed within Ms. Matheson's job description, or for that matter, that of Ms. Barrington. With that being said, it requires a very small amount of insight to realize that one cannot summarily "fire" or "remove" someone in Ms. Barrington's position from the workplace merely because such is the "treatment" prescribed by a co-worker's physician. To belabor the obvious, such an action would open HRM up to a whole host of legal proceedings, likely more onerous or substantial than those in which it was embroiled with Ms. Matheson, in addition to the substantial toll that it would likely have on Ms. Barrington personally. For Ms. Matheson's physician to refer to such action on the part of HRM as the "treatment" prescribed for her patient is to distort that word beyond any acceptable meaning.

Conclusion

[115] Even if Ms. Matheson was able to establish that she was possessed of a disability within the meaning of the *Human Rights Act* (and it was open to the Commission to find that she could not) it was open to the Commission on the basis

of the record to conclude that, under these circumstances, HRM had clearly discharged its duty to accommodate her to the point of hardship.

[116] The manner in which the applicant's claim was evaluated by the Commission at the "gate keeping" stage attracts a high level of deference. Ms. Matheson alleged that she suffered from discriminatory treatment on the basis of her disability because her employer, HRM, failed to reasonably accommodate her. It was open to the Commission to conclude, for the reasons above, that this was not a case that "could succeed" if referred to a Board of Inquiry. Put differently, the conclusion that there was nothing in the evidence to take the case "out of the realm of conjecture" as per *Lee, supra*, was available to the Commission in these circumstances.

[117] The decision of the Commission not to exercise its discretion under s. 32A of the *Human Rights Act* was one of the reasonable outcomes available to it based upon the record. I therefore cannot conclude that the decision was an unreasonable one.

[118] I dismiss Ms. Matheson's application, and will accept short written submissions from the parties if they are unable to agree as to costs.

Gabriel, J.