

Federal Court



Cour fédérale

**Date: 20150729**

**Docket: T-1332-14**

**Citation: 2015 FC 925**

**Ottawa, Ontario, July 29, 2015**

**PRESENT: The Honourable Mr. Justice Fothergill**

**BETWEEN:**

**CLAUDETTE BROSAN**

**Applicant**

**and**

**THE BANK OF MONTREAL**

**Respondent**

**JUDGMENT AND REASONS**

I. Introduction

[1] Claudette Brosnan has brought an application for judicial review pursuant to s 18.1 of the *Federal Courts Act*, RSC 1985, c F-7. Ms. Brosnan challenges the decision of the Canadian Human Rights Commission [the Commission] to dismiss her complaint pursuant to s 44(3)(b)(i) of the *Canadian Human Rights Act*, RSC 1985, c H-6 [the Act].

[2] Ms. Brosnan says that the Bank of Montreal [the Bank] failed to investigate her complaint that the Bank did not take reasonable steps to accommodate her disability upon her return to work. She also asserts that the Commission's investigator [the Investigator] failed to interview two key witnesses.

[3] For the following reasons, I have concluded that the Commission's Investigator failed to examine Ms. Brosnan's complaint that the Bank did not take reasonable steps to accommodate her disability. The application for judicial review is therefore allowed in part, and the matter is remitted to the Commission to investigate this aspect of Ms. Brosnan's complaint.

## II. Background

[4] Ms. Brosnan began working for the Bank in 1991. She was promoted a number of times and she eventually assumed the position of Assistant Product Manager in 2007.

[5] On July 17, 2009, Ms. Brosnan commenced a period of disability leave after she was diagnosed with anxiety and depression. No date was set for her return. In July, 2010, the Bank permanently staffed Ms. Brosnan's position of Assistant Product Manager with another employee. At some point between August, 2010, and September, 2010, Ms. Brosnan was found to be medically fit to return to work without restriction and she informed the Bank accordingly.

[6] On October 4, 2010, Ms. Brosnan returned to work on a part-time basis, but in a different role at a different location. In June, 2011, the Bank notified Ms. Brosnan that her new position

would be eliminated “without cause” due to corporate restructuring. In August, 2011, Ms. Brosnan’s employment with the Bank came to an end.

[7] Ms. Brosnan filed a human rights complaint with the Commission on November 14, 2011, alleging discrimination on the ground of disability contrary to ss 7 and 14 of the Act. The complaint identified three discriminatory practices by the Bank: (a) adverse differential treatment; (b) failure to provide a harassment-free work environment; and (c) termination of employment. Ms. Brosnan also alleged that the Bank had failed to accommodate her medical condition, causing a serious decline in her mental health.

[8] In April, 2013, after a failed attempt at mediation, the Commission assigned the Investigator to review Ms. Brosnan’s complaint. On April 15, 2013, the Investigator wrote to counsel for Ms. Brosnan and invited comment on the Bank’s defence to the claim. In submissions made on May 21, 2013, Ms. Brosnan’s counsel devoted 10 paragraphs to the subject “failure to accommodate”.

[9] In February, 2014, the Investigator issued the Report. Both Ms. Brosnan and the Bank were given a copy of the Report and invited to comment on its findings. Ms. Brosnan’s counsel responded with an 11-page submission that focused primarily on the Investigator’s failure to examine Ms. Brosnan’s complaint that the Bank had not complied with its duty to accommodate her disability.

[10] On April 23, 2014, the Commission adopted the Investigator’s findings and dismissed Ms. Brosnan’s complaint pursuant to s 44(3)(b)(i) of the Act. On April 29, 2014, the

Commission informed Ms. Brosnan that her complaint was dismissed. The short letter stated only that the Commission had reviewed the Report as well as the parties' submissions, and had decided to dismiss the complaint because there appeared to be insufficient evidence to support Ms. Brosnan's allegations. The Commission therefore determined that further inquiry by the Canadian Human Rights Tribunal [the Tribunal] was not warranted.

### III. The Commission's Decision

[11] Where the Commission provides only brief reasons for a screening decision under section 44(3) of the Act, an investigator's report may be regarded as the Commission's full reasons for the purpose of reviewing the decision (*Sketchley v Canada (Attorney General)*, 2005 FCA 404 at paras 37, 38 [*Sketchley*]; *Canadian Union of Public Employees (Airline Division) v Air Canada*, 2013 FC 184 at para 72 [*CUPE*]). The Commission's decision therefore comprises the letter dated April 29, 2014 from David Langtry, Acting Chief Commissioner, and the Investigator's Report.

[12] The Report identified four issues that were raised by the allegations of discrimination contained in Ms. Brosnan's complaint: whether the Bank (i) treated Ms. Brosnan in an adverse differential manner; (ii) denied Ms. Brosnan employment opportunities; (iii) failed to provide a harassment-free work environment; and (iv) terminated Ms. Brosnan's employment, all on the basis of disability (depression and anxiety).

[13] The Report began with a discussion of Ms. Brosnan's allegation that she was treated in an adverse differential manner because her position was permanently staffed while she was on a

medical leave of absence and that she was provided with no assistance in finding a comparable position upon her return. Ms. Brosnan also alleged that she had received little to no training in her new position. The Investigator was unable to interview Katherine Archdekin, Ms. Brosnan's manager while she was on disability leave. Nevertheless, the Investigator observed that even if the Bank had failed to provide Ms. Brosnan with sufficient assistance, this did not appear to have significantly delayed her return to work. Furthermore, the Investigator concluded that Ms. Brosnan had received the same "on-the-job" training as similarly-situated individuals when she assumed her new position. The Investigator found that there was insufficient evidence to justify further analysis of this aspect of the complaint.

[14] The Investigator next considered Ms. Brosnan's complaint that the Bank had denied her employment opportunities. Ms. Brosnan alleged that she had submitted job applications to a number of the Bank's branches in the Greater Toronto Area but, despite being a qualified candidate, she received only one job offer. The Investigator concluded that Ms. Brosnan had made four applications and had been successful in one. The Investigator found that the successful candidates for the other positions were better qualified than Ms. Brosnan.

[15] The Investigator then addressed Ms. Brosnan's claim that she had been bullied, yelled at and treated in a disrespectful manner by other employees at the branch where she worked following her return from disability leave. The Investigator found that there was insufficient evidence to support Ms. Brosnan's claim that the Bank had failed to provide a harassment-free work environment.

[16] Finally, the Investigator examined Ms. Brosnan's claim that she was terminated because of her disability. The Investigator concluded that there was insufficient evidence to suggest that the Bank's decision to end Ms. Brosnan's employment was linked to her disability. Instead, the evidence suggested that the elimination of Ms. Brosnan's position was due to corporate restructuring.

[17] Following its review of the Report, the Commission decided that there was insufficient evidence to support Ms. Brosnan's complaint and that further inquiry by the Tribunal was not warranted.

#### IV. Issues

[18] Ms. Brosnan raised a number of issues in support of her application for judicial review, but she ultimately focused on the following:

- A. Whether the Commission failed to address Ms. Brosnan's complaint that the Bank did not take sufficient steps to accommodate her disability; and
- B. Whether the Commission's decision to dismiss the complaint was unreasonable because the Commission's Investigator did not obtain the evidence of two key witnesses.

## V. Analysis

[19] Questions of procedural fairness, including whether the Commission's investigation was sufficiently thorough and addressed all aspects of a claim, are reviewable against the standard of correctness (*Khela v Mission Institution*, 2014 SCC 24 at para 79; *Joshi v Canadian Imperial Bank of Commerce*, 2015 FCA 92 at para 6).

[20] Absent a breach of procedural fairness or an error of law, the Commission's decision not to refer a complaint to the Tribunal is reviewable against the standard of reasonableness (*Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, 2012 SCC 10 at para 17 [*Halifax*]; see also *Alkoka v Canada (Attorney General)*, 2013 FC 1102 at paras 37-39). The Court should intervene only if the decision falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59).

[21] If the Commission's factual findings are reasonable, then the analysis turns to whether the Commission's dismissal of the complaint was also reasonable. Deference is owed to the Commission's decision, although the Court must be cognizant that a decision by the Commission to dismiss a complaint is a final determination that ends a complainant's opportunity for redress (*Attaran v Canada (Attorney General)*, 2015 FCA 37 at para 14; *Moors v Minister of National Revenue*, 2015 FC 446 at 19).

A. *Whether the Commission failed to address Ms. Brosnan's complaint that the Bank did not take sufficient steps to accommodate her disability*

[22] Ms. Brosnan submits that the Commission breached her right to procedural fairness by failing to address her complaint regarding the Bank's duty to accommodate. It is well established that an investigation report that is relied upon by the Commission must be neutral and thorough, and that the parties must be given an opportunity to respond to it (*Canada (Attorney General) v Davis*, 2010 FCA 134 at para 6; *Vos v Canadian National Railway*, 2010 FC 713 at para 44; *Carroll v Canada (Attorney General)*, 2015 FC 287 [*Carroll*] at para 60). An assessment of an investigation's thoroughness involves an examination of whether the ensuing report addresses all of the most fundamental issues raised in the applicant's complaint (*Carroll* at para 61).

Thoroughness also entails that the Commission must, as a matter of fairness, respond to any submissions which go to the heart of the investigator's findings (*Carroll* at paras 68-71, citing *Sketchley* at para 37; see also *Canada (Attorney General) v Davis*, 2009 FC 1104 at para 56, and *Herbert v Canada (Attorney General)*, 2008 FC 969 [*Herbert*] at para 26).

[23] The Bank argues that the Investigator thoroughly examined all of Ms. Brosnan's factual allegations in relation to her complaint of adverse differential treatment. The Investigator concluded that there was nothing to suggest that the Bank's decision to permanently staff Ms. Brosnan's position during her disability leave, the nature of its assistance to secure alternative employment for Ms. Brosnan within the organization, the treatment of Ms. Brosnan in her new position, or the ultimate termination of her employment, were discriminatory in nature.



[24] According to the Bank, returning an employee to work is not itself a form of accommodation. The question of reasonable accommodation arises only when an employee returns to work and her restrictions or limitations need to be accommodated to enable her to perform her work-related functions. In this case, Ms. Brosnan returned to work without restrictions or limitations, and accordingly the Bank says that the duty to accommodate never arose. Put simply, the Bank says that Ms. Brosnan's complaint did not engage the employer's duty to accommodate.

[25] The Bank relies on *Tutty v Canada (Attorney General)*, 2011 FC 57 [*Tutty*]. In that case, Justice Barnes held that an employer's duty to accommodate does not require that it hold a legitimate corporate restructuring in abeyance pending the resolution of an affected employee's disability:

[26] [...] In the face of the elimination of his position, Mr. Tutty could only demand further accommodation for his apparently unresolved limitations if he accepted a new position while maintaining that he continue in his yet to be completed return-to-work plan. In the face of a legitimate business reorganization, Mr. Tutty had no special "right" to be maintained in his existing position simply because the accommodation he was receiving had not yet run its course.

[26] *Tutty* supports the Bank's assertion that the duty to accommodate does not require an employer to maintain an existing position for an employee while it undergoes a reorganization. However, Ms. Brosnan's complaint extended to the manner of her reintegration into the workforce and her treatment in the new position. While the Bank may have strong arguments to

make respecting the broader application of the duty to accommodate in this case, the fact remains that the Investigator did not address this aspect of Ms. Brosnan's complaint in the Report.

[27] The Report acknowledged that the duty to accommodate was an aspect of Ms. Brosnan's complaint: "The complainant states that she had no performance issues, and that any issues in respect of her ability to perform her job related to the Bank's failure to accommodate her return to work." Despite this acknowledgment, the Investigator did not examine this aspect of Ms. Brosnan's complaint insofar as it concerned (a) the Bank's decision to permanently staff Ms. Brosnan's position during her disability leave; (b) the Bank's refusal to create a comparable position, despite allegedly promising to do so; (c) the Bank's failure to assist her in obtaining a new position within the organization; and (d) the Bank's decision to terminate Ms. Brosnan's employment.

[28] Where the Commission fails to address submissions that go to the heart of the complaint under adjudication, this implicates the procedural fairness of the investigation and the resulting decision. As Justice Zinn explained in *Herbert*:

[26] [...] Where the parties' submissions on the report take no issue with the material facts as found by the investigator but merely argue for a different conclusion, it is not inappropriate for the Commission to provide the short form letter-type response. However, where these submissions allege substantial and material omissions in the investigation and provide support for that assertion, the Commission must refer to those discrepancies and indicate why it is of the view that they are either not material or are not sufficient to challenge the recommendation of the investigator; otherwise one cannot but conclude that the Commission failed to consider those submissions at all.

[Emphasis added.]

[29] In addition to raising the duty to accommodate in her initial complaint, Ms. Brosnan's counsel emphasized the Investigator's failure to address this issue in subsequent submissions to the Commission. Despite Ms. Brosnan's objections, the Commission made no reference to the duty to accommodate in its decision to dismiss her complaint.

[30] There is nothing to indicate that Ms. Brosnan's concerns regarding the failure of the Report to address the Bank's duty to accommodate were considered by the Commission. There is nothing in the Commission's decision that responds to her submissions. It appears that they were simply ignored. This was a breach of Ms. Brosnan's right to procedural fairness. As Justice Mosley wrote in *Carroll*:

[67] The case law clearly establishes that an investigation which does not deal with the substance of a complaint, fails to investigate a relevant question, or fails to consider crucial evidence is unfair because it is not thorough. That unfairness carries over to any eventual dismissal decision rendered by the Commission. Whether the complainant has been able to make submissions is irrelevant. If submissions were made but disregarded, that does not increase the thoroughness of the investigation – it decreases it.

[31] This lack of thoroughness undermines the Commission's decision (*Herbert* at paras 26, 30, and 31; *Carroll* at para 85), and the matter must therefore be remitted to the Commission for reconsideration.

B. *Whether the Commission's decision to dismiss the complaint was unreasonable because the Commission's Investigator did not obtain the evidence of two key witnesses*

[32] Ms. Brosnan complains that the Investigator failed to interview Katherine Archdekin, who was her manager while she was on disability leave and when she returned to work. Ms. Brosnan also expresses concern about the failure of the Investigator to interview Sandy Kwan, who was Ms. Brosnan's supervisor for a portion of her disability leave. Ms. Kwan was replaced by Ms. Archdekin at some point between March, 2010 and June, 2010, before Ms. Brosnan returned to work. As Ms. Brosnan's allegations primarily concern her return to work and subsequent events, it does not appear that Ms. Kwan's evidence would have been central to the resolution of her complaint. It should be noted that Ms. Kwan was not included in the list of witnesses that Ms. Brosnan provided to the Investigator.

[33] The Report indicates that the Investigator attempted to interview Ms. Archdekin, who was no longer employed by the Bank, by calling her home telephone number and leaving messages on two occasions. The calls were not returned. As a result, the Investigator dealt with Ms. Brosnan's allegations against Ms. Archdekin as follows:

The complainant alleges that her manager, Ms. Archdekin did not provide assistance to the complainant in her attempts to find comparable employment. Attempts by the investigator to interview Ms. Archdekin were unsuccessful. However, the evidence of Ms. Pirani [Sun Life Health Management Consultant] is that the Bank cooperated with the complainant's return to work. Moreover, the evidence suggests that the complainant returned to work on October 4, 2010 (i.e. just over a month after she notified the Bank that she was able to do so). Therefore, even if Ms. Archdekin failed to provide the complainant with assistance in locating an alternative position, it does not appear that this significantly delayed the complainant's return to work. Accordingly, there does

not appear to be sufficient evidence to suggest that further analysis into this aspect of the allegation is required.

[34] The Commission has a broad discretion and a “remarkable degree of latitude” when it performs its role of screening complaints, and this is not to be interfered with lightly (*Bell Canada v CEP*, [1999] 1 FC 113 (Fed CA) at para 38; *CUPE* at para 63). The conclusion reached by an administrative tribunal is reasonable so long as it can be “rationally supported” (*Halifax* at para 47). However, a decision to dismiss a complaint in reliance upon a deficient investigation will itself be deficient because “[i]f the reports were defective, it follows that the Commission was not in possession of sufficient relevant information upon which it could properly exercise its discretion” (*Grover v Canada (National Research Council)*, 2001 FCT 687 (Fed TD) [*Grover*] at para 70).

[35] In *Grover*, Justice Heneghan said the following about the need for an investigator to interview a key witness:

[71] The broad discretion vested in the Commission in respect of deciding whether to dismiss a complaint or refer it to adjudication before a tribunal does not allow it, in my opinion, to short-circuit the investigative process and ignore a necessary witness. Indeed, the failure to interview a person who is vitally connected to the alleged discriminatory action may lead to the inference of pre-judgment by the investigator.

[36] In *Singh v Canada (Attorney General)*, 2001 FCT 198 (Fed TD) [*Singh*], aff'd 2002 FCA 247, Justice McKeown wrote as follows:

[23] [...] any investigation of discrimination must, at minimum, ascertain who the decision-maker is and contain some inquiry into why that decision-maker decided the way they did. In this case, that would mean that the investigator should have investigated who actually decided not to renew the applicant's contract and why. The decision-maker should have been questioned regarding the applicant's allegations of discrimination and her theory that the Department had constructed excuses after the fact to cover up why her contract had not been renewed.

[37] Both *Grover* and *Singh* dealt with situations where the investigator failed to consider matters that were fundamental to the applicants' complaints. In *Singh*, the application for judicial review was allowed because the investigator failed to examine whether the reasons for dismissal were a pretext for discrimination; however in this case, the matters that Ms. Archdekin might have helped to elucidate were explicitly addressed in the Report. In *Grover*, no attempt was made to interview the key witness at all; but in this case, reasonable efforts were made by the Investigator to contact Ms. Archdekin. Given that she was no longer employed by the Bank, there was little that the Bank or Commission could do to compel her participation in the investigation. Instead, the Bank provided further information regarding the circumstances surrounding Ms. Brosnan's return to work through written responses to questions dated June 4, 2013. These responses included the following:

While the Bank was able [under its policies] to permanently fill the position once the Complainant had been absent for a 12-week period, [the Bank] opted to redistribute the work of the Complainant and keep her position vacant until such time as it became necessary to permanently fill the role.

The Bank decided to permanently fill the Complainant's position in or around April 22, 2010 based on the guidance from Sun Life that there was no determinable return to work date based on the Complainant's condition at the time. At the time of this decision,

the Complainant's manager contacted her via telephone and advised the Complainant that her role would be filled during her absence and when she was ready and able to return to work, she would be supported in finding another role.

[38] The Bank's responses also provided details of the nature of the assistance available to Ms. Brosnan in securing alternative employment, and the training that is ordinarily provided to individuals who are assuming the position of Assistant Branch Manager for the first time. With the exception of Ms. Archdekin and Ms. Kwan, the Investigator was able to speak directly to witnesses who were involved in the events that were relevant to Ms. Brosnan's complaints.

[39] I am therefore satisfied that the Investigator made reasonable efforts to establish why the Bank decided to permanently staff Ms. Brosnan's position while she was on disability leave, and the manner in which the Bank assisted Ms. Brosnan in finding another position within the organization. Ms. Brosnan was in fact able to find a new position within a month of expressing her willingness to return to work. In this respect, the conclusions reached by the Commission were "rationally supported" and they were therefore reasonable.

## VI. Conclusion

[40] For the foregoing reasons, the application for judicial review is allowed in part. Ms. Brosnan's complaint is remitted to the Commission to investigate her allegation that the Bank failed to take reasonable steps to accommodate her disability.

[41] As success on the application for judicial review was divided, no costs are awarded to either party.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** the application for judicial review is allowed in part. Ms. Brosnan's complaint is remitted to the Commission to investigate her allegation that the Bank failed to take reasonable steps to accommodate her disability. No costs are awarded to either party.

"Simon Fothergill"

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Judge



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

**DOCKET:** T-1332-14

**STYLE OF CAUSE:** CLAUDETTE BROSINAN v BANK OF MONTREAL

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** MAY 20, 2015

**JUDGMENT AND REASONS:** FOTHERGILL J.

**DATED:** JULY 29, 2015

**APPEARANCES:**

Craig Colraine FOR THE APPLICANT

Frank Cesario FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Birenbaum, Steinberg, Landau  
Savin and Colraine LLP  
Barristers and Solicitors  
Toronto, Ontario FOR THE APPLICANT

Hicks Morley Hamilton Stewart  
Storie LLP  
Barristers and Solicitors  
Toronto, Ontario FOR THE RESPONDENT