Federal Court  Cour fédérale

Date: 20170124

Docket: T-785-12

Citation: 2017 FC 85

Toronto, Ontario, January 24, 2017

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

CATHY MORAND

Applicant

and

BANK OF NOVA SCOTIA OPERATING AS SCOTIABANK

Respondent

AMENDED JUDGMENT AND REASONS

I. INTRODUCTION

[1] Ms. Cathy Morand (the "Applicant") seeks judicial review of the decision of the Canadian Human Rights Commission (the "Commission"), dated March 16, 2012, dismissing her complaint of discrimination against her employer, the Bank of Nova Scotia operating as Scotiabank (the "Respondent"). The complaint was dismissed by the Commission pursuant to subparagraph 44(3)(b)(i) of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (the "Act").

[2] The Applicant seeks an order quashing the Commission's decision, and an order to compel the Commission to request the Canadian Human Rights Tribunal to institute an inquiry under section 49 of the Act. The Applicant sought costs in her Notice of Application but submitted in her Memorandum of Fact and Law that it would be inequitable for any costs to be awarded in this application, regardless of the outcome.

II. PROCEDURAL HISTORY

[3] The Applicant filed the within Notice of Application on April 16, 2012. Her motion for an extension of time to file an affidavit of documents pursuant to Rule 306 of the *Federal Courts Rules*, SOR/98-106 (the "Rules") was granted by Order dated June 14, 2012.

[4] By Order dated November 9, 2012, this proceeding continued as a specially managed proceeding. This Order also required the Applicant serve and file a proposed timetable within 20 days.

[5] No further steps were taken in this proceeding until December 9, 2014 when the Applicant filed an Affidavit of Service confirming service of her affidavit and proposed timetable on the Respondent.

[6] On July 28, 2015 a Case Management Conference was held.

[7] As will be discussed below the Respondent, in its Memorandum of Fact and Law, seeks an Order dismissing this application for judicial review for undue delay pursuant to Rule 167 of the Rules.

[8] Following the hearing, the Respondent filed a letter dated April 1, 2016 in response to the question of why it sought dismissal for undue delay at the hearing. Attached to the letter were emails between the Counsel for the parties and Federal Court Registry staff, including:

- An email from Mr. Shaun Nelson, Case Management Team Registry Officer, to Counsel for the Applicant and the Respondent dated November 20, 2014;
- An email from Mr. Nelson to Counsel for the Applicant and the Respondent dated June 4, 2015;
- An email from Counsel for the Respondent to Mr. Nelson dated June 15, 2015;
- An email from Mr. Nelson to Counsel for the Respondent dated June 16, 2015;
- An email from Counsel for the Respondent to Mr. Nelson dated June 16, 2015;
- An email from Counsel for the Applicant to Mr. Nelson and Counsel for the Respondent dated September 30, 2015;
- An email from Mr. Nelson to Counsel for the Applicant and the Respondent dated October 1, 2015;
- An email from Counsel for the Respondent to Mr. Nelson, carbon copy to Counsel for the Applicant dated October 6, 2015;
- An email from the Assistant to Counsel for the Respondent to Mr. Nelson, carbon copy to Counsel for the Applicant dated November 26, 2015; and
- An email from Mr. Nelson to Counsel for the parties dated December 1, 2015.

[9] In the April 1, 2016 letter, the Respondent said that the Registry informed it that the issue of dismissal for undue delay could be raised at the hearing of the application.

[10] The Applicant responded by letter dated April 12, 2016, and sought direction as to whether she should make supplementary submissions on this issue.

[11] A Direction was issued on April 14, 2016 inviting the parties to advise of their availability to make further oral submissions on this issue.

[12] The hearing of the application resumed on July 19, 2016 by video conference, where the parties made additional submissions on the issue of delay.

III. THE EVIDENCE

[13] The evidence in this application consists of the Certified Tribunal Record, the affidavit of documents of the Applicant sworn on May 30, 2012, and the affidavit of Ms. Frances Fitzgerald, Senior Legal Counsel for the Respondent, sworn on July 13, 2012.

IV. BACKGROUND

[14] The following facts are taken from the evidence.

[15] The Applicant filed a complaint with the Commission on October 14, 2009. In that complaint she alleged adverse differential treatment, contrary to section 7 of the Act, on the basis

of a disability, that is chronic pain syndrome, fibromyalgia, a herniated disc in her neck, general anxiety and degenerative disc disease. She advanced, as part of her complaint, a fear of retaliation for making a complaint and harassment by other employees.

[16] The Applicant was hired by the Respondent on January 25, 2005 as a part-time Customer Service Representative to work at the Tecumseh branch, near Windsor, Ontario. She generally worked afternoon shifts of 1:45 p.m. to 4:45 p.m. or 7:00 p.m., Monday to Friday for a total of 16 hours per week.

[17] Between May 2007 and December 3, 2007 the Applicant was on medical leave related to a herniated disc. The Applicant provided a doctor's note dated November 27, 2007 outlining her limitations, which according to the Investigator's Report included that she work her "regular duties of afternoon shifts" and that "these are the maximum hours she can work". In anticipation of her return an ergonomic assessment of the workplace was completed by the Respondent.

[18] In March 2008, the Respondent sought to change the Applicant's work shifts to the morning.

[19] The Applicant presented a doctor's note from her physician, Dr. Makinde, dated March 18, 2008. The note said that the Applicant suffers from chronic pain syndrome, a permanent disability, and recommended steady afternoon shift**s**. The Applicant's hours did not change at that time.

[20] The Applicant returned from stress leave on June 4, 2009. The duration of that leave is unclear from the record.

[21] On June 9, 2009, Ms. Diane Sinclair, Manager of Customer Service for the Respondent, advised the Applicant that a committee of her coworkers had revised the shifts at the branch. The Applicant was asked to work two full days a week. She replied that she would attempt to work this proposed schedule but did not think her doctor would approve of the change in hours. In her complaint to the Commission, the Applicant said she was pressured and manipulated by Ms. Sinclair to accept the change in shifts.

[22] On June 12, 2009, the Applicant was provided with a letter stating that effective July 13, 2009 her work hours would change to Tuesday 8:30 a.m. to 5:00 p.m. and Thursday 9:15 a.m. to 5:15 p.m.

[23] In response to that letter, the Applicant provided the Respondent with another note from Dr. Makinde, dated June 17, 2009, which stated that the Applicant suffers from chronic pain syndrome. Dr. Makinde said the Applicant could work the two full day shifts on a trial basis, and that careful monitoring was necessary since the change may cause flare ups of her symptoms.

[24] On June 18, 2009, Ms. Sinclair notified the Applicant the changes to her work schedule were permanent. The Applicant states that Ms. Sinclair told her that if she could not work the shifts she should contact Scotiahealth and take sick leave.

[25] The Applicant sent Ms. Sinclair an email on June 22, 2009 stating she felt uncomfortable with the shift change.

[26] Ms. Sinclair asked the Applicant to work an additional shift on Friday July 31, 2009 from 11:00 a.m. to 2:00 p.m. The Applicant agreed but stated she was pressured to do so.

[27] On August 19, 2009, the Applicant received an email reprimand from Ms. Sinclair for causing a cash imbalance. The Applicant states she was on the only one reprimanded despite the fact that all team members are responsible for balancing.

[28] In her complaint, the Applicant said that she emailed Ms. Sinclair and Mr. Marc Bissonnette, Branch Manager, on September 8, 2009 and said she was having difficulty and requested a meeting to discuss revising her shifts.

[29] On September 10, 2009, the Applicant advised Mr. Bissonnette and Ms. Sinclair that she was having problems working the assigned shifts because mornings were difficult for her. The Applicant claims Mr. Bissonnette asked why she just did not take pain pills. He denies asking that question but admits he might have asked if pain medication helped her.

[30] At the September 10, 2009 meeting, Mr. Bissonnette refused to alter the schedule. Ms. Sinclair suggested the Applicant become a casual employee but she refused.

[31] Mr. Bissonnette said that Great West Life and Employee Relations were responsible for making determinations about accommodation requests. The Applicant alleges that Mr. Bissonnette said that there was no position available for her at the Tecumseh branch, one would not be created, and that hours of employment were not part of the duty to accommodate. Mr. Bissonnette recalls telling the Applicant that he could not create a position for her.

[32] The same day, the Applicant received a handwritten reprimand from Ms. Sinclair for having $2000.00 in her "bandit box". The Applicant acknowledges that this is contrary to security policy but said that this policy is not consistently enforced. She said that she perceived her job was being threatened, and that she was being intimidated and punished in an effort to get her to quit.

[33] In her complaint, the Applicant said that on September 15, 2009 she emailed Mr. Bissonnette, Ms. Sinclair and Mr. Tom Geikie, District Vice President, stating she was pressured, intimidated and that her job was contingent upon her working the new hours.

[34] The Applicant also sent a second email to Mr. Geikie saying that she had been reprimanded for failing to comply with a security policy that was not regularly enforced.

[35] The Applicant was called into Ms. Sinclair's office later on September 15, 2009, where she claimed that Mr. Bissonnette yelled at her for emailing Mr. Geikie. She said that Ms. Sinclair loudly told Mr. Bissonnette that the Applicant was being insubordinate. The Applicant left the

office and called the Human Rights Commission. She said she was humiliated since all her coworkers heard the argument.

[36] Later on September 15, 2009, Mr. Bissonnette apologized to the Applicant. The Applicant alleges that Mr. Bissonnette and Ms. Sinclair said they did not see anything wrong with her.

[37] The Applicant spoke with Ms. Lori Mansfield, Manager of Employee Relations, on September 16, 2009. Ms. Mansfield offered the solution of two four-hour shifts at the Tecumseh branch and two four-hour shifts at another branch. At the time, Ms. Mansfield said the Applicant would likely only have to work the next two full day shifts.

[38] In a letter dated September 17, 2009, Mr. Bissonnette provided the Applicant with a questionnaire to be completed by her physician.

[39] A doctor's note, dated September 22, 2009, written by Dr. Makinde, was sent to the Respondent on September 22, 2009. It stated that the Applicant's attempt to perform an eight hour work shift had exacerbated her symptoms of pain and fatigue.

[40] Dr. Makinde noted that early mornings are particularly difficult for the Applicant. He recommended that the Applicant work steady afternoon shifts of four hours, four days a week. At the time the Applicant submitted the note, Mr. Bissonnette informed her that a decision could not

be made regarding accommodation until her doctor completed the questionnaire attached to the September 17th letter.

[41] The Applicant submitted another note, on a prescription pad, from Dr. Makinde, dated September 28, 2009 which stated the Applicant was "to start working 4 hours per day, afternoon shifts from September 29, 2009."

[42] On the same day, the Applicant notified the Respondent that she would not continue to work her assigned hours as per the doctor's note dated September 28, 2009. The Applicant continued to work all afternoon hours of her assigned shifts. The Applicant initially used sick days to cover the missed morning hours.

[43] The Respondent did not change the Applicant's hours of work because, according to Mr. Bissonnette, there were no other hours available.

[44] Dr. Makinde completed the questionnaire sent by Mr. Bissonnette. It was received by the Respondent on October 13, 2009.

[45] The Respondent reviewed this questionnaire and determined that there was insufficient medical information to establish a basis for the request for accommodation, that is that the Applicant was medically restricted from working before 12:00 p.m.

[46] The Applicant submitted her complaint to the Commission on October 14, 2009.

[47] The Respondent requested further information from Dr. Makinde in letters dated November 27, 2009 and January 14, 2010.

[48] The Applicant completed a Functional Abilities Evaluation on May 12, 2010. The evaluator recommended that the Applicant limit sitting, standing or walking up to 30 minutes at a time, and that she pace herself and take adequate rests throughout the day. The evaluator did not comment on the "exact timings" that the Applicant could work because that was outside the scope of the evaluation.

[49] Dr. Franklyn, a psychologist in a letter dated May 18, 2010, stated that it was unreasonable to expect a person suffering from fibromyalgia and chronic pain to work an eight hour day. She expressed the opinion that the Applicant's condition is permanent and repeated requests for "proof" of her ongoing need for accommodation worsened her symptoms. She concluded by recommending that the Applicant be reassigned to her original work schedule.

[50] At the request of the Respondent, the Applicant underwent an independent medical examination on July 14, 2010. In a report dated July 28, 2010, Dr. John Heitzner concluded that the Applicant was not suffering from any medical or musculoskeletal restrictions that would prevent her from returning to work a full day. He noted that the Applicant had a high perceived level of disability and mild pain behaviour.

[51] As of December 7, 2010, the Respondent compensated the Applicant for all sick days used to offset the loss of her morning work hours and did not require her to use her sick time for that purpose. Her morning absences were marked as unpaid absences.

[52] In the period between October 14, 2009 and July 31, 2012, the Applicant was offered alternate shifts twice. However, the Applicant did not accept the offers as they both included shifts beginning before 12:00 p.m.

V. INVESTIGATOR'S REPORT

[53] Pursuant to sections 43 and 44 of the Act, the Commission appointed an Investigator to investigate the complaint and make a report on his findings. As part of the investigation the Investigator reviewed the complaint, the Applicant's reply, the Respondent's response and additional documents provided by the Respondent. As well, the Investigator conducted telephone interviews with Ms. Sinclair, Mr. Bissonnette and Ms. Mansfield.

[54] At paragraph 130 of his report, the Investigator made the following recommendation:

> It is recommended, pursuant to Subparagraph 44(3)(b)(i) of the *Canadian Human Rights Act*, that the Commission dismiss the complaint, because based on the evidence:
>
> - The complainant did not provide the respondent with adequate time to assess her accommodation requirements given that she had not provided sufficient objective medical documentation when she signed the complaint on October 16, 2009;

- At the time of the complaint the respondent did accommodate the complainant's request to work only afternoon shifts; and

- Considering all the evidence, further inquiry by the Canadian Human Rights Tribunal does not appear warranted.

[55] The Investigator concluded that the requirement to work two full day shifts imposed a burden on the Applicant, and the adverse impact of that requirement was linked to the Applicant's disability.

[56] The Investigator then considered whether the Applicant required accommodation for reasons related to a prohibited ground of discrimination. He referred to the two doctor's notes the Applicant submitted, dated November 27, 2007 and March 18, 2008, which recommended that she work only afternoon shifts.

[57] The Investigator noted that all new shift assignments included at least one morning shift. The Investigator also found that the Applicant's original application for employment did not indicate a preference to work in the afternoons although she had been diagnosed with both fibromyalgia and chronic pain syndrome prior to making that job application.

[58] The Investigator found that at the time of her complaint, there was no objective medical evidence to indicate that the Applicant required accommodation. He relied upon the doctor's notes on file which indicated that eight hour and morning shifts "may" cause a flare up of symptoms.

[59] The Investigator found that, while the evidence showed that the Respondent knew the Applicant might require accommodation, the Respondent required further medical information to determine whether accommodation was appropriate.

[60] Finally, the Investigator concluded that the Respondent did accommodate the Applicant by allowing her to work only the afternoon hours of her shifts while it waited for further medical documentation. He found that the Applicant did not provide the Respondent with sufficient time to assess her accommodation request before making her complaint on October 16, 2009.

[61] Both the Applicant and the Respondent were given the opportunity to make submissions to the Commission about the Investigator's Report. The Applicant made submissions on January 6, 2012. The Respondent filed submissions dated January 16, 2012. The Respondent filed further submissions dated February 7, 2012 in response to the Applicant's submissions.

A. *Decision under Review*

[62] In its decision dated March 16, 2012, the Commission decided to dismiss the complaint pursuant to paragraph 44(3)(b)(i).

[63] The Commission dismissed the complaint for the same reasons outlined in the Investigator's report, that is the Applicant had not provided the Respondent with adequate time to assess her accommodation requirements since she had not provided it with objective medical evidence before making her complaint; at the time of the complaint the Respondent had

accommodated the Applicant's request to work only afternoon hours; and further inquiry by the Canadian Human Rights Tribunal was not warranted.

VI. ISSUES

[64] The parties addressed the following issues:

1. What is the applicable standard of review?
2. Should this application be dismissed for undue delay?
3. Did the Commission err by relying on prematurity as a ground for dismissing the complaint?
4. Did the Commission err in determining that the Applicant had been accommodated?
5. Did the Investigator err by finding that the Applicant was not harassed?
6. Did the Investigator err by finding that there was insufficient objective medical evidence to support the Applicant's request for accommodation?
7. Did the Investigator err by restricting the period of the complaint to June 2009 to October 14, 2009?

VII. SUBMISSIONS

A. *Applicant's Submissions*

[65] The Applicant submits that the decision of the Commission should be reviewed on a standard of reasonableness; see the decision in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190.

[66] The Applicant submits that her application for judicial review should not be dismissed for delay. She relies upon Rules 56 and 58 of the Rules.

[67] The Applicant argues that the Rule 58 requires that the Respondent bring a motion to challenge non-compliance with the Rules. Since the Respondent has not brought a motion, its request to dismiss the within application should not be granted.

[68] The Applicant acknowledged that most of the delay in this proceeding was her fault. However, she submits that the Respondent did not take any actions before the fall of 2015 to move the proceeding along.

[69] In response to the Respondent's submissions that it relied upon the advice of Federal Court Registry staff who informed it that it could seek dismissal of the proceeding for delay at the hearing of this application for judicial review, the Applicant argues that there is no evidence of the telephone conversations between its Counsel and Registry staff.

[70] The Applicant submits the Respondent sought a status review to raise the issue of delay and should be bound by its choice of procedure.

[71] In addressing the merits of this application, the Applicant submits that the first reason given for dismissal of her complaint, that is the Respondent was not given adequate time to assess her accommodation requirements, does not correspond with any provision of the Act.

[72] The Applicant relies upon subsection 41(1) of the Act which provides as follows:

41 (1) Subject to section 40, the Commission shall deal with any complaint filed with it unless in respect of that complaint it appears to the Commission that	41 (1) Sous réserve de l'article 40, la Commission statue sur toute plainte dont elle est saisie à moins qu'elle estime celle-ci irrecevable pour un des motifs suivants :
(a) the alleged victim of the discriminatory practice to which the complaint relates ought to exhaust grievance or review procedures otherwise reasonably available;	a) la victime présumée de l'acte discriminatoire devrait épuiser d'abord les recours internes ou les procédures d'appel ou de règlement des griefs qui lui sont normalement ouverts;
(b) the complaint is one that could more appropriately be dealt with, initially or completely, according to a procedure provided for under an Act of Parliament other than this Act;	b) la plainte pourrait avantageusement être instruite, dans un premier temps ou à toutes les étapes, selon des procédures prévues par une autre loi fédérale;
(c) the complaint is beyond the jurisdiction of the Commission;	c) la plainte n'est pas de sa compétence;
(d) the complaint is trivial, frivolous, vexatious or made in bad faith; or	d) la plainte est frivole, vexatoire ou entachée de mauvaise foi;
(e) the complaint is based on acts or omissions the last of which occurred more than one year, or such longer period of time as the Commission considers appropriate in the circumstances, before receipt of the complaint.	e) la plainte a été déposée après l'expiration d'un délai d'un an après le dernier des faits sur lesquels elle est fondée, ou de tout délai supérieur que la Commission estime indiqué dans les circonstances.

[73] The Applicant argues that her complaint does not fall within one of the exceptions in subsection 41(1). She also submits that the Commission erred in dismissing her complaint pursuant to paragraph 44(3)(b)(i) of the Act.

[74] Paragraph 44(3)(b)(i) of the Act provides as follows:

(3) On receipt of a report referred to in subsection (1), the Commission	(3) Sur réception du rapport d'enquête prévu au paragraphe (1), la Commission :
…	…
(b) shall dismiss the complaint to which the report relates if it is satisfied	b) rejette la plainte, si elle est convaincue :
(i) that, having regard to all the circumstances of the complaint, an inquiry into the complaint is not warranted, or	(i) soit que, compte tenu des circonstances relatives à la plainte, l'examen de celle-ci n'est pas justifié,

[75] The Applicant submits that the Respondent had adequate time to assess her accommodation request.

[76] The Applicant points out that the Respondent had information on file from 2007 that spoke to her need for accommodation by working only afternoon shifts.

[77] Further, in early June 2009, the Applicant informed Ms. Sinclair that she would likely have difficulty with the new hours. The Applicant submits that she had provided medical documentation advising of the issues with the revised scheduled three weeks before filing the complaint.

[78] The Applicant submits that the Commission erred in finding that she was accommodated. She argues that this finding is perverse since her complaint was based upon the Respondent's requirement that she work beyond the restrictions of her disability or forego half the hours she previous worked. The Applicant argues that the finding is contrary to the purposes of the Act.

[79] The Act requires that an employer accommodate an employee up to the point of undue hardship. The Applicant submits that the Investigator failed to address the questions of whether further accommodation was required and if so, whether that accommodation constituted undue hardship on the Respondent.

[80] The Applicant argues that accommodating her request would not cause undue hardship on the Respondent. She says there was no evidence before the Investigator on this issue. She contends that the requested accommodation would be no more than a minor administrative inconvenience.

[81] The Applicant submits that the Investigator erred in finding that the reprisal incident on September 15, 2009 did not meet the standard of harassment. She argues that the Investigator ignored the incident on September 10, 2009.

[82] The Applicant further submits that the Investigator erred by relying upon the decision in *London v. New Brunswick Aboriginal Peoples Council*, 2008 CHRT 49, which only addresses harassment, not reprisal. She also argues that repetition is only one criterion in assessing

harassment, the severity of the incident should also be considered; see *London*, *supra* at paragraphs 92 to 94.

[83] The Applicant contends that the finding about the adequacy and objectivity of the medical evidence constitutes an error in law. She argues that her disabilities were not in dispute. The medical documentation was substantial and the most salient aspects of the Applicant's disability, that is her pain, fatigue and anxiety, cannot be objectively measured.

[84] The Applicant argues that the Act does not require "objective" medical information to be provided. She submits that the Investigator provided no reason as to why he accepted the May 12, 2010 and July 28, 2010 reports as "objective" but not the doctor's notes or questionnaire, completed by Dr. Makinde, submitted earlier. By relying upon irrelevant factors, the Commission committed a reviewable error.

[85] Further, the Applicant submits the Investigator did not correctly define her disabilities; he excluded generalized anxiety and degenerative disc disease.

[86] Finally, the Applicant submits that the Commission erred by limiting the period of complaint to June 2009 to October 14, 2009, the date of her complaint to the Commission. The actions complained of, that is the discrimination in the form of reduced hours of employment continued to October 27, 2014. By ignoring evidence outside the defined period of the complaint, the Commission erred.

B. *Respondent's Submissions*

[87] The decision of the Commission whether to refer a complaint to the Canadian Human Rights Tribunal is reviewed on a standard of reasonableness; see the decision in *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, [2012] 1 S.C.R. 364 at paragraphs 17, 27, 40 and 44.

[88] The Respondent submits that undue delay is a ground for dismissing an application for judicial review, relying upon Rule 167 of the Rules.

[89] The Notice of Application in this proceeding was filed on April 16, 2012. The Applicant failed to file her Application Record by August 27, 2012, as required by the Rules. By Order dated November 9, 2012, the Applicant was to serve and file a timetable within 20 days. The Applicant did not take any further steps until December 2014.

[90] The Respondent argues that delays as short of four months have been grounds for dismissal of a proceeding; see the decisions in *Bellefeuille v. Commercial Transport (Northern) Ltd.*, [1995] 1 F.C. 237 (F.C.T.D.) at paragraph 22 and *Bahrami v. Canada (Minister of Citizenship and Immigration)* (1998), 149 F.T.R. 133. The Respondent argues that the Applicant has not provided any reason for the three year delay in pursuing this application.

[91] The Respondent also submits that it is prejudiced by the Applicant's delay because, in the event the complaint was returned to the Commission, witnesses' memories must be presumed to have faded.

[92] At the hearing held on July 19, 2016, the Respondent reiterated its position that it brought its request to dismiss this proceeding for delay in accordance with advice it received from the Federal Court Registry.

[93] In response to the Applicant's submissions that the Commission erred in dismissing her complaint, the Respondent argues that paragraph 44(3)(b)(i) of the Act grants the Commission a broad discretion to dismiss a complaint where, considering all the circumstances, an inquiry is not warranted. It argues the prematurity of the complaint is a valid consideration under that paragraph.

[94] The Respondent argues that the finding of prematurity is related to the finding that the Applicant had not provided it with objective medical evidence establishing a need to work only in the afternoons. It argues that this conclusion was reasonable because the medical notes dated November 27, 2007, March 18, 2008, June 17, 2009, September 22, 2009, and the medical questionnaire do not state that the Applicant is incapable of working before 12:00 p.m.

[95] The Respondent argues that the law only requires accommodation that meets the Applicant's medical restrictions, not her preferred form of accommodation; see the decision in *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970 at paragraph 44. The Respondent says it was entitled to request medical information to confirm that working only after 12:00 p.m. is a medical necessity.

[96] The Respondent submits the Commission correctly concluded that the Applicant did not give it sufficient time to engage in the accommodation process.

[97] The Respondent argues that it met its obligation to accommodate by allowing the Applicant to work only the afternoon hours of her shifts. It argues that it is not required to accommodate the Applicant by providing redundant or unproductive work; see the decisions in *Croteau v. Canadian Railway Co.*, 2014 CHRT 16 at paragraph 44, and *Smith v. Canadian National Railway*, 2008 CHRT 15 at paragraph 166.

[98] The Respondent submits that simply providing the Applicant with additional afternoon hours would not meet its operational needs.

[99] The Respondent argues that the Investigator "correctly" determined that the September 15, 2012, incident did not meet the standard of harassment. Contrary to the Applicant's submissions, the Investigator recognized that a single incident could constitute harassment, but determined this incident did not meet constitute harassment.

[100] The Respondent argues that the Investigator correctly found that the medical evidence which post-dates the complaint was not determinative of the well-foundedness of the allegation of discrimination in the complaint. It submits that, in any event, the medical evidence submitted after October 14, 2009 supports its position that the Applicant is capable of working in the morning.

VIII. DISCUSSION

[101] I have outlined above the issues identified and addressed by the parties. However, in my opinion, those issues can be refined to identify the real questions in contention between the parties as follows:

1. What is the applicable standard of review;
2. Should this application be dismissed for undue delay;
3. What is the time frame of the complaint, is it a "fixed" complaint or a "continuing" complaint;
4. Did the Commission err in accepting the Investigator's finding that there was insufficient objective medical evidence to support the Applicant's request for accommodation;
5. Did the Commission err in finding that the Applicant had been accommodated;
6. Did the Commission err by finding that the Applicant was not harassed.

[102] According to the decision of the Federal Court of Appeal in *Sketchley v. Canada (Attorney General)*, [2006] 3 F.C.R. 392 (F.C.A.) at paragraphs 36-37, the Commission may accept the recommendation of the Investigator as its reasons. The lawfulness of the Commission's decision can be assessed by reference to the Investigation Report and the evidence that was submitted to the Investigator.

A. *What is the applicable standard of review?*

[103] The Commission's decision not to refer a complaint to the Canadian Human Rights Tribunal is discretionary, reviewable on the standard of reasonableness; see the decision in *Halifax*, *supra* at paragraph 17.

[104] The reasonableness standard requires that the decision be justifiable, transparent, intelligible and fall within a range of possible, acceptable outcomes; see the decision in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 at paragraph 47.

B. *Should this application be dismissed for undue delay?*

[105] The Respondent raises a procedural challenge to this application for judicial review, arguing it should be dismissed for undue delay. It relies on Rule 167 of the Rules, which provides as follows:

167 The Court may, at any time, on the motion of a party who is not in default of any requirement of these Rules, dismiss a proceeding or impose other sanctions on the ground that there has been undue delay by a plaintiff, applicant or appellant in prosecuting the proceeding.	167 La Cour peut, sur requête d'une partie qui n'est pas en défaut aux termes des présentes règles, rejeter l'instance ou imposer toute autre sanction au motif que la poursuite de l'instance par le demandeur ou l'appelant accuse un retard injustifié.

[106] This issue arises only in this application for judicial review and is not subject to a standard of review analysis, in this application.

[107] The Applicant argues that the Respondent's request that this application be dismissed for undue delay has not been properly brought before this Court since Rule 58 requires that a party bring a motion. I note that Rule 167 requires that a party seeking to dismiss a proceeding for undue delay must bring a motion.

[108] Despite the fact that no motion was filed, the issue of dismissal for delay was argued at the April 1, 2016 and the July 19, 2016 hearings. In the exercise of my discretion, I will consider the merits of the Respondent's request.

[109] The power to dismiss a proceeding for undue delay involves the exercise of discretion; see the decision in *Yellowhead v. Canada (Minister of Indian Affairs & Northern Development)* (2012), 434 N.R. 63 (F.C.A.) at paragraph 2.

[110] Considering the totality of the file, including the Index of Recorded Entries, I agree with the Applicant that it would be unfair and inequitable, at this time, to dismiss this application for judicial review for delay.

[111] In my opinion, the Index of Recorded Entries forms part of the court file. Rule 23 provides that the Registry is to keep a file that consists of all the documents filed. The Index of Recorded Entries is part of the file that records the documents filed, orders and correspondence between the parties and the Registry, and other documents relating to a proceeding.

[112] According to the Index of Recorded Entries, the following steps were taken by the parties between April 16, 2012 and December 7, 2015:

- April 16, 2012, Notice of Application filed;
- June 4, 2012, a Notice of Motion was filed by Applicant seeking an extension to file an affidavit of documents;
- June 14, 2012, Order by Prothonotary Aalto extending the time for service of the affidavit of documents;
- July 16, 2012, Affidavit of service was filed on behalf of the Respondent confirming service of the Respondent's affidavit on the Applicant;
- November 9, 2012, Order by Chief Justice Crampton that the proceeding continue as a specially managed proceeding and the Applicant served and filed a proposed timetable for completion of the steps to advance this proceeding;
- December 9, 2014, Affidavit of service was filed on behalf of the Applicant confirming service of Applicant's affidavit on the Commission;
- June 10, 2015, Affidavit of service was filed on behalf of the Applicant confirming service of Affidavit on the Respondent;
- July 21, 2015, Prothonotary Aalto issued Oral Directions that a case management conference be held to obtain a status update;
- July 28, 2015, Case management conference was held;
- October 22, 2015, Applicant filed her Application Record;
- November 6, 2015, Consent of all parties to an extension of time for the filing of the Respondent's Record;
- November 25, 2015, Respondent filed its Record; and
- December 7, 2015, Applicant filed her Requisition for Hearing.

[113] I have reviewed the correspondence provided by the Respondent relating to the issue of delay. I refer to the letter of April 1, 2016, where the following position is stated:

> I would appreciate you providing a copy of the attached email to Justice Heneghan, in response to her question at yesterday's hearing in the above matter as to why the Respondent presented its motion for dismissal due to undue delay at the hearing yesterday, rather than filing a separate motion.
>
> As evidenced by the attached email copies, we had several discussions and email exchanges with the Court's Case Management Team Registry Officer about the procedure for dealing with the Applicant's undue delay in prosecuting the proceeding. I asked specifically about how best to present to the Court the Respondent's request for dismissal – either by way of status review or by motion. In response, the Court Officer relayed that Prothonotary Aalto saw no need for a status review, and confirmed that the issue could be raised at the hearing of the application, which is what we were advised verbally as well. That is why the Respondent presented the request for dismissal at yesterday's hearing rather than filling a separate motion.

[114] The letter of April 1, 2016 refers to certain email correspondence between Counsel for the parties and the staff of the Registry of the Court, exchanged between November 20, 2014, and December 1, 2015.

[115] In the email of June 4, 2015, a Registry employee asked for a status update on behalf of the case management judge.

[116] In reply, by email dated June 15, 2015, Counsel for the Respondent said the following:

> I left you a voicemail message last week, but have yet to hear back. I would like to discuss the applicant's procedure so far, as well as scheduling a status hearing. I am in the office through this Thursday, then away for two weeks. Please let me know if there is a convenient time this week.

[117] By email dated October 6, 2015, Counsel for the Respondent referenced the Applicant's delay in prosecuting this application as follows:

> Our client does not consent to the Applicant's proposed timetable. In our view the timetable does not deal with the Applicant's inordinate delay in moving this application forward:
>
> - The Notice of Application was issued on April 16, 2012. The Applicant's affidavit was filed after a motion on consent to extend the time for her to do so. The Respondent then filed its affidavit on July 16, 2012. This was the last step taken in this proceeding.
>
> - The Applicant's Record was due on August 27, 2012. Over 2 years passed before the applicant took any steps.
>
> - We see from the Court's docket that a status review was almost ordered on October 19, 2012, but the court instead continued the application as a specially managed proceeding. On November 9, 2012, the Court ordered the Applicant to serve and file a timetable within 20 days. She did not.
>
> - Nothing occurred in this matter until 2 years later, when the Applicant improperly served a further affidavit directly upon our client. She did not take further steps until about June 2015, when you telephoned the parties about the status of this proceeding.
>
> In light of the inordinate delay, our client requests that the Court exercise its power under Rule 385(2) to order a status review. In our view, a status review will be a more efficient use of the Court's resources than a motion by the Applicant to extend the time to serve her Applicant's Record, and/or a motion by the Respondent to dismiss the proceeding for delay.
>
> [Emphasis in the original]

[118] Counsel for the Respondent sent a further email, dated November 26, 2015, inquiring about a reply to his email of October 6, 2015.

[119] By email dated December 1, 2015, a staff member of the Toronto Registry responded as follows:

> This file looks to be moving on track. Prothonotary Aalto see no need for a status review. Once the requisition for hearing is filed a hearing date should be scheduled shortly.

[120] The Respondent argues that it followed advice from Registry staff in deciding to wait until the hearing of this application to address the issue of delay; it raised the matter in its Memorandum of Fact and Law.

[121] I recognize that the case management process affords flexibility about timelines in the completion of pre-trial steps. However, the ultimate responsibility for taking such steps lies with a party, not with a case management judge or Registry staff. The pre-trial steps, in this case, could have included a motion to strike for delay.

[122] In my opinion, it would be unfair to dismiss the within application now, on the basis of delay. I decline to do so, in the exercise of my discretion.

C. *What is the timeframe of the complaint, is it a "fixed" complaint or a "continuing" complaint?*

[123] I will start by considering what are the indicators of a "fixed" or "continuing" complaint. The Complaint does not use words "continuing" or "ongoing". The Applicant alleged "I felt this [the new schedule] was definite discrimination and a failure to accommodate by scheduling me on a shift for which there were definite concerns about and with a doctor note on file and I believe my bosses were hoping I would fail."

[124] A Summary of Complaint form in the Certified Tribunal Record states the date of alleged discrimination is "June 9, 2009 – October 14, 2009". The accommodation that the Applicant sought was the reassignment of her afternoon shifts 4 days a week. This was also part of the remedy she sought from the Commission. In submissions before the Commission the Applicant argued that the discrimination was ongoing.

[125] In *Casler v. Canadian National Railway* (2012), 433 N.R. 253 (F.C.A.), despite the fact that the Commission restricted the period of the complaint to the date of the complainant's termination, the Investigator considered submissions about events that occurred outside that period. The Court found that it may be reasonable to consider events outside the period if those events assist in understanding events that occurred with the period of the complaint or if the employer alleged something that occurred outside the period amounted to reasonable accommodation.

[126] I agree with the Respondent that the fact that subsection 44(3) of the Act is silent about the prematurity of a complaint does not mean this factor is an invalid ground for dismissing a complaint. Paragraph 44(3)(b)(i) provides for dismissal of a complaint where the Commission is satisfied that, having regard to all the circumstances of the complaint, an inquiry into the complaint is not warranted. The timing of the complaint forms part of the circumstances of the complaint.

[127] In my opinion, the Commission's finding that the Applicant had not provided the Respondent with adequate time to consider her request before filing the complaint was

unreasonable. The Respondent was on notice from June 2009 that the Applicant may need accommodation.

[128] Subsection 41(1) of the Act allows for any individual to make a complaint if he or she has "reasonable grounds for believing that a person is engaging or has engaged in a discriminatory practice". The words "is engaging" suggest that the discriminatory practice may be ongoing and continue after the complaint is made. While the complaint itself was made only a month after the initial request for accommodation, the Applicant's hours remained the same until October 2014.

[129] In my opinion, the period of the complaint should not have been limited by the Investigator to the period of June 2009 to October 14, 2009. The Investigator should have considered the complaint to be a continuing complaint.

[130] Further, in my opinion, the Respondent had sufficient opportunity to accommodate the Applicant before the Commission rendered its decision in March 2012.

[131] As stated above, I agree with the Applicant that the Investigator unreasonably limited the consideration of the complaint to the period of June 2009 to October 2009. As a result, I find the Investigator erred by not taking into account the medical evidence which post-dates the filing of the complaint.

D. *Did the Commission err in accepting the Investigator's finding that there was insufficient objective medical evidence to support the Applicant's request for accommodation?*

[132] On September 17, 2009, the Respondent sent a questionnaire to the Applicant's doctor. The doctor returned the completed questionnaire on October 13, 2009.

[133] On November 27, 2010, the Respondent sent a letter the Applicant's doctor for further information and indicated it was going to facilitate an independent medical assessment.

[134] On January 14, 2010, the Respondent sent a letter to the Applicant's doctor requesting further information. The Applicant's doctor responded by letter of February 16, 2010.

[135] The Applicant attended an Independent Medical Examination at the Respondent's request on July 14, 2010.

[136] At paragraph 60 of the Report, the Investigator said "... it appears there was no objective medical evidence on file to confirm that the complainant required an accommodation related to her hours of work."

[137] The Investigator acknowledged other information. He reviewed the May 12, 2010 Functional Abilities Evaluation but noted it was beyond the timeframe of the complaint. He also reviewed the May 18, 2010 Report from Dr. Franklyn and observed that it was beyond the

timeframe of the complaint. He reviewed the Independent Medical Examination conducted on July 14, 2010 but noted it was beyond the timeframe of the complaint.

[138] In light of my conclusion that the complaint is continuing, the Investigator erred by failing to give due consideration to the medical documentation submitted after the complaint was filed.

E. *Did the Commission err in finding that the Applicant had been accommodated?*

[139] In paragraph 124 of the Report, the Investigator stated the following:

> … the respondent did accommodate the complainant by allowing her to work only the afternoon portion of her assigned shifts while it awaited additional medical documentation and further considered her request for accommodation.

[140] At paragraph 130 of the Report, the Investigator found that "at the time of the complaint the respondent did accommodate the complainant's request to work only the afternoon shifts".

[141] As of September 29, 2009 the Respondent allowed the Applicant to absent herself from her morning shifts and use sick leave to offset the loss of income. Between October 2009 and July 2012, the Respondent offered two alternate shifts but both new schedules included shifts that began before 12:00 p.m.

[142] The Respondent argues that its duty of accommodation does not require it to provide unproductive or redundant work. It submits that it met its duty to accommodate by allowing the Applicant to avoid working the morning hours of her assigned shifts.

[143] In my opinion, the Commission's finding that the Applicant had been accommodated is unreasonable. The Applicant's work hours were reduced by half which resulted in her using her sick leave to offset the loss of income. I acknowledge that the Respondent later compensated the Applicant for the loss of her sick leave benefits. However, in spite of this adjustment, the Applicant was still earning half her previous pay.

[144] This case is similar to that of *Ontario Human Rights Commission v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536.

[145] In that case, a Simpsons' employee became a member of the Seventh Day Adventist Church and was no longer able to work on Saturdays. The employer refused to allow the employee to work full time hours without working on Saturday. The employee was forced to resign and accept a part time position with a decrease in pay.

[146] The Supreme Court held that the employer had failed to accommodate the employee's creed and ordered it pay the difference between the amount she would have earned as a full time employee and the amount she earned as a part-time employee.

[147] The Respondent's only accommodation to the Applicant was to allow her to not work the morning hours of her shift**s**, while using sick leave to maintain a similar wage. In my opinion, this is not accommodation. The purpose of the duty to accommodate is to ensure that persons who are otherwise fit to work are not unfairly excluded where working conditions can be adjusted without undue hardship; see the decision in *Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ),* [2008] 2 S.C.R. 561 at paragraph 14.

[148] The duty of accommodation requires the employer take reasonable steps to arrange the employee's workplace or duties to enable the employee to do his or her work so long as those steps do not impose undue hardship; see the decisions in *Simpsons-Sears, supra* and *Hydro-Québec, supra*.

[149] The Supreme Court in its decision in *Central Okanagan School District No. 23, supra* at paragraph 984 described the burden on the employer as follows:

> … More than mere negligible effort is required to satisfy the duty to accommodate. The use of the term "undue" infers that some hardship is acceptable; it is only "undue" hardship that satisfies this test. The extent to which the discriminator must go to accommodate is limited by the words "reasonable" and "short of undue hardship". These are not independent criteria but are alternate ways of expressing the same concept. What constitutes reasonable measures is a question of fact and will vary with the circumstances of the case. …

[150] In her affidavit filed in this proceeding, Ms. Fitzgerald said that "Scotiabank cannot provide the Applicant with 16 hours per week at these branches on an after-12:00 p.m. basis while maintaining these branches' operational needs."

[151] In my opinion, the Respondent has not shown that it would suffer undue hardship in accommodating the Applicant's need to work only in the afternoon hours. The conclusion of accommodation is unreasonable.

F. *Did the Commission err by finding that the Applicant was not harassed?*

[152] The Investigator determined that the September 15, 2009 incident was isolated and did not meet the standard for harassment. He addressed the allegations of intimidation, pressure and bullying as part of his analysis of the adverse impacts. This conclusion was reasonable.

IX. CONCLUSION

[153] In the result, the application for judicial review is allowed. However, the Applicant's request that her complaints be referred directly to a tribunal is dismissed. There is no jurisdiction in the Court to grant such relief. The matter is returned to the Canadian Human Rights Commission to be dealt with in a manner not inconsistent with these reasons. The Applicant did not seek costs in the event of success and no costs will be awarded.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed. [text removed]The matter is returned to the Canadian Human Rights Commission to be dealt with in a manner not inconsistent with these reasons. No order as to costs.

"E. Heneghan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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