Federal Court  Cour fédérale

Date: 20170508

Docket: T-461-16

Citation: 2017 FC 451

Ottawa, Ontario, May 8, 2017

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

JASYN EVERETT WALSH

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicant seeks an order setting aside a decision of the Canadian Human Rights Commission [the Commission], dated February 26, 2016, in which the Commission confirmed a previous decision rendered on April 15, 2014, dismissing the Applicant's complaint under the *Canadian Human Rights Act*, RSC, 1985, c H-6 [the *Act*]. The Applicant alleges that he was discriminated against by Transport Canada on the basis of disability resulting from an alcohol

dependence condition first by being refused a Marine Medical Certificate (Certificate) that would have allowed him to be employed as a seafarer, and then by being issued a restricted Certificate which had the effect of disqualifying him from 95% of all deckhand jobs.

[1] This is the second time this case comes before the Court. On February 23, 2015, Justice Donald J. Rennie, now a judge of the Federal Court of Appeal, granted the Applicant's application for judicial review against the Commission's decision of April 2014 (*Walsh v Canada (Attorney General)*, 2015 FC 230 [*Walsh 2015*]). Justice Rennie held that the Commission had failed to properly apply the third branch of the test articulated by the Supreme Court of Canada in *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 SCR 3 [*Meiorin*] and *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)*, [1999] 3 SCR 868 [*Grismer*] (hereinafter, the "*Meiorin* test") in order to establish, once a *prima facie* case of discrimination has been made out, whether there is a *bona fide* justification for the discriminatory practice.

[2] The *Meiorin* test required Transport Canada to prove on a balance of probabilities that its policy related to the issuance of Certificates to persons with the characteristics of the Applicant (i) was adopted for a purpose or goal that is rationally connected to the function being performed, (ii) was adopted in good faith, and (iii) was reasonably necessary to accomplish their purpose or goal, in the sense that these persons could not be accommodated without undue hardship being incurred (*Walsh 2015*, at para 25).

[3] Justice Rennie held that the Commission had failed to analyze, as was required, whether Transport Canada had accommodated the Applicant up to the point of undue hardship. As a result, the Commission's decision was set aside and the matter was remitted back for reconsideration.

[4] The Applicant remains dissatisfied with the Commission's reconsideration of the matter. He claims that the Commission erred again in its application of the *Meiorin* test. He also contends that the duty of procedural fairness owed to him by the Commission was breached in various ways.

II. Background

A. *The Applicant's Application for a Marine Medical Certificates*

[5] Pursuant to the *Marine Personnel Regulations*, SOR/2007-115 (the Regulations) adopted under the *Canada Shipping Act*, SC 2001, c 26, any person who wishes to be employed as a seafarer cannot be so employed without holding a Certificate attesting to his or her physical and mental fitness. Such Certificate can be issued with or without restrictions. The Regulations do not contain a list of physical and/or mental disabilities that would prevent a seafarer from obtaining a Certificate or that would result in a seafarer obtaining a restricted Certificate. They rather leave the assessment of medical fitness for the purposes of the issuance of Certificates to the professional judgment of Marine Medical Examiners.

[6] The Applicant applied for a Certificate on or around June 2010. Justice Rennie summarized as follows the handling of the Applicant's application leading to the decision not to issue a Certificate in August 2010 and then to the decision to issue a Certificate with a "No Watchkeeping" restriction in May 2012:

> [4] In order to assess whether the applicant was fit to hold a Certificate, he was examined by TC Marine Medical Examiner Dr. L.A. Leong. After the examination, Dr. Leong had concerns about the applicant's health. He contacted Dr. Peter Janna, a Senior Marine Medical Officer. Dr. Janna shared Dr. Leong's concerns regarding the applicant's fitness for seafaring duty. Consequently, on or around August 31, 2010, [Transport Canada (TC)] informed the applicant that he was unfit to hold a Certificate. The decision letter cited "Alcohol Dependence, Major Depression, and a Developmental Disorder among other things" as the reasons for the denial of the Certificate.
>
> [5] The applicant appealed TC's decision to the Transportation Appeal Tribunal of Canada (TATC). On November 21, 2011, TATC confirmed the decision to refuse to issue a Certificate to the applicant as he had not demonstrated that he met the necessary medical requirements.
>
> [6] Subsequent to the TATC decision, on December 3, 2011, the applicant emailed Dr. Janna to ask what requirements he would have to meet to be considered for a Certificate. Dr. Janna explained that the applicant's medical history was of concern and until the applicant's health issues were addressed and managed, the applicant would not be deemed fit to hold a Certificate. Dr. Janna also recommended that the applicant contact his family doctor and be referred to a specialist to address his issues. Dr. Janna concluded by stating that only after such steps were taken would the applicant be allowed to undergo another Marine Medical Examination, and only upon TC's satisfaction that the applicant's medical conditions no longer posed a safety risk would TC "consider the possibility of issuing" a Certificate.
>
> [7] On December 9, 2011, the applicant again wrote to Dr. Janna to advise that his medical issues, specifically his alcoholism, were being addressed and that he hoped to be found fit to hold a Certificate in the very near future. The applicant reapplied for a Certificate, and on or around May 29, 2012, Dr. Leong again examined the applicant and found that he was fit with two limitations; no bridge watchkeeping; and the certification

> would be limited to three months. Consequently, on June 8, 2012, the applicant was issued a three-month provisional restricted Certificate with the restriction of "no watchkeeping duties."

[7] The June 8, 2012 letter informing the Applicant of the issuance of the Certificate with a "No Watchkeeping" restriction provided the following details:

> […] At this point in time, you will be provided a Marine Medical Certificate with limitations while you undergo a monitoring program. These limitations will be reviewed at the end of the monitoring period. Those capable of providing documented abstinence for 2 years are subsequently deemed FIT.
>
> In keeping with the requirements of the *Marine Personnel Regulations, Section 278(3)*, in order to adequately assess your medical fitness, you are required to provide the following information:
>
> - **A periodic report from your treating physician or Addiction Specialist regarding your alcohol rehabilitation and their perspective of your ongoing abstinence. You will be obliged through your primary caregiver or Addiction Specialist, to provide such reports <u>every three months for a two-year period</u> if you wish to obtain an Unlimited Medical Certificate.**
>
> Please arrange for your physician to have this information submitted directly to our office and be advise any expenses incurred to establish your medical fitness are your responsibility.
>
> […]
>
> Please find enclosed a short term Marine Medical Certificate expiring on August 31, 2012. A limitation of No Watchkeeping duties has been applied as a result of your past alcohol abuse problems. This limitation may be lifted after two years of confirmed abstinence.
>
> [Emphasis in original]

B. *The Applicant's complaint to the Commission*

[8] The Applicant filed his complaint with the Commission on June 4, 2012. It was founded both on the initial refusal to issue a Certificate and on the subsequent decision to issue a Certificate with a "No Watchkeeping" restriction.

[9] As that restriction was lifted in October 2012, the Commission first thought there was no need to deal with the Applicant's complaint. It is only in July 2013 that the Commission decided to investigate the complaint. On January 20, 2014, it issued its Investigation Report. The Report found that the Applicant had established a *prima facie* case of discrimination under section 5 of the *Act*. In particular, it concluded that by requiring that a seafarer must be physically and mentally fit in order to obtain a Certificate, Transport Canada had imposed requirements or restrictions on the Applicant's employment and that these requirements did not take into account the Applicant's past maritime service or his ability to do the work of a seafarer, including standing watch. It further concluded that these requirements disadvantaged the Applicant as he was not able to obtain the Certificate because of his alcohol use, and that their adverse effects were related to the ground of disability (*Walsh 2015*, at para 24).

[10] However, the Investigation Report ultimately recommended the dismissal of the Applicant's complaint on the ground that there was a safety-grounded *bona fide* justification for Transport Canada's written (and unwritten) rules and practices covering seafarers and alcohol dependence. It further concluded that rules and practices requiring a seafarer to be physically and mentally fit to work in a safety critical occupation accommodated seafarers with the

characteristics of the Applicant by allowing the issuance of a restricted Certificate to those who are in verifiable sobriety and treatment (*Walsh 2015*, at para 13 and 27).

C. *The Commission's April 2014 Decision and its Setting Aside by Walsh 2015*

[11] On April 15, 2014, the Commission, being satisfied pursuant to subsection 44(3)(b)(i) of the *Act* that an inquiry into the Applicant's complaint was not warranted, dismissed the complaint. Its reasons for the decision were derivative of the Investigation Report.

[12] As indicated at the outset of these reasons, that decision was set aside by Justice Rennie because of the Commission's failure to consider and apply the third branch of the *Meiorin* test in its entirety, namely to ask itself whether Transport Canada had accommodated the Applicant up to the point of undue hardship. Although he was satisfied that much of the Investigation Report, including the treatment of the first two steps of the *Meiorin* test, was "unassailable", Justice Rennie held that each of the steps in the *Meiorin* test was critical and that the Report only considered half of step 3, leaving aside the accommodation part of that step. He said this in this respect:

> [29] The Investigation Report then considered step 1 of the *Meiorin* test: whether these written and unwritten rules and practices were adopted for a purpose that was rationally connected to the service. The Investigation Report concluded that the rules and practices were adopted to ensure marine safety, and specifically to ensure that those working in safety critical positions as seafarers with Watchkeeping are fit to perform their duties.
>
> [30] Step 2 of the *Meiorin* test was then considered. At paragraph 42 of the Investigation Report, the Commission concluded that there is "no reason to doubt" that [Transport Canada] adopted the rules in a good faith belief that they contribute to marine safety.

> [31] Finally, the Investigation Report went on to consider the first half of step 3 of the *Meiorin* test. The Investigation Report questioned whether [Transport Canada] had a "[BFJ] for its rules, considering health, safety and cost." However, the Investigation Report did not analyze, as was required, whether [Transport Canada] had accommodated persons with the characteristics of the applicant without incurring undue hardship. Specifically, under the controlling jurisprudence of the Supreme Court of Canada the Investigation Report was required to analyze undue hardship in terms of both the initial refusal by [Transport Canada] to issue a Certificate on August 31, 2010, as well as undue hardship in the context of the Certificate issued on June 8, 2012, with the restriction of No Watchkeeping.

[13] Justice Rennie found the lack of an undue hardship analysis in the context of the restricted Certificate issued in June 2012 to be of particular concern given the Investigation Report's failure to "consider ways in which [Transport Canada] may have accommodated the [A]pplicant, such as imposing a No Lone Watchkeeping restriction", since at the time this Certificate was issued, the Applicant had commenced sobriety and treatment (*Walsh 2015*, at para 32).

[14] Justice Rennie held this error to be determinative and he sent the matter back to the Commission "for re-determination of the third step in the *Meiorin* test" (*Walsh 2015*, at para 35).

D. *The Supplementary Investigation Report and the Impugned Decision*

[15] Pursuant to Justice Rennie's judgment, the Commission conducted a further investigation and issued a Supplementary Investigation Report on October 30, 2015. The Supplementary Report recommended no further inquiry into the Applicant's complaint, holding that it was reasonably necessary, on the basis of the evidence gathered, to deny a Certificate to people with

alcohol dependency resisting treatment and to provide a restricted Certificate to an alcohol dependent applicant who has relatively new sobriety.

[16] The Supplementary Report's main findings, which are found at paragraphs 44 to 49 of the Report, can be summarized as follows:

a) According to the Supreme Court of Canada, an "accommodation" in the human rights law context refers to what is required in the circumstances of each case to avoid discrimination and failure to accommodate may be established by evidence of arbitrariness in setting the practice or rule, by an unreasonable refusal to provide individual assessment, or perhaps, some other way (*Grismer*, at para 21-22); however, where safety is at issue in determining whether there is undue hardship, the magnitude of the risk and the identity of those who bear it are relevant considerations (*Central Alberta Dairy Pool v Alberta (Human Rights Commission)*, [1990] 2 SCR 489, at para 62 [*Central Alberta Dairy Pool*]);

b) In the present matter, the mandate of Transport Canada is to ensure a safe and secure maritime industry, which includes determining, through individual medical assessments, the mental and physical fitness of those who seek to perform the safety sensitive function of a seafarer so as to protect the safety of the crew, the vessel, the environment and the public at large;

c) There is no dispute that the Applicant's alcoholism coupled with reports from several medical professionals regarding his excessive consumption of alcohol and apparent lack of insight into the consequences of this behavior at the time, were

central to Transport Canada's decision of August 2010 refusing the Applicant a Certificate;

d) The May 2012 restricted Certificate and the subsequent unrestricted Certificate of October 2012, were issued on the basis of evidence that the Applicant had stopped drinking and had begun treatment;

e) At issue is whether Transport Canada accommodated the Applicant to the point of undue hardship when it issued the May 2012 restricted Certificate;

f) The duty to accommodate depends on context and part of that context is that Transport Canada is not an employer, but rather a regulatory body whose role it is to certify and possibly identify potential accommodation measures a Certificate applicant may require, not to offer treatment suggestions to applicants or require potential employers to periodically conduct field sobriety testing to certain individuals;

g) The Applicant provided several examples of how it would not be an undue hardship for Transport Canada to have accommodated him, including imposing a "No Lone Watchkeeping" rather than a "No Watchkeeping" restriction but bearing in mind that the seafarer position requires sound judgment and ability to make quick decisions, Transport Canada opted for a cautious approach.

[17] The investigator concluded as follows, at para 49 of the Supplementary Report:

> While it is important to balance the [Applicant's] accommodation needs, the undue hardship in this case also needs to consider the perspective of those whose safety may have been at risk (ie. the general public) if [Transport Canada] were to have issued him an unrestricted medical certificate. The [Applicant's] sobriety was still relatively new and he had a significant history of alcoholism

> that included blackouts which rendered him cognitively impaired. Based on all the evidence gathered during this supplementary investigation, [Transport Canada] has shown an undue hardship in the form of a real risk to the safety of others. Therefore, [Transport Canada] has accommodated the [Applicant] to the point of undue hardship when considering the factors of safety and security of the [Applicant], the maritime industry and the general public.

[18] On February 26, 2016, the Commission endorsed the recommendation contained in the Supplementary Report that no further inquiry was warranted into the Applicant's complaint.

III. Issue

[19] As was the case in *Walsh 2015*, the Applicant claims both procedural and substantive errors on the part of the Commission. In particular, he contends that the Commission:

i) did not properly apply the *Meiorin* test;

ii) failed to consider his submissions of February 2014, November 2015 and January 2016 and thereby to provide adequate reasons for dismissing his complaint; and

iii) was bias in a number of ways.

[20] For the reasons that follow, I find that the Commission unreasonably concluded that Transport Canada met its obligation under step 3 of the *Meiorin* test to accommodate the Applicant to a point of undue hardship when issuing the May 29, 2012 Certificate which imposed on the Applicant a "No Watchkeeping" restriction. This suffices to quash the February 26, 2016 decision dismissing the Applicant's complaint. As a result, there will be no need to

consider the other issues raised by the Applicant except to the extent it is necessary to do so in determining whether, as requested by the Applicant, the matter shall be remitted to the Comission for reconsideration or referred directly to the Canadian Human Rights Tribunal.

IV. Standard of Review

[21] In dismissing a complaint on the basis that no further inquiry is warranted, the Commission exercises a screening function (*Cooper v Canada (Human Rights Commission)*, [1996] 3 SCR 854, [1996] SCJ No. 115 (QL)). This role, in any given case, is to determine whether an inquiry by the Canadian Human Rights Tribunal is warranted having regard to all the circumstances of the complaint, not "to determine if the complaint is made out" (*Cooper*, above at paras 52-53; *Syndicat des employés de production du Québec et de l'Acadie v Canada (Canadian Human Rights Commission)*, [1989] 2 SCR 879, [1989] SCJ No. 103, at pp 898-899).

[22] In exercising that role, the Commission is entrusted with a broad discretion (*Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, 2012 SCC 10 at paras 21 and 25, [2012] 1 SCR 364; *Bell Canada v Communications, Energy and Paperworkers Union of Canada*, [1999] 1 FC 113 (CA), at para 38). This calls, on judicial review, for the application of the deferential standard of reasonableness (*Tutty v Canada (Attorney General)*, 2011 FC 57, at para 14; *Keith v Correctional Service of Canada*, 2012 FCA 117, at para 43; *Sketchley v Canada (Attorney General)*, 2005 FCA, 263 DLR (4^{th}) 113, at para 47 [*Sketchley*]; *Dunsmuir v New Brunswick*, 2008 SCC 9, at para 47 [*Dunsmuir*]). This also means that the Court will normally not interfere with the Commission's decisions unless "unreasonable omissions are made, for example where an investigator failed to investigate obviously crucial evidence" (*Slattery v*

Canada (Canadian Human Rights Commission), [1994] 2 FC 574, [1994] FCJ No 181, [*Slattery*]).

[23] As to what will constitute "obviously crucial evidence", this Court has stated that "the 'obviously crucial test' requires that it should have been obvious to a reasonable person that the evidence an applicant argues should have been investigated was crucial given the allegations in the complaint" (*Gosal v Canada (Attorney General)*, 2011 FC 570 at para 54).

V. Analysis

[24] The Act prohibits discriminatory practices based on prohibited grounds of discrimination. According to section 3 of the *Act*, a disability, which is defined at section 25 of the *Act* as including a "previous or existing dependence on alcohol", is such a ground of discrimination. Section 5 of the *Act* makes it a discriminatory practice in the provision of a service generally available to the general public to deny such service or access to it or to differentiate adversely in relation to any individual on a prohibit ground of discrimination.

[25] However, section 5 must be read together with paragraph 15(1)(g) of the *Act* which provides that such denial or differentiation is not a discriminatory practice if there is a *bona fide* justification for it. According to paragraph 15(2) of the *Act*, a justification is *bona fide* if it is established that the needs of the affected individual cannot be accommodated without imposing "undue hardship on the person who would have to accommodate those needs, considering health, safety and costs".

[26] In *Meiorin*, the Supreme Court of Canada provided some guidance as to what constitutes a *bona fide* justification for a *prima facie* discriminatory practice in the context of section 5 of

the *Act* by developing the three-part test referred to at the outset of these Reasons (*Meiorin*, at para 54). Step 3 of that test, which is relevant to the present proceedings, requires Transport Canada to show that its policy regarding the issuance of Certificates to individuals with a previous or existing dependence on f alcohol is reasonably necessary to the accomplishment of the purpose for which it was adopted. It is not disputed that this purpose is to ensure marine safety, including safety of the ship, the crew members, the public and the environment, by making sure that those working in safety critical positions as seafarers are fit to perform their duties.

[27] Step 3 is met where it can be shown that "it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer" (*Meiorin*, at para 54). In assessing step 3, the courts "should be sensitive to the various ways in which individual capabilities may be accommodated" (*Meiorin*, at para 64). At para 65 of *Meiorin*, the Supreme Court listed some of the "important questions" that may be asked in this regard:

> (a) Has the employer investigated alternative approaches that do not have a discriminatory effect, such as individual testing against a more individually sensitive standard?
>
> (b) If alternative standards were investigated and found to be capable of fulfilling the employer's purpose, why were they not implemented?
>
> (c) Is it necessary to have <u>all</u> employees meet the single standard for the employer to accomplish its legitimate purpose or could standards reflective of group or individual differences and capabilities be established?
>
> (d) Is there a way to do the job that is less discriminatory while still accomplishing the employer's legitimate purpose?

> (e) Is the standard properly designed to ensure that the desired qualification is met without placing an undue burden on those to whom the standard applies?
>
> (f) Have other parties who are obliged to assist in the search for possible accommodation fulfilled their roles? As Sopinka J. noted in *Renaud*, *supra*, at pp. 992-96, the task of determining how to accommodate individual differences may also place burdens on the employee and, if there is a collective agreement, a union."

[28] The factors that may be considered when assessing the duty to accommodate to a point of undue hardship also include the financial costs of the possible method of accommodation, the relative interchangeability of the workforce as well as the prospect of substantial interference with the rights of other employees. However, this list of considerations is not exhaustive and in all cases, the relevant considerations "should be applied with common sense and flexibility in the context of the factual situation in each case" (*Meiorin*, at para 63; *Commission scolaire régionale de Chambly v Bergevin*, [1994] 2 SCR 525 at p 546).

[29] As I indicated previously, Justice Rennie found that much of the Investigation Report that was before him was "unassailable" and that the first two steps of the *Meiorin* test had been "fully applied" by the Commission (*Walsh 2015*, at para 35). This means that for the purposes of this judicial review application, I take it that steps 1 and 2 have been satisfied. In other words, whether Transport Canada adopted its policy respecting the issuance of Certificates to seafarers with a previous or existing dependence on alcohol for a purpose rationally connected to the performance of the work of a seafarer and in an honest and good faith belief that this policy is necessary to the fulfilment of that safety-related purpose, is not in dispute before me.

[30] Rather, Justice Rennie set aside the Commission's decision on the ground that it had failed to consider ways in which Transport Canada may have accommodated the Applicant, such

as imposing "No Lone Watchkeeping" restriction (*Walsh 2015*, at para 32). What is in dispute before me therefore is not whether the Commission failed to apply the *Meiorin* test. The Commission did apply it as clearly evidenced by the Supplementary Investigative Report. The issue is rather whether, in so doing, the Commission reached a reasonable conclusion in all the circumstances of this case, that is a conclusion which "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, at para 47). In other words, is the Commission's conclusion that Transport Canada have accommodated the Applicant up to a point of undue hardship in May 2012 by issuing a Certificate with a "No Watchkeeping" limitation, instead, for instance, of opting for a "No Lone Watchkeeping" restriction, a reasonable outcome?

[31] The Applicant claims that a *prima facie* discriminatory policy is only justifiable under paragraph 15(2) of the *Act* where the service provider "has made every possible accommodation short of undue hardship" (his emphasis). He contends that Transport Canada has failed to meet that onus.

[32] In particular, the Applicant argues that there was no risk in May 2012 in being issued an unrestricted Certificate subject only to periodic sobriety controls or, alternatively, subject to such controls and a "No Lone Watchkeeping" limitation since at that time:

a) He had been in a verifiable state of sobriety and treatment for 8 months;

b) The blackouts he experienced as a result of his alcohol abuse occurred in 2010;

c) There was no evidence of any cognitive deficits, withdrawal symptoms, motor deficits, maladaptive behaviors or liver disease;

d) He had 509 days of previous sea-time experience;

e) There was no evidence either of any major mental health issues as confirmed by a psychiatric evaluation performed in April 2012; and

f) There was evidence that he was mentally fit and had full perceptual functioning for a seafarer position as evidenced by the fact he had successfully passed a difficult Navigation Course in October 2011, only a few days after having stopped drinking.

[33] The Applicant submits that Transport Canada's failure to meet the undue hardship requirement in May 2012 is further evidenced by the fact that he was issued an unrestricted Certificate only five months into the two-year monitoring period required by the May 2012 restricted Certificate for the "No Watchkeeping" limitation to be lifted. He says that this proves that it was in fact possible for Transport Canada to accommodate him further on May 29, 2012, especially given the fact that the only new piece of information leading to the issuance of the unrestricted Certificate is a letter from his Addiction Specialist, dated October 10, 2012, reiterating that he was still attending counselling services and maintaining sobriety.

[34] The Applicant further claims that nothing on record rationally supports this sudden and significant change in Transport Canada's position regarding his physical and mental fitness to perform Watchkeeping duties and that the Commission fatally failed to address its mind to this important consideration in determining whether Transport Canada had made every possible accommodation short of undue hardship when it issued the May 2012 restricted Certificate.

[35] I believe that the Applicant raises a valid point here.

[36] There is certainly no controversy over the fact that where, as is the case here, safety is at issue in determining whether the undue hardship requirement has been met, both the magnitude

of the risk and the identity of those who bear it are relevant considerations (*Central Alberta Dairy Pool*, at para 62). As the Respondent points out, the Commission had before it evidence of the safety risks at issue in the work of seafarers, including those posed by alcohol dependency. It also had before it evidence of Transport Canada's "unwritten" policy requiring for all individuals with alcohol dependency that these risks be addressed not by the subjective self-assessment of the individual concerned but by a two-year period of verifiable sobriety, with ongoing reporting, which could be shortened based on an individual assessment.

[37] The Respondent claims that such policy is sound because of the very nature of addiction which, contrary to other types of disabilities, raises impaired judgment issues and carries with it a risk of relapse that is not in the control of either the affected individual or his or her employer but which is known to decrease with the length of time in sobriety.

[38] At first glance, this all make sense. However, it hardly explains why, in a matter of a few months, Transport Canada made a complete 180-degree turn in its assessment of the Applicant's fitness to perform Watchkeeping duties. It does not explain either how this "unwritten" policy concretely works or the manner in which it was applied to the Applicant.

[39] The Respondent claims in this regard that the "No Lone Watchkeeping" is not a viable option for those with alcohol dependency due to the issues of potential impaired judgment such as the difficulty for both the alcohol dependant seafarer and the companion Watchkeeper to determine whether the former's judgment is impaired or, depending on the degree of impairment, the possible dispute between the two as to whom the crew should follow. It contends that there was nothing unreasonable on the part of the Commission to conclude that in not offering the Applicant the "No Lone Watchkeeping" in May 2012, Transport Canada had adopted a cautious

approach and had proven accommodation to the point of undue hardship given the safety considerations at play and the Applicant's alcohol dependency history.

[40] However, in my view, in considering whether the Applicant was accommodated to the point of undue hardship in May 2012 by being issued a Certificate with a "No Watchkeeping" restriction, which for all intents and purposes, prevented him from working as a seafarer, the Commission failed to fully address what appears to me to be a significant turn of events, that of the lifting of that restriction only five months after it had been imposed.

[41] This evidence, which was before the Commission, begs the following question: if the Applicant was found to be fit in October 2012 to perform the work of a seafarer without any Watchkeeping restrictions, was Transport Canada overly and unreasonably cautious in denying the Applicant with a "No Lone Watchkeeping" accommodation a few weeks earlier given that the record shows that at that time, he had been sober for eight months and he presented no signs of any major mental health issues nor any signs of any cognitive deficits, withdrawal symptoms or maladaptive behavior. In other words, was it reasonably impossible, in such circumstances, to accommodate the Applicant with a "No Lone Watchkeeping" restriction in May 2012 without imposing undue hardship upon the employer given that he was deemed fit for non-restricted Watchkeeping duties shortly thereafter?

[42] This turn of events also raises concerns regarding Transport Canada's "unwritten" policy respecting the issuance of Certificates to seafarers with a previous alcohol dependency issue. As we have seen, this policy provides for a two-year period of verifiable sobriety, with ongoing reporting, before a seafarer with such disability can be deemed fit for seafarer work. It also apparently provides that this two-year period can be shortened.

[43] Here, it is not clear at all how this policy was applied to the Applicant. When one reads the letter of June 8, 2012 confirming the conditions and restrictions attached to the Certificate issued on May 29, 2012, it is clear that if the Applicant wished to obtain "an Unlimited Medical Certificate", he was to provide Transport Canada with reports from his treating physician or Addiction Specialist "every three months for a two year period". This was the "monitoring period" at the end of which these conditions and restrictions would be reviewed. It is also clear that the "No Watchkeeping" limitation could be lifted "after two years of confirmed abstinence". There is no reference in that letter, expressed or implied, to the possibility that this monitoring period be shortened. As that letter stands, it appears that the "No Watchkeeping" limitation would only be lifted provided Transport Canada was satisfied, after two years of confirmed abstinence starting on June 8, 2012, that the Applicant was fit for "an Unlimited Medical Certificate".

[44] But then, in the October 19, 2012 letter informing the Applicant of the lifting of the "No Watchkeeping" restriction, Transport Canada appeared satisfied that the Applicant was now fit for unrestricted Watchkeeping duties given his ongoing attendance to counselling services and sobriety since August 2011. The letter goes on by stating that "[a]t this point, one year has passed and as a result, the limitation previously applied to your Medical Certificate will be lifted".

[45] This is hardly consistent with the approach taken in the previous letter of June 8, 2012 and it raises questions as to how this "unwritten" two-year abstinence policy is being implemented in general and was implemented in the case of the Applicant in particular. In an

undue hardship analysis, failure to accommodate may be established in various ways, including by evidence of arbitrariness in setting the policy (*Grismer*, at paras 21-22).

[46] Here, the starting point of the two-year abstinence monitoring period is anything but clear. The June 2012 letter clearly suggests that it began at that point in time whereas the October 2012 letter indicates that it started in August 2011. If the starting point was indeed June 2012, then one wonders on what basis the Applicant could have been assessed within the first five months of the policy's 24-month sobriety monitoring requirement from being wholly unfit for any type of Watchkeeping duties, including No Lone Watchkeeping, to being totally fit for such duties, without any restrictions, with no evidence other than this letter from the Addiction Specialist indicating that the Applicant was maintaining sobriety. This hardly makes sense and raises concerns as to the potential arbitrariness of the policy. It is further highly questionable given that Transport Canada allegedly imposed the "No Watchkeeping" restriction because the Applicant had not only relatively new sobriety but also little insight into his condition. Again, if this was really the case - and I could not find any credible evidence on record supporting the claim that Applicant had little insight into his condition at the time the May 2012 Certificate was issued -, one wonders how the policy's two-year monitoring period could reasonably be reduced to five months in such circumstances.

[47] If the starting point was rather August 2011, in which case the June 2012 letter was misleading in this regard, then one wonders why the Applicant was deemed fit for unrestricted Watchkeeping duties after the first year of the required two years of sobriety and counselling services but unfit for "No Lone Watchkeeping" duties after eight months of sobriety and counselling services.

[48] As I indicated previously, the Respondent contends that the two-year monitoring period can be shortened on the basis of individual assessments made by Marine Medical Examiners, a feature of the policy which was not mentioned in the June 2012 letter and which appears to be left entirely to the judgment of these professionals. However, here, it is not clear at all on what basis the Applicant was assessed in such a short period of time from being wholly unfit to being totally fit for Watchkeeping duties. In other words, why was the Applicant deemed fit for such duties at the mid-way point of the policy's two-year monitoring period instead of the full two years or at the 15 month mark or, for that matter, at the 8 month mark? There is no evidence of a further individual assessment being performed on the Applicant by a Marine Medical Examiner between May and October 2012. And yet, according to the Supplementary Investigation Report, the Respondent claims that "the most effective way" to assess for alcohol dependence and ensure outcomes that are "neither arbitrary nor thoughtless" is "through individual assessment through personal medical examinations and questionnaires" as well as through further tests or further information that Marine Medical Examiners are advised to obtain from the applicants' family doctors (Supplementary Investigation Report, at para 11). None of that appears to have preceded the October 2012 decision to lift the "No Watchkeeping" restriction in this case.

[49] The Supplementary Report goes on to state that according to Transport Canada's policy, if the Marine Medical Examiner has "any concerns", no Certificate will be issued "because any compromise to the seafarer's function could lead to a societal hardship in terms of injury to other crew, passengers, destruction of cargo or vessel and environmental impact" (Supplementary Report, at para 13). Again, there is no clear explanation on record as to what prompted Transport Canada to move, in a span of five months, from a zero-risk approach to a no safety-concern

position in the case of the Applicant. This hardly provides a basis for concluding that these outcomes, when considered together, are "neither arbitrary nor thoughtless".

[50] Furthermore, relieving the Applicant from any Watchkeeping restrictions only halfway through that alleged two-year safety critical period signals a steady and successful participation to his rehabilitation program. Why then was he deemed unfit for a "No Lone Watchkeeping" accommodation after 8 months into this program? Again, I fail to see any reasonable explanation for this denial in the material before me in light of this further decision lifting the restrictions on the Applicant's Certificate. But more importantly, I do not see any type of inquiries on the part of the Commission on what is, in my view, an obviously crucial element of this case.

[51] As mentioned previously, the Respondent claims that the "No Lone Watchkeeping" is not a viable option for those with alcohol dependency due to the potential for impaired judgment issues such as determining whose instructions the crew and the public on board should follow if the alcohol dependent seafarer was to find himself in a state of impaired judgment. However, this approach, which does not take into account the particular circumstances of each case, does not sit well with step 3 of the *Meiorin* test which discourages blanket accommodation refusals (*Grismer*, at para 3). This is especially the case here where the Applicant, shortly after being denied a "No Lone Watchkeeping", was relieved of any restrictions regarding his ability to conduct Watchkeeping duties. In my view, there is a disconnect between these two sharply contrasted positions which lacks a rational justification in the circumstances of this case.

[52] Also, as the Supreme Court of Canada pointed out in *Meiorin*, courts and tribunals "should be sensitive to the various ways in which individual capabilities may be accommodated" (*Meiorin*, at para 64). Although I appreciate the fact that when it comes to seafarers, Transport

Canada acts as a regulator, not as an actual employer, and that, therefore, there are some limits to its duty to accommodate, the Commission, in the Supplementary Investigation Report, appears to recognize that part of Transport Canada's role in that regard is to "possibly identify potential accommodations measures an applicant may require" (Supplementary Investigation Report, at para 48). It seems that performing "No Lone Watchkeeping" duties under the supervision of a ship officer, as proposed by the Applicant (Supplementary Investigation Report, at para 27) could alleviate the safety concerns Transport Canada has regarding this accommodation option by making sure that there is no ambiguity for the crew and the public as to who is the person ultimately in charge of giving instructions. I take it that this option could be in place until the end of the policy's two-year monitoring period and subject to the policy's quarterly abstinence reports. There is no evidence before me that an employer would not be amenable to such an arrangement, be it for health, safety or costs concerns. However, there is no discussion in the Commission's Supplementary Investigation Report as to whether it would have been impossible to accommodate the Applicant in this fashion in May 2012.

[53] Again, this particular "No Lone Watchkeeping" option does not appear to have been fully canvassed by the Commission, if at all. In light of the fact that the Applicant was cleared for unrestricted Watchkeeping duties only a few months after been told he was unfit for any such duties, including those performed in the presence of a companion Watchkeeper, it was in my view incumbent on the Commission to look into this option further. It did not do so.

[54] I am mindful that the Commission has "a remarkable degree of latitude" when exercising its screening function and that the Court, as a result, will not interfere lightly when the Commission decides that no further inquiry is warranted in a given case (*Bell Canada v*

Communications, Energy and Paperworkers Union of Canada, [1999] 1 FC 113 (CA), at para 38). However, the Commission's decision still needs to meet the reasonableness standard threshold and in applying this standard, the Court must be satisfied that the Commission did not fail to investigate obviously crucial evidence.

[55] Here, in my view, the main flaw in the Commission's decision is its failure to consider Transport Canada's alleged impossibility to accommodate the Applicant further than by a "No Watchkeeping" restriction in May 2012 in the context of Transport Canada's decision, shortly thereafter, to lift all restrictions to the Applicant's capacity to perform Watchkeeping duties. In particular, the Commission considered the sequence of events (denial of a Certificate in 2010, issuance of a restricted Certificate in May 2012 and issuance of an unrestricted Certificate in October 2012) without regard to the actual timelines of these decisions when considered in the context of Transport Canada's policy. The sharp contrast between the last two decisions, given their timelines, needed to be explained and further investigated with a view of determining whether the May 2012 "No Watchkeeping" restriction was in fact the only accommodation that could be offered to the Applicant at that time considering all the circumstances of the case.

[56] This was not done and leaves wide open, in my view, the issue of whether this outcome was indeed "neither arbitrary nor thoughtless". I find nothing in Transport Canada's submissions in response to the Supplementary Investigation Report which, as permitted by the jurisprudence (*Slattery*, at para 58), overcomes these defects in the investigation.

[57] The Applicant's judicial review application will therefore be granted. As I am not prepared to accept that this case raises a reasonable apprehension of bias, as contended by the Applicant, the matter will be remitted to the Commission for reconsideration of the undue

hardship component of the *Meiorin* test, and not referred directly to the Canadian Human Rights Tribunal as requested by the Applicant.

[58] As is well established, any apprehension of bias must be reasonable and held by "reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information" (*Committee for Justice and Liberty v National Energy Board,* [1978] 1 SCR 369 at p. 394 [*Committee for Justice*]). This onus is a demanding one as allegations of bias are amongst the most serious.

[59] The Applicant's bias claim is first based on the fact that his compliant was held by the Commission, in its early stages, to be moot and vexatious due to the issuance of the unrestricted Certificate in October 2012. I agree with the Respondent that this is no evidence of bias. This was rather an error on the part of the Commission which was corrected by the time of the first judicial review application.

[60] As for the contention that the exchanges between the Commission's (second) investigator and Transport Canada raised an apprehension of bias, the Applicant also failed to meet the *Committee for Justice* threshold. Indeed, while the Applicant alleges that the investigator directed Transport Canada to specific case law, the jurisprudence she referred to in her discussion with Transport Canada's representative was specifically raised by Justice Rennie in *Walsh 2015*. Furthermore, I see no basis to the Applicant's allegation that the Commission's investigator helped Transport Canada shape its answer to the Supplementary Investigation Report by pointing to certain sections of Justice Rennie's decision. I believe that the investigator

was simply attempting to be as thorough as she felt she had to be in responding to Justice Rennie's decision.

[61] Finally, the Applicant contends that the granting of a 5-day extension of time for the filing of Transport Canada's submissions amounts to a reasonable apprehension of bias. I do not agree. As pointed out by the Respondent, this request was reasonably sought and reasonably granted by the Commission as the Transport Canada official providing these submissions is in a wheelchair, types with a mouth stick and was obliged to go to the dentist. This does not indicate bias in favour of Transport Canada all the more so as there is no evidence that the Applicant sought or was unreasonably denied similar treatment.

[62] The Applicant does not seek any costs other than those associated with the Court fees and photocopies. Given the outcome of this case, these costs are awarded to him.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The judicial review application is granted;
2. The matter is remitted to the Commission for reconsideration in accordance with these Reasons;
3. No costs with the exception of those associated with the Court fees and photocopies.

"René LeBlanc"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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