

Federal Court



Cour fédérale

Date: 20180302

Docket: T-337-17

Citation: 2018 FC 239

Ottawa, Ontario, March 2, 2018

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

HAROLD BLACKBIRD

Applicant

and

MHS MASKWACIS HEALTH SERVICES

Respondent

JUDGMENT AND REASONS

I. Nature of the Case

[1] The Applicant, Harold Blackbird, [Mr. Blackbird] seeks judicial review, pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, of the February 3, 2017 decision of the Canadian Human Rights Commission [CHRC] to dismiss his complaint against his former employer, Maskwacis Health Services [MHS], under the *Canadian Human Rights Act*, RSC 1985, c H-6 [the *CHRA*]. Mr. Blackbird has been self-represented throughout.

[2] MHS is a federal non-profit corporation that operates out of Maskwacis, Alberta to provide health services to the Samson Cree Nation, Montana First Nation, Ermineskin Cree Nation and Louis Bull First Nation which are collectively known as the Maskwascis Cree.

[3] Mr. Blackbird is a professional driver with a Class 1 licence from the Province of Alberta. From March 9, 2012 to October 7, 2014 he was employed by MHS as a driver. He used MHS vehicles to transport MHS clients to and from appointments for health services.

[4] On October 8, 2014 at a meeting at MHS with several staff present a letter dated October 7, 2014 was read aloud to Mr. Blackbird terminating his employment. The ground was insubordination. Mr. Blackbird was informed he would receive two weeks' pay in lieu of notice plus five days' pay under the Canada Labour Standards.

[5] The brief reasons provided in the termination letter were that on October 5th and 6th, 2014, contrary to instructions given to Mr. Blackbird on September 29, 2014, he put vehicles up on jacks without first notifying his supervisor or obtaining permission.

[6] Mr. Blackbird filed a complaint with the CHRC on February 6, 2015. He believed he had been the victim of discrimination by MHS because he is not a Cree person from Maskwacis and he is one-half Caucasian. He also alleged that he received differential treatment because he spoke up for himself about the need to repair the vehicles he drove. He alleged that his complaints were disregarded and he received disciplinary actions when he spoke up about safety issues and undertook to show MHS that repairs were needed as well as the cost of certain repairs and safety equipment.

[7] MHS says that Mr. Blackbird's complaint to the CHRC suffered from what it terms a "fatal flaw": there is no evidence of any connection between any alleged adverse treatment of Mr. Blackbird and any protected ground of discrimination.

[8] Approximately eleven months after receiving the complaint, the CHRC, on January 8, 2016, assigned an investigator [the Investigator] to review it. The Investigator rendered her report on September 19, 2016 [the Report]. She recommended to the CHRC that it dismiss the complaint under subparagraph 44(3)(b)(i) of the *CHRA* on the basis that further inquiry was not warranted.

[9] After receiving written submissions from both Mr. Blackbird and MHS with respect to the Investigator's report, the CHRC advised the parties on February 3, 2017 that the complaint was dismissed as, having regard to all the circumstances of the complaint, further inquiry was not warranted.

[10] For the reasons that follow, this application is dismissed.

II. **The CHRC Investigation**

[11] Mr. Blackbird's complaint was examined on the basis of two sections of the *CHRA*: 7 (employment termination or adverse deferential treatment (indirect or direct) based on a prohibited ground) and 14 (harassment on a prohibited ground, in this case in matters relating to employment: subsection (c)). Given Mr. Blackbird's allegations the alleged prohibited ground was that of race, national or ethnic origin (*CHRA* subsection 3(1)).

[12] There is no substantial dispute as to the facts. The parties completely disagree as to how those facts ought to have been considered by the Investigator and by the CHRC.

[13] Mr. Blackbird sincerely believes he has been subjected to adverse differential treatment and discrimination, largely because he is not a member of Maskwacis Cree and he is half-Caucasian. He provided several examples of what he considers mistreatment in his original complaint and in his submissions to the CHRC about the Investigator's Report. He has challenged the Investigator's treatment and analysis of his complaints.

[14] MHS says that Mr. Blackbird's employment was terminated because he was insubordinate after he had received prior warnings. It also says he failed to provide evidence of any connection between the alleged discriminatory actions and a prohibited ground of discrimination under the *CHRA*.

[15] The Investigator reviewed the material already on file and the submissions from each of the parties. She also interviewed a number of current and past workers at MHS including: Mr. Blackbird; Lori Ward (Personnel Manager); Randy Littlechild (Executive Director); Tammy Crane-Johnston (Transportation Manager); Andy Neposse (Elder and Driver with MHS); Luna Lldzi (MHS Driver, who is a member of a First Nation in British Columbia and not Cree); Mark Graham (Former MHS Driver, who is Caucasian); and Henry Shawanda (MHS Driver, who is a First Nation member from Ontario (Wikwemikong First Nation, Manitoulin)).

[16] The Investigator identified the issues before her were whether MHS failed to provide a harassment-free work environment, treated Mr. Blackbird in an adverse differential manner in his employment and whether his employment had been terminated due to his race, national or ethnic origin. She then identified additional steps and considerations under each of these grounds.

[17] In her Report the Investigator divided Mr. Blackbird's complaint into three areas: alleged harassment; alleged deferential treatment; and alleged termination of employment. She identified the time period under review to be between February 2014 and October 2014.

[18] The Investigator engaged in a two-step process. First, she determined whether the alleged conduct occurred and if it was linked to a prohibited ground (along with other criteria that varied depending on which of the three allegations were being considered). If the first step was met then the Investigator examined the actions of MHS (such as whether MHS was notified by Mr. Blackbird (or MHS was otherwise aware, or ought to have been aware) of the conduct and, whether MHS could provide a reasonable explanation for its actions).

[19] In several instances the Investigator determined that the conduct underlying Mr. Blackbird's complaints did occur. Ultimately though, after reviewing and setting out the evidence, the Investigator found that none of Mr. Blackbird's allegations were substantiated.

[20] In the case of the harassment allegations the Investigator determined that MHS acted appropriately and addressed incidents that warranted action. Similarly, she found that with respect to the adverse differential treatment allegations MHS followed its policies and would have responded the same way with any employee. Finally, regarding the termination of Mr. Blackbird's employment the Investigator determined that MHS provided a reasonable explanation for its actions.

[21] As a result of her findings the Investigator recommended to the CHRC that further inquiry into the complaint was not warranted.

III. The CHRC Decision

[22] In the decision of February 3, 2017, the CHRC dismissed the complaint under subparagraph 44(3)(b)(i) of the *CHRA* [the Decision] which provides that the CHRC “shall dismiss the complaint ... if it is satisfied ... that, having regard to all the circumstances of the complaint, an inquiry into the complaint is not warranted”.

[23] In arriving at the Decision the CHRC examined the Report prepared by the Investigator and the materials submitted by both the Applicant and Respondent in response to the Report as well as the Applicant’s original complaint.

[24] The Applicant’s submissions to the CHRC in response to the Report total 7 pages and address a wide range of topics. While he has issues with the evidence in general, primarily, Mr.

Blackbird submitted arguments along the following lines:

- the Report did not reflect all the documents submitted;
- the Respondent and its counsel lied;
- in the September 29, 2014, meeting he was talked to as if he was a child and the comments made to him were inappropriate sexual remarks;
- the Investigator was biased;
- the Investigator incorrectly stated they tried CHRC mediation.

IV. Legislation

[25] The criteria for the dismissal of a complaint by the CHRC without a referral to the Tribunal is found in paragraph 44(3)(b) of the *CHRA*:

44(3) On receipt of a report referred to in subsection (1), the Commission

44(3) Sur réception du rapport d’enquête prévu au paragraphe (1), la Commission :

<p>...</p> <p>(b) shall dismiss the complaint to which the report relates if it is satisfied</p> <p>(i) that, having regard to all the circumstances of the complaint, an inquiry into the complaint is not warranted, or</p> <p>(ii) that the complaint should be dismissed on any ground mentioned in paragraphs 41(c) to (e).</p>	<p>...</p> <p>b) rejette la plainte, si elle est convaincue :</p> <p>(i) soit que, compte tenu des circonstances relatives à la plainte, l'examen de celle-ci n'est pas justifié,</p> <p>(ii) soit que la plainte doit être rejetée pour l'un des motifs énoncés aux alinéas 41c) à e).</p>
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V. Issues

[26] Mr. Blackbird has made many allegations. The two issues to be resolved are whether the Decision was arrived at in a procedurally unfair manner and, whether it is unreasonable.

[27] Mr. Blackbird alleges that the Investigator and, as a result, the CHRC mishandled and did not properly assess his evidence. The instances upon which he relies for this position include:

- the Investigator changed his two-weeks of stress leave to a two day medical leave;
- the Investigator was biased as she took MHS's side and did not properly deal with the following matters:
 - the Sept. 29, 2014 meeting at which he says he was sexually harassed
 - the termination of his employment
 - his allegation that MHS lied to the Investigator about what happened at the meeting and that the Investigator was biased
 - the way in which the sexual harassment complaint against Mr. Blackbird was handled by MHS
 - harassment of Mr. Blackbird by other employees as a non-Cree person
 - the adverse deferential treatment he experienced

[28] Mr. Blackbird also says that the Investigator made errors of fact such as stating the parties participated in the mediation process when they did not.

[29] I do not propose to address the undisputed error that the Investigator stated the parties engaged in mediation when they did not. That misstatement played no role in the Investigator's conclusion on the merits of Mr. Blackbird's complaints. It does not make the Report itself either unreasonable or procedurally unfair.

[30] The issues of procedural fairness and reasonableness Mr. Blackbird raises are interwoven. On a review of the facts and the arguments made by the parties it is apparent that analysis of the events in question does not readily or easily separate into questions of reasonableness or procedural fairness. They will therefore be considered, as applicable, in the discussion of each of the major grounds identified by Mr. Blackbird.

VI. **Standard of Review**

[31] Whether the CHRC decision was arrived at in a procedurally unfair manner is reviewed on a standard of correctness: *Ritchie v Canada (AG)*, 2017 FCA 114 at para 16, 19 Admin LR (6th) 177 [*Ritchie*]. Correctness review of whether the investigation itself was appropriately thorough may require some deference to the fact-based judgment of the CHRC: *Bergeron v Canada (AG)*, 2015 FCA 160 at para 69, 99 Admin LR (5th) 1; see also *Ritchie* at para 44.

[32] The findings of fact and the exercise of discretion by the CHRC to dismiss a complaint as not warranting further inquiry is reviewable on the standard of reasonableness. The range of possible, acceptable outcomes may be narrower though when the result, as here, is that a complaint does not go forward and the matter is terminated: *Attaran v Canada (AG)*, 2015 FCA 37 at para 14, 380 DLR (4th) 737.

[33] A decision is reasonable if the decision-making process is justified, transparent and intelligible resulting in a determination that falls within the range of possible, acceptable outcomes which are defensible on the facts and law: *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190 [*Dunsmuir*]. Essentially, “if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the Dunsmuir criteria are met”: *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16, [2011] 3 SCR 708 [emphasis added].

[34] In applying a reasonableness review, the Court is mindful that the role of the CHRC has been described as a screening function for the Tribunal. As such, a decision by the CHRC will not be overturned “simply because [the Court] might have come to a different conclusion on the evidence. It is not the Court’s role either to dissect the Investigator's report on a microscopic level or second-guess the Investigator's approach to [their] task”: *Abi-Mansour v Canada (Revenue Agency)*, 2015 FC 883 at para 21, 257 ACWS (3d) 415.

VII. Analysis

A. *Overview*

(1) The Law

[35] As the CHRC did not provide any additional reasons in the letter dismissing Mr. Blackbird’s complaint the Investigator’s Report is constitutes the reasons of the CHRC in support of the screening decision: *Canada (AG) v Sketchley*, 2005 FCA 404 at para 37, [2006] 3 FCR 392 [*Sketchley*].

[36] On a reasonableness review, the Investigator's Report will not be found unreasonable due to flaws unless the flaws in the investigation "are so fundamental that they cannot be remedied by the further responding submissions made to the CHRC by the parties": *Sketchley* at para 38.

[37] With respect to Mr. Blackbird's allegation that the report did not reflect all the documentation sent to the Investigator, she is not required to refer to every document or piece of evidence unless it is significant or crucial and could affect the outcome. "Incorrect or vague facts, which are inconsequential to a determination of whether discriminatory acts actually occurred, cannot, on their own, result in a finding that a decision is unreasonable [citations removed]": *Ritchie* at para 30.

(2) Mr. Blackbird's Position

[38] The issues identified by Mr. Blackbird in this application are approximately the same as those he put forward to the CHRC. I will therefore consider the examples he submitted to the CHRC as well as the representations he made at the hearing. In doing so I acknowledge that MHS makes the point that when the CHRC adopted the recommendation from the Investigator's Report, the CHRC already had received and is presumed to have considered Mr. Blackbird's submissions.

[39] In large measure, Mr. Blackbird's submissions amount to a disagreement with the findings made by the Investigator. In his opinion, he received differential treatment because he is half-Caucasian and not a member of the Maskwacis Cree. In particular he disagrees with the way that the Investigator weighed the evidence and her findings that MHS did not engage in differential treatment of him nor did it fail to prevent discriminatory conduct towards him by its employees. He alleges that her findings demonstrate bias against him.

[40] While the Investigator found in several instances that the behaviour about which Mr. Blackbird complained did occur, she also found that there was no evidence to support that Mr. Blackbird was personally detrimentally affected by such conduct. In my view, given the evidence, those conclusions, some of which are reviewed below, were reasonable and were not arrived at in a procedurally unfair manner.

B. *The two weeks stress leave note*

[41] The first submission to the CHRC was that the investigator minimized Mr. Blackbird's two weeks of stress leave by changing it into two days of medical leave. The stress leave to which Mr. Blackbird refers is not identified as such in the doctor's letter he submitted. The doctor's letter only says that Mr. Blackbird was assessed and is unable to work due to illness/injury from September 12-26, 2014. In mentioning a medical note for two weeks of leave, rather than stress leave, the Investigator was correct.

[42] There is no indication that the Investigator was mistaken as to the difference between the two week leave and a separate two day leave (September 30, 2014). She did not minimize the two weeks medical leave; it is referred to at paragraph 99 of her Report. The Investigator notes that Mr. Blackbird was absent from work during the period of September 12-26, 2014. She did not, as alleged by him, confuse that period with the separate two day period of leave to which she referred at paragraph 61 of her Report.

C. *The September 29th meeting*

[43] There were several specific incidents during the September 29, 2014 meeting about which Mr. Blackbird complains. Three such incidents are discussed in this section.

(1) Allegation of sexual harassment of Mr. Blackbird during the meeting

[44] Mr. Blackbird submits that the Investigator ignored instances of sexual harassment that took place in the September 29th meeting. In support of his position, Mr. Blackbird provided to the Investigator a partial transcript he made of his audio recording of the September 29th meeting.

[45] It is clear from a review of Mr. Blackbird's transcript of the meeting that the remarks, while intemperate, would not be classified as sexual harassment. He was referring to remarks made by the Transportation Manager and the Executive Director during that meeting in reference to the complaints received against Mr. Blackbird. They were made during a discussion about the sexual harassment complaints made against him. In context, the examples were part of an effort to explain to Mr. Blackbird the process he was required to follow to respond to the complaints.

[46] In her report the Investigator found that the transcript Mr. Blackbird supplied did not show the comments made at the September 29th meeting met the definition of harassment under the *CHRA*. I have reviewed the transcript and agree that is a reasonable conclusion for the Investigator to have drawn on the evidence provided by Mr. Blackbird.

(2) Investigation of the termination of Mr. Blackbird's employment

[47] The Investigator accepted that Mr. Blackbird's employment was terminated on October 7, 2014. Mr. Blackbird believed it was because he was not a member of the Maskwacis Cree and because he was half-Caucasian. MHS denied that was the basis for the termination.

[48] The Investigator required MHS to provide a reasonable explanation for the termination of Mr. Blackbird's employment that was not a pretext for discrimination on a prohibited ground.

[49] MHS provided its Discipline/Termination Policy to the Investigator as well as documentation of prior disciplinary measures taken against Mr. Blackbird. These measures were a verbal warning on July 2, 2013 (failure to pick up a client, rudeness to clients, driving in an unsafe manner), a written warning on September 24, 2013 (failure to follow procedures for preapproval of purchases, not attending a mandatory meeting, failure to pick up a client, unsafe driving), and a written warning on September 29, 2014 (failure to comply with the directives given by the Executive Director, failing to follow vehicle maintenance request procedures), that at one point also comprised of a suspension which, as discussed below, was rescinded during the meeting. In the latter case Mr. Blackbird was warned that the consequence of further infractions would result in termination of his employment.

[50] MHS told the Investigator that in less than two weeks following the September 29th meeting Mr. Blackbird rejected three vehicles and took them out of service. Mr. Littlechild said that Mr. Blackbird would jack up the vehicles to inspect them and then pull parts off that he felt were not up to safety standards. MHS provided the Investigator with evidence that nothing was wrong with any of the vehicles.

[51] MHS told the Investigator that the last straw, the incident which resulted in the issuance of the termination letter, was when Mr. Blackbird took a vehicle out of service in Edmonton. He insisted it was not roadworthy, that he and the client be picked up and that the vehicle be towed. The two people who went to pick up the vehicle found it did not have to be towed. They drove it back to MHS and although roadworthy later that month repairs were made to it.

[52] The Investigator found that Mr. Blackbird had received multiple verbal and written warnings for not following proper procedure in requesting repairs and that MHS applied its

disciplinary policy and terminated his employment. The Investigator concluded that MHS had provided a reasonable explanation for its action and that it was not a pretext for discrimination on a prohibited ground.

[53] Juxtaposed to Mr. Blackbird's unsupported allegations that the termination of his employment arose from, or was fuelled by, his ethnic origin and racial status, the Investigator had written documentation of his incremental discipline and the prior warning that termination would result if the behaviour continued. Whether or not that was sufficient to justify the termination of employment in a wrongful dismissal lawsuit, it was sufficient to provide a reasonable basis for the Investigator to make the findings that she did in her report and for the CHRC to rely on those findings despite Mr. Blackbird's critique.

(3) Allegation that MHS lied to the Investigator and that she was biased against Mr. Blackbird

[54] Mr. Blackbird's allegation that MHS lied to the Investigator was very important to him. His belief that this occurred may also underlie his allegation that the Investigator was biased when making credibility findings.

[55] The incident to which Mr. Blackbird points is a two-week suspension that had initially been given to him at the September 29th meeting however the suspension was rescinded prior to the final conclusion of the meeting. He said that this was an example of MHS being dishonest as he states this information was provided to the Investigator without explanation that the suspension was rescinded. He also states that the Investigator improperly accepted the explanation by MHS that although there was no suspension as of the end of the September 29th meeting Mr. Blackbird had been provided a warning. He also submitted that when the

Investigator did not listen to the audio recording of that meeting (which he states he provided on a USB stick) it was an example of procedural unfairness.

[56] The Certified Tribunal Record sent from the CHRC does not contain the USB memory stick that Mr. Blackbird said he sent to the Investigator. Nonetheless, Mr. Blackbird's transcript confirms that, contrary to his allegation that MHS lied or was dishonest, it changed the penalty being imposed on him. At one point during the meeting Mr. Blackbird was asked to leave the room. When he returned, he was told the two week suspension had been rescinded. Given that evidence, it was not unreasonable for the Investigator to accept the version of events put forward by MHS that he received a warning in the meeting on September 29th (as reflected in the Discipline Report Form dated and signed September 29th, although not signed by Mr. Blackbird) nor, in my view, is it an example of bias or any procedural unfairness by the Investigator.

D. *The sexual harassment complaints against Mr. Blackbird*

[57] In September 2014, two separate verbal allegations of sexual harassment were made against Mr. Blackbird. They occurred a few weeks apart. One complaint was from a client who Mr. Blackbird said was sending inappropriate texts and messages to him. The other complaint, according to Mr. Blackbird, was not from a client but rather was from a person using a "fake name".

[58] Mr. Blackbird responded to the first complaint by providing details of inappropriate texts and photos he received on his work cell phone. He also stated that he did not know the person in the second complaint. Despite being requested to do so by the Executive Director, Mr. Blackbird did not respond to the complaints in any greater detail than above and did not provide written responses to the Executive Director.

[59] Mr. Blackbird's complaint to the CHRC was that he was harassed when his supervisors asked him at the meeting on September 29, 2014, his first day back at work, to respond to the verbal complaint and to the fake complaint.

[60] Mr. Littlechild told the Investigator that MHS verified that Mr. Blackbird had driven the client who lodged the first complaint on the day she alleged the incident occurred. Mr. Littlechild asked both the complainant and Mr. Blackbird for a written complaint and written reply respectively but received neither. When the second complaint was received, Mr. Littlechild sought a meeting with Mr. Blackbird who at that time was on medical leave. The meeting was therefore held on the first day that Mr. Blackbird returned to work.

[61] With respect to the two complaints, Mr. Blackbird's position was that his supervisors and managers had no right to question him about the first complaint (as a written complaint was not provided) or the second complaint (as it was fake); when they did so, it was harassment.

[62] The Investigator reviewed her discussions with Mr. Blackbird and Mr. Littlechild, the transcript Mr. Blackbird prepared of the September 29th meeting and the MHS policy on Cell Phone/Computer Usage. She concluded that Mr. Littlechild was acting in his role as manager when he required a written response from Mr. Blackbird to the serious allegations made against him in the course of his employment.

[63] The Investigator found that the incidents Mr. Blackbird described were counselling or discipline by a supervisor. They were not harassment; they were within management's right to manage. She concluded that any employee, regardless of race, national or ethnic origin, would

have received the same treatment. Therefore, no further analysis was required. This conclusion was reasonable.

E. *Allegations of differential treatment and harassment by other employees*

[64] As previously mentioned, one of Mr. Blackbird's central complaints is that he was treated differently because he is non-Cree, not from Maskwacis, and is half-Caucasian. He says he was also harassed for the same reason.

(1) Use of the word Mooniyaw or Moonias

[65] Mr. Blackbird alleged the terms "Mooniyaw", and "Moonias" were derogatory and were used several times at formal meetings and during informal conversation. The Investigator found it was an unwelcome reference that is linked to a prohibited ground.

[66] The Investigator also found that based on the information she had obtained it did not appear that the word Mooniyaw was a derogatory expression. The Investigator reviewed the fact that Mr. Blackbird first heard the word at a retreat in February 2014 and Mr. Graham heard it twice in one year, once being from a client. She also noted that Mr. Blackbird found the term unacceptable.

[67] MHS said Mooniyaw and its variants were a descriptive term for a white person, a greeting, not a derogatory one. Most of the witnesses the Investigator interviewed said it was used to describe a white person.

[68] In considering whether use of the term Mooniyaw or Moonias detrimentally affected Mr. Blackbird's work environment or led to adverse job-related consequences for him, the Investigator reviewed Mr. Blackbird's performance reviews. She found that there were no

adverse job-related consequences to Mr. Blackbird after he objected to the use of the words. The use of the word did not detrimentally affect Mr. Blackbird or his employment.

[69] Given those findings the Investigator determined it was not necessary to proceed to the next step of whether appropriate action was taken by MHS. That finding flows naturally from the evidence; it is a reasonable conclusion.

[70] However, Mr. Blackbird raised with the CHRC and in this application the fact that the Investigator did not specifically inquire about use of the term “Mooniyaw Squasies” which he says means “little white girls”. He says that in context it is offensive when it is said every time you walk in the office.

[71] Mr. Blackbird’s initial complaint to the CHRC referred to the use of “Mooniyaw Squasies” at the staff retreat when Mr. Nepoose said that was what he sometimes called the girls in the office because they did not speak their own Cree language. In that respect the complaint was not about treatment of Mr. Blackbird. It was however an example of language he did not find to be appropriate in the workplace.

[72] The CHRC was not persuaded to overturn the Investigator’s report on that basis nor am I. It is not a fundamental flaw of the kind referred to in *Sketchley* that would cause the Investigator’s report to be overturned. It may not even be a flaw given that the term Mooniyaw was found not to appear to be derogatory in and of itself.

(2) Mr. Blackbird is not a Cree and not from Maskwacis

[73] Mr. Blackbird submits that because he is not a member of the Maskwacis Cree, and the First Nations it comprises, he is not allowed to attend any meetings nor is he allowed to vote. In

his submissions to the CHRC he mentions that the *Indian Act* is a racist and discriminatory document, and that racism and discrimination has been handed down to the Indigenous communities of North America by colonial governments. These examples were given by Mr. Blackbird to support his argument that people from off the reserve are not treated the same as those who live on the reserve. Therefore, as he was not from Maskwacis he received differential treatment from MHS based on his race, national or ethnic origin.

[74] The evidence before the Investigator outlined the general nature of the employees at MHS. There were around 120 employees, 95% of whom are women. From 20 to 25 employees were Caucasian. MHS is not governed by the bands; there is a separate board of directors albeit populated by band members.

[75] It was reasonable for the Investigator to find that linguistically there is no requirement at MHS to speak Cree. Of the ten drivers who worked for MHS at the time of the investigation four or five did not belong to any one of the four Cree Nations. They are status Indians who belong to other reserves in Ontario, British Columbia and the Maritimes. On that basis 40 to 50% of the drivers could also have had similar experiences to Mr. Blackbird if his allegations of being discriminated against by MHS because he was not Maskwacis Cree were accurate. There was no evidence before the Investigator that other drivers were discriminated against on this basis by MHS. The only mention of possible differential treatment was from a Caucasian driver who stated he was assigned as the on call driver on an Aboriginal potluck day. The driver stated he could only speculate it was a result of him not being Indigenous and that he was invited to attend the potluck and could have done so if not for emergency pickup calls coming in.

[76] Mr. Blackbird also raised these arguments as being behind the reason his employment was terminated and that he was given unsafe vehicles to drive. The termination issue has already been addressed above and the unsafe vehicle issue is discussed below.

[77] While Mr. Blackbird definitely believes he was mistreated because he was not from Maskwacis, he was not able to provide to the Investigator, the CHRC, or this Court, any proof that he was subjected to differential or discriminatory treatment on that basis.

(3) Harassment by other employees

[78] The Investigator also looked into harassment complaints made by Mr. Blackbird. He said that clerical staff made jokes about him having an affair and that a fellow driver harassed him in the parking lot because he heard Mr. Blackbird complain about that driver's wife, the MHS Personnel Manager.

[79] The Investigator concluded that the conduct in question had occurred and that it was unwelcomed by Mr. Blackbird. In considering whether the conduct was linked to his not being a member of the Maskwacis Cree she determined however that the clerical staff were responding to conversations Mr. Blackbird initiated. Also, in written statements made at the time of the incident, neither Mr. Blackbird nor the other driver made any reference to Mr. Blackbird not being a member of the Maskwacis Cree.

[80] The Investigator found Mr. Blackbird made a complaint at the September 29th meeting about the clerical staff comments and on September 30th he submitted a written complaint to the other driver's manager about his behaviour.

[81] The Investigator found that the harassment had taken place and that MHS had been notified about it. She therefore examined whether MHS had taken appropriate action to deal with the harassment. She found that management had requested the two drivers submit written incident reports, which they did, and that the reports would remain on their personnel files. She noted that Mr. Blackbird did not ask for mediation nor did he file a grievance in connection with the events.

[82] The Investigator concluded that MHS took appropriate action to deal with the harassment and to prevent it from continuing. That conclusion is consistent with the evidence and is owed deference.

[83] Although Mr. Blackbird has alleged that the Investigator was biased he can point to no concrete examples evidencing that bias. It appears that allegation is part of his overall dissatisfaction with what he perceived to be an improper failure by the Investigator to consider the evidence and her failure to reconcile conflicting findings and evidence. As indicated above, in the report the Investigator explained her findings. While she found some of the conduct, such as use of the word Mooniyaw, did occur she also found that it was not derogatory. There was no evidence to support Mr. Blackbird's allegation that the Investigator was biased.

(4) Mr. Blackbird's harassment complaint against his managers

[84] On September 17, 2014 Mr. Blackbird filed a written complaint of harassment with MHS alleging, amongst a number of complaints, that he had experienced adverse differential treatment from management (Executive Director, Mr. Littlechild, and Transportation Manager, Ms. Crane-Johnston). The substance of the complaint to the CHRC was that while Mr. Blackbird was on

medical leave MHS did not follow its own policy to investigate and address that harassment complaint.

[85] During her investigation, the Investigator reviewed the MHS policy on Complaint Procedures and the letter written by the Personnel Manager dated October 6, 2014 responding to Mr. Blackbird's September 17, 2014 complaint. In the Personnel Manager's letter it was noted that an appointment to discuss Mr. Blackbird's complaint had been set for October 1st but, Mr. Blackbird was on leave, returning on October 6th.

[86] The Investigator concluded that MHS had followed its policies and did not treat Mr. Blackbird in a negative way on the basis of his race, national or ethnic origin. She found that MHS would have applied the policy in the same manner with any employee and it was not necessary to take any further steps to investigate that complaint.

[87] Given the evidence before the Investigator, that was a reasonable conclusion.

F. *Allegations of adverse differential treatment by the employer*

(1) Unsafe vehicles assigned to Mr. Blackbird

[88] Mr. Blackbird alleged that he was given unsafe, poorly maintained vehicles to drive. After discussing the matter with both Mr. Blackbird and management at MHS, the Investigator concluded that there was no support for Mr. Blackbird's complaint. She found that Mr. Blackbird and two other drivers were assigned new vehicles in 2013 all at the same time. The Investigator also noted that prior to September 2014, Mr. Blackbird had no substantive issues with respect to vehicle assignments or repairs and maintenance.

[89] Documentation from MHS showed that in September and October 2014 the three vehicles assigned to Mr. Blackbird that he complained of were replaced with substitute vehicles. That meant that Mr. Blackbird did not have to drive the vehicle complained of and repairs could be made where required. The Investigator also found the evidence showed that if there were no vehicles available for Mr. Blackbird to drive he would be sent home with pay.

[90] After reviewing this evidence the Investigator concluded she did not need to consider any further steps in the investigation of that complaint and this conclusion was reasonable.

(2) Being asked to attend a meeting while on medical leave

[91] Mr. Blackbird had alleged that while he was on medical leave he was told he had to come in for a meeting with Mr. Littlechild. Subsequently, he was required to meet with Mr. Littlechild on September 29th, his first day back to work.

[92] MHS said it asked for the meeting on that date because it was Mr. Blackbird's first day back and they had received the second complaint of sexual harassment against Mr. Blackbird. Management wanted to address that issue as it was a serious one. Mr. Littlechild told the Investigator that he had also requested a meeting with Mr. Blackbird about these complaints.

[93] The Investigator found the incident occurred but that MHS would have acted the same way with any employee to address allegations of misconduct. There is no indication on the record that this conclusion was unreasonable or that it was arrived at based on any bias held by the Investigator.

VIII. **Summary and Conclusion**

[94] As previously stated, the CHRC dismissed Mr. Blackbird's complaint, without additional reasons, after receiving submissions on the Report from both parties. Mr. Blackbird has not shown that the complaint's dismissal was an unreasonable conclusion.

[95] The Investigator is not required by law to mention every piece of evidence that she considered. On that basis, any failure to mention a document reviewed or argument presented to her does not render the report unreasonable unless a crucial piece of evidence that would have led to a different finding was omitted. There is no such omission on the record.

[96] The Investigator's conclusion that MHS provided a reasonable explanation for the termination of Mr. Blackbird's employment is itself a reasonable conclusion. In my view, the Investigator reasonably found on the evidence before her that Mr. Blackbird did not follow the MHS policies and procedures and that he had previously received both verbal and written warnings. Her conclusion that the termination of his employment was not a pretext for discrimination on a prohibited ground was within the range of outcomes that were defensible on the facts and law. Similarly, when the CHRC arrived at the same conclusion after receiving and considering the Investigator's Report, along with submissions from the parties about the Report, the decision was within the range of available outcomes defensible on the facts and law.

[97] The Federal Court of Appeal has recognized that the scope of an investigation requires balancing the interests of a complainant with the limited resources available to the CHRC:

[39] Any judicial review of the Commission's procedure must recognize that the agency is master of its own process and must be afforded considerable latitude in the way that it conducts its investigations. An investigation into a human rights complaint cannot be held to a standard of perfection; it is not required to turn

every stone. The Commission's resources are limited and its case load is heavy. It must therefore balance the interests of complainants in the fullest possible investigation and the demands of administrative efficacy. [Citations omitted]

Tahmourpour v Canada (Solicitor General), 2005 FCA 113, 27 Admin LR (4th) 315.

[98] The evidence provided, and statements of witnesses (including from 3 drivers that are not Maskwacis Cree) shows there was a lack of sufficient evidence to be able to connect a prohibited ground to what happened to the Applicant. The Investigator balanced the evidence, made some findings in favour of Mr. Blackbird and some against him. Her investigation was detailed and thorough. Mr. Blackbird would have preferred for her to have determined that the evidence was in his favour. He justifies and explains the negative outcome by believing the Investigator must have been biased against him.

[99] The Canadian Human Rights Tribunal has stated that a subjective belief or feeling of a complainant that discrimination has occurred is not sufficient:

The belief or feeling, however profound or strong, that the complainant has been discriminated against is not sufficient to establish discrimination. Facts must be proven that clearly show that the person alleging discrimination was the object of some form of unbecoming behaviour based on a prohibited ground listed in the *CHRA*.

McAvinn v Strait Crossing Bridge Ltd, [2001] CHR D No 36, 2001 CarswellNat 3797 (WL Can) at para 103.

[100] I understand that Mr. Blackbird feels very, very strongly that he was mistreated by MHS. I have reviewed all the materials and arguments made to the Investigator, the CHRC and to this Court. Unfortunately, despite Mr. Blackbird's impassioned and heartfelt arguments, I am unable to agree with him that the Investigator's Report and, by extension, the CHRC Decision, are so

flawed that they are either unreasonable as defined at law or were arrived at in a procedurally unfair manner.

[101] To his credit, Mr. Blackbird acknowledged, when asked during the hearing of this application, that he could not show a connection between his allegations of misconduct on the part of MHS and a prohibited ground under the *CHRA*. He also acknowledged that perhaps he ought to have filed a wrongful termination lawsuit. He is aware that this Court cannot address that issue.

[102] It is my view that the Investigator conducted a thorough investigation. She interviewed eight people, reviewed numerous documents, received written submissions from the parties and explained her findings in some detail. After receiving further submissions from Mr. Blackbird and MHS, the CHRC agreed with her recommendation. All in all, the decision-making process was intelligible, justified and transparent. The outcome falls within the range of possible, acceptable outcomes which are defensible on the facts and law as required by *Dunsmuir*. This means that the Decision is reasonable.

[103] For all the above reasons, this application is dismissed. Although MHS seeks costs, I decline to award them in this case.

JUDGMENT IN T-337-17

THIS COURT'S JUDGMENT is that the application is dismissed, without costs.

“E. Susan Elliott”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-337-17

STYLE OF CAUSE: HAROLD BLACKBIRD v MHS MASKWACIS
HEALTH SERVICES

PLACE OF HEARING: EDMONTON, ALBERTA

DATE OF HEARING: JANUARY 17, 2018

JUDGMENT AND REASONS: ELLIOTT J.

DATED: MARCH 2, 2018

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