

Federal Court



Cour fédérale

**Date: 20190503**

**Docket: T-677-18**

**Citation: 2019 FC 569**

**Saint-Sauveur, Québec, May 3, 2019**

**PRESENT: Madam Justice Simpson**

**BETWEEN:**

**PAMELA HARVEY**

**Applicant**

**and**

**VIA RAIL CANADA INC.**

**Respondent**

**JUDGMENT AND REASONS**

[1] This application is for judicial review of a decision of the Canadian Human Rights Commission [the Commission] dated February 28, 2018. Therein, the Commission effectively dismissed a complaint by Pamela Harvey [the Applicant], in which she alleged that she had been harassed and terminated by VIA Rail Canada [VIA] because she is a woman. She also alleged systemic discrimination by VIA, but that allegation is not involved in this application.

**I. The Program**

[2] On September 30, 2011, the Applicant was hired to participate as one of a group of 16 trainees in a VIA Locomotive Engineer Training Program [the Program]. It began on October 17, 2011 and was scheduled to last approximately 12 months. There is now no issue that the Applicant was the only female trainee.

[3] The Applicant understood that testing would occur throughout the Program and that a failure at any stage of the Program would cause a trainee to be terminated. A passing grade was 90%.

[4] By January 2012, the trainees had been taught in a classroom setting and had taken numerous training trips in locomotives. The next step in the Program was skills development using a locomotive simulator.

**II. The Simulator and the Test**

[5] The Applicant participated in 7 sessions on the simulator on the dates shown on the chart reproduced below [the Chart]. It was compiled during the investigation [the Investigation] by the Commission's investigator [the Investigator] from VIA's records and it appears in paragraph 66 of the Investigator's report dated February 22, 2017 [the Report]. The Chart shows that two of the five instructors in the Program observed the Applicant's sessions on the simulator. They were Mr. Martial Laberge and Mr. Paul Holden. Their comments about her work were consistent and indicated that the Applicant was nervous, needed coaching and had trouble with stops. As well, on January 26, 2012, just before the final simulator test on January 27, 2012 [the Final Simulator Test], Mr. Holden wrote that she was "improving but not there yet." The Chart

also shows that the Applicant failed an earlier test on January 24, 2012 while being supervised by Mr. Laberge. However, she was not terminated for that failure.

[6] The Chart reads as follows:

Date of SIM test	SIM Test Scenario	Score (%)	Summary of comments	Assessing Instructor
January 18, 2012	Initial run	89% Revised: 91.3%	<ul style="list-style-type: none"> <li>- Nervous</li> <li>- Problems with multitasking</li> <li>- Needs coaching</li> </ul>	Mr. Laberge
January 19, 2012	Initial run	95%	<ul style="list-style-type: none"> <li>- Coached throughout the run by instructor to improve technique and confidence</li> <li>- Still nervous, not receptive to feedback</li> </ul>	Mr. Laberge
January 20, 2012	SIMRun 2	90%	<ul style="list-style-type: none"> <li>- Coached through the entire run</li> <li>- Over reacting; over thinking</li> <li>- Will be on her own for the next run</li> </ul>	Mr. Laberge
January 23, 2012	SIMRun 2	91%	<ul style="list-style-type: none"> <li>- Still nervous, getting better with the controls;</li> <li>- Needs to develop confidence</li> <li>- Station stop needs work</li> </ul>	Mr. Holden
January 24, 2012	SIMRun 4	87%	<ul style="list-style-type: none"> <li>- Problems with multitasking;</li> <li>- Lots of work to be done</li> </ul>	Mr. Laberge
January 25, 2012	SIMRun 4	93%	<ul style="list-style-type: none"> <li>- Station stop is getting better but still needs work;</li> <li>- Needs to be patient</li> </ul>	Mr. Holden
January 26, 2012	SIMRun 4	94%	<ul style="list-style-type: none"> <li>- Station stop is getting better but still needs work;</li> <li>- Improving but not there yet</li> </ul>	Mr. Holden
January 27, 2012	SIMRun 4	88%	<ul style="list-style-type: none"> <li>- So nervous she could not get the train going.</li> <li>- 3 missed stops</li> <li>- Inability to multitask and overcome her nervousness</li> <li>- Did not achieve passing mark</li> </ul>	Mr. Laberge

[7] The Report deals with Mr. Laberge's comments about the Final Simulator Test on January 27. It notes at paragraph 52 that in his interview with the Investigator, Mr. Laberge

explained that the Applicant did not put the train in gear to commence her test run, which is why he commented that she could not get the train going.

[8] The Report, in paragraph 68, refers to the record of the test results for Mr. Louis, who was another trainee. The record shows that his Final Simulator Test concluded at 9:57 AM on January 27, 2012 and that his final score was 94%. This document means that Mr. Louis took the first test of the day [the First Test].

[9] VIA's records show that the Applicant's Final Simulator Test finished at 10:49 AM on Friday, January 27, 2012. This means that she took the second test of the day [the Second Test]. The record also shows that she failed the Final Simulator Test with a score of 88%. However, the Applicant alleges that this record does not reflect her score because she actually took the First Test and scored 94%.

### **III. The Written Test**

[10] The Final Simulator Test was accompanied by a written test [the Written Test] which the trainees wrote on January 27, 2012. The Applicant failed this test as well with a final mark of 88%. This score is not in dispute. Her initial score had been lower, but all the trainees' marks were adjusted upwards by the instructors who felt that some of the questions had been unfair because they dealt with material that had not been taught.

### **IV. The Termination**

[11] Following the Final Simulator Test and the Written Test, the five instructors met and all agreed that the Applicant should be terminated because she had failed both tests.

[12] On February 1, 2012, Mr. Laberge wrote to Ms. Bélanger, who was the Training Manager for the Program. He said:

Pamela participated very well in class asking lots of questions and clarifications. She seemed to understand the material at the end of the day but went home and read the reference material and got confused. She returned the next day with tons of bookmarks asking again for clarification. Pamela barely passed the first test (90%) and failed the final exam (83.9%). The pass mark is 90%.

Field exercises: Pretty much the same for the tasks in the field. When coached through the exercises she seemed to understand, but because of nervousness and over thinking, she was getting confused and was barely able to do the different exercises on her own the very last day.

Pamela was so nervous through the entire SIM program that she never grasped the basic principles about how to drive the train.

Pamela was not successful in any aspect of the program. All 5 instructors involved recommended that Pamela be removed from the LE program.

[13] By letter dated February 1, 2012, VIA terminated the Applicant's employment as a trainee in the Program by reason of her failure to pass the tests on January 26, 2012 [the Termination]. However, the date VIA used was incorrect. As the Chart shows, the Applicant passed her Simulator Test on January 26th. The Final Simulator Test and the Written Test were both held on January 27, 2012.

**V. The Human Rights Proceedings**

[14] The Applicant's initial complaint was filed on September 19, 2013 and was referred to the Commission for investigation on March 15, 2015. However, on May 1, 2015, the Applicant provided particulars which substantially expanded her complaint in that she made further and more serious allegations of harassment against Mr. Laberge. She also included a fresh allegation in which she stated that VIA had sent a letter dated January 18, 2012, which denied her the

benefits to which she was entitled as a trainee in the Program [the Benefits Letter]. The Applicant's initial complaint together with these particulars will be referred to collectively as the "Complaint".

[15] The Report was issued on February 22, 2017 and the Applicant's amended response was dated April 27, 2017 [the Response]. On February 28, 2018, the Commission issued a decision in which it asked the Chairperson of the Canadian Human Rights Tribunal to institute an inquiry, but only in relation to the complaint about systemic discrimination [the Decision]. The Decision effectively dismissed all the Applicant's personal allegations of harassment and discrimination.

## **VI. The Complaint**

[16] The Applicant alleged that Program instructor Martial Laberge had:

- i. Made sexist jokes and comments and ignored her during the Program and had repeatedly asked her to stay after class and join him for dinner or drinks. He also boasted about his sexual prowess.
- ii. Falsely given her the failing score from the Second Test to establish grounds to terminate her employment because she is a woman and because she had rejected his advances.
- iii. Worked with VIA's Operations Office to send her the Benefits Letter as an act of retaliation for her rejection of his advances.

## **VII. The Investigation**

[17] The Report shows that in addition to the Applicant, the Investigator interviewed two other former trainees. As well, the two former instructors who worked with the Applicant in the Program were interviewed. The interviewees were:

- The Applicant;
- Mr. Norbert Louis – former trainee and now a locomotive engineer. (In the Report he is referred to interchangeably as Mr. Norbert and Mr. Louis);
- Mr. Scott Matheson – former trainee and now a locomotive engineer;
- Mr. Paul Holden – former instructor and now a locomotive engineer; and
- Mr. Martial Laberge – former instructor - retired since April 2012.

## **VIII. The Report**

[18] The Report, which serves as the reasons for the Commission's Decision, concluded that the witnesses who the Applicant said would support her allegations of harassment did not do so. Accordingly, there was no evidence to support the Applicant's claims against Mr. Laberge. The Investigator also concluded that the Applicant had failed both the Final Simulator Test and the Written Test. This meant that Mr. Laberge had not falsified her test results. The Investigator ultimately concluded that poor performance and not a prohibited ground of discrimination explained the Termination.

**IX. Issues**

[19] The Applicant raises the following issues:

1. Did the Investigator overlook important aspects of the Complaint?
2. Did the Investigator err when she decided that she could not identify which trainee was paired with the Applicant during the Final Simulator Test?
3. Did the Investigator breach the principles of procedural fairness by not interviewing Mr. St. Amour, who was a witness suggested by the Applicant?
4. Did the Investigator breach the principles of procedural fairness when she failed to consider the Benefits Letter?
5. Did the Commission fail to address issues raised by the Applicant in her Response?

**X. Standard of Review**

[20] In my view issues 3, 4 and 5 are to be reviewed on a correctness standard because they deal with the thoroughness of the investigation which is an issue of fairness (see *Canada (Attorney General) v. Sketchley*, 2005 FCA 404 at paragraphs 82-84). However, issues 1 and 2 will be reviewed on a reasonableness standard because they involve the weighing of evidence.

**XI. Issue 1**

A. *The error in the Termination letter*

[21] The Termination letter described the Applicant's failure to pass the testing held on January 26, 2012, as the reason for her Termination. The Chart shows that a test on the



simulator was given on January 26 and that the Applicant passed with a score of 94%. However, according to paragraph 57 of the Report, no written test was administered on January 26.

[22] These facts suggest that the testing date on the Termination letter was a typographical error [the Error]. January 26 should have read January 27. The latter was the date on which the Applicant failed both the Final Simulator Test and the Written Test.

[23] The Error in the Termination letter is also found in the Complaint. Therein, the Applicant repeatedly describes the two tests as having been held on January 26<sup>th</sup> (see paras 9(d), 12, and 13 of the Complaint).

[24] Nowhere in the Complaint does the Applicant allege that she was terminated even though she passed the test on January 26 or suggest that this fact required investigation. Her entire focus is the on two tests actually held on January 27, 2012.

[25] As well, in her Response, the Applicant neither mentions the Error nor asks that it be investigated. She accepts that the Final Simulator Test and the Written Test, which were said to justify her Termination, were both held on January 27, 2012.

[26] Given these circumstances, the fact that an incorrect date appeared in the Termination letter is not material and did not require investigation.

*B. The falsification of the Applicant's Final Simulator Test score*

[27] The Applicant's position is that she took the First Test at 9:00 AM on January 27, 2012 and that her score was 94%. She claims that the notes on the Chart made by Mr. Laberge about her Final Simulator Test describe the problems she had installing a gear shift lever called the

“reverser” during her set up of the simulator. She says that only the first trainee of the day was required to set up the simulator. For this reason, she submits that the notes are evidence which proves that she was the trainee who achieved a score of 94% in the First Test. She claims that the trainee tested during the Second Test at 10:00 AM achieved a score of 88% and that Mr. Laberge falsely used that score as her test result.

[28] However, in my view, the Investigator reasonably concluded that Mr. Laberge’s notes of January 27, 2012 which appear on the Chart, do not mention any problems the Applicant may have experienced with the reverser. At paragraph 72 of the Report, the Investigator states the following as part of her conclusions:

The written comments on the complainant’s simulation test results appear to indicate that the complainant had trouble getting the train moving and not that she struggled with the “reverser.”

[29] This conclusion meant that the Investigator rejected the Applicant’s submission and found that there was no documentary evidence which proved that the Applicant had scored 94% on the First Test.

[30] The Investigator also noted that the Chart shows that the concerns about the Applicant’s performance on the simulator were consistent throughout the simulator exercises. As well, at paragraph 61 of the Report, the Investigator states that Mr. Louis told her that he had taken the First Test. This meant that he and not the Applicant started at 9:00 AM and scored 94%.

[31] Finally, although the Applicant has not challenged the Investigator’s conclusion that her allegations of harassment by Mr. Laberge were not supported by the evidence, it is important to recognize that the allegations of harassment were central to the Complaint. The Applicant alleged that Mr. Laberge’s anger at her refusal to socialize with him in part motivated his

falsification of her Final Simulator Test results, and his alleged involvement in VIA's decision to send the Benefits Letter. Once the Investigator concluded that harassment had not been demonstrated, the Applicant's Complaint was weakened as retaliation was no longer a motive for Mr. Laberge's alleged conduct.

[32] For these reasons, it is my view that the Investigator reasonably concluded that Mr. Laberge did not falsify the Applicant's Final Simulator Test results.

C. *Another trainee received better treatment in the Written Test*

[33] The Applicant also complained that Mr. Matheson who scored 88% was allowed to rewrite the Written Test while the Applicant, who achieved the same score, was not given that opportunity. In my view, the Investigator reasonably concluded at paragraph 39 of the Report that the other trainee's circumstances were different and justified the decision to allow him to retake the test. Unlike the Applicant, he had passed the Final Simulator Test.

**XII. Issue 2**

[34] The Investigator tried to determine who was paired with the Applicant during the Final Simulator Test because that person would have been present and might have been able to confirm the time of the Applicant's test. However, the Investigator concluded that she was unable to determine who was paired with the Applicant. She reached this conclusion because she was faced with the following inconsistent and incomplete evidence:

- Mr. Laberge and Mr. Holden said Mr. Bernier was paired with the Applicant.
- Mr. Bernier could not be located for an interview.

- VIA said it was Mr. Louis who was paired with the Applicant but Mr. Louis disagreed.
- Mr. Louis said he was paired with Mr. Matheson and not with the Applicant.
- Mr. Matheson couldn't recall who had been his partner.
- The Applicant said she was paired with Mr. Louis.

[35] In view of this evidence, I have found the Investigator's conclusion to be reasonable.

### **XIII. Issue 3**

[36] In her Response to the Report, the Applicant said:

The Investigator can speak to a VIA Rail Locomotive Engineer – Luc St. Amour 705-309-6475, who will verify after Harvey was let go several engineers joked about the fact that Harvey had problems with the Reverser on set-up for the first (09:00) Final SIM Test that day.

[37] The Commission did not direct the Investigator to reopen the Investigation and interview Mr. St. Amour. The question therefore is whether his evidence was “obviously crucial” as that term appears in *Slattery v. Canada (Human Rights Commission)*, [1994] 2 FC 574, 73 FTR 161 (TD), affirmed (1996), 205 NR 383 (FCA).

[38] There is no suggestion that Mr. St. Amour had any involvement in the Program. It appears that he was simply engaged in a conversation with fellow locomotive engineers. There is no reason to suppose that he would have had any first-hand information to offer the Investigator about whether the Applicant took the First or Second Test on January 27, 2012.

[39] In these circumstances, I cannot conclude that his evidence was “obviously crucial”. In the case law, that term has been used to describe witnesses who were directly involved with an applicant’s work and related experiences. They include treating physicians, supervisors in the workplace and similarly situated co-workers. In this regard, please see *Egan v Canada (Attorney General)*, 2008 FC 649 and *Casler v Canadian National Railway*, 2012 FCA 135.

**XIV. Issue 4**

[40] The Applicant correctly submits that the Investigator did not consider the Benefits Letter. However, it is my view that a letter written almost two weeks before the Applicant failed her tests could not be evidence of an intention to terminate her in the future on a prohibited ground. Further, the motive of retaliation assigned to Mr. Laberge was unsupported and there was no evidence that the person in charge of benefits had any involvement with the Program or with Mr. Laberge. Accordingly, I cannot conclude that the Benefits Letter was obviously crucial evidence which should have been considered.

**XV. Issue 5**

[41] The Applicant’s Response did not include new allegations or references to material or evidence which was not before the Investigator. The only exception was the reference to Mr. St. Amour discussed above. The Applicant’s Response repeated her evidence and her conclusion that witnesses who disagreed with her were either lying or mistaken. In my view, there is nothing in the Response which is fundamental (see *Herbert v Canada (Attorney General)*, 2008 FC 969). Accordingly, the Commission was not required to reopen the Investigation and was not required to refer to the Response in its Decision.

**XVI. Conclusion**

[42] For all these reasons, this application will be dismissed.

**JUDGMENT in T-677-18**

**THIS COURT'S JUDGMENT is that** this application for judicial review is hereby dismissed.

“Sandra J. Simpson”

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Judge

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

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