Federal Court  Cour fédérale

Date: 20110415

Docket: T-1388-10

Citation: 2011 FC 468

Ottawa, Ontario, April 15, 2011

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

CERESCORP COMPANY

Applicant

and

LINDA MARSHALL

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of the Decision of an Investigator of the Canadian Human Rights Commission (Commission), dated 27 July 2010, recommending that the Chairperson of the Canadian Human Rights Tribunal (Tribunal) institute an inquiry into the complaint of Linda Marshall (the Respondent or Ms. Marshall) against the Cerescorp Company (the Applicant or

Cerescorp) pursuant to paragraph 44(3)(*a*) of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (Act).

BACKGROUND

[2] The Applicant has been providing stevedoring, terminal operations and ancillary services at cruise ship terminals in Vancouver since 2006. These services include the loading, unloading and handling of baggage and stores as well as various ancillary matters. Longshore workers constitute the largest group of workers at the terminals. The Respondent has been a longshore worker and a member of the International Longshore and Warehouse Union Local 500 since 1984.

[3] In 2006 when the Applicant obtained the contract to provide its services in Vancouver, it carried out two sets of hiring for full-time supervisors. The second set of hiring was open to Local 500 members. There were three positions available and, of the 65 candidates, the Respondent was the only female. The superintendent, the manager of stevedoring operations and the superintendent–pier foreman were directly involved in the hiring process. They have admitted that they relied heavily upon their management knowledge of the candidates and their understanding of the job requirements to assess each candidate's suitability.

[4] The Respondent was not offered a position. The respondent reportedly told the Applicant that she was interviewed as a "courtesy" after the successful candidates had been hired; no formal list of questions was utilized in the interview. The three successful candidates were not submitted to a formal interview process but, according to the Applicant, were hired on the strength of their experience.

[5] On 13 September 2006, the Respondent filed a complaint with the Canadian Human Rights Commission, alleging that the Applicant had discriminated against her on the basis of her sex. She claims that she suffered: the loss of the job and the opportunity to compete for the job; discrimination in her efforts to obtain supervisory experience; and differential treatment, namely being scrutinized and held to a higher standard than her male coworkers. She also alleged that she was blamed for making comments that she did not make.

[6] On 23 April 2007, prior to the Commission receiving submissions on the merits of the complaint, the parties engaged in mediation. They subsequently entered into an Interim Settlement Agreement (ISA), designed to create and implement a development plan to assist the Respondent with promotion to a supervisory position in the future.

[7] In the Respondent's view, the Applicant did not comply with the ISA. Consequently, on 18 January 2008, she amended her complaint to include additional allegations of discriminatory conduct after the 2006 hiring.

[8] In June/July 2008, the Commission heard the parties' submissions regarding the enforceability of the ISA, and it decided to conduct an investigation. On 8 April 2010, the Commission Investigator (Investigator) released her report (Report), which recommended that the Chairperson of the Tribunal institute an inquiry into the complaint for the following reasons:

> … [A] determination of whether most of the alleged acts occurred rests on the credibility of the parties involved; and there is evidence to suggest that the respondent's practices may present a systemic

> barrier to the promotion of women to the position of Supervisor of Longshore workers.

[9] The Commission accepted the Chairperson's recommendation in a letter dated 27 July 2010.

This is the Decision under review.

DECISION UNDER REVIEW

[10] The relevant passages of the Decision are as follows:

> Before rendering the decision, the Commission reviewed the report disclosed to you previously and any submission(s) filed in response to the report. After examining this information, the Commission decided, pursuant to paragraph 44(3)(a) of the *Canadian Human Rights Act*, to request that the Chairperson of the Canadian Human Rights Tribunal institute an inquiry into the complaint because:
>
> i. a determination of whether most of the alleged acts occurred rests on the credibility of the parties involved; and
>
> ii. there is evidence to suggest that the respondent's practices may present a systemic barrier to the promotion of women to the position of Supervisor of Longshore workers.

ISSUES

[11] The following issues arise in this application:

a. Whether the Commission acted reasonably in recommending that the Chairperson of the Tribunal institute an inquiry into the Respondent's complaint; and

b. Whether the Investigator breached the principles of natural justice or procedural fairness.

STATUTORY PROVISIONS

[12] The following provisions of the Act are applicable in these proceedings:

Report	**Rapport**
44. (1) An investigator shall, as soon as possible after the conclusion of an investigation, submit to the Commission a report of the findings of the investigation.	**44.** (1) L'enquêteur présente son rapport à la Commission le plus tôt possible après la fin de l'enquête.
Action on receipt of report	**Suite à donner au rapport**
(2) If, on receipt of a report referred to in subsection (1), the Commission is satisfied	(2) La Commission renvoie le plaignant à l'autorité compétente dans les cas où, sur réception du rapport, elle est convaincue, selon le cas :
(*a*) that the complainant ought to exhaust grievance or review procedures otherwise reasonably available, or	*a*) que le plaignant devrait épuiser les recours internes ou les procédures d'appel ou de règlement des griefs qui lui sont normalement ouverts;
(*b*) that the complaint could more appropriately be dealt with, initially or completely, by means of a procedure provided for under an Act of Parliament other than this Act,	*b*) que la plainte pourrait avantageusement être instruite, dans un premier temps ou à toutes les étapes, selon des procédures prévues par une autre loi fédérale.
it shall refer the complainant to the appropriate authority.	
Idem	**Idem**
(3) On receipt of a report referred to in subsection (1), the	(3) Sur réception du rapport d'enquête prévu au paragraphe (1),

Commission

(*a*) may request the Chairperson of the Tribunal to institute an inquiry under section 49 into the complaint to which the report relates if the Commission is satisfied

(i) that, having regard to all the circumstances of the complaint, an inquiry into the complaint is warranted, and

(ii) that the complaint to which the report relates should not be referred pursuant to subsection (2) or dismissed on any ground mentioned in paragraphs 41(*c*) to (*e*); or

(*b*) shall dismiss the complaint to which the report relates if it is satisfied

(i) that, having regard to all the circumstances of the complaint, an inquiry into the complaint is not warranted, or

(ii) that the complaint should be dismissed on any ground mentioned in paragraphs 41(*c*) to (*e*).

Notice

(4) After receipt of a report referred to in subsection (1), the Commission

(*a*) shall notify in writing the complainant and the person against whom the complaint was made of its action under subsection (2) or (3); and

la Commission :

a) peut demander au président du Tribunal de désigner, en application de l’article 49, un membre pour instruire la plainte visée par le rapport, si elle est convaincue :

(i) d’une part, que, compte tenu des circonstances relatives à la plainte, l’examen de celle-ci est justifié,

(ii) d’autre part, qu’il n’y a pas lieu de renvoyer la plainte en application du paragraphe (2) ni de la rejeter aux termes des alinéas 41*c*) à *e*);

b) rejette la plainte, si elle est convaincue :

(i) soit que, compte tenu des circonstances relatives à la plainte, l’examen de celle-ci n’est pas justifié,

(ii) soit que la plainte doit être rejetée pour l’un des motifs énoncés aux alinéas 41*c*) à *e*).

Avis

(4) Après réception du rapport, la Commission :

a) informe par écrit les parties à la plainte de la décision qu’elle a prise en vertu des paragraphes (2) ou (3);

(*b*) may, in such manner as it sees fit, notify any other person whom it considers necessary to notify of its action under subsection (2) or (3).	*b*) peut informer toute autre personne, de la manière qu'elle juge indiquée, de la décision qu'elle a prise en vertu des paragraphes (2) ou (3)….
[…]	[...]
Request for inquiry	**Instruction**
49. (1) At any stage after the filing of a complaint, the Commission may request the Chairperson of the Tribunal to institute an inquiry into the complaint if the Commission is satisfied that, having regard to all the circumstances of the complaint, an inquiry is warranted.	**49.** (1) La Commission peut, à toute étape postérieure au dépôt de la plainte, demander au président du Tribunal de désigner un membre pour instruire la plainte, si elle est convaincue, compte tenu des circonstances relatives à celle-ci, que l'instruction est justifiée.

STANDARD OF REVIEW

[13] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9, held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to the particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[14] The first issue concerns the Decision of the Commission to recommend that the Chairperson of the Tribunal institute an inquiry into the complaint pursuant to paragraph 44(3)(*a*) of the Act.

This Decision is reviewable on the standard of reasonableness. See *Utility Transport International Inc. v Kingsley*, 2009 FC 270 at paragraphs 26-27.

[15] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See Dunsmuir, *above*, at paragraph 47; and *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

[16] The second issue concerns natural justice and fair process. It attracts the correctness standard. See *Khosa*, above, at paragraph 43.

ARGUMENTS

The Applicant

The Commission's Decision Was Unreasonable: Objective Evidence Shows that the Respondent Was Unqualified for the Position

[17] The Applicant argues that an investigation under the Act is an initial screening to determine if there is sufficient evidence to warrant convening a Tribunal. Where such evidence is lacking, the Commission should dismiss the complaint. See *Canadian Broadcasting Corp. v Paul* (1998), [1999] 2 FC 3, [1998] FCJ No 1823 (QL) (TD) (*Paul)*, at paragraph 62.

[18] The onus is on the Respondent to demonstrate a *prima facie* case of discrimination. The test applicable to discrimination in hiring decisions was set out by Justice Leonard Mandamin of this Court in *Khiamal v Canada (Canadian Human Rights Commission)*, 2009 FC 495 at paragraphs 57-58:

> Generally, in this context, it will be sufficient for the complainant to prove: that the complainant was qualified for the particular employment; that the complainant was not hired; and that someone no better qualified but lacking the distinguishing feature (i.e.: race, colour, etc.) subsequently obtained the position (*Shakes v. Rex Pak Limited* (1982), 3 CHRR D/1001 at D/1002).
>
> If the employer does provide a reasonable explanation for otherwise discriminatory behaviour, the applicant has the burden of demonstrating that the explanation was pre-textual, and that the true motivation was discriminatory.

[19] The Applicant argues that the Respondent has adduced no direct evidence of discrimination other than her own assertions and that, contrary to the Decision's finding, this is not a contest of credibility which would justify instituting an inquiry into the matter. In *Utility Transport*, above, at paragraph 37, I cited with approval the following comments of Justice Barbara Reed in *Varma v Canada Post Corp*. (1995), 56 ACWS (3d) 1060, [1995] FCJ No 1065 (QL) (TD) at paragraph 13, aff'd (1996) 66 ACWS (3d) 1129 (FCA):

> [I]t is important to distinguish between evidence of primary fact and evidence respecting opinions or personal beliefs. In this case, the applicant's personal belief is that many of the events which occurred were caused because the individuals with whom he was interacting were racially prejudiced. The CHRC, or a Court, cannot act on this kind of assertion or belief unless there is primary fact evidence to support it. Direct evidence specific to the event in question linking it to racial discrimination is necessary. This is necessary to establish that the actions were racially motivated rather than merely being the result of other factors, such as bad temper, frustration, or a personality conflict.

[20] In the instant case, the position of supervisor required "a thorough knowledge of stevedoring equipment as well as the safe work practices associated therewith." The objective evidence demonstrates that the Respondent's qualifications for the job were deficient compared to those of the successful candidates. It was for this reason, and not by reason of her sex, that she was not among the successful candidates. The Applicant argues that this direct, objective evidence, which was provided to the Investigator, is a "complete answer" to the Respondent's allegations of discrimination. In light of such evidence, the Commission could not reasonably have decided to institute an inquiry. The objective evidence is as follows.

[21] First, operation of the gangway is part of daily operations at the cruise ship terminals. It involves significant safety issues. Gangway training is a pre-requisite for a supervisory position, and re-training is required each year. At the material time, the Respondent had not taken gangway training; she did not take it until 2007. The successful candidates, however, had completed the training on many occasions and had operated the gangway "countless times." Although the Report stated that the Respondent provided the names of two witnesses who could attest to her experience with gangway operations, the Commission did not inform the Applicant of this "very significant assertion" and did not interview the witnesses. The Applicant contends that, as the Respondent did not complete her gangway training until 2007, the alleged experience could only have happened after the job was posted.

[22] Second, the loading, unloading and handling of stores is more complex than the loading, unloading and handling of baggage. A review of the Respondent's work history demonstrates that

her experience in stores was neither as extensive nor as recent as that of each of the successful candidates. The Applicant contends that recent experience in baggage and stores is preferable, given that the personnel, layouts and requirements of the vessels being serviced change over time.

[23] Third, of the two terminals serviced by the Applicant, the Respondent worked almost exclusively at Canada Place. She had worked only twice at Ballantyne between January 2001 and July 2006. The work experience of the successful candidates, in terms of location, was much more diverse than that of the Respondent during the same period.

[24] Fourth, at the material time, the Respondent had never worked “floater” shifts, unlike the successful candidates, who had worked many. These floater shifts provided an opportunity to gain supervisory experience prior to becoming a supervisor. Moreover, the Investigator found that when the Respondent expressed interest in such shifts in 2007, the Applicant provided her with an equivalent number of spare floater shifts as that which was offered to each of her male coworkers. In this way, she was not treated adversely.

[25] Fifth, unbeknownst to the Applicant, during the investigation the Respondent submitted information concerning her work history from 1992 to 2001, which included evidence of additional experience in stores. The Applicant submits that the Investigator acted unreasonably and unfairly in considering the Respondent’s work history data for a 14-year period (1992-2006) but the successful candidates’ work histories for only a 4-year period (2002-2006).

[26] Sixth, the Investigator did not give sufficient weight to the ISA, which required preferential treatment for the Respondent.

[27] Seventh, the Respondent did not challenge the reasonableness of the posted job qualifications, nor did she dispute the Applicant's assertions that her qualifications were deficient in particular areas. The Investigator made no finding with respect to whether the Respondent met the minimum qualifications required of a successful candidate. In this respect, the Report is deficient.

[28] Finally, although the Respondent's complaint does not allege systemic discrimination pursuant to section 10 of the Act, the Investigator raised systemic discrimination as a possible consideration in the Report, observing that "subjective methods of assessment disadvantage women in hiring and promotion." The Applicant relies on *Salem v Canadian National Railway*, 2008 CHRT 13 at paragraph 63, to argue that all hiring decisions involve subjectivity and that this, alone, does not justify an inference of systemic discrimination:

> There is a subjective element in every hiring process. The mere fact that the respondent used subjective criteria to assess the candidates and that it may have erred in doing so does not in itself expose its decision to challenge on grounds of discrimination, even though the existence of subjective criteria may require greater scrutiny of the hiring decision (see *Folch v. Canadian Airlines International Ltd.* (1992), 17 C.H.R.R. D/261, D/303; *Morin v. Canada (RCMP)*, 2005 CHRT 41, at paragraph 213).

[29] The Applicant contends that there was no reasonable basis for the Commission to refer an allegation of systemic discrimination to the Tribunal. The Respondent made no such allegation, and the job competition in dispute was the first and only such competition involving longshore workers. There is no evidence that the alleged discriminatory practice has continued. Any future allegations

that the Applicant's hiring processes are tainted by systemic discrimination must be dealt with in a new complaint.

[30] In short, the Applicant contends that the Commission erred in taking the Respondent's baseless allegations at face value. The Commission had an obligation to verify them, particularly in light of the direct evidence refuting them, and to provide the Applicant an opportunity to respond.

The Investigation Was Procedurally Unfair and Biased

[31] The Applicant contends that, in investigating this complaint, the Commission did not fulfill its duty of fairness. Justice Danièle Tremblay-Lamer of this Court summarized this duty in *Paul*, above, at paragraph 63:

> In essence, the investigator must collect the information which will provide an adequate and fair basis for a particular case, and which will in turn allow the Commission to balance all the interests at stake and decide on the next step. No relevant fact should be left out. Omissions, particularly when the information is damaging to the complainant's position, only result in casting serious doubts on the neutrality of the investigator. I realize that this is a difficult task, but it is only in achieving this high standard of fairness that the investigator will help the Commission retain its credibility.

[32] The Applicant argues that the Investigator failed to disclose in full the Respondent's written submissions, her documentary evidence and her oral submissions, contrary to the guidelines set out in *Paul*, above, at paragraphs 76-79. The Applicant alleges that the Investigator provided only the amended complaint and a few isolated allegations near the conclusion of the investigation. Such one-sided disclosure indicates bias.

[33] The Applicant was deprived of the opportunity to respond to the Respondent's documentary and oral evidence. The Investigator accepted the Respondent's "bare assertions," including evidence regarding her work experience, without verifying them through interviews with available witnesses (specifically, with the successful candidates) who, in some cases, had conflicting evidence regarding matters central to the disposition of the complaint. For example, the Applicant was never informed of the Respondent's claim that the strategies employed in baggage are "identical" to the strategies employed in stores, nor of the Respondent's claim that she had supervisory experience other than in floater shifts. The Applicant contends that this demonstrates a lack of thoroughness and biased decision making.

[34] The Applicant states that, where the Commission does not provide reasons for its decision to refer a complaint to the tribunal, as in this case, the Commission's reasons are deemed to be the reasons set out in the investigator's report. See *Paul*, above, at paragraph 56. If the report is fundamentally flawed, then the decision to refer the matter to a tribunal is itself flawed. See *Paul*, above, at paragraph 58. The Applicant argues that this is the case here. The Investigator's Report is biased and based on unfair process. The Commission adopted that flawed Report. Therefore, the Commission's Decision is tainted.

The Respondent

The Commission's Decision to Institute an Investigation Was Reasonable

[35] The Applicant claims that there is objective evidence of the successful candidates' superior qualifications and that this is a "complete answer" to the complaint. In the Respondent's view, this suggests a narrower dispute than that which was before the Investigator. What the Applicant fails to acknowledge is that the parties disagree both on the requisite qualifications for the job and on whether the Respondent possessed those qualifications.

[36] There was evidence before the Investigator to suggest a possibility of discrimination. For example, the workplace has been identified in the Respondent's documentary evidence as one that is hostile to women. The Respondent was the sole female candidate for the job. The Applicant's assessment of the candidates was subjective. The parties disagree as to whether the Respondent was qualified for the job. The Respondent did not get the job. As nothing more than a possibility of discrimination is required post-investigation, it was reasonable for the Investigator to recommend an inquiry.

[37] In deciding whether to institute an inquiry, the Commission acts as a screening body. See *Bell Canada v Communications, Energy and Paperworkers Union of Canada* (1998), [1999] 1 FC 113, [1998] FCJ No 1609 (QL) (FCA) at paragraph 35. The Act grants the Commission a very broad discretion in the performance of this function. A court should not intervene where the Commission is satisfied that, having regard to all of the circumstances of the complaint, "there is a reasonable basis in the evidence for proceeding to the next stage." See *Bell Canada*, above, at paragraph 35. The Court need not agree with the Commission's opinion, nor should it speculate as to the outcome of the complaint. See *Bell Canada*, above, at paragraph 36. Intervention is warranted

only where it is clear that the Tribunal has no jurisdiction to deal with the matter before it. See *Brine v Canada* (1999), 175 FTR 1, [1999] FCJ No 1439 (QL) at paragraph 39.

[38] The Applicant relies on *Utility Transport*, above, to argue that the Decision to institute an inquiry was unjustified because the Respondent could not adduce direct evidence of discrimination, other than her own evidence. The Respondent contends that *Utility Transport* stands for no such proposition. The complainant in that case had no evidence of discrimination. The Applicant's suggestion that the Respondent's uncorroborated evidence leads automatically to the dismissal of the complaint is unsupported by authority and is belied by the great number of complaints that are adjudicated solely on issues of credibility. Moreover, the *Utility Transport* passage citing Justice Reed in *Varma* does not assist the Applicant, as it is quoted to establish the kind of evidence that is required to establish a claim, not to move to adjudication, as in the instant case.

[39] The Respondent argues that, contrary to the Applicant's contention, the following evidence raises a possibility that the Tribunal will infer the taint of discrimination in the hiring process in question, and this is all that is required at the investigative stage.

[40] First, the Respondent works in a male-dominated profession. She was the sole female candidate for the position of supervisor. She provided documentary evidence that "at worst, [the profession] reflects a poisoned work environment that is almost intolerant to the presence of women" and that sexual harassment was, and for years had been, reflective of the culture of the work environment.

[41] Second, the Investigator properly expressed concern regarding the unstructured interviews and the subjective assessment of candidates employed during the hiring process. See *Salem*, above, at paragraph 63. The Applicant admits that the hiring was based "heavily" on "management knowledge." This, the Respondent submits, means that the Applicant relied chiefly on what was going on in the minds of the three men who did the hiring; it was not until after the hiring was completed and the sexual discrimination complaint was filed that the Applicant canvassed the differences between the Respondent's qualifications and those of the successful candidates. The Respondent submits that the Investigator was correct in concluding that adjudication of this dispute turned on credibility and that an inquiry was warranted.

[42] Third, the Respondent alleges that the Applicant has exaggerated the complexity and importance of tasks at which she is less experienced (for example, loading, unloading and handling stores) and diminished the complexity and importance of tasks at which she has considerable experience (for example, loading, unloading and handling baggage). She challenges the Applicant's claims that her skills on the pallet jack are "average" and that she has no supervisory experience. She views these arguments as attempts to minimize her qualifications. The Applicant has "moved the target" to thwart her efforts to become a supervisor. Again, the dispute involves issues of credibility, which are properly adjudicated by a Tribunal, not by an Investigator, who lacks an adjudicative function.

[43] Fourth, the Respondent alleges that, despite the existence of the ISA, one of her male coworkers informed her that he was being groomed by management for a supervisory position. The

Respondent infers from this that the Applicant has no intention of hiring her, despite her qualifications. The ISA, which was created to redress inequities in the workplace, has failed.

[44] Fifth, the Respondent submits that the Investigator had a duty to raise the possibility of systemic discrimination. In *Bell Canada*, above, at paragraph 45, the Federal Court of Appeal stated:

> Where, therefore, an investigator in the course of investigating a complaint is provided with some evidence, not of her making, that there is a possible ground for discrimination which the complaint, as formulated, might not have encompassed, it becomes her duty to examine that evidence, to alert the parties as to the impact of that evidence on the investigation and even to suggest that the complaint be amended.

The Investigator identified these concerns, brought them to the attention of the parties in her Report and provided them with an opportunity to respond. There is no need to initiate a new complaint, and the Applicant's arguments with respect to mootness are without merit.

[45] The Respondent submits that the Applicant objects to the Decision because the Investigator did not simply accept its post-complaint analysis as a "complete answer" to the complaint and reject the Respondent's challenges to it. The evidence demonstrates that credibility is at issue in this dispute and, therefore, the matter is properly adjudicated by a Tribunal.

Procedural Fairness Is Limited at the Investigative Stage

[46] At the investigative stage, neither party is entitled to the full range of natural justice. See *Tsui v Canada Post Corp.*, 2010 FC 860 at paragraph 21. In the instant case, the Investigator complied with her duty of fairness. She provided to the parties a copy of her Report. Contrary to its assertions, the Applicant had a full opportunity to respond to the Report and it was informed, for example, that the Respondent claimed that the strategies employed in baggage are "identical" to the strategies employed in stores and that she was experienced in gangway operations. The Investigator considered the parties' responses in reaching her Decision. See *Bell Canada*, above, at paragraph 43. The Court's intervention is justified only where obviously crucial evidence remains uninvestigated or where the "investigative flaws … are so fundamental that they cannot be remedied by the parties' further responding submissions." See *Hughes v Canada (Attorney General)*, 2010 FC 837 at paragraph 33-34. That is not the case here.

[47] The Respondent submits that the Investigator's disclosure was not one-sided. The Applicant received a copy of the Respondent's post-Report communications to the Commission, which did not include further submissions but rather a correction of errors. Moreover, the Investigator's failure to inform the Applicant that the Respondent had provided a 14-year work history is immaterial. The issue central in this dispute is whether the Respondent had gained the "core competencies" for a supervisory position and whether the Applicant minimized her skills to thwart her attempts to secure a supervisory position.

ANALYSIS

[48] An investigation under the Act is an initial screening to determine if there is sufficient evidence to warrant convening a tribunal. Where such evidence is lacking, the Commission should dismiss the complaint. See *Paul*, above, at paragraph 62, overturned in part on other grounds (2001 FCA 93).

[49] Where the Commission does not provide reasons for its Decision to refer a complaint to the Tribunal, the Commission's reasons are deemed to be the reasons set out in the investigative report. See *Paul*, above at paragraph 56; and *Sketchley v Canada (Attorney General)*, 2005 FCA 404 at paragraph 37.

[50] If the investigation report is deemed adopted as the reasons of the Commission, and that report is fundamentally flawed, then the decision to refer to the tribunal is itself flawed See *Paul*, above, at paragraph 58.

[51] Subparagraph 44(3)(*a*)(*i*) of the act says that it is sufficient for the commission to be "satisfied that, having regard to all the circumstances of the complaint, an inquiry into the complaint is warranted." This is a low threshold. See *Bell Canada*, above, at paragraph 35. All that is required is that the Commission form an opinion, rightly or wrongly, that there was "a reasonable basis in the evidence for proceeding to the next stage." See *Syndicat des employés de production du Québec et de l'Acadie v Canada (Human Rights Commission)* (1989), [1989] 2 SCR 879, [1989] SCJ No 103 (QL) at paragraph 27.

[52] In *Slattery v Canada (Human Rights Commission)* (1994), 81 FTR 1, [1994] FCJ No 1017 (QL), aff'd (1996), 205 NR 383, [1996] FCJ No 385 (QL) (FCA), the Court held that procedural fairness requires that the Commission inform the parties of the substance of the evidence obtained by the investigator, which was put before it, and give the parties the opportunity to respond to the evidence and make all relevant representations in relation thereto, even if merely in writing. The Court further held that, notwithstanding the apparent sufficiency of the above process, procedural fairness also demands that the Commission have an adequate and fair basis on which to evaluate whether sufficient evidence exists to warrant the appointment of a tribunal. To do so, the investigation must satisfy two conditions: neutrality and thoroughness. See *Slattery*, above, at paragraphs 47-49.

[53] With regard to neutrality, if the Commission simply adopts an investigator's conclusions without giving reasons, and those conclusions were made in a manner that may be characterized as biased, a reviewable error occurs. See *Slattery*, above, at paragraph 50.

[54] In *Paul*, above, at paragraphs 59-60 and 63, Justice Tremblay-Lamer commented as follows on the procedural fairness obligations of the Commission and its investigator:

> The Commission is bound by procedural fairness in the investigation of complaints, which means that the matter must be dealt with objectively and with an open mind; that there can be no predetermination of the issue; and that the parties are informed of the evidence put before the Commission so they can make meaningful representations. Put another way, as expressed by my colleague Nadon J. in *Slattery*, the Commission "must satisfy at least two conditions: neutrality and thoroughness".
>
> The role of the investigator is not prosecutorial. It is not meant to be a fishing expedition.

> …
>
> In essence, the investigator must collect the information which will provide an adequate and fair basis for a particular case, and which will in turn allow the Commission to balance all the interests at stake and decide on the next step. No relevant fact should be left out. Omissions, particularly when the information is damaging to the complainant's position, only result in casting serious doubts on the neutrality of the investigator. I realize that this is a difficult task, but it is only in achieving this high standard of fairness that the investigator will help the Commission retain its credibility.

[55] The Commission has an obligation to disclose newly introduced evidence to the other party when such evidence is crucial to the case. See *Paul*, above, at paragraphs 76-79.

[56] The parties agree, and the Court concurs, that the standard of review in this case is reasonableness as regards the Decision to refer the complaint to a tribunal and correctness as regards the procedural fairness issues raised.

The Decision

[57] The Commission's Decision to refer the complaint to a tribunal as contained in its letter of 27 June 2010 simply adopts the recommendations contained in the Investigator's Report and provides no further reasons.

[58] Where the Commission does not provide reasons for its decision to refer a complaint to a tribunal, the Commission's reasons are deemed to be the reasons set out in the investigator's report. See *Paul*, above, at paragraph 56 and *Sketchley*, above, at paragraph 37.

[59] The Report in the present case identified the following as the Complaint:

> The complainant alleges that the respondent denied her promotion to a Foreperson position because she is a woman. She alleges further that, because she is a woman, she was treated differently in that: male employees are preferred over her for Floater positions; she has been "thwarted" in her efforts to get developmental supervisory experience (Floater position) and, she has been singled out for more scrutiny than her male co-workers.

Denial of Promotion

[60] As regards the denial of promotion, Ms. Marshall alleged that she possessed all of the posted qualifications for the foreperson position and had significant experience supervising as well as training new forepersons unfamiliar with the work that she performs.

[61] Notwithstanding Ms. Marshall's assertion that she possessed all of the posted qualifications:

a. She offered no rebuttal to Cerescorp's position that, as regards attitude and aptitude for overseeing the operation and movement of product and people in a production oriented environment, she was significantly deficient and lacked interpersonal skills and her behaviour on the job was at times unbecoming. However, Ms. Marshall does appear to dispute this allegation in other of her responses;

b. She offered no rebuttal to Cerescorp's position that she was significantly deficient in her knowledge and ability to ensure employees' conformance with safety procedures and regulations;

c. She offered no rebuttal to Cerescorp's position that she was significantly deficient in her knowledge of stevedoring equipment as well as the safe work practices associated therewith although, once again, she refutes Cerescorp's position elsewhere;

d. As regards Ms. Marshall's knowledge of stevedoring equipment and safe work practices associated therewith, Ms. Marshall gave evidence that she had operated the pallet jack throughout her tenure on the docks (Cerescorp said she had limited experience with pallet jacks) and she gave the names of two witnesses who could attest to her experience with gangway operations.

[62] It is difficult to know what Ms. Marshall meant by her experience with gangway operations. Cerescorp pointed out that Ms. Marshall had never taken gangway training and so could not operate a gangway. This means that, at the material time of hiring and interview, Ms. Marshall could not operate or supervise the operation of a gangway which was a key skill for the job. Ms. Marshall has subsequently confirmed that, at the material time, she had not taken the requisite gangway training. It is not possible to work or operate a gangway, without the requisite training and the qualifications.

[63] In its submissions to the Commission on the Report, Cerescorp went to considerable lengths to point out the mistake that had been made in this regard:

> The Complainant has never taken any issue with the requirements contained on the job posting. In particular, the successful candidates had to have "a thorough understanding of dock, stevedoring and coastwise operations as they pertain to the products which the company handles". This is obviously the fundamental minimum qualification for a supervisory position at the Respondent and comparison among applicants. One of the skills required to be a foreperson is operation of the gangway (mechanically operated

> passageway for passengers and supplies between the vessel and the terminal) which is a "rated" skill by the BCMEA requiring successful completion of training to be repeated each year. There are very significant safety issues related to the operation of the gangway (hence the requirement for re-training each year) and qualification and experience operating the gangway was a pre-requisite to a supervisory position. However, despite the very long time that the Complainant has worked at the cruise ship terminals, she had never chosen to take the gangway training prior to the job selection in 2006. The independent records of the BCMEA indicate that the successful applicants had passed the gangway training as follows: Mr. Buttar: 1995, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006; Mr. Chauhan: 1999, 2000, 2001, 2002, 2003, 2005; and Mr. Delgiglio: 2002, 2003, 2004, 2005. In addition to repeatedly taking the required training, each of these successful applicants had operated the gangway countless times by the time of the job selection process. These facts are verifiable by the training records of the BCMEA and undeniable by the Complainant. The Investigator (para. 56) says that the Complainant provided names of two witnesses who can attest to her experience with gangway operations (and also see para. 31). The Investigator did not inform the Respondent of these new assertions and did not interview those individuals. In any event, Complainant has misled the Investigator because she can only be referring to events after the job selection process because she had not taken the gangway training prior to the job selection and she did not choose to take the gangway training during the 2006 season either. The Respondent previously identified this fact which again demonstrates the lack of any reasoned analysis by the Investigator. After the ISA was implemented, the Complainant took and passed the gangway training in 2007, 2008 and 2009. However, this was a minimum qualification she was required to have at the time of the job selection in 2006 in order to have a "thorough understanding of the Respondent's Coastwise operations." She did not have it, and therefore, she also did not have any experience operating the gangway prior to the job selection. Therefore, with respect to this qualification alone, the Complainant did not meet the minimum requirements of the job and there is no reasonable basis to refer the Complaint to the Tribunal.

[64] What this means is that, at the time of the job posting and the interviews, the Applicant did not have the qualifications necessary to operate or supervise the operation of the gangway. She has made a great deal in her submissions about how other skills she had were transferable across the job

requirements so that, for instance, any knowledge or skills she may have lacked in stores could be made up for by her knowledge or skills in baggage. Ms. Marshall, however, has offered no explanation as to how her lack of skills and qualifications as regards the gangway could possibly have been made up for in some other way.

[65] In at least this one crucial aspect, she lacked the qualifications for the foreperson's job. This was a core competency that she had chosen not to acquire. The people who were hired did not lack this qualification nor any other qualification. At the material time, Ms. Marshall did not have the important gangway experience or qualification that the job required so that she could neither be awarded the position nor considered for it. She has never questioned the need for this qualification. She has simply said that Jerome Wong and John Mikulik are two witnesses who can attest to her experience with gangway operations. The Investigator did not bother to contact these witnesses, and she appears to have accepted that there is some dispute as to whether Ms. Marshall had the qualifications for the foreperson's job. The Investigator appears to think this was a credibility issue because she recommended referral to a tribunal on the basis that "a determination of whether most of the alleged acts occurred rests on the credibility of the parties involved." This is not the case in so far as gangway experience and qualifications are concerned. Ms. Marshall has conceded that she did not have gangway qualifications at the material time. Had the Investigator asked her a few more questions, interviewed witnesses on this crucial point or had the Commission paid any heed to Cerescorp when it pointed out why Ms. Marshall could not have this necessary qualification and experience, then it would have been obvious that this fundamental skill and qualification for the job (a fact she has never disputed) was entirely lacking from her background. This meant that she was not qualified to do the foreperson's job and that those who were hired as forepersons were. The

question “was the complainant qualified or otherwise eligible for the opportunity?” has to be answered in the negative. Even if Ms. Marshall could establish that it was reasonable for the Investigator to conclude that there could be some dispute about job requirements and that she has interchangeable skills that could have been considered, there is no dispute that gangway qualifications are crucial and Ms. Marshall does not have them. Hence, she was not qualified for the job and she could certainly not be considered as comparable in this respect to the individuals who were hired and who had the necessary gangway experience and qualification.

[66] It was Ms. Marshall’s choice not to take gangway training in the past. There is nothing to suggest that she was prevented or discouraged from doing so. She appears to have recognized the need for this crucial requirement in her promotion because, after the ISA was implemented, she took and passed the gangway training in 2007, 2008 and 2009. But she did not have the necessary disqualification in 2006, which is the material time.

[67] To have overlooked this was a fundamental mistake of fact on the part of the Investigator which renders the Decision to refer the complaint to a tribunal on the basis of denial of promotion unreasonable.

Alleged Adverse Differential Treatment

[68] In addition to being denied an opportunity to be promoted to foreperson, Ms. Marshall also alleged the following three forms of adverse differential treatment.

Male Employee Was Favoured over Ms. Marshall for the Floater Job

[69] The Investigator found that the "complainant does not appear to have been treated differently than the male employee she compares herself to" and Ms. Marshall does not take issue with this finding.

Ms. Marshall Was Thwarted in Her Efforts to Get Floater Experience

[70] On this issue, the Investigator concluded as follows:

> It is not clear whether the complainant was "thwarted" in her efforts to get supervisory experience. Her allegation is that she has been given conflicting information as to the importance of Floater experience as it relates to getting a job as a Supervisor. A determination on this allegation would require an assessment of credibility of the complainant and Mr. Rondpre as there are no witnesses to the alleged comments. As mentioned earlier, CHRC Investigators do not have the authority to assess credibility.

[71] After reviewing the record, I cannot say that it was unreasonable for the Investigator to reach this conclusion. However, this finding cannot be used as a basis by the Commission to refer the whole complaint to a tribunal.

Ms. Marshall Was Singled out For Scrutiny More So Than Male Employees

[72] The Investigator's conclusions on this point read as follows:

> It is not clear whether the complainant has been "scrutinized" more than her male co-workers. The parties relate different versions of

> events. The complainant says that she was "investigated" and the respondent says that she was not. Rather, the inappropriate comment was raised in a constructive feed-back session with the complainant as an example of the kind of behaviour it deems inappropriate especially in someone who wants to be a supervisor. A determination of this allegation would rest on the credibility of the parties involved.

[73] Once again, after reviewing the record, I cannot say that it was unreasonable for the Investigator to reach this conclusion, but this finding cannot be used as a basis by the Commission to refer the whole complaint to a tribunal.

Systemic Discrimination

[74] The Investigator and the Commission also concluded that the complaint should be referred to a tribunal pursuant to paragraph 44(3)(*a*) of the Act because

> there is evidence to suggest that the respondent's practices may present a systemic barrier to the promotion of women to the position of Supervisor of Longshore workers.

[75] The rationale for this conclusion is found in paragraph 85 of the Investigator's Report:

> Possible Systemic Discrimination against Women in Promotion Process
>
> That said, the investigation can conclude that, the respondent's subjective methods of assessment along with its practice of having no fixed procedures, may present a systemic barrier to the promotion of women to the position of Supervisor of Longshore workers in this traditionally male-dominated workplace. Two authorities, the Canadian Human Rights Commission (CHRC) and the International Labour Organization (ILO) note that subjective methods of assessment disadvantage women in hiring and promotion. They point to the necessity for objective and unbiased promotional procedures as well as the necessity to have women involved in decision making processes, so that women can advance in the workplace.

[76] The record reveals the following:

a. Ms. Marshall's complaint was made under section 7 of the Act;

b. There was no amendment to the complaint to include allegations of systemic discrimination;

c. Cerescorp consistently sought information from the Investigator on the scope of the complaint and the case it had to answer, but it was never told that it needed to address systemic discrimination, thus it was deprived of the opportunity to make representations to the Investigator on this issue;

d. The Investigator chose to raise systemic discrimination on her own initiative and on the basis of two pieces of evidence that were never provided to either Ms. Marshall or Cerescorp; and

e. After Cerescorp received a copy of the Investigator's Report, it made representations to the Commission on point but the Commission did not address these submissions, it simply confirmed the Investigator's Report.

[77] The Respondent says that there is nothing wrong with this approach and relies upon paragraph 45 of *Bell Canada*, above, at paragraph 45:

> Where, therefore, an investigator in the course of investigating a complaint is provided with some evidence, not of her making, that there is a possible ground for discrimination which the complaint, as formulated, might not have encompassed, it becomes her duty to examine that evidence, to alert the parties as to the impact of that evidence on the investigation and even to suggest that the complaint be amended. To require the investigator in such a case to recommend the dismissal of the complaint for being flawed and to force the filing of a new complaint by the complainant or the initiating of a complaint by the Commission itself under subsection 40(3) of the Act, would serve no practical purpose. It would be tantamount to importing into human rights legislation the type of procedural

> barriers that the Supreme Court of Canada has urged not be imported. It is of interest to note that in *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970 at 977-78, albeit in a different legislative context, no issue appears to have been raised with respect to the fact that the investigator had himself amended a complaint which he had found to be deficient, in order to include an additional section of the *British Columbia Human Rights Act*.

[78] It seems to me that this passage makes it clear that the Commission cannot do what it did in this case. If the Investigator had found evidence of systemic discrimination not encompassed by the Complaint, then it was "her duty to examine that evidence, to alert the parties as to the impact of that evidence on the investigation and even to suggest that the complaint be amended." This did not occur in the present case.

[79] Indeed, Ms. Marshall concedes that it did not occur but says that the defect was rectified because Cerescorp received a copy of the Investigator's Report and was allowed to make submissions to the Commission on point.

[80] In my view, this was not alerting Cerescorp to the impact of the evidence on the investigation. The investigation was complete when the Report was provided. There was no opportunity for Cerescorp to provide input on this highly significant issue as part of the investigation. And when Cerescorp did provide comments to the Commission following the investigation and Report, the Commission simply ignored them and proceeded to rubberstamp the Report. This was a travesty of procedural fairness. On this issue, the investigation and the Commission's Decision were neither neutral nor fair. See *Paul*, above, at paragraph 59.

[81] Justice Russel Zinn provided extensive guidance on this issue in *Herbert v Canada (Attorney General)*, 2008 FC 969 at paragraphs 18, 26, and 27:

> In performing its screening function, the Commission is given a very broad discretion to determine "having regard to all of the circumstances" whether an inquiry is warranted: *Mercier v. Canada (Human Rights Commission)*, [1994] 3 F.C. 3 (C.A.). However, the process it follows in exercising that discretion must be fair. In *Sketchley v. Canada (Attorney General)*, [2005] F.C.J. No. 2056, 2005 FCA 404, the Federal Court of Appeal affirmed at paragraph 112 that where the investigation is procedurally flawed, then the decision of the Commission, if it is made in reliance on that report, is equally flawed:
>
> > It is clear that a duty of procedural fairness applies to the Commission's investigations of individual complaints, in that the question of "whether there is a reasonable basis in the evidence for proceeding to the next stage" (*SEPQA*, *supra* at para. 27) cannot be fairly considered if the investigation was fundamentally flawed. As the Supreme Court of Canada noted in *SEPQA*, *supra*, "[i]n general, complainants look to the Commission to lead evidence before a tribunal appointed under s. 39 [now s. 49], and therefore investigation of the complaint is essential if the Commission is to carry out this role" (para. 24). This same consideration -- the indispensable nature of the investigation in the Commission's handling of each individual complaint -- applies equally to an investigation undertaken prior to dismissal of a complaint under section 44(3)(b). Where a proper inquiry into the substance of the complaint has not been undertaken, the Commission's decision based on that improper investigation cannot be relied upon, since a defect exists in the evidentiary foundation upon which the conclusion rests (*Singh*, *supra* [[2002] F.C.J. 885] at para. 7).
>
> The duty of the investigator is to be neutral and thorough in the investigation. Where that duty has not been met, procedural unfairness may result. It has been recognized in many decisions, *Slattery v. Canada (Human Rights Commission)*, [1994] 2 F.C. 574; affirmed (1996), 205 N.R. 383 (F.C.A.) being one, that the requirement for thoroughness must be considered within the administrative and financial realities of the Commission's work.

Accordingly, it has been held that minor omissions in the investigation may be overcome by providing the parties with a right to make submissions on the report -- a process followed in this instance. However, it has also been recognized in many cases that the right to make submissions cannot compensate for a defect in procedural fairness in the investigation where evidence has been disregarded or ignored: see, as examples, *Slattery*, *supra*; *Sanderson v. Canada (Attorney General)*, 2006 FC 447; *Powell v. TD Canada Trust*, 2007 FC 1227; and *Egan v. Canada (Attorney General)*, 2008 FC 649.

…

The jurisprudence is clear that where the Commission provides the complainant what is essentially a form letter dismissing the complaint for the same reasons set out in the investigator's report, then the report does constitute the reasons of the Commission as to why the complaint was dismissed. If the Commission chooses to dismiss on some other basis than that advanced by the investigator, it must state those reasons in its decision. Where the parties' submissions on the report take no issue with the material facts as found by the investigator but merely argue for a different conclusion, it is not inappropriate for the Commission to provide the short form letter-type response. However, where these submissions allege substantial and material omissions in the investigation and provide support for that assertion, the Commission must refer to those discrepancies and indicate why it is of the view that they are either not material or are not sufficient to challenge the recommendation of the investigator; otherwise one cannot but conclude that the Commission failed to consider those submissions at all. Such was the situation in *Egan v. Canada (Attorney General)*, [2008] F.C.J. 816; 2008 FC 649.

In *Egan* the complainant filed a rebuttal submission of some ten pages that began with the statement: "I have read the report in total disbelief as to how a less than 10-minute telephone conversation with me and my union reps can amount to an "investigation". My colleague, Mr. Justice Hughes, noted:

> The Commission's letter does not specifically address any of the concerns as to the investigation and Report raised in the Applicant's rebuttal and refers to the rebuttal in such a neutral way -- "any submission(s) filed in response" -- that one is left to wonder to what extent, if at all, the Applicant's concerns were even noted let alone considered.

Justice Hughes concluded, in allowing the review:

> I am satisfied that, in the present case the issues raised by the Applicant in rebuttal were of such a fundamental character that they should have been clearly considered by the Commission and a further or better investigation ordered or clear reasons set out by the Commission in its decision as to why it did not do so. To simply say that the Report is the Commission's reasons would be to ignore the rebuttal entirely.

[82] In my view, on the facts of this case, the issue of systemic discrimination was so significant that, following the Investigator's failure to inform fully Cerescorp of the issue and grounds and to allow submissions on point, the Commission ought at least to have referred the matter back to the Investigator for further investigation and the preparation of a new report. If the Commission wanted to make a determination on this issue on all the evidence before it, including the submissions from Cerescorp, then procedural fairness required that the Commission specifically deal with the issues raised in the submissions of Cerescorp. Having failed to do so, this aspect of the Decision cannot stand.

[83] Cerescorp says that there is no point in remitting this issue for reconsideration because it has not hired any forepersons since 2006 and has, in any event, changed its hiring practices. It seems to me, however, that the Decision is that "the respondent's [Cerescorp's] practices may present a systemic barrier to the promotion of women to the position of Supervisor of Longshore workers" and that those practices are not necessarily confined, on the evidence, to the hiring procedure *per se* but may be broader in nature. Consequently, I think the issue of systemic discrimination requires re-investigation.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application is allowed in part;

2. The Decision of the Canadian Human Rights Commission dated 27 July 2010 is set aside except as follows:

    a. The issue of "Thwarted in Efforts to get Floater Experience" as identified in paragraphs 102-107 of the Investigator's Report; and

    b. The issue of "Singled out for Scrutiny More Than Male Employees," as identified in paragraphs 108-115 of the Investigator's Report

    can, pursuant to paragraph 44(3)(*a*) of the *Canadian Human Rights Act*, proceed to the chairperson of the Canadian Human Rights Tribunal to institute an inquiry into these two aspects of the Complaint alone;

3. The aspect of the Decision that deals with possible systemic discrimination against women in the promotion process is remitted to the Commission for investigation by a different investigator acting in a procedurally fair manner and subsequent re-determination by the Commission; and

4. The parties may address the Court on the issue of costs. This should, initially at least, be done in writing.

"James Russell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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