

Federal Court



Cour fédérale

**Date: 20130606**

**Docket: T-1581-11**

**Citation: 2013 FC 610**

**Ottawa, Ontario, June 6, 2013**

**PRESENT: The Honourable Mr. Justice O'Keefe**

**BETWEEN:**

**ATTORNEY GENERAL OF CANADA**

**Applicant**

**and**

**DIANE CAROLYN EMMETT**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] This is a judicial review of the decision of the Human Rights Commission (the Commission) to refer a complaint to the Human Rights Tribunal pursuant to subparagraph 44(3)(a)(i) of the *Canadian Human Rights Act*, RSC 1985, c H-6 (the Act).

[2] The applicant seeks an order setting aside the decision and dismissing the complaint or in the alternative, an order returning the matter to the Commission with the direction that it be dealt with in accordance with this Court's reasons.

[3] The applicant also seeks costs.

### **Background**

[4] The respondent has been an employee of the Canada Revenue Agency (the CRA) since 1981. At the beginning of these proceedings, she was assistant director of the Audit Division of the Toronto North Tax Services Office, which she had occupied since 1996. She had applied unsuccessfully for numerous EX02 positions (lateral moves) and EX03 positions (promotions), including short-term acting opportunities. Her affidavit indicates she retired from the CRA on September 7, 2011.

[5] In a complaint to the Commission dated June 7, 2007, she alleged she had been discriminated against by the CRA on the basis of age and sex.

[6] The respondent alleged she had been subject to discrete incidents of discrimination, initially on the basis of sex and then later due to age. She identified 14 incidents when she had been denied job opportunities during the 11 years she had occupied her current position. In two of the incidents, she identified age as the ground of discrimination, as the desired position had been given to a much younger female colleague. For the other 12 incidents, she alleged she had either been passed over in favour of a less qualified male colleague or that she had been denied the opportunity in a break from the past practice for allocating acting positions.

[7] The Commission appointed an investigator to produce a report to assist the Commission in its determination. The investigator interviewed the respondent and five CRA managers and reviewed documentary evidence submitted by both the applicant and the respondent. The investigator produced a 47 page report that ultimately recommended against referring the complaint.

[8] The report divided the respondent's complaint into three components: (1) systemic discrimination on the basis of sex; (2) discrete or individual differential treatment on the basis of sex and age; and (3) systemic discrimination on the basis of age.

[9] On the systemic discrimination based on sex component, the investigator recommended the Commission not refer the complaint on the basis of subsection 41(2) of the Act, which allows the Commission to decline to refer a complaint where it is of the opinion that the matter has been adequately dealt with in the employer's employment equity plan prepared pursuant to section 10 of the *Employment Equity Act*, SC 1995, c 44. The investigator found that based on the CRA's employment equity plans, women were not under represented compared to labour market availability in the executive group for the 2001 to 2004 period. He found that while women were an under represented group in the 2005 to 2008 period, the CRA had an employment equity plan to deal with the issue and that more recent data indicated that women's representation at the EX02 and EX03 levels in 2009 far exceeded the labour market availability.

[10] On the individual differential treatment allegation, the investigator analyzed each of the alleged incidents of discrimination in detail. For each incident, the investigator considered the respondent's allegation and then the rationale provided by the CRA, via the interviewed managers,

for the impugned hiring. The investigator concluded for each of the incidents, there was no evidence that discrimination had played a role in the decision.

[11] Finally, on the issue of systemic discrimination on the basis of age, the investigator found that the data supplied by the applicant showed that there was no discrimination based on age at the executive level since a large portion of managers were nearing retirement age. While the investigator agreed with the respondent that these data did not show the age of those executives at the time of their appointment, she concluded the respondent had not shown any evidence of this allegation of discrimination as required.

[12] Both the applicant and the respondent made submissions to the Commission responding to the report.

### **Commission's Decision**

[13] The Commission rendered its decision on August 10, 2011. I reproduce the reasons for decision in full:

The Commission has considered the Complaint, the Investigation Report and the submissions of the parties. For the reasons that follow, the Commission has decided pursuant to section 44(3)(a) of the *Canadian Human Rights Act* (the *Act*) that, having regard to all the circumstances of the complaint, an inquiry into the complaint is warranted.

While section 41(2) of the *Act* provides a wide discretion to the Commission, it is necessary to balance that discretion with protecting a complainant's human rights. In this case, the information provided by the respondent indicates that there were gaps in representation for women in 2001-2003 and 2004-2008. Although the respondent's

submission dated July 12, 2011 states that as of March 31, 2011, the representation of women in the EX cadre is above labour market availability, this was not the case during the period when the complainant was seeking acting positions. In these circumstances the Commission has decided not to exercise its discretion under section 41(2) of the *Act*.

The evidence of systemic gaps in employment equity for women during the time period covered by the complaint has been considered alongside the evidence regarding the denial of employment opportunities that the complainant alleges were discriminatory. Taking the evidence as a whole, the complaint merits further inquiry even though the evidence with respect to discrete allegations may not suggest that discrimination was a factor in the outcome of particular acting opportunities. Moreover, the reasonableness of some of the explanations offered by the respondent as to why someone no more qualified than the complainant was chosen (for example, “management continuity” or “career development”) merits being tested and assessed in a full hearing.

### **Issues**

[14] The applicant raises the following issues:

1. Was the Commission’s decision to request the chairperson of the Tribunal to institute an inquiry into the complaint unreasonable?
2. Did the Commission violate the principles of procedural fairness and natural justice by failing to provide sufficient reasons for disregarding the investigator’s recommendations?

[15] The respondent also adds a preliminary issue:

1. Is the applicant’s evidence submitted to the investigator, but not part of the certified tribunal record, admissible in this proceeding?

[16] I would rephrase the issues as follows:

1. What is the appropriate standard of review?
2. Is the applicant's evidence submitted to the investigator, but not placed before the Commission, admissible?
3. Was the Commission's decision to refer the complaint unreasonable?

### **Applicant's Written Submissions**

[17] The applicant argues the standard of review for the quality of the Commission's reasons for decision is reasonableness, while the standard of review for procedural fairness issues is correctness. The applicant acknowledges that the Supreme Court has recently held that adequacy of reasons is not a stand-alone basis for judicial review.

[18] The applicant argues that while the Commission is not bound to accept an investigator's recommendation, it is settled law that the Commission's reasons for failing to adopt the recommendation must demonstrate a rational basis for doing so and must meet a standard of sufficiency. This Court's intervention is justified as the Commission's reasons fail to have proper regard for relevant considerations. In this case, the Commission's reasons contradict the investigator's findings without explanation.

[19] The applicant argues that as the investigator is an extension of the Commission, the investigator's report must be read together with the Commissioner's own reasons as composing the decision of the Commission.

[20] The applicant submits that the Commission's reasons do not demonstrate justification, transparency and intelligibility in the decision making process. Jurisprudence has established that where the Commission provides inadequate reasons, the investigator's concurring report is to be treated as the reasons for its decisions. However, where the Commission does not adopt the recommendations of its investigator, the Commission's written reasons must meet the reasonableness standard on their own.

[21] The Commission's decision with respect to the allegations of systemic discrimination against women makes no reference to the CRA's employment equity plan. The Commission's discussion of under representation at the CRA is extraneous to the use of subsection 41(2), as it presumes the existence of a breach of the Act, but provides discretion to decline to deal with the complaint where an adequate employment equity plan is in place.

[22] On the discrete allegations of discrimination, the applicant argues the Commission set out no deficiency in the investigator's material findings and acknowledged that the evidence may not suggest that discrimination was a factor in the outcome of particular hiring decisions. It is unclear whether the Commission has independent reasons to doubt the findings of its investigator, or whether it simply referred the complaint on the basis of the respondent's submission responding to the investigator's report. Therefore, the Commission has not communicated to the parties or a reviewing court why it made its decision. The decision should therefore be quashed for lack of transparency.

[23] Finally, on the issue of systemic age discrimination, the applicant argues the Commission failed to provide any reasons at all, which is a violation of procedural fairness.

### **Respondent's Written Submissions**

[24] The respondent argues that the 684 pages of documents filed by the applicant that were not part of the certified tribunal record should not be considered by this Court. It is well established that applications for judicial review are conducted only on the basis of the material before the decision maker, except for certain procedural fairness issues not relevant here. This material was submitted to the investigator but was not before the Commission and should therefore be given no weight by this Court.

[25] The respondent agrees that the standard of review for the referral decision is reasonableness and notes that a decision to refer a complaint is critically different than a decision to dismiss a complaint, as only the latter is a final determination of the complainant's rights. A referral should attract the highest degree of deference. The respondent also agrees the standard of review for failure to provide sufficient reasons is correctness.

[26] The respondent argues the decision to refer was reasonable. The Commission's role is not to determine the merits of the case but to assess whether there is a reasonable basis in evidence to suggest the possibility that discrimination has occurred which would justify referral to the Tribunal.



[27] Adequacy of reasons is not a stand-alone basis of review and a reviewing court must consider reasons in the context of the evidence, the parties' submissions and the process. Reasons do not have to be perfect or comprehensive.

[28] The respondent argues the Commission's reasons logically flow from the material before it and readily allow the reviewer to understand why the complaint was referred. The decision was based on the evidence before the respondent had been discriminated against. The Commission had before it a detailed rebuttal from the respondent explaining the flaws in the investigator's report and made specific reference to the rebuttal submission in its reasons.

[29] While the Commission did not specifically mention the age discrimination allegation in its reasons, a review of the material before the Commission makes the decision to refer understandable and reasonable. The Commission simply chose the respondent's arguments over the recommendation of the investigator.

[30] On the procedural fairness argument, the respondent points out there is no statutory requirement for the Commission to give reasons and that the requirements of procedural fairness are flexible. Here, the decision is not determinative of anyone's rights. The case law relied upon by the applicant is distinguishable, as they dealt with decisions not to refer, and the Commission provided no reasons for disagreeing with the investigator's report. Here, the Commission did provide reasons. Additionally, the applicant did not request any further reasons but instead proceeded directly to judicial review.

## **Analysis and Decision**

### [31] **Issue 1**

#### What is the appropriate standard of review?

Where previous jurisprudence has determined the standard of review applicable to a particular issue before the court, the reviewing court may adopt that standard (see *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at paragraph 57).

[32] The standard of review for a human rights commission's referral of a complaint to a tribunal was recently held by the Supreme Court to be reasonableness (see *Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, 2012 SCC 10 at paragraph 17, [2012] 1 SCR 364). This holding confirms the prior jurisprudence of this Court and the Court of Appeal determining reasonableness to be the standard of review for such decisions in the analogous federal context (see *Canada (Attorney General) v Davis*, 2010 FCA 134 at paragraph 3, [2010] FCJ No 702).

[33] The Supreme Court described the role of a court reviewing a commission's decision to refer applying the following test (see *Halifax* above, paragraph 17): "is there a reasonable basis in law or on the evidence for the Commission's conclusion that an inquiry is warranted?" Given the similarities between the federal human rights regime and the *Nova Scotia* regime reviewed in that case, the holding applies to the case at bar (see *Halifax* above, at paragraph 24).

[34] The Court also cautioned that a reviewing court's approach "must reflect the appropriate level of judicial deference both to the substance of the administrative tribunal's decision and to its

ongoing process” (see *Halifax* above, at paragraph 43). The reference to the “ongoing process” means the reviewing court must remember that a referral is not a final determination on the merits, but only one step in the human rights complaint process; therefore, intervening at this early stage prevents the court from having the benefit of the tribunal’s considered view of the disputed points and may also result in multiplication of issues and delay (see *Halifax* above, at paragraph 51).

[35] Both parties made submissions on whether procedural fairness requires that the Commission give reasons for its decision to refer and disputed whether reasons had in fact been given on the point of age discrimination. The Supreme Court has clearly held that where reasons are given, there is no procedural fairness issue (see *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paragraph 22, [2011] 3 SCR 708). In this case, the Commission clearly provided reasons for the decision to refer; the applicant’s concerns are therefore better dealt with under the reasonableness review described above. I consider the case law raised by both sides dealing with the adequacy of reasons as it pertains to the Commission’s obligation to explain departing from the investigator’s report to have been overtaken by *Newfoundland Nurses’* above, and that decision’s instruction to consider decisions organically.

[36] **Issue 2**

Is the applicant’s evidence submitted to the investigator, but not placed before the Commission, admissible?

The respondent takes issue with the applicant’s filing in this Court of materials that are not part of the certified tribunal record. The arguments made by the applicant in its memorandum, however, make little reference to these materials and are chiefly concerned with the investigator’s

report. As I describe below, I am able to dispose of this review without reference to those materials and I therefore need not decide this issue.

[37] Nonetheless, I wish to comment on this issue. Had I determined that such materials were admissible and required to decide the matter, this Court would have been faced with an extremely lopsided record, as the applicant filed only its own submissions to the investigator, while the respondent's submissions to the investigator are not before this Court as she was under the impression that such files were inadmissible.

[38] I presume that the applicant has the respondent's submissions to the investigator on file and could have easily introduced them into this Court by affidavit, either in the initial application or during the eight month period when the applicant knew the respondent had not filed these materials due to a belief in their inadmissibility.

[39] **Issue 3**

Was the Commission's decision to refer the complaint unreasonable?

As mentioned, this case requires an application of two recent Supreme Court of Canada decisions: *Halifax* above, and *Newfoundland Nurses'* above. In particular, it requires an application of *Halifax* above, in the context of a Commission decision that contradicts an investigator's report with brief reasons for doing so.

[40] I do not think, however, that this context requires me to depart from the basic holdings of either case. In applying *Newfoundland Nurses'* above, therefore, I will seek to supplement the

Commission's reasons before subverting them (see paragraph 12) and in applying *Halifax* above, I will answer the question of whether there is a reasonable basis in law or on the evidence for the Commission's decision that an inquiry is warranted (see paragraph 17).

[41] It is clear that both decisions show that the applicant's contention that the Commission's reasons are inadequate is misplaced, since not only is inadequacy not an independent basis for judicial review (see *Newfoundland Nurses* above), but the test for a commission's referral is entirely unconcerned with reasons offered: the *Halifax* test is concerned with the "reasonable basis in law or on the evidence". While a commission's reasons for decision certainly help elucidate a reasonable basis, I interpret that test as more focused on the underlying record.

[42] There is no dispute in this case on the "in law" component of the *Halifax* test, as the facts alleged by the respondent in her complaint would clearly constitute discrimination as defined under the Act and be within the Commission's jurisdiction. Rather, the issue is whether there is a reasonable basis on the evidence for the Commission's referral.

[43] The evidence before the Commission was the complaint, the investigator's report and responses to the report from both parties. It is this evidence, together with the Commission's own reasons, which must be examined to determine whether it yields a reasonable basis for the referral.

[44] The evidence on the individual incidents of discrimination was the initial brief descriptions of the incidents in the complaint, a detailed examination of each by the investigator and fairly detailed rebuttals by the respondent. The Commission's reasons also appear to concede that not all

of the acts may have been discriminatory. I would be very reluctant to intervene on the basis of this evidence, as this Court is not well placed to make factual determinations on a judicial review.

Indeed, it is not even the Commission's role to make factual determinations; a decision to refer is justified where "[t]he record discloses a true debate: there is evidence in support of each side's position that is capable of being believed, and if believed, could be determinative of the merits of the complaint" (see *Davis* above, at paragraph 7). The evidence before the Commission discloses such a "true debate" as it essentially pits the word of one side against the other.

[45] The evidence on the other two components of the complaint, however, causes more concern.

[46] The principal issue with the systemic sex discrimination claim is that the Commission does not appear to distinguish between the representation of women in the professional group and such representation in the executive group. The investigator found that there was under representation in the former group, but not the latter, which is the group the respondent is part of and within which she alleged systemic discrimination took place. The Commission's reasons only refer generally to "gaps in representation of women".

[47] It is also not clear that the Commission properly considered whether to exercise its discretion to decline to deal with a complaint on the basis of an employer's employment equity plan. I agree with the applicant that subsection 41(2) of the Act refers to a situation where discrimination has been made out but the Commission still declines to deal with the complaint on the basis of an employment equity plan.

[48] Here, the Commission merely stated that the 2011 data provided by the applicant did not refer to the time period the respondent complained of. Yet, the text of subsection 41(2) seems open to a scenario where the employment equity plan comes after the impugned discriminatory act (“the matter has been adequately dealt with”). Therefore, the Commission’s explanation that exercising its discretion is inappropriate due to the alleged discrimination predating the plan is unconvincing.

[49] Finally, the record is sparse on the systemic age discrimination claim. The investigator’s report noted that managers nearing retirement age were well-represented at the CRA. The report acknowledged the respondent’s counter-argument that these statistics did not show the manager’s age at the time of appointment, but pointed out this was not evidence of discrimination but rather a refutation of evidence of a lack of discrimination. Neither of the rebuttal submissions added any evidence.

[50] Were the complaint on the sole basis of systemic age discrimination, I would be reluctant to let the referral stand, given that this does not amount to a reasonable basis on the evidence. Similarly, where the sole basis of the complaint is systemic gender discrimination, I would have concerns that the evidence on that point passed the *Halifax* test.

[51] When considering a Commission’s decision to refer, however, it does not seem appropriate to quash a decision on the fragile basis of one or even two parts of a three-pronged complaint, given that allowing the referral decision to stand will allow the Tribunal to make a final determination on all three prongs. It would not be appropriate to return the matter to the Commission when one of the

three parts of the complaint clearly has a reasonable basis, since the reviewing court would be in effect only further prolonging a process that would ultimately end at the Tribunal.

[52] Given the Supreme Court's comments in *Halifax* above, about the importance of avoiding undue delay, my finding that there is a reasonable basis for the referral of the complaint on the ground of individual discrimination means that the matter should now be heard by the Tribunal. The applicant is free to repeat its arguments on the paucity of evidence relating to the systemic discrimination complaints in that forum.

[53] Therefore, the application is dismissed with applicable costs to the respondent.



**JUDGMENT**

**THIS COURT'S JUDGMENT is that** the application is dismissed with applicable costs to the respondent.

“John A. O’Keefe”

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Judge

## ANNEX

**Relevant Statutory Provisions*****Canadian Human Rights Act, RSC 1985, c H-6***

41. (2) The Commission may decline to deal with a complaint referred to in paragraph 10(a) in respect of an employer where it is of the opinion that the matter has been adequately dealt with in the employer's employment equity plan prepared pursuant to section 10 of the *Employment Equity Act*.

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.

(2) If, on receipt of a report referred to in subsection (1), the Commission is satisfied

(a) that the complainant ought to exhaust grievance or review procedures otherwise reasonably available, or

(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,

it shall refer the complainant to the appropriate authority.

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

(a) may request the Chairperson of the Tribunal to institute an inquiry under section 49 into the complaint to which the

41. (2) La Commission peut refuser d'examiner une plainte de discrimination fondée sur l'alinéa 10a) et dirigée contre un employeur si elle estime que l'objet de la plainte est traité de façon adéquate dans le plan d'équité en matière d'emploi que l'employeur prépare en conformité avec l'article 10 de la *Loi sur l'équité en matière d'emploi*.

44. (1) L'enquêteur présente son rapport à la Commission le plus tôt possible après la fin de l'enquête.

(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) que le plaignant devrait épuiser les recours internes ou les procédures d'appel ou de règlement des griefs qui lui sont normalement ouverts;

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.

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

a) peut demander au président du Tribunal de désigner, en application de l'article 49, un membre pour instruire la plainte visée

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).

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).

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

**DOCKET:** T-1581-10

**STYLE OF CAUSE:** ATTORNEY GENERAL OF CANADA  
- and -  
DIANE CAROLYN EMMETT

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** December 11, 2012

**REASONS FOR JUDGMENT  
AND JUDGMENT OF:** O'KEEFE J.

**DATED:** June 6, 2013

**APPEARANCES:**

Gillian A. Patterson  
Andrew Law

FOR THE APPLICANT

Diane Carolyn Emmett

FOR THE RESPONDENT  
(ON HER OWN BEHALF)

**SOLICITORS OF RECORD:**

William F. Pentney  
Deputy Attorney General of Canada  
Toronto, Ontario

FOR THE APPLICANT

Diane Carolyn Emmett  
North York, Ontario

FOR THE RESPONDENT  
(ON HER OWN BEHALF)