

Federal Court of Appeal



Cour d'appel fédérale

Date: 20241108

Docket: A-237-23

Citation: 2024 FCA 186

**CORAM: BOIVIN J.A.
GLEASON J.A.
HECKMAN J.A.**

BETWEEN:

ANDRÉ GILLES GIVOQUE

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Ottawa, Ontario, on October 10, 2024.

Judgment delivered at Ottawa, Ontario, on November 8, 2024.

REASONS FOR JUDGMENT BY:

HECKMAN J.A.

CONCURRED IN BY:

**BOIVIN J.A.
GLEASON J.A.**

Federal Court of Appeal



Cour d'appel fédérale

Date: 20241108

Docket: A-237-23

Citation: 2024 FCA 186

**CORAM: BOIVIN J.A.
GLEASON J.A.
HECKMAN J.A.**

BETWEEN:

ANDRÉ GILLES GIVOQUE

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT

HECKMAN J.A.

[1] Mr. André Givogue submitted a complaint (the Complaint) to the Canadian Human Rights Commission asserting that his employer, Fisheries and Oceans Canada, discriminated against him in employment on the grounds of genetic characteristics (the genetic characteristics claim) and “partial/perceived disability” (the perceived disability claim), contrary to section 7 of the *Canadian Human Rights Act*, R.S.C. 1985, c H-6. The alleged discriminatory act was the

employer's decision to deny Mr. Givogue workplace accommodations when he objected to disclosing his COVID-19 vaccination status. Accepting the conclusions set out in its Human Rights Officer's Report for Decision (the Report), the Commission found that the Complaint was frivolous because it failed to establish a link between the employer's conduct and a prohibited ground of discrimination under section 3 of the Act. Accordingly, it decided that it would not deal with the Complaint pursuant to paragraph 41(1)(d) of the Act (the Decision).

The Commission also decided not to consider Mr. Givogue's submission that the requirement that he disclose his vaccination status constituted harassment, contrary to section 14 of the Act, because he had not set out this allegation in the complaint form.

[2] The Federal Court dismissed Mr. Givogue's application for judicial review of the Decision: *Givogue v. Canada (Attorney General)*, 2023 FC 864, 2023 CarswellNat 7443. It held that since Mr. Givogue had failed to establish that his employer's requirement to disclose his vaccination status was a form of genetic discrimination, the Commission had reasonably concluded that the Complaint could not succeed and that it was frivolous. The Federal Court also upheld as reasonable the Commission's decision not to consider Mr. Givogue's allegations of harassment. Finally, it held that the Commission had not erred by failing to consider additional documents provided by Mr. Givogue to the Commission staff, because the main submissions raised in these documents were reflected in his response to the Report (the Response), which the Commission had expressly acknowledged in its Decision.

[3] The role of this Court in this appeal is to determine whether the Federal Court identified the proper standard of review to be applied to the Decision, and whether it properly applied this

standard. This requires the Court to “step into the shoes” of the Federal Court judge, focusing on the Commission’s decision: *Northern Regional Health Authority v. Horrocks*, 2021 SCC 42, [2021] 3 S.C.R. 107 at paras. 10-12; *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 at paras. 45-47. We are not to dive into the facts underlying Mr. Givogue’s complaint, re-weigh the evidence that was before the Commission or make the decision that we think the Commission should have made: *Tazehkand v. Bank of Canada*, 2023 FCA 208, [2023] CarswellNat 5838 at paras. 26-27 [*Tazehkand*].

[4] Nor are we to consider claims or information that were not before the Commission when it made its decision. Mr. Givogue’s allegation before this Court that he rebuffed his employer’s attempt to force him to undergo a COVID-19 test and disclose his “test result information” does not appear in the Complaint. Rather, Mr. Givogue argued before the Commission that his employer’s decision to deny him workplace accommodations and place him on administrative leave without pay following his refusal to disclose his vaccination status constituted discrimination on the basis of genetic characteristics because, in his view, the outcome of “asking employees’ vaccination status” is equivalent to an employee “disclosing the results of a genetic test.” Similarly, the 2023 decision of the Social Security Tribunal, General Division regarding Mr. Givogue’s claim for employment insurance, to which Mr. Givogue referred in his Memorandum of Fact and Law, was not before the Commission and is therefore not properly before this Court.

[5] The Federal Court was correct to review the merits of the Decision on the reasonableness standard. In making the Decision, the Commission’s role was to assess whether the information

before it was sufficient to establish a link between the employer's conduct and the grounds of discrimination raised in the Complaint. This Court has confirmed that such screening decisions are to be reviewed on a reasonableness standard: *Canada (Attorney General) v. Ennis*, 2021 FCA 95, [2021] 4 F.C.R. 3 at para. 46, leave to appeal to SCC refused, 39800 (20 January 2022). Further, Mr. Givogue has not convinced us that the Decision raises a question for which the rule of law requires correctness review: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 563 at para. 53 [*Vavilov*].

[6] In conducting reasonableness review, a reviewing court must take a “reasons first” approach that evaluates the administrative decision maker’s justification for its decision: *Mason v. Canada (Citizenship and Immigration)*, 2023 SCC 21, 485 D.L.R. (4th) 583 at para. 8 [*Mason*]. A reasonable decision is based on an internally coherent reasoning and is justified in light of the relevant legal and factual constraints that bear on the decision: *Vavilov* at para. 99. The party challenging a decision bears the burden to show that it is unreasonable. Mr. Givogue must satisfy this Court that there are sufficiently serious shortcomings in the Decision, such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency. These flaws or shortcomings must be sufficiently central or significant to the merits of the Decision to render it unreasonable: *Vavilov* at para. 100.

[7] Where, as here, the Commission adopts the recommendations of its Officer in the Report for Decision, its brief reasons may be supplemented by the reasons in the Report: *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Human Rights Commission)*, 1989 CanLII 44 (SCC), [1989] 2 S.C.R. 879 at 902-903; *Tazehkand* at para. 39.

[8] The Commission's decision can be broken down into three parts: its decision that the genetic characteristics claim was frivolous; its decision that the perceived disability claim was frivolous; and its decision not to consider Mr. Givogue's harassment claim. I will consider each in turn.

[9] I turn first to the Commission's decision that Mr. Givogue's complaint of discrimination based on genetic characteristics is frivolous under section 41(1)(d) of the Act. In my view, the Commission's reasons for this decision, when read in conjunction with the reasoning set out in the Report, are coherent. Moreover, the decision is justified in light of the provisions of the Act, the relevant jurisprudence and the evidence before the Commission.

[10] The Officer observed in the Report that Mr. Givogue stated in the Complaint: "I fear that *my* genetic characteristics are being used and will be used to discriminate against me now and in the future" [emphasis added]. He noted that the Commission defined "genetic characteristics" as including disclosing the results of a genetic test. This is consistent with section 3(3) of the Act, which prescribes that "where the ground of discrimination is refusal... to disclose... the results of a genetic test, the discrimination shall be deemed to be on the ground of genetic characteristics." Finally, the Officer concluded in the Report that, since "attesting to a vaccination status is not equivalent to revealing a genetic test," Mr. Givogue had failed to offer, as required by the relevant jurisprudence, information or facts supporting his allegation that his employer had treated him differently based on genetic characteristics: *Love v. Office of the Privacy Commissioner of Canada*, 2014 FC 643, 459 F.T.R. 11 at para. 69, aff'd 2015 FCA 198, [2015] CarswellNat 4560.

[11] Mr. Givogue has not identified shortcomings in the Commission's analysis that would render its decision unreasonable. It was open to the Commission to decide that Mr. Givogue had not offered any information or facts that could establish, as he claimed in the Complaint, that the act of disclosing his COVID-19 vaccination status revealed something about *his* genetic characteristics. Even if the Complaint had alleged that his employer had required him to take a COVID-19 test, information supplied by Mr. Givogue in his Response states that such tests detect the virus's genetic material, not the genetic characteristics of the person to whom the test is administered. Based on this and other evidence before it, it was open to the Commission to conclude that Mr. Givogue had not offered information supporting his claim of discrimination on the basis of genetic characteristics.

[12] Mr. Givogue claims that the Commission committed a reviewable error by finding that it had before it sufficient information to fully understand and assess his position on the genetic characteristics claim even though it did not have access to additional information he had provided to the Commission in correspondence with Commission staff. This argument misunderstands the decision-making process established under the Act. As recently observed by this Court in *Jagadeesh v. Canadian Imperial Bank of Commerce*, 2024 FCA 172,

2024 CarswellNat 4133 at para. 50 [*Jagadeesh*], this process

calls for an investigator to collect and review all of the information submitted by the parties to the complaint and to prepare a report for the Commissioners. The Commissioners do not play as active a role in the screening process. It is their role to review the investigation report and to come to a decision with respect to the complaint: *Pedroso v. WestJet Airlines*, 2019 FC 878 at paras. 28-30. Procedural fairness requires that the Commissioners also review any submissions filed by the parties in response to the investigation report before arriving at a decision: *Carroll v. Canada (Attorney General)*, 2015 FC 287 at paras. 68-71.

[13] That is precisely what occurred in Mr. Givogue's case. In concluding that the genetic characteristics claim was frivolous, the Commissioner relied on the Report that the Officer had prepared based on the information provided by Mr. Givogue. Mr. Givogue was afforded — and took full advantage of — the opportunity to provide a submission in response to the Report in which he reiterated the facts and arguments he viewed as crucial to establishing a link between his employer's conduct and the prohibited ground of genetic characteristics. The Commission concluded that his Response, the Complaint and the Report provided it with the information necessary to decide whether this aspect of his Complaint was frivolous. In doing so, the Commission did not make any reviewable error.

[14] I turn now to the Commission's decision that Mr. Givogue's perceived disability claim is frivolous under section 41(1)(d) of the Act. While this decision was not examined by the applications judge, likely because the genetic characteristics claim was the focus of the parties' arguments before the Federal Court, Mr. Givogue continued to advance before this Court that it was unreasonable.

[15] In my view, the Commission's decision not to deal with Mr. Givogue's perceived disability claim does not exhibit the degree of justification, intelligibility and transparency required of a reasonable decision.

[16] In the Report, the Officer dealt with this aspect of the Complaint by stating the following:

27. The Complaint also alleges that the Respondent discriminated against them on the grounds (*sic*) of disability. The Complainant has not offered any information that suggests they have a disability that would exempt them from

the COVID-19 vaccine or that they even requested to be exempted from the COVID-19 vaccine on the ground of disability.

28. Therefore, the Complainant has not demonstrated that a reasonable person in their situation would believe that the Respondent discriminated against them based on genetic characteristics or disability. As such, this complaint cannot succeed, and it is frivolous within the meaning of the Act.

[17] In his Response, Mr. Givogue noted that the Report had mischaracterized his claim of disability-based discrimination, because he had never claimed that he had a disability that would exempt him from the COVID-19 vaccine. Rather, he had argued that COVID-19 was a serious illness and could be “considered a partial/perceived disability.” Based on the terms of the vaccination policy and other information provided to the Commission, Mr. Givogue had claimed that in light of his refusal to confirm his vaccination status, his employer assumed that he was “unwilling to be fully vaccinated.” He asserted that his employer further presumed that, as someone who was not fully vaccinated, he was more likely to contract and transmit COVID-19, and therefore presented a risk to the health of others. In this context, he argued, his employer’s decision to deny him workplace accommodations and to place him on unpaid leave was based on its perception of his increased risk to others and amounted to discrimination on the ground of perceived disability.

[18] The operative portions of the Commission’s Record of Decision read as follows:

Before rendering its decision, the Commission reviewed the Complaint Form, the Report for Decision, and the submission of the Complainant filed in response to the Report for Decision. After examining this information, the Commission decides, pursuant to paragraph 41(1)(d) of the *Canadian Human Rights Act* (“the Act”), not to deal with the Complaint because it is frivolous in that it fails to establish a link between the alleged discriminatory conduct and a ground of discrimination under section 3 of the Act.

The Complainant has alleged that the Respondent discriminated against him on the ground of genetic characteristics by denying workplace accommodations when he objected to disclosing the COVID-19 vaccination status. In reaching its decision not to deal with the Complaint, the Commission agrees with and adopts the reasons in the Report for Decision.

[19] The Commission did not expressly address Mr. Givogue's perceived disability claim beyond adopting as its own the reasons in the Report.

[20] Reasonableness is a robust form of review that highlights the need to develop and strengthen a culture of justification in administrative decision-making: *Mason* at para. 63.

One cannot expect the Commission, when screening a complaint to decide whether it should be dealt with on its merits, to provide full and detailed reasons of the kind expected of adjudicative tribunals or courts: *Rameau c. Canada (Attorney General)*, 2024 CAF 40, 2024 CarswellNat 607 at para. 158. However, the Commission must still provide an explanation of its reasoning on points central or significant to its decision. Its reasons, read in light of the record and with due sensitivity to the administrative screening context in which they are delivered, must be sufficient to assure the parties that their concerns have been heard, demonstrate that it actually listened to them and show it was actually alert and sensitive to the matter before it: *Alexion Pharmaceuticals Inc. v. Canada (Attorney General)*, 2021 FCA 157, [2022] 1 F.C.R. 153 at para. 20 [*Alexion*], citing *Vavilov* at paras. 127-128, leave to appeal to SCC refused, 39858 (24 March 2022).

[21] I agree with Mr. Givogue that the reasons in the Report clearly indicate that the Officer misconstrued his argument on perceived disability. Rather than addressing whether the employer's conduct following Mr. Givogue's refusal to disclose his vaccination status

constituted adverse differential treatment on the ground of perceived disability, the Officer asked whether Mr. Givogue had established that he actually suffered from a disability that prevented him from being vaccinated. By adopting the reasons in the Report, which did not address Mr. Givogue's perceived disability claim, one of the two grounds expressly raised in both the Complaint and Response, the Commission did not address a core plank supporting Mr. Givogue's position and failed to meet *Vavilov*'s standard of responsive justification: *Mason* at para. 97.

[22] Counsel for the Respondent submitted that the Report demonstrates that the Officer grappled with Mr. Givogue's disability arguments. She argued that in reading the Report, the Court should infer that the Officer decided that the information provided to the Commission by Mr. Givogue was insufficient to establish a link between the employer's conduct and alleged discrimination on the ground of disability because it was presented in the form of generalized arguments and media articles. Similarly, counsel for the Respondent argued that in deciding that it would not deal with the Complaint, the Commission should be taken to have considered Mr. Givogue's Response, which included his description of his perceived disability claim. She submitted that in the absence of any reference to this claim in its reasons, the Commission should be taken to have decided that nothing in the Response convinced it that the Officer had erred when he determined the essence of the Complaint and found that there was insufficient information to establish a link between the employer's conduct and the ground of perceived disability.

[23] Reasons must be read in a holistic and sensitive way. In the face of silence in a decision maker's reasons on a particular point, "[t]he evidentiary record, the submissions made, the understandings of the administrator as seen from previous decisions cited or that it must have been aware of, the nature of the issue before the administrator and other matters known to the administrator may... supply the basis for a conclusion that the administrator made implicit findings": *Alexion* at para. 16, citing *Vavilov* at paras. 94, 123. Far from being silent, the Officer's reasons, adopted by the Commission, indicate that he misconstrued and therefore did not consider Mr. Givogue's perceived disability claim. This Court cannot disregard the flawed basis for the Commission's decision and substitute its own justification: *Vavilov* at para. 96.

[24] I am also of the view that by effectively failing to consider Mr. Givogue's perceived disability claim, the Officer did not conduct a thorough investigation, as required by the jurisprudence of this Court: *Slattery v. Canada (Canadian Human Rights Commission)*, [1994] 2 F.C. 574 at 591-601, 73 F.T.R. 161, aff'd 205 N.R. 383 (F.C.A.), 62 A.C.W.S. (3d) 761; *Jagadeesh* at paras. 28-31. Based as it was on a deficient investigation, the Commission's decision not to deal with Mr. Givogue's perceived disability claim was itself deficient, because the Commission was not in possession of sufficient relevant information upon which it could exercise its discretion: *Jagadeesh* at para. 33.

[25] Finally, Mr. Givogue has not convinced me that the Commission's decision not to deal with allegations of harassment that were not detailed in the Complaint was unreasonable, as it is consistent with the jurisprudence of this Court: *Manfoumbi-Mouity v. Canada (Attorney*

General), 2017 FCA 240, 2017 CarswellNat 7037 at para. 2, aff'g 2016 FC 988, 270 A.C.W.S. (3d) 833; *Jagadeesh* at para. 60.

[26] For the foregoing reasons, I would allow the appeal in part and remit the matter back to the Commission for re-determination solely with regards to whether Mr. Givogue's complaint that his employer discriminated against him on the ground of perceived disability is frivolous under section 41(1)(d) of the Act.

[27] As success on this appeal is divided, I would award no costs.

“Gerald Heckman”

J.A.

“I agree.
Richard Boivin J.A.”

“I agree.
Mary J.L. Gleason J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-237-23

STYLE OF CAUSE: ANDRÉ GILLES GIVOQUE v.
ATTORNEY GENERAL OF
CANADA

PLACE OF HEARING: OTTAWA, ONTARIO

DATE OF HEARING: OCTOBER 10, 2024

REASONS FOR JUDGMENT BY: HECKMAN J.A.

CONCURRED IN BY: BOIVIN J.A.
GLEASON J.A.

DATED: NOVEMBER 8, 2024

APPEARANCES:

André Gilles Givogue THE APPELLANT,
ON HIS OWN BEHALF

Helen Gray FOR THE RESPONDENT

SOLICITORS OF RECORD:

Shalene Curtis-Micallef FOR THE RESPONDENT
Deputy Attorney General of Canada