Federal Court  Cour fédérale

Date: 20170629

Docket: T-550-16

Citation: 2017 FC 633

Ottawa, Ontario, June 29, 2017

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

MEI (VICKY) WONG

Applicant

and

PUBLIC WORKS AND GOVERNMENT SERVICES CANADA

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of a decision by the Canadian Human Rights Commission [the Commission], dated February 24, 2016, in which the Commission dismissed the Applicant's complaint of discrimination made under section 7 of the *Canadian Human Rights Act*, RSC, 1985, c H-6 [the Act]. Section 7 provides that in the course of employment, it is

a discriminatory practice to differentiate adversely in relation to an employee on a prohibited ground of discrimination. "Sex" [or "gender"] is one such ground of discrimination.

[2] The Applicant, a mechanical engineer with Public Works and Government Services Canada [PWGSC]'s Pacific Region Office, complained to the Commission that she was discriminated against by her employer on the basis of her gender since returning from maternity leave in June 2009. In particular, she complained that when she returned, she was treated differently with respect to the nature of her duties and workload, her advancement opportunities and discipline.

[3] After investigating the matter and unsuccessfully attempting to settle it through conciliation, the Commission found that although there was evidence that the Applicant had been treated differently, a reasonable explanation for the differential treatment that is not a pretext for discrimination had been provided by the Respondent. As a result, it dismissed the complaint since it was satisfied, pursuant to subparagraph 44(3)(b)(i) of the Act, that an inquiry by the Canadian Human Rights Tribunal was not warranted.

[4] The Applicant claims that the Commission's decision is flawed in three respects. First, she says that she was denied procedural fairness when the Commission's investigator refused to interview her manager, Mr. Ted Leung, as well as some of the witnesses she had identified as people having relevant evidence regarding the discrimination she experienced. Second, she contends that the Commission erred in law by improperly applying the test for a *prima facie* case

of discrimination. Finally, she submits that the Commission based its decision on erroneous findings of fact.

II. Background

[5] The Applicant is a mechanical engineer. She joined PWGSC's Mechanical Engineering Group in Vancouver in June 2001. She was hired as a level 3 junior mechanical engineer [ENG3]. The Applicant is the only woman engineer in the Mechanical Engineering Group. The Applicant was under the supervision of Mr. Leung from 2001 until the later went on medical leave in 2011. At the time of his departure, Mr. Leung was the Regional Manager of the Mechanical Engineering Group.

[6] In June 2006, the Applicant went on the first of her two maternity leaves. When she got back to work in June 2007, she returned to her former position of ENG3 in the Mechanical Engineering Group. Then, in June 2008, she went on her second maternity leave but before she did, she requested a job classification desk audit as she thought she was performing the tasks and duties of an ENG4 level and that her position should be reclassified accordingly. That request was eventually denied.

[7] When she got back to work from her second maternity leave in June 2009, the Applicant claims that although she returned to her former position, there were significant changes in her duties and responsibilities. First, she says that she was assigned fewer projects. In particular, she contends that Mr. Leung refused to reassign projects she was working on before her maternity leave, including projects of ENG4 level for which, according to what Mr. Leung allegedly said to

her, she needed "re-familiarization". She further claims that Mr. Leung assigned new projects to two casual employees hired while she was on leave instead of to her. As a result, the Applicant contends that she was only given little work and struggled to meet billable rate targets. As of September 14, 2009, the Applicant had a billing rate of 16.57% compared to billable rates of 37.2%, 58.13%, 62.54%, 63.21% and 73.57% for the five male engineers within the Mechanical Engineering Group.

[8] Second, the Applicant claims she was subjected to supervision that had not existed prior to her second maternity leave. Third, she says that the Respondent deliberately denied her work and career advancement opportunities by having external competitive searches to fill an ENG4 position when one became available instead of appointing her to the position without a search.

[9] Finally, the Applicant alleges that she received a letter of reprimand in July 2009 for refusing to go to a Corrections Services Canada [CSC] site as part of an assignment for doing design work for the site. She says that she had never been disciplined prior to this and that this disciplinary action was unwarranted.

[10] The Applicant filed her complaint with the Commission on December 13, 2012, alleging that these changes in her work environment and events upon her return from maternity leave in June 2009 were the result of discrimination based on her gender. Initially, the Commission declined to deal with the complaint on the ground that the Applicant had grievance procedures available to her before turning to the Commission. Once the grievance process was completed, the Applicant requested the Commission to process her compliant. On August 7, 2013, the

Commission agreed to deal with the Applicant's complaint and, as empowered by paragraph 43(1) of the Act, assigned an investigator to the file [the Investigator].

[11] The Investigator conducted her investigation throughout the year 2014, interviewing the Applicant and 10 other witnesses in addition to reviewing the documentation submitted by both parties. On December 5, 2014, she released her investigation report [the Report]. She accepted most of the Applicant's claim that she had been treated differently upon returning from her second maternity leave. However, she found that there was insufficient evidence to support a finding that the differential treatment was related to the Applicant's gender.

[12] More particularly, the Investigator found that the Respondent had provided a reasonable explanation for the number of projects being assigned to the Applicant that is not a pretext for discrimination based on gender. She relied on evidence that:

a) CSC projects accounted for a very large portion of the projects handled by the Mechanical Engineering Group at the time and the Applicant was unable to work on those projects due to a prior traumatic experience;

b) The Mechanical Engineering Group's business is cyclical such that it is not unusual for there to be less work in the first few months of the fiscal year, which begins on April 1st and ends on March 31st; and

c) There had been a change in the nature of the work being done by the Mechanical Engineering Group in that the Group was doing less design work in-house and

> more work reviewing the work of consultants which, in turn, required a higher level of engineer and supervision.
>
> (Applicant's Record, p. 039, at para 74)

[13] The Investigator reached a similar conclusion regarding the level of supervision the Applicant found herself subjected to when she returned from her second maternity leave. It appeared "more probable than not" to the Investigator that the reason the Applicant was subjected to more supervision after her return to work in June 2009 "was because she challenged her level with the desk audit and later brought a grievance, and the respondent thereafter wanted to ensure that her work was at an ENG3 level, which does require more supervision than an ENG4" (Applicant's Record, p. 040, at para 81).

[14] With respect to the Applicant's claim that she was denied advancement opportunities, the Investigator noted that the Applicant had not applied for the ENG4 position that became available in 2010-2011 and declined an offer to be the acting ENG4 in 2012. She also found that the evidence gathered did not establish a link between the processes chosen by the Respondent to fill vacant ENG4 positions and the fact the Applicant is a woman. In particular, the Investigator found that there was nothing about the comment made by Mr. Leung to the Applicant, when she asked for his support for a promotion to the ENG4 level in 2007, establishing such a link. According to the Applicant, Mr. Leung responded to her request by saying "there will be none of this before [my] retirement" (Applicant's Record, p. 036, at para 51).

[15] Finally, the Investigator did not see a link either between the Applicant's gender and the letter of reprimand the Applicant received in July 2009. She noted that the Applicant received

that letter because she had refused to complete a report on a CSC project on the basis that she believed the technician sent to take measurements was unqualified. The Applicant had refused to go take measurements herself due to a prior traumatic experience in July 2007 following which it was agreed that she would no longer be assigned site visits at CSC facilities. The Applicant grieved that reprimand letter and the matter proceeded to a grievance hearing on April 26, 2010. The reprimand letter was upheld.

[16] The Applicant told the Investigator that this disciplinary action was discriminatory because her male colleagues were not being disciplined for what she perceived to be abusive behaviour towards Mr. Leung such as swearing at him, hitting the back of his head and kicking his chair.

[17] The Investigator concluded that a disagreement between the Applicant and Mr. Leung about the appropriateness of having another individual complete the drawings for the Applicant's report appeared to be at the root of the discipline, not the Applicant's gender. She also determined that the reason for the Applicant's discipline - insubordination - was sufficiently dissimilar to the other employees' alleged behaviour toward Mr. Leung to establish that there was differential treatment linked to the Applicant's gender (Applicant's Record, p. 037, at para 59).

[18] In the closing paragraphs of the Report, the Investigator indicated that Mr. Leung was not available to be interviewed for this investigation but that despite this, she was satisfied that there was other relevant evidence supporting her conclusions (Applicant's Record, p. 041, at para 87).

At the outset of the Report, the Investigator noted that both parties had confirmed that Mr. Leung "went on a medical leave for a serious illness in 2011 and that he ha[d] not returned to work" (Applicant's Record, p. 029, at para 3).

[19] Both parties responded in writing to the Report's findings in January 2015. On March 10, 2015, the Commission appointed a conciliator pursuant to section 47 of the Act. In the course of the conciliation process, the Applicant received a settlement offer from the Respondent. That offer was declined by the Applicant as she felt it did not compensate her for the extensive discrimination she had allegedly experienced over the years and for the financial loss she had suffered by the Respondent's refusal to pay her at the ENG4 level.

[20] On February 24, 2016, with the conciliation process proving unfruitful, the Commission, based on the findings, conclusions and recommendation of the Report, dismissed the Applicant's complaint on the ground that having regard to all the circumstances, no further inquiry into said complaint was warranted.

[21] As indicated at the outset of these Reasons, the Applicant claims that the Commission's decision shall be set aside on the basis that the Commission breached the duty of procedural fairness it owed to her when the Investigator refused to interview some witnesses, including Mr. Leung, misapplied the test for a *prima facie* case of discrimination and made a number of erroneous findings of fact.

[22] The Respondent acknowledges that the Applicant has experienced some workplace issues and disputes in recent years. However, it claims that the evidence that was before the Commission does not support that any of these issues relate to the Applicant's gender or return to work from maternity leave.

III. Issues and Standard of Review

[23] The present case raises three issues; namely:

1) Was the level of procedural fairness owed to the Applicant met?

2) Did the Commission apply the correct legal test in screening out the Applicant's complaint?

3) Were the Commission's findings reasonable?

[24] The Applicant's allegations that the Commission breached its duty of procedural fairness must be review on a standard of correctness (*Tutty v Canada (Attorney General)*, 2011 FC 57 at para 14 [*Tutty*]; *Mission Institution v Khela*, 2014 SCC 24; [2014] 1 SCR 502 at para 79; *Joshi v Canadian Imperial Bank of Commerce*, 2014 FC 552, at para 55; *Guerrier v Canadian Imperial Bank of Commerce*, 2013 FC 937, at para 7).

[25] The issue of whether the Commission applied the correct legal test in deciding whether further inquiry is warranted or not is also reviewable on a standard of correctness (*Walsh v Canada (Attorney General)*, 2015 FC 230, at para 20).

[26] As to the third issue, the applicable standard of review is reasonableness (*Ritchie v Canada (Attorney General)*, 2016 FC 527 at para 28 [*Ritchie*]; *Tutty*, at para 14, *Dupuis v Canada (Attorney General)*, 2010 FC 511 at paras 9-10; *Sketchley v Canada (Attorney General)*, 2005 FCA 404 at para 47 [*Sketchley*]). As is well established, the standard of reasonableness is highly deferential (*Ritchie*, at para 28; *Rabah v Canada (Attorney General)*, 2001 FCT 1234 at para 9). Thus, the Court will only intervene if the Commission's findings do not fall within a range of possible, acceptable outcomes (*Dunsmuir v New Brunswick*, 2008 SCC 9, at para 47 [*Dunsmuir*]). In a case like the present one, where the Commission merely advise the parties of its determination, the investigator's report is deemed to constitute the Commission's reasons for decision (*Sketchley*, at para 37).

[27] Before I begin the analysis, it is important to bear in mind that in reviewing a decision dismissing a complaint on the basis that no further inquiry is warranted, the Court must be mindful of the Commission's role under section 44 of the Act which has long been described as a screening function (*Cooper v Canada (Human Rights Commission)*, [1996] 3 SCR 854, at para 53, [1996] SCJ No 115 (QL)). This role, in any given case, is to determine whether an inquiry by the Canadian Human Rights Tribunal is warranted having regard to all the circumstances of the case, not "to determine if the complaint is made out" (*Cooper*, above at paras 52-53; *Syndicat des employés de production du Québec et de l'Acadie v Canada (Canadian Human Rights Commission)*, [1989] 2 SCR 879, at pp 898-899, [1989] SCJ No 103; *Herbert v Canada (Attorney General)*, 2008 FC 969 at para 16 [*Hebert*]).

[28] In exercising that role, the Commission is entrusted with broad discretionary powers (*Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, 2012 SCC 10 at paras 21 and 25, [2012] 1 SCR 364) which were once described as providing it with "a remarkable degree of latitude" (*Walsh v Canada (Attorney General)*, 2015 FC 230, at para 19, quoting from *Bell Canada v Communications, Energy and Paperworkers Union of Canada*, [1999] 1 FC 113 (CA), at para 38).

IV. Analysis

A. *No Breach of Procedural Fairness*

[29] It is now firmly established that in order to be procedurally fair, the investigation leading to a decision made under section 44 of the Act must be both neutral and thorough (*Slattery v Canada (Canadian Human Rights Commission)*, [1994] 2 FC 574, at para 50 [*Slattery*]). As to the thoroughness of the investigation, the Court in *Slattery* observed that it is only "where unreasonable omissions are made, for example where an investigator failed to investigate obviously crucial evidence, that judicial review is warranted". Evidence is "obviously crucial" in that context where "it should have been obvious to a reasonable person that the evidence an applicant argues should have been investigated was crucial given the allegations in the complaint" (*Gosal v Canada (Attorney General)*, 2011 FC 570 at para 54 [*Gosal*], citing *Beauregard v Canada Post*, 2005 FC 1383, at para 21).

[30] The Applicant's main contention in this regard is the Investigator's alleged failure to interview Mr. Leung. She says that without having interviewed Mr. Leung, the Investigator

could not have properly determined what the actual motivating factors and explanations were for her differential treatment. She claims that the present situation is no different from those in *Sanderson v Canada (Attorney General)*, 2006 FC 447 [*Sanderson*] and *Gravelle v Canada (Attorney General)*, 2006 FC 251 [*Gravelle*], where this Court held that the failure on the part of the Commission's investigator to interview key witnesses, that is individuals who were "central players" in the events giving rise to the complaint, resulted in the investigation not meeting the thoroughness threshold.

[31] Here, Mr. Leung is no doubt a "central player" in the events that led to the Applicant's complaint - the Respondent is not denying it - but it is equally clear in my view that the circumstances leading to Mr. Leung not being interviewed differ significantly from those that led the investigators in *Sanderson* and *Gravelle* not to interview key witnesses. Indeed, contrary to what was the case in *Sanderson* and *Gravelle*, the evidence on record shows that Mr. Leung was simply not available to be interviewed during the whole time the Investigator conducted her investigation due to a serious illness. There seemed to be an implied common understanding between the parties that such was the case when the Investigator noted at the outset of the Report that "[b]oth parties confirm that [Mr. Leung] went on a medical leave for a serious illness in 2011 and that he had not returned to work".

[32] This, in my view, is reinforced by the fact the Applicant did not raise the issue that Mr. Leung ought to have been interviewed in the course of the investigation when she responded to the Report in January 2015. Rather, she requested to "be given an opportunity to call evidence and to cross-examine the managers who try to explain away [her] mistreatment" (Certified

Tribunal Record, at p. 56). In other words, she did not ask or push at the time for the Investigator to interview Mr. Leung.

[33] This is further reinforced by the Applicant's actual compliant form, dated December 13, 2012, where she indicated that Mr. Leung was away on sick leave and would be on such leave until his retirement. One could reasonably infer that the Applicant implicitly recognized that Mr. Leung would be unavailable for an interview by the Investigator and that this is why she focussed on other managers in her response to the Report.

[34] I believe this inference is confirmed by the Applicant's submissions made in the course of the conciliation process held in 2015. Hence, on September 28, 2015, in a letter addressed to the conciliator, the Applicant asserted that Mr. Leung had fully recovered as evidenced by his recent attendance to two retirement parties organized by the Respondent, one in July 2015 and one in September 2015, and his involvement in the Respondent's business forums. It is only then that she requested "to be given an opportunity to call evidence and to cross-examine Mr. Leung and other managers who try to explain away [her] mistreatment". It is clear that the Applicant's focus changed from simply targeting the "managers who try to explain away [her] mistreatment" in January 2015 to include Mr. Leung specifically in September 2015 when she realized that he had recovered.

[35] However, the fact remains that until September 2015, she had submitted no evidence that Mr. Leung had recovered or that he was available to be interviewed. Thus, I do not believe that the Investigator failed to uphold the thoroughness standard established in *Slattery* in concluding,

in light of the evidence before her, that Mr. Leung was unavailable to be interviewed in the course of the investigation as he was on sick leave for a serious medical condition. In other words, the Investigator cannot be faulted for not interviewing Mr. Leung.

[36] Furthermore, it was for the Applicant to submit arguments that Mr. Leung had recovered and was available for an interview before the Commission rendered its decision on February 24, 2016. Whereas she raised the issue in her submissions to the conciliator, whose role is to attempt to bring about a settlement of the complaint, not to assist the Commission in determining whether further inquiry into said complaint is warranted, she failed to bring it to the Commission's attention once the conciliation process failed.

[37] One must keep in mind that in determining whether an investigator failed to investigate crucial evidence, the Court "must place itself at the time of the investigation and consider the information provided by the complainant to the investigator" (*Gosal*, at para 54). As the Respondent correctly points out, the Investigator, as required by this Court's jurisprudence, did provide a reasonable justification for not interviewing Mr. Leung (*Utility Transport International Inc v Kingsley*, 2009 FC 270, at para 44). In such context, she relied on other significant evidence from ten other PWGSC employees which, despite Mr. Leung not being interviewed, supported, according to her, the conclusions reached in the Report.

[38] I am therefore satisfied that neither the Commission nor the Investigator breached the duty of procedural fairness owed to the Applicant because Mr. Leung was not interviewed at the investigation stage of the Applicant's complaint.

[39] The Applicant also claims that the investigation lacked in thoroughness because the Investigator only interviewed two of her seven witnesses. I cannot agree with this contention as I am not satisfied that the Applicant has demonstrated that these witnesses would have provided "obviously crucial evidence". Rather, the Report indicates that the Applicant herself told the Investigator that all her witnesses would provide similar evidence.

[40] As is well established, an investigation will not lack in thoroughness only because the investigator has not interviewed each and every person suggested by the parties (*Slattery*, at para 70) The requirement for thoroughness in investigations must also be considered in light of the Commission's administrative and financial realities, which means, among other things, that its investigations need not be perfect. As the Federal Court of Appeal observed in *Tahmourpour v.Canada (Solicitor General)*, 2005 FCA 113:

> [39] Any judicial review of the Commission's procedure must recognize that the agency is master of its own process and must be afforded considerable latitude in the way that it conducts its investigations. An investigation into a human rights complaint cannot be held to a standard of perfection; it is not required to turn every stone. The Commission's resources are limited and its case load is heavy. It must therefore balance the interests of complainants in the fullest possible investigation and the demands of administrative efficacy. [Citations omitted]

[41] But more importantly, as pointed out by the Respondent, for the Court to intervene, the Applicant ought to have established that there were fundamental flaws in the Report that could not have been remedied by her submissions in response to it (*Eadie v MTS. Inc.*, 2015 FCA 173 at para 90). In *Slattery*, the Court emphasized that the Commission must be the master of its own procedure and that it ought to interfere with the way the Commission conducted the investigation only where the investigation is "clearly deficient":

> 70 The fact that the investigator did not interview each and every witness that the applicant would have liked her to and the fact that the conclusion reached by the investigator did not address each and every alleged incident of discrimination are not in and of themselves fatal as well. This is particularly the case where the applicant has the opportunity to fill in gaps left by the investigator in subsequent submissions of her own. In the absence of guiding regulations, the investigator, much like the CHRC, must be master of his own procedure, and judicial review of an allegedly deficient investigation should only be warranted where the investigation is clearly deficient. In the case at bar I find that the investigator did not fail to address any fundamental aspect of the applicant's complaint, as it was worded, nor were any other, more minor but relevant points inadequately dealt with that could not be dealt with in the applicant's responding submissions.

[42] As the Respondent puts it, the Applicant did not specify what specific information the non-interviewed witnesses would have provided nor did she indicate that she could not obtain that evidence herself from them in order to fill the alleged gaps in her own submissions. Therefore, I do not believe that the Investigator's decision to only interview two of the Applicant's seven witnesses, in the absence of arguments indicating the "crucial" nature of those witnesses' evidence or the Applicant's inability to deal with that evidence in her responding submissions, amounts to a breach of procedural fairness.

B. *The Test for Prima Facie Discrimination*

[43] The Applicant submits that the Investigator failed to properly apply the test for *prima facie* discrimination. She claims that all that was required of her was to establish evidence that, if believed, would suffice to justify a finding of discrimination and that as a result, the Respondent's submissions in response to the Report ought not to have been considered.

[44] As I indicated in *Abi-Mansour v Canada (Revenue Agency)*, 2015 FC 883, such contention, in my view, cannot stand when made in the context of the exercise by the Commission of its screening function:

> [38] First, [the applicant] says that the Investigator applied the wrong test in determining whether the complaint gave rise to a *prima facie* case of discrimination. In particular, he claims that the Investigator ought not to have considered [the respondent]'s evidence before determining whether to recommend or not that his complaint be dismissed.
>
> [39] This argument cannot stand. As I already indicated, the Commission has a screening function. Its role is to decide whether a further inquiry into a complaint is warranted or not, based on the evidence adduced before it by both parties. The Commission's function, at this stage, is to conduct an investigation, not to establish a *prima facie* case of discrimination, which is the role of the Canadian Human Rights Tribunal, as evidenced by the Federal Court of Appeal decision in *Lincoln v Bay Ferries ltd*, 2004 FCA 204, a case on which the Applicant is relying in support of his contention.

[45] Again, the role of the Commission, when exercising its screening function, is to determine whether an inquiry by the Canadian Human Rights Tribunal is warranted having regard to all the circumstances of the complaint. The central component of that role is that of assessing "whether there is a reasonable basis in the evidence for proceeding to the next stage", not "to determine if the complaint is made out" which is for the Canadian Human Rights Tribunal to decide (*Cooper v Canada (Human Rights Commission)*, [1996] 3 SCR 854, at paras 52-53; *Syndicat des employés de production du Québec et de l'Acadie v Canada (Canadian Human Rights Commission)*, [1989] 2 SCR 879, at p. 898-899. The issue for the Court in the present matter is therefore to determine whether the Commission's decision not to proceed to the

next stage, that is to not refer the Applicant's complaint to the Canadian Human Rights Tribunal for further inquiry, was reasonable on all the evidence before it.

[46] For the reasons that follow, I find that the Commission's decision was reasonable in regard to all the circumstances of the case.

C. *The Commission's Decision is Reasonable*

[47] The Applicant claims that despite not interviewing key witnesses, the Commission improperly concluded that the Respondent provided a reasonable explanation for its differential treatment towards her that was not a pretext for discrimination. In particular, she contends that the acceptance of the Respondent's explanations resulted in at least four erroneous findings of fact, that is:

a) That she was not performing ENG4 level work prior to her second maternity leave;

b) That CSC projects accounted for a very large portion of projects handled by the Mechanical Engineering Group and that she was unable to work on these projects;

c) That the nature of the Mechanical Engineering Group's business is cyclical such that it is not unusual for there to be less work in the first few months of the fiscal year; and

d) That there was a change in the type of work being done by the Mechanical Engineering Group as it began to outsource projects instead of doing them in-

> house, a change which required a higher level of supervision by higher level engineers.

[48] The Applicant asserts that the Investigator arrived at these findings without giving due weight to her evidence. However, I note that aside from making that assertion, the Applicant has provided little, if no, details, as to how the Investigator might have erred in this respect.

[49] It is important to keep in mind at this stage of the analysis that the role of the Court on judicial review is not to reweigh the evidence that was before the decision-maker but rather to determine if the decision-maker's conclusions fall within a range of possible acceptable outcomes (*Dunsmuir*, at para 47). I believe they do here.

[50] First, regarding the Applicant's level of work, it was, in my view, reasonably open to the Investigator to consider - and give some weight to - the results of the desk audit requested by the Applicant prior to her departure on her second maternity leave. As indicated previously, that audit concluded that the Applicant was not performing ENG4 level work prior to leaving for a second maternity leave although the Investigator noted that the Applicant had performed some work at that level in an acting capacity. The Investigator also noted that the Applicant's union did not grieve the audit which, as the Respondent suggests, lends support to the outcome of the audit.

[51] Therefore, I see no reason to interfere with the Investigator's finding that the Applicant has failed to show differential treatment on the basis of her gender with regards to the level of

her work projects as the desk audit the Investigator was entitled to rely on clearly established that the Applicant was performing work at an ENG 3 level prior to her second maternity leave.

[52] Second, with respect to the Investigator's finding respecting the significant portion of CSC projects handled by the Mechanical Engineering Group and the Applicant's reluctance to work on these projects, I agree with the Respondent that there is ample evidence on record supporting that finding. The Investigator had before her evidence from the acting Regional Manager for the Mechanical Engineering Group, that from 2011 to 2014, 70-80% of the projects assigned to the Group were CSC projects. Further, it is difficult to give much weight to the Applicant's contention that CSC projects did not account for a significant portion of the Group's workload when she submitted the Investigator an email, dated June 8, 2009, in which she wrote: "I understand currently our mechanical group is low in workload. CSC projects are the only ones that are available. I am sorry that I can't help you with these projects".

[53] It was therefore reasonably opened to the Investigator to rely on the acting Regional Manager's evidence on the CSC projects issue and to infer from that email that the Applicant was unable to work on these projects. As indicated previously, there was evidence before the Investigator that the Applicant had suffered a traumatic experience in July 2007 during a visit at a CSC facility for work related purposes following which it was agreed that she would no longer be assigned site visits at such facilities.

[54] Third, as to the cyclical nature of PWGSC's work, the Investigator had evidence before her that there is frequently a delay to starting projects in the early part of each fiscal year, which

extends from April 1st to March 31st, as government departments finalize any budgetary issues. A colleague of the Applicant within the Mechanical Engineering Group, Mr. Patrick Berard, confirmed that work is typically slow from April to July and that things start to pick up in August and September as funding comes through the federal government.

[55] I have not seen any evidence from the Applicant indicating that the Investigator's conclusion that her work is cyclical in nature is unfounded. Quite the contrary, as I cannot help but notice and draw a negative inference from the fact that in her submissions in response to the Report, the Applicant agreed with Mr. Preepital Paul, the Regional Manager of PWGSC's Architecture and Engineering Group for the years 2010 and 2011, that "the year is off to a slow start and there is not a lot of work being done in the first quarter such that employees' billable rate may be low" (Applicant's Record, at p 165, at para 68).

[56] Again, I see no reason to interfere with the Investigator's finding regarding the cyclical nature of the Applicant and her colleagues' work.

[57] Finally, respecting the Applicant's contention that the Investigator erred in concluding that there has been a change in the nature of the Mechanical Engineering Group's work requiring a higher level engineer as that work - contracted out work - required a higher level of supervision, I cannot help but notice again that she has not brought forward evidence supporting her claim. Since there was evidence before the Investigator that reasonably supported that finding, I see no basis to intervene.

[58] Again, it is clear from the record that the Applicant experienced some workplace issues and disputes in recent years with her supervisors and managers, particularly since coming back from her second maternity leave in June 2009. However, when it comes to determining whether these events occurred because of some discriminatory practices, it is important to distinguish between evidence of primary fact and evidence respecting opinions and personal beliefs (*Varma v Canada Post Corp*, 1995 CarswellNat 2383, at para 13).

[59] Here, I agree with the Respondent's assessment that it was reasonably opened to the Investigator, and the Commission after her, to find that the Applicant provided insufficient evidence to support her personal belief that she was discriminated against on the basis of her gender. As a matter of fact, there is evidence on record that shows that the Applicant acknowledged that there could have been other reasons for being treated differently at work, the main one being management retaliating against her for requesting a desk audit and for filing a grievance.

[60] The following excerpts from the Applicant's Record, which are reproduced at paragraph 56 of the Respondent's written submissions before this Court, are quite revealing in this respect:

> - "She thought there were two possible explanations for Mr. Leung's Treatment of her, namely her second maternity leave, or the desk audit and grievance." (page 147 of the [Applicant's Record])
> - "Mr. Leung retaliated against me because I have asked for a promotion to ENENG-4." (page 155 [of the Applicant's Record])

- "I grieved, Mr. Leung was upset over my grievance and the desk audit, and as a result, he was taking steps to deny me work, including the ENENG-4 work I used to perform and employment benefits." (page 156 [of the Applicant's Record])

- "He retaliated against me for claiming that I should be employed at the ENG4 level and paid at that level." (page 163 [of the Applicant's Record])

- "Mr. Leung is very adamant on asking me only to work on this project when I have disability while there are other male engineers (including casuals) who could also work on this project." (page 164 [of the Applicant's Record])

- "It seems more probable than not that Mr. Leung's refusal at that time was because the work was at a higher level and he did not want to support this as it would contradict the desk audit." (page 164 [of the Applicant's Record])

- "It is clear his actions are retaliatory and his objective is to discipline me." (page 164 [of the Applicant's Record])

- "Mr. Leung deliberately kept projects away from me because I filed a desk audit." (page 166 [of the Applicant's Record])

- "It is clear that Mr. Leung is upset over my grievance and the desk audit, and as a result, he is taking steps to deny me work, including the ENG4 work and employment benefits." (page 167 [of the Applicant's Record])

- "Due to the desk audit and the grievance, the evidence is clear that Mr. Leung has retailed against me…" (page 167 [of the Applicant's Record])

[61] Retaliation in the workplace is no doubt an undesirable and reprehensible practice but it does not necessarily amount to a discriminatory practice within the meaning of the Act. In light of the evidence gathered by the Investigator, it was reasonable for the Commission to conclude that the Applicant's differential treatment was not the result of discrimination based on the Applicant's gender. In other words, this finding falls, in my view, within a range of possible,

acceptable outcomes which are defensible in respect of the facts and the law (*Dunsmuir*, at para 47).

[62] For all these reasons, the Applicant's judicial review application is dismissed. Given the outcome of the present proceedings, costs are awarded to the Respondent in an amount set at $2,240.00, plus reasonable disbursements, as agreed to by the parties.

JUDGMENT

THIS COURT'S JUDGMENT is that the judicial review application is dismissed, with costs payable to the Respondent in an amount of $2,240.00, plus reasonable disbursements.

"René LeBlanc"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-550-16
STYLE OF CAUSE:	MEI (VICKY) WONG v PUBLIC WORKS AND GOVERNMENT SERVICES CANADA
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	JANUARY 18, 2017
JUDGMENT AND REASONS:	LEBLANC J.
DATED:	JUNE 29, 2017

APPEARANCES:

Charles B. Coutts	FOR THE APPLICANT
Nathan Murray	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Coutts Pulver Crawford LLP Barristers and Solicitors Vancouver, British Columbia	FOR THE APPLICANT
Nathalie G. Drouin Deputy Attorney General of Canada Vancouver, British Columbia	FOR THE RESPONDENT