Federal Court  Cour fédérale

Date: 20180731

Dockets: T-747-17
T-748-17

Citation: 2018 FC 809

[ENGLISH TRANSLATION]

Ottawa, Ontario, July 31, 2018

PRESENT: The Honourable Mr. Justice Martineau

Docket: T-747-17

BETWEEN:

DAVID LESSARD-GAUVIN

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Docket: T-748-17

AND BETWEEN:

DAVID LESSARD-GAUVIN

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] The Applicant, David Lessard-Gauvin, is seeking to have set aside two decisions of the Canadian Human Rights Commission [Commission] dismissing, pursuant to subparagraph 44(3)(b)(i) of the *Canadian Human Rights Act*, RSC 1985 c. H-6 [CHRA], his discrimination complaints against Health Canada (docket T-747-17) and the Canada Border Services Agency [CBSA] (docket T-748-17). Not including a number of incidental applications, the Applicant notably seeks declaratory relief from the Court to the effect that the Commission's decision-making process generally infringes upon the constitutional right of access to justice.

[2] For the reasons that follow, both applications for judicial review are dismissed.

I. Background

[3] In the fall of 2013, the Applicant applied to the CBSA for a position as a student border services officer. This was a screening process to fill temporary positions in the summer of 2014 in the Toronto area. On March 6, 2014, after passing the interview and language assessment phases, the Applicant still had to pass a Health Canada medical assessment.

[4] On March 27, 2014, the Applicant underwent a medical assessment at the Medisys clinic in Quebec City performed by examining physician Dr. Langis Dionne. At that time, he was

continuing to take an antidepressant even though his attending physician had recommended in January 2014 that he stop taking that drug entirely. However, the Applicant had opted to continue taking the drug in question to avoid the side effects of weaning during a demanding period in his studies. The examining physician completed a medical form indicating that the Applicant met the medical requirements but also mentioned that the Applicant was taking the drug.

[5] On April 23, 2014, Dr. Bernard Parizeau, a reviewing medical officer with Health Canada, completed the health assessment report. He concluded instead that the Applicant did not fulfil the medical requirements. His notes indicated, [TRANSLATION] "Currently has active condition to be re-evaluated when condition stable." A report containing essentially the same information was also forwarded to the Applicant. The Applicant states that he was never contacted by the reviewing medical officer or referred to a mental health expert. He also was not advised as to what was meant by "active condition" or of the existence of any assessment appeal or review process.

[6] On May 1, 2014, the Applicant was informed that the CBSA had rejected his application on the grounds that he had not met the medical requirements. It is noted in passing that the Applicant underwent the medical examination again and passed it the following year after his condition stabilized. However, he chose not to apply for a temporary position as an officer in Toronto as he had accepted employment elsewhere in the Quebec area.

II. Content of discrimination complaints

[7] The Applicant filed two discrimination complaints, one against the CBSA on May 5, 2014 (complaint 20140543/docket T-748-17), the other against Health Canada on December 23, 2014 (complaint 20150029/docket T-747-17), both pursuant to sections 7 and 10 of the CHRA.

[8] First, the Applicant claims that the CBSA refused to employ him due to his disability. He maintains that the health assessment was excessively strict for the requirements of the position in that student officers are subject to the same medical requirements as regular officers although they perform different work. He also claims that the CBSA had him undergo an assessment several weeks or months before the start of employment rather than at the start of training. His medical condition, which was temporary, would have been resolved by that time.

[9] Next, the Applicant claims that Health Canada followed a discriminatory practice at the time of his medical assessment by failing to consider the foreseeable short-term change in his state of health, thereby causing the rejection of his application for the position at the CBSA. He should have instead been reassessed after he stopped taking the drug. Additionally, the form is, in and of itself, discriminatory in that it does not provide an opportunity to supply information concerning the possible improvement of the medical condition over the short term. The CBSA was consequently not informed of the need for accommodation. Overall, the fact of having previously had depression and completing treatment in no way prevented the Applicant from working at the CBSA.

III. First investigation and interim decision

[10] A preliminary investigation was conducted after the complaints were filed. Reports concerning the two complaints were issued on December 4, 2015. In both cases, the investigator recommended that the Commission dismiss the complaints in accordance with subparagraph 44(3)(b)(i), as a review of the complaints by the Canadian Human Rights Tribunal [Tribunal] was not warranted.

[11] First, the investigator reviewed the complaint against Health Canada under section 5 of the CHRA addressing the denial of goods or services on discriminatory grounds, since Health Canada is simply mandated to conduct medical assessments on behalf of the CBSA. The investigator concluded that the final recommendation of the report was directly related to the Applicant's medical condition. If not for this condition, the Applicant would have passed the assessment. All is consistent with the criteria in Health Canada's *Occupational Health Assessment Guide* [OHAG] taking into account the Applicant's perspective. In short, Health Canada did not differentiate adversely in the provision of service to the Applicant.

[12] Next, the investigator reviewed the complaint against the CBSA under section 7 of the CHRA addressing the refusal to consider the Applicant's application on discriminatory grounds. She concluded that the employer knew that the Applicant had failed the Health Canada medical assessment due to a medical condition. The grounds for rejection were consequently prima facie discriminatory. However, the refusal to employ was rooted in a standard: having applicants undergo a medical assessment as prescribed in the Treasury Board Secretariat's *Occupational Health Evaluation Standard* [OHES]. Health Canada conducts the assessment in accordance with

the criteria of the *Health Canada Category III Medical Assessment* developed specifically for CBSA employees. The latter simply accepts the outcome. The investigator concluded that the CBSA adopted this assessment as part of the hiring process for reasons related to the position. Due to the nature of their work, CBSA officers must be in good physical and mental condition. Nothing was raised in the investigation to imply that this practice was adopted other than in the honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose. This assessment is reasonably necessary to fulfilment of that purpose. The CBSA also takes into account requests for accommodation from applicants but did not receive any from the Applicant.

[13] On March 9, 2016, after reviewing the reports, the Commission decided to return the complaints to the investigation phase due to a lack of information as to justification of the imposition of medical requirements for the position. This is because, although the medical criteria may constitute a prima facie discriminatory practice, the imposition of such requirements may be acceptable if the employer successfully demonstrates that they are a bona fide occupational requirement (see *British Columbia [Public Service Employee Relations Commission] v. BCGSEU*, [1999] 3 SCR 3, 176 DLR (4th) 1 [*Meiorin* cited to SCR]). Similarly, the party that applies the criteria, in this case Health Canada, may demonstrate that their application constitutes a bona fide ground. Now, the Commission finds that the investigation reports do not provide sufficient information concerning justification of the medical criteria for it to render a final decision. It also proposes a series of questions meriting more detailed analysis by the investigator.

IV. Supplementary investigation and final decision

[14] A second investigation was conducted by the same investigator despite the fact that the Applicant expressed concerns to the Commission regarding her impartiality subsequent to comments she apparently made concerning him. On November 28, 2016, the investigator prepared two new reports again recommending dismissal of the complaints. The investigator adopted a similar analytical framework in the two cases even though the complaint against Health Canada was analyzed under section 5 and the complaint against the CBSA under section 7. First, the investigator examined whether the alleged treatment—in the case of the complaint against the CBSA, failure to obtain employment, and in the case of that against Health Canada, discrimination in the provision of service—had occurred and, if so, was directly or indirectly related to the Applicant's medical condition. In the present case, it appeared clear to her that the Applicant had failed the medical assessment and consequently not obtained employment due to his medical condition. Next, the investigator examined the "standard" or practice cited by the two institutions in differentiating adversely against or refusing to employ the Applicant.

[15] In the case of Health Canada, this standard is to indicate that an applicant has not met the medical requirements if an unstable medical condition prevents assessment of him or her. For the CBSA, it is instead a matter of declining to hire applicants who have not achieved a satisfactory outcome on the medical assessment. In the end, the investigator concluded that for both institutions, the use of this "standard" was warranted according to the three criteria identified in *Meiorin* (at paragraph 54), these being that the standard was adopted for a purpose rationally connected to the performance of the job; that the standard was adopted in an honest and good

faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. Each aspect of these conclusions is justified by detailed reasoning.

[16] In two decision letters dated April 18, 2017, the Commission advised the Applicant that both of his complaints had been dismissed under subparagraph 44(3)(b)(i) of the CHRA. With regard to the complaint against the CBSA, the Commission essentially accepts the conclusions of the two investigation reports. It adds, however, that it is not enough for an employer to accommodate an applicant. The standard followed—in this case, use of a medical assessment—must also incorporate the concepts of equality and accommodation. In the present case, in light of the brief duration of employment and the large number of applicants, it was reasonable for the CBSA to have applicants undergo a medical assessment several weeks or months prior to the anticipated start date of employment. Allowing the Applicant to have a second assessment would have posed an excessive constraint. With respect to the complaint against Health Canada, the Commission limits itself to noting that the initial recommendation was upheld: review of the complaint by a tribunal was not warranted.

V. Standard of review

[17] According to the case law, the Commission's screening of complaints is to be reviewed on the standard of reasonableness (see *Joshi v. Canadian Imperial Bank of Commerce*, 2014 FC 552, at paragraphs 53–55, affd by 2015 FCA 92; *2553-4330 Québec Inc. v. Duverger*, 2018 FC 377, at paragraph 8). With respect to interference with the Applicant's constitutional rights, the Supreme Court's analytical framework in *Doré v. Barreau du Québec*, 2012 SCC 12,

at paragraph 7, is applicable. Lastly, the correctness standard of review applies to issues of procedural fairness (see *Canada [Citizenship and Immigration] v. Khosa*, 2009 SCC 12, at paragraph 43).

VI. Constitutionality of screening process

[18] The Applicant claims that subparagraph 44(3)(b)(i) of the CHRA is unconstitutional and seeks a declaration of invalidity to that effect from this Court because the current access scheme in relation to the Tribunal is inconsistent with the right of access to justice.

[19] The Applicant submits that the right of access to justice arises from section 96 of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict, c. 3, reproduced in RSC 1985, Appendix II, No. 5 [*Constitution Act, 1867*] (pursuant also to *Trial Lawyers Association of British Columbia v. British Columbia [Attorney General]*, 2014 SCC 59 [*Trial Lawyers*]; *Hryniak v. Mauldin*, 2014 SCC 7; *BCGEU v. British Columbia [Attorney General]*, [1988] 2 SCR 214, 53 DLR (4th) 1 [*BCGEU* cited to SCR]). Now, international law should serve in defining the content of this right (see *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4, at paragraph 64; see also *Syndicat des employées et employés professionnels et de bureau, section locale 573 [CTC-FTQ] c. Commission de la construction du Québec*, 2014 QCCA 368, at paragraph 68). In fact, a number of international instruments indicate that the right to a fair process includes the right of access to the courts. While reasonable limits to this right may exist, such as costs, they must not hinder litigants' access to the courts to rule on their disputes. In the present case, since the Commission is not a court, the option to file a complaint is not sufficient to guarantee access to justice. The screening process adversely affects this right by way not of its

existence but of the broad discretion given to the Commission: subparagraph 44(3)(b)(i) essentially authorizes the Commission to take on the role of the Tribunal. Complaints should be dismissed only if there is no reasonable possibility that they will be allowed.

[20] The Respondent argues that none of the Applicant's constitutional rights were violated. Although access to justice may be an essential element of the rule of law principle and the Supreme Court has recognized its importance, there is no legal basis in Canadian law for a general and absolute right of access to justice (see *Trial Lawyers*, *BCGEU*, *Hryniak*). In *Trial Lawyers*, access to justice was examined in the context of protecting the inherent jurisdiction of superior courts guaranteed by section 96 of the *Constitution Act, 1867*. That being the case, this protection is not relevant in the context of the Commission or the Tribunal. Regardless, there exists a proportionate balance between the Commission's screening mandate and access to justice among persons claiming to be victims of discrimination. The Commission maintains administrative effectiveness while also ensuring that complainants are heard. By increasing the effectiveness of the judicial system, the Commission instead contributes to improving access to justice. The Commission's complaint process constitutes adequate recourse, and complainants have the option to apply for judicial review of decisions. With respect to violation of the right to equality, the Respondent argues that the Court should not address these allegations as they are vague and lacking supporting evidence (see *Agnaou v. Canada [Attorney General]*, 2015 FCA 30, at paragraph 62).

[21] We must examine first the purpose of the CHRA and then the Commission's complaint review process.

[22] The CHRA seeks to prevent discrimination within institutions, employers and service providers under federal jurisdiction. Section 3 sets out prohibited grounds of discrimination under the scheme, which include disability. The CHRA goes on to define various prohibited practices. Among service providers, for example, an act is discriminatory where it is based on a prohibited ground of discrimination. This includes denying an individual access to a service or differentiating adversely in relation to an individual (section 5). It is also prohibited to refuse to employ an individual on a prohibited ground of discrimination (section 7). However, the CHRA provides for certain exceptions. As such, any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment that is established by an employer to be based on a bona fide occupational requirement is not a discriminatory act (paragraph 15(1)(a)).

[23] In accordance with the provisions of Part III of the CHRA, the Commission has the power to receive and address complaints of discriminatory acts—including any act listed in sections 5 through 14.1 of the CHRA—that are not inadmissible on other grounds (subsections 40(1), (5) and (7) and sections 41 and 42). It has already been stated more than once but merits repeating once again: the Commission is not a decision-making body and instead plays a review and screening role (see *Cooper v. Canada [Human Rights Commission]*, [1996] 3 SCR 854, at paragraph 53, 140 DLR (4th) 193 [*Cooper* cited to SCR]; *Halifax [Regional Municipality] v. Nova Scotia [Human Rights Commission]*, 2012 SCC 10, at paragraph 23 [*Halifax*]).

[24] In this context, the Commission may designate a person—referred to as an "investigator"—to investigate a complaint (subsection 43(1)). The investigator shall submit a report as soon as possible after the conclusion of an investigation (subsection 44(1)). On receipt of the investigation report, at least three outcomes are possible. The Commission may: (1) refer the complainant to another appropriate authority if the complainant ought to exhaust grievance or review procedures otherwise reasonably available (subsection 44(2)); (2) request the Chairperson of the Tribunal to institute an inquiry into the complaint if the Commission is satisfied that an inquiry into the complaint is warranted and the complaint is not otherwise inadmissible (paragraph 44(3)(a)); or (3) dismiss the complaint if it is satisfied that, having regard to all the circumstances of the complaint, an inquiry into the complaint is not warranted or the complaint is otherwise inadmissible (paragraph 44(3)(b)). At this point, it is up to the Commission only to determine whether a review of the complaint is warranted, that is, "determine whether there is a reasonable basis in the evidence for proceeding to the next stage" (*Syndicat des employés de production du Québec et de l'Acadie v. Canada [Canadian Human Rights Commission]*, [1989] 2 SCR 879, at p. 899, 62 DLR (4th) 385 [*SEPQA* cited to SCR]).

[25] In the present case, in light of the existence of mechanisms for judicial review of the Commission's decisions, the Applicant has not successfully demonstrated to the Court's satisfaction that subparagraph 44(3)(b)(i) of the CHRA is unconstitutional because it would grant overly broad discretion to the Commission. Regardless, in accordance with the principle of parliamentary supremacy, a judge may invalidate a legislative provision under section 52 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c-11 [*Constitution Act, 1982*], only if the provision violates the Constitution. Principles taken from

international law may certainly serve as interpretive tools. Indeed, Canadian laws are to be interpreted so as to give effect to Canada's international obligations in the absence of legislative provisions to the contrary (see e.g. *R v. Hape*, 2007 SCC 26, at paragraph 53). However, principles of international law may not be used to invalidate a legislative provision validly adopted by Parliament. International treaty obligations must be incorporated into Canadian law in order to amend domestic law (see Henri Brun, Guy Tremblay and Eugénie Brouillet, *Droit constitutionnel*, 6th Ed., Cowansville QC, Éditions Yvon Blais, 2014 at p. 688 [Brun & Tremblay]). In the present case, in addition to the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, the Applicant cites international instruments to which Canada is not even a signatory. The Covenants, meanwhile, may provide a basis for recourse to the United Nations but may not be applied directly by Canadian courts (see Brun & Tremblay at p. 683, citing *Ahani v. Canada [Attorney General]*, 58 OR (3d) 107, [2002] OJ No. 431 (QL) (ONCA), leave to appeal to the SCC refused). The Applicant consequently may not rely on international law to justify the existence of an absolute right of access to the courts and certainly may not rely on these instruments to give weight to a declaration of constitutional invalidity.

[26] While the Supreme Court has on numerous occasions recognized the importance of access to justice, there is no constitutional right of access to justice to statutory tribunals such as the Canadian Human Rights Tribunal. In *BCGEU* at paragraph 24, the Supreme Court recognized that access to justice was an essential element of the rule of law principle. However, this recognition did not have the effect of constitutionalizing an absolute right of access to justice (see *Trial Lawyers* at paragraph 20, citing *British Columbia [Attorney General] v. Christie*,

2007 SCC 21, at paragraph 17). Moreover, in *Trial Lawyers*, access to justice was examined in the context of protecting the inherent jurisdiction of superior courts guaranteed by section 96 of the *Constitution Act, 1867*. In the present case, the Commission's complaint screening process has nothing indeed to do with the jurisdiction of superior courts. I recognize that it would be desirable nevertheless that the Commission improve the rapidity, transparency and uniformity of its complaint handling and referral process. One might also ask whether, in some cases, the Commission does not go a little too far in the screening phase, where it occasionally appears to undertake a much more detailed review of a complaint than would have been expected at that stage. However, a situation of this nature may still be corrected upon review of the reasonableness of the Commission's decision insofar as an applicant is able to demonstrate that he or she has suffered detriment—which does not apply to the present case.

VII. Reasonableness of the decision

[27] The Applicant challenges the Commission's dismissal of the complaints on multiple grounds. First, he submits that the complaint against Health Canada should have been reviewed under section 7 in addition to section 5. The CBSA has delegated to Health Canada the authority to assess applicants. Health Canada consequently plays a role in the staff selection process. The CBSA states further that it has no control over the assessment outcome. As a result, the investigator excluded the application of a relevant provision. The Applicant adds that it is unreasonable to apply the same medical requirements to student officers as to regular officers since their working conditions are not the same. The medical assessment is consequently too strict in relation to the actual working conditions. Moreover, Health Canada's failure to provide him details concerning his active condition prevented him from requesting accommodation and

contesting the assessment. It is paradoxical that the report concludes that the condition prevented his assessment but that his application was subsequently rejected. The investigator neglected to analyze these elements. With regard to the CBSA, having 160 applicants to assess cannot serve as justification for denying him a second assessment; this is not an excessive constraint. Finally, it would be discriminatory from a financial perspective to evaluate the complaint differently because it involved a short employment contract.

[28] The Respondent argues that dismissal of the complaints was a reasonable outcome. Together, the investigator's conclusions are based on the evidence in the record and the relevant provisions. In this regard, even in the presence of evidence of discrimination on prohibited grounds, the investigator then had to review the employer's or service provider's justification. The analysis in *Meiorin* was established in the context of employment but also applies to the provision of services (see *British Columbia [Superintendent of Motor Vehicles] v. British Columbia [Council of Human Rights]*, [1999] 3 SCR 868, 181 DLR (4th) 385 [*British Columbia* cited to SCR]). The investigator concluded that the practices of Health Canada and the CBSA were discriminatory but that dismissal of the complaints was justified nonetheless in light of grounds warranting the discriminatory acts. The Respondent is of the view that the Commission analyzed the facts in the record using the applicable statutory framework in relation to both Health Canada and the CBSA. In both cases, the investigator considered the entire evidence and the various arguments submitted by the parties. For example, the Respondent had the opportunity to submit its observations to the Commission, notably concerning the differences in the duties performed by student officers and regular officers. The investigator has already addressed this issue. The Respondent notes further that the Commission is not required to make an explicit

finding on each argument raised by a complainant (see *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador [Treasury Board]*, 2011 SCC 62, at paragraph 16). The Court must show deference to this assessment. Additionally, the Respondent submits that it was reasonable to review the complaint against Health Canada under section 5. Section 7 addresses the refusal to employ or to continue to employ an individual. That being the case, in conducting the medical assessment, Health Canada was not likely to employ the Applicant within the meaning of section 7; this section was consequently inapplicable. Subsequent to the investigator's report, it was the Commission's role to evaluate and weigh the evidence to determine whether review of the complaint by the Tribunal was warranted in the present case. In short, the decisions are reasonable.

[29] It is to be noted that for the purpose of analyzing the reasonableness of the Commission's decision, the investigator's reports constitute an integral part of the reasons for decision (see *Sketchley v. Canada [Attorney General]*, 2005 FCA 404, at paragraph 37 [*Sketchley*]).

[30] As I explained above, the Commission's role during the complaint screening phase should be similar to that of a judge conducting a preliminary investigation (*Cooper*, at paragraph 53). As such, the Commission and the investigator it appoints must examine the evidence to determine whether it is sufficient to warrant a detailed review, or whether there is "a reasonable basis in the evidence for proceeding to the next stage" (*SEQPA* at p. 899). This is a preliminary review of the record, not a detailed review of the issue. The Commission is not required to determine whether the complainant is likely to win his or her case (see *Halifax*, at

paragraph 23). In so doing, it would necessarily run the likelihood of taking on the Tribunal's role. Acting in this manner, it would encounter the necessary intervention of this Court.

[31] That being said, this issue was not raised by the Applicant with respect to evaluating the decision's reasonableness. As discussed earlier, the Applicant asserts that, in general, the Commission tends to take on the Tribunal's role during the complaint screening phase, hence the unconstitutionality of the legislative scheme. However, he does not explain how, specifically, the investigator and the Commission went too far in their evaluation of the two complaints before this Court. Moreover, the arguments submitted by the Applicant as to the unreasonableness of both decisions are inadequate to allow this Court to conclude in his favour. While the investigator conducted an analysis of the case similar to that which the Tribunal would have possibly undertaken, I find it necessary nonetheless to exercise restraint concerning her analysis of the case and her recommendation not to refer the complaints to the Tribunal. The investigator's reports and the decisions challenged are reasonable. In the context of the evidence in the record and the applicable law, intervention is not warranted, particularly since the detriment alleged by the Applicant has not been demonstrated. The judicial system should not promote the proliferation of avenues of theoretical recourse such as in the present case.

[32] In this case, the Applicant has not convinced me that reviewable errors were committed. Indeed, with respect to both complaints, the investigator reviewed the evidence following the approach recommended by the Supreme Court in *Meiorin*, which consists of determining through use of a three-step test whether a prima facie discriminatory practice is a bona fide occupational requirement. As pointed out fairly by the Respondent, this analytical framework

applies to complaints concerning not only employment but also the provision of services (see *British Columbia*, at paragraph 19). Although *Meiorin* and *British Columbia* involved complaints under the British Columbia *Human Rights Code*, the principles are also applicable pursuant to the CHRA (see e.g. *Sketchley*, at paragraph 86; *Walsh v. Canada [Attorney General]*, 2017 FC 451).

[33] As such, in light of application of the analytical framework from *Meiorin* beyond the strict context of refusal to employ, I do not find that a review of the complaint against Health Canada under section 7 rather than section 5 would have had decisive impact on the outcome. Moreover, although Health Canada was involved in the hiring process, it did not ultimately have the power to refuse to employ the Applicant. To this extent, it was not unreasonable to consider that Health Canada, when conducting a medical assessment on behalf of another department, was acting as a service provider rather than a potential employer. I do not see any reviewable errors in this regard.

[34] Both reports attest to serious and complete investigations. The investigator also considered the various questions raised by the Commission at the time of referring the complaints back for a second, more detailed, investigation. It is not the role of this Court in judicial review to re-evaluate evidence and arguments already examined by the Commission. Yet that is what the Applicant is asking us to do. The Applicant argues that it is unreasonable to apply the same medical requirements to student officers as to regular officers since their working conditions are not the same. However, this issue was already examined by the investigator in the investigation report concerning the CBSA (see paragraphs 16 to 19 of the report). The

investigator accepted the CBSA's explanation whereby all employees performing enforcement functions undergo the same medical assessment, including students, since their positions are associated with essentially the same risks. Having collected the evidence, the investigator had the option to accept this explanation from the CBSA. I do not find this unreasonable. Similarly, the Applicant asserts that it was paradoxical that the report concludes that the condition prevented his assessment but that his application was subsequently rejected. This argument was also examined by the investigator in the report concerning Health Canada (see report at paragraph 16). Here again, the investigator accepted Health Canada's explanation to the effect that when an applicant could not be assessed due to an active condition, the practice was to indicate that he or she had not met the medical requirements. This is certainly not the most transparent of practices, but it is not up to this Court to substitute itself for the investigator. The same applies to the Applicant's argument that having 160 applicants to assess could not serve as justification for failing to conduct a second assessment. Once again, the Commission expressly concluded that conducting a second assessment would have posed an excessive constraint (see decision concerning complaint against CBSA). The Applicant simply disagrees with this conclusion but does not identify any reviewable errors.

[35] Finally, the Applicant asserts that the Commission did not refer his complaint to the Tribunal—without specifying which one—because it involved a short-term employment contract, which would be discriminatory. However, close reading of the reasons makes clear that the Commission considered the duration of the employment contract in its review of excessive constraints. In light of the duration of the contract (four months), having the Applicant undergo a second assessment would have posed an excessive constraint. This finding is reasonable. It

cannot be claimed that the Commission dismissed the complaint simply due to the duration of the contract.

[36] The decisions are consequently reasonable overall and must be upheld.

VIII. Allegations of bias

[37] The Applicant finds it problematic that the same investigator conducted the supplementary investigation. He raised the issue to the Commission in a letter dated June 7, 2016, but did not receive a response. He argues that his allegations of bias should have been reviewed by the Commission. The Respondent counters that the designation of an investigator is entirely up to the Commission, which is in charge of its own procedure (see subsection 43(1) of the CHRA; see also *Sketchley*, paragraph 119).

[38] The burden of demonstrating bias falls on the person alleging the existence thereof (*R v. S [RD]*, [1997] 3 SCR 484, at paragraph 114, 151 DLR (4th) 193 [*R v. S (RD)*]). It is not necessary to show actual bias but rather the reasonable apprehension of bias. This involves asking what an informed person, viewing the matter realistically and practically, and having thought the matter through, would conclude. Would he think that it is more likely than not that the decision-maker, whether consciously or unconsciously, would not decide fairly? (*Committee for Justice and Liberty v. National Energy Board*, [1978] 1 SCR 369, at p. 394, 68 DLR (3rd) 716, de Grandpré J., dissenting, adopted by the majority, notably in *R v. S [RD]*, at paragraph 111; *Wewaykum Indian Band v. Canada*, 2003 SCC 45, at paragraph 74 [*Wewaykum*]). Such allegations must rest on serious grounds in light of the strong presumption of impartiality

enjoyed by decision-makers (*Wewaykum*, at paragraph 75). In the present case, although the Applicant's allegations may potentially be serious, they are nonetheless vague and lack supporting evidence. On the contrary, the investigation reports attest to detailed and complete investigations. There is nothing prima facie to indicate that the investigator did not conduct an objective review of the case. The Applicant has consequently failed to submit adequate arguments to conclude as to the existence of a reasonable apprehension of bias on the part of the investigator.

IX. Conclusion

[39] This application is dismissed. The lump sum of $750, inclusive of disbursements, proposed by the Respondent is payable to the Respondent for costs in light of all the circumstances surrounding the case, the nature of the issues raised, the Applicant's particular situation and the outcome of the matter.

JUDGMENT in T-747-17 and T-748-17

THIS COURT'S JUDGMENT is that the applications for judicial review are dismissed. The Respondent is entitled to costs in the amount of $750.

"Luc Martineau"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-747-17
STYLE OF CAUSE:	DAVID LESSARD-GAUVIN v THE ATTORNEY GENERAL OF CANADA
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PLACE OF HEARING:	QUÉBEC, QUEBEC
DATE OF HEARING:	JUNE 26, 2018
JUDGMENT AND REASONS:	MARTINEAU J.
DATED:	JULY 31, 2018

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Marilou Bordeleau	FOR THE RESPONDENT

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