Federal Court of Appeal Cour d'appel fédérale

Date: 20150707

Docket: A-141-13

Citation: 2015 FCA 160

CORAM: **TRUDEL J.A.**
STRATAS J.A.
WEBB J.A.

BETWEEN:

MICHÈLE BERGERON

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Ottawa, Ontario, on June 4, 2014.

Judgment delivered at Ottawa, Ontario, on July 7, 2015.

REASONS FOR JUDGMENT BY: STRATAS J.A.

CONCURRED IN BY: TRUDEL J.A.
WEBB J.A.

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REASONS FOR JUDGMENT

STRATAS J.A.

[1] Ms. Bergeron appeals from the judgment dated March 25, 2013 of the Federal Court (*per* Justice Zinn): 2013 FC 301.

[2] In that judgment, the Federal Court determined two applications for judicial review. In those applications, Ms. Bergeron sought to set aside a decision of the Canadian Human Rights

Commission. In that decision, the Commission dismissed two human rights complaints Ms. Bergeron made under the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6. In the Commission's view, they had already been addressed and remedied in two grievances Ms. Bergeron brought.

[3] In the Federal Court, Ms. Bergeron succeeded in one of her applications for judicial review (file T-316-12). The respondent did not appeal to this Court. That matter is not before us.

[4] The other application for judicial review brought by Ms. Bergeron (file T-315-12) is before us. The Federal Court dismissed Ms. Bergeron's application. She now appeals to this Court. She alleges that the Commission's decision must be set aside because it is unreasonable. She adds that the Commission's investigation was not sufficiently thorough and so the Commission's decision was the product of procedural unfairness.

[5] In my view, the Commission's decision was both reasonable and procedurally fair. Therefore, I would dismiss the appeal with costs.

A. The facts

(1) The taking of leave

[6] Ms. Bergeron was a lawyer at the Department of Justice from March 1999 to May 2001. She developed chronic fatigue syndrome. The Department granted her sick leave, disability leave and, later, extensions to her leave. During her leave, she received long-term disability payments.

(2) Discussions about a return to work

[7] In 2005, roughly four years later after her leave began, Ms. Bergeron raised the possibility of returning to work with the Department. Her manager received a medical certificate supporting her return to work.

[8] The Department sent Ms. Bergeron to a Health Canada physician for an assessment. After receiving input, that physician recommended that Ms. Bergeron should gradually return to full-time work over a period of seven months.

[9] Ms. Bergeron's physician and her psychiatrist commented on this return-to-work plan. Her physician agreed with the plan for the most part; he wanted monthly health assessments to be included in the return-to-work schedule. Ms. Bergeron's psychiatrist found the recommendation of the Health Canada physician "eminently reasonable and fair."

[10] With these comments, the Health Canada physician provided his final recommendation to the Department of Justice. He maintained his original recommendation that Ms. Bergeron return to work but added that if she could not fulfil her work requirements or if “additional concerns” arose, she should stop work.

[11] Ms. Bergeron had concerns about that addition to the recommendation. She also expressed concern about the date of her return to full-time work. Her physician echoed those concerns. Her psychiatrist, originally satisfied with the proposal, expressed a preference for more flexibility in the return-to-work plan. However, the Health Canada physician did not change his recommendation.

[12] Matters stood there until 2007. In March, April, and August 2007, a manager at the Department invited Ms. Bergeron to meet and discuss her return to work. Ms. Bergeron refused these invitations. The proposed date of one of the meetings was too soon. And she wanted to have an agreement in place before returning to work.

[13] Further, in July and August 2007, the manager sent letters proposing dates for Ms. Bergeron’s return to work. Ms. Bergeron refused to agree to any dates because she felt she would be putting her health at risk.

(3) The Department's final offer

[14] In May 2008, the Department gave Ms. Bergeron an offer to return to work on the basis of the recommendation of the Health Canada physician. This was a final offer, in the sense that the Department informed her that if she did not accept it, her position would be filled by someone else. As matters turned out, this was not the last offer the Department made.

[15] The Department's May 2008 offer removed all references to full-time hours and stated that any decision to stop work would be made only after consulting with the human resource department, the insurance company, and Ms. Bergeron's physicians.

[16] Ms. Bergeron rejected this offer. At the end of June 2008—seven years after Ms. Bergeron had been away from work—the Department informed her that it intended to fill her position.

(4) Ms. Bergeron starts proceedings

[17] In response, Ms. Bergeron filed two grievances with the Department and filed two complaints with the Commission under the *Canadian Human Rights Act*. For present purposes, only the grievance and the complaint that is the subject-matter of the Federal Court's decision under appeal—her complaint of September 26, 2008—shall be described.

(5) The grievance and the relevant complaint compared

[18] The grievance and the relevant complaint cover essentially the same subject-matter:

- *The grievance.* Ms. Bergeron complained of her manager's "on-going discriminatory conduct" since 2005, in particular the manager's "consistent and persistent failure to provide [her] with ability-appropriate accommodations." She also complained about the Department's actions in staffing her position. She founded the grievance "on the application of Sections 2, 3, 7, 14(1)(*c*) and 15(2) of the *Canadian Human Rights Act*." In submissions filed in support of the grievance, she characterized the Department's failure to accommodate her return to work and the decision to staff her position as "disciplinary action." She sought the cessation of the Department's efforts to staff her position, restoration to her position with a view to discussing "an approach to this issue which is equitable, acceptable to both parties and non-discriminatory in nature," and compensatory relief.

- *The complaint.* Ms. Bergeron alleged that the Department discriminated against her on the basis of disability by failing to accommodate her and by staffing her position. Specifically, the Department refused to allow her to come back to work on the basis of the plan she developed with her physician and psychiatrist. She also attacked a Treasury Board policy that maintained disabled persons on a priority staffing list for only one year as discriminatory. She cited various sections

of the *Canadian Human Rights Act*. She said that the discrimination caused her mental distress and aggravated her physical symptoms.

(6) Events following the launching of proceedings

[19] In February 2009, after Ms. Bergeron had issued her complaint and launched her grievance, the Department extended her leave period for another two months and offered her a position in her old unit and a return to work based on her own physician's plan. She could consult a physician of her own choice regarding the return-to-work plan. In exchange, the Department asked her to discontinue her various proceedings. Ms. Bergeron refused.

(7) The relevant grievance decision

[20] The grievance officer, the Associate Deputy Minister of Justice, found no violation of the *Canadian Human Rights Act*. However, she upheld Ms. Bergeron's grievance in part.

[21] For Ms. Bergeron, this was no small win. It will be recalled that Ms. Bergeron sought the cessation of efforts to staff her position and restoration to her position in the Department with a view to discussing "an approach to this issue which is equitable, acceptable to both parties and non-discriminatory in nature." The grievance officer essentially granted that relief: she authorized a further five month period of leave without pay to allow discussions to take place concerning a return-to-work plan. She placed no restrictions on the return-to-work plan that Ms. Bergeron could propose and could discuss with the Department.

[22] Ms. Bergeron did not accept this. Instead, two days before her recently-extended leave expired, she demanded that the Department pay damages and costs.

(8) The grievance decision becomes final

[23] Ms. Bergeron's union declined to exercise its right under the *Public Service Labour Relations Act*, S.C. 2003, c. 22 to refer her grievance to adjudication.

[24] Ms. Bergeron could have referred her grievance to adjudication but she did not. As mentioned above, Ms. Bergeron characterized the Department's failure to accommodate her and to fill her position as a "disciplinary action" and "disguised discipline." An employee subject to disciplinary action can refer her grievance against that disciplinary action to adjudication without the union's support or representation as long as the grievance does not involve the interpretation or application of a collective agreement or arbitral award: *Public Service Labour Relations Act*, section 209. Since neither the union nor Ms. Bergeron referred the grievance to adjudication, the decision of the grievance officer became final. Ms. Bergeron has never explained why she did not take her grievance further.

(9) A further offer

[25] In June 2010, the Department offered Ms. Bergeron the options of resigning, retiring or applying for early retirement on medical grounds. She rejected all of these options. In October 2010, the Department terminated Ms. Bergeron's employment.

(10) The Commission's investigation of the complaint

[26] The Commission assigned an investigator to look into Ms. Bergeron's complaint. The investigator invited the parties to make submissions on whether the grievance process adequately addressed the issues raised in the complaint. If so, then the complaint would be "trivial, frivolous, vexatious or…in bad faith" within the meaning of paragraph 41(1)(*d*) of the *Canadian Human Rights Act*. The investigator specifically asked the parties to address eight relevant factors.

[27] Submissions of the parties followed. The investigator considered the submissions and issued a report. The report recommended that the complaint be dismissed under paragraph 41(1)(*d*) of the *Canadian Human Rights Act* because, in the words of the Act, the "allegations of discrimination in the complaint were addressed through a review procedure otherwise reasonably available to the complainant."

(11) Events following the investigator's report

[28] The investigator invited submissions on the report. Ms. Bergeron filed two sets of submissions.

[29] The Commission appointed a conciliator to try to settle the complaint. The conciliation was unsuccessful.

[30] After the unsuccessful conciliation, Ms. Bergeron asked for a further opportunity to file submissions on the investigator's report. Although the parties had already exchanged submissions, the Commission granted Ms. Bergeron's request. She filed a further ten pages of submissions on the investigator's report.

(12) The Commission's decision

[31] The investigator's report, the parties' submissions and some relevant documents were forwarded to the Commission for decision.

[32] The Commission accepted the recommendation of the investigator, adopting the analysis portion of the investigator's report, and dismissed the complaint under paragraph 41(1)(*d*) of the *Canadian Human Rights Act*. In the Commission's view, the grievance procedure adequately addressed the issues raised in the complaint.

(13) Judicial review proceedings in the Federal Court

[33] Ms. Bergeron applied to the Federal Court to set aside the Commission's decision. Her primary ground of attack was the unreasonableness of the Commission's decision.

[34] The Federal Court conducted reasonableness review of the Commission's decision. In assessing whether the Commission's decision fell within a range of acceptable and defensible outcomes, it held that the range of acceptability and defensibility was quite broad. In its words,

the Commission should be given "great latitude" in assessing whether another procedure, here the grievance proceedings, adequately addressed the issues in the complaint (at paragraph 39).

[35] The Federal Court examined the evidentiary record and the investigator's report and concluded that the outcome reached by the Commission was acceptable and defensible. In its view, the evidentiary record "amply support[ed]" the Commission's decision (at paragraph 41):

> While the Commission's reasons in the First Decision as contained only in the letter given to the parties are far from perfect; the record before it and, in particular, the Section 40/41 Report prepared for the First Complaint, amply supports its conclusion. Through her First Grievance, Ms. Bergeron had raised virtually the same issues as she raised in the First Complaint; she had asked for virtually the same relief; she had the opportunity to present her case (although she did not even fully avail herself of that right); she received a decision which made a finding on her allegations that there was a failure to accommodate (although, largely because of her own delay, it dismissed them); and she received another "let's negotiate" back-to-work offer which evidenced that, in fact, the accommodation process was still on-going and that therefore, in law, her complaint was not yet ripe.

[36] The Federal Court acknowledged that the complaint differed from the grievance in one respect: it raised the issue whether a Treasury Board policy of "maintaining disabled persons on the priority list for only one year" was discriminatory. This was not part of the grievance. However, to the Federal Court, this was of no consequence (at paragraph 42):

> …Ms. Bergeron's submissions in response to the Section 40/41 Report prepared for the First Complaint did not seriously pursue the argument that the Treasury Board policy would be dealt with if her complaint was dismissed; nor was that issue pursued by Ms. Bergeron in this judicial review. Thus, in addition to the fact that whether the exact issues were raised in both processes is but one factor in the 41(1)(*d*) analysis, the issue of the Treasury Board policy is of negligible significance in this Court's review of the Commission's decision.

[37] In the Federal Court, Ms. Bergeron submitted that the grievance process was not independent: the grievance officer was the Associate Deputy Minister of Justice. The Federal Court rejected her submission (paragraph 43):

> Moreover, although at all times Ms. Bergeron has complained that the grievance process was not independent and thus cannot be considered to have adequately addressed her complaints, there was no evidence that Ms. Miller was biased or did not decide the grievances impartially; nor, in these circumstances, is the alleged lack of independence in the grievance process sufficient to render the Commission's decision unreasonable: the alleged deficiencies are speculative, and, again, only relate to one factor in the above-mentioned list of factors. Most if not all of the other factors weighed in favour of dismissing the complaint.

[38] The Federal Court concluded that the Commission's decision fell within a range of acceptable and defensible outcomes and was reasonable. It dismissed Ms. Bergeron's application for judicial review.

[39] Ms. Bergeron now appeals to this Court. She submits that:

(1) the Commission's decision on the merits is unreasonable; and

(2) the Commission did not act in a procedurally fair manner because it failed to investigate her complaint thoroughly.

B. Analysis

(1) The reasonableness of the Commission's decision on the merits

[40] On appeal, first we must assess whether the Federal Court properly chose reasonableness as the standard of review: *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 at paragraphs 45-47.

[41] The parties both submit that the Federal Court properly chose reasonableness as the standard of review. I agree. The Commissioner's decision was a preliminary screening decisions involving fact-based discretion with elements of expertise and specialization. More will be said about this below when discussing the margin of appreciation to which the Commissioner is entitled. For present purposes, decisions of that sort are presumed to be subject to reasonableness review: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, above at paragraphs 51 and 53. I note that relatively recently the Supreme Court also applied the reasonableness standard when reviewing a preliminary screening decision of a provincial human rights commission: *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2012 SCC 10, [2012] 1 S.C.R. 364.

[42] Having found that the Federal Court selected the appropriate standard of review—here, reasonableness—this Court must now determine whether the Federal Court properly concluded that the Commissioner's decision was reasonable. In other words, we are to step into the shoes of

the Federal Court and conduct reasonableness review ourselves to see if we agree: *Agraira*, above at paragraphs 45-47.

[43] It is now trite that reasonableness review requires us to assess whether the outcome reached by the administrative decision-maker, here the Commission, falls within a range of acceptability and defensibility: *Dunsmuir*, above at paragraph 47.

[44] The Supreme Court in *Dunsmuir* deployed the idea of a range of acceptability and defensibility but offered no comments concerning the nature of the range. By its nature, a range can be broad or narrow. However, later Supreme Court cases have confirmed the idea that the range can be broad or narrow depending on the circumstances: *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5 at paragraphs 17-18 and 23; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at paragraph 59; *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895 at paragraphs 37-41.

[45] In the case at bar, the range—or as some cases put it, the margin of appreciation afforded to the Commission—is quite broad owing to the factual and policy-based task of the Commission: *Canada (Minister of Transport, Infrastructure and Communities) v. Farwaha*, 2014 FCA 56, 455 N.R. 157 at paragraphs 90-99. The Federal Court was correct to state (at paragraph 39) that the Commission gets "great latitude" when courts review decisions such as this. This Court has previously said that very thing: *Sketchley v. Canada (Attorney General)*, 2005

FCA 404, [2006] 3 F.C. 392 at paragraph 38 (screening decisions under section 41 are to be "reviewed with a high degree of deference").

[46] As is shown by the investigator's report, the Commission had to consider several relevant factors. These factors are mainly questions of fact or factually-suffused questions of mixed fact and law:

- What is the nature of the alternate redress mechanism that was used?
- Was there a hearing on the issues?
- Was the complainant permitted to present his or her case?
- Was the decision-maker independent?
- What did the decision-maker decide?
- Did the decision address all of the human rights issues raised in the complaint?
- What remedies were requested in the grievance or other review procedure?
- If the complainant was successful (or partially successful) under the alternate redress procedure, what remedies were awarded?

Importantly, Ms. Bergeron does not challenge the reasonableness or otherwise of the Commission's use of these factors in its assessment.

[47] Further, in considering the breadth of the margin of appreciation to which the Commission is entitled, I note that the Commission's task under paragraph 41(1)(*d*) is to screen out complaints where adequate redress elsewhere has been had. The concept of adequacy is highly judgmental and fact-based, informed in part by the policy that the Commission should not devote scarce resources to matters that have been, in substance, addressed elsewhere or that could have been addressed elsewhere. On this last-mentioned point, a failure to pursue adequate redress elsewhere or to pursue that adequate redress to its full extent can be invoked under paragraph 41(1)(*d*).

[48] In this case, the Commission's decision was well within its margin of appreciation and cannot be set aside. As the Federal Court noted, the record supports the Commission's decision that the grievance proceedings were an adequate recourse and so the decision was acceptable and defensible. I note the following:

- The grievance and the complaint are essentially the same (see paragraph 18, above).

- The grievance allowed for further discussions to take place, discussions that Ms. Bergeron declined to pursue; pursuit of those discussions might have resulted in a return-to-work plan and other accommodations.

- The grievance officer considered the allegations of discrimination which are substantially similar to those in the complaint. The complaint contains the added element of the Treasury Board policy but this is of no moment for the reasons given by the Federal Court at paragraph 42.

- There was no evidence the grievance officer was biased or did not decide the grievances impartially. In this regard, I adopt the reasoning of the Federal Court at paragraph 43.

- The only evidence Ms. Bergeron offers concerning the grievance officer's lack of independence is her status as Associate Deputy Minister. But decisions by departmental officials are not necessarily deficient merely because of their status as departmental officials: *Vaughan v. Canada*, 2005 SCC 11, [2005] 1 S.C.R. 146 at paragraph 37.

- To the extent that the grievance officer lacked sufficient independence because she was a senior official in the Department, Ms. Bergeron could have had access to independent adjudication by proceeding from the grievance officer's decision to independent adjudication under section 209 of the *Public Service Labour Relations Act*: see paragraph 24, above. If an independent adjudicator mattered to her, she could have taken that step. But she did not.

- The independence of the grievance officer is just one of several factors that the Commission had to factually assess, balance and weigh. Absent some unusual consideration, reviewing courts afford a good margin of appreciation to administrative decision-makers over their factual assessments, balancings and weighings.

[49] Another consideration supporting the reasonableness of the Commission's decision is the fact that the list of factors considered by the Commission—set out at paragraph 46 above—is entirely consistent with the factors set out by the Supreme Court in *British Columbia (Worker's Compensation Board) v. Figliola*, 2011 SCC 52, [2011] 3 S.C.R. 422.

[50] In *Figliola*, the Supreme Court identified three factors to be considered when assessing whether a human rights complaint has been appropriately dealt with in an alternative process (at paragraph 37):

- Was there concurrent jurisdiction to decide human rights issues?

- Was the legal issue in the alternate forum essentially the same as the legal issue in the human rights complaint?

- Did the complainant have the opportunity to know the case to meet and have a chance to meet it?

[51] The Commission's decision is consistent with these requirements. The grievance officer had the jurisdiction to decide human rights issues under subsection 208(2) of the *Public Service Labour Relations Act*. She had the ability to grant adequate relief. The issues in the grievance were essentially the same as those raised in the complaint. And Ms. Bergeron had an opportunity to know the case to meet and the chance to meet it. As the factual summary earlier in these reasons shows, she was able to submit multiple submissions at various times.

[52] In support of her submissions on reasonableness, Ms. Bergeron notes that the grievance officer was not an expert in human rights. She adds that the investigator's report wrongly said that the grievance officer was the Department's human rights expert.

[53] While the report indeed did err in this respect, there is no basis for concluding that the grievance officer was insufficiently knowledgeable to deal with the human rights issues in the grievance. Indeed, reviewing the grievance officer's reasons, there is no reason to believe that she was incapable—far from it. And there is no legal requirement that human rights issues be placed only before experts and, in particular, only before members of human rights commissions and tribunals. Rather, other administrative decision-makers are allowed to deal with human rights issues. This furthers the objective of fostering a general culture of respect for human rights in the administrative justice system. See generally *Figliola* at paragraph 37.

[54] Ms. Bergeron also urges the authority of *Berberi v. Canada (A.G.)*, 2013 FC 99 upon us. In that case, like here, the Commission decided not to deal with certain human rights complaints because they were, like here, the subject of grievances. In *Berberi*, the grievances were

withdrawn by her union at the third level. The Federal Court set aside the Commission's decision because it failed to consider the adequacy of the grievance process.

[55] In my view, *Berberi* is distinguishable on its facts. Unlike *Berberi*, in this case an investigator's report was before the Commission. Unlike *Berberi*, the report analyzed, with reference to certain factors, whether the grievance process dealt with the complaint. Also, the grievance process did not arrive at a decision in *Berberi*; here, it did. Here, the grievance officer looked at the essence of Ms. Bergeron's human rights complaints—the alleged lack of accommodation, how the return-to-work plan was handled, and the filling of her position—and ruled on it, giving her some relief. In this case—unlike *Berberi*—the Commission discharged its statutory responsibility to consider the decision on the grievance and the reasons for it and to assess whether it was an adequate recourse.

[56] Ms. Bergeron also submits that the reasons of the Commission were inadequate. She complains that the Commission issued only a three page decision that quoted from the investigator's report and only stated "perfunctorily" that her submissions were considered. The reasons do not deal with all of the matters she raised in her submissions.

[57] As is well-known, the adequacy of reasons is not an independent ground for setting aside an administrative decision, but rather part of the reasonableness analysis: *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708 at paragraph 14.

[58] Further, the reasons of an administrative decision-maker of this type in these circumstances need not address every last matter raised in the submissions put to it:

> Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion (*Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Assn*., [1975] 1 S.C.R. 382, at p. 391). In other words, if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met.

(*Newfoundland Nurses*, above at paragraph 16; see also *Construction Labour Relations v. Driver Iron Inc.*, 2012 SCC 65, [2012] 3 S.C.R. 405 at paragraph 3.)

[59] Further, in assessing reasonableness, reviewing courts are not limited to asking whether the *reasons* are acceptable and defensible. Rather, reviewing courts are to assess whether the *outcome* reached is acceptable and defensible: *Dunsmuir*, above at paragraph 48. In other words, they must assess "whether the decision, viewed as a whole in the context of the record, is reasonable"; *Construction Labour Relations*, above at paragraph 3; *Newfoundland Nurses*, above at paragraph 15. There are limits to this though. The Court cannot cooper up an outcome that the Commission itself would not have reached: *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654 at paragraphs 54-55; *Lemus v. Canada (Citizenship and Immigration)*, 2014 FCA 114, 372 D.L.R. (4th) 567 at paragraphs 27-38.

[60] Indeed, where "the Commission adopts an investigator's recommendations and provides no reasons or only brief reasons," the reviewing court can treat "the investigator's report as constituting the Commission's reasoning" for the purposes of a screening decision under the *Canada Human Rights Act*: *Sketchley*, above at paragraph 37. In this case, in its reasons the Commission went further. It adopted the recommendation of the investigator and the analysis section of the investigator's report.

[61] When viewed in light of the record, the Commission's reasons are not so sparse that this Court cannot engage in reasonableness review: *Leahy v. Canada (Citizenship and Immigration)*, 2012 FCA 227, [2014] 1 F.C. 766. Indeed, as the analysis of reasonableness above shows, the Commission's reasons have not frustrated the Federal Court or this Court from conducting reasonableness review.

[62] Viewing the Commission's reasons in light of the record confirms the reasonableness of its decision. This is not like *Lemus*, above where there was a real concern about the reasonableness of the decision stemming from the reasons of the decision-maker and the Court felt it could not wade into the record to cooper up the outcome reached. The case before us is different: the reasons of the Commission alone do not raise any particular concerns and the record unequivocally supports the outcome the Commission reached. To borrow the words of the Federal Court (at paragraph 41), the record "amply supports" the outcome.

[63] In this case, the brevity of the reasons does not create concerns about transparency or intelligibility: *Dunsmuir*, above at paragraph 47. The reasons, especially viewed in light of the

record and the investigator's report, are sufficient for Ms. Bergeron to understand how the Commission came to its decision: *English-Baker v. Canada (Attorney General)*, 2009 FC 1253 at paragraph 28.

[64] For the foregoing reasons and also for the reasons set out by the Federal Court at paragraphs 41-43 of its reasons, I conclude that no grounds exist for setting aside the Commission's decision on the basis of reasonableness.

(2) The procedural fairness issue: the thoroughness of the investigation

[65] Ms. Bergeron submits that the Commission's investigation was not thorough enough. She says, with some support in the case law, that this is a procedural fairness question that is to be reviewed on a standard of correctness. She adds that although she made submissions on the inadequacy of the investigation to the Federal Court, the Federal Court did not deal with them. The respondent contests this.

[66] The reasons of the Federal Court do not reveal any specific analysis of the thoroughness of the investigation. Therefore, I shall consider the issue afresh.

[67] The law concerning the standard of review for procedural fairness is currently unsettled. The unsettled nature of that law is shown by the Supreme Court's recent decision in *Mission Institution v. Khela*, 2014 SCC 24, [2014] 1 S.C.R. 502, a procedural fairness case. In that decision, the Supreme Court declared, without elaboration, that the standard of review is

correctness but just ten paragraphs later it found that some deference should be owed to the administrative decision-maker on some elements of the procedural decision: at paragraphs 79 and 89.

[68] Some cases of this Court have fastened onto the Supreme Court's statement of correctness in *Khela* without noting the later words of deference: see, *e.g.*, *Air Canada v. Greenglass*, 2014 FCA 288, 468 N.R. 184 at paragraph 26. Those cases have not referred to other cases of this Court that suggest that the standard is not purely correctness and that some deference can come to bear.

[69] For example, this Court has spoken of proceeding under correctness review but in a manner "respectful of the [decision-maker's] choices" with "a degree of deference": *Re:Sound v. Fitness Industry Council of Canada*, 2014 FCA 48, 455 N.R. 87 at paragraph 42. And this Court has also upheld reasonableness review, but on the basis of a variable margin of appreciation being afforded to the decision-maker (as explained above), sometimes a wide one and sometimes no margin at all: *Forest Ethics Advocacy Association v. Canada (National Energy Board)*, 2014 FCA 245, 465 N.R. 152; and for a defence of this position see my dissenting reasons in *Maritime Broadcasting System Limited v. Canadian Media Guild*, 2014 FCA 59, 373 D.L.R. (4th) 167. And in this very context—whether procedural fairness was infringed by an insufficiently thorough investigation under the *Canadian Human Rights Act*—there is authority for the proposition that deference to the fact-based judgment of the Commissioner is warranted: *Slattery v. Canada (Human Rights Commission)*, [1994] 2 F.C. 574, 73 F.T.R. 161 (T.D.) at paragraphs 55-56, aff'd (1996), 205 N.R. 383 (C.A.).

[70] One might also query whether a failure to investigate thoroughly under the Act is a procedural defect, triggering whatever standard of review applies to procedural matters. A decision based on a deficient investigation can be characterized as one that is not substantively acceptable or defensible because it is based on incomplete information, thereby triggering the standard of review for substantive defects governed by *Dunsmuir*, above. As was the case in *Forest Ethics*, above, the line between a procedural concern and a substantive concern can be a blurry one. As this Court explained in *Forest Ethics*, there is much to be said for the view that the same standard of review—reasonableness with variable margins of appreciation depending on the circumstances (as described earlier in these reasons)—should govern all administrative decisions.

[71] So what we have right now is a jurisprudential muddle. And now is not the time to try to resolve it. For one thing, we have not received submissions on the issue in this case. For another, with so many conflicting decisions, perhaps only a reasoned decision of the Supreme Court can provide clarity.

[72] In any event, as will be seen, it is not necessary to resolve this issue here. On this record, even on a standard of correctness, there is no ground to interfere with the Commissioner's decision on the basis of procedural fairness.

[73] Ms. Bergeron submits that the Commission committed procedural error by not investigating the matter thoroughly. She relies upon Federal Court decisions that suggest that Commission investigations must be "thorough and complete" and even "as thorough as

possible”: *Gravelle v. Canada (Attorney General)*, 2006 FC 251, 60 Admin. L.R. (4th) 179 at paragraph 36; *Canadian Broadcasting Corp. v. Syndicat des communications de Radio-Canada*, 2005 FC 466, 272 F.T.R. 116 at paragraphs 36-37.

[74] In my view, these snippets from the Federal Court decisions—not binding upon us—should not be relied upon as requirements for all investigations in all contexts. Taken in the abstract, they can be misleading. While an investigation must be thorough, an investigator need not pursue every last conceivable angle:

- The degree of thoroughness required of an investigation depends on the circumstances of each case. In some cases, one or more facts may resolve the issue under investigation to the investigator’s satisfaction, rendering continued investigation unnecessary.

- Perhaps related to the last point, thoroughness must also be qualified by the need for a workable and administratively effective system for reviewing complaints under the Act: *Slattery* (T.D.), above at paragraph 55, aff’d C.A., above; *Shaw v. Royal Canadian Mounted Police*, 2013 FC 711, 435 F.T.R. 176 at paragraph 31. In some cases, at some point, the utility of further investigation is nil.

- Only “fundamental issues” need be investigated so that complaints can receive the “broad grounds” of the case against them. Put another way, a deficient investigation warranting relief is one where there has been an “unreasonable

omission" in the investigation or the investigation is "clearly deficient": *Slattery* (T.D.), above at paragraphs 56 and 67-69, aff'd C.A., above. For example, a failure to investigate obviously crucial evidence where an omission has been made that cannot be compensated for by making further submissions will result in a finding of lack of procedural fairness: *Sketchley*, above.

- In a section 41 matter, the extent of investigation is limited. An investigator is not to weigh evidence. Rather, the investigator's task is to uncover the facts relevant to the section 41 matter. See generally *McIlvenna v. Bank of Nova Scotia*, 2014 FCA 203, 466 N.R. 195.

[75] The Commission considered Ms. Bergeron's submissions, including those she submitted after the investigator issued her report. The submissions she filed after the report largely repeated information she had previously given the investigator. The investigator's report itself addressed a number of Ms. Bergeron's submissions and materials she provided: Report, paragraphs 16(d)-(h) and 18-21.

[76] To some extent, Ms. Bergeron's submissions smack of a complaint that the investigator's report did not reference everything she had submitted. But an investigator is not required to refer to everything: *Shaw*, above at paragraph 27; *Anderson v. Canada (Attorney General)*, 2013 FC 1040, 71 Admin. L.R. (5th) 1 at paragraph 55. The test in *Slattery* (T.D.), above, aff'd C.A., above, is whether there is an "unreasonable omission" in the investigation or the investigation is

"clearly deficient." The investigator's report need not be an encyclopaedia of everything submitted. The focus must be on the substance of the investigator's findings, not matters of form.

[77] In this case, the process was fair. The investigator was neutral and sufficiently thorough for the purposes of the issue before her, namely whether the grievance was an adequate recourse. She repeatedly sought submissions. Indeed, Ms. Bergeron was allowed to make further submissions well after submissions were formally closed, after the conciliation failed. The investigator prepared a report that identified the issues, the parties' positions, the factors to be applied and the information gathered from the parties. The Commission based its decision on the report and adopted some of the analysis in it.

[78] For the foregoing reasons, I conclude that there is no ground for setting aside the Commission's decision on the basis of procedural unfairness.

C. Proposed disposition

[79] Like the Federal Court, I have not been persuaded that there are any grounds for setting aside the Commission's decision. Accordingly, I would dismiss the appeal with costs.

"David Stratas"
J.A.

"I agree
Johanne Trudel J.A."

"I agree
Wyman W. Webb J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-141-13

APPEAL FROM A JUDGMENT OF THE HONOURABLE MR. JUSTICE ZINN DATED MARCH 25, 2013, NO. T-315-12 AND T-316-12

STYLE OF CAUSE:	MICHÈLE BERGERON v. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	JUNE 4, 2014
REASONS FOR JUDGMENT BY:	STRATAS J.A.
CONCURRED IN BY:	TRUDEL J.A. WEBB J.A.
DATED:	JULY 7, 2015

APPEARANCES:

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