SUPREME COURT OF NOVA SCOTIA

Citation: *MacDonald v. Nova Scotia (Human Rights Commission)*, 2022 NSSC 306

Date: 20221027
Docket: *Halifax No. 494912*
Registry: Halifax

Between:

Frances MacDonald

Applicant

v.

The Nova Scotia Human Rights Commission, The Nova Scotia Government, and General Employees Union, and The Attorney General (Nova Scotia)

Respondents

Judge:	The Honourable Justice Pierre Muise
Heard:	April 19, 2022, in Halifax, Nova Scotia
Counsel:	Barry J. Mason, KC and Laura H. Veniot, for Frances MacDonald Jason Cooke, for the Human Rights Commision David J. Roberts for the NSGEU Edward Gores for the Attorney General

By the Court:

INTRODUCTION

[1] May 3, 2017, Frances MacDonald filed a complaint with the Nova Scotia Human Rights Commission ("HRC") alleging that the Nova Scotia Government Employees Union ("NSGEU") had discriminated against her, during its process of hiring Employee Relations Officers ("EROs"), because of her sex (gender). More specifically she alleged it was because she was a strong, independent, and confident woman.

[2] The Investigator ultimately assigned to the Complaint recommended that it be dismissed and the HRC did dismiss it. The decision to dismiss is dated, and it was communicated to Ms. MacDonald, on November 13, 2019.

[3] On December 17, 2019, she filed a Notice for Judicial Review on the grounds that the HRC:

1. Breached her right to procedural fairness by:

    a. Relying on an investigative report prepared by a Human Rights Officer ("HRO") who was biased or in relation to whom there was a reasonable apprehension of bias;

    b. Failing to assign a new HRO to investigate after being made aware of the bias or reasonable apprehension of bias; and,

c. Relying on the investigative report where the investigating HRO had failed to disclose important, relevant documents with little explanation as to why;

2. Erred in its interpretation of s. 29(4)(b) of the *Human Rights Act*; and,

3. Rendered an unreasonable decision.

[4] Written and oral submissions from Ms. MacDonald also specifically alleged that the investigation was not sufficiently thorough.

[5] Ms. MacDonald's written submissions did not provide any argument in support of the alleged error in interpretation of s. 29(4)(b) or the unreasonableness of the decision.

[6] Her oral submissions did not mention the interpretation of that provision. They emphasized the real issue was neutrality and apprehension of bias.

[7] In passing, they referenced the following. 75% of the NSGEU membership is made up of women, but less than 75% of the ERO's are women. A man from another local was selected to fill in as ERO in Ms. MacDonald's local even though she was the vice-president of that local. Portions of the record related the views of some interviewees that the then NSGEU president, Joan Jessome, treated men more favourably than women and controlled the hiring process.

[8] However, the information before the Investigator, closest to the timeframe of the Complaint, indicated nine of the 19 EROs, the Executive Director, and the two ERO coordinators were women. Thus, women were well represented. There was no general practice of having local officers fill in vacant ERO positions. Those interviewed, who would have had direct knowledge, refuted the allegations that Ms. Jessome gave preferential treatment to men and controlled the hiring process. They stated Ms. Jessome never told anyone not to interview or hire Ms. MacDonald. They noted points including the following. Several women had been hired during the relevant period, including women in relation to which being strong, independent, and confident were, at least impliedly, deemed to be positive attributes. Ms. MacDonald scored lower than most others in her interview. She had less involvement with the NSGEU, and it was more recent, than the shortlisted candidates. The NSGEU preferred candidates with greater involvement in union activities and more experience on the Executive Board or with Locals. Further, the Collective Agreement prohibited hiring "external" candidates (such as Ms. MacDonald) whenever there were candidates who were already employees of the NSGEU.

[9] It is clear from reviewing the record and supplementary affidavits filed, as well as the brief reasons provided, that the decision was: based on rational, logical

and internally coherent reasoning; tenable in the HRC context; consistent with past decisions; within the range of acceptable outcomes; and, defensible on the facts and law. It also addressed the central issues and concerns raised.

[10] Its interpretation of s. 29(4)(b) was consistent with the text, context and purpose of that provision. Therefore, the reasonableness of the decision is not a real issue.

[11] That leaves only the alleged breaches of procedural fairness to address.

ISSUES

[12] There is no dispute that some level of procedural fairness was owed to Ms. MacDonald.

[13] The remaining procedural fairness issues in the case at hand can be addressed in the following questions:

1. Is there a standard of review for procedural fairness, and, if so, what is it?
2. What is the scope and content of the duty of procedural fairness?
3. Was it breached?
4. If so, what is the appropriate remedy?

LAW AND ANALYSIS

QUESTION 1: IS THERE A STANDARD OF REVIEW FOR PROCEDURAL FAIRNESS AND, IF SO, WHAT IS IT?

[14] Ms. MacDonald and the HRC submitted that there is no standard of review analysis to be conducted in relation to procedural fairness issues. That, on its face, appears consistent with the general approach taken by the courts.

[15] However, as stated at paragraph 47 of **Labourers International Union of North America, Local 615 v. CanMar Contracting Ltd.**, 2016 NSCA 40:

> The reason there is no "standard of review" for a matter of procedural fairness is that *no tribunal decision* is under review. The court is examining how the tribunal acted, not the end product. If, on the other hand, the applicant asks the court to overturn a tribunal's *decision* – including one that discusses procedure – a standard of review analysis is needed. The reviewing court must decide whether to apply correctness or reasonableness to the tribunal's decision.

[16] In the case at hand, Ms. MacDonald is challenging the HRC's act of continuing with the same investigator after she submitted the Investigator was biased or presented a reasonable apprehension of bias. Consequently, the question of whether a standard of review applies could arguably arise.

[17] On the other hand, there is nothing in the record or the final decision which mentions the bias or apprehension of bias issue, apart from the submissions of Ms. MacDonald. The simple fact that an objection was raised to the Investigator

continuing does not transform the fact, that she did continue, from a procedural event to a procedural decision to be reviewed. In fact, failure to object to a procedural defect in a timely way may constitute a waiver of procedural objection. Therefore, it is more appropriately treated as simply part of the procedure followed.

[18] In addition, there is some divergence in the case law regarding what the standard should be. The general standard applied by the Supreme Court of Canada is one of correctness (for example, in **Canada (Citizenship and Immigration) v. Khosa**, [2009] 1 S.C.R. 339). Sometimes it mixes some deference with the correctness standard (for example, in **Mission Institution v. Khela**, 2014 SCC 24, at paras 79 and 89). Sometimes it simply states that there is no standard of review and the Court is simply to apply the Baker factors (for example, in **Moreau-Bérubé v. New Brunswick (Judicial Council)**, [2002] 1 S.C.R. 249, at para 74).

[19] **Baker v. Canada (Minister of Citizenship and Immigration)**, [1999] 2 S.C.R. 817, and the factors outlined in it, provide for a level of deference in determining the requisite standard of procedural fairness. Since the reviewing court determines that standard based on what it sees as correct. It is effectively a correctness standard of review based on the Baker factors, which allows for some deference depending on the context.

[20] For these reasons, I will simply apply the Baker factors in making my own determination on the procedural fairness issues.

QUESTION 2: WHAT IS THE SCOPE AND CONTENT OF THE DUTY OF PROCEDURAL FAIRNESS?

Baker Factors

[21] The Court in **Canada (Minister of Citizenship and Immigration) v. Vavilov**, 2019 SCC 65 at paragraph 77, stated:

> Where a particular administrative decision-making context gives rise to a duty of procedural fairness, the specific procedural requirements that the duty imposes are determined with reference to all of the circumstances: *Baker*, at para. 21. In *Baker*, this Court set out a non-exhaustive list of factors that inform the content of the duty of procedural fairness in a particular case, one aspect of which is whether written reasons are required. Those factors include: (1) the nature of the decision being made and the process followed in making it; (2) the nature of the statutory scheme; (3) the importance of the decision to the individual or individuals affected; (4) the legitimate expectations of the person challenging the decision; and (5) the choices of procedure made by the administrative decision maker itself: … .

[22] The Court in **Baker**, *supra*, at paragraphs 21 to 48, discussed the variable and flexible nature of procedural fairness in the administrative law context and the principles and factors affecting the content of the duty of procedural fairness. It went on the apply those principles and factors to determine the scope and content of procedural fairness in the aspects of the procedures used that were alleged to

have been deficient. It then examined the procedure used and determined whether it met the requisite standard of procedural fairness.

[23] I will take the same approach. It is the approach directed by our Court of Appeal, including in **Halifax (Regional Municipality) v. Tarrant**, 2019 NSCA 27.

[24] I will do so bearing in mind the values upon which procedural fairness requirements are based. As stated at paragraph 28 of **Baker**:

> The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decision.

[25] In the case at hand, the Complainant submitted her procedural fairness rights were breached because: the HRO who investigated her complaint was one that was biased, or in relation to which there was a reasonable apprehension of bias; she was not provided the materials in the possession of the Investigator that she requested; and the Investigator was not sufficiently thorough.

[26] I will determine the standard of procedural fairness, and whether the procedures complained of fell short of the requisite standard, under the following

broad categories: thoroughness, neutrality and fairness of the investigation; participatory rights; and impartiality.

[27] The parties agreed that no reasons are required in the context of the case at hand, beyond those contained in the Investigation Report and the statement by the Commission that the complaint was dismissed under s. 29(4)(b) of the *Human Rights Act* because the complaint was without merit.

[28] As stated in **Green v. Nova Scotia (Human Rights Commission)**, 2011 NSCA 47, at paragraph 40:

> The absence of any legislative requirement for written or extensive reasons beyond those in s. 29(4) of the *Act*, the omission of any appeal process, the screening and administrative function performed by the Commission at this stage, and its inclusion of public policy considerations when it chooses, all support the Chambers judge's determination that the Commission is not obliged to give fuller reasons explaining its decision to dismiss a complaint.

[29] As such, I will not expand upon the issue of reasons while discussing the applicable procedural fairness standard.

[30] However, as noted at paragraph 44 of **Baker**, in these circumstances, the report of the reviewing officer, in this case the Investigator, though she did not make the ultimate decision, "should be taken, by inference to be the reasons for the decision". In the case at hand, the Memorandum from the Investigating HRO, providing her analysis and recommendation, along with the attached Complaint

Form, Investigation Report and submissions of the Complainant and the NSGEU, which were all the materials before the Commission, can be taken as providing the reasons for the decision. That way, as stated at paragraph 23 of **Green v. Nova Scotia (Human Rights Commission)**, 2010 NSSC 242 (affirmed 2011 NSCA 47), the reviewing court can look to the materials before the Commission to determine whether the decision to dismiss was reasonable.

[31] I now turn to discussing the Baker factors in the circumstances of the case at hand.

[32] The decision in the case at hand is a screening decision. The investigating HRO provides a report summarizing the investigation and containing recommendations as to the screening decision, which is made by the Commissioners of the HRC, following a meeting or meetings in which the case is discussed. It does not approach the judicial process, which would import "procedural protections closer to the trial model", as referenced at paragraph 23 of **Baker**.

[33] As such, the nature of the decision, and the process used in reaching it, even if the decision is to dismiss the complaint, and thus determinative, still likely point to a level of procedural fairness that is towards the lower end of the spectrum. **McDougall v. Nova Scotia (Human Rights Commission)**, 2016 NSSC 118, at

paragraphs 15 to 21, came to that conclusion after discussing the decision to refer as being a feature distinguishing preceding cases which described the decision as essentially administrative, requiring a lower level of procedural fairness. In doing so, it approved of the approach advocated in Brown and Evans, *Judicial Review of Administrative Action in Canada* (Carswell, looseleaf) at § 7:2554. I adopt the reasoning in **McDougall**. However, I add that the determinative nature of the decision still impacts the second and third Baker factors.

[34] The second Baker factor is "the nature of the statutory scheme and 'the terms of the statute pursuant to which the body operates'". **Baker**, at paragraph 24, noted the following:

> Greater Procedural protections, for example, will be required when no appeal procedure is provided within the statute, or when the decision is determinative of the issue and further requests cannot be submitted: … .

[35] In the case at hand the decision to dismiss the complaint was determinative and there is no right of appeal, pointing towards a higher level of procedural protection.

[36] On the other hand, as noted at paragraph 29 of **Green** (NSSC), *supra*, the *Human Rights Act*, R.S.N.S. 1989, c. 214, (the "Act") gives the Commission discretion to dismiss a complaint for reasons other than lack of merit, including

points related to public interest and policy. S. 29(4) gives the Commission discretion to dismiss a complaint at any time for various reasons, even without an investigation, as s. 29(4)(f) of the Act allows it to dismiss a complaint where "there is no reasonable likelihood that an investigation will reveal evidence of a contravention of" the Act. S. 29(4)(a) gives it discretion to dismiss a complaint if continuing with it is not in "the best interests of the individual or class of individuals on whose behalf the complaint was made", a public interest and policy consideration. Such broad discretion, as stated at paragraph 31 of **Baker**, militates "in favour of more relaxed requirements under the duty of fairness".

[37] The third Baker factor is the importance of the decision to the person affected and the impact it has on them. In the case at hand, the fact that the decision is determinative increases its importance. In addition, recognition of human rights violations is important to all persons and groups affected.

[38] "A high standard of justice is required when the right to continue in one's profession or employment is at stake": **Baker**, para 25, citing *Kane v. University of British Columbia*, [1980] 1. S.C.R. 1105. In **Baker**, the decision was described, at paragraph 31, as being of "exceptional" importance, because it would result in the applicant being deported. Other decisions with exceptional impacts might include

those resulting in loss of physical liberty or security, major economic repercussions, and denial of licenses or permits.

[39] The impact at stake in the case at hand is not exceptional. It would not result in Ms. MacDonald losing employment, income or benefits, nor experiencing any other exceptional impact. It effectively forecloses a chance to establish discrimination and obtain a remedy. The most favourable remedy she could hope for would be to get a position as an ERO. A more likely remedy would be priority treatment in relation to future competitions. In the resolution conference held with the prior HRO, she was offered ERO work as a fill-in for 5 weeks, a guaranteed interview for the next available position and help in preparing for it. She refused that, expressing distrust in the NSGEU. Pursuant to s. 29(1) of the Act, the Commission must "endeavour to effect" such a settlement. It may also consider the outcome of the process in determining whether to dismiss a complaint.

[40] Collectively, the considerations under this third factor point towards a level of procedural fairness that is closer to moderate.

[41] The fourth Baker factor is "the legitimate expectations of the person challenging the decision", which may determine the scope or content of the duty of procedural fairness. As was the case in **Baker**, there is nothing in the circumstances of the case at hand giving rise to an issue regarding the Complainant

having any legitimate expectation of any procedural rights beyond those that normally apply in the context of investigation of complaints by the HRC.

[42] The fifth factor was described at paragraph 27 of **Baker** as requiring the reviewing court to: "take into account and respect the choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances"; and, give "important weight to … the choice of procedures made by the agency itself and its institutional constraints".

[43] In the case at hand, s. 29(1) of the Act requires the Commission to "inquire into and endeavour to effect a settlement". Otherwise, the Act and the *Boards of Inquiry Regulations*, N.S. Reg. 221/91, leave the choice of procedure leading up to a decision to dismiss or refer totally up to the Commission. It can even dismiss the complaint or appoint a board of inquiry without any investigation.

[44] This broad freedom to choose procedure militates in favour of a very low level of procedural requirements.

[45] Another relevant factor in the case at hand is that the decision to dismiss was based on the complaint being without merit, after the Commission had determined

that the complaint warranted an investigation. That militates in favour of a higher level of procedural protections than if the decision was based on public policy or interest considerations. It also points to a different type of procedural protection than if the complaint had been dismissed because there was no reasonable likelihood that an investigation would reveal that discrimination based on sex had occurred. For instance, that situation might call for more extensive reasons from the Commission because there would be no investigator's report, analysis, or recommendation to review.

[46] Considering these factors and principles, in the circumstances of the case at hand, as indicated in **McDougall**, *supra*, the requisite standard of procedural fairness is towards the lower end of the spectrum, or, to put it another way, moderate side of low.

[47] The requisite procedural fairness standard under each of the broad categories noted above is as follows.

Thoroughness, Neutrality and Fairness of Investigation

[48] As noted in **McDougall**, *supra*, at paragraphs 22 to 24, in the context of the decision in the case at hand, the investigation must satisfy the following requirements.

[49] It must be "conducted in a 'thorough and neutral' manner". That includes that it must be free of "unreasonable omissions", such as failing "to investigate obviously crucial evidence". There is no need to interview every witness or obtain all documents suggested by the complainant unless they "could have provided 'obviously crucial evidence'".

[50] This is because procedural fairness interests must be balanced with the Commission's "interests in maintaining a workable and administratively effective system": **Slattery v. Canada (Canadian Human Rights Commission)**, [1994] 2 F.C. 574. If the Commission had to provide high levels of procedural protection at this screening stage, it would risk compromising its ability to proportionately handle its caseload. At the same time, the investigation must be sufficiently thorough for the Commission "to make a proper screening determination": **Tessier**, *supra*, para 65.

[51] The "interview" format is flexible and may include, or be solely comprised of, consideration of written statements from witnesses and the parties.

[52] The investigation must also be fair to both the complainant and the subject of the complaint: **Bergeron v. Canada (Attorney General)**, 2015 FCA 160.

[53] In the case at hand, the Complainant submitted that the lack of thoroughness in the investigation suggests a lack of neutrality. She did not allege that the Investigation Report itself reveals a lack of neutrality. However, she alleged apprehension of bias in the investigator based on association with the NSGEU and alleged lack of thoroughness in the investigation. Thus, the neutrality requirement flows over into the bias issue.

Participatory Rights

[54] As this case involves a screening stage decision, there is no right to a hearing in which the complainant, or any other party, may examine witnesses.

[55] Complainants and respondents have the right to make submissions, and, if they choose to do so, retain a lawyer to represent them and make submissions on their behalf. However, it can all take place in writing.

[56] For them to be able to make meaningful submissions, they must know the case they have to meet. This does not mean they have a right to receive every piece of information that is before the investigator. It is sufficient that they, including the complainant, be informed of "the essence of the case" against them: **Slattery**, *supra*, para 69.

Impartiality

[57] Human rights complaint investigators must “act impartially” because they play a “central role” in the process and their report and recommendations “constitute the reasons for the decision”: **Baker**, para 45.

[58] The Complainant submitted that, in the circumstances of the case at hand, given the relationship between the Investigator and the NSGEU, the applicable test to determine whether a human rights investigator was sufficiently impartial is the reasonable apprehension of bias test applied in **Baker**. The HRC submitted that the “closed mind” test applies and the relationship between the investigator and a party is irrelevant, as the Court is to make its decision based on the notes and report of an investigator. The NSGEU submitted that the test may fall somewhere between those two extremes, and the relationship between an investigator and a party is a relevant consideration.

[59] The Complainant distinguished the bulk of the cases provided by the HRC and the NSGEU in support of a “closed mind” test, by noting that they were all cases where the bias was revealed in the conduct or remarks of the investigating or screening officer. She added that test did not make sense where the apprehension of bias arises from the investigator’s association with a party.

[60] She advanced, as support, **Tremblay v. Canada (Attorney General)**, 2006 FC 219. In that case the investigator had previously been hired by the respondent

to investigate allegations that it had engaged in discriminatory behaviour. So, the bias issue was based on association. However, I note that, in that case, the reasonable apprehension of bias test was ultimately applied, at least in part, because of the legitimate expectations of the complainant.

[61] At paragraphs 23 and 25, the court implicitly acknowledged that, usually, the test to apply would be the "closed mind" test. However, it stated "in this particular case I consider it more appropriate to apply the reasonable apprehension of bias test". That was because "the director of the Investigation Branch of the Commission specifically used that term in her letter to Mr. Tremblay's solicitor, and thus may have created a legitimate expectation on his part that that was the standard against which Mr. Grainger [the investigator] had been measured, rather than a lesser standard".

[62] Ms. MacDonald distinguished **Northwest Territories v. PSAC**, [1997] F.C.J. No. 143, where the "closed mind" test was applied, on the basis that the investigator was merely a member of the union, as opposed to playing an active role in the union. With respect, it would appear to be more workable that the level of association be a factor to consider in determining whether the applicable test has been met, not what the applicable test is.

[63] I also disagree with the submission of the HRC that the "closed mind" test applies in every situation, irrespective of the relationship between the investigator and a party.

[64] I agree with the NSGEU that the test may fall between those two extremes and the relationship is a relevant factor.

[65] As noted at paragraph 47 of **Baker**, "standards for reasonable apprehension of bias may vary, like other aspects of procedural fairness, depending on the context and the type of function performed by the administrative decision-maker involved".

[66] In **Baker**, the decision, which would lead to deportation, was of great importance to the affected individuals, and required "special sensitivity" to "cultures, races and continents". It involved assessing "humanitarian and compassionate grounds". There was no interviewing of witnesses, nor report to which the applicant could respond before a final decision was made. The reviewing officer simply considered the application and supporting materials filed and made a recommendation to the ultimate decision-making officer. The test applied was whether "a reasonable and right-minded" and "informed person, viewing the matter realistically and practically" would "think it is more likely than not that [the

decision-maker], whether consciously or unconsciously, would not decide fairly": **Baker**, paras 46 to 48.

[67] The decision in the case at hand does not import such drastic consequences and no special sensitivity to other "cultures, races and continents", nor assessment of such exceptional grounds, were at play. There was extensive interviewing of witnesses and a report summarizing the information obtained was provided to the Complainant so that she could make submissions. These extra steps better facilitated assessing whether a biased approach was taken.

[68] In **Gagliano v. Canada (Commission of Inquiry into the Sponsorship Program and Advertising Activities, Gomery Commission)**, 2011 FCA 217, in the context of a public inquiry, the bias test applied fell between the "closed mind" test and the reasonable apprehension of bias test. It was articulated at paragraphs 28 and 29 as follows:

> When, in the course of an inquiry, an allegation of bias is made against a commissioner, the commissioner must not be disqualified for bias unless there is a reasonable apprehension that the commissioner's decisions are made on a basis other than the evidence. This test must be applied flexibly. ….
>
> When the conclusions of a commission of inquiry's report are in dispute, and a reasonable apprehension of bias on the part of the Commissioner is alleged, the evidence supporting the report's conclusions cannot be ignored. And, for the conclusions to be upheld, it suffices for them to be supported by some evidence in the record of the inquiry.

[69] In the case at hand, it is not alleged that the conclusions reached raise a reasonable apprehension of bias. Rather, it is alleged that the Investigator's relationship with the NSGEU did. So, a middle-ground test that would compare with that used in **Gagliano**, would be whether there was a reasonable apprehension that the Investigator's recommendation would be based on something other than the information she gathered.

[70] A public inquiry differs greatly from screening of a human rights complaint. However, those differences make the inquiry closer to a trial than the screening function of HROs. Therefore, they militate in favour of a test in the case at hand that is closer to the "closed-mind" test.

[71] Nevertheless, there are sufficient similarities between the two to view the "inquiry test" as being the closest to reasonable apprehension of bias one could reasonably apply in the case at hand. Those similarities include that both public inquires and screening of human rights complaints:

- are not trial-like;
- are more inquisitorial than adversarial;
- involve investigative powers;
- have flexible rules of evidence and procedure; and,
- do not impose monetary or penal sanctions.

[72] I also highlight that all the human rights complaint screening cases submitted in this case used the "closed-mind" test, except for **Tremblay**, *supra*, where unique legitimate expectations made the reasonable apprehension of bias test more appropriate.

[73] For these reasons, the applicable test in the case at hand falls no closer to reasonable apprehension of bias than the "inquiry test" I have described. It is unnecessary, for the purposes of this judicial review, to determine exactly where it falls between the "closed mind" test and the "inquiry test".

QUESTION 3: WAS THE DUTY OF PROCEDURAL FAIRNESS BREACHED?

Thoroughness, Neutrality and Fairness of Investigation

[74] The initial investigator assigned to the case was Lianne Chang. After April 24, 2018, Melanie MacNaughton took over.

[75] The Complainant alleges the investigation was defective in that the final investigator, Ms. MacNaughton, did not:

- interview her;
- "investigate whether the candidates chosen over [her] were more qualified";

- obtain, from the NSGEU, information other than for seven of the 13 competitions she was involved in, stating only that the NSGEU was unable to provide the additional information, despite her power under s. 30 of the Act to compel its production;
- obtain information from the NSGEU beyond the competitions for which she was shortlisted; nor,
- gather information for all of the men granted ERO positions over her.

[76] In addition, the Complainant submitted the fact that the HRC directed Ms. MacNaughton to obtain "further information respecting the job competitions that the Complainant submitted applications, including screening notes and scoring charts" shows "Ms. MacNaughton's first investigation was so flawed that the Commission refused to follow her recommendation and told her to continue investigating".

[77] Both Ms. Chang and Ms. MacNaughton interacted with the Complainant during the investigation. The information they gleaned from her, which was in addition to that contained in her initial complaint, is summarized at pages 2 and 3 of the Investigation Report. It was unnecessary for Ms. MacNaughton to formally interview the Complainant. Ms. Chang had already dealt extensively with her. Ms. MacNaughton was entitled to adopt Ms. Chang's work: **Tessier**, *supra*, para 37.

[78] The Complaint filed only identified four competitions in which the Complainant alleged men who were lesser qualified than herself were the

successful candidates. Information regarding all of those, plus seven other competitions was obtained. In total, information regarding 11 different competitions, on seven competition dates, was obtained.

[79] The Complainant submitted the NSGEU only provided information on competitions for which she was shortlisted. That is incorrect as, according to paragraph 15 of the Investigation Report, there was only one competition in which she was shortlisted.

[80] Information was gathered in relation to the men that were the successful candidates in the four competitions identified in her Complaint. There were only two other men who were successful in the competitions for ERO positions the Complainant applied for.

[81] Two of the competitions for which information was provided date back to May 2011. That was four years before the earliest competition referred to in the Complaint.

[82] Ms. Chang, even before Ms. MacNaughton's involvement, had requested more information from the NSGEU.

[83] However, it is important to note that the NSGEU is not required to keep competition records beyond the grievance deadline, which had long passed before

the Complaint was filed, for all competitions, including the last one complained of. In addition, it does not make notes or score the applicants to determine who is shortlisted. Therefore, it is fortuitous that the NSGEU was able to provide as much information and materials as it did. Contrary to the submissions of the Complainant, in these circumstances, the fact the NSGEU was not able to provide all the information from all the competitions in which the Complainant was an applicant, including two of the competitions in which a man was the successful candidate, does not show lack of thoroughness on the part of the Investigators, and it would have been inappropriate for them to have drawn any adverse inference from it.

[84] The situation in the case at hand is far different from that in **Casler v. Canadian National Railway**, 2012 FCA 135. The Complainant advanced that case in support of her argument that the missing information regarding the two additional male EROs hired showed a lack of thoroughness in the investigation. In **Casler**, a central issue was whether the complainant's disabilities had been adequately accommodated and the investigator made "no attempt" to obtain information about other workers which the complainant had identified as having been accommodated. In the case at hand, the Investigators tried to get all information regarding the competitions the Complainant had entered. It was not all

available. However, they were able to obtain information regarding four of the six successful male candidates.

[85] As submitted by the NSGEU, the HRC asking the Investigator to gather more information, does not show it considered her investigation to have been flawed. It shows they disagreed with her recommendation or did not know whether it should follow her recommendation and wanted more information to assist them in deciding whether they should follow her recommendation or not.

[86] It is noteworthy that, armed with additional information and an updated investigation report, they agreed with the same recommendation, ie. that the Complaint be dismissed.

[87] More importantly, if any flaw or lack of thoroughness was revealed by the HRC's request for more information, it was rectified through the continued investigation. That step would remedy any such shortfall in procedural fairness.

[88] It is an example of how the separation between the investigator and the decision-maker itself provides additional procedural safeguards.

[89] A review of the Record and Affidavits filed shows that the investigation was sufficiently thorough, neutral, and fair to both sides. It does not reveal any

unreasonable omissions, including any failure to investigate obviously crucial evidence.

[90] In addition to the points already noted, which included consideration of the allegations in the Complaint and of additional information provided by the Complainant, I highlight the following.

[91] The Investigators took statements from the main witness presented by the Complainant and attempted to obtain relevant information from all witnesses suggested by the Complainant. Two did not wish to provide any information. Two others did not provide any relevant information.

[92] They also took statements from the Executive Director, former President, and then current President, of the NSGEU, as well as from another member who had been a candidate in a competition for an ERO position. The former President was the person the Complainant was pointing to as the source of the alleged discrimination.

[93] They considered: the position descriptions for each competition in which the Complainant was an applicant, noting that the requirements focused on experience; the information the NSGEU was able to provide in relation to 11 of the competitions; the materials submitted by the Complainant in her ERO applications;

the materials submitted by the four successful male candidates in the competitions in relation to which they were successful; email exchanges between the Complainant and an NSGEU Director and the then current President; the NSGEU Employment Equity and Hiring Policies; and, the Resolution Conference process in this Complaint.

[94] Ms. MacNaughton provided her analysis of the issues raised in the Complaint, considering the meaning of discrimination in the Act.

[95] The Investigation Report dated April 30, 2019, addresses all central issues raised in the complaint.

[96] It includes Ms. MacNaughton's recommendation that the complaint be dismissed as being without merit.

[97] It was provided to the Complainant and the NSGEU.

[98] The Complainant's lawyer filed written submissions dated May 23, 2019, raising issues with the Report and issues of bias in relation to Ms. MacNaughton. The lawyer for the NSGEU was copied with those submissions, and filed submissions dated May 30, 2019, regarding the issue of bias.

[99] Those additional submissions were before the Commission when it rendered its decision to dismiss.

[100] So, the Commission was armed with a thorough, neutral, and fair investigation and report, plus additional submissions from the Complainant and the NSGEU in response to the Report.

[101] Consequently, there was no breach of the Complainant's right to a thorough, neutral, and fair investigation.

Participatory Rights

[102] The Complainant notes that Ms. MacNaughton refused her request for copies of the materials she had received from the NSGEU and told her to make a FOIPOP application to obtain them, and that application was refused as well. Therefore, she has never seen those materials.

[103] As stated above, the Complainant did not have a right to receive every bit of information that was before the Investigator. She was only entitled to be informed of "the essence of the case" against her.

[104] The thorough 13-page Investigation Report provided the Complainant with a fairly detailed summary of the position and information received from and about

her and the NSGEU, as well as of the information obtained from the witnesses interviewed. It identified and analyzed the central issues raised by the Complaint. It communicated more than just the essence of the case against the Complainant. It described and analyzed the cases for and against her in detail.

[105] Then, after receiving the Report, the Complaintant was able to file additional written submissions.

[106] She was not denied any information required to make meaningful submissions.

[107] Requiring human rights investigators to produce, to a complainant, information regarding other candidates in a job competition would create serious risks of prejudice to the privacy rights of those other candidates.

[108] The fact that the FOIPOP application in the case at hand was unsuccessful indicates that the privacy rights of the other candidates trumped any right the Complainant may have had to access the information requested.

[109] In addition, if complainants could readily access information about other candidates, it would create a risk of complaints being filed, ostensibly alleging human rights violations, but being for the purpose of obtaining private information about those other candidates.

[110] There is a need to balance the Complainant's right to know the case against her with the privacy rights of third parties.

[111] The Report in the case at hand achieved that balance in a way that more than adequately informed the Complainant of the case against her.

[112] Therefore, the refusal to provide her the requested information was not a breach of the procedural fairness standard related to her rights to participate.

Impartiality

[113] There is no dispute that employees of the Nova Scotia Human Rights Commission have been members of the NSGEU since the mid-1970s. Therefore, any HRO appointed to investigate would be a member of the NSGEU and the Complainant did not submit that apprehension of bias arises from that alone.

[114] She submitted that Ms. MacNaughton was an "activist" with the NSGEU, and that, combined with the lack of thoroughness in the investigation, clearly raises a reasonable apprehension of bias, which breached her right to procedural fairness.

[115] I have already determined the investigation was sufficiently thorough in the circumstances.

[116] What remains to be determined is whether Ms. MacNaughton's involvement with the NSGEU raises a reasonable apprehension that her report, including her recommendation, was based on something other than the evidence or information before her.

[117] In doing so, I will first address the argument that Ms. MacNaughton was an "activist" with, or at least active within, the NSGEU during the relevant period.

[118] That argument is based on the following reasoning.

[119] Ms. MacNaughton sat on one *ad hoc* committee of the NSGEU, being the Disabilities Committee. She attended three meetings of this committee. They were in March, June and November 2017. As of May 23, 2019, she was still listed as a member of that committee. Therefore, she was on the committee from when Ms. MacDonald filed her complaint to when the Commission made its decision.

[120] Committee members are selected because of their known activism within the NSGEU. They are not even eligible to be selected unless they have been active in their local 12 months before the first meeting after the triennial convention and attend the first local meeting after that convention.

[121] There are affidavits from Mary Lou Wilson and Pearl Kelly indicating this is their understanding of prerequisites to serving on committees, including *ad hoc*

committees. The Complainant herself also provided an affidavit. It outlines the information she read on the NSGEU website regarding requirements for becoming a member of a regular NSGEU committee, and her own experience regarding being handpicked to be on the *ad hoc* Health Care Committee, as opposed to responding to an expression of interest.

[122] However, I find that the argument advanced by the Complainant is based on a misunderstanding of prerequisites to serving on an *ad hoc* committee.

[123] I accept the evidence provided in the affidavit of Robin MacLean, relating to serving on *ad hoc* committees generally and Ms. MacNaughton serving on the *ad hoc* Disabilities Committee specifically. I accept it over the evidence of Ms. Wilson, Ms. Kelly and Ms. MacDonald, because it is based on information and knowledge gained as Executive Director of the NSGEU, rather than on an understanding arising from individual experiences with committee involvement. In addition, the actual September 2016 Expression of Interest requesting volunteers for the *ad hoc* Disabilities Committee is attached to the affidavit.

[124] The evidence in Ms. MacLean's affidavit establishes the following.

[125] There are no such prerequisites to being members of an *ad hoc* committee. Those apply to regular committees. For *ad hoc* committees they call for volunteers, who do not have to have shown any particular level of union activity.

[126] Ms. MacNaughton volunteered to serve on the *ad hoc* Disabilities Committee in response to the September 2016 Expression of Interest. She was selected because of the expertise and experience she brought to the committee. Being an HRO, she would be well versed in disability issues.

[127] As already noted, Ms. MacNaughton only attended three meetings, the last one being on November 3, 2017. She had no further involvement with the *ad hoc* Disabilities Committee thereafter. She was not assigned to the investigation until after April 24, 2018. Therefore, she had not been active with the Committee for at least about five and one-half months before she became involved in the investigation of Ms. MacDonald's complaint.

[128] In addition, Ms. MacLean attached as Exhibit "A" to her affidavit, the Human Rights Investigator Position Description in effect during the relevant period. The specified duties include providing human rights training for various persons and entities, including unions, and organizing human rights events.

[129] The Expression of Interest stated that the work of the *ad hoc* Disabilities Committee would be to "gather information from NSGEU members and develop a framework to educate members and the broader public about workplace disability issues".

[130] That falls squarely within the specified duties of human rights investigators in Nova Scotia. Therefore, by volunteering for the *ad hoc* Disabilities Committee, Ms. MacNaughton was fulfilling part of her duties as Human Rights Investigator. She was not being an "activist" for, or even active in, the NSGEU. She was not promoting or advocating for the NSGEU. She was doing her job.

[131] In these circumstances, an "informed person, viewing the matter realistically and practically" would clearly not "think it is more likely than not" that Ms. MacNaughton would make her recommendations "on a basis other than the evidence" or information before her.

[132] Further, though reasonable apprehension of bias on her part is theoretically arguable, in the circumstances, it is difficult to see how an "informed person, viewing the matter realistically and practically" would "think it is more likely than not that" Ms. MacNaughton, whether consciously or unconsciously, would not decide fairly". Her having, before her investigation, used the *ad hoc* Disabilities

Committee as a vehicle to carry out her public involvement and education duties does not import the requisite partiality.

[133] Therefore, even if the reasonable apprehension of bias test applies, it is not made out.

[134] For these reasons, I find that the HRC has met its procedural fairness requirement to provide an impartial decision-maker.

QUESTION 4: IF SO, WHAT IS THE APPROPRIATE REMEDY?

[135] Given my finding that the HRC did not deny Ms. MacDonald the requisite procedural protections, there is no need to address the issue of remedy.

CONCLUSION

[136] For the foregoing reasons, Ms. MacDonald's Application for Judicial Review is dismissed.

ORDER

[137] I ask Counsel for the NSGEU to prepare the order.

COSTS

If the parties cannot agree on costs, I will receive submissions in writing on the issue.

Pierre Muise, J.