

SUPREME COURT OF NOVA SCOTIA

Citation: Tessier v. Nova Scotia (Human Rights Commission),
2014 NSSC 65

Date: 20140219

Docket: Hfx 390961

Registry: Halifax

Between:

Liane Elizabeth Tessier

Applicant

v.

Nova Scotia Human Rights Commission,
Nova Scotia (Attorney General) and
Halifax Regional Municipality

Respondents

Judge: The Honourable Justice Arthur LeBlanc

Heard: November 12, 2013, in Halifax, Nova Scotia

**Final Written
Submissions:** November 5, 2013

Counsel: Ms. Angela A. Walker, for the applicant

Ms. Lisa Teryl, for the respondent, Nova Scotia Human Rights
Commission

Ms. Karen MacDonald, for the respondent, Halifax Regional
Municipality

No one appearing for the respondent, Nova Scotia (Attorney
General)

By the Court:

INTRODUCTION

[1] The applicant, Liane Tessier, is a former volunteer firefighter with the Halifax Regional Municipality Fire and Emergency Services ("HRMFES"). In 2007, after a number of troubling incidents at her fire station, Ms. Tessier filed a complaint against HRMFES with the Nova Scotia Human Rights Commission ("the Commission"). The complaint alleged that she had been discriminated against by her supervisors on the basis of sex and mental disability.

[2] On December 29, 2011, the human rights investigator appointed to Ms. Tessier's file released a report recommending that the complaint be dismissed. The Commission reviewed the contents of the report and on February 29, 2012, dismissed the complaint due to insufficient evidence.

[3] Ms. Tessier has applied for judicial review of the Commission's decision on procedural and substantive grounds.

BACKGROUND

[4] From 1998 to 2007, Ms. Tessier worked as a volunteer firefighter with HRMFES at Station 60 in Herring Cove, and Station 61 in Ketch Harbour, Nova Scotia. She also worked as a paid on-call firefighter filling in for absent career firefighters from January 2005 to May 2006.

[5] For the first several years, Ms. Tessier thoroughly enjoyed working with HRMFES and excelled in her position, eventually attaining the rank of Captain at Station 60.

HRMFES INTERNAL INVESTIGATION

[6] Starting in 2004, Ms. Tessier says that the culture at Station 60/61 began to change, becoming increasingly hostile to female firefighters. She claimed that two of her supervisors, Chief Don McLean and DC Doug Burgess, began spreading false rumours about her to other members of the firefighting community. She said that she was denied necessary equipment and clothing and that her gear was repeatedly tampered with. The discipline she received for minor transgressions was

disproportionate and excessive. According to Ms. Tessier, the junior firefighters at the station followed the example of Chief McLean and DC Burgess in creating a toxic work environment for women where disrespect and exclusionary treatment were common.

[7] On October 22, 2006, Ms. Tessier filed an internal complaint with HRMFES. The complaint alleged that Ms. Tessier had been subjected to workplace harassment and discriminatory treatment because of her gender for a period of two years. She specifically named supervisors Chief McLean and DC Burgess as the individuals primarily responsible for her mistreatment.

[8] As a result of the alleged discrimination that she had endured and the stresses involved with bringing a formal complaint, Ms. Tessier says that she began to experience anxiety and depression. These health issues culminated in Ms. Tessier taking a leave of absence from HRMFES in January, 2007.

[9] Halifax Regional Municipality (“HRM”) appointed Beth VanGorder of HRMFES human resources and District Chief John Verall to investigate Ms. Tessier's complaint. They interviewed Chief McLean, DC Burgess, and other firefighters at the

station and released an internal report on March 1, 2007. The report concluded that Ms. Tessier's complaints were unfounded. Ms. VanGorder and Mr. Verall found that the evidence of other female firefighters at the station did not corroborate Ms. Tessier's allegations of a discriminatory work environment. HRMFES informed Ms. Tessier on July 3, 2007 that it would take no further action with respect to her complaint.

MS. TESSIER'S HUMAN RIGHTS COMPLAINT

[10] Ms. Tessier first spoke with the Commission in April, 2007 and filed an intake form on May 15, 2007. Her complaint against HRMFES alleged that she had been discriminated against on the basis of sex and mental disability, contrary to section 5(1)(d),(e),(m) and (o) of the *Nova Scotia Human Rights Act*, RSNS 1989, c.214.

[11] The Commission informed HRMFES of Ms. Tessier's complaint on November 28, 2007. HRM offered to provide a facilitator to mediate the dispute between Ms. Tessier and Chief McLean and DC Burgess. Ms. Tessier informed the Commission that she was not comfortable with mediation and preferred to have her complaint formalized and an investigator assigned to the case.

[12] Ms. Tessier's complaint was initially assigned to Human Rights Officer Melanie McNaughton on March 21, 2008, who shortly thereafter took a one year leave of absence. The file was then reassigned on April 25, 2008 to Officer Jose Montes for investigation.

[13] Mr. Montes prepared a formal complaint form on May 1, 2008 setting out the details of the complaint. Ms. Tessier reviewed and revised the complaint before signing a final version on May 22, 2008. The final complaint outlined a number of incidents involving Chief McLean and DC Burgess where Ms. Tessier felt that she had been discriminated against, unfairly disciplined or excluded from the social life of the station. The complaint also alleged that once Ms. Tessier began to suffer stress and depression as a result of the alleged discrimination at Station 60/61, she was not granted appropriate accommodation.

[14] Ms. Tessier provided Mr. Montes with a list of seven witnesses on August 7, 2008. Between September 10 to 22, 2008, Mr. Montes interviewed four firefighters at station 60/61, three of whom were women, and one female firefighter at another station who was well acquainted with Ms. Tessier. The two witnesses on Ms.

Tessier's list that he chose not to interview were her psychologist and a Deputy Chief at another fire station.

[15] Mike Dunphy, Conflict Resolution Consultant with HRM, was appointed to respond to Ms. Tessier's complaint on behalf of HRMFES, Chief McLean and DC Burgess. The response from Mr. Dunphy was due on June 12, 2008. On June 13, 2008, he requested an extension which was granted to June 30, 2008.

[16] Having not received the response, Mr. Montes wrote to Mr. Dunphy on July 7, 2008 and offered a further extension until July 14, 2008. Mr. Montes advised that if he did not hear from Mr. Dunphy by July 14, 2008, the file would proceed directly through the investigation process with the allegations considered unchallenged.

[17] On July 14, 2008, Mr. Dunphy requested and was granted a further extension until July 18, 2008. The deadline came and went without explanation from Mr. Dunphy or further follow-up by Mr. Montes.

[18] As of January 20, 2009, Mr. Dunphy had still not tendered a response, nor requested any further extensions. On that date, Mr. Montes e-mailed Ms. Tessier to

advise that due to the respondents' failure to file a response to her complaint, the allegations of discrimination would be considered unchallenged and he would prepare the investigation report with the information he had on file as of that date.

[19] Despite his earlier representations to Ms. Tessier, Mr. Montes sent a letter to Mr. Dunphy on January 28, 2009 requesting copies of the material gathered by HRMFES as part of the internal investigation into Ms. Tessier's workplace complaint. The letter also offered the respondents a further extension to file their response to the complaint.

[20] One day later, Mr. Dunphy tendered a 40 page response to the complaint. Ms. Tessier filed a lengthy rebuttal to the HRMFES response on May 26, 2009. On June 1, 2009, Mr. Montes e-mailed Ms. Tessier indicating that with the receipt of the HRMFES response and her rebuttal, he would "need to interview more witnesses/the respondents, and very likely gather further evidence."

[21] Mr. Montes left the Commission in the fall of 2009. The record shows that nothing was done on the file for approximately a year and a half, while it was

transferred first to Daryl McPherson, then to Gerald Hashey, and finally to Human Rights Officer Herbert Desmond on Feb 4, 2010.

[22] After learning that Mr. Desmond had taken over her file, Ms. Tessier arranged to meet with him on April 6, 2010. Unfortunately Mr. Desmond became ill and the meeting did not take place. Ms. Tessier did not hear from Mr. Desmond again until January 18, 2011, when he wrote a letter indicating that he was in the process of writing an investigation report and was considering incorporating her complaint with another complaint involving similar facts. This did not occur.

[23] According to the record, Mr. Desmond scheduled interviews with Chief McLean, DC Burgess, Ms. VanGorder, Mr. Verall, and several female firefighters at Station 60/61 for September 12 and 13, 2011. On the morning of September 12, 2011, Mr. Desmond cancelled all of these interviews due to a scheduling conflict. He attempted to reschedule the interviews with Chief McLean, DC Burgess, Mr. Verall and Ms. VanGorder, but, for reasons that are unclear, none of these interviews took place.

[24] Mr. Desmond proceeded to prepare an investigation report based on the following record:

- (1) Ms. Tessier's complaint form and additional documentation;
- (2) the HRMFES response prepared by Mr. Dunphy;
- (3) Ms. Tessier's rebuttal to the HRMFES response; and
- (4) Mr. Montes's interview notes from September of 2008.

All of these materials had been in Ms. Tessier's file since 2009. Mr. Desmond released his investigation report on December 29, 2011, recommending that Ms. Tessier's complaint be dismissed under section 29(4)(b) of the *Act* on the basis of insufficient evidence to support the allegations.

[25] With respect to the substance of Ms. Tessier's complaint, Mr. Desmond made the following findings:

In summary the information suggests that the Complainant did not have a good relationship with either Chief McLean or DC Burgess. It appears that notwithstanding the allegations of discrimination that they did not appear to like each other and personalities appeared, in part, to be a factor in the ongoing issues the Complainant experienced during her tenure.

The issues she raises in respect to discrimination appear to be based on perception. There does not appear to be any overt acts of discrimination in that no one person or

persons have openly made negative reference to females being involved in the fire service.

The Complainant's assertion is that she received differential treatment overall. She appears to relate everything that happened to her was because she is a female and asserts the Respondent [sic] failure to address her concerns was because she is female. It is apparent that the Complainant believes that her being a female was the factor in her issues and seeking redress for those issues but the evidence does not support that perception. The Respondent has presented non-discriminatory reasons for the situations she has raised in her complaint.

[26] In coming to this conclusion, Mr. Desmond appears to have relied heavily on the version of events offered by HRMFES.

[27] Ms. Tessier filed a response to Mr. Desmond's investigation report on January 19, 2012. She also sent a letter of complaint on January 23, 2012 to Gerald Hashey, Manager of Dispute Resolution for the Commission, raising issues with the quality of the investigation conducted by Mr. Desmond. Mr. Hashey responded the next day with a short letter dismissing any alleged deficiencies in Mr. Desmond's investigation.

[28] The Commissioners considered Ms. Tessier's complaint at their meeting of February 15, 2012. They were in possession of the record compiled by Mr. Montes and Mr. Desmond, Mr. Desmond's investigation report, and Ms. Tessier's response of January 19, 2012. The Commissioners ultimately adopted Mr. Desmond's recommendation and dismissed the complaint under section 29(4)(b) of the *Act*. The

Commission's reasons for the decision consisted of the following letter to Ms.

Tessier:

We are writing to advise you that the above-named complaint was discussed at the meeting of the Commissioners of the Nova Scotia Human Rights Commission held on February 15, 2012.

After a thorough review of the matter, the Commissioners decided that based on the available information, the complaint is dismissed pursuant to Section 29(4)(b) of the *Human Rights Act* because there is insufficient evidence to support the allegation. Decisions by the Commissioners of the Nova Scotia Human Rights Commission are final.

[29] On April 13, 2012, Ms. Tessier filed a notice of judicial review of the Commission's decision. She challenges the fairness of the investigation on the following grounds:

Failure to interview key witnesses;

Inordinate delay;

Bias;

Reliance on the HRMFES internal investigation;

Assessing credibility at a stage when credibility should not be assessed; and,

Failure to correct deficiencies in the investigation.

In the alternative, she says that the Commission's decision to dismiss her complaint was unreasonable.

[30] Ms. Tessier asks that this Court quash the decision and direct the Commission to refer her complaint to a Board of Inquiry.

LEGISLATIVE FRAMEWORK

[31] Section 4 of *the Human Rights Act* defines discrimination as follows:

4 For the purpose of this Act, a person discriminates where the person makes a distinction, whether intentional or not, based on a characteristic, or perceived characteristic, referred to in clauses (h) to (v) of subsection (1) of Section 5 that has the effect of imposing burdens, obligations or disadvantages on an individual or a class of individuals not imposed upon others or which withholds or limits access to opportunities, benefits and advantages available to other individuals or classes of individuals in society.

[32] Section 5 of the Act states in part:

5 (1) No person shall in respect of

...

(d) employment;

(e) volunteer public service;

...

discriminate against an individual or class of individuals on account of

...

(m) sex;

...

(o) physical disability or mental disability

...

(3) No person shall harass an individual or group with respect to a prohibited ground of discrimination.

[33] The procedure to be followed in filing a complaint under the *Act* is set out at section 29, which provides, in part:

29 (1) The Commission shall inquire into and endeavour to effect a settlement of any complaint of an alleged violation of this Act where

(a) the person aggrieved makes a complaint in writing on a form prescribed by the Director; or

...

if (4) The Commission or the Director may dismiss a complaint at any time

(a) the best interests of the individual or class of individuals on whose behalf the complaint was made will not be served by continuing with the complaint;

(b) the complaint is without merit;

(c) the complaint raises no significant issues of discrimination;

(d) the substance of the complaint has been appropriately dealt with pursuant to another Act or proceeding;

(e) the complaint is made in bad faith or for improper motives or is frivolous or vexatious;

(f) there is no reasonable likelihood that an investigation will reveal evidence of a contravention of this Act; or

(g) the complaint arises out of circumstances for which an exemption order has been made pursuant to Section 9.

ISSUES

1. Was Ms. Tessier denied procedural fairness in the Commission's investigation of her complaint?

2. If Ms. Tessier was accorded procedural fairness, was the Commission's decision to dismiss her complaint reasonable?

PROCEDURAL FAIRNESS OF THE INVESTIGATION

[34] The Commission serves a screening or gate-keeping function in determining which complaints to dismiss and which complaints to refer to a Board of Inquiry: *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2012 SCC 10, at para 20. A decision by the Commission to dismiss a complaint under section 29(4) of the *Act* is an administrative decision to which specific rules of procedural fairness apply: *Grover v. Canada*, 2001 FCT 687, at para 52.

[35] Questions of procedural fairness are questions of law that are to be reviewed on a standard of correctness. No deference is due to the decision-maker. The task of this Court is to isolate specific requirements of procedural fairness and determine whether they have been met in the circumstances of the case at bar. The decision-maker will either be found to have complied with the content of the duty of fairness applicable in the circumstances, or to have breached this duty: *Sketchley v. Canada (Attorney General)*, 2005 FCA 404, at para. 53.

[36] In the context of human rights investigations, complainants are owed a duty of procedural fairness by both the investigator gathering the evidence and crafting a report, and by the Commission in reaching its decision

[37] It is well established that human rights Investigators are masters of their own procedure and are afforded broad discretion in choosing who they interview and how they gather information: *Slattery v. Canada (Human Rights Commission)*, (1994) 73 FTR 161, [1994] 2 FC 574, at para. 69, affirmed (1996) 205 NR 383 (CA). That broad discretion, however, must be exercised in accordance with the duty of procedural fairness owed to the complainant.

[38] In *Slattery, supra*, Justice Nadon, as he then was, held that the duty of procedural fairness requires that human rights investigations satisfy two criteria: neutrality and thoroughness: para. 49. He recognized that in determining the degree of thoroughness required, one must balance the rights of individual parties to procedural fairness with the Commission's interests in maintaining a workable and effective system. Justice Nadon concluded as follows:

56 Deference must be given to administrative decision-makers to assess the probative value of evidence and to decide to further investigate or not to further

investigate accordingly. It should only be where unreasonable omissions are made, for example where an investigator failed to investigate obviously crucial evidence, that judicial review is warranted. Such an approach is consistent with the deference allotted to fact-finding activities of the Canadian Human Rights Tribunal by the Supreme Court in the case of *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554.

57 In contexts where parties have the legal right to make submissions in response to an investigator's report, such as in the case at bar, parties may be able to compensate for more minor omissions by bringing such omissions to the attention of the decision-maker. Therefore, it should be only where complainants are unable to rectify such omissions that judicial review would be warranted. Although this is by no means an exhaustive list, it would seem to me that circumstances where further submissions cannot compensate for an investigator's omissions would include: (1) where the omission is of such a fundamental nature that merely drawing the decision-maker's attention to the omission cannot compensate for it; or (2) where fundamental evidence is inaccessible to the decision-maker by virtue of the protected nature of the information or where the decision-maker explicitly disregards it.

[39] Although *Slattery, supra*, was decided prior to the Supreme Court of Canada's decision in *Baker v. Minister of Citizenship and Immigration*, [1999] 2 SCR 817, the Federal Court of Appeal had the opportunity to revisit the content of procedural fairness required in the context of human rights investigations in *Sketchley, supra*. After weighing the *Baker* factors, the Court confirmed that Justice Nadon's decision in *Slattery, supra*, appropriately described the content of procedural fairness in this context: para. 121.

[40] I will consider each ground of review raised by Ms. Tessier in order to determine whether she was accorded procedural fairness by the investigator.

Failure to Interview Key Witnesses

[41] The duty of procedural fairness does not require an investigator to interview every witness suggested by a complainant. The court must consider each witness individually. The Federal Court has taken two distinct approaches to assessing whether or not a failure to interview a particular witness amounts to a breach of procedural fairness. In *Egan v. Canada (Attorney General)*, 2008 FC 649, the Court stated:

24 It is acknowledged that an investigator has no duty to interview every witness named by a complainant if there is no relevant evidence to be gained or other good reason not to do so. However where a reasonable person would expect that useful evidence could possibly be gained by an interview there is some obligation to conduct the interview or say why not. [Emphasis added]

[42] In *Tinney v. Canada (Attorney General)*, 2010 FC 605, the test in *Egan, supra*, was restated as follows:

28 The jurisprudence is clear: There is no requirement that a human rights investigator interview every witness proposed or identified by the parties: *Miller v. Canada (Human Rights Commission)* (1996), 112 F.T.R. 195. However, it is equally clear that an interview is required where a reasonable person would expect evidence useful to the investigator in his determination would be gained as a result of the interview (*Egan v. Canada (Attorney General)*, 2008 FC 649) or where there is a witness that may have information that could address a significant fact and where no one else has been interviewed that could resolve that important and controversial fact (*Busch v. Canada (Attorney General)*, 2008 FC 1211.) [Emphasis added]

[43] In *Gravelle v. Canada (Attorney General)*, 2006 FC 251 and *Sanderson v. Canada (Attorney General)*, 2006 FC 447, the Federal Court chose instead to apply the thoroughness standard articulated in *Slattery, supra*. Justice Blanchard in *Gravelle, supra*, held as follows:

40 In failing to interview the key individuals involved in the applicant's case, particularly Mr. Soucy, Mr. Cardinal, Ms. Bouchard and Mr. Cole, I feel that the Investigator did not conduct an in-depth and thorough investigation and thus did not examine obviously crucial evidence in the case. The investigation into the applicant's complaint therefore did not meet the thoroughness standard in *Slattery* and affirmed by the Federal Court of Appeal in *Sketchley*. The Commission's decision to dismiss the complaint must therefore be quashed because it violates the procedural fairness requirement. [Emphasis added]

[44] In my view, the language in *Tinney, supra*, of "useful" interviews being "required" is contrary to Justice Nadon's observations in *Slattery, supra*, that investigators are entitled to significant deference, and judicial intervention will be warranted only where an investigator fails to investigate obviously crucial evidence. It is easy to imagine an investigation where many potential witnesses could provide "useful" information, but that information would fall short of being "crucial" to the investigation. Accordingly, as in *Gravelle, supra*, and *Sanderson, supra*, I will apply the *Slattery* thoroughness test to determine whether the failure of the investigator in this case to interview certain witnesses amounted to a failure to investigate obviously crucial evidence.

Ms. Tessier's Position

[45] Counsel for Ms. Tessier submits that the Commission's investigation in this case clearly fell below the requirements for procedural fairness. The most glaring omission, she argues, was the failure of both Mr. Desmond and Mr. Montes to interview the named respondents, Chief McLean and DC Burgess. She invites the court to hold categorically that a human rights investigation cannot be thorough when the named parties are not interviewed. Further, she notes that Mr. Desmond attempted to schedule interviews with Chief McLean and DC Burgess on two occasions, but these interviews did not take place. This fact is offered as further proof that failing to interview the named respondents was a crucial omission.

[46] Counsel for Ms. Tessier identifies a number of other omissions. She argues that Mr. Desmond should have interviewed Beth VanGorder and John Verrall, the authors of HRM's report regarding Ms. Tessier's internal workplace complaint. She also argues that Mike Dunphy, the author of HRM's response to the Commission complaint, was a key witness that should have been interviewed. Finally, counsel argues that Mr. Desmond should have interviewed Nadya Pare, the HRM's diversity

officer and a career firefighter who could speak to the discrimination faced by women in the fire service.

[47] With respect to the five interviews conducted by Mr. Montes in 2008, counsel argues that the questions asked were not sufficiently probing or detailed. In addition, she points out that Mr. Desmond only had the benefit of Mr. Montes's interview notes, but did not have the benefit of speaking to Mr. Montes in order to clarify or contextualize his notes.

[48] Counsel draws attention to the fact that both Mr. Montes and Mr. Desmond indicated that, in addition to the interviews already conducted, more interviews would be needed to complete the investigation. Additional interviews did not occur.

[49] Lastly, counsel for Ms. Tessier argues that the investigation report was focused solely on the individual instances of discrimination raised by Ms. Tessier, and does not address her allegations of systemic gender discrimination in the fire service. It is Ms. Tessier's position that Mr. Desmond would have had to interview additional witnesses in order to put adequate information before the Commissioners regarding the alleged systemic discrimination within HRMFES.

The Respondent's Position

[50] The respondent HRM submits that none of the omissions highlighted by Ms. Tessier amount to a breach of procedural fairness. Counsel for the respondent argues that between the submissions of Ms. Tessier, HRM's response submissions, and the interview notes from the five interviews conducted by Mr. Montes, all of the key allegations of the complaint were addressed. She further submits that Mr. Desmond was entitled to rely on Mr. Montes's interview notes and was not under any obligation to re-interview the same witnesses.

[51] Counsel for the respondent argues that Mr. Desmond's failure to interview Chief McLean or DC Burgess does not amount to a breach of procedural fairness. She rejects Ms. Tessier's submission that an investigation should categorically be held insufficient on the basis that the named parties are not interviewed, citing *Best v. Canada (Attorney General)*, 2011 FC 71, at paras 22-23. Further, she argues that a reasonable person would not believe that Chief McLean or DC Burgess would provide any additional information useful to the investigation since their positions were already laid out extensively in the HRM response authored by Mr. Dunphy.

[52] With respect to Ms. VanGorder, Mr. Verrall, and Mr. Dunphy, counsel states simply that these individuals were not key witnesses. Ms. VanGorder and Mr. Verrall were tasked with investigating Ms. Tessier's internal complaint, and Mr. Duffy performed a similar investigation in preparing HRM's response document to the Commission complaint. None of these individuals were directly involved in any of the events that gave rise to Ms. Tessier's allegations of discrimination and differential treatment.

ANALYSIS

[53] My task at this point is to determine whether the investigator made unreasonable omissions in deciding who to interview and failed to investigate obviously crucial evidence. With that in mind, I will discuss each omission raised by Ms. Tessier in turn.

[54] With respect to Ms. VanGorder, Mr. Verrall and Mr. Dunphy, I agree with the respondent that these individuals were not key witnesses. All three of these proposed witnesses were involved with investigating Ms. Tessier's internal complaint but were

not directly involved with the events that gave rise to the complaint. Any information that Mr. Desmond would have obtained from them in interviews would have been information that an investigator could gather by conducting their own investigation. I cannot conclude that other investigators to a similar internal workplace complaint are key witnesses for a human rights investigation. In fact, it is preferable for human rights investigators to conduct their own thorough investigations rather than relying on the opinions of internal investigators.

[55] Also with respect to Ms. VanGorder, counsel for Ms. Tessier raises the fact that Mr. Desmond posed questions to Ms. VanGorder via e-mail on December 8, 2011, but proceeded to finalize the investigation report without receiving a response to these questions. On its face, these facts are similar to the facts in *Charlebois v. Canada (Canadian Human Rights Commission)*, [1998] FCJ No 1335 (TD). In that case, an investigation was held procedurally unfair because the investigator had written a letter to the complainant's employer seeking answers to specific questions, but proceeded to prepare his investigation report without receiving a response from the employer. However, I find *Charlebois* to be distinguishable on the basis that the information sought by the investigator in that case was crucial to the investigation. In this matter, I have already found that Beth VanGorder was not a key witness. I do

not find that the questions posed to her by Mr. Desmond would have yielded information crucial to the investigation. He merely asked for her opinion as to whether discrimination based on gender had occurred. While it is unusual to ask questions in an investigation and not wait for a response, I cannot say that this omission breached Ms. Tessier's right to procedural fairness.

[56] Although the respondent did not make submissions regarding Ms. Tessier's suggestion that Nadya Pare should have been interviewed, I find that Ms. Pare was not a key witness. As HRMFES's Diversity Officer, she may have had useful information relevant to the investigation. But as I have stated, I do not accept that an investigator is under a strict obligation to interview every witness that could offer useful information. I am also of the view that other female firefighters interviewed by Mr. Montes could speak to discrimination experienced by female firefighters within HRMFES. The decision not to interview Ms. Pare fell within the investigator's discretion.

[57] Ms. Tessier also calls into question the quality of Mr. Montes's interviews. I do not believe that it is properly the role of this Court to review the transcripts of every interview conducted during an investigation with a fine-toothed comb and

assess the quality of the questions asked therein. I would leave open the possibility that an investigation may be called into question where the interviews are conducted so superficially as to raise serious doubt that any relevant information was gathered by the investigator. Generally, however, an investigator must have discretion to choose which questions to ask of their witnesses, and how to best gather information. I have reviewed the transcripts of the five interviews conducted by Mr. Montes, and they do not reveal any immediate or obvious shortcomings. I do not find that there was a lack of procedural fairness on these grounds.

[58] Similarly, Mr. Desmond was entitled to rely on Mr. Montes's interview notes. The Commission, like all administrative bodies, experiences staffing turnover and cannot guarantee that every investigation will be commenced and completed by the same investigator. It would be unreasonable to require the Commission to restart the investigation process each time a file is transferred to a new investigator.

[59] This brings me to Chief McLean and DC Burgess. They were both named as respondents to Ms. Tessier's complaint and were central players in nearly all of the events Ms. Tessier cited as evidence of discrimination against her. There can be no doubt that both were key witnesses.

[60] The respondent does not deny that Chief McLean and DC Burgess were key witnesses. Rather, the respondent submits that all of the relevant information they could provide was provided to Mr. Dunphy and submitted as part of HRM's written response to Ms. Tessier's complaint. Counsel for the respondent suggests that a reasonable person would not believe that Chief McLean and DC Burgess would provide additional relevant information above and beyond that which was included in the HRM response.

[61] This argument has some merit. It is true that the HRM response addressed every specific instance of alleged discrimination raised by Ms. Tessier and, therefore, provided the Commission with insight as to Chief McLean and DC Burgess's positions regarding the complaint. It is also worth noting that the Commission has the discretion to accept written submissions in lieu of in-person interviews.

[62] However, as I have previously stated, the operative question is whether the failure to interview Chief McLean and DC Burgess was a failure to investigate obviously crucial evidence to the investigation. In this case it must be asked whether, after receiving the HRM response, Chief McLean and DC Burgess could

provide additional crucial information, such that interviews with these men were necessary. I find that it is reasonable to believe that Chief McLean and DC Burgess had additional crucial information to offer, such that conducting interviews with them was necessary for a thorough investigation.

[63] While the HRM response was thorough in content, it nevertheless suffered from the limitations inherent to written submissions. In an interview, the investigator has the ability to ask follow-up questions, challenge opinions, and make limited credibility assessments. The Commission generally has discretion to accept written submissions in lieu of interviews, but whether it is appropriate to do so in any given circumstance is highly context-dependent. In this case, Chief McLean and DC Burgess were both central to the allegations of discrimination. A thorough investigation required more than merely accepting the contents of the HRM response at face value. A reasonable investigator would have recognized that additional crucial information could be gathered by conducting thorough and critically-minded interviews with Chief McLean and DC Burgess. Given the central importance of their version of events to the outcome of the investigation, such interviews were required for a thorough investigation.

[64] This view finds support in Mr. Montes's comment to Ms. Tessier that he would "need to interview more witnesses/the Respondents", and Mr. Desmond's decision to schedule interviews with both Chief McLean and DC Burgess in September, 2011. When those interviews were cancelled, Mr. Desmond made efforts to re-schedule later in the month. These interviews never took place. In the absence of any explanation as to why he never went forward with the interviews, it can be inferred that Mr. Desmond himself recognized that interviews with Chief McLean and DC Burgess were relevant to his investigation. At the very least, Mr. Desmond was required to explain why such obviously crucial evidence was not gathered.

[65] I find that Mr. Desmond's failure to interview either Chief McLean or DC Burgess amounts to a breach of procedural fairness pursuant to the test set out in *Slattery, supra*. This breach alone is sufficient to invalidate the investigation and render the Commissioners unable to make a proper screening determination on this case based on the sufficiency of the record before them.

[66] Given that I have found the Commission's investigation in this case to have breached procedural fairness by failing to interview Chief McLean or DC Burgess,

it is unnecessary to address the other grounds of judicial review raised by Ms. Tessier.

I wish, however, to make two additional observations.

[67] Ms. Tessier also alleged that the Commission failed to thoroughly investigate her allegations of systemic gender discrimination at HRMFES. I agree that the investigation into systemic gender discrimination in the fire service was not thorough. However, I do not accept that Ms. Tessier's complaint initially included allegations of systemic discrimination. Her formal complaint, signed May 22, 2008, makes occasional reference to the "boy's-club" environment in her workplace and makes passing mention to difficulties that other women have experienced at the station. I do not find that these occasional references are sufficient to establish systemic discrimination as a separate ground of her complaint. Her subsequent submissions to the Commission make increased reference to the male-dominated culture at Station 60/61 and within HRMFES more broadly. It is not clear from the record whether Ms. Tessier intended to include an allegation of systemic discrimination in her formal complaint letter, or whether she later on attempted to incorporate this element of her complaint through additional submissions. In either case, I find that it was appropriate for the Commission's investigation to focus on the allegations set out in her May 22, 2008 complaint. The Commission's failure to fully investigate Ms. Tessier's

allegations of systemic discrimination does not amount to a breach of procedural fairness.

[68] Finally, I want to express to the Commission that I am troubled by Mr. Montes's actions on this file in January of 2009. I refer specifically to the e-mails sent by Mr. Montes to Ms. Tessier and to Mr. Dunphy. On January 20, 2009, Mr. Montes e-mailed Ms. Tessier and plainly indicated that as a result of the respondents' failure to file a response within the requisite time period, the allegations of discrimination would be treated as unchallenged and the investigation report would be prepared on the basis of existing file materials. Despite having made these representations to Ms. Tessier, Mr. Montes proceeded to send an e-mail to Mr. Dunphy on January 28, 2009, seeking further documentation and offering a further extension of time to file a response to the complaint. While I need not decide whether this conduct is sufficiently egregious on its own to amount to a breach of procedural fairness, I caution the Commission that similarly inappropriate behaviour ought not become a standard in the investigation process.

REMEDY

[69] Counsel for Ms. Tessier requests that I order the Commission to refer Ms. Tessier's complaint directly to a Board of Inquiry. I am convinced that this court does not have the jurisdiction to do so: *Grover, supra*, at para 74.

[70] The appropriate remedy in this case is to quash the decision of the Commission and remit the matter back to the Commission for re-consideration, with another investigation to be conducted by an investigator with no prior involvement with this complaint.

CONCLUSION

[71] This judicial review is allowed. The decision of the Nova Scotia Human Rights Commission to dismiss Liane Tessier's complaint is quashed. Ms. Tessier's complaint against Halifax Regional Municipality Fire and Emergency Services is remitted back to the Commission to be re-considered after a fresh investigation, conducted by an investigator with no prior contact with her complaint file.

[72] The parties may provide written submissions on costs by March 14, 2014

A handwritten signature in black ink, appearing to read "Arthur J. LeBlanc", written over a horizontal line.

Justice Arthur J. LeBlanc