SUPREME COURT OF NOVA SCOTIA

Citation: *Stoddard v. Nova Scotia (Department of Justice)*, 2019 NSSC 158

Date: 2019 05 22
Docket: Hfx No. 478504
Registry: Halifax

Between:

Iona Stoddard

Applicant

v.

The Province of Nova Scotia (Department of Justice)
and The Nova Scotia Human Rights Commission

Respondents

Judge: The Honourable Justice Joshua M. Arnold

Heard: March 4, 2019, in Halifax, Nova Scotia

Counsel: Ian Gray, for the Applicant
Kevin Kindred, for the Respondent DOJ
Kymberly Franklin appearing for Kendrick Douglas, for the Respondent NSHRC

By the Court:

Overview

[1] Iona Stoddard was training as a Judicial Assistant ("JA") at the Halifax Provincial Court location. After several years of off and on attendance at work, she requested a transfer to another job site. Ms. Stoddard subsequently filed a complaint with the Nova Scotia Human Rights Commission, alleging that she was subjected to excessive training and had her work excessively scrutinized by her employer when training as a JA because she is African-Canadian and also because she has been diagnosed with depression.

[2] Following an investigation by Human Rights Officer Allison Smith, the Commission dismissed Ms. Stoddard's complaint pursuant to s. 29(4)(b) of the *Human Rights Act*, on the basis that "the complaint is without merit.".

[3] Ms. Stoddard has applied for a judicial review of the Commission's decision, on the grounds of a breach of procedural fairness. She says HRO Smith did not interview certain witnesses and failed to explain to what standard of competence she was being held prior to recommending dismissal of her complaint.

Facts

[4] Between November 2012 and August 2015, Iona Stoddard was employed as a JA by the Nova Scotia Department of Justice. She worked at the Provincial Court in Halifax.

[5] The record indicates that a JA plays a critical role in the administration of the Provincial Court. The Provincial Courts in this province deal with criminal and quasi-criminal matters. Court dockets in Halifax are heavy. JA's manage the administrative aspects within a courtroom. JA's require a strong working knowledge of the court system. They must pay attention to detail, be able to work independently, be able to make decisions on-the-spot, be aware of what is going on around them, and be able to multi-task. A JA's job is demanding, fast-paced, and pressure packed. Because of their important role in ensuring the proper functioning of a courtroom and their contribution to the criminal justice system, the consequences of a JA making an error can be significant.

[6] According to the Province, Ms. Stoddard displayed significant difficulties in performing the basic duties of a JA. As a result, the Province took a "series of performance management steps" in order to assist her. The Province provided additional coaching, training and mentoring. Supervisors met with Ms. Stoddard to review her errors and to discuss goals for improvement. Nonetheless, Ms. Stoddard continued to struggle to properly perform as a JA. According to the Record, concerns were raised by her managers, peer mentors, and members of the judiciary.

[7] The Province says that Ms. Stoddard's performance issues were complicated by absences due to lengthy medical leaves while she was working as a JA in Provincial Court. When she started in Provincial Court in November 2012, she was just returning to work from medical leave in her previous position and therefore only worked part-time hours due to an easeback. Ms. Stoddard did not actually start working full-time until January 2013. She had another medical leave between September 2013 and January 2014, after which she had another period of easeback and worked part-time hours. She had another medical leave between November 2014 and April 2015, following which she had another easeback and worked part-time hours. On July 22, 2015, the Province asked for the details of any limitations, restrictions and/or accommodations that Ms. Stoddard might require. On July 29, 2015, the Province was advised by Morneau Shepell, disability managers, that Ms. Stoddard would require an accommodation commencing July 28, 2015, but Morneau Shepell did not include any details of the accommodation. They advised that an Attending Physician Statement form had been requested and was due by August 12, 2015. Subsequently, later in August 2015 (the precise date is obscured in the Record (p.400)), Dr. Kathy Gallagher prepared an Accommodation Request, with the following three limitations and restrictions suggested:

1. Less busy courtroom;
2. Regular scheduled meetings, one on one;
3. Constructive criticism and positive reinforcement.

[8] According to emails from the Province in the Record, on August 25, 2015, Ms. Stoddard went on medical leave from her job as a JA. In October 2015, while on sick leave, Ms. Stoddard filed a grievance. She obtained another job with different job duties. She started at that new position in January 2016.

[9] Ms. Stoddard did not face any discipline during her time as a JA.

[10] On May 9, 2016, Ms. Stoddard filed a complaint with the Commission alleging that the close scrutiny of her job performance as a JA amounted to discriminatory conduct.

[11] On June 24, 2016, the Commission assigned HRO Sean Hardy to investigate the complaint.

[12] The investigation was transferred to HRO MaryAnn Barker on October 6, 2016.

[13] According to the Commission's notes, on November 23, 2016, HRO Barker met with Kevin Kindred, counsel for the Province. HRO Barker met with Ms. Stoddard on January 5, 2017. HRO Barker then met again with Mr. Kindred; with Deirdre Smith, supervisor at Halifax Provincial Court; with Tanya Pellow, Court Administrator; and with Cory Marsman, Human Resources, on February 8, 2017. HRO Barker then left her employ at the Commission.

[14] The investigation was transferred to HRO Allison Smith on February 27, 2017.

[15] On May 17, 2017, in accordance with Ms. Stoddard's wishes, HRO Smith determined that a resolution conference was not appropriate.

[16] On July 11, 2017, HRO Smith requested a written response from the Province and included several questions she wished to be addressed.

[17] On August 29, 2017, the Province responded to the complaint via email.

[18] Numerous emails were exchanged between HRO Smith and Ms. Stoddard. They met on September 26, 2017.

[19] Ms. Stoddard filed a six-page rebuttal to the Province's August 29 response on October 20, 2017. She identified witnesses she says would be important to the investigation and said:

> My other mentors (Stephanie Olive, Sara [sic] Winfield and Jason Warham, to name a few) told me it was acceptable to correct errors, i.e. spelling, punctuation, etc. before logging out of Novo (Voxlog).
>
> ...
>
> Only a couple of Judicial Assistants came to me personally to let me know what was going on behind my back. One was Hillary [sic] Rankeillor.

> ...
>
> Joan LeBlanc had spoken to all the other Judicial Assistants that were involved. This included my trainer at the time, Jason Warham, and Ina Joudrey, who was the Judicial Assistant who completed the paperwork.
>
> ...
>
> The enclosed training notes, refer to Laurie VanHorne and Leah Ferguson, as my primary mentors.
>
> ...
>
> The few Judicial Assistants, one was Tina Devoe, who were honest with me told me many times that "they (Deirdre Smith and Tanya Pellow) are trying to get rid of you" and with the treatment I was receiving, there was no doubt in my mind.

[20] On November 3 and 22, 2017, HRO Smith emailed the Province asking follow-up questions about the documentary evidence and Ms. Stoddard's depression. On December 7, 2017, the Province sent an email responding to questions raised by HRO Smith. This information was forwarded via email to Ms. Stoddard on January 19, 2018.

[21] On February 7, 2018, Ms. Stoddard sent a response to HRO Smith regarding the email of January 19, 2017.

[22] On May 2, 2018, HRO Smith advised Ms. Stoddard and the Province that she would be recommending the complaint be dismissed in accordance with s. 29(4)(b) of the *Human Rights Act*. HRO Smith advised the parties of their right to provide written submissions regarding her recommendation by May 24, 2018, prior to sending her final recommendation to the Commission.

[23] Ms. Stoddard filed rebuttal submissions on May 13, 2018. In these submissions, she identified two co-workers that she said should have been interviewed and/or mentioned in HRO Smith's report:

> As was noted in my Rebuttal, two of my collegues, Hilary Rankeillor and Jason Warham said that my training was different from all the other Judicial Assistants and in fact made them uncomfortable.

[24] She also complained that she should have been disciplined if her performance was as poor as alleged:

> Smith notes that "at no point was Stoddard disciplined by her employer due to her work performance." Why? If my work was that inferior to the other Judicial

> Assistants. I should have received a letter of discipline on my file. If my performance was that poor, then as a matter of public safety, I should have been fired, but I was not.

[25] Ms. Stoddard claimed that the discrimination followed her to Family Court:

> Smith did not mention in her investigative report that I filed my complaint because of the same differential treatment and discrimination that continued at Family Court. All of which was being directed by Tanya Pellow, at the Provincial Court.

[26] On June 20, 2018, the Commission dismissed Ms. Stoddard's complaint pursuant to s. 29(4)(b) of the *Act*, "because the complaint is without merit". According to the Record, in the course of considering Ms. Stoddard's complaint, the Commission reviewed the following documents:

- Copy of Complaint Form;
- Copy of Investigation Report;
- Submission on Investigation Report from Complainant dated May 13, 2018.

Issues

1. Did HRO Smith breach the duty of procedural fairness by failing to interview witnesses identified by Ms. Stoddard regarding her level of supervision and by failing to explain why she did not interview those witnesses?
2. Did HRO Smith breach the duty of procedural fairness by failing to interview a witness identified by Ms. Stoddard regarding the Province's knowledge of her depression, and by failing to explain why she did not interview that witness?
3. Did HRO Smith breach the duty of procedural fairness by failing to explain to what standard of performance Ms. Stoddard would be held in determining whether she displayed performance difficulties?

Legislation

[27] Section 29(4)(b) of the *Human Rights Act*, R.S.N.S. 1989, c. 214, states, in part:

> 29 (4) The Commission or the Director may dismiss a complaint at any time if

...

(b) the complaint is without merit...

Standard of Review

Reasonableness

[28] Administrative decisions, such as that under review here, are reviewed under one of two standards: reasonableness or correctness.

[29] The reasonableness standard of review was outlined by Bastarache and LeBel JJ., for the majority, in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] S.C.J. No. 9. They said:

> 47 Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review or reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.
>
> 48 The move towards a single reasonableness standard does not pave the way for a more intrusive review by courts and does not represent a return to pre-*Southam* formalism. In this respect, the concept of deference, so central to judicial review in administrative law, has perhaps been insufficiently explored in the case law. What does deference mean in this context? Deference is both an attitude of the court and a requirement of the law of judicial review. It does not mean that courts are subservient to the determinations of decision makers, or that courts must show blind reverence to their interpretations, or that they may be content to pay lip service to the concept of reasonableness review while in fact imposing their own view. Rather, deference imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law. The notion of deference "is rooted in part in a respect for governmental decisions to create administrative bodies with delegated powers" (*Mossop*, 1993 CanLII 164 (SCC), [1993] 1 S.C.R. 554 at p. 596, per L'Heureux-Dubé J., dissenting). We agree with David Dyzenhaus where he states that the concept of "deference as respect" requires of the courts "not submission but a respectful attention to the reasons offered or which could be offered in support of a decision": "The Politics of Deference: Judicial Review and

> Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279 at p. 286 (quoted with approval in *Baker*, 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817 at para. 65, *per* L'Heureux-Dubé J.; *Ryan*, 2003 SCC 20 (CanLII), [2003] 1 S.C.R. 247 at para. 49).
>
> 49 Deference in the context of the reasonableness standard therefore implies that courts will give due consideration to the determinations of decision makers. As Mullan explains, a policy of deference "recognizes the reality that, in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime": D. J. Mullan, "Establishing the Standard of Review: The Struggle for Complexity?" (2004), 17 *C.J.A.L.P.* 59, at p. 93. In short, deference requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system.

[30] The majority went on to discuss the correctness standard:

> 50 As important as it is that courts have a proper understanding of reasonableness review as a deferential standard, it is also without question that the standard of correctness must be maintained in respect of jurisdictional and some other questions of law. This promotes just decisions and avoids inconsistent and unauthorized application of law. When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

[31] In *Green v. Nova Scotia (Human Rights Commission)*, 2010 NSSC 242, Bryson J. (as he then was) explained that a substantial degree of deference should be shown to the Commission's decision making:

> [29] It is clear from the *Act* and *Regulations* that the Commission enjoys a discretion concerning whether or not to refer a complaint to a Board of Inquiry. The Commission's decision is entitled to a substantial degree of deference particularly in view of the specialized human rights regime and the establishment of the statutory scheme for examining and vindicating those rights where appropriate (*Halifax v Nova Scotia*, 2010 Carswell NSCA 8 ¶ 14 and following).
>
> [30] In exercising its discretion, the Commission is not required to follow the recommendation of its investigator. If it were otherwise, there would be no need for a Commission. The Commission's mandate is obviously broader than that of an investigator. The Commission must consider the public interest and policy issues

> which can involve factors other than those relating to the parties alone (*Garnthum v. Canada*, AG, (1996), 30 C.H.R.R. D/152 (F.C.T.D.) at ¶ 30).
>
> [31] Where the appropriate standard of review is reasonableness, a court should not interfere unless the applicant positively demonstrates that the decision under review was unreasonable (*Ryan, supra*, at ¶48). [emphasis added]

[32] In *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2012 SCC 10, [2012] S.C.J. No. 10, Cromwell J. elaborated on the standard of reasonableness as applied to the Nova Scotia *Human Rights Act*, and specifically to the decision of whether to refer a complaint to a board of inquiry. He said, for the court:

> 47 While I would use the word "reasonable" rather than "rational", I do not think there is any difference in substance between the two formulations. As the Court said in *Dunsmuir*, a result reached by an administrative tribunal is reasonable where it can be "rationally supported": para. 41.
>
> 48 In my view, this formulation is an appropriate way to reflect, in the context of the Nova Scotia statutory scheme, both the appropriate standard of review and the judicial reluctance to intervene in relation to the Commission's decision to refer a complaint to a board of inquiry. I reach this conclusion for several reasons.
>
> 49 First, this threshold for judicial intervention is firmly tied to the reasonableness standard of judicial review. In the context of the broad discretion given to the Commission to refer a complaint for inquiry, reasonableness review must focus primarily on whether there is any basis in reason for such an inquiry. The test of any reasonable basis on the law or the evidence seems to me to appropriately reflect this requirement.
>
> 50 Second, this formulation, in my view, is well adapted to the particular role which the legislation gives to the Commission, a role which has been described by this Court as "an administrative and screening" role: *Cooper*, at p. 893. While no doubt the Commission, in deciding to refer for inquiry, has some quite limited role to screen the merits of the complaint, its task is not to decide the issues which underlie its decision to proceed to the next stage; these are left to the board of inquiry: *Zündel* (2000), at para. 4. By not focussing solely on the merits of the complaint, the formulation I propose recognizes that the Commission might decide to appoint a board of inquiry in order to allow the board, after a full hearing, to decide a jurisdictional or other important legal point. This would provide a reasonable basis for the Commission's decision.
>
> 51 Third, this formulation reflects the appropriate deference to the Commission's process. Just as reasonableness requires appropriate deference to a tribunal's decision, it also implies appropriate deference to its processes of decision-making. The proposed formulation makes it clear that reviewing courts should be reluctant to intervene before a board of inquiry has addressed the substance of the points with

> respect to which the application for judicial review is brought. A reviewing court should take into account the benefit of having the board's considered view of the point raised on review as well as the risks of an unnecessary multiplication of issues and delay as was caused by premature judicial intervention in this case. Only where there is no reasonable basis in law or on the evidence to support the Commission's decision that an inquiry by a board of inquiry is warranted in all the circumstances would it be appropriate to overcome judicial reluctance to intervene.
>
> 52 Finally, this approach is consistent not only with case law on judicial review of decisions to refer complaints for adjudication, but also with the modern law concerning the discretion in relation to intervening by way of judicial review in ongoing administrative proceedings. As to the former, I refer for example not only to *Zündel* (1999), but also to other cases in the federal courts in relation to the similarly worded powers of the Canadian Human Rights Commission to request referral of complaints to the Human Rights Tribunal: see, e.g., *Bell* (1999); and *Canada (National Research Council) v. Zhou*, 2009 FC 164 (CanLII). As to the latter, I refer to decisions such as *Lorenz, Psychologist Y, C.B. Powell*, and the other cases and texts to which I referred earlier in my reasons on this point.
>
> 53 I conclude that in reviewing the Commission's decision to request appointment of a board of inquiry to inquire into these complaints, the reviewing court should ask itself whether there is any reasonable basis in law or on the evidence to support that decision.

[33] The Commission's decision to dismiss the complaints under s. 29(4)(b) of the *Act* is subject to a standard of reasonableness. However, Ms. Stoddard claims that HRO Smith's report is deficient because HRO Smith failed to interview witnesses Ms. Stoddard identified as important ones, and failed to delineate the standard of competence to which she was being held. Therefore, Ms. Stoddard alleges that HRO Smith breached the duty of procedural fairness.

Review for procedural fairness

[34] On the issue of review for procedural fairness, Fichaud J.A. said, in *Labourers International Union of North America, Local 615 v. CanMar Contracting Ltd.*, 2016 NSCA 40:

> [45] The judge described the issue as procedural fairness, with no standard of review. The passage from the *North End* decision, cited by Justice Wood, relied on *Nova Scotia (Community Services) v. T.G.*, 2012 NSCA 43 (CanLII), leave to appeal refused [2012] S.C.C.A. No. 237.
>
> [46] In *T.G.*, this Court said:
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> > [90] A court that considers whether a decision maker violated its duty of procedural fairness does not apply a standard of review to the tribunal. The

> judge is not reviewing the substance of the tribunal's decision. Rather the judge, at first instance, assesses the tribunal's process, a topic that lies outside standard of review analysis: ...
>
> [emphasis by Fichaud J.A.]
>
> [47] 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. (e.g. *Coates, supra*, paras. 43-45)

[35] On judicial review where there is a complaint regarding procedural fairness, the analysis should be conducted according to a two-stage process. In *Tessier v. Nova Scotia (Human Rights Commission*, 2014 NSSC 65, LeBlanc J. stated:

> [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 (CanLII), 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 (CanLII), 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 (CanLII), at para. 53.

[36] In *Whitty v. Nova Scotia (Human Rights Commission)*, 2007 NSSC 233, Kennedy C.J. restated the test as follows:

> [29] As to the suggestion that more information should have been gathered; Mr. Whitty was specific about what some of that information should have been. That is a claim that would always be available. The proper question I think is this, was the information that was before the Commission sufficient, complete enough to provide a reasonable basis for such a decision?

[37] Therefore, when examining a matter that involves how the Commission acted, rather than the substance of its decision, there is no standard of review *per se*, as the court is required to examine how the tribunal operated, not its end product.

[38] In *Nova Scotia Public Service Long Term Disability Plan Trust Fund v. Hyson*, 2017 NSCA 46, Bourgeois J.A., in the context of explaining the analysis to be undertaken by the Court of Appeal, explained the two-step analysis to be undertaken by a court in determining whether there has been a breach of procedural fairness:

> [25] ...[I]n *Burt v. Kelly*, 2006 NSCA 27 (CanLII), the task this Court is to undertake was described as follows:
>
> > [20] Given that the focus was on the manner in which the decision was made rather than on any particular ruling or decision made by the Board, judicial review in this case ought to have proceeded in two steps. The first addresses the content of the Board's duty of fairness and the second whether the Board breached that duty. In my respectful view, the judge did not adequately consider the first of these steps.
> >
> > [21] The first step – determining the content of the tribunal's duty of fairness – must pay careful attention to the context of the particular proceeding and show appropriate deference to the tribunal's discretion to set its own procedures. The second step – assessing whether the Board lived up to its duty – assesses whether the tribunal met the standard of fairness defined at the first step. The court is to intervene if of the opinion the tribunal's procedures were unfair. In that sense, the court reviews for correctness. But this review must be conducted in light of the standard established at the first step and not simply by comparing the tribunal's procedure with the court's own views about what an appropriate procedure would have been. Fairness is often in the eye of the beholder and the tribunal's perspective and the whole context of the proceeding should be taken into account. Court procedures are not necessarily the gold standard for this review.
>
> [26] There is no dispute that the Board owed Ms. Hyson a duty of procedural fairness. Both parties further agree that the duty is a "high" one. What remains to be determined is whether the reviewing judge correctly ascertained the content of that duty, and was correct in finding it was breached. [emphasis added]

[39] Therefore, in reviewing for procedural fairness, the analysis proceeds in two stages:

1) determining the content of the duty of procedural fairness with respect to the Commission's investigation of the complaints; and

2) determining whether the Commission's investigation breached that duty.

Analysis

1) Determining the content of the duty of procedural fairness with respect to the Commission's investigation of the complaints

[40] Ms. Stoddard alleges a breach of procedural fairness in part because HRO Smith did not interview certain named individuals, who she says are critical witnesses. She additionally argues that once she suggested to the investigator that these were critical witnesses, if HRO Smith decided not to interview them, she had to explain why. Ms. Stoddard argues HRO Smith's investigation was deficient in three areas, stating in her brief:

> 14. In Ms. Stoddard's submission, this can be most clearly seen in the related questions of 1) whether her training was in any way unusual or different than that undergone by other JAs, 2) whether the "serious errors" alleged by the Department were indeed attributable to her and the related issue of whether they represented a departure from the norms expected of JAs and 3) whether or not the Department was aware of her mental health issues. In general, Ms. Stoddard takes the position that Ms. Smith either failed to investigate these allegations in a way that meets the standard applied to investigators or was far too willing to take the Department's statements at face value.
>
> 15. Ms. Stoddard also takes the position that she was placed under an unusual amount of scrutiny by Court Services in relation to the amount of supervision afforded other JAs. In her submission, this in and of itself constituted unlawful discrimination against her. Again, Ms. Stoddard informed Ms. Smith of where she could find corroborating evidence, but again, Ms. Smith did not follow up.

[41] The general contours of the duty of procedural fairness owed by the Commission in this context was discussed by LeBlanc J. in *Tessier v. Nova Scotia (Human Rights Commission),* 2015 NSSC 65. He pointed out that investigators have broad discretion in determining which witnesses to interview:

> [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) 1994 CanLII 3463 (FC), 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 CanLII 164 (SCC), [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 CanLII 699 (SCC), [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.[emphasis added]

[42] In providing guidance as to when a human rights investigator should interview witnesses during an investigation, Nadon J. (as he then was) stated in *Slattery v. Canada (Human Rights Commission)*, [1994] F.C.J. No. 181 (F.C.T.D.), affirmed at [1996] F.C.J. No. 385:

54. I note that investigators, the CHRC and reviewing courts are essentially without legislative guidance regarding the conduct of investigations. Section 43 of the Act empowers investigators with search and seizure abilities but sets no minimum duties of investigation. Furthermore, except in the limited domains of investigations pertaining to matters of immigration and customs and excise, no investigation regulations have been created despite the provision under subsection 43(4) of the Act for the Governor in Council, *inter alia*, to make regulations prescribing the procedures to be followed by investigators.

55. In determining the degree of thoroughness of investigation required to be in accordance with the rules of procedural fairness, one must be mindful of the interests that are being balanced: the complainant's and respondent's interests in procedural fairness and the CHRC's interests in maintaining a workable and administratively effective system. Indeed, the following words from Mr. Justice Tarnopolsky's treatise *Discrimination and the Law* (Don Mills: De Boo, 1985), at page 131 seem to be equally applicable with regard to the determination of the requisite thoroughness of investigation:

> With the crushing case loads facing Commissions, and with the increasing complexity of the legal and factual issues involved in many of the complaints, it would be an administrative nightmare to hold a full oral hearing before dismissing any complaint which the investigation has indicated is unfounded. On the other hand, Commission should not be assessing credibility in making these decisions, and they must be conscious of the simple fact that the dismissal of most complaints cuts off all avenues of legal redress for the harm which the person alleges.

[43] Justice Nadon went on to explain how a court conducting a judicial review should assess whether an investigator has been unfair in omitting to interview a witness during a human rights investigation:

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 CanLII 164 (SCC), [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.

[44] Determining whether or not omitted witnesses could have provided crucial evidence was discussed in *Selig v. Nova Scotia (Human Rights Commission)*, 2018 NSSC 116, where Gabriel J. stated:

> [76] As to all of the people on the Applicant's list who were not interviewed, in *Wong v. Canada (Public Works and Government Services)*, 2017 FC 633 (CanLII), the Court stated at para. 29:
>
> > It is now firmly established that in order to be procedurally fair, the investigation leading to a decision made under section 44 of the Act must be both neutral and thorough (*Slattery v Canada (Canadian Human Rights Commission)*, 1994 CanLII 3463 (FC), [1994] 2 FC 574, at para 50 [*Slattery*]). As to the thoroughness of the investigation, the Court in *Slattery* observed that it is only "where unreasonable omissions are made, for example where an investigator failed to investigate obviously crucial evidence, that judicial review is warranted". Evidence is "obviously crucial" in that context where "it should have been obvious to a reasonable person that the evidence an applicant argues should have been investigated was crucial given the allegations in the complaint" (*Gosal v Canada (Attorney General)*, 2011 FC 570 (CanLII) at para 54 [*Gosal*], citing *Beauregard v Canada Post*, 2005 FC 1383 (CanLII), at para 21).
> >
> > [Emphasis added]
>
> [77] Without speculating, I cannot conclude that the investigator's failure to follow up with the five witnesses on the list presented to her by the Applicant constituted a failure to investigate obviously crucial or even significant evidence. The fact is, as noted above, I simply do not know what these witnesses would or could have said that would have further assisted the investigator in coming to a conclusion as to the validity of the Applicant's complaint.
>
> [78] There is nothing before me which enables me to conclude that the Investigator failed to interview key witnesses. This ground of contention's without merit.

[45] This issue was also explored in *Tessier* where LeBlanc J. distinguished between the duty of an investigator to pursue witnesses that could provide useful information, as opposed to ones that could provide crucial information, and stated:

> [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.

[46] In *Bergeron v. Canada (Attorney General),* 2015 FCA 160, leave to appeal denied, [2015] S.C.C.A. No. 438, Stratas J.A., speaking for the court, explained that regarding the issue of fairness, one factor that will be considered is whether the complainant had an opportunity to know the case they had to meet and whether they were given an opportunity to meet it. In that case, Justice Stratas noted that the complainant had the opportunity to make submissions:

> [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.

[47] In *McDougall v. Nova Scotia (Human Rights Commission),* 2016 NSSC 118, LeBlanc J. explained that when determining the content of the duty of fairness, "Justice L'Heureux-Dube stressed that the ultimate consideration is fairness for the parties, and that the level of fairness required will be dependant on the particular facts of each case." (para. 14). Justice LeBlanc went on to state:

> [16] The applicant argues that the degree of fairness required in *Cape Breton* must differ from the amount required here because, unlike in that case, the Commission here dismissed Mr. McDougall's complaint and did not refer the matter to a Board of Inquiry. There is no opportunity for the merits of the case to be assessed at a later time. As such, this decision was determinative of the matter and took on an adjudicative, rather than administrative, flavor. The Commission replies by reference to the deference to be accorded to its decision. The Commission says Justice Cromwell's decision in *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2012 SCC 10 (CanLII), [2012] S.C.J. No. 10 (*sub nom. Comeau*), determines the matter:

> 21 Where a complaint is not settled or otherwise determined, the Commission may appoint a board of inquiry to inquire into it: s. 32A(1). The Commission has a broad discretion as to whether or not to take this step…
>
> 24 … While there is some limited assessment of the merits inherent in this screening and administrative role, the Commission is not making any final determination about the complaint's ultimate success or failure…

[48] I am satisfied that the content of the duty of procedural fairness is as described in the cases discussed above, particularly *Tessier*.

2) Determining whether the Commission's investigation breached the duty of procedural fairness

a) Witnesses regarding Ms. Stoddard's training and level of scrutiny

[49] In her brief Ms. Stoddard identifies the witnesses she says should have been interviewed about her training and the level of scrutiny of her work:

> 18. Similarly, despite being pointed by Ms. Stoddard in the direction of witnesses who could confirm that the level of scrutiny and oversight she was subject to was in fact outside the norm for JAs, Ms. Smith does not appear to have followed up. Ms. Stoddard identified two potential witnesses to the overly strict scrutiny she says she was subjected to, Hillary [sic] Rankeillor and Jason Warham, who Ms. Smith describes in her rebuttal to the Department's response as being uncomfortable with being asked by management to check up on her. The references to Ms. Rankeillor and Mr. Warham are reproduced at pages 402 and 403 of the Record.
>
> 19. With respect, it is hard to see why Ms. Smith did not attempt to interview Ms. Rankeillor or Mr. Warham. The Department's defense to Ms. Stoddard's claim is that nothing out of the ordinary was done in her case – that she was not in fact the subject of differential treatment on any basis. If this is the case, why did Ms. Rankeillor and Mr. Warham express to Ms. Stoddard that the directives they were under to report to management about her performance were "not the proper thing to do"?

[50] On this point the Province argues in their brief:

> 27. The only alleged deficiency in the Investigation on this point is the failure to interview two potential witnesses who, according to the Applicant, would have confirmed the unusual level of scrutiny to which she was subjected. However, as noted, this was never seriously disputed as a matter of fact. The disputed point was the *explanation* for that strict scrutiny, and there is no indication that the two named

> co-workers would have any insight as to the Applicant's performance difficulties, the need for performance management, or the way that performance management was carried out in this case. Thus, there is no basis to conclude that the decision not to interview these two witnesses deprived the investigation of "obviously crucial evidence", the standard adopted in *Tessier v. Nova Scotia (Human Rights Commission),* 2014 NSSC 65 (at para. 38). As worded in *McDougall*, it is
>
> > ...not clear on the established or pleaded facts that interviewing these witnesses would have affected the evidentiary record. Therefore there was no evidence that the investigator did not conduct a thorough and neutral investigation. (para.24)
>
> 28. The Department submits that this argument by the Applicant is based on a mischaracterization of the issues relevant to the investigation, and provides no basis to rebut the presumption that the investigation was fair and neutral.

[51] Additionally, in her reply letter to the Commission dated, May 13, 2018, Ms. Stoddard states:

> Again, my colleagues, Cathy Decost and Cheryl McKinnely, stated that this was not normal procedure and they were not comfortable with it.

[52] Ms. Stoddard was subject to a high level of scrutiny when working as a JA at the Halifax Provincial Court. The Province provided the Commission investigators with significant documentation explaining why this occurred. The Province says that Ms. Stoddard had significant performance issues and was struggling as a JA. Making a mistake as a JA can have serious consequences. The Record supports this submission.

[53] Ms. Stoddard identified witnesses, JAs in Halifax, who she says would state that she was subject to an unusually high level of scrutiny or that they were uncomfortable being asked to report to their supervisor about her. The Province agrees that Ms. Stoddard was subject to a high level of scrutiny. The Province points out that there is no indication that the named co-workers would have any insight as to Ms. Stoddard's performance difficulties, the need for performance management, or the way that performance management was carried out in this case. Ms. Stoddard's named witnesses may have provided some information relevant to the overall situation, but, the Province says, they would not be considered crucial witnesses.

[54] Ms. Stoddard also points out that HRO Smith did not explain in her report why she omitted to interview these witnesses. Justice Stratas noted in *Bergeron* that

while an investigation must be thorough, an investigator is not required to pursue every conceivable angle:

> [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 (CanLII), 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 (CanLII), 466 N.R. 195.

[55] Justice Stratas also noted that the reasons of an administrative decision maker do not have to be inordinately detailed, and stated:

> [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.*, 1973 CanLII 191 (SCC), [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 (CanLII), [2012] 3 S.C.R. 405 at paragraph 3.)

[56] Justice Stratas reiterated this when he stated:

> [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 (CanLII), 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.

[57] In *Tessier,* LeBlanc J. found that where an investigator does not gather obviously crucial evidence they are obligated to explain why they omitted to do so:

> [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.

[58] While not addressing whether or not particular witnesses must be interviewed at the screening stage, in explaining the level of detail required in reporting the Commission's decision to dismiss a complaint at the screening stage, Oland J.A. stated in *Green v. Nova Scotia (Human Rights Commission),* 2011 NSCA 47:

> [35] In *Bell v. Canada (Canadian Human Rights Commission); Cooper v. Canada (Canadian Human Rights Commission)*, 1996 CanLII 152 (SCC), [1996]

3 S.C.R. 854, La Forest , J., writing for the majority, described the screening role of the Canadian Human Rights Commission as follows:

> [53] The Commission is not an adjudicative body; that is the role of a tribunal appointed under the Act. When deciding whether a complaint should proceed to be inquired into by a tribunal, the Commission fulfills a screening analysis somewhat analogous to that of a judge at a preliminary inquiry. It is not the job of the Commission to determine if the complaint is made out. Rather its duty is to decide if, under the provisions of the Act, an inquiry is warranted having regard to all the facts. The central component of the Commission's role, then, is that of assessing the sufficiency of the evidence before it. . . . [Emphasis added] [Emphasis in original]

...

> [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.

[59] HRO Smith had the discretion not to interview Hilary Rankeillor, Jason Warham, Cathy DeCost or Cheryl McKinnely on the basis that they were not crucial witnesses. Additionally, since they were not crucial witnesses, she was not obligated to explain why she chose not to interview them.

[60] Ms. Stoddard identified Hilary Rankeillor and Jason Warham in her correspondence to HRO Smith on October 20, 2017, and May 13, 2018. She knew the case she had to meet and was provided with multiple opportunities to make submissions to HRO Smith. The Commission had Ms. Stoddard's May 13, 2018, submissions when they deliberated about this matter on June 20, 2018.

[61] HRO Smith's report was comprehensive. The documentary material she reviewed was voluminous. She also interviewed Ms. Stoddard and those named as offenders in Ms. Stoddard's complaint of discrimination based on race, colour, and physical or mental disability. One recommendation available to HRO Smith was that Ms. Stoddard's complaints of discrimination were without merit. Merely because she did not interview peripheral witnesses who could only confirm the unusually high level of scrutiny Ms. Stoddard was subjected to at work, without being able to speak to why she was subject to such scrutiny, and then did not explain why she chose not to interview those witnesses in her report, does not equate to a breach of procedural fairness in this case.

b) Witnesses regarding the Province's awareness of Ms. Stoddard's depression

[62] In her brief Ms. Stoddard argues that the Province knew, or ought to have known, that she suffered from depression, stating:

> 16. For more specificity, at paragraph 52 of Ms. Smith's report she writes that "there is no evidence to indicate that management at the Provincial Court were aware of Stoddard's diagnosis of depression during the time she worked there." Here, the contradictory evidence can be found in Ms. Stoddard's rebuttal of the Province's answers. According to her, her husband specifically told her supervisor that she suffered from anxiety and depression, and furthermore she states that her use of a blue light to combat seasonal affective disorder was common knowledge in the courthouse. Ms. Stoddard makes these statements in her response, reproduced between pages 270 and 278 of the record.
>
> 17. With respect, the only reason Ms. Smith did not find the evidence that Ms. Stoddard's supervisors were aware of her depression is because she did not look for it. Had she contacted Ms. Stoddard, she would have had evidence that at the very least she could have tested to determine whether the Province was aware of Ms. Stoddard's mental health issues.

[63] As to whether these were critical witnesses, the Province states the following in their brief:

> 35. In response, the Applicant told the Investigator that (a) the Applicant's husband had, at some unidentified point in time outside of the office, told a manager that the Applicant suffered from depression and anxiety; and (b) she used a blue light in the office and openly attributed that to her depression. (Applicant's brief at para. 16, Record at pp. 271-272)
>
> 36. There are several responses to this argument. First, it should be noted that, while these statements were made to the Investigator, they were never provided to the Department for response. While this means that the Record does not contain any counterpoint to these allegations, the Department stands by its position that it had some awareness of the Applicant describing herself as "depressed" but was unaware of any diagnosis of depression.
>
> 37. More importantly, however, this issue is not crucial to the ultimate findings of the Investigation Report. The more significant finding in the report is that
>
> > ...at the time that Stoddard stopped working at the Provincial Court, management was unaware of the particulars of Stoddard's accommodation requirements. Consequently, management would have been unable to take steps to fulfil these accommodation requirements. (Report at para. 52, Record at p. 43.)

38. This is the point which is pivotal to the finding of no discrimination, since the duty to accommodate can only be implemented once an employee has cooperated by bringing forward the need for an accommodation and the facts necessary to accommodate (*Nova Scotia (Environment) v. Wakeham*, 2018 NSCA 86 at para. 72.)

39. Whatever general awareness the Department may have had of the Applicant's depression (which the Department says was no more than set out in the Investigation Report), it is very clear from the record that no specific accommodations were identified on account of that depression, either informally by the Applicant or more formerly [sic] by her doctor, until after she left work in August 2015. Even with the Applicant's significant absenteeism, which she identified as related to physical health issues, there was no need for an accommodation identified. These are the undisputed facts that led the Investigator to conclude that there was no evidence of discrimination based on disability.

40. Moreover, the Investigator specifically found that the Department had actually complied with one of the three accommodation requests without ever knowing that it was an accommodation request:

> ...the Respondent made efforts to provide Stoddard with positive feedback as well as constructive criticism well before positive feedback was requested by Stoddard's accommodation request. (Report at para. 54, Record at p. 43).

41. While the Investigator did not make any specific finding with respect to the other two aspects of the accommodation request, she did have the Department's submission that "[a]ttempts had already been made to move Ms. Stoddard into various courtrooms, with no success; there was no 'less busy courtroom' to consider" and "they were already taking steps to ensure Ms. Stoddard had notice of scheduled meetings" (Record at p. 257). Again, all of this was provided to the Applicant for her review, and she took advantage of the opportunity to respond.

42. In light of the clear evidence that the Department was unaware of the Applicant's specific accommodation request, and also in light of the submissions and findings as to the Department's efforts to meet those requests without even knowing they were sought as accommodations, the question of the Department's level of familiarity with the Applicant's diagnosis of depression becomes entirely secondary to the investigation. If the Investigator failed to resolve that question to some degree, which is the most the Applicant could claim, it falls far short of the "obviously crucial evidence" standard required for a procedural fairness claim.

[64] In *Nova Scotia (Environment) v. Wakeham*, 2018 NSCA 86, Bryson J.A., speaking for the court, explained that a failure to accommodate an employee with a disability is not discriminatory unless it adversely affects the employee. Justice Bryson stated:

> [59] A failure to accommodate employees with a disability is not discriminatory unless it adversely affects them. It is not enough for Ms. Wakeham to show a lack of accommodation—she must also show that she was adversely affected by the alleged failure to accommodate. Her disability must be a factor in that adverse effect.

[65] Justice Bryson went on to explain that an employer's duty to accommodate arises only when the employee cooperates by bringing forward facts necessary to permit implementation of the duty to accommodate:

> [70] Employers are required to make accommodation for employees with health conditions that impair their function at work. But employers are not clairvoyant and are not required to intuit an employee's medical condition and functional limitations. As Justice Sopinka said in *Central Okanagan School District No. 23 v. Renaud*, 1992 CanLII 81 (SCC), 1992 S.C.J. No. 75:
>
> > [43] ***The search for accommodation is a multi-party inquiry. Along with the employer and the union, there is also a duty on the complainant to assist in securing an appropriate accommodation.*** The inclusion of the complainant in the search for accommodation was recognized by this Court in *O'Malley*. At page 555, McIntyre J. stated:
> >
> > > Where such reasonable steps, however, do not fully reach the desired end, the complainant, in the absence of some accommodating steps on his own part such as an acceptance in this case of part-time work, must either sacrifice his religious principles or his employment.
> >
> > To facilitate the search for an accommodation, the complainant must do his or her part as well. Concomitant with a search for reasonable accommodation is a duty to facilitate the search for such an accommodation. ***Thus in determining whether the duty of accommodation has been fulfilled the conduct of the complainant must be considered.***
> >
> > [Emphasis in original]
>
> [71] Ms. Wakeham admitted—and the Board found—that she never discussed with Dr. Lewis the forms completed by Dr. Lewis for the Department, nor did she discuss what her recommendations would be. This is a clear failure by Ms. Wakeham to "bring the facts" to the Department's attention.
>
> [72] The employer's obligation to accommodate only arises and can only be implemented with the employee's cooperation by bringing forward facts necessary to permit implementation of the duty to accommodate. In *Snow v. Cape Breton – Victoria Regional School Board*, 2006 NSHRC 6 (CanLII):
>
> > 74. The Complainant has the initial obligation to bring the facts relating to her disability to the attention of the employer so that the employer has the

> opportunity to offer accommodation. The employer has the responsibility to initiate the process of accommodation. The employee has the duty to work in good faith with the employer to attempt a workable accommodation, and the duty not to reject a proposed accommodation simply because it is not the one preferred by the employee.

[73] To similar effect is *Halliday v. Michelin North America (Canada) Ltd.*, [2006] N.S.H.R.B.I.D. No. 6:

> 97. The BOI finds Dr. Dean failed to "bring the facts" to Michelin. Dr. Dean was in the unenviable and demanding position of the "prism" through which Mr. Halliday's medical care was conducted. He was in a key position to "bring the facts" to Michelin regarding the information on Mr. Halliday's disability that Michelin needed to "fashion" an accommodation solution. However, the BOI finds that ***Michelin received an incomplete and confusing picture of the source of Mr. Halliday's disability from Dr. Dean's APR's.*** [. . .]
>
> [Emphasis in original]

[66] Ms. Stoddard did not advise her supervisors or the Province that she was suffering from clinical depression while working as a JA at the Halifax Provincial Courthouse. She essentially admits this in her arguments. Instead, she says that her use of a blue light at work and a single comment about being "depressed", along with an off-the-record conversation between her husband and her supervisor, would have provided support for her claim that her supervisors discriminated against her based on a mental health issue. In response to inquiries made about the Province's knowledge and accommodation of Ms. Stoddard, the Province wrote to HRO Smith on December 7, 2017, and stated:

> 2. With respect to Ms. Stoddard's diagnosis of depression, and her move to a new position:
>
> - Strictly speaking, management in Court Services was not notified that Ms. Stoddard was diagnosed with depression until it was identified in the Complaint. However, that statement requires some context.
> - Ms. Stoddard did, on one occasion, refer to being "depressed" during a meeting with her managers in November 2014, during an attempt to review performance concerns with her. Her managers did not interpret this as a medical diagnosis, and there was no request for accommodation made. Ms. Stoddard then went on sick leave, returning in April 2015; no request for accommodation was made at the time of her return.
> - Ms. Stoddard did have a pattern of significant use of sick leave, which was explained to the managers as related to physical concerns (such as a knee injury.) On return from any lengthy period of sick leave, the normal

accommodations were made by arranging for the employee to return on easeback.

- The first reference to an accommodation related at all to Ms. Stoddard's difficulties in performing the role was in an email to Deirdre Smith from Morneau Shepell dated July 29, 2015 and noting the first day of accommodation as July 28, 2015. The email did not identify specific accommodations to be implemented; it simply identified that a request was made and that further medical information was being sought (which is the standard process). The email did not refer to a diagnosis of depression; again this is standard as the management is not generally entitled to awareness of the diagnosis. On reviewing the email, Tanya Pellow asked Ms. Stoddard whether any immediate accommodation was needed, and was referred back to Morneau Shepell.
- On August 24, 2015, Morneau Shepell followed up with the management team, stating that "medical on file is recommending for Ms. Stoddard to be assigned to a less busy courtroom, for a more regularly scheduled one-on-one meetings, and also to provide constructive criticism and positive reinforcement." Management took steps to meet with Morneau Shepell to review; this again would be a standard approach.
- On August 25, 2015, Ms. Stoddard left on sick leave, and from that point did not return to her role in the Spring Garden Road courthouse.
- In October 2015, while on sick leave, Ms. Stoddard filed a grievance about being denied a judicial support position at Family Division (for which she had applied through an Expression of Interest in May 2015.) To resolve that grievance, a placement was found which involved no courtroom work, which avoided the difficulties she experienced performing the JA role. This rendered moot the discussions around accommodating her into the JA role.
- While the discussions of accommodation in the JA role were made moot, it should be noted that there was no determination as to whether the unusual accommodations being considered were feasible. Attempts had already been made to move Ms. Stoddard into various courtrooms, with no success; there was no "less busy courtroom" to consider. From management's perspective, they were already taking steps to ensure Ms. Stoddard had notice of scheduled meetings and was provided with positive feedback (though if she had returned to the position, some further efforts could have been made in that respect.) Ultimately, these issues did not need to be addressed, as Ms. Stoddard sought out other positions of her own accord, and was ultimately placed in a position without courtroom work.

[67] Ms. Stoddard wrote to HRO Smith on February 7, 2018, and stated, regarding her depression:

5. At a meeting with Ms. Smith and Ms. Pellow on April 13, 2015, when Ms. Pellow explained that if I was put on performance management, it meant "my job", I felt a little angry because I told them I had an illness and I needed to review my work, etc. Ms. Smith said there were other staff that had been off and were able to come back and go to court after a few days. Was their illness anything like mine? Did it involve their brain? Their memory? Their concentration?

6. The meeting of November 17, 2015 [sic], was held in Ms. Pellow's office and both of them bullied me into telling them what was wrong with me, so they could "help me". It was at that time that I told them that I suffered from depression and was under doctor's care. This was also when Ms. Pellow offered me another job in the admin department with a pay cut, of course, and no guarantee that I would return to my present position as Judicial Assistant. They said I needed a break. I have never heard of any other JA being harassed to that extent and I felt that I was being treated differently. There was no doubt in my mind that they were trying to get rid of me, especially because of this insulting and degrading offer. I was upset, shaking and in tears yet, this is the treatment I received. They had no compassion for me at all. I advised them that I would be seeing my doctor and/or specialist immediately after this meeting because of the way they continued to belittle and harass me was effecting my depression and anxiety.

7. There was another time, before this meeting November 2015, that Ms. Smith was in the back parking lot and she approached my husband, John Stoddard who was waiting for me. She asked him what was wrong with Iona? He said that he would rather not say because it was personal and confidential but she insisted and told him that she wanted to know as a "friend". He told Ms. Smith that I suffered from depression and anxiety. So Ms. Smith was made aware that I suffered depression on at least three occasions and Ms. Pellow was aware on at least two occasions.

8. It should also be noted that during the winter months, I used a S.A.D. (Seasonal Affective Disorder) blue light at my desk. Management inquired why I was using it and I let Ms. Smith and Ms. Pellow, know that I used this blue light to lessen the effects of my depression. All of my workmates and a few sheriffs were aware and made comments as to why I used the blue light as well. I also told them that exercise also helped with my depression.

...

11. As far as my request for accommodation, which was prepared by my doctor and specialist, it was never implemented by management. I have an email on July 22, 2015 from Magen Richards, Absence Management Consultant, confirming that she was referred to me by Corey Marsman in HR, that I required accommodation. I had an email from Ms. Pellow on July 29, 2015 with an attached email from Morneau Shapell, the insuring company, confirming that my accommodation should commence July 29, 2015. However, every time I contacted Cory [sic] Marsman, and asked him what the status of my accommodation request was, he'd say that it had been sent to Ms. Smith and no response had been received. This is

> quite a discrepancy between my emails and Mr. Kendrick's statement that stated Morneau Shapell contacted management on August 24, 2015. Cory [sic] Marsman continued to refer to the same delay every time I contacted him. As the bullying and harassment continued and became unbearable and the request for accommodation was still not approved, my doctor and specialist were concerned about my continuing decline in mental health and signed me off of work on August 25, 2015 and I did not return to what my doctor and specialist referred to as a "toxic environment".

[68] It is not clear how interviewing Ms. Stoddard's husband would have assisted her claim. If HRO Smith did interview Ms. Stoddard's husband, and if he did say that he told her supervisor that she had depression and anxiety, what then? HRO Smith's report states:

> 43. In its written response, the Respondent has noted that it was unaware that Stoddard had been diagnosed with depression until receiving a copy of Stoddard's human rights complaint. The Respondent has noted that at one point Stoddard had mentioned being "depressed" during a meeting with her managers in November of 2014, but that they interpreted this statement as referring to Stoddard's state of mind rather than a formal medical diagnosis.
>
> ...
>
> 49. At no point was Stoddard disciplined by her employer due to her work performance. Rather, the evidence indicates that the Respondent took appropriate steps to respond to performance concerns through standard coaching and mentorship which would have been part of a training regimen for any JA. This training and coaching was aimed at helping Stoddard improve her performance. The fact that Stoddard was provided with more training and mentorship than other JAs can be attributed to the documented performance concerns as well as the fact that Stoddard had been absent on a lengthy medical leave on two occasions, thus warranting refresher training upon return to work.
>
> 50. Further, documentary evidence confirms that Stoddard was herself attuned to concerns regarding her performance and took steps to solicit training and feedback of her own initiative. Documentary evidence (in the form of Stoddard's February 2014 performance review) confirms that Stoddard was aware of areas in which her performance required improvement. In this document, Stoddard acknowledges that she required additional training and mentorship in order to perform her job independently and efficiently.
>
> 51. Accordingly, it cannot be concluded that the Respondent acted in a discriminatory manner by availing Stoddard of additional training and mentorship by her peers. Instead, evidence supports the Respondent's position that additional training was provided in order to support Stoddard in developing her skills.

> 52. Documentary evidence indicates that at the time that Stoddard stopped working at the Provincial Court, management was unaware of the particulars of Stoddard's accommodation requirements. Consequently, management would have been unable to take steps to fulfil these accommodation requirements. Further, there is no evidence to indicate that management at the Provincial Court were aware of Stoddard's diagnosis of depression during the time that she worked there.
>
> 53. Accordingly, it cannot be concluded that management acted in a discriminatory manner toward Stoddard on the basis of her depression. Evidence also does not support Stoddard's allegation that she was singled out and provided extensive training due to her race. As supported by notes documenting the observations of various employees at the Provincial Court (including management and Stoddard's trainers), there were numerous, ongoing concerns about Stoddard's rate of errors and performance in her JA role. [emphasis added]

[69] While an interview with Ms. Stoddard's husband might have clarified whether he had told her supervisor that she was depressed, the supervisor had heard from Ms. Stoddard herself that she was "depressed" and was aware that she used a blue light at work. Between the date she started work at the Halifax Provincial Court in November 2012 and sometime shortly before she left on medical leave in August 2015, Ms. Stoddard did not provide the Province with any specific information that she had a diagnosed health condition, such as depression, that would impair her function at work. She did not provide the Province with any medical information that would require accommodation, and she did not request any specific medical accommodation. The Province was not required to intuit Ms. Stoddard's medical condition and functional limitations. It was only on August 24, 2015, shortly before she left her job as a JA, that a report of Dr. Kathy Gallagher was received by the province, requesting accommodations because of Ms. Stoddard's health condition. According to the Province, Ms. Stoddard left her job as a JA the next day.

[70] In her reply Ms. Stoddard suggests that her husband would have been able to say that he quietly told her supervisor, Deirdre Smith, that she was depressed, thereby refuting the broad statement in HRO Smith's report about the Province's lack of knowledge. But even if this was the case, it would not equate to a breach of procedural fairness. Nowhere does Ms. Stoddard allege that she ever provided information to the Province that would require a duty to accommodate or permit the implementation of the duty to accommodate while she was actually working as a JA Since Ms. Stoddard's husband was not a crucial witness, HRO Smith was not obligated to interview him, nor was she obligated to explain in her report why she omitted to interview him. There was no breach of procedural fairness in this regard.

c) Standard to Determine Performance Difficulties

[71] Ms. Stoddard argues that a further denial of procedural fairness arose from HRO Smith's alleged failure to explain the level of performance she was being held to before dismissing her complaint. In HRO Smith's report, she stated:

> 10. The Respondent has noted that accuracy and precision are vital to the JA role because it is "a job in which errors can have significant consequences to the parties involved." In support of its position, the Respondent listed examples of incidents in which Stoddard's errors had "significant real-world consequences." These noted incidents are as follows:
>
> - A September 2013 incident in which "an administrative error by Ms. Stoddard resulted in a person being arrested on a warrant that was actually vacated";
> - A May 2014 incident in which "an oversight by Ms. Stoddard ... led to incorrect information about a young offender's curfew being communicated";
> - A November 2014 incident in which an error made by Stoddard in endorsing a Warrant of Committal led to a more serious charge being noted which then had to be corrected by Corrected [sic] once noticed; and
> - An occasion on April 25, 2015 in which errors were made by Stoddard in relation to 8 charges related to youth.

[72] In her brief, Ms. Stoddard argues that her own rebuttal submission explained that several of these incidents were not attributable to errors of hers. Her submission continues:

> 27. In her rebuttal, Ms. Stoddard addresses three of the four serious errors that the Province identified as her responsibility. In her submission, reproduced at page 403-405 of the record, the Province was quick to wrongly assign blame to her, but that in fact several of these incidents were not attributable to her.
>
> 28. Again, the issue is not at this stage whether or not the Province or Ms. Stoddard is right about who was to blame for the errors. The issue is that Ms. Smith does not seem to have looked into the question at all. Ms. Stoddard in her rebuttal, for example, points to an email reproduced at page 307 of the record, sent by Kristen Naas, which seems to explain completely that the supposed error in a young offender's curfew conditions was in fact not an error at all. Yet Ms. Smith makes no mention of this.

[73] In her reply brief Ms. Stoddard further argues:

> Finally, with respect to the question of the specific errors that Ms. Stoddard is alleged to have committed, Mr. Kindred makes the argument in his brief that the

> specific question of the four specific errors referred to repeatedly throughout the Department's submissions to Ms. Smith and repeated in Ms. Smith's Report is in fact besides the point. In his submission, this list of errors is to be taken as "an illustration of why errors are taken so seriously in this work."
>
> The issue Ms. Stoddard takes with this submission is that it is reflective of the general difficulty she has had throughout this process in getting answers to the questions of what the specific standards were and by what margin she was failing to meet them. The incidents mentioned by the Province to Ms. Smith include four alleged errors by Ms. Stoddard. She disputes her responsibility for three of them, and set out why in her various rebuttals. The specific question, however, of who was at fault for these specific incidents is, she agrees, not central to this judicial review. The issue she takes is that these incidents are put forward as evidence that she was not up to her job, and then when challenged on the specifics the Province retreats to the position that these are merely examples of a wider problem.
>
> Ms. Stoddard submits that it is impossible to respond to this, given that there are no established standards or any wider statistical record of her own alleged incompetence. For the purposes of this judicial review, the central point she makes is that again, Ms. Smith has not adequately explained what her reasons are in relying on these examples, or why she has rejected Ms. Stoddard's rebuttal of them. Once again, Ms. Stoddard says, Ms. Smith's reasoning is insufficient to ground a reasonable decision to accept her report.

[74] In her report, HRO Smith lists numerous examples of Ms. Stoddard's performance difficulties in addition to the four points detailed in paragraph 10 of her report. The Record is replete with such examples. It is not correct to reduce this to a "position" taken by the Province. The investigator adverted to the performance issues in general, which are documented throughout the record. She also considered the efforts made by both Ms. Stoddard and others to address those issues. HRO Smith did not limit her consideration to the four examples with which Ms. Stoddard takes issue. In her Report, HRO Smith states:

> 48. The evidence does not support a case of discrimination by the Respondent as alleged by Stoddard.
>
> 49. At no point was Stoddard disciplined by her employer due to her work performance. Rather, the evidence indicates that the Respondent took appropriate steps to respond to performance concerns through standard coaching and mentorship which would have been part of a training regimen for any JA. This training and coaching was aimed at helping Stoddard improve her performance. The fact that Stoddard was provided with more training and mentorship than other JAs can be attributed to the documented performance concerns as well as the fact that Stoddard had been absent on a lengthy medical leave on two occasions, thus warranting refresher training upon return to work.

> 50. Further, documentary evidence confirms that Stoddard was herself attuned to concerns regarding her performance and took steps to solicit training and feedback of her own initiative. Documentary evidence (in the form of Stoddard's February 2014 performance review) confirms that Stoddard was aware of areas in which her performance required improvement. In this document, Stoddard acknowledges that she required additional training and mentorship in order to perform her job independently and efficiently.
>
> 51. Accordingly, it cannot be concluded that the Respondent acted in a discriminatory manner by availing Stoddard of additional training and mentorship by her peers. Instead, evidence supports the Respondent's position that additional training was provided in order to support Stoddard in developing her skills.
>
> ...
>
> 54. As noted above, the evidence does not support a case of discrimination on the basis of race and colour or physical and/or mental disability. The evidence demonstrates that the Respondent took steps to address well documented performance concerns and provide Stoddard with appropriate mentorship and coaching during Stoddard's time working at the Provincial Court. Additionally, the Respondent made efforts to provide Stoddard with positive feedback as well as constructive criticism well before positive feedback was requested by Stoddard's accommodation request.

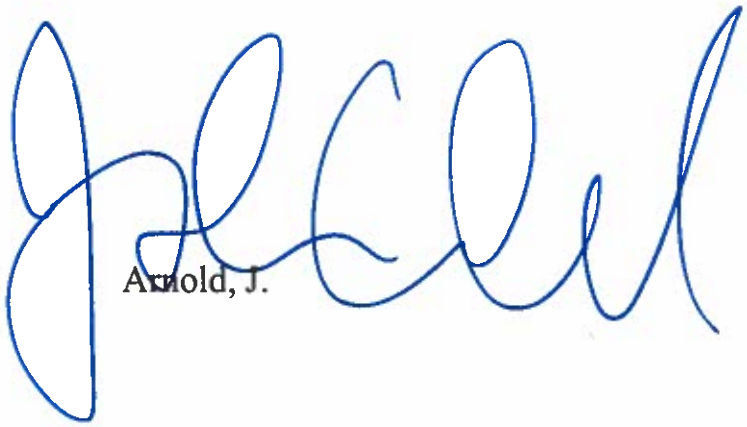
[75] Ms. Stoddard noted her objection to those four points in her rebuttal letter to HRO Smith of October 20, 2017, and again in her letter to the Commission of May 13, 2018. The Commission had those documents prior to rendering their decision on June 20, 2018. While HRO Smith did not set out an express description of the standard of performance expected of a JA, it is apparent from the record, and from her comments, that the standard being aimed for was that of a JA who could perform her duties independently and efficiently with accuracy and precision. The record demonstrates that HRO Smith had information before her detailing the duties of a JA, and the skills and competencies required to perform them. As such, I am not satisfied that the failure to set out a specific standard amounted to a denial of procedural fairness by the Commission.

[76] There was no breach of procedural fairness due to HRO Smith's mention of the four examples noted in paragraph 10 of her report, nor was there any other breach of procedural fairness.

Conclusion

[77] There was no breach of procedural fairness in the preparation of HRO Smith's report. The decision of the Commission was one reasonable outcome available from the Record.

[78] Ms. Stoddard's application for judicial review is dismissed.



Arnold, J.