Federal Court  Cour fédérale

**Date: May 22, 2025**

**Docket: T-2173-24**

**Citation: 2025 FC 927**

**Toronto, Ontario, May 22, 2025**

**PRESENT: The Honourable Mr. Justice A. Grant**

**BETWEEN:**

**EMILIO ZAVARELLA**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

# JUDGMENT AND REASONS

## I. OVERVIEW

[1] The Applicant seeks judicial review, for a second time, of a decision by the Canadian Human Rights Commission (the "Commission"). A first decision of the Commission was overturned by this Court in *Zavarella v Canada (Attorney General)*, 2024 FC 87 [*Zavarella I*].

[2] For the reasons that follow, I find that the Commission's decision is unreasonable, and this application is therefore allowed.

## II. BACKGROUND

### A. *Facts*

[3] For the sake of clarity and consistency, I will rely largely on Justice Little's characterization of the facts, as set out in *Zavarella I*.

[4] Mr. Zaveralla is an employee of Immigration, Refugees and Citizenship Canada [IRCC]. He lives with a chronic medical condition. In around 2019, he applied to join the Foreign Service Development Program [FSDP] in order to become a Foreign Service Officer [FSO] with the IRCC International Network Branch [IN]. He was accepted into the program and was therefore assigned to French language training for 17 months, in order to meet the language requirements of the FSO position.

[5] Between May 2019 and January 2021, the Applicant communicated with various IN employees regarding his medical condition and how it could affect his role as an FSO when posted on assignment abroad. It is clear now that, over the course of these communications, some of the information provided to Mr. Zavarella was ambiguous, while other details were plainly incorrect. This information related to several workplace topics, including the principle of "rotationality" within the FSO, the availability of accommodations, and whether a probationary period applied to the Applicant's employment.

[6] In late January 2021, Mr. Zavarella completed his French language training and was offered, by letter dated February 3, 2021, a position with the IN as an FSO (the "Offer").

[7] Between January 28 and February 12, 2021, the Applicant had further communications with IN employees, including the Assistant Director responsible for assignments. The employer also put Mr. Zavarella in touch with other FSOs who have worked in the field while managing medical conditions. At the employer's suggestion, Mr. Zavarella also communicated with a representative of the union ("PAFSO") that represents FSOs.

[8] By email dated February 12, 2021, Mr. Zavarella declined the Offer. He stated:

> …there are too many factors that have made this difficult and risky to my health and career determination. It is impossible for me to manage, plan and coordinate this on my own faced with so many unknowns. It is why I must send this with deep regret and inform you that I cannot accept your offer of employment to IRCC's Foreign Service.

[9] On February 16, 2021, the Applicant again corresponded with a PAFSO representative and the next day he requested that IRCC put his file "on the side in case some new information arises." IRCC formally refused this request on February 24, 2021, indicating that following Mr. Zavarella's rejection of the employment offer, his file was closed, and the offer was no longer available.

[10] The Applicant filed a Complaint with the Commission on July 5, 2021, under s.7 (adverse effects discrimination) and s.10 (systemic discrimination) of the *Canadian Human Rights Act* [CHRA], based on "discrimination/failure to accommodate on grounds of disability."

A human rights officer was assigned to the matter, who prepared a Report for Decision dated August 2, 2022 (the "Report"). Ultimately, the human rights officer recommended that the Applicant's complaint be dismissed because "having regard to all the circumstances of the complaint, further inquiry by a Tribunal is not warranted."

[11] The Report was distributed to the parties for comment. On September 6, 2022, Mr. Zavarella provided a detailed submission on the Report, arguing that the investigator's Report failed to grapple with the fundamental issue raised in his complaint. While the investigator had focused on the question of whether the Applicant was denied accommodation and whether the duty to accommodate was engaged prior to the acceptance of the job offer, this was not, according to Mr. Zavarella, the core of his complaint. The essence of his Complaint, rather, was that the inaccurate information provided to him by various IRCC officials discouraged him from accepting his letter of offer, for reasons related to his disability.

[12] The Respondent did not comment on the Report itself but provided detailed submissions contesting many of those assertions made by the Applicant.

[13] Ultimately, the Commission adopted the recommendation contained in the Report and dismissed the Complaint, pursuant to s.44(3)(b)(i) of the CHRA. No further reasons were provided, aside from those contained in the Report for Decision.

[14] As noted above, the Applicant brought an application for judicial review of the Commission's decision before this Court. Justice Little granted the judicial review, finding that the Report and the Decision had, as alleged by Mr. Zavarella, failed to meaningfully grapple with

the essence of his Complaint, as outlined above. Justice Little found that neither the Report, nor the Decision which adopted it, addressed this key aspect of the Applicant's submission. As a result, he remitted the matter back to the Commission for redetermination.

B. *Decision under Review*

[15] On July 30, 2024, the Commission once again dismissed the Applicant's Complaint pursuant to s.44(3)(b)(i) of the CHRA. The Commission did not prepare a Supplementary Report, but did provide a Record of Decision, containing the Commission's reasons. The Record stated that "for the reasons discussed in the [initial] report and those set out below, the Commission further decides to dismiss this complaint because further inquiry is not warranted."

[16] At the outset of its reasons, the Commission also indicated that its decision would squarely consider the issue that Justice Little found it had failed to grapple with in the first decision, namely "whether there is a reasonable basis in the evidence to support that the Respondent discouraged the Complainant from participating further in the process, thereby treating him adversely in the course of employment within the meaning of s.7 of the CHRA."

[17] The Commission organized its reasons according to the six issues raised by the Applicant in his September 6, 2022, submission. The six issues were:

1) Probation and medical examination
2) Rotationality
3) Posting preferences and hardship priority consideration
4) Accommodation requirements

5) Decision deadline
6) The cancellation of the Health Canada Green Box program

[18] On the question of probation, the Commission found that there was no evidence to support the position that Mr. Zavarella was ever formally told that he would be subject to a period of probation. While the Commission accepted that the Applicant may have been provided with erroneous information by an IN employee – FSDP Coordinator, Claudine Bissonnette – there was no reference to a period of probation in the Applicant's letter of offer. Similarly, the Commission noted that the FSDP Guide, to which Mr. Zavarella had been referred, indicates that probationary periods only apply to participants hired from outside the public service (whereas the Applicant was hired from within the public service). The Commission accepted that Ms. Bissonnette's statement was an error, and found that "more weight" ought to have been given to the letter of offer, given that it contained the actual terms of employment. As such, the Commission found that there was "no reasonable basis to support that the Respondent led the Complainant to believe that he would be subject to a probation period to discourage him from further participating in the process."

[19] In regard to medical examinations, the Commission found no reasonable basis to support the Applicant's allegation that IRCC led him to believe that he would be terminated if he failed a medical exam, to discourage him from participating in the process. On the contrary, the Commission noted that the Applicant was put in contact with FSOs who have managed medical issues while maintaining their FS careers. Further, the Commission noted that a medical exam or clearance is required to become an FSO, and that the medical assessment is conducted against the conditions at a specific posting location, taking into account the officer's pre-existing

condition and treatment plan, with supporting evidence from their treating physician. It is through this assessment, the Commission suggested, that accommodations in respect of particular assignments are assessed. This information was provided to the Applicant, the Commission concluded, not to suggest that he would be fired if he could not pass an exam, but to assist him in making an informed decision about his offer of employment.

[20] On the question of rotationality, the Commission once again found that there was no evidence that IRCC misrepresented the concept of rotationality to discourage Mr. Zavarella from accepting the offer. While another IRCC employee – Ms. Robin Crowder – may have used the wrong word when discussing rotationality (discretion vs. request), once again, the letter of offer and the FSDP Guide use the correct language. Moreover, the evidence simply did not support the Applicant's contention that FSOs who are less than fully rotational due to a health condition may be terminated from their position. On the contrary, questions of rotationality are based on Health Canada assessments, which include accommodation processes, and which assess an employee's health condition against any potential assignment.

[21] As to posting preferences, the Commission found, contrary to the Applicant's position, that there is no basis upon which to conclude that Mr. Zavarella was instructed to select only hardship countries, without regard to his medical condition. Rather, the Commission found that the Applicant was not restricted to selecting hardship countries; he was in fact told that he may select any location, but was informed that there was a lower chance of being placed in a location that was not highlighted, as there was no expectation that there would be positions available in those locations. Further, Mr. Zavarella was encouraged to research the available countries prior to selecting them, and was informed of the accommodations process with regard to posting

determinations. Finally on this issue, the Commission found that there was no reasonable basis to support an allegation that the Hardship Priority Consideration policy is discriminatory, because assignment decisions continue to be made pursuant to an accommodation process that is "highly dependent on an individual's medical conditions against the conditions of a specific posting location."

[22] The Commission came to a similar conclusion on the question of whether Mr. Zavarella was provided with inaccurate information as to the accommodations that would be available to him. Once again, while "errors were made and the wrong choice of words used" in various conversations that Mr. Zavarella had with IRCC staff, the Commission concluded that there was no reasonable basis to support that the Applicant was provided with misleading or erroneous information related to accommodations, to discourage him from further participating in the process.

[23] The Commission also rejected the Applicant's arguments on the deadline IRCC imposed for the acceptance of his offer, and its subsequent refusal to put his offer "on hold." Specifically, the Commission found that there was no reasonable basis to find that, in refusing to put a hold on the offer given to the Applicant after he had rejected it, the Respondent discouraged the Applicant from continuing in the process. The Applicant was given an offer immediately after completion of his French language training, which he chose to refuse. The Respondent was not obligated to hold his offer beyond this point.

[24] Finally, the Commission addressed the Applicant's allegations related to the 2018 cancellation of the Health Canada Green Box program, which was a program for shipping

temperature-sensitive medications to embassies and consulates in areas where local supplies did not meet Health Canada standards. The Commission refused to consider whether the cancellation of this program was discriminatory, because the Applicant had not included this allegation in his original Complaint Form, and it was therefore outside the scope of the Applicant's Complaint.

## III. ISSUES and STANDARD OF REVIEW

[25] The Applicant makes two central submissions. First, he argues that the Commission breached his right to procedural fairness, by leading him to believe that a Supplementary Report would be prepared and then failing to do so. Second, he argues that the Commission's decision was unreasonable because it once again wrongly interpreted the essence of the Complaint and because it misapprehended or ignored key evidence.

[26] On questions of procedural fairness, the reviewing court must conduct its own analysis of the process followed by the decision-maker to determine whether the process was fair: *Bharadwaj v Canada (Citizenship and Immigration)*, 2022 FC 1362 at para 8. This approach to review is functionally the same as applying the correctness standard: *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 (CanLII), [2019] 1 FCR 121 at paras 49-56.

[27] On the merits of the Decision, the parties agree that the applicable standard of review is reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 23 [*Vavilov*]. A reasonable decision bears the hallmarks of justification, transparency and intelligibility, with the burden resting on the challenging party to show that the decision is

unreasonable: *Vavilov* at paras 99-100. Reasonableness review is not a "line-by-line treasure hunt for errors" but remains a robust form of review and is not intended to shelter administrative decision-makers from accountability: *Vavilov* at paras 13, 102; *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21, at paras 8, 63 [*Mason*].

[28] A reviewing court must ensure that the decision demonstrates an internally coherent and rational chain of analysis that is justified in relation to the facts and law that constrained the decision maker: *Vavilov* at para 85. The Court in *Vavilov* also sought to encourage a "culture of responsive justification," to ensure that a decision-maker's reasons are not simply justifiable but justified in relation to the individuals subject to it: paras 95, 133.

[29] In *Zavarella I*, Justice Little set out various principles related specifically to the Federal Court's review of decisions of the Canadian Human Rights Commission. I agree with Justice Little's articulation of these principles, and see no further reason to elaborate on them here: see *Zavarella I* at paras 41-46.

## IV. ANALYSIS

### A. *Preliminary Issue: Applicant's Affidavit*

[30] The Respondent submits that certain Exhibits attached to the Applicant's affidavit are inadmissible on judicial review, as they were not before the administrative decision-maker: *Delios v Canada (Attorney General)*, 2015 FCA 117 at para 42; *Maltais v Canada (Attorney General)*, 2022 FC 817 at para 21; *Terra Reproductions Inc. v Canada (Attorney General)*, 2023 FCA 214 at para 5. Specifically, the Respondent argues that some of the documents included in

the affidavit are already found in the Certified Tribunal Record, while others do not fall into one of the exceptions referred to in *Choi v Canada (Attorney General)*, 2022 FC 265 at para 22, as earlier established in *Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 128 [*Tseil-Waututh*]. The inadmissible exhibits, from the perspective of the Respondent, are:

- Exhibit A;
- Exhibit B;
- Exhibit C, aside from one email thread from February 2021;
- Exhibit E.

[31] It is clear that Exhibits A and B are inadmissible as it appears that they were not before the Commission, and do not fall under any of the exceptions contemplated in *Tseil-Waututh*.

[32] The emails contained in Exhibit C are somewhat more complicated in that they appear to have been sent to the CRHC Human Rights Officer by the Applicant on June 3, 2022, prior to the Report for Decision. The majority of these emails were not, however, considered in the Report, and were thus not included in the initial Commission decision, which simply adopted the reasons contained in the Report. These documents were also not put before the Commission in respect of its subsequent decision, which is the decision presently under review. The problem, however, is that in providing its own reasons in the decision under review, the Commission did evaluate, and make findings on evidence, that either was not directly before it, or was before it, but has not been included in the CTR.

[33] An example will help to clarify. In his June 2022 disclosure, the Applicant included an email from FSDP Coordinator Claudine Bissonnette to his former manager indicating, amongst other things, that he would become a probationary employee of IN if he passed his French exam. This was an inaccurate statement, and was one of the errors that Mr. Zavarella argues led to his

conclusion that he could not accept his offer of employment with IN. This email is included in Exhibit C of the Applicant's affidavit and is one of the emails that the Respondent argues is not admissible. However, the Commission referred specifically to this document in its reasons, noting that it was merely an instance of human error and did not establish that Mr. Zavarella was led to believe that he would be on probation. In arriving at this conclusion, it appears that the Commission was likely relying on references to this email that were provided in submissions responding to the initial Report. Irrespective of this, however, it is my view that if the Commission engages with evidence that was properly submitted in respect of an underlying investigation, it is important for this evidence to be included in the Record.

[34] In the end, however, little turns on the admissibility of these documents, as I have found that this matter must be reconsidered irrespective of the documents in question. I would suggest, however, that in reconsidering this matter, the Commission carefully consider the documents originally submitted by the parties, to ensure that all relevant, and properly adduced evidence is before the next Commissioner.

B. *No Legitimate Expectation, No Denial of Natural Justice*

[35] The Applicant argues that, following Justice Little's decision in *Zavarella I*, he was led to believe that a Supplementary Report would be prepared in advance of a new decision, and that he therefore had a legitimate expectation that the Commission would follow this process. The Commission ultimately proceeded without preparing a Supplementary Report and in so doing, the Applicant argues that his natural justice rights were breached. I disagree.

[36] On May 8, 2024, a representative of the Commission responded to an email inquiry from the Applicant, indicating as follows:

> The file is currently awaiting to be assigned to a Human Rights Officer. A Human Rights Officer will likely be assigned to your file within the next month or two. As soon as Human Rights Officer is assigned, they will reach out to you to discuss next steps.
>
> The Human Rights Officer assigned to your file will have to prepare a Supplementary Report to address the issues raised by the Federal Court in its decision (2024 FC 87).

[37] Later, however, on June 18, 2024, the Commission sent Mr. Zavarella a further email, in which it confirmed that it would be making a redetermination of his application at one of its upcoming meetings, and outlined the documents that would be considered in that redetermination. Notably, the Commission did not indicate in this email that it would be preparing a Supplementary Report. It also stated that submissions from the parties were not requested, and if provided, would not be placed before the Commission when it makes its decision.

[38] On July 4, 2024, the Commission emailed the Applicant again, informing him that two additional documents were added to the Commission Package. The message was again silent on the question of a Supplementary Report, and reiterated that that submissions from the parties were not requested, and would not be considered.

[39] I see no basis for the Applicant's argument that his right to procedural fairness was infringed by the Commission's choice of procedure. To establish that a legitimate expectation

has arisen, an applicant must show that there has been a "clear, unambiguous, and unqualified representation that a certain procedure will be followed": *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paras 95–96.

[40] Even assuming for a moment that the Commission's initial communication with the Applicant did set out a clear process that the Applicant could expect to be followed, this was one email over a larger course of communication that, assessed globally, did not create an expectation that a Supplementary Report would be prepared. In fact, the communications, taken as a whole, did precisely the opposite, providing the parties with a clear, unambiguous, and unqualified indication that it would *not* be relying on a Supplementary Report. The Applicant has provided no authority for the proposition that a one-off statement provided by a decision-making body is forever crystallized into an unalterable choice of procedures.

[41] In the circumstances, I therefore find that the Commission's email of May 8, 2024, did not create a legitimate expectation that the Commission would prepare a Supplementary Report. This finding is also consistent with *Zavarella I*, wherein Justice Little afforded the Commission broad latitude as to the reconsideration of this matter. He stated (at para 124):

> The matter will be returned to the Commission for redetermination under the *CHRA*. However, this conclusion does not imply that the Commission's process must start over with another investigation or a fresh Report into all of the applicant's allegations of discrimination and failure to accommodate in relation to the hiring process. It will be for the Commission to decide how to proceed towards a screening decision, having regard to all the circumstances including these Reasons.

[42] This being the case, and keeping in mind the caution I provided above about the contents of the Record going forward, I do not agree that Mr. Zavarella's natural justice rights were infringed in the redetermination of this matter.

C. *The Decision was Unreasonable*

[43] It is clear from the Commission's second decision that it set out to address, and correct, the deficiencies in the first decision, as identified in *Zavarella I*. Recall that in *Zavarella I*, Justice Little found that the Commission had erred in failing to grapple with the Applicant's position that he was provided with inaccurate information in the hiring process, which dissuaded him from accepting his offer of employment. Rather than addressing this aspect of the Applicant's complaint, the Commission, in its first decision, instead focused on the duty to accommodate the Applicant in the FS position, and whether that duty been engaged (it concluded that it had not).

[44] For the sake of clarity, the Applicant articulated the core of his complaint in the submissions he made in response to the Report for Decision. He stated:

> The investigator's Report for Decision (the 'Report') fails to grapple with the fundamental issue raised by my complaint.
>
> At its core, my complaint concerning discrimination is not about whether I was denied accommodation. As such, the issues on which the investigator focusses regarding when the duty to accommodate is or is not engaged are of limited relevance and not determinative of the substance of my complaint.
>
> The essence of my complaint is this: after I raised, in a forthright and proactive manner, my medical condition and potential accommodation needs during my candidacy for a foreign service (FS) position, the responses and information I was provided and the terms set out in the letter of offer I was presented were so

> inaccurate, misleading, and threatening to my health and public service career **as to** discourage and ultimately dissuade me from accepting the offer and continuing as a candidate in the FS program.
>
> [Emphasis added]

[45] Unfortunately, I find the Commission again failed to respond to the Applicant's Complaint, as he had articulated it in his submissions. A careful read of the Applicant's submission makes it clear that he never alleged bad faith on the part of IRCC employees, and he never alleged that IRCC provided him with erroneous information *for the purpose* of dissuading him from accepting his job offer.

[46] The thrust of his complaint, rather, was that the cumulative *effect* of this misinformation discouraged him from accepting the offer, for reasons directly related to his health condition. This submission makes sense in the context of human rights law, which has long focused on the impact of (allegedly) discriminatory practices, rather than the intent underlying such practices: *Ont. Human Rights Comm. v Simpsons-Sears,* 1985 CanLII 18 (SCC), [1985] 2 SCR 536 at para 14.

[47] At times, the Commission appears to have understood, and responded to, the Applicant's complaint, on the terms provided in his submission. For example, in the following passages, the Commission correctly addressed the core of the Applicant's complaint:

> - Specifically, this decision addresses the issue of whether the Complainant was provided with inaccurate information that dissuaded him from accepting the offer.
>
> - This decision will address these arguments and assess whether there is a reasonable basis in the evidence to support that the Respondent discouraged the Complainant

> from participating further in the process, thereby treating him adversely in the course of employment within the meaning of s. 7 of the CHRA.
>
> - The Complainant submits that he was provided misleading information that discouraged him from continuing with the process.
>
> - There is no reasonable basis to support that, in refusing to put a hold on the offer given to the Complainant after he had rejected it, the Respondent discouraged the Complainant from continuing in the process.

[48] At numerous other parts of its reasons, however, the Commission appears to reject the Applicant's arguments because he failed to establish that erroneous information was shared with him *to* discourage him from accepting the offer of employment. See for example:

> - As such, there is no reasonable basis to support that the Respondent led the Complainant to believe that he would be subject to a probation period to discourage him from further participating in the process.
>
> - There is no reasonable basis to support that the Respondent led the Complainant to believe that he would be terminated if he failed a medical exam to discourage him from further participating in the process.
>
> - Therefore, there is no reasonable basis to support that the Respondent led the Complainant to believe that he would be "fired" if he failed a medical exam to discourage him from further participating in the process.
>
> - There is no reasonable basis to support that the Respondent misrepresented the concept of rotationality to discourage the Complainant from further participating in the process.
>
> - For all these reasons, there is no reasonable basis to support that the Respondent misrepresented the concept of rotationality, threatened to terminate the Complainant's employment or fails to accommodate disabled employees to discourage the Complainant from further participating in the process.

- There is no reasonable basis to support that the Respondent instructed the Complainant to select only hardship countries without regard to his medical condition or the advice of his doctor to discourage him from further participating in the process.

- There is also no reasonable basis to support that the Respondent led the Complainant to believe that he could not and would not be accommodated to discourage and dissuade him from accepting the offer and continuing as a candidate in the FS program.

[49] I have considered whether the above passages simply amount to minor or semantic errors on the part of the Commission. I considered, for example, whether these passages could simply reflect a conclusion that there was no objective basis to support Mr. Zavarella's contention that he was dissuaded from accepting his position on account of his disability.

[50] In the end, however, I am not convinced that the above statements can be so simply reconciled. At root, I believe that the Commission simply asked itself the wrong question. To reiterate, the question was not whether IRCC shared erroneous information with Mr. Zavarella with the intent of dissuading him from accepting his job offer. The proper question, and the one the Commission will have to consider again, is whether Mr. Zavarella was provided with inaccurate information that had the discriminatory effect of dissuading him from accepting the offer of employment, for reasons related to his medical condition.

[51] Despite the above, I recognize the possibility that the Commission may, in a broad sense, have properly understood the essence of the Applicant's complaint. It did, after all, intersperse accurate statements of the complaint several times, between its inaccurate statements. But this possibility does not make the decision reasonable. Indeed, the inconsistent and ambiguous

language employed by the Commission in describing the Applicant's complaint demonstrates, on its own, that the decision lacks transparency and intelligibility.

[52] In evaluating whether the Commission properly grappled with the Applicant's complaint, I am also somewhat puzzled by its failure to consider the decision of the CHRT in *Oster v ILW, Local 400 (No. 2)*, 2000 CanLII 49338 [*Oster CHRT*]; judicial review dismissed by this Court: *International Longshore & Warehouse Union (Marine Section), Local 400 v Oster*, 2001 FCT 1115, [2002] 2 FC 430 [*Oster*].

[53] In *Oster CHRT,* the Tribunal concluded that the complainant had been discouraged from applying for a position on a vessel because the sleeping accommodations were considered "not suitable" for a woman. Based on the factual matrix in that case, the CHRT found that there was *prima facie* evidence of a discriminatory practice under the *CHRA*, and that this practice deprived the complainant of an employment opportunity: *Oster,* at paras 42-45. Of relevance to this matter, the CHRT in *Oster* did not assess whether the actions of the respondent in that case were *meant* to discourage the applicant, but whether, as a matter of fact, the actions in question "constituted a discouragement": *Oster CHRT* at para 44.

[54] The Applicant put the *Oster* decision squarely before the Commission in his response to the draft Report for Decision and argued that it was largely analogous to his own situation. Indeed, it was the Commission's previous failure to consider the Applicant's arguments, based on *Oster*, that led Justice Little in *Zavarella I* to conclude that its decision was unreasonable. Justice Little stated (at paras 92-93):

> The inaccuracy of information was raised in the Complaint, and the applicant's position was based essentially on the same facts and circumstances that the human rights officer had investigated in relation to the hiring process, but with a distinct legal basis to support his position that relied on the CHRT decision in *Oster*. As already explained, the applicant raised the argument in reply to the draft Report, and before the Commission made its decision (as in *Northcott*).
>
> The applicant's argument on this issue was significant to his position, whether or not it was determinative or was "the fundamental issue" as he characterized it: *Mason,* at paras 91, 95, 96. In my view, the applicant's submission on this issue acted as a constraint on the Commission's decision so that it had to grapple with it meaningfully and provide an adequate justification in response to it: *Vavilov,* at para 127; *Mason,* at paras 118-120.

[55] Considering that a significant aspect of the Applicant's position was that his situation was analogous to the circumstances in *Oster*, and given Justice Little's conclusion that this submission acted as a constraint on the Commission's decision, it is all the more surprising that the Commission, again, did not consider the *Oster* decision.

[56] The Respondent argues that the Commission's failure to reference the *Oster* decision is of no consequence because it is obviously distinguishable from Mr. Zavarella's case, and that this is apparent in the Commission's reasoning.

[57] It is true that *Oster* CHRT involved a largely fact-based analysis. It may also be true that the relevant facts in *Oster* are sufficiently distinct from those at issue here, such that its relevance to this case is minimal. To point to the most obvious distinction between the two cases, in *Oster*, the applicant did not put her name forward for a job because she was discouraged from proceeding with the process, whereas in this case, Mr. Zavarella was, quite literally, offered the position he sought.

[58] With respect, however, assessing the application of *Oster* to this case was a determination for the Commission to make, not counsel, and not this Court on judicial review: *Mason* at paras 62, 101; *Vavilov*, at para 96. This is particularly the case, given Justice Little's explicit finding that the Applicant's significant reliance on *Oster* constituted a constraint on the Commission's decision. Absent any mention of the *Oster* decision, one is simply left to speculate as to whether the Commission considered the central question in that case, and its applicability to this one, which was whether the actions of the employer, irrespective of intention, constituted discouragement. It is not, however, the role of courts on judicial review to speculate as to what the underlying tribunal might have been thinking: *Vavilov* at para 97, endorsing *Komolafe v Canada (Citizenship and Immigration)*, 2013 FC 431 at para 11.

[59] For the above reasons, I find that the Commission's decision was, once again, unreasonable. Before concluding, however, I wish to make a few further comments.

[60] Recall from above that, in my view, the central question that the Commission will have to consider is whether Mr. Zavarella was provided with inaccurate information that had a *prima facie* discriminatory effect of dissuading him from accepting the offer of employment, for reasons related to his medical condition. Embedded in this question is another question, which also lies at the core of this matter. That question is whether there was an objective basis to support Mr. Zavarella's subjective feeling that he could not accept his offer of employment because of the various erroneous statements that were made to him and their connection to his medical concerns.

[61] To put it bluntly, the fact that Mr. Zavarella felt that he could not accept the IRCC offer because of his disability and because of the erroneous statements made to him, and the fact that he acted on this feeling does not necessarily establish that there was discrimination in the hiring process: *Conway v. St. Joseph's Healthcare Hamilton,* 2015 HRTO 1232 (CanLII) at para 17; *Beausoleil v. Ontario (Community Safety and Correctional Services)*, 2017 HRTO 383 at para 146. A subjective experience of discrimination must have some objective basis to attract human rights protection: see, in the context of s. 15(1) of the *Canadian Charter of Rights and Freedoms*, *Law v. Canada (Minister of Employment and Immigration)*, 1999 CanLII 675 (SCC), [1999] 1 SCR 497, at para 59.

[62] In *Stringer v Canada (Attorney General)*, 2013 FC 735, this Court stated as follows (at para 45):

> A tribunal should consider all the circumstances in determining whether there exists the subtle scent of discrimination. Intent is not a necessary element in proving discrimination occurred. A finding of discrimination requires only that a discriminating factor influenced the employer's actions. An employer's stated basis for any particular action, even if supported by the evidence, is never a sufficient reason to deny a discrimination claim.

[63] I see three lessons in the above. The first is that situations may arise that are subtle in their discriminatory impact on vulnerable individuals. The second is a reminder, from my above analysis, about the irrelevance of intent as a necessary element in establishing discrimination. The third is that, notwithstanding the above, there must be an (objectively founded) "discriminating factor" that influenced the employer's actions. In my view, it is far from clear that a discriminating factor animated IRCC's interactions with Mr. Zavarella. Ultimately,

however, it will be for the Commission to decide whether there was sufficient objective evidence of such a discriminating factor, to warrant inquiry by the Canadian Human Rights Tribunal.

## V. REMEDY and COSTS

[64] The Applicant notes that this is the second application for judicial review that he has been forced to bring in respect of his Complaint. He further argues that, even after this Court's decision in *Zavarella I*, the Commission has yet to grapple with the core of his Complaint. As a result, he requests that this Court order the Commission to institute an inquiry into the Complaint. In the alternative, he requests that this Court remit the matter to the Commission with a directed order.

[65] While Mr. Zavarella has again been successful in this application, and while I am sympathetic to his position, I decline his request to issue a directed Order in respect of the redetermination of this matter. Where a decision is unreasonable, as a general rule, the Court should set the decision aside and remit the matter for reconsideration with the benefit of the Court's reasons. While this Court has the power to substitute its own decision on the merits, or to provide a directed Order, this is only appropriate in limited scenarios. It may be appropriate, for example, where a particular outcome is "inevitable" or where remitting the matter would prevent the effective and timely resolution of the matter: *Vavilov* at paras 140-142. It may well be that a directed Order in this matter would expedite a resolution of this matter; however, I am not at all convinced that a particular outcome is inevitable, and in the circumstances of this case, I find this to be the more persuasive factor in determining the proper remedy.

[66] As a result, I will grant this application for judicial review, set aside the Commission's second decision, and remit the matter for reconsideration with the benefit of these reasons. However, I would also specifically refer the Commission back to my comments at paras 32-34 of these reasons, in determining the material to include in the record before the next Commissioner. I would also refer specifically to my comments above about the central questions for the Commission to consider in redetermining this matter: see paras 50, 60-62.

[67] At the outset of the hearing into this matter, the parties indicated that they had agreed to an all-inclusive, lump sum order of costs of $2,750 for the prevailing party. In my view, this is a reasonable quantum, and costs in that amount will therefore be ordered.

## VI. CONCLUSION

[68] For the foregoing reasons, this application for judicial review is granted and I remit the matter for reconsideration by a different decision-maker, with the benefit of these reasons.

**JUDGMENT in T-2173-24**

**THIS COURT'S JUDGMENT is that**:

1. The application for judicial review is allowed;

2. The matter is returned to the Commission for reconsideration by a different decision-maker, in accordance with these reasons;

3. The Respondent shall pay costs to the Applicant, fixed at $2,750, payable forthwith.

"Angus G. Grant"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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|---|---|
| **DOCKET:** | T-2173-24 |
| **STYLE OF CAUSE:** | EMILIO ZAVARELLA v ATTORNEY GENERAL OF CANADA |
| **PLACE OF HEARING:** | OTTAWA, ONTARIO |
| **DATE OF HEARING:** | MARCH 19, 2025 |
| **JUDGMENT AND REASONS:** | GRANT J. |
| **DATED:** | MAY 22, 2025 |

**APPEARANCES:**

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|---|---|
| Emilio Zavarella | FOR THE APPLICANT (Self-Represented) |
| Adam Lupinacci | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

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| Attorney General of Canada<br>Ottawa, Ontario | FOR THE RESPONDENT |