Federal Court Cour fédérale

Date: 20250609

Docket: T-2379-23
T-2380-23

Citation: 2025 FC 1033

Toronto, Ontario, June 9, 2025

PRESENT: Mr. Justice Brouwer

BETWEEN:

GURMEET DHALIWAL

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. OVERVIEW

[1] The Applicant, Gurmeet Dhaliwal, is a senior psychologist with Correctional Service Canada ("CSC"). She identifies as a woman of South Asian ethnicity and member of the Sikh community. The Applicant alleges that she was subjected to discriminatory harassment by her director at CSC, and that this harassment was compounded by the inaction and acquiescence of her director's superior. She brought complaints to the Canadian Human Rights Commission ("Commission") against both individuals, for harassment contrary to s. 14(1) of the *Canadian*

Human Rights Act, RSC 1985, c. H-6 [*CHRA*], and against her employer for adverse differential treatment contrary to s. 7 of the *CHRA*. Her s. 14(1) harassment complaints against the individuals were screened out by the Commission (“Decisions”), while her s. 7 institutional complaint against CSC was referred to the Canadian Human Rights Tribunal (“Tribunal”) for determination.

[2] The Applicant seeks judicial review of the Commission’s Decisions to screen out her individual harassment complaints. She alleges that the Commission misinterpreted the scope of protection against harassment under s. 14(1) of the *CHRA* including by unreasonably excluding misuse of authority, misunderstood its own screening role, applied an unreasonably high standard in assessing one of the incidents at issue, and followed an unfair procedure.

[3] Although the Decisions under review are separate and distinct, there is substantial overlap in the facts, reasons, and arguments raised by the parties; therefore, the applications were argued together before me, pursuant to a consent order by my colleague Justice Benoit Duchesne. To avoid duplication, this judgment will address both Decisions under review. For the reasons that follow, I find that the two Decisions under review are unreasonable and must be set aside. I award the Applicant costs in the agreed amount of $2,500 per application.

II. **BACKGROUND**

[4] At the time that the alleged harassment began the Applicant was the Regional Manager for Institutional Mental Health in the Pacific Region for CSC. She reported directly to Savinder

Bains, the Regional Director for CSC Health Services. Mr. Bains reported to Jennifer Wheatley, the Assistant Deputy Commissioner for CSC Health Services.

[5] Before Mr. Bains became her supervisor, the Applicant had worked for CSC for over 20 years and had consistently received exceptional performance reviews. She had a Talent Management Plan ("TMP") in place, which is typically given to public employees with high performance reviews to help promote their career growth.

[6] Mr. Bains became the Applicant's direct supervisor on October 10, 2017. Within two weeks of taking on this new role, Mr. Bains called the Applicant to his office to tell her that she lacked the required competencies for her position. He reportedly provided no explanation as to the basis of this allegation and, according to the Applicant, it marked the beginning of a course of discriminatory and harassing conduct that ended up derailing her career. This conduct included:

- Prohibiting the Applicant from communicating with managers or wardens without Mr. Bains' direct approval;
- Removing the Applicant's TMP contrary to Treasury Board ("TB") policy;
- Conducting a mid-year performance review ("PMP") of the Applicant after only supervising her for one month, contrary to TB policy on performance management;
- Directing that the Applicant's year-end PMP be closed as a "refusal", despite her attempts to address concerns in the PMP with the assistance of Ms. Wheatley;

- Overriding the Applicant's decisions and management, disregarding her opinions, and excluding her from meetings relating to her areas of responsibility;
- Yelling at the Applicant during a bilateral meeting in his office conducted with the door open so colleagues could hear, an incident that paralyzed the Applicant and caused her to take a doctor-recommended sick leave ("Yelling Incident");
- Staffing the Applicant's position for six months during a six-week sick leave by hiring two employees from another region for no legitimate operational reason;
- Making derogatory comments regarding the Applicant's disability following a return from sick leave; and
- Repeatedly contacting the Applicant's new supervisor at NHQ in order to poison her reputation.

[7] According to the Applicant, the manner in which Mr. Bains treated her was notably different from his treatment of her male colleagues of similar rank. She alleges that Mr. Bains used his supervisory authority over the Applicant to undermine and demean her in an effort to push her out of her position. The Applicant alleges harassment on the basis of her sex and vulnerability as a racialized Sikh woman. She notes that Mr. Bains is from the same Sikh community as she is.

[8] The Applicant first raised her concerns about Mr. Bains with his supervisor, Ms. Wheatley, in December 2017. However, according to the Applicant, Ms. Wheatley failed to act,

and instead minimized the Applicant's concerns and misled the Applicant to believe that she would address the issues with Mr. Bains.

[9] In July 2018 the Applicant informed Mr. Bains that she was pursuing an assignment with National Headquarters ("NHQ") for family and personal reasons. She began the assignment in November 2018; however, Mr. Bains contacted the Applicant's new supervisor on several occasions once she started at NHQ.

[10] In fall 2018, the Applicant underwent a "360 Review", an assessment tool used by the federal government to assess employee competencies based on an independent psychologist's assessment. It involved gathering feedback on her performance by Mr. Bains, regional managers, direct-report employees and front-line staff. This review disclosed "consistent under-ratings" by Mr. Bains as compared to other interlocutors. The psychologist recommended that the Applicant seek career opportunities away from Mr. Bains.

[11] Following the psychologist's advice, the Applicant accepted a transfer to NHQ on March 14, 2019. However, Ms. Wheatley imposed a condition that the Applicant accept a classification demotion in order to accept the deployment. The Applicant began the deployment on April 29, 2019.

[12] In September 2019, while on deployment, the Applicant learned that Ms. Wheatley was assigned the investigation into her allegations against Mr. Bains. The Applicant requested that Ms. Wheatley recuse herself from the investigation, but Ms. Wheatley refused to do so. The

Applicant raised her concerns directly with the Commissioner of CSC, requesting that Ms. Wheatley recuse herself and that an independent investigator be appointed. The Commissioner failed to respond to this request.

[13] On January 18, 2020, Ms. Wheatley dismissed the Applicant's complaint against Mr. Bains. A few weeks later, after being advised by the Applicant's counsel that her dismissal of the Applicant's complaint may have been improper, Ms. Wheatley left the Applicant a handwritten note requesting informal facilitated discussions to address the "issues of [their] working relationship." The Applicant rejected the request and instead brought complaints under the *CHRA* against Mr. Bains, Ms. Wheatley, and CSC.

A. ***Complaints to the Commission***

[14] In her complaint against Mr. Bains, brought under s. 14(1)(c) of the *CHRA*, the Applicant alleged that he had harassed and discriminated against her on the prohibited grounds of race, national or ethnic origin, colour, religion and sex ("Bains Complaint"). Raising the same conduct that she had complained about to Ms. Wheatley, the Applicant alleged that Mr. Bains had subjected her to harassment by micromanaging, chastising and belittling her; falsely accusing her of lacking the necessary competencies for her job, falsely evaluating her performance; and pushing her out of her role and forcing her to take a demotion to escape the harassment. She alleged that Mr. Bains continued to harass her even after her transfer by contacting her new managers and speaking badly about her to them.

[15] In her complaint against Ms. Wheatley, also under s. 14(1)(c) of the *CHRA*, the Applicant alleged that she, too, had harassed and discriminated against her on the prohibited grounds of race, national or ethnic origin, colour, religion and sex ("Wheatley Complaint"). She alleged that Ms. Wheatley had been negligent in dealing with her complaint against Mr. Bains, contributing to and aggravating an already hostile work environment by:

- Failing to assist with her return to work from a sick leave necessitated by the Yelling Incident;

- Deliberately inserting herself as a decision-maker in the internal harassment complaint process that served to protect and justify the alleged abusive conduct of Mr. Bains in violation of employer policies regarding conflict of interest, and over the Applicant's objections;

- Misleading the Applicant about the conversations she was having with Mr. Bains and, in fact, acting in complicity with him;

- Promising to resolve the issues with her PMP but then allowing it to be entered as a "refusal"; and

- Leaving the Applicant a handwritten note requesting informal facilitated discussions to address the "issues of [their] working relationship" after the Applicant's counsel warned Ms. Wheatley that her dismissal of the Applicant's complaint may have breached the *CHRA*.

[16] The Applicant alleged that Ms. Wheatley's negligent handling of her harassment complaints against Mr. Bains perpetuated a culture of gender-based and race-based discrimination.

[17] In addition, as noted, the Applicant brought a complaint of discriminatory adverse differential treatment by her employer, CSC, under s. 7 of the *CHRA* ("CSC Complaint"). However, that matter is not before this Court.

[18] The Applicant submitted her complaints against Ms. Wheatley and Mr. Bains in draft form in December 2019. Final versions were accepted by the Commission three months later, in March 2020.

[19] Mr. Bains and Ms. Wheatley objected to the complaints, arguing both prematurity (alleging that the Applicant had failed to exhaust internal resolution mechanisms as required by s. 41(1)(a) of the *CHRA*) and untimeliness (the Applicant's failure to bring her complaints within one year of the alleged instances of harassment as required by s. 41(1)(e)).

B. ***Human Rights Officer Reports & Recommendations***

[20] Pursuant to s. 43(1) of the *CHRA*, the complaints and objections were assigned to a Human Rights Officer ("Officer") for investigation. In reports dated June 9, 2023, the Officer set out their findings and recommendations regarding the individual complaints.

[21] The Officer dismissed the prematurity objections, finding that even though the Applicant had access to the formal internal grievance process, her "failure to exhaust the process was not her fault alone, as she was not instructed or informed of this option by her union who, instead, supported filing this human rights complaint".

C. ***Report on Bains Complaint***

[22] The Officer accepted that many of the Applicant's allegations against Mr. Bains, a majority of which were uncontested, may have occurred. However, the Officer found that, for the most part, they constituted adverse differential treatment, not harassment, because the actions were exercises of Mr. Bains' legitimate managerial authority. This included the allegations that Mr. Bains "falsely evaluated her job performance, removed her [TMP], overrode her management decisions, disregarded her opinions, left her out of meetings, entered her PMP as a refusal, and many of the other dismissive behaviours the [Applicant] viewed as belittling". The Officer also found that there was insufficient evidence to conclude that Mr. Bains contacting her new supervisors amounted to harassment.

[23] The Officer found that the Yelling Incident on January 8, 2018, when Mr. Bains allegedly yelled at the Applicant and accused her of having communication problems, could amount to harassment. However, the Officer determined that the complaint about this incident was out of time because it had occurred over two years before the Bains Complaint was filed, and the Applicant had not provided a reasonable explanation for the delay in filing.

[24] The Officer further recommended that the Bains Complaint be dismissed because "it was based on acts which occurred more than one year before the complaint was filed and the [Applicant] has not provided a reasonable explanation for the delay in filing".

D. ***Report on Wheatley Complaint***

[25] The Officer found that the allegations against Ms. Wheatley related to how she, on behalf of the CSC, handled the Applicant's harassment allegations against Mr. Bains, including that she did not stop Mr. Bains from harassing the Applicant and instead actively protected him; forced the Applicant into a demotion; and forced interactions with the Applicant against her wishes. While the Officer accepted that at least some of the alleged conduct could have occurred, they determined that it amounted to adverse differential treatment or poor management, not harassment. In the Officer's framing, the allegations went to whether the CSC had responded appropriately to the allegations against Mr. Bains and/or treated the Applicant in an adverse differential manner. The Officer further found that forced conversations and a handwritten note inviting informal mediation do not fall within the parameters or definition of harassment. The Officer declined to make a finding regarding timeliness on the basis that there simply was no reasonable basis for any of the allegations since none of them could constitute harassment under s. 14(1) of the *CHRA*. The Officer found that the conduct was not discriminatory and did not constitute harassment and urged the Commission to reject the Wheatley Complaint as frivolous.

[26] The Officer's reports were provided to the Commission for decisions on whether and how to proceed. The Applicant and the respondents to the complaints were provided an opportunity to make submissions and did so.

[27] Pursuant to ss. 40-47 of the *CHRA*, the Commission, which acts as a gatekeeper, has three options for dealing with reports: it may refer the complainant to a more appropriate mechanism, such as an internal grievance procedure that has not yet been exhausted; it may refer the complaint(s) to the Tribunal for inquiry; or it may dismiss the complaint where an inquiry is not warranted or the complaint is beyond the Commission's jurisdiction, is trivial, vexatious or in bad faith, or is out of time (i.e. more than a year has passed since the last of the acts or omissions at issue). The Commission may also appoint a conciliator to try and bring about a settlement.

[28] In exercising its gatekeeping function, the Commission is not to assess the credibility of the evidence gathered by the investigator, but only "its sufficiency to provide a reasonable basis in support of the complaint" (*Rosianu v Western Logistics Inc*, 2021 FCA 241 at para 47). The task of adjudicating complaints, including deciding questions of fact and questions of law, rests solely with the Tribunal (*2553-4330 Québec Inc v Duverger*, 2018 FC 377 [*Duverger FC*] para 47).

III. **DECISIONS UNDER REVIEW**

A. ***T-2380-23: Bains Decision***

[29] By decision dated October 10, 2023, a decision maker at the Commission dismissed the Bains Complaint, finding that referral to the Tribunal was not warranted pursuant to s. 44(3)(b)(i) of the *CHRA* ("Bains Decision").

[30] On the preliminary issues, the Commission agreed with the Officer that the Applicant's failure to exhaust the grievance process was not solely attributable to her and did not justify dismissing the Complaint under s. 41(1)(a). The Commission rejected the Officer's finding that the Yelling Incident was out of time, determining that "the earlier and later allegations of discrimination are related and part of a continuous pattern. They involve the same types of incidents, conduct and actors." The Commission therefore determined that it should proceed to deal with the Bains Complaint (*CHRA*, s. 41(1)).

[31] The Commission agreed with the Officer that Mr. Bains' impugned conduct did not constitute harassment under s. 14(1) of the *CHRA* because it fell within Mr. Bains' managerial responsibilities and was not extraneous to the legitimate operation of the workplace. The Commission found:

> … Requesting justification for overtime and closing her PMP as a refusal are legitimate actions that the Respondent may take within his managerial position. Again, these allegations may constitute adverse differential treatment but do not constitute harassment because they do not go outside the roles and responsibilities of a manager in supervising his subordinate. When a supervisor acts within the confines of their legitimate duties, they are carrying out the actions of the employer and, therefore, the employer could be held directly responsible under section 7 of the CHRA.

[32] As for the Yelling Incident, the Commission determined that, even if proved, it was not serious enough on its own to constitute harassment and "cannot have violated her overall dignity as a human being to such an extent as to constitute harassment". The Commission came to this conclusion despite acknowledging that the Applicant was deeply impacted and went on medically recommended leave for six weeks following the incident. To support the conclusion

that the Yelling Incident was not serious enough to constitute harassment, the Commission reasoned:

> As a comparison, the Tribunal has held that an isolated racial slur, even one that is very harsh, will seldom by itself constitute harassment within the meaning of the CHRA. Although completely different in nature from the incident at stake, a harsh racial slur would objectively be more serious than the Respondent yelling at the Complainant that she is at fault for their communication problems. Therefore, this incident alone is not serious enough to constitute harassment.

[33] The Commission rejected Mr. Bains' objection that the Officer's failure to interview him while preparing his report to the Commission was procedurally unfair, finding *inter alia* that the objection was overcome by the opportunities to provide written submissions, which were considered in the Decision.

[34] Noting that the Applicant had also filed a complaint against CSC, which is the proper respondent for allegations of adverse differential treatment, the Commission dismissed the Bains Complaint.

B. ***T-2379-23: Wheatley Decision***

[35] The same decision maker dismissed the Wheatley Complaint, also on October 10, 2023 ("Wheatley Decision").

[36] The Commission again agreed that the failure to exhaust the grievance process did not justify declining to deal with the Wheatley Complaint and acknowledged that "the earlier and later allegations of discrimination are related and form a continuous pattern." However, as in the

Bains Decision, the Commission found that the allegations, even if true, are not capable of constituting harassment and thus have no chance of success. As a result, the Commission rejected the Wheatley Complaint as frivolous (*CHRA*, ss. 41(1)(d), 44(3)(b)(ii)).

[37] As in the Bains Decision, the Commission rejected Ms. Wheatley's objection that she had not been interviewed by the Officer in the preparation of the report, finding that the opportunity to make submissions had satisfied the requirements of procedural fairness. Finally, the Commission noted the Applicant's concurrent CSC Complaint alleging adverse differential treatment. Therefore, the Wheatley Complaint was dismissed.

IV. **ISSUES**

[38] The Applicant challenges both Decisions under review as unreasonable and procedurally unfair. She alleges numerous interrelated and often overlapping errors in the Commission's reasoning for dismissing the complaints. Specifically, the Applicant alleges the Commission repeated the following errors in both Decisions under review:

> The Commission departed from the established definition of harassment under the *CHRA*;
>
> The Decisions falsely conclude that adverse treatment within the purview of supervisor's legitimate scope of authority could not constitute harassment;
>
> The Commission improperly read down the scope of section 14(1)(c) of the *CHRA*;
>
> The assessment of mixed fact and law analysis under section 14 of the *CHRA* is more appropriately the purview of the Tribunal;
>
> Absurd consequences of the Commission reading down section 14(1)(c) of the *CHRA*;

The Commission misinterpreted and misapplied *Day v. Canada Post*;

The Commission departed from the Tribunal's jurisprudence defining harassment without explanation;

The Commission disregarded circumstances of alleged harassment against Mr. Bains and Ms. Wheatley;

The Record of Decision fails to meet the requirements of a reasonable decision; and

The Commission's Decisions were procedurally unfair.

[39] The Applicant raises the following additional issues with respect to the Bains Decision:

The Commission's treatment of the Yelling Incident is illogical and unintelligible; and

The Record of Decision adopts as a false and inappropriate analogy to racist slur.

[40] And regarding the Wheatley Complaint, the Applicant alleges in addition:

Unreasonable treatment of the jurisprudence raised by the Applicant.

[41] I find that the common issues raised by the Applicant in respect of both T-2379-23 and T-2380-23 are appropriately grouped together and summarized as follows:

a) Did the Commission unreasonably limit the scope of protection from harassment under s. 14(1) of the *CHRA*?

b) Did the Commission unreasonably step into the shoes of the Tribunal and make findings of fact and law?

c) Were the Decisions procedurally unfair?

[42] The remaining issue with respect to the Bains Decision (T-2380-23) is as follows:

d) Was the Commission's treatment of the Yelling Incident unreasonable?

[43] The parties agree, as do I, that the Commission's screening decisions are generally reviewable for reasonableness (*Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31 at para 55; *Jagadeesh v Canadian Imperial Bank of Commerce*, 2024 FCA 172 [*Jagadeesh*] at para 95). While reasonableness review is a single standard, it takes its colour from the context in which the decision is made; every decision "must be both justified by the administrative body and evaluated by reviewing courts in relation to its own particular context" (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paras 89-90).

[44] The assessment of procedural fairness, in contrast, attracts no judicial deference and is assessed on a standard akin to correctness (*Ariaratnam v Canada (Attorney General)*, 2023 FC 1248 at para 15; *Vavilov* at para 77; *Jagadeesh* at para 53).

V. <u>**ANALYSIS**</u>

A. ***Preliminary issue: Admissibility of certain evidence adduced by the Applicant***

[45] The notices of application in both matters under review contained requests for documents, pursuant to Rule 317 of the *Federal Courts Rules,* SOR/98-106. Among the documents sought were "[a]ll Commission policies, internal memoranda, opinions and directions

to Investigators relating to the definition of harassment under section 14 of the CHRA that are not subject to solicitor-client privilege."

[46] The Respondent initially objected to the request, but eventually agreed to provide the following documents, all posted on the Commission's public facing website, on a without-prejudice basis regarding admissibility:

- A report by independent consultant Mark Hart entitled "Strengthening the Commission's handling of Race-based Cases," dated April 30, 2020 ("Hart Report");
- A document entitled "Complaint Criteria", dated October 29, 2020;
- Pages from the Commission's website entitled:

  "Your Guide to Understanding the Canadian Human Rights Act";

  "What is Harassment?";

  "Policy template – Preventing and addressing workplace harassment and violence", dated April 5, 2024;

  "Human rights-based approach to workplace investigations", dated April 5, 2024; and

  "Preventing and addressing workplace harassment and violence", dated April 5, 2024.

[47] The Applicant included the documents in her application records, asserting that even though they do not form part of the certified tribunal record, they meet a recognized exception to the normal rule of admissibility of documents on judicial review because they constitute general background information pertinent to the Commission's interpretation of harassment under the *CHRA* (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para 20; *Armstrong v Canada (Attorney General)*, 2005 FC 1013 at para 40).

[48] The Respondent objected in writing that the documents constituted inadmissible "evidence" that goes "directly to the merits of the underlying complaint[s] before the Commission." However, upon being advised at the outset of the hearing that the Applicant no longer intended to rely on the Hart Report, the Respondent withdrew their objection. In any event, I agree that the remaining documents from the Commission's website are admissible as they constitute useful and noncontroversial general background information from the Commission itself that could be of assistance to the Court.

B. ***Did the Commission unreasonably limit the scope of protection from harassment under s. 14(1) of the CHRA?***

a) Did the Commission unreasonably apply a conjunctive test for harassment requiring both severity and repetition?

[49] The Applicant argues that the Commission misstated and misapplied binding jurisprudence establishing a disjunctive test for harassment as requiring *either* a certain level of seriousness *or* repetition.

[50] As the Applicant acknowledges, the Commission cited appropriate authorities for the definition of harassment, both of which very clearly identify the test as disjunctive (*London v New Brunswick Aboriginal Peoples Council*, 2008 CHRT 49 [*London*]; *Canada (Human Rights Commission) v Canada (Armed Forces)*, 1999 CanLII 7907 (FC) [*Franke*]). As Justice Tremblay-Lamer explained in *Franke*, a case about sexual harassment:

> If the trier of fact is satisfied that the conduct was unwelcome and "sexual in nature", he or she should proceed to an assessment of the persistence and gravity of the conduct. This will generally enable the tribunal to determine whether the conduct was detrimental to the work environment.
>
> …
>
> The simple fact that the infringement in question is one of **harassment** requires an element of persistence or repetition, although in certain circumstances a single incident may be enough to create a hostile work environment.
>
> …
>
> [T]he more serious the conduct and its consequences are, the less repetition is necessary; conversely, the less severe the conduct, the more persistence will have to be demonstrated.
>
> Again, in assessing whether the conduct is sufficiently severe or persistent to create a poisoned workplace, the trier of fact will apply the objective "reasonable person standard" in the context. [emphasis in the original]

[51] In both Decisions under review, the Commission began its discussion of the harassment allegations with a summary of the test from *Franke* and correctly identified the test as disjunctive. The Applicant's concern, however, is that just a few paragraphs later the Commission referred to the test as *conjunctive*. Therefore, the Applicant argues, the Commission applied a higher threshold for establishing harassment than is required by the

jurisprudence. She points to the Commission's treatment of the Yelling Incident to demonstrate the impact of the error.

[52] The Respondent does not dispute that the Commission misstated the test but characterizes the error as a mere inadequacy of expression that did not result in an unreasonable decision.

[53] As discussed later in these reasons, I agree with the Applicant that the Commission's assessment of the Yelling Incident was unreasonable, in part because it failed to assess it in context, as part of a pattern of conduct. However, I am not convinced that the Commission's misstatements of the test from *Franke* demonstrate that the Commission actually applied a conjunctive test for harassment requiring both repetition and severity. Not only did the Commission state the proper test just a few paragraphs earlier in its Decisions, there is also little in the Commission's reasoning that supports the contention.

b) Did the Commission unreasonably exclude misuse of authority from the protection of s. 14(1) of the CHRA?

[54] In the Bains Decision, the Commission set out its conclusion regarding the allegations in the Bains Complaint as follows:

> … [T]hese allegations may constitute adverse differential treatment but do not constitute harassment because they do not go outside the roles and responsibilities of a manager in supervising his subordinate. When a supervisor acts within the confines of their legitimate duties, they are carrying out the actions of the employer and, therefore, the employer could be held directly responsible under section 7 of the CHRA.

[55] The Commission applied the same analysis in the Wheatley Decision, finding that none of the alleged conduct by Ms. Wheatley went beyond her managerial responsibilities or was extraneous to the legitimate operation of the workplace. According to the Commission, Ms. Wheatley's actions "may constitute adverse differential treatment or poor management but they do not constitute harassment."

[56] The Applicant alleges that the Commission erred by unreasonably interpreting and applying s. 14(1) of the *CHRA* to categorically exclude misuses of authority – here, discriminatory exercises of legitimate managerial authority. I agree.

[57] Section 7 of the *CHRA* provides for protection from adverse differential treatment in employment:

> **Employment**
>
> 7 It is a discriminatory practice, directly or indirectly,
>
> (a) to refuse to employ or continue to employ any individual, or
>
> (b) in the course of employment, to differentiate adversely in relation to an employee,
>
> on a prohibited ground of discrimination.

[58] Protection against harassment in employment is guaranteed by s. 14(1) of the *CHRA*, which provides:

> **Harassment**
>
> 14 (1) It is a discriminatory practice,
>
> (a) in the provision of goods, services, facilities or accommodation customarily available to the general public,

> (b) in the provision of commercial premises or residential accommodation, or
>
> (c) in matters related to employment,
>
> to harass an individual on a prohibited ground of discrimination.

[59] The statutory scheme does not require complainants to choose between s. 7 and s. 14(1) when seeking redress for discriminatory workplace conduct by management.

[60] The *CHRA* is a quasi-constitutional human rights instrument designed to ensure that all people have an equal opportunity to live their lives “without being hindered by discriminatory practices based on certain prohibited grounds of discrimination, including discrimination on the ground of sex.” As such, “the rights enunciated in the [CHRA] must be given full recognition and effect consistent with the dictates of the *Interpretation Act* that statutes must be given such fair, large and liberal interpretation as will best ensure the attainment of their objects” (*Robichaud v Canada (Treasury Board)*, 1987 CanLII 73 (SCC), [1987] 2 SCR 84 at para 8).

[61] In the scheme of the *CHRA,* it is the Tribunal, not the Officer conducting the preliminary investigation, nor the Commission undertaking the screening - nor this Court on judicial review – that is best placed to interpret the scope of the statutory provisions and their application to the facts of any particular case (*Duverger FC* at para 47).

[62] Established jurisprudence defines harassment as “unwelcome conduct related to one of the prohibited grounds that detrimentally affects the work environment or leads to adverse job-related consequences for the victims” (*Janzen v Platy Enterprises Ltd*, 1989 CanLII 97 (SCC),

[1989] 1 SCR 1252 at 1284). The conduct must be unwelcome and related to a prohibited ground of discrimination, and there must be either a pattern of persistent or repetitive conduct or, in certain circumstances, a single serious incident that is enough to create a poisoned work environment (*Franke*).

[63] Neither s. 14(1) of the *CHRA* itself nor this guiding jurisprudence indicates that managerial action is excluded from the definition of harassment. The Commission relied on *Day v Canada Post Corporation*, 2007 CHRT 43 [*Day*], for the proposition that the harassment jurisprudence "is premised on the idea that the conduct in issue is, by its nature, extraneous or irrelevant to the legitimate operations and business goals of the employer". However, the next sentence in the *Day* decision adds some important nuance: "Derogatory comments or constant and unnecessary questioning about a disability which are humiliating and demeaning are examples of conduct that is extraneous to the legitimate operation of a workplace" (at para 184).

[64] In her submissions to the Commission, the Applicant explained that the Tribunal's decisions in *André v Matimekush-Lac John Nation Innu*, 2021 CHRT 8 [*André*] and *Temate v Public Health Agency of Canada*, 2022 CHRT 31 [*Temate*] supported her argument that the workplace actions of managers may constitute harassment.

[65] In *André*, the Tribunal had made a finding of harassment contrary to s. 14(1) where a supervisor had "used his authority and his powers to control [the complainant] in every area of her work," including prohibiting the complainant from leaving the workplace to warm up her

food, requiring her to remain on the premises at all times, denigrating and looking down on her, shouting at her, and controlling her use of the internet in the workplace (at para 98).

[66] In *Temate*, the Tribunal had found that alleged discriminatory exercises of managerial authority to disclose personal information and to restrict communication were appropriately addressed through the lens of harassment under s. 14(1) of the *CHRA* (at paras 137, 227).

[67] Although the Commission distinguished these authorities – for reasons that, the Applicant rightly observes, suggest a failure to recognize the different roles of the Commission as screener and the Tribunal as fact finder – they were not the only authorities before the Commission acknowledging that exercises of legitimate management authority can constitute discrimination. In *Croteau v Canadian National Railway Company*, 2014 CHRT 16 [*Croteau*], a case purportedly relied on by the Commission, the Tribunal considered a harassment allegation based on a manager's denial of a tuition subsidy – a matter well within the manager's scope of responsibility. While the Tribunal rejected the claim, it did so not because the allegation could not constitute harassment but rather because the evidence had not established that the actions of the manager were tainted by a discriminatory intention, had resulted in adverse impact discrimination, or were the result of targeting on a prohibited ground (*Croteau* at paras 126-129). Clearly, the Tribunal was proceeding on the understanding that misuse of managerial authority could constitute harassment.

[68] The Commission's own website provides further guidance into the proper interpretation of harassment. The website includes webpages entitled 'What is Harassment?'; 'Policy template

– Preventing and addressing workplace harassment and violence'; 'Human rights-based approach to workplace investigations'; and 'Preventing and addressing workplace harassment and violence'. These pages all provide the following definition of harassment:

> Harassment is when someone says or does something that offends or humiliates another person. Usually, the harasser must say or do these offensive things many times, but a serious one-time incident, may also be harassment. Harassment can be direct or indirect, obvious or subtle, physical or psychological. It can occur in many ways, such as through spoken words, text, gestures, and images.

[69] The same webpages provide examples of acts that can constitute harassment under the *CHRA*, many of which were in fact alleged by the Applicant, including:

- creating a toxic work environment;
- socially excluding or isolating someone;
- impeding a person's work in any deliberate way;
- persistently criticizing, undermining, belittling, demeaning or ridiculing a person;
- public ridicule or discipline;
- misusing authority, including by
    - blocking applications for leave, training or promoting in an arbitrary manner;
    - microaggressions, or subtle acts of exclusion.

[70] The Commission webpages acknowledge that, consistent with *Day*, management action might not meet the definition of harassment, but it provides crucial context and nuance to the proposition:

> Workplace harassment **does not** include <u>appropriate</u> management action (such as performance evaluations, directives and job assignments) <u>if these are carried out in a fair manner and for legitimate reasons</u>. However, <u>management action that results in a negative impact and which is made based on a prohibited ground, can</u> <u>constitute harassment</u> and/or discrimination. For example, it is a discriminatory practice if a person's race is a factor in a manager's decision to assign a less desirable task or shift to them.
>
> (Bold in the original; underlining added)

[71] The Commission’s Decisions adopt an interpretation of harassment that is directly at odds with these sources. They narrow the protection available under s. 14(1) in a manner that is neither justified by the language of the *CHRA* itself, nor by the policies and past practices of the Commission, and that runs contrary to the “large and liberal” interpretation required of quasi-constitutional human rights legislation.

[72] *Vavilov* teaches us that “a reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation or to the facts and law that constrain the decision maker” (at para 85). When it comes to statutory interpretation, administrative decision makers are similarly required to ensure their interpretation is “consistent with the text, context and purpose of the provision” (*Vavilov* at para 120).

[73] With respect, I am unable to find that the Commission’s determination that protection from harassment is limited to “conduct that falls outside … managerial responsibilities” is reasonable. There is no apparent rational chain of analysis leading to this conclusion, and it is contradicted by both jurisprudence and the Commission’s own policy guidance. The Respondent’s counsel could not point the Court to any authority beyond those discussed above that might justify the Commission’s approach.

C. ***Did the Commission misconstrue its role?***

[74] The Applicant argues that the Commission unreasonably strayed into adjudicative territory reserved for the Tribunal by dismissing the complaints rather than referring them to the

Tribunal for inquiry (*Ennis v Canada (Attorney General)*, 2020 FC 43 [*Ennis*] at paras 24-28, citing *McIlvenna v Bank of Nova Scotia (Scotiabank)*, 2019 FC 1610 at paras 15-17).

[75] As the Applicant notes, the Commission's role is not to resolve factual disputes, "but to consider whether an inquiry is warranted, based on the sufficiency of the evidence and all the circumstances before it" (*Wagmatcook First Nation v Oleson*, 2018 FC 77 at paras 18-19, 44). A sufficiency analysis "is not a balance of probabilities matter but a question of whether a reasonable basis for a referral to the Tribunal exists. Credibility and weight are usually the preserve of the Tribunal" (*Ennis* at para 27).

[76] The Applicant maintains that the Commission overstepped by determining that all but one of the allegations against Mr. Bains fell within his legitimate managerial role and responsibilities, and that all of Ms. Wheatley's likewise fell within hers.

[77] The Commission's reasons, read holistically, do not bear this out.

[78] I have found that the Commission unreasonably interpreted s. 14(1) of the *CHRA* as categorically excluding misuse of authority so long as that impugned conduct does not fall outside of the parameters of managerial authority or responsibility. Given the Commission's misunderstanding of the provision, there would have been no reason for it to embark on a factual inquiry into the alleged incidents, and I do not find support in the reasons for the allegation that the Commission did so. Further, the fact that the Commission referred the related CSC Complaint to the Tribunal for inquiry confirms that the Commission recognized that the

allegations raised by the Applicant may have merit, warranting referral to the Tribunal for fact finding and disposition. Therefore, this ground raised by the Applicant fails.

D. ***Were the Decisions procedurally unfair?***

[79] The Applicant asserts that, in both Decisions, the Commission's failure to recognize misuse of authority as a form of harassment was procedurally unfair because it breached the Applicant's legitimate expectation that the Commission would follow its own published policies. The Respondent contends that the Applicant has not identified a breach of procedural fairness, noting that legitimate expectations doctrine does not create substantive rights but is limited to procedural remedies (*Moreau-Bérubé v New Brunswick (Judicial Council)*, 2002 SCC 11 at para 78).

[80] I agree with the Respondent. While there is a valid concern about the inconsistency between the Commission's approach to abuse of authority in the cases at bar and the approach set out in the Commission's published policy documents, I find that this concern goes to the reasonableness of the Commission's approach as discussed above and does not give rise separately to a breach of procedural fairness. I note that that this is not a case where the Commission's approach was novel and could not have been anticipated, such that the Applicant was unfairly deprived of an opportunity to be heard on the issue. The Applicant had an opportunity to address the issue in submissions to the Commission following receipt of the Officer's reports, which took the same approach as was adopted by the Commission, and did so.

E. ***Was the Commission's assessment of the Yelling Incident unreasonable?***

[81] The Applicant argues that the Commission erred in the Bains Decision by unreasonably failing to assess the Yelling Incident as part of a pattern of conduct by Mr. Bains and therefore excluding consideration of the cumulative impact of the conduct. She also alleges that the Commission erred by unreasonably relying on a false and inappropriate analogy to racial slurs and their treatment in dated jurisprudence. I agree.

[82] As noted above, the Commission properly rejected the Officer's recommendation that it decline to consider the Yelling Incident because it was out of time, on the basis that the "earlier and later allegations of discrimination are related and part of a continuous pattern. They involve the same types of incidents, conduct and actors", the last of which occurred within the one-year limitation period. Yet, in assessing whether the Yelling Incident could constitute harassment under s. 14(1), the Commission inexplicably failed to take that very context into account, instead viewing it in isolation as a one-off incident that was not serious enough to meet the threshold for a finding of harassment.

[83] The analysis of a harassment claim requires a determination of whether the impugned conduct forms part of a pattern of persistent or repetitive conduct or comprises a single serious incident that is enough to create a poisoned work environment (*Franke*). Decision makers must consider the cumulative effect of incidents that individually may be insufficient to rise to the level of harassment (*Canada (Human Rights Commission) v Canada (Department of National Health and Welfare)*, 1998 CanLII 7740 (FC) at paras 17-18; *Larente v Canadian Broadcasting Corp (No 2)*, 2002 CanLII 78259 (CHRT) at para 202; *Croteau* at paras 38-43). I am unable to

discern a rational chain of reasoning in the Bains Decision that justifies the Commission's seemingly contradictory analysis. As such, I must conclude that this aspect of the decision, too, is unreasonable.

[84] As for the Commission's reliance on *London*, *Pitawanakwat v Secretary of State*, 1992 CanLII 7190 (CHRT) and *Rampersadsingh v Wignall*, 2002 CanLII 23563 (CHRT) for the proposition that the single Yelling Incident did not constitute harassment because the Tribunal had previously found that the use of racial slurs and sexualized language in the workplace did not meet the threshold of harassment, I am frankly not sure where to even start. The first and most obvious observation to make is that, thankfully, human rights jurisprudence has evolved and what might have been deemed acceptable workplace conduct in decades past would hopefully not be viewed that way today in this country. Further, those were evidence-based decisions flowing from detailed fact-finding inquiries in which the Tribunal examined whether and to what extent the impugned conduct had created a poisoned workplace, not preliminary screening decisions by the Commission, and so bear little relevance to the cases at bar. In any event, the jurisprudence does not establish a general threshold of "seriousness" against which other instances of verbal harassment in the workplace can or should be measured, and it was unreasonable for the Commission to do so.

F. ***Conclusion***

[85] Both Decisions under review are unreasonable and must be set aside. The Commission's interpretation of the scope of protection from harassment under s. 14(1) of the *CHRA* was

unreasonable, as was its assessment of the Yelling Incident. The Commission did not, however, misconstrue its role or reach its decisions in a manner that was procedurally unfair.

G. ***Costs***

[86] At the close of the hearing, the parties advised the Court that they had agreed to lump sum costs of $2,500 per case to the successful party. I will so order.

JUDGMENT in file T-2379-23

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.
2. The decision of the Commission is quashed, and the matter is remitted to a different panel for redetermination in accordance with these reasons.
3. Costs are awarded to the Applicant in the amount of $2,500.

JUDGMENT in file T-2380-23

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.
2. The decision of the Commission is quashed, and the matter is remitted to a different panel for redetermination in accordance with these reasons.
3. Costs are awarded to the Applicant in the amount of $2,500.

"Andrew J. Brouwer"
Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET:	T-2379-23 & T-2380-23
STYLE OF CAUSE:	GURMEET DHALIWAL V. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	MAY 13, 2025
JUDGMENT AND REASONS:	BROUWER J.
DATED:	JUNE 5, 2025

APPEARANCES:

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