

Federal Court



Cour fédérale

Date: 20230222

Docket: T-517-22

Citation: 2023 FC 258

Ottawa, Ontario, February 22, 2023

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

**KINISTIN SAULTEAUX NATION
Represented by its council**

Applicant (Respondent)

and

MOHAMMED CHOUDHARY

Respondent (Complainant)

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Kinistin Sauteaux Nation (the “Nation”), seeks judicial review of a decision of the Canadian Human Rights Commission (the “Commission”) dated February 9, 2022, pursuant to sections 49(1) and 40(4) of the *Canadian Human Rights Act*, R.S.C., 1986, c. H-6 (“*CHRA*”).

[2] The Respondent, Mohammed Choudhary (Mr. “Choudhary”), filed a complaint against the Applicant with the Commission on September 20, 2018, alleging discrimination contrary to sections 7 and 14 of the *CHRA* (“September 2018 Complaint”). Mr. Choudhary filed a subsequent discrimination complaint against Greg Scott (Mr. “Scott”), a former employee of the Nation, on November 22, 2018 (“November 2018 Complaint”). The certified tribunal record (“CTR”) and the underlying decision of the Commission do not clearly distinguish between these complaints and largely refer to them as one. Mr. Choudhary has not filed a memorandum or materials in this application for judicial review.

[3] On February 9, 2022, the Commission rendered its decision to refer Mr. Choudhary’s September 2018 Complaint to the Canadian Human Rights Tribunal (the “Tribunal”), but did not include the November 2018 Complaint against Mr. Scott in its decision and requested that the Tribunal hear both complaints singularly.

[4] The Applicant submits that the Commission erred in referring Mr. Choudhary’s November 2018 Complaint to the Tribunal, both in requesting the Tribunal to institute a further

inquiry into the initial September 2018 Complaint and in requesting that the Tribunal institute a single inquiry into the related November 2018 Complaint.

[5] The Court notes that although the Applicant's Record listed the Attorney General of Canada ("AGC") as a Respondent to the matter, the AGC filed a letter to the Court on March 14, 2022, advising that it would not be participating in this application for judicial review.

[6] For the reasons that follow, I find that the Commission's decision is reasonable. This application for judicial review is therefore dismissed.

II. Facts

A. The Applicant and Incidents at Issue

[7] The Applicant is a Band pursuant to the *Indian Act*, R.S.C., 1985, c I-5, and is represented by its current elected Chief and Council.

[8] Mr. Choudhary identifies as a Pakistani male. He is a former employee of the Applicant, where he worked as the Chief Financial Officer. He is not a member of the Nation and was discharged from his brief employment on October 31, 2018.

[9] According to the CTR, the Commission received a complaint from Mr. Choudhary on September 20, 2018. However, the underlying complaint form is dated November 22, 2018. The CTR does not contain a separate complaint form indicating a complaint made before

November 2018. The Applicant claims that the September 2018 Complaint and November 2018 Complaint are distinct.

[10] The November 2018 complaint form details multiple negative comments allegedly directed against Mr. Choudhary regarding the aforementioned protected grounds, and specifically outlines comments allegedly made by Mr. Scott, the Chief of the Nation at the time. Mr. Choudhary alleged that the Applicant discriminated against him in employment on the grounds of his sex (male), colour, race, and national or ethnic origin (Pakistani), by subjecting him to adverse treatment on the basis of these grounds, and failing to provide a workplace free of harassment, in breach of section 7 and 14 of the *CHRA*.

B. *Report for Decision*

[11] On December 1, 2021, a Human Rights Officer (the “Officer”) at the Commission prepared a Report for Decision (the “Report”) recommending that the November 2018 complaint be referred for a hearing by the Tribunal. The Report noted that the Commission’s role is not to render a decision on whether or not discrimination has occurred, but to decide whether to send a complaint to the Tribunal for further inquiry, where witnesses can be testified.

[12] The Report included a detailed overview of Mr. Choudhary’s allegations, and acknowledged that the complaint is one of two related complaints, which will be presented to the Commission simultaneously. In outlining the scope of this complaint, the Officer stated that the Report would not address Mr. Choudhary’s allegations of adverse treatment on the basis of sex and/or disability pursuant to section 7 of the *CHRA* and, rather, would assess the allegations of a

failure to provide a harassment-free workplace based on the grounds of colour, race, and national or ethnic origin, pursuant to section 14 of the *CHRA*. These allegations are summarized in the Report as follows:

- In or around May 2018, his co-worker, Marlene Campeau:
 - made a comment to Tamara Morrison (another co-worker), along the lines of “I bet his kind beats women. He probably enjoys it as a control thing”;
 - told the complainant that she did not see him working for the respondent very long and that his background [race and/or national or ethnic origin] was not going to help his situation;
- The complainant states that when he learned of what Marlene Campeau had said about him, he raised these comments with the Chief and Council of the respondent who did nothing to resolve the situation;
- Between June and August 2018, various members of the respondent's staff told the complainant that he was a “cheap brown bastard”. He felt devalued and rejected for all the hard work he put into ensuring that the respondent was saving money; and
- On September 10, 2018, during a telephone conversation with Greg Scott, Greg Scott “bombard[ed] [the complainant] with swear words”. Specifically, the complainant alleges that Greg Scott told him to “go fuck off to where ever the fuck I came from, because I am useless and worthless”.

[13] Mr. Choudhary also alleged that he experienced panic attacks caused by the issues at work, and his doctor recommended a medical leave of absence effective September 17, 2018. The Applicant terminated his employment on October 13, 2018, while he was on leave.

[14] The Officer noted that the recommendation was prepared following an interview with Mr. Choudhary; Tamara Morrison, a former Post-Secondary Coordinator for the Nation (Ms. “Morrison”); and Calvin Nippi, a former Counsellor for the Applicant (Mr. “Nippi”). The Report states that Mr. Scott did not respond to the Officer’s requests for comment.

[15] The Applicant objected to the Commission’s consideration of this complaint on several grounds. The Officer found, contrary to the Applicant’s position, that the Commission has jurisdiction over complaints made against band councils such as the Nation. Considering the Applicant’s position that the complaint is based on hearsay and therefore frivolous, the Officer found that the Commission could only decide not to deal with a complaint at this preliminary stage if it is “plain and obvious” and at this stage, the allegations should be taken as true. The Officer stated that Mr. Choudhary provided sufficient information to establish a reasonable basis for the complaint and it is therefore not frivolous. The Officer also found that Mr. Choudhary’s other complaints under labour and occupational health and safety legislation did not include the human rights allegations, and therefore did not make it plain and obvious that the Commission should not deal with this complaint.

[16] Pursuant to section 49 of the *CHRA*, the Commission may consider several factors in deciding whether to refer a complaint to the Tribunal. The Officer considered three of these factors in the Report: (1) whether the available information, if true, suggests the alleged discrimination happened; (2) whether the parties’ information is contradictory, and; (3) what the likelihood is that an investigation would assist the Commission in deciding whether further inquiry into the allegations is warranted.

[17] The Officer summarized the information provided by Ms. Morrison. Ms. Morrison identifies as Caucasian and was previously employed with the Applicant. She told the Officer that the workplace was toxic before Mr. Choudhary began his employment and that she found it difficult to work there. Ms. Morrison stated that the Applicant's staff referred to Mr. Choudhary as "stupid Paki", and that Marlene Campeau (Ms. "Campeau"), another employee at the Nation, told Ms. Morrison that "people like that beat their women," referring to Mr. Choudhary. Ms. Morrison told the Officer that Mr. Scott made comments about Mr. Choudhary in the office, such as calling him "the wrong kind of Indian," asking why he was not wearing a turban, and stating "stupid Paki, doesn't understanding how it works around here." Ms. Morrison stated she did not challenge these comments because she was afraid of Mr. Scott.

[18] The Officer then noted the Applicant's position that the allegations were based on third-party hearsay and that, since the time of the alleged acts, the Nation has elected a new Chief and Council. The Applicant also noted that Mr. Choudhary only made his complaint after female staff "retaliated against him for his conduct towards them." The Officer also summarized information provided by Mr. Nippi, an elected Councillor for the Applicant at the relevant time. Mr. Nippi told the Officer that he did not pay much attention to other "administrative things" in the office, but that he knew Mr. Choudhary had complained "about something." He stated that he had not witnessed Mr. Scott make any racist comments to Mr. Choudhary, and the two seemed "level with each other," but he was not in the office very often.

[19] The Officer noted that Ms. Morrison's information appeared to support Mr. Choudhary's position. Both individuals described the workplace as toxic. Ms. Morrison stated she was told

she was “too white” to work there and Ms. Morrison detailed specific comments made by Mr. Scott about Mr. Choudhary. The Officer also noted that Mr. Nippi was aware that Mr. Choudhary had raised issues about his treatment in the workplace, suggesting a certain level of awareness about the issues among the Applicant’s staff.

[20] Subsection 65(2) of the *CHRA* stipulates that an employer may limit its responsibility for the discriminatory actions of its employees by acting with due diligence to try to prevent, mitigate, or avoid the effects of these actions. The Officer acknowledged the Applicant’s position that it has a policy to address harassment in the workplace, but found that the Applicant provided no information to show that it acted with due diligence to investigate, prevent, or mitigate Mr. Choudhary’s concerns. The Officer found sufficient evidence to demonstrate that the alleged actions could constitute harassment based on colour, race, and national or ethnic origin under section 14 of the *CHRA*.

[21] In a letter dated January 7, 2022, the Applicant’s counsel provided further submissions to the Commission following its Report. The Applicant submitted that Mr. Choudhary’s allegations and the information provided by Ms. Morrison concerned Mr. Scott, who was not authorized by the Applicant and whose actions breached the *Kinistin Saulteaux Nation Personall Policy and Regulations October 2013* (“KSN Policy”). Therefore, the Applicant submitted that Mr. Choudhary’s allegations against it are strictly limited to his claim that the Applicant was informed of the allegations and failed to adequately respond.

[22] The Applicant further submitted that there is no evidence to support this claim. Mr. Nippi's comments were too vague to suggest that the Applicant knew of Mr. Choudhary's allegations, and these comments could have been about any of the other complaints Mr. Choudhary initiated against the Applicant, or about the disciplinary action the Applicant had initiated against Mr. Choudhary himself. The Applicant submitted that there is insufficient evidence to indicate that Mr. Choudhary formally informed the Applicant of his allegations pursuant to section 17 of the KSN Policy, which allows an employee to request an appeal of the Applicant's action or inaction if they feel they have been aggrieved. The Applicant submitted that a further inquiry by the Tribunal is not required.

C. *Decision Under Review*

[23] In a decision dated February 9, 2022, the Commission rendered its decision to request the Tribunal to institute an inquiry into both the September 2018 and November 2018 complaints, as a single inquiry, pursuant to subsection 40(4) of the *CHRA*.

[24] The decision-maker (the "Commissioner") stated that in making its determination, she reviewed Mr. Choudhary's complaint form, the Report for Decision, and the further submissions filed by the Applicant following the Report. The Commissioner considered the Applicant's three central submissions in turn.

[25] The Commissioner found the Applicant's first submission, which Mr. Choudhary's allegations are against Mr. Scott, whose conduct breached KSM Policy and was not authorized by the Applicant, to be inaccurate. The Commissioner found Mr. Choudhary's complaint to

include allegations against other employees and not solely Mr. Scott. Mr. Choudhary further alleged that the Applicant failed to provide him with a workplace free of harassment and discrimination, failed to take the required action to respond to his complaint, and that the Applicant's termination of his employment was discriminatory.

[26] The Commissioner did not agree with the Applicant's assertion that there is insufficient evidence to show that it was aware of Mr. Choudhary's allegations. In the Commission's Report, the Officer noted Mr. Choudhary's evidence showing that he complained directly to the Chief and Council about his treatment in the workplace, and summarized the information provided by Mr. Nippi, who knew Mr. Choudhary had complained about "something". The Commissioner found that although it is unclear what this refers to, it reveals the possibility that this complaint could have been related to the allegations of discrimination and harassment.

[27] Lastly, the Commissioner noted that the Applicant seemed to suggest that it is no longer the appropriate respondent in the complaint because it has a new governing body and new employees. The Commissioner found that, to the contrary, the respondent in Mr. Choudhary's complaint remains The Nation, not the individual employees.

[28] For the above reasons and for those set out in the Report, the Commissioner concluded that the complaint should be referred to the Tribunal to institute a further inquiry, as warranted. The Commissioner further requested that the Tribunal institute a single inquiry into both the September 2018 and November 2018 complaints, finding that they substantially are the same in

fact and law. This decision to refer the matter to the Tribunal as a single inquiry is the subject of this application for judicial review.

III. Preliminary Issues

A. *Stay Motion*

[29] On April 29, 2022, following the Commissioner's decision to refer Mr. Choudhary's complaint to the Tribunal, the Applicant filed a motion to stay the Tribunal's proceedings, pending the determination of this application for judicial review. Both the Nation and Mr. Choudhary provided the Tribunal with written representations on the stay motion.

[30] The Tribunal rendered its decision to allow the Nation's stay motion on September 12, 2022. The Applicant requested leave to file this decision as evidence before this Court on November 4, 2022, four days before the hearing on the application for judicial review, without explanation for the late request. Although this Court accepted the affidavit for filing, the following reasons do not include a discussion of the Tribunal's ruling on the stay motion.

B. *Mr. Choudhary*

[31] On March 18, 2022, Mr. Choudhary served the Applicant with a Notice of Appearance, advising that he intended to oppose this application. However, Mr. Choudhary failed to file this Notice of Appearance with this Court. Mr. Choudhary also did not serve or file his supporting affidavit, documentary exhibits, or a Respondent's record.

[32] In oral directions issued on July 18, 2022, Associate Judge Ring (“AJ Ring”) noted that Mr. Choudhary did not file a Notice of Appearance or take steps to participate in this proceeding. AJ Ring therefore directed that the Applicant be prepared for and attend the hearing of the application for judicial review as scheduled.

IV. Issues and Standard of Review

[33] This application for judicial review raises the following two issues:

- A. *Whether the Commissioner’s decision is reasonable.*
- B. *Whether the Commissioner’s decision breached procedural fairness.*

[34] The Applicant submits that the first issue is reviewed on a standard of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16–17, 23–25) (“*Vavilov*”). The Applicant submits that the issue of procedural fairness is reviewed on a correctness standard. I agree on both points.

[35] Reasonableness is a deferential, but robust, standard of review (*Vavilov* at paras 12-13). The reviewing court must determine whether the decision under review, including both its rationale and outcome, is transparent, intelligible and justified (*Vavilov* at para 15). A reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision-maker (*Vavilov* at para 85). Whether a decision is reasonable depends on the relevant administrative setting, the record

before the decision-maker, and the impact of the decision on those affected by its consequences (*Vavilov* at paras 88-90, 94, 133-135).

[36] For a decision to be unreasonable, an applicant must establish the decision contains flaws that are sufficiently central or significant (*Vavilov* at para 100). Not all errors or concerns about a decision will warrant intervention. A reviewing court must refrain from reweighing evidence before the decision-maker, and it should not interfere with factual findings absent exceptional circumstances (*Vavilov* at para 125). Flaws or shortcomings must be more than superficial or peripheral to the merits of the decision, or a “minor misstep” (*Vavilov* at para 100; *Canada (Citizenship and Immigration) v Mason*, 2021 FCA 156 at para 36).

[37] Correctness, in contrast, is a non-deferential standard of review. The central question for issues of procedural fairness is whether the procedure was fair having regard to all of the circumstances, including the factors enumerated in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paragraphs 21-28 (*Canadian Pacific Railway Company v Canada (Attorney General)*, [2019] 1 FCR 121 at para 54).

V. Analysis

[38] The Applicant submits that the Commissioner unreasonably found that Mr. Choudhary’s complaints require further inquiry by the Tribunal, and breached procedural fairness by requesting that the Tribunal pursue the complaints as a single inquiry. In my view, the Commissioner’s decision is both reasonable and procedurally fair.

A. *Referral to Tribunal for Further Inquiry*

[39] The Applicant submits that the Commissioner's decision to refer Mr. Choudhary's complaints to the Tribunal is based on insufficient evidence. Mr. Choudhary alleged that in June 2018, Ms. Campeau said that she did not "see him working for the Applicant Kinistin very long" and that "his background was not going to help his situation." The Applicant submits that this is an insufficient basis upon which to base the allegation that Mr. Choudhary raised his complaint with Chief and Council, who did not respond adequately, and Mr. Choudhary provided no further information to corroborate this claim. The Applicant submits that it is not aware of any records or minutes from a meeting between Mr. Choudhary and the Applicant's staff.

[40] The Applicant submits that the Commissioner erroneously relied on Mr. Nippi's knowledge that Mr. Choudhary complained about "something" to conclude that some staff were aware of Mr. Choudhary's issues relating to discrimination or harassment in the workplace. The Applicant advised the Commission that Mr. Choudhary pursued complaints through other channels and, therefore, the complaint about "something" could have been any one of these complaints. Mr. Nippi did not state that he is aware of a complaint relating to Mr. Choudhary's treatment in the workplace and thus provides insufficient evidence to support Mr. Choudhary's allegation of discrimination and harassment.

[41] The Applicant relies on the decision of the Supreme Court of Canada in *R v Khelawon*, 2006 SCC 57, to submit that hearsay evidence is largely inadmissible and the Commissioner therefore erred in relying on hearsay evidence. The Applicant particularly notes that the Officer

failed to contact Ms. Campeau for comment, despite her being named in Mr. Choudhary's allegations and failed to glean when and where Ms. Campeau's comment was made from the interview with Ms. Morrison. The Applicant therefore submits that the Commissioner's reliance on hearsay evidence renders the decision to be unreasonable.

[42] The Applicant has not pointed to a reviewable error in the Commission's assessment of Mr. Choudhary's complaints. A bulk of the Applicant's submissions on this point challenge the truthfulness of Mr. Choudhary's allegations. However, both the Commissioner's decision and the Report for Decision explicitly state that, at this stage in the proceedings, the Commission's role is not to assess whether the allegations took place. The Officer's reasons explicitly state that the Commission does not decide whether the discrimination has occurred, only whether there is a reasonable basis to refer the complaint for further inquiry by the Tribunal, in light of the relevant factors. If referred, it is the Tribunal's role to decide whether or not the discrimination occurred. Therefore, the Applicant places a higher burden of assessment on the Commission, which goes beyond the task that was actually before the Commission. The Commissioner's reasons and the Officer's rationale in the Report both provide transparent and intelligible rationale for coming to the conclusion to refer the complaints to the Tribunal (*Vavilov* at para 15).

[43] It is also not this Court's role to reassess the evidence that was before the decision-maker (*Vavilov* at para 125). The Applicant's submissions ask this Court to reweigh the information provided by the witnesses, and arrive at its own conclusion about whether there is a reasonable basis for further inquiry into Mr. Choudhary's allegations. This amounts to a complaint about the final result, and not the reasonableness of the decision as a whole (*Vavilov* at para 96).

B. *Request to Institute Complaints as a Single Inquiry*

[44] The Applicant submits that the Commissioner breached procedural fairness by requesting the Tribunal to consider both complaints as a single inquiry. The Applicant further submits that the Commission breached procedural fairness by failing to acknowledge subsection 34(1)(1.2) of the *CHRA*, which states that the *CHRA* must be “interpreted and applied in a manner that gives due regard to First Nations legal traditions and customary laws.” The Applicant submits that the Commission unreasonably ignored this provision by failing to consider the KSN Policy in its assessment of Mr. Choudhary’s allegations, and the specific right of appeal the KSN Policy affords to employees who feel they have been aggrieved. The Applicant notes that the Commission did not refer Mr. Choudhary to these internal procedures and Mr. Choudhary failed to file an appeal through the KSN Policy.

[45] I do not find that the decision breached procedural fairness. The Commissioner clearly and intelligibly explained the rationale to include the complaint against Mr. Scott in the broader complaint against the Applicant, stating that Mr. Choudhary’s complaint included allegations against other employees, that Mr. Choudhary alleged that the Applicant failed to respond adequately to his issues in the workplace, and that the Applicant subsequently failed to provide Mr. Choudhary with a workplace free of harassment. On these grounds, the Commissioner concluded that both complaints could be reviewed within a single inquiry. Assessing Mr. Choudhary’s allegations against Mr. Scott is essential to an assessment of the allegations against the Applicant as the employer, and vice versa.

[46] I also disagree with the Applicant that the Commission breached procedural fairness by failing to account for subsection 34(1)(1.2) of the *CHRA*. I agree that this provision in the *CHRA* requires an attentiveness to the internal governance procedures of First Nations. However, the KSN Policy's appeals procedure does not *require* that an employee making a complaint of discrimination utilise this avenue. In fact, it explicitly states, "an employee who feels that they have been aggrieved by the application of any provision within this Personnel Policy and Procedures Manual may initiate the appeals procedure." The KSN Policy merely provides an internal option for an employee to pursue if they feel aggrieved, not a mandatory process that, if they do not pursue, provides a basis to challenge the credibility of their allegations.

[47] I do not find that the Commission's failure to mention this option in the KSN Policy amounts to a failure to adhere to subsection 34(1)(1.2) of the *CHRA* or exhibits a lack of attentiveness to First Nations legal traditions and governance. This is unsupported by the evidence or the reasons provided for the decision. It is inappropriate to challenge Mr. Choudhary's allegations on the basis that he did not avail himself of this internal procedure in the KSN Policy. It is not the stage in the proceedings to be challenging the credibility of Mr. Choudhary's claim, and it is also inappropriate to fault Mr. Choudhary for what may have been a reasonable hesitation to pursue an appeal procedure facilitated by the very employer against whom he is lodging a complaint in the first place. For these reasons, I find the Commissioner's decision to be procedurally fair.

VI. Conclusion

[48] In my view, the Commissioner's decision to refer Mr. Choudhary's complaints to the Tribunal for further inquiry is reasonable, and its request that the Tribunal consider both complaints as a single inquiry is procedurally fair. Neither party made submissions as to costs. This application for judicial review is therefore be dismissed, with no costs.

JUDGMENT in T-517-22

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed,
with no costs.

“Shirzad A.”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-517-22

STYLE OF CAUSE: KINISTIN SAULTEAUX NATION, REPRESENTED
BY ITS COUNCIL v MOHAMMED CHOUDHARY
AND THE ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: BY VIDEOCONFERENCE

DATE OF HEARING: NOVEMBER 8, 2022

JUDGMENT AND REASONS: AHMED J.

DATED: FEBRUARY 22, 2023

APPEARANCES:

Bruce J. Slkusar FOR THE APPLICANT (RESPONDENT)

No Appearance FOR THE RESPONDENT (COMPLAINANT),
MOHAMMED CHOUDHARY

No Appearance FOR THE RESPONDENT,
THE ATTORNEY GENERAL OF CANADA

SOLICITORS OF RECORD:

Bruce J. Slusar Law Office FOR THE APPLICANT (RESPONDENT)
Barrister and Solicitor
Saskatoon, Saskatchewan