

Federal Court



Cour fédérale

Date: 20230809

Docket: T-711-22

Citation: 2023 FC 1085

Montréal, Quebec, August 9, 2023

PRESENT: Mr. Justice Gascon

BETWEEN:

ZAHEERUDDIN CHOUDHRY

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicant, Mr. Zaheeruddin Choudhry, seeks judicial review of a decision dated July 23, 2021 [Decision], rendered by the Canadian Human Rights Commission [Commission]. In that Decision, the Commission refused to deal with a complaint made by Mr. Choudhry against the Canadian Energy Regulator [CER] because it was out of time, having been filed more than one year after the last alleged act of discrimination [CER Complaint].

[2] Mr. Choudhry submits that the Commission ignored relevant facts and made erroneous findings, and that it should have accepted to deal with his CER Complaint despite his delay in filing it. Further, Mr. Choudhry claims that the Commission breached his right to procedural fairness. Mr. Choudhry asks the Court to set aside the Decision and to refer the matter back to the Commission for a fresh investigation by an investigator and staff who had no involvement in this matter.

[3] For the following reasons, and even though I have a lot of sympathy for Mr. Choudhry's difficult situation and challenging health condition, I must dismiss this application for judicial review. I am not convinced that the Commission committed any reviewable error in refusing to deal with Mr. Choudhry's late CER Complaint or that it breached his right to a procedurally fair process. There are therefore no legal grounds to justify the Court's intervention.

II. Background

A. *The factual context*

[4] Mr. Choudhry identifies himself as a Muslim man of Pakistani origin. He served as a Canadian public servant for several years and had a successful career in the Royal Canadian Navy. However, since 2013, Mr. Choudhry has had a history of major depression and anxiety, which led to numerous and severe health-related issues. He was put on long-term disability in October 2015, and had to retire from his employment at the Department of National Defence [DND] in January 2016, due to his medical disability. He was then placed on long-term disability benefits, which he continues to receive. It is clear that, since that time, Mr. Choudhry has

endured significant and recurring mental suffering, to the point where he had suicidal ideations on repeated occasions. As I could observe at the hearing before the Court, Mr. Choudhry carries a grief that can hardly be spoken.

[5] Mr. Choudhry claims that his mental disability and health problems find their source in the discriminatory treatment he allegedly faced when employed at DND due to his race, national or ethnic origin, religion, colour, and disability.

[6] In January 2016, after he retired from DND, Mr. Choudhry applied for two positions with the CER, an independent federal regulator that regulates energy, pipelines, and trade. The CER is the successor of the National Energy Board. In his application, Mr. Choudhry submitted that, because he was a retired public servant with a disability, he was entitled to receive a Priority Placement designation for the positions he was seeking at the CER. However, on this point, the CER advised Mr. Choudhry that it did not have the authority to grant such a designation. Rather, a Priority Placement designation is part of the mandate of the Public Service Commission [PSC]. The CER thus informed Mr. Choudhry that it had no power over the PSC's refusal to grant him the Priority Placement designation.

[7] The CER did not hire Mr. Choudhry for either of the two positions he had applied for, because he did not meet the essential hiring criteria. For the first position, the CER maintains that, at the outset of a written exam he was required to take, Mr. Choudhry failed to meet the competency requirements for the position. For the second position, the CER states that Mr. Choudhry did not demonstrate that he met the essential screening criteria. Mr. Choudhry was

informed of the first refusal on March 24, 2016, and of the second refusal on June 9, 2016. Mr. Choudhry's last contact with the CER was on June 9, 2016.

[8] In April 2018, Mr. Choudhry communicated with the Commission, following the recommendation of one of his health professionals. However, Mr. Choudhry did not file a proper complaint on that occasion.

[9] On February 6, 2019, Mr. Choudhry filed a complaint against DND [DND Complaint] with the Commission, and asked for the CER to be a respondent in that complaint. However, contrary to Mr. Choudhry's belief, the Commission never accepted the CER as a respondent in his DND Complaint. On October 22, 2019, the Commission informed Mr. Choudhry of this situation. I pause to mention that the DND Complaint is not the subject of this application for judicial review.

[10] It was only on November 18, 2019 — some three and half years after the 2016 events involving the CER — that Mr. Choudhry successfully filed his CER Complaint with the Commission. The Commission accepted the complaint on December 4, 2019. In the CER Complaint, Mr. Choudhry alleged that the CER's failure to hire him in 2016, despite his "excellent qualifications," was the result of a discriminatory conduct based on his colour, race, religion, disability, and national or ethnic origin. Further, Mr. Choudhry alleged that the CER wrongly denied him a Priority Placement designation.

[11] In response to the CER Complaint, the CER said that the only reason why Mr. Choudhry was not hired was strictly his failure to meet the hiring criteria, which he would have been required to meet even if he had received a Priority Placement designation.

B. *The Commission's Decision*

[12] On December 18, 2019, the Commission issued a notice to Mr. Choudhry, informing him that it intended to decide his case under paragraph 41(1)(e) of the *Canadian Human Rights Act*, RSC 1985, c H-6 [CHRA], because the CER Complaint was filed almost three and a half years after the last alleged act of discrimination. The usual delay to file a complaint under the CHRA is one year. Paragraph 41(1)(e) of the CHRA allows the Commission not to deal with a complaint if it “is based on acts or omissions the last of which occurred more than one year, or such longer period of time as the Commission considers appropriate in the circumstances, before receipt of the complaint.”

[13] Further to the notice issued by the Commission in December 2019, the CER and Mr. Choudhry received an opportunity to make submissions on the issue of the late filing of the CER Complaint before the Commission reached its final decision. On January 19 and 20, 2020, Mr. Choudhry provided lengthy written submissions and evidence, including medical records.

[14] On March 23, 2021, as part of a new procedure followed by the Commission, Mr. Choudhry and the CER received further letters, which offered them an opportunity to provide supplemental information on the delay issue. The letters also included information about what the Commission would consider in determining the delay issue. Mr. Choudhry did not provide

supplemental information of his own at that moment but, on May 28, 2021, he did produce a reply to the CER's additional submissions, which had been filed on May 7, 2021.

[15] Pursuant to this process before the Commission, Mr. Choudhry ended up filing over 80 pages of evidence and submissions, including medical records, all of which was considered by the Commission. At no point during the process did Mr. Choudhry raise any procedural concerns.

[16] In the Decision, the Commission first explained that the one-year delay under the CHRA is not final; the Commission may still exercise its discretion to deal with a complaint. To do so, the Commission looks at a number of factors. The Commission listed the following:

1. What type of human rights issues does the complainant list in the complaint? How serious are these issues?
2. How is the public interest affected by the issues raised in the complaint?
3. How long was the delay in filing the complaint?
4. What are the reasons for the delay in filing the complaint?
5. Was the delay within the complainant's control?
6. Was the delay related to the complainant's disability?
7. Was the complainant represented at the time the alleged discrimination happened or during the year after?

[17] The Commission determined that, in the case of Mr. Choudhry, the last alleged act of discrimination occurred on June 9, 2016, as it was the last time Mr. Choudhry communicated

with the CER. Therefore, because he only successfully filed his CER Complaint with the Commission on December 4, 2019, the Commission determined that Mr. Choudhry filed it in a delay of three and a half years. Faced with a clearly out-of-time complaint, the issue the Commission had to determine was whether it would exercise its discretion to deal with it despite it being almost two and a half years over the usual one-year delay.

[18] The Commission specifically considered Mr. Choudhry's medical condition as a reason for explaining the lengthy delay. However, from the evidence before it, the Commission found that, for a period of 10 months at the beginning of 2018, Mr. Choudhry responded well to his medical treatments. Accordingly, the Commission considered that Mr. Choudhry was in a position to file his CER Complaint during that period (which would have been close to the usual one-year time frame), but failed to do so.

[19] The Commission also took into consideration a list of officials and departments to which Mr. Choudhry complained over an extended period of time, which fell within the one-year delay he had to file his CER Complaint with the Commission. Accordingly, the Commission found that Mr. Choudhry was able to submit the CER Complaint much sooner than November 18, 2019, as he had managed to file other complaints with various other departments during the relevant time period.

[20] The Commission further noted that Mr. Choudhry's explanation to the effect that he was not aware of the Commission was not relevant, since the courts have clearly stated that such argument is not a compelling reason to accept delay in the filing of a complaint.

[21] In the end, the Commission concluded that Mr. Choudhry failed to provide a reasonable explanation for his lengthy delay in submitting his CER Complaint. Moreover, the Commission failed to see how it would be in the public interest to deal with Mr. Choudhry's CER Complaint despite the delay.

C. *The standard of review*

[22] Mr. Choudhry submits that he demonstrated beyond a reasonable doubt that the Decision is illegitimate. However, this is not the standard to be applied on this application for judicial review. As correctly argued by the Respondent, the Attorney General of Canada [AGC], the Decision is reviewable under the standard of reasonableness (*Tryggvason v Canada (Attorney General)*, 2021 FC 206 [*Tryggvason*] at para 12; *Gauthier v Canada (Attorney General)*, 2017 FC 697 [*Gauthier*] at para 15).

[23] Reasonableness is the presumptive standard that reviewing courts must apply when conducting judicial review of the merits of an administrative decision (*Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]). Reasonableness focuses on the decision made by the administrative decision maker, which encompasses both the reasoning process and the outcome (*Vavilov* at paras 83, 87). Where the applicable standard of review is reasonableness, the role of a reviewing court is to examine the reasons given by the administrative decision maker and to determine whether the decision is based on “an internally coherent and rational chain of analysis” and is “justified in relation to the facts and law that constrain the decision maker” (*Vavilov* at para 85). The reviewing court must therefore consider whether the “decision

bears the hallmarks of reasonableness — justification, transparency and intelligibility” (*Vavilov* at para 99).

[24] Such a review must include a rigorous evaluation of administrative decisions. However, as part of its analysis of the reasonableness of a decision, the reviewing court must begin its inquiry by examining the reasons provided with “respectful attention,” and seeking to understand the reasoning process followed by the decision maker to arrive at its conclusion (*Vavilov* at para 84). The reviewing court must adopt an attitude of restraint and intervene “only where it is truly necessary to do so in order to safeguard the legality, rationality and fairness of the administrative process” (*Vavilov* at para 13).

[25] The onus is on the party challenging the administrative decision to prove that it is unreasonable. Flaws must be more than superficial for a reviewing court to overturn an administrative decision. The court must be satisfied that there are “sufficiently serious shortcomings” (*Vavilov* at para 100). When the reasons contain a fundamental gap or an unreasonable chain of analysis, a reviewing court may have grounds to intervene.

[26] However, the standard of review applies differently on procedural fairness issues. It is true, as the AGC argued, that many courts have stated that the standard of correctness applies to procedural fairness issues. But the Federal Court of Appeal has repeatedly held that procedural fairness does not truly require the application of the usual standards of judicial review (*Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35; *Lipskaia v Canada (Attorney General)*, 2019 FCA 267 at para 14; *Canadian*

Airport Workers Union v International Association of Machinists and Aerospace Workers, 2019 FCA 263 at paras 24–25; *Perez v Hull*, 2019 FCA 238 at para 18; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 [CPR] at para 54). Rather, procedural fairness is a legal question that must be assessed on the basis of the circumstances and which requires the reviewing court to determine whether or not the procedure followed by the administrative decision maker respected the standards of fairness and natural justice (CPR at para 56; *Huang v Canada (Citizenship and Immigration)*, 2018 FC 940 at paras 51–54).

[27] Thus, when procedural fairness and alleged breaches of fundamental justice are the object of an application for judicial review, the reviewing court must take into account the particular context and circumstances at issue. Its role is to determine whether the process followed by the administrative decision maker was fair and offered the affected parties a right to be heard as well as a full and fair chance to know and respond to the case against them. The reviewing court owes no deference to the decision maker when considering issues of procedural fairness.

III. Analysis

[28] Before dealing with the substantive issues raised by Mr. Choudhry’s application for judicial review, a general preliminary remark is in order.

[29] During the hearing before the Court, Mr. Choudhry spent a fair amount of time explaining, with passion, conviction, and emotion, how his medical condition and the serious difficulties he has encountered since he was diagnosed with severe depression and anxiety have hampered his day-to-day life. Given what Mr. Choudhry has had to go through for the last

decade, it is understandable that Mr. Choudhry feels very frustrated about the Commission's Decision and wishes to decry the fact that his allegations of discrimination have been ignored.

[30] However, as I explained to Mr. Choudhry at the hearing, on this application for judicial review, the Court is not tasked with considering the merits of Mr. Choudhry's CER Complaint on his alleged discrimination in the employment process before the CER, nor the discrimination he may have suffered while employed at the DND. The Court's role is more modest and limited to assessing the legality of the Commission's Decision rejecting Mr. Choudhry's CER Complaint because it was out of time. This means that the Court's role is restricted to verifying the reasonableness of the Decision on the merits, and whether the process followed by the Commission was procedurally fair (*Allaire v Canada (Attorney General)*, 2020 FC 562 at para 9).

[31] On judicial review, the courts must consider the conclusions of an administrative decision maker from a perspective of reasonableness and restraint, with a respectful attention to the reasons of the decision maker. This judicial restraint requires the reviewing courts to adopt a deferential and disciplined approach. On judicial review, it is not for the reviewing courts to substitute their point of view for that of the decision maker, even if they could have come to a different conclusion. The reviewing courts must focus their attention on the decision made by the administrative decision maker, in particular on its justification, and not on the conclusion that they would have reached themselves if they had been in the shoes of the decision maker.

[32] In other words, a reviewing court cannot conclude that a decision maker's decision is unreasonable simply because it is not pleased with the result, because the result does not seem generally just, or because it would have ruled differently. Even in those cases where the factual context of a request raises a lot of sympathy, the reviewing court must resist the temptation of deciding an application for judicial review on the basis of the conclusion it would have reached (*Braud v Canada (Citizenship and Immigration)*, 2020 FC 132 at paras 51–52).

[33] In *Trigonakis v Sky Regional Airlines Inc*, 2022 FCA 170, the Federal Court of Appeal recently reminded the limits of the reviewing courts' role on judicial review. It is useful to reproduce what the court said at paragraph 9 of its reasons.

[9] In oral argument, the appellant emphasized, with passion and eloquence, what he personally viewed as the general injustice of this situation, especially in light of his background and motives and his employer's conduct and motives. However, when conducting reasonableness review, the task of the Federal Court and this Court is limited: in cases like this, we can only vet the acceptability and defensibility of an administrative decision, such as the decision of the adjudicator here, based on the legal standards set in the legislation, any other legal documents such as contracts, and the facts found in the evidentiary record. We cannot operate outside of these constraints. We cannot do whatever might strike someone—or us—as right or just in a general sense.

[34] This is not always an easy task for the courts. But the standard of reasonableness is rooted in the principles of judicial restraint and deference, and requires reviewing courts to show respect for the distinct role that Parliament has chosen to confer on administrative decision makers rather than on courts (*Vavilov* at paras 13, 46, 75). Evidently, reviewing courts are entitled to make their determinations based on the specific and distinguishing characteristics of the factual context of each case before them. However, they cannot ignore or loosen the bolts on

the key legal principles governing applications for judicial review. Moreover, adherence to case law and clearly established legal rules supports the virtues of consistency and predictability, two key elements anchoring the rule of law that govern our legal system.

[35] With those principles in mind, I will now look at the substantive issues raised by Mr. Choudhry's application for judicial review.

A. *Preliminary issue*

[36] As a preliminary substantive matter, the AGC maintains that Mr. Choudhry's affidavit should be struck on two grounds. First, because it seeks to introduce extensive material that was not before the Commission when the latter issued the Decision. Second, because it contains opinions, arguments, and legal conclusions, contrary to subsection 81(1) of the *Federal Courts Rules*, SOR/98-106 [Rules].

[37] In particular, the AGC submits that many of the exhibits attached to Mr. Choudhry's affidavit are supplemental medical evidence that were not before the Commission, and are therefore inadmissible. The rest of the documents would either be part of the Certified Tribunal Record [CTR], or irrelevant to this application for judicial review. Therefore, says the AGC, it would cause no prejudice to Mr. Choudhry if his affidavit were struck out. The AGC underlines that these exhibits do not meet any of the exceptions to the general rule that the only evidence admissible on an application for judicial review is that which was before the decision maker, as they go beyond providing general, helpful background information and are not included in Mr.

Choudhry's affidavit as evidence of breaches of procedural fairness or that the Decision was not based on any evidence.

[38] I partly agree with the AGC.

[39] I will first deal with the contents of Mr. Choudhry's affidavit. Section 81 of the Rules provides that the alleged facts contained in an affidavit shall be confined to facts within the deponent's personal knowledge and must be delivered "without gloss or explanation" (*Canada (Attorney General) v Quadrini*, 2010 FCA 47 [*Quadrini*] at para 18). Moreover, the Court may strike or disregard all or parts of affidavits where they are abusive or clearly irrelevant, or where they contain opinions, arguments, or legal conclusions (*Quadrini* at para 18; *Cadostin v Canada (Attorney General)*, 2020 FC 183 [*Cadostin*] at para 36). The general rule is that lay witnesses may not give opinion evidence but may only testify to facts within their knowledge, observation, and experience (*White Burgess Langille Inman v Abbott and Haliburton Co*, 2015 SCC 23 [*White Burgess*] at para 14; *Toronto Real Estate Board v Commissioner of Competition*, 2017 FCA 236 at para 78). The main rationale for excluding lay witness opinion evidence is that it is generally not helpful to the decision maker and may be misleading (*White Burgess* at para 14). In this case, there is no doubt that Mr. Choudhry was a lay witness and that his affidavit was submitted to provide context regarding the refusal of his CER Complaint.

[40] I agree with the AGC that certain paragraphs of Mr. Choudhry's affidavit contain improper opinions, arguments, and legal conclusions regarding the issues before the Court. In my view, they go far beyond what the case law has recognized as acceptable lay opinion evidence.

As such, I agree that they were not properly included in Mr. Choudhry's affidavit and that they cannot be considered by the Court in this judgment.

[41] With respect to the AGC's second ground of challenge against Mr. Choudhry's affidavit, it is well recognized that, in applications for judicial review, the general rule is that materials which were not in front of the decision maker cannot be considered by the reviewing court, except for limited exceptions (*Gittens v Canada (Attorney General)*, 2019 FCA 256 at para 14; *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 [AUCC] at paras 19–20). Those limited exceptions extend to materials that: 1) provide general background assisting the reviewing court in understanding the issues; 2) demonstrate procedural defects or a breach of procedural fairness in the administrative process; or 3) highlight a complete absence of evidence before the decision maker (*Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 128 at para 98; *Bernard v Canada (Revenue Agency)*, 2015 FCA 263 [Bernard] at paras 23, 25; AUCC at paras 19–20; *Seklani v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 778 at para 18; *Nshogoza v Canada (Citizenship and Immigration)*, 2015 FC 1211 at paras 16–18). On the second exception (relating to breach of procedural fairness), the Federal Court of Appeal in *Bernard* specified that if the applicant had the opportunity to raise the procedural issue before the decision maker, they cannot raise it on judicial review for the first time (*Bernard* at para 26).

[42] Again, I agree with the AGC that Mr. Choudhry's affidavit contains numerous attachments, notably some medical evidence and materials related to the DND Complaint, that were not before the Commission in this matter. In the circumstances of this case, the Court

cannot take this evidence into consideration in its assessment of the reasonableness of the Decision, as I am not persuaded that such materials fall within one of the three exceptions outlined above.

[43] In such a situation, the Court has the discretion of striking the impugned paragraphs or of giving them no weight or probative value (*CBS Canada Holdings Co v Canada*, 2017 FCA 65 at para 17; *Cadostin* at para 36; *Abi-Mansour v Canada (Attorney General)*, 2015 FC 882 at paras 30-31).

[44] It should be noted that Mr. Choudhry is not represented by counsel. Further, it is not possible, at this time in the proceeding, for Mr. Choudhry to file a further affidavit which would conform to the Rules (*Duyvenbode v Canada (Attorney General)*, 2009 FCA 120 at para 4). In this context, in all fairness to Mr. Choudhry and as the Court is authorized to do, I will not strike out his entire affidavit. Some excerpts of the affidavit do contain admissible information about the facts of the case, even though these excerpts are non-severable. Accordingly, I have opted to exercise my discretion to give no weight or probative value to the inadmissible information contained in Mr. Choudhry's affidavit, without striking it out in its entirety (*Zurita Vallejos v Canada (Citizenship and Immigration)*, 2009 FC 289 at paras 16–17). This will be reflected in the rest of this judgment

B. *Procedural fairness*

[45] Turning to Mr. Choudhry's main grounds of attack against the Decision, Mr. Choudhry first maintains that the Commission breached his procedural fairness rights, as it did not conduct

a thorough investigation, it ignored submissions allegedly made on May 6, 2021, and it arbitrarily restricted his reply to the CER's submissions to five (5) pages.

[46] I am not persuaded by any of these three arguments.

[47] First, as noted by the AGC, the Commission expressly mentioned in the Decision that, for the purpose of its analysis of the late filing issue, it presumed that the allegations of discrimination made by Mr. Choudhry were true (*Love v Office of the Privacy Commissioner of Canada*, 2014 FC 643 at para 66). No formal or thorough investigation into the merits of Mr. Choudhry's CER Complaint was therefore necessary at this stage of the proceeding, as the main purpose of the Decision was to decide whether the circumstances were such that the Commission should have exercised its discretion to deal with the complaint despite its late filing. Mr. Choudhry's first argument on procedural fairness has no foundation.

[48] Second, with regard to the alleged submissions Mr. Choudhry would have made on May 6, 2021, there is simply no evidence, either in the CTR or in Mr. Choudhry's affidavit, of such document or communication to the Commission. Nor did Mr. Choudhry submit to the Court the content of those alleged submissions. Furthermore, when he made his additional submissions on May 28, 2021, Mr. Choudhry explicitly stated that he was relying on his prior submission of January 19 and 20, 2020, with no reference to the elusive May 6, 2021 materials. Therefore, this argument about a May 6, 2021 submission allegedly ignored by the Commission has no merit.

[49] Third, on the length of Mr. Choudhry's submissions, the Federal Court of Appeal has already recognized that the Commission is the master of its own procedure, and that a restriction on the number of pages does not constitute a breach of procedural fairness (*Jean Pierre v Canada (Citizenship and Immigration)*, 2015 FC 1423 [*Jean Pierre*] at para 42, affirmed in *Gandhi v Canada (Attorney General)*, 2017 FCA 26 [*Gandhi*] at para 15).

[50] In any event, I observe that Mr. Choudhry received many opportunities to make submissions to the Commission. In response to the Commission's first letter advising that paragraph 41(1)(e) of the CHRA might apply, Mr. Choudhry had the opportunity to file lengthy submissions. He indeed did so in January 2020. Then, further to the notice issued by the Commission on March 21, 2021, he had another opportunity, which he used to respond to the CER's additional submissions at the end of May 2021.

[51] It is only at this second round of submissions that both Mr. Choudhry and the CER were restricted to five (5) pages. Furthermore, the Commission communicated with Mr. Choudhry on two occasions to provide him with clear instructions and information in relation to paragraph 41(1)(e) of the CHRA. In light of the foregoing, I am satisfied that Mr. Choudhry knew the case he had to meet and had meaningful opportunities to make submissions (*Jean Pierre* at paras 38, 40).

[52] Finally, Mr. Choudhry's claims that the Commission is biased is not substantiated by any evidence or anything other than bald assertions.

[53] For all of these reasons, I find that the Commission did not breach its duty of procedural fairness towards Mr. Choudhry and that the process followed by the Commission in reaching its Decision was procedurally fair in all relevant respects.

C. *Reasonableness of the Decision*

[54] In his memorandum of facts and law and his oral submissions before the Court, Mr. Choudhry raised a wide range of arguments to challenge the reasonableness of the Commission's Decision. The following is a summary of Mr. Choudhry's main arguments, as provided by the AGC:

1. The Decision contains factual errors about the medical evidence and ignored Mr. Choudhry's extenuating medical health conditions that caused the delay;
2. The Decision did not address a purported removal of the CER as a respondent in Mr. Choudhry's February 2019 DND Complaint and its contribution to the delays in filing the CER Complaint; and
3. The Decision did not follow precedents involving medical mental health exigencies, including the June 18, 2021 Human Rights Officer's recommendation regarding the DND Complaint.

[55] Mr. Choudhry further argues that the Commission should have dealt with the CER Complaint because of its impact on the public interest, since the treatment he received allegedly demonstrates systemic discrimination.

[56] The AGC responds that the Commission properly took into account Mr. Choudhry's medical evidence and found that it did not explain the three-and-a-half-year delay. Further, according to the AGC, the Commission reasonably did not address the DND Complaint in the Decision.

[57] I will address each of Mr. Choudhry's main arguments in turn.

(1) Factual errors and misapprehension of the evidence

[58] Mr. Choudhry argues that the Commission misapprehended the evidence about the status of his medical condition in early 2018. To support his claim, he adduced additional evidence and referred to excerpts of medical notes contained in the CTR. As explained above, in the context of this judicial review, I am only able to consider the evidence that was before the Commission. This notably includes a December 17, 2018 letter from Dr. Baven Pillay (Exhibit H to Mr. Choudhry's affidavit and CTR at p 54) as well as the January 20, 2020 letter from Dr. Pillay (Exhibit L to Mr. Choudhry's affidavit and CTR at p 55). The medical notes and reports that were not before the Commission cannot be used as material to fault the Commission's Decision.

[59] After carefully reviewing the evidence in the CTR, I am satisfied that the Commission did not fail to engage with contradictory evidence on the record with regard to Mr. Choudhry's medical condition in early 2018. On the contrary, the evidence of Dr. Pillay dated December 17, 2018 stated the following: "[h]e has improved within the last ten months. [S]uch that he feels capable of presenting his situation to the necessary authorities" [emphasis added] (CTR at p 54). Furthermore, a note from Dr. Gary Leong dated April 1, 2019 indicates that Mr. Choudhry's

health issues were “so severe that he was unable to dispute his dismissal from the DND until the beginning of 2018” [emphasis added] (CTR at p 55). Lastly, another note from Dr. Pillay, dated January 20, 2020, states that Mr. Choudhry “had improved from February of 2018 until recently” (CTR at p 94), though in the last few months before the letter, his mood, anxiety and other symptoms had “worsened.” There are therefore at least three pieces of medical evidence pointing to the fact that Mr. Choudhry’s medical condition had indeed improved in 2018.

[60] The Commission also noted that Mr. Choudhry had complained to numerous entities other than the Commission “over an extended period of time which certainly appears to have included the one[-]year time limit for submitting his Complaint to the Commission” (Decision at p 11).

[61] In sum, while the Commission accepted that Mr. Choudhry suffered from depression during various periods between June 2016 and December 4, 2019, it held that he was capable of filing his CER Complaint during a period of ten months in 2018.

[62] Mr. Choudhry says that, at the time, he was experiencing severe depression, he was not fit in any shape or form, he was under stress and suffering due to his medical condition, and he had no decision making power. With respect, nothing in the Decision suggests that the Commission was blind to Mr. Choudhry’s mental condition or deaf to his arguments about the precariousness of his health. However, in light of the medical evidence singled out by the Commission, I find that it was open to the decision maker to conclude that Mr. Choudhry could have filed the CER Complaint earlier. In his written and oral submissions, Mr. Choudhry has not

referred the Court to any clear and compelling evidence contradicting the medical evidence referred to by the Commission in the Decision.

[63] It should be recalled that, under the standard of reasonableness, multiple reasonable outcomes may exist. The sole fact that Mr. Choudhry suggests an alternative interpretation of the evidence he submitted does not render the interpretation retained by the Commission unreasonable, and the Court owes deference to the Commission's analysis of the evidentiary record (*Gauthier* at para 19). I underline that, when a reviewing court applies the standard of reasonableness, the question is not whether other alternative interpretations or conclusions would have been possible. Rather, it is whether the interpretation chosen by the decision maker passes the muster of reasonableness, even though other interpretations or conclusions might have been possible.

[64] Mr. Choudhry relies on the decision of the Federal Court of Appeal in *Hicks v Canadian National Railway*, 2015 FCA 109 [*Hicks*] to claim that a delay of three years should have been accepted by the Commission. However, the circumstances of Mr. Choudhry's case differ considerably from those in *Hicks*, where the Federal Court of Appeal found that the Commission failed to analyze the possible impact of the applicant's disability on the delay in filing. In that short decision, the court determined that the Commission had failed to consider the appellant's explanation as to the communications he had with the Commission, where he was under the impression that he had to exhaust other recourses before filing a complaint with the Commission. Here, the Commission never made such a statement and, on the contrary, expressly considered Mr. Choudhry's disability as one of the main reasons explaining the delay in filing. In this

context, I am of the view that *Hicks* can be distinguished from the present case and that the Federal Court of Appeal's findings in *Hicks* do not apply to the circumstances of Mr. Choudhry.

(2) Failure to follow precedents on mental health emergencies and the decision regarding the DND Complaint

[65] Mr. Choudhry also argues that the Decision was unreasonable with regard to its treatment of his DND Complaint. He submits that the Commission wrongly refused to deal with his CER Complaint while allowing his DND Complaint to proceed, even though both complaints were based on the same medical evidence. He maintains that this differential treatment between the two complaints is unreasonable. Moreover, says Mr. Choudhry, the Commission ignored that his delay in filing the CER Complaint was due to the Commission's refusal of his prior complaint made in April 2018, for lack of properness, and to the Commission's failure to inform him, in a timely manner, that the CER was not accepted as a respondent in the DND Complaint.

[66] The AGC maintains that the DND Complaint was not before the Commission when it issued the Decision, and that the Court should therefore not consider Mr. Choudhry's argument about this "precedent." Furthermore, because there is no evidence on the contents of the record underlying the DND Complaint, the AGC argues that there is no way to know whether the medical evidence underlying that complaint was the same as the evidence submitted by Mr. Choudhry for the CER Complaint.

[67] I am not convinced by Mr. Choudhry's arguments.

[68] On the delay allegedly caused by the Commission, I am satisfied that the Commission's decision to refuse Mr. Choudhry's "complaint" in April 2018 was reasonable. On that occasion, Mr. Choudhry had simply contacted the Commission, and did not properly file his CER Complaint "in a form acceptable to the Commission" (Decision at p 10). In this context, "it was open to the Commission to consider that [Mr. Choudhry] had not sent this initial communication in a format that was acceptable for the filing of a complaint and for constituting the starting point for calculating the limitation period" (*Gandhi* at para 12). It is well recognized that the first contact of a complainant with the Commission "does not stop the clock for the one-year time limit" (*Good v Canada (Attorney General)*, 2005 FC 1276 at para 26). Also, as noted in *Jean Pierre* at paragraph 68, citing *Rhéaume v Canada (Attorney General)*, 2007 FC 919 at paragraph 33, "a simple earlier correspondence with the Commission regarding the applicant's intention to file a complaint [does] not constitute a complaint under the CHRA." The inquiry that Mr. Choudhry did with the Commission in April 2018 was simply not a complaint, and it was within the Commission's powers to refuse it.

[69] I should add that it is not the role or responsibility of the Commission to tell an applicant when a complaint shall be made.

[70] Regarding the DND Complaint, I first underline that it was not before the Commission at the time of the Decision, and does not form part of the CTR (even though it was attached as Exhibit V to Mr. Choudhry's affidavit). So, the Commission cannot be faulted for not having compared the two separate complaints — namely, the CER Complaint and the DND Complaint — submitted to the Commission by Mr. Choudhry.

[71] Finally, I point out that the Court does not have the evidence enabling it to compare the record for the Decision with the evidentiary basis underlying the treatment of the DND Complaint. The DND Complaint is not part of the record before the Commission (even though it was attached as Exhibit V to Mr. Choudhry's affidavit). In addition, as it appears from the documents on the record, the context of each complaint and how Mr. Choudhry's rights were affected in each case are different. This could explain the different outcome in the two processes, as the Commission considers the "rights affected" as a factor influencing the outcome of a decision under paragraph 41(1)(e) of the CHRA. I agree with the AGC that the Court is not in a position to assess the reasonableness of the Decision against the Commission's decision dealing with the DND Complaint, as it lacks the evidence to do so properly.

[72] Again, I find nothing unreasonable in the way that the Commission dealt with the issue of the DND Complaint in the Decision.

[73] The AGC further argues that Mr. Choudhry was alerted that the CER was not a respondent in his DND Complaint in a letter from the Commission dated February 6, 2019, which only refers to the complaint being against one respondent, namely, DND. This is incorrect. While the document indeed shows DND as the only respondent, it also indicates that February 6, 2019 is the date the DND Complaint was received. But the document referred to by the AGC is a report dated June 18, 2021, in which a Human Rights Officer recommended to the Commission to accept the DND Complaint (Applicant Record at p 148). Accordingly, the only evidence before the Court on the Commission's notice to Mr. Choudhry that his DND Complaint would

not include the CER as a respondent is Mr. Choudhry's own statement that the Commission alerted him of this fact on October 22, 2019.

[74] In any event, such consideration is not determinative of this case. Even if I were to accept that the CER Complaint could have been filed at the same moment as the DND Complaint (i.e., in February 2019) had it not been for the Commission's delay in informing Mr. Choudhry that the CER was not a respondent in the DND Complaint, it would not change the fact that the Decision would still be reasonable. The Commission had issues with the fact that Mr. Choudhry could file the Complaint as of the beginning of 2018, while the DND Complaint was only filed a year later, in February 2019. Accordingly, the Complaint would still have been filed almost two years late (*Tryggvason* at para 17).

(3) The public interest

[75] As far as the public interest argument made by Mr. Choudhry is concerned, it clearly has no merit. Mr. Choudhry failed to demonstrate, with clear and compelling evidence, that the treatment he received from the Commission reveals "systemic discrimination." Rather, according to the evidence, the alleged conduct of the CER seems to have had impacts limited solely to Mr. Choudhry himself (*Bergeron v Canada (Attorney General)*, 2022 FCA 209 at para 74).

(4) Conclusion on reasonableness

[76] For all of the above reasons, I find that it was reasonable for the Commission not to deal with the CER Complaint in the circumstances. A thorough reading of the Decision leaves no

doubt that the Commission did consider Mr. Choudhry's arguments and evidence about his mental health, but was simply not satisfied that these reasons were sufficient to explain the delay of almost three and a half years (*Gauthier* at para 19).

[77] The reasons underlying the Decision reveal that it “is based on an internally coherent and rational chain of analysis and that [it] is justified in relation to the facts and law that constrain the decision maker” (*Vavilov* at para 85). Mr. Choudhry failed to identify any sufficiently serious shortcomings in the Decision that would allow the Court to intervene (*Vavilov* at para 100). Stated differently, I am satisfied that the Decision is justified, transparent, and intelligible, and therefore reasonable (*Vavilov* at paras 15, 81, 86).

[78] Since *Vavilov*, the reasons provided by administrative decision makers have become more important and serve as the starting point for the analysis. They are the primary mechanism by which administrative decision makers show that their decisions are reasonable — both to the affected parties and to the reviewing courts (*Vavilov* at para 81). They “explain how and why a decision was made,” “demonstrate that the decision was made in a fair and lawful manner,” and shield against “the perception of arbitrariness in the exercise of public power” (*Vavilov* at para 79). In sum, reasons help establish the justification of a decision.

[79] Here, the errors alleged by Mr. Choudhry do not cause me “to lose confidence in the outcome reached by the decision maker” (*Vavilov* at para 123). I am satisfied that the Commission's reasoning can be traced without encountering any fatal flaws in its logic or rationality and that the reasons contain a line of analysis that could reasonably lead the

Commission from the evidence before it and the relevant legal and factual constraints to the conclusion at which it arrived (*Vavilov* at para 102). The Decision does not suffer from a serious shortcoming that would hamper the analysis and that would be likely to undermine the requirements of justification, intelligibility, and transparency.

D. Confidentiality order

[80] At the hearing, Mr. Choudhry asked the Court to issue an order to protect the confidentiality of his medical records. Justice Diner had granted such a confidentiality order on December 9, 2021 [Order], in the context of a motion for an extension of time to file the present application for judicial review (see Court file No 21-T-54). However, the Order indicated that it was granted only for the limited purposes of the motion for an extension of time, and that Mr. Choudhry would be “required to present a formal motion record, pursuant to Rule 151 of the Rules if he wishes for any of the documentation in support of his Application for judicial review to be treated as confidential” (Applicant’s Record at p 211). Mr. Choudhry did not do so. Yet, because the Order treated Exhibits A to FF of Mr. Choudhry’s motion record as confidential, and because the AGC does not object to the request made by Mr. Choudhry at the hearing, I am satisfied that Mr. Choudhry should be granted a similar confidentiality order, even if he failed to follow the procedure prescribed by Justice Diner.

[81] After verification, Exhibits A to FF of the motion record before Justice Diner correspond to the exhibits attached to Mr. Choudhry’s affidavit and contained in his record for the purpose of this application for judicial review, with the exception of exhibits W3, EE, GG, HH, and II. Since Exhibits W3, EE, HH, and II do not contain medical information, they will be excluded

from any confidentiality order. However, Exhibit GG contains a medical note from Dr. Hassani and, as such, it will be included in the confidentiality order, just as the rest of the medical evidence.

IV. Conclusion

[82] For the above-mentioned reasons, Mr. Choudhry's application for judicial review is dismissed. The Decision constitutes a reasonable outcome based on the law and the evidence, and it has the requisite attributes of transparency, justification, and intelligibility. According to the reasonableness standard, it is sufficient for the Decision to be based on an internally coherent and rational analysis, and to be justified having regard to the legal and factual constraints to which the decision maker is subject. This is the case here. In addition, Mr. Choudhry was given a full and fair opportunity to be heard and to respond to the case he had to meet, and the process followed by the Commission was procedurally fair in all respects. There are no grounds justifying the Court's intervention.

[83] Mr. Choudhry's medical information will be considered confidential in this matter and an order to that effect will be issued.

[84] The AGC also asks that Mr. Choudhry be ordered to pay costs. Under section 400 of the Rules, I have full discretion with respect to the awarding of costs. It is not disputed that the well-established practice is that the losing party be ordered to pay the costs of the successful party. However, in the exercise of my discretion, and considering the particular circumstances of this

case, I am of the view that I should depart from the established practice and make no order of costs against Mr. Choudhry, who represented himself and was not assisted by counsel in this matter.

JUDGMENT in T-711-22

THIS COURT’S JUDGMENT is that:

1. The application for judicial review is dismissed.
2. The following information in the evidentiary record will be considered confidential and will be redacted from the public record in this matter, pursuant to section 151 of the Rules: all exhibits to Mr. Choudhry’s affidavit and contained in Mr. Choudhry’s Application Record, with the exception of exhibits W3, EE, HH, and II.
3. No costs are awarded.

“Denis Gascon”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-711-22

STYLE OF CAUSE: ZAHEERUDDIN CHOUDHRY v THE ATTORNEY
GENERAL OF CANADA

PLACE OF HEARING: VANCOUVER, BRITISH COLUMBIA

DATE OF HEARING: MAY 25, 2023

JUDGMENT AND REASONS: GASCON J.

DATED: AUGUST 9, 2023

APPEARANCES:

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