SUPREME COURT OF NOVA SCOTIA

Citation: *Leon's Furniture Limited v. Downey and Nova Scotia (Human Rights Commission)*, 2024 NSSC 249

Date: 20240904
Docket: 526007
Registry: Halifax

Between:

Leon's Furniture Limited

Applicant

v.

Diondra Downey and Nova Scotia (Human Rights Commission)

Respondents

Judge: The Honourable Justice Glen G. McDougall

Heard: April 24, 2024, in Halifax, Nova Scotia

Counsel: Rick Dunlop, counsel for Leon's Furniture Limited
Kendrick Douglas, counsel for Nova Scotia Human Rights Commission
Diondra Downey, Self-Represented

By the Court:

Background

[1] Leon's Furniture Limited ("the Employer") has applied for judicial review of the Nova Scotia Human Rights Commission's ("the Commission") June 21, 2023, decision to refer the June 29, 2020, complaint of discrimination made by Diondra Downey to a Board of Inquiry.

[2] Diondra Downey was hired by the Employer as a full-time Customer Service Associate on September 23, 2019.

[3] On December 12, 2019, her employment was terminated. She was informed that her employment was being terminated because she would not pass probation. Her probation period was set to expire 13 days before her termination.

[4] On June 29, 2020, Diondra Downey submitted a complaint to the Commission alleging that, in terminating her, the Employer discriminated against her on the basis of race and colour, violating the *Human Rights Act*, RSNS 1989, c 214.

[5] The Commission appointed a Human Rights Officer ("HRO") to investigate the complaint. The HRO conducted an investigation and provided an investigation report to the Commission on May 11, 2023 (the "report" or the "HRO's report").

[6] The report reviewed Diondra Downey's allegations of discrimination and the Employer response. The HRO concluded that there was reason to believe that Diondra Downey was discriminated against during the course of her employment and recommended that the Commission refer the complaint to a Board of Inquiry.

[7] The Employer provided submissions in response to the HRO's report in the afternoon of June 2, 2023.

[8] Seventeen minutes after receiving the Employer's submissions, a Commissioner's memorandum was sent to the Commission adopting the HRO's recommendation that the complaint be sent to a Board of Inquiry. The memorandum stated that the Employer's response submissions were reviewed but resulted in no change to the recommendation.

[9] The Commission met on June 21, 2023, to review the complaint. The Commission followed the recommendations in the HRO report and the Commissioner's memorandum and referred the complaint to a Board of Inquiry.

[10] The Employer has applied to this Court for judicial review of the Commission's decision.

[11] The Employer argues that the decision does not meet the standard of review set out in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 ("*Vavilov*"). The Employer says that the decision should be quashed and the matter set back for investigation by a different HRO.

Issue

[12] The only issue to be decided in this case is whether the Commission's decision to send Diondra Downey's complaint to a Board of Inquiry meets the standard of review.

Standard of Review

[13] The parties agree that the applicable standard of review for the Commission's decision is reasonableness. This accords with the ruling of Supreme Court of Canada in *Vavilov*, where the majority held that the presumptive standard of review for an administrative decision will be reasonableness (paragraph 16).

[14] In determining whether the decision meets the standard of review, I will answer the following questions:

1. Was the HRO's report tainted with flaws?

2. If so, was the Commission's decision reasonable in light of those flaws?

Summary of the HRO's Report

[15] The HRO's report begins with an overview of Diondra Downey's complaint. Diondra Downey provided the following examples of times she felt that she was discriminated against on the basis of race and colour:

(a) Diondra Downey was told that her footwear, moccasins with fur, were not appropriate for the workplace. Diondra Downey

reported that she had observed other people wearing casual footwear, including moccasins, but they were not told to remove their footwear. Diondra Downey reported that she told her co-worker that she felt that it was racist for her to be denied the ability to wear her moccasins because she is indigenous.

(b) On December 11, 2019, one of Diondra Downey's co-workers asked if Diondra Downey would switch shifts with her. Diondra Downey was the only employee (out of four working at the time) who was African Nova Scotian. Diondra Downey refused and she noticed that her co-worker's attitude toward her changed as a result. On December 12, 2019, Diondra Downey was called into her manager's office and was informed that her employment was being terminated.

[16] Diondra Downey believes that the reason for her termination was that she would not switch shifts with her co-worker. She says that prior to being terminated she was complimented on her work and was never coached or spoken to about her work performance.

[17] The HRO outlined the Employer's position in response to Diondra Downey's allegations. The Employer denied that Diondra Downey experienced discrimination based on race and colour. The Employer further stated that the termination was not related to Diondra Downey wearing moccasins at work or refusing to switch shifts with her co-worker.

[18] Diondra Downey was asked not to wear moccasins, the Employer says, because her supervisors viewed them as indoor slippers. Other employees were also asked not to wear moccasins.

[19] Diondra Downey's supervisor said that Diondra Downey came across as unsympathetic and aggressive to customers and was provided with coaching but no improvement was observed. She became angry with co-workers when she was asked questions about her work and her co-workers described her as confrontational.

[20] The Employer said that Diondra Downey's employment was terminated because she did not have the qualities which she claimed to have in her résumé and continued to lack the skills for the position after being coached.

[21] The HRO stated that her role was to determine if the evidence supported a case of discrimination on account of race and colour and if so whether the respondent had a valid, non-discriminatory defence. The HRO correctly defined discrimination and the requirements of proof that are outlined in section 4 of the *Human Rights Act*.

[22] In the final section of the report the HRO stated that the purpose of the report was not meant to determine whether or not there had been discrimination only whether there were allegations which, if proven, could establish discrimination.

[23] The HRO's report addressed the complaints of discrimination by investigating two events:

1. The moccasin incident where Diondra Downey was asked not to wear moccasins to work; and

2. The shift switching incident where Diondra Downey alleges that she was expected to take shifts because of her race. Diondra Downey alleges that her refusal to take a co-worker's shift was the cause of her termination.

Position of Leon's Furniture Limited

[24] The Employer says that the reasonableness standard of review requires a Court to consider the Commission's decision holistically and that *Vavilov* requires Courts to develop a culture of justification for administrative decision-makers. The Employer claims that the HRO's report represents a misapprehension of the *prima facie* test for discrimination for the following reasons:

1. Perceived indigenous origin discrimination in relation to the moccasin incident was used as a basis to support a finding of discrimination, but Diondra Downey did not allege discrimination based on the protected ground of aboriginal origin;

2. A previous 2014 Human Rights Commission decision involving the Employer and its cultural competency training was irrelevant to Diondra Downey's claim of discrimination but was relied on to form the basis for the finding of unconscious bias; and

3. The HRO relied on the social context of discrimination which is inconsistent with the test outlined in *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc (Bombardier Aerospace Training Center)*, 2015 SCC 39 (*"Bombardier"*), which states that there must be more than circumstantial evidence to ground a claim of discrimination.

[25] The Employer argues that the HRO's report contains errors in the logical chain of analysis in her decision. Due to the Commission relying on a flawed HRO report, the Employer says its decision is flawed as well.

[26] The Employer argues that the HRO left gaps in her reasoning when considering the evidence she collected during the course of her investigation. For example, the HRO said credibility was at issue but that it was beyond the scope of her investigatory authority to make credibility determinations. However, the HRO suggested there was a contradiction between the notes that Ms. Moser, Diondra Downey's supervisor, made after Diondra Downey was fired and statements in Ms. Moser's interview with the HRO.

[27] Despite never raising the contradiction with Ms. Moser, the HRO determined that there was no evidence to suggest that Ms. Moser's version of the events was true. The HRO did not explain why she did not accept Ms. Moser's evidence.

[28] The Employer claims that the HRO did not analyze the interview evidence provided by other employees who said Diondra Downey was difficult to get along with and confrontational.

[29] The Employer says that the HRO invited submissions and indicated that their submissions would be placed before the Commissioners who would review them as part of the file. This, it is submitted, set an expectation that was not met.

[30] The Employer alleges that a holistic reading of the Commissioner's memorandum shows that it failed to meaningfully grapple with the Employer's submissions, noting that it took the author of the memorandum only seventeen minutes to review and dismiss the response submissions.

[31] The Commissioner's memorandum does not provide reasons as to why the arguments were dismissed. It merely states a peremptory conclusion, contrary to the

guidance in *Vavilov,* which requires decision-makers to meaningfully grapple with key issues or central arguments raised by the parties.

[32] The Employer says that submissions raised crucial points about the prior Board of Inquiry finding of discrimination regarding the training that the Employer requires all staff to undertake. The Employer says their submissions refuted the HRO's findings that the Employer has not provided cultural competency training.

Position of the Nova Scotia Human Rights Commission

[33] The Commission says reasonableness review does not require the Court to determine what decision the reviewing Judge would have made, nor does it ask the Judge to decide a range of possible outcomes.

[34] The Commission maintains that its' decisions at this stage are screening and administrative in nature. The *Human Rights Act* provides a complete regime for the adjudication of disputes and the decision to send the complaint to a Board of Inquiry is but one decision within that regime.

[35] The Commission is not deciding the ultimate issue. Commission decisions do not determine whether discrimination occurred, only whether there were sufficient grounds to warrant a Board of Inquiry. The Commission says the role of the HRO is to investigate complaints.

[36] HRO's manage their own procedures and judicial intervention is only warranted if the HRO fails to properly conduct their investigation, which the Commission says has not happened in this case.

[37] The Commission argues that even if there were flaws in the HRO's report, the Court cannot presume that these flaws tainted the Commission's decision. The Commission is not required to follow the recommendation of the HRO and its mandate is broader than the HRO's because the Commission must additionally take account of public policy reasons in dismissing a complaint or referring it to a Board of Inquiry.

[38] Because the Commission does not provide reasons for their decision, and they are not required to, it argues that this situation calls for a reasonableness review in the absence of reasons. To accomplish this, the Court must consider the entire record to determine whether the decision was reasonable. This will require consideration

of the HRO report, the Employer's reply submissions, and the Commissioner's memorandum.

[39] The Commission argues that the seventeen minutes that elapsed between receiving the Employer's reply submissions and sending the Commissioner's memorandum does not mean that the Commission did not meaningfully grapple with the Employer's submissions, because the Commissioners received a copy of those submissions and had an opportunity to review them prior to their June 21, 2023, meeting.

[40] The Commission says the decision is supported by the record, which discloses a reasoning path, and which reasonably supports the outcome. As such, the Commission submits that the decision meets the standard of review.

Applicable Legal Principles

Test for Discrimination

[41] During the hearing, the parties made submissions regarding the appropriate "test" for discrimination and indeed whether there was a "test" for discrimination at all.

[42] The Commission argues that there is no "test" *per se* for discrimination, relying *on Disability Rights Coalition v. Nova Scotia (Attorney General)*, 2021 NSCA 70.

[43] The Employer relies on *KO v. Nova Scotia (Human Rights Commission) 2023 NSSC 40*, which cites the test articulated in *Moore* for the establishment of a *prima facie* case of discrimination:

> [21] The generic legal test for "discrimination" is well-established and can be found articulated in *Moore v. British Columbia (Education)*, [2012] 3 SCR 360:
>
> > 33 As the Tribunal properly recognized, to demonstrate *prima facie* discrimination, complainants are required to show that they have a characteristic protected from discrimination under the *Code*; that they experienced an adverse impact with respect to the service; and that the protected characteristic was a factor in the adverse impact. Once a *prima facie* case has been established, the burden shifts to the respondent to justify the conduct or practice, within the framework of the exemptions available

> under human rights statutes. If it cannot be justified, discrimination will be found to occur.
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> [Emphasis in original].

[44] The Employer also cited *Canadian Elevator Industry Welfare Trust Find v. Skinner*, 2018 NSCA 31, where Bryson J.A., writing for the Court, held:

> [33] Absent contrary legislative intent, provincial human rights legislation should be interpreted consistently with other human rights statutes *(Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39, para 31). Summarising similar principles to those in the Nova Scotia *Act*, the Supreme Court in *Moore v. British Columbia (Education)*, 2012 SCC 61 described the test for discrimination in the British Columbia's [sic] Human Rights Code:
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> > [33] As the Tribunal properly recognized, to demonstrate *prima facie* discrimination, complainants are required to show:
> >
> > > [1] that they have a characteristic protected from discrimination under the *Code*;
> > >
> > > [2] that they experienced an adverse impact with respect to the service; and
> > >
> > > [3] that the protected characteristic was a factor in the adverse impact.
>
> Once a *prima facie* case has been established, the burden shifts to the respondent to justify the conduct or practice, within the framework of the exemptions available under human rights statutes. If it cannot be justified, discrimination will be found to occur.

[45] I had the benefit of receiving supplemental written submissions from the parties on this issue. The Employer maintains that the Court of Appeal in *Disability Coalition* affirmed that the Commission must apply the *prima facie* discrimination test, which is outlined in section 4 of the *Human Rights Act*, and which mirrors the test articulated in *Moore* and *KO*.

[46] The Commission argues that although the requirements to prove *prima facie* discrimination are the same between the *Moore* test and section 4 of the *Human*

Rights Act, they are not properly classified as a "test". The Commission says this issue does not go to the crux of the application because the issue for the Court is whether the Commission's decision was reasonable and is not confined to determining if they have considered the discrimination "test".

[47] In short, I agree with the Commission's submissions. I find that the requirements of proof of discrimination are set out in section 4 of the *Human Rights Act*, where discrimination is defined as follows:

> 4 For the purpose of this *Act*, a person discriminates where the person makes a distinction, whether intentional or not, based on a characteristic, or perceived characteristic, referred to in clauses (h) to (v) of subsection (1) of Section 5 that has the effect of imposing burdens, obligations or disadvantages on an individual or a class of individuals not imposed upon others or which withholds or limits access to opportunities, benefits and advantages available to other individuals or classes of individuals in society.

[48] Based on that definition, a person alleging discrimination must demonstrate each of the following:

1. a person made a distinction, whether intentional or not, based on a characteristic, or perceived characteristic;

2. the characteristic was a protected characteristic referred to in subsection 5(1) (h) to (v); and

3. that distinction had the effect of imposing a burden, obligation or disadvantage on an individual.

[49] Given the statutory guidance, I need not rely on case law that sets out the discrimination requirements. However, I note that the requirements remain largely the same throughout the cases regardless of whether they are characterized as a "test" or not.

[50] This "non test" characterisation has been adopted by our Court of Appeal in *Disability Rights Coalition*. I agree with the Commission that this decision articulates how the *Human Rights Act* definition forms the basis of a discrimination analysis, rejecting the characterisation that *Skinner* adopted the test articulated in *Moore*:

[100] We are satisfied the Board did not err in law as alleged by the Province. Although it is not uncommon to see reference in the case authorities to the "*Moore* test", the Supreme Court of Canada did not create a test for establishing *prima facie* discrimination in its judgment. Rather, Justice Abella set out what was required by the British Columbia *Human Rights Code*, R.S.B.C 1996, c. 210 to establish discrimination under that legislation. Although Justice Abella's description is also applicable to the Nova Scotia legislative definition, it is a misnomer to say the "test" is as established in *Moore*. The test is established by the *Act*, interpreted with *Charter* values in mind and with guidance in its application from *Moore* and other authorities.

[101] Further, contrary to the Province's argument, there is nothing in this Court's decision in *Skinner* that supports its assertion the test is found in *Moore* and not the Act. The question before the Court in *Skinner* was whether it was discriminatory under the *Act* for a private drug plan to limit reimbursement for the cost of drugs to those approved by Health Canada.

[102] Writing for the Court, Justice Bryson noted "the starting point is the definition of discrimination in s. 4 in the *Act*". He had this to say about *Moore*:

> [33] [...] Summarising similar principles to those in the Nova Scotia *Act*, the Supreme Court in *Moore* [...] described the test for discrimination in the British Columbia's *Human Rights Code* [...]

[103] Justice Bryson's analysis, while referencing *Moore*, is solidly grounded in what s. 4 of the *Act* requires to establish discrimination. For example, when considering the required "distinction" in question he poses:

> [60] The Board does not say how the foregoing constitutes a "distinction" within the meaning of s. 4 of the *Act*. [...]

And further:

> [71] Section 4 of the *Act* requires that an impugned "distinction" be "based on" an enumerated ground --in this case a "physical or mental disability." [...]
>
> [73] There must be a connection between the distinction and the adverse treatment or effect--s. 4 says so. So does the Supreme Court.

[104] It is the *Act* that establishes the legislative regime for making, assessing and remedying complaints of discrimination. It identifies what characteristics can

> ground a finding of discrimination. Although case authorities can provide guidance as to how to apply the schemes created by legislatures, it is the *Act* that must be the starting point of any discrimination analysis.
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> [Emphasis added].

[51] The Employer argues that *Bombardier* adds another element to the *prima facie* discrimination elements. Wagner (as he then was) and Cote JJ., writing for the Court, held that discrimination can be made out even when it is not based on direct conduct:

> [32] For more than 30 years, the Court has recognized that discrimination can take various forms, including "adverse effect" or "indirect" discrimination: *Ontario Human Rights Commission v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536 ("*O'Malley*"), at p. 551. It has found that adverse effect discrimination comes within the purview of the *Charter* on the basis of the language of s. 10, which provides, *inter alia*: "Discrimination exists where such a distinction, exclusion or preference has the effect of nullifying or impairing [the right to equality]": *Commission scolaire régionale de Chambly v. Bergevin*, [1994] 2 S.C.R. 525, at p. 540…
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> [Emphasis in original].

[52] However, Wagner and Cote JJ. also noted that when establishing a *prima facie* case of discrimination, the complainant must show that the alleged discriminatory conduct is tangibly related to the prohibited ground of discrimination:

> [35] First, s. 10 requires that the plaintiff prove three elements: "(1) a 'distinction, exclusion or preference', (2) based on one of the grounds listed in the first paragraph, and (3) which 'has the effect of nullifying or impairing' the right to full and equal recognition and exercise of a human right or freedom" (*Forget*, at p. 98; *Ford*, at pp. 783-84; *Devine v. Quebec (Attorney General)*, [1988] 2 S.C.R. 790, at p. 817; *Bergevin*, at p. 538).
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> [43] As we will see below, the second element is central to the dispute in the instant case. The plaintiff must establish that the distinction, exclusion or preference in question is "based" on one of the grounds listed in s. 10 of the *Charter: City of Montréal*, at para. 84; *McGill*, at paras. 45 and 49-50. This element presupposes a connection between the differential treatment and a prohibited ground. Given that there is no consensus regarding the nature of this connection, it needs to be clarified.
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> [56] In our opinion, even though the plaintiff and the defendant have separate burdens of proof in an application under the *Charter*, and even though the proof

> required of the plaintiff is of a simple "connection" or "factor" rather than of a "causal connection", he or she must nonetheless prove the three elements of discrimination on a balance of probabilities. This means that the "connection" or "factor" must be proven on a balance of probabilities.

[53] The comments from Wagner and Cote JJ. reflect the same requirements to establish a *prima facie* case of discrimination as the *Human Rights Act*. What this case adds is a clarification that the person experiencing the differential treatment must be able to prove on a balance of probabilities that the treatment was connected to the ground of discrimination.

[54] In doing this, the Court rejected the argument that there must be a causal, or exclusive, connection. It held that the "decision or action of the person responsible for the distinction, exclusion or preference need not be based solely on the prohibited ground; it is enough if that decision or action is based in part on such a ground" (paragraph 48).

[55] Though this is an important part of the discrimination analysis, the *prima facie* discrimination analysis is not undertaken during the investigative stage of a human rights complaint. The role of the Commission is not to determine whether a *prima facie* case of discrimination does exist, but whether the complaint should go on to be considered by a Board of Inquiry who will conduct the discrimination analysis. However, the elements of discrimination are relevant to the review of the Commissioner's decision.

[56] In order to refer the complaint to the Board of Inquiry, the Commission must be satisfied that the facts, if proven, could establish a *prima facie* case of discrimination. If the facts supporting the complaint could not lead to a finding of discrimination, the complaint cannot reasonably be referred to a Board of Inquiry.

Timing of Judicial Review

[57] This review application is in response to the Commission's decision to send the complaint to a Board of Inquiry for a determination of whether discrimination occurred. Therefore, this review occurs in the midst of the administrative proceeding.

[58] The Supreme Court of Canada underscored the importance of judicial restraint in these circumstances in *Halifax (Regional Municipality) v. Nova Scotia (Human*

Rights Commission), 2012 SCC 10, [2012] 1 SCR 364, where Cromwell J., writing for the Court, noted:

> [17] … The second issue raises the related question of when judicial intervention is justified at this preliminary stage of the Commission's work. This turns mainly on the ongoing authority of this Court's decision in *Bell* (1971). In my view, *Bell* (1971) should no longer be followed and courts should exercise great restraint in intervening at this early stage of the process…
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> [23] What is important here is that a decision to refer a complaint to a Board of Inquiry is not a determination that the complaint is well founded or even within the purview of the *Act*. Those determinations may be made by the Board of Inquiry. In deciding to refer a complaint to a Board of Inquiry, the Commission's function is one of screening and administration, not of adjudication.
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> [25] Moreover, the Commission's referral decision is a discretionary one. Subsection 32A(1) of the *Act* provides that the Commission "may" appoint a board. Section 1 of the *Boards of Inquiry Regulations* expands on this permissive language, stating that the Commission "may" appoint a board "if the Commission is satisfied that, having regard to all circumstances of the complaint, an inquiry thereinto is warranted" (see *Green*, at para. 5). It is up to the Commission to perform an initial investigation of a complaint and decide whether or not an inquiry is warranted in all of the circumstances.
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> [36] While such intervention may sometimes be appropriate, there are sound practical and theoretical reasons for restraint… Early judicial intervention risks depriving the reviewing court of a full record bearing on the issue; allows for judicial imposition of a "correctness" standard with respect to legal questions that, had they been decided by the tribunal, might be entitled to deference; encourages an inefficient multiplicity of proceedings in tribunals and courts; and may compromise carefully crafted, comprehensive legislative regime…Thus, reviewing courts now show more restraint in short-circuiting the decision-making role of the tribunal, particularly when asked to review a preliminary screening decision such as that at issue in *Bell* (1971).

[59] Furthermore, Cromwell J. emphasized the broad discretion granted to Commissioners when deciding whether a complaint should be sent to a Board of Inquiry:

> [21] Where a complaint is not settled or otherwise determined, the Commission may appoint a Board of Inquiry to inquire into it (s. 32A(1)). The Commission has a broad discretion as to whether or not to take this step. The Commission may do

> so if it "is satisfied that, having regard to all circumstances of the complaint, an inquiry thereinto is warranted" (*Boards of Inquiry Regulations*, N.S. Reg. 221/91, s. 1). There is no legislative requirement that the Commission determine that the matter is within its jurisdiction or that it passes some merit threshold before appointing a Board of Inquiry; the Commission must simply be "satisfied" having regard to all the circumstances of the complaint that an inquiry is warranted.

I am mindful that the Court must take an approach reflecting restraint given that the decision under review is a discretionary screening decision and not a final one.

Application of Reasonableness Review

[60] The leading case on the application of reasonableness review is *Vavilov*. In *Vavilov*, Wagner J., (as he then was), writing for the majority, discussed how a reviewing Court should structure their review analysis:

> [83] It follows that the focus of reasonableness review must be on the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome. The role of courts in these circumstances is to *review*, and they are, at least as a general rule, to refrain from deciding the issue themselves. Accordingly, a court applying the reasonableness standard does not ask what decision it would have made in place of that of the administrative decision maker, attempt to ascertain the "range" of possible conclusions that would have been open to the decision maker, conduct a *de novo* analysis or seek to determine the "correct" solution to the problem. The Federal Court of Appeal noted in *Delios v. Canada (Attorney General)*, 2015 FCA 117, 472 N.R. 171, that, "as reviewing judges, we do not make our own yardstick and then use that yardstick to measure what the administrator did": at para. 28; see also *Ryan*, at paras. 50-51. Instead, the reviewing court must consider only whether the decision made by the administrative decision maker -- including both the rationale for the decision and the outcome to which it led -- was unreasonable.
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> [86] Attention to the decision maker's reasons is part of how courts demonstrate respect for the decision-making process: see *Dunsmuir*, at paras. 47-49. In *Dunsmuir*, this Court explicitly stated that the court conducting a reasonableness review is concerned with "the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes": para. 47. Reasonableness, according to *Dunsmuir*, "is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process", as well as "with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *ibid*. In short, it is not enough for the outcome of a decision to be *justifiable*. Where reasons for a decision are required, the decision must also be *justified*, by way of those

reasons, by the decision maker to those to whom the decision applies. While some outcomes may be so at odds with the legal and factual context that they could never be supported by intelligible and rational reasoning, an otherwise reasonable outcome also cannot stand if it was reached on an improper basis.

[87] This Court's jurisprudence since *Dunsmuir* should not be understood as having shifted the focus of reasonableness review away from a concern with the reasoning process and toward a nearly exclusive focus on the outcome of the administrative decision under review. Indeed, that a court conducting a reasonableness review properly considers both the outcome of the decision and the reasoning process that led to that outcome was recently reaffirmed in *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2, [2018] 1 S.C.R. 6, at para. 12. In that case, although the outcome of the decision at issue may not have been unreasonable in the circumstances, the decision was set aside because the outcome had been arrived at on the basis of an unreasonable chain of analysis. This approach is consistent with the direction in *Dunsmuir* that judicial review is concerned with both *outcome* and *process*. To accept otherwise would undermine, rather than demonstrate respect toward, the institutional role of the administrative decision maker.

[101] What makes a decision unreasonable? We find it conceptually useful here to consider two types of fundamental flaws. The first is a failure of rationality internal to the reasoning process. The second arises when a decision is in some respect untenable in light of the relevant factual and legal constraints that bear on it. There is however, no need for reviewing courts to categorize failures of reasonableness as belonging to one type or the other. Rather, we use these descriptions simply as a convenient way to discuss the types of issues that may show a decision to be unreasonable.

[103] While, as we indicated earlier (at paras. 89-96), formal reasons should be read in light of the record and with due sensitivity to the administrative regime in which they were given, a decision will be unreasonable if the reasons for it, read holistically, fail to reveal a rational chain of analysis or if they reveal that the decision was based on an irrational chain of analysis... A decision will also be unreasonable where the conclusion reached cannot follow from the analysis undertaken… or if the reasons read in conjunction with the record do not make it possible to understand the decision maker's reasoning on a critical point…

[104] Similarly, the internal rationality of a decision may be called into question if the reasons exhibit clear logical fallacies, such as circular reasoning, false dilemmas, unfounded generalizations or an absurd premise. This is not an invitation to hold administrative decision makers to the formalistic constraints and standards of academic logicians. However, a reviewing court must ultimately be satisfied that the decision maker's reasoning "adds up".

[61] In *Alexion Pharmaceuticals Inc v. Canada (Attorney General)*, 2021 FCA 157, [2021] FCJ No 812, Stratas J., writing for the Court, outlined the key principles from *Vavilov* that further explain the requirements of a reasonable decision:

> [12] Vavilov tells us that a reasoned explanation has two related components:
>
> > **Adequacy*. The reviewing court must be able to discern an "internally coherent and rational chain of analysis" that the "reviewing court must be able to trace" and must be able to understand. Here, an administrator falls short when there is a "fundamental gap" in reasoning, a "fail[ure] to reveal a rational chain of analysis" or it is "[im] possible to understand the decision maker's reasoning on a critical point" such that there isn't really any reasoning at all: *Vavilov* at paras. 103-104.
> >
> > **Logic, coherence and rationality*. The reasoning given must be "rational and logical" without "fatal flaws in its overarching logic": *Vavilov* at para. 102. Here, the reasoning given by an administrator falls short when it "fail[s] to reveal a rational chain of analysis", has a "flawed basis", "is based on an unreasonable chain of analysis" or "an irrational chain of analysis", or contains "clear logical fallacies, such as circular reasoning, false dilemmas, unfounded generalizations or an absurd premise": *Vavilov* at paras. 96 and 103-104.
>
> [13] These shortcomings must be evident on "critical point[s]": *Vavilov* at paras. 102-103. The "critical point[s]" are shaped, in part, by "the central issues and concerns raised by the parties": *Vavilov* at paras. 127-128. They are also points that are "sufficiently central or significant" such that they point to "sufficiently serious shortcomings in the decision": *Vavilov* at para. 100. They must be "more than merely superficial or peripheral to the merits of the decision": *Vavilov* at para. 100.

[62] Stratas J., also commented on how reviewing Courts may approach silence from the decision-maker on one or more aspects of a decision:

> [16] Thus, silence in the express reasons on a particular point is not necessarily a "fundamental gap" that warrants intervention by the reviewing court. The administrator's reasons, read alone or in light of the record in a holistic and sensitive way, might legitimately lead the reviewing court to find that the administrator must have made an implicit finding. The evidentiary record, the submissions made, the understandings of the administrator as seen from previous decisions cited or that it must have been aware of, the nature of the issue before the administrator and other matters known to the administrator may also supply the basis for a conclusion that

> the administrator made implicit findings: *Vavilov* at paras. 94 and 123; and see, *e.g.*, *Bell Canada v. British Columbia Broadband Association*, 2020 FCA 140.

[63] Because the Commission did not issue reasons for their decision, this Court must look to the evidentiary record to determine why the Commission made the decision that it did.

[64] This was the approach that Rosinski J., took in *KO*, where he reviewed a decision of the Human Rights Commission. Rosinski J., noted that the Commission is not required to expressly give reasons for its decision (paragraph 40). Rosinski J., adopted the reasoning of Bryson J., (as he then was) in *Green v. Nova Scotia (Human Rights Commission)*, 2010 NSSC 242, [2010] NSJ No 350, stating that "the Commission is not limited to purely evidentiary considerations in making such determinations about whether to dismiss a case as "without merit" or not" (paragraph 50). Bryson J., further explained in *Green*:

> [55] To my mind, the Commission's full responsibility includes its consideration of not only "the sufficiency of the evidence before it", but also other legitimate factors that would inform its exercise of discretion to forward a complaint to a Board of Inquiry or dismiss it. The sufficiency of the evidence is part of the broader concept, "merit" of a complaint, which includes a limited consideration of issues of credibility of the potential witnesses, and the "strength of the case" factors, such as whether there is a viable justification(s) for what would otherwise appear to be a *prima facie* case of discrimination (para. 33, *Moore*, [2012] 3 SCR 360).

[65] Rosinski J., held that without explicit reasons from the Commission, the Court must infer what reasons the Commission could have contemplated in its decision based on the record put before it. He also held that it was reasonable to infer that the Commission would have relied on the findings and recommendations in the HRO's report and the Commissioner's memorandum. Rosinski J., adopted the reasons of Linden J.A. in *Sketchley v. Canada (Attorney General)*, 2005 FCA 404, who held:

> [37]…. The investigator's Report is prepared <u>for</u> the Commission, and hence for the purposes of the investigation, the investigator is considered to be an extension *of the Commission* (*SEPQA*, at page 898). When the Commission adopts an investigator's recommendations and provides no reasons or only brief reasons, the Courts have rightly treated the investigator's Report as constituting the Commission's reasoning for the purpose of the screening decision…
>
> [<u>Emphasis added</u>].

[66] As noted above, Bryson J., in *Green*, conducted judicial review of a Commission decision. Though this case was decided prior to *Vavilov*, it still contains useful guidance on determining the reasonableness of a Commission decision. Bryson J., held that the Commission was not required to follow the HRO's recommendations because "the Commission's mandate is obviously broader than that of an investigator". He noted that "the Commission must consider the public interest and policy issues which can involve factors other than those relating to the parties alone" (paragraph 30). Bryson J., also held:

> [29] It is clear from the *Act* and *Regulations* that the Commission enjoys a discretion concerning whether or not to refer a complaint to a Board of Inquiry. The Commission's decision is entitled to a substantial degree of deference particularly in view of the specialized human rights regime and the establishment of the statutory scheme for examining and vindicating those rights where appropriate (*Halifax v. Nova Scotia*, [2010] N.S.J. No. 54, 2010 CarswellNS 8, para. 14 and following).

[67] Because the HRO's report is not determinative of the Commission's decision, flaws in the HRO's report do not necessarily doom the decision. As Rosinski J. noted in *KO*:

> [65]… such flaws must rise to a serious level (*Sketchley*, 2005 FCA 404): "so fundamental that they cannot be remedied by the parties' further responding submissions"; thus sufficiently tainting the decision made by the Commission, such that it cannot be considered "reasonable".

[68] Recently our Court of Appeal, in *EMC Emergency Medical Care Inc. v. Canadian Union of Postal Workers*, 2024 NSCA 55, noted the importance of the attention the Court must pay to the context in which the decision is made. Fichaud JA, writing for the Court, said:

> [35] Reasonableness is "a single standard that accounts for context". Reviewing courts are to analyze the administrative decisions "in light of the history and context of the proceedings in which they were rendered". The history and context may show that, after examination, an apparent shortcoming is not a failure of justification. Context includes the evidence, submissions, record, the policies and guidelines that informed the decision maker's work and past decisions. Context also includes the administrative regime, the decision maker's institutional expertise, the degree of flexibility assigned to the decision maker by the governing statute and the extent to which the statute expects the decision maker to apply the purpose and policy

> underlying the legislation (*Vavilov*, paras. 88-94, 97, 110; *Mason*, paras. 61, 67, 70).

[69] I am guided by these remarks in the caselaw in applying the reasonableness standard to the Commission's decision.

Analysis

[70] The Commission is entitled to consider all of the information on the record when they make their decisions. Included in the record for Diondra Downey's complaint was the HRO's report, the Commissioner's memorandum, the reply submissions from the Employer, and the HRO's notes and communications during the investigation of the complaint. This Court must be attuned to the circumstances surrounding the Commission's decision, including the material received, when determining whether the decision was reasonable.

[71] I will start by examining the HRO's report. I will then consider the Commission's decision in light of that report and the other materials the Commission had before it when rendering their decision.

Is the HRO's Report Flawed?

[72] In her investigation and analysis, the HRO considered the two incidents described by Diondra Downey that she claimed were discriminatory, namely the moccasin incident and the shift-switching incident. The HRO interviewed employees about both incidents. The HRO also considered a prior complaint of discrimination at the same Leon's Furniture Limited location in 2014 which led to a finding of discrimination by a Board of Inquiry.

Moccasin Incident

[73] The HRO received conflicting evidence from the people she interviewed about Diondra Downey's statements regarding her indigenous heritage and her ability to wear moccasins. Some people she interviewed recalled that she spoke about the moccasins and indicated that *if* she was indigenous, she would not have been asked to remove them.

[74] Conversely, Diondra Downey recalled telling her co-workers that she was indigenous and that she should be allowed to wear her moccasins.

[75] The Employer responded to this aspect of the report by noting that the complaint Diondra Downey made was on the basis of race and colour, not on indigenous origin, which is a separate ground of complaint under the *Human Rights Act*.

[76] The HRO found that other employees had been told not to wear moccasins, but, that another employee, who was also black, was able to continue to wear moccasins. The HRO concluded that this suggested that Diondra Downey was not discriminated against on the basis of race and colour because there was no connection between the differential treatment (not wearing moccasins) and the protected characteristic (race and colour) as required by section 4 of the *Human Rights Act*.

[77] Likewise, the HRO's conclusion that the Employer's management team appeared to have "colonialist perceptions" regarding moccasins does not establish a connection between the disadvantage and the characteristic of race and colour.

[78] The protected characteristic of indigenous origin was not raised as a basis for establishing the complaint and the issue only arose tangentially during the investigation. The HRO determined that it was not part of the scope of her investigation and she did not make findings about discrimination on the basis of indigenous origin.

[79] The HRO spoke to the Employer about their policy on deviation from standard uniform requirements. The Employer's policy stated that if accommodation was requested, they would speak to the employee requesting the accommodation and consider it on a case-by-case basis.

[80] The HRO stated that the Employer did not follow their accommodation policy in relation to the moccasin incident. However, there was no evidence before the HRO that Diondra Downey spoke to her manager, disclosed her indigenous identity, and requested accommodation. For the HRO to determine that the Employer failed to follow its policy is an unfounded conclusion.

Shift Switching Incident

[81] Diondra Downey alleged that her position was terminated because she refused to switch shifts with a white co-worker when asked. Diondra Downey's co-workers, Ms. Mosher, Ms. Swinamer, and Ms. Gowen were interviewed by the HRO.

Regarding the shift switching incident, they unanimously denied that the refusal to switch shifts related to Diondra Downey's employment being terminated. Each stated that they understood that Diondra Downey's position was terminated because of her inability to handle criticism and her confrontational attitude with customers. They said that the co-worker in question was an associate and would have had no influence over the decision to terminate Diondra Downey's employment.

[82] The HRO noted that Diondra Downey and her co-workers had diverging views of what precipitated her dismissal. The co-workers reported that Diondra Downey was confrontational with customers and became defensive if an issue was brought up to her. Co-workers reported that she was pleasant with staff and customers during the first few weeks of her employment, but there was a change in her behavior as she became more comfortable in her role.

[83] The HRO noted that though the *Labor Standards Code* does not require it, it would have been helpful if Diondra Downey's supervisors had documented their concerns about her work performance and their conversations with her at the time of the incidents rather than at the time of termination. Though she does not say this in her report, the HRO seemed to make an inference about the credibility of the assertions because they were documented by post-dated notes.

Does the evidence support a finding of discrimination?

[84] The HRO's role was to determine if the evidence supported a finding of discrimination on the basis of race and colour, and if so, whether the Employer had a valid, non-discriminatory defence.

[85] To aid in determining if the Commission's decision was reasonable, the Court can consider the elements of discrimination outlined in section 4 of the *Human Rights Act*, in relation to the HRO's analysis of Diondra Downey's complaint:

1. A person made a distinction, whether intentional or not, based on a characteristic, or perceived characteristic;

2. The characteristic was a protected characteristic referred to in subsection 5(1)(h) to (v); and

3. The distinction had the effect of imposing a burden, obligation or disadvantage on an individual.

[86] The evidence collected by the HRO related to the moccasin incident does not support a finding that Diondra Downey was asked to stop wearing moccasins due to her race. There was no connection between Diondra Downey's treatment and the protected characteristic of race and colour. Therefore, it is not an allegation that could establish discrimination.

[87] Diondra Downey claims that she was asked to switch shifts with her white co-worker. She was the only person of colour working that day. She claims that her employment was terminated as a result of her refusal to switch shifts.

[88] To establish discrimination, Diondra Downey must establish that either the request itself was discriminatory, or that the Employer's response to the refusal demonstrated discrimination.

[89] In this instance, the evidence gathered by the HRO could not reasonably support a finding that the request to switch shifts was discriminatory. There was no indication that the request was made to Diondra Downey because of her race. There is no evidence as to whether other co-workers were asked to switch shifts, or if it was only Diondra Downey who was asked. Diondra Downey claims that she was asked to switch because she was the newest and youngest employee. This does not support her claim that the treatment was based on the protected characteristic of race and colour.

[90] A decision-maker does not need to provide perfect reasons. They simply have to be able to demonstrate how they reached the decision that they did. While the HRO's conclusion could have been an appropriate inference given the conflicting nature of the evidence that she collected, the finding that the Employer did not have a valid non-discriminatory defence rested on a credibility assessment. In coming to this decision, the HRO ignored the evidence of Diondra Downey's co-workers, who said that her employment was terminated because she did not have the qualities that they were looking for in an associate. This clear rejection of the evidence provided by Diondra Downey's co-workers went beyond the scope of the HRO's role, and, more importantly, did so without any explanation of why Diondra Downey's narrative was accepted while the narratives of Ms. Moser, Ms. Swinamer, and Ms. Gowen were rejected.

[91] If the HRO had weighed the co-workers' evidence against other evidence, such as the Employer's records and Diondra Downey's allegations, it would be possible to understand why she rejected the co-workers' evidence. This was the

approach taken by the HRO in *Boutilier v. Nova Scotia (Human Rights Commission)*, 2018 NSSC 166, where the HRO reviewed corporate records during her investigation:

> [46] Ms. Tarr's study of Glentel's tables for sales performance was relevant to personal discrimination and tended to show Ms. Sponagle was discriminated against on the basis of poor performance, not sex. Those tables contradict what Ms. Sponagle said to the Commission about performance of her store and deviation from standards. The same goes for Ms. Tarr's study of the store visit reports, which contradicted Ms. Sponagle's account and, on the contrary, tended to show that concerns with her performance did not arise out of the blue. The interviews of managers suggested by Ms. Sponagle herself did not support her allegations of different treatment. Another manager contradicted Ms. Sponagle's allegation that she was a target at meetings.

[92] Though Diondra Downey's evidence supports a finding that she experienced a disadvantage, it does not follow that she experienced a distinction on the basis of race or colour.

[93] The HRO explicitly stated that credibility is a significant factor in this complaint, but noted that determining credibility is beyond the scope of the report. The HRO considered that there was sufficient evidence to question whether the decision to terminate Diondra Downey's employment was informed by race and colour. The HRO suggested, however, that the prevalence of systemic racism and unconscious bias necessitated a referral to a Board of Inquiry. If the bias was unconscious, a credibility assessment would be fruitless.

[94] The issue that arises is whether it is acceptable for an HRO to determine that there is evidence to suggest there was discrimination when the only evidence goes to unconscious bias.

Prior Finding of Discrimination

[95] Another occurrence that was reviewed by the HRO relates to a previous complaint of discrimination against the Employer. In 2014, a complaint was sent to a Board of Inquiry (the "2014 Board of Inquiry") which determined that discrimination had occurred. As part of the ruling against the Employer, the Board of Inquiry ordered that the employees undertake anti-racism and discrimination training. The HRO found that the Employer conducted two training sessions shortly after being ordered to do so by the 2014 Board of Inquiry.

[96] In commenting on the 2014 Board of Inquiry, the HRO said that although the Employer commenced discrimination training immediately after the 2014 Board of Inquiry decision, they did not continue providing that training to employees. She noted that the employees she interviewed as part of this complaint did not remember partaking in similar anti-racism training.

[97] The 2014 Board of Inquiry was brought up several times throughout the analysis section of the HRO's report, which suggests, contrary to the Commission's submission during oral argument, that it was more than simply a passing comment.

[98] Though Commissioners are entitled to consider policy reasons for sending a complaint to a Board of Inquiry and would be entitled to consider the 2014 Board of Inquiry as part of their decision, it was not appropriate for the HRO to use the 2014 Board of Inquiry to form part of her analysis of the complaint.

[99] The scope of her report was limited to determining if the evidence of the Employer's conduct toward Diondra Downey supported an allegation of discrimination, not to provide an analysis of the Employer's historical management practices.

[100] The HRO's analysis demonstrates that she considered the previous human rights complaint and the 2014 Board of Inquiry finding of discrimination against the Employer in concluding that there was sufficient evidence to support a finding of unconscious bias and possibly systemic racism.

[101] It was not within the HRO's authority to conclude that the 2014 Board of Inquiry impacted Ms. Downey's experience. She was tasked with determining if Diondra Downey's allegations established discrimination.

[102] Diondra Downey did not comment on the 2014 Board of Inquiry.

Conclusion of the HRO's Report

[103] The HRO concluded that the evidence supported a finding of discrimination, without specifically identifying what evidence she relied on. The report went on to recommend that the complaint be sent to a Board of Inquiry to consider the possibility of systemic discrimination. The HRO did not explain why she came to the conclusion that there might be systemic discrimination.

[104] One could infer that the 2014 Board of Inquiry decision, and the HRO's finding that the Employer did not conduct further anti-racism training with employees, tainted her view of the Employer and caused her to conclude that there was systemic discrimination on the basis of previous conduct.

[105] In this case, the HRO explicitly stated that credibility was at issue. The HRO also said that systemic discrimination and unconscious bias may be present. This comment seems to suggest that even if Diondra Downey's co-workers thought the Employer terminated Diondra Downey's employment due to her poor performance, they may have been unconsciously holding her to a different performance standard.

[106] The inference to be made is that the HRO, concerned about the possibility of systemic racism and unconscious bias, and presented with conflicting narratives, decided to recommend a referral to a Board of Inquiry because credibility assessments were beyond the scope of her investigation and a Board of Inquiry would be able to make the necessary credibility assessments.

[107] The issue with this inference is that the HRO's report does not demonstrate that this was the reasoning behind the decision to recommend a referral. There is a gap in the chain of analysis from the existence of unconscious bias as a phenomenon, to the conclusion that it likely affected the decision to terminate Diondra Downey's employment.

Do the flaws in the HRO's report make the Commission's defence unreasonable?

[108] Though I have identified errors in the HRO's report, this does not necessarily make the Commission's decision unreasonable. Only if the report contains significant errors that cannot be remedied by responding submissions would the errors taint the Commission's decision (paragraph 65).

[109] At the outset, I note that the Commission has broad discretion to determine the merits of a complaint, as Rosinski J. explained in *KO*:

> [62] Regarding whether there was a reasonable basis in the evidence for proceeding to the next stage, I bear in mind that the Commission may also take a broader view than of the HRO in her Investigative Report, and each of the following suggest a substantial degree of deference should be given to the Commission's decision:
>
> * its highly specialized expertise;

> * the benefit of what has been colloquially referred to as "the collective wisdom and common sense of" the Commissioners;
>
> * their having had access to all the available information (evidence and arguments-including those of K.O.);
>
> * their having had the benefit of the opportunity to question the HRO and take advice from their own legal counsel, both of whom were present, on March 10, 2022.

[110] I also keep in mind the guidance from the Supreme Court of Canada in *Halifax*, regarding the Commission's broad discretion at the screening stage of a complaint:

> [21] Where a complaint is not settled or otherwise determined, the Commission may appoint a Board of Inquiry to inquire into it (s. 32A(1)). The Commission has a broad discretion as to whether or not to take this step. The Commission may do so if it "is satisfied that, having regard to all circumstances of the complaint, an inquiry thereinto is warranted" (*Boards of Inquiry Regulations*, N.S. Reg. 221/91, s. 1). There is no legislative requirement that the Commission determine that the matter is within its jurisdiction or that it passes some merit threshold before appointing a Board of Inquiry; the Commission must simply be "satisfied" having regard to all the circumstances of the complaint that an inquiry is warranted.

[111] I must consider the reasonableness of the Commission's decision, while being sensitive to the highly specialized expertise of human rights tribunals and their broader public policy mandate.

[112] I accept that the Commission could reasonably have decided to send the complaint to a Board of Inquiry on the basis of public policy factors such as the presence of systemic discrimination and the Employer's previous history related to the 2014 Board of Inquiry finding of discrimination.

[113] I also keep in mind the recent comment from our Court of Appeal in *EMC* regarding the need to consider decisions holistically and not impose an exacting burden on decision-makers to explain their reasoning in great length. As Fichaud JA, noted:

> [43] Reviewing courts "cannot expect administrative decision makers to 'respond to every argument or line of possible analysis' [citation omitted], or to 'make an explicit finding on each constituent element, however subordinate, leading to its

> final conclusion' "[citation omitted]. That is because "[t]o impose such expectations would have a paralyzing effect on the proper functioning of administrative bodies and would needlessly compromise important values such as efficiency and access to justice". Rather, the questions for the reviewing court are: was the decision maker "actually alert and sensitive to the matter before it", were the parties' concerns "heard", and does an omission reflect "inadvertent gaps and other flaws in its reasoning"? [*Vavilov*, para. 128; *Mason*, para. 74].

[114] The trouble I face is that while the Commission could have referred the complaint to a Board of Inquiry on this basis, it did not provide reasons. The only analysis before me is the flawed analysis of the HRO.

[115] However, the Court, in *EMC*, also noted that errors and gaps in the chain of analysis do not necessarily mean that a decision is unreasonable. As Fichaud JA, held:

> [46] As to the remedy, when the administrative decision has "a fundamental gap or … an unreasonable chain of analysis, it is not ordinarily appropriate for the reviewing court to fashion its own reasons in order to buttress the administrative decision". The reviewing court may not "disregard the flawed basis for a decision and substitute its own justification for the outcome". (*Vavilov*, para. 96). Rather, the court should remit the matter to the decision maker. However, where "the interplay of text, context and purpose leaves room for a single reasonable interpretation … it would serve no useful purpose in such a case to remit the interpretative question to the original decision maker", and the reviewing court may end the matter (*Vavilov*, para. 124 and to the same effect para. 142; *Mason*, paras. 71, 120-22)

[116] The Commission argues that the Employer must demonstrate not just that the HRO's report was tainted with errors but also that the errors tainted the Commission's decision to the extent that it is unreasonable.

[117] In determining whether the decision was reasonable "in all the circumstances" (*Vavilov*, paragraph 137), this Court must look at the record as a whole.

[118] As Rosinski J. noted in *KO*, this Court can consider the record put before the Commission and can "consider by inference what reasons the Commission *could have contemplated* in support of its decision" (paragraph 43).

[119] It is difficult for a reviewing Judge to determine how the Commission reached its decision, given that they do not provide reasons. A review of the record can be

of assistance. However, I accept Rosinski J.'s finding in *KO* that when a Commission makes a decision that follows the HRO recommendation and does not provide its own reasons, the Court is entitled to assume that it relied on the reasons provided in the HRO's report.

[120] To ignore flaws in the HRO's report would be to ignore the direction from *Vavilov* to take a robust approach to judicial review. Though the Commission could have contemplated broader public interest factors to support their decision to refer the complaint to a Board of Inquiry, there is no basis in the record before this Court to support an inference that they did so.

Commissioner's Memorandum and Treatment of the Employer Response

[121] The Commissioner's memorandum provided an overview of Diondra Downey's complaint and a recommendation to the Commissioners to refer her complaint to a Board of Inquiry. The memorandum was drafted by a staff member who reviewed the Employer's response and advised that it did not impact the Board of Inquiry referral recommendation of the HRO. This suggests that the purpose of the Commissioner's memorandum was to obviate the need for the Commissioners to consider the Employer's response submissions. Just as the Commission was entitled to rely on the HRO's report to understand the facts surrounding the complaint, the Commission was entitled to rely on the Commissioner's memorandum to balance the HRO's findings with the Employer's response and the recommendation contained in the memorandum.

[122] The Commissioners received copies of the submissions from the Employer in response to the HRO's report and had the opportunity to read the submissions before deciding to refer the complaint to a Board of Inquiry. There is no indication on the record of what the Commissioners did with the materials. However, given that it is their job to review complaints, I can assume that they used the materials, including the Employer's response submissions, to inform their decision.

Conclusion on Reasonableness

[123] The HRO's report demonstrated an illogical reasoning process that did not take account of the evidence before her. She left gaps in her analysis such that it is not possible to determine how she concluded that the evidence supported a finding of discrimination. Finally, she inappropriately relied on information outside the scope of the complaint without explaining her reasons for doing so.

[124] These errors are not insignificant, superficial, or peripheral to the merits of the decision. The flaws in the analytical process go directly to the issue of whether there was evidence of discrimination.

[125] Though the Employer had an opportunity to respond to the report, the very short time between receipt of the submissions and the memorandum provided to the Commission was insufficient to allow for meaningful consideration of the Employer's response and could not have rectified the flaws in the HRO's report.

[126] The Commission did not provide reasons for their decision. They did not say that they were referring the complaint to a Board of Inquiry based on public policy concerns. When a Commission does not provide reasons, this Court is entitled to treat the reasoning in the HRO's report as the Commission's reasons (*KO* at para 59; *Sketchley v. Cananda (Attorney General)*, 2005 FCA 404 paragraph 37). The flaws in the HRO's reasoning process were sufficiently serious to taint the Commission's decision. The flaws were raised by the Employer in response submissions but the Commission's memorandum did not address them. Because the HRO's report does not meet the reasonableness standard, neither does the Commission's decision.

Remedies

[127] Leon's Furniture Limited asks this Court to quash the Commission's decision and to remit the complaint back to be heard by a new Human Rights Officer.

[128] The Court, in *Wright v. Nova Scotia (Human Rights Commission*), 2017 NSSC 11, addressed the scope of remedies that can be provided by this Court when it has determined that the Commission's decision was unreasonable:

> [40] Having regard to Rule 7, given my determination that the Commission's June 23, 2016 decision is unreasonable, I am of the view it should be quashed and set aside.
>
> [41] More problematic are the Applicants' requests (contained in their reply brief) that the order:
>
> - set aside the impugned reasons for the decision while also going on to determine the alternative grounds proposed by the Province, and then remitting it; or
>
> - set aside the impugned decision, remitting the matter to the Commission in accordance with the Court's reasons which address

> the question of whether a prima facie case of discrimination has been made out.

[42] In my view, the above remedies are more in the nature of *mandamus*. *Mandamus* is a discretionary prerogative writ issued by a superior court and used to compel public authorities to perform their duties. An order of mandamus does not issue as of right and will not ordinarily be granted where another remedy is available. In considering a human rights case under former Rule 56, Saunders J. (as he then was) noted in *Nova Scotia (Executive Council) v. Kaiser*, 1999 CanLII 19098 (NS SC) at p. 6:

> When the Human Rights Commission fails in its duty to act fairly, the appropriate step is to seek relief from a court of superior jurisdiction for an order in the nature of certiorari. And when a Human Rights Commission fails in its duty to act fairly with respect to the dismissal of a complaint, the superior court ought refer the entire matter back to the Commission to be dealt with in accordance with the principles of fairness.

…

[44] … I have decided to refer the matter back to the Commission for re-consideration. As a result, I do not propose to decide (as the Applicants have invited me to) the alternative grounds proposed by the Province and/or address the question of whether a prima facie case of discrimination has been made out. In due course, if the Commission decides to send the matter on to a Board of Inquiry, it will be the Board's role to make the call.

[45] By way of conclusion, two further issues require the Court's attention. Firstly, I feel compelled to address Commission counsel's contention that in the event of a referral back to the Commission that an entirely new investigation should occur. I would strongly urge the Commission not to proceed with a new investigation. In this regard, the within case is readily distinguishable from *Tessier v. Nova Scotia (Human Rights Commission)*, 2014 NSSC 65. In *Tessier*, Justice LeBlanc made key findings that the investigator breached procedural fairness (para. 66) and that the investigation was not thorough (para. 67). He accordingly quashed the Commission's decision and remitted the matter back with another investigation to be conducted by an investigator with no prior involvement with the complaint (para. 70). Here, I have found no such flaws in Ms. MacNaughton's investigation. Indeed, the Record reveals a thorough investigation and, not surprisingly, the parties have not alleged any problems. In the result, the re-consideration I have ordered should not involve a fresh investigation.

[129] The Commission suggests that if this matter is to be remitted, it does not require a new investigation. Distinguishing *Tessier*, the Commission noted that LeBlanc J. had found that the HRO in that case failed to interview key witnesses and, therefore, remitting the matter to the same HRO was clearly inappropriate.

[130] As noted above in *Wright*, when the HRO investigation does not reveal investigative flaws then no new investigation needs to be undertaken.

[131] In this case, I have identified flaws within the HRO's report, namely the analysis of the information collected during the investigation. Given these defects, it would defy common sense to remit the matter to the same HRO for re-evaluation given her failings in the first instance.

[132] Though I have not identified specific errors within the investigation process, I do not believe that this is a situation in which a new HRO can be appointed to undertake an analysis of the complaint using the information collected by the previous HRO. I say this because the original HRO conducted interviews with witnesses where she took notes but did not otherwise record what occurred during the interviews.

[133] Given my finding that the HRO's credibility assessment made without considering objective evidence was flawed, I do not see how a new HRO could accept the previous HRO's interview notes at face value.

[134] Though a new HRO could certainly make use of some of the materials collected by the previous HRO, it is beyond my authority to dictate how the HRO conducts its investigation.

[135] For these reasons, I find that it is appropriate to remit the matter to a new HRO for investigation. I say this with the hope that the investigative process can be streamlined so that the complainant will not have to wait a further three years for a decision on this matter.

Conclusion

[136] I have determined that the Commission's decision was tainted by the errors in the HRO's report and the Commissioner's memorandum, and thus, was unreasonable. The decision should be remitted to a new HRO for investigation.

[137] The parties have not made submissions on the costs of this motion. If they cannot agree on costs within 30 calendar days of the date of release of my decision, I invite them to file further written submissions and I will decide what is appropriate.

McDougall J.