Federal Court  Cour fédérale

Date: 20191213

Docket: T-1453-18

Citation: 2019 FC 1601

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, December 13, 2019

PRESENT: The honourable Mr. Justice LeBlanc

BETWEEN:

IMMACULÉE FRANÇOIS-JUMELLE

Applicant

and

CANADA POST CORPORATION

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] This is an application for judicial review of a decision of the Canadian Human Rights Commission [the Commission] dated June 27, 2018, dismissing the discrimination complaint made by the applicant under section 7 of the *Canadian Human Rights Act*, RSC 1985, c H-6

[Act] against the respondent, Canada Post Corporation [the Corporation], where she worked from October 1, 2000, until November 20, 2008, the date on which she was dismissed.

[2] In her complaint, the applicant argues that from the month of May 2007 until her dismissal, the Corporation discriminated against her by failing to provide accommodations, in a timely manner, for the functional limitations that she claimed to be hindered by and for which she was dismissed.

[3] The Commission found, on the basis of a report prepared by one of its investigators under section 43 of the Act, that the applicant's complaint did not warrant referral to the Canadian Human Rights Tribunal [Tribunal] for review. Accordingly, pursuant to subparagraph 44(3)(b)(i) of the Act, it dismissed the complaint in question.

II. BACKGROUND

A. *Complaint*

[4] Issues with the filing of her complaint to the Commission began in May 2007, when the applicant was transferred, at her own request, from Montréal to Ottawa. According to the complaint, upon arriving in Ottawa, a night position was assigned to her. However, given her diabetes, a day or evening position would have been preferable. On May 29, 2007, she submitted a request for accommodation, with a medical note in support, for day or evening work. However, as a result of administrative delays, the medical note was not received by the Corporation until the end of August 2007. In the meantime, given the lack of accommodation, she refused to show

up for work. This situation continued until October 7, 2007, the date on which she was transferred, at her request, to a letter carrier position.

[5] On November 5, 2007, she obtained a new medical note, this one for flat feet resulting from her new duties as a letter carrier, which required her to walk for long periods of time on her workdays. A gradual return to work was negotiated with the Corporation, subject to the applicant procuring orthotics for herself. As she could not afford to procure such orthotics, her return to work was delayed. A few weeks later, on December 15, 2007, the applicant, while still on sick leave due to her flat feet issues, fractured her left elbow. She obtained a new medical note which recommended that she be off work for two to three weeks.

[6] On December 27, 2007, according to the complaint, the applicant provided the Corporation with a medical note stating that she was fit to work if modified tasks were assigned to her. Following this medical note, the union representing the applicant suggested to the Corporation that she be transferred to clerical tasks.

[7] On January 23, 2008, the Corporation transferred the applicant to a clerk position, but, given that it was a night shift that involved handling oversized parcels, the applicant refused to show up for work, taking the view that the transfer failed to respect her functional limitations. The impasse was resolved on February 12, 2008, when the applicant was [TRANSLATION] "accommodated with modified tasks for her arms and feet until she obtains her orthotics" (Complaint Form, Certified Tribunal Record [CTR], at p 3).

[8] According to the complaint, on May 8, 2008, the Corporation ceased accommodating the applicant in a clerk position as a result of her delay in providing her endocrinologist's advice with respect to the limitations related to her diabetes and thus to her working at night. In the days that followed, in the absence of the required medical information, she was returned to her letter carrier position, but was only scheduled two hours per day in light of her functional limitations related to this type of work. Yet, as the applicant argues, Manulife Financial, which manages the Corporation's disability cases, recommended a gradual return to work as a letter carrier, over a three-week period, for four hours per day for the first two weeks and six hours per day for the third week.

[9] On May 26, 2008, she was assigned to a clerk position at the Gatineau depot. It was on the night shift. On June 5, 2008, she obtained another medical which recommended that she be off work until June 20, 2008, owing to an adjustment disorder with anxiety. On July 7, 2008, Manulife Financial recommended that the Corporation reinstate the applicant to her letter carrier position on the basis of the gradual return to work timetable proposed in May, but the applicant did not feel capable of returning to work given the functional limitations which, according to her, still hindered her. Throughout this period, the applicant was still not working. In fact, she would remain off work until November 12, 2008.

[10] In the meantime, at the end of July 2008, an update on the medical information concerning the applicant's functional limitations was required further to an agreement between her union and the Corporation regarding her return to work, which under the terms of the agreement was scheduled for early August 2008. That request for an update of medical

information, which was followed by a second request on August 8, 2008, delayed her return to work, a delay which the applicant attributed to the Corporation and Manulife Financial.

[11] On October 6, 2008, the applicant went to consult a colleague of her specialist for an independent medical assessment of her condition but was told, upon arriving at the clinic, that her name was not on the appointments list and that, in any event, the physician in question did not work that day. She claims that from that point she was convinced that it was an attempt on the Corporation's part to harass her specialist. The assessment was finally conducted on October 20, 2008, and the consulting physician determined that the applicant was not hindered by any limitations. He nonetheless confirmed, according to the complaint, the applicant's willingness to return to work.

[12] As was noted earlier, the applicant returned to work on November 12, 2008. She was assigned to a clerk position on the night shift, for four-hour shifts. This work accommodated her [TRANSLATION] "for modified tasks for her arm and for a gradual return to work for her feet (standing work)" (Complaint Form, CTR, at p 5). She was also summoned to an interview to discuss the fact that she had been absent from work since the month of June. Feeling intimidated by this, she did not attend the interview.

[13] On November 18, 2008, she left her workplace, taking the view that the Corporation was refusing to accommodate her in accordance with occupational health and safety standards on the basis of a medical assessment—the one from October 20, 2008—that she considered to be

[TRANSLATION] “not legally compliant” (Complaint Form, CTR, at page 5). On November 20, 2008, the applicant was dismissed.

B. *Investigation report*

[14] The applicant failed to persuade the Commission’s investigator that her complaint warranted a recommendation for review by the Tribunal. In a report dated February 26, 2018, the investigator found that, in light of the evidence gathered, the need for accommodation for night work had not been established because, after two medical assessments, the diabetes diagnosis could not be confirmed. She noted, in that regard, that aside from the medical note obtained by the applicant shortly after starting her night shift in May 2007, a note which, in her opinion, recommended only temporary accommodation measures, there was no other evidence indicating that the applicant suffered from diabetes.

[15] The investigator also took the view that the applicant had not fully co-operated with the Corporation in finding accommodation measures by taking a long time to provide the required medical information in support of her functional limitations, despite numerous reminders. She further determined that one could not conclude from the evidence that the Corporation had refused to implement the accommodation measures required by the applicant’s condition.

[16] Lastly, the investigator found that the Corporation had provided a reasonable explanation in connection with the applicant’s dismissal given that, having been deemed fit to return to work without restrictions in October 2008, she nonetheless refused to carry out the required tasks. She

noted, in this regard, that the Corporation had properly applied the process of progressive discipline before proceeding with the applicant's dismissal.

[17] In making these findings, the investigator, in addition to interviewing the applicant, reviewed a certain number of documents, including medical reports from the applicant's endocrinologist and from the physician who had carried out the independent assessment on October 20, 2008. She also examined a letter from the applicant's union, dated February 19, 2013, stating that the grievances filed against the Corporation in connection with the applicant's dismissal would not be submitted for arbitration, on the ground that a review of the file indicated that at the time of said dismissal, it had not been medically established that the applicant was hindered by limitations which would have prevented her from working.

[18] None of the documents examined by the investigator, and I will return to this point later, was filed in the record of this application for judicial review.

C. *Applicant's response to investigation report*

[19] The applicant availed herself of the opportunity provided to her to respond to the investigation report. In a letter dated April 9, 2018, she denied having taken a long time to submit the requested documentation and blamed any delays on administrative issues beyond her control. As for her assignment to a night shift upon arriving in Ottawa in May 2007, she stated that it was not of her choosing, as she had sought above all else to fill one of the vacant positions in the Ottawa area, positions she had learned of prior to her transfer. She added that she was

being followed at the time for [TRANSLATION] "indications of type 2 diabetes" (Applicant's Submissions, CTR, at p 20).

[20] With respect to the letter carrier position, she claimed she was unaware of her flat feet issues before starting that work—work for which, in any event, she doubted she had the necessary skills. Having used up all of her sick leave, she could not afford to procure the orthotics required to resume such work. The fact that the Corporation did nothing at the time to assist her in a gradual return to work or to assign her with tasks that were adapted to her condition, as was noted, in her view, by the Employment Insurance Board of Referees [Board of Referees] in a decision dated March 12, 2008, left her without any income for a longer period than she had expected.

[21] In her written submissions, the applicant also describes the difficulties she had renewing her residential lease in the summer of 2008, difficulties which she attributes to the fact that she was not paid on time by the Corporation, despite an agreement between her union and the Corporation.

[22] She concluded by asserting that she did not refuse to carry out the tasks that had been assigned to her, reiterating that she had never been able to return to work gradually [TRANSLATION] "in a health and safety environment favourable to her condition and professional development" (Applicant's Submissions, CTR, at p 22). She urged the Commission to [TRANSLATION] "further explore union evidence from the Outaouais region with regard to the

psychological harassment in which the employer engaged every time [she] had to begin a new assignment" (Applicant's Submissions, CTR, at page. 22).

D. *Commission's decision*

[23] On June 27, 2018, the Commission, having reviewed the investigator`s report and having considered both the applicant's submissions and those of the Corporation, which essentially stated that it was in agreement with the report's findings, determined on the basis of subparagraph 44(3)(b)(i) of the Act that the evidence did not support [TRANSLATION] "the allegation that the [applicant] suffered adverse differentiation in the course of her employment and that the [Corporation] terminated her employment due to her disability".

III. ISSUE

[24] The issue here is whether, in the circumstances of this case and within the parameters set out in section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, the dismissal of the applicant's complaint warrants the intervention of the Court.

[25] It is well established that the Commission has broad discretion and "a remarkable degree of latitude" when it decides to dismiss, pursuant to subparagraph 44(3)(b)(i) of the Act, a complaint made under the same Act (*Bell Canada v Communications, Energy and Paperworkers Union of Canada*, [1999] 1 FC 113 at para 38 [*Bell Canada*]). This attracts a standard of reasonableness, according to which this Court will intervene only where the decision of the Commission lacks the required justification, transparency and intelligibility and falls outside the

range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47; *Ritchie v Canada (Attorney General)*, 2017 FCA 114 at para 16; *Keith v Canada (Correctional Service)*, 2012 FCA 117 at para 47).

[26] Where, as in this case, the Commission simply adopts the recommendations of the investigation report prepared under section 43 of the Act, the analysis of the reasonableness of the Commission's decision is conducted on the basis of the contents of the report itself, as these are considered as constituting the reasons for the Commission's decision (*Sketchley v Canada (Attorney General)*, 2005 FCA 404 at paras 37-38; *Egueh-Robleh v Canadian Institutes for Health Research*, 2019 FC 1079 at para 22; *Nepp v KF Aerospace*, 2019 FC 1169 at para 14; *Bergeron v Canada (Attorney General)*, 2015 FCA 160 at para 60).

[27] The Commission's decision can also be overturned if, during the investigation leading up to that decision, the complainant was denied a fair and unbiased process. This would be the case, for example, where it is alleged that the Commission failed to consider obviously crucial evidence (*Slattery v Canada (Human Rights Commission)*, [1994] 2 FC 574, at para 57). Where such a failure is alleged, a standard of correctness applies (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; *Tutty v Canada (Attorney General)*, 2011 FC 57 at para 14).

[28] At this stage, it is important to recall that the role of the Commission, pursuant to the powers conferred upon it by section 44 of the Act, is not to determine whether the complaint has been made out; rather, it is to decide whether a review of the complaint by the Tribunal is

warranted, having regard to all the facts (*Cooper v Canada (Human Rights Commission)*, [1996] 3 SCR 854 [*Cooper*] at para 53). In that sense, the Commission is not an adjudicative body; that role belongs to the Tribunal under the Act. Accordingly, the Commission's primary function is more analogous to that of a judge at a preliminary inquiry. In other words, it is tasked with carrying out a "screening analysis" of the matter (*Cooper* at paras 52-53; *Syndicat des employés de production du Québec et de l'Acadie v Canada (Canadian Human Rights Commission)*, [1989] 2 SCR 879 at pp 898-99; *Herbert v Canada (Attorney General)*, 2008 FC 969 at para 16).

[29] In exercising this role, the Commission, as I have just noted, has been given broad discretion (*Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, 2012 SCC 10 at paras 21 and 25) and has "a remarkable degree of latitude" (*Walsh v Canada (Attorney General)*, 2015 FC 230 at para 19, citing *Bell Canada* at para 38).

IV. ANALYSIS

[30] According to the notice of application she filed on July 31, 2018, as with the amended notice of application filed in December 2018, the applicant is making three allegations against the Commission. The first concerns the fact that the Commission allegedly refused to consider the decision of the Board of Referees, a decision which in her view supports the allegation that she suffered adverse differentiation in the course of her employment. The second was that the Commission allegedly failed to take into account [TRANSLATION] "relevant and factual" information regarding the availability of medical documents and progressive disciplinary measures.

[31] The third allegation concerns the Commission ignoring [TRANSLATION] "evidence of acknowledgement of the judgment of the Administrative Tribunal of Québec related to the automobile accident" (Notice of Application, July 31, 2018, at p 3).

[32] This case presents two significant difficulties. For one, nowhere in the written submissions are the arguments against the Commission's decision supported by any documentary evidence. Indeed, the applicant never produced an "applicant's record", as is required by section 309 of the *Federal Courts Rules*, SOR/98-106 [Rules]. Yet an order by Prothonotary Sylvie M. Molgat, dated May 27, 2019, reminded her to produce such a record and granted her until June 10, 2019, to do so, a period which was later extended until July 4, 2019.

[33] On that date, the applicant submitted a document entitled [TRANSLATION] "Immaculée François-Jumelle's Written Submissions in Response to the Motion Challenging Irregularities" despite that specific motion having already been dismissed by Prothonotary Molgat in that same order. With the exception of one paragraph—paragraph 17—these submissions fail to address, either directly or indirectly, the merits of the judicial review application. That paragraph reads as follows:

> [TRANSLATION]
>
> [17] The respondent [sic] challenges the decision dated June 27, 2018, of the Canadian Human Rights Commission by reason of the omission of the contents of the decision of the Employment Insurance Board of Referees dated March 12, 2008 (Exhibit 2, Appendix 8). As well as the ambiguity raised for the delay in negotiations between the employer and the union for the resolution of my grievances while awaiting an arbitration hearing (Exhibit 3, Appendix 9). A delay that Canada Post Corporation estimated would be 10 months. As of July 4, 2019, there was no justification for the irregularities in the handling of my employee file. A request

> for temporary accommodation resulted in a dismissal on grounds of poor work attendance.

[34] In this case there are therefore no other forms of written submissions that address the merits of the proceedings initiated by the applicant. And yet, upon reading paragraph 17, one notes that aside from the argument based on the decision of the Board of Referees, there is no reference to the two other grounds cited in the notice of application. Indeed, there is no reference, direct or indirect, to the failure to take into account the decision of the Administrative Tribunal of Québec related to the [TRANSLATION] "automobile accident". Nor is there any reference to [TRANSLATION] "relevant and factual" information regarding the availability of medical documents or the progressive disciplinary measures allegedly ignored by the Commission.

[35] This leads me to the second difficulty posed in this matter, which to me is even more problematic than the first. That difficulty arises from the fact that, aside from the decision of the Board of Referees, nothing that was before the investigator was filed on the Court record. Given such a context, how can the Court, despite what the applicant may have pleaded in oral arguments at the hearing of this application for judicial review, assess the merits of the argument according to which, for example, the Commission allegedly failed to consider [TRANSLATION] "relevant and factual" information about the availability of medical documents or progressive disciplinary measures?

[36] The assessment of the reasonableness of a decision by an administrative decision-maker cannot be done blindly. The Court must have a modicum of factual information before it if it is

to dispose of such an issue. In this case, with the exception of the decision of the Board of Referees, there is no such modicum of information. It is up to the party alleging the unreasonableness of a decision to provide the required evidence. It is they who bear the onus (*Opportunities for the Disabled Foundation v Canada (National Revenue),* 2016 FCA 94 at para 63).

[37] In this case, the CTR, filed by the Commission in August 2018 pursuant to section 318 of the Rules, consists of relatively few items. Essentially, it contains the Commission's decision, a summary of the applicant's complaint, the complaint form, the investigator`s report, and the submissions of the applicant and those of the Corporation regarding that report.

[38] In the letter filed along with the CTR, which is addressed to the Administrator of the Court and to the parties as well, it is stated that the applicant wished that [TRANSLATION] "all of the documents" regarding her complaint be disclosed by the Commission, to which the Commission objected on the basis that the request was not specific enough to assess the relevance of any additional documentation in light of the grounds of the notice of application. The Commission did, however, state that it was prepared to reconsider its position if a more specific request for disclosure was presented to it. In any event, there was no response to that invitation.

[39] The Commission also pointed out, in that letter, that it considered the documents provided by the applicant to the investigator to be relevant. However, as such documents should normally be in the applicant's possession, its view was, rightly or wrongly, that it did not need to

include them in the CTR. But there was nothing to prevent the applicant from challenging the Commission's position or producing those documents herself, by means of an affidavit. The applicant did neither.

[40] It must be concluded that this case, as it is constituted, does not allow me to determine whether the Commission failed, as the applicant argues, to take into account [TRANSLATION] "relevant and factual" information regarding the availability of medical documents, the progressive disciplinary measures or even the judgment of the Administrative Tribunal of Québec [TRANSLATION] "related to the automobile accident".

[41] First of all, such information, if it exists, is not before me. Moreover, nowhere in the applicant's record is the specific content of that information indicated. As for the judgment of the Administrative Tribunal of Québec, it was not included in the record, and there is no indication that it was even provided to the investigator or to the Commission. Nor, as the Corporation noted, was there even any reference in the written submissions of the applicant having provided it to the Commission following the filing of the investigator`s report.

[42] As to the other grounds raised in paragraph 17 of the written submissions filed by the applicant [TRANSLATION] "in response to the motion challenging irregularities", namely the alleged ambiguity regarding the delay in the negotiations between the employer and the union for the resolution of the grievances while awaiting an arbitration hearing, a delay estimated at 10 months, and the lack of justification [TRANSLATION] "for the irregularities in the handling of her

employee file", they appear to have come out of nowhere and are not based on any verifiable factual evidence in this case.

[43] I understand that the applicant has no legal training and is representing herself, although she appears to have availed herself of the services of counsel at least for the purposes of initiating these proceedings, based on the written submissions dated July 4, 2019. While it is true that the Court will generally show flexibility and openness where a party is self-represented—and it has done so in this case by accommodating the applicant in terms of timeframes provided to her to further her case—such openness does have its limits. As the Court so eloquently explained in *Barkley v Canada*, 2014 FC 39 [*Barkley*], this conciliatory attitude "cannot, however, exempt a party of the obligation to discharge its burden to prove the facts supporting its claim in order to succeed". As the Court has noted, "bare assertions and conclusions are not sufficient: see, among others, *Lewis v Canada*, 2012 FC 1514; *Brazeau et al v Her Majesty the Queen*, 2012 FC 1300; *Gagné v Her Majesty in Right of Canada*, 2013 FC 331." (*Barkley* at para 18). In this case, it is clear that the applicant's submissions are just that: bare assertions and conclusions with no factual basis in the Court record to support them.

[44] This leaves us with the argument based on the Board of Referees' decision. This decision was filed by the applicant and was referred to by the investigator in her report. The applicant contends that the decision contradicts the investigator's determination that she had failed to establish that she was subject to adverse differential treatment in the course of her employment. To the extent that this decision is central to the applicant's arguments, one cannot claim that the

investigator ignored it, given that she discusses it in paragraph 39 of her report, which reads as follows:

> [TRANSLATION]
>
> 39. The complainant maintains that she was offered no work that was adapted to her condition. The complainant provided a copy of the Board of Referees decision dated March 12, 2008, in which it was noted that there was insufficient evidence on the employer's part that reasonable offers were made to her with regard to her functional limitations. The decision states that the matter was resolved when the employer was able to propose an acceptable task on February 12, 2008.

[45] I therefore cannot conclude that the investigator failed to consider evidence that was obviously crucial to the applicant or that she was denied a fair and unbiased process. Was the investigator's handling of the Board of Referees' decision reasonable? In my view, yes.

[46] Based on the evidence she had before her, the investigator noted that in mid-January 2008, Manulife Financial proposed a gradual return to work as a letter carrier as soon as the applicant could obtain orthotics, which were to have been obtained in the two weeks at the beginning of the applicant's absence in November 2007. She further noted that, given that the applicant had stated that she lacked the necessary resources to procure the orthotics required for her return to work, the Corporation had agreed to temporarily accommodate her by proposing that she take a clerical position on the night shift, effective January 23, 2008. According to the investigator, following her refusal of that proposal, the Corporation offered the applicant a clerical position on the evening shift, effective February 12, 2008, which the applicant accepted.

[47] The investigator also pointed out that on May 14, 2008, a report from the physician consulted and chosen by the applicant concluded that the applicant was not diabetic and that her metabolic condition was not an impediment to working a night shift. She found that the Corporation, contrary to what the applicant claimed, had not refused to implement measures to accommodate the applicant, while noting, as I have already pointed out above, that the situation on which the Board of Referees had made a determination had been resolved on February 12, 2008.

[48] I understand that in the eyes of the investigator, the wavering situation, so to speak, that followed the medical note dated December 27, 2007, which confirmed the applicant's availability to perform modified tasks, was promptly resolved, given all the circumstances surrounding this case and the evolution of the applicant's condition.

[49] My role, as a reviewing judge, is not to substitute my own assessment of the situation for that of the Commission. It is, as I stated earlier, to determine whether the Commission's decision bears the qualities of justification, transparency and intelligibility and whether it falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and law. This role requires a certain deference towards the decision of the Commission, which I should also point out enjoys broad discretion in the exercise of its duties under section 44 of the Act.

[50] Thus, in this case, no intervention is warranted with regard to the way in which the investigator, and later the Commission, treated the Board of Referees' decision. In other words, that treatment appears to me to meet the standard of reasonableness.

[51] I find it is also important to point out that the Commission and the Board of Referees do not have the same mandate. Put another way, they do not view things the same way and are not bound by each other's decisions; indeed, their respective roles and what they are to analyze and decide are different. The Board of Referees, prior to its abolition, sat in appeal from decisions made by the Employment Insurance Commission [EIC] on, among other things, workers' eligibility for employment insurance benefits. In this case, the EIC had refused to pay the applicant employment insurance benefits for the period beginning on December 24, 2007, because it was of the opinion that she had not proved her availability for work. More specifically, the EIC found that the applicant had been able to work as of December 27, 2007, but had refused to return to work when the Corporation was ready to reinstate her.

[52] The Board of Referees determined otherwise, being of the view that there was no evidence that the applicant had made reasonable offers to return to work. It added that the employer appeared to have acknowledged its mistakes in managing the tasks between December 2007 and January 2008 (emphasis added), while pointing out the weakness of the evidence submitted by the EIC to justify its decision, evidence that was based [TRANSLATION] "on transcribed, and therefore indirect, statements from individuals who were not directly involved in the process of proposing tasks to [the applicant]" (Decision of the Board of Referees, at p 7).

[53] Given that I do not have the evidence that was submitted to the Board of Referees before me, it is difficult to know what led it to conclude that no reasonable offers to return to work had been made to the applicant in January 2008. However, its comments regarding the quality of the

evidence provided by the EIC are certainly a clue as to what may have motivated that conclusion. Nor do I have in the record the evidence that was before the investigator. It is possible that this evidence may have been of better quality. As for the Board of Referees' statement that the employer reportedly acknowledged its mistakes in managing the tasks between December 2007 and January 2008, it is written in the kind of language ([TRANSLATION] "it appears that the employer had acknowledged its mistakes") that would appear to describe a mere impression. Normally these types of assertions carry little, if any, weight.

[54] It would therefore be risky, to my mind, to read too much into the Board of Referees' decision. What does appear certain to me, however, is that its decision, which covers a very small portion—the end of December 2007 to the beginning of February 2008—of the period in question here, May 2007 to November 2008, does not support the applicant's argument that this decision contradicts the investigator's determination that she had not been subject to adverse differentiation in the course of her employment. Even if one were to suppose that the Corporation should have done more to accommodate the applicant during this very brief period, one could not reasonably say of the Board of Referees' decision that it made a general finding that the applicant had been subject to adverse differentiation in the course of her employment for the entire period in issue here.

[55] The applicant also filed in the record a decision of the Canada Industrial Relations Board, dated April 20, 2011. That decision concerned a complaint filed by the applicant against her union, which the applicant accused of having breached its duty of representation in relation to the events leading up to her dismissal.

[56] The Corporation has requested that I not consider this document because it was not brought to the attention of either the Commission or its investigator. At the hearing of this judicial review application, the applicant indicated having referred to this decision in her initial complaint to the Commission.

[57] In any event, I do not see how that decision helps the applicant. It is a dispute between the applicant and her union in which the Canada Industrial Relations Board ruled in the union's favour. In it, the decision-maker found, among other things, that the union had not acted in a manner that was arbitrary, discriminatory or in bad faith in its handling of grievances filed on behalf of the applicant against the Corporation. I see nothing in the decision that would, directly or indirectly, support the applicant's argument here.

[58] As for the applicant's dismissal, the investigator`s report reveals, based on medical reports, that as of mid-May 2008, there was no reason why the applicant could not be assigned to work night shifts, and that, as of October 20, 2008, there were no functional limitations preventing her from returning to work. Faced with the applicant's persistence in continuing to not show up for work and refusing the transfers that were proposed to her, the investigator concluded that the Corporation, having applied progressive disciplinary measures before making its decision, was entitled to terminate her employment without violating the Act.

[59] Here again, given the lack of evidence on the record that would allow for an assessment as to the reasonableness of these findings, which, as an aside, appear entirely intelligible to me,

this portion of the application for judicial review should be dismissed, the applicant having failed to meet her burden of proof.

[60] Thus, this application for judicial review will be dismissed. The Corporation is seeking costs. Awards of costs are entirely within the discretion of the Court, as long as such discretion is, of course, exercised judicially (*Consorzio del Prosciutto di Parma v Maple Leaf Meats Inc.*, 2002 FCA 417 at para 9; *Whalen v Fort McMurray No. 468 First Nation*, 2019 FC 1119 at para 6). In this case, the applicant did what she could to represent herself. It was certainly not to her advantage. In these circumstances, she will have to bear her own costs, but I will refrain from having her also bear those of the Corporation which, in other circumstances, may have been required to mount a more vigorous defence than it did in this judicial review application.

JUDGMENT in T-1453-18

THIS COURT'S JUDGMENT is as follows:

1. The application for judicial review is dismissed;

2. Without costs.

"René LeBlanc"
Judge

Certified true translation
This 10th day of January 2020.

Michael Palles, Reviser

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1453-18
STYLE OF CAUSE:	IMMACULÉE FRANÇOIS-JUMELLE v CANADA POST CORPORATION
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DATED:	DECEMBER 13, 2019

APPEARANCES:

Immaculée François-Jumelle	FOR THE APPLICANT
Patrick Galizia	FOR THE RESPONDENT

SOLICITORS OF RECORD:

None	FOR THE APPLICANT
Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT