Federal Court  Cour fédérale

Date: 20200416

Docket: T-2154-18

Citation: 2020 FC 526

Ottawa, Ontario, April 16, 2020

PRESENT: Mr. Justice Russell

BETWEEN:

CLAUDIO LUBAKI

Applicant

and

BANK OF MONTREAL

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] This is an application under s 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, for judicial review of a decision, dated November 21, 2018 [Decision] of the Canadian Human Rights Commission [Commission] to dismiss the Applicant's complaint against the Bank of Montreal [BMO] pursuant to s 44(3)(b)(i) of the *Canadian Human Rights Act*, RSC 1985, c H-6 [*CHRA*].

II. BACKGROUND

[2] The Applicant is currently employed as a Grade 4 Collecting Agent at BMO's Collections Call Centre in Toronto. He first began working at BMO in September 2006 as a temporary employee on contract. He subsequently became a permanent employee in July 2007 in the position of "Call Agent I." The Applicant was promoted to "Call Agent II" in April 2011, and was promoted to his current position in March 2013. This is considered to be the highest graded position within the division, apart from the Team Leader and Manager positions.

[3] In August 2010, the Applicant filed a previous complaint with the Commission alleging that he had been treated differently and denied employment opportunities due to his race, colour, and national or ethnic origin. This complaint was dismissed by the Commission in June 2012 and the Applicant's application for judicial review to the Federal Court was dismissed on September 11, 2014. See *Lubaki v Bank of Montreal Financial Group*, 2014 FC 865.

[4] Meanwhile, in 2014, the Applicant began reporting to a new manager, Ms. Renee Beltran. Ms. Beltran managed the Applicant until 2016, when Mr. Ruben George took over the position.

[5] From 2014 to 2016, the Applicant received "mixed" performance reviews from management. As defined by the Respondent, mixed performance means that:

> Employee successfully met some of the expectations of their role this year; however, there are areas in which performance improvement is required. While their performance contribution is

> valued by the team, their current level of performance falls below that of their peers.

[6] Moreover, the Applicant was placed on corrective action in July 2015, was given a lower incentive payout as compared to a co-worker, and was excluded from grade alignment. The Applicant also claims that he was managed more aggressively by Ms. Beltran and by Ms. Karin Riddell (Senior Manager of Collections), was falsely set up for acts he did not commit, was intentionally portrayed negatively by management, and was denied further employment opportunities within BMO.

[7] The Applicant took a medical leave of absence on March 10, 2016, and returned to work on October 5, 2016. The Applicant says that BMO refused his numerous earlier requests to return to work, notably his request made on August 23, 2016 to return to work on a gradual basis beginning September 6, 2016. Despite not having received authorization, the Applicant returned to work on September 6, 2016, and was advised by Mr. George that he had not yet been cleared to work by Oncidium Health Group [OHG], BMO's third-party medical claims adjudicator. The Applicant left the building accompanied by Mr. George. Finally, upon his return to work on October 5, 2016, the Applicant says that he was incorrectly paid, although this matter was eventually corrected.

[8] The Applicant states that his adverse treatment by BMO management was retaliation against him for filing his previous human rights complaint in August 2010, and that this differential treatment was discriminatory as it was on the basis of colour, national or ethnic origin, and race. The Applicant self-identifies as "Black-African" born in Angola.

[9] The Applicant filed a complaint on these grounds with the Commission on April 1, 2016, and subsequently amended his complaint on February 1, 2017. The complaint was investigated by Ms. Jennifer Huber [Investigator]. On August 29, 2018, the Investigator issued a report [Report] recommending that the Commission dismiss the Applicant's complaint. The Applicant and the Respondent each filed submissions responding to the Report on September 30, 2018, and October 15, 2018, respectively. On November 21, 2018, the Commission dismissed the Applicant's complaint.

III. DECISION UNDER REVIEW

[10] In its Decision dated November 21, 2018, the Commission noted:

> Before rendering the decision, the Commission reviewed the report disclosed to you previously and any submission(s) filed in response to the report. After examining this information, the Commission decided, pursuant to subparagraph 44(3)(b)(i) of the *Canadian Human Rights Act*, to dismiss the complaint because having regard to all the circumstances of the complaint, further inquiry is not warranted.

[11] The Investigator found that there was insufficient evidence to suggest that the Applicant was treated differently concerning his performance ratings in 2014, 2015, and 2016, as well as with regard to his applications for other positions within BMO. Moreover, the Investigator found that the evidence did not support the allegation that the Applicant was managed more "aggressively" or "set up" and portrayed negatively by management. The Investigator also concluded that the evidence does not suggest that the Applicant was prevented from returning to work following his leave of absence. Although the Investigator acknowledged that the Applicant's return was delayed by a month and that there was a payroll error, she noted that there

was insufficient evidence to demonstrate that the delay or the error amounted to adverse differential treatment.

[12] With regard to some matters where the Investigator found that adverse differential treatment had occurred, she found that there was insufficient evidence to suggest that this treatment was linked to any prohibited ground of discrimination or to any sort of retaliation for filing a previous complaint. Indeed, the Investigator found that, although the corrective action taken in 2015 and the lower incentive given to the Applicant as compared to a co-worker did treat the Applicant differently from his colleagues and did adversely affect him, it could not be said that these differences arose from any prohibited grounds of discrimination or for any retaliatory reasons.

[13] In producing the Report, the Investigator noted that she had reviewed the parties' positions, all the documentary evidence submitted, and had conducted telephone interviews with: the Applicant, Ms. Riddell, Ms. Beltran, Mr. Freddy Matondo (Team Lead, Collections), Mr. Oliver Baroum (former New Business Associate at BMO), and Mr. Amit Karia (Team Lead Collections). The Investigator also noted that she had attempted to conduct interviews with all of the Applicant's witnesses; however, barring Mr. Baroum, the Applicant's witnesses were either not willing to testify or were unable to be reached by the Investigator despite multiple attempts.

IV. ISSUES

[14] The issues raised in the present application are as follows:

1. Should the Applicant's affidavit be struck out in full or in part?

2. Did the Investigator breach the Applicant's right to procedural fairness by failing to conduct an unbiased and thorough investigation?

3. Did the Report, which the Commission relied upon, err in finding that the Applicant did not receive adverse differential treatment as retaliation for his 2010 complaint or on the basis of colour, national or ethnic origin, and race?

V. STANDARD OF REVIEW

[15] The memoranda of the parties in this case were provided prior to the Supreme Court of Canada's recent decisions in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] and *Bell Canada v Canada (Attorney General)*, 2019 SCC 66. The parties' submissions on the standard of review were therefore made under the *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] framework. At the hearing of this matter, the Court asked the parties whether they wished to modify their submissions on the applicable standards of review in this matter. Neither party suggested that any material modifications were required. I have applied the *Vavilov* framework in my consideration of the application and found that, in comparison to an analysis under the *Dunsmuir* framework, the applicable standards of review have not changed in this case nor have my conclusions.

[16] In *Vavilov*, at paras 23-32, the majority sought to simplify how a court selects the standard of review applicable to the issues before it. The majority did away with the contextual and categorical approach taken in *Dunsmuir* in favour of instating a presumption that the reasonableness standard applies. However, the majority noted that this presumption can be set

aside on the basis of (1) clear legislative intent to prescribe a different standard of review (*Vavilov*, at paras 33-52), and (2) certain scenarios where the rule of law requires the application of the standard of correctness, such as constitutional questions, general questions of law of central importance to the legal system as a whole and questions regarding the jurisdictional boundaries between two or more administrative bodies (*Vavilov*, at paras 53-64).

[17] In his memorandum, the Applicant does not explicitly make any submissions on the applicable standard of review in this case. Meanwhile, the Respondent argues that the standard of reasonableness applies to this Court's review of the neutrality and thoroughness of the Commission's investigation as well as the investigation's findings. However, the Respondent adds that should this Court apply the standard of correctness to its review of the neutrality and thoroughness of the Commission's investigation, the result would be the same.

[18] Regarding the issue of whether the Commission breached the Applicant's right to procedural fairness by conducting a biased and incomplete investigation of the complaint, some courts have held that the standard of review for an allegation of procedural unfairness is "correctness" (*Mission Institution v Khela*, 2014 SCC 24 at para 79; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 59 and 61 [*Khosa*]). The Supreme Court of Canada's decision in *Vavilov* does not address the standard of review applicable to issues of procedural fairness (*Vavilov*, at para 23). However, a more doctrinally sound approach is that no standard of review at all is applicable to the question of procedural fairness. The Supreme Court of Canada in *Moreau-Bérubé v New Brunswick (Judicial Council)*, 2002 SCC 11 stated that the issue of procedural fairness:

> requires no assessment of the appropriate standard of judicial review. Evaluating whether procedural fairness, or the duty of fairness, has been adhered to by a tribunal requires an assessment of the procedures and safeguards required in a particular situation (*Moreau-Bérubé*, para 74).

[19] As for the standard applicable to this Court's review of the Report's findings relied on by the Commission, there is nothing to rebut the presumption that the standard of reasonableness applies in this case. The application of the standard of reasonableness to these issues is also consistent with the existing jurisprudence prior to the Supreme Court of Canada's decision in *Vavilov*. See *Kirkpatrick v Canada (Attorney General)*, 2019 FC 196 at para 22, and *Holder v UBS Bank (Canada)*, 2019 FC 1597 at para 34.

[20] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with whether it "bears the hallmarks of reasonableness—justification, transparency and intelligibility—and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov*, at para 99). Reasonableness is a single standard of review that varies and "takes its colour from the context" (*Vavilov*, at para 89 citing *Khosa*, at para 59). These contextual constraints "dictate the limits and contours of the space in which the decision maker may act and the types of solutions it may adopt" (*Vavilov*, at para 90). Put another way, the Court should intervene only when "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" (*Vavilov*, at para 100). The Supreme Court of Canada lists two types of fundamental flaws that make a decision unreasonable: (1) a failure of rationality internal to the decision-maker's reasoning process; and (2) untenability "in light of the relevant factual and legal constraints that bear on it" (*Vavilov*, at para 101).

[21] For the sake of clarity, no standard of review is applicable to whether the Applicant's affidavit should be struck out, in full or in part.

VI. STATUTORY PROVISIONS

[22] The following statutory provisions of the *CHRA* are relevant to this application for judicial review:

Employment	**Emploi**
7 It is a discriminatory practice, directly or indirectly, **(a)** to refuse to employ or continue to employ any individual, or **(b)** in the course of employment, to differentiate adversely in relation to an employee, on a prohibited ground of discrimination.	**7** Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait, par des moyens directs ou indirects : **a)** de refuser d'employer ou de continuer d'employer un individu; **b)** de le défavoriser en cours d'emploi.
…	…
Retaliation	**Représailles**
14.1 It is a discriminatory practice for a person against whom a complaint has been filed under Part III, or any person acting on their behalf, to retaliate or threaten retaliation against the individual who filed the complaint or the alleged victim.	**14.1** Constitue un acte discriminatoire le fait, pour la personne visée par une plainte déposée au titre de la partie III, ou pour celle qui agit en son nom, d'exercer ou de menacer d'exercer des représailles contre le plaignant ou la victime présumée.
…	…

Report	**Rapport**
44(3) On receipt of a report referred to in subsection (1), the Commission	**44(3)** Sur réception du rapport d'enquête prévu au paragraphe (1), la Commission :
(b) shall dismiss the complaint to which the report relates if it is satisfied	**b)** rejette la plainte, si elle est convaincue :
(i) that, having regard to all the circumstances of the complaint, an inquiry into the complaint is not warranted, or	**(i)** soit que, compte tenu des circonstances relatives à la plainte, l'examen de celle-ci n'est pas justifié,
(ii) that the complaint should be dismissed on any ground mentioned in paragraphs 41(c) to (e).	**(ii)** soit que la plainte doit être rejetée pour l'un des motifs énoncés aux alinéas 41c) à e).

The following provision of the *Federal Courts Rules*, SOR/98-106 [*Federal Courts Rules*] is relevant to this application for judicial review:

Content of affidavits	**Contenu**
81 (1) Affidavits shall be confined to facts within the deponent's personal knowledge except on motions, other than motions for summary judgment or summary trial, in which statements as to the deponent's belief, with the grounds for it, may be included.	**81 (1)** Les affidavits se limitent aux faits dont le déclarant a une connaissance personnelle, sauf s'ils sont présentés à l'appui d'une requête – autre qu'une requête en jugement sommaire ou en procès sommaire – auquel cas ils peuvent contenir des déclarations fondées sur ce que le déclarant croit être les faits, avec motifs à l'appui.
Affidavits on belief	**Poids de l'affidavit**
(2) Where an affidavit is made on belief, an adverse inference may be drawn from the failure	**(2)** Lorsqu'un affidavit contient des déclarations fondées sur ce que croit le

of a party to provide evidence of persons having personal knowledge of material facts.	déclarant, le fait de ne pas offrir le témoignage de personnes ayant une connaissance personnelle des faits substantiels peut donner lieu à des conclusions défavorables.

VII. ARGUMENTS

A. *Applicant*

[23] The Applicant argues that the Decision is based upon a flawed Report and, as such, this application for judicial review should be allowed. Notably, the Applicant says that: (1) the investigation into his complaint was conducted by a biased Investigator and lacked thoroughness; and (2) the Report's findings are grounded in an improper assessment of the evidence as well as a failure to assess critical evidence.

(1) Neutrality and Thoroughness of Investigation

[24] The Applicant argues that the investigation into his complaint was conducted by a biased Investigator and lacked thoroughness.

[25] In essence, the Applicant states that the Investigator was biased as she defended the Respondent and did not impartially investigate the complaint. Specifically, the Applicant notes that the Investigator blindly preferred the testimony of the Respondent's witnesses, despite the absence of corroborating evidence and their clear incentive to support the Respondent. Indeed,

he notes that there was no evidence that the Respondent's witnesses were telling the truth while he provided many documents to corroborate his testimony.

[26] In addition, the Applicant states that the Investigator revealed her bias when she refused to permit many of the Applicant's witnesses to testify anonymously. The Applicant states that this led many of his witnesses to refuse to testify for fear that there would be adverse repercussions on their careers.

[27] The Applicant also argues that the investigation was not thorough in that the Investigator failed to cross-examine the Respondent's witnesses and failed to review the vast majority of the evidence submitted by the Applicant.

(2) Reasonableness of the Findings

[28] The Applicant argues that the Report contains numerous erroneous findings by the Investigator, which result from her ignoring critical evidence submitted and improperly assessing the evidence.

[29] The Applicant says that the discriminatory and retaliatory nature of his "mixed" performance reviews in 2014, 2015, and 2016 demonstrate adverse differential treatment on prohibited grounds given the fact that, prior to those reviews, he had received mostly "solid" performance reviews under different managers. Although the Applicant acknowledges that the Investigator took note of his previous performance reviews, he notes that she erred in accepting the Respondent's explanation that the previous manager conducted his performance reviews

subjectively and did not closely supervise the Applicant. The Applicant says that the Investigator failed to take into account the fact that his previous manager was only in the position for nine months and that other previous managers also gave him "solid" performance reviews. Moreover, the Applicant argues that the Investigator failed to analyze the reason why he was not given a mid-year performance review in 2015 despite having achieved the highest number of restructuring referrals and the highest number of successful restructures.

[30] The Applicant says that the Investigator also erred by finding that the 2015 corrective action against him was not based on retaliation or prohibited discriminatory grounds. The evidence clearly demonstrated that it was not done in good faith. In fact, he notes that the email evidence provided demonstrates that he did not improperly request Mr. Matondo to reinstate a MasterCard but rather asked him to review the account. Given the fundamental flaw in the Respondent's reasons for taking corrective action in 2015, the Applicant argues that it is clear that this was done in retaliation or on prohibited discriminatory grounds.

[31] Furthermore, the Applicant says that the Investigator unreasonably found that the difference in incentive payments between himself and his colleague, Mr. Karia, who had less seniority and lower performance statistics, was not due to retaliation or discrimination. Given the circumstances, the only substantial difference was that his colleague did not file a human rights complaint against the Respondent.

[32] The Applicant also says that the Investigator erred by failing to address the adverse differential treatment he received with regard to the seating positions of black employees who

expressed their opinions to management or complained to the Commission. He notes that the Investigator erred by not properly considering the fact that black employees were segregated from the rest of the group and placed near management and that the vast majority faced corrective action.

[33] In addition, the Applicant says that the Investigator failed to investigate the examples he provided of how he was aggressively managed and "set up" or portrayed negatively by management. In particular, the Applicant notes that the Investigator failed to investigate the false accusation made by Ms. Beltran that he did not transfer a call "warmly to her," which was later proven false upon reviewing the recording of the conversation. Moreover, the Applicant states that the Investigator erred by accepting Mr. Matondo's explanation for falsely accusing him of being a security threat without corroborating evidence. This was despite the fact that Mr. Matondo had already misrepresented the Applicant's request to review a MasterCard account in order to justify corrective action.

[34] Finally, the Applicant states that the Investigator erred by failing to recognize the retaliatory and discriminatory nature of the adverse differential treatment of the Applicant when he returned to work following his medical leave. The Applicant notes that the Respondent never notified him in writing that he could not return to work and escorted him off the premises causing him "total humiliation." For the Applicant, this is critical evidence that was not properly considered by the Investigator. Moreover, upon his return, the Applicant notes that it took more than one year, and government involvement, to correct the payroll error made by the Respondent. It was therefore unreasonable for the Investigator to simply excuse this error

because it was eventually corrected. The Applicant notes that the Investigator also unreasonably omitted to mention the fact that the Respondent refused to pay him his monthly incentive for March 2016.

B. *Respondent*

[35] The Respondent argues that: (1) the Applicant's affidavit should be struck out, in full or in part, as it almost entirely consists of opinion, argument, and conjecture; (2) the Investigator thoroughly considered the evidence and submissions in this case and there is no evidence demonstrating that she was biased; and (3) the Investigator's findings were reasonable, responsive to the submissions of the parties, and defensible in respect of the facts and the law. For these reasons, the Respondent submits that this application for judicial review should be dismissed. Moreover, the Respondent asks for costs given that the Applicant's current complaint and application for judicial review is largely based on a similar one filed and dismissed a handful of years ago, and given that the Applicant's affidavit is improper.

(1) Affidavit of Applicant

[36] The Respondent submits that the Applicant's affidavit is improper as it almost entirely consists of opinion, argument, and conjecture. The Respondent points out that Rule 81 of the *Federal Courts Rules* makes it clear that affidavits are "confined to facts within the deponent's personal knowledge." As such, given that the affidavit is "replete" with improper content, the Respondent asks this Court to strike it in its entirety. See *Lostin v Canada (Citizenship and*

Immigration), 2013 FC 1098 at para 14, and *Canadian Tire Corporation v Canadian Bicycle Manufacturers Association*, 2006 FCA 56 at paras 7-8 and 15 [*Canadian Tire Corporation*].

(2) Neutrality and Thoroughness of Investigation

[37] The Respondent argues that the Applicant has failed to provide any basis for his allegation that the Investigator was biased. A thorough assessment of the complaint was undertaken in this case.

[38] The Respondent states that the burden of demonstrating either the existence of actual bias or a reasonable apprehension of bias rests on the person alleging it. This is a high burden and mere suspicion of bias will not suffice. See *Hughes v Canada (Attorney General)*, 2010 FC 837 at para 21 [*Hughes*]. The Applicant has provided no basis for his allegation of bias. The Investigator properly considered witness evidence in this case and attempted, on multiple occasions, to reach out to the Applicant's witnesses, who either did not return the Investigator's calls or, except for Mr. Baroum, refused to testify.

[39] Moreover, the Respondent says that the Investigator satisfied the principle of thoroughness in this case, as she did not make any unreasonable omissions during the investigation. Only where there is a failure to consider "obvious crucial evidence" will judicial review be justified. See *Slattery v Canada (Human Rights Commission)*, [1994] 2 FC 574 at para 69 [*Slattery*]. In this case, the Applicant simply makes bald assertions that the Investigator did not investigate all the issues raised in his complaint or consider all the evidence he provided.

However, it is trite law that an Investigator is not obliged to refer to every allegation or every piece of evidence submitted. See *Slattery,* at paras 68-70.

(3) Reasonableness of the Findings

[40] The Respondent states that the Report was based on a full and reasonable consideration of the evidence. It was also responsive to the submissions of the parties and is defensible in respect of the facts and the law. This Court has recognized that disagreement with an investigator's conclusions is not sufficient to quash the Commission's acceptance of a report. In this case, the Report's findings are reasonable and this application for judicial review should be dismissed.

[41] More specifically, the Respondent states that the Investigator assessed the failure of management to provide the Applicant with a mid-year performance review in 2015 in favour of corrective action. The Respondent notes that the Investigator did not dispute this fact. However, the Investigator ultimately found that, beyond the Applicant's own bald assertion, there was no evidence to demonstrate that the corrective action was linked to a prohibited ground of discrimination or was retaliation for his previous complaint. The Respondent says that this was a reasonable conclusion that was based on the evidence before the Investigator.

[42] As regards the Applicant's assertion that the Investigator failed to find that his lower incentive payment as compared to a colleague was the result of retaliation or discrimination on a prohibited ground, the Investigator made a reasonable finding based on the evidence before her. Beyond the Applicant's own bald assertion, there was no evidence to demonstrate that the

comparatively lower incentive was linked to a prohibited ground of discrimination or was retaliation for his previous complaint.

[43] As regards the Applicant's return to work, the Respondent notes that the Investigator reasonably concluded that there was no evidence of differential treatment in this case given the short delay after which he was able to return to work and the eventual correction of the payroll error.

[44] With regard to seating arrangements, the Respondent notes that the Applicant has provided no basis for how the Investigator's findings in this regard were unreasonable. In fact, the Respondent says that the Investigator's conclusion on this issue was reasonable and entirely defensible in light of the evidentiary record before her.

[45] Finally, regarding the Applicant's incident with Mr. Matondo, the Respondent argues that the Applicant, other than expressing his disagreement with the conclusion reached, does not indicate how the conclusions of the Investigator on this issue were unreasonable. In sum, the Respondent says that while the Applicant may feel that the conclusions reached by the Investigator in the Report were incorrect, his subjective belief or feeling that discrimination has occurred is not sufficient.

VIII. ANALYSIS

A. *Introduction*

(1) The Application

[46] The Applicant, who is representing himself in this application, is asking the Court to review the Decision of the Commission not to refer his complaint to the Canadian Human Rights Tribunal for an inquiry. Notwithstanding problems with his written materials, the Applicant is highly articulate and represented himself with conviction at the oral hearing of this matter in Toronto. I am convinced that he genuinely believes he has suffered discrimination in his place of work although, of course, this does not prove that it has occurred or that the Decision under review is biased or unreasonable.

[47] Generally speaking, his complaint is that BMO retaliated against him for filing a previous complaint with the Commission in August 2010, and discriminated against him by treating him in an adverse differential manner on the basis of colour, national or ethnic origin, race, and/or disability.

[48] In the present application before me, the Applicant alleges that the Decision was not impartial, that the investigation that led to the Decision was not sufficiently thorough, and that the Investigator – and hence the Commission – came to unreasonable conclusions.

[49] In his submissions to the Court, the Applicant asserts a general conspiracy theory to the following effect:

a) The issue of retaliation and discrimination within BMO has become an issue of public concern;

b) The concerns of black BMO employees are being silenced by a fear of retaliation; and

c) The complaints of black BMO employees have been dismissed by the Commission because, in most cases, the investigators are not impartial.

[50] These general allegations were not before the Commission in the present case and there is certainly no evidence before me to establish them. Consequently, these are not matters that require review as part of this application.

[51] The Applicant has also filed an affidavit with the present application that is not admissible. It is not confined to facts within the Applicant's personal knowledge and consists almost entirely of opinion, argument, and conjecture. This is contrary to Rule 81 of the *Federal Courts Rules* and governing Federal Court jurisprudence. The Applicant does not attempt to provide the Court with relevant facts so that the Court can assess them for itself but, rather, he provides his own assessment of the evidence and states his disagreement with the assessment and the conclusions of the Investigator. See *Canadian Tire Corporation*. The Applicant's assessment of the evidence and his views on the mistakes made by the Investigator are not factual evidence and can be made by way of written and oral submissions. Consequently, I have disregarded all portions of the Applicant's affidavit that contain argument, surmise, conjecture, opinion, and

hearsay. Instead, my reliance upon the affidavit is confined to any statements of facts that are within the Applicant's knowledge.

[52] The Applicant also alleges that the whole Decision is tainted by a lack of impartiality and bias. The Applicant, however, has provided the Court with no evidentiary basis for these serious accusations. He appears to be of the view that because the Investigator did not conduct a thorough enough investigation from his perspective and did not confirm his own views, the whole process was therefore biased.

[53] There is no evidence of actual bias in this case and the test for a reasonable apprehension of bias as set forth in *Hughes* is as follows:

> [20] The test for determining whether actual bias or a reasonable apprehension of bias exists in relation to a particular decision-maker is well known: that is, the question for the Court is what an informed person, viewing the matter realistically and practically - and having thought the matter through – would conclude. That is, would he or she think it more likely than not that the decision-maker, either consciously or unconsciously, would not decide fairly: see *Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369, at p. 394. See also *Wewaykum Indian Band v. Canada*, [2003] 2 S.C.R. 259 at paragraph 74.
>
> [21] The burden of demonstrating either the existence of actual bias, or of a reasonable apprehension of bias, rests on the person alleging bias. An allegation of bias is a serious allegation, which challenges the very integrity of the decision-maker whose decision is in issue. As a consequence, a mere suspicion of bias is not sufficient: *R. v. R.D.S.*, [1997] 3 S.C.R. 484 at para. 112; *Arthur v. Canada (Attorney General)* (2001), 283 N.R. 346 at para. 8 (F.C.A.). Rather, the threshold for establishing bias is high: *R. v. R.D.S*, at para. 113.
>
> [22] The Canadian Human Rights Commission is clearly subject to the duty of fairness when it is exercising its statutory powers to investigate human rights complaints: *Syndicat des employés de*

> *production du Québec et de l'Acadie v. Canada (Human Rights Commission)*, [1989] 2 S.C.R. 879 ("*SEPQA*"). This requires that the Commission and its investigators be free from bias.
>
> [23] That said, because of the non-adjudicative nature of the Commission's responsibilities, it has been held that the standard of impartiality required of a Commission investigator is something less than that required of the Courts. That is, the question is not whether there exists a reasonable apprehension of bias on the part of the investigator, but rather, whether the investigator approached the case with a "closed mind": see *Zündel v. Canada (Attorney General)* (1999), 175 D.L.R. 512, at paras.17-22.
>
> [24] As the Court stated in *Canadian Broadcasting Corp. v. Canada (Human Rights Commission)*, (1993), 71 F.T.R. 214 (F.C.T.D.), the test in cases such as this:
>
> > [I]s not whether bias can reasonably be apprehended, but whether, as a matter of fact, the standard of open-mindedness has been lost to a point where it can reasonably be said that the issue before the investigative body has been predetermined.

[54] For reasons that will become clear when I address the reviewable errors alleged by the Applicant, this test has not been satisfied in the present case. There is no evidence that the Investigator improperly favoured management witnesses, disregarded the Applicant's own evidence or failed to investigate sufficiently because of a reasonable apprehension of bias in favour of the Respondent. The Applicant's view is that management witnesses cannot be counted on to give truthful evidence because they must support BMO and are inevitably biased. This is, of course, a relevant consideration for the Investigator with regard to evidence from management witnesses in the same way that the Investigator must be wary of the Applicant's self-interest when assessing his evidence. The Applicant's view appears to be that BMO witnesses are unreliable and that he is the only one who tells the truth. However, the Applicant has provided no convincing evidence that any BMO witnesses lied or that the Investigator demonstrated actual

bias or reasonable apprehension of bias when investigating his complaints. Even if the Investigator made mistakes or acted unreasonably this would not, *per se*, demonstrate any form of bias.

(2) Specific Allegations

[55] Many of the Applicant's submissions appear to be attempts to have the Court reweigh and reconsider evidence in order to reach a different conclusion from that of the Investigator. This is not the purpose of judicial review. Consequently, I will only address those instances where the Applicant alleges a reviewable error that is subject to judicial review.

(3) Failure to Investigate

[56] The Applicant says that he was constantly harassed and humiliated by his managers and was sometimes blamed for things he did not do. For example, he says that Ms. Beltran once angrily blamed him for not transferring a call "warmly" to her, which was subsequently proven false when they listened to the monitored call that demonstrated that he did indeed transfer the call "warmly." He says that the Investigator "didn't investigate that matter despite the evidence [he] provided to her."

[57] The "matter" that the Investigator did not investigate is the Applicant's complaint that his managers were "micromanaging" him in an attempt to intimidate and discredit him as retaliation for his first complaint to the Commission in 2010. He says that their approach amounted to

harassment and humiliation that caused mental illness, which forced him to go on short-term disability leave.

[58] The Investigator explicitly set out the Applicant's allegations that he said demonstrated he had been treated in an adverse differential manner. These allegations include that he was "managed more aggressively" and that he was "set up and portrayed negatively."

[59] The Decision contains extensive information and description as to how the allegations were investigated and considered by the Investigator. Failing to mention whether the Applicant had spoken "warmly" when transferring a call is not a significant or sufficiently material matter to require mention in the Report as whether the Applicant had spoken "warmly" is a highly subjective question. Moreover, the Investigator is not required to mention every detail, irrespective of its importance and materiality. See *Tahmourpour v Canada (Solicitor General)*, 2005 FCA 113 at para 39; *Slattery*, at paras 68-70. Regardless, the Applicant has not established before me the evidence to demonstrate that he did speak "warmly" to Ms. Beltran.

(4) Returning to Work

[60] In written submission, the Applicant asserts as follows:

> After 6 months of short term disability, I sent to my employer my Doctor's document stating that I was able to return to work on September 6 2016. On my return, I was shocked to see that my manager not only asked me to go home but also escorted me out of the premises. This was a total humiliation and it was clear message from my employer that I wasn't welcome. In the first place, my employer shouldn't ask me to go home because they didn't comply with the Federal Government employment Law section 34 (3), which states that "Where the employer cannot return an employee

> to work within 21 days after the date of receipt of the certificate referred to in subsection (1), the employer shall within those 21 days, notify in writing the employee....” (see my affidavit section 2.M Exhibit 12- last page). My employer never notified me in writing the reason why I shouldn’t return to work on September 6. After I was sent home, I had to wait 3 to 4 weeks before I returned to work on October 5. Until now I haven’t got paid yet for the 3 weeks that I stayed home.

[61] In keeping with the general approach of the Applicant’s submissions, he does not state the reviewable error the Investigator committed in dealing with this issue.

[62] As the Decision makes clear, the allegation that, upon his return to work on September 6, 2016, he was escorted from the building by Mr. George in a humiliating way, was investigated as follows:

> 94. The respondent states that on September 6, 2016 the complainant reported to work and was advised by Mr. George that he was not yet cleared to work and that he should return home pending a confirmation. The complainant was instructed to contact his doctor, obtain medical clearance and submit the documentation to OHG.
>
> 95. The respondent denies that Mr. George escorted the complainant out of the building. The respondent states that Mr. George and the complainant continued to chat while walking towards the exit. The respondent states that at no time was it Mr. George’s intention to accompany the complainant for the purpose of ensuring he left the building: he was simply having a conversation with him while he walked towards the exit.

[63] Mr. George’s evidence was as follows:

> 101. Mr. George states that when an employee goes on a leave of absence the third party disability provider usually communicates with the manager about the employee’s return to work information. Mr. George advises that during the transition, Ms. Beltran would have received the initial return to work information, but then the

> updates were sent to him. Mr. George states that the complainant attempted to come back to work in September 2016, but they did not have the medical clearance for him to return to work. Regarding the complainant's allegation that he tried to call Mr. George but he did not return his calls, Mr. George states that given the time elapsed, he does not specifically recall. However, he states that "*I would have called him back if he had called me. I would have told him that he needs to get cleared.*" Mr. George denies that he "escorted" the complainant out of the building. He states that if someone needs to be escorted out of the building, then security is called, and that was never done with the complainant.

[64] The Investigator's analysis and conclusions were as follows:

> 102. The complainant states that despite being ready to return to work on September 6, 2016, he was prevented from returning to work and was escorted out of the workplace.
>
> 103. The evidence indicates that beginning in May 2016, the complainant's physician identified restrictions/limitations in the complainant's ability to return to work (limited in ability to understand instructions, ability to concentrate, limited in social interactions, etc). The respondent states that the limitations were inconsistent with the complainant's role working in a call centre, given the need for the complainant to deal with customers on the telephone, pay attention to detail and follow processes and multitask. From May 2016, until August 2016, the respondent received updates from OHG regarding the complainant's ability to return to work.
>
> 104. The evidence indicates that the complainant attempted to return to work on September 6, 2016, however the respondent had not received confirmation from OHG that he was cleared to return to work. As such, it is reasonable that the respondent informed the complainant that he was not yet cleared to return to work. Although the complainant takes issues with Mr. George's walking him to the door of the building, there is nothing to suggest that the complainant was treated differently. As indicated by Mr. George, where an employee is to be escorted from the building, security would have been called. In this case it appears that security was not involved. Without further supporting evidence, there is no indication that the complainant was treated in an adverse differential manner.

> 105. The complainant has alleged that he was prevented from returning to work. However, the evidence indicates that the complainant was returned to work in October, 2016 (approximately one month later than his doctor recommended). A one month delay, given the complexity of the complainant's restrictions, does not appear to be unreasonable. There does not appear to be sufficient evidence to suggest that the complainant was treated differently in this regard. As such, there is no need for further analysis into this allegation.

[65] In the present application, the Applicant submitted that he should not have been asked to go home on September 6, 2016, because he was not notified in writing that he could not return to work. However, he does not dispute that he had not been cleared for work. In essence, he appears to be suggesting that, although he had not been cleared for work by OHG, he should not have been sent home and, in particular, Mr. George should not have escorted him out of the building in a humiliating way.

[66] The evidence from the Respondent on this issue was:

> 93. The respondent states that on August 23, 2016, OHG received additional medical information from the complainant's physician recommending a gradual return to work beginning September 6, 2016. The respondent states that no restrictions or limitations were given, however the physician commented that the respondent should change the complainant's seating arrangement away from the managers. The respondent states that the physician did not indicate why and did not specify the duration of the requested accommodation. The respondent states that OGH made three attempts to reach the complainant's physician to obtain further clarification, however they were unable to reach the physician. The respondent states that because OHG was unable to secure clarification on the accommodation requirements, the complainant was not yet deemed medically cleared to return to work.

[67] The Applicant contends that his being asked to go home on September 6, 2016 was just another exercise in humiliation that the Investigator overlooked. Clearly, the Investigator established that there were good reasons for asking the Applicant to return home on that day, that Mr. George's evidence as to how he left the building was contrary to the Applicant's, and that attempts were made to contact the Applicant's physician to receive an explanation as to why the Applicant was not cleared to work.

[68] There is nothing unreasonable about the Investigator's conclusions that there was insufficient evidence to establish that the Applicant was treated differently in this matter. The Applicant may have felt humiliated, but this is not, *per se*, evidence of differential treatment.

(5) Incorrectly Paid Upon Returning to Work

[69] On this issue, the Applicant argues in writing as follows:

> When I was finally able to resume work, my employer wasn't willing to pay me accurately (missing my worked hours). I contacted the ministry of Employment Social Development Canada and made a complaint about my payroll issue. After an investigation, it was concluded that my employer violated section 247 (see my affidavit section 2.N Exhibit#13). The Canadian Human Rights Commission's investigator agreed that there was an adverse differential treatment but concluded in her report that this issue wasn't good enough to classify the matter as retaliatory case. The investigator at paragraph 111 on her report (see Affidavit of Karen section 1F) stated that the respondent acknowledges that an error in payroll may have occurred, resulting in the complainant not being paid properly, however, it appears that this was corrected. I would like to make a correction on that matter. My employer didn't acknowledge the mistake when I contacted them in various occasions to discuss about my payroll's issues. They admitted the error occurred 1 year later after an investigation was completed by the Federal Government inspector.

> Should I not contacted the Ministry of Employment Social and development, my employer wouldn't paid me what I deserved.

[70] The Applicant's assertions fail to engage with the facts of how an error occurred and how it was corrected. The matter was fully investigated by the Investigator.

[71] The fact that the Applicant was not allowed to return to work on September 6, 2016, is no indication that he was not welcome back. As set out above, it was because he did not have OHG clearance. The payment errors were fully explained and dealt with by the Investigator. The Applicant now asks the Court to reconsider these matters and reach a different conclusion from that of the Investigator on the same facts. Contrary to what the Applicant asserts, it is not clear that BMO was "bullying" him financially in order to force him to resign. There was insufficient evidence before the Investigator to support the conclusion that the Applicant now says should have been drawn.

(6) Corrective Actions

[72] In written submission, the Applicant complains that corrective actions were taken against him, as well as other black employees of BMO, simply because they expressed opinions different from those of management:

> Here is another example of an adverse differential treatment that the investigator didn't take into consideration. All black employees (Myself, Mrs Boboy still BMO's employees, Mr Muco was dismissed, Ms Weir dismissed for refusing to join the segregating area, Mr Diankulu resigned) who expressed their opinions differently than the Manager or made a complaint to the Canadian Human Rights Commission were subject of retaliation by segregating and placing them on corrective actions. Our seating position was isolated from the rest of the floor. We were sitting at

> the corner of the floor where we could be monitored on regular basis (My Manager and Senior Manager sitting behind us). It is difficult to understand that the investigator from the Canadian Human Rights Commission didn't think or believe that segregating employees from the same ethnic background (all black) should be considered as an adverse differential treatment (see my Affidavit section 2J Exhibit 9). 98% of US had been placed a corrective actions. In the second question of the Investigator to Ms. Carruthers (Bank of Montreal's employees relation) (see Affidavit of Ms. Karen Carruthers, section 2.1). Ms Carruthers was asked to provide the name of 4 employees who were place on corrective action. Unfortunately, the response wasn't available on the investigation's report and that issue wasn't raised on the report.

[73] In dealing with the Applicant's specific complaints of corrective and retaliatory action again him, the Investigator undertook a thorough investigation and analysis and came to the following conclusion:

> 120. Except for the bald assertion by the complainant that the corrective act was linked to a prohibited ground of discrimination, there does not appear to be any supporting evidence. The respondent has provided evidence to demonstrate that the complainant's performance was below that of his team, and that he had areas which needed improvement. It appears that his unwillingness to acknowledge his performance was the reason for the corrective action. The corrective action document provides examples of where management was concerned with his performance. Given that there is no supporting evidence to demonstrate that the corrective action was linked to a prohibited ground of discrimination, the analysis into this alleged [*sic*] did not proceed.

[74] As the Investigator makes clear in the Report, several witnesses addressed the seating arrangements in evidence:

> 51. Regarding the seating arrangement, Ms. Riddell states that the managers did not have their own offices, and were "on the floor" with the agents. Ms. Riddell confirms that in 2015 the seating arrangement in the call centre changed and the agents were organized into teams (i.e. morning, afternoon and the night teams

> were all together). Ms. Riddell states that they wanted to organize the agents into teams so it would be easier for managers and team leads to do "one on ones" and "side by side" observations "without going all over the floor." Ms. Riddell states that she placed herself with the night team, as this meant from 7:00am-2:00pm she "had the area with no one around me". She states that Renee Beltran and Freddy Matondo were seated near each other.
>
> 52. Ms. Riddell states that they decided to seat the bilingual employees next to Freddy Matondo (the Team Lead) as he was also bilingual and could therefore more easily assist the bilingual agents with their calls. She states that many of the bilingual employees were black; however, she disagrees that "all the black employees" were placed next to Ms. Beltran.
>
> 53. Freddy Matondo, Team Leader states that from his observations, Ms. Beltran treated the complainant the same as she treated anyone else. He states that he cannot comment on how Ms. Riddell treated the complainant as he did not witness any direct interactions between them. However, he stated that he has not witnessed any discrimination from management. During the interview, Mr. Matondo self identified as a "black employee, originally from Congo." He denied that the black employees were isolated or all seated together. He further states that "in my point of view I have not seen any difference. We are all treated in the same way. I have been here for 14 years. It is more about performance. What you can do and what you cannot do."
>
> …
>
> 57. Regarding the allegations that management segregated the bilingual black employees, Mr. Karia states "I don't agree with that. No, there were other black people that were in other areas. Another black employee sat right by me. I never saw certain people on one side and certain other people on another. Never anything like that."

[75] Given the evidence before the Investigator, her conclusion on this issue – although they failed to satisfy the Applicant – cannot be regarded as unreasonable.

(7) False Accusations

[76] In written submissions, the Applicant asserts that BMO management made up stories about him and twisted his words. However, he focuses upon the actions of his Team Lead, Mr. Matondo:

> Making up stories against me, planting evidences and twisting my words had become a routine at workplace. For example, Mr Matondo (Team Leader) who wrongly accused me of requesting a reinstatement of Master Card back in July 2015. I have never requested a reinstatement of Master Card. On my email back in May 2015 (see my affidavit section 2.E Exhibit #4), I was clear on my email that I was asking Mr. Matondo to review the account. There is a difference between requesting and reviewing. Ms. Beltran decided to use that misinterpretation from their part as of the reason that I should be placed on corrective action. (see My affidavit section 2.C Exhibit#2- paragraph 2). The Bank of Montreal on their response to my complaint stated that Ms. Beltran (Manager) misinterpreted review as a request. Despite the fact that my employer admitted that my word was twisted, the Investigator didn't think that it was an adverse differential treatment.
>
> In December of 2015, I was wrongly accused again by Mr. Matondo of harassing and threatening him and told him that God is watching. After a very strange investigation (I have never received nothing in writing, neither the foundation of the accusation nor the final report of the investigation), I was found not guilty. Unfortunately, the Investigator didn't find that it was necessary to classify that as an adverse differential treatment. The investigator on her report (See affidavit of Karen Carruthers, section IF paragraph 71) went even far by stating on her report that there are no supportive evidences that Mr. Matondo was lying. This proves how partial the investigator was. First of all, Mr. Matondo is the accuser and he is the one who supposed to provide evidences that what he was accusing of was true. He wasn't able to provide a single evidence or a witness. Secondly, the investigator could also say that there is no evidence that Mr. Matondo was telling the true. That statement proves that investigator wasn't impartial and she was standing by Mr. Matondo's false allegation. She kind of giving Mr. Matondo a benefit of doubt without cross examining Mr. Matondo's responses (evidences, witnesses). This defamation has caused a serious damage to my reputation and my career. I applied for different

> positions within the Bank of Montreal, unfortunately I was turn downed on each application. (see Affidavit of Karen Carruthers, section 2.B CHRC SUPP008 027).
>
> I have never been a violent person and I will never be. I was raised as a peace maker not a trouble maker. My perfect behavior in the Canadian society has demonstrated by promoting peace around the world during my academic at University of Sudbury. I was a president of Angolan Student against landmines (Member of the Canadian Landmines Foundation). Mr. Matondo's accusation had tarnished my image and the reputation that took me years to build.
>
> The Investigator shouldn't be considered Mr. Matondo as a witness because he has been constantly lying about me. There was a clear indication that there was a conflict of interest by interviewing Mr. Matondo because he has been constantly lying about me. Also, he was promoted weeks before the interrogation. The true is that he was being forced to lie. He himself confessed to me that he was caught in the middle and he was very tired of being put on that situation.
>
> Prior Mr. Matondo's accusation, I had contacted Ms. Beltran and asked her that going forward, I would like to have a third party witness in our one on one meeting in order to avoid the misinterpretation of my word (see my affidavit section 21 Exhibit # 8). This is a proof that I knew that my employer was planning to plant evidences against me. Prior to Mr. Matondo's false accusations, There was another Manager by the name of Jag Brar who went wrongly report me to my manager that I was talking to my colleague while I was on wrap time (time after a phone conversation with the customer). When I told my manager my side of story, she asked to confront Ms. Brar. I categorically refuse to do so because I could be accused of an aggressor or a harasser like Mr. Matondo did. I knew that my employer was preparing a set up.

[77] These assertions do not have sufficient factual affidavit evidence to support them. Given the evidence, the Investigator's conclusions on this issue were reasonable.

[78] The Investigator examined all evidence related to these matters and came to the following conclusions:

> 71. The complainant alleges that management is lying about him, setting him up and portraying him negatively to destroy his career. He refers to two incidents (one involving another manager Jag Brar, and another involving Team Lead Freddy Matondo). The evidence of Mr. Matondo is that the complainant made statements to him that were concerning and that the incident was "scary". The complainant denies that he made the statements as alleged by the respondent. Regardless of whether or not the statements were made by the complainant, the evidence of Mr. Matondo was that he reported the incident to management. Upon Mr. Matondo reporting the incident, the respondent had an obligation to investigate the situation. In the end it appears that the respondent's Security Services department determined that there was no threat to employee safety and the matter was closed. It appears that no disciplinary action was taken against the complainant. There is no supporting evidence to demonstrate that Mr. Matondo lied about the incident, or that management was "setting him up." Rather, it appears that an incident was reported, investigated and closed.
>
> 72. Regarding the incident with Jag Brar, the evidence of Ms. Beltran is that Ms. Brar reported an incident to her about the complainant and another employee. Upon discussing the matter with the complainant, it is reasonable that Ms. Beltran would suggest that the complainant go and speak to Ms. Brar if he had concerns about the incident. It appears that no disciplinary action was taken as a result of this incident. The complainant has not provided any evidence to support his allegation that this was a "set-up".

[79] Apart from expressing his disagreement with these conclusions, the Applicant points to nothing in the Investigator's investigation and analysis that is unfair or unreasonable. In oral argument before me, the Applicant said that his principal concern here was that the Investigator was not thorough enough. He stated that the accusations against him may have been dealt with internally and in an informal way, but this does not explain why Mr. Matondo made false accusations against him, and the fact that he did demonstrate management's hostility towards him. However, the Investigator addressed these matters fully in paragraph 71 of the Report set out above.

[80] In other words, other than the Applicant's own assertions, there is no evidence that Mr. Matondo lied. Further investigation was not likely to settle who should be believed. Moreover, there was insufficient evidence of differential treatment.

[81] The Applicant alleged that Mr. Matondo falsely accused him. Therefore, the Investigator had to decide whether there was any evidence to support this accusation other than the Applicant's bald assertion. There was no supporting evidence that Mr. Matondo had lied about the incident. This does not mean that he was telling the truth, but there was simply nothing to support the Applicant's contentions on this issue. Finding that there is no evidence to support an assertion is not an indication of unreasonableness or bias.

(8) Ms. Weir's Statement

[82] The Applicant complains that the Investigator improperly contacted his witnesses, who had refused to come forward due to the Investigator's decision to not allow them to testify confidentially. This appears to be an allegation that the Investigator acted in bad faith:

> During the investigation, I contacted Ms Huber (The Investigator) and asked her if some of witnesses can come to testify without their names being mention on the report. My witnesses were willing to come forward and testify against Bank of Montreal but they didn't want their names to appear in the final report of the investigation. Ms. Huber said that whoever comes forward to testify, her/his will be mentioned in the report. For that reason my witnesses refused to come forward. As a result, l told the investigator that she can only interview Mr. Olivier Baroun who didn't mind to see his name in the report. Unfortunately Ms, Huber went and tried to contact those individuals who refused to be as witnesses. How the investigator ended up to have their contact informations without their consent. By trying to contact Ms. Boboy, Mr Diankulu, Ms. Weir. Mr. Muco without them knowing how their numbers were given to the Canadian Human Rights

> Commission, they were all scared. Honestly they were concerned about their privacy information. Wasn't there a breach of privacy? I wasn't the one who gave her the contact informations (Telephone number and email). I would like to know who gave the contact informations of these 4 people to the Investigator. For example, Mr Diankulu's, Muco and Ms. Weir's telephones aren't listed in Canada 411. How she ended to have their numbers? What was the real intention of the Investigator by trying to get in touch with them, knowing that they were refusing to be cross-examined? If the investigator was acting in good faith because she wanted to hear their version of story, she could mention Ms. Weir's statement (see my affidavit section 2J Exhibit#9) on her report. Unfortunately, the Investigator was more interested to mention that she tried to contact them but wasn't interested to read what one of them put on the statement.

[83] The Investigator explains the situation as follows:

> 4. The complainant was asked to provide a list of witnesses to his complaint. He identified Olivier Baron. The investigator interviewed Mr. Baron and his evidence is contained in this report.
>
> 5. The investigator attempted to interview a number of the complainant's co-workers (current and former}, who he alleged were similarly discriminated against on the basis of colour, national or ethnic origin, and/or race. Specifically, he identified the following individuals: Sharifah Weir, Freddy Muco, Ricky Diankulu and Mie-Josee Boboy. The respondent provided contact information for these individuals. The investigator attempted but was unable to interview these individuals for the following reasons:
>
> a. Ms. Weir (former employee) spoke with the investigator on May 14, 2018, and initially agreed to an interview. However, prior to beginning the interview (scheduled on May 23, 2018) she indicated that she had settled her own legal claim against the respondent and was unsure if her participation would affect her own settlement. As such the interview was postponed pending confirmation from her lawyer. On May 25, 2018, Ms. Weir contacted the investigator and indicated she had arranged to speak to a lawyer and would notify the investigator if she decided to proceed with the interview. As of the date of this report, Ms. Weir has not contacted the investigator.

> b. The investigator telephoned the number for Mr. Muco (former employee) on May 14, 2018, however the individual who answered the phone indicated that it was the wrong number, and that the number had been reassigned to someone else. A search on Canada411 returned no results for F. Muco.
>
> c. The investigator telephoned the number for Mr. Diankulu (current employee) on May 14, 2018, and left a voice message explaining the nature of the call and asking Mr. Diankulu to call back to arrange for an interview time. Having not received a call back, on June 15, 2018, the investigator left another message for Mr. Diankulu asking him to call back to arrange for an interview. As of the date of this report, Mr. Diankulu had not contacted the investigator.
>
> d. The investigator contacted Ms. Boboy (current employee) via email on August 15, 2018, and requested an interview. In response, Ms. Boboy declined to participate in the investigation, citing personal reasons.

[84] As regards Ms. Weir, it appears that she declined to be interviewed. She did not confirm that she wished to participate in the process, including participation by witness statement. The Investigator was simply honouring Ms. Weir's obvious reluctance to participate.

[85] The Applicant now says that the Investigator should have taken into account the written statements that Ms. Weir provided. In this statement, Ms. Weir says that she did observe management putting the Applicant down and that she objected on his behalf. The statement also makes many general unsubstantiated statements about how difficult it is "for someone of colour to get ahead" and that people of colour "were being singled out and eventually fired for matters that could be resolved." However, no specifics were provided. Mr. Weir ends her statement with the words "I hereby am in support of Claudio Lubaki and any accusations he makes in regards to his treatment at BMO, from being singled out, harassed and discriminated against." Such indiscriminate support for "any accusations" does not suggest a reliable unbiased witness, which

is why the Investigator would need to interview Ms. Weir because this evidence could not be relied on. Notwithstanding Ms. Weir's general statement that it is difficult for people of colour to get ahead at BMO, the record shows that the Applicant has been promoted since he made his first discrimination complaint to the Commission. Despite the Investigator's attempts, Ms. Weir did not agree to an interview. The Investigator reasonably decided not to rely upon Ms. Weir's evidence for the simple reason that it could not be clarified or tested by interview. All of the evidence relied on came from individuals who agreed to be interviewed, including the Applicant's own witness, Mr. Baroum.

(9) 2015 Mid-Year Performance Review

[86] The Applicant asserts that his manager chose to hide and disregard his good 2015 mid-year performance review because it would contradict how "they have been portraying [him]" since filing his 2010 complaint to the Commission.

[87] The Report deals with this matter fully:

> 37. The complainant states that he was placed on a corrective action in July 2015. He refutes that his performance deteriorated in 2015 and believes he was actually improving month after month.
>
> 38. The respondent explained that the complainant submitted his mid-year review around June 15, 2015 and was on leave from July 14 to 27, 2015. The respondent states that both Ms. Riddell and Ms. Beltran decided to address the complainant's performance issues (continued errors; failure to follow SOPs, frequent customer complaints and escalations to the manager on accounts that he had handled) with a Corrective Action instead of a mid-year performance review in order to emphasize the seriousness of their concerns and to clearly set out the expected behaviours.

> Analysis and Conclusion:
>
> 39. It is not in dispute that instead of completing a mid-year performance review, the respondent placed the complainant on a corrective action. Therefore, it appears that the complainant was treated differently than his peers. Given that a corrective action is a form of discipline, it appears that this differential treatment would have negative consequences. As such, with respect to the corrective action, the complainant may have been treated in an adverse differential manner. The reasons for the corrective action will be considered under the next step in the analysis (i.e. link to a prohibited ground).
>
> …
>
> 115. The respondent explained that during 2015, the complainant's performance deteriorated to a point where he was below target in two of the five indicators. As a result the complainant was placed on a Corrective Action Step 1 (of a three step program) on July 29, 2015 and was not considered for a salary increase. The respondent states that the Corrective Action was to address his lack of adherence to processes and his lack of receptivity to coaching and feedback.
>
> …
>
> 120. Except for the bald assertion by the complainant that the corrective act was linked to a prohibited ground of discrimination, there does not appear to be any supporting evidence. The respondent has provided evidence to demonstrate that the complainant's performance was below that of his team, and that he had areas which needed improvement. It appears that his unwillingness to acknowledge his performance was the reason for the corrective action. The corrective action document provides examples of where management was concerned with his performance. Given that there is no supporting evidence to demonstrate that the corrective action was linked to a prohibited ground of discrimination, the analysis into this alleged did not proceed.

[88] The Applicant provides nothing to refute the Respondent’s evidence on this issue other than stating that he disagrees with this evidence. He has not demonstrated how the Commission was biased or unreasonable on this issue.

(10) Lower Incentive

[89] In order to support his major contention that he is being "set up," discriminated against and held back, the Applicant says that, despite his better performance than his colleague, Mr. Karia, he received a lower incentive. The Applicant now complains that the Investigator failed to classify this matter as an adverse differential treatment.

[90] This is simply inaccurate. The Investigator found as follows:

> 74. The complainant states that in 2015, despite more seniority (three years) and better performance, another coworker who works at the same group and level as him (Amit Karia) received a better incentive than he did.
>
> 75. The respondent does not dispute that the complainant was given a lower incentive. In this regard the complainant may have been treated differently. The reasons for will be considered under the next step in the analysis (i.e. link to a prohibited ground).

[91] The Investigator then went on to examine the evidence and came to the following conclusions:

> 129. The complainant alleges that Mr. Karia received a better incentive and a salary increase. He alleges that this is evidence he is treated differently based on a prohibited ground. However, other than his bald assertion that the treatment is linked, there is no supporting evidence to suggest a link to a prohibited ground of discrimination.
>
> 130. Conversely, the respondent explains that the reason Mr. Karia received a better incentive and a salary increase is because his overall performance is better than that of the complainant's. Mr. Karia himself explains that the bonus is not linked only to how you perform on the metrics, but that it is linked to overall performance.

> 131. In reviewing the complainant's and Mr. Karia's PPAs, the investigator notes that in 2014, Mr. Karia met 7/9 of the metrics; whereas the complainant met 5/8 in Q1 and Q2, and 3/9 in Q3 and Q4. The complainant is correct in indicating that he had a higher metrics score than Mr. Karia in 2015. However, from reviewing the PPA, it is clear that the metrics scores are one aspect of the performance appraisal. The investigator notes that there were several categories where the complainant was rated as Mixed whereas Mr. Karia was ranked as distinguished or solid. For example in 2015, Mr. Karia was rated as solid for Demonstrate "Being BMO" whereas the complainant was mixed.
>
> 132. Give the lack of supporting evidence to demonstrate a link to a prohibited ground of discrimination, the analysis into this allegation did not proceed.

[92] The Applicant has not shown any reviewable error in the Investigator's analysis and conclusions. He simply disagreed with it.

(11) Seating Arrangements

[93] The Applicant alleges the use of seating arrangements to target black employees, including himself. The problem with this allegation is that there was significant conflicting evidence and little to support the Applicant's assertions:

> 59. With respect to the seating arrangements, the evidence of Mr. Baroum was that "they put all black employees in the same area. All the bilinguals. Put them all close in one area close to [management]." However, Ms. Riddell states that they put all the bilingual employees next to Mr. Matondo, Team Lead, who was also bilingual. She states that many of the bilingual employees were black, but denies that they placed "all the black employees" next to Ms. Beltran. Mr. Matondo (who self-identifies as black) and Mr. Karia also denied that black employees were isolated or all seated together.
>
> 60. The complainant alleges that Mr. Muco, Mr. Diankulu, Ms. Boboy and Ms. Wier (who he identifies as bilingual black employees) were all targeted by Ms. Beltran. The investigator

> attempted to interview these individuals; however, for reasons explained at paragraph 5, none of these individuals participated in an interview.
>
> 61. Although the complainant states that Mr. Baroum witnessed Ms. Betran targeting these employees, that was not the evidence of Mr. Baroum. Mr. Baroum confirmed that he did not see anything directly: "everything I heard was based on what Claudio told me."
>
> 62. In comparison, the evidence of Mr. Mr. Matondo, who self identifies as a "black employee, originally from Congo", is that during his 14 years of employment with the respondent, he has not witnessed any differential treatment. He states "We are all treated in the same way." Mr. Karia states that he "never saw certain people on one side and certain people on another. Never anything like that."
>
> 63. Therefore, given the lack of supporting evidence, the analysis into this allegation did not proceed further.

[94] The Applicant has not established that these findings were unreasonable. He simply disagrees with the Investigator's analysis and findings. He therefore wants the Court to reweigh the evidence and find in his favour. This is not the role of the Court on judicial review. See *Vavilov*, at para 125.

B. *Other Issues*

[95] The Applicant has raised other issues for review. He objects to his "mixed" performance ratings in 2014, 2015, and 2016. He says he was denied other employment opportunities and was excluded from a grade alignment. However, the Decision shows that the Investigator was fully alive to each issue, addressed the evidence on both sides in a thorough and impartial way, and provided clear conclusions. The Applicant has not demonstrated that these conclusions were unreasonable.

[96] In representing himself before me, the Applicant impressed me as someone who is both honest and able. He would like his career to advance and he believes he is being held back and discriminated against. He also believes, according to his submissions, that BMO discriminates against black employees. In essence, the Applicant argues that he believes that by not agreeing with him on these issues, the Commission was therefore biased and did not conduct a thorough and impartial investigation.

[97] The sincerity of the Applicant's beliefs are not, however, a ground for judicial review. On many issues, he simply wants the Court to reweigh evidence and reach a conclusion that favours him. This is not something the Court can do. The evidence before me does not support the allegation that the Investigator, and therefore the Commission, was biased and did not conduct a reasonable and thorough investigation. Nor can I find that the Investigator's analysis and conclusions were unreasonable in any material way that would require the Decision to be set aside and reconsidered.

JUDGMENT IN T-2154-18

THIS COURT'S JUDGMENT is that

1. The application is dismissed, with costs to the Respondent.

"James Russell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2154-18
STYLE OF CAUSE:	CLAUDIO LUBAKI v BANK OF MONTREAL
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	FEBRUARY 10, 2020
JUDGMENT AND REASONS:	RUSSELL J.
DATED:	APRIL 16, 2020

APPEARANCES:

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Jordan D. Winch	FOR THE RESPONDENT

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