

Federal Court



Cour fédérale

Date: 20200930

Docket: T-1210-19

Citation: 2020 FC 944

Ottawa, Ontario, September 30, 2020

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

ROBERT MULDER

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application by Mr. Mulder for judicial review of a June 28, 2019 decision of the Canadian Human Rights Commission (CHRC) to dismiss his complaint against the Canada Revenue Agency (CRA) under subparagraph 44(3)(b)(i) of the *Canadian Human Rights Act*, RSC 1985, c H-6 (*CHRA*). The Commission decided to adopt the recommendation of its

Investigator and not refer Mr. Mulder's complaint to a Tribunal for further inquiry [the Decision].

[2] Mr. Mulder had complained that his employer, the CRA, treated him in an adverse differential manner based on disability and failed to accommodate him to the point of undue hardship by refusing to provide him with a trial period of telework to allow him to work from home, contrary to the *CHRA*.

[3] In this application, Mr. Mulder seeks an order to set aside the Decision and remit the matter back to the CHRC for a fresh investigation by a different investigator.

[4] For the reasons that follow, this application is dismissed.

II. **Background**

[5] Mr. Mulder began working for the CRA in April 2007 as a Taxpayer Relief Officer. His position involved communicating with taxpayers or their representatives, responding to requests for information, preparing detailed reports, letters, and other documents.

A. *2012 Events*

[6] In February 2012, Mr. Mulder was involved in a motor vehicle accident in which he sustained a concussion as well as injuries to his neck and back. He was off work until April 4, 2012 when, on the basis of a note from his Chiropractor, he returned to work for 4 hours per day, with breaks.

[7] Mr. Mulder found that he experienced pain and discomfort at work during that time. The CRA requested that he undergo a fitness to work medical assessment known as an Occupational Fitness Assessment Form (OFAF) to be conducted by its third party health provider, Workplace Health & Cost Solutions (WHCS). Prior to receiving the results of that OFAF, Mr. Mulder went on medical leave without pay. That leave period ran from July 2012 to May 19, 2015.

B. *2014 Events*

[8] During the leave period Mr. Mulder was medically assessed by his own physician, Dr. Janjua, who completed an OFAF on June 26, 2014 (the June 2014 OFAF). Dr. Janjua recommended that Mr. Mulder was fit to work, subject to the limitations/restrictions set out in the report and that he should work from home on a trial basis.

[9] Dr. Janjua noted there was no limitation with the components to be assessed for the physical work environment but that Mr. Mulder “would very likely have difficulty in following a schedule and maintaining attendance and punctuality required for the workplace at this time due to the stated conditions.” It was also noted that a number of tasks related to social/emotional demands might prove to be difficult and seemed to worsen with stress, “while affecting proper communication and ability to be diligent and accurate for the important tasks required for his job.” For the same reason, Dr. Janjua noted that all the relevant cognitive/mental demands would be difficult for Mr. Mulder.

[10] On November 26, 2014, in response to the June 2014 OFAF, the CRA gave Mr. Mulder a letter for Dr. Janjua. The CRA sought clarification of his report and asked for feedback on a proposed plan for workplace accommodation the details of which were set out in the letter.

C. *2015 Events*

[11] On January 6, 2015, the CRA sent Mr. Mulder a letter providing him with three options to resolve his leave without pay, which had extended beyond the period of leave established in the CRA Injury and Illness Policy. Mr. Mulder's options were to apply for medical retirement, resign, or return to work.

[12] Mr. Mulder and the CRA agreed at a meeting on January 28 or 29, 2015, that he would try a graduated return to work beginning March 1, 2015. To that end, on February 3, 2015, the CRA wrote to Mr. Mulder's Occupational Therapist, Dawn James, requesting she complete an OFAF. The CRA sought her advice on Mr. Mulder's specific limitations and restrictions and how best to implement them in the workplace.

[13] In March of 2015, Dawn James advised the CRA that she was not able to provide the CRA with the information that was required on the OFAF.

[14] On March 23, 2015 the CRA advised Mr. Mulder by letter that no reply had been received from Dawn James and his leave without pay had extended beyond the time allowed in the CRA policies. As Mr. Mulder had not provided medical information to support his ability to

return to work in the foreseeable future, the CRA asked that by April 7, 2015, he either apply for medical retirement, resign or retire, in writing.

[15] Notwithstanding the deadline of April 7, 2015 on April 21, 2015 the CRA provided Mr. Mulder with the option to seek another assessment from WHCS. A release form and a consent form were provided for signature by Mr. Mulder to be returned by May 1, 2015.

[16] On May 7, 2015, when the CRA had not received the OFAF consent form from Mr. Mulder, it indicated that it would rely on the last medical information that was on file which was the June 2014 OFAF. He was advised to report for work on May 19, 2015.

[17] On May 19, 2015 Mr. Mulder returned to work from medical leave. The next day, the CRA had an ergonomic assessment conducted of Mr. Mulder's workspace.

[18] On May 22, 2015 the CRA sent the consent form and OFAF to WHCS. The ensuing report, dated December 18, 2015, was received December 22, 2015. The main part of the OFAF assessment was conducted by Dr. Chernish on June 8, 2015. An additional component of the assessment was conducted by Dr. Lazereck on October 19, 2015. The report noted that there were no limitations related to the physical aspects of Mr. Mulder's work but there were observed limitations and restrictions in his social/emotional demands and cognitive mental demands. Dr. Chernish estimated Mr. Mulder would be able to assume his full regular duties by March 30, 2016.

[19] On June 12, 2015, Mr. Mulder obtained his own Functional Capacity Evaluation (FCE). The FCE was performed by Occupational Therapist Shauna Bourbonniere of the Wellness Institute (the Wellness FCE). A wide range of physical and functional testing was conducted over two days. The results indicated that Mr. Mulder had chronic pain over his entire body which severely limited his function. Even with a walker he was extremely limited in the distance he could travel and the use of his upper extremities was poor. She stated that Mr. Mulder would not be able to attend the office to perform his daily work activities due to multiple issues which she identified. She said that given a well-designed workstation in his home with a voice recognition program on his computer such as Dragon Speak, Mr. Mulder might be able to perform some work tasks. He would need to start with only one to two hours of work each day and slowly build up his tolerance.

[20] On July 1, 2015, Mr. Mulder submitted to the CRA a copy of the FCE, a note from his chiropractor, Dr. Arauz, dated May 25, 2015 and an undated one-page summary from a report prepared by his psychotherapist, Mr. Hanson.

[21] By letter dated July 15, 2015, Dr. Janjua said he had reviewed the Wellness FCE and found the assessment to be very thorough, objective and accurate. He endorsed the assessment and recommendations, indicating that he felt they would greatly improve Mr. Mulder's function.

[22] Dr. Arauz 's note supported teleworking noting that "although Mr. Mulder has limitations as noted, he has expressed the desire to work and it is recommended by his family physician to do so from home as a trial to see if he would be successful in the return to work program."

[23] Mr. Hanson's summary page said that Mr. Mulder's prognosis for an eventual return to work was favourable. He noted Mr. Mulder experienced severe limitations – physical, psychosocial and cognitive functional – which prevented him from returning to his regular job. The summary indicated that accommodations which would benefit Mr. Mulder could include the following, which were neither exhaustive nor fixed:

- part-time over an extended duration,
- establishing the duties or responsibilities Mr. Mulder is currently capable of,
- flexible days and times due to his fluctuating symptoms,
- control and autonomy over his workflow and priorities,
- allow time to attend his medical and psychotherapy appointments.

[24] On November 24, 2015 Mr. Mulder provided the CRA with a letter from Mr. Hanson recommending additional accommodations. Mr. Hanson recommended part-time work of three hours per day over an extended duration as well as a three-day work week with Wednesdays and Fridays off. He also recommended Mr. Mulder receive the support of a supervisor to provide a work environment which is supportive and accommodating to both Mr. Mulder's psychological and medical needs. Mr. Hanson advised that Mr. Mulder's desk should be moved to an area where he could work alone without the intrusion of being constantly scrutinized by management. Finally, Mr. Hanson stated that Mr. Mulder's work environment was currently significantly stressful so it was necessary that he have the opportunity to recuperate mid-week in order to not become overwhelmed.

[25] Mr. Hanson concluded that Mr. Mulder's prognosis for an eventual return to full-time work was positive with the provision of job accommodations for his functional limitations. He noted that Mr. Mulder continued to experience physical, psychosocial and cognitive function limitations that were severe, preventing him from returning to his regular job.

[26] After receiving the updated medical information from Mr. Hanson, the CRA in December, 2015, provided additional accommodations in the workplace to Mr. Mulder. The CRA moved Mr. Mulder to a different desk in a new location that was more secluded and was 70 feet closer to the hallway leading to the washroom. Mr. Mulder used umbrellas over his desk to reduce the amount of light and glare. As of December 21, 2015, Mr. Mulder's schedule was changed so that he could work three hours per day Tuesdays, Thursdays and Fridays leaving him free for doctor's appointments on Mondays.

[27] As previously noted, on December 18, 2015 the WHCS OFAF was also received with an estimate that Mr. Mulder would be able to assume his full regular duties by March 30, 2016.

D. *2016 Events*

[28] In January 2016, the CRA received from Mr. Mulder a copy of Dr. Janjua's response, dated December 12, 2014. The response indicated that Mr. Mulder would be fit to return to work if he was provided the ability to work from home.

[29] By the time the CRA received the January 2016 response, Mr. Mulder had already returned to the workplace on a reduced schedule.

[30] As to when Mr. Mulder would be capable of full regular duties, Dr. Janjua indicated it was unknown at that time.

[31] On March 3, 2016, Mr. Mulder left work. On March 4, 2016, he took a second period of medical leave. On March 9, 2016, Mr. Mulder provided another note from Mr. Hanson, indicating that Mr. Mulder's progress in psychotherapy has been "repeatedly compounded by the significant stresses of his work environment."

[32] On March 14 and 23, 2016 a Cognitive Functional Capacity Evaluation (CFCE) was done by Shauna Bourbonniere, a Registered Occupational Therapist [the OT] at Enabling Access. The evaluation is described in the May 6, 2016 report as a customized, job specific evaluation. The CRA received the results of the report in June 2016, shortly after Mr. Mulder filed his complaint with the CHRC.

[33] The CFCE noted that Mr. Mulder demonstrated an array of pain behaviours. He also walked and moved very slowly in a forward bent position. He sighed, grunted and groaned frequently.

[34] Enabling Access reviewed Mr. Mulder's history, conducted a physical examination of his abilities and limitations and evaluated his functional cognition as to both his abilities and tolerances. The report contained a Job Match Chart which set out the 7 physical and 10 cognitive demands of the position of a Taxpayer Relief Screener/Officer. The corresponding abilities demonstrated by Mr. Mulder for each of the work demands was set out. A Chart indicated either

Yes or No for whether accommodation was required. Thirteen work demands required accommodation and ten of the thirteen contained recommended accommodations.

[35] The CFCE concluded with the section “Return to Work”, the opening sentence of which states that “Mr. Mulder would not be able to attend the office in order to perform his daily work activities”. The report identified multiple issues leading to that conclusion including:

- Mr. Mulder’s limited standing and walking tolerance which made it very difficult for him to move from the parking lot to his office and from his office to the lunchroom or a washroom;
- after approximately 30 minutes of sitting, Mr. Mulder had to lie down to relieve discomfort which would not be possible in an office workspace;
- Mr. Mulder’s vision and hearing had become very sensitive so it does not tolerate bright overhead lights or loud noises as they can lead to severe headaches;
- Mr. Mulder’s hand coordination is very poor which makes it difficult for him to type. This could be accommodated by using Dragon Speak voice dictation software which is most successful in a quiet environment and would work better in his home than in the office.

[36] A number of accommodations were listed based on the foregoing. The conclusion was:

Given a well-designed workstation in the client’s home with a voice recognition program on his computer Mr. Mulder may be able to perform some work tasks. He would need to start with only 1-2 hours of work each day and slowly build up his tolerance. Work is an extremely important part of all of our lives and Mr. Mulder is driven to be productive in any way possible. This will help give meaning to his life and restore some sense of normalcy.

[37] On March 14, 2016, prior to receiving the CFCE, the CRA sent a letter advising Mr. Mulder that he must either resign or medically retire.

[38] On May 18, 2016, Mr. Mulder filed his complaint with the CHRC.

[39] Mr. Mulder medically retired on November 26, 2016. The CRA worked with Mr. Mulder and his union to allow him to choose a retirement date after the new Collective Agreement was ratified to ensure his eligibility for a signing bonus.

III. **The CHRC Complaint**

[40] The CHRC received Mr. Mulder's complaint on May 19, 2016.

[41] In his complaint Mr. Mulder alleged several grounds of discrimination. Only one, disability, is the subject of this application.

[42] Mr. Mulder's complaint was referred to investigation on July 14, 2017.

IV. **The Investigation Report**

[43] The investigation was completed on February 11, 2019 when the Investigator's Report (the Report) was released. In the course of her investigation, in addition to reading the various medical reports and documents, the Investigator exchanged correspondence with the parties and others to confirm or clarify as necessary the information she received. The Investigator interviewed Mr. Mulder, his Team Leader and his Union Representative. She also attempted to interview two former staff of the CRA, without success.

[44] The Investigator began the Report by stating that it was not a decision of the CHRC and that the CHRC members do not determine whether discrimination actually occurred. They determine whether a complaint requires further inquiry by the Canadian Human Rights Tribunal which is a separate entity from the CHRC.

[45] Although the Report addressed the various grounds upon which Mr. Mulder alleged he had suffered adverse differential treatment, this application pertains only to the allegation that the CRA failed to accommodate Mr. Mulder's disability to the point of undue hardship by denying him the opportunity to telework from home. Therefore the sections of the Report addressing other issues will not be reviewed.

A. *The Investigator's Methodology*

[46] The Investigator reviewed the positions of the parties. She reviewed and commented upon all the medical reports received from the parties. The Supplementary Certified Tribunal Record (SCTR) contains the various medical reports as well as interview notes, correspondence, emails, memos to file and administrative documents including the CRA Injury and Illness Policy, all of which were either generated by or considered by the Investigator.

[47] The Investigator set out the overall background to the complaint. At paragraph 18 of the Report she set out a two-page high-level chronological summary of events based on the documents she had received. Much of that chronology is set out in the Background section of this Judgment and Reasons.

B. *Alleged Adverse Differential Treatment*

[48] Mr. Mulder told the Investigator that he was forced to submit to medical assessments by the CRA and that his manager lied about not receiving Dr. Janjua's December 12, 2014 response to CRA's follow-up letter. Mr. Mulder did not send the Investigator the email evidence she had asked him to provide which he said acknowledged receipt of Dr. Janjua's response. The CRA said it did not receive that report until January 30, 2016. The CRA indicated that it requested Mr. Mulder undertake another OFA consultation because it needed further information to determine how best to accommodate him.

[49] The Investigator concluded from the evidence that the CRA did not treat Mr. Mulder in an adverse differential manner when it required him to obtain another medical assessment on which to base accommodation efforts. That finding is not challenged in this application.

C. *Alleged Failure to Accommodate*

[50] The Investigator noted that Mr. Mulder and the CRA agreed that he required accommodation based on disability, and that he had advised the CRA that he needed accommodation. She identified their differences as being between a modified workspace/schedule or telework.

(1) *Accommodation in the Workplace*

[51] The Investigator found the evidence did not indicate that Mr. Mulder failed to cooperate in the search for accommodation as he attended the assessments and provided consent forms and

medical information requested by the CRA however, he did not reliably respond to requests by management and others in a prompt manner.

[52] The Investigator briefly set out the highlights of Mr. Hanson's November 2015 letter expressing concern over Mr. Mulder's physical and emotional health as being at risk because of stress in the workplace. She considered the comments of both Mr. Mulder and the CRA and noted that the CRA provided the Ergonomic Assessment of Mr. Mulder's workspace from May 20, 2015 showing the lighting was deemed to be optimal. The CRA also advised that at both his desks Mr. Mulder used overhead umbrellas to reduce the amount of light and glare.

[53] The Investigator noted that, in response to Mr. Hanson's recommendations, Mr. Mulder's schedule was altered so he would work three hours per day - Tuesdays, Thursdays and Fridays - thereby leaving his Monday's free for doctors' appointments.

[54] The Investigator found that the evidence gathered did not show that the CRA denied accommodation to Mr. Mulder in the workplace. The evidence indicated that the CRA attempted to accommodate him according to operational needs, and the information received from the ergonomic assessment and from Mr. Hanson.

[55] The Investigator's conclusion was that it did not appear that the CRA treated Mr. Mulder in an adverse differential manner based on disability with respect to accommodation in the workplace.

(2) Accommodation by Telework from Home

[56] The Investigator next considered the main issue in this application of whether the CRA failed to accommodate Mr. Mulder to the point of undue hardship by refusing to provide him with a trial period of telework to allow him to work from home contrary to the CHRA.

[57] After extensively reviewing the evidence, the Investigator determined that it did not suggest that the CRA treated Mr. Mulder in an adverse differential manner based on disability when it refused to provide him with telework.

[58] This issue is fully discussed in the following section addressing whether the Decision is reasonable and whether the Investigator cherry-picked or misrepresented the evidence.

V. **The Decision**

[59] The CHRC adopted the Investigator's recommendation. It advised Mr. Mulder that after examining the information and any submissions, it had decided, pursuant to subparagraph 44(3)(b)(i) of the *CHRA*, to dismiss the complaint because "based on the evidence collected during the investigation, it does not appear that the [CRA] treated [Mr. Mulder] in an adverse differential manner based on a prohibited ground under the [CHRA]." As such, the CHRC determined that, having regard to all the circumstances of the complaint, an inquiry into the complaint was not warranted and the file had been closed.

[60] In section 44 screening decisions, when the CHRC adopts the Investigator's recommendations and provides no reasons or only brief reasons, the investigation report is deemed to be part of the CHRC's reasons. This is because the investigator's report is prepared for the CHRC, and so "the investigator is considered to be an extension of the Commission": *Sketchley v Canada (Attorney General)*, 2005 FCA 404 at paragraph 37.

VI. Issues and Standard of Review

[61] Mr. Mulder raises two issues with the Decision:

1. Was the Decision not to refer Mr. Mulder's complaint to the Tribunal for further inquiry pursuant to subparagraph 44(3)(b)(i) of the *CHRA* reasonable?
2. Did the CHRC breach Mr. Mulder's right to procedural fairness?

[62] Mr. Mulder alleges the Decision is unreasonable because the Investigator departed from her screening function and adjudicated his complaint on the merits. In particular he alleges that the Investigator: (1) improperly weighed the medical evidence, (2) misrepresented some of the evidence, and (3) ignored his evidence.

[63] Mr. Mulder also argues that even if the Investigator was permitted to weigh the evidence she did so unreasonably by cherry-picking the evidence and ignoring his evidence.

[64] With respect to the issue of procedural fairness, Mr. Mulder alleges that the investigation was not conducted in a manner that was thorough and neutral. He repeats that the Investigator

ignored, without explanation, the majority of the medical evidence while accepting, without question, the evidence of the CRA.

[65] In addition, Mr. Mulder alleges the Investigator displayed bias when she added her own observations about his ability to perform telework based on her experience with his response time during the investigatory process.

A. *Reasonableness Review*

[66] Judicial review of an administrative decision begins with a presumption that the applicable standard of review for all aspects of that decision is to be reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paragraph 25.

[67] Reasonableness review begins with the principle of judicial restraint and a respect for the distinct role of administrative decision-makers: *Vavilov* at paragraph 13.

[68] A decision is considered reasonable where it is justified in relation to the facts and law constraining the decision-maker and is based on an internally coherent and rational chain of analysis. Where this is the case, “the reasonableness standard requires a reviewing court to defer to such a decision”: *Vavilov* at paragraph 85.

[69] It is trite law that the decision maker may assess and evaluate the evidence before it and, absent exceptional circumstances, a reviewing court will not interfere with its factual findings.

The reviewing court must refrain from reweighing and reassessing the evidence considered by the decision maker: *Vavilov* at paragraph 125.

[70] Specific to the determination of whether further inquiry by the Tribunal is warranted, reasonableness review has been held to be a highly fact and policy driven process to which a broad margin of appreciation and a high degree of deference is owed: *Ritchie v Canada (Attorney General)*, 2017 FCA 114 at paragraph 38.

B. *Procedural Fairness under the CHRA*

[71] The duty of procedural fairness owed by the CHRC to a complainant has long been established. The investigation upon which the CHRC relies must be both neutral and thorough. Where obviously crucial evidence is not investigated, judicial review is warranted: *Slattery v Canada (Human Rights Commission)*, [1994] 2 FC 574 at paragraphs 50 and 57.

[72] If the investigation was not sufficiently thorough then the decision cannot stand because it would have been arrived at in a manner that was procedurally unfair: *Herbert v Canada (Attorney General)*, 2008 FC 969 at paragraph 18.

[73] In *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 [CPR], Mr. Justice Rennie recently reviewed and confirmed the core principles of reviewing matters involving issues of procedural fairness. He determined that procedural fairness is not amenable to a standard of review analysis. Rather, the question here is whether Mr. Mulder “knew the case to meet and had a full and fair chance to respond.”: *CPR* at paragraphs 55 and 56.

[74] Correctness review of whether an investigation was appropriately thorough may require some degree of deference to the fact-based judgment of the CHRC: *Bergeron v Canada (Attorney General)*, 2015 FCA 160 [*Bergeron*] at paragraph 69.

[75] Keeping in mind all of the foregoing principles and the related jurisprudence, my analysis of the two issues follows.

VII. **The Decision is Reasonable**

A. *The Investigator did not make a determination on the merits*

[76] Mr. Mulder argues that the Decision is unreasonable because the Investigator departed from her proper screening role at the section 44 stage and adjudicated the complaint on its merits. In support, he cites *Cooper v. Canada (Human Rights Commission)*, [1996] 3 SCR 854 at paragraph 53 [*Cooper*] in which the Supreme Court states “[t]he central component of the Commission’s role, then, is that of assessing the sufficiency of the evidence before it” and, “[i]t is not intended that [. . .] the evidence is weighed as in a judicial proceeding but rather the Commission must determine whether there is a reasonable basis in the evidence for proceeding to the next stage.”

[77] Both parties cited *Cooper*. Mr. Mulder argues the Investigator used language that shows she weighed the evidence, such as “the evidence [. . .] suggests”, “the evidence shows”, “it appears that” and “the evidence does not suggest”.

[78] In contrast, the CRA argues that the language cited shows that the Investigator assessed the sufficiency of the evidence. She did not make a finding on the merits, nor did she make any credibility findings.

[79] In *Gupta v. Canada*, 2011 FC 56 Mr. Justice Zinn considered the phrases “does not support”, “does not identify” and “could not link” when he was presented with a similar allegation against an Investigator. Justice Zinn found the phrases were all determinations as to the probative value of the evidence, not its weight. He noted that while it is not within the power of the CHRC to assess the weight of evidence it is within their power to assess the probative value of the evidence. As he stated, the very task of the Investigator is to prepare a report for the Commission to be used to determine whether there is sufficient evidence to warrant referring the complaint to the Tribunal for further inquiry: at paragraphs 24-26.

[80] Determining the sufficiency of evidence involves assessing its probative value. As Mr. Justice Barnes stated in *Tutty v. Canada (Attorney General)*, 2011 FC 57, at this stage, the decision to dismiss or refer a complaint “inevitably requires some weighing of the evidence to determine if it is sufficient to justify a hearing on the merits”: at paragraph 14.

[81] The CRA points out that the Investigator considered all the medical evidence and made no credibility findings; she did not weigh some pieces of evidence against other pieces of evidence. It points to paragraph 98, the Summary paragraph of the Report, as further evidence that the Investigator did not make a determination on the merits:

The complainant alleges that the respondent treated him in an adverse differential manner based on disability [. . .] in relation to

[. . .] workplace accommodation measures, and the denial of telework when he attempted to return to work and then did return to work in 2015. However, the evidence collected at investigation does not support the complainant's allegations.

[82] Considering all of the foregoing, in my view the Investigator's use of the impugned phrases is not sufficient to ground a finding that she was making a decision on the merits of Mr. Mulder's complaint. Instead, as in *Gupta*, the Investigator was assessing the sufficiency of the evidence, which she was both entitled to do, and required to do, in order to make her recommendation to the CHRC.

B. *The Investigator did not Misrepresent or Cherry-pick Mr. Mulder's Medical Evidence*

[83] Mr. Mulder argues that the Investigator erroneously concluded that he wanted, but did not medically require, telework as an accommodation. Mr. Mulder points to the Investigator's statement at paragraph 95 of the Report that the June 2014 report from Dr. Janjua refers to his "desire" to telework, and that the 2015 WHCS report did not refer to telework. He says this was an unreasonable cherry-picking of the evidence which shows an utter disregard for the preponderance of the material before the Investigator.

[84] Paragraph 95 reads as follows:

The evidence shows that the complainant wanted to work from home, at least for a three-month period. In his 2014 OFAF report, the complainant's physician, Dr. Janjua, indicated that the complainant should work from home; and the appointments/assessments the complainant undertook on his own initiative indicated that he should work from home. Dr. Janjua, however, referred to such accommodations (*sic*) measure as a 'desire', and the 2015 WHCS OFAF ordered by the respondent report (*sic*) did not state that this form of accommodation was necessary.

[85] In paragraph 94, the Investigator states her conclusion:

The evidence gathered at investigation suggests that the required accommodation was not denied, but rather that the respondent did not provide the complainant with his desired accommodation.

[86] As I read paragraph 95, in the overall context of the evidence referred to in the Decision, and considering the wording of paragraph 94, my view is that the Investigator is stating the facts set out in the two medical reports to which she refers.

[87] The Investigator did not cherry-pick or misrepresent evidence. The Report is replete with recitations from all the medical evidence. Some of the reports support telework as an accommodation and some do not mention it. In paragraph 95, the Investigator referred to one of each kind of report: Dr. Janjua recommended telework and the 2015 WHCS OFAF made no telework recommendation on the basis that there were no limitations related to the physical aspects of Mr. Mulder's work but there were observed limitations and restrictions in his social/emotional demands and cognitive mental demands.

[88] The CRA submits that the Investigator's conclusion did not turn on whether telework was a desire or a medical recommendation. The Investigator's conclusion at paragraph 96 was that teleworking was not a viable accommodation in Mr. Mulder's circumstances:

The Respondent is required to provide reasonable accommodation to an employee, and the respondent noted that the work assigned to an employee must be meaningful and productive and have value to the Agency and the employee. Given the complainant's job description in relation to his medical limitations/restrictions as noted by medical practitioners and assessors, including observed problems with memory and cognitive function that would require steady supervision, as well as the complainant's unwillingness or inability to respond in a timely manner, or at all, to requests made

by phone or electronically, it appears that the respondent was justified in determining that the complainant's request for telework would not have been appropriate or conducive to meaningful and productive work. The respondent was, however, willing to continue to try to accommodate the complainant's needs in the workplace.

[89] Although the other medical reports are not specifically referred to by the Investigator in the paragraphs Mr. Mulder focussed upon, she did discuss and examine the medical evidence at some length throughout the Report. From paragraph 65 to paragraph 93 of the Report the Investigator reviewed the medical reports in the context of telework. She noted the various accommodation recommendations in the reports, including the recommendations for telework.

[90] The CRA points to several paragraphs in the Report where the Investigator notes that telework was recommended by Dr. Janjua, the chiropractor and the Wellness FCE.

[91] The Investigator also noted the reasons provided by the CRA for determining that Mr. Mulder was not a suitable candidate for telework based on the limitations and restrictions in the reports.

[92] In particular, Dr. Janjua's second report set out a number of physical problems experienced by Mr. Mulder and made the following recommendation in reply to the original request by the CRA to outline a return to work schedule for Mr. Mulder:

A maximum of three hours per day for no more than a total of 15 hours per week. This may need to be adjusted depending on changes to Mr. Mulder's health condition, or should any complications arise. Mr. Mulder will require frequent breaks, working for no more than 20 minutes at a time. Breaks may vary in

length as there are times Mr. Mulder may need to lay down or will require extended washroom breaks due to medical reasons.

[93] Mr. Mulder's psychotherapist, Mr. Hanson, who is also a Certified Rehabilitation Counsellor, issued several reports. The first "report" was the summary page delivered by Mr. Mulder on July 1, 2015. It indicated that Mr. Mulder's prognosis for an eventual return to work was favourable but he continued to experience severe limitations preventing him from returning to his regular job. Mr. Hanson made five recommendations none of which included telework from home.

[94] Mr. Hanson's next report, a few months later, also contemplated Mr. Mulder being in the workplace. Of the accommodations suggested by Mr. Hanson, telework was not mentioned.

[95] In the final report, Mr. Hanson said that a graduated return to work with the CRA was not recommended at that time. He did not suggest telework as an option.

[96] Mr. Mulder also says that the Investigator failed to comment on his psychological and cognitive limitations. The Report certainly set out extracts from his medical reports stating the impact of his cognitive problems. For example, the Investigator noted that Dr. Chernish, on finding that there were no limitations for Mr. Mulder in the physical and non-physical work environment, did state that "[t]his employee may have fluctuating symptoms that may temporarily limit his cognitive abilities and judgement as well as his ability to deal with confrontation situations."

[97] It is well known that the Investigator is presumed to have considered all the evidence before her and she was not required to mention it all: *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paragraph 16. As for the Commission, it considered the Report and the parties' responses to the Report.

[98] Mr. Mulder has not persuaded me that the Investigator erred in her choice of words or treatment of the medical evidence.

VIII. **There was No Breach of Procedural Fairness**

A. *The Investigation was Thorough and it was Not Biased*

[99] Mr. Mulder argues that the decision is procedurally unfair because the investigation was not sufficiently thorough. To that end he says that the Investigator “ignored the majority of the medical evidence that supported [my] complaint, without providing any explanation for doing so.” He relies on *Dupuis v Canada (Attorney General)*, 2010 FC 511 [*Dupuis*], in which Mr. Justice Martineau set aside a CHRC decision to dismiss a complaint on the basis that the CHRC had shown “wilful blindness” to the merits of the complainant’s case when it improperly accepted the employer’s argument without explaining why it rejected the evidence of the complainant: at paragraph 42.

[100] In *Dupuis*, the investigator, without addressing contrary evidence in the file, found that the applicant was not suffering from depression at the time he resigned. The case turned on the investigator there disregarding the issue of accommodation and not truly discussing the complainants past or present disability. In Mr. Mulder’s case, the investigator did not make

these kinds of errors. Mr. Mulder again states that the Investigator accepted that telework was a desired accommodation as opposed to a necessary one and that she ignored the majority of the medical evidence. I addressed the Investigator's use of the word "desire" in the previous section. In the following discussion of procedural fairness, I address whether medical evidence was ignored by the Investigator.

[101] The CRA argues that the investigation was sufficiently thorough. It relies on *McIlvenna v Bank of Nova Scotia*, 2017 FC 699 [*McIlvenna*] for the principle that reviewing courts should only intervene on the grounds of procedural fairness where an investigator fails to investigate or overlooks "obviously crucial evidence." The overlooked evidence in *McIlvenna* was two emails that supported the complainant's allegation that the bank decided to call in a mortgage because the occupants were growing medical marijuana.

[102] The CRA says that in Mr. Mulder's case, there is no such "obviously crucial" evidence that the Investigator ignored. The Investigator considered and referred to the medical reports which recommended telework. The Investigator clearly set out all the relevant evidence in the Report and discussed each of the medical reports. They were not overlooked.

[103] I agree. Mr. Mulder did not point to any examples of evidence that the Investigator ignored. The Investigator discussed all the medical reports and assessments provided, including assessments that Mr. Mulder obtained on his own initiative.

B. *Investigator's Own Observations about the Applicant*

[104] Mr. Mulder argues that the Investigator was biased and relied on stereotypes about people with disabilities. He points to paragraph 85 of the Decision, where the Investigator recalls “at least four occasions” where Mr. Mulder did not respond to her calls or emails. Mr. Mulder argues that it was unfair to draw conclusions about his ability to perform telework based on only four instances, especially when some of the “delayed responses” were due to illness. He says that the Investigator’s frustration with him led her to reject the medical evidence stating that he would benefit from telework.

[105] Mr. Mulder also argues that the Investigator relied on the stereotype that people with disabilities are less capable than people without disabilities. According to Mr. Mulder, the Investigator relied on this stereotype when she accepted the CRA’s argument that he would require steady supervision which was incompatible with teleworking.

[106] Mr. Mulder says the steady supervision argument was contradicted by the report from his psychotherapist, Mr. Hanson, who stated that Mr. Mulder would benefit from a higher level of autonomy and a decreased level of supervision. However, Mr. Mulder overstates the contents of Mr. Hanson’s report. In the one page summary provided by Mr. Mulder, the psychotherapist states that Mr. Mulder would benefit from “control and autonomy over his work flow and priorities.” The report does not state that Mr. Mulder could or should work without supervision. In fact, the next report by Mr. Hanson recommended as an accommodation that Mr. Mulder receive the “the support of a supervisor to provide a work environment which is supportive and accommodating to both Mr. Mulder’s psychological and medical needs.”

[107] The CRA relies on *Abi-Mansour v Canada Revenue Agency*, 2015 FC 883

[*Abi-Mansour*] for the principle that the standard of “reasonable apprehension of bias” does not apply to the CHRC, because it is not an adjudicative body. Instead, the CRA states, and I agree, that the test from *Canadian Broadcasting Corp v Canadian Human Rights Commission et al.* (1993), 71 FTR 214 (FCTD), at page 225, should be used for whether an investigation was neutral is “whether as a matter of fact, the standard of open-mindedness has been lost to the point where it can reasonably be said that the issue before the investigative body has been predetermined.” The CRA says that there was nothing in the record to suggest that the Investigator’s conclusions were predetermined, nor is there evidence that the Investigator became frustrated with the Applicant.

[108] In my view, the evidence relied on by Mr. Mulder does not support a finding that the Investigator “approached the case with a closed mind.” The Investigator discussed Mr. Mulder’s failure to respond after discussing similar evidence given by the CRA and by Mr. Mulder’s union representative, Diana Litke.

[109] In a January 24, 2019 letter to the investigator, the CRA explained why it concluded that Mr. Mulder needed supervision. As he had been away from work for almost three years, Mr. Mulder needed to be trained in the new workplace systems and procedures, and this training was best done one-on-one, at the workplace.

[110] While the Investigator’s own opinion on whether Mr. Mulder would be able to telework was relevant to the CRA’s argument that telework was not an operationally viable option it was

not determinative. Other evidence, including various medical reports, discussed Mr. Mulder's cognitive issues and his union representative attested to those issues.

[111] The Investigator's statement was not based on negative stereotypes, it was based on her review of the evidence before her. There was no breach of procedural fairness.

[112] I have not been persuaded that Mr. Mulder's procedural fairness rights were violated. In addition to the foregoing reasons, I note that the Investigator interviewed Mr. Mulder and followed up with him to obtain his views when evidence was in conflict or she sought an elaboration of his position. He received a draft of the Report and, through his Union, he made comments on it. Mr. Mulder knew the case he had to meet. He had the opportunity to present his evidence and arguments and he did so.

IX. **Summary and Conclusion**

[113] There was a sufficient basis for the Investigator to conclude that the CRA had accommodated Mr. Mulder to the point of undue hardship. The CRA ordered multiple assessments to determine how to accommodate him in the workplace. The CRA also considered the medical evidence provided by Mr. Mulder. When Mr. Mulder provided a letter from his psychotherapist recommending that he work fewer days each week, the CRA adjusted the Applicant's schedule accordingly.

[114] Based on the evidence before her, it was reasonable for the Investigator to conclude that the CRA had a valid basis to refuse telework.

[115] The CRA explained why telework was not a viable option. When Mr. Mulder first returned to work, he required training as he adapted to the new systems in place. The CRA, as the employer, determined that this was best done in person. When Mr. Mulder requested telework again, the work schedule he proposed – three hours spread over an entire day, with breaks – the CRA reasonably found that it would not result in meaningful and productive work for the Agency or Mr. Mulder.

[116] The CRA was not required to provide the Applicant with the accommodation that he preferred where that accommodation was not operationally feasible. The CRA was only required to accommodate the Applicant up to the point of undue hardship. When it became clear that the Applicant was no longer able to fulfil the basic obligations of the job, the CRA was no longer obligated to accommodate him.

[117] The CHRC reasonably dismissed Mr. Mulder's complaint under subparagraph 44(3)(b)(i) of the *CHRA*. The Investigator set out in detail the evidence presented to her. She sought explanations from the parties when the medical reports did not agree. While she did not weigh the evidence, she did assess it based on the facts and the law and she made a recommendation that is consistent with the evidence.

[118] There is an internally coherent and rational chain of analysis in the Decision that is justified in relation to the facts and law. The application of reasonableness review requires the reviewing Court to defer to the Decision: *Vavilov* at paragraph 85.

[119] Much of what Mr. Mulder has asked the Court to do is re-assess the evidence which is not the job of a reviewing court. The Investigator found that the evidence indicated the CRA attempted to accommodate Mr. Mulder in the workplace according to its operational needs. The evidence before the Investigator included many lengthy lists of suggested accommodations and an equally long list of physical limitations/restrictions as well as cognitive functioning ones. When the CRA received new medical reports, it implemented the accommodations it could. Voice-to-text software was installed. A professional ergonomic assessment was conducted. Mr. Mulder's workspace was modified and his desk was relocated to a quieter location, closer to the bathroom. His workload was reduced and the expectations for his production rate were reduced. He had access to Resource Officer to provide him with personal coaching. His workweek was reduced to 3 hours per day, 3 days a week.

[120] The Court is in no position to challenge the Investigator's finding given the expert evidence. My role is to review the Decision. The Supreme Court has stated very clearly that when conducting judicial review a Court is to refrain from deciding the issue afresh. The reviewing court is to consider only whether the Decision, including the rationale for it and the outcome to which it led, is unreasonable: *Vavilov* at paragraph 83.

[121] The CHRC reasonably found, given the evidence, that Mr. Mulder's medical limitations and restrictions coupled with his diagnosed memory problems, the impact of his cognitive functioning issues and the suggested work schedule(s) for short periods of time, followed by breaks, justified the CRA's determination that telework would not have been appropriate or conducive to meaningful and productive work either for the CRA or for Mr. Mulder.

[122] A decision by the CHRC will not be overturned “simply because [the Court] might have come to a different conclusion on the evidence. It is not the Court’s role either to dissect the Investigator's report on a microscopic level or second-guess the Investigator's approach to [their] task”: *Abi-Mansour* at paragraph 21.

[123] The application is dismissed. Although the CRA sought costs, in the exercise of my discretion I do not consider this a proper case for costs.

JUDGMENT IN T-1210-19

THIS COURT'S JUDGMENT is that the application is dismissed, without costs.

"E. Susan Elliott"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1210-19

STYLE OF CAUSE: ROBERT MULDER v ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: OTTAWA, ONTARIO

DATE OF HEARING: MARCH 11, 2020

JUDGMENT AND REASONS: ELLIOTT J.

DATED: SEPTEMBER 30, 2020

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