Federal Court  Cour fédérale

Date: 20240119

Docket: T-2601-22

Citation: 2024 FC 87

Ottawa, Ontario, January 19, 2024

PRESENT: Justice Andrew D. Little

BETWEEN:

EMILIO ZAVARELLA

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] The applicant filed an application for judicial review of a decision by the Canadian Human Rights Commission dated November 2, 2022, made under paragraph 44(3)(*b*)(i) of the *Canadian Human Rights Act,* RSC 1985, c H-6 (the *"CHRA"*). The Commission dismissed the applicant's complaint of discrimination based on disability against Immigration Refugees and Citizenship Canada ("IRCC") because further inquiry by a human rights tribunal was not warranted.

[2] In this proceeding, the applicant requested that the Court set aside the Commission's decision as unreasonable, applying the principles in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 SCR 653. In particular, the applicant submitted that the Commission failed to grapple with a key aspect of his position when he filed his complaint under the *CHRA*, which he identified expressly in his written response to an investigation report prepared for the Commission. The applicant also argued that the Commission failed to review or address the grounds of complaint thoroughly, which constituted a breach of procedural fairness.

[3] For the reasons below, the application is allowed.

I. Facts and Events Leading to this Application

[4] The applicant applied to the Foreign Service Development Program ("FSDP") to become a Foreign Service Officer ("FSO") with IRCC's International Network Branch (known as "IN"). After he was accepted into the program, he was assigned to French language training for 17 months as he did not meet the language requirements for the FSO position.

[5] Between May 2019 and January 2021, the applicant had communications with IN personnel about his medical condition and how it could affect his role as an FSO when assigned outside Canada.

[6] In late January 2021, the applicant completed his French language training.

[7] By letter dated February 3, 2021, IRCC offered the applicant a position as an FSO (the "Offer").

[8] Between January 28 and February 12, 2021, the applicant had additional communications, including meetings, with IN personnel. He also communicated with a representative of the professional association that represents FSOs (known as "PAFSO").

[9] By email on February 12, 2021, the applicant declined the Offer. Although he believed that participating in IRCC's foreign service operations would be possible despite medical challenges, he stated:

> … there are too many factors that have made this difficult and risky to my health and career determination. It is impossible for me to manage, plan and coordinate this on my own faced with so many unknowns. It is why I must send this with deep regret and inform you that I cannot accept your offer of employment to IRCC's Foreign Service.

[10] On February 16, 2021, the applicant spoke to a PAFSO representative. It "became clear" to the applicant that certain information provided to him concerning the FSO position and available accommodations was false and misleading. He requested that IRCC put his file "on hold", which IRCC declined to do because he had declined the Offer and his file was closed.

[11] The applicant filed a complaint form dated July 5, 2021 (the "Complaint") with the Commission under sections 7 and 10 of the *CHRA*. The Complaint concerned "discrimination/failure to accommodate on grounds of disability".

[12] The Commission assigned a human rights officer to the matter, who communicated with the applicant and with IRCC and received documents from both.

[13] The officer prepared a Report for Decision dated August 2, 2022 (the "Report"), which recommended that the Commission dismiss the applicant's complaint.

[14] The officer provided the Report to the parties. By email sent on September 6, 2022, the applicant provided a 10-page written submission concerning the Report (the "September 6 Response"). The applicant's position was that the Report failed to "grapple with the fundamental issue" raised by his complaint. According to the applicant, information he received, including in the terms of the Offer, were "so inaccurate, misleading, and threatening to [his] health and public service career as to discourage and ultimately dissuade [him] from accepting the offer and continuing as a candidate in the FS program".

[15] By email dated September 8, 2022, IRCC advised that in its view, the Report accurately reflected the issues at hand and IRCC would not be submitting anything further in relation to it at that time.

[16] IRCC subsequently filed an undated 7-page letter to the Commission responding to the applicant's September 6 Response. IRCC disagreed with the applicant's characterization of facts and responded with factual and other reasons why it denied that the applicant was provided with inaccurate, misleading and threatening information in relation to the Offer. The applicant received IRCC's letter on October 3, 2022.

[17] In response to IRCC's undated letter, the applicant sent a 2-page reply dated October 6, 2022, entitled "Inaccuracies in the Respondent's Comments on the Complainant's Submission on Report for Decision".

[18] The Commission's decision dated November 2, 2022, stated:

> Before rendering its decision, the Commission reviewed the Complaint Form, the Report for Decision, and the submissions of the parties filed in response to the Report for Decision. After examining this information, the Commission decides, pursuant to subsection 41(1) of the *Canadian Human Rights Act*, to deal with the complaint.
>
> The Commission further decides, pursuant to subparagraph 44(3)(b)(i) of the *Canadian Human Rights Act*, to dismiss this complaint because having regard to all the circumstances of the complaint, further inquiry by a Tribunal is not warranted.

[19] By letter dated November 9, 2022, the Commission notified the parties of its decision.

[20] The applicant now challenges the Commission's decision, arguing that it should be set aside as unreasonable and that he was denied procedural fairness because the Commission's investigation was not thorough.

[21] As a result of the nature of the parties' legal and factual submissions, and the conclusions I have reached, it is necessary to set out the circumstances in some detail. Before doing so, I will address the proposed new evidence on this application.

II. Admissibility of New Evidence

[22] The applicant filed an affidavit on this application that attached almost 140 pages of additional documents. The respondent objected to its admissibility.

[23] The parties did not disagree on the applicable legal principles. The general rule is that the evidentiary record before the reviewing court is restricted to the evidentiary record that was before the administrative decision maker. Evidence that was not before the decision maker and

that goes to the merits of the matter is not admissible on an application for judicial review in this Court: *Terra Reproductions Inc. v. Canada (Attorney General),* 2023 FCA 214, at para 5; *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright),* 2012 FCA 22, at para 19; *Perez v. Hull*, 2019 FCA 238, at para 16.

[24] The applicant relied on two exceptions to the general rule: the procedural fairness exception, which is for evidence showing possible procedural unfairness that cannot be found in the evidentiary record of the decision maker; and evidence that highlights the complete absence of evidence before the decision maker when it made a particular finding: see *Perez*, at para 16; *Association of Universities*, at para 20. The applicant relied on *McFadyen v. Canada (Attorney General),* 2005 FCA 360, at paras 4, 13-15; and *Canadian Civil Liberties Association v. Canada (Attorney General),* 2023 FC 118, at paras 11, 24, 42, 43, 65.

[25] The applicant's written submissions referred to some of the documents in reciting the background facts and chronology of events leading to the Complaint. The applicant advised that he sent all of the documents to the officer in June 2022 (i.e, prior to the Report). However, he submitted that the Report failed to mention many of them (without further elaboration).

[26] During oral submissions, the applicant only relied on one specific document: an email to the applicant from a representative of PAFSO dated March 11, 2021.

[27] The respondent argued that the proposed new evidence did not fall within any exception. The record reflected the materials before the Commission, which was the decision maker (not the

human rights officer). The record included the Report, which referred to the key documents. It is uncontested that the parties were provided with an opportunity to comment on the Report before it was sent to the Commission, as was required for procedural fairness (citing *Choi v. Canada (Attorney General),* 2022 FC 265, at paras 23, 36).

[28] The email dated March 11, 2021, to the applicant from the PAFSO representative is relevant to the applicant's position on procedural unfairness. Otherwise, the applicant did not identify or rely on any other document sent to the officer during the investigation, and proposed to be admitted in this proceeding, to support his position on procedural unfairness. I note in *McFadyen* that the Federal Court of Appeal admitted a large number of new documents but suggested that consideration be given by the appellant "to select and bring forward his best evidence, and nothing more, to the attention of the applications judge, so that this matter may proceed expeditiously": *McFadyen*, at para 16. In practical terms, the applicant did that by relying only on one document in support of his argument in this Court.

[29] The rest of the documents do not fall within the other exception relied upon by the applicant as they do not show a complete absence of evidence before a decision maker when it made a particular finding. While the background information exception was not advanced by the applicant, there appears to be no need to admit any document into evidence under that exception.

[30] The email dated March 11, 2021, is therefore admitted on this application. I would also admit the cover letter from the applicant to the Commission dated June 3, 2022 (found in the

application record, at p. 10) to establish that the applicant sent a copy of the email to the human rights officer on that date.[1]

III. Was the Commission's decision unreasonable?

A. *Legal Principles*

(1) The Reasonableness Standard of Review

[31] As both parties submitted, the standard of review of the Commission's substantive decision is reasonableness: *Canada (Attorney General) v. Ennis*, 2021 FCA 95, [2021] 4 FCR 154, at paras 44, 46. The onus is on the applicant to demonstrate that the decision is unreasonable: *Vavilov*, at paras 75 and 100.

[32] Reasonableness review entails a disciplined, but robust, evaluation of administrative decisions: *Mason v. Canada (Citizenship and Immigration)*, 2023 SCC 21, at paras 8, 63; *Vavilov*, at paras 12-13. In conducting a reasonableness review, a court must consider the outcome of the administrative decision in light of its underlying rationale in order to ensure that the decision as a whole is transparent, intelligible and justified: *Vavilov*, at para 15.

[33] A reviewing court does not consider whether the decision maker's decision was correct, or what the court would do if it were deciding the matter itself: *Mason*, at para 62; *Vavilov*, at para 83; *Amer v. Shaw Communications Canada Inc.*, 2023 FCA 237, at paras 60, 64.

[1] A footnote in the applicant's September 6 Response advised that the email was provided to the officer with a submission dated November 10, 2021 related to *CHRA* section 41. The record before this Court does not include the latter submission.

[34] If the decision maker gives reasons, they are the starting point for reasonableness review. The reviewing court considers both the reasoning process and the outcome: *Mason,* at para 58; *Vavilov,* at paras 83, 86. A reasonable decision is one that is based on an internally coherent and rational chain of analysis and is justified in relation to the facts and law that constrained the decision maker: *Mason,* at paras 8, 66; *Vavilov,* at paras 85, 99.

[35] Reasons are "the means by which the decision maker communicates the rationale for its decision" and demonstrate that the decision is reasonable: *Mason,* at paras 8, 59-61; *Vavilov*, at paras 81, 84; *Ennis,* at para 48. The Supreme Court in *Mason* and *Vavilov* emphasized that "it is not enough for the outcome of a decision to be *justifiable*. Where reasons for a decision are required, the decision must also be *justified*, by way of those reasons, by the decision maker to those to whom the decision applies": *Mason,* at para 59, quoting *Vavilov,* at para 86 [original emphasis]. A decision will be unreasonable when the reasons "fail to provide a transparent and intelligible justification" for the result: *Mason,* at para 60, quoting *Vavilov,* at para 136.

[36] The Supreme Court has also held that the written reasons given by a decision maker "must not be assessed against a standard of perfection", and need not "include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred": *Mason,* at para 61, quoting *Vavilov,* at para 91.

[37] In addition, as will be developed further below, the reviewing court must read the reasons "holistically and contextually", in light of the record before the decision maker and with due

sensitivity to the administrative regime in which the reasons were given: *Mason*, at paras 61, 91; *Vavilov*, esp. at paras 94, 97, 103.

[38] However, if a decision maker fails to provide a responsive justification for its decision – that is, there has been a significant failure to account for or meaningfully grapple with a party's key issues or central arguments – a reviewing court may lose confidence in the reasonableness of the decision: *Mason*, at paras 10, 86, 97, 98, 118; *Vavilov*, at paras 127-128.

[39] A reviewing court's review must also be mindful of the impact of the decision on the affected individual. The principle of "responsive justification" means that "[w]here the impact of a decision on an individual's rights and interests is severe, the reasons provided to that individual must reflect the stakes": *Mason*, at paras 76, 81; *Vavilov*, at para 133.

[40] Not all errors or concerns about a decision will warrant the court's intervention. To intervene, the court must be satisfied that there are "sufficiently serious shortcomings" in the decision such that it does not exhibit sufficient justification, intelligibility and transparency. The problem must be sufficiently central or significant to render the decision unreasonable: *Vavilov*, at para 100.

(2) The Court's review of a decision of the Commission

[41] The Commission has a screening and gatekeeping role that is entitled to considerable deference. Its role is not adjudicative: *Rosianu v. Western Logistics Inc.*, 2021 FCA 241, at para 47; *Ennis*, at paras 2, 56.

[42] The Federal Court of Appeal stated in *Ennis* that "the relevant statutory language is open-ended, providing minimal constraint on the Commission, which Parliament has charged with determining whether an inquiry into a human rights complaint is warranted": *Ennis,* at para 56. The appeal court referred to Federal Court decisions that concluded the Commission has "broad discretionary power" and enjoys a "remarkable degree of latitude" when performing its screening function on receipt of an investigation report: *Ennis,* at para 57; see also *Rosianu,* at para 47. The screening decision is policy-laden and inherently factual: *Rosianu,* at para 48; *Ennis,* at para 56.

[43] The Federal Court of Appeal also stated in *Ennis* that most of the other constraints described in *Vavilov* likewise provide "little constraint on the breadth of the discretion given to the Commission to make screening decisions": *Ennis,* at para 58.

[44] This Court does not consider whether the Commission's decision under *CHRA* paragraph 44(3)(*b*)(i) was correct. The Court's role is not to ask what decision it would have made, nor to decide whether the evidence before the Commission was in fact sufficient to warrant further inquiry: *Ennis,* at paras 38, 48-50. Applying the reasonableness standard, the question is whether the Commission made a reviewable error, including whether it was open to the Commission to make the decision it did having regard to the legal and factual constraints bearing on that decision: *Ennis,* at paras 51, 53.

[45] The mere possibility of discrimination is not enough to warrant further inquiry before the Tribunal: *Rosianu,* at para 49; *Ennis,* at para 62. Under section 44, the Commission is to determine the sufficiency of the evidence – whether the evidence supporting the complaint is

sufficient after a reasonably thorough investigation: *Rosianu*, at para 75; *Ennis*, at paras 37, 65; *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2012 SCC 10, [2012] 1 SCR 364, at paras 23-24; *Cooper v. Canada (Human Rights Commission)*, [1996] 3 SCR 854, at p. 891 (para 53).

[46] It is well-settled that a report by an investigator prepared under section 43 may constitute the Commission's reasoning, at least when the Commission decides to follow the investigator's recommendation: *Rosianu*, at paras 70-74; *Sketchley v. Canada (Attorney General)*, 2005 FCA 404, [2006] 3 FCR 392, at para 37.

B. ***The parties' positions***

[47] The applicant submitted that his Complaint concerned discrimination during the hiring process, namely that he was discouraged from accepting the FSO position by false and misleading information provided to him by IRCC personnel in the IN branch and in the written Offer. The applicant submitted that the allegations in the Complaint should be treated flexibly and non-formalistically, noting decisions that have permitted complainants to amend their allegations even when they are before the Tribunal (citing *Canada (Attorney General) v. Robinson (C.A.)* [1994] 3 FC 228 (CA), at pp. 229, 248-249; *Canadian Museum of Civilization Corporation v. Public Service Alliance of Canada (Local 70396)*, 2006 FC 704, at paras 50-54; *Gaucher v. Canadian Armed Forces*, 2005 CHRT 1, at paras 10-12; *Casler v. Canadian National Railway*, 2017 CHRT 6, at paras 8-9; *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2019 CHRT 39, at para 99-101).

[48] The applicant argued that the Commission failed to grapple with the central point of his Complaint, as he expressly stated in his September 6 Response: that he was provided with false and misleading information during the hiring process, which dissuaded him from accepting the Offer (citing *Oster v. I.L.W., Local 400 (No. 2),* 2000 CarswellNat 3597, 2000 CanLII 49338 (CHRT), at paras 42-44; judicial review dismissed by this Court: *International Longshore & Warehouse Union (Marine Section), Local 400 v. Oster,* 2001 FCT 1115, [2002] 2 FC 430, at paras 44-46). In *Oster*, the CHRT concluded that the complainant had been discouraged from applying for a position on a vessel because the sleeping accommodations were considered "not suitable" for a woman. There was *prima facie* evidence of a discriminatory practice under the *CHRA* that deprived the complainant of an employment opportunity: *Oster,* at paras 42-45.

[49] The applicant submitted that there was nothing in the Report analyzing whether he was provided with false and misleading information that dissuaded him to decline the Offer. The applicant also submitted that the Report did not refer to the analysis by the PAFSO representative in March 2021, which he provided to the officer.

[50] The applicant did not characterize any of the other myriad of issues and arguments in his September 6 Response as similarly fundamental or central to his position for present purposes.

[51] The applicant raised two related arguments. His written submissions argued that the Commission initially recognized the issue of adverse differential treatment in the hiring process, but never actually addressed it. The applicant contended that, instead of considering whether IRCC adversely differentiated against him because of his disability when it discouraged him from accepting the FS position by providing false or misleading information during the hiring

process, the Report treated the issue as whether the duty to accommodate had been engaged. In addition, the applicant maintained that the Commission did not properly investigate or analyse whether IRCC's rotationality policy had an adverse impact on persons identified by a protected ground (disability) or whether it was a *bona fide* occupational requirement. At the hearing, the applicant noted that the Report found that the rotationality policy never applied to the applicant because the applicant rejected the Offer. The Report did some analysis of the rotationality policy, finding that the information on file did not support the claim that he was treated adversely due to his disability or that the rotationality principle was discriminatory. However, the applicant argued that the Report failed to analyse how the provision of false or misleading information during the hiring process discouraged the applicant from accepting the Offer. The applicant's submissions referred to sections 7 and 10 of the *CHRA*.

[52] The applicant urged that accommodation was a very minor part of his Complaint as a whole, and was specific to circumstances arising during his French training (which are not at issue in this proceeding).

[53] The applicant also submitted that depriving him of the ability to enforce the important, quasi-constitutional rights in the *CHRA* is a particularly harsh consequence (relying on *Mason*, at paras 66, 76).

[54] The respondent supported the reasonableness of the Commission's decision. The respondent submitted that the issue of accommodation was the fundamental point of the applicant's Complaint. According to the respondent, the Report properly addressed the allegations made by the applicant in the Complaint, which related to his dissatisfaction with not being given assurances as to job conditions (i.e., accommodations owing to the applicant's

disability) in advance of accepting the Offer as an FSO. The respondent focused on the contents of the Complaint, which described various instances where the applicant felt his requests for accommodations and/or assurances as to job conditions were not appropriately considered. The respondent submitted that the contents of the Report demonstrated that the officer was aware that the Complaint was about treatment during the hiring process and that the substance of the Report carefully addressed each of the areas raised by the applicant, including the availability of a medical examination prior to employment and country assignment, and rotationality including IRCC's refusal to assure the applicant that he would only be posted to low hardship postings.

[55] The respondent also argued that the applicant's position in this Court, and in his September 6 Response, attempted to reframe his Complaint as one of inaccurate and misleading information provided to him to dissuade him from accepting the Offer. According to the respondent, the applicant did not mention this allegation in the Complaint and the substance of the applicant's position was a "rehash of areas in which he wanted concrete assurances from IRCC regarding accommodations".

[56] After the hearing of this application on September 25, 2023, the Supreme Court released its decision in *Mason*. At the request of the Court, the parties made supplementary submissions by letters dated October 20, 2023, on the issues of responsive justification and the possible use of the record to find implied or implicit reasons for a decision.

C. ***Analysis***

(1) The applicant's Complaint

[57] Both parties made submissions on whether the applicant's Complaint contained, or was required to contain, the allegations that he later characterized as the "fundamental issue". It is helpful to consider the contents of both the Complaint and the Report prepared by the human rights officer.

[58] The Complaint filed in July 2021 concerned "discrimination/failure to accommodate on grounds of disability". It described events from May 2019 until February 2021 related to the applicant's communications with IRCC personnel about becoming an FSO and whether and how his health concerns would be accommodated in that position if he were assigned to work outside of Canada.

[59] For present purposes, the Complaint mentioned that the applicant had been given false information. However, the information and its alleged falseness were not well identified. The Complaint did not expressly allege that IRCC, or the false information, dissuaded the applicant from accepting the Offer.

[60] The Complaint raised the following factual allegations that are pertinent to the applicant's position on receiving allegedly false information in his later September 6 Response:

- **Probation:** the applicant was advised on February 5, 2021, that he would be subject to a probation period of three years, but a PAFSO representative told him on February 11 that there was no probation period;
- **Rotationality:** he was advised in May 2019 that if his "condition worsened in the future [he] would fail to meet a condition called 'rotational' and would face potential termination of employment";
- on February 11, 2021 [i.e., before he declined the Offer], he advised IN that he didn't want to lose his job at IRCC because of his disease and could risk termination of employment through no fault of his own;
- on February 11, 2021, a PAFSO representative gave him "the sense" he was being provided with wrong information, as other candidates had "dropped out and were found other jobs"; and
- on February 16, 2021 [i.e., after he declined the Offer] and as a result of a discussion with a PAFSO representative, "it became clear that [he] was provided false information regarding the job and available accommodations".

[61] The Report in August 2022 characterized the applicant's allegations in its opening paragraphs as follows:

> 1. The Complainant alleges that the Respondent discriminated against him in employment on the ground of disability (Crohn's disease), by treating him in an adverse differential manner during a hiring process and by pursuing a discriminatory policy or practice, contrary to sections 7 and 10 of the Canadian Human Rights Act (the Act).
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> 2. Specifically, the Complainant alleges that the Respondent discriminated against him and failed to accommodate him when he

> applied for the position of Foreign Service Officer (FSO) with the Respondent's International Network Branch (IN).
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> 3. Moreover, the Complainant alleges that the Respondent is pursuing a discriminatory policy or practice by not allowing him to pass a medical exam and by not confirming he would be sent to countries with Canadian health equivalencies or countries approved by his doctors before accepting his letter of offer, as well as the policy or practice that failure to meet a condition called "rotational" could lead to termination of employment. The allegations are detailed in full in the complaint form.
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> [Underlining added.]

[62] At the hearing in this Court, the applicant acknowledged that paragraphs 1 and 2 were reasonably accurate but challenged paragraph 3 as "factually wrong".

[63] Paragraph 13 of the Report also characterized the contents of the Complaint and set out the discrimination issues apparently identified by the applicant after his interview with the officer:

> 13. In his complaint form, the Complainant identified policies or practices, specifically the Respondent's refusal to offer a medical examination prior to signing the letter of offer, the Respondent's refusal to confirm that the Complainant would be sent to a non-hardship country, and the Respondent's operational requirement of rotationality, that employees must be able to be deployed at any time. Following his interview, the Complainant indicated that the following four policies/practices are discriminatory:
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> > 1. The selection process (no medical exam but implying one is necessary)
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> > 2. Rotationality (and how it is construed and threatening employees if they can't remain fully rotational, employer's request and employer's discretion)
> >
> > 3. The posting preference form/assignment process (internal to the Respondent)

> 4. The 2018 Hardship priority consideration (internal to the Respondent).
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> [Underlining added.]

[64] The record before this Court did not include any underlying written communications at or following the applicant's interview with the human rights officer.

[65] Paragraph 14 advised that the Report would consider whether IRCC's policies, as they related to "medical examination, country assignment (including posting preference form/assignment process and hardship priority consideration) and the requirement that FS officers be able to be deployed (rotationality), are in themselves discriminatory" and if so, whether they may be justified as a *bona fide* occupational requirement having regard to the factors of cost, safety and/or health. The paragraph concluded: "Both the individual treatment of the Complainant and the policy aspect of this complaint will be analyzed under the criteria of Alleged Adverse Differentiation in Employment (section 7 of the Act)."

[66] Several important points emerge from the Complaint and the Report in relation to the characterization of the issues:

1. The Complaint provided some factual allegations related to the applicant's receipt of inaccurate information, but did not allege that the inaccurate information dissuaded him from accepting the Offer.
2. In each of paragraphs 1, 2 and 3, and elsewhere, the Report recognized that the Complaint raised issues related to the hiring process, when the applicant applied for the FSO position.

3. The Report characterized the content of the applicant's Complaint, with the participation of the applicant himself, within the provisions of the *CHRA*.
4. The Report did not identify the issue of whether inaccurate information dissuaded the applicant from accepting the Offer.

[67] As the Report in law constituted the Commission's reasons, I observe that the characterization of the issues was within its expertise and should be afforded considerable deference: *Alliance for Equality of Blind Canadians v. Canada (Attorney General),* 2023 FCA 31, at para 7 (aff'g 2021 FC 860, at paras 51-60).

(2) Portions of the Report related to the alleged "fundamental" issue

[68] The Report set out information received from the applicant and the respondent (paragraphs 65-95), analyzed issues (paragraphs 96-123) and recommended that the Commission dismiss the complaint.

[69] The Report's analysis addressed adverse treatment allegations. The Report noted that the parties did not dispute that the applicant rejected the Offer. The Report found that while IRCC had an obligation to accommodate the applicant in the hiring process, the complaint was about accommodating the applicant in the FSO position itself. Because the applicant was not yet accepted to the FSO position when the relevant events occurred, IRCC's duty to accommodate him in that position was not yet engaged. The Report then analysed each of the following policies or practices: the selection process and medical exam; country assignment; and the principle of rotationality.

[70] As both parties recognized, the Report did not contain a section with an express assessment of the applicant's position concerning information that was inaccurate and misleading, or whether that information dissuaded him from accepting the Offer.

[71] However, the Report did address factual matters related to these concerns and made some pertinent findings, having considered the information received from both parties. These factual matters and findings are relevant, particularly to the applicant's position that the investigation was not thorough. The Report addressed them as follows:

- **Probation:** the Report noted that the Offer made no reference to a probationary period and the applicable Guide stated clearly that the probationary period was for candidates hired from outside the Public Service (Report, paragraph 79). Based on these sources, the Report found that it appeared that the 3-year probationary period did not apply to the applicant (Report, paragraph 95). The Report discussed the applicant's meetings with two FSOs who were subject to a 3-year probationary period (having been hired externally) (Report, paragraph 117).

- **"Rotationality":** the Report set out the applicant's concern (paragraphs 71-72) and evidence he relied on (including an email from an IN official that stated that accommodations in the workplace are accepted "where feasible", and a Guide that addressed the circumstances if an employee is unable to comply with rotationality as a condition of employment) (Report, paragraphs 85-86).

  The Report quoted the Offer at length, including its reference to "Rotationality: Able and willing to be posted abroad or in Canada at any time and at the request

of the employer" and its description in Annex 1 (Report, paragraphs 87-88). Further, the Report referred to the applicant's May 2019 communications on rotationality (at paragraph 89) and to his meetings with current FSO officers (paragraph 93).

The Report discussed rotationality as a policy at paragraphs 113-115, including that "[m]any prohibited grounds of discrimination can prevent a FS officer from being assigned to a particular posting", and provided examples, including "[o]fficers with a disability may have more difficulty accessing medical adequate medical care in some foreign countries". The Report found at paragraph 116 that IRCC's assignment team does their best to accommodate FSOs' medical needs but that does not include a promise to be posted to low hardship posts.

The Report returned to the IN official's statement that accommodations in the workplace are accepted "where feasible" (Report paragraph 118). The Report found that such "accommodations [were] much more difficult to work with from an operational perspective overseas as there are set work hours, local laws and considerations, etc." The Report found the "early discussions" between the applicant and the IN official to be "speculative", and discussed the content of the duty of accommodation.

- **Medical Examinations and Refrigerated Medicines:** the Report referred to evidence on the role of Health Canada in medical examinations for FSOs and distinguished between the expertise of an FSO's treating physician and that of

Health Canada (paragraph 101). The Report discussed the feasibility of travelling with refrigerated medicines (at paragraph 117).

[72] As may be seen, the Report was aware of, and made findings concerning, the factual issues and the evidence that each party presented on the alleged probationary period, rotationality (including the applicant's concern about accommodations being available where "feasible"), medical examinations and travelling with refrigerated medicine.

(3) The applicant's September 6 Response

[73] The applicant is correct that in his September 6 Response, he stated that the Report failed to "grapple with the fundamental issue" raised by his complaint which, he contended, was that the information provided by IRCC and in the Offer was inaccurate, misleading and threatening to his health and career, and that it discouraged and dissuaded him from accepting the Offer. The applicant's September 6 Response, particularly at paragraph 4, identified some statements he claimed were inaccurate. The balance of that submission described his position in considerable detail and made additional arguments alleged to arise on the facts. Organizing those allegations based on paragraph 4, the applicant's position related to:

a) **The probationary period**, which should not have applied to him as he was already an indeterminate employee of the federal public service;

b) Rotationality:

a. potential termination of employment “if less than fully rotational”, ignoring IRCC’s duty to accommodate employee with disabilities;

b. accommodations being available on foreign postings only if “feasible” based on the email from the IN official that was quoted in the Report at paragraph 85 and discussed at paragraph 118 of the Report. The applicant also made submissions on alleged misleading, erroneous and omitted information related to accommodations, including statements made by IRCC personnel;

c) **assessments/opinions from his physicians** being rejected as unacceptable for accommodation purposes;

d) **refusal to ship refrigerated medicines** to foreign postings and potential discontinuation of financial coverage; and

e) giving the impression that only whose without medical conditions or accommodation needs can be considered fully rotational and aspire to have a successful foreign service career at IRCC.

[74] The applicant’s September 6 Response also expressly referred to the CHRT’s decision in *Oster*.

[75] In relation to accommodations, the applicant’s September 6 Response argued that he was led to believe that he would not be offered any accommodation if he accepted the Offer and would be risking termination of his public service career due to his disability. He advised that he

was not seeking a specific accommodation but “proactively sought to know whether accommodation would be available and how this process might work”. The applicant argued he was “repeatedly told that accommodations are not available in the foreign service and, faced with these discriminatory policies and practices, had no choice but to decline the offer as it was presented” to him.

[76] The applicant also made arguments about other matters, including preferences for posting and the deadline for decision.

[77] In this Court, the respondent submitted that the applicant had reframed his complaint in his September 6 Response and raised one or more new issues that were not the subject of the investigation. Put another way, the respondent’s position was that the applicant’s position in his September 6 Response was not actually “the fundamental issue” in the applicant’s complaint. The respondent also noted that the applicant was aware of the legal issue specifically as of March 11, 2021, as a result of the email from a PAFSO representative. The respondent raised broader concerns about inefficiencies in the complaint investigation process if complainants were permitted to reframe their complaints after an investigation report is prepared.

[78] I agree with the respondent that the applicant’s September 2022 characterization of an issue as “the fundamental issue” did not make it so. Nor must the invocation of words used in *Vavilov* (“fails to grapple”) lead the Court to conclude that there was necessarily a reviewable error if the Commission did not expressly grapple meaningfully with the submission. What is a

fundamental or significant issue, and whether the Commission grappled meaningfully with a party's submission, are substantive questions for the Court.

[79] In this case, the applicant's position in his September 6 Response that inaccurate information dissuaded him from accepting the Offer, was not raised expressly in his July 2021 Complaint (although some factual allegations were). The applicant's position was also outside the characterization of the issues related to the hiring process as set out in the August 2022 Report, in which he had participated. The applicant's position was "new" in that sense. However, like the issues in the Report, it arose from the circumstances during the hiring process which the human rights officer had investigated. The Report made findings and conducted legal analysis under the *CHRA* but did not address the position, advanced by the applicant in response to it, that inaccurate information dissuaded him to decline the Offer.

[80] In sum, the applicant's September 6 Response relied substantially on known allegations of facts and circumstances in the hiring process to advance a position or submission based on the CHRT's *Oster* decision.

(4) IRCC's Response Letter

[81] In its undated letter, IRCC responded on the merits to the allegations of misleading information in paragraph 4 of the applicant's September 6 Response. IRCC did not directly address whether the Report failed to grapple with the fundamental issue in the Complaint, nor did it argue that the issue was new or reframed compared to the Complaint. IRCC disagreed with the applicant's characterization of facts and provided a point-by-point response to his allegations.

[82] IRCC's response letter denied that the applicant was provided with inaccurate, misleading and threatening information. IRCC submitted that any information provided to him, at his request, was "intended to ensure that he made his decision based on available facts and not to dissuade" him from becoming an FSO.

[83] IRCC's letter stated that the applicant "inaccurately outlined" instances of what he termed "misleading statements". It argued in part:

a) **On probation**: "The facts do not support the [applicant's] assertion that he was inaccurately told that he would be placed on probation, since there is no reference to a probationary period in the letter of offer … and the FSDP Guide clearly states that the probationary period is for participants hired from outside the Public Service". The applicant's only evidence was a single email, which contained a reference to probation and was an instance of "human error";

b) **On rotationality**: "At no time was the [applicant] told that his employment would be terminated if he was 'less than fully rotational'. This statement is not supported by any evidence, and goes against established IRCC practices." The applicant "misunderstood and misrepresented the concept of rotationality in his submission" and the Report at paragraphs 113-119 correctly described and interpreted the requirements of rotationality;

c) **On accommodation**: "At no time was the [applicant] told that he would not be accommodated as required, nor that his doctor's assessments were being 'rejected' for the purpose of accommodation";

d) **On refrigerated medicines**: “Information provided to the [applicant] relating to the shipping of refrigerated medicines were not misrepresentations as he asserts, but rather accurate descriptions of the current situation facing those with particular medical needs …”.

[84] IRCC submitted that the applicant’s conclusion, that only those without medical conditions or accommodation needs can be considered “fully rotational” and aspire to have a successful foreign service career at IRCC, was “not based in fact”.

[85] IRCC argued that the evidence suggested that management tried to equip the applicant with as many relevant resources and information as possible so he could make an informed decision, not to discourage his participation. His decision was based on his own interpretation and assessment of his own comfort level in joining the FSDP.

[86] At paragraphs 15-18 of its letter, IRCC addressed the applicant’s position on “Accommodation: misleading, erroneous and omitted information” at paragraph 27 of his submission. IRCC argued that all official information provided to the applicant in relation to his situation “cannot be described as misleading or erroneous”. IRCC had no record of a conversation between the applicant and one IRCC employee (who had retired in 2020) and the statements attributed to her were not based on IRCC policy or practice. Other “unsubstantiated statements” made by another IRCC employee were “vehemently denied” by that employee.

[87] IRCC addressed the applicant's issues related to the decision deadline, arguing that the termination of his (French language training) assignment agreement was not relevant to his decision to decline the Offer and that refusing to re-offer or put it "on hold" was not a refusal to hire based on disability. IRCC advised that the applicant made a personal choice to refuse the Offer based on the information available to him.

(5) Application of Legal Principles to the Commission's Decision

[88] The applicant submitted that to be reasonable, the Commission had to analyze his September 6 Response position (on false information dissuading him from accepting the Offer) expressly in its decision, as it was fundamental to his complaint under the *CHRA*. In my view, that is not a complete picture of a reviewing court's approach to reasonableness review.

[89] I agree with the applicant that in law, if the Commission did not address a core or fundamental part of his complaint, or his position, it may in some circumstances lead a reviewing court to find that the decision was unreasonable for failure to provide responsive justification, and set it aside: *Mason*, at paras 118, 121; *Vavilov*, at paras 127-128; *Ernst v. Canadian National Railway Company*, 2021 FC 16, at paras 74-76; *Northcott v. Canada (Attorney General)*, 2021 FC 289, at para 41.

[90] In *Ernst*, this Court set aside a screening decision of the Commission made under subparagraph 44(3)(*b*)(i) of the *CHRA*. An investigator's report recommended that the claim be dismissed. The Commission accepted the recommendation. Justice Brown concluded that the Commission's decision should be set aside as unreasonable because the investigator's report did

not grapple with or thoroughly investigate a “very serious” claim of discrimination made by the complainant. See *Ernst,* at paras 25-26, 57-71, 74-78.

[91] In *Northcott,* an investigator prepared a report under sections 40/41 of the *CHRA*. It was provided to the parties for comment. The complainant filed a reply to that report. In the reply, the complainant raised an allegation of bad faith to support her position that a provision in a statute could not apply to her complaint. The issue was therefore placed before the Commission before it rendered its decision. The Commission’s screening decision dismissed her complaint without reasons to supplement the section 40/41 report. Both the report and the decision were silent on the issue. Justice Gleeson held that the bad faith submissions were central and fundamental to the complainant’s reply, but the Commission did not address or grapple with them. Bad faith directly impacted the application of the statute to the complainant’s claim. The Commission’s failure to address the issue rendered its decision unreasonable: *Northcott,* at paras 24, 25-26, 29, 37-42.

[92] In the present case, the respondent submitted that the position raised in the applicant’s submissions replying to the Report was not a central issue that the Commission needed to address. I am unable to agree. The inaccuracy of information was raised in the Complaint, and the applicant’s position was based essentially on the same facts and circumstances that the human rights officer had investigated in relation to the hiring process, but with a distinct legal basis to support his position that relied on the CHRT decision in *Oster*. As already explained, the applicant raised the argument in reply to the draft Report, and before the Commission made its decision (as in *Northcott*).

[93] The applicant's argument on this issue was significant to his position, whether or not it was determinative or was "the fundamental issue" as he characterized it: *Mason,* at paras 91, 95, 96. In my view, the applicant's submission on this issue acted as a constraint on the Commission's decision so that it had to grapple with it meaningfully and provide an adequate justification in response to it: *Vavilov,* at para 127; *Mason,* at paras 118-120.

[94] Did the Commission's reasons do so? Not expressly. The Commission's decision memorandum dated November 2, 2022, did not mention the applicant's position claiming that inaccurate information dissuaded him from accepting the Offer, although it did explicitly confirm that the Commission had reviewed the parties' submissions filed in response to the Report. For its part, the Report (which formed part of the Commission's reasons) did not expressly analyze the applicant's position or IRCC's response position. It did consider most of the factual circumstances on which the applicant's reply position relied, and it analyzed legal issues that arose from those circumstances under the *CHRA*. There is nothing in the record suggesting that the human rights officer amended or updated the Report after receiving the parties' written responses to it.

[95] Did the Commission's decision do so implicitly? The parties did not agree.

[96] *Vavilov* contemplates that certain factors outside of the expressed reasons may "explain an aspect of the decision maker's reasoning process that is not apparent from the reasons themselves, or may reveal that an apparent shortcoming in the reasons is not, in fact, a failure of justification, intelligibility or transparency": *Vavilov,* at paras 94 [quotation], 123; *Mason,* at

paras 61, 69, 95-96, 97. As previously noted, decision maker's reasons must be read "in light of the record and with due sensitivity to the administrative regime in which they were given": *Vavilov,* at paras 91-96, 103; *Mason,* at paras 61, 91. To that end, the reviewing court may consider the institutional context and record before the decision maker, such as the contents of transcripts of a hearing, the parties' submissions, prior communications with the parties leading to the decision at issue, past decisions of the decision maker, and policies and bulletins: *Mason,* at paras 61, 91-97; *Vavilov,* at paras 94-97, 103, 303; *Le-Vel Brands, LLC v. Canada (Attorney General),* 2023 FCA 177, at paras 39-42, 47, 55; *Alexion Pharmaceuticals Inc. v. Canada (Attorney General),* 2021 FCA 157, at paras 15-17; *Yu v. Richmond (City),* 2021 BCCA 226, at paras 99-102. However, a reviewing court may not supply its own reasons or buttress those provided by the decision maker: *Mason,* at paras 62, 101; *Vavilov,* at para 96. Nor may the court guess or speculate when the decision maker's reasons are silent: *Vavilov,* at para 97.

[97] The parties' post-hearing submissions addressed whether the Court should fill the perceived gap in the Commission's reasoning through implied or implicit reasons based on the record, having regard to *Zeifmans LLP v. Canada,* 2022 FCA 160. In that case, an accounting firm argued that because the Minister's decision did not supply an express interpretation of a statutory provision, the Minister "never thought about the interpretation", rendering the decision unreasonable. The Federal Court of Appeal disagreed, finding that "reviewing courts must not insist on the sort of express, lengthy and detailed reasons that, if asked to do the job themselves, they might have provided" and that "an administrative decision should be left in place if reviewing courts can discern from the record why the decision was made and the decision is otherwise reasonable": *Zeifmans,* at paras 9-10. The Court stated at paragraph 10:

> In other words, the reasons on key points do not always need to be explicit. They can be implicit or implied. Looking at the entire record, the reviewing court must be sure, from explicit words in reasons or from implicit or implied things in the record or both, that the administrator was alive to the key issues, including issues of legislative interpretation, and reached a decision on them.

[98] The Federal Court of Appeal's review of the record before the Minister and the decision itself left the appeal court in "no doubt": it knew where the Minister was coming from, that the Minister was aware of the statutory provision, that the Minister implicitly or impliedly adopted an interpretation of that provision consistent with multiple binding decisions of that Court, and applied that interpretation to the facts in a reasonable way: *Zeifmans*, at para 11.

[99] The applicant contended that the Federal Court of Appeal's decision in *Zeifmans* is of "questionable authority" on this issue since the Supreme Court's decision in *Mason*. I do not agree. Justice Jamal's reasons for the Supreme Court confirmed that the history and context of the proceeding, including the record before the decision maker, may explain an aspect of the reasoning process that is "not apparent from the reasons themselves": *Mason*, at para 61 (quoting *Vavilov*, at para 94); see also *Mason*, at paras 69, 91, 97. In addition, the Supreme Court in *Mason* found no basis to conclude that the decision maker had considered two points of statutory context, "even implicitly": *Mason*, at para 97. *Mason* also focused on whether the decision maker considered or meaningfully grappled with the arguments raised before it: *Mason*, at para 97.

[100] The appellate authorities also suggest that the reviewing court must have considerable confidence in order to conclude that something in the record fills an apparent gap in the decision

maker's express reasoning. The Supreme Court in *Vavilov* confirmed that the reviewing court may "connect the dots on the page where the lines, and the direction they are headed, may be readily drawn": at para 97. The Federal Court of Appeal found in *Le-Vel Brands* that it was "entirely appropriate", given the words in the impugned decision, to incorporate by reference the reasons provided in earlier correspondence. Statements in the decision "clearly" provided the basis to read the decision in light of the prior correspondence between the decision maker and the affected parties: *Le-Vel Brands,* at paras 40-42, 47; see also *Zeifmans,* at paras 10-11; *Halifax Employers Association v. Farmer,* 2021 FC 145, at paras 74-80. Having such a high level of confidence supports the focus on adequate and responsive justification by the decision maker, and ensures that the reviewing court maintains its supervisory role and does not supply its own reasoning: *Mason,* at paras 58, 101; *Vavilov*, at paras 12-15, 96-97; *Alexion Pharmaceuticals*, at paras 8-10. *Mason* made no direct comment on the degree of confidence a reviewing court must have when using the record to fill a possible gap in the decision maker's reasoning.

[101] The respondent made three submissions about what the Commission decided impliedly or implicitly, looking at its decision in light of the record.

[102] First, the respondent submitted that the Commission made an implicit finding that it agreed with IRCC's undated letter submitted in response to the applicant's September 6 Response, specifically IRCC's position at paragraphs 7-12 and 15-18 of its letter relating to allegedly inaccurate information.

[103] Considering this argument, I account for the nature of the screening decision made by the Commission under paragraph 44(3)(*b*) of the *CHRA* and the wide latitude given to the Commission to make such decisions, as well as its role in assessing the sufficiency of the factual evidence. However, I cannot make my own assessment of the relative merits of the two parties' positions in their submissions, or what the Commission's screening decision should have been. I must focus only on what the record discloses about the Commission's decision and its reasoning process – that is, what the Commissioner's decision on the issue actually was.

[104] In my view, the Commission's decision cannot be read to have agreed with the arguments in IRCC's letter, either entirely or at paragraphs 7-12 and 15-18 in particular. The record does not support a confident inference that the Commission reached such a conclusion. The Commission's decision memorandum dated November 2, 2022, did not adopt or address the applicant's position expressly and only advised that the Commission had read the parties' submissions. There were duelling factual positions and arguments in the parties' very detailed submissions on a number of different allegedly inaccurate statements. IRCC made no submissions on *Oster*. The Report made factual findings affecting the allegedly inaccurate statements but did not address the applicant's position or IRCC's response. There is nothing in the record showing any additional post-Report analysis by the human rights officer prior to the Commission's decision, for example in a memorandum or other communication to the Commission assessing the position raised by the applicant's September 6 Response and IRCC's letter responding to it. In this context, the Commissioner's conclusion that further inquiry was not warranted was not sufficient to adopt or implicitly agree with IRCC's position.

[105] In sum, there was no incorporation of IRCC's position, no daisy chain of reasoning through connected documents, and no dots that form readily-drawn lines towards that conclusion: see *Vavilov,* at para 97; *Le-Vel Brands,* at paras 39-41, 47, 55; *Zeifmans,* at paras 9-11. I cannot confidently conclude that the Commission implicitly or impliedly agreed with IRCC's undated submissions on this issue.

[106] Second, the respondent argued that by declining to send the matter back for investigation on the applicant's new issue, the Commission made an implicit finding that as a complainant, the applicant was expected to put forward all live allegations in the Complaint form. However, there was nothing in the Commission's decision on November 2 to support an implicit finding of that nature. Contrary to the respondent's submission, there are none of the necessary dots on the page to connect: *Vavilov,* at para 97; *Farmer,* at para 80.

[107] Third, the respondent contended that there was no basis even to conclude that the allegedly incorrect information was designed to dissuade or discourage the applicant from accepting the Offer and that it was not even clear what information the applicant relied upon as incorrect. I cannot consider that argument at this stage as it is bound up with the merits and would insert the Court's own analysis in place of the Commission's, contrary to *Vavilov* principles.

[108] For these reasons, I conclude that the Commission's decision failed to provide a responsive justification to, and did not expressly or implicitly grapple with, the applicant's position made in response to the Report that he was provided with inaccurate information that

dissuaded him from accepting the Offer. The absence of justification was sufficiently significant to render the Commission's decision unreasonable. See *Mason,* at paras 59, 76, 81, 85, 91-95, 97; *Vavilov*, at paras 86, 100, 127-128, 133.

[109] To complete this analysis, I note that the Commission's reasons in this case resemble the reasons for the Commission's decision at issue in *Rosianu*: see *Rosianu,* at paras 68-69. In that case, the Federal Court of Appeal found the decision reasonable, considering the essence of the complaint, the few material facts in dispute and the overall context, which only required the Commission to determine whether there was "sufficient evidence (a reasonable basis) supporting the complaint after a reasonably thorough investigation": *Rosianu*, at para 75. The appeal court understood very well why the Commission concluded that the complaint's key elements lacked sufficient support and there was no significant issue or evidence that needed to be addressed more specifically: at paras 76-77. The present case is materially different, in that the issue raised in the applicant's September 6 Response was distinct from the issues analyzed in the Report, there were some disputed facts in the parties' responses on that issue and the issue was sufficiently important to the applicant's position to warrant a specific responsive justification: *Rosianu*, at paras 75, 77.

[110] I turn now to the applicant's submissions on procedural unfairness. I will address the appropriate remedy below.

IV. Was the applicant deprived of procedural fairness?

[111] The parties did not disagree about the Court's role if a procedural fairness question arises on an application for judicial review. The Court determines whether the procedure used by the decision maker was fair, having regard to all of the circumstances including the nature of the substantive rights involved and the consequences for the individual(s) affected. While technically no standard of review applies, the Court's review exercise is akin to correctness: *Hussey v. Bell Mobility Inc*, 2022 FCA 95, at para 24; *Canadian Association of Refugee Lawyers v. Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196, [2021] 1 FCR 271, at para 35; *Canadian Pacific Railway Company v. Canada (Attorney General)*, 2018 FCA 69, [2019] 1 FCR 121, at paras 54-55.

[112] Procedural fairness concerns arise if an investigation was clearly deficient because the investigator failed to investigate crucial evidence, such as key witnesses or crucial documentary information: *Rosianu*, at paras 33-34, 40; *Tahmourpour v. Canada (Solicitor General)*, 2005 FCA 113, at paras 8-9, 11, 30-35, 40; *Sketchley*, at paras 114-125.

[113] The applicant's position was that the human rights officer completely failed to investigate or analyze the core allegations in his Complaint (citing *Naqvi v. Defence Research and Development Canada*, 2023 FC 88, at paras 19, 21; *Boychyn v. Canada (Royal Mounted Police)*, 2018 FC 1185, at paras 32, 36-39; *Jagadeesh v. Canadian Imperial Bank of Commerce (CIBC)*, 2019 FC 1224, at paras 61-64, 66; *Peterkin v. Toronto Dominion Bank TD Canada Trust*, 2019 FC 579, at paras 27-28; *Ernst*, at para 54). The applicant submitted that the Report demonstrated that the Commission seemed to have ignored important documents provided by the applicant (in particular, the email sent on March 11, 2021, concerning whether the applicant was strategically misled by false information in the hiring process) and relied on factual assertions made by IRCC

as being true, although they were directly contradicted by other information provided during the investigation.

[114] The respondent submitted that the Commission was required to inform the parties of the evidence obtained by the investigator, and to have an opportunity to respond to it, both of which occurred. The respondent also argued that the investigation was sufficiently thorough and did not ignore obviously crucial evidence: see *Alkoka v. Canada (Attorney General)*, 2013 FC 1102, at paras 4, 29, 31, 40, 41, 43.

[115] The applicant has not persuaded me that the investigation was not thorough on the legal standard in the case law cited above, or that this case raises a procedural unfairness concern akin to the cases cited by the applicant. Nor has the applicant demonstrated that the Report improperly relied on factual assertions made by one party instead of the other.

[116] I do not agree with the applicant that the human rights officer completely failed to investigate or analyze the core allegations in his Complaint, or that the investigation was clearly deficient for failure to pursue critical evidence. The Report demonstrates that the applicant's core allegations – including the issues defined in the Report with the applicant's participation – were in fact investigated and assessed for screening purposes. The fact that the applicant later raised a position, based on a distinct legal argument, does not detract from the thoroughness of the investigation into the facts and circumstances in the present case (as reflected in the Report, described above at paragraphs 61-72), nor the Report's assessment of the other legal positions as defined in the Report.

[117] The failure of the Report to refer expressly to the March 11, 2021, email from the PAFSO representative to the applicant does not lead to the conclusion that the investigation was not thorough. The applicant provided the March 11, 2021, email to the officer in June 2022 in amongst approximately 140 pages of materials. The email set out the representative's views on the implications of the alleged factual inaccuracies, well before the applicant filed his Complaint in July 2021 and before he was interviewed and participated in the investigation process that led to the Report in August 2022. We know little about that interview or the communications between applicant and officer about the issues to be analyzed, apart from what is in the Report. The applicant did not point to any evidence that he highlighted the PAFSO representative's email in his communications with the human rights officer before September 6, 2022, or that he advanced the theory in it that IRCC personnel strategically manipulated the applicant's decision making process or offered him inaccurate information designed to compel him to decline the Offer.

[118] In addition, the Report demonstrated that the factual concerns mentioned in the representative's email (probation, accommodation and the "where feasible" email, and rotationality) were reasonably investigated. The applicant did not identify any other crucial evidence that was not investigated.

[119] Accordingly, I do not agree with the applicant's argument at the hearing that this case is very similar to *Naqvi*. This is not a case in which there was a complete failure to investigate or analyze the core allegations in the applicant's complaint, or a fundamentally flawed investigation report owing to a failure to investigate: see *Naqvi*, at paras 17, 21, 22.

[120] Finally, the human rights officer provided the parties with an opportunity to comment on the Report before it was provided to the Commission: see *Choi,* at para 41; *Thomas v. Canada (Attorney General),* 2013 FC 292, at paras 72-96; *Ennis,* at paras 76-78.

[121] In all these circumstances, I find no procedural unfairness arising from lack of thoroughness in the investigation process.

[122] The applicant also argued that the Commission did not have his two-page submission dated October 6, 2022, when it made its decision. The respondent noted that the applicant was not entitled to file another reply submission at that stage, and relied on *Lafond v. Canada (Attorney General),* 2015 FC 735, at paras 20-21. The applicant's October 6 submission was filed to reply to IRCC's undated letter, which in turn responded to the applicant's September 6 Response. Looking at the submissions and the circumstances, there are insufficient grounds to conclude that the applicant did not have a meaningful opportunity to be heard. In any event, as the matter will be returned to the Commission, it can decide whether to hear further from the applicant.

V. Remedy

[123] In the circumstances, the Commission's decision dated November 2, 2022, must be set aside. The Commission's decision did not grapple meaningfully with, and provide a responsive justification concerning, the position raised in the applicant's September 6 Response related to the applicant allegedly being provided with inaccurate information that dissuaded him from accepting the Offer.

[124] The matter will be returned to the Commission for redetermination under the *CHRA*. However, this conclusion does not imply that the Commission's process must start over with another investigation or a fresh Report into all of the applicant's allegations of discrimination and failure to accommodate in relation to the hiring process. It will be for the Commission to decide how to proceed towards a screening decision, having regard to all the circumstances including these Reasons.

VI. Conclusion

[125] The application is therefore allowed.

[126] The parties advised at the hearing that they had agreed on a quantum of costs in the amount of $3,500 inclusive of disbursements and taxes. That amount is satisfactory under Rule 400 of the *Federal Courts Rules*.

JUDGMENT in T-2601-22

THIS COURT'S JUDGMENT is that:

1. The applicant's letter to the Commission dated June 3, 2022, and the email dated March 11, 2021, found at pages 10 and 145-146 of the application record, are admitted as evidence in this proceeding.

2. The application is allowed. The decision of the Canadian Human Rights Commission dated November 2, 2022, is set aside and the matter remitted for redetermination by the Commission, having regard to the Reasons in this proceeding.

3. The respondent shall pay to the applicant costs in the amount of $3,500, inclusive of taxes and disbursements.

"Andrew D. Little"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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PLACE OF HEARING:	OTTAWA, ONTARIO
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DATED:	JANUARY 19, 2024

APPEARANCES:

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