Date: 20090317

Docket: T-762-08

Citation: 2009 FC 270

Toronto, Ontario, March 17, 2009

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

UTILITY TRANSPORT INTERNATIONAL INC.

Applicant

and

BETTY KINGLSEY, CANADIAN HUMAN RIGHTS TRIBUNAL

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This application challenges the decision of the Canadian Human Rights Commission (Commission) of April 15, 2008 (Decision) which referred the complaint of the Respondent, Betty Kingsley, to the Canadian Human Rights Tribunal. The Applicant, Utility Transport International Inc., seeks an order under section 18.1 of the *Federal Court Act*, R.S.C. 1985, c.F-7 (Act) to quash and set aside the Decision.

[2] The Applicant is a trans-border specialized common and contract carrier that conducts priority transportation for its customers. It has 65 trucks, 90 trailers, 12 specialized pieces of equipment and 15 owner-operators.

[3] On July 22, 2008, the parties consented to an Order that the Respondent, the Canadian Human Rights Commission, be removed as named respondent in the proceeding, without costs pursuant to sections 18, 18.1 and 18.2 of the Act.

BACKGROUND

[4] The Respondent, Betty Kingsley, was hired by the Applicant, Utility Transport International Inc., on May 12, 2004 for a clerical position. Within a couple of months she was promoted to a fleet co-coordinator position.

[5] The Respondent's job required her to: maintain the Applicant's transport trusts with authorities books (permits, stickers, registration, logs, transponders); go inside the trucks and put on the appropriate stickers for Canada and USA travel; and to take drivers to doctor's appointments for pre-employment medical tests.

[6] The Respondent alleges that Mr. Campitelli, the secretary-treasurer of the Applicant company, told drivers that the Respondent had spent the night with Mr. Tom Mackay, a driver at the Applicant company, in Mr. Mackay's transport truck some time in November 2006. The

Respondent states that she was made aware of Mr. Campitelli's comments by Mr. Mackay on February 13, 2007.

[7] The Applicant had purchased a new transport truck in November 2006 and the Respondent had arranged to put the stickers inside the front window on the driver's side. Mr. Mackay was in the office waiting to be dispatched, so he asked if he could come along with the Respondent while she was putting the stickers on the truck.

[8] Mr. Mackay assisted in putting some of the stickers inside the window of the truck, while the Respondent placed stickers on the bumper and inside the truck. She also made sure that the authorities book was up-to-date so that the truck could be dispatched.

[9] While this was taking place, Mr. Campitelli was in the tire shed about 50 feet away with Mr. MacGarry, another driver. Both doors of the truck were open. The Respondent says that Mr. Campitelli saw her and Mr. Mackay in the truck and asked what she was doing. The Respondent says that Mr. MacGarry told Mr. Campitelli that she was putting stickers on the truck as well as updating the authorities book.

[10] The Respondent claims that four months after this incident Mr. Mackay told her that Mr. Campitelli was spreading a rumour that she and Mr. Mackay had slept together in the truck that night. As well, the Respondent also says that Mr. Jerry Fenton, another driver at the Applicant's company, said that Mr. Campitelli told him directly that the Respondent had slept with Mr. Mackay.

[11] The Respondent says that she told the Officer manager, Mr. Bruce Higgerson, that Mr. Campitelli had ruined her reputation, to which Mr. Higgerson allegedly replied, “He has ruined everyone’s reputation, why should you be any different?” The Respondent reports that she then went to her doctor, who recommended stress leave for one month. After her visit to the doctor, the Respondent informed Mr. Higgerson and Mr. Campitelli about her stress leave, and that she was going to contact the Commission about filing a complaint.

[12] The Respondent alleges that Mr. Campitelli said that he would do “what the fuck he wanted to do, it was his company and he could do what he wanted to do.”

[13] The Respondent states that she applied for sick leave benefits with the Applicant company and decided that she could not go back to the atmosphere of the office. She is now unemployed at the age of 54.

[14] The Applicant denied the Respondent’s allegations of discrimination, harassment or incidents of discrimination towards the Respondent. Mr. Campitelli also denied having “ever engaged in ‘rumour mongering’ or having generated or disseminated any rumours about the complainant.”

DECISION UNDER REVIEW

[15] The initial investigation report held that in light of Mr. Campitelli’s denial of the allegations and the lack of cooperation of the witnesses, it was a matter of the Respondent’s word against Mr. Campitelli’s as to whether the offending comment had been made. As well, the investigation officer found that, in the absence of any defence other than the denial of the allegations from the Respondent, the Applicant’s allegations were not refuted and nor had the Respondent taken any action to deal with the alleged harassment.

[16] The investigation report cites *Francois v. Canadian Pacific Ltd.*, [1988] C.H.R.D. No. 1 and *Hinds v. Canada (Employment and Immigration Commission)*, [1988] C.H.R.D. No. 13 for the three basic elements that are to be satisfied by an employer to avoid liability under section 65(2) of the *Canadian Human Rights Act*, R.S., 1985, c. H-6 (CHRA) which are as follows:

1. The employer did not consent to the commission of the act or omission complained of;
2. The employer exercised all due diligence to prevent the act or omission from being committed; and
3. The employer exercised all due diligence subsequently to mitigate or avoid the effect of the act or omission.

[17] In considering whether an employer has exercised all due diligence, it is necessary to examine the nature of the employer’s response. To avoid liability, the employer is obliged to take

reasonable steps to alleviate, as best it can, the distress arising within the workplace environment and to reassure those concerned that it is committed to the maintenance of a workplace free from harassment. A response that is both timely and corrective is called for and its degree must turn upon the circumstances of the harassment in each case. The investigation officer found that that the Respondent's contention suggested that the Applicant did not take any corrective actions to mitigate the effects of the alleged harassment.

[18] It was noted by the investigation officer that the parties had turned down mediation. The investigation officer recommended that, pursuant to section 47 of the CHRA, a conciliator be appointed to bring about a settlement of the complaint and, pursuant to paragraph 44(3)(*a*) of the CHRA, to request that a Chairperson of the Commission institute an inquiry into the complaint because further inquiry was warranted.

[19] The Commission sent a letter to the parties on April 15, 2008 outlining its decision. The Commission indicated that it had reviewed the investigator's report and, after examining the information, the Commission reiterated the investigators recommendation as follows:

> [P]ursuant to section 47 of the *Canadian Human Rights Act*, to appoint a conciliator to bring about a settlement of the complaint and pursuant to paragraph 44(3)(a) of the *Act*, to request the Chairperson of the Canadian Human Rights Tribunal to institute an inquiry into the complaint because: having regard to all the circumstances in the complaint, further inquiry is warranted. Should the parties fail to reach a settlement within ninety (90) days of the date of this decision, the matter will be referred to Tribunal. Should the parties reach a settlement, the terms of the settlement will be referred to the Commission for approval or rejection, pursuant to paragraph 48(1) of the *Act*.

ISSUES

[20] The Applicant raises the following issues:

1. Did the Commission err in law or fail to observe principles of natural justice or procedural fairness by basing the Decision on the investigation report which:

   a) Was deficient in that it contained no direct, first-hand evidence to support a claim that the course of conduct described in the complaint ever occurred; and

   b) Based its recommendation on little more than rumour that was uncorroborated, third hand hearsay?

STATUTORY PROVISIONS

[21] The following statutory provisions are applicable in these proceedings:

18.1 (1) An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.	**18.1** (1) Une demande de contrôle judiciaire peut être présentée par le procureur général du Canada ou par quiconque est directement touché par l'objet de la demande.
Time limitation	Délai de présentation
(2) An application for judicial review in respect of a decision or an order of a federal board, commission or other tribunal shall be made within 30 days after the time the decision or	(2) Les demandes de contrôle judiciaire sont à présenter dans les trente jours qui suivent la première communication, par l'office fédéral, de sa décision ou de son ordonnance au

order was first communicated by the federal board, commission or other tribunal to the office of the Deputy Attorney General of Canada or to the party directly affected by it, or within any further time that a judge of the Federal Court may fix or allow before or after the end of those 30 days.	bureau du sous-procureur général du Canada ou à la partie concernée, ou dans le délai supplémentaire qu'un juge de la Cour fédérale peut, avant ou après l'expiration de ces trente jours, fixer ou accorder.
Powers of Federal Court	Pouvoirs de la Cour fédérale
(3) On an application for judicial review, the Federal Court may	(3) Sur présentation d'une demande de contrôle judiciaire, la Cour fédérale peut :
(*a*) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or	*a*) ordonner à l'office fédéral en cause d'accomplir tout acte qu'il a illégalement omis ou refusé d'accomplir ou dont il a retardé l'exécution de manière déraisonnable;
(*b*) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.	*b*) déclarer nul ou illégal, ou annuler, ou infirmer et renvoyer pour jugement conformément aux instructions qu'elle estime appropriées, ou prohiber ou encore restreindre toute décision, ordonnance, procédure ou tout autre acte de l'office fédéral.
Grounds of review	Motifs
(4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal	(4) Les mesures prévues au paragraphe (3) sont prises si la Cour fédérale est convaincue que l'office fédéral, selon le cas :

(*a*) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;	*a*) a agi sans compétence, outrepassé celle-ci ou refusé de l'exercer;
(*b*) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;	*b*) n'a pas observé un principe de justice naturelle ou d'équité procédurale ou toute autre procédure qu'il était légalement tenu de respecter;
(*c*) erred in law in making a decision or an order, whether or not the error appears on the face of the record;	*c*) a rendu une décision ou une ordonnance entachée d'une erreur de droit, que celle-ci soit manifeste ou non au vu du dossier;
(*d*) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;	*d*) a rendu une décision ou une ordonnance fondée sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments dont il dispose;
(*e*) acted, or failed to act, by reason of fraud or perjured evidence; or	*e*) a agi ou omis d'agir en raison d'une fraude ou de faux témoignages;
(*f*) acted in any other way that was contrary to law.	*f*) a agi de toute autre façon contraire à la loi.
Defect in form or technical irregularity	Vice de forme
(5) If the sole ground for relief established on an application for judicial review is a defect in form or a technical irregularity, the Federal Court may	(5) La Cour fédérale peut rejeter toute demande de contrôle judiciaire fondée uniquement sur un vice de forme si elle estime qu'en l'occurrence le vice n'entraîne aucun dommage important ni déni de justice et, le cas échéant, valider la décision ou

	l'ordonnance entachée du vice et donner effet à celle-ci selon les modalités de temps et autres qu'elle estime indiquées.
(*a*) refuse the relief if it finds that no substantial wrong or miscarriage of justice has occurred; and	
(*b*) in the case of a defect in form or a technical irregularity in a decision or an order, make an order validating the decision or order, to have effect from any time and on any terms that it considers appropriate.	

[22] The following provisions of the CHRA are also of relevance:

Report	Rapport
44. (1) An investigator shall, as soon as possible after the conclusion of an investigation, submit to the Commission a report of the findings of the investigation.	**44.** (1) L'enquêteur présente son rapport à la Commission le plus tôt possible après la fin de l'enquête.
Action on receipt of report	Suite à donner au rapport
(2) If, on receipt of a report referred to in subsection (1), the Commission is satisfied	(2) La Commission renvoie le plaignant à l'autorité compétente dans les cas où, sur réception du rapport, elle est convaincue, selon le cas :
(*a*) that the complainant ought to exhaust grievance or review	*a*) que le plaignant devrait épuiser les recours internes ou

procedures otherwise reasonably available, or	les procédures d'appel ou de règlement des griefs qui lui sont normalement ouverts;
(*b*) that the complaint could more appropriately be dealt with, initially or completely, by means of a procedure provided for under an Act of Parliament other than this Act,	*b*) que la plainte pourrait avantageusement être instruite, dans un premier temps ou à toutes les étapes, selon des procédures prévues par une autre loi fédérale.
Idem	Idem
(3) On receipt of a report referred to in subsection (1), the Commission	(3) Sur réception du rapport d'enquête prévu au paragraphe (1), la Commission :
(*a*) may request the Chairperson of the Tribunal to institute an inquiry under section 49 into the complaint to which the report relates if the Commission is satisfied	*a*) peut demander au président du Tribunal de désigner, en application de l'article 49, un membre pour instruire la plainte visée par le rapport, si elle est convaincue :
(i) that, having regard to all the circumstances of the complaint, an inquiry into the complaint is warranted, and	(i) d'une part, que, compte tenu des circonstances relatives à la plainte, l'examen de celle-ci est justifié,
(ii) that the complaint to which the report relates should not be referred pursuant to subsection (2) or dismissed on any ground mentioned in paragraphs 41(*c*) to (*e*); or	(ii) d'autre part, qu'il n'y a pas lieu de renvoyer la plainte en application du paragraphe (2) ni de la rejeter aux termes des alinéas 41*c*) à *e*);
(*b*) shall dismiss the complaint to which the report relates if it is satisfied	*b*) rejette la plainte, si elle est convaincue :
(i) that, having regard to all the circumstances of the complaint, an inquiry into the complaint is not warranted, or	(i) soit que, compte tenu des circonstances relatives à la plainte, l'examen de celle-ci n'est pas justifié,

(ii) that the complaint should be dismissed on any ground mentioned in paragraphs 41(*c*) to (*e*).	(ii) soit que la plainte doit être rejetée pour l'un des motifs énoncés aux alinéas 41*c*) à *e*).
Notice	Avis
(4) After receipt of a report referred to in subsection (1), the Commission	(4) Après réception du rapport, la Commission :
(*a*) shall notify in writing the complainant and the person against whom the complaint was made of its action under subsection (2) or (3); and	*a*) informe par écrit les parties à la plainte de la décision qu'elle a prise en vertu des paragraphes (2) ou (3);
(*b*) may, in such manner as it sees fit, notify any other person whom it considers necessary to notify of its action under subsection (2) or (3).	*b*) peut informer toute autre personne, de la manière qu'elle juge indiquée, de la décision qu'elle a prise en vertu des paragraphes (2) ou (3).

STANDARD OF REVIEW

[23] The investigator's report constitutes the Commission's reasons. Therefore, if the investigation report is flawed, the Commission's decision is equally flawed, as the Commission was not in possession of the relevant information upon which it could properly exercise its discretion: *Forster v. Canada (Attorney General)*, [2006] F.C. 787 at paragraph 37 and *Canada (Attorney General) v. Grover*, [2004] F.C.J. No. 865 (F.C.) at paragraph 25 (*Grover*).

[24] The discretion vested in the Commission in deciding whether to dismiss a complaint or refer it to adjudication before a tribunal does not allow it to short-circuit the investigation process or ignore a necessary witness. No relevant fact should be left out or omitted, particularly when the information is damaging to the complainant's position, as this only casts serious doubts on the neutrality of the investigator: *Grover* and *Canadian Broadcasting Corp. v. Paul*, [1998] F.C.J. No. 1823 (F.C.T.D.) at paragraph 63 (*Paul*).

[25] The Commission should dismiss a complaint "where there is insufficient evidence to warrant appointment of a tribunal" and determine if there is a "reasonable basis in the evidence for proceeding to the next stage": *Paul* at paragraph 62.

[26] *Canada (Canadian Human Rights Commission) v. Canada (Canadian Armed Forces)(re Franke)*, [1999] 3 F.C. 653 (F.C.T.D.) dealt with the judicial review of a Commission decision involving sexual harassment. The Court had the following to say of relevance at paragraphs 22-24 and 27-28:

> 22. When reviewing the decisions of a human rights tribunal, the Supreme Court of Canada has stated that the standard of review on questions of law should be one of correctness: there should be no deference to the tribunal's findings of law.
>
> 23. On the other hand, when dealing with questions of fact, the tribunal's area of expertise, the appropriate standard of review is patent unreasonableness.
>
> 24. In the present case, the Tribunal was faced with the task of applying the correct legal test for sexual harassment to the impugned conduct, in order to decide whether that which occurred constituted sexual harassment. This is a question of mixed fact and law.

> …
>
> 27. The *Canadian Human Rights Act*, on the other hand, does not contain a statutory right of appeal, which suggests that the decisions of the Tribunal are to be final, yet there is no privative clause to this effect. The absence of a statutory right of appeal indicates more deference should be shown, while the lack of a privative clause usually signifies less deference.
>
> 28. After careful consideration of these factors, I conclude that the appropriate standard of review in this case, as it was in *Southam*, is reasonableness: provided the decision is supported by reasons which can be justified by the evidence, the Court should not intervene.

[27] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, the Supreme Court of Canada recognized that, although the reasonableness *simpliciter* and patent unreasonableness standards are theoretically different, "the analytical problems that arise in trying to apply the different standards undercut any conceptual usefulness created by the inherently greater flexibility of having multiple standards of review": *Dunsmuir* at paragraph 44. Consequently, the Supreme Court of Canada held that the two reasonableness standards should be collapsed into a single form of "reasonableness" review.

[28] The Supreme Court of Canada in *Dunsmuir* also held that the standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to the particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[29] In the present case, the Applicant has specifically raised procedural fairness issues that are reviewable under a standard of correctness: *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1.

ARGUMENTS

The Applicant

[30] The Applicant submits that the Investigation report of December 18, 2007 that led to the Decision of the Commission was deficient and fundamentally flawed. Further, the Applicant argues that the report: contained erroneous findings; failed to elicit any direct, admissible evidence or any material facts establishing that the complaint occurred; and failed to elicit any direct or admissible evidence linking the alleged sexual harassment to the Applicant.

Did the Commission err in referring this matter to the Tribunal?

[31] The Applicant submits that the Commission had no rational basis to allow the complaint to proceed to the inquiry stage. The Applicant argues that there was no direct, admissible or cogent evidence establishing that the conduct complained of ever occurred.

[32] The Applicant also argues that the Commission has a duty of procedural fairness which requires "an adequate and fair basis on which to evaluate whether there is sufficient evidence to

warrant appointment of a tribunal": *Forster v. Canada (Attorney General)*, [2006] F.C. 787 at paragraph 47.

[33] The Applicant says that, for the Commission to refer a complaint under section 7 of the Act to a Tribunal, there must be specific material facts linked to a possible discriminatory practice in the case under investigation. The test that should be followed is established by the Supreme Court of Canada in *Canadian Broadcasting Corp. v. Paul*, [1998] F.C.J. No. 1823 (F.C.T.D.) at paragraph 62 to the effect that where a complaint has "insufficient evidence to warrant appointment of a tribunal" the complaint should be dismissed.

[34] The Applicant submits that the Decision to order an inquiry in the present case was based on the Commission's faulty assessment of the relevant evidence before it. The Commission also considered irrelevant and otherwise inadmissible evidence and made erroneous findings of fact in disregard of the material placed before it. The Decision was either contrary to, or not supported by, the evidence that was placed before it.

[35] The Commission's role is to determine whether there is sufficient evidence establishing a reasonable basis to justify the further pursuit of a complaint. In *Bell v. Canada (Canadian Human Rights Commission); Cooper v. Canada (Canadian Human Rights Commission)*, [1996] 3 S.C.R. 854 (S.C.C.), Justice La Forest describes the role of the Commission as follows:

> a) It is an administrative and screening body with no appreciable and adjudicative role (para. 58);

b) It is a statutory body entrusted with accepting, managing and processing complaints of discriminatory practices (para. 48);

c) When deciding whether a complaint should proceed to be inquired into by a Human Rights Tribunal, the Commission fulfils a screening function somewhat analogous to that of a judge at a preliminary inquiry. It is not the job of the Commission to decide if the complaint is made out. Rather, its duty is to decide if, under the provisions of the Act, an inquiry is warranted having regard to all the facts. The central component of the Commission's role, then is that of assessing the sufficiency of the evidence before it (para. 55); and

d) The Commission has the power to interpret and apply its enabling statute but does not have a jurisdiction to address general questions of law (para. 52).

[36] In the present case, the Applicant says the Commission did not base its Decision on the material before it to determine if there was a reasonable justification for proceeding to the next stage of the process. The Commission cannot accept the Investigator's recommendation to pursue the complaint further based on irrelevant or extraneous factors: *Williams v. First Air*, [1998] F.C.J. No. 1844 (F.C.T.D.) at paragraphs 38 and 52; *Oakwood Development Ltd. v. St. François Xavier (Rural Municipality)*, [1985] 2 S.C.R. 164 at paragraph 15.

[37] In *Varma v. Canada Post Corp.*, [1995] F.C.J. No. 1065 (F.C.T.D.) at paragraphs 13-14, aff'd [1996] F.C.J. No. 1381 (F.C.A.), Justice Reed provides the following guidance on the kind of evidence required to establish a claim:

> …it is important to distinguish between evidence of primary fact and evidence respecting opinions or personal beliefs. In this case, the applicant's personal belief is that many of the events which occurred were caused because the individuals with whom he was interacting were racially prejudiced. The CHRC, or a Court, cannot act on this

> kind of assertion or belief unless there is primary fact evidence to support it. Direct evidence specific to the event in question linking it to racial discrimination is necessary. This is necessary to establish that the actions were racially motivated rather than merely being the result of other factors, such as bad temper, frustration, or a personality conflict.
>
> …One has to find direct evidence connecting negative decisions in question to racial prejudice in order to support such an allegation. This is not easy to do, but it is required to avoid false and potentially slanderous allegations made against people.

[38] The Applicant alleges that the Commission erred in law by reaching a conclusion that was unreasonable in that it was not based on admissible and sufficient evidence. The broad discretion vested in the Commission to decide whether to dismiss a complaint or refer it to adjudication before a tribunal does not allow it to "short-circuit" the investigative process and ignore a necessary witnesses or relevant facts. According to the Applicant, there were serious omissions, particularly in regards to evidence that was damaging to Ms. Kingsley's position, which cast serious doubt on the neutrality of the Investigator in the present case.

Hearsay Evidence

[39] The Applicant further submits that the Commission erred in law and violated the principles of natural justice by considering and acting upon hearsay and other inadmissible evidence contained in the Investigation report. The Applicant emphasizes that Ms. Kingsley acknowledged that she did not actually hear Mr. Campitelli make the alleged comment. The complaint was based entirely on "third hand hearsay."

[40] The Applicant acknowledges that administrative tribunals are not bound by the strict rules of evidence to which courts must adhere, and are permitted to accept hearsay evidence: *Jeffers v. Canada (Citizenship and Immigration)* 2008 CHRT 25 at paragraph 10. However, the Applicant submits that, in determining whether to accept hearsay evidence, the factors of reliability and necessity must be considered. In this case, the Investigator accepted hearsay evidence from unidentified sources that were nothing more than rumours. Further, the Investigator failed to interview a key witness. In these circumstances, the Commission should not have allowed the complaint to continue to the next stage. There was no rational or reasonable basis for the Commission's exercise of discretion.

The Respondent

[41] The Respondent has not submitted a Memorandum of Fact and Law in response to this application. However, she did send a letter reiterating that her complaint was valid.

ANALYSIS

[42] Ms. Kingsley has filed no record in this matter. On the eve of the hearing and at the hearing itself, Ms. Kingsley's recently retained counsel (December 1, 2008) requested an adjournment so that he could review the file and prepare responding materials. No explanation was offered, either by Ms. Kingsley by way of affidavit or through counsel, as to why Ms. Kingsley had not filed her record at the appropriate time other than simple inadvertence and lack of understanding concerning

the process. However, Ms. Kingsley did file her own Notice of Appearance on June 30, 2008, which suggests that she was aware that she was involved in legal proceedings that required the filing of documents, and yet she chose not to appoint legal counsel until the eve of the hearing and has not given the Court any substantive explanation for her neglect. Under such circumstances, the Court felt it could not grant an adjournment and the extensions of time requested.

[43] In *Paul*, Justice Tremblay-Lamer set out the following principles that are relevant to the application before me:

> **56.** Where the Commission does not provide reasons for its decision to refer a complaint to a tribunal, its reasons will be taken to be those set out in the investigative report.
>
> **…**
>
> **58.** Consequently, if the investigative report, adopted by the CHRC in making its decision, is fundamentally flawed, then the decision itself to appoint a tribunal will be flawed.
>
> **59.** The Commission is bound by procedural fairness in the investigation of complaints, which means, that the matter must be dealt with objectively and with an open-mind; that there can be no predetermination of the issue; and that the parties are informed of the evidence put before the Commission so they can make meaningful representations. Put another way, as expressed by my colleague Nadon J. in *Slattery*, the Commission "must satisfy at least two conditions: neutrality and thoroughness".
>
> **60.** The role of the investigator is not prosecutorial. It is not meant to be a fishing expedition.
>
> **61.** The role of the Commission, when deciding whether a complaint should be processed further, was established in *Cooper*. La Forest J. writing for the majority:
>
> > The Commission is not an adjudicative body; that is the role of a tribunal appointed under the Act. When

> deciding whether a complaint should proceed to be inquired into by a tribunal, the Commission fulfills a screening analysis somewhat analogous to that of a judge at a preliminary inquiry. It is not the job of the Commission to determine if the complaint is made out. Rather its duty is to decide if, under the provisions of the Act, an inquiry is warranted having regard to all the facts. The central component of the Commission's role, then, is that of assessing the sufficiency of the evidence before it.

62 In *SEPQA* the Supreme Court of Canada established the test to be applied when reviewing the decision of the Commission to appoint a tribunal pursuant to section 44 of the Canadian Human Rights Commission. Although the threshold is very low, as pointed out in the recent *Bell Canada* decision of the Federal Court of Appeal, Sopinka J. stated that the intention of s. 36(3)(b) (now s. 44) is that the Commission should dismiss a complaint "where there is insufficient evidence to warrant appointment of a tribunal." Although he acknowledged that this is not a judicial proceeding, he stated that the Commission must determine if there is "a reasonable basis in the evidence for proceeding to the next stage."

63. In essence, the investigator must collect the information which will provide an adequate and fair basis for a particular case, and which will in turn allow the Commission to balance all the interests at stake and decide on the next step. No relevant fact should be left out. Omissions, particularly when the information is damaging to the complainant's position, only result in casting serious doubts on the neutrality of the investigator. I realize that this is a difficult task, but it is only in achieving this high standard of fairness that the investigator will help the Commission retain its credibility.

…

71. It is important to note that this is an investigation under section 7 and not section 10 of the CHRA. In my view, in order to provide the sufficient grounds necessary to appoint a tribunal, specific material facts must be found, which link a possible discriminatory practice to the case under investigation.

[44] With these basic principles in mind, if I turn to the facts of the present case and the Commission's Decision to proceed to the tribunal phase pursuant to section 44 of the Act, the following are immediately apparent:

1. Paragraph 6 of the Investigator's report indicates that the Investigator interviewed Ms. Kingsley, Mr. Tom Mackay, and Mr. Tom MacGarry. He says that his attempts to contact Mr. Tom Higgerson, Officer Manager, and Mr. Jerry Fenton failed because they did not return the Investigator's calls.

   We have no response from Mr. Fenton but Mr. Higgerson says quite clearly that he received a telephone message on his home answering machine on November 27, 2007 from a representative of the Commission requesting that Mr. Higgerson contact him. Mr. Higgerson attempted to contact the representative directly, but without success. No further calls were received.

   There is no explanation as to why the Investigator could not have spoken with Mr. Higgerson, an important witness referred to by Ms. Kingsley in her complaint. Mr. Higgerson is an important witness because he denies words attributed to him and Mr. Campitelli by Ms. Kingsley and gives a clear account of an interview he had with her on February 12, 2007 in which he says she advised him she would be seeking medical leave as a result of stress she was experiencing on the job, but did not connect this with Mr. Campitelli ruining her reputation.

Mr. Higgerson is the Office Manager at Utility Transport and there is no explanation as to why the Investigator was not able to talk with such an important witness. The Investigator complains about the "lack of cooperation of the witnesses" as one of his findings, but this hardly seems to be the case with Mr. Higgerson.

All of this suggests a lack of rigor by the Investigator and undermines his impartiality and the fairness of his findings;

2. In paragraph 7 of the report the Investigator says that the "complainant alleges Mr. Campitelli was telling the drivers that she spent a night with Mr. Tom Mackay in Mr. Mackay's transport truck some time in November 2006."

   This is not accurate. Ms. Kingsley said that her "complaint happened on February 13, 2007, when a driver, Mr. Tom Mackay informed me that John Campitelli was telling the drivers that I spent the night in Mr. Mackay's transport truck with Mr. Mackay." She then says that the "incident John Campitelli was speaking of happened approximately 4 months earlier when Utility International (John Campitelli) purchased a new transport truck."

   There is no indication of how Ms. Kingsley could know what particular incident Mr. Campitelli was allegedly referring to and, even more important, the complaint was not that "Mr. Campitelli was telling his drivers" about a night Ms. Kingsley spent with Mr.

Mackay. Ms. Kingsley has no knowledge of anything Mr. Campitelli may have said on this topic. The complaint was that Mr. Mackay informed her of something Mr. Campitelli allegedly said. The Investigator turns Mr. Mackay's rumour mongering into something of which Ms. Kingsley has direct knowledge. This is highly significant for the report as a whole in which the Investigator mistakes hearsay and rumour for established fact. As was subsequently discovered by the Investigator, even Mr. Mackay had not heard Mr. Campitelli say that Ms. Kinglsey had spent the night with him.

The complaint was that Ms. Kingsley had been told something by Mr. Mackay;

3. A significant aspect of Ms. Kingsley's evidence is referred to in paragraph 13 of the report. This is her allegation that she went to Mr. Higgerson and told him that Mr. Campitelli had "ruined my reputation" and that Mr. Higgerson replied that "He has ruined everyone's reputation, why should you be any different?" Quite apart from the fact that this is irrelevant to the issue of whether Mr. Campitelli uttered the offending words, Mr. Higgerson – an easily accessible witness – was never interviewed and his subsequent evidence refutes what Ms. Kingsley alleges she said or he replied;

4. In paragraph 18, the Investigator reports that Mr. Tom MacGarry confirmed he had been with Mr. Campitelli at the time of the "alleged incident," but is clear that "Mr. Campitelli did not, at that time, make the alleged comments or any other comment about Ms. Kingsley."

So there was no "lack of cooperation" from Mr. MacGarry and his evidence on this point is clearly supportive of Mr. Campitelli's position;

5. In paragraph 19, the Investigator says that Mr. Tom Mackay "confirmed what Ms. Kingsley has stated in the complaint form which is that he heard from another driver that Mr. Campitelli told that driver that Ms. Kingsley slept with Mr. Mackay."

This is not accurate because, in the complaint form, Ms. Kingsley did not say that Mr. Mackay had heard the rumour from another driver; she says "a driver, Mr. Tom Mackay informed me that John Campitelli was telling the drivers that I spent the night in Mr. Mackay's transport truck with Mr. Mackay."

There is no mention of "another driver" by Ms. Kingsley in relation to Mr. Mackay, a fact which the Investigator overlooks. In the complaint form, Ms. Kingsley reports Mr. Mackay's words as though they are first-hand knowledge by Mr. Mackay. The Investigator not only fails to address this discrepancy, he also finds that Mr. Mackay "confirmed what Ms. Kingsley had stated." So Ms. Kingsley is given credit for the discrepancy between her complaint and Mr. Mackay's version of events.

Not only does Mr. Mackay make it clear that he has only heard the rumour from another driver and has no first-hand knowledge of whether Mr. Campitelli uttered the

offending words, he also refuses to give the name of the driver he says he heard it from, so there was no way that the rumour could be traced any further than Mr. Mackay;

6. In paragraph 21, the Investigator makes a finding that is crucial for the whole report:

> 21. FINDINGS: In light of Mr. Campitelli's denial of the allegations and the lack of cooperation of the witnesses, it is a matter of Ms. Kingsley's word against that of Mr. Campitelli as to whether the alleged comment was made.

In my view, this finding is inaccurate and unreasonable for a variety of reasons:

a) The witnesses were not uncooperative except for Mr. Mackay's refusal to name the "other driver." Mr. Tom MacGarry confirmed what had happened and made it clear that he had not heard any offending words from Mr. Campitelli. Mr. Higgerson returned the phone call but was never interviewed by the Investigator, and he has subsequently refuted Ms. Kingsley's testimony involving him. Mr. Gerry Fenton was not interviewed. He did not return the Investigator's call, but we are not told whether the Investigator made any more effort to speak with Mr. Fenton than he made with Mr. Higgerson, who could hardly be characterized as an uncooperative witness when he attempted to reach the Investigator and was easily accessible with very little effort;

b) It was not a matter of Ms. Kingsley's word against that of Mr. Campitelli as to whether the alleged comment was made. Ms. Kingsley did not allege that she heard Mr. Campitelli make the comment. She simply alleged that she had been told a rumour. Mr. Campitelli does not deny that Ms. Kingsley was told a rumour. He

cannot do so because he has no knowledge of that fact, just as Ms. Kingsley has no knowledge of whether Mr. Campitelli said that she spent the night with Mr. Mackay, and nor do any of the witnesses who were interviewed;

c) Mr. Campitelli denies he made the offending comment, Mr. Higgerson denies that he said anything to Ms. Kingsley on point, Mr. Fenton was never interviewed, and Ms. Kingsley herself does not allege that she heard Mr. Campitelli say anything on point;

d) Mr. Mackay's evidence is that he heard the rumour from "another driver" who he refuses to name, and the reasons for not naming him remain unexplained by the Investigator. All Mr. Mackay says is that he has been told by someone else that Mr. Campitelli uttered the offending words. There is no evidence that challenges Mr. Campitelli's version of events or his credibility;

e) Ms. Kingsley has subsequently attempted to challenge Mr. Campitelli's and Mr. Higgerson's credibility through unsubstantiated character assassination that has no probative value. She also makes changes to her story. For example, in her complaint she says that she went and asked other drivers if they had heard the rumours:

> I wasn't sure who John Campitelli told the rumours to so I asked the drivers and I was told my (sic) another driver, Mr. Jerry Fenton that John Campitelli told him directly that I had slept with Tom Mackay.

So Ms. Kingsley says she asked "the drivers," but only Mr. Fenton – who was not interviewed by the Investigator – said he had heard Mr. Campitelli utter the offending words.

Later, after Ms. Kingsley has seen comments made about the Investigator's report by the Applicant, she changes her story to try and deal with the hearsay problem and the fact that Mr. Fenton has not been interviewed and has not confirmed her evidence. In her comments of February 4, 2008 Ms. Kingsley has the following to say:

> As far as anyone witnessing what Mr. Fenton told me, there is a witness, my ex-husband (Randy Kingsley) works at the same company and still does. He was the one who brought Mr. Fenton to my office that day and told Mr. Fenton to tell me what John Campitelli had told him. He witnessed the whole conversation between Mr. Fenton and myself. In that conversation, Mr. Fenton told me John Campitelli told him that I slept in the transport truck with Tom Mackay. I suggest you contact him and he will tell you what was said in my office that day. His cell number is 289-404-2577.

Ms. Kingsley has now introduced a new character into her evidence. Originally, she said in her complaint that "I asked the drivers and I was told by another driver…" But now it is Mr. Randy Kingsley, who still works at the company, who brought Mr. Fenton to the complainant and witnessed what Mr. Fenton told her.

This is an important change in Ms. Kingsley's narrative that was not investigated or questioned. She has changed her account to try and deal with what she perceives as a problem regarding Mr. Fenton and his lack of availability.

Another inconsistency occurs when, in her complaint, Ms. Kingsley says that Mr. Higgerson told her "He [i.e. Mr. Campitelli] has ruined everyone's reputation, why should you be any different," but later insists that "Bruce (i.e. Mr. Higgerson) is John's lackie and will stab you in back if it means preserving (sic) his investment and saving face with John Campitelli." In other words, Mr. Higgerson whom Ms. Kingsley alleges would never say anything against Mr. Campitelli, told her that Mr. Campitelli has ruined everyone's reputation and is treating her in the same way. This hardly seems likely;

f) From the perspective of the Investigator's report, Ms. Kingsley clearly indicates that she has no direct knowledge of whether Mr. Campitelli said she slept with Mr. Mackay and she can only attest to hearsay and rumours that have not been confirmed or investigated by the Investigator. This is not Ms. Kingsley's word against that of Mr. Campitelli.

7. In paragraph 25, the fact of the Respondent's stress leave is not evidence that Mr. Campitelli uttered the offending words;

8. The Investigator makes another important finding in paragraph 28 of the report:

> In the absence of any defence other than the denial of the allegations from the respondent, Ms. Kingsley's allegations are not refuted.

This is an unreasonable finding for several reasons. First of all, it makes it clear that the denial itself counts for nothing in the Investigator's conclusions. It is difficult to see what other defence could be offered if Mr. Campitelli says the alleged remarks were not made. If a denial counts for nothing then Mr. Campitelli has no defence and must, therefore, automatically submit to the allegations.

More importantly, however, the only allegations Ms. Kingsley makes are that Mr. Mackay and Mr. Fenton have said certain things to her. This is not an allegation that Mr. Campitelli and the Applicant can refute because they have no knowledge of what Mr. Mackay and Mr. Fenton may have said to Ms. Kingsley. The Investigator is simply equating hearsay and rumour with an allegation that Mr. Campitelli uttered the offending words. But Ms. Kingsley could not, and did not in her complaint, make such an allegation. The Investigator is simply adopting Ms. Kingsley's position that "where there is smoke there is fire," as she puts it in her latter comments. But that is equivalent to saying that uncorroborated and uninvestigated hearsay are sufficient for a complaint and a tribunal investigation;

9. The Investigator's findings at paragraphs 29 and 30 of the report are, in my view, unfair and unreasonable:

> 29. The complainant states that when she met with Mr. Higgerson and Mr. Campitelli, after she got her doctor's certificate for stress leave, Mr. Campitelli, while leaving the meeting made the comments "I could what (sic) the fuck I wanted to, it was his company and he could do what he wanted."

> 30. Findings: The statements of the complainant, which are unrefuted, suggest that the respondent took no action to deal with the alleged harassment.

The reason Ms. Kingsley's statements in relation to Mr. Higgerson were unrefuted was because they were not investigated. Mr. Higgerson returned the call and was readily available for questioning, but the Investigator chose not to put Ms. Kingsley's evidence regarding her meeting with Mr. Higgerson and Mr. Campitelli to the test. There is no acceptable reason why the Investigator did not investigate these important allegations with Mr. Higgerson. Mr. Higgerson subsequently made it clear that, had he been questioned on these matters, he would have totally refuted Ms. Kingsley's testimony on this issue;

10. In the summary, at paragraph 32, the Investigator again repeats the following unreasonable findings:

> 32. Given that the respondent denies the allegations and the witnesses did not return the investigator's calls, it is a matter of the complainant's word against that of the respondent as to whether the alleged sexual harassment occurred.

Mr. Higgerson says he did return the phone call, but there was no follow-up by the Investigator. Both Mr. MacGarry and Mr. Mackay spoke with the Investigator. Only Mr. Fenton did not return the call, but Ms. Kingsley herself says that he is easy to reach and she even has his cell phone number. Also, Ms. Kingsley has no direct evidence with which to question Mr. Campitelli's evidence that he did not say what the rumours allege he said;

11. In paragraph 40, the Investigator says that "having regard to all the circumstances in the complaint, further inquiry is warranted." Given the unreasonable findings and inadequate investigation already mentioned, this conclusion is unfair and unreasonable. The complaint remains hearsay and rumour that has not been properly investigated in accordance with the jurisprudence.

[45] In my view, the Investigator's report adopted by the Commission in making its Decision in this case is fundamentally flawed. The report in this case lacks neutrality and thoroughness. It is also inaccurate in material ways.

[46] The screening analysis under section 44 of the Act is to decide if an inquiry is warranted and whether there is sufficient evidence to proceed to the tribunal stage. In the present case, the investigation itself was inadequate, the evidence disclosed was inadequate, and the assessment of that evidence was faulty to a degree that is unreasonable and unfair.

[47] Although the threshold is very low, the Commission should dismiss a complaint where there is insufficient evidence to warrant the appointment of a tribunal. In the present case, there is no reasonable basis in the evidence for proceeding to the tribunal stage: there is no direct evidence of Mr. Campitelli having uttered the offending words; Mr. Mackay's evidence is, at least, third-hand hearsay that could have emanated from anywhere, and Mr. Mackay, who is obviously very sensitive about this matter because he has attempted to placate Ms. Kingsley's common-law spouse or ex-

husband (depending upon which piece of evidence is relied upon), refuses to provide information that will allow his allegations to be checked; and the words attributed to Mr. Fenton have not been investigated in a situation where the Plaintiff herself says that Mr. Fenton could be contacted and "he will tell you what was said in my office that day." In addition, Ms. Kingsley herself has changed her narrative to account for how she heard about the rumour from Mr. Fenton.

[48] In order to satisfy the duty of procedural fairness, the investigation has to be thorough. Justice Nadon had the following to say on point in *Slattery v. Canada (Canadian Human Rights Commission)*, [1994] 2 F.C. 574 (T.D.); aff'd (1996), 205 N.R. 383 (F.C.A.) at paragraphs 55 and 56:

> In determining the degree of thoroughness of investigation required to be in accordance with the rules of procedural fairness, one must be mindful of the interests that are being balanced: the complainant's and respondent's interests in procedural fairness and the CHRC's interests in maintaining a workable and administratively effective system…
>
> Deference must be given to administrative decision-makers to assess the probative value of evidence and to decide to further investigate or not to further investigate accordingly. It should only be where unreasonable omissions are made, for example where an investigator <u>failed to investigate obviously crucial evidence</u>, that judicial review is warranted. Such an approach is consistent with the deference allotted to fact-finding activities of the Canadian Human Rights Tribunal by the Supreme Court in the case of *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554 [My emphasis.]

[49] In the present case, the Investigator's report does not, in my view, reflect a fair and unbiased presentation of all the relevant facts. Nor has crucial evidence been either investigated or taken into account in the Decision.

[50] The Investigator’s report is inadequate and is inaccurate and unfair in its conclusions. Mr. Campitelli’s denial of uttering the offensive words is treated as a reason to proceed with a tribunal, as though Ms. Kingsley had provided direct evidence to refute his account that he did not utter the offending words. The evidence in the Investigator’s report does not provide an adequate and fair basis for the Commission to balance all of the interests at stake and to decide the next step. Relevant facts are omitted and findings are made that have no basis in the evidence. Important discrepancies are overlooked.

[51] In the present case, after a careful review of the record, I am of the view that the Decision and the Investigator’s report upon which it is based is inadequate in its methods and unreasonable in its conclusions. It shows a tendency, in the face of inadequate evidence, to simply accept Ms. Kingsley’s position that “where there is smoke there is fire” and that Ms. Kingsley is the only person involved who is capable of telling the truth. But even if what Ms. Kingsley says is true, she has adduced no acceptable evidence of harassment despite her unsubstantiated attempts to destroy the characters of Mr. Campitelli and Mr. Higgerson: “I have more integrity in my little finger than both Mr. Campitelli and Mr. Higgerson have in their whole bodies.” The Commission can only make a decision on the basis of relevant evidence actually adduced. Ms. Kingsley in this case has not produced sufficient evidence and, as a substitute, has resorted to vilification of Mr. Campitelli and Mr. Higgerson which the Commission unreasonably and incorrectly concludes gives rise to a credibility issue that justifies proceeding to a tribunal.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. The application for judicial review is allowed and the Decision of the Commission dated April 15, 2008 referring the complaint of the Respondent, Betty Kingsley, under the *Canadian Human Rights Act* (complaint no. 20070390) against the Applicant, Utility Transport International Inc., to the Canadian Human Rights Tribunal for inquiry is hereby quashed and set aside.

2. No costs are awarded against the Respondent, Ms. Kingsley, in this case as the Court's decision is based upon inadequacies in the Investigator's report.

"James Russell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-762-08
STYLE OF CAUSE:	**UTILITY TRANSPORT INTERNATIONAL INC.** **v.** **BETTY KINGLSEY, CANADIAN HUMAN RIGHTS TRIBUNAL**
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	4-DEC-2008
REASONS FOR :	RUSSELL J.
DATED:	March 17, 2009

APPEARANCES:

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Kyle Armagon	FOR THE RESPONDENT

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