Court of Queen's Bench of Alberta

Citation: Guay v Alberta (Human Rights Commission), 2022 ABQB 36

Date: 20220112
Docket: 2003 11614
Registry: Edmonton

Between:

Yvonne Guay

Applicant/Plaintiff

- and -

Chief of the Commission and Tribunals of the Alberta Human Rights Commission and the Minister of Justice and Solicitor General

Respondents/Defendants

Reasons for Judgment of the Honourable Madam Justice L.K. Harris

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[1] The Applicant has brought an originating application for judicial review of two decisions of the Chief of Commission and Tribunals (the "Chief"), both dated January 23, 2020 (the "Decisions"). The Decisions arose as a result of two separate complaints made by the Applicant in 2012 pursuant to s. 20 of the *Alberta Human Rights Act*, R.S.A. 2000 ch. A-25.5 (the "*Act*").

[2] At the time the Applicant made her complaints, she was a Correctional Peace Officer ("CPO") at the CPO2 level, working at a correctional institution operated by the Respondent Alberta Justice and Solicitor General. As a CPO, the Applicant was a member of the Alberta

Union of Provincial Employees ("AUPE"). The AUPE and the Alberta Government were parties to a collective agreement.

[3] The Applicant began working for the Respondent in January, 1987. She identifies herself as a gay female, and in 2012 was 53 years of age.

[4] It should be noted that the Applicant had made a third complaint relating to a direction to provide a medical note which was also dismissed on review by the Chief. The Applicant is not pursuing judicial review of that complaint.

[5] In addition to the Applicant and the Minister of Justice and Solicitor General (referred to as the "Respondent" for the purposes of this decision), the Chief was also a party to these proceedings. However, the Chief properly limited his submissions and took no position on the merit of the applications.

I. Background

(a) The BCL Complaint

[6] CPOs could be assigned to different positions during a shift, one of which was the Admissions and Discharge (A & D) Officer. A & D Officers process inmates who enter into and are transferred within a correctional facility, ensuring that all inmates are searched, showered and changed into appropriate clothing and housed. As an A & D Officer, a CPO could perform a number of specific duties, such as Admitting Officer, Book Officer, Sallyport Officer, Clothing Change/Shower Officer or Dormitory Officer. Although a CPO is assigned a specific duty at the start of a shift, according to the Respondent, the CPOs on shift work as a team and they are required to perform whatever other tasks are necessary to ensure that all inmates are processed properly.

[7] The majority of inmates at the correctional facility where the Applicant worked were male – in 2012, it was estimated that 83% of inmates were male and 17% were female. The gender of an inmate dictated the gender of the CPO that completed or supervised tasks that were of a sensitive or personal nature, for example, searches of inmates. Dormitories had bedding and washroom facilities that were in plain view of supervising CPOs and therefore male dormitories required male CPOs to be assigned to supervision. It was necessary to ensure that there were female CPOs on shift so that female inmates could be properly processed.

[8] In 2012, some A&D duties were deemed by the Respondent to be "gender neutral", for example, Book Officer duties, or Book and Court List ("BCL") duties. As a BCL Officer, a CPO was required to keep inmate count sheets up to date, document movements of inmates, and during the night shift, compile and distribute sheets for court attendances and other purposes – primarily administrative tasks.

[9] During night shifts when staffing levels were low, the Respondent felt that it did not make operational sense to assign a female CPO to gender-specific A & D duties, such as Shower Officer or Dormitory Officer, as that would mean that the female CPO would be doing nothing for the majority of the shift given that the majority of inmates were male. Accordingly, most of the time, at least leading up to 2012, the BCL Officer during a night shift was female as that meant the female CPO could remain occupied throughout the shift.

[10] In 2009, the Respondent recognized that there was dissatisfaction amongst female CPOs in being assigned BCL Officer duties, as they felt that only females were given that assignment, and females were not permitted to work at any other A & D duties. Further, the complaint was that CPOs assigned to BCL duties were called the "Book Bitch" by other staff members because the BCL Officer was almost always female. A female CPO had once refused to do BCL duties and had been disciplined for that, and a male CPO once offered to do BCL Duties but was dissuaded from it by other male CPOs.

[11] In response to those complaints, the Respondent directed that all staff were required to be trained on all tasks within A & D (in other words, that males be trained for BCL Officer duties) and directed that female CPOs be rotated through all available gender-neutral assignments.

[12] During the night shift on August 12, 2012, the Applicant was assigned to work as an A & D Officer. She was ordered to perform BCL duties, which she objected to as being degrading and discriminatory. When she complained to her supervisor, she alleges that her supervisor told her that a female CPO always does BCL Duties.

[13] The AUPE submitted a grievance regarding the Applicant's assignment. A Level 2 Grievance Hearing was held on July 31, 2013. On August 16, 2013, the grievance was denied on the basis that there was no violation, misapplication or misrepresentation of the collective agreement. The grievance decision specifically declined to address the question of whether there was any violation of the *Act*.

[14] On August 9, 2013, the Applicant made a complaint to the Human Rights Commission about being assigned the BCL duties, alleging that she had been treated adversely on the ground of gender contrary to s. 7(1)(b) of the *Act*. Her complaint read in part:

> "I arrived at work on Aug 12/12 at approx. 1030 pm and was called to the shift managers office by my supervisor for that shift (DDO). DDO Volk informed me that I was to discuss with a co-worker (female) about who would work in the Admissions & Discharge (A&D) area as we were the only 2 female CO's on duty on the upcoming shift. I informed the DDO that although I would speak with the co-worker I did not want to be assigned to the book and court list duties. During the ensuing discussion, the DDO told me the female CPOs assigned to A&D always did that position and there were no other females or CPOs on duty who knew how to do the court list and book. I told the DDO I found the assignment degrading and discriminatory as it was only females who did that duty and females were not allowed to work at any other duties in A&D on night shift.
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> …
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> The practice of assigning a female to the "Book bitch" duties of the book and court list are ongoing. The "Book Bitch" refers to the <u>female</u> on any shift who is working on the "book" in A&D assignment. This is the female's duty in A&D 95% or more of the time – since its always a female it is also a bitch."

[15] The Applicant's complaint was investigated by a Human Rights Officer ("HRO"), and on January 3, 2019, the HRO released an Investigation Report wherein she recommended that there was a "reasonable basis to proceed with the complaint with respect to the assignment…to BCL duty role on August 12, 2012."

[16] The HRO concluded that the Respondent did have a policy that wherever possible, and to maintain the dignity and privacy of the inmates, CPOs of the same gender conducted searches and supervised undressed inmates. That policy was adopted for a purpose rationally connected to the job, and in good faith. However, the HRO also concluded that it did not follow that because males were required to do certain tasks, it was reasonably necessary to typically require a female to perform BCL duties – for example, a female could be brought in from another unit to conduct any female inmate duties if a male CPO was assigned the BCL duties.

[17] The Investigation Report was then reviewed by the Director. On August 16, 2019, the Director dismissed the complaint, notwithstanding the recommendation made by the HRO.

[18] On October 5, 2019 the Applicant requested that the Chief conduct a review of the Director's decision. On January 23, 2020 the Chief upheld the Director's decision to dismiss the complaint. The Chief found in part:

> "In sum, while there is information that would support evidence of gender-based practices and workplace culture, there is insufficient detail to determine whether these practices continued to exist in 2012 and beyond. The complainant does not provide sufficient information that links her treatment in August 2012 with the alleged systemic discrimination."

[19] The Applicant filed an application for judicial review of the Chief's decision on March 5, 2021.

(b) The Promotion Complaint

[20] The second complaint advanced by the Applicant arose as a result of her unsuccessful application for a CPO3 position.

[21] In 2012, the Respondent was seeking to fill 20 CPO3 positions. It received 85 applications and interviewed 74 candidates, including the Applicant.

[22] The CPO3 position provides "first line supervision to a group of entry and working level CPOs and Correctional Service Workers". Responsibilities included providing direction, coaching, training and appraising the performance of CPOs. CPO3s are required to work within standard operating procedures and rules to ensure the safety, security and good order of a correctional center. The Respondent's position is that knowledge and understanding of institutional policies and procedures is vital because CPO3s are expected to ensure those under their supervision are acting in accordance with such policies and procedures, and must be able to identify training needs for other CPOs where gaps in training and knowledge occur. Without a firm understanding of policies and procedures a CPO3 will not be able to identify such gaps for those under their supervision. Further, a CPO3 is expected to be a role model for other employees and as such, they must be familiar with and abide by policy and procedure themselves.

[23] The Respondent developed a Competition Process Chart and Interview Assessment Guide to be used in conducting interviews. A Human Resource Consultant attended all interviews to provide objective third-party input. Candidates' competencies were scored and candidates were then ranked and selected using the Guide. The successful candidates ranged from 25 to 48 years of age. 16 were male and 4 were female. Eight of the successful male candidates and one of the successful female candidates had tactical team experience. All of the

successful candidates stated that they had signed off on having reviewed the Respondent's Policies and Procedures, which was something required of all CPOs on a yearly basis.

[24] The notes from the interview panel who interviewed the Applicant indicated that the panel had concerns regarding the Applicant's "personal suitability" as she questioned the interview questions and had not signed off on having reviewed the Policies and Procedures for several years prior. The Respondent's position was that the Applicant demonstrated a lack of understanding of the key job duties of a CPO3, demonstrated a dismissive and insubordinate attitude in not reading and signing off on policies and procedures as required and failed to demonstrate leadership skills and qualities.

[25] On November 6, 2013, the Applicant made a complaint to the Human Rights Commission regarding her lack of success within the promotion competition, alleging that she was discriminated against due to her gender, sexual orientation and age. Her complaint read in part:

> "I believe the competition process is unfair in that it was administered in such a manner that allows [the Respondent] to set standards and competencies that they know will increase or decrease a candidates' ability to be competitive in this 2012 and other past competitions. The interview process is also subjective and not based on objective criteria. A successful interview has always been the criteria for a successful outcome. I know [the Respondent] is aware of my sexual orientation since 1997 when I filed a complaint of incidences of harassment because of my gender and sexual orientation against a co-worker…and when I "outed" myself to co-workers…during a meeting there.
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> …
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> I believe that my gender has historically affected my success in COIII competitions I have entered into as males in the competition were credited with membership in the tactical response team that does not generally accept females into their ranks (members will vote on who they want on the team). I also believe decisions who is successful in the COIII competitions and in the 2012 competition are based in part of their gender and that the male candidates qualifications were not as good as mine or I was unable to meet their competencies because males had more opportunities to increase their competency...
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> I believe that my sexual orientation affected my competencies as the successful heterosexual candidates did not have qualifications that were as good as mine. I know of a belief among my co-workers that "if they know your gay, that's where you stay" in relation to advancement...
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> I believe my age had an effect on the 2012 CPOIII competition because although I had many years of experience, I am nearing retirement and candidates were chosen on the basis of future career potential…"

[26] The Applicant felt that she was "blacklisted" as a result of having made complaints in the past, including having complained about being assigned the Book Duty Officer role in August 2012.

[27] The Applicant's complaint was investigated by an HRO. On December 14, 2018, the HRO released the Investigation Report, recommending that there was no basis to proceed and

that the complaint be dismissed. The HRO concluded that the Applicant was not competitive in all of the job requirements, specifically, the requirement for working familiarity with policies and procedures, ERC Standard Operating Procedures and Emergency Standing Orders. The Applicant had not signed off on the policies and procedures in the ten years prior to the interview, whereas all successful candidates indicated that they had done so. It was reasonable that the Respondent would be concerned that successful candidates be familiar with policies and procedures given the context in which they work, especially the legal, security, leadership, supervisory and training responsibilities.

[28] Although information supported the view that historically there may have been barriers to advancement related to protected grounds under the *Act*, the investigation also supported the conclusion that in 2012, the Applicant did not meet the knowledge and suitability criteria for promotion.

[29] On July 26, 2019, the Director dismissed the Applicant's complaint. The Applicant requested a review of the Director's dismissal by the Chief. The Chief upheld the decision to dismiss on the basis that the information did not support concerns about unfairness of the competition, much less that the Applicant's age, gender, sexual orientation or prior complaints played a role in the interview process or the way her application was assessed. Although there was some evidence that there may have been a workplace and management culture that disadvantaged certain groups, there was not sufficient information that supported the complaint of a discriminatory competition in this instance. The Chief concluded that the Applicant had provided only bald assertions that her age, gender or sexual orientation were factors, while in contrast, the Respondent provided substantial materials establishing the basis upon which it chose the successful candidates, and there was nothing that suggested those candidates were chosen in a discriminatory fashion.

[30] The Applicant's application for judicial review of the Promotion Decision was incorporated with her application for judicial review of the BCL Decision.

II. Legislative Framework

[31] It is important to understand the legislative framework in order to appreciate the role of the Court in applications for judicial review of decisions made by the Chief under the *Act*.

[32] Any person who has reasonable grounds to believe that the *Act* has been contravened may make a complaint to the Alberta Human Rights Commission as permitted by section 20(1) of the *Act*. In this case, the Applicant alleges that s. 7(1) of the *Act* was contravened. That section reads:

> 7(1) No employer shall
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> (a) refuse to employ or refuse to continue to employ any person, or
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> (b) discriminate against any person with regard to employment or any term or condition of employment,
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> because of the race, religious beliefs, colour, gender, gender identity, gender expression, physical disability, mental disability, age, ancestry, place of origin,

marital status, source of income, family status or sexual orientation of that person or of any other person.

[33] The exception is set out in section 11 of the *Act*, which reads:

> 11 A contravention of this *Act* shall be deemed not to have occurred if the person who is alleged to have contravened the *Act* shows that the alleged contravention was reasonable and justifiable in the circumstances.

[34] Once a complaint is made, an investigator may be appointed to review and investigate. An investigator has broad powers under s. 23 of the *Act*, including the power to interview witnesses and receive documentation, which was done in this case. The investigator issues a report detailing the outcome of the investigation and makes recommendations as to whether a hearing into the complaint ought to be held or not. The report is then considered by the Director, who may, at any time, dismiss a complaint if the Director considers the complaint is without merit under s. 22(1) of the *Act*.

[35] Where there has been a dismissal by the Director, the complainant may request a review of that decision by the Chief under s. 26(1) of the *Act*. Once such a request is made, the Chief must review the record and the Director's decision and decide whether the complaint should have been dismissed:

> Appeal to Chief of the Commission and Tribunals
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> 26(1) The complainant may, not later than 30 days after receiving notice of dismissal of the complaint or notice of discontinuance under section 22, by notice in writing to the Commission request a review of the director's decision by the Chief of the Commission and Tribunals.
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> (2) The Commission shall serve a copy of a notice requesting a review referred to in subsection (1) on the person against whom the complaint was made.
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> (3) The Chief of the Commission and Tribunals shall
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> (a) review the record of the director's decision and decide whether
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> (i) the complaint should have been dismissed, or
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> (ii) the proposed settlement was fair and reasonable, as the case may be, and
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> (b) forthwith serve notice of the decision of the Chief of the Commission and Tribunals on the complainant and the person against whom the complaint was made.

[36] ***Cook v Alberta (Human Rights Commission Chief Commissioner),*** 2020 ABQB 239 summarizes the roles of the Director and the Chief at paragraph 26:

> It is well established that the Director under s.22 of the *Act* and the Commissioner under s.26(3) of the *Act* plays a screening or gatekeeping function. The question they must ask is whether there is a "reasonable basis in the evidence for proceeding to the next stage": ***Mis v Alberta Human Rights Commission***, 2001 ABCA 212 at paras 8-9. In so doing, they are to apply their own experience and

> common sense in evaluating whether the claim is without merit. The threshold assessment of merit is low and the gatekeeper is given wide latitude in performing the screening function. The courts are not to lightly interfere: ***Mis*** at paras 8 and 9." (emphasis added)

[37] In ***Mis***, the Court states at paragraph 108 that the test which the Chief must apply is somewhere between an "arguable case" and a "reasonable prospect of success":

> In determining whether a complaint is without merit, the Chief Commissioner must ask whether there is a reasonable basis in the evidence for proceeding to the next stage.

[38] As part of the Chief's gatekeeper function, the Chief has the ability to assess the quality of the evidence gathered by the Investigator. In cases where there is a credibility contest, the Chief is able to weigh the evidence and assess credibility – independent confirming evidence may resolve such cases: ***Economic Development Edmonton v Wong***, 2005 ABCA 278; ***Holmstrom v Alberta (Human Rights Commission)***, 2021 ABQB 400. However, where there is a conflict that cannot be resolved by the Chief, this may result in the matter being sent to a hearing: ***Holmstrom*** at paragraph 48.

[39] If a complainant is dissatisfied with the Chief's decision, then he or she may apply for judicial review pursuant to s. 35 of the *Act*:

> 35 A decision of the Chief of the Commission and Tribunals or another member of the Commission under section 26(3)(a) is final and binding on the parties, subject to a party's right to judicial review of the decision.

III. Standard of Review

[40] The parties agree that the applicable standard of review that this Court is to apply to the Chief's decisions is one of reasonableness, citing ***Canada (Minister of Citizenship and Immigration) v Vavilov***, 2019 SCC 65 ("***Vavilov***"). They state that in ***Vavilov***, the Supreme Court has affirmed that the presumptive standard of review is reasonableness subject to several noted exceptions, none of which apply in this particular case.

[41] At paragraph 17 of ***Vavilov***, the Supreme Court states that "where the legislature has indicated that it intends a different standard or set of standards to apply" that would include a statutory right of appeal, or "where the rule of law requires the correctness standard to be applied in cases such as constitutional questions, general questions of law or jurisdictional boundaries between administrative bodies", the presumption of a reasonableness standard of review may be rebutted. I agree with the parties that none of those situations apply here, and I am satisfied that the reasonableness standard applies to this application.

[42] What does a reasonableness standard of review look like? In determining whether the decisions of the Chief were reasonable, I must perform a "robust form of review" that requires me to assess the analysis of the Chief and the outcome of the proceedings before him: ***Vavilov*** at paragraph 13.

[43] The Supreme Court in ***Stewart v Elk Valley Coal Corp.***, 2017 SCC 30 at paragraph 27 describes the reasonableness review as follows:

> The only question for a reviewing court is whether this conclusion is unreasonable. Deference requires respectful attention to the Tribunal's reasoning process. A reviewing court must ensure that it does not only pay "lip service" to deferential review while substituting its own views: *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 48. If the decision is within a "range of possible, acceptable outcomes" which are defensible in respect of the evidence and the law, it is reasonable: *Dunsmuir*, at para. 47; see also *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, at para. 16.

[44] I should respect the administrative decision-maker and its specialized expertise, and should not substitute my own opinion on how I would have resolved the issue: ***Vavilov*** at paragraphs 75 and 83. I must consider whether the Chief's decision demonstrates "justification, transparency and intelligibility" and is based on an internally coherent and rational chain of analysis and is justified in relation to the facts and the law that constrain him: ***Dunsmuir v. New Brunswick***, 2008 SCC 9 at paragraph 47 and ***Vavilov*** at paragraph 85.

IV. Analysis

[45] The Respondent has raised a threshold issue which must be addressed first – that is, whether I ought to exercise my discretion to hear this application given that there is an adequate alternate remedy available to the Applicant. The Respondent says that the grievance procedure available under the collective agreement provided for an adequate alternative remedy. The Respondent argues that the subject of the application for judicial review of the BCL Decision is the same as the subject matter of the grievance filed in 2012. No grievance was filed in relation to the Promotion Decision, but that right was available to the Applicant had she wished to exercise it. It is not an efficient use of the Court's resources to pursue judicial review given the availability of the grievance process, and therefore, the Court should decline to exercise its discretion to hear this application.

[46] Even if the Applicant makes out a case for review on the merits, the reviewing court has an overriding discretion to refuse relief: ***Strickland v Canada (Attorney General of Canada)***, 2015 SCC 37 ("***Strickland***"). One reason to decline to hear an application for judicial review is that there is an adequate alternate remedy available. Determining whether there is an adequate alternate remedy requires an assessment of a number of factors as explained in ***Strickland*** starting at paragraph 42:

> The cases identify a number of considerations relevant to deciding whether an alternative remedy or forum is adequate so as to justify a discretionary refusal to hear a judicial review application. These considerations include the convenience of the alternative remedy; the nature of the error alleged; the nature of the other forum which could deal with the issue, including its remedial capacity; the existence of adequate and effective recourse in the forum in which litigation is already taking place; expeditiousness; the relative expertise of the alternative decision-maker; economical use of judicial resources; and cost: *Matsqui*, at para. 37; *C.B. Powell Limited v. Canada (Border Services Agency),* 2010 FCA 61, [2011] 2 F.C.R. 332, at para. 31; *Mullan*, at pp. 430-31; Brown and Evans, at topics 3:2110 and 3:2330; *Harelkin*, at p. 588. In order for an alternative forum or

> remedy to be adequate, neither the process nor the remedy need be identical to those available on judicial review. As Brown and Evans put it, "in each context the reviewing court applies the same basic test: is the alternative remedy adequate in all the circumstances to address the applicant's grievance?": topic 3:2100 (emphasis added).
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> The categories of relevant factors are not closed, as it is for courts to identify and balance the relevant factors in the context of a particular case: *Matsqui*, at paras. 36-37, citing *Canada (Auditor General)*, at p. 96. Assessing whether there is an adequate alternative remedy, therefore, is not a matter of following a checklist focused on the similarities and differences between the potentially available remedies. The inquiry is broader than that. The court should consider not only the available alternative, but also the suitability and appropriateness of judicial review in the circumstances. In short, the question is not simply whether some other remedy is adequate, but also whether judicial review is appropriate. Ultimately, this calls for a type of balance of convenience analysis: *Khosa*, at para. 36; *TeleZone*, at para. 56. As Dickson C.J. put it on behalf of the Court: "Inquiring into the adequacy of the alternative remedy is at one and the same time an inquiry into whether discretion to grant the judicial review remedy should be exercised. It is for the courts to isolate and balance the factors which are relevant . . ." (*Canada (Auditor General)*, at p. 96).
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> This balancing exercise should take account of the purposes and policy considerations underpinning the legislative scheme in issue: see, e.g., *Matsqui*, at paras. 41-46; *Harelkin*, at p. 595. David Mullan captured the breadth of the inquiry well:
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> > While discretionary reasons for denial of relief are many, what most have in common is a concern for balancing the rights of affected individuals against the imperatives of the process under review. In particular, the courts focus on the question of whether the application for relief is appropriately respectful of the statutory framework within which that application is taken and the normal processes provided by that framework and the common law for challenging administrative action. Where the application is unnecessarily disruptive of normal processes . . . the courts will generally deny relief.

[47] It is useful to identify and compare the applicable legislative schemes. Such a comparison assists in defining the overall purpose of the subject legislation, its jurisdiction, nature and remedial capacity – all factors to consider in deciding if there is an adequate alternative remedy to judicial review. The Applicant's complaint regarding her assignment on August 12, 2012 falls not only within the jurisdiction of the *Act* given that it is a complaint of discrimination, but also the *Labour Relations Code*, R.S.A. 2000, ch. L-1 (the "*Code*") given that she is a unionized employee subject to the provisions of a collective agreement.

[48] ***Amalgamated Transit Union, Local 583 v City of Calgary and the Labour Arbitration Board consisting of Ivan F. Ivankovich, David Laird and Starr Neiderwieser***, 2007 ABCA 121 ("***Amalgamated Transit***") was an appeal considering the jurisdiction of the Human Rights

Commission and a labor arbitration board to hear a dispute. The Applicant was a member of the Amalgamated Transit Union, Local 583 when her employment was terminated in October 2003. She was fired for insubordination and her Union grieved her dismissal. At the same time, she filed a complaint with the Alberta Human Rights and Citizenship Commission alleging that she had been discriminated against and harassed because of her sex, and that she was treated differently from her co-workers, most of whom are male, because she is a woman.

[49] The Court of Appeal found that human rights issues could fall within the jurisdiction of either the arbitration board or the Commission. There was no clear language in the labor legislation that ousted the jurisdiction of the Commission to deal with human rights issues in a unionized workplace. The Court concluded that it was not the intent of the legislature that either labor arbitrators or the Commission should have exclusive jurisdiction over human rights issues when they arise in unionized settings. Because of the way the Union framed the grievance, there were two separate disputes. It was the Union that defined the grievance, not the arbitration board or the Applicant or the employer. The Court held that the Union's right not to take a grievance cannot foreclose an employee's right to use the human rights regime, unless the legislature clearly states that it does. This it did not do.

[50] This conclusion speaks to the fact that the legislative schemes under the *Code* and the *Act* have separate and distinct purposes, and further, that proceedings under the *Code* might not have the remedial capacity of proceedings under the *Act*, given that the complainant does not have as much control over the grievance procedure.

[51] The fact scenario in ***Amalgamated Transit*** is nearly identical to the Applicant’s situation here. Although the issue considered by the Court in ***Amalgamated Transit*** is different than the issue of whether the grievance proceedings constitute an adequate alternative remedy, the Court’s discussion is of assistance in answering the latter question because it speaks to the distinct purpose and mandate of each forum, the need to provide access to all persons to the complaint process under the *Act*, and grievance proceedings not having the same remedial capacity as proceedings under the *Act*.

[52] Here, the AUPE submitted the grievance on the Applicant’s behalf. The grievance made allegations of breaches of the collective agreement, and although it referred to the *Act*, it did not provide any particulars as to how it was alleged that the *Act* was breached. A Level 2 hearing was held, during which apparently there was some discussion in regards to the scope of the grievance. In the “final and binding” letter of August 16, 2013 authored by the Executive Director of Regional Court Operations, the Executive Director states:

> “…we were in agreement that my decision will not be in relation to the Human Rights Act as listed on the grievance form.”

[53] Further, in its October 15, 2013 letter to the Commission providing its submissions regarding the Applicant’s complaint under the *Act*, the Respondent acknowledged:

> “In respect to the allegations on assigned duties in A&D on August 12, 2012, a Level II decision was issued on August 16, 2013 (see TAB 1) denying the grievance. The Level II Hearing Officer specifically did not address the allegation that the Human Rights Act was violated.”

[54] The Respondent goes on to note that the Applicant had requested that her grievance be taken to the next step in the grievance procedure and that she would not withdraw it, and as such,

the complaint made under the *Act* should be held in abeyance pending the outcome of the grievance procedure. Nowhere does the Respondent take the position that the Commission did not have jurisdiction to consider the Applicant's complaint given the fact that she had submitted a grievance under her collective agreement.

[55] It is later noted that the AUPE decided not to proceed further with the Applicant's grievance, leaving the complaint under the *Act* to proceed.

[56] It appears that all parties at least assumed that there is concurrent jurisdiction over the Applicant's complaint as between the *Code* and the *Act*, speaking to separate and distinct objectives of the two legislative schemes and the fact that the proceedings under the *Act* could potentially address a different remedy than the grievance proceedings, consistent with ***Amalgamated Transit***. Without more, this suggests that the grievance proceedings would not constitute an adequate alternative remedy.

[57] However, a recent decision from the Supreme Court calls this suggestion into question. In ***Northern Regional Health Authority v Horrocks***, 2021 SCC 42, ("***Horrocks***") an employee filed a discrimination complaint with the Manitoba Human Rights Commission, which was heard by an adjudicator. The employer contested the adjudicator's jurisdiction, arguing that ***Weber v Ontario Hydro***, 1995 CanLII 108 (SCC), [1995] 2 S.C.R. 929 recognizes exclusive jurisdiction in an arbitrator appointed under a collective agreement, and that this extends to human rights complaints arising from a unionized workplace.

[58] The Supreme Court held that the adjudicator did not have jurisdiction over the employee's complaint. Where matters arise from the interpretation, application, administration or violation of the collective agreement and labor legislation provides for mandatory dispute resolution of such matters, the jurisdiction of the labor arbitrator is exclusive. Competing statutory tribunals may carve into that sphere of exclusivity, but only where such legislative intent is clearly expressed. In ***Horrocks***, the essential character of the employee's complaint fell squarely within the labor arbitrator's mandate, and there was no clear express legislative intent to grant concurrent jurisdiction to a human rights adjudicator over such disputes.

[59] The framework of the legislation considered in ***Horrocks*** is similar to the framework of the legislation at issue here - the *Code* contains mandatory dispute resolution provisions (ss. 135 and 136). That then leads to the question of whether the essential character of the Applicant's complaint falls squarely within the mandate of the grievance process and whether there is clear legislative intent to grant concurrent jurisdiction to the Commission.

[60] To answer the first part of the question, the parties themselves appear to agree that the Applicant's complaint under the *Act* did not fall within the mandate of the grievance process. The complaint was explicitly excluded by the agreement of the parties as well as the Executive Director at the grievance hearing.

[61] To answer the second part of the question, ***Amalgamated Transit*** again provides some assistance, considering several factors. First, the Court commented upon the legislative purpose of both the *Act* and the *Code*, finding that both addressed important societal goals, and that the complaint at issue clearly fell in the first instance within the jurisdiction of both the *Act* and the *Code*. Second, the Court considered whether there was an exclusivity clause within the *Code* that clearly ousted the jurisdiction of the *Act*. The provisions of the Alberta legislation were compared to the legislation from other provinces considered in ***Weber***, ***Morin*** and ***Vaid***. The

Court concluded starting at paragraph 57 that the language in Alberta was considerably weaker than the exclusivity provisions considered in those other cases, and that the Commission retained jurisdiction concurrently with the *Code*:

> …However, in my view, clearer and more explicit language would be needed to oust the jurisdiction of the Commission over all human rights issues that arise in a unionized workplace. I find support for that conclusion in the competing statutory regime established by the Alberta *Human Rights Act.*
>
> As noted above, the Commission has a broad mandate to promote compliance with the *Human Rights Act* (s. 16), a mandate that is achieved in part by granting to all persons the right to make a complaint under the *Act* (s. 20). As was pointed out by the Chambers Judge, the *Act* contains a primacy clause; s. 1 provides that every law of Alberta is inoperative to the extent it authorizes or requires the doing of anything prohibited by the *Act.* This is in keeping with the generally accepted principle that human rights legislation is of a special, quasi-constitutional nature and that parties may not contract out of its application: *Cadillac Fairview Corp. Ltd. v Saskatchewan (Human Rights Commission)* (1999), 1999 CanLII 12358 (SK CA), 173 D.L.R. (4th) 609 [34 C.H.R.R. D/133] (Sask. C.A.); *Winnipeg School Division No. 1 v Craton,* 1985 CanLII 48 (SCC), [1985] 2 S.C.R. 150 [6 C.H.R.R. D/3014]. See also *Vaid* at § 81 and *McGill University Health Centre v Syndicat des employés de l'Hôpital général de Montréal,* 2007 SCC 4 [reported 59 C.H.R.R. D/259] at § 20—21.
>
> The Supreme Court has recently stated that it is essential to recognize that human rights codes are not only fundamental, quasi-constitutional law, but also that, like the *Canadian Charter of Rights and Freedoms,* they are the "law of the people". As such, they must be given expansive meaning and offered accessible application: *Tranchemontagne v. Ontario (Director, Disability Support Program),* 2006 SCC 14, [2006] 1 S.C.R. 513 [56 C.H.R.R. D/1] at § 33.
>
> Moreover, unlike the Quebec legislation at issue in *Morin,* the *Alberta Human Rights Act* does not contain a deferral clause that would allow the Commission to stop acting on behalf of a complainant in circumstances where the complainant has sought a remedy elsewhere. I agree with the Chambers Judge that the legislative scheme suggests that the Commission has jurisdiction over human rights complaints arising in the workplace, and retains jurisdiction even when the complainant's union has filed a grievance arising out of the same set of facts.
>
> …
>
> The wording of the exclusivity clause in the *Alberta Labour Relations Code,* the clear legislative intent that all persons should have access to the complaints procedure under the *Human Rights Act,* and the lack of a deferral clause in that *Act,* all lead to the conclusion that it was not the intent of the Alberta legislature that either labour arbitration boards or the Commission should have jurisdiction over all human rights issues that arise in the unionized workplace to the exclusion of the other tribunal.

[62] Since ***Amalgamated Transit*** was decided, the *Act* has been amended to include a deferral clause. Section 22 of the *Act* permits the Director, in his or her discretion, to either refuse to accept a complaint if it could more appropriately be dealt with in another forum, or accept the complaint pending the outcome of the matter in the other forum. Does this amendment have the effect of creating a clear legislative intent to confer exclusive jurisdiction over human rights complaints made by unionized employees? Does this mean that proceedings under the *Code* are now an adequate alternative remedy to judicial review?

[63] I have concluded that the amendment to the *Act* subsequent to the release of ***Amalgamated Transit*** to add a deferral clause does not oust the jurisdiction of the Commission in all cases. As noted in ***Horrocks***, an analysis as to whether the essential character of the Applicant's complaint falls squarely within the mandate of the grievance process is also still required.

[64] I decline to go so far as to conduct this analysis here because the question of whether the *Code* ousts the jurisdiction of the Commission in this case such that this judicial review cannot proceed was not raised or argued by the parties and is not actually before me. All parties appeared to agree that the Commission retained jurisdiction to hear the Applicant's complaint notwithstanding the grievance. I therefore leave the issue of whether the decision in ***Horrocks*** ousts the jurisdiction of the Commission in certain cases given the amendment to the *Act* since ***Amalgamated Transit*** was decided for another day.

[65] All I am required to resolve is whether there is an adequate alternative remedy to judicial review on the facts of this case, considering the factors listed in ***Strickland*** as well as any other relevant factors. I have concluded that the grievance proceedings in this case do not provide an adequate alternative remedy such that I should decline to hear this application for judicial review for the following reasons:

(a) Both the *Act* and the *Code* may still have concurrent jurisdiction over complaints of discrimination advanced by unionized employees as long as the essential character of the Applicant's complaint falls squarely within the mandate of the *Act's* complaint process;

(b) Given the *Act's* mandate and accessibility to all persons, it does not follow that the grievance procedure is an "adequate alternative remedy" for the purposes of judicial review. As set out in ***Amalgamated Transit****,* the *Act* fulfills an important, quasi-constitutional purpose, to be given expansive meaning and accessible application, a purpose which the *Code* does not provide;

(c) The Applicant did not have control over the grievance procedure to the same extent as her complaint under the *Act*. Much of the control rested with the AUPE. Aside from any issues regarding the separate mandates of the *Act* and the *Code*, the lack of control on the part of the Applicant over the grievance process speaks to the inability of the grievance process to provide a remedy for any human rights violation as an alternative to judicial review of the Chief's decision;

(d) the fact that the grievance decision specifically excluded allegations under the *Act* speaks to the fact that the grievance procedure did not address the same issue that the decision makers under the *Act* were asked to decide – specifically, whether there was a breach of the provisions of the *Act* constituting discrimination;

(e) Despite having jurisdiction under s. 22 of the *Act* to refuse to accept the complaint given the grievance, the Director decided to exercise her discretion in favour of accepting the complaint pending the outcome of the grievance. None of the parties objected to this or sought to overturn that decision, which not only speaks to the appropriateness of the proceedings under the *Act* but in my view, prevents the Respondent from now arguing that there is an adequate alternate remedy in the grievance process;

(f) Finally, judicial review in this instance is an appropriate remedy. The *Act* itself contemplates the parties' right to judicial review in s. 35. The Applicant has followed the appropriate steps provided for in ss. 20 and 26 and has not sought judicial review prematurely and in advance of other available remedies under the *Act*.

[66] I will therefore proceed to decide the merits of the Application.

(a) The BCL Complaint

[67] The Applicant argues that the Chief's decision was unreasonable and that the underlying investigation breached the duty of fairness owed to her. She states that the term "Book Bitch" is a "demonstrably demeaning term", and that most people who were assigned the BCL duties during night shift were women. Males being actively dissuaded from working BCL duties is evidence of one of the most "pure and stereotypical examples of sexism" as it is a notion that men are "above women's work". The Applicant argues that the Chief failed to grapple with key issues raised by the Investigator – that is, first, that it did not follow that because males are required to do certain tasks it is reasonably necessary to (typically) require a female to do the BCL, and second, why the Respondent didn't ensure that any male CPOs working that evening were trained to perform the BCL duties. The Applicant argues that the Chief simply assumes, without analysis, that the behavior was no longer occurring in 2012, based upon the past decision to train males for BCL duties and the plans to automate the position upon a move to a new facility.

[68] The Chief properly articulated the issue for him to resolve, namely, whether there was a reasonable basis in the evidence for proceeding to the next stage? He argues that there was not. The Applicant's complaint was an individual complaint of discrimination – specifically, that the Respondent discriminated against her on August 12, 2012 - and that it was not a complaint of systemic discrimination. As such, the Chief confines his decision to this scope and undertakes an analysis of whether the Applicant established a reasonable basis for proceeding to the next stage in relation to her BCL assignment on August 12, 2012. The Chief argues that prior to the night in question, the Applicant had not been asked to perform BCL duties since August 2008. There were operational needs that established undue hardship had the Applicant not performed that assignment, and the BCL duties fell directly within the Applicant's job description. The Chief acknowledged the Applicant's concerns with the BCL role, but concluded that there was insufficient information to support her allegation of discrimination.

[69] I do not agree with the Chief's position that the complaint was an individual complaint of discrimination relating solely and specifically to the BCL assignment on August 12, 2012. The plain wording of the Applicant's complaint makes it clear that it relates to the systemic assignment of BCL duties to female CPOs during the night shift, that despite concerns being raised in the past the practice continued, and it was this systemic practice which resulted in the

BCL assignment on the evening in question. While the catalyst for the complaint was the Applicant's specific assignment on August 12, 2012, she clearly points to prior complaints about the practice, not only by her but also by other female CPOs, and she says that despite those complaints, the practice continued.

[70] The distinction between a complaint of systemic discrimination as opposed to one specific instance of individual discrimination is important as the Chief felt that a complaint of one specific instance of individual discrimination supported a very narrow scope of investigation. I stop here to note that even if the Applicant's complaint related to the single assignment on August 12, 2012, as opposed to systemic discrimination, that would not relieve the Commission from performing a reasonable investigation or the Chief from having to consider whether there was a basis for a hearing given relevant historical background.

[71] As noted by the Court **in *Moore v British Columbia (Education)***, 2012 SCC 61 the Applicant need only show a *prima facie* case:

> "…to demonstrate prima facie discrimination, complainants are required to show that they have a characteristic protected from discrimination under the *Code*; that they experienced an adverse impact with respect to the service; and that the protected characteristic was a factor in the adverse impact. Once a *prima facie* case has been established, the burden shifts to the respondent to justify the conduct or practice, within the framework of the exemptions available under human rights statutes. If it cannot be justified, discrimination will be found to occur.

[72] Given my finding that the Applicant's complaint encompassed an allegation of ongoing systemic issues with the BCL assignment despite the instruction given in 2009, the characterization of the complaint as an individual complaint of discrimination in 2012 was artificially narrow. The result was that the Chief failed to consider the historical information that was before him on the Record that supported the Applicant's allegations, which, coupled with the Applicant's evidence that she was in fact assigned the BCL duties on August 12, 2012 because she was female, renders his decision unreasonable.

[73] I agree with the Applicant that the Chief failed to consider whether the allegation of discriminatory assignments of females to BCL duties was continuing despite the instruction in 2009 to train all CPOs in BCL duties. While there was evidence before the Chief that this instruction did take place, there was no evidence that any assessment was done to determine if that either led to a change in practice such that the assignment of female CPOs to BCL duties during night shift was done in a non-discriminatory fashion, or otherwise was determined to be justified as an operational necessity. The need for such an inquiry is highlighted by the fact that not only does the Chief agree that there was "substantial" information that the BCL duties were seen as "women's work" (at least historically) and which supported the Applicant's position, but that on the evening in question, the Respondent assigned the Applicant the BCL duty because she was the only officer on duty trained in those responsibilities.[1] This begs the question as to why this was if all CPOs were to be trained in BCL duties. The Chief simply assumed that the instruction did result in changes to the practice, and because of that, the Applicant's complaint related to a single instance of being assigned BCL duties.

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[1] *Y.G. v. Alberta Justice and Solicitor General*, 2020 AHRC 10 at paragraphs 20 and 27

[74] It may be that the instructions given to train all CPOs in BCL duties resulted in effective revisions to the alleged discriminatory assignment practice, or resulted in the conclusion that the practice might be discriminatory but was operationally necessary. However, as that inquiry was never made, there is no evidence to support the Chief's assumption that this was the case.

[75] As the Chief ought to have considered the plain wording of the Applicant's complaint as encompassing a complaint of systemic discriminatory assignment practices, and ought to have considered the historical context as a result, his decision is not justified given the evidence available to him.

[76] I therefore conclude that the Chief's decision was unreasonable as a result of defining the Applicant's complaint in an artificially narrow way, thus limiting the scope of the information considered. The BCL Decision is therefore quashed.

(b) The Promotion Decision

[77] The Applicant argues that the Promotion Decision was unreasonable and her right to fairness was breached because the Chief failed to apprehend evidence of "a discriminatory culture" against LGBT employees, females or older employees in the face of vague and subjective reasons given for not promoting the Applicant. She further says that the Chief failed to investigate evidence that females were prevented from gaining skills which would benefit them in job competitions, instead focusing on the interview process.

[78] I disagree with the Applicant's argument. Although she does advance allegations of a discriminatory culture within her complaint, the evidence gathered during the investigation into complaint does not support her contention that her lack of success was due to any such discrimination. Her lack of success was clearly tied to her failure to sign off on the Respondent's policies and procedures, a requirement of all CPOs. It is entirely reasonable for the Respondent to require applicants for supervisory positions to demonstrate a knowledge of policies and procedures, to follow their employer's requirements, and to model leadership behavior. Having an applicant confirm that he or she has reviewed policies and procedures is one objective way to measure an applicant's suitability for promotion, and a failure to demonstrate such suitability renders an applicant less competitive as compared to an applicant who has demonstrated these qualities.

[79] The Applicant's lack of competitiveness is not the whole story, however. The investigation delved into the manner in which the competition was structured. The Investigator determined that there were clear guidelines as to how the competition would be conducted, that the questions asked of each candidate during interviews would be the same. Observers from the Respondent's Human Resource department attended interviews to provide objective third-party input into the process. While it is not possible for a competition to be entirely objective, all of these steps generally speak to the fairness of the process and a sensitivity to the need for objectivity as much as possible. Generally, there was no evidence uncovered of discriminatory behavior towards LGBTQ, older or female candidates in general, or towards the Applicant in particular. Further, despite the Applicant's assertions, no evidence was uncovered indicating that the process favored male candidates as they were more likely to have tactical team experience. The successful candidates were varied in that regard – many had no tactical team experience, and one successful female did.

[80] The Promotion Decision is an example of the Chief properly exercising his gatekeeper function by assessing the evidence as required by ***Wong*** and ***Holmstrom*** and deciding that there is no reasonable basis for a hearing. The evidence uncovered during the investigation tends to support the Respondent's position that the COIII competition was fair and that the Applicant was not discriminated against. Put another way, the evidence rendered the Applicant's assertions in this regard very weak. This was a case where the evidence allowed the Chief to resolve the complaint in favor of the Respondent on the basis that there was no merit to the complaint.

[81] I therefore dismiss the application for judicial review of the Promotion Decision.

V. Conclusion and Remedy

[82] I conclude that the BCL Decision was unreasonable. The Chief ought to have considered the "substantial information" that supported the Applicant's position that she was discriminated against when assigned the BCL duties on August 12, 2012 in determining whether to direct the matter to a hearing. In accordance with ***Vavilov*** at paragraph 141, it therefore is appropriate to remit the matter back to the Chief for reconsideration with the benefit of this Court's reasons.

[83] I dismiss the application for judicial review of the Promotion Decision on the basis that the Chief's decision was reasonable.

Heard on the 9th day of December, 2021.
Dated at the City of Edmonton, Alberta this 12th day of January, 2022.

L.K. Harris
J.C.Q.B.A.

Appearances:

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