SUPREME COURT OF NOVA SCOTIA

Citation: *Selig v. Nova Scotia (Human Rights Commission*), 2018 NSSC 116

Date: 20180511
Docket: Hfx No. 458545
Registry: Halifax

Between:

Liza Selig

Applicant

v.

The Nova Scotia Human Rights Commission,
Nova Scotia Health Authority (South Shore Health),
Attorney General of Nova Scotia

Respondents

Judge:	The Honourable Justice D. Timothy Gabriel
Heard:	December 21, 2017, in Halifax, Nova Scotia
Counsel:	Angela Walker, for the Applicant Kendrick H. Douglas, for the Respondent, Nova Scotia Human Rights Commission Rebecca Saturley, for the Respondent, Nova Scotia Health Authority (South Shore Health) Edward Gores, Q.C., for the Respondent, Attorney General of Nova Scotia (not appearing)

By the Court:

Introduction

[1] On November 17, 2016, the Nova Scotia Human Rights Commission ("the Commission") dismissed the Applicant's complaint, which had been filed on March 10, 2016. The Complainant, Liza Selig, alleged that the Respondent, Nova Scotia Health Authority ("NSHA") had discriminated against her on the basis of a physical and/or mental disability. She also alleged harassment.

[2] The Applicant seeks judicial review of the Commission's decision. She argues that she was denied procedural fairness by virtue of the manner in which the Commission investigated her complaint. She also argues that the Commission's decision to dismiss her complaint was unreasonable.

[3] The Commission and NSHA each defend the investigation, the procedure followed and the Commission's decision to dismiss the complaint. The Respondent, Attorney General of Nova Scotia, has not participated in this application and will not be referenced further in these reasons.

Background

[4] I will outline the facts in a summary, rather than exhaustive fashion.

[5] Ms. Selig was employed as a licensed practical nurse, or LPN, with the South Shore Regional Hospital, at all material times. She underwent two very trying experiences in the fall of 2013, into early 2014. The first was very unfortunate. The second was tragic.

[6] In the fall of 2013, the Applicant underwent surgery. In the aftermath, she developed an infection pursuant to which she was off work until January 1, 2014.

[7] The second event occurred on January 12, 2014. While Ms. Selig was at work, her house burned down. Everything that she, her husband, and her son had was lost (*Record, Tab 4, p. 17*). The only fortunate result was that no one in her family was killed or injured, and her pets survived.

[8] The Applicant went to see her family physician, Dr. Holly Zwicker, on January 16, 2014. Dr. Zwicker put her off of work for two weeks. When the Applicant returned to see Dr. Zwicker for follow-ups on February 5, 2014, and

February 19, 2014, she was experiencing anxiety. She was placed off of work for additional periods of time pending a reassessment on March 17, 2014. On this latter date, she was once again placed off of work by her physician, this time until April 22, 2014 (*Applicant's affidavit, Exhibit B, pp. 31, 35, and Record, Tab 4, p. 17, and Tab 6D, pp. 118-119*).

[9] On April 14, 2014, during another visit to Dr. Zwicker's office, a return to work schedule was discussed. After consultation, the doctor's recommendation was:

1. Begin on April 22, 2014;
2. Work in two 8 day blocks, two days on, two nights on, four days off;
3. Then for the next 8 days work only two day shifts with no nights;
4. Then, over the next 28 days, work two days and one night in first 8 day block, then in the third set of 8 day blocks work three days and one night; and
5. After 6 weeks, resume normal schedule.

[10] Ms. Selig met with Andrea Hatt on April 16, 2014. Ms. Hatt is an Occupational Health Nurse. One of her duties with NSHA is to review all questions relating to accommodation and, in the process, determine whether sufficient medical information has been provided to support the requested accommodation.

[11] Ms. Hatt's notes (*Record, p. 139*) indicate that what was agreed upon, when she met with Ms. Selig, was a gradual six week return to work, to commence April 23, 2014. The schedule would include two 8 hour day shifts, increasing to three sets of 12 hour shifts within six weeks. Specifically, her notes indicate that it was agreed that the Applicant would not work nights for the first two weeks following her return.

[12] On May 13, 2014, the Applicant again saw her physician. A chart entry was made by Dr. Zwicker which indicated that she was:

> "…supporting her … not working night shift, as it is causing her increased stress due to husband's medical condition." (Selig affidavit, Exhibit B, p. 27)

[13] The next day, Ms. Selig followed up with Andrea Hatt. She expressed difficulty with night shifts, indicating that she felt that it was not safe for her son to be home alone at night. She further told Ms. Hatt that Dr. Zwicker had advised against night shifts (*Record, p. 140*).

[14] The investigator (more on which will be said shortly) concluded that Ms. Hatt had requested that the Applicant provide medical information to support the request for no night shifts. A finding was also made that this information was not, in fact, provided to Ms. Hatt until June 12, 2014 (*Record, pp. 76 and 140*). The Respondent, NSHA, takes the position that the information was not, in fact, provided until June 19, 2014.

[15] The latter position appears to be supported by para. 19 of the Applicant's brief, as well as by the fax imprint at the top of the documents. Indeed, it appears Ms. Hatt made the request of Dr. Zwicker on June 11, 2014, (*Record, pp. 122-124*) and that the information was faxed to her by the latter on June 19, 2014 (*Record, p. 120*).

[16] In the meantime, Dr. Zwicker saw Ms. Selig again on May 20, 2014. The chart note entry for that date reads (*Selig affidavit, Exhibit B, p. 26 and Record, p.144*):

> "Her employer has honoured my request for her not to work night shifts, however, she has been bumped to full-time day shifts at 12 hours x 4 days. Unfortunately, this has increased the amount of stress she has as she is unable to manage her household with these hours."

[17] It appears to be uncontroverted that the only night shift that the Applicant worked until the supporting medical information was supplied to her employer on June 19, 2014, was May 11, 2014. Prior to the May 20, 2014 meeting with her doctor, NSHA takes the position that Ms. Selig had agreed to work four day shifts, instead of two days and two nights. Specifically, they say that this occurred at the meeting with Ms. Hatt on May 14, 2014.

[18] The Record reflects that Ms. Hatt expressed this belief in her notes of that meeting (*Record, p. 138*) and in an email to Michelle Tipert (*Record p. 289*). Ms. Tipert was the person responsible, overall, for the nursing schedule, which (in turn) was implemented by Jeri Zinck (Team Lead for Emergency/ICU Department).

[19] The Applicant characterizes her allocation of four day shifts in a row very differently. At para. 16 and 17 of her brief, she states:

> 16. Despite the request for accommodation, Liza Selig was scheduled for four day shifts in a row rather than two day shifts per cycle. It is Liza Selig's evidence that Jeri Zinck also stated to her that she had to work night shifts because she was a nurse. Liza Selig advised the Commission that Jeri Zinck put pressure on Liza Selig to work nights. Liza Selig acquiesced to these demands and did work one night shift. (Ref. Record, Tab 4, p. 17)
>
> 17. Liza Selig went to Andrea Hatt about Jeri Zinck's comments, which Liza Selig experienced as harassing, and was advised by Andrea Hatt to simply ignore Jeri Zinck. (*Ref. Record, Tab 4, p. 18*)
>
> [Emphasis added]

[20] On June 19, 2014, Dr. Zwicker completed and returned the aforementioned medical form requested by Andrea Hatt. This form contained the following recommendation:

> "Two day shifts per 8 day cycle until at least mid-July, then gradual increase" (*Record, p. 120*).

[21] This, it turns out, is the schedule that was followed from the end of June until mid-September (specifically September 17, 2014). There was one "outlier" with which I will deal momentarily.

[22] On July 9, 2014, Ms. Selig, together with Ms. Hatt, Ms. Tipert and Lisa Burton from Human Resources, all participated in a meeting. Also in attendance was the Applicant's union representative, Diane Frittenberg. The explicit consensus was that Ms. Selig would work two day shifts per 8 day cycle *(Record, Tab 4, p. 18*).

[23] A follow up note from Dr. Zwicker on July 30, 2014 (*Record, p. 127*) confirmed that Ms. Selig would be "reassessed in August". There had been an earlier note (July 14, 2014 – *Record, p. 126*) which said that the reassessment would take place prior to August 13, 2014.

[24] On August 20, 2014, there was email communication between Michelle Tipert and Ms. Hatt whereby the former noted that the Applicant was scheduled to work a night shift on August 24, 2014, was the only LPN scheduled to work that night, and so they needed to know if they had to replace her (*Record, p. 168*). Ms. Hatt confirmed that Ms. Selig was scheduled for a reassessment with Dr. Zwicker on August 26, 2014.

[25] Against this background, the Applicant contended that Jeri Zinck was pressuring her. She contended that the latter harassed her about working night shifts, to the point where she finally gave in and worked a night shift on August 24, 2014. On another occasion, when Ms. Selig was attending a medical appointment, she states that Ms. Zinck sent her a text saying "you can run but you can't hide" (*Record, p. 18*).

[26] For her part, Ms. Zinck stated that she did "not recall how Liza came to work the night (August 24, 2014) – it was an one day/one night shift." She further added that "they must have had a conversation about this". (*Record, p. 343*)

[27] In any event, Dr. Zwicker sent a further letter to NSHA on August 26, 2014 which was to the effect that the schedule (two days per 8 day cycle) should continue (*Record, pp. 127 – 128*). Ms. Selig had, however, already worked the night on August 24, 2014, as indicated.

[28] This brings us to the meeting of September 15, 2014, which the Applicant has referred to as "the September meeting". There are two diametrically opposed versions of this meeting. In the Applicant's brief, it was described thus:

> 27. On September 15, 2014, Liza Selig was unexpectedly asked to meet with Michelle Tipert. The meeting took place in a small office. When Liza Selig went into Michelle Tipert's office, Jeri Zinck and Andrea Hatt were also present … Andrea Hatt closed the door and her chair was placed in front of the door. Liza Selig was confronted about when she would be coming back to work full-time. According to Liza Selig, Andrea Hatt stated at the September Meeting that Dr. Zwicker was "babying" Liza Selig and she wanted to know when Liza Selig would be working full-time. Liza Selig states that she agreed with everything that was said to her in that meeting so that she could leave the meeting. Liza Selig left the meeting and was brought to tears. (Ref. Record, Tab 4, p. 18)
>
> 28. Liza Selig states that there was discussion of her physician and personal reports at this meeting even though medical information is to remain confidential vis-à-vis the occupational health nurse (Andrea Hatt). According to Liza Selig, aspects of what was covered in this meeting were then conveyed by Jeri Zinck to Denise Peach-Stokes, a work colleague. (Ref. Record, Tab 4, p. 18)
>
> 29. Liza Selig had an appointment with Dr. Zwicker on September 17, 2014. Dr. Zwicker proceeded to put Liza Selig off work completely for three weeks. Dr. Zwicker recounts the following in her chart notes:
>
> > "Had a surprise meeting with her supervisor, nurse manager and occupational health person to discuss her eventual return to work with

> no prior notice and no reps to support Liza, no union rep or HR person. Liza feels she was bullied into agreeing with these superiors and then went home quite upset. Begin not sleeping and major panic attack yesterday – not coping with this well, passively suicidal. Mental health questionnaire completed and scores high for depression and very high for anxiety. Feeling extreme guilt and at the same time apathetic as to what happens to her. Cries a lot. Difficulty concentrating with ruminative thinking." (Ref. Affidavit of Liza Selig, Exhibit B, p. 19 and Record, Tab C, pa. 129)

30. Liza Selig did not return to work after this time. Liza Selig is currently on long-term disability. The workplace has been described by Dr. Zwicker as a toxic environment for Liza Selig. (Ref. Record, Tab 4, p. 18)

31. Liza Selig filed a formal complaint with the Human Rights Commission signed on November 24, 2015. This complaint was formalized on March 10, 2016. (Ref. Record, Tab 4)

[Emphasis added]

[29] The Respondent, NSHA, describes the September meeting (in its brief) in these terms:

> "30. The investigator determined that "as a result of the confusion [over what the Applicant was telling them about her ability to work and what the doctor was telling them]…Hatt, Tipert and Zinck decided to meet with the complainant. A meeting was arranged on September 15, 2014, to ensure that everyone involved better understand the details of Ms. Selig's return to work schedule. Ms. Selig attended this meeting along with Mses. Hatt, Zinck and Tipert.
>
> 31. The parties have a very different understanding of what occurred at this meeting. Ms. Hatt's chart notes say: "Mtg w EE, Michelle T, Jeri, RTW plan discussed. Undersigned expressed concern with info from Doc not matching messages from EE. The investigator concluded with respect to this meeting:
>
> > While their intentions were to clarify her return to work plan so they could support her at work, the Complainant reports this meeting affected her to the extent that she had to take another medical leave…While this meeting ended up having a detrimental impact on her health, the goal of this meeting was to clarify her return to work and provide an opportunity for discussion about her accommodation."
> >
> > [Emphasis added]

The Investigation

[30] Ms. Selig's complaint was filed with the Nova Scotia Human Rights Commission ("NSHRC") on November 24, 2015, and formalized on March 10, 2016. It alleged that she had been subjected to discrimination on the basis of a protected characteristic namely, mental illness, specifically depression. It also alleged harassment relating to the manner in which the Applicant was treated by Ms. Zinck.

[31] The latter, Ms. Selig alleged, had told her that she "had to work nights". She said Ms. Zinck had also sent her the text message "you can run but you can't hide", and had also written "sick" on the schedule "to put pressure" on Ms. Selig.

[32] Excerpted from the Applicant's complaint are the following passages:

1. At p. 2 of her complaint (*Record, Tab 4, p. 18*) she notes:

> "There was a meeting with the union, Andrea Hatt, Michelle Tippert and Peoples' Services on July 9, 2014. It was agreed at that meeting that I would work two shifts in every eight day rotation and no night shifts. I went back to work towards the beginning of August 2014. Jeri continued to harass me into working a few night shifts by the tone of her voice or how she asked me, for instance, she called me once from ICU and said she needed to talk to me. She said in a very demanding voice "I need these shifts covered and how am I going to cover them". But other than that things seemed to be okay.
>
> On September 15, 2014, I was asked to see the manager (Michelle Tippert). In Michelle's office was also Andrea (OH&S nurse) and Jeri. Andrea closed the door when I arrived and put her chair in front of the door. Andrea said "Michelle and Jeri have been good to you all this time". I have went to Andrea before to complain about Jeri's treatment towards me. She also said "We want to know when you are coming back full time". Jeri asked "Do you even intend on coming back full time?" Andrea said she felt my doctor was babying me and stated forcefully that they wanted a date when I would be coming back to work. Some of the questions they were asking were emotionally driven. I left the meeting and went back to the floor bathroom and cried."
>
> [Emphasis added]

2. Then, at p. 3, (*p. 19 of the Record*) she continued:

> …
>
> Although I have a history of depression, I know that if it weren't for the harassing treatment by Jeri I would have been able to cope and manage my condition better as I had for many years.
>
> …
>
> I don't know if all employees who suffer from depression are treated in the exact manner that I have been treated but I do know that many people are treated poorly. And I do know that Jeri and Michelle have modified other peoples doctors ordered ease back plans that they had originally agreed with. And I do know that there have been other employees who have received inappropriate text messages from superiors.
>
> …
>
> Following my meeting on September 15, 2014, my doctor put me off work again due to depression. I contemplated suicide, used EAP services, got a therapist but couldn't get an appointment until December 2014. My doctor continues to switch my medications in hopes to find a balance that helps me. My EI benefits were exhausted and I am currently on LTD benefits."
>
> [Emphasis added]

[33] Melanie McNaughton ("the investigator") was tasked with the conduct of the investigation. She prepared a report dated October 20, 2016. Its bottom line was a recommendation to the Commission that the Applicant's complaints be dismissed pursuant to Section 29(4)(b) of the *Nova Scotia Human Rights Act* (henceforth, "the Act") as being "without merit".

[34] In the course of her investigation, Ms. McNaughton spoke with Ms. Selig, Ms. Tippert, Ms. Zinck, Ms. Hatt, as well as, Denise Peach-Stokes, Diane Frittenberg (CUPE representative, Local 8920) and two human resources consultants in the employ of the Respondent, Lisa Burton and Michelle Flack.

[35] Prior to submitting her report, the investigator had received written submissions from counsel for the Respondent, NSHA, dated May 6, 2016 (*Record, Tab 6D, pp. 145-150)*) and a response/rebuttal from Ms. Selig dated June 1, 2016 (*Record, Tab 6C, pp. 80-93*).

[36] Ms. Selig was provided with an opportunity to file a submission in response to the investigation report, and availed herself of that opportunity. She filed her

reply submission date stamped October 12, 2016, with attached additional materials (*Record, Tab 6C, pp. 96-144).* This was also provided to the Commissioners.

[37] On November 17, 2016, the Commissioners of the NSHRC met to discuss the Applicant's complaint. They dismissed it pursuant to Section 29(4)(c) of the *Act*, on the basis that it raised "no significant issues of discrimination" (*Record, Tab 5A).*

[38] It is in relation to this determination that the Applicant seeks judicial review. She filed the requisite notice on December 16, 2016, and coupled it with a motion to introduce new evidence.

[39] This latter application was heard on January 25, 2017, while Ms. Selig was still self-represented. Her motion was partially successful. Accordingly, a redacted version of her affidavit dated December 16, 2016, was filed with the court on October 31, 2017. Among other things, it contained 36 pages of her medical chart with Dr. Zwicker, 43 pages of her clinical file related to the counselling that she had undertaken, and two pages with mental health referrals (Exhibit B). This is all material which the Applicant says had been returned to her by the investigator with a note attached, "I did not make copies of the attached".

[40] Exhibit C to that affidavit also contained materials which had been returned to the Applicant. Appended to these materials was a note, "only made copies of the attached documents". These materials are comprised of a letter from Manulife to the Applicant, a letter from NSHA, some pay stubs, some material from Sunlife Financial, a report from Dr. Zwicker, and two pages of her Record of employment. Exhibit D contains a copy of her amended complaint.

Issues

[41] Counsel for Selig has raised the following issues:

a. Was the Applicant denied procedural fairness in the Commission's investigation or the handling of her complaint?

b. Even if the Applicant received procedural fairness, was the Commission's decision to dismiss Ms. Selig's complaint reasonable in the circumstances?

Analysis

a. **Was the Applicant denied procedural fairness in the Commission's investigation or/the handling of her complaint?**

[42] Ms. Selig's submissions allege five breaches of her right to procedural fairness:

i. The investigator failed to interview key witnesses;

ii. The investigator failed to conduct probing interviews;

iii. The investigator disregarded and failed to consider obviously crucial evidence;

iv. The investigator was biased; and

v. The investigator improperly made findings of credibility.

Standard of Review

[43] Briefly stated, the applicable standard of review is correctness. The process followed by the Commission must be fair to all parties.

[44] But "fairness" is a nuanced word. It is generally necessary to consider *Baker v. Canada* (*Minister of Citizenship and Immigration*), [1999] 2 SCR 817 to determine what it means in a given set of circumstances. *Baker* sets out five non exhaustive factors that are relevant to a determination of the content of the duty of fairness. They consist of:

1. The nature of the decision;
2. The nature of the statutory scheme;
3. The importance to the individual's affected;
4. The legitimate expectations of the person challenging the decision; and,
5. The choices of procedure made by the agency itself.

[45] Given that we are dealing here with a decision of the Nova Scotia Human Rights Commission, there are case authorities which have already undertaken the requisite analysis. In *Cape Breton Regional Municipality v. Nova Scotia Human Rights Commission*, 2013 NSSC 193, Bourgeois, J. (as she was then) reviewed a Commission decision to refer a matter directly to a Board of Inquiry without first

conducting an investigation. She concluded that a low level of procedural fairness was required.

[46] In so doing, she reasoned that the Commission was not, in the circumstances before her, making a final decision with respect to the complaint, whose merits would be determined by the Tribunal at a later date. Therefore, a lower threshold or level of fairness was necessary when the first and second of the *Baker* criteria were considered.

[47] In this case the Commission's decision was dispositive. Because of it there will not be a decision on the merits. This distinguishes Ms. Selig's case from the one in *Cape Breton Regional Municipality (supra).*

[48] Justice LeBlanc dealt with such a concern in *MacDougall v. Nova Scotia (Human Rights Commission)* 2016 NSSC 118. There, at paras. 18-19, he stated:

> Given the focus of the above cases finding a low level of fairness based largely on the fact that the merits of the complaint will be assessed at a later stage, it is reasonable to conclude that the same logic does not apply where the Commission's decision effectively precludes any further consideration. This in turn may affect the amount of procedural fairness required at this stage of the proceeding. Brown and Evans write in *Judicial Review of Administrative Action in Canada* (Carswell loose-leaf) at 7:2554:
>
> On completion of an investigation, a body may be required to decide whether there is sufficient evidence to warrant referring a matter for a full hearing... In these circumstances where the investigation body *rejects* a complaint, it will usually be found to owe a duty of fairness to the complainant, since rejection of the complaint will effectively preclude the Complainant from obtaining redress. However, the content of the duty is likely to fall toward the low end of the spectrum. (emphasis added)

[49] Then at para. 21 Justice LeBlanc continued:

> Reconciling this with the statements by Cromwell J. in *Comeau*, [2012] 1 S.C.R. 364 and reiterated by the Nova Scotia Court of Appeal in *Green v. Nova Scotia (Human Rights Commission)*, 2011 NSCA 47, [2011] N.S.J. No. 260, that the decision is essentially administrative, is difficult, but in all the circumstances, the level of procedural fairness due likely remains on the lower end of the spectrum. As will be discussed below, the facts of this case are such that a finely tuned differentiation of the exact degree of procedural fairness does not have a significant bearing on the outcome, and even a low-to-moderate degree of fairness was met by the

> investigation and the Commission decision-making process. (emphasis added)

[50] The above considerations will inform my assessment of the five specific complaints raised by the Applicant with respect to procedural fairness.

i. The investigator failed to interview key witnesses

[51] Ms. Selig states, at para. 4 of her affidavit, that she provided the investigator with the names of six witnesses to be interviewed. These were:

a) Ashley Surrette

b) Shannon Dicks

c) Janet Dawson

d) Dr. Holly Zwicker

e) Jean Blackler (therapist)

f) Denise Peach-Stokes

[52] Of these, only the last, Ms. Peach-Stokes, was interviewed by Ms. McNaughton. Moreover, with respect to her, Ms. Selig says that she had advised the investigator that this particular witness "may not be a good witness for me as she has been best friends with one of the people mentioned in my complaint for over 20 years [Jeri Zinck]". (*Selig affidavit, para. 4*)

[53] The Applicant concedes at para. 6 (of her brief) that "in and of itself, the fact that the investigator may not have interviewed every witness suggested by the complainant will not necessarily be fatal". She goes on to argue, however, that "…failure to interview key witnesses does result in a breach of procedural fairness to warrant the quashing of a decision based upon such an investigation".

[54] In support of her contention, the Applicant relies heavily on *Tessier v. Nova Scotia (Human Rights Commission)*, 2014 NSSC 65, *Gravelle v. Canada (Attorney General)*, 2006 FC 251, and *Sanderson v. Canada (Attorney General)*, 2006 FC 447.

[55] In *Tessier*, Justice LeBlanc indicated at paras. 36 – 37:

> 36. In the context of human rights investigations, complainants are owed a duty of procedural fairness by both the investigator gathering the evidence and crafting a report, and by the Commission in reaching its decision
>
> 37. It is well established that human rights Investigators are masters of their own procedure and are afforded broad discretion in choosing who they interview and how they gather information: *Slattery v. Canada (Human Rights Commission)*, (1994) 73 F.T.R. 161, [1994] 2 F.C. 574, at para. 69, affirmed (1996) 205 N.R. 383 (CA). That broad discretion, however, must be exercised in accordance with the duty of procedural fairness owed to the complainant.
>
> [Emphasis added]

[56] He added at para. 44 that:

> …investigators are entitled to significant deference and judicial intervention will be warranted only where an investigation fails to investigate obviously crucial evidence.
>
> [Emphasis added]

[57] The court went on to indicate at para. 54:

> With respect to Ms. VanGorder, Mr. Verrall and Mr. Dunphy, I agree with the respondent that these individuals were not key witnesses. All three of these proposed witnesses were involved with investigating Ms. Tessier's internal complaint but were not directly involved with the events that gave rise to the complaint. Any information that Mr. Desmond would have obtained from them in interviews would have been information that an investigator could gather by conducting their own investigation. I cannot conclude that other investigators to a similar internal workplace complaint are key witnesses for a human rights investigation. In fact, it is preferable for human rights investigators to conduct their own thorough investigations rather than relying on the opinions of internal investigators.
>
> [Emphasis added]

[58] However, at para. 62, the Court reasoned:

> … as I have previously stated, the operative question is whether the failure to interview Chief McLean and DC Burgess was a failure to investigate obviously crucial evidence to the investigation. In this case it must be asked whether, after receiving the HRM response, Chief McLean and DC Burgess could provide additional crucial information, such that interviews with these men were

> necessary. I find that it is reasonable to believe that Chief McLean and DC Burgess had additional crucial information to offer, such that conducting interviews with them was necessary for a thorough investigation.
>
> [Emphasis added]

[59] At para. 64, Justice LeBlanc concluded:

> This view finds support in Mr. Montes's comment to Ms. Tessier that he would "need to interview more witnesses/the Respondents", and Mr. Desmond's decision to schedule interviews with both Chief McLean and DC Burgess in September, 2011. When those interviews were cancelled, Mr. Desmond made efforts to re-schedule later in the month. These interviews never took place. In the absence of any explanation as to why he never went forward with the interviews, it can be inferred that Mr. Desmond himself recognized that interviews with Chief McLean and DC Burgess were relevant to his investigation. At the very least, Mr. Desmond was required to explain why such obviously crucial evidence was not gathered.
>
> [Emphasis added]

[60] In *Sanderson*, *supra*., the investigator failed to conduct interviews of two individuals in relation to whom the complainant had alleged that she had experienced harassment in the workplace. As a consequence, the court determined at para. 58:

> In my view, the failure of the Commission investigator to interview either Mr. Sacha or Mr. Ready is an omission of a similar magnitude to that identified in *Gravelle*, the result of which was that the investigation report in this case was less than thorough. This in turn means that the Commission did not have sufficient relevant information before it when it made its decision to dismiss Ms. Sanderson's complaint.

[61] In *Gravelle*, Justice Blanchard considered a similar argument and pointed out at para. 27:

> At pages 600-601 [of *Sketchley v. Canada (Attorney General)*, 2005 FCA 404], Nadon J. went on to state that an investigation may have lacked the legally required degree of thoroughness if, for instance, an investigator "failed to investigate obviously crucial evidence":
>
> > 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 failed to

> investigate obviously crucial evidence, 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.
>
> [Emphasis added]

[62] Justice Blanchard continued at para. 36 (of *Gravelle*):

> 36. In light of these evidentiary findings, it is clear that the main reason for not rehiring the applicant--the lack of work--is questionable. At the very least, a knowledgeable investigator would have had doubts. In her report, the Investigator seems to have simply accepted the Department's explanation that [TRANSLATION] "the applicant's services were no longer required for the GOL initiative or as senior purchasing assistant". The investigation went no further. In my view, some questions directly related to the applicant's discrimination complaint needed to be clarified, namely, who decided not to rehire him and whether this person's decision was influenced by the applicant's medical disability. As it stands, we cannot know, since the people who were directly involved and responsible were never approached. The Investigator did not question Mr. Soucy or Mr. Cardinal, the applicant's immediate supervisors when he was working, or Ms. Bouchard, the person who replaced him when he was on leave, or other employees of the ET Division, to determine whether a replacement had been found or whether the applicant's duties were given to other employees. These individual should be questioned about a number of aspects in the case, including about whether there is still work and whether there was a discriminatory aspect to the decision. In my view, a thorough approach such as this was required under the circumstances and would have led to an in-depth examination of the evidence, which I find crucial, given the complaint.
>
> [Emphasis added]

[63] He then concluded at para. 40 of *Gravelle*:

> 40. In failing to interview the key individuals involved in the applicant's case, particularly Mr. Soucy, Mr. Cardinal, Ms. Bouchard and Mr. Cole, I feel that the Investigator did not conduct an in-depth and thorough investigation and thus did not examine obviously crucial evidence in the case. The investigation into the applicant's complaint therefore did not meet the thoroughness standard in *Slattery* and affirmed by the Federal Court of Appeal in *Sketchley*. The Commission's decision to dismiss the complaint must therefore be quashed because it violates the procedural fairness requirement.
>
> [Emphasis added]

[64] The Applicant's argument is that the impact upon her of the actions by the representatives of her employer must be viewed through the lens of her particular disability (*brief, para. 47*). In this case, the requisite lens is that of a person suffering from major depression and anxiety.

[65] The Applicant goes on to argue that this ought to have alerted the investigator to the need to interview those witnesses on her list who were ignored. For example, given the issues involved in the Applicant's complaint, she argues that Ms. Blackler (her therapist) and Dr. Zwicker (her physician) ought to have been interviewed. After all, as the argument continues (*para. 69, Applicant's brief*):

> The NSHA's own policies articulate that Liza Selig's attending physician was a (sic) considered a "team member" in determining her return to work. Pages 287-296 of the Record is containing the "return to Work Policy" that is dated September 2008. This policy contains a list of definitions, including that of a Multidisciplinary RTW [return to work] Team. It states that the clinicians (physicians/therapists) are a part of this multidisciplinary RTW Team that must work together in establishing a return to work plan. The NSHA itself identifies the physician and therapist as critical players in its return to work policies.

[66] In addressing this contention, the *a priori* presumption is that the investigation was fair and neutral. The party asserting otherwise must point to facts which would tend to show, for example, that during the course of the investigation, the investigator neglected or omitted to follow up or investigate significant or crucial information. The significance of the information is to be assessed in relation to the nature of the complaint and the context supplied by all of the surrounding circumstances.

[67] As previously noted, the Applicant agrees that, in and of itself, the fact that she provided a list of six witnesses that she felt the investigator should interview, places no corresponding onus upon the investigator to interview all (or any) of them.

[68] Moreover, in the authorities cited by the Applicant, there was an obvious correlation between the individuals with whom the investigator failed to consult or interview and the crux of the case. These were individuals, who (in *Tessier*) had been named as Respondents and committed the impugned acts, and who (in *Gravelle*) had arrived at the particular decisions upon which the Applicant's complainant was based.

[69] Here, the investigator had medical information available to her from Dr. Zwicker. Ms. McNaughton was therefore aware of what the physician recommended upon the basis of the information that the latter had obtained from the Applicant. Ms. Blackler's information was accumulated long after Ms. Selig's last day worked.

[70] Moreover, I have not been referred to anything remotely suggestive of what additional evidence would have been provided by Dr. Zwicker, Ms. Blackler, or any of the others, if they had been interviewed by Ms. McNaughton. Often, in these circumstances, an affidavit of the neglected witnesses will be supplied which will indicate the nature of the evidence that would have been provided had they been questioned.

[71] The circumstances of this application would have been particularly accommodating of such an approach. After all, the Applicant applied, and the Court permitted her, to introduce some new evidence. No leave to introduce evidence on this particular point was sought, and no such evidence was introduced. I have no yardstick against which to measure how "crucial" anything they (the neglected witnesses on her list) had to say would have been.

[72] I return to my earlier observation that the bone of contention between the parties appears to have been, all along, how to best go about accommodating Ms. Selig's disability and whether the employer had discharged its obligation in this regard. What was alleged to have made this a challenge for the NSHA was the perception of its representatives that the Applicant was telling her doctor the things reflected in the doctor's report to the employer, and telling some of the employer's representatives something else with respect to her ability to work. (For example, see *Record, pp. 77-78)*

[73] The nature of this dilemma is apparent in many of the email exchanges contained in the Record. Some examples include the following, between Andrea Hatt and Jeri Zinck:

> **June 19, 2014 Andrea Hatt (Record page 196):**
>
> I just received the ACR from Liza's doc recommending two-day shifts per eight-day-cycle until mid-July. I have left a message for Liza. Wondering why she did not mention this to you guys when you were scrambling with the schedule…Are we dealing with a practitioner who has skewed judgment/information or a staff member who is giving or getting all the information? Sigh
>
> **June 20, 2014 Jeri Zinck (Record page 196):**

> …Barely words to express my frustration of this situation. I am wondering if the practitioner and you and Michelle and I are all receiving the same information. Based on prior experiences with this situation over the last six months, I think not….
>
> **September 2, 2014 Andrea Hatt (Record page 201):**
>
> "She will be reassessed in September" I am not happy with the way she is handling things. She seems to be deliberately avoiding direct contact with me.
>
> **September 17, 2014 Andrea Hatt (Record page 156):**
>
> I have some bad news I just got a fax from Liza' doc recommending that she be off work for the next three weeks and will plan to return to work on the 9th and I should expect more info regarding that return to work upon further assessment. I am not sure what to say. …
>
> **September 17, 2014 Michelle Tipert (Record page 156):**
>
> The girl who sat with us Monday and claimed she was absolutely fine and able to work and didn't understand why her MD didn't write in her last note is obviously not the same girl who went to visit her doctor and now needs to be off for three weeks. One of us is not getting the true story….
>
> [Emphasis added]

[74] I observe that in *Grivas v. Air Canada*, 2006 FC 793, it was noted:

> 31. … Neither Air Canada nor the Commission disputed the applicant's medical condition, his inability to work in his previous position or the fact that he required accommodation. Therefore, these were immaterial to the complaint, a non-issue from the point-of-view of the Investigator and the Commission. Accordingly, in addition to the fact that the Investigator was not required by law to interview each of the applicant's attending physicians (see: Miller, above, and Slattery, above), from a practical point-of-view, such interviews were unnecessary as his medical condition was never questioned. …

[75] In this case, there does not appear to be so much of a question (on the Respondent NSHA's part) with respect to the medical issues that Ms. Selig was facing. There is also no doubt that a system of accommodation was put in place to assist her. The issue was with respect to what was plainly contained in Dr. Zwicker's materials with respect to the extent of Ms. Selig's residual ability to work, how that compared with what Ms. Selig told her employer about that ability from time to time, and how that impacted upon the ability of the employer to come up with an accommodation which was appropriate to the Applicant's true needs.

[76] As to all of the people on the Applicant's list who were not interviewed, in *Wong v. Canada (Public Works and Government Services)***,** 2017 FC 633, the Court stated at para. 29:

> It is now firmly established that in order to be procedurally fair, the investigation leading to a decision made under section 44 of the Act must be both neutral and thorough (*Slattery v Canada (Canadian Human Rights Commission)*, [1994] 2 FC 574, at para 50 [*Slattery*]). As to the thoroughness of the investigation, the Court in *Slattery* observed that it is only "where unreasonable omissions are made, for example where an investigator failed to investigate obviously crucial evidence, that judicial review is warranted". Evidence is "obviously crucial" in that context where "it should have been obvious to a reasonable person that the evidence an applicant argues should have been investigated was crucial given the allegations in the complaint" (*Gosal v Canada (Attorney General)*, 2011 FC 570 at para 54 [*Gosal*], citing *Beauregard v Canada Post*, 2005 FC 1383, at para 21).
>
> [Emphasis added]

[77] Without speculating, I cannot conclude that the investigator's failure to follow up with the five witnesses on the list presented to her by the Applicant constituted a failure to investigate obviously crucial or even significant evidence. The fact is, as noted above, I simply do not know what these witnesses would or could have said that would have further assisted the investigator in coming to a conclusion as to the validity of the Applicant's complaint.

[78] There is nothing before me which enables me to conclude that the Investigator failed to interview key witnesses. This ground of contention's without merit.

ii. Failure to conduct probing interviews

[79] The Applicant argues that, in any event, the nature of the questions posed by Ms. McNaughton to the witnesses that she did interview were inadequate given the issues involved in the investigation. Specifically, she notes that there was little to no questioning in relation to the documentation that was contained in the file, and in particular none of the witnesses were questioned on the emails that were exchanged (some of which were previously referenced, and appear at pages 156, 184, 185, 196, 198, 201, 205, 211 of the Record).

[80] The Applicant indicates that these emails evince a level of distain for her accommodation needs. She further asserts that, from the tenor of these emails, "it is arguably clear that Michelle Tipert, Jeri Zinck and Andrea Hatt believe that Liza

Selig was "making up her illness and she was not contending with a serious mental health issue at all." (Applicant's brief para. 77)

[81] Ms. Selig argues that the need to probe these issues was made manifest by what Denise Peach-Stokes had to say when interviewed about the relationship between Ms. Selig and Jeri Zinck. This witness stated that it would have been difficult for Ms. Selig to tell Jeri Zinck that she was not medically cleared to work nights because she felt intimidated by her.

[82] The other reason why this area required follow up, the Applicant contends, was Ms. Zinck's text message sent to Ms. Selig when she was engaged in attending a doctor's appointment "you can run but you can't hide". She argues that this comment was therefore relevant to her allegations of harassment.

[83] The only authority proffered by either party in their respective discussions of this issue was *Tessier*. They have focused upon Justice Leblanc's statement in para. 57:

> Ms. Tessier also calls into question the quality of Mr. Montes's interviews. I do not believe that it is properly the role of this Court to review the transcripts of every interview conducted during an investigation with a fine-toothed comb and assess the quality of the questions asked therein. I would leave open the possibility that an investigation may be called into question where the interviews are conducted so superficially as to raise serious doubt that any relevant information was gathered by the investigator. Generally, however, an investigator must have discretion to choose which questions to ask of their witnesses, and how to best gather information. I have reviewed the transcripts of the five interviews conducted by Mr. Montes, and they do not reveal any immediate or obvious shortcomings. I do not find that there was a lack of procedural fairness on these grounds.
>
> [Emphasis Added]

[84] It is clearly important that investigators be permitted some autonomy with respect to the manner in which they investigate complaints. This is particularly so given the caseloads with which they contend. While an obviously shoddy investigation will not be countenanced, in order for an investigation to be called into question based upon the inadequacy of the interviewing, it must be clear that the questioning was so deficient that it did not arm the commissioners with sufficient information upon which to base their decision. Such an investigation would be a very superficial one, as Justice LeBlanc pointed out in *Tessier* above.

[85] Thus, it would rarely be the case that the court would seek to intervene and/or second guess the manner in which an investigator has elected to conduct an investigation. Put differently, not often will the Court be left in "serious doubt that any relevant information was gathered in the investigation" (per *Tessier*, para. 57)

[86] In her brief, the Applicant characterizes the questioning with respect to the September meeting as such:

> 82. The structure of the September Meeting was not queried at all. A properly constructed meeting took place on July 9, 2014 so it cannot be argued by Andrea Hatt or Michelle Tipert, who were present at the July meeting, that they were unaware a union representative and human resources representative should have been present. Despite this awareness, they proceeded to plan the September Meeting which was arguably an ambush. Melanie McNaughton asked no questions about how or why the September Meeting was organized.

[87] In fact, Ms. McNaughton did deal with the "how and why" of the September meeting. In her interview with Michelle Tipert, she reports the latter as explaining:

> Regarding the September meeting they had with Liza (and Jeri and Andrea), had they known what she was struggling with, they would not have held this meeting. <u>They were all getting different stories and thought they should be all in the same room to hear the same thing. It was to find out what she can work and how to schedule her.</u> The intent was to help her as they knew she was going through a tough time. They did not realize what she was going through at the time.
>
> (*Record, Tab 7, page 339*)
>
> [Emphasis added]

[88] Then, in her interview with Andrea Hatt:

> 10. … Hatt says that in hindsight, Hatt can see it was a difficult meeting. The intent was not as it was perceived by Liza. Hatt's hope was to offer support. Now Hatt would recommend human resources and union be present but wonders if Liza's reaction would have been the same anyway. The purpose of the meeting was to hear the same information at once – Liza was telling people that she was going to start her regular schedule.
>
> (*Record, Tab 7, Page 341*)

[89] As to Dianne Frittenburg, the Vice President for the South Shore Area for Local 8920 CUPE, she was asked about both the July and September meetings:

> … Liza sent her an email on December 10th, 2014, asked to see her, saying she was off work on medical leave and was having concerns with her RTW (Return to

> Work). They had a meeting and Liza had personal issues in her file, was on sick leave and was on a RTW program. DF (Dianne Frittenburg) suggested she work with OH&S. At their meeting, Liza said that she had a meeting with her manager, OH Nurse and team leader where inappropriate questions were asked. DF advised her that she could file a complaint about this meeting with Human Resources or the Union could serve a notice to human resources that no more such meetings take place without union representation. Liza was going to think this over. There were also other issues with her LTD claim which seemed to be her major issue. She was trying to get support in dealing with this. In May 2015 they met to draft a grievance over this and met with the employer over the issue. They never mentioned filing a harassment grievance. They were able to meet with the employer on the LTD claim and Liza did not want to pursue a complaint on the September meeting. A $20,000.00 settlement from LTD (Manulife) was reached so a grievance was not filed.
>
> (*Record, p. 344*)

[90] At para. 7 and 8 further queries and responses are recorded:

> 7. Did you follow up with her following the July meeting? After their meeting DF [Diane Frittenburg] tried to contact Liza checking in to see how she was doing and whether she wanted to meet and to contact her any time. DF left messages on the phone number Liza had given her and she never returned her calls. DF called at least three or four times.
>
> 8. Regarding Liza's concerns about the September 2014 meeting, DF advised her to file a complaint with Human Resources. When they spoke about this issue during their involvement with HR on the LTD issue, HR advised that there would be no more meetings without union representation.
>
> (*Record, p. 344*)

[91] With respect to the nature of Ms. Selig's interactions with Jeri Zinck and her relationship with Jeri Zinck, in Ms. McNaughton's interview with Andrea Hatt on September 21, 2016, the latter was asked to:

> 9. Describe any concerns Liza Selig brought to you about Jeri Zinck and/or the scheduling of her shifts. Liza mentioned feeling a certain pressure to perform which is common in a lot of RTW situations. Hatt did not feel her concern was out of the ordinary. Hatt did not take her concerns any further as Liza's concerns did not strike her. They had sporadic visits – Liza would drop in to her office – they had no scheduled visits and Hatt did not visit her on the floor. Were there complaints about schedule? Liza thought the recommendations had not been implemented. In the April 22 email during her second set there was a night

> scheduled for her rather than a day shift and this got changed. Hatt chalked this up to an error as errors frequently happen in scheduling.
>
> (Record, Tab 7, p. 341)

[92] Jeri Zinck, was asked about her interactions with Ms. Selig and her scheduling difficulties as follows:

> 7. What information were you given about scheduling Liza Selig's shifts when she returned from medical leave in April 2014 until September 2014? Liza talked to her a lot and had appointments with her doctor. She seemed keen to RTW [return to work]. Liza would tell JZ that she would be back but then JZ would hear from someone else that she was not. She would say one thing but JZ would hear another. The issue seemed to be her doing night shifts. Liza would say she could do nights but hen (sic) Michelle and Andrea would say she could not. At the end of the day, JZ scheduled the shifts according to what Michelle said. She took direction from Michelle, who JZ assumes was speaking to OHS. It was confusing and conflicting info.
>
> 8. Why was Liza Selig scheduled 4 12-hour day shifts (May) and some night shifts (August) when this was not her accommodation? JZ recalls talking to Liza about 4 12-hour shifts being rough. Liza said that she could switch her 2 night shifts to 2 day shifts so she would work 4 days in a row.
>
> 9. Have you had to schedule other employees who required accommodations to their shifts? If so, please describe. Any difficulties? Yes. JZ gets a plan from the OH nurse who devises the plan and sends it. It usually starts with a set to return to full time and is time limited. She is familiar with this. In Liza's case there was conflicting information. Once they got the plan, they started with the 4 hour shifts. Beginning in April 20 until June when she began her 2 day shifts.
>
> 10. What does it mean where it says "sick" on the schedule? (does it mean the shift was short staffed? The time keeper has to track the time – place it in a category. JZ wrote "sick" on the night shifts Liza was scheduled to work but did not due to her accommodation.
>
> 11. What information was Liza Selig giving you about her medical condition? She could not work nights. She did not want to leave her son at night. The fire occurred at night and she was nervous to leave him alone at night. She told JZ some personal things as to why she did not want to work nights – not medical information. These conversations made JZ understand and support her not wanting to work nights.
>
> 12. Was there discussion with Liza about working nights or extra shifts? Did she work any nights? On May 11 Liza did a night shift. On August 24 she worked a night too. JZ does not recall how Liza came to work that night – it was a 1 day/1 night shift. They must have had a conversation about this. There were lots of conversation about what Liza would do. JZ asked Liza what she was doing,

needed to have nursing care covered. Asked her if she was going to work because JZ needed to know – shifts needed to be covered and the sooner she knew the better. Liza's response would be varied – sometimes saying she would be back and then JZ would hear otherwise.

13. Any other information? The need nursing care in ICU and Emerg. The sooner JZ knows that a nurse cannot make a shift, then the sooner she can provide coverage. It is challenging to find staffing.

(*Record, pp. 342 – 343*)

[Emphasis added]

[93] In the interview with Denise Peach-Stokes:

3. What is/was your relationship with Liza Selig? They are friends and co-workers – working on the same unit.

…

6. did she [the Applicant] indicate that Jeri Zinck was giving her a difficult time over accommodation? Yes. Liza certainly said she felt JZ was giving her a difficult time. It seemed the schedule would be okay with Michelle Tipert but when JZ came back to work, Liza's schedule got switched and there would be nights scheduled. The issue was over the schedule, that Liza felt JZ did not want to accommodate her doing days. Did JZ speak to you about scheduling Liza? No, she never said anything.

7. Did you have any concerns or make any observations that Liza Selig was being pressured into accepting shifts that were not part of her accommodation? If so please describe. When Liza spoke to her about this, DPS [Denise Peach-Stokes] told her that when her schedule got changed to nights, that she should say no that she is not switching to nights because she has a doctors note that says she is to work days. Told her also to talk to her doctor. Liza said that JZ told Liza that she was switching her two a night shift from a day shift due to staffing needs. Do you know if Liza followed your advice? DPS does not think so because Liza was not able to do that – she felt intimidated by JZ and DPS thinks it would have been difficult for Liza to have that conversation. DPS did not offer to go with her because she did not want to get caught in this.

8. Did you observe Jeri Zinck telling Liza Selig that she did not have staff for some night shifts and what she was going to do? DPS never observed this, but Liza told her this happened because she would be quite upset about it afterwards. She never observed any interactions between them over the scheduling. Otherwise, she thought their interactions were okay.

9. Does Jeri Zinck generally approach staff about working nights? Is it an issue in general? DPS has nothing to do with the scheduling so does not know. They have assigned rotations so people know when they are required to work.

(*Record, pp. 345 – 346*)

[94] There are, no doubt, some questions that spring to mind that do not appear to be covered in the summaries of the interviews prepared by the investigator. One of the most prominent of these is whether Ms. Zinck admits that she made the "you can run but you can't hide" comment, and, if so, the circumstances surrounding it. However, the impact of this particular oversight is vitiated, somewhat, by the fact that Ms. Zinck's evidence with respect to the text message was provided to the investigator by counsel for the Respondent:

> The text from Zinck has been taken out of context. The Complainant was going to the doctor and was to let Zinck know what happened. When Zinck did not hear from her, she texted the Complainant with something along the lines of "you can run but can't hide", not meant in an aggressive way. When another employee told Zinck that the Complainant was upset about this, Zinck spoke to the Complainant who acknowledged that she knew nothing negative was intended, thanking Zinck for her support. Zinck went to the Complainant's home on March 16, 2015 at the request of an employee who had confirmed with the Complainant that Zinck could attend. They stayed for an hour, work was not discussed and Zinck was not asked to leave.
>
> (*Record, Tab 5B, p. 40)*

[95] It is clear that there were questions asked of Ms. Zinck in relation to her process and the manner in which she went about preparing the schedules. There were questions asked of her and the other interviewees from which the investigator could glean more than merely the rudiments of Ms. Zinck's interaction and working relationship with the Applicant.

[96] I am unable to conclude that the interviews were conducted "…so superficially as to raise serious doubt that any relevant information was gathered by the investigator". (*Tessier*, *supra*, para. 57). In fact, they were far from superficial. Much evidence that was germane to the complaint was obtained. I dismiss the Applicant's contentions in this regard.

iii. The investigation disregarded and failed to consider obviously crucial evidence.

[97] The Applicant argues that she provided a full package of materials to the investigator, including her medical Records. She points out that some of what was included in this package was returned to her. The investigator did not retain a copy

of some of it. These materials are canvassed by the Applicant in her amended affidavit as filed with this Court on December 16, 2016.

[98] As noted in the Applicant's brief at para. 88:

> "It is submitted that the medical Records were obviously crucial evidence as they served to not only provide a clear timeline of Liza Selig's medical issues but they also contain detailed notes that place the entirety of the issues addressed in the investigating context." (emphasis in original)

[99] In her affidavit (paras. 5 to 12), Ms. Selig outlines her concerns in relation to this material:

> 5. THAT on March 10, 2016, the Human Rights Officer asked to take my evidence with her to make copies of. The meeting ended approximately 1030 hours, I left my evidence with the Human Rights Officer.
>
> 6. THAT on or about March 30, 2016, I received a large envelope via Canada Post which contained the evidence I had left with the Human Rights Officer on March 10, 2016. I did not go through the documents, I placed the envelope with the evidence inside into my filing cabinet (rubber maid container).
>
> 7. THAT on September 29, 2016, I received a copy of the "Investigation Report" from the Human Human Rights Officer, and realized that very little if any of my evidence was considered in the analysis.
>
> 8. THAT I spoke with the Human Rights Officer (Melanie McNaughton) during the first week of October 2016 and addressed with her in detail the evidence that was omitted from the report. It was her position that she had never received that evidence from me.
>
> 9. THAT I trusted the Human Rights Commission and its officers to act in a professional and non-biased manner by examining and taking into consideration all evidence provided by all parties so it wasn't until that first week of October 2016, that I retrieved that envelope containing my evidence from the rubber maid [sp] container, it became apparent immediately that Melanie McNaughton had not made copies of over half of the evidence that I had provided her with on March 10, 2016.
>
> 10. THAT the evidence returned to me from March 10, 2016, was separated into 3 sections, one section with a sticky note saying "Copy of your amended complaint form", one section with a sticky note saying "liza, only made copies of the attached documents, Thanks Melanie" and one saying "Hello Liza, I did not make copies of the attached, m".
>
> 11. THAT with-in the evidence that the Human Rights Officer did not copy, there is significant evidence pertaining to the complaint.

> 12. THAT I filed a written submission to the commissioners on or before October 19, 2016 expressing (amongst other things) my concern that significant evidence had been omitted, the investigation was one sided and there were many errs [sic] of fact throughout the analysis.

[100] The Applicant's affidavit continues in this vein:

> 19. THAT I am asking the court allow/order the omitted evidence to be presented as part of the Record labelled as exhibit B and attached to this affidavit, which when removed from the original envelope was clamped together with a large black clamp and on the front page contained a sticky note with the Human Rights Logo, and in hand written blue ink stated "Hello Liza, I did not make copies of the attached, m" and with-in that clamp were 36 pages of my medical chart, 43 pages of my clinical file related to counselling and 2 pages with mental health referrals.
>
> 20. THAT I am providing the court with the two other sections of the evidence that was returned to me on or about March 30, 2016, labelled as exhibit C, and attached to this affidavit, which when removed from the original envelope was clamped together with a small metallic purple clamp and on the front page had a sticky note with the Human Rights Logo, and in hand written blue ink stated "liza, only made copies of the attached documents, Thanks Melanie" and with-in this clamp were 21 pages, consisting of a letter to manulife from my family physician Holly Zwicker, 9 pages of letters from Manulife to me, 4 pages of letters from Health Association Nova Scotia, 3 pages of pay stubs from Manulife, 1 page of letters from Sunlife financial, and 2 pages of my Record of employment. AND labelled as exhibit D and attached to this affidavit, which when removed from the original envelope was 4 pages, held together with a staple and on the front page was a sticky note with the Human Rights Logo and in hand written blue ink stated "Copy of your amended complaint form".

[101] The Respondent counters by saying that merely because the investigator did not retain a copy of certain file materials does not lead inexorably to the conclusion that she failed to consider them. *Shiferaw v. Canada Post Corporation* 2011 FC 1046 is cited for the proposition that:

> 13. The Commission has a duty to conduct a neutral and thorough investigation into a complaint. However, it does not have to refer to every piece of evidence. It is only where an investigation has overlooked significant evidence that the Commission's decision under s 41 can be overturned.

[102] The materials contained in exhibit B to the Applicant's affidavit (those materials not copied by Ms. McNaughton) are, by and large, just as Ms. Selig has described them in para. 19 of her affidavit:

> "Thirty-six pages of my medical chart, forty-three pages of my clinical file related to counselling, two pages with mental health referrals".

[103] The thrust of what is contained in Dr. Zwicker's medical chart notes (which comprised a portion of Exhibit B to the amended affidavit of Liza Selig dated December 16, 2016) may be gathered from the following extracts:

> …General anxiety in the day is better and mood overall has improved, however, panic still persists – had a bad day yesterday dealing with her sisters even though her dad's report was a very good one. (Affidavit, Tab B, Page 10)
>
> **January 16, 2014:**
>
> Under huge stress right now – house burned down last weekend. Nobody injured, even their three dogs survived, but lost everything. Having very emotional time. Better now since finding the fire was started in the attic and possible electrical, not due to mishap by her husband. Will need a bit of time of (sic) work to get things sorted and to get her anxiety under sontrol (sic) again.
>
> (Affidavit, Tab B, page 44)
>
> **February 5, 2014 :**
>
> Having a very difficult time coping since the housefire. Now in a rented house and getting settled. Overwhelmed with trying to work, care for Tommy and Josh, and deal with insurance company. Having increasing daily anxiety and some severe panic attacks. Did not tolerate a higher dose of Effexor in the past, so will try adding something else to combat anxiety – loraz helps a bit.
>
> (Affidavit, Tab B, page 43)
>
> **February 19, 2014**
>
> …No real change in mood yet, more conflict since last visit, now with insurance company andfurther (sic) losses from the house – unable to try to retrieve any belongings and re-devastated by it. Has engaged a lawyer to help her.
>
> (Affidavit, Tab B, page 42)
>
> **March 17, 2014:**
>
> Anxiety/mood improved? Less anxious, no panic, but crying ++ and mood very labile. Still sleep disturbance nad (sic) dreams with welbutrin. Will stop welbutrin and will try increasing Effexor – had a panic episode after trying to increase several years ago, may not have been related – will try cautiously again.
>
> (Affidavit, Tab B, page 40)

May 13, 2014:

I have written a note for work supporting her not working night shift, as it is causing her increased stress due to husband's medical condition. Recheck in 2 weeks.

(Affidavit, Tab B, page 36)

May 20, 2014:

Patient here today for discussion of ongoing anxiety. She continues to be plagued by anxiety, and is not coping particularly well with her life situation, or work. She continues to have mood lability, and somatic symptoms, difficulty with concentrating, and feeling overwhelmed. Sleeping has been difficult as well. Only one or 2 full blown panic attacks.

Her employer has honored my request for her not to work night shifts, however she has been bumped to full-time day shifts at 12 hoursx4days. Unfortunately this has increased the amount of stress she has as she is unable to manage her household with these hours. She continues to have difficulty due to her husband's medical circumstances.

(Affidavit, Tab B, page 35)

June 12, 2014:

Patient here today for discussion of anxiety dealing with her social situation. She is not sleeping, and is feeling exhausted all the time. (Affidavit, Tab B, page 34)

July 10, 2014:

Has finally settled things at work through the help of her union rep and she is now going to be working as I recommended, two day shifts a week per eight day rotation.

(Affidavit, Tab B, page 33)

September 9, 2014:

…States that there is another meeting regarding her work term so we will wait until after this needing to decide what to do about her return to work plan.

(Affidavit, Tab B, page 29)

September 17, 2014:

…Had a surprise meeting with her supervisor, nrse(sic) manager and occupational health person to discuss her eventual return to work with no prior notice and no reps to support Liza, no union rep or HR person. Liza feels she was bullied into agreeing with these superiors and then went home quite upset. Begin not sleeping and major panic attack yesterday – not coping with this well, passively suicidal. Mental health questionnaires completed and scores high for depression and very high for anxiety. Feeling extreme guilt and atthe (sic) same time apathetic as to what happens to her.

(Affidavit, Tab B, page 28)

October 15, 2014:

Maybe a bit better since switch of meds – actually having return of some feeling – upset at her parent's bad behavior towards her last weekend. Not sleeping.

(Affidavit, Tab B, page 26)

December 23, 2014:

…starting to deal with her previous sexual assault and is working hard to understand how this trauma informs her current thoughts and behaviors. Anxiety is high all day and is having some breakthrough(sic) panic attacks as well.

(Affidavit, Tab B, Page 19)

January 12, 2015:

…She continues to have high anxiety with intermittent panic attacks. She continues to see her counselor which is difficult and hard work for her.

…

Assessments

Acute depression

January 26, 2015:

Mood relatively okay, but anxiety is killing her – feels like she is ramping up to a place she hasn't been in years. (Affidavit, Tab B, Page 17)

March 11, 2015:

Has continued with meds and regular counselling with Jean Blackler…Feeling like she is making progress…Anxiety generally manageable, some difficulties with her dad going through surgery for bowel cancer (sic) last week. (Affidavit, Tab B, Page 14)

March 26, 2015:

…Increased anxiety with lots of panic attacks and very low mood with passive suicidal thinking. Not sleeping much at all and has a heck of a headache for the past three days. (Affidavit, Tab B, Page 11)

[104] Other information which was not copied by the investigator comprised Ms. Selig's clinical file related to counseling with Ms. Blackler (her therapist). It consisted mainly of assessment forms and materials that were prepared based upon information provided to the assessor by the Applicant and a discussion of counseling strategies based on risk screening. The Applicant did not see the counsellor until about three months after her last day worked at the hospital.

[105] There were some substantive comments by Ms. Blackler interspersed throughout these documents. For example, on January 6, 2015, she noted:

> **A. Review of goal(s):**
>
> Reviewed the details of the work event in terms of what was done by her and what can be done differently in terms of her level of wellness. This was an eye opener for her. Reviewed what she needs to do to get @ work and with medical support. We strategized opportunities to reduce panic around the anniversary around the fire.
>
> (Affidavit, Tab B, page 68)
>
> **February 22, 2015:**
>
> **A. Review of goal(s):**
>
> Our client reports that on 3 occasions in the past 3 wks her supervisor has spoken to our client's coworkers indicating our client is "milking the system". Coworkers are texting her and telling her in public places. She reports her supervisor is repeating to coworkers medical info that is confidential. (If that was scared and depressed then I would hate to see her happy face). Reported to say to a coworker.
>
> (Affidavit, Tab B, page 81)
>
> **March 2, 2015:**
>
> Is going to work on self-respect and self-image. Place family dynamics in perspective. This was a powerful epiphany for her.
>
> (Affidavit, Tab B, page 83)

[106] On March 10, 2015 Ms. Blackler notes:

> **A. Review of goal(s):**
>
> Dad is doing better. Family dynamic is acutely apparent and client is putting in place strategies to have a positive influence in her life. She identified where she kept herself separate from others behaviors that were not hers.
>
> (Affidavit, Tab B, page 85)

[107] Obviously, the foregoing is not exhaustive but it does serve to contextualize and gain a broader understanding of the (uncopied) material in exhibit B of Ms. Selig's affidavit. At exhibit C of the affidavit (the copied material) is found certain correspondence between Ms. Selig and her disability insurer (Manulife), some information (such as her Record of Employment with South Shore Health Authority, correspondence with Health Association Nova Scotia, largely in relation to her unpaid leave of absence), other information relevant to her dealings with those parties, and a report from Dr. Zwicker.

[108] Correspondence from Manulife Financial dated March 11, 2012 (which date appears to be in error, since page 2 of that correspondence is dated March 11, 2015) contains the following paragraph (*Affidavit, Tab C, page 94*):

> The information submitted with your application is insufficient to support disability; however, the documentation submitted appears to be incomplete. Specifically, we would ask that you submit copies of Dr. Zwicker's office chart notes from January 2014 to present, as well as Jean Blacker's notes including her initial assessment and progress reports to present.

[109] On April 10, 2015, the correspondence from Manulife indicates, *inter alia*:

> The available information supports that you would be totally disabled from the duties of your occupation. We are therefore approving your claim effective June 27, 2014. However, under the provisions of the LTD plan, the LTD benefit commencement date has been adjusted as follows:
>
> …
>
> Therefore, given that your claim was late filed, no benefits are payable prior to Notice of the Claim date of February 9, 2015.
>
> Your benefit amount is calculated at 70% of your pre-disability monthly earnings ($4,117.31 x 70% = $2,882.12).

[110] There is also a narrative report from Dr. Zwicker in exhibit C which was copied and retained by the investigator. This report is dated March 23, 2015 and will be referred to more extensively later in these reasons.

[111] I observe that those authorities which have concluded that investigations were flawed generally did so in contexts where the oversight cannot be adequately made up by virtue of the Applicant's ability to make submissions directly to the commissioners afterward.

[112] So, in *Slattery*, *supra.*, for example we see at para. 57:

> In contexts where parties have the legal right to make submissions in response to an investigator's report, such as in the case at bar, parties may be able to compensate for more minor omissions by bringing such omissions to the attention of the decision-maker. Therefore, it should be only where complainants are unable to rectify such omissions that judicial review would be warranted. Although this is by no means an exhaustive list, it would seem to me that circumstances where further submissions cannot compensate for an investigator's omissions would include: (1) where the omission is of such a fundamental nature that merely drawing the decision-maker's attention to the omission cannot

> compensate for it; or (2) where fundamental evidence is inaccessible to the decision-maker by virtue of the protected nature of the information or where the decision-maker explicitly disregards it.
>
> [Emphasis added]

[113] In the result, Ms. Selig was provided with the opportunity to respond to the investigator's report. She submitted her response to Ms. McNaughton's report on October 12, 2016. Therewith, she provided some of the evidence which she argues that Ms. McNaughton missed in her report/analysis. Presumably she provided that portion of it which she felt was appropriate to the argument that she advanced in opposition to the investigator's conclusion.

[114] This material included some medical chart notes, and it was received by the Commission on October 12, 2016 (*Record, pp. 142 -144*). The Commission had this information available to it when it made its decision, even if it could be said that the investigator failed to adequately reflect upon it, or overlooked it. The therapist's Records were accumulated well after Ms. Selig had left the hospital for good. They do little to illustrate the appreciation or insight which the NSHA personnel ought to have had with respect to Ms. Selig's capacity when they were attempting to accommodate her.

[115] Dr. Zwicker's note of March 3, 2014 and March 17, 2014, her attending Clinician's Report faxed June 19, 2014, her notes of July 10, 2014, July 3, 2014, August 26, 2014, September 7, 2014, October 1, 2014 and October 29, 2014 all form part of the Record (at pp. 118-131). Other than the Clinician Report (p.120), the others are very sparse in detail.

[116] However, as previously indicated, a much more comprehensive Report from Dr. Zwicker was also in the hands of both the investigator and the Commission. It is dated March 23, 2015 (hence was written after the Applicant's last day worked) but summarizes her circumstances "…for the period January 2014 until the present". It was written to facilitate her application for LTD benefits. The substantive paragraph of this report says the following:

> Liza has a history of generalized anxiety disorder with panic, that has been more or less controlled with medication and lifestyle modifications in the past. Despite a number of stressors in her life up until 2014, I felt she coped rather well. In January 2014, Liza's mental health issues were further challenged by a number of life events including the loss of her home to a fire, difficulty managing her husband's chronic illness, and some problems with the relationships in her family

> of origin. Liza's anxiety became unmanageable and she subsequently developed a major depression. Both of these inter-related mental health problems have proven difficult to control and we have tried a number of different medication combinations as well as intensive psychotherapy. Her workplace was not particularly supportive, but generally did comply with modifications I prescribed beginning in May, 2014, which did seem to lessen her burden to some degree. In September 2014, Liza experienced a traumatic meeting with her work supervisors that took her completely off guard and sent her depression and anxiety into a spiral, and I saw no alternative but to remove her from the workplace, which seems to be a toxic environment for Liza. Since then, we have struggled to gain control over Liza's anxiety and depression with multiple medication changes and ongoing therapy. In the past month I feel we have made a little progress, but certainly not enough to begin a discussion about return to work. In fact, I am referring Liza on to psychiatry to see if their expertise would help us to get her feeling better, sooner. That appointment is pending.
>
> (Record, p.101)
>
> [Emphasis added]

[117] It will be recalled that also in the hands of the investigator, and those of the Commission was the "Attending Clinician's Report" form which was prepared by Dr. Zwicker at the request of Ms. Hatt, and provided to the latter on June 19, 2014 (*Record, p. 120)* which contained, *inter alia:*

> "Major depression and generalized anxiety disorder"
>
> Date of onset "January 2014"
>
> Subjective findings "low mood, poor sleep, difficulty concentrating, racing thoughts"
>
> Objective findings "tearful, appropriate, good eye contact"
>
> Is the worker still working? "yes"
>
> Is Issue work related? "no"
>
> Current problems/barriers that may influence recovery? "very difficult life situation in past 6 months with house fire and lost (?) all possessions. Dealing with insurance and struggling with husband's chronic illness"
>
> "Recommend: 2 day shifts per 8 day cycle until at least mid-July, then gradual increase."

[118] Even had I concluded that the material contained in Exhibit B of Ms. Selig's affidavit had not been considered and/or could not adequately be addressed by virtue of her ability to present a rebuttal to the investigator's report, I would have concluded that the material in Exhibit B to her affidavit was essentially a restatement of information which was available to the investigator, and also the Commission, in the other materials which are contained in the Record.

[119] I am unable to conclude that the Applicant's submissions on this point have any merit.

iv. Bias

[120] The Applicant contends that:

> …based on the failure to conduct interviews of key witnesses, the failure to consider crucial evidence, and the failure to conduct a probing analysis, that the investigation was inherently flawed and incomplete. The conclusions reached by the investigator in the absence of a thorough and fair investigation are thus suspect and demonstrate a failure to investigate with an 'open mind'.
>
> (*Brief, para. 95*)

[121] In *Hughes v. Canada (Attorney General)* 2010 FC 837, Justice Mactavish noted:

> The burden of demonstrating either the existence of actual bias, or of a reasonable apprehension of bias, rests on the person alleging bias. An allegation of bias is a serious allegation, which challenges the very integrity of the decisionmaker whose decision is in issue. As a consequence, a mere suspicion of bias is not sufficient: *R. v. R.D.S.*, [1997] 3 S.C.R. 484 at para. 1 12; *Arthur v. Canada (Attorney General)* (2001), 283 N.R. 346 at para. 8 (F.C.A.). Rather, the threshold for establishing bias is high: *R. v. R.D.S*, at para. 113.
> …
>
> That said, because of the non-adjudicative nature of the Commission's responsibilities, it has been held that the standard of impartiality required of a Commission investigator is something less than that required of the Courts. That is, the question is not whether there exists a reasonable apprehension of bias on the part of the investigator, but rather, whether the investigator approached the case with a "closed mind": see *Ziindel v. Canada (Attorney General)* (1999), 175 D.L.R. (4th) 512, at paras. 17-22.

> As the Court stated in *Broadcasting Corp. v. Canada (Canadian Human Rights Commission)*, (1993), 71 F.T.R. 214 (F.C.T.D.), the test in cases such as this:
>
> > [I]s not whether bias can reasonably be apprehended, but whether, as a matter of fact, the standard of open-mindedness has been lost to a point where it can reasonably be said that the issue before the investigative body has been predetermined.

[122] This is consistent with the earlier case of *Zundel v. Canada (Attorney General)* [1999] 4 FC 289 where, at para. 21, the Court stated that:

> . ...it has been held with respect to both a provincial human rights commission (*Reimer v. Saskatchewan (Human Rights Commission)* (1992), 98 D.L.R. (4th) 51
> (Sask. C.A.)), and the *Canadian Human Rights Commission (Bell Canada v. Communications, Energy and Paperworkers Union of Canada* (1997), 127 F.T.R. 44 (F.C.T.D.)) that the closed mind test of bias is applicable to investigators and the Commission. As Noel J. (as he then was) said in *Canadian Broadcasting Corporation v. Canada (Human Rights Commission)* (1993), 71 F.T.R. 214, 225, when considering the test of bias applicable to the Commission:
>
> > The test, therefore, is not whether bias can reasonably be apprehended, but whether, as a matter of fact, the standard of open-mindedness has been lost to a point where it can reasonably be said that the issue before the investigative body has been predetermined.

[123] The authorities are to the effect that whether the allegation of bias arises within the context of an investigation or in the case of an administrative tribunal determining a matter on the merits, the bar is set extremely high. Courts impose such a standard because of the seriousness of the misconduct alleged.

[124] The Applicant argues:

> It is respectfully submitted that the Record establishes that Melanie McNaughton relied almost solely on a superficial determination that Liza Selig's need for an accommodated work schedule was generally accepted and implemented by NSHA.
>
> This assumption resulted in a failure to properly investigate the second aspect of Liza Selig's claim regarding the harassment she faced. It is submitted that this is a fatal flaw to the outcome of the disposition of the complaint and demonstrates that the investigation was completed with a closed mind.

(*Brief, paras. 98-99*)

[125] I have previously dealt with the allegations respecting the failure to conduct interviews of key witnesses to conduct a probing interviews, and to consider crucial evidence. As earlier mentioned, there were attempts to discuss with the interviewees the nature of the relationship between Ms. Selig and Ms. Zinck, as well as the difficulties experienced with respect to the construction of a return to work schedule which accorded with Ms. Selig's real needs.

[126] The mere fact that the investigator's conclusion on this topic (in large measure) accorded with that which was put forward by the Respondent at the time (and when before this Court) does not suffice to make it "superficial".

[127] There is nothing that is apparent on the basis of the investigation report, or the manner in which Ms. McNaughton conducted that investigation, which would enable me to conclude that she failed to approach her task with an open mind. This is particularly the case given the heavy onus to be borne by the party asserting bias to demonstrate it. As indicated, most of those aspects of the investigation upon which the Applicant relies in support of her allegations of bias have been dealt with, individually, in the discussion of the earlier sub-issues.

[128] The Applicant's arguments with respect to bias on this issue are unfounded and are dismissed.

v. Findings of credibility

[129] The Applicant argues that the investigator must have improperly assessed credibility, when addressing the harassment allegations. This is because the investigator concluded that there was no harassment, even though Ms. Selig and Ms. Peach-Stokes told her that there was. In effect, she argues that this means that Ms. McNaughton "must have preferred the evidence of Ms. Zinck, Ms. Tipert, and Ms. Hatt." (*Applicant's brief, paras. 102-103*).

[130] The Applicant cites *Slattery*, *supra*., as the basis for her contention that it is not appropriate for an investigator to make findings of credibility in the course of an investigation. Apparent support for such a proposition is found at para. 55 of that case:

> With the crushing case loads facing Commissions, and with the increasing complexity of the legal and factual issues involved in many of the complaints, it would be an administrative nightmare to hold a full oral hearing before dismissing any complaint which the investigation has indicated is unfounded. On the other hand, Commission should not be assessing credibility in making these decisions, and they must be conscious of the simple fact that the dismissal of most complaints cuts off all avenues of legal redress for the harm which the person alleges.
>
> [Emphasis added]

[131] There are, however, other authorities which advert to the extreme difficulty in conducting an investigation without making some limited common sense based findings or drawing inferences. This was apparently the case in *Green v. Nova Scotia (Human Rights Commission)* 2010 NSSC 242, and it was also the conclusion at which Justice LeBlanc arrived in *Mercier v. Nova Scotia (Police Complaints Commissioner)* 2014 NSSC 79. Therein, at para. 33-34 of the latter case, he noted:

> 33. As such, the court held that "a consideration of the evidence does not establish that the Human Rights Council used a wrong test in deciding that Dr. Rogers' complaint should be discontinued" (para. 52). *Rogers* was cited with approval by Bryson J. (as he then was) in *Green v. Nova Scotia (Human Rights Commission)*(2010), 2010 NSSC 242, at para 33. In particular, Justice Bryson cited the following formulation of the analysis, found in *Rogers* at para. 28:
>
> > ... the Human Rights Council may discontinue the proceedings on a complaint if it determines that there is no reasonable basis in the evidence to warrant taking on the complaint to the next stage. In making this determination the Council may evaluate the information in the investigator's report, and in doing so, may use the collective experience and common sense of its members. The scope of the evaluation is limited to that which is necessary to determine whether there is a reasonable basis in the evidence for carrying on the claim to the next stage.
>
> 34. The decision-maker at the investigative level in *Rogers* had a broader discretion not to refer a complaint than the Police Complaints Commissioner. However, limited findings of credibility are still relevant in determining whether a claim is frivolous or vexatious..
>
> [Emphasis added]

[132] In fact, the above is not even inconsistent with the earlier referenced comments in *Slattery*, as Justice Simpson pointed out in *Canada (Attorney General) v. Tran* 2011 FC 1519, at para. 25:

> .. However, it appears that Mr. Justice Nadon (in *Slattery, supra.*) … began the next paragraph of his decision saying that, "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." In my view, an assessment of credibility is inherent in an assessment of the probative value of evidence and so I conclude that Mr. Justice Nadon did not agree that the Commission's investigators were not to assess credibility.
>
> [Emphasis added]

[133] I am in respectful agreement with the above mainly because it also accords with common sense. To deny opportunity to an investigator to make limited determinations with respect to credibility would, in most cases, hamstring the investigation from the start. Often, decisions as to the direction which the investigation will take, and those areas which require further inquiry, may boil down to decisions respecting credibility made on the basis of the other evidence collected or inferences drawn on the basis of that evidence.

[134] Often, as in this case, investigators will hear conflicting versions of what is said to support, or undermine, a complaint. Surely it is within the demesne of an investigator carrying out such an investigation to consider whether or not the evidence which she is able to uncover tends to support the contentions of one side or the other. Often this will weigh heavily in her conclusions, which will be reflected in the recommendation with which she provides the Commission.

[135] In this case, the investigator was unable to discover evidence which in her view, warranted other than the dismissal of the claim of discrimination made by the complainant. The Commission was under no obligation to accept this recommendation, and is presumed to have considered the additional representations offered by the Applicant in response to Ms. McNaughton's report. The Commission nonetheless determined that it would dismiss the complaint, albeit on the basis of s. 29(4)c, rather than s. 29(4)b of the *Act* as recommended by the investigator.

[136] I find no basis for the Applicant's contentions with respect to this issue and as such dismiss them.

Issue 2: Was the Commission's decision on the merits of Ms. Selig's complaint reasonable?

[137] The parties have appropriately agreed that the review of the Commission's decision should be on the basis of the deferential standard of reasonableness. The Commission made the decision pursuant to its home statute. It wields both legislated powers and collective experience which must be recognized by the Court in any consideration of this sort.

i. What does "reasonableness" mean?

[138] It is usual to begin to answer this question by referring to the Supreme Court of Canada's decision in *Dunsmuir v. New Brunswick* 2008 SCC 9. There, at para. 47, the court explained:

> Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[139] Our Court of Appeal has had opportunity to comment with respect to the above on a number of occasions. For example, in *Casino Nova Scotia v. Nova Scotia Labour Relations*, 2009 NSCA 4 at paras. 29-31, Justice Fichaud stated:

> In applying reasonableness, the court examines the tribunal's decision, first for process to identify a justifiable, intelligible and transparent reasoning path to the tribunal's conclusion, then second and substantively to determine whether the tribunal's conclusion lies within the range of acceptable outcomes.
>
> Several of the Casino's submissions apparently assume that the "intelligibility" and "justification" attributed by *Dunsmuir* to the first step allow the reviewing court to analyze whether the tribunal's decision is wrong. I disagree with that assumption. "Intelligibility" and "justification" are not correctness stowaways crouching in the reasonableness standard. Justification, transparency and intelligibility relate to process (*Dunsmuir*, para. 47). They mean that the

> reviewing court can understand why the tribunal made its decision, and that the tribunal's reasons afford the raw material for the reviewing court to perform its second function of assessing whether or not the Board's conclusion inhabits the range of acceptable outcomes. *Nova Scotia (Director of Assessment) v. Wolfson*, 2008 NSCA 120, para. 36.
>
> Under the second step, the court assesses the outcome's acceptability, in respect of the facts and law, through the lens of deference to the tribunal's "expertise or field sensitivity to the imperatives or nuances of the legislative regime." This respects the legislators' decision to leave certain choices within the tribunal's ambit, constrained by the boundary of reasonableness. *Dunsmuir*, para. 47-49; *Lake*, para. 41; *PANS Pension Plan*, para. 63; *Nova Scotia v, Wolfson*, para. 34.
>
> [Emphasis added]

[140] In *Delport Realty Limited v. Nova Scotia (Registrar General of Service Nova Scotia and Municipal Relations)*, 2014 NSCA 35 at para. 25, the Court elaborated further:

> Reasonableness means the court respects the Legislature's choice of decision maker by analyzing that tribunal's reasons to determine whether the result, factually and legally, occupies the range of reasonable outcomes. The question for the court isn't -- What is correct or preferable? The question is ‗ What is reasonable? If there are several reasonably permissible outcomes, the tribunal, not the court, chooses among them. If there is only one and the tribunal's conclusion isn't it, or several and the tribunal's decision isn't among them, the decision is set aside. *Law Society of New Brunswick v. Ryan*, [2003) 1 S.C.R. 247, paras 50-51. *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, [2011] 3 S.C.R. 708, paras 7-11. *McLean v. British Columbia (Securities Commission*), 2013 SCC 67, paras 20, 31-41. *Coates v. Nova Scotia*, supra, para 46.
>
> [Emphasis added]

[141] The process does not mean that the reviewing court gets to "plot its own itinerary". Rather, it contemplates that the Court will track "the tribunal's reasoning path" (see *Communications Energy and Paperworkers Union of Canada, Local 1520 v. Maritime Paper Products Limited*, 2009 NSCA 60 at para. 24).

[142] This case involves a decision by the Board of Commissioners not to refer a complaint to a board of inquiry for further consideration. As is usually the case, the written reasons proffered by the Commission were extremely scant:

> "It was moved by D. Prasad and seconded by N. Comeau that the complaint be dismissed pursuant to Section 29(4)(c) of the *Human Rights Act* because the complaint raises no significant issues of discrimination. Motion carried. Letters to be sent to parties notifying them of the decision."
>
> (*Record, pp. 27-28)*

[143] The *Board of Inquiry Regulations, OIC 91,122 Nova Scotia Regulations 221/91* offer some insight into the Commission's role and the exercise of the discretion bestowed upon it:

> The Nova Scotia Human Rights Commission may at any stage after filing a complaint, request the Chief Judge of the Provincial Court to nominate a person or persons for appointment by the commission to a Human Right Board of Inquiry to inquire into the complaint if the commission is satisfied that, having regard to all circumstances of the complaint, an inquiry thereto is warranted.

[144] In *Green v. Nova Scotia (Human Rights Commission)* 2010 NSSC 242, aff'd 2011 NSCA 47, Bryson, J. (as he was then) noted at paras. 29 – 31:

> It is clear from the Act and Regulations that the Commission enjoys a discretion concerning whether or not to refer a complaint to a Board of Inquiry. The Commission's decision is entitled to a substantial degree of deference particularly in view of the specialized human rights regime and the establishment of the statutory scheme for examining and vindicating those rights where appropriate (*Halifax v Nova Scotia*, [2010] N.S.J. No. 54, 2010 Carswe11NS 8, para. 14 and following).
>
> In exercising its discretion, the Commission is not required to follow the recommendation of its investigator. If it were otherwise, there would be no need for a Commission. The Commission's mandate is obviously broader than that of an investigator. The Commission must consider the public interest and policy issues which can involve factors other than those relating to the parties alone (*Garnthum v . Canada, AG*, (1996), 30 C.H.R.R. D/152 (F.C.TD.) at para. 30).
>
> Where the appropriate standard of review is reasonableness, a court should not interfere unless the applicant positively demonstrates that the decision under review was unreasonable (*Ryan, supra*, at para. 48).
>
> [Emphasis added]

[145] Then in para. 33-36 Justice Bryson continues:

In *Rogers v. British Columbia (Counsel of Human Rights)* (1993), [1993] B.C.J. No. 698, 21 C.H.R.R. D/67 (B.C.S.C.), the court formulated the following test after reviewing the appropriate jurisprudence:

> In my opinion, the test which is better suited to the scheme of the *Human Rights Act* is one which may be derived from S.E.P.Q.A., [1989] 2 S.C.R. 879, and *Cohen*, [1990] B.C.J. No. 1691, supra. I would articulate it as follows: The Human Rights Council may discontinue the proceedings on a complaint if it determines that there is no reasonable basis in the evidence to warrant taking on the complaint to the next stage. In making this determination the council may evaluate the information in the investigator's report and in doing so, may use the collective experience and common sense of its members. The scope of the evaluation is limited to that which is necessary to determine whether there is a reasonable basis in the evidence for carrying on the claim to the next stage.

The foregoing was approved in *Lee v British Columbia (Attorney General)* (2004), 50 C.H.R.R. D/295, 2004 BCCA 457 at para. 26, where the court noted that the mere possibility of discrimination cannot be enough to require a hearing.

It is not the role of this court to determine whether or not Ms. Green suffered discrimination, but rather to review the Commission's decision to determine whether its refusal to move Ms. Green's complaint to the next stage of a Board of Inquiry, was within a reasonable set of outcomes, (*Dunsmuir* para. 47).

An absence of reasons does not frustrate judicial review where the Record allows the court to discern whether the decision was reasonable in all of the circumstances (*Hiscock, Gardner*). Deference extends to reasons that could be offered in support of the Commission's decision (*Dunsmuir* para. 48).

[Emphasis added]

ii. Analysis

a. Discrimination

[146] Section 29(1)(a) of the *Human Rights Act* provides a complainant, such as Ms. Selig, with the right to make a complaint in writing to the Director in the prescribed form. Pursuant to s. 29(2), the complaint must be made within twelve months of the date of the action or conduct complained of, or within twelve months of the last instance of the action or conduct if the action or conduct is ongoing.

[147] Section 29(3) states: Notwithstanding subsection (2), the Director may, in exceptional circumstances, grant a complainant an additional period of not more

than twelve months to make a complaint if to do so would be in the public interest and, having regard to any prejudice to the complainant or the respondent, would be equitable.

[148] The fact that Ms. Selig's complaint was not filed with the Commission until December 4, 2015, well over one year after her last day worked for the Respondent, NSHA, was not addressed by either party before the Court. It was not addressed by the Investigator or the Commission either.

[149] Perhaps this is because an interpretation of the Applicant's argument is that her inability to attend work after September 15, 2014 results from the continuing failure of the NSHA to reasonably accommodate her disability. As such, it could be said that the conduct that she has complained of is still "ongoing" in the sense intended by s. 29(2). Without purporting to deal further with this, I will assume this to be the case, since it does not affect my ultimate conclusion.

[150] Section 29(4)(b) says that the Commission or the Director "may dismiss a complaint at any time...if it is without merit". Section 29(4)(c) entitles the Commission to dismiss a complaint at any time if it is determined that it "raises no significant issues of discrimination". Section 32(a)(l) goes on to note that the Commission "may" appoint a Board of Inquiry to inquire into the complaint "at any stage" after it is filed. I have earlier pointed out that the investigator recommended that the discrimination case be dismissed by the Commission pursuant to section 29(4)(b), whereas the Commission elected to dismiss it under s. 29(4)(c).

[151] The Investigation Report (*Record, Tab 6b, pages 72-79*) proceeds to outline the positions of both parties, and provides a summary of the evidence obtained from each witness. With respect to the documentary evidence, reference is made therein to a March 17, 2014 medical note, a summary of Andrea Hatt's notes, a May 14, 2014 email exchange between Ms. Hatt and Ms. Tipert, a June 11, 2014 letter from Ms. Hatt to Dr. Zwicker, a June 12, 2014 (sic – should be June 19) attending clinician report, a June 19, 2014 email from Ms. Hatt to Ms. Tipert and Ms. Zinck, a June 20, 2014 email from Ms. Zinck to Ms. Hatt, July 2, 2014 notes on Ms. Selig's return to work meeting at which meeting Ms. Tipert, Frittenburg, Burton, Hatt and Ms. Selig were in attendance, July 10, 2014 medical note, July 30, 2014 medical note, an August 20, 2014 email from Ms. Tipert to Ms. Hatt, and August 22, 2014 email to Ms. Hatt from Ms. Tipert and Ms. Zinck, August 26, 2014 medical note, September 2, 2014 email from Ms. Hatt to Ms. Tipert and Ms.

Zinck, a September 17, 2014 medical notes, a September 17, 2014 email exchange between Ms. Hatt and Ms. Tipert and Ms. Zinck, October l, 2014 medical note and October 26, 2014 medical note, November 3, 2014 exchange between Ms. Hatt and Ms. Tipert and Ms. Zinck, March 23, 2015 letter from Dr. Zwicker to Manulife Financial, and a July 17, 2015 statement from Manulife Financial to Ms. Selig, code of conduct policy, respectful workplace policy, workplace accommodations for employees policy, return to work policy, and master list of LPN time charts from December 2013 to December 27, 2014.

[152] Some excerpts from the Report shed light upon the investigator's analysis:

ii. **Documentary Evidence:**

> **29**. **Andrea Hatt** is the Occupational Health Nurse for the Respondent. When Hatt received a medical note in April 2014 with the Complainant's return to work date and no other information, Hatt set out a gradual return to work plan over a short period of time.
>
> **30.** When the Complainant advised that night shifts were difficult due to safety concerns over her son and her doctor did not want her to do nights, Hatt requested supporting documentation from her doctor. In the meantime, the Complainant said she could work her 2 day shifts and then 2 more day shifts instead of the 2 night shifts she would have normally worked as she did not want to work nights. In June 2014 medical information was provided recommending the Complainant work 2 day shifts per 8 day cycle. Hatt noted her medical diagnosis was not a clear indication that no night shifts would be a solution. It was not until October that she received medical information that the Complainant required time off to adjust her medications, which made more sense.
>
> **31.** When the Complainant spoke to Hatt about feeling some pressure to perform, this did not stand out to Hatt as many employees returning to work feel this way. The September 15, 2014 meeting with the Complainant was intended to provide support and clarity on her schedule – she was telling others that she was going to start her regular scheduled despite her medical information.
>
> **35.** **Jeri Zinck** is an RN and Team Lead for ER/ICU and was a friend of the Complainant. As Team Lead she does the schedules and forecasting. Scheduling can be difficult as nurses from other units cannot fill in, there are certain staffing requirements in ER/ICU, and there are often vacancies in staffing which she needs to fill.

36. Zinck had difficulties scheduling when the Complainant told Zinck she would be returning to work full time but then Zinck would hear something different from others. ... When the Complainant said that she could switch her 2 night shifts to 2 day shifts and work 4 day shifts in a row, Zinck told her that this would be rough.

38. **Diane Frittenburg** is the Vice-President of CUPE local 8982. She attended the July 9, 2014 meeting to discuss the Complainant's accommodation plan at the request of Human Resources. The Complainant did not raise any concerns during this meeting. Frittenburg followed up with the Complainant to offer support, leaving voice mail messages but did not hear from her until December when she called about issues with LTD, the September meeting, her return to work...

39. **Denise Peach-Stokes** works as an RN in ER/ICU and is a friend of the Complainant. When the Complainant returned to work in April 2014 she spoke to Peach-Stokes about having to provide numerous medical notes to support her not working nights. The Complainant did not want to work nights due to a concern for her son who was anxious at night. The Complainant told Peach-Stokes that Zinck was giving her a difficult time over working days only, telling the Complainant one time that due to staffing needs Zinck was switching her to a night shift. Peach-Stokes advised the Complainant that if she had a medical note saying she was not to do nights that she could say no this. Peach-Stokes believes the Complainant would not say this because she felt intimidated by Zinck. Peach-Stokes never observed nor heard Zinck discussing scheduling with the Complainant.

…

44. **May 14, 2014 email exchange between Hatt and Tipert** — Hatt has spoken to the Complainant about getting medical information and following the formal process of accommodation. The Complainant is fully in agreement with working full time days and is willing to do 4 in a row. Tipert should go ahead and put her in for these shifts.

45. **June 11, 2014 letter from Hatt to Dr. Zwicker** (the Complainant's physician) asking for approval and input on the Complainant's work schedule on her recommendation of no night shifts; requests an Attending Clinician Report to be completed.

46. **June 12, 2014 Attending Clinician Report** indicates a diagnosis of "major depression and generalized anxiety disorder" with "low mood, poor sleep, difficulty concentrating, racing thoughts, tearful, appropriate, good eye contact". She has been on a treatment plan of "altering medication and doses

since January". The doctor recommends 2 day shifts per 8 day cycle until at least mid-July, then gradual increase.

47. **June 19, 2014 email from Hatt to Tipert and Zinck** saying she received medical information recommending 2 days shifts per 8 day cycle until mid-July. She wonders why the Complainant did not provide this information when they were scrambling with the schedule. Hatt may ask for an independent medical assessment wondering if the physician has skewed judgment/information or if the Complainant is giving or getting all the information.

48. **June 20, 2014 email from Zinck to Hatt** says the Complainant told Zinck yesterday she is prepared to work 2 days and I night shift. Zinck is frustrated saying this is impacting patient care and staffing levels in critical care. She is short a nurse in ER tonight. She wonders if everyone is receiving the same information and based on prior experience with the situation she thinks not.

49. **July 2, 2014 notes** on the Complainant's return to work meeting. Present were Tipert, Frittenburg, Burton, Hatt and the Complainant. The new medical recommendation is work 2 days in an 8 day cycle and gradually increase. She is seeing her doctor for reassessment.

50. **July 10, 2014 medical note** recommending the Complainant continue with 2 day shifts per 8 day rotation for the next 4 rotations to be reassessed prior to August 13.

51. **July 30, 2014 medical note** recommending continuation on her current schedule to be reassessed in August.

52. **August 20, 2014 email from Tipert to Hatt** requesting an update on the Complainant who has been working 2 days but this was to be reassessed. She is scheduled for a night on August 24 and is the only LPN working so they need to know if they have to replace her. With the vacancies on ICU it is getting harder to accommodate.

56. **September 17, 2014 medical note** saying the Complainant will be off work for the next three weeks and will plan a return on October 9 with information on this following assessment.

57. **September 17, 2014 email exchange between Hatt and Tipcrt and Zinck** saying Hatt received a fax from the Complainant's physician stating she be off work for the next 3 weeks. Tipert responds: *'The girl who sat with us Monday and claimed she was absolutely fine and able to work and didn't understand why her MD didn't write that in her last note is obviously not the same girl who went to visit her doctor and now needs to be off 3 weeks. One of us in (sic) not getting the true story... '. Zinck responds: 'not at all*

surprised, actually expected the off time to be much longer. Learning to read between her lines'.

...

61. March 23, 2015 letter from Dr. Zwicker to Manulife Financial supporting the Complainant's application for LTD benefits and stating her history of generalized anxiety disorder with panic, controlled with medication and lifestyle changes in the past. In January 2014 her mental health issues were challenged, her anxiety became unmanageable and she developed a major depression. In September 2014 she had a traumatic meeting with her work supervisors sending her depression and anxiety into a spiral. She was placed off work as it seems to be a toxic environment for her.

66. Return to Work policy was reviewed.

67. The master list of LPN time charts from December 2013 to December 27, 2014 were reviewed. These charts show the Complainant's work schedule revealing:

- all her shifts during her medical leave from January 2014 until her return to work in April are marked "sick";
- on May 11 she worked a night shift;
- she worked 4 full consecutive day shifts from May 31 to June 3;
- with one exception she worked 2 day shifts per 8 day cycle from June 10 until September 17;
- the exception - on August 22 she worked 7.5 hours, August 23 a day shift, August 24 a night shift and August 25 she worked 7.5 hours;
- the May 26, June 8, 9 and July 13 day shifts she was to work, "sick" is marked across each day and the Respondent says she called in sick for those shifts;
- April until August 16 night shifts she would normally work but could not due to her restriction have a line crossed through them or "RTW" is indicated;
- August 31, September l, 8, 9, 16, 17 night shifts she would normally work but could not due to her restriction are marked "sick";
- the LPN rotation was running a line (position) short from July 13 onwards

(*Report, Tab 6B*)
[Emphasis added]

[153] Had the matter been referred to a Board of Inquiry by the Commission, the Applicant would have initially been required to establish that she was possessed of a disability. The *Act* provides the following guidance:

> 3(1) "physical disability or mental disability" means an actual or perceived
>
> i. loss or abnormality of psychological, physiological or anatomical structure or function,
>
> ii. restriction or lack of ability to perform an activity,
>
> iii. physical disability, infirmity, malformation or disfigurement, including, but not limited to, epilepsy and any degree of paralysis, amputation, lack of physical co-ordination, deafness, hardness of hearing or hearing impediment, blindness or visual impediment, speech impairment or impediment or reliance on a hearing-ear dog, guide dog, a wheelchair or remedial appliance or device,
>
> iv. learning disability or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language,
>
> v. condition of being mentally impaired,
>
> vi. mental disorder, or
>
> vii. dependency on drugs or alcohol.

[154] As the Applicant has pointed out in her brief, establishing the above would likely not be a particularly onerous proposition upon these facts. The onus would then have shifted to her employer to demonstrate that it has discharged its duty to accommodate Ms. Selig in the workplace, to the point of undue hardship.

[155] The case law has determined that this duty to accommodate has two components, both a procedural and a substantive one. The former has been interpreted to require the employer to consider the employee's disability related needs, investigate, and consider individualized accommodation measures to address those needs. The latter duty has been interpreted to require an employer to modify and accommodate, if necessary, in order to allow a disabled employee to participate in the workplace.

[156] However, in this case the Commission was involved at the "screening stage", which precedes the decision whether or not to refer the matter on to a Board of Inquiry, or Tribunal. The case law is clear that decisions rendered at this stage are due a high degree of deference.

[157] In *Lee v. British Columbia (Attorney General)*, 2004 BCCA 457, we find an expanded discussion of the Commission's role at this preliminary stage.

> 26. The HRC's use of the phraseology: "not any evidence" was infelicitous; it would have been better to say there was not sufficient evidence. As other judges have observed, there will almost always be some evidence of the possibility of

> discrimination when a member of a minority group is passed over in favour of a member of the majority group. But a mere possibility surely cannot be enough to require a hearing. The scheme of the statute involves a screening process so that only complaints with sufficient merit will proceed to a hearing. The HRC was assigned the role of gate keeper. Thus the HRC had to assess this case in a preliminary way and make a judgment whether the matter warranted the time and expense of a full hearing. The threshold is not particularly high: whether the evidence takes the case "out of the realm of conjecture": O*nischak v. British Columbia (Council of Human Rights)* (1989), 38 Admin. L.R. 258 at 266 (B.C.S.C.) per Huddart J. (as she then was), followed by Shaw J. in *Rogers v. British Columbia (Council of Human Rights)* (1994), 21 C.H.R.R. D/67, [1993] B.C.J. No. 698 at para. 18 (B.C.S.C.), which in turn was applied by this Court in *Kratoska v. British Columbia (Council of Human Rights)* (1997), 88 B.C.A.C. 241, [1997] B.C.J. No. 638 at para. 11. As the tribunal is assumed to know the law, the HRC must be taken to have applied this test.
>
> 27. In my view the evaluation of the complaint at the gate keeping stage attracts the highest degree of curial deference. It involves the assessment of evidence in a specialized area. I do not think it can be said that the decision to dismiss the complaint was patently unreasonable. Mr. Lee said racism influenced BC Hydro's decisions relating to his career. BC Hydro said racism played no part in the matter. It was open to the HRC to decide that there was nothing in the evidence that moved the allegation from speculation to inference: see *Jacques v. British Columbia (Council of Human Rights)* (1998), 51 B.C.L.R. (3d) 111, 161 D.L.R. (4th) 137 at para. 25 (C.A.). Before us, Mr. Lee was unable to bring out anything that takes the case over the line in an obvious way so that it can be said that the dismissal of his complaint was patently unreasonable. As I said in my introductory remarks, the reviewing judge appears to have substituted her own view of the evidence for that of the HRC contrary to the approach set out in *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19 at para. 42. It is clear that the legislature intended the screening to be done by the HRC, not the courts.
>
> [Emphasis added]

[158] In this case, the conclusionary portions of Ms. McNaughton's Investigation Report are as follows:

> 71. The Respondent's information reveals they accepted the Complainant's medical information and attempted to accommodate the recommendations made by her doctor. Throughout her return to work, the Complainant reported information inconsistent with her medical information which seemed to cause confusion and difficulty in scheduling her shifts. When they attempted to clarify this issue with the Complainant, she went on another medical leave.

77. The evidence indicates the Complainant did not make her concerns about any pressure she was feeling about her accommodation known at the time. She gives evidence that when she felt pressured she would tell people what they wanted to hear. This likely created a misunderstanding about her ability to work. Peach-Stokes says the Complainant may not have told Zinck how she was feeling as she was likely intimidated by Zinck. Despite her union representative Frittenburg leaving messages with offers of support, the Complainant never contacted Frittenburg at the time. There is no evidence the Complainant contacted Human Resources to discuss any issues with her accommodation. While Hatt says that the Complainant spoke of some pressure, Hatt did not feel it was unusual given her experiences with other staff. While the nature of the Complainant's disability may have affected her ability to effectively deal with this situation, it seems that there were supports available to her at this time to address her issues.

78. The information reveals that as a result of the confusion that Hatt, Tipert and Zinck decided to meet with the Complainant. While their intentions were to clarify her return to work plan so they could support her at work, the Complainant reports this meeting affected her to the extent that she had to take another medical leave and the Complainant's doctor report this meeting sent her depression and anxiety into a spiral. While this meeting ended up having a detrimental impact on her health, the goal of this meeting was to clarify her return to work and provide an opportunity for discussion about her accommodation.

79. Accommodation is a two way process, requiring both the employee and employer to work together. In the present situation, it seems the Complainant did not fully engage in the accommodation process when she did not reveal her concerns about the accommodation and went against her doctor's recommendation and worked a night. There was some responsibility on her to identify and resolve issues in her accommodation.

81. Section 3 (ha) of the *Nova Scotia Human Rights Act*, defines harass as "to engage in a course of vexatious conduct or comment that is known or ought reasonably to be known to be unwelcome". In the present case there is no corroboration from witnesses revealing vexatious conduct or comment. It seems from the evidence that there was an attempt to have a conversation with the Complainant about her plan to return to work given the confusion around this subject and this was done to provide some clarity.

82. The Complainant's allegation of scheduling her 4 shifts in a row, reveals that she told 3 staff that should would do this instead of working 2 night shifts. Regarding allegations about Zinck pressuring her about the schedule and writing "sick" on the shifts the Complainant was to work, the information reveals that Zinck was responsible for the schedule and was trying to backfill

> several shifts during the relevant time. Evidence is further provided that writing "sick" on the schedule when an employee is on a return to work and cannot cover their shifts, is a practice sometimes done to indicate this information to payroll. There is no witness evidence revealing Zinck was pressuring the Complainant.
>
> 83. The above information does not seem to reveal harassment on the basis of her disability.
>
> (*Report, Tab 6B*)
> [Emphasis added]

[159] The investigator concluded that the Applicant had told her Doctor different things with respect to her work capabilities than some of the representatives of her employer. There was a significant basis for this. Previously referenced examples such as the Applicant's brief, para. 27, Record, Tab 4, p. 8, and Record pp. 156, 184, 196, 201, 339 immediately spring to mind.

[160] As the investigator points out at para. 77 of her Report (*Record, Tab 6B*), Ms. Selig gave evidence to her that:

> …when she felt pressured she would tell people what they wanted to hear.

[161] This is a completely different situation, in my view, from *Mellon v. Human Resources Development Canada*, 2006 CHRT 3. In *Mellon*, the Court noted that:

> The Complainant alleges that she suffers from a disability; more specifically, she testified that she suffers from panic and anxiety attacks. She further asserts that a series of events related to these attacks occurred in the workplace between April 17 and August 30, 2001, creating conditions that led to the Respondent's decision not to renew her contract.

[162] Then at para. 11:

> The Complainant testified that she had informed her manager of her medical condition. She referred to a telephone conversation they had around that period. Her understanding of this conversation was that Marg Garey understood what she was dealing with. She added that she had informed her manager that she was on antidepressants and that they were having a really bad effect on her. She said that she indicated that under these circumstances she could not return to the workplace. Marg Garey testified that she had no recollection of this conversation.

[163] Then at paras. 23 and 24:

On June 27, 2001, the Complainant was invited to a meeting with Monica Kington, Esther Davis and Pat Richard, all officers of the Foreign Workers Unit. The purpose of the meeting was to discuss how to deal with the extra workload in the unit which was created by the fact that Diann Luksa was on sick leave. Ms. Luksa was absent from work from June 18 to July 13, 2001. During the meeting the Complainant was asked if she would take on the extra work. She testified that she tried to discuss her health but that Monica Kington replied that "they didn't need to hear that". Monica Kington testified that she had no recollection of this exchange. She added that she remembered that the Complainant was upset during this meeting and that she indicated that she wanted to speak with her supervisor. Pat Richard testified that the Complainant had indicated that she would not do the work. The Complainant said that at the end of the meeting she agreed to take on this extra work.

The Complainant stated that following this meeting, she felt that the perception of her co-workers was that she did not want to do her work. She felt that because of this, her relationship with them was falling apart.

[164] The Court concluded at para. 110 - 111, that:

110. The factual situation in this case is, in many ways, different from the *Gardiner* case. Here, taking into consideration the context, I have concluded that the Respondent was aware or should have been aware of the Complainant's disability. Although there was no formal notice requesting accommodation before October 22, 2001, the various discussions that the Complainant had with her supervisor and manager, as their written notes clearly indicate, show that this is what was being sought.

111. In this case the Respondent led no evidence with respect to its efforts to try to accommodate the Complainant. The fact that it reviewed the Complainant's job description and made one or two phone calls to market the Complainant cannot be seen as an effort to accommodate her up to the point of undue hardship. Following the Complainant's formal request for accommodation on October 22, 2001, what the Respondent could have done is explore with her whether she was willing to have them discuss the issue with her doctor. This would have allowed them to ascertain what accommodation measures she needed and make an informed decision as to whether these measures were reasonable or imposed an undue hardship. They chose not to adopt this course of action because they had made up their minds that this was a performance issue. It is important to remember that performance and disability are not unrelated, especially inasmuch as disability can affect an employee's performance. Not all performance problems are rooted in disability, but those that are usually require some measure of accommodation.

[Emphasis added]

[165] In the case at bar, the Applicant was not merely being reticent or even coy about what she was telling some of the representatives of her employer the Respondent. In her own words, according to the investigator, she was actively "telling them what they wanted to hear" in some cases. She would then say contradictory things to other representatives of her employer, and also to her doctor.

[166] The Commission ultimately decided that there was no "significant" evidence of discrimination and dismissed it under s. 29(c) of the *Act*. Implicit in this finding is an acceptance of the investigation's (apparent) conclusion that the Applicant's practice of telling people different things about her work capability hampered the accommodation efforts of her employer.

[167] Whether I would have dealt with this complaint in the same fashion is not relevant. It is the Commission upon whom the legislation has conferred the relevant determinative power. Its decision was one of the reasonable conclusions available to it. I therefore may not disturb it.

b. Harassment

[168] As for the harassment complaint, the meaning of "to harass" is ascribed by the *Act* (s.5.3(ha)) as follows:

> …to engage in a course of vexatious conduct or comment that is known or ought reasonably to be known to be unwelcome.

[169] Section 5(3) stipulates that no person shall harass an individual … with respect to a prohibited ground of discrimination. The investigator's report summarized the allegations of harassment and her conclusions with respect to this issue thus:

> 81. Section 3(ha) of the Nova Scotia *Human Rights Act*, defines harass as "to engage in a course of vexatious conduct or comment that is known or ought reasonably to be known to be unwelcome". In the present case there is no corroboration from witnesses revealing vexatious conduct or comment. It seems from the evidence that there was an attempt to have a conversation with the Complainant about her plant to return to work given the confusion around this subject and this was done to provide some clarity.
>
> 82. The Complainant's allegation of scheduling her 4 shifts in a row, reveals that she told 3 staff that she would do this instead of working 2 night shifts. Regarding allegations about Zinck pressuring her about the schedule and writing

> "sick" on the shifts the Complainant was to work, the information reveals that Zinck was responsible for the scheduled and was trying to backfill several shifts during the relevant time. Evidence is further provided that writing "sick" on the schedule when an employee is on a return to work and cannot cover their shifts, is a practice sometimes done to indicate this information to payroll. There is no witness evidence revealing Zinck was pressuring the Complainant.
>
> 83. The above information does not seem to reveal harassment on the basis of her disability.

[170] The email from Ms. Zinck to the Applicant ("You can run but can't hide") was not mentioned in the summary. It would have, however, been before the Commission as it is mentioned (albeit with no other details to provide context) in para 3 of her Complaint (*Record Tab 4, pp 17-18*) and Amended Complaint (*Record Tab 4, pp 22-27*). As noted, Ms. Zinck's explanation for it also appears in the Investigation Report (*Record, Tab 5B, p. 40, para.* 27). Other comments and innuendo alleged by the Applicant were also mentioned in the Complaint/Amended Complaint.

[171] There is a presumption that the Commission considered all of the materials that were before it, specifically the Record. There is no evidence before me suggesting otherwise. Moreover, the fact that the Commissioner dismissed the Complaint on the basis of s. 29(4)(c) of the *Act* "no significant issues of discrimination" rather than s. 29(4)(b) "without merit" (which latter was the basis recommended by the investigator) suggests that they considered the matter in its entirety, and agreed with the end result put forward, but upon a basis other than the one recommended.

[172] The Applicant argues that this conclusion is nonetheless problematic. Although not articulating it in precisely this way, to dismiss a complaint as being "without merit" may cover allegations of both discrimination and harassment. To dismiss a claim which includes both harassment and discrimination components "because no significant issues of discrimination" are raised, suggests (in the Applicant's argument) that:

> 134. There was no assessment of the harassment claim. The Nova Scotia Human Rights Commission defines workplace harassment as follows:
>
> > Workplace Harassment: Objectionable conduct or comment directed towards a specific person which serves no legitimate work purpose, and creates an intimidating, humiliating, hostile or offensive work environment.

> A form of bullying, harassment and violence in the workplace; often a manifestation of abuse of power.
>
> Ref: Human Rights in the Workplace A Glossary of Terms, Nova Scotia Human Rights Commission, Spring/Summer 2011 https://humanrights.novascotia.ca/sites/default/files/RREI-Glossary.pdf-Book of Authorities Tab 22

135. Impact is also relevant in determining whether harassment took place. As stated by the Nova Scotia Human Rights Commission:

> Impact: A strong effect or impression; in human rights, impact refers to a significant outcome because of a negative event (see negative impact). Impact is the key element in deciding if discrimination or harassment has occurred during a complaints process.
>
> Ref: Human Rights in the Workplace A Glossary of Terms, Nova Scotia Human Rights Commission, Spring/Summer 2011 https://humanrights.novascotia.ca/sites/default/files/RREI-Glossary.pdf-Book of Authorities Tab 22

[173] In *Valair v. Canada (Attorney General)* 2004 FC 692, the complaint to the Commission alleged that the Applicant had been denied a position for which she had applied because she had been discriminated against on the basis of her sex. She also alleged harassment on the basis of several questions put to her during the interview.

[174] As the Court further summarized:

> 10. On December 11, 2000, Corporal Johnston informed her he had been asked by Superintendent Harrison to investigate and report to him on the selection board interview she had participated in on August 9, 2000. He wanted to access her search warrant files. She says she wanted to know why and was given no answer.
>
> 11. About five days later, she was informed by another Regular Force member rumours were circulating a code of conduct investigation was being conducted into whether she had lied to the selection board on the number of search warrants she had executed during the previous year; rumour was that she had told the selection board she had executed ten search warrants.
>
> 12. In her affidavit, she recites she was very upset and on December 20, 2000, she spoke with the senior NCO who allegedly grabbed her by the arm, closed the office door and stated "[W]ait, we have to discuss this further" and then informed her he was aware of the investigation and told her an inspector had made a complaint against her. She retained legal counsel.
>
> 13. She recites speaking directly to Superintendent Harrison and being told she was not being investigated. However, she felt she was and not really being told why.

[175] The Investigator concluded that the board member who interviewed the Applicant felt that her response to the question of how many warrants she had done was "inordinately high" and sought to confirm the number. Since this mirrored a similar procedure adopted with respect to a male who had also applied for the job, and whose answer to one of the questions was disputed, no claim of harassment had been established.

[176] The Commission dismissed Ms. Valais' complaint pursuant to s. 44(3)(b) of the *Canadian Human rights Act*. In particular, it stated that:

> 2. The material part of the Commission's March 6, 2003 decision (applicant's Record, page 3.58) reads:
>
> > Before rendering its decision, the Commission reviewed the report disclosed to you previously and any submission(s) filed in response to the report. After examining this information, the Commission decided, pursuant to paragraph 44(3)(b) of the Canadian Human Rights Act, to dismiss the complaint because:
> >
> > - having regard to all the circumstances, no further inquiry is warranted. The evidence suggests that the decision not to grant the complainant the position was related to it being developmental and not related to her sex.

[177] One of the Applicant's contentions before the Court was that no mention of the harassment component of her complaint was mentioned by the Commission in its reasons. The Court responded thus:

> 62. The applicant's second ground involves a failure to give reasons for dismissing her harassment complaint. The case law does not support the applicant's position.
>
> 63. The investigator found her harassment complaint had not been made out. She … did comment on the investigator's report.
>
> 64. This case is similar to one recently decided by the Federal Court of Appeal in Hutchinson, supra, where an issue of harassment had been alleged and where the complainant alleged the Commission did not deal with her allegations of harassment. Justice Pelletier wrote the following at paragraph 62 and 63 of his reasons for judgment:
>
> > para. 62 The respondent also claims that the Commission did not deal with her allegations of harassment which she framed as follows in her complaint (Appeal Book, at page 60):
> >
> > > In addition to my struggle to obtain a safe working environment, I have been the recipient of comments about my disability. For example, in a meeting in September 1995 the manager of the Pollution Control Division stated "Read my lips, Charlotte, your office is on the fourth floor", although I had informed him working there would make me sick. He also stated that if they had known about my illness, they would [not] have hired me in their branch, and that if I left my position they would probably not fill it. He further

> commented that I had no sick leave left and should not expect to be paid, although I was entitled to apply for, and later was granted, advanced sick leave.
>
> para. 63 These allegations were discussed in the investigation report. The investigator concluded that the remark with respect to "Read my lips" was made in frustration in the context of a meeting where the respondent's manner apparently provoked a reaction. The remark about not hiring the respondent was made in the context that one would not generally place a person with environmental sensitivity in a job which required her to attend at various industrial sites. As for sick leave, the investigator was not able to determine if the remark was made and, in any event, the respondent was given advance sick leave. In dismissing the complaint, the Commission must be taken to have given effect to the investigator's assessment of the merits of the harassment complaint.
>
> 65. The point made by Justice Pelletier in Hutchinson, supra, that the Commission must be taken to have given effect to the investigator's assessment on the merits of the harassment complaint is really saying, in the circumstances, the investigator's report constitutes the Commission's reasons for dismissal. (See also Justice Sopinka's decision in L'Acadie, supra, at pages 902 and 903, as well as Justice Décary's views in Mercier, supra, at page 15, where he held, in a case where the Commission rejects an investigator's recommendation, it may be presumed it did so on the basis of comments received from the responding party).
>
> [Emphasis added]

[178] The investigator's report has earlier been the subject of extensive discussion in these reasons. In it, among other things, she dealt with Ms. Selig's allegations of harassment. She concluded that they were unsubstantiated. It would appear on the basis of the Commission's decision to dismiss the discrimination complaint on a basis different than that recommended by Ms. McNaughton (s. 29(c) of the *Act*, rather than s. 29(b) that her recommendations and analysis received careful consideration. The expectation is that the investigator's treatment of the harassment component of the complainant received the same attention, and, in any event, the Commission would be presumed to have done so absent any reason to suggest otherwise.

[179] I conclude that the Commission's reasons for dismissal of the harassment component of the complaint, in the circumstances, are as set out in the investigator's report on the subject. The investigator's conclusions on the topic essentially "boiled down" to the following:

a. "…there is no corroboration from witnesses revealing vexatious conduct or comment."

b. "…[on September 15, 2014] there was an attempt to have a conversation with the complainant about her return to work given the confusion around this subject and this was done to provide some clarity."

c. [with respect to]…the [complainant's] allegation of scheduling her four shifts in a row…she told three staff that she would do this instead of working two night shifts."

d. "…there is no witness evidence revealing Zinck was pressuring the complainant".

e. "The above information does not seem to reveal harassment on the basis of her disability".

(*Record, Tab 6B, p. 78, paras. 81-83*)

[180] This is not to say that (e) above was the only reasonable conclusion at which the investigator and Commission could have a arrived on the basis of the evidence collected. But it was one of them.

Conclusion

[181] The application is dismissed. If costs are sought, I will receive submissions within 30 days.

Gabriel, J.