



**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR  
GENERAL DIVISION**

**Citation:** *Dawe v. Newfoundland and Labrador (Human Rights Commission)*,  
2025 NLSC 152

**Date:** October 31, 2025

**Docket:** 202301G0757

**BETWEEN:**

**RICHARD DAWE**

**APPLICANT**

**AND:**

**NEWFOUNDLAND AND LABRADOR  
HUMAN RIGHTS COMMISSION**

**FIRST RESPONDENT**

**AND:**

**WORKPLACE HEALTH, SAFETY AND  
COMPENSATION COMMISSION**

**SECOND RESPONDENT**

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**Before:** Justice Sandra R. Chaytor

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**On Judicial Review From:** A Decision of the Executive Director of Human Rights Commission, File # 13762 dated the 23rd day of January, 2023.

**Place of Hearing:** St. John's, Newfoundland and Labrador

**Date of Hearing:** March 12, 2025

**Summary:**

This is an application for judicial review of a decision of the Executive Director of the Newfoundland and Labrador Human Rights Commission. The

Executive Director summarily dismissed a complaint by the Applicant against the Workplace Health, Safety and Compensation Commission (“WHSCC”) alleging discrimination based on disability. The Executive Director determined pursuant to section 32 of the *Human Rights Act* that the complaint was not within its jurisdiction and could be addressed through the review mechanisms available under the *Workplace Health, Safety and Compensation Act*.

**Held:** The Application was dismissed and WHSCC was awarded its costs on a party-party basis.

The Court found that the standard of review was reasonableness. The Application for judicial review was dismissed as the Applicant had failed to establish that the decision was unreasonable. The Court found that the decision dismissing the complaint due to lack of jurisdiction was internally coherent and justified in light of the relevant legal and factual constraints. The Court found, however, that after determining the HR Commission did not have jurisdiction to deal with the complaint, the Executive Director should not have conducted an analysis under section 32(1)(c) of the *HR Act* or opined upon the jurisdiction of the WHSCC to deal with a matter not involving discrimination. The Court further found the Executive Director articulated the wrong test to be applied in a section 32(1)(c) analysis. These errors, however, were not fatal to the overall reasonableness of the Decision.

### Appearances:

Richard Dawe	Appearing on his own behalf
Hilary Winter	Appearing on behalf of the First Respondent
Karen M. Holloway	Appearing on behalf of the Second Respondent

### Authorities Cited:

**CASES CONSIDERED:** *Weir’s Construction Limited v. Warford (Estate)*, 2018 NLCA 5; *Canada (Minister of Citizenship & Immigration) v. Vavilov*, 2019 SCC 65; *Yeadon v. Newfoundland and Labrador (Fisheries, Forestry*

*and Agriculture*), 2023 NLSC 140; *Mitchell v. Newfoundland and Labrador (Human Rights Commission)*, 2025 NLSC 28; *R. v. Sullivan*, 2022 SCC 19; *Chaisson v. Happy Valley Goose Bay (Town)*, 2011 NLTD(G) 156; *Ontario (Attorney General) v. G*, 2020 SCC 38; *R. v. Kapp*, 2008 SCC 41; *Withler v. Canada (Attorney General)*, 2011 SCC 12; *Law v. Canada (Minister of Employment & Immigration)*, [1999] 1 S.C.R. 497; *Moore v. British Columbia (Ministry of Education)*, 2012 SCC 61; *Baker v. Canada (Minister of Citizenship & Immigration)*, 1999 SCC 699; *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36

**STATUTES CONSIDERED:** *Workplace Health, Safety and Compensation Act*, R.S.N.L. 1990, c. W-11; *Workplace Health, Safety and Compensation Act*, S.N.L. 2022, c. W-11.1; *Human Rights Act*, S.N.L. 2010, c H-13.1; *Human Rights Code*, R.S.B.C. 1996, c. 210; *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11

**RULES CONSIDERED:** *Rules of the Supreme Court, 1986*, S.N.L. 1986, c. 42, Sch. D.

## **REASONS FOR JUDGMENT**

**CHAYTOR, J.:**

### **INTRODUCTION**

[1] This is an application by Richard Dawe (“Dawe”) for judicial review of a decision (“Decision”) of the Executive Director of Newfoundland and Labrador Human Rights Commission (“HR Commission”) dismissing a human rights complaint (“Complaint”) by Dawe against the Workplace Health, Safety and Compensation Commission (WHSCC).

[2] The Executive Director dismissed the Complaint because she was satisfied it was outside the jurisdiction of the HR Commission and could be addressed through

the review/appeal mechanisms available under the *Workplace Health, Safety and Compensation Act*, R.S.N.L. 1990, c. W-11 (“*WHSC Act*”)<sup>1</sup>.

[3] In bringing this application for judicial review (“Application”), Dawe seeks an order that the Decision be overturned. He asks that the Complaint be investigated pursuant to section 27(1) of the *Human Rights Act*, S.N.L. 2010, c H-13.1 (“*HR Act*”) and referred to a board of inquiry as per section 34(1) of the *HR Act*.

[4] Dawe alleges the Executive Director erred in: mischaracterizing the Complaint; failing to find the HR Commission had jurisdiction over the Complaint; and failing to afford him procedural fairness in reaching the Decision.

[5] WHSCC opposes the Application. It submitted that the Decision was substantively reasonable and procedurally fair.

[6] The HR Commission, in accordance with the direction given in *Weir’s Construction Limited v. Warford (Estate)*, 2018 NLCA 5, was cognizant of its role as the decision maker. It took no position on the merits of the Application. However, to assist the Court, it filed a written response and made a limited oral submission on the background facts of the Complaint and the Decision as well as the applicable law.

[7] This is my decision on the Application.

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<sup>1</sup> This legislation was subsequently repealed and replaced with the *Workplace Health, Safety and Compensation Act*, 2022, SNL 2022, c. W-11.1. Throughout this decision, I refer only to the now repealed *WHSC Act*, as that was the legislation in place at the relevant time.

## BACKGROUND

### WHSCC Processes and Decisions

[8] Dawe was injured in the course of his employment. He submitted a claim to WHSCC for benefits. The claim was accepted. Dawe was engaged in an Early and Safe Return to Work (ESRTW) program when he was terminated from his employment. The employer took the position that the termination was not related to Dawe's injury, but rather it was for just cause, due to Dawe violating a zero-tolerance employment policy by smoking in a propane truck.

[9] Dawe's WHSCC case manager determined that the termination was not related to Dawe's workplace injury. The case manager consequentially found that Dawe was not able to accept suitable employment as required by section 89(2)(c) of the *WHSC Act*. On this basis, Dawe was deemed non-cooperative with the ESRTW program. This had the effect of terminating Dawe's WHSCC benefits.

[10] Subsequently, Dawe participated in a number of WHSCC internal reviews, but the finding of non-cooperation was not overturned.

[11] The Review Division of WHSCC ("Review Division") then heard an appeal of the matter. That process culminated in the Review Division overturning the finding of non-cooperation. The matter was referred back to the WHSCC case manager for determination of Dawe's entitlement, if any, to retroactive benefits.

[12] In subsequent communications between the WHSCC case manager and Dawe's representative, Renee Dawe, WHSCC requested that Dawe execute an affidavit as to his sources of income to assist in the determination of entitlement to retroactive benefits. The case manager offered to arrange for a Commissioner of Oaths to meet with Dawe to execute the affidavit. Dawe's representative objected to Dawe executing the affidavit and Dawe's claim for retroactive benefits remained unprocessed.

[13] Dawe then lodged the Complaint with the HR Commission.

### **The Complaint**

[14] The Complaint alleged Dawe was treated in an arbitrary and discriminatory manner because, as an injured worker, a burden was imposed on him that was not imposed on the employer or on WHSCC. It stated that WHSCC found Dawe to be non-compliant with the ESTRW program for not accepting work when there was no work to accept. It stated that this was a common decision-making practice of WHSCC.

[15] The Complaint provided that (1) the protected characteristic under the *HR Act* was Dawe's disability; (2) the adverse impact was the finding of non-cooperation against Dawe; and (3) Dawe's disability was a factor in the adverse impact in that WHSCC determined as Dawe was unable to accept suitable employment, he was non-cooperative.

[16] The Complaint further stated that while the Review Division concluded that WHSCC misapplied the *WHSC Act*, the Review Division does not offer a remedy for human rights violations. In other words, Dawe contended that the Complaint had not been dealt with through the WHSCC review processes.

[17] Although not specifically mentioned in the Complaint, a summary document provided by Dawe suggested that WHSCC's requirement that he provide an affidavit as to his sources of income also amounted to discrimination on the basis of disability. This theme was explored further in Dawe's written submission on the Application.

## The HR Commission's Processes

[18] After an unsuccessful attempt by the parties at mediation through the HR Commission, the file was assigned to a Human Rights Specialist. The parties subsequently submitted additional documentation.

[19] WHSCC then requested that the file be reviewed for early dismissal by the Executive Director pursuant to section 32 of the *HR Act*.

[20] The HR Commission notified the parties that the Complaint was under review for early dismissal and the basis for this consideration. The parties were given over a month to make submissions and to offer additional information. Both parties provided submissions, and Dawe provided additional documents.

[21] Following receipt of the additional submissions and documentation, the Executive Director advised the parties, by way of separate letters, of the Decision to dismiss the Complaint.

## The Decision

[22] The Decision begins with a summary of its outcome.

[23] It references the authority of the Executive Director to summarily dismiss the Complaint pursuant to section 32 of the *HR Act*. It specifically references the authority of the Executive Director to dismiss the Complaint where she is satisfied the HR Commission does not have jurisdiction to deal with it (the ground listed in section 32(1)(a)) and when the substance of the Complaint has been appropriately dealt with in another proceeding (the ground listed in section 32(1)(c)).

[24] The Executive Director then wrote:

I have decided to DISMISS the complaint because I am satisfied it is outside of our jurisdiction and can be addressed through the review/appeal mechanisms available under the [*WHSC Act*].

[25] The Decision continues by summarizing the Complaint and WHSCC's response.

[26] The Executive Director notes that, following Dawe's termination, WHSCC's case manager found that the termination was unrelated to the workplace injury and that Dawe was found to be non-cooperative with the ESRTW program resulting in the termination of his WHSCC benefits.

[27] The Decision reviews the procedural history of the internal reviews and reconsideration at WHSCC and notes that Dawe had been successful on the appeal to the Review Division in that the finding of non-cooperation was struck. The Decision indicates that the matter was then remitted to the case manager for determination of entitlement, if any, to retroactive benefits.

[28] The Decision summarizes the basis of the Complaint as alleging discrimination on the prohibited ground of disability, and Dawe's allegation that the administration of the *WHSC Act*, and the policies and procedures of WHSCC were biased in favour of employers.

[29] The Decision summarizes WHSCC's response denying Dawe suffered any adverse treatment and that the alleged differential treatment of employers over workers is not a prohibited ground of discrimination. The Decision also notes that WHSCC further submitted that the crux of the matter related to the case manager's determination of non-cooperation which had been appropriately dealt with through the appeal proceedings under the *WHSC Act*.

[30] Under the heading “Reasons for Dismissal”, the Decision outlines what is required for a complainant to prove discrimination under the *HR Act*. The Executive Director notes that a complainant must establish that they have a characteristic protected by the *HR Act*, that they experienced an adverse impact with respect to an area protected by the *HR Act*, and that the protected characteristic was a factor in the adverse impact.

[31] The Executive Director continues by finding that a workplace injury can be considered a disability for the purposes of the *HR Act*, but that Dawe did not provide any evidence that his injury had the effect of imposing burdens, obligations, or disadvantages on him which were not imposed on others.

[32] The Decision states that there was no evidence suggesting that Dawe’s workplace injury impacted his case worker’s interpretation of her role or the findings she made on that issue. The Decision further states that an assertion of widespread bias had not been established and that it was countered by the internal review and appeal processes availed of by Dawe.

[33] The Decision concludes, as follows:

The crux of the matter in this case is [Dawe’s] dissatisfaction that WHSCC did not find that he was terminated from employment because of his injury, thereby ruling him “non-cooperative” instead of the employer as “non-cooperative.” This matter was pursued through the appeal mechanisms of the WHSCA. The question of the correctness and the adequacy of the case manager’s decision-making is within the Review Division’s jurisdiction pursuant to section 26(1)(e) [of the *WHSC Act*]:

26(1) Upon receiving an application under subsection 28(1)(a) a review commissioner may review a decision of the commission to determine if the commission in making that decision, acted in accordance with this Act, the regulations and policy established by the commission under subsection 5(1) as they apply to

(e) the obligations of an employer and a worker under Part VI. [Return to Work and Rehabilitation].

The Review Division's alleged inadequacy in dealing with that issue, does not factor into an analysis of whether or not the Human Rights Commission has jurisdiction to accept the Complaint.

## ISSUES

[34] The issues to be determined are:

1. What is the standard of review?
2. Does the Decision contain a reviewable error justifying a remedy through judicial review?
3. Was Dawe afforded procedural fairness?

## DISPOSITION

[35] The Application is dismissed.

[36] WHSCC is awarded its party-party costs against Dawe to be taxed in accordance with Column 3 of Rule 55 of the *Rules of the Supreme Court, 1986*, S.N.L. 1986, c. 42, Sch. D. ("*Rules*").

## ANALYSIS

### **Issue 1: What is the Standard of Review?**

[37] WHSCC submits that the standard of review with respect to the Decision is reasonableness. Dawe did not advance a submission on this issue.

[38] I have determined that the standard of review is reasonableness.

[39] The leading case on standard of review in judicial review remains *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65. The Supreme Court wrote at paragraph 16 of *Vavilov* that the analysis of the appropriate standard of review begins with the presumption that the standard is reasonableness.

[40] This presumption is rebutted in two situations: where the legislature has indicated that it intends a different standard to apply, either by prescribing a standard of review or by providing for a statutory appeal mechanism; and where the rule of law requires that a standard of correctness be applied (*Vavilov* at para. 17).

[41] This matter comes to the Court by way of section 33 of the *HR Act*.

#### **Appeal of dismissal**

Where a complaint or part of a complaint is dismissed, a party to the complaint may, within 30 days after service of the written notice of the dismissal, apply for judicial review of the dismissal by filing an application with the Trial Division and serving it on all the parties to the complaint and the executive director.

[42] There is no explicit standard of review set out in the *HR Act* and, despite the heading to section 33 using the term “appeal,” the text itself refers to a right of judicial review.

[43] In *Yeadon v. Newfoundland and Labrador (Fisheries, Forestry and Agriculture)*, 2023 NLSC 140, Noel J. (as he then was), considered the standard of review applicable to proceedings brought pursuant to section 33 of the *HR Act*. Noel J. concluded that there was insufficient evidence of legislative intent to indicate a section 33 judicial review be subject to a standard of correctness.

[44] The presumption of reasonableness can also be displaced where the rule of law requires that the standard be correctness. In *Vavilov* at paragraph 53, the Supreme Court stated this would include questions regarding the jurisdictional boundaries between two or more administrative bodies.

[45] The issue of the jurisdictional intersection of the HR Commission and that of another administrative body was recently considered by the Court in *Mitchell v. Newfoundland and Labrador (Human Rights Commission)*, 2025 NLSC 28. In dismissing a complaint pursuant to section 32 of the *HR Act*, the Court determined that the HR Commission was deciding the scope of its own authority. In other words, the issue was not one that constituted a truly jurisdictional question. It was simply an unremarkable application of the HR Commission's enabling statute.

[46] Similarly, in the circumstances of this case, there is nothing in the record or the submissions that suggests the rule of law requires a standard of correctness. Although the Complaint and Dawe's submission speak to the jurisdictional limits between WHSCC and the HR Commission, this is done primarily to highlight how the two administrative bodies are demarcated from each other in terms of subject-matter jurisdiction. It is not a true jurisdictional issue.

[47] The jurisprudence (both before and after *Vavilov*) determined that judicial review pursuant to section 33 of the *HR Act* is subject to a reasonableness standard of review. There are no distinguishing features of this case to warrant departing from that standard of review.

[48] I am satisfied that both *Vavilov* and the principles of horizontal *stare decisis* as articulated in *R. v. Sullivan*, 2022 SCC 19, support the conclusion that the standard of review is reasonableness.

[49] I will now assess the Decision on that basis.

**Issue 2: Does the Decision contain a reviewable error justifying a remedy through judicial review?**

[50] As I have determined that the standard of review is reasonableness, this issue may be simply re-stated as, “Was the Decision reasonable?”

[51] If the Decision is found to be reasonable, then the judicial review must fail.

[52] I find the Decision was reasonable. I will explain why.

**The meaning of reasonableness**

[53] In *Vavilov*, the Supreme Court wrote extensively on the hallmarks and indicia of reasonableness. It stated, at paragraph 99, that to determine if the decision as a whole is reasonable, the reviewing court must ask whether the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision.

[54] In *Vavilov*, the Supreme Court approached the problem *via* a two-pronged analysis. It instructed reviewing courts to ask whether the decision under review is (1) based on internally coherent reasoning; and (2) justified in light of the legal and factual constraints that bear on the decision.

[55] The decision under review is central to the reviewing court’s analysis. It bears repeating that, in the present case, the Decision is that of the Executive Director to dismiss the Complaint without referral to a board of inquiry. The procedural history relating to the proceedings before WHSCC and the Review Division is important, but only so far as that history contributes to the factual and legal constraints that bore on the Decision.

[56] Reasonableness review, and judicial review more broadly, is grounded in the constitutional division of powers and the prerogative of the legislature to vest responsibility for certain decisions in administrative decision makers.

[57] The Court's role is to ensure that exercises of state power are subject to the rule of law (*Vavilov* at para. 82).

[58] Reasonableness review is about process and outcome. *How* the decision is made is, itself, important. When written reasons are provided, as is the case here, reasonableness review puts those reasons first and seeks to understand the reasoning process the decision maker followed to arrive at their conclusion. So long as the decision was reasonable, then the reviewing court ought not to displace it.

[59] I will now undertake the *Vavilov* two-prong analysis to determine if the Decision was reasonable.

### **(1) Is the Decision Based on Internally Coherent Reasoning?**

[60] In order for a decision to be reasonable, the decision itself must be the product of an understandable, coherent analysis. As the *Vavilov* majority wrote at paragraphs 102 and 103:

102 However, the reviewing court must be able to trace the decision maker's reasoning without encountering any fatal flaws in its overarching logic, and it must be satisfied that "there is [a] line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived... Reasons that "simply repeat statutory language, summarize arguments made, and then state a peremptory conclusion" will rarely assist a reviewing court in understanding the rationale underlying a decision and "are no substitute for statements of fact, analysis, inference and judgment"...

103 ...[F]ormal reasons should be read in light of the record and with due sensitivity to the administrative regime in which they were given, a decision will be unreasonable if the reasons for it, read holistically, fail to reveal a rational chain

of analysis or if they reveal that the decision was based on an irrational chain of analysis... A decision will also be unreasonable where the conclusion reached cannot follow from the analysis undertaken ... or if the reasons read in conjunction with the record do not make it possible to understand the decision maker's reasoning on a critical point...

[61] The Decision stated that the Complaint was dismissed on the basis that the HR Commission did not have the jurisdiction to deal with it, and that the substance of the Complaint could be addressed through the review mechanisms available under the *WHSC Act*.

[62] The Decision outlined the background leading up to the Complaint, from the occasion of Dawe's workplace injury to the finding of non-cooperation, his successful appeal to the Review Division, and his ultimate filing of the Complaint.

[63] The Decision also noted WHSCC's denial of discriminatory treatment and its position that the crux of the matter related to the case manager's determination of non-cooperation, and its contention that this had been appropriately dealt with through the review provisions of the *WHSC Act*.

[64] The Decision stated the test for discrimination under the *HR Act* as requiring a complainant to prove they have a protected characteristic, that they experienced an adverse impact with respect to a protected characteristic, and that the protected characteristic was a factor in the adverse impact.

[65] The Executive Director found that a workplace injury could constitute a disability for the purposes of the *HR Act*, but that Dawe had not brought forward evidence that his injury had the effect of imposing burdens, obligations, or disadvantages not imposed on others.

[66] The Executive Director referred to the case manager's finding that Dawe's termination was not related to his injury and the absence of evidence to suggest that

his injury impacted her interpretation of her role. The Executive Director found that Dawe's allegations of a "discriminatory inherent bias" and "widespread bias" had not been established. She further stated that these allegations had been countered by the case law filed where findings of worker non-cooperation had been overturned by the Review Division.

[67] The Executive Director found that the crux of the Complaint was Dawe's dissatisfaction that WHSCC had failed to find he was terminated because of his injury, thereby ruling him—rather than the employer—as non-cooperative. The Executive Director acknowledged that this issue was pursued through the *WHSCC Act*, and that the Review Division had jurisdiction to assess the correctness and adequacy of the case manager's decision-making on the issue. The Executive Director concluded that the Review Division's alleged inadequacy on Dawe's issue was not a factor in the analysis of the HR Commission's jurisdiction.

[68] I find that the Decision, grounded in the record and legislation, contains reasons that are easy to follow, clear and internally coherent.

[69] The Executive Director explained the test to establish discrimination, which is the basis on which the HR Commission assumes jurisdiction. She further explained how Dawe's circumstances did not meet the legal requirements. She made a finding that the crux of the dispute was the non-cooperation finding and determined that issue could be addressed in another forum. The reasons given by the Executive Director were sufficient for dismissing the Complaint under section 32(1)(a).

[70] Dawe took issue with the Executive Director's reasons, noting that he did not claim "widespread" discrimination, but rather "systemic" discrimination. The distinction Dawe draws is largely immaterial. Reviewing the reasons holistically and in the context of the record, it is clear that the Executive Director was alive to the issues alleged in the Complaint.

[71] Dawe further submitted that the Executive Director misapprehended the nature of the Complaint in finding that its crux was the non-cooperation decision, rather than the systemic practices of WHSCC as a whole.

[72] The reasons articulated in the Decision indicate that, contrary to Dawe's assertion, the Executive Director was cognizant of the systemic dimensions of the Complaint. The reasons, when read in context, suggest that the root cause of the Complaint had less to do with systemic issues and lay more with the finding of non-cooperation against Dawe. The Executive Director found that this subject matter did not lie within the jurisdiction of the HR Commission.

[73] The Executive Director's reasons are internally coherent and bear the hallmarks of justification, transparency, and intelligibility. This aspect of the Decision is therefore reasonable.

[74] The analysis however does not end there. I must consider the second prong of the test.

**(2) Is the Decision Justified in Relation to its Relevant Factual and Legal Constraints?**

[75] It is insufficient for reasons to merely be internally consistent. Reasonable decisions are always to be assessed in context.

[76] This context is established by the legal and factual constraints bearing on the particular decision under review. As the *Vavilov* majority wrote at paragraph 90:

The approach to reasonableness review that we articulate in these reasons accounts for the diversity of administrative decision making by recognizing that what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review. These contextual constraints dictate the limits and contours of the space in which the

decision maker may act and the types of solutions it may adopt. The fact that the contextual constraints operating on an administrative decision maker may vary from one decision to another does not pose a problem for the reasonableness standard, because each decision must be both justified by the administrative body and evaluated by reviewing courts in relation to its own particular context.

[77] The *Vavilov* majority continued at paragraph 106, to provide a non-exhaustive list of factors that will generally be relevant in evaluating a decision's reasonableness. They include:

- a) The governing statutory scheme;
- b) Other relevant statutory or common law considerations;
- c) The principles of statutory interpretation;
- d) The evidence before the decision maker and facts of which the decision maker may take notice;
- e) The submissions of the parties;
- f) The past practices and decisions of the administrative body; and,
- g) The potential impact of the decision on the individual to whom it applies.

[78] I will deal with each of these factors as part of my contextual analysis.

*(a) Governing Statutory Scheme*

[79] In my view, the statutory scheme as a whole suggests that the Decision is reasonable.

[80] The Executive Director is empowered and operates pursuant to the authority conveyed by the *HR Act*, making it the governing statutory scheme impacting her decision making.

[81] The Executive Director dismissed the Complaint pursuant to section 32(1) of the *HR Act*. She did so on the basis that the Complaint fell outside the HR Commission's jurisdiction (section 32(1)(a)). In my reading of the Decision, in dismissing the Complaint, the Executive Director also applied section 32(1)(c) and in doing so erred. I will deal with this latter point further in the decision.

[82] Section 32 provides as follows:

**Dismissal of Complaint**

32(1) The executive director may, at any time before a complaint is referred to a board of inquiry under section 34, dismiss all or part of the complaint where the executive director is satisfied that

- (a) this Act provides no jurisdiction to deal with the complaint or that part of the complaint;
- (b) the complaint or that part of the complaint is trivial, frivolous, vexatious or made in bad faith; or
- (c) the substance of the complaint or that part of the complaint has been appropriately dealt with in another proceeding.

(2) Where the executive director dismisses all or part of a complaint, the executive director shall serve the parties to the complaint with a written notice of and the reasons for the dismissal.

[83] Dawe argues that the Executive Director was incorrect in determining that the *HR Act* did not confer jurisdiction over the Complaint. He submits that the Complaint provided evidence that supports a discriminatory practice exists at WHSCC which fetters the discretion of individual decision makers.

[84] The Complaint alleged that WHSCC's practice is to find injured workers who are participating in an ESRTW program to be non-cooperative when they are terminated for reasons not related to their injury. Dawe argues that these workers' injuries are the "defining characteristic" of the group being discriminated against, and that the injury is an "obvious factor" in the discriminatory treatment.

[85] WHSCC submits that the *HR Act* explicitly delegates authority to the Executive Director to determine whether a complaint falls within the HR Commission's jurisdiction, suggesting a legislative intent that the Executive Director ought to be the primary decision-maker regarding jurisdiction, not the Court.

[86] The question of jurisdiction depends on whether discrimination under the *HR Act* can be made out. That is to say, the jurisdiction of the HR Commission over a dispute is contingent on the allegations satisfying the legislative test for discrimination.

[87] Section 11 of the *HR Act* sets out the prohibition against discrimination in the provision of goods and services. Section 11(1) states:

11(1) A person shall not, *on the basis of* a prohibited ground of discrimination,

(a) deny to a person or class of persons goods, services, accommodation or facilities that are customarily offered to the public; or

(b) discriminate against a person or class of persons with respect to goods, services, accommodation or facilities that are customarily offered to the public.

[emphasis added]

[88] The requirement that the denial of services or discrimination be “on the basis of” a prohibited ground of discrimination is essential to establishing discrimination under the *HR Act*.

[89] The Executive Director wrote in the Decision that, for a complainant to prove discrimination, there is a three-part test they must meet:

- i. They have a characteristic protected by the *HR Act*;
- ii. They have experienced an adverse impact with respect to an area protected by the *HR Act*; and
- iii. The protected characteristic was a factor in the adverse impact.

[90] The Executive Director accepted that a workplace injury can be considered a disability for the purposes of the *HR Act* but stated that Dawe did not adduce evidence that his injury had the effect of imposing on him burdens, obligations, or disadvantages not imposed on others.

[91] As the Executive Director correctly noted, establishing that a complainant has a protected characteristic is not, in and of itself, sufficient to establish discrimination. The protected characteristic must be a factor in the alleged adverse impact.

[92] In *Yeadon*, Noel, J. noted at paragraph 132 that section 32 of the *HR Act* gives the Executive Director a screening or gatekeeping authority when considering whether to dismiss a complaint. This means that the Executive Director would be expected to subject complaints to adequate scrutiny to ensure they are appropriate to refer to a board of inquiry.

[93] The Executive Director has the requisite expertise and institutional knowledge to determine what constitutes discrimination under the *HR Act*. Therefore, decisions

pertaining to the exercise of her gatekeeping role under section 32 is due an appropriate degree of deference by a reviewing court.

[94] Dawe references other decisions where the Review Division overturned findings of non-cooperation against workers. This is not sufficient however to establish systemic discrimination. The Review Division acts as a forum for the resolution of disputes under the *WHSC Act*.

[95] The reasons given for the Decision do not describe how Dawe's Complaint was dealt with in another forum, other than to state that the crux of the Complaint, non-cooperation, is within the jurisdiction of the Review Division.

[96] In an effort to be of assistance and provide clarity to the Court regarding the content of the Decision, the HR Commission suggests that the Executive Director based the dismissal of the Complaint solely on lack of jurisdiction (section 32(1)(a) of the *HR Act*) and not on the substance of the Complaint having been appropriately dealt with in another proceeding (section 32(1)(c) of the *HR Act*).

[97] I do not accept this submission by the HR Commission. In my view, in dismissing the Complaint, the Executive Director also applied section 32(1)(c). In doing so, I find she erred in two respects. Firstly, she did not apply the correct test for dismissal under section 32(1)(c) and, secondly, once she had made a finding that the HR Commission lacked jurisdiction over the Complaint, it was not appropriate to consider the Complaint under section 32(1)(c).

[98] I will explain why I am of the view that the Executive Director erred and why ultimately it does not affect the reasonability of the Decision.

[99] The Decision begins with a statement of the authority of the Executive Director to dismiss a complaint in circumstances where she is satisfied the HR Commission does not have jurisdiction over the Complaint or where the substance of a complaint has been appropriately dealt with in another proceeding.

[100] The Executive Director then continues by writing she decided to dismiss the Complaint because she was satisfied it is outside of the HR Commission's jurisdiction *and* could be addressed through the review/appeal mechanisms available under the *WHSC Act*.

[101] By stating this, it is clear that the dismissal of the Complaint was based on two grounds – sections 32(1)(a) and 32(1)(c) of the *HR Act*.

[102] In dismissing the Complaint on the basis of section 32(1)(c), the Executive Director misstates the applicable test. The test pursuant to section 32(1)(c) of the *HR Act*, is not whether the substance of the Complaint *could be addressed* through other proceedings. The test is whether the matter *has been appropriately dealt with* in the other proceedings.

[103] It is further evident that the Decision was based on section 32(1)(c) in that the Executive Director continued in the Decision to find the crux of the Complaint had been pursued through the appeal mechanisms of the WHSCC.

[104] The Decision clearly indicates that the Executive Director found that the crux of the Complaint was not discrimination but rather lay with Dawe's dissatisfaction with the WHSCC having found him, and not his employer, to be non-cooperative.

[105] On this point, the Executive Director wrote in the Decision regarding the jurisdiction of WHSCC, as follows:

This matter was pursued through the appeal mechanisms of the WHSCA. The question of the correctness and the adequacy of the case manager's decision-making is within the Review Division's jurisdiction pursuant to section 26(1)(e) [of the *WHSC Act*].

[106] In my view, the Executive Director further erred in opining on the jurisdiction of the Review Division to deal with a matter (other than one whose subject matter is discrimination).

[107] The Executive Director of the HR Commission is not in a position to find whether a matter *not* related to discrimination is within the jurisdiction of another administrative decision maker. In my view, section 32(1)(c) of the *HR Act* allows the Executive Director to dismiss a complaint where matters *within* the HR Commission's jurisdiction have been appropriately dealt with in another proceeding.

[108] This was the situation in *Chaisson v. Happy Valley Goose Bay (Town)*, 2011 NLTD(G) 156. In *Chaisson*, the HR Commission had jurisdiction over the complaint, but the HR Commission found that the discriminatory allegations had been adequately dealt in another forum. In other words, section 32(1)(a) did not apply; section 32(1)(c) did.

[109] In *Chaisson*, the Executive Director dismissed a complaint brought in the context of labour dispute proceedings. Prior to making a human rights complaint, Mr. Chaisson's union brought a grievance alleging that while he was suffering from depression his employer discriminated against him by terminating him. Following arbitration, the arbitrator found that the employer had established cause for disciplinary action, but that dismissal was an excessive punishment. The reasons specifically addressed the issue of mental disability and the allegation of discrimination contrary to the terms of the collective agreement.

[110] Mr. Chaisson was dissatisfied with the award and filed a complaint with the HR Commission. The Executive Director's decision to dismiss the complaint was found to be reasonable on judicial review, as legal issues around discrimination had been previously decided.

[111] *Chaisson* differs from the case before me in that in dealing with the Complaint, the Executive Director found that the "crux" of the dispute did not meet the test for discrimination so as to vest jurisdiction in the HR Commission. At the

point of that finding, in my view, it would not have been open to the Executive Director to also deal with the Complaint under section 32(1)(c) or to opine upon the jurisdiction of the WHSCC to deal with a non-discriminatory subject matter.

[112] Although I have found that the Executive Director erred in the handling of the Complaint under section 32(1)(c) of the *HR Act*, this is not a fatal error rendering the Decision unreasonable. The reasons concerning the crux of the Complaint and its relationship to the jurisdiction of the HR Commission, which formed the substantive bulk of the Decision, still carry the hallmarks and indicia of reasonableness.

[113] Insofar as Dawe has sought to characterize the Complaint as one of discrimination, he is correct when he submits that the Review Division did not deal with his argument on discrimination as it was not raised in that forum.

[114] However, the *HR Act* grants the Executive Director significant discretion on questions of the jurisdiction of the HR Commission and in determining what constitutes discrimination so as to fit within the HR Commission's jurisdiction. She reasonably determined that the Complaint was not one of discrimination.

[115] The reasons set out in the Decision show that the Executive Director was alive to the main issue to be determined with respect to the HR Commission's jurisdiction and reasonably explains how the Complaint did not meet the criteria of section 11 of the *HR Act*.

*(b) Other Statutory or Common Law Constraints*

[116] I am satisfied that a review of the relevant jurisprudence supports the reasonability of the Decision.

[117] Dawe submits that a comparator group is not needed in order to assess the presence of discrimination under the *HR Act*. WHSCC argues that a comparator group is a necessary prerequisite of establishing an adverse impact.

[118] In some instances, Dawe argues that the comparator group to injured workers ought to be “employers” engaging with WHSCC programs, and in others he argues that no comparator group is necessary, relying on cases like *Ontario (Attorney General) v. G*, 2020 SCC 38, which built upon the reasons in *R. v. Kapp*, 2008 SCC 41, and *Withler v. Canada (Attorney General)*, 2011 SCC 12, respecting the test applicable to alleged violations of section 15 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.), 1982, c. 11 (“Charter”)*.

[119] *Kapp* and *Withler* altered the section 15 test that had been established in *Law v. Canada (Minister of Employment & Immigration)*, [1999] 1 S.C.R. 497, which formalistically emphasized the importance of choosing the correct comparator group when conducting a section 15 *Charter* analysis.

[120] While the body of cases that have followed *Kapp* and *Withler* are helpful in that they caution against overly formalistic approaches to questions of substantive equality, the cases are distinguishable and address different circumstances than those under present review.

[121] It is important to note that no *Charter* claim has been brought, and that this is a relatively straightforward judicial review pursuant to the *HR Act*.

[122] In *Moore v. British Columbia (Ministry of Education)*, 2012 SCC 61, at paragraph 33, the Supreme Court set out the test for discrimination in reference to the *Human Rights Code*, R.S.B.C. 1996, c. 210.

[123] The context in *Moore* is directly applicable to the present analysis. The test as described by the Supreme Court in *Moore* mirrors that used by the Executive Director in the Decision.

*(c) The Principles of Statutory Interpretation*

[124] The Decision reads reasonably in light of the principles of statutory interpretation.

[125] The Complaint alleged discrimination on the basis of disability and perceived disability in relation to Dawe's workplace injury.

[126] "Disability" is a defined term in the *HR Act*. The Executive Director accepted that a workplace injury can satisfy the language of the definition. The Complaint was dismissed, however, on the basis that Dawe did not prove an adverse impact on the basis of that disability.

*(d) Evidence Before the Executive Director as Decision Maker*

[127] I am satisfied that the Decision is reasonable given the evidence (or lack thereof) before the Executive Director.

[128] The record reveals that both parties were given opportunities to adduce evidence at an early stage in the process and again after being informed that the Complaint was under consideration for dismissal pursuant to section 32. The parties availed themselves of this opportunity.

[129] The Decision, read in light of the record, reveals that the Executive Director considered the evidence that was adduced. The reasons indicate that the Executive Director was familiar with the history between the parties and the decision made by the Review Division. The Decision repeatedly invokes that the evidence adduced

did not show Dawe suffered an adverse impact as a consequence of his disability. Further, the Executive Director showed an awareness that what she identified as the crux of the Complaint, was not a matter within the HR Commission's jurisdiction.

[130] The Decision did not comment on the "continuing discrimination" alleged by Dawe to have been perpetuated by WHSCC by requiring him to execute an affidavit regarding his income sources. This allegation did not form part of the written Complaint submitted by Dawe. It was raised however by Dawe in supplementary documents contained in the record and was canvassed in Dawe's submission before the Court.

[131] WHSCC submits that pursuant to section 54.1 of the *WHSC Act*, Dawe was required to provide it with full and accurate information relevant to his claim for compensation. As such, WHSCC submits that it had statutory authority to require proof of eligibility of benefits from Dawe by way of affidavit evidence.

[132] The fact that the Decision omits reference to Dawe's allegation of discrimination by WHSCC in requiring an affidavit does not establish that the reasons taken as a whole are unreasonable. The reasons must be considered in context.

[133] In any event, in reviewing the record, I can find no evidence that was before the HR Commission tending to show that WHSCC's request that Dawe provide an affidavit was made in a discriminatory fashion.

[134] The Executive Director found that the crux of the dispute was the finding of non-cooperation as against Dawe. This conclusion was reasonable given the evidence before her.

[135] The Executive Director further concluded that the HR Commission did not have jurisdiction on the basis that the evidence did not disclose how Dawe's disability factored into the alleged adverse impact. Dawe's submissions with respect

to the affidavit requirement do not overcome this core aspect of the reasonability of the Decision.

*(e) Submissions of the Parties*

[136] The Executive Director gave each party opportunities to present evidence, and the parties availed of these opportunities. She summarized the parties' submissions in her reasons. The core issues in dispute were considered and the parties' submissions were dealt with adequately.

*(f) Past Practices and Decisions*

[137] Dawe's submissions use the language of "past practices," but primarily in connection to the doctrine of legitimate expectations. This is discussed below in the procedural fairness analysis.

[138] No evidence was presented to show the Decision's reasons or outcome were contrary to past practice so as to make it unreasonable.

*(g) Impact of the Decision on the Affected Individual*

[139] The dismissal of the Complaint prevents Dawe from proceeding to the next stage of the Complaint process. This could be seen to deprive Dawe of a remedy for the discrimination he allegedly experienced.

[140] Discrimination is insidious and dangerous, and to be deprived of a remedy when one has been discriminated against would only perpetuate injustice.

[141] With this said, the Executive Director of the HR Commission is understood to have certain expertise in the area of human rights law and discrimination. She is

entitled to deference consistent with her role as a gatekeeper when it comes to jurisdictional questions under the *HR Act*.

[142] The Executive Director's explanation for the lack of jurisdiction is considered, thoughtful, and respectful of Dawe's submissions and point of view.

[143] Furthermore, the record shows that there was ample evidence before the Executive Director for her to determine that the crux of the matter lay in Dawe being found to be non-cooperative. Dawe suggests that the Executive Director misapprehended the Complaint because he alleged that it was systemic in nature. Despite this assertion, the reasons show this is not the case. The Executive Director was aware of Dawe's allegations that WHSCC was perpetuating a discriminatory practice.

[144] The problem was that there was no evidence that Dawe suffered an adverse impact due to his disability.

[145] Dawe was successful at the Review Division stage. Afterwards, he refused to execute an affidavit which WHSCC sought pursuant to section 54.1 of the WHSCC. Given these circumstances, the specific impact on Dawe can be seen as relatively minimal.

### **Conclusion on Reasonability**

[146] Overall, the Decision is reasonable.

[147] With respect to the assessment of the HR Commission's jurisdiction, the Decision is internally coherent and well justified in light of the relevant legal and factual constraints. It bears the hallmarks of justification, transparency, and intelligibility.

[148] In my view, however, after determining that the HR Commission did not have jurisdiction to deal with the Complaint, the Executive Director should not have conducted an analysis under section 32(1)(c) of the *HR Act* or opined upon the jurisdiction of the WHSCC to deal with a matter not involving discrimination. Further, the Executive Director articulated the wrong test to be applied in a section 32(1)(c) analysis.

[149] These errors however were not fatal to the overall reasonability of the Decision and therefore there is no basis to interfere with the Decision.

### **Issue 3: Was Dawe afforded Procedural Fairness?**

[150] I am satisfied that Dawe was afforded adequate procedural fairness.

[151] Dawe alleges he was not afforded procedural fairness. He submits that the Executive Director dismissed the Complaint “without investigation” and that she “ignored evidence that supported” the Complaint.

[152] Dawe further alleges that the Executive Director had a past practice to review human rights decisions from “another forum” to determine whether the human rights complaint had been addressed. Dawe submits that this did not happen in his case and therefore his legitimate expectations went unmet.

[153] In *Vavilov*, at paragraphs 76 to 81, the Supreme Court endorsed the reasons from *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 SCC 699, as explaining the requirements of procedural fairness in a given case.

[154] In *Baker*, the Court set out a non-exhaustive list of factors that inform the content of the duty of procedural fairness. These include:

- a) the nature of the decision being made and the process followed in making it;
- b) the nature of the statutory scheme;
- c) the importance of the decision to the individual or individuals affected;
- d) the legitimate expectations of the person challenging the decision; and,
- e) the choices of procedure made by the administrative decision maker itself.

[*Vavilov* at para. 77; *Baker* at paras. 21 to 28]

[155] These are not airtight compartments, and some factors relevant to procedural fairness also find expression under reasonableness review and have been considered in my reasonability analysis.

[156] The HR Commission allowed Dawe to be assisted by a layperson, and he availed of the opportunity.

[157] The parties made submissions following the initial acceptance of the Complaint by the HR Commission. Dawe was provided with a copy of the written reply submission of WHSCC.

[158] The parties were given notice that the Complaint was being considered for dismissal under section 32 of the *HR Act*. Through this communication, Dawe was

advised of the content of Section 32 and the grounds on which the Complaint was being considered for early dismissal, namely lack of jurisdiction and/or the substance of the Complaint having been appropriately dealt with in another proceeding. Dawe was also provided a link to the HR Commission's guideline document which contained more information on Section 32.

[159] The parties were given an opportunity to provide further submissions as to whether the Complaint should be dismissed summarily under section 32. Both parties made further submissions and provided further information.

[160] Dawe submits that he had a legitimate expectation that the Complaint would be investigated, and a *prima facie* case of discrimination made out and the Complaint would move the matter forward to a board of inquiry.

[161] As I have already articulated, the Executive Director performs a gatekeeper role with relatively broad discretion. The statutory scheme grants her significant authority to determine whether a complaint should be dismissed pursuant to section 32 of the *HR Act*.

[162] Given the Executive Director's gatekeeping role, it was not a legitimate expectation of Dawe to assume that the case would move through all the steps of the HR Commission's process. The fact that the Executive Director has the power to dismiss complaints prior to referral suggests that Dawe's expressed expectations were unfounded.

[163] In *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, at paragraph 94, the Supreme Court explained how the doctrine of legitimate expectations operates:

If a public authority has made representations about the procedure it will follow in making a particular decision, or if it has consistently adhered to certain procedural practices in the past in making such a decision, the scope of the duty of procedural fairness owed to the affected person will be broader than it otherwise would have

been. Likewise, if representations with respect to a substantive result have been made to an individual, the duty owed to him by the public authority in terms of the procedures it must follow before making a contrary decision will be more onerous.

[164] The record does not disclose evidence to suggest that the Executive Director made a representation she did not fulfil, or that the HR Commission had a practice that was not fulfilled.

[165] Dawe cites *Chiasson* in support of his argument that his legitimate procedural expectations went unfulfilled. However, Dawe was given the same, if not more, procedural opportunities as the complainant in *Chiasson*.

[166] In *Chiasson*, the Court's recitation of procedural history indicates that the respondents had filed replies to an initial complaint, and the complainant had an opportunity to respond to the replies. The Executive Director wrote to the parties indicating that the complaint was under consideration for dismissal under section 32. The complainant was given an opportunity to provide further submissions, which he did. The complaint was dismissed under section 32, and the Court dismissed the complainant's appeal.

[167] In addition, the reasons for the Decision (which I have already determined were reasonable) were provided in writing to the parties.

[168] There is no evidence to support Dawe's assertion that the Executive Director fell short of the requirements of procedural fairness.

## **COSTS**

[169] WHSCC requests that costs be granted in its favour. The HR Commission, as a neutral party, is not seeking costs.

[170] As the successful party, WHSCC is awarded its party-party costs against Dawe to be taxed in accordance with Column 3 of Rule 55 of the *Rules*.

## **SUMMARY AND CONCLUSION**

[171] The Application is dismissed. In so doing, I find that:

- a) The standard of review pursuant to an application for judicial review under section 33 of the *HR Act* is reasonableness;
- b) The Decision met the requirements of reasonableness; and
- c) The Decision was not made in breach of the obligations of procedural fairness.

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**SANDRA R. CHAYTOR**  
Justice