

Court File No. T -

FEDERAL COURT OF CANADA

B E T W E E N:

EMILIO ZAVARELLA

Applicant

-and-

ATTORNEY GENERAL OF CANADA

Respondent

APPLICATION FOR JUDICIAL REVIEW
UNDER SECTION 18.1 OF THE *FEDERAL COURTS ACT*

NOTICE OF APPLICATION

TO THE RESPONDENT:

A PROCEEDING HAS BEEN COMMENCED by the Applicant. The relief claimed by the Applicant appears on the following page.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the Applicant. The Applicant requests that this application be heard in Ottawa, Ontario.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the *Federal Courts Rules* and serve it on the Applicant's solicitor, or where the Applicant is self-represented, on the Applicant, **WITHIN 10 DAYS** after being served with this notice of application.

Copies of the *Federal Courts Rules* information concerning the local offices of the Court and necessary information may be obtained on request to the Administrator of this Court Ottawa (telephone 613-992-4238) or at any local office.

**IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN
IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.**

August 26, 2024

Issued by: _____
Registry Officer

Address of Local office: 90 Sparks Street, 5th floor
Ottawa, ON K1A 0H9

TO: **The Attorney General of Canada**
Department of Justice
50 O'Connor Street, Suite 500
Ottawa, ON K1A 0H8

AND TO: **Canadian Human Rights Commission**
344 Slater St. 8th Floor
Ottawa ON K1A 1E1

APPLICATION

This is an application for judicial review in respect of the decision of the Canadian Human Rights Commission (the “Commission”) provided by letter dated July 30, 2024 (the “Decision”). In the Decision, the Commission dismissed my complaint of discrimination based on disability against Immigration, Refugees and Citizenship Canada (the “Complaint”) pursuant to paragraph 44(3)(b)(i) of the *Canadian Human Rights Act*, RSC, 1985, c. H-6 (“*CHRA*”) without addressing the essence of my complaint and key allegations in a reasonable and procedurally fair manner. The Commission determined that an inquiry into the Complaint was not warranted and declined to refer the Complaint to the Canadian Human Rights Tribunal (the “Tribunal”).

I make application for:

- (a) an Order allowing this application;
- (b) an Order that the Tribunal institute an inquiry into my Complaint, or in the alternative, remitting the matter back to the Commission for a fresh investigation by a new investigator and a new decision by the Commission based on a full record and in accordance with the reasons of this Honourable Court;
- (c) the costs of this application; and
- (d) such further and other relief as I may request and this Honourable Court permit.

The grounds for the application are:

- (a) I filed my Complaint on July 5, 2021 alleging that Immigration, Refugees and Citizenship Canada (the “Respondent”) discriminated against me because of my disability pursuant to sections 7 and 10 of the *CHRA*.
- (b) My allegation of discrimination relates in large part to the Respondent’s conduct after I had disclosed my disability during a selection process for a Foreign Service Officer position. Namely, the Respondent provided me with false or misleading information which discouraged and prevented me from accepting the offer.

- (c) I also alleged that the Respondent's policies, and the terms written in the employment offer, pertaining to persons "less than fully rotational" systemically discriminates against persons with disabilities pursuant to section 10 of the *CHRA*.
- (d) The Commission conducted an investigation into the Complaint, which included the provision of documentary and other evidence on June 3, 2022 (the "June 3 letter"). The Commission prepared a final report on August 2, 2022, recommending that the Commission dismiss the Complaint (the "Report"). The reasoning in the Report was based primarily on the conclusion that I did not accept the offer and the duty to accommodate had not been engaged. With respect to the section 10 allegations, the Report simply accepted the Respondent's assertion about the requirement of Foreign Service Officers to be "fully rotational" and did not engage in an analysis of whether the policy discourages, adversely differentiates or "...deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination..." within the meaning of section 10 of the *CHRA*. The Report made no mention or analysis of whether I was provided with erroneous information or the impact that misleading information had in the circumstances.
- (e) I made submissions to the Commission on September 6, 2022 (the "September 6 submission") taking issue with the analysis in the Report and demonstrating that some of the factual findings in the Report were contrary to the evidence presented during the course of the investigation. I could not address all inaccuracies nor attach the evidence as there was a 10-page limit.
- (f) The Respondent submitted an undated 7-page letter in response to my September 6 submission (the "Respondent's comments"). As the Respondent's comments contained significant inaccuracies, I sent an email and a 2-page response to the Commission, demonstrating evidence in the Commission's possession supporting my allegations (the "October 6 letter").
- (g) The Commission dismissed the Complaint by letter dated November 9, 2022 pursuant to paragraph 44(3)(b)(i) of the *CHRA*. I made an application for judicial

review of that decision in this Court. Justice Little allowed that application and remitted the matter to the Commission on January 19, 2024 [*Zavarella v. Canada (Attorney General)* 2024 FC 87]. The Commission did not meaningfully grapple with the essence of my complaint nor provide a responsive justification.

- (h) The Commission notified the parties on June 18, 2024 that it would reconsider the matter based on the existing Report and submissions. On July 4, 2024, the Commission included the March 11, 2021 email from the Professional Association of Foreign Service Officers (“PAFSO”) and my October 6 letter in the Commission Package, as these were referenced in this Court’s Reasons (citing *Zavarella* at paras 28, 30, 122). The Commission did not permit new submissions.
- (i) By letter dated July 30, 2024, the Commission notified the parties of its Decision to dismiss this Complaint under subparagraph 44(3)(b)(i) of the *CHRA*. The Commission’s reasons were based on the premise that the Respondent informed me of the potential termination of my employment and provisioned ensuing information to “[b]e clear about the potential consequences of accepting the FS position given [my] medical condition” so that I “[c]ould make an informed decision aligned with [my] best interests”. The Commission made no reference to evidence in the Commission Package which contradicted its findings of fact concerning the probationary period, nor to evidence from PAFSO that I would not have been subject to a termination of employment under these circumstances.
- (j) Concerning the ensuing matters, the Commission noted that discrimination was unfounded as accommodations would have been available had the employment offer been signed. The Commission contended that “[w]hile errors were made and the wrong choice of words used”, I “[o]ught to have known” that information provided by the Respondent was misleading and/or inaccurate. There was no reference to evidence demonstrating that I had accepted the Respondent’s claims as true, or analysis of how the provision of false or misleading information discouraged my candidacy. The Commission concluded that the Respondent’s refusal to hold or reoffer the employment offer was not discriminatory.

- (k) The Commission noted that the Respondent informed me “[a]bout the current situation relating to refrigerated medications for FS officers to help [me] make an informed decision”, but declined to review this pursuant to Complaint Rule 9.1.
- (l) While the Commission acknowledged the existence of documentary evidence in the June 3 letter contradicting the Respondent on key issues, “[t]he Commission did not consider that letter” in rendering its Decision. Instead, the Commission relied on the Respondent’s comments and accepted the Respondent’s hearsay account of witness statements as true, without any direct interview or reasons, to “nuance” my and PAFSO’s arguments. Based on the Respondent’s comments, the Commission found no indication that the statements attributed to the Respondent were “made to discourage” my participation. The Commission referred to no jurisprudence that discriminatory intent is required to demonstrate *prima facie* discrimination. Contrarily, the jurisprudence has established that a discrimination complaint does not focus on discriminatory intent but on discriminatory effect.
- (m) In sum, the Commission relied substantially on the Respondent’s comments to reach its Decision while aware of duelling factual positions on key issues and the existence of evidence in its possession that would address these positions. The Commission did not have regard to all the circumstances as directed by this Court.
- (n) In its Decision, the Commission erred in law, inappropriately exercised its jurisdiction and/or based its decision on erroneous findings of fact that it made in a perverse or capricious manner in dismissing my Complaint. Without limiting the generality of the foregoing, the Commission:
 - (i) Provided reasons based on an absurd premise and unfounded generalizations and which were insufficiently intelligible and/or justified.
 - (ii) Failed to address the core issue raised by the Complaint of whether the Respondent adversely differentiated against me because of my disability when it provided inaccurate or misleading information that had the effect of discouraging me from continuing my candidacy and accepting the offer.

- (iii) Made a serious error of law by repeatedly and consistently regarding the presence or absence of discriminatory intent as determinative or in any way relevant to its discrimination analysis, particularly with respect to whether the Respondent's statements discouraged me from continuing my candidacy.
 - (iv) Unreasonably accepted as accurate factual assertions of the Respondent which were directly contradicted by other information in the record.
 - (v) Unreasonably applied Rule 9.1 of the Commission's Complaint Rules in light of the procedural history of this case and the Complaint Form, when it refused to conduct any analysis of whether information related to refrigerated medicines had an adverse effect or discouraged me from accepting the offer.
 - (vi) Conducted an inadequate analysis of whether the Respondent's requirement that Foreign Service Officers be "fully rotational" discourages, differentiates or deprives individuals of an employment opportunity on a prohibited ground of discrimination within the meaning of section 10 of the *CHRA*.
 - (vii) Failed to provide a responsive justification.
- (o) I was denied natural justice and/or procedural fairness during the course of the Commission's process. Without limiting the generality of the foregoing, the Commission:
- (i) Conducted an insufficiently thorough analysis when it failed to investigate the key issues of adverse differential treatment based on disability during the hiring process or whether the Respondent's practices or policies discourages or deprives a class of individuals of employment opportunities.
 - (ii) Failed to give any or adequate consideration to information provided during the course of the investigation which contradicted claims made by the Respondent on key issues.
 - (iii) Failed to give any or adequate consideration to the submissions I provided in response to the Report and which demonstrated that the Commission accepted

as true information provided by the Respondent which was contradicted by the documentary evidence.

- (iv) Failed to investigate and/or give any or adequate consideration to evidence which directly contradicted its findings of fact.
- (p) Section 18.1 of the *Federal Courts Act*, rules 300-317 of the *Federal Courts Rules*, the provisions of the *CHRA*; and
- (q) Such further and other grounds as I may advise and this Honourable Court permit.


This application will be supported by the following material:

- (a) An affidavit of my own and/or another individual, together with exhibits attached thereto, to be sworn and filed in this Honourable Court;
- (b) The material in the possession of the Commission, relating to the Report and the Decision that is the subject of this application; and
- (c) Such further and other material as I may request and this Honourable Court permit.

I request that the Respondent comply with Rule 317 and send a certified copy of the following material that is not in my possession but is in the possession of the Commission to myself and to the Registry:

- (a) The complete file in the possession of the Commission that is relevant to the Decision that is the subject of this application, including the Complaint Rules.

Date: August 26, 2024



Emilio Zavarella
2705 Draper Avenue
Ottawa ON K2H 7A1
emilio.zavarella@gmail.com
Tel.: 613-883-6992
Applicant