Court of Queen's Bench of Alberta

Citation: Wint v Alberta (Human Rights Commission), 2022 ABQB 87

Date: 20220131
Docket: 2103 01743
Registry: Edmonton

Between:

Kameron Wint

Applicant

- and -

Alberta (Human Rights Commissions) and Suncor Energy Inc.

Respondent

Reasons for Decision
of the
Honourable Mr. Justice Douglas R. Mah

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A. Background

[1] Kameron Wint, as a black man in Canada, has undoubtedly experienced racism in ways both large and small throughout his life. He says it happened to him again while working at Suncor in Fort McMurray and in consequence he made a discrimination complaint to the Alberta Human Rights Commission.

[2] In reviewing the dismissal of the complaint under section 26 of the *Alberta Human Rights Act*, the Chief of the Commission and Tribunals (Commissioner) upheld the dismissal and said there was no reasonable basis in the evidence to refer the complaint to a human rights tribunal for adjudication under section 32. The Commissioner's August 25, 2020 decision is reported as ***Wint v Suncor Energy Inc***, 2020 AHRC 61.

[3] Mr. Wint applies for judicial review of the Commissioner's decision. As such, the entire focus of my review and decision is whether the Commissioner's decision is 'reasonable', as that legal concept is articulated in ***Canada (Minister of Citizenship and Immigration) v Vavilov***, 2019 SCC 65.

[4] In his complaint, Mr. Wint says that Suncor through the actions of his immediate supervisor, Christian Coetzee, discriminated against him in the area of employment practices on the protected grounds of race and colour, contrary to sections 7(1)(a) and (b). The purported discrimination took two forms:

- On or about February 17, 2015 Mr. Wint says he was presented with and required to sign a letter confirming that he is in a safety sensitive position, which Mr. Wint says subjected him to illegal random drug and alcohol testing, and which he ultimately refused to sign; and
- On or about July 16, 2014, he was informed by his supervisor that an investigation was underway relating to a safety incident occurring during the night shift on July 7, 2014, and that Mr. Wint was believed to be involved. It turns out that Mr. Wint in fact did not work that shift and another employee was responsible.

[5] Both incidents, contends Mr. Wint, were racially motivated because Mr. Coetzee is a known racist. Mr. Wint reports that it was reported to him in 2012 by co-workers that earlier in 2011 Mr. Coetzee was heard to use a racial slur in reference to black workers.

[6] In response to the complaint, Suncor submitted that:

- All employees in safety sensitive positions were required to acknowledge the letter under Suncor policy, and thus Mr. Wint was not singled out for differential treatment; and
- The documentation created at the time of the safety incident indicated that an electrician with the initials 'KW' had committed the safety error and management believed KW was Mr. Wint. In fact, it was an electrician with the initials 'KN' who was responsible for the error but had written his initials on the document to look like KW. When it was determined that Mr. Wint had not been working that night, that was the end of the matter as far as Mr. Wint was concerned.

[7] Suncor contends that neither incident was racially motivated. It denies the racial slur attributed to Mr. Coetzee in 2011.

[8] Mr. Wint and Suncor agree that no employment consequences befell Mr. Wint as a result of either incident. However, Mr. Wint states that the incidents are a form of harassment of black male employees, all too common in his lived experience, and which contribute to his stress and anxiety, if not racial trauma.

[9] Mr. Wint contends that the Commissioner's decision is unreasonable because he failed to give due appreciation to Mr. Wint's subjective perception of the facts, his lived experience and Mr. Coetzee's demonstrated racism, and instead relied excessively on Suncor's documentation. He asserts that there is a reasonable, albeit circumstantial, basis for the complaint and therefore it should have been referred for adjudication to a tribunal.

[10] Suncor counters that Mr. Wint's complaints amount to no more than speculation and, in any event, are amply refuted on the record. Therefore, says Suncor, the Commissioner's decision is reasonable.

B. Proceedings Before the AHRC

[11] The record shows that the handling of the complaint followed the process set out in sections 20-26 of the *AHRA* and the applicable Alberta Human Right Commission Bylaws:

- Mr. Wint's complaint, invoking section 7, was received by the Commission on June 6, 2015 and deemed to meet the requirements for acceptance on June 19, 2015.
- Suncor (through counsel) responded to the complaint on September 23, 2015.
- A human rights officer (Ms. Moisey) was assigned to investigate the complaint. As part of the investigation, she wrote to the parties on May 28, 2019 and posed specific questions to each. In response, Mr. Wint provided his further written submission on July 12, 2019 and Suncor similarly did so on September 30, 2019.
- On October 31, 2019 Ms. Moisey contacted the parties again in writing to advise that she was recommending that the complaint be dismissed and attaching her investigation memo. She further advised that it was now up to the Director of the Commission to dismiss, discontinue, or refer the complaint to the Commissioner with a request that a human rights tribunal be appointed to adjudicate the complaint. At this point, the parties were afforded a further opportunity to comment on the investigation report and then to respond the other side's comments.
- Mr. Wint forwarded his comments to the Director on November 21, 2019. Suncor responded to those comments on February 12, 2020.
- The Director (Ms. Henderson) rendered her decision in writing on March 24, 2020, concurring with Ms. Moisey's recommendation and dismissing the complaint. Mr. Wint was advised of his right of review under section 26(1).
- The appeal period was suspended between March 17, 2020 and June 1, 2020 (presumably because of COVID), extending Mr. Wint's appeal period until June 30, 2020. Mr. Wint, now through counsel, submitted a review brief to the Commissioner on June 26, 2020. Suncor gave its responding submissions on August 6, 2020.

- The Commissioner (Mr. Gottheil) rendered his written decision on August 25, 2020, upholding the Director's decision to dismiss the complaint and thereby declining to refer the complaint to a human rights tribunal for adjudication. The present judicial review application arises from that decision.

C. The Commissioner's Role

[12] At the review stage, after receipt of any further submissions from the parties as permitted by the bylaws, the Commissioner conducts a solely documentary review of the matter: section 26(3)(a). The role here is a screening or gatekeeper role to determine if there is a reasonable basis in the information before the Commissioner to proceed to a tribunal: ***Mis v Alberta Human Rights Commission***, 2001 ABCA 212 at paras 8-9, applying ***Cooper v Canadian Human Rights Commission***, [1996] 3 SCR 854 at p 891 and ***Syndicat des employés de production du Québec et de l'Acadia v Canada (Canadian Human Rights Commission)***, [1989] 2 SCR 879 at p 899.

[13] In the present case, the Commissioner had two options, either uphold the dismissal or send the complaint to a tribunal: sections 26(3) and 27(1)(b). There is no legislative authority permitting the Commissioner to refer the matter back to the Director for further investigation.

[14] In ***Mis*** the Court of Appeal describes the gatekeeping role, the tools the gatekeeper may apply, the legal standard to be met before advancing a case to the tribunal stage and the approach that the court should adopt in reviewing such a decision:

> [8] The Supreme Court of Canada's characterization of the gatekeeping function in ***S.E.P.Q.A., supra***, and ***Cooper***, ***supra***, govern the function under the Alberta Act. The determination whether a complaint should be dismissed as "without merit" is a screening or gatekeeping function performed as a paper review. We are disinclined to set the specific test as low as 'arguable case' or as high as 'reasonable prospect of success'. In our view, the standard is somewhere in between. The question the Director or Chief Commissioner must ask in deciding whether a complaint is without merit is whether there is a reasonable basis in the evidence for proceeding to the next stage.
>
> [9] The gatekeeper can be expected to apply his or her experience and common sense in evaluating the information in the investigator's report. The threshold assessment of merit is low and the gatekeeper (here, the Chief Commissioner) is given wide latitude in performing the screening function. The courts are not to lightly interfere.

[15] Accordingly, in this case it was the Commissioner's function and duty to determine from the record whether there was a reasonable basis in the evidence to warrant an adjudication by tribunal.

D. Standard of Review

[16] In a judicial review of the Commissioner's decision, the question for the court is not whether the court agrees or disagrees with the decision under review. Rather, the court focuses on the question of whether the decision is reasonable or not. The parties agree that the presumptive reasonableness standard of review per ***Vavilov*** applies.

[17] In applying the reasonableness standard, ***Vavilov*** states the test the of reasonableness as either:

- first, a decision is acceptable if it is based on an internally coherent and rational chain of analysis, which is evident in the reasons themselves or which can be inferred from the record (at paras 102); or
- second, the decision is justified in relation to the facts and the law that constrain the decision-maker (at para 105).

[18] The concept of constraints on decision-makers is defined as the limits and contours of the space in which the decision-maker may act, and the types of solutions it may adopt, and includes: governing legislation, other statute or common law, the principles of statutory interpretation, the evidence, the submissions of the parties, past practices and decisions, and the impact of the decision on the affected party (see paras 108-135).

[19] Overall, the ***Vavilov*** approach affords deference to and recognizes that administrative decision-makers are appointed for the specific purpose that courts should not be making those decisions and should exercise only supervisory capacity (at para 82).

[20] Accordingly, the reasonableness review focuses on the decision actually made, both in terms of the reasoning process and the outcome. A reviewing court should refrain from re-deciding the issue itself, but rather only consider whether the decision made, including both the rationale and the outcome, is reasonable or not. In doing so, the reviewing court must develop an understanding of the reasoning that led to the decision to assess whether decision as a whole is reasonable (at paras 83-84).

[21] Deference by the courts does not mean an absence of accountability on the part of administrative decision-makers. Where the standard of reasonableness applies in judicial review, the court exercises a supervisory function and the review must still be robust (at para 13). Where the reviewing court has an appreciation of the institutional setting and the record, if the reasons reveal a fundamental gap or an unreasonable chain of analysis, the court should not rewrite the decision and substitute its own justification for the outcome. The reviewing court must still hold the decision-maker to a standard of accountability in that the decision-maker must have articulated to the affected party, in a justifiable, transparent and intelligible way, the rationale on which it based its conclusion (at para 96). If the decision lacks these essential qualities, then the decision may be overturned.

E. Summary of the Commissioner's Decision

[22] In the decision:

- The Commissioner, citing ***Mis***, properly identified his role, the test to be applied, and the scope of his review authority (at para 17):

  > The test that I must apply in carrying out my review function under section 26 of the *Act* is whether there is a reasonable basis in the evidence for proceeding to a hearing before a tribunal. The threshold is low, and I am given wide latitude in performing the screening function.

- He stated that his purpose is not to critique the investigation or the report of the human rights investigator, but rather to review the whole of the record, including

all of the submissions of the parties, in order to determine whether there is a reasonable basis for referral up the line (at para 18).

- He correctly set out the components that a complainant must establish in order to make out a claim of discrimination under the *AHRA* (at para 19):

> In order to make out a claim of discrimination, the complainant must establish that i) they have a characteristic protected by the *Act*, ii) they experienced adverse treatment, and iii) the personal characteristic was at least a factor in the adverse treatment. Where complainant is able to establish these points, then the evidentiary burden shifts to the respondent to provide a non-discriminatory explanation for its decisions.

- It was readily accepted that Mr. Wint's race and colour are protected characteristics (para 20).

[23] With regard to the letter incident:

- The Commissioner found that the letter merely asked Mr. Wint to acknowledge that he occupied a safety sensitive position and was subject to Suncor's drug and alcohol policy. He noted that Mr. Wint was not in fact ever required to take a drug or alcohol test, nor was he ever prevented from working or told that his job was at risk if he refused to sign the letter. (at para 20)

- The Commissioner acknowledged Mr. Wint's position than an arbitral award had ruled that random drug and alcohol testing was illegal, and that the arbitrary application of an otherwise permissible employment policy may constitute adverse treatment. However, he found that Mr. Wint, in receiving the letter, was not singled out for differential treatment. (at para 20)

- The Commissioner accepted that in 2012, Suncor established the safety sensitive designation under its drug and alcohol policy and sent the letter to all employees who worked in safety sensitive positions at the time. Since Mr. Wint was not in a safety sensitive position at that time, he did not receive a letter. (at para 6) Mr. Wint then began working in a safety sensitive position sometime in 2013. Through a safety audit conducted in early 2015, it was discovered that a number of employees who then occupied safety sensitive positions had not been sent the letter, including Mr. Wint. (at para 7) At that point, the employees in safety sensitive positions who had been missed in the first round of letters were given the letter in February 2015. Mr. Wint was among this group, along with 18 other individuals. (at para 21)

- It was acknowledged by both sides that Mr. Wint was the only person of colour working in the bargaining unit when he received the letter, and that other employees, who are not persons of colour, received the same letter. (at para 21)

- The Commissioner found that Suncor first saying that 12 other employees received the same letter, and then correcting itself in saying that it was 18, and its misidentification of the date on which Mr. Wint received his journeyman designation, are irrelevant and do not adversely affect Suncor's credibility. (at para 21)

[24] The safety investigation incident was dealt with as follows:

- The Commissioner accepted Suncor's explanation that the investigation into Mr. Wint in respect of the safety violation was a case of mistaken identity and that he was not targeted by his supervisor because of race and colour. He explained that once it became known that Mr. Wint was not on shift at the time of the safety incident, the investigation against him was dropped with no adverse consequences. (paras 23 & 24)
- By his own admission, the Commissioner says at para 25, Mr. Wint asked the union safety representative not to disclose that he had not been on shift at the time of the safety incident and to let the investigation continue. Therefore, the Commissioner concluded, Mr. Wint could not complain about how the investigation continued for a full week before it was discovered that he was not involved in the incident.

[25] On the question of whether the evidence supports that Mr. Coetzee is a racist:

- At para 22, the Commissioner noted that Mr. Wint submitted that an inference should be drawn that his race and colour were factors in both the letter incident and the safety investigation based on the circumstances. Mr. Wint alleged in his complaint that his supervisor, Mr. Coetzee, is a "white South African manager who is a well-known racist" and it could therefore be inferred that the two incidents were racially motivated.
- As support for this assertion, Mr. Wint reported that he had been told by other persons in 2012 that back in 2011, Mr. Coetzee had been heard using a racial slur in reference to black workers in Africa. Mr. Wint also alleged that Mr. Coetzee had been harsh and unfair toward at least one other black employee.
- The Commissioner found this latter allegation lacked factual context and consisted of nothing more than a bald assertion. Overall, it seems that the Commissioner did not find this evidence reliable enough to draw the inference.

[26] Regarding retaliation, Mr. Wint in both his submissions to the director and to the Commissioner referred to an October 22, 2015 incident that he considered retaliation for filing his human rights complaint. The Commissioner found that the retaliation allegation was outside the statutory one-year time limit prescribed in section 20.

[27] In the result, after review of the record, the Commissioner concluded that there was no reasonable basis in the evidence to proceed to a hearing, and the director's decision to dismiss the complaint was upheld under section 2(3)(a).

F. Mr. Wint's Arguments on Judicial Review

[28] Mr. Wint's contention that the Commissioner's decision is unreasonable is based on three main heads of argument:

- The decision lacks contextualized analysis in that it:
  - fails to consider Mr. Wint's lived experience as a black person and that of black persons generally, particularly with regard to microaggression, as described in an academic article; and
  - suffers from the same insufficiency of context that was found in ***Wang v Alberta (Human Rights Commission),*** 2021 ABQB 780; and

    - failed to recognize that Mr. Wint, as a result of institutionalized or systemic discrimination, could sustain a discriminatory outcome from a seemingly routine exercise.

- The decision failed to recognize that the safety investigation was a form of racial profiling; and
- Early stage dismissal is inappropriate because there is circumstantial evidence of racial motivation, and the decision shows an over-reliance on Suncor's documentary evidence

[29] Although not stated specifically as a ground of judicial review, Mr. Wint expressed disappointment about the Commission's failure to address his retaliation complaint. His counsel reiterated that disappointment during oral argument.

G. Mr. Wint's Lived Experience

[30] At the outset, I do not in any way intend to minimize or delegitimize Mr. Wint's lived experience as a black man in Canada. I accept that as a black person he has been subjected to discrimination both overtly and in the form of microaggression, whether by specific individuals or institutionally and systemically. I agree that it is dispiriting, and could even be traumatic, for an individual to continually experience this discrimination over a lifetime.

[31] Society, and the people and entities within, must aspire to be better.

[32] One means directed at achieving that ideal of a respectful and egalitarian society has been the introduction of human rights commissions. I think it fair to surmise that the very reason that human rights commissions were created in Canada, and given statutory powers to enforce a human rights regime, was to address the experiences of persons and groups who have certain immutable characteristics and who have suffered disadvantages, discrimination and marginalization because of those characteristics.

[33] I therefore accept that part of the institutional expertise of both the Commission and its Chief Commissioner is an appreciation of the lived experiences of those persons and groups. Within that lived experience, and the understanding of it, is the phenomenon of microaggression, which I understand to be indirect, subtle, or even unintentional discrimination, by words or interactions that occur in everyday life including within the employment setting, directed against members of racial or ethnic minorities, or towards women.

[34] The idea of microaggression as a form of discrimination is not completely new. I note that in CanLII, Canada's public legal database, there are about 11 reported cases, mostly in the human rights or labour law context, dealing with microaggression, dating back to 2017. In ***R v JG***, 2021 ONSC 1095, a sentencing case involving a black offender, the court referred to academic research going back to 2010 containing the same themes as the academic article upon which Mr. Wint relies in this judicial review and which I will talk about later in this section.

[35] Even before the expression "microaggression" hit the lexicon, human rights law has long recognized the phenomenon of subconscious racial bias leading to differential treatment of black persons. In ***Peel Law Association v Pieters***, 2013 ONCA 396, a case cited by Mr. Okoye, the Court of Appeal for Ontario noted that racial stereotyping will usually be the result of subtle subconscious beliefs, biases, and prejudices. At paras 113 and 114, the court says:

> [113] This court has repeatedly recognized the fifth proposition as a sociological fact. For example, Doherty JA has said in ***R v Parks*** (1993), 1993 CanLII 3383 (ON CA), 15 OR (3d) 324, [1993] OJ No 2157, 84 CCC (3d) 353 (CA), at para. 54: [page104]
>
> > Racism, and in particular anti-black racism, is a part of our community's psyche. A significant segment of our community holds overtly racist views. A much larger segment subconsciously operates on the basis of negative racial stereotypes.
>
> [114] The Supreme Court of Canada has also endorsed the proposition. For example, L'Heureux-Dubé J. and McLachlin J. writing in ***R v S (RD),*** 1997 CanLII 324 (SCC), [1997] 3 SCR 484, [1997] SCJ No 84, at para. 46, cited Doherty JA's statement with approval.

[36] Then, at para 123, the court further says:

> … The proposition that implicit stereotyping can affect the manner in which individuals continue to deal with others after an encounter begins does not seem to me to be a matter that would provoke much controversy.

[37] Even further back, the first human rights legislation creating a code and an agency to enforce it was enacted in Alberta in 1972. The Commission (or its predecessor) has had some fifty years of experience in administering the human rights regime in this province. As the Commissioner says in the brief filed on his behalf, decision-makers and tribunals created under administrative regimes are "… assumed to have specialized expertise with the assigned subject-matter": ***Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association***, 2011 SCC 61 at para 1. In short, it may be assumed that the Commission and the Chief Commissioner, by virtue of their statutory mandate and their institutional experience and expertise, are racially literate and do not lack race consciousness.

[38] Accordingly, to me it is inaccurate to suggest that the Commission undertakes its role in regulating human rights in the province, or that the Commissioner in conducting his review in this or any other case, does so in a manner devoid of any understanding of the thousand and one slights, insults and indignities that people within racialized, ethnic or minority groups endure every day, simply because of who they are. I think it fair to say that, at an institutional level, the Commission and its Chief Commissioner are aware of the insidious nature of routine and everyday discrimination, even in its microaggression form, and of its effects upon victims.

[39] The question in this case is not whether Mr. Wint, like other black people in Canada, has experienced stereotyping, discrimination or microaggression during his life. Surely, he has. The question is also not whether Mr. Wint perceived the incidents in question to be racial slights or insults. Obviously, he did. The question that faced the Commissioner is whether there was a reasonable basis in the record that the actions of Suncor, or its supervisor Mr. Coetzee, in these two incidents were in part racially based, such that the matter should be further adjudicated by a tribunal. The inquiry focused on the state of mind of Suncor and the supervisor. I agree that the state of mind can be inferred from the circumstances.

[40] While Mr. Wint's precise life experiences were not part of the evidence, the idea that racialized people experience frequent discrimination in large ways and small, and its effect upon them, could not have been not lost on the Commission or the Chief Commissioner. Their very

statutory existence is devoted to determining whether such discrimination has occurred and if so to fashion a remedy for the injury.

H. The Academic Article

[41] Mr. Okoye, counsel for Mr. Wint, attached a 2020 academic article to his brief entitled "Microaggressions: Clarification, Evidence, and Impact" by Monica T. Williams, published in the journal *Perspectives on Psychological Science* by the Association for Psychological Science. Ms. Williams is associated with the University of Ottawa School of Psychology, and I assume the article is peer-reviewed and academically sound. She argues that microaggression as a form of discrimination is well-defined, related to power imbalance, and can be linked to individual prejudice in offenders and adverse mental health outcomes in those subjected to it.

[42] Mr. Okoye relied on the article as both an authority and an example of the type of social science evidence that could be called, if the matter were referred to tribunal adjudication. Mr. Cascadden, for Suncor, noted the article was not part of the record and therefore of limited relevance.

[43] I do not question the value of social science or social context evidence in the appropriate venue. The article, while informative, is of limited assistance in this judicial review for three reasons. First, it was not before the Commissioner and should not now be factored in as evidence to show that the Commissioner erred. The Commissioner's decision should be assessed on the basis of the evidence in the record, not evidence that could be called if there were a tribunal hearing. Second, I already noted above that the Commission and the Commissioner, as part of their institutional experience and expertise, are racially literate and institutionally aware of the concept of microaggression and its effect. Third, the law doesn't permit me to accept new evidence on judicial review, re-do the Commissioner's task and substitute my own decision.

I. Applicability of *Wang* case

[44] The complainant in ***Wang*** was terminated from his job as a geologist because of purported redundancy. He had a disability of an orthopedic nature and prior to the termination had requested accommodation from the employer. The complainant alleged he had been terminated on account of physical disability and sought redress from the Commission. At the Chief Commissioner level, the complaint was dismissed.

[45] In ***Wang***, the complainant's key contention was that the employer had replaced him in the unit with another geologist, so it could not be said that the position had been eliminated. This fact, the court found, lent credence to the complainant's assertion that he had been terminated over his accommodation request, not because of redundancy. The Commissioner did not address this point in the dismissal decision. The court determined that the Commissioner's failure to do so resulted in an unreasonable decision and remitted the matter for redetermination.

[46] Mr. Wint analogizes his case to that of ***Wang***. He points out (through counsel) that in ***Wang***, the complainant was one of 8 employees whose positions were eliminated at the same time. That did not prevent the court from saying that the Commission and the Commissioner should have examined the reason why the complainant was terminated. In other words, it was unreasonable simply to accept the employer's explanation that it was all part of a downsizing exercise. Here, Mr. Wint suggests, it is similarly unreasonable simply to accept Suncor's

explanation that the 18 other employees in safety sensitive positions who had been missed in the earlier mailing, as was Mr. Wint, received the same letter. As in ***Wang***, Mr. Wint suggests, there is something more than meets the eye. In his case, it is the fact that he is a black man.

[47] Mr. Wint says the facts that contextualize his receipt of the letter, and which the Commissioner ignored, are:

- 15 of Mr. Wint's co-workers say they did not receive the letter;
- Mr. Wint's belief that Mr. Coetzee is a racist.

[48] For reasons set out below, I feel it is inaccurate to say that the Commissioner failed to consider these factors.

The 15 co-workers who did not receive letters

[49] The matter of the co-workers who did not receive the letters is mentioned at para 13(c) of the decision. It is fair to conclude from the record that the Commissioner did not consider this point to have probative value with respect to the discrimination issue. Suncor readily admits that the letter did not go to all employees, only those in safety sensitive positions who were missed in the first mailing in 2012. Mr. Wint was one such employee, among 19, because he was not in a safety sensitive position until sometime in 2013. A safety audit revealed that the 19 had been missed. As such, it was open to Commissioner to feel that the 15 co-workers not receiving the same letter as Mr. Wint was of no consequence. Mr. Cascadden pointed out that there are any number of reasons why a co-worker did not receive that letter: the co-worker was not in a safety sensitive position, the co-worker had previously received the letter, the co-worker had acknowledged his or her safety sensitive obligations in some other manner, or a reason related to something in the collective agreement. He noted that Suncor has some 20,000 employees, only some proportion of whom are in safety sensitive positions. Many Suncor employees would not have received the 2015 letter.

[50] In effect, Mr. Wint argues that the fact that 18 Suncor workers in the same circumstances as him receiving the same letter is evidence of nothing, while 15 other Suncor workers whose circumstances are unknown not receiving the letter is evidence suggestive of racism. On a review of the record, I can see how the Commissioner would not agree with this logic.

[51] Even if the Commissioner did not comment as robustly on this point regarding the 15 with no letters as Mr. Wint would have liked, I bear mind that a decision-maker is not required to answer every argument or point that is raised. This statement from ***Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)***, 2011 SCC 62 at para 16 is apposite:

> Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion (***Service Employees' International Union, Local No 333 v Nipawin District Staff Nurses Assn***, 1973 CanLII 191 (SCC), [1975] 1 SCR 382, at p 391). In other words, if the reasons allow the reviewing court to understand why the tribunal made its decision and

permit it to determine whether the conclusion is within the range of acceptable outcomes, the ***Dunsmuir*** criteria are met.

Legality of Random Drug and Alcohol Testing

[52] I pause here to deal with a collateral point that Mr. Wint has repeatedly made during these proceedings. He says that the letter was illegal because an arbitral award had struck down Suncor's random drug and alcohol testing program. The letter does not purport to tell the employee that he or she is subject to random drug and alcohol testing. Rather, the letter says that the employee is confirmed to be in safety-sensitive position and that there are related standards in the drug and alcohol policy. Mr. Wint is quite correct that the random testing program was declared illegal in arbitration and was only restored by the court a year later. Obviously, Suncor can only enforce its policy to the extent it is legal at a given time. Further, whether the policy is legal or illegal affects all employees who fall under the policy, not just Mr. Wint. That the random testing aspect of the policy may have been illegal at a point in time does not assist Mr. Wint in advancing his discrimination claim.

Mr. Wint's belief that Mr. Coetzee is a racist

[53] Moving to Mr. Wint's second point, the racist comment attributed to Mr. Coetzee is specifically mentioned in para 22 of the decision. The Commissioner concludes that hearsay evidence of a remark heard by unknown persons and purportedly made in 2011 is not sufficiently reliable to draw the inference that Mr. Coetzee caused the letter to be sent to Mr. Wint on account of the latter's race. Further, even if it could be said that Mr. Coetzee is a racist, there is nothing in the evidence pointing to Mr. Coetzee being the prime force behind the letter to Mr. Wint, as opposed to it being part of a human resources exercise undertaken by Suncor to shore up deficiencies identified in a safety audit. The Commissioner's decision indicates that he concluded it was the latter. The letter is a form letter, identical in content to the 18 others. It shows Mr. Coetzee (Mr. Wint's supervisor) as the sender but it is signed by someone else. Suncor disclosed redacted copies of the other 18 letters, showing various managers in the organization sending the same letter.

[54] Before leaving this head of argument, I want to comment on one last point pressed by Mr. Okoye. Mr. Wint did not produce in any of his written submissions to date the names of witnesses to the 2011 event in which Mr. Coetzee is said to have uttered a racial slur. Mr. Okoye suggested to me that Suncor employees would be reluctant to give evidence against their employer unless under compulsion of a subpoena. Therefore, I was told, the proper course would be for a tribunal to be struck and subpoenas issued so that those employees could testify without fear of retribution.

[55] From the record, I note:

- Mr. Wint was specifically requested by the investigator in her May 28, 2019 letter to provide more detail about the racial slur incident.

- In his July 12, 2019 reply, Mr. Wint referred to witnesses but did not name them.

- In the cover letter of October 31, 2019 that transmitted the investigation report, he was asked by the investigator to provide any further any written comments.

- In his November 21, 2019 response at para 9, Mr. Wint criticized the investigator for even asking Suncor for its version of the racial slur incident. He characterized this allegation as "my weakest point" and acknowledged the futility of trying to prove it, saying "I cannot prove hearsay."

- In Mr. Okoye's review brief of June 26, 2020 to the Commissioner, a list of the 15 co-workers who did not receive the letter was attached, but no names of witnesses to the racial slur were provided. As Mr. Cascadden pointed out in the hearing, it is incongruous that Mr. Wint is prepared to give up the names of the 15 to testify against their employer but not the names of the other witnesses.

[56] I recount the foregoing from the record to make two points. First, the whole allegation of the racial slur even as acknowledged by Mr. Wint is tenuous. Second, in ***Wang*** the missing information cited by Eamon J was easily accessible from the employer. Here, evidence which would come from unknown persons who supposedly heard a remark spoken by someone in 2011, is not so accessible. Even if I had the power to direct that a tribunal be empaneled (as Mr. Wint's counsel asked that I do), this would not be a reason for doing so.

Conclusion re *Wang*

[57] The main difference between ***Wang*** and this case is that in ***Wang*** the complainant's key point was left unaddressed by the Commissioner. That key point went to the core logic of the Commissioner's decision in ***Wang***: if the complainant's geologist position was eliminated because of job redundancy (as the Commissioner concluded), then why was he replaced in his unit by another geologist? In the present case, there is no big question left unanswered undermining the logic of the decision. The Commissioner felt that the non-discriminatory explanation satisfactorily answered the allegation.

J. Institutionalized or Systemic Discretion

[58] Mr. Wint's counsel argued the Commissioner failed to recognize that Mr. Wint, as a result of institutionalized or systemic discrimination, could sustain a discriminatory outcome from a seemingly routine exercise. However, I note that the Commissioner expressly acknowledges such a possibility in para 20 of the decision but explains in the same paragraph that it is not supported on the evidence.

[59] All 19 employees receiving the letter had the same relevant characteristics: they were in safety sensitive positions and had not, as discovered by audit, previously received the letter. Even if it could be shown that Mr. Coetzee has racist tendencies, it is difficult to see why the Commissioner should have reason to think that Mr. Wint should not have received the letter. I accept that Mr. Wint took offence upon receiving the letter, but as the Commissioner found at para 20 of the decision, the issuance of the letter had no effect on Mr. Wint's employment. The Commissioner accepted that Suncor had sent the letter to Mr. Wint for a non-discriminatory purpose, namely, to fulfill a requirement in its workplace safety policy.

[60] In summary on the whole of Mr. Wint's argument regarding lack of contextualized analysis, I cannot say that the Commissioner's analysis failed to consider the appropriate context and is therefore unreasonable.

K. Racial Profiling

[61] Mr. Wint argues here that he was investigated for the safety violation because he is black, or that his race was at least a factor. Suncor says it was because Mr. Wint's initials are 'KW', the initials that appear in 2 of 3 places as the responsible electrician in the contemporaneous record (the HEI form) of the incident are 'KW' and that Mr. Wint is the only person on Mr. Coetzee's team with those initials.

[62] There is not much information in the record about what actually happened during the investigation. Mr. Wint says he was informed of the investigation on July 16, 2014, by his supervisor. There is no further information about the tenor or content of that interaction. Mr. Wint's next involvement appears to be the conversation he had with the union safety officer the next day when he told her to keep quiet about the fact he was not on shift when the incident occurred. He found out that on July 22, 2014, the union representative told Mr. Coetzee that another employee, not Mr. Wint, was now being investigated for the incident. As of then, Mr. Wint was exonerated. Mr. Wint reported that on July 24, 2014, Mr. Coetzee announced at a team meeting that there had been a "misunderstanding" concerning the incident and reminded his team that safety was everyone's responsibility.

[63] I looked at the two sets of initials on the HEI form. They look like 'KW'.

[64] This is a case of mistaken identity. Mr. Wint makes the point that Mr. Coetzee should have made the effort to consult other records and exclude Mr. Wint at the outset. It is natural and reasonable to look at the contemporaneous record of the incident (the HEI form) to see who was involved as represented by the initials on the document, and to form a belief from looking at those initials. As the investigation proceeds, that initial belief may change because of other credible evidence coming to light. That is what happened. The belief that Mr. Wint was responsible was refuted immediately upon the correct information being revealed.

[65] This is not a case of racial profiling, as Mr. Wint suggests, analogous to ***Peel Law Association*** where two black lawyers and a black articling student were asked to produce to ID to justify their presence in the association's lawyers' lounge. In that case, the respondent had no credible explanation to justify the differential treatment. The person questioning the complainants said she knew everyone else in the lounge to be a lawyer. That explanation turned out to be demonstrably false. The Court of Appeal restored a decision of the human rights tribunal that found the complainants had been discriminated against because of race and colour. In so doing, the court said at para 105: "A false or shifting explanation for the impugned conduct can be used to support the inference of discrimination."

[66] Mr. Wint's counsel also relied on this similar passage from ***Park v University of Ontario Institute of Technology***, 2017 HRTO 580 at para 60:

> As noted above, racial profiling occurs when criminal or improper activity is attributed to a person because of his or her race. A feature of racial profiling cases is that the person(s) operating on racial stereotypes offer explanations for their actions towards racialized people that are shown on review to have no substance.

[67] I accept this proposition. However, as the ***Park*** case itself shows, there can be a valid non-discriminatory explanation for singling out a racialized person. What is missing from the quotation above is the rest of para 60 in which the adjudicator accepts the explanation for the incident as valid. Mr. Park complained about being detained, handcuffed and escorted away by

campus security, on account of being Asian. Later, it was confirmed that the reason behind the incident was because the complainant physically resembled another student who had threatened a professor and was under a petty trespass notice. Like this case, ***Park*** involved mistaken identity. (In ***Park***, the complaint was dismissed following a hearing. The hearing was apparently necessitated because of a factual dispute about what actually happened and what was said during the encounter.)

[68] In the present case, there is nothing undermining Suncor's explanation that the initials precipitated the investigation. Once the true identity behind the initials was known, Mr. Wint was in the clear. The Commissioner noted at para 24 that it was beyond the scope of review for him to comment on whether the safety investigation had been conducted competently and, at para 25, recounts how Mr. Wint stated in his complaint that he was content to let the investigation run its course.

[69] Mr. Wint probably should have received an apology for being mistakenly identified as the culprit. However, the Commissioner was not unreasonable in his conclusion that the evidence pointed to the operative inducement for the mistaken identity being the presence of the apparent 'KW' initials, and not racial bias. Nor was it unreasonable for him to conclude that the evidence did not suggest that Mr. Wint's race or colour was a factor in the duration of the investigation.

L. Circumstantial Evidence of Racial Bias and Over-Reliance on Suncor Documentation

[70] Mr. Wint further argues that there is circumstantial evidence of racial motivation behind the incidents that forms a reasonable basis for referral of the complaint to a tribunal. Most of this evidence, or rather the way the Commissioner addressed it, has been discussed earlier in this decision (the 15 co-workers who did not receive a letter, the putative 2011 racial slur, unfair treatment of another black employee) and so I will not go over it again.

[71] In addition, Mr. Wint argues that the Commission's investigatory process favours documentary proof over subjective perception and this only institutionalizes injustice. At paras 24 and 25 of his judicial review brief, Mr. Wint's counsel writes:

> The Commission's weighing of evidence in favour of Suncor, based on Suncor's records, in comparison to Mr. Wint's recollections, perpetuates the power imbalance between a sophisticated employer like Suncor and an employee such as Mr. Wint. It reinforces the proposition that ignoring minority perspectives increases the likeliness that their concerns will never be addressed.
>
> The Commission's excessive emphasis on written or documentary evidence, at the investigation stage, can only be said to benefit the sophisticated employer who maintains records (sometimes statutorily mandated) for its day-to-day operations. The opportunity for an employee such as Mr. Wint to provide their own evidence, via oral testimony, was limited by the Commission and Mr. Wint's circumstances. This preference for documentary evidence, over that of oral evidence, indicates to a vulnerable group of people they must take additional steps to protect themselves from discrimination at the hands of the more powerful employers such as Suncor. Perhaps, Mr. Wint was not able to provide all of his evidence. As so aptly stated in ***Wang***, the question that follows is: "[does] he need to?" The Commission's message seems to be that such vulnerable employees are not worth believing in

> the absence of other corroborative evidence. It discountenances a hearing tribunal's ability to assess credibility and reliability of evidence and witnesses.

[72] The statutory scheme does set out in the *AHRA* does not contemplate that every time there is factual conflict between an employer's documents and a complainant's subjective perceptions, the matter must go to a tribunal hearing. Nor does every factual dispute necessarily require *viva voce* evidence to be resolved. At each stage (investigator, Director, Commissioner), the statutory delegate is given powers to gather and review information, assess that information, and form a conclusion. As discussed in Section C above, the applicable case law establishes the legal standard that the Commissioner must apply before a complaint can be advanced to the next level.

[73] The "does he need to?" comment in ***Wang*** (see paras 41 & 42) relates to the question of why the employer filled Mr. Wang's position with another geologist when the employer justified the termination by saying the position was redundant. Eamon J was pointing out that the question cried out to be answered, and that it was not up to complainant to provide that answer but rather for the AHRC investigator to seek it from the employer.

[74] Here, there is no question crying out to be answered. The reason Mr. Wint received the letter is spelled out by Suncor: he was one of the 19 employees identified through audit who should have, but had not, received that letter. The question that Mr. Wint wanted answered (why did 15 of his co-workers not receive the letter?) was not considered probative. It wouldn't matter that the 15 had not received the letter because they had not been identified in the audit.

[75] With the reasonable basis test required to be met, it is not enough for Mr. Wint to say that Suncor's documents should be discounted, and his subjective perceptions given more weight, and that otherwise he is being silenced by not receiving a *viva voce* hearing. The complaint must still carry enough evidentiary merit to make it through the Commissioner's screening process. As the cases discussed in the section after next show, in doing that screening the Commissioner can and often must evaluate competing versions of the facts. The circumstantial basis was not ignored by the Commissioner, it was just considered too insubstantial to meet the legal test.

M. Retaliation

[76] Mr. Wint says that on October 22, 2015, he was summoned to a meeting with Suncor's HR manager and his union president. This occurred about the time he had filed a complaint with the Alberta Labour Relations Board that the union had violated its duty of fair representation. Mr. Wint had previously filed separate grievances in 2013 and 2014 regarding discrimination and unfair treatment by his employer. His counsel described the meeting as an "ambush". Mr. Wint considered the meeting to be a form of intimidation and to constitute retaliation for the filing of the human rights complaint. Mr. Wint had advised the human rights investigator of the meeting. However, Mr. Wint was disappointed that neither the two grievances nor the meeting were addressed by the investigator in her report.

[77] The Commissioner dealt with the retaliation issue in the same way as the Director, stating that it was now time-barred. Counsel for Mr. Wint submitted that the Commission has a duty to assist and that the investigator should have advised Mr. Wint to file a retaliation complaint, so that it would not have been time-barred.

[78] This is not posed as a ground of review in this application. It is put forward as another example of the system failing Mr. Wint.

[79] There is no information in the record about what happened in the meeting or what was said. Given that, I am not sure what else the investigator or the Commissioner could have done. It is now not my place to comment on the merits of a retaliation complaint that was never brought or, on this record, to assign fault for why it was not brought.

N. A Reasonable Decision

[80] Just because Mr. Wint and Suncor see this matter differently does not mean that referral to a tribunal is warranted. Mr. Okoye cited ***AD v Alberta Health Services***, 2020 AHRC 49 at para 44, quoting the Chief Commissioner who said in cases where information gathered does not "point clearly to the veracity of one account of the facts as opposed to another" the matter should be referred to full hearing. He also cited ***Mysko v Red Deer County***, 2019 AHRC 33 at para where the Chief Commissioner stated that his role on review is not make a finding that discrimination had occurred, but rather to determine whether the complaint provided more than mere assertions. Obviously, there is the "reasonable basis" test that must be met before a referral can be made.

[81] Although not deciding the discrimination case itself, in applying the legal test the Commissioner of necessity must make some modicum of credibility or veracity assessment. The Court of Appeal noted ***Callan v Suncor Inc***, 2006 ABCA 15 at paras 15 & 16 as follows:

> [15] The Respondent argues that while the Chief Commissioner may be permitted to "assess" the evidence, the Chief Commissioner is not entitled to "adjudicate". This is a distinction which is not of assistance in defining the role of the Chief Commissioner. ... If the Chief Commissioner is faced with a complaint that is bristling with issues of credibility and conflicts on the facts, it will in many cases be unreasonable for him not to refer the matter to a human rights panel. However, his decision should be assessed in light of its reasonableness, not based on any perceived distinction between assessing evidence and adjudicating.
>
> [16] If the Chief Commissioner were to consider only the evidence of one party or the other, that might well make the resulting decision unreasonable. On the other hand, mere conflicts in the evidence of the parties, or issues of credibility, do not always require a full hearing. Sometimes in the context of all the evidence, particular areas of conflict may lose their apparent importance ... In the end the standard of review is reasonableness of the ultimate decision, not whether the Chief Commissioner has "adjudicated" or made "findings on credibility".

[82] In ***Economic Development Edmonton v. Wong***, 2005 ABCA 278 at para 16, the Court of Appeal affirmed that:

> The chief commissioner fulfils a screening role. He does not determine whether a complaint is made out. The chief commissioner is called upon to consider the evidence gathered by the investigator in the context of deciding whether there is a reasonable basis in the evidence for proceeding to the next stage. In my opinion, it follows that if the chief

> commissioner is to properly discharge his duty, he must evaluate the quality of the evidence gathered by the investigator.

[83] Further, Grosse J in ***Cunin v Alberta (Human Rights Commission*)**, 2019 ABQB 578 at para 36 instructively observed:

> Mr. Cunin presented a long list of incidents and information that gave rise to his complaint. For its part, Human Services submitted a long list of steps taken to accommodate Mr. Cunin's disability. Mr. Cunin has acknowledged that the employer attempted to accommodate him in a number of ways. However, he argues that Human Services did not go far enough and could have done more. The Chief did not specifically address every incident raised by Mr. Cunin. However, her decision reveals that she understood the nature of his concerns. The law is clear that to be reasonable, her decision does not have to address every piece of evidence, or every argument raised by Mr. Cunin: ***Newfoundland Nurses*** at para 16. The law is also clear that the Chief was entitled to assess competing information where accounts of a particular incident differed: ***Callan*** at paras 14-16. The Chief applied her experience and expertise and found that the complaint did not meet the threshold for moving to a hearing.

[84] It is clear to me from reading his decision that the Commissioner followed the process set out in the legal precedents above. He examined and assessed the veracity of the evidence from both sides. After reviewing the record, he did not find unresolved issues of credibility and factual conflict in this case. Indeed, most of the facts (apart from the racial slur) were agreed to, with only Suncor's (or Mr. Coetzee's) motivation at issue. It is clear that the Commissioner understood the nature of Mr. Wint's concerns. He appreciated Mr. Wint's subjective views but did not feel that there was a reasonable basis in the evidence to support those views such that a hearing was required. With regard to both incidents, it is fair to say that the Commissioner concluded that the information gathered clearly pointed to the veracity of Suncor's account of the facts. He felt that the allegations of racial bias behind both incidents amounted to no more than assertion.

[85] Unlike in ***Wang,*** the logic of the Commissioner's acceptance of the non-discriminatory explanations was not undermined because of a failure to address the complainant's key point. Unlike in ***Peel Law Association,*** the non-discriminatory explanation offered in both incidents stood up to scrutiny and there is insufficient evidence in the record to permit an inference of discrimination. These findings are well within the "wide latitude in performing the screening function" afforded to the Commissioner in para 9 of ***Mis*.**

[86] In effect, Mr. Wint disagrees with the Commissioner's assessment of the evidence. He essentially asks the court to step in, engage in its own evidentiary analysis and come to a different conclusion. That is not the court's role on judicial review: ***Vavilov*** at paras 75 & 83; see also ***Canada (Attorney General) v Ennis***, 2021 FCA 95 at paras 49-51.

O. Result

[87] As stated, in the reasonableness analysis, the reviewing court assesses whether the decision shows an internally coherent and rational chain of analysis, which is evident in the reasons themselves or which can be inferred from the record, and is justified in light of the law,

the facts and the constraints imposed. In my view, the Commissioner's decision here, both in terms of the reasoning and the outcome, bear those necessary qualities so as to be reasonable.

[88] It was suggested to me by Mr. Okoye that the failure to refer this matter to hearing effectively deprives Mr. Wint of his voice and perpetuates a power imbalance that reinforces the systemic and institutional discrimination that he has faced his entire life. I asked Mr. Okoye whether this meant that every complaint advanced by a person of colour must be referred to a tribunal. He said no, recognizing that a legal standard must still be met.

[89] I fully accept that racial disparity is too common throughout Canadian society and in Canadian workplaces. I wish it were not so.

[90] In this case, the Commissioner decided that the legal standard of 'reasonable basis' had not been met. That decision, to me, is reasonable, in the way described in ***Vavilov***. The Commissioner's decision is not an attempt to invalidate any of Mr. Wint's lived experience, or deny (or, for that matter, perpetuate) the discrimination of black people that occurs in Canada in both overt and insidious ways. The decision only concluded that *on this record* there was an insufficient evidentiary basis to move *this complaint* to the next stage.

[91] The application for judicial review is dismissed. If they wish to do so, counsel may contact me within 30 days to address costs.

Heard on the 13th day of January, 2022.
Dated at the City of Edmonton, Alberta this 31st day of January, 2022.

Douglas R. Mah
J.C.Q.B.A.

Appearances:

Appearances:
Nnamelugo (Nnam) Okoye, The Oak Law Firm
for the Applicant, Kameron Wint

Will Cascadden, Gowling WLG (Canada) LLP
for the Respondent, Suncor Energy Inc

Melissa L. Luhtanen
for the Chief Commissioner, Alberta Human Rights Commission