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CASE SUMMARY: CANADIAN HUMAN RIGHTS COMMISSION'S FINDING THAT BANK EMPLOYEE HAD BEEN ACCOMMODATED IS UNREASONABLE

Administrative law – Human rights complaints – Disability – Duty to accommodate; Employment law; Judicial review – Decisions reviewed – Canadian Human Rights Commission – Delay – Standard or review – Reasonableness

[Morand v. Bank of Nova Scotia \(c.o.b. Scotiabank\)](#)

The Applicant, Ms. Morand, applied for judicial review of the Canadian Human Rights Commission's decision dismissing her complaint. The complaint alleged the Respondent (the Bank of Nova Scotia) discriminated against Ms. Morand on the basis of a disability. The Court held the Commission's decision was unreasonable and allowed the application for review.

[2017] F.C.J. No. 57

2017 FC 85

Federal Court, Toronto, Ontario and St. John's, Newfoundland and Labrador

January 24, 2017

E. Heneghan J.

The Applicant, Ms. Cathy Morand, was a part-time customer service representative for the Respondent, Bank of Nova Scotia (the "Bank"). Ms. Morand was hired in 2005. Ms. Morand usually worked afternoon shifts on weekdays. Ms. Morand was on medical leave for several months in 2007. After her return in 2008, the Bank tried to change her shifts to the morning hours. Over the course of several months, Ms. Morand and the Bank had many discussions and communications regarding her limitations and her work hours.

In 2009, Ms. Morand made a complaint to the Canadian Human Rights Commission alleging adverse differential treatment on the basis of a disability (chronic pain syndrome, fibromyalgia, anxiety disorder, and disc disease). The Commission dismissed her complaint in March 2012. The Commission held that Ms. Morand had not provided the Bank with a sufficient opportunity to assess her accommodation requirements because she had not provided objective medical evidence before making her complaint to the Commission.

In April 2012, Ms. Morand applied for judicial review and asked for an order quashing the Commission's decision and an order compelling the Commission to order an inquiry. With her application, Ms. Morand applied for an extension of time to file an Affidavit of documents. Ms. Morand's application for an extension was granted but Ms. Morand was required to file a proposed timeline within 20 days. Ms. Morand did not take any further steps for 2 years when she filed an Affidavit and proposed timetable in December 2014. At the hearing of the judicial review application, the Bank asked for an order dismissing the judicial review application on the basis of undue delay.

The Court first considered the standard of review and determined it was reasonableness.

The Court considered whether the application for review should be dismissed on the basis of undue delay. The Court considered this issue even though the Bank had not filed a formal motion on this point. The Bank argued that it did not file a formal motion based on advice it received from the Court Registry. The Court held that in the circumstances it would be unfair and inequitable to dismiss the application on the basis of undue delay.

The Court considered whether Ms. Morand's complaint was a fixed or a continuing complaint. The Court held that the Commission's investigator should not have limited the period of the complaint to June 2009-October 2009; instead the investigator should have considered the complaint as ongoing. The Court held it was unreasonable for the Commission to find that Ms. Morand had not provided the Bank with sufficient opportunity to consider her request for accommodation.

The Court considered whether it was reasonable for the Commission to accept the investigator's finding that there was insufficient objective medical evidence to support Ms. Morand's request for accommodation. The Court held the investigator erred by not considering the medical evidence submitted after the complaint was filed (because the complaint was ongoing rather than fixed).

The Court held the Commission erred in finding the Bank had accommodated Ms. Morand. The Court reviewed the purpose of the duty to accommodate. The Court held the Bank's only accommodation was to allow her not to work the morning portion of her shifts, while using sick leave to maintain a similar wage. The Court held this was not accommodation and the Bank had not shown it would suffer undue hardship to accommodate Ms. Morand's request to only work afternoon hours.

The Court allowed Ms. Morand's application for judicial review. The Court referred the matter back to the Commission to deal with the complaint in a manner not inconsistent with this decision.

This case was digested by [Scott J. Marcinkow](#) of Harper Grey LLP. If you would like to discuss this case further, please feel free to contact him directly at smarcinkow@harpergrey.com or review his biography at <https://www.harpergrey.com/>.