

**Canadian Human  
Rights Tribunal**



**Tribunal canadien  
des droits de la personne**

**Citation:** 2016 CHRT 8

**Date:** March 10, 2016

**File Nos.:** T2041/4214 & T2042/4314

**Between:**

**Keith Waddle**

**Complainant**

**- and -**

**Canadian Human Rights Commission**

**Commission**

**- and -**

**Canadian Pacific Railway**

**- and -**

**Teamsters Canada Rail Conference**

**Respondents**

**Ruling**

**Member:** Ricki T. Johnston

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[1] This is a motion by the complainant, Mr. Keith Waddle (“Complainant”) to amend his Statement of Particulars (“SOP”) to include allegations related to a claim of discrimination on the ground of family status (the “Motion”). Each of the respondents, Canadian Pacific Railway (CPR) and Teamsters Canada Rail Conference (TCRC), object to the Motion. The Canadian Human Rights Commission (“CHRC”) has taken no position.

## **I. History of the Complaint**

[2] The Complainant filed complaints with the CHRC against CPR and TCRC on March 28, 2012. The original complaints did not, on their face, include any allegations related to discrimination based upon family status. Instead, the allegations in the complaints related strictly to an alleged disability. The two complaints were consolidated on referral to the Tribunal as they involved substantially the same issues of fact and law and, are hereinafter referred to as the “Complaints.”

[3] Approximately 17 months after the Complaints were filed, a CHRC investigator contacted CPR and TCRC by letter dated August 28, 2013, and indicated:

I have attached to this letter, an Amended Summary of Complaint form which adds the ground of Family Status to the complaint. This has been done without amending the complaint form as both parties have responded to the allegations brought up by the complainant.

[4] On the same date, an investigator for the CHRC also contacted the Complainant and by way of letter, enclosing the Amended Summary of Complaint Forms and indicating:

I have attached to this letter the amended Summary of Complaint forms which adds the ground of Family Status to the complaints. This has been done without amending the complaint for

[5] At that time, the Summary of Complaint Forms were amended to include family status as a ground of discrimination under section 7 of the *CHRA*. The August 28, 2013 letter addressed to CPR and TCRC stated that the CHRC would not be amending the Complaints as both Respondents had already had an opportunity to respond to the family status allegations in the course of the investigation. TCRC objected in writing to the

addition of family status as a ground of discrimination. There is no evidence before me that the CHRC responded to that objection.

[6] The CHRC's Investigation Report in this matter, issued on May 1, 2014, stated the Complainant did not provide any reasonable grounds to support his allegations of a claim of discrimination based on family status, and so the investigator did not pursue the claim.

[7] The Acting Chief Commissioner of the CHRC referred this matter to the Canadian Human Rights Tribunal ("Tribunal") on July 30, 2014, by way of letter of request indicating that a "copy of the complaint forms is enclosed." Attached to that letter were copies of the two Amended Summary of Complaint Forms, copies of the two original Summary of Complaint Forms, and copies of the Complaints. In each of the two Amended Summary of Complaint Forms, family status was included as a ground of discrimination. The Complaints, as referred to the Tribunal and without consideration of the Amended Summary Complaint Forms, on their face, contain no reference to allegations associated with discrimination based on family status, but only allege discrimination based on disability.

[8] Following referral of this matter to the Tribunal, the Complainant sought representation and on October 7, 2014, the Complainant's counsel was provided with the CHRC's disclosure, including the Amended Summary of Complaint Forms. Despite the substance of the Amended Summary of Complaint Forms, when Complainant's counsel filed the SOP on October 30, 2014, no reference was made to discrimination based on family status. The Complainant's position is that he understood prior to referral of the matter to the Tribunal, based on representations made to him by the CHRC, that the family status ground had been rejected due to a limitation period. As a result of this understanding, he allegedly told his counsel not to pursue it in the SOP.

[9] Following the filing of the Complainant's SOP, CPR and the TCRC then filed their SOPs, and the matter proceeded through disclosure and to the first day of the hearing, without any of the Complainant, CPR or TCRC making reference before the Tribunal to allegations of discrimination based on family status.

[10] The hearing into this matter began November 16, 2015. At the initiation of the hearing, the presiding Registry Officer read into the record the Amended Summary of Complaint Forms. They included reference to both disability and family status as alleged grounds of discrimination. At that time it became apparent counsel for each of the Complainant, CPR and TCRC had understood that the matter was proceeding to a hearing based on disability as the sole alleged ground of discrimination. CPR and TCRC objected to any evidence being led with regard to the family status discrimination claim. The CHRC did not appear at the hearing and no submissions were made on its behalf.

[11] Complainant's counsel confirmed at that stage of the hearing that he had not been aware that family status had been included in the Amended Summary of Complaint Form and had drafted and filed the SOP considering only disability. Following a pause in the proceedings during which he was able to confer with his client, Complainant's counsel requested an adjournment of the hearing to proceed with an application to amend the SOP to deal with family status allegations. I briefly delayed the adjournment request to allow for the hearing of some previously scheduled evidence.

[12] After a brief continuation of the hearing, it was adjourned at the request of the Complainant, and on consent of the Respondents, as a result of an unrelated matter. Following that adjournment, the Complainant continued to be represented by counsel for a short period of time. Subsequently, he advised he was no longer represented by counsel and was moving ahead with a motion to amend his SOP to deal with any outstanding matters, including the family status allegations.

[13] In the Motion filed December 26, 2015, the Complainant confirmed he was seeking an amendment to his SOP to include family status. He recounted the process of filing his complaints before the CHRC and of the consideration of the family status ground at the CHRC stage, but did not set out the amendment he was seeking or any detail regarding the family status allegation. The Complainant was directed by this Tribunal to provide further detail of his family status claim. He did so on February 4, 2016, by way of an addendum to the Motion (the "Addendum").

## II. The Family Status Allegations

[14] The original Complaints in this matter allege discrimination based on disability as a result of CPR and TCRC, or both of them, having failed to adequately accommodate the Complainant's alleged disability over the time period from July 2011 to February 7, 2012. The Complainant states in the original SOP that by February 7, 2012, he had been fully accommodated.

[15] The substance of the family status allegations in the Addendum are, in essence, that during a process of arriving at an accommodation for the Complainant's alleged disability, CPR or TCRC, or both of them, did not properly disclose to others within their organization that the Complainant had family obligations in Lethbridge, Alberta, where he was then residing and working. The discrimination based on family status is alleged to have occurred between July 2011 and April 30, 2012.

## III. Complainant's Position

[16] The Complainant argues that the family status allegations appropriately form part of his Complaint and that there would be no prejudice to the other parties in allowing his motion to amend his SOP.

[17] The Tribunal has the authority to grant amendments in order to determine "...the real questions in controversy between the parties," if granting the amendments would "...serve the interests of justice" (*Candere! Ltd. v. Canada* 1993 CanLII 2990 (FCA), ("*Candere!*"), cited in *Canada (A.G.) v. Parent*, 2006 FC 1313 at para. 30 ("*Parent*"); *Tabor v. Millbrook First Nation* 2013 CHRT 9 ("*Tabor*") at para. 4. While I acknowledge that the preceding authorities were discussing amendments to the complaint itself, based on the same reasoning, and for the same purposes, I find that the SOP that particularizes those complaints is subject to the same flexible amendment process.

#### IV. The Respondents' Positions

[18] The Respondents each provided their initial arguments opposing the Complainant's application to amend his SOP. After the Complainant was directed to, and did provide further details of his allegations of discrimination based on family status in the Addendum, the Respondents provided further arguments opposing the Complainant's motion. The CHRC, while given notice of the Motion, has declined to make submissions.

[19] TCRC has opposed the Motion on the grounds that:

1. The family status discrimination allegation constitutes a new complaint outside the Tribunal's jurisdiction;
2. The requested amendment does not set out particulars on which the Complainant is relying in support of the family status discrimination allegation with sufficient detail; and
3. The Complainant's Motion fails to identify a *prima facie* case of discrimination based on family status

[20] CPR has opposed to the Motion on the grounds that:

1. The Tribunal lacks jurisdiction to allow the amendment as a result of deficiencies in the Complaints, and as a result of the conclusions and intentions of the CHRC investigator;
2. The requested amendment does not set out particulars on which the Complainant is relying in support of the family status discrimination allegation with sufficient detail;
3. The Complainant's Motion fails to identify a *prima facie* case of discrimination based on family status;
4. The Complainant's Motion, were it to be granted, would constitute an abuse of process; and

5. The Complainant's Motion, were it to be granted, would be unduly prejudicial and would cause procedural inefficiencies.

[21] The arguments of CPR and TCRC will be dealt with jointly.

## **V. Jurisdiction**

[22] The arguments of TCRC and CPR with regard to jurisdiction are distinct. TCRC argued that the Tribunal does not have jurisdiction to amend a complaint after referral from the CHRC to add a substantially new complaint. CPR argued that this Tribunal lacks jurisdiction to grant this amendment for two reasons:

1. The Complaints included no reference to the family status allegations, which are only referenced in the Amended Summary Complaint Form. Without a proper complaint on the ground of family status, the Tribunal has not been granted proper jurisdiction; and
2. The Tribunal lacks jurisdiction to grant the requested amendment because the CHRC did not investigate or intend to refer the family status claim.

### **A. Jurisdiction and the Sufficiency of the Complaint**

[23] CPR argues that the failure of the Complaints to adequately describe the family status claim is a bar to this Tribunal taking jurisdiction over that element of the claim. CPR referred to *Canadian Human Rights Commission v. Bell Canada*, 1981 CanLII 5 (CHRT) ("*Bell*") in which the Tribunal held that it did not have jurisdiction over a matter referred by the CHRC, as the initial complaint was so insufficient, it was considered not to have been filed. The Tribunal held in *Bell* that:

...since a proper complaint has not been filed, this Tribunal has not been appointed in accordance with the Canadian Human Rights Act and accordingly has no jurisdiction to hear the matter before them.

[24] The *Bell* decision elevates to a jurisdictional level problems with the sufficiency of a complaint's particulars. Advancing this reasoning is problematic by today's standards for



two main reasons. The first pertains to the language of former s. 39(1) of the *CHRA*, which refers to the appointment of the Tribunal. This provision, heavily relied upon by the panel in *Bell* to define jurisdiction, no longer exists in the current *CHRA*. Secondly, a significant line of cases from the Superior Courts (*Central Okanagan School District No. 23 v. Renaud*, 1992 CanLII 81 (SCC); *Canada (A.G.) v. Robinson*, 1994 CanLII 3490 (FCA); *Bell Canada v. C.E.P.U.*, 1998 CanLII 8700 (FCA); *CHRC v. C.T.E.A.*, 2002 FCT 776, paras. 30-32; *Canadian Museum of Civilization Corporation v. P.S.A.C. (Local 70396)*, 2006 FC 704, paras. 37-54 (“*Museum*”); *Parent, supra*, paras. 30-44, when read together, make it clear that for a variety of reasons, complaints do not always arrive at the Tribunal in a perfect state. But that does not mean the complaint is fatally flawed; when the issue is raised, it falls to the Tribunal to endeavour to bring the complaint into conformity with the proceedings.

[25] The Tribunal spoke to this dynamic in *Gaucher v. C.A.F.* 2005 CHRT 1, at paras. 11-12 (cited with approval by the Court in *Museum* at para 52):

“[...]It is inevitable that new facts and circumstances will often come to light in the course of the investigation. It follows that complaints are open to refinement. As long as the substance of the original complaint is respected, I do not see why the Complainant and the Commission should not be allowed to clarify and elaborate upon the initial allegations before the matter goes to a hearing.

[26] The scope of the jurisdiction of this Tribunal in a particular case is not defined by the sufficiency of the original Complaints filed by the Complainant, but by the CHRC’s request for an inquiry. Deficiencies in the particulars of a complaint can be dealt with at the CHRC level through amendments, or at the Tribunal, through amendments to the complaint or through the filing of SOPs and the amendment of those SOPs.

[27] The real jurisdictional issue in this motion is: what constituted the ‘Complaints’ that were referred to the Tribunal – the Complaints alone, or the Complaints in conjunction with the Amended Summary of Complaint Forms? The scope of this referral is particularly significant because it is clear that on their face, the Complaints are silent with regard to the family status claim.

[28] The jurisprudence of this Tribunal has not decided conclusively whether the Summary of Complaint form constitutes part of the complaint for the purposes of jurisdiction. The Tribunal has in previous decisions considered the Summary of Complaint form in determining the nature of a complaint, where the complaint form was incomplete (See *Deschambeault v. Cumberland House Cree Nation*, 2008 CHRT 48 (“*Deschambeault*”). However, in *Deschambeault*, the complaint form contained all the factual allegations and the Summary of Complaint form was merely used to identify the discriminatory practice and prohibited ground reflected in those allegations. In this case, it is the Amended Summary of Complaint Forms themselves that contain the only reference to the family status aspect of the claim. The Amended Summary of Complaint Forms do not merely clarify the allegations in the Complaints. Instead, for the Tribunal to find it has jurisdiction, it would have to conclude that the Summary of Complaint Forms constitute an essential element of the Complaints.

[29] It would have been very helpful on this issue to have some form of submission from the CHRC as to the purpose of the Summary of Complaint form, and its relationship generally to the complaint. Unfortunately, no such submission has been provided.

[30] Based on the evidence that is before this Tribunal in this Motion, it is clear the CHRC directly advised the parties that it was not necessary to amend the original complaints, and that only the Summary of Complaint Forms would be amended in order to add the family status ground to the Complaints. Through its own process, the CHRC itself gave weight to the Summary of Complaint Form and its amendments. In addition, in its letter referring the matter to the Tribunal, the Acting Chief Commissioner of the CHRC includes all the Summary of Complaint Forms, the Amended Summary of Complaint Forms and the Complaints. Given that the referring letter itself is essentially silent on the scope of the complaint being referred, one can only conclude from a review of all the records enclosed in support, that the Summary of Complaint can serve as an instrument amending the complaint.

[31] As a result of the particular use of the Amended Summary of Complaint Form by the CHRC in this matter, the Tribunal concludes that it does form part of the Complaints and can help to define the scope of jurisdiction of the Tribunal.

## B. Jurisdiction and the CHRC Investigator's Report

[32] CPR also argues that the Tribunal does not have jurisdiction to hear this matter because the CHRC's investigator did not intend for it to be investigated or referred. It is clear in the investigator's report that she found the Complainant did not provide any reasonable grounds to support his family status claim and so she "did not pursue the family status allegation." However, there are several problems with CPR's argument.

[33] The first is that it is not infrequent that the CHRC refers matters to the CHRT in a manner inconsistent with the conclusions of its investigators. The investigators' reports do not form part of the referral to the CHRT, and do not define the scope of that referral. Of relevance to this point is the decision of the Tribunal in *Gover v. Canada Border Services Agency*, 2013 CHRT 14, in which the Respondents challenged the referral of a portion of the complaint, based on the conclusions in the CHRC investigator's report:

[38] In fact, it is clear that only the letter from the Canadian Human Rights Commission to the Chairperson of the Canadian Human Rights Tribunal conferred legal jurisdiction for the purpose of granting the Tribunal all the powers that the Act gives to the Tribunal under sections 44(3)(a) and 49 of the *Canadian Human Rights Act*.

[34] Secondly, although the investigator's report indicated that the family status claim was not pursued, the CHRC did not direct any further changes to the Complaints. Earlier in the process, the CHRC had used the Amended Summary Complaint forms to add family status to the Complaints. After hearing from its investigator, the CHRC had the opportunity to dismiss the family status portion of the Complaints pursuant to s. 44(3)(b) of the *CHRA*. See e.g. *Lindor v. PWGSC*, 2014 CHRT 13, para. 2; *Emmett v. CRA*, 2013 CHRT 12, para. 40 ("*Emmett*") and *Johnston v. C.A.F.*, 2007 CHRT 42, para. 6. It chose not to do so.

[35] Thirdly, defining the jurisdiction of the Tribunal based on the investigator's report, or based on the correctness of the CHRC's decision in referring, is inconsistent with the jurisprudence of the Tribunal. It is clear that matters can be referred to the CHRT for an inquiry regardless of the conclusions of the CHRC investigator, and that the Tribunal has

no jurisdiction to reconsider the decision to refer in light of the investigation, which jurisdiction rests with the Federal Court.

[36] In *Tweten v. RTL Robinson Enterprises Ltd.*, 2004 CHRT 8, the Tribunal considered its jurisdiction in a similar referral situation:

[29] In another vein, the fact that the complaint was investigated by three different investigators on behalf of the Commission over a period of two years following the filing of the complaint, that the last recommended that the matter not proceed to the Tribunal and that the Commission nevertheless referred the complaint to the Tribunal are all matters that should have been part of a judicial review of the Commission's decision to refer the complaint to the Tribunal.

[30] In the case at bar, the record shows that the Respondent did not seek judicial review of the Commission's decision to refer Mr. Tweten's complaint to the Tribunal. As stated previously, the Tribunal has no jurisdiction to review that decision.

[37] Accordingly, if CPR or TCRC disagreed with the scope of the matter referred in the present case, whether as a result of the investigator's conclusions or otherwise, their recourse was by way of judicial review to the Federal Court.

### **C. Conclusions Re: Jurisdiction**

[38] The jurisdiction of this Tribunal in this matter is defined by the scope of the referral from the CHRC, i.e. the request to institute an inquiry. That referral included the entirety of the Complaints which, on the unique and particular facts of this case, consist of the Amended Summary of Complaint Forms and the Complaints. The Tribunal therefore has jurisdiction to deal with both the grounds of family status and disability, and jurisdiction to grant this Motion, should it be appropriate to do so.

### **VI. Insufficient Particularization of the Allegations Based on Family Status**

[39] In his initial Motion, the Complainant failed to provide any particulars in support of his allegations regarding discrimination based on family status. After receiving the Motion, each of CPR and TCRC argued that the ground was pled with insufficient particularization

to allow them to prepare for and respond to it at a hearing. Specifically, it was not possible to determine from the Motion what would constitute the amendment to the SOP. Based on my own review of the Motion, I directed that the Complainant file his Addendum. The Complainant did so and in that Addendum he sets out the allegations that form the basis of his claim, including the events, the timing of said events, and the individuals involved.

[40] CPR, in particular, has argued that the Motion was insufficient to meet the requirements in Rule 3(1)(c) of the CHRT Rules:

3(1) Motions, including motions for an adjournment, are made by a Notice of Motion, which Notice shall

[...]

(c) set out the relief sought and the grounds relied upon;

[41] As held in *P.S.A.C. v. Government of the Northwest Territories (Minister of Personnel)*, 1999 CanLII 19858 (CHRT), it is necessary that the respective parties provide particulars, the purpose of which is to properly define the issues, to enable parties to prepare for the hearing, to prevent surprises at the hearing, and to facilitate the hearing.

[42] The Complainant's initial motion failed to meet the requirements of Rule 3(1)(c). The Addendum, however, includes sufficient detail of the proposed family status allegations in order for the Respondents to determine the nature of the relief sought, and to respond to the motion.

## **VII. *Prima Facie* Case**

[43] CPR and TCRC have argued both that the allegations as set out in the Motion and the Addendum do not identify an act of discrimination and that they do not show a *prima facie* case of discrimination. These arguments will be dealt with jointly as, in essence, they both go to the question of whether the Complainant's allegations of discrimination as set out in the Addendum have no chance of success, and therefore should be dismissed on a preliminary basis.

[44] CPR notes correctly that the Complainant alleges in the Addendum that "...they didn't make me work out of Calgary but they sure tried to willfully hide the family status issues so I would have to work out of Calgary." The Addendum does not contain allegations regarding failure to accommodate based on family status, and the Complainant admits he was eventually accommodated in Lethbridge, from where his family obligations allegedly stem. Instead, the Addendum includes the more general allegation that the Respondents, or either of them, refused to make reference to the Complainant's family status issue in the process of accommodating the Complainant's disability.

[45] CPR argues that the Complainant must prove a *prima facie* case of discrimination before the duty to accommodate to the point of undue hardship is engaged. While this argument is clearly correct, the question remains whether the Complainant must meet this burden in the context of this Motion, based solely on the Addendum, or whether he should only be required to do so upon a full hearing of this matter.

[46] In deciding whether or not to grant an amendment, "...the Tribunal does not embark on a substantive review of the merits of the proposed amendment" (*Tabor, supra*, at para. 4). In particular, it would be extremely unusual for this Tribunal to dismiss a complaint, prior to the hearing of evidence, on the basis that the allegations did not make out a *prima facie* case. The decisions considering this Tribunal's authority to strike out portions of a Complaint on that basis are informative.

[47] In *Canada (H.R.C.) v. Canada (A.G.)*, 2012 FC 445 ("*FNCFCS*"), aff'd 2013 FCA 75, the Federal Court considered the issue of dismissal on a preliminary basis. The Federal Court confirmed that this Tribunal has the authority to dismiss in whole or in part a complaint on a preliminary basis, prior to conducting a full hearing on the merits. However, the Federal Court was clear that this was a power to be used cautiously:

[140] I do, however, understand the Government to agree with the statement in *Buffet* that the Tribunal's power to dismiss a human rights complaint in advance of a full hearing on the merits should be exercised cautiously, and then only in the clearest of cases: above at para. 39. I also agree with this statement.

[48] In exercising this authority, the Tribunal must be cautious to ensure the parties have had a full and ample opportunity to present evidence and make arguments on the matters at issue (see *Emmett v. Canada Revenue Agency*, 2013 CHRT 12). The Tribunal in *Emmett* noted that:

[14] I agree that the Tribunal can dismiss all or part of a complaint prior to conducting a full hearing on the merits. However, it is important to remember that in the decisions rendered in *FNCFCS et al.* and *Murray*, the Federal Court and the Tribunal clearly expressed the view that in dismissing allegations the process must be fair, respecting the rules of natural justice, and the parties must be given a full and ample opportunity to adduce the evidence necessary to decide the issues raised by the motion.

[49] I would question whether the current matter constitutes one of the clearest of cases in which this Tribunal would exercise its preliminary dismissal authority, particularly as the Complainant is now unrepresented and has not had legal assistance in drafting his submissions on this Motion. To deprive the Complainant of the opportunity to proceed with the family status aspect of his Complaints, based solely on those submissions, prepared without the benefit of counsel, would fall well short of the standard of the clearest of cases.

[50] Further, it would not respect the principles of procedural fairness set out in *FNCFCS* to require the Complainant, in the context of this Motion to amend his SOP, to meet his standard of proof of a *prima facie* case of discrimination, and based solely on the allegations as articulated in the Addendum. Such a requirement would not provide the full and ample opportunity to adduce evidence necessary to decide the issue without a full hearing.

### **VIII. Abuse of Process**

[51] CPR has argued the Complainant's Motion should be dismissed as an abuse of this Tribunal's process. This argument with regard to abuse of process was made prior to receipt of the Addendum. Two of the grounds CPR included in support of its abuse of process argument are related to lack of particularization of the Complainant's allegations

of discrimination based on family status. These, I conclude, have been resolved by the provision of the Addendum.

[52] CPR raises essentially one other ground in support of a finding of an abuse of process. CPR submits that the Addendum raised an entirely new ground of discrimination mid-way through the hearing process which either, in and of itself, constitutes an abuse of process or that, given the prejudice to CPR as a result of this late stage amendment, it would similarly constitute an abuse of process. Given the overlap in these arguments, both arguments regarding abuse of process will be addressed jointly below.

[53] In support of its abuse of process argument, CPR makes reference to the decision of this Tribunal in *Cremasco v. Canada Post Corp.* 2002 CanLii 61852 (CHRT) aff'd. 2004 FC 81, in which the Tribunal considered the concept of abuse of process through re-litigation of matters. However, CPR also makes reference in its arguments generally to the prejudice CPR would experience should the motion be granted. Furthermore, it emphasizes the inappropriateness of allowing this late stage amendment to the SOP after commencement of the hearing and characterizes it as generally constituting an abuse of process.

[54] The Courts have spoken to the general inherent and residual discretion to prevent an abuse of their process. This general concept of abuse of process includes proceedings “unfair to the point that they are contrary to the interest of justice” (*R. v. Power*, 1994 CanLII 126 (SCC), [1994] 1 S.C.R. 601, at p. 616), or proceedings that constitute “oppressive treatment” (*R. v. Conway*, 1989 CanLII 66 (SCC), [1989] 1 S.C.R. 1659, at p. 1667).

[55] McLachlin J. (as she then was) expressed the general principles of abuse of process in this way in *R. v. Scott*, 1990 CanLII 27 (SCC), [1990] 3 S.C.R. 979, at p. 1007:

...abuse of process may be established where: (1) the proceedings are oppressive or vexatious; and, (2) violate the fundamental principles of justice underlying the community's sense of fair play and decency. The concepts of oppressiveness and vexatiousness underline the interest of the accused in a fair trial. But the doctrine evokes as well the public interest in a fair and just trial process and the proper administration of justice.



[56] See also on this point the decision in *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, para. 51 in which the Court noted that: “[r]ather than focus on the motive or status of the parties, the doctrine of abuse of process concentrates on the integrity of the adjudicative process.”

[57] In *Thwaites et al.* 2007 CHRT 54, this Tribunal clarified the doctrine of abuse of process as it relates more specifically to re-litigation of matters:

[9] The doctrine of abuse of process is used to preclude relitigation in circumstances where the strict requirements of issue estoppel have not been met, but where allowing the litigation to proceed would nonetheless violate principles such as judicial economy, consistency, finality and the integrity of the administration of justice: *Toronto (City) v. C.U.P.E., Local 79* 2003 SCC 63 (CanLII), [2003] 3 S.C.R. 77 at para. 37. The application of the doctrine in the context of the Tribunal’s proceedings has been approved by the Federal Court: *Canada (Canadian Human Rights Commission) v. Canada Post Corporation (Cremasco)* 2004 FC 81 (CanLII) at para. 41; aff’d 2004 FCA 363 (CanLII)...

[11] However, the Tribunal should exercise caution in applying doctrines such as abuse of process which result in the dismissal of a complaint without a hearing. Such action deprives the parties of the opportunity to present evidence and make representations regarding the alleged violation of their human rights (*O’Connor v. Canadian National Railway* 2006 CHRT 5 (CanLII), at para. 22). Where it is apparent that the dismissal of a complaint could lead to unfairness or create an injustice, the doctrine should not be applied (Morton, at para. 24; *Toronto v. C.U.P.E.*, para. 52).

[58] My conclusions are threefold. First, this Motion, if granted, while late in the Tribunal’s process, would not involve introduction of a new matter not previously before the CHRC or this Tribunal. The administrative path taken by these Complaints through the CHRC was not as clear as it could have been. However, I have found that the Complaints in this case do include the family status ground. This prohibited ground of discrimination formed part of the Complaints before the CHRC, was considered by the CHRC, and was referred to this Tribunal. It did not simply arise on the first day of the hearing in this matter. The family status allegations arise from the same series of events, being the accommodation process in which the Complainant and the Respondents were engaged, and they relate to a very similar time period. The family status allegations do not involve

an entirely new matter, unrelated to the events already clearly set out in the Complaints and the SOP.

[59] Secondly, the Motion, if granted, would not involve a re-litigation of matters previously decided upon in the hearing before this Tribunal, or elsewhere. While this matter is currently mid-hearing, no evidence has yet been led on the events set out in the Addendum. Under the scheme established by the *CHRA*, all matters are considered by the CHRC before referral to the Tribunal for inquiry. The referral is often preceded by an investigation, though this is not mandatory (see ss. 44(3)(a), 49). CHRC investigators do arrive at conclusions. However as set out earlier in this decision, in this case those conclusions were not adhered to by the CHRC itself when it exercised its discretion, which discretion is subject to judicial review by any of the parties, and requested an inquiry into the entire matter. It cannot constitute an abuse of process to then proceed before the Tribunal with the matters in respect of which the CHRC has requested an inquiry. Instead, it is the standard application of the Tribunal's statutory duty to consider the claims as referred by the CHRC, without imposing limitations based on the conclusions of the CHRC investigator.

[60] Thirdly, it is clear from the procedural history in this matter that some confusion about the scope of the Complaint resulted from the interactions between the parties and the CHRC. While the CHRC has, perhaps unfortunately, not taken a position or provided submissions in this Motion, it is clear that the parties, most particularly the Complainant, were confused about the scope of this Complaint by the time it was referred to the Tribunal. The Complainant came to understand that those portions of his Complaints related to family status were time barred in some way, and the Respondents, upon reviewing the investigator's report (which was shared with the parties after the amendments to the Summary of Complaint Form), could reasonably have concluded that the family status claim would not form part of this matter. Such a conclusion ought to have been re-assessed however, once the Complaints were referred in their entirety, without exception or reservation.

[61] The Complainant did have counsel at the time the SOP was filed, and at the time the Amended Summary of Complaint forms including family status as a ground were

provided in the disclosure package by the CHRC. However, he was self-represented through the CHRC process, and in particular, he was self-represented at the time the CHRC directed that he not amend his Complaints but rather rely on the Amended Summary of Complaint Forms. Furthermore, he no longer has counsel of record to address these issues.

[62] Given the issues arising prior to the referral of the Complaints, it would not constitute an abuse of the process, having regard to the more general principles of fairness of the process and access to justice, to amend the SOP to reflect more clearly the actual scope of the Complaints referred. Instead, allowing the amendment reflects procedural fairness in the face of an unrepresented Complainant, especially having regard to the procedural anomalies during the CHRC process.

#### **IX. Allowing the Amendment Would be Unduly Prejudicial and Cause Procedural Inefficiencies**

[63] CPR argues that if the Motion is granted, it would result in procedural inefficiencies and be unduly prejudicial. In support of this argument, CPR points to the requirement set out in the Tribunal's Rules of Procedure that matters be heard as efficiently and expeditiously as possible.

[64] In this matter, the hearing has been adjourned on two occasions, both at the request of the Complainant. The Respondents have repeatedly stressed their reluctance to have the matter adjourned further. The Respondents are therefore left in the difficult position of either having to proceed to a hearing with little time to deal with the recently articulated allegations regarding family status, or seeking an adjournment further delaying resolution of this matter.

[65] While I appreciate the challenges created by any amendment to the SOP at this late stage, in the circumstances of this case such amendment does not result in procedural inefficiencies or undue prejudice. First, the allegations as set out in the Addendum are brief, and arise from the same series of events as are already at issue in this matter. The time period is very similar and several of the witnesses mentioned in

connection with the family status allegation are already scheduled to give evidence in this matter. Secondly, the Complainant has sought no additional forms of relief, remedial measures or amounts of compensation, and has not added any additional witnesses to his list for the hearing. Thirdly, those portions of the hearing that have already been completed were limited, consisting only of the examination in chief and the cross-examination of the Complainant's expert. These examinations were completed with the knowledge of this outstanding issue. In light of the present ruling, the Tribunal would consider requests to recall the witness to testify in respect of the family status issue, should this prove necessary.

[66] Therefore, I conclude that any prejudice that CPR or either Respondent may experience would not be undue, and can be resolved through further disclosure, further examination of the only witness heard thus far and a brief adjournment, if necessary.

## **X. Conclusion**

[67] For all of the aforementioned reasons, the Tribunal grants the Complainant's Motion to amend his SOP to include only those allegations expressly listed in the Addendum. The Respondents CPR and TCRC are granted leave to make corresponding amendments to their SOPs.

*Signed by*

Ricki T. Johnston  
Tribunal Member

Ottawa, Ontario  
March 10, 2016