

**Canadian Human  
Rights Tribunal**



**Tribunal canadien  
des droits de la personne**

**Citation:** 2017 CHRT 9

**Date:** March 30, 2017

**File No.:** T2162/3616

[ENGLISH TRANSLATION]

**Between:**

**Serge Lafrenière**

**Complainant**

- and -

**Canadian Human Rights Commission**

**Commission**

- and -

**Via Rail Canada Inc.**

**Respondent**

**Ruling**

**Member:** Anie Perrault

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## **I. The complaint and the motion**

[1] On November 30, 2012, Serge Lafrenière (the Complainant) filed a complaint under the *Canadian Human Rights Act* (*CHRA*) against Via Rail Canada Inc. (the Respondent).

[2] On August 10, 2016, after investigation, the Canadian Human Rights Commission (the Commission) referred the complaint filed by the Complainant to the Canadian Human Rights Tribunal (the Tribunal) for inquiry under section 7 of the *CHRA*.

[3] In essence, the Complainant alleges that he was treated differently and that he had unfairly accumulated penalty points in his disciplinary file, all of which led to his dismissal on October 5, 2012.

[4] In his original complaint, the Complainant alleges his sexual orientation as a prohibited ground of discrimination.

[5] The Commission, in its referral to the Tribunal and its Statement of Particulars, raises two grounds of discrimination: sexual orientation and disability.

[6] In the Complainant's Statement of Particulars, only the ground of disability is raised.

[7] On January 17, 2017—a week before the first case management conference call for this case—counsel for the Respondent filed four preliminary motions, including a motion to strike.

[8] During the case management conference call held on January 24, 2017, the Tribunal informed the parties that it would first deal with the motion to strike, once it had received written submissions from all parties.

[9] The Tribunal also asked the Complainant to make the prohibited grounds of discrimination raised in his complaint clear in his written submissions.

## **II. The issues**

[10] The Tribunal has identified the following issues arising from the filing of the Respondent's motion to strike:

- (a) First, in order to narrow the scope of the discussion, what are the prohibited grounds of discrimination to be heard by the Tribunal at the hearing?
- (b) Can the Tribunal dismiss part of the complaint before the start of the hearing?
- (c) Should the Tribunal grant the Respondent's motion to strike and strike paragraphs 4 to 53 of the Complainant's Statement of Particulars, grant part of the motion and strike only part of those paragraphs, or dismiss the motion entirely?

## **III. Analysis**

### **A. What are the prohibited grounds of discrimination to be heard by the Tribunal at the hearing?**

[11] During the case management conference call, the Tribunal made it clear to the parties that there appeared to be a discrepancy between the prohibited grounds of discrimination raised in the original complaint (sexual orientation), the Commission's Statement of Particulars (sexual orientation and disability), and the Complainant's Statement of Particulars (disability).

[12] The Tribunal informed the Complainant that, in his response to the motion to strike, he should clarify which grounds correspond to each of the allegations of discrimination that he intends to raise in this complaint.

[13] The Tribunal requested that the Commission contact the Complainant after the conference call to ensure that he understood the correct procedure regarding grounds of discrimination. The Commission agreed to do so.

[14] Upon reading the written submissions (responses to the motion to strike) submitted by the Complainant and the Commission, it appears that only the ground of disability is now being raised by the Complainant in this case.

[15] The Tribunal therefore concludes that only this ground will be considered at the hearing of this case and that the debate is thus limited to this sole ground of discrimination.

**B. Can the Tribunal dismiss part of the complaint before the start of the hearing?**

[16] The case law in this regard is clear. In the past, the Federal Court and the Tribunal have clearly expressed the view that the Tribunal may dismiss a complaint in whole or in part before holding a full hearing on the merits, provided that the process is fair and respects the rules of natural justice, and that the parties have had full and ample opportunity to present the necessary evidence to determine the issues raised by the motion to strike. (See *Canadian Human Rights Commission v. Canada (Attorney General)*, 2012 FC 445; *Murray v. Immigration and Refugee Board*, 2013 CHRT 2; and *Emmett v. Canada Revenue Agency*, 2013 CHRT 12).

[17] In light of these principles, the Tribunal will now review parts of the Complainant's Statement of Particulars to determine whether they should be struck.

**C. Should the Tribunal grant the Respondent's motion to strike and strike paragraphs 4 to 53 of the Complainant's Statement of Particulars, grant part of the motion and strike only parts of those paragraphs, or dismiss the motion entirely?**

[18] The CHRA and the Tribunal's *Rules of Procedure* do not specifically provide for striking a Statement of Particulars. This concept originates from the civil litigation process before the courts. In *Bailie et al. v. Air Canada and Air Canada Pilots Association*, 2011 CHRT 17, the Tribunal explained it as follows:

[22] Perhaps the Tribunal should consider the legal tests and practices before other human rights tribunals in Canada before resorting to the courts'. There are strong policy reasons why the Tribunal's *Rules of Procedure* contain only ten rules, whereas the *Federal Courts Rules* are over 500 in

number. Notably, there is also a statutory basis as subsection 48.9(1) of the *CHRA* provides: “Proceedings before the Tribunal shall be conducted as informally and expeditiously as the requirements of natural justice and the rules of procedure allow.” (See also Rule 1(1)c).

[19] The Respondent submits that paragraphs 4 to 53 of the Complainant’s Statement of Particulars concern issues that are not within the jurisdiction of the Tribunal and are therefore irrelevant. The Respondent submits that the Complainant is using these paragraphs in an attempt to demonstrate the cause of his disability—an area over which the Tribunal does not have jurisdiction—and that it is not within its jurisdiction to determine the reason for the Complainant’s disability.

[20] The Complainant and the Commission plead that the motion to strike should be rejected.

[21] The Commission argues that the motion is unfounded in fact and in law, and that the Complainant’s complaint is based on his dismissal on a prohibited ground of discrimination—his disability. As a result, [translation] “Mr. Lafrenière’s complete disciplinary record is before the Tribunal.”

[22] The Commission also refers the Tribunal to the reasons for its request that the Tribunal institute an inquiry into the Complainant’s complaint, citing the following excerpt in particular from its decision:

[translation]

[I]f the Respondent knew or should have known that the Complainant, who had no disciplinary record for years but who suddenly accumulated several penalty points, had no mental disability for which he needed accommodation.

[23] The Commission explains in paragraph 17 of its response to the motion that [translation] “the Commission specifically asked the Tribunal to look into Mr. Lafrenière’s dismissal and his disciplinary record.” It is important to note that the Chairperson of the Tribunal did not receive a copy of the Commission’s reasons with its request to institute an inquiry. The scope of the referral is determined by the letter the Commission files with the Chairperson of the Tribunal along with a copy of the complaint; it is this letter that initiates

the Tribunal inquiry process (see *Bentley v. Air Canada and the Air Canada Pilots Association*, 2016 CHRT 17, paragraph 4). The request to institute an inquiry dated August 22, 2016, referred the whole complaint to the Tribunal, which could include the issue of the Complainant's disciplinary record. In any case, the Commission's reasons in its response to the motion to strike clarify one of the main reasons for the request to initiate an inquiry.

[24] The Complainant alleges in paragraph 18 of his representations on the motion, and not in his Statement of Particulars, [translation] "... [that] there is written evidence of the Complainant's disability dating back to November 2011, and even earlier."

[25] At the beginning of his representations on the motion, the Complainant also confirms in paragraph (d) that he had a mental disability that the Respondent should have been aware of because he disclosed it several times in the year preceding his dismissal [my emphasis]. Moreover, he claims in paragraph (e) that the Respondent intentionally refused to take his disability into account.

[26] At paragraph 19 of his Statement of Particulars, the Complainant states that his last year of employment with the Respondent corresponds to the period when he had a mental disability. If one accepts that the Respondent dismissed him on October 5, 2012, according to paragraph 74 of his Statement, this means that he is claiming to have had a disability from October 6, 2011.

[27] In light of the above, I must categorize the paragraphs of the Complainant's Statement of Particulars covered by the motion in the following manner:

- a. First, the paragraphs dealing with the alleged causes of his disability and in which the Complainant attempts to establish a causal link between the Respondent's actions and the Complainant's disability, or dealing with an incident that occurred at work that does not seem to be related to the alleged disability (staffing April 2011) (paragraphs 4 to 9; paragraphs 10 to 18 and 39 to 53); and
- b. Second, the other paragraphs (19 to 26 and 27 to 38), which deal with an incident or with disciplinary action or the accumulation of disciplinary action in his record

during his last year of employment with the Respondent, during the period of his alleged disability (from October 6, 2011 to October 5, 2012).

**(i) Paragraphs dealing with the alleged causes of the Complainant's disability or with an incident at work that does not seem to be related to his alleged disability**

[28] First, paragraphs 4 to 9 refer to a job application dated April 2011, which does not seem to have led to disciplinary action or occurred during the period of the Complainant's alleged disability. The relevance of these allegations is therefore questionable.

[29] An inquiry into the allegations in paragraphs 4 to 9, which would require a hearing of the evidence to find the Respondent responsible and reply evidence from the Respondent to defend itself, would not help in disposing of the issue before the Tribunal. If the Complainant wishes to testify about these allegations to provide [translation] "context" and if this helps him tell his story, that is his choice, but the Respondent should not feel obliged to respond to or to rebut each of his allegations to avoid being found responsible by the Tribunal.

[30] As for the paragraphs dealing with the alleged causes of the Complainant's disability, the Tribunal does not believe there to be a need to establish a causal link between the Respondent's alleged actions and the Complainant's disability, unless these actions can be characterized as discriminatory practices within the meaning of the *CHRA*, which does not seem to be the case based on the Tribunal's reading of the Complainant's Statement of Particulars.

[31] What is relevant for the Tribunal is whether a prohibited ground of discrimination under the *CHRA*, in this case, disability, was a factor in the decisions (disciplinary action and dismissal) made by the Respondent during the alleged period of disability.

[32] In other words, were the actions taken in regard to the Complainant during his alleged period of disability discriminatory because they did not take his disability into account? Anything that concerns the cause of the disability, as described by the Complainant, is irrelevant.



[33] Consequently, the Complainant does not have to establish the cause of his disability before the Tribunal. He must, however, demonstrate that he had a disability when the impugned actions (disciplinary action and dismissal) were taken.

[34] As indicated in paragraph 18 of this decision, the motion to strike adds a formality to the Tribunal's proceedings that is more appropriate in a civil litigation context. The Tribunal therefore does not object to the Complainant providing context for his complaint at the hearing by referring to paragraphs 10 to 18 and 39 to 53 of his Statement of Particulars and thus describing the work environment in which the impugned actions were taken, but he may not do so to establish and prove the Respondent's responsibility and thus require the Respondent to provide reply evidence.

[35] The Tribunal adds, however, that part of paragraph 18 of the Complainant's Statement of Particulars is relevant: [translation] "I had to take a great deal of medication, and my doctor (Doctor Ben Haddad) ordered me not to work for a total of three months (from March 1, 2012, to June 7, 2012)."

#### **(ii) Other paragraphs**

[36] Let us move on to the paragraphs dealing with an incident or disciplinary action and the accumulation of disciplinary action in the Complainant's disciplinary record during his last year of employment with the Respondent, during the period of his alleged disability (from October 6, 2011 to October 5, 2012).

[37] Paragraphs 19 to 26 seem to describe a disciplinary incident that occurred in November 2011, which falls in the alleged period of disability. These allegations therefore seem relevant.

[38] Paragraphs 27 to 38 refer to a physical incident that led to disciplinary action, but that occurred before the period of alleged disability, so, before October 6, 2011. The relevance of these allegations is therefore debatable. However, the Tribunal is reluctant to apply a very strict interpretation of the alleged period of disability in this case.

[39] In fact, paragraphs 27 to 38 refer to incidents that occurred on September 19 and 24, 2011, that is, only a few days before the alleged period of disability, which, according to the Complainant's Statement of Particulars, began on October 6, 2011. The Tribunal is reluctant to call into question the relevance of these paragraphs. At issue is not a physical injury, like a broken ankle, but a mental disability for which an exact date is much harder to establish.

[40] This is why the Tribunal, respective of the spirit of the *Rules of Procedure*, which are much more flexible than the rules in civil litigation, finds that the allegations in these paragraphs are also relevant.

#### **IV. Conclusion**

[41] The Tribunal, aware of how important it is for the Complainant to properly establish the context of his allegations, but recognizing the lack of a causal link between a number of these allegations and a prohibited ground of discrimination, and in order to inquire into the complaint expeditiously, dismisses the Respondent's motion to strike, but concludes as follows:

- a. Paragraphs 4 to 9 of the Complainant's Statement of Particulars, which refer to a job application that did not have disciplinary consequences and that was made before the alleged period of disability, may be referred to at the hearing solely for context should the Complainant so wish, but not in order to establish the Respondent's responsibility;
- b. Paragraphs 19 to 26 and 27 to 38, which concern disciplinary action taken during or close to the alleged period of disability, are relevant and will be heard by the Tribunal; the Complainant will have to establish them, and the Respondent will have to provide reply evidence;
- c. Paragraphs 10 to 18 and 39 to 53, intended to establish a causal link between the Respondent's alleged actions and the Complainant's disability may be used by the

Complainant should he so wish, solely to provide context but not to establish the Respondent's responsibility; and

- d. The following portion of paragraph 18 of the Complainant's Statement of Particulars is relevant and will be heard by the Tribunal: [translation] "I had to take a great deal of medication, and my doctor (Doctor Ben Haddad) ordered me not to work for a total of three months (from March 1, 2012 to June 7, 2012)." The Complainant will have to establish this, and the Respondent, provide reply evidence.

## **V. Further observations**

[42] The Tribunal wishes to remind the parties that the documents related to their respective Statement of Particulars, or the Statement of Particulars of any other party involved, must all be disclosed (rule 6 of the Tribunal's *Rules of Procedure*). The *Rules of Procedure* provide for ongoing disclosure of such documents (rule 6(5)). However, if the documents in question raise new facts that were not raised in the parties' respective Statement of Particulars, a motion to amend the Statement of Particulars must first be filed with the Tribunal.

[43] The Tribunal received an email from the Complainant on the evening of March 21, 2017, at 7:21 p.m., after having received all parties' written submissions on the motion to strike and after having begun drafting this decision. In this email, the Complainant states for the first time, and contrary to his original Statement of Particulars, that he has had a disability since December 9, 2010. The Tribunal needs to know with certainty as of when the Complainant alleges having a disability. If he deviates from his original Statement of Particulars, the Complainant must officially apply for leave from the Tribunal to amend it, before disclosing to the other parties the documents that are relevant to this amendment. If the Complainant files a motion to amend his Statement of Particulars, the other parties will then have an opportunity to submit their positions in writing, thus respecting the principles of natural justice and procedural fairness.

[44] Such a motion to amend, if granted, could affect the Tribunal's decision on this motion to strike. The Tribunal reserves jurisdiction on the issues raised by this motion in the event of a motion to amend the Complainant's Statement of Particulars.

*Signed by*

Anie Perrault  
Tribunal Member

Ottawa, Ontario  
March 30, 2017

**Canadian Human Rights Tribunal**

**Parties of Record**

**Tribunal File:** T2162/3616

**Style of Cause:** Serge Lafrenière v. Via Rail Canada Inc.

**Decision of the Tribunal Dated:** March 30, 2017

**Motion dealt with in writing without appearance of the parties**

**Written submissions:**

Serge Lafrenière, for himself

Daniel Poulin, counsel for the Canadian Human Rights Commission

Cristina Toteda, counsel for the Respondent