Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2017 CHRT 6
Date: March 29, 2017
File No.: T1999/7913

Between:

Donna Casler

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Canadian National Railway

Respondent

Ruling

Member: J. Dena Bryan

Outline

I. Motion to determine scope/amend complaint

[1] Ms. Donna Casler alleges Canadian National Railway ("CN") discriminated against her in employment, on the grounds of disability and sex, pursuant to sections 7 and 10 of the *Canadian Human Rights Act* ("the *Act*"). In sum, she claims CN treated her in an adverse differential manner, failed to accommodate her disability and employed discriminatory policies and/or practices.

[2] When Ms. Casler filed her complaint with the Commission on September 22, 2004, she had been off work since August 2000, which according to her was as a result of CN's failure to accommodate her disability. By the time the complaint was referred to this Tribunal on February 28, 2014, CN had terminated Ms. Casler's employment on September 6, 2006. Ms. Casler claims her termination is the end result of CN's failure to accommodate her disability as detailed in her original complaint. Therefore, she has brought the present motion to include her termination and the facts leading up to her termination, including some facts prior to August 2000, within the scope of the Tribunal's inquiry into her complaint. Alternatively, Ms. Casler moves to amend her complaint to add these details.

[3] CN claims the complaint referred to the Tribunal is limited to the period of August 25, 2000 to September 22, 2004. In its view, Ms. Casler should not be allowed to amend her complaint to include matters outside of this referral period. According to CN, to do so would prejudice its case.

[4] The Commission has limited its participation in this matter to Case Management Conference Calls ("CMCCs") and has not made submissions on this interim motion.

[5] For the reasons that follow, I find the Commission's referral of Ms. Casler's complaint is not limited to the period of August 25, 2000 to September 22, 2004. The allegations Ms. Casler raises before and after this period, including her termination, properly fall within the scope of her complaint.

II. Issues

[6] Upon review and consideration of the parties' submissions, I have identified the issues to be determined in this ruling as follows:

A. What is the Tribunal's ability to determine scope/amendments of the complaint?

B. Is there a temporal limit or defined scope to the referral of Ms. Casler's complaint to the Tribunal?

C. Do events pre August 25, 2000 and post September 22, 2004 fall within the scope of Ms. Casler's complaint?

D. Will CN suffer prejudice if events pre August 25, 2000 and post September 22, 2004 fall within the scope of Ms. Casler's complaint?

III. Analysis

A. What is the Tribunal's ability to determine scope/amendments of a complaint?

[7] The Tribunal's role is to inquire into complaints referred to it by the Commission (see ss. 40, 44, 49 of the *Act*). Therefore, the scope of a complaint and whether to allow an amendment thereto is determined by examining the original complaint and the Commission's request for an inquiry, which generally includes a letter from the Chief Commissioner, the original complaint and a Summary of Complaint form prepared by the Commission. In performing this examination, the Tribunal is ensuring that there is a link to the allegations giving rise to the original complaint and that it is not bypassing the Commission's referral mandate under the *Act*. In other words, a determination of scope or amendment cannot introduce a substantially new complaint that was not considered by the Commission (see *Canada (Attorney General) v. Parent*, 2006 FC 1313 at para. 30 ("*Parent*"); *Kanagasabapathy v. Air Canada*, 2013 CHRT 7 at paras. 29-30 ("*Kanagasabapathy*"); and, *Gaucher v. Canadian Armed Forces*, 2005 CHRT 1 at para. 9 ["*Gaucher*"]).

[8] That said, it must be kept in mind that filing a complaint is the first step in the complaint resolution process under the *Act*. It raises a set of approximate facts that call for

further investigation by the Commission. As the Tribunal stated in *Gaucher*, at paragraph 11, "[i]t 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".

[9] Indeed, the original complaint does not serve the purposes of a pleading in the Tribunal's adjudicative process leading up to a hearing. Rather, it is the Statements of Particulars filed with the Tribunal that set the more precise terms of the hearing. As long as the substance of the original complaint is respected, the complainant and Commission can clarify and elaborate upon the initial allegations before the matter goes to hearing (see *Gaucher* at para. 10).

[10] The role of the Tribunal in a motion such as the present is to consider the documentation and submissions regarding the scope or amendment sought; determine what the substance of the complaint is; and, decide whether the definition of scope or the amendment sought is connected to the substantive complaint and required to enable the Tribunal to inquire into the real issues in dispute. In doing so, it is not the Tribunal's role to reconsider the Commission's investigation or its decision to refer a complaint in light of the investigation. That jurisdiction rests exclusively with the Federal Court (see *Waddle v. Canadian Pacific Railway and Teamsters Canada Rail Conference*, 2016 CHRT 8 at paras. 32-38).

[11] As with all its actions, in making determinations as to scope and amendment the Tribunal must respect the principles of natural justice and ensure that each party has a full and ample opportunity to present their case (see ss. 48.9(1) and 50(1) of the *Act*). If an amendment results in real and significant prejudice to a party, and that prejudice cannot be cured, the amendment should not be allowed (see *Cook v. Onion Lake First Nation*, 2002 CanLII 61849 (CHRT) at para. 20).

B. Is there a temporal limit or defined scope to the referral of Ms. Casler's complaint to the Tribunal?

[12] According to CN, the Commission's referral of Ms. Casler's complaint to the Tribunal included a temporal limit on its scope. That is, the Commission limited the scope

of the referral to allegations arising between the time period of August 25, 2000 to September 22, 2004.

[13] CN submits that, after initially screening Ms. Casler's complaint under section 41(1) of the *Act*, the Commission wrote a letter to the parties dated January 6, 2005 indicating that it decided to deal only with those allegations which occurred from August 25, 2000 to September 22, 2004. CN argues that this decision of the Commission was never altered or amended by a subsequent decision of the Commission. Therefore, the only decision of the Commission respecting the time period of the complaint is set out in this January 6, 2005 letter, which has remained determinative and consistently followed throughout the Commission's investigations of the complaint and in its ultimate decision to refer the complaint to the Tribunal.

[14] In my view, there is no temporal limit or defined scope to the complaint as indicated by CN. CN's submissions ignore the series of events and decisions that came after the Commission's January 6, 2005 letter and, more importantly, the actual referral of the complaint to this Tribunal.

[15] Following the Commission's initial investigation, it was recommended that the complaint be dismissed, which recommendation was adopted in a decision of the Commission dated June 17, 2009. Ms. Casler sought judicial review of the Commission's decision and, while unsuccessful at the Federal Court (see *Casler v. Canadian National Railway*, 2011 FC 148 [*Casler 2011*]), the Federal Court of Appeal upheld the appeal and sent the matter back to the Commission for re-investigation (see *Casler v. Canadian National Railway*, 2012 FCA 135 [*Casler 2012*]).

[16] CN refers to excerpts from *Casler 2011* and *Casler 2012* to support its temporal scope argument and to indicate that Ms. Casler did not at any time prior to the present motion raise her termination or events outside the time period of August 25, 2000 to September 22, 2004.

[17] However, the effect of *Casler 2012* was to reject the first Commission investigation and decision. The first investigation and decision not to refer the complaint are irrelevant because the subsequent decision to refer the complaint to the Tribunal was based on a re-

investigation and re-determination by the Commission. *Casler 2011* and *Casler 2012* do not support CN's assertion that there is a temporal limit or scope to the complaint.

[18] Following a re-investigation, the Commission decided to refer Ms. Casler's complaint to the Tribunal on February 28, 2014. The referral documentation forwarded to the Tribunal includes a 4 page Complaint Form signed by Ms. Casler on September 22, 2004. It has not been updated or changed by the Commission or Ms. Casler since that time. Also in the referral documentation is a Complaint Summary, which was prepared by the Commission, with information in boxes such as "file number", "date received", "complainant's name", "respondent's name and address" and "where occurred", all of which is not in issue.

[19] Under the heading "Date of Alleged Conduct" the Complaint Summary states: "October 14, 1998 to July 4, 2000, and August 25, 2000 to September 22, 2004 and ongoing". Under "Relevant Prohibited Grounds" it states: "Disability (Fibromyalgia and Myalgic Encephalomelitis); Sex (female)". Under "Applicable Sections of the CHRA" it states: "7 & 10".

[20] Under "Practices (e.g. termination of employment, harassment, etc.)" it states:

> Employment - Adverse Differential Treatment
>
> - Failure to Accommodate
>
> - Discriminatory Policy and/or Practice

[21] There is also accompanying the Complaint Form and Complaint Summary a letter from the Commission (signed by Mr. David Langtry), dated February 28, 2014, addressed to Susheel Gupta, the Acting Chairperson of the Tribunal at the time. The entire letter reads as follows:

> I am writing to inform you that the Canadian Human Rights Commission has reviewed the complaint (20040537) of Donna Casler against Canadian National Railway.
>
> The Commission has decided, pursuant to paragraph 44(3)(a) of the *Canadian Human Rights Act*, to request that you institute an inquiry into the

> complaint as it is satisfied that, having regard to all the circumstances, an inquiry is warranted.
>
> I would also like to inform you that the Commission had previously decided to deal only with the allegations which occurred from August 25, 2000.
>
> A copy of the complaint form is enclosed. Form I, including complainant and respondent information, will be provided by the Litigation Services Division.
>
> The complainant and respondent are being advised that they will receive further information from the Tribunal regarding the proceedings.

[22] The Complaint Summary does not include "termination" under the "Practices (e.g. termination of employment, harassment, etc.)" and this letter from Mr. Langtry includes that the Commission "previously decided to deal only with the allegations which occurred from August 25, 2000", without explaining the relevance, if any, to the Tribunal.

[23] During a conference call on October 18, 2016, I asked Commission counsel if they had any submissions to make regarding this letter, but none were made at that time and, as mentioned above, the Commission has not made any submissions on this motion.

[24] The Tribunal has held that if the Commission intends to request an inquiry into something less than the entirety of a complaint, this intention must be explicitly stated in the letter of request it sends to the Tribunal Chairperson (see *Kanagasabapathy* at paras. 30-32; and, *Blodgett v. GE-Hitachi Nuclear Energy Canada Inc.*, 2013 CHRT 24 at para. 67).

[25] The sentence in Mr. Langtry's February 28, 2014 letter that "I would also like to inform you that the Commission had previously decided to deal only with the allegations which occurred from August 25, 2000" is an ambiguous statement and is not an explicit limitation or restriction on the scope of the complaint referred to the Tribunal. Therefore, I cannot agree that this sentence has the intent or effect of limiting the Tribunal's inquiry only to events after August 25, 2000. There is also no mention at all of an end date such as September 22, 2004, other than that is the date of the original Complaint Form.

[26] I find that the Commission did not impose any temporal limits on the referral of Ms. Casler's complaint to the Tribunal. That said, the determinative issue on this motion is not

when or on what date the events or allegations occurred but, as mentioned above, whether those events and allegations are connected to the substance of the original complaint.

C. Do events pre August 25, 2000 and post September 22, 2004 fall within the scope of Ms. Casler's complaint?

[27] Ms. Casler submits that her termination on September 6, 2006 and the circumstances giving rise to that termination, as set out in her Statement of Particulars, are inextricably linked to the original complaint she filed and which the Commission referred to the Tribunal. Her original complaint specified that the alleged discrimination was ongoing because, as of the date of the complaint, she had yet to be accommodated by CN. Ms. Casler submits that her ultimate termination is the continuum of CN's ongoing discrimination and failure to accommodate, as alleged in the original complaint.

[28] CN submits there is no reasonable basis to amend the complaint or otherwise include events pre August 25, 2000 and post September 22, 2004 within the scope of Ms. Casler's complaint. According to CN, the factual circumstances arising after September 22, 2004 and culminating in Ms. Casler's termination are distinct from the circumstances arising between 2000 and 2004. Furthermore, CN argues the fact that Ms. Casler used the words "and ongoing" in her complaint do not justify the amendment or enlargement of scope requested. A complaint, by definition, must be clearly defined and cannot include some yet-to-occur future issue. CN also takes issue with Ms. Casler raising arguments and suggesting evidence will be called on matters that occurred prior to August 25, 2000.

[29] As mentioned above, in ruling upon this motion, the Tribunal must assess the submissions of the parties and the referral documentation it received from the Commission to determine if the scope or amendment sought is logically, factually, or causally connected to the substance of the original complaint referred to the Tribunal by the Commission. To determine this motion, I reviewed the parties' Statements of Particulars and submissions on this motion, along with the referral documentation received from the Commission.

[30] The Complaint Form dated September 22, 2004, alleges CN discriminated against Ms. Casler due to her disability and sex by failing to accommodate her disability by offering her suitable work. Ms. Casler asserts she has not worked since August 25, 2000, because CN has not offered her suitable work.

[31] The events pre August 25, 2000 described in Ms. Casler's original complaint and Statement of Particulars provide context to the events leading up to August 25, 2000, including: Ms. Casler's employment history with CN; her diagnosis with fibromyalgia and Myalgic Encephalomyelitis and related sick leave; and, her version of events regarding her attempts to return to work and related requests for accommodation.

[32] With respect to events post September 22, 2004, Ms. Casler's original complaint alleges the failure to accommodate **is ongoing** because, as of the date of her complaint, she had yet been offered a suitable position. Ultimately, she did not go back to work and was terminated in September 2006 by CN. Both parties' Statement of Particulars associate the termination with the ongoing accommodation process.

[33] In all the events described by Ms. Casler, the parties are the same, the employer is the same, the grounds are the same, and the alleged discriminatory practices (i.e., failing to provide suitable employment) are alleged to have the same basis (i.e., failure to accommodate based on disability and sex).

[34] I am satisfied that the events pre August 25, 2000 and post September 22, 2004 are factually and logically connected to the substance of Ms. Casler's original complaint. Subject to the consideration of CN's arguments regarding prejudice below, I conclude that in order to conduct this inquiry into the real issues in controversy, Ms. Casler ought to be able to include her allegations of ongoing discrimination following her complaint dated September 22, 2004, including her termination and all facts leading thereto, whether they occurred before August 25, 2000 or after September 22, 2004.

D. Will CN suffer prejudice if events pre August 25, 2000 and post September 22, 2004 fall within the scope of Ms. Casler's complaint?

[35] CN submits that allowing events pre August 25, 2000 and post September 22, 2004 within the scope of Ms. Casler's complaint would cause evident and inherent prejudice to CN in violation of procedural fairness and natural justice.

[36] CN raises two arguments regarding prejudice: delay and the loss of its opportunity to have the Commission apply section 41(1) of the *Act*.

(i) Delay

[37] According to CN, there is inherent prejudice caused by the delay of almost 10 years in seeking the amendment of the complaint following Ms. Casler's termination. Furthermore, allegations preceding August 25, 2000 occurred over 16 years ago. CN submits that documents and evidence that may have existed in relation to these allegations are or may have been lost. In this regard, it notes the CN employee managing Ms. Casler's accommodation and return to work over the post-September 2004 time period is now deceased. In addition, a CN occupational nurse who also had primary responsibility for managing Ms. Casler's accommodation and return to work is no longer with CN and is unreachable.

[38] As the Supreme Court of Canada stated in *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, at paragraph 101, the mere passage of time, without more, does not warrant a stay of proceedings as an abuse of process at common law and would be tantamount to imposing a judicially created limitation period. There must be proof of significant prejudice, which results from an unacceptable delay, to warrant dismissing the complaint or an aspect of the complaint as requested by CN. In this regard, I also note Justice Mactavish's statement in *Canada (Human Rights Commission) v. Canada (Attorney General)*, 2012 FC 445, at paragraph 140, 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".

[39] In my view, CN has not provided proof of significant prejudice at this stage of the proceedings to warrant dismissing the pre August 25, 2000 and post September 22, 2004 allegations at issue in this motion. While it has taken many years for Ms. Casler's

complaint to get to hearing, as mentioned above, the mere passage of time is not enough to establish prejudice. With respect to the unavailability of witnesses and related documentation, the claim of prejudice is speculative at this stage. CN has not specified what actual prejudice it has suffered as a result of the unavailability of these witnesses and, with regard to the occupational nurse, I note that it is unclear why she is unreachable and will not be available for the hearing. I further note that, despite CN's claim of prejudice, it was able to prepare a detailed Statement of Particulars responding to all aspects of Ms. Casler's complaint, including allegations raised pre August 25, 2000 and post September 22, 2004.

[40] I believe CN's claim of prejudice due to delay is best determined following the hearing of this matter. At that stage, any evidence of the effects of delay will have been proffered before the Tribunal and tested by the parties. Therefore, while I dismiss CN's claim of prejudice due to delay for the purposes of this motion, this does not affect its right to raise the issue again at a later stage of these proceedings.

(ii) Loss of opportunity to have the Commission apply section 41(1) of the *Act*

[41] CN submits that it will be prejudiced because it has lost the opportunity to have Ms. Casler's allegations pre August 25, 2000 and post September 22, 2004 pass through the gate keeping and investigative functions of the Commission pursuant to section 41(1) of the *Act*. Relatedly, it has lost the opportunity to challenge any referral of those allegations by the Commission through judicial review with the Federal Court.

[42] In the same vein, CN argues that if section 41(1)(b) of the *Act* were applied to Ms. Casler's termination allegations, it is clear that the termination related issues would be found to be within the exclusive jurisdiction of a labour arbitrator. Relying on the Supreme Court of Canada's decision in *Canada (House of Commons) v. Vaid*, 2005 SCC 30 ("*Vaid*"), CN argues all matters arising from or in relation to a collective agreement are within the exclusive jurisdiction of a labour arbitrator, empowered under the *Canada Labour Code* in the case of a federally regulated employer like CN. The Tribunal has no

jurisdiction to apply section 41 of the *Act* to the complaint post-referral and, therefore, this prejudice cannot be rectified by the Tribunal and supports the dismissal of this motion.

[43] Any prejudice with respect to the opportunity to have the Commission screen and investigate the allegations at issue in this motion is lost only if there is in fact a new complaint. Having found Ms. Casler's allegations pre August 25, 2000 and post September 22, 2004 not to raise a new complaint, I find there is no prejudice to CN as a result of any lost opportunity to have those allegations go through the Commission process (see *Parent* at paras. 42-44).

[44] With respect to the decision in *Vaid*, it involved an employee who was subject to a specific grievance process under the *Parliamentary Employment and Staff Relations Act* ("*PESRA*"). In the specific circumstances of Mr. Vaid's employment and the allegations surrounding his dismissal, the Supreme Court found his complaint ought to have been considered under the *PESRA* and not the *Act*. I do not read the decision in *Vaid* to stand for the broad proposition advanced by CN that all matters arising from or in relation to a collective agreement are within the exclusive jurisdiction of a labour arbitrator, empowered under the *Canada Labour Code* in the case of a federally regulated employee. Aside from *Vaid*, CN did not advance any jurisprudential, statutory or other authority for this proposition.

[45] Ultimately, the Tribunal's examination of Ms. Casler's allegations will focus on whether her disability or sex was a factor in her termination pursuant to the *Act*. It is not the Tribunal's role to examine the termination broadly in terms of the collective agreement, whether it was wrongful or unjust dismissal, or whether CN was required to provide notice or severance.

IV. Ruling

[46] For the reasons above, I find the Commission's referral of Ms. Casler's complaint is not limited to the period of August 25, 2000 to September 22, 2004. The allegations she raises before and after this period, including her termination, properly fall within the scope of her complaint.

[47] The parties are reminded that this is a pre-hearing ruling. Nothing in this ruling should be interpreted as a determination of any of the matters in dispute. Ms. Casler still has the burden of establishing a *prima facie* case in relation to all her allegations. Further, this ruling is not a determination of the admissibility or weight of any particular evidence. Such argument is reserved for the hearing.

[48] I do not think it is necessary to formally amend the complaint in order for the Tribunal to receive the Statement of Particulars already filed by Ms. Casler and which addresses the allegations covered in this ruling. As mentioned above, the complaint does not serve the purposes of a pleading in the Tribunal's adjudicative process leading up to a hearing. Rather, it is the Statements of Particulars filed with the Tribunal that set the more precise terms of the hearing.

[49] CN may file an amended Statement of Particulars to address anything arising from this ruling and Ms. Casler may reply to those amendments, if any.

Signed by

J. Dena Bryan
Tribunal Member

Ottawa, Ontario
March 29, 2017

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1999/7913

Style of Cause: Donna Casler v. Canadian National Railway

Ruling of the Tribunal Dated: March 29, 2017

Motion dealt with in writing without appearance of parties

Written representations by:

Hugh R. Scher, for the Complainant

Michael Torrance, for the Respondent