Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2017 CHRT 34
Date: October 26, 2017
File No.: T2101/1715

Between:

Tracy Polhill

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Keeseekoowenin First Nation

Respondent

Ruling

Member: Gabriel Gaudreault

I. Background

[1] The Canadian Human Rights Tribunal (the "Tribunal") was convened to hear a motion by Tracy Polhill (the "Complainant") to amend her complaint and initial Statement of Particulars filed in December 2015. Before considering this motion, the Tribunal deems it necessary to provide a brief summary of the background to the aforementioned motion.

[2] On April 28, 2014, the Complainant filed a complaint with the Canadian Human Rights Commission (the "Commission") on the grounds that the Keeseekoowenin First Nation (Respondent, "Nation" or "KFN") had engaged in discriminatory practices based on race or national or ethnic origin, contrary to section 5 of the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6 ("CHRA" or "the Act")

[3] On June 24, 2015, the Commission referred the complaint to the Tribunal for inquiry under section 44(3)(a) of the CHRA. The Commission is fully participating in the hearing.

[4] The Complainant and the Commission filed their respective documentation in December 2015, including their Statements of Particulars. The Respondent, for its part, did not participate at any stage of the proceedings. Between January 24, 2016, and April 6, 2017, the Tribunal sent the Nation 22 items of correspondence with confirmation of receipt. The Nation did not respond to any of them.

[5] That said, the hearing was nevertheless scheduled to be held over a period of four days, from April 25 to April 28, 2017, in Onanole, Manitoba. Without advising the Tribunal or the Registrar of its intentions, the Respondent attended on the first day of the hearing, represented by counsel. Counsel for the Respondent asked the Tribunal for a brief adjournment so that the parties could discuss a possible agreement. If they failed to reach an agreement, counsel would request an adjournment of the hearing to allow the Respondent to file its submissions. The parties informed the Tribunal that the minutes of settlement had been signed but that the settlement had to be approved by the Nation's band council. Considering the representations of the parties, the Tribunal adjourned the hearing.

[6] On May 9, 2017, the Commission formally informed the Tribunal that ultimately, the agreement was not reached. The Tribunal therefore asked the parties to provide it with information on their availability over the coming months so that the hearing could resume as soon as possible. On June 12, 2017, the Complainant sent an email to the parties and the Tribunal, indicating her intention to amend her complaint and her Statement of Particulars of December 2015.

[7] On June 13, 2017, a conference call took place, and the Complainant formally notified the Tribunal of her intention to amend her complaint and Statement of Particulars. The Tribunal therefore reached an agreement with the parties regarding the process to be followed. The Complainant was required to clearly highlight or underline all the amendments or additions to her Statement of Particulars. She was also required to indicate the reasons for requesting these amendments, notably by submitting a simple cover letter. Obviously, the Respondent and the Commission reserved the right to respond to these amendments or additions. On July 24, 2017, the Tribunal received the Complainant's amendments. The Respondent replied on August 10, 2017, and the Commission, on August 11, 2017.

[8] That said, the Tribunal must rule on the Complainant's motion to amend.

II. Positions of the parties

[9] For the purposes of brevity and efficiency, the Tribunal will not repeat each and every one of the arguments submitted by the parties, but will summarize the main arguments as follows.

A. The Complainant

[10] In her amended Statement of Particulars, the Complainant made relatively significant changes to her initial complaint and Statement of Particulars. It is the Tribunal's view that these amendments fall into four categories.

- First, the Complainant alleges three new violations of the CHRA by the Nation, more specifically of sections 6(b), 14 and 14.1 of the CHRA.
    - In her opinion, the resolution which the Band Council adopted against her deprived her of sources of income and forced her to leave the community and her husband's home. She was therefore subjected to adverse differential treatment by the Respondent in the provision of residential accommodation under section 6(b) of the CHRA.
    - With respect to section 14 of the CHRA concerning harassment, the Complainant alleges that she was the subject of many forms of harassment by the Respondent, one of its agents or members of the community affiliated with the Respondent. She attributes the cause of this harassment to the Respondent's actions;
    - Lastly, the Complainant claims that under section 14.1 of the CHRA, the Respondent engaged in acts of retaliation against her, her daughter and her husband, Wes Bone (who will also be a witness at the hearing). In the interest brevity, the Tribunal will not repeat all the details provided by the Complainant. She most notably alleges that:
        - The Respondent intimidated her special needs daughter and engaged in actions intended to have an adverse effect on her finances;
        - The Respondent, one of its agents or members of the community affiliated with the Respondent, intimidated and engaged in acts of retaliation and defamation against her husband via Facebook and email;
        - The Respondent engaged in acts of retaliation against her and her partner in managing a flood in their home's basement, and in managing hay cutting around their home and the sweat lodge fire;

- The Respondent engaged in acts of retaliation by contacting the Royal Canadian Mountain Police (RCMP) about the management of her horses and did so in an effort to cause her prejudice;
- A few days after the hearing, the RCMP went to the Complainant's home to inform her that she was being accused of fraud. She alleges that someone had made false statements about her and attributes responsibility for this situation to the Respondent and its actions.

- Second, she seeks additional relief under section 53 of the CHRA for a number of additional discriminatory practices, most notably $20,000 for each violation of section 14.1 and $20,000 for the violation of section 6(b) of the CHRA. She is also asking for the amount of $20,000 under section 3(1) of the CHRA.

- Third, she alleges a multitude of new facts in support of her complaint. The vast majority of these facts are general in nature and provide a context for the basis of her complaint. These facts are summarized as follows:
  - Details about her daughter's health and financial circumstances;
  - Details about her relationship with Mr. Bone, her husband, their lifestyle and their relationship with the community;
  - Details about Mr. Bone's ex-wife, Dianne Blackbird, and her actions against Ms. Polhill and Mr. Bone's other ex-partners;
  - The adoption of the band council resolution at Ms. Blackbird's request with the assistance of Karen Blackbird and their attempts to disclose the content of the aforementioned resolution to the community;
  - The discriminatory remarks that both of the Blackbirds made publicly against the Complainant.

- Lastly, she made two other changes to her Statement of Particulars concerning new applications for subpoenas and the modification to the summary of Wes Bone's testimony;

- The Complainant asks the Tribunal to subpoena Facebook or one of its departments for the purpose of revealing the true identity of the person who fraudulently opened an account in her husband's name;

- The Complainant asks the Tribunal to subpoena Google (Gmail) or one of its departments for the purpose of revealing the true identity of Brian Sharpe, the person who has been sending emails to her husband subjecting him to intimidation and retaliation;

- The Complainant asks the Tribunal to investigate the identity of the person who made false statements about her daughter to the BC Employment and Assistance Office in Abbotsford, British Columbia, in April 2017;

- With respect to the modifications to Wes Bone's testimony, she adds that the latter will also testify about the band council resolution; Dianne Blackbird, their relationship and her history; the intimidation and retaliation experienced via Facebook and email; the management of hay cutting around their house and the sweat lodge fire; and the traditional methods used to help and support the Complainant;

B. The Respondent

[11] In its response, the Respondent objected to any and all of the amendments, additions or modifications requested by the Complainant. The Tribunal can summarize the Respondent's representations as follows:

- The Respondent alleges that the Complainant did not respect the Tribunal's instructions and requirements, most notably by failing to highlight all the amendments made and particularly by failing to justify their addition;

- The Respondent alleges that the Complainant's statements keep changing over time;

- The Respondent alleges that the Complainant did not provide the list of documents in support of her application and did not forward the documents in her possession;
- With respect to the allegations of retaliation, the Respondent finds that the addition requested by the Complainant is frivolous and fails to meet the applicable legal test;
- The Respondent claims that the Complainant did not provide the Tribunal with solid and tangible evidence that would justify amending the complaint to include acts of retaliation;
- The Respondent argues that there is no nexus between the new facts and the original complaint;
- The Respondent indicates that some of the new facts occurred during the same period as the original complaint. However, the Respondent argues that a complaint of retaliation requires much more than just a coincidence;
- The Respondent is also opposed to the addition of paragraph 6(b) of the CHRA, alleging that it did not provide the Complainant with accommodation and that there is no information in the complaint that would justify such an addition.

C. The Commission

[12] I would first like to mention that the Commission did a good job of providing the Tribunal with a concise response. That said, the Commission's position is divided according to the element in question. Its position can be summarized as follows:

- The Commission states that it is not necessary to amend the Statement of Particulars to request subpoenas or provide a new summary of testimony. It proposes revisiting these elements at a later date;
- With respect to the new violations of the CHRA and the relief being sought, the Commission distances itself from the application submitted by the Complainant and does not request that the proceedings be amended as proposed;

- The Commission informed the Tribunal that it will focus primarily on the elements raised in the initial complaint and more specifically on the actions relating to section 5 of the CHRA;

- With respect to the proposed new facts in the complaint, the Commission does not take any position on the proposed factual additions. It states that these facts are rather related to the factual context of the case. Accordingly, and in the event that the Tribunal decides against authorizing the amendments to the Complainant's Statement of Particulars, the Tribunal could authorize the Complainant to refer to this information during her testimony at the hearing (as authorized in *Serge Lafrenière v. Via Rail Canada Inc*., 2017 CHRT 12);

- The Commission also gave the Tribunal an overview of the legal framework concerning amendments to a complaint, a Statement of Particulars and retaliation;

- The Commission emphasizes that at this stage of the proceedings, the Respondent has still not filed a Statement of Particulars, a list of documents or a list of witnesses. Under these circumstances, the questions surrounding prejudice or fairness do not really come into play, since the Respondent will be given a full and ample opportunity to respond to the allegations;

- The Commission reminds the Tribunal that if it agrees to add the discriminatory practices to the complaint pursuant to paragraph 6(b) and section 14.1 of the CHRA, it should consequently give the Complainant an opportunity to amend the relief sought;

- The Commission also submits that subsection 3(1) of the CHRA sets out the prohibited grounds for discrimination, but does not give rise to relief per se.

III. Applicable law

[13] It is important to remember that the original complaint does not serve the purposes of a pleading (*Casler v. Canadian National Railway*, 2017 CHRT 6 at para. 9 [*Casler*]; see

also *Gaucher v. Canadian Armed Forces*, 2005 CHRT 1 at para. 10 [*Gaucher*]). Moreover, as explained in *Casler*:

> [8] . . . [I]t must be kept in mind that filing a complaint is the first step in the complaint resolution process under the *Act*. . . . 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".

[14] The Tribunal enjoys considerable discretion in terms of hearing the complaint under sections 48.9(1), 48.9(2), 49 and 50 of the CHRA. It has been confirmed repeatedly that the Tribunal has the power to amend the original complaint referred to it by the Commission (*Canada (Attorney General) v. Parent,* 2006 FC 1313 at paras. 30, 41, 43).

[15] The decision in *Canada (Human Rights Commission) v. Canadian Association of Telephone Employees*, 2002 FCT 776, also helps to establish the general principles that guide the Tribunal with regard to applications for amendments:

> [T]he general rule is that an [application for] amendment [filed before the Tribunal] should be allowed at any stage of an action for the purpose of determining the real questions in controversy between the parties, provided, notably, that the allowance would not result in an injustice to the other party not capable of being compensated by an award of costs and that it would serve the interests of justice. (*Canada (Human Rights Commission) v. Canadian Association of Telephone Employees*, 2002 FCT 776 at para. 31, referring to *Canderel Ltd. v. Canada*, 1993 CanLII 2990 (FCA), [1994] 1 F.C. 3 (F.C.A.)).

(see also Attaran v. Immigration, Refugees and Citizenship Canada (formerly Citizenship and Immigration Canada), 2017 CHRT 21 at para. 16 [Attaran]; *Canadian Museum of Civilization Corporation v. P.S.A.C. (Local 70396)*, 2006 FC 704 at paras. 40, 50 [Museum Corporation]; Gaucher at para. 10).

[16] Furthermore, the proposed amendments cannot, by themselves, amount to a brand new complaint that was not initially referred by the Commission (*Museum Corporation* at paras. 40, 50). These amendments must necessarily be linked in fact or law to the original complaint: this is what is referred to as a nexus (see *Blodgett v. GE-Hitachi Nuclear Energy Canada Inc*., 2013 CHRT 24 at paras. 16-17; see also *Tran v. Canada Revenue Agency*, 2010 CHRT 31 at para. 17).

[17] The addition of allegations of retaliation is based on the same guidelines outlined above for the addition of both prohibited grounds of discrimination and discriminatory practices. It has been confirmed repeatedly that it "would be impractical, inefficient and unfair to require individuals to make allegations of reprisals only through the format of separate proceedings" (see for example *Kavanagh v. C.S.C.* (May 31, 1999), T505/2298 (C.H.R.T.); *First Nations Child and Family Caring Society of Canada v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada).* 2012 CHRT 24 at para. 14). The Tribunal should generally authorize an amendment to add an allegation of retaliation unless it is plain and obvious that the allegations in the amendment sought could not possibly succeed (see *Virk v. Bell Canada*, 2004 CHRT 10 at para. 7 [*Virk*]; see also *Palm v. International Longshore and Warehouse Union, Local 500, et al.*, 2015 CHRT 23 at para. 12; *Saviye v. Afroglobal Network Inc. and Michael Daramola*, 2016 CHRT 18 at para. 15 [*Saviye*]). The Tribunal must also ensure that sufficient notice is given to the Respondent so that it is not prejudiced and can properly defend itself (see for example *Virk*, cited above at para. 8; see also *Saviye*, cited above at para. 17).

[18] Lastly, when the Tribunal is required to analyze an application to amend and modify a complaint, the Tribunal should not embark on a substantive review of the merits of these amendments and modifications (see *Bressette v. Kettle and Stony Point First Nation Band Council*, 2004 CHRT 2 at para. 6 [*Bressette*]). The merits of the allegations should be assessed at the hearing when the parties have full and ample opportunity to provide evidence (see *Saviye* at para. 19, referring to *Bressette* at para. 8). Including these amendments does not in itself establish a violation of the CHRA: The Complainant must still meet the burden of proof, on the balance of probabilities.

IV. Analysis

A. Failure to comply with the Tribunal's instructions

[19] Proceedings before the Tribunal are intended to be as expeditious and informal as possible (section 48.9 of the CHRA and rule 1(1)(c) of the *Canadian Human Rights Tribunal Rules* (03-05-04) ("Rules"). On July 23, 2017, the Complainant forwarded an

email to the parties and to the Tribunal. A cover letter and her proposed amendments were attached to this email. In this message, she indicated that she had included the reasons for these amendments. Further to the response by the Respondent, the Complainant submitted a reply on August 18, 2017, in which she reiterated her reasons for requesting the amendments.

[20] The Respondent alleges that the Complainant did not comply with the Tribunal's instructions by failing to justify why the amendments had not been included in the initial Statement of Particulars. I would remind everyone that the Complainant is not represented, and I believe that she complied with the Tribunal's requests to the best of her abilities. Judicial and quasi-judicial proceedings can be complex. It is a rare occurrence for individuals who appear before the Courts to be involved in these types of proceedings during their lifetime. We cannot expect that they will suddenly be able to act like officers of the court and produce work of the same calibre. The Tribunal understands the general idea behind the Complainant's amendments. I am satisfied with her application and her explanations. I will therefore dismiss the Respondent's objection concerning this matter and examine the elements of the proposed amendments in further detail.

B. Prejudice to the Respondent

[21] I will first address the notion of prejudice to the Respondent because I believe that this issue can be dealt with quickly. As explained earlier, amendments should generally be allowed if they remain within the spectrum of the initial complaint and do not cause the Respondent to suffer any prejudice. If prejudice is caused, how can we limit or remedy it?

[22] In this case, I agree with the Commission's contention that the Complainant's amendments are not prejudicial to the Respondent. Indeed, I believe that the Complainant's request comes at the right time: the Respondent has not yet filed its Statement of Particulars, its list of documents or its list of witnesses. It will therefore have ample opportunity and latitude to refute the initial or amended allegations and raise the defences provided for in the Act, where applicable. The Commission will also have an opportunity to amend the Statement of Particulars it filed initially, and the Complainant may

also file a reply, if she chooses to do so. I believe that this clearly respects the principles of natural justice and fairness.

[23] Since I have decided that the Respondent did not suffer any prejudice, I will instead examine the amendments from the point of view of whether they have a nexus with the original complaint. With respect to retaliation, I will also consider whether the request is defensible or tenable as stipulated in *Virk*, cited above.

C. Section 6(b) of the CHRA – Adverse differential treatment in the provision of accommodation

[24] In her original complaint, the Complainant alleges that she did not receive the food and housing benefits she was entitled to receive. Furthermore, she indicates that the band council adopted a resolution stating that she did not have the right to live on the Nation's territory. In her Statement of Particulars, she also states that she was forced to leave the territory and the home she shared with her husband for several reasons attributable to the Respondent, most notably due to the council's resolution, issues with benefits, harassment, pressure, etc.

[25] At this stage, the Tribunal should not embark on a substantive review of the merits of the amendments and facts. Since the issue of prejudice has already been addressed, I must simply determine whether there is a link between this amendment and the original complaint. I believe that there is in fact a nexus. The issues related to housing benefits, the resolution prohibiting the Complainant from living on the reserve, the harassment and pressure, etc., were enough to force the Complainant to leave her home. Consequently, I authorize the addition of an allegation of discriminatory practice to the complaint under section 6(b) of the CHRA.

[26] However, I must emphasize the fact that the reference to section 6(b) of the CHRA as a result of an added allegation does not in itself establish a violation of the CHRA. I am not concerned with assessing the evidence based on a balance of probabilities. This will be done at the hearing in light of the evidence filed. The Complainant is still required to demonstrate to the Tribunal that there was a violation, in accordance with the burden of

proof on a balance of probabilities. The Respondent will have an opportunity to refute these allegations or raise a defence under the Act.

D. Section 14 of the CHRA – Harassment

[27] Since the filing of her original complaint, the Complainant has claimed that she was subjected to intimidation and harassment via Facebook, within the community, in the offices of the Respondent, etc., and she attributes the cause of these incidents to the actions of the Respondent, the Respondent's agents or people affiliated with the Respondent.

[28] The notion of harassment is not defined in the CHRA. However, the case law provides some guidance on the matter, particularly *Siddoo v. International Longshoremen's and Warehousemen's Union, Local 502, 2015 CHRT 21* at paras. 45-47. Not all insensitive, unintelligent, impertinent or vulgar comments give rise to the right to file a complaint under section 14 of the CHRA. Harassment must be assessed on a case-by-case basis from the perspective of a reasonable person in the circumstances. This analysis must be conducted in light of the facts and evidence presented at the hearing. However, this is not the point where I should assess the merits of the actions or the violation.

[29] From the beginning of this case, the Complainant has alleged that she was intimidated and harassed by the council, its members or people affiliated with the council. Section 14 of the CHRA concerning harassment is only the next logical step to these supposed allegations. Consequently, I believe that there is a nexus between the addition of an allegation under section 14 of the CHRA and the original complaint.

[30] At the risk of repeating myself, the Complainant must still meet the burden of proof, on a balance of probabilities, regarding this element, and once again the Respondent will have an opportunity to refute the allegations or present a defence provided by the Act.

E. Section 14.1 of the CHRA – Retaliation

[31] With respect to retaliation, the Tribunal must determine not only whether there is a nexus between the allegations and the original complaint, but also whether the application is defensible or tenable. It is important to remember that in this case, the complaint is filed against the Nation itself. Therefore, the Complainant bears the burden of proving that there is a link between the alleged acts of retaliation and the actions taken by the Nation or agents of the Nation.

[32] Subsection 14.1 of the CHRA concerns victims of retaliation or anyone acting on the victim's behalf. The Tribunal reviewed the initial complaint and Statement of Particulars submitted by the Complainant and the Commission. It is clear to me that the victim of the complaint is Ms. Polhill personally: her daughter and husband are not referred to as victims in the original complaint. However, the Tribunal is of the opinion that it is not clear whether the inquiry should end here. Historically the Tribunal has dealt with the issue of retaliation as it is directed at an individual who has filed a complaint or the alleged victim (see *Warman v. Winnicki*, 2006 CHRT 20 at para. 113). Without deciding the merits of the issue in this ruling, the Tribunal is of the view that an argument can be made that an act against a third party, such as the Complainant's husband or daughter, can be considered to be an act of retaliation against the Complainant herself. On this point, the Tribunal would like to draw the parties' attention to the Federal Court of Appeal's decision in *Singh (Re),* [1989] 1 F.C. 430 at 442, where the Court stated as follows:

> The question as to who is the "victim" of an alleged discriminatory practice is almost wholly one of fact. Human rights legislation does not look so much to the intent of discriminatory practices as to their effect. That effect is by no means limited to the alleged "target" of the discrimination and it is entirely conceivable that a discriminatory practice may have consequences that are sufficiently direct and immediate to justify qualifying as a "victim" thereof persons who were never within the contemplation or intent of its author.

Given the above, the Tribunal is not convinced that the allegations of retaliation related to acts committed against Mr. Bone or the Complainant's daughter have no reasonable chance of success on the merits. The Tribunal therefore allows the Complainant's proposed amendments to her Statement of Particulars as they relate to the fake Wes Bone Facebook page, e-mails from Brian Sharpe and the benefits lost by the

Complainant's daughter. The Tribunal looks forward to receiving the parties' submissions on this issue at the hearing.

[33] The Complainant also describes other situations of alleged retaliation which affected her personally, most notably the situation concerning the flooding of the basement, the cutting of hay around the house and the matter relating to the horses. With respect to the first situation, it is the Tribunal's understanding that the Complainant claims that the Nation failed to act properly or quickly, which according to her constitutes retaliation. Secondly, she alleges that the Chief of the council interfered with a contractual agreement that she could have reached with a third party for hay cutting. With respect to the third situation, she claims that the Chief tried to cause her prejudice by informing her that her horses had possibly escaped from their enclosure. These incidents occurred after she had filed her complaint in April 2014. I reiterate that I am not able to express an opinion on the merits of these allegations. However, I must determine whether they are defensible. Is it "plain and obvious that the allegations sought could not possibly succeed" (see *Bressette*, cited above, at para. 6)? Without having an opportunity to hear all of the evidence relating to these allegations, it is not so plain and obvious that they would be deemed to be unfounded. I will therefore authorize the addition of these amendments. Nevertheless, the Complainant must still prove these elements on the balance of probabilities. The Respondent will have an opportunity to refute the allegations or present its defence.

[34] Lastly, the Complainant alleges another act of retaliation perpetrated recently. Someone allegedly made false statements to the RCMP. An officer reportedly went to the Complainant's home to inform her that she was being charged with fraud. The Complainant attributes this situation to the actions of the Respondent but was not able to identify the person who made these statements. In the case of the other allegations, the Complainant provided a rather clear explanation of the involvement of the Nation or its agents. In the situation involving the RCMP, it is very difficult for the Tribunal to establish the link between the person who allegedly made false statements and the Respondent, despite the summary analysis of the circumstances and the inferences that could be

made. In this situation, I believe that the allegations are not tenable, and for these reasons, I will not authorize the amendments relating to this specific aspect.

[35] The Tribunal would like to remind the parties that the Complainant has the onus of establishing retaliation against her on a *prima facie* basis. As such, for each allegation made, the Complainant must demonstrate (i) that she experienced adverse treatment following the filing of her complaint against the Nation or by any person acting on the Nation's behalf; and, (ii) that the human rights complaint was a factor in the adverse treatment (see *Tabor v. Millbrook First Nation*, 2015 CHRT 18 at para. 6).

F. Other amendments

[36] The Complainant also made other amendments to her Statement of Particulars. In my opinion, these amendments generally relate to the factual background already established initially. The Complainant clarified certain situations or corrected certain errors, such as the year 2014 instead of 2013. As explained in *Gaucher* and *Casler*, cited above, the complaint filed with the Commission only provides a synopsis; it will essentially become clearer during the course of the process. The conditions for the hearing are defined in the Statement of Particulars. Since the amendments do not substantially change the essence of the file, and as I have already determined that there was no prejudice to the Respondent, I will authorize these various amendments. The burden of proving these allegations at the hearing rests with the Complainant.

G. Relief

[37] I authorized the Complainant to amend her original complaint to add the discriminatory practices, with certain limitations, under sections 6(b), 14 and 14.1 of the CHRA. At the same time, the Complainant should have an opportunity to amend her relief accordingly. As stated by Member Marchildon and Member Lustig in *First Nations Child and Family Caring Society of Canada v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada).* 2012 CHRT 2 at para. 469:

> [469] It is also important to reiterate that the CHRA gives rise to rights of vital importance. Those rights must be given full recognition and effect through the Act. In crafting remedies under the CHRA, the Tribunal's powers under section 53(2) must be given such fair, large and liberal interpretation as will best ensure the objects of the Act are obtained Applying a purposive approach, remedies under the CHRA should be effective in promoting the right being protected and meaningful in vindicating the rights and freedoms of the victim of discrimination (see *CN v. Canada (Canadian Human Rights Commission*), [1987] 1 SCR 1114 at p. 1134; and, *Doucet-Boudreau* at paras. 25 and 55).

When the Tribunal finds that a party has violated the CHRA and engaged in a discriminatory practice, the Act provides for remedies that may be ordered to correct the situation. Without relief, the purpose of the Act cannot be achieved.

[38] That said, I am not very clear about the specific relief that the Complainant is requesting. Indeed, she is requesting $20,000 for each violation of sections 3(1), 6(b) and 14.1 of the CHRA. I would first point out that section 3(1) of the CHRA does not in itself give rise to relief under the CHRA because this is the section which sets out the prohibited grounds for discrimination. It does not concern a discriminatory practice that gives rise to relief under section 53(2) of the CHRA. Consequently, I will not authorize this amendment. With respect to the two other claims for $20,000 under sections 6(b) and 14.1 of the CHRA, the Complainant did not indicate whether she was claiming these amounts under section 53(2)(e) of the CHRA for the pain and suffering she allegedly experienced, or under section 53(3) of the CHRA for allegedly willful or reckless conduct.

[39] I do not believe that these omissions are fatal at this stage of the proceedings, but the Complainant will have to clarify her intentions before the Respondent presents its Statement of Particulars. The latter has the right to have a clear understanding of the facts alleged and the relief sought. I would like to point out that there is a difference between damages for pain and suffering and damages for willful or reckless conduct. The evidence to be submitted by the Respondent will therefore be adapted accordingly. This question will therefore need to be clarified in a conference call following the publication of this judgment, and this will need to be done before the Respondent prepares its Statement of Particulars.

H. Summary of Mr. Bone's testimony

[40] The summary of testimony provided by the parties is simply a cursory outline of the facts on which the witness will testify during the hearing (see section 6(1)(f) of the Rules). The Complainant nevertheless decided to include detailed information on Mr. Bone's testimony in her amended Statement of Particulars and asked the Tribunal to amend the summary of this testimony. The Complainant is claiming new facts and new discriminatory practices and has informed the parties that Mr. Bone will testify in that regard during the hearing. Given the Complainant's request at this stage, I will authorize this amendment. Since the Respondent has yet to file its Statement of Particulars, it will still have an opportunity to respond to such allegations, produce its documents and summon witnesses accordingly.

I. Subpoenas

[41] Pursuant to section 50(3)(*a*) of the *Act*, a member possesses the discretionary power to issue a subpoena if the member considers it necessary for the full hearing and consideration of the complaint (*Canadian Telephone Employees' Association v. Bell Canada*, 2000 CanLII 20416 [*Bell Canada*]; see also *Schecter v. Canadian National Railway Company*, 2005 CHRT 35 at para. 20 [*Schecter*]). Generally, the purpose of a subpoena is to compel a third party to give oral or written evidence on oath or to produce documents and items in their possession. In rendering its decision, the Tribunal weighs factors such as, whether there is a rational connection between the information sought and the facts, issues and forms of relief identified by the parties' submissions, whether the request amounts to a fishing expedition and whether the request is oppressive in that it subjects an individual outside the litigation to an onerous and far ranging search for the documents (see *Bell Canada*).

[42] It is evident that the identity of the author of the Facebook page and Gmail account are relevant for imputing liability on the Respondent or one of its agents. However, it is not clear to the Tribunal whether Facebook or Gmail have the information sought by the Complainant. For example, if the person(s) can only be identified by their IP address, the

cooperation of the internet service provider is required. The Complainant may have to reach out to the internet provider to ask it to reveal the identity or the address of the individual. Additional subpoenas may be required.

[43] The Tribunal is not aware if the Complainant has already taken steps to contact these third parties nor if she already identified a person or specific department for the service of the subpoenas. The Tribunal will not issue a subpoena for the attendance of a witness or the production of a document or other material in this proceeding without first being provided with more details. Given the lack of particulars, the Tribunal is of the view that it is not in a position to rule on the necessity of the subpoena against Facebook or Google at this time. This matter can be discussed between the parties and the Tribunal at the next CMCC.

[44] In the same vein, the Tribunal has difficulty finding that issuing a subpoena against BC Employment and Assistance Office is necessary at this time as it is unclear whether the office is in possession of the requested information. First, the Complainant has not identified the employee who received the anonymous call. Second, it is not clear whether the employee would have to rely on her memory alone to identify the anonymous caller by voice or if there is a recording of the alleged conversation that can be produced. Given that the Tribunal lacks the particulars necessary to decide whether the subpoena is necessary at this stage, the Tribunal will not issue a subpoena at this time. Again, this matter can be discussed between the parties and the Tribunal at the next CMCC.

[45] The Tribunal reminds the parties that pursuant to section 50(6) of the Act any person “summoned to attend the hearing is entitled in the discretion of the member or panel to receive the same fees and allowances as those paid to persons summoned to attend before the Federal Court” (see *Day v. Canada (National Defence)*, 2003 CHRT 7 at paras. 2-3). Thus, pursuant to Rules 41, 42 and Tariff A of the *Federal Courts Rules*, SOR/98-106, each witness summoned to testify is entitled to a witness fee of $20 per day plus reasonable travel expenses incurred by the party who subpoenaed the witness’ attendance.

J. Disclosure of documents by the Complainant

[46] The Respondent argued that the Complainant did not provide the parties with the list of documents in her possession which may potentially be relevant to the dispute. The Respondent asks that the Complainant submit said documents and the corresponding list.

[47] Indeed, having reviewed the file, I note that the Commission filed its list of documents on November 13, 2015, and a list of additional documents dated October 26, 2016. The Complainant did not file such a list. The Tribunal has also not been informed of the various aspects of disclosure between the parties. It is at this stage that one of the parties has submitted such a request to the Tribunal.

[48] In short, I would remind the parties of section 50(1) of the CHRA, which states among other things that the parties have the right to a full and complete hearing where they are entitled to present evidence and make representations. This right also includes the disclosure of evidence: the parties have an obligation to disclose the evidence that is in their possession or under their control (*Guay v. Canada (Royal Canadian Mounted Police),* 2004 CHRT 34 at para. 40 [*Guay*]). This right is also provided in sections 6(1)(d) and 6(1)(e) of the Rules. All the documents that are potentially relevant to the dispute must be disclosed (*Bushey v. Sharma,* 2003 CHRT 5 at para. 4; *Hughes v. Transport Canada*, 2012 CHRT 26, at para. 20, 25-26; see in the alternative *Guay* at para. 40, cited above; *Day v. Department of National Defence and Hortie,* decision No. 3, 2002/12/06; *Warman v. Bahr*, 2006 CHRT 18 at para. 7 [*Warman*]; *Seeley v. Canadian National Railway*, 2013 CHRT 18 at para. 6; *Gaucher v. Canadian Armed Forces*, 2005 CHRT 42 at paras. 10-11). I would point out that the threshold for arguable relevance is very low (*Warman*, cited above, at para. 6).

[49] The Complainant is therefore required to disclose all of the documents with arguable relevance that she has in her possession to the Respondent and the Commission. She is also required to compile a list of these documents that includes a very short description of the documents. Any documents for which the Complainant is claiming privilege (for example, mediation, settlement or litigation privilege) should be compiled in a separate list that also includes a short description of the document(s). I reiterate that these

documents should not be disclosed since privilege is being claimed. I refer the Complainant to the lists provided by the Commission dated November 13, 2015, and October 26, 2016, as good examples of the types of lists to be forwarded to the parties.

[50] The Complainant's deadlines for filing these lists and disclosing the documents will be determined during a conference call following the release of this decision.

V. Additional remarks

[51] I will take advantage of this opportunity to remind the parties that fundamental rights and freedoms are intrinsic to every individual as a human being. Guaranteeing these inherent rights is of paramount importance in a democratic, egalitarian and just society. These guarantees help to safeguard human dignity. As the Supreme Court of Canada described it in *Law v. Canada (Minister of Employment and Immigration),* [1999] 1 S.C.R. 497, 1999 CanLII 675 (SCC) at para. 53:

> [53] . . . Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society. Human dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society *per se*, but rather concerns the manner in which a person legitimately feels when confronted with a particular law.

[52] The Tribunal is one of the few bodies that allow individuals to assert their right to "have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated consistent with their duties and obligations as members of society", without being hindered by any considerations, characteristics or personal situation (section 2 of the CHRA). Issues that are brought before the Tribunal by complainants concern their dignity and self-esteem and can be profoundly sensitive in nature.

[53] Each party has the right to a full and complete hearing before the Tribunal, which is guided by the principles of natural justice and fairness. In their defence, respondent parties have a right to disagree with the complainants and may respond to the allegations raised. As mentioned earlier, the subjects that are raised in the context of human rights and freedoms are sensitive and concern individuals. Consequently, submissions by the parties must show restraint and sensitivity. I therefore invite the parties to demonstrate restraint in the use of certain expressions.

[54] Lastly, I will add that I do not agree with the Respondent's comments indicating that the Complainant's application is frivolous to the point of verging on wastefulness of the Tribunal's resources. I recall that the Respondent, over a period of more than a year and a half, did not participate in the Tribunal's quasi-judicial process. The Tribunal sent the Respondent 22 items of correspondence with acknowledgement of receipt in addition to serving the Notice of Hearing on the Respondent by bailiff. Lastly, the Tribunal, its Registrar (as well as the Commission) travelled to the venue of the hearing in order to inquire into the complaint, but this hearing was postponed. In so doing, the Tribunal has committed all of its resources in order to guarantee the rights of each of the parties: for the Respondent, for the Complainant as well as for the Commission, whose objective is to protect the interests of Canadian society.

VI. Orders

[55] For these reasons, **I authorize** the following amendments:

- In the section entitled Introduction:
    - All the changes between "I, Tracy M. M. Polhill have filed" and "in April 2017 as my only witness";
- In the section entitled Personal Impact:
    - All the changes included in this section, more specifically between "When I met Wes Bone" and "fall fire hazard, 61A is our home";

- In the section entitled Remedies sought:
    - The addition of sections (iv) and (v);

[56] **I do not authorize** the following amendments:

- In the section entitled Remedies Sought :
    - The addition of section (vi);

[57] I authorize the changes to the “will say statement” by Wes Bone;

[58] I will not issue the subpoenas requested by the Complainant at this stage of the process;

[59] The Tribunal will contact the parties following the publication of the decision in order to discuss the details of the remedies sought and the subpoenas requested by the Complainant, as well as the disclosure of documents by the Complainant.

Signed by

Gabriel Gaudreault
Tribunal Member

Ottawa, Ontario
October 26, 2017

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T2101/1715

Style of Cause: Tracy Polhill v. Keeseekoowenin First Nation

Ruling of the Tribunal Dated: October 26, 2017

Motion dealt with in writing without appearance of parties

Written representations by:

Tracy Polhill, for herself

Brian Smith, for the Canadian Human Rights Commission

Norman Boudreau, for the Respondent