

**Canadian Human
Rights Tribunal**



**Tribunal canadien
des droits de la personne**

Citation: 2019 CHRT 15

Date: March 28, 2019

File No.: T2201/2317

Between:

Tesha Peters

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

United Parcel Service Canada Ltd. and Linden Gordon

Respondents

Ruling

Member: Kirsten Mercer

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I. Summary

[1] In considering whether to add a party, the Tribunal must be guided by various factors, including a balancing of the prejudice that may result from the addition of a respondent.

[2] Parties should be added to proceedings before the Tribunal with restraint, as doing so could deprive a prospective respondent of the procedural protection afforded by the Commission's statutory review process.

[3] In this case, having weighed the various factors and considerations before me, I find that the prejudice and inefficiency that would result if Ms. Peters is not permitted to add Mr. Gordon as a respondent to her Complaint outweighs the prejudice asserted by any other party in the event that this motion is granted.

[4] Furthermore, the Tribunal can and will take steps to mitigate potential prejudice to any party arising from this ruling.

[5] Ms. Peters' motion to add Mr. Gordon as a respondent in this case is therefore granted.

II. Background

[6] Tesha Peters (the "Complainant") filed a complaint against United Parcel Service (UPS) Canada ("UPS" or the "Respondent"), her former employer, for alleged sexual harassment by her former manager, Linden Gordon (the "Complaint").

[7] In her initial Complaint, Ms. Peters did not name Mr. Gordon as a party, but she maintains that she always intended to do so, and in fact did name Mr. Gordon as a party to her complaint filed (erroneously) with the Human Rights Tribunal of Ontario (the "HRTO").

[8] When Ms. Peters re-filed her Complaint with the Canadian Human Rights Commission (the "CHRC" or the "Commission") in or around July 2, 2015, she states that she intended to name him as a respondent but was unable to do so as the electronic Complaint Form at the time only provided space for one respondent to be named.

[9] The Commission investigated the Complaint.

[10] During the Commission's investigation, efforts were made to contact Mr. Gordon, but he was unavailable to be interviewed due to serious medical issues.

[11] The matter was referred to the Tribunal for an inquiry on Feb 16, 2018.

[12] On June 21, 2018, Ms. Peters filed a motion with the Tribunal seeking to add Mr. Gordon as a respondent to this Complaint.

III. The Issue

[13] Can Ms. Peters add Mr. Gordon as a respondent to her Complaint before the Tribunal? In other words, is the addition of Mr. Gordon as a respondent at this stage of these proceedings unfair, considering all the circumstances before the Tribunal on this Complaint?

IV. The Position of the Parties

A. The Complainant's Submissions

[14] Ms. Peters submits that Mr. Gordon ought to be added as a respondent in this case as it was always her intention to do so. In fact, it is the Complainant's assertion that Mr. Gordon was served with a copy of a proceeding commenced at the HRTO.

[15] Ms. Peters asserts that Mr. Gordon was the principal actor in the events alleged in her Complaint, and that as such, his participation is necessary for the Tribunal's inquiry into the Complaint. Further, she alleges that it would be "fallacious logic that UPS Canada is vicariously liable for Mr. Gordon's actions when the allegations of sexual harassment remain in dispute" (Complainant's Motion to Add a Party, paragraph 26).

[16] Ms. Peters asserts that Mr. Gordon is or ought to have been aware of the events alleged in the Complaint, since she had named him as a respondent to her complaint before the HRTO, and because he was contacted by the Commission when it was

investigating her Complaint. She submits therefore that he would not suffer prejudice as a result of his addition to the proceeding at this stage.

[17] Finally, Ms. Peters submits that she has already experienced a great deal of mental anguish over the conduct alleged in her Complaint, and that it would be unfair to prevent her from adding Mr. Gordon to these proceedings or to require her to commence a new proceeding against him at the Commission.

B. The Commission's Submissions

[18] The Commission consents to the addition of Mr. Gordon as a party to this Complaint.

[19] The Commission acknowledges the Tribunal's jurisdiction to add a party pursuant to *Rule 8(3)* of the Tribunal's *Rules of Procedure* (the "*Rules*") and notes that the *Rules* do not stipulate any substantive conditions under which a party may be added to a proceeding.

[20] The Commission notes that in the Tribunal's decision in *Syndicat des employés d'exécution de Québec-téléphone section locale 5044 du SCFP v. Telus communications (Québec) inc.*, 2003 CHRT 31, at para 30, ("*Telus*") the CHRT determined that a respondent can be added as a party to an inquiry if it can be established that: (i) the presence of this new party is necessary to dispose of the complaint; and (ii) it was not reasonably foreseeable, once the complaint was filed with the Commission, that the addition of a new respondent would be necessary to dispose of the complaint.

[21] The Commission further submits that in complaints alleging workplace harassment, the presence of both the corporate respondent and alleged harasser may be necessary to ensure that the matter can be properly disposed of.

[22] In addition, the Commission cautions that while its process is not subject to the Tribunal's review, it recognizes that there may have been an error made in this case in the filing of Ms. Peters' Complaint.

[23] With respect to the issue of prejudice, the Commission submits that Mr. Gordon was aware of Ms. Peters' harassment allegations, and notes that while Mr. Gordon was not available to participate in the Commission's investigation, the Commission relied in part on statements made by Mr. Gordon as part of UPS's internal investigation in its review of the Complaint.

C. The Respondent UPS's Submissions

[24] UPS submits that the Tribunal ought to reject this motion.

[25] UPS submits that the Complainant has not demonstrated that Mr. Gordon's presence is necessary to dispose of the Complaint. UPS argues that, if his participation were found to be necessary, such necessity was foreseeable at the outset of the Complaint, and in fact was foreseen by the Complainant when she initiated her HRTO complaint.

[26] UPS submits that it would be prejudiced by the addition of Mr. Gordon as a respondent as doing so would deviate the proceedings from the course allegedly set by the Complainant. UPS asserts that it could be an abuse of process for the Complainant to change the course of her litigation strategy at this stage, which the Respondent characterizes as being "on the eve of hearing".

[27] UPS further asserts that the Complainant is not without recourse against Mr. Gordon, even in the event that UPS prevails in its section 65(2) defence, as under the law in Ontario, it is open to Ms. Peters to commence a civil action in that jurisdiction.

[28] UPS submits that the addition of Mr. Gordon as a party to these proceedings would further prejudice UPS as it will have been denied the opportunity to engage in a more contemporaneous investigation and preparation with regard to Mr. Gordon.

D. Mr. Gordon's Submissions

[29] Mr. Gordon also objects to being added as a respondent to the Complaint.

[30] Relying upon and adopting the submissions of UPS, Mr. Gordon additionally submits that the medical condition that precluded his participation in the Commission investigation may impact his ability to participate fully in the Tribunal proceedings and to fully recall the details of this Complaint.

V. The Law

[31] The proceedings of the Tribunal are conducted pursuant to the *Canadian Human Rights Act* (*CHRA* or the *Act*).

[32] Section 50(2) of the *CHRA* provides that

In the course of hearing and determining any matter under inquiry, the member or panel may decide all questions of law or fact necessary to determining the matter.

[33] The overarching statutory framework for the exercise of discretion by the Tribunal is reflected in section 48.9(1) of the *Act*, which states:

Proceedings before the Tribunal shall be conducted as informally and expeditiously as the requirements of natural justice and the rules of procedure allow.

[34] In other words, the Tribunal is to conduct its inquiry in an informal and efficient manner, while taking care not to be unfair or to unduly prejudice any party.

[35] It is established and not in dispute on this motion that the Tribunal has jurisdiction to add a respondent to a proceeding that has been referred to the Tribunal for an inquiry.

[36] What's more, the *Supreme Court of Canada* has affirmed that the Tribunal is in control of its own procedure. In *Prassad v. Canada* (*(Minister of Employment and Immigration)*), [1989] 1 SCR 560 [*Prassad*], the SCC pronounced that:

[...] We are dealing here with the powers of an administrative tribunal in relation to its procedures. As a general rule, these tribunals are considered to be masters in their own house. In the absence of specific rules laid down by statute or regulation, they control their own procedures subject to the proviso that they comply with the rules of fairness and, where

they exercise judicial or quasi-judicial functions, the rules of natural justice.

[37] The Tribunal may establish its *Rules of Procedure* in compliance with subsection 48.9(2) of the *Act*. Indeed, the Tribunal has put rules of procedure in place which governs the conduct of its proceedings.

[38] More specifically, rule 8(3) provides that:

Where the Commission, a respondent or a complainant seeks to add a party to the inquiry, it may bring a motion for an order to this effect. Which motion shall be served on the prospective party, and the prospective party shall be entitled to make submissions on the motion.

[39] Because the addition of a party at the inquiry stage could deprive that party of the screening function provided by the Commission pursuant to ss. 41 and 44 of the *Act*, the Tribunal generally exercises caution when adding a respondent. It is incumbent on the Tribunal to carefully consider the various risks and prejudice that may result from its decision to do so. (see *Gervais v. Canada (Department of Agriculture)*, 7 C.H.R.R. D/3624; *Coupal v. Canada (Border Services Agency)*, 2008 CHRT 24 (“*Coupal*”) at para 20).

[40] It is therefore clear that the Tribunal must carefully weigh the various factors involved in the decision to add a party to a proceeding at this stage.

[41] In *Telus*, at paragraph 30, the Tribunal held that “the addition of a new respondent is appropriate if it is established that: (i) the presence of this new party is necessary to dispose of the complaint; and (ii) it was not reasonably foreseeable, once the complaint was filed with the Commission, that the addition of a new respondent would be necessary to dispose of the complaint.”

[42] Since the Tribunal’s decision in *Telus*, the Tribunal has usually considered these two specific questions in determining whether a party ought to be added to a proceeding before the Tribunal.

[43] It is common ground among the parties that the *Telus* test is relevant to this analysis. However, the parties are not in agreement as to whether the *Telus* factors represent a strict test or merely factors to be considered on a motion to add a party.

[44] Although the *Telus* factors have been indirectly endorsed by the Federal Court in *Canada v. Brown*, 2008 FC 734 (“*Brown*”), and have been applied with some consistency by the Tribunal since 2003, it cannot be said that Member Deschamps intended or purported to establish a closed list of factors to consider, or a bright line rule with respect to the addition of a party to the Tribunal’s inquiry. The *Brown* decision and the further decisions of the CHRT do not support such a limited approach either.

[45] Such a rigid approach would likely be inconsistent with the Tribunal’s statutory obligation to conduct its proceedings in an informal and expeditious manner within the necessary bounds of natural justice and procedural fairness.

[46] For example, in the Tribunal’s recent decision in *Harrison v. Curve Lake First Nation*, 2018 CHRT 7, the Tribunal adopted a further consideration of “serious prejudice” to the conventional *Telus* analysis:

In *Coupal and Milinkovich v. Canada Border Services Agency*, 2008 CHRT 24 (CanLII), the Tribunal also noted that the addition of parties should be done with caution and only after careful consideration of the factors noted in *Telus* and consideration of whether the addition of the new party will result in serious prejudice.

[47] Lastly, although this does not form the basis of my decision on this motion, I note that the *Telus* factors differ considerably from those considered by Human Rights Tribunals in other jurisdictions in Canada. For instance, the British Columbia Human Rights Tribunal has developed a three-prong test, where the question of the reasonable foreseeability is not considered: (1) Are there facts outlined in the complaint form or particulars of allegation which make it apparent that the party sought to be added may have contravened the Code? (2) What is the impact of adding the proposed respondent on the natural justice concerns of the parties, and on the timely resolution of the Present Complaint? (3) Would it be in the public interest to add the proposed respondent? (*Vetro v. Klassen and Pacific Transit Cooperative and others (No.5)*, 2006 BCHRT 16)

[48] Similarly, the Alberta Human Rights Commission applies a test in two parts: “The first part of this test considers whether there are facts alleged that, if proven, could support a finding that the proposed respondent violated the complainant’s rights. The second part

of the test is whether the addition of the proposed respondent would cause substantial prejudice to the respondent's ability to make full answer and defence to the allegations that cannot be alleviated by procedural orders of the Tribunal" (*Abdulkadir v. Creative Electric Co. Ltd. and McEwan*, 2012 AHRC 11, at 12).

[49] Finally, the Human Rights Tribunal of Ontario also applies similar criteria when evaluating a motion to add a respondent (see *Racine v. PDS Services Inc.* 2013 HRT0 2124 and *Greenhorn v. 621509 Ontario Inc.o/a Belleville Dodge Chrysler Jeep and Terry Belch*, 2006 HRT0 22)

[50] While this jurisprudence has not been expressly adopted by this Tribunal and I am not purporting to do so here, this significant difference in approach is one that may warrant further consideration in the future.

VI. Analysis

[51] The parties have each made submissions with respect to the application of the *Telus* factors to this matter. However, I find that merely applying the *Telus* factors to the Tribunal's analysis on the motion to add Mr. Gordon as a respondent to the Complaint is insufficient and somewhat inconclusive.

A. Necessity of the new party to dispose of the complaint

[52] It is true that Mr. Gordon likely has relevant evidence and arguments that would be of assistance to the Tribunal in its inquiry into this Complaint.

[53] While these documents and evidence are compellable by subpoena, Mr. Gordon's arguments, which may be of assistance to the Tribunal, are not.

[54] Furthermore, I am persuaded by the Commission's submissions that it may be necessary for Mr. Gordon to be added as a party to the Complaint in order to avoid the futility of a Complaint in which the Tribunal finds that harassment has occurred, but that UPS has discharged its statutory obligations and was therefore shielded from liability by operation of s. 65(2) of the *Act*.

B. The addition of the new party was not reasonably foreseeable

[55] It cannot be said that Mr. Gordon's alleged involvement in the events that underpin the Complaint was not reasonably foreseeable to the Complainant when she filed her Complaint. In fact, it is clear on the uncontradicted evidence before me that Ms. Peters did in fact foresee the necessity of Mr. Gordon's participation as a party, and named him in the proceeding she commenced before the HRTO.

[56] On the facts before me on this motion, it appears that Ms. Peters was operating under the belief that she would indeed be able to include Mr. Gordon as a Respondent in the event that the Complaint was referred to the Tribunal, despite the fact that her Complaint was only initiated against UPS.

[57] It is not the Tribunal's role to sit in review of the conduct of an investigation at the Commission, and I do not intend to do so here. However, to the extent that any party made a mistake at some point in that process, the question for me to determine is whether it is proper for the Tribunal to cure that mistake at this stage of the proceedings.

[58] I find that the possibility of Mr. Gordon's inclusion as a respondent was reasonably foreseeable (and indeed was foreseen) at the time when the Complaint was initiated.

[59] It is clear that the Tribunal has the jurisdiction to add a party at this stage. So if I am to do so, I must turn to the consideration of how each party might be prejudiced by my doing so, and whether such prejudice can be mitigated.

C. Balance of Prejudice

[60] Ultimately, while I have found that an analysis of the *Telus* factors is not conclusive in this case, I am mindful of my overarching duty to conduct this inquiry in an informal and expeditious manner within the bounds of fairness and natural justice.

[61] The specific facts of this inquiry compel me to consider factors beyond those laid out in *Telus* and, particularly, to assess the balance of prejudice in this case.

[62] The Respondent UPS and Mr. Gordon have raised several prejudice arguments, which I will now address

(i) Loss of the Procedural Protections afforded by the Commission's Screening Function

[63] In my view, the potential loss of the procedural protections afforded by the Commission's screening function this is the most important of the arguments raised by UPS and Mr. Gordon.

[64] This concern is one of the animating features of the Tribunal's case law regarding the addition of a party (particularly adding a respondent), and it drives the Tribunal's cautious approach to these requests.

[65] While the value of the Commission's statutory screening function cannot be ignored, the legal principles that are reflected in the s.41 analysis (such as delay, jurisdiction, alternate forum, or the trivial or vexatious nature of the complaint) can equally be raised and considered by the Tribunal at the hearing stage.

[66] In this case, the concerns regarding delay that were raised by both Mr. Gordon and UPS can be raised by those parties at the hearing. In general, an inquiry into procedural fairness caused by delay cannot be made without an evidentiary basis and must be considered in light of the impact of that delay on the specific inquiry (See *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 ([CanLII](#)) at paragraphs 101 and 115, and *Canadian National Railway Company v. Casler*, 2015 FC 704 at para 2). With regard to the Commission's investigation function, the Tribunal is aware that an investigation was indeed conducted into the events in this case.

[67] While the Tribunal is not privy to details or conclusions of the Commission's investigation, I note that evidently the Commission concluded that the Complaint warranted referral to the Tribunal.

[68] Based on the submissions before me on this motion, I understand that Mr. Gordon was not able to participate in that investigation, and that the Commission was forced to

rely on UPS's internal investigation in reaching some of its conclusions. However, even in absence of Mr. Gordon's participation, the Commission elected to refer the Complaint to the Tribunal.

[69] An employer's liability pursuant to s. 65 of the *Act* is not a stand-alone source of liability. The *Act* provides for an employer to be held responsible for the acts of an employee, where it failed to take sufficient steps to prevent and/or address discrimination in its workplace. It is a form of vicarious liability.

[70] It is not up to the Tribunal to speculate as to the Commission's investigations and conclusions, but since any possibility of liability for UPS in this case is contingent on an underlying finding of sexual harassment by Mr. Gordon, the Tribunal must infer that the Commission had sufficient evidence to determine that an inquiry into the underlying offence was also justified, for without the establishment of the underlying offence, there is no basis for referral of a complaint regarding the vicarious liability of an employer.

[71] Considering all of the foregoing, I acknowledge that the addition of a party at this stage of the process may deprive Mr. Gordon of the procedural protections of the Commission's review, and this is not a step that should be taken lightly. That being said, I am not convinced that any prejudice resulting from doing so is of a serious and incurable nature in this case.

(ii) Deviation from the Established Course at a Late Stage in the Proceeding

[72] I understand that the parties to this Complaint have been engaged in the complaint process for a number of years prior to the referral of the Complaint to the Tribunal. I do not, however, agree that (as the Respondent UPS submits) it is too late in the proceeding to deviate from what UPS calls the "established course" of the litigation.

[73] The allegation against Mr. Gordon — that he sexually harassed Ms. Peters — is implicit in the allegation that UPS failed in its duty to appropriately address Mr. Gordon's conduct in the workplace. And as a matter of law, the Complainant must establish an

underlying offence pursuant to s. 7 and/or s. 14 of the *Act*, before any consideration of the employer's liability pursuant to s. 65 ought to be undertaken.

[74] While I appreciate that the addition of a Respondent would add an additional factual consideration to the proceedings and that Mr. Gordon may have distinct interests from those of the Respondent, UPS, I do not agree with UPS that the addition of Mr. Gordon as a party represents a significant or prejudicial deviation from the factual inquiry that would otherwise have been undertaken by the Tribunal.

[75] Parties before the Tribunal may be permitted to make changes to their litigation strategy, provided that doing so does not unduly prejudice any other parties, or (in the event that prejudice may arise) that the prejudice cannot be mitigated by the Tribunal in some way. This is often done by affording the opposing party additional time to prepare for the hearing, or by granting leave to amend the Statements of Particulars (the "SOPs") and witness lists, or even an adjournment if necessary.

[76] In this case, this Complaint has not even been set down for a hearing.

[77] The facts and issues that will be raised are substantially the same as those that would have been considered in Mr. Gordon's absence. While I agree with the UPS that the addition of a second respondent will add an element of complexity that it may not have anticipated, the Tribunal will certainly provide all parties an adequate opportunity to prepare themselves in advance of setting the matter down for a hearing.

[78] On the basis of the above considerations, I am not convinced that the addition of Mr. Gordon as a Respondent in this inquiry at this stage of the proceedings would represent an incurable prejudice to UPS.

(iii) Denied the Opportunity for a Contemporaneous Investigation

[79] UPS submits that it would be denied the opportunity to have conducted a more contemporaneous investigation if the Tribunal permits the addition of Mr. Gordon as a respondent to this Complaint.

[80] In addition to the parties' pleadings on this motion, I have had the benefit of the SOPs filed in this Complaint. Based on my review of those SOPs, and without prejudice to any submissions that the parties may make based on the evidence presented at the hearing, it is the Tribunal's understanding that both the Respondent UPS and the Commission have pled that UPS conducted an investigation into the alleged harassment at the time that Ms. Peters' allegations were brought to the company's attention by the Commission.

[81] In fact, UPS pleads that it conducted nine interviews and felt that it had sufficient grounds at that time to take "appropriate corrective action" in response to Ms. Peters' allegations.

[82] While none of these pleadings have been proven, and the sufficiency of UPS's investigation and response may be an issue before me at the hearing, it is unclear what additional contemporaneous investigation UPS feels it would have conducted had it known at an earlier date of the possibility of Mr. Gordon's participation as a respondent in these proceedings.

[83] On the basis of the above, I do not find sufficient basis to determine that the addition of Mr. Gordon to this Inquiry would meaningfully deprive UPS of the ability to conduct a contemporaneous inquiry.

[84] The prejudice highlighted by the Respondent and Mr. Gordon (particularly with regard to the deprivation of the procedural protections afforded by the Commission's statutory review) must be balanced against the prejudice that could accrue to the Complainant in the event that the motion were denied.

(iv) An Expedious and Informal Process

[85] To stay these proceedings in order for the matter to be referred back to the Commission, or for a new separate complaint to be initiated at the Commission would cause considerable delay and would likely exacerbate any concerns raised by UPS and Mr. Gordon about the impact of the passage of time on the quality of the evidence available to the Tribunal.

[86] While it may or may not be the case that some civil remedy is available to Ms. Peters in Ontario, Ms. Peters has elected to seek recourse through the Canadian Human Rights regime. I do not believe that it is consistent with the Tribunal's mandate to be informal and expeditious to require her to pursue a remedy in *Superior Court* if a more expeditious and informal avenue exists before the Tribunal.

(v) The Loss of a Chance

[87] It is clear that a successful complaint against Mr. Gordon could afford the Complainant a remedy even if the Complaint against UPS is not substantiated. While it cannot yet be known whether or not the Complaint will be substantiated, the Tribunal's refusal to permit the addition of Mr. Gordon would foreclose a meaningful prospect of potential remediation for the Complainant.

[88] In addition to the above considerations of the respective balance of prejudice, I also take particular note of the Commission's consent to this motion, in light of its duty to represent the public interest before the Tribunal.

[89] While I do not take lightly the request to deny Mr. Gordon the procedural benefit of the Commission's statutory review of the Complaint brought against him, I am confident that the substantive rights to due process and procedural fairness can still be afforded (as appropriate) to Mr. Gordon through the Tribunal's inquiry.

[90] As such, I find that any prejudice argued by the Respondent and Mr. Gordon is not sufficient to outweigh the negative impact that the denial of the motion would have on Ms. Peters' Complaint and possible remedies, particularly in light of the Tribunal's statutory mandate to conduct its inquiry in an informal and expeditious manner, within the bounds of procedural fairness.

VII. Order

[91] Consistent with the statutory authority provided in s.48.9(2) of the *CHRA*, and Rule 8 of the *Tribunal Rules*, I make the following orders:

- 1) Ms. Peters is granted leave to add Mr. Gordon as a respondent to the Complaint;
- 2) Ms. Peters will serve and file her Amended Statement of Particulars on or before April 20, 2019;
- 3) The Commission will serve and file its Amended Statement of Particulars (if necessary) on or before April 27, 2019;
- 4) Mr. Gordon will serve and file his Statement of Particulars on or before May 10, 2019;
- 5) UPS will serve and file its Amended Statement of Particulars on or before May 24, 2019;
- 6) Any Reply by the Complainant or the Commission will be served and filed on or before May 31, 2019.

Signed by

Kirsten Mercer
Tribunal Member

Ottawa, Ontario
March 28, 2019

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T2201/2317

Style of Cause: Tesha Peters v. United Parcel Service Canada Ltd. and Linden Gordon

Ruling of the Tribunal Dated: March 28, 2019

Motion dealt with in writing without appearance of parties

Written representations by:

David Baker and Claire Budziak, for the Complainant

Sasha Hart and Ikram Warsame, for the Canadian Human Rights Commission

Seann D. McAleese, for the Respondent, United Parcel Service Canada Ltd.

James Hill, for the Respondent, Linden Gordon