Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2019 CHRT 33
Date: August 13, 2019
File No.: T2274/2918

Between:

AA

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Canadian Armed Forces

Respondent

Ruling

Member: Edward P. Lustig

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I. Context

[1] This is a ruling on a motion by the Respondent, the Canadian Armed Forces (the "CAF"), pursuant to Rule 3(1) of the *Canadian Human Rights Tribunal Rules of Procedure (*the *"Rules")* for an Order:

a) striking out from AA's Statement of Particulars dated November 20, 2018 ("SOP"), the following paragraphs and references: paragraphs 12, 13, 14, 32, 40; references to the following provisions of the *Canadian Human Rights Act* (*CHRA*), s. 5(a) on page 19, s. 10(a) on page 20, and ss. 8(b) and 10(a) on page 21; and

b) striking out from AA's Reply Statement dated December 28, 2018 ("Reply"), the following paragraphs: 3, 5 and 9;

c) requiring AA to disclose his Income Tax Return for the following years: 2014, 2015, 2016, 2017, 2018 and 2019; and

d) requiring AA to provide a summary of the anticipated testimony of each witness in his SOP and Reply, pursuant to Rule 6(1)(f) of the *Rules*.

II. Background

[2] On May 6, 2014, AA filed a complaint with the Commission alleging he experienced discrimination between May 2013 and May 6, 2014 on the grounds of disability contrary to sections 7 and 14 of the *CHRA.* In the complaint, he alleges that the CAF engaged in adverse differential treatment and failed to provide a harassment-free environment.

[3] AA enrolled with the CAF as an Infantry Officer on March 28th, 2007 and became an Intelligence Officer in June 2008. During the period relevant to this complaint, AA was a captain, posted to The Royal Canadian Dragoons in Petawawa, Ontario.

[4] In October 2007, AA sustained an injury that led to him having surgery on his right hip in 2010.

[5] AA alleges that he was subjected to adverse differential treatment on the basis of disability. Specifically, he alleges that he had a disability that the CAF failed to accommodate, and that he was subjected to reprisals and harassment for trying to enforce his medical employment limitations ("MELs").

[6] AA was ultimately released from the CRA for medical reasons on March 22, 2015.

[7] On April 10th, 2013 the RCD physician assigned AA MELs arising from arthritis in his hip. The MELs included avoiding running, uneven ground, high impact activity and stop/go exercise.

[8] On May 1, 2013, the CAF deployed AA on a training exercise, Exercise Maple Resolve 1301 ("Ex MR 1301") at the Canadian Armed Forces Base in Wainwright, Alberta.

[9] AA alleges that while he was deployed on Ex MR 1301, the CAF breached his MELs by requiring him to participate in physically active portions of the exercise. AA states that he was required to cross rugged and broken terrain, navigate wobbly floorboards, and travel by vehicle on heavily rutted and uneven trails that jolted and inflamed his hip.

[10] On May 7th, 2013, shortly after his arrival at CFB Wainwright, AA sought medical attention. The medical officer prescribed AA a cane and assigned him additional MELs. On May 24, 2013, the physician at CFB Wainwright excused AA from duty for two days. On or around May 27th, 2013, the CAF returned AA to CFB Petawawa for treatment.

[11] According to AA, the conditions of his deployment on Ex MR 1301 caused his physical health to deteriorate. He says that on May 24, 2013, while he was on sick leave, his Commanding Officer demanded that he perform tasks for his unit that he was physically incapable of performing. When he refused to do so, he says that his CO circulated an email questioning his integrity.

[12] On August 29, 2013, AA grieved his alleged discriminatory treatment during Ex MR 1301 using the CAF's grievance procedure. He says he also asked to see a harassment advisor.

[13] In his grievance AA alleged that the CAF failed to accommodate his MELs during his deployment on Ex MR 1301. The grievance was unsuccessful at two levels of decision-making: the Initial Authority and the Final Authority. As well, there was an external review of the procedure by the Military Grievances External Review Committee an independent administrative tribunal.

[14] On October 21, 2013, after AA filed his grievance, the CAF issued a Recorded Warning against AA for dishonesty, unethical conduct, and lack of professionalism related to incidents that occurred in May 2013, during Ex MR 1301.

[15] In July, 2013, AA says he was diagnosed with anxiety and depression arising from his work experience and service in Afghanistan in 2012. He disclosed this condition for the first time to his chain of command in March 2014. Shortly after, one of the officers in his chain of command disseminated an email stating "we must ensure we support our soldiers that are injured and weed out the ones that are taking the free ride." AA believes the CAF viewed him as "taking a free ride."

[16] AA says that on April 17, 2014, after he advised the CAF of his intention to file a formal harassment complaint, the CAF removed him from his position and placed him under the supervision of his alleged harasser. AA says he suffered a mental breakdown because of this action. AA says that as his grievance process progressed, the CAF questioned the timing and legitimacy of his mental health issues.

[17] The Commission investigated the complaint and in its report of August 18, 2016, pursuant to sections 40 and 41 of the *CHRA,* it summarized the complaint as follows:

> [ ] In his human rights complaint, [AA] alleges that the CAF failed to accommodate his disabilities and failed to provide him with a harassment-free work environment. He identifies his disabilities as moderate arthritis in his right hip and moderate depression and anxiety, which he says are both attributable to his military service.

> [AA] advises that in March 2014 he revealed his mental disability for the first time to the CAF (until then, only his doctors were aware of it). He alleges that in April 2014, after he advised of his intention to file a harassment complaint against an individual, he was informed that he would be removed from his position and placed under the supervision of that individual. He alleges that this was discriminatory and resulted in his having a mental breakdown and being placed under psychiatric care.

[18] The Commission's report of December 7, 2017, pursuant to section 49 of the *CHRA,* summarized the scope of the report as follows:

> [AA] makes several allegations of adverse differentiation based on disability and failure to provide a workplace free from harassment. However, based on the information the parties have provided, and the recommendation under s. 49, this report will focus only on his allegation that the CAF employed him in breach of his MELs.

III. Issues

[19] The issues to be decided are as follows:

a) Whether certain paragraphs and references in AA's SOP and Reply as described in paragraphs 1(a) and (b) of this ruling should be struck, for raising additional allegations outside the scope of the complaint to the Commission*;*

b) Whether AA ought to disclose his Income Tax Returns to the CAF for the years 2014 to 2019; and

c) Whether AA ought to provide a summary of the anticipated testimony of each witness in his SOP as required or contemplated by Rule 6(1)(f) of the *Rules.*

IV. Parties' Positions

[20] The CAF, as the moving party, in its Factum dated April 5, 2019 makes the arguments summarized in the following paragraphs 21 to 28:

[21] The CAF seeks to strike those portions of the SOP and Reply that it says contain new and unrelated allegations suggesting AA also suffered discrimination on the

grounds of mental health. The CAF says that this allegation was not part of AA's complaint, it was not investigated by the Commission, nor did the CAF consider or respond to such an allegation. Therefore, it was not included in the matter the Commission referred to the Tribunal for inquiry. While the CAF acknowledges that the entire complaint has been referred to the Tribunal, it argues that what is at issue is the nature and substance of the complaint.

[22] The CAF argues that in AA's complaint the only statements alleging discrimination based on mental disability were that he suffered from "moderate anxious depression" and describes his reaction to a response to his grievance regarding the alleged breach of MELs as having a "mental breakdown." The CAF contends that these allegations within the complaint allude to AA's mental health suffering as a *corollary effect* of his MELs and the grievance that he filed in relation to his MELs. The CAF argues that as AA concedes in his SOP that the CAF did not know about his mental health issues, it remains unclear as to how the CAF could discriminate against AA or fail to accommodate him on grounds which it did not know existed.

[23] The CAF argues that to entertain, in effect, a new complaint related to mental health at this stage prejudices the CAF. It denies the CAF the opportunity to respond at the investigation stage and the potential to have it dismissed summarily. To entertain a new complaint now bypasses that procedural step and denies the CAF the right to know the allegations made against it and be given a fair opportunity to respond.

[24] In particular, the CAF argues that:

a) Paragraphs 12-14, 32 and 40 of the SOP ought to be struck for falling outside of the scope of the complaint referred to the Tribunal including allegations of discrimination on the grounds of mental disability and issues arising since AA's medical release in 2015 and onward;

b) References to sections 5(a), 8(b) and 10(a) pursuant to the *CHRA* in the SOP ought to be struck as these allege new discriminatory practices for the first time before the Tribunal that were not at issue at the time of the complaint, the grievance process or the Commission's investigation including allegations of

undiagnosed mental issues not accommodated and systemic discriminatory practices unrelated to the alleged breach of MELs;

c) Paragraphs 3, 5 and 9 of the Reply ought to be struck as falling outside the scope of the complaint including new issues regarding mental disability unrelated to the time of the alleged discrimination such as AA's decision not to challenge his medical release.

[25] The CAF submits that it is anticipated that AA's additional allegations will (1) expand the scope of and add to the matters before the Tribunal, (2) will increase the number of witnesses required to testify, and (3) extend the hearing days required to hear the complaint.

[26] The CAF also seeks disclosure of AA's Income Tax Returns for the years from 2014 to 2019 as the T4's and other information provided by AA to date are insufficient. AA seeks lost wages totalling between $255,000 and $297,500, a living differential benefit between $53,460 and $63,270, as well as his pension, which he calculates to be $31,500 per year. The data provided in his Income Tax Return would provide an accurate accounting of the income he made during the period in question. This information is essential as it provides the basis upon which the Tribunal can determine issues of wage loss, mitigation and causality.

[27] AA has provided a list of names of potential witnesses in his SOP but he has not provided the requisite summary of the anticipated testimony of those witnesses. The CAF requests it be provided this information as soon as possible.

[28] The CAF contends that AA's complaint throughout the grievance process and the Commission's investigation process, as demonstrated by the reports issued from these processes, has been about the alleged failure to accommodate his MELs, which relates to his hip injury not to mental health issues. The CAF cites *Bentley v. Air Canada and the Air Canada Pilots Association*, 2016 CHRT 17 in support of its contention that the nature and substance of the complaint referred to the Tribunal for inquiry is not related to mental health issues.

[29] The Commission in its submissions dated June 5, 2019, in response to the motion, makes the arguments summarized in the following paragraphs 30 to 43:

[30] The Commission contends that, without exception, every allegation made in the SOP and Reply was expressly raised in his complaint dated May 6, 2014. Mental health discrimination is very clearly part of the complaint. As every paragraph of the SOP and Reply relates directly to his complaint, there is no basis for the Tribunal to strike any portion of the SOP or Reply, as the CAF requests. Permitting these allegations to stand does not constitute an amendment of the complaint and will not result in any prejudice to the CAF. In addition, the Commission submits there is no basis for the Tribunal to limit the remedies that may be available to AA at this point in the proceedings.

[31] At paragraphs 50 and 51 of its submissions, attached as Appendix “1” to this ruling, the Commission presents direct references by way of quotes and an illustrative table to demonstrate the connection between the language of mental health and harassment issues raised by AA in his complaint and the language in the SOP objected to by the CAF.

[32] The Commission argues that the entire complaint of AA was referred to the Tribunal for further inquiry, not just a portion of it. There is nothing in the Commission’s decision of April 11, 2018, and the referral letter to suggest that the Commission only referred the limited issue of accommodation during EX MR 1301 for inquiry.

[33] Contrary to the CAF’s position, the Commission argues that a matter that is raised in a complaint is not outside the scope of the Tribunal’s inquiry by reason only that the Commission did not address it in its investigation.

[34] The Commission cites *Connors v. Canadian Armed Forces,* 2019 CHRT 6 [*Connors*] for the proposition that the Commission’s “assessment report is used to justify or support a decision to proceed with the inquiry into the case before the Tribunal and **not to limit the scope of the Tribunal’s inquiry**”. The investigator’s approach does not determine the content of the complaint or the scope of the inquiry. Where the Commission refers a complaint without further clarification, the Tribunal is seized of the entire complaint.

[35] The Commission cites *Casler v. Canadian National Railway,* 2017 CHRT 6 [*Casler*]; *Gaucher v. Canada (Armed Forces),* 2005 CHRT 1 [*Gaucher*] for the proposition that human rights complaints do not serve the purpose of pleadings in the adjudicative process before the Tribunal. Instead, it is the SOP's filed with the Tribunal that set the terms of the hearing. The Tribunal may grant requests to amend SOP's, to ensure they properly reflect the issues in dispute between the parties to a complaint. Human rights proceedings are thus open to refinement as new facts and circumstances come to light.

[36] The Commission cites *Tabor v. Millbrook First Nation*, 2013 CHRT 9; *Blodgett v. GE-Hitachi Nuclear Energy Canada Inc.*, 2013 CHRT 24 [*Blodgett*]; *Cook v. Onion Lake First Nation*, 2002 CanLII 61849 (CHRT) [*Cook*] for the proposition that an amendment should be allowed at any stage, for the purpose of determining the real questions in controversy between the parties. However, an amendment will not be permitted if it will introduce a substantially new complaint, lacking a nexus in fact or law with the original complaint. Further, an amendment must not cause "real and significant" prejudice to the other parties that cannot be cured.

[37] The Commission cites *Casler* for the proposition that to determine the scope of the complaint referred to the Tribunal by the Commission, the Tribunal must examine the original complaint and the Commission's referral letter. "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.*"

[38] The Commission cites *Blodgett* for the proposition that it is appropriate to view allegations of ongoing failures in an accommodation process as "intrinsic parts of the narrative as a whole" and allow amendments for this purpose.

[39] The Commission argues that the portions of the SOP that the CAF seeks to strike are so clearly and expressly grounded in the complaint or related to it that AA's pleading is not in the nature of an "amendment". The CAF is fundamentally asking the

Tribunal not to hear certain portions of the complaint that the Commission has referred to it for an inquiry.

[40] The Commission submits that amendments should be permitted to include allegations of systemic discrimination, when sufficiently linked to the factual nexus of the initial complaint.

[41] The Commission argues that at paragraphs 12 through 14 of his SOP, AA simply elaborates on and provides additional particulars and context for the allegations he raised in his complaint. This is perfectly acceptable in pleadings before the Tribunal. The Commission submits these paragraphs should not be struck.

[42] The Commission argues that in paragraphs 3 and 5 of the Reply, AA outlines his legal argument related to the facts. Paragraphs 3 and 5 of the Reply relate to his allegation that the CAF failed to accommodate his mental illness, and articulate a basis for awarding particular remedies. These paragraphs of the Reply do not expand the scope of the complaint beyond the allegations in the complaint.

[43] The Commission submits that allegations related to AA's release from the CAF and wage loss, including paragraph 40 of the SOP and 5 of the Reply, should not be struck because the Tribunal possesses a broad remedial discretion to order appropriate remedies for any discrimination it may find after considering the evidence in a full inquiry. The Tribunal clearly has jurisdiction to remedy all losses incurred as a result of the discriminatory conduct, including any wage loss. Complainants are not required to itemize their requested remedies at the time of filing a complaint, and it is premature to foreclose on any of the available remedies at this point in the proceeding. The question of appropriate remedy is a matter for the Tribunal to determine on a reasonable and principled basis based on all the evidence at the conclusion of the inquiry, as stated in section 53(2) of the *CHRA.*

[44] AA also filed a response to the motion. Most of the submissions in the response are similar to and make the same arguments as the Commission has made. AA also provides an illustrative table similar to Appendix "1" to this ruling however, he also includes references to mental illness and harassment in the materials he filed with the

Commission in the Fall of 2015 as an update to his complaint. As such, AA's arguments that are different than the Commission are summarized in the following paragraphs 45 and 46.

[45] AA notes that the opportunity he was given by the Commission to update his complaint in the Fall of 2015 after it was held in abeyance resulted in him providing the Commission with information about continuing events and actions that went past his tenure with the CAF. As well, he notes that mental health issues were raised by him to the CAF in May of 2015 during the grievance process.

[46] AA does not object to the request for disclosure of his Income Tax Returns for 2015 through 2017 as they are the only relevant years required. As well, he does not object to the request for a summary of anticipated testimony from his witnesses. In both cases, AA simply requests thirty (30) days of the ruling to disclose the information.

[47] In its Reply Submission dated July 31, 2019 the CAF makes the arguments summarized in paragraphs 48 to 52.

[48] The CAF maintains its position that AA has raised new and unrelated allegations in his SOP and Reply which cause prejudice to the Respondent.

[49] The CAF argues that the illustrative table provided by AA "… cherry picks statements by, for example, including quotes from various persons without providing a broader context. The Complainant provides detailed facts related to his mental health for the first time in his SOP that were not provided in his original complaint."

[50] The CAF argues that AA's reference to being diagnosed with "moderate depression and anxiety" in his complaint has no nexus with a discrimination ground. In his complaint, and in subsequent submissions to the Commission, AA did not provide any details or facts regarding being discriminated against *on the basis of* having mental health issues. It is only at this stage of the proceeding that he provides a chart comparing his original complaint, with his submissions to the Commission to take his complaint out of abeyance and his SOP to support his mental health claim.

[51] The CAF argues that contrary to the Commission's position, AA's new allegations of systemic discrimination are not sufficiently linked to the factual nexus of the initial complaint. In *Gaucher*, the Tribunal reiterated the basic principle that "if a proposed amendment opens up a new and unanticipated route of inquiry, it should not be allowed. A key practical factor considered by the Tribunal is whether the Respondent had sufficient notice to meet the requirements of natural justice. Notably, the Respondent in *Gaucher* had notice of the systemic nature of the complaint in the "pre-complaint stage" by way of the affidavit of the complainant in her judicial review application as well as throughout the course of the investigation and supplementary investigation by the Commission. In contrast, in the case at bar, AA raised systemic discrimination for the first time in his SOP dated November 20, 2018. At no point prior to the filing of the SOP did AA or the Commission put the CAF on notice regarding the systemic nature of the complaint.

[52] The CAF argues that AA's Income Tax Return for the year 2014 is required to provide an accurate accounting of his financial earning capacity in and around the time that he was released. This information is essential to determining AA's actual earnings and whether he suffered a loss or reduction in income. His Income Tax Returns for the years 2018 and 2019 are essential to determining issues of wage loss and mitigation. The Tax Returns would provide a complete and accurate accounting of any income earned by AA from mitigating employment following his release from the CAF in 2015.

V. Analysis

[53] For the reasons that follow and through the orders below, I am dismissing the motion to strike out from AA's SOP and Reply the paragraphs and references to the *CHRA*, as described in paragraph 1(a) and (b) of this ruling and I am granting the requests for the disclosure of Income Tax returns (except for 2019 as it is not yet available) and a summary of the anticipated testimony of witnesses, as described in paragraph 1(c) and(d) of this ruling.

[54] In essence, the basis for the motion to strike is that mental health issues should not be part of the scope of this inquiry as :

a) they were not raised in the complaint of May 6, 2014, except at the very late date of March 2014 and only then in a superficial and unsubstantiated way that was collateral but unrelated and without the requisite nexus to the real focus of the complaint, being the alleged discriminatory treatment that AA received in light of his MELs; and

b) they were not investigated by the Commission or responded to by the CAF during the Commission process when the CAF could have had them dismissed summarily and they were not included in the matter the Commission referred to the Tribunal for inquiry. As such, for the Tribunal to entertain these issues now bypasses the procedural step of investigation by the Commission and prejudices the CAF by denying it the right to know the allegations made against it and be given a fair opportunity to respond.

[55] This case does not involve a request for an amendment, as the paragraphs and references in question are already in the SOP and Reply and are now being requested to be struck out. As such, this case is the reverse of a case for an amendment; nevertheless many of the principles that apply in cases involving a request for an amendment also apply to this case.

[56] A complaint is the starting point under the *CHRA* for invoking the process that eventually can lead to an inquiry by the Tribunal on a referral by the Commission. Most often, a prospective complainant like AA files a complaint without any independent legal advice or assistance. At this point the complainant is simply setting out his story on a prescribed summary form about what he says has transpired to his knowledge as at that time to make him believe that he has been discriminated against under the *CHRA* and that the discrimination may continue.

[57] It is well established that human rights laws are considered to be quasi-constitutional and need to be interpreted in a broad and purposeful manner in order to give full effect to the rights of individuals to live their lives free from discrimination. Given

this context, a complaint should not be unduly restricted by form over substance or by legalisms over practical realities.

[58] While the complaint gives rise to the investigation by the Commission and ultimately the referral to the Tribunal, if warranted, it is not a pleading. The pleadings are the Statements of Particulars and Reply as they flush out the case for the purpose of setting the terms for the adjudicative stage of the inquiry by the Tribunal in its search for the truth with respect to the real and essential matters in dispute.

[59] That said, there must be some factual foundation in the complaint that establishes a reasonable nexus with what is in the Statement of Particulars rather than a brand new allegation not reasonably connected to anything in the complaint and hence essentially a new complaint. In determining the scope of an inquiry when that issue arises, as it has in this case, the Tribunal must look at both the complaint and the Commission's request for an inquiry. As stated in *Casler* at paras. 7 to 11:

> [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*"]).
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> [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).
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> [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).
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> [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).

As also stated in *Gaucher* at paras. 9 to 13 where it was stated as follows:

> [9] The jurisdiction of the Tribunal under the *Canadian Human Rights Act* comes from the fact that the complaint has been referred by the Commission. This provides the general context in which any request for an amendment must be considered. The Commission must have considered the essential situation that forms the subject-matter of the inquiry, when it referred the complaint to the Tribunal. This places certain limits on amendments, which must have their pedigree in the circumstances that were put before the Commission.
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> [10] This is only one aspect of the matter however. I think that one needs to be conscious of the reality of the situation, in examining an application for an amendment. The complaint form is there primarily for the purposes of the Commission. It is a necessary first step, which raises a set of facts that call for further investigation. The complaint form provides an important starting point and is inherently approximate. It was never intended to serve the purposes of a pleading in adjudicative process leading up to a hearing.

It is the Statements of Particulars, rather than the original complaint, that set the more precise terms of the hearing.

[11] The parties must be aware that there is nothing unusual in the request for an amendment. The forms that come before the Tribunal are usually drawn up before the Complaint has been properly examined and all the relevant facts are on the table. It is inevitable that new facts and circumstances will often come to light in the course of the investigation. It follows that complaints are open to refinement. As long as the substance of the original complaint is respected, I do not see why the Complainant and the Commission should not be allowed to clarify and elaborate upon the initial allegations before the matter goes to a hearing.

[12] I think that human rights tribunals have adopted a liberal approach to amendments. This is in keeping with the *Canadian Human Rights Act*, which is remedial legislation. It should not be interpreted in a narrow or technical manner. In *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.J. No. 75 (QL), at para. 50, for example, the Supreme Court approved of an amendment to a complaint that "simply brought the complaint into conformity with the proceedings". I think that I am presented with a similar situation. It is merely a matter of ensuring that the form of the complaint accurately reflects the substance of the allegations that were referred to the Tribunal.

[13] The Federal Court has also endorsed this approach. In *Canadian Human Rights Commission et al. v. Bell Canada* 2002 FCT 776, at para. 31, Justice Kelen suggests that the rule before the Tribunal and the Federal Court should be the same. The jurisprudence in human rights:

> ...is echoed in the decisions of the Federal Court with respect to amendments to pleadings under Rule 75 of the *Federal Court Rules*, 1998. I refer to the case of *Rolls Royce plc v. Fitzwilliam* (2000), 10 C.P.R. (4th) 1 (F.C.T.D.), where Blanchard J. set out as a general rule that proposed amendments should be allowed where they do not result in prejudice to the opposing party...
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> Justice Kelen then quotes the Federal Court of Appeal, in *Canderel Ltd. v. Canada*, [1994] 1 F.C. 3 (F.C.A.) at p. 10, to much the same effect. As long as they can be tracked back to the facts and allegations that went before the Commission, and do not prejudice the Respondent, amendments should be allowed. This assists all of the parties in "determining the real questions in controversy between the parties".

[60] Given the above, I have examined the complaint and the disputed paragraphs and references currently included in the SOP and the Reply to see whether there is the required nexus between the complaint and the SOP and Reply to support their continued inclusion and I elaborate on the results of this examination in paragraphs 61 to 71 below. I have also examined the Commission's request for an inquiry to determine whether the disputed paragraphs and references are properly before the Tribunal and I elaborate and elaborate on this examination in paragraphs 72 to 75 below.

[61] With respect to the examination of the complaint and the disputed paragraphs and references in the SOP and Reply, it is my view that there is a sufficient nexus between the complaint and the disputed paragraphs and references in the SOP and Reply to justify their continued inclusion.

[62] The substantive part of the complaint is only three pages long as it is supposed to be a summary preliminary document. One needs, however, only to read the third sentence of the first paragraph of the complaint to find that AA states that he has been diagnosed with "moderate, anxious depression" which together with "moderate arthritis in my right hip" are both "injuries...attributable to my military service". Later on he states that on "...23 July 2013 I was diagnosed with moderate depression with anxiety based on my recent work experience while deployed to Afghanistan in 2012...with the CAF". Later on he states that in response to a recorded warning issued to him after he initiated an internal grievance while he was on sick leave that stated, in part, that "...your attempt to use your newly prescribed MELs and sick leave as a shield... demonstrated your willingness to abuse the medical system as a means to an end" that on "...4 March I revealed to the CAF that I had been diagnosed with moderate depression and anxiety. I had decided to make this revelation because the CAF had not actioned my request to see a harassment advisor (made over seven months prior)". Further, he states that as a result of what he felt was harassment he suffered a "...mental breakdown and within days...was placed under psychiatric care". Finally, he relates that on "...28 April 2014 I received a representation from...Col. P.S. Dawe. In this representation Col Dawe questioned the timing of my mental health issues as "odd" and he went on to state that I should have notified my chain of command so as to properly access help. I disagree

with this statement, I as a CAF member I should not have to reveal personal medical details to my supervisor to receive medical attention or support".

[63] The above quotes from the complaint together with the references in Appendix "1" are not, in my opinion, "cherry picking" or "unrelated" as suggested by the CAF. They are real references to mental health issues in the complaint. Notwithstanding the date of the revelation to the CAF about mental health issues by AA, in my opinion, they provide a sufficient foundation to establish the required nexus with the pleadings referred to in the paragraphs above. They do not introduce a new complaint in my opinion. That said, my decision in this ruling to sustain the inclusion of the paragraphs and references objected to does not mean that any allegation of discrimination of a failure to accommodate a disability is as yet proved, as that will require evidence at the hearing. As stated in *Saviye v. Afroglobal Network Inc. and Michael Daramola*, 2016 CHRT 18 at para. 18:

> [18] In determining whether the motion to amend the Complaint should be granted, the Tribunal should not embark on a substantive review of the merits of the amendment (see *Bressette v. Kettle and Stony Point First Nation Band Council*, 2004 CHRT 02 ("*Bressette*") at para 6). The merits of the allegations should be assessed at the hearing when the parties have full and ample opportunity to provide evidence.

[64] Further, I agree to the extent that that AA has pleaded additional facts and details of mental health discrimination that were not expressly included in the complaint, these particulars have a nexus to the mental health-related issues he raised in his complaint and are within the scope of the Tribunal's inquiry in my opinion. As stated in *Polhill v. Keeseekoowenin First Nation*, 2017 CHRT 34 at para 36:

> [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.

[65] On-going accommodation issues, including AA's ultimate release from the CAF, in my opinion also fall into this category and are connected to the complaint as "intrinsic parts of the narrative as a whole" to use the language in *Blodgett* at para 57 as follows:

> [57] Whether the test for granting the Disputed Amendments is that they be part of the "essential situation" of the Original Complaint, or whether the test is that they must be connected to or have a nexus with the facts in the Original Complaint if an ongoing series of discriminatory events is alleged, I find that the Disputed Amendments meet both tests. The type of discrimination alleged in the Disputed Amendments – age – does not change from the Original Complaint; the management personnel involved do not change; the group of employees in the Complainant's group do not change significantly; the incidents alleged consistently arise from the same type of situation in the workplace: the denial of assignment and training opportunities for the Complainant, allegedly on account of age discrimination. The alleged retaliation and harassment arise from the same ground of discrimination, except that the circumstances of some of the incidents also constitute harassment and retaliation, in the Complainant's view. The Disputed Amendments appear to be intrinsic parts of the narrative of the whole, which if left out, would not permit the Tribunal to fully assess the parties' evidence or obtain a complete narrative of the Complaints.

[66] In my view, allegations of systemic discrimination should be permitted when there is a sufficient link to the fabric of the complaint which is the case here. As stated in *Itty v. Canada (Border Services Agency)*, 2013 CHRT 33 at paras 23-25:

> [23] The proposed amendment is within the subject matter and substance of the original Complaint because the same facts that support the Complainant's section 7 allegations also support his section 10 allegations. The proposed amendment merely brings the Complaint into conformity with the facts already alleged.
>
> [24] The allegations of systemic discrimination (contrary to section 10), flow from the Complainant's allegations of discrimination in employment and adverse differential treatment.
>
> [25] By having investigated and considered the facts in the Complaint which support section 7, the Commission also investigated and considered the facts to support the addition of section 10 to the Complaint,

> because they are the same. The Commission referred the entire Complaint to the Tribunal, and the Complaint also encompasses the section 10 facts. Therefore, the Tribunal has jurisdiction to grant the amendment.

[67] As such, I am declining to strike the references in AA's SOP to additional provisions of the *CHRA* (sections 5(a) 10(a) and 8(b) at pages 19-21 thereof as these allegations flow from the same facts as the complaint alleged in relation to sections 7 and 10 of the *CHRA.*

[68] Further, I have considered the particulars of the various requests the CAF for paragraphs and references to be struck as described in paragraph 1(a) and (b) of this ruling. In this regard, I agree with the positions taken by the Commission for the same reasons summarized in paragraphs 41, 42 and 43 of this ruling.

[69] With respect to paragraph 43 of this ruling discussing the broad remedial authority of the Tribunal, it should be noted that the in *Hughes v. Elections Canada*, 2010 CHRT 4 at para. 50 it was stated as follows:

> [50] The Supreme Court of Canada has allowed human rights tribunals a certain degree of latitude in the making of remedial orders. This is in keeping with the purposes and goals of anti-discrimination statutes. Of course, orders of a remedial nature must be linked or have a nexus to the *lis* or subject-matter of the complaint substantiated by the tribunal: the "four corners of the complaint" or "the real subject matter". The remedy must be commensurate with the breach. The orders also must be reasonable and the remedial discretion exercised in light of the evidence presented.

[70] Further in *Chopra v. Canada (Attorney General)*, 2007 FCA 268 at paras. 35-37 in setting out a framework for the Tribunal to exercise its discretion in matters involving compensation it was stated as follows:

> In the context of compensation for losses suffered as a result of a discriminatory practice, the question of foreseeability does not arise for the simple reason that Parliament has set out the kind of losses which are recoverable. **Paragraph 53(2)(c) of the *Act* provides that a Tribunal may make an order that the wrongdoer pay compensation for wages lost, and expenses incurred, as a result of the discriminatory practice.**

> The fact that foreseeability is not an appropriate device for limiting the losses for which a complainant may be compensated does not mean that there should be no limit on the liability for compensation. The first limit is that recognized by all members of the Court in *Morgan*, that is, there must be a causal link between the discriminatory practice and the loss claimed. **The second limit is recognized in the *Act* itself, namely, the discretion given to the Tribunal to make an order for compensation for any or all of wages lost as a result of the discriminatory practice. This discretion must be exercised on a principled basis.**

[71] I am not prepared to limit the scope of the available remedies at this preliminary stage of the inquiry in a way that would limit or exclude the possibility of recovering wage losses in the event that a finding of liability occurred after the hearing of the evidence. This and the matter of mitigation of damages will be part of the evidence at the hearing to be determined after completion of the hearing.

[72] With respect to the Commission's request for an inquiry and whether it provides sufficient authority for the Tribunal hear the matters objected to: It is my view that a matter that is raised in the complaint is not outside the scope of the Tribunal's inquiry by reason only that the Commission did not address it in its investigation. As stated in *Connors* at paras 39 to 43:

> [39] Therefore, the assessment report is used to justify or support a decision to proceed with the inquiry into the case before the Tribunal and not to limit the scope of the Tribunal's inquiry.
>
> [40] Moreover, the Tribunal notes that the Commission is not strictly required to conduct an investigation before referring a complaint to the Tribunal under section 49(1) of the *Act*. In fact, the provision states that the Commission may, at any stage after the filing of a complaint, request that the Tribunal institute an inquiry into the complaint. The Commission's investigation is therefore not a prerequisite for the Tribunal to institute an inquiry into the complaint. Consequently, the fact that the assessor did not examine the allegations of sexual assault and sexual exploitation does not automatically preclude the Tribunal from considering them, especially since the complainant specifically refers to them in her original complaint.
>
> [41] In this case, the investigator's approach cannot in itself determine the content of the complaint or the scope of the inquiry.
>
> [42] Moreover, the Commission has not made any such decision. In fact, in its decision to request the Chairperson of the Tribunal to institute an

> inquiry into the complaint, the Commission does not specify whether events should be included or excluded from the Tribunal's inquiry. The Commission merely refers the complaint without further clarification. The Commission writes:
>
> > The Commission has decided, pursuant to section 49(1) 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.
>
> [43] In addition, the file does not contain any other decision of the Commission whereby it may have limited the complaint to certain alleged events. Although, as noted above, the assessor himself limited his assessment, the Commission referred the complaint without further clarification. The Tribunal concludes that it is seized of the complaint in its entirety.

[73] While it appears that the Human Rights Officer focused on the allegations regarding the failure to accommodate for the hip injury, as quoted in paragraph 18 of this ruling, clearly the report of August 18, 2016, pursuant to sections 40 and 41 of the *CHRA* quoted at paragraph 17 of this ruling indicates that mental issues were identified in the report. Further in the section 49 report referring the complaint to the Tribunal the Human Rights Officer explained as follows:

> As mentioned earlier, this report deals only with the issue of whether the respondent employed the complainant within his MEL. The officer has not considered the complainant's remaining allegations in this report because, under section 49 of the *Act*, "[at any stage after the filing of a complaint, the Commission may request the Chairperson of the Tribunal to institute an inquiry into the complaint, if the Commission is satisfied that, having regard to all the circumstances of the complaint, an inquiry is warranted". Given the analysis that follows on the issue of the complainant's MEL, the evidence indicates that the complaint warrants further inquiry.

[74] The Commission referred AA's complaint to the Tribunal for an inquiry without placing any limitations on the scope of the complaint or inquiry in its Decision letter to the Chair of the Tribunal dated April 11, 2018, and its Referral Decision in which it states as follows:

> After examining this information, the Commission decided, pursuant to section 49 of the *Canadian Human Rights Act*, to request that the

> Chairperson of the Canadian Human Rights Tribunal institute an inquiry into the complaint because the investigator has been unable to reconcile the conflicting information presented by the parties. A Tribunal hearing would allow for the examination and cross-examination of witnesses as well as, where necessary, the evidence of an expert witness, in order to make an in-depth assessment of credibility.

[75] As such, the Tribunal is properly seized of the entire complaint including the paragraphs and references in AA's SOP and Reply proposed to be struck by the CAF.

[76] While I accept the principle referred to in the cases cited above, that amendments ought not to be made to pleadings if the amendment will cause real and significant prejudice that cannot be cured, in my opinion leaving the paragraphs and references objected to in place at this time will not cause such prejudice to the CAF. The CAF will have an opportunity and the time to defend all of the allegations made by AA at the hearing including mental health issues. Among other things, to succeed, AA will have to prove that he had a mental health disability that the CAF was in a position to accommodate and unlawfully failed to do so. That will be determined by me on the evidence that is adduced at the hearing, regardless of the determination on this motion and regardless of what the Commission did with respect to its investigation.

[77] Finally with respect to the requests of the CAF described in paragraphs 1(c) and (d) of this ruling for AA's Income Tax Returns and a summary of his anticipated witnesses' testimony, there does not now appear to be a real dispute about this request and I agree with it for the reasons advanced by the CAF, except for the fact that the 2019 Income Tax Returns are not in existence and will not be until sometime in 2020.

VI. Orders

[78] For the foregoing reasons:

a) the motion by the CAF to strike out the paragraphs and references to the *CHRA* in AA's SOP and Reply described in paragraphs 1(a) and (b) of this ruling is dismissed.

b) the motion by the CAF for disclosure of AA's Income Tax returns, except for 2019, and a summary of his anticipated witnesses' statements as described in paragraphs 1(c) and (d) of this ruling is allowed and AA is ordered to make the disclosure and provide the summary within 30 days of the release of this ruling.

VII. Appendix 1

	Allegation in Complainant's SOP (to which Respondent objects)	**Allegation in the Original Complaint**
Para 12	"When I submitted my grievances on 29 August 2013, **I had asked to see a harassment advisor** (HA)."	"On 29 August I initiated a Grievance to address the Issues that I have described above. In addition, **I requested to see a harassment advisor**."
	"Over six months passed and I had not been contacted by a HA … When I requested FA adjudication on 4 March 2014, I wrote about not having been granted access to a HA, and **I wrote about mental health issues that I was experiencing (I had been diagnosed with depression and anxiety after my removal from** the RCD). I wanted the FA to know that my working environment, specifically, discrimination and harassment, were aggravating my mental health issues, and that **I was not being given access to a HA. I had hoped that this disclosure would highlight my need for assistance."**	"On 4 March 2014 I responded to the representation of LCol Atherton. In this response **I revealed to the CAF that I had been diagnosed with moderate depression and anxiety**. I had decided to make this revelation **because the CAF had not actioned my request to see a harassment adviso**r (made over seven months prior). **I had hoped that my admission would spur just action."**
Para 13	"Col Dawe's response, in his function as an IA, was to hold my request for FA adjudication until 29 April 2014 (this amounted to almost two months) while he drafted a supplemental letter to the FA. In this letter, Col Dawe made many accusations against me, so I will focus on some key issues.	"On 28 April 2014 I received a representation from the initial authority (IA), Col P.S. Dawe. In this representation, **Col Dawe questioned the timing of my mental health issues as 'odd' …"**

	Firstly, while claiming not to doubt that I had been diagnosed with mental health issues, Col Dawe states, **"I find it odd that in light of a decision letter from me, that did not grant his request or address his inappropriate use of the grievance system, he now feels that it is necessary to state that he is suffering from mental health issues."** My diagnosis existed prior to the decision from Col Dawe; his decision had nothing to do with my disclosure. My disclosure was motivated because I was experiencing discrimination and discriminatory harassment and I wanted to address these issues with a HA.	
	Col Dawe **went on to state**, "if the griever felt that his mental health issues were a concern which would impact his ability to work or have the potential to escalate, **he should have notified his chain of command** so as to properly address them with the CAF mental health services." My medical records will attest to the fact that I was receiving proper medical attention without the need to involve my chain of command (CoC) or superiors in my treatment or diagnosis. Col Dawe's statements contravene CANfORGEN128/03 (ADMHRMIL 061 241 824Z OCT 03); there is no requirement for me to go through my superiors to receive medical care or treatment. Col Dawe's statement reveal [sic] **a requirement to have me bare my soul to his staff in order to receive administrative support**; this is called gate keeping and it is unjust. I have a right to privacy and	"…and **he went on to state that I should have notified my chain of command** sooner to as to properly access help. I disagree with this statement, I as a CAF member **I should not have to reveal personal medical details to my supervisor to receive medical attention or support**."

	to work in an environment that is free of judgement; I only chose to reveal details relating to my mental health issues after suffering sustained and continued discrimination and after being denied the right to see a HA for months. It should be noted, when I disclosed that I had mental health issues, I specifically stated that I wanted that information protected and not accessible by my superiors (because they had proven hostile toward me); this request was ignored – the CAF administrative system failed to safeguard my privileged medical information, and as discussed above Col Dawe unlawfully accessed my medical information and used it to case aspersions against me.	
Para 14	The gate keeping described above is not unique. In fact, superiors and supervisors at 2 CMBG are encouraged to use scepticism when dealing with mental health issues. For example, on 7 April 2014, Chief Warrant Officer (CWO) K. Olstad, Col Dawe's right-hand man disseminated an email. This email discusses CAF members with mental health issues. CWO Olstad stated, "**we must ensure we support our soldiers that are injured and weed out the ones that are taking the free ride**." This email was disseminated shortly after I had revealed I had mental health issues. I remind the reviewer, Col Dawe and LCol Atherton' s own statements indicate doubts as to the legitimacy of my psychological injuries. I remind the reviewer, Col Dawe and LCol Atherton' s own	"On 28 March 2014 I met with a CAF harassment advisor-- the results were varied. On 8 April 2014, the 2 CMBG Sergeant Major disseminated an email about mental illness, he states, "**we must ensure we support our soldiers that are injured and weed out the ones that are taking the free ride.**" Based on my experience and the representations and actions taken against me **it is clear that I have been identified as someone to be weeded out** (email dated 8 April 2014)."

	statements indicate doubts as to the legitimacy of my psychological injuries. I believe that the facts so far demonstrate that **I was being targeted because of my health issues**; specifically, I was targeted because the leaders in my organization thought that I was a malingerer, in the words of CWO Olstad, I was regarded as someone taking the system for a free ride. This is not true, at all times my health issues were addressed using the CAFs own medical system, and it was CAF's own medical professionals who prescribed MELs to me. The fact that my superiors behaved cynically and unjustly reveals a failure on the part of the CAF to provide employees with a working environment free of harassment and discrimination. Simply put, if my superiors wanted or felt that they needed more information they should have addressed this issue appropriately through proper medical channels; instead, they misused the CAF's administrative system to target me unfairly, removing me from my position and placing me on RW.	

Signed by

Edward P. Lustig
Tribunal Member

Ottawa, Ontario
August 13, 2019

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T2274/2918

Style of Cause: AA v. Canadian Armed Forces

Ruling of the Tribunal Dated: August 13, 2019

Motion dealt with in writing without appearance of parties

Written representations by:

AA, for himself

Daphne Fedoruk, for the Canadian Human Rights Commission

Kathryn Hucal, for the Respondent