

**Canadian Human  
Rights Tribunal**



**Tribunal canadien  
des droits de la personne**

**Citation:** 2019 CHRT 40  
**Date:** September 9, 2019  
**File No.:** T2323/7818

**Between:**

**Linda Logan**

**Complainant**

**- and -**

**Canadian Human Rights Commission**

**Commission**

**- and -**

**Canadian National Railway Company**

**Respondent**

**Ruling**

**Member:** Anie Perrault

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In preparation for the hearing of this case, the Respondent brought a motion seeking to strike certain paragraphs from the Statements of Particulars (“SOPs”) filed by the Complainant and the Canadian Human Rights Commission (“CHRC”). This motion is the subject of the present ruling.

## I. OVERVIEW

[1] The Complainant, Ms. Linda Logan, alleges that her employer CN Railway (the Respondent) has discriminated against her on the ground of disability, and continues to do so, contrary to s. 7 of the *Canadian Human Rights Act* (“CHRA”). She also alleges that CN Railway has retaliated against her for having filed a complaint, contrary to section 14.1 of the *CHRA*.

[2] Two preliminary issues are the subject of the present ruling:

[3] First, a motion was brought by the Respondent in advance of the Tribunal’s inquiry into this case. The motion seeks an order striking out several paragraphs from the Statements of Particulars (“SOPs”) filed by the Complainant and the CHRC and declaring a grievance dated March 12, 2018 (the “Grievance”) and a worker’s compensation issue outside the scope of the inquiry.

[4] Specifically, the Respondent is seeking the following:

1. An order striking out portions of the Statement of Particulars of the Complainant (the “SOP of the Complainant”) and the Statement of Particulars of the CHRC (the “SOP of the CHRC”), in particular:
  - a. paragraphs 9 and 29 of each of the SOP of the Complainant and the SOP of the CHRC dealing with the meeting of March 2, 2018 between the Complainant and representatives of the Respondent, and the Complainant’s alleged constructive dismissal and failure to accommodate on the part of the Respondent, all of which is the subject matter of a grievance (the “Grievance”) and found to be outside of the scope of the Complaint by the Canada Human Rights Commission (the “Commission”);
  - b. the notation of “For refusal to allow me to rescind retirement - 10 Days Paid Vacation” under the subsection entitled “ii) Personal Remedies” in the Amended Section 2 of the SOP of the Complainant;

- c. the paragraph beginning with “Background with David Kawaler: . . .” on page 9 of Section 2 of the SOP of the Complainant dealing with a WCB wage appeal following the Complainant’s workplace injury in 2010 (the “WCB Issue”); and
  - d. the notation of “Loss of award of WCB Monies owed to Trustee - \$8,000.00” under the subsection entitled “(ii) Personal Remedies” in the Amended Section 2 of the SOP of the Complainant.
2. An order that the Grievance and WCB Issue are outside the scope of the Complaint and the parties are precluded from adducing evidence at the inquiry of the within [sic] Complaint with respect to the Grievance and/or WCB Issue and from seeking any remedy from the Respondent with respect to the Grievance and/or WCB Issue.

[5] Second, in her May 30, 2019 Reply to the Respondent’s SOP, Ms Logan sought to formally add a claim of retaliation to her complaint against the Respondent. The CHRC supports this request, while the Respondent disagrees with several of the alleged bases for the retaliation claim. During a case management conference call with the parties, I requested that the request for adding retaliation allegations to the complaint be dealt with within the parameters of the motion to strike presented by the Respondent.

[6] In its response to the motion to strike, the CHRC agrees with certain aspects of the Respondent’s requests and proposes changes to the disputed paragraphs, which the Respondent largely agrees with in its reply.

[7] Regarding the personal remedies section of the Complainant’s SOP, the CHRC made no comments.

[8] In her response to the motion to strike, Ms. Logan agrees partially to the Respondent’s motion in regard to the WCB issue but clearly mentions that she wants to be able to raise elements which she feels constitute evidence of ongoing discrimination or retaliation by the Respondent, without making a distinction between elements related to the Grievance or other events post-March 23, 2015.

[9] I am partially granting the Respondent’s motion to strike and I am partially granting the Complainant’s request for adding a retaliation claim to her complaint.

## II. LEGAL QUESTIONS

[10] Are the Grievance and the events surrounding it (the Grievance Facts) outside the scope of the complaint?

[11] Is the WCB issue outside the scope of the complaint?

[12] Can the complainant add retaliation allegations as per section 14.1 of the *CHRA*?

- a. The confidentiality of the complainant's medical record: the difference between disclosure and evidence.

## III. ANALYSIS

### A. The grievance of March 12, 2018 (the "Grievance")

[13] The Respondent is asking that paragraphs 9 and 29 of the Complainant's and CHRC's SOP be struck out and that the events related to the Grievance dated March 12, 2018, all of which are the subject matter of the Grievance, be found to be outside the scope of the complaint.

[14] The CHRC's response to the Respondent's motion is to propose omitting all but the first sentence from each of the disputed paragraphs and restrict debate to the March 2, 2018 meeting which was to discuss Ms. Logan's accommodation, and not to raise the Grievance Facts in connection with this meeting. The Respondent is amenable to this approach, while reserving the right to raise an objection if they feel it necessary during the inquiry.

[15] As for Ms. Logan, the reading of her response leads the Tribunal to believe that she is not prepared to modify paragraphs 9 and 29 of her SOP.

[16] So as to make the reading of this ruling easier, these are the Grievance Facts as agreed by the CHRC and the Respondent:

- Ms. Logan's retirement application;
- Ms. Logan's rescinding of her retirement;
- The Respondent's refusal to allow Ms. Logan to rescind her retirement;

- The Respondent's request for medical documentation as a condition of rescinding retirement;
- The Respondent's allowing Ms. Logan to return to work (apart from the fact of her restarting work on March 19, 2018); and
- The outcome of the Grievance.

[17] The Tribunal's jurisdiction over the complaint comes from the referral made by the CHRC. The Tribunal does not have the jurisdiction to review a decision of the CHRC regarding the scope of a complaint referral.

[18] The referral letter sent by the Commission to the Tribunal for this case and dated August 10, 2018, does not give any details or any particular aspect of the original complaint for referral to the Tribunal.

[19] However, the jurisprudence is clear that the referral letter to the Tribunal cannot be considered in isolation from materials provided to the parties.

[20] In *Murray v. Canada (Immigration and Refugee Board)*, 2014 FC 139, the Federal Court considered a similar situation in which the Commission wrote a letter to the Tribunal Chairperson that did not contain the same level of detail about its decision as did the letters to the parties. In that case, the Court stated:

[67] I agree that, in principle, the letter that the Commission sends to the Tribunal defines the scope of "what" is being referred to the Tribunal for an inquiry. Furthermore, I agree that the letter sent to the Tribunal in this case did not specify that only portions of Mr. Murray's complaint were referred for inquiry. However, the Commission's letter cannot be disconnected from the long history of the complaint and the context into which the Tribunal was being seized of Mr. Murray's complaint. In the specific circumstances of this case, I find the authorities on which the applicant relied to be of little use.

[21] In the case before me, it is clear from the SOP's and all motion materials provided by the parties that the CHRC did, in fact, limit the referral to exclude the Grievance, and that this was clearly communicated to all the parties.

[22] Furthermore, as stated above, the CHRC agrees in its response to the motion that such Grievance is outside the scope of this complaint and proposes modifications to the disputed paragraphs.

[23] The CHRC proposal regarding the Grievance is to amend the most problematic paragraphs from the SOP's to address the Respondent's concerns, limit discussion of the Grievance to the "bare facts" necessary to establish a timeline and the needed context, which include the March 2, 2018 meeting, but exclude the Grievance Facts as described above.

[24] In its Reply, the Respondent indicates that it agrees with the CHRC's proposed approach, while reserving the right to object at the hearing should it feel certain evidence is too closely related to the Grievance.

[25] This seems a prudent and reasonable approach with which this Tribunal agrees with.

[26] Nevertheless, the Respondent is still requesting a formal order from this Tribunal to address this issue.

[27] The *CHRA* and the *Rules of procedure of the Tribunal* do not provide an explicit mechanism for the striking of portion of a SOP. The concept of a motion to strike comes from civil courts procedure. In *Bailie et al v. Air Canada and the Air Canada Pilot Association*, 2011 TCDP 17, this Tribunal stated clearly:

[22] Perhaps the Tribunal should consider the legal tests and practices before other human rights tribunals in Canada before resorting to the courts'. There are strong policy reasons why the Tribunal's Rules of Procedure contain only ten rules, whereas the Federal Courts Rules are over 500 in number. Notably, there is also a statutory basis as subsection 48.9(1) of the *CHRA* provides: "Proceedings before the Tribunal shall be conducted as informally and expeditiously as the requirements of natural justice and the rules of procedure allow." (See also Rule 1(1)(c)).

[28] The Tribunal is also given broad remedial powers through s. 50(3)(e) of the *CHRA*, which states that the Tribunal may "decide any procedural or evidentiary question arising during the hearing".

[29] An order to strike might be appropriate in a hearing with sophisticated and represented parties, but the Tribunal feels that it may not strike the correct balance of fairness and expediency in this case, where Ms. Logan is self-represented. A more balanced approach is likely to be more appropriate.

[30] The Tribunal, as I ruled before in *Lafrenière v. Via Rail Canada Inc*, 2017 CHRT 9, has jurisdiction to receive contextual information relevant to the complaint:

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

[31] In *Murray v. IRB*, 2018 CHRT 32, the Tribunal ruled that referencing events for context in ongoing discrimination cases is acceptable:

[65] Insofar as events are alleged that post-date the key period, these would seem naturally relevant to consideration of any claim for relief, if the complaint is substantiated in respect of March 2003 – March 2004. This principle extends to references made to continuing discrimination, or to the consequences or effects of alleged discrimination. For example, references to a "poisoned work environment" (Complainant's SOP, para. 2), a "poisoned" workplace (Complainant's SOP, para. 26(f)), or "harassment" (*ibid*) are made in the context of detailing alleged effects of the systemic discrimination, e.g., it contributed to a poisoned work environment etc. I do not view these mere references as a resurrection of allegations dismissed by the Commission as I do not understand them to be advanced as free-standing sources of liability.

[32] The Tribunal therefore rules that the Grievance and the Grievance Facts are outside the scope of the complaint and that modifications to paragraph 9 and 29 of the Complainant's and CHRC's SOP be made as per suggested by the CHRC and agreed with by the Respondent. Paragraphs 9 and 29 of the CHRC and Complainant's SOP should now read as follows:

9. The Commission recognizes Ms. Logan's dismissal and related grievance as outside the scope of this complaint.

29. On March 2, 2108, Ms. Logan met with CN management to discuss her accommodation of flexibility around her workday start time, which she says was not being properly implemented.

[33] That said, the Tribunal does not object to Ms. Logan providing context for her complaint at the hearing by referring to elements related to the Grievance, but she may not seek any remedy related to those events and thus, the Respondent is not required to provide



reply evidence. If, even knowing that such information will not be used to establish any liability, the Respondent still takes issue with anything raised during the inquiry, he might of course raise an objection.

## **B. The WCB issue**

[34] The Respondent alleges that any references by the Complainant in her SOP to a Worker's Compensation Board (WCB) wage appeal following a workplace injury in 2010 have no "logical, factual or causal connection" to the complaint, and that furthermore the Tribunal has no jurisdiction to consider them as the events fall well outside of the 1-year time limit established for the Commission to consider complaints under the *CHRA* (see below):

41 (1) Subject to section 40, the Commission shall deal with any complaint filed with it unless in respect of that complaint it appears to the Commission that

...

(e) the complaint is based on acts or omissions the last of which occurred more than one year, or such longer period of time as the Commission considers appropriate in the circumstances, before receipt of the complaint.

[35] While the CHRC did expressly waive the one-year time limit for the other events that form the basis of this complaint, it did not do so for the workplace compensation issue, which occurred four years prior the date of the events at the heart of this discrimination complaint and is not referenced in any way in the original complaint.

[36] The CHRC has taken no position as to the Respondent's request regarding the WCB issue and the related paragraphs.

[37] Ms Logan agrees that her request for damages relating to her WCB matter is unrelated to the complaint. However, she does not agree that she should not refer to the WCB issues in describing events that took place later with Mr. David Kawaler, as she feels some of his actions were a "reprisal" for the previous WCB case.

[38] The Tribunal agrees with the Respondent that the WCB issue has no "logical, factual or causal connection" to the complaint.

[39] The complaint involves allegations of discrimination based on the ground of disability, contrary to section 7 of the *CHRA* and relates to events dating from December 2014.

[40] The WCB issue that the Complainant is referring to in her SOP, and the background with David Kawaler she wishes to refer to, relates to a workplace injury that took place back in 2010. This event took place 4 years prior to the events at the basis of the Complainant's original complaint for discrimination.

[41] Given the time difference between the WCB issue and the events referred to in the complaint, given the lack of connexion between the two and since the CHRC has not granted any waiver pursuant to s. 41(e) of the *CHRA*, the Tribunal concludes that the WCB issue is outside the scope of this complaint and that the paragraph beginning with "Background with David Kawaler:..." on page 9 of section 2 of the Complainant's SOP and dealing with that WCB issue and the request for "WCB monies owed to Trustee" should be struck out.

### **C. Retaliation allegations**

[42] The Complainant has requested to add allegations of retaliation in accordance with s. 14.1 of the *CHRA* to her complaint.

[43] The CHRC agrees that facts post March 23, 2015, which is the date that Ms. Logan began a medical leave, other than those facts related to the Grievance of March 12, 2018, should be included in the scope of the complaint and examined by the Tribunal as ongoing discrimination. It also endorses the addition of the following allegations of retaliation, as outlined by Ms. Logan at page 5 of part 2 of her Statement of Particulars: "changing her accommodation, making statements to her union about her being "antagonistic" and failing to commence team building meetings with her."

[44] The Respondent first indicated in its SOP that it opposed the inclusion of events post-March 23, 2015 in the scope of the complaint. However, in a June 7, 2019 CMCC, followed by directions dated June 10, 2019, the Tribunal directed the Respondent to bring a motion to strike which was to deal with all issues surrounding the scope of the complaint, including the request to add retaliation allegations.

[45] In that motion to strike, which the Tribunal is examining now, the Respondent did not make any reference to these other events subsequent to March 23, 2015.

[46] In its response to that motion to strike, the CHRC referred again to post-March 23, 2015 events and the specific allegations of retaliation, giving the Respondent another opportunity to address those if needed.

[47] The Respondent's reply a few days later addressed the issue of retaliation but only in light of the medical record disclosure issue as raised by the Complainant in her response to the motion. The Tribunal will deal with this further below.

[48] After reading all the material filed by the parties, the Tribunal concludes that the Respondent no longer opposes the inclusion of post-March 23, 2015 events and alleged acts of retaliation (excluding those related to the Grievance).

[49] Notwithstanding this, the Tribunal must be convinced that the allegations of retaliation disclose a **tenable** claim for retaliation (see *Brickner v. Royal Canadian Mounted Police* 2018 CHRT 2). The claims of retaliation raised by Ms. Logan appear to be linked to the allegations giving rise to the complaint, and it is not plain and obvious that they have no chance of success. It is plausible that, if proven, the allegations could be linked to Ms. Logan's having filed a human rights complaint.

[50] Further, the Respondent will not be prejudiced by the amendment to add retaliation, as the matter is still at an early stage and gives the Respondent adequate time to prepare its responding case accordingly. I also believe the claims are sufficiently particularized to enable the Respondent to prepare its case. Should the Respondent wish to clarify any details in advance of the inquiry, this can be discussed at a future CMCC.

[51] However, the Tribunal wishes to clarify that the allegation of retaliation made by Ms. Logan in her response to the Respondent's motion as it pertains to David Kawaler, plainly and clearly can not qualify as retaliation contemplated in s. 14.1 of the *CHRA* and therefore will not be considered on the merits by this Tribunal.

[52] The Tribunal has already indicated above that all paragraphs related to the WCB issue are outside the scope of this complaint and that the paragraph about “Background with David Kawaler” be struck out.

[53] But since the Complainant is suggesting that the December 2014 incident, which is the base of the complaint, was an act of reprisal on the part of Mr. Kawaler over her previous Worker’s compensation case, which I have already declared outside the scope of this complaint, the Tribunal is of the opinion that this is clearly not the type of retaliation contemplated by s. 14.1 of the *CHRA*.

[54] The Tribunal will not hear the Complainant on the background she wishes to give about David Kawaler and will not allow the Complainant to refer to it during the hearing as it relates to the WCB issue, which the Tribunal has already concluded to be outside the scope of this complaint.

**(i) The Complainant’s medical record**

[55] In her response to the motion - “Motion Brief of the Complainant”, Ms. Logan indicates that she also wishes to add a claim of retaliation as it relates to the disclosure of medical records:

In addition to evidence I have already provided, I would like to include further evidence of continuing retaliation/discrimination. This is in regard to the Respondents’ legal counsel including private medical documents dated back to 1984 in the disclosure presented to me. These private medical documents require my consent to have disclosed. I in no way consented to anyone in any way to provide such information to the Respondent’s counsel. This is an egregious breach of my privacy rights. I perceive this to be an unethical attempt to discredit, humiliate and intimidate me. I perceive this to be a malicious attack on my character and to strip me of my dignity.

[56] Ms. Logan also brought this matter to the Tribunal during the CMCC held on June 7, 2019.

[57] At that time, I explained to Ms. Logan that she could raise this as an objection at the time of the inquiry, should the Respondent decide to enter these records as a hearing exhibit. For now, the disclosure of the medical records does not form part of the public record

related to this matter. If the medical records are filed as exhibits at the hearing, an objection can be raised, or it can be requested by Ms. Logan that these exhibits be subject to a confidentiality order. (as per s. 52 of the *CHRA*).

[58] Specifically, s. 52(1)(c) of the *CHRA* stipulates that the Tribunal may take any measures and make any order necessary to ensure the confidentiality of the inquiry if the Tribunal is satisfied that there is a real and substantial risk that the disclosure of matters will cause undue hardship to the persons involved and that this outweighs the societal interest in a public hearing.

[59] At this time, the Tribunal agrees with the Respondent that making disclosure of all documents potentially relevant to the case, in accordance with its obligations under the Tribunal's *Rules of Procedure of the Tribunal* does not constitute the basis of an allegation of retaliation.

#### **IV. CONCLUSION**

[60] On the motion to strike, the Tribunal orders as follows:

1. that the Grievance dated March 12, 2018 and the Grievance Facts are outside the scope of the complaint;
2. that the Complainant may refer to elements of the Grievance at the hearing solely for giving context should the Complainant so wish, but not in order to establish the Respondent's responsibility;
3. that the WCB issue is outside the scope of the complaint;
4. that the Complainant is precluded from seeking any remedy with respect to the Grievance and the WCB Issue;
5. that paragraph 9 and 29 of the Complainant's and CHRC's SOP be amended and now be read as follow:
  9. The Commission recognizes Ms. Logan's dismissal and related grievance as outside the scope of this complaint.
  29. On March 2, 2108, Ms. Logan met with CN management to discuss her accommodation of flexibility around her workday start time, which she says was not being properly implemented.

6. that the notation “for refusal to allow me to rescind retirement – 10 days paid vacation” under the subsection entitled “ii) personal remedies” in the amended section 2 of the Complainant’s SOP be struck out of the Complainant’s SOP; and
7. that the paragraph beginning with “Background with David Kawaler:...” on page 9 of section 2 of the Complainant’s SOP and dealing with that WCB issue and the request for “WCB monies owed to Trustee” be struck out of the Complainant’s SOP.

[61] On the request from the Complainant to add retaliation claims, the Tribunal rules that post-March 23, 2015 events (excluding those related to the Grievance) are to be included in the scope of the complaint as well as the retaliation claims as outlined by Ms. Logan at page 5 of part 2 of her Statement of Particulars: “changing her accommodation, making statements to her union about her being “antagonistic” and failing to commence team building meetings with her”. To be excluded are the retaliation claim about David Kawaler, as described above at paragraphs 53 and 54 of this ruling, as well as the retaliation claim about the medical records, as described at paragraphs 55 through 59.

[62] As proceedings before the Tribunal shall be conducted as informally and expeditiously as the requirements of natural justice and the rules of procedure allow, the parties are not required in this case to file Amended Statements of Particulars. The changes to the CHRC and Complainant’s SOP’s, as described above in my ruling, are hereby deemed to have been made.

*Signed by*

Anie Perrault  
Tribunal Member

Ottawa, Ontario  
September 9, 2019

# Canadian Human Rights Tribunal

## Parties of Record

**Tribunal File:** T2323/7818

**Style of Cause:** Linda Logan v. Canadian National Railway Company

**Ruling of the Tribunal Dated:** September 9, 2019

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

**Written representations by:**

Linda Logan, for herself

Sheila Osborne-Brown and Jessica Walsh, for the Canadian Human Rights Commission

Curran P. McNicol, for the Respondent