

**Canadian Human  
Rights Tribunal**



**Tribunal canadien  
des droits de la personne**

**Citation:** 2022 CHRT 39

**Date:** December 8, 2022

**File No.:** T2457/1420

**Between:**

**Ray Miller**

**Complainant**

**- and -**

**Canadian Human Rights Commission**

**Commission**

**- and -**

**International Longshoremen's Association, ILA Local 269**

**Respondent**

**Ruling**

**Member:** Colleen Harrington

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## **I. Overview and Decision**

[1] The International Longshoremen's Association, ILA Local 269 ("Respondent" or "Union") has brought this Motion relating to the timeframe of the complaint that the Canadian Human Rights Tribunal ("Tribunal") can consider in its inquiry. The Respondent argues that the scope of the complaint before the Tribunal was limited by the Canadian Human Rights Commission ("Commission") during its screening process. It argues that the Tribunal may only consider events of alleged discrimination that occurred between May and July of 2015.

[2] The Commission and Mr. Miller ("Complainant") disagree with the Respondent that the scope of the inquiry into the complaint is limited to this 3-month time period. They agree that any reference to alleged discrimination that occurred more than one year prior to the complaint being filed with the Commission in December of 2015 may only be considered as background or contextual information. However, they do not agree that the Tribunal is limited from considering events that occurred after July of 2015, and in particular allegations of discrimination that the Commission considered when investigating the complaint.

[3] I agree with the Commission and Complainant that the scope of the Tribunal's inquiry into this complaint is not as limited as the Respondent suggests. The Tribunal may consider allegations of discrimination that occurred after the complaint was filed, including specifically the Complainant's application for the "Cardboard" hiring process in 2015-2016.

[4] I decline to strike any particulars from the Commission's or Complainant's Statements of Particulars, as requested by the Respondent. To do so at this stage would be premature. However, I agree that the Respondent is entitled to further particulars from the Complainant relating to his Cardboard application.

## **II. Issues**

[5] The Tribunal must determine the following issues arising out of this Motion:

1. Is the scope of the complaint that the Tribunal can inquire into limited to allegations of discrimination that happened between May and July of 2015, as the Respondent argues, or does the scope of the complaint include the 2015-2016 Cardboard competition as well?

2. If the scope of the complaint is broader than that argued by the Respondent, is the Respondent entitled to further particulars relating to the cardboard competition of 2015-2016?

### **III. The Respondent's Motion**

[6] The Respondent's Motion seeks an order that:

1. Portions of the of the Complainant's and Commission's Statements of Particulars should be struck out for being outside the proper scope of the complaint referred to the Tribunal;
2. In the alternative, if the allegations about the 2015-2016 Cardboard application process are found to be within the scope of the complaint, the Union seeks particulars;
3. Seeking direction on the role that fifteen years of context or background from prior to May 2015 plays in the hearing of the complaint.

[7] The Respondent argues that the Tribunal should only consider allegations of discrimination that took place between May and July of 2015. It submits that the Commission made the decision to limit the timeframe for this complaint early in its screening process, before conducting its investigation into the complaint.

### **IV. Background: Commission's Complaint Screening**

#### **A. Human rights complaint**

[8] Mr. Miller's human rights complaint form states that he is "a Black man who has experienced both systemic and overt racism in" his place of employment. He states that, in May of 2015, while he was at the Respondent's Union Hall waiting to be assigned longshoring work, he was advised by the Union's president that he would not be assigned any work. The president said he had been told by a former Union president that Mr. Miller was seen dealing drugs 15 years prior and was actually barred from being assigned work by the Union. Mr. Miller says he does not deal drugs and has no history of any criminal record involving drugs, nor is there documentation to support the allegation that he was witnessed dealing drugs by the former Union president.

[9] Mr. Miller says that, despite being barred, he had been working out of the Union Hall for the past 15 years off and on and that he had been exposed to racist comments by his coworkers. He says in his complaint that this treatment was ongoing and, in June of 2015, he had a conversation with the Union president who told Mr. Miller that comments about his race were being made under people's breath or behind closed doors.

[10] Mr. Miller says that, by not removing his restriction on being dispatched for work, the Union has prevented him from applying for Cardboard positions, including in July of 2015. A Cardboard is a list of persons who are trained to work in the longshoring industry. As the Tribunal stated in a previous decision, "Cardboard positions are highly sought after, as they offer the only path to Union membership, with its considerable associated benefits" (*Chisholm v Halifax Employers Association*, 2021 CHRT 14 (CanLII) at para 22).

[11] Mr. Miller says in his complaint that he believes he was denied opportunities for work, advancement, and union membership on the basis of his race or colour. He says Black employees are underrepresented in Union roles, leadership roles, and management. He says that this is a systemic issue that perpetuates itself from hiring to promotion.

[12] Mr. Miller's human rights complaint was received by the Commission in December of 2015.

## **B. Section 40/41 Report and Decision**

[13] After the Commission disclosed Mr. Miller's complaint to the Respondent, the Union raised an objection to the Commission dealing with the complaint on the basis of section 41(1)(e) of the *Canadian Human Rights Act*, RSC 1985, c H-6 ["CHRA"], which states:

**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.

[14] In response to the Respondent's objection, Commission staff prepared a Section 40/41 Report, which considered the allegations of discrimination included in the complaint,

the last of which was described as occurring in July of 2015. This Report concludes that there are allegations in the complaint that are in time and can be investigated by the Commission. These include the Complainant's May 2015 interaction with the Union president when he was told he had been barred from working for the past 15 years, and his June 2015 interaction with the Union president in which he was allegedly told that people were making racist comments. The Section 40/41 Report states that, "as this complaint was accepted by the Commission on December 1, 2015, these two allegations were both filed within the one-year time period established by the Act".

[15] In making its decision about whether to deal with Mr. Miller's complaint, the Commission said it considered the Section 40/41 Report and the submissions of the parties and decided, pursuant to section 41(1) of the *CHRA* "to deal only with the 2015 allegations in the complaint." The Commission decided that the allegations that predate May 2015 were included as contextual or background information. It stated that "the 2000-2014 allegations are based on acts which occurred more than one year before the complaint was filed and which are separate and independent of the remaining allegations, and the complainant has not provided a reasonable explanation for the delay in filing".

[16] Commission staff amended the Summary of Complaint form to change the Date of Alleged Discrimination from "2000 to JUL-2015" to "May, 2015 to July, 2015".

### **C. Commission's Investigation**

[17] The Commission then investigated the complaint. In its March 14, 2019 Investigation Report, the Commission acknowledges it had decided to deal only with the 2015 allegations in the complaint. In addition to the alleged discriminatory events described by Mr. Miller in his complaint that occurred between May and July of 2015, the Investigation Report also addresses access to the Cardboard positions. In his complaint, Mr. Miller described the Cardboard as a list of preferred shifts, stating that, on July 1, 2015 a list of 100 preferred positions was made available with a closing date of July 15, 2015. He alleged that the Union president did not reinstate him as a further means to prevent him from accessing those positions.

[18] The Investigation Report says: “As clarification, the complainant explains that he applied for every cardboard position, in an effort to obtain more work hours. For the hiring process that was initiated in November 2015, he recalls filling out a specific application (number 341) and obtained a bank draft made out to the ILA in the amount of \$75.00 dated December 3, 2015 (copy of receipt provided to the Commission). The complainant states that he dropped of (*sic*) both his application and the bank draft to the respondent.”

[19] The Respondent told the Commission’s investigator that Mr. Miller did not need to be reinstated to apply for a Cardboard position and that the Union could not prohibit anyone from applying for such a position. It advised that Mr. Miller was not banned from applying for Cardboard positions, and that he did not apply for any. The Union’s president was interviewed and told the investigator that, although the Complainant picked up application number 341, he did not return it to the Union office.

[20] The Commission’s investigator indicated that there was a dispute as to whether Mr. Miller returned his application for the Cardboard process that was initiated in November 2015 but, since the existence of the bank draft supported Mr. Miller’s position that he did apply, the analysis would continue. The Investigation Report concludes that Mr. Miller’s lack of success in obtaining a Cardboard position resulted in a denial of an employment opportunity and that his race and colour may have been a factor in this denial. The Report recommends that the Commission refer the complaint to the Tribunal for an inquiry.

#### **D. Respondent’s Submissions to the Investigation Report**

[21] The parties were given the opportunity to make submissions with respect to the Investigation Report. The Respondent’s submissions say that the recommendation in the Investigation Report to refer the complaint for an inquiry is based on 2 matters that are outside the proper scope of the complaint. The Respondent submitted that the Commission decided in April of 2017 that the investigation would deal “only with the alleged discrimination that occurred from April to July, 2015” but then recommended that the complaint be referred to the Tribunal for an inquiry based primarily on: (1) the 2001 decision of the Union president to bar Mr. Miller from working because he was selling marijuana on Union property; and (2)

Mr. Miller's assertion that he submitted an application in December of 2015 for the Cardboard, which the Union disputes, and his production of a bank draft dated December 3, 2015 in support of this assertion. The Union noted that the complaint was dated November 24, 2015 and was received by the Commission on December 1, 2015. The bank draft was dated after the complaint was received, and therefore the alleged refusal by the Union to accept the bank draft also occurred after the complaint was received.

[22] In its submissions to the Commission's Investigation Report, the Respondent argued that both the 2001 decision to bar Mr. Miller and the 2015 Cardboard process "are outside the proper scope of the complaint. In turn, they cannot be the basis for a Tribunal inquiry. The complaint is limited – by decision of the Commission – to the allegations concerning the Union's actions between May, 2015 to July, 2015." The Union described those allegations as being the acceptance by the Union president that Mr. Miller had been barred by a previous president from working out of the Union Hall and that he continued to be barred, and the president's alleged statement that racial comments were being made about him in the workplace. The Union argued: "That is the scope of the complaint. The first Investigation Report into this matter dated October 26, 2016 notes that the Complainant clarified that the allegations pre-dating May, 2015 were intended for contextual or background purposes only." By "first Investigation Report into this matter", the Respondent is apparently referring to the Commission's Section 40/41 Report dated October 26, 2016.

#### **E. Commission's Decision to Refer the Complaint to the Tribunal**

[23] On January 31, 2020, the Commission sent a letter to the Tribunal and to the parties indicating that it had decided to refer the complaint to the Tribunal for an inquiry. This letter says that, before rendering its decision, the Commission reviewed the complaint, the Investigation Report and the submissions filed in response to the Report. "After examining this information, the Commission decided, pursuant to paragraph 44(3)(a) of the *Canadian Human Rights Act*, to request that the Chairperson of the Canadian Human Rights Tribunal institute an inquiry into the complaint."



[24] The letter further advises the parties of the opportunity to ask the Federal Court to review the Commission's referral decision. The Respondent did not do so.

## V. Analysis

[25] As part of the Tribunal's case management proceedings, the parties have all filed Statements of Particulars as required by the *Canadian Human Rights Tribunal Rules of Procedure*, 2021, SOR/2021-137.

[26] The Respondent argues that the Statements of Particulars of the Commission and the Complainant contain particulars that exceed the scope of the complaint that the Commission referred to the Tribunal for an inquiry. It argues that some particulars pre-date the scope of the complaint as they relate to events that occurred prior to May of 2015, while others occurred after the complaint was filed, and so cannot be considered by the Tribunal.

[27] The Respondent's position is that the scope of the complaint referred to the Tribunal was circumscribed by the Commission's decision further to its Section 40/41 Report. It argues that, as this Report recommended that the Commission deal only with "the 2015 allegations" in the complaint, the Commission was only permitted to investigate the allegations of discrimination that took place between May and July of 2015. The Respondent further argues that the investigator assigned to Mr. Miller's complaint "either misunderstood the Commission's decision or failed to respect it when she expanded her investigation to include events subsequent to" July of 2015.

[28] The Respondent refers to Tribunal case law which sets out general principles applicable to disputes about the scope of a complaint referred by the Commission. In doing so, the Respondent notes that, if the Commission has relied on an Investigation Report to reach its decision, the Tribunal should consult that report with a view to understanding the scope of the complaint (*Karas v Canadian Blood Services and Health Canada*, 2021 CHRT 2 (CanLII) ["*Karas*"] at para 29). The Respondent takes this a step further and suggests "that applies equally to a decision further to a Section 40/41 Report".

[29] The Respondent argues that the Commission's decision pursuant to its Section 40/41 Report is "a binding decision on the scope of the complaint" that necessarily forms part of

the Commission's decision to refer the complaint to the Tribunal. It says that the Commission did not indicate in the referral to the Tribunal that it was departing from the earlier Section 40/41 decision.

[30] The Section 40/41 Report considered the Respondent's objection to the Commission dealing with the complaint on the basis of section 41(1)(e) of the *CHRA*. This Report considered the complaint as filed and, specifically, whether any of the incidents described in the complaint pre-dated the one-year time limit in the *CHRA*. Section 41 does not speak to incidents of alleged discrimination that may arise *after* the complaint has been filed.

[31] The Respondent has provided no authority to support its position that the Commission was limited to investigating only allegations of discrimination that occurred up to the point that the complaint was filed. Indeed, such a proposition is contrary to the principle, established in the jurisprudence, that the Commission has considerable latitude in the way that it conducts its investigations (*Desgranges v. Canada (Administrative Tribunals Support Services)*, 2020 FC 315 (CanLII) [*"Desgranges"*] at para 30).

[32] The Commission owes a duty of procedural fairness to the parties to a complaint, which it extended to the Union when it received and considered its submissions to the Investigation Report. In those submissions, the Union made the same argument to the Commission that it is making in this Motion: that the Commission was only entitled to investigate allegations of discrimination that occurred between April and July of 2015, because this is what it had decided pursuant to its Section 40/41 Report. The Union specifically argued that, because the Cardboard application process occurred after the complaint was received by the Commission, it could not be considered by the Commission in its investigation.

[33] In coming to its decision pursuant to section 44(3)(a) of the *CHRA* to refer "the complaint" to the Tribunal for an inquiry, the Commission considered the complaint, the Investigation Report and the submissions of the parties. Section 44(3)(a)(i) of the *CHRA* states that the Commission "may request the Chairperson of the Tribunal to institute an inquiry under section 49 into **the complaint to which the report relates** if [it] is satisfied that, having regard to all the circumstances of the complaint, an inquiry into the complaint is

warranted” [emphasis added]. The case law is clear that the Commission has broad discretion to determine whether further inquiry into a complaint is warranted in the circumstances (*Desgranges* at para 30).

[34] The Tribunal has previously stated that the Commission’s letter asking the Tribunal’s Chairperson to institute an inquiry into the complaint essentially establishes the scope of the complaint that the Tribunal is to inquire into (*Karas* at para 20). If, as in the present case, the letter to the Tribunal does not express any limitations or exclusions, the Tribunal assumes that the complaint is referred in its entirety (*Karas* at para 20).

[35] It is a longstanding principle, reaffirmed by the Court in *Desgranges* (at para 33), that the Commission may adopt the Investigator’s Report as its reasons, as noted in *Sketchley v Canada (Attorney General)*, 2005 FCA 404 at para 37:

When the Commission adopts an investigator's recommendations and provides no reasons or only brief reasons, the Courts have rightly treated the investigator's Report as constituting the Commission's reasoning for the purpose of the screening decision under section 44(3) of the [CHRA].

[36] The complaint to which the Investigation Report relates includes the allegations of discrimination that the Commission considered to be in time pursuant to its Section 40/41 Report. It also includes the subsequent Cardboard application process, which the Complainant says he participated in.

[37] The Commission argues that the Respondent’s Motion is a “collateral attack on the Commission’s decision to refer Mr. Miller’s complaint to the Tribunal for inquiry” and says the Motion should be dismissed. The Supreme Court of Canada defines a collateral attack as “an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment” (*Wilson v. The Queen*, 1983 CanLII 35 (SCC), [1983] 2 SCR 594 at 599). It does appear that the Respondent’s Motion fits within this definition of collateral attack.

[38] The Tribunal acquires its jurisdiction over human rights complaints when the Commission asks the Tribunal’s Chairperson to institute an inquiry into a complaint. Once the Commission has made this request, the role of the Tribunal is not to review the

Commission's decision-making process, but rather to adjudicate the complaint (*Torraville v Jazz Aviation LP*, 2020 CHRT 40 (CanLII) at para 32).

[39] It is well established that the Tribunal does not have the jurisdiction to review decisions made by the Commission in its screening process. Only the Federal Court may do so (*Canada (Human Rights Commission) v. Warman*, 2012 FC 1162 (CanLII) at para 56).

[40] The Respondent was advised by the Commission that it could ask the Federal Court to review the Commission's decision to refer the complaint to the Tribunal for an inquiry. Instead of doing so, the Respondent is essentially now asking the Tribunal to vary or nullify the Commission's decision about the scope of the complaint referred for an inquiry. It is making the same argument to the Tribunal that it has already made to the Commission and hoping for a different result.

[41] This is the wrong venue to raise this issue. On that basis I would dismiss the Respondent's Motion to limit the scope of the complaint.

[42] I decline the Respondent's request to strike the allegations in the Commission's and Complainant's Statements of Particulars relating to the 2015-2016 Cardboard competition. I do agree with the Respondent, however, that it is entitled to further particulars related to the Complainant's application to the Cardboard competition.

[43] In *Richards v CSC*, 2020 CHRT 27 (CanLII) [*Richards*], the Tribunal confirmed that it has "the authority to amend, clarify or determine the scope of the original discrimination complaints, provided that no prejudice is caused to other parties" (at para 85). The Respondent has had notice of the allegations relating to the 2015-2016 Cardboard hiring process since they were raised during the Commission's investigation and it was provided an opportunity to respond to them at that time. There is no unfairness or prejudice to the Respondent by having to respond to the 2015-2016 Cardboard competition allegations as part of the Tribunal's inquiry.

[44] However, the Respondent is entitled to further particulars and disclosure relating to these allegations of discrimination and any remedies Mr. Miller seeks related to the Cardboard competition, so that it may know the case it has to meet.

[45] The Respondent points out that, in order for a Cardboard application to be screened by the Union and forwarded to the Halifax Employers Association, which does the ultimate testing and hiring for the Cardboard, an applicant must meet certain minimum requirements. The Respondent argues that, in order to allege discrimination by the Union in the Cardboard competition, Mr. Miller must show that he met these minimum requirements. Ultimately, it is up to the Complainant to prove on a balance of probabilities that he was discriminated against, and if he fails to provide sufficient evidence to do so, then the Tribunal will not make such a finding.

[46] With regard to the Respondent's request to strike allegations relating to events that occurred prior to May of 2015, I also decline to do so. While there is some reference in the Commission's and Complainant's Statements of Particulars to alleged discriminatory behaviour that occurred prior to April or May of 2015, it has already been established that such events have been included to provide context that is relevant to the allegations of discrimination that are "in time".

[47] While acknowledging that the Tribunal has the power to strike portions of Statements of Particulars that exceed the proper scope of the complaint in advance of a full hearing, the Tribunal in *Richards* cautioned that it must do so only in the clearest of cases (at para 86; see also *Desmarais v. Correctional Service of Canada*, 2014 CHRT 5 at para 83). Caution is required to ensure that the Tribunal does not strike factual assertions that are relevant to the inquiry until a full evidentiary record is established at a hearing (*Richards* at para 87).

[48] The Respondent will have the opportunity to object to the admission of evidence during the hearing, and to make submissions with regard to the relevance of certain evidence to the findings the Tribunal will be asked to make, including the issue of appropriate remedies if discrimination is found to have occurred.

**VI. Conclusion**

[49] I dismiss the Respondent's Motion to limit the timeframe of the complaint inquiry and to strike portions of the Complainant's and Commission's Statements of Particulars.

[50] However, because the scope of the complaint includes the 2015-2016 Cardboard competition, I order the Complainant to provide further particulars to the Respondent and Commission relating to his allegations of discrimination in the Cardboard competition. Deadlines for the parties to amend their Statements of Particulars will be provided in writing by the Tribunal.

*Signed by*

**Colleen Harrington**  
Tribunal Member

Ottawa, Ontario  
December 8, 2022

## **Canadian Human Rights Tribunal**

### **Parties of Record**

**Tribunal File:** T2457/1420

**Style of Cause:** Miller v. International Longshoremen's Association, ILA Local 269

**Ruling of the Tribunal Dated:** December 8, 2022

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

**Written representations by:**

Michael Dull, for the Complainant

Ikram Warsame, for the Canadian Human Rights Commission

Ronald A. Pink, K.C. and Bettina Quistgaard, for the Respondent