Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2023 CHRT 31
Date: August 14, 2023
File No(s).:HR-DP-2856-22

Between:

E.F.

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Correctional Service of Canada

Respondent

Ruling

Member: Athanasios Hadjis

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I. OVERVIEW

[1] The Complainant seeks an order to add a third party, Dr. Stephen John Charman Hucker, as a respondent to her human rights complaint. The Complainant states in her complaint that she is an Indigenous transgender woman in the custody of the Correctional Service of Canada (CSC). She alleges that the CSC's practice for determining access to gender-affirming care for gender diverse prisoners is discriminatory and in particular that Dr. Hucker, a forensic psychiatrist contracted by the CSC, outed her to her family and home community without her consent. She contends that these actions amount to discrimination based on gender identity or expression.

[2] Her complaint only named the CSC as respondent.

II. DECISION

[3] For the following reasons, I deny the request.

III. ISSUES

[4] Should I exercise my discretion to allow the Complainant to add Dr. Hucker as a respondent?

IV. BACKGROUND

[5] The Complainant is detained at a prison operated by the CSC. In the complaint, she alleges that the CSC contracted Dr. Hucker to make a gender-dysphoria assessment of her. He interviewed her on July 6, 2018, and issued a report on August 3, 2018. She claims that after interviewing her, Dr. Hucker disclosed personal information about her gender identity and expression to third parties in her home community, effectively outing her, all without her consent. This included seeking input from her estranged wife.

[6] The complaint focusses almost entirely on Dr. Hucker's actions. She contends that he relied on her estranged wife's views and on the fact that she had not come out earlier to

conclude that she was not a transgendered woman. She adds that Dr. Hucker deliberately misgendered her numerous times in his report. He ultimately recommended that she not be offered feminizing hormones and that she abandon her "strategy" regarding sex transformation.

[7] In her complaint, the Complainant alleges that Dr. Hucker's conduct towards her amounted to willful and reckless discrimination and harassment on the grounds of gender identity and expression. She specifies that he outed her to persons in her small community, denied her right to self-determine her gender identity, and accused her of falsifying her gender identity based on stereotypical and discriminatory assumptions.

[8] The complaint is three pages long. Her allegations about the CSC's responsibility in this matter are set out in the last paragraph of the two-page portion of the complaint entitled "Summary and details of discrimination at issue." The Complainant states that the CSC controls her access to healthcare and submits that the CSC has an obligation to ensure the professionals it hires abide by CSC policies and uphold the CSC's human rights obligations. Since the CSC contracted Dr. Hucker's services, it is liable for his discriminatory conduct and for compounding the discrimination by defending his report and refusing to pay for a new assessment. The last page of her complaint form details the impact of the alleged discrimination on her and the steps she took to address it.

[9] The Complainant's lawyer filed the signed complaint form with the Canadian Human Rights Commission (Commission) on June 27, 2019. The Summary of Complaint prepared by the Commission, which is attached to the complaint, states that the alleged discriminatory practice is the denial of service on a prohibited ground of discrimination (s.5 of the *Canadian Human Rights Act*, RSC 1985, c. H-6 (*Act*)).

[10] Both the signed complaint form and the Summary of Complaint only list the CSC as the respondent.

[11] The Commission reviewed the complaint, its investigation report, and the parties' submissions, and decided on June 15, 2022, to request that the Tribunal conduct an inquiry into the complaint. The letter to the Tribunal Chairperson refers to the case as a complaint against the CSC.

[12] On December 13, 2022, the Complainant's lawyer wrote to the Tribunal and other parties to advise them that she intended to file a motion for a confidentiality order and another motion to add Dr. Hucker as a respondent. I directed that the confidentiality motion be dealt with first and issued a ruling on April 3, 2023. The parties and Dr. Hucker filed their submissions on the second motion between April 21 and June 30, 2023.

[13] The Commission supports the Complainant's request, while the CSC takes no position. Dr. Hucker opposes it.

V. ANALYSIS

[14] There is no dispute that the Tribunal has the authority to add parties to a case. Rule 29 of the *Canadian Human Rights Tribunal Rules of Procedure, 2021*, SOR/2021-137, sets out the procedure for making this request, which includes a requirement that the prospective party be notified of it and be given the opportunity to make submissions.

[15] *Peters v. United Parcel Service Canada Ltd.*, 2019 CHRT 15 (CanLII) (*Peters*) explained how the Tribunal has dealt with these requests over the years. It observed that because the addition of a party at the inquiry stage could deprive the party of the Commission's screening function under ss. 41 and 44 of the *Act*, the Tribunal must carefully consider the various risks and prejudice that may result and weigh the factors involved (paras. 39-40).

[16] In *Syndicat des employés d'exécution de Québec-téléphone section locale 5044 du SCFP v. Telus communications (Québec) inc.*, 2003 CHRT 31 at paras. 30, 36 (*Telus*), the Tribunal held that the addition of a new respondent is appropriate if it is established that:

1. The presence of this new party is necessary to dispose of the complaint.
2. It was not reasonably foreseeable, once the complaint was filed with the Commission, that the addition of a new respondent would be necessary to dispose of the complaint.
3. The addition of a new party will not result in serious prejudice to that party.

[17] *Peters* noted that the Tribunal has usually considered the first two *Telus* criteria in determining whether a party ought to be added to proceedings before the Tribunal. However, *Peters* also commented that *Telus* was not intended to establish a closed list of factors to consider (para. 44), especially given the Tribunal's statutory obligation to conduct its proceedings in an informal and expeditious manner within the necessary bounds of natural justice and procedural fairness (s. 48.9(1) of the *Act*).

[18] Accordingly, the Tribunal in *Peters* concluded that in the specific facts of that case, an analysis of the *Telus* factors was not conclusive. The Tribunal had to consider factors beyond those laid out in *Telus*.

[19] The Complainant submits that given the concerns about the rigid application of *Telus*, I should go further than *Peters* and abandon the *Telus* test entirely as the analytical framework. Her lawyer proposed a reformulated two-part test. The Commission supports her submission and proposes that in plain language it would read as follows:

1. Would it be in the public interest to add the proposed respondent?
2. Does the benefit of adding the proposed respondent outweigh the potential prejudice to the proposed respondent?

[20] The Complainant then went on to set out 10 factors to consider in applying this test.

[21] I am not persuaded that a complete reformulation with an inventory of 10 or more factors is needed. As *Peters* noted, the *Telus* criteria are useful factors that can be supplemented by others, depending on a given case's facts. Creating a long list of factors as a new test would not be any more helpful. I think the two general considerations reflected in the Commission's proposal (public interest and prejudice) are broadly addressed whenever examining such requests, whether by just applying the *Telus* criteria or considering other factors that are relevant to a particular case.

[22] I will consequently analyze the Complainant's request by considering the *Telus* criteria and other relevant factors whether found in *Peters* or in the parties' submissions.

A. It was reasonably foreseeable that Dr. Hucker should be named as a respondent

[23] In my view, the most important factor to consider in the facts of this case is the second *Telus* factor, reasonable foreseeability. The Complainant not only knew about Dr. Hucker's involvement in the issues raised in her complaint, but her entire case is almost entirely about him and his alleged discriminatory practices. Until the last paragraph, the complaint basically only talks about him, and she maintains emphatically in her motion that her complaint's allegations against him are not frivolous or speculative.

[24] Yet, the complaint was filed only against the CSC. Complainants often file complaints against the organization that would be vicariously liable for the conduct of a wrongdoer for any number of reasons, not the least of which is that the organization may have the means or be best placed to provide the appropriate remedy, such as the implementation of systemic remedies.

[25] The Commission and Complainant argue that merely because it was reasonably foreseeable from the outset that Dr. Hucker would be necessary to fully dispose of the complaint, the Complainant should not be denied the request to add him now. They suggest that it is a better alternative than having the Complainant file a fresh complaint against Dr. Hucker and ask the Commission to exercise its discretion under s. 41(1)(e) of the *Act* to accept the complaint despite the passage of time. This would be inefficient and inconsistent with the instruction in s. 48.9(1) that Tribunal proceedings be conducted as informally and expeditiously as the requirements of natural justice and rules of procedure allow.

[26] Section 41(1)(e) provides that the Commission is not required to deal with a complaint if it is based on acts or omissions that occurred more than one year before it receives the complaint, or a longer period if the Commission considers it appropriate. In other words, the Commission has the discretion to decide whether to deal with a complaint about acts or omissions that occurred more than a year before. The remaining provisions in s. 41(1) set out other reasons why the Commission may decide not to deal with a complaint (i.e., it is beyond its jurisdiction; it is trivial, frivolous, vexatious, or made in bad faith; the

matter can be more appropriately dealt with under another act; the complainant should exhaust other recourses first).

[27] The Commission and Complainant's argument is troubling. How can the Commission presuppose how it would independently assess a properly formulated complaint against Dr. Hucker? We do not know if it would decide to exercise its discretion to deal with the complaint beyond the one-year period mentioned in s. 41(1)(e) after a lapse of well over three years since the alleged discriminatory practice. We do not know how the Commission would address any other objections or representations by Dr. Hucker in the exercise of its authority under the *Act*.

[28] The Commission and Complainant contend that the Tribunal could address Dr. Hucker's objections at the hearing stage, as *Peters* determined regarding the proposed respondent in that case.

[29] However, the Commission's authority, particularly under s. 41(1)(e), is not one that the Tribunal can ever assume. The Tribunal has repeatedly held in inverse situations, where respondents have requested that a complaint be dismissed because it was filed after the expiry of the one-year period, that the Tribunal must respect the Commission's exclusive jurisdiction to decide whether to deal with such complaints unless there is evidence that a fair hearing has become impossible due to the excessive passage of time (see *Pequeneza v. Canada Post Corporation*, 2016 CHRT 21).

[30] The problem is particularly acute in this instance. The Tribunal cannot usurp the Commission's exclusive jurisdiction to decide whether it is appropriate to deal with a complaint that is being initiated against Dr. Hucker over three years after the alleged acts and omissions took place, even though the Complainant has been fully aware of the potential claims against him since then. Under the *Act*, the decision to accept and deal with the complaint is the Commission's to make, not the Tribunal's.

[31] The Commission referred to the general rule that issues arising out of the same set of factual circumstances should normally be heard together, which improves the efficiency of the process and avoids the possibility of inconsistent rulings. However, this rule is ordinarily applied to join several existing proceedings that are properly before the

adjudicating body. In the present case, I am only seized with a single complaint, filed against one responding party, the CSC.

[32] I also note that the Complainant gave no explanation for why she did not include Dr. Hucker as a respondent, despite his name appearing throughout almost all of her complaint. In contrast, in *Peters*, there was evidence that the complainant intended to name the other party as a respondent from the outset but was unable to due to a technical problem with the Commission's website. In *Peters*, the Commission recognized in its pleadings that there may have been an error made in the filing of the complaint.

[33] Similarly, in *Leonard v. Canadian American Transportation Inc.*, 2022 CHRT 20, the complainant had named the proposed additional party as a respondent in the initially filed complaint but, somehow, the Commission withdrew that party's name from the complaint without providing advance notice or reasons to the complainant.

[34] There is no similar indication of error or other explanation for failing to include Dr. Hucker as a respondent in this case.

[35] In *Peters*, the Commission also stated that it was unable to contact the other party during its investigation and that he was unavailable for an interview, which may have further explained why he was not included as a respondent in the complaint that was referred to the Tribunal for inquiry. In contrast, the Commission in the present case was in constant contact with Dr. Hucker. According to the Complainant's outline of the facts, the Commission's human rights officer spoke directly to Dr. Hucker. The Complainant submits that Dr. Hucker was an active participant in the Commission investigative process and that the investigation report set out his position.

[36] Yet, there was no reason provided for why there was no follow-up to include him as a respondent before the complaint was sent to the Tribunal for inquiry.

[37] The Complainant submits that she declared her intention to request Dr. Hucker's inclusion at the earliest opportunity, about six months after the complaint was referred to the Tribunal for inquiry, before the Statements of Particulars were due. This would minimize any prejudice to him and the CSC. I do not agree. It is a mischaracterization of the facts. The

complaint dealt almost exclusively with Dr. Hucker. The earliest opportunity to file a complaint against him was in June 2019, when she filed the complaint with the Commission through her legal counsel. Her declaration of intention, which she made on December 13, 2022, was hardly her first opportunity.

[38] Finally, I am concerned about what this suggested approach would give rise to. It effectively allows parties to bypass the Commission's gatekeeping function as set out in the *Act*. Rather than making sure to organize one's case and name all known potential respondents, which in turn affords them the *Act*'s procedural protections, complainants may opt to just act against one respondent and not worry about following up with any other, in the assurance that this omission will be addressed by the Tribunal years later. This is the wrong message to be sending to stakeholders. Parliament must be presumed to have set up the *Act*'s complaint process scheme for a reason. Parties should not be able to easily ignore it.

[39] In sum, it was obvious, let alone reasonably foreseeable, that Dr. Hucker should be a respondent when the complaint was filed. This mitigates strongly against granting any request to add him as a respondent at this stage, well over three years later.

B. The inclusion of Dr. Hucker as a party to these proceedings is not "necessary"

[40] The Complainant and Commission argue that Dr. Hucker must be added as a respondent because his conduct is at the heart of this complaint. He has first-hand knowledge of the interactions that took place with the Complainant and third parties, as well as his reasoning for the positions he took in his report. He may also be holding documents that are arguably relevant to these proceedings that are not within the CSC's power, possession, or control. He can more appropriately respond to the allegations than the CSC and may have a different perspective on whether the CSC acted with due diligence in this case, such as whether the CSC's policies were properly conveyed to him.

[41] However, this information can be accessed without making him a respondent. It can be acquired by compelling him to testify as a witness. The Tribunal has the authority to

summon and enforce the attendance of witnesses, to compel them to give evidence, and to produce any documents and things the Tribunal considers necessary for the full hearing and consideration of the complaint (s. 50(3)(a) of the *Act*).

[42] The Commission and Complainant acknowledge this but maintain that it would be "more efficient" to have the documents listed and disclosed early, and to know his position on the issues, as part of the case management process. This argument is not sustainable. Just because it would be easier and more convenient for the Complainant and Commission to present their cases does not mean that Dr. Hucker's involvement is *necessary*, particularly when weighed against the resulting denial to him of the *Act*'s procedural protections by adding him as a party at this stage.

C. The availability of additional remedies against Dr. Hucker is not a factor

[43] Under s. 65(1) of the *Act*, an organization is deemed to have committed any act or omission committed by its agent or employee. But the organization can exculpate itself of this vicarious liability if it proves that it fulfilled the conditions set out in s. 65(2). The Commission argues that at this stage, before the CSC has filed its Statement of Particulars, we do not know if the CSC intends to raise a defence under s. 65(2) of the *Act*. If it does and is successful in exculpating itself from liability for Dr. Hucker's actions, then the Complainant will be left without a remedy.

[44] I am not persuaded by this argument. Whenever a complaint is filed against an organization based on the alleged discriminatory acts or omissions of its employees or agents, it is almost certain that the employer will try to exculpate itself from liability under s. 65(2). Given this reality, when the complaint is filed, a complainant can name as respondent the employee or agent who committed the discriminatory practice to preserve for themselves the possibility of obtaining a remedy against them.

[45] There may be situations where a complainant does not know the identity of the agent or employee when they file their complaint but learn it later, possibly through the disclosure process. It is understandable if the complainant then asks to add them as respondents.

[46] In this case, however, the Complainant and the Commission knew Dr. Hucker's identity and his involvement in the alleged discriminatory practice from the outset. Indeed, almost all of the complaint explicitly refers to him. It is unreasonable to argue that Dr. Hucker should be added as a respondent, well over three years later, simply because the Complainant has suddenly realized that the CSC might have a successful s. 65(2) defence.

[47] The argument does not stand.

D. The fact that Dr. Hucker knew of the allegations for years does not negate the prejudicial effect

[48] The Complainant points out that Dr. Hucker was interviewed by the Commission's human rights officer and thus participated in its investigation. He also learned of the allegations against him in at least two other forums—the CSC's internal grievance process and a complaint against him at the College of Surgeons and Physicians of Ontario. He has known of her allegations since at least May 2019. He therefore has had ample opportunity to preserve evidence and take steps to prepare to respond to the Complainant's allegations. The Complainant argues that this prejudice is "minimal" and does not outweigh the harm in forcing her to file a new complaint against him with the Commission.

[49] This argument takes the *Act*'s complaint screening process too lightly. Respondents are afforded procedural protections that should not be so easily displaced, particularly in these circumstances where the additional party's identity and role have been known from the outset and where no reason was given for failing to name him as a respondent in the first place.

[50] Furthermore, Dr. Hucker submits that although he participated in the Commission's investigation, he did not have an opportunity to provide a formal or fulsome defence to the Complainant's allegations. He states that he engaged in the investigation on a good-faith basis and on an understanding that he would not be named as a respondent. In addition, he was not permitted to clarify, correct, or defend any conclusions made by the human rights officer regarding his conduct in the investigation report.

[51] The Complainant counters that the CSC's reply to the report suggests that it closely collaborated with Dr. Hucker, which enabled him to make a fulsome defence. However, this contradicts the Complainant's previous submission that Dr. Hucker's addition is necessary because he may have a perspective on the facts and issues that differs from the CSC's. This is indeed quite possible, which is why he should benefit from the same procedural protections under the *Act* as the CSC.

[52] I note that in another case where the Tribunal exercised its discretion and allowed the addition of another party (*Harrison v. Curve Lake First Nation*, 2018 CHRT 7), a separate human rights complaint on the same issue had been filed against the proposed respondent, which the Commission investigated. It is not clear whether the other complaint was ever referred to the Tribunal for inquiry. Nonetheless, the party was able to address the allegations as a respondent during the Commission's investigative process. In the present case, no human rights complaint was ever filed against Dr. Hucker personally. He may have conducted himself and reacted to the report differently if he knew that his personal liability was at stake.

[53] Dr. Hucker correctly points out that the Commission's investigation process is a defined and essential step in the proceeding that serves a critical screening function and affords respondents with the essential right to dispute the allegations at an early stage. His cooperation with the Commission's investigation cannot be construed as a meaningful participation in that process, as a named respondent would have been entitled to. The prejudice to him of not benefitting from the procedural protections in this process was not cured by this limited participation of speaking to the human rights officer and collaborating with the CSC, whose interests may not necessarily have been aligned with his.

[54] For all these reasons, I find the Complainant's request to add Dr. Hucker to this complaint as a respondent at this stage is not justified. I will not exercise the discretion to grant it.

VI. ORDER

[55] The Complainant's request to add Dr. Hucker as a respondent is denied.

Signed by

Athanasios Hadjis
Tribunal Member

Ottawa, Ontario
August 14, 2023

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: HR-DP-2856-22

Style of Cause: E.F. v. Correctional Service of Canada

Ruling of the Tribunal Dated: August 14, 2023

Motion dealt with in writing without appearance of parties

Written representations by:

Paul Quick, for the Complainant

Laure Prévost, for the Canadian Human Rights Commission

David Aaron and Aman Owais, for the Respondent

Brooke F. Smith and Daniel Yang, for Dr. Hucker