Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2024 CHRT 80
Date: May 9, 2024
File Nos.: T2747/12321; HR-DP-2868-22

Between:

Nicholas Dinardo

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Correctional Services Canada

Respondent

Ruling

Member: Catherine Fagan

I. OVERVIEW OF REQUESTED AMENDMENTS

[1] Nicholas Dinardo, the Complainant in this case, self-identifies as an Indigenous, Jewish, Two-Spirit transfeminine woman who uses gender-neutral pronouns.

[2] Mx. Dinardo has filed two human rights complaints against Correctional Service Canada (CSC), the Respondent, with this Tribunal (Tribunal file numbers T2747/12321 and HR-DP-2868-22). The Tribunal has consolidated the two complaints to be heard in a single inquiry. In these converged complaints, Mx. Dinardo alleges past and ongoing harassment and discrimination while in custody of CSC.

[3] On January 15, 2024, Mx. Dinardo brought a written request to the Tribunal to allow numerous amendments to their Statement of Particulars (SOP). The Tribunal addressed the requested amendments to remove certain allegations and to add retaliation allegations in a ruling on January 29, 2024 (see *Dinardo v. Correctional Services Canada*, 2024 CHRT 3).

[4] The remaining requested amendments are addressed in this ruling, namely:

a) Amendments to account for the fact that Mx. Dinardo is no longer in custody and for the advancement of time (paras 6, 34, 70, 107, 250(c),(d), (f)-(j) of their proposed amended SOP) (the “Timing Amendments”); and

b) Increasing the compensation sought by Mx. Dinardo (para 253 of their proposed amended SOP) (the “Quantum Amendment”).

[5] Mx. Dinardo, CSC and the Canadian Human Right Commission (the “Commission”) provided the Tribunal their submissions in writing on the requested amendments. The interested parties, who are only participating in the systemic aspects of the complaints, took no position.

[6] For the reasons that follow, the amendments are allowed.

II. LEGAL FRAMEWORK

[7] In *Peters v. Peters First Nation,* 2023 CHRT 58 (para 9) (“*Peters”*) and *Blodgett v. GE-Hitachi Nuclear Energy Canada Inc*, 2013 CHRT 24 (paras 16-17), this Tribunal

highlights the considerable discretion that s. 48.9(2) of the *Canadian Human Rights Act,* R.S.C., 1985, c.H-6 (CHRA) gives it in managing proceedings, including granting or dismissing motions to amend a complaint. As stated in paragraph 9 of *Peters* (citing *Canada (Attorney General) v. Parent*, 2006 FC 1313 at para 30 ("*Parent*"), the Tribunal has the discretion to permit amendments, namely if granting them serves the interests of justice by helping to identify the issues in dispute.

[8] However, the Tribunal must carefully assess any potential prejudice granting the amendment would cause to other parties. Paragraph 10 of *Peters* clarifies that the other party will not suffer any prejudice if the party can prepare itself and argue its position on the new issues being raised (also *Parent* at para 40).

[9] Additionally, amendments must not transform the complaint into an entirely new one. This means there must be a nexus, in fact and in law, between the initial complaint and the proposed amendment (*Peters* at para 10 and *Tran v. Canada Revenue Agency*, 2010 CHRT 31 at paras 17-18).

[10] Finally, in *Temate v Public Health Agency of Canada*, 2022 CHRT 31 at para 17 ("*Temate*"), the Tribunal confirmed that a motion to amend may be dismissed when it is plain and obvious that the allegations have no chance of success.

[11] Overall, when considering whether to allow amendments, the Tribunal must adopt a balanced approach. In other words, amendments will be allowed where the balance of convenience favours the party seeking the amendment (*Peters* at para 9).

III. TIMING AMENDMENTS

[12] CSC has informed the Tribunal that it consents to the Timing Amendments. Given this, the Tribunal allows the Timing Amendments.

IV. QUANTUM AMENDMENT

[13] Mx. Dinardo requests the following deletions and additions at paragraph 253 of their proposed amended SOP (deletions are crossed out and additions are underlined):

> Mx. Dinardo further requests compensation in the total amount of ~~$80,000~~ $720,000, representing: (a) compensation for Mx. Dinardo's pain and suffering experienced as a result of CSC's discriminatory practices; and (b) special compensation as CSC's discriminatory practices have been willful, reckless, or both. This represents $40,000 for each of the two human rights complaints filed by Mx. Dinardo (or, in the alternative, $40,000 for the s. 5 *CHRA* claim and $40,00 for the s. 14 *CHRA* claim), $40,000 for each use of force incident they are leading evidence on (15 incidents), and $40,000 for retaliation. The Tribunal has recognized in the First Nations Child and Family Caring Society proceeding that it can award multiples of the usual $40,000 compensation maximum to account for the compounding effect of breaches of the *CHRA*. Further, CHRT jurisprudence establishes that retaliation "is a separate, specialized 'discriminatory practice'" and therefore "calls for the consideration of a separate head of damages."

[14] Through this amendment, Mx. Dinardo seeks to increase the total compensation requested pursuant to sections 53(2)(e) and 53(3) of the CHRA from $80,000 to $720,000. As explained in the proposed new paragraph 254, the increased amount is requested to account for the compounding effects of the multiple alleged acts of harassment and discrimination against Mx. Dinardo by CSC, and for CSC's retaliatory conduct.

(i) Summary of the Positions of the Parties

[15] Mx. Dinardo argues that the Quantum Amendment should be allowed because the addition would cause no prejudice or injustice to CSC. They point out that 1) the amendment does not raise any new facts, 2) does not change the substance of Mx. Dinardo's complaint and 3) requires no additional documentary disclosure. Mx. Dinardo say that CSC has plenty of time to prepare to address the amendments because CSC's submissions on the quantum of any remedy would come at the end of the hearing, which is many months away.

[16] Mx. Dinardo also claims that the interests of justice are served by allowing this amendment because it allows them to seek the full compensation for CSC's many acts of discrimination and violence. Denying this amendment, they argue, would be seriously prejudicial to them.

[17] Although the Tribunal does not determine the merits of requested amendments when deciding whether to allow them, Mx. Dinardo submits that this Tribunal has recognized in *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada*

(representing the Minister of Indigenous and Northern Affairs Canada), 2019 CHRT 39 at para 257 ("*Caring Society Decision*") that it can award multiples of the usual $40,000 compensation maximum to account for the compounding effect of discriminatory behaviour. In that case, the Tribunal awarded $40,000 to caregiving parents and grandparents for each child that the respondent removed from them ($20,000 for pain and suffering and $20,000 for wilful and reckless conduct). The Tribunal later stated that the purpose of this compensation order was to recognize "the compound effect on a caregiving parent or grandparent who has already experienced the pain and suffering of the removal of a child and now experiences the egregious harm of losing another one or more children as a result of the systemic racial discrimination" (*First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada),* 2022 CHRT 41 at para 356).

[18] Finally, Mx. Dinardo states that retaliation is a "separate, specialized discriminatory practice" and therefore calls for the consideration of a separate head of damages.

[19] The Respondent argues, on the other hand, that the Quantum Amendment should be disallowed as it is plain and obvious that it has no chance of success. More specifically, it argues the request is contrary to the plain language in the CHRA because the CHRA sets a clear compensation cap, regardless of the number of alleged incidents of discrimination within the converged complaints.

[20] Sections 53(2)(e) and 53(3) of the CHRA read:

> (2) If at the conclusion of the inquiry the member or panel finds that the complaint is substantiated, the member or panel may, subject to section 54, make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in the order any of the following terms that the member or panel considers appropriate:
> …
> (e) that the person compensate the victim, by an amount not exceeding twenty thousand dollars, for any pain and suffering that the victim experienced as a result of the discriminatory practice.
>
> (3) In addition to any order under subsection (2), the member or panel may order the person to pay such compensation not exceeding twenty thousand dollars to the victim as the member or panel may determine if the member or

> panel finds that the person is engaging or has engaged in the discriminatory practice willfully or recklessly.
>
> [Emphasis added]

[21] CSC further argues that the *Caring Society Decision* did not increase the $40,000 cap per victim. The *Caring Society Decision,* according to CSC, was unique in that it involved two public interest complainants who were not themselves the victims of the discrimination. Although the Tribunal's approach could lead to multiple awards for parents or grandparents who had multiple children removed, CSC argues that this was a consequence of the unique class proceeding-like nature and the exceptional circumstances of the complaint that led to the compensation orders. On the other hand, CSC argues that the current complaint involves only one single complainant who is the alleged victim of the discriminatory conduct and so the $40,000 cap applies.

[22] CSC states that, since the *Caring Society Decision,* the Tribunal has remained consistent and clear that the statutory limit of $40,000 applies even where more than one instance of discrimination is proven.

[23] The Commission does not contest the Quantum Amendment. It takes the position that the amendment would not expand the scope of the inquiry and so should be allowed. It says that the "plain and obvious" test set out in *Temate*, which states that amendments should not be granted if the allegations have no chance of success, should only apply to address issues of proportionality when the scope of the inquiry is being expanded. Because the scope of the inquiry is not being expanded, the Commission submits that the test would not apply.

[24] The Commission also argues that the "plain and obvious" test is limited in that it applies to new allegations that have no chance of success. Because the Quantum Amendment is not adding new allegations (i.e., new grounds of discrimination or new discriminatory practices), this test again does not apply.

V. Analysis

[25] I agree with the Commission that the "plain and obvious" test discussed in *Temate* does not apply to the current request given that the Quantum Amendment does not expand the scope of the inquiry and does not add any new allegations. The factual scope of Mx. Dinardo's complaints remains largely unchanged by the Quantum Amendment. The Complainant is also not alleging additional grounds of discrimination or new discriminatory practices. Given that the "plain and obvious" test does not apply, I need not embark on a substantive review of the arguments presented stating that the Quantum Amendment should be dismissed because it stands no reasonable prospect of success. This is a legal issue that will be decided on only after fulsome legal submissions are provided on a full record.

[26] I also agree that there is a nexus between the Quantum Amendment and the complaints, as the amended remedies are connected to the alleged discriminatory practices as described in the original complaints.

[27] The Respondent will be given sufficient time to prepare itself and argue positions on the proposed remedies, and therefore I agree with the Complainant and Commission that CSC will suffer no prejudice in allowing the Quantum Amendment.

[28] Given that there is a nexus between the requested amendment and the complaints and that there would be no prejudice to the parties in allowing the amendment, I find that the balance of convenience favours allowing the request.

[29] It should be noted that the allowance of the Quantum Amendment is not a statement as to whether the request itself is well-founded in law or in fact. Questions of compensation and what is permissible under sections 53(2)(e) and 53(3) of the CHRA will be addressed in the final decision on Mx. Dinardo's converged complaints if a finding of discrimination is made.

VI. ORDER

[30] The Tribunal therefore makes the following orders:

a) On consent, the Timing Amendments to the Complainant's SOP are allowed;

b) The Quantum Amendment to the Complainant's SOP is allowed; and

c) Given the above and the 2024 CHRT 3 ruling, the entirety of the Complainant's proposed amended SOP filed on January 15, 2024, is allowed.

Signed by

Catherine Fagan
Tribunal Member

Ottawa, Ontario
May 9, 2024

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T2747/12321; HR-DP-2868-22

Style of Cause: Nicholas Dinardo v. Correctional Services Canada

Ruling of the Tribunal Dated: May 9, 2024

Date and Place of Hearing: Oral submissions only

Appearances:

Nicole Kief, Jessica Magonet, David Taylor, and Christopher Trivisonno, for the Complainant

Ezra Park, Matt Huculak, and Charmaine De Los Reyes, for the Respondent

Geneviève Colverson, for the Canadian Human Rights Commission