CANADIAN HUMAN RIGHTS TRIBUNAL TRIBUNAL CANADIEN DES DROITS DE LA PERSONNE

ALETA GAUCHER

Complainant

- and -
CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -
CANADIAN ARMED FORCES

Respondent

RULING ON THE COMMISSION'S MOTION TO AMEND THE COMPLAINT

MEMBER: Dr. Paul Groarke

2005 CHRT 1
2005/01/13

I. INTRODUCTION

[1] Aleta Gaucher filed a complaint with the Canadian Human Rights Commission in 1998 alleging discrimination under section 7 of the *Act*. The Commission now brings a Motion to amend the Complaint. The Complainant supports the amendment.

[2] The material filed by the Commission is not entirely clear. As I understand it, the application is simply to add a reference to section 10 of the *Canadian Human Rights Act* in the Allegation clause of the complaint, which would then read as follows:

The Canadian Armed Forces have discriminated against me on the grounds of sex, race, national or ethnic origin, marital status, family status and age by treating me in an adverse differential manner, by failing to promote me, and by refusing to continue to employ me in violation of Section 7 **[and section 10]** of the *Canadian Human Rights Act*.

In the future, I would ask that the Commission file a Notice of Motion with an attachment containing the exact wording of the proposed amendment. This would be in keeping with section 3(1) of the Tribunal's Rules of Procedure.

A. The position of the Commission

[3] The Commission submits that the complaint is based on allegations that the employment policies of the Canadian Forces systemically discriminate against women, aboriginal women and single mothers. In paragraph 26 of it's written submissions, the

Commission states that this was brought to the attention of the Respondent in a variety of ways, in both the proceedings before the Commission and an application for judicial review in the Federal Court.

26. In this case, the Respondent 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.

The written submissions refer to a number of passages in the existing documentation that contain references to the systemic nature of the Complaint.

[4] The Respondent objects that most of these passages are taken from the affidavit that was provided to the Federal Court. In spite of this, it is evident that the investigation was reopened, at a relatively late stage, to collect information regarding five male employees who were allegedly promoted ahead of the Complainant. This would seem to be the point of departure for any inquiry into the systemic aspects of the complaint. The Respondent was apparently of the view that it could not provide this information under the *Privacy Act* without a subpoena or a warrant.

[5] I think the more important factor lies in the evidentiary process. I say this because the Commission suggests that it is difficult if not impossible to investigate Ms. Gaucher's complaint without examining a number of systemic issues in the workplace. This is an inevitable part of the law of human rights and is frequently the case in those matters that come before the Tribunal. The Federal Court has held that the Commission is entitled to lead institutional and systemic evidence as circumstantial evidence, which may help to establish that an individual complainant was discriminated against.

B. The position of the Respondent

[6] The Respondent has opposed the application. It submits that the amendment "would significantly change the nature of the complaint" and prolong "the ultimate resolution of it". The essential submission is that the statutory scheme must be respected. The Tribunal cannot inquire into a complaint unless it has gone through the process set out in the *Canadian Human Rights Act*.

[7] The Respondent cites the decision of the Nova Scotia Court of Appeal in *IMP Group Limited v. Dillman* [1995] N.S.J. No. 326 (QL), at para. 37, where the court says:

As counsel for the Company says, it was not merely an extension, elaboration or clarification of the sexual harassment complaint already before the Board. To raise a new complaint at the hearing stage would circumvent the whole legislative process that is designed to provide for attempts at conciliation and settlement. This matter did not go through the preliminary stages of investigation, conciliation and referral by the Commission to an inquiry pursuant to s. 32A of the *Act*. The Board dealt with a matter which had never been referred to it.

The Respondent also cites my own decision in *Cook v. Onion Lake First Nation* [2002] CHRT 2002/04/22, where I wrote that there is a point where an amendment introduces a "substantially new complaint".

[8] I naturally agree with these statements of the law. The substance of the complaint must pass through the referral process. The Commission cannot bring in a new complaint after the referral, under the guise of an amendment, and circumvent its own referral process. The situation was quite different in *Dillman*, however, where the amendment related to an averment of facts that were not included in the original complaint. There are

cases on the other side, which seem much closer to the situation before me. In *Woiden v. Lynn* CHRT 2002/01/23, for example, the member allowed an amendment of the complaint to include a reference to an additional section in the *Act*, on the basis that the facts before the Tribunal would remain the same.

II. ANALYSIS

[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.

[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 . . .

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".

[14] As I see it, the Commission simply wants to clarify the legalities of the situation, in advance of the hearing, so that all of the parties are on notice that the Complaint raises deeper systemic issues. This is a laudable move. It is better to be explicit. I do not accept the Respondent's characterization of the request for an amendment as a request to add a new, systemic complaint to the inquiry. The *chose* or *tort* or delict before the Tribunal will remain as it was before any amendment was granted. The substance of the complaint will remain as it was before any amendment was granted.

[15] I should add that I think the Commission could proceed without an amendment. The provisions in section 53 that deal with relief do not distinguish between the private and systemic aspects of a complaint and it is a mistake to draw some rigid dichotomy between complaints under section 7 and section 10. The *Act* is remedial and calls for a more organic approach. As a general rule, the Tribunal has an obligation to follow the substance of the complaint, wherever it leads. The issue on remedy is simply whether the corrective action that the Commission is seeking arises naturally out of the allegations before the Tribunal. This is generally determined by the facts of the case rather than the section under which the complaint was laid.

[16] The decision of the Federal Court of Appeal in *Canada (Attorney General) v. Robinson*, [1994] 3 F.C. (F.C.A) 228, at 248, would at least implicitly support the contention that the scope of the remedial power exercised by the Tribunal is determined by the provisions of section 53, as I have suggested, rather than the section under which the complaint is laid. It would follow that systemic remedies are available, if the complaint, the ensuing investigation and disclosure process before the Tribunal indicate that they are appropriate. If the source of the alleged discrimination under section 7 lies in the system of promotions, I would think that the Tribunal has an obligation to inquire into that process.

[17] The statements of particulars in the immediate case have not been exchanged. It follows that any issue with regard to the evidence that the Commission wishes to introduce or the precise remedy that it is seeking will have to be left for another day. From a practical perspective, however, one has to wonder how it is possible to inquire into the process of promotions as it affects the Complainant without looking into the process of promotions more generally? If the evidence establishes that there are deficiencies in that process, it seems to me that the Commission is within its rights to have the process corrected under section 53 of the *Act*. That is clearly what the *Act* contemplates.

[18] The real issue in a case like the one before me is whether the amendment would prejudice the Respondent. This calls for an exercise of judgement, rather than a logical or linguistic analysis of the original complaint. The question is whether the proposed amendment would seriously undermine the fairness of the process. The basic principle is simple enough. If a proposed amendment opens up a new and unanticipated route of inquiry, it should not be allowed. The practical issue is usually whether the Respondent has had sufficient notice to meet the requirements of natural justice.

[19] I see nothing in the amendment requested by the Commission that is prejudicial in this sense. The amendment is accordingly allowed, in the terms that I have set out.

"*Signed by*"
Dr. Paul Groarke

OTTAWA, Ontario

January 13, 2005

PARTIES OF RECORD

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APPEARANCES:

Dennis Callihoo	On behalf of the Complainant
Leslie Reaume	On behalf of the Canadian Human Rights Commission
Doreen Mueller	On behalf of the Respondent