Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Between:

Heather Lynn Grant

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Manitoba Telecom Services Inc.

Respondent

Ruling

Member: Sophie Marchildon
Date: October 14, 2010
Citation: 2010 CHRT 26

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I. Introduction:

[1] The Panel is seized of a preliminary issue raised by the Respondent, Manitoba Telecom Services Inc., ("the Respondent") in respect of a complaint filed January 10, 2008, with the Canadian Human Rights Commission ("the Commission") by Ms. Heather Lynn Grant ("the Complainant"). The Respondent has filed a motion to add the Telecommunications Employees Association of Manitoba Inc. ("TEAM" or the "Union") as a Respondent to the Tribunal's inquiry into the complaint.

[2] The grounds for the motion are section 48.9(2) (b) of the *Canadian Human Rights Act* ("the Act") and section 8(3) of the *Canadian Human Rights Tribunal Rules of Procedure.*

[3] In her complaint, the Complainant alleges that the Respondent discriminated against her by adverse differential treatment, refusal to accommodate her disability and by terminating her employment because of the said disability in violation of section 7 of the *Act*.

[4] The Respondent's position is as follows:

a) The Complainant was identified for lay-off in compliance with the terms of the Collective Agreement entered into between the Union and the Respondent;

b) The Respondent maintains that the addition of the Union as a Respondent to the inquiry is necessary for the Tribunal to properly determine this matter and if necessary grant an effective remedy;

c) The Respondent also argues that if the Tribunal finds that there is discrimination, the Union and the Respondent are jointly liable for an act of discrimination arising out of the operation of the Collective Agreement and jointly responsible for remedying same.

[5] On June 28, 2010, Ms. Shirish P. Chotalia, Q.C., the Chairperson of the Canadian Human Rights Tribunal, determined that this motion would be dealt with through written arguments. The undersigned was designated to decide the present motion.

II. Analysis:

[6] The *Act* does not provide any procedure as such for the forced addition of parties and interested persons in a proceeding before the Tribunal. At most, paragraph (b) of subsection 48.9(2) of the *Act* states as follows:

> The Chairperson may make rules of procedure governing the practice and procedure before the Tribunal, including, but not limited to, rules governing
>
> (…)
>
> (b) the addition of parties and interested persons to the proceedings;
>
> (...)

[7] Prior to 2004, the Chairperson had not made any rules dealing with the addition of parties, with or without their consent, and it was unclear if the Tribunal had the jurisdiction to do so.

[8] I find the following reasons stated in rulings issued in the *Desormeaux v. OC Transpo* (T701/0602) and *Syndicat des employés d'exécution de Québec-téléphone section locale 5044 du SCFP v. Telus communications (Québec) inc.,* 2003 CHRT 31 ("*Telus*") cases to be instructive:

> [25] In an oral decision rendered on October 2, 2002, in *Desormeaux v. OC Transpo (T701/0602),* the Chair of the Tribunal, who was seized of an application to add a union as a respondent, ruled that under section 50 of the *Act*, the Tribunal has the power to add individuals or groups as interested persons in the context of a hearing (our underlining). She pointed out, however, that in the case in point, this was not the issue put to her, the issue to be decided being, rather, whether a third party (a party not involved in the complaint) could be added as a respondent, with the effects this could have with regard to its liability.

[9] On this point, the Chair of the Tribunal concluded, relying on paragraph (b) of subsection 48.9(2) of the *Act*, that the legislator's intent was to vest in the Tribunal the power to add parties as well as interested persons to a proceeding before the Tribunal. Thus the jurisdictional question was answered in the affirmative. What remained to be determined was whether it was appropriate to add a respondent in those particular circumstances.

[10] In a subsequent oral decision rendered on October 3, 2002, in the same case, the Chair of the Tribunal ruled that the circumstances did not warrant the addition of the union as a respondent. She ruled that, while it had previously been found that the *Act* vests in the Tribunal the power to add parties to a proceeding when the Tribunal deems it appropriate, the legislative context surrounding this discretionary power argues for a measure of restraint or "*caution*" (the term used by the Chair).

[11] In this regard, the Chair of the Tribunal pointed out, most aptly in my view that the *Act* provides, in dealing with complaints of discrimination, a carefully developed process of investigation and inquiry in which both the Commission and the Tribunal have clearly defined roles.

[12] In her decision, the Chair of the Tribunal mentioned the fact that the addition of parties during a proceeding before the Tribunal deprives the new Respondent of the benefit of certain means of defence it can normally present at the stage of the screening of a complaint by the Commission, notably the possibility of having the complaint dismissed without the need for the Tribunal to institute an inquiry, for example because the complaint was filed after the period of one year stipulated in the *Act*.

[13] In a decision rendered by the Tribunal on November 27, 2002, in *Bozek v. MCL Ryder Transport Inc. and McGill* (T716/2102 and T717/2202), the Panel ordered, following an application in this regard by the Commission and the Complainant, that the initial complaint be amended to substitute the name of the company born of the merger of the initial Respondent with a number of other corporations in place of the name of the initial Respondent.

[14] The following year, in the ruling in *Telus* the Tribunal once again held that it had the power to add respondents. It further held that, in the absence of formal rules dealing with the matter, the forced addition of a new respondent would be appropriate:

> "…if it is established that the presence of this new party is necessary to dispose of the complaint of which the Tribunal is seized and that 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."

[15] In 2004, the Tribunal Chairperson made a rule providing for the addition of parties (Rule 8(3)), however this rule—like the other Tribunal rules—has not been published in the *Canada Gazette* as provided for in s. 48.9(3), so it is arguably not a "formal rule" as that term was used in the *Telus* ruling. Moreover, rule 8(3) does not stipulate any substantive pre-conditions for the issuance of an order joining a party.

[16] In a recent decision, *Canada (A.G.) v. Brown et al.,* 2008 FC 734, Justice Simon Noël, for the Federal Court, reaffirmed the principles set out by the Tribunal in *Telus.*

[17] Even after the above Federal Court decision in *Brown*, the situation as remained the same, no formal rules have been made establishing the conditions on which the Tribunal may add a new respondent.

[18] I share the concern raised by the Tribunal member in *Telus* that for all intents and purposes, the addition of a new Respondent at the stage of the Tribunal's inquiry into the complaint with no formal complaint having been brought against it deprives this new Respondent of the opportunity to present certain grounds of defence before the Commission pursuant to sections 41 and 44 of the *Ac*t.

[19] The Respondent in the current matter argued that the Panel should apply the *Renaud* decision to the present motion (*Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970).

[20] To that argument, I would respond with the reasoning of the Tribunal in *Telus*, with which I agree, and which I believe is equally applicable to the matter before me:

> [18] It should be pointed out that the facts in the Renaud case differ appreciably from those in the present case. In Renaud, the plaintiff had filed a complaint against both the employer and his union, which is not the case here. At the hearing of the complaint, the assigned member amended the complaint of which he was seized to include a claim against the union under another section of the Act as well as that brought under the initial section, in order to bring the initial complaint into conformity with the nature of the proceedings. The assigned member justified his decision by the fact that no prejudice would be suffered by the union as a result of the amendment as the union had been represented throughout the proceedings and had fully taken part in the initial complaint, which is not the case here. The Supreme Court confirmed the validity of the decision of the designated member to hear the complaint.

[21] As for the Respondent's arguments based upon jurisprudential principles emanating from the provincial Courts, I would respectfully note that the Tribunal is not bound by said principles, which were developed in a different statutory context, and that the Tribunal cannot choose to follow them where there is binding jurisprudence on the issue from the Tribunal's own supervisory courts (*i.e.* the Federal Court's judgment in *Brown*).

[22] In *Telus*, the Tribunal member, Pierre Deschamps, dismissed the motion for the following reasons:

> [36] In the case in point, the respondent has not satisfied me that the forced impleading of the Union is necessary in order to dispose of the complaint as worded. Moreover, I believe that the impleading of the Union at this stage would be prejudicial to it from a standpoint of procedural fairness.
>
> [37] This being said, it will be permissible for the respondent to assert during the hearing before the Tribunal that the evidence submitted to the Tribunal does not warrant the allowing of the complaint, and that it cannot be held liable or solely liable for the discrimination alleged in the complaint.

[23] I concur with the Tribunal member's reasons which are applicable to this case. I take note of the fact that the Complainant is opposing the addition of the Union as a Respondent. I also

note that the motion was brought before the Tribunal quite some time after the complaint had been referred to the Tribunal by the Commission.

[24] Moreover, the Respondent will have the opportunity summon and examine a witness from the union at the hearing.

[25] Finally the Respondent may make submissions to the Tribunal in its final arguments to the effect that, if the complaint is substantiated, the amount to provide to the Complainant on behalf of the Respondent, should be reduced according to any joint liability established and taken into account by the Tribunal.

III. Conclusion:

[26] The motion is dismissed and the inquiry of the complaint will proceed as planned.

Signed by

Sophie Marchildon
Tribunal Member

Ottawa, Ontario
October 14, 2010

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1452/7809

Style of Cause: Heather Lynn Grant v. Manitoba Telecom Services Inc.

Ruling of the Tribunal Dated: October 14, 2010

Appearances:

R. Ivan Holloway, for the Complainant

No one appearing, for the Canadian Human Rights Commission

Gerald D. Parkinson and Paul A. McDonald, for the Respondent