Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Between:

Geevarughese Johnson Itty

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Canada Border Services Agency

Respondent

Ruling

File No.: T1817/4712
Member: Olga Luftig
Date: December 16, 2013
Citation: 2013 CHRT 33

Table of Contents

Page

I. Background

[1] On January 20, 2010, Mr. Geevarughese Johnson Itty, also known as Mr. Johnson Itty, ("Complainant") filed a complaint ("Complaint") with the Canadian Human Rights Commission ("Commission") against the Canada Border Services Agency ("CBSA" or "Respondent"), alleging discrimination based on race, national or ethnic origin and age, contrary to section 7 of the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6, as amended ("*Act*").

[2] On April 24, 2012, by letter ("Referral Letter"), the Commission asked the Tribunal to institute an inquiry into the Complaint, pursuant to section 44(3)(a) of the *Act*, attaching a copy of the Complaint.

[3] The Commission has advised that unless circumstances arise which cause it to change its position; it will not participate in the hearing.

[4] On January 31, 2013, the Complainant filed his Statement of Particulars ("SOP"). In addition to particulars of the allegations of discrimination against him by the Respondent contrary to section 7 of the *Act*, the Complainant alleges systemic discrimination contrary to section 10 of the *Act*. His SOP also states he anticipates filing a motion to amend the Complaint so as to include section 10.

[5] On March 8, 2013, the Respondent filed its SOP. The Respondent objects to the Complainant's inclusion of his section 10 allegations. However, the Respondent's SOP contains responses and a defence to those section 10 allegations.

[6] The Complainant did not and will not be filing a Reply to the Respondent's SOP.

[7] On April 11, 2013, the parties by their counsel, and I, absent Commission counsel, had a Case Management Conference Call ("CMCC"), during which the Complainant stated he would be making a motion to amend the Complaint in order to include section 10 ("Motion to Amend").

[8] Respondent's counsel advised that he would be making a motion for an order for the confidentiality of parts of the Respondent's evidence ("Confidentiality Motion"). The Ruling on that Motion will be issued separately.

[9] The parties submitted their motion materials in writing. There was no oral hearing.

II. The Complaint

[10] The Complaint alleges that the Respondent's Port of Entry Recruitment Training program ("POERT") discriminated against him on account of his age, national or ethnic origin and race, contrary to section 7 of the *Act*. Below is a summary of the Complaint.

[11] The Complainant, a naturalized Canadian citizen, applied to the Respondent to become a Border Services Officer ("BSO"). He passed the Respondent's initial screening, and was invited into the nine-week POERT program, which contains two evaluation stages, called Determination Points: Determination Point I ("D-I") and Determination Point II ("D-II"). The Complainant passed all the behavioural and written tests in D-I, and went on to POERT's second component, at the end of which was D-II. The latter Determination Point consists of another set of written tests and behavioural evaluations, including evaluations of simulations in which ten competencies ("Competencies") are assessed.

[12] A trainee must obtain a "met" (pass) on all the tests and behavioural evaluations in D-I and D-II, including the competencies, to become a BSO. The Complainant did not pass three of the D-II competencies, leading to a "not met" grade, and was eliminated from the pool of potential BSOs.

[13] The Complaint alleges that during the D-II training and evaluations, the following gave rise to the above grounds of discrimination and adverse differential treatment against the Complainant, which resulted in the denial of the employment opportunity to become a BSO:

1) Two of the three assessors who evaluated his D-II competencies failed him on at least three competencies; they did not explain their observations and the reasons they failed him; this was improper given that the evaluation of these competencies is subjective and therefore vulnerable to individual prejudice, which these two assessors displayed; the Complainant noted that all three assessors were white;

2) the Complainant was held to a higher standard than his white, younger classmates, none of whom were the same race or had the same national or ethnic origins as the Complainant, but who were passed notwithstanding that some of them made serious errors;

3) the Complainant believes that the Respondent wanted to fail him because of his age and alleges that two other "older gentlemen over 50 years of age were also failed…";

4) one of the assessors who failed him held a rank lower than Superintendent and was inexperienced, which inexperience detrimentally affected the Complainant's assessment; the fact that this lower-ranking individual assessed him rather than someone of at least Superintendent rank was contrary to what the Respondent's representatives had told the Complainant during the initial screening;

5) he was told to change his seat at least twice during the classroom sessions, 2 weeks before D-II simulation testing; no one else had to change their seat more than once; this also made him nervous and insecure;

6) on a number of occasions, the classroom instructor did not respond to the Complainant's questions or requests for clarification on training topics and he had to ask several times before the instructor answered him; the Complainant also found this insulting;

7) he did not receive the requisite number of compensated visits home, contrary to Treasury Board guidelines;

8) during his feedback session at the end of POERT, the feedback leader stopped the Complainant from taking notes when the assessors were telling him why he had not passed; when he attempted to ask questions and obtain clarifications of the reasons he had not passed, the feedback leader again treated him unfairly by yelling at him in front of everyone present.

III. Complainant's Motion to Amend

[14] The Motion to Amend seeks to add the allegation that the Respondent's POERT program discriminated against the Complainant, on the same grounds as the section 7 allegations, but also contrary to section 10 of the *Act*.

[15] Section 10 of the *Act* states:

> "It is a discriminatory practice for an employer, employee organization or employer organization
>
> (a) to establish or pursue a policy or practice, or
>
> (b) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment,
>
> that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination."

IV. Issue

[16] The issue in this Motion is whether or not the Tribunal should grant the Complainant's Motion to Amend the Complaint by adding the allegation of discrimination contrary to section 10 of the *Act*.

V. Law on Amending Complaints

Generally

[17] The Tribunal has the authority to grant amendments in order to determine "…the real questions in controversy between the parties", if granting the amendments would "…serve the interests of justice" (*Canderel Ltd. v. Canada* (1994) 1 FC 3 (FCA) *("Canderel"*), cited in *Attorney General of Canada v. Alain Parent and The Canadian Human Rights Commission*, 2006 FC 1313 at para. 30 *("Parent")*; in *Stacey Lee Tabor v. Millbrook First Nation 1013 CHRT 9 ("Tabor")* at para. 4.

[18] In deciding whether or not to grant an amendment, "…the Tribunal does not embark on a substantive review of the merits of the proposed amendment" (*Tabor, supra,* at para. 4).

Connection between Complaint and Proposed Amendment

[19] An amendment cannot so alter a complaint that it results in a substantially new complaint, therefore bypassing the referral process mandated by the *Act* (*Tabor, supra,* at para. 5, citing *Gaucher v. Canadian Armed Forces*, 2005 CHRT 1 *("Gaucher").* Generally, "…issues arising out of the same set of factual circumstances should normally be heard together" (*Cook v. Onion Lake First Nation*, 2002 CanLII45929, CHRT, at para. 17 *("Cook v. Onion Lake"*), cited in *Parent* (*supra*) at para. 33.

[20] Put another way, there must be a connection, in fact and in law, between the complaint and the amendment sought.

Prejudice

[21] However, the Tribunal cannot grant an amendment if there is "actual prejudice" to the other party, which is "real and significant"("*Cook v. Onion Lake*", *supra*), cited in *Museum of Civilization Corp. v. Public Service Alliance of Canada,* Local 70396 (2006) F.C. 704, para. 28 ("*Museum of Civilization"*). The party pleading prejudice must show prejudice which is of "sufficient magnitude to impact on the fairness of the hearing", *Cook v. Onion Lake, supra*, at para. 20.

(a) The Complainant's Position

Connection between Complaint and Proposed Amendment

[22] In *Museum of Civilization, supra,* para. 52, the Federal Court adopted two paragraphs in *Gaucher, supra,* which essentially stated:

> a) it is inevitable that new facts and circumstances come to light during an investigation;
>
> b) therefore, complaints are open to refinement;
>
> c) as long as the substance of the original complaint is respected, a complainant should be permitted to clarify and elaborate on the initial allegations before the complaint goes to a hearing;
>
> d) the Act is remedial and human rights tribunals have accordingly adopted a liberal approach to amendments, rather than a narrow or technical interpretation;
>
> e) in *Central Okanagan School District No. 23 v. Renaud,* [1992] 2 S.C.R. 970, the Supreme Court approved of an amendment to a complaint that "simply brought the complaint into conformity with the proceedings", and an amendment of the kind proposed in *Gaucher* is merely a matter of ensuring that the form of the complaint accurately reflects the substance of the allegations the Commission referred to the Tribunal.

[23] The proposed amendment is within the subject matter and substance of the original Complaint because the same facts that support the Complainant's section 7 allegations also support his section 10 allegations. The proposed amendment merely brings the Complaint into conformity with the facts already alleged.

[24] The allegations of systemic discrimination (contrary to section 10), flow from the Complainant's allegations of discrimination in employment and adverse differential treatment.

[25] By having investigated and considered the facts in the Complaint which support section 7, the Commission also investigated and considered the facts to support the addition of section 10 to the Complaint, because they are the same. The Commission referred the entire Complaint to the Tribunal, and the Complaint also encompasses the section 10 facts. Therefore, the Tribunal has jurisdiction to grant the amendment.

[26] The Complaint contains the following factual allegations in support of section 10 systemic discrimination:

a) the Complainant and two older men in their 50's failed POERT;

b) an officer ranking lower than Superintendent evaluated the Complainant, contrary to the procedure the Respondent told the Complainant would be used;

c) the competencies' evaluations are subjective, therefore vulnerable to the individual prejudices of evaluators, as occurred with the Complainant;

d) the adverse differential treatment the Complainant experienced during POERT was indicative of larger discriminatory practices during his evaluations;

e) the Respondent applied an unreasonable threshold to the Complainant (i.e., a higher standard) in assessing his competencies.

[27] The Commission's April 24, 2012 letter to the Complainant ("Commission Letter"), (described by the Complainant as the referral letter to the Tribunal) contained a statement that "…the evidence suggests…the complainant did not pass the standardized testing [in] the training program because of his race, national or ethnic origin and/or age". The Commission Letter's reference to "standardized" tests raises section 10 grounds.

(b) The Respondent's Position

Connection between Complaint and Proposed Amendment

[28] The proposed amendment alleges a new legal ground containing new allegations of systemic discrimination, and opens up a new and unanticipated route of inquiry which substantially amounts to a new complaint, not contemplated in the original Complaint and which takes it far beyond its original scope and factual content.

[29] It raises the same issue as described by the Federal Court in *Museum of Civilization*, *supra*, at para. 30, in that it would alter the allegations in the Complaint "…to such a degree that it amounts to a new subject of inquiry which takes the complaint outside the scope…" of the Commission's referral.

[30] There is a distinction between a complaint of personal discrimination contrary to section 7, and one that a practice or policy is itself discriminatory, contrary to section 10. That distinction makes them separate complaints. Given this distinction, the proposed section 10 amendment constitutes a new complaint. The Tribunal followed this distinction in C*ook v. Onion Lake, supra*. The question of whether the program in question was "…inherently discriminatory is a separate issue. It was never part of the original complaint" (*ibid, supra*, at para. 24).

[31] Therefore, the proposed amendment does not flow from the substance and facts of the existing Complaint, nor does it merely bring the Complaint into conformity with facts already alleged.

[32] The Tribunal is without jurisdiction to grant the amendment. First, subsection 44(3) and section 49 of the *Act* have the effect of conferring jurisdiction on the Tribunal only if the Commission refers a complaint to the Tribunal. To permit the amendment in the within circumstances would circumvent the *Act*'s prerequisites for the Tribunal to have jurisdiction. The Respondent also relies for this ground on *Museum of Civilization, supra,* at para. 28.

[33] Secondly, the Complaint does not include section 10 allegations – it contains only allegations under section 7. Therefore, the Commission did not investigate the Complaint in terms of section 10, rather only in terms of section 7. The Commission did not consider or deal with section 10, and therefore could not have referred a section 10 allegation to the Tribunal. On this ground as well, the Tribunal has no jurisdiction to add the amendment to the Complaint.

[34] In fact, the Commission's Investigative Report ("IR") was specifically framed in terms of section 7 (*IR, December 5, 2011, para. 1, as cited in Respondent's Response to Motion*). It follows that in referring the Complaint to the Tribunal, the Commission's Referral Letter did not include section 10 and the Tribunal has no jurisdiction to permit the amendment.

[35] The facts in the Complaint which the Complainant states support the addition of section 10 allegations in reality do not do so. The Complainant interprets particular phrases and sentences in the Complaint out of context. The Complaint only alleges instances of discrimination personal to him, and not systemic discrimination in the POERT program itself.

[36] Further, neither the Complaint nor Complainant's SOP clearly states which policies or practices he alleges as discriminatory contrary to section 10.

[37] To interpret the phrase "standardized testing" in the Commission Letter as encompassing an amendment to add section 10 to the referred Complaint is to impute a meaning to the phrase that is not warranted by the Complaint itself or the Commission investigation.

(c) Analysis

[38] The Complainant states that he relies on all the factual allegations under section 7 to also support his section 10 allegations. I have reviewed the Complainant's SOP. The only change in its factual allegations compared to those in the Complaint is the addition of an incident of alleged differential treatment during the CDT simulation in the D-II component ("the CDT simulation"). Therefore, the requisite factual connection between the Complaint and the amendment is present. The requested amendment cannot correctly be characterized as a new and separate complaint.

[39] In *Cook v. Onion Lake*, *supra*, the Commission motioned to add alcoholism as another ground of discrimination under the disability ground. The Tribunal denied the amendment on the basis that it amounted to a new complaint. This reason, however, was coupled with the Tribunal's finding that the amendment raised "deep issues" for the Respondent, who would suffer prejudice if the amendment was granted.

[40] The Complainant alleges discrimination in the Respondent's assessment of his suitability for a job. The tests and practices used in those assessments would themselves have to be canvassed in evidence in order to both provide a full picture of the matters in issue and also determine "…the real questions in controversy between the parties" (*Canderel*, *supra*, cited in *Parent*, *supra* and *Tabor*, *supra*). The tests and evaluation processes themselves represent a substantive connection to the Complaint and flow from the allegations under section 7.

[41] I have concluded that the requested amendment does not constitute a separate, new complaint. I have found that the proposed amendment and the Complaint have factual and substantive connections. When the Commission referred the Complaint to the Tribunal, that referral included all the circumstances of the Complaint, including section 10 systemic discrimination. Therefore, the Tribunal is not bypassing the *Act*'s referral processes, and the Tribunal has the jurisdiction to grant the amendment.

[42] The Complainant included the Commission's Investigative Report ("IR") in its motion materials and argument. I note that the IR recommended that the Commission dismiss the

Complaint. After receiving the parties' responses to the IR, the Commission referred the Complaint to the Tribunal for an inquiry.

[43] Given that circumstance, the IR can be given little weight.

[44] The question of whether the Complainant's materials and evidence establish section 10 allegations will be decided after the hearing.

[45] Regarding whether or not the Complainant's materials notify the Respondent as to which policies and practices he alleges violate section 10, I note the following:

a) the Complaint alleges the Respondent wanted to fail him because of his age and that the Respondent also failed two other "older gentleman over 50";

b) the Complaint notes that Complainant's three competencies assessors were white;

c) in paragraph 33 of his SOP, the Complainant characterizes the simulation evaluations of the competencies as "…more subjective and vulnerable to prejudice and discrimination" [than the other tests in POERT];

d) in paragraph 34 of his SOP, the Complainant alleges that many of those from other classes who failed POERT were also middle-aged;

e) the Complaint states that the competencies evaluations are subjective and therefore vulnerable to the assessors' individual prejudices;

f) paragraph 52 of Complainant's SOP alleges in effect that the practice of using an officer of lesser rank than Superintendent as an assessor adversely affected his evaluation;

g) paragraph 54 again characterizes the competencies, including those he failed, as "highly subjective", which "adversely impacted the Complainant's performance" because his "…race, national or ethnic origin, and age played a significant factor in his evaluations"; as such, POERT is "discriminatory, contrary to section 10…";

h) paragraph 55 alleges Respondent's application of the competencies discriminated contrary to sections 7 and 10 because "…it relied on aspects of his race, colour [sic], national or ethnic origin and age when it failed him";

i) paragraph 57 asserts the Respondent used a higher standard to evaluate the Complainant's competencies than that it used for his classmates, none of whom shared his racial, national or ethnic origin or age attributes; he alleges that the fact the other candidates made mistakes and passed, while he failed, evidences discrimination contrary to sections 7 and 10.

[46] The above allegations serve to both set out and notify the Respondent of the policies and practices which the Complainant alleges are contrary to section 10 of the *Act*.

[47] The Commission Letter is not relevant in ascertaining the scope of the Complaint. The Commission Letter was a communication between the Commission and the Complainant, not the Commission and the Tribunal. It is not the Referral Letter the Commission sent **to the Tribunal** to initiate the inquiry.

[48] The referral letter, with the complaint attached, is what the Tribunal sees and acts upon – it sets the Tribunal inquiry in motion. The specific Referral Letter in this case asked the Tribunal to make an inquiry into the Complaint because "…having regard to all the circumstances, an inquiry is warranted". The phrase "…having regard to all the circumstances…" is broad and general, and is to be interpreted broadly and generally. That phrase mandates the Tribunal to enquire into all relevant aspects of a complaint.

Prejudice

(a) The Complainant's Position

[49] The Complainant submits that the proposed amendment will not cause any prejudice to the Respondent because it merely brings the Complaint into conformity with the facts already alleged. It does not raise a new complaint because it does not allege new facts. It does not open up "…a new and unanticipated route of inquiry" (*Gaucher*, *supra*, para. 18).

[50] Contrary to the Respondent's allegation of delay, the Complainant has in fact sought the amendment very early in the process – his SOP, filed January 31, 2013, set out his section 10 allegations and his intention to seek the amendment. Further, the Tribunal has not set any hearing dates. The Respondent has therefore had notice of the proposed amendment since January 31, 2013, and has had notice of and known about the facts on which the Complainant relies for the amendment since the Complaint was filed. The Respondent will have ample time to prepare for the hearing of the amended Complaint. It follows that this is not a case where permitting the amendment would impair the Respondent's right to natural justice by taking away its right to procedural fairness and a fair hearing.

(b) The Respondent's Position

[51] The Respondent submits that the proposed amendment would prejudice the Respondent for the reasons below.

[52] The proposed amendment would alter the Complaint to such a degree that it would open up a "new and unanticipated route of inquiry", introducing a "substantially new complaint".

[53] The Complainant's delay in raising systemic discrimination has already prejudiced the Respondent at the Commission level because the Respondent could not avail itself of the Commission's scrutiny with respect to section 10.

[54] The Respondent would be severely prejudiced if the Tribunal grants the amendment because it would take away the Respondent's opportunity to have defended itself at the Commission level. The Complaint and the investigation were framed solely in terms of section 7, not section 10. All of the Respondent's responses to the Commission process, including to the investigation, were geared to section 7. The Respondent submits that it did not have access to any of the Commission's processes with respect to section 10, including investigation, conciliation and mediation. This constitutes real and significant prejudice to the Respondent.

[55] If the Tribunal permitted the amendment, it would result in a breach of the Respondent's procedural fairness rights, specifically, its right to be given a fair opportunity to defend itself at the Commission against the section 10 allegations. This is akin to what the Nova Scotia Court of Appeal decided in *Dillman v. IMP Group Ltd.*, 1995 CanLII 4254 (NSCA) *("Dillman")*, where it overturned an amendment a Board of Inquiry had granted at the hearing stage.

[56] The Respondent will be further prejudiced because it will have to produce a "wealth" of additional witnesses, expert reports, and statistical analyses in order to respond to the section 10 allegations, significantly delaying the hearing date. It would also lengthen the hearing itself, thereby further prejudicing the Respondent.

[57] The proposed amendment would so prejudice the Respondent that it would negate its ability to have a fair hearing.

(c) Analysis

[58] I have found above that the proposed amendment to add section 10 systemic discrimination does not constitute a new and separate complaint.

[59] A motion to amend a complaint to include section 10 discrimination three years from the date of filing a complaint is a long delay. However, that delay does not rise to the level of real and significant prejudice which would bar the amendment.

[60] The Respondent has had notice of the Complainant's section 10 allegations since January 31, 2013, when the Complainant included them in his SOP. It has had notice of almost all of the facts and incidents on which the Complainant relies, except one, since the Complainant filed his Complaint. The delay in requesting the amendment does not prejudice the Respondent's right to a fair hearing at the Tribunal. If the Respondent requires more time to prepare for the hearing, including proffering additional documentary evidence and witnesses prior to the hearing, a reasonable request for more time will be considered favourably. Although inconvenient, this delay does not unfairly impact the Respondent's ability to prepare for the Tribunal hearing.

[61] With respect to investigation, the Complainant's SOP, documentary evidence and Motion materials set out the allegations of fact on which he relies. In his SOP, he specifies the processes and practices he alleges constitute discrimination contrary to section 10. The Complainant has included one additional alleged incident which is not in the Complaint, the Control and Defensive Tactics Simulation Exercise ("CDT simulation"), during which the Complainant alleges discrimination by the Respondent. The Respondent can respond to this in an amended Statement of Particulars, by calling additional witnesses, or in whichever manner it chooses.

[62] Mediation is also available at the Tribunal at any time the parties wish, up to the commencement of the hearing. As well, the parties are free to discuss private settlement at any time in the Tribunal process.

[63] Although granting the amendment may delay the hearing date and may lengthen the duration of the hearing because the Respondent wishes to add other witnesses and provide further documentary evidence, the Complainant faces the same delay and lengthening of the hearing. I do not see this as constituting prejudice – rather, it is inconvenience.

[64] I also take into account the factors set out below.

The Respondent's SOP

[65] Paragraph 47 of the Respondent's SOP denies the Complainant's allegations under section 10. Paragraph 58 denies that the POERT competencies tests are subjective and took away the Complainant's employment opportunities or that they tend to deny employment opportunities to others with the Complainant's characteristics, contrary to section 10.

[66] Paragraph 59 provides that if the Tribunal does find discrimination, the Respondent submits that requiring the Complainant to pass the D-II competencies, including the three competencies he failed, are *bona fide* occupational requirements ("BFOR") of the BSO position and cannot be accommodated without undue hardship.

[67] The above paragraphs in the Respondent's SOP respond to the Complainant's section 10 allegations, and also set up a BFOR justification defence pursuant to the *Act*.

[68] Presently, the Respondent's Schedule "A" lists the following documents:

> 1) no. 3, CBSA Workforce Analysis Report for Visible Minorities, dated March 2007 – April 1, 2012
>
> 2) no. 6, Port of Entry Recruit Training Program Handbook, July, 2008;
>
> 3) no. 7, Port of Entry Training Program Test Objectives Booklet, October 7, 2008;
>
> 4) no. 37, CBSA-GTA Visible Minority Demographics, March 31, 2009 – April 1, 2012;
>
> 5) no. 53, Statement of Merit Criteria, undated;
>
> 6) no. 55, Port of Entry Training Program – An Overview, undated;
>
> 7) no. 67, Training Process Summary, undated

The Respondent's Proposed Witnesses

[69] I summarize below those Respondent witnesses to date and the portions of their anticipated evidence which appear relevant to this motion:

> 1) in addition to the specifics of the Complainant's individual assessment process, witnesses (a), (b), and (c), the three assessors who evaluated the Complainant's D-II simulations, will give evidence as to "the objects and goals of D-II simulation assessments" and their priorities in conducting assessments of simulations in general;
>
> 2) witness (d)'s evidence will address the general structure and process of the BSO recruitment process, including POERT; POERT's purpose and goals; and the training program for assessors;
>
> 3) witness (f) will address scheduling and practices related to the CDT evaluation simulations;
>
> 4) in addition to specifics regarding the Complainant, witness (g)'s evidence will address the classroom practices in the POERT program;
>
> 5) witness (h), director of the entity which developed simulations and assessment processes for POERT with the CBSA, will present expert evidence as an industrial psychologist to rebut any expert testimony regarding the simulation evaluations the Complainant may submit;
>
> 6) witness (i), a CBSA Administrative Superintendent for the GTA region, will testify about scheduling and pay practices for BSOs in the GTA region;
>
> 7) witness (j), an expert witness, will opine on CBSA employment.

[70] Subject to the fact that I have not seen the actual Schedule "A" documents listed above, and will not see them until the hearing, the combination of the above portions of the Respondent's SOP and the portions of the anticipated evidence of the above witnesses speak to the Complainant's section 10 allegations because they seem to address, at least in part, general structure, process and practices of the Respondent's recruitment system. They indicate that the Respondent is in a position to mount a defence regarding the Complainant's section 10

allegations. This proposed evidence militates against the Respondent suffering prejudice if the Tribunal grants the proposed section 10 amendment.

[71] In addition, if it wishes to do so, the Respondent can submit further documentary evidence or witnesses, giving the other parties proper notice (the Complainant can do the same in response). Hearing dates have not yet been set and the parties therefore have the time to do this as part of their preparation and ongoing disclosure.

[72] The Respondent cites *Cook v. Onion Lake (supra)* in support of its position. Ms. Cook's original complaint was that by refusing to admit her to its Life Skills Programme because of her disability (Hepatitis C), the respondent discriminated against her contrary to section 5 of the *Act*. After the Commission referred her complaint to the Tribunal, the Commission requested the complaint be amended by adding that the respondent discriminated against Ms. Cook also because of the disability of alcoholism.

[73] The Tribunal refused the amendment in part because it found the amendment constituted a new, separate complaint which the Commission could not have referred to the Tribunal and, therefore, the Tribunal did not have jurisdiction to deal with it. The other basis for the Tribunal's refusal to grant the amendment was because, in the Tribunal's words, the Respondent would face "…deep issues", and "…any attack on this aspect of the programme undermines one of the fundamental policies [no alcohol or drugs on the reserve] on which the [respondent] reserve operates" (*ibid, supra*, at para. 25). I interpret the foregoing statement as finding that the Onion Lake would suffer actual prejudice if the Tribunal granted the requested amendment.

[74] The Respondent also cites *Dillman, supra.* The New Brunswick Court of Appeal disallowed an amendment which had not been introduced until the Board of Inquiry hearing, at which no one at all was present for the respondent. The Court held that the respondent could not have been deemed to have had notice of the amendment granted by the Board, and therefore suffered real prejudice on account of the amendment, which the Commission had never referred to the Board of Inquiry. In the present case, the Complainant has sought its amendment before

any hearing date has been set and the Respondent has had notice of the proposed amendment, as noted above.

[75] In considering the issue of prejudice, I have also taken into account potential prejudice to the Complainant if the Tribunal held that the requested amendment was a new, separate complaint. It would serve no purpose, both in terms of natural justice or judicial economy, to require the Complainant to start anew and file another complaint with the Commission alleging discrimination contrary to section 10 in the POERT program against the same Respondent and on the same facts. Both parties would have to go through the whole process again. Granting the amendment would avoid prejudice to the Complainant.

[76] For all the reasons set out above, I find there is a connection in fact and in substance between the Complaint and the requested amendment; the Respondent will not be prejudiced if the amendment is granted; and granting the amendment will not impact the fairness of the hearing.

[77] It should be noted that the granting of the amendment does not mean that the Complainant has established his case with respect to either section 10 or section 7. That can only be decided when the hearing is complete.

VI. Decision

[78] The Complaint is amended by deleting the words “contrary to section 7 of the *Canadian Human Rights Act*” in the last line of paragraph 1 of the Complaint and substituting for the deleted portion the phrase “contrary to sections 7 and 10 of the *Canadian Human Rights Act*.”

[79] The Tribunal will hold a Case Management Conference Call (“CMCC”) as soon as possible on a date convenient to the parties to discuss scheduling of dates for the Respondent to file an amended Statement of Particulars, pursuant to Rule 6(1) of the *Canadian Human Rights Tribunal’s Rules of Procedure (03-05-04)*, if the Respondent wishes to do so in light of the

amendment, and for the Complainant to file a Reply to the Amended Statement of Particulars, if he wishes to do so. The parties may also address any other matter they wish in the CMCC.

Signed by

Olga Luftig
Tribunal Member

Ottawa, Ontario
December 16, 2013