Canadian Human Rights Tribunal **Tribunal canadien des droits de la personne**

BETWEEN:

KINDRA WOIDEN, LISA FALK,

JOAN YEARY AND

SHARLA CURLE (FORMERLY SPEIGHT)

Complainants

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

DAN LYNN

Respondent

RULING ON AMENDMENT OF COMPLAINTS

AND SIMILAR FACT EVIDENCE

Ruling No. 1

2002/01/23

PANEL: Athanasios D. Hadjis, Chairperson

[1] This ruling relates to certain preliminary motions presented by the Commission, prior to the commencement of the hearings in the present case, which is scheduled for February 11, 2002.

[2] Each of the four Complainants has filed a separate complaint against the Respondent. In each complaint, it is alleged that the Respondent, who was a senior manager at the Complainants' place of employment, had discriminated against them by harassing them on the ground of sex, contrary to Section 14 of the *Canadian Human Rights Act* ("*CHRA*").

Ms. Joan Yeary's complaint contains an additional allegation of harassment on the basis of her family status.

[3] In a letter addressed to the Complainants and the Respondent, dated November 16, 2001, the Commission alleges that the facts supporting the complaints of discrimination on the basis of sex, pursuant to Section 14 of the *CHRA*, also support a complaint of discrimination based on Section 7, and that the latter section was "inadvertently" excluded from the complaint forms.

[4] Although the Commission's letter is not entirely clear on the following point, it would appear that the Commission, in addition, claims that the facts supporting Ms. Joan Yeary's complaint under Section 14, of discrimination on the basis of her family status, also support a claim of discrimination on the same ground, but pursuant to Section 7. Inadvertence is again cited as the cause for this omission.

[5] The Commission has therefore made the following preliminary motion regarding the content of the actual complaints:

That, on the basis of the same facts as revealed in the complaints, the investigation report and the disclosed information:

1. all four complaints should be amended to add an allegation of discrimination on the basis of sex, pursuant to Section 7 of the *CHRA*; and,

2. with respect to the complaint of Ms. Joan Yeary, an allegation of discrimination, pursuant to Section 7, on the additional ground of family status, should be added.

[6] The Commission has made an additional motion requesting that the Tribunal rule in advance that each Complainant's testimony will be considered as similar fact evidence with respect to the complaints of the other Complainants.

I. Background

[7] The request from the Commission that an inquiry be instituted into the complaints was received by the Chairperson of the Canadian Human Rights Tribunal, on July 18, 2001. By letter dated July 26, 2001, and delivered to the Respondent by courier, the Tribunal informed him of the referral of the complaints to the Tribunal and of his entitlements under the *CHRA* to present evidence and legal submissions, either on his own behalf or through legal counsel. A standard-form pre-hearing questionnaire was attached to the letter, to be completed and returned by August 16, 2001.

[8] The Tribunal Registry followed up, in the months of September and October 2001, with additional correspondence to all the parties, setting out, amongst other items, the date and venue of the hearings. Some of this correspondence was sent to the Respondent by messenger service. Other documents were sent by registered mail, but were returned to the Tribunal office marked "unclaimed". The Commission's letter of November 16, 2001, regarding the preliminary motions referred to earlier, indicates that it was sent "by fax and courier", but I have no evidence of whether it was ever actually received by the Respondent. Nonetheless, in a letter dated November 27, 2001, sent by regular mail service, the Tribunal Registry informed the Respondent that he was to provide his written submissions regarding the preliminary motions, by January 7, 2002. On December 13, 2001, a package, containing copies of all the previous correspondence from the Tribunal Registry to the Respondent, was personally served on him by process server.

[9] The Commission has informed the Tribunal Registry that its written submissions regarding the motions, dated December 17, 2001, were sent to the Respondent by messenger service, on December 20, 2001. The messenger service later informed the Commission that it was unable to deliver the package, seemingly because there was no answer at his address. The messenger service apparently followed up with a notice by telephone to the Respondent informing him of the location where he could pick up the package himself. According to the Commission, he never did pass by to retrieve the documents and consequently, the messenger service returned them to the Commission on January 14, 2002.

[10] The Tribunal Registry managed to speak to the Respondent by telephone on several occasions and suggested to him that he accept the documentation being sent to him, examine it and, if possible, seek the advice of counsel. Unfortunately, and in spite of the above-mentioned notices, as of the date of this ruling, the Respondent has not remitted to the Tribunal the questionnaire nor his reply to the Commission's submissions. I am therefore compelled to rule on the motions without the benefit of any representations from the Respondent.

II. Amendments

[11] The Canadian Human Rights Tribunal has previously ruled that a human rights complaint is not analogous to a criminal indictment and that a certain amount of discretion vests in the Tribunal to amend a complaint, provided that sufficient notice is provided to the Respondent.[(1)]

[12] In the present case, the amendments sought would not alter the allegations of fact set out in the complaints, but rather merely insert a reference to another section of the *CHRA*. In *Hum* v. *Royal Canadian Mounted Police* [(2)], a similar situation arose. The complaint originally alleged that the Complainant had been a victim of differential treatment, on a prohibited ground, pursuant to Sub-section 5(b) of the *CHRA*. After the Commission had investigated the complaint, but before the Tribunal had been appointed to inquire therein, the Commission amended the complaint to insert an additional ground of harassment, under Section 13.1 [now Section 14]. In finding that this modification constituted a permissible amendment to the complaint, the Tribunal noted that the addition of a new ground did not put the respondent at any disadvantage since the change had not altered the facts that the respondent had itself investigated. Hence, there were no new facts in which to inquire and no new parties to interview. The Tribunal noted that the "change would have merely required the development of legal arguments to meet the thrust of the new ground of complaint".[(3)]

[13] Similarly, in the present case, none of the facts alleged in any of the four complaints are being altered. The only real change will occur once all of the evidence is in, when the parties will make their final submissions. The additional issue to be debated at that time will be whether the facts adduced during the hearing of the case constitute evidence of a violation of Section 7, in addition to, or in the alternative to, Section 14.

[14] Attempts were made to notify the Respondent of the Commission's intent to request these amendments since at least November 16, 2001, which is almost three months prior to the commencement of the hearings. There is no doubt that notice of the filing of the preliminary motions was included amongst the documents that were served on the Respondent by process server on December 13, 2001. If the Respondent is in any way unaware of the content of these preliminary motions, it is solely attributable to his own unwillingness to receive or examine the documentation and other information being presented to him. I therefore consider the Respondent as having been duly notified of these preliminary motions, as of December 13, 2001, at the latest.

[15] I find that sufficient notice of the amendments has been provided to the Respondent and that the approval of these changes will not put the Respondent at any disadvantage that would justify denying the Commission's motion to amend the complaints. I therefore allow the complaints to be amended in the manner set out earlier in this ruling.

III. Similar Fact Evidence

[16] In its second preliminary motion, the Commission requests that the testimony of each of the Complainants be considered as similar fact evidence with respect to the other complaints. The Commission notes that the four Complainants form part of the same work force, and submits that the facts stated in the four complaints demonstrate a similar pattern of conduct by the Respondent, occurring over approximately the same time frame. In support of this motion, the Commission referred to the details provided in each of the complaints as well as to its statement of material facts that formed part of its November 16, 2001 letter.

[17] Human rights tribunals are entitled to admit and act on similar fact evidence,[(4)] subject to the principles applicable to the use of such evidence in criminal and civil proceedings. Thus, the Canadian Human Rights Tribunal, in *Hewstan* v. *Auchinlek* found that:

The proper test for the reception of such evidence is whether it is sufficiently similar to the facts alleged to be probative of the issues before the tribunal when balanced against the prejudice which may be caused by its admission. The factors to consider in reaching this determination are (a) whether the evidence put forward as similar fact indeed involves similar facts as those at issue in the proceedings, (b) whether the evidence addresses issues other than the Respondent's mere propensity to commit a particular act or acts and (c) whether the introduction of the evidence will serve to confuse the issues by requiring the Tribunal to resolve whether the earlier acts have in fact been committed. [(5)]

[18] Turning to the case at hand, although it is possible that the testimony of each Complainant will satisfy the test for being considered as similar fact evidence with regard to the other complaints, I do not find any compelling reason to rule on this issue in advance of this evidence being heard. The common practice in other cases before the Canadian Human Rights Tribunal appears to have been to hear the proposed witnesses first and determine the issue of admissibility later.[(6)] The usual concern raised by this manner of proceeding relates to the reluctance to have evidence heard that by its nature is prejudicial to a respondent, and that would otherwise be irrelevant to the complaint, were it not for its "similar fact" nature. This problem does not, however, arise in the present case. The proposed similar fact evidence will in all likelihood be adduced without objection, in any event, since it consists of the testimony of one or the other of the four Complainants, relating directly to their respective complaints.

[19] Therefore, if the evidence is likely to be admitted, whether or not it is accepted as similar fact evidence, there is no reason to rule on this question at this time. Moreover, by

waiting until the Complainants have testified, the Tribunal will have the benefit of knowing the exact scope and nature of the evidence adduced, when assessing whether the test for admitting similar fact evidence has been satisfied.

[20] For these reasons, I do not, at this time, grant the Commission's motion to consider the evidence of each Complainant as similar fact evidence, with respect to the other complaints. However, I make this ruling without prejudice to the Commission's right to make a similar submission to the Tribunal after the proposed evidence has been adduced.

_____

Athanasios D. Hadjis, Chairperson

OTTAWA, Ontario

January 23, 2002

CANADIAN HUMAN RIGHTS TRIBUNAL

COUNSEL OF RECORD

TRIBUNAL FILE NO.: T657/4501

STYLE OF CAUSE: Kindra Woiden, Lisa Falk, Joan Yeary and Sharla Curle (formerly Speight) v. Dan Lynn

RULING OF THE TRIBUNAL DATED: January 23, 2002

APPEARANCES:

Giacomo Vigna For the Canadian Human Rights Commission and the Complainants

1. *Uzuoba* v. *Canada (Correctional Service)* (1994) 26 C.H.R.R., D/361 (CHRT) at page D/368, referring to the Ontario Board of Inquiry decisions in *Cousens* v. *Canadian Nurses Association* (1981) 2 C.H.R.R., D/365 and *Barnard* v. *Fort Francis (Town) Commissioners* v. *Police (No. 1)* (1986) 7 C.H.R.R. D/3167, at page D/3167. See also *Hum* v. *Royal Canadian Mounted Police* (1987) 8 C.H.R.R., D/3748, (CHRT) at page D/3751; *Kavanagh* v. *Correctional Services of Canada*, (May 31, 1999), (CHRT), at pages 2-4; *Public Service Alliance of Canada* v. *Government of the Northwest Territories*, (June 10, 1999), (CHRT), at page 6; *Brown* v. *Canadian Armed Forces* (August 23, 1994) at page 847 of the transcript.

2. *Ibid*.

3. *Ibid* at page D/3751.

4. *Hewstan* v. *Auchinlek* (1997) 29 C.H.R.R. D/309 (CHRT); *Swan* v. *Canadian Armed Forces* (1994) 25 C.H.R.R. D/312 (CHRT); *Rivers* v. *Squamish Indian Band Council* (January 27, 1994) T.D. 3/94 (CHRT); *Mehta* v. *McKay* (1990) 47 Admin L.R. 254 (N.S.S.C. - App. Div.); *Re: Commodore Business Machines Ltd.* v. *Minister of Labour for Ontario* (1984) O.R. (2d) 17.

5. *Ibid*, at page D/313.

6. *Rivers*, *supra* note 4 at page 53, *Swan*, *supra* note 4 at page D/319, *Hewstan*, *ibid* at page D/310.