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

BETWEEN:

CAROL COOK

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

ONION LAKE FIRST NATION

Respondent

RULING ON THE APPLICATION OF THE

CANADIAN HUMAN RIGHTS COMMISSION

TO AMEND THE COMPLAINT

Ruling No. 1

2002/04/22

PANEL: Paul Groarke, Member

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I. INTRODUCTION

[1] The Complainant filed a complaint with the Canadian Human Rights Commission on October 7, 1999. In the complaint, she alleges that the Onion Lake First Nation "has discriminated against m[e] by not selecting m[e] for its Life Skills Programme because of my disability (Hepatitis C) contrary to section 5 of the *Canadian Human Rights Act*".

[2] The complaint form includes the following particulars:

On or about 20 September 1999, I applied for a six month Life Skills Programme run by the respondent's Learning Centre. All applications were to be submitted to the respondent's Social Welfare Office. To be admitted into the programme, each applicant had to be on social assistance, be drug and alcohol free for a minimum of 6 weeks, have no outstanding legal issues and be able to attend the course on a daily basis for 6 months. I believe I meet all the respondent's criteria.

On 7 October 1999, I telephoned my social worker, Ms. Bonnie Whitstone, regarding the status of my application. Ms. Whitstone referred me to the Director of Social Development, Ms. Marvina Pete. I telephoned Ms. Pete that same day, at which time she told me that I was not selected for the programme because of my medical condition, Hepatitis C.

There seems to be a dispute over the conversation between Ms. Cook and Ms. Pete.

[3] The Commission requested that the Canadian Human Rights Tribunal inquire into the complaint on December 18, 2001. The Tribunal subsequently sent a questionnaire to all of the parties to assist in the planning of the inquiry. On February 7, 2002, the Commission returned the questionnaire, indicating that it wished to bring a motion:

… to amend the complaint form by adding the words "and/or alcoholism" after the words "Hepatitis C" in the parenthesis in the first paragraph thereof.

The Tribunal set a hearing date and directed the Commission to file its submissions on the motion to amend by March 1st.

[4] The Commission provided its submissions on the motion by letter. The letter states:

The grounds for the motion are that the Respondent has advised the Commission that the complainant was not selected into the Life Skills Programme because she "has a serious problem with alcohol".

The letter here refers to a letter from George Forsyth, the Director of Operations for Onion Lake First Nation. His letter is reproduced in a Book of Documents supplied by the Commission and responds to a number of written questions from Ms. Wheatley, an investigator with the Canadian Human Rights Commission.

[5] In his response to one of the questions, Mr. Forsyth wrote as follows:

4. Why was Ms. Cook not selected for the Life Skills Programme?

To be blunt, Ms. Cook has a serious problem with alcohol. She has made no attempt to undergo any form of rehabilitation for the problem. She has lost her children over her excessive use of alcohol and, despite this difficulty, continues to use alcohol.

You will note in the application form (Item 4) that the applicant must sign a statement indicating abstinence from alcohol and drugs for a minimum period of 6 weeks prior to the application date. Ms. Cook could not meet this requirement.

Mr. Forsyth also states that hepatitis C was never considered in deciding whether Ms. Cook should be enrolled in the programme.

[6] The Onion Lake First Nation responded to the Commission's motion on March 11th. In its response, at paragraph 8, it submits "that the amendment sought is a substantial and material change to the complaint and will entirely change the nature and extent of the inquiry". At paragraph 9, it continues:

The allegation … that Ms. Cook was discriminated against because she had not abstained from alcohol and drugs for a minimum period of six weeks prior to the application date is a much broader inquiry, including the purpose of the life skills program and may bring into play the issue of a *bona fide* justification for denial or differentiation contained in s. 15(1)(g) of the *Canadian Human Rights Act*. The amendment will make the hearing much more lengthy and complicated than the current Complaint respecting Hepatitis C.

The Respondent goes on to complain that the Commission knew of the facts on which its motion is based for more than two years before making the application.

[7] Onion Lake then raises a jurisdictional issue. It argues that the Tribunal can only proceed on the basis of a reference from the Commission. Since the question of alcoholism was never raised in the original investigation, the Commission has not referred the complaint regarding alcoholism to the Tribunal. It follows that "the statutory conditions for the exercise of the Tribunal's jurisdiction would not exist, if the amendment were allowed".

[8] The Commission replied to the response by letter on March 19. It argued as follows:

The jurisprudence is clear that even where an amendment relates to a substantive matter the Tribunal may order the amendment. The only consideration for a Tribunal is whether the granting of an order to amend a complaint will cause prejudice to a respondent.

The Commission submits that the Respondent has not suffered any actual prejudice in the immediate case. The Commission also rejects the proposition "that as a matter of jurisdiction a complaint must have been investigated on the same ground that is inquired into by the Tribunal".

II. LEGAL ISSUES

[9] There are two distinct legal issues in the immediate case. The first is whether the Tribunal has the jurisdiction to inquire into a complaint that has not been considered by the Commission. The second is simply when an amendment should be granted. The respondent has expressed concern, in this context, with delay. It will become apparent that it is necessary to review the case law in both areas.

III. JURISDICTION

[10] The essentials on the jurisdictional argument are relatively simple. Under section 49(1) of the *Canadian Human Rights Act*, the Canadian Human Rights Commission has the authority to request that the Human Rights Tribunal inquire into a complaint. Section 49(2) states that the Chairperson of the Tribunal "shall" institute an inquiry on receiving a request by assigning a member or a panel to inquire into the complaint. It follows that the decision to take a complaint to an inquiry lies with the Commission rather than the Tribunal. Section 50 of the *Act* sets out the powers of the Tribunal and gives the member or panel the authority to "inquire into the complaint".

[11] The case law focuses on the facts of individual cases, rather than the law. It establishes that the word "complaint" must be interpreted broadly, in a manner that captures the full extent of the complainant's allegations. There is a point, however, where an amendment of a complaint can no longer be considered a "mere amendment" and becomes a substantially new complaint.[(1)] In such a situation, the Commission cannot be said to have requested an inquiry and the Tribunal has no jurisdiction to proceed.

[12] The Federal Court has dealt with the jurisdiction of the Commission to amend a complaint. Most recently, in *Bell Canada v. C.E.P.U.*, [1998] F.C.J. No. 1609 (Q.L.), at paragraph 45, the Federal Court of Appeal stated that an investigator may have a duty to suggest that a complaint be amended to conform with the evidence.

To require the investigator in such a case to recommend the dismissal of the complaint for being flawed and to force the filing of a new complaint by the complainant or the initiating of a complaint by the Commission itself under subsection 40(3) of the *Act*, would serve no practical purpose. It would be tantamount to importing into human rights legislation the type of procedural barriers that the Supreme Court of Canada has urged not be imported.

This was followed by the Trial Division in *Tiwana v. Canada (C.H.R.C.)*, [2000] F.C.J. No. 1955 (F.C.T.D.), at paragraph 32, where the court allowed a complainant to amend a complaint of discrimination on the basis of age.

[13] These cases deal with amendments during the course of an investigation, however. The situation changes once a complaint has been referred to the Tribunal. In *I.M.P. Group Limited v. Dillman* (1995), 24 C.H.R.R. D/529, for example, the Nova Scotia Court of Appeal criticized a Board of Inquiry for allowing an amendment that went beyond the facts of the original complaint. In paragraph 35, at page 332, the court stated as follows:

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. 32(a) of the *Act*. The Board dealt with a matter which had never been referred to it.

The Commission would be the last to suggest that the Tribunal is entitled to enter into an inquiry without a referral from the Commission.

IV. PREJUDICE

[14] The second legal issue is when an amendment should be granted. The Commission has referred me to *Cousens v. Canadian Nurses Association* (1981), 2 C.H.R.R. D/365, where an Ontario Board of Inquiry considered a complaint of discrimination on the grounds of "ancestry". At the outset of the hearing, the Commission asked the Board to consider two additional grounds of discrimination, "nationality" and "place of origin". The Board rejected the Respondent's objection, on the basis that there is a public interest in hearing all aspects of a complaint at a single hearing. There was no reason to restrict the precise characterization of the facts before the Board to the specific ground enumerated in the complaint.

[15] The Board of Inquiry in *Cousens* nevertheless ruled that a respondent must be given enough notice of any amendments to prepare its response. The amendment should not be granted if it prejudices the respondent. The corollary is also true. In *Canada (A.G.) v. Robinson*, [1994] 3 F.C. 228 (F.C.A.), the Court of Appeal held that a tribunal was entitled to enter a finding of discrimination under section 10 of the *Canadian Human Rights Act*, in spite of the fact that the complaint had been laid under section 7. The court held, at page 248, that the allegations under the different sections were "for practical purposes", indistinguishable. Since there was no evidence of "actual prejudice", both sections of the *Act* were properly before the tribunal.

[16] The same approach has been followed in other cases. In *Tabar & Lee v. Scott and Westend Construction Limited* (1982), 3 C.H.R.R. D/1073, an Ontario Board of Inquiry dealt with a number of preliminary issues. In doing so, the Board made a distinction between the form and substance of the complaint. This distinction has been employed in

Barnard v. Fort Frances Board of Police Commissioners (1986) 7 C.H.R.R. D/3167 (Ont. Bd. of Inq.) and *Renaud v. School District No. 23*, (1987) 8 C.H.R.R. D/4255 (B.C.H.R.C.). All three cases hold that a tribunal should not adopt a strict approach to the specifics of individual complaints. A tribunal has a fundamental obligation to hear the substance of the complaint before it.

[17] The rule of practice is accordingly that issues arising out of the same set of factual circumstances should normally be heard together. This is a general legal rule, which improves the efficiency of the process and avoids the possibility of inconsistent rulings. In the human rights context, it also recognises the inevitable fact that complaints are usually filed before a thorough investigation has taken place, without the benefit of legal scrutiny. As a result, they are often imprecise. It follows, as a practical matter, that commissions and tribunals need some authority to amend complaints so that they are in keeping with the law and evidence.

[18] It is notable that prejudice has been used as a test in other contexts. In *Uzoaba v. Correctional Services of Canada* (1994), 26 C.H.R.R. D/361 (C.H.R.T.), for example, the Commission wished to introduce evidence regarding events that occurred prior to the circumstances which gave rise to the complaint. The respondent argued that the Commission's decision to broaden the scope of the complaint would contravene the principles of natural justice. In ruling against the Commission, this tribunal held that the introduction of such evidence would prejudice the respondent and should therefore be excluded.

[19] The issue of amendments has become prominent in the context of allegations that a respondent has retaliated against a complainant for filing a complaint. In *Kavanagh v. Correctional Services of Canada* (May 31, 1999), T505/2298 (C.H.R.T.), the Chairperson of this tribunal adopted the reasoning of the Ontario Board of Inquiry in *Entrop v. Imperial Oil Limited* (1994) 23 C.H.R.R. D/186, at paragraph 9:

It would be impractical, inefficient and unfair to require individuals to make allegations of reprisals only through the format of separate proceedings. This would necessitate their going to the end of the queue to obtain investigation, conciliation and adjudication on matters which are fundamentally related to proceedings already underway. Insofar as reprisals are intended to intimidate or coerce complainants from seeking to enforce their rights under the *Code*, this would thwart the integrity of the initial proceedings and make a mockery of the *Code*'s obvious intent to safeguard complainants from adverse consequences for claiming protection under the *Code*. The allegations of reprisal should be dealt with in the context of the original complaint.

The same approach was followed in *Fowler v. Flicka Gymnastics Club*, 31 C.H.R.R. D/397 (B.C.H.R.C.), where the complainant argued that the amendment arose "out of the facts which form the basis of the original complaint".

[20] The rule regarding allegations of retaliation can probably be seen as an exception to the general practice regarding amendments. That practice appears to be that amendments

will normally be allowed if they do not alter the substance of the complaint, as reflected in the material facts of the case. If the amendment prejudices the case for the respondent, on the other hand, it should not be allowed. The case law does not discuss how much prejudice is sufficient, but it must be real and significant. There must be "actual prejudice". There may also be factors such as delay, which are implicitly prejudicial. This might include the loss of the investigation and conciliation processes.

[21] There are cases that suggest that delay is inherently prejudicial. In *Canada (A.G.) v. Canada (C.H.R.C.)* (1991) 36 C.C.E.L. 3 (F.C.T.D.), [1991] F.C.J. No. 334 (Q.L.), Justice Muldoon held that the Commission could not amend a complaint without exercising its discretion to extend the one year time limit for filing the complaint. In *E.C.W., Local 916 v. Atomic Energy of Canada* (1984) 5 C.H.R.R. D/2066 (C.H.R.T.), an amendment was refused because it would cause a further delay in the proceedings. A period of almost 5 years had elapsed between the date of the complaint and the date of the decision.

V. THE PRESENT CASE

[22] This brings me to the present case. The first issue is whether the Tribunal has the jurisdiction to entertain the proposed amendment. The Respondent essentially argues that the amended complaint is based on allegations that were never considered by the Commission. The amendment accordingly introduces a new complaint, which was never referred to the Tribunal. The question in the case law is whether the amendment would alter the allegations of fact set out in the complaint. The simple answer appears to be yes.

[23] The case put forward by the Complainant and Commission alleges that the decision as to who should be enrolled in the programme was tainted by some form of prejudice. Ms. Cook apparently feels that she was the victim of unfairness. The complaint relates to her treatment as an individual and states that she has been discriminated against personally. It does not question the design of the programme or the admission criteria.

[24] The question whether the Life Skills Programme is inherently discriminatory is a separate issue. It was never part of the original complaint. The complaint and the particulars do not suggest that the programme's admission criteria discriminate against applicants with alcoholism, in requiring that applicants be free of alcohol. Ms. Cook merely alleged that she was not allowed to enrol in the programme because she had hepatitis C. She did not question the requirement that the applicant "be drug and alcohol free for a minimum of six weeks". In point of fact, Ms. Cook stated that she met thiscriteria.

[25] The Respondent feels that it is now facing a new attack on a broader front, which calls the entire Life Skills Programme into question. This raises deep issues for Onion Lake, which requires that all employees refrain from the use of drugs and alcohol. The

concern is that any attack on this aspect of the programme undermines one of the fundamental policies on which the reserve operates. This is a systemic issue that does not appear to have been canvassed in the investigation. It follows that the issue was never referred to the Tribunal and cannot be incorporated into the complaint. In my view, the Tribunal has no jurisdiction to deal with it.

[26] That is not the end of the matter. The material filed with the Tribunal suggests that there may be a misunderstanding between the parties. As a result, it seems advisable to add an addendum to the present ruling. If Ms. Cook was drug and alcohol free, there may well be an issue of personal discrimination. The precise nature of this discrimination may or may not relate to the fact that she had hepatitis C and might include alcoholism. This could conceivably give rise to an argument that she was not enrolled in the programme because she was an alcoholic, in spite of the fact that she met the programme's requirements. If this is the concern of the Commission, I can only say that it comes well within the parameters of the case law, which establishes that a tribunal has the authority to go outside the narrow bounds of the description in the complaint.

[27] It is open to the Commission to raise this much more restricted issue at the outset of the hearing. I see nothing in the present ruling to prevent the member who hears the complaint from dealing with this aspect of the complaint or ordering an amendment to encompass it. The case law seems to suggest that the tribunal would have the authority to consider such a ground, with or without an amendment. The only issue would be whether the Respondent was given adequate notice of the relevant facts and the evidence on which the Commission is relying to prove the allegation. That is a matter that the Member hearing the case should decide.

VI. RULING

[28] The Commission's request for an amendment of the complaint is accordingly denied, subject to the above addendum. If further disclosure is required, the Commission is ordered to do provide it immediately.

Original Signed By

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Paul Groarke, Chairperson

OTTAWA, Ontario

April 22, 2002

CANADIAN HUMAN RIGHTS TRIBUNAL

COUNSEL OF RECORD

TRIBUNAL FILE NO.: T693/8101

STYLE OF CAUSE: Carol Cook v. Onion Lake First Nation

RULING OF THE TRIBUNAL DATED: April 22, 2002

APPEARANCES:

Carol Cook On her own behalf

Patrick O'Rourke For the Canadian Human Rights Commission

John Beckman, Q.C. For Onion Lake First Nation

1. [1] As the words were used by Muldoon J. in *Canada (A.G.) v. Canada (C.H.R.C.)*, *infra*, at page 99.