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

BETWEEN:

HEIDI BOZEK

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

MCL RYDER TRANSPORT INC.

- and -

NEIL McGILL

Respondents

RULING ON MOTION TO ADD ALLIED SYSTEMS (CANADA)

COMPANY AND ON MOTION TO DISMISS THE COMPLAINTS FOR DELAY

Ruling No. 1

2002/11/27

MEMBER: J. Grant Sinclair

[1] Heidi Bozek has filed two complaints with the Canadian Human Rights Commission, one against Neil McGill and the other against MCL Ryder Transport Inc., both dated March 25, 1996.

[2] This ruling responds to two motions that have been made to the Tribunal. The first motion by the Commission and the respondent, Neil McGill, is for an order to add Allied Systems (Canada) Company as a respondent party to these proceedings. The second motion by Neil McGill and by MCL Ryder Transport Inc. and supported by Allied Systems (Canada) Company is for an order dismissing the complaints of Heidi Bozek without a hearing.

I. MOTION TO ADD ALLIED SYSTEMS (CANADA) COMPANY

[3] MCL Ryder Transport Inc. was continued in Nova Scotia as MCL Ryder Transport Incorporated on December 9, 1997. On December 18, 1997, MCL Ryder Transport Incorporated was amalgamated under the Nova Scotia *Companies Act*, R.S. c. 81, s. 1, together with a number of companies to form the amalgamated company, Allied Systems (Canada) Company.

[4] In their original submissions, the Commission and Neil McGill provided details of the corporate history leading to the amalgamation and the Tribunal requested further submissions concerning the corporate law implications of the continuance and amalgamation of MCL Ryder Transport Inc. as related to the motion to add Allied Systems as a party. The parties have done so.

[5] As to the continuation of MCL Ryder Transport Inc. in Nova Scotia, it is apparent from s. 133(4) of the Nova Scotia *Companies Act*, that it continued as a company with the

same property, assets and liabilities as before and continued to be subject to any pending, civil, criminal or administrative action or proceeding brought in any jurisdiction. According to Fraser & Stewart, *Company Law of Canada*, 6th ed. 1993, upon a continuance, the existence of the original corporation is not terminated. The company retains and maintains its identity and the only change is the governing law (p. 572).

[6] On the corporate implications of an amalgamation, the Commission and Neil McGill provided among others, the two leading cases on this subject. These are the decisions of the Supreme Court of Canada in *Witco Chemical Co. Canada Ltd. v. Town of Oakville* [1975] 1 S.C.R. 273 and *R. v. Black and Decker Manufacturing Co*., [1975] 1 S.C.R. 411.

[7] In Witco, Witco Chemical Company, Canada had amalgamated on December 30, 1971, with Argus Chemical Canada Limited to form the amalgamated company, Argus Chemical Canada Limited. On December 31, 1971, the solicitor for Witco, unaware of the amalgamation, issued a statement of claim against the Town of Oakville with Witco as plaintiff. Witco sought to amend the claim to substitute Argus, the amalgamated company, as plaintiff. The defendant objected on the basis that the claim had been issued by a non-existent plaintiff and because of the intervening limitation period, the claim could not be so amended.

[8] The case found its way to the Supreme Court of Canada which allowed the amendment. The Supreme Court based its conclusion on the section of the *Ontario Business Corporations Act* which provided that "the amalgamating corporations are amalgamated and continue as one corporation". As such, said the Court, each amalgamating corporation continues to exist as a corporate entity. There was no extinguishment of the corporate identity of Witco to justify the conclusion that the claim had been issued in the name of a non-existent plaintiff.

[9] In *Black and Decker*, the Black and Decker Manufacturing Company Limited, amalgamated with DeWalt Canada Limited and Master Pneumatic Tools (Canada) Ltd., under the name of Black and Decker Manufacturing Company Limited. The question in this case was whether a prosecution for alleged breaches of the *Combines Investigation Act* by the amalgamating company Black and Decker could be carried forward against the amalgamated company.

[10] The Supreme Court, after reviewing the relevant provisions of the *Canada Business Corporations Act*, concluded as it did in *Witco*, that on an amalgamation, no "new" company is created and no "old" company is extinguished (p. 415). An amalgamation has a different objective than a share or an asset purchase. Different legal mechanics are used, usually for the express purpose of maintaining the continued existence of the amalgamating companies and this is reflected in the governing corporate legislation. In the result, the prosecution could proceed against the amalgamated company.

[11] The Nova Scotia *Companies Act* contains the same provisions relating to the effects of a continuation and an amalgamation as does the *Ontario Business Corporations Act* and the *Canada Business Corporations Act*.

[12] On this basis of the Nova Scotia legislation and the decisions of the Supreme Court in *Witco* and *Black and Decker*, I have concluded that MCL Ryder Transport Inc. continues to exist as a continued, amalgamating company of Allied Systems (Canada) Company, which latter company possesses all the property, rights, privileges and franchises, and is subject to all the liabilities contracts and debts of the amalgamating companies (see s. 134(12), of the Nova Scotia *Companies Act*).

[13] Accordingly, it is hereby ordered that the complaint of Heidi Bozek filed against MCL Ryder Transport Inc. be amended to substitute Allied Systems (Canada) Company as respondent in place of MCL Ryder Transport Inc.

II. MOTIONS TO DISMISS THE COMPLAINT WITHOUT A HEARING

[14] The grounds for these motions relate to the alleged misconduct and delay of the Commission in processing and investigating the complaints. The respondents argue that these amount to an abuse of process, a breach of natural justice and a failure to observe procedural fairness, all of which have caused irremediable prejudice to the respondents. More specifically, because of the Commission's actions and delay in processing the complaints, the respondents are unable to present a full answer and defence.

[15] The Commission's response is two-fold. First, the Commission asserts that, once the complaints have been referred to it, this Tribunal has no jurisdiction to dismiss the complaints without a hearing. To do so would be tantamount to a review by the Tribunal of the Commission's decision to refer. Alternatively, the Commission argues that the consequences of its alleged actions should only be judged by the Tribunal in the fullness of the evidence adduced at a hearing on the merits.

[16] I will deal first with the Commission's alternative position. In so doing, I begin by reference to the Newfoundland Court of Appeal decision in *Newfoundland (Human Rights Commission) v. Newfoundland (Department of Health)*, [1995] N.J. No. 12 (Q.L.); (1998) 13 Admin. L.R. 3^{d} 142, a case which involved exactly this issue. Although, the Tribunal is not bound by this decision, I consider the reasoning of the Court to be particularly instructive and useful.

[17] In *Newfoundland*, the complainant filed a complaint with the Newfoundland Human Rights Commission alleging discrimination on the grounds of national and social origin. The Commission referred the complaint to a Board of Inquiry. At the commencement of the hearing, the respondents requested, by way of a preliminary objection, that the Board of Inquiry dismiss the complaint for lack of jurisdiction. The argument was that the respondents were not employers as required to found a complaint under the Newfoundland *Human Rights Code*. The Inquiry Board agreed and dismissed the complaint without a hearing on the merits. The Commission appealed this decision, taking the position that the preliminary objection was premature and the Inquiry Board

should have heard all of the evidence on the complaint before dealing with the jurisdictional question.

[18] The Newfoundland Court of Appeal allowed the appeal. In doing so, the Court enumerated certain legal propositions which I consider relevant in deciding the respondents' motions. The first, which is clearly established in law, is that administrative tribunals may determine their own procedures and that includes the discretion as to how to deal with preliminary objections. Secondly, when dealing with an application to determine a question of law as a preliminary matter, *it is open* to a board of inquiry to receive oral or affidavit evidence and make findings of fact on that evidence. Where however, the issues of fact and law are complex and intermingled, it is more appropriate for the board of inquiry to have a full hearing before ruling on the preliminary question.

[19] I accept these propositions. And I would go further. In my opinion, this Tribunal *should at least* have a full evidentiary record before dealing with any preliminary motions that seek to dismiss a complaint without a hearing, because of delay and consequential prejudice to the respondents. This would require an agreed statement of facts, or affidavit evidence, or an oral hearing; and with the full opportunity for cross-examination if required, and argument. To this, I add the caveat that where the issues of fact and law are complex or intermingled, the preliminary objections should await a full hearing.

[20] The respondents have submitted voluminous materials in support of their motions. Their submissions and the submissions of the Commission in reply contain extensive statements of facts, none of which have been proven. There has been no evidence given nor any agreed statements of facts filed with the Tribunal. The Tribunal suggested an oral hearing but this was resisted by the respondents.

[21] I have reviewed in great detail the submissions of the parties. Without being definitive, it appears that the central issue arising out of the complaints is credibility. The fundamental objection of the respondents is that the delay of the Commission in processing the complaints and the loss of the Commission files has effectively precluded the respondents from mounting an effective credibility response. Witnesses have died or can't be located or their memories have faded; corporate files and corporate memories have been lost. The Commission disputes this and takes the position that the respondents can effectively respond to the complaints through cross-examination of Commission witnesses or through the evidence of other witnesses. No one witness is key to the respondents' case says the Commission.

[22] There are facts to be proved. There are facts and issues in dispute. In the absence of any evidentiary record, I do not see how this Tribunal can decide the respondents' motion to dismiss the complaints on a preliminary basis. Accordingly, I have concluded that the respondents' motions to dismiss the complaints be adjourned without prejudice to, or in any other way affecting the rights of the respondents to bring these motions again at any time during the hearing of the complaints on the merits or at the completion of the evidence.

[23] Having adjourned the motions to the hearing, there is no need to decide whether this Tribunal has the jurisdiction to dismiss a complaint referred to it by the Commission, without a hearing.

"Original signed by"

J. Grant Sinclair

OTTAWA, Ontario

November 27, 2002

CANADIAN HUMAN RIGHTS TRIBUNAL

COUNSEL OF RECORD

TRIBUNAL FILE NO.: T716/2102 & T717/2202

STYLE OF CAUSE: Heidi Bozek v. MCL Ryder Transport Inc. and Neil McGill

RULING OF THE TRIBUNAL DATED: November 27, 2002

APPEARANCES:

Heidi Bozek On her own behalf

Giacomo Vigna For the Canadian Human Rights Commission

John-Edward C. Hyde For Allied Systems (Canada) Company

John-Paul Alexandrowicz For MCL Ryder Transport Inc.

Karen M. Anderson For Neil McGill