

Canadian Human
Rights Tribunal



Tribunal canadien
des droits de la personne

Between:

**Marie-Claire Coupal and
Biserka (Biba) Milinkovich**

Complainants

- and -

Canadian Human Rights Commission

Commission

- and -

Canada Border Services Agency

Respondent

Ruling

Member: J. Grant Sinclair

Date: June 16, 2008

Citation: 2008 CHRT 24

[1] The Public Service Alliance of Canada (PSAC) requests that it be added as a party to the complaints of Marie-Claire Coupal and Biserka Milinkovich against the Canada Border Services Agency (CBSA).

[2] Ms. Coupal was a Border Service Officer (BSO) at the Windsor Land Border crossing when CBSA introduced Use of Force Training (UFT) for its officers. The training provides BSOs with the knowledge and skills needed to deal with potential or actual conflict in the course of their duties. Ms. Coupal alleged that as a result of a partial disability and her age, she was not able to participate in UFT. She complained that CBSA restricted her work duties as a result of her inability to complete the training, and this in turn resulted in a loss of employment opportunities.

[3] Ms. Milinkovich was a successful candidate for a BSO position at the CBSA International Mail Operations in Toronto. She alleged that CBSA prevented her from taking a position as a BSO because it assumed that her physical restrictions would not permit her to complete the UFT.

[4] At issue in both complaints is whether CBSA's Use of Force Training (UFT) Policy for BSOs discriminates against the Complainants on the basis of their disability or age, contrary to s. 7 of the *Act*. Ms. Coupal's complaint includes the additional allegation that the UFT requirement deprives or tends to deprive her or a class of individuals of an employment opportunity on the basis of their disability and/or age, contrary to s. 10 of the *Act*.

[5] PSAC wishes to be added as a complainant in order to address the allegations regarding systemic discrimination in Ms. Coupal's s. 10 complaint, and to seek an appropriate remedy on behalf of all Border Service Officers in the event that the complaints are substantiated.

[6] The Complainants consent to the motion.

[7] CBSA opposes the motion to add PSAC as a party arguing that the Tribunal does not have the jurisdiction to add PSAC as a complainant and, in the alternative, that PSAC has not met the test for adding a party.

[8] The Tribunal has jurisdiction under s. 48.9(2)(b) of the *Act* to add parties to existing proceedings. In the majority of cases, this jurisdiction has been exercised to add respondents rather than complainants.

[9] It has been said that adding parties should be done with caution and only after careful consideration of a number of factors. These factors include: whether the addition of the party is necessary to resolve the complaint; whether it could not reasonably have been foreseen that the new party should have been added when the complaint was filed; and, whether the addition of a party will result in serious prejudice to the opposing party (See for example: *Brown v. National Capital Commission*, 2003 CHRT 43 ; *Wade v. Canada (Attorney General)*, 2008 CHRT 9; and, *Groupe d'aide et d'information sur le harcèlement sexuel au travail v. Barbe*, 2003 CHRT 24 where the Tribunal granted a motion to add a complainant. See also : *Syndicat des employés d'exécution de Québec-Téléphone v. TELUS Communications (Québec) Inc.* 2003 CHRT 31 at para. 30; and, *Smith v. CNR* 2005 CHRT 23 at para. 52).

[10] In the present case, PSAC contends that its participation as a complainant is necessary since only PSAC can provide the information that would assist the Tribunal to fashion an appropriate remedy in the event that the s. 10 complaint is substantiated. An appropriate remedy, according to PSAC, would be one that applies to all of the BSOs across Canada. BSOs perform extremely diverse functions across the country in approximately 12,000 Points-of-Entry across Canada, which include land border crossings, airports, seaports, postal services and immigration detention centres.

[11] As a result of the diversity of their work and workplaces, the nature and extent of the risks that BSOs face on the job varies greatly. So too does the need for UFT. Information about the nature and extent of the risks facing this diverse work group is needed, it is argued, to design

a remedy that is not restricted to the Complainants' workplaces – the Windsor Land Border crossing and the International Mail Operations in Toronto.

[12] Assuming, without deciding, that the scope of the complaint is broad enough to encompass a remedy for all BSO's throughout Canada who are in similar circumstances to those of the Complainants, I see no reason why the Complainants could not call a PSAC witness who could provide the information outlined above. It is not necessary to have PSAC added as a party in order to provide this information to the Tribunal.

[13] The denial of party status to PSAC would not impede the Complainants from making arguments with respect to the appropriate systemic remedy that should be ordered in the event that the complaint is substantiated. It is noteworthy, in that regard, that PSAC appears to be working very closely with the Complainants on this matter.

[14] This is not a case like *Brown v. National Capital Commission*, 2003 CHRT 43, where it was necessary to add Public Works as a respondent because without that party the appropriate remedy would be unenforceable. Nor is it similar to *Groupe d'aide et d'information sur le harcèlement sexuel au travail v. Barbe*, where the Tribunal added the victim of the discriminatory conduct as a complainant. In that case, it was appropriate to add Ms. Des Rosiers as a complainant in order to properly resolve a complaint that was exclusively about her.

[15] PSAC's response to the point that Ms. Coupal is free to call a PSAC representative to testify about other BSOs is that the Respondent will likely object to this evidence on the grounds that it is irrelevant: the scope of the complaints is limited to the particular circumstances of the Complainants' workplaces and therefore, any information about other workplaces is irrelevant.

[16] If PSAC had a concern that the scope of the complaint might not be large enough to encompass the circumstances of all BSO's working throughout Canada, then it should have raised that concern when the complaint was drafted or as soon after that as it became aware of the complaint.

[17] As PSAC stated, it was engaged in ongoing discussions with the Respondent on the Use of Force Training issue since at least 2001.

[18] Moreover, it appears that PSAC has been involved in the present complaints since at least the investigation stage. PSAC had the opportunity to request that it be added to the complaint if it felt this was necessary **before** the referral was made to the Tribunal.

[19] This is all the more apparent when one considers that the complaint was initially dismissed by the Commission and on judicial review, it was returned to the Commission for further investigation and reconsideration. PSAC would therefore have had ample opportunity to become aware of the case and to request that it be added prior to referral.

[20] Once the complaint has been referred to the Tribunal, the addition of a party may result in a deprivation of the benefit of certain procedural protections that are provided at the pre-referral stage. These protections include the opportunity to persuade the Commission during its investigation process, that it should refuse to deal with the complaint because, for example, the complaint is without merit or it is based on acts or omissions that occurred more than one year before the receipt of the complaint (*Warman v. Lemire* 2006 CHRT 48 at paras. 4-7).

[21] PSAC argues that there is no procedural unfairness to the Respondent in circumventing the Commission process given that the Respondent has known since 2001 that PSAC had concerns about the UFT as it was applied to aging and disabled workers. PSAC's position with respect to the complaints will therefore come as no surprise to the Respondent. This may be so but this argument does not address the loss of procedural protections that may be otherwise available if PSAC is added as a complainant at this stage of the proceedings.

[22] For all of these reasons, the Tribunal concludes that this is not an appropriate case in which to exercise its discretion under s. 48.9(2)(b) to add PSAC as a complainant to the proceedings. The motion is dismissed.

Signed by

J. Grant Sinclair
Tribunal Member

Ottawa, Ontario
June 16, 2008

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1240/5207

Style of Cause: Marie-Claire Coupal and Biserka (Biba) Milinkovich v.
Canada Border Services Agency

Ruling of the Tribunal Dated: June 16, 2008

Appearances:

Alison Dewar and Lisa Addario, for the Complainants

No submissions made, for the Canadian Human Rights Commission

Sandra Nishikawa and Sean Gaudet, for the Respondent