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

**BETWEEN:**

**SYNDICAT DES EMPLOYÉS D'EXÉCUTION DE QUÉBEC-TÉLÉPHONE, SECTION LOCALE 5044 DU SCFP**

**Complainant**

**- and -**

**CANADIAN HUMAN RIGHTS COMMISSION**

**Commission**

**- and -**

**TELUS COMMUNICATIONS (QUÉBEC) INC.**

**Respondent**

# REASONS FOR DECISION ON THE PRELIMINARY ISSUES

**MEMBER: Pierre Deschamps**

**2003 CHRT 31**

**2003/09/15**

**(TRANSLATION)**

## TABLE OF CONTENTS

**Page**

I. INTRODUCTION . . . . . 1

II. THE FIRST ISSUE. . . . . 1

III. DECISION ON THE FIRST ISSUE . . . . . 3

IV. THE SECOND ISSUE . . . . . 8

V. DECISION ON THE SECOND ISSUE . . . . . 10

A. Late filing of the complaint . . . . . 10

B. Insufficient evidence . . . . . 12

1. The role and powers of the Commission . . . . . 12

2. The role and powers of the Tribunal . . . . . 13

VI. CONCLUSION. . . . . 15.

## I. INTRODUCTION

[1] The Panel is seized of two preliminary issues raised by the respondent, TELUS Communications (Québec) Inc., ("the respondent") in respect of a complaint filed July 8, 1999, with the Canadian Human Rights Commission ("the Commission") by the Syndicat des employés d'exécution de Québec-Téléphone, Section locale 5044 du Syndicat canadien de la fonction publique ("the complainant").

[2] In its complaint, the complainant alleges that the respondent discriminates against the incumbents of a female-dominated job in its employ. According to the complainant, in so doing, the respondent is in contravention of section 10 of the *Canadian Human Rights Act* ("the *Act*").

[3] The issues raised by the respondent are as follows:

1) The respondent maintains that certain parties, including the Syndicat des Agents de Maîtrise de Québec-Téléphone, Section locale 5144 du Syndicat canadien de la fonction publique ("the SAQT"), ought to be summoned in the context of this case as their interests could potentially be directly affected by the findings of the Tribunal;

2) The respondent maintains that there was not sufficient evidence to warrant the Commission's decision to request the appointment of this Tribunal.

[4] On March 26, 2003, Mr. Athanasios D. Hadjis, a member of the Canadian Human Rights Tribunal, determined that these two issues would be dealt with through written arguments. The undersigned was designated to dispose of both these issues.

## II. THE FIRST ISSUE

[5] It should be pointed out straightaway that the first issue raised by the respondent consists of several elements..

[6] Firstly, the respondent requests that the SAQT be duly summoned for the purposes of this case (Respondent's written submissions of April 15, 2003, para. 26). The respondent asserts that the SAQT is an interested party whose rights could be affected by a decision of the Tribunal in this case (Submissions, para. 46). The respondent therefore requests that the SAQT be notified that any decisions the Tribunal might hand down in this case are likely to affect its rights, so as to permit it to present its defence or its viewpoint (Written Submissions, para. 47).

[7] Secondly, the respondent argues that, should the Tribunal make a finding of any discrimination whatsoever in this case, both the complainant and the SAQT should be held liable for damages as active and essential agents of the alleged discrimination (Written Submissions, para. 38).

[8] According to the respondent, the job in question was evaluated by a joint standing job evaluation committee composed of representatives of the complainant, the respondent and the SAQT (Written Submissions, para. 34); according to the respondent, if discrimination is found to exist, it is the result of the decision of the committee, a decision that was final and not subject to review and was binding on the respondent (Written Submissions, para. 43).

[9] Consequently, the respondent asserts that the representatives of the complainant and those of the SAQT who sat on the joint committee charged with evaluating the jobs in question should be held jointly and severally liable for any compensation the Tribunal might order in this case (Written Submissions, para. 44).

[10] The respondent therefore requests that the SAQT be summoned for the purposes of this case by an impleading, in view of its active and essential role in the alleged discrimination, and asserts that its presence is necessary to permit a complete resolution of the dispute (Written Submissions, para. 51)..

[11] In response to the respondent's arguments, the Commission states that it takes no stand on the merits of this issue. It requests, however, that the third party be notified of the preliminary objection so that it can make representations on the merits of the objection.

[12] The complainant, for its part, argues that the Tribunal is seized of no complaint filed by the SAQT, that the evaluation of the job related to the SAQT, namely, that of small business representative, is not at all in dispute.

[13] Out of concern for procedural fairness, the Tribunal called for the SAQT to be notified of the respondent's application to summon and implead an additional party and be invited to submit its representations to the Tribunal. The SAQT had until August 4, 2003, to make its representations.

[14] As of the date of this decision, the Tribunal still had not received any representations from the SAQT, even though a letter of reminder was sent. The Tribunal is therefore required to render its decision on the first issue based on the representations of the Commission, the complainant and the respondent.

## III. DECISION ON THE FIRST ISSUE

[15] Regarding the first issue, the Panel believes it should be pointed out that the respondent's position is somewhat ambiguous. Firstly, the respondent asked that the SAQT be duly summoned, which was done in this case, to present its viewpoint on the respondent's applications in its regard. Secondly, the respondent asked that the SAQT be impleaded.

[16] The Panel is of the opinion that this application to implead a third party goes well beyond the sending of a notice to appear and respect for the rules of natural justice or procedural fairness. It is intended to make the SAQT a respondent party to the Tribunal's inquiry into the complaint and not just an interested party.

[17] In support of its claims in respect of the first issue, the respondent refers to the decision handed down by the Supreme Court of Canada in *Renaud v. Board of School*

*Trustees, School District No. 23 (Central Okanagan) and the Canadian Union of Public Employees, Local 523,* [1992] 2 S.C.R. 970.

[18] It should be pointed out that the facts in the *Renaud* case differ appreciably from those in the present case. In *Renau*d, the plaintiff had filed a complaint against both the employer and his union, which is not the case here. At the hearing of the complaint, the assigned member amended the complaint of which he was seized to include a claim against the union under another section of the *Act* as well as that brought under the initial section, in order to bring the initial complaint into conformity with the nature of the proceedings. The assigned member justified his decision by the fact that no prejudice would be suffered by the union as a result of the amendment as the union had been represented throughout the proceedings and had fully taken part in the initial complaint, which is not the case here. The Supreme Court confirmed the validity of the decision of the designated member to hear the complaint.

[19] The *Act* does not provide any procedure as such for the forced addition of parties and interested persons in a proceeding before the Tribunal. At most, paragraph *(*b) of subsection 48.9(2) of the *Act* states as follows:

The Chairperson may make rules of procedure governing the practice and procedure before the Tribunal, including, but not limited to, rules governing
(…)

*(*b) the addition of parties and interested persons to the proceedings;
(...)

[20] Moreover, the Tribunal's Interim Rules of Procedure require the following, under the heading **Addition of Interested Parties:**

**Apply by way of motion for status**

8(1) Anyone who is not a party, and who wishes to be recognized by the Panel as an interested party in respect of an inquiry may bring a motion in writing for an order granting interested party status.

**Motion to specify grounds**

8(2) A motion under 8(1) shall specify the grounds invoked in support of the request for status and the extent of the desired participation in the inquiry.

[21] On reading this rule, one notes that it is not aimed specifically at the impleading of a third party by one of the parties to an inquiry into a complaint by the Tribunal, namely, the complainant, the Commission or the respondent. Nothing is said, moreover, of the Tribunal's power to allow a third party to be brought in, with the legal effects entailed by such a procedure.

[22] This being said, if the *Act* states that the Chairperson may make rules of procedure governing, notably, the addition of parties and interested persons to a proceeding, it is logical to think that the Tribunal has the power to add parties to a given proceeding. For the time being, the Tribunal's Interim Rules of Procedure contain no stipulation to this effect.

[23] In an oral decision rendered on October 2, 2002, in *Desormeaux v. OC Transpo (T701/0602)*, the Chair of the Tribunal, who was seized of an application to add a union as a respondent, ruled that under section 50 of the *Act*, the Tribunal has the power to add individuals or groups as interested persons in the context of a hearing (our underlining). She pointed out, however, that in the case in point, this was not the issue put to her, the issue to be decided being, rather, whether a third party (a party not involved in the complaint) could be added as a respondent, with the effects this could have with regard to its liability.

[24] On this point, the Chair of the Tribunal concluded, relying on paragraph *(*b) of subsection 48.9(2) of the *Act*, that the legislator's intent was to vest in the Tribunal the power to add parties as well as interested persons to a proceeding before the Tribunal.

[25] Moreover, in a subsequent oral decision rendered on October 3, 2002, in the same *Desormeaux* case, the Chair of the Tribunal ruled that in the case in point, the circumstances did not warrant the addition of the union as a respondent. She ruled that, while it had previously been found that the *Act* vests in the Tribunal the power to add parties to a proceeding when the Tribunal deems it appropriate, the legislative context surrounding this discretionary power argues for a measure of restraint or "*caution*" (the term used by the Chair).

[26] In this regard, the Chair of the Tribunal points out, most aptly in our view, that the *Act* provides, in dealing with complaints of discrimination, a carefully developed process of investigation and inquiry in which both the Commission and the Tribunal have clearly defined roles.

[27] In her decision, the Chair of the Tribunal mentions the fact that the addition of parties during a proceeding before the Tribunal deprives the new respondent of the benefit of certain means of defence it can normally present at the stage of the screening of a complaint by the Commission, notably the possibility of having the complaint dismissed without the need for the Tribunal to institute an inquiry, for example because the complaint was filed after the period of one year stipulated in the *Act*.

[28] Moreover, in a decision rendered by the Tribunal on November 27, 2002, in *Bozek and Canadian Human Rights Commission v. MCL Ryder Transport Inc. and McGill* (T716/2102 and T717/2202), the Panel ordered, following an application in this regard by the Commission and the complainant, that the initial complaint be amended to substitute the name of the company born of the merger of the initial respondent with a number of other corporations in place of the name ofthe initial respondent.

[29] As there exist no formal rules establishing the conditions in which the Tribunal may add a new respondent, and, moreover, as the Tribunal has the power to add a new respondent, the Chairperson having the power, under the *Act*, to make rules governing the addition of parties and interested persons to the proceedings, it is important for the Panel to review the criteria that should guide it in deciding whether to add a new respondent at the inquiry stage of the complaint before the Tribunal.

[30] The Panel is of the opinion that the forced addition of a new respondent once the Tribunal has been charged with inquiring into a complaint is appropriate, in the absence of formal rules to this effect, if it is established that the presence of this new party is necessary to dispose of the complaint of which the Tribunal is seized and that it was not reasonably foreseeable, once the complaint was filed with the Commission, that the addition of a new respondent would be necessary to dispose of the complaint.

[31] In the case in point, the reasons invoked by the respondent for impleading the SAQT and having it become a party in the inquiry into the complaint and not just an interested person, have to do essentially with the fact that two of its members were on the joint standing job evaluation committee (Written Submissions, para. 34 and 35) that evaluated the jobs in question.

[32] This fact in itself does not at all mean that the two members of the SAQT bound the liability of their union by participating on the committee. Moreover, nothing in the documentation submitted to the Panel indicates that these members or the committee acted, or may have acted, in a discriminatory manner in evaluating the jobs.

[33] It should be pointed out, moreover, that the report of the Commission's investigator submitted in evidence by the respondent in support of its claims, makes no reference at all to the SAQT and its involvement in evaluating the jobs in question.

[34] Furthermore, the Panel cannot ignore the fact that for all intents and purposes, the addition of a new respondent at the stage of the Tribunal's inquiry into the complaint with no formal complaint having been brought against it deprives this new respondent of the opportunity to present certain grounds of defence before the Commission pursuant to sections 41 and 44 of the *Act*.

[35] It should be pointed out in this regard that the courts recently underscored the importance of respect for procedural fairness in dealing with complaints of discrimination filed with the Commission, notably with regard to the respondent's right to dispute, at this initial stage, the merits of the complaint *(Canada Post Corporation v. Barrett*e, [2000] 4 F.C. 145 (C.A.) and *Judge v. Canada Post Corporatio*n, [2002] F.C.A. no. 426 (F.C.T.D.).

[36] In the case in point, the respondent has not satisfied the Panel that the forced impleading of the SAQT is necessary in order to dispose of the complaint as worded. Moreover, the Panel believes that the impleading of the SAQT at this stage would be prejudicial to it from a standpoint of procedural fairness.

[37] This being said, it will be permissible for the respondent to assert during the hearing before the Tribunal that the evidence submitted to the Tribunal does not warrant the allowing of the complaint, and that it cannot be held liable or solely liable for the discrimination alleged in the complaint.

## IV. THE SECOND ISSUE

[38] Regarding the second issue, the respondent, relying here on sections 41 and 44 of the *Act*, maintains that the Commission could not ask the Chair of the Tribunal, in application of section 49 of the *Act*, to assign a member to inquire into the complaint for the two reasons set out as follows in its written arguments of April 15, 2003:

[Translation]

a) regarding the first reason, the respondent, relying on the facts recorded in both the Investigation Report and in the complaint, argues that the complaint was filed more than one year after the last of the events on which it is based occurred, namely, the allocation of a different evaluation rating for business customer service representatives (BAR) than for small business representatives (PME);

b) regarding the second reason, the respondent relies on the fact that the author of the investigation report recommends that, pursuant to section 44(3)(b) of the *Act*, that *[sic]* the Commission dismiss the complaint for various reasons.

[39] The respondent therefore concludes that the Commission should have dismissed the complaint pursuant to paragraphs 41(1)(c) to *(*e) of the *Act*.

[40] In response to the respondent's arguments, the Commission maintains that only the Federal Court has jurisdiction to review decisions of the Commission. The complainant says it shares the Commission's viewpoint.

[41] In its rebuttal of the Commission's position, the respondent maintains that the scheme of the *Act* argues in favour of the review by the Tribunal of the sufficiency of the evidence on which the referral of the complaint to the Tribunal is based.

[42] According to the respondent, the Commission's viewpoint has the effect of restricting the Tribunal's power to determine whether or not a complaint is substantiated under the *Act* (Respondent's written rebuttal, para. 25). Firstly, it undermines the Tribunal's power to examine whether or not there was sufficient evidence to warrant the Commission's decision to refer the complaint to the Tribunal (Rebuttal, para. 26), and secondly, it restricts the Tribunal's power to determine whether or not a complaint ought to be dismissed for the reasons set out in section 41 of the *Act* (Rebuttal, para. 27).

[43] In the respondent's view, the Tribunal is fully competent to decide the issue raised regarding insufficient evidence to warrant the inquiry into the complaint. What is more, the respondent maintains that this issue does not come, at this stage, under the jurisdiction of the Federal Court.

## V. DECISION ON THE SECOND ISSUE

[44] The Panel intends to examine, in turn, each argument raised by the respondent regarding the expiry of the time period for consideration of the complaint by the Commission and insufficient evidence to warrant an inquiry into the complaint before the Tribunal.

### A. Late filing of the complaint

[45] Under subsection 41(1) of the *Act*, the Commission is not required to rule on a complaint filed after the specified period of time. Paragraph 41(1)(e) of the *Act* stipulates that:

41. (1) Subject to section 40, the Commission shall deal with any complaint filed with it unless in respect of that complaint it appears to the Commission that

(…)

(e) the complaint is based on acts or omissions the last of which occurred more than one year, or such longer period of time as the Commission considers appropriate in the circumstances, before receipt of the complaint.

[46] This being said, the Commission can, nevertheless, rule on a complaint filed after the one-year period stipulated in paragraph 41(1)(e) of the *Act (International Longshore & Warehouse Union (Marine Section), Local 400 v. Oster and Canadian Human Rights Commission and Canadian Human Rights Tribunal*, [2002] 2 F.C. 430 (F.C.T.D.)). Under the *Act*, the Commission is not required to justify its decision. In fact, only if the Commission decides not to rule on a complaint on the ground that it is not receivable under subsection 41(1) of the *Act* is it required to send the reason for its decision in writing to the complainant, as subsection 42(1) of the *Act* stipulates.

[47] Evidently, in the case in point, the Commission did not deem the complaint to be not receivable, having first assigned someone to investigate the complaint and having then referred it to the Tribunal. This being said, no reason is given for the Commission's decision to refer the complaint to the Tribunal, if we rely on the Commission's letter to the respondent of December 24, 2002. It was not necessary to give one.

[48] The Panel believes that it is not up to it to rule on the reasons that may have prompted the Commission to refer the present complaint to the Tribunal *(Parisien and*

*Canadian Human Rights Commission v. Ottawa-Carleton Regional Transit Commissio*n, Decision No. 1, Canadian Human Rights Tribunal, July 15, 2002, para. 12). The fact is that the Commission did refer the complaint to the Tribunal without, however, formally giving its reasons for doing so. Accordingly, the reasons that prompted the Commission to seize the Tribunal of the complaint despite the recommendation to the contrary formulated by the Commission's investigator, are not known to the Panel.

[49] Be that as it may, it seems well established in case law that when the person against whom a complaint is made believes that the complaint was filed after the time limit, the person may raise this point before the Commission. As pointed out by Mr. Justice Décary of the Federal Court of Appeal, in *Canada Post Corporation v. Barrett*e, [2000] 4 F.C. 145, para. 24:

[w]ith respect to the grounds set out in paragraphs 41(1)(a) to *(*e), a person against whom a complaint is made is expressly given two opportunities to raise them: one at the section 41 preliminary screening stage, the other at the section 44 screening stage (see paragraphs 44(2)(a) and *(*b) and subparagraphs 44(3)(a)(ii) and *(*b)(ii)).

[50] In the case in point, there is nothing to indicate that the respondent argued its claims before the Commission as to the lateness of the complaint made against it. The respondent did, however, have two opportunities to do so.

[51] Furthermore, if the respondent did not agree with the Commission's decision to refer this complaint to the Tribunal, it could have applied for judicial review before the Federal Court *(International Longshore & Warehouse Union (Marine Section), Local 400 v. Oster and Canadian Human Rights Commission and Canadian Human Rights Tribuna*l, *supr*a), which it seems it did not do. The comments of Mr. Justice Gibson in paragraph 30 of the above-cited decision certainly apply to the present case:

The Union, having decided not to seek judicial review before this Court of the Commission's discretionary decision to extend the time limit under paragraph 41(1)(e) of the *Act*, was simply precluded from adopting the alternative recourse that it chose, that being to raise precisely the same issues that it could have raised on judicial review, before the Tribunal.

[52] The Panel therefore finds that the respondent's arguments regarding the late filing of the complaint are unsubstantiated.

**B. Insufficient evidence**

[53] It is relevant, to dispose of this issue, to examine the respective role and powers of the Commission and the Tribunal under the *Act*.

**1. The role and powers of the Commission**

[54] Under section 41 of the *Act*, the Commission has a duty to rule on any complaint of which it is seized, subject to the exceptions set out in paragraphs (a) to (e) of subsection 41(1), as Mr.Justice Décary of the Federal Court of Appeal points out in *Canada Post Corporation v. Barrett*, [2000] 4 F.C. 145, para. 23:

Section 41 imposes a duty on the Commission to ensure, even *proprio motu*, that a complaint is worth being dealt with. There is obviously no duty to investigate at that stage and the Commission is asked no more than to examine on a *prima facie* basis whether the grounds set out in subsection 41(1) are present and, if so, to decide whether to nevertheless deal with the complaint.

[55] Under section 43 of the *Act*, the Commission may designate a person to investigate a complaint. This being said, section 49 of the *Act* stipulates that the Commission may, at any stage after the filing of a complaint, request the Chairperson to institute an inquiry into the complaint if it is satisfied that, having regard to all the circumstances of the complaint, an inquiry is warranted.

[56] Under the *Act* the Commission is not required to give reasons for its decision to request that the Tribunal inquire into a complaint. At most, section 42 of the *Act* requires the Commission to send written reasons to a complainant of its decision not to rule on a complaint that it considers, under the *Act*, not receivable.

[57] Finally, under the *Act* the Commission is not required to act on the recommendation of the person charged with investigating a complaint pursuant to section 43 of the *Act*. The Commission has considerable discretion in this regard. Pursuant to section 44 of the *Act*, in deciding to ask the Tribunal to assign a member to inquire into a complaint that is the subject of an investigation report, the Commission must consider not only the investigation report, but also *all the circumstances of the complaint*.

**2. The role and powers of the Tribunal**

[58] The role vested in the Tribunal under the *Act* has been described, notably, as follows by Mr. Justice La Forest in *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854, para. 64:

Taken together, ss. 50(1) and 53(2) of the *Act* state that a tribunal shall inquire into the complaint referred to it by the Commission to determine if it is substantiated. This is primarily and essentially a fact-finding inquiry with the aim of establishing whether or not a discriminatory practice occurred. In the course of such an inquiry a tribunal may consider questions of law.

[59] Thus, under the *Act*, the role of the Tribunal consists essentially in inquiring into any complaint referred to it by the Commission. Under section 50 of the *Act*, the Tribunal is empowered to decide all questions of law or fact relating to the complaint of which it is seized. In the context of the inquiry conducted by the Tribunal, the parties have the opportunity to present all arguments of fact and of law in support of their claims.

[60] Upon completion of the inquiry into the complaint, the Tribunal may, under section 53 of the *Act*, either allow the complaint or dismiss it based on the evidence that has been presented and the applicable law.

[61] Thus, according to the scheme of the *Act*, it is not up to the Tribunal in the context of the inquiry into a complaint to inquire about the reasons that warranted the referral of the complaint to the Tribunal. If a respondent does not agree with the Commission's decision to refer a complaint to the Tribunal despite a recommendation to the contrary from one of its investigators, then it must apply to the Federal Court.

[62] Nor is it up to the Tribunal to decide whether there was sufficient evidence to warrant the Tribunal's inquiry into the complaint. The issue of the sufficiency of the evidence will be resolved upon completion of the Tribunal's inquiry into the complaint. The Tribunal will then have to determine whether the complaint, in view of the evidence presented and the applicable law, ought to be allowed or dismissed. In so doing, the Tribunal is not refusing to exercise its jurisdiction. It is merely respecting the scheme of the *Act* and adhering solely to the role vested in it by the *Act*.

[63] In the final analysis, the ends of justice are better served if one adheres to the roles vested under the *Act* in the Commission and the Tribunal, and to the means provided by the legislator to appeal a decision with which one is not satisfied.

[64] The Tribunal therefore finds that the respondent's arguments regarding insufficient evidence are unsubstantiated.

## VI. CONCLUSION

[65] For the reasons set out above, the Tribunal therefore finds that the respondent's arguments in respect of the two preliminary issues submitted to the Tribunal are unsubstantiated. The inquiry into the complaint will therefore proceed as planned.

_____

Pierre Deschamps

OTTAWA, Ontario

September 15, 2003

**CANADIAN HUMAN RIGHTS TRIBUNAL**

**PARTIES OF RECORD**

TRIBUNAL FILE NO.: T757/0703

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RULING OF THE TRIBUNAL DATED : September 15, 2003

APPEARANCES :

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