CANADIAN HUMAN RIGHTS TRIBUNAL TRIBUNAL CANADIEN DES DROITS DE LA PERSONNE

EVELYNE MALEC, SYLVIE MALEC, MARCELLINE, KALTUSH, MONIQUE ISHPATAO, ANNE B. TETTAUT, ANNA MALEC, GERMAINE MESTÉPAPÉO, ESTELLE KALTUSH

Complainants

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

CONSEIL DES MONTAGNAIS DE NATASHQUAN

Respondent

RULING

MEMBER: Athanasios D. Hadjis 2009 CHRT 9
2009/03/12

[1] The Complainants are Aboriginal women employed as teachers by the Conseil des Montagnais de Natashquan (the Band). In their human rights complaint, they claim that the Band had paid them lower wages than it had paid its non-Aboriginal teachers.

[2] The Band has filed a motion alleging, as a preliminary exception in advance of the hearing, that it is exempt from the application of the *Canadian Human Rights Act* (*CHRA*), pursuant to s. 67 of the Act, which provides as follows:

Nothing in this Act affects any provision of the *Indian Act* or any provision made under or pursuant to that Act.	La présente loi est sans effet sur la *Loi sur les Indiens* et sur les dispositions prises en vertu de cette loi.

[3] The Band contends that its decisions with respect to teachers' wages were made in furtherance of the authority conferred on the Band regarding education, under Sections 114 to 122 of the *Indian Act*, R.S.C. 1985, c. I-5, and that consequently, s. 67 exempts these decisions from the application of the *CHRA*. Although s. 67 was repealed by *An Act to Amend the Canadian Human Rights Act*, S.C. 2008, c. 30 (*Bill C-21*), the provision was still in force when the complaint was filed in 2007.

[4] The Commission argues, in response, that the Band's motion is premature, and submits that the Tribunal should put off its decision until after all of the evidence in this case has been heard.

[5] Section 50(1) of the *CHRA* states that the Tribunal shall inquire into every complaint referred to it and shall provide parties with a full and ample opportunity to present evidence and make representations on the matters raised in the complaint. As the Tribunal recently pointed out, in *Harkin v. Attorney General (Canada)*, 2009 CHRT 6 at paras. 22-24, it is appropriate in only very limited circumstances for a Tribunal to dismiss a complaint on a preliminary basis, prior to the start of the hearing. The Tribunal has, in the past, dismissed complaints without a hearing, where it has been apparent that the parties had been heard in another forum, or where there has been an inordinate delay in the case resulting in a denial of natural justice or an abuse of the Tribunal's process. In all such instances, the motions to dismiss have relied upon uncontroverted facts and grounds.

[6] The Band has not referred me to any decisions where the Tribunal dealt with a s. 67 motion on a preliminary basis, before the hearing had commenced. To my knowledge, the Tribunal has never granted relief under s. 67 without having heard evidence at the hearing, and in the two sole occurrences where a s. 67 objection was successfully raised after the complaint had been referred to the Tribunal (*Prince v. Canada (Department of Indian Affairs and Northern Development* (1993), 20 C.H.R.R. D/376 (C.H.R.T.), affirmed (1994) 25 C.H.R.R. D/386 (F.C.T.D.); *Laslo v. Gordon Band (Council)*, (1996), 31 C.H.R.R. D/369 (C.H.R.T.), affirmed [2001] 1 F.C. 124 (F.C.A.)), the Tribunal's decision came after evidence had been adduced at the hearing into the complaint.

[7] In the present case, the Band has alleged numerous facts in its motion, to support its position that the Band's decisions are exempt from the application of the *CHRA*. These facts include:

(1) the extent of the Band's indebtedness;

(2) the decisions taken in 2005 and 2006 by the Department of Indian Affairs and Northern Development (DIAND) regarding the appointment of a co-manager to assist in the administration of the Band's funds;

(3) DIAND's decision in 2005 to appoint a receiver to manage the Band's finances;

(4) the changes made to the Band's budgets regarding the education sector;

(5) the Band's adoption of certain policies and resolutions, including a policy of granting "bonuses" to non-residants who work for the Band, and the reasons for that policy's adoption;

(6) the linkage between these Band decisions and the Band's authority under the *Indian Act* in matters relating to education.

[8] The Commission, for its part, contends that the decisions at issue in this case are not related to the education provisions of the *Indian Act* (s. 114 to 122). The Complainants add that their dispute with the Band is a matter of labour relations, not education.

[9] There are therefore conflicting views on these points, and the facts raised by the Band appear, on their face, to be fairly detailed and complex. In order for this motion to be properly argued by all parties, findings of fact must be made on these issues. In my view, the Tribunal can only accomplish this task on a full hearing of the evidence.

[10] The Band did not initially accompany its motion with any supporting evidence, other than copies of the complaint and of a report published by the Commission regarding s. 67, which is arguably an authority, rather than evidence. Subsequently, after the Commission and the Complainants had made their submissions on the motion, the Band produced a detailed affidavit signed by the Band's chief, essentially reciting the same assertions and arguments set out in the Band's initial motion. The addition of this affidavit does not have any impact on my decision. The findings of fact that must be made, regarding the Band's motion, require a fulsome inquiry, which cannot merely be replaced by the sworn declaration of one individual.

[11] I therefore find the Band's s. 67 motion is premature.

[12] The Band has, however, raised a subsidiary argument, to be invoked in the event that the Tribunal finds that the current version of the *CHRA* (i.e. after the repeal of s. 67) applies to this case. The Band points out that the transitional provisions of *Bill C-21* create a grace period of 36 months during which the acts or omissions of a First Nation government cannot constitute the basis of a complaint under the *CHRA*. The Band submits that during this grace period, it benefits from an exception similar to, if not broader than, the exception created by s. 67.

[13] The relevant transitional provisions are set out in s. 3, which states that acts or omissions of any First Nation government, made in the exercise of powers or the performance of duties and functions conferred or imposed by or under the *Indian Act*, shall not constitute the basis of a human rights complaint under the *CHRA*, if they occur within 36 months after royal assent of *Bill C-21*. The Band contends that s. 3 is broader in scope than s. 67, and that the

provision effectively exempts any Band decisions from liability under the *CHRA*, until the end of the transitional period.

[14] I have difficulty seeing how these transitional provisions could apply to the present case. *Bill C-21* received royal assent on June 18, 2008. The present complaint alleges that the Band engaged in discriminatory practices that occurred more than one year earlier, from March 2006 to April 2007. Section 3 of *Bill C-21* only appears to exempt acts or omissions occurring within 36 months after royal assent. At first glance, therefore, it would seem that the discriminatory practices alleged in the complaint do not come within the ambit of *Bill C-21*'s transitional provisions.

[15] Nevertheless, irrespective of whether this interpretation of *Bill C-21* is correct, I believe that a factual record would equally be needed in order to determine if the discriminatory practices alleged in the complaint fall within the ambit of s. 3. The Band's submissions regarding this provision are therefore also premature.

[16] For these reasons, I dismiss the Band's motion, without prejudice to the Band's right to make similar submissions at the end of the hearing.

Athanasios D. Hadjis

OTTAWA, Ontario

March 12, 2009

PARTIES OF RECORD

TRIBUNAL FILE:	T1318/4808
STYLE OF CAUSE:	Evelyne Malec, Sylvie Malec, Marcelline Kaltush, Monique Ishpatao, Anne B. Tettaut, Anna Malec, Germaine Mestépapéo, Estelle Kaltush v. Conseil des Montagnais de Natashquan
RULING OF THE TRIBUNAL DATED:	March 12, 2009
APPEARANCES:	
Richard Boies	For the Complainants
Ilram Warsame	For the Canadian Human Rights Commission
Maurice Dussault Sylvain Unvoy	For the Respondent