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

BETWEEN:

CONNIE BUSHEY

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

ARVIND SHARMA

Respondent

RULING ON DISCLOSURE

2003 CHRT 5

2003/02/11

MEMBER: Athanasios D. Hadjis

[1] This ruling concerns the issue of whether the Canadian Human Rights Commission ("**Commission**") and the Complainant are obliged to disclose the minutes of settlement regarding two other human rights complaints.

[2] The Complainant and the Respondent are both employed by Canada Post Corporation. In 1998, they were also members of the local executive of their union, the Union of Postal Communications Employees ("**UPCE**"), which is a component of the Public Service Alliance of Canada ("**PSAC**"). The Complainant claims that Respondent sexually harassed her on an ongoing basis, during the course of his membership on the executive. As a result of this alleged harassment, the Complainant filed human rights complaints against the Respondent, the UPCE and the PSAC.

[3] The complaints against the unions (Commission File Nos. H48451 & H48449) were settled in December 2002. The terms of the settlement have since been approved by the Commission, pursuant to s. 48 of the *Act*. A settlement was not, however, reached with the Respondent, and the hearing as to the merits of the complaint against him began on January 13, 2003. A second set of hearing dates is scheduled to commence on February 17, 2003.

[4] The Respondent has taken issue with the fact that a copy of the minutes of settlement with the unions has not been disclosed to him. Although the Respondent is not represented by legal counsel and is acting on his own behalf, I understand him to be contending that he is entitled to have this document communicated to him, in accordance with Rule 6(3) of the Tribunal's *Interim Rules of Procedure*. This rule, when read together with Rule 6(1)(d), obliges a party to provide to other parties, copies of all documents in its possession which are *relevant to any matter in issue in the case* and *for which no privilege is claimed*. The test for relevance for these purposes has been expressed as being whether the document in question is "arguably relevant" to the hearing.[(1)]

[5] The Commission and the Complainant are unwilling to disclose the minutes of settlement. Instead, the Commission has informed the Respondent in writing of what the Commission identifies as a "general recounting of the terms of the settlement". This summary consists of four paragraphs that are set out in point form. It purportedly reflects all the essential terms of the agreement (minus the technical language), with one significant exception: the specific monetary amounts that the unions undertook to pay the Complainant have been excluded. Together with the summary, the Respondent was

provided with a copy of the letter of apology from the unions to the Complainant, which was drafted in accordance with the terms of the agreement. According to Commission counsel, a single document was drafted to reflect the settlement of both complaints. The minutes of settlement contain a clause by which the parties agree to keep the terms of the agreement confidential.

[6] The Respondent is not satisfied with this level of disclosure and has specifically requested communication of the amounts paid by the unions to the Complainant. I should point out that I have not viewed the minutes of settlement in question.

[7] Considering the fact that the unions, who are not parties before the Tribunal in this case, were signatories to the agreement, I felt it appropriate to request their opinions with respect to this disclosure issue. Their joint position was expressed in a letter from Mr. Craig Spencer, Legal Counsel, PSAC Membership Programs Branch. The unions concur with the Complainant and the Commission that the Minutes of Settlement should not be disclosed in their entirety. The objections of the Commission and the Complainant are seemingly limited to the disclosure of the actual financial settlement amounts. They are "amenable" to the communication of the remainder of the minutes of settlement.

I. IS THE DOCUMENT RELEVANT TO A MATTER IN ISSUE IN THE CASE?

[8] The unions submit, with the apparent concurrence of the Commission and the Complainant, that the matters in issue in the settled complaints are completely unrelated and irrelevant to the matters in issue in the complaint against the Respondent. The latter complaint alleges specific actions in violation of the *Canadian Human Rights Act* ("*Act*") by the Respondent. The complaints against the unions, on the other hand, although triggered by the alleged actions of the Respondent, are distinct in that they deal specifically with the administrative framework developed by the PSAC and the UPCE to review complaints of harassment in the context of union activity. As is evident from the text of the complaints against the unions, the Complainant believes that the system for dealing with harassment issues that was in place within the unions failed to deliver to her a timely review of her concerns.

[9] Indeed, a significant portion of both complaints against these labour organizations is focussed on the manner in which senior union representatives had mismanaged her complaints to them regarding the Respondent's conduct. In the human rights complaint filed with the Commission against the Respondent, a contravention of s. 14 of the *Act* is alleged only. This provision makes it a discriminatory act to harass a person based on a prohibited ground, including sex. With respect to the complaints filed against the union, however, violations of s. 7, s. 9 as well as s. 14 are alleged. Under s. 7, it is a discriminatory practice to differentiate adversely in the course of a person's employment and, of greater significance, pursuant to s. 9, it is a discriminatory practice for an employee organization to exclude, expel or suspend a member of the organization on a prohibited ground, such as sex. Thus, the liability that the Commission sought to attach to the unions was based, at least in part, on the manner in which they treated their member,

as a consequence of her allegations that another union executive member had sexually harassed her.

[10] The unions argue that they could have been found liable, irrespective of the outcome of the complaint against the Respondent. The unions' counsel suggested that if the Tribunal were to find that the Respondent had not harassed the Complainant, the unions would not seek to reopen or seek to invalidate the settlement.

[11] It is pointed out that the only significant portions of the settlement terms that are being withheld are the settlement amounts. In light of the discrete liabilities of the unions on the one hand and the Respondent on the other, the sums paid to the Complainant by the unions are of no relevance to the amounts that she is claiming from the Respondent. The Commission notes that according to the summary of the minutes of settlement referred to above, compensation was to be paid by the unions to the Complainant to "address" the Complainant's pain and suffering pursuant to s. 53(2)(e) of the *Act* only. No payment was made in respect of lost wages (that is, *honoraria* to which union executives were entitled) or expenses. Turning to the present case, the Commission's and Complainant's Joint Letter of Particulars indicates that financial compensation for the Complainant's expenses is being claimed against the Respondent, as well as an award for pain and suffering, pursuant to s. 53(2)(e).

[12] Thus, compensation for pain and suffering was claimed against the Respondent as well as the unions. The Commission argues that these remedies are nonetheless unrelated. The Complainant was entitled to claim up to the maximum amount allowable for pain and suffering under the *Act* ($20,000.00) against each of the original respondents. Commission counsel directed me to the findings in *Ghosh* v. *Domglas Inc. (No. 2)*,[(2)] with respect to the remedial provision in the *Ontario Human Rights Code* that authorizes a Board of Inquiry to order an award of up to $10,000 as monetary compensation for mental anguish. The Board stated that:

While the *Code* limits the amount of an award of monetary compensation in respect of mental anguish, it does not restrict the number of such awards a board may order after a hearing where it finds distinct rights to have been infringed in separate incidents, or series of incidents, and whether by the same or by different respondents.[(3)]

A similar finding was reached in the more recent Ontario Board of Inquiry decision in *Moffat* v. *Kinark Child and Family Services*.[(4)]

[13] The Commission contends that the same reasoning can be extended to the remedial provisions under the *Act*, including s. 50(2)(e). If the remedies for pain and suffering are distinct, from one complaint to another, the sums received by the Complainant from the unions cannot be set off against those that she is claiming from the Respondent. Therefore, the amounts that the Complainant may have received from the other respondents are of no relevance to the claim for pain and suffering that she has addressed against the Respondent in the present case.

[14] This argument assumes that the Tribunal will be in a position to distinguish the pain and suffering that the Complainant experienced at the hands of the Respondent from the pain and suffering arising from the unions' conduct. It is possible that the Tribunal will be unable to make such a determination. The three human rights complaints and the Joint Letter of Particulars all suggest that a significant portion of the unions' actions and omissions occurred at the same time as the Respondent was purportedly harassing the Complainant. In the event that I sustain the complaint against the Respondent and find that the Complainant experienced pain and suffering over the period in question, it is certainly possible that I will be unable to separate out the injury caused by the Respondent's conduct from that of the unions. In this event, the Respondent could argue that he should not be ordered to compensate the Complainant for all her pain and suffering. At least for the purpose of avoiding a double indemnification of the Complainant, knowledge of whatever amounts she may have received from the unions is relevant to a matter in issue in the Respondent's case. On this basis alone, I find that the settlement document is arguably relevant.

[15] But is the liability of the unions really as distinct as it has been made out to be? It is true that the complaints against the labour organizations refer to s. 7 and s. 9 of the *Act* and mention the specific conduct of the unions and their representatives. However, according to the Commission's and Complainant's Joint Letter of Particulars, which was prepared before the complaints against the unions were settled, the issues of the case include the following:

Did the Respondents UPCE and PSAC fail to exercise due diligence in preventing the acts of harassment from occurring or mitigate the effect of the harassment on the Complainant, per section 65 of the Act?

S. 65(1) is the provision of the *Act* in virtue of which acts or omissions committed by officers, directors, employees or agents of an organization are deemed to be acts or omissions committed by the organization - in other words, deemed or vicarious liability. Under s. 65(2), the organization may exculpate itself by demonstrating that it did not consent to those acts or omissions, it exercised all due diligence to prevent them and it tried subsequently to mitigate their effects.

[16] As is implied by the Complainant's and the Commission's reference to s. 65, the liability of the unions could flow from the principal liability of the alleged harasser, the Respondent. In these circumstances, organizations may be condemned jointly and severally with their officers, directors, employees or agents, to compensate complainants. As was explained in *Moffat*:

In those decisions, where the corporate respondent is found to be liable for the discriminatory conduct of a personal respondent, the order holds the corporate respondent jointly and severally liable with the individual for the award in respect of that conduct.[(5)]

The Board of Inquiry in *Moffat* went on to note that a finding of deemed or vicarious liability does not support a further separate award in respect of that liability.[(6)]

[17] Accordingly, it could certainly be argued that the liability alleged against the unions flows vicariously from the liability of the Respondent, and that the Complainant's damage claim against him should be reduced by the sums received in settlement of her complaints against the unions. The settlement amounts thus become relevant the Respondent's case.

[18] For all these reasons, I am satisfied that the minutes of settlement are relevant to a matter in issue in the case, namely, the determination of the amount of the award that the Respondent may be ordered to pay if he is found liable.

II. IS THE DOCUMENT PRIVILEGED?

[19] In his written submissions, counsel for the unions noted that in practice, parties to settlement negotiations undertake to maintain strict confidentiality as a "motivation to parties to reconcile their differences and avoid litigation". Any "societal interest" in the terms of the agreement is protected through the process of review and approval by the Commission that must be completed before the settlement becomes enforceable, pursuant to s. 48 of the *Act*.

[20] Indeed, in furtherance of this objective, courts have protected from disclosure communications made with a view to reconciliation or settlement.[(7)] However, as explained by Sopinka, Lederman and Bryant, if negotiations are successful and result in a consensual agreement, the communications may be tendered in proof of the settlement, where the existence or interpretation of the agreement is itself in issue.[(8)] I note that the authors' discussion regarding this privilege appears to revolve around the communications leading up to the settlement, not the settlement document itself. By implication, I take it that minutes of settlement would not be subject to the privilege. At any rate, I am satisfied that the questions regarding the assessment of damages for pain and suffering are issues that relate to the interpretation of the settlement agreement itself. I am therefore not persuaded that a privilege extends to the minutes of settlement.

III. CONCLUSION AND ORDER

[21] I order the Commission and the Complaint to disclose to the Respondent, by 4:00 PM, on Thursday, February 13, 2003, the minutes of the settlement with the PSAC and the UPCE. This disclosure shall be in the form of copies of the document, in accordance with Rule 6(3) of the Tribunal's *Interim Rules of Procedure*.

[22] In order to address some of the concerns as to the confidentiality of the documents, I order the disclosure of the document on the following conditions:

- The Respondent shall only consult the document for the purposes of the hearing;

• The Respondent shall not disclose the document nor its content to anyone, other than his legal counsel, if any;

• The Respondent shall not make any additional copies of the disclosed document and shall return it to the Commission within one week after the close of the hearing in this case.

[23] Any similar concerns regarding the admission of the document into evidence during the hearing can be addressed at that time, perhaps through a motion for *in camera* proceedings.

" Original signed by"

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Athanasios D. Hadjis

OTTAWA, Ontario

February 11, 2003

CANADIAN HUMAN RIGHTS TRIBUNAL

COUNSEL OF RECORD

TRIBUNAL FILE NO.: T722/2702

STYLE OF CAUSE: Connie Bushey v. Arvind Sharma

RULING OF THE TRIBUNAL DATED: February 11, 2003

APPEARANCES:

Connie Bushey On her own behalf

Ceilidh Snider For the Canadian Human Rights Commission

Arvind Sharma On his own behalf

1. [1] *Public Service Alliance of Canada* v. *Northwest Territories (Minister of Personnel)*, [2001] C.H.R.D. No. 44 (C.H.R.T.)(QL) at para. 8; *Hutchison* v. *British Columbia (Ministry of Health)*, 2001 BCHRT 30, [2001] B.C.H.R.T.D. No. 29 (QL) at para. 36.

2. [2] (1992), 17 C.H.R.R. D/216 (Ont.Bd.Inq.)

3. [3] *Ibid.* at para. 118.

4. [4] [1999] O.H.R.B.I.D. No. 15 (Ont.Bd.Inq.)(QL).

5. [5] *Ibid.* at para. 37.

6. [6] *Ibid*. at para 41.

7. [7] J. Sopinka, S. N. Lederman, A. W. Bryant, *The Law of Evidence in Canada*, 2nd ed. (Toronto: Butterworths, 1999) at 807.

8. [8] *Ibid*. at 816-17.