CANADIAN HUMAN RIGHTS TRIBUNAL TRIBUNAL CANADIEN DES DROITS DE LA PERSONNE

FIONA ANN JOHNSTONE

Complainant

- and -
CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -
CANADA BORDER SERVICES AGENCY

Respondent

RULING

MEMBER: Karen A. Jensen

2009 CHRT 14
2009/04/23

[1] The Respondent, the Canadian Border Services Agency (CBSA) seeks to add the Customs and Immigration Union (CIU) as a Respondent to the complaint.

[2] The Complainant, Fiona Ann Johnstone, works on a rotating shift with the Respondent. She was unable to arrange child care to cover the rotating shift pattern. She inquired about the possibility of accommodation on a static shift. She learned that the Respondent does not permit employees to work a full-time static shift because of family-related needs. Rather, employees requesting a static shift are required to work part-time. Ms. Johnstone requested a part-time static shift of three 12 hour shifts. Her request was denied. The Respondent states that the request did not comply with the Variable Shift Schedule Arrangement (VSSA).

[3] VSSA's are arrangements made between the union and local management to establish shift schedules that are different from the normally established schedules. The VSSA in question in the present case offered a static full-time midnight shift. However, the Complainant was not eligible for this shift as a result of the Respondent's policy regarding family-related needs. In addition, the VSSA did not permit employees to work twelve hour

shifts. Therefore, the Complainant's request to work three twelve hour static shifts was denied.

[4] Ms. Johnstone then filed a complaint with the Canadian Human Rights Commission alleging that the CBSA has discriminated against her on the basis of family status contrary to sections 7 and 10 of the *Canadian Human Rights Act (CHRA)*.

[5] The Respondent asserts that the Customs and Immigration Union (CIU), a component of the Public Service Alliance of Canada (PSAC), should be added as a Respondent to the complaint. The Respondent bases this assertion on the fact that the CIU is the Complainant's bargaining agent, and is a party to the collective agreement and the VSSA.

[6] The Complainant and the Commission oppose the motion. The Complainant asserts that the remedy which the Complainant seeks does not require amendments to the collective agreement or the VSSA. Moreover, the Complainant has made no allegations that her bargaining agent has, in any way, been responsible for the alleged discrimination.

[7] The Tribunal has the authority to add parties to a complaint under the appropriate circumstances (s. 48.9(2)(b) of the *Canadian Human Rights Act*, Rule 8 of the Tribunals Rules of Procedure, *Brown v. Canada (National Capital Commission)* 2008 FC 734).

[8] In *Syndicat des employés d'exécution de Québec-Téléphone v. TELUS Communications (Québec) Inc.*, 2003 CHRT 31, the Tribunal stated that the forced addition of a new respondent is appropriate if it has been established that the presence of the new party is necessary to dispose of the complaint, 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. Furthermore, caution should be exercised when adding a respondent to the proceedings since doing so deprives the new respondent of the opportunity to present certain grounds of defence before the Commission pursuant to ss. 41 and 44 of the *CHRA*.

[9] In *Brown v. Canada (National Capital Commission)*, 2003 CHRT 43, the Tribunal added the Department of Public Works and Government Services as a Respondent to the complaint on the basis that it was necessary to provide an effective remedy in the event that discrimination was found to have occurred.

[10] On judicial review, the Federal Court quashed the Tribunal's decision (*Brown v. Canada (National Capital Commission), supra)*. Among other reasons for its decision, the Court held that the Tribunal based its decision regarding the necessity of adding the respondent on "conjecture". That is, in deciding to add Public Works as a respondent, the Tribunal acted upon the recommendation of the Commission's expert witness whose suggestion was not based on an intimate knowledge of the facts but rather upon conjecture. The Court stated that the Tribunal is to be held to a higher standard than the simple reliance on a "mere suggestion" when there are far reaching consequences for everyone involved.

[11] In its reasons, the Court endorsed the test for adding parties that was set out in *TELUS*. It is that test therefore, upon which I base my consideration of the Respondent's request to add the CIU as a party.

[12] The Respondent asserts that the CIU's presence may be necessary in the event that the Tribunal finds the complaint is substantiated, and orders a change to be made to the collective agreement or the VSSA. The Respondent argues that it would not be able to implement such a change since it cannot unilaterally effect changes to these documents.

[13] However, provided the union has been given an opportunity to participate in the inquiry when the collective agreement or other mutually negotiated documents are in issue, the Tribunal is not prevented from ordering that changes be made to the agreements even if the union is not a party to the complaint.

[14] The union has been given the opportunity to participate and has declined it. In his Affidavit in support of the Complainant's response to the motion, Ron Moran, the National

President of the CIU, states that the CIU and PSAC support the remedy sought by the Complainant. These remedies do not require changes to the collective agreement or the VSSA. They require the Respondent to establish a policy of accommodation on the basis of family status and to appoint Ms. Johnstone to a full-time fixed shift position, both of which can only be accomplished by the Respondent.

[15] Mr. Moran also indicates in his affidavit that the CIU and PSAC do not oppose measures adopted by employers or ordered by this Tribunal to extend accommodation to individuals on the basis of any of the prohibited grounds set out in the *CHRA*.

[16] Therefore, the CIU's presence is not necessary in order to implement a remedy in the present case.

[17] The Respondent argues that the CIU's presence is necessary to dispose of the present case since the CIU may be found to share responsibility for the discriminatory conduct. According to the Respondent, the VSSA prevented it from being able to provide the Complainant with the part-time schedule that she requested. Given that the VSSA is negotiated jointly with the CIU, the CIU would share responsibility with the Respondent in the event that the Tribunal finds that the discriminatory conduct resulted from the application of the VSSA.

[18] It is clear from Ms. Johnstone's complaint and her Statement of Particulars that she is not challenging the VSSA and its impediment to her part-time work proposal. Rather, she is challenging the Respondent's informal policy of not permitting employees to work a full-time static shift for family-related reasons. The Respondent has not alleged that the CIU had any role in the development of the policy regarding family-related full-time shift requests. Nor is there any indication on the record that the collective agreement or the VSSA played a role in the policy. Therefore, the CIU's involvement is not necessary to address the primary focus of the complaint.

[19] With respect to the part-time accommodation request, the Respondent may wish to argue that it was not solely responsible for being unable to accommodate the Complainant's request. This is similar to the situation in *TELUS* where the Tribunal also foresaw the possibility that the respondent might wish to argue that it was not solely responsible for the alleged discriminatory conduct. Although the Tribunal found that it was neither necessary nor fair to forcibly add the union as a respondent, it held that the respondent was not precluded from arguing that it could not be held liable or solely liable for the alleged discrimination.

[20] Similarly, in the present case, while I am not satisfied that the CIU's presence is required to properly dispose of the liability portion of the complaint, the Respondent is free to argue that it should not be held liable or solely liable for the alleged discrimination.

[21] Finally, the Respondent argues that the CIU must be added as a party in order to provide important information about the development, negotiation and application of the VSSA provisions of the collective agreement. It is not necessary for the CIU to be a party to the proceedings in order to introduce such evidence.

[22] Even if I were satisfied that the CIU's presence was necessary in order to properly dispose of the case, I find that the forced addition of the union at this stage of the proceedings would be prejudicial to it from the standpoint of procedural fairness.

[23] The Respondent has not pointed to any events or circumstances which would have made it difficult for it to have foreseen the need to add the CIU prior to this point. In my view, it would have been reasonably foreseeable to the Respondent that the CIU should be added as a party when the complaint was before the Commission. Had that been done, the CIU would then have been in a position to receive the full benefit of the procedural protections afforded under sections 41 and 44 of the *CHRA*.

[24] The addition of the CIU at this point in time would deprive the CIU of those protections. The courts have recognized the procedural protections available to parties under ss. 41 and 44

of the *Act* as being fundamentally important (*Brown, supra*, at para. 39). Those protections include the opportunity to argue that the complaint against it should be dismissed on the basis that an inquiry is not warranted. The deprivation of the opportunity to have the complaint dismissed prior to a full hearing is a significant prejudice.

[25] For all of these reasons, the Respondent's request to add the CIU as a Respondent is denied.

"Signed by"
Karen A. Jensen

OTTAWA, Ontario

April 23, 2009