Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Between:

Melissa Khalifa

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Indian Oil and Gas Canada

Respondent

Ruling

Member: Athanasios D. Hadjis
Date: September 3, 2009
Citation: 2009 CHRT 27

[*Delivered orally*]

[1] The Complainant has advised the Tribunal that she has concluded her case. The Respondent has now indicated that it wishes to bring forward a motion for non-suit or dismissal of the complaint, claiming that the Complainant has not made out a *prima facie* case.

[2] The Respondent further submits that it should not be required to elect not to call evidence in order to proceed with its motion.

[3] The issue of whether respondents who come before the Tribunal should be required to elect has been dealt with a number of times, most recently in three Tribunal decisions, one of which was affirmed on judicial review to the Federal Court. These cases are, in chronological order, *Chopra v. Canada (Department of National Health and Welfare)*, [1999] C.H.R.D. No. 5 (CHRT), *Filgueira v. Garfield Container Transport Inc.*, 2005 CHRT 30, affirmed by the Federal Court, 2006 FC 785, and *Fahmy v. Greater Toronto Airports Authority* 2008 CHRT 12.

[4] In *Chopra*, I held that the common law rule of election applies to this Tribunal but that where the appropriate circumstances warrant, a respondent may be exempted for the rule's application by the Tribunal. In reaching this conclusion, I stated that the Ontario Board of Inquiry in a case called *Nimako v. C.N. Hotels* (1985), 6 C.H.R.R. D/2894, set out a compelling argument for maintaining the practice of putting respondents to their election in matters relating to human rights legislation. The *Nimako* Board of Inquiry noted that it is only upon the completion of the whole case that a tribunal is in a position to weigh the evidence and come to a decision, and it may happen that evidence adduced from witnesses called on behalf of a defendant tips the scales against him or her. The Board highlighted the difficulties human rights complainants in particular may face in getting access to all the information relevant to establishing discrimination, and that in this context, it is only fair that a defendant make up its mind on whether to close the case, thereby thwarting the plaintiff's access to evidence that might have made the latter's case, or on the other hand, proceeding to call witnesses at the risk of assisting the plaintiff's case. I went on to note in the *Chopra* decision that complainants alleging

workplace discrimination face particular challenges in endeavouring to prove discrimination directly, especially where that discrimination takes place behind the employer's closed doors.

[5] In the subsequent Tribunal decision in *Filgueira*, at para. 3, the Tribunal remarked that although there may be "room for different views" than those expressed in *Chopra*, it agreed that the question should be decided in the circumstances of each case, adding that the Tribunal enjoys more latitude in these matters than a court. After considering the circumstances of the case before it, the Tribunal was satisfied that there was no reason to put the respondent to its election before hearing the application for a non-suit. This decision was brought before the Federal Court on judicial review. After noting, at paras. 21-2 of the Court's decision, that the practice of requiring a moving party to make an election varies from province to province, the Court concluded that the requirement as to an election is a matter of procedure regarding which Tribunals should be allowed "reasonable latitude". The Court ultimately held that the *Filgueira* Tribunal had "weighed the relevant factors" and made a procedural determination that should not be overturned on judicial review "even if this Court believed that it would have ruled otherwise".

[6] The Court's reasons did not, in my view, establish that respondents before the Tribunal should never be put to an election before making their motions to dismiss. On the contrary, the Court appears to endorse the view that the question is one that should be decided depending on the circumstances of the case.

[7] The issue returned before the Tribunal, in the case of *Fahmy v. Greater Toronto Airport Authority*. The Tribunal stated, at para. 13, that while there are sound legal and policy reasons for and against requiring moving parties to make an election, the Tribunal was "more persuaded by the arguments in favour of not requiring an election". By my reading, the Tribunal did not limit the scope of this finding to the circumstances of the particular case before it.

[8] The *Fahmy* Tribunal cited a number of considerations, at para. 13, in making its determination. The Tribunal noted that a respondent dealing with a frivolous or vexatious complaint has "little recourse" to a summary determination, short of a full hearing at the

Tribunal, once the Canadian Human Rights Commission has referred the complaint to the Tribunal. I find, however, that this consideration does not take into account the role and authority of the Commission prior to the complaint's referral. Section 41(1)(*d*) of the *Canadian Human Rights Act* provides that the Commission shall deal with a complaint unless it appears to the Commission that the complaint is trivial, frivolous, vexatious or made in bad faith. Respondents are able to make submissions to the Commission to have the complaints made against them dismissed on these grounds, and in the event that the Commission decides nonetheless to deal with a complaint and ultimately refer it to the Tribunal, respondents still have the option of seeking judicial review of the Commission's decision. Thus, it is not in my view entirely correct to say that a respondent faced with a frivolous or vexatious complaint will have little recourse but to endure a full Tribunal hearing. Given these safeguards under the *Act*, it seems very unlikely that genuinely frivolous or vexatious complaints would ever make it to the Tribunal.

[9] Another consideration for the finding in *Fahmy* was the absence, in the context of the *Canadian Human Rights Act*, of any "pre-trial oral discovery process available to the parties". Indeed, aside from the documentary disclosure that the Tribunal requires in the course of its case management process, parties have no other means available to them to learn of any potential evidence that may be of assistance to them from witnesses associated with the other side. But this was precisely the point highlighted in *Nimako*. Persons filing complaints against their employers, or even worse, their former employers, find themselves at a particular disadvantage. These employer-respondents and their witnesses may have knowledge of important information regarding the complainant's employment and ultimately the establishment of a *prima facie* case, but the complainant will have no means of gaining access to it. Thwarting a complainant's access to such important information could give rise to the "unseemly 'heads I win, tails you lose'" scenario discussed in *Nimako*.

[10] I am not persuaded that these considerations referred to in *Fahmy* justify a finding that an election should never be required when a party moves to dismiss a complaint. I remain

convinced that there are sound reasons (as I indicated in *Chopra*) for applying the common law rule in human rights cases except where circumstances warrant.

[11] Are there any such circumstances in the present case? An obvious consideration should be delay and cost. If it is anticipated that the respondent's evidence will take long to adduce and will add significantly to the parties' costs, a compelling argument can be made for exempting the respondent from its election. This would enable the respondent to make a "no-risk" attempt at getting the complaint dismissed before having to adduce its evidence and incurring these costs. This would also prevent unnecessarily prolonging the hearing process. In *Chopra*, I found that although the anticipated remaining length of the hearing was likely "significantly longer" than the five days that had been originally estimated, its expected duration did not warrant dispensing the respondent in that case from having to elect, given the overall context of the case's long history. I also found that the anticipated cost of completing the hearing in that case did not constitute a "special circumstance" that would justify treating cost avoidance as a factor in deciding to exempt the respondent from having to elect.

[12] In the present case, the parties had anticipated completing their evidence within five days, a relatively short time given the length of most other Tribunal cases. The case has been proceeding as scheduled and by the Respondent's own estimation, it will have no difficulty adducing the evidence of its four witnesses over the remaining three hearing days. As I understand it, three of the Respondent's witnesses reside in Calgary, where the hearing is taking place, and are employees of the Respondent. The one remaining witness resides in New Brunswick and had already arrived in Calgary when Respondent Counsel rose to make its motion to dismiss on Day 2 of the hearing. This out-of-town witness will be the first to testify for the Respondent. There is therefore no evidence of any significant reduction in costs to the Respondent in having the case come to an early end on Day 3 or 4 of the five day hearing, nor for that matter, would it have any impact on the length of the hearing, were its motion to dismiss to succeed.

[13] The Respondent has not presented me with any other reasons that would persuade me to exempt it from having to elect not to call any further evidence, prior to making its motion to dismiss.

[14] The Respondent may therefore proceed with its motion for the dismissal of the complaint provided it elects not to call any evidence.

> *"I hereby certify that the foregoing is a true and accurate representation of my ruling given from the bench to the parties on August 19, 2009."*

Signed by

Athanasios D. Hadjis
Tribunal Member

Ottawa, Ontario
September 3, 2009

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1334/6408

Style of Cause: Melissa Khalifa v. Indian Oil and Gas Canada

Ruling of the Tribunal Dated: September 3, 2009
(Oral ruling rendered from the bench on August 19, 2009)

Date and Place of Hearing: August 18-19, 2009

Calgary, Alberta

Appearances:

Melissa Khalifa, for herself

No one appearing, for the Canadian Human Rights Commission

Raymond Lee and Frank Durnford, for the Respondent