

**CANADIAN HUMAN RIGHTS TRIBUNAL TRIBUNAL CANADIEN DES
DROITS DE LA PERSONNE**

**TELECOMMUNICATIONS EMPLOYEES ASSOCIATION OF MANITOBA
INC.,**

**BARBARA CUSTANCE, CARMEN GIROUX, CHUCK HANDO,
KATHLEEN MULLIGAN, JANICE SIRETT**

Complainants

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

MANITOBA TELECOM SERVICES

Respondent

RULING

MEMBER: J. Grant Sinclair 2007 CHRT 26
2007/07/05

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I. INTRODUCTION

[1] The respondent, Manitoba Telecom Services Inc. (MTS) has brought a motion for an order that:

- (i) the parties are bound by the factual and legal conclusions of a 2004 arbitrator's award (Graham Award) and barring the complainants from leading any evidence inconsistent therewith;
- (ii) the complainant Hando, having submitted a grievance and subsequently withdrawing it from the Graham arbitration, is barred from proceeding with his complaint before this Tribunal;
- (iii) the Telephone Employees' Association of Manitoba (Union) should be added as a respondent to the complaint; and
- (iv) the Union has no standing as a complainant under ss. 40(1) and 40(2) of the *Canadian Human Rights Act*.

II. BACKGROUND

[2] The complainants in this inquiry are the Union and five individuals who are members of the Union, Hando, Mulligan, Giroux, Sirett and Custance. The five complainants were all laid off by the MTS in January of 2003. The Union contested the lay-offs through the grievance process.

[3] One grievance, filed on behalf of Hando (Hando grievance) was withdrawn by the Union. In so doing, the Union asserted that the withdrawal was without prejudice to Hando's pursuit of a human rights allegation against MTS with the Canadian Human Rights Commission (CHRC). There was no alleged violation of the *CHRA* in the Hando grievance.

[4] The Union filed another grievance on behalf of a group of 14 individuals which included Mulligan, Giroux, Siret and Custance (group grievance). The Graham Award dismissed the group grievance.

[5] The scope of the group grievance narrowed over time leading up to the arbitration. At the time it was signed, it alleged violations of the collective agreement as well as the *CHRA*. Yet reference to the *CHRA* was excluded from the grievance synopsis appearing in the Graham Award and it was not discussed elsewhere in the document.

[6] Similarly, the group grievance in its original form alleged that some of the laid off employees were improperly targeted for layoff due to their record of absence due to illness and/or the fact that they recently claimed long-term disability benefits. However, prior to arbitration, the Union indicated that it would not be arguing the issue of improper targetting due to record of absence.

[7] Moreover, the Graham award notes that "the Union chose not to proceed with 14 individual grievances in which the individual grivors would attempt to prove that their individual skills abilities, performance and qualifications, warranted that they be retained in preference to other specifically identified employees". While it is unclear if this was ever the Union's intention, the Graham Award suggests it was an option open to it.

[8] Thus, the group grievance focussed only on the process used by MTS to identify which employees were being laid off, as determined by article 26.03 of the collective agreement. Article 26 essentially states that when identifying which incumbents in a position were to be laid-off, seniority would only become a factor where there were no differences between the incumbents on the basis of skill, ability, performance and

qualifications. The implication of this article is that MTS was allowed to lay-off those employees who were judged to be most wanting in the above qualities.

[9] In the course of determining the grievance, the Graham Award examined MTS's lay-off exercise with a view to determining (1) whether there was compliance with the collective agreement; (2) whether the procedure by which the article 26 standards were applied was fair, appropriate and unbiased; (3) whether the lay-off decision was reasonable.

[10] In particular, the Graham Award examined a number of allegations by the Union, and evidence in support thereof, that the MTS lay-off exercise was based on incomplete or inaccurate information which led to a flawed comparative analysis of the laid-off employees vis-à-vis the other incumbents.

A. The CHRA Inquiry

[11] Before this Tribunal, the complainants are seeking to "re-activate" the discrimination component of the group grievance which was for whatever reason, not pursued at arbitration. The complaints of Mulligan, Giroux, Sirett and Custance filed with the CHRC, make reference to the individual complainants having been deliberately targeted for lay-off by MTS on the grounds that they were perceived to be disabled. The Hando complaint and the complaint filed directly by the Union, are to the same effect.

[12] Furthermore, in their joint statement of particulars the complainants take direct aim at the comparative analysis conducted by MTS under article 26. For example, in para. 20 of their statement they assert that Sirett, Mulligan, Giroux and Custance possess the skills, abilities and qualifications that were at least equal to or greater than other employees with lesser seniority who were not laid off.

[13] The respondent MTS says that the complainants should not be allowed to question the validity of the article 26 lay-off exercise, as it was already challenged in the arbitration process and upheld in the Graham Award. Moreover, to the extent Hando was not governed by the Graham Award (he was not a member of the group grievance), Hando should be similarly bound as he abandoned his right to arbitration.

[14] The complainants reply that the group grievance was a policy grievance focussed on the process; it did not address the comparative analysis as it affected the individual complainants. Moreover, the requisite evidentiary basis for doing so was not put forward. Finally, Hando's grievance "deliberately" did not contain any allegation concerning any discrimination contrary to the CHRA.

B. Legal Principles

[15] The question of multiple proceedings in different fora exposes a key tension in the administration of the CHRA. On the one hand, there is abundant jurisprudential doctrine, espoused in cases such as *Weber v. Ontario Hydro*, [1995] S.C.R. 929 and *Danyluk v. Ainsworth Technologies*, [2001] 2 S.C.R. 460 that would limit an employee's right to litigate an employment dispute that has previously been determined, or that could have been determined, by a labour arbitrator. There are clear public policy grounds behind these doctrines, including the need for finality of litigation, and the avoidance of contradictory results.

[16] On the other hand, there is the apparent expression by Parliament that the recourse set out in the CHRA is cumulative, or concurrent with other forms of recourse. See *Sherman v. Canada (Canada Customs and Revenue Agency)* 2006 FC 715 at paras. 23-24. In a similar vein, Sopinka J. has described human rights legislation as "the final

refuge of the disadvantaged and the disenfranchised" (*Zurich Insurance v. O.H.R.C* [1992] 2 S.C.R. 321).

[17] The Federal Court has held that this Tribunal has the jurisdiction to dismiss a complaint by way of preliminary motion on the grounds of abuse of process, assuming there are valid grounds to do so. Moreover, *res judicata* is one of the means by which a tribunal can prevent abuse of its process. (*C.H.R.C. v. Canada Post* 2004 FC 81, at paras. 19, 31).

[18] *Res judicata* not only prevents parties from re-litigating issues that have been finally decided between them (issue estoppel). It also serves to prevent "litigation by instalment" where parties had the opportunity to have the issues between them adjudicated in an earlier proceeding, but chose not to do so in favour of later prosecution. In this latter manifestation, it is often referred to as cause of action estoppel. (*Canada Post*, at paras. 29-32; *Desormeaux v. Ottawa-Carleton Regional Transit Commission*, 2002 CanLII 45932 (C.H.R.T.) at para. 35)

C. Application to the current matter

[19] In the current matter, the record suggests that the Union made a pre-meditated decision not to fully air at arbitration its concerns regarding the potentially discriminatory nature of the lay-offs. It also appears from the material that the Union made a deliberate choice in the group grievance arbitration not to directly impugn the comparative lay-off exercise under article 26 as it affected Sirett, Mulligan, Giroux and Custance. And there does not appear to be any explanation of the Union's decisions in the motion record.

[20] To the degree that the the arbitration led to general findings in the Graham Award that the comparative lay-off process was in compliance with article 26, the Union and the other complainants now seek to contradict those findings. Presumably by introducing evidence that employee absences were a factor in determining whether an employee would be laid off.

[21] If the Tribunal were to grant the motion, certainly the individual complainants' ability to present their case as expressed in the statement of particulars could be significantly curtailed if not eliminated. It was the Union that had carriage of the grievances. And in granting the motion the Tribunal would be attaching consequences to decisions taken by the Union, namely, decisions not to go forward to arbitration with the *CHRA* aspects of their claims. In these circumstances, it would be inequitable to expose these individuals to the application of the doctrine of *res judicata*.

[22] As to the respondent's request to add the Union as a respondent, I do not see the need to do so. The Union is already a party to the complaint. I agree with the complainants' position (set out on page 9, para. 31 of the complainants' Supplemental Motion Brief dated June 26, 2007) that the respondent can seek contribution/indemnification from the Union should the Tribunal find a discriminatory practise by the respondent in which the Union was also implicated.

[23] The standing of a union to bring a complaint under s. 40 of the *CHRA* was dealt with by the Tribunal in *CTEA v. Bell Canada*, [1999] C.H.R.D no.3. There the Tribunal concluded that a union, for the reasons stated in the decision, can file a complaint under s. 40 of the *CHRA*. In this case, the Union's complaint alleges a breach of s. 10 of the *CHRA*. The relief the Union is seeking is a systemic order as contrasted to the individual complainants' request for a personal remedy. To this extent the Union's complaint is independent and starts apart from the complainants (although the complainants also

allege a breach of s. 10, they do not pursue this by way of remedy), the Union should have the standing to pursue this claim.

[24] For all of these reasons, the motion of the respondent MTS is dismissed. Any costs relating to the motion should be dealt with, if necessary, by the Tribunal hearing the complaints.

"Signed by"

J. Grant Sinclair

OTTAWA, Ontario
July 5, 2007

PARTIES OF RECORD

TRIBUNAL FILE:	T1161/4306
STYLE OF CAUSE:	Telecommunications Employees Association of Manitoba Inc., Barbara Custance, Carmen Giroux, Chuck Hando, Kathleen Mulligan, Janice Sirett v. Manitoba Telecom Services
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APPEARANCES:	
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No one appearing	For the Canadian Human Rights Commission
Gerry Parkinson Paul McDonald	For the Respondent