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

**JIM SMITH**

**Complainant**

**- and -**

**CANADIAN HUMAN RIGHTS COMMISSION**

**Commission**

**- and -**

**CANADIAN NATIONAL RAILWAY**

**Respondent**

# RULING TO ADD A PARTY AND AMEND THE COMPLAINT

MEMBER: Karen A. Jensen

2005 CHRT 23
2005/06/15

[1] On February 28, 2002, Jim Smith filed a complaint with the Canadian Human Rights Commission alleging that Canadian National Railway ("CN") has been discriminating against him in employment on the basis of his disability. On May 19, 2004, the Canadian Human Rights Commission ("Commission") referred the complaint to the Tribunal for further inquiry.

[2] Mr. Smith is now asking that the complaint be amended to add allegations of retaliation against him by CN. He is also asking that the Workers' Compensation Board of British Columbia ("the WCB") be added as a party to the complaint and that the complaint be amended to include allegations of retaliation and threats of retaliation by the WCB on behalf of CN.

[3] CN does not oppose amending the complaint to add allegations of retaliation by CN.

## I. BACKGROUND

[4] Mr. Smith began working for CN in April, 1979. In November, 1997, Mr. Smith hurt his back while working. He filed a claim with the WCB. His claim was accepted and he received physiotherapy and other treatment for several months, returning to work in April, 1998.

[5] Unfortunately, however, Mr. Smith's back condition worsened and in March, 1999, he was required to undergo surgery. For the remainder of 1999, Mr. Smith was off work, but participated in two work conditioning programs designed to build up his strength and mobility for an eventual return to work. These programs were sponsored by the WCB.

[6] By January, 2000, a medical advisor for the WCB determined that Mr. Smith's condition had stabilized. The WCB placed certain restrictions on Mr. Smith's work activities, but stated that he could complete the graduated Return to Work Plan developed by the kinesiologist and orthopedic surgeon involved in his case.

[7] The first Return to Work Plan in 2000 involved an attempt to gradually return Mr. Smith to his pre-injury position as a locomotive engineer. It was developed by a

kinesiologist with CN. The WCB approved it and made recommendations to assist in making Mr. Smith's return to work a success. The WCB also provided him with short term disability benefits and health care benefits up to January 21, 2001.

[8] The first Return to Work plan was unsuccessful. Mr. Smith was apparently experiencing ongoing back pain and spasms throughout the duration of the plan. He consulted with his physician, Dr. Appleton, about his ongoing back pain and spasms. Dr. Appleton recommended a neurological exam and indicated that Mr. Smith could not sit for greater than six hours.

[9] The WCB referred Mr. Smith's medical file to a Board Medical Advisor for review. In a letter dated March 2, 2001, Ms. C. Arujo, a case manager for the WCB, stated that, based on the opinion provided by the WCB's medical advisor, Mr. Smith's pre-injury job was suitable.

[10] As a result, effective January 21, 2001, the WCB terminated Mr. Smith's short term disability benefits. Ms. Arujo stated that vocational rehabilitation assistance was not necessary as Mr. Smith's pre-injury job was thought to be suitable. However, she stated that his file would be referred to the Disablity Awards Department for consideration of a permanent functional impairment award.

[11] Mr. Smith appealed the WCB's decision that his pre-injury job was suitable and the decision to terminate his benefits to the Workers' Compensation Review Board.

[12] In the meantime, CN developed several more Return to Work Plans in which Mr. Smith participated. They were, however, ultimately unsuccessful.

[13] On February 28, 2002, Mr. Smith filed a complaint against CN with the Canadian Human Rights Commission alleging discrimination on the basis of disability.

[14] In June, 2002, Mr. Smith's union advanced a grievance on his behalf alleging that the Company had violated the Collective Agreement by failing to accommodate Mr. Smith's disability.

[15] On March 14, 2003, the Workers' Compensation Review Board allowed Mr. Smith's appeal of the WCB decision that his pre-injury job was suitable and that his benefits should be terminated. The Review Board held that employment as a locomotive engineer was unsuitable for Mr. Smith. The Review Board also ordered that he receive income continuity benefits from January 21, 2001 onward and a loss of earnings pension unless he was retrained for accommodated employment that would mitigate the loss of earnings. CN appealed this decision.

[16] In April 2003, CN proposed that Mr. Smith train for a new position as a Traffic Coordinator in Prince George, British Columbia during the months of June and July, 2003. If he successfully completed the training program, Mr. Smith was to be offered the Traffic Coordinator position.

[17] Mr. Smith began the training program in June, 2003. He completed a self-guided instruction component in Vancouver in June and then traveled to Prince George in July, 2003.

[18] On July 4 and July 7, 2003, Mr. Todd McDonald, a vocational rehabilitation consultant with the WCB, communicated by fax and letter with Mr. Smith regarding his participation in the training program and his chances of receiving an offer for the position in Prince George.

[19] In these communications, Mr. McDonald advised Mr. Smith of the WCB's view that the return to work plan in Prince George was appropriate, reasonable and necessary to

assist Mr. Smith to return to work. He emphasized how important it was that Mr. Smith willingly participated in the Traffic Coordinator training program in Prince George notwithstanding the fact that he and his union had taken the position, in the grievance and human rights complaint, that he should be accommodated in Terrace.

[20] Mr. McDonald also advised Mr. Smith that if he continued to insist upon a position in Terrace with the result that CN could not offer him the position in Prince George, then it might become necessary for the WCB to review the file to determine if any further vocational assistance should be offered.

[21] On July 9, 2003, the union's grievance against CN was heard before Arbitrator Michel Picher. Arbitrator Picher rendered a decision on July 14, 2003, in which he dismissed the grievance. In his decision, Arbitrator Picher held that CN had fulfilled its responsibilities under the Collective Agreement and the *Canadian Human Rights Act* ("the *Act*") to accommodate Mr. Smith.

[22] In a file memorandum dated July 21, 2003, Todd McDonald of the WCB documented a telephone conversation with Tanya Gordon from CN about CN's concerns regarding the costs of the WCB's continued involvement in Mr. Smith's case should Mr. Smith be unsuccessful in obtaining the position in Prince George. According to the memorandum, Mr. McDonald told Ms. Gordon that given the current evidence on the file, Mr. Smith did not need further accommodation in terms of being able to lie down on the job or being allowed to leave work early.

[23] In a letter dated July 29, 2003, CN informed Mr. Smith that the training program in Prince George had been terminated. The letter indicated that although Mr. Smith was capable of performing the duties of traffic coordinator in Prince George, he had yet to demonstrate any real commitment to learning the job.

[24] The letter also stated that Mr. Smith had declined to follow instructions regarding how to correctly complete his diary entries and he appeared to have established a pattern of leaving his work area and/or leaving his work unattended for non-work related reasons. The letter suggested that there were other "objective observations" by the transportation supervisors in Prince George that supported the termination of the program.

[25] In a letter dated August 21, 2003 to Mr. Smith's union, Mr. McDonald from the WCB appeared to respond to accusations made by the union that he had threatened Mr. Smith in his earlier communications with him. Mr. McDonald asserted that if the union was using the word "threaten" in the sense identified by the Webster's dictionary as "to give signs or warning of" or "to announce as intended or possible", then he may have threatened Mr. Smith. However, Mr. McDonald maintained that his communications with Mr. Smith were simply meant to advise the latter that his evident lack of commitment to the Return to Work Plan in Prince George could have potential consequences as they related to his Workers' Compensation claim.

[26] In a letter dated October 1, 2003, Todd McDonald informed Mr. Smith of the WCB's decision that he would no longer be entitled to ongoing vocational rehabilitation assistance following the termination of the Return to Work plan. Mr. McDonald stated that in the WCB's view, the plan was appropriate, reasonable and necessary, took into account Mr. Smith's compensable restrictions and allowed for considerable flexibility in performance of the work. He stated that there were non-compensable barriers to Mr. Smith's return to work.

[27] These barriers included Mr. Smith's unwillingness to fully commit himself to the position in Prince George as evidenced by his continuing investigation of "avenues to stay in Terrace". In addition, the decision cited a demonstrated inability on Mr. Smith's part to complete full shifts in the absence of medical restrictions supporting this inability.
[28] Mr. Smith appealed the WCB's decision of October 1, 2003 to terminate his vocational rehabilitation benefits. It was, however, subsequently upheld by a Workers' Compensation Review Officer on July 12, 2004.
[29] In a decision dated March 22, 2004, the Workers' Compensation Appeal Board dismissed CN's appeal regarding Mr. Smith's ability to work as a locomotive engineer.

**A. The Parties' Positions**

[30] Mr. Smith alleges that CN retaliated against him for filing a human rights complaint by interfering with the adjudication of his WCB compensation claims. He further states that CN's early termination of the training program in Prince George constituted retaliation.
[31] With respect to the WCB, Mr. Smith alleges that Todd McDonald threatened him that if he did not withdraw his grievance and his human rights complaint, his WCB benefits would be terminated. He further alleges that the termination of his WCB benefits following the cancellation of the training program in Prince George constituted retaliation on behalf of CN for the filing of a human rights complaint against CN.
[32] While in no way admitting to any of the allegations, CN does not oppose that part of Mr. Smith's motion to amend the complaint that deals with allegations of retaliation by CN. However, CN opposes the amendment of the complaint to include allegations of retaliation and threats of retaliation against Mr. Smith by the WCB. CN adopts the submissions of the WCB on this part of the motion.
[33] The WCB argues that the motion should be dismissed because there is no chance that the allegations in the amendment regarding the WCB could possibly succeed. Furthermore, the WCB asserts that the Tribunal does not have jurisdiction over the WCB, a body which is within the exclusive jurisdiction of the provincial government.

**B. Issues**

[34] The first issue to be determined in this motion is whether the WCB should be added as a party. If it is appropriate to add the WCB as a party, then the question becomes whether the complaint should be amended to add the allegations against the WCB.
[35] However, in order to determine whether to add the WCB as a party, one must first look at the requirements of the Act with respect to complaints of retaliation and/or threats of retaliation *on behalf of* a respondent.

**(i) Section 14.1 of the *Act***

[36] Section 14.1 of the *Act* states that it is a discriminatory practice for a respondent *or any person acting on their behalf*, to retaliate or threaten retaliation against the complainant or the victim. Although this Tribunal has dealt with cases of retaliation by respondents, it has not yet had occasion to deal with allegations of retaliation by a person acting on behalf of a person against whom a complaint has been filed.
[37] In order to determine what is meant by "acting on their behalf " it is appropriate to first look at the legislative context of the provision.
[38] Section 4 of the *Act* provides that a discriminatory practice, as described in sections 5 to 14.1, may be the subject of a complaint under Part III, and if the complaint is

substantiated, the person who has engaged in the discriminatory practice may be subject to an order under sections 53 and 54 of the *Act*.

[39] Section 65(1) of the *Act* stipulates that, subject to the due diligence provision under subsection 65(2), the acts or omissions of an officer, a director, an employee *or an agent of any person* in the course of his or her employment, shall be deemed to be the acts or omissions of that person, organization or association. Thus, for example, an organization may be held liable for the discriminatory conduct of its agent if it was performed in the course of employment. However, the agent does not, by operation of s. 65(1) alone, become personally liable for the discriminatory conduct.

[40] By virtue of s. 4 of the *Act*, s. 65 applies to complaints of retaliation under s. 14.1 with the result that an organization may be held liable for the retaliatory actions of its agent. However, once again, the agent would not be personally liable for its retaliatory actions by operation of s. 65(1) alone.

[41] Given that s. 65 applies to s. 14.1, the words "acting on their behalf" in section 14.1 must have another meaning than what is expressed in s. 65(1) of the *Act*. Otherwise, it would have been unnecessary to have added the words "acting on behalf of" in section 14.1.

[42] One of the notable differences is that, unlike the liability established under s. 65 of the *Act*, the person found to be acting on behalf of a respondent for the purposes of retaliation is directly liable for a discriminatory practice and may be subject to an order under sections 53 and 54 of the *Act*.

[43] It is possible to glean an additional meaning of the words "acting on their behalf" from the French version of the *Act*. The French text of s. 14.1 describes the person acting on behalf of the respondent as "celle qui agit en son nom", that is, someone who is acting *in the name of* the respondent.

[44] The French wording of s. 14.1 directs our attention to the second of two definitions provided by the Canadian Oxford Dictionary for "on behalf of". There, the term is defined as meaning "in the interests of a person" or "as a representative of".

[45] Based on the preceding analysis of the legislative context of the provision, I conclude that in order to fall within the ambit of s. 14.1, the person who is acting on behalf of the respondent must be taking retaliatory action or making threats in the name of the respondent, or as a representative of the respondent. Further, the retaliatory action taken or threats made in the name of the respondent must be with respect to the filing of a human rights complaint against the respondent.

[46] Since s. 14.1 opens up the possibility that the other person, in this case the WCB, may be subject to an order under s. 53 of the Act, that person must be added as a party to the complaint. What is the law on adding a party to the complaint?

**C. Adding a Party**

[47] This Tribunal has held that it has the discretion to add parties to an inquiry under the appropriate circumstances (oral ruling on October 2, 2002 by Chairperson Mactavish in *Desormeaux v. OC Transpo* (T701/0602), referred to in *Syndicat des employs d'excution de Qubec-tlphone v. Telus Comunications* 2003 CHRT 31 at paragraphs 23 - 27). However, the Tribunal has also stated that the legislative context surrounding this discretionary power argues for a measure of restraint or caution in adding parties.

[48] Under what circumstances is it appropriate to add a party? There are several Tribunal decisions which followed *Desormeaux* that provide some answers to this question.

[49] For example, in the *Telus* case, the Panel declined to add the union as a party to the complaint. Among the circumstances that militated against the addition of the union as a party was the fact that nothing in the documentation submitted to the Panel indicated that the union or its members acted, or might have acted, in a discriminatory manner.

[50] The Panel in *Telus* also noted that the addition of a new respondent at the stage of the Tribunal's inquiry into the complaint, with no formal complaint having been brought against it, deprives the new respondent of the opportunity to present certain grounds of defense before the Commission.

[51] In *Brown v. NCC* 2003 CHRT 43**,** Member Groarke granted a motion by the Canadian Human Rights Commission to add the Department of Public Works and Government Services as a respondent to the proceedings. He held that the addition of Public Works was necessary to provide a proper remedy to the complainant in the event that he was successful in establishing discrimination.

[52] Thus, what emerges from the Tribunal's decisions to date on this issue is that caution should be exercised when adding a party. A new party should be added at the inquiry stage only if the addition of the party is necessary to properly dispose of the complaint and if there is a tenable basis for the allegations against the new party.

[53] With regard to the latter point, I wish to be clear that the threshold for establishing that there is a tenable basis for the allegations against a new party is not high. The Tribunal will not engage in a substantive review of the merits of the allegations. However, the fact remains that there must be a tenable basis to the allegations involving the new party in order to justify exercising the Tribunal's discretion to add a party.

[54] In the present case, I am prepared to accept that there may be some basis for the allegations that the WCB retaliated and threatened retaliation against Mr. Smith. However, I am not satisfied that there is a tenable basis to the allegations that the WCB took these actions *on behalf of* CN.

[55] Mr. Smith asserts that the following material on the file supports the allegations that the WCB was acting on behalf of CN: (1) documentation of discussions between CN and the WCB regarding the costs of accommodating Mr. Smith; (2) documentation of meetings between the WCB and CN to discuss Mr. Smith's Return to Work and progress in the Prince George training program; (3) documentation regarding the WCB's agreement with CN's position on a number of issues.

[56] In my view, this material does not establish a tenable basis for the allegation that the WCB's actions with regard to Mr. Smith were done in the name of CN.

[57] Section 16 of the *Workers' Compensation Act of British Columbia* (" the *WCA*") provides the WCB with the discretion to "take the measures and make the expenditures" that it considers necessary in order to assist workers in getting back to work or to assist in lessening or removing a handicap resulting from a workplace injury or disease.

[58] I think that it is appropriate to infer, based on the wording of the *WCA*, that in order to fulfill its mandate under section 16 to assist workers in getting back to work, the WCB may need to work with the "accident employer".

[59] In my view, the material to which Mr. Smith points in his file does no more than suggest the existence of a working relationship between officials in the WCB and CN

regarding Mr. Smith's return to work. Evidence of a working relationship is not enough, however, to lend any plausibility to the allegation that the WCB was acting *on behalf of* CN, or in order to advance CN's alleged interest in retaliating against Mr. Smith for filing the complaint.

[60] In other words, evidence of a working relationship between the two organizations does not raise an implicit assumption that the WCB was acting in the name of CN in allegedly retaliating or threatening retaliation against Mr. Smith.

[61] There is a link that is missing here, which, in my view, is essential to the success of Mr. Smith's motion. That link consists of allegations and some evidence about the relationship or events that occurred between the WCB and CN which would explain why the WCB would act as CN's representative against Mr. Smith. I do not see anything in Mr. Smith's submissions or on the file that addresses this missing link.

[62] Therefore, I find that there is no tenable basis to Mr. Smith's allegations that the WCB acted on behalf of CN. For this reason, I find that it is not appropriate to add the WCB as a party to the complaint. In my view, if it is not appropriate to add the WCB as a party, then Mr. Smith's request to amend the complaint must also be denied.

## II. ORDER

[63] In view of the fact that CN does not oppose Mr. Smith's request to amend the complaint to add the allegations of retaliation by CN, this part of the motion is granted. The complaint should be so amended.

[64] However, the request to add the WCB as a party and to amend the complaint to add the allegations of retaliation and threats of retaliation by the WCB on behalf of CN is denied.

_____________*"Signed by"*_____________
Karen A. Jensen

OTTAWA, Ontario
June 15, 2005

PARTIES OF RECORD

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| TRIBUNAL FILE: | T939/5904 |
| STYLE OF CAUSE: | Jim Smith v. Canadian National Railway |
| | June 15, 2005 |
| RULING OF THE TRIBUNAL DATED: | |
| APPEARANCES: | |
| Jim Sayre | For Jim Smith |

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|---|---|
| Daniel Pagowski | For the Canadian Human Rights Commission |
| Joseph H. Hunder | For Canadian National Railway |
| Scott A. Nielsen | For the Workers' Compensation Board of British Columbia |