Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Between:

Pamela Egan

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Canada Revenue Agency

Respondent

Ruling

Member: Edward P. Lustig
Date: December 12, 2012
Citation: 2012 CHRT 31

I. Context

[1] The Complainant filed a human rights complaint on May 21, 2003, alleging that her employer, the Canada Customs and Revenue Agency (CCRA), now known as Canada Revenue Agency (CRA), discriminated against because of her disability and refused to accommodate her, contrary to section 7 of the *Canadian Human Rights Act*, RCS 1985, c H-6 (the *Act*). Section 7 of the Act reads as follows:

> Employment
>
> **7.** It is a discriminatory practice, directly or indirectly,
>
> (*a*) to refuse to employ or continue to employ any individual, or
>
> (*b*) in the course of employment, to differentiate adversely in relation to an employee,
>
> on a prohibited ground of discrimination.

[2] The Complainant is a legally blind woman who was employed as a Collection Contact Officer on an indeterminate full-time basis. In 1998, she sustained a non-work-related injury to her neck and upper back and to this day, suffers chronic pain. The Complainant went on disability leave for a period of two years following this incident. The Complainant's doctor deemed her fit to begin a graduated return to work in early 2001.

[3] In the complaint form filed before the Canadian Human Rights Commission (the Commission), the Complainant alleges that on numerous occasions, starting in April, 2001, she requested permission to work from home (Telework) as a manner for her to better manage the adverse effects of aspects of the workplace, including sitting at a desk for prolonged periods, lifting charts or files, and using a standard chair, computer monitor and mouse, as a result of her disabilities. The Complainant alleges that these accommodation requests were either avoided or refused by her employer. She also alleges that in June, 2001, a return to work plan was implemented without her consent and despite the recommendations of her doctor for a graduated

and restricted work re-entry. According to the Complainant, the Respondent also denied the ergonomic assessment which had been recommended by her doctor.

[4] In mid-November, 2001, the employer held a meeting to discuss the Complainant's progress in returning to work full-time. During this meeting, it was agreed that the Complainant would benefit from an ergonomic assessment. The assessment was completed in January 2002 and a report was provided to management on March 11, 2002 with a recommendation that the equipment be ordered and in place by the end of March 2002. According to the Complainant, in February 2003, she had still not received all the recommended equipment.

[5] In February 2002, the Complainant made a request for Leave with Income Averaging. This request was denied by the Respondent in April 2002 because the Complainant had not yet established a working base of 37.5 hours per week. In June 2002, the Complainant was told that she had been selected for a Telework Pilot project and would also be granted the Leave with Income Averaging she had requested. While pleased with this decision, she describes being baffled that her application for this program had been granted under the project's criteria but not for reasons of her disability.

[6] In February 2009, the Complainant sustained a workplace injury. The software installed for her visual acuity problems was allegedly malfunctioning, causing the cursor to jump all over the screen. As a result, the Complainant says that she had to use her mouse excessively and she eventually developed a repetitive stress injury to her elbow, shoulder and neck. She has not returned to the workplace since.

[7] The Complainant describes that throughout this period, she felt that she was being discriminated against and suffered harassment. She notes that while the CCRA has policies on Telework, Duty to Accommodate, and Employment Equity, they were not adhered to in her situation.

[8] The Complainant filed her human rights complaint with the Commission on May 21, 2003. In a decision dated February 9, 2007, the Commission dismissed the complaint. This decision was judicially reviewed by the Federal Court and on May 22, 2008, the matter was remitted back to the Commission for redetermination. The Commission carried out two investigations and referred the Complaint to the Tribunal on September 10, 2010.

II. Amending the Complaint

[9] On June 28, 2012, the Complainant filed her Statement of Particulars ("SOP") with the Tribunal. The first two paragraphs of the SOP read as follows:

> This is a case of discrimination, adverse differential treatment and harassment contrary to Sections **7 and 14** of the Canadian Human Rights Act (hereinafter called "the Act"). The Complainant, Pamela Egan, asserts that her employer, the Respondent, Canada Revenue Agency ("the Respondent"), contravened the Act by discriminating against her, and by adopting policies and practices that adversely impacted her due to her disabilities. Ms Egan further asserts that the Respondent harassed her as the result of her disabilities.
>
> Ms Egan also asserts that the Respondent pursued policies and engaged in practices that had an adverse differential impact on Ms Egan's career opportunities. To bring all pertinent sections of the Act into conformity with the facts as asserted, Ms Egan anticipates requesting of this Tribunal that she be permitted to amend her complaint to include an allegation of discrimination contrary to Section 10 of the Act.
>
> [Emphasis Mine]

[10] In addition to the events described in the initial complaint, the SOP described a series of incidents of harassment which are alleged to have occurred over the course of her employment with the Respondent. The SOP also contained allegations regarding the Respondent's failure to provide the Complainant with the training and accessible materials that were available to her sighted colleagues and would have permitted her to fulfill her career aspirations. Despite her excellent work record, fifteen years later, the Complainant remains at the PM01 (now SP4) level

at which she was hired and links her lack of promotion to the Respondent's discriminatory practices.

[11] Shortly after its receipt of the Complainant's SOP, the Respondent wrote to the Tribunal expressing concern with the new allegations raised in the SOP, which the Respondent alleges were not raised during the Commission process. The Complainant replied to these concerns, characterizing the addition of sections 10 and 14 as mere housekeeping amendment arising out of the central facts of the complaint. Unsatisfied with this response, the Respondent submitted that the most appropriate means to deal with these issues was to have the Complainant file a formal motion, following which the Respondent would provide more fulsome submissions on the request to amend the complaint. The Complainant filed a motion to amend the complaint on September 6, 2012.

[12] For ease of reference, sections 10 and 14 of the *Act* read as follows:

> Discriminatory policy or practice
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> 10. It is a discriminatory practice for an employer, employee organization or employer organization
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> (*a*) to establish or pursue a policy or practice, or
>
> (*b*) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment,
>
> that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.
>
> Harassment
>
> 14 (1) It is a discriminatory practice,
>
> (*a*) in the provision of goods, services, facilities or accommodation customarily available to the general public,

(*b*) in the provision of commercial premises or residential accommodation, or

(*c*) in matters related to employment,

to harass an individual on a prohibited ground of discrimination.

III. The Parties' Positions

A. The Complainant's position

[13] The Complainant is of the view that all of the impugned allegations are merely elaborations upon the initial complaint and that the addition of sections 10 and 14 of the *Act* to the complaint stems naturally from the facts alleged by the Complainant in her complaint. The Complainant disputes that denial of employment opportunities within the meaning of section 10 and harassment within the meaning of section 14 of the Act were not considered in the course of the investigation of the complaint.

[14] The Complainant submits that *Gaucher v. Canadian Armed Forces*, 2005 CHRT 1 sets a relatively low threshold for amending a complaint and that, unlike situation in *Cook v. Onion Lake First Nation*, (2002), 43 CHRR D/77 and *Tran v. Canada (Revenue Agency)*, 2012 CHRT 31 where there existed no factual connection between the original complaint and the amendment sought by the Complainants, the proposed amendments in this motion simply add the legislative provisions engaged by the Complainant's existing allegations. The Tribunal in *Gaucher* at paragraphs 14, 15 and 17 held that there is no bright line between sections 7 and 10 of the *Act*. The Complainant submits that her allegation that the application of the Respondent's policies resulted in discrimination inevitably requires consideration for the application of those policies in general. According to the Complainant, the addition of section 10 merely 'clarifies the legalities' of the complaint, and therefore meets the test for amendment.

[15] The Complainant submits that the impugned allegations simply serve as examples to demonstrate the ongoing pattern of the failure to accommodate on the part of the Respondent, which is consistent with the purpose of the SOP. The Respondent does not, contrary to what it

alleges, have to respond to new allegations of which it was unaware when the process started. The Complainant submits that the Respondent has ample time at this stage to prepare its submissions on the basis of the added sections and therefore, does not suffer any prejudice as a result of this amendment. While the Complainant agrees that this complaint has been plagued with significant delays, they have impacted both parties equally. The Complainant also submits that the purported 20 new witnesses identified by the Respondent should reasonably have been anticipated as they are linked to the Complainant's initial allegations of lack of accommodation.

B. The Respondent's position

[16] The Respondent contends that the crux of the allegations contained in the Complainant's original complaint concern the Respondent's alleged failure to provide a timely provision of ergonomic equipment and the delay in approving the Complainant's request for Telework and Leave with Income Averaging. These are the issues which the Respondent had to defend before the Commission at the investigation stage.

[17] The Respondent argues that the new allegations of harassment and systemic discrimination have no link to the original complaint, are not mentioned in any of the Investigation Reports considered by the Commission, and are tantamount to filing a new complaint. The Respondent submits that expanding the scope of the complaint so as include sections 10 and 14 of the *Act* would effectively bypass the Commission's referral process at the root of the Tribunal's jurisdiction pursuant to sections 44(3)(a) and 49(1) of the *Act*. The Respondent relies on the Tribunal's position in *Gaucher* at Para. 8:

> The Commission must have considered the essential situation that forms the subject-matter of the inquiry, when it referred the Complaint to the Tribunal. This places certain limits on amendments, which must have their pedigree in the circumstances that were put before the Commission.

[18] The Respondent is of the view that to allow the amendment would seriously undermine the fairness of the process and open up a new and unanticipated route of inquiry. The

Respondent states that out of the 37 witnesses identified during its review of the Complainant's SOP, 20 are new witnesses which the Respondent had not previously anticipated calling and which the Respondent would need to interview in order to respond to the allegations. The Respondent submits that it will take a significant amount of time to locate and interview these witnesses as some are no longer with the Public Service as they have changed jobs, retired or passed away. The Respondent claims to have contacted some of these witnesses and that a number of them could not recall the events set out by the Complainant in her SOP and stated that it was the first time that they were hearing the impugned allegations. In addition, the Respondent's retention policy requires employees to keep documents up to two years and it is therefore unlikely that these potential witnesses will have retained any documents relating to these issues.

[19] The Respondent submits that the Complainant had many opportunities to amend her complaint and yet this motion has been filed two years after the matter was referred by the Commission. Had the Complainant raised these allegations during the investigation of the complaint, the Commission would have interviewed these witnesses to determine the veracity of the allegation and the Respondent would have received the appropriate notice required for the preservation of evidence. The Respondent submits that the significant passage of time will impede its ability to mount a full answer and defence. To permit these allegations to be raised for the first time, over nine years after the filing of the original complaint will cause substantial prejudice to the Respondent. The motion to amend should therefore be dismissed and the Complainant's SOP accordingly amended so as to remove the paragraphs dealing with the allegations of harassment and systemic discrimination.

C. The Commission's position

[20] While the Commission initially indicated that it would not be filing submissions on the Complainant's motion as they would not participating at the hearing in this matter, it reconsidered its position and filed submissions on October 4, 2012. The Commission stated that

it does not object to the Complainant's motion as it is of the view that the amendments do not alter the substance of the complaint and will not prejudice the Respondent.

IV. The Respondent's Supplementary Motion Record

[21] On October 15, 2012, following the Commission's submissions on the motion to amend the complaint, the Respondent filed a Supplementary Motion Record which contained a copy of a memorandum to file authored by George Kolk of the Canadian Human Rights Commission, dated November 15, 2006. In this memorandum, Mr. George Kolk, Manager of Investigations, informed the Complainant's representative that if the Complainant had issues subsequent to the alleged events in the Complaint Form, she should file a new complaint. The Respondent argues that the Commission's current position is inconsistent with its advice of November 15, 2006.

[22] In reply, the Complainant submitted that this evidence was hearsay as the purported author, Mr. Kolk, is not an affiant in the proceedings. The Complainant maintained that regardless, the evidence was wholly irrelevant to the motion and should therefore be disregarded. Indeed, the Complainant submits that there are no cases where a statement purportedly made by a Commission investigator to the Complainant's former representative was replied upon to determine the scope of a complaint. The Complainants contends that communications made by Commission staff to the parties during the investigation process are extraneous and do not assist in determining whether an amendment falls within the scope of the original complaint. Furthermore, the memorandum was written in the course of the first investigation into the Complainant's complaint which was subsequently found to be inadequate by the Federal Court. The Complainant submits that it would be absurd to construe the scope of the complaint based on an investigation that the Federal Court found to be insufficiently thorough.

V. Analysis and Decision

[23] The Tribunal's authority to amend a complaint is well-established and is not challenged by the parties in the present case. The Federal Court clearly affirms the Tribunal's discretion in this regard in *Canada (Attorney General) v. Parent*, 2006 FC 1313 at paragraph 30:

> The Tribunal enjoys considerable discretion with respect to the examination of complaints under subsections 48.9(1) and (2) and sections 49 and 50 of the Act. As for the exercise of that discretion in regard to an amendment request, Mr. Justice Robert Décary wrote in *Canderel Ltd. v. Canada (C.A.)*, 1993 CanLII 2990 (FCA), [1994] 1 F.C. 3, 1993 CanLII 2990 (F.C.A.), that " […] the general rule is that an amendment should be allowed at any stage of an action for the purpose of determining the real questions in controversy between the parties, provided, notably, that the allowance would not result in an injustice to the other party not capable of being compensated by an award of costs and that it would serve the interests of justice."

[24] It is clear that the "complaint" must be interpreted broadly so as to capture the full extent of the complainant's allegations and that it is open to refinement. As long as the substance of the original complaint is respected, or said otherwise, as long as the allegations are by their nature linked, the Complainant and the Commission are permitted to clarify and elaborate upon the initial allegations before the matter goes to a hearing: *Gaucher* at paragraph 11. The line is drawn where the amendment sought to the complaint can no longer be considered a "mere amendment" but becomes substantially a new complaint. "In such a situation, the Commission cannot be said to have requested an inquiry and the Tribunal has no jurisdiction to proceed": *Cook v. Onion Lake First Nation* at paragraph 11.

[25] In addition to establishing a link between the complaint and the amendment, the Tribunal must also examine the possible prejudice that the Respondent could suffer in allowing the Complainant to amend its complaint. The case law does not specify the degree of prejudice that must be demonstrated so as to deny an amendment, but it must be "real and significant". As stated in *Cook v. Onion Lake First Nation* at paragraph 20, there must be "actual prejudice" and "there may be factors such as delay which are implicitly prejudicial. This might include the loss of the investigation and conciliation processes".

[26] In applying these principles to the facts of the present case, I note that the two amendments sought are distinct both in their nature and scope. I have therefore addressed each of them separately, in turn.

A. Adding section 14 of the Act to the Complaint

[27] In establishing whether or not the amendment sought constitutes a “new complaint”, the starting point is to examine the impugned allegations. The Complainant’s harassment allegations are stated at paragraph 142 of her SOP. They read are as follows:

> 142. Over the course of her employment with the Respondent, Ms. Egan was harassed by Respondent employees on the basis of her disabilities. These experiences of harassment included:
>
> > (a) Her Team Leader Ellen Howard once complained to Ms. Egan that all of the disability cases were being "dumped" on her. It was to Ms Howard that Ms Egan was supposed to turn to check her leave balance and salary level, since the Employee Self Service Portal was not accessible to her.
> >
> > (b) Ms Kitchen, the Human Resources contact person for Ms. Egan's writing platform, emailed and telephoned Ms. Egan to complain about the high cost of the writing platform, despite the fact that the cost was not borne by the Hamilton Tax Services Office.
> >
> > (c) The clerk who had been directed to assist Ms. Egan to input her time, Barb Nelson, regularly complained to Ms. Egan and their manager lvano Feltrin because Ms. Egan submitted her materials in an incorrect format. Ms Egan was unfamiliar with the formatting required as the system was not accessible to her.
> >
> > (d) Ms. Egan's Team Leader Ellen Howard authored and distributed a 'Work Disposal Plan for 2003-04" to all members of her team. Ms. Egan and two other colleagues with disabilities were identified as "disabled" to all other members of the team for no apparent purpose. Ms. Egan was embarrassed and upset to be

> characterized in such a reductive way to her colleagues when it was clearly not relevant to the objectives of the document.
>
> (e) Ms. Egan experienced harassment from the local IT department during their visits to her home to install technology for her home office. Mr. Tony Gazzalone and Mr. Brad Moore often made Ms. Egan feel like she was asking too much when they were simply doing what management had assigned to them. On one occasion, Mr. Gazzalone accused Ms. Egan of having too much equipment. He alleged that she already had a second computer at home, when in fact, the equipment he had singled out was a paper shredder.

[28] In addition to these allegations, the Respondent also highlights a number of other harassment allegations raised elsewhere in the Complainant's SOP. In particular:

a. The allegation that Ms. Mary Wesko, a Health Canada employee, stacked binders for Ms. Egan to use as a platform (at paragraph 7 of the SOP);

b. the allegation that Ms. Steacy made the statement during a January 29, 2004 meeting that she did not want to be 'blind-sided' by accommodation requests (at paragraph 82 of the SOP); and

c. the allegation that Mr. Bill Julian said "You put on a good act" (at paragraph 127 of the SOP).

[29] While these incidents are not mentioned in the Complainant's complaint form (CF) or the Commission Investigation Report (IR) she does describe a working environment where she is treated differently than her coworkers (CF, page 2, para. 1; page 4, paras. 1, 3; IR, para. 33.c.). She alleges a disregard for the difficulties associated with her visual disability on the part of Respondent employees. For example, she describes a meeting with Assistant Director Tony Prosia during which she alleges that he minimized all that she had been through and refused to accommodate her visual impairment by letting her use a tape recorder as a way of taking notes in one of their meetings. The Complainant also alleges a disregard on the part of Respondent employees for the measures needed to accommodate the chronic pain she suffered following her accident. These include the allegations that the Respondent ignored her requests for Telework,

which would have enabled her to better manage her pain, and for an ergonomic assessment. The Complainant concludes the complaint form by stating that she believes that she has been the victim of harassment and discrimination in the course of her employment with the Respondent.

[30] While the specific incidents of harassment are absent from the complaint form these allegations all fall within a broader theme: the alleged difficulties faced by the Complainant in her requests for accommodation for her disabilities. If her allegations of harassment are believed, the Complainant's requests for accommodations, be it to the local IT department or to the Human Resources contact person, were met with hostility, often "making her feel like she was asking too much". This is in line with the Commission Investigator's previous observation that "Ms. Cordeiro said that Ms Steacy "made the complainant feel like she was 'not worth it'" (See Investigator's Supplementary Report at paragraph 13) and with the Complainant's allegations in her complaint form that her other requests for accommodation such as Telework and an ergonomic assessment were disregarded. The Complainant does not allege that she suffered harassment in these specific accommodation requests and it is evident that the incidents of harassment described in the Complainant's SOP had not previously been particularized. However, in my view, these incidents elaborate on the Complainant's initial complaint and are sufficiently linked to the initial complaint to satisfy the test for amendment.

[31] Turning to the Respondent's submission that it will be seriously prejudiced by the amendment, I am of the view that the Respondent has had ample time and will have ample opportunity to respond to these allegations. While the Respondent may have identified additional witnesses which it had not previously planned to call, I have not been convinced that the delay has resulted in obtaining their testimony unworkable. It may be that, due to the lapse in time, some of the witnesses called will have difficulty remembering the incidents alleged. This is something that I will consider when they are called to testify. In this regard, I note that I retain jurisdiction, having examined all the evidence provided, to dismiss the Complainant's allegations of harassment should I conclude that the delays incurred have resulted in the Respondent's inability to adequately respond to the allegations thereby compromising the procedural fairness of the process.

B. Adding section 10 of the Act to the Complaint

[32] In addition to the above-stated allegations, the Complainant's SOP contains allegations regarding the Respondent's failure to provide the Complainant with the training and accessible materials that were available to her sighted colleagues. In a section entitled "Access to Training" at paragraphs 110 to 123 of her SOP, the Complainant contends, amongst other allegations:

> a. that on three separate occasions she was turned down for acting assignments as a PM02 position because the required material was not provided in an accessible format and she could therefore not demonstrate her competency (paragraph 112);
>
> b. that she was unable to fill out an Individual Learning Plan ("ILP") which the Respondent created with each employee on an annual basis so as to highlights the employees competencies for improvement and development as the forms were not in an accessible format (paragraph 114);
>
> c. that she was unable to undertake the training recommended by her team leaders on the Campus Direct program as she had to put her face up to the monitor in order to view its content and the experience was too painful (paragraph 115); and
>
> d. that despite her Director's promise to try to provide her with accessible forms to enable the Complainant to become part of a Pre-Qualified Pool which was required to compete for positions, the accessible forms were never provided (paragraph 116).

[33] The Complainant contends that access to this training and materials would have permitted her to fulfill her career aspirations and that the Respondent's failure in this regard resulted in a profound prejudice to her promotional opportunities, contrary to section 10 of the *Act*.

[34] Unlike the allegations of harassment, however, neither the complaint form nor the Commission's investigation discuss a loss of promotional opportunities resulting from the Respondent's discrimination. While the Complainant highlights paragraph 41 of the Investigation Report wherein the Complainant stated that "she was not given training that was accessible to her", this statement is not linked to a loss of promotional opportunities but rather to

the allegation that the Respondent provided her with the equipment it *thought* she would require as opposed to assessing her to ensure that she was provided with the right equipment. This only serves to further exemplify the difficulties faced by the Complainant in her requests to the Respondent for accommodation for her disabilities.

[35] The allegations of loss of promotional opportunities are related to the Complainant's disabilities broadly. As argued by the Complainant: but for the Respondent's discrimination against the Complainant on the basis of her disabilities, the Complainant would have obtained the necessary training and, in light of her excellent work record, would have been promoted. However, I do not think the test is as broad. Adopting such reasoning would mean that any discriminatory act founded on the Complainant's disability, regardless of the Complainant's initial allegations or the Commission's investigation, could later be added to the Complaint. This would disregard the importance of a logical connection or 'nexus' between the facts investigated by the Commission and the new allegations which, in my view, is lacking in this instance.

[36] Issues relating to employment staffing also require different considerations than those surrounding the accommodation of an employee in their current position. In addition to examining the Complainant's performance, consideration must be had, to name a few, for the number and type of promotional processes undertaken by the employer during the relevant period, their relation to the training which the Complainant alleges was inaccessible to her and to the other candidates benefitting from the processes, none of which was investigated at the Commission stage in the present case. In my view, for the Tribunal to now embark on this new and unanticipated route of inquiry would result in a lengthier and more complicated hearing and would require an analysis and examination of allegations that are beyond the investigation conducted at the Commission stage. It is therefore, beyond the Tribunal's jurisdiction: *Canada (Attorney General) v. Canada (Canadian Human Rights Commission),* [1991] F.C.J. No. 334 [Q.L.]. In addition, unlike the situation in *Gaucher,* the Respondent did not receive any notice of these allegations prior to receiving the Complainant's SOP. To allow this amendment and require the Respondent to defend these new allegations would, in my view, undermine the fairness of the process.

[37] For these reasons, I would dismiss the portion of the Complainant's motion to amend the complaint which seeks to include section 10 of the *Act* and I would strike the paragraphs 110 to 123 of the Complainant's SOP which contain the allegations relating to loss of promotional opportunities. I would grant the portion of the motion to amend seeking the addition of section 14 of the *Act* to the complaint.

Signed by

Edward P. Lustig
Tribunal Member

OTTAWA, Ontario
December 12, 2012

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1509/5510

Style of Cause: Pamela Egan v. Canada Revenue Agency

Ruling of the Tribunal Dated: December 12, 2012

Appearances:

Andrew Raven and Lisa Addario, for the Complainant

Samar Musallam, for the Canadian Human Rights Commission

Gillian Patterson, for the Respondent