

Canadian Human
Rights Tribunal



Tribunal canadien
des droits de la personne

Between:

Ashraf Karimi

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

MTS Allstream Inc.

Respondent

Ruling on a Motion to Consolidate the Hearing of Two Complaints

File Nos.: T1616/16210 and T1783/1312

Member: Réjean Bélanger

Date: February 7, 2013

Citation: 2013 CHRT 4

Table of Contents

I.	Motion to Consolidate the Hearing of Two Complaints.....	1
II.	Positions of the Parties.....	1
	A. The Complainant.....	2
	B. The Respondent	4
	C. The Commission	7
III.	Analysis.....	8
IV.	Ruling.....	13

I. Motion to Consolidate the Hearing of Two Complaints

[1] This ruling relates to a request made by the Complainant, Ashraf Karimi, seeking an order consolidating two Canadian Human Rights Tribunal (the Tribunal) Files (Nos. T1616/16210 and T1783/1312) for the purpose of a single hearing.

[2] On November 4, 2010, pursuant to paragraph 44(3)(a) of the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6 (the *Act*), the Canadian Human Rights Commission (the Commission) requested that the Chairperson of the Tribunal institute an inquiry into the complaint of Ms. Karimi against MTS Allstream Inc. (the Respondent). In this first complaint (Tribunal File No. T1616/16210), the Complainant alleges the Respondent engaged in a discriminatory practice, pursuant to section 7 of the *Act*.

[3] On February 1, 2012, the Commission requested an inquiry into a second complaint by Ms. Karimi against the Respondent. In the second complaint (Tribunal File No. T1783/1312), the Complainant alleges the Respondent engaged in a discriminatory practice, pursuant to section 7 of the *Act*; and, that the Respondent retaliated against her in response to her first complaint, in contravention of section 14.1 of the *Act*.

[4] Following a Case Management Conference Call held on November 2, 2012, all parties confirmed that the motion to consolidate the two complaints should be dealt with by way of written submissions.

II. Positions of the Parties

[5] After reading the submissions of the parties on this motion to consolidate, the Tribunal summarizes their respective positions as follows.

A. The Complainant

[6] The purpose of the Complainant's motion to consolidate the proceedings is to allow for a joint hearing of her two complaints.

[7] The Complainant's Notice of Motion lays out the following grounds for the motion:

1. Both complaints involve the same parties.
2. Both complaints contain allegations of disability discrimination and failure to accommodate.
3. The second complaint alleges reprisal for filing the first complaint.
4. There is overlap in both the witnesses to be called and the documents to be relied upon in both complaints.
5. The Complainant will call the same expert witness, a psychiatrist, in relation to both complaints.
6. Both complaints contain similar legal issues.
7. There is no prejudice to any party in hearing both complaints together. Doing so benefits both parties.
8. It is in the Tribunal's best interests with respect to time, expense and consistency in decisions that both complaints are heard together.
9. The *Act*, with particular regard to section 40(4), which does not deal specifically with multiple complaints by a single Complainant, but suggests if there are similar issues of facts and law, complaints can be heard together.
10. And, the Canadian Human Rights Tribunal Rules of Procedure with particular regard to Rule 1(1) with respect to proceedings being conducted in a timely, efficient and expeditious manner.

[8] Paragraphs 2 to 4 of the Complainant's Affidavit in support of the motion outline the allegations made in her two complaints:

2. The primary allegation in my first complaint is gender discrimination. A secondary issues (sic) is disability discrimination and the failure to accommodate.
3. With respect to disability, my first complaint alleges that I was overwhelmed with tasks that I was physically unable to complete upon return from short-term disability. Furthermore, my first complaint alleges a failure to accommodate by the respondent disallowing me to work from home when other employees were permitted to do so.
4. The primary allegation in my second complaint is disability discrimination and a failure to accommodate. A secondary allegation is reprisal for having filed my first complaint.

[9] The following paragraphs of the Complainant's Affidavit summarize her argument as to why she is seeking to consolidate the hearing of her two complaints:

Similar Witnesses

6. Since both complaints are between myself and MTS Allstream Inc., it is likely that the same witnesses will be called to testify at both hearings if heard separately. Originally, there were two individuals noted as respondents to the second complaint, but they are no longer parties.

Similar Documents

7. The documents in both complaints will be similar and include many of the same MTS Allstream policy documents, the governing collective agreement, medical documents and wage loss documents.

Same Expert

8. If the complaints are heard separately, my expert witness, Dr. Kiraly, will have to be called on two occasions at significant expense to myself and significant inconvenience to the witness. Attached to this affidavit and marked as **Exhibit "A"** is a copy of Dr. Kiraly's expert report. Dr. Kiraly is a psychiatrist and will testify as to how the gender discrimination in my first complaint was a significant precipitating factor to my mental health challenges, including depression, that are involved in my second complaint.

Similar Legal Issues

9. In both my first and second complaints, I allege disability discrimination and a failure to accommodate, which was ongoing during the time periods referred to in both complaints. As well, my second complaint alleges reprisal in response to my

first complaint. It seems to me that these related legal issues should be decided together.

No Prejudice to the Respondent

10. There is no prejudice to the respondent in having the complaints heard together. Doing so will actually reduce the total hearing time by avoiding the unnecessary repetition of information and reduce inconvenience to the respondent's witnesses.
11. Through counsel, I have asked MTS Allstream Inc. to consent to consolidate the two hearings, but they have refused, hence the necessity for this motion.

Hearing the Complaints Together is Best for the Tribunal

12. Hearing the complaints together will save the Tribunal time and expense by reducing total hearing time.
13. The analysis of disability discrimination and failure to accommodate which will be required both complaints and addressing issues of credibility ought to be dealt with the tribunal together to avoid the risk of inconsistent findings and results.

B. The Respondent

[10] The Respondent's position with respect to the Complainant's motion is stated in the first paragraph of its submissions:

1. The Respondent MTS Allstream Inc. ("Allstream") opposes the Complainant's motion to consolidate Tribunal Files No. T1783/1312 (the "First Complaint") and T1616/16210 (the "Second Complaint") (together the "Complaints") so that both files may be heard together. Allstream respectfully submits that the motion should be denied.

[11] The essence of the Respondent's position is found in the following abstract of paragraph 4 of its submissions:

4. [...] While the Complaints both relate to the Complainant's employment at Allstream, they concern different time periods, different grounds of alleged discrimination and make specific allegations against different individuals.

[12] Specifically, the following is a list of what I understand to be the main objections of the Respondent in opposition to the consolidation of the two complaints:

- In the first complaint, gender was the only alleged ground of discrimination (see Respondent's submissions at para. 5).
- The first complaint made reference to the Complainant's alleged disability but did not allege that the Complainant was subjected to discrimination or any adverse treatment on the basis of that alleged disability (see Respondent's submissions at para. 5).
- The Tribunal does not have jurisdiction to inquire into allegations of discrimination on any other ground, including disability, in respect of the first complaint (see Respondent's submissions at para. 6).
- The allegations of discrimination in the two complaints cover different time periods and refer to actions by different people. Namely, the first complaint makes allegations against Mr. Picard for the period of March 2005 to October 2008. Mr. Picard is not mentioned in the second complaint. The second complaint makes allegations against Mr. Rooney for the period of October 2008 to February 2010. Mr. Rooney is not mentioned in the first complaint (see Respondent's submissions at paras. 7 & 8).
- Consolidation of the two complaints is not necessary to determine the allegation of reprisal (see Respondent's submissions at para. 9).
- The parties will be required to call different witnesses and to present different documentary evidence in respect of each complaint but, since there is significant differences between the allegations contained in the two complaints, there will be minimal repetition of evidence (see Respondent's submissions at para 10).
- "[I]n light of the wholly different allegations in each of the Complaints, there is no risk of inconsistent findings" (Respondent's submissions at para. 11).

- “The consolidation of the Complaints will not save the parties time or expense” (Respondent’s submissions at para. 13).

[13] According to the Respondent, it will be prejudiced by the consolidation of the two complaints. The following is what I understand to be the Respondent’s main arguments in this regard:

- As the first complaint alleged discrimination on the basis of gender only, consolidation of the two complaints would expand the grounds of the first complaint to include allegations of discrimination on the basis of disability (see Respondent’s submissions at paras. 16-18).
- “The Tribunal does not have jurisdiction to inquire into allegations of discrimination on the basis of disability in respect of the First Complaint” (Respondent’s submissions at para. 17).
- “[I]f the Complainant is permitted to expand the grounds of the First Complaint...[t]his would place Allstream in the unfair position of having to defend itself against new allegations that are more than five years old” (Respondent’s submissions at para. 19).
- “If the Complaints are heard together, Allstream respectfully submits that significant procedural protections would be necessary in order to ensure that there is no confusion between the Complaints to the prejudice of Allstream” (Respondent’s submissions at para. 20).
- “In addition to calling separate witnesses and documentary evidence for each of the Complaints, the parties will likely be required to make separate arguments in respect of each Complaint. As noted above, this is likely to extend the length of

the hearing significantly and use more of the Tribunal's limited resources” (Respondent's submissions at para. 20).

C. The Commission

[14] The Commission, in a letter dated September 10, 2012, responded to the motion to consolidate the hearing of the complaints as follows:

The Commission does not take a position regarding the Motion to merge both complaints in a single hearing in this matter. However, normally if both complaints involve the same parties and the facts have a certain connectivity in the employment relationship, it may be in the interests of justice to have a single hearing before the same member.

Having said, the parties can put forth the factual and legal arguments which justifies their respective positions and the Tribunal can make the determination which it deems appropriate which ensure procedural fairness, efficiency of costs and the interest of justice.

We bring the attention of the parties the following matter on this issue *Karen Schuyler v. Oneida Nation of the Thames*, 2005 CHRT 10 (CanLII). Member Hadjis states at par.8 of his decision the following:

‘(8) The Tribunal has had occasion in the past to rule on whether to allow the amendment of an existing complaint of discrimination in order to add a claim of retaliation under s. 14.1 (see e.g. *Kavanagh v. Correctional Services of Canada* (May 31, 1999), T505/2298 (C.H.R.T.); *Bressette v. Kettle and Stony Point First Nation Band Council*, 2004 CHRT 2 (CanLII), 2004 CHRT 2; *Blondin v. Purolator Courier Ltd.*, 2005 CHRT 7 (CanLII), 2005 CHRT 7). It has been observed in these cases that it makes sense for evidence of acts made in reprisal to an existing human rights complaint, to be heard within the context of the hearing into that complaint. Before granting such amendments, however, the Tribunal should be satisfied that the respondent is not prejudiced by a lack of sufficient notice of the new allegations. The respondent must be given the chance to properly defend itself.’

[15] In a further correspondence to the parties and to the Tribunal, dated October 1, 2012, the Commission provided a copy of the decision rendered in *Anne Marsden v. Public Works and Government Services Canada and Courts Administration Service*, 2012 CHRT 21. The Commission explains the utility of this decision as follows:

Since the issue of consolidation is a live issue between the parties, I am attaching a recent decision of the Tribunal on a similar issue which can inform.

III. Analysis

[16] In *Lattey v. Canadian Pacific Railway*, 2002 CanLII 45928 (CHRT) [*Lattey*], the Tribunal noted that the issue of whether to hold a single hearing or multiple hearings into complaints is, in the absence of any specific statutory direction, a procedural matter that the Tribunal has the authority to address as master of its own procedure (see *Lattey* at para. 12; and, *Cruden v. Canadian International Development Agency & Health Canada* and *Wheatcroft v. Canadian International Development Agency*, 2010 CHRT 32 at paras. 10-11). In determining requests to consolidate hearings, some of the factors the Tribunal considers include:

1. The public interest in avoiding a multiplicity of proceedings, including considerations of expense, delay, the convenience of the witnesses, reducing the need for the repetition of evidence, and the risk of inconsistent results;
2. The potential prejudice to the respondents that could result from a single hearing, including the lengthening of the hearing for each respondent as issues unique to the other respondent are dealt with, and the potential for confusion that may result from the introduction of evidence that may not relate to the allegations specifically involving one respondent or the other; and
3. Whether there are common issues of fact or law.

(*Lattey* at para. 12)

Ultimately, the Tribunal must ensure that its proceedings are conducted as informally and expeditiously as the requirements of natural justice and the rules of procedure allow (see subsection 48.9(1) of the *Act*; and, Rule 1(1)(c) of the Tribunal's *Rules of Procedure* (03-05-04)).

[17] Many of the Respondent's objections to the consolidation of the hearing of the two complaints derive from its interpretation of the first complaint form. Based on this form, it has concluded that the inquiry into the first complaint should be restricted to discrimination on the basis of gender, and that the Tribunal is without jurisdiction to inquire into allegations of

discrimination on the basis of disability with respect to the first complaint. According to the Respondent, it will be significantly prejudiced in its ability to defend against new allegations that are permitted to bleed into the first complaint.

[18] However, in analyzing the present motion, I find limiting oneself to the examination of the first complaint form gives an incomplete picture of the matter. Along with the submissions of parties on the present motion, the Tribunal also has the benefit of Statements of Particulars from the parties regarding the first complaint. In her motion materials and in her Statement of Particulars with respect to the first complaint, the Complainant explains the nature of her first complaint as including allegations of discrimination on the basis of disability. In this regard, the following statement from the Tribunal is instructive:

The complaint form is there primarily for the purposes of the Commission. It is a necessary first step, which raises a set of facts that call for further investigation. The complaint form provides an important starting point and is inherently approximate. It was never intended to serve the purposes of a pleading in adjudicative process leading up to a hearing. **It is the Statements of Particulars, rather than the original complaint, that set the more precise terms of the hearing.**

[...]

As long as they can be tracked back to the facts and allegations that went before the Commission, and do not prejudice the Respondent, amendments should be allowed. This assists all of the parties in “determining the real questions in controversy between the parties”.

*(Gaucher v. Canadian Armed Forces, 2005 CHRT 1, at paras. 10 and 13, **emphasis added**)*

[19] The present motion is not to amend the first complaint or, conversely, to strike out portions of the Complainant’s Statement of Particulars with respect to the first complaint. For the purposes of the present motion, it is not necessary for the Tribunal to determine whether an allegation of discrimination on the basis of disability properly forms part of the first complaint.

[20] Whether there is one hearing or two, the Complainant’s allegations will remain the same. The Respondent’s concerns about defending against “new allegations” on the basis of disability

can be addressed through the exchange of Statements of Particulars with regard to the second complaint. At that point, the Respondent will be able to address and challenge any perceived conflation of the facts and issues with respect to the first and second complaint prior to the hearing. As mentioned above, it is the parties' Statement of Particulars that set the more precise terms of the hearing. Therefore, I do not accept the Respondent's contention that consolidating the hearing of the two complaints will result in prejudice through the conflation of the facts and issues between the two complaints.

[21] The Respondent also argues there are insufficient common issues of fact and law to warrant consolidation. According to the Respondent, the two complaints refer to different time periods and make allegations that involve different individuals. The Respondent adds that as the Complainant alleges different types of discrimination, different legal tests apply.

[22] In my view, there are common issues of fact and law in this matter and I will address each of the Respondent's arguments in this regard in turn.

[23] First, while the two complaints refer to different periods of time, those time periods are continuous. On this issue, I would add that the second complaint includes an allegation of retaliation for having filed the first complaint. Since the allegation of retaliation covers the period following the filing of the first complaint, "it makes sense for evidence of acts made in reprisal to an existing human rights complaint, to be heard within the context of the hearing into that complaint" (*Karen Schuyler v. Oneida Nation of the Thames*, 2005 CHRT 10 at para. 8).

[24] Second, the Respondent argues, since the actors in each of the two complaints are not the same (see paras. 7 & 8 of the Respondent's submission), there are insufficient common issues of fact between the two complaints. I wish to point out that this is partly inexact since Jennifer Bazinet, who was the Complainant's manager at one time, is mentioned in the two complaints. According to the Complainant, Ms. Bazinet has been involved in some of the incidents

mentioned in both complaints. Here are some abstracts of her allegations made in each of her complaints where the name of Jennifer Bazinet is mentioned:

Complaint Form #1 (at page 4, para. 3):

On Feb. 4 2008 my request for a Project Management course was rejected by the manager, Jennifer Bazinet, in my new department. The manager informed me that the course “was not in line with your skills and development.”

Complaint Form #1 (at page 4, para.5):

On March 5, 2008, Jennifer Bazinet and HR set up a meeting for me [...] in the meeting they requested that I should change my attitude.

Complaint Form #2 (at para. 10):

On October 26, 2009, Jennifer Bazinet (“Bazinet”), Karimi’s immediate manager, told Karimi that she would have to return to work on a full-time basis the following week.

Complaint Form #2 (at para. 12):

On Nov. 19, 2009, Karimi met with MTS representatives, including Bazinet [...] Karimi was told that MTS would no longer accommodate her working 3 days per week as it had done since March 31, 2009. In spite of Dr. Malkin’s October 22, 2009 note confirming that Karimi could not return to work full-time[...]

Complaint Form #2 (at para. 22):

Karimi submits that MTS is vicariously liable for all actions taken by Rooney. [...] Rooney devised the discriminatory practices implemented by Bazinet, Stammer and Van Horne.

[25] That said, overall, I do not find it relevant that the first complaint makes allegations involving different individuals than the second. MTS Allstream Inc. is the respondent in both complaints and the individuals named in each complaint are its employees. The Complainant explains in her two complaints how each one of them, at different moments, was involved in the alleged discriminatory practices. Hearing from these people in a single hearing would facilitate the examination and the understanding of the evolution of the Complainant’s situation.

[26] Third, the Respondent argues the two complaints make allegations involving different types of discrimination, which calls for different legal tests. However, both complaints allege a discriminatory practice under section 7 of the *Act*. While the second complaint also includes an allegation under section 14.1, that does not change the legal test or burden that the Complainant must establish in both complaints: a *prima facie* case. That is, in both complaints, the Complainant must present a case “...which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent...” (*Ontario Human Rights Commission v. Simpsons-Sears*, [1985] 2 SCR 536 at para. 28).

[27] Finally, the Respondent is of the view that there will not be any efficiency gained by having one hearing. Specifically, the Respondent contends the length and complexity of one hearing will be affected by the separate witnesses, documentary evidence, and legal argument that will be advanced to address each complaint.

[28] I am of the opinion that holding only one hearing to cover the facts alleged in the two complaints would save time and money for both parties, for some of the witnesses and for the Tribunal as well. None of the witnesses would have to testify twice. This would be the case for at least the following potential witnesses: the Complainant, the Complainant's expert, Dr. Malkin, and Ms. Jennifer Bazinet. Furthermore, the time for opening and closing statements and for argumentation would be reduced. Overall, I believe there is an economy of time to be gained by having a single hearing, which would allow both complaints to proceed more expeditiously pursuant to subsection 48.9(1) of the *Act* and Rule 1(1)(c) of the Tribunal's *Rules of Procedure* (03-05-04).

[29] Therefore, I conclude that there are common issues of fact and law between both complaints. Furthermore, consolidating the hearing of the two complaints would shorten the time required for the hearing and will not prejudice the Respondent. As a result, I believe a single hearing into both complaints is warranted. However, the fact that I have concluded that the

two complaints should be dealt with at a single hearing should not be interpreted as meaning that either of the two complaints is well founded in fact or in law.

IV. Ruling

[30] For the above mentioned reasons, the Complainant's request to consolidate the hearing of her two complaints is granted. The Tribunal will conduct one hearing for both complaints.

Signed by

Réjean Bélanger
Tribunal Member

Ottawa, Ontario
February 7, 2013