Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Between:

Leslie Palm

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

International Longshore and Warehouse Union, Local 500,
Richard Wilkinson and Cliff Willicome

Respondents

Ruling

File Nos.: T1625/17110, T1626/17210 and T1627/17310
Member: Robert Malo
Date: August 25, 2014
Citation: 2014 CHRT 25

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I. Background

[1] The Canadian Human Rights Tribunal (the Tribunal) is faced with a motion by the respondent, the International Longshore and Warehouse Union, Local 500 (hereinafter I.L.W.U.), in which the respondent is seeking the dismissal of the complaints of the complainant, Leslie Palm, in the above-noted files.

[2] In its motion, the respondent submits that the complainant's complaints against the respondent and the other respondents, Richard Wilkinson and Cliff Willicome, would, in its opinion, constitute an abuse of process.

[3] Moreover, the respondent alleges in its motion that the complainant allegedly altered and withheld certain documents which it believes demonstrated a pre-existing condition of depression.

[4] The respondent alleges that, in so doing, the complainant allegedly committed fraud by altering said documents prior to submitting them. Furthermore, she deliberately withheld information and these documents. Thus, the complainant's negligent conduct misled the respondents and the Tribunal about her lost wages claim, which is entirely unsupported by the existing medical evidence.

[5] The respondent also submits that the complainant's complaints must be dismissed without a hearing on the merits of the evidence, as said hearing would involve unnecessary and unjustified costs. The respondent claims that there is no disagreement in respect of the material facts of this case. In that regard, it argues that the complainant's complaints cannot be allowed legally.

[6] Also in that regard, the respondent argues that the Federal Court of Appeal should have affirmed the authority of the Tribunal to dismiss complaints that would constitute an abuse of process, in which there is no dispute over the material aspect of the facts, and which would only involve questions of law.

[7] In the summary of its motion, which contains approximately 181 paragraphs, the respondent states the following:

> « 178. In 2009, Ms. Palm filed separate complaints against each of the three remaining respondents plus her two employers. After an investigator concluded that Ms. Palm's complaints should be dismissed, the Canadian Human Rights Commission referred all five complaints to the Tribunal. Since that time, however, the circumstances have fundamentally changed in the following ways.
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> a. Ms. Palm has entered into a binding settlement agreement with the employer and employer representative and has received very close to the maximum amount of compensation permitted by statute for pain and suffering from each. In addition to fulfilling the remedial purpose of the Code, this settlement has effectively precluded any finding of liability against the two employers. Because any finding of liability against the remaining respondents would necessarily entail a finding of liability against the employers – an impossibility in law- there can be no such finding.
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> b. Even if a finding against the remaining respondents were legally possible, such a finding would be entirely unsupported by the facts. Neither the pleadings nor the extensive document disclosure process has revealed one scintilla of evidence that Ms. Palm suffered discrimination because of her gender – a fundamental prerequisite for a finding of liability under the Code.
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> c. Ms. Palm has behaved in bad faith throughout the document disclosure process by withholding and fraudulently altering documents in an apparent effort to mislead the Tribunal and the Respondents about her pre-existing medical condition.
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> d. Ms. Palm has repeatedly abused the Tribunal's processes in an effort to add to the expense and delay suffered by the Respondents.

[8] It also adds as follows:

> 179. The Respondents ask that the Tribunal dismiss Ms. Palm's three remaining complaints on the ground that their continued litigation constitute an abuse of process.
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> 180. In light of Ms. Palm's bad faith and abuse of process in the conduct of these complaints, the Respondents also ask that the Tribunal make an award of costs against Ms. Palm.
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> 181. The Respondents request an in-person hearing before the Tribunal for the purpose of making submissions.

II. Response of the complainant

[9] On March 3, 2014, the complainant submitted the following arguments against the respondent's motion.

[10] The complainant argued that the respondents did not provide detailed and dated evidence that the complaints she filed were allegedly made in bad faith or on unwarranted grounds. The complainant indicates that she is of the opinion that detailed evidence in support of her complaints, along with the introduction of witnesses, would provide a better assessment of the events at issue.

[11] The complainant also indicates that the respondents' arguments are untruthful and contain discrepancies and changes in the facts presented in their defence.

[12] The complaints that the complainant filed arise from the fact that the respondent allegedly supported male employees who are the subject of these complaints in maintaining a known campaign of altering her hours of work in the course of obtaining additional work on weekends.

[13] The complainant reiterated the fact that she had allegedly been the victim of harassment, intimidation, isolation and discrimination, and these reprehensible acts allegedly had an adverse effect on her. She refers the Tribunal to the investigation report issued by the "British Columbia Maritime Employers Association" (BCMEA) on the harassment investigation into those actions.

[14] She also notes a discrepancy in the arguments presented by the respondent with respect to the hours worked contrary to the submissions made by the respondent.

[15] She also made reference to the fact that Mr. Wilkinson had allegedly intentionally and fraudulently altered her hours of work. In that regard, her male co-workers allegedly continued to benefit financially from that fraud contrary to the provisions of section 9(1) and 10 of the *Canadian Human Rights Act* (the *Act*).

[16] She categorically denies that Mr. Wilkinson was subjected to disciplinary sanctions for his conduct against her.

[17] She submits that from the beginning of this case, she filed five separate complaints against the respondents and that a settlement agreement was reached in two of them.

[18] The complainant alleges that the settlement agreements are not relevant in this case and she submits that said settlement agreements do not affect the liability of the other respondents for their conduct against her.

[19] The complainant also categorically denies that she fraudulently altered certain documents she submitted and submits that the medical documents she produced contain information that she considers relevant.

[20] She also submits that the allegation that there is no other valid remedy with respect to the other respondents on the basis of her current complaints would constitute an insult to the integrity of the Tribunal and she categorically denies the following proposition put forward by

the respondent: “the employer is the only party that can provide any other meaningful remedies” (see page 4 of the complainant’s argument).

[21] The complainant strongly disagrees with the respondents’ proposition that the union is not able to control the conduct of the members in the workplace and she claims that she is aware of certain current and past contradictions in that statement.

[22] The complainant denies that the amendments to the retaliation complaint she filed would constitute an abuse of process and she indicates that the Tribunal allowed her retaliation complaints based on the facts and submissions she provided.

[23] Thus, the complainant claims that the amendments to the retaliation complaint constitute a separate complaint from the original complaints she previously filed, and that, therefore, any motion that may be allowed to dismiss her original complaints should not affect the retaliation complaints she filed.

[24] With regard to some of the statements made by Mark Keserich, longshoreman and President of ILWU, Local 500, particularly with respect to the fact that the union allegedly took measures within its powers to identify and rectify situations involving a woman working in a male-controlled physical environment like that of longshoremen, the complainant indicates that no such measures were taken.

[25] She submits that appropriate and reasonable measures could have been applied long before by the respondents to prevent complaints such as the ones she filed.

[26] Finally, the complainant refers to page 8, paragraph 30 of the respondent’s motion and submits that this is a clear harassment and intimidation tactic on the part of the respondents. She once again argues that it is a clear indication of the paucity of measures adequately implemented by the union to rectify the status quo and the mentality she described as being “the good old boys club”.

III. Position of the Human Rights Commission (the Commission)

[27] The Commission submits that the Tribunal may summarily dismiss a complaint if the Tribunal considers that the hearing of a complaint would constitute an abuse of process.

[28] The Commission alleges that the Tribunal would error in law and would exceed its jurisdiction if it were to summarily dismiss a complaint that does not constitute an abuse of process. In that regard, the Commission cites *Cremasco*[1].

[29] The Commission submits that in the federal human rights system, the jurisdiction to dismiss on a preliminary basis a complaint, which does not have a reasonable chance of success, rests with the Canadian Human Rights Commission and not the Canadian Human Rights Tribunal, as shown in *Harkin*[2].

[30] Based on the statutory provisions creating the Canadian Human Rights Tribunal, the Tribunal does not have any inherent power to dismiss a complaint without a full hearing to establish a *prima facie* case of discrimination.

[31] This situation would be different from the situation in British Columbia, where the British Columbia Human Rights Tribunal has the statutory authority to dismiss a complaint without a hearing if such a complaint is unlikely to have a reasonable chance of success (section 27(1)(*c*) of the British Columbia Human Rights Code).

[32] The Commission refers to the provisions of section 41 of the *Act*, which states that the Commission shall deal with any complaint filed with it unless in respect of that complaint it

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[1] *Canada (Human Rights Commission) v. Canada Post Corp.*, 2004 FC 81 at para. 17 [*Cremasco*], aff'd in *Canada (Human Rights Commission) v. Canada Post Corp.*, 2004 FCA 363.
[2] *Harkin v. Canada (Attorney General)*, 2009 CHRT 6, at. para. 20.

appears to the Commission that the complaint is trivial, frivolous, and vexatious or made in bad faith.

[33] Similarly, under the provisions of section 49 of the *Act*, when a complaint is referred to the Tribunal for inquiry, it is because the Commission is satisfied that, having regard to all the circumstances of the complaint, a complaint is warranted.

[34] Thus, from the moment the Commission refers a complaint to the Tribunal, the Tribunal is subject to a process that guarantees the hearing of a complaint on the merits.

[35] When a motion to dismiss a complaint for abuse of process is filed with the Tribunal as a preliminary motion, the Tribunal must use its power to dismiss a complaint on such a motion with extreme caution and only in the clearest of cases (see the case law submitted by the Commission in that regard).[3]

IV. Response of the respondent I.L.W.U. in respect of the responses of the complainant and the Commission

[36] In its reply, the respondent reviewed the complainant's argument in respect of the complainant's response to its motion to dismiss.

[37] It indicates that the complainant did not provide sufficient explanations regarding the allegations she made in her complaints against the respondents.

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[3] *Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.), Local 79*, [2003] S.C.J. No. 64 (Q.L.), at paras 37, 43 and 51; *Prassad v. Canada (Minister of Employment and Immigration)*, [1989] 1 S.C.R. 560 at paras. 16-18; *Cremasco et al v. Canada Post Corporation* (2002), 45 C.H.R.R. D/410 (aff'd: *Canadian Human Rights Commission v. Canada Post Corp.*, 2004 FC 81); *Buffet v. Canada (Canadian Armed Forces)*, [2005] C.H.R.D. No 9, at para. 39; *Blencoe v. British Columbia (Human Rights Commission)*, [2000] S.C.J. No 43, at para. 120.

[38] It maintains that the allegations contained in the complainant's complaints are not based on credible evidence and that the allegations remain vague despite the numerous opportunities she was given to clarify those allegations.

[39] Moreover, the respondent maintains that the complainant did not provide sufficient explanations regarding the fact that she did not withhold or alter certain medical documents. The respondent submits that the complainant's conduct was deceitful. In addition, the complainant allegedly engaged in fraud, which required answers from the complainant about her conduct.

[40] The respondent submits that the complainant allegedly misled and made false statements in her reply to the respondent's motion.

[41] Furthermore, the respondent replied to the complainant's contentions regarding the Tribunal's confidentiality orders in respect of the disclosure of her medical reports, and also replied to the complainant's contentions regarding the privileged nature of the settlement agreement allegedly entered into by other respondents and the Commission. In that regard, the respondent submits that the discussions pertaining to that settlement agreement are not relevant to the proceedings currently pending in this case.

[42] With respect to the allegations set out in the response of the Commission, the respondent referred to the provisions set out in *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, [2012] FC 445 ("*First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indian Affairs and Northern Development Canada) (First Nations Child and Family Caring Society of Canada)*"), where the decision of the Honourable Madam Justice Mactavish was upheld by the Court of Appeal (2013 FCA 75).

[43] Particularly, the respondent relied on the provisions set out in *First Nations Child and Family Caring Society of Canada*, cited above, in which certain provisions of *Cremasco* and

Harkin, cited above, were upheld (see paras. 138, 139 and 140 of *First Nations Child and Family Caring Society of Canada*).

[44] Also in its rebuttal argument, the respondent referred to the fact that the authorities on abuse of process are applicable in cases where there is no dispute as to the facts and where the underlying issue is a pure question of law (para. 143 of *First Nations Child and Family Caring Society of Canada*).

[45] In that regard, the respondent submits that the facts of this case are not in dispute, or that there is no conflict in the evidence, and that there is therefore a clear abuse of the process currently underway.

[46] More specifically, the respondent notes that the complainant did not present any clear evidence of the discrimination alleged by the complainant on the basis of sex and in that respect, the complainant's allegations are too vague, unparticularized and unsupported by the allegations contained in the complainant's complaints. It also continues to maintain that the complainant altered and withheld certain documents and that by so doing she attempted to mislead the Tribunal.

[47] In conclusion, the respondent submits that after six years of proceedings in this case, the complainant has not provided sufficient details and that this constitutes non-compliance with the *Act*. Also, the conduct of this case has shown that there is insufficient evidence to support the complainant's allegations and that, once again, the complainant has abused the process currently underway before the Tribunal and the parties' resources.

V. The law

[48] The Tribunal properly reviewed the motion to dismiss of the respondent, the response of the complainant and the Commission, and the reply of the respondent, as described in the first part of this decision.

[49] However, after analyzing the relevant statutory provisions and the applicable case law, the Tribunal arrived at the decision not to allow the respondent's motion to dismiss for the reasons set out below.

[50] In a recent decision of the Federal Court, *First Nations Child and Family Caring Society of Canada*, the Federal Court had occasion to specifically address the issue of the Tribunal's power to decide issues that could result in the dismissal of a complaint without conducting a full hearing on the merits of the complaint that provides the parties with an opportunity to adduce *viva voce* evidence.

[51] In that application for judicial review, the Honourable Madam Justice Mactavish of the Federal Court reviewed the underlying principles applicable to such an issue.

[52] In particular, Justice Mactavish addressed the question referred to her by the Commission that stated that the *Act* and the jurisprudence only allowed the Tribunal to dismiss a complaint without a full hearing on the merits in limited circumstances: that is, where there had been an abuse of process, including an undue delay in the process.

[53] After reviewing the applicable provisions, namely, sections 48.9(1), 48.9(2), 49(1), 53(1), 50(1), 50(3)(*c*), 50(3)(*e*) of the *Act*, in her analysis, the Honourable Madam Justice Mactavish refers to the fact that administrative tribunals are "masters of their own procedure" (see para. 129 of the decision).

[54] She also cites *Prassad v. Canada (Minister of Employment and Immigration)*, [1989] 1 S.C.R. 560, where, at paragraph 16, the Supreme Court states:

> [16] In order to arrive at the correct interpretation of statutory provisions that are susceptible of different meanings, they must be examined in the setting in which they appear. We are dealing here with the powers of an administrative tribunal in relation to its procedures. As a general rule, these tribunals are considered to be masters in their own house. In the absence of specific rules laid down by statute or regulation, they control their own procedures subject to the proviso that they comply with the rules of fairness and, where they exercise judicial or quasi-

> judicial functions, the rules of natural justice. Adjournment of their proceedings is very much in their discretion.

[55] The Tribunal enacted its own rules of procedure on May 3, 2004, which implies a distinction with respect to *Prassad*, noted above.

[56] However, the Honourable Madam Justice Mactavish states, with respect to the Tribunal's power as defined in the *Act*:

> [132] Nor is there anything in the Act or the Tribunal's Rules that would preclude the Tribunal from deciding such a motion, as long as it provides the parties with a "full and ample opportunity" to adduce the evidence necessary to decide the issue and to make submissions. The process followed by the Tribunal in relation to the hearing of the motion must also be fair, and the rules of natural justice must be respected.
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> [133] The applicants say that the jurisprudence has established that the Tribunal may only dismiss a complaint on a preliminary motion **in the clearest of cases, and then only where proceeding with the case would amount to an abuse of process**. (Emphasis added.)

[57] In emphasizing certain passages from *Cremasco*, decision written by the Honourable Mr. Justice von Finckenstein, she refers to the fact that, according to that decision, the Tribunal is not obliged to hold a full hearing in relation to every complaint that the Commission refers to it.

[58] The Honourable Madam Justice Mactavish also cited certain passages from *Harkin* and *Terry Buffett v. Canadian Forces* (*Buffet*), particularly *Buffet*:

> [140] I do, however, understand the Government to agree with the statement in *Buffet* that the Tribunal's power to dismiss a human rights complaint in advance of a full hearing on the merits **should be exercised cautiously, and then only in the clearest of cases**: above at para. 39. I also agree with this statement. (Emphasis added.)
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> [141] Most human rights cases are highly dependent on their individual facts and those facts are often hotly contested. As a result, many cases involve serious

> issues of credibility. **While it is open to the Tribunal to receive evidence by way of affidavit, the more contested the facts and the greater the issues of credibility, the less appropriate this will be. Such cases may well require a full hearing on their merits, including *viva voce* evidence in chief and cross-examinations held in the presence of a Tribunal member**. (Emphasis added.)
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> [142] Similarly, where the issues of fact and law are complex and intermingled, it may well be more efficient to await the full hearing before ruling on the preliminary issue: see *Newfoundland (Human Rights Commission) v. Newfoundland (Department of Health)*, [1998] CanLII 18107 (NL CA), (1998), 164 Nfld. & P.E.I.R. 251, 13 Admin. L.R. (3d) 142 at para. 21.

[59] As indicated in *First Nations Child and Family Caring Society of Canada*, the Tribunal "will have to consider the facts and issues raised by the complaint before it, and will have to identify the appropriate procedure to be followed so as to secure as informal and expeditious a hearing process as the requirements of natural justice and the rules of procedure allow" (see para. 148 of the decision).

[60] Also, the Tribunal notes the words of the Honourable Madam Justice Mactavish at paragraph 149 where she states:

> [149] However, the process adopted by the Tribunal will have to be fair, and will always have to afford each of the parties "a full and ample opportunity to appear[,] ... present evidence and make representations" in relation to the matter in dispute.

[61] In light of the case law submitted, the Tribunal would also like to refer to the case law of the Supreme Court of Canada in *Blencoe v. British Columbia (Human Rights Commission)* (*Blencoe*), [2000] S.C.J. No. 43.

[62] In *Blencoe*, where the Supreme Court of Canada considered the abuse of process, it is stated:

> [120] In order to find an abuse of process, the court must be satisfied that, "the damage to the public interest in the fairness of the administrative process should the proceeding go ahead would exceed the harm to the public interest in the enforcement of the legislation if the proceedings were halted" (Brown and Evans,

> supra, at p. 9-68). According to L'Heureux-Dubé J. in Power, supra, at p. 616, "abuse of process" has been characterized in the jurisprudence as a process tainted to such a degree that it amounts to one of the clearest of cases. In my opinion, this would apply equally to abuse of process in administrative proceedings. **For there to be abuse of process, the proceedings must, in the words of L'Heureux-Dubé J., be "unfair to the point that they are contrary to the interests of justice" (p. 616). "Cases of this nature will be extremely rare" (Power, supra, at p. 616). In the administrative context, there may be abuse of process where conduct is equally oppressive**. (Emphasis added.)

[63] In the Tribunal's analysis of the respondent's motion, the parties present had the opportunity to submit their written arguments.

[64] In this respect, the parties had an opportunity to express their views, and the Tribunal is of the opinion that the rules of natural justice and procedural fairness with respect to the respondent's motion were complied with. The Tribunal does not consider that a *viva voce* hearing is necessary to dispose of the respondent's motion for the following reasons.

[65] The Tribunal also reviewed the complainant's and the respondent's Statement of Particulars, which contains the facts alleged by both parties, as well as a related amendment to add a reprisal complaint under the provisions of section 14.1 of the *Act*.

[66] The Tribunal noted that there is a significant discrepancy between the allegations in the respondent's motion to dismiss and those in the response of the complainant in respect of the facts underlying and relating to the complaints filed by the complainant against the respondents.

[67] As such, there is no consensus between the parties regarding the facts alleged by both sides, and therefore, I do not find that this is one of the clearest of cases as suggested by the case law to dismiss a complaint on a preliminary motion, such as the one of the respondent (see paragraphs 58 and 62 above).

[68] Without limiting the seriousness of the allegations and criticisms contained in the respondent's motion to dismiss in order to conclude, according to the respondent's submissions,

that there is an abuse of process, the Tribunal finds that to dispose of this case based on this motion without giving the complainant an opportunity to fully and completely present her evidence with respect to the complaints she filed against the respondents would be significantly detrimental to the complainant's rights in this case.

[69] Indeed, the respondent's very detailed motion alleges a series of facts that are far from being admitted by the complainant, as evidenced by the response of the complainant in that regard.

[70] In light of the foregoing, and having regard to the fact that the Tribunal is the master of its own procedure as set out in *First Nations Child and Family Caring Society of Canada*, noted above, the Tribunal is of the view that a hearing on the merits would provide better compliance with the rules of natural justice and procedural fairness with respect to the complaints made by the complainant and would certainly better serve the interests of justice.

[71] Indeed, given the complexity of the respondent's motion and the responses of the other parties as mentioned in the first part of this decision and the parties' amended Statements of Particulars, these proceedings indicate to the Tribunal that they are certainly not proceedings that would be unfair "to the point that they are contrary to the interests of justice" (see *Blencoe*, *supra*, para. 120).

[72] *A fortiori*, I adopt the comments of the Honourable Madam Justice Mactavish in *First Nations Child and Family Caring Society of Canada*, where she states at paragraph 141 that "the more contested the facts and the greater the issues of credibility, the less appropriate this will be. Such cases may well require a full hearing on their merits, including *viva voce* evidence in chief and cross-examinations held in the presence of a Tribunal member".

[73] It is therefore this attitude that I plan to adopt in this case and if, in light of the evidence presented by the complainant to establish a *prima facie* case for its complaints against the respondents, said evidence was not established, in the respondents' view, it will be up to the

respondents to resubmit its motion for dismissal or non-suit, at which time, the Tribunal will dispose of the new motion, but within a framework which will most certainly allow all parties to clearly establish the necessary evidence with respect to their submissions in accordance with the rules of natural justice and procedural fairness.

[74] Consequently, I find that the respondent's motion to dismiss is premature, having regard to all the circumstances of this case, and it is therefore dismissed for all legal purposes.

VI. Conclusion

[75] For the reasons given above, the respondent's motion to dismiss the complainant's complaints is therefore dismissed.

Signed by

Robert Malo
Tribunal Member

Ottawa, Ontario
August 25, 2014

Canadian Human Rights Tribunal

Parties of Record

Tribunal Files: T1625/17110, T1626/17210 and T1627/17310

Style of Cause: Leslie Palm v. International Longshore and Warehouse Union, Local 500, Richard Wilkinson and Cliff Willicome

Ruling of the Tribunal Dated: August 25, 2014

Appearances:

Leslie Palm, for herself

Ikram Warsame, for the Canadian Human Rights Commission

Joanna Gislason and Lyndsay Watson, for the Respondents