

Canadian Human  
Rights Tribunal



Tribunal canadien  
des droits de la personne

**Between:**

**Stephen Leung**

**Complainant**

**- and -**

**Canadian Human Rights Commission**

**Commission**

**- and -**

**Canada Revenue Agency**

**Respondent**

**Ruling**

**Member:** Wallace G. Craig

**Date:** March 27, 2012

**Citation:** 2012 CHRT 7

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## **I. COMPLAINT**

[1] On February 28, 2003, Stephen Leung (the “Complainant”) filed a complaint #20030099 (“Complaint B”) with the Canadian Human Rights Commission (the “Commission”), alleging discrimination by the Respondent, Canada Revenue Agency, based on race and national/ethnic origin contrary to sections 7 and 10 of the *Canadian Human Rights Act*, (“CHRA”), and retaliation, contrary to section 14.1 of the *CHRA*.

[2] On December 23, 2010, the Commission referred Complaint B to the Canadian Human Rights Tribunal (the “Tribunal”).

## **II. Motion by Respondent**

[3] On September 22, 2011, the Respondent filed a Notice of Motion with the Tribunal seeking:

1. An Order striking out the Complainant’s Statement of Particulars, in whole or in part; or
2. In the alternative, an Order limiting the Tribunal Inquiry to solely retaliation vis-a-vis the 2002 FI-04 competition; and
3. An Order requiring the Complainant to provide witness statements pursuant to subparagraph 6(1)(f) of the Tribunal Rules of Procedure.

[4] The stated grounds for the motion are:

1. On July 4, 2011, the Complainant filed a Statement of Particulars with respect to his human rights complaint (CHRC File #20030099) referred to the Tribunal by the Commission.

2. Many of the issues raised in the Statement of Particulars have been investigated by the Commission in previous complaints filed by the Complainant, and dismissed. The Complainant did not judicially review these decisions and the decision of the Commission to dismiss these complaints ought to stand.
3. The Federal Court of Appeal's decision returned the matter to the investigation to conduct a supplementary investigation with respect to the 2002 FI04 classification only.

[5] In support of its motion, the Respondent relies on the affidavit of Lisa Minarovich, sworn September 21, 2011.

[6] In paragraph 1 of her affidavit, Ms. Minarovich, an employee of the Department of Justice, deposes that she "... reviewed the Canadian Human Rights files associated with this Complaint and as such, have knowledge of the matters hereinafter deposed". While Ms. Minarovich's affidavit summarizes the Commission's investigation and determination of the Complainant's complaints, and attaches as exhibits a large number of documents, presumably obtained during her review of the files, I am satisfied that Ms. Minarovich has no personal knowledge of the circumstances of the complaint presently before the Tribunal, nor has she any expertise to support the opinions expressed in her affidavit.

[7] The Respondent asserts that the Complainant's Statement of Particulars inappropriately seeks to raise issues that were previously dealt with by the Commission, and argues that these issues are *res judicata* or should be excluded by the application of the doctrine of issue estoppel.

### **III. Complainant's Response to the Motion**

[8] Complainant's counsel argues that the Motion of the Respondent is premature:

Submissions of this nature should be made at a hearing and not before. This is a time of disclosure. The time to debate evidence has not yet come. Both parties have the right

during the hearing to object to evidence being led. At the current stage the adjudicator cannot gauge whether the evidence is arguably relevant or not. At hearing he can allow evidence in or not, giving it the weight it deserves.

They ask the adjudicator to look behind the complaint referred by the commission and reconstruct it. They would have the adjudicator, without having heard a lick of evidence, to go through the documents to essentially decide on the nature of the case. The motion is an attempt by the employer to argue their case before anybody has put any evidence in.

[9] The Complainant also argues that the assertions in paragraphs 4, 13, 19, 22, 29 and 30 of Ms. Minarovich's affidavit are either misleading, misconstrued, or have omitted relevant matters.

#### **IV. Background**

[10] At all material times the Complainant was an employee of the Respondent.

[11] The circumstances of Complaint B occurred between March 2001 and August 2002. The Commission referred Complaint B to the Tribunal on December 23, 2010.

[12] On May 26, 2000, **before** the filing of Complaint B, the Complainant filed complaint #20000565 ("Complaint A"), alleging discrimination during the period October 1997 to May 2000, when two managerial positions were available to the Complainant. The Complainant sought each of these employment positions without success, triggering his allegation of discrimination by reason of race, national or ethnic origin and age, contrary to section 7 of the *CHRA*. The Commission investigated Complaint A and dismissed it.

[13] On February 10, 2006, **after** the filing of Complaint B, the Complainant filed a complaint #2006307 ("Complaint C"), alleging ongoing retaliation by the Respondent, particularly by the

Respondent's employee, Steven Hertzberg, in connection with the Commission's direction to the Complainant to engage in the Respondent's internal review processes in an attempt to resolve Complaint B. Paragraph 6 of Complaint C is significant:

As per CHRC's direction, I met with Hertzberg on February 14, 2005 to initiate internal review processes. At the meeting, instead of engaging in a constructive discussion of such processes, Hertzberg unilaterally suspended my employment, confiscated my ID card and building/parking access card and banned me from entering the workplace. He indicated that I was too sick to work and forced me to go on indefinite sick leave.

[14] Complaint C was screened out by the Commission without the benefit of an investigator's report.

## **V. Circumstances of Complaint B**

[15] On or about August 2002, the Respondent refused the Complainant's request for promotion to a newly created management position of Assistant Director, Finance (FI-104). Thereafter, on February 28, 2003, the Complainant filed Complaint B.

[16] Complaint B was investigated and dismissed by the Commission on the grounds that there was no evidence to support the Complainant's allegation of retaliation triggered by the Complainant's filing of Complaint A on May 26, 2000. Initially the Commission refused to refer Complaint B to the Tribunal, and dismissed it.

### **A. Retaliation**

[17] S. 14.1 *CHRA*:

It is a discriminatory practice for a person against whom a complaint has been filed under Part III, or any person acting on their behalf, to retaliate or threaten retaliation against the individual who filed the complaint or the alleged victim.

[18] Counsel for the Complainant summarized the evidentiary relationship and synergy of Complaints A, B and C:

What is clear from a close look at the order of filing is that the three complaints followed logically one after another. Complaint B is based on race and now retaliation connected to race. Complaint C is based on further retaliation. All three complaints deal with the same workplace and individuals but have different manifestations of the problem he complained about.

The employer's motion implies that Mr. Leung is a serial complainer who keeps bringing back the same rejected issues time after time. This is an improper characterization and one that is belied by a closer look at the timeline of filing and the allegations made in the three complaints.

In fact, the timing of the employer's actions are questionable and the retaliation complaints in both instances are reactions to workplace actions emboldened by investigator's dismissals or sidestepping of Mr. Leung's complaints.

In order to prove his case at tribunal Mr. Leung must have the opportunity to refer what he sees as evidence of the wrongdoing. The employer well knows the difficulties if he is not allowed to present evidence involving the three complaints. That is the real purpose of the employer's motion – to restrict Mr. Leung's opportunity to substantiate his case.

[19] Complainant's counsel emphasized the relevance of the circumstances in Complaint C in which the Complainant alleges further retaliation:

as a result of a direction by the Commission sending him back for internal recourse to the same person he had complained about in Complaints A and B. The manager, Mr. Hertzberg, is the same person complained of in all three complaints He is the essential link.

**B. Judicial Review**

[20] The Complainant applied for judicial review of the Commission's dismissal of Complaint B. On June 4, 2008, the Federal Court dismissed the Complainant's application for judicial review.

[21] The Complainant appealed to the Federal Court of Appeal. On February 11, 2009, the decision of the Federal Court was set aside. Appellate Justice Nadon stated:

I would therefore allow the appeal with costs, set aside the decision of the Federal Court and, rendering the decision which ought to have been rendered, I would allow the appellant's judicial review application with costs and I would return the matter to the Commission for reconsideration of the appellant's complaint in accordance with these Reasons.

[22] Paragraphs 15 and 16 of the Federal Court of Appeal's decision are relevant to this proceeding:

[15] Thus, in my view, the investigator failed to properly investigate an issue that goes to the essence of the complaint, in that she failed to make a proper inquiry into the classification process which resulted in the appellant having to compete for the new position. It is difficult to understand why the record remains obscure on this matter, considering that the information required to clarify the matter should be readily available from the employer.

[16] For example, what decisions were actually made in the fall of 2001 by one or more classification committees? Who were the members of these committees, were they the same persons or different ones? In my view, this information is crucial to determine whether there was retaliation or not on the part of the appellant's employer.



[23] On December 23, 2010, almost two years after the decision of the Federal Court of Appeal, David Langtry, Acting Chief Commissioner of the Commission, referred Complaint B to the Chairperson of the Tribunal.

[24] The Respondent did not seek judicial review of the Commission's decision.

## **VI. The Law**

[25] In *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2012 SCC 10, released March 16, 2012, the Supreme Court of Canada, in a unanimous decision, clarified the nature of a decision by a human rights commission to dismiss or refer a complaint.

[26] Mr. Justice Cromwell:

[19] I respectfully agree with the Court of Appeal. The Commission's decision to refer a complaint to a board of inquiry is not a determination of whether the complaint falls within the Act. Rather, within the scheme of the Act, the Commission plays an initial screening and administrative role; it may, for example, decide to refer a complaint to a board of inquiry so that the board can resolve a jurisdictional matter.

[20] The Act sets up a complete regime for the resolution of human rights complaints. Within this regime, the Commission performs a number of functions related to the enforcement and promotion of human rights. With regard to complaints, it acts as a kind of gatekeeper and administrator.

[21] Where a complaint is not settled or otherwise determined, the Commission may appoint a board of inquiry to inquire into it: 32A(1). The Commission has a broad discretion as to whether or not to take this step. The Commission may do so if 'it is satisfied that, having regard to all circumstances of the complaint, an inquiry there into is warranted': *Boards of Inquiry Regulations*, N.S. reg. 221/91. s. 1. There is no legislative requirement that the Commission determine that the matter is within its jurisdiction or that it passes some merit threshold before appointing a board of inquiry: the Commission must simply be 'satisfied' having regard to all the circumstances of the complaint that an inquiry is warranted.

[22] Once appointed, a board of inquiry conducts a public hearing into the complaint and decides the matter. The board of inquiry has authority to determine any question of fact or law required to make a determination on whether there has been a contravention of the Act, and has the power to remedy such a contravention

[23] What is important here is that a decision to refer a complaint to a board of inquiry is not a determination that the complaint is well founded or even within the purview of the Act. Those determinations may be made by the Board of Inquiry. In deciding to refer a complaint to a board of inquiry, the Commission's function is one of screening and administration, not of adjudication.

[50] ...While no doubt the Commission, in deciding to refer for inquiry, has some quite limited role to screen the merits of the complaint, its task is not to decide the issues which underlie its decision to proceed to the next stage; these are left to the board of inquiry.

## **VII. Assessing the merit of the Respondent's Motion**

[27] The Respondent's seeks to limit the scope of the Tribunal's Inquiry into Complaint B.

[28] The Respondent argues that Complainant's Statement of Particulars is an attempt to "resurrect allegations **which were dealt with, and dismissed by the Commission in earlier complaints**. The allegations in the Statement of Particulars are the same in subject matter and scope to the allegations contained in one or more of the human rights complaints filed by the Complainant." (underlining added)

[29] The Respondent's position reflects a misunderstanding of the Tribunal's procedural rules and the purpose of Statements of Particulars. I agree with the characterization of Statements of Particular by the Complainant's counsel:

Section 6 of the Canadian Human Rights Tribunal Rules of Procedure (03-05-04) sets out the necessity of disclosure and what should be contained in a 'Statement of Particulars'. The purpose of the Statement of Particulars is not explicitly

stated. However, its purpose can be derived from section 1(1) and 1(2). The purpose would be to disclose what case Mr. Leung intends to make. The Respondent will then know what case they have to meet.

The statement of particulars is not an 'Agreed Statement of Facts.' Parties do not have to agree with the particulars, the perceptions contained in the particulars, or what argument they believe will be derived from the particulars.

In fact Mr. Leung's Statement of Particulars meets the requirements set out in the Rules because he has provided those material facts he intends to rely on. The employer knows what case Mr. Leung intends to make.

[30] I have examined the Complainant's Statement of Particulars and conclude that it is within the expectations of the Tribunal's procedural requirements.

[31] More importantly, the Respondent's pre-emptive attempt to limit the scope of the inquiry into the complaint reflects a misunderstanding of the investigatory and administrative roles of the Commission, and the fact, as recently clarified in the *Halifax* decision, that the Commission's decision to dismiss a complaint, or to refer it to the Tribunal for hearing, is not an adjudicative decision, and is therefore not litigation which is subject to the doctrines of *res judicata* or issue estoppel.

[32] The procedures involved in the investigation and disposition of a complaint filed with the Commission, and the decision by the Commission to either dismiss or refer it to the Tribunal, are all administrative in nature. The submission of a report by an appointed investigator to the Commission of his/her findings, as required under s. 44, and the reasons for the discretion exercised by the Commission to either dismiss a complaint or refer it to the Tribunal for Inquiry, remain private within the Commission until either of the parties seeks judicial review.

[33] The Commission's referral of a written complaint to the Tribunal, and its contemporaneous request that the Tribunal institute an inquiry into it, involves transmitting only the actual complaint and information identifying the parties. Thereafter, as provided in s. 51 of the *CHRA*, the Commission may become a party to the inquiry, adopting such position as, in its opinion, is in the public interest having regard to the nature of the complaint.

[34] The Commission's decision to refer a complaint to the Tribunal has no effect on the procedures of the Tribunal, nor on the exercise of its adjudicative role, and the significant degree of independence exercised by Tribunal members conducting public inquiries.

[35] The assigned presiding member will conduct the inquiry in public and, in due course thereafter, will provide the parties with a written decision. An essential aspect of a decision is the determination of credibility of each witness, entailing consideration of the consistency of evidence in chief and the manner in which each witness has responded to cross examination. The adjudicator may find it necessary to consider a witness' evidence against the probabilities arising from circumstances surrounding the alleged act of discrimination.

## **VIII. Decision**

[36] Counsel for the Complainant has convinced me that the circumstances of Complaints A and C are relevant to the allegations of discrimination and retaliation in Complaint B. I accept his argument that:

Because Complaint A was dismissed does not mean that facts during the time frame of the dismissed complaint are not factual and usable in an inquiry into Complaint B. There can be common facts. Allegations particular to Complaint A may be dismissed but not facts. Only allegations from complaint B will be considered by the tribunal, but that does no mean the history leading up to Complaint B does not have to be considered. That would particularly be so in this case, because the retaliation complaint in Complaint B stems from the employer's action taken as a result of Complaint A.

[37] Moreover, even though the *Halifax* decision may be determinative of the motion, I have also considered each of the Complainant's objections to various assertions in Ms. Minarovich's affidavit, which the Complainant's counsel argues are misleading, misconstrued or have omitted relevant information. I agree, and find Ms. Minarovich's affidavit unreliable and unpersuasive.

[38] In accordance with the foregoing reasons the Respondent's Motion is dismissed.

Signed by

Wallace G. Craig  
Tribunal Member

OTTAWA, Ontario  
March 27, 2012

**Canadian Human Rights Tribunal**

**Parties of Record**

**Tribunal File:** T1629/17510

**Style of Cause:** Stephen Leung v.Canada Revenue Agency

**Ruling of the Tribunal Dated:** March 27, 2012

**Appearances:**

Steve Eadie, for the Complainant

François Lumbu, for the Canadian Human Rights Commission

Gillian Patterson, for the Respondent