Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Between:

Diane Carolyn Emmett

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Canada Revenue Agency

Respondent

Ruling

Member: Réjean Bélanger
Date: May 8, 2013
Citation: 2013 CHRT 12

I. Complaint & Motion

[1] On June 7, 2007, Diane Carolyn Emmett, the Complainant, filed a complaint under the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6 [the *Act*], against Canada Revenue Agency ("CRA"), the Respondent.

[2] Essentially, the Complainant alleges the Respondent deprived her of employment opportunities granted to her male and younger colleagues, pursuant to section 7 of the *Act*; and, that this is reflective of a pattern of systemic discrimination, pursuant to section 10 of the *Act*.

[3] The Complainant also filed two additional complaints alleging retaliation by the Respondent for having filed her initial complaint, contrary to section 14.1 of the *Act*. The second complaint was filed on March 5, 2008 covering the time period from September 10, 2007 and ongoing. The third complaint was filed on February 5, 2009 covering the time period from July 2008 and ongoing.

[4] On August 25, 2011, the complaint under section 7 and 10 of the *Act* was referred by the Canadian Human Rights Commission ("the Commission") to the Canadian Human Rights Tribunal ("the Tribunal") for further inquiry. The Commission did not request an inquiry into the two additional complaints of retaliation.

[5] During a pre-hearing case management conference call held on October 10, 2012, the Respondent's counsel informed the parties of her intention to file, at the beginning of the coming hearing into the merits of the complaint, a Motion to strike portions of the Complainant's Statement of Particulars ("SOP").

[6] It was then agreed that written submissions would be filed and that each party would be given the opportunity to make oral submission on the first day of the hearing.

[7] On December 21, 2012, the Respondent submitted its Motion to strike some allegations of the Complainant's SOP. In particular, the Respondent requests:

1. An order striking from the Complainant's SOP:
    a. all allegations pertaining to the under representation of women in the Executive Group and the under representation of women in other Occupational Groups at the CRA, in particular paragraphs 46-54 and 59-64;
    b. all allegations of discrimination based on the prohibited ground of age;
    c. paragraph 27, Item #10 which asks the Tribunal to award a remedy contrary to section 54.1(2) of the *Act*; and
    d. all claims for relief post-dating the time period of this complaint.
2. An order pursuant to section 52(1)(c) of the *Act* that all personal information of current and former employees of the Respondent unrelated to the complaint be kept confidential.

[8] The Motion was heard in Toronto on February 4 and 5, 2013. Since the ruling on the Motion may have an effect on the scope of the rest of the hearing into the complaint, it was agreed that it was in the best interest of the parties to adjourn any further hearing time until the Tribunal rendered its present ruling.

[9] Upon request of the Respondent, the Tribunal held a case management conference call on March 4, 2013 to discuss further issues regarding the Motion. Where relevant to the present ruling, that call is discussed herein.

II. Issues

[10] The Respondent's Motion raises many issues:

a. On what basis can the Tribunal dismiss part of a complaint prior to conducting a full hearing on the merits?

b. Should all allegations pertaining to the "under representation" of women in the Executive Group and in other Occupational Groups at the CRA be struck?

c. Should all allegations of discrimination based on the prohibited ground of age be struck?

d. Should the remedy at paragraph 27, item #10, of the Complainant's SOP be struck?

e. Should all claims for relief post-dating the time period of this complaint be struck?

f. Should the Tribunal grant an order pursuant to paragraph 52(1)(c) of the *Act*?

[11] The positions adopted by the parties on each one of the issues above, and the Tribunal's analysis thereof, will be discussed in turn.

III. Analysis

A. On what basis can the Tribunal dismiss part of a complaint prior to conducting a full hearing on the merits?

[12] According to the Respondent, the Tribunal can dismiss part of a complaint prior to conducting a full hearing on the merits. To support its position, the Respondent relies on the recent decision of the Federal Court in *Canada (Human Rights Commission) v. Canada (Attorney General)*, 2012 FC 445 [*FNCFCS et al.*]; and, the recent decision of the Tribunal in *Murray v. Immigration and Refugee Board*, 2013 CHRT 2 [*Murray*].

[13] The Commission submits the Tribunal is master of its own procedure and can appropriately decide in any given case the suitable approach to efficiently and expeditiously adjudicate human rights complaints. While the Commission and the Complainant recognize that it is possible for the Tribunal to dismiss all or part of a complaint prior to conducting a full hearing on the merits, they emphasize that this jurisdiction should be exercised cautiously and then only where the parties have been given a full and ample opportunity to present evidence and make arguments on the matters raised in the complaint.

[14] I agree that the Tribunal can dismiss all or part of a complaint prior to conducting a full hearing on the merits. However, it is important to remember that in the decisions rendered in *FNCFCS et al.* and *Murray*, the Federal Court and the Tribunal clearly expressed the view that in dismissing allegations the process must be fair, respecting the rules of natural justice, and the parties must be given a full and ample opportunity to adduce the evidence necessary to decide the issues raised by the motion. The following are some pertinent abstracts of the decision of the Federal Court in *FNCFCS et al.*:

> [125] That said, after providing due notice, subsection 50(1) of the Act requires the Tribunal member assigned to the case to "give all parties to whom notice has been given a full and ample opportunity, in person or through counsel, to appear at the inquiry, present evidence and make representations".
>
> …
>
> [131] Nothing in either the Act or the Tribunal's *Rules of Procedure* limits the type of motions that can be brought before the Tribunal. Consequently, I see no statutory or regulatory impediment that would preclude the bringing of a motion to have the Tribunal determine a substantive issue in advance of a full hearing of the complaint on its merits.
>
> [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.
>
> …
>
> [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.
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> (*FNCFCS et al.* at paras. 125, 131-132, 140)

[15] It is in light of the above principles that I will analyze whether certain portions of the Complainant's SOP should be struck.

B. Should all allegations pertaining to the "under representation" of women in the Executive Group and in other Occupational Groups at the CRA be struck?

[16] In its reply to the submissions of the Complainant and the Commission, the Respondent modified its position with regard to issue B as follows:

> The Respondent no longer objects to the Tribunal's jurisdiction to inquire into the allegation of systemic gender-base discrimination in regards to the Executive Cadre. However, the Respondent seeks direction from the Tribunal and asks the Complainant to identify with specificity which practices and/or policies she is challenging as discriminatory.
>
> The Respondent continues to object to the Tribunal's jurisdiction to inquire into the allegation of systemic gender-base discrimination with respect to other occupational groups identified in the Complainant's Statement of Particulars. The allegations in respect of these other groups were never investigated by the Commission are solely based on statistical evidence, and do not identify a specific policy or practice.
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> (*Reply Submissions of the Respondent, Canada Revenue Agency (Motion to Strike Portions of Complainant's Statement of Particulars)*, February 1, 2013, at paras. 2-3)

[17] There are three aspects to the Respondent's argument on this issue: (i) the Tribunal lacks jurisdiction to hear complaints based solely on statistical evidence; (ii) the Complainant has inappropriately amended her complaint to add new allegations of systemic gender based discrimination to other occupational groups; and, (iii) the Complainant has not identified a specific policy or practice held by the Respondent that she alleges to be discriminatory. Each argument will be examined in turn.

(i) Does the Tribunal lack jurisdiction to hear complaints based solely on statistical evidence?

[18] Subsection 40.1(2) of the Act provides:

> (2) No complaint may be dealt with by the Commission pursuant to section 40 where
>
> (a) the complaint is made against an employer alleging that the employer has engaged in a discriminatory practice set out in section 7 or paragraph 10(a); and
>
> (b) the complaint is based solely on statistical information that purports to show that members of one or more designated groups are underrepresented in the employer's workforce.

[19] The Respondent submits the Complainant's allegations with respect to the other Occupational Groups are based solely on statistical evidence of under-representation, which is contrary to subsection 40.1(2). The Respondent is of the view that when the *Employment Equity Act*, S.C. 1995, c. 44 [the *EEA*], was enacted, amendments were also made to the *Act* to harmonize the two laws and avoid duplication. Specifically, subsection 40.1(2) was added to the *Act*. According to the Respondent, in situations where a complaint is based solely on statistical evidence of under-representation the case should be treated under the *EEA* and not pursuant to the *Act*. In support of its position, the Respondent referred to the minutes of proceedings and evidence of the Standing Committee that studied the amendments to the *EEA* and the *Act*.

[20] The Respondent maintains that the Tribunal, even though not mentioned in subsection 40.1(2), has the same obligation as the Commission with regard to the application of this section. According to the Respondent, it does not make sense that the Commission be under an obligation to refuse to examine complaints based solely on statistical information, while the Tribunal would not be subject to the same obligation.

[21] The Commission's position is that the wording of subsection 40.1(2) is clear and it applies strictly to the Commission. The Tribunal is not mentioned in subsection 40.1(2). According to the Commission, the Tribunal is a separate and independent institution from the Commission. There is no need to go to the minutes of proceedings of the Standing Committee that studied the amendments to the *EEA* and the *Act* to understand subsection 40.1(2). The Commission submits that this subsection is part of sections 40-46 of the *Act*, which explains the role of the Commission as to the reception and processing of complaints under the *Act*.

[22] The Complainant is in agreement with the position adopted by the Commission regarding the inapplicability of subsection 40.1(2) to the present case. However, she denies that her allegations are based solely on statistical information. In support of her position, she referred to paragraph 62 of her SOP:

> An example of a systemic barrier was the practice of having no fixed procedures or formal selection processes for appointments made to acting Director assignments. The almost exclusive appointment of male colleagues to these career enhancing acting opportunities, was done so in a subjective and non-transparent manner instead of using competition processes that assessed the qualifications and competencies of all interested parties. […] Even where formal competitions were run for executive promotions, the CRA's selection processes contained subjective methods of assessment played out during ½ hour interviews with "holistic" assessment ratings versus the use of more rigorous, unbiased and objective assessment techniques. Informal and highly discretionary staffing practices are problematic as there is significant room for subjective considerations, differing standards and biases to come into play. I submit these systemic discriminatory practices had an adverse differential impact on women's career advancement in the OR [Ontario Region] as well as on my individual advancement to the Director positions I aspired to.
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> (*Complainant's Statement of Particulars*, April 30, 2012, at para. 62)

[23] I agree that subsection 40.1(2) of the *Act* prevents the Commission from dealing with a complaint that would be "…based solely on statistical information that purports to show that members of one or more designated groups are underrepresented in the employer's workforce" (see subsection 40.1(2) of the *Act*). However, the Tribunal is not mentioned in subsection

40.1(2). In fact, sections 40-46 relate exclusively to the role of the Commission in processing complaints; and, subsection 40.1(2) is one of those sections.

[24] The role of the Commission and the Tribunal are clearly defined in the *Act*. With regard to complaints, the Tribunal's role is to institute inquiries into them when the Commission deems such an inquiry to be warranted (see sections 49-50 of the *Act*). While I assume the Commission has examined the complaint against the requirements of subsection 40.1(2) of the *Act*; in any event, it is not the Tribunal's role to sit in appeal of the Commission's decision or to review it. That is the role of the Federal Court on judicial review (see *Murray* at para. 37; *Deborah P. Labelle v. Rogers Communications Inc.*, 2012 CHRT 4 at para. 71; *International Longshore & Warehouse Union (Maritime Section), Local 400 v. Oster*, [2002] 2 FC 430 at paras. 29-30; *Canada (Human Rights Commission) v. Warman*, 2012 FC 1162 at paras. 55-57; and, *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2012 SCC 10 at paras. 23, 27, and 33).

[25] Given that subsection 40.1(2) of the *Act* relates exclusively to the Commission, I am of the view that it does not affect the Tribunal's ability to inquire into the Complainant's allegations. That said, the focus of complaints under sections 7 and 10 of the *Act* are on the discriminatory practices set out therein, and not under-representation *per se*. Therefore, the question as to whether the Complainant's allegations are based solely on statistical information of under-representation will be examined following the hearing of all the Complainant's evidence. At this stage, prior to having received any evidence on the merits of the Complainant's allegations, I cannot determine whether her allegations are based solely on statistical information of under-representation. The Tribunal recently adopted a similar approach in *Murray*:

> [48] Nor do I accept that paragraph 40.1(2)(b) of the *Act* now limits the Tribunal's ability to consider the current complaint. As stated above, section 40.1 of the *Act* applies strictly to the Commission and, once an inquiry is requested, it is the Tribunal's role to inquire into the complaint. In my view, once a complaint is referred to the Tribunal, the question as to whether or not the complaint is based solely on statistical evidence is a matter to be considered in determining whether the complainant has established a *prima facie* case of discrimination. At this point

> in the proceedings, prior to having received any evidence on the merits of the complaint, there is no basis upon which the Tribunal can determine if the complaint is based solely on statistical evidence and, consequently, whether the Complainant has established a *prima facie* case.
>
> [49] Therefore, paragraph 40.1(2)(b) of the Act does not limit the Tribunal's ability to consider this complaint.
>
> (*Murray* at paras. 48-49)

[26] Similarly, I conclude that subsection 40.1(2) of the *Act* does not prevent the Tribunal from inquiring into the Complainant's allegations.

(ii) Has the Complainant inappropriately amended her complaint to add new allegations of systemic gender based discrimination to other occupational groups?

[27] According to the Respondent, allegations regarding the under-representation of woman in other occupational groups, aside from the executive group, only first appeared in the Complainant's SOP. The Respondent did not have the benefit of having this allegation investigated by the Commission or providing a response thereto to the Commission's investigator. In the Respondent's view, the allegation regarding the under-representation of women in other occupational groups is an entirely new complaint within itself and the Respondent would be prejudiced by its inclusion within the current inquiry. The Respondent adds, there is no link between this new allegation and the initial complaint.

[28] For her part, the Complainant maintains that she has not amended her complaint and that the Respondent has been aware of the systemic nature of her complaint in regard to women in other occupational groups since its initial filing and through the Commission's investigation process. During the hearing of this motion, the Complainant indicated that examining the under-representation of women in both the executive and other occupational groups would support her systemic allegation that ingrained attitudes unfavourable to women's advancement manifested in behaviours that resulted in discriminatory staffing decisions made during informal and subjective

staffing processes. In this regard, the Complainant claims that statistics of under-representation can be used as circumstantial evidence from which discrimination may be inferred.

[29] I do not accept that the Complainant has amended her complaint to add new allegations of systemic gender based discrimination. The allegations forming the basis of a complaint must be differentiated from the evidence advanced to support it. In her SOP, at paragraph 63, the Complainant distinguishes between the two:

> It is also my position that I was subject to engrained attitudinal and cultural barriers that negatively stereotyped women from the audit field (my background) as not being strong and as capable as men in leadership roles. The evidence clearly shows women AUs (auditors) have historically been under-represented in the CRA. They have also suffered historic exclusion at the higher levels of the organization, especially at the executive levels where they were almost non-existent over the period of my complaint. It is my position that systemic discriminatory practices blocked women in the audit field from advancing to key executive positions in the CRA's organization. I submit they were also a factor impeding my advancement to a Director's position in the OR.
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> (*Complainant's Statement of Particulars*, April 30, 2012, at para. 63)

[30] As this statement indicates, the under-representation of women in the CRA is not the basis of the Complainant's allegations of systemic discrimination. Rather, it is the "…engrained attitudinal and cultural barriers that negatively stereotyped women from the audit field […] from advancing to key executive positions in the CRA's organization" that forms the basis of the Complainant's allegations of systemic discrimination. The Complainant points to statistical information of women auditors being historically under-represented in the CRA, whether in the executive group or other occupational groups, as evidence in support of her allegations of systemic discrimination. Whether that evidence supports the Complainant's allegations or establishes a *prima facie* case of discrimination will be determined following the hearing of this complaint.

[31] The Respondent has been given an opportunity to respond to the Complainant's arguments by submitting its own SOP. The Respondent will also be given a full and ample opportunity to present its own evidence and arguments in response to the Complainant at the hearing of this complaint. I see no prejudice to the Respondent if the Complainant advances statistical information regarding the under-representation of women in other occupational groups at the CRA to support her allegations of systemic discrimination.

(iii) Has the Complainant identified a policy or practice held by the Respondent that she alleges to be discriminatory?

[32] According to the Respondent, the Complainant has failed to identify a specific policy or practice held by the Respondent that she alleges to be discriminatory. Instead, relying solely on statistical information, her systemic complaints are couched in vague and imprecise allegations of "organizational culture", "attitudinal barriers" and "old boys club". The Respondent submits the complaint is not with respect to any identifiable informal staffing practices, but with the exercise of management's discretion as allegedly influenced by attitudinal and cultural barriers perceived by the Complainant.

[33] In her reply to the Respondent's SOP, the Complainant provided as follows:

> 12. [...] I will also provide evidence to demonstrate the practice of awarding acting opportunities over the period of my complaint created systemic barriers to women's advancement in the executive group in the Ontario Region. The informal and subjective nature of these practices allowed for bias and prejudice to guide the CRA's decisions whether intentionally or unintentionally, adversely impacting the careers of women executives including mine. For example, all acting assignments were unadvertised; call letters were never circulated soliciting applications from interested parties, a practice that created barriers and denied fair access to qualified executives; all acting appointments were made informally and without competition; executives appointed were handpicked based on the personal views of the Assistant Commissioner and an all male succession planning committee; qualifications for the acting positions were not determined in advance and competencies were not assessed to ensure the candidate chosen was qualified and was the right executive for the job which the CRA points out in paragraph 56

> to be its goal; the only documented rationale for the CRA's selection decision was contained in a brief staffing announcement citing generic reasons such as management continuity; many of the chosen candidates were allowed to remain in their acting assignments for lengthy periods of time, i.e., six months to over fifteen months without competition or assessment of their qualifications; and in cases where the acting executive aspired to the position, they would subsequently be appointed on a permanent basis to it from a tainted competition process.
>
> […]
>
> 19. In paragraph 55, the CRA takes the position I was not treated unfairly or in an arbitrary manner in the 2006 selection processes since Mr. Baker determined this to be the case, as a result of a staffing appeal I filed termed a "Decision Review". I disagree with CRA's position. It is my position Mr. Baker's decision was seriously flawed, biased and he simply rubber stamped the selection board's results. For example, I was denied access to my source assessment documents which prejudiced my ability to mount an appeal based on the relevant facts. I was never given any reasons for my appeal being dismissed. The selection process's anomalies raised in my appeal were never addressed with me nor was I given the opportunity to provide rebuttal submissions to the CRA's response to my appeal document. The CRA categorically denied me any form of natural justice in the recourse I undertook. Added to this, Mr. Baker, the Decision Reviewer of my appeal, was the person who approved the appointment of the successful candidates in the selection processes I appealed which raises a serious conflict of interest issue. And, Mr. Baker was also Mr. Hillier's boss, the chairperson of the selection processes. CRA's executive recourse is unique in the federal service in that unsuccessful candidates seeking recourse in a competition process are denied the right to an independent third party appeal board hearing. What you have in the CRA is an unfair, in-house paper review process by senior executives investigating senior executives which I submit allows for significant bias to enter into the decision.
>
> (*Complainant's Reply to Respondent's Statement of Particulars*, June 19, 2012, at paras. 12, 19)

[34] On this basis, I am satisfied that the Complainant has satisfactorily identified the practices she is alleging to cause discrimination contrary to section 10 of the *Act*. The Complainant's submissions are sufficient to put the Respondent on notice of the case to be met in these proceedings; and, as mentioned above, the Respondent has and will continue to be given a full and ample opportunity to meet that case.

[35] Therefore, for the reasons above, I reject the Respondent's arguments that: (i) the Tribunal lacks jurisdiction to hear complaints based solely on statistical evidence; (ii) the Complainant has inappropriately amended her complaint to add new allegations of systemic gender based discrimination to other occupational groups; and, (iii) the Complainant has not identified a specific policy or practice held by the Respondent that she alleges to be discriminatory. As a result, I dismiss the Respondent's request to strike all allegations pertaining to the "under representation" of women in other occupational groups at the CRA from the Complainant's SOP.

C. Should all allegations of discrimination based on the prohibited ground of age be struck?

[36] In its decision to refer the complaint to the Tribunal, the Respondent claims the Commission made a clear reference to the Complainant's allegations of gender discrimination, but made no reference to allegations of individual or systemic age discrimination. According to the Respondent, the Commission's silence on this issue should be interpreted to mean that the Commission did not refer allegations of age discrimination to the Tribunal. While the Respondent recognizes that a mention of individual and systemic age discrimination is made in the Complaint Form, the Commission's Investigator recommended the dismissal of both allegations. The Respondent assumed the Commission would have adopted the Investigator's recommendations and, consequently, would have decided not to refer those allegations to the Tribunal.

[37] The Commission disagrees with the position advanced by the Respondent. The Commission claims allegations of discrimination based on age are outlined in the Complaint Form and that the whole complaint, without exclusion, was referred to the Tribunal for inquiry. Specifically, the Commission refers to the August 25, 2011 letter sent by the Deputy Chief Commissioner of the Commission to the Chairperson of the Tribunal requesting: "…that you

institute an inquiry into the complaint as it is satisfied that, having regard to all the circumstances, an inquiry is warranted […] A copy of the complaint form is included".

[38] According to the Commission, the expression "having regard to all the circumstances" meant that its decision had been taken after having studied all the information and documents available on the file, including the Complaint Form, the Investigator's Report and the exchange of written communications between the parties. Furthermore, the fact that the Complaint Form was included indicates that it did not refer a part of the complaint, but rather it referred the whole complaint. On this basis, the Commission submits that there is no reason to assume that it referred only part of the complaint to the Tribunal.

[39] The Complainant's position on issue C is as follows:

> 16. […] The Commission referred my complaint of individual and systemic discrimination based on sex and age pursuant to ss. 7 and 10 of the *CHRA*. The Commission's decision did not state anywhere that its referral excluded age discrimination. The Tribunal is thereby seized with my entire complaint which includes age discrimination [...] Furthermore, the Commission states in its August 10, 2011 decision that it considered my Complaint, the Investigation report and the parties submissions, and having regard for all of the circumstances, referred my complaint to the Tribunal for inquiry. The documents considered by the Commission show the grounds for my complaint are on sex and age made pursuant to ss. 7 and 10 of the *CHRA*. My arguments supporting age discrimination were laid out in the Investigation Report which the Commission examined and considered in making its decision. The evidence clearly shows the Commission referred my allegations of age discrimination to the Tribunal, giving the Tribunal the jurisdiction to hear them.
>
> (*Response Submissions of Complainant to Respondent's Motion Dated December 21, 2012*, January 25, 2013, at para. 16)

[40] It appears to me that, based on the Complaint Form transmitted to the Tribunal, the Complainant had clearly indicated that she was complaining about individual and systemic discrimination on the basis of gender and age. Had the Commission decided to dismiss her allegations on the basis of age, it would have made a specific decision about it, would have

provided reasons for the dismissal and, thereafter, would have indicated the dismissal of this portion of the complaint in its referral letter to the Tribunal. This is not the case in the present circumstances.

[41] A similar question was raised in *Côté v. Canada (Royal Canadian Mounted Police)*, 2003 CHRT 32 [*Côté*]. I find the comments of former Member Hadjis to be instructive in this case:

> In my opinion, it is evident from the Chief Commissioner's letter to the Tribunal Chairperson that all the aspects of the complaint, as set out in the complaint form that was signed by the Complainant in 1996, were referred to the Tribunal by the Commission. I do not find anything in the Chief Commissioner's letter from which to infer that less than the entire complaint was being sent on for inquiry by the Tribunal. Furthermore, one must not lose sight of the fact that although the Commission has the authority to decide whether a complaint is to be referred to the Tribunal (ss. 44(3) and 49 of the Act), the complaint continues to remain the complainant's, not the Commission's. The Complainant in the present case has never amended her complaint.
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> (*Côté* at para. 12)

[42] In contrast to the decision in *Côté*, I also find the decision of Member Hadjis in *Kowalski v. Ryder Integrated Logistics*, 2009 CHRT 22 [*Kowalski*], to be instructive. In *Kowalski*, four allegations of discrimination had been made by the complainant. The Commission dismissed two of them. It informed the parties of its decision. However, the Commission referred the complaint to the Tribunal without mentioning its previous decision. The question raised then in front of the Tribunal was: did the Commission refer some or all of the allegations to the Tribunal. Member Hadjis found:

> In the present case, the Commission specifically decided not to deal with two of the four allegations in the complaint, and provided the parties with written decisions to that effect, which were both in fact entitled "Decision of the Commission". As such, it is clear that the Commission exercised its discretion, pursuant to s. 41, not to deal with these allegations. In light of the Commission's explicit determinations in this regard, I am satisfied that the Commission did not ultimately refer these portions of the complaint to the Tribunal.

(*Kowalski* at para. 10)

[43] I consider it important to mention that the present Motion was brought by the Respondent. Consequently, it is up to the Respondent to convince the Tribunal to exercise its discretion to dismiss aspects of the complaint, a discretion the Tribunal exercises cautiously and only in the clearest of cases (*FNCFCS et al.* at para. 140). Given this caveat, and the clear wording of the Complaint Form and referral letter to the Tribunal, I am not convinced that the Commission referred anything less than the whole complaint to the Tribunal for inquiry. For these reasons, I dismiss the Respondent's request to strike all allegations of discrimination based on the prohibited ground of age from the Complainant's SOP.

D. Should the remedy at paragraph 27, item #10, of the Complainant's SOP be struck?

[44] The remedy in question is as follows:

> 10. Evidence of an aggressive staffing strategy to close and keep closed, existing gaps in all of the Employment Equity Occupational Groups in the CRA.
>
> (*Complainant's Statement of Particulars*, April 30, 2012)

[45] According to the Respondent, the remedy requested by the Complainant is contrary to subsection 54.1(2) of the *Act*. Section 54.1 provides:

> 54.1 (1) In this section,
>
> "designated groups" has the meaning assigned in section 3 of the Employment Equity Act; and
>
> "employer" means a person who or organization that discharges the obligations of an employer under the Employment Equity Act.

(2) Where a Tribunal finds that a complaint against an employer is substantiated, it may not make an order pursuant to subparagraph 53(2)(a)(i) requiring the employer to adopt a special program, plan or arrangement containing

(a) positive policies and practices designed to ensure that members of designated groups achieve increased representation in the employer's workforce; or

(b) goals and timetables for achieving that increased representation.

(3) For greater certainty, subsection (2) shall not be construed as limiting the power of a Tribunal, under paragraph 53(2)(a), to make an order requiring an employer to cease or otherwise correct a discriminatory practice.

[46] The Respondent's position on issue D is as follows:

63. Where the Tribunal finds that a complaint is substantiated, it may grant the Complainant appropriate relief as set out at s.53 of the *CHRA*. Under this provision, the Tribunal may, pursuant to s. 53(2)(a)(i), order that a person adopt a special program, plan or arrangement designed to reduce and/or eliminate disadvantages based on or related to a prohibited ground of discrimination.

64. However, the Tribunal's jurisdiction to grant relief under s. 53(2)(a) of the *CHRA* is qualified by s.54.1. Under that provision, the Tribunal "may not make an order pursuant to subparagraph 53(2)(a)(i)" requiring an employer that is subject to the provisions of the *EEA* to notably adopt positive policies and practices designed to increase representation of designated groups. Subsection 54.1(3) clarifies that the Tribunal retains jurisdiction to order remedies requiring an employer to cease or correct a discriminatory practice. However no specific practice was alleged by the Complainant to be discriminatory.

65. In this matter, the Complainant seeks relief under s. 53(2)(a)(i), namely "evidence of an aggressive staffing strategy to close and keep closed existing gaps in all of the Employment Equity Occupational Groups in [the Respondent]." An aggressive staffing strategy designed to reduce and/or eliminate alleged disadvantages to women is precisely the kind of positive policy or practice envisioned by s. 53(2)(a)(i) and barred by s.54.1 as against an employer subject to the *EEA*. As the Respondent is an employer pursuant to s.4(c) of the *EEA*, the Tribunal's jurisdiction to award the remedy sought by the Complainant is barred by s. 54.1 of the *CHRA*. For this reason, this portion of the Complainant's claim for relief should be struck.

> (*Written Representations of the Respondent (Motion to strike portions of Complainant's Statement of Particulars)*, December 21, 2012, at paras 63-65)

[47] According to the Commission, a plain reading of section 54.1 demonstrates that the Tribunal has the necessary remedial power to correct and prevent discriminatory practices. Subsection 54.1(2) does not limit the Tribunal's authority to order an employer to cease or otherwise correct a discriminatory practice. In fact, the Commission submits the *Act* expressly authorizes the Tribunal to use its remedial powers to address systemic discrimination such as that alleged by the Complainant.

[48] In response to the Respondent's arguments on issue D, the Complainant decided to amend her remedy to read as follows: "The CRA cease or correct deficiencies in its informal and subjective staffing practices that I identified as discriminatory in my complaint" (*Response Submissions of Complainant to Respondent's Motion Dated December 21, 2012*, January 25, 2013, at para. 17). According to the Complainant, under subsection 54.1(3) of the *Act*, the Tribunal has the jurisdiction to order the amended remedy.

[49] During the second day of hearing on this Motion, although the Commission was not present, the Complainant and the Respondent arrived at an agreement regarding the proposed amendment to the Complainant's remedy. The following is a transcript of the exchange that took place during the hearing:

> At 2:46:50 on recorded transcript on February 5, 2013
>
> Gillian Patterson (GP): So what are requesting, it seems as all parties are in agreement, we are requesting formally, that if you can order this in your decision that Ms Emmett, by consent of all parties, I guess, amend her Statement of Particulars, to award ... to a remedy that is consistent with the statute.
>
> Member Bélanger (MB): No, I think you should be more specific. We should say that that we should say we replace with what she said in the first paragraph, by what is said in here.

> GP: That's fine.
>
> MB: O.K., so, I'm just wondering how to do it. I guess I could...
>
> Diane Emmett (DE): Can I not just send in an email to all the parties saying I hereby I further amend, or whatever, is that...?
>
> MB: ... Yes I guess, as long as the content is the same as what is written here.
>
> GP: Well the only issue is that, if we're waiting for a decision from you ... Oh, I guess we could proceed that way.
>
> MB: In fact as long as we agree here today and it is just that we are put in writing and she would sign it, no not sign it, and you send it by email to each the parties ... let me write this down.
>
> DE: So, it's not fancy, it would just be one page. I don't want to send the whole document.
>
> MB: Oh no, it's very short...
>
> (*Partial Transcript of Hearing Held on February 5, 2013*, being Exhibit "B" of the Affidavit of Lisa Minarovich, March 4, 2013)

[50] What came out of this exchange, even though the words used could have been clearer and used in a more elegant fashion, is that the Complainant and the Respondent were of the opinion that an agreement had been reached as to the content of the amendment sought by the Complainant. The Complainant was to put the amendment in writing and send it to the Tribunal and the Respondent by email in the days following the hearing.

[51] On February 11, 2013, by email, the Complainant, as requested, submitted her amended remedy:

> The CRA cease or otherwise correct its staffing practices that I have identified as discriminatory.

[52] In an email response dated February 12, 2013, the Respondent provided:

> However, in her motion response material at paragraph 17, Ms Emmett agreed to amend her SOP to "The CRA cease or correct deficiencies in its informal and subjective staffing practices that I identified as discriminatory in my complaint".
>
> In view of the above, the Respondent objects to the amendment proposed in Ms. Emmett's email of yesterday. We ask that she amend her Statement of Particulars to be consistent with what the parties consented to at the hearing, and what is indicated in her written submissions to the Tribunal.

[53] In an email reply dated February 14, 2013, the Complainant submitted:

> I respectfully submit that Ms. Patterson's objection to my amended remedy, i.e., "The CRA cease or otherwise correct its staffing practices that I have identified as discriminatory", is overly technical and inappropriate.
>
> I agreed to amend my remedy so it falls in line with subsection 54.1(3) of the Canadian Human Right Act which allows the Tribunal the discretionary authority to order the CRA to cease or correct a discriminatory practice under paragraph 53(2)(a).
>
> My amended remedy is clearly in accordance with subsection 54.1(3) and is thereby appropriate.

[54] In the same email of February 14, 2013, the Complainant also submitted the following two additional amendments:

> I also amend the remedy located at point 2 on page 26 of my April 30, 2012 SOP to include lost wages as a result of EX3 Acting opportunities that I was denied because of the CRA'S alleged discriminatory conduct.
>
> Further to the above, I reserve the right to amend my remedies at a future date based on the evidence presented at the Tribunal hearing.

[55] Following reception of the Complainant's email of February 14, 2013, the Respondent asked the Tribunal to schedule a case management conference call to straighten out the situation before the ruling on the present Motion. Consequently, a case management conference call took place on March 4, 2013.

[56] Prior to the conference call, in correspondence dated March 4, 2013, the Respondent set out its position on the amendments proposed by the Complainant:

> Moreover, since the hearing on the motion, the Complainant has sought two additional amendments to her complaint. These new amendments were not the subject matter of the motion, nor were they addressed formally in writing. On February 14, 2013, the Complainant sought to further amend paragraph 27 of her statement of particulars to add a claim for lost wages. In addition, the Complainant states: "I reserve the right to amend my remedies at a future date based on the evidence presented at the Tribunal hearing."
>
> The respondent's consent to the complainant's amendment was contingent upon her representations, both written and oral. However, the complainant now seeks to amend her statement of particulars in a manner inconsistent with her representations to the Tribunal. Moreover, the amendments sought by the Complainant are vague and lack specificity, resulting in substantial prejudice to the Respondent. In these circumstances, and given the complainant's indication that she may seek future amendments *based on the evidence presented*, the respondent's position is that any amendments to the complainant's statement of particulars must be done by way of formal motion in accordance with Rule 3 of this Tribunal's rules of procedure.

[57] During the case management conference call of March 4, 2013, the Complainant and the Respondent reiterated their respective positions. In the Respondent's view, the Complainant had accepted to amend her remedy to make it consistent with the *Act*. According to the Complainant, her amended remedy follows the wording of the *Act* and, therefore, is in conformity with what the parties agreed during the hearing. She added that the remedy is a matter that should be considered following the evidence presented at the hearing.

[58] The Commission also participated in the March 4, 2013 conference call. It submitted that remedies must be examined holistically and do not have to be specific. According to the Commission, the Complainant can amend her remedies as long as the Respondent is not taken by surprise.

[59] The Respondent's request under issue D began with an opposition based on subsection 54.1(2) of the *Act*. The issue now includes a concern regarding amending the Complainant's SOP. I will address each in turn.

[60] With respect to subsection 54.1(2) of the *Act*, the wording of legislation is clear. Positive policies or practices designed to ensure that members of designated groups achieve increased representation in the workforce, including goals and timetables for achieving that increased representation, are to be covered by the *EEA*. In *Murray*, the Tribunal came to a similar conclusion:

> As opposed to section 40.1, which applies solely to the Commission, section 54.1 of the *Act* does apply to the Tribunal. Again, the Tribunal does not dispute that the addition of this section was intended to avoid duplication between the enforcement mechanisms of the *EEA* and the *Act*. This is clear when one considers section 10 of the *EEA*, which requires employers to address the issues found in paragraphs 54.1(2)(a) and 54.1(2)(b) of the *Act* under their respective employment equity plans. As mentioned above, Parliament has chosen a cooperative and collaborative approach to enforcing the issues in paragraphs 54.1(2)(a) and 54.1(2)(b) of the *Act* "…through persuasion and the negotiation of written undertakings…" between the Commission and employers under the *EEA* (see subsections 22(1) and 22(2) of the *EEA*). Therefore, I agree with the Respondent that the Tribunal cannot make an order requiring a respondent to implement positive policies and practices designed to ensure that members of designated groups achieve increased representation in the employer's workforce. Nor can the Tribunal make an order that sets goals and timetables for achieving that increased representation.
>
> (*Murray* at para. 54)

[61] However, the wording of subsection 54.1(3) of the *Act* is also clear. Despite the limitations in subsection 54.1(2), the Tribunal can still "…make an order requiring an employer to cease or otherwise correct a discriminatory practice" (see subsection 54.1(3) of the *Act*). Again, the Tribunal's reasoning in *Murray* is instructive:

> That said, I do not agree that the limitations in subsection 54.1(2) of the *Act* limit the Tribunal's ability to order an effective remedy in this case. Subsection 54.1(3) specifically states subsection 54.1(2) does not limit the power of the Tribunal to make an order requiring an employer to cease or otherwise correct a discriminatory practice under paragraph 53(2)(a) of the *Act*. Specifically, I note, despite the limitations in 54.1(2) of the *Act*, paragraph 53(2)(a)(i) still allows the Tribunal to order an employer to adopt a special program, plan or arrangement designed to prevent, eliminate, or reduce disadvantages suffered by any group of individuals. Furthermore, subsection 54.1(2) of the *Act* does not otherwise limit the Tribunal's power to order any of the other remedies found at paragraphs 53(2)(b) to 53(2)(e) or subsections 53(3) and 53(4) of the *Act*.
>
> (*Murray* at para. 55)

[62] Furthermore, the Tribunal's remedial authority under the *Act* is derived from subsection 53(2), which provides: "If *at the conclusion of the inquiry* the member or panel *finds that the complaint is substantiated*, the member or panel may, subject to section 54, make an order…"; in French: "*À l'issue de l'instruction*, le membre instructeur *qui juge la plainte fondée*, peut, sous réserve de l'article 54, ordonner…" (*emphasis added*). The wording of subsection 53(2) of the *Act* is also consistent with the operating words of subsection 54.1(3): "Where a Tribunal *finds that a complaint against an employer is substantiated*…"; in French: "Le tribunal *qui juge fondée une plainte* contre un employeur…" (*emphasis added*). In my view, the emphasized words suggest the Tribunal's remedial authority is only invoked at the conclusion of an inquiry, once a complaint has been substantiated. Therefore, I will consider whether the Complainant's requested remedy is contrary to subsection 54.1(2) of the *Act* at the conclusion of the inquiry, in consideration of all the arguments and evidence presented by the parties during the hearing, and only if the complaint is substantiated.

[63] Therefore, as framed pursuant subsection 54.1(2) of the *Act*, the Tribunal dismisses the Respondent's request to strike the remedy at paragraph 27, item #10, of the Complainant's SOP.

[64] With respect to the proposed amendments to the Complainant's remedies, given the dispute between the parties and the Respondent's concerns regarding prejudice, I think the fairest way to proceed would be to have the Complainant bring a Notice of Motion pursuant to Rule 3 of the Tribunal's *Rules of Procedure (03-05-04)* to amend her complaint. In her motion, the Complainant can layout the basis for her proposed amendments and the Respondent will then have an opportunity to respond and explain the grounds for its concerns to the proposed amendments. Based on fulsome submissions from the parties, the Tribunal will then have an informed basis upon which to rule on whether to allow the amendments.

E. Should all claims for relief post-dating the time period of this complaint be struck?

[65] To establish the time period covered by the complaint, the Respondent says that it is necessary to take into account all three complaints filed by the Complainant, including the two retaliation complaints that were dismissed by the Commission and have not been referred to the Tribunal for inquiry. According to the Respondent, the Complainant is not permitted to seek relief for time periods falling outside the period covered by her initial complaint (February 22, 1999 to September 6, 2006) and that fall within those periods covered by the retaliation complaints (September 10, 2007 and ongoing). Specifically, the Respondent submits:

> In requesting these terms of relief, the Complainant improperly seeks to incorporate into this matter relief sought in other complaints that have not been referred to the Tribunal for further inquiry. This is an unacceptable skirting of the Commissions' role as gatekeeper and should not be permitted. Further, the pursuit of relief for time periods that have already been considered and dismissed by the Commission is duplicative and an abuse of process. For these reasons, the items of relief post-dating the scope of this complaint should be struck.
>
> (*Written Representation of the Respondent (Motion to strike portions of Complainant's Statement of Particulars*, December 21, 2012, at para. 68)

[66] In the Complainant's view, she should not be restricted to the time period covered by the allegations in her complaint. She described the allegations in her complaint as a "going concern" and, therefore, the remedies she requests cannot be restricted to the particular time period of the events that gave rise to the complaint.

[67] The Commission adopted a position similar to the Complainant's and also disagrees with the Respondent's position.

[68] As mentioned above, the Tribunal's remedial authority is only invoked at the conclusion of an inquiry, once a complaint has been substantiated (see subsection 53(2) of the *Act*). Furthermore, the Tribunal's remedial discretion must be exercised on a principled basis, considering the link between the discriminatory practice and the loss claimed (see *Chopra v. Canada (Attorney General)*, 2007 FCA 268 at para. 37). In other words, the Tribunal's remedial discretion must be exercised reasonably, in consideration of the particular circumstances of the case and the evidence presented (*Hughes v. Elections Canada*, 2010 CHRT 4 at para. 50).

[69] At this stage of the proceedings, prior to having received any evidence on the merits of the Complainant's allegations, I see no basis upon which I can dismiss the Complainant's claims for relief post-dating the time period of her complaint. I was also not provided with any authority, whether in the *Act* or otherwise, that restricts the period over which complainants can claim relief. The fact that the Complainant's retaliation complaints were dismissed by the Commission is also not persuasive. Ultimately, the Complainant still has to establish a link between the alleged discriminatory practices and the loss she is claiming. If there is no link, and the remedies requested are only related to the retaliation complaints, the remedy will not be awarded. The Respondent will have a full and ample opportunity to present its arguments in this regard at the hearing of this matter.

[70] Therefore, the Tribunal dismisses the Respondent's request to strike from the Complainant's SOP all claims for relief post-dating the time period of the complaint.

F. Should the Tribunal grant an order pursuant to paragraph 52(1)(c) of the Act?

[71] The Respondent requests an order pursuant to paragraph 52(1)(c) of the *Act* to protect the identity of individuals unrelated to this complaint. According to the Respondent, the disclosure of personal information for public view could cause undue hardship for individuals unrelated to this complaint, whose only involvement is that they applied for the same positions as the Complainant.

[72] During the hearing of this Motion, both the Complainant and the Commission indicated that they did not have an objection to the Respondent's request.

[73] In light of the agreement of the parties on this issue, and pursuant to paragraph 52(1)(c) of the *Act*, I order:

> The parties and their representatives to keep confidential all information regarding the identity of current and former employees of the Respondent unrelated to the complaint.

[74] To ensure additional confidentiality, I assured the parties that, even though the names of persons related to the complaint could be mentioned during the hearing, they would not appear in the Tribunal's decision; in as far as it would be possible.

IV. Conclusion

[75] For the reasons above, the Respondent's motion to strike portions of the Complainant's SOP is dismissed.

[76] The Respondent's request for an order under to paragraph 52(1)(c) of the *Act* is granted pursuant to the terms outlined at paragraph 73 above.

Signed by

Réjean Bélanger
Tribunal Member

OTTAWA, Ontario
May 8, 2013

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1727/8211

Style of Cause: Diane Carolyn Emmett v. Canada Revenu Agency

Ruling of the Tribunal Dated: May 8, 2013

Date and Place of Hearing: February 4 and 5, 2013

Toronto, Ontario

Appearances:

Diane Carolyn Emmett, for herself

Ikram Warsame, for the Canadian Human Rights Commission

Gillian Patterson and Andrew Law, for the Respondent