

Canadian Human
Rights Tribunal



Tribunal canadien
des droits de la personne

Between:

Janet Gover

**Complainant
(Responding Party)**

- and -

Canadian Human Rights Commission

**Commission
(Responding Party)**

- and -

Canada Border Services Agency

**Respondent
(Moving Party)**

**Ruling on the Motion Record of the Respondent (Moving Party)
(Motion for an Order Regarding Scope of Referral to Tribunal)**

Member: Robert Malo

Date: May 24, 2013

Citation: 2013 CHRT 14

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I. Background

[1] On January 30, 2005, the Complainant, Janet Gover, filed a complaint against the respondent, the Canada Border Services Agency, in which she refers to allegations of violations of sections 7, 10 and 14 of the *Canadian Human Rights Act*.

[2] At the beginning of her complaint, the Complainant stated the following:

I have reasonable grounds for believing that I have been discriminated against and my Employer has failed to accommodate my disability. I have reasonable grounds to believe that I have been subjected to systemic prejudice, Discrimination and Harassment. Therefore, I am noting (but not limited to) a reference to allegations of violations under Section 07 (seven) Section 10 (Ten) and Section 14 (Fourteen) of the Canadian Human Right Act.

[3] For a better understanding of this case, I refer to the provisions cited above with respect to the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, which read as follows:

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

Section 10: It is a discriminatory practice for an employer, employee organization or employer organization
(a) to establish or pursue a policy or practice, or
(b) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment,
that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.

Section 14: (1) It is a discriminatory practice,
(a) in the provision of good, services, facilities or accommodation customarily available to the general public,
(b) in the provision of commercial premises or residential accommodation, or
(c) in matters related to employment,
to harass an individual on a prohibited ground of discrimination.

Marginal note: Sexual harassment

(2) Without limiting the generality of subsection (1), sexual harassment shall, for the purposes of that subsection, be deemed to be harassment on a prohibited ground of discrimination.

1980-81-82-83, c. 143, s. 7.

Section 14.1: 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.

1998, c. 9, s. 14.

[4] Before I proceed to the inquiry and hearing of the Complainant's case, the Respondent has filed a motion that appears in the style of cause of this judgment, asking the Tribunal to make an order confirming the scope of the complaint filed by the Complainant.

[5] Specifically, the Respondent is asking the Tribunal to limit the hearing of the Complainant's complaint to the telephone aspect that was referred to the Tribunal by the Canadian Human Rights Commission, to the exclusion of the questions about the wage/salary issue.

[6] Accordingly, this motion was filed for the avowed purpose of obtaining clarification of the mandate entrusted to the Canadian Human Rights Tribunal by the Canadian Human Rights Commission under sections 44(3)(a) and 49 of the *Canadian Human Rights Act*.

II. The Motion

A. Respondent's motion

[7] In the motion that the Respondent filed with the Tribunal, the Respondent states that the Complainant's original complaint raised two points before the Canadian Human Rights Commission:

- (a) Wage/salary issue;
- (b) Telephone;

[8] According to the Respondent, the Commission investigated two aspects of the Complainant's complaint but referred only the telephone issue to the Tribunal, based on an investigation report that appears in Schedule A, paragraph 14, Affidavit of C. Deborah Hagarty, Tab B.

[9] In the Respondent's view, again based on the above-noted Commission's investigation report, the Respondent indicates the following at paragraph 10 of its submissions on this motion:

On the basis of those conclusions, the investigation report made the following recommendations:

It is recommended, pursuant to paragraph 44(3)(a) of the *Canadian Human Rights Act*, that the Commission request that the Chairperson of the Canadian Human Rights Tribunal institute and inquire into the complaint because:

- the evidence suggests that the Respondent adversely affected the complainant by denying her a telephone at her workstation.
- having regard to all the circumstances of the complaint, an inquiry by a Tribunal is warranted.

[10] Subsequently, the Respondent states the following at paragraph 12 of its submissions:

The investigation report was reviewed by the Commission along with submissions filed by the parties in response to the report. The Commission issued its referral decision by letter of May 3, 2012.

[11] Also, the Respondent refers to the Commission's decision letter, which uses the same wording as the Commission's investigation report, and refers the parties to the Commission's decision letter, Hagarty Affidavit, Tab A, which is a letter from the Canadian Human Rights Commission to the Complainant, Janet Gover, which reads as follows: (The following emphasis is the Tribunal's.)

Dear Ms. Gover:

I am writing to inform you of the decision taken by the Canadian Human Rights Commission in your complaint (20041101) against Canada Border Services Agency.

Before rendering the decision, the Commission reviewed the report disclosed to you previously and any submission(s) filed in response to the report. After examining this information, the Commission decided, pursuant to paragraph 44(3)(a) of the *Canadian Human Rights Act*, to request that the Chairperson of the Canadian Human Rights Tribunal institute an inquiry into the complaint because:

The evidence suggests that the Respondent adversely affected the complainant by denying her a telephone at her workstation; and

Having regard to all the circumstances of the complaint, an inquiry by a Tribunal is warranted.

Further information will be provided to you by the Tribunal regarding the conduct of proceedings.

[12] In its principal argument, the Respondent asks the following question:

Is the scope of the referral to the Tribunal limited to the complaint about the telephone issue?

[13] In its subsequent argument, the Respondent bases its motion on the following point:

The Commission did not refer to the wage/salary issue in its decision and, in addition, it stated that the investigation report would be considered as reflecting the Commission's reasoning. In that, the Respondent referred to *Sketchley v. Canada (Attorney General)*, 2005 FCA 404, at para. 37. Reference: Page 7, para. 22 of the Respondent's submissions.

[14] Second, the Respondent states that the Tribunal's jurisprudence recognizes that it is possible to refer a portion of a complaint, citing the decisions in *Powell v. United Parcel Service Canada Ltd.*, 2006 CHRT 27, *Kowalski v. Ryder Integrated Logistics*, 2009 CHRT 22 and *Côté v. Attorney General of Canada*, 2003 CHRT 32.

[15] Overall, the Respondent states that only the telephone issue was referred to the Tribunal since the Commission did not explicitly also mention a reference to the wage/salary issue, and I quote: Reference: Page 10, paragraphs 33 and 34 of the Respondent's submissions.

33. As the wage/salary issue was not referred by the Commission, it is not before the Tribunal for inquiry. It is therefore outside of the Tribunal's jurisdiction. If the Tribunal were to allow the wage/salary issue to proceed to hearing regardless, it would render meaningless the Commission's screening function under the Act.

34. The Act does not provide complainants with direct access to the Tribunal. The Commission, an administrative agency, is charged with deciding whether complaints should be dealt with, investigated and/or referred to Tribunal. The Tribunal can only adjudicate complaints that have been referred to it by the Commission.

[16] Lastly, the Respondent states in its final argument that the Tribunal must ensure that complaints entrusted to it are dealt with expeditiously, taking into account the interpretation of the letter from the Commission as indicated above, and that only the telephone issue was entrusted to the Tribunal for inquiry, not the wage/salary issue. The Respondent states that if the Respondent's motion is granted, that would greatly facilitate the expeditious conduct of the proceedings instituted in this case.

B. Complainant's Reply

[17] In response to the argument filed by the Respondent in support of its motion, the Complainant states that the failure to explicitly mention a part of the complaint as in this case demonstrates the Commission's intention to refer the Complainant's entire complaint. She therefore adopts a position *a contrario* to the Respondent's argument in its motion.

[18] She also refers to the fact that the Respondent misconstrued the Commission's investigation report and states that the Commission clearly indicated that it had fully considered all the arguments that had been filed including "both the investigation report and the post-investigation submissions of the parties".

[19] In her view, the interpretation of the jurisprudence from the Federal Court indicates that the Commission must use clear language and reasons to reject "post-investigation submissions, particularly where those submissions allege omissions."

[20] Like the Respondent, the Complainant refers to the letter of May 3, 2012, **addressed to the Complainant, Janet Gover**. It should be noted that the Complainant had previously filed an application for judicial review of the Commission's decision with the Federal Court; the Complainant subsequently abandoned this application for judicial review. (The emphasis above is the Tribunal's.)

[21] In her conclusion, the Complainant states the following:

50. The Commission in this instance chose to refer the complaint to the Tribunal using broad, general language which encompasses all portions of the complaint. The Respondent relies on the lack of an express referral to assert that the wage/salary issue has been dismissed. However, this is not consistent with the importance of the rights in issue, the role of the Commission, or the statutory scheme setting out the Commission's powers to refer and dismiss. These factors indicate that the Commission's exercise of its discretion and power to dismiss must be done through clear and explicit language. Here, the lack of express language dismissing any part of the complaint and the generality of the referral demonstrate the Commission's intention to refer the full complaint. Had the Commission intended to dismiss the wage/salary issue, it would have done so explicitly, as is consistent with its own practice.

51. Moreover, the Commission has indicated that it gave consideration to the post-investigation submissions of the parties. The Commission at no time indicated that it was rejecting any of these submissions, and so it can be assumed that they inform the Commission's assessment of whether an inquiry is warranted. The Respondent's position relies entirely on the investigator's report to interpret the Commission's referral. The investigator's report is of limited interpretive value where the Commission took other submissions under consideration.

52. Accordingly, the Respondent's motion should be dismissed in its entirety.

C. Position of the Canadian Human Rights Commission

[22] In response to the Respondent's motion, the Canadian Human Rights Commission opposes the Respondent's motion and asks that it be dismissed for the following reasons.

[23] In its argument, the Commission refers to two letters issued by the Commission on the same day, May 3, 2012, i.e. a letter addressed to the Complainant herself, with the following notation:

the evidence suggests that the Respondent adversely effected the complainant by denying her a telephone at her workstation: and

having regard to all the circumstances of the complaint, an inquiry by the Tribunal is warranted (emphasis added).

[24] The Commission also refers to a second letter dated May 3, 2012, addressed directly to **the Chairperson of the Canadian Human Rights Tribunal** in the following terms: (emphasis added)

On May 3, 2012, the Commission referred Ms. Gover's complaint to the Tribunal for inquiry. The Acting Chief Commissioner's letter to the Chairperson of the Tribunal is instructive. It stated:

The Canadian Human Rights Commission has reviewed the complaint (20041101) of Janet Gover against Canada Border Services Agency.

The Commission has decided, pursuant to paragraph 44(3)(a) of the *Canadian Human Rights Act*, to request 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 enclosed. . . .

Saikali affidavit, Commission's Motion Record, Tab 2, Exhibit "D"

[25] The Commission reiterates unequivocally that it referred to the Tribunal "the **entire** complaint of Ms. Gover has been referred to the Tribunal for further inquiry, not just a portion of it as there is no indication in the Commission's decision and referral letters that **only** 'the telephone issue' has been referred for inquiry." Reference: Page 5, para 11 Submissions of the Canadian Human Rights Commission.

[26] In its argument, the Commission refers to *Kowalski v. Ryder Integrated Logistics*, 2009 CHRT 22, and *Lacroix v. RCMP*, 2009 CHRT 35, Respondent's Motion Record, TABS F and G.

[27] The Commission drew the Tribunal's attention to the fact that it considers the Respondent's argument to be, in fact, a request to the Tribunal to review the process whereby the Commission refers a complaint to the Tribunal, which the Federal Court explicitly excluded from the Tribunal's powers in *Canadian Human Rights v. Lemire and al*, 2012 FC 1162, paras 52-58, Commission's Motion Record, Tab 5.

[28] It states as follows: (page 7 Submission of the Canadian Human Rights Commission)

15. We submit that what the Respondent is requesting here amounts to a review of the Commission's decision-making process and its handling of the complaint. This is merely a collateral attack of the Commission's administration of the complaint and its decisions.

16. By doing so, the Respondent fails to consider the separate roles of the Commission and the Tribunal under the *CHRA*. The Supreme Court of Canada recently reconfirmed in Halifax the different functions and roles of the Commission as an administrative body and the Tribunal as an adjudicative body. As such, the Tribunal has no authority over the exercise of the Commission's discretion to refer a complaint for further inquiry pursuant to section 44(3)(a) of the *CHRA*.

Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission), 2012 SCC 10, para 50, Commission's Motion Record, Tab 7.

17. Very recently, the Federal Court confirmed that the role of the Tribunal is to adjudicate complaints and not collaterally review the Commission's decision making process. The Federal Court's reasoning in *Lemire* is instructive. In upholding a judicial review of the Tribunal's decision. Justice Mosley held:

[55] The CHRA establishes two distinct institutions, each of which has a particular role as described by the statute. It sets out a complete mechanism for dealing with human rights complaints. Central to this mechanism is the Commission. Under the scheme of the Act, the Commission is the body empowered to accept, manage and process complaints of discriminatory practices. The Tribunal has no statutory mandate under the Act with respect to its

administration, except as set out in s 50 which provides that “it shall inquire into the complaint” when a request is made by the Commission that it do so. These factors suggest that the legislature did not intend that the Tribunal would have the authority to find the Act inoperative based on the manner in which the statute was administered.

[56] In particular, the Tribunal has no jurisdiction over the exercise of the Commission’s discretion under CHRA’s 44(3) (rejecting of referring a complaint) and s 47 (appointing a conciliator). **The proper way to challenge a Commission decision in respect of such matters is through juridical review by the Federal Court.**

[57] **In exercising its authority, the Tribunal cannot collaterally question a Commission decision that is within the statutory authority of that body. This is properly left to judicial review:**

[58] **The concern that the Commission referred this complaint to the Tribunal even though most of the impugned material had been moved from the Internet is, in effect a comment on the Commission’s decision to request that the Tribunal hold an inquiry. That is outside the tribunal’s mandate.** (emphasis added)

Lemire, supra, paras 55-58.

[29] Lastly the Commission also referred to *Côté v. Canada (Royal Canadian Mounted Police)*, 2003 CHRT 32, para. 12, Commission’s Motion Record, Tab 6, which is a decision of Member Hadjis of the Canadian Human Rights Tribunal.

[30] In conclusion, the Commission states the following:

23. Essentially, we respectfully submit that there is nothing in the Commission’s decision which suggests that only the ‘telephone issue’ is referred to the Tribunal for inquiry as asserted by the Respondent. The Respondent relies on irrelevant considerations, including comments made by the Commission’s investigators which are not binding on the Tribunal. The proceedings before the Tribunal are

de novo. As such, the Tribunal has the jurisdiction to inquire into the entire complaint of Ms. Gover and not only portions.

III. Decision

[31] After thoroughly reviewing the written arguments of the parties and consulting the relevant jurisprudence cited by the parties, the Tribunal concludes that the motion filed by the Respondent in this case should not be granted.

[32] In this regard, the Tribunal finds that the main point that should be considered in adjudicating the Respondent's motion is the letter from the Canadian Human Rights Commission to the Chairperson of the Tribunal, Ms. Shirish P. Chotalia, Chairperson, Canadian Human Rights Tribunal, dated May 3, 2012, which it is very useful to refer to.

Dear Ms. Chotalia:

I am writing to inform you that the Canadian Human Rights Commission has reviewed the complaint (20041101) of Janet Gover against Canada Border Services Agency.

The Commission has decided, pursuant to paragraph 44(3)(a) of the *Canadian Human Rights Act*, **to request that you institute an inquiry into the complaint as it is satisfied that, having regard to all the circumstances, an inquiry is warranted.** (emphasis added)

A copy of the compliant form is enclosed. Form I, including complainant and Respondent information, will be provided by the Litigation Services Division.

The complainant and Respondent are being advised that they will receive further information from the Tribunal regarding the proceedings.

Yours sincerely,

David Langtry

[33] A review of this letter indicates, in the second paragraph, that the Commission decided, pursuant to paragraph 44(3)(a) of the *Canadian Human Rights Act*, to request that the Tribunal institute an inquiry “into the complaint, as it is satisfied that, having regard to all the circumstances, an inquiry is warranted.”

[34] Also, in the same letter, a copy of the complaint was enclosed.

[35] Curiously, no mention of this letter addressed directly to the Chairperson of the Canadian Human Rights Tribunal appears in the Respondent’s argument in support of its motion to limit the scope of the complaint that was referred to the Tribunal.

[36] A review of the documents appended to the Respondent’s motion shows a letter also dated May 3, 2012, but addressed to the Complainant in very similar terms to the letter addressed to the Chairperson of the Canadian Human Rights Tribunal.

[37] The above-mentioned nuance appears vital to the survival of the Respondent’s motion.

[38] In fact, it is clear that only the letter from the Canadian Human Rights Commission to the Chairperson of the Canadian Human Rights Tribunal conferred legal jurisdiction for the purpose of granting the Tribunal all the powers that the Act gives to the Tribunal under sections 44(3)(a) and 49 of the *Canadian Human Rights Act*. (The emphasis below is the Tribunal’s.)

44. (3) On receipt of a report referred to in subsection (1), the Commission:

(a) **may request the Chairperson of the Tribunal** to institute an inquiry under section 49 into the complaint to which the report relates if the Commission is satisfied

(i) that, having regard to all the circumstances of the complaint, an inquiry into the complaint is warranted, and

(ii) that the complaint to which the report relates should not be referred pursuant to subsection (2) or dismissed on any ground mentioned in paragraphs 41(c) to (e);

49. (1) At any stage after the filing of a complaint, the Commission may **request the Chairperson of the Tribunal** to institute an inquiry into the complaint if the Commission is satisfied that, having regard to all the circumstances of the complaint, an inquiry is warranted.

(2) On receipt of a request, **the Chairperson shall institute an inquiry by assigning** a member of the Tribunal to inquire into the complaint, but the Chairperson may assign a panel of three members if he or she considers that the complexity of the complaint requires the inquiry to be conducted by three members.

(3) If a panel of three members has been assigned to inquire into the complaint, the Chairperson shall designate one of them to chair the inquiry, but the Chairperson shall chair the inquiry if he or she is a member of the panel.

(4) The Chairperson shall make a copy of the rules of procedure available to each party to the complaint.

(5) If the complaint involves a question about whether another Act or a regulation made under another Act is inconsistent with this Act or a regulation made under it, the member assigned to inquire into the complaint or, if three members have been assigned, the member chairing the inquiry, must be a member of the bar of a province or the *Chambre des notaires du Québec*.

(6) If a question as described in subsection (5) arises after a member or panel has been assigned and the requirements of that subsection are not met, the inquiry shall nevertheless proceed with the member or panel as designated.

[39] Indeed, no other document appears to be as useful and necessary for conferring jurisdiction on the Tribunal in order to proceed with an inquiry that is entrusted to it by the Canadian Human Rights Commission as the letter addressed directly to the Chairperson of the Tribunal and no one else.

[40] Specifically, the Tribunal relies on a recent decision in the case *Premakumar Kanagasabapathy v. Canadian Human Rights Commission and Air Canada*, 2013 CHRT 7, a decision written by Sophie Marchildon, Administrative Judge at the Canadian Human Rights Tribunal.

[41] In that decision, Administrative Judge Marchildon had to address the same issues as this case does.

[42] Regarding the issue of the determinative nature of the letter addressed to the Chairperson of the Tribunal, she stated the following at paragraph 29 of her decision:

[29] In my view, given the working of s. 49(1), the ‘best evidence’ of the Commission’s request to the Chairperson for an inquiry is this: the Letter sent from the Commission to the Chairperson requesting an inquiry. In the present case, the letter of request was signed by the Acting Chief Commissioner, but most importantly, *it is addressed to the Chairperson of the Tribunal*. This is the document which initiates the entire Tribunal inquiry process. Accordingly, this is the document that determines whether the complaint has been referred in its entirety or not.

[43] Similarly, Administrative Judge Marchildon also refers to various decisions including *Côté v. Attorney General of Canada*, 2003 CHRT 32 and *Kowalski v. Ryder Integrated Logistics*, 2009 CHRT 22, which also dealt with issues that are similar to those in this case.

[44] In *Kowalski*, Member Hadjis stated the following with respect to the Tribunal’s jurisdiction to institute inquiries under section 49 of the Act:

[7] The tribunal's jurisdiction to conduct inquiries into complaints is derived from s. 49 of the *Act*, pursuant to which the **Tribunal Chairperson must institute an inquiry into a complaint upon receipt of a request from the Commission (s.49(2))**. The scope of Tribunal inquiries is thus limited to the matters arising from the complaint accompanying such requests. (emphasis added)

[8] Did the Commission refer Mr. Kowalski's entire complaint to the Tribunal in the present case? The Commission gave no indication in its letter to the Tribunal Chairperson that it had decided to limit the complaint's scope. This would suggest, therefore, that the Commission referred the entire complaint, as drafted by Mr. Kowalski on April 20, 2007, to the Tribunal.

[45] In the *Kowalski* decision, Member Hadjis also referred to *Côté v. Attorney General of Canada*, 2003 CHRT 32, where the letter from the Commission to the Chairperson of the Tribunal gave no indication to suggest that only some parts of the complaint had been referred. Consequently, Member Hadjis found that the entire complaint was before the Tribunal.

[46] By way of distinguishing this case from *Kowalski*, it is useful to note that in this case, just as in *Côté*, there is no explicit decision by the Commission to not deal with certain allegations in the Complainant's complaint.

[47] Furthermore, with respect to the argument that the reasons in support of the decision by the Human Rights Commission should be considered, I find that it is unnecessary to address the considerations supporting the investigation reports that are in the Complainant's record because, in doing so, the Tribunal would be in the position of reviewing the Commission's reasons, which is not within the Tribunal's jurisdiction, as the Federal Court decided in the *Lemire* decision (*Warmen v. Lemire*, 2012 F.C.J. 1233, para. 56-58).

[48] Therefore, considering the wording of the letter dated May 3, 2012, addressed to the Chairperson of the Tribunal at the time, Shirish P. Chotalia, which makes no distinction with respect to portions of the complaint or rejecting those portions, I find that the entire complaint was referred to the Tribunal for inquiry and hearing, including the wage/salary issue.

[49] Accordingly, the Respondent's motion is dismissed.

Signed by

Robert Malo
Tribunal Member

Ottawa, Ontario
May 24, 2013

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1822/5212

Style of Cause: Janet Gover v. Canada Border Services Agency

Ruling of the Tribunal Dated: May 24, 2013

Appearances:

Andrew Astritis, for the Complainant

Ikram Warsame, for the Canadian Human Rights Commission

Zoe Oxaal, for the Respondent