Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Between:

Ken Kelsh

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Canadian Pacific Railway

Respondent

Ruling

File No.: T1956/3613
Member: Olga Luftig
Date: December 15, 2014
Citation: 2014 CHRT 36

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I. Background – The Complaint

[1] On August 12, 2013, the Canadian Human Rights Commission (the "Commission") requested that the Acting Chair of the Canadian Human Rights Tribunal (the "Tribunal") institute an inquiry into the complaint of Mr. Ken Kelsh (the "Complainant") against the Canadian Pacific Railway (the "Respondent").

[2] The complaint ("Complaint") alleges discrimination in employment on account of disability, adverse differential treatment and failure to accommodate, contrary to section 7 of the *Canadian Human Rights Act* ("*Act*") and retaliation, contrary to section 14.1 of the *Act*. The Complaint was amended on June 1, 2012 to include the allegation of systemic discrimination in the Respondent's testing and bidding practices and procedures, contrary to section 10 of the *Act*.

[3] The Complainant belongs to a division of the Teamsters Union ("Union"). His employment is governed by a collective agreement ("Collective Agreement") between the Union and the Respondent.

[4] Although the Commission will not participate in the hearing, it has filed a Statement of Particulars ("SOP"), and a Response to the Motion which is the subject of this Ruling.

[5] Oral argument on the Motion was heard via teleconference on September 19, 2014.

II. Respondent's Motion to Dismiss the Complaint

[6] The Respondent has motioned to dismiss the Complaint on the grounds below.

- The Complainant has failed to exhaust the grievance procedure available to him under the Collective Agreement, contrary to subsection 41(1) of the *Act*.

- Subsection 50(2) of the *Act* gives the Tribunal the power to determine all questions of law and fact arising in the course of determining any matter under the inquiry, including deciding its own jurisdiction.

[7] In addition to its submissions in its Notice of Motion, the Respondent submitted the following documentary evidence in support of the Motion:

- the Affidavit of Brianne Sly, sworn February 10, 2014 ("Sly Affidavit");
- the Complaint;
- the Commission's Section 40/41 Report and Decision dated April 17, 2012;
- an October 20, 2011 letter from David Brown, Union counsel, to the Commission's Early Resolutions Officer, Caroline Audet ("Brown Letter").

III. Background to the Motion to Dismiss

[8] There is no dispute among the parties as to the background to this Motion as described below.

- August 24, 2011: the Complainant filed the Complaint with the Commission;
- October 21, 2011: the Union sent the Brown Letter to the Commission. The crux of the Brown Letter is that the Union refused to file a grievance on behalf of the Complainant because in the Union's experience, the Complainant's lack of a specific certification ("D Card") while at the same time holding an equivalent position without loss of pay, would not be successful at the grievance or arbitration stage;
- The Brown Letter also commented that the Complainant's human rights matters should proceed at the Commission;

- The Commission satisfied itself that the failure to commence a grievance was not attributable to the Complainant, and on June 27, 2012 decided that the Complaint should go forward because another redress procedure was not reasonably available to the Complainant, in accordance with the Commission's April 17, 2012 Section 40/41 Report and Decision;

- The Respondent did not apply to the Federal Court for judicial review of the Commission's June 27, 2012 decision;

- August 12, 2013: the Commission referred the Complaint to the Tribunal for an inquiry.

[9] With respect to the grievances filed on the Complainant's behalf, the main steps are described as follows:

- June 21, 2013: Mr. Wade Phillips, a Union employee temporarily acting as assistant to the Union director, filed a grievance ("Grievance #1") on behalf of the Complainant, which included a request for accommodation under the *Act*. This was the "Step 1" stage of the grievance process;

- The Respondent denied Grievance #1;

- September 17, 2013: Mr. Phillips filed a Step 1 grievance on behalf of the Complainant ("Grievance #2") which also included a request for accommodation under the *Act*;

- The Respondent denied Grievance #2;

- The Union proceeded to the next stage ("Step 2") with the Grievances;

- The Respondent denied both grievances at Step 2;

- The next stage in the grievance process is arbitration;

- In February 2014, the Respondent served and filed its Notice of Motion;

- Shortly thereafter, the Union withdrew the Grievances on a without prejudice basis;

- As part of the Complainant's response to this Motion, Mr. Phillips swore an affidavit on April 17, 2014 ("the Phillips Affidavit") essentially declaring that:

  (i) he pursued the Complainant's two grievances because he was unaware of the Brown Letter (para. 3); and

  (ii) once he became aware of the Brown Letter on February 18, 2013 [sic], he withdrew the Grievances on a without prejudice basis (para. 4). [My note: given the dates in all the materials regarding this issue, I am assuming that in paragraph 4, Mr. Phillips meant February 18, *2014* and not 2013.]

[10] The Respondent did not cross-examine Mr. Phillips on his Affidavit.

A. The Respondent's Submissions in Support of the Motion to Dismiss

[11] The Respondent's position is set out below.

- The grievance procedure is still reasonably available to the Complainant, but he has elected not to pursue it;

- The Grievances deal with substantially the same facts which are at issue in the Complaint. The Grievances had gone through to the end of the Step 2 process;

- The Union withdrew the Grievance only at the request of Complainant's counsel;

- Further, the withdrawal of the Grievances was on a "without prejudice and without precedent" basis, and the Grievances can therefore be revived. The essential nature of the

Grievances and the Complaint are the same. In fact, the Complainant can exhaust the grievance process by filing grievances on "…exactly the same facts and the same human rights issues that are before the Tribunal in this matter, at any time" (para. 6, Respondent's Reply to Complainant's Response to Motion);

- The Canadian Railway Office of Arbitration and Dispute Resolution ("CROA") is the more appropriate place to address the Complaint, because the CROA arbitrators are more familiar with the specialized work and labour environment that is part of the Respondent's workplace;

- Labour arbitrators have the jurisdiction and the obligation to deal with human rights legislation;

- If the Tribunal permitted the Complaint to proceed, it would be contrary to the purposes of subsection 41(1)(a), which the Respondent submits are:

  a) to prevent the unnecessary duplication of proceedings, particularly when an arbitrable grievance and a human rights complaint "… emerge from the same factual matrix";

  b) to promote the timely resolution of workplace disputes by "experts in the field who are sensitive to the workplace environment" as set out in *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42 (*"Parry Sound"*).

- Instead of using the Human Rights procedure when the Union refused to represent him, the Complainant should have availed himself of section 37 of the *Canada Labour Code* (R.S.C. 1985, c. L-2). [My note: section 37 essentially provides that a bargaining agent shall not act in a manner that is arbitrary, discriminatory or in bad faith in representing any employee under the applicable collective agreement.]

B. The Complainant's Position

[12] The Complainant's position is set out below.

- The Grievances were mistakenly filed by Mr. Phillips, the temporary assistant to the Union president, because he was not aware of the Brown Letter;

- This is not a case of "forum shopping" – the Complainant's counsel was not aware of the Grievances until he received this Motion;

- The Complainant could not appreciate the consequences of filing the Grievances in terms of their possible impact on his Complaint. He did so only to find out why he was denied any particular position;

- When Complainant's counsel and Union counsel Brown spoke on the phone in the presence of Union director William Brehl in October 2013, Union counsel was very direct, persistent and unequivocal in confirming that the Union did not support a grievance on behalf of the Complainant. Therefore, the Complainant has no grievance or review procedures reasonably available to him;

- The Tribunal should dismiss the Respondent's Motion.

C. The Commission's Position

[13] The Commission takes the position below.

- The Tribunal lacks the jurisdiction to dismiss a complaint on a preliminary basis – it is the Commission which has the primary jurisdiction to do so (*Harkin v. Canada (Attorney General)*, 2009 CHRT 6 ("*Harkin*"), at para. 20;

- The Tribunal is a creature of statute – the *Canadian Human Rights Act*. This enabling statute does not give the Tribunal the authority to conduct what would essentially be a second screening function once the Commission refers a complaint for an inquiry. Had Parliament intended that, it would have specifically granted the Tribunal this authority in its enabling statute;

- When the Commission referred the Complaint to the Tribunal for an inquiry, the Commission was satisfied that there was no ability for the Complainant to avail himself of any grievance procedure pursuant to subsection 41(1)(a) of the *Act* because the Union's counsel had stated in the Brown Letter that the Union would not grieve the Complainant's issue. Therefore the Complainant had no other grievance or review procedure reasonably available to him;

- The Tribunal should dismiss a complaint on a preliminary basis only in exceptional circumstances – for example, if an inquiry constitutes an abuse of the Tribunal's process, or where an inquiry would violate principles such as judicial economy, consistency, finality and the integrity of the administration of justice.

IV. Issues

[14] The issues in this Motion are:

A. Can the Tribunal decide its own jurisdiction?

B. Can the Tribunal dismiss a complaint at a preliminary stage, before a hearing?

C. Does the Tribunal have the authority to dismiss this Complaint on the basis that a grievance or review procedure is otherwise reasonably available to the Complainant, as set out in subsection 41(1)(a) of the *Act*?

V. Analysis

A. Can the Tribunal decide its own jurisdiction?

[15] Subsection 50(2) of the *Act* states:

> **"50(2)** In the course of hearing and determining any matter under inquiry, the member or panel [of the Tribunal] may decide all questions of law or fact necessary to determining the matter."

[16] I conclude that by using the phrase "all questions of law and or fact", the wording in subsection 50(2) of the *Act* is sufficiently broad that the Tribunal can decide questions of its own jurisdiction.

B. Can the Tribunal dismiss a complaint at a preliminary stage, before a hearing?

[17] I also conclude that in very limited circumstances, the Tribunal has the jurisdiction to dismiss complaints at a preliminary stage, prior to a hearing. Those limited circumstances are:

i) when an inquiry would constitute an abuse of the Tribunal's processes, as in *Canada (Human Rights Commission) v. Canada Post Corp*., 2004 FC 81 ("*Cremasco*"), aff'd in *Canadian Human Rights Commission v. Canada Post Corp.*, 2004 FCA 363; and

ii) where an inquiry would constitute re-litigation of a matter which although not falling into issue estoppel, would "…violate principles such as judicial economy, consistency, finality and the integrity of the administration of justice" (*Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.), Local 79*, [2003] S.C.J. No. 64, at para. 37).

C. Does the Tribunal have the authority to dismiss this Complaint on the basis that a grievance or review procedure is otherwise reasonably available to the Complainant, as set out in subsection 41(1)(a) of the *Act*?

(i) Abuse of Process and Re-litigation

[18] The Respondent does not allege that it would be an abuse of the Tribunal's process if the inquiry into the Complaint were to continue.

[19] Rather, the Respondent essentially alleges that the grievance procedure is the appropriate process to deal with the matters in the Complaint because: a) CROA arbitrators are both familiar with the specialized workplace environment in this Complaint, and also are capable, authorized and obligated to deal with the Complaint's human rights allegations; and b) section 41(1)(a) of the *Act* embodies Parliament's intention to avoid having matters that should be addressed through the grievance process dealt with by the human rights administrative process.

[20] Even if the Respondent had alleged abuse of process, I find that the situation here does not constitute abuse of process. There has not been an inordinate delay in the Complainant's case. There is no re-litigation issue here because there is no arbitration decision – the Step 1 and 2 Grievances were made up of written submissions and written responses. There was no hearing and no arbitrator's decision, which would have constituted a final decision.

[21] Proceeding with the inquiry would not violate judicial economy, consistency, finality or the integrity of the administration of justice.

(ii) Should Tribunal dismiss this Complaint on the basis that s. 41(1)(a) of the *Act* applies?

[22] Although the Tribunal has the authority, in very limited circumstances, to dismiss a complaint at a preliminary stage before a hearing, the issue remains whether that authority extends to the circumstances contemplated in subsection 41(1)(a).

[23] Subsection 41(1)(a) of the *Act* states:

> "**41.(1)** Subject to section 40, the Commission shall deal with any complaint filed with it unless in respect of that complaint it appears to the Commission that
>
> (a) the alleged victim of the discriminatory practice to which the complaint relates ought to exhaust grievance or review procedures otherwise reasonably available;"

[24] In putting subsection 41(1)(a) into the *Act*, Parliament recognized that there are parallel proceedings which exist together.

[25] Subsection 41(1) of the *Act* obligates the Commission to deal with any complaint filed with it, unless, in certain enumerated circumstances, such as in 41(1)(a), "it appears to the Commission… that the enumerated circumstance or circumstances apply".

[26] Parliament therefore specifically vested the Commission with the authority and responsibility to exercise the discretion to decide whether to "deal with any complaint filed with it", subject to the grounds in 41(1)(a) and the subsections following it.

[27] Parliament did not give that authority to the Tribunal – otherwise, that authority would be in the *Act*, as in *Harkin*, supra, at paras. 21 and 22.

[28] Further, Parliament did not authorize the Tribunal to be a second screening authority – that is not the scheme envisioned in the *Act*.

[29] If a party is not satisfied with the way the Commission has exercised its discretion under subsection 41(1)(a), that party has recourse by way of an application to the Federal Court for judicial review of the Commission's decision. The Respondent did not do that after the Commission's June 12, 2012 decision to proceed with the Complaint.

[30] The Respondent's submission that as the Union representative for the Complainant, Mr. Phillips withdrew the grievances solely because Complainant's counsel asked him to do so is contrary to paragraph 4 of the Phillips Affidavit, in which he avers that "[O]nce I became aware of Mr. Brown's letter on or about February 18, 2013 (sic) … I withdrew the grievances…"

[31] Read together, paragraphs 3 and 4 of the Phillips Affidavit establish that Mr. Phillips withdrew the Grievances once he became aware of the Brown Letter. Complainant counsel's information to Mr. Phillips regarding the situation only served as notice to Mr. Phillips that he had inadvertently grieved, contrary to his Union's position.

[32] Put another way, I conclude that Mr. Phillips did not take his instructions to withdraw the Grievances from the Complainant's counsel, but rather from the Union's counsel, whose instructions and position were embodied in the Brown Letter.

[33] During the September 19, 2014 oral hearing of the Motion via teleconference, Complainant's counsel confirmed that as in the Complainant's Response to Motion, when the Complainant's counsel spoke on the phone to Union counsel Mr. Brown in October 2013, with the Union's director, William Brehl, also present, Mr. Brown again confirmed that the Union would not pursue a grievance based on the D Card issue on the Complainant's behalf.

[34] Further, the Phillips Affidavit was sworn in April 2014, after the Grievances were withdrawn. I find that the fact that the Grievances were withdrawn on a "without prejudice" basis is irrelevant to the true position of the Union, which had not and has not changed since the Brown Letter. That position is that so long as a potential grievance involves the lack of a D Card, by a potential griever whose salary is not affected by not having the D Card, the Union will not file a grievance, because in its experience, those grievances are never successful.

[35] The Complainant would be left without recourse to a grievance or other procedure to address his human rights Complaint.

[36] The *Act* is clear, as is the case law – the Tribunal does not have the jurisdiction to dismiss a Complaint at a preliminary stage of the Tribunal process on the basis of subsection 41(1)(a). That jurisdiction belongs to the Commission.

[37] For all of the above reasons, the Respondent has not established that the Tribunal should dismiss the Complaint pursuant to this Motion.

VI. Ruling

[38] The Respondent's Motion is dismissed.

Signed by

Olga Luftig
Tribunal Member

Ottawa, Ontario
December 15, 2014