Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Between:

First Nations Child and Family Caring Society of Canada

- and-

Assembly of First Nations

Complainants

- and -

Canadian Human Rights Commission

Commission

- and -

Attorney General of Canada
(Representing the Minister of Indian Affairs and Northern Development of Canada)

Respondent

- and -

Chiefs of Ontario

- and -

Amnesty International

Interested Parties

Ruling

Members: Sophie Marchildon, Réjean Bélanger and Edward P. Lustig
Date: October 16, 2012
Citation: 2012 CHRT 24

I. Context

[1] The Complainants have filed a human rights complaint alleging that the inequitable funding of child welfare services on First Nations reserves amounts to discrimination on the basis of race and national ethnic origin, contrary to section 5 of the *Canadian Human Rights Act*, RCS 1985, c. H-6 (the *Act*). On December 22, 2009, the First Nations Child and Family Caring Society of Canada ("FNCFCS") served a notice of motion to amend the complaint to include allegations of retaliation, contrary to section 14.1 of the *Act* (the motion to amend the complaint). On February 7, 2011, Dr. Cindy Blackstock, Executive Director of the Caring Society and FNCFCS, filed a second human rights complaint alleging that the Respondent had engaged in retaliation. This complaint is currently at the Canadian Human Rights Commission ("the Commission") stage and has yet to be referred to the Tribunal.

[2] In view of the Respondent's December 21, 2009 motion for the dismissal of the complaint on the ground that the issues raised were beyond the tribunal's jurisdiction (the jurisdictional motion) and the Tribunal's March 14, 2011 decision reported at 2011 CHRT 4, granting this motion, the Tribunal never ruled on the motion to amend the complaint. The Tribunal's 2011 CHRT 4 decision was subsequently the subject of an application for judicial review before the Federal Court and, on April 18, 2012, the Federal Court set aside the Tribunal's decision and remitted the matter to a differently constituted panel of the Tribunal for re-determination in accordance with its reasons (2012 FC 445).

[3] On July 10, 2012, a panel of three Tribunal members, composed of members Marchildon, Lustig and Bélanger was appointed to hear this case (2012 CHRT 16). In a letter dated July 16, 2012, counsel for FNCFCS brought to the Tribunal's attention the December 22, 2009 motion to amend the complaint, which is the subject of the present ruling.

II. The allegations of retaliation

[4] The Complainants contend that the Respondent has retaliated against Dr. Blackstock since they filed the initial complaint. The Complainants allege that on December 9, 2009, Dr. Blackstock was invited by the Chiefs of Ontario to attend a meeting with David McArthur in INAC's office regarding child welfare funding in Ontario. She was one of five individuals who had been invited to attend this meeting by the Chiefs of Ontario as a technical aid. Upon her arrival, David McArthur told Dr. Blackstock that he was aware that she had a number of "issues" regarding child welfare, including a human rights complaint, and that he would rather meet with her another time. Mr. McArthur made it clear that he would refuse to meet with the Chiefs of Ontario if Dr. Blackstock were present. Dr. Blackstock was asked to wait outside the meeting room, in the reception area, during the meeting. No other individual invited to provide technical support to the Chiefs was excluded from the meeting. Dr. Blackstock wrote to Minister Chuck Strahl on December 15, 2009, detailing the incident and asking for an explanation as to why she was excluded from the meeting.

[5] According to the Complainants, this was not the first time that Dr. Blackstock had been denied the opportunity to provide support to agencies seeking her expertise. A similar incident happened in 2008 when the British Columbia Children and Family Services Association ("BCCFSA") invited Dr. Blackstock to provide them with support during the negotiation of an enhanced funding model with INAC officials. The officials refused to meet with BCCFSA if Dr. Blackstock were present because she had filed a complaint against INAC.

[6] In addition, Dr. Blackstock contends that, since December 2009, she has become aware that INAC and Department of Justice officials have monitored her personal and private Facebook page. Internal INAC email correspondence obtained through various *Access to Information and Privacy Act* requests links the surveillance of her personal Facebook page and Twitter account with trying to discover "other motives" for the filing of the Complainants' human rights complaint. Dr. Blackstock explains that these transgressions into her personal life constitute a form of intimidation which might impact the fairness of the process before the Tribunal. The Complainants submit that prior to filing the human rights complaint, Dr. Blackstock was

regularly consulted by INAC officials and worked collaboratively with the department on studies and projects in order to help improve the outcome of First Nations children in care.

III. The parties' position

The Complainants' position

[7] The Complainants submit that Rule 3(2) of the *Canadian Human Rights Tribunal Rules of Procedure* (the *Rules of Procedure*) confers to the Tribunal considerable discretion in the manner in which it disposes of motions and specifies that amendments to complaints can be made at any time prior to the commencement of proceedings in order to promote expeditiousness and the procedural rights of the parties: *Canada (Human Rights Commission) v. Canadian Telephone Employees Assn.*, 2002 FCT 776, at paragraphs 30-32. The test to be applied in determining whether to allow the amendment of the complaint was stated by the Tribunal in *Virk v. Bell Canada*, 2004 CHRT 10, at paragraph 8: "whether the allegations of retaliation are by their nature linked, at least by the complainant, to the allegations giving rise to the original complaint and disclose a tenable claim for retaliation". In coming to this conclusion, the Tribunal "should not embark on a substantive review of the merits of the amendment"; rather, it should grant the amendment unless it is plain and obvious that the allegations have no chance of success: *Bressette v. Kettle and Stony Point First Nation Band Council*, 2004 CHRT 02, at paragraph 6. While the Tribunal in *Gaucher v. Canadian Armed Forces*, 2005 CHRT 1, at paragraphs 10 and 12, acknowledged that because the Tribunal's jurisdiction over a complaint originates from a referral by the Commission, there must be certain limits on the scope of the amendments; this constraint is "only one aspect of the matter" as "human rights tribunals have adopted a liberal approach to amendments" that is in keeping with the remedial nature of the *CHRA*.

[8] The Complainants argue that the allegations of retaliation are clearly linked to the Caring Society's complaint. Indeed, Mr. McArthur expressly stated that Dr. Blackstock was not permitted in the meeting room because of the Caring Society's human rights complaint. Regardless of Mr. McArthur's motivation in making these statements, a reasonable complainant

would have perceived this adverse treatment as retaliation: *Witwicky v. Canadian National Railway*, 2007 CHRT 25. In addition, the Complainants submit that the Respondent will suffer no prejudice if the amendment is made to add the allegations of retaliation as it has been aware for some time that the Complainants' claims to have been subjected to retaliation and was given the opportunity to respond to these allegations shortly after the incident occurred. Furthermore, for the Tribunal to render a decision on the allegations of retaliation separately would cause a duplication of proceedings, involving the same parties, overlapping evidence and interrelated issues. The Complainants submit that any prejudice to the Respondent as a result of amending the complaint to include these allegations of retaliation would be offset by the prejudice to the Complainant arising from the artificial separation of these related allegations into multiple proceedings. Should the motion to amend the complaint be granted, the Complainants agree to jointly ask the Commission to place the retaliation complaint currently before the Commission in abeyance, pending a determination on the merits of the amended complaint.

The Respondent's position

[9] The Respondent is of the view that to amend the complaint now to include allegations of retaliation would disregard the complaint process established under the *Act* and deprive the parties of this procedure. The retaliation complaint is currently under investigation by the Commission. During this investigation, the Respondent will have its first opportunity to respond to the merits of the complaint and provide its version of the events. Only once the Commission has completed its investigation, taking into account the evidence submitted, will it make a decision to either dismiss the complaint or refer it to the Tribunal. The Respondent is of the view that if the motion to amend the complaint is granted, all of these steps will be bypassed, which would result in denying the Respondent an opportunity to respond to the complaint, thereby compromising its right to procedural fairness at the investigation stage.

[10] The Respondent also submits that amending the complaint would result in the expansion of the scope of the complaint and supplant the role of the Commission, thereby prejudicing the Respondent. According to the Respondent, the underlying nature of the two complaints in this case is different as the original complaint concerns allegations of funding for child welfare

services for First Nations children on reserve and the complaint of retaliation deals with allegations arising from personal interactions between the Executive Director of the Caring Society and federal government officials. The Respondent is of the view that there is an insufficient nexus between the complaints to warrant amending the initial complaint at this stage of the proceedings and that the Tribunal should allow the Commission to make a full and informed decision on whether an inquiry by the Tribunal into the retaliation complaint is warranted in these circumstances.

The Commission's position

[11] The Commission contends that to dismiss the motion to amend the complaint would permit a respondent to engage in retaliation against representatives of charitable organizations that have filed complaints on behalf of victims. The Commission is of the view that the *Act* must be interpreted in a liberal and purposive manner so as to protect the officer or agent of a charitable organization which has become identified with a complaint: *Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000*, 2008 SCC 43.

[12] Section 14.1 of the *Act* states that "it is a discriminatory practice […] to retaliate or threaten retaliation against the individual who filed the complaint […]". In the present case, by signing the original complaint, Dr. Blackstock is the "individual who filed the complaint" and should therefore have the same protection from retaliation as the First Nations children on behalf of whom she signed. Any other interpretation would result in everyone having protection from alleged retaliation except parties who file representative complaints on behalf of the victims. Moreover, the Commission is of the view that the evidence suggests that Dr. Blackstock has been identified as the Complainant by the Respondent.

IV. Analysis and Decision

[13] It is trite law that the Tribunal has the ability to amend a complaint. The Federal Court in *Canada (Attorney General) v. Parent*, 2006 FC 1313, affirmed this principle at paragraph 30 of the decision in the following manner:

> The Tribunal enjoys considerable discretion with respect to the examination of complaints under subsections 48.9(1) and (2) and sections 49 and 50 of the Act. As for the exercise of that discretion in regard to an amendment request, Mr. Justice Robert Décary wrote in *Canderel Ltd. v. Canada (C.A.)*, 1993 CanLII 2990 (FCA), [1994] 1 F.C. 3, 1993 CanLII 2990 (F.C.A.), that " […] the general rule is that an amendment should be allowed at any stage of an action for the purpose of determining the real questions in controversy between the parties, provided, notably, that the allowance would not result in an injustice to the other party not capable of being compensated by an award of costs and that it would serve the interests of justice."

[14] As to the issue of amending a complaint so as to consider allegations of retaliation in the same proceeding as the allegations of discrimination which gave rise to the initial complaint, the Tribunal previously addressed this issue in *Kavanagh v. C.S.C.* (May 31, 1999), T505/2298 (C.H.R.T.). At paragraph 9 of this decision, the Chairperson of the Tribunal adopted the reasoning of the Ontario Board of Inquiry in *Entrop v. Imperial Oil Limited* (1994) 23 C.H.R.R. D/186, stating that it "would be impractical, inefficient and unfair to require individuals to make allegations of reprisals only through the format of separate proceedings." In deciding whether to grant the amendment, the Tribunal must determine whether "the allegations of retaliation are by their nature linked, at least by the complainant, to the allegations giving rise to the original complaint and disclose a tenable claim for retaliation": *Virk v. Bell Canada*, 2004 CHRT 10, at paragraph 7; See also *Fowler v. Flicka Gymnastics Club*, 31 C.H.R.R. D/397 (B.C.H.R.C.), *Cook v. Onion Lake First Nation*, [2002] C.H.R.R. no. 12, at paragraph 17 and *Tran, Cam-Linh (Holly) v. Canada Revenue Agency*, 2010 CHRT 31, at paragraph 18.

[15] In addition to establishing a link between the complaint and the amendment, the Tribunal must also examine the prejudice that the Respondent could suffer in allowing the Complainant to amend its complaint. As stated in *Parent*, *supra*, at paragraph 40:

> The issue of prejudice is the predominant factor to be considered in such circumstances: the amendment must not be granted if it results in a prejudice to the other party. In this case, even though the complaint could have been amended at an earlier stage of the proceedings, nothing in the evidence indicates that the Canadian Forces were unable to prepare themselves and argue their position on the issues raised. The amendment caused no prejudice to the Canadian Forces, and in the circumstances, the balance of convenience favours the position of Alain Parent.

[16] In the present case, the panel is of the view that to proceed to a hearing on the initial complaint and then subsequently hold a separate hearing to address the allegations of retaliation would thwart the fair administration of justice and hinder the panel's ability to conduct the proceedings in the most informal and expeditious manner, as the requirements of natural justice and rules of procedure allow as mandated by paragraph 48.9(1) of the *Act*. Moreover, the Complainants' allegations of retaliation emanate from the same factual matrix as the initial complaint as both complaints share the same Complainants and the retaliatory events alleged are linked to the filing of the initial complaint against the Respondent.

[17] Furthermore, the panel is of the view that the Respondent will not be prejudiced by the amendment as it has had ample time and will have ample opportunity to respond to the allegations of retaliation made by the Complainants. To hear both the initial complaint and the allegations of retaliation in the same proceeding, as opposed to creating an artificial separation of the allegations in multiple proceedings, is favorable to all parties and is in the interest of justice.

[18] For the foregoing reasons, the motion to amend the complaint is granted. The Respondent will be granted an opportunity to amend its Statement of particulars by way of a request made to the Tribunal and other parties will be able to file a reply. Upon reception of the Respondent`s request, the panel Chair will set timelines for the filing of the amended particulars.

Signed by

Sophie Marchildon
Panel Chairperson

Signed by

Réjean Bélanger
Tribunal Member

Signed by

Edward P. Lustig
Tribunal Member

Ottawa, Ontario
October 16, 2012

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1340/7008

Style of Cause: First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada).

Ruling of the Tribunal dated: October 16, 2012

Appearances:

Paul Champ, for the Complainant First Nations Child and Family Caring Society of Canada

David Nahwegahbow and Stuart Wuttke, for the Complainant Assembly of First Nations

Daniel Poulin and Samar Musallam, for the Canadian Human Rights Commission

Jonathan Tarlton, Melissa Chan and Edward Bumburs, for the Respondent

Michael Sherry, for the Interested Party Chiefs of Ontario

Justin Safayeni, for the Interested Party Amnesty International