Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2015 CHRT 8
Date: April 20, 2015
File No.: T1909/13912

Between:

Richard Carpenter

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Navy League of Canada

Respondent

Ruling

Member: Olga Luftig
Tribunal Member

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I. The Complaint

[1] Mr. Richard Carpenter ("Complainant") filed a complaint against the Navy League of Canada ("Respondent") on January 25, 2011 ("First Complaint"), alleging that pursuant to sections 7 and 14(1) of the *Canadian Human Rights Act, R.S.C*. 1985, c.H-6, as amended ("*Act*"), the Respondent discriminated against him on account of his sexual orientation, treated him in an adverse, differential manner, and failed to provide a harassment free workplace. On the same day, the Complainant filed an amendment to the First Complaint, alleging national or ethnic origin as another ground of discrimination. The Commission accepted the amendment.

II. The Motions

[2] The Complainant has made two motions:

(1) that the Respondent's February 5, 2014 Statement of Particulars ("First SOP") be substituted for its amended SOP filed April 7, 2014 ("Amended SOP"); or alternatively, that both SOPs form part of the record in this inquiry ("SOP Motion");

and

(2) that the Tribunal permit the Complainant to amend the Complaint to add retaliation, within the meaning of section 14.1 of the *Act* ("Motion to Amend").

A. The SOP Motion

(i) Background

[3] On January 17, 2013, the Commission requested that the Tribunal Chairperson institute an inquiry into the First Complaint. The record indicates that at the time of referral, the Respondent was represented by counsel, and on January 13, 2014, counsel removed himself as the Respondent's lawyer.

[4] On January 28, 2014, the Respondent's National Executive Director sent notice that the Respondent was no longer represented by counsel and that Gordon King, President of the Respondent's Ontario Division, would represent the Respondent. The Respondent's letter also stated that Mr. King was then in the process of reviewing the Complainant's SOP.

(ii) The Respondent's First SOP

[5] On February 5, 2014, the Respondent served and filed the First SOP, consisting of 2 pages, under a cover letter signed by Mr. King. Although there are other statements and representations in the First SOP, those which are relevant to the SOP Motion are:

- "One member had confessed to making "Gay Slurs and Comments" and left the organization as soon as confronted with this information" ("Gay Slur Admission" or "Gay Slur");
- The Respondent does not intend to call any witnesses or file any documents.

[6] On February 11, 2014, the Respondent notified the Tribunal that it had retained a new representative, a paralegal.

[7] On February 24, 2014, the representative requested an extension of time to file an "amendment and re-submission of the Statement of Particulars", because he had just received the file and needed to review it.

[8] I asked for the Complainant's and Commission's submissions on the request. The Complainant objected because, in his view, the Respondent had been "fully represented by counsel" since September, 2010, has already filed its SOP, and should be strictly held to the Tribunal's timeframes." The Complainant alleged that the Respondent was using "…yet again, another stall tactic".

[9] The Commission consented to the Respondent's request.

[10] After considering the above submissions, I granted the Respondent's request. The Respondent subsequently filed the Amended SOP on April 7, 2014.

B. The Amended SOP

[11] The Amended SOP consists of:

- recitations of sections 1, 2, 3, 4, and 5 of the Act;
- the following statements:

  > "It is [the Respondent's position that the Act was complied with at all times to its fullest. Guidelines are in place and were followed at all times to prevent and investigate all matters. We feel that this claim is unfounded and should be dismissed";

- the names of 9 proposed witnesses;
- a 1-page list of 20 documents for disclosure.

[12] The Respondent provided will-say statements for its witnesses on April 23, 2014.

[13] The Amended SOP did not include any of the statements and representations in the First SOP.

(i) Complainant's Reply and Position regarding the Amended SOP

[14] The Complainant submits he had intended to rely on the Gay Slur Admission.

[15] In the Complainant's Reply to the Amended SOP, he noted that the Amended SOP did not include any of the statements in the First SOP, including the Gay Slur Admission. He noted that in contrast to the First SOP, the Amended SOP proffered 9 witnesses, as well as documentary disclosure.

(ii) Respondent's Position

[16] In a subsequent Case Management Conference Call, the Respondent confirmed its position that the Amended SOP be substituted for the First SOP and requested that the Amended SOP be the only one on record.

[17] The Complainant objected, and made this SOP Motion.

(iii) Complainant's Submissions

[18] The Complainant's submissions are set out below.

- An amendment is a clarification only, not a "license …to introduce new issues, submit new particulars, or overcome inept representation".
- Does the Tribunal have the authority to delete the First SOP from the record?
- The Respondent's request to amend the Statement of Particulars was a way for the Respondent to "…circumvent the Tribunal's Rules of Procedure ("the Rules") in a veiled attempt to overcome its previously stated positions on various issues that are the focal point of the Complainant's case.
- The First SOP was signed by the Respondent's duly authorized representative, and dated; the Amended SOP was neither signed nor dated.
- The Amended SOP withdraws material admissions, including one which goes to the focal point of the Complaint.
- To the extent that the Respondent is introducing new witnesses and documentary evidence, it should seek authorization from the Tribunal under Rule 9(3), not through a new or amended SOP.

(iv) Commission's Submissions

[19] The Commission filed its Response to assist the Tribunal and the parties by providing what it submits is the appropriate test and the factors to take into account in making its decision. The Commission takes no position on the Complainant's requested remedy.

[20] The Commission's submissions are set out below.

- There is nothing specific in the Rules regarding the amendment of Complaints and SOPs, nor about the withdrawal of admissions.
- The within situation is unusual because "most cases deal with …withdrawal of an admission in the context of a motion to amend a pleading (as opposed to after an amended pleading has been filed with a court or tribunal)", as is the sequence here.
- It is well established that the Tribunal has the authority to grant amendments, including to a party's "pleadings", such as an SOP.
- Black's Law Dictionary defines "admission" as:

  "[C]onfessions, concessions or voluntary acknowledgements made by a party of the existence of certain facts. More accurately regarded, they are statements by a party, or someone identified with him in legal interest, of the existence of a fact which is relevant to the cause of his adversary."

- The Tribunal should consider the following in making its decision on this Motion:

  (a) whether an admission constitutes a "substantial" one, which, if withdrawn, would result in a "radical change in the nature of the questions in controversy", as in *Merck & Co. Inc. v. Apotex Inc.*, 2003 FCA 488 ("*Merck*"), at para 32; and

  (b) whether withdrawing the admission would prejudice the Complainant, by placing the onus on the Complainant to establish the truth of the

admission and whether that onus would lengthen the hearing and financially impact the Complainant; and

(c) what best serves the interests of justice.

(v) Respondent's Submissions

[21] The Respondent's submissions are set out below.

- The Respondent properly requested the amendment to the First SOP, and the Tribunal granted the Respondent the right to file an amended SOP.
- The Respondent understood the Tribunal's "approval" for the amendment as meaning that "the new SOP was to strike and replace the former submission" and would be the only submission referred to and responded to.
- It is prejudicial to the Respondent for the First SOP to remain on the record because the Respondent did not have a legal representative when it was written, nor was legal review of it sought.
- An amendment can also make additions and deletions to what it is amending, not just clarifications.
- Once the Respondent had a legal representative who reviewed the file, an "amendment was required".

C. Issues

[22] Can the First SOP be struck from the record?

[23] Can the Respondent revoke the First SOP in its entirety and substitute the Amended SOP?

D. Analysis

(i) Can the First SOP be struck from the record?

[24] It is necessary to preserve a complete record of the Tribunal's inquiry into the complaint. A complete record includes all documents filed, including those which have been amended.

[25] A complete record is also required if either party wishes to make an application for judicial review of the Ruling or any subsequent rulings or decisions in this inquiry. The *Federal Courts Rules,* 1998, SOR/98-106 ("*FC Rules*"), in particular, Federal Courts Rules 317 and 318, require the administrative body which made the ruling or decision to submit a certified copy of the material requested by the party making an application for judicial review, subject to any objection by the administrative body or a party. The failure to preserve a complete record could be viewed as interfering with the Court's exercise of its supervisory jurisdiction under the *Federal Courts Act,* R.S.C. 1985, c. F-7.

[26] Therefore, the Tribunal's record of the First Complaint shall include both the Respondent's First SOP and the Respondent's Amended SOP.

(ii) Can the Respondent revoke the First SOP in its entirety and substitute the Amended SOP?

[27] It is necessary to briefly review the legislative framework of the Tribunal and its resulting legal nature in order to give context to and decide this issue.

E. Statute law

[28] The relevant sections of the *Act* are:

[29] Subsection 48.1(1):

> "There is hereby established a tribunal to be known as the Canadian Human Rights Tribunal…"

[30] Subsection 48.9(1):

> "Proceedings before the Tribunal shall be conducted as informally and expeditiously as the requirements of natural justice and the rules of procedure allow."

[31] Section 50(1):

> "After due notice to the Commission, the complainant, the person against whom the complaint was made, and, at the discretion of the member or panel conducting the inquiry, any other interested party, the member or panel shall inquire into the complaint and shall 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."

[32] Section 50(3)(c):

> "In relation to a hearing of the inquiry, the member or panel may
>
> (c) subject to subsections (4) and (5), receive and accept any evidence and other information, whether on oath or by affidavit or otherwise, that the member or panel sees fit, whether or not the evidence or information is or would be admissible in a court of law".[1]

[33] Section 48.1(1) of the *Act* (supra) creates the Tribunal. Therefore, the Tribunal is what is called a "creature of statute". It has only the powers which the *Act* confers on it, either expressly, or by necessary implication as recognized in the case law. The Tribunal is not a judicial authority. Rather, it is a quasi-judicial body, that is to say, an administrative body that functions in much the same way as a court.

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[1] Subsection (4) prohibits the admission of evidence that would be privileged under the law of evidence. Subsection (5) prohibits a conciliator appointed to settle the complaint from being a witness.

[34] There are other significant differences between a court and the Tribunal flowing from the fact that the Tribunal is a statutory creation, conducting a statutory inquiry. Of relevance are the following:

- The *Act* does not create or make a complaint into a common law cause of action (*Chopra v. Canada, 2007 FCA 268,* at para. 36*).*
- An inquiry under the *Act* is not an action governed by the Federal Courts Rules, specifically FC Rule 169, nor is it a "proceeding" under FC Rule 1.1. Put briefly, a complaint is not the same as a lawsuit in a court.
- Subsection 50(3)(c) provides that in a Tribunal hearing, the member or panel can "receive and accept" "any evidence and other information that the member or panel sees fit, ***whether or not"…it "…would be admissible in a court of law", [my emphasis***] subject only to privilege and information from a conciliator.

[35] Therefore, the rules of evidence which apply to a Tribunal hearing provide much greater leeway for admissibility than do the rules of evidence applicable in a court.

[36] Parliament's intention in making the Tribunal a quasi-judicial administrative body constituted by the *Act* was to provide the public with less formal, more flexible procedures for hearing human rights complaints than those of the courts (see section 48.9(1) of the *Act*, supra.)

[37] Therefore, one must both exercise caution and make appropriate adjustments when comparing and trying to import terminology and procedures from civil courts to administrative human rights tribunals.

F. Statement of Particulars ("SOP")

[38] The fact that the Tribunal is not a court impacts on the inherent nature of the documents the parties use to present their positions and respond to the opposite parties.

[39] Statements of Particulars are filed pursuant to Rule 6(1) of the Tribunal Rules ("Tribunal Rules"), which reads, in part:

> "6(1) Within the time fixed by the Panel, each party shall serve and file a Statement of Particulars setting out,
>
> (a) the material facts that the party seeks to prove in support of its case;
>
> (b) its position on the legal issues raised by the case;
>
> (c) the relief it seeks;
>
> (d) a list of all documents in the party's possession, for which no privilege is claimed, that relate to a fact, issue, or form of relief sought in the case, including those facts, issues and forms of relief identified by other parties under this rule;
>
> (e) a list of all documents in the party's possession, for which privilege is claimed…
>
> (f) a list identifying all witnesses the party intends to call, other than expert witnesses…"

[40] Although an SOP may be roughly analogous to a "pleading" in a civil court action, it is not the same thing. This fact also holds for complaints, replies and other documents which parties file in a human rights case. None are the same as pleadings in a civil court. Not only are they not the same because the venue in which they are filed is not a court, but they are not the same because they are not subject to the special rules which govern pleadings.

[41] Significant to this motion is that rules of a court which may govern representations and admissions in pleadings simply do not apply to SOPs – or any other documents – filed in Tribunal inquiries. In particular, in the Federal Court, FC Rule 183 requires a party to admit every allegation of material fact which is not disputed when that party files a defence or subsequent pleading.

[42] Tribunal Rule 6 sets out the required content of SOPs. Among other things, a party's SOP is required to set out "the material facts that the party seeks to prove in support of its case".

[43] There is nothing in the *Act* or the Tribunal Rules about admissions or the withdrawal of an admission, whether made in a complaint, an SOP or any other document.

[44] With respect to documents, Tribunal Rule 9(4), in referring to the hearing, states:

> "Except with the consent of the parties, a document in a book of documents does not become evidence until it is introduced at the hearing and accepted by the Panel."

[45] The fact that in its SOP, a party makes a statement, lists a document for disclosure or names a proposed witness and summarizes the witness' proposed hearing testimony does not in and of itself establish either the admissibility of the document or the proposed testimony at the hearing. Nor does it establish the truth thereof. Credible admissible evidence about a representation, statement or admission in an SOP, proffered or elicited at the hearing, is what the decision maker must ultimately rely upon in deciding whether a disputed fact has been established.

[46] Statements of Particulars and Tribunal Rules 6(1) and 9(3) support and further the aims of Tribunal Rule 1(1) which states:

> 1(1) These Rules are enacted to ensure that
>
> (a) all parties to an inquiry have the full and ample opportunity to be heard;
> (b) arguments and evidence be disclosed and presented in a timely and efficient manner; and
> (c) all proceedings before the Tribunal be conducted as informally and expeditiously as possible.

[47] This language partially mirrors subsection 48.9(1) and section 50 of the *Act.* However, as subsection 48.9(1) makes clear, informality and expeditiousness are always subject to the requirements of natural justice.

(i) Function of an SOP

[48] The function of a party's SOP is to put the opposite party on notice about the position the party will take, the kind of evidence it proposes to adduce at the hearing, and the case the opposite party will have to meet. This pre-hearing disclosure plays a critical role in affording the parties a "…full and ample opportunity to be heard…[and] present evidence…", as required by section 50(1) of the *Act*.

[49] While one could assert that as of February 5, 2014, some of the facts in issue in the First Complaint were not being disputed, by April 7, 2014, this was no longer the case.

(ii) Tribunal's jurisdiction regarding amendments to SOPs

[50] It is settled law that the Tribunal has the discretion to permit amendments to complaints: *Attorney General v. Parent*, 2006 FC 1313 *("Parent")*.

[51] I find that the Tribunal's authority to permit amendments to complaints also necessarily authorizes it to permit the amendment of SOPs. If this were not so, then a party who had already filed its SOP and was then faced with an amended Complaint could not respond to the amendment by filing an amended SOP. This would deny a party the full and ample opportunity to present its case, and would be contrary to natural justice. It is also not the Tribunal's practice – see *Itty v. Canada Border Services Agency*, 2013 CHRT 33, para. 61.

(iii) Unsigned SOP

[52] The Complainant has objected to the fact that the Amended SOP is unsigned and undated. The Rules do not require that an SOP be signed or dated**.**

(iv) Is Rule 9(3) the correct vehicle to amend an SOP in these circumstances?

[53] Rule 9(3) states:

> "Except with leave of the Panel, which leave shall be granted on such terms and conditions as accord with the purposes set out in 1(1), and subject to a party's right to lead evidence in reply,
>
> (1) a party who does not raise an issue under Rule 6 shall not raise that issue at the hearing;
>
> (2) a party who does not, under Rule 6, identify a witness or provide a summary of his or her anticipated testimony shall not call that witness at the hearing;
>
> (3) a party who does not disclose and produce a document under Rule 6 shall not introduce that document into evidence at the hearing;
>
> (4) a party who does not, under Rule 6, identify the relief which it seeks shall not make representations in respect of that relief at the hearing; and
>
> (5) a party who has not complied with 6(3) shall not introduce an expert report into evidence nor call an expert witness at the hearing."

[54] In essence, then, Rule 9(3) mandates that except with leave of the Member or Panel, the failure of a party to comply with Rule 6 by not disclosing a new issue, witness, testimony, document, request for relief or expert's report before the hearing means the party cannot introduce that new issue, witness, testimony, document, request for relief or expert's report at the hearing.

[55] A party making a request under Rule 9(3) potentially faces a denial of such leave by the Member or panel.

[56] If the Member does grant leave, it is on terms and conditions as the Member decides. For example, the Member can order an adjournment to allow the other party to prepare its response. Leave is also subject to the other party's right to call reply evidence.

[57] To suggest that the hearing is the correct place to raise an amendment or other new matter when the need for the amendment or the fact of the new matter is known to the requesting party well before the hearing, as is the case here, does not take into account the purpose of Rule 9(3). That purpose is to avoid what is called "trial by ambush" and the resulting waste of time, resources and added expense to all those participating in the hearing - the parties, counsel, witnesses - and the Tribunal.

[58] I conclude that Rule 9(3) is not the correct procedure to use in the circumstances**.**

(v) Nature of an amendment

[59] An amendment can make additions and deletions to the original version of a document, as well as clarifications.

[60] In the normal course, it would be understood that the amended document would likely take the place of the original document going forward, for the purposes of case management, ongoing disclosure and hearing preparation.

[61] However, the circumstances here are not in the normal course. The Respondent's amendments to the First SOP include the removal of the Gay Slur Admission. This is a significant matter in the context of the First Complaint. The Gay Slur Admission has the potential to directly relate to one of the grounds of discrimination alleged in the Complaint: sexual orientation.

[62] In the British Columbia Human Rights complaint of *McLean v. B.C. (Min. of Public Safety and Sol. Gen.) No.2*, 2006 BCHRT 83 ("*McLean*"), the respondent had admitted that the complainant had a disability as defined in the *British Columbia Human Rights*

Code. Two years later, the respondent sought to withdraw the admission. The tribunal stated that "The overriding question is whether the interests of justice justify the withdrawal of the admission" (*McLean*, at para. 23)

[63] I adopt the B.C. Tribunal's statement in *Mclean* which also points out that:

> "…in the human rights context, it must be kept in mind that the complaint and response are not the equivalent of pleadings in the civil litigation context, and, so far as fairness and the nature of the issues raised allow, the Tribunal's procedures should be kept simple and flexible." (ibid).

[64] The removal of the Gay Slur Admission therefore requires a consideration of whether the interests of justice justify its removal, as well as adjustments to the human rights administrative context in which this inquiry takes place.

G. Relevant factors to determine interests of justice

[65] I find the following are relevant in arriving at a determination of the interests of justice in the SOP Motion: whether the Respondent delayed in seeking leave to amend and withdraw the Gay Slur Admission; whether there is loss of a hearing date, and general procedural efficiency; prejudice; whether the admission was made inadvertently, or by mistake; other factors arising from the human rights context (*ibid*).

(i) Did the Respondent delay in requesting the amendment and seeking leave to withdraw the Admission?

[66] The Respondent gave notice that it had retained new representation on February 11, 2014 and made its request to amend its SOP on February 24. I find that the Respondent did not delay in its request to amend its SOP.

[67] However, the Respondent did not notify the parties or the Tribunal that the Amended SOP would withdraw the Gay Slur Admission. The substance of the notice the

Respondent gave was that because it had obtained legal representation after filing the First SOP, it sought an extension of time to file an amended SOP.

[68] So although there was no delay, there was also no notice of the withdrawal of the admission.

(ii) Loss of Hearing Date and general procedural efficiency

[69] There is no hearing date set. The withdrawal of the admission at this stage of the First Complaint does not hinder procedural efficiency.

(iii) Was the Admission made inadvertently or by mistake?

[70] The Respondent submits that it did not have legal representation or advice when it drafted and filed the First SOP. Its subsequently-retained legal representative confirmed this.

[71] I do not know if the Gay Slur Admission "…was made inadvertently or hastily or without full knowledge of the facts…" (*McLean*, at para. 23) as there is no evidence in this regard.

[72] The only finding I make as to how the admission came about is that the Respondent did not have a legal representative when it drafted and filed the First SOP. As a consequence of that, through its subsequent legal representative, the Respondent sought to amend the First SOP, which, among other things, proffered no witnesses or documentary evidence.

[73] The legal advice which the Respondent obtained was presumably responsible for the changes in its Amended SOP.

[74] Subject to my comments and decision regarding the removal of the Gay Slur Admission without notice, I do not find anything incorrect in the Respondent's amending its SOP based on legal advice.

(iv) Other factors arising out of the human rights context

[75] There is no evidence as to whether the Respondent is an "unsophisticated litigant" (*McLean*, at para.31). Therefore, I do not make a finding on this issue.

(v) Prejudice

[76] The Respondent has added a list of witnesses and documents in its Amended SOP. The Amended SOP reflects the Respondent's most current position. It also allows the Complainant to know the case he must meet.

[77] Not permitting the Respondent to rely on its Amended SOP would prejudice the Respondent by among other things, removing its proposed witnesses and documents from the inquiry. That would deny the Respondent the "…full and ample opportunity to … appear at the inquiry, present evidence and make representations", mandated by section 50(1) of the *Act*. The Respondent shall therefore be permitted to use the Amended SOP for the purposes of case management, disclosure, and hearing preparation.

[78] On its face, the Gay Slur Admission goes to one of the Complaint's key allegations: discrimination on the ground of sexual orientation.

[79] The Complainant wishes to rely on this Admission as conclusive proof of the truth of its contents. That view is based in large part on the way in which civil courts have treated admissions made in pleadings in various cases. The Commission uses the same framework to suggest the criteria the Tribunal should use to arrive at its decision.

[80] As set out in other parts of this Ruling, above, the Complainant cannot rely on the Gay Slur Admission as conclusive proof of the truth of its contents, because of the way the *Act* and the Tribunal Rules are meant to work.

[81] Further, the Amended SOP no longer mentions the Gay Slur, and the Respondent will not seek to establish this incident at the hearing.

[82] However, the First SOP remains on the record. Its reference to the Gay Slur has put the other parties on notice that an incident involving negative comments about sexual orientation may have been made by a member of the Respondent and that there may have been consequences that arose from the incident.

[83] I find that it would prejudice the Complainant to the degree that the interests of justice would not be served if the Gay Slur was totally removed from this inquiry.

[84] Therefore, the Complainant will be granted leave to amend its Statement of Particulars, if he chooses to do so, by adding the Gay Slur contents. It would then become an allegation.

[85] If the Complainant chooses to amend its SOP to include the Gay Slur, the Respondent will not be prejudiced. The amendment will give the Respondent notice that the Complainant will lead evidence on the incident at the hearing and the Respondent can prepare its defence accordingly. Further, the Tribunal will give the Respondent the opportunity to file an amended SOP to deal with the Complainant's amendment.

[86] Giving the Complainant the option to proceed in this manner does not prejudice him. It simply removes the idea that he could have relied on the Gay Slur Admission as conclusive proof that the events therein occurred. He could not have done this in any event, for the reasons previously set out. However, giving him this option permits him to seek to establish that the Gay Slur incident occurred.

[87] If the Complainant amends his SOP to include the Gay Slur, he can then request documentary disclosure relating to it from the Respondent, cross-examine the Respondent's witnesses at the hearing regarding the allegation, and, subject to the Tribunal's consent, can subpoena witnesses to the hearing whose testimony he thinks will shed light on the alleged incident by adducing evidence on it.

[88] Having decided the foregoing, I again wish to stress that simply because a representation or allegation is in a party's SOP, the truth of that representation or allegation is not established unless the parties agree that it is true, or unless and until the Tribunal decides that its truth has been established, based on admissible, credible evidence at the hearing

H. The Motion to Amend the Complaint by adding retaliation under section 14.1

(i) Background - The Second Complaint

[89] On January 28, 2013, the Complainant filed another complaint with the Commission, alleging that the Respondent retaliated against him for filing the First Complaint, contrary to section 14.1 of the Act ("Second Complaint"). As at the date of this Ruling, the Commission has not referred the Second Complaint to the Tribunal for an inquiry.

(ii) Statute law and jurisprudence

[90] Section 14.1 of the *Act* states:

> "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."

[91] As set out in the previous section of this Ruling dealing with the SOP Motion, the Tribunal has the authority to grant amendments to complaints (*Parent*, supra**).**

[92] An amendment cannot introduce a substantially new complaint (*Cook v. Onion Lake First Nation*, 2002 CanLII 45929 (CHRT), at para 11) ("*Cook*"), and the amendment cannot result in prejudice to the opposite party (*Parent*, supra, at para 40).

[93] *Virk v. Bell Canada*, 2004 CHRT 10 *("Virk")* held that the specific test to permit section 14.1 retaliation as an amendment to a complaint was "whether the allegations of retaliation are by their very nature linked, at least by the complainant, to the allegations giving rise to the original complaint, and disclose a tenable claim for retaliation" (*Virk*, supra, at paras 7-8.)

(iii) Complainant's Submissions

[94] The Complainant submits that the Respondent retaliated against him within the meaning of section 14.1 of the Act, for having filed the First Complaint, by:

- refusing to permit the Complainant to attend two of the Respondent's three ceremonial events in May, 2012 and one such event in January, 2013; and
- instructing him not to pick up and drop off cadets at, or be on the Respondent's parking lot.

[95] The Complainant alleges that these events occurred after the Respondent suspended him.

[96] He alleges that in response to his request to attend the 2012 events, the Respondent's National Director, after consulting with the Respondent's Brantford branch, refused to permit him to attend two of them, and "…indicated that I should be able to appreciate that they are presently working through my Human Rights…complaint…individual members named in my complaint were concerned that my presence at Navy League activities could…further complicate the issue."

[97] The Complainant submits that the Respondent's response to his request to attend the 2013 event "…indicated that my presence at these event[s] [sic] would most assuredly lead to the creation of a negative atmosphere among the onsite volunteer staff". The Respondent "hope[s] that I can appreciate the level of anxiety".

[98] The Complainant further submits that the Second Complaint has not been withdrawn, nor has the Commission dismissed it, contrary to the Respondent's submission below.

(iv) Respondent's Position and Submissions

[99] The Respondent opposes the amendment. It submits that it would be prejudiced if the Tribunal permitted the amendment because:

(a) the subject matter of the proposed amendment occurred after the First Complaint was filed;

(b) the Complainant filed a "newer application" at the Commission containing the same allegations as the Motion to Amend and that application was either dismissed or withdrawn at the Commission's investigation stage;

(c) the Respondent has not had the opportunity to address the proposed amendment's allegations in its statement of particulars, nor in conference calls when the allegations could have been raised in relation to the First Complaint.

[100] The Respondent also submits:

- the Motion to Amend is *res judicata* because its subject matter was already "presented to the Commission"; and
- the proposed amendment constitutes a substantially new complaint and would not aid in determining the real questions in controversy between the parties, as

required by *Canderel Ltd. v. Canada*, [1994] 1 F.C. 3 1993 Can LII 2990 (FCA), at page 10.

(v) Commission's Position and Submissions

[101] The Commission's supports the Motion to Amend. The Commission submits that the requested amendment passes the test in *Virk*, supra, because the issue of retaliation is "clearly" linked to the original complaint, is linked to it by the Complainant, and discloses a tenable claim for retaliation.

I. Analysis

(i) Timing of alleged retaliation

[102] The Complainant links the Respondent's refusals to let him attend certain events and be on Respondent's property to the fact that he filed the First Complaint. One of the grounds on which the Respondent objects to the amendment is that the alleged retaliation occurred after the First Complaint was filed.

[103] Retaliation is a reaction to an action. It is therefore in the nature of retaliation that it occurs after an action.

[104] The wording of section 14.1 acknowledges this nature by stating that a

> "…person against whom a complaint **has been filed**" [my emphasis] discriminates by retaliating or threatening retaliation against the individual "**who filed the complaint…" [my emphasis].**

[105] I find that section 14.1 requires that a complaint has to have been filed before a subsequent act against the filer or the victim can be alleged to be retaliation**.**

[106] Therefore, the fact that the retaliation alleged by the Complainant occurred after the First Complaint was filed does not preclude the Tribunal from granting the amendment.

(ii) Is the allegation of retaliation untenable?

[107] Given the language the Complainant alleges the Respondent used in denying the Complainant's requests to attend the Respondent's ceremonial functions, especially the language used regarding the 2012 events, I find that the Complainant's allegations of retaliation are not untenable.

(iii) *Res Judicata*

[108] There are conflicting submissions from the Complainant and the Respondent about whether the Second Complaint has been withdrawn or dismissed.

[109] Commission counsel does not state that the Complainant has withdrawn it, or that the Commission has dismissed it. I assume that Commission counsel knows the status of the Second Complaint at the Commission. As well, presumably, the Respondent and the Complainant would have received official correspondence had the Commission dismissed the Complaint. No party has filed or referred to such correspondence.

[110] I find that there has not been a final decision on the merits of the alleged retaliation. Therefore, *res judicata* does not apply here.

(iv) Does the proposed amendment constitute a substantially new complaint?

[111] The Complainant links the alleged retaliation to the filing of the First Complaint. The Tribunal has found that in cases like this, when the *Virk* test has been met, granting an amendment to add section 14.1 retaliation does not make the amendment a new complaint.

(v) The issue of prejudice

[112] The Respondent has known that the Complainant viewed retaliation as an issue since January 28, 2013, when the Complainant filed the Second Complaint.

[113] Further, there are no hearing dates set.

[114] The Tribunal will give both parties the opportunity to file Amended Statements of Particulars in relation to the retaliation allegation. The Respondent will therefore be given sufficient time to prepare an answer to the retaliation amendment.

[115] For all of the above reasons, I find that the Respondent will not be prejudiced by the amendment.

[116] Further, as set out in *Cook*, supra, at para. 19, I find that it would be unfair to the Complainant to require him to pursue his retaliation allegation by way of a separate complaint.

[117] I also take into account that the Commission supports the amendment, notwithstanding that it has not formally referred the Second Complaint to the Tribunal.

[118] I point out that the fact the Tribunal has granted this amendment does not mean that the Complainant has substantiated the allegation of retaliation. As with the other allegations in the First Complaint, the Tribunal can only decide whether the allegation of retaliation has been substantiated after evaluating all the evidence admitted at the hearing.

III. Ruling

[119] The Respondent's First SOP dated February 5, 2014 and the Respondent's Amended SOP dated April 7, 2014 shall remain part of the Tribunal's record in this Complaint.

[120] For the purposes of case management and the parties' disclosure obligations and hearing preparations, and subject to the rulings below, the Respondent's Amended SOP takes the place of the Respondent's First SOP.

[121] The Tribunal hereby grants the Complainant leave to amend his SOP, if he so chooses, to include the Gay Slur Admission. Should he do so:

(a) the Gay Slur Admission will become and be called the "Gay Slur Allegation";

(b) the Complainant may request disclosure from the Respondent in respect of the Gay Slur Allegation; and

(c) the Tribunal will grant a request from the Respondent for a corresponding amendment to the Respondent's Amended SOP.

[122] At the hearing, subject to the Complainant having amended his SOP to include the Gay Slur Allegation, and provided the parties have complied with the Tribunal Rules, particularly those dealing with ongoing disclosure, both parties may lead evidence, including, without limitation, documentary and oral evidence, related to the Gay Slur Allegation, subject to the admissibility of such evidence.

[123] The Motion to Amend is granted. The First Complaint is hereby amended by adding to it the allegation that the Respondent discriminated against the Complainant by retaliating against him within the meaning of section 14.1 of the *Act*.

[124] The Complainant and the Commission may serve and file amended Statements of Particulars, in accordance with Rule 6, with respect to the section 14.1 allegation.

[125] The Respondent may serve and file an amended Statement of Particulars, dealing with the section 14.1 allegation, in response to the Complainant's and Commissions amended Statements of Particulars, in accordance with Rule 6.

[126] The Complainant may serve and file a Reply, if any, to the Respondent's amended Statement of Particulars.

[127] The dates by which the parties serve and file the foregoing documents shall be decided at a Case Management Conference Call to be held as soon as possible.

Signed by

Olga Luftig
Tribunal Member

Ottawa, Ontario
April 20, 2015