Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

**Citation:** 2016 CHRT 6
**Date:** February 26, 2016
**File No.:** T1852/8212

**Between:**

**Brian William Carter**

**Complainant**

**- and -**

**Canadian Human Rights Commission**

**Commission**

**- and -**

**Attorney General of Canada**

**Respondent**

**Ruling**

**Member:** Olga Luftig

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## I. Background

[1] On June 3, 2011, the Complainant filed a complaint ("Complaint") with the Canadian Human Rights Commission ("Commission") against the then Department of Fisheries and Oceans (now Fisheries and Oceans Canada) ("DFO"). The Complainant alleges that DFO discriminated against him by failing and/or refusing to accommodate his disability, treating him in an adverse, differential manner by engaging in a discriminatory policy or practice, thereby denying him an employment opportunity, contrary to sections 7 and 10 of the *Canadian Human Rights Act,* R.S.C., 1985, c H-6, as amended *("Act" or "Human Rights Act"*). The Complaint was amended so that the Respondent became "The Attorney General of Canada, representing DFO and the Public Service Commission of Canada" ("PSC") (collectively, "Respondent").

[2] There is a confidentiality order governing this inquiry.

[3] Each party filed a Statement of Particulars (SOP). The Commission is not participating in the hearing.

[4] The Complainant brought a motion seeking further documentary disclosure from the Respondent (Disclosure Motion). Ruling 2015 CHRT 13, issued May 29, 2015 (May 29 Ruling) decided the Disclosure Motion.

[5] The May 29 Ruling ordered the Respondent to disclose almost all of the documents in Table 2 in the Complainant's notice of motion, but declined to order disclosure of documents in Table 1 thereof (Table 1 Documents), on the basis that this request for disclosure was not related to any fact, issue, or form of relief in one of the SOPs.

[6] In his Disclosure Motion, the Complainant also requested documents which he stated were arguably relevant to his allegation of harassment. The Respondent submitted that harassment within the meaning of the *Act* was not within the scope of the Complaint.

[7] The May 29 Ruling found that:

a. although the Complainant cited subsection 14(1)(c) and section 59 of the Act in his SOP, the Tribunal has jurisdiction only over subsection 14(1)(c);

b. because the Respondent's position was that subsection 14(1)(c) harassment was not within the scope of the Complaint, it was in the parties' best interests to know whether the Complaint included harassment;

c. the Tribunal had to decide the issue of the scope of the Complaint before it could rule on the Complainant's request for disclosure of documents related to harassment.

[8] Therefore, the May 29 Ruling invited submissions from the parties on:

a. whether the Complaint includes an allegation of harassment within the meaning of subsection 14(1)(c) (harassment allegation); and,

b. if any party thought that it did not, their positions on amending the Complaint to include the harassment allegation.

[9] The May 29 Ruling further stated at para. 34 regarding disclosure of the Table 1 Documents, that:

> "If the Complainant is able to formulate a more specific request that clearly demonstrates why the disclosure he has received thus far is inadequate and how any further disclosure request complies with Rule 6, then, after submissions from the other parties, the Tribunal would assess and decide on the request."

[10] The Complainant has filed his Submission (Complainant's Submission) and reply (Reply) to the Respondent's response to his Submission (Response). The Commission has not filed any submissions.

## II. Issues

A. Does the Complaint include harassment within the meaning of subsection 14(1)(c) of the Act?

B. If any party's position is that the Complaint does not include harassment, should the Tribunal amend the Complaint to include it?

C. Is the Complainant entitled to disclosure of the Table 1 Documents, as requested in his Submission?

**A. Does the Complaint include harassment within the meaning of subsection 14(1)(c) of the *Act?***

**B. If not, should the Tribunal amend the Complaint to include it?**

[11] Subsection 14(1)(c) of the *Act* states:

> "It is a discriminatory practice, (c) in matters related to employment, to harass an individual on a prohibited ground of discrimination."

### 1. Complainant's Position re Harassment and Amendment

[12] The Complainant submits that he has already included harassment in the Complaint (which he also calls the "Complaint Form"), because the Complaint:

i. "amply" alleges harassment with "linkages to disability", so that subsection 14(1)(c) applies;

ii. when the Commission was deciding whether to refer the Complaint to the Tribunal Chair for an inquiry, the documents it reviewed included the Complaint, the Commission's Investigative Report (IR), and the Complainant's and Respondent's responses to the IR;

iii. the Commission's July 31, 2012 referral letter to the Tribunal Chair requesting that the Tribunal initiate an inquiry (Referral Letter) was attached to the Complaint and did not limit the allegations the Tribunal was to inquire into;

iv. in accordance with *Kanagasabapathy v. Air Canada,* 2013 CHRT 7 (*Kanagasabapathy),* it is the Referral Letter which decides the scope of the Complaint (*Kanagasabapathy,* at paras. 29 to 38);

v. the fact that the Commission's Summary of Complaint form did not contain a reference to subsection 14(1)(c) is irrelevant, because the Summary of Complaint form is not a part of the Complaint itself, but is merely an administrative attachment which the Commission drafts, used for internal Commission purpose;

vi. the Complainant had no input into the Summary of Complaint form;

vii. the Summary of Complaint form has no legal status and does not limit the allegations in the Complaint;

viii. paragraphs 2 and 69 to 76 of the Complainant's SOP refer to and specifically address the allegation of the Respondent's section 14-related harassment of the Complainant;

ix. although paragraphs 8, 10 and 11 of the Complaint do not contain specific mention of section 14 of the *Act,* there is no requirement for a Complaint to cite specific sections of the *Act;*

x. subsection 14(1)(c) does not constitute a new complaint, because the Respondent has known since the Complainant sent the emails attached as Exhibit A to his Reply (Complainant's Email Chain) – that is, since 2010 – that the Complainant has been alleging that the Respondent harassed him, and that the harassment was "directly related to" the Complainant's disability;

xi. there is therefore no prejudice to the Respondent, because of its above knowledge regarding harassment.

[13] The Complainant opposes amending the Complaint to include harassment; he submits it is "crystal clear" that the Complaint as it stands alleges harassment.

[14] Alternatively, the Complainant submits that if the Tribunal decides that the Complaint needs to be amended, there are cases which support the Tribunal's authority to amend a complaint – for example, *Carol Cook v. Onion Lake First Nation,* Ruling No. 1, (CHRT) April 22, 2002 (*Cook v. Onion Lake*).

[15] An amendment to include harassment would not alter the scope of the Complaint, nor would it amount to a new complaint, because the Complaint already contains the allegation of harassment.

## 2. Respondent's Position

[16] The Respondent's position is that harassment is not within the scope of the Complaint. The Tribunal should not grant the request for an amendment to add harassment within the meaning of subsection 14(1)(c) to the Complaint, for the following reasons:

### a. Jurisdiction

i. the wording of subsections 44(1) and 44(3)(a) of the *Act* mean that the Tribunal's jurisdiction to hear a complaint "flows directly from the Commission's investigation and subsequent referral of that complaint";

ii. in this Complaint, the Commission did not complete an investigation into harassment, and refused to do so, as clearly shown by attached emails between the Commission and the Complainant;

iii. therefore, the harassment allegation could not have been part of the Complaint which the Commission referred to the Tribunal.

iv. it follows that the Tribunal does not have the jurisdiction to hear the issue and would exceed its jurisdiction if it amended the Complaint to include harassment.

**b. Other Factors**

v. The Complainant did not request a remedy for harassment – all the remedies the Complainant seeks are related to his allegation of failure to accommodate him in the appointment process – therefore, harassment could not have been included in the Complaint;

vi. it is irrelevant that the Complainant's SOP referred to the *Act's* harassment sections – the Complaint never did;

vii. the conduct alleged by the Complainant as constituting harassment was not on a prohibited ground of discrimination, but rather in response to his "repetitive and insistent requests"; This conduct "relates to a workplace dispute between the Complainant and Mr. Gardiner";

viii. nothing in the Complaint connects Mr. Gardiner's actions to a prohibited ground of discrimination, including by the Complainant himself;

ix. the Commission did not address any harassment allegation in its SOP, which fact is "another indication that it was obviously not part of the Complaint".

**c. Summary of Complaint form**

x. neither the Commission's original Summary of Complaint Form nor the amended version cite subsection 14(1)(c) or section 59 harassment;

xi. the Summary of Complaint form attached to the Referral Letter was amended to remove section 10 as a ground and again did not mention subsection 14(1)(c).

**d. Prejudice**

xii. According to the Federal Court in *Canada (Attorney General) v. Parent*, 2006 FC 1313 (*Parent*) at para.40, the most important factor a tribunal must consider when deciding whether to grant an amendment is whether granting it will prejudice an opposite party;

xiii. the Respondent will be prejudiced because harassment would constitute a substantially new complaint, contrary to the criteria in *Cook v. Onion Lake* (*supra*), *Gaucher v. Canadian Armed Forces*, 2005 CHRT 1 (*Gaucher*) and *Canderel Ltd. v. Canada* (1994) 1 FC 3 (FCA) (*Canderel*);

xiv. the Complainant's harassment allegations are new and "are of such a different nature that particulars will not be sufficient to allow the Respondent to defend itself";

xv. at this late stage of the Complaint process, it would prejudice the Respondent's right to procedural fairness, specifically, the "right to be given a fair opportunity to defend itself against" the harassment allegation, contrary to *Cook v. Onion Lake, Gaucher and Canderel*;

xvi. the passage of time also prejudices the Respondent – for example, the DFO no longer employs the former Deputy General, Major Crown Projects (DGMCP), Mr. Gardiner;

xvii. the Complainant's SOP is not sufficiently particular with respect to any alleged harassment for the Respondent to know the case to be met, including the fact that there is "no indication of the prohibited ground on which the allegation of harassment is based".

## 3. Legislation, case law re scope of a complaint and amendment of a complaint

[17] Subsection 43(1) of the *Act* states:

> "The Commission may designate a person, in this Part referred to as an "investigator", to investigate a complaint.

[18] Subsection 44(1) of the *Act* states:

> "An investigator shall, as soon as possible after the conclusion of an investigation, submit to the Commission a report of the findings of the investigation."

[19] Subsection 44(3)(a) of the *Act* states:

> "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);"

[20] Subsection 49(1) of the *Act* states:

> "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."

[21] *Parent (supra)* is the Federal Court's latest guidance on amendments. The initial complaint and the requested amendment must have a common thread or a common factor underpinning them both (*Parent*, (*supra*), at para. 43).

[22] The proposed amendment cannot constitute a new and different complaint (*Canderel, supra*).

[23] Further, in deciding whether to grant an amendment, the Tribunal does not enter into an examination of the merits of the proposed amendment (*Stacey Lee Tabor v. Millbrook First Nation*, 1013 CHRT 9 (*Tabor*) at para. 4).

[24] Notwithstanding any other factors which may support doing so, the Tribunal cannot grant an amendment if it would result in prejudice to another party to the complaint (*Parent*, *supra*, at para. 40), (*Cook v. Onion Lake*, supra, cited in *Museum of Civilization Corp. v. Public Service Alliance of Canada, Local 70396* (2006) F.C. 704 (*Museum of Civilization*), at para. 28. The prejudice must be actual prejudice, which impacts on the fairness of the hearing (*Cook v. Onion Lake*, supra, at para.20).

## 4. Analysis re Harassment and Amendment

### a. Tribunal's jurisdiction

[25] The Respondent submits that the Tribunal's jurisdiction to initiate an inquiry into a complaint flows directly from the IR and the Commission's subsequent referral of the complaint to the Tribunal. Therefore, because the Commission did not investigate harassment, its referral of this Complaint to the Tribunal Chair could not have included harassment. In analyzing this submission, I take into account the factors below.

[26] Subsection 43(1) of the *Act* gives the Commission the option of *not [my italics]* designating an investigator, by using the word "may", rather than the mandatory "shall". Therefore, the Commission may refer a complaint to the Tribunal for an inquiry without any

investigation at all. Subsection 49(1) confirms this. It authorizes the Commission to request the Tribunal Chairperson to institute an inquiry "[A]t any stage after the filing of a complaint", if the Commission is "satisfied that, having regard to all the circumstances of the complaint, an inquiry is warranted."

[27] Subsection 44(3)(a) of the *Act* does not say, nor has it been construed to say, that if an IR recommends that a complaint be referred to the Tribunal Chairperson for an inquiry, the Commission is obligated to do so. The subsection also does not say, nor has it been construed to say, that if an IR recommends that the Commission dismiss a complaint or recommends against referring the complaint to the Tribunal, the Commission is obligated to do so.

[28] Further, subsection 44(3)(a) cannot be read and interpreted in isolation.

[29] Subsection 44(3)(a) also directs the Commission to be "satisfied that, having regard to all the circumstances of the complaint, an inquiry is warranted". The IR is one of the documents the Commission examines in coming to its decision, but only if it has ordered an investigation. Even if there has been an investigation, this subsection of the *Act* mandates that the Commission must still have regard to "all the circumstances of the complaint" in deciding if a Tribunal inquiry is "warranted".

[30] Therefore, the prerequisites for the Commission to decide whether to refer a complaint to the Tribunal for an inquiry are first, the complaint must have been filed with the Commission, and second, the Commission must be "satisfied that, having regard to all the circumstances of the complaint, an inquiry is warranted."

[31] To summarize, then, subsections 43(1) and 49(1) of the *Act* work together to authorize the Commission to refer a complaint to the Tribunal Chairperson without the necessity of an investigation or the resulting IR. The Commission may refer a complaint to the Tribunal "At any stage" after a complainant files it with the Commission.

[32] I have briefly read the series of emails the Respondent attached to its Response as Tabs 118 and 120 (Respondent's Email Chain). I have also briefly read the series of emails the Complainant attached as Exhibit A to his Reply (Complainant's Email Chain).

[33] At this stage of the inquiry, neither the Respondent's nor the Complainant's Email Chains are admitted into evidence for the truth of their contents, but are merely referred to as evidence that the emails within them were sent on the dates shown.

[34] In this Complaint, the IR recommended *against* referral to the Tribunal – rather, it recommended the Complaint be dismissed. The Commission nevertheless referred the Complaint to the Tribunal Chairperson to institute an inquiry. The Commission must have been "satisfied that, having regard to all the circumstances" of this Complaint, that an inquiry into this Complaint was "warranted".

[35] Therefore, I conclude that the fact that the Commission's investigation did not include harassment under the *Act* is not determinative of the scope of the Complaint. That is particularly so because in this Complaint, the Commission overrode the IR's recommendation in any event.

[36] Further, a Tribunal inquiry is akin to a *trial de novo* - a "trial from the beginning". The Tribunal takes a fresh look – from the beginning – at the complaint and all the admissible evidence. The Tribunal is not bound by the IR or by the Commission's findings, as was held, for example, by the Federal Court in *Gravel v. Canada (Attorney General),* 2011 FC 832, at para 50.

[37] To determine the scope of this Complaint, I also take into account other factors, as set out below.

### b. The Complaint, the Summary of Complaint form and the Referral Letter

[38] I note the following paragraphs of the Complaint, using its numbering:

> "8. My email then precipitated a lengthy exchange of emails with DGMCP (Mike Gardiner) in which he badgered me regarding my involving senior leadership in the accommodation request issue. He also exerted excessive and unwarranted managerial pressure for me to meet with him to discuss my accommodation request. I told him that my mental health would be adversely affected by continuing to discuss it. DGMCP continued to push me hard, questioned the veracity of my disability and threatened (actually promised) disciplinary action if I continued to refuse to meet with him. Eventually, his confrontational, aggressive and bullying methods caused me

> tremendous mental stress and I approached my previously established breaking point. I simply could not endure any more of his unrelenting, abusive, authoritative bullying. Therefore I informed [Commissioner Da Pont] that he needed DGMCP to stop acting on his behalf and to cease his harassment of me. …
>
> 10. …DFO tolerated and encouraged the bullying of me by DGMCP and otherwise intentionally and actively discriminated against me…"

[39] The Tribunal should keep in mind the Federal Court of Appeal's statement in *Canada (Attorney General) v. Robinson*, [1994] 3 FCR 228, that "Complaint forms are not to be perused in the same manner as criminal indictments". Although the Complaint does not specifically cite any harassment sections of the *Act,* I find that it does allege a course of behaviour which the Complainant calls harassment, and which, in the Complainant's view, is part of the circumstances of his Complaint.

[40] The Respondent submits that because both the Commission's original Summary of Complaint form and the revised version make no mention of harassment, it follows that harassment was not included in the scope of the Complaint which the Commission referred to the Tribunal Chair.

[41] The Complainant submits that the Summary of Complaint form is simply an administrative document and the fact that its two iterations do not state harassment is irrelevant, and has no legal effect.

[42] I have looked into whether any other Tribunal cases dealt with the significance or weight to be accorded to the Summary of Complaint form, and found two such cases.

[43] In *Valerie Deschambeault v. Cumberland House Cree Natio*n, 2008 CHRT 48 (*Deschambeault*), the Tribunal noted that the unrepresented complainant had not specified in her complaint "which provision of the *Act*" she alleged was violated (at para 1). The Tribunal used the Summary of Complaint form the Commission attached to her complaint, which cited section 7 under "applicable section", and "national or ethnic origin" under "relevant prohibited ground" to deem that Ms. Deschambeault's complaint was about a breach of section 7, on the grounds of national or ethnic origin (*ibid*).

[44] In *Corrine McAdam v. Big River First Nation*, 2009 CHRT 2 (*McAdam*), the Tribunal took into account the Summary of Complaint form, together with the unrepresented complainant's submission at the hearing's opening, and the "context of the complaint" to clarify the respondent's identity (at para.2).

[45] The *McAdam* complaint also did not specify which provisions of the *Act* the respondent was alleged to have breached (at para.4). The Tribunal noted in *McAdam* that the Commission's "complaint summary" was "…attached to the complaint form…" and "…constituted part of the complaint material …sent to the Tribunal when the Commission referred the complaint …for inquiry" (*ibid*). The complaint summary specified section 5 as the "…provision of the Act applicable to this case", and the Tribunal deemed section 5 as the applicable section (*ibid*).

[46] The above cases demonstrate that where a complaint does not specify either the section of the *Act* alleged to have been breached or the grounds upon which the breach is based, or who the respondent is, the Tribunal has taken into account and accepted information in the Commission's Summary of Complaint form to clarify these issues.

[47] I conclude that the Summary of Complaint form is an administrative document, drafted by Commission personnel and is attached to the Commission's Referral Letter. In this Complaint, the Complainant had no input into the form.

[48] The above two cases demonstrate that the Tribunal has given the Summary of Complaint form weight in clarifying which section of the *Act* apply to a complaint, and, together with other evidence, to clarify the correct respondent, but not to decide the scope of a complaint.

[49] In *Deschambeault,* the Tribunal was satisfied that the Summary of Complaint form itself established the answer to the issue. In *McAdam,* the Tribunal took into account not only the Summary of Complaint form, but also the complainant's opening submissions, as well as the "context of the complaint", in coming to its decision.

[50] I find that the issue in the within Complaint with respect to the weight to be attached to the Summary of Complaint form is different than the clarifications required in

*Deschambeault* and *McAdam*. Here, the Respondent is asking the Tribunal to *limit [my italics]* the scope of the Complaint by placing significant weight on the fact that the Summary of Complaint form does not include any section of the *Act* citing harassment nor does it state the ground of the alleged harassment.

[51] The Respondent submits that the Summary of Complaint form was revised to "more accurately reflect the Complainant's allegations" and that the "scope of the complaint was modified to be adverse impact on the grounds of disability (failure to accommodate)…" The Complainant submits that he was never consulted about nor did he have input into the amendment to the Summary of Complaint form.

[52] I find that the Tribunal's decision in *Kanagasabapathy* (*supra,* at para.29*)* applies. It is the Commission's letter to the Tribunal Chair, referring a complaint for an inquiry, which is the "best evidence" of the scope of a complaint. This "…is the document that determines whether the complaint has been referred in its entirety or not" *(ibid)* I find that a consequence of the decision in *Kanagasabapathy* is that*,* as in *Deschambeault* and *McAdam,* the Tribunal can use the Summary of Complaint form as an aid to clarify aspects of a complaint, but not to limit its scope.

[53] The investigator amended the Summary of Complaint form in this Complaint. The amendment deleted reference to section 10 of the *Act.* However, the allegation under section 10 of the *Act*, which related to whether the "right fit" policy discriminates or tends to discriminate against people who share the Complainant's disability remains a category of alleged discrimination in this Complaint. It is the substance of a complaint that has weight, not the Summary of Complaint form. An investigator's view of the scope of the Complaint is also not binding on the Tribunal.

[54] I conclude that it is the substance of a complaint that has weight, not the Summary of Complaint form, nor does the Summary of Complaint form limit the scope of the complaint if the Referral Letter does not do so. As acknowledged in *Kanagasabapathy (supra),* the Commission is entitled to limit or qualify the scope of the Tribunal's inquiry. As examples, it has done so in *Johnston v. Canadian Armed Forces*, 2007 CHRT 42, at para. 6, referred to in *Kanagasabapathy*, *supra*, at para. 30, and in *Northwest Territories v.*

*P.S.A.C.* (1999) 162 F.T.R. 50, *(ibid*). However, it does not do so through the Summary of Complaint form, but by way of the Referral Letter, which the Commission sends directly to the Tribunal Chair.

[55] There was no such limitation in the Referral Letter in this Complaint. Citing subsection 44(3)(a) of the *Act*, the Commission referred this Complaint to the Tribunal Chair for an inquiry into the Complaint, because the Commission was "…satisfied that, having regard to all the circumstances, an inquiry is warranted."

### c. The Complainant's SOP

[56] In paragraphs 73, 74, 75 and 76 of his SOP, the Complainant sets out the Respondent's actions which he alleges constitute harassment "Contrary to the CHRA". This section of his SOP is headed "Did the respondent demonstrate wilful and reckless disregard for the complainant's health and welfare".

[57] Paragraph 73 of the Complainant's SOP states:

> "Contrary to the CHRA [footnote 20 beside "CHRA" quotes subsection 14(1)(c) and section 59 of the Act], Mr. Gardiner then wantonly bullied, threatened, intimidated and otherwise harassed the complainant. Mr. Gardiner was persistent in his
>
> offensive behaviour despite repeated cautions from the complainant regarding his health condition and that Mr. Gardiner's intentions/actions were inappropriate and injurious."

[58] Paragraph 74 alleges that the Coast Guard Commissioner and the Deputy Minister at the time "were made aware" of the DGMCP's behaviour, remained silent, "if not complicit in that repetitive intimidation and harassment". After the word "intimidation", there is a footnoted reference to Treasury Board of Canada Secretariat policy on certain behaviours, which "…includes harassment within the meaning of the Canadian Human Rights Act."

[59] I find that the Complainant's SOP not only alleges that the Respondent harassed the Complainant contrary to the *Act*, it also cites the ***Act's*** sections on harassment. Section 59 is erroneously cited, and the May 29 Ruling dealt with this error. But subsection 14(1)(c) is also cited.

### d. Connection between harassment and a prohibited ground

[60] The Respondent submits that nothing in the Complaint connects the DGMCP's alleged actions to a prohibited ground of discrimination in the *Act*. The Complainant's position is that the harassment is directly related to his disability. He also submits that the Complaint alleged harassment related to his disability, and that he detailed the harassment allegation.

[61] The Complainant states at paragraph 8 of the Complaint that during DGMCP's alleged harassment of the Complainant, the DGMCP questioned the "veracity" of the Complainant's disability. The Complainant bases all his other allegations of discrimination on the ground of his disability. No other ground is mentioned in both the Complaint or the Complainant's SOP.

[62] I therefore conclude that the Complainant's disability is the ground on which the harassment allegation is based.

### e. Workplace dispute

[63] The Respondent's submission that the interactions which the Complainant characterizes as harassment were actually a workplace dispute goes to the merits of the harassment allegation. It is premature at this stage for the Tribunal to make a decision on the merits of this allegation (*Tabor, supra*).

### f. Prejudice

[64] The Respondent's submissions on how including harassment in the Complaint would prejudice the Respondent's rights to a fair hearing are set out above under "Respondent's Position".

### g. Does the inclusion of harassment constitute a "new complaint"?

[65] The Respondent submits that it would be prejudiced if the Complaint were deemed to include or was amended to include subsection 14(1)(c) harassment because that allegation constitutes a substantially new complaint, and that even further particulars would not enable the Respondent to properly defend itself, and would prejudice its right to procedural fairness.

[66] In considering whether the harassment allegation constitutes a new complaint, I have taken the following into account:

- paragraph 5 of the Complaint alleged that the Complainant sent an email to the Commissioner of the Canadian Coast Guard (Commissioner) because he was an Employment Equity "Champion";
- the email told the Commissioner about the Complainant's difficulties in obtaining what the Complainant felt was a proper response to his accommodation request;
- the Complainant received a responding email from the then DGMCP Gardiner, on behalf of the Commissioner (later withdrawn);
- paragraph 5 further alleges how the Complainant's Director became involved regarding the Complainant's accommodation request, and that the Respondent still provided no satisfactory answer to that request;
- Complaint paragraph 7 describes the Complainant's subsequent email to the Commissioner, copied to the Deputy Minister and another individual who were EE Champions;
- in this email, he told the Commissioner, among other things, that there was a problem in the department regarding its seeming inability or disinterest in accommodating persons with the Complainant's type of disability;
- paragraph 8 alleges that the then DGMCP responded, and in the Complainant's view, harassed him, which harassment included questioning "the veracity" of the Complainant's disability and repeatedly requesting meetings with the Complainant to discuss the Complainant's "accommodation request";
- the allegations are that the DGMCP wanted to engage with the Complainant about his accommodation request and continued to require this engagement for a time.

[67] These allegations have not been established. They will only be established based on admissible evidence at the hearing. However, for the purposes of this motion, I find that on their face, the course of conduct and alleged harassment they describe is related to the Complainant's accommodation request and the issue of accommodation in this Complaint.

I therefore find that the alleged contacts between the Complainant and the DGMCP which the Complainant characterizes as harassment contrary to the *Act*, and between the Complainant and other personnel at DFO arise out of the same set of circumstances as the Complaint and are part of the narrative of this Complaint. They therefore do not constitute a new complaint and do not prejudice the Respondent's right to procedural fairness.

### h. The Commission and Respondent's SOPs

[68] The Commission is not participating in this Motion, and therefore offers no reason why its SOP did not address harassment. The Tribunal cannot speculate on those reasons. I find that the Tribunal cannot make any inference from that omission about whether harassment is included in the Complaint.

[69] In assessing potential prejudice to the Respondent, I take into account that the Respondent's SOP also did not address the harassment allegations in the Complaint and in the Complainant's SOP. It is fair to find that one of the reasons the Respondent did not address harassment was that in its opinion, harassment within the meaning of the *Act* was not part of the Complaint.

[70] A significant factor which I find mitigates any actual prejudice a clarification or amendment to include harassment may have caused the Respondent is that a hearing date has not yet been set. Therefore, the Tribunal can allocate sufficient time for the Respondent to revise its SOP to address the harassment allegation, and to find and disclose arguably relevant documents related to the harassment allegation. I also note that the Respondent's list of intended witnesses in its SOP (at para.76) includes former DGMCP Gardiner, who figures in the Complainant's allegation of harassment.

### i. DFO no longer employs witness

[71] The Respondent's submission that DFO no longer employs former DGMCP Gardiner is another factor I take into account in assessing prejudice. That factor is balanced by the Complainant's submission that the former DGMCP is presently employed by Service Canada as the ADM for Western Canada and the Territories.

[72] I find that the Respondent can contact him, receive information from him, and call him as a witness. The fact that former DGMCP Gardiner is no longer as easily available to be a witness as he was shortly after the Complaint was filed is an inconvenience – it does not rise to the level of an actual prejudice impacting on the fairness of the hearing.

[73] The Respondent submits that the passage of time is another way in which it is prejudiced. However, the passage of time impacts the Complainant in the same way.

[74] For the above reasons, I conclude that the Respondent is not prejudiced by the inclusion in the Complaint of the allegation that the Respondent harassed the Complainant on the ground of disability, within the meaning of subsection 14(1)(c) of the *Act*.

[75] In the interests of clarity, and even though I have found that the Complaint and the Complainant's SOP include the allegation of harassment, this Ruling orders that the Complaint be formally amended to include harassment on the ground of disability, contrary to subsection 14(1)(c) of the *Act.*

[76] The fact that this Ruling formally amends the Complaint to include the allegation of harassment within the meaning of subsection 14(1)(c) does not establish that allegation. The Tribunal can only decide if it has been established after it has evaluated the admissible evidence submitted at the hearing.

## C. Is the Complainant entitled to disclosure of the Table 1 Documents?

### 1. Complainant's Position

[77] The Complainant submits that he has and continues to request disclosure not only of documents which are arguably relevant to the accommodation issue, but "to all the discrimination allegations contained" in the Complaint and in his SOP.

[78] The Complainant submits that the Respondent's disclosure to date is inadequate because it focuses mainly on the issue of accommodation, and does not include all documents which are arguably relevant to the other allegations of discrimination in the Complaint. Those allegations include harassment within the meaning of the *Act,* and the Respondent's discriminatory practice or policy of "right fit", which denied the Complainant an employment opportunity on the prohibited ground of his disability, differentiated adversely against him, and for which the Respondent failed to accommodate him, contrary to section 7 of the *Act.* Further, the Complaint also includes allegations against the Respondent's discriminatory practice or policy of "right fit", which is discriminatory against and denies others who share the Complainant's disability employment opportunities, contrary to section 10 of the *Act.*

[79] In the Disclosure Motion, the Complainant sought from DFO all documents "related to any harassment investigation or discussion by senior DFO management in regards to Michael Gardiner and/or [the Complainant]". He submitted that the Complaint and his SOP allege both the harassment and the Complainant's requests to senior management that the harassment stop.

[80] He submits that his request for disclosure of the Table 1 documents is "required to determine whether the Respondent complied with its own harassment policy, and if so, to what degree", and that his request includes documents that can "shed light on why the harassment eventually stopped."

[81] In his Submission, the Complainant added the Linkage column in response to the May 29 Ruling's requirement, at paragraph 28, that he demonstrate "…how any further disclosure request complies with Rule 6". The Complainant submits that the description in the Linkage column identifies the connection of the requested documents to the "arguably relevant facts, issues and/or forms of remedy stated as per Rule 6" in his SOP.

## 2. Respondent's Position

[82] The Respondent's position on further documentary disclosure is set out below.

- The Respondent has already disclosed hundreds of documents which were either in the possession of or created by the individuals named in Table 1;
- The Complainant's disclosure request is still overly broad and general, notwithstanding the Linkage column, because the Complainant "is not identifying the precise documents that the Respondent would have failed to disclose";
- therefore, the disclosure request still amounts to a "fishing expedition" (Joanne (*Johanne Guay v. Royal Canadian Mounted Police*, 2004 CHRT 34 (Can LII) (*Guay*), at para. 43.

## 3. Analysis – Relevant Portions of the Complaint

[83] The allegations in the Complaint which are relevant to the Complainant's Submission requesting disclosure of the documents in the revised Table 1 are set out below. Many of the allegations below are the same as those under the same heading in

the May 29 Ruling. Rather than asking the reader to also refer to the May 29 Ruling, I included them all here for ease of reference.

i. The Complainant has a medical condition which he states is a disability under the *Act*.

ii. In June, 2008, he submitted an application in Selection Process 08-DFO-IA-NCR-929466 (ENG-05 Job Competition) for a not-yet-established ENG-05 position with DFO (ENG-05 position), without self-identifying as disabled and without requesting accommodation.

iii. In April, 2009, after completing the assessment process, which included an interview, DFO placed him in the pool of candidates qualified for the position. The pool had an effective date of April 20, 2009 to October 20, 2010.

iv. The Complainant was told that his interview was just "OK", and that he would not be considered for the position once it was established.

v. The Complainant felt his disability had hindered him in the interview, as it had done before; in August, 2009, he self-identified as a person with a disability requiring accommodation. In September, 2009, he submitted an "Accommodation Request" form to DFO.

vi. DFO then offered to re-do the assessment phase of the ENG-05 Job Competition, but after it received information on specific appropriate accommodation modes for the Complainant from PSC. DFO asked the Complainant to go to the PSC Psychology Centre ("PPC") to be assessed for appropriate modes of accommodation in the assessment process.

vii. The Complainant disagreed and did not go to PPC. He proposed to DFO that the appropriate accommodation was to appoint him to the ENG-5 position for various reasons, including:

    a. the "right fit" standard and practice the PSC developed and DFO used and uses in its job competition process to assess candidates is inherently discriminatory against the Complainant and others with his disability;

    b. the employer's duty to accommodate applies throughout the selection process, up to and including appointment; and

    c. his appointment would not cause DFO undue hardship and would close a representational gap in the Respondent's employment equity ("EE") plan.

viii. in the next few months, the Complainant resubmitted the Accommodation Request "several times", discussed accommodation issues and the form of the request with his supervisor, Heather Skaarup (nee MacDonald) and human resource specialists, principally Ashley Austin;

ix. in November, 2009, the Complainant wrote to the Coast Guard Commissioner, George Da Pont, that he was having difficulties in getting what the Complainant considered a reasonable response;

x. the Complainant's Director, Nico Pau, told the Complainant he [Pau] did not have the authority to grant the accommodation the Complainant requested and also, the Complainant was using the wrong Accommodation Request form, without identifying which form was the correct one;

xi. in December, 2009, the Complainant emailed Commissioner DaPont, copying Claire Dansereau and Ms. Scattolon; he stated that DFO's application of its employment equity policy was a "farce" regarding people with other than physical disabilities;

xii. the then Deputy General, Major Crown Projects M. Gardiner (DGMCP) and the Complainant exchanged a series of emails in which the DGMCP pressured the Complainant to meet to discuss the Complainant's accommodation request; the Complainant refused because his mental health would be adversely affected by continuing to discuss the accommodation request; the DGMCP continued to ask for the meeting, questioned the truth of the Complainant's disability and promised disciplinary action if the Complainant did not meet with him;

xiii. the Complainant informed Commissioner Da Pont that Da Pont needed to stop the DGMCP from acting on the Commissioner behalf and stop harassing the Complainant;

xiv. DFO declined the Complainant's accommodation proposal.

xv. the "right fit" determination is a systemic barrier to persons with disabilities;

xvi. the Complaint's requested remedies in the Complaint were: an apology from senior managers; credit for 2 sick days the Complainant had to take off to protect his mental health; damages for pain and suffering (withdrawn later); confirmation that DFO failed to accommodate him; confirmation that DFO will comply with its policy.

[84] The Complainant's SOP sought additional remedies, including compensation for wilful and reckless discrimination and pay differential.

## 4. Analysis – Statutory Law and Tribunal Rules of Procedure

[85] Subsection 50(1) of the *Act* states:

> "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."

[86] Rule 6 of the Tribunal Rules of Procedure (03-05-05) (Rules) requires parties to a complaint to provide a Statement of Particulars (SOP), which includes, among other things, documentary disclosure.

[87] For the purposes of the Complainant's Submission, Rules 6(1)(d) and (e) are again particularly relevant.

[88] Rule 6(1)(d) states:

> "Within the time fixed by the Panel, each party shall serve and file a Statement of Particulars setting out, …
>
> (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;"

Rule 6(1)(d) therefore limits the disclosure obligation to "documents…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".

Rule 6(1)(e) requires another list of documents in the party's possession, setting out "documents for which privilege is claimed". The rest of 6(1)(e) repeats the language in 6(1)(d).

## 5. The standard for disclosure pursuant to Rule 6

[89] The pre-hearing standard for the disclosure of documents has been established to be "arguable relevance". For a document to be arguably relevant, there must be a nexus or rational connection between the document requested and a fact, issue, or form of relief sought or identified by the parties (*Seeley v. Canadian National Railway*, 2013 CHRT 18 (Can LII) ("*Seeley*"), at para. 6. An arguably relevant document may or may not be admissible at the hearing, but admissibility at the hearing is not the standard for pre-hearing disclosure.

[90] Each party must disclose all arguably relevant documents in its possession. A respondent does not meet that obligation if it only discloses documents that in its opinion, are sufficient for the opposite party to establish a *prima facie* case.

[91] Subject to the comments below regarding "advice", I conclude that in the Linkage column of Table 1, the Complainant has provided a nexus between the documents he requests be disclosed and issues, facts or forms of relief in the Complaint and in his SOP.

[92] For example, regarding arguably relevant documents to, from, or copied to the former DGMCP Gardiner, he relates such documents to the failure to accommodate and harassment issues in the Complaint. There is no dispute that the Complainant and the DGMCP corresponded. The Complainant characterized these correspondences and the discussions he had with the DGMCP as harassment within the meaning of the *Act.* Harassment is an issue in the Complaint and in the Complainant's SOP – therefore, the requested documents are arguably relevant, and should be disclosed. I note that in the Disclosure Motion, the Complainant requested arguably relevant documents regarding any investigation regarding his allegation of harassment. This disclosure is also ordered in this Ruling in light of the amendment to the Complaint.

[93] Another example is the description in the Linkage column regarding Commissioner Da Pont. The Complainant alleges in the Complaint that he asked the Commissioner to direct the DGMCP to stop contacting him about the accommodation situation, because the Complainant felt he was being harassed. The Complainant also alleged the systemic lack of accommodation by the DFO as a department for those who shared the Complainant's disability. The request for disclosure is also therefore connected to the issues in the Complaint and in the Complainant's SOP, and is arguably relevant

[94] Regarding the other named individuals in Table 1, the Linkage column relates the documents requested for each individual to the failure to accommodate and harassment issues, which are in the Complaint and the Complainant's SOP; or to the "competition and accommodation process[es]", which are also part of the Complaint and the parties' Statements of Particulars; or to the "right fit" issue, also part of the Complaint and the parties' SOPs. They are therefore arguably relevant.

[95] In addition, Ms. Skaarup (formerly MacDonald) was named in the Respondent's SOP as the individual appointed to the relevant position pursuant to departmental employment equity goals for the position. Therefore, requests for documents around the process which resulted in her selection, participation and deployment, as set out in the Linkage column, are connected to the issues and facts in the Complaint and the parties' SOPs and are arguably relevant.

[96] I note that in the Linkage column, the Complainant has requested disclosure of documents related to "advice". He does not clarify what he means by advice. I note that Rule 6(1)(e) applies to documents which are privileged under the law of evidence.

### D. Confidentiality Ruling is in effect

[97] The Confidentiality Ruling previously issued for this Complaint remains in effect.

### E. Case Management Conference Call

[98] As soon as practicable, the Tribunal shall hold a Case Management Conference Call (CMCC) with all the parties, to set timelines for the Respondent and Commission to each file an amended Statement of Particulars regarding the allegation of harassment, in accordance with Rule 6, if they wish to do so, and for the Complainant's amended Reply thereto, if he wishes to file one. During the CMCC, time lines will also be set for the disclosure of documents ordered in this Ruling.

## III. Ruling

[99] Paragraph 1 of the Complaint is amended by adding to it the following:

> "The Complainant alleges that the Respondent harassed the Complainant on the ground of disability, within the meaning of subsection 14(1)(c) of the *Canadian Human Rights Act*."

[100] The Respondent shall search for, and to the extent that it has not already done so, shall disclose, in accordance with Rule 6 of the Tribunal Rules of Procedure, all arguably relevant documents, including letters, briefing notes, memos, minutes, emails, and faxes

from, to, or copied to the individuals named below, for the inclusive time periods set out, with respect to the subject matter set out:

A. Claire Dansereau, former Deputy Minister, Department of Fisheries and Oceans, all arguably relevant documents, from February 12, 2010 to March 10, 2010, the subject matter of which are facts, actions, directions and advice regarding the issues of failure to accommodate and harassment;

B. George Da Pont, Commissioner, Canadian Coast Guard, all arguably relevant documents for the periods November 20, 2009 to November 30, 2009 and February 12, 2010 to March 10, 2010, the subject matter of which are facts, actions, directions and advice regarding the issues of failure to accommodate and harassment;

C. Michael Gardiner, then Director General, Major Crown Projects, all arguably relevant documents for the periods November 20, 2009 to November 30, 2009 and February 12, 2010 to March 10, 2010, the subject matter of such documents being facts, actions, directions and advice regarding the issues of failure to accommodate and harassment and any investigation with respect to harassment;

D. Derek Buxton, all arguably relevant documents for the periods July 1, 2008 to October 31, 2008 and August 25, 2009 to November 30, 2009, the subject matter of such documents being facts, actions, direction and advice regarding the competition process, the appointment process, “right fit” selection and justification, and issues of failure to accommodate and harassment;

E. Ashley Austin, Human Resources Advisor, all arguably relevant documents, for the period August 25, 2009 to November 30, 2009, the subject matter of such documents being facts, actions, direction and advice regarding the competition process, the accommodation process, the appointment process, and “right fit”;

F. Heather Skaarup, formerly Heather MacDonald, Manager, Major Crown Projects, all arguably relevant documents for the period September 22, 2008 to October 31, 2009, the subject matter of such documents being her selection process, participation and deployment; and all arguably relevant documents for the period September 1, 2010 to September 30, 2010, the subject matter of such documents being facts, actions, directions and advice regarding the accommodation process;

G. Patti Kuntz, Director General, Human Resources, all arguably relevant documents for the period February 12, 2010 to April 10, 2010, the subject matter of such documents being facts, actions, directions and advice regarding accommodation and harassment issues;

H. Michaela Huard, all arguably relevant documents for the period February 12, 2010 to April 12, 2010, the subject matter of such documents being facts, actions,

directions and advice regarding the issues of failure to accommodate and harassment;

I. Catherine Taubman, Director General, HR Ops, all arguably relevant documents for the period February 12, 2010 to April 12, 2010, the subject matter of such documents being facts, actions, directions and advice regarding the issues of failure to accommodate and harassment.

*Signed by*

Olga Luftig
Tribunal Member

Ottawa, Ontario
February 26, 2016