

**Canadian Human
Rights Tribunal**



**Tribunal canadien
des droits de la personne**

Citation: 2016 CHRT 17

Date: October 28, 2016

File Nos.: T2117/3315 & T2118/3415

Between:

Roy Bentley

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Air Canada

- and -

Air Canada Pilots Association

Respondents

Ruling

Member: Alex G. Pannu

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I. Scope of the Complaints

A. Background

[1] The Complainant submits that the Canadian Human Rights Commission (the “Commission”) had no authority to restrict the Canadian Human Rights Tribunal’s (the “Tribunal”) *de novo* assessment of the merits of the complaints raised. Since the Commission found sufficient reason to request the Tribunal to initiate an inquiry into the complaints, the inquiry should not be restricted to one issue.

[2] Air Canada and the Air Canada Pilots Association (“the Respondents”) submit that the Commission was clear in referring only one allegation to the Tribunal relying on the Decision of the Commission dated November 4, 2015 which says:

The Commission accepts the finding by the investigator that the evidence does support that there is an age-based distinction in L75.07 of LOU 75. The Commission decides to refer only this allegation to the Tribunal.

B. Law

[3] The Tribunal does not have jurisdiction over a complaint until it has been referred to the Tribunal. Furthermore, the Tribunal has no jurisdiction over the exercise of the Commission’s discretion under the *Canadian Human Rights Act* (CHRA or the “Act”) s.44 (3) for rejecting or referring a complaint. The Federal Court has confirmed that the proper way to challenge a Commission decision in respect of such matters is through judicial review by the Federal Court. (*Canada (Human Rights Commission) v. Warman*, 2012 FC 1162 at para 56, decision affirmed by *Lemire v. Canada (Human Rights Commission)*, 2014 FCA 18).

[4] The scope of the referral is determined by looking at the letter from the Commission addressed to the Chairperson of the Tribunal, as this letter initiates the entire Tribunal inquiry process. This document determines whether the complaint has been referred in its entirety or not. One must look at whether there is specific language limiting the scope of a

complaint or referring the complaint in its entirety. (*Kanagasabapathy v. Air Canada*, 2013 CHRT 7 at paras 29-32 (“*Kanagasabapathy*”)).

C. Analysis & Ruling

[5] Having considered the arguments submitted by the parties, I have decided that I will hear evidence and argument only on whether the allegation that L75.07 of LOU 75 is discriminatory based on age. I base my ruling on the letter from the Commission to the Chairperson of the Tribunal dated November 12, 2015:

The Commission has decided, pursuant to paragraph 44(3) of the Canadian Human Rights Act, to request that you institute an inquiry into the allegation that L75.07 of LOU 75 is discriminatory based on age as it is satisfied that, having regard to all the circumstances, an inquiry is warranted.

[6] The correspondence from the Commission contains qualifying language that limits the scope of the inquiry to the specific allegation of discrimination based on L75.07 of LOU 75.

[7] The Respondents rely upon the Tribunal’s decision in *Kowalski v. Ryder Integrated Logistics*, 2009 CHRT 22 where the Tribunal found that correspondence from the Commission addressed to the parties and entitled “Decision of the Commission”, restricted the scope of an inquiry. However, as explained by the Tribunal in *Kanagasabapathy*, the Tribunal’s approach was established in *Côté v. A.G. Canada*, 2003 CHRT 32 which has been to rely upon the correspondence from the Commission addressed to the Chairperson of the Tribunal. Doing otherwise would result in “looking behind” the Commission’s decision and exercising a supervisory jurisdiction over the actions and decisions of the Commission which falls within the exclusive purview of the Federal Court.

[8] I have reviewed the Decision of the Commission dated November 4, 2015 which was relied upon by the Respondents. However, for the reasons outlined above, the Tribunal does not find the November 4, 2015 Decision of the Commission to be determinative of the scope of the referral to the Tribunal.

[9] The Respondents argue that paragraphs 8, 9, 10, 11, 17B Issue #1, 18 and 20 are outside of the scope of the complaint before the Tribunal. Given the above assessment, I would agree with the Respondents.

II. Expert witness and report

A. Background

[10] The Complainant provided their Statement of Particulars (“SOP”) and witness list, which did not include the name of the expert witness or a summary of the anticipated evidence. The Complainant also did not include the name of the Air Canada pilot, or former Air Canada pilot, who would speak to the adverse consequences of the loss of Group Disability Income Plan (“GDIP”) benefits.

[11] The Complainant takes the position that Rule 6(3) requires only that an expert report be provided “within a time fixed by the Panel” and that requirement has not yet been met.

[12] The Respondents have yet to provide their SOPs since they are waiting for the information from the Complainant. The Respondents submit that the Complainant must provide them with the name of the expert witness and summary of evidence with the SOP because “the Tribunal has already, pursuant to Rule 6(3), required that the Complainant provide such detailed information in its direction of January 18, 2016”.

B. Law

[13] The Tribunal’s Rules of Procedure are more relaxed than the rules of a civil court. A Member may exercise his discretion provided that the decisions are in line with the purpose of the Rules of Procedure (Rule 1(1)):

- i. allowing the parties the opportunity to be heard
- ii. to proceed in a timely and efficient manner

- iii. proceedings are to be conducted as informally and expeditiously as possible.

[14] Rule 6(3) provides the Tribunal Member with the flexibility to determine the timeline for expert reports. This flexibility must be in accordance with the rules of procedural fairness and natural justice.

C. Analysis & Ruling

[15] As noted above, the Tribunal's Rules of Procedure are more relaxed than the rules of a civil court. Although the Respondents rely upon a Tribunal direction to seek disclosure of certain information prior to disclosure of their own SOPs, it is important to not further delay the matter due to the exchange of expert reports. As such, I will first deal with the exchange of SOPs. I am exercising my discretion within the purpose of the Rules of Procedure to make the following ruling:

- A. Pursuant to Rule 6(1)(f), the Complainant will provide the name of the Air Canada pilot and a summary of his/her expected testimony to the Respondents within two (2) weeks of the date of this ruling if he intends to call this witness.
- B. The Respondents will file their SOPs within two (2) weeks of the receipt of notice from the Complainant that the Air Canada pilot will or will not be called as a witness.

The Respondents shall comply with Rule 6(1) and are not required to provide information regarding expert witnesses or expert reports in their SOPs.

[16] Rule 6(3) provides me with the discretion to determine timelines for expert reports. I find that in light of the issues to date regarding expert witnesses, the parties shall first complete the exchange of SOPs. Following this, a Case Management Conference Call (CMCC) will be scheduled by the Tribunal to discuss disclosure, procedural and any other issues prior to setting a date for a hearing. At such CMCC, the Complainant will advise if he intends to call an expert witness. If so, we will discuss a timeline for the disclosure of

the expert witness' name, credentials, summary of evidence and report as well as any expert witness the Respondents may call.

III. Order

[17] I make the following Orders:

- paragraphs 8, 9, 10, 11, 17B Issue #1, 18 and 20 are to be struck from the Complainant's SOP;
- The Complainant will provide the name of the Air Canada pilot and a summary of his/her expected testimony to the Respondents within two (2) weeks of the date of this ruling if he intends to call this witness;
- The Respondents will file their SOPs within two (2) weeks of the receipt of notice from the Complainant that the Air Canada pilot will or will not be called as a witness;
- A CMCC will be scheduled by the Tribunal. At such CMCC, the Complainant shall advise if he intends to call an expert witness.

Signed by

Alex G. Pannu
Tribunal Member

Ottawa, Ontario
October 28, 2016