Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Between:

Leslie Palm

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

International Longshore and Warehouse Union, Local 500,
Richard Wilkinson and Cliff Willicome

Respondents

Ruling

Member: Susheel Gupta
Date: July 25, 2013
Citation: 2013 CHRT 19

Table of Contents

[1] The Complainant, Ms. Leslie Palm, claims the International Longshore and Warehouse Union, Local 500 (the Union) has discriminated and harassed her on the basis of her sex, pursuant to sections 9, 10 and 14 of the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6 [the *Act*]. The Complainant also claims that Mr. Cliff Willicome and Mr. Richard Wilkinson have harassed her on the basis of her sex in contravention of section 14 of the *Act* (the Union, Mr. Willicome and Mr. Wilkinson are herein collectively referred to as the Respondents).

[2] Among other things, the Complainant alleges the Union creates and fosters a work environment that is hostile to females and in which work is allocated to males and females in a discriminatory manner.

[3] The following ruling deals with the Complainant's motion to amend her complaints to add allegations of retaliation, pursuant to section 14.1 of the *Act*. This section provides:

> **14.1** 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.

[4] For its part, the Respondent has also made a motion to modify a ruling made by the Tribunal regarding the disclosure of the Complainant's medical records.

[5] Each motion will be dealt with in turn.

I. Motion to Amend the Complaints

[6] In a motion dated December 19, 2012, the Complainant alleges the Union has retaliated against her for having filed her complaint. In a further letter on March 30, 2013, the Complainant provided further particulars regarding claims of "further and ongoing retaliation" by the Union.

[7] The Complainant alleges the Union and Mr. Willicome have retaliated against her for having filed her complaints against them. The allegations against the Union stem from the

actions of other Union members and, specifically, Mr. Tony Pantusa. The allegations against Mr. Willicome revolve around an incident with the Complainant's son, Mr. Chris Cornett.

[8] Although the Respondents view the December 19, 2012 and March 30, 2013 correspondence from the Complainant as two separate motions to amend, the latter correspondence only provides an update as to the situation with Mr. Pantusa. In the March 30, 2013 correspondence, the Complainant does not seek to add additional grounds or discriminatory practices to her complaints, just facts. Ultimately, the Respondents have had an opportunity to provide submissions on both pieces of correspondence and, if the motion to amend is granted, the Respondents will be able to address all these facts through the filing of amended Statements of Particulars. Therefore, I will address the Complainant's December 19, 2012 and March 30, 2013 correspondence together, as her motion to amend her complaint.

[9] The Complainant also provided additional submissions and documentation on July 15, 2013, regarding her motion to amend her complaints. However, I did not consider that correspondence in ruling on the present motion. As described by the Complainant in her July 15, 2013 correspondence, those submissions go to the merits of substantiating her allegations of retaliation: "The findings of the attached prove as I have stated that I have been continually subjected to ongoing retaliation and harassment to which my Union has been aware of and done nothing to stop". As will be described in more detail below, these submissions are irrelevant for the purposes of determining whether the complaints should be amended, as the Tribunal is not embarking on a substantive review of the merits of the Complainant's allegations. Should the amendment be granted, the Complainant can include her July 15, 2013 submissions and documentation as part of her amended Statement of Particulars.

A. Alleged retaliatory conduct by other Union members

[10] Since the filling of her complaint, the Complainant alleges there have been many incidents of remarks, lewd comments and various verbal attacks made against her by other Union members regarding the filing of her complaint. Specifically, the Complainant described an

incident where a newspaper article describing her complaint had been posted in the workplace and on which employees wrote comments that she found offensive.

[11] In another incident, on July 30, 2009, the Complainant claims six co-workers were hostile and aggressive towards her, yelling at her about having filed her complaint. The Complainant felt intimidated by the incident and feared for her safety. Although the incident was reported to the Union, she claims nothing was ever done about the incident.

[12] Most of the Complainant's retaliation allegations stem from her interactions with Mr. Tony Pantusa, a former Union Executive Officer and Dispatch Coordinator at the Complainant's workplace.

[13] According to the Complainant, Mr. Pantusa has been aware of her complaint against the Union since at least December 2009. At that time, she claims she and Mr. Pantusa had a conflict regarding an incident with her son. During that conflict, she claims Mr. Pantusa criticized her, in front of other co-workers, for having brought a complaint against the Union. The Complainant submits that this incident was humiliating and emotionally stressful for her and, in her view, the criticism was intended to prevent her from continuing with her complaint. She claims the incident was witnessed by the Union's Business Agent on duty in the workplace that evening.

[14] The Complainant also alleges, on May 19, 2012, following a discussion regarding the dispatch of work in the workplace, Mr. Pantusa said to the Complainant that he was not afraid of her and stated several times that she was a "rat". In the Complaint's view, these comments were directed at the fact she had filed a complaint against the Union. Subsequently, the Complainant claims Mr. Pantusa refused to dispatch her for work that evening. Although she brought up the incident with the Union's Business Agent who was present in the workplace at the time, she claims he did not attempt to prevent Mr. Pantusa's conduct.

[15] Following the May 19, 2012 incident, the Complainant alleges Mr. Pantusa started making inquiries of other Union members to get some "dirt" on her, and even contacted her ex-

spouse in this regard. The Complainant also claims Mr. Pantusa began spreading false rumours about her regarding sexual conduct in the workplace.

[16] The Union hired an independent investigator to investigate the Complainant's allegations against Mr. Pantusa and prepare a report. In October 2012, the investigator found that Mr. Pantusa had retaliated against the Complainant. It was recommended that the Union discipline Mr. Pantusa and compensate the Complainant for the one day of work she missed. The Union disciplined Mr. Pantusa by making him ineligible for Union office for a period of two years and paid the Complainant her day's wages.

[17] On November 6, 2012, Mr. Pantusa filed an appeal with the Union and was heard by the membership at a Union meeting held on February 20, 2013. In preparation for his appeal, the Complainant claims Mr. Pantusa distributed documents in the workplace relating to her without her consent and campaigned in the workplace, naming her personally.

[18] In the week following the Union's meeting, the Complainant claims the atmosphere at the dispatch hall intensified, which lead to several unwelcome encounters with co-workers. According to the Complainant, one of these incidents resulted in her having to be dispatched for work from home, rather than from the dispatch hall, for approximately 4 weeks. In another incident, she claims to have been approached by a co-worker regarding a rumour that she had been involved in sexual conduct in the workplace.

[19] According to the Complainant, the alleged retaliatory actions of the Union members occurred with either the direct or implied consent of the Union; or, the Union was aware or ought to have been aware of the incidents, but turned a blind eye or acquiesced in the retaliatory conduct of others acting on the Union's behalf.

B. Alleged retaliatory conduct by Mr. Willicome

[20] The Complainant's son, Mr. Chris Cornett, also works for Western Stevedoring Ltd. The Complainant describes her son's status with the Union as a "welfare paying casual", without the

full rights of Union membership. On March 29, 2012, he had a dispute with Mr. Willicome, a named Respondent in this complaint, regarding his availability to be dispatched for work. Mr. Willicome was the Dispatch Coordinator that day and, according to the Complainant, did not make her son available for shifts he should have been. An altercation ensued in which the Complainant claims her son was shoved by Mr. Willicome.

[21] Following the altercation, Mr. Cornett was suspended and Mr. Willicome remained working pending investigation. According to the Complainant, her son was only made aware of his suspension when he arrived at work the next day, and never received written notice of his suspension, nor of its length.

[22] Following Western Stevedoring Ltd.'s (the Employer) investigation of the incident, both Mr. Cornett and Mr. Willicome received suspensions. Mr. Cornett received a 15 day suspension, but had already been off work for 35 days pending the investigation. The Complainant claims her son did not receive any financial compensation for the extra 20 days he was suspended, and adds that the Union appealed Mr. Willicome's suspension.

[23] Following this incident, in early June 2012, the Complainant claims Mr. Willicome initiated a process to charge her son with 'conduct detrimental to the welfare of the Union'. The basis of the charge was for filling a false complaint of assault with the Vancouver Police Department regarding the March 29, 2012 altercation. According to the Complainant, the Union proceeded with the charge against her son without ever seeing a copy of the alleged false complaint, without investigating or interviewing her son, and based solely on Mr. Willicome's allegations. Mr. Cornett was eventually found guilty of 'conduct detrimental to the welfare of the Union'.

[24] In the Complainant's view, Mr. Willicome's refusal to make her son available for shifts and charging him with 'conduct detrimental to the welfare of the Union' were done in retaliation against her for bringing a complaint against the Union and Mr. Willicome. She submits that the March 2012 incident with her son was the first opportunity Mr. Willicome had to retaliate

against her since being elected an Executive Officer of the Union and Dispatch Coordinator, and he used that position of authority to personally target her through her son. The Complainant adds that the Union's actions in supporting the 'conduct detrimental to the welfare of the Union' charges and in suspending her son for 35 days are in retaliation for the filing of her complaint.

C. Analysis

[25] The Tribunal has the authority to amend complaints "...for the purpose of determining the real questions in controversy between the parties" (*Canderel Ltd. v. Canada*, [1994] 1 FC 3 (FCA); cited in *Canada (Attorney General) v. Parent*, 2006 FC 1313 at para. 30 [*Parent*]). In determining whether to allow an amendment, the Tribunal does not embark on a substantive review of the merits of the proposed amendment. Rather, as a general rule, an amendment is granted unless it is plain and obvious that the allegations in the amendment sought could not possibly succeed (see *Bressette v. Kettle and Stony Point First Nation Band Council*, 2004 CHRT 2 at para. 6; and, *Virk v. Bell Canada*, 2004 CHRT 10 at para. 7 [*Virk*]).

[26] That said, an amendment cannot introduce a substantially new complaint, as this would bypass the referral process mandated by the *Act* (see *Gaucher v. Canadian Armed Forces*, 2005 CHRT 1 at paras. 7-9; and, *Cook v. Onion Lake First Nation*, 2002 CanLII 45929 (CHRT) at para. 11). The proposed amendment must be linked, at least by the complainant, to the allegations giving rise to the original complaint (see *Virk* at para. 7; and, *Cam-Linh (Holly) Tran v. Canada Revenue Agency*, 2010 CHRT 31 at paras. 17-18).

[27] Furthermore, the issue of prejudice must be considered when an amendment is proposed. An amendment cannot be granted "...if it results in a prejudice to the other party" (*Parent* at para 40).

[28] According to the Respondents, the Complainant makes sweeping and non-specific allegations of retaliation against the Union and Mr. Willicome, which are not linked to her complaint and do not disclose a tenable claim of retaliation. In this regard, the Respondents note

that, while the Complainant seeks to amend all three of her complaints, she makes no allegations of retaliation against Mr. Wilkinson.

[29] I agree with the Respondents that no allegations of retaliation have been made against Mr. Wilkinson. Accordingly, there is no basis upon which to amend the complaint against him. The Complainant's allegations of retaliation are directed solely at the Union and Mr. Willicome.

[30] With regard to the complaint against the Union, the Respondents argue that retaliation is limited to the behaviour of "a person acting on [a respondent's] behalf", as per the wording of section 14.1 of the *Act*. The Respondents submit that any alleged retaliatory conduct was neither directed nor condoned by the Union, nor was it within the Union's authority to do so. According to the Respondents, the Union is not responsible for employees' behaviour at the worksite: the employer is responsible. The Union adds, it has no knowledge of the conduct allegedly engaged in by Mr. Pantusa, and any such conduct has no relation to Union business. In any event, the Respondent submits the allegations against Mr. Pantusa are now moot as the Union has already investigated the retaliatory conduct, disciplined Mr. Pantusa and compensated the Complainant.

[31] The fact the Union says it did not direct or condone the behaviour is irrelevant at this stage, as the Tribunal is not embarking on a substantive review of the merits of the proposed amendment. Nor is it relevant for the Union to assert that it is not responsible for employees' behaviour at the worksite. Whether the conduct occurred at the worksite or off the worksite, the question raised by the Complainant's allegations under section 14.1 of the *Act* is whether other union members retaliated against the Complainant on behalf of the Union. She claims they did. If the amendment is allowed, evidence will have to be brought forward to establish this allegation and the Union will be given an opportunity to dispute that evidence.

[32] With regard to the allegations involving Mr. Pantusa, again, the fact the Union claims it has no knowledge of his alleged conduct, or that his conduct was not related to Union business, is irrelevant at this stage given the Tribunal is not embarking on a substantive review of the merits of the proposed amendment. As mentioned above, the Complainant claims Mr. Pantusa

was acting on the Union's behalf and, if the amendment is allowed, evidence will have to be brought forward to establish this allegation. In response to such allegations, the Union will be given a full and ample opportunity to raise arguments in defence of the allegations. Furthermore, there is nothing in the *Act* or otherwise that prohibits the Complainant from raising allegations of retaliation before the Tribunal despite the fact the Union has investigated and disciplined Mr. Pantusa for his actions.

[33] While the Respondents claim the allegations of retaliation against the Union are sweeping and non-specific, the Complainant has provided a factual outline of the events giving rise to her allegations of retaliation and has brought forward documentation to support those allegations. The events giving rise to her allegations of retaliation all occurred following the filing of her complaint against the Union and she believes the alleged retaliatory conduct to be linked to the filing of that complaint. I also note the Respondents did not raise any issues of prejudice with regard to amending the complaint against the Union. On this basis, the Complainant has presented a tenable claim of retaliation and, having addressed the Respondent's arguments in this regard, it is not plain and obvious the allegations could not possibly succeed.

[34] As for the complaint against Mr. Willicome, the Respondents argue that actions can only be retaliatory under the *Act* when they are directed at a person who has filed a human rights complaint, as per the wording of section 14.1 of the *Act*. In this regard, the Respondents argue that the allegations against Mr. Willicome concern an interaction between him and the Complainant's son, Mr. Cornett, who is not a human rights complainant. The Union adds, Mr. Willicome did not know who Mr. Cornett was during the incident. Furthermore, despite filing a harassment complaint with the employer regarding Mr. Willicome's actions, the Union notes that Mr. Cornett's complaint did not link the incident with Mr. Willicome to the Complainant's human rights complaint.

[35] While the allegations of retaliation against Mr. Willicome concern an interaction between him and the Complainant's son, it does not preclude the Complainant from claiming she was targeted for retaliation and victimized by those same actions as well. Individuals may suffer

discrimination as a result of actions directed at third parties (see *McKenna v. Secretary of State*, 1993 CanLII 308 (CHRT) at p. 18). Furthermore, in given circumstances, there may be more than one victim (*Canada (Secretary of State for External Affairs) v. Menghani*, [1994] 2 FC 10 at para. 39-40). The question as to who is the "victim" of an alleged discriminatory practice is almost wholly one of fact: are the consequence of the discriminatory practice sufficiently direct and immediate to justify qualifying the individual as a "victim" (see *Singh (Re)*, [1989] 1 FC 430 (FCA) at para. 22). If the amendment is allowed, this question will have to be examined as part of the merits of the Complainant's allegations of retaliation.

[36] The Union's submissions regarding the fact that Mr. Willicome did not know who Mr. Cornett was during the incident and that Mr. Cornett did not link the incident with the Complainant's human rights complaint as part of his own harassment complaint can also be raised when examining the merits of the allegations. However, for the purposes of determining this motion, they are irrelevant.

[37] Again, the allegations of retaliation against Mr. Willicome relate to a specific event to which the Complainant has provided detailed facts and supporting documentation. Her allegations of retaliation are against the same respondent as in her initial complaint; the event giving rise to the allegation of retaliation occurred following the filing of that initial complaint; and, the Complainant believes the alleged retaliatory conduct to be linked to the filing of that complaint. I also note the Respondents did not raise any issues of prejudice with regard to amending the complaint against Mr. Willicome. On this basis, the Complainant has presented a tenable claim of retaliation and, having addressed the Respondent's arguments in this regard, it is not plain and obvious the allegations could not possibly succeed.

[38] As a result, the Complainant's motion to amend her complaints is granted. The complaints against the Union and Mr. Willicome are amended to include allegations of retaliation pursuant to section 14.1 of *Act*. The parties will be given an opportunity to file amended Statements of Particulars pursuant to the following schedule:

August 15, 2013: Complainant's Statement of Particulars and Disclosure
September 5, 2013: Respondent's Statement of Particulars and Disclosure
September 12, 2013: Complainant's Reply, if any

[39] In filing amended Statements of Particulars, the parties are reminded of their obligations under Rule 6 of the Tribunal's *Rules of Procedure (03-05-04)* and, specifically, ongoing disclosure and production pursuant to Rule 6(5).

II. Motion to Modify Disclosure Ruling

[40] In a previous ruling in this matter, the Complainant was ordered to produce certain medical records to the Respondents (see *Palm v. International Longshore and Warehouse Union, Local 500 et al.*, 2013 CHRT 1 [*Palm*]). However, to protect the confidentiality of those medical records, the Tribunal directed as follows:

> the documents shall be disclosed to the Complainant and counsel for the Respondents only and shall not be disclosed to any other individuals without prior permission from the Tribunal. The documents may not be used for any purpose outside of the present inquiry and the documents must be returned to the respective doctor who disclosed them at the conclusion of the inquiry.
>
> (*Palm* at para. 13)

[41] By way of motion dated May 3, 2013, the Respondents sought an order that counsel for the Respondents may allow the President of the Union, Mr. Willicome and Mr. Wilkinson to view the disclosed medical records to the extent required by counsel to obtain informed instructions and provide advice.

[42] According to the Respondents, the current restrictions on disclosed documents prevent counsel from obtaining informed instructions from the Respondents and are, therefore, now prejudicial and unreasonable. Without permission from the Tribunal allowing counsel to obtain informed instructions, the Respondents claim they are unable to fully and meaningfully defend themselves from the claims against them.

[43] The Complainant is concerned that the disclosure of her medical records to the Respondents will result in that information being divulged in the workplace. She claims her medical records contain not only information about her, but also about family, friends and co-workers. She notes the President of the Union, Mr. Willicome and Mr. Wilkinson are her fellow co-workers and hold positions of authority over her in the workplace. Furthermore, she notes that following the previous disclosure of a settlement agreement between her and her employer in this matter (see *Palm v. International longshore and Warehouse Union, Local 500,* 2011 CHRT 12), within two weeks, there were rumours and statements being made in the workplace with regard to its contents; the Complainant's finances; and, her complaint. Therefore, the Complainant argues the disclosure ruling should not be altered.

[44] The Tribunal has recognized that a complainant has a right to privacy and confidentiality with respect to his or her medical records and, as was done in this case, has put procedures in place to protect the privacy and confidentiality of that information in appropriate circumstances (see *Beaudry v. Canada (Attorney General)*, 2002 CanLII 61851 (CHRT) at para. 7; and, *McAvinn v. Strait Crossing Bridge Ltd.*, 2001 CanLII 38296 (CHRT) at para. 3). However, in protecting the privacy interests of a complainant, the Tribunal must still ensure that all parties have a full and ample opportunity to present evidence and make representations (see subsection 50(1) of the *Act*). In other words, the Tribunal must balance the privacy interests of the Complainant in her medical records with the Respondents' right to present their case (see for example, *M. (A.) v. Ryan*, [1997] 1 SCR 157 at para. 36; and, *British Columbia v. British Columbia Government and Service Employees' Union*, 2005 BCCA 14).

[45] In this case, to allow the Respondents the full and ample opportunity to present their case, their counsel requests permission to allow her clients to view the Complainant's medical records to the extent required to obtain informed instructions and provide advice. While the Complainant has concerns about this disclosure, I believe the interests of both parties can be balanced by allowing the Complainant's disclosed medical records to be viewed under the following conditions:

(1) To the extent required to obtain informed instructions and provide advice, counsel for the Respondents may allow the President of the Union, Mr. Willicome and Mr. Wilkinson to view the Complainant's disclosed medical records.

(2) Counsel for the Respondents shall not provide a copy or any sort of reproduction of the Complainant's disclosed medical records to the individuals named in paragraph 1 or allow those individuals to make a copy or any sort of reproduction of the Complainant's disclosed medical records.

(3) Prior to counsel for the Respondents allowing the individuals named in paragraph 1 to view the Complainant's disclosed medical records, she is to receive a written undertaking from each of the three individuals that they will not (a) discuss the Complainant's disclosed medical records with anyone besides their counsel or (b) in any way disseminate the Complainant's disclosed medical records or any of its contents to anyone.

(4) A copy of each of the undertakings set out in paragraph 3 shall be provided to the Tribunal and the Complainant.

[46] The previous directions of the Tribunal regarding the confidentiality of the Complainant's medical records, found at the paragraph 13 of *Palm* above, will continue to apply. If further directions are required concerning the Complainant's disclosed medical records, any of the parties may make a request to the Tribunal for such directions.

Signed by

Susheel Gupta
Tribunal Vice-Chairperson

Ottawa, Ontario
July 25, 2013

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1625/17110, T1626/17210, T1627/17310

Style of Cause: Leslie Palm v. International Longshore and Warehouse Union, Local 500, Richard Wilkinson and Cliff Willicome

Ruling of the Tribunal Dated: July 25, 2013

Appearances:

Leslie Palm, for the Complainant

Ikram Warsame, for the Canadian Human Rights Commission

Lyndsay Watson and Joanna Gislason, for the Respondents