Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2018 CHRT 2
Date: January 5, 2018
File No.: T2125/4115

Between:

Kayreen Brickner

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Royal Canadian Mounted Police

Respondent

Ruling

Member: David L. Thomas

Table of Contents

I. Complaint & Motions to Amend Statement of Particulars

[1] Corporal Kayreen Brickner (Complainant or Cpl. Brickner) is a female member of the Royal Canadian Mounted Police (RCMP), the Respondent in this proceeding. She is married to another member of the RCMP and together they have four minor children. The Complainant and her husband, Corporal John Marinis (Cpl. Marinis), had been stationed together with the RCMP in British Columbia (E Division) in Squamish, B.C. In April 2012, Cpl. Marinis applied for an RCMP position in Whitehorse in the Yukon Territory, but it required moving his spouse and children from British Columbia to the Yukon. Cpl. Marinis began working in Whitehorse in January of 2013 while his family remained in Squamish.

[2] The Complainant alleges in her Statement of Particulars (SOP) dated May 9, 2016, that the RCMP agreed to try its best to accommodate her in securing a new position in Whitehorse. However, the Complainant also alleges that in June of 2012, the RCMP in the Yukon (M Division) only offered her a position that did not accommodate her childcare responsibilities. After giving birth to a fourth child in October 2013, and finishing her related maternity and other leave on October 13, 2014, Cpl. Brickner returned to work in Squamish. She began to work in Whitehorse in January 2015.

[3] Cpl. Brickner alleges that subsequent to her rejection of the job offer in June of 2012, M Division failed to inform her of other available employment opportunities and deviated from RCMP practice in filling positions with other candidates rather than staffing the said positions with the Complainant. She alleges this was discrimination based on the grounds of sex and family status. She also alleges two acts of retaliation in her original SOP.

[4] In a previous ruling of the Canadian Human Rights Tribunal (Tribunal), (*Brickner v. Royal Canadian Mounted Police*, 2017 CHRT 28 (*Brickner*)), part of Cpl. Brickner's motion for disclosure of certain documents was denied because there was no nexus to the documents requested and the allegations contained in her SOP. The documents denied in the ruling alluded to two very specific acts of retaliation related to performance assessments and acting assignments that were not articulated in Cpl. Brickner's SOP. The Tribunal ruled that it would be prejudicial to the Respondent to allow what would

amount to new allegations of retaliation without having provided the RCMP the chance to respond to such in its SOP.

[5] To overcome these negative findings in the Tribunal's earlier ruling, Cpl. Brickner now brings this separate motion to amend her SOP to add several allegations of retaliation. The new motion also requests disclosure of certain documents in the event the motion to amend her SOP is granted.

[6] I am sympathetic to the fact that Cpl. Brickner is self-represented in this matter. So far in this proceeding, she has demonstrated that she is intelligent and articulate. To the extent that my required impartiality has allowed, I have tried to guide Cpl. Brickner in the course of our Case Management Conference Calls (CMCC).

[7] A CMCC was called by me shortly after receiving the first draft of this motion on September 1, 2017. I wanted to discuss the potential impact on upcoming hearing dates that had already been confirmed and to address some obvious deficiencies in Cpl. Brickner's motion. During this CMCC, it became apparent that Cpl. Brickner was under the impression that she could withhold information in her motion and still raise the information or issues at the hearing. However, I explicitly explained to Cpl. Brickner that particulars were required because the main reason parties must provide a detailed SOP is so that the other parties will not be surprised by any issues raised at the hearing. It is the spirit and intention of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (*Act*) and the Tribunal's *Rules of Procedure (03-05-04)* (*Rules*) to ensure that parties are given the opportunity to fully present evidence and arguments to the questions at issue. As such, the allegations in the SOP must be sufficiently detailed so that a responding party can adequately prepare their response. In light of the discussion at the CMCC, Cpl. Brickner was invited to amend the motion in order to add particulars, which she did a few days later.

[8] The motion in its present form went further than correcting the deficiencies that were highlighted in the earlier *Brickner* (*supra*) ruling. In addition to adding the two specific allegations of retaliation mentioned therein, Cpl. Brickner added numerous allegations of retaliation under two new headings. Unfortunately, not all of these new allegations have

been sufficiently particularized. Our *Rules* state that parties must set out the "material facts that the party seeks to prove in support of its case…" (Rule 6(1)(*a*)).

[9] Subsection 48.9(1) of the *Act* instructs the Tribunal to proceed "as informally and expeditiously" as the requirements of natural justice and the *Rules* allow. At the same time, subsection 50(1) of the *Act* states that parties are to be "given a full and ample opportunity" to make their case at a hearing. Accordingly, there is a balance that must be reached by weighing the right of a party to have their full and ample opportunity and the right of parties to have their inquiry dealt with expeditiously. In striking this balance, for the reasons set forth below, not all of the new allegations raised by Cpl. Brickner will be allowed. Notably, in light of my specific instructions to Cpl. Brickner during our CMCC, I must conclude that where she has continued to be vague in her allegations, she must have deliberately done so to leave open her options for bringing evidence to the hearing for which the Respondent may not be prepared to respond.

II. Amending Complaints / Statements of Particulars

[10] As stated above, pursuant to subsection 50(1) of the *Act*, parties before the Tribunal must be given a full and ample opportunity to present their case.

[11] The legal test for amending an SOP is well established and was recently set out in the Tribunal's decision in *Tabor v. Millbrook First Nation*, 2013 CHRT 9 (*Tabor*). Ms. Tabor was also a complainant who wished to amend her SOP to add allegations of retaliation. The *Tabor* decision described the legal requirements as follows:

> [4] It is well established that 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). 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 [*Bressette*]; and, *Virk v. Bell Canada*, 2004 CHRT 10 at para. 7 [*Virk*]).

> [5] 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 (CanLII) 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 (CanLII) at paras. 17-18; and, *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2012 TCDP 24 (CanLII), 2012 CHRT 24 at para. 16 [*FNCFCS et al.*]).
>
> [6] 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).

[12] For a complainant to establish a *prima facie* case of retaliation, complainants are required to show that they previously filed a human rights complaint under the *Act*, that they experienced an adverse impact following the filing of their complaint and that the human rights complaint was a factor in the adverse impact (see *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2015 CHRT 14 at para. 5). Furthermore, to demonstrate that a human rights complaint was a factor in the alleged adverse treatment, a complainant must, at a minimum, provide the Tribunal with complete and sufficient evidence demonstrating a reasonable perception that retaliation occurred (*Millbrook First Nation v. Tabor*, 2016 FC 894 at paras. 62-64).

[13] The *Tabor* decision elaborated on the test for an amendment for retaliation at paragraphs 12 and 13 in the following terms:

> [12] In the context of a motion to amend a complaint to add allegations of retaliation, the Tribunal has previously stated that "[i]t should not be necessary for individuals to make allegations of reprisal or retaliation arising after a complaint, by way of separate proceedings" (*Bressette* at para. 6). As the Ontario Board of Inquiry stated in *Entrop v. Imperial Oil Ltd. (No. 3)*, (1994) 23 C.H.R.R. D/186, at paragraph 9:
>
> > It would be impractical, inefficient and unfair to require individuals to make allegations of reprisals only through the format of separate proceedings. This would necessitate their going to the end of the queue to obtain investigation,

> conciliation and adjudication on matters which are fundamentally related to proceedings already underway. Insofar as reprisals are intended to intimidate or coerce complainants from seeking to enforce their rights under the *Code*, this would thwart the integrity of the initial proceedings, and make a mockery of the *Code*'s obvious intent to safeguard complainants from adverse consequences for claiming protection under the *Code*.

> [13] Therefore, "it makes sense for evidence of acts made in reprisal to an existing human rights complaint, to be heard within the context of the hearing into that complaint" (*Karen Schuyler v. Oneida Nation of the Thames*, 2005 CHRT 10 at para. 8; see also *FNCFCS et al.* at para. 16).

[14] The Tribunal reminds the parties that in terms of remedies, the purpose of section 53 of the Act is not to punish the person found to have engaged in a discriminatory practice, but to eliminate and prevent discrimination (see *Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84 at para. 13; and *CN v. Canada (Canadian Human Rights Commission)*, [1987] 1 SCR 1114 at p. 1134). Moreover, the maximum amount the Tribunal can award under paragraph 52(2)(e) of the *Act* (pain and suffering) is $20,000. The maximum amount the Tribunal can award under subsection 53(3) of the *Act* (willful and reckless) is also $20,000 (see *Tanner v. Gambler First Nation*, 2015 CHRT 19 at paras. 166-172). In other words, the maximum compensation that the Tribunal can award under these two headings of damages under a single complaint is $40,000, and this is done only in rare and exceptional circumstances where the pain and suffering and the respondent's conduct have been particularly egregious. While an act of retaliation is an independent discriminatory practice (*Millbrook First Nation v. Tabor*, 2016 FC 894 at para. 60), the Tribunal has not historically awarded separate and additional remedies under paragraph 52(2)(e) and subsection 53(3) when retaliation has been substantiated. This is a legal issue the parties may want to address at the hearing as Cpl. Brickner appears to claim, in her original SOP, the maximum amount of compensation possible under paragraph 52(2)(e) and subsection 53(3) of the *Act* for each *allegation* of discrimination and retaliation, which amounts to over $200,000 in potential damages. It does not follow that the allowance of further allegations of retaliation automatically increases the potential limit of damages.

III. Preliminary Issues

[15] In paragraphs 11–23 of its response, the Respondent argues that the proposed amendments in Cpl. Brickner's motion are an abuse of process and would compromise the timely and efficient hearing of the complaint.

[16] The Respondent argues that, with the exception of the allegation about the failure to provide Cpl. Brickner with performance assessments, all of the new allegations of retaliation arose in 2015 and were known to Cpl. Brickner at the time she filed her original SOP in May of 2016. The Respondent alleges that the omissions were deliberate and therefore it would be an abuse of process for them to be added now.

[17] The Respondent also alleges that allowing the amendments would cause delay and therefore compromise the efficient hearing of the complaint. The RCMP highlights the fact that this motion came to the Tribunal just a few weeks before the hearing was to start in October of 2017. Original hearing dates in September of 2017 were set down over 7 months earlier due to conflicting schedules of the parties and their respective counsel. Over time, 9 different weeks were reserved by the parties for this hearing, which was expected to last 4 weeks in total. As a result of the first motion brought by Cpl. Brickner, the tentative hearing dates in September were cancelled. All of the remaining tentative dates for the hearing have been cancelled due to this motion.

[18] If the amendments are allowed, the Respondent argues, there will be further delays as the Commission and Respondent would have to amend their respective SOPs, search and produce additional arguably relevant documents, and take further time to prepare their case for hearing.

[19] With regard to its abuse of process argument, the Respondent admits that not all of the retaliation allegations necessarily arose in 2015. Following a review of the record, I could not find any evidence that Cpl. Brickner's omission of some of these allegations from her original SOP was deliberate. Furthermore, I am mindful of the fact that Cpl. Brickner is self-represented and therefore may not have known to make a more specific account of her retaliation allegations at that time.

[20] I must now consider whether permitting any amendments would be prejudicial to the Respondent. Undoubtedly, if amendments to Cpl. Brickner's SOP are allowed, there will be an additional delay in preparing for the first day of hearing. I am mindful of unwarranted delays and generally wish our process could move faster. However, as noted above, subsection 50(1) of the *Act* requires that we allow all parties a full and ample opportunity to present their case before us. Cpl. Brickner filed her complaint on April 9, 2013. It was not referred to the Tribunal until November 25, 2015, and as stated above, hearing dates could only be set down in 2017 because of conflicting schedules. To date, Cpl. Brickner has been very patient with the length of time it has taken to get her complaint to hearing. The Respondent is an agency of the Crown and represented by government lawyers at the Department of Justice. While they would like to move forward on a more timely basis, I am not convinced that permitting Cpl. Brickner more time to fully prepare her case would cause undue hardship for either the Respondent or its counsel in this case.

[21] By the Respondent's own admission, it may not have been reasonable to expect Cpl. Brickner to have included, as an allegation of retaliation, the Respondent's failure to provide her with performance assessments at the time she submitted her SOP. For reasons set out below, I find that this amendment ought to be allowed. Given the addition of this allegation, I find that there will not be undue hardship or prejudice against the Respondent to allow Cpl. Brickner to add some of the other allegations of retaliation which arose earlier.

[22] The Respondent also argues that allowing any amendments will likely lengthen the hearing and may require additional witnesses. This may be true, yet it is the Tribunal's view that this is not enough to establish prejudice in this case, especially given the importance of human rights legislation (see *CN v. Canada (Canadian Human Rights Commission),* [1987] 1 S.C.R. 1114 at 1133-1134).

[23] At paragraphs 48 to 50 of the Respondent's submissions, the argument is made that certain individuals were not personally aware of Cpl. Brickner's human rights complaint and therefore, allegations of misconduct by those individuals could not be characterized as retaliation under section 14.1 of the *Act*. The events described by

Cpl. Brickner, if they occurred as alleged, would only be ordinary workplace conflicts, and not matters properly brought before this Tribunal.

[24] The Respondent is correct that evidence should be brought to prove that any person acting on behalf of the Respondent and engaging in retaliation was personally aware of the existence of the Complainant's human rights complaint. However, that is evidence that Cpl. Brickner will be required to bring at the hearing to substantiate her allegations. Such evidence is not required at this stage.

IV. Complainant's Motion to Amend SOP

[25] The Complainant's motion details several allegations of retaliation under the following headings:

1. Retaliation based on Exclusion / Differential Treatment as the Unit Commander for General Investigation Section (GIS);
2. Exclusion and Differential Treatment by MCU;
3. Acting Appointments – not being given equal opportunities;
4. Annual Assessment /Bi-annual Assessment (January 2015-August 2017).

[26] This ruling will deal with each allegation of retaliation separately.

1. Retaliation based on Exclusion / Differential Treatment as the Unit Commander for GIS

[27] Cpl. Brickner describes this allegation of retaliation in paragraphs 3 – 8 of her motion. Unfortunately, only paragraph 6, dealing with Cpl. Ellis, actually provides specific dates, times, names and other substantive details. Paragraph 8 speaks to her exclusion from a selection panel created to hire new GIS members in 2015 – 2016, but not in detail. The other paragraphs are more general in nature, without specific details.

[28] Cpl. Brickner first alleges that while she was in the role of unit commander for the GIS, her authority was minimized by management and others regarding decisions and use

of resources related to her command. Cpl. Brickner alleges that senior and middle management excluded her from decisions that impacted her unit, including decisions regarding investigative files, allocation of GIS resources, employee overtime, assignments in the unit, finances and selection of candidates for the unit. She also alleges that files were routinely assigned to members in the unit without her knowledge.

[29] In paragraph 6 of her motion, the Complainant gives one specific example of this type of retaliation occurring on August 25, 2015. She alleges Sgt. Ian Fraser approached her with an email written by Cpl. Lindsay Ellis (the Acting NCO of the Federal Investigation Unit). Sgt. Fraser asked Cpl. Brickner if she knew that Cpl. Ellis placed one of her members on a 30 day rotation to GIS (at the expense of the GIS cost centre) because he had noticed that Cpl. Brickner's name was not included in the email chain. During the 30 days, Cpl. Brickner alleges, she was disregarded by the constables/subordinates as the Unit Commander and excluded from the investigative file. Cpl. Brickner alleges she was only later told that money was taken from the GIS budget and given to the Federal Investigational Unit due to the member working in the GIS office without her knowledge.

[30] In paragraph 8 of her motion, Cpl. Brickner alleges she was excluded from the panel which selected new members in the GIS in "2015/2016". She does not specify exactly when - she states "2015 / 2016" - although it appears she was not in her GIS supervisory role throughout that whole period. Furthermore, Cpl. Brickner does not indicate the specific hiring processes from which she alleges she was excluded.

[31] The Respondent objects to these allegations on the basis that they are general, too broad and, with the exception of the allegations concerning Cpl. Ellis, they are non-specific. Further, the Respondent argues that the motion does not disclose a tenable claim of retaliation because the motion does not contain allegations to the effect that any of these alleged events occurred with some knowledge or in response to Cpl. Brickner's human rights complaint.

[32] Unfortunately, the Commission's submissions do not address the new allegations individually. The Commission takes the general position that the Tribunal should allow all

the allegations to be added to the Complainant's SOP. The Commission submits that Cpl. Brickner's motion meets the established legal tests for the following reasons:

A) It is not clear and obvious that the allegations sought to be added "could not possibly succeed";

B) The addition of the new allegations do not introduce a substantially new complaint as they are merely further specific examples of retaliation. They do not alter the essence of her complaint, which originally included two examples for retaliation;

C) The further acts of retaliation alleged are linked to exactly the same factual matrix which gave rise to the original complaint; and,

D) The respondent will not be prejudiced by having to respond to the new allegations as they have been aware of Cpl. Brickner's concerns for some time and a number of individuals referred to in the motion are already listed as witnesses to appear at the hearing.

[33] Furthermore, the Commission submits that it would be prejudicial to force Cpl. Brickner to bring a new complaint to address her new allegations of retaliation which originate from the same factual matrix as the complaint.

(i) Tribunal Ruling

[34] Principles of natural justice dictate that a party must be aware of the case it must meet at the hearing. A respondent before this Tribunal must be afforded a reasonable opportunity to respond when its conduct has been impugned. The purpose of requiring parties to prepare SOPs is to sufficiently describe to the other parties the details of the allegations and the factual matters intended to be proven at hearing. If a respondent is not provided with sufficient details in the SOP, then it will be impossible for them to interview potential witnesses or to source the arguably relevant documentation. Proceeding in such a fashion would obviously prejudice the respondent.

[35] As stated above, the Tribunal should not assess the merits of the allegations in this ruling. However, the allegations themselves must be sufficiently detailed to give a respondent an adequate opportunity to prepare for the evidence and argument that will be brought by the complainant to the hearing (*Warman v. Lemire*, 2006 CHRT 32 at para. 5 relying on *Public Service Alliance of Canada v. Northwest Territories (Minister of Personnel)*, [1999] C.H.R.D. No. 8 (C.H.R.T.)(QL)).

[36] Despite Cpl. Brickner being advised during the last CMCC of the importance of providing specific details, the allegations described in paragraphs 3, 4, 5 and 7 are still not sufficiently particularized to allow the Respondent to know and meet the case to be met.

[37] The Tribunal is cognizant that if it allows Cpl. Brickner to amend her motion again, or allows her to bring a further motion to provide additional details of the allegations, it might be possible for her to meet the required threshold of details to allow the new allegations. However, as mentioned above, the Tribunal must seek a balance in allowing a party to make a full case on the one hand, and proceeding expeditiously on the other. In light of this, the Tribunal finds that Cpl. Brickner has been given a fair opportunity to amend her SOP. Moreover, given my earlier finding at paragraph 9 above, the Tribunal does not believe that Cpl. Brickner would return with perfected allegations if she were to be afforded another opportunity.

[38] Furthermore, it must be recalled that the purpose of allowing parties to amend their complaints is to determine “the real questions in controversy…” (*Canderel, supra*). The additional allegations of retaliation described in paragraphs 3, 4, 5 and 7 are not the main questions in controversy. They are ancillary to the main allegations of discrimination and retaliation.

[39] As such, the generally described allegations in paragraphs 3, 4, 5 and 7 are not allowed. The allegations described in paragraphs 6 and 8, related to Cpl. Ellis and her exclusion from the GIS selection process in 2015/2016, are permitted to be added under this heading. While the allegations described in paragraph 8 of the motion are missing some key details, the events are sufficiently described for the Respondent to determine

from which selection processes the Complainant was excluded. Accordingly, the Tribunal will allow its addition.

2. Exclusion and Differential Treatment by Major Crimes Unit (MCU)

[40] Cpl. Brickner describes this allegation of retaliation in paragraphs 9 – 14 of her motion. She states that she was treated in a differential manner by the MCU when compared to the previous GIS Corporal and other members. Cpl. Brickner states that Sgt. Mark London was the unit commander of the MCU in January 2015 and that he "was aware of the Human Rights Complaint and the Grievance." Under this heading of her motion, Cpl. Brickner describes four separate events which she alleges were acts of retaliation.

[41] According to Cpl. Brickner, it is common knowledge that during time-sensitive investigations, the MCU contacts all available members for assistance. Despite her qualifications, Cpl. Brickner alleges she was excluded from these files and investigations.

[42] The first event under this heading occurred in June of 2015 when, Cpl. Brickner alleges, members of the GIS unit that she supervised had been pulled onto an MCU investigation without her knowledge. According to Cpl. Brickner, it is a common practice to seek the approval of the person in charge before pulling members away from their regular duties.

[43] The second alleged event of retaliation was when Cpl. Brickner was tasked to perform duties generally assigned to a more junior or new member. After voicing her concern about being excluded from MCU investigations, S/Sgt. Jason Flynn assigned her to work on a drowning investigation. Cpl. Brickner was assigned to work under one of her GIS Constables and asked to perform door-to-door inquiries. According to Cpl. Brickner, this is considered a basic task that is generally assigned to junior or new members of the RCMP.

[44] The third event described under this heading occurred in September of 2015. Cpl. Brickner was asked to attend a briefing about a homicide. After the meeting, Cpl. Brickner was approached by Cpl. Caswell, the MCU Team Commander, and

Sgt. Fraser, the Watch Commander. She was told that she could not be part of this investigation because there was a potential for violence, and that she was not up to date on her qualifications. Although not stated explicitly, the motion implies this was an act of retaliation because she was tasked with collecting surveillance videos while, according to Cpl. Brickner, the lead investigator at the time had a medical restriction and yet he was observed going in and out of the office in a bullet-proof vest and with his gun.

[45] The fourth alleged event under this heading relates to Cpl. Brickner's assignment to work in the Murdered Missing Indigenous Women & Girls (MMIW&G) position in June of 2015. According to Cpl. Brickner, the previous person to occupy her new position, Cpl. Macleod, received assistance and direction from Sgt. Mark London, the MCU Commander. Cpl. Macleod worked regularly with members of the MCU team, and was included to work on serious investigations. Cpl. Macleod also received training, specifically the Major Case Management Course, which was denied to Cpl. Brickner.

[46] According to Cpl. Brickner, upon her acceptance of the MMIW&G position, Supt. Paul McConnell advised her that she would not be working with or inside the MCU unit. Unlike Cpl. Macleod who had her workstation inside the MCU office, Cpl. Brickner was placed in an office on the second floor, working in isolation and reporting directly to the Criminal Operations Officer. In January 2016, when Supt. Brian Jones became the Criminal Operations Officer, Cpl. Brickner outlined the importance for a working relationship with MCU, which was investigating files related to her work. Nevertheless, Cpl. Brickner remained segregated from the MCU during her time in M Division.

[47] The Respondent objects to the inclusion of these allegations in Cpl. Brickner's SOP. The RCMP describes the allegations as "open ended" and too broad to allow it to properly respond and defend itself. The RCMP also argues that the third allegation of retaliation under this heading has no chance of success as the motion to amend does not show that the individuals involved had personal knowledge of the human rights complaint.

(i) Tribunal Ruling

[48] Before reviewing the allegations under this heading, the Tribunal notes that in paragraph 9 of her motion, Cpl. Brickner states that Sgt. Mark London was the unit commander of the MCU in January 2015 and that he "was aware of the Human Rights Complaint and the Grievance." Unfortunately, in this paragraph, and indeed in several other instances in the motion and her motion reply, Cpl. Brickner refers to her "Human Rights Complaint and Grievance" together. The language used by Cpl. Brickner is not clear as to whether she is suggesting others were aware of both, or either of the two proceedings. This makes it difficult for the Tribunal to ascertain clearly whether the alleged retaliatory actions are related to the human rights complaint or whether they might be retaliation for filing the grievance. Cpl. Brickner's workplace grievance is a separate matter from her complaint before the Commission and this Tribunal. Cpl. Brickner should be more specific at the hearing since to succeed at the hearing, a nexus between the impugned conduct and knowledge of the human rights complaint specifically must be demonstrated.

[49] The event described in paragraph 11 of the motion, Cpl. Brickner's exclusion from the homicide investigation in June of 2015, will be permitted to be added to the SOP as a ground of retaliation.

[50] The second alleged event relating to the door-to-door inquiry assignment usually performed by more junior members, and described in paragraph 12 of the motion, will be permitted to be added to the SOP as a ground of retaliation. While it is not clear in the motion who directed her to perform the door-to-door inquiries, I believe there are sufficient particulars to allow the Respondent to address these allegations.

[51] The third alleged event relating to Cpl. Brickner's exclusion from a homicide investigation because her qualifications were out of date is rejected since Cpl. Brickner has not alleged that she was treated adversely (see paragraph 13 of Complainant's motion). She states that she was denied a role because her qualifications were out of date. Cpl. Brickner does not allege that this was not correct RCMP policy nor does she allege that her qualifications were up to date. It is plain and obvious on the facts alleged

alone that this allegation of retaliation could not possibly succeed. Furthermore, Cpl. Brickner's observation that the lead investigator wore a bullet proof vest and carried his gun in and out of the office while having a "medical condition" is not conclusive of anything. It is not alleged the lead investigator did not have up to date qualifications. There is no information given about his medical condition and whether it disqualified him from participating in the investigation. It is unclear as to whether he was actually working on the investigation while wearing his bullet proof vest and carrying his gun. In order to see an act of retaliation in this paragraph of the motion, the reader is being asked to make assumptions and rely on innuendo. I am left to conclude that if the answers to these obvious questions were helpful to this allegation, Cpl. Brickner would have included them.

[52] The fourth alleged event, described in the first part of paragraph 14 of the motion, is allowed. This is the allegation that Cpl. Brickner was treated differently than her predecessor, Cpl. Macleod, by being excluded from working with or inside the MCU office while in the MMIW&G position. Cpl. Bricker is allowed to add these allegations of retaliation to her SOP.

[53] The other allegation under paragraph 14 of the motion is that Cpl. Brickner was denied training, specifically a course called "Major Case Management" which she alleges was offered to Cpl. MacLeod. Unfortunately there are no other details provided. Thus, it is unclear why Cpl. Brickner was denied attending the Major Case Management course. We also don't know who made the decision to deny her request to take that course. Since the motion materials do not provide any details whatsoever, I can only conclude that Cpl. Brickner is being deliberately vague again. It would not be reasonable to ask the Respondent to defend itself against these allegations as they are not sufficiently particularized.

[54] In allowing the aforementioned new allegations of retaliation to be added to the Complainant's SOP, I have concluded that there is a sufficient nexus to the established factual matrix of the original complaint. These allegations arose after Cpl. Brickner began working at M Division. They arose subsequent to her filing a human rights complaint with the Commission. The allegations allowed are sufficiently particularized. As there are

currently no hearing dates scheduled, it will not prejudice the other parties to respond to these allegations now.

3. Acting Appointments – not being given equal opportunities

[55] Cpl. Brickner describes this allegation of retaliation in paragraphs 15 of her motion. She states that when she was in the GIS Corporal position, from January 2015 to October 2015, she was not offered any opportunities for the acting Sergeant Positions. She alleges that other Corporals and her predecessor were offered such opportunities and Corporals from the specialized units were placed in long term acting roles, both at the Sergeant and Staff Sergeant levels.

[56] The Respondent argues that these allegations fail to identify with any specificity the acting appointments for which Cpl. Brickner feels she should have received an offer, but didn't due to her human rights complaint. The RCMP argues that to reply to such broad allegations, it would have to undertake a review of all such acting appointments in 2015 and determine upon what basis they were assigned to other members.

[57] The RCMP also argues that these allegations would be issues within the jurisdiction of the *Royal Canadian Mounted Police Act*, R.S.C., 1985, c. R-10 (*RCMP Act*) grievance process, and as such, the Commission may exercise its discretion not to investigate pursuant to paragraph 41(1)(*a*) of the *Act*. As such, the Tribunal should not allow them to be included in this complaint.

(i) Tribunal Ruling

[58] The Tribunal allows this amendment to Cpl. Brickner's SOP. Notwithstanding the objection of the RCMP, Cpl. Brickner has narrowed her allegation to only those "acting Sergeant Positions" that were awarded to others between January 2015 and October 2015. Moreover, there is a clear nexus between the amendment sought and the factual matrix alleged by Cpl. Brickner in her original SOP. I do not find this proposed amendment to be overly broad. Furthermore, the objection of the RCMP does not demonstrate that it would suffer prejudice if the amendment were to be allowed since it did

not specify the scope of the review it would have to undertake or that it would be overly burdensome.

[59] Regarding the Respondent's argument that paragraph 41(1)(*a*) of the *Act* should preclude the inclusion of these allegations, I am not persuaded.

[60] Paragraph 41(1)(*a*) of the *Act* states:

> **41(1)** Subject to section 40, the Commission shall deal with any complaint filed with it unless in respect of that complaint it appears to the Commission that
>
> > (a) the alleged victim of the discriminatory practice to which the complaint relates ought to exhaust grievance or review procedures otherwise reasonably available;

[61] By including paragraph 41(1)(*a*) into the *Act*, Parliament recognized that there are parallel proceedings which may exist together (see *Coulter v. Purolator Courier Ltd.,* 2004 CHRT 1 at para. 32, adopted in *Wisdom v. Air Canada*, 2017 FC 440 at para. 22).

[62] Subsection 41(1) of the *Act* obliges the Commission to deal with any complaint filed with it, unless, in certain enumerated circumstances, such as in paragraph 41(1)(*a*) where it appears to the Commission that "the alleged victim of the discriminatory practice to which the complaint relates ought to exhaust grievance or review procedures otherwise reasonably available".

[63] Parliament therefore specifically vested the Commission with the authority and responsibility to exercise the discretion to decide whether to "deal with any complaint filed with it", subject to the grounds in paragraph 41(1)(*a*) and the paragraphs following it.

[64] Conversely, Parliament did not give authority to the Tribunal to essentially be a second screening body under subsection 41(1) (see *Harkin v. Canada (Attorney General*), 2009 CHRT 6 at para. 21).

[65] In the first instance, if a party is not satisfied with the way the Commission has exercised its discretion under paragraph 41(1)(*a*), that party has recourse by way of an application to the Federal Court for judicial review of the Commission's decision.

Unfortunately, this was not an issue before the Commission, as Cpl. Brickner argues that these specific allegations of retaliation arose after the filing of her complaint.

[66] Nevertheless, in my view it is beyond the jurisdiction of the Tribunal to screen out these allegations of retaliation under section 41(1)(a) of the *Act*. The jurisdiction of the Tribunal is somewhat limited to make an inquiry into the complaint referred to it by the Commission based upon the authority conferred upon it by subsection 50(1) of the *Act* (see *Wall v. Kitigan Zibi Education Council*, 1997 CanLII 1251 (CHRT); see also *Warman v. Lemire*, 2014 FCA 18 at para. 49).

[67] Furthermore, while specific recourse may be available under the grievance procedures contained in the *RCMP Act*, Cpl. Brickner is entitled to characterize these allegations as retaliation in the context of her human rights complaint. She has chosen to do this and I do not see a compelling reason to disallow her this option. Moreover, the Tribunal finds no reason why the principles in *Tabor*, reproduced at paragraph 13 above, ought not to apply in this case.

4. Annual Assessment /Bi-annual Assessment (January 2015-August 2017)

[68] Cpl. Brickner alleges that, contrary to RCMP policy, she has not received any annual or bi-annual assessments during her time working in M Division. She alleges that in March of 2015, she completed an annual assessment of herself and forwarded it to her supervisor for revisions to be made. She alleges this assessment was forwarded to two different supervisors at two different assessment periods: to Sgt. Dave Wallace on April 20, 2015; and, to Superintendent Brian Jones on February 18, 2016.

[69] Cpl. Brickner alleges that within the last year, she raised her concern about the lack of assessments with Superintendent Brian Jones. She alleges she also spoke with Chief Superintendent Scott Sheppard in January of 2017 about the lack of assessments and also for the lack of assessments for her husband, Cpl. Marinis, who also had received no assessments at M Division up until that time. Cpl. Brickner advises that Cpl. Marinis has since received annual assessments for the years 2015 and 2016 in June of 2017.

However, as of August of 2017, she has not received a mandatory assessment or bi-annual assessment from M Division.

[70] The RCMP takes the position that these allegations would be issues within the jurisdiction of the *RCMP Act* grievance process, and as such, the Commission may exercise its discretion not to investigate pursuant to paragraph 41(1)(*a*) of the *Act*. As such, the Tribunal should not allow them to be included in this complaint. The RCMP also argues that the amendment ought not be allowed because Cpl. Brickner did not allege that Sgt. Dave Wallace had personal knowledge or acted in response to the human rights complaint (see Respondent's response at para. 46).

(i) Tribunal Ruling

[71] The Tribunal allows Cpl. Brickner to add these allegations of retaliation to her complaint. The allegations are narrowly outlined and specifically described. However, Cpl. Brickner must clarify if, when she writes "bi-annual" she actually means "semi-annual" as her motion materials appear to suggest the latter. For the purposes of this ruling, I am assuming she means semi-annual.

[72] The Respondent has conceded that some of these alleged events would have occurred after Cpl. Brickner filed her original SOP. Performance assessments are an important part of an officer's career, and if indeed Cpl. Brickner was singled out and denied these after her human rights complaint was filed, then there is a sufficient nexus to the original factual matrix in the context of her employment in Whitehorse. The allegations are sufficiently detailed and although it may take some time for the Respondent to respond to these allegations, there will be adequate time allowed before the hearing commences. Therefore, the Tribunal does not find any prejudice arising for the Respondent by allowing the inclusion of these retaliation allegations.

[73] Moreover, the Tribunal rejects the Respondent's argument that the Tribunal should not allow the amendments because of the potential application of the *RCMP Act* grievance process for the reasons outlined above in paragraphs 61-66.

5. Document Disclosure Requests

[74] The general principles of disclosure elaborated by the Tribunal are summarized in *Brickner* at paragraphs 4-10 and need not be repeated here. Suffice to say that in deciding whether information ought to be disclosed, the Tribunal must consider whether the information at issue is arguably relevant (see *Warman v. Bahr*, 2006 CHRT 18 at para. 6)

[75] In paragraph 20 of her motion, Cpl. Brickner requests disclosure of the following:

> **a. I request the Respondent to produce a list of Corporals that have been placed in both Acting Sergeant and Staff Sergeant Positions in Whitehorse, including detachment, Federal and Territorial positions, as well as the length of time they occupied the acting position between January 2015 and August 2016.**
>
> **b. I replaced Cpl. J. WALDNER as the unit GIS i/c. I have been advised that while in his position since 2013 he had received regular acting appointments (both formal and informal) within Whitehorse Detachment. I therefore request the number and duration of those acting appointments. Formal acting appointments can be easily printed from the HRMIS/TEAM databases.**

[76] In paragraph 23 of her motion, Cpl. Brickner requests disclosure of the following:

> **I request the Respondent to produce documents which show M Divisions compliance rate for annual and bi annual assessments. I request a list of members (names can be vetted), with rank visible that have either received or not received annual or bi-annual assessments between January 2015 and August 2017.**

[77] The Respondent submits that the motion for disclosure is premature and prejudices the RCMP by making it respond before it has the opportunity to consider amendments to the complaint permitted by the Tribunal. The Respondent also argues that the Tribunal can only order the production of documents that exist as there is no authority for the Tribunal to order a party to create a document (see *Brickner* at para. 10).

[78] The RCMP objects to the disclosure of Cpl. Waldner's acting appointments history on the grounds that it is not arguably relevant. It also suggests that it unduly raises privacy concerns for an individual who is not a party to the inquiry. Furthermore, there is not an

allegation that Cpl. Waldner received a specific acting position for which the Complainant believes she should have been offered. The RCMP argues there is no arguable relevance to Cpl. Waldner's history other than he preceded Cpl. Brickner in her position and as such, there is no reason to provide this specific history as it is no more relevant than the acting appointment history of any other Corporal working in Whitehorse.

[79] Notwithstanding its objections, the RCMP concedes in its motion materials that it would be willing to produce certain documents if the Tribunal permits Cpl. Brickner to add certain allegations of retaliation to her complaint.

(i) Tribunal Ruling

[80] Notwithstanding the Respondent's concerns that Cpl. Brickner's disclosure requests included in her motion are premature, I am going to deal with them now. I am concerned about the length of time it has taken to deal with preliminary matters before this hearing has started. If possible, I would like to avoid further delay by addressing the disclosure requests in this ruling. If there are still further disclosure issues arising later, they will be discussed at a future CMCC and dealt with accordingly then.

[81] It is unclear why Cpl. Brickner is requesting documentation for the period of January 2015 to August 2016 as the allegation at paragraph 15 of her motion materials specifically states a time frame of January 2015 to October 2015. Accordingly, with regards to the acting positions, any order for production of documents will be limited to the shorter period stated in Cpl. Brickner's motion.

[82] The request for disclosure related to Cpl. Waldner's acting appointments is for a period starting in 2013, which pre-dates Cpl. Brickner's start of employment in M Division. As such, I am not convinced that this information is arguably relevant to the specific allegation that Cpl. Brickner was retaliated against by the failure to receive an acting appointment between January 2015 and October 2015. Accordingly, the request for specific documentation relating to Cpl. Waldner is denied.

[83] Notwithstanding my earlier ruling on disclosure in this inquiry, Cpl. Brickner has again requested the Respondent to "produce a list" as part of this disclosure request. This

was also specifically discussed during our last CMCC. However, Cpl. Brickner's revised motion still includes requests for the Respondent to create documents as part of the disclosure process.

[84] Notwithstanding the Tribunal's lack of jurisdiction to order the creation of documents for disclosure (see para. 10 of *Brickner, supra*, and *Gaucher v. Canadian Armed Forces,* 2005 CHRT 42 at para. 17), in its motion reply regarding the denial of acting positions allegations, the RCMP has offered to do the following:

> A) Search for a list of acting positions between January 2015 and October 2015 (the time period identified by the Complainant in paragraph 15 of her motion), and produce the list if it exists; and
>
> B) If the list does not exist, the Respondent will make reasonable efforts to produce a list, redacted to protect privacy interests of third parties, if such a list can be readily produced by staff in "M" Division's Human Resources unit and existing HRMIS software.

[85] Accordingly, with respect to Cpl. Brickner's first disclosure request, the Tribunal requests the Respondent to:

> A) Search for a list of Corporals that were placed in Acting Sergeant and/or Acting Staff Sergeant positions in Whitehorse (including detachment, Federal and Territorial positions) for the period of January 2015 to October 2015, such list including the length of time each occupied such position;
>
> B) If such list does not exist, make reasonable efforts to produce such a list which may be redacted to protect privacy of third parties; and
>
> C) If such list cannot be readily produced by staff at M Division's Human Resources unit, advise the other parties and the Tribunal what steps were undertaken in committing their efforts on or before February 15, 2018.

[86] If the list is not provided, the Tribunal orders the Respondent to provide any arguably relevant documents in its possession which relate to such acting appointments during this period by February 28, 2018.

[87] Regarding the request for the allegation of no annual or semi-annual assessments, in its motion reply, the RCMP has offered to do the following:

> A) Search for a list of members with rank visible that have either received or not received annual or semi-annual assessments between January 2015 and August 2017, and produce the list if it exists; and
>
> B) If the list does not exist, the Respondent will make reasonable efforts to produce a list, redacted to protect privacy interests of third parties, if such a list can be readily produced by staff in “M” Division’s Human Resources unit and existing HRMIS software.

[88] The Tribunal requests the Respondent to:

> A) Search for a list of members at M Division (showing rank but not names) that have either received or not received annual or semi-annual assessments for the period of January 2015 to August 2017;
>
> B) If such list does not exist, make reasonable efforts to produce such a list; and
>
> C) If such list cannot be readily produced by staff at M Division’s Human Resources unit, advise the other parties and the Tribunal what steps were undertaken in committing their efforts on or before February 15, 2018.

[89] If the list is not provided, the Tribunal orders the Respondent to provide any arguably relevant documents in its possession which relate to such assessments during this period by February 28, 2018.

Signed by

David L. Thomas
Tribunal Member

Ottawa, Ontario
November 14, 2017

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T2125/4115

Style of Cause: Kayreen Brickner v. Royal Canadian Mounted Police

Ruling of the Tribunal Dated: January 5, 2018

Motion dealt with in writing without appearance of parties

Written representations by:

Kayreen Brickner, for herself

John Unrau, for the Canadian Human Rights Commission

Edith Campbell, for the Respondent