

**Canadian Human  
Rights Tribunal**



**Tribunal canadien  
des droits de la personne**

**Citation:** 2018 CHRT 3

**Date:** January 15, 2018

**File No.:** T2085/0115

**Between:**

**Canadian Postmasters and Assistants Association**

**Complainant**

**- and -**

**Canadian Human Rights Commission**

**Commission**

**- and -**

**Canada Post Corporation**

**Respondent**

**Ruling**

**Member:** George E. Ulyatt

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[1] This is a Motion regarding the scope of the complaint before the Tribunal. The Respondent, Canada Post Corporation (hereinafter referred to as “Respondent”) by agreement with the Canadian Post Masters Assistants Association (hereinafter referred to as the “Complainant”) seeks clarity for what has been referred by the Canadian Human Rights Commission (hereinafter referred to as the “Commission”) to the Canadian Human Rights Tribunal (hereinafter referred to as the “Tribunal”).

[2] The position of the Respondent and the Complainant differ with regards to what has been referred to the Tribunal. The Respondent also seeks an Order striking out paragraph 68(a) of the Complainant’s Statement of Particulars (SOPs) dated November 14, 2016 and paragraphs 4 through 8 of the Complainant’s Reply to the Respondent’s SOPs dated January 19, 2017.

## **I. Background**

[3] The complaint has a very long procedural history with the matters at hand filed with the Commission in November 1992. There had been a prior complaint in 1982 which was settled by a Memorandum of Settlement in 1985. The 1992 complaint filed by the Complainant alleges the Respondent has discriminated against members of a female-dominated complainant bargaining unit by using different systems to value the work and determine the wage, resulting in them being paid less in comparison to employees in another, male-dominated bargaining unit.

[4] On December 12, 1997, the parties signed a Memorandum of Agreement that was applied retroactively to March 20, 1997. The Memorandum of Agreement dated December 12, 1997 in part stated:

6. b) It was the opinion of the parties that as of the date of the signing of the memorandum on March 20, 1997, the rates of pay in the collective agreement were equitable and do not result in any contravention of the [CHRA]; and
- c) The parties will further review this matter in committee with the assistance of a pay equity consultant (Mr. Clive Peterson of Watson, Wyatt Company), and should they conclude that there are inequities in

the wage grid they are to met[sic] and negotiate such inequities without delay.

[Submissions of the CHRC, page 3. paragraphs 6 b, c]

[5] The parties attempted to resolve the outstanding issues and a further Memorandum of Agreement was signed in 2006, but over the years the efforts to resolve the matters amicably were unsuccessful. On May 11, 2012, the Complainant wrote to the Commission to reactivate the complaint and on October 4, 2012 the Commission advised that they would determine whether to deal with the complaint pursuant to Section 41(1) of the *Canadian Human Rights Act* (“CHRA”).

[6] On December 8, 2014, the Commission issued a Section 41/49 report which recommended the Commission deal with the complaint and refer it to the Tribunal without further investigation.

[7] On March 26, 2015, correspondence was sent to the Complainant and Respondent, notifying the parties that the Commissioner adopted the Section 41/49 report and decided pursuant to section 41 of the *CHRA* to deal with only the allegations prior to March 30, 1997 (“Commission Decision” or “Commission’s Decision”). A Section 40/41 Record of Decision was attached to this March 26, 2015 correspondence (“Record of Decision”). The Commission referred the matter to the Tribunal without an investigation, pursuant to section 49 of the *CHRA*. At that time the Commission sent identical letters to the Complainant and the Respondent which stated:

I am writing to inform you of the decision taken by the Canadian Human Rights Commission in the complaint (X00418) of Canadian Postmasters and Assistants against Canada Post Corporation.

Before rendering the decision, the Commission reviewed the report disclosed to you previously and any submission(s) filed in response to the report. After examining this information, the Commission decided, pursuant to subsection 41(1) of the *Canadian Human Rights Act*, to deal only with the allegations prior to March 30, 1997 of the complaint.

The Commission further decided, pursuant to paragraph 49 of the *Canadian Human Rights Act*, to request that the Chairperson of the Canadian Human Rights Tribunal institute an inquiry into the complaint.

Further information will be provided to you by the Tribunal regarding the conduct of proceedings.

[Book of Documents and Authorities of CPC, Tab 7]

[8] On the same day, the Commission sent a letter to David Thomas, Chairperson of the Tribunal which stated:

I am writing to inform you that the Canadian Human Rights Commission has reviewed the complaint (X00418) of Canadian Postmasters and Assistants Association against Canada Post Corporation.

The Commission has decided, pursuant to paragraph 49 of the *Canadian Human Rights Act*, to request that you institute an inquiry into the complaint as it is satisfied that, having regard to all the circumstances, an inquiry is warranted.

...

[Book of Documents and Authorities of CPC, Tab 8]

[9] The Commission did not send to Mr. Thomas a copy of its letters to the parties, nor was a copy of the letter to Mr. Thomas provided to the parties. The letter to the parties limited the scope of the referral whilst the letter to Mr. Thomas did not limit the scope of the complaint.

[10] The Respondent sought judicial review of the Commission's Decision and on July 28, 2016 a Judicial Review Application was dismissed.

[11] As previously noted, on March 26, 2015, the Commission had sent to the parties its Decision and Record of Decision, which contained qualifying language that limits the scope of the complaint.

[12] On March 31, 2015, counsel for the Complainant sent correspondence to the acting Chief Commissioner David Langtry which stated:

I am writing to you regarding the decision of the Canadian Human Rights Commission dated March 26, 2015 relating to complaint X00418.

In that decision, the Commission decided to only deal with allegations prior to March 30, 1997. We are writing to seek clarification of this decision. We understand that the Commission is saying it will not examine facts after that

date. However, if it is found that a wage gap continued to exist on March 30, 1997, will the Corporation remain liable after that date?

[Book of Documents and Authorities of CPC, Tab 18]

[13] A reply to that letter came from counsel for the Commission dated April 13, 2015, which stated:

This is further to your letter of March 31, 2015 to Mr. David Langtry, Deputy Chief Commissioner in reference to the above-referenced file.

In your letter, you requested clarification regarding Canada Post Corporation's liability if it is determined that a wage gap continued to exist after March 30, 1997. Kindly note that the Commission sent this matter to the Tribunal for further inquiry and the issue of liability will be determined by the Tribunal.

[Book of Documents and Authorities of CPC, Tab 21]

[14] Neither the Complainant nor the Respondent was aware of the wording of the letter to the Chairperson of the Tribunal dated March 26, 2015.

## **II. Position of the Parties With Respect to the Scope of the Complaint**

### **A. Respondent's Position**

[15] The Respondent submits that generally the complaint is determined by looking at the letter from the Commission to the Chairperson of the Tribunal. However, the Respondent submits in the present circumstances, the Respondent was not aware of the contents of the referral letter to the Tribunal until October 13, 2016, after the judicial review of the Commission's decision referring the matter to the Tribunal, had been decided by the Federal Court.

[16] The Respondent, in the present circumstances, requests that the Tribunal be mindful of past history and follow the referral letter by the Commission to the parties. The Respondent states the referral letter to the Tribunal cannot be disconnected from procedural history, and the written decision of the Commission under section 41 of the

*CHRA* explicitly states that it would only deal with the allegation of discrimination for the period prior to March 30, 1997.

[17] In support of its position, the Respondent states the following at page 6-7 of its Brief:

In *Murray*, the Commission's letter of referral failed to reflect that the Commission had only dealt with a portion of the complaint, pursuant to an earlier Consent Order. As in the present case, the Commission's decision in *Murray* to refer only a portion of the complaint was made clear in its letter to the parties, but not in its letter to the Tribunal, which was sent on the same day. The Federal Court stated that the letter to the Tribunal alone could not be relied upon to determine the scope of the referral:

I agree that, in principle, the letter that the Commission sends to the Tribunal defines the scope of "what" is being referred to the Tribunal for an inquiry. Furthermore, I agree that the letter sent to the Tribunal in this case did not specify that only portions of Mr. Murray's complaint were referred for inquiry. **However, the Commission's letter cannot be disconnected from the long history of the complaint and the context into which the Tribunal was being seized of Mr. Murray's complaint. In the specific circumstances of this case, I find the authorities on which the applicant relied to be of little use.**

(emphasis added)

[Submissions of CPC, pages 6, 7, paragraph 24]

[18] Furthermore, the Respondent relies on *Kowalski v. Ryder Integrated Logistics*, 2009 CHRT 22 ("*Kowalski*") at paragraph 27 as follows:

27. In *Kowalski*, as in the present case, the Commission had rendered a decision, pursuant to section 41 of the *CHRA*, with respect to whether it would "deal with" all or any of the allegations in the complaint. The decision was issued in writing and sent to the parties. The Commission determined that it would deal with only two of the four allegations the complainant had made. The Commission investigated these two allegations and issued a second decision, stating that it would request the Chairperson of the Tribunal to institute an inquiry into the two allegations. However, the Commission's referral letter to the Tribunal did not indicate that the Commission had decided to deal with only two of the four allegations in the complaint

[Submissions of CPC, pages 7, 8, paragraph 27]

[19] The Respondent explained that in *Kowalski*, the Tribunal held that the referral letter to the Chairperson could not override an explicit determination of the Commission under section 41 to only deal with two of the four allegations in the complaint. Further, this restricted referral had been communicated to the parties in the form of a “Decision of the Commission”. The Respondent submits that the fact situation in the present case also demonstrates that only a portion of the complaint was referred to the Tribunal for a hearing.

[20] Lastly, the Respondent also submits that the Commission could not clarify its Decision by way of the letter dated April 13, 2015 from Ms. Warsame because the Decision had already been issued and the Commission was *functus officio*.

## **B. Commission’s Position**

[21] The Commission submits that the complaint in the present circumstance is limited to the allegations of discrimination up to March 30, 1997, which it states was the intention of the Commission.

[22] The Commission argues that the language of the Commission’s Decision and Record of Decision are a clear indication that the Commission intended to limit the scope of the complaint to a specific time period.

[23] The Commission relied upon *Murray v. Canada (Human Rights Commission)*, 2014 FC 139, (sub nom *Murray v. Canada (Immigration and Refugee Board)*) (“*Murray*”) at page 9 of their Brief as follows:

28. We note that the Commission’s letter to the Chairperson of the Tribunal dated March 26, 2015 did not specify that only allegations of discrimination prior to March 30, 1997 were referred, however, we cannot ignore that this letter was sent the same day as the Commission’s decision and the Record of Decision which contain qualifying language that limits the scope of the complaint. The two letters must be read conjunctively and the Commission’s letter to the Chairperson of the Tribunal should not be viewed as the sole document determining the scope of the referral given the explicit intention of the Commission in this case expressed in its decision letter.



29. The Federal Court in *Murray* concluded that the scope of the referral is not solely determined by the Commission's letter to the Chairperson of the Tribunal. The Federal Court reasoning is instructive:

...

[Submissions of the CHRC, pages 9, 10, paragraphs 28, 29]

### **C. Complainant's Position**

[24] The Complainant submits that its position is "consistent with the spirit of the *Canadian Human Rights Act*, quasi-constitutional remedial legislation intended to protect against discrimination".

[25] The following is a good summary of the Complainant's position:

41. CPAA agrees that the scope of the referral to the Tribunal is limited to an initial assessment of the facts up to March 30, 1997. It accepts the position of the Corporation that, in order to understand the scope of the referral, the full context of the referral must be considered. CPAA does not take the position that all possible issues arising from the complaint, from 1992 to present, were referred to the Tribunal simply because the referral letter did not include the limiting language set out in the Section 40/41 Report and in the covering letter to the parties. If the Tribunal determines there was no wage gap as of 1997, that ends the matter.

42. Rather, CPAA's position, based on all the facts and history of this matter, is that the only reasonable conclusion to draw in all the circumstances is that the Commission referred the period from 1992 to 1997 to the Tribunal for an inquiry, and *also* charged the Tribunal with determining issues related to ongoing *liability* during that time period as well as from 1997 onward *if* it found a pay gap existed as of March 30, 1997.

[Submissions of the Complaint, page 9, paragraphs 41, 42]

[26] The Complainant states that it is not asking the Tribunal to review the Commission's Decision, but merely asking the Tribunal to implement the Commission's Decision as they set out in the referral letter to the Tribunal and the letter of April 13, 2015 to the parties.

[27] The Complainant explains that it agrees that only facts up to March 1997 are to be assessed by the Tribunal to determine whether a wage gap existed throughout this time.

However, the Complainant is asking the Tribunal to find that the scope of referral permits it to determine whether or not the Respondent's liability could persist beyond March 30, 1997, provided a wage gap existed as of that date.

[28] The Complainant submits that if there was any ambiguity in the referral it was clarified by the April 13, 2015 letter from the Commission in response to the Complainant's letter of March 31, 2015, which the Complainant states supports that the Tribunal's scope of inquiry for ongoing liability is not limited to March 30, 1997.

[29] The Complainant submits that the April 13, 2015 letter was not a new decision, but rather a clarification of the Commission Decision. The Complainant argues that the April 13, 2015, clarifying letter and the Commission's Decision must be looked at conjunctively.

[30] Furthermore, the Complainant takes issue with the position of the corporation that the Commission is declining jurisdiction, and is according to the Complainant, inconsistent with the wording of the letter of April 13, 2015.

[31] The Complainant submits that the April 13, 2015 letter clarifies any ambiguity and qualifies that the referral must be read in context of the Commission's Decision, subject to the April 13, 2015 letter.

[32] The Complainant also argues that the concept of *functus officio* as it relates to the April 13, 2015 correspondence does not apply. The Complainant referred the Tribunal to the cases of the *Canadian Museum of Civilization Corp. v. PSAC, Local 70396*, 2006 FC 703 and the *Larocque v. Louis Bull Tribe*, 2008 FC 1402.

#### **D. Respondent's Reply**

[33] The Respondent in its reply reaffirms its position about the complaint and the referral to the Tribunal, arguing that it clearly defines that there is no issue before the Tribunal of ongoing liability for the corporation following March 30, 1997.

[34] The Respondent submits that the Complainant's argument that the Tribunal could make findings of ongoing liability after 1997, based only on the facts as they existed prior to 1997 is flawed and defies common sense.

[35] The Respondent further argues that the April 13, 2015 letter is not a decision for many reasons in that it does not contain any of the hallmarks of a decision and if the Complainant sought clarification, it could have been done so by way of Judicial Review.

### **E. Analysis of the Decision**

[36] At the outset the Tribunal must state that the litigation of this matter has been extensive. The parties have tried many times to resolve the complaint and the matter has gone to Judicial Review in the Federal Court with respect to the referral to the Tribunal by the Commission.

[37] The Federal Court dismissed the Application and recommended the Tribunal proceed expeditiously with this matter.

[38] The parties suggested and agreed that determining the scope of referral, particularly whether the referral included ongoing liability from 1997 (assuming the Tribunal found a pay gap existed as of March 30, 1997), would be beneficial prior to a full hearing on the merits.

[39] As outlined in the parties' submissions, unfortunately the letters to the parties had identified limiting factors in them, but they were not provided in the referral letter to the Tribunal. Also, the referral letter to the Tribunal was not provided to the parties, and appears to have a much broader scope than what was provided to the parties.

[40] The Complainant argues that the Tribunal's scope of inquiry is not limited and should follow:

- i. the March 26, 2015 referral letter to the Tribunal (Commission's Decision);
- ii. the letter of March 31, 2015 from the Complainant to the Commission which sought clarification of the Commission's decision; and finally

iii. the letter of April 13, 2015 from the Commission.

[41] The Complainant states that the March 31, 2015 letter was not intended to change the decision but only to seek clarification.

[42] There are conflicting Tribunal Decisions in *Kowalski, supra*, and *Kanagasabapathy v. Air Canada*, 2013 CHRT 7 (“*Kanagasabapathy*”). In *Kanagasabapathy* it would appear to be focused on the referral letter to the Chairperson of the Tribunal whilst in the *Kowalski* case the Tribunal chose to widen the scope of inquiry consistent with the referral letter to the parties. These decisions are instructive, but not binding on the Tribunal, unlike a judgment from the Federal Court.

[43] The matter is further complicated by the letter of March 31, 2015 from the Complainant to the Commission, and the Commission’s response to same dated April 13, 2015 signed not by the Acting Commissioner, but by a staff lawyer.

[44] In reviewing the April 13, 2015 letter, the Tribunal is satisfied that the letter does not possess the attributes of a decision, nor does it clarify the Commission’s referral Decision, which had adopted the Commission’s Section 41/49 Report.

[45] The Tribunal would be hard-pressed to find that the April 13, 2015 letter from Ms. Warsame, a staff lawyer, was more than a mere acknowledgment of the Complainant’s letter, reaffirming that the matter had been referred to the Tribunal. Thus, having found that the April 13, 2015 correspondence is not a Decision, it is not necessary to go into an analysis of *functus officio*.

[46] With respect to the substance of the complaint and the referral, I look to the Federal Court decision in *Murray*, which is binding upon this Tribunal, to be the decision that provides clarification:

[66] On the same date, the Commission wrote a letter to the Chairperson of the Tribunal. That letter did not contain the same specifications as the letter to the IRB. It only specified that the Commission, pursuant to paragraph 44(3) (2) of the CHRA, had decided to request that the Tribunal “institute an inquiry into the complaint as it is satisfied that, having regard to all the circumstances, an inquiry is warranted.

[67] I agree that, in principle, the letter that the Commission sends to the Tribunal defines the scope of “what” is being referred to the Tribunal for an inquiry. Furthermore, I agree that the letter sent to the Tribunal in this case did not specify that only portions of Mr. Murray’s complaint were referred for inquiry. However, the Commission’s letter cannot be disconnected from the long history of the complaint and the context into which the Tribunal was being seized of Mr. Murray’s complaint. In the specific circumstances of this case, I find the authorities on which the applicant relied to be of little use.

[68] Over the years, and more specifically as a result of Justice Hansen’s Order, which was rendered on consent by all parties, the scope of Mr. Murray’s complaint was clearly narrowed to specific allegations of systemic discriminations in a specific timeframe. As a result, only specific portions of the complaint were re-investigated by the Commission and only the allegations covered by the supplemental investigation could be referred to the Tribunal. (...)

[Submissions of the CHRC, page 10, paragraph 29, quoting paragraphs 66, 67, 68 of the *Murray* decision]

[47] This decision of the Federal Court was rendered after the *Kanagasabapathy* decision and has set forth the governing principles to follow.

[48] The *Murray* decision clearly states that the Tribunal can look at a history of the complaint. In the present circumstances, a letter from the Commission dated March 26, 2015 to the parties clearly sets forth the issues and the time frame. Accompanying the letter was the Commission’s Record of Decision. The Commissioner adopted the Section 41/49 Report which provided detailed reasons as to why the scope of the referral to the Tribunal should be limited to allegations prior to March 30, 1997. Furthermore, in the particular circumstances of this matter spanning decades, the Tribunal cannot ignore the procedural history and steps taken, both at the Commission and between the parties, such as Memorandums of Agreement, all of which is explained in the Commission’s Section 41/49 Report.

[49] It is unfortunate that the Commission was not more explicit in its referral letter to the Chairperson of the Tribunal, as the general wording of the referral in this case and in past cases has caused significant litigation.

[50] The parties were not aware of the referral letter to the Chairperson of the Tribunal until October 2016, when it was included in the Commission’s disclosure package filed

with the Tribunal. Therefore, both the Complainant and the Respondent have for some time been aware of what the scope of the referral from the Commission was. There is no prejudice to either party and therefore the Tribunal will only consider matters as set forth in the referral letter to the parties.

[51] The Complainant argues if a wage gap existed on March 30, 1997, that not considering liability post-March 30, 1997 would be illogical, highly prejudicial and contrary to the *CHRA*. This is not the case. Given the information outlined above, the parties ought to have been aware of the time frame of the referral. It was clearly outlined in the Commission's Section 41/49 Report, and adopted by the Commissioner as a part of its Decision. The referral letter to the parties dated March 26, 2015 also confirmed this scope, limited to the period ending March 30, 1997.

[52] The Tribunal agrees with the Respondent that if the Commission Decision to refer offered anything less to the Complainant than desired, it ought to have sought judicial review thereof.

[53] With regards to the possibility of ongoing liability, post March 30, 1997, the Tribunal finds that it cannot find liability without facts. The Complainant agrees that fact finding is limited to the end of March 1997. As such, the Tribunal is of the view that it cannot find liability post March 30, 1997 without a factual basis, allegations which have not been referred to the Tribunal by the Commission. The referral to the Tribunal is clear that only allegations up until March 30, 1997 have been referred.

[54] However, the Commission raised an important argument in its oral submissions. The Tribunal has sole jurisdiction with regards to remedy pursuant to section 53 of the *CHRA*. As such, should a finding of liability during the referred time frame require an analysis of information post March 1997 to ascertain an appropriate remedy, the Tribunal may look at facts post March 1997. To be clear, this would be limited to determining a remedy for the period up to March 30, 1997, and for no subsequent period.

[55] As to the second part of the application, the Respondent seeks an Order striking out paragraphs 68(a) of the Complainant's SOPs dated November 14, 2016 and

paragraphs 4 through 8 of the Complainant's Reply to the Respondent's SOPs dated January 19, 2017.

[56] Paragraph 68(a) states that the Complainant seeks a finding that a pay equity gap existed in 1992, that it was not completely resolved by the negotiations in 1997, and that it has not been corrected to date. The Tribunal dismisses the Respondent's request that this paragraph be struck. It falls within the time frame referred by the Commission. Should there be an issue with regards to compliance of some aspects of this paragraph with the scope of referral; submissions regarding same may be made at the hearing.

[57] With regards to the Complainant's Reply, paragraphs 4 through 8 specifically address liability post-1997. As such, the Tribunal finds that these paragraphs do not respect the scope of the referral.

### **III. Order**

[58] For these reasons, the Tribunal partially grants the Respondent's motion and orders as follows:

- i. The Tribunal confirms that the scope of referral from the Commission to the Tribunal is limited to the period from September 1992 to March 30, 1997, and does not include ongoing liability;
- ii. Paragraphs 4 through 8 of the Complainant's Reply to the Respondent's SOPs dated January 19, 2017 are hereby struck; and
- iii. Paragraph 68 (a) of the Complainant's SOPs dated November 14, 2016 shall not be struck.

*Signed by*

George E. Ulyatt  
Tribunal Member

Ottawa, Ontario  
January 15, 2018

# Canadian Human Rights Tribunal

## Parties of Record

**Tribunal File:** T2085/0115

**Style of Cause:** Canadian Postmasters and Assistants Association v. Canada Post Corporation

**Ruling of the Tribunal Dated:** January 15, 2018

**Date and Place of Hearing:** June 19, 2017

Ottawa, Ontario

### Appearances:

Sean T. McGee, for the Complainant

Ikram Warsame and Samar Musallam, for the Canadian Human Rights Commission

Karen A. Jensen, for the Respondent