Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2018 CHRT 31
Date: November 29, 2018
File No.: T2246/0118

Between:

Cheryl Simon

Complainant

– and –

Canadian Human Rights Commission

Commission

– and –

Abegweit First Nation

Respondent

Ruling

Member: Gabriel Gaudreault

Table of Contents

I. Motion background

[1] On August 3, 2018, the Complainant, Cheryl Simon, filed a motion with the Canadian Human Rights Tribunal (the Tribunal) under rule 3(1) of the *Canadian Human Rights Tribunal Rules of Procedure* (03-05-04) (the *Rules*).

[2] The motion seeks to amend her initial Complaint filed with Canadian Human Rights Commission (the Commission) on October 11, 2016, to include in it an act of retaliation on the part of the Respondent, the Abegweit Fist Nation (the Nation).

[3] Let us recall that Ms. Simon's initial Complaint filed with the Commission refers to alleged discriminatory acts committed by the Nation against her contrary to section 5 of the *Canadian Human Rights Act*, R.S.C. (1985), c. H-6 (the *Act*), based on prohibited grounds of discrimination, which are sex, marital status, family status, race and national or ethnic origin.

[4] The Commission, which is a party to the proceedings before the Tribunal, filed a response to the Complainant's motion on August 29, 2018. The Respondent did the same on September 5, 2018. Finally, the Complainant was able to file a reply, which she did on September 11, 2018.

[5] The Tribunal read all of the parties' submissions as well as the associated case law. For the reasons explained in this decision, I grant the Complainant's motion.

II. Position of the parties

[6] In the interest of brevity and efficiency, I do not intend to set out in detail each party's submissions, and I would reproduce only the main points that I deem important.

A. The Complainant

[7] In her motion, Ms. Simon alleges that she submitted an application for funding to the Nation on June 28, 2018, under its Post-Secondary Assistance Policy (the Policy).

More specifically, she had been accepted into a program specializing in constitutional law at *Osgoode Professional LLM*.

[8] The total cost of this two-year program was $25,338.60 with 6 sessions costing $4,387.76 per session.

[9] On July 5, 2018, the Complainant learned from a letter from Carolyn Sark, Director of Education, that her funding request was denied because of the high tuition and a lack of funding.

[10] Ms. Simon is of the opinion that the Complaint she had filed with the Commission influenced or caused the denial of her funding request. Notably, out of the 11 candidates who had submitted a funding application for the 2018/2019 school year, she believes that she was the only candidate who was refused funding.

[11] In relation to the lack of funding alleged by the Nation and the argument that the costs of the program chosen by the Complainant are high, the Complainant stated that she had already been funded for studies at the University of Victoria from 2003 to 2007 for approximately $55,000. Therefore, she finds those arguments by the Nation particularly surprising.

[12] She also adds that the Director of Education, Carolyn Sark, is the one who approves the funding, and it appears that she is the sister of the Nation's current Chief, Brian Francis. Let us recall that Mr. Francis's conduct as well as his family situation resonates in Ms. Simon's Complaint.

[13] The Complainant adds that, historically, when the Nation was unable to fund an entire school program, it proposed partial funding for the program, especially, in cases of part-time studies. The Nation did not propose this to Ms. Simon.

[14] In addition, the Nation's Policy provides that unsuccessful candidates are put on a waiting list for funding. According to the Complainant, nothing indicates that she had been placed on such a waiting list. Ms. Simon also puts forward that the letter from the Director, Ms. Sark, did not invite or encourage her to apply again for the next school year.

[15] Finally, the Complainant concludes by specifying that, since her funding application was denied for lack of funding reasons, she has no means of appealing such a decision.

[16] Based on her motion, she is seeking specific remedies including:

- the amount of $25,338.60 under paragraph 53(2)(b) of the *Act*;
- compensation under paragraph 53(2)(d) of the *Act*, without specifying the amount sought;
- an amount of $20,000 for pain and suffering, under paragraph 53(2)(e) of the *Act* (in her submissions, the Complainant mentioned paragraph (d), but the Tribunal believes that this was an error and that paragraph (e) is the one that provides for the maximum amount of $20,000 for pain and suffering); and
- interest on the compensation awarded at the prescribed rate.

B. The Commission

[17] With respect to the Commission's submissions, it brought some needed clarity, in my view, regarding the legal context to be applied in cases of retaliation as well as the legal framework to be followed by the Tribunal while it decides on a motion to add allegations of retaliation.

[18] That being said, the Commission adds nothing more, materially, to what was alleged by the Complainant in her motion. It considers that the application should be allowed for several reasons.

[19] The Commission agrees with the fact that it would be more practical and efficient to add the act of retaliation alleged by the Complainant to the current proceedings before the Tribunal. According to the Commission, Ms. Simon's allegations are defensible and tenable, and there is a connection between the original Complaint and the alleged acts of retaliation.

[20] The Commission adds that, considering that the motion was served at the beginning of proceedings, there is no indication that adding such allegations would be prejudicial to the Respondent or create unfairness in the proceedings. It is of the view that the Respondent will have a full and ample opportunity to defend itself from such allegations. The Commission believes that, if the Tribunal allows Ms. Simon's motion, the parties will have the opportunity to amend their respective statement of facts.

[21] Finally, the Commission states that, if the motion is granted, the parties will have to disclose all documentation that is potentially relevant to the dispute related to the act of retaliation.

C. The Respondent

[22] In response to the Complainant's allegations, the Nation first denies committing an act of retaliation against Ms. Simon in denying her funding application for post-secondary education. It states that it applied its Post-Secondary Assistance Policy to the Complainant's application and adds, furthermore, that the Complainant knew that her funding application would have low priority based on the terms of the Policy.

[23] The Respondent states that its ability to fund its members' post-secondary education programs is subject to funding granted by *Indigenous Services Canada*. Given that funds are limited, the Nation developed a policy governing the awarding and administration of its funds. It adds that it is unable to fund the programs of all candidates who submit an application.

[24] Without the Tribunal having to reproduce the entire Policy, the Respondent states that the candidates are listed in order of priority based on objective factors established in the Policy. It states that Ms. Simon is a mature student who has been out of school for one year or more. As such, her request has level 5 priority, which is the lowest level provided by the Policy (on a scale of priority of 1 to 5).

[25] According to the Nation, the Complainant was aware of the Policy and of the prioritization of candidates. An email exchange took place between Ms. Simon and Ms. Sark in April 2018, during which explanations were made about the application of the

Policy and Ms. Simon's particular situation. On July 5, 2018, she received her letter of refusal.

[26] The respondent states that, on July 24, 2018, the Complainant contacted Ms. Sark to receive the list of candidates who had applied for funding for post-secondary education as well as the number of candidates whose applications had been denied. Ms. Sark informed her that 11 applications had been received by the Nation and only one application was denied. She informed the Complainant that her application had been denied because she had been ranked as priority 5 based on the application of the Policy as well as because of a lack of funding and the high cost of her program.

[27] She said that any other individual in the same circumstances as Ms. Simon would have been refused funding based on the prioritization of applications and the costs associated with his or her program. The Nation indicated that the Complaint filed by the Complainant had nothing to do with the denial of her application and denied treating her differently.

[28] Finally, the Nation adds that the Complainant could file another application the following school year if she wished, and her application would be processed based on the priorities established by the Policy.

[29] In response to the remedies sought, the Nation asks the Tribunal to dismiss the Complainant's motion because she was not subject to differential treatment and her motion is not defensible or tenable. According to the Respondent, the denial of the application is the result of applying the Policy, and the Complaint filed by Ms. Simon is not related to the denial.

[30] The Tribunal deems it important to reiterate that, when the Respondent filed its statement of facts on August 14, 2018, it also filed a motion to dismiss, deeming that the Tribunal has no jurisdiction to hear the Complaint filed by Ms. Simon. In the arguments related to the motion to add an act of retaliation filed by the Complainant, the Respondent returned to that point, that is, that it believes that the Tribunal has no jurisdiction over the Complainant's original Complaint. Consequently, the Nation asks the Tribunal to deal with

or decide on its own motion to dismiss filed on August 14, 2018, before deciding on this motion.

D. The Complainant's reply

[31] In response to the Respondent, the Complainant states that the Nation's ability to fund, which, according to it, depends on the amounts it receives from *Indigenous Services Canada*, is not the only source of funding. According to Ms. Simon, the Nation has the possibility of supplementing the funding it receives from *Indigenous Services Canada* by fundraising as it has previously done.

[32] She adds that the Nation did not disclose the amounts received from *Indigenous Services Canada*, the discretional amounts it had or the amount of funding awarded for the current academic year in order to demonstrate the alleged lack of funding.

[33] She also states that the Respondent did not disclose information concerning its application selection process or confirm what other candidates' rankings were.

[34] The Complainant also argues that her application was simply denied by the Nation and was not deferred, as provided by the Policy. The Policy provides that, when an application cannot be accepted because of a lack of funding, it is deferred, and thus, if the applicant submits a new application for the following school year, his or her application is ranked at priority level 3. She also adds that, had her application been deferred, she could have been eligible to receive funding if funding became available.

[35] In response to the allegation that the Tribunal has no jurisdiction over the original Complaint filed by Ms. Simon, she states that retaliations, as a discriminatory practice set out in section 14.1 of the *Act*, are contingent on the filing of a complaint. According to her, a complaint was indeed filed with the Commission in October 2016.

III. Does the Tribunal have to give priority to the motion to dismiss filed by the Respondent or does it first have to deal with the motion to add an act of retaliation filed by the Complainant?

[36] I consider it necessary and useful to put Ms. Simon's motion to add an act of retaliation into context.

[37] As mentioned above, this motion was filed on August 3, 2018, at the same time as the Complainant's statement of facts. On the same day, the Tribunal sent to the parties a time line in order, first, to finalize the filing of statements of facts and, second, to deal with the motion to add an act of retaliation under section 14.1 of the *Act*.

[38] When the Respondent filed its statement of facts, it also served a notice of motion to dismiss to be dealt with on written submissions. The Nation considers that the Tribunal has no jurisdiction to hear the Complaint under section 5 of the *Act*. Alternatively, if the Tribunal did not allow the Nation's motion, it asks the Tribunal to stay its proceedings pending the resolution of proceedings before the Federal Court. For all purposes, at this stage, the Tribunal is not undertaking to deal with this motion to dismiss. This decision concerns specifically the Complainant's motion to add an act of retaliation. The motion to dismiss will be dealt with subsequently in the Tribunal's process.

[39] In its submissions regarding this motion, the Respondent asks the Tribunal to deal with its motion to dismiss before deciding on the Complainant's motion to add an act of retaliation. I must therefore decide whether indeed I must deal with the motion to dismiss before the motion to add an act of retaliation.

[40] For the reasons that follow, I decided that the motion to add an act of retaliation filed by Ms. Simon will be dealt with first.

[41] With respect to the power of the member to deal with motions submitted to him or her by the parties, the Tribunal very recently reminded in *Constantinescu v. Correctional Service Canada*, 2018 CHRT 10, at paras 10 to 13, that:

> [10] First, the Tribunal is the master of its own procedures. As stated by the Supreme Court in 1989 in *Prassad v. Canada ((Minister of Employment and Immigration)*, [1989] 1 SCR 560 [Prassad]:

> …We are dealing here with the powers of an administrative tribunal in relation to its procedures. As a general rule, these tribunals are considered to be masters in their own house. In the absence of specific rules laid down by statute or regulation, they control their own procedures subject to the proviso that they comply with the rules of fairness and, where they exercise judicial or quasi-judicial functions, the rules of natural justice. Adjournment of their proceedings is very much in their discretion.
>
> [Emphasis added]

[11] Subsection 48.9(1) of the *Canadian Human Rights Act* (the "CHRA" or the "*Act*") provides that proceedings before the Tribunal be conducted as informally and expeditiously as the requirements of natural justice and the rules of procedure allow.

[12] The Tribunal may establish its rules of procedure in compliance with subsection 48.9(2) of the *Act*. The Tribunal has put rules of procedure in place (see the *Canadian Human Rights Tribunal Rules of Procedure* (03-05-04) (the "*Rules*").

[13] Following the receipt of a Notice of Motion in compliance with subsection 3(2) of the *Rules*, the Panel:

> (a) shall ensure that the other parties are granted an opportunity to respond;
>
> (b) may direct the time, manner and form of any response;
>
> (c) may direct the making of argument and the presentation of evidence by all parties, including the time, manner and form thereof;
>
> (d) shall dispose of the motion as it sees fit.

[42] I emphasize paragraph 3(2)(d) of the *Rules*, which is, in my opinion, particularly explicit on the fact that the member "shall dispose of the motion as it sees fit" [emphasis added]. It is clear that the member has a great deal of flexibility in these matters.

[43] Accordingly, I am of the view that it is absolutely possible for me to deal with the Complainant's motion first and to deal with the motion to dismiss afterwards.

[44] The Complainant's motion was filed in accordance with the *Rules* of the Tribunal and was served in due course. That motion was also the first to be filed, on August 3, 2018, and the Tribunal currently holds all the necessary materials sent by the parties to dispose of the motion in a timely manner.

[45] I add that it seems fair and equitable that the Complainant's motion be deal with first. Assuming that I grant the motion to dismiss filed by the Respondent (and I must reiterate that I have not yet decided on that issue) and that Ms. Simon's Complaint under section 5 of the *Act* could fail and potentially close the file with the Tribunal (which is also not certain), it would not be fair or efficient to leave as Ms. Simon's last resort to file a new complaint with the Commission so that her allegations concerning an act of retaliation under section 14.1 of the *Act* are investigated. As it has been explained by the Tribunal numerous times, it:

> "would be impractical, inefficient and unfair to require individuals to make allegations of retaliations only through the format of separate proceedings" (see for example *Kavanagh v. C.S.C.* (May 31, 1999), T505/2298 (C.H.R.T.); *First Nations Child and Family Caring Society of Canada v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2012 CHRT 24 at para. 14).
>
> (See also *Polhill v. Keeseekowenin First Nation,* 2017 CHRT 34*,* at para. 17 [*Polhill*].)

[46] We must also keep in mind that an act of retaliation is a discriminatory practice provided for by the *Act* in section 14.1, the same as all other discriminatory practices set out in section 5 and following*.* of the *Act* (see section 4 of the *Act*). The act of retaliation, as a discriminatory practice, is distinct from and independent of other discriminatory practices.

[47] As indicated by my colleague Sophie Marchildon, member of the Tribunal, in her decision in *Tabor v. Millbrook First Nation*, 2015 CHRT 6, at paras. 14 to 16:

> [14] Retaliation under section 14.1 of the CHRA is an independent discriminatory practice, separate and apart from the complaint that gives rise to the alleged retaliation (see *Nkwazi v. Canada (Correctional Service)*, 2001 CanLII 6296 (CHRT) at para. 233; *Chopra v. Canada (Department of National Health and Welfare)*, 2001 CanLII 8492 (CHRT) at para. 292; and, *Gainer v. Export Development Canada*, 2006 FC 814 at para. 36).

> [15] The wording of section 14.1 explicitly states that retaliation is a discriminatory practice ("It is a discriminatory practice…"); and, section 4 of the CHRA specifies that a discriminatory practice, "…as described in sections 5 to 14.1…", can be the subject of a complaint (see also s. 40(1) of the CHRA) and an order (see also s. 53(2) of the CHRA). Furthermore, a "discriminatory practice" is defined at section 39 of the CHRA as "…any practice that is a discriminatory practice within the meaning of sections 5 to 14.1".
>
> [16] Nothing in the CHRA binds a retaliation complaint to the jurisdiction or substantiation of the complaint giving rise to the allegations of retaliation. Therefore, even if the provisions of the *Indian Act* submitted by Millbrook were to affect the Tribunal's jurisdiction over the main complaint, this does not affect the Tribunal's jurisdiction over the retaliation complaints.

[48] Accordingly, I am of the view that it is justified to deal with the motion to add an act of retaliation filed by the Complainant first. In doing so, I am denying the Nation's request to deal with its motion to dismiss filed on August 14, 2018, in priority.

IV. Applicable law

A. Act of retaliation set out in section 14.1 of the *Act*

[49] Briefly, an act of retaliation is a discriminatory practice set out in section 14.1 of the *Act*, which reads as follows:

> 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.

[50] As it was stated by my colleague Sophie Marchildon, member of the Tribunal, in her decision in *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 paragraphs 4 and 5:

> [4] As is the case with other discrimination complaints, the onus of establishing retaliation first rests on the complainant who must demonstrate a *prima facie* case. That is, the complainant must provide evidence which, if believed, is complete and sufficient to justify a verdict that the respondent

> retaliated against him or her (see *Ont. Human Rights Comm. v. Simpsons-Sears*, [1985] 2 SCR 536, at para. 28 [O'Malley]). Where a complaint is based on a prohibited ground of discrimination, complainants are required to show that they have a characteristic protected from discrimination under the CHRA, that they experienced an adverse impact and that the protected characteristic was a factor in the adverse impact (see *Moore v. British Columbia (Education)*, 2012 SCC 61, at para. 33).
>
> [5] Retaliation complaints, however, are not founded on a prohibited ground of discrimination. Rather, it is a complainant's previous human rights complaint that is substituted for the prohibited ground of discrimination. Therefore, to establish a *prima facie* case of retaliation, complainants are required to show that they previously filed a human rights complaint under the CHRA, 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. That said, there is some debate in the Tribunal's jurisprudence as to how a complainant can establish that their human rights complaint was a factor in the adverse impact suffered.

[51] Although I do not like to use the expression "*prima facie* case" of discrimination because that expression is not useful and can even lead to a misunderstanding of the law applicable to discrimination as my colleague Susheel Gupta reminds us in his decision in *Emmett v. Canada Revenue Agency*, 2018 CHRT 23, at paras. 53 and 54, Ms. Simon will have to provide evidence that, if it is believed, would be complete and sufficient to render a verdict of retaliation on the part of the Nation against her. She must therefore demonstrate that:

(1) She has previously filed a human rights complaint under the *Act*;

(2) She has experienced an adverse impact following the filing of her complaint caused by the Nation or one of its agents acting on its behalf; and

(3) Her complaint was a factor in the adverse impact.

(see, among others, *Brickner v. Royal Canadian Mounted Police*, 2018 CHRT 2, at para. 12 [*Brickner*]; *Karimi v. Zayo Canada Inc. (formerly MTS Allstream Inc.)*, 2017 CHRT 37, at para. 82; *Tabor v. Millbrook First Nation*, 2015 CHRT 18, at para. 6, affirmed by the Federal Court, *Millbrook First Nation v. Tabor*, 2016 FC 894).

[52] Finally, with regard to whether the filing of the Complaint was a factor in the adverse impact, the Tribunal has previously recognized that "a complainant's perception of retaliation, as long as it is reasonable, may constitute sufficient evidence in this regard" (see *Tanner v. Gambler First Nation,* 2015 CHRT 19, at para. 138, which refers to *Wong v. Royal Bank of Canada*, 2001 CanLII 8499 (CHRT), at paras. 218 to 223. See also *Brickner*, above, at para. 12).

B. Amending an original complaint to add an act of retaliation

[53] Regarding amendments to original complaints and additions of acts of retaliation when the Tribunal hears the complaint, the Tribunal recently reiterated in its decision in *Polhill*, above, the legal framework applicable in that regard. It is useful to reproduce paragraphs 13 to 18 of that decision:

> [13] It is important to remember that the original complaint does not serve the purposes of a pleading (*Casler v. Canadian National Railway*, 2017 CHRT 6 at para. 9 [*Casler*]; see also *Gaucher v. Canadian Armed Forces*, 2005 CHRT 1 at para. 10 [*Gaucher*]). Moreover, as explained in *Casler*:
>
> > [8] … [I]t must be kept in mind that filing a complaint is the first step in the complaint resolution process under the *Act*. . . . As the Tribunal stated in *Gaucher*, at paragraph 11, "[i]t is inevitable that new facts and circumstances will often come to light in the course of the investigation. It follows that complaints are open to refinement".
>
> [14] The Tribunal enjoys considerable discretion in terms of hearing the complaint under sections 48.9(1), 48.9(2), 49 and 50 of the CHRA. It has been confirmed repeatedly that the Tribunal has the power to amend the original complaint referred to it by the *Commission (Canada (Attorney General) v. Parent*, 2006 FC 1313 at paras. 30, 41, 43).
>
> [15] The decision in *Canada (Human Rights Commission) v. Canadian Association of Telephone Employees*, 2002 FCT 776, also helps to establish the general principles that guide the Tribunal with regard to applications for amendments:
>
> > [T]he general rule is that an [application for] amendment [filed before the Tribunal] should be allowed at any stage of an action for the purpose of determining the real questions in

> controversy between the parties, provided, notably, that the allowance would not result in an injustice to the other party not capable of being compensated by an award of costs and that it would serve the interests of justice. (*Canada (Human Rights Commission) v. Canadian Association of Telephone Employees*, 2002 FCT 776 at para. 31, referring to *Canderel Ltd. v. Canada*, 1993 CanLII 2990 (FCA), [1994] 1 F.C. 3 (F.C.A.)).

(see also *Attaran v. Immigration, Refugees and Citizenship Canada (formerly Citizenship and Immigration Canada)*, 2017 CHRT 21 at para. 16 [Attaran]; *Canadian Museum of Civilization Corporation v. P.S.A.C. (Local 70396)*, 2006 FC 704 at paras. 40, 50 [*Museum Corporation*]; *Gaucher* at para. 10).

[16] Furthermore, the proposed amendments cannot, by themselves, amount to a brand new complaint that was not initially referred by the Commission (*Museum Corporation* at paras. 40, 50). These amendments must necessarily be linked in fact or law to the original complaint: this is what is referred to as a nexus (see *Blodgett v. GE-Hitachi Nuclear Energy Canada Inc.*, 2013 CHRT 24 at paras. 16-17; see also *Tran v. Canada Revenue Agency*, 2010 CHRT 31 at para. 17).

[17] The addition of allegations of retaliation is based on the same guidelines outlined above for the addition of both prohibited grounds of discrimination and discriminatory practices. It has been confirmed repeatedly that it "would be impractical, inefficient and unfair to require individuals to make allegations of reprisals only through the format of separate proceedings" (see for example *Kavanagh v. C.S.C.* (May 31, 1999), T505/2298 (C.H.R.T.); *First Nations Child and Family Caring Society of Canada v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada),* 2012 CHRT 24 at para. 14). The Tribunal should generally authorize an amendment to add an allegation of retaliation unless it is plain and obvious that the allegations in the amendment sought could not possibly succeed (see *Virk v. Bell Canada*, 2004 CHRT 10 at para. 7 [*Virk*]; see also *Palm v. International Longshore and Warehouse Union, Local 500, et al.*, 2015 CHRT 23 at para. 12; *Saviye v. Afroglobal Network Inc. and Michael Daramola*, 2016 CHRT 18 at para. 15 [*Saviye*]). The Tribunal must also ensure that sufficient notice is given to the Respondent so that it is not prejudiced and can properly defend itself (see for example *Virk*, cited above at para. 8; see also *Saviye*, cited above at para. 17).

[18] Lastly, when the Tribunal is required to analyze an application to amend and modify a complaint, the Tribunal should not embark on a substantive review of the merits of these amendments and modifications (see *Bressette v. Kettle and Stony Point First Nation Band Council*, 2004 CHRT 2 at para. 6

> [*Bressette*]). The merits of the allegations should be assessed at the hearing when the parties have full and ample opportunity to provide evidence (see *Saviye* at para. 19, referring to *Bressette* at para. 8). Including these amendments does not in itself establish a violation of the CHRA: The Complainant must still meet the burden of proof, on the balance of probabilities.

V. Analysis

[54] I would like to reiterate that, when the Tribunal analyzes a request to amend a complaint, among other things, to add an act of retaliation under section 14.1 of the *Act*, the member must not engage in a detailed analysis of the merits of these amendments. It is at the hearing that the member is in a position to analyze and assess the merits for the allegations in light of all of the evidence that would be submitted to him or her by the parties, whether it is documentary or testimonial.

[55] As was stated by the Commission, at this stage, even if the Tribunal agrees with an addition of an act of retaliation, this does not in itself constitute a verdict in favour of the Complainant and that a violation of the *Act* indeed occurred. The Complainant must still discharge her burden of proof at the hearing on the balance of probabilities.

[56] That being said, the Complainant indeed filed a Complaint with the Commission on October 11, 2016, under the *Act*. No one is disputing that fact. In addition, in her submissions, I find that the Complainant was able to make a link between the filing of her Complaint with the Commission and the alleged conduct of the Nation or of one of its agents, specifically, with respect to the denial of her application for funding for her post-secondary studies.

[57] The Complainant filed a Complaint with the Commission under the *Act*, and after that, filed an application for funding for post-secondary studies. She was denied that application by the Nation, specifically, by the Education Director, Ms. Sark. In support of its decision, the Nation relied on the high costs of the program chosen by Ms. Simon and the lack of funding. It is relevant to add that Ms. Sark is the sister of the current Chief of the Nation, Mr. Francis, whose conduct and family situation are alleged in Ms. Simon's Complaint.

[58] Without determining the merits of the allegations submitted by the parties, and although I find that the arguments presented by the Nation inform the Tribunal of certain aspects of the Policy's application, I find that Ms. Simon was able to demonstrate the nexus between the allege act of retaliation and her original Complaint: both are part of a continuum that emanates from the same factual matrix.

[59] In addition, I am of the view that the Complainant raised arguments and questions in her reply, which remain unanswered. Some administration of evidence will be necessary for the Tribunal to be able to make an informed decision regarding the act of retaliation alleged by Ms. Simon.

[60] Accordingly, I am of the view that the motion to add an act of retaliation filed by the Complainant in relation to the denial of funding for her post-secondary studies is tenable or defensible. Currently, I have no evidence that would show me that it is clear and evident that such a motion could not be deemed founded. Accordingly, I find that there is indeed matter for an inquiry by the Tribunal regarding this new aspect.

[61] I would like to add that the motion to add an act of retaliation was filed in due course. In fact, I would go further and say that the motion was made at the right time, that is, at the very start of proceedings before the Tribunal. The parties, including the Respondent, will have ample time to address the new allegations submitted by the Complainant in relation to the alleged act of retaliation. The parties will have a full and ample opportunity to make their submissions, to amend their statement of facts, to disclose potentially relevant documentation in relation to that addition and to amend their list of witnesses and will-say statements accordingly. Therefore, I consider that the prejudice to the Respondent is minimal, if not inexistent, and this necessarily respects procedural fairness.

VI. Orders

[62] For the reasons set out above, I dismiss the Respondent's incidental request to deal with the motion to dismiss first, and I grant the Complainant's motion to add an act of

retaliation under section 14.1 of the *Act*, specifically, in relation to the denial of her application for funding for post-secondary studies;

[63] I thus authorize the parties to amend their respective statements of facts, lists of documents, lists of witnesses and will-say statements;

[64] The parties will be informed by the Registrar in a timely manner of timelines for amending their documentation.

Signed by

Gabriel Gaudreault
Tribunal Member

Ottawa, Ontario
November 29, 2018

Canadian Human Rights Tribunal

Parties of Record

Tribunal File No.: T2246/0118

Style of cause: Cheryl Simon v. Abegweit First Nation

Decision on motion of the Tribunal dated: November 29, 2018

Motion dealt with in writing without appearance of parties

Written submissions by:

Michelle McCann, for the Complainant

Brian Smith, for the Canadian Human Rights Commission

Ryan McCarville, for the Respondent