Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2019 CHRT 12
Date: March 22, 2019
File No.: T2163/3716

Between:

Amir Attaran

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Immigration, Refugees and Citizenship Canada (formerly Citizenship and Immigration Canada)

Respondent

- and -

Chinese and Southeast Asian Legal Clinic

Interested party

Ruling

Member: David L. Thomas

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I. Introduction

[1] This is a ruling on a motion dated November 28, 2018, by the Respondent, Immigration, Refugees and Citizenship Canada ("IRCC"), which seeks to amend its Statement of Particulars ("SOP") to add a legal argument it intends to make before the Canadian Human Rights Tribunal (the "Tribunal") at the hearing in this matter.

[2] The Complainant, Mr. Attaran, opposes this motion. The Canadian Human Rights Commission (the "Commission") has advised the Tribunal that it takes no position on this motion, but requests the opportunity to amend its own SOP if the motion is allowed. The Interested Party in this inquiry, the Chinese and Southeast Asian Legal Clinic ("CSALC"), is not entitled to make submissions on interim motions as per the Tribunal's earlier ruling (see 2018 CHRT 6).

[3] Mr. Attaran's complaint against IRCC was filed with the Commission on July 28, 2010. The complaint alleged that the significant delay in processing sponsorship applications for parents and grandparents, compared to other categories under the Family Class (as defined in the Regulations to the *Immigration and Refugee Protection Act* ("*IRPA*"), S.C. 2001, c. 27), was discriminatory, contrary to section 5 of the *Canadian Human Rights Act,* R.S.C. 1985, c. H-6 (the "*Act*").

[4] On February 22, 2012, the Commission decided that an inquiry into the complaint was not warranted. Mr. Attaran made an application to the Federal Court for a judicial review of the Commission's refusal to refer the complaint to the Tribunal. The Federal Court dismissed his application and Mr. Attaran then appealed to the Federal Court of Appeal ("FCA").

[5] On February 3, 2015, the FCA allowed the appeal and referred the complaint back to the Commission, finding that it had not adequately addressed the issue of IRCC's *bona fide* justification (*Attaran v. Canada (A.G.)*, 2015 FCA 37).

[6] Pursuant to section 44(3)(a) of the *Act,* on September 6, 2016, the Commission requested the Tribunal Chairperson to institute an inquiry into Mr. Attaran's complaint.

[7] In the process of case management, the Tribunal has already issued three rulings in response to motions brought forward. The net result is that CSALC was added as an Interested Party and Mr. Attaran was permitted to amend his complaint to allege additional grounds of discrimination (see 2017 CHRT 21 and 2017 CHRT 16).

[8] The parties to this matter submitted their SOPs in late 2016 and early 2017. Since then, the Respondent has been engaged in providing voluminous disclosure to Mr. Attaran, as per his requests.

[9] Prior to the fifth Case Management Conference call ("CMCC") held in this inquiry on November 14, 2018, IRCC circulated a proposed amended version of its SOP for the other parties and the Tribunal to consider. The amended SOP of the Respondent reflected three changes: 1) the Respondent further identified one of their witnesses; 2) the retaliation portion of the SOP was removed to reflect the Tribunal's subsequent ruling in 2017 CHRT 21; and 3) the Respondent added the legal argument that the complaint does not implicate a "service" under s.5 of the *Act*.

[10] Mr. Attaran stated that he did not object to the first two items listed above. However, he voiced his strong objection to allowing the amendment of the SOP to include a new legal argument that had not been raised before.

[11] Without a consensus of the parties to allow the Respondent's amended SOP, the Tribunal requested the parties to submit their positions in writing, to which this ruling responds.

[12] During the CMCC on November 14, 2018, the parties and the Tribunal tentatively reserved the three weeks commencing on June 3, 2019, as the dates for the hearing in this inquiry.

II. The Law

[13] Section 50(1) of the *Act* states that the Tribunal's panel "shall give all parties…a full and ample opportunity…to appear at the inquiry, present evidence and make representations."

[14] Rule 1(1) of the Tribunal's *Rules of Procedure* states that the purpose of the *Rules* is to ensure that "all parties to an inquiry have the full and ample opportunity to be heard."

[15] A previous ruling in this inquiry considered the question of allowing the Complainant to amend his SOP. In *Attaran v. Immigration, Refugees and Citizenship Canada*, 2017 CHRT 21, the Tribunal stated at paragraphs 15 and 16:

> [15] The Tribunal is also guided by the Court's judgment in *Canadian Human Rights Commission v. Canadian Telephone Employees Association et al,* 2002 FCT 776, at paras. 30-31:
>
>> [30] The jurisprudence is clear that the Tribunal has the jurisdiction to amend complaints of discrimination. In *Central Okanagan School District No. 23* v. *Renaud*, 1992 CanLII 81 (SCC), [1992] 2 S.C.R. 970 as per Sopinka J. at pages 978 and 996, the Supreme Court of Canada recognized that a Human Rights Commission can amend a deficient complaint to bring the complaint into conformity with the nature of the proceedings before the Tribunal. This can be done at any time during the proceedings.
>>
>> [31] This jurisprudence is echoed in the decisions of the Federal Court with respect to amendments to pleadings under Rule 75 of the *Federal Court Rules, 1998.* I refer to the case of *Rolls Royce plc* v. *Fitzwilliam* (2000), 2000 CanLII 16748 (FC), 10 C.P.R. (4th) 1 (F.C.T.D.), where Blanchard J. set outs a general rule that proposed amendments should be allowed where they do not result in prejudice to the opposing party:
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>>> 10 Although leave is discretionary, as a general rule a proposed amendment should be allowed in the absence of prejudice to the opposing party. As stated by Décary J.A., speaking for the Federal Court of Appeal, in *Canderel Ltd. v. Canada*, 1993 CanLII 2990 (FCA), [1994] 1 F.C. 3 (F.C.A.) at p. 10]:
>>>
>>>> ... the general rule is that an amendment 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.

> [16] Useful guidance may also be garnered from the judgment rendered in *Canadian Museum of Civilization Corporation v. P.S.A.C. (Local 70396)*, 2006 FC 704. Therein the Court acknowledged that when a complaint is before the CHRT, a proposed amendment could alter the allegations set out in the original complaint to such a degree that it amounts to a new subject of inquiry that has not been referred to the Tribunal by the Commission (para. 30). However, the extension, elaboration or clarification of a complaint is permitted where it does not take the complaint outside the scope of the referral, subject to any prejudice caused to the parties (paras. 40, 50). Complaints are open to refinement. Provided that the substance of the original complaint is respected, the complainant and CHRC are allowed to clarify and elaborate upon the initial allegations before the matter goes to a hearing (para. 52).

[16] While I acknowledge the aforementioned jurisprudence cited in my earlier ruling speaks to amending the complaint, based on the same reasoning, I found that the SOP, which particularizes the complaint(s), should be subject to the same flexible process for amendment, within reason (see also *Waddle v. Canadian Pacific Railway and Teamsters Canada Rail Conference*, 2016 CHRT 8 at para. 17).

[17] This motion to amend the SOP is somewhat unusual as it is the respondent who wishes to make the amendment. As a result, the potential prejudices are somewhat different from when a Complainant wishes to amend its SOP. When a complainant seeks to amend its SOP, a respondent may argue that it suffers prejudice as a result of a matter being raised at the tribunal stage, which was not raised when the complaint was still before the Commission. This would not apply in this case.

III. Position of the Respondent

[18] In this contested motion, the Respondent seeks to amend its SOP by adding the following paragraph:

> 59. The processing times at issue in this Complaint were the product of the annual Levels Plan combined with the number of sponsorship applications being received on a yearly basis. Since the source of the alleged discrimination is the Levels Plan, this Complaint does not implicate a "service" under s. 5 of the CHRA. When Cabinet sets the Levels Plan, which is then tabled before Parliament by the Minister under s. 94 of the IRPA, it does not provide a "service" under s. 5 of the CHRA.

[19] The Respondent states that its purpose in proposing this amendment is to put Mr. Attaran on notice that it intends to argue at the hearing that the complaint does not implicate a "service" under s.5 of the *Act*.

[20] If the amendment is refused, the Respondent argues that the Tribunal would be forced to make a decision in the absence of argument and evidence relating to a fundamental question at issue. This would not be in the interest of justice. Furthermore, the Respondent would like to present the recent Supreme Court of Canada decision, *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)* 2018 SCC 31 ("*Matson"*) which they argue will give guidance to the Tribunal on the scope of "services" under s.5 of the *Act.*

[21] It is IRCC's position that this amendment will not prejudice Mr. Attaran or make the proceeding so unfair or oppressive as to constitute an abuse of process. Moreover, it submits that prejudice is a harm that cannot be overcome by costs or an adjournment. In the present inquiry, hearing dates have only been tentatively set, and they are almost 3 months away. Therefore, IRCC argues, allowing the motion at this time should not interfere with the expediency of the proceedings.

IV. Position of the Complainant

[22] Mr. Attaran makes eight separate arguments against the Respondent's motion.

[23] Firstly, Mr. Attaran argues that the courts have previously determined that family class immigration is a "service" under s.5 of the *Act.* In *Singh (Re) (C.A.),* [1989] 1 F.C. 430, [1988] F.C.J. No. 414, a reference from the CHRC to the Federal Court of Appeal, the Court affirmed that the Commission had jurisdiction to investigate numerous complaints about discrimination in family class immigration. Mr. Attaran also cites *Canada (Secretary*

of State for External Affairs) v. Menghani, [1994] 2 FC 102, 1993 CanLII 3018 (FC), a judicial review of a decision of the Tribunal, in which the Federal Court upheld the Tribunal's finding that the Respondent's actions under the family class program amounted to a discriminatory "service" under s.5 of the *Act*. In light of this jurisprudence, Mr. Attaran argues that it would be an abuse of process to re-litigate this issue.

[24] The second argument Mr. Attaran puts forward is that the motion should be dismissed because it has no reasonable prospect of success at the merits hearing. He discusses *IRPA*, the "Levels Plan" and "Ministerial Instructions" and how they relate to processing times. Essentially, Mr. Attaran says that processing times are a product of Ministerial discretion rather than the Levels Plan and therefore the Respondent's argument underlying its proposed amendment must fail at the merits stage.

[25] The third argument Mr. Attaran raises concerns the hearing dates that were discussed during the CMCC on November 14, 2018. The Respondent stated in its submissions that they have not yet been set. However, Mr. Attaran points out that the parties did agree to reserve three weeks for hearing starting June 3, 2019. If the amendment to the SOP is permitted, Mr. Attaran does not see those dates will be kept.

[26] The fourth argument of Mr. Attaran is that this motion is an "ambush" because it addresses a "fundamental legal issue", and for the Respondent to raise it now is "tantamount to recasting its case in a new light."

[27] The fifth argument is that the proposed amendment is untimely. The Respondent originally filed it SOP on February 7, 2017, and chose not to plead the "service" argument at that time. He alleges the Respondent demands the change without any explanation why it chose not to make this argument earlier.

[28] The sixth argument of the Complainant extends from the fifth. As the Respondent is a sophisticated party and well experienced, they should not be allowed to amend their SOP two years later without proper explanation for the delay.

[29] The seventh argument is that an amendment at this time will cause prejudice to Mr. Attaran because he has already reviewed about 20,000 documents provided by the

Respondent, taking about 200 hours to date. If the amendment is allowed, Mr. Attaran states that he will have to revisit his document review to take into account the new legal argument being put forward. Mr. Attaran describes the motion as an “ambush”, resulting in a “massive” prejudice, and that he finds it is “distasteful and unbecoming of the Respondent to belittle this just as an ‘inconvenience’.”

[30] The final argument of the Complainant is that the need to repeat his review of the 20,000 document already reviewed will necessitate the postponement of hearing dates, likely until 2020. As his complaint was originally filed in 2010, too much delay will result if the Tribunal allows the Respondent’s amendment.

V. Analysis and Decision

[31] Although Mr. Attaran’s submissions set out eight different arguments, they essentially fall under two categories. The first two arguments are essentially abuse of process argument: previous case law has settled this question; and therefore the argument has no reasonable chance of success. The remaining arguments of the Complainant are essentially that allowing the amendment will cause him prejudice. I will address these two groups of objections below.

[32] The *Act* requires the Tribunal to give all parties a full and ample opportunity to appear at the inquiry, present evidence and make representations (s.50(1)). It would not be consistent with these statutory obligations for the Tribunal to prevent a legal argument which one party would like to make.

[33] The SOPs before the CHRT are merely a roadmap to give notice to the Tribunal and other parties about what to expect at the hearing. The Tribunal should avoid making any conclusions about the merits of an argument before it is presented to the Tribunal. It would be inappropriate to disallow this amendment at this stage on the grounds that it would not succeed at hearing.

[34] No additional facts are alleged or disputed in the motion. The scope of the complaint that was referred to the Tribunal would not be altered by allowing this

amendment. The Respondent seeks the amendment to advise the other parties that it intends to raise a legal argument that was not identified earlier.

[35] It is without question in the interest of justice that the Tribunal remain open to hearing all arguments that a party wishes to make. The only modifier of this principle should be the consideration to prejudice that might arise to other parties under certain circumstances. This is the bridge to Mr. Attaran's second set of objections.

[36] I do not agree with Mr. Attaran's assertions that the proposed amendment to the SOP is "an ambush" or even "extremely late in the day." At the time of the CMCC on November 14, 2018, Mr. Attaran's complaint had been before the Tribunal in excess of two years. However, the relevant point is whether or not a party has sufficient time in order to address a new allegation or argument before the hearing starts.

[37] At the same CMCC, the parties did agree to reserve the three weeks starting June 3, 2019, as possible dates for the hearing. It is often true that parties must look far into the future to find mutually available dates for a hearing, especially when it is predicted to go longer than one week. This was the purpose behind looking ahead in our calendars at that time.

[38] There may have been some confusion after the CMCC. The written summary of the CMCC on November 14, 2018, confirmed that the parties agreed to hold these dates in reserve for the time being. The summary noted that Mr. Attaran would confirm his progress of the review of documents in mid-January, to better assess whether he would still be able to prepare in time. However, prior to any confirmation from Mr. Attaran, the Tribunal Registry sent out a normal calendar notice to the parties which appeared to confirm those dates as the firm dates for the hearing. In fact, they are not firm dates. They are subject to the parties, in particular Mr. Attaran, confirming that they will have sufficient time to prepare their case, given the issues in play and the large volume of documents that have been disclosed.

[39] If Mr. Attaran or any other party feels they will not be ready to proceed with the hearing in June, then a new CMCC will be arranged and the parties will again look for a mutually available window of time for the hearing.

[40] For the forgoing reasons, the Tribunal grants the Respondent's motion dated November 28, 2018, permitting the Respondent to amend its Statement of Particulars by adding the following paragraph:

> (59) The processing times at issue in this Complaint were the product of the annual Levels Plan combined with the number of sponsorship applications being received on a yearly basis. Since the source of the alleged discrimination is the Levels Plan, this Complaint does not implicate a "service" under s.5 of the CHRA. When Cabinet sets the Levels Plan, which is then tabled before Parliament by the Minister under s. 94 of the IRPA, it does not provide a "service" under s. 5 of the CHRA

[41] The Complainant and the Commission are permitted to amend their respective Statements of Particulars to reply to the permitted amendment of the Respondent, and such amended Statements of Particulars shall be forwarded to the Tribunal and the other parties by no later than March 29, 2019.

[42] To avoid prolonging matters unduly, prior to the release of these reasons, the Tribunal issued an order to the parties on March 6, 2019, reflecting the decisions herein.

[43] Regarding Mr. Attaran's request for costs in his motion materials, the request is denied. The Supreme Court of Canada has held that the Tribunal has no jurisdiction to award costs under the *Act* (see *Canada (Canadian Human Rights Commission) v. Canada) Attorney General)*, 2011 SCC 53).

Signed by

David L. Thomas
Tribunal Member

Ottawa, Ontario
March 22, 2019

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T2163/3716

Style of Cause: Amir Attaran v. Citizenship and Immigration Canada

Decision of the Tribunal Dated: March 22, 2019

Motion dealt with in writing without appearance of parties

Written representations by:

Amir Attaran, the Complainant, for himself

Sean Stynes / Kelly Keenan, for the Respondent