Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2019 CHRT 2
Date: January 9, 2019
File No.: T2225/4717

Between:

Jennifer Young

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Via Rail Canada Inc.

Respondent

Ruling

Member: Kirsten Mercer

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I. Summary

[1] While a motion for non-suit in a proceeding before the Canadian Human Rights Tribunal ("CHRT" or the "Tribunal") is appropriate in certain circumstances, the law is clear that such a motion ought only be granted in cases where the complaint cannot succeed on the basis of the evidence presented by the complainant.

[2] As such, a motion for non-suit ought only be granted in the clearest of cases.

[3] A motion for non-suit ordinarily requires the moving party to make an election not to call any further evidence in the event that it is unsuccessful. One of the ways that the Tribunal can ensure that non-suit motions are used appropriately is to apply the common law rule requiring an election to Tribunal proceedings, unless a compelling case can be made to displace it.

[4] This rule can be waived by the parties, or by the Tribunal in appropriate and exceptional circumstances.

[5] On the basis of the submissions and reasons discussed herein, I do not find the circumstances of this case to warrant a departure from the common law rule requiring the Respondent to make an election, and the parties have not consented to its waiver.

[6] Therefore, if the Respondent wishes to bring a motion for non-suit in this case, it must make an election prior to doing so.

II. Background

[7] On November 15, 2013, Jennifer Young (the "Complainant", or "Ms. Young") filed a complaint with the Canadian Human Rights Commission (the "Commission") alleging that her employer, VIA Rail Canada Inc. (the "Respondent" or "VIA") was liable for harassment perpetrated against her on the basis of her gender by her fellow employee, Mr. Kevin Sawchuck, who is not a party to this proceeding (the "Complaint").

[8] On August 23, 2017, the Commission referred the Complaint to the Tribunal so that it might conduct an inquiry into the Complaint. The Commission is participating in the Tribunal's proceedings.

[9] All of the parties participated in the pre-hearing case management process with the Tribunal, and completed the disclosure process, following which dates were set for the hearing.

[10] On September 21, 2019, the hearing into Ms. Young's Complaint began in Toronto.

[11] To date, the Tribunal has heard approximately 11 days of evidence from 11 witnesses, has received two large volumes of documentary evidence and one piece of video evidence.

[12] Both the Complainant and the Commission have rested their respective cases.

[13] Early in the hearing process, the Respondent gave notice to the parties and to the Tribunal that, notwithstanding the list of witnesses provided as part of the disclosure process, and consistent with its rights, it may elect not to call any witnesses in this proceeding.

[14] At the conclusion of the Complainant's case, the Respondent sought direction from the Tribunal with regard to the CHRT's procedure on a motion for non-suit. More specifically, the Respondent inquired whether, in bringing a motion for non-suit, it would be required to make an election not to call any further evidence in the event that the non-suit motion was not granted.

[15] In response to this inquiry, the Tribunal advised the parties that it would hear submissions on the question of the requirement to make an election. The Tribunal gave the parties the opportunity to make brief written submissions in advance of hearing oral arguments on the motion regarding an election; however, none of the parties did so.

[16] On December 5, 2018, the Tribunal heard oral arguments from the Respondent and from the Complainant by teleconference. Unfortunately, although the Commission

participated in the teleconference, it did not take a position on the issue of the election or make any submissions in the public interest.

III. Positions of the Parties

A. Respondent's Position

[17] The Respondent submitted that it ought not be required to make an election in this case for the following reasons:

- **Time:** The Respondent noted that the hearing has already taken an estimated 13 days, reflecting a considerable investment of time for all parties. The Respondent further advised that it anticipates calling upwards of 10 additional witnesses should the hearing on the merits continue.

- **Cost:** The Respondent submitted that it anticipates incurring a further $40,000 in costs associated with the ongoing proceedings. Although these costs were approximate and were not particularized, the Tribunal understands these costs to be largely in respect of the Respondent's legal fees.

- **Fairness:** The Respondent argued that this is not a case where the Complainant would be prejudiced by the fact that some information relevant to this Complaint lies with the Respondent. The Respondent submitted that, although there is no pre-trial discovery in proceedings before the Tribunal, the facts of this Complaint are all within the Complainant's knowledge.

  The Respondent submitted that it ought to be permitted to bring a motion for non-suit without having to go "all in" in order to test the proposition that the Complainant has not met her burden of proof. It acknowledged that the Tribunal, as a part of the human rights system, has a role in protecting people, but submitted that this protection ought to extend to all parties, including corporate Respondents, who should not be forced to expend considerable resources defending unmeritorious complaints.

[18] In Reply, the Respondent strenuously noted that it was not seeking to deploy the procedural tool of a non-suit motion for any nefarious tactical reason, and reiterated that VIA has been flexible and accommodating with the Complainant in making witnesses available for the hearing, as well as transparent about the possibility that it may not call any witnesses throughout the hearing process.

B. Complainant's Position

[19] The Tribunal notes that the Complainant experienced some difficulty in making her submissions on the motion, and appeared to be discouraged and frustrated by her perception that the Respondent viewed her Complaint to be entirely unsubstantiated and without merit.

[20] The Complainant opposed the Respondent's request that the Tribunal waive the requirement to make an election for the following reasons:

- **Cost:** The Complainant, as a self-represented litigant, likened the Tribunal's hearing process to climbing a mountain in terms of the time, money and energy required. She noted that the extra time, cost and complexity required to deal with a motion for non-suit would be difficult for her to bear.

- **Time:** The Complainant noted that the Tribunal's process ought to be as informal and expeditious as possible, and submitted that a non-suit motion would add complexity and delay. The Complainant argued that moving to have the case dismissed in the middle of the proceedings should not be made easier for the Respondent by allowing them to pursue such an avenue without consequences.

- **Fairness:** The Complainant submitted that it would be unfair to permit the Respondent to "test the waters" by canvassing the Tribunal's point of view on the proceedings to at this stage of the inquiry.

C. Commission's Position

[21] The Commission chose not to take a position on the motion, reserving its right to make submissions on a motion for non-suit, if one is brought by the Respondent.

[22] While the Tribunal respects the Commission's right not to take a position on the motion, I was disappointed not to have the benefit of the Commission's view on the policy issues at stake on the question of the rule regarding an election - particularly as some of those issues go directly to the Commission's own role in the human rights complaint process.

IV. Analysis

[23] I want to begin this analysis by stating clearly that nothing in these reasons seeks to detract in any way from a party's right to proceed with its case in the manner it deems appropriate, including the decision by a respondent to exercise its right not to call any evidence on an inquiry before the Tribunal. Rather, I want to situate those deliberations within the framework of the Tribunal's analysis on a human rights inquiry, and some of the considerations at play in this context.

[24] While the question before the Tribunal on this motion is whether the Respondent will be put to an election in the event that it brings a motion for non-suit, in light of the uncertainty arising from some of the Tribunal's jurisprudence with regard to the Tribunal's approach to non-suit motions, I believe there is merit in articulating what a motion for non-suit is and how the law surrounding such a motion ought to be applied in the context of proceedings before the Canadian Human Rights Tribunal.

[25] A motion for non-suit is a tool available to a Respondent to stop a proceeding at the close of the Complainant's case without calling any of its own evidence, where it believes that there is no basis on which the trier of fact could possibly find the complaint to be substantiated.

[26] In bringing a motion for non-suit, the moving party's burden is a demanding one.

[27] Motions for non-suit have their origins in the context of jury trials, where the judge and the trier of fact were and are two distinct entities. In this context, the law provided a tool whereby the judge could (at the request of the defence) intervene in the case and take the matter out of the hands of the jury, where the case was so weak that there was no reasonable chance of success.

[28] The purpose of the tool was not to have the judge usurp the role of the jury by *weighing* the evidence to determine the merits of the case, but rather to intervene in cases where there simply was insufficient evidence for <u>any</u> reasonable jury to conclude that the case had merit.

[29] As Sopinka et al. explains,

> The trial judge, in performing this function, does not decide whether he or she believes the evidence, rather the judge decides whether a reasonable trier of fact could find in the plaintiff's favour if it believed the evidence given in the trial up to that point. The judge does not decide whether the trier of fact should accept the evidence, but whether the inference that the plaintiff seeks in his or her favour could be drawn from the evidence adduced, if the trier of fact chose to accept it.[1]

[30] Characterized this way, the evidentiary hurdle that the Complainant has to clear on a motion for non-suit is a very low one. And the bar for granting a motion for non-suit is therefore a high one. As such, granting a motion for non-suit is only appropriate in the clearest of cases, where the Complainant has failed to lead any evidence on an element required to establish their complaint.

[31] The motion should be granted only if a *prima facie* case has not been made out. This is a lower standard than the balance of probabilities applied when finally deciding whether the burden of proof has been met. Reviewing the evidence in the most favourable light to the party who presented it, if there is some evidence (however weak) in support of the case, a *prima facie* case has been made out. Credibility of the witnesses and weight of evidence is not considered at this stage.[2]

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[1] Sidney N. Lederman, Alan W. Bryant & Michelle K. Fuerst, *Sopinka, Lederman & Bryan: The of Evidence in Canada*, 4th ed. (Markham: LexisNexis Canada, 2014) at para. 5.4.
[2] Sara Blake, *Administrative Law in Canada*, 3rd ed. (Markham: Butterworths Canada, 2001) at 66.

[32] It is clear that the Tribunal has authority to hear and grant a motion for non-suit.[3].

[33] The Tribunal's jurisprudence is less clear however, as to how it ought to entertain such a motion, and whether or not the moving party is required to make an election not to call further evidence in the event that the motion is unsuccessful.

[34] At common law, the moving party is required to make an election not to call any further evidence in the event of an unsuccessful motion for non-suit. In Canada, this requirement has been explicitly set aside in the civil context in some jurisdictions (for example, Prince Edward Island,[4] Newfoundland[5] and Nova Scotia[6]).

[35] However, in the *Federal Courts Rules* of the Federal Court of Canada, no rule has been enacted to displace the common law rule, nor has any such rule been introduced for proceedings before the Tribunal.

[36] The Federal Court in *Filgueira* confirmed that requiring an election (or not) is a matter of procedure, and that the Tribunal should be granted latitude in making procedural determinations.[7]

[37] While the Federal Court determined that the Tribunal *can* dispense with the election requirement on a motion for non-suit, the Court did not determine whether or not the Tribunal *should* do so.

[38] The Tribunal's jurisprudence demonstrates a divergence in practice on non-suit motions, with some adjudicators requiring the moving party to make an election, and others waiving this requirement.

[39] I believe that the practice surrounding non-suit motions at the Tribunal is beset by a number of important public policy questions that are instructive on the issue of whether the moving party ought ordinarily to be put to an election, per the common law rule.

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[3] *Filgueira v. Garfield Container Transport Inc.*, 2006 FC 785 ["*Filguiera*"]
[4] *Rules of Civil Procedure*, r. 52.11.
[5] *Rules of the Supreme Court, 1986*, S.N.L. 1986, c. 42, Sch. D. r. 42.08.
[6] *Nova Scotia Civil Procedure Rules*, r. 51.06.
[7] *Filguiera* supra at para. 22

[40] While there may very well be circumstances where it is appropriate to set aside the obligation of the moving party to make an election, I believe that in proceedings before the Tribunal these situations ought to be the exception and not the rule.

[41] There are four main reasons for this:

1. The gatekeeper role of the Commission;
2. The Tribunal's comprehensive approach;
3. The disruptive effect of a prospective non-suit motion; and
4. The perceived unfairness of a no-risk non-suit.

[42] I will consider each of these reasons in more detail below.

1. The Gatekeeper Role of the Commission

[43] The Commission is directed by statute to screen complaints before they are referred to the Tribunal. This process is designed to eliminate complaints that have little or no merit, which are vexatious, which are filed prematurely or in the wrong jurisdiction, etc.

[44] Section 41(1) of the *Canadian Human Rights Act ("CHRA or "Act"")* empowers this initial screening function for complaints that should not proceed. Respondents are engaged in the Commission's process and are able to make submissions to the Commission where they believe that the complaints made against them are trivial, frivolous, vexatious or made in bad faith.[8]

[45] Section 41(1) of the *CHRA* provides that:

> **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;

[8] *Khalifa v. Indian Oil and Gas Canada*, 2009 CHRT 27 ("*Khalifa*") at para 8.

> **(b)** the complaint is one that could more appropriately be dealt with, initially or completely, according to a procedure provided for under an Act of Parliament other than this Act;
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> **(c)** the complaint is beyond the jurisdiction of the Commission;
>
> **(d)** the complaint is trivial, frivolous, vexatious or made in bad faith; or
>
> **(e)** the complaint is based on acts or omissions the last of which occurred more than one year, or such longer period of time as the Commission considers appropriate in the circumstances, before receipt of the complaint.

[46] Ordinarily, if the Commission finds no reason to dismiss a complaint at this stage, it proceeds with a further investigation before determining whether an inquiry into the complaint by the Tribunal is warranted - in essence, a second level of screening.

[47] When the Commission decides to refer a complaint to the Tribunal, Respondents may seek judicial review of that decision if they believe the referral to be without merit.

[48] While the Tribunal process represents a hearing *de novo* on the merits of a complaint, it would be improper to ignore the legislative mandate of the Commission to determine whether an inquiry into the complaint is warranted, or to too quickly dismiss the result of that determination without conducting a full hearing.

[49] The result of this gatekeeper process is that complaints are referred to the Tribunal having already been vetted and screened.

[50] This is not to say that a non-suit motion cannot still be successful before the Tribunal.

[51] There are any number of reasons why a complaint may be an appropriate candidate for a non-suit motion, including a change in the relevant law since the Commission’s referral, a material change in the available facts, critical admissions or recanting on the part of a witness at the hearing or a simple failure on the part of a complainant to lead evidence necessary to make its case.

[52] However, the existence of the legislated gatekeeper function provided by the Commission suggests a more restrictive approach to non-suit relief may be warranted. It also means that the circumstances in which a motion for non-suit is successful should be quite rare.

2. The Tribunal's Comprehensive Approach

[53] In spite of the Commission investigation process and the Tribunal's disclosure requirements, it is sometimes the case that an informational disparity exists between the parties to a human rights complaint before the Tribunal. Sometimes it is the particulars of a Complainant's concerns that are not fully understood by the Respondent until the hearing, and other times it is the details of the policies, procedures and management decisions made in response to a developing human rights complaint that are not entirely clear to a Complainant.

[54] While documents are exchanged as part of the disclosure process (both at the Commission and once a complaint is referred to the Tribunal), parties are often faced with the paradox of not knowing what they don't know. This can make it difficult for them to ascertain whether they have led all of the relevant evidence at the hearing.

[55] The Ontario Board of Inquiry in *Nimako v. C.N. Hotels*[9], characterized this imbalance as a common feature of human rights litigation:

> In approaching this question it is important to bear in mind that it is only upon the completion of the whole case that a tribunal is in a position to weigh the evidence and come to a decision, and it may happen that evidence adduced from witnesses called on behalf of the defendant (or an accused) tips the scales against him or her. Having regard to the difficulties complainants face in getting access to all the information relevant to establishing discrimination, this may well be more likely to be the case in hearings under the Human Rights Code than in civil actions generally. (*Nimako* at page D/286, as cited in *Chopra v. Canada (Department of National Health and Welfare)*, [1999] C.H.R.D. No. 5 ["*Chopra*"] at para. 4)

[56] This underlying concern is also reflected in the Tribunal's jurisprudence in *Chopra* and *Khalifa*.

[9] (1985) 6 C.H.R.R. D/2894 ("*Nimako*")

[57] In such cases, complainants may not be able to prove discriminatory conduct directly, and must therefore resort to evidence that may be established through the testimony of some of the respondent's witnesses.

[58] As stated in C*hopra at para. 9:*

> It would be inappropriate therefore in a case where there may in fact been a breach of the *Act*, for the complainant to be denied the relief to which he is entitled because he has not been able to establish his case by this stage in the proceedings, when the tribunal has not had the benefit of hearing all of the evidence, especially when some of that evidence was not available to the Commission or the complainant.[10]

[59] What's more, the Tribunal's mandate to determine whether conduct is discriminatory often necessitates a comprehensive approach to the evidence.

[60] To understand whether a party has experienced discrimination, the Tribunal is required to consider both the Complainant's assertion of adverse treatment on the basis of a protected ground, as well as the existence of any justification for that treatment offered by the Respondent. It is only in looking at the situation as a whole that the Tribunal can determine whether an act, omission, policy or practice was discriminatory.

[61] This phenomenon is perhaps even more acute in cases that engage section 65 of the *CHRA*, where detailed evidence of a Respondent's actions, policies and procedures may be required in order to determine whether it exercised due diligence in the circumstances. This information may not be accessible to the Complainant – particularly (as in this case) where the Respondent's actions pertain to the disciplinary record or employment file of another employee, not party to the proceeding.

[62] Therefore, the Tribunal often takes a comprehensive approach to its Inquiry into a complaint, which can be more challenging without the benefit of hearing from both sides of the complaint.

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[10] *Chopra* at para. 9

3. The Disruptive Effect of a Prospective Non-Suit Motion

[63] The Respondent in this case has proceeded with respect and civility with regard to the prospect that it might not call any witnesses in this case.

[64] However, based on the parties' discussion of the prospect of a non-suit motion during the course of the hearing and at the closing of the Complainant's case, it is not clear that the Complainant fully understood the meaning and significance of the Respondent's warning that it might not call any witnesses. Nevertheless, the Tribunal notes that the prospect that the Respondent might not call any witnesses prompted the Complainant to call additional witnesses from VIA in support of her Complaint.

[65] Based on the parties' submissions on this motion, I believe that the Complainant now understands the implications of the Respondent's motion for non-suit on the proceedings.

[66] It cannot be said that the non-suit motion was sprung upon the Complainant, as counsel for the Respondent was transparent about the prospect that it might not call any witnesses from the start of the hearing.

[67] While I understand and appreciate the value of this transparency which I believe was provided in good faith, the knowledge that the Respondent may not call any evidence has had a somewhat destabilizing effect on the normal conduct of the adversarial hearing process, both for the other parties as well as for the Tribunal itself.

[68] The Tribunal notes that being compelled to call evidence in chief from witnesses whom one might otherwise expect to cross-examine may present litigation challenges.

[69] Although the Respondent assisted in the process by making its corporate witnesses available for the hearing, it is not clear to what extent the Complainant was able to meet with and or prepare herself, or these witnesses, for their testimony.

[70] Further, as the Tribunal process does not provide for any examination for discovery, the parties have no opportunity to explore the knowledge and/or anticipated evidence of witnesses who are adverse in interest in advance of the hearing beyond what is provided in the parties' documentary disclosure and Will Say statements.

4. The Perceived Unfairness of a No-Risk Non-Suit

[71] While I do not ascribe any malice or improper motive to the moving party in this case, I am compelled by the Complainant's submissions that an election-free non-suit *feels* unfair in the context of proceedings before the Tribunal.

[72] I am struck by the language adopted by the Board of Inquiry in *Nimako*, which was adopted by the Tribunal in *Chopra*:

> Unlike the criminal process, which pits the state against an individual who risks criminal sanction, and who must be found guilty beyond a reasonable doubt, a civil action involves the resolution of conflicting individual interests on a balance of probabilities. In that context, it seems only fair that the defendant must make up his or her mind whether to close the case after the plaintiff's evidence is in, thus thwarting the plaintiff's access to evidence that might have made the latter's case, or to proceed to call witnesses at the risk of assisting the plaintiff's case. Otherwise, the defendant would appear to be saying to the tribunal: "I want you to decide this case without hearing all the evidence, some of which might be helpful to the plaintiff, but only if you decide it in my favour, the effect of which is to dismiss the action; if you are unprepared to decide in my favour on the basis of the evidence adduced by the plaintiff, then I want you to postpone deciding the case until my evidence is in as well, even though some of it may prove of assistance to the plaintiff." If such a "heads I win, tails I don't lose" suggestion appears unseemly in relation to an action before a civil court, it would seem even less acceptable in a hearing before a Board of Inquiry such as this. [11]

[73] I am reminded of the Respondent's own submissions in which it characterized an election as a requirement that it go "all in" on its motion. The corollary point, however, is that an election-free non-suit motion would permit the Respondent a turn to roll the dice without having to make a bet, which does not jibe with the usual rules of the game.

[74] Ultimately, following the extensive public and private resources that have been invested into a complaint by the time it reaches the hearing stage at the Tribunal, a decision to stop short of the hearing's conclusion should be made sparingly and only in the clearest of cases.

[75] There may well be circumstances where waiver of the requirement to make an election is in the interest of justice, and furthers the Tribunal's mandate (*Chopra* at

[11] *Nimako* cited in *Chopra* at para. 8.

para. 22). However, where no such conditions exist, it is my view that in non-suit proceedings before the CHRT, the common law rule requiring the moving party to make an election should apply.

V. Finding

[76] In examining the facts of this case, and the submissions of the parties, I do not find sufficient cause to depart from the common law rule that an election must be made on a motion for non-suit.

[77] I want to reiterate here that I find no impropriety on the part of the Respondent either in terms of the question it has posed on this motion, or its transparency about the prospect that it might not call any witnesses in the course of the hearing. To the contrary, I have found the Respondent's attempts to navigate this challenge to reflect the good faith, respect and civility that is expected of all parties before the Tribunal - particularly considering that the Complainant is inexperienced in litigation and representing herself in these proceedings.

[78] In addition to the general principles articulated above, which reinforce the reasons to apply the common law rule, there are three additional considerations that the parties have highlighted in their submissions that are relevant to my determination of whether an election is required on a motion for non-suit in this case. I will address each briefly below.

[79] **Time:** On one hand, the Respondent indicates that it may call many further witnesses as part of its evidence. This would likely require a week (or more) of additional hearing days.

[80] On the other hand, the Complainant notes that being required to respond to a non-suit motion will contribute to her burden, will represent an additional drain of her time and will contribute to the feeling that she is climbing a proverbial mountain in this case.

[81] While the amount of time required to complete the evidence is relevant to my determination, I do not find that an additional week of testimony, scheduled to begin in early January 2019, will contribute significantly to the amount of time required to determine

this Complaint. This is particularly true given that we are already nearly three weeks into the hearing process and more than 5 years into the determination of this Complaint.

[82] Further, in the event that the Respondent is not put to an election and brings a non-suit that is not successful, it is likely that we will be delayed by several additional months in order for the parties to schedule new hearing dates. While this possibility is uncertain, the risk of significant delay in the event of an unsuccessful motion must still be considered.

[83] **Cost:** The Respondent estimated that its cost of proceeding with the case is $40,000, some of which would be incurred in any event in preparing a motion for non-suit.

[84] The Tribunal acknowledges that this is a significant sum of money, but the Tribunal is cautious about unduly weighing litigation costs to be borne by any party in an analysis such as this one. These costs are at the discretion of the party that incurs them. Parties are all required to make careful considerations about how best to proceed with litigation and the fact that a party has chosen to dedicate significant financial resources to litigating the Complaint cannot dictate the extent of its prejudice in proceeding with the case on those terms.

[85] In this case, two of the parties are represented by counsel, and one is not. And while the Tribunal greatly values the contributions of experienced counsel, such representation is not required.

[86] There may be circumstances where certain costs associated with proceeding with a hearing are extraordinary, and in such circumstances, a waiver from the common law rule may be appropriate, but ordinary litigation costs are not likely to trigger a departure from the common law rule requiring an election on a non-suit motion (*Chopra* at para. 30).

[87] As such, the Respondent's ordinary litigation expenses are not sufficiently prejudicial to displace the common law rule requiring an election.

[88] **Fairness:** Allowing a respondent to assess the viability of a complainant's case part way through the hearing could present an unfair opportunity for the Respondent to "test the waters". However, I am not persuaded that this concern cannot be overcome in cases where a non-suit motion is appropriate.

[89] The evidentiary burden on a non-suit motion is significantly different from that employed in a determination on the merits. It would be a mistake to draw any conclusions about the strength or weakness of any party's case on the merits from the outcome of a motion for non-suit, unless of course, the motion was to be successful. Any outcome short of a successful motion for non-suit would be of little use in evaluating whether a complaint is likely to succeed or fail on the merits, based on a balance of probabilities standard.

[90] What's more, while the reasons for decision on a non-suit motion could provide the moving party with some insight as to how the adjudicator perceives the case, creating unfairness in favour of the moving party which still has the opportunity to tailor its evidence to respond to the Tribunal's view of the case as presented to that point, this too could be mitigated. By reserving its reasons for decision on the non-suit motion to the final decision on the merits in the event that the motion not be granted, the Tribunal would alleviate any undue advantage to the moving party.

[91] In addition, VIA submitted that it would be unfair to require it to mount a defence if the Complainant has not met her burden of proof.

[92] I do not agree.

[93] Any imperative on a respondent to defend against a complaint brought before the Tribunal arises from the Commission's referral of that complaint, and not the Tribunal's conduct of a hearing. In the face of a complaint brought against it, a party can decide not to call a defense, to settle a complaint, or to litigate. There is no inherent unfairness in providing a party the opportunity to bring its case to conclusion in the circumstances of a human rights complaint before the Tribunal.

[94] Therefore, on balance, in light of the facts before me in this case, and for the reasons laid out herein, I do not find sufficient reason to waive the common law rule requiring VIA to make an election not to call further evidence in the event that it brings a motion for non-suit in respect of the Complaint.

VI. Disposition

[95] The Tribunal makes the following determination with regard to the issues on this motion:

1. The Respondent is directed that the common law rule requiring the moving party to make an election on a motion for non-suit applies in this case.

2. As agreed by the parties on December 5, 2018, the Respondent shall notify the Tribunal and the parties of its intentions with regard to a non-suit motion by noon on December 21, 2018.

[96] The disposition of this motion was communicated to the parties in advance of the publication of these reasons, in the interest of preserving the January 2019 hearing dates if possible, and the Tribunal notes that the Respondent decided not to bring the motion for non-suit, and communicated this intention promptly, in accordance with the Tribunal's Order.

Signed by

Kirsten Mercer

Tribunal Member

Ottawa, Ontario
January 9, 2019

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T2225/4717

Style of Cause: Jennifer Young v. Via Rail Canada Inc.

Ruling of the Tribunal Dated: January 9, 2019

Motion heard by Case Management Conference Call, December 5, 2018.

Oral representations by:

Jennifer Young, for herself

Ikram Warsame, for the Canadian Human Rights Commission

William Hlibchuk, for the Respondent