Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2021 CHRT 5
Date: February 10, 2021
File Nos.: T2458/1520; T2394/5319

Between:

Frank Thomas Halcrow

Complainant

- and –

Johnny Awasis

Complainant

- and –

Canadian Human Rights Commission

Commission

- and -

Correctional Service of Canada

Respondent

Ruling

Member: Jennifer Khurana

I. OVERVIEW

[1] This ruling grants Correctional Service of Canada (CSC)'s request that the complaints filed by Frank Halcrow and Johnny Awasis be consolidated and heard together. It also grants CSC's motion requesting that Frank Halcrow be ordered to file further and better particulars.

II. BACKGROUND

[2] Johnny Awasis and Frank Halcrow self-identify as Indigenous. They are both serving indeterminate sentences in federal custody and are classified as Dangerous Offenders. Correctional Service of Canada (CSC) is the federal government agency responsible for administering jail sentences of a term of two years or more. Mr. Awasis and Mr. Halcrow allege that CSC uses culturally biased psychological and actuarial risk assessment tools to make decisions about Indigenous prisoners. They allege that the continued use of tools to assess Indigenous prisoners' risk deprives them of opportunities for release and limits their ability to access proper rehabilitative programming.

[3] The parties agree that the two complaints be joined. Counsel are the same in both complaints. Mr. Halcrow filed a Statement of Particulars (SOP), but Mr. Awasis has not yet done so. CSC filed a motion asking that the Tribunal order Mr. Halcrow to provide an amended SOP with further and better particulars as it cannot otherwise meaningfully respond to the complaint. CSC also asks the Tribunal to order that certain paragraphs of Mr. Halcrow's SOP be struck, as well as all references to the words "tools", "assessments" and "information".

[4] The parties want me to first deal with their request to join the two complaints before deciding CSC's motion.

ISSUE

[5] I have to decide two issues in this ruling:

1. Should Mr. Halcrow and Mr. Awasis' complaints be joined?

2. Has Mr. Halcrow sufficiently set out the material facts which he intends to prove to support his complaint or should he be ordered to provide more and better particulars? Relatedly, should Mr. Halcrow strike parts of his SOP in the manner requested by CSC?

REASONS

Issue 1: Joining the complaints

[6] Tribunal proceedings should be conducted as expeditiously as the requirements of natural justice allow (s. 48.9(1) of the *Canadian Human Rights Act* ("*CHRA*") and Rule 1(1)(c) of the Tribunal Rules of Procedure).

[7] The Tribunal may determine that complaints be heard together if it determines it is appropriate to do so on the facts and law (*Lattey v. Canadian Pacific Railway*, 2002 CanLII 45928 at paras 11-12 ["*Lattey*"])

[8] In deciding whether to hear complaints together, the Tribunal should consider:

> 1) The public interest in avoiding a multiplicity of proceedings, including considerations of expense, delay, the convenience of the witnesses, reducing the need for the repetition of evidence, and the risk of inconsistent results;
>
> 2) The potential prejudice to the respondents that could result from a single hearing, including the lengthening of the hearing for each respondent as issues unique to the other respondent are dealt with, and the potential for confusion that may result from the introduction of evidence that may not relate to the allegations specifically involving one respondent or the other; and
>
> 3) Whether there are common issues of fact or law.
>
> *Lattey*, *supra*, at para. 13.

[9] These factors are not exhaustive and the Tribunal will consider whether to hear complaints together on a case-by-case basis (*Karas v. Canadian Blood Services and Health Canada*, 2020 CHRT 12 (CanLII) at para. 17). Potential prejudice is not to be assessed only from the respondents' perspective (*Karas*, Ibid at para 96). The impact of joining should be considered from the perspective of all parties.

[10] Complaints also do not need to be identical to proceed together (see *Andrews v. Aboriginal Affairs and Northern Development Canada*, 2011 CHRT 22 at para.10).

[11] I am prepared to join the hearing of these complaints at this time, on consent of the parties. But I may revisit this decision if it appears the process is being unduly delayed or if one or more of the parties are prejudiced by being tied to one another in this way. The parties may also file a request to sever these complaints.

[12] While I have only a limited understanding of the scope of either complaint based on the information before me, I find that the application of the *Lattey* factors favours joining these complaints at this time.

[13] It is in the public interest to avoid duplication at all stages of the proceedings, including during what can be a time-consuming and costly disclosure process that involves the same legal counsel on both files. While it is not yet clear if Mr. Halcrow and Mr. Awasis will challenge the same subset of CSC risk assessment tools, there will invariably be overlap in both fact and law given the similarities of the general framework of their complaints, including with respect to remedial requests. Joining their complaints will avoid the possibility of inconsistent evidence and findings on the same or substantially the same alleged conduct. It could also avoid the possibility of calling the same witnesses to repeat testimony in two hearings.

[14] I do not find that prejudice would be caused to any party by joining the complaints at this very early stage of proceedings. Only Mr. Halcrow has filed an SOP, which I am finding below should be revised to add more detail. As the inquiry proceeds through the initial stages, a party may make a request to vary this order if it feels that it is being unduly delayed by the joining of these complaints. If, for example, it turns out that one of the complainant's lists of impugned tools is far broader than the other's or if Mr. Halcrow's case turns into a

more protracted dispute about the scope of his complaint, I will ask the parties how they intend to manage these differences. One complainant should not be prejudiced by the breadth and scope of the other complaint.

[15] Much will depend on how the parties proceed going forward. The parties must be prepared to work together to move forward expeditiously, and that includes cooperating through the case management and disclosure process.

[16] I have set out below the next steps for the parties, including dates for the filing of particulars.

Issue 2: CSC's Motion for more and better particulars

[17] CSC argues that Mr. Halcrow has not identified the tools he alleges are discriminatory, leaving CSC to speculate as to what his case might be. According to CSC, the particulars do not meet the requirements of the Tribunal's Rules of Procedure which require parties to set out the material facts they seek to prove in support of their case, their position on the legal issues the case raises, and the relief they seek (Rule 6(1)). CSC further submits that Mr. Halcrow's SOP is so vague and general that it could touch every aspect of CSC's administration of his various federal custodial sentences, dating back to approximately 1989.

[18] Mr. Halcrow takes the position that his SOP is clear in challenging "all of the psychological assessments that use or used actuarial tools to assess him and that have been applied to him to assess risk". He explains that his use of language is intentionally broad to reflect the reality of how CSC collects, builds and uses CSC file information, which contains risk assessments based on actuarial tools.

[19] Mr. Halcrow also indicates that he could not provide a preliminary list of specific actuarial tools. He is not sure that the list of tools in the Commission's investigation report is exhaustive. In other words, he needs the disclosure process to be able to identify the tools CSC relied on in making decisions about how he was to be treated as a prisoner. He disputes CSC's claim that it does not know the case it has to meet since it knows which tools

it used to assess him. Mr. Halcrow also suggests that it is at the hearing of these proceedings where the parties will focus on all of the actuarial tools CSC relied on in his case.

[20] The Commission filed a response to CSC's motion stating that it takes no position on the motion or the orders sought. But the Commission also states that it agrees that it would be appropriate for Mr. Halcrow to clarify which psychological actuarial tools he is challenging, to the extent that he is able to do so without first receiving CSC's disclosure. For example, it may be that Mr. Halcrow is challenging: i) all or some of the psychological actuarial risk assessment tools CSC used on him; ii) all or some of the psychological actuarial risk assessment tools that were at issue in the case of *Ewert v Canada*, 2018 SCC 30; and/or iii) all or some of the other psychological actuarial risk assessment tools that CSC generally employs on Indigenous prisoners. In its SOP, the Commission also wrote that it anticipated Mr. Halcrow would stipulate whether he is challenging all of the actual risk assessment tools used by CSC or the specific ones used on him.

[21] The Commission argues that it is open for Mr. Halcrow to clarify the tools he alleges are at issue – regardless of whether they were identified by Commission staff when writing the investigation report. It states that the scope of a Tribunal inquiry is determined by the complaint, the Commission's letter of referral to the Tribunal and the SOP, and not by a staff investigator's report.

[22] CSC replied that Mr. Halcrow has misapprehended the particulars process and turned it on its head. CSC argues that Mr. Halcrow cannot wait for disclosure and engage in a fishing expedition in an attempt to define his claim. Rather, if Mr. Halcrow learns something new through the disclosure process, he can ask to amend his particulars to include additional allegations. CSC claims that Mr. Halcrow's response has exacerbated the ambiguity in his particulars by indicating that "information" could include elements beyond actuarial tools such as "clinical observations, socio-economic factors, Indigenous history and other tools used to assess risk".

[23] I agree. The SOP is where Mr. Halcrow is to clarify and elaborate upon his allegations. For this process to be fair, CSC must know the case it must meet (*Brickner v Royal Canadian Mounted Police*, 2018 CHRT 2 at para 34). "Particulars are given to

make clear what is unclear” and “a defendant should not be left guessing at what a plaintiff is alleging” (*Chen v Canada (Minister of Citizenship and Immigration)*, 2006 FC 389 (CanLII) at paras 8 and 11).

[24] Particulars also help to define the contours of relevant evidence, including documentary disclosure, witnesses the parties may call and the scope of their intended evidence. Without sufficient details in the SOP, a respondent will not be able to interview potential witnesses or source the arguably relevant information, which would prejudice the respondent (*Brickner*, *Ibid*).

[25] I also do not accept Mr. Halcrow’s argument that CSC already knows the case it has to meet because it has access to all of Mr. Halcrow’s records. That argument implies that complainants are under no obligation to narrow down or refine what they are alleging because institutional respondents already have access to the entirety of their file. I agree with CSC that between the SOP and the complainant’s response to CSC’s motion, the scope of potential "tools", "Information" or "assessments" could be very broad, and extend beyond the use of specific instruments or evaluations under the category of "information". It is not for CSC to prepare a response guessing at which subset of information is being challenged, or to respond in full to every possible "information" or tool that may have been at issue in an incarceral history that dates back to 1989.

[26] This type of open-ended approach also does not make for an efficient hearing process. The complainants have already expressed concern about moving forward in a timely way. As CSC notes, if Mr. Halcrow is suggesting that every aspect of his federal institutional history may be relevant to identify which tools or information were used to make decisions about his risk level or classification, this could mean over 27,000 pages of disclosure, and potentially more. I share CSC’s concern about opening the door too wide in disclosure, only to attempt to shut it later on down the road. This kind of approach could lead to further delays and issues that arise at the production stage or thereafter, including the need to file another series of amended particulars.

[27] I acknowledge that Mr. Halcrow may not know or be able to identify the names of all tools that had an impact on him or to detail every decision made about him by the

correctional system. But it is not clear to me why, after 4 years of a complaints process, including a Commission investigation, he cannot make best efforts to identify some of the tools he is alleging are discriminatory on one or many of the grounds he has cited or at least find wording in the SOP that avoids an unbounded process. As the Commission notes in its response, the addition of further particulars beyond the complaint would be appropriate so long as there is a sufficient nexus with his complaint.

[28] I agree with Mr. Halcrow that he is not bound by the terms of an investigation report or even by what he initially included in his complaint form, which was not intended to serve the purposes of a pleading. The SOP sets the more precise terms of the hearing as long as the substance of the original complaint is respected (see *Gaucher v. Canadian Armed Forces*, 2005 CHRT 1 at para 10) *Casler v. Canadian National Railway*, 2017 CHRT 6 (CanLII), par. 9.

[29] But I also agree with CSC that the appropriate procedural mechanism is to seek to amend his particulars if Mr. Halcrow learns information that was not available to him when he filed his SOP. However, ensuring the disclosure process goes smoothly will also require the cooperation of CSC on this front.

[30] I do not, however, accept CSC's request that Mr. Halcrow needs to strike the words "assessments", "tools" and "information" from his SOP to meet the requirements of the Tribunal's Rules. I agree that further and better particulars are needed, and that Mr. Halcrow must amend his SOP to detail his allegations and the remedies he is seeking, to the best of his abilities. But Mr. Halcrow may satisfy this requirement without being precluded from using certain words. A failure to particularize allegations is the real problem, not the use of specific words. I am also not prepared to order a number of paragraphs struck at such an early stage on the basis that they are too general, as I am already making an order that Mr. Halcrow provide better particulars. He can use the words he chooses, provided it is clear to all parties, and the Tribunal, what this case is about and the material facts on which he relies.

[31] The legal issues in this case include whether Mr. Halcrow has established, on a balance of probabilities, that the psychological and actuarial risk assessment tools he

challenges are inappropriate for use on Indigenous prisoners and that the use of these tools has adverse impacts for Indigenous prisoners. For me to determine the issues in dispute, I must know what the tools are and what the alleged impacts on Mr. Halcrow have been. CSC must first know what they are so they have a fair opportunity to respond, and the parties need to limit and efficiently manage their disclosure and prepare to call their evidence. If the parties are not clear about their respective cases, this will not set them ahead any faster. It is worth getting this sorted out sooner rather than later.

[32] I encourage the parties to work together, in the hope of saving time in the long run. This also applies to the disclosure process, acknowledging the challenges that Mr. Halcrow may face in identifying instruments. Doing so now may avoid the need for additional motions requesting further amendments of particulars, requiring a ruling on the proper scope of this complaint, or requesting an order for production. This also applies to the filing of Mr. Awasis' complaint. We do not want to go down this same road in his file, particularly as the complaints have been joined with the agreement of the parties.

Next steps

[33] Mr. Halcrow will file amended particulars that identify the specific actuarial psychological risk assessment tools that form the subject matter of his complaint and the material facts he intends to prove as to how he alleges he has been adversely impacted. A deadline for the filing of Mr. Halcrow's amended SOP is set out below, as are dates for the Commission's amended SOP, CSC's SOP and replies.

[34] Mr. Awasis also must file particulars in this case. As requested by the parties, while he will file a separate SOP, it is due on the same day as Mr. Halcrow's amended SOP.

[35] Following receipt of the responses and replies, the Tribunal will convene a case management conference call. The parties' should be prepared to present a proposed process for efficiently managing the disclosure process for the joined files.

III. ORDER

[36] Mr. Awasis and Mr. Halcrow's complaints are joined. There will be one hearing of these complaints. This ruling can be revisited and the request reopened if there are concerns about delay because these complaints have been joined in the manner set out above. The parties may make a request to revert to separate inquiries if there are concerns about delay.

[37] CSC's motion is allowed in part. Mr. Halcrow must provide an amended SOP containing further and better particulars as set out in paragraph 33 above, no later than **March 5, 2021**. Specifically, he must set out the specific actuarial psychological risk assessment tools that he alleges impacted him in a discriminatory way and list the material facts he intends to rely on to prove his case. CSC's request for an order that Mr. Halcrow strike specific words and paragraphs is denied.

[38] Mr. Awasis must also deliver and file his SOP no later than **March 5, 2021**.

[39] CSC must file its SOPs in both complaints **no later than April 5, 2021**. The Commission may file an amended SOP with respect to Mr. Halcrow by that same date.

[40] Replies from Mr. Halcrow, Mr. Awasis and the Commission, if any, are due **April 12, 2021**.

[41] The Tribunal will contact the parties to schedule a CMCC following receipt of the replies.

Signed by

Jennifer Khurana
Tribunal Member

Ottawa, Ontario
February 10, 2021

Canadian Human Rights Tribunal

Parties of Record

Tribunal Files: T2458/1520; T2394/5319

Style of Cause: Frank Thomas Halcrow and Johnny Awasis v Correctional Service of Canada

Ruling of the Tribunal Dated: February 10, 2021

Motion dealt with in writing without appearance of parties

Written representations by:

Sarah Rauch, for the Complainant

Sasha Hart and Simone Akyianu, for the Canadian Human Rights Commission

Banafsheh Sokhansanj, Malcom Palmer and Lysandra Bumstead, for the Respondent