

**Canadian Human
Rights Tribunal**



**Tribunal canadien
des droits de la personne**

Citation: 2021 CHRT 17

Date: April 26, 2021

File Nos.: T1726/8111 and T1769/12411

Between:

Chris Hughes

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Canada Border Services Agency

Respondent

Ruling

Member: David L. Thomas

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I. Background

[1] This is a ruling in the matter of a complaint brought by Mr. Chris Hughes (the “Complainant”) against his once prospective employer, Canada Border Services Agency. The initial complaint was filed with the Canadian Human Rights Commission (the “Commission”) on January 19, 2005. Mr. Hughes also filed a second complaint with the Commission on July 9, 2008. The complaints were forwarded to the Tribunal and on June 27, 2012, the Tribunal granted Mr. Hughes’ request to have both complaints heard together. The matter was originally assigned to Member Craig. After a number of preliminary matters, the hearing was conducted by Member Ulyatt starting on June 23, 2015 and ending on February 26, 2018 for a total of 29 hearing days. Member Ulyatt rendered a decision on liability in the case on May 29, 2019 (see 2019 CHRT 23.) With the consent of the parties, the inquiry was “bifurcated” at the hearing to permit a decision on liability to be made before hearing submissions on remedy, should the complaint be substantiated. Mr. Hughes now seeks to have Member Ulyatt replaced with another member to hear submissions and to render a decision on the remedy.

II. Jurisdiction

[2] A Chairperson of the Canadian Human Rights Tribunal (“CHRT”) has no inherent jurisdiction over cases that are not assigned to them. Under s. 49(2) of the *Canadian Human Rights Act*, R.S.C 1985, c. H-6 (the “CHRA”), the Chairperson is responsible for assigning a member of the Tribunal to conduct an inquiry in each case. Once that assignment has been made, a Chairperson ceases to have any conduct with respect to that case (unless a Chairperson has assigned that case to themselves.) This severs any jurisdiction over the case and preserves the principle that the presiding member has absolute independence to decide the matter before them as they see fit.

[3] This case is somewhat unusual, in that Mr. Hughes brings this motion to me, as Chairperson of the CHRT, to make a ruling on a case of which I am not seized. This case was assigned to Member Ulyatt and he is seized with the matter.

[4] In essence, this motion brought by Mr. Hughes challenges my decision, made under s. 48.2(2) of the *CHRA*, to permit Member Ulyatt to continue to preside over Mr. Hughes' complaint after the expiry of Member Ulyatt's term in office. Member Ulyatt's term expired on December 12, 2020. Prior to that expiry, I specifically authorized Member Ulyatt to continue working on several matters before him, including this case, under s. 48.2(2).

[5] Mr. Hughes alleges that I exercised my authority under s.48.2(2) of the *CHRA* in error. I will address that allegation in the next section of this ruling. However, I must first make a decision on whether or not this motion is properly before me and if I have jurisdiction to make a ruling on a matter that is not before me.

[6] The Respondent took no position on Mr. Hughes' motion.

[7] There is little jurisprudence to guide the Tribunal in this matter. The decision of a previous Chairperson under s.48.2(2) was challenged in *Montreuil v. Canadian Armed Forces*, 2009 FC 22 ("*Montreuil*") when the Chairperson refused to allow a member to continue presiding over a matter after the expiry of his term. In that case, an application was made to the Federal Court for a judicial review of Chairperson Sinclair's decision. The Federal Court responded to the application by requesting the Chairperson to reverse his decision.

[8] Following the precedent in *Montreuil*, it would have been open to Mr. Hughes to challenge my decision under s.48.2(2) with an application for judicial review to the Federal Court. However, Mr. Hughes' motion also seeks a decision from the Chairperson to reassign this case to a different member whose term in office has not expired. Perhaps this is why he brought the motion before me rather than seeking a judicial review by the Federal Court.

[9] Mr. Hughes did not address the jurisdiction issue in his submissions, and I received no submissions from the Respondent. This leaves me to take a closer look at the *CHRA*.

[10] Under s.48.9(1) of the *CHRA*, the Tribunal is granted the latitude to conduct its affairs in an informal manner and with more discretion than permitted in the courts. In other words, the Tribunal is "master of its own procedure". The Tribunal is also mandated under s.48.9(1) to conduct its affairs in an expeditious manner, within the bounds of natural justice. I am very

mindful of how long Mr. Hughes has been engaged in litigation before the CHRT. His case has already been brought before the Federal Court on several occasions.

[11] With this in mind, and with the consent of Member Ulyatt, I am willing to accept limited jurisdiction in this case to decide on the matters put before me by Mr. Hughes that relate to my decisions made as Chairperson of the CHRT. I am also mindful that the Federal Court might find, upon judicial review, that I have overstepped my authority by doing so. However, in the absence of any objections from the parties, this would seem to be the prudent and most expeditious way of moving this case forward.

III. Issues

[12] There are two issues to be determined:

1. When a hearing is bifurcated to hear evidence and submissions on remedy, subsequently and separately from evidence and submissions that go to the question of liability, does that create a “new” inquiry?
2. Is it an error for a Chairperson of the CHRT to authorize a member, whose term has expired, to continue to handle a case with respect to remedies, even though submissions had not yet been made at the time of the term’s expiry?

A. Issue #1 - When a hearing is bifurcated to hear evidence and submissions on remedy, separately from evidence and submissions that go to the question of liability, does that create a “new” hearing?

[13] The Complainant submits that the root meaning of the word, “bifurcation” is “two” and “forks” meaning that it divides a case into two parts. As such, he argues there are two inquiries in his case, one for liability and one for the remedy.

[14] The English Oxford Dictionary defines the verb, *bifurcate*, as meaning to “divide into two branches or forks.” The adjective, *bifurcate*, means, “forked; branched” for example, “a bifurcate tree.”

[15] As a matter of administration, the CHRT creates a new file number for every complaint that is referred to it by the Commission. That file number is associated with the complaint throughout the course of its life before the CHRT, whether the matter is settled at

a mediation or if it proceeds to a full hearing resulting in a merits decision. In no case has it been the practice of the CHRT to create a new file number when a hearing is “bifurcated” to allow evidence and submissions on remedy to proceed at a later date.

[16] In a well-known case presently before the Tribunal, *First Nation Family Caring Society et al v. Attorney General for Canada*, the merits decision was rendered in 2016 (2016 CHRT 2). In that case, the parties had consented to the bifurcation of the hearing to hear evidence and submissions on remedies after a liability decision had been made. This undoubtedly made sense to the parties, given the high volume of documentation and evidence delivered during the liability portion of the hearing. Since the finding of liability in 2016, there have been numerous rulings, motions, and hearing days on remedy in that matter. At no point did the Tribunal create a new file number for that inquiry or consider it to be a separate matter. It remains part of a single inquiry assigned to the same panel.

[17] In the ordinary sense of the adjective, *bifurcate*, it does not imply the creation of a separate entity. For example, if a tree is bifurcated, it means that it has grown in two directions, creating a fork, essentially. However, it remains one tree. This is an appropriate analogy of our hearing process. The bifurcation of a hearing means that it is divided into two parts, but that action does not create a separate entity in itself. It remains the same inquiry, but the manner in which it is conducted is separated into two distinct parts.

[18] Accordingly, I reject the Complainant’s argument that “the liability inquiry is finished” and there is now a new inquiry to begin on the subject of remedy. The hearing on remedy is nothing more than a continuation of the same inquiry which has found a portion of liability in his favour.

B. Issue #2 – Is it an error for a Chairperson of the CHRT to authorize a member, whose term has expired, to continue to handle a case with respect to remedies, even though submissions had not yet been made at the time of the term’s expiry?

[19] The Complainant submits that Member Ulyatt no longer has the jurisdiction and authority to hear the evidence and submissions on the matter of remedy in his complaint. While Member Ulyatt rendered his liability decision in 2019, both the Complainant and the

Respondent made application to the Federal Court for judicial review of his decision. In the meantime, the parties attempted to mediate a resolution to the outstanding issues in May of 2020, requesting in the meantime that those applications be put in abeyance. The mediation attempt was ultimately unsuccessful, and the Federal Court heard the parties in their judicial review applications in January of 2021. In the meantime, Member Ulyatt's appointment to the CHRT expired.

[20] The *CHRA* contemplates the scenario when the end of a member's term does not coincide with the conclusion of an inquiry before the member. If a member were strictly forbidden to complete an inquiry which has already commenced, it could result in an extreme prejudice to the parties, particularly when evidence and testimony has already come before that member. It makes sense to allow a member with an expired term to finish their work and to render a decision in the matter which they have heard.

[21] As stated by the Supreme Court of Canada in *Bell Canada v. Canadian Telephone Employees Association*, 2003 SCC 36 at para 52:

"There is an obvious need for flexibility in allowing members of the Tribunal to continue beyond the expiry of their tenure [...] It would not, for this reason, be practicable to suggest that members simply retire from a panel upon the expiry of their appointment, with no official having the power to extend their appointments. [...] [T]he Tribunal Chairperson seems most likely both to be in a good position to know how urgent the need to extend an appointment is and also to be somewhat distant from the Commission."

[22] As a general principle of law, the person who heard the evidence should be the person to render the decision. Substituting a decision-maker who did not hear the evidence would be unfair to the parties and perhaps constitute a breach of natural justice.

[23] This case has now been before the Tribunal for ten years, and the last eight have been before Member Ulyatt. He is very familiar with the facts and evidence and is undoubtedly the best qualified member to continue with the remedy portion of the hearing.

[24] A Chairperson of the CHRT should only substitute a new member into an inquiry under the rarest of circumstances where there are compelling reasons to do so. To do otherwise would set a dangerous precedent for the CHRT where parties might be

encouraged to petition for a new member if they have a sense the outcome of the inquiry might not be favourable.

IV. Conclusion

[25] There are no compelling reasons for the Chairperson to substitute Member Ulyatt for the remedy portion of this hearing. Member Ulyatt has been duly authorized to hear and conclude this matter in accordance with the *CHRA*. Accordingly, this motion is dismissed.

Signed by

David L. Thomas
Tribunal Member

Ottawa, Ontario
April 26, 2021

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1726/8111 & T1769/2411

Style of Cause: Chris Hughes v. Canada Border Service Agency

Ruling of the Tribunal Dated: April 26, 2021

Motion dealt with in writing without appearance of parties

Written representations by:

Chris Hughes, for the Complainant

Graham Stark, for the Respondent