Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2021 CHRT 25
Date: August 6, 2021
File No.: T2363/2219

Between:

Noella Jorge

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Canada Post Corporation

Respondent

Ruling

Member: Kathryn A. Raymond, Q.C.

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I. Overview

[1] Ms. Noella Jorge wishes to amend her complaint of discrimination pursuant to the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (the "Act"). Conversely, Canada Post asks the Tribunal to limit the scope of Ms. Jorge's complaint and to exclude or strike certain allegations in the complaint so that they are not considered at the hearing. For the reasons that follow, Ms. Jorge is permitted to amend her complaint as directed below. Canada Post's request to limit the scope of the complaint is denied. Certain other related requests by Canada Post are adjourned on the basis that they would be better addressed at the hearing.

II. Background

[2] The Complainant, Ms. Jorge, filed a complaint of discrimination against her former employer, the Respondent, Canada Post, with the Canadian Human Rights Commission (the "Commission") in July 2013. When Ms. Jorge filed the original complaint, she was self-represented.

[3] Her complaint as filed (the "original complaint") alleged that Canada Post discriminated against her based on family status and disability. The complaint alleged this occurred in the context of employment, including harassment, hate messages and equal wages, and in relation to the denial of goods, services, facilities or accommodation. The original complaint also alleged that Canada Post had retaliated against Ms. Jorge for having made a complaint or, on the facts of this case, because she indicated an intention to Canada Post to file a complaint with the Commission.

[4] Commission staff investigated the original complaint and made recommendations. The Board of the Commission ("the Commissioners") reviewed the results and recommendations from that investigation and referred the complaint to this Tribunal in February 2019.

[5] On October 4, 2019, Ms. Jorge filed a Statement of Particulars with the Tribunal. The Tribunal's *Rules of Procedure* (the "*Rules*"), specifically Rule 6(1)(a), require that a party's

Statement of Particulars include the material facts that the party intends to prove at the hearing. Ms. Jorge had the benefit of legal counsel to assist her when she filed her Statement of Particulars, as counsel began to represent her in March 2017. Ms. Jorge's counsel submits that the Statement of Particulars that she filed provides the detail that is required by the *Rules*.

[6] Canada Post objected to the Statement of Particulars filed on behalf of Ms. Jorge, taking the position that some of its content fell outside the original complaint. Counsel for Ms. Jorge brought this motion to amend Ms. Jorge's original complaint to resolve any issue in this regard before the hearing.

[7] Ms. Jorge's motion asks for an order:

1) to amend the complaint to include additional facts and allegations against Canada Post that were specified in her Statement of Particulars; and,
2) that the Tribunal consider all matters raised in her Statement of Particulars in the adjudication of her complaint.

[8] The proposed amendments are attached to Ms. Jorge's motion as Schedule "B". Ms. Jorge says that the additional content primarily provides details respecting the allegations in the original complaint. The content includes corrected dates.

[9] The proposed content also includes the addition of an alleged pattern of retaliatory conduct, said to have continued *after* the complaint was filed in July 2013, until Ms. Jorge was allegedly forced to leave her employment in late 2013. As indicated above, the original complaint alleged retaliation at the time it was filed. Obviously, any basis for the retaliation allegation in the original complaint would have occurred *before* the complaint was filed.

[10] The Commission takes no position respecting Ms. Jorge's motion for amendment.

[11] Canada Post not only opposes Ms. Jorge's motion for amendment but has also filed its own cross-motion. In its cross-motion, Canada Post asks the Tribunal to issue four orders. These are:

1) an order limiting the scope of the complaint based on the decision of the Commissioners respecting the investigation;

2) an order excluding any existing retaliation allegations in the original complaint based on events that Ms. Jorge says occurred before she filed her complaint with the Commission;
3) an order dismissing Ms. Jorge's claim for lost wages and pension arising from psychological injuries she alleges were caused by Canada Post and striking the corresponding allegations in Ms. Jorge's Statement of Particulars; and,
4) an order striking other allegations of discrimination from Ms. Jorge's Statement of Particulars because they pre-date the "starting date" of discrimination identified in the original complaint.

[12] Ms. Jorge asserts that the Tribunal should not predetermine any of these issues raised by Canada Post before a full hearing of the merits of the complaint. Having recorded this position, Ms. Jorge nonetheless offered submissions on the merits of Canada Post's cross-motion, in the event the Tribunal chose to decide the merits of the cross-motion in advance of the hearing.

[13] As for its position, the Commission opposes the proposed limitation of the scope of the complaint based upon its own referral decision. The Commission takes no position respecting Canada Post's request to strike the retaliation allegations in the original complaint that are said to have occurred before Ms. Jorge filed her complaint with the Commission. The Commission submits that the Tribunal has the jurisdiction to determine whether Canada Post caused Ms. Jorge to suffer psychological injuries and possesses the jurisdiction to award lost wages and pension arising from such injuries. Lastly, the Commission takes no position respecting Canada Post's request for an order striking certain allegations from Ms. Jorge's Statement of Particulars because they pre-date the starting date of discrimination identified in the original complaint.

III. Procedural Ruling for Motions

[14] The Tribunal has considered Ms. Jorge's position that Canada Post's cross-motion should not be ruled upon at this stage of the proceeding, before a full hearing of the merits of the complaint. The Tribunal has significant discretion respecting matters of procedure pursuant to section 50(3)(e) of the Act and Rules 1 and 3 of the *Rules*. The Tribunal has exercised its discretion and determined that the following process is the most fair and effective means to address the preliminary issues raised in this case.

[15] Ms. Jorge's motion for amendment will be decided now. Canada Post's cross-motion to limit the scope of the complaint will also be decided now. It is similar to Ms. Jorge's motion to amend the original complaint.

[16] The Tribunal will also determine whether certain allegations in Ms. Jorge's Statement of Particulars are to be struck because they pre-date the starting date of discrimination identified in the original complaint. This issue overlaps with Ms. Jorge's desire to amend her complaint and Canada Post's request to limit the scope of the complaint to what it submits has been decided by the Commission. In this regard, the content that Canada Post wishes to strike from Ms. Jorge's Statement of Particulars is content that Ms. Jorge wishes to add to her amended complaint.

[17] Determining these issues as preliminary matters permits the parties to know the case they must meet so that they can prepare for the hearing. Of equal importance, the Tribunal sees no practical impediment to deciding these matters now. Resolution of the issues selected for advance determination requires the Tribunal to apply the law to evidence that is already available to the Tribunal. As well, most of the facts are not in dispute.

[18] Respecting the motion to amend, we have as evidence for this motion the original complaint, the Commission's Investigation Report and a Reply Record that was filed by Ms. Jorge at the Commission stage. This Reply was a response to Canada Post's Response to the complaint that was sent to the Commission. We also have other communications within the Reply Record that Ms. Jorge sent to the Commission.

[19] With respect to Canada Post's objection to the scope of the complaint, there are two key documents in evidence. The first is the Commission's letter to the Tribunal requesting an inquiry into the complaint of February 25, 2019. This document is the foundation of the Tribunal's jurisdiction and is part of the Tribunal's record of the proceeding. The second document is a decision by the Commissioners dated August 1, 2018 to refer this matter to the Tribunal. This decision was issued to the parties by letter of August 17, 2018 from the Commission. It was not issued to or provided to the Tribunal. This document is part of the record of decisions in the Commission's proceedings at the pre-inquiry stage of this matter. This decision has now been provided to the Tribunal by Canada Post in support of its cross-

motion. Therefore, the evidence the parties need to submit for consideration by the Tribunal to have the scope of the complaint determined is available to the Tribunal now.

[20] The Tribunal reaches a different conclusion with respect to Canada Post's cross-motion to exclude retaliation allegations in the original complaint which would have allegedly occurred before the Complainant filed her complaint with the Commission. This aspect of Canada Post's cross-motion amounts to a request for an order striking portions of Ms. Jorge's original complaint before the case is heard and related content that is in her Statement of Particulars. Canada Post seeks to strike these allegations on the basis that retaliation for filing a discrimination complaint can only be found to occur after a complaint is filed. Its argument is based on the wording of section 14.1 of the Act, which states that it is a discriminatory practice "…for a person against whom a complaint has been filed…to retaliate…."

[21] In response, Ms. Jorge argues, in part, that the allegations regarding what occurred prior to her filing her original complaint can be characterized as discrimination rather than retaliation. She submits that this issue should be considered with access to the evidence at the hearing so that an assessment of the characterization of these allegations can be made in a full factual context.

[22] In the Tribunal's view, aspects of an existing complaint should not be struck before a hearing on the merits, except in the clearest of cases. This is not one of those clearest of cases. There is a dispute over the appropriate characterization of certain alleged facts. Whether these facts are ultimately proven, and, whether, if proven, they are found to be retaliation or examples of discrimination or neither, the objection and Ms. Jorge's response should not be determined on a theoretical basis, without the evidence and argument available together. At the conclusion of the hearing, the Tribunal will have the benefit of having heard the evidence and the parties will have an opportunity to finalize their submissions, based upon a completed evidentiary record. Canada Post may raise this issue again, at that time.

[23] I turn to the timing of Canada Post's request for an order dismissing Ms. Jorge's claim for lost wages and pension arising from psychological injuries allegedly caused by Canada

Post and its request that the Tribunal strike the corresponding allegations in Ms. Jorge's Statement of Particulars. As explained, Canada Post seeks a ruling that the Tribunal lacks jurisdiction to determine whether Canada Post caused Ms. Jorge to suffer psychological injuries. Based on this alleged lack of jurisdiction, Canada Post submits that the Tribunal has no jurisdiction to award lost wages and pension arising from such injuries. Canada Post submits that jurisdiction in this regard lies within the exclusive purview of the Workplace Safety and Insurance Board of Ontario (the "WSIB"). Specifically, Canada Post argues that Ms. Jorge's claim for lost wages and pension is barred by the *Government Employees Compensation Act*, R.S.C. 1985, c. G-5 because, it says, that statute provides that the WSIB has exclusive jurisdiction to determine whether Ms. Jorge has a compensable workplace injury.

[24] This issue will not need to be decided unless Ms. Jorge provides sufficient evidence at the hearing to establish a *prima facie* case of discrimination and establishes on a balance of probabilities that she suffers from psychological injuries that were caused by Canada Post. The issue of whether the Tribunal is precluded from awarding lost wage and pension benefits by reason of Ms. Jorge's alleged psychological injuries, the "sister issue", will only need to be decided if these other matters are established. Any such findings should be made at a time when the parties and the Tribunal have had the benefit of having heard the evidence and the Tribunal has made the findings that underpin these issues.

[25] What is at issue now is whether Ms. Jorge can include allegations about psychological impacts upon her in her complaint and Statement of Particulars. Her original complaint includes references to "stress" and needing to take stress related leaves from work in describing the alleged effect of discrimination upon her. This type of allegation is included in many human rights complaints filed with the Tribunal. It is potentially relevant to the issue of remedy. It would be highly unfair to pre-emptively not permit those allegations to be made at this stage of the proceeding. Instead, all parties will have an opportunity to argue this issue completely at the hearing.

[26] For these reasons, this ruling will address these issues:

1) Whether Ms. Jorge should be permitted to amend her complaint with the addition of content and date corrections, as requested in Schedule “B” to her motion;
2) Whether Canada Post’s request to limit the scope of the complaint should be granted; and,
3) Whether certain allegations of discrimination in Ms. Jorge’s Statement of Particulars should be struck because they pre-date the starting date of discrimination identified in the original complaint.

IV. Issue 1: Amendment of the Complaint

A. The Original Complaint v the Proposed Amendments

[27] The complaint form provided by the Commission to complainants limits the narrative of events to three pages and divides that into areas that include a space for description of the alleged discrimination and a space to describe any negative effects alleged to be caused by the discrimination. As noted, Ms. Jorge was self-represented at the time she filed the complaint. At several points on the form, Ms. Jorge indicated that further details were available. For example, at page 5 of the complaint form, she wrote, “In order to keep this to 3 pages, and this would be lengthy, if you require more information on this, please contact me and I can provide much more information. I have copies of all my paystubs and the mess they have created is extremely hard to explain in writing.” She conveyed a similar message on the section of the form where she was asked to describe whether the allegedly discriminatory treatment had a negative effect on her and, if so, how she was affected. She also identified further alleged discriminatory practices in this section and repeated that she did not have enough room.

[28] The complaint form asks complainants to identify when the alleged discrimination started and when it ended. Ms. Jorge wrote in the space provided that the discrimination began in May 2012 and was ongoing. At the same time, the narrative description of the original complaint states that in early February 2012 Ms. Jorge developed a disability and that her employer began to harass her upon her return to work in April 2012 (at page 5 of the complaint form). Because of the references to both April and May start dates, it appeared there was likely a factual conflict within the original complaint about the start date of the

alleged discrimination. One of the proposed amendments includes a statement that Ms. Jorge returned to work on April 27, 2012.

[29] For purposes of this motion, I will assume that the start date of the alleged discrimination was around the beginning of May, after Ms. Jorge returned to work on April 27, 2012. Complaints received by this Tribunal typically allege that discrimination occurred upon return from a medical leave. Accordingly, the third issue in this motion respecting allegations that may pre-date the starting date of discrimination has been decided on the basis that the starting date is approximately the beginning of May 2012.

[30] The original complaint is attached as Exhibit A to Ms. Jorge's Affidavit in support of her motion and was summarized at page 69, para 2 of her counsel's written submissions for the motion. Although it is a summary, the description of the complaint prepared by Ms. Jorge's counsel accurately captures the core content of the original complaint as follows:

1) Jorge suffers from a disability, which impacted on her ability to perform her duties at the Canada Post Corporation in the manner in which they were previously performed;
2) After her return to work, her disability was not adequately accommodated;
3) As a result of her disabling conditions and Canada Post's response, Jorge was harassed by many Canada Post employees;
4) Jorge was separated from other employees and told to find new employment;
5) When an employee had written a critical letter to a supervisor regarding Jorge, the matter was "addressed" without any involvement from Jorge;
6) Jorge was adversely treated, both in respect of her entitlement to paid vacation and in the execution of a targeted audit of her performance;
7) Canada Post's actions and inactions related to her disabling conditions and medical leaves caused issues with her compensation;
8) Canada Post retaliated against Jorge as a result of her requests for accommodation and once its staff became aware that she had contacted the Commission. This retaliation included refusing to accommodate her family status by preventing her from driving her children to school in the mornings, and unwarranted disciplinary interviews and suspensions; and
9) Jorge had taken several periods of leave due to the impact of these events on her mental health.

[31] Ms. Jorge submits that the requested amendments in this motion, which are currently allegations in the Statement of Particulars, are all factually and legally connected to the original complaint. As summarized by her counsel at pages 72-73, paras 8 and 9 of her

written submissions, the proposed amendments to the complaint consist of the following additions:

1) background information on Jorge's employment history, salary and benefits with Canada Post, and her family status;
2) the events that led Io Jorge taking a leave of absence in February 2012 due to her disability;
3) details regarding Jorge's disability, diagnosis, treatment and the impact on Jorge's ability to remain at work;
4) further details regarding Canada Post's failure to accommodate Jorge's disability;
5) further details regarding steps taken by Canada Post to discipline Jorge in retaliation for her requests for accommodation, failure to complete her route on time and for contacting the Commission and making the Complaint;
6) further details of the retaliatory harassment perpetrated by Jorge's coworkers and the failure of Canada Post to properly address the harassment of Jorge by her coworkers;
7) additional instances of Canada Post causing issues with Jorge's compensation;
8) further details regarding the impact of Canada Post's actions and inactions on Jorge's mental health.

[32] In the summary of the requested amendments, Ms. Jorge’s counsel also referenced new alleged facts said to arise after the complaint was filed in July 2013 including:

1) Canada Post's continued failure to accommodate Jorge's disability;
2) Canada Post's retaliation against Jorge for seeking accommodation and for filing the Complaint through revoking her accommodation for family status and escalating disciplinary measures, ultimately leading to a threat of an indefinite suspension;
3) how Jorge's health deteriorated requiring a medical leave of absence in November 2013 from which she did not return;
4) details of Jorge's disability payments received until November 2015 and her termination without pay in lieu of notice or severance in December 2017 as she remained totally disabled from working; and
5) how, as a result of her loss of income, Jorge has suffered extreme financial hardship, requiring her to withdraw from her pension and sell her home.

[33] Counsel for Ms. Jorge advised that the proposed amendments also correct several typographical errors respecting dates that were contained in the Complaint.

B. Ms. Jorge's Position

(i) Overview

[34] Ms. Jorge submits that the Tribunal has a broad discretion to make procedural rulings in hearing a complaint in sections 48.9(1), 48.9(2), 49 and 50 of the Act and relies upon the Tribunal's authority to address a motion to amend a complaint "as it sees fit" in Rule 3(2)(d) of the *Rules*. She argues that the proposed inclusion of additional content in the complaint, reflecting the content of her Statement of Particulars, would not result in injustice or prejudice Canada Post.

(ii) Ms. Jorge's Legal Argument

[35] Counsel for Ms. Jorge relies upon what she describes as a well-settled point of law that a complaint is not a pleading and does not serve the purpose of a pleading in a civil case before the courts. (Pleadings in civil actions are usually expected to be filed with complete particulars.) She submits that after a complaint is filed, new details can and do arise during an investigation by the Commission. She argues that as long as the substance of the complaint is respected, a complainant can clarify and elaborate upon the initial allegations: *Polhill v. Keeseekoowenin First Nation*, 2017 CHRT 34 at para 13 ("*Polhill*") and *Casler v. Canadian National Railway*, 2017 CHRT 6 at para 9 ("*Casler*").

[36] Ms. Jorge's counsel submits that the established test to be applied by the Tribunal to decide whether to permit amendment of a complaint is as follows:

1) whether the amendments are done for the purpose of determining the real questions of controversy between the parties;
2) whether the allowance would not result in an injustice between the parties that could not be cured. Such an injustice must amount to real and significant prejudice;
3) whether it would serve the interests of justice; and
4) that the proposed amendments cannot essentially amount to a new complaint. There must be a nexus, or link or law, between the amendments sought and the initial complaint.

[37] Counsel relies upon *Parent v. Canadian Armed Forces*, 2005 CHRT 37 at para 9 ("*Parent CHRT*") in this regard.

[38] With respect to the amendments that allege retaliation by Canada Post, counsel for Ms. Jorge submits that there are a number of Tribunal decisions where it has been held that complainants should not be required to advance allegations of retaliation by way of a separate proceeding from the complaint as this would be "impractical, inefficient and unfair". She relies upon *Simon v. Abegweit First Nation*, 2018 CHRT 31 as an example of such a decision.

C. Canada Post's Position Respecting Proposed Amendments

(i) Overview & Further Organization of the Issues

[39] Counsel for Canada Post argues that Ms. Jorge is trying to add 31 new allegations to the original complaint, to the effect that Ms. Jorge is trying to redo her complaint. In support of its arguments, Canada Post organized the proposed amendments into three different categories.

[40] In the first category, Canada Post says that 13 proposed amendments appear to provide background or context to the complaint. Canada Post indicates that it does not oppose the addition of this content to the complaint if it is solely for the purpose of background.

[41] Ms. Jorge agrees that much of these specific amendments provide context for the complaint. However, she does not agree to an unspecified restriction upon the use of these amendments as "background" or "context".

[42] In the Tribunal's view, these 13 amendments consist of both background and allegations. As the parties did not reach agreement on their treatment, they are included in this ruling.

[43] In a second category, counsel for Canada Post objects to the addition to the complaint of three allegations because the allegations indicate that Canada Post's conduct caused Ms. Jorge's psychological injuries, which allegedly resulted in lost wages and pension. As explained above, Canada Post asks in its cross-motion that corresponding allegations in Ms. Jorge's Statement of Particulars be struck in advance of the hearing.

[44] As directed above, this issue will be determined, if necessary, at the hearing. However, the content involves the proposed addition of three allegations to the complaint and, therefore, involves proposed amendments to the complaint. The issue of whether these allegations can form part of the complaint are included in this ruling.

[45] Canada Post did not provide additional submissions respecting the merits of including the three amendments respecting alleged psychological injuries in the complaint.

[46] In the third category, Canada Post objects to a group of 15 proposed amendments to the complaint and to their inclusion in Ms. Jorge's Statement of Particulars for these reasons:

1) undue delay by Ms. Jorge and prejudice to Canada Post if the amendments are permitted;
2) the additional allegations are not within the scope of the referral of the complaint by the Commission to the Tribunal;
3) in the alternative, the addition of some of these allegations would amount to a new complaint;
4) in the further alternative, Ms. Jorge should not be allowed to add allegations regarding alleged retaliatory conduct that occurred before the complaint was filed.

[47] As can be seen, there is significant overlap between Canada Post's objections to the proposed amendments and its cross-motion.

(ii) Canada Post's Legal Arguments About the Third Category

[48] On the issue of delay, counsel for Canada Post highlights that the amendments are being sought long after the events of the complaint. Counsel submits that Ms. Jorge did not add to the allegations in her complaint during the three year period between when the complaint was filed with the Commission and when it was referred by the Commission for investigation, nor did Ms. Jorge ask to amend her complaint during the investigation itself, which took about one and a half years, although she was interviewed by the Commission investigator.

[49] Ms. Jorge retained legal counsel in March 2017, prior to the issuance of the Commission's Investigation Report on May 8, 2018. Canada Post's counsel points out that Ms. Jorge filed a response to the Investigation Report with the assistance of counsel and did not identify the need to add allegations to the complaint.

[50] Counsel for Canada Post says that, once the complaint was referred to the Tribunal for inquiry on August 17, 2018, it took Ms. Jorge over thirteen months to bring the allegations that are now requested amendments to the Tribunal's attention, which Ms. Jorge did by providing her Statement of Particulars with this content. Counsel submits that this delay alone is reason to deny the request for amendment.

[51] Canada Post relies upon the decision of *Canada (Attorney General) v. Parent, 2*006 FC 1313 at para 40 ("*Parent FC*") where the Federal Court made it clear that an "...amendment must not be granted if it results in a prejudice to the other party." In this regard, Canada Post submits that the 6-7 year delay in bringing forward these new allegations has prejudiced its ability to defend itself at a hearing because it did not have the ability to preserve the evidence it needs for the hearing. Canada Post says that all the allegations Ms. Jorge wishes to add to her complaint involve conversations or conduct that occurred in 2012 or 2013. Canada Post argues that witnesses' memories have faded and asserts that documents have not been maintained. Canada Post submits that it is "highly unlikely that the alleged wrongdoers and witnesses will be able to recall the details and circumstances of conversations and conduct that occurred so many years ago" (Respondent's Brief, para 20). Canada Post stresses that this information is vital to its ability to defend itself against the complaint. Because of the delay and resulting prejudice, Canada Post says that Ms. Jorge should not be able to add allegations to her complaint, nor should the same allegations in her Statement of Particulars be considered by the Tribunal at the hearing.

[52] In the alternative, Canada Post submits that the allegations in category three do not fall within the two issues that the Commission referred to the Tribunal for inquiry. As noted above, this argument will be addressed in the context of Canada Post's cross-motion.

[53] Canada Post further submits that some of the new allegations amount to a new complaint and should not be allowed for that reason. In this regard, it points to two key decisions, *Gaucher v. Canadian Armed Forces,* 2005 CHRT 1 ("*Gaucher*") and *Tabor v. Millbrook First Nation*, 2013 CHRT 9 ("*Tabor*"). In *Gaucher*, at para 11, the Tribunal decided that "[a]s long as the substance of the original complaint is respected, I do not see why the Complainant and the Commission should not be allowed to clarify and elaborate upon the initial allegations before the matter goes to a hearing." In *Tabor*, at para 5, the Tribunal held that "an amendment cannot introduce a substantially new complaint, as this would bypass the referral process mandated by the Act." Canada Post asserts that Ms. Jorge is not simply clarifying her complaint. Canada Post argues that Ms. Jorge is trying to file a new complaint and is describing the new content as an amendment to be able to do so.

[54] Canada Post submits that everything (beyond additional background) that Ms. Jorge is trying to add to her complaint is a new instance of discrimination, harassment or retaliation. The only "nexus" with the original complaint is disability and this is not enough, it argues, to form a "nexus" with the original complaint. Canada Post submits that the term "nexus" has been interpreted as requiring something more than this in the relevant case law.

[55] Canada Post also submits that Ms. Jorge is trying to circumvent the process under the Act which requires that the Commission investigate complaints that are filed with it.

[56] Canada Post provided three examples of allegations within the proposed amendments that it believes are new complaints:

1) Ms. Jorge wishes to add other instances of being moved to different areas within the workplace by Canada Post, allegedly for discriminatory or retaliatory reasons;
2) Ms. Jorge wishes to add to her allegations that she was instructed to complete her delivery route regardless of the restrictions related to her disability; and,
3) Ms. Jorge wishes to add new allegations of harassment by her co-workers.

[57] Canada Post further submits that 10 of the 15 allegations in the third category concern alleged retaliation over matters that occurred prior to Ms. Jorge filing her complaint. Canada Post relies on its cross-motion where it objects to any allegations of retaliation prior to the filing of the complaint. It has been decided not to determine this issue before the

hearing. However, these 10 allegations are being included in this ruling respecting the requested amendments because they form part of the proposed amendments.

D. Ms. Jorge's Reply

[58] Counsel for Ms. Jorge denies that the content of the proposed amendments was first provided in Ms. Jorge's Statement of Particulars. Counsel says that most of this content was referenced in the original complaint itself. Counsel says that other content was contained in a Reply filed by Ms. Jorge that responded to a Response filed by Canada Post when the complaint was being considered by the Commission. As indicated, a copy of this Reply to Canada Post's Response to the complaint (when the matter was before the Commission) was filed with Ms. Jorge's Reply in support of her motion for amendment.

[59] With respect to Canada Post's assertions of prejudice related to its alleged inability to preserve evidence, its non-retention of documents and the fading memories of witnesses, counsel for Ms. Jorge points out that the claim of prejudice is not supported by any evidence.

[60] Counsel submits that in the *Parent FC* case, upon which Canada Post relies, the Tribunal did not accept that the passage of time, even over a prolonged period, meant that amendments to the complaint would cause substantial prejudice (at para 11). As well, she refers to the *Casler* decision, at para 37, where there was a 10-year delay bringing forward allegations over matters that had occurred 16 years earlier. In that case a witness was deceased. Another witness's whereabouts were unknown. The respondent in *Casler* argued that evidence and documents may have been lost. Counsel for Ms. Jorge submits that, nonetheless, the Tribunal permitted the amendments because the respondent had not provided proof of real and substantial prejudice.

[61] Ms. Jorge's counsel further submits on the basis of *Parent CHRT* that it is not relevant if the Commission did not investigate every single allegation in the amendments to the complaint because Canada Post will have an opportunity to make those arguments to the Tribunal at the hearing.

[62] Ms. Jorge disputes that the requested amendments amount to a new complaint. Her counsel submits that, in any event, amendments can go beyond the limited approach of

"clarifying" and "elaborating" a complaint as argued by Canada Post. Counsel says amendments can introduce new allegations of discrimination, harassment, and retaliation. She refers to the *Tabor* decision, at paras 10 and 15, as an example of a case where the Tribunal permitted amendments that introduced additional retaliation allegations.

[63] Counsel for Ms. Jorge submits that the other decisions Ms. Jorge relies upon are examples of allowing new content. Regarding the *Polhill* decision, she submits that, at para 10 and paras 24-37, the Tribunal permitted amendments that allowed the introduction of new facts, with the exception of allegations involving the conduct of the RCMP. She argues that in *Casler*, at paras 27-46, the complainant was permitted to add new facts on the basis that the parties were the same, the discriminatory grounds were the same, and the alleged discriminatory practices were the same.

[64] Ms. Jorge also relies upon *AA v. Canadian Armed Forces*, 2019 CHRT 33 at paras 53-77, where the Tribunal allowed the addition of a new allegation that the complainant suffered discrimination in relation to his mental health. The Tribunal found that the amendments had a nexus with the complaint as it was originally filed. Counsel for Ms. Jorge highlights that, at para 65, the Tribunal held that ongoing failures to accommodate are "intrinsic parts of the narrative as a whole" and should be allowed.

[65] Ms. Jorge submits the following:

1) That one of the allegations that Ms. Jorge had been moved to another area of the workplace occurred after the original complaint was filed and, therefore, could not have been included in the original complaint;
2) That two other instances have a general and specific nexus to the original complaint because the original complaint generally alleged harassment within the workplace and specifically referred to Ms. Jorge being moved on a different occasion;
3) That three allegations that Ms. Jorge had been expected to complete her route despite her functional limitations had a nexus to the original complaint because it states that she was told that the help she would receive would be limited and temporary; as well, she asserted in the complaint that there were other issues of Canada Post failing to accommodate her;
4) That other amendments regarding co-worker harassment and bullying were directly relevant to the complaint because in her complaint Ms. Jorge stated that she was treated like she had "a contagious disease" and that there were a number of incidences of harassment.

[66] Ms. Jorge's counsel attached a chart listing the amendments Ms. Jorge is requesting and the connections or alleged nexus to the original complaint or to the Reply filed at the Commission stage, as the case may be, as Schedule B to her Reply to this motion.

E. Commentary about Procedural Background at Commission & Tribunal Stage

[67] Before proceeding with any analysis of the issues, it is important to accurately set the stage for this motion by providing context for the complaint form and highlighting the procedural differences at the Commission and Tribunal stage.

[68] The complaint form provides an overview of the complaint. The space for narrative is limited. Complainants may not expect the complaint form to be treated as a complete recitation of an extended series of perceived discrimination, given the limitation of space for content. Depending on the amount of information involved, the facts or allegations may be summarized. Further, these forms are often completed by self-represented individuals who may not have legal expertise.

[69] The use made of a complaint form is key. The complaint form is not a pleading. This is a well-settled point of law. However, it seems from the case law that there is a tendency for some respondents to continue to characterize it as a pleading. In this regard, some motions to amend a complaint are opposed by respondents urging a strict interpretation of the wording of the complaint form. However, the complaint form is not the kind of document that is intended to be strictly and narrowly interpreted.

[70] When respondents oppose complainants who seek to clarify and elaborate upon what is included within their complaint via amendment, concerns about procedural fairness may arise. Respondents have, at least in theory, an extended period and greater flexibility to amend their positions, compared to complainants. A respondent may articulate a position during the investigation. However, respondents first articulate a position that is binding upon them in the Tribunal process when they file a Statement of Particulars. In other words, respondents are not compelled to file anything like a pleading at the Commission stage. Yet some respondents expect complainants to state absolutely everything relevant to their complaint in a binding fashion when the complaint form is filed with the Commission.

[71] Complaints are filed before any investigation by the Commission that could lead to the discovery of additional facts potentially relevant to discrimination. In matters before this Tribunal, it is not uncommon for individual complainants to believe that they have been discriminated against based upon what they have knowledge of and perceive, but all the facts may not be available to them at the time they file their complaint. For example, in cases involving discrimination in the context of employment, employees usually are not in a position to access all the information relevant to what occurred to them in the workplace due to differences in access to information as between management and staff and the privacy entitlements of other employees.

[72] Further, complaint forms are often drafted years before a respondent is required to file a Statement of Particulars. Respondents have the benefit of everything they have learned in the interim. At the stage of completing the complaint form, complainants do not.

[73] The issue of fairness in the context of a proposed amendment is relevant to both parties. Respondents who oppose an amendment or who are considering bringing a motion to limit the scope of a complaint should be prepared to address why expecting precise details at the time of the original complaint does not unfairly prejudice the complainant.

[74] Further, some respondents take narrow, legalistic positions respecting the Commission's procedural decisions respecting amendments. From the Tribunal's perspective, when the Commission refers complaints for inquiry, the complaint form is often forwarded to the Tribunal without amendment as a result of or reflecting the Commission's investigation. New or additional information collected by the Commission during the investigation may or may not be seen by the Commission as sufficiently significant to warrant amendment of the complaint by the Commission on its own initiative.

[75] The Commission makes decisions about its own processes such as amendments. Pursuant to section 49(1) of the Act, complaints can be forwarded by the Commission any time to the Tribunal after they are filed. The Commission need only be satisfied that, "having regard to all the circumstances of the complaint, an inquiry is warranted." It is possible that a complaint could be forwarded without amendment because the Commission believes it is

forwarding a complaint for a full inquiry and that there will be a full adjudicative process by the Tribunal.

[76] It is open to a party to bring an application for judicial review if there is an issue about amendment of a complaint at the Commission stage or respecting the scope of what is being referred by the Commission, as discussed below.

[77] At the Tribunal stage, Statements of Particulars much more closely resemble the stage of formal pleadings in the courts. Rule 6(1) states that each party is required to file a Statement of Particulars that sets out the material facts that the party seeks to prove, its position on the legal issues in its case, a list identifying all arguably relevant documents and a list of witnesses and a summary of their anticipated testimony. The parties disclose all arguably relevant documents, provide witness information and file Statements of Particulars precisely to provide particulars to the other parties, to elaborate upon and complete the complaint as stated on the complaint form. The parties are, however, expected to remain within the parameter of relevance to the complaint.

[78] The similarity of a Statement of Particulars to pleadings in civil actions is reflected in Rule 9(3) whereby parties may not be permitted to present evidence respecting issues at the hearing before the Tribunal that are not referenced in their Statement of Particulars, unless they are granted leave to do so. Likewise, they may not be able to call a witness for whom they have not provided a summary of their anticipated evidence or introduce a document into evidence without prior disclosure in the Statement of Particulars, without leave of the Tribunal.

[79] Rule 6(5) also requires that there be ongoing disclosure at the Tribunal stage and that additional disclosure be made if a party learns that their disclosure has been incomplete. The obligation to disclose at the hearing stage is based on arguable relevance to the issues and is not determined by the interests of the party making disclosure, as can be the case earlier in the proceedings.

[80] It is the Tribunal, not the Commission, that has the obligation to ensure that there is full disclosure before the hearing of the inquiry. The legal test for arguable relevance at the pre-hearing disclosure stage is very broad. This and the ongoing disclosure obligations of

parties can impact the content of a Statement of Particulars and the content of the original complaint.

[81] Because it is not until the pre-hearing stage that disclosure is completed, it can be anticipated that there could be further refinement of a complaint after it has been forwarded to the Tribunal. Sometimes a complainant will seek amendment of a complaint before disclosure, sometimes after. Sometimes the parties will simply proceed with the hearing based on the Statements of Particulars and the disclosure that has been made without amendment of the complaint. Sometimes there are complainants that try to advance essentially new complaints under the guise of amendments.

[82] This background to the use of complaint forms and to human rights procedure is offered to fully acknowledge that the complaint form is highly relevant to any motion to amend. However, the law respecting amendments is being applied here in the context of an administrative proceeding that is intended to advance human rights in an efficient, effective and not overly formalistic manner. Given this context, Tribunal decisions respecting amendments are highly sensitive to considerations of prejudice.

[83] Even formal pleadings filed with a court are amended in the interests of justice where there is no prejudice to the other party. Unreasonably restricting the hearing of a human rights inquiry to the strict wording of the complaint form, as opposed to a liberal interpretation of its contents, would impose a more rigorous standard upon granting amendments at this Tribunal than the one applied by the courts to pleadings. That is not consistent with the objective of simplified administrative proceedings.

F. Analysis

(i) Authority, Purpose & Discretion

[84] The Tribunal's authority to amend complaints has been established in a number of cases, as has the principle that, in general, amendments to complaints should be allowed by the Tribunal to permit the real questions of controversy between the parties to be determined. These cases include *Canada (Human Rights Commission) v. Canadian*

Telephone Employees Assn., 2002 FCT 776, where the complaint was amended at the Commission stage, but the Commission (inadvertently) referred the original complaint instead of the complaint "as amended" to the Tribunal:

> **iii. Jurisdiction to amend**
>
> [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 out as a general rule that proposed amendments should be allowed where they do not result in prejudice to the opposing party:
>
> > 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.
>
> [32] Moreover the parties acknowledged at the hearing that the Commission could at anytime refer the amended complaints to the Tribunal for adjudication. If the Commission can file the amended complaints at any time, it is logical for the Commission to seek leave to amend the original complaints which were mistakenly filed. This is particularly evident since the amended complaints were the subject of the Commission's investigation reports and had replaced the original complaints in March, 1994.

[85] Another example of the authority of the Tribunal to amend is *Canadian Museum of Civilization Corporation v. Public Service Alliance of Canada (Local 70396)*, 2006 FC 704. A further example is *Parent FC*, where the court recognized the general rule at para 30:

> [30] The Tribunal enjoys considerable discretion with respect to the examination of complaints under subsections 48.9(1) and (2) and sections

> 49 and 50 of the Act. As for the exercise of that discretion in regard to an amendment request, Mr. Justice Robert Décary wrote in *Canderel Ltd. v. Canada (C.A.)*, [1994] 1 F.C. 3, 1993 CanLII 2990 (F.C.A.), that " […] 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."

[86] In summary, this Tribunal has the authority to amend complaints. The purpose of permitting amendments is to determine the real questions of controversy between the parties. The "general rule" referenced in *Parent FC* that amendments should be granted is subject to two caveats: 1) The requested amendments should not cause irreparable injustice and prejudice to the other parties; and, 2) because, in this context, the Act requires some degree of screening by the Commission and the Commission decides whether to forward complaints for inquiry, amendments are not permitted where they allow a party to circumvent the Act by creating new complaints before the Tribunal that were not screened by the Commission.

[87] Such an approach is not only consistent with the interests of justice but is consistent with the purpose of the Act, namely to "extend the laws in Canada to give effect… to the principle that all individuals should have an opportunity equal…. and to have their needs accommodated… without being… prevented from doing so by discriminatory practices…" (section 2). Because the purpose of the Act is to extend the law of human rights, it would be inconsistent with the Act to not address discrimination that is relevant to a complaint, barring exceptional circumstances where the interests of justice would not be served by permitting amendment or where there is a statutory requirement that operates against doing so.

[88] As well, the authority granted to the Tribunal in the Act permits the Tribunal to determine any matter necessary to decide the complaint. This is designed to permit the member to determine the real matters of controversy between the parties. Section 50(2) provides as follows:

> 50(2) In the course of hearing and determining any matter under inquiry, the member… may decide all questions of law or fact necessary to determining the matter.

"Necessary to determining the matter" is consistent with the concept that that the Tribunal is required to determine the real matters of controversy between the parties.

[89] The Tribunal also has a broad discretion to determine its own procedure. Section 50(3)(e) of the Act provides that the Tribunal member may "decide any procedural or evidentiary question arising during the hearing." That the Tribunal "may decide", unencumbered by any express limitation in the Act, conveys the Tribunal's discretion to address issues as appropriate. This obviously includes considering fairness. Further, the Tribunal's *Rules* enable the Tribunal to decide procedural disputes before the hearing by way of motion "as it sees fit:" Rule 3(2)(d).

[90] In short, the Tribunal has the authority and the discretion to make procedural decisions such as permitting amendment of a complaint for the purpose of effectively and efficiently addressing allegations of discrimination that are relevant to a complaint, in order to determine the real questions of controversy between the parties.

(ii) Nexus

[91] In general, amendments to complaints are permitted where there is sufficient nexus between the content of the requested amendments and the original complaint. The struggle lies in delineating what limits should be imposed in interpreting what a "nexus" to a complaint means.

[92] In my view, the term "nexus" to a complaint is grounded purely in relevance. Relevance can be visualized as a sliding scale in the decisions respecting proposed amendments. The relational characterization of proposed amendments to the original complaint is the key to determining placement on that sliding scale.

[93] That the new proposed content involves the same parties may be essential to relevance.

[94] There are other characteristics of relational relevance. The proposed content is more relevant if it relates to the same ground of discrimination or what is referred to as a protected

characteristic in the Act (e.g. race, gender) or to the same discriminatory practice (e.g. differential treatment in employment, denial of service).

[95] However, that may or may not establish sufficient relevance, depending on the overall circumstances. For example, a proposed amendment could allege discrimination based on the same protected characteristic, yet the proposed new facts are entirely unrelated to the facts in the original complaint. The Tribunal would have to determine whether, in that case, a shared protected characteristic is enough of a nexus with the original complaint.

[96] On the other hand, where the same protected characteristic is involved, additional facts could be consistent with and necessary to the integrity of the factual narrative of the complaint, i.e., they are “part of the same storyline”. Additional facts of this nature add examples of events and similar alleged discriminatory practices to an existing complaint with the same protected characteristic.

[97] The same protected characteristic is not always required to establish relevance. Additional facts that are part of the same storyline of the original complaint can potentially give rise to additional grounds of discrimination based on other protected characteristics. For example, a complaint of discrimination based on family status related to eldercare might seek to add the protected characteristic of sex if an employer was making assumptions about gender in relation to eldercare. In this example, it could be argued that the protected characteristic of sex arises from the same storyline and is a characteristic related to family status. I do not intend to fully describe or to decide this circumstance or to attempt to limit this category as it is not the situation here.

[98] Other alleged breaches of the Act can have a nexus to the original complaint. Retaliation in response to the filing of a complaint would be a further breach of the Act. Retaliation is defined in section 14.1 of the Act as another discriminatory practice. It would typically be related to the original complaint. As other examples, in the context of employment, there may be a request that discrimination based on policy or practices pursuant to section 10 be added to a complaint or, for example, a complainant or the Commission may allege systemic discrimination and request systemic remedies under

section 53(2)(a), although the original complaint is specific to an individual. Discriminatory policies and practices and systemic discrimination are other examples of additional prohibited practices that can be related to an existing complaint and lead to requested amendments. Again, I am not deciding all of these situations here, but rather intend to highlight the different ways in which an alleged nexus may arise.

[99] The most obvious relational relevance is where new proposed content applies to the same grounds of discrimination and fits within the same discriminatory practices or types of practices already identified in the complaint. In my view, the nature of this relational relevance locates this factor further along the sliding scale towards indisputable relevance.

[100] In this case the parties are the same. The grounds of discrimination underpinning the proposed amendments are the same. The additional facts are part of the storyline of the complaint's narrative. They are "more of the same" alleged facts, i.e. additional examples of the same type of discriminatory practice(s) that were identified in the complaint, such as harassment or adverse differentiation in the course of Ms. Jorge's employment in terms of an alleged failure to accommodate her. Here, retaliation was alleged in the original complaint. Some of the requested amendments involve allegations of retaliation that are alleged to have occurred after the complaint was filed. They clearly have a nexus to the original complaint because retaliation was alleged. They are "more of the same" thing.

[101] These requested amendments are not entirely new allegations as argued by Canada Post. They may not all fit perfectly within the four corners of the original complaint, but they are further examples, and are very closely tied to the original complaint.

[102] Even if a few of the alleged facts in the proposed amendments were "new" examples of additional facts, they are consistent with the factual narrative of the complaint. They are "part of the same storyline" and do not represent a major divergence in the allegations.

[103] Here, the additional allegations in the amendments either complete the history of what occurred or build on the history of what occurred. The Tribunal is satisfied that the proposed amendments have not only a sufficient nexus to the original complaint but a strong nexus.

[104] In these circumstances, permitting Ms. Jorge to amend her complaint to deal with all discriminatory practices that are relevant to her complaint is in fact required for the proceeding to be fair.

(iii) Prejudice

[105] In reaching the above conclusion, I have considered the prejudice alleged by Canada Post. Canada Post alleges that Ms. Jorge's delay has prejudiced its ability to defend itself at a hearing because it did not have the ability to preserve the evidence it needs for the hearing.

[106] Canada Post points out that the allegations Ms. Jorge wishes to add to her complaint involve conversations or conduct that occurred in 2012 or 2013. Canada Post submits that witnesses' memories have faded and that it is "highly unlikely that the alleged wrongdoers and witnesses will be able to recall the details and circumstances of conversations and conduct that occurred so many years ago". Canada Post also alleges in its submissions that documents have not been maintained.

[107] Canada Post is taking the position that missing or lost information from witnesses and documents is vital to its ability to defend itself. However, Canada Post provided no evidence of actual prejudice via affidavit or otherwise. No specific information was provided respecting alleged prejudice by reason of a witness's lost memory. Canada Post does not explain what documents it is referring to that were not maintained.

[108] It is to be expected that faded memories will be an issue for witnesses. When the hearing is held, it will likely be close to 10 years since some of the events occurred. That is unfortunate. However, Canada Post has not demonstrated how the potential loss of memory of witnesses is different as between the allegations for which it concedes it had specific notice from the outset and those it now challenges.

[109] In my view, Canada Post is in a similar position to the respondent in *Casler*, at paras 37-38:

> [37] According to CN, there is inherent prejudice caused by the delay of almost 10 years in seeking the amendment of the complaint following Ms. Casler's termination. Furthermore, allegations preceding August 25, 2000 occurred over 16 years ago. CN submits that documents and evidence that may have existed in relation to these allegations are or may have been lost. In this regard, it notes the CN employee managing Ms. Casler's accommodation and return to work over the post-September 2004 time period is now deceased. In addition, a CN occupational nurse who also had primary responsibility for managing Ms. Casler's accommodation and return to work is no longer with CN and is unreachable.
>
> [38] As the Supreme Court stated in *Blencoe v British Columbia (Human Rights Commission)* 2000 SCC 44, at para. 101, the mere passage of time, without more, does not warrant a stay of proceedings as an abuse of process at common law and would be tantamount to imposing a judicially created limitation period. There must be proof of significant prejudice, which results from an unacceptable delay, to warrant dismissing a complaint or an aspect of a complaint as requested by CN.

[110] While there had been a delay of almost 10 years in seeking amendment of the complaint, the respondent in *Casler* did not prove that it was in fact prejudiced by reason of delay. The Tribunal noted at para 39: "With respect to the unavailability of witnesses and related documentation, the claim of prejudice is speculative at this stage. CN has not specified what actual prejudice it has suffered…." There must be proof of significant prejudice.

[111] The Tribunal is not prepared to make a finding of prejudice based on speculation or assumption which is what the Tribunal is being asked to do when a party provides no supporting evidence. Even potentially reasonable assumption on its face may not prove to be the case in fact. For example, a potential witness maybe deceased, but their evidence may not be material at the hearing or may be available through other means. Here, no evidence of prejudice was provided by Canada Post. Accordingly, the Tribunal makes no finding of prejudice because there is no evidence before the Tribunal upon which to do so.

[112] I will add that the circumstances of this case do not support an inference that the delay prejudiced Canada Post. There are a number of reasons the Tribunal requires evidence in this particular case to be persuaded that the prospect of prejudice is real and significant. The Tribunal's obligation to address the real controversy between the parties is not displaced lightly or presumptively in any event.

[113] The finding that the amendments are closely linked with the original complaint as filed and are closely linked with the earlier Reply filed with the Commission supports an inference that these amendments do not prejudice Canada Post. Without more, these are not the kind of “new” allegations that, in these circumstances, could, on their face, cause prejudice to a respondent.

[114] Other circumstances undermine Canada Post’s submissions that it will be prejudiced if the amendments are permitted. Canada Post had advance notice of the original complaint. It is not disputed that Ms. Jorge advised Canada Post that she intended to file a complaint with the Commission. Canada Post could have taken steps at that time to preserve anything to do with Ms. Jorge, including securing relevant human resources files, interviewing personnel, relevant managers or supervisors and the staff with whom she worked, and by placing a litigation hold in effect to preserve evidence. There is no suggestion or evidence that this occurred. There is also no evidence about why this did not occur, to establish that there is a good reason why Canada Post is prejudiced by the proposed amendments. The Tribunal was given only submissions about witnesses’ presumptive loss of memory. In short, Canada Post has not explained what it would have done differently if it had received the additional allegations and factual details in the Statement of Particulars filed by Ms. Jorge with the original complaint.

[115] It should also be noted that, after the complaint was filed in July 2013, Canada Post would have received a copy of the complaint from the Commission. The copy of the complaint provided notice to Canada Post. As well, the original complaint indicates that Ms. Jorge had filed a grievance within the workplace. She was being assisted by her union and her grievance was proceeding to arbitration. Her human rights complaint did not immediately proceed to investigation by the Commission as a result.

[116] These events provided notice to Canada Post of the subject matter of this complaint and constituted further opportunities for Canada Post to take reasonable steps to investigate events within the workplace and to preserve evidence.

[117] It is also relevant that the original complaint alleges that the discrimination by Canada Post is ongoing. This notified Canada Post that further particulars were developing or that

Ms. Jorge believed that discrimination would continue to occur after the complaint was filed. In other words, Canada Post had notice when the complaint was filed with the Commission that there was more to the complaint as it existed when it was filed. Ms. Jorge wrote that this was the case. She also wrote that more facts or allegations were expected to develop. Again, Canada Post could have secured all documents relevant to Ms. Jorge and identified the people with whom she interacted within her area of the workplace. It could have taken whatever statements it wished to collect respecting issues such as whether Ms. Jorge was harassed by coworkers or accommodated or retaliated against.

[118] Canada Post should have also known that Ms. Jorge did not have the benefit of legal advice when she completed the complaint form. Ms. Jorge wrote on the complaint form that she was not represented. As well, in addition to expressly stating in two key areas of the complaint form that she had additional details and would provide them, Ms. Jorge seems to have struggled, as a person with no legal training, to know what information to include. This is based on a reading of the original complaint. This includes that, when she was asked on the complaint form to describe how the allegedly discriminatory treatment negatively impacted her, she erred in including further discriminatory practices as opposed to addressing the effects of those practices. All of this should have given Canada Post, which is represented by legal counsel, notice that the complaint was not precisely drafted, that the complaint was not complete, and it should not assume that the original complaint was a pleading.

[119] There is no evidence that Canada Post requested particulars or further disclosure of any additional allegations from Ms. Jorge. There is no suggestion by Canada Post that it conducted its own investigation into what was alleged on the complaint form. If it had, it presumably would have asked Ms. Jorge to provide the remaining details of her allegations. There is no suggestion that Canada Post objected to the content of the Reply that Ms. Jorge filed with the Commission to respond to Canada Post's response to the complaint at the Commission stage.

[120] The Tribunal is not persuaded that the requested amendments are new allegations as framed by Canada Post in its argument such that prejudice by reason of the amendments

is a factor. All of the above circumstances mitigate against the likelihood of prejudice to Canada Post being caused by these amendments now.

(iv) Delay

[121] Canada Post submits that Ms. Jorge delayed bringing forward these new allegations for 6-7 years. Canada Post states that this delay is attributable solely to Ms. Jorge at paragraph 20 of its submissions. Canada Post submits that for this reason alone, the amendments should not be permitted by the Tribunal. With respect, the Tribunal sees this issue differently.

[122] Canada Post did not present evidence to prove its contention that there was delay attributable solely to Ms. Jorge. The evidence is that Ms. Jorge provided most of the content in her requested amendments to the Commission during its investigation. There is no evidence of delay by Ms. Jorge in seeking an order from the Tribunal to amend her complaint once Canada Post voiced objection to her Statement of Particulars. There does not appear to be delay that is solely attributable to Ms. Jorge given the other findings noted above. The existence of delay in this case, by whatever cause, is in any event unaccompanied by significant prejudice. Any delay in this case is not a factor in and of itself that would warrant declining to address the real issues in dispute between these parties.

(v) Circumventing the Commission Process

[123] Finally, I turn to Canada Post's submission that Ms. Jorge is attempting to circumvent the screening processes of the Commission by introducing amendments before the Tribunal that were not investigated by the Commission. Whether the content of Ms. Jorge's Reply to Canada Post's Response to the Commission was or was not investigated by the Commission, she shared the information with the Commission. The extent to which this information was or was not investigated was decided by the Commission, not Ms. Jorge.

[124] There is no factual basis on the record of the motion to conclude that Ms. Jorge has attempted to thwart the screening role of the Commission or has unintentionally done so. It should also be noted that neither Canada Post nor the Commission took the position at the

time that the information Ms. Jorge provided to the Commission was outside the parameters of the original complaint. The Commission considered the additional information gathered during the investigation without requiring an amendment to the original complaint.

(vi) Summary of Findings

[125] The Tribunal finds the requested amendments have a strong nexus in the original complaint. Canada Post has not proven that it will suffer any prejudice that is directly caused by the proposed amendments if the amendments are allowed. Canada Post has also not established that the delay is the fault of Ms. Jorge. Without proof of significant prejudice, there is no basis to refuse the requested amendments.

[126] On the evidence of the motion, because Ms. Jorge filed a Reply to Canada Post's Response to the complaint, the Commission had an opportunity to conduct its screening role fully. Ms. Jorge should not be denied a hearing respecting examples of what she believes is discrimination or retaliation because she did not list every incident on the complaint form or because, as a non-lawyer, she stated in her complaint that she was not accommodated but did not specify fully how she was not accommodated, or because she stated she was harassed and experienced retaliation without providing details of all incidents of alleged harassment and retaliation. It was open to Canada Post to request particulars at the Commission stage so that it could better identify relevant evidence to preserve.

[127] The Tribunal is of the view that most of the requested amendments to the complaint constitute particulars that Ms. Jorge properly included in her Statement of Particulars. Strictly speaking, because the additional particulars in the Statement of Particulars are consistent with the framework of the complaint, the complaint did not require amendment and Ms. Jorge does not require an order from this Tribunal that it will consider her Statement of Particulars.

[128] The Tribunal wishes to make it clear that its decision respecting Ms. Jorge's requested amendments has been made in tandem with and following thorough consideration of Canada Post's cross-motion to limit the scope of the complaint, addressed below in these reasons.

[129] Ms. Jorge's motion to amend her complaint is granted. She may amend her original complaint in accordance with Schedule B to her motion. The Tribunal will consider all matters raised in the Complainant's Statement of Particulars in the adjudication of her complaint that are pursued at the hearing. To be clear, the fact that the amendments are allowed does not change the fact that Ms. Jorge still bears the burden of establishing a *prima facie* case with respect to all her allegations at the hearing.

[130] The Respondent may, at the hearing stage, raise the issues in its response to this motion that were expressly reserved in this decision to be potentially raised by it at the hearing.

V. Issue 2: Scope of the Complaint

A. Introduction

[131] As explained at the outset, Canada Post's cross-motion to limit the scope of the complaint is denied. Therefore, Canada Post's request for an order striking the content in Ms. Jorge's Statement of Particulars that became the amendments Ms. Jorge sought to make to her original complaint is denied. The reasons for this decision follow.

B. Framing the Issues

[132] Canada Post submits that, following investigation, the Commissioners decided that there was merit in the Tribunal inquiring into only two issues in the complaint. The core issue in its cross-motion is whether this is the case.

[133] If so, this would have been a valid basis to limit the scope of the complaint to the two issues. It would have meant that the Statement of Particulars, as filed, contained extraneous content which would have required a further ruling. Ms. Jorge's motion to amend her complaint to match the detail in her Statement of Particulars would have proceeded based on the referral being limited to two issues. Whether the Commissioners only referred two issues for inquiry to the Tribunal was, therefore, a pivotal issue for both motions.

[134] With respect to this core issue, Canada Post makes two arguments. First, it submits that the wording of the Commissioners' decision to the parties makes it clear that only two issues were referred to the Tribunal. Secondly, Canada Post argues in the alternative that, if this communication is found by the Tribunal to be ambiguous, the Tribunal should consider the history of the complaint. Canada Post submits that any ambiguity in the referral communication from the Commission should be resolved based on the context provided by the history of the complaint. Canada Post submits that the context in this case will lead the Tribunal to conclude that the Commissioners only intended to refer two issues for hearing.

C. Identifying the Commission's Decision

[135] What is submitted by Canada Post to be the "decision" of the Commissioners to refer two issues only for inquiry was issued to the parties and not to the Tribunal. A differently worded "decision" that referred the entire complaint for inquiry was issued to the Tribunal. Determining which document is the Commission's decision was of potential relevance to this motion because Canada Post saw the two communications as conflicting decisions. Canada Post argued that this was a reason to consider the history of the complaint. Therefore, a further issue in the cross-motion is what communication constitutes the Commissioners' decision respecting referral of the complaint to the Tribunal.

[136] None of the following factual background is in dispute.

[137] As explained above, when the Act refers to the "Commission" making a decision, the Act is really referring to members appointed to the Commission who sit as the Board of the Commission, who are sometimes referred to as the "Commissioners". They are referred to as the Commissioners in this decision to separate them from staff/employees of the Commission. It is the Commissioners who make the final "decision" of the Commission respecting whether to refer a complaint to the Tribunal for inquiry. That a final decision will be made by the Commission is referenced in each Investigation Report. However, staff of the Commission write correspondence on behalf of the Commissioners and did so in this case.

[138] As explained, the Commissioners issued a decision on August 1, 2018 respecting the next procedural steps of the complaint. That decision is entitled the “Decision of the Commission” and was filed as Tab C to Canada Post’s cross-motion. The August 1, 2018 document does not state that it is a decision of the Commissioners, but it is. This is because the Commissioners decide whether to refer complaints to inquiry, not Commission staff. The Commissioners (on behalf of the Commission) decided that the complaint should be referred for conciliation. If the complaint did not resolve at conciliation, it was to be referred to the Tribunal for inquiry.

[139] The decision of August 1, 2018 was conveyed to the parties by letter of the Commission dated August 17, 2018, filed as Tab D to the cross-motion. The letter was signed by the Director, Registrar Services. As indicated, the letter and attached decision were not sent to the Tribunal.

[140] The case did not settle at conciliation. The Commission, namely the Director, Registrar Services, wrote the Tribunal on February 25, 2019 with what appeared to be on its face a recent decision of the Commissioners, without accompanying reasons, stating:

> I am writing to inform you that the Canadian Human Rights Commission has reviewed the complaint (20130423) of Noella Jorge against Canada Post Corporation.
>
> The Commission has decided pursuant to paragraph 44(3)(a) of the *Canadian Human Rights Act*, to request that you institute an inquiry into the complaint, as it is satisfied that, having regard to all the circumstances, an inquiry is warranted.

[141] A copy of the original complaint was attached to the letter to the Tribunal. There was nothing in the communication of February 25, 2019 to indicate to the Tribunal that the February 25, 2019 communication was anything other than a communication by the Commission of the decision of the Commissioners pursuant to section 44(3) of the Act to request an inquiry into the attached complaint. Upon receipt, the Tribunal had no knowledge of the Commission’s letter of August 17, 2018 nor the Commissioners’ decision of August 1, 2018.

[142] Likewise, the parties had no knowledge of the Commission's letter to the Tribunal of February 25, 2019 at the time. It was not copied to the parties.

[143] For purposes of deciding Canada Post's cross-motion, the Tribunal has determined to focus on the Commissioners' decision to the parties of August 1, 2018 as being "the" decision of the Commission to refer the complaint. As is explained below, the parties made submissions about whether the Commission's "decision" to the parties or the Commission's "decision" to the Tribunal was determinative of or the dominant consideration for this motion. They provided case law that reached different conclusions in this regard.

[144] I concluded that it is not necessary to attempt to resolve the conflicts in the case law to decide this motion and chose to focus upon the Commissioners' decision to the parties of August 1, 2018 in considering Canada Post's arguments, including the issue of ambiguity, in the reasons below. That is the source of the alleged conflict with what the Tribunal was advised. Furthermore, section 44(4) of the Act requires the Commission to notify the complainant and any respondents of the action it is taking pursuant to section 44(3)(a). I conclude that the decision of August 1, 2018 is "the Commission's decision" and not the letter to the Tribunal because the former was sent to the parties. The letter to the parties of August 17, 2018 provided notice of the decision to the parties and enclosed the decision of August 1, 2018. I characterize the letter to the Tribunal as notice to the Tribunal of the Commissioners' decision, which is an administrative action taken by the Registrar.

[145] Canada Post appears to consider the letter of August 17, 2018 to be part of the decision of the Commissioners and places corresponding weight upon this letter. For purposes of this motion, this document has been given weight to the extent that it comments upon the decision of the Commissioners. However, it is correspondence from Commission staff. There is no evidence that it was reviewed by the Commissioners before being sent. It is not apparent that much weight should be placed upon it. In any event, nothing material turns on the weight to be given to this document.

D. Canada Post's Position

[146] Canada Post relies upon the fact that, in the August 1, 2018 decision, the Commissioners wrote that they "carefully considered the Complaint Form, Investigation Report and post-disclosure submissions of the Complainant". The focus of Canada Post's argument is on the Commission's reference to the Investigation Report. The Commissioners then addressed only two issues in their brief reasons for the referral. It is on this factual basis that Canada Post submits that the wording of this decision makes it clear that only two issues were referred to the Tribunal.

[147] Canada Post says that the issues that are stated in the August 1, 2018 decision and, therefore, the issues that have been referred are:

> 1) whether the Respondent fully accommodated the Complainant's sensitivity to cold, including making appropriate follow-up inquiries when the initial medical evidence appears to have not been clear and making accommodations in terms of her work schedule and routes; and,
> 2) whether the previous accommodation relating to altered hours for family status may have been unreasonably altered without an opportunity for the Complainant to address her continued need for accommodation in this regard.

[148] Canada Post also relies upon the following portion of the August 17, 2018 letter that provided the Commissioner's decision of August 1, 2018 to the parties:

> Before rendering the decision, the Commission reviewed the report disclosed to you previously and any submission(s) filed in response to the report. After examining this information, the Commission decided, pursuant to section 47 of the Canadian Human Rights Act, to appoint a conciliator to attempt to bring about a settlement of the complaint and pursuant to paragraph 44(3) of the Act, to request that the Chairperson of the Canadian Human Rights Tribunal institute an inquiry into the complaint, **based on the reasons outlined in the attached** [Emphasis added by Canada Post].

[149] The "reasons outlined in the attached" are said by Canada Post to be the two issues that were articulated expressly in the Commissioner's decision of August 1, 2018 set out above. Canada Post submits that it is very clear that only two issues were referred to the Tribunal.

[150] To put it another way, because the Commission's decision of August 1, 2018 stated that: "…there is merit in exploring whether the Respondent fully accommodated the Complainant's sensitivity to cold…. [and] whether the previous accommodation relating to altered hours for family status may have been unreasonably altered…," Canada Post submits that the Commissioners decided that there was only merit in inquiring into these two allegations in the complaint. Canada Post argues that it makes "no sense" to conclude that the Commissioners referred the entire complaint to the Tribunal after finding that only two issues potentially had merit.

[151] Canada Post submits that considering the entire complaint would ignore the Commissioners' decision to the parties. It says that considering the entire complaint would negate the Commission's screening role and render its decision of August 1, 2018 meaningless.

[152] Canada Post relies upon a principle of law, stated as a Latin phrase, to sum up its argument: *expressio unius est exclusio alterius.* This Latin phrase is a rule used in interpreting statutes. It is used to argue that if something is expressly referred to in a statute, that itself excludes all other possible inclusions. Canada Post applies this principle here by arguing that, because the Commissioners' decision expressly includes two allegations from the complaint, it should be presumed that the Commission intended to exclude other allegations in the complaint that could have been included.

[153] In the alternative, Canada Post submits that, if the Tribunal does not consider the Commission's decision to refer only two allegations to be clear, the Tribunal should consider the evidence respecting the history of the complaint to resolve any ambiguity. Canada Post submits that several decisions have held that the scope of the complaint is not determined only by the Commission's letter of referral to the Tribunal. Rather, the history of the complaint provides relevant context that is to be taken into account by the Tribunal in determining the scope of a complaint: *Murray v. Canada (Human Rights Commission),* 2014 FC 139 at paras 54-68 ("*Murray*"); *Canadian Postmasters and Assistants Association v. Canada Post Corporation,* 2018 CHRT 3 at paras 46, 48, 50, 58 ("*Canadian Postmasters*"); and, *Oleson v. Wagmatcook First Nation*, 2019 CHRT 35 at para 37 ("*Oleson"*).

[154] Canada Post also addressed the alleged inconsistency in the letter sent to the Tribunal by the Commission on February 25, 2019 that stated that the entire complaint was being referred. Canada Post submits that this letter is the same letter as that sent to the Tribunal in *Murray*, *Canadian Postmasters* and *Oleson*. (The letters in *Murray* and *Canadian Postmasters* were signed by the Acting Commissioner whereas in *Oleson* the letter was signed by the Director, Registrar Services.) In each of these cases, the letter from the Commission to the Tribunal referred the entire complaint for inquiry. However, Canada Post notes that in each of these cases the issue was not decided based on the "decision" the Tribunal received, but rather the issue was decided based on contextual evidence respecting the history of the complaint. It submits that the same approach should be taken here.

[155] In this regard, Canada Post asserts that the Tribunal should consider the findings in the Investigation Report to be part of the history of the complaint, and argues that the Commissioners must have considered the Investigation Report to be well founded, since they only referred two allegations for inquiry. As further context, the Investigation Report did not find that any of Ms. Jorge's allegations warranted inquiry for various reasons. Canada Post relies on those reasons.

E. Ms. Jorge's Position

[156] Ms. Jorge takes the position that the Commissioners referred the complaint in its entirety to the Tribunal. Ms. Jorge alleges that Canada Post is misrepresenting the Commissioners' decision of August 1, 2018. Ms. Jorge submits that the Commissioners did not adopt the findings in the Investigation Report in their decision or express an intention to only refer part of the complaint to the Tribunal. Instead, the Commissioners simply expressed the view that there was merit to two allegations. Ms. Jorge says that the Commissioners did not make any findings for or against any of the other allegations in the Investigation Report. Ms. Jorge disputes that the Commissioners ever stated that "only" two issues were worth an inquiry. Instead, she says that the Commissioners provided short reasons to explain why they were referring the complaint to inquiry.

[157] Ms. Jorge likewise disputes Canada Post's submission that the principle *expressio unius est exclusio alterius* applies to the Commissioners' decision. She says that if this argument is accepted, it would lead to the absurd result that the Commissioners would be required to state every single allegation they wish to refer to the Tribunal in their reasons. The Commissioners have no practice of doing this.

[158] Ms. Jorge agrees with Canada Post that the Tribunal can look beyond the letter of referral it receives from the Commission to determine what was referred to it for hearing and decision. However, Ms. Jorge argues that Canada Post is incorrectly describing the way in which this should occur.

[159] Ms. Jorge submits that if the Commissioners intend that the Tribunal inquire into something other than the complaint in its entirety, they must be explicit about this intention: *Casler* at para 24 and *Kanagasabapathy v. Air Canada*, 2013 CHRT 7 at paras 30-32 ("*Kanagasabapathy*").

[160] Ms. Jorge argues that the case law relied upon by Canada Post, the *Murray*, *Canadian Postmasters* and *Oleson* decisions, takes a different approach in considering a complaint's history than the cases she refers to and are distinguishable from this case. She submits that Canada Post's cases should not be applied to this case. She argues that the facts of this this proceeding are more consistent with *Kanagasabapathy* and that in that case the Tribunal made it clear that the Tribunal should focus on the letter to the Tribunal to determine the scope of an inquiry, not the letter to the parties.

[161] A key aspect of Ms. Jorge's position is that she disputes the idea that the Investigation Report should be one of the tools used to assess the scope of the complaint. She suggests that the Investigation Report should only be considered by the Tribunal where it is adopted by the Commissioners. She submits that the Investigation Report was not adopted by the Commissioners in this case.

[162] Ms. Jorge asserts that the only way Canada Post could set aside or alter the Commissioners' decision of August 1, 2018 to refer the complaint was by way of judicial review of the decision by the Federal Court, which Canada Post did not pursue, although it was notified that it had this option. The letter of August 17, 2018 informed the parties that

they could ask the Federal Court to review the enclosed decision. Ms. Jorge submits that Canada Post is attempting to seek the same result by a motion to the Tribunal to limit the scope of the complaint today and that this is improper.

F. The Commission's Position

[163] The Commission takes the position that the Commissioners referred the whole complaint to the Tribunal. The Commission says the Commissioners did not limit the inquiry to the two issues they addressed in their decision of August 1, 2018.

[164] The Commission provided additional context respecting the procedural history of the complaint. The Commission advised that it made an earlier decision about the complaint that has not yet been referenced in these reasons. Sections 40 and 41 of the Act permit the Commission to not deal with a complaint if the complainant has another legal avenue to have their human rights protected. As noted previously, Ms. Jorge had a grievance process available to her through her workplace. However, ultimately Ms. Jorge was unable to deal with her human rights issues through that grievance process. The Commission decided to address her complaint and issued a decision pursuant to section 41 of the Act to this effect. The Commission points out that Canada Post also did not seek to judicially review the section 41 decision to investigate the complaint despite the grievance process.

[165] The Commission explains that the point of its staff investigating a complaint is to provide information to the Commissioners so that the Commissioners can decide whether to refer the complaint to the Tribunal. The human rights officer assigned to conduct the investigation makes a recommendation to the Commissioners. The information arising from the investigation, and the officer's recommendation respecting whether the complaint should be referred to the Tribunal, are put in the Investigation Report. The parties are given a chance to respond to the Investigation Report before the Commissioners' decision is made. In this case, the Commission advises that Ms. Jorge was the only party to respond to the Investigation Report.

[166] The Commission points out that, while the Investigation Report prepared by staff of the Commission recommended that there be no inquiry into the complaint, the

Commissioners decided to appoint a conciliator to see if the matter could be settled. The Commissioners also decided that, if it did not settle, an inquiry by the Tribunal was warranted pursuant to section 44(3) of the Act. The Commission concludes that the Commissioners declined to adopt the Investigation Report's recommendation to dismiss the complaint. The Commission submits that the complaint in its entirety is referred to the Tribunal unless the Commissioners expressly state otherwise.

[167] As indicated, the Commission advised the parties in its letter of August 17, 2018 that, if they disagreed, they could ask the Federal Court to review the decision. When the matter did not settle through conciliation, the Commission wrote to the Tribunal on February 25, 2019 to request that the Tribunal institute an inquiry into the complaint. The Commission says that because Canada Post did not seek judicial review of the Commissioners' decision to refer the complaint to the Tribunal, that decision stands and the Tribunal must proceed with the inquiry.

[168] The Commission submits that "if the scope of the complaint before the Tribunal is to be limited, it should only be in circumstances in which it is clear that it is fair, and in accordance with natural justice, to do so" (Commission's submissions, para 23). The Commission cites *Canada (Human Rights Commission) v. Canada (Attorney General)*, 2012 FC 445, upheld in 2013 FCA 75, for the proposition that a Tribunal should exercise its discretion to dismiss a complaint in advance of a full hearing cautiously and should do so "only in the clearest of cases" (para 140). The Commission submits that this is not one of those cases.

[169] The Commission further submits that once a matter is referred to the Tribunal by the Commission, the Tribunal is required by section 50 of the Act to inquire into the complaint: *Oleson*, at para 29, citing *Canadian Human Rights Commission v. Lemire and al,* 2012 FC 1162, also cited as *Canada (Human Rights Commission) v. Warman*, 2012 FC 1162 ["*Warman*"] at para 55. The Commission argues that the Tribunal must adjudicate the complaint, and not "collaterally review the Commission's decision-making process": *Oleson*, at para 34, citing *Warman* at para 56 (Commission's submissions, para 32).

[170] The Commission concedes that the history of the complaint can provide context when there is an ambiguity about the scope of the complaint. However, the Commission also submits that it is incorrect for Canada Post to rely heavily upon the Investigation Report which recommended that the complaint be dismissed. That is because an Investigation Report only provides a recommendation.

[171] At para 40 of its submissions, the Commission summarized its position:

> When the Commission intends to limit the scope of the complaint referred, it must use clear language to this effect in the referral itself. Where there is no such clear instruction, then the entire complaint has been referred, without restrictions or limitation. As held by the Tribunal in *Connors*, "the Commission referred the complaint without further clarification. Therefore, the Tribunal is seized of the complaint in its entirety."

[172] The Commission cites *Côté v. Canada (Royal Canadian Mounted Police),* 2003 CHRT 32 at paras 12-14 ("*Côté*"); *Spurrell v. Canadian Armed Forces*, 1990 CanLII 188 (CHRT) at paras 7-11 ("*Spurrell*"); *Gover v. Canada Border Services Agency*, 2013 CHRT 14 at paras 38-39, 42, 47-48 ("*Gover*") and *Connors v. Canadian Armed Forces*, 2019 CHRT 6 ("*Connors*") in support of this position.

[173] In short, the Commission submits that the fact that the Commissioners described two of Ms. Jorge's allegations in their decision of August 1, 2018 falls short of expressly excluding her other allegations. The Commission says there is no indication in the Commissioners' decision that it intended to limit the scope of the complaint. Like Ms. Jorge, the Commission also argues that the cases relied upon by Canada Post are distinguishable from the circumstances here.

G. **Canada Post's Reply**

[174] Canada Post submits that Ms. Jorge is incorrect when she suggests that the Commissioners did not make any final determinations about the allegations in the complaint. Canada Post asserts at para 1 of its Reply to the Complainant that, in their decision to the parties, the Commissioners:

> …specifically determined that there was merit in exploring only two issues. Both logic and common sense dictate that by expressly carving out the two issues in the Decision, the CHRC did not support and made a final determination about the merit of the remaining allegations.

[175] Canada Post suggests that Ms. Jorge is incorrect in placing such weight on the referral letter to the Tribunal. Canada Post points out that in *Murray* the Federal Court found that the referral letter to the Tribunal is not the sole consideration in deciding the scope of a referred complaint. Canada Post acknowledges that the *Kanagasabapathy* decision of the Tribunal referenced by Ms. Jorge focuses on the referral letter to the Tribunal rather than the context offered by the complaint history. However, Canada Post argues that *Kanagasabapathy* should not be followed because it was decided in 2013 and conflicts with the Federal Court's decision in *Murray,* at paras 54-68, which was decided subsequently in 2014.

[176] Canada Post submits that the conflict between the *Kanagasabapathy* and *Murray* cases was correctly addressed in a subsequent decision of the Tribunal, *Canadian Postmasters*. In *Canadian Postmasters,* the Tribunal held that the Federal Court decision in *Murray* was binding upon it. On this basis, the Tribunal found that the referral letter is not determinative and that it can look at the history of the complaint.

[177] Canada Post argues that the context of the complaint history, deemed relevant in *Murray*, includes the Investigation Report. Canada Post points out that in both *Murray* and *Oleson,* the Investigation Report was considered in deciding the scope of what was referred to the Tribunal.

[178] In response to Ms. Jorge's suggestion that the principle of *expressio unius est exclusio alterus* would lead to absurd results if applied to the Commissioners' decisions, Canada Post points out that this is a long-standing legal principle.

[179] In reply to the Commission's submissions, Canada Post submits that the Commission is legally incorrect when the Commission argues that the power to dismiss a human rights complaint in advance of a hearing on the merits should be exercised only in the clearest of cases. Canada Post says that the Commission is applying the standard applicable to a motion to strike or a motion to dismiss a complaint. It submits that this is not

the applicable standard to be applied to a motion to limit the scope of a referred complaint. Canada Post asserts that instead the Tribunal should take the approach in the *Murray*, *Canadian Postmaster* and *Oleson* cases where the scope of a complaint is limited when the Tribunal concludes that this was intended by the Commission.

[180] Canada Post argues that none of the cases that the Commission relies upon (*Côté*, *Spurrell*, *Gover* and *Connors*) have held that the Commissioners must use clear instructions if they intend to limit the scope of the complaint when they refer a complaint to the Tribunal. Canada Post suggests, as well, that the Commission's cases are distinguishable from the facts here. In those cases, the Commissioners did not send a detailed decision to the parties about the referral, as occurred in *Murray*, *Canadian Postmasters* and *Oleson*.

[181] Canada Post denies that its motion is a disguised attempt to judicially review the Commissioners' decision. It says that it is trying to clarify or confirm the scope of what has been referred.

H. Analysis

(i) Is There a Clear Decision by the Commissioners?

[182] The motion to limit the scope of the complaint is anchored in the wording of the Commission's letter of August 17, 2018 and the attached decision of August 1, 2018. The first issue to determine is whether the Commission's decision to the parties clearly refers only two allegations in the complaint for inquiry.

[183] At no point do these communications state that the Commissioners "only" referred two allegations for inquiry. There is a clear statement in the decision that "the complaint" will be referred to the Tribunal if it does not settle. In fact, the Commissioners' decision is expressed consistently, on several occasions, within the decision of August 1, 2018 as being a decision to refer the complaint. The Commissioners referred "the complaint" to conciliation. The Commissioners wrote that "the complaint" would be dealt with as follows. The Commissioners said that if "the complaint" was not resolved at conciliation, "the complaint" would be referred to the Tribunal for inquiry. This language is repeated in the August 17,

2018 cover letter to the August 1, 2018 decision. There is no clear statement in the covering letter and decision that “only two allegations” are being referred for hearing by the Tribunal.

[184] In fact, “the complaint” was not resolved at conciliation. There is no suggestion in the Commissioners’ decision that anything other than the entire complaint was referred to conciliation. The February 25, 2019 letter that the Registrar of the Commission sent to the Tribunal states that “the Commission has decided to request… an inquiry into the complaint”. This indicates that the Registrar understood that it was the Commissioners’ decision to refer “the complaint”.

[185] I do not accept Canada Post’s argument that there is a clear decision to only refer two allegations in the complaint for inquiry. I am also not persuaded by Canada Post’s alternative argument that there is an ambiguity in the Commissioners’ decision that is resolved by finding that only two allegations in the complaint have been referred for hearing. The operative aspect of the decision, the final effect of the decision on this proceeding, is the action of referring the complaint to the Tribunal in its entirety. This is a clear decision by the Commissioners. The operative aspect of the Commissioners’ decision involves no ambiguity.

[186] Accordingly, there is no conflict between the decision issued to the parties and the decision conveyed to the Tribunal. Instead, there is a clear decision by the Commissioners to refer the complaint in its entirety for inquiry, if it did not settle.

(ii) How Should Any Ambiguity Be Resolved?

(a) Overview

[187] Having decided that there is no ambiguity about what was referred for inquiry, I will, nonetheless, address Canada Post’s submissions about the alleged ambiguity and its proper interpretation in the event I am incorrect. The essence of Canada Post’s submission is that the Commissioners’ statement in their decision about certain allegations having merit creates ambiguity, and that this ambiguity negates what appears to the Tribunal to be clear statements that the complaint has been referred to the Tribunal. Similarly, if the Tribunal

finds that the referral of only two of the allegations is not clear in the Commissioners' decision, that ambiguity should be interpreted in the context of the history of the complaint. Canada Post argues that the history of the complaint lies in the Investigation Report and its findings that none of the allegations in the complaint had merit. Canada Post' s submissions are to the effect that the Commissioners implicitly agreed with the Investigation Report.

[188] I have considered this argument carefully. I am not persuaded that it is reasonable to interpret the relevant communications as evidencing an intention to only refer two allegations within the complaint for inquiry. It is most likely not the case that this is what the Commissioners intended.

[189] With respect, Canada Post is interpreting the Commissioners' decision of August 1, 2018 to the parties in a manner that does not consider the context provided by the full content of the August 1 and August 17, 2018 communications of the Commission and which does not correctly recognize the broader statutory context that applies to a decision respecting whether to refer a complaint pursuant to the Act. I will address the context provided by the content in the Commissioner's decision to the parties first.

(b) The Content of the Commissioners' Decision

i. Reference to the Investigation Report

[190] As Canada Post points out, in their decision of August 1, 2018, the Commissioners wrote that they "carefully considered the Complaint Form, Investigation Report and post-disclosure submissions of the Complainant". I would expect the Commissioners to usually write something to this effect to confirm that they, in their role as Commissioners, as procedural fairness would require, have read and reviewed all submissions. As well, whether the Commissioners should review the history of the complaint is not an issue, as the history of the complaint would be at the Tribunal stage. The Commissioners should consider the history of the complaint as it has progressed through the Commission's processes because they make the final decision for the Commission.

[191] It is implicit in Canada Post's submissions that it is assuming that the Commissioners' reference to review of the Investigation Report means that the Investigation Report played a prominent role in their decision. There is little doubt that it did because it is an important document. Canada Post further implies that the Commissioners' reference to the Investigation Report means that the Commissioners adopted the report in the absence of reasons to the contrary. By necessary implication, Canada Post seems to take the approach that the Commissioners need to apply the Investigation Report to each issue, i.e. that they should be taken to agree with the Investigation Report on a given issue unless they expressly indicated otherwise. This approach is founded upon the Commissioners' silence respecting points they could have included in their reasoning. It is not persuasive. There is no evidence to support an assumption that the Investigation Report was assessed as being pre-eminent and nothing to say that its findings were adopted. The Commissioners reviewed other important documents too. Their decision is also silent respecting their assessment of everything else they reviewed. The Commissioners' statement above simply states what they reviewed.

[192] As explained above, Investigation Reports reflect the information collected by a human rights officer and that officer's recommendation. The Tribunal regularly has complaints referred to it by the Commissioners where the Investigation Report recommended that the complaint not be referred. The Tribunal also receives referrals where the complaint is only referred in part. In this case the Commissioners could have been persuaded significantly by the Investigation Report. Or they could have discounted the Investigation Report, thought it wrong, and placed great weight upon Ms. Jorge's complaint and/or post-disclosure submissions. The Commissioners' earlier remark about the careful extent of their consideration of documents that include the Investigation Report does not implicitly inject the word "only" into their decision regarding what is being referred.

[193] If there is any added intent or significance behind these words about what the Commissioners carefully considered, they most likely were intended to reassure Ms. Jorge that the Commissioners had considered her evidence and submissions. The human rights officer that had investigated her complaint had concluded that the complaint should not be referred for inquiry. Ms. Jorge had responded to that. Ms. Jorge believed that the

Commission (really the human rights officer at that stage) was wrongly refusing to consider important evidence in deciding to recommend not to refer the complaint for inquiry. A witness that Ms. Jorge had asked to be interviewed during the investigation had not been interviewed. Ms. Jorge objected, alleging that the investigation was materially flawed.

[194] The Commissioners' comments about Ms. Jorge's concerns appear in the decision immediately following the Commissioners' statement about what they reviewed. The Commissioners appear more likely to have intended to address Ms. Jorge's objection to what she perceived as a lack of thoroughness in the conduct of the investigation than to have intended to limit the scope of the Tribunal's inquiry. The Commissioners confirm that they reviewed all relevant background including the Complaint Form, the Investigation Report, the post-disclosure submissions of the Complainant, and Ms. Jorge's notes of discussions she had with the witness in question and her other documentation. The relevant paragraph in the decision in its entirety is as follows:

> The Commission has carefully considered the Complaint Form, Investigation Report, and post-disclosure submissions of the Complainant. The Commission notes that the Complainant expressed a concern with respect to the thoroughness of the investigation and the decision of the Investigator to not interview all the witnesses identified by the Complainant and, in particular, the Complainant's union representative, Greg Knickle. The Complainant makes serious but unsubstantiated allegations against the other union representative who was interviewed by the Investigator and urges the Commission to find that the investigation was insufficiently thorough. We are of the view that because the Investigator relied on the Complainant's notes of the meeting in which Mr. Knickle was involved, and reviewed other union documentation provided by the Complainant, it was not necessary to interview Mr. Knickle to have a full sense of the workplace context. It is not necessary to interview each and every witness proposed by a party to arrive at a fair picture of the context of a complaint, and we are not persuaded by the Complainant's submissions on this point.

[195] The proximity and nature of this other content provides highly relevant context. I do not agree that the Commissioners' reference to the Investigation Report implicitly adopts the findings of the Investigation Report.

ii. Reference to "The Merits"

[196] In the following paragraph of its decision, after explaining that it is not necessary to interview every witness, the Commissioners wrote, "Having said that, the Commission believes there is merit in exploring whether the Respondent…" and refers to the two issues identified in earlier passages of these reasons.

[197] That the Commissioners commented upon two allegations that the Commissioners appear to believe clearly have merit does not permit the insertion by implication of the word "only" into the Commissioners' decision.

[198] The Tribunal considered whether the Commissioners intended to emphasis the "there is merit" in contrast to something else in the decision that indicated that most of the complaint had no merit. No such content exists. To the extent there could be emphasis on the words, "is merit", the reader would naturally look to the paragraph above to find what that emphasis relates too.

[199] The Commissioners had just written that the Complainant had made "serious but unsubstantiated allegations against the other union representative who was interviewed by the investigator and urges the Commission to find that the investigation was insufficiently thorough." The Commissioners concluded that it was not necessary to interview the other union representative Ms. Jorge wanted interviewed "to arrive at a fair picture of the context of a complaint, and we are not persuaded by the Complainant's submissions on this point." In sum, the Commissioners had just stated that Ms. Jorge made serious and unsubstantiated allegations against a witness and that they were not persuaded by her allegations about how unfair the investigation was. In my view, when the Commissioners then wrote, "Having said that, there is merit…" they were balancing their criticism of Ms. Jorge, who they apparently believe made unfounded procedural complaints and unsubstantiated allegations against a witness, with assurance that there were two issues respecting the merits of the complaint that they were persuaded had merit. It is unlikely that anything more was intended by these statements.

[200] In using the words "there is merit", based on their ordinary meaning, the Commissioners meant that those two issues most definitely required inquiry by the Tribunal.

Perhaps the Commissioners did intend to emphasis this belief. However, this does not mean that the Commissioners intended to convey that the other issues required no inquiry at all. With respect, that is not what the Commissioners wrote. That is not a reasonable interpretation of what the Commissioners wrote. Taken in context, these statements fall short of constituting an express or implied limit upon what was referred to this Tribunal for inquiry.

[201] The two allegations that are expressly described relate to the issue of accommodation of disability and family status. These are the most fundamental issues raised in the complaint. It seems that what likely happened was that the Commissioners were satisfied that these two issues had merit and that the complaint, therefore, passed the Commission's screening test and was being sent along to the conciliator or the Tribunal, if needed.

[202] The most logical inference to draw from the decision is that once the complaint passed the screening test, the Commissioners did not turn their mind to the merits of all the other issues raised by both parties, or adopt or reject the remaining findings in the Investigation Report, or, if they did, they chose not to communicate their assessment in their decision, but instead referred the complaint, which is what they wrote that they were doing. For example, the Commissioners did not make decisions in their reasons about any of the objections raised by Canada Post during the investigation. This included issues Canada Post raises in this motion, such as whether retaliation can be alleged before a complaint is physically filed with the Commission. It appears the Commissioners decided to just refer the whole complaint instead of trimming away more peripheral issues.

[203] One cannot assume that the absence of an assessment of a particular issue in a decision to refer a complaint means that the relevant portions of the Investigation Report discounting that issue become the Commissioners' decision.

(c) **The Statutory Context**

[204] This brings me to my second point which is also intended to foster a greater understanding of proceedings pursuant to this Act and to explain how the statutory context provides context to issues respecting the scope of a complaint.

i. The Statutory Scheme

[205] For reasons suggested here or for other reasons, the Commissioners may choose to not make more determinations within their role than the Act (see sections 40, 41, 44 and 49) or the situation requires. Paragraph (3)(a) of section 44 of the Act provides that the Commission:

> (3)(a) …may request the Chairperson of the Tribunal to institute an inquiry under section 49 into the complaint to which the report relates if the Commission is satisfied
>
> (i) that, having regard to all the circumstances of the complaint, an inquiry into the complaint is warranted, and
>
> (ii) that the complaint to which the report relates should not be referred pursuant to subsection (2) or dismissed on any ground mentioned in paragraphs 41(c) to (e)….

[206] This is followed by statutory language to address the opposite possible conclusion the Commission could reach, via section 44(3)(b), in which the Commission "shall" dismiss a complaint if it is satisfied "(i) that, having regard to all the circumstances of the complaint, an inquiry into the complaint is not warranted, or (ii) that the complaint should be dismissed on any ground mentioned in paragraphs 41(c) to (e)."

[207] The Commissioners' ability to dismiss is limited to the grounds in paragraph 41(c) to (e), which includes complaints over which there is no jurisdiction, complaints that are trivial, frivolous, vexatious or made in bad faith or those which are time-barred. As indicated, the Commission can also refuse to refer pursuant to section 44(3)(b)(i) if the Commissioners conclude that an inquiry is not warranted based on the investigation. There is nothing in the Commissioners' decision of August 1, 2018 that decides that the complaint or any part of it should be dismissed for these reasons.

[208] Of primary relevance here is that the Commission screens complaints to determine whether an inquiry is warranted. I do not mean to suggest that this happens, but in theory, the Commissioners could determine whether any one significant aspect of a complaint could more probably than not merit investigation and, on the basis there is one aspect that merits investigation, refer the complaint because an inquiry is warranted, fulfilling its screening function. The Commissioners could alternatively turn their mind to severing part of a complaint, but they did not do so in this case.

[209] This is consistent with the Act's requirement that the Commission screen complaints but not decide them on their merits, leaving the issues for final decision by the Tribunal following a hearing where any relevant evidence or arguments can be fully heard. This is the entirely appropriate process required by the Act and by natural justice.

[210] The referral of complaints for hearing triggers the distinct roles of the Commission and Tribunal. There is a significant difference between screening out complaints (which requires a finding that a complaint has insufficient merit to warrant further inquiry or that the complaint should be screened out for other reasons permitted by the Act) and making a final decision about each allegation, which the Tribunal is required to do. Given the Commission's role is to screen (out) complaints with no merit, as opposed to decide all issues, it is logical to infer that the entire complaint is referred, unless this inference is expressly contradicted by the Commissioners in their decision.

[211] Accordingly, in my view, the statutory process supports the presumption of referral of a complaint in its entirety unless express and clear exception is made by the Commissioners in their decision. Here, not only did the Commissioners state that they were taking the action of referring "the complaint" for inquiry, if "the complaint" did not resolve via conciliation in their decision, the Commissioners expressly requested that the Tribunal institute an inquiry into "the complaint" pursuant to section 44(3)(a) of the Act in their letter to the Tribunal of February 25, 2019.

ii. Interconnected Issues

[212] The presumption of the referral of a complaint in its entirety is supported by more nuanced but equally important reasons within the statutory scheme. Most complaints involve a number of factual issues or alleged discriminatory practices that must be resolved within the framework of the legal issues relevant to a human rights complaint. Often the different aspects of a human rights complaint are interconnected. To some extent, the interconnectedness of different aspects of a complaint counters the advisability of final decisions to not proceed on issues taken in isolation by the Commission respecting the content of a complaint before a hearing. To this effect, section 3.1 of the Act suggests that it is inappropriate to look at specific grounds of discrimination in isolation:

> 3.1 For greater certainty, a discriminatory practice includes a practice based on one or more prohibited grounds of discrimination or on the effect of a combination of prohibited grounds.

[213] Discrimination can be subtle and overlaid. Grounds of discrimination can possibly be compound, as opposed to requiring only a singular analysis, and intersect: *Turner v Canada (Attorney General)*, 2012 FCA 159 at paras 30-49). Similar intersections are noted in *Radek v. Henderson Development (Canada) Ltd and Securiguard Services Ltd. (No. 3)*, 2005 BCHRT 302 at para 464: “The interrelationship between a number of intersecting grounds of discrimination is sometimes described as “intersectionality””. The intersectionality of human rights complaints mitigates against early prejudgement of issues before there is a complete record of evidence.

iii. Preliminary Nature of Any Decision by the Commission

[214] There are other reasons why the Commissioners may wish to take a modest approach to the extent of their decisions to refer and their written reasons once convinced referral of a complaint is appropriate. The parties may frame the issues differently at the hearing than they did at the Commission stage. An example here is Ms. Jorge’s argument, in response to Canada Post’s objection to her motion, that some of her retaliation allegations (those that pertain to the time period before she filed her complaint) should be characterized

and dealt with as examples of discrimination and not retaliation, as suggested in the original complaint. Further, the Tribunal may frame or organize the issues differently. There is no obligation on the Tribunal to accept any party's framing of the issues. Neither the Commission, nor any other party, can assume that the investigation stage crystallizes the issues in some final way. That happens in the course of the hearing. It makes sense for the Commission to exercise prudence by limiting its decision to what it truly needs to decide. This, of course, is subject to the adequacy of its reasons, which is not an issue that this Tribunal can decide.

[215] As an aside, when the Commission makes a decision to dismiss a complaint prior to investigation, the statute expressly requires in section 42(1) that the notice of the decision include reasons for its decision, an express statutory requirement that is absent when the Commission makes a decision following investigation. This may possibly provide context for the relatively brief nature of decisions by the Commission to refer a complaint for inquiry, but the Tribunal cannot speak for the Commission respecting a matter such as this, that lies within the Commission's discretion.

(iii) Considering the History of the Complaint

[216] In this case, I reached the conclusion that there is no conflict between the Commission's letter to the Tribunal of February 25, 2019 and the Commissioners' decision of August 1, 2018 to the parties and no ambiguity in the Commissioners' decision. Nonetheless, I will address Canada Post's broader submission that the Tribunal should look at the history of the complaint for context to resolve the alleged conflict and ambiguity. All parties agreed that there are appropriate circumstances for the Tribunal to consider the history of the complaint. However, they disagreed about in what circumstances and manner this should occur.

[217] As explained, when Canada Post refers to the history of the complaint, they are really relying on the Investigation Report. Some of Canada Post's submissions in this regard have already been addressed. For example, I have explained that the Investigation Report is not a decision, only a recommendation. It is, therefore, not part of the record of decisions at the

Commission stage. There is no evidence or basis to infer in this case that it ought to be treated as a *de facto* decision, in part. The Investigation Report is not part of the decision of the Commission because it was not adopted by the Commissioners.

[218] What remains to be addressed is the case law relied upon by Canada Post, namely the decision of the Federal Court in *Murray* and the decisions of this Tribunal in *Canadian Postmasters* and *Oleson.* Canada Post submits that the Tribunal can "review the larger context of the complaint history" at para 29 of its submissions and asks the Tribunal to consider the Investigation Report on this basis. However, the Tribunal views these cases as distinguishable from this case.

[219] In *Murray*, the history of the complaint was not only highly relevant, it was determinative of what had been referred for inquiry to the Tribunal. Justice Hanson of the Federal Court had decided the parameters of the complaint to be investigated at an earlier stage of the process via judicial review. The Commission could not refer more than what it was permitted to investigate by the Federal Court. The Tribunal could not ignore the Federal Court's ruling about what issues had been left with the Commission to investigate. A decision of the Federal Court is binding upon the Commission and the Tribunal. The limited issues that the Commission was ordered to investigate by the Court was the most that could be referred to the Tribunal.

[220] The Tribunal acknowledges that the Federal Court did indicate at paragraphs 54 and 67 of its decision that it was appropriate to consider the history of the complaint. However, this statement must be taken in context. By "the history", the Federal Court meant the history of the binding decision it had previously made about the scope of the complaint. This is not at all the same as a decision to consider (as the history of the complaint) earlier documentation generated during the investigation stage by staff of the Commission to assist the Commissioners in making their decision. Decisions should be considered, if relevant. The initial findings of the investigation are not relevant post-Commission decision unless adopted by the decision.

[221] In *Canadian Postmasters*, the Commission decided to refer a complaint to the Tribunal without any investigation, following consideration of what is known as a Section

41/49 Report. This Section 41/49 Report is a recommendation. The Commission has the authority to refer complaints to the Tribunal without investigation pursuant to section 41 and 49 of the Act. Like the circumstances here, a decision of the Commission to refer the matter for inquiry was sent to the parties. A referral letter was also sent to the Tribunal conveying the Commission's decision. Unlike this case, the decision the Commission sent to the parties expressly limited what was referred for inquiry to "only… the allegations prior to March 30, 1997". The referral letter sent to the Tribunal did not.

[222] Canada Post submits at paragraph 23 of its submissions that the Tribunal in *Canadian Postmaster* followed *Murray* in looking at the history of the complaint, which included the Section 41/49 Report (recommendation), the referral letter to the parties and the Commission's Section 41/49 Record of Decision. Canada Post submits that the Tribunal's consideration of the Section 41/49 Report in *Canadian Postmasters* demonstrates how the Tribunal should rely on the Investigation Report in the current case to determine the scope of the complaint.

[223] Unlike the situation here, the Tribunal in *Canadian Postmasters* found that the decision of the Commission adopted the Section 41/49 Report. The decision adopted that Report in its entirety. The Report, therefore, was incorporated into the Commission's decision and became its decision. It was entirely appropriate for the Tribunal to consider the adopted content in the Commission's decision, in keeping with *Murray*.

[224] The Tribunal does not agree that *Canadian Postmasters* stands for the proposition that it is proper for the Tribunal to review a recommendation to the Commission that was not adopted in considering the history of the complaint or to base a decision regarding the scope of the complaint upon it.

[225] It is acknowledged that *Canadian Postmasters* held at paragraph 48 that the *Murray* decision "clearly states that the Tribunal can look at a history of a complaint" in deciding the scope of a complaint. At first blush, the Tribunal in that case appears to have considered more than just the Commission's decision as the procedural history of the case. At para 48 the Tribunal stated that it "cannot ignore the procedural history and steps taken, both at the Commission and between the parties…." For the reasons explained above, this Tribunal

does not agree that *Murray* stands for the permissibility of review of any and all documentation relevant to the history of the complaint, if that is what was intended by the Tribunal's statement in *Canadian Postmasters*. This Tribunal does not agree with an open-door approach to the review of the prior history of a complaint that is not part of the formal record of decision-making by the Commission.

[226] I make no determination respecting whether it may be appropriate to consider, as prior history to the complaint, a formal agreement on the record between the parties, such as binding Memorandums of Agreement, as was also the case in *Canadian Postmasters*. The Tribunal in that case did not explain why the Memorandums of Agreement should be considered in addition to the Commission's decision or identify what additional relevant information they included. I decline to endorse the review of documents outside of formal decisions by the Commission without understanding the rationale for returning to documents that pre-date the Commission's final decision respecting what was referred for inquiry. In any event, it may be the case that these memorandums were not given their own separate consideration by the Tribunal. The Tribunal also stated at para 48 "…the procedural history and steps taken, both at the Commission and between the parties, such as Memorandums of Agreement, all… is explained in the Commission's Section 41/49 Report", which Report was incorporated into and became part of the Commission's decision.

[227] In short, consideration of documents that are not binding decisions could lead to mischief such as the Tribunal inaccurately re-interpreting or changing the Commission's reasons for decision or the Tribunal making decisions it has no authority to make over the decisions and processes followed by the Commission. This Tribunal believes that the Federal Court in *Murray* held that the prior history of *decisions* made about a complaint must be reviewed by the Tribunal if they are relevant.

[228] *Oleson* is also distinguishable. On the facts in *Oleson*, the Commission expressly stated in its decision to the parties to refer the complaint that the evidence did not support allegations of discrimination in the complaint respecting certain protected characteristics. The letter of referral to the Tribunal did not contain this limitation. The Commission and the respondent successfully argued that the Commission's letter requesting that the Chair institute an inquiry could not be looked at in isolation from the Commission's decision to the

parties. With this proposition, this Tribunal agrees. Again, *decisions* made about a complaint should be reviewed by the Tribunal if they are relevant at the inquiry stage.

[229] Neither *Murray* nor *Oleson* stand for the proposition that an Investigation Report is, in all cases, to be considered in deciding the scope of what was referred to the Tribunal. In *Murray*, the facts are that the Commission expressly endorsed the recommendations in the Investigation Report in its decision to the parties. At para 65, the Federal Court noted that, in informing the parties of its decision, the Commission "specifically reiterated Mr. Steacy's recommendations". Mr. Staecy was the investigator. His recommendations were re-stated in the Commissioners' decision and were thereby specifically adopted by the Commissioners. There was a conflict between the Commission's decision and the Commission's letter to the Tribunal requesting the inquiry. The latter made no mention of any limitation upon the complaint. In resolving this conflict, the Federal Court did not consider the Investigation Report. The Federal Court considered the decision of the Commission that was sent to the parties that adopted the Investigation Report by restating the investigator's recommendations.

[230] In *Oleson*, the Commission's decision to the parties stated that the Commission accepted the findings of the Investigation Report. This included that the decision expressly accepted an excerpt from the Investigation Report with a specific finding that certain allegations were not supported by the evidence and that, accordingly, there was no basis to proceed with those allegations. In *Oleson*, the Tribunal in effect indicated at para 41 that it did not consider the Investigation Report as a stand-alone investigation report to determine the scope of the complaint. The findings in the Investigation Report had become the decision of the Commission in clear language from the Commission. It is on that basis that content originally in the Investigation Report was considered as part of the history of the complaint in determining the scope of the complaint before the Tribunal.

[231] In this case, the findings in the Investigation Report did not become the decision of the Commissioners. For these reasons and those stated earlier, the Tribunal declines to consider the Investigation Report and declines to make a decision limiting the scope of the complaint based upon it. If Canada Post wished to have the Commissioners' decision considered in light of the Investigation Report, it was for the Federal Court to consider the

official record of the proceeding before the Commission and for the Court to assess the Commissioners' decision in that light.

(iv) *Expressio unius est exclusio alterius*

[232] Before leaving the issue of the alleged ambiguity and its requested interpretation, the Tribunal turns to the principle of *expressio unius est exclusio alterius* relied upon by Canada Post. Canada Post submits that, since the Commissioners' decision did not specifically mention any other allegations raised in the complaint, the other allegations ought to be automatically excluded from the referral. To be applicable, even as a theory or tool to interpret a quasi-judicial decision, Canada Post would need to establish that there was an ambiguity upon which this principle could operate to resolve the ambiguity. It is the finding of this Tribunal that there is no ambiguity to which this principle could apply because there is an insufficient basis to conclude that the Commissioners may have intended to only refer two allegations in the complaint.

[233] I am not convinced that this principle has a role to play in this case in any event. This principle of interpretation is applicable to statutes. Statutes are rules that apply in many different factual situations. It can make sense for legislators to create a definitive list. Principles of statutory interpretation are applied to statutory instruments because statutory rules do not explain their reasoning or necessarily the mischief they are intended to rectify. In contrast, at issue here is a decision written in prose by a public body that is supposed to explain their thinking in one particular case. It is a document that expresses the decision-makers' exercise of discretion in communicating the decision. I am not persuaded that it is appropriate to apply this principle of statutory construction in interpreting reasons of a decision of this nature by a public body in one particular case.

(v) Final Comments

[234] Canada Post's position is also untenable because, if accepted, it continues to import standing to the investigator's findings. The officer made their own findings in the

Investigation Report. These findings do not influence the Tribunal process. It is the Tribunal that makes final findings as to what occurred following a new and separate process.

[235] Canada Post's submissions also have implications for procedural fairness. A respondent cannot in fairness to the complainant rely upon the Investigation Report to protect itself from liability anymore than a complainant can rely on an Investigation Report to prove their case against the respondent.

[236] Canada Post's urging that this Tribunal review the documentation leading to the Commissioners' decision looks and feels very much as if the Tribunal is being asked to judicially review the Commissioners' decision, as opposed to being asked to apply the Commissioners' decision to delineate the scope of the complaint. The Tribunal is being asked to review the information collected during the investigation i.e. the record of the investigation proceeding, as it were, and the opinion of the investigating officer, and to analyze the Commissioners' decision on the basis of that Report and the investigator's opinion. The Tribunal cannot do this without engaging in a form of judicial review.

[237] Canada Post had notice that it could seek judicial review of the Commissioners' decision. There are many examples of judicial review of the Commissioners' decisions. If the Commissioners make a decision that contradicts other information on the record in an unexplained manner, that leads to issues about the reasonableness and justifiability of the Commissioners' reasons for decision: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65; for example, as applied in *Ennis v. Canada (Attorney General),* 2020 FC 43 at para 18; and *Halifax Employers Association v. Farmer,* 2021 FC 145 ("*Halifax Employers Association*"). In *Halifax Employers Association,* at para 37-38, the Federal Court upheld a respondent's complaint that the reasons explaining why the Commissioners rejected the Investigation Report were inadequate. That is exactly the kind of issue the courts assess on judicial review and that was the proper forum.

[238] In addition to the option of a judicial review, there may be scope for parties to request clarity from the Commissioners without violating the *functus officio* principle if the decision truly is ambiguous: See Sara Blake, *Administrative Law in Canada*, 6th ed (LexisNexis Canada), s. 4.53 citing *Nova Scotia Government and General Employees Union v. Capital*

District Health Authority, 2006 NSCA 85 ; *Severud v. Canada (Employment and Immigration Commission)*, [1991] 2 FC 318 (FCA).

[239] The Tribunal understands that Canada Post does not agree with the Commissioners' decision to refer the complaint, or, does not agree that the Commissioners decided to refer the complaint in its entirety to the Tribunal. However, it is not for the Tribunal to engage in a review of the reasonableness or justifiability of the Commissioners' reasons for decision.

VI. Issue 3: Whether Certain Allegations in Ms. Jorge's Statement of Particulars Should be Struck

[240] The last issue is whether certain allegations in Ms. Jorge's Statement of Particulars should be struck because they pre-date the starting date of discrimination identified on the complaint form in the original complaint. As explained, the content that Canada Post wishes to strike from Ms. Jorge's Statement of Particulars on this basis is content that Ms. Jorge wishes to add to her amended complaint. This is why this issue is being determined now.

[241] In this regard, paragraphs 7, 8, 12, 13, 16 and 17 of the Statement of Particulars are in issue. Those paragraphs read as follows:

> 7. On February 16, 2012, Jorge met with R. Carey, her supervisor, J. Wastell, the Union President, to discuss Jorge's modified duties. During this meeting, it was decided that Jorge could not work without the assistance of another RSMC.
>
> 8. Between February 17 to 27, 2012, Jorge had difficulty completing her deliveries. Jorge brought these concerns to Carey, who advised her to complete the stops to the best of her ability.
>
> 12. Between February 28, 2012 and April 26, 2012, due to the severity of her medical conditions, Jorge required time off work.
>
> 13. As a result of her time off, the Respondent's pay system created several errors with respect to her pay. Neither Jorge, nor Jorge's union were able to resolve the errors. Jorge received some benefits from WSIB, which also created issues with her pay, which went unresolved.
>
> 16. Jorge was provided with non-prescription gloves that were too big and prevented Jorge carrying out the essential functions of her position.

> 17. Further, Jorge was not provided with the assistance of another RSMC to perform her modified duties.

[242] Canada Post does not object to content in these paragraphs that will be used for the purpose of providing background or context. Ms. Jorge objects to any limits upon her use of the content in her Statement of Particulars. In my view, if a paragraph is truly only relevant as background, it should not be struck. The first consideration, therefore, is whether any of these paragraphs only assert facts as background to alleged discrimination.

[243] Paragraph 7 asserts that there was a discussion on February 16, 2012 about Ms. Jorge's modified duties and that it was agreed that Ms. Jorge could not work without the assistance of a co-worker. From content in later portions of the Statement of Particulars it seems that the alleged failure of Canada Post to accommodate Ms. Jorge includes a lack of co-worker assistance. Therefore, whether on February 28, 2012 there was a decision that the assistance of a co-worker was required is a material fact. If this fact is proven, it is consistent with Canada Post being engaged to some extent in an accommodation process, at least initially. Paragraph 7 contains no example of any alleged failure to accommodate or allegation to this effect. Accordingly, this paragraph only provides relevant factual background to the allegation that there was a failure to accommodate. The paragraph should not be struck.

[244] Paragraph 12 provides what appears to be the first dates that Ms. Jorge was unable to work due to her alleged disability, or her first significant period of absence. As explained, it appears that Ms. Jorge came back to work on April 27, 2012. As indicated, the alleged "start date" of discrimination on the complaint form is May 2012. Dates of absences are material facts. They are not allegations. Here, they constitute important background facts. Paragraph 12 should not be struck.

[245] Paragraphs 13, 16 and 16 contain allegations that Canada Post failed to resolve various pay errors, failed to provide appropriate gloves said to be required by reason of Ms. Jorge's disability and failed to arrange for the assistance of a co-worker. Paragraphs 13, 16 and 17 contain no dates. However, Canada Post alleges that these allegations pre-date May 2012 and should be struck.

[246] There is no content in these paragraphs to indicate that the events in question occurred before May 2012. Canada Post has not established that these events occurred prior to May 2012. The basis upon which Canada Post alleges that these events occurred before May 2012 is unstated.

[247] Ms. Jorge is described as having been off work for an extended period from February 28 until April 27, 2012. Given that Ms. Jorge's medical leave occurred immediately before May 2012, it seems highly unlikely that the types of events described in these paragraphs could have occurred on or after April 27, 2012, when she returned, but before May 1, 2012. If this was the case, the burden was on Canada Post to establish this, which it has not done. Furthermore, Ms. Jorge' s Statement of Particulars refers to allegations of the nature stated in these paragraphs on more than one occasion. These appear to be issues that are alleged to have continued over a prolonged period after the start date of the alleged discrimination. Paragraphs 13, 16 and 17 should not be struck.

[248] This leaves paragraph 8. The events in this paragraph are described as having occurred between February 17 to 27, 2012. This paragraph therefore pertains to events that allegedly occurred prior to the start date of discrimination stated on the complaint form, which was May 2012.

[249] Additional explanation about paragraph 8 was not provided with the motion or in response. As mentioned, Ms. Jorge did not agree that any of these paragraphs, including paragraph 8, would only be used as background and, therefore, I assume she may be interested in alleging that some of the events described in this paragraph are part of a discriminatory practice.

[250] The paragraph states that when Ms. Jorge notified her supervisor in February 2012 that she had difficulty completing her deliveries, he advised her to "complete the stops to the best of her abilities". The paragraph could imply that Ms. Jorge believes that the supervisor was required to have done something more. On the other hand, if the appropriate accommodations required time to implement, Canada Post may argue that the supervisor did provide interim accommodation to Ms. Jorge by giving her permission to self-regulate her activity on the job until other accommodations could be put in place. Either way, the

content of paragraph 8 includes content that could be relevant to the issue of liability. I conclude that paragraph 8 does not include only content that could be background.

[251] The potential allegation in paragraph 8, if proven, occurred prior to the start date on the complaint form. Accordingly, this paragraph is only permitted to remain as background. The Tribunal will not consider any alleged discrimination against Ms. Jorge between February 17-27, 2012 in determining liability or in assessing remedy. Likewise, the Tribunal will not consider arguments that Canada Post may wish to make based on paragraph 8 in determining liability or assessing remedy. The paragraph is only relevant background to the beginning of the accommodation process in the period before Ms. Jorge began a medical leave. Paragraph 8 can remain in Ms. Jorge's Statement of Particulars on this basis.

VII. Orders Granted

[252] Ms. Jorge is permitted to amend her complaint as directed in accordance with Schedule B to her motion. Canada Post's request to limit the scope of the complaint is denied. Other related requests by Canada Post as described above are adjourned on the basis that they would be better addressed at the hearing. Canada Post may raise those issues at the hearing, if it wishes. None of paragraphs 7, 8, 12, 13, 16 and 17 in Ms. Jorge's Statement of Particulars are to be struck. The purpose of paragraph 8, however, is limited to that of background to the complaint.

[253] It is ordered that Ms. Jorge amend her complaint in accordance with Schedule B to her motion by August 30, 2021.

Signed by

Kathryn A. Raymond, Q.C.

Tribunal Member

Ottawa, Ontario
August 6, 2021

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T2363/2219

Style of Cause: Noella Jorge v Canada Post Corporation

Ruling of the Tribunal Dated: August 6, 2021

Motion dealt with in writing without appearance of parties

Written representations by:

Heather J. MacDougall, for the Complainant

Julie Hudson, for the Canadian Human Rights Commission

Shaffin Datoo, for the Respondent