

Canadian Human
Rights Tribunal



Tribunal canadien
des droits de la personne

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T2310/6518, T2327/8218, T2328/8318, T2378/3719, T2379/3819

Between:

Tracy Mercier

Complainant

Aleksandra Besirovic et al.

Complainants

- and -

Canadian Human Rights Commission

Commission

- and -

Correctional Service of Canada et al.

Respondents

Ruling

Member: Colleen Harrington

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I. Introduction

[1] On August 15, 2016, Tracy Mercier (Complainant) filed a human rights complaint with the Canadian Human Rights Commission (Commission) against her employer, Correctional Service of Canada (CSC or Respondent). The complaint alleges discrimination and harassment on the basis of her race, sex and disability.

[2] Human rights complaints against federally regulated respondents made pursuant to the *Canadian Human Rights Act*, RSC 1985, c H-6 (*CHRA*) are filed with the Commission, which screens the complaints to determine whether they should be referred to the Tribunal for an inquiry. Section 40(4) of the *CHRA* gives the Commission the authority to refer more than 1 complaint against a common respondent to the Tribunal for a single inquiry if it is satisfied that they involve substantially the same issues of fact and law. This is what the Commission did in Ms. Mercier's case.

[3] Between June 29, 2018 and May 3, 2019, the Commission referred 24 complaints made by 9 complainants against 9 different respondents to the Tribunal for a single inquiry. The complainants are all female employees of CSC, and allege discrimination and harassment by various respondents, including CSC, the Union of Canadian Correctional Officers (UCCO), and several individuals. CSC is the only common respondent for all 9 complainants. Ms. Mercier's complaint against CSC was referred to the Tribunal as part of this group on June 29, 2018, and hers is the only complaint made against a single respondent.

[4] I understand that there is both a civil suit to which not all complainants are parties (Ms. Mercier is not), as well as a class action, running parallel to the human rights proceedings. These separate proceedings are related to the allegations underlying this group of 24 complaints of which Ms. Mercier is a part.

[5] Upon being asked by the Commission to inquire into a complaint, it is the Tribunal's practice to ask the parties if they wish to engage in Tribunal-assisted mediation. I understand that this group of complaints has been at the mediation stage since being referred to the Tribunal by the Commission. Ms. Mercier says that her complaint has been held in abeyance

since December of 2019, when she indicated she was not interested in participating in mediation and wished to proceed with her complaint separately.

[6] In December of 2021, (then Acting) Chairperson Khurana appointed me to case manage these complaints. On December 13, 2021, Ms. Mercier made a Motion to sever her complaint from the group referred jointly to the Tribunal. She wants her complaint to proceed through case management and to a hearing on its own. The Tribunal reached out to all 9 of the respondents involved in the 24 complaints, as well as to the other 8 complainants and the Commission, inviting their submissions on Ms. Mercier's Motion to sever her complaint. Only the Commission and CSC provided submissions, while legal counsel representing 6 of the other complainants wrote to indicate they did not intend to take a position on the Motion. The respondent UCCO wrote to advise that it did not wish to make submissions with regard to the Motion or the Commission's submissions. No other parties responded.

[7] The Commission does not oppose Ms. Mercier's Motion. The Respondent CSC does oppose the Motion and asks the Tribunal to dismiss Ms. Mercier's request to sever her complaint.

II. Decision

[8] I agree to sever Ms. Mercier's complaint against CSC from the group of complaints referred by the Commission for a single inquiry, so that it may continue through the Tribunal's process on its own.

III. Preliminary Issue

[9] On the date that it was supposed to provide its response to the Motion to sever, CSC wrote to the Tribunal to object to certain information that was included in Ms. Mercier's Motion submissions. Specifically, CSC alleges that Ms. Mercier included information that is subject to settlement privilege, as it "refers to the process of, and the discussions that took place at, the attempted mediation of systemic issues in 2020." CSC highlighted the specific portions of Ms. Mercier's submissions that it says are in breach of the agreement to mediate. This includes nearly every reference to mediation in her submissions.

[10] CSC requested that Ms. Mercier's Motion materials be removed from the Tribunal's public record. It asked that she be required to revise and resubmit her Motion, following which it would provide its submissions in response.

[11] Ms. Mercier replied to CSC's objection, stating that she did not believe that any of the references to mediation in her Motion breached the confidentiality clause agreed to by the parties prior to mediating. This clause stated that "all information exchanged during mediation will be treated as strictly confidential by the parties." She says most of the information related to mediation that she included in her Motion refers to the process of organizing the mediation, which was not confidential. Ms. Mercier says the only other non-process-related information she disclosed was about how she was treated during the mediation, which does not reveal any "information exchanged during mediation."

[12] The Commission takes the position that the Tribunal needs to know about Ms. Mercier's experience with the mediation process in order to make a fully informed decision because this information is "foundational" to her Motion. It agrees with Ms. Mercier that most of the text that CSC considers objectionable in her Motion relates to the mediation process rather than the content of mediation discussions, with the exception of one paragraph found on page 2 of her Motion submissions.

[13] The Commission proposed a solution to avoid further delay. It suggested that, because CSC's objections relate to the public forum, the Tribunal could seal all of the submissions related to CSC's objection, as well as Ms. Mercier's Motion submissions. The parties could then continue to file their submissions and the Tribunal could decide on CSC's objection when ruling on the merits of the Motion.

[14] In the interest of proceeding expeditiously and fairly to all parties, I agreed to proceed as proposed by the Commission. The relevant submissions were sealed pending this Ruling.

[15] The *CHRA* allows the Tribunal to "receive and accept any evidence and other information, whether on oath or by affidavit or otherwise, that the member or panel sees fit, whether or not that evidence or information is or would be admissible in a court of law" (section 50(3)(c) *CHRA*). However, the *CHRA* sets out an exception at section 50(4), stating

that the Tribunal “may not admit or accept as evidence anything that would be inadmissible in a court by reason of any privilege under the law of evidence.” This includes information that is subject to settlement privilege.

[16] Prior to assisting the parties with mediation, the Tribunal requires anyone who will be participating in the mediation to sign an Agreement to Mediate. This Agreement states that all information acquired during the mediation is intended by the parties to be without prejudice and is to be treated as strictly confidential. This includes any written or verbal communications made in the course of the mediation.

[17] A party’s decision about whether to take part in a Tribunal-assisted mediation is not in itself confidential or subject to settlement privilege. In a case such as this, involving many complainants alleging systemic discrimination, it is not unexpected that the parties would be trying to resolve the systemic issues through mediation.

[18] This group of complaints has been in the mediation process for nearly the entire time it has been at the Tribunal, except for Ms. Mercier’s, which has been held in abeyance for approximately 2 years. Ms. Mercier’s decision to not engage in mediation is relevant to her Motion to sever. So is the then-Chairperson’s decision to hold her complaint in abeyance while the other complaints continued in mediation. Ms. Mercier argues that she has been prejudiced by the delay she has experienced relating to the mediation of the other complaints.

[19] Most of the references to mediation highlighted by CSC in the Motion to sever relate to the mediation process and Ms. Mercier’s experience with the process. Most do not concern written or verbal communications made in the course of, or information exchanged in, the mediation. However, I do agree that the portion identified by the Commission on page 2 of Ms. Mercier’s Motion should be redacted. In order to ensure no privileged information is disclosed in this proceeding, all references to this section of text on page 2 of her Motion submissions - which consists of 3 sentences starting with “For example” and ending with “systematic remedies” - shall be redacted by the Tribunal from all materials filed in the Tribunal’s public record. I have not considered the content of these 3 sentences in making

my decision to sever Ms. Mercier's complaint. Once this information has been redacted by the Tribunal, all records will be unsealed and placed on the public record.

IV. Legal Framework

[20] The Tribunal has previously decided that it has the jurisdiction, as master of its own proceedings, to consider an application to sever complaints referred to it jointly by the Commission under section 40(4) of the *CHRA*. "If it becomes apparent, after a single inquiry has been instituted, that continuing to proceed jointly would not be expedient or procedurally fair, the Tribunal should have the discretion to consider an application to sever the complaints" (*Gullason and Attaran v. Tri-agency Institutional Programs Secretariat*, 2018 CHRT 21 (CanLII) [*Gullason*] at para 41).

[21] All parties agree that, when a request to sever a complaint is received, the Tribunal should consider and apply the following non-exhaustive list of factors to determine whether the complaints should continue to proceed together or not:

- A) Whether there are common issues of fact or law;
- B) The public interest in avoiding a multiplicity of proceedings, including consideration of expense, delay, the convenience of the witnesses, reducing the need for the repetition of evidence, and the risk of inconsistent results;
- C) The potential prejudice to the complainants that could result from a single hearing, including the lengthening of the hearing for each complainant as issues unique to the other complainants are dealt with, and the potential for confusion that may result from the introduction of evidence that may not relate to the allegations specifically involving one complainant or the other.

(*Lattey v. Canadian Pacific Railway*, 2002 CanLII 45928 (CHRT) [*Lattey*] at para 13; *Gullason* at para 51).

[22] The balancing of these factors should be done on a case-by-case basis.

V. Positions of the Parties

[23] Ms. Mercier's human rights complaint alleges that she was sexually assaulted on more than one occasion by a fellow correctional officer at the Mountain Institution, a federal

penitentiary near Agassiz, British Columbia. She alleges that CSC failed to protect her and provide her with a harassment-free workplace. Ms. Mercier says that having to continue to be around this co-worker resulted in her leaving the workplace due to anxiety and mental stress. She does not feel that CSC took her complaint against her co-worker seriously and believes she has been treated differently from others in similar circumstances because she is Indigenous. She says her employer failed to accommodate her when it knew her mental health was deteriorating, that it failed to provide her with a harassment-free workplace, and that it intimidated her and treated her differently when she made her complaint. It appears that she remains off work for medical reasons, without pay.

[24] Ms. Mercier says in her Motion that it has been more than 5 years since she filed her human rights complaint. She asks the Tribunal to allow her complaint against CSC to proceed to a hearing on its own.

[25] The Commission does not oppose Ms. Mercier's Motion to sever and says it is both expedient and fair to allow her to sever her complaint.

[26] CSC is opposed to Ms. Mercier's application to sever her complaint from the others. It argues that severing her complaint at this time is inconsistent with the requirement that the Tribunal's *Rules of Procedure* be interpreted and applied to secure the informal, expeditious and fair determination of every inquiry on its merits.

[27] CSC argues in the alternative that Ms. Mercier's Motion to sever is premature because the parties have not yet filed Statements of Particulars (SOP) that fully plead material facts, systemic allegations and the remedies sought. It argues that the Tribunal should have a sufficient factual foundation upon which to determine whether severance of this complaint is expedient and fair.

[28] The Commission disagrees with CSC's argument that the severance Motion is premature. It submits that the Tribunal has been asked to decide a preliminary, procedural matter and that it would be inefficient and unfair to wait until SOPs have been filed to consider this Motion.

[29] I agree with the Commission that Ms. Mercier's Motion need not wait to be determined until after the parties have filed their SOPs. This would only cause further delay for Ms. Mercier. She would also be required to review disclosure and submissions that are not relevant to her complaint, given the number of other parties involved in these complaints. The Commission is correct that delay is a central factor in the prejudice Ms. Mercier continues to experience and is a key consideration in this Motion. The information in the Tribunal's record, as well as the submissions of the parties to the Motion provide a sufficient factual foundation to assess the factors that should be considered in an application for severance, which are:

- A) Whether there are common issues of fact or law;
- B) The public interest;
- C) The potential prejudice to the Complainant that could result from a single hearing.

[30] Under the "public interest" factor, the Commission makes arguments not only about the public interest in avoiding a multiplicity of proceedings, which was considered in *Lattey* and *Gullason*, but also about other public interest considerations. This is appropriate, as the Tribunal previously stated that the factors are "non-exhaustive" and that they should be considered in relation to the circumstances of each particular case.

[31] The Commission argues that the factors of potential prejudice to the Complainant and the public interest should weigh most heavily when balancing all of the factors, and that they tip the balance toward the severance of Ms. Mercier's complaint.

[32] Ms. Mercier's position is that all 3 factors weigh in favour of severing her complaint from the others.

[33] CSC argues that a balancing of the 3 factors should lead to the conclusion that it would not be appropriate to sever Ms. Mercier's complaint without first having the common systemic allegations adjudicated as part of a single inquiry.

A. Common Issues of fact or law

[34] CSC says that, while the complainants may ultimately file SOPs with materially distinct allegations of fact, they all advance the common discriminatory grounds of sex and failure to provide a harassment free environment. It says the Commission referred Ms. Mercier's complaint to the Tribunal with the others because her allegations speak to the same possible systemic issues considered in the related complaints. These include a possible "toxic" organizational structure at CSC and whether its policies and practices are sufficient to prevent discrimination and harassment from occurring in its institutions.

[35] CSC argues that the only way to achieve an efficient and expeditious determination of the systemic allegations in these complaints is to hold a single consolidated inquiry into all of them.

[36] The Commission submits that, while the allegations contained in all of the group complaints are similar as they involve sexual harassment and violence carried out by male coworkers within CSC institutions, Ms. Mercier's complaint involves unique circumstances that could permit a natural separation from the others. For example, Ms. Mercier's is the only complaint where the alleged discrimination occurred at the Mountain Institution. The other complaints occurred at the Edmonton Institution.

[37] Ms. Mercier and the Commission both note that one of the incidents of sexual assault by a co-worker included in Ms. Mercier's complaint was caught on camera and that CSC's own investigation found the incident to have occurred. They say this distinguishes Ms. Mercier's complaint from several of the others where the alleged perpetrator is named as a respondent and the issue of whether sexualized conduct occurred may be disputed.

[38] The Commission also says that Ms. Mercier's complaint could be easily severed because CSC is the only respondent in her matter, while there are multiple respondents involved with the other complaints.

[39] Ms. Mercier says she is seeking different systemic remedies from the other complainants because her case relates to her Aboriginal status, and race is not a prohibited ground brought forward by the other complainants.

[40] The Commission argues that this factor is neutral in this case given that there are common threads amongst the complaints, but also a number of individualized circumstances in Ms. Mercier's complaint. As such, it argues that this factor does not tip the balance in favour of severing her complaint or keeping it joined with the others.

B. Public Interest

[41] CSC argues that severing Ms. Mercier's complaint from the others would result in a multiplicity of proceedings in the form of separate inquiries into complaints that the Commission has expressly stated "speak to the same possible systemic issues." It says this would result in the duplication of effort, increased expense and inconvenience. For example, it says that documents will have to be disclosed in more than one inquiry, and evidence will have to be repeated, sometimes by the same witnesses.

[42] Ms. Mercier disagrees with CSC. She says that, if her case goes to a public hearing before the other cases, any systemic remedies from her case will be publicly available to the other parties.

[43] Both Ms. Mercier and the Commission suggest that different witnesses would be required in Ms. Mercier's case because hers is the only complaint in which the alleged discrimination occurred at the Mountain Institution, which is in a different CSC operating region (Pacific) from the Edmonton Institution (Prairie).

[44] CSC also argues that there is a risk of the Tribunal reaching inconsistent conclusions about similar systemic allegations. With regard to this concern, the Commission proposes that the same Tribunal member could preside over all of the complaints to ensure familiarity with the evidence and to reduce the likelihood of an inconsistent analysis of common issues.

[45] The Commission also submits that it is in the public interest to ensure there is not a delay in hearing Ms. Mercier's complaint because it deals with allegations of sexual assault. It says it is important for complainants in cases involving allegations of a sexual nature to have some control over their complaints "in order to feel heard and to access justice." The Commission argues that adjournments and delays in legal proceedings cause worry and anxiety to victims as they await closure in matters that were very traumatic for them, and

this can revictimize survivors of such assaults. It argues that procedural delays can act as barriers to justice, potentially causing a chilling effect for others to come forward and report allegations of discrimination and harassment.

[46] The Commission also suggests that a different approach is required when deciding cases involving Indigenous complainants such as Ms. Mercier, in order to foster reconciliation.

C. Potential prejudice to the Complainant that could result from a single hearing

[47] Ms. Mercier notes that it has been more than 5 years since she filed her complaint and she wants her case to proceed as soon as possible. She says that she has Post-Traumatic Stress Disorder and feels the process is “actively re-victimizing” her. She is also concerned that, as more time passes, there will be less opportunity for the complainants to call witnesses who were involved in their cases as many of them may have retired from public service. She feels the procedural delay is benefitting CSC while re-victimizing the complainants.

[48] CSC submits that there is no prejudice to Ms. Mercier in having her systemic allegations determined as part of a consolidated proceeding and, in fact, that is the most efficient way to proceed. It says that, rather than delaying the hearing of Ms. Mercier’s individual complaint, a consolidated hearing of systemic allegations common to all complainants would proceed more quickly than if the Commission, CSC and the Tribunal are required to duplicate their efforts in more than one hearing.

[49] Ms. Mercier notes that the majority of the other complainants are involved in a civil lawsuit against CSC and so could have different strategies than her before the Tribunal. She says this could cause further delay and increase the complexity of the Tribunal proceedings for her. She also notes that she does not have a lawyer, unlike most of the other complainants, and this has led to her feeling “minimized” during the mediation process. She worries that, if she has to continue in a consolidated proceeding, she will continue to be left out of this process, which will be a significant injustice for her.

[50] The Commission submits that, as Ms. Mercier is the only complainant who filed a single complaint, if her matter remains joined with the others, it will be significantly lengthened by the presence of 8 additional respondents that have nothing to do with her matter. It argues that proceeding jointly will require Ms. Mercier to review what may be an onerous amount of disclosure relating to all of the other complaints.

[51] The Commission also submits that, because Ms. Mercier is still an employee of CSC, this adds urgency to having her complaint addressed to assist with her return to work, if possible. It argues that the “prolonged and continued delay in her matter is contrary to her well-being and will only prejudice her ability to have her matter heard.”

VI. Analysis

[52] Section 40(4) of the *CHRA* allows the Commission to request that the Chairperson of the Tribunal institute a single inquiry into more than one complaint if it is satisfied that the complaints involve substantially the same issues of fact and law. The Tribunal has concluded that, as master of its own proceedings, it can decide to sever complaints referred to it jointly if circumstances warrant this. There is nothing preventing the Commission from agreeing with a motion to sever, especially when circumstances have changed from the time it referred the complaints to the Tribunal.

[53] Nearly 4 years have passed since Ms. Mercier’s complaint was referred to the Tribunal in June of 2018. Ms. Mercier says she indicated by December of 2019 that she no longer wanted to participate in mediation but wanted to proceed with her complaint separately. Instead, her complaint was placed in abeyance, which meant she had to wait for the outcome of the mediation of the other complaints.

[54] It is clear that Ms. Mercier has already been prejudiced by having to proceed jointly with the other complaints for so long. It is unfair to expect her to wait any longer for her case to proceed. It is also contrary to section 48.9(1) of the *CHRA*, which requires the Tribunal to conduct its proceedings as informally and expeditiously as the requirements of natural justice and the rules of procedure allow.

[55] If all or even some of the complaints proceed to a hearing together, such a consolidated proceeding will necessarily be more complex and lengthier than if Ms. Mercier's complaint proceeds alone. Ms. Mercier would be required to receive and review on her own what I agree could be an onerous amount of disclosure relating to all of the complaints, including those involving several other respondents. She may face further delays if there are procedural matters or motions to be dealt with in those cases. As she stated, her witnesses could become unavailable if she has to continue to wait to deal with her complaint. The continued delay in her matter is also contrary to her well-being and possibly to her ability to return to work with CSC.

[56] I am not convinced that the issues in Ms. Mercier's case are so similar to the others that her complaint must proceed in a single inquiry, especially since the other complaints involve more than one respondent. I do not see the existence of similar systemic issues as being enough to tip the balance in favour of requiring Ms. Mercier to remain part of a single inquiry.

[57] While all of the complainants have filed complaints against CSC relating to their employment, CSC is a very large national organization, with institutions in many regions across Canada. Ms. Mercier's complaint is the only one where the alleged discrimination took place in the Pacific region, in a different correctional facility from the others. The institutional witnesses who will be called to testify about the individual aspects of her complaint will necessarily differ from those in the other complaints.

[58] CSC suggests some witnesses and evidence will be common to all of the complaints and so proceeding together to deal with these systemic issues will be more efficient. It is also concerned about the possibility of inconsistent conclusions being made about systemic allegations in different proceedings. There are ways to address CSC's concerns through the Tribunal's process. Having the same Tribunal member hear all of the complaints can ensure familiarity with the issues and evidence and reduce the likelihood of an inconsistent analysis of the common issues. I have already been assigned to case manage all of these complaints. A discussion may be had with the Tribunal regarding possible ways to be more efficient and not require the repetition of the same evidence in different proceedings.

[59] I agree that procedural delays generally are not in the public interest as they can act as barriers to justice not only for Indigenous complainants and those alleging sexual assault, but for others accessing, or considering whether to access, the human rights system as well.

[60] In this case, the prejudice that Ms. Mercier continues to experience by having to wait for her complaint to proceed to a hearing outweighs any inefficiencies that may result from her case being heard separately from the others.

[61] It is in the public interest for complaints of discrimination to be dealt with expeditiously. The way to achieve this in Ms. Mercier's case is to sever it from the others so that her complaint may proceed to a hearing on its own. Deadlines for SOPs and the disclosure of documents will be provided by the Tribunal separately from this Ruling.

Signed by

Colleen Harrington
Tribunal Member

Ottawa, Ontario
June 7, 2022

Canadian Human Rights Tribunal

Parties of Record

Tribunal Files: T2311/6618, T2292/4718, T2293/4818, T2294/4918, T2295/5018, T2296/5118, T2297/5218, T2298/5318, T2299/5418, T2300/5518, T2301/5618, T2302/5718, T2303/5818, T2304/5918, T2305/6018, T2306/6118, T2307/6218, T2308/6318, T2309/6418, T2310/6518, T2327/8218, T2328/8318, T2378/3719, T2379/3819

Style of Cause: Tracy Mercier and Aleksandra Besirovic et al. v Correctional Service of Canada et al.

Ruling of the Tribunal Dated: June 7, 2022

Motion dealt with in writing without appearance of parties

Written representations by:

Tracy Mercier, for herself

Sonia Beauchamp, Julie Hudson & Anshumala Juyal, for the Canadian Human Rights Commission

Graham Stark, for the Respondent CSC