Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2022 CHRT 31
Date: September 27, 2022
File No(s).: T2526/8320

[ENGLISH TRANSLATION]

Between:

Cyrille Raoul Temate

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Public Health Agency of Canada

Respondent

Ruling

Member(s): Gabriel Gaudreault

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I. Background to Motions

[1] This proceeding is still at an early stage. The Complainant, Cyrille Raoul Temate ("Mr. Temate"), and the Canadian Human Rights Commission ("Commission") filed their Statements of Particulars ("SOPs") a few months ago.

[2] Before it even filed its own SOP, the Respondent, the Public Health Agency of Canada ("Agency"), filed a motion with the Canadian Human Rights Tribunal ("Tribunal") asking it to strike several allegations in the Complainant's SOP.

[3] The Commission and Mr. Temate object to that motion. In so doing, they have asked the Tribunal to instead expand the scope of the complaint to add new facts, a new prohibited ground of discrimination, namely, disability, as well as new discriminatory practices, namely, harassment in matters related to employment and retaliation under paragraph 14(1)(c) and section 14.1 of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 ("CHRA") respectively.

[4] The Tribunal has already informed the parties that it will deal with the two motions jointly because the motion to expand the complaint and the motion to strike allegations are closely related. The Tribunal finds that it is much more efficient and consistent to deal with the two motions together.

II. Issues

[5] The Tribunal must decide whether it should strike all or part of certain allegations in Mr. Temate's SOP at the Respondent's request and limit the scope of the complaint, or whether it should expand its scope at the request of the Commission and Mr. Temate and authorize the amendments requested.

III. Legal Basis

A. Expanding Scope of Complaint and Striking Allegations

[6] In *Levasseur v. Canada Post Corporation*, 2021 CHRT 32 (CanLII) [*Levasseur*], the Tribunal wrote that the legal foundation for determining the scope of a complaint is inevitably

the same as that applied to dealing with motions to strike (*Levasseur*, at para 7). In other words, regardless of whether the Tribunal is dealing with a motion to strike allegations in an SOP or a motion to expand the scope of a complaint, the same legal principles apply (*AA v. Canadian Armed Forces*, 2019 CHRT 33 (CanLII), at para 55 [*AA*]).

[7] In *Levasseur*, the Tribunal summarized those main principles at paragraphs 9 to 17 and 22. It wrote the following:

> [9] The principles guiding the Tribunal in this matter are well established (see, for example, *AA*, at paragraphs 56 to 59; *Karas v. Canadian Blood Services and Health Canada*, 2021 CHRT 2, at paragraphs 9 to 31 [*Karas*]; *Casler v. Canadian National Railway*, 2017 CHRT 6, at paragraphs 7 to 11 [*Casler*]; *Gaucher v. Canadian Armed Forces*, 2005 CHRT 1, at paragraphs 9 to 13 [*Gaucher*]).
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> [10] The procedure through which litigants can file a complaint regarding discriminatory practices within the purview of matters coming within the legislative authority of Parliament is set out in the CHRA. It is the Commission's role to, among other things, receive and investigate complaints (subsections 40(1) and 43(1) of the CHRA), a role that distinguishes the Commission from the Tribunal, whose role it is to institute inquiries into the complaints referred to it (subsections 44(3), 49(1) and 50(1) of the CHRA).
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> [11] The process is triggered by the filing of a formal complaint with the Commission through a specific form. In that form, the complainant describes the events that, in the complainant's opinion, led to the alleged discriminatory practices. The complainant thus provides a review of their version of the facts leading them to believe that they are, or have been, a victim of discrimination, as of the date of filing of the complaint. The discrimination may be ongoing or persistent, depending on the circumstances described.
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> [12] After investigating, the Commission determines whether the circumstances justify the complaint being referred to the Tribunal (subsection 49(1) of the CHRA) and, as required, sends a letter to the Chairperson of the Tribunal to that effect. The parties receive a separate letter confirming that the complaint has been referred for inquiry. If the Commission does not express any limitations or exclusions in its letter to the Tribunal Chairperson, and unless the Commission instructs otherwise, the Tribunal assumes that the complaint has been referred in its entirety.
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> [13] The jurisprudence also recognizes that the Commission's letter is not the only tool the Tribunal has at its disposal to determine the scope of a complaint. The parties' statements of particulars, filed right at the beginning of the proceeding before the Tribunal, are the constituent procedural vehicle

underlying the complaint. The SOP clarifies, refines and elaborates on the alleged discrimination, and it is inevitable that new facts or new circumstances are revealed after the initial complaint is filed. It follows that complaints can be refined.

[14] Since the SOP is the procedural vehicle used in the Tribunal's inquiry, the original complaint filed before the Commission and forms such as the complaint summary and other administrative documents are not pleadings as such during the inquiry stage.

[15] It does not follow that an SOP may include aspects that have no logical connection to the complaint filed by the complainant. In fact, the substance of an SOP must reasonably respect the factual foundation and the allegations set out in a complainant's initial complaint. And when the Tribunal receives a motion to modify, amend or expand the scope of a complaint or, as in this case, a motion to narrow the scope of the complaint or to strike certain items, it must use the tools and the material at its disposal to rule on the issue.

[16] So, to decide on this issue, the Tribunal must necessarily determine the substance and the scope of the complaint before it. It therefore has to examine the material and the submissions it has received, determine the scope of the complaint and reach a conclusion on whether there is a sufficient connection or nexus between the allegations in the SOP and the original complaint filed before the Commission. A complaint should not be unduly restricted by form over substance, thereby limiting the Tribunal's review of the real and essential matters in dispute, but there must be some factual foundation in the complaint that establishes a reasonable nexus with what is in the SOP. In the absence of a sufficient (or reasonable) nexus with the original complaint, the allegations constitute a completely new complaint.

[17] In determining the scope of a complaint, and depending on the material before it, the Tribunal may consult, among other things, the Commission's investigation report and the letters sent by the Commission to the Chairperson and the parties, the original complaint and any administrative forms. In other words, "the Tribunal may consider the documents and information made available to it in order to develop an overall understanding of the complaint, its history and the general context. This allows the Tribunal to determine the scope of the complaint before it" (*Karas*, at paragraph 30).

…

[22] … The Tribunal notes that in the context of this motion, the goal is not to make any findings of fact or to draw any inferences whatsoever regarding the complaint. The Tribunal will not deal with the merits of the allegations (*Karas*, at paragraph 147; *Constantinescu v. Correctional Service Canada*, 2020

> CHRT 4, at paragraph 204). The Tribunal will be able to make findings of fact and draw inferences from the evidence in the hearing of this matter. …

B. Principle of Proportionality

[8] The Tribunal and the parties involved in a quasi-judicial proceeding like this one must necessarily be guided by the principle of proportionality, which is well established in Canadian law (see, for example, *Hryniak v. Mauldin*, 2014 SCC 7 (CanLII); *Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani- Utenam)*, 2020 SCC 4 (CanLII)).

[9] The principle of proportionality requires that all actors involved in the justice system use it appropriately in order to improve access to that system and must conduct themselves so as to reduce the time and costs associated with legal proceedings as much as possible. These actors include lawyers and litigants, but also the decision-maker, who must manage their proceeding actively and effectively.

[10] The principle of proportionality also requires, for example, that counsel take into account their client's limited means but also the nature of the file and the dispute and use proportional means to reach a fair and just outcome.

[11] The Tribunal has written little regarding this principle, and its jurisprudence is relatively silent in this regard. However, without naming it specifically, the Tribunal has always been guided by this major principle, which is implicit in its enabling statute. For example, the CHRA requires it to hear complaints as informally and expeditiously as the requirements of natural justice and the rules of procedure allow (subsection 48.9(1) of the CHRA).

[12] The *Canadian Human Rights Tribunal Rules of Procedure*, SOR/2021-137 ("Rules") also include the principle of proportionality, specifically, in Rule 5, which refers to the principles of expeditiousness and flexibility in the Tribunal's proceedings.

[13] The Tribunal finds that, when it deals with a motion filed by a party, including a motion to expand the complaint or to strike allegations, it must necessarily be guided by the principle of proportionality.

[14] Although it has been acknowledged that motions to amend complaints must be analyzed liberally because of the very nature of these files that involve human rights (*Gaucher v. Canadian Armed Forces,* 2005 CHRT 1 (CanLII), at para 12; *Richards v. Correctional Service Canada*, 2020 CHRT 27 (CanLII), at para 88 [*Richard*]), the Tribunal finds that limits may also be imposed.

[15] Thus, in addition to the lack of a sufficient nexus with the original complaint, the principle of proportionality may also warrant imposing limits based on the circumstances of each case.

[16] These limits are rooted in, among other things, the fact that the Tribunal should not engage in analyzing allegations that are bound to fail in practice. Doing otherwise would result in additional costs, time and energy for the Tribunal and the parties alike and would inevitably have impacts on the justice system as a whole and on access to justice for other litigants who are waiting for their cases to be heard.

[17] Without specifically stating that it was applying this principle, the Tribunal has reiterated that, in some cases, a motion to amend may be dismissed when the allegations have no chance of success. In *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2012 CHRT 24 (CanLII) [*Child Caring Society 2012*], the Tribunal wrote the following at paragraph 7 regarding a motion to amend the complaint to include allegations of retaliation:

> … the Tribunal "should not embark on a substantive review of the merits of the amendment"; rather, it should grant the amendment unless it is plain and obvious that the allegations have no chance of success: *Bressette v. Kettle and Stony Point First Nation Band Council*, 2004 CHRT 02, at paragraph 6. While the Tribunal in *Gaucher v. Canadian Armed Forces*, 2005 CHRT 1, at paragraphs 10 and 12, acknowledged that because the Tribunal's jurisdiction over a complaint originates from a referral by the Commission, there must be certain limits on the scope of the amendments; this constraint is "only one aspect of the matter" as "human rights tribunals have adopted a liberal approach to amendments" that is in keeping with the remedial nature of the CHRA.
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> [Emphasis added.]

[18] Similarly, the Tribunal also reiterated this idea in *Tracy Polhill v. Keeseekoowenin First Nation*, 2017 CHRT 34 (CanLII), at para 31 [*Polhill 1*], stating that a motion to add retaliation allegations must be defensible and tenable.

IV. Analysis

[19] To deal with these motions as concisely and expeditiously as possible (subsection 48.9(1) of the CHRA), the Tribunal will only address the parties' arguments that are essential, necessary and relevant to making its decision (*Turner v. Canada (Attorney General* , 2012 FCA 159 (CanLII), at para 40).

A. Summary of Parties' Positions

(i) Respondent

[20] The Tribunal notes that the Agency's arguments can be divided into three main elements: (1) Mr. Temate's additions were not referred by the Commission and are beyond the scope of the complaint; (2) the additions do not have a sufficient nexus with the original complaint; and (3) some of the additions are bound to fail.

[21] In general, the Agency argues that the complaint filed by Mr. Temate with the Commission under paragraph 7(a) of the CHRA and referred to the Tribunal only specifically concerns the refusal of employment in relation to staffing process AHS-HISIA-NCR-108797, which took place in January and February 2015.

[22] It adds that the only prohibited grounds of discrimination raised by the Complainant that should be analyzed are race, national or ethnic origin and skin colour. Disability was not a ground referred by the Commission. It also argues that several of Mr. Temate's allegations are bound to fail and should therefore not be analyzed by the Tribunal.

[23] Thus, the Respondent believes that all the elements that exceed or go beyond those specific allegations are not included in Mr. Temate's complaint, were not referred by the Commission and therefore should not be analyzed by the Tribunal. It submits that the complaint is specific and detailed. It argues that the form the Complainant filed with the

Commission was clear and only covered allegations related to paragraph 7(a) of the CHRA and its refusal of employment under staffing process AHS-HISIA-NCR-108797, based on grounds of race, national or ethnic origin and colour.

[24] It adds that the Complainant's allegations relative to harassment under paragraph 14(1)(c) of the CHRA are implausible, not covered by the CHRA and bound to fail. For example, allegations regarding his personal information or the subject line of internal emails that included Mr. Temate's last name should not be analyzed by the Tribunal.

[25] Regarding retaliation, the Respondent argues that Mr. Temate's allegations were not investigated by the Commission and that this issue was not referred to the Tribunal for inquiry. It adds that retaliation related to events that took place before the complaint was filed on May 4, 2016, do not fall within the scope of section 14.1 of the CHRA.

[26] With respect to the Complainant's allegations concerning retaliation for events that occurred after the complaint was filed, the Respondent believes that those are completely new complaints and that the allegations are implausible and bound to fail, including the allegations related to a staffing process other than AHS-HISIA-NCR-108797, the communications between the Agency and Mr. Temate as well as the impacts on his work environment at the Correctional Service of Canada ("CSC").

[27] Finally, the Respondent submits that, if Mr. Temate's additions are analyzed by the Tribunal, this would be prejudicial to it and have impacts on the proceedings, including the cost, complexity and length of the inquiry. Furthermore, the Agency submits that the principle of proportionality should prevail to limit the Complainant's complaint.

[28] The Respondent did a good job of identifying the specific passages in Mr. Temate's SOP that it would like to be struck and specifying why. Specifically, it requests that the following elements be struck from the Complainant's SOP:

- Disability as a prohibited ground of discrimination under subsection 3(1) of the CHRA;
    - The following paragraphs of Mr. Temate's SOP: 22, 28, 29, 30, 39, 73, 75, 76, 77, 93, 94, 95 and 96;

- Harassment in matters related to employment as a discriminatory practice under paragraph 14(1)(c) of the CHRA;
    - The following paragraphs of Mr. Temate's SOP: 13, 14, 20, 47, 54 and 55;
- Retaliation for events that took place before the complaint was filed under section 14.1 of the CHRA;
    - The following paragraphs of Mr. Temate's SOP: 10, 11, 12, 13, 14, 15, 19, 20, 21, 35, 39, 47 and 50;
- Retaliation for events that took place after the complaint was filed under section 14.1 of the CHRA;
    - The following paragraphs of Mr. Temate's SOP: 12, 20, 21, 54, 55, 56 and 57.

[29] The Respondent is also requesting that allegations referring to mediation be struck as they are irrelevant, inappropriate and vexatious and include information that is privileged, in its opinion. Those references are found at:

- The following paragraphs of Mr. Temate's SOP: 30, 70, 71 and 72.

[30] Following the Tribunal's request for submissions regarding Mr. Temate's countermotion to expand his complaint, the Respondent provided additional submissions. The Agency's reasoning and main arguments remain largely the same as those provided in the motion to strike.

[31] First, it reiterates that the Complainant's additional allegations have an insufficient nexus with the original complaint, that some allegations constitute new discriminatory practices that were not referred by the Commission and that some allegations have no reasonable chance of success. Second, it alleges that it would suffer prejudice if those allegations were added because, to defend itself, it would have to look for documents that may no longer exist; because witnesses may be difficult to find; and because it would have to invest additional resources to deal with those additions.

(ii) Commission

[32] First, the Commission submits that the Tribunal should hear all the evidence surrounding staffing process AHS-HISIA-NCR-108797 and all aspects related to it to be able to decide Mr. Temate's complaint.

[33] Although it consents to having the references to mediation removed from Mr. Temate's SOP, it objects to all the other elements of the Agency's motion to strike and considers that the Agency will not suffer any prejudice and will have plenty of time to respond to the additions. It submits that the complaint is only a summary of the facts. With respect to the SOP, it states that the parties do not have to agree on all the facts it contains. An SOP is not a joint statement of facts, but presents the important facts on which a party intends to base its arguments. The Commission alleges that the allegations must simply be relevant to the complaint.

[34] It adds that Mr. Temate's complaint has not only individual but also systemic aspects and that, although the complaint is mainly about staffing process AHS-HISIA-NCR-108797, the events that took place after the process are also relevant. As such, the facts put forward by the Complainant regarding process AHS-HISIA-NCR-108797 in October 2014 and the events that followed that process are related to the complaint.

[35] It believes that, not only should Mr. Temate be able to present a complete and contextualized case for discrimination, but that this new evidence could also show a continued refusal to hire him or even constitute retaliation. The Commission considers that, at this early stage of the proceedings, Mr. Temate should be authorized to add new facts in relation to paragraph 14(1)(c) and section 14.1 of the CHRA because they emanate from the same factual matrix, that is, they are part of staffing process AHS-HISIA-NCR-108797.

[36] It also argues that the facts related to another staffing process that took place after the complaint may show a continued refusal to consider hiring him for a position based on a prohibited ground or even constitute retaliation. The Commission states that, although allegations of retaliation occurring after the filing of the complaint were not analyzed during the investigation, the Tribunal has the authority to amend the complaint to add them. Those

allegations also flow from the same factual matrix as the Complainant's initial complaint, and it would not be in the interests of justice to ask him to file a new complaint regarding them.

[37] Regarding the retaliation allegations concerning events that took place before the complaint was filed, the Commission concedes that they do not meet the strict criteria in section 14.1 of the CHRA but may be admitted for context for allegations related to section 7 of the CHRA.

[38] Finally, the Commission believes that the Complainant's additional allegations may also be relevant with respect to the remedies the Tribunal may order under subsection 53(3) of the CHRA.

[39] Regarding the prohibited ground of disability, the Commission alleges that there is a connection with Mr. Temate's taking part in staffing process AHS-HISIA-NCR-108797.

[40] Finally, in its reply to the countermotion, the Commission briefly states that, should the complaint be expanded by adding the new elements raised by Mr. Temate, the Agency would not suffer any prejudice. It claims that the time and resources needed to respond to the allegations are part of the process related to a motion to expand a complaint. The Commission argues that no hearing date has yet been set and that the Agency has been informed of the new allegations and will be able to respond to them, which will therefore cause it no prejudice.

(iii) Complainant

[41] Mr. Temate argues that the Tribunal should not limit his complaint. According to him, some of the Respondent's actions were discovered after his complaint was filed with the Commission. He submits that, at the investigation stage, he raised only the facts that he knew about at the time. He then learned of new facts as the proceedings progressed and as he was able to access additional documentation, including from the Commission's investigation and his access to information requests as well as from Federal Court and Tribunal proceedings.

[42] He states that his relationship with the Respondent began when he applied to staffing process 14-AHS-HSI-NCR-108797 to fill position 090777. He therefore considers this relationship to be on a continuum and that all the facts, allegations, events and decisions—even related ones—that he included in his SOP are linked to that staffing process. Mr. Temate argues that the Tribunal should not unduly limit his complaint and should hear all of the contextual elements.

[43] He adds that the Tribunal must hear all the evidence, including all facts connected to staffing process AHS-HISIA-NCR-108797, to determine whether one of the prohibited grounds of discrimination was a factor in not granting him the EC-07 position at the Centre for Emergency Preparedness and Response of the Health Security Infrastructure Branch.

[44] The Complainant adds that, in the course of the motion and this ruling, the Tribunal will also have the opportunity to analyze the evidence he submitted in support of his arguments. The Tribunal will address this argument by Mr. Temate straight away. The Tribunal reiterates that when it analyzes a motion to expand the scope of a complaint, its role is neither to determine the merits of the allegations nor to assess the evidence (*Levasseur*, at para 22; *Karas v. Canadian Blood Services and Health Canada*, 2021 CHRT 2 (CanLII), at para 147 [*Karas*]).

[45] The evidence is admitted and assessed by the Tribunal at the hearing, and it may then draw conclusions about it. It is clear that the Tribunal's role in this ruling is not to weigh the evidence submitted by Mr. Temate or to draw conclusions about it. It must limit itself to applying the principles stated in section III of this ruling.

[46] Now that this has been clarified, Mr. Temate adds that he also took part in another staffing process in August 2016, namely, process 16-AHS-HSI-IA-NCR-164360, to fill position 090782, among others. He explained that the purpose of applying to that staffing process was to show that the Agency's order that its staff no longer communicate with him in any way was indeed real. That said, Mr. Temate confirms that he withdrew from the process within 24 hours of filing his application. He actually wanted the Respondent to contact him to inform him that he would then lose privileges regarding potential recourse.

He confirms in his submissions that filing a new complaint for this process that he withdrew from [TRANSLATION] “is simply ridiculous”, to use his own words.

[47] In other words, the Tribunal therefore understands that, according to the Complainant, the Agency’s order to no longer communicate with him resulted from the fallout of events following his being denied a position in staffing process AHS-HISIA-NCR-108797. However, Mr. Temate wanted to verify whether the order was real by applying to a second staffing process, namely, 16-AHS-HSI-IA-NCR-164360. According to Mr. Temate, he wanted to get evidence demonstrating that the Agency and its employees continued to discriminate against and harass him.

[48] Several of Mr. Temate’s other arguments essentially reiterate the Commission’s arguments. He believes that the complaint is only a summary of the facts, that the parties do not have to agree on the allegations stated in the SOP and that the facts in the SOP must simply be relevant to the subject matter of the complaint.

[49] Mr. Temate adds that the Commission did not investigate some elements that he had raised and instead referred the entire complaint to the Tribunal, including retaliation and the other prohibited ground of discrimination, thus enabling the Tribunal to have a broad and unrestricted interpretation of the complaint. He states, however, that he asked the Commission to amend his complaint several times during the investigation, but his requests went unheeded or it was suggested to him to file a new complaint regarding them. Regarding that last argument, the Tribunal must reiterate that it has no jurisdiction to review the Commission’s decisions (*Williams v. Bank of Nova Scotia*, 2021 CHRT 24, at para 32; *Leonard v. Canadian American Transportation Inc. and Penner International Inc.*, 2022 CHRT 20, at para 61). However, it is certain that the Tribunal has jurisdiction to expand the scope of a complaint and to include elements that had not been investigated by the Commission.

[50] Mr. Temate considers that disability should also be included because it was the Agency that disclosed information about his health condition. He believes that this influenced its decision not to grant him the position even though he was the only qualified candidate. Mr. Temate states that he did not receive information and evidence regarding this until

October 2020 when the complaint was referred to the Tribunal. The same is also true for his allegations of harassment and retaliation, which are related to the same factual matrix. According to him, it would not be in the interests of justice to require him to file a new complaint.

[51] He believes that the Respondent would suffer no prejudice if all these elements are added to his complaint because it is aware of his allegations, it has responded to them in various processes involving the parties, and the proceedings are still at an early stage. He reiterates that all of his allegations are related to staffing process 14-AHS-HSI-NCR-108797 posted on October 30, 2014, and to the events that followed the process.

[52] Mr. Temate argues that, should the Tribunal not include his retaliation allegations because they do not meet the requirements of section 14.1 of the CHRA, they must be admissible to demonstrate context and to determine whether there was discrimination under section 7 of the CHRA.

[53] Finally, he believes that several of his allegations, including his participation in the second staffing process, 16-AHS-HSI-IA-NCR-164360, and the order not to communicate with him may also be relevant in determining the remedies to be granted by the Tribunal under subsection 53(3) of the CHRA.

[54] Regarding the allegations related to mediation, Mr. Temate specifies that at no point was there mediation between the parties, but that he is prepared to remove this term from his SOP if necessary.

[55] Regarding Mr. Temate's reply in his countermotion, the Tribunal will focus solely on the significant arguments he submitted. First, Mr. Temate argues that the Respondent is well aware of his additional allegations included in his SOP because it learned about them several times during other administrative proceedings. Second, he adds that those allegations are necessarily linked to his relationship with the Respondent involving the same parties during the same period and that it is impossible to separate them. Finally, like the Commission, Mr. Temate believes that the Agency would suffer no prejudice should the Tribunal grant the additions and that the additional time and resources needed are not

circumstances that are out of the ordinary in dealing with a motion to expand the scope of a complaint.

B. Analysis – Sections 7 and 14.1 and Paragraph 14(1)(c) of CHRA and Issue of Prejudice

[56] As previously mentioned by the Tribunal, it is settled law that, when the Tribunal must determine the scope of a complaint and whether it should be amended, it does not proceed to a substantive review of the merits of the new elements (*Levasseur*, at para 22; *Karas*, at para 147. See also *Constantinescu v. Correctional Service Canada*, 2018 CHRT 17 (CanLII), at para 5; *Canadian Association of Elizabeth Fry Societies v. Correctional Services of Canada*, 2022 CHRT 12 (CanLII), at para 15 [*Elizabeth Fry Societies*]).

[57] As described in *Levasseur*, at paragraph 16, the Tribunal must authorize amendments if

> … there is a sufficient connection or nexus between the allegations in the SOP and the original complaint filed before the Commission. A complaint should not be unduly restricted by form over substance, thereby limiting the Tribunal's review of the real and essential matters in dispute, but there must be some factual foundation in the complaint that establishes a reasonable nexus with what is in the SOP. ...

[58] The Tribunal must also be guided by the principle of proportionality in managing its inquiry, which includes dealing with motions filed by the parties. Thus, the Tribunal may decide not to analyze allegations when it is plain and obvious that they have no reasonable chance of success or, in other words, would be bound to fail or would be neither defensible nor tenable in fact and in law (*Child Caring Society 2012* at para 7; *Polhill 1* at para 31; *Bressette v. Kettle and Stony Point First Nation Band Council*, 2004 CHRT 2 (CanLII), at para 6).

[59] In light of the original complaint filed by Mr. Temate at the Commission stage, the investigation report, the Commission's decision to refer the complaint to the Tribunal for inquiry and the Federal Court reasons, which also serve as a guide, it appears that the crux

of Mr. Temate's complaint is clear: the complaint concerns the Agency's refusal to hire him following staffing process AHS-HISIA-NCR-108797.

[60] That said, the Tribunal notes that several events have unfolded following the refusal. Mr. Temate did not practise restraint in his SOP: his Statement of Particulars is over 90 pages long, which is exceptionally long for an SOP. Mr. Temate decided to describe in great detail all the events that took place in connection with the refusal to hire him. The Tribunal notes that the starting point of the complaint always remains the same, namely, the Respondent's refusal to hire Mr. Temate. Without that event, the complaint would not exist.

[61] The Tribunal believes that this is where the main difficulty arises in this file. The facts alleged by the Complainant to provide context for his complaint and to explain the refusal to hire, including those that occurred after the refusal, must be distinguished from the allegations that are an actual amendment to the complaint, whether it is adding a prohibited ground of discrimination or a discriminatory practice.

(i) Allegations under Section 7 of CHRA – Discrimination in Course of Employment

[62] To examine this, we must put section 7 of the CHRA into context to understand where Mr. Temate's allegations might fit.

[63] Section 7 has two paragraphs. The scope of paragraph 7(a) of the CHRA is quite specific. It provides that it is a discriminatory practice, directly or indirectly, *to refuse to employ or continue to employ any individual*.

[64] Under that paragraph, two options are provided: refusing to employ and refusing to continue to employ. In this case, Mr. Temate was never employed by the Agency. He categorically insists that the only relationship created with the Respondent is that which started on November 14, 2014, when he formally applied to staffing process 14-AHS-HISIA-NCR-108797. Therefore, since he was never employed by the Agency, it cannot have refused to continue to employ him. The second part of paragraph 7(a) of the CHRA, that is, *refusing to continue to employ an individual*, therefore does not apply. Any argument to the contrary is absolutely bound to fail.

[65] As for paragraph 7(b) of the CHRA, it provides that it is a discriminatory practice, *in the course of employment, to differentiate adversely in relation to an employee*. The Tribunal refers the reader to *Duverger v. 2553-4330 Québec Inc. (Aéropro)*, 2019 CHRT 18 (CanLII) [*Duverger*], at paragraphs 84 to 158, to understand the Tribunal's interpretation of the words *in the course of employment*.

[66] It is sufficient to say that *in the course of employment* equates to *during* (*Duverger*, at paras 115 and 116). This implies then that the adverse differentiation takes place *during* employment and that it may continue for a period of time during the employment relationship between the employee and the employer. But the problem remains: there must still be employment, an employment relationship between an employee and an employer. Once again, Mr. Temate was never an employee of the Agency. It is therefore clear that paragraph 7(b) of the CHRA does not apply and that any argument to the contrary is inevitably bound to fail.

[67] The complaint filed by Mr. Temate under section 7 is therefore based solely on paragraph 7(a) of the CHRT. The refusal to hire him following staffing process 14-AHS-HISIA-NCR-108797 is the basis for the discriminatory practice. And since there is no employment relationship after the refusal, the events following the refusal to hire Mr. Temate cannot in themselves constitute new discriminatory practices under paragraph 7(a) of the CHRA.

[68] Consequently, the Tribunal agrees with the Respondent that some of Mr. Temate's allegations stemming from the refusal to hire him following staffing process 14-AHS-HISIA-NCR-108797 cannot constitute new discriminatory practices independent from the refusal to hire under paragraph 7(a) of the CHRA.

[69] However, the Tribunal does not agree that they should be struck from Mr. Temate's SOP. Those additional allegations following the refusal to hire may provide context to help us understand, for example, what led the Respondent to make its decision to refuse employment. The post-refusal allegations may also make it possible to determine whether a ground of discrimination may have been a factor in the refusal to hire.

[70] The Tribunal agrees with Mr. Temate's explanation that the facts are part of a continuum. Things happened after the Agency refused to employ him. Mr. Temate would like to highlight these allegations to demonstrate that the Respondent made the decision not to hire him for discriminatory reasons.

[71] Now, could some of the post-refusal allegations be considered through the lens of other discriminatory practices under the CHRA such as harassment in matters related to employment or retaliation? Maybe. This is what the Tribunal will address in the next sections of this ruling.

(ii) Allegations under Section 14.1 of CHRA – Retaliation

[72] Regarding retaliation under section 14.1 of the CHRA, it is well established in the Tribunal's jurisprudence that it is not the prohibited ground of discrimination that is the basis for the complaint, but rather the filing of the complaint itself with the Commission (*First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2015 CHRT 14 (CanLII), at paras 4 and 5; *Polhill v. Keeseekoowenin First Nation*, 2019 CHRA 42 (CanLII), at para 219 [*Polhill 2*]).

[73] A complainant must therefore show

1) that they filed a previous complaint with the Commission;

2) that they suffered an adverse impact;

3) and that filing the complaint with the Commission was a factor in this adverse impact.

(*Polhill 2*, at para 219)

[74] In this case, it appears that Mr. Temate's complaint was filed on May 4, 2016. If Mr. Temate believes that the Agency retaliated against him because he filed his complaint, the filing of the complaint on that date would then serve as the starting point for the retaliation allegations.

[75] Therefore, any allegations that retaliation under section 14.1 of the CHRA occurred before May 4, 2016, that is, before the complaint was filed, are necessarily bound to fail. Any argument to the contrary is neither defensible nor tenable in fact or in law (*Polhill 1*, at para 31). This was also conceded by the Commission in its submissions.

[76] Accordingly, there is no need for the Tribunal to consider the retaliation allegations made for events taking place before May 4, 2016. However, Mr. Temate's allegations that there was retaliation after his complaint was filed may be admissible.

[77] The Tribunal will decide on a case-by-case basis whether these elements need to be added to Mr. Temate's complaint if there is a sufficient nexus between the allegations in the SOP and his original complaint.

(iii) Allegations under Paragraph 14(1)(c) of CHRA – Harassment in Matters Related to Employment

[78] Regarding harassment, paragraph 14(1)(c) of the CHRA provides that it is a discriminatory practice, in matters related to employment, to harass an individual on a prohibited ground of discrimination. The Tribunal has recently had to interpret the words *in matters related to employment* in that paragraph.

[79] After conducting a purposive analysis in this respect, it therefore concluded that paragraph 14(1)(c) of the CHRA should be interpreted more broadly and liberally (*Duverger* at paras 108 to 158). Thus, when the Tribunal must decide whether there has been harassment in matters related to employment within the meaning of that paragraph, the question rather is whether there is a sufficient nexus to the employment context and not whether there is an employment relationship, strictly speaking (*Duverger* at para 158).

[80] In this case, no employment relationship has been created between Mr. Temate and the Agency. Although the Tribunal does not have to decide on the merits of the allegations raised by the Complainant, which will be done at the hearing in light of all of the evidence presented, the principles laid down in *Duverger* make it possible to open the door to applying paragraph 14(1)(c) of the CHRA in the circumstances.

[81] The argument that Mr. Temate was harassed *in matters related to employment* by the Agency or its employees is not necessarily unfounded. Although there is no employment relationship between him and the Agency, it is possible that his allegations have a sufficient nexus *in matters related to employment*, *in the context of employment*, and that paragraph 14(1)(c) of the CHRA may apply in the circumstances. The Tribunal does not have to consider the facts on the merits; this will be done at the hearing after all of the evidence is presented.

[82] That said, the parties will be able to present arguments on whether paragraph 14(1)(c) of the CHRA applies in the circumstances at the hearing. But, at first glance, it appears that it may apply. Mr. Temate will have to prove this on a balance of probabilities.

[83] Accordingly, the Tribunal agrees to assess whether Mr. Temate's allegations may be added to the complaint under paragraph 14(1)(c) of the CHRA. To do so, it will decide on a case-by-case basis whether there is a sufficient nexus between Mr. Temate's new allegations and his original complaint (*Levasseur*, at para 16).

(iv) Prejudice

[84] The Tribunal will first address the Respondent's argument regarding the prejudice it would suffer if the motion to expand the scope of Mr. Temate's complaint to include allegations related to harassment, retaliation and disability were granted.

[85] On the one hand, the Agency believes that it did not have the opportunity to benefit from the Commission's investigation regarding the allegations the Complainant would like to add, which prevented it from making the informed decision to dispute the decision in judicial review.

[86] The Tribunal reiterates that the complaint filed at the Commission stage is only a summary of the facts (*Richard*, at para 88; *AA*, at para 56). It is clear that the complaint may evolve over time and that facts can be added and refined (*Karas*, at paras 138 and 141). Nonetheless, parties cannot add completely new allegations that have nothing to do with the original complaint in any way.

[87] That is precisely one of the reasons why the Tribunal developed its analysis regarding this, which is aimed at determining whether a sufficient nexus exists with the original complaint or, on the contrary, whether the new allegations constitute a whole new complaint that has no connection in fact or in law to the original complaint (*Torraville v. Jazz Aviation LP*, 2020 CHRT 40 (CanLII), at para 48).

[88] Thus, if the additions constitute a whole new complaint that has no connection to the original complaint, the Complainant will have to file a new complaint with the Commission, and the process will follow its course. The Respondent would then have the option to apply for judicial review of the Commission's decision, if it wished to do so. Conversely, if there is a sufficient nexus between the new allegations and the original complaint, it would be unfair to ask the Complainant to file a new complaint to address those additions, which would do a disservice to the CHRA's statutory scheme requiring that complaints be heard as informally and expeditiously as possible (subsection 48.9(1) of the CHRA; *Constantinescu v. Correctional Service Canada*, 2018 CHRT 17 (CanLII), at para 9).

[89] The Respondent refers to *Karas*, in which the complainant was requesting that new alleged victims be added—certain women and certain trans people—as well as new prohibited grounds of discrimination—sex and gender identity or expression.

[90] In *Karas*, the situation was different and quite specific because the facts related to that case were tightly focused in both fact and law. Mr. Karas disputed the application of a blood donation policy, which was very specific and affected a very specific group of individuals, namely, men who had had sex with men. All the information was available at the complaint filing stage, and the Tribunal concluded that had Mr. Karas or the Commission wanted to add those allegations, they could have done so, with full knowledge, at that stage. They chose not to do so (*Karas* at paras 142 and 143).

[91] It should also be added that, in *Karas*, the Commission was very clear in its letters to the parties on the subject matter of the complaint that had been referred to the Tribunal (*Karas* at paras 123 to 127). It was as explicit as possible about this, leaving no room for any other interpretation of the object of the complainant's original complaint. It was therefore concluded that the amendments did not have a sufficient nexus with the original complaint.

[92] In this case, which is very different from the situation in *Karas*, the relationship between Mr. Temate and the Agency is complex and originally stems from staffing process 14-AHS-HISIA-NCR-108797. Interactions between the parties went on for some time even after the refusal to hire Mr. Temate, thus resulting in new information being gathered between 2015 and now.

[93] Mr. Temate states that he did not know about the new facts and new allegations until after his complaint was filed, which explains, among other things, why he could not add them at the Commission stage. This information was collected when he gathered additional documentation through various processes involving him and the Agency. Regarding the ground of disability, Mr. Temate provides the same reasoning stating that he did not know about the alleged impact of his disability until he received the briefing notes by the Respondent's employees following their informal meeting.

[94] The Tribunal also notes that the Commission's decision to refer the complaint to the Tribunal for inquiry specifically mentions that it would not be necessary for it to consider the Complainant's other allegations regarding retaliation or other [TRANSLATION] "incendiary, racist and discriminatory" statements made by the Agency's representatives. It added in its decision that the Tribunal would be able to examine those allegations when it considers Mr. Temate's complaint. The Commission therefore decided not to address those allegations because it was not necessary. This does not mean, however, that this completely prevents the Tribunal from adding them to the complaint if a motion is made to that effect.

[95] It should be mentioned that the Commission's role is not to assess all of the parties' allegations, and it is not obliged to examine every detail of the complaint: the investigation must focus on its most fundamental issues (*Georgoulas v. Canada (Attorney General)*, 2018 FC 652 (CanLII), at para 87; *Desgranges v. Canada (Administrative Tribunals Support Services)*, 2020 FC 315 (CanLII) [*Desgranges*], at para 30). In addition, the Commission performs a screening function, not an adjudicative function (*Desgranges* at para 29). The Commission has broad discretion to refer the complaint to the Tribunal if there is a reasonable basis for holding an inquiry. This is what the Commission has done in the circumstances.

[96] Now, Mr. Temate is formally requesting that the Tribunal amend his complaint. Although the additions were not investigated by the Commission, the Tribunal still has jurisdiction to determine whether the Complainant's additional allegations have a sufficient nexus to the original complaint to be added to it.

[97] Should the Tribunal agree to add these allegations at this stage of the proceedings, it should be noted that the Respondent has yet to file its own SOP. It will then have the opportunity to read through the additions, to collect the information needed to respond to them, to identify witnesses and to disclose documents potentially relevant to the matter that it has in its possession.

[98] It will unequivocally have a full and ample opportunity to present its arguments and to defend itself as required by the principles of natural justice and procedural fairness and the CHRA (s 50(1) of the CHRA). In this case, the prejudice raised by the Agency can thus be mitigated or cured (*Torraville*, at para 48).

[99] The Respondent further adds that dealing with Mr. Temate's new allegations would require a disproportionate use of the parties' and the Tribunal's resources, both in costs and in effort, and that there will be an impact on the complexity of the proceedings and their length.

[100] The Tribunal understands the Respondent's concerns, but, as it had already stated in *Karas v. Canadian Blood Services and Health Canada*, 2020 CHRT 12 (CanLII), at paragraph 86, "... prejudice, be it financial, human or organizational, cannot be simply hypothetical (as opposed to real prejudice)." The Tribunal wrote about the same concept of "real and significant" prejudice in *Torraville*, at paragraph 48.

[101] In addition, the Tribunal's Chairperson, Jennifer Khurana, stated the following in *Elizabeth Fry Societies*, at paragraph 16:

> The Tribunal has generally found that no prejudice will exist for an opposing party where they were on notice of the issue prior to the motion to amend, no hearing dates are set, and they have a full chance to respond to amendments through their own amendments and at the hearing (*Carpenter* at para 114 and *Tabor* at para 14). In some cases, the Tribunal has considered whether denying the proposed amendment would waste time and resources and

> whether it would be in the public interest for the complainant to bring a new complaint to address an issue (see *Matson, Matson and Schneider (née Matson) v Indian and Northern Affairs Canada*, 2011 CHRT 14 at para 18 [*Matson*]).
>
> [Emphasis added.]

[102] At this stage of the proceedings, the Tribunal is not satisfied on a balance of probabilities that there is an overall prejudice, be it financial, human or organizational, for the Agency that is so real and significant that it would justify summarily rejecting all of Mr. Temate's motions to add allegations. However, as this will be analyzed in the upcoming sections, the Tribunal concludes that several limits will be put in place.

[103] The Tribunal will specifically limit Mr. Temate's allegations and will determine whether allegations are added as new discriminatory practices or simply for context and whether the ground of disability may be added, and if so, on what conditions.

[104] Finally, the Agency will be sufficiently informed of these amendments and will, once again, have a full and ample opportunity to respond to them in its SOP, which has not yet been filed with the Tribunal. This will considerably mitigate and even cure any prejudice it may experience (*Elizabeth Fry* Societies at para 16; *Torraville* at para 48).

C. Analysis Regarding Striking or Expanding Certain Allegations

[105] In this section, the Tribunal will concisely assess the paragraphs targeted by the Respondent's motion to strike and the Complainant's and Commission's countermotion to expand the complaint

(i) Paragraphs 10 and 11

[106] The Respondent submits that the events described in paragraphs 10 and 11 of the Complainant's SOP took place before the complaint and that they cannot constitute retaliation.

[107] In those paragraphs, Mr. Temate refers to, among other things, a letter from the Agency added to his job application file as well as some instructions that were given by the Agency to its employees to stop all communication with him. He believes that these allegations constitute discriminatory practices under sections 7 and 14.1 of the CHRA.

[108] The Tribunal understands that this letter or correspondence added to his file was created after an informal meeting between Mr. Temate and the Agency. This was still at the beginning of 2015. Regarding the instructions to stop communicating with him, Mr. Temate found out about their existence on April 4, 2016. If he found out about the instructions on April 4, 2016, this necessarily means that those instructions existed before that date.

[109] As the Tribunal previously explained, retaliation is not based on a traditional prohibited ground of discrimination under section 3 of the CHRA, but on the filing of the complaint itself under the CHRA. In this case, Mr. Temate's complaint was filed on May 4, 2016. The instructions given by the Agency, which certainly precede April 4, 2016, therefore cannot constitute retaliation within the meaning of the CHRA because those events took place before the complaint was filed. The Complainant's arguments are therefore bound to fail, and the Tribunal does not allow them to be added under section 14.1 of the CHRA.

[110] However, the Tribunal notes that Mr. Temate's allegations may be part of a chronological sequence of events following the Agency's refusal to hire him under paragraph 7(a) of the CHRA.

[111] As previously concluded by the Tribunal, the Agency's instructions to its staff to stop communicating with Mr. Temate fall under neither paragraph 7(a) of the CHRA as a *refusal to continue to employ* since he was never employed by the Respondent nor under paragraph 7(b) of the CHRA for the same reasons: there can be no adverse differentiation *in the course of employment* if there is no employment.

[112] However, Mr. Temate's additional facts provide context to what happened after the refusal to hire, and there is a nexus with the original complaint. The events stem from a logical sequence of events and are intrinsically linked to the refusal to hire Mr. Temate following staffing process 14-AHS-HISIA-NCR-108797.

[113] Thus, the Tribunal does not grant the Respondent's motion to strike and allows the allegations to remain in Mr. Temate's SOP. However, the allegations in themselves are not new independent discriminatory practices and will be dealt with through the lens of the refusal to hire in relation to staffing process 14-AHS-HISIA-NCR-108797 in order to provide context for the purposes of applying paragraph 7(a) of the CHRA.

(ii) Paragraph 12

[114] The Respondent asks the Tribunal to strike this paragraph in which the Complainant alleges that he experienced differential treatment from the Agency in relation to a second staffing process, namely, process 16-AHSIA-NCR-164360 to fill position 90782. In Mr. Temate's opinion, the adverse differentiation resulted from the Agency's order to no longer communicate with him, in violation of sections 7 and 14.1 of the CHRA.

[115] Mr. Temate specifies in his SOP that he withdrew his application from staffing process 16-AHSIA-NCR-164360 only a few hours after he formally applied. As he himself writes, his objective was to verify whether the Agency's order to its staff to no longer communicate with him was indeed real.

[116] It is important to note that, in this paragraph, the Complainant emphasizes the Agency's order to no longer communicate with him as being the manifestation of the differential treatment he received. He does not argue that the refusal to hire in staffing process 16-AHSIA-NCR-164360 is discriminatory in itself. He withdrew his application of his own accord since his goal was to prove that the order did really exist.

[117] We come back to this: the Agency's order to no longer communicate with Mr. Temate is related to the events that took place after the refusal to hire in the first staffing process, namely, 14-AHS-HISIA-NCR-108797. These allegations are on a continuum of events that have followed but are ultimately connected to the main subject of the complaint, that is, the refusal to hire.

[118] However, as it was previously analyzed, the order was given before the complaint was filed, which once again cannot constitute retaliation within the meaning of the CHRA.

[119] Thus, the allegations cannot on their own constitute new discriminatory practices under section 7 of the CHRA or under section 14.1 of the CHRA. That said, the Tribunal will not strike them from Mr. Temate's SOP but will analyze them in relation to the refusal to hire relative to staffing process 14-AHS-HISIA-NCR-108797, under paragraph 7(a) of the CHRA, in order to give it context.

(iii) Paragraph 13

[120] The Respondent asks for the retaliation and harassment allegations at paragraph 13 of Mr. Temate's SOP to be removed.

[121] The Tribunal notes that the facts described in paragraph 13 of the Complainant's SOP are similar to those in paragraph 20 of the SOP. It seems that the facts are interrelated.

[122] At paragraph 13, Mr. Temate summarily alleges that the Agency and its staff disclosed false information based on grounds of discrimination to his superiors at CSC. The purpose of this disclosure was allegedly to cause harm to his career and to threaten his job security. He alleges that he was wiretapped and put under surveillance and under investigation after that disclosure.

[123] He believes that those actions constitute planned and systemic harassment by the Respondent, in retaliation for his complaint, contrary to section 14.1 of the CHRA.

[124] In those paragraphs (13 and 20), Mr. Temate sometimes uses the word harassment and sometimes the word retaliation. However, at paragraph 13, he asks the Tribunal to specifically recognize the allegations as retaliation for his complaint under section 14.1 of the CHRA. As for paragraph 20, it rather seems to refer to harassment on the part of the Respondent.

[125] At paragraph 13, regarding Mr. Temate's allegations that the Respondent disclosed discriminatory information to his employer, CSC, the information collected had been allegedly gathered at or resulted from a case management conference in his case against the Agency before the Federal Public Sector Labour Relations and Employment Board (FPSLREB).

[126] In this respect, Mr. Temate referred to a security incident report dated November 20, 2015, produced by Éric Terrien, relating what happened during that call. Mr. Temate also enclosed what appears to be personal notes by Michelle Taillon, dated November 25, 2015, which refer to facts found in the report. Finally, the Complainant refers the Tribunal to a letter by his employer, CSC, dated February 9, 2016, inviting him to a meeting in reference to the events that took place during that case management call with the FPSLREB.

[127] Therefore, since Mr. Temate's allegations that the Respondent disclosed to his employer discriminatory information stemming from that the FPSLREB case management call on November 20, 2015, the Tribunal notes that those events took place before Mr. Temate's complaint was filed on May 4, 2016.

[128] Mr. Temate's arguments that the Respondent's actions relative to these events were discriminatory and constituted retaliation precede the filing of his complaint and are therefore bound to fail. As the Tribunal previously indicated, section 14.1 of the CHRA cannot apply in these circumstances. Thus, the Tribunal does not agree to address them under section 14.1 of the CHRA.

[129] However, Mr. Temate states in paragraph 13 that he was a victim of [TRANSLATION] "continued and sustained vindictive harassment that was systematic and planned" in his own words. It should be noted that Mr. Temate is not represented by counsel and is representing himself. As such, it is sometimes difficult for unrepresented parties to properly make their legal arguments, and the Tribunal must be flexible in this respect.

[130] The Tribunal understands that Mr. Temate is referring to harassment in this paragraph. This is not surprising because he states in general in his SOP that some actions and conduct of the Respondent that took place after the refusal to hire him in staffing process AHS-HISIA-NCR-108797 constitute harassment in matters related to employment.

[131] Regarding allegations found at paragraph 13 and whether they may be added to the complaint under paragraph 14(1)(c) of the CHRA, the Tribunal reiterates once again that it is not to determine the merits of Mr. Temate's allegations. He will still have to make a case on a balance of probabilities in this regard.

[132] That said, the Tribunal considers that these allegations necessarily have a sufficient nexus with the original complaint. The subsequent relationship between Mr. Temate and the Agency results from the refusal to hire him following staffing process AHS-HISIA-NCR-108797. The Respondent's actions alleged by the Complainant, which took place after the refusal to hire, are necessarily linked to the original complaint. Without the refusal, no relationship would have been created between the two parties.

[133] We can say that there would have been no file before the FPSLREB just as there would have been no case management conference, no security incident report, no personal notes by Ms. Taillon and no meeting between Mr. Temate and his employer, CSC, regarding what happened during that conference call.

[134] Contrary to the Respondent's argument that Mr. Temate's allegations do not fall within the definition of harassment under the CHRA, at this stage and on the basis of the Tribunal's information in *Duverger*, above, it seems that the concept of *harassment in matters related to employment* is broad enough to include the facts raised by Mr. Temate.

[135] Finally, it does not appear that adding these allegations relative to harassment in matters of employment will unduly prolong or complicate the proceeding: they involve the same parties, stem from the same factual matrix and involve the same individuals.

[136] It should still be mentioned that Mr. Temate will have to be able to demonstrate that the Agency's actions did constitute harassment and discharge his burden to establish a *prima facie* case of discrimination, which remains to be seen. But once again, the Tribunal does not have to consider the merits of the allegations (*Elizabeth Fry Societies* at para 15). It must simply decide whether there is a sufficient nexus between them and the original complaint, which is the case here (*Levasseur* at para 16).

[137] Thus, the Tribunal agrees to deal with these allegations through the lens of harassment in matters related to employment under paragraph 14(1)(c) of the CHRA, and therefore will not strike them from Mr. Temate's SOP.

(iv) Paragraph 14

[138] It must be pointed out that, in this paragraph, Mr. Temate's statements are difficult to understand. In short, the Tribunal understands that the Complainant alleges that the Agency violated his right to the protection of his personal information contrary to sections 7 and 14.1 of the CHRA.

[139] For example, according to him, the Respondent revealed his identity to an unauthorized person, namely, Tammy Delaney-Plugowsky ("Ms. Delaney"), who was eventually given the position that Mr. Temate desired. Mr. Temate alleges that the Agency sent protected personal information related to his participation in staffing process AHS-HISIA-NCR-108797 to her.

[140] Mr. Temate also believes that Ms. Delaney had access to information related not only to his participation in staffing process AHS-HISIA-NCR-108797, but also to his complaint filed with the Commission and the evidence filed with various administrative tribunals.

[141] Mr. Temate believes that Ms. Delaney and the Agency are colluding together and with the human resources department. He also explains that he received a phone call from a stranger, who had access to information about him, which he attributes to the Agency's violations related to his personal information.

[142] First, the Tribunal understands that the events in question allegedly took place before Mr. Temate's complaint was filed on May 4, 2016. The Tribunal has no information that would lead it to believe the events in question took place after May 4, 2016.

[143] For example, based on Mr. Temate's allegations in his SOP, the stranger's call occurred before the informal meeting between Mr. Temate and Jean-François Duperré, which took place in January 2015. According to Mr. Temate's SOP, Ms. Delaney started in the position he desired on January 26, 2015. It therefore seems more likely than not that the alleged actions of the Agency, Ms. Delaney and Human Resources would have taken place before May 4, 2016.

[144] With respect to the disclosure of his personal information, Mr. Temate states that he specifically shared his concerns with the human resources department regarding this in

August 2015. This all leads to the conclusion that these allegations also precede the filing of the complaint.

[145] Accordingly, the Tribunal concludes that this cannot be retaliation within the meaning of section 14.1 of the CHRA and that any argument to the contrary has no reasonable chance of success in the circumstances.

[146] Now, regarding the violation of section 7 of the CHRA, the Tribunal believes that the allegations described by Mr. Temate also fall within the sequence of events stemming from the Agency's refusal to hire, which is at the heart of the complaint before the Tribunal. The events are intrinsically linked to the refusal to hire; without the refusal, no relationship would have existed between the parties.

[147] As the Tribunal already explained, this is not a complaint involving a *refusal to continue to employ* under paragraph 7(a) of the CHRA or adverse differentiation *in the course of employment* under paragraph 7(b) since there was never any employment. As such, the allegations in themselves cannot constitute separate discriminatory practices.

[148] Mr. Temate's allegations may help explain, however, what took place after the refusal to hire, in chronological order, and provide context for the complaint and the refusal. The Tribunal therefore agrees to analyze them under paragraph 7(a) of the CHRA, for purposes of context. For these reasons, the Tribunal will not strike them from Mr. Temate's SOP.

(v) Paragraphs 15 and 21

[149] Paragraphs 15 and 21 of Mr. Temate's SOP basically state the same allegations.

[150] Mr. Temate alleges that the Agency took actions that he characterizes as "branding", that is, stigmatizing and labelling using his name "TEMATE" in email exchanges between its staff.

[151] According to Mr. Temate, the branding campaign together with the Agency's order to no longer communicate with him as well as other discriminatory statements that it made about him, including in a letter by Jean-François Duperré, resulted in creating a negative

label with senior management and leaders in order to affect their judgment and perpetuate the discriminatory decisions in his regard, contrary to sections 7 and 14.1 of the CHRA.

[152] At paragraph 15, Mr. Temate refers to section 14.1 of the CHRA, while at paragraph 21, he refers only to section 7 of the CHRA. Nowhere in these paragraphs does the Complainant refer to retaliation or explain how section 14.1 of the CHRA can apply in the circumstances. The Respondent requests that these allegations, which it connects to retaliation for events before and after the complaint was filed, be struck.

[153] The Tribunal notes that Mr. Temate alleges that, in this branding campaign, the Respondent engaged in an [TRANSLATION] "act of differential treatment" associated with negative stereotypes and prejudices related to race and national or ethnic origin, to use his own words. However, nothing in Mr. Temate's explanations helps the Tribunal understand how those actions could constitute retaliation in response to the filing of his complaint on May 4, 2016. Mr. Temate is completely silent in this regard.

[154] However, the Tribunal notes that these allegations do fall within the logical sequence of events and are closely linked to the refusal to hire the Complainant and the Agency's alleged actions following that refusal. It appears that the "branding" described by Mr. Temate showed up in email exchanges within the Agency and other stakeholders. The fact remains that these exchanges, submitted by Mr. Temate in support of his submissions, are intrinsically linked to the existing relationship between Mr. Temate and the Agency, in connection with the refusal to hire in staffing process AHS-HISIA-NCR-108797.

[155] The Tribunal thus concludes that his allegations may be analyzed under paragraph 7(a) of the CHRA as the sequence of events stemming from the refusal to hire, for purposes of context, and are not in themselves new discriminatory practices or retaliation within the meaning of section 14.1 of the CHRA. For these reasons, the Tribunal will not strike these allegations from Mr. Temate's SOP.

(vi) Paragraph 19

[156] The Complainant alleges that Agency employees spread discriminatory information about him to [TRANSLATION] “cloud their judgment and perpetuate their discriminatory decision” contrary to section 7 of the CHRA.

[157] The Tribunal gathers that the Respondent believes that these allegations concern facts that predate the filing of the complaint and cannot constitute retaliation under the CHRA. However, at paragraph 19, Mr. Temate is not alleging retaliation under section 14.1 of the CHRA, but requesting that these additions be made under section 7 of the CHRA.

[158] That said and to be clear, the Tribunal notes that, in Mr. Temate’s submissions, he draws its attention to several emails from the Agency dated January 2016. Mr. Temate failed to bring to the Tribunal’s attention other elements that could explain his allegations and help the Tribunal understand that those events took place after the complaint was filed.

[159] Therefore, the Tribunal must conclude that the facts alleged by the Complainant predate the filing of the complaint on May 4, 2016, and cannot constitute retaliation within the meaning of section 14.1 of the CHRA. Any argument to the contrary would have no reasonable chance of success.

[160] Now, with respect to section 7 of the CHRA, the Tribunal notes that these allegations fall within the logical and chronological sequence of events following the refusal to hire Mr. Temate and are closely linked to it. The Complainant refers to [TRANSLATION] “their discriminatory decision” being perpetuated, and the Tribunal understands this to be allegations related to the refusal to hire in staffing process AHS-HISIA-NCR-108797.

[161] Now, the Tribunal has already determined that it is the *refusal to employ* portion of paragraph 7(a) of the CHRA that applies in the circumstances, not the *refusal to continue to employ*. In addition, the Tribunal determined that the complaint cannot include paragraph 7(b) of the CHRA regarding adverse differentiation *in the course of employment* since there was no employment between the Complainant and the Agency. As a result, Mr. Temate’s allegations cannot constitute independent discriminatory practices.

[162] However, they fall within the chronological sequence of events that took place following the refusal to hire and make it possible to put into context what happened after the refusal. The Tribunal has therefore decided not to strike these allegations from Mr. Temate's SOP, but it is clear that it will analyze them under paragraph 7(a) of the CHRA, relative to the refusal to hire during staffing process AHS-HISIA-NCR-108797, but only for context.

(vii) Paragraph 20

[163] The Respondent considers that, at paragraph 20, the Complainant added harassment and retaliation allegations for events that occurred before and after the complaint was filed.

[164] The Tribunal notes that Mr. Temate is not referring to retaliation in this paragraph. The Complainant rather submits that the Respondent harassed him psychologically in refusing to communicate with him regarding an internal competition process, in spreading false information about him and in disclosing this information to his work colleagues in his department at the time, thus affecting his own work environment at CSC and ultimately leading to his dismissal from the public service.

[165] Although Mr. Temate does not mention paragraph 14(1)(c) of the CHRA, it is clear that he is referring to that paragraph when he mentions psychological harassment by the Agency.

[166] However, the Tribunal considers that Mr. Temate's paragraph 20 is very broad and notes that the facts included in it are covered by several other paragraphs in his SOP, and the Tribunal deals with them in other parts of this ruling.

[167] More specifically, when Mr. Temate alleges that he was psychologically harassed by the Respondent when it refused [TRANSLATION] "to communicate with him about the staffing process", the Tribunal dealt with similar, if not identical, facts at paragraphs 10, 11, 12, 50 and 54 to 57 of Mr. Temate's SOP. Furthermore, the Tribunal has agreed to expand the scope of the complaint for facts contained in paragraphs 50 and 54 to 57. The reader must refer to the relevant sections of this ruling as well as the Tribunal's orders in that regard.

[168] With respect to the allegation that Mr. Temate was psychologically harassed by the Respondent when it [TRANSLATION] “spread false information about him”, the Tribunal dealt with similar, if not identical, allegations at paragraphs 10, 11, 19 and 39 of Mr. Temate’s SOP. The Tribunal did not authorize these allegations to be added as new discriminatory practices, but they will be analyzed for context. The reader must refer to the relevant sections of this ruling as well as the Tribunal’s orders in that regard.

[169] Finally, Mr. Temate argues that the Respondent harassed him psychologically by disclosing his information to his work colleagues in his department at the time, thus affecting his own work environment and ultimately leading to his dismissal from the public service. Once again, the Tribunal has dealt with similar, if not identical, facts at paragraphs 13 and 47 of Mr. Temate’s SOP. The Tribunal authorized that these facts be analyzed under paragraph 14(1)(c) of the CHRA. The reader is invited to refer to the relevant sections of this ruling as well as the Tribunal’s orders in this regard.

[170] To summarize, since the Tribunal did not decide in the other relevant sections of its ruling to strike similar, if not identical, allegations to those at paragraph 20, which are raised by Mr. Temate in other parts of his SOP, the Tribunal will not strike them here. However, the Tribunal’s reasons, limitations and orders relative to paragraphs 10, 11, 12, 13, 39, 47, 50 and 54 to 57 of Mr. Temate’s SOP are applicable to the facts alleged at paragraph 20.

(viii) Paragraphs 22, 28 to 30, 39, 73, 75 to 77 and 93 to 96

[171] The Complainant alleges that his disability within the meaning of the CHRA was not accommodated by the Agency during staffing process AHS-HISIA-NCR-108797, which he took part in and for which he did not get the job. He also believes that the Respondent used the information he had provided about his disability against him several times after the refusal to hire, contrary to section 7 of the CHRA.

[172] The Agency, for its part, considers that the ground of disability is not part of Mr. Temate’s complaint, was not investigated by the Commission and was not referred to the Tribunal for inquiry. This addition is a whole new complaint and does not have a sufficient nexus with the original complaint. In addition, the Respondent argues that Mr. Temate did

not provide any details on the disability in question in his SOP or on the effects that it has had in the adverse impact. Thus, it believes that the allegations are bound to fail.

[173] The Agency notes that Mr. Temate also explicitly stated that he preferred to keep the information about his disability private. It adds that it does not have the details on the Complainant's disability, but would be able to put into evidence that, as part of staffing process AHS-HISIA-NCR-108797, he did not specify that he needed accommodation because of his disability.

[174] This being said, Mr. Temate explains in his SOP that he suffers from a disability that he had disclosed to those responsible for staffing process AHS-HISIA-NCR-108797, namely, Maryanne Kampouris and Madalena McCall. He alleges that he had asked for his assessment to be postponed because of his disability because it could have had an impact on him and on his performance in his competitive assessment.

[175] Mr. Temate thus alleges that the Respondent used his disability to discriminate against him in this staffing process in not selecting him even though he was the only qualified candidate. According to him, everything became clear during the informal meeting with Mr. Duperré and other employees of the Respondent on January 30, 2015, as well as in the letter prepared a few days later, on February 13, 2015, in which Mr. Duperré stated his disability.

[176] In support of his submissions, Mr. Temate filed Mr. Duperré's letter and a recording of more than two hours, which, from what the Tribunal understands, is the recording of the January 30, 2015 meeting between him and the Agency's representatives.

[177] The Tribunal listened to the entire recording of the January 30, 2015 meeting submitted by the Complainant, and read Mr. Duperré's letter dated February 13, 2015. The Tribunal notes that a portion of the recording filed by Mr. Temate is problematic because it is impossible to understand what is being said. For example, the recording that is over 2 hours and 8 minutes long becomes inaudible around 1 hour and 35 minutes in. This occurs intermittently until 1 hour 51 minutes, when the recording become completely inaudible.

[178] That said, in the clear portion of the recording, Mr. Temate's disability is not specifically mentioned or discussed. The participants refer to the Agency's organizational needs and to people with disabilities, but it is impossible to understand the nature of Mr. Temate's disability or its impact on what might have happened with regard to the hiring process.

[179] A person who has no knowledge of the situation and the file would not necessarily understand that the Complainant's disability was central to the conversation. There is no description of the disability or any specific information about it, and the participants do not discuss it in detail.

[180] However, in his letter dated February 13, 2015, Mr. Duperré refers to the fact that Mr. Temate [TRANSLATION] "... questioned at length why the organizational needs with regard to diversity/people with disabilities were not considered". He goes on to say that the Complainant [TRANSLATION] "... is convinced that, because he is a member of a visible minority and a person with a disability, he should have been selected by default". The Tribunal understands that this letter was written after the informal meeting on January 30, 2015, between Mr. Duperré, Mr. Temate and other representatives of the Respondent.

[181] Now, in its submissions, the Agency states that it has no details on Mr. Temate's alleged disability. However, the Tribunal notes that Mr. Duperré did refer to it in his letter from February 13, 2015, but it is unclear to what extent he was informed about it.

[182] It also seems that Mr. Temate disclosed some information regarding his disability to those responsible for the staffing process, as part of staffing process AHS-HISIA-NCR-108797. Once again, to what extent was that information shared between representatives of the Respondent, Mr. Duperré and other people responsible for the process? Nothing is for certain, but even though Mr. Temate's alleged disability is not described in detail, it is mentioned by the Respondent in the February 13, 2015 letter.

[183] At this stage, the Tribunal reiterates that it does not need to determine the merits of the allegations, which will be done at the hearing (*Elizabeth Fry Societies*, at para 15). It must simply determine whether there is a sufficient nexus between Mr. Temate's new allegations and the original complaint.

[184] Just like the Respondent, the Tribunal notes that disability was not a ground raised by Mr. Temate at the Commission's investigation stage. Disability was not discussed in the Commission's investigation report or its decision. Mr. Temate did not mention it in his original complaint either.

[185] Despite this, Mr. Temate explicitly stated that he could have added that ground at the complaint filing stage, but that he chose not to do so. From the explanations in his submissions, the Tribunal gathers that the Complainant learned about certain significant elements related to his disability only in October 2020, from Mr. Duperré's letter, among other things, when his complaint was referred to the Tribunal. Finding this out led him to believe that, in fact, his disability was a factor in the Agency's refusal to hire him.

[186] Given the above, the Tribunal concludes that there is certainly a nexus between Mr. Temate's allegations regarding his disability and his original complaint and that this nexus is sufficient under the circumstances. The Tribunal considers that this is not a whole new complaint, different from the one he filed in May 2016.

[187] In this case, the ground of disability involves the same factual matrix and the same events with the same chronological order. It appears that the same individuals are also involved in both this prohibited ground of discrimination and the others (national or ethnic origin, colour and race). It appears that the list of Mr. Temate's witnesses included in his SOP shows that the main actors in this complaint are the same and will be called as witnesses: Mr. Duperré, Ms. Kampouris, Ms. McCall, and Suzette Trudeau from Human Resources, to name only a few.

[188] It would also be surprising if adding this one ground made the hearing so complex and so costly that this would justify it being summarily rejected by the Tribunal, as the Respondent claims.

[189] With respect to the Agency's argument that Mr. Temate's disability is not sufficiently detailed in his SOP and that, because of this, the allegations must fail, it must be noted that the Complainant is not represented by counsel. As previously mentioned, it is sometimes difficult for unrepresented parties to properly understand the expectations and requirements

to be met in a process like this one, and the Tribunal must be flexible in that respect (subsection 48.9(1) of the CHRA).

[190] The Agency decided to file a motion to strike Mr. Temate's allegations relative to his disability, which was completely within its rights. However, it should be noted that other means could have been used to obtain details from Mr. Temate regarding this. For example, the Respondent could have asked the Complainant for more details before choosing to file a motion to strike. This could have been done via teleconference or correspondence. The Tribunal and the parties could have worked together to obtain the necessary additional information from Mr. Temate and then decided what it meant for the case.

[191] Finally, if the Agency absolutely needed to formally file a motion, instead of asking for the allegations to be struck, it could have filed a motion for particulars. In *Imperial Manufacturing Group Inc. v. Decor Grates Incorporated*, 2015 FCA 100 (CanLII), the Federal Court of Appeal explained the purpose of this type of motion and quoted the following excerpt at paragraph 7 of its decision:

> The rules applicable to requests for particulars and pleadings are well-established and require a party to plead with sufficient particularity to set out the basis for its claim or defence so as to inform the other party of the case it has to meet, allow it to prepare its responding pleading, avoid surprise and appropriately limit and shape the scope of discovery and evidence at trial (see *e.g. Gulf Canada Ltd. v. Mary Macklin*, [1984] 1 F.C. 884 (C.A.)). …

[192] That said, the Tribunal will inevitably have to be flexible (subsection 48.9(1) of the CHRA), and, given the lack of information in Mr. Temate's SOP regarding his disability, this is indeed an item that would have required the Tribunal's intervention even if the Agency did not dispute it.

[193] The principle of proportionality requires the decision-maker to also be proactive in managing its proceedings. It must therefore, together with the parties, identify the main challenges in the case before it and manage its proceedings as efficiently as possible. This is even more meaningful in a quasi-judicial, administrative proceeding like this one, in which the Tribunal has broad discretion. Clearly, care should be taken to ensure that procedural fairness and the principles of natural justice are respected for all parties.

[194] Although the Tribunal concludes that there is a sufficient nexus between the ground of Mr. Temate's disability and the original complaint and that it would be unfair to ask him to file a new complaint in this respect, the Tribunal agrees that he will have to provide more particulars regarding his disability.

[195] Neither the Tribunal nor the other parties can head into the hearing without understanding the nature of the Complainant's disability. Mr. Temate cannot allege that he has a disability and that it was a factor in the refusal to hire him, on the one hand, and not disclose its nature or any details about it, on the other hand. The Respondent also has the right to understand the Complainant's allegations with enough details to be able to defend itself fully and amply (subsection 50(1) of the CHRA).

[196] Thus, the Tribunal agrees to add the ground of disability to the complaint because it finds that there is a sufficient nexus between the disability and the original complaint (*Levasseur*, at para 16) and will not strike the allegations in paragraphs 22, 28 to 30, 39, 73, 75 to 77 and 93 to 96 of Ms. Temate's SOP. But the Tribunal will order him to provide details regarding the disability in his SOP before the Respondent files its own SOP. Once this is done, the Respondent will have the full picture on this and will then be able to present a full and ample defence.

[197] The Tribunal will order Mr. Temate to very specifically explain in his SOP the details of his disability, which was at stake when he applied to staffing process AHS-HISIA-NCR-108797 and when he sat his written exam. The Tribunal is clear: this is not opening the door for the Complainant to allege all the health problems that he may suffer from. He is to provide specific details about the disability that he disclosed to the Agency during the staffing process for his written exam. Mr. Temate is advised that if he does not respect this order, the Tribunal will intervene on its own motion.

[198] The Tribunal also orders him to disclose all potentially relevant documents regarding this disability before the Respondent's SOP is filed and to amend his list of documents. These documents may be part of his medical file or come from his doctor or other heath professionals, for example.

[199] Finally, following that decision, the Tribunal will also issue directions regarding time limits in order to move the proceeding forward.

[200] Now that this has been decided, the Tribunal is sensitive to Mr. Temate's comments that he is afraid to debate his disability publicly. The Tribunal reminds him that its inquiries are public, with some exceptions (subsection 52(1) of the CHRA). In other words, since Mr. Temate's disability has been put forward, it will be one of the subjects addressed at the inquiry. The Complainant is therefore fully aware that his choice to file a motion to amend his complaint to add this ground to it will have consequences in the proceeding and will render information about his disability public, unless exceptions apply.

(ix) Paragraph 35

[201] The Respondent submits that paragraph 35 of Mr. Temate's SOP concerns facts that arose before the complaint and therefore cannot constitute retaliation within the meaning of the CHRA.

[202] The Tribunal has already gone over this situation in paragraph 14 of Mr. Temate's SOP (section (d)). Suffice it to say that, in paragraph 35, the Complainant claims to have received a phone call from a stranger one day before his informal discussion with Jean-François Duperré scheduled for January 30, 2015. The stranger allegedly told him that he knew that Mr. Temate was researching him, and that he knew what he was doing and where he lived.

[203] Mr. Temate draws certain links between the conversation with the stranger, its content and the statements of other individuals involved in the Commission's investigation process.

[204] Contrary to the Respondent's claims, the Tribunal notes that, in paragraph 35 of Mr. Temate's SOP, he refers to neither retaliation nor section 14.1 of the CHRA. The Complainant seems to simply state the facts that occurred after he took part in the staffing process and before his informal meeting with the Agency's representatives in January 2015, nothing more.

[205] Although the facts stated by Mr. Temate raise relevant issues, it is clear to the Tribunal that those allegations are not in themselves new discriminatory practices under sections 7 and 14.1 of the CHRA. The Tribunal rather considers that these allegations fall within a logical and chronological sequence of events that took place after the refusal to hire Mr. Temate.

[206] As such, the Tribunal will not strike them from Mr. Temate's SOP but will examine them under paragraph 7(a) in relation to the refusal for context only.

(x) Paragraph 39

[207] As for paragraph 39, the Respondent disputes it on two fronts: first, it objects to the addition of a portion of allegations related to retaliation for events that occurred before the complaint was filed and, second, it objects to the addition of a second portion that is related to Mr. Temate's disability.

[208] The Tribunal will not deal with the disability here since it was already addressed in section C (viii) of this ruling and will focus solely on the retaliation portion.

[209] The Tribunal notes that, in paragraph 39, Mr. Temate does not request that section 14.1 of the CHRA be added and that he does not refer to retaliation by the Agency in his allegations.

[210] Paragraph 39 rather seems to contain facts and perceptions stated by Mr. Temate in relation to the informal meeting held with Mr. Duperré and other members of the Agency's staff. For example, he explains that he invited Mr. Duperré to find a compromise before that meeting. He also explained that an email was drafted by Mr. Duperré after the meeting and that it was, in fact, a briefing note for the organization's senior management.

[211] Therefore, the Tribunal does not find that Mr. Temate is trying to add new discriminatory practices with respect to these facts. These allegations are intrinsically linked to the refusal to hire and describe events that took place after the refusal.

[212] Accordingly, the Tribunal will not strike Mr. Temate's allegations from his SOP, but it will not consider them as new separate discriminatory practices. It will analyze them under paragraph 7(a) of the CHRA in relation to the refusal to hire, but for context only.

(xi) Paragraph 47

[213] The Respondent argues that the allegations at paragraph 47 of Mr. Temate's SOP concern facts that arose before the complaint and therefore cannot constitute retaliation within the meaning of the CHRA. It also believes that Mr. Temate's harassment allegations do not have a sufficient nexus with the original complaint.

[214] The Tribunal notes that paragraph 47 of Mr. Temate's SOP is long and sometimes difficult to understand. This paragraph seems to basically restate the events described in paragraph 13 of the Complainant's SOP.

[215] Without going into details, the Tribunal gathers that the Complainant explained what happened between November 20, 2015, and February 2016. According to him, the events that followed the refusal to hire and the Respondent's actions as well as those of some of its employees filtered down to his work environment at the CSC. He believes that the content of the letter prepared by Mr. Duperré following the informal meeting in February 2015 was deliberately circulated to cause him harm.

[216] On November 20, 2015, a security incident report was produced relative to Mr. Temate's comments on a case management conference call with the FPSLREB. This ultimately led to an investigation of him and to a request for a disciplinary meeting held on February 11, 2016, involving, among others, his managers at his employer, CSC, Human Resources employees and the Royal Canadian Mounted Police.

[217] This is the crux of Mr. Temate's allegations in paragraph 47 surrounding these events. He believes that the Agency's actions not only in relation to Mr. Duperré's letter, but also in relation to the FPSLREB case management call and the production of the incident report constitute retaliation under section 14.1 of the CHRA as well as harassment in matters related to employment under paragraph 14(1)(c) of the CHRA.

[218] The Tribunal reiterates that Mr. Temate filed his complaint on May 4, 2016. The Tribunal notes that the events alleged at paragraph 47 of his SOP took place between November 20, 2015, and February 2016, which is necessarily before his complaint was filed. Accordingly, as previously explained, section 14.1 of the CHRA cannot apply to these allegations, and any argument to the contrary has no reasonable chance of success in these circumstances.

[219] That being said, although the Tribunal notes that several allegations made by Mr. Temate in this long paragraph raise relevant issues, the allegations at paragraph 47 are basically the same as those at paragraph 13.

[220] The heart of Mr. Temate's allegations in this paragraph concerns the events surrounding the FPSLREB case management call and the events that followed that call, including the security incident report and his being called to a disciplinary meeting with the CSC.

[221] The Tribunal has already analyzed these allegations in section C (iii) of this ruling in relation to paragraph 13 of Mr. Temate's SOP. The Tribunal has already agreed to analyze them under paragraph 14(1)(c) of the CHRA.

[222] The Tribunal reiterates that it does not have to determine the merits of these allegations (*Elizabeth Fry Societies* at para 15), which is not the goal of this ruling. However, it will be necessary for the Complainant to show, on a balance of probabilities, that the Respondent's actions constitute harassment in matters related to employment under paragraph 14(1)(c) of the CHRA.

(xii) Paragraph 50

[223] The Respondent considers that the facts in paragraph 50 of Mr. Temate's SOP arose before the complaint was filed and therefore cannot constitute retaliation within the meaning of the CHRA.

[224] In this paragraph, the Complainant explains that he contacted an Agency employee and learned that there was an instruction to cease all communication with him in any form.

[225] The Tribunal notes that nowhere in this paragraph does the Complainant refer to retaliation. Rather, it appears that the allegations fall within a logical sequence of events that took place after the refusal to hire him in staffing process AHS-HISIA-NCR-108797 under paragraph 7(a) of the CHRA.

[226] In addition, Mr. Temate's allegations at paragraph 50 regarding the refusal to communicate with him are the same as the allegations at paragraph 20 of his SOP.

[227] The Tribunal has already concluded that the allegations concerning the order not to communicate with Mr. Temate were going to be analyzed through the lens of harassment in matters related to employment under paragraph 14(1)(c) of the CHRA. Accordingly, the Tribunal will not strike these elements from Mr. Temate's SOP.

(xiii) Paragraphs 54 to 57

[228] In these long paragraphs, Mr. Temate basically alleges that, at the start of August 2016, the Agency posted another staffing process, namely, 16-AHS-HSI-IA-NCR-164360, to fill three positions, 90782, 90697 and a third one at the EC-07 level.

[229] He adds that position 90782 was the one left vacant by Ms. Delaney, who was selected by the Respondent to staff the position that Mr. Temate wanted in 2015.

[230] The Complainant alleges that he applied to this new staffing process to [TRANSLATION] "take the opportunity", to quote him, to verify whether the Agency's instructions to its staff to no longer communicate with him were going to be implemented.

[231] Mr. Temate alleges that he did not receive any email from the Human Resources representative after applying to the process. He claims that, between August 2016 and January 2017, he attempted to contact the Respondent by email and by telephone and never heard back from them. That said, he adds that his friends called the Agency from the same phone number, and their calls were answered or returned by the organization.

[232] In addition, he states that the same employees were responsible for the new staffing process, 16-AHS-HSI-IA-NCR-164360, as the first process in 2015, namely, staffing process AHS-HISIA-NCR-108797, in which he was not selected.

[233] Thus, Mr. Temate believes that the Respondent's actions regarding staffing process AHS-HSI-IA-NCR-164360 constitute adverse differentiation, harassment and retaliation under sections 7 and 14.1 and paragraph 14(1)(c) of the CHRA.

[234] The Tribunal therefore understands Mr. Temate's explanations that the goal of his participation in the new staffing process, AHS-HSI-IA-NCR-164360, was to demonstrate two things, namely, (1) that the Agency had indeed ordered its staff to no longer communicate with him, and (2) that, when a candidate withdraws from a staffing process, the Human Resources department acknowledges receipt of the withdrawal and informs the candidate that they have lost their privileges. The Agency never contacted him or contacted him very late, thus proving that the order was real, according to Mr. Temate.

[235] Thus, if those were really Mr. Temate's intensions, it then seems that these elements are intrinsically linked to his allegations that the Agency ordered its staff to no longer communicate with him. Therefore, these facts seem to be related to the relationship that already exists between Mr. Temate and the Agency, resulting from the first refusal to hire in staffing process AHS-HISIA-NCR-108797.

[236] These allegations cannot constitute a *refusal to employ* within the meaning of paragraph 7(a) of the CHRA, because Mr. Temate withdrew from the staffing process less than 24 hours after formally applying to it. In addition, there cannot be a *refusal to continue to employ* within the meaning of paragraph 7(a) of the CHRA, just as there cannot be *adverse differentiation in the course of employment* under paragraph 7(b) of the CHRA since there was never any employment. Any argument to the contrary is bound to fail.

[237] Regarding retaliation, given Mr. Temate's statements and the reasons underlying his participation in staffing process AHS-HSI-IA-NCR-164360, the allegations that the Respondent retaliated are bound to fail.

[238] Retaliation within the meaning of section 14.1 of the CHRA must constitute actions that are taken by a person in response to a complaint filed against them under the CHRA. In this case, the Agency would have to have taken actions in response to the complaint Mr. Temate filed in May 2016.

[239] Mr. Temate is clear: he took part in this process to show the Agency had issued an order not to communicate with him. The Tribunal has already concluded the Respondent's order had been given to the staff well before the complaint was filed in May 2016.

[240] Therefore, the connection Mr. Temate is trying to establish between the order and the acts of retaliation on the Respondent's part cannot stand and the principle of proportionality requires the Tribunal not to consider these allegations because it is plain and obvious that they are bound to fail.

[241] That said, the Tribunal reiterates that it has already agreed that the allegations surrounding the Agency's order to its staff to cease all communication with the Complainant are linked to the refusal to hire and to staffing process AHS-HISIA-NCR-108797 and provide context for the complaint.

[242] In addition, the Tribunal has also decided to deal with the events surrounding the order through the lens of harassment in matters of employment under paragraph 14(1)(c) of the CHRA. It is not necessary for the Tribunal to reiterate its reasons in this regard. Thus, the Tribunal will not strike these allegations from Mr. Temate's SOP.

D. Analysis of Allegations Related to Mediation (paragraphs 30 and 70 to 72)

[243] The Agency alleges that Mr. Temate's additions concerning mediation between the parties are irrelevant, inappropriate and vexatious and violate settlement privilege. References to mediation are found at paragraphs 30, 70, 71 and 72 of the Complainant's SOP. The Commission agrees to this request.

[244] With respect to settlement privilege, the Supreme Court recently wrote the following at paragraph 95 of its decision in *Association de médiation familiale du Québec v. Bouvier*, 2021 SCC 54 (CanLII):

> [95] Settlement privilege is a rule of evidence that protects the confidentiality of **communications and information exchanged for the purpose of settling a dispute** (*Union Carbide*, at paras. 1 and 31; *Globe and Mail v. Canada (Attorney General)*, 2010 SCC 41, [2010] 2 S.C.R. 592, at para. 80; *Lafond and Thériault*, at No. 3- 9). It is recognized as fundamental to the making of an agreement between parties (*Sable Offshore Energy Inc.*

> *v. Ameron International Corp.*, 2013 SCC 37, [2013] 2 S.C.R. 623; *Union Carbide*, at para. 1) because it promotes honest and frank discussions, which can make it easier to reach a settlement in all types of mediation (*Union Carbide*, at para. 31). The privilege applies in the general law of mediation without having to be invoked by the parties, because it [translation] "presupposes that all discussions in the course of mediation between the parties are protected at all times" (*Piché*, at Nos. 1284- 86; see also *Union Carbide*, at para. 34). Unlike a confidentiality clause in a contract, "settlement privilege applies to all communications that lead up to a settlement, even after a mediation session has concluded" (*Union Carbide*, at para. 51).
>
> [Emphasis added.]

[245] Therefore, such privilege protects communications and information exchanged for the purpose of settling a dispute. For its part, the Federal Court reiterated in *SSE Holdings, LLC v. Le Chic Shack Inc.*, 2020 FC 983 (CanLII) that three conditions must be met for this privilege to apply, namely, (1) there must be a litigious dispute in existence or within contemplation; (2) a communication must be made with the express or implied intention that it would not be disclosed to the court in the event negotiations failed; and (3) the communication must be made with the purpose to attempt to effect a settlement (see also *Kirkbi AG v. Ritvik Holdings Inc*, [2002] FCJ No 793 at para 175).

[246] None of the information provided by the parties leads the Tribunal to believe that there were discussions aimed at settling the dispute. Indeed, Mr. Temate refers to a mediation process at paragraphs 30 and 70 to 72 of his SOP. Although it must be conceded that these allegations are of limited use, they are only speculation at this stage and are based on Mr. Temate's perception of the Agency's decision on whether to take part in mediation and, if so, on what conditions.

[247] That said, the Tribunal considers that those comments are not protected by settlement privilege. Mr. Temate was only referring to the Respondent's refusal to take part in mediation and speculating about its reasons. The comments were made in passing, made no reference to discussions that took place between the parties regarding negotiations, or their content, for the purpose of settling the dispute. There is nothing more.

[248] Although the relevance of these elements is debatable, the debate will take place at the hearing, and the Tribunal will decide on the weight to be attributed to such allegations in

due course. That said, the allegations made by Mr. Temate are not protected by settlement privilege and are neither vexatious nor oppressive as the Agency claims.

[249] For these reasons, the Tribunal rejects the Respondent's request and does not grant the motion to strike.

[250] Finally, although Mr. Temate has proposed to remove the word *mediation* from his SOP while also arguing correctly that he did not disclose the context of any discussions aimed at settling the dispute, the Tribunal will not ask him to remove that word from his SOP. It is clear that he violated no privilege in the circumstances.

V. Orders

[251] In light of the above, the Tribunals **ORDERS** that the complaint be expanded to include the following:

1) The prohibited ground of discrimination of disability under section 3 of the CHRA found at paragraphs 22, 28 to 30, 39, 73, 75 to 77 and 93 to 96 of the Complainant's SOP;

2) The discriminatory practice of harassment in matters related to employment under paragraph 14(1)(c) of the CHRA, found at paragraphs 13, 20, 47, 50 and 54 to 57 of the Complainant's SOP;

[252] **WILL CONSIDER** the allegations stated at the following paragraphs only for purposes of establishing context for the complaint:

1) At paragraphs 10, 11, 12, 14, 15, 19, 21, 35, 39 and 54 to 57 of the Complainant's SOP, regarding the refusal to employ under paragraph 7(a) of the CHRA;

[253] **DISMISSES** the motion to expand the complaint to include the following:

1) The discriminatory practice of retaliation under section 14.1 of the CHRA, found at paragraphs 10, 11, 12, 13, 14, 15, 19, 21, 47 and 54 to 57 of the Complainant's SOP;

[254] **DISMISSES** the motion to strike the allegations regarding mediation found at paragraphs 30 and 70 to 72;

[255] **ORDERS** the Complainant to amend his SOP to specify the disability alleged at the time of applying to staffing process AHS-HISIA-NCR-108797 and his written exam;

[256] **ORDERS** the Complainant to amend his list of documents to include all potentially relevant documents regarding his alleged disability and **ORDERS** him to disclose those documents to the other parties.

The Tribunal will establish, by directions, the time limits to be respected, including the time limit for Mr. Temate's amendments and the disclosure of his documents and for the filing of the Agency's SOP.

Signed by

Gabriel Gaudreault
Tribunal Member

Ottawa, Ontario
September 27, 2022

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T2526/8320

Style of Cause: Temate v. Public Health Agency of Canada

Ruling of the Tribunal Dated: September 27, 2022

Motion dealt with in writing without appearance of parties

Written representations by:

Cyrille Raoul Temate, for the Complainant

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