

**Canadian Human  
Rights Tribunal**



**Tribunal canadien  
des droits de la personne**

**Citation:** 2022 CHRT 44  
**Date:** December 23, 2022  
**File No(s):** T2640/1621

**Between:**

**Bibi Ali**

**Complainant**

**- and -**

**Canadian Human Rights Commission**

**Commission**

**- and -**

**Department of National Defence**

**Respondent**

**Ruling**

**Member:** Kathryn A. Raymond, K.C.

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## I. Result

[1] The Respondent, the Department of National Defence (“DND”), alleges that the Complainant, Ms. Ali, is trying to change the complaint referred to the Tribunal for hearing by altering its scope. DND asks the Tribunal not to assume jurisdiction over new particulars of an allegation in the Complainant’s Statement of Particulars filed in preparation for the hearing. DND says that another tribunal should hear that dispute, based on the Supreme Court of Canada’s decision in *Northern Regional Health Authority v. Horrocks*, 2021 SCC 42 (*Horrocks*).

[2] The Tribunal finds it has concurrent jurisdiction with the other tribunal which it should not decline to exercise. Doing so would fragment the issues, leave the Complainant with an incomplete decision on the merits of her complaint and unfairly limit the issue of remedy, should the complaint be upheld.

[3] However, the larger issue concerns whether the disputed content should be struck from the Complainant’s Statement of Particulars on the basis that it constitutes an improper amendment to the complaint. The disputed content has relational relevance to the complaint. It would not be fair to strike the content.

## II. Background

[4] Ms. Ali says that she experienced discrimination as an employee of DND based on harassment and adverse differential treatment. In February 2018, she filed a complaint under the *Canadian Human Rights Act* R.S.C. 1985, c.H-6 (the “Act”) with the Canadian Human Rights Commission (the “Commission”). Her complaint was eventually referred to the Tribunal by the Commission for inquiry. Whether her complaint is upheld will be determined another day.

[5] DND raised concern about the scope of the complaint when each of the parties provided particulars of their case in Statements of Particulars (“SOPs”). These are required to be filed by the Tribunal’s *Rules of Procedure* (the “Rules”). Ms. Ali, who worked for DND in an ENG-04 position over the course of a lengthy career with DND, says in her SOP, in

part, that she was not considered for an acting ENG-05 position in 2017 on discriminatory grounds. This allegation is not stated in the complaint she filed with the Commission in 2018 which led to this proceeding.

[6] Ms. Ali was not represented when she filed her complaint. She retained counsel in 2021. When SOPs were filed with the Tribunal, her counsel sought the consent of the parties to amend the complaint to add the content included in her SOP. This content included historical background/context, additional allegations that were not included in the complaint, but which occurred within the relevant period of the complaint, and allegations subsequent to the filing of the complaint. DND agreed to all amendments created by the new content in Ms. Ali's SOP except the allegation about the acting Eng-05 position.

[7] In response to DND's objection, Ms. Ali's counsel took the position that the acting position allegation fell within the scope of the existing complaint and that no amendment was necessary. DND brought this motion to strike the disputed content about the acting ENG-05 position from Ms. Ali's SOP. The disputed content consists of paragraphs 2, 29(e), 57,91, 92 and 102(f) of the SOP.

[8] DND argues that the Tribunal should not permit this on two grounds:

1)(a) because the Tribunal does not have jurisdiction to decide this allegation given the *Horrocks* decision, and

(b) even if the Tribunal does have jurisdiction, the Tribunal should not assume jurisdiction, and

2) the allegation is a new complaint which has no nexus to the existing complaint and was not referred by the Commission to the Tribunal for inquiry.

### **III. The Issues: Jurisdiction & Scope of the Complaint**

[9] The issues are:

1. Does the Tribunal have jurisdiction to decide whether Ms. Ali was not considered for an acting ENG-05 position on discriminatory grounds?
2. If the Tribunal does have jurisdiction, should it exercise that jurisdiction?
3. If so, should Ms. Ali be permitted to retain the disputed content in her SOP?

#### **IV. Jurisdiction**

##### **A. Should the FPSLREB Decide the Dispute over the Acting Position?**

[10] DND is a unionized environment and has a collective agreement. The alleged denial of the acting ENG-05 position could have been grieved under the dispute resolution process pursuant to the applicable collective agreement. That grievance would ultimately be decided by the Federal Public Service Labour Relations and Employment Board (the “FPSLREB” or the “Board”). The Board is created and so authorized by the *Federal Public Sector Labour Relations and Employment Board Act*, SC 2013, c.40, s. 365. DND submits that the disputed content should be decided by the FPSLREB.

[11] Ms. Ali and the Commission dispute that there is any issue with respect to the Tribunal’s jurisdiction and say that it should hear and decide the disputed content.

##### **B. Does DND Assert Concurrent or Exclusive Jurisdiction of the FPSLREB?**

[12] DND begins with the point that the FPSLREB is “better positioned” to address the subject matter of the alleged denial of opportunity related to the ENG-05 position. That is due to the Board’s expertise in interpreting and applying collective agreements. DND submits that simply because Ms. Ali says that she was denied the ENG-05 position on discriminatory grounds does not mean that the Tribunal should decide that issue. The submission that the Board is “better positioned” to address the ENG-05 acting opportunity implicitly assumes that the Tribunal has concurrent jurisdiction with the FPSLREB but should make a choice not to act upon its jurisdiction.

[13] DND also appears to assert that the Tribunal does not have jurisdiction, in which case the Tribunal would not have a discretionary decision to make. This is suggested by DND’s citations from the *Horrocks* decision. The paragraphs in *Horrocks* that DND relies upon all concern the Supreme Court of Canada’s finding that a labour relations arbitrator, authorized by provincial legislation and the applicable collective agreement, had exclusive jurisdiction over facts that gave rise to an alleged human rights violation and that a human rights adjudicator in Manitoba, authorized by provincial statute, did not have jurisdiction.

DND does not state outright that the Tribunal has no jurisdiction over the disputed content based on *Horrocks*, but its reliance on the specific excerpts it has chosen implies that DND believes that the Tribunal does not have jurisdiction and cannot exercise discretion to hear the matter as the Tribunal could if it had concurrent jurisdiction.

[14] It was not until DND's later submissions about staffing decisions that DND expressly claimed that the FPSLRB has exclusive jurisdiction. This was in the context of DND's submission that the disputed content concerns staffing decisions which are to be decided by the FPSLRB because of the *Federal Public Sector Labour Relations Act*, SC 2003, c. 22, s. 2.

### **C. Why The Jurisdictional Issue Matters**

[15] The issue of whether the Board, the Tribunal or both have jurisdiction is significant, as is the question of whether the Tribunal should exercise its jurisdiction, if it has jurisdiction. DND asserts that Ms. Ali should pursue the alleged denial of the acting ENG-05 position before the Board. It is by no means clear that Ms. Ali could do so.

[16] In labour relations disputes arising under a collective agreement, an employee has no personal legal ability to take a matter to arbitration. Grieving a dispute, which an employee may do, does not give the employee a personal right of access to an independent and neutral arbitrator. That is dependant upon the union agreeing to take the grievance forward to arbitration. It can be difficult for an employee to overcome a decision by a union not to do so, given the additional procedural hurdle that presents, the limited legal grounds upon which the duty of fair representation rests, the difficulty of obtaining evidence of unfair representation and related issues. The issue of practical access to the FPSLRB is not addressed in the motion materials. If the Tribunal concludes it cannot or should not exercise jurisdiction, Ms. Ali may be left with questions about her access to justice if she is not able to obtain a decision on the merits concerning the ENG-05 acting position from the Board.

[17] To be clear, the Tribunal is obligated to decide whether it has jurisdiction based on the law. The impact on the parties cannot drive the result. Prejudice to either party is only to be considered if the Tribunal is required to decide whether to exercise its jurisdiction.

#### **D. Analysis: The Case for Exclusive Jurisdiction of the FPSLREB**

[18] The Tribunal is not persuaded by DND's contention that the FPSLREB has exclusive jurisdiction over the disputed content based on *Horrocks* or because the disputed content concerns a staffing issue.

##### **(i) Applying *Horrocks***

[19] DND asserts that the Supreme Court of Canada decided in *Horrocks* that an allegation of a human rights violation does not bring a dispute within the jurisdiction of a human rights tribunal. As in this case, Ms. Horrock's workplace was unionized. A human rights adjudicator in Manitoba took jurisdiction over a human rights issue raised by Ms. Horrocks. The decision of the adjudicator to assume jurisdiction was challenged. Ultimately, the Supreme Court of Canada found that a labour arbitrator had exclusive jurisdiction to determine disputes, including allegations about discrimination, arising from the collective agreement. It did so on the basis that Manitoba's *Labour Relations Act* contained a mandatory dispute resolution clause. The court concluded that this conferred exclusive jurisdiction over disputes arising under the collective agreement upon the labour arbitrator.

[20] The court made this legal finding conditional by holding that its ruling was subject to "clearly expressed legislative intent to the contrary" (at para 39) but found nothing in the legislation authorizing the human rights adjudicator to hear human rights complaints that expressed a contrary intent. In other words, the statutory authorization to hear a human rights complaint was not enough on its own to override the mandatory dispute resolution clause in Manitoba's *Labour Relations Act*.

[21] DND specifically relies upon paras 30, 46, 50-52 of *Horrocks*. These are the paragraphs in the decision which confirm that the arbitrator in that case has exclusive jurisdiction; these paragraphs negate the exercise of discretion by the human rights adjudicator in assuming jurisdiction. The court expressly states that this conclusion "is not a judicial *preference* but an *interpretation* of the mandate given to arbitrators by statute" (para 30).



[22] DND implies that this case is analogous with *Horrocks* because the disputed content is subject to the *Federal Public Sector Labour Relations Act*. DND submits that jurisdiction for the final settlement of disputes arising from Ms. Ali's collective agreement lies with the Board. DND emphasizes that, in *Horrocks*, the Supreme Court of Canada found that the Manitoba Human Rights Commission adjudicator erred in finding that she had jurisdiction by focusing too narrowly on the legal characterization of the claim as involving human rights rather than on whether the facts of the dispute fell within the scope of Ms. Horrocks' collective agreement. DND argues, similarly, that the facts relating to Ms. Ali's acting allegations fall squarely within the scope of her collective agreement. DND points out that the collective agreement contains an article that prohibits discrimination (Article 44).

[23] The Tribunal notes that DND did not identify what provisions in the federal statutes it references are said to confer exclusive jurisdiction on the Board. *Horrocks* concerns the specific legislation in Manitoba in issue in that case, not the *Federal Public Sector Labour Relations Act*, the *Public Service Employment Act* or the *Federal Public Sector Labour Relations and Employment Board Act*.

[24] It is not necessary to compare the wording of the *Labour Relations Act* in Manitoba, which was in issue, and the federal statutes relevant here to determine whether they grant the Board exclusive jurisdiction such that the result in this case should be the same as in *Horrocks*. In *Horrocks*, the Supreme Court of Canada decided that the Canadian Human Rights Tribunal has concurrent jurisdiction with labour arbitrators and other statutory tribunals possessing jurisdiction over human rights. This is because of the *Canadian Human Rights Act*.

[25] The court pointed out that "to displace labour arbitration as the sole forum for disputes arising from a collective agreement... some positive expression of the legislature's will" is required, at para 33. The court emphasized that the "mere existence of a competing tribunal is insufficient". The court then explained what would negate the exclusive jurisdiction of the labour arbitrator:

Ideally, where a legislature intends concurrent jurisdiction, it will specifically so state in the tribunal's enabling statute. But even absent specific language, the statutory scheme may disclose that intention. For example, some statutes

specifically empower a decision-maker to defer consideration of a complaint if it is capable of being dealt with through the grievance process (see, e.g., *Human Rights Code*, R.S. B. C. 1996, c. 210, s. 25; *Canada Labour Code*, ss. 16(1.1) and 98(3); *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, ss. 41 and 42). Such provisions necessarily imply that the tribunal has concurrent jurisdiction over disputes that are also subject to the grievance process.... In these circumstances, applying an exclusive arbitral jurisdiction model would defeat, not achieve, the legislative intent. (Emphasis added)

[26] DND does not acknowledge this finding of the Supreme Court of Canada in *Horrocks* in its submissions for the motion and, therefore, does not offer arguments about why it is not applicable or should be distinguished and not followed.

[27] The Tribunal can see no basis to conclude otherwise than that it is bound by the finding of the Supreme Court of Canada in *Horrocks*. The Tribunal has concurrent jurisdiction with labour arbitrators and statutory tribunals such as the FPSLRB over matters involving facts that give rise to allegations of discrimination.

## (ii) The Case for Differentiating Staffing Matters

[28] DND argues that the ENG-05 allegation is a staffing issue. DND makes a blanket assertion at para 48 of its submissions that the FPSLRB has exclusive jurisdiction over staffing matters as a specialized staffing tribunal with expertise to hear grievances related to staffing actions under the authority of the *Public Service Employment Act*, SC 2003, c.22, ss12,13.

[29] The ENG-05 allegation is not just a staffing issue. The allegation raises a human rights issue. DND's submission does not identify how the FPSLRB could have exclusive jurisdiction over a staffing issue alleged to be caused by discrimination. DND does not offer a specific legislative interpretation of the *Public Service Employment Act* or explain how *Horrocks* would not apply. DND's argument that this is a different situation because the issues also involve staffing matters is not persuasive.

[30] The Tribunal has concurrent jurisdiction over the human rights issues in this case. Whether the facts also involve staffing issues or personnel issues, for example, such as when a complainant's employment is terminated, is not the correct analysis.

## **E. Analysis: The Case for the FPSLREB being “Better Positioned”**

[31] In *Horrocks*, the court commented that “[w]here two tribunals have concurrent jurisdiction over a dispute, the decision-maker must consider whether to exercise its jurisdiction in the circumstances of a particular case” at para 41. The court declined to elaborate regarding the factors that should guide the determination of forum. At first glance, the Tribunal is required to make a decision about whether it should act upon its concurrent jurisdiction. However, the Tribunal is required to hold an inquiry into complaints that are referred to it by the Commission and to effect a resolution of all disputed issues within the scope of the complaint.

### **(i) The Internal Jurisdictional Issue Under the Act & Its Significance**

[32] The decision respecting concurrent jurisdiction over the human rights issues that are relevant to the complaint was effectively made by the Commission when it assumed jurisdiction in its Section 41 Decision. The Commission referred the complaint in its entirety to the Tribunal in its Referral Decision pursuant to sections 44(3) and 49. The Commission’s concurrent jurisdiction has been transferred to the Tribunal.

[33] The issue to be decided by the Tribunal is whether the denied acting ENG-05 position has a sufficient nexus to the complaint such that it falls within its scope. If the allegation has a sufficient nexus to the complaint, the allegation falls within the scope of the complaint and thereby the jurisdiction of the Tribunal over the complaint. The Tribunal is required to hold an inquiry into allegations that fall within the scope of the complaint and must comply with the statutory regime within which it operates.

[34] In Canada, the federal human rights regime is not a direct access model. The Commission screens complaints, and the Tribunal hears complaints referred to it by the Commission. No party has direct access to the Tribunal. When the Commission refers a complaint to the Tribunal, the Tribunal acquires jurisdiction.

[35] Section 49(1) and (2) of the Act make it clear that the Chair of the Tribunal is required upon referral by the Commission pursuant to section 44(3) to “institute an inquiry” by

assigning a member of the Tribunal to “inquire into the complaint”. Section 50(1) states that the member “shall inquire into the complaint.” In other words, when a complaint is referred to the Tribunal, it is expected to act upon that referral.

[36] The Supreme Court of Canada’s conclusion in *Horrocks*, that Parliament intended there be concurrent jurisdiction for proceedings under the Act concerning discrimination allegations in a federal unionized workplace, is based upon the court’s interpretation and application of sections of the Act that speak to the authority of the Commission. When the court wrote that certain provisions in a statute will necessarily imply that the tribunal has concurrent jurisdiction over disputes that are also subject to the grievance process, the court specifically identified sections 41 and 42 which apply to the Commission. Sections 41 and 42 grant the Commission statutory authority to defer a human rights complaint if it can reasonably be dealt with through a grievance process, not the Tribunal. Further, once a complaint has gone through a different legal process, if the complainant requests, the Commission has the ability to determine whether it should proceed to address the complaint, not the Tribunal. When the court described “the expression of legislative intent that negates the exclusive jurisdiction of other decision-makers”, it confirmed the concurrent jurisdiction and authority of the Commission.

[37] This authority includes that, in deciding whether to grant access to the Tribunal, the Commission may consider whether the complaint has been rendered “trivial, frivolous, vexatious or made in bad faith” pursuant to section 41(1)(d) by reason of another process. That is what happened in this case.

[38] Ms. Ali’s allegations of harassment and discrimination by her manager originally became the subject of a grievance which was withdrawn on the basis that DND would provide an internal investigation. Accordingly, an internal harassment complaint within DND was filed by Ms. Ali. Following its conclusion, Ms. Ali apparently was dissatisfied with that internal process in terms of fairness and result. She subsequently filed her human rights complaint with the Commission in 2018.

[39] Commission staff considered Ms. Ali’s complaint in light of section 41. Because of DND’s previous internal investigation, they specifically considered whether her complaint

was trivial, frivolous, vexatious or made in bad faith pursuant to section 41(d) of the Act. In doing so, they considered whether Ms. Ali was required to file a grievance under the collective agreement if she did not consider the outcome of the internal investigation to be satisfactory. A “Section 41 Report” was, in fact, issued by Commission staff with a recommendation that the complaint be dismissed.

[40] The Board of Commissioners of the Commission received and considered the Section 41(1) Report. They make decisions that become the Commission’s decisions (see *Jorge v Canada Post* 2021 CHRT 25 (Can LII) (“Jorge”) at para 137). The Board of Commissioners did not accept the recommendation of their staff to dismiss the complaint. They decided that the Commission should consider the complaint on the understanding that, if warranted, the complaint would be sent on to the Tribunal for hearing.

[41] The Board of Commissioners provided written reasons for the Commission’s decision (the “Section 41 Decision”) to the parties. This decision was not judicially reviewed and became final. DND had an opportunity to dispute the jurisdiction asserted by the Commission by applying to judicially review the Commission’s Section 41 Decision or as part of a judicial review of the Commission’s ultimate referral of the complaint to the Tribunal. It did not do so.

[42] It is recognized that the Section 41 Decision concerned the Commission’s assertion of jurisdiction over the complaint, not the acting ENG-05 position or the more general issue of denied promotional opportunities. As explained below, these allegations had not yet been made to the Commission. The Section 41 Decision, however, set the foundation of the Commission’s jurisdiction over the complaint.

[43] Ultimately, the complaint was referred by the Commission to the Tribunal for inquiry (the “Referral Decision”) pursuant to section 44(3) and 49. In referring the complaint to the Tribunal, the Commission further exercised its decision to exercise concurrent jurisdiction over the complaint in proceedings pursuant to the Act.

[44] The Tribunal’s jurisdiction over the complaint is not in question. The issue of the Tribunal’s jurisdiction over the ENG-05 allegation is dependant upon the relevance of that allegation to the complaint it has received.

[45] The Tribunal's responsibility is to conduct an inquiry commensurate with the scope of the complaint referred to it. The Tribunal should not be re-visiting the history of the complaint before the Commission without a defensible reason to do so, such as when there is an ambiguity about what was referred in the Referral Decision. The Tribunal will not engage in a form of indirect judicial review of a final decision of the Commission (*Jorge*, para 236). The Tribunal has no authority to do so.

[46] Specifically, the Tribunal does not have the authority to make a decision under section 41, which must be made by the Commission. Section 44(2), similarly, gives the Commission the authority to decide to defer a complaint following receipt of an investigation report if the Commission concludes that the complainant ought to exhaust reasonably available grievance or review procedures. It is the Commission that is authorized to make the decision about whether a complaint, in whole or in part, is referred to the Tribunal pursuant to sections 44(3) and 49. On making a referral pursuant to section 44(3), the Commission must be satisfied that an inquiry is warranted, and that the complaint should not be referred to a grievance or other review process.

[47] The Tribunal has no statutory authority to defer matters referred to it by the Commission for jurisdictional reasons. The Tribunal has no jurisdiction to order that a complaint or part of a complaint referred to it by the Commission be sent elsewhere, in this case, to be addressed through the Board's arbitration process. If the ENG-95 allegation is properly a part of the complaint, the Tribunal cannot order that the allegation be sent to another decision-maker.

[48] In summary, the Tribunal derives its concurrent jurisdiction through the Commission under the limited access regime prescribed by the Act. The Tribunal does not decide whether to exercise concurrent jurisdiction as it does not have the jurisdiction or authority to decide whether to apply section 41 or 44(2), or to decline a referral made to it pursuant to section 44(3) and section 49. The decision respecting concurrent jurisdiction was effectively made by the Commission previously when it made its Section 41 Decision and was made again when the Commission referred the complaint to the Tribunal in its Referral Decision pursuant to section 44(3) and 49. The Tribunal is required to hold an inquiry into any matter

that is relevant to a complaint referred to it by the Commission and to effect a resolution of all disputed issues within the scope of the complaint.

[49] For reasons explained below, the Tribunal has concluded that the allegation respecting the ENG-05 acting position falls within the scope of the complaint. The Tribunal has concurrent jurisdiction over this allegation, which it is required to exercise.

**(ii) If a Discretionary Decision by the Tribunal to Assume Jurisdiction is Required**

[50] If the Tribunal is incorrect in its interpretation of the Commission's determination of concurrent jurisdiction over the complaint and its effect, and there is a discretionary decision for the Tribunal to make about exercising its concurrent jurisdiction, given that the Tribunal has decided that the ENG-05 allegation falls within the scope of the complaint, the appropriate forum, the balance of convenience, judicial economy and the interests of justice all but obligate the Tribunal to exercise its jurisdiction to hear the complaint.

[51] It is far more expeditious and efficient to permit amendment of the complaint, if that is appropriate and needed, so that the complaint may be dealt with in its entirety in one proceeding than to decline jurisdiction over one allegation and inform Ms. Ali that, if she wishes to have a decision about the ENG-05 allegation, she is required to begin a separate proceeding for that one allegation with the Board. As explained above, it is not even clear and obvious that she could do so or do so in an efficient or timely manner. DND's submissions do not address issues of judicial economy by reason of the Tribunal already having the disputed content in issue before it. In the Tribunal's view, it would create more work for all parties that is unnecessary and duplicative if the Tribunal were to decline to exercise concurrent jurisdiction in these circumstances.

[52] Further, isolating one set of facts or an allegation from consideration could have implications for the merits of either a human rights complaint before the Tribunal or the FPSLRB. The Referral Decision makes it clear that the discrimination is said to arise on multiple grounds and be intersectional in nature. It could work an injustice to an alleged victim of discrimination or harassment to leave out relevant facts or to carve an allegation

out of a complaint so that it is dealt with separately and negate the opportunity to consider the intersectionality of grounds of discrimination. Sometimes allegations need to be considered in context of other facts and allegations so that the overlapping intersectionality that establishes that discrimination has occurred becomes apparent. It would not only be in the interests of judicial economy but is also in the interests of justice to have all matters within the scope of the complaint heard and decided, at once, by one decision-maker.

[53] DND submits that the Board is better positioned to decide the ENG-05 allegation because it is, at its core, a dispute arising from Ms. Ali's employment relationship with DND, which is governed by a collective agreement. DND says that these allegations necessitate the interpretation and application of Article 44 of the collective agreement which prohibits discrimination in employment on the grounds asserted by Ms. Ali in her allegations, namely religion, national origin, race, colour, sex, and age. DND submits that this is a function that the Board is uniquely qualified to perform. On this point, DND asserts that the interpretation and application of collective agreements has been described by the Federal Court of Appeal as the heartland of the Board's expertise in *Canada (Attorney General) v. Fehr*, 2018 FCA 159 at para 4.

[54] DND points out that the Board also has statutory jurisdiction to interpret, apply, and award remedies pursuant to the Act, and routinely hears cases involving discrimination in employment. The Commission has standing in grievances requiring interpretation or application of the Act, and Ms. Ali is entitled to free representation by her union, the Professional Institute of the Public Service of Canada, with respect to disputes arising from matters covered under the collective agreement. DND further notes that, "as emphasized by Justice Brown in *Horrocks*, unions are subject to both to the duty of fair representation (as codified in this case by s. 187 of the *Federal Public [Sector] Labour Relations Act*) and by application of human rights legislation."

[55] As further support for its argument that the Board is better positioned than the Tribunal to address the disputed content, DND submits that staffing issues require different considerations than the issues raised by Ms. Ali. DND includes here the performance and skills of her and that of other candidates, "...the profile of the other candidates (i.e., their age, colour, national origin, race religion or sex), the qualifications required for [the] ENG-



05 [position], and the team's operational needs which were not investigated at the Commission stage." DND submits that having the Tribunal deal with these issues would add considerably to the proceeding.

[56] These are all reasons why the Board could have heard and decided the issues respecting the disputed content. These are not persuasive reasons why the Tribunal should not exercise its concurrent jurisdiction regarding the complaint before it.

#### **F. Conclusion respecting Jurisdiction Over Disputed Content**

[57] The Tribunal has concurrent jurisdiction and is already engaged in active jurisdiction over Ms. Ali's human rights complaint. The disputed content is properly included as part of the complaint before the Tribunal. The Tribunal has jurisdiction over the disputed content.

#### **G. Acknowledging that a Jurisdictional Issue Remains to be Decided**

[58] Before leaving the issue of jurisdiction, the Tribunal wishes to acknowledge that DND also advanced an argument based on the law respecting when amendments to a complaint may be made. The argument is relevant to the exercise of jurisdiction by the Tribunal in this case.

[59] DND submits that the ENG-05 allegation is different and should be heard by the Board, not by the Tribunal, because the Commission did not consider the specific matter of the acting ENG-05 position during its screening, investigation and referral process. The Tribunal recognizes that the disputed content must be appropriate to include in Ms. Ali's SOP as a particular or as an amendment to the complaint for the Tribunal to have concurrent jurisdiction, as the Tribunal has no jurisdiction independent of the Commission's referral of the complaint. This issue is addressed below.

## **V. Should the Disputed Content be Struck from Ms. Ali's SOP?**

### **A. Overview of the Issues About the Scope of the Complaint**

[60] The issues raised by DND's objections and the responses of the other parties are:

1. Whether the allegation about the ENG-05 acting position was included in the complaint;
2. If not, whether the allegation can bypass the Commission's screening roles during its process;
3. Whether the allegation about the ENG-05 position was referred by the Commission to the Tribunal;
4. If not, whether there is a sufficient nexus between the allegation and the complaint to permit amendment of the complaint; and,
5. Whether any party would be prejudiced should the amendment be granted or denied.

### **B. DND's Objects that the Complaint Did Not Include the ENG-05 Allegation**

[61] As indicated, DND asserts that the ENG-05 allegation was not raised in Ms. Ali's complaint and is outside the scope of the complaint. Accordingly, DND submits that the relevant paragraphs in Ms. Ali's SOP should be struck.

[62] DND asserts that, in all respects, Ms. Ali's complaint was limited to the manner in which she was managed by a specific manager. DND submits that Ms. Ali raised very specific categories of events in her complaint.

[63] DND uses the titles written by Ms. Ali in her complaint to describe what it says are the relevant categories of allegations in the complaint. These include, but are not limited to, "Problem Employee", "Administrative Work/Threat of Discipline", "Performance Monitoring/Workload Distribution", "Retaliation" and alleged "Continued Intimidation After Separation". DND refers, as well, to the use of similar titles in a more detailed version of the complaint that was filed by Ms. Ali early in the Commissions' process before Ms. Ali secured legal counsel. In placing emphasis only upon these two documents that were prepared by Ms. Ali at the Commission stage, which describe the complaint without reference to the ENG-05 acting position allegation, DND implies that Ms. Ali consistently did not refer to subject matter for which the allegation would be relevant.

**C. DND's Objects that the Allegation Did Not Go Through the Commission's Process**

[64] DND states that the acting allegations and the remedies now put forward in Ms. Ali's SOP "...have not been vetted... and have not been investigated or scrutinized by the Commission..." DND submits that allowing the ENG-05 issue to proceed now would circumvent the Commission's process. This includes not only an alleged lack of investigation into the allegation but that the Commission's Section 41 Report and the parties' submissions before the Commission were limited to DND's handling of the internal harassment complaint filed by Ms. Ali with DND. DND asserts that there was no decision by the Commission to deal with the ENG-05 allegation despite Ms. Ali's failure to grieve that decision.

[65] DND submits that the Commission cannot deal with a complaint if it should be screened out by the Commission on the basis of section 41(1)(a) of the Act. In this case, DND says that Ms. Ali ought to have used the grievance process under the collective agreement to dispute the ENG-05 acting position; because she failed to grieve, the Commission cannot deal with her complaint. DND adds that Ms. Ali's recourse to DND's separate internal investigation does not mean that she should not have to exhaust the grievance procedure in relation to the acting ENG-05 position. DND points out that the internal harassment investigation did not consider staffing issues.

[66] DND also says that it would be unfair to permit the disputed content to remain. It submits that it is prejudiced in its ability to raise an objection pursuant to section 41 of the Act to argue that Ms. Ali should have filed a grievance if she wished to dispute the outcome of the acting ENG-05 position.

[67] Regarding the alleged subsequent lack of investigation by the Commission into the ENG-05 allegation, DND emphasizes that the inclusion of the allegation now would permit Ms. Ali to circumvent the Commission's broader screening process which is based upon consideration of an investigation report pursuant to section 44(3). DND relies upon *Karas v Canadian Blood Services and Health Canada*, 2021 CHRT 2 (Can LII) ("Karas") at para 140 where the Tribunal found that permitting additions at a late stage before the Tribunal circumvented the process under the Act to the prejudice of the respondent. DND further

cites *Jorge*, at para 86, as authority for the proposition that the fact the disputed content was not vetted through the Commission's investigatory process alone is a reason to deny an amendment and strike the disputed content.

[68] DND acknowledges that in *Jorge* the Tribunal rejected a similar argument that the respondent was prejudiced by reason of the Commission not having an opportunity to investigate but says that *Jorge* may be distinguished because, unlike the facts in *Jorge*, in this case no notice of the acting allegations was given by the complainant at the Commission stage. DND asserts that the acting allegation was only raised after the referral of the complaint.

#### **D. DND's Objects Because the Allegation was Not Referred by the Commission**

[69] DND further points out that the Referral Decision, which sets the parameters for the inquiry, addressed specific allegations in the complaint. It did not refer to any allegation that Ms. Ali was denied an ENG-05 acting opportunity. DND says, therefore, that the allegation concerning the acting ENG-05 position was not referred to the Tribunal.

[70] DND concludes its description of the facts in its submissions with a simple statement that Ms. Ali took the position, prior to it filing this motion, that the acting allegations were referred to the Tribunal "based on some statements made by the Complainant in her February 7, 2020 reply to the Respondent's submissions." DND does not explain what these statements were.

[71] In its legal arguments, DND adds that Ms. Ali made "vague comments" in her reply submissions to the Commission that, throughout her career she ought to have advanced further beyond an ENG-04 position and that she was "never considered for career opportunities." DND submits that general assertions made two years after a complaint is filed cannot expand the substance of a complaint. DND argues that the "mere mention of an issue in a complaint does not directly support the conclusion that the Complainant was asking for the issue to be dealt with by the Commission...." (*Karas* at para 114).

### **E. Ms. Ali Disputes Her Failure to Raise the ENG-05 Acting Position**

[72] Ms. Ali submits that the complaint contains specific content that makes it clear that the ENG-05 position is relevant and within the scope of the complaint. Ms. Ali points out that “it is uncontradicted that the Complainant had raised the allegation of lost promotional opportunities, including acting positions, before the Commission.” Ms. Ali says that she put the Commission and the Respondent on notice of the lost promotion allegation in February 2020, which was months before the Commission began its investigation, in her reply to the defence DND filed with the Commission. Ms. Ali wrote the Commission in February 2020 as follows:

I was always treated as inferior to the other DMPP employees as if I was something to be tolerated but not considered equal regardless of my intellectual or educational skills. I was never considered for career opportunities. I was going to be corrected to accept my role of indentured servitude....

[73] In para 2 of the affidavit Ms. Ali filed in support of her motion, she alleges that she has suffered 30 years of individual and systemic discrimination while employed by DND which has stymied her career as a mechanical engineer. In para 6, she asserts that she explicitly alleged in her rebuttal to DND’s response to the complaint that “DND never considered me for career advancements, and that I was never permitted to progress beyond the ENG-04 level, including through acting or assignment opportunities”. As well, she says that she explained that she was “pursuing the lost wages and pension benefits of the ‘higher-level engineering (ENG-05) career progression”.

[74] Ms. Ali directed the Tribunal to confirmatory evidence that Commission staff considered her February 2020 reply document. This includes that the Commission’s subsequent Investigation Report of October 19, 2020 noted that she was seeking special damages for lack of career opportunities and lost wages. Ms. Ali asserts that the allegation was included in the Investigation Report and the entire matter was referred in full by the Board of Commissioners to the Tribunal to conduct an inquiry into the allegations. Ms. Ali relies upon on the content of the Referral Decision which she says confirms this.

[75] As noted above, Ms. Ali's counsel ultimately took the position that it was not necessary for Ms. Ali to bring a motion to amend the complaint to include the acting ENG-05 position referenced in the Complainant's SOP. Counsel says this is because it was already a relevant particular, i.e., the content fell within the scope of the existing allegations of the complaint.

#### **F. The Commission Agrees**

[76] The Commission points out that the disputed content contains allegations about Ms. Ali being denied career opportunities and benefits throughout her career and, in particular, the acting position in March 2017. The Commission says that these are not new allegations. The Commission asserts that they were raised before it during the investigation.

[77] The Commission referenced this content in Ms. Ali's February 2022 reply:

...Ms. Ali alleges that she has remained at the same level for 20 years and 'due to the demeaning nature of (her) assigned tasks, (her) career progression has been effectively denied and (she) has been prevented from applying to other engineering opportunities.' Ms. Ali also specified that she would be requesting special damages for deliberate, willful and reckless discrimination which resulted in the loss of career opportunities and benefits.

[78] The Commission submits that the issue of lack of promotional opportunity was before the Commission and was included when the Commission referred the entire complaint to the Tribunal. The Commission says that DND had an opportunity to respond to this allegation prior to the complaint being referred to the Tribunal.

[79] The Commission submits that the lack of promotional opportunities was "properly before the Commission as it has concurrent jurisdiction to the... FPSSLREB over such matters." With respect to DND's argument that it did not have an opportunity to object to Ms. Ali's failure to file a grievance, the Commission states that DND had an opportunity to object to the forum of the proceedings at the time but did not do so.

### **G. DND's Objects that There is an Insufficient Nexus Between the Allegation and the Complaint to Permit Amendment**

[80] DND elaborates that there is an insufficient nexus between the ENG-05 allegation and the complaint to allow amendment. DND submits that the fact Ms. Ali cannot point to any reference to a staffing issue in her complaint confirms there is no link between the complaint's factual foundation and the allegation about the acting ENG-05 position. DND submits "Even interpreting her complaint and subsequent correspondence generously, [the ENG-05] allegations are not "more of the same" as was noted to be the case in *Jorge* at paras 100-101." *Jorge* permitted amendments that are further examples of the same allegation. DND submits that the ENG-05 allegation is not another example that falls into any of the categories of the complaint. DND emphasizes that the acting allegations could not reasonably be considered to be further examples of any category of allegations in the complaint.

[81] DND implies that Ms. Ali is only arguing that there is a nexus between the ENG-05 allegation and the original complaint on the basis that both issues involve the same grounds of discrimination (for example, religion, national origin, race....) DND submits that shared grounds of discrimination (i.e., shared protected characteristics) are not sufficient to create a nexus respecting separate factual circumstances. DND relies upon *Egan v Canada Revenue Agency*, 2012 CHRT 31 (Can LII) ("Egan") to argue that, as was found in that case, there is no nexus between the facts investigated by the Commission and the new allegation.

### **H. The Arguments of Prejudice If Amendment is Permitted or Denied**

[82] DND complains that it did not have an opportunity to put litigation holds in place to protect evidence that would permit it to fully prepare to address the ENG-05 acting position. Ms. Ali asserts that she will be prejudiced if she cannot advance the issues she raised with the Commission which include missed promotional opportunities. The Commission submits that, since DND was aware of the allegations of lost promotional opportunities at the investigation stage, it was incumbent upon DND to ensure that proper litigation holds were put in place.

## I. The Analysis

### (i) A Note About *Jorge* and the Evidence for the Motion About Referral

[83] In part, the history of the complaint before the Commission is relied upon by DND when it argues that the ENG-05 allegation was not considered by the Commission. *Jorge* included a ruling about what can be used from the history of the complaint and in what circumstances. *Jorge* required that there be an ambiguity about what was referred in the Referral Decision to warrant looking at the prior history beforehand.

[84] DND does not address how there is any ambiguity in relation to what was referred to the Tribunal for inquiry in the Referral Decision. There is no dispute that the Commission referred the entire complaint. It appears that DND is taking the position that there is no ambiguity in the Referral Decision given its position that the ENG-05 allegation was not raised by Ms. Ali until post-referral.

[85] In *Jorge*, the Tribunal limited consideration of the history of the complaint, where appropriate, to decisions of the Commission, as opposed to reports and staff recommendations which are not decisions of the Commission.

[86] *Jorge* could be misapplied in this situation. There being no ambiguity raised about the Referral Decision, and no dispute about the interpretation of prior decisions of the Commission, it could be argued that consideration of Ms. Ali's reply, as urged by Ms. Ali and the Commission, should be excluded from the evidence for the motion.

[87] The Tribunal acknowledges that DND did not make this argument. However, for the sake of consistency between the Tribunal's decisions, it should be noted that the situation in this case may be distinguished from *Jorge*. Here, the overall issue raised by DND is what the parties said the case was about and/or what submissions they made to the Commission, not what the Commission decided. DND took the position that the ENG-05 acting position and request for related remedies were not raised by Ms. Ali until after the complaint was referred to the Tribunal for inquiry. Parties should be permitted to use documents from the Commission's record to correct a description of the Commission's record or of the positions they took that are relayed to the Tribunal by another party. This circumstance exists here



and warrants review of the relevant portion of the record of the Commission's official proceeding, namely the Complainant's reply submissions.

[88] As explained above, DND provides a bare acknowledgement that Ms. Ali took the position, prior to this motion, that the general issue of career advancement was referred to the Tribunal based on "vague comments" in her February 2020 reply to the Respondent's submissions. Ms. Ali and the Commission have responded with historical information consisting of quotes from the February 2020 reply to show what they say relates to the issue of denied career progression in the reply. They submit that this was considered by the Commission before it referred the complaint in its entirety to the Tribunal. They argue that the allegation in the reply was included in the Referral Decision when the complaint was referred.

**(ii) Clarifying the Facts About the Record Before the Commission**

[89] The Tribunal makes the following initial factual findings:

1. The original complaint and the follow-up version prepared by Ms. Ali do not specifically mention lost promotional opportunities or the ENG-05 acting position.
2. The Commission's Section 41 Decision did not specifically address the alleged loss of promotional opportunities or the disputed content about the ENG-05 acting position because it had not been raised with the Commission yet.
3. Ms. Ali raised the subject matter of the loss of promotional opportunities after the Commission issued its Section 41 Decision and before the Commission's investigation began. She also identified to the Commission and DND that she was seeking remedies for loss of promotional opportunities. She raised these matters in her February 2020 reply.
4. Staff considered the February 2020 reply in preparing its Investigation Report/Report for Decision for the Board of Commissioners and specifically referenced it.
5. It does not appear that the ENG-05 allegation was specifically investigated by Commission staff during the investigation stage.
6. The Commission's Referral Decision does not expressly reference lost promotional opportunities or the ENG-05 allegation but clearly refers the complaint in its entirety to the Tribunal.
7. The specific ENG-05 allegation was not raised until Ms. Ali filed her SOP and initially requested that the complaint be amended upon agreement.

### (iii) The Significance of the Referral Decision

[90] As indicated, DND submits that general assertions made in Ms. Ali's reply two years after her complaint was filed cannot expand the substance of the complaint. This is incorrect. It is well-established in the caselaw that the Commission has the authority to add matters discovered during its process to ensure that the relevant matters engaging human rights issues are sent forward to be determined by the Tribunal, assuming inquiry is warranted: *Emmett v. Canada Revenue Agency*, 2018 CHRT 23 (CanLII) at para. 34.

[91] In reference to the February 2020 reply, DND argues that the "mere mention of an issue in a complaint does not directly support the conclusion that the Complainant was asking for the issue to be dealt with by the Commission...." (*Karas* at para 114). This argument overstates the point that the Tribunal was making in *Karas*. *Karas* considered whether the scope of a complaint concerned other groups of people beyond the complainant. The Tribunal concluded that, just because it was mentioned that a policy could apply to other people, it could not reasonably be concluded that the complainant was asking to have other groups of people included in a complaint for whom he intended to advocate. In comparison, Ms. Ali clearly communicated the alleged impact upon her career and the nature of the remedy she was seeking as a result, prior to the investigation of her complaint.

[92] Consistent with *Jorge*, what is relevant is what was referred to the Tribunal by the Board of Commissioners. The Board of Commissioners' reasons for decision do not state that any aspect of the complaint is excluded. *Karas* (at note 14, page 20) made it clear that the referral letter to the Tribunal must make it clear this is required by direct limitation or exclusion, or the Tribunal will assume that the complaint is referred for inquiry in its entirety. By extension, *Jorge* made the same ruling but in respect of the referral decision that is given to the parties, as the referral letter to the Tribunal was characterized in that case as administrative in nature.

[93] In this case, the Board of Commissioners wrote in their Referral Decision they were not satisfied that there had been sufficient inquiry. Various omissions were identified respecting the limited investigation of what was a complex complaint. This included the fact that there was "no global assessment of the treatment that the complaint alleges in the

context of the multiple and intersectional prohibited grounds of discrimination alleged.” The Board of Commissioners also specifically referenced the “extensive and conflicting post-disclosure submissions filed by the parties” in concluding that the case raised complex factual and legal issues that require a full hearing by the Tribunal. Having read the extensive submissions of the parties, the Board of Commissioners likely read Ms. Ali’s submissions about lost promotional opportunities. The Commissioners did not screen out any part of the complaint.

**(iv) Observations About Omissions in DND’s Position**

[94] DND does not explain why it proceeded after receipt of Ms. Ali’s reply before the Commission in 2020 as if no mention of lost promotional opportunities had been made. It raised no objection respecting section 41 or pursuant to section 44(2) or about forum. The time to do so was when the matter was before the Commission.

[95] DND does not explain what was vague about what was stated in the reply. It sought no clarification. If DND means the assertion lacked particulars, DND could have requested particulars. When faced with a general accusation there has been a lack of promotion and a lack of career progression, the logical question is to ask, “in what respect?” Lost job opportunities are relevant particulars of a complaint of a constrained career.

[96] Almost the entirety of DND’s submissions for the motion convey the impression that the issue of lost promotions was not raised by Ms. Ali because of DND’s repeated statements that the ENG-05 position was never raised until after the complaint was referred. DND fails to explain why earlier reference to lost promotional opportunities is irrelevant to the ENG-05 lost opportunity. The content about lost promotional opportunities quoted from the reply is, at the very least, arguably relevant to this motion. In fact, the content presents a key issue in this motion about its significance. DND should have addressed the content in the February 2020 reply clearly and directly in its submissions. DND’s motion to strike the content in Ms. Ali’s SOP can be dismissed on the basis it did not do so.

**(v) The Finding Respecting the February 2020 Reply**

[97] The Tribunal finds that the February 2020 reply establishes that the complaint included a relevant category of alleged differential treatment that would include the loss of opportunity respecting the ENG-05 acting position. One is an example or “particular” of the other.

[98] It is not necessary that the complaint be formally amended. The parties will proceed on the basis that the allegations in the February 2020 reply respecting an alleged lack of career progression and lost opportunities for promotion are deemed to be included as part of the complaint by reason of the Tribunal’s findings respecting the Referral Decision.

**(vi) Offering An Alternative Finding Based on the Content of the Complaint**

[99] DND’s submissions are almost written as if the February 2020 reply does not exist. In the event the Tribunal’s reasons based upon the February 2020 reply and Referral Decision are rejected on judicial review, these reasons will address, below, the arguments that DND made that reflect the documents upon which DND relied. These focus primarily upon the complaint and its categories.

**(vii) The Significance of the Commission’s Investigation**

[100] Much of DND’s submissions turn on the fact that the Commission investigated the complaint and did not investigate the allegation in Ms. Ali’s SOP that she had been denied an ENG-05 acting opportunity. (As found above, it also does not appear that the issue of lost promotions raised in the reply was investigated by the Commission.)

[101] The Commission is under no obligation to investigate every allegation in a complaint or that is raised during an investigation. In fact, the Commission may refer a complaint for hearing at anytime after it is filed without conducting an investigation pursuant to section 49(1) of the Act. It is within the authority of the Board of Commissioners, as well, to decide to refer a complaint in its entirety to the Tribunal based on an investigation of only a part of a complaint or of one allegation out of many.

[102] The Commission decides whether an inquiry is warranted, not whether an inquiry is warranted into each and every aspect of a complaint. Complaints are regularly referred to the Tribunal that contain allegations that were not investigated by the Commission, but which were referred for inquiry.

[103] It is not the case that allegations that are not investigated at the Commission stage automatically circumvent the Commission's investigation process or its discretion pursuant to section 41 or 44(2)(a) to defer a complaint where a grievance process is available. The Commission's decision to not investigate an allegation that has been raised or to not defer a complaint where a grievance process is available falls within its authority, discretion and screening process.

[104] DND has relied on *Egan* where the Tribunal required that there be a nexus between the facts investigated by the Commission and the new allegation sought to be included. The Tribunal notes that the reasons for this conclusion in *Egan* do not address the Commission's power to refer a complaint at any stage after it has been filed pursuant to section 49(1). As explained, section 49(1) permits a complaint to be referred to the Tribunal without any investigation. The Tribunal respectfully disagrees with the Tribunal's conclusion on *Egan* that the facts investigated by the Commission determine whether there is a sufficient nexus between a proposed amendment and the complaint.

[105] The fact that the Commission did not investigate the details of the allegation that Ms. Ali had been denied an ENG-05 acting opportunity is relevant background, but it is not determinative of whether an amendment should be granted, or content struck. Almost all amendment motions involve the proposed addition of content to a complaint that was not investigated specifically by the Commission.

[106] Circumventing the Commission's screening process is a reason to deny an amendment in retrospect when the requested addition is found to be a new complaint. Amendments are granted or denied based upon their relational relevance to the existing complaint and an assessment of prejudice to both parties: *Jorge*. A lack of investigation alone is not determinative, as DND suggests. With respect, *Jorge* does not stand for the

proposition that circumventing the Commission's investigation is grounds on its own to refuse to grant an amendment.

**(viii) The Commission's Alleged Failure to Consider Whether to Screen Out the Disputed Content Given Ms. Ali's Access to a Grievance Process**

[107] In the same vein, DND appears to believe that the Commission cannot proceed to investigate or refer a complaint if the complaint should be grieved and asserts that this is a reason why the disputed content cannot be considered now. That is not the law. The Commission exercises discretion when deciding how and when to apply section 41. The only mandatory language in section 41 is that the Commission "shall" deal with any complaint filed with it. This could include, or not include, deferring a complaint because another process is available. There is no mandatory requirement to screen out complaints because a grievance or other process is available; rather there is significant case law respecting the Commission's assessment of these other options and whether it will proceed with a complaint regardless or subsequently.

[108] This case is an example of the latter. Commission staff prepared a Section 41 Report because DND had conducted an internal investigation and Ms. Ali had an opportunity to file a grievance about that internal investigation but did not do so. However, when the Section 41 Report was provided to the Board of Commissioners, the Report's conclusion that the complaint should not proceed was not accepted.

[109] As explained, the Board of Commissioners may also screen complaints after receiving the Investigation Report pursuant to section 44(2). Like section 41(1), that section of the Act gives the Commission the authority to defer proceeding with a complaint and to refer the complaint elsewhere if it is satisfied that "the complainant ought to exhaust grievance or review procedures otherwise reasonably available" (section 44(2)(a)) or if the complaint could more appropriately be dealt with under another Act of Parliament (section 44(2)(b)).

[110] In this case, staff prepared an Investigation Report that referenced various documents including Ms. Ali's reply and provided the information collected during the

investigation to the Board of Commissioners for its consideration. The Commissioners are entitled to the presumption, in the absence of evidence to the contrary, that they considered matters relevant to their statutory obligations, including pursuant to section 44(2). Section 44(3)(a)(ii) makes it appropriate, if not necessary, for the Commission to consider whether the complaint or any part of it should be referred elsewhere pursuant to section 44(2) before sending the matter to the Tribunal. DND's submissions do not address the fact that the Commission could have screened out the "lost career opportunities" allegation in Ms. Ali's February 2020 reply pursuant to section 44(2) and required Ms. Ali to file a grievance but did not do so; nor does DND offer a reason why it did not make an objection pursuant to section 44(2) at the time.

[111] Ms. Ali submits that her belief that her career progression had been stymied by reason of discrimination in the workplace was appreciated at the time by the Commissioners. Ms. Ali stayed at the ENG-04 level during her 20-year career. This fact is in her complaint and is undisputed. It seems likely, based on the Commissioner's comments about the breadth of issues and complexity of this case, all concerning allegations respecting Ms. Ali's experience at work over approximately 20 years, that the Board of Commissioners reviewed the documentation and appreciated that a lack of career progression was included as an allegation and should be part of the complaint. They have expertise in these matters. Alternatively, the Commission issued a Referral Decision that could have been judicially reviewed, if DND believed that the Commission had failed to meet its statutory obligations pursuant to section 41(1) or 44(2) in reaching that decision. The Tribunal will not engage in a review of the Commission's decision to refer the complaint in its entirety.

**(ix) Is There a Sufficient Nexus to the Complaint on the Issue of Liability?**

[112] The pre-existence of facts about an allegation in a complaint is not the legal test for the purpose of determining whether a fact(s) is a relevant particular in an SOP or whether, if an amendment is required, it should be granted. DND relies upon *Jorge*, which describes what a "nexus to a complaint" means and the most significant overall circumstances that help define relational relevance between a fact/allegation and the existing complaint. *Jorge*

does not say that the existing complaint must contain the facts or some of the facts in dispute already.

[113] DND also distinguishes *Jorge* by arguing that the disputed content is “not another example” of more of the same thing. However, that is too narrow and restricted a reading of *Jorge*’s explanation of what a nexus can be. The disputed content does not need to fall within an existing category in the complaint (the titles used by Ms. Ali to organize her complaint) as is argued by DND. The complaint is properly framed, not based upon an organizational approach to alleged categories of facts adopted by a party, but rather based on the content of the Act.

[114] Following the framework in the Act, it is first noted that the parties are the same in the complaint and respecting the disputed content which is necessary for purposes of a complaint under the Act.

[115] Continuing with this approach, as noted at para 94 in *Jorge*, “[t]he proposed content is more relevant if it relates to the same ground of discrimination or what is referred to as a protected characteristic in the Act (e.g., race, gender) or to the same discriminatory practice (e.g., differential treatment in employment, denial of service).”

[116] The complaint alleges discrimination on the basis of religion, national origin, race, colour, sex, and age, as the relevant protected characteristics in the Act. The disputed content is based on identical grounds.

[117] DND asserts that shared grounds of discrimination (i.e., shared protected characteristics) are not sufficient to create a nexus respecting separate factual circumstances. DND relies upon *Egan* at para 35 to point out that not all discriminatory acts based on the same alleged ground or protected characteristic have a sufficient nexus with a complaint to meet the legal test to permit amendment. At para 35 in *Egan*, the Tribunal found that, “Adopting such reasoning would mean that any discriminatory act founded on the Complainant’s disability, regardless of the Complainant’s initial allegations or the Commission’s investigation, could later be added to the complaint.”



[118] The complaint in that case concerned an alleged failure to accommodate. The Tribunal was not prepared to permit the complaint to be amended to add a claim of alleged loss of promotional opportunities based on the fact the complainant's allegations about this topic were broadly related to her disabilities. There was an insufficient nexus to the complaint in that case, because there was nothing in the complaint that could reasonably be said to relate to the loss of promotional opportunities or that would include it by extension. In any event, Ms. Ali's argument is not limited to the assertion that there is a nexus between the ENG-05 allegation and the original complaint because both involve the same grounds of discrimination, as DND's submissions imply.

[119] Ms. Ali complains that she was discriminated against and experienced adverse differential treatment during her employment which, if true, is contrary to section 7 of the Act. Section 7 states that it is a discriminatory practice in the course of employment to differentiate adversely in relation to an employee. The allegation in the disputed content that Ms. Ali was held back in her career with DND for discriminatory reasons likewise constitutes alleged adverse differential treatment. The disputed content is another alleged discriminatory practice in the course of employment that, if true, would be contrary to section 7. All alleged instances of differential treatment in the complaint and the differential treatment alleged in the disputed content relate to employment with the same employer, while Ms. Ali held the same position.

[120] However, DND classifies the ENG-05 allegation as a staffing issue, and its argument develops from that standpoint, not from the position that the acting ENG-05 allegation alleges adverse differential treatment or discrimination. DND does not define "staffing". DND does not explain this argument in any detail apart from listing staffing considerations such as the need to consider Ms. Ali's performance and skills, the profile of other candidates; the qualifications required for the position and DND's operational needs. Its position implies that, while a human rights issue may be included, staffing involves specialized issues, or that the Tribunal lacks the expertise to handle staffing issues, when this is not the case. Staffing decisions may involve adverse differential treatment and thereby discrimination in the context of employment and commonly arise in human rights cases in the context of employment.

[121] DND relies upon *Egan* at para 36 where the Tribunal found that issues related to employment staffing require different considerations than those concerning the accommodation of an employee in their current position. But in *Egan* there was an insufficient nexus between the original complaint and the allegation of loss of promotional opportunities. The original complaint alleged a lack of accommodation of the complainant in their existing position. There had been no suggestion prior to referral that promotional opportunities were an issue. *Egan* is distinguishable because the Tribunal was not required to deal with a staffing issue.

[122] Further, DND complains that staffing considerations were not considered by the Commission during its investigation and relies upon *Egan* at para 36 where the Tribunal's conclusion about the requested amendment was greatly impacted by the fact that none of the staffing issues in that case had been investigated by the Commission. In addressing (above) the significance of the Commission's investigation, the Tribunal has explained why this alone is not determinative in a motion for a requested amendment

[123] To this point of the analysis, the disputed content involves the same parties, the same protected characteristics under the Act and alleged discriminatory practices in the context of employment. The analysis in *Jorge* then moves (at paras 95-96) to the proposed additional facts. Given that the same protected characteristics are involved, are the additional facts consistent with and necessary to the integrity of the factual narrative of the complaint, i.e., are they "part of the same storyline"? The disputed content occurred within the relevant time frame of the complaint. That increases the probability of relevance but does not ensure its certainty. The facts themselves still need to be assessed for relevance.

[124] Ms. Ali expressly complains that she was given administrative work to do instead of engineering tasks, contrary to her job description and says that this constitutes an adverse impact upon her. DND, however, submits that the category of being assigned "Administrative Work" as an engineer is not relevant to a lost opportunity to gain further professional experience. The impact of being given administrative duties is not inherently constrained to the issue of Ms. Ali's job duties. The underlying allegation is that Ms. Ali was under-utilized in her role and that her skills and education as an engineer were not valued the same as her counterparts who did not have the same protected characteristics. The

disputed content about the denial of the acting ENG-05 position is capable of being a logical extension of the alleged facts in the complaint about being given administrative work rather than engineering tasks. If the necessary facts are proven, the implication or outcome of a pattern of underutilization may, in theory, include a lack of promotion or promotional opportunity.

[125] It cannot be fairly said that the proposed new facts about the ENG-05 position are entirely unrelated to the facts in the original complaint. They are not strictly “more of the same” in the sense that the disputed content is not another example of being assigned administrative duties outside of any that may be assigned to an engineer. However, the content is a relevant, potential outcome of being assigned tasks below one’s skill set and job description; it appears “necessary to the integrity of the factual narrative of the complaint”, or to “part of the same storyline” (*Jorge* at para 102) to include the disputed content. It “complete(s) the history of what occurred” (*Jorge* at para 103). The Tribunal concludes that there is a nexus between the allegation about administrative work, which appears to be an example of alleged under-utilization, and the allegation about a lost or denied opportunity to take an acting position as an ENG-05. The latter concerns a lack of career progression, which could be proven to be a long-term effect of underutilization and be closely related to it. One appears to follow as a logical consequence from the other.

[126] The same can be said for other categories of alleged discriminatory practices in the complaint. At least two other categories/allegations lead logically to a possible connection to underutilization or implied impact upon career progression because they concern career progression. For example, being asked about your intention to retire has a logical connection to the issue of career progression. Age and retirement are logically linked to opportunities for career progression. The Tribunal is not determining here whether any discrimination occurred; the point is that the two topics share a logical relationship in a workplace.

[127] Similarly, Ms. Ali claims that her manager told her supervisor to record that she was a problem employee on a performance appraisal for the year. She says she was unfairly labelled a problem employee by the manager because she was an older woman, a practicing Muslim, etc. She asserts that this label was intended to convey within the workplace that she was a problem employee. A negative performance evaluation as a

problem employee could have an impact upon an employee's continued employment, promotional opportunities or career progression. The allegation and its alleged impact are not entirely unrelated. Again, the Tribunal makes no finding here that if one fact is proven, the other follows. Both must be proven.

[128] There is a sufficient nexus or "relational relevance" between the existing content or categories in the complaint based on their potential for a shared commonality with underutilization of Ms. Ali as an engineer or leading to that result and the loss of promotional opportunities. That commonality is, in turn, shared with the disputed content about the ENG-05 position.

**(x) Is There a Sufficient Nexus to the Complaint on the Issue of Remedy?**

[129] The disputed content respecting limited career opportunities is also relevant to the issue of remedy. In fact, there is a strong nexus between the disputed content and the issue of remedy. If her complaint is upheld, Ms. Ali is asking the Tribunal in her SOP to exercise its authority to grant an order of damages for loss of income based on the higher earnings and pension adjustment that she claims she would have earned in the ENG-05 acting position had she not allegedly been passed over for the position in 2017. The Tribunal would need to be persuaded that such an order is warranted and appropriate before this would be ordered. However, the denial of a position is relevant to the issue of remedy in these circumstances. Omitting the ENG-05 allegation from the scope of the complaint would have a prejudicial effect upon Ms. Ali on the issue of remedy by removing the alleged example upon which the calculation of alleged lost income is based. A failure to consider evidence of an example of an alleged impact of discrimination would be unfair.

**(xi) The Assessment of Prejudice**

[130] The Tribunal is not persuaded there is prejudice to DND if the disputed content is permitted to remain in Ms. Ali's SOP. In part, this is because the issue of a lack of career progression was expressly raised in 2020 and not objected to at the time. DND had an opportunity to raise section 41(1) type arguments either when Ms. Ali filed her reply by

asserting that the claim of impaired career progression and a lack of opportunities was new content, or, DND could have made essentially the same objection pursuant to section 44(2). The claim of prejudice to DND in this regard fails.

[131] As *Jorge* and other decisions of this Tribunal have made clear, for an argument of prejudice to succeed, it must be specific, not speculative, and be supported by evidence. DND has offered no evidence of any actual prejudice in support of its motion.

[132] The Tribunal is not persuaded by DND's submission that it should not be subject to the expectation of evidence in *Jorge* because DND did not have notice of the ENG-05 allegation. DND had express notice of the nature of the issue in Ms. Ali's reply of February 2020 and of the fact that Ms. Ali was seeking payment of a significant amount of compensation and other remedies based on an alleged lack of promotional opportunities. It is not reasonable for DND to allege a lack of notice respecting the ENG-05 position when DND had notice that Ms. Ali would be seeking compensation for lost income arising from alleged limited career opportunities and DND did not request details or raise an objection about the missing particulars. DND has not established that it would be prejudiced if an amendment were ordered by the Tribunal.

## **J. Overall Conclusion & Direction**

[133] The complaint is deemed to include the referenced content in Ms. Ali's February 2020 reply. The allegation respecting the ENG-05 position is permitted and the disputed content in the SOP may remain as particulars of the complaint for purpose of the merits of this inquiry and the issue of remedy.

## **VI. Order**

[134] DND's motion to strike the disputed content in Ms. Ali's SOP is dismissed.

*Signed by*

**Kathryn A. Raymond, K.C.**  
Tribunal Member

Ottawa, Ontario  
December 23, 2022

**Canadian Human Rights Tribunal**

**Parties of Record**

**Tribunal File:** T2640/1621

**Style of Cause:** Bibi Ali v. Department of National Defence

**Ruling of the Tribunal Dated:** December 23, 2022

**Motion dealt with in writing without appearance of parties**

**Written representations by:**

Yavar Hameed and Nicholas Valela, for the Complainant

Luke Reid, for the Canadian Human Rights Commission

Sarah Jiwan and Taylor Andreas, for the Respondent