Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2023 CHRT 57
Date: December 5, 2023
File Nos.: T2673/4921 and T2674/5021

Between:

Christopher Coyne and Penny Way

Complainants

- and -

Canadian Human Rights Commission

Commission

- and -

Salt River First Nation

Respondent

Ruling

Member: Athanasios Hadjis

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I. OVERVIEW

[1] This is a ruling on a request made by one of the complainants, Penny Way.

[2] There have already been ten days of hearing in this case. Two more hearing days are scheduled to take place in January 2024. During the hearing, Ms. Way asked to amend her Statement of Particulars (SOP) to include an additional remedial claim for special compensation under s. 53(3) of the *Canadian Human Rights Act*, R.S.C.1985, c. H-6 (the "Act").

[3] The Respondent, the Salt River First Nation (SRFN), objects to the request. The Canadian Human Rights Commission (CHRC) consents.

[4] For the following reasons, I grant the amendment request.

II. ANALYSIS

[5] In her current SOP, Ms. Way asks that the following remedies be granted to her if her complaints are substantiated:

- That the SRFN cease its practice of excluding certain SRFN members, including her, from Per Capita Distribution (PCD) payments and change its "dilution prevention policy";
- That the SRFN change its election code, which excludes members like her born before June 22, 2002, from running for council;
- That the SRFN accept her as a full beneficiary member;
- That the SRFN provide her PCD payments from 2017 to date;
- That the SRFN pay her $10,000 for "mental anguish" (i.e., pain and suffering pursuant to s. 53(2)(e) of the Act).

[6] On the ninth day of the hearing, November 9, 2023, Ms. Way asked to amend her SOP to add the following remedial claim:

> I now ask for compensation under the Canadian Human Rights Act under section 51(3) [sic] at the members [sic] discretion of the amount they see fit. I feel after hearing the testimony given that this was a willful and reckless act by SRFN.

[7] Ms. Way clarified at the hearing that she meant to write s. 53(3) of the Act, which provides that the Tribunal can order up to a maximum of $20,000 in special compensation if it finds that a respondent has engaged in a discriminatory practice wilfully or recklessly.

[8] When Ms. Way made her request, the SRFN was in the process of examining its second witness. Its first witness had finished testifying earlier in the day. Ms. Way had called her last witness several days earlier, on November 7, 2023, and closed her case. Christopher Coyne, the other complainant, testified as his only witness on November 1 and 2, 2023. The CHRC did not call any witnesses. Both the CHRC and Mr. Coyne have closed their cases as well.

[9] Ms. Way is self-represented. She explains that, when she wrote her SOP, she hesitated to add a claim under s. 53(3) of the Act and opted to limit her claim under s. 53(2)(e) of the Act to $10,000, instead of the maximum $20,000, because she did not want to put a financial strain on her First Nation. She had understood the SRFN's position as being that if all members, including her, were to receive PCD payments, the entire trust fund from which they are sourced would eventually be depleted. It is her understanding now from the SRFN's evidence at the hearing that the trust will not be depleted.

[10] Ms. Way claims that she learned from the testimony of the SRFN's first witness, an Elder who was its former chief negotiator of the 2002 Treaty Settlement Agreement at issue in this case and a former councillor, that the SRFN lied to her and other members about the trust. She contends that he made it very clear that he and the SRFN deliberately decided to "exclude" members like her. She also claims to have learned that the SRFN does not allow her to vote on annual budgets and does not consider her eligible for a house on reserve or any land rights. This all has led Ms. Way to conclude that the SRFN has discriminated against her wilfully and recklessly, which is why she now seeks to add a s. 53(3) claim.

[11] The Tribunal recently dealt with a similar issue of a mid-hearing request to amend an SOP, in *Vadnais v. Leq'á:mel First Nation*, 2022 CHRT 38 (*Vadnais*). As the Tribunal noted, at paras 14-15, SOPs can be amended at any stage of the proceeding—even during the hearing or trial—to determine the real issues in controversy between the parties.

[12] The party requesting the amendment must show that the request:

- does not result in an injustice;
- serves the interests of justice; and
- is not prejudicial to the other parties or the Tribunal process.

[13] The Tribunal must also be satisfied that there is a valid justification for the late request (*Whyte v. Canadian National Railway*, 2009 CHRT 33).

[14] As was highlighted in *Vadnais*, at para. 29, parties to a case have the right to know the position of the other parties and what they will present as evidence at the hearing. The whole purpose of filing sufficiently detailed SOPs is so that the parties know well enough and in advance the allegations, the questions of law, the remedies, and the defences that are at issue and that they have a full and ample opportunity to respond to these elements (s. 50(1) of the Act and Rules 18 to 21 of the *Canadian Human Rights Tribunal Rules of Procedure, 2021*, SOR/2021-137).

[15] In *Vadnais*, the Tribunal denied the major amendment request to introduce a whole new defence for the first time. The SRFN submits that I should make a similar finding here. It contends that its SOP was very clear. The PCD payments were paid from the income derived from the trust fund, not the trust itself. If Ms. Way thought this justified an award of special compensation under s. 53(3) of the Act, she could have requested it in her SOP, including on the occasions when she amended it prior to the start of the hearing.

[16] This argument does not really address Ms. Way's point. She is not saying that learning the source of the PCD payments triggered her s. 53(3) claim. She is saying that she now became motivated to seek this remedy after realizing that SRFN allegedly misled its members about the trust fund and engaged in other efforts to "exclude" her and others deliberately.

[17] Ms. Way pointed out in her amendment request that Mr. Coyne had made a s. 53(3) claim in his SOP. She argues that the issue was therefore always before the Tribunal and that the SRFN would not be prejudiced if she makes a similar request. The SRFN has had every opportunity to address the s. 53(3) issue.

[18] The SRFN counters that Mr. Coyne's and Ms. Way's complaints are nonetheless distinct, with their own pleadings and evidence. They were joined solely for the purposes of

the hearing. Because Ms. Way seeks to amend her SOP after her case is closed, the SRFN will have no opportunity to cross-examine her or her witnesses with respect to this new remedy.

[19] While this argument could carry some weight with respect to certain remedial claims under the Act, such as claims for expenses (s. 53(2)(d)) or for pain and suffering (s. 53(2)(e)), it is hard to see how it could apply to the compensation under s. 53(3). It is called "special" compensation for a reason. It is unique since it is not focussed on the impact the discrimination had on the "victim" as the term is used in s. 53(2), but rather on the person who engaged in the discriminatory practice wilfully or recklessly. Thus, as was noted in *Christoforou v. John Grant Haulage Ltd.*, 2021 CHRT 15 at para. 108, to determine if a discriminatory practice was wilful or reckless under s. 53(3) of the Act, the Tribunal must focus on the respondent's conduct and not on the effect that the conduct has had on the complainants.

[20] This has a bearing on Ms. Way's reason for making the amendment request now. She claims to have realized from the evidence presented through the course of the hearing that it would support a finding of wilful or reckless discriminatory conduct. This is a matter for final argument, of course, but the submissions in this regard will be based on evidence presented at the hearing. As noted in *Vadnais*, SOPs can be amended at any stage to determine the real issues of the case. Ms. Way alleges that the nature of the SRFN's conduct has emerged as a real issue for her complaint.

[21] I find this to be a valid justification for making the request at this stage mid-hearing, mindful that I may ultimately find that her allegations about SRFN's conduct are unsubstantiated.

[22] Of course, the Tribunal also points out in *Vadnais* that we must ensure that the amendment request does not result in an injustice, is not prejudicial to the other parties, and serves the interests of justice. I note that while Mr. Coyne's and Ms. Way's complaints are distinct, the issues are largely common, particularly as to the instruments that created the trust and the adoption of the policy and band council resolutions that resulted in the PCD payments ceasing to be given to both complainants. The s. 53(3) issue regarding the

SRFN's conduct was raised by Mr. Coyne and has been present from the outset of the hearing. It is difficult to see how the assessment of the SRFN's conduct for the purposes of s. 53(3) of the Act would differ much with respect to Ms. Way's claim. In this light, the SRFN has had ample opportunity to cross-examine all the witnesses for the complainants. I am not persuaded that allowing Ms. Way to add a virtually identical claim to Mr. Coyne's would entail any injustice or any serious prejudice to the SRFN. It would also serve the interests of justice to allow Ms. Way, who is self-represented, to amend her claim considering the circumstances she has raised.

[23] In any event, if the SRFN feels that it needs to present evidence beyond what it already has with respect to Mr. Coyne's allegation of wilful or reckless discriminatory practices, it still has an opportunity to do so. In contrast to *Vadnais*, where the respondent in that case sought to amend its SOP and add a wholly new defence after the opposing party had closed its case, here Ms. Way has made her request before the SRFN has closed its case. The SRFN's next witness is scheduled to testify for two days in January 2024. According to his will-say statement, he is the SRFN's land and resources officer and was present at the negotiations leading to the 2002 Treaty Settlement Agreement. If the SRFN needs to call additional witnesses or recall any other witnesses, there is still time to do so. The Tribunal is prepared to consider such a request, provided their testimonies' scope is limited to Ms. Way's additional remedial claim. Given the narrow focus of this claim and its close similarity to Mr. Coyne's, I do not anticipate that hearing additional evidence would cause any significant delay to the proceedings or be otherwise prejudicial to the hearing process.

[24] I am therefore satisfied that the SRFN will have had ample opportunity to fully address Ms. Way's s. 53(3) claim.

III. ORDER

[25] For these reasons, I grant Ms. Way's request to amend her SOP to add the following remedial claim:

> I now ask for compensation under the Canadian Human Rights Act under section 53(3) at the member's discretion of the amount they see fit. I feel after hearing the testimony given that this was a willful and reckless act by SRFN.

Signed by

Athanasios Hadjis
Tribunal Member

Ottawa, Ontario
December 5, 2023

Canadian Human Rights Tribunal

Parties of Record

File Nos.: T2673/4921 and T2674/5021

Style of Cause: Christopher Coyne v. Salt River First Nation – T2673/4921 and Penny Way v. Salt River First Nation – T2674/5021

Ruling of the Tribunal Dated: December 5, 2023

Motion dealt with in writing without appearance of parties

Written representations by:

Christopher Coyne and Penny Way, Self-represented

Sophia Karantonis and Jonathan Bujeau, for the Canadian Human Rights Commission

Colleen Verville and Jessica Buhler, for the Respondent