Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2024 CHRT 15
Date: March 19, 2024
File Nos.: T2670/4621 and T2671/4721

Between:

Dawne Koke

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Corus Entertainment Inc. and Chris Gailus

Respondents

Ruling

Member: Jennifer Khurana

I. OVERVIEW

[1] The Complainant, Dawne Koke, was a makeup artist who worked with the individual respondent, Chris Gailus, a news anchor. When they worked together, they were both employed by Shaw Media ("Shaw"), a division of Shaw Communications, that operated a television station known as Global BC. Corus Entertainment ("Corus"), the corporate respondent, acquired Shaw in 2016.

[2] Ms. Koke alleges that Mr. Gailus sexually harassed her at work. She also alleges that her former employer is liable for Mr. Gailus's conduct, that it did not respond effectively and appropriately to her complaint of sexual harassment, and that it failed to provide a harassment-free workplace.

[3] The Respondents, Mr. Gailus and Corus, filed motion materials seeking a Tribunal order dismissing Ms. Koke's complaints, or portions of her complaints, for a number of reasons. First, they argue that the complaints should be dismissed before a hearing because the allegations were out of time and because of delay. Second, they say that the Tribunal should dismiss the complaints because Ms. Koke did not follow the instructions of Canadian Human Rights (the "Commission") to exhaust all internal remedies before proceeding with these complaints. Third, the Respondents take the position that all proceedings against Corus should be struck since Ms. Koke and Mr. Gailus worked for Shaw, and Shaw was not named as a respondent. Finally, the Respondents want the Tribunal to dismiss Ms. Koke's claim for income loss due to issue estoppel and abuse of process because they say an arbitrator already decided in a separate proceeding that Ms. Koke was terminated for just cause and that she was not entitled to recover any past or future wages.

[4] In the alternative, and if the Tribunal allows the complaints to proceed, in whole or in part, the Respondents seek an order for the production of documents.

[5] Ms. Koke opposes the Respondents' motions to dismiss. She largely agrees to produce the materials the Respondents requested. Ms. Koke filed a motion as well. She

wants the Tribunal to order Corus to produce her complete personnel file which she says is arguably relevant to the issues in dispute in these complaints.

[6] The Commission did not file a response to any of the requests.

II. DECISION

[7] The Respondents' motions to dismiss the complaints, in whole or in part, are dismissed. The Respondents' motion for production is allowed. Ms. Koke does not object to producing the requested materials in any event, if they exist. The Respondents have seven (7) days to respond to Ms. Koke's request for her personnel file if they dispute its production. If they do not object, they must produce the complete personnel file within seven (7) days.

III. ISSUES

[8] This ruling determines the following issues:

1) Does the Tribunal have the jurisdiction to enforce its own interpretation of s.41(1)(e) and dismiss the complaints as untimely?

    a. If so, should it grant Corus' request to dismiss the complaints due to timeliness?

2) Should the complaints be dismissed for delay?

3) Does the Tribunal have the authority to consider a motion to strike?

    a. If so, is it plain and obvious that the allegations have no reasonable prospect of success because Ms. Koke did not grieve the human rights allegations?

4) Should the complaints against Corus be dismissed because Ms. Koke and Mr. Gailus worked for Shaw when the incidents at the heart of these complaints allegedly occurred?

5) Should the claims for income loss be dismissed due to issue estoppel and/or abuse of process?

6) Should Ms. Koke produce the documents sought by the Respondents?

7) Should the Respondents produce Ms. Koke's full personnel file?

IV. ANALYSIS

1. Does the Tribunal have the jurisdiction to enforce its own interpretation of s.41(1)(e) and dismiss the complaints as untimely?

[9] No. The Tribunal inquires into complaints the Commission refers to it. It is not an appellate body and cannot review or overrule the Commission's decisions (*Pequeneza v. Canada Post Corporation*, 2016 CHRT 21). The Federal Court is the appropriate venue to challenge the Commission's decisions under s.41(1)(e) of the *Canadian Human Rights Act*, RSC 1985, c H-6 (the "Act").

[10] Complaints under the Act must generally be made within one year of the last alleged act or omission giving rise to the complaint, or the Commission may extend the period of time if it considers it appropriate in the circumstances, before receipt of the complaint (s.41(1)(e) of the Act). The Respondents argue that the complaints do not conform with s.41(1)(e) and that the Tribunal should therefore dismiss them. They also argue that the Tribunal can enforce its own interpretation of s.41(1)(e) of the Act, relying on a 1996 Federal Court case (*Canadian Human Rights Commission v Canadian Broadcasting Corp*, 1996 CanLII 11865 (FC), [1996] FCJ No 1274, at para 33 [*Vermette*]). According to the Respondents, the Tribunal can modify the Commission's initial findings.

[11] Ms. Koke submits that the Act empowers the Commission—not the Tribunal—to use its discretion in making a determination about timeliness. Ms. Koke also argues the request should be dismissed based on the principles of issue estoppel, judicial economy and abuse of process, relying on the Supreme Court of Canada's decision in British Columbia (*Workers' Compensation Board) v. Figliola,* 2011 SCC 52 [*Figliola*]. She submits that revisiting the issue of timeliness at the Tribunal would be contrary to judicial economy and could raise the possibility of inconsistent results. According to Ms. Koke, *Vermette* cannot be considered

good authority for rehearing a matter that was already determined by the Commission, “even if the Tribunal technically has jurisdiction to do so”.

[12] But the Tribunal does not have that jurisdiction, “technically” or otherwise. There is no statutory authority under the Act that would allow the Tribunal to review the Commission’s exercise of its discretion to deal with a complaint. The Tribunal cannot substitute its own determination for that of the Commission. I need not even engage with the principles set out in *Figliola* that Ms. Koke relies on because doing so presupposes that I have the jurisdiction to review the Commission’s decisions. I do not. I do, however, agree with Ms. Koke that it would be a reviewable error to substitute my determinations about timeliness for those of the Commission.

[13] Further, the approach in *Vermette* has been rejected by subsequent cases in the decades that followed. The Tribunal simply has no jurisdiction to apply s. 41 (*Pequeneza* at para 37). *Pequeneza* thoroughly canvassed the case law interpreting s. 41, including the subsequent Federal Court decisions in *I.L.W.U. (Marine Section), Local 400 v. Oster,* 2001 FCT 1115, [2002] 2 FCR 430 [*Oster*] and *Canada (Human Rights Commission) v. Canada Post Corp.*, 2004 FC 81, and concluded *Vermette* was inconsistent with the Federal Court’s subsequent case law.

[14] The Commission’s decision to refer these complaints is water under the bridge. The Act sets out the respective roles of the Commission and the Tribunal in the federal human rights scheme that Parliament created. The Tribunal cannot step into the shoes of the Federal Court or second-guess the Commission’s exercise of its discretion under s.41 (*Oster* at para 29).

i) If so, should it grant Corus’ request to dismiss the complaints due to timeliness?

[15] I have already found that there is no authority for the Tribunal to make its own determination about s.41(1)(e).

2. Should the complaints be dismissed for delay?

[16] No. In my view, the delay has not impaired the Respondents' ability to have a procedurally fair hearing process and does not otherwise amount to an abuse of process.

[17] Dismissal for inordinate delay or an abuse of process is a final measure with serious consequences for a complainant. In administrative proceedings, abuse of process is a question of procedural fairness. Decision makers have a duty to act fairly. Assessing allegedly abusive delay flows from that duty (*Law Society of Saskatchewan v. Abrametz*, 2022 SCC 29 [*Abrametz*] at para 38, *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 at paras 105-7 and 121 [*Blencoe*]).

[18] To succeed, the Respondents must establish that the delay:

> **1.** Has impaired their ability to make their case and thus compromised the fairness of the hearing; or
>
> **2.** Is inordinate, directly causes significant prejudice to them or the administration of justice and is manifestly unfair to a party, amounting to an abuse of process or otherwise bringing the administration of justice into disrepute (*Abrametz* at paras 42-43 and 101 and *Blencoe* at para 121).

[19] Prejudice is a question of fact. Evidence is required to establish that an administrative delay amounts to an abuse of process of the principles of procedural fairness (*Abrametz* at para 69).

[20] Dismissal should only be ordered when the balance between the public interest in a fair process without abuse of proceedings outweighs the public interest in having the matter determined on its merits (*Abrametz* at para 84).

[21] The Respondents submit they are significantly prejudiced by the inordinate delay of these proceedings, noting that the source of the delay falls entirely upon the Complainant, her counsel and the Commission.

[22] Ms. Koke argues that delay was already addressed by the Commission and cannot be reheard here. According to Ms. Koke, the Tribunal should only be considering additional

delay since the complaints were referred to the Tribunal in 2021 and whether this delay renders the hearing procedurally unfair. She also says that the Respondents' pursuit of every available argument for dismissal disentitles them to address prejudice caused by delay and that dismissing the complaints before a hearing would offend the community's sense of fair play and would be contrary to the interests of justice and the purposes of the Act.

1) Has the fairness of the hearing been compromised?

[23] No. I do not find that the delay in these proceedings has impaired the Respondents' ability to answer the complaints against them. They have not provided concrete support for their claim that the prejudice they allege they suffer by the passage of time is of sufficient magnitude to jeopardize their right to a fair hearing (*Abrametz* at para 41; *Blencoe* at para 102).

[24] While memories fade with time and some witnesses may be unavailable, two of the essential witnesses who can give evidence related to the allegations of sexual harassment, namely Ms. Koke and Mr. Gailus, are participating. Further, while employees may have moved on and are no longer employed by Corus, the Respondents have not demonstrated that essential witnesses have died or cannot still be called to testify or that evidence has been lost.

2) Does the delay amount to an abuse of process?

[25] Delay that has not affected the fairness of the hearing may nonetheless amount to an abuse of process where the delay was unacceptable to the point of being so oppressive as to taint the proceedings, which happens when the delay is inordinate and has directly caused significant prejudice. The delay must be manifestly unfair to a party or otherwise bring the administration of justice into disrepute (*Abrametz* at para 43).

Was the delay inordinate?

[26] Context is important when deciding whether a delay is inordinate. It is not just the number of years or the amount of time that has passed that determines whether the delay is inordinate (*Blencoe* at para 122, *Abrametz* at para 57).

[27] To determine whether the delay was inordinate, the Tribunal should consider the following non-exhaustive list of factors:

i. the nature and purpose of the proceedings;

ii. the length and causes of the delay; and

iii. the complexity of the facts and issues in the case (*Abrametz* at para 51).

Nature and purpose of proceedings

[28] The purpose of the Act is to ensure that all individuals have equal opportunities to other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices. Harassment is a discriminatory practice under the Act, which includes sexual harassment (ss. 2 and 14).

[29] The parties do not dispute the general nature and purpose of human rights proceedings but do differ in terms of what has transformed these proceedings into lengthier, more complex ones. They also disagree on the impact of that delay. I will address this below in considering the cause and length of the delay.

Length and causes of the delay

[30] Ms. Koke filed a human rights complaint with the Commission in 2014. She filed a second complaint in 2015, and grievance proceedings were started that year as well, which apparently resulted in the Commission advising Ms. Koke to exhaust that mechanism first. The Respondents claim that Ms. Koke added to the delay by deciding to bring a judicial review of the Commission's decision while her grievances were being adjudicated. According to the Respondents, Ms. Koke also ignored the Commission's direction and did not address the sexual harassment allegations in her grievance proceedings.

[31] Ms. Koke then filed a third complaint against Mr. Gailus in 2017. She says that she had already filed a complaint against Mr. Gailus in 2014 but that the Commission did not deal with that part of her complaint and told her to refile it. The Commission completed its

investigation reports in 2019 and, in 2021, referred the 2014 and 2017 complaints to the Tribunal. The Commission dismissed the 2015 complaint. The Respondents allege that, throughout that period, Ms. Koke's counsel was unresponsive, which led to the filing of a law society complaint.

[32] Ms. Koke's union filed two grievances on her behalf, related to whether there was cause for termination and about Shaw's hiring of a replacement makeup artist.

[33] The parties dispute when the clock should start ticking in assessing delay, that is, from the time the complaints were referred to the Tribunal in 2021, from the time the first complaint was filed in 2014, or from when the alleged incidents occurred, which predate the filing of the complaint by a number of years. While the last complaint filed by Ms. Koke was in 2017, the Commission referred the complaints to the Tribunal in 2021.

[34] The Respondents argue that the delay from the time the alleged events occurred as well as the time before the Commission referred the complaints to the Tribunal is inordinate. They argue that none of the blame for the delay can be attributed to them, whereas they suffer all of the prejudice of proceeding with the complaints.

[35] Ms. Koke submits that the delay described in *Blencoe* and *Abrametz* relates to the period between the filing of the complaint and the date of hearing, rather than the delay which occurred prior to the filing of the complaint, the last of which was filed in 2017. She also submits that the delay in processing the complaints at the Commission stage has been to the benefit of the Respondents only. According to Ms. Koke, it is unreasonable for the Respondents to pursue every available argument in an attempt to have the complaints dismissed and then complain about the time this has taken.

[36] Ms. Koke submits that, in the analysis of *Abrametz*, delay, which is part of the Commissioner's routine processing of complaints, would not seem to create the same concern about unfairness or abuse. She submits that the time before the Commission refers a complaint is typically long, due in part to what she says is the Commission's approach in handling complaints.

[37] Ms. Koke disputes the Respondents' claims about the cause of the delay, including the facts leading up to the filing of her grievance, the reasons for her seeking judicial review of the Commission's decision to not deal with her complaints in 2016, and the reasons for the ensuing delay while the grievance proceedings were ongoing. She further submits that allegations about delays in her lawyer's communications were unrelated to the complaints and only had to do with the payment of costs in relation to the judicial review. According to Ms. Koke, the Commission's interim closure of her complaints to prioritize the grievance process, at the Respondents' request, caused substantial delay. She argues that judicial review of the decision to close the complaints was irrelevant to the reopening of the complaints and did not materially alter the timing of the reopening.

[38] Considering when the first complaint was filed in 2014, it is clear that seven years is on its face a lengthy delay to refer the complaints to the Tribunal. That said, Ms. Koke filed a second complaint in 2015, and her last complaint was filed in 2017; from that time, the Commission took four years to refer the complaints to the Tribunal. On its face, four or seven years are both a long time, but I have considered the context of that time period and what transpired in the interim. I have also considered the fact that actions by the parties and the Commission necessarily added complexity to the process, even if they were all undertaken as part of the parties' pursuit of their respective cases or the Commission's handling of their complaints.

[39] The Respondents take issue with Ms. Koke's claim that while the time before the Commission was long, this appears to not be that out of the ordinary, arguing that she has not provided any authority for that position. The Commission did not participate in these proceedings, and I have no evidence before me comparing this file to others or typical timeframes before the Commission. But I have considered that there were three complaints, multiple investigations and apparently a number of issues raised by the parties at the Commission stage that added to the time taken and to the back and forth that necessarily transpired.

[40] While allegations of sexual harassment in the employment context are not necessarily at the top end of complexity in human rights proceedings, the parties engaged in multiple challenges at the Commission stage, and there were parallel grievance

proceedings and judicial reviews, in addition to the Commission's processing of three complaints, one of which it ultimately dismissed. Further, as in any litigation, parties pursuing certain approaches must accept the downsides as well as the upsides of those choices. Both parties chose to challenge various aspects of the Commission process and to pursue certain strategies. For better or for worse, those decisions took time and added complexity.

[41] I agree with Ms. Koke that taking the time to consider the arguments being advanced by the Respondents is not an abuse of process or a denial of natural justice and is not oppressive or unfair to the Respondents. For example, the Respondents sought to stop the Commission process while the grievances were proceeding. Delay while parallel proceedings are ongoing can be consistent with procedural fairness and does not constitute an abuse of process, even if the delay that results is long (*Abrametz* at para 59).

[42] Further, if there were concerns about the Commission's decision to refer or about the timeliness of the complaints given disputes about the last alleged act of discrimination, as I have already set out above, it is too late to question that referral decision, and the time for reviewing that decision has passed.

[43] Since the complaints were referred to the Tribunal, the parties engaged in mediation and case management. They also filed these motions and extensive supporting materials. There has been delays at the Tribunal in rendering this ruling that is no fault of the parties. While I acknowledge the Tribunal has contributed to the delay and this is unfortunate, I am not persuaded that the delay to this point, including up to the time of the referral and since then, has been inordinate. In any case, if I am wrong on whether the delay in this matter is inordinate, in my view the Respondents fail in establishing that the delay caused significant prejudice.

Has the delay directly caused significant prejudice?

[44] No. The Respondents have not persuaded me that the delay caused them significant prejudice. Although the criteria set out in *Blencoe* and *Abrametz* are conjunctive, if I am wrong on whether the delay in this matter is inordinate, I will address whether the delay directly caused significant prejudice.

[45] There must be more than delay alone to constitute an abuse of process. Staying proceedings for mere passage of time would be "tantamount to imposing a judicially created limitation period" (*Abrametz* at para 67; *Blencoe* at para 101).

[46] The doctrine of abuse of process as it relates to administrative delay requires proof of significant prejudice (*Abrametz* at 67). Determining prejudice is a question of fact, and examples can include significant psychological harm, the stigma attached to the individual's reputation, the disruption to family life, the loss of work or business opportunities, and extended and intrusive media attention (*Abrametz* at para 69).

[47] In some cases, delay can be beneficial to the affected party. It is only where there is a detriment to an individual that a court or a tribunal will conclude that there has been an abuse of process. It is the prejudice caused by the inordinate delay that is relevant to the abuse of process analysis, and not from the fact that an investigation or proceeding was undertaken. Prejudice caused by the investigation of or proceedings against an individual can be exacerbated by inordinate delay (*Abrametz* at para 68).

[48] While the uncertainty inherent in the time these proceedings have dragged on has impacted all parties, the Respondents have not presented evidence that delay itself, rather than the nature of the allegations and the complaints, has either directly caused significant prejudice or exacerbated prejudice to Mr. Gailus or Corus.

[49] While I accept that the corporate respondent carries on a public-facing business and that Mr. Gailus's role is one in the public eye, the Respondents have not supported their claim of significant prejudice to either Corus or Mr. Gailus since the complaints were filed or referred to the Tribunal. The Respondents have not, for example, presented evidence that Mr. Gailus lost his job or has been demoted as a result of delay. They did not provide evidence of significant psychological harm, the stigma attached to the individual's reputation, or that the delay is what directly caused disruption to his family life, his reputation, the loss of work or business opportunities or extended and intrusive media attention.

[50] The Respondents argued that Mr. Gailus has suffered reputational damage as a result of the length of time these proceedings have been underway, particularly because of Ms. Koke's public posting of her allegations on social media in 2014 and public interviews

she and her counsel participated in in 2016. But even if social media posts were undertaken and impacted the Respondents, they have not made out how this is due to delay, rather than to the very nature of the claims and the proceedings themselves. Nor have they made out how the delay exacerbated existing prejudice caused to the Respondents from the proceedings.

[51] This is not a situation, as addressed in *Abrametz*, where a doctor who was suspended from practice for almost six years could not practise his profession (*Misra v. College of Physicians and Surgeons of Saskatchewan*, (1988) 52 DLR (4th) 477 at para 490 [*Misra*]) or where lengthy delays exacerbated the harm to an individual's reputation such that profits collapsed (*Investment Dealers Association of Canada v. MacBain*, 2007 SKCA 70, 299 Sask. R. 122, cited in *Abrametz* at para 71).

[52] The Respondents argue that Ms. Koke has benefited from the delay because she can rely on her own factual assertions, while the corporate respondent must rely on contemporaneous notes and former staff's recollection that have long since moved on from their careers with them, let alone their involvement with these specific complaints.

[53] Ms. Koke says that the claim that she has benefited from the delay is nonsensical, arguing that it is her onus to prove the allegations of discrimination and that she will always be harmed by the passage of time and consequent loss of detail in her evidence. Further, she argues that she has had to respond to and attempt to defeat an unending series of arguments from the Respondents and the Commission about why her complaints should not proceed. She says that the costs of this have been enormous, that the delay harms her recovery from the alleged events, and that the long delay puts her opportunity for justice into question through the very arguments the Respondents are now making. She says that, on balance, the delay has been plainly harmful to the Complainant.

[54] While in general terms the Respondents claim prejudice from the fact that potential witnesses are no longer in their employ, I agree with Ms. Koke that the Respondents have not supported this claim with any specifics about potential witnesses they could no longer maintain contact with, or of specific documents that are now missing since the complaints were filed in 2014 or since the complaints were referred in 2021. Further, as Ms. Koke

submits, the Respondents have been aware of all potential witnesses since at least late 2014 and have not identified whom they can no longer contact.

[55] I do not accept that the Respondents bear all the prejudice of delay. Ms. Koke has the burden of establishing that it is more likely than not that the Respondent(s) discriminated against her. It is her case to make out, and if she does not meet that onus, her complaints will be dismissed. To the extent that some evidence is stale or no longer available, both parties will have to deal with that.

Does the delay otherwise amount to an abuse of process? Is the delay manifestly unfair? Will it otherwise bring the administration of justice into disrepute?

[56] No. I have already concluded that the Respondents have not established the existence of either inordinate delay or significant prejudice. Further, as set out above, the Respondents have made arguments and challenged steps throughout these proceedings, which necessarily added time and complexity to the process. The time taken to address those challenges is not an abuse of process or manifestly unfair to them.

[57] I accept Ms. Koke's claim that the Tribunal must also consider the harm to the human rights processes if it is unable to provide her with a forum in which to adjudicate her complaints between private parties, particularly given the mandate of the Act to provide redress to complainants where discrimination has been established. Ms. Koke argues that the purposes of the Act must be weighed against the relief the Respondents are seeking, namely the dismissal of the complaints before a hearing. She says that the legislature decided to create a human rights system with a Commission and a Tribunal process. The Tribunal should consider both the substance and purposes of the Act but also the means established by the Act to carry out those purposes. Ms. Koke argues that if the Act is to have relevance and consider allegations of sexual harassment, complaints must be able to proceed to a hearing before the Tribunal.

[58] I acknowledge that the delay to date in these proceedings is unfortunate. In addition to the time taken at the Commission, the Tribunal is facing significant delays in its ability to case manage and schedule matters for hearings, as evidenced by the delay in issuing this ruling. It has very few members able to hear cases. But until the delay becomes inordinate

and significant prejudice is caused to the Respondents, it would be manifestly unfair to dismiss complaints because of delays in their processing. In the absence of those factors, a complainant cannot be penalized for trying to access human rights recourse using the mechanisms that exist and that Parliament created.

3. Does the Tribunal have the authority to consider a motion to strike?

[59] Yes. The Tribunal may consider and grant preliminary motions to dismiss but must do so cautiously, in a procedurally fair manner and only in the clearest of cases (*Cushley et al v. Veterans Affairs Canada*, 2022 CHRT 21 at paras 16-18; *Richards v Correctional Service Canada,* 2020 CHRT 27 at para 85; *First Nations Child and Family Caring Society* at paras 132 and 140).

[60] On a motion to strike, the Tribunal assumes the facts to be true, and evidence is not admissible. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed (*R. v. Imperial Tobacco Ltd*., 2011 SCC 42 at para 21). Even a complex and novel legal claim may properly be struck from a pleading if on a proper analysis of the law it is plain and obvious that the claim cannot succeed (*Callan v. Cooke*, 2012 BCSC 1589 at para 19).

(i) If so, is it plain and obvious that the allegations have no reasonable prospect of success because Ms. Koke did not grieve the human rights allegations?

[61] No. The Commission exercised its discretion to refer these complaints to the Tribunal for an inquiry, and the Tribunal has no authority to review Commission decisions. It is not plain and obvious that these complaints should be dismissed, even if the Respondents are right and Ms. Koke did not raise the human rights allegations at her grievance proceedings.

[62] The Respondents argue that Ms. Koke did not address her human rights complaints through the grievance procedure, contrary to what the Commission instructed her to do. They say that this is akin to forum shopping and that by failing to file a grievance at the relevant time that included the human rights allegations, she has also contributed to the significant delay in this file. They want the Tribunal to dismiss her claim because she

allegedly did not grieve the subject matter of the complaints, relying on s.41(1)(a) of the Act. Specifically, the Respondents submit that it is plain and obvious that Ms. Koke's claims will fail because she actively chose not to pursue them in an avenue suggested by the Commission. The Respondents maintain that the Tribunal has the authority to modify decisions of the Commission and, in this instance, to strike Ms. Koke's claims in their entirety.

[63] I need not make findings of fact on what happened in relation to the grievance proceeding or what the Commission did or did not tell Ms. Koke to do. As Ms. Koke argues, the Commission has already decided to deal with this complaint and to exercise its discretion under s.41(1)(a).

[64] I have no authority to second-guess what the Commission decided under s.41. The Tribunal hears the complaints the Commission decides to refer to it under s.49(1) of the Act. It is time to move on from disputes about how or what the Commission decided, or about what Ms. Koke should or should not have done when her complaints were still with the Commission. That ship has long sailed. None of this assists the Tribunal in its task, and the parties' submissions about the lead-up to the Commission's exercise of its discretion under the Act are not relevant to the issues before me.

[65] As set out above, while the Tribunal can dismiss a case before a hearing, if it is plain and obvious that the complaint discloses no reasonable cause of action, I cannot find that the complaints cannot proceed because Ms. Koke did not grieve her human rights allegations. It is not because a party disagrees with the Commission's exercise of its jurisdiction under s.41(1)(a) that the Tribunal can dismiss complaints as disclosing any reasonable cause of action.

[66] If any of their submissions are relevant to the adjudication of the human rights complaints before this Tribunal, the parties can raise these arguments at the hearing of these complaints.

4. Should the complaints against Corus be dismissed because Ms. Koke and Mr. Gailus worked for Shaw when the incidents at the heart of these complaints allegedly occurred?

[67] No. The Respondents did not provide evidence to support a claim that, in acquiring Shaw, Corus did not also take on its liabilities and any outstanding claims.

[68] The Respondents argue that it is plain and obvious that the complaints should be struck in their entirety because Ms. Koke and Mr. Gailus worked for Shaw at all material times relevant to these complaints. They say Ms. Koke did not name Shaw as a respondent in these proceedings and that Corus did not acquire Shaw until 2016, long after all of the events at issue. According to the Respondents, Ms. Koke improperly named Corus as a respondent and therefore claims against Corus should be struck in their entirety.

[69] Ms. Koke submits that Corus purchased the whole of Shaw, and the new company was the successor to the previous company, including as a respondent to these complaints. She argues that this continuity is supported by the fact that counsel on these complaints has remained the same since 2014 when the first complaint was filed. Ms. Koke further argues that Corus is the ultimate successor to Shaw and is a proper party to provide any remedy in the event of a finding of discrimination, along with Mr. Gailus. Further, if Corus' policies today are not discriminatory, that will be for Corus to argue at the hearing.

[70] The complaint form that the Commission sent to the Tribunal indicates that Ms. Koke wrote Shaw as the corporate respondent. Yet the Commission's referral letter stated that it was referring a complaint against Mr. Gailus and Corus. At the first case management conference call in this matter, I asked the Commission to clarify. The Commission explained that it administratively changed the corporate respondent's name from Shaw to Corus.

[71] Ms. Koke also argues that the objectives of a human rights complaint are not punitive and that it is not necessary for the corporate respondent to remain Shaw. Ms. Koke argues, however, that it "likely would have been appropriate to add Corus to the complaint against Shaw, rather than replacing Shaw with the successor entities, including Corus" to allow the Tribunal to make orders vis-à-vis Shaw. According to Ms. Koke, "[c]hanging corporate owners over time is clearly an issue that requires more careful management by the Commission to ensure maximum benefit from each complaint". Ms. Koke argues that it would not be consistent with the remedial and ameliorative purposes of the Act to dismiss the complaint against Corus, which would deprive Ms. Koke of her just remedies.

[72] In reply, Corus submits that Ms. Koke has been represented by counsel throughout these proceedings and that if Ms. Koke wishes to add Corus as a party to these proceedings at this stage, she must provide a justification for doing so.

[73] I would not exercise my discretion to dismiss the complaint against Corus on a preliminary basis. At this point, Corus has not provided any evidence that it did not assume Shaw's liabilities. The parties may make submissions at the hearing about possible remedies.

5. Should the claims for income loss be dismissed due to issue estoppel and/or abuse of process?

[74] No. The Commission decided to refer these complaints to the Tribunal after determining that the grievance procedure did not deal with all the allegations. The parties are free to make arguments at the hearing on the points the Respondents set out in their motion submissions and on any possible remedial orders.

[75] The Respondents argue that a labour arbitrator has already dismissed the grievance filed on Ms. Koke's behalf related to her termination. They submit that while the grievance decision was not primarily concerned with the allegations of harassment, in dismissing the grievance, the arbitrator made findings of fact directly relevant and contrary to the allegations Ms. Koke makes in her human rights complaints. The Respondents argue that Ms. Koke cannot now seek a different outcome and ask for lost wages in the context of her human rights complaints because the arbitrator already determined that Ms. Koke was not entitled to back pay or prospective income. They submit that a tribunal has no power to change the arbitrator's findings and that an award of lost wages for Ms. Koke would be an abuse of process and would contravene the principles of *res judicata* and issue estoppel. The Respondents have also argued that Ms. Koke failed to bring her human rights allegations to the grievance proceeding.

[76] Ms. Koke submits that there is no basis to dismiss the claim for lost wages and that there were significant differences between the grievance process and the human rights complaints. She argues that the termination did not cause Ms. Koke's losses from 2015 onwards.

[77] It is premature to dismiss remedial claims before the hearing. The Tribunal will hear the parties' evidence and submissions on any possible remedies, including the relevance of the arbitrator's findings, at the hearing.

V. THE DISCLOSURE REQUESTS

[78] Parties must be given a full and ample opportunity to present their case (s. 50(1) of the Act). This includes the right to the disclosure of all arguably relevant information held by the opposing party so that each party knows the evidence it is up against and can prepare for the hearing (*Egan v. Canada Revenue Agency*, 2019 CHRT 8 at para. 4). The *Canadian Human Rights Tribunal Rules of Procedure, 2021*, SOR/2021-137 (the "Rules") require parties to disclose a copy of all documents in their possession that relate to a fact, issue or form of relief that is sought in the case, including those identified by other parties. This obligation is ongoing (*SM et al v Royal Canadian Mounted Police*, 2022 CHRT 11 and Rule 24 of the Rules).

[79] The threshold for disclosure is arguable or possible relevance, which is not particularly high. A party seeking the production of a document must show that there is a rational connection between the document it seeks and the issues raised in the complaint. (*T.P. v. Canadian Armed Forces*, 2019 CHRT 19 at para. 11 and *Turner v. CBSA*, 2018 CHRT 1 at para 30). Requests for disclosure should not be speculative or amount to a fishing expedition (*Egan v. Canada Revenue Agency*, 2017 CHRT 33 at paras. 31-32).

[80] While arguable relevance is not a high threshold, it is meant to prevent production for purposes which are speculative, fanciful, disruptive, unmeritorious and time consuming (*Brickner v Royal Canadian Mounted Police*, 2017 CHRT 28 at para 5).

6. Should Ms. Koke produce the materials sought by the Respondents?

[81] Yes. The materials sought are arguably relevant. Ms. Koke did not object to producing them in any event and made no submissions opposing their production, beyond saying that if the materials do not exist or she does not have control over them, she cannot disclose them.

[82] The Respondents seek six categories of documents they say are arguably relevant to the allegations set out in Ms. Koke's Statement of Particulars (SOP) and have framed their requests in relation to specific passages found in the Complainant's particulars. They submit that the documents sought are relevant to credibility, systemic issues, possible remedies and an alleged improper motive in bringing the complaints and remedies.

[83] Specifically, the Respondents seek:

> a. Any and all evidence pertaining to Mr. Gailus's alleged sexual harassment of other employees, including communications between, but not limited to, Pam Mason, Jill Krop and Kristi Gordon, as referred to at paragraph 28 of Ms. Koke's SOP in relation to Shaw;
>
> b. Any and all medical notes pertaining to Ms. Koke's doctor's recommendation to stay off work for two weeks following the alleged October 2013 incident and/or Ms. Koke's uncertainty about bringing a formal complaint, referred to at paragraph 25 of Ms. Koke's SOP in relation to Mr. Gailus.
>
> c. Any and all medical notes pertaining to Ms. Koke's inability to participate in the reinvestigation for medical reasons and her one-month sick leave during the reinvestigation, referred to at paragraphs 49-50 of her SOP against Shaw;
>
> d. Any and all evidence that Mr. Gailus's alleged inappropriate conduct vis-à-vis Ms. Koke had been "condoned by management" prior to the December 2013 complaint, referred to at paragraph 28 of the SOP against Mr. Gailus;
>
> e. Any and all correspondence and notes between Ms. Koke and her co-workers concerning how unhappy Ms. Koke was in her job, how she wished she was paid severance, and how Shaw was not allowed to deal with her directly and only through her lawyer, referred to at paragraphs 41 and 51 of the Respondents' SOP; and
>
> f. Any and all evidence pertaining to the damage that Shaw allegedly caused to Ms. Koke's "standing in the community", referred to at paragraph 82 of the SOP against Shaw.

[84] Ms. Koke does not object to producing these and says she will disclose any document record that exists. She sought clarification for the timeframe sought in relation to item e), but otherwise agrees to producing the documents that exist.

[85] With respect to category f), Ms. Koke argues that the Commission placed these documents “in the court file” and must be disclosed by the Commission if they have not already been. The parties can review what was disclosed by the Commission and verify with the Commission. If not, Ms. Koke must disclose or confirm that no documents exist.

[86] With respect to category c), the Respondents clarified in their reply that they are seeking medical records from Ms. Koke’s health professionals from October 2013 to the date of the grievance arbitration on October 14, 2016, and a list of medication she was prescribed and related doctors’ notes.

[87] Finally, with respect to category d), the Respondents specify that they seek materials from 2006 to October 2013. They say that Ms. Koke alleges that Mr. Gailus’s conduct was inappropriate for all of the seven years they worked together.

[88] Ms. Koke is ordered to confirm in writing to the Tribunal and to the other parties that the materials requested either do not exist or produce them within fourteen (14) calendar days of this ruling.

7. Should the Respondents produce Ms. Koke’s personnel file?

[89] Ms. Koke says she has been asking the corporate respondent to produce her complete personnel file since 2015. She said she again asked for this in 2018 and in three separate letters in 2019, including a request that was sent to the Commission. She has not yet received her personnel file. She wants the Tribunal to order the Respondents to disclose her complete personnel file and any other arguably relevant information in its possession or care.

[90] The Respondents did not respond to Ms. Koke’s motion but appear to have not received it. If the Respondents still oppose producing Ms. Koke’s personnel file, they may provide a response no later than seven (7) calendar days of receipt of this ruling. These submissions must not exceed five (5) pages. Ms. Koke may wish to reply. If so, she must

do so within seven calendar days of receipt of the Respondents' response and the reply must not exceed three (3) pages.

VI. MEDIATION

[91] The parties participated in a Tribunal-assisted mediation in 2022 that did not resolve the complaints. If they wish to revisit mediation, the Tribunal can appoint a new mediator to work with them or the parties can work with the hearing Member through mediation-adjudication. They are, of course, free to resolve the complaints on their own.

VII. ORDER

[92] The Respondents' motions to dismiss and to strike are dismissed.

[93] The Respondents' motion for production of documents is allowed. She is ordered to confirm in writing that the material set out in paragraph [83] either does not exist or must otherwise produce the documents within fourteen (14) calendar days of this ruling.

[94] If the Respondents do not object to producing Ms. Koke's complete personnel file, they must produce it within seven (7) calendar days of this ruling. If they do object to its production, they must provide a response to Ms. Koke's request for her full personnel file within seven (7) calendar days of this ruling. The response must not exceed five (5) pages. If the Respondents file a response, Ms. Koke may file a reply within seven (7) calendar days of receipt of the Respondents' response. The reply must not exceed three (3) pages.

Signed by

Jennifer Khurana
Tribunal Member

Ottawa, Ontario
March 19, 2024

Canadian Human Rights Tribunal

Parties of Record

File Nos.: T2670/4621 and T2671/4721

Style of Cause: Dawne Koke v. Corus Entertainment Inc. and Chris Gailus

Ruling of the Tribunal Dated: March 19, 2024

Motion dealt with in writing without appearance of parties

Written representations by:

Clea F. Parfitt, for the Complainant

Howard Levitt and Eduard Matei, for the Respondents