Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Between:

Francine Desormeaux

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Ottawa-Carleton Regional Transit Commission

Respondent

Ruling

Member: Anne Mactavish
Date: October 2, 2002
Citation: Ruling #2

[1] There are two issues that we dealt with this morning, the issue of the admissibility of any information with respect to the settlement negotiations and the second issue of the jurisdiction of the Tribunal to consider Ms. Breen's motion to add the Union as a party.

[2] I will deal with the jurisdictional question first. The issue is whether the Canadian Human Rights Tribunal has jurisdiction to entertain OC Transpo's request to have the Amalgamated Transit Union added as a respondent in this case.

[3] The fact that the Union does not object to being added as a party either as a respondent or as an interested party does not assist as jurisdiction cannot be conferred by consent.

[4] Counsel for the Canadian Human Rights Commission relies on the decision of the British Columbia Court of Appeal in *CUPE v. Crozier* as authority for its submission that the Canadian Human Rights Tribunal does not have the jurisdiction to add the Union as a respondent.

[5] Administrative tribunals, including the Canadian Human Rights Tribunal, are creatures of statute. As the British Columbia Court of Appeal noted in *Crozier*, the powers of an administrative tribunal are limited to those conferred by the tribunal's enabling legislation.

[6] In *Crozier*, the B.C. Court of Appeal carefully reviewed the provisions of the British Columbia Human Rights Code, finding that the code was silent on this question. The Court further considered the gate-keeping function ascribed to the British Columbia Human Rights Commission and the adjudicative function assigned to the Tribunal and concluded that it could not find by necessary implication that the Tribunal had the power to add a party.

[7] In order to determine whether the Canadian Human Rights Tribunal has the power to add parties to a proceeding, reference must be had to the provisions of the *Canadian Human Rights Act* itself. It is clear from the provisions of section 50 of the *Act* that the Tribunal has jurisdiction to add individuals or groups as interested parties to an inquiry under the *Act*. What is in issue

here, however, is whether the Tribunal can add a union as a respondent with the consequent potential exposure to liability.

[8] The answer must, in my view, reside in the wording of the *Canadian Human Rights Act* itself. As was the case in *Crozier*, the *Canadian Human Rights Act* confers a gate-keeping role on the Canadian Human Rights Commission and an adjudicative role on the Tribunal. However, as counsel for OC Transpo pointed out, unlike the legislative scheme in issue in *Crozier*, section 48.9(2)(b) of the *Act* specifically contemplates the addition of both parties and interested parties to inquiries before tribunals.

[9] As a result, I am satisfied that Parliament intended that the Tribunal be empowered to add parties to an inquiry on motion where the Tribunal deems it appropriate.

[10] With respect to the second issue, that is, whether or not OC Transpo can make reference to the settlement discussion, the issue before me is whether in the context of OC Transpo's motion to add the Amalgamated Transit Union as a respondent in this inquiry, reference can be made to settlement negotiations which took place in the course of the grievance process relating to the termination of Ms. Desormeaux's employment with OC Transpo.

[11] OC Transpo seeks to lead evidence with respect to the settlement discussions and in particular with respect to the Union's rejection of an offer of settlement made by the employer. As I understand OC Transpo's argument, in rejecting the employer's offer to accommodate Ms. Desormeaux, the Union has exposed itself to liability in the event that Ms. Desormeaux's human rights complaint is sustained on the basis of the principles articulated by the Supreme Court of Canada in the *Renaud* case.

[12] The Union objects to information with respect to settlement negotiations being put before the Tribunal, arguing that any such discussions are the subject of privilege. The Commission also objects to such evidence being led on the basis of relevance, given that any discussions occurred after Ms. Desormeaux's termination.

[13] As Sopinka and Lederman have noted, when dealing with communications made in furtherance of settlement, privilege will attach when three conditions are met:

1) First, the litigious dispute must be in existence or within contemplation;

2) Second, that the communication must be made with the express or implied intention that it would not be disclosed to the court or tribunal in the event that the negotiations failed; and

3) Third, that the purpose of the communication must be an attempt to effect a settlement.

[14] There is clearly no dispute about the presence of the first and third conditions here. Insofar as the second condition is concerned -- that is, that the communication be made with the express or implied intent that it not be disclosed -- Sopinka and Lederman note that if the parties are clearly involved in negotiating a settlement or buying peace, the intention that the communications not be disclosed should be inferred in the absence of anything to suggest otherwise.

[15] Nothing has been put before me today to suggest that the parties intended that the communications in issue be disclosed. Accordingly, I am satisfied that the three conditions necessary to establish privilege have been met insofar as the grievance proceedings are concerned.

[16] The issue here, however, does not relate to disclosure in the context of the grievance proceedings, but rather in subsequent litigation arising out of the same facts involving the same and additional parties. Here again Sopinka and Lederman is instructive. At page 813 the authors note that if it is accepted that the basis of the privilege is a public policy to encourage settlement, then it follows that the privilege should extend to subsequent proceedings not related to the dispute which the parties attempted to settle.

[17] Any possible subsequent adverse use could deter full and frank discussion. The principle "once privileged, always privileged" applies. This principle is all the more apt, I suggest, in these circumstances where it could be said that these subsequent proceedings are related to the dispute that the parties attempted to settle insofar as this inquiry arises out of the same factual matrix as did the grievance.

[18] There are indeed exceptions to privilege attaching to settlement negotiations; for example, where threats are made in the context of settlement discussions, as was exemplified by the *Donaldson* case cited by counsel for OC Transpo.

[19] While there are other exceptions, I am not satisfied that the present circumstances fall within any of these exceptional circumstances.

[20] Statutes may also abrogate privilege. In this regard, section 50(4) of the *Canadian Human Rights Act* is instructive. Not only does it not abrogate privilege, it expressly preserves it.

[21] Counsel for OC Transpo refers to the principles articulated by the Supreme Court of Canada in *Dickason v. University of Alberta* and the important role that human rights legislation plays.

[22] Be that as it may, the purposive approach to be taken in human rights cases must be taken in conformity with the express wording of the *Canadian Human Rights Act*. In this case, Parliament has explicitly demanded that the Canadian Human Rights Tribunal respect the law of privilege and I intend to do so here.

[23] Indeed, in seeking to establish a basis for potential joint liability on the Union as a result of what transpired in settlement negotiations, OC Transpo was seeking to do precisely what the law of privilege is designed to prevent. As a consequence, I find that the settlement negotiations

to which the employer and the Union were a party are subject to privilege and may not be referred to before this Tribunal.

[24] The remaining issue, I understand it, is Ms. Breen's motion itself, now that it has been defined by these two earlier rulings.

[25] Before we get to that, Mr. McDonald, perhaps you assist me. I have now concluded that there is jurisdiction to entertain the request. We know from Mr. McLuckie that his client doesn't object to being added as a respondent. What I need to hear from you and from Ms. Desormeaux is what your position is. Obviously, if you are not objecting, then I don't know that we need to entertain Ms. Breen's motion. If you are objecting, then obviously we do. But I haven't had any clear indication as to what your position is. I know Ms. Desormeaux did express some concerns earlier and I am certainly mindful of that. I don't know if you can answer that, if you need to talk to Ms. Desormeaux.

Signed by

Anne Mactavish
Chairperson

Ottawa, Ontario
October 2, 2002

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T701/0602

Style of Cause: Francine Desormeaux v. Ottawa-Carleton Regional Transit Commission

Ruling of the Tribunal Dated: October 2, 2002

Date and Place of Hearing: October 2, 2002

Ottawa, Ontario

Appearances:

Francine Desormeaux, for herself

Mark McDonald, for the Canadian Human Rights Commission

Marion Breen, for the Respondent

John McLuckie, for the Interested Party, Amalgamated Transit Union