Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2014 CHRT 3
Date: February 6, 2014
File No.: T1852/8212

Between:

Brian William Carter

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Fisheries and Oceans Canada

Respondent

Ruling

Member: Olga Luftig

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I. Background

[1] On June 3, 2011, Mr. Brian William Carter ("Complainant") filed a complaint ("the Complaint") with the Canadian Human Rights Commission ("Commission") against Fisheries and Oceans Canada ("DFO" or "Respondent"), alleging that the Respondent discriminated against him by failing and/or refusing to accommodate his disability, treating him in an adverse, differential manner by engaging in a discriminatory policy or practice, thereby denying him an employment opportunity, contrary to sections 7 and 10 of the *Canadian Human Rights Act,* R.S.C., 1985, c. H-6, as amended *("Act" or "Human Rights Act*").

[2] On July 31, 2012, by letter ("Referral Letter"), pursuant to subsection 44(3)(a) of the *Act*, the Commission asked the Tribunal Chairperson to institute an inquiry into the Complaint.

[3] The Commission is participating in the proceedings.

[4] The parties have filed their Statement of Particulars and applicable responding materials.

[5] These reasons relate to a motion the Respondent has brought in respect of adding a party and naming of parties in this proceeding.

II. Respondent's Motion

[6] The Respondent's Notice of Motion is for an Order:

1. adding the Public Service Commission ("PSC") as an additional Respondent; and
2. then substituting the Attorney General of Canada ("AG") as the Respondent in the place of both the PSC and DFO.

[7] The grounds for the Respondent's Motion are as follows:

(a) the AG is the only appropriate legal representative of Her Majesty the Queen and Her Departments;

(b) substituting the AG as Respondent will not prejudice the Complainant;

(c) Section 50(3)(e) of the *Act*;

(d) Section 23(1) of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50 ("*CLPA*");

(e) Rule 8 of Canadian Human Rights Tribunal Rules of Procedure ("the Rules").

Motion Materials

[8] In addition to the Respondent's Notice of Motion and supporting materials and the Complainant and Commission's Responses filed earlier, the parties also made some oral representations on the Motion during the December 20, 2013 Case Management Conference Call ("December 20 CMCC"). On January 3, 2014, the parties provided further written submissions on two cases which I felt were relevant to the Motion, pursuant to my request during the December 20 CMCC.

III. Portions of the Complaint relevant to this Motion

[9] The allegations in the Complaint, which are relevant to this Motion, are set out below.

1. The Complainant has a medical condition which he states is a disability under the *Act*.

2. In June, 2008, he applied for a not-yet-established ENG-05 position with the DFO without self-identifying as disabled and without requesting accommodation.

3. In April, 2009, after completing the DFO assessment process, which included an interview, the DFO placed him in the pool of candidates qualified for the position.

4. The Complainant received information that his interview was just "OK", and that once the position was established, the Respondent would not appoint him to it.

5. The Complainant decided to self identify as a person with a disability requiring accommodation. He did so in August, 2009, and in September, 2009, submitted an "Accommodation Request" form to DFO.

6. DFO's accommodation offer was to reassess the Complainant after receiving information on specific appropriate accommodation modes from PSC.

7. The DFO asked the Complainant to attend at the PSC Psychology Centre so that PSC could assess and tell DFO the specific mode of accommodation the Complainant required.

8. The Complainant disagreed with the DFO's proposed accommodation and did not attend at the PSC Psychology Centre. He proposed to DFO that the correct accommodation was to appoint him to the ENG-5 position for the following reasons:

    a. he was already in the pool of qualified candidates;

    b. the "right fit" standard and practice the DFO used was inherently discriminatory against him and others with his disability; and

    c. his proposed mode of accommodation would not cause DFO undue hardship.

9. DFO refused the Complainant's proposal for accommodation.

10. In the materials I have before me, the Complainant filed his Complaint with the Commission on June 3, 2011 against the DFO as Respondent.

IV. Issues

[10] The Respondent submits that the issues in this Motion are the following:

1. Should the Tribunal add the Public Service Commission as a Respondent?

2. Should the Tribunal then substitute the Attorney General of Canada as Respondent, in the place of both DFO and PSC, given that both have an interest in the proceedings?

[11] However, there is an issue underlying both of the above, and that is:

3. Who can be a respondent in a complaint at the Tribunal? Put another way, are the Public Service Commission and Department of Fisheries and Oceans entities which can be named as respondents in a complaint at the Tribunal? This issue directly impacts on the question of whether or not the PSC can be added as a Respondent in its own right, and directly impacts whether or not the AG should be substituted as the Respondent in place of the DFO and PSC.

[12] I note that throughout the Motion materials, the Respondent and PSC used various words and phrases such as "Respondent", "responding party", "respondent party". This was confusing, and at the December 20 CMCC, I asked Respondent counsel what they meant. He clarified that they should each should be read as "Respondent".

V. Law

Adding Parties under the *Canadian Human Rights Act* at the Tribunal

[13] Section 48.9(2)(b) of the *Act* provides in essence that the Chairperson may make rules of procedure governing practice and procedure before the Tribunal, including " rules governing the addition of parties and interested persons to the proceedings;".

Tribunal Rules of Procedure

[14] The specific rule in the Canadian Human Rights Tribunal Rules of Procedure (03-05-04) ("the Rules") dealing with the addition of parties is **Rule 8**, which states:

> "Motion for interested party status
>
> Anyone who is not a party, and who wishes to be recognized by the Panel as an interested party in respect of an inquiry, may bring a motion for an order granting interested party status.
>
> Motion to specify extent of participation
>
> (2) A motion under 8(1) shall comply with the requirements of Rule 3 and shall specify the extent of the desired participation in the inquiry.
>
> Addition of party on motion of another party
>
> (3) Where the Commission, a respondent or a complainant seeks to add a party to the inquiry, it may bring a motion for an order to this effect, which motion shall be served on the prospective party, and the prospective party shall be entitled to make submissions on the motion.
>
> Addition of party by its own motion
>
> (4) Anyone who is not a party, and who wishes to be added to the inquiry as a party, may bring a motion under Rule 3 for an order to this effect."

Law on Substituting the Attorney General of Canada as Respondent

[15] Section 23(1) of the *CLPA* states:

> "Proceedings against the Crown may be taken in the name of the Attorney General of Canada or, in the case of an agency of the Crown against which the proceedings are by an Act of Parliament authorized to be taken in the name of the agency, in the name of that agency."

[16] Section 66(1) of the *Human Rights Act* states that the *Act* "…is binding on Her Majesty in right of Canada", except in matters respecting the Yukon Government or the Government of the Northwest Territories or Nunavut.

VI. Who can be a Respondent in a Human Rights Complaint at the Tribunal?

Respondent's Position

[17] With respect to who should be the **ultimate** [my emphasis] Respondent in this Complaint, the Respondent submits that both DFO and PSC are emanations of the Crown and are not legal entities. Therefore, neither can be respondents. There is case law supporting this – for example*, Shelly Ann Gravel v. Canada (Attorney General)*, 2011 FC 832, at para.6 ("*Gravel*").

[18] The Tribunal's practice of substituting the AG for federal departments or entities which have been named as respondents in human rights complaints also supports the fact that emanations of the Crown do not have legal identity. Examples are *Plante v. RCMP*, 2003 CHRT 28, at para.7 ("*Plante*") and *Tremblay v. Attorney General of Canada (representing the Public Service Commission, the Treasury Board of Canada and the Transportation and Safety Board of Canada*, 2004 CHRT 15 *("Tremblay")*.

Complainant's Position

[19] The Respondent has not complied with the procedure in the Rules in bringing his Motion.

[20] Rule 1(3) of the Tribunal Rules states:

> (i) party, in respect of an inquiry, means the Canadian Human Rights Commission, the complainant, and the person against whom the complaint was made;
>
> (ii) respondent means the person against whom the complaint was made.

[21] A respondent must therefore be a person. Neither DFO nor PSC are legal entities. Given Rule 1(3), the Respondent should be the former Deputy Minister ("DM") of DFO,

because she is a person; she was the DM when the relevant events occurred; she was the person against whom the Complainant made his original Complaint.

Human Rights Commission's Position

[22] The Commission originally did not object to adding the PSC as a Respondent nor to then substituting the AG for both DFO and PSC, based on the understanding that any potential order arising from the hearing would be enforceable against both DFO and PSC, notwithstanding that the AG was the named Respondent.

[23] The Commission's January 3, 2014 submissions deal further with the issue of substituting the AG as Respondent in relation to the interpretation of the *CLPA* and the *Department of Justice Act*, RSC 1985, c J-2. Therefore, the Commission's position is set out below under "Substituting the Attorney General of Canada as Respondent".

Analysis – Procedure

[24] This is a Motion by the named Respondent, DFO, first, to add the PSC, as an additional Respondent. The Complainant submits that in bringing this Motion, the Respondent has not complied with the relevant Tribunal Rules.

[25] Rule 8(3) of the Tribunal Rules applies to this part of the Motion. Rule 3(1) also applies.

[26] The Respondent has brought its Notice of Motion. In its Motion Record and other motion materials, Respondent counsel has represented that he acts not only for DFO, but also for PSC. Further, the Respondent's written Motion materials and Respondent counsel's oral representations during the December 20, 2013 CMCC were stated to be on behalf of both the DFO and the PSC. The Tribunal can therefore assume that PSC, as the prospective party, has had notice of this Motion and that the Respondent has the mandate to present PSC's position. The fact that the written representations in the Respondent's materials are from PSC as well as DFO means that PSC has made submissions to the Tribunal on the Motion.

[27] Therefore, the Respondent has complied with all the requirements of Rules 8(3) and 3(1).

Analysis – Who Can Be a Respondent at the Tribunal?

[28] The Complaint is a human rights complaint under the *Act*, against an employer. The ostensible employer, DFO, is a part of the federal government. The Commission has referred the Complaint to the Tribunal for an inquiry. Therefore, the primary statute being administered in this Complaint is the *Act.* It is also the primary source for deciding who can be a respondent in a complaint at the Tribunal.

[29] The *Act* does not require that a respondent be a corporate entity. Section 4 of the *Act* states that "…**anyone** [my emphasis] found to be engaging or to have engaged in a discriminatory practice may be made subject to an order as provided in section 53…".

[30] I also note the following sections of the *Act*, parts of which I have bolded for emphasis:

> 1. Section 14.1 makes it a discriminatory practice "…**for a person against whom a complaint has been filed under Part III, or any person acting on their behalf, to retaliate**…against the individual who filed the complaint…".
>
> 2. Subsection 40(1): " …any individual or group of individuals having reasonable grounds for believing that **a person is engaging or has engaged in a discriminatory practice** may file with the Commission a complaint…"
>
> 3. Subsection 50(1): (Conduct of inquiry), states in part that "After due notice to the Commission, the complainant, **the person against whom the complaint was made**…"
>
> 4. Subsection 53(2):
>
> > "If at the conclusion of the inquiry the member or panel finds that the complaint is substantiated, the member or panel may…**make an order against the person found to be engaging or to have engaged in the discriminatory practice**…and include in the order any of the following terms…:
> >
> > (a) that **the person** cease the discriminatory practice…

> (b) that the person make available to the victim of the discriminatory practice…
>
> (c) that **the person** compensate the victim for any and all of the wages…
>
> (d) that **the person** compensate the victim for any and all of the additional costs…
>
> (e) that **the person** compensate the victim…for any pain and suffering…".

5. Subsection 53(3): "In addition to any order under subsection (2), the member or panel may order the person to pay…".

[31] As seen in the above sections and subsections of the *Act*, the concept of a respondent being a "person" is used consistently throughout the *Act* – for example, "person against whom the complaint was filed"; "person against whom the complaint was made"; "person found to be engaging or to have engaged in the discriminatory practice".

[32] Throughout the *Act,* the words "individual" and "individuals" are used in various sections and subsections, to describe those whose right to equal opportunities it seeks to protect.

> Section 2 states in part that the Purpose of the *Act* "…is to extend the laws in Canada to give effect…to the principle that **all individuals** should have an opportunity equal with **other individuals** to make for themselves the lives that they are able and wish to have…" (my emphasis).
>
> Subsection 5(a) states that it is a discriminatory practice to "(a) deny or deny access to [any good, service, facility or accommodation customarily available to the general public] …to **any individual**". Subsection 5(b) makes it a discriminatory practice "…to differentiate adversely **in relation to any individual**, on a prohibited ground of discrimination." Subsections 6(a) and (b) deal with the denial of commercial premises or residential accommodation **"to any individual"** and adverse differential treatment **"in relation to any individual"** with respect to commercial premises or residential accommodation (my emphasis).
>
> Section 7 with respect to employment discrimination; Section 9 with respect to "employee organizations" and both describe the target of discriminatory practices as being **"any individual"; "an individual"; "that individual"** (my emphasis).

> Section 10 states it is a discriminatory policy or practice for an employer, employee organization or employer organization to have or pursue a policy or practice or enter into an agreement relating to employment or prospective employment "…that deprives or tends to deprive **an individual or class of individuals** of any employment opportunities on a prohibited ground of discrimination" (my emphasis).

[33] There are other sections and subsections of the *Act* which refer to the entity being discriminated against as "an individual" or "any individual", or "class of individuals". Therefore, under the *Act*, a potential complainant is "an individual" or "individuals" or "class of individuals" - they are the aggrieved entities.

[34] The *Act* therefore differentiates between a respondent, which it refers to as a "person" or "persons", and a complainant, which it refers to as "an individual" or "individuals" or "class of individuals".

[35] I conclude that Parliament deliberately included these different descriptions in the *Act,* in order to differentiate between who can be complainants and who can be respondents in a human rights complaint.

[36] I further conclude that given those different descriptions, the *Act* requires a respondent to be a "person".

[37] However, the *Act* does not define the word "person". I deal with that issue under "Substituting the AG as Respondent".

VII. Is the Public Service Commission a "person" in accordance with the *Act*?

Respondent's Position

[38] Notwithstanding that this motion first seeks to add the PSC as a respondent, the Respondent's motion later submits that the PSC is a federal entity, not a legal entity. It is an emanation of the federal Crown, not a person. It is not a proper respondent in this matter.

Complainant's Position

[39] The Complainant agrees that neither the PSC nor the DFO are legal entities. However, all that is required to make them legal entities and therefore a proper respondent is to add "Deputy Minister" in front of Department of Fisheries and Oceans.

Commission's Position

[40] The Commission does not make any submissions on the issue of whether or not the PSC is a "person" under the *Act*. However, it did submit in its January 3, 2014 additional submissions that one of the core issues in this Complaint is whether or not the structure and application of "right fit" discriminates against the Complainant and individuals who share his disability, contrary to the *Act*. The PSC has delegated authority regarding staffing to government departments, including to DFO. The DFO applies the "right fit" standard to its staffing procedures. The Commission therefore sees the PSC as an essential entity in this Complaint.

Analysis

[41] The constituting statute of the Public Service Commission ("PSC") is the *Public Service Employment Act*, S.C. 2003, c. 22, ss 12, 13 ("*PSEA*").

[42] Subsection 4(1) of the *PSEA* continues the existence of the PSC, which it describes as consisting of a President and at least two other Commissioners.

[43] The *PSEA* does not characterize the PSC as an agency of the Crown against which proceedings are authorized to be taken in its own name. It is also not a Crown corporation.

[44] Although not determinative of the issue, I note that the *Financial Administration Act,* 1985 R.S.C., c. F-11 *("Financial Administration Act")* places the PSC into Schedule IV, part of the Core Public Administration.

[45] Given that the PSC's constituting statute does not characterize it as an agency, and does not authorize it to take proceedings in its own name, the PSC is not a person. It is more akin to a department in the federal government.

[46] In *Gravel*, the complainant brought a human rights complaint under the *Act* against the PSC. The Tribunal dismissed her complaint. She appealed to the Federal Court, naming the Tribunal, the PSC and the AG as respondents. The Federal Court held that "…government departments are not legal entities and cannot properly be named as parties…" (*Gravel, supra*, at para.6, citing *Mahmood v. Canada* (1998), 154 FTR 102 at para.14). The Federal Court therefore removed the PSC as respondent because it was held to be a government department.

[47] In light of the PSC's constituting statute, the Federal Court decision in *Gravel, supra*, and the Respondent's acknowledgment that PSC is not a person and not a proper respondent, I conclude that the Public Service Commission is not a "person" under the *Act*, and therefore cannot properly be named as a respondent in a complaint at the Tribunal.

[48] Therefore, the first part of the Motion which seeks to add the PSC as a Respondent is dismissed.

VIII. Is the Department of Fisheries and Oceans a "person" in accordance with the *Act*?

Respondent's Position

[49] The Respondent submits that the DFO is a department of the federal government, and therefore an emanation of the Crown, and not a legal entity.

Complainant's Position

[50] The Complainant submits that DFO is not a legal entity because it is a department of the federal government. All that is needed to make it a person for the purposes of the Complaint, is to add the name of the former Deputy Minister ahead of the DFO in the style of cause.

Commission's Position

[51] The Commission did not take a position regarding this specific issue.

Analysis

[52] The DFO's constituting statute is the *Department of Fisheries and Oceans Act,* R.S.C., 1985, c. F-15 *("DFO Act"*). Its preamble states it is ["A]n Act respecting the Department of Fisheries and Oceans".

[53] Section 2(1) of the *DFO Act* states:

> "There is hereby established a department of the Government of Canada called the Department of Fisheries and Oceans over which the Minister of Fisheries and Oceans appointed by commission under the Great Seal shall preside".

[54] Therefore, the Respondent DFO is a department of the Government of Canada.

[55] The short, six-section *DFO Act* does not contain any section constituting DFO as an agency or as having the capacity to conduct or respond to litigation or claims in its own name.

[56] The Complainant, the Respondent and the Commission agree that the DFO is a department of the Government of Canada.

[57] Given the contents of the DFO's constituting statute, which makes it a department of the federal government, and not an agency or entity with the authority to take legal proceedings in its own name, and given *Gravel, supra*, in which the Federal Court clearly states that federal departments cannot be respondents, I conclude that the DFO is not a "person" within the meaning of the *Act*, and therefore cannot be the Respondent in this Complaint at the Tribunal.

[58] DFO and PSC are however, intrinsically involved in this Complaint. Personnel from both departments will be witnesses at the inquiry. This is because the Complaint makes allegations of DFO's failure to accommodate the Complainant during a staffing procedure which used the standard and practice of "right fit", and that the standard and practice of "right fit" used in that staffing procedure systemically discriminated against him personally and against the class of individuals who share his disability. "Right fit" is designed by PSC, which delegates its staffing authority to federal government departments, such as DFO.

[59] This still leaves the issue of who in fact can be a respondent under the *Act* at the Tribunal when a federal government department is the alleged employer or prospective employer discriminator.

IX. Substituting the Attorney General of Canada as Respondent

Respondent's Position

[60] The Respondent's submissions are set out below.

1. In the context of the federal public service, the employer is Her Majesty the Queen in Right of Canada, because section 2(1) of the *PSEA* defines "employer", for organizations named in Schedules I and IV of the *Financial Administration Act*, as being the Treasury Board. [DFO is named in Schedule I; PSC is named in Schedule IV – my note.]

2. The Treasury Board is in fact an emanation of the Crown.

3. The Queen cannot be impleaded.

4. DFO and PSC are emanations of the Crown and are not legal entities. There is case law confirming this – for example, *Gravel*, *supra*, at para.6.

5. Therefore, the AG is the proper party to be named as Respondent.

6. The Tribunal's practice has been to substitute the AG for federal departments or entities that have been named as respondents. An example is *Plante v. RCMP*, 2003 CHRT 28, at para.7 ("*Plante*").

7. Further, section 23(1) of the *CLPA* mandates this substitution.

8. The Complainant will not be prejudiced by the substitution because:

    a. the AG is not asking to file an additional Statement of Particulars, nor is the PSC;

    b. the hearing will not be complicated by this substitution because there will be only one counsel for the Respondent;

    c. there will be no delay in the hearing on account of this substitution.

9. Any potential order would be enforceable against the Crown, with DFO and PSC having responsibility over the mechanisms to enforce the order and implement any remedies. The Respondent does not seek to blur or make unclear its responsibilities with respect to any potential Tribunal order.

10. In *Lacroix v. Attorney General of Canada*, 2009 CHRT 35 *(*"*Lacroix*"*)*, where the RCMP was alleged to have discriminated against the complainant, the Tribunal noted several previous cases involving the RCMP where the AG was named as Respondent, notwithstanding that the AG was not alleged to have been the discriminating party: *Maillet v. Canada (Attorney General),* 2005 CHRT 48 *(*"*Maillet*"*)*; *Berberi v. Canada (Attorney General*), 2009 CHRT 21 *(*"*Berberi*").

11. In *Lacroix, supra*, at para. 8, the Tribunal noted that the RCMP cannot be named in its own right as its constituting statute does not permit this.

12. As can be seen in the style of cause in *Tremblay v. Attorney General of Canada (representing the Public Service Commission, the Treasury Board of Canada and the Transportation and Safety Board of Canada* , 2004 CHRT 15 ("*Tremblay*"), the Tribunal followed the practice of the AG being the respondent when the respondents were emanations of the federal Crown.

13. *Attorney General of Canada v. Brown,* 2008 FC 734 *("Brown")* is distinguishable on its facts from the present Complaint. (I will not set out further details of the Respondent's submissions re *Brown, supra* because in my view, it deals with the addition of parties to a complaint at the Tribunal. When I asked the parties to comment on the Federal Court's decision in *Brown*, I considered that decision as important to the then live issue of whether to add PSC as a respondent. However, adding the PSC, and therefore *Brown,* became moot due to my conclusion on the underlying issue.)

The Complainant's Position

[61] The Complainant objects to the substitution of the Attorney General as Respondent in place of the DFO and the PSC, on the following grounds:

1. The Respondent's Motion does not comply with Rule 8.

2. The requested substitution would leave the DFO's and PSC's legal status unclear during the hearing.

3. The Respondent should be Claire Dansereau, the former Deputy Minister of the DFO, as this was the person against whom the Complainant filed his Complaint originally; all that is required is to insert her name ahead of the DFO in the style of cause.

4. Section 23(1) of the *Crown Liability and Proceedings Act* ("*CLPA*") does not mandate that only the AG can be named as respondent in proceedings against the federal government, because it uses the word "may". The naming of the AG as respondent is therefore discretionary, not mandatory.

5. Further, the C*LPA* refers only to court proceedings, and is silent regarding the Tribunal.

6. It is the *Financial Administration Act,* 1985 R.S.C., c. F-11 ("*Financial Administration Act*") and its Schedules and not the *CLPA* that determines which parts of the federal government can be legal persons in legal proceedings. *Lacroix's* finding on this issue is incorrect.

7. There is no practice in complaints at the Tribunal that the AG be substituted as the respondent when a federal government department is originally named as the respondent. In fact, the proposed substitution is highly irregular and totally illogical.

8. This part of the Motion is also too late, and the proposed substitution would prejudice the Complainant as he would not know what roles DFO and PSC would take at the hearing, nor the rules governing them at the hearing.

9. The Treasury Board Secretariat's Policy on Legal Assistance and Indemnification ("Treasury Board Policy") provides how the *CLPA* is to be applied. Paragraph 8 of the Treasury Board Policy states the role and responsibilities of the Department of Justice. Nothing in that section or anything else in the Policy mandates the AG to be the substituted respondent for Tribunal cases or for the Department of Justice to represent the substituted AG in such cases.

The Commission's Position

[62] In its August 27, 2013 response to the Motion, the Commission did not oppose the Motion, on the understanding that "…the replacement of the Attorney General of Canada will make any potential order enforceable against it as it would be against the Department of Fisheries and Oceans Canada".

[63] In its Reply, the Respondent stated that the Commission's position reflected a "misunderstanding" of what the Respondent requests in its Motion, without clarifying the misunderstanding. However, during the December 20, 2013 CMCC, he did so. Specifically, if the Tribunal granted the Respondent's Motion, and the Complainant established his case at the hearing, if the Tribunal ordered the PSC and/or the DFO to take any actions or make any monetary payments, the AG itself would not be required to internally take those same actions or make those payments. Respondent's counsel further clarified that the AG could and would ensure that the PSC and DFO complied with any such Tribunal order.

[64] In its January 3, 2014 additional written submissions, the Commission stated that its understanding of the Respondent's Motion to replace the Respondent DFO with the AG also seeks to include the PSC, and any Tribunal order would be enforceable against the DFO and PSC, that is to say, against the Crown. It is on the specific circumstances of this

Complaint and this Motion that in its August 27, 2013 response, the Commission did not object to the Respondent's Motion and still does not object to it.

[65] The Commission also provided a 2-page list of Tribunal cases where the AG was the named Respondent without having been the discriminator. That list includes cases where the successful request to change the Respondent to the AG was made during the proceedings, and includes *Lacroix.*

[66] Notwithstanding that the Commission does not object to the Respondent's Motion, the Commission makes the submissions set out below.

> a) The *CLPA* does not in fact take a blanket approach in requiring all human rights complaints against federal government departments to name the AG as the respondent.
>
> b) The *CLPA* speaks to the litigation of torts. The Supreme Court of Canada held in *Seneca College v. Bhaduria* [1981] 2 S.C.R.181 ("*Seneca College*") and in *Honda Canada Inc. v. Keays* ("*Honda Canada*") that discrimination is not a tort. A complaint of discrimination must be dealt with by the statutorily-created human rights entities. In the federally-regulated employment and service sectors, the only recourse for human rights complaints is under the *Act*. Therefore because the *Act* creates the Commission and the Tribunal, a federal human rights complaint is not a "proceeding" under the *CLPA.*
>
> c) Section 21, *CLPA* refers to the Federal Court and provincial Superior Courts as the appropriate forums for claims brought against the Crown. The CLPA is silent regarding administrative proceedings, and complaints at the Tribunal are administrative proceedings.
>
> d) Although the *Department of Justice Act*, RSC 1985, c. J-2 ("*Dept. of Justice Act"*) gives the AG "…the regulation and conduct of all litigation for or against the Crown or any department in respect of any subject within the authority or jurisdiction of Canada", it does not mandate that any such litigation against the Crown must name the AG as respondent or defendant.

Analysis

Financial Administration Act

[67] The purpose of the *Financial Administration Act* is described above its section 1 as being: "[A]n Act to provide for the financial administration of the Government of Canada,

the establishment and maintenance of the accounts of Canada and the control of Crown corporations."

[68] Its purpose is therefore financial and human resource governance, not judicial governance. It sets out Schedules classifying portions of the federal government as departments, agencies and Crown corporations, but that is for the overriding purpose of finances, financial organization and human resource governance. It does not speak to how legal proceedings are to be taken.

Treasury Board Policy

[69] The Treasury Board Policy gives guidance on how and when the Treasury Board will provide legal assistance to and indemnify Crown servants for legal costs and protect them from personal liability if they are subject to legal claims or actions. One of the purposes of the Treasury Board Policy is to "…protect the Crown's interest and its potential or actual liability arising from the acts or omissions of its Crown servants…" (Treasury Board Policy, section 5.1).

[70] Notwithstanding that section 8.2's enumeration of the responsibilities of the Department of Justice does not include the AG as the substituted respondent whenever a federal department is sued or there are proceedings against it, that section must be seen in the context of the Treasury Board Policy's purpose, which is to protect the Crown's interests and its potential or actual liability, and one of the ways it does so is to set out this policy. Its purpose is not to set out or describe statutory legal concepts. It does not mention the *CLPA*.

[71] Further, Treasury Board Policy is not a statute of Canada – it is not legislation. It is made pursuant to section 7 of the *Financial Administration Act.* It is a policy used for guidance and information. It does not have the authority of legislation or of decided case law.

[72] The reasons the style of cause named the AG as respondent in *Tremblay* are not contained in that case. I therefore cannot give *Tremblay* much weight, except to note that the respondent is the AG.

Human Rights Act

[73] The *Human Rights Act* itself does not define the word "person". Therefore, one has to see if that definition can be found by inquiring into Parliament's intent by reading the word and the provisions in which it is in, in context and in its plain and ordinary meaning, but together with the scheme and object of the *Act* (*Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*), 2011 SCC 53. In that decision, the Supreme Court of Canada also stated that in interpreting human rights legislation, one has to "…be mindful that it expresses fundamental values and pursues fundamental goals" (*ibid*). The Court further stated that human rights legislation must be interpreted liberally and purposively so that the rights set out are given their full recognition and effect.

[74] The scheme of the *Act* shows that:

(a) complaints are filed against a "person" or "persons" (s. 40(1);

(b) the "person" against whom the complaint is made has the right to participate at the Tribunal (s.50.1);

(c) the Tribunal can make an order "against the person found to be engaging or to have engaged in the discriminatory practice" (ss.53(2), (3);

(d) the Act binds Her Majesty in right of Canada (s.66(1).

[75] Based on this scheme, "person" for the purposes of the *Act*, includes Her Majesty in right of Canada. That enables the Tribunal to make orders against Her Majesty.

[76] In looking at the purpose of the *Act*, the strong language of section 2 reveals that the Act's goal, in summary, is to promote the ability of every individual to achieve "the life he or she is able and wishes to have" by providing each such individual an equal opportunity to do so, without being hindered by discrimination and discriminatory practices. It seeks both to remedy such discrimination should that discrimination be established, and to prevent it (*CN v. Canada (Canadian Human Rights Commission,* [1987] 1 SCR 1114).

[77] The Tribunal is part of the ***Act's*** scheme and objectives. The purpose of its adjudication is to ensure that the objects of the *Act* – remedying and preventing discrimination - are implemented. To do this, the Tribunal should interpret any ambiguity in

the Act in a way that furthers, rather than frustrates, the Act's objectives (*Bell Canada v. CTEA 2003 SCC 36, at para.26).*

Crown Liability and Proceedings Act ("CLPA")

[78] The *CLPA's* descriptive statement above its section 1 describes it as "[A]n Act respecting the liability of the Crown and proceedings by or against the Crown".

[79] Although it does not mention administrative proceedings specifically, and seems to restrict the subject of litigation against the Crown in Ontario to "torts", it contains no definition of "proceedings". I find because it is described as an Act about the liability of the Crown and proceedings by or against the Crown, the provisions of the *CLPA* can be referred to and applied to further the section 2 objects of the *Human Rights Act*.

[80] Section 2, *CLPA* defines the "Crown" as being "Her Majesty the Queen in right of Canada or a province".

[81] Section 2.1 defines person. "For the purposes of sections 3 to 5, "person" means a natural person of full age and capacity, other than Her Majesty in right of Canada…".

[82] Sections 3 to 5 of the *CLPA* deal with the liability of the Crown.

[83] Departments, commissions and other entities in the federal government are not legal "persons" under the *CLPA*, and cannot bring or respond to legal proceedings in their own name unless their constituting statutes give them that authority. They are also not persons within the meaning of the *Human Rights Act.* They are emanations of the Crown, which in turn is Her Majesty the Queen in right of Canada or a province. Much of the cited case law, particularly at the Tribunal, confirms this, as does *Gravel* in the Federal Court.

[84] The Crown is therefore a single entity, because it is embodied in the person of Her Majesty the Queen in right of Canada. The non-person federal government departments, commissions and other institutions are parts of the Crown, which is the person of Her Majesty the Queen in right of Canada. The DFO and the PSC are parts of the single Crown.

[85] However, section 2.1, *CLPA*, exempts the person of Her Majesty the Queen in right of Canada from liability. Section 66(1) of the *Human Rights Act* provides that the *Act* is

binding on the Queen in right of Canada. Further, the *Human Rights Act* requires that a "person" be the Respondent. These are seemingly conflicting provisions.

[86] But the *CLPA* does not exempt the Crown itself from liability.

[87] Section 23(1), *CLPA* deals with proceedings, and provides the mechanism for proceeding against the Crown. Such proceedings may be taken in the name of the Attorney General of Canada, unless there is an Act of Parliament which authorizes the Crown entity to be named in proceedings.

[88] Therefore, to obtain a remedy against the federal departments who are part of the Crown, which in turn is Her Majesty in right of Canada, in accordance with section 66(1) of the *Human Rights Act*, one names the Attorney General of Canada as respondent, in accordance with section 23(1) of the *CLPA.*

[89] That is the interplay between the *Human Rights Act* and the *CLPA* which furthers the scheme, values and objects of the *Human Rights Act* by naming the Attorney General of Canada as the Respondent in the Complaint.

[90] The cited cases, including those appended to the Commission's January 3, 2014 additional submissions, confirm that for the last several years, the Tribunal practice has been to substitute the AG when federal government departments have originally been named as respondents.

[91] The *Lacroix* decision (supra) decided that the named Respondent should be the AG, and no recital describing the entity represented by the AG should come after the AG's name in the style of cause. Notwithstanding *Lacroix,* in this Complaint, the DFO and PSC are the emanations of the Crown which are at the heart of the Complaint – the DFO because of the Complaint's allegations that it failed to accommodate his disability in a staffing process which used the "right fit" standard and practice, and the PSC because it is responsible for the design and implementation of the "right fit" standard and practice which it delegates to the DFO to apply, and which the Complaint alleges systemically discriminated and discriminates against both him and other individuals who share his disability.

[92] Therefore, for all the above reasons, the Attorney General of Canada should be substituted as the Respondent, and the style of cause will also recite that the AG represents the emanations of the Crown which are the Public Service Commission of Canada and the DFO. This does not run counter to the fact that the AG is the named Respondent. Having the style of cause read in this manner is done for the sake of both the clarity and the transparency of the inquiry.

X. Former Deputy Minister as a Respondent

The Complainant's Position

[93] Although the Complainant has not made a motion on this issue, he has frequently submitted in his materials that the Respondent should be Claire Dansereau, who was Deputy Minister ("DM") of DFO at the time of the incidents alleged in the Complaint.

[94] In his Response to the Respondent's Motion, the Complainant added Ms. Dansereau's name to the style of cause, so that Respondent is shown as "Claire Dansereau, FISHERIES AND OCEANS CANADA – Respondent (DFO)". In other parts of his Tribunal materials, he has stated that Ms. Dansereau should be added as a Respondent, and is the correct Respondent in law.

He bases his position on the following:

- the Complaint originally specified her by name as the Respondent;
- she is a "person" in accordance with the *Act* and the Rules*;*
- she was the person responsible for the DFO's alleged failure to accommodate the Complainant and for its implementation of the "right fit" policy;
- the DFO is not a legal person;
- the Complainant had informed Ms. Dansereau, among others, of his dissatisfaction with DFO's accommodation procedure;
- Ms. Dansereau knew about the accommodation issue and the discrimination, and did not, as far as the Complainant knows, do anything to stop the latter; and

- She was personally aware of and corporately responsible for the impugned conduct of DFO personnel, as set out in the Complaint.

Respondent's Position

[95] In its reply submissions on the motion, the Respondent objects to Ms. Dansereau being named as a party. The Respondent asserts that she was not acting outside her employment nor in any personal capacity in any matter related to the Complaint, but was only acting as an employee of the Crown. The AG represents the Crown, and therefore there is no need to add Ms. Dansereau as a party.

Commission's Position

[96] The Commission made no submissions on this issue.

Analysis

Procedure

[97] As set out above, Rule 8(3) applies to the procedure required when a complainant, respondent or the Commission wishes to add another party to the inquiry. Compliance with Rule 8(3), particularly that part of the Rule which requires service of the motion on the prospective party, giving that party notice of the proceeding, and the part of the Rule entitling the prospective party to make submissions on the motion, ensure that the prospective party has the opportunity to know what the matter is about and to speak to the issue of its being added - before the Tribunal decides whether or not the prospective party should be named as a party.

[98] In other words, the prospective party is entitled to natural justice, which includes the opportunity to be heard before a decision is made that directly affects its interests. Being added as a respondent party in respect of a *Human Rights Act* inquiry can have significant consequences. It would be a breach of natural justice to simply name someone as a party to an inquiry, with all the obligations and consequences that entails, without first giving them proper notice of the order being sought, and then providing them with a full and ample opportunity to both know the issues facing them, and also make submissions to the Tribunal on the matter. This is especially so in the current circumstances, when the individual no

longer occupies the DM position at DFO; she may not even be aware of this proceeding, including the Complainant's wish to add her as a party.

[99] The Complainant has not served Ms. Dansereau with a Notice of Motion informing her of the fact that he wishes to add her as a respondent, which Notice would entail her being given the opportunity to make submissions to the Tribunal on the issue. The Complainant has therefore not complied with Rule 8(3) regarding his request to name Ms. Dansereau as a party.

[100] Further, even though the Respondent made brief objections to adding Ms. Dansereau, I am not persuaded that these objections mean that Rules 8(3) and 3(1) were complied with. I am unable to infer from these objections that the Respondent notified Ms. Dansereau of the request, and that it has a mandate to make submissions on her behalf.

[101] For the above reasons, I cannot in the present circumstances consider whether to add Claire Dansereau as a respondent to this Complaint.

XI. Order

1. The Respondent in this Complaint shall be identified as: "Attorney General of Canada (representing the Department of Fisheries and Oceans Canada and the Public Service Commission of Canada)", effective immediately.

2. If the Complainant wishes to add Ms. Claire Dansereau or any other person as a party to the Complaint,

    a. he shall comply with Rules 3(1) and 8(3);

    b. he may use as his Notice of Motion a letter addressed to the prospective party, setting out the relief he seeks. In any event, the Notice of Motion shall clearly indicate the coordinates of the Registry Officer assigned to this case, to whom administrative enquiries bout the filing of materials may be addressed;

    c. he shall attach to the Notice of Motion, a copy of this Ruling, the Complaint Form, all Statements of Particulars which have been filed, and any other material the Complainant wishes to include in his motion;

d. he shall serve the prospective party, the Respondent and the Commission with the items referred to in subparagraphs 2(b) and 2(c), and file them with the Tribunal, within fourteen (14) days of the date of this Ruling;

e. the prospective party, the Commission and the Respondent shall serve and file their Response to this Rule 8(3) motion within fourteen (14) days of the date on which they were served by the Complainant;

f. the Complainant shall serve and file his Reply, if any, on the Commission, the Respondent and the prospective party within seven (7) days of his receipt of the Responses referred to in subparagraph 2.e) above.

Signed by

Olga Luftig
Tribunal Member

Ottawa, Ontario
February 6, 2014