Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Between:

Norm Murray

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Immigration and Refugee Board

Respondent

Ruling

Member: Edward P. Lustig
Date: January 4, 2013
Citation: 2013 CHRT 2

I. Complaint & Motions

[1] On July 29, 2011, pursuant to paragraph 44(3)(a) the Canadian Human Rights Act, R.S.C., 1985, c. H-6 [the Act], the Canadian Human Rights Commission (the Commission) requested the Chairperson of the Canadian Human Rights Tribunal (the Tribunal) institute an inquiry into the complaint of Norman Murray (the Complainant) against the Immigration and Refugee Board (the IRB or the Respondent).

[2] On April 10, 2012, the Commission brought a motion for an order of production by the Respondent of certain documents.

[3] On April 24, 2012, the Complainant also brought a motion for an order of production by the Respondent of certain documents.

[4] On June 4, 2012, the Respondent brought a motion for an order dismissing the complaint. In the alternative, the Respondent requests an order defining the scope of the complaint including in particular, the issues to be determined, the groups or classifications to be considered, the specific time periods to be covered and the remedies that may be ordered.

[5] The following ruling deals with all three motions.

II. Background

A. The Human Rights Complaint

[6] On April 22, 2004, the Complainant filed a human rights complaint with the Commission. The allegations of discrimination arose out of an incident in April 2003 between the Complainant, a black male, and several white co-workers, who allegedly made racist comments about another black male co-worker. The complaint was initially brought under sections 7 and 14 of the Act, but was later amended to include sections 10 and 12. Among other things, the Complaint Form alleges:

2. I believe that management at the IRB, has discriminated against me, has imposed adverse differential treatment against me, has incited others to discriminate against me, has created and supported a poisoned work environment that makes it difficult to do my job, to attain career improvement, and has adversely affected my health because of my race. As well, I believe that management at the IRB, has systematically pursued a practices that has effectively deprived me of employment opportunities because of my race.

[...]

18. As a union representative and a member of the Employment Equity Committee I have often been critical of the IRB on its practices concerning employment equity, race relations and discrimination. The reason being that the IRB has been is officially recognized as having the largest percentage of visible minority employees in the Federal Public Service (the IRB has used this favourable status when it benefits the organization), yet visible minority employees do not favour well in the IRB as they continue to be clustered at the lowest classification levels. In addition acts of systemic racism, harassment and discriminatory practices, which adversely affects visible minorities, are prevalent throughout the IRB. This has been revealed in public accessible documents the most recent being the Public Service Survey. Management know these problems exist and have not taken the necessary steps to resolve them. I however, had never until then, been faced with this overt form of racism and harassment and wondered if years of neglect by management to address serious issues of racism, discrimination and harassment was the contributing factor.

[...]

56. I believe that management has encouraged and supported racism, harassment and discrimination at the IRB. I believe that because of the actions of management, racism, harassment and discriminatory practices have taken roots and have grown radically over this 12-month period. Management's actions over this period have caused the workplace to be polarized along racial lines, and have poisoned the workplace to the extent where I cannot work effectively. I am presently off on sick leave, because of the level of stress and poison in the workplace as a result of the accumulative racist behaviour of management at the IRB over the 12-month period. As well: my ability to do my job has suffered: my ability to pursue promotional opportunities has suffered: my personal working relationship with my colleagues has suffered and my personal live outside the IRB has suffered tremendously.

[7] On April 13, 2005, the Commission decided, pursuant to paragraph 41(1)(a) of the Act, not to deal with the complaint at that time. As an internal investigation into the complaint by the Respondent was pending, the Commission was of the view that those procedures ought to be exhausted before proceeding. Dealing with the harassment allegations only, the internal investigation concluded the complaint was not founded.

[8] On July 4, 2005, the Complainant requested the Commission proceed with his human rights complaint.

[9] Following investigations of the complaint, on August 10, 2007, the Commission decided, pursuant to paragraph 41(1)(d) of the Act, not to deal with the Complainant's allegations of harassment. However, the Commission also decided, pursuant to subsection 41(1) of the Act, to deal with the portion of the complaint that was not dealt with through the Respondent's internal investigation. Specifically, in a letter dated September 19, 2007 to the Respondent, the Commission stated it would be dealing with the allegations that the Respondent incited others to discriminate against the Complainant and deprived him and other visible minorities permanent employment advancements because of race.

[10] Prior to the Commission's decision, the Respondent had requested the Commission not deal with the complaint on the basis that it would cause a duplication of proceedings. In 2007, the Complainant and others also initiated complaints against the IRB under the Public Service Labour Relations Act, S.C. 2003, c. 22, s. 2 [the PSLRA], and the Public Service Employment Act, S.C. 2003, c. 22, ss. 12, 13 [the PSEA], which are described in more detail below. Despite the Respondent's request, the Commission proceeded with the investigation of the Complainant's human rights complaint. The Respondent did not raise this issue again prior to these proceedings.

[11] Following another investigation, on October 20, 2008, the Commission decided, pursuant to paragraph 44(3)(b) of the Act, to dismiss the complaint. Based on the evidence gathered during the investigation, the Commission concluded the Respondent had not failed to provide the

Complainant with a harassment-free workplace; and, the Respondent did not pursue a policy, rule, practice or standard which deprives the Complainant and other visible minorities of permanent employment advancements due to their race and colour.

[12] An application for judicial review of the Commission's October 20, 2008 decision was brought before the Federal Court. On August 18, 2009, on the consent of the parties, the application for judicial review was allowed in part by Justice Hansen. The Federal Court quashed the Commission's decision in so far as it related to the allegations of systemic discrimination and remitted the matter of systemic discrimination back to the Commission for a supplemental investigation. Specifically, the Federal Court ordered the Commission to examine the situation of visible minorities at the Respondent's Toronto Regional Office during the period of 12 months preceding the filing of the complaint with specific reference to: (a) clustering of visible minorities in lower status positions; and, (b) underrepresentation of visible minorities in permanent positions. Needless to say, having consented to the Federal Court's order, it was not appealed by any party. Nor was the Commission's jurisdiction under the Act to deal with the issues directed by the Court questioned or alleged to be in conflict with any other legislation, by any party at any time prior to these proceedings, other than as described in paragraph 10 above.

[13] After a supplementary investigation into the complaint, the Commission decided, pursuant to paragraph 44(3)(a) of the Act, to request that the Tribunal institute an inquiry into the complaint. In a letter to the Respondent, dated July 29, 2011, the Commission explained that it requested an inquiry because:

- the evidence gathered indicates that from March 1, 2003 to March 17, 2004, visible minorities within the IRB's Toronto regional office, appear to be clustered in lower level positions in the PM, AS and CR categories;

- The evidence gathered shows that visible minorities within the IRB's Toronto regional office, when provided acting opportunities, were provided the acting opportunities mainly within the lower categories;

- The evidence gathered also shows that within the IRB's Toronto regional office, that a barrier may exist that prohibits PM-01s from advancing with the IRB; and,

- The evidence gathered shows that within the IRB's Toronto regional office, visible minorities appear to be under-represented within the higher levels such as the PM-05 and PM-06 levels.

[14] In its letter to the Tribunal, also dated July 29, 2011, the Commission wrote:

> I am writing to inform you that the Canadian Human Rights Commission has reviewed the complaint (20040576) of Norm Murray against Immigration and Refugee Board.
>
> The Commission has decided, pursuant to paragraph 44(3)(a) of the Canadian Human Rights Act, to request that you institute an inquiry into the complaint as it is satisfied that, having regard to all the circumstances, an inquiry is warranted.
>
> A copy of the complaint form is enclosed. Form 1, including complainant and respondent information, will be provided by the Litigation Services Division.
>
> The complainant and respondent are being advised that they will receive further information from the Tribunal regarding the proceedings.

This letter did not, on its face, place any limitations on the inquiry vis-a-vis the issues raised in the complaint.

[15] The Respondent did not seek judicial review of the Commission's decision to request an inquiry into the complaint.

[16] At the outset of the Tribunal's proceedings, the parties agreed to attempt to mediate the complaint. In a letter dated October 4, 2011, the Tribunal informed the parties that mediation was scheduled for December 6, 2011, with mediation briefs due November 15, 2011. In that same letter, the Tribunal set out a schedule for disclosure in the event mediation did not result in a settlement.

[17] On December 2, 2011, after reviewing the file, the Tribunal Member appointed to mediate the matter decided to postpone mediation and instructed the parties to proceed with

disclosure. A conference call was scheduled for December 6, 2011 to clarify next steps and to address any disclosure or other preliminary issues. That call was subsequently postponed.

[18] On December 19, 2011, the Commission sent a letter to the Respondent requesting the production of certain documents.

[19] On January 10, 2012, the Commission wrote to the Tribunal to request an update regarding the complaint. As the Commission's disclosure package was due January 17, 2012, and given the mediation and conference call were postponed, the Commission requested the disclosure timelines be halted until the parties were able to discuss the matter at a conference call. In response, the Tribunal indicated, as mediation had been postponed, the disclosure schedule was no longer applicable. The parties were asked to provide their availabilities for an upcoming conference call.

[20] A conference call with the parties was held on January 23, 2012, where the parties and the Tribunal agreed to proceed with mediation.

[21] The mediation occurred on February 28, 2012, but did not result in a settlement. The Tribunal held a case management conference call with the parties on the same date. During this conference call, the Commission indicated it had not received a response to its letter to the Respondent, dated December 19, 2011, requesting production of certain documents. Also during the call, the Complainant requested the production of certain documents from the Respondent. The Tribunal asked the Respondent to provide a response to the Complainant and the Commission's request for production of documents by March 7, 2012.

[22] The Respondent responded to the Commission and Complainant's request for documents on March 7, 2012. Among other things, the Respondent was of the view that the request for documents was premature, given statements of particulars had not been exchanged yet, and that certain of the documents requested could not be disclosed pursuant to the Employment Equity Act, S.C. 1995, c. 44 [the EEA].

[23] The Complainant and the Commission decided to file motions to seek the production of the documents they previously requested. In response, the Respondent indicated it would be bringing a motion dealing with the scope of the complaint and the jurisdiction of the Tribunal. Therefore, a timetable for written submissions on all three motions was established. The written submissions for all three motions were due to be completed by July 23, 2012.

[24] The Tribunal held a further case management conference call on July 18, 2012. During this conference call, the Tribunal decided it would hear oral submissions from the parties on the motions. A hearing was scheduled for October 15-16, 2012, in Ottawa.

[25] Beginning with the Respondent's motion, the Tribunal heard oral submissions from the parties on October 15-16, 2012 in Ottawa, on all three motions. The hearing concluded on October 17, 2012, by teleconference.

B. The PSLRA Complaint

[26] On February 27, 2007, the Complainant and seven others brought a group grievance against the Respondent under section 215 of the PSLRA. Among other things, the group grieves the past and present actions, policies and practices of IRB management that discriminate adversely, deny employment opportunities and benefits, and create and promote employment barriers against visible minority Case Officers who work in the Immigrations Appeal Division in the Toronto region of the IRB. Given the grievance involved issues under the Act, the Commission was notified of the grievance.

[27] The Public Service Labour Relations Board (the PSLRB) was scheduled to hear the Complainant's group grievance on September 27 and 28, 2012. The Commission did not participate in the proceedings.

C. The PSEA Complaint

[28] On March 21, 2007, the Complainant filed a complaint with the Public Service Staffing Tribunal (the PSST) pursuant to section 77 of the PSEA. The PSST complaint alleged the IRB's choice to use a non-advertised appointment process to staff new PM-05 positions discriminated against the Complainant on the basis of his race. The Complainant alleged the non-advertised process constituted systemic discrimination where job barriers result in a clustering of visible minorities in Case Officer positions at the PM-01 group and level.

[29] On December 21, 2009, the PSST dismissed the Complainant's PSEA complaint (Murray v. Chairperson of the Immigration and Refugee Board, 2009 PSST 33 [Murray]). The PSST determined the Complainant had not established a prima facie case of discrimination. Even if he had, the PSST found the IRB had met its evidentiary burden of establishing a reasonable non-discriminatory explanation for choosing between an advertised and a non-advertised appointment process. An application for judicial review of the PSST decision was brought before the Federal Court.

[30] On May 11, 2011, the Federal Court allowed the Complainant's application for judicial review of the PSST decision (Murray v. Canada (Attorney General), 2011 FC 542). The Federal Court found the Complainant's right to procedural fairness was breached by the PSST when it did not consider the Complainant's request to submit post-hearing evidence. The Federal Court ordered the PSST to consider the relevance of the evidence and whether it would accept it and, if so, its impact on the merits of the complaint.

[31] On November 30, 2011, the PSST denied the Complainant's request to submit post-hearing evidence (Murray v. Chairperson of the Immigration and Refugee Board of Canada, 2011 PSST 36). The PSST dismissed the complaint as per its reasons dated December 21, 2009. An application for judicial review of the PSST's 2011 decision is currently pending before the Federal Court (Court Number T-372-12).

III. Issues

[32] The Respondent's motion to dismiss the complaint raises the following issues for the Tribunal to address:

A. On what basis can the Tribunal dismiss a complaint prior to conducting a full hearing on the merits?

B. Does paragraph 40.1(2)(b) of the Act limit the Tribunal's ability to consider the complaint?

C. Does subsection 54.1(2) of the Act limit the Tribunal's ability to consider the complaint?

D. Is there reason to dismiss the complaint based on the principles of issue estoppel or abuse of process?

E. In the alternative, if the complaint is not dismissed for any reason above, is there reason to limit the scope of the inquiry?

[33] If the complaint is not dismissed in addressing the issues above, then the Tribunal will address the following issues raised in the Complainant and Commission's motions for production of documents:

F. Does the EEA limit the Tribunal's power to order the production of documents?

G. Are the motions for production of documents premature?

H. Should the Respondent produce the documents requested by the Complainant?

I. Should the Respondent produce the documents requested by the Commission?

IV. Analysis

A. On what basis can the Tribunal dismiss a complaint prior to conducting a full hearing on the merits?

[34] According to the Respondent, pursuant to sections 48.9 and 50 of the Act, the Tribunal has broad discretion to dismiss complaints on a preliminary motion. The Respondent submits the

questions raised in the motion to dismiss are not concerned with whether the Commission erred, but whether the Tribunal has jurisdiction over the substance of the complaint, and whether it would be an abuse of the Tribunal's process to proceed with a full inquiry. The Respondent adds, bringing these concerns to the attention of the Tribunal in a preliminary motion is the proper and most efficient way to have these concerns addressed.

[35] While the Complainant and the Commission agree that the Tribunal has the power to dismiss a complainant on a preliminary motion, they are of the view that the power should be exercised cautiously. According to the Commission, this complaint is not the type of complaint the Tribunal should dismiss on a preliminary basis, as it involves a complex set of facts and raises important issues of law, including substantial public interest issues. The Commission points out the parties have not filed their statement of particulars, nor provided any evidence which will assist the Tribunal in determining the substantial legal and factual issues raised in this complaint. The Complainant adds, the Tribunal cannot deal with issues concerning the Commission's investigation that should have been raised by judicial review before the Court.

[36] The Federal Court recently examined the Tribunal's power to dismiss complaints prior to conducting a full hearing on the merits: Canada (Human Rights Commission) v. Canada (Attorney General), 2012 FC 445 [First Nations Child and Family Caring Society]. According to the Federal Court, nothing in the Act or the Tribunal's Rules of Procedure precludes the bringing of a motion to have the Tribunal determine a substantive issue in advance of a full hearing of the complaint on its merits. Nor is there anything in the Act or the Tribunal's Rules of Procedure that would preclude the Tribunal from deciding such a motion. However, pursuant to sections 48.9 and 50 of the Act, in hearing and deciding the motion the process must be fair, and the rules of natural justice respected, with a full and ample opportunity for the parties to adduce the evidence necessary to decide the issues raised by the motion (see First Nations Child and Family Caring Society at paras. 131-132).

[37] However, in entertaining motions of this nature, the Tribunal must respect the separate roles of the Commission and the Tribunal. Under the scheme of the Act, the Commission is the

body who accepts, manages and processes complaints of discriminatory practices. Pursuant to subsection 49(1) of the Act, the Commission may request the Tribunal institute an inquiry into a complaint if it is satisfied that, having regard to all the circumstances of the complaint, an inquiry is warranted. The Commission's decision to refer is not a determination that the complaint is well founded or even within the purview of the Act. Nor is it for the Tribunal to question whether the Commission has reasonably concluded an inquiry is warranted. That is the role of the Federal Court on judicial review (see Deborah P. Labelle v. Rogers Communications Inc., 2012 CHRT 4 at para. 71; International Longshore & Warehouse Union (Maritime Section), Local 400 v. Oster, [2002] 2 FC 430 at paras. 29-30; Canada (Human Rights Commission) v. Warman, 2012 FC 1162 at paras. 55-57; and, Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission), 2012 SCC 10 at paras. 23, 27, and 33). The Tribunal's role is to inquire into the complaint (see subsections 49(2) and 50(1) of the Act). In conducting an inquiry that is de novo from the Commission's decision to refer the complaint, the Tribunal is master of its own procedure and can determine how best to deal with the issues which have been referred to it, including dismissing the complaint in advance of a full hearing on the merits (see Prassad v. Canada (Minister of employment and immigration), [1989] 1 SCR 560 at para. 16; and, Canada (Human Rights Commission) v. Canada Post Corp., 2004 FC 81 at para. 14, aff'd 2004 FCA 363 [Canada Post]).

[38] That said, the Tribunal exercises its power to dismiss a human rights complaint in advance of a full hearing on the merits cautiously, and then only in the clearest of cases (see First Nations Child and Family Caring Society at para. 140; and, Buffett v. Canadian Armed Forces, 2005 CHRT 16 at para. 39). While there may be cases where a full hearing involving viva voce evidence is not necessarily required; in other cases, where the issues of fact and law are complex and intermingled, it may well be more efficient to await the full hearing before ruling on the preliminary issue (see First Nations Child and Family Caring Society at paras. 141-144). In every case, "the Tribunal will have to consider the facts and issues raised by the complaint before it, and will have to identify the appropriate procedure to be followed so as to secure as informal and expeditious a hearing process as the requirements of natural justice and the rules of procedure allow" (First Nations Child and Family Caring Society at para. 148).

[39] It is with this understanding of the Tribunal's power to dismiss a complaint prior to conducting a full hearing on the merits that I will examine the issues raised by the Respondent in its motion to dismiss.

B. Does paragraph 40.1(2)(b) of the Act limit the Tribunal's ability to consider the complaint?

[40] According to the Respondent, in 1995, Parliament made amendments to the EEA and at the same time, made consequential amendments to the Act. Those consequential amendments removed the jurisdiction of the Tribunal over complaints concerning the underrepresentation of designated groups. In the Respondent's view, this ensures that the cooperative and collaborative approach to achieving employment equity that is central to the scheme of the EEA is not put at risk by third party complaints brought before the Tribunal. In particular, the Respondent points to section 40.1 of the Act, which it says precludes complaints based solely on statistical information that purport to show that members of a designated group are underrepresented in the employer's workforce. The Respondent submits it is evident from the Complaint Form, the Commission's Investigation Reports, Justice Hansen's order and the Commission's decisions of October 20, 2008 and July 29, 2011, that the portions of the complaint referred to the Tribunal focus entirely on allegations that there was clustering of visible minorities at lower levels and underrepresentation of visible minorities at higher levels of certain classifications within the Toronto Regional Office of the IRB during the twelve month period prior to the filing of the complaint. The complaint does not identify a practice or policy of the Respondent that is alleged to cause discrimination contrary to section 10 of the Act. According to the Respondent, as the complaint is based solely on statistical information that purports to show that members of a designated group are underrepresented in the employer's workforce, it is not a proper complaint under the Act pursuant to section 40.1 and, therefore, is beyond the jurisdiction of the Tribunal.

[41] The Complainant submits a complaint based on statistical information and other evidence is entirely permissible. According to the Complainant, that is precisely the nature of the complaint here, which is also supported by a variety of other circumstantial and direct evidence.

[42] According to the Commission, section 40.1 of the Act applies exclusively to the Commission and not to the Tribunal. The Commission submits the Respondent's arguments fail to consider the separate roles of the Commission and the Tribunal under the Act and is an implicit attack of the Commission's decision to refer the complaint to the Tribunal. If the Respondent disagreed with the Commission's decision, it had the opportunity to seek judicial review before the appropriate forum: the Federal Court. However, it chose not to do so.

[43] Subsection 40.1(2) of the Act provides:

> Employment equity complaints
>
> (2) No complaint may be dealt with by the Commission pursuant to section 40 where
>
> (a) the complaint is made against an employer alleging that the employer has engaged in a discriminatory practice set out in section 7 or paragraph 10(a); and
>
> (b) the complaint is based solely on statistical information that purports to show that members of one or more designated groups are underrepresented in the employer's workforce.

[44] Given the clear language of subsection 40.1(2), the Tribunal does not dispute the Respondent's assertion that section 7 and 10(a) complaints, based solely on statistical information that purport to show the underrepresentation of designated groups, are not to be dealt with by the Commission as a complaint under the Act. Similarly, subsection 40(3.1) of the Act precludes the Commission from initiating a complaint as a result of information obtained in the course of the administration of the EEA. I also note subsection 41(2) of the Act, which allows the Commission to decline to deal with a section 10(a) complaint where it is of the opinion the matter has been adequately dealt with in the employer's employment equity plan prepared pursuant to section 10 of the EEA. Subsections 40(3.1), 40.1 and 41(2) of the Act are consistent with the Commission's responsibility to enforce the obligations imposed on employers under the

EEA "…through persuasion and the negotiation of written undertakings…" (see subsections 22(1) and 22(2) of the EEA). As the Respondent pointed out, Parliament has chosen a cooperative and collaborative approach to achieving employment equity, rather than adjudicating such complaints under the Act.

[45] That said, the wording of subsection 40.1(2) of the Act only mentions the Commission: "No complaint may be dealt with by the Commission…" (emphasis added). There is no mention of the Tribunal in 40.1(2). That is because, when one examines the scheme of the Act, it is clear that sections 40-46 of the Act relate exclusively to the Commission's role in receiving and processing complaints under the Act. The Tribunal has no involvement in a complaint until such time as the Commission is satisfied, having regard to all the circumstances of the complaint, an inquiry is warranted and requests the Tribunal institute such an inquiry pursuant to subsection 49(1) of the Act. As mentioned above, once an inquiry is requested, it is the Tribunal's role to inquire into the complaint, not question whether the Commission has reasonably concluded an inquiry is warranted (see subsections 49(2) and 50(1) of the Act).

[46] In addition to the fact subsection 40.1(2) applies strictly to the Commission, I note the wording of paragraph 40.1(2)(b) is concerned with complaints "…based solely on statistical information…" (emphasis added). This wording suggests a complaint under section 7 or paragraph 10(a) of the Act can be supported by statistical information showing underrepresentation, but it cannot be the sole basis for the complaint. That is because the focus of complaints under section 7 and paragraph 10(a) of the Act is on the discriminatory practices set out therein, and not underrepresentation per se. However, statistical evidence of underrepresentation can be useful in human rights complaints and may constitute circumstantial evidence from which inferences of discriminatory conduct may be drawn (see Canada (Attorney General) v. Walden, 2010 FC 490 at para. 114; Khiamal v. Canada (Human Rights Commission), 2009 FC 495 at paras. 89-102; and, Canada (Human Rights Commission) v. Canada (Department of National Health and Welfare), 1998 CanLII 7740 (FC) at paras. 10-22).

[47] In the circumstances of this case, following a judicial review application of the Commission's October 20, 2008 decision to dismiss the complaint, the Respondent consented to the remittal of the matter of systemic discrimination back to the Commission for a supplemental investigation. No mention of a section 40.1 issue is identified in the Federal Court's August 18, 2009 decision. Nor was a section 40.1 issue identified by the Respondent during the Commission's supplemental investigation. Following the completion of the supplementary investigation, the Commission requested an inquiry into Mr. Murray's complaint as it was satisfied such action was warranted. If the Respondent was of the view the complaint was based solely on statistical information regarding underrepresentation it should have raised section 40.1 of the Act prior to the completion of the Commission's supplemental investigation, either before the Commission or prior to consenting to the Federal Court's August 18, 2009 order. It chose not to do so. Furthermore, if it did not agree with the Commission's decision to request an inquiry into this complaint, it should have sought judicial review of that decision before the Federal Court. Again, it chose not to do so. As mentioned above, it is not open to the Respondent to now seek review of the Commission's decision before this Tribunal.

[48] Nor do I accept that paragraph 40.1(2)(b) of the Act now limits the Tribunal's ability to consider the current complaint. As stated above, section 40.1 of the Act applies strictly to the Commission and, once an inquiry is requested, it is the Tribunal's role to inquire into the complaint. In my view, once a complaint is referred to the Tribunal, the question as to whether or not the complaint is based solely on statistical evidence is a matter to be considered in determining whether the complainant has established a prima facie case of discrimination. At this point in the proceedings, prior to having received any evidence on the merits of the complaint, there is no basis upon which the Tribunal can determine if the complaint is based solely on statistical evidence and, consequently, whether the Complainant has established a prima facie case.

[49] Therefore, paragraph 40.1(2)(b) of the Act does not limit the Tribunal's ability to consider this complaint.

C. Does subsection 54.1(2) of the Act limit the Tribunal's ability to consider the complaint?

[50] Similar to its argument regarding paragraph 40.1(2)(b) of the Act, the Respondent submits that in addition to the amendments to the Act mentioned above (ss. 40(3.1), 40.1 and 41(2)), section 54.1 was also added to the Act following the 1995 amendments to the EEA. According to the Respondent, the combined effect of these amendments was to preclude complaints under the Act concerning the underrepresentation of designated groups and avoids duplication between the enforcement mechanisms of the EEA and the Act. Specifically, section 54.1 precludes the Tribunal from ordering the implementation of positive policies or practices regarding the underrepresentation of designated groups. Again, according to the Respondent, as the complaint is based solely on statistical information that purports to show that members of one or more designated groups are underrepresented in the employer's workforce, section 54.1 bars the Tribunal's from awarding an effective remedy in this case. As no effective remedy may be ordered, the Respondent submits the Tribunal should exercise its discretion to dismiss the complaint.

[51] According to the Complainant, section 54.1 of the Act addresses the Tribunal's remedial authority after it has inquired into a complaint referred to it by the Commission. The Complainant submits section 54.1 simply prevents the Tribunal from ordering employment equity measures that are otherwise covered by the EEA. This is a narrow limit on the Tribunal's remedial authority that does not otherwise bar it from awarding other remedies if the complaint is substantiated, either directly to the complainant or to address systemic issues.

[52] According to the Commission, the Respondent's interpretation of section 54.1 is inconsistent with the express language of the Act, as the section does not operate to limit the remedial powers of the Tribunal. When read together with subsection 54.1(3), subsection 54.1(2) of the Act does not limit the Tribunal's authority to order an employer to cease or otherwise correct a discriminatory practice. The Commission adds, the Tribunal has broad remedial powers under the Act, which allow it to craft creative remedies to address systemic discrimination.

[53] Subsections 54.1(2) and 54.1(3) of the Act state:

> Limitation of order re employment equity
>
> (2) Where a Tribunal finds that a complaint against an employer is substantiated, it may not make an order pursuant to subparagraph 53(2)(a)(i) requiring the employer to adopt a special program, plan or arrangement containing
>
> (a) positive policies and practices designed to ensure that members of designated groups achieve increased representation in the employer's workforce; or
>
> (b) goals and timetables for achieving that increased representation.
> Interpretation
>
> (3) For greater certainty, subsection (2) shall not be construed as limiting the power of a Tribunal, under paragraph 53(2)(a), to make an order requiring an employer to cease or otherwise correct a discriminatory practice.

[54] As opposed to section 40.1, which applies solely to the Commission, section 54.1 of the Act does apply to the Tribunal. Again, the Tribunal does not dispute that the addition of this section was intended to avoid duplication between the enforcement mechanisms of the EEA and the Act. This is clear when one considers section 10 of the EEA, which requires employers to address the issues found in paragraphs 54.1(2)(a) and 54.1(2)(b) of the Act under their respective employment equity plans. As mentioned above, Parliament has chosen a cooperative and collaborative approach to enforcing the issues in paragraphs 54.1(2)(a) and 54.1(2)(b) of the Act "…through persuasion and the negotiation of written undertakings…" between the Commission and employers under the EEA (see subsections 22(1) and 22(2) of the EEA). Therefore, I agree with the Respondent that the Tribunal cannot make an order requiring a respondent to implement positive policies and practices designed to ensure that members of designated groups achieve increased representation in the employer's workforce. Nor can the Tribunal make an order that sets goals and timetables for achieving that increased representation.

[55] That said, I do not agree that the limitations in subsection 54.1(2) of the Act limit the Tribunal's ability to order an effective remedy in this case. Subsection 54.1(3) specifically states subsection 54.1(2) does not limit the power of the Tribunal to make an order requiring an employer to cease or otherwise correct a discriminatory practice under paragraph 53(2)(a) of the Act. Specifically, I note, despite the limitations in 54.1(2) of the Act, paragraph 53(2)(a)(i) still allows the Tribunal to order an employer to adopt a special program, plan or arrangement designed to prevent, eliminate, or reduce disadvantages suffered by any group of individuals. Furthermore, subsection 54.1(2) of the Act does not otherwise limit the Tribunal's power to order any of the other remedies found at paragraphs 53(2)(b) to 53(2)(e) or subsections 53(3) and 53(4) of the Act.

[56] I also do not agree that the unavailability of an effective remedy can provide the basis for dismissing a complaint. In this regard, I note the wording of subsection 53(2) of the Act: "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…" (emphasis added). The wording of subsection 53(2) suggests the Tribunal's remedial authority is only invoked at the conclusion of an inquiry, once a complaint has been substantiated. Therefore, the Act does not seem to allow the Tribunal to dismiss a complaint preliminarily on the basis that there is no effective remedy. In any event, the Respondent's argument also assumes the Tribunal is obliged to order a remedy. The use of the word "may" in subsection 53(2) of Act suggests the Tribunal has the discretionary authority to make an order, or not. In certain circumstances, while a complaint may be substantiated, it may be appropriate for the Tribunal not to make an order. In each case, the Tribunal's remedial discretion will be exercised in consideration of the particular circumstances of the case and the evidence presented.

[57] Therefore, subsection 54.1(2) of the Act does not limit the Tribunal's ability to consider this complaint.

D. Is there reason to dismiss the complaint based on the principles of issue estoppel or abuse of process?

[58] Pursuant to the Supreme Court of Canada's decision in British Columbia (Workers' Compensation Board) v. Figliola, 2011 SCC 52 [Figliola], and the Federal Court of Appeal's decision in Canada (Human Rights Commission) v. Canadian Transportation Agency, 2011 FCA 332 [Morten], the Respondent argues the Tribunal should exercise its discretion to dismiss the complaint on the basis of issue estoppel and/or abuse of process. According to the Respondent, the issues of clustering and underrepresentation, both in the total workforce and in acting and permanent positions of the IRB's Toronto Regional Office, have been investigated by the employer, external consultants and the Commission. The Respondent adds, these issues have also been adjudicated by the PSST and are scheduled to be litigated before the PSLRB.

[59] With specific regard to the PSST proceedings, the Respondent submits the current human rights complaint involves the same facts and issues. Furthermore, while the Commission was given the opportunity to participate in the PSST proceedings, it declined to do so. According to the Respondent, the PSST found it had jurisdiction to hear complaints of abuse of authority where systemic discrimination is alleged and allowed the Complainant to introduce evidence in this regard. After reviewing all the evidence, the PSST concluded the Complainant had not established a prima facie case of discrimination and dismissed his complaint. The Respondent adds, while the PSST decision only deals with the PM classification (rather than the PM, CR, AS and LA classifications that are now claimed in this human rights complaint), this is not an argument for seeing the PSST and Tribunal proceedings as different. Rather, the Respondent submits it is another basis for arguing that the course of action taken by the Complainant is an abuse of process, as he has now expanded the scope of the complaint to include several other classifications.

[60] The Complainant submits the doctrines of issue estoppel and abuse of process are inapplicable to the present case. According to the Complainant, it makes no difference whether or to what extent, the employer, or anyone acting on its behalf, investigated any aspect of the complaint now before the Tribunal. The Tribunal is not bound by any of the employer's findings

on any of the issues that fall within the complaint. Furthermore, the Complainant argues investigation reports prepared by the Commission are not decisions of the Commission, and the Tribunal is not bound by them. The inquiry before the Tribunal is a fresh one, and the investigators findings or recommendations are not binding on the merits of the complaint. With regard to the group grievance before the PSLRB, the Complainant submits the matter is irrelevant. The Figliola principles and the doctrine of issue estoppel require that the same question has been decided and that the earlier decision was final. At the time of this motion, the PSLRB had yet to hear the grievance or render a final decision. The Complainant adds, the respondent in the group grievance is the Treasury Board, and not the IRB.

[61] On the PSST complaint, the Complainant claims it dealt only with whether the employer's decision to select a non-advertised appointment process for a PM-05 Tribunal Office position was tainted by systemic discrimination. According to the Complainant, the PSST has no authority to inquire into broader issues of discrimination that fall outside of a specific appointment process, neither can it remedy systemic discrimination issues. Therefore, the PSST did not, and could not, examine any other issues identified in the current human rights complaint. The Complainant adds, as the present human rights complaint was presented on April 22, 2004, it could not have contained allegations with respect to an appointment process that occurred at least two years later. Also, the PSST had no jurisdiction to address the Complainant's broader concerns that, as a result of systemic discrimination at the IRB, he has been deprived of employment opportunities and subject to discriminatory conduct, including harassment, which has affected his ability to perform his job. Therefore, the Complainant submits that it cannot be said that the issue decided by the PSST was essentially the same as the issues in the present human rights complaint.

[62] According to the Commission, the investigations conducted by the employer are internal investigations, separate from any determination to be made by this Tribunal and related to an allegation of harassment, which is not before this Tribunal. The Commission submits the external consultants referenced by the Respondent relate to findings by an employment equity audit, which found there was clustering of visible minorities at the PM-01 level.

[63] With regard to the PSST complaint, the Commission submits the present complaint does not raise the same issues. According to the Commission, a review of the PSST decision indicates that any systemic discrimination matters raised were peripheral to the central issue addressed: whether there had been an abuse of authority, pursuant to section 77 of the PSEA, in the IRB's decision to staff new PM-05 positions using an unadvertised process. According to the Commission, in the current proceedings, the issue is different: whether systemic discrimination by the Respondent deprives the Complainant and other visible minority employees of employment opportunities on the basis of race, or national or ethnic origin. The Commission adds, the legal and factual issues before the Tribunal in the current complaint are distinct from those in Figliola and Morten. In both cases, the complainants had chosen to bypass the appeal process before them and file a separate human rights complaint concurrently. In this case, the Complainant has not bypassed the appeal process at any tribunal.

[64] Furthermore, the Commission submits the Human Rights Code of British Columbia, the legislative scheme under which the decision in Figliola was made, differs significantly from the Act. Specifically, the Commission points to paragraph 27(1)(f) of the Human Rights Code of British Columbia, which allows the BC Human Rights Tribunal to dismiss a complaint where the substance of the complaint has been appropriately dealt with in another proceeding. The Ontario Human Rights Code contains a similar provision at section 45.1. According to the Commission, the Act does not contemplate a comparable section as those in both British Columbia and in Ontario. While paragraph 41(1)(b) of the Act allows the Commission not to deal with a complaint where it could more appropriately be dealt with according to a procedure provided for under another Act, the Commission states this section specifically deals with the Commission's jurisdiction and not the Tribunal's. As a result, although the principles set out in Figliola are applicable to administrative decision makers in general, it is necessary to consider the context of the applicable legislation in each case.

[65] The doctrines of issue estoppel, abuse of process and collateral attack "exist to prevent unfairness by preventing abuse of the decision-making process" (Figliola at para. 34). In Figliola,

a majority of the Supreme Court of Canada summarized the common principles which underlie these doctrines:

- It is in the interests of the public and the parties that the finality of a decision can be relied on.

- Respect for the finality of a judicial or administrative decision increases fairness and the integrity of the courts, administrative tribunals and the administration of justice; on the other hand, relitigation of issues that have been previously decided in an appropriate forum may undermine confidence in this fairness and integrity by creating inconsistent results and unnecessarily duplicative proceedings.

- The method of challenging the validity or correctness of a judicial or administrative decision should be through the appeal or judicial review mechanisms that are intended by the legislature.

- Parties should not circumvent the appropriate review mechanism by using other forums to challenge a judicial or administrative decision.

- Avoiding unnecessary relitigation avoids an unnecessary expenditure of resources.

(see Figliola at para. 34)

[66] Based on these principles, a tribunal determining a request that it not hear a proceeding, because the subject matter of the proceeding has previously been the subject of adjudication by another tribunal, should ask the following questions:

- whether there was concurrent jurisdiction to decide human rights issues;

- whether the previously decided legal issue was essentially the same as what is being complained of to the Tribunal; and,

- whether there was an opportunity for the complainants or their privies to know the case to be met and have the chance to meet it, regardless of how closely the previous process procedurally mirrored the one the Tribunal prefers or uses itself.

(see Figliola at para. 37)

According to a majority of the Supreme Court: “At the end of the day, it is really a question of whether it makes sense to expend public and private resources on the relitigation of what is essentially the same dispute” (Figliola at para. 37).

[67] In examining the issue estoppel/abuse of process issue in this case, I find the Tribunal need only be concerned with what the PSST decision may have decided. Any investigations conducted by the Respondent or its external consultants are irrelevant. Neither the Respondent, nor its external consultants, has any statutory jurisdiction to decide human rights issues. The same applies to the Commission's investigations. As mentioned above, in dealing with human rights complaints, the Commission's role is one of receiving and processing complaints. The Commission only decides whether an inquiry by the Tribunal is warranted or not. The Commission's investigation and decision does not decide the merits of the human rights issues in a given case. That is the role of the Tribunal under the Act: to inquire into complaints referred to it by the Commission (see ss. 49(2) and 50 of the Act).

[68] With regard to the group grievance under the PSLRA, there is no decision from the PSLRB regarding the complaint. While the PSRLB may have concurrent jurisdiction to decide human rights issues, there is no "previously decided legal issue" to speak of.

[69] In examining the PSST decision, the Commission argues that it is necessary for the Tribunal to consider the context of the legislative scheme under which the decision in Figliola was made, and how that legislative scheme differs from the Act. However, I find this has no bearing on the matter. In Figliola, a majority of the Supreme Court of Canada stated that paragraph 27(1)(f) of the British Columbia Human Rights Code reflects the common law doctrines of issue estoppel, abuse of process and collateral attack (see para. 25). Specifically, the majority stated:

> s. 27(1)(f) is the statutory reflection of the collective principles underlying those doctrines, doctrines used by the common law as vehicles to transport and deliver to the litigation process principles of finality, the avoidance of multiplicity of proceedings, and protection for the integrity of the administration of justice, all in the name of fairness.
>
> (Figliola at para. 25, emphasis added)

[70] In Morten, the Federal Court of Appeal found the Supreme Court's comments to be apposite to "the application of these common law principles by the Tribunal" (at para. 24). In applying these principles to the Tribunal's decision in that case, the Federal Court of Appeal found that the Tribunal "did not engage in the required analysis" (at para. 28). That analysis required the Tribunal to consider "...the unfairness inherent in serial forum shopping" (Morten at para. 28, emphasis added).

[71] Given the comments of the Court in Figliola and Morten, I fail to see how the scheme of the Act, and specifically paragraph 41(1)(b), affects the issue estoppel/abuse of process analysis in this case. Paragraph 41(1)(b) applies only to the Commission in its screening and investigatory role under the Act. As mentioned above, once the complaint is referred to the Tribunal for inquiry, the proceedings are de novo. In this regard, the Federal Court in First Nations Child and Family Caring Society stated there is "[n]othing in either the Act or the Tribunal's Rules of Procedure [that] limits the type of motions that can be brought before the Tribunal" (at para. 131); and, specifically acknowledged the Tribunal can determine an abuse of process issue in advance of a full hearing of the complaint on its merits (at paras. 133-139). Therefore, paragraph 41(1)(b) of the Act does not affect the Tribunal's ability to consider common law fairness doctrines. In considering the issue estoppel/abuse of process question in this motion, the Tribunal is not questioning the Commission's decision to deal with the complaint or to request an inquiry; rather, as stated in Figliola and Morten, the Tribunal is ensuring the fairness of its de novo proceedings. As the Federal Court stated in Canada Post, "one cannot maintain that the Tribunal is the "master in its own house" if it cannot protect its own process from abuse" (at para. 15).

[72] Moving on to the application of the Figliola principles to the PSST's decision, the first question is whether the PSST had concurrent jurisdiction to decide human rights issues. In Figliola, relying on its decision in Tranchemontagne v. Ontario (Director, Disability Support Program), 2006 SCC 14, the majority of the Supreme Court stated: "absent express language to the contrary, all administrative tribunals have concurrent jurisdiction to apply human rights legislation" (Figliola at para. 45). The complaint before the PSST was filed under section 77 of the PSEA (see Murray at para. 4). In considering whether a complaint under section 77 is

substantiated, section 80 of the PSEA provides the PSST "...may interpret and apply the Canadian Human Rights Act, other than its provisions relating to the right to equal pay for work of equal value". Before the PSST, the Complainant alleged the Respondent's choice to use a non-advertised appointment process to staff new PM-05 positions discriminated against him on the basis of this race. He alleged that this non-advertised process constituted systemic discrimination where job barriers result in a clustering of visible minorities in CO positions at the PM-01 group and level (see Murray at para. 1). These allegations did not require the PSST to interpret or apply the provisions of the Act relating to the right to equal pay for work of equal value. Therefore, the PSST had the express jurisdiction to decide the human rights issues alleged in the PSEA complaint.

[73] The second question is whether the previously decided legal issue was essentially the same as what is being complained of to the Tribunal. As mentioned above, the issue before the PSST was whether the Respondent's choice to use a non-advertised appointment process to staff new PM-05 positions discriminated against the Complainant on the basis of his race. To substantiate his allegation, the Complaint did not advance direct evidence of discrimination against him, but led circumstantial evidence of systemic discrimination at the IRB. In analyzing this evidence, the PSST proceeded on the basis that "[t]he evidence must establish first that systemic barriers exist, and, secondly, that there is a link between the evidence of systemic barriers and evidence of individual discrimination against the complainant, based on race" (Murray at para. 103). After examining the Complainant's circumstantial evidence, the PSST concluded that "the complainant has not adduced sufficient circumstantial evidence to substantiate his allegation of systemic discrimination" (Murray at para. 99). Even if there was evidence of systemic barriers, the PSST also concluded that "there is insufficient evidence before the Tribunal that links the alleged systemic barriers to individual discrimination against the complainant" (Murray at para. 103).

[74] Before this Tribunal, in the context of the current motion, the Complainant described his human rights complaint as follows: "as a result of systemic discrimination at the IRB, he has been deprived of employment opportunities and subject to discriminatory conduct, including

harassment, which has affected his ability to perform his job" (at para. 70 of the Complainant's Response to the Respondent's Motion to Dismiss). Similarly, the Commission describes the complaint as follows: "In the current complaint before this Tribunal, the issue concerns an allegation of systemic discrimination by the Respondent which deprives Mr. Murray and other visible minority employees of employment opportunities on the basis of race, national or ethnic origin" (at para. 48 of the Submissions of the Canadian Human Rights Commission (re the Respondent's Motion to dismiss)). Despite not having received Statements of Particulars detailing the specifics of the Complainant's allegations, both the Complainant and the Commission's characterization of the complaint make it clear that allegations of systemic discrimination within the IRB form the basis of Mr. Murray's complaint now before this Tribunal. This characterization of the complaint as a "systemic discrimination" complaint was also reinforced by the Complainant and the Commission during the hearing of these motions.

[75] While the adverse effects of the alleged systemic discrimination may be different before the Tribunal than they were before the PSST, including the number of people affected, the underlying issue remains the same: whether the IRB has engaged in a discriminatory practice against Mr. Murray as a result of alleged systemic practices based on race. The PSST has already concluded that the Complainant has insufficient evidence to establish that there exists systemic race based barriers within the IRB. As outlined above, the fact that the PSST was examining whether there was discrimination in relation to a single appointment process did not change the nature of this finding. The PSST first determined that there was insufficient evidence to establish the existence of systemic barriers, before moving on to whether that evidence established discrimination in the particular circumstances of section 77 of the PSEA. In the current complaint, the Complainant again puts in issue the existence of systemic race based barriers within the IRB, and that those barriers have resulted in discrimination against him. As the PSST has previously decided that the Complainant has insufficient evidence to establish the existence of systemic race based barriers within the IRB, I find the PSST has decided essentially the same legal issue as what is currently being complained of to the Tribunal.

[76] The third question is whether there was an opportunity for the Complainant to know the case to be met and have the chance to meet it. Before the PSST, the Complainant had an opportunity to establish, on a balance of probabilities, that the Respondent engaged in a prima facie discriminatory practice by advancing circumstantial evidence of systemic barriers at IRB. The PSST held a hearing and the Complainant led evidence in the form of reports dealing with employment equity at the IRB, expert testimony of systemic discrimination, and testimony of current and former colleagues (see Murray at para. 87). While the focus of the evidence before the PSST was on whether the employment practices of the IRB created a "bad" cluster of visible minority employees at the lower ranks of the IRB - which is also one of the systemic barriers identified by the Complainant in the present complaint - there was nothing preventing the Complainant from adducing evidence regarding other alleged systemic barriers at the IRB, which may now form part of the present complaint. This is reinforced by the fact that the PSST complaint was filed and adjudicated after the filing of the present complaint. Any alleged systemic barriers at the IRB forming the basis of the present complaint were known to the Complainant prior to adjudicating the PSST complaint. These alleged systemic barriers, and any evidence thereof, could have, and should have, been brought forward before the PSST as part of the Complainant's circumstantial evidence of systemic discrimination in that case.

[77] Therefore, in the course of adjudicating his PSEA complaint, the Complainant had a full and ample opportunity to present his case regarding systemic discrimination at the IRB. Now before the Tribunal, it does not make sense to expend public and private resources on the re-litigation of what is essentially the same allegation. The Tribunal's role is not to "..."judicially review" another tribunal's decision, or to reconsider a legitimately decided issue in order to explore whether it might yield a different outcome" (Figliola at para. 38). As the Complainant is currently doing, the proper way to challenge the PSST's decision is through an application for judicial review.

[78] In applying the doctrines of issue estoppel/abuse of process, and the principles outlined in Figliola, I find that the subject matter of the current proceeding has previously been the subject

of adjudication by the PSST. Therefore, as adjudicating the present complaint would amount to an abuse of the Tribunal's process, it should be dismissed.

[79] For these reasons, the Respondent's Motion to Dismiss the complaint is granted. Therefore, it is not necessary to deal with issues E to I outlined in paragraphs 32 and 33 above.

Signed by

Edward P. Lustig
Tribunal Member

OTTAWA, Ontario
January 4, 2013

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1706/6111

Style of Cause: Norm Murray v. Immigration and Refugee Board

Ruling of the Tribunal Dated: January 4, 2013

Place of Hearing: Ottawa, Ontario

Appearances:

David Yazbeck, for the Complainant

Ikram Warsame and Samar Musallam, for the Canadian Human Rights Commission

Christine Mohr and Liz Tinker, for the Respondent