Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Between:

Premakumar Kanagasabapathy

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Air Canada

Respondent

Ruling

Member: Sophie Marchildon
Date: March 20, 2013
Citation: 2013 CHRT 7

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[1] On July 18, 2009, Mr. Premakumar Kanagasabapathy (the "complainant") filed a complaint against Air Canada (the "respondent") under the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6 (the "*Act*"). The complainant alleged therein that, in the context of his employment, the respondent had denied him promotional opportunities as a form of "reprisal", and that it had treated him differently on the grounds of race, colour and national or ethnic origin. On January 11, 2012, pursuant to paragraph 44(3)(*a*) of the *Act*, the Canadian Human Rights Commission (the "Commission") requested that the Chairperson of the Canadian Human Rights Tribunal (the "Tribunal") institute an inquiry in respect of the complaint, the exact scope of which is the subject of the present motion brought by the respondent.

[2] The motion seeks an order striking out a number of paragraphs of the Statements of Particulars filed by the Commission and the complainant.

I. Background

[3] Pursuant to Rule 6(1) of the Tribunal's *Rules of Procedure (03-05-04)* (the "*Rules*"), each party is to serve and file a Statement of Particulars ("SOP") setting out, among other things, (a) the material facts that the party seeks to prove in support of its case; (b) its position on the legal issues raised by the case. The Commission's SOP was provided on August 30, 2012. The complainant's SOP was provided on September 13, 2012.

[4] On September 28, 2012, the respondent brought the present motion to strike certain paragraphs of the two SOP's, on the grounds that the paragraphs in question make reference to parts of the original complaint that were not referred for inquiry to the Tribunal, namely:

- allegations that the complainant failed to receive job promotions
- allegations that the complainant was the subject of retaliation

[5] It argues that, prior to referral, the Commission investigator grouped the allegations comprising the complaint into three distinct parts:

Part (i): Allegations related to a failure to receive job promotions;

Part (ii): Allegations related to retaliation;

Part (iii): Allegations of adverse differential treatment, particularly with respect to the Complainant not being returned to the temporary position of a cabin planner.

[6] The Commission's investigation report ("IR") concluded that there was no evidence to support allegations of discrimination in respect of Parts (i) and (ii) of the complaint. Subsequently, the respondent argues, the IR recommended that only the allegations of Part (iii)—"cabin planner position"—warranted a Tribunal inquiry, and that the Commission only referred this part of the complaint to the Tribunal. The first and second parts of the complaint were not referred for inquiry; as such they are outside the scope of the referral and the paragraphs of the SOPs which deal with them should therefore be struck. The respondent affirms that striking these paragraphs will simplify the inquiry process and allow the Tribunal to focus on the part of the complaint that is genuinely before it.

[7] In support of its argument the Respondent relies on a letter dated January 11, 2012, which it received from the Acting Chief Commissioner (the "Air Canada letter"), indicating that the complaint is being sent for inquiry because the respondent's decision not to return the complainant to the cabin planner position may have been discriminatory. This demonstrates, in the respondent's view, that the referral for inquiry was based on the "Part (iii)" allegations.

[8] The Commission opposes the Respondent's motion. The Commission submits that the entire complaint was referred to the Tribunal for inquiry, not just portions of it. The Commission denies that it ever decided to dismiss portions of the complaint, or that it communicated such a decision to the parties. In this regard, it disputes the respondent's interpretation of the Air Canada letter. Furthermore, it relies on another letter sent by the Acting Chief Commissioner on January 11, 2012—this one addressed to the Chairperson of the Tribunal—requesting that an inquiry be instituted ("the Chairperson letter"). The Chairperson letter simply requests "an inquiry into the complaint", without mentioning allegations about the cabin planner position, or any other allegations.

[9] The Commission asserts that the present motion is in essence a collateral attack on the Commission's decision-making process, and that the respondent is improperly asking the Tribunal to conduct a review thereof. In this regard, the Commission affirms that the Tribunal has no supervisory jurisdiction over the Commission. As for the findings of the IR, the Commission argues that they are in no way binding upon the Tribunal.

[10] The complainant asserts that the entire complaint has been referred to the Tribunal for inquiry; it has not been truncated or divided into sections. In particular, the complainant argues that the cabin planner allegation is interwoven with the retaliation allegations. If the Tribunal were to limit the scope of the complaint *as per* the order sought, the complainant would suffer prejudice, since the narrative in support of his case would be undermined. The complainant submits that if there is any ambiguity in the meaning of the referral letter, that ambiguity ought to be resolved in favour the complainant, by allowing the particulars he has sought to advance. Moreover, he advances the premise that inquiries before the Tribunal proceed without reliance on the Commission's IR and/or the reasons for referring the complaint.

[11] In reply, the respondent argues that the recommendations in the IR and the representations of the parties with respect to the report are necessary matter for the Commission's decision. In particular, the Commission's reasons for decision can be found in the IR itself; it is the only document referred to in the *Act* as the basis for a Commission decision on how to proceed. Moreover, the Air Canada letter reproduced verbatim the recommendations of the IR, demonstrating that the Commission essentially accepted all of its conclusions, including the screening out of Parts (i) and (ii) of the complaint. The respondent invokes previous cases where the Tribunal did not rely exclusively on the strict wording of the Commission's referral decision in order to determine the scope of the referral. It also notes that the wording of the Air Canada letter is significantly different from that of the Chairperson letter. The wording of the former militates in favour of a contextual approach in order to determine the extent of the referral.

[12] The respondent asserts that the complainant is able to advance his case in respect of Part (iii) of the complaint (failure to place him in the cabin planner position) without relying on the allegations contained in Part (i) (failure to receive job promotions) or Part (ii) (retaliation). It

also asserts that judicial economy would be better served if the Tribunal's resources would not be spent on allegations that were identified as being unsupported by the evidence and not warranting further inquiry.

[13] In the respondent's submission, a contextual approach to determining the scope of the referral requires consideration of the complaint, the IR and the decision of the Commission. The Chairperson letter is not a decision and was not communicated to the parties. This letter amounts to no more than an administrative transferring of the file to the Tribunal; to hold the Tribunal to the letter's content disregards the content of the Commission's decision that was communicated to the parties.

[14] On December 18, 2012, in an addendum to its reply submissions, the respondent makes reference to correspondence sent by the complainant to the Commission prior to the referral, apparently agreeing with the conclusions in the IR that the allegations of Part (i) and Part (ii) did not merit an inquiry. The respondent asserts that it relied on these representations from the complainant.

[15] On January 7, 2013, in answer to the reply addendum, the complainant acknowledges that the correspondence in question did not challenge the IR. But he submits that this correspondence was not binding on the Commission in the exercise of its discretion. He further argues that no estoppel was created so as to prohibit him from arguing for a broader interpretation of the referral letter before the Tribunal. Finally, he observes that without access to the entire record that was before the Commission, one cannot know the impact the correspondence had on the Commission's decision to refer the case.

II. Analysis

[16] The present motion requires the Tribunal to ascertain the scope of the referral before it. Before addressing the particular facts of this case, a number of general observations are in order.

The Statutory Scheme

[17] Under the *CHRA*, the Commission may designate an investigator to investigate a complaint. An investigator shall, as soon as possible after the conclusion of the investigation, submit to the Commission a report of the findings of the investigation, the aforementioned "IR" (ss. 43(1), 44(1)).

[18] Under s. 44, upon receipt of the IR, the Commission is empowered to take a number of different dispositive actions—and it must notify in writing the parties to the complaint of the dispositive action it has chosen. Pursuant to s. 44(3), if it is satisfied that the complaint should not be referred to another authority, or dismissed on the ground that it is untimely, beyond its jurisdiction, trivial, vexatious, or made in bad faith, the Commission may request the Chairperson of the Tribunal to institute an inquiry into the complaint under s. 49.

[19] Section 49(1) specifies that such requests can be made to the Chairperson if the Commission is satisfied that, having regard to all the circumstances of the complaint, an inquiry is warranted. It is noteworthy that s. 49 requests can be made any time after the filing of a complaint.

The Correspondence from the Acting Chief Commissioner

[20] This motion boils down to an alleged inconsistency between two letters, signed the same day, by the Acting Chief Commissioner.

[21] The "Chairperson letter" purports to be a physical manifestation of a s. 49 request, emanating from the Acting Chief Commissioner, and addressed to the then CHRT Chairperson. It is fairly succinct, informing the Chairperson that the Commission has reviewed the complaint, and then stating:

> "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."

[22] Notably absent from the "Chairperson letter" is any reference to the component allegations of the complaint, the recommendations of the investigator, or any finding or detail of the IR.

[23] The "Air Canada letter" is quite different. The Air Canada letter is of course addressed to the respondent, but beyond that, it is also considerably more detailed.

[24] It begins by explaining that before rendering its decision, the Commission reviewed "...the report disclosed to you previously..." (presumably the IR), as well as any submissions filed in response thereto. It goes on to explain why the complaint was not dismissed for untimeliness. Then comes the key paragraph:

> "It is further recommended, pursuant to paragraph 44(3)(a) of the *Canadian Human Rights Act*, that the Commission request that the Chairperson of the Canadian Human Rights Tribunal institute an inquiry into the complaint because:
>
> - credibility is an issue and as the investigator is unable to assess credibility, further inquiry is warranted; and
>
> - the respondent's decision not to return the complainant to the Cabin Planner position because of a performance issue may have been used as a pretext not to return the complainant to the position because of his race and national or ethnic origin."

[25] This paragraph has attracted the respondent's attention, because it singles out one of the constituent allegations in the complaint: the Part (iii) portion. Moreover, the paragraph fairly closely tracks the recommendation contained in the IR—the same IR that apparently found the allegations of Part (i) and Part (ii) to be unsupported by the evidence.

[26] However, in spite of its differences, the "Air Canada letter" shares some important similarities with the "Chairperson letter":

- neither letter says that any portion of the complaint has been dismissed;
- neither letter says that an inquiry is being requested into a portion of the complaint.

[27] In spite of these characteristics, the respondent sees in the Air Canada letter, a clear indication from the Commission that "...the complaint, in its entirety was not referred to the Tribunal..." Rather, in the respondent's view, an inquiry was only sought in respect of the Part (iii) portion (failure to return the complainant to the cabin planner position).

[28] For the reasons that follow, I cannot accept the respondent's arguments and would dismiss the motion.

The Determinative Nature of the Chairperson Letter

[29] In my view, given the wording of s. 49(1), the "best evidence" of the Commission's request to the Chairperson for an inquiry is this: the letter sent from the Commission to the Chairperson requesting an inquiry. In the present case, the letter of request was signed by the Acting Chief Commissioner, but most importantly, *it is addressed to the Chairperson of the Tribunal*. This is the document which initiates the entire Tribunal inquiry process. Accordingly, this is the document that determines whether the complaint has been referred in its entirety or not.

[30] It was open to the Commission to request an inquiry in respect of only a portion of the complaint. As the respondent points out, it was held in the *Northwest Territories* case that the Commission has jurisdiction to refer two constituent allegations of a complaint before a tribunal while continuing to investigate a third (*Northwest Territories v. P.S.A.C.* (1999) 162 F.T.R. 50)). However, I believe that if, in the present matter, the Commission had intended to request an inquiry into something less than the entirety of the complaint, this intention would have been manifest in the letter of request it sent to the Chairperson. As an example, in the decision of *Johnston v. Canadian Armed Forces* 2007 CHRT 42, para. 6, one reads that:

> "On June 11, 2003, the Commission notified the Tribunal Chairperson that it was only referring the s. 10 aspect of the complaint to the Tribunal for inquiry, having decided that the s. 7 component of the complaint should be dismissed…"

[31] Similarly, the Court's judgment in *Northwest Territories* contains the observation that:

> "The Commission notified the GNWT by letter dated May 27, 1997 that it had decided, pursuant to section 49 of the Act, to request the President of the Panel to appoint a Tribunal to inquire **into the sections 7 and 11 aspects of the complaint**."
>
> [para.8 emphasis added]

[32] There is no such qualifying language in the letter of request sent to the Chairperson in the current case. I therefore conclude that the complaint, in its entirety, was sent to the Chairperson for the institution of an inquiry, and that I was subsequently assigned to inquire into it, in its entirety.

[33] Given the paramount significance I attach to the Chairperson letter, it follows that the contents of the Air Canada letter cannot supersede it.

[34] Moreover, reliance on the Air Canada letter to justify an inquiry confined to a mere portion of the complaint is problematic for other reasons as well. The Air Canada letter is not addressed to the Chairperson of the Tribunal, or to any officer thereof. It would appear to be a written notification sent to the respondent pursuant to s. 44, informing it of the dispositive action taken under that provision. As such, it is an element of the Commission's complaint-handling machinery which is beyond the Tribunal's purview. As was recently confirmed by the Federal Court in *Canada (Human Rights Commission) v. Warman*, 2012 FC 1162 (appeal pending A-456-12), at para. 56:

> "In particular, the Tribunal has no jurisdiction over the exercise of the Commission's discretion under CHRA s 44(3) (rejecting or referring a complaint) and s 47 (appointing a conciliator). The proper way to challenge a Commission decision in respect of such matters is through judicial review by the Federal Court."

[35] A similar finding was made in respect of the Tribunal's ability to examine the Commission's decision-making under s. 41(1)(*e*) (See *I.L.W.U. (Marine Section) Local 400 v. Oster*, 2001 FCT 1115, para. 30.

[36] The respondent invites the Tribunal to enmesh itself in the methodology of the investigation, the findings and recommendations of the investigator, the wording of the IR, and its apparent similarities with the subsequent letter sent to the respondent, notifying it of the Commission's decision. As I have mentioned, this is not permissible. But even if it were, the Tribunal is in no way bound by the IR or the views of the investigator. (see *Bell Canada v. C.E.P.U.* [1999] 1 F.C. 113, [1998] F.C.J. No. 1609 (QL) (C.A.), QL 37; *P.S.A.C. (Local 70396 v. Canadian Museum of Civilization Corporation* 2006 CHRT 1, paras. 29-30 ; *Emmett v. Canada Revenue Agency* 2012 CHRT 3, at paras.4-5).

[37] On a certain level, the respondent's objection is understandable. It received a decision under s. 44 which it interpreted as having restricted the ambit of the request for an inquiry. Such interpretation, however, was not borne out by the Commission's action taken under s. 49. The respondent may reasonably ask why this is the case, especially given the findings of the IR, from which the wording of the Air Canada letter seems to be drawn. But the forum in which to ask that question is the Federal Court, in a judicial review application of the Commission's decision, and not the Tribunal. Even if one were to accept the respondent's contention that the Chairperson letter is not a decision *per se*, but a mere "administrative transferring", it is this letter of request *addressed to the Chairperson* that breathes life into the Tribunal's jurisdiction in regard to a complaint.

[38] The determinative nature of the Chairperson letter was recognized by the Tribunal in *Côté v. A.G. Canada* 2003 CHRT 32, paras. 12-13 where the Tribunal rejected the proposition that, due to the Commission's prior declared findings regarding the scope of the complaint, the Commission was no longer able to refer the entire complaint to the Tribunal. In *Côté*, the Tribunal would not accept the respondent's invitation to "...look behind the Commission's decision and review it in order to determine whether the Commission possessed the jurisdiction to make such a referral." Supervisory jurisdiction over the actions and decisions of the Commission, it was observed, falls within the exclusive purview of the Federal Court.

[39] The respondent relies on the Tribunal's decision in *Kowalski v. Ryder Integrated Logistics* 2009 CHRT 22, as authority for the premise that the Tribunal can indeed look behind the Commission's letter of request to the Chairperson, in order to verify if in fact the entire

complaint has been referred for inquiry. In *Kowalski*, because the Commission had made an express prior decision that certain aspects of the complaint "...ought not to be considered further...", the Tribunal saw fit to depart from the approach in *Côté*. It held that even though, on its face, the letter of request to the Chairperson referred the entire complaint, this document belied earlier correspondence to the parties, in which the Commission had communicated "explicit determinations" not to deal with portions of the complaint.

[40] I do not believe that the decision in *Kowalski* resolves the issue before me. First of all, I am respectfully of the view that *Kowalski* is not truly consistent with the approach established in *Côté*; the same reasons that militated against the Tribunal's poring over the pre-referral record in *Côté* do not lose their potency in the context of pre-referral determinations made by the Commission in *Kowalski*. In each case, the Tribunal is being asked to "look behind" a clear request to the Chairperson for an inquiry, in search of ambiguities and contradictions in the Commission's pre-referral dealings with the complaint. Moreover, the exclusive supervisory jurisdiction of the Federal Court acknowledged in *Côté*, would seem to be just as available in *Kowalski* to correct alleged discordance between the request for an inquiry and any "explicit determinations" made previously.

[41] If my assessment of *Kowalski* is held to be incorrect, I would add only that the facts of the case itself are distinguishable from those before me. Nothing in the record before me suggests that at any time, the Commission had *decided, pursuant to a provision of the CHRA*, that the allegations comprising Parts (i) and (ii) of the complaint "ought not to be considered further." (*cf Kowalski*, para. 3).

[42] Finally, the Respondent, in its Addendum Reply Submissions, seeks to rely on yet another event taking place during the Commission phase of the complaint process. In his submissions made to the Commission in respect of the IR, the complainant apparently agreed that Parts (i) and (ii) of the complaint were without merit, which, in the respondent's view, amounted to a representation as to the scope of the complaint, upon which the respondent relied. For the reasons given above, I cannot consider it as a basis on which to second-guess the clear and unequivocal request sent to the Chairperson of the Canadian Human Rights Tribunal on January 11, 2012. If anything, this last submission by the respondent amply demonstrates the

dangers of the approach it advocates, whereby the Tribunal is essentially asked to conduct a *de facto certiorari* proceeding in respect of the Commission's handling and disposition of the complaint. Neither the judicial economy objective invoked by the respondent, nor the expeditious inquiry mandated by Parliament is advanced by such an endeavour. More to the point, the Tribunal cannot exercise a supervisory jurisdiction it simply does not possess.

[43] For all of the above reasons, the motion is dismissed.

Signed by

Sophie Marchildon
Administrative Judge

Ottawa, Ontario
March 20, 2013

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1771/0412

Style of Cause: Premakumar Kanagasabapathy v. Air Canada

Ruling of the Tribunal Dated: March 20, 2013

Appearances:

Davies Bagambiire, for the Complainant

Ikram Warsame, for the Canadian Human Rights Commission

Christianna Scott, for the Respondent