File No. T470/1097
Ruling No. 4

In the matter of
THE CANADIAN HUMAN RIGHTS ACT
R.S.C. 1985, c. H-6, as amended

BETWEEN:

PUBLIC SERVICE ALLIANCE OF CANADA

Complainant

-and-

CANADIAN HUMAN RIGHTS COMMISSION

Commission

-and-

MINISTER OF PERSONNEL FOR THE
GOVERNMENT OF THE NORTHWEST TERRITORIES
AS EMPLOYER

Respondent

**RULING OF THE HUMAN RIGHTS TRIBUNAL
ON THE APPLICATION FOR PARTICULARS**

Before: Paul Groarke, Chairperson
Jacinthe Théberge, Member
Athanasios Hadjis, Member

Appearances: Judith Allen
For the Complainant

Rosemary Morgan
For the Commission

Guy Dufort
Thomas Brady
For the Respondent

Date & Location of Sitting: Nov. 16, 17, and 22-25
Ottawa

INTRODUCTION

The Canadian Human Rights Commission has filed a Notice of Motion before the Tribunal requesting:

1) "full particulars of the allegation of bad faith on the part the PSAC";

2) a list of specific documents to be relied upon;

3) a list of witnesses; and,

4) a brief summary of their anticipated evidence in respect to the bad faith allegation.

The Complainant has filed a separate Notice of Motion, for directions, which includes a similar request. We do not propose to go further than the application for particulars at this time.

It may be necessary to address some of the other matters raised in the Commission's Notice of Motion after we have dealt with the question of particulars. In paragraph 5, for example, the Commission questions the relevance of the cross-examination of Mr. Jones with respect to the preparation and filing of the complaint. This is a matter that is more properly dealt with when we return to the cross-examination.

There were also a number of legal issues raised in argument, some of which go to the jurisdiction of the Tribunal. We are of the view that it is preferable to deal with these issues, if that proves necessary, after we have disposed of the request for particulars.

The allegation of bad faith originally arose in the context of the Respondent's preliminary motions. The Respondent took the position, on these motions, that the union should be named as a co-respondent. One of the motions raised the defence of estoppel, which was characterized as estoppel by conduct by counsel for the Commission. From the comments of the Federal Court of Appeal in Communications, Energy and Paperworkers Union of Canada v. Bell [1999] 1 F.C. 113, it appears that the defence of estoppel cannot be raised without an allegation of bad faith.

Counsel for the Complainant referred us to Black's Law Dictionary (6d, 1990), which states that bad faith:

> . . . implies the conscious doing of a wrong because of a dishonest purpose or moral obliquity; it is different from the negative idea of negligence in that it contemplates a state of mind affirmatively operating with furtive design or ill will.

In its Statement of Case, the Respondent alleges that the Union of Northern Workers deliberately negotiated collective agreements that were defective under section 11 of the Canadian Human Rights Act. Counsel made a further allegation, in the course of argument, that the union entered into the Joint Equal Pay Study, knowing it was fundamentally flawed, with the intention of deceiving the employer.

The application for particulars arose out of a series of objections to the Respondent's cross-examination of Mr. Jones with respect to the filing of the complaint. This was the subject of some controversy, as the Commission and the Complainant felt that any issues with respect to the filing of the complaint stand outside the scope of the present hearing. In volume 27 of the transcript, at p. 3465, counsel for the Complainant objected to Mr. Dufort's attempt to establish whether the union adopted the same position in collective bargaining as it did in filing the complaint. Counsel for the Commission subsequently suggested that the real problem lay in the Respondent's failure to provide the particulars of its defence.

It was this concern which ultimately led to the filing of the Notice of Motion before us. At p. 3490 of the same volume, Ms. Morgan states:

> . . . I would submit that what we need to do at this stage is have, as soon as possible, particularization of this defence of whatever it is, whether it's bad faith or estoppel by conduct. By particularization, I mean all aspects of it that go to the evidence because we want to preclude, if possible -- and I am not saying that it can possibly be done totally -- these continual objections by counsel for the

Commission and the Complainant or questions from the Tribunal of what is this evidence about, why are we getting into this. If possible, particularization should assist in reducing -- I am not going to say preventing, but reducing -- those kinds of objections.

Counsel for the Complainant expressed similar concerns, on a number of occasions, and sets out the position of the Complainant in volume 26, at p. 3506.

THE LAW

The legal issues on the present application are relatively straightforward and there is no reason to examine them at length. We accept the general view of the Ontario Court of Appeal in Fairbairn v. Sage (1925), 56 O.L.R. 462 (Ont. C.A.), that the purpose of particulars is:

1) to define the issues;

2) to prevent surprises;

3) to enable the parties to prepare for trial; and,

4) to facilitate the hearing.

This view was adopted by a Saskatchewan Board of Inquiry in Andreen v. Dairy Producers Co-operative Ltd. (No. 1) (1993) 22 C.H.R.R. 58, at 59. In the immediate case, the Commission and the Complainant are requesting the particulars on which the Respondent is relying, in support of its assertion of bad faith. The argument is essentially that this would define the issues, avoid surprises and clarify the parameters of the evidentiary process. This would facilitate the hearing and expedite the process, in accordance with section 48.9(1) of the Canadian Human Rights Act.

We accept the position of the Respondent, on the other hand, that the Commission and the Complainant are only entitled to the material facts on which the Respondent is relying. They are not entitled, on particulars, to a summary of the evidence that it intends to call. We also agree with Master Funduk, in Trizec Properties Ltd. v. Brett, Q.L. [1996] A.J. No. 1173 (Alta. Q.B.), that arguments and reasoning are not a matter for particulars.

Counsel for the Respondent referred us to the decision of the Manitoba Court of Queen's Bench in Dumont v. Canada (Attorney General) 1990 CarswellMan 395, 71 Man.R. (2d) 199, [1991] 3 C.N.L.R. 22. It has come to our attention, since we heard the submissions of counsel, that this decision was overturned on appeal, in Dumont v. Canada (Attorney General), Q.L. [1991] M.J. No. 621, 6 75 Man. R. (2d) 273, 91 D.L.R. (4th) 654. In spite of this, the Manitoba Court of Appeal applied the same principles in deciding whether a request for particulars should be granted. It is significant, in this regard, that one of the reasons for particulars is to "limit the generality" of a claim by one of the parties. It will also "tie the hands" of a party, so that they cannot go into other matters in the course of adducing evidence. This appears to be the major consideration, in the immediate instance. Counsel for the Complainant and Commission have already expressed considerable concern that the parameters of the hearing have already shifted, in the course of the cross-examination.

The cases before us reflect the same concerns. The basic rule is that the parties should disclose sufficient facts to permit the other parties to prepare themselves for the hearing. This is a fundamental aspect of fairness and natural justice, since a party cannot respond properly to other parties unless they have the material facts on which those parties are relying. It is also a matter of efficacy, and assists the parties and the Tribunal in facilitating the hearing process.

DELAY

There is no reason to enter into a comparison of the process before a human rights tribunal and a court. We do not accept, however, that it is too late for the Commission and the Complainant to request particulars. The proceedings before a human rights tribunal are less formal than a proceeding in a court, and tribunals have more latitude in procedural matters. This is evident in the draft rules of procedure under the Canadian Human Rights Act, which permit

a Tribunal to vary the rules of procedure to meet the needs of a specific case.

In the present case, the Tribunal required the parties to file an outline of their case, containing the material facts on which they are relying. It was always our intention that these statements would determine the parameters of the hearing. We accordingly wish to make it clear that any party that wishes to raise new issues should make an application to amend its statement of case. The ruling consideration, in every instance, is one of fairness.

The situation before us differs from a civil proceeding, since we began the hearing without the benefits of a discovery process. This is an important factor that must be taken into consideration in assessing procedural questions and which goes some distance in explaining the timing of the present application. The primary reason for beginning the hearing at a relatively early stage of disclosure was that the Complainant and the Commission were concerned about any further delays in the process. Although there were references to the issue of estoppel, and the allegation of bad faith, in the preliminary stages of the hearing, they were less explicit than they might have been.

Any problems encountered by the parties in proceeding without discoveries have been compounded by the fact that we heard the evidence-in-chief of the Complainant's first two witnesses before the Respondent completed its disclosure of documents. We were advised that this is attributable to the fact that it was necessary to review some 40,000 documents, in order to complete the list of documents. We have no reason to question the sincerity of the Respondent's efforts in this respect, but the delays in the process have put counsel for the Complainant in the unenviable position of calling witnesses before it was fully apprised of the case which it was facing. It seems clear that the Complainant was aware of the difficulties that this presented, but chose to proceed with its case in order to expedite the hearing.

RULING

We accept that the Respondent has an obligation to provide the Commission and the Complainant with a statement of the material facts on which it is relying in asserting its defences. In paragraph 17 of its Notice of Motion, the Commission refers to two assertions by the Respondent. They are, essentially, that:

1) the complainant filed the present complaint "after having agreed to the wages in collective bargaining"; and,

2) the complainant "sought to rely upon inadequate evidence or flawed evidence both at the time of filing the evidence and after the allegedly flawed JEPS process was completed and bargaining resumed".

There is a reference to bad faith in paragraph 59 of the Respondent's Statement of Case, which apparently sets out the first assertion. Counsel for the Respondent went further in the course of argument, however, and stated that the Union of Northern Workers deliberately negotiated a wage-gap, with the intention of correcting the deficiency by means of a complaint.

In volume 31, at p. 3952, counsel for the Respondent agreed to provide particulars as to which groups of employees and which round of negotiations the Respondent is referring to in asserting such a defence. That leaves the second assertion in paragraph 17 of the Notice of Motion. The Respondent's Statement of Case refers to flaws in the Joint Equal Pay Study, and the Joint Union Management Initiative, which was carried out by the Commission, the Public Service Alliance and the Federal Government in the context of the Treasury Board case.

The argument is apparently that the Complainant was aware of these flaws and proceeded with the complaint in a deceptive or mendacious manner, in relying on the Joint Equal Pay Study. We agree that the Respondent has an obligation to provide the Commission and the Complainant with particulars of the flaws that are mentioned in paragraph 40 of its Statement of Case. What flaws is the Respondent referring to? Which committees, which benchmark jobs, which statistical methods? These material facts should be sufficient to allow the Commission and the Complainant to prepare their cases.

Those are the positions identified by the Commission. There are a number of general statements on the record, however, and we would go one step further. In volume 31, at p. 3938, counsel for the Respondent tried to clarify his position:

I have indicated clearly to the Tribunal the three basic material facts on which

we were basing ourselves. First, the filing of the complaint itself. There was bad faith in the way it was processed, the way it was filed and processed later on. Second, the JEPS. There was bad faith in the way it was acted upon by PSAC or UNW representatives. Third, I am talking about collective bargaining. There was bad faith in the collective bargaining. Paragraphs 33, 34 and 35 generally deal with that and indicate and include the essential material facts to that. And fourth, in dealing with the settlement of the complaint it also acted in bad faith. Those are essentially the material facts on which we are basing ourselves.

These are general statements, however, which express legal conclusions rather than factual assertions. As they stand, these statements are not sufficient to establish the relevance of cross- examination on these issues.

It may help to comment specifically on each of these statements. The first statement refers to the complaint. In the course of argument, counsel for the Respondent argued that the complaint was based on false representations and misleading information. What representations does this refer to? Which information? The second statement refers to the Joint Equal Pay Study and may refer to the flaws which are mentioned in paragraph 40 of the Respondent's Statement of Case. The third statement refers to collective bargaining. Although the paragraphs to which counsel refers contain a number of significant details, they do not contain details of the bad faith. That leaves only the fourth statement, which requires further explication.

We wish to be clear. The mere statement that the Complainant acted in bad faith does not establish the necessary factual basis for a defence. This requires a description of the Complainant's actions, and a recitation of the facts which have led the Respondent to draw such a conclusion. We accordingly order the Respondent to provide the Commission and the Complainant with the material facts on which it relies in making these four statements. It has no obligation to provide the evidence on which it is relying.

We would ask the Respondent to provide all of the particulars as soon as possible. If it cannot provide the particulars before the hearing resumes on December 13th, we are willing to hear from counsel on the matter. As we have indicated, we do not feel that it would be appropriate to deal with the other issues raised by counsel until the Respondent has supplied the necessary particulars.

Dated this 6th day of December, 1999.

Paul Groarke, Chairperson

Jacinthe Théberge, Member

Athanasios Hadjis, Member