

Canadian Human
Rights Tribunal



Tribunal canadien
des droits de la personne

BETWEEN:

BEACHESBOY@AOL.COM

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

HEATHER FLEMING AND RONALD FLEMING

Respondents

RULING

MEMBER: Athanasios D. Hadjis

2007 CHRT 52
2007/11/01

[1] The Canadian Human Rights Commission has made a motion requesting an amendment of the style of cause in this proceeding. The complaint identifies the respondent simply as “Drumsaremybeat” and this designation has to this point been carried forward into the style of cause. The Commission is requesting that this name now be substituted with the names of two individuals, Heather Fleming and Ronald Fleming.

[2] The Commission has also requested a direction from the Tribunal that the Complainant’s identity not be publicly disclosed, even to the responding party.

[3] The Tribunal’s hearing on the two motions was conducted by videoconference on October 1, 2007. The Commission’s counsel and the Complainant appeared at the hearing, but no one appeared or filed any written submissions on behalf of Drumsaremybeat.

[4] The Tribunal had sent a notice to Mr. and Ms. Fleming informing them that they could appear at the hearing by presenting themselves at the Federal Court’s videoconferencing facilities located in Edmonton, which is not far from their residence. Neither of them appeared at the hearing, which lasted over four hours in total. The Tribunal did not receive any communication from them explaining their failure to attend. They did not provide any written submissions regarding the Commission’s motions either.

[5] As a result, the Complainant and the Commission were the only parties to put evidence and submissions before the Tribunal on the motions.

Motion to amend style of cause

[6] The Complainant states in the complaint that from December 2004 to March 2005, he viewed a number of postings on an Internet bulletin board administered by AOL Canada (AOL), which he believes constitute hate messages, within the meaning of s. 13 of the *Canadian Human Rights Act*. The messages were posted by someone using “Drumsaremybeat” as his or her AOL “username” or pseudonym.

[7] The Complainant did not know the true identity of the person making these postings when he filed the complaint on July 15, 2005. As a result, he identified the respondent merely as “Drumsaremybeat”. On February 6, 2006, AOL informed the Commission that according to its records, the AOL customer who was using Drumsaremybeat as a “screen name” in 2005 was Heather Fleming. AOL provided the Commission with an information sheet regarding Ms. Fleming’s account, which included her postal address.

[8] From then on, the Commission began to basically deal with the matter as if Ms. Fleming was the respondent. Thus, on March 6, 2006, the Commission investigator assigned to this case wrote a letter to Ms. Fleming advising her that the Commission had received a complaint from beachesboy@aol.com alleging that “drumsaremybeat posted messages on an AOL bulletin board” that discriminate against the Complainant and others on the basis of sexual orientation. The letter went on to state the following:

At this time, I would appreciate receiving by March 27, 2006, *your* position regarding the allegations, but not limited to, the following:

- (1) Are *you* drumsaremybeat?
- (2) Did *you* post the messages as alleged in the complaint form? If so what was the purpose of posting the messages?
- (3) What is the intent of the information/documentation posted on the websites?
- (4) Who is *your* present Internet Service Provider (ISP)? Where is it located? Please provide a copy the agreement with *your* ISP. [*sic*]

If someone other than yourself will be representing *you* in this matter, please let us know at your earliest opportunity. Also, please be advised that *you* are required to preserve any material related to the complaint, including information in electronic formats, until the final disposition of the matter.

(Emphasis added)

[9] The Commission received a letter in response, dated March 15, 2006. Although the letter appeared to have been signed by “H. Fleming” its content suggested that someone else was its author. For instance, in the second paragraph, the writer wrote, “This complaint is addressed to my wife as the phone in which I was on the ISP AOL at the said time of the offensive was in her name” (*sic* throughout). The author then went on to state that at the time the alleged hate messages were posted, his computer was being “controlled by a hacker” without his consent. He added that no one at “this address applies to that screen-name” (i.e. Drumsaremybeat).

[10] By early July 2006, the Commission investigator prepared the investigation report regarding the complaint. On the cover page of the report, the investigator identified “Heather Fleming (a.k.a. Drumsaremybeat)” as the respondent. The report states that Ms. Fleming confirmed to the investigator that she was the registered holder of the AOL account linked to the Drumsaremybeat username, but that it was her spouse who was in fact using the account. She told the investigator that she was inexperienced in handling computers and did not post any messages on the AOL message boards. She added that the written “defence” to the complaint that had been submitted to the Commission by Drumsaremybeat had been provided by Mr. Fleming. The report gave a summary of this “defence” including Mr. Fleming’s claim that a “hacker” had used their AOL Account to post the impugned messages under the Drumsaremybeat username.

[11] On July 10, 2006, the Commission sent a letter to Ms. Fleming informing her that:

The investigation into the complaint against *you* has been completed. A copy of the investigation report is enclosed for *your* review.

(Emphasis added)

[12] The Commission similarly sent a copy of the investigation report to the Complainant, who in turn opted to submit a reply in writing. On July 27, 2006, the Commission forwarded this reply to Ms. Fleming, stating in its accompanying letter that the Complainant’s submissions were regarding the complaint “filed by Beachesboy against you”.

[13] In October 2006, the Commission sent a letter addressed to Ms. Fleming advising her that the Commission had decided to refer the complaint of “*Beachesboy@aol.com v. Drumsaremybeat*” to the Tribunal for inquiry.

[14] The Commission subsequently received a letter dated October 19, 2006, seemingly bearing the signatures of “Ronald Fleming” and “H. Fleming”. The letter ends with the following typewritten statement:

Yours pathetically in anger

Ronald L. Fleming

“Canadian Citizen”

The letter reiterated the claim that Ms. Fleming had nothing to do with the AOL user account in question, and added:

Now, if you wish to communicate with the person that is supposed to be responsible for this phoney human rights charge, then you will address this envelope and all other particulars to me and to me only!

Mr. Ronald Fleming at said address.

[15] In its motion, the Commission maintains that the information garnered from AOL, as confirmed by Mr. and Ms. Fleming themselves, indicates that they were responsible for the AOL account with which the username “Drumsaremybeat” was associated.

[16] The Commission claims that the complaint did not initially identify the AOL member who was using the screen name “Drumsaremybeat” because the member’s identity was not known at that time. I note, however, that as of February 6, 2006, the Commission had learned of the AOL member’s name (Ms. Fleming) and in the Commission investigator’s report of July 2006, there was a finding that Mr. Fleming was using the AOL account.

[17] Yet, despite having knowledge of this information, the Commission did not amend the complaint and opted to refer it to the Tribunal in its existing form. It was only after the complaint had been referred to the Tribunal that the Commission sought permission from the Tribunal to amend the style of cause, a “merely technical” formality, according to the Commission.

[18] I disagree with this assertion. Amending the style of cause is not a mere technicality. Serious consequences may flow from such action. Persons who have hitherto not been involved in the human rights complaint may suddenly find themselves embroiled in a legal process that will bear significantly on them. They will have to expend time and resources contesting the complaint. If the complaint is ultimately found to be substantiated, remedial orders may be issued against them. These sorts of amendments are therefore not to be taken lightly.

[19] Where circumstances warrant, the Tribunal has the authority to add new parties to a complaint, a procedure that is explicitly contemplated in s. 48.9(2)(b) of the *Act* and in Rule 8(3) of the Tribunal’s Rules of Procedure. In *Syndicat des employés d’exécution de Québec-téléphone, Section locale 5044 du SCFP v. Telus Communications (Québec) Inc.*, 2003 CHRT 31 at para. 30 (“*Telus*”), the Tribunal noted that the addition of a new respondent once a complaint has been referred to the Tribunal is appropriate where the presence of the new party is “necessary to dispose of the complaint” and it was not “reasonably foreseeable, once the complaint was filed with the Commission, that the addition of a new respondent would be necessary to dispose of the complaint”.

[20] This latter condition calls for particular attention in the present case. Was it not reasonably foreseeable, since at least February 2006, that Ms. Fleming should be named as a respondent? Was it not reasonably foreseeable, as of the date when the Commission released its investigation report, that Mr. Fleming should also be named?

[21] The question of foreseeability relates largely, as I see it, to the potential prejudice to new respondents that may arise from the denial of the benefits that accrue to them during the Commission process that precedes the complaint’s referral to the Tribunal (see *Brown v. National Capital Commission*, 2003 CHRT 43 at para. 46). These benefits include the possibility that the

Commission will decide not to deal with the complaint (s. 41 of the *Act*), dismiss it (s. 44(3)(b)), or refer it to conciliation (s. 47) (see in this regard the Tribunal's oral decision in *Desormeaux*, cited in *Telus* at paras. 25-7). The Federal Court pointed out in *Parent v. Canada*, 2006 CF 1313, at paras. 40-1, that the question of prejudice to the respondent is the predominant factor to be considered by the Tribunal when ruling on amendments to complaints, though it should be noted that *Parent* dealt with the addition of factual allegations to a complaint, not new parties.

[22] I am satisfied that in the present case, Mr. and Ms. Fleming would not be denied the benefits that would have accrued to them had they been named as respondents from the outset, in the complaint. The Commission has dealt with them as the actual respondents since well before the complaint was referred to the Tribunal. Correspondence with Ms. Fleming repeatedly referred to her ("you") having been named in the complaint. More importantly, both she and Mr. Fleming responded to the allegations made against them. They were able to put their positions before the Commission, prior to the referral. Indeed, their defence submissions were summarized in detail in the Commission investigation report. They not only were given the opportunity to respond to the allegations made, but they in fact exercised their right to do so.

[23] I also find that the second component of the test set out in *Telus* has been met. The involvement of Mr. and Ms. Fleming is necessary to dispose of the complaint, if only because an Internet username is not likely recognizable as a person who can participate in a hearing and be held accountable for compliance with any final order. Without their presence, there is effectively no respondent to the complaint and thus, no dispute before the Tribunal. If, as the Commission alleges, Mr. and Ms. Fleming were the individuals who held the AOL account associated with the *Drumsaremybeat* username, they can be held accountable.

[24] In the circumstances, I find that it is appropriate for the Tribunal to exercise its discretion to allow the change being sought by the Commission and, in effect, add two party respondents and remove another. As such, it is perhaps more correct to frame the Commission's motion as a request to add parties rather than a motion to amend the complaint. It is unfortunate that the parties were not added to the complaint prior to its referral to the Tribunal, which would have obviated the need for the present motion.

[25] I therefore order that Ronald Fleming and Heather Fleming be added as respondents in this case, in substitution of “Drumsaremybeat”. I also direct that the style of cause associated with this complaint be amended to show Mr. and Ms. Fleming as the sole respondents.

Motion regarding disclosure of the Complainant’s identity

[26] On the complaint form filed with the Commission on July 15, 2005, the Complainant did not disclose his real name. Instead, he signed the document as “beachesboy@aol.com” followed by an explanation that his name and contact information had been provided separately to the Commission, but “withheld from publication for safety reasons”. In its subsequent dealings with the complaint, the Commission acceded to this request and never divulged the Complainant’s name and contact information to Mr. and Ms. Fleming.

[27] When the complaint was referred to the Tribunal for inquiry, the Commission provided the Tribunal with the Complainant’s name and contact information. However, the Commission also requested that these details not be revealed publicly, citing “safety” concerns. The Tribunal has, accordingly, to this date, not disclosed the Complainant’s name and contact information to Mr. and Ms. Fleming, nor anyone else.

[28] It bears repeating, at this point, that nobody appeared at the hearing to contest the Commission’s motion for a direction from the Tribunal that this practice be maintained indefinitely.

[29] In support of its motion, the Commission has highlighted some of the messages referred to in the complaint. These consist of postings made by someone using the pseudonym Drumsaremybeat on AOL’s on-line bulletin board. These messages, if genuine, appear to contain expressions of aggression and violence directed against homosexuals generally and beachesboy@aol.com personally. The Complainant is not named specifically since he never revealed his true identity on the bulletin board, and only participated using his username. The messages rely on some fairly vulgar language to depict the harm and violence that the author of the messages would wish upon beachesboy@aol.com and all homosexual persons. The

messages' author laments that homosexuals are not executed "anymore" in Canada and he or she proudly recounts an incident where a friend punched a gay man on an Edmonton street.

[30] All of these messages, however, were posted in late 2004 or early 2005. No evidence of any subsequent statements of a similar nature was presented to me. Moreover, these AOL bulletin board messages were posted by someone using a pseudonym (Drumsaremybeat), and at this point, it has merely been alleged that the person(s) responsible for posting the messages are Mr. and/or Ms. Fleming. This has yet to be proven. Since the filing of the human rights complaint, Mr. and Ms. Fleming have sent a number of letters to the Complainant, the Commission and the Tribunal, some of which I alluded to earlier in this ruling. While these letters express anger with regard to what are claimed to be wrongful accusations in the complaint, they do not contain any threats or expressions of violence.

[31] The Complainant has pointed out that he has filed several more s. 13 complaints against other individuals. A number of these complaints have already been referred to the Tribunal. The Complainant claims that on at least one occasion in the past, when some statements by him condemning discriminatory conduct were reported in the media, he received a number of threats at his home.

[32] In my view, given the violent language used in the messages referred to in the complaint, some of which targets the Complainant, and the Complainant's general concerns regarding the public disclosure of his identity, coupled with the fact that the Commission's motion was not contested, I see no reason to modify the approach that has been adopted in this case thus far. However, once the case reaches the hearing stage, maintaining this approach will pose certain challenges. For instance, how will the Complainant be able to give testimony if he does not reveal his actual name when taking his oath or making his solemn affirmation? If the complaint is ultimately found to be substantiated and the Complainant seeks a personal remedy to which the Tribunal believes he is entitled, the Tribunal may have some difficulty drafting an order in favour of an unidentified victim.

[33] Mindful of these concerns, I direct nonetheless that the practice followed by the Tribunal Registry to this date be maintained until the opening of the hearing on the complaint (i.e. that the Complainant be publicly identified as beachesboy@aol.com and that his contact information not be disclosed to anyone, including the respondents in this case). The matter may thereafter be addressed by the member assigned to inquire into the complaint.

“Signed by”

Athanasios D. Hadjis

OTTAWA, Ontario
November 1, 2007

CANADIAN HUMAN RIGHTS TRIBUNAL

PARTIES OF RECORD

TRIBUNAL FILE:	T1170/5206
STYLE OF CAUSE:	Beachesboy@aol.com v. Heather Fleming and Ronald Fleming
DATE AND PLACE OF PRELEMINARY MOTION:	October 1, 2007 Ottawa, ON; Toronto, ON and Edmonton, AB (via videoconference)
RULING OF THE TRIBUNAL DATED:	November 1, 2007
APPEARANCES:	
Beachesboy@aol.com	For the Complainant
Ikram Warsame	For the Canadian Human Rights Commission
No one appearing	For the Respondents