

Date Issued: July 9, 2014
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Indexed as: United Steelworkers obo others v. Tim Hortons and others, 2014 BCHRT 152

IN THE MATTER OF THE *HUMAN RIGHTS CODE*
R.S.B.C. 1996, c. 210 (as amended)

AND IN THE MATTER of a complaint before
the British Columbia Human Rights Tribunal

B E T W E E N:

United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied
Industrial and Service Workers International Union on behalf of all workers
from the Philippines currently and formerly employed through the temporary
foreign worker program at 658380 B.C. Ltd. dba Tim Hortons in Fernie, B.C.,

COMPLAINANT

A N D:

Pierre Joseph Pelletier, Kristin Hovind-Pelletier, 658380 B.C. Ltd. dba Tim
Hortons, Time Hortons, Inc. and TDL Group Corp.

RESPONDENTS

REASONS FOR DECISION
TIMELINESS OF COMPLAINT: Section 22

Tribunal Member:

Murray Geiger-Adams

Counsel for the Complainant:

Charles Gordon

Counsel for the Respondents Tim Hortons, Inc. and
TDL Group Corp.:

Gary Clarke
Kristopher Noonan

Counsel for the Respondents Pierre Joseph Pelletier,
Kristin Hovind-Pelletier, 658380 B.C. Ltd.:

Jeremy West

Introduction

[1] The United Steelworkers (“the Union”) filed a representative complaint on behalf of workers from the Philippines employed since 2009 under the Temporary Foreign Workers Program (“TFWP”) at a Tim Hortons restaurant in Fernie, B.C., operated by 658380 B.C. Ltd., Mr. Pelletier and Ms. Hovind-Pelletier (“the Fernie respondents”), as franchisees of Tim Hortons, Inc. and TDL Group Corp. (“the Oakville respondents”). The Union alleges that, during their employment, six of these workers were required to rent expensive and substandard accommodations in a house provided by Mr. Pelletier. It also alleges that the workers were denied overtime premiums, given less desirable shifts than other employees, and threatened with being returned to the Philippines. It says that this treatment constitutes discrimination in both tenancy and employment, because of the workers’ race, colour, ancestry, and place of origin, contrary to s. 10 and s. 13 of the *Human Rights Code*.

[2] As it appeared that the complaint may have been filed outside the six-month time limit in s. 22 of the *Code*, the Tribunal asked the parties for submissions on whether the Tribunal should accept the complaint for filing. The Oakville respondents sought further and better particulars from the complainant before filing their Time Limit Response. The Tribunal treated that request as an application for particulars, and, after considering submissions from those respondents and the Union, denied the application. It did so because the burden is on the complainant to establish either that the complaint is timely, or, if not, that it is in the public interest to accept it for late filing. As the respondents have been able to point out, any lack of detail as to the timing, frequency, or nature of the alleged contraventions can be considered by the Tribunal in deciding whether the complainant has met that burden.

[3] The Oakville respondents filed a Time Limit Response on April 25, 2014. The Fernie respondents filed a Time Limit Response on April 28, 2014. The Union filed a Time Limit Reply on May 9, 2014. Although the Oakville respondents said that they might seek to file a sur-reply to the Union’s reply, no application to file one was received.

[4] This is my decision on whether to accept the complaint for filing. References to events are drawn from the complaint, and the materials the parties have filed on the

timeliness issue. I make no findings of fact, other than as necessary to determine when events are alleged to have occurred, and do not address the merits of the complaint.

Timeliness

[5] Section 22 of the *Code* provides:

- (1) A complaint must be filed within 6 months of the alleged contravention.
- (2) If a continuing contravention is alleged in a complaint, the complaint must be filed within 6 months of the last alleged instance of the contravention.
- (3) If a complaint is filed after the expiration of the time limit referred to in subsection (1) or (2), a member or panel may accept all or part of the complaint if the member or panel determines that
 - (a) it is in the public interest to accept the complaint, and
 - (b) no substantial prejudice will result to any person because of the delay.

[6] The issues which I have to consider are: first, whether all or some of the Union's complaint is timely; second, if any part of it is timely, whether it alleges a continuing contravention; and third, if not, whether the Union has established that it is in the public interest to accept the late-filed portions of the complaint, and that no substantial prejudice would result to any person because of the delay.

The complainant's position

[7] Though the Union stated in the complaint, filed December 20, 2013, that everything had happened in the last six months (i.e. after June 20, 2013), it also included a request to file after the six-month time limit. In that request, it said that Heide Kibanoff (who resigned her employment on June 17, 2013), and other members of the group had been led to believe for a number of months that the Oakville respondents were conducting an internal investigation and that, when it became apparent that the situation would not be remedied, the group was only then able to obtain legal advice about it.

[8] The Union also says that, in general, participants in the TFWP experience significant barriers to accessing the legal system, while the respondents are part of a

multinational corporation with extensive resources and access, and that the Tribunal should prioritize the rights of vulnerable groups and members of society.

[9] As to possible prejudice to the respondents, the Union says any delay has been minimal; that there is overlap in the issues raised by members of the group (apparently respecting alleged events both before and after the six-month deadline); that the respondents have already interviewed members of the complainant group, including Ms. Kibanoff, in their internal investigative process; and that she made statements in the press regarding her treatment which were accessible to the respondents, so that they are aware of the issues raised by the complaint.

The respondents' positions

[10] The Oakville respondents identify four distinct aspects of the complaint: accommodation, overtime, shifts, and threats. They submit that the complaint should not be accepted for filing because it does not allege any discriminatory conduct in any of these aspects during the six months preceding its filing. Even if it does, they say, any timely allegation does not form part of a continuing contravention with any untimely part, because any timely allegations are not of the same character as the untimely ones. They submit that the late complaint should not be accepted for filing, because the explanations offered by the Union for its delay – lack of knowledge of legal rights or access to legal advice, and awaiting the outcome of an internal investigation – have not been accepted by the Tribunal as explanations for such delay. Finally, they say there will be substantial prejudice to them if the complaint is accepted for filing, as the allegations in it are as much as five years old, members of the complainant group may no longer be available to testify at a hearing, and witnesses will have difficulty remembering the factual circumstances.

[11] The Fernie respondents adopt the submissions of the Oakville respondents. They also say that one member of the complainant group filed a related employment standards complaint in June 2013, and invite the Tribunal to infer that group members were aware of their legal rights and had access to legal advice several months before the Union filed the present complaint.

[12] The Fernie respondents also say that they will suffer significant prejudice if the complaint is accepted for filing so long after at least some of the events in issue, in that they have sold their business, and no longer operate it, which deprives them of access to documentary records; witnesses may not be available; documentary evidence may have been lost, and memories may have faded.

The complainant's reply

[13] The Union points out that, while the complaint referred to instances of alleged discriminatory conduct beginning in 2009, it also referred to that conduct as “ongoing since then.”

[14] In its reply, the Union alleges that the respondents’ failure to pay overtime, “occurred repetitively/bimonthly over a period of many years, including instances within six months of filing the complaint.” It says that Mr. Pelletier “routinely” threatened to call immigration authorities, cancel work permits, or send group members back to their country of origin if they raised concerns about how they were treated, or refused his requests, and that such threats were made in the fall of 2013, particularly October and November. It says that the Fernie respondents ignored a medical note and required a member of the group to work a graveyard shift in December 2013. In each of these areas – overtime, threats, and shifts – they say there is a timely allegation, and a continuing contravention.

[15] The Union acknowledges that the allegations relating to housing, which it describes as one of the first experiences many of the group members had with the respondents, occurred more than six months prior to the filing of the complaint. However, it says that it is in the public interest to accept this untimely part of the complaint, because the alleged threats prevented group members from seeking legal remedies for all the alleged discrimination, and because the treatment of workers employed through the TFWP is a matter of current and major public concern, and raises a novel issue on behalf of a particular and vulnerable group.

[16] The Union submits that the respondents, including, until very recently, the Fernie respondents, have records, including contracts, medical notes, and payroll information,

relevant to the complaint, and that the Oakville respondents took over the franchise from the Fernie respondents. It says that the Oakville respondents, at least, have the records, including of lengthy interviews with members of the complainant group, from their internal investigation. It also says that members of the complainant group remain in the country, and are available to participate in the Tribunal's process.

Analysis

[17] I accept, with respect to overtime and threats, that the complaint includes both timely allegations, and allegations which are of a similar character, thus constituting timely allegations of continuing contraventions in these areas. While I am less sure about the allegations with respect to shifts, principally because the complaint is poorly-particularized as to the timing and frequency of such events before December 2013, I am persuaded that, where the complaint alleges a widespread pattern of abuse of the members of a vulnerable group because of their race, colour, ancestry, and place of origin, it would be artificial to separate out this aspect of the complaint. Thus, these three parts of the complaint are accepted for filing.

[18] Because there is no timely allegation with respect to housing, there can be no continuing contravention, so I must consider whether it is in the public interest to accept this part of the complaint for filing, and, if so, whether the respondents will suffer substantial prejudice if it is accepted.

[19] I do not accept that it is in the public interest to accept the tenancy part of the complaint. In spite of being asked for particulars, and challenged as to the timeliness of this allegation, the Union has provided little information. I infer from the fact that the Union refers to this as one of the complainant group's earliest experiences with the respondents that it dates back to 2009, and that there is a very substantial delay, approaching five years, in bringing it forward.

[20] The Union appears to allege that the group members' mistreatment with respect to housing was at the hands of the Fernie respondents, and does not provide any information tending to suggest that the Oakville respondents had knowledge of, or participated in this aspect of the complaint. Thus, to allow this allegation to go forward would involve the latter in a substantially-lengthened hearing over matters which do not concern them.

[21] Finally, the Tribunal has accepted, for filing, a timely complaint in which several individuals from Mexico make similar allegations with respect to tenancy against the Oakville respondents and another Tim Hortons franchisee: *Chein and others v. Tim Hortons and others*, 2013 BCHRT 229, so that this is not a novel issue which cannot otherwise be addressed.

[22] In view of my determination on the question of the public interest in accepting this part of the complaint for filing, it is not necessary to consider the question of prejudice.

Order

[23] The part of the Union's representative complaint alleging discrimination in employment because of the group members' race, colour, ancestry, and place of origin is accepted for filing.

[24] The part of the Union's complaint alleging discrimination in tenancy because of the group members' race, colour, ancestry, and place of origin is not accepted for filing.

Murray Geiger-Adams, Tribunal Member