HUMAN RIGHTS BOARD OF ADJUDICATION

IN THE MATTER OF: A Complaint by DENIS COTE against MANITOBA HYDRO alleging a breach of Section 14 of *The Human Rights Code*;

AND IN THE MATTER OF: *The Human Rights Code*, C.C.S.M., Chapter H175, as amended

BETWEEN

DENIS COTE,

Complainant,

- and -

MANITOBA HYDRO

Respondent.

DECISION

Hearing Date: October 20, 2015

Appearances:

Denis Cote, *in person, Complainant*

For the Human Rights Commission: Ms. Isha Khan

Janet Mayor/Paula Hamilton, *in person for the Respondents*

Panel: Lawrence Pinsky, adjudicator

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November 18, 2015

[1] The Motion before me is one brought by the Respondent, Manitoba Hydro, seeking to add the Union, CUPE Local 998, as a party to this Human Rights complaint. In order to be as expeditious as possible and to provide all of the parties as much time as possible to consider the substantive matters in issue, following argument on October 20, 2015, I advised the parties orally (following brief reasons), that the Union would be added as a party with more fulsome written reasons to follow. These are my reasons.

BACKGROUND

[2] Briefly by way of background, the Complainant, Mr. Cote, is employed by the Respondent, Manitoba Hydro. He is also a member of the Canadian Union of Public Employees (CUPE) Local 998.

[3] The Complainant began a process in order to adopt a child in or about August of 2012. At the hearing, the Complainant confirmed that the adoption did not proceed such that he never became an adoptive father.

[4] The Complainant filed a complaint alleging that there is a differential between the benefits available to adoptive mothers and adoptive fathers as negotiated in the Collective Agreement entered into between the Respondent, Manitoba Hydro, and the Union that governed his employment. In particular, the complaint alleges that there are additional funds available for (adoptive) mothers by way of an EI top up to 93% of an employee's salary and that this top up is not available to (adoptive) fathers.

[5] In his complaint, the Complainant references the Collective Bargaining Agreement in several places. His references to the Collective Agreement include references to paragraph F4.21 and F4.11 thereof. The Complainant confirmed at the hearing that his complaint of discrimination relates solely to the unavailability of the top up to adoptive fathers pursuant to the Collective Bargaining Agreement.

[6] For its part, the Respondent, Manitoba Hydro, stated in its Reply to Complainant (hereafter "Reply") that it:

> *…continues to be willing to address any discriminatory impact of the existing provisions. However, attempts made to address the discriminatory impact in a financially feasible manner have yet to be successful.*

[7] The aforementioned comment seemed to imply that Hydro might not be denying that the policy complained about was discriminatory, however the Respondent made no obvious admission to that effect in its Reply. Manitoba Hydro suggested that if discrimination is to be found here as alleged, it is the jointly negotiated (with the Union) Collective Agreement that was discriminatory and therefore the Union should be added as a party.

[8] A pre-hearing conference was held on June 25, 2015. It was decided at that time that the preliminary question as to whether the Union should be added as a party would be heard first. A direction was made that the Union be served well in advance. I was advised by counsel for the Respondent that the Union was served on or about July 8, 2015.

[9] At the pre-hearing conference, I directed that briefs be filed and they were. A joint brief was filed by the Manitoba Human Rights Commission and the Complainant, Mr. Cote. The Respondent filed its own brief.

[10] The joint brief of the Manitoba Human Rights Commission and the Complainant, Mr. Cote, did not oppose adding the Union as a party. It suggested that though there might be:

> …some prejudice to the Complainant and the Commission by adding an additional party to these proceedings, that prejudice does not constitute undue prejudice, and there is no other clear impediment to amending the complaint, as requested at this time.

[11] Their brief stated elsewhere that:

> The Commission… submits that there would be no undue prejudice to CUPE Local 998, if it were added as a Respondent to this complaint.

[12] Following that submission, counsel for the Union, Kristine Barr, advised in an e-mail sent to all parties and to the Adjudicator, that CUPE would not be providing a brief or any material but that a CUPE representative would attend on a "watching brief". In fact, a representative of the Union did attend the hearing. Ms. Barr made clear that the Union did not consent to being added as a party. Somewhat confusingly given the Complainant's Brief, she went on to advise that the Complainant had advised the Union that he objected to the Union being added as a party "…as his Human Right's Claim is against the employer only".

[13] At the commencement of the hearing, I inquired as to whether anyone was opposed to adding CUPE as a party. The Complainant advised that he was opposed but that his opposition was "personal, not legal". He indicated that he felt that it was the (alleged) discriminatory practice of the employer that was in issue. He suggested that the Union had been quite supportive of him and that he felt it would be a retrograde step to add the Union as a party. He also expressed some concern as to lengthening of the proceedings.

[14] For its part, the Commission argued that there would be no undue prejudice. It advised that the Union had been aware of all steps in this matter for some time. The Commission confirmed that the Adjudicator had the authority to add a party and that the biggest (and really only) concern it could point to was the possibility of delay or complication by adding the Union as a party. That said, the Commission confirmed that given no undue prejudice, there was no impediment to adding the Union as a party.

[15] The Respondent for its part argued the appropriateness of adding the Union as a party given the nature of the Collective Agreement, the negotiations leading to it, and the impact of possible remedies, among other submissions.

ANALYSIS AND DECISION

[16] A raft of cases were provided by counsel for the Respondent and in the joint submission of the Complainant and the Human Rights Commission.

[17] I have read all of the cases submitted by both parties. I do not find that there would be any undue prejudice as contemplated by Section 40 of the Human Rights Code, by adding the Union as a party.

[18] The only case filed emanating from a Manitoba Human Rights tribunal was Scott v. Lou's Moving and Storage Ltd [1992] M.H.R.B.A.D. No. 1. This was a decision of Adjudicator Goodman. In Scott, a party was added based on the unique facts of that case. The other cases filed are from other jurisdictions dealing with legislation somewhat

different than that found in Manitoba (though helpful),and/or arising from labour adjudications.

[19] The issues raised in the Complaint and the Reply make it apparent that the Union should be added as a party. I pause here to note that no decision is made on the merits of the complaint at this stage of proceedings.

[20] It is clear that natural justice concerns would be better served by adding the Union as a party. I do not find that there would be any undue delay by adding the Union as a party and further find that it is in the public interest to add the Union as a party.

[21] I am bolstered in that conclusion by the fact that at the hearing, the Respondent, Manitoba Hydro, confirmed that their position is that the policy in issue is discriminatory and that the only question is one of remedy. Given that any remedy may involve the Union and may involve the Collective Bargaining Agreement, it is clear that the Union should be added on these grounds alone.

[22] Further, in light of the unique facts of this case where there really is no legal opposition (though there is some personal opposition by the Complainant), and given the Respondent's admission such that the only question is one of remedy, it is clear that the Union should be added.

[23] In its submissions, the Respondent, Manitoba Hydro, referred to the decision in University of Prince Edward Island v. Thomson et. ors. 2009 PESC 02. In that case, Mr. Justice Cheverie had to consider the issue of adding the Union as a party to a Human Rights complaint related to mandatory retirement issues in the context of judicial review. The Court quoted with approval the 2006 decision of the Ontario Human Rights Commission v. Greenhorn, 2006 HRTO 22 (CanLII) which confirmed the "so called" Payne test (Payne v. Otsuka Pharmaceutical Co., [2001] OHRIBO No. 23).

[24] In that case, the following questions were determined to be relevant in deciding whether to add a party:

a. Is there some reliable evidence on which the tribunal could make the finding of liability against the party?
b. Would the proposed party suffer real and substantial prejudice not capable of being cured (paragraph 22)?

[25] Although the relevant section of our Code is worded somewhat differently than that in Ontario and Prince Edward Island, I do not view the differential in wording in the relevant sections as significant in this context.

[26] Applying the Payne test, I would find that given the nature of the Collective Bargaining Agreement, the tribunal could make a finding of liability in terms of remedy against the Union as well as the employer. That said, in light of the Respondent's admission, it is not so much a matter of finding liability, but rather determining the remedy (finding a solution) that might require the presence of the Union.

[27] Clearly, the Union would not suffer any real or substantial prejudice that was not capable of being cured if it were added as a party. In fact, it would be the failure to add the Union as a party at this stage that might result in real or substantial incurable prejudice. A potential remedy involving the Union may be required in which case it is in the interest of justice, given the remedial nature of the Code, to add the Union as a party.

[28] Given the remedial nature of our legislation, I would add to the Payne test the following additional questions to be considered in such cases:

c. Does a potential remedy involve the party sought to be added?
d. Is it in the interest of justice given the remedial nature of the Code and the stage of proceedings, to add the party?

[29] Here, I would answer both additional questions in the affirmative. I do not suggest that all four questions must be answered in the affirmative in order to add a party. Rather, I am suggesting that these four questions should be considered and balanced in determining whether to add a party.

[30] In my view, it is essential in the interest of justice to canvas the question of whether it is appropriate to add a party early on in the proceedings. The Commission and all other parties should consider this possibility as soon as possible in the proceeding to ensure a fair, just, and expeditious process. Failure to do so may result in an inability to add the party, given the requirement to ensure that all elements of natural justice in the proceedings are met and/or may require another remedy in appropriate circumstances.

[31] At the conclusion of my advising the parties that the Union would be added as a party, I raised a few matters. I did so in order to ensure there would be no undue delay and in the interest of justice to allow the parties to focus on the real matters and concerns in issue or potentially in issue.

[32] I confirmed with Mr. Cote, the Complainant, that the only ground that he wishes to proceed upon (which the Commission confirmed as well) was his allegation that he was discriminated against as an adoptive father. Given Mr. Cote's confirmation that the adoption did not proceed, I raised with the parties the issue of mootness. I invited the parties to consider and address that issue at the next hearing date.

[33] Counsel for Hydro was also asked to confirm whether there was a formal admission being made that the policy being complained about was discriminatory with the only question (should mootness not be a factor) being one of remedy. As aforementioned, Manitoba Hydro made that formal admission. No doubt this will have the effect of shortening these proceedings.

[34] Finally, the Union Representative was invited forward to inquire as to whether the Union would be retaining counsel. The Union representative advised that Ms. Barr would be representing them. The Union Representative was then invited to contact Ms. Barr and to consult with both counsel as to when it would be appropriate to have the fulsome hearing.

[35] Following a brief adjournment for counsel to discuss scheduling, hearing dates were set for January 12 – 14 and January 19, 2016 inclusive. All counsel confirmed the sufficiency of the time allotted.

[36] Additionally, counsel were directed to provide notice in writing by Friday, November 27, 2015, if there are any issues as to documentary disclosure. Witness lists were directed to be exchanged by December 8, 2015. The Complainant and the Commission were directed to provide and serve their Brief by December 8, 2015, and the Respondent was directed to provide its Brief by December 23, 2015.

[37] Counsel are thanked for their Briefs and submission on the matter in issue. Their cooperation and professionalism are appreciated.