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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:

Victor Guy

**COMPLAINANT**

A N D:

School District No. 44 (North Vancouver)

**RESPONDENT**

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**REASONS FOR PRELIMINARY DECISION  
APPLICATION TO ADD A RESPONDENT**

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Tribunal Member:

Barbara Humphreys

Advocate for the Complainant:

Dulce Cuenca

Counsel for the Respondent:

Terri Cohen

Counsel for the proposed Respondent:

Morgan Rea

## **1. Introduction**

[1] Victor Guy is a 63-year-old retired teacher. Since September 2005, he has been employed by School District No. 44 (North Vancouver) (the “NVSD”) as a teacher on call (“TOC”), acting as substitute teacher. On December 18, 2006, he received a letter from the NVSD stating that, in order to be able to offer sufficient work to regular (that is, non-retired) TOCs, they would receive priority over retired TOCs.

[2] Mr. Guy filed a complaint in which he alleged that, because of this practice, the NVSD discriminated against him regarding employment because of age, contrary to s. 13 of the *Human Rights Code*.

[3] While it appears that the practice of giving preference to regular teachers had been in effect for many years, due to an oversight Mr. Guy was not initially provided with a letter outlining the NVSD’s practice. For some time, he was erroneously called out in the same manner as were the regular TOCs. It was not until the fall of 2006 that the NVSD discovered its error and changed Mr. Guy’s status. He was officially informed of the practice of giving preference to regular TOCs in the NVSD’s December 18 letter.

## **2. The Application**

[4] The NVSD has applied to add the North Vancouver Teachers’ Association (the “NVTa”) as a respondent to this complaint. The NVTa, a local of the British Columbia Teachers’ Federation, opposes the application. Mr. Guy made no submissions.

[5] The NVSD and the NVTa both made lengthy submissions. While I do not refer to every aspect of their arguments, I have read them all and taken them into account in reaching my decision.

## **3. NVSD’s Submissions**

[6] The NVSD says that its process of dispatching retired TOCs only after all regular TOCs are dispatched was established as a joint practice with the NVTa in the early 1990s. At that time, the NVTa took the position that work opportunities should first be made available to TOCs who were seeking full-time work before being made available to

retired teachers. The rationale for this practice was that work as a TOC was the front-line position from which the NVSD hired teachers into regular teaching positions.

[7] The NVSD says that it agreed with this rationale. This joint practice continued for many years. Shortly after Mr. Guy filed his complaint on February 6, 2007, the NVTA filed a grievance about the practice.

[8] The position of the NVSD is that it and the NVTA implemented this practice together for 17 years, and that, in the event of a finding of liability, it would be unjust and unfair for the NVTA not to bear any liability.

#### **4. NVTA's Submissions**

[9] The NVTA says that it was the NVSD which began the practice of giving preference to regular TOCs. The NVTA initially agreed that regular TOCs, who were just beginning in the profession, and whom the NVSD wished to retain so that they could move into full-time teaching jobs as they became available, should be given preference over retired TOCs.

[10] The NVTA says it began to reconsider its position in the spring of 2006, and it informed the NVSD that, if a retired TOC grieved the practice, the NVTA would represent the individual. The NVTA says that it put the NVSD on notice at this time, and again in the fall of 2006, that the understanding regarding the call-out practice was being withdrawn.

[11] The position of the NVTA is that it had withdrawn its support for the practice of giving regular TOCs preference before Mr. Guy filed his human rights complaint. Moreover, Mr. Guy chose not to name the NVTA as a respondent.

#### **5. Decision**

[12] For the following reasons, I have decided not to add the NVTA as a respondent to this complaint.

## 6. Reasons

[13] Both the NVSD and the NVTA provided extensive submissions regarding the Tribunal's case law and the factors to be taken into account when considering an application to add a respondent. Both agreed that there were three factors; however, they expressed them somewhat differently.

[14] The NVSD described the factors as follows:

1. Are there acts or omissions alleged as against the proposed respondent which, if proven, contravene the *Code*?
2. What is the impact of adding the proposed respondent on the natural justice concerns of the parties, and on the timely resolution of the complaint?
3. Would it be in the public interest to add the respondent?

[15] The NVTA's description is:

1. Whether there are any allegations before the Tribunal on which it could make a finding of liability against the proposed respondent?
2. Whether the potential respondent would suffer any real prejudice as a result of the delay in being added that is not capable of being cured?
3. Whether it is in the public interest to add the respondent?

[16] In my view, the different articulations of the first factor are not significant. However, a matter on which the NVSD and the NVTA fundamentally disagree is what information the Tribunal should take into account when considering this factor.

[17] The NVSD says that, in *Ferguson v. Peace River North School District No. 60*, 2005 BCHRT 552, the Tribunal made it clear that the "basis for adding a prospective respondent may also include facts alleged by the current respondent in relation to, and in the context of, the allegations made in the complaint" (para. 46), thus rejecting the approach set out in *Matuszewski v. Min. of Competition, Science and Enterprise*, 2004 BCHRT 46, and other decisions, which state that the person alleging discrimination will be the one to frame the complaint and to choose the respondents. (para. 31) The NVSD submits that, as in this case, there may be allegations of fact pertaining to a complaint of discrimination which are unknown to a complainant, and, therefore, the Tribunal should take into account all the information before it, including the named respondent's

allegations against a third party, when deciding whether to add the third party as a respondent.

[18] While acknowledging the approach taken in *Ferguson*, the NVTA says that, with the exception of *Atwal v. Timberwest and Ulley and others (No. 2)*, 2005 BCHRT 567, which was issued shortly after *Ferguson*, the Tribunal's case law, when considered as a whole, makes it clear that the Tribunal has not adopted this reasoning, but instead looks to the allegations in the complaint made by the complainant when determining whether a respondent should be added.

[19] The NVTA also refers to *Peterson v. British Columbia (Ministry of Forest and Range)*, 2007 BCHRT 129, the Tribunal stated that respondents to a complaint cannot determine whether it is appropriate to name other respondents (para. 18). The NVTA submits that the Tribunal should take into account only the allegations set out in the complaint when considering whether to add a third party as a respondent.

[20] Section 21(1) of the *Code* states that a person who alleges that another person has contravened the *Code* may file a complaint. Section 27.3(2)(k) of the *Code* authorizes the Tribunal to make rules regarding the addition of parties to a complaint in order to facilitate the just and timely resolution of a complaint. When read as a whole, I see no basis in the *Code* for a named respondent, in the absence of any allegation by the complainant of discrimination by a third party, to raise allegations against that party and seek to add it as a respondent to the complainant's complaint. To do so would not facilitate the just and timely resolution of the complaint which has been filed.

[21] Both the MVSD and the NVTA have referred to many Tribunal decisions regarding applications to add respondents. Some deal with an application made by a complainant to add a respondent; others with an application by a named respondent to add another respondent. In my view, different considerations may apply in these two different situations, as it is the complainants who have control over their complaints.

[22] Regarding an application by a named respondent to add another entity as a respondent, I agree with the reasoning set out in *Matuszewski*. (para. 31) Of fundamental significance is the fact that it is Mr. Guy's complaint and it is up to him to frame it as he

wishes. To look to allegations made by the NVSD against the NVTA, in the absence of any reference to the NVTA in Mr. Guy's complaint, is contrary to this principle.

[23] Section 17 of the *Administrative Tribunals Act*, S.B.C. c. 45, as amended, supports the view that complainants have control over their complaints.

[24] *Ferguson* and *Atwal*, and perhaps other Tribunal decisions, are inconsistent with this fundamental principle; in any event, I am not bound by those decisions. *Atwal* can be distinguished from *Ferguson* as *Atwal* dealt with an application by the complainant to add respondents. Therefore, any comments in *Atwal* regarding relying on information provided by a named respondent when considering whether to add a party are *obiter*.

[25] I agree with the submission of the NVSD that there may be allegations of fact unknown to a complainant at the time a complaint is filed. However, what is important is whether, based on that information, the complainant subsequently chooses to amend the complaint. While Mr. Guy may not have been aware of the NVTA's apparent involvement in the practice at issue, he certainly became aware of those allegations when the NVSD filed its application. For whatever reasons, Mr. Guy chose not to amend his complaint.

[26] While it may appear unfair to the NVSD to be the sole named respondent in light of the apparent involvement of the NVTA, the *Code* does not contemplate a third party procedure analogous to that set out in the Rules of Court.

[27] Therefore, when considering the first factor, whether as articulated by the NVSD or the NVTA, the allegations made by the NVSD against the NVTA are not to be taken into account. In his complaint, Mr. Guy does not mention the NVTA. As framed, his complaint is directed solely against the NVSD. There are no acts or omissions alleged in Mr. Guy's complaint against the NVTA which, if proven, would contravene the *Code*. Similarly, there are no allegations in Mr. Guy's complaint on which the Tribunal could make a finding of liability against the NVTA. Nor has Mr. Guy adopted the allegations set out by the NVSD.

[28] Further, I note that the Tribunal in *Matuszewski* set out the first question, which it stated is a prerequisite to considering whether to add a respondent, as: Are there facts

outlined in the Complaint Form or Particulars of allegation which make it apparent that the party sought to be added may have contravened the *Code*? (para. 42) Again, the answer in this case is clearly 'no'. I agree that when the first question, whether as articulated by the NVSD, the NVTA, or in *Matuszewski*, is a prerequisite, and it must be answered in the affirmative before the remaining factors are considered.

[29] As there is no mention of the NVTA in Mr. Guy's complaint, the prerequisite to adding it as a respondent has not been met.

#### **7. Sur-reply**

[30] The NVTA filed an application for sur-reply, together with its sur-reply. It addressed a provision of the collection agreement between the NVSD and the NVTA. As the sur-reply had no relevance to the basis of my decision, it was not necessary to give the NVSD an opportunity of sur-sur-reply.

#### **8. Conclusion**

[31] The application is denied.

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Barbara Humphreys, Tribunal Member

