

**Canadian Human  
Rights Tribunal**



**Tribunal canadien  
des droits de la personne**

**Citation:** 2017 CHRT 11

**Date:** May 4, 2017

**File No.:** T2131/0516

**Between:**

**Jean-Marc Malenfant**

**Complainant**

**- and -**

**Canadian Human Rights Commission**

**Commission**

**- and -**

**Vidéotron S.E.N.C.**

**Respondent**

**Ruling**

**Member:** Gabriel Gaudreault

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## I. Background

[1] This is a ruling on a motion filed by the Canadian Human Rights Commission (Commission) on April 4, 2017. By this motion, the Commission seeks full disclosure of potentially relevant information by the respondent, Videotron G.P. (Videotron or the respondent) and, more specifically, disclosure of the contact information of five candidates who received job offers for positions 13-1004 and 14-1004 in 2014. On April 5, 2017, Jean-Marc Malenfant (Mr. Malenfant or the complainant) filed a similar motion. Videotron filed its submissions on April 12, 2017, and objects to the motions.

[2] In 2014, Videotron posted two offers of employment for positions as sales and after-sales service consultants, in Gatineau (13-1004 and 14-1004). The complainant applied for these two positions but was screened out by Videotron at the preliminary stage of the hiring process. Mr. Malenfant filed a complaint with the Commission under sections 7 and 8 of the *Canadian Human Rights Act (CHRA or the Act)* claiming that Videotron had discriminated against him in matters related to employment, by reason of his age.

[3] During the process of disclosing potentially relevant documents, several documents, including the resumés of the candidates hired by Videotron for positions 13-1004 and 14-1004, were exchanged between the parties. However, the candidates' contact information was not released by Videotron, given the personal and confidential nature of this information. The Commission and Mr. Malenfant wish to summon five candidates who received job offers for positions 13-1004 and 14-1004 so that they can testify at the hearing. The names of the five candidates appear in the complainant's list of witnesses, sent to the parties and the Tribunal on January 16, 2017. Videotron objects to providing the contact information of said candidates.

[4] The issue is whether the Canadian Human Rights Tribunal should order Videotron to disclose the information requested by the Commission and the complainant.

[5] The Tribunal has read the submissions of each party, and for the reasons given in detail in the paragraphs that follow, the Tribunal orders Videotron to disclose the

unredacted resumés of the five candidates hired by the respondent who are identified by the complainant in his list of witnesses dated January 16, 2017.

## **II. Positions of the parties on the motion**

### **A. The Commission**

[6] The Commission argues that the Tribunal has the necessary authority to order Videotron to disclose the contact information of the five candidates in question. In coming to this conclusion, the Tribunal has summarized the main arguments made by the Commission in its written submissions as follows.

[7] The Commission states that the parties are entitled to make full answer and defence and consequently have the right to appear and present evidence that is relevant to their case. The parties must disclose any documents or information, favourable or unfavourable that is potentially relevant to the matter in dispute.

[8] The Commission argues that the threshold for relevance is low, and the Tribunal has tended to favour disclosing information rather than not disclosing it. The party seeking disclosure must show that there is a connection between the elements to be proven and the documents or information requested.

[9] The Commission further submits that there is a significant distinction between the production of relevant documents and information and their admissibility at the hearing. At the production stage, only relevance need be established. Relevance must relate to a fact, issue, or form of relief.

[10] In its submissions, the Commission proposes that the Tribunal review the complaint to establish the relevance of the documents or information. It states that the candidates' testimony is necessary, particularly with regard to their skills, their ages and the hiring process. As this is an employment complaint involving discrimination based on age, a comparative study between Mr. Malenfant and the candidates selected by Videotron is necessary.

[11] The Commission argues that the violation of privacy raised by the respondent is not a ground for not disclosing the candidates' contact information. Potentially relevant documents must be disclosed and, in a litigation context, are subject to an implied undertaking of confidentiality or may be subject to any other order deemed appropriate to ensure confidentiality.

[12] Finally, the Commission submits that the candidates' contact information is necessary to summon them as witnesses to establish a *prima facie* case of discrimination. It argues that the failure to disclose this information deprives it, as well as the complainant, of the opportunity to present the Tribunal with a case to meet. The Commission therefore asks that the Tribunal order the respondent to disclose the contact information (addresses and telephone numbers) of the five candidates selected.

## **B. The complainant**

[13] Mr. Malenfant has brought a motion similar to that of the Commission. He asks that the Tribunal order the respondent to disclose the contact information of the five candidates selected. The Tribunal can sum up Mr. Malenfant's main arguments as follows.

[14] In his written submissions, the complainant states that he has in large part adopted the Commission's submissions. He adds that the candidates' testimony is essential to establishing a *prima facie* case of discrimination and conducting a comparative analysis of the skills, work experience and age of each candidate. Mr. Malenfant also argues that there is a direct connection between the age of an individual and the experience and skills acquired over years of work.

[15] The complainant submits that there is no violation of the candidates' privacy if their contact information is disclosed and that the rules of confidentiality already apply in a litigation context. He states, moreover, that where the circumstances warrant it, the Tribunal has the authority to order more specific rules regarding the confidentiality of the information.

[16] Mr. Malenfant argues that in order to present a full and complete case to the Tribunal, he must have access to the contact information of the candidates selected. In his view, non-disclosure will prevent him from meeting his burden of proof.

### **C. The respondent**

[17] As for Videotron, it objects to the disclosure of the personal contact information of the five candidates who received job offers for positions 13-1004 and 14-1004. The Tribunal has summarized the respondent's main arguments as follows.

[18] First of all, Videotron submits that it is not necessary to disclose the contact information and that the moving parties (the Commission and Mr. Malenfant) have not substantiated the necessity of disclosing this information.

[19] Videotron states that the information on the candidates is already in the Tribunal record and that it is not necessary to hear the testimony of third parties to the dispute. It argues that the candidates' resumés were disclosed, such that all parties and the Tribunal have the same information that it itself held and used to make its decision in its hiring process.

[20] The respondent argues that the confirmation of the candidates' skills and ages, in 2014, does not justify a violation of the privacy of said candidates, nor does the potential probative value to be given to this evidence. There must be a rational connection between the requested documents and the issues, and the information must therefore have probable relevance without, however, being speculative or oppressive. Videotron submits that the question to be asked is whether the requested information is necessary for the party seeking disclosure to be able to prepare its arguments for presentation to the Tribunal.

[21] Videotron notes that there are several steps in its hiring process. The first step in its hiring process is a resumé review. It submits that Mr. Malenfant was not invited to take part in the second step of the process, a telephone interview. Accordingly, the comparative analysis should be carried out in the same context, that is, a comparison of the candidates' resumés. According to Videotron, what the other candidates experienced in the later steps

of the process is not relevant. As Mr. Malenfant was not invited to those subsequent steps, the testimony of these candidates on this subject does not relate to a fact, issue or form of relief sought.

[22] Videotron also mentions that the evidence must be presented in an efficient manner and that proceedings before the Tribunal must be conducted as expeditiously as possible. In its view, allowing the irrelevant testimony would prolong the hearing by at least three days.

[23] Finally, the respondent states that the right to privacy and the confidentiality of information is an aspect that must be assessed in the context of a request for disclosure. As the candidates are strangers to the proceeding, have no interest in it, are still employees of the company and will have to testify against it, these aspects must be taken into account when deciding the motion.

[24] Videotron reiterates that it does not object to a full disclosure of the candidates' information, only to an unnecessary disclosure. According to Videotron, the moving parties have not demonstrated the necessity and relevance of the five candidates' testimony, and disclosure would constitute an unwarranted violation of the right to privacy of these third parties.

### III. Law and analysis

[25] Each party has a right to a full hearing. In this regard, the *CHRA* provides as follows at subsection 50(1):

50(1) After due notice to the Commission, the complainant, the person against whom the complaint was made and, at the discretion of the member or panel conducting the inquiry, any other interested party, the member or panel shall inquire into the complaint and shall give all parties to whom notice has been given a full and ample opportunity, in person or through counsel, to appear at the inquiry, present evidence and make representations. [Emphasis added.]

[26] This right includes the right to the disclosure of relevant evidence in the possession or care of the opposing party (*Guay v. Royal Canadian Mounted Police*, 2004 CHRT 34,

para. 40). The Rules of Procedure of the Canadian Human Right Tribunal (the Rules) provide as follows in Rule 6(1), and more specifically at paragraphs (d) and (e):

6(1) Within the time fixed by the Panel, each party shall serve and file a Statement of Particulars setting out,

...

(d) a list of all documents in the party's possession, for which no privilege is claimed, that relate to a fact, issue, or form of relief sought in the case, including those facts, issues and forms of relief identified by other parties under this rule;

(e) a list of all documents in the party's possession, for which privilege is claimed, that relate to a fact, issue or form of relief sought in the case, including those facts, issues and forms of relief identified by other parties under this rule;

...

[Emphasis added.]

[27] Regarding disclosure, the Tribunal has already ruled several times that the guiding principle is probable or possible relevance (*Bushey v. Sharma*, 2003 CHRT 5 and *Hughes v. Transport Canada*, 2012 CHRT 26. See in the alternative *Guay, supra*; *Day v. Department of National Defence and Hortie*, 2002 CanLII 61833; *Warman v. Bahr*, 2006 CHRT 18; *Seeley v. Canadian National Railway Company*, 2013 CHRT 18). The Tribunal notes that the parties have an obligation to disclose potentially relevant documents in their possession (*Gaucher v. Canadian Armed Forces*, 2005 CHRT 42, para. 17).

[28] To show that the documents or information is relevant, the moving party must demonstrate that there is a rational connection between those documents or information and the issues in the case (*Warman, supra*, para. 6. See for example *Guay, supra*, para. 42; *Hughes, supra*, para. 28; *Seeley, supra*, para. 6). Relevance is determined on a case-by-case basis, having regard to the issues raised in each case (*Warman, supra*, para. 9. See also *Seeley, supra*, para. 6). The Tribunal notes that the threshold for arguable relevance is low and the tendency is now towards more, rather than less disclosure (*Warman, supra*, para. 6. See also *Rai v. Royal Canadian Mounted Police*,

2013 CHRT 36, para. 18). Of course, the disclosure must not be speculative or amount to a fishing expedition (*Guay, supra*, para. 43).

[29] The Tribunal notes that the production of documents stage is different from the stage of their admissibility in evidence at the hearing. Accordingly, relevance is a distinct concept. As Member Michel Doucet stated in *Telecommunications Employees Association of Manitoba Inc. v. Manitoba Telecom Services*, 2007 CHRT 28 (hereafter *TEAM*), at para. 4:

[4] . . . The production of documents is subject to the test of arguable relevance, not a particularly high bar to meet. There must be some relevance between the information or document sought and the issue in dispute. There can be no doubt that it is in the public interest to ensure that all relevant evidence is available in a proceeding such as this one. A party is entitled to get information or documents that are or could be arguably relevant to the proceedings. This does not mean that these documents or this information will be admitted in evidence or that significant weight will be afforded to them.

[30] That being said, I have considered the parties' arguments and come to the conclusion that the testimony of the five candidates identified by the complainant in his list of witnesses dated January 16, 2017, is potentially relevant to the case.

[31] It is important to note, as Tribunal Chairperson, David L. Thomas, correctly pointed out in *Siddoo v. International Longshoremen's and Warehousemen's Union, Local 502*, 2015 CHRT 21, at para. 29, that:

[29] The Tribunal has recognized the difficulty in proving allegations of discrimination by way of direct evidence. As was noted in *Basi v. Canadian National Railway Company*, 1988 CanLII 108 (CHRT) [*Basi*]: "discrimination is not a practise which one would expect to see displayed overtly. In fact, rarely are there cases where one can show by direct evidence that discrimination is purposely practised." Rather, one must consider all of the circumstances to determine if there exists what was described in the *Basi* case as the "subtle scent of discrimination."

[32] It is in this same vein that I come to the conclusion that the testimony of these five candidates could potentially be relevant. The burden would be a heavy one, for complainants, if they had to show direct evidence of discrimination in every case. The

subtle scent of discrimination may rise from the circumstances, taken as a whole. The complainant must still have the chance to present evidence regarding these circumstances. As the Commission states at paragraphs 19 and 20 of its submissions, the candidates will have to be heard on subjects [TRANSLATION] “including, but not limited to” their age, their skills, and their resumé, but also regarding the hiring process [emphasis added]. The circumstances in which the respondent’s hiring process was conducted could potentially be relevant. In his statement of facts, taken as a whole, the complainant too expresses this same idea regarding Videotron’s selection process, which according to his interpretation voluntarily sets forth its preferences for younger candidates. In this respect, he draws a connection, at paragraphs 19 to 22 of his statement, between discrimination based on section 8 (advertising for employment applications) and discrimination based on section 7 (refusal to employ) of the *CHRA*. He expresses the idea that the reasons for refusal are tainted by assumptions or are merely pretexts for refusing to hire him. In addition, Mr. Malenfant cites *O’Malley v. Simpson-Sears*, [1985] 2 S.C.R. 536, which sets out the concept of indirect effects of discrimination. Clearly, the complainant is raising issues regarding the hiring process and the circumstances surrounding it.

[33] I do not agree with Videotron’s statement at paragraph 23 of its submissions that the candidates’ testimony on the hiring process or other information not presented in their resumé is entirely irrelevant to the case. I note that the threshold for potential relevance, at this stage, is low, particularly since relevance need only be potential or probable.

[34] It is clear that the parties do not agree on the issue before the Tribunal, that is, the disclosure of the contact information of the five candidates selected, nor do they agree on the relevance of the testimony of the five candidates selected. The production of documents and admissibility in evidence at the hearing are separate stages. I find that it would be premature at this stage, and without having been able to hear the evidence at the hearing, to deny disclosure of the contact information of said candidates and immediately draw a conclusion by stating that the candidates’ testimony is not relevant to the case. If the respondent wishes to make submissions regarding relevance at the hearing, it will be open to it to do so. Otherwise, the prejudice to the Commission and in

particular to the complainant should this request be denied at this stage could be considerable and have repercussions on the merits of the case.

[35] Regarding the confidentiality of personal information and the privacy of the five candidates selected, I can understand Videotron's arguments. Nevertheless, it is also "in the public interest to ensure that all relevant evidence is available in a proceeding such as this one" (*TEAM, supra*, para. 4). Other measures, as suggested by the Commission, at paragraph 21, and the complainant, at paragraph 11, in their respective submissions, may be taken to protect as much as possible the candidates' personal information. At this stage, no formal request for a confidentiality order has been made by the parties. They could, in due course, make such a request if they deem it necessary. I would also point out to the parties that other measures could be taken at the hearing to minimize, to the extent possible, the disclosure of the candidates' personal information.

[36] Finally, I would remind the parties that the duty to disclose the documents concerns documents in their possession. Accordingly, the duty does not extend to creating documents for disclosure (*Gaucher, supra*, para. 17). Therefore, as the contact information exists and can be found in the resumés of the five candidates selected, I will order Videotron to provide the resumés without the contact information being redacted.

#### **IV. Ruling and order**

[37] For these reasons, I order that Videotron provide the other parties with the resumés of the five candidates selected for positions 13-1004 and 14-1004, in 2014, and identified in the complainant's list of witnesses dated January 16, 2017, at paragraph 4 therein, without their contact information being redacted.

*Signed by*

Gabriel Gaudreault  
Tribunal Member

Ottawa, Ontario  
May 4, 2017

## **Canadian Human Rights Tribunal**

### **Parties of Record**

**Tribunal Files:** T2131/0516

**Style of Cause:** Jean-Marc Malenfant v. Videotron S.E.N.C.

**Ruling of the Tribunal Dated:** May 4, 2017

#### **Appearances:**

Fo Niemi, for the Complainant

Daniel Poulin, for the Canadian Human Rights Commission

Karen A. Jensen, for the Respondent