Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2016 CHRT 4
Date: February 4, 2016
File No.: T1863/9312

Between:

Mohamed Yaffa

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Air Canada

Respondent

Ruling

Member: David L. Thomas

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I. Request for disclosure

[1] This request for disclosure arises in the context of a *Canadian Human Rights Act* (“*CHRA*”) complaint filed by Mr. Yaffa against Air Canada. Mr. Yaffa alleges the airline discriminated against him by subjecting him to enhanced security screening because of his race, national or ethnic origin, colour and religion, on six different occasions from March to June 2010. As a result of Air Canada’s alleged actions, Mr. Yaffa claims to have suffered depression, anxiety, insomnia and diminished self-esteem, for which he seeks compensation.

[2] By way of motion, Air Canada requests that Mr. Yaffa and the Canadian Human Rights Commission (the “Commission”) produce all materials related to another human rights complaint filed by Mr. Yaffa against Canada Border Services Agency (“CBSA”). That complaint relates to events that occurred in March of 2009, prior to the events in issue in the present complaint, and alleges CBSA officials targeted and unfairly subjected Mr. Yaffa to a secondary screening at Pearson International Airport because of his race, colour and religion. In the complaint against CBSA, Mr. Yaffa stated that the experience left him “psychologically tormented and significantly stressed” and that he had subsequently travelled three times after the incident and that each time he found himself “recalling the scenarios and becoming nervous, among other things.”

II. Reasons for the request

[3] As part of the ongoing disclosure process, which was the subject of an earlier ruling (see *Yaffa v. Air Canada*, 2014 CHRT 22), Mr. Yaffa provided Air Canada with a copy of a complaint form letter against CBSA that he had previously filed with the Commission. After reviewing the complaint form letter, Air Canada requested further disclosure. Air Canada argues that the circumstances giving rise to the CBSA complaint and the complaint against it appear to be similar, insofar as they both involve incidents that transpired at Canadian airports, within the context of secondary screenings, and as a result of which the Complainant alleges psychological injuries. Furthermore, in both

complaints, the Complainant alleges the incidents were a result of his race, colour and religion.

[4] Air Canada adds that the incident against CBSA and the alleged psychological injuries associated therewith chronologically preceded the incidents alleged against Air Canada by only one year. Furthermore, Mr. Yaffa alleges similar psychological injuries against Air Canada and seeks compensation for said injuries, notwithstanding that the alleged injuries may have been pre-existing and for which he may have already received compensation from CBSA by way of a settlement.

[5] In Air Canada's view, in order for it to know the case against it and be permitted to respond to that case, it must be given the opportunity to explore whether Mr. Yaffa seeks compensation from Air Canada for previously existing psychological injuries attributable to CBSA's conduct. Furthermore, any admissions of liability, terms of resolution, including compensation paid to Mr. Yaffa for psychological injuries, would be material to these proceedings given the similarity in the nature of the allegations raised against Air Canada and the compensation sought by Mr. Yaffa.

[6] Pursuant to subsection 50(1) of the *CHRA*, parties before the Tribunal must be given a full and ample opportunity to present their case. To be given this opportunity, parties require, among other things, the disclosure of arguably relevant documents in the possession or care of the opposing party prior to the hearing of the matter. Along with the facts and issues presented by the parties, the disclosure of documents allows each party to know the case it is up against and, therefore, adequately prepare for the hearing. For that reason, if there is a rational connection between a document and the facts, issues or forms of relief identified by the parties in the matter, it should be disclosed pursuant to subparagraphs 6(1)(d) and 6(1)(e) of the Tribunal's *Rules of Procedure (03-05-04)* (see *Yaffa v. Air Canada*, 2014 CHRT 22).

[7] The CBSA complaint was settled before the Commission decided whether it warranted an inquiry before the Tribunal. Mr. Yaffa and the Commission have confirmed that the only requested materials in their possession that relate to the CBSA complaint are the initial complaint form letter itself, which has already been disclosed to Air Canada, and

documents related to the mediation of the complaint and the terms of its settlement. They deny that any investigation report or other materials requested by Air Canada exist. Both Mr. Yaffa and the Commission object to the disclosure of the mediation and settlement documents as, in their view, they are not arguably relevant to the issues in the present case. Furthermore, they submit the documents are privileged and, as such, are not compellable in the absence of exceptional circumstances.

[8] CBSA was also invited to provide submissions with respect to Air Canada’s request for disclosure. It agrees with Mr. Yaffa and the Commission that the mediation and settlement documents should not be disclosed. CBSA argues that the materials have no probative value and that Air Canada has not adequately shown a nexus between the documentation sought and the issues in dispute in this matter.

III. Ruling

[9] For the reasons set out below, the Tribunal dismisses the Respondent’s motion, but on terms and conditions set out herein.

IV. Legal Framework

[10] This ruling stems from subsection 50(4) of the *CHRA*, which prohibits the Tribunal from admitting or accepting anything that would be inadmissible in a court by reason of any privilege under the law of evidence. In the present matter, the privilege asserted is settlement privilege.

[11] In *Sable Offshore Energy Inc. v. Ameron International Corp.,* 2013 SCC 37 (“*Sable*”)*,* the Supreme Court of Canada confirmed the importance of settlements to the judicial system and the importance of settlement privilege to the administration of justice:

> [11] Settlements allow parties to reach a mutually acceptable resolution to their dispute without prolonging the personal and public expense and time involved in litigation. The benefits of settlement were summarized by Callaghan A.C.J.H.C. in *Sparling v. Southam Inc. (1988), 1988 CanLII 4694 (ON SC), 66 O.R. 225 (H.C.J.):*

> ….the courts consistently favour the settlement of lawsuits in general. To put it another way, there is an overriding public interest in favour of settlement. This policy promotes the interests of litigants generally by saving them the expense of trial of disputed issues, and it reduces the strain upon an already overburdened provincial court system…..

> [12] Settlement privilege promotes settlements. As the weight of the jurisprudence confirms, it is a class privilege. As with other class privileges, while there is a *prima facie* presumption of inadmissibility, exceptions will be found "when the justice of the case requires it" *(Rush & Tompkins Ltd. V. Greater London Council (1988) 3 All E.R. 737 (H.L.) at p. 740).*

[12] Settlement privilege is based on the understanding that parties will be more likely to settle if they have confidence from the outset that their negotiations will not be disclosed. Settlement negotiations are protected, whether or not final settlement is ever reached, and settlement privilege extends to the content of any concluded agreement (*Sable,* at paras. 13, 17-18).

[13] The Supreme Court acknowledged in *Sable* that there are exceptions to settlement privilege, where "…a competing public interest outweighs the public interest in encouraging settlement." Such competing public interests have included the need to prevent a plaintiff from being overcompensated (*Sable*, at para.19).

V. Analysis

[14] Under section 50 of the *CHRA*, the Tribunal must afford the parties "a full and ample opportunity" to present evidence and make representations, subject to the prohibition on receiving anything protected by the law of privilege.

[15] The Respondent in this case argues that it is imperative that it be given the opportunity to explore whether the Complainant seeks compensation for previously existing psychological injuries attributable to CBSA's conduct that pre-dated the alleged incidents in the current complaint. In particular, the Respondent asserts that any admissions of liability, terms of resolution, including compensation paid for psychological injury would be material to the within proceedings. The Respondent submits that any failure to produce the subject documents will prejudice its ability to defend itself.

[16] As stated above, since settlement privilege is a class privilege, the requested documents pertaining to the mediation and settlement ("the settlement documents") are accorded a *prima facie* presumption of inadmissibility, and the party contesting the presumption has the burden of establishing that an exception to the class privilege applies: *Sable*, at para. 19; see also *Dos Santos v. Sun Life Assurance Co. of Canada*, 2005 BCCA 4, at para. 19 ("*Dos Santos*"); and, *Brown v. Cape Breton (Regional Municipality)*, 2011 NSCA 32, at paras. 59-61 ("*Brown*").

[17] In answer to the claim of settlement privilege, the Respondent invokes the exception allowing for the admissibility of material necessary to prevent a party from being overcompensated. In this regard, it relies on the *Dos Santos* judgment where the court ordered the disclosure of a settlement agreement in an insurance action.

[18] In *Dos Santos*, the plaintiff's wife was receiving long-term disability benefits under an employment group insurance policy with Sun Life Assurance Co. of Canada. The policy's subrogation clause provided that if the disability was caused by the negligence of a third party, 75% of the employee's net recovery for loss of income in any action must be repaid to the insurer, to the extent of the benefits paid or payable (*Dos Santos*, at para. 4).

[19] The plaintiff commenced an action against the driver of the car which injured his wife, and the driver was held 100% at fault. Damages were then mediated with the driver's insurer, the Insurance Corporation of British Columbia ("I.C.B.C."). Sun Life claimed it was entitled to see the documents underling the mediated settlement so it could tell what sum was paid in respect of lost income (*Dos Santos*, at paras. 6-7).

[20] The B.C. Court of Appeal agreed, holding that the plaintiff had clearly put into issue the subrogation rights of Sun Life under the disability policy. The documents were accordingly relevant and necessary. In the words of the Court: "[i]n the case at bar, there is a clear relationship between the sums the plaintiff seeks from the defendant and the sums the plaintiff may have already received in settlement with I.C.B.C." (*Dos Santos*, at paras. 25 and 33).

[21] There are a number of difficulties in applying the *Dos Santos* case to the current matter before the Tribunal. First of all, and of greatest significance, the relevance and

necessity of disclosing the settlement in the *Dos Santos* case was manifest; the requesting party, Sun Life, had a contractual right to be indemnified for any monies received by the plaintiff from or on behalf of the negligent third party. In the current matter, the Respondent, Air Canada, has no contractual right of indemnification vis-à-vis any monies received by the Complainant from CBSA.

[22] Secondly, in *Dos Santos*, it is clear that the requesting party is seeking disclosure of settlement terms governing payments by a third party in respect of *the very same incident*. In the current matter, while there is a potential for overlap, it is not clear that the incidents giving rise to the CBSA complaint are the same as those giving rise to the Air Canada complaint. In any event, the current matter involves multiple incidents. It is quite possible that there is no overlap at all, and that the incidents mentioned in the CBSA complaint entirely predate the Air Canada allegations.

[23] A more analogous fact situation arose in the *Brown* case, *supra*. In *Brown*, the plaintiff had suffered two separate injuries to her knee, by two separate defendants. She settled the claim in respect of the second injury, and the defendant to the first claim sought disclosure of the settlement agreement and related correspondence. The Nova Scotia Court of Appeal in *Brown* followed *Dos Santos* to the extent that it acknowledged that settlement privilege is subject to exceptions, and that the obvious exception that could apply to the matter at hand involved the risk of double recovery (*Brown*, at para. 72). However, in *Brown*, the Court refused to order disclosure at that stage of the proceedings given that the relevance of the settlement communications had not thus far been established, and was a matter for the trial judge (*Brown*, at paras. 73-74).

[24] Of particular interest in *Brown* is the Court's insistence on evidence of indivisibility of the two injuries. Relying on the judgment in *Athey v. Leonati*, 1996 CanLII 183 (SCC), the Court held that as a general proposition, where there is more than one cause of a plaintiff's injury, the Court must first determine whether that injury is divisible or indivisible (*Brown*, at para. 15). It then concluded as follows:

> [23] Relevancy is a question of law: *R. v. Mohan*, 1994 CanLII 80 (SCC), [1994] 2 S.C.R. 9 at para. 18. The medical evidence before the Chambers judge in this matter was extremely limited. It falls far short of

> providing the court with sufficient information to decide whether the injuries to Ms. Brown's knee were indivisible within the meaning of *Athey*. Without evidence which could support that determination one cannot say whether settlement information from the 2004 accident was relevant. In ordering disclosure, the Chambers judge erred in law…

[25] In the current matter before the Tribunal, the hearing has not yet commenced, and no evidence has been adduced about the Complainant's psychological injuries. Nor has any evidence been led on the issue of whether one or more of the three subsequent flights referred to in the CBSA complaint are in fact coincident with one of the five flights referred to in the Air Canada complaint.

[26] The Respondent concedes in its reply submissions that "it is unclear whether there is an overlap" between the incidents referred to in the two complaints, and whether the Complainant continued to experience the psychological effects of the incidents giving rise to the CBSA complaint when he flew with Air Canada. But it then asserts that:

> None of the responding parties have provided any argument or evidence to put this concern to rest, nor have they confirmed that the three subsequent travel incidents referred to were not with Air Canada, on dates relevant to the within complaint.

[27] While the Respondent makes an interesting observation, the difficulty with this submission is that it implies the other parties have the burden of demonstrating that the settlement documents should not be disclosed. However, as was explained above, it is the requesting party that has the burden of establishing an exception to the privilege which presumptively attaches to settlement documents. In the absence of sufficient evidence to rebut the presumption, settlement privilege applies (*Brown*, at para. 23).

[28] This situation may change after the hearing commences, and the Complainant testifies and is subject to cross-examination. If and when an appropriate evidentiary foundation has been laid, the Tribunal would be willing to consider a similar motion for disclosure that underscores the relevance and necessity of the documents based on the evidence adduced. At that point, the potential for double recovery or over-compensation could be properly ascertained.

[29] The Tribunal has in the past been vigilant in guarding against the possibility of double recovery, as evidenced by such rulings as *Palm v. International Longshore and Warehouse Union, Local 500*, 2011 CHRT 12 ("*Palm*"), where the Tribunal, relying on *Dos Santos*, ordered disclosure of settlement agreements with two employer respondents in a case proceeding against three union respondents. It is noteworthy, however, that the Tribunal found that the complaints—though not identical—were "strikingly similar" (*Palm*, at para. 8). In particular, it was clear from a reading of the complaints that they all referred to the same two-month period at the same workplace establishment (*Palm*, at para. 7).

[30] In contrast, in the current matter, the potential for factual overlap remains speculative. The two complaints being compared in this case do not display the same "interconnectedness" as did the five complaints at issue in *Palm*. That is not to say that the CBSA complaint and the Air Canada complaint are unrelated. Rather, it is to say that at the current stage of proceedings, it is simply not possible to ascertain the extent or degree of their connectedness with the level of certainty that is required to rebut the presumption of settlement privilege. The *Dos Santos* judgment itself cautions against setting the test too low, as the public policy behind settlement privilege is a compelling one.

[31] Overcompensation is a possibility in this case, but its reality must be established before settlement privilege can be rebutted. The Tribunal invited the parties to consider a bifurcation of this inquiry, so that the potential overlap between the CBSA allegations and the Air Canada allegations could be fully explored during a hearing focussed on liability only. If and when liability had been established, the disclosure issues regarding overcompensation could then be considered and decided on a solid evidentiary footing. They might even be resolved consensually: see *Sable*, at para. 25. In spite of the apparent advantages of this approach, the parties declined the Tribunal's invitation.

[32] The motion for production of the settlement documents is hereby dismissed, without prejudice to the moving party's right to present it again after probative evidence has been adduced regarding the nature of the CBSA allegations vis-à-vis the Air Canada allegations and, in particular, regarding the degree and extent of any overlap between: (a) the

incidents comprising the two complaints; and, (b) the psychological harm allegedly caused thereby.

Signed by

David L. Thomas
Tribunal Chairperson

Ottawa, Ontario
February 4, 2016