Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2016 CHRT 7
Date: March 1, 2016
File Nos.: T1726/8111 & T1769/12411

Between:

Chris Hughes

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Canada Border Services Agency

Respondent

Ruling

Member: George E. Ulyatt

Table of Contents

I. Background 1

II. Analysis and Ruling 4

A. Issue No. 1 4

B. Ruling 5

A. Issue No. 2 5

B. Ruling 5

A. Issue No. 3 6

B. Ruling 9

I. Background

[1] There are presently two complaints before the Tribunal respecting alleged discrimination and discriminatory practices pursuant to sections 7 and 10 of the *Canadian Human Rights Act,* R.S.C. 1985 c. H-6 (“the CHRA”).

[2] The Tribunal has previously set forth the history of this matter up to November 7, 2013, in its Ruling dated April 7, 2014.

[3] Hearing dates were set for May 20 to 23, 2014, and subsequently, another period for continuation was set for the week of September 8, 2014. The parties continued with disclosure and disagreements by the Respondent, which the Complainant argued the disclosure was lacking key documents and the issue of redactions contained in the documents. The parties, by consent, agreed to adjourn the May 20 to 24, 2014 hearing dates, but would work towards the commencement of the hearing on September 8, 2014. This did not occur, as on August 13, 2014, at the request of the parties, the matter was adjourned *sine die* for settlement discussions.

[4] On or about December 14, 2014, at the request of the Complainant, a Case Conference Management Call (“CMCC”) was convened on January 7, 2015, and hearing dates were set for June 22 to 26, 2015, and September 14 to 18, 2015.

[5] At a subsequent CMCC on April 27, 2015, the Complainant raised issues concerning disclosure and the Complainant and the Respondent corresponded with disclosure and further disclosure was sought up to June 16, 2015.

[6] The hearing commenced on June 22, 2015, and at the outset, no preliminary motions were brought by either party.

[7] The hearing was adjourned on June 25, 2015, with respect to allegations of:

a) non-disclosure; and

b) pending a ruling by the Tribunal brought by the Respondent, as to whether or not there was an agreement as to parts of the complaint and therefore as to the scope of the Inquiry.

[8] At the CMCC on July 6, 2015, the dates of September 11 to 18, 2015 were set aside to deal with preliminary matters and Respondent counsel was directed to advise as to whether or not he would call *viva voce* evidence with respect to the issue of an agreement.

[9] The Respondent, on July 31, 2015, advised that no further evidence was to be called and the Tribunal issued a Ruling in letter format dated August 31, 2015, which stated in part:

> The last issue is the question of disclosure. It is noteworthy that at the outset of the hearing both parties indicated that they were prepared to proceed. One would have anticipated that the Respondent, if there were disclosure concerns, ought to have raised the objection at that time. It is disquieting that disclosure issues and objections are raised on the 4th day of the scheduled hearing. However, the Tribunal is left in a quandary by the Respondent counsel's letter of July 31, 2015, wherein it states:
>
> > "Given the respondent's election not to call evidence, please advise whether the dates currently reserved in September to hear outstanding issues are still required."
>
> The Tribunal is unable to determine if the Respondent's objections concerning disclosure are still outstanding or if they have been abandoned by the Respondent. The Respondent is directed to advise the Tribunal by the End of Business on September 2, 2015 as to its position on this issue.
>
> In a letter dated August 11, 2015, Complainant counsel noted that there were still disclosure issues respecting the Respondent. These issues will have to be addressed.
>
> Finally, the hearings will resume on Wednesday, September 16, 2015, at 9:30 a.m.

[10] The dates of September 11 to 18, 2015 were not used and were adjourned; the parties were directed that any outstanding disclosure matters were to be filed.

[11] The Respondent has filed its Motion.

[12] The present Motion, brought by the Complainant, seeks:

1. An order that the Respondent produce a Corporate Administrative System report containing the ages of Customs Inspectors and Border Services Officers hired externally in Pacific Region from 2001 to 2009 ("CAS Report");

2. An order that the Respondent produce assessment materials of two candidates (herein referred to as Candidates A and B for privacy reasons) who were deemed not qualified in the Respondent employer's selection process 2005-BSF-OC-PAC-1001 but who received employment opportunities pursuant to different selection processes;

3. An order that the Respondent produce a sampling of assessment materials for candidates in selection process 2003-1727-PAC-3391-1002 who (i) were screened out of the competition based on lack of experience and (ii) were initially screened into the competition but who the selection board found to be unqualified based on the submitted portfolio of competencies;

4. Further to the order in the preceding paragraph 3, a direction that the Respondent make available the assessment materials to the Complainant who will select a sampling of the materials of ten candidates screened out at each of the identified stages of the process;

5. That the Tribunal fix a deadline for the Complainant to file a written reply to the Respondent's response, if any, to the present motion;

6. That the Tribunal grant a brief oral hearing of the present motion by way of Case Management Conference Call.

[13] In support of the Complainant's Motion for disclosure, the Complainant had filed the affidavit of Tracy Brown, affirmed the 14th day of October, 2015, written representations of October 29, 2015, and the Complainant's Reply Brief of November 13, 2015, which contained the Affidavit of Lily Black, affirmed the 13th day of November, 2015.

[14] The Respondent filed a written response dated October 29, 2015, and, at paragraph 2 of its written representations, stated:

> 2. The Respondent's position on each of the requested orders is as follows: (a) <u>the Respondent agrees to produce a CAS Report setting out the age of employees hired as Border Services Officers in the Pacific Region from 2001 to 2009</u>; (b) while the Respondent maintains that the documents in question are not relevant, for reasons of adjudicative efficiency it agrees to produce the assessment materials of candidates A and B in selection

> process 2005-BSF-OC-PAC-100; (c) the documents sought from selection process 2005-BSF-OC-PAC-1001 are not subject to production pursuant to Rule 6(1)(d) and (5) of the *Canadian Human Rights Tribunal Riles and Procedure* (the "*Rules*"); and (d) in the alternative, if the Tribunal makes an order for production of the documents sought from selection process 2005-BSF-OC-PAC-1001 the sampling procedure suggested by the Complainant is wholly inappropriate. (Emphasis added)

[15] Furthermore, at paragraphs 11 and 12 of the Respondent's written representations dated October 29, 2015, is the following:

> 11. The respondent agrees to produce the requested CAS Report.
>
> 12. While the respondent maintains that the documents in question do not rise to meet the standard of being arguably relevant, for reasons of administrative-efficiency and to save further effort and expense, the respondent agrees to produce the Assessment Materials of A & B.

[16] At the end of the Respondent's written submissions, it appeared that the only outstanding matter was the third head of relief dealing with samplings of assessments.

II. Analysis and Ruling

A. Issue No. 1

[17] This is the Motion for:

(a) An order that the Respondent produce a Corporate Administrative System report containing the ages of Customs Inspectors and Border Services Officers hired externally in Pacific Region from 2001 to 2009 ("CAS Report");

[18] One would have assumed that this was a non-issue. Not so in the present Complaint. The Respondent has not produced the CAS Report setting out the ages of Border Services Officer hired externally in the Pacific Region from 2001 to 2009. In reviewing the Complainant's Motion, the phrase "<u>hired externally in the Pacific Region</u>" (emphasis added) was clear, as was the submission of the Complainant in paragraphs 66 and 67 of the Complainant's Motion for disclosure. This ought not to have come as a surprise to the Respondent as it was specifically requested by letter of June 16, 2015, Exhibit "U" to the Affidavit of Tracy Brown, affirmed the 14th day of October, 2015. The

Complainant, in an extensive Brief submitting his rationale for disclosure and the relevant legislation and authorities to support such a Motion.

[19] The Respondent has agreed to the disclosure and has provided no salient argument for why it ought not to be disclosed.

B. Ruling

[20] Therefore, the Respondent shall forthwith and in any event, within 21 days of the date of this Ruling, provide the Complainant with the materials requested as set forth in paragraph 1 of the Complainant's Notice of Motion.

[21] The Tribunal, if necessary, will hear submissions for an extension of time if so is required.

A. Issue No. 2

[22] This is the Motion for:

(b) An order that the Respondent produce assessment materials of two candidates (hereinafter referred to as Candidates A and B for Privacy reasons) who were deemed not qualified in the Respondent's employer's selection process 2005-BSF-OC-PAC-1001 but who received employment opportunities pursuant to different selection processes ("Assessment Materials of A and B").

B. Ruling

[23] As there has been agreement with respect to same, this material shall be supplied to the Complainant within 21 days of the date of this Ruling.

[24] The Tribunal, if necessary, will hear submissions for an extension of time if so is required.

A. Issue No. 3

[25] This is the Motion for:

(c) An order that the Respondent produce a sampling of assessment materials for candidates in selection process 2003-1727-PAC-3391-1002 who (i) were screened out of the competition based on lack of experience and (ii) were initially screened into the competition but who the selection board found to be unqualified based on the submitted portfolio of competencies;

(d) Further to the order in the preceding paragraph 3, a direction that the Respondent make available the assessment materials to the Complainant who will select a sampling of the materials of ten candidates screened out at each of the identified stages of the process;

[26] The Complainant argues that the samples from selection process 2003-1727-PAC-3391-1002, with respect to candidates who were screened out of the competition based on lack of experience and who were initially screened into the competition but were found to be unqualified on their submitted portfolio of competencies, are in fact relevant and germane.

[27] The Complainant's position for same is set forth in paragraphs 77 and 78 of the Complainant's Motion Brief, which states that they are relevant for comparison of the Complainant's qualifications in addition to qualifications of younger candidates being qualified against candidates who failed out of the competition. Also, it was submitted that for every selection board, there is a bare minimum of qualifications, and then the standards applied for the remaining screening process. In the present circumstances, Mr. Hughes, the Complainant herein, alleges that the screening board deviated in following those standards.

[28] The Respondent argues that the request by the Complainant does not meet the standard of "relevance." Furthermore, the Respondent argues that the request for the candidate sampling is "both speculative and the very definition of a fishing expedition." (*Respondent's Brief of October 29, 2015*, at paragraph 16)

[29] The Respondent relies on *Johanne Guay v. Royal Canadian Mounted Police,* 2004 CHRT 34 ("*Guay*"), at para. 43, wherein Member Michel Doucet stated:

> The request must not be speculative or amount to a "fishing expedition". The description of the documents should not be too broad or general and should be identified with reasonable particularity. Finally, the request should not be oppressive, that is, should not subject a stranger to the litigation to an onerous and far-ranging search for documents. (See *CTEA v. Bell Canada* T503/2098, Ruling No. 2)

[30] Furthermore, it is submitted that there must be, as recognized by previous Tribunals, a nexus between what is sought and the issues in dispute. In this case, with respect to candidate sampling, Respondent counsel submits that such a nexus does not exist and furthermore states, at paragraph 17 of his Brief, as follows:

> The unassailable flaw in the Complainant's assertion of relevance is that he was not himself screened out of the selection process for lack of experience at the outset. Nor was he initially screened into the competition only to later be found unqualified on his submitted POCs.

[31] The Respondent also argues relevancy and the Complainant would be requesting the right to search the Respondent's records, without restriction. The Respondent takes the position that a sampling in fact distorts the process and, if production were ordered, all of the documents should be ordered; not only a sampling.

[32] The Complainant asserts that the Respondent has failed to realize that there are two elements to the Complaint:

> …[O]ne alleging the employer discriminated against the Complainant personally on the basis of age and disability, contrary to section 7 of the *Canadian Human Rights Act,* and the other alleging that the employer pursued a policy or practice that, contrary to section 10, deprived individuals of employment opportunities on the basis of age. (*Complainant's Reply Brief dated November 13, 2015*, at paragraph 11)

[33] The Complainant maintains that these documents are not speculative and are not a fishing expedition, and that the Respondent has already disclosed names of candidates in other competitions at issue, but has not done so for the specific competition 2003-1727-PAC-3391-1002. The Complainant has modified its request to seek:

> 19. In sum, to be clear, the Complainant is requesting the assessment materials for Candidate #1 to Candidate #9 as an alternative to disclosure of the assessment materials for all relevant candidates. (*Complainant's Reply Brief dated November 13, 2015*, at paragraph 19)

[34] In the alternative, at paragraph 20 of the Complainant's Reply Brief, the Complainant stated:

> As an alternative to the disclosure of the assessment material for all candidates screened out of the competition for lack of experience, the Complainant requests an order that the Respondent produce a list of the names of candidates screened out of the competition at this stage from which the Complainant will select assessment materials, without prejudice to his position that the assessment material of all candidates is arguably relevant to his complaint.

[35] Thus, the Complainant had made an initial request in his Motion and then provided two alternatives for consideration which, for various reasons, the Respondent takes issue with.

[36] The Respondent argues that the requirement to produce all of the documentation would be extremely onerous and would put the Respondent to considerable effort and additional expense where the relevance is purely speculative.

[37] In *Guay* (supra), at paragraph 44, the Tribunal referred to the case of *Day v. Department of National Defence and Hortie* (Hortie)*, Ruling No. 3*, 2002/12/06:

> i. The Tribunal should determine whether the information is likely to be relevant, which is not a particularly high standard. There must be some relevance, and the party seeking production of the information or documents must demonstrate a nexus between the information or documents sought and the issues in dispute. The material must be probative and arguably relevant to an issue in the hearing. This is meant to prevent production for purposes which are speculative, fanciful, disruptive, unmeritorious, obstructive and time-consuming.

ii. The Tribunal must then consider any other issues that may have a bearing on disclosure, without examining the documents. If there is no compelling reason to maintain the privacy of the documents, they should be released.

iii. If the Tribunal is unable to resolve the matter without examining the material, it should inspect the documents. In the final step of this process, it may be helpful for the party requiring the documents to be protected to draw the Tribunal's attention to passages or individual documents that raise concerns.

[38] As noted in *Hortie* (supra), whether the information is likely relevant is "not a particularly high standard." In the present circumstances, the threshold of "arguably relevant" has been met and there is a nexus to the documentation and the claim; therefore the documentation is disclosable. However, the Tribunal is persuaded by the Respondent's position that to produce <u>all</u> of the documentation at this juncture may cause difficulties and have significant economic impact upon the Respondent.

B. Ruling

[39] The Tribunal therefore orders:

i. The Respondent to produce the assessment materials of Candidate #1 through Candidate #9, without prejudice to the Complainant's position that the assessment material of all candidates is relevant, **or alternatively**;

ii. The Respondent to produce a list of the names of candidates screened out of the competition at this stage from which the Complainant will select assessment materials, without prejudice to his position that the assessment material of all candidates ought to be provided.

[40] If the materials are lacking the specificity required, or are inadequate, the Tribunal will review the Order respecting disclosure of all documents requested.

[41] The said materials shall be provided within 21 days of the date of this Ruling.

[42] The Tribunal, in necessary, will hear submissions for an extension of time if so is required.

[43] The Tribunal does not believe there will be any privacy concerns, but would reiterate the Ruling made on April 7, 2014, wherein I ordered:

a) The parties and their representatives to keep confidential all information regarding the identity of job candidates unrelated to the Complaint.

b) That during the hearing process, although the names would be open, the Tribunal will ensure whenever possible that their names not appear in a decision.

[44] The hearing dates resuming the week of April 4, 2016 are confirmed and any further motions will be heard at the commencement of the hearing.

Signed by

George E. Ulyatt
Tribunal Member

Ottawa, Ontario
March 1, 2016