Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2019 CHRT 31
Date: July 18, 2019
File No.: T1817/4712

Between:

Geevarughese Johnson Itty

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Canada Border Services Agency

Respondent

Ruling

Member: Olga Luftig

Table of Contents

I. The Complainant's motion

[1] Mr. Geevarughese Itty Johnson, also known as Mr. Johnson Itty (Complainant) has made a motion for disclosure from the Canada Border Services Agency (CBSA or Respondent). The Canadian Human Rights Commission (Commission) has not participated in this motion.

II. The Complaint and amendments

[2] As at September 26, 2018, after two amendments, the complaint (Complaint) alleged that in its Port of Entry Recruitment Training program (POERT) in which the Complainant participated from November 24, 2008 to February 5, 2009, the Respondent discriminated against the Complainant on the grounds of race and national or ethnic origin contrary to section 7 of the *Canadian Human Rights Act,* R.S.C., 1985, c H-6, as amended (*Act*) and that, on the same grounds, the Respondent engaged in systemic discrimination contrary to section 10 of the *Act*.

III. Context of the Complaint

[3] Strictly for the purposes of this Ruling, the following is a brief outline of the context of the Complaint.

[4] The Complainant, a naturalized Canadian citizen born in India, while an employee of the Canada Revenue Agency (CRA), applied to the Respondent in 2007 to become a Border Services Officer (BSO). He passed the initial screening and the Respondent invited him as a trainee (also called a recruit or candidate) into the nine (9) week POERT program.

[5] POERT contains two evaluation stages, called Determination Points: Determination Point I (D-I) occurs after the first stage of classes, and Determination Point II (D-II) after the second stage. Trainees must pass the entire POERT program in order to be placed in a pool of those eligible to be hired as BSOs.

[6] After being trained to do so, CBSA employees act as assessors (Assessors) and evaluate the POERT trainees pursuant to behavioural scenarios (Simulations) in which professional actors play a traveller, and the trainees act as a BSO and which purport to test various enumerated competencies (Competencies).

[7] The evidence adduced at the hearing to date is that there were 16 or 17 trainees in the Complainant's class (not in the entire POERT program at issue).

[8] The Complainant passed all the Simulations and written tests in D-I.

[9] He then took the second stage of classes at the end of which Assessors evaluated him in D-II. D-II consisted of another set of written tests and Simulations, evaluated by Assessors, who evaluated the trainees on ten (10) enumerated Competencies. There was also a Control and Defensive Tactics evaluation which the Complainant passed.

[10] After the Simulations are completed, the Assessors fill out what is officially titled the "Simulation Exercise Recruit Assessment Report – D-II Series" (hereafter called "D-II Assessment Reports"), assessing the recruit and deciding whether he or she met or did not meet the Competencies in each of the D-II Simulations. That is to say, the Assessor determines whether the recruit passed the Simulations, comments on the recruit's behaviour in the Simulations and makes any suggestions for improvement.

[11] According to the testimony of the Respondent's witness Dr. Francois Ducharme, at the end of the POERT program, the only assessment document the trainees receive are their D-II Assessment Reports.

[12] The Complainant did not pass all the Simulations in D-II and was not placed in the pool of potential BSOs.

IV. Procedural background to the present motion

[13] This is not a pre-hearing motion for disclosure. The hearing in this inquiry began on August 14, 2017. The Commission did not participate. Both parties were represented.

[14] The hearing chronology to date is as follows:

a. on August 14, 2017, the Complainant began presenting his case;

b. on August 17, 2017, the Complainant closed his case;

c. on August 18, 2017, the Respondent began presenting its case and three of its ten scheduled witnesses testified and were cross-examined;

d. on August 21, 2017, the Complainant's representative and the Complainant advised the Tribunal and Respondent that the Complainant was terminating his representative's services. The Complainant requested an adjournment in order to obtain other representation;

e. the Respondent contested the request for an adjournment;

f. on August 22, 2017, after hearing the parties' submissions, the Tribunal granted the adjournment, and directed the Complainant to retain another representative, if he was going to do so, by September 12, 2017; the parties and the Tribunal discussed that the hearing could likely resume about 6 months later.

g. The hearing remains adjourned as at the date of these reasons.

[15] On August 28, 2017, the Complainant retained another representative, who was not a licensee of a provincial bar. There were issues around disclosing the documents covered by the Confidentiality Orders to that representative. On April 28, 2018 that representative's engagement ended. The Complainant retained his current representative, who is a lawyer licensee and who received the file from the first representative.

[16] By letter dated September 26, 2018, the Complainant's new counsel requested, among other things, the disclosure discussed below. After a Case Management Conference Call (CMCC), the Tribunal directed that the Complainant's requests for disclosure be made by way of motion.

V. The Complainant's motion

[17] The Complainant's motion seeks the following:

a. an order that the Respondent disclose the unredacted Simulation Exercise Recruit Assessment Reports – Series D-II (Un-redacted D-II Assessment

Reports) of the other recruits in the Complainant's class, showing the recruits' names; and

b. given that the Respondent retained the Assessors' notes regarding the Complainant's performance during Simulations 4, 5 and 6 in D-II, specifically their notes on pages 2, 3, 4, 5 and 8 thereof, and pages 6 and 7 which the Assessors completed after the recruit left the testing area (Assessment Forms), but destroyed the Assessment Forms in respect of the Complainant's classmates, an order that the Respondent disclose:

    i. its document retention policy;

    ii. the date on which the Assessment Forms were destroyed;

    iii. the date on which counsel requested the Assessment Forms, and

    iv. a list of individuals who reviewed the Assessment Forms before their destruction, including counsel.

VI. The Confidentiality Orders and agreement re Tribunal's final Decision

[18] The Tribunal has made a series of confidentiality orders in this inquiry, governing certain documents and testimony about those documents.

[19] In *Itty v. Canada Border Services Agency*, 2013 CHRT 34, dated December 16, 2013, the Tribunal designated certain enumerated documents as confidential pursuant to section 52 of the *Act* and by order, stipulated how the parties were to store and handle the documents (*First Confidentiality Order).* The First Confidentiality Order arose from the Respondent's May 17, 2013 motion (First Confidentiality Motion) for an order designating as confidential the itemized documents in Schedule "A" (Schedule "A" Documents) in the supporting Affidavit of Fernande Surprenant, sworn May 17, 2013 (Surprenant Affidavit). The Complainant had earlier requested disclosure of the Schedule "A" documents. As a condition of disclosing the Schedule "A" documents, the Respondent sought specific terms for any disclosure order.

[20] Item 10 in the Schedule "A" Documents is described as "Border Services Officer Simulation Exercises – Recruit Assessment Report Determination Point II for other candidates in Mr. Itty's class". The Respondent's June 17, 2013 Reply in the First Confidentiality Motion stated at paragraph 9 that in those documents, it had redacted

"…the names of the individuals to which the documents pertain." These are the D-II Assessment Reports relating to the Complainant's classmates in respect of which he seeks disclosure of the un-redacted versions – that is, with the names visible.

[21] In *Itty v. Canada Border Services Agency*, 2015 CHRT 2 (*Second Confidentiality Order*), the Tribunal extended the First Confidentiality Order to cover all previously undisclosed pages of the Respondent's unredacted Simulation Exercise Administration Manual.

[22] On consent of the parties, on August 9, 2017 the Tribunal issued *Itty v. Canada Border Services Agency*, 2017 CHRT 26 (*Third Confidentiality Order*), extending the *First* and *Second Confidentiality Orders* to another group of documents the Complainant wished disclosed.

[23] At the hearing, the Respondent's and the Complainant's representatives told the Tribunal that the Respondent had previously disclosed the entire contents of the D-II Assessment Reports in respect of the Complainant's classmates, except that their names were redacted.

[24] At a CMCC on November 9, 2018, the parties agreed with the proposal that the Tribunal issue two versions of its final Decision: one version for the parties containing unredacted references to matters the Confidentiality Orders covered, and another version for the Tribunal's website, accessible to the public, and referring only in a generic way to matters the Confidentiality Orders cover.

Issues

[25] The Respondent has agreed to disclose its document retention policy. The remaining issues are:

a. whether the Tribunal should order the Respondent to disclose the un-redacted D-II Assessment Reports of the rest of the Complainant's classmates – that is, showing their names; and

b. whether the Tribunal should order the Respondent to disclose:

(1) the date on which the Respondent destroyed the D-II Assessment Forms for the rest of the Complainant's class;

(2) the date on which counsel requested those Assessment Forms, and

(3) a list of individuals, including counsel, who reviewed those Assessment Forms before their destruction.

Complainant's Submissions in its Notice of Motion

[26] The following is a summary of the Complainant's submissions in his Notice of Motion.

a. Rule 6 of the Canadian Human Rights Tribunal Rules of Procedure (03-05-04) (Tribunal Rules) includes the procedure for disclosure.

b. According to Rule 6(5), as interpreted in Tribunal jurisprudence (e.g., the *Second Confidentiality Order),* a party's obligation to disclose and produce documents an ongoing one.

c. Notwithstanding that he closed his case, the Complainant can still utilize his classmates' Un-redacted D-II Assessment Reports when cross-examining the Respondent's witnesses.

d. The standard for the disclosure of documents pursuant to Rules 6(1)(d) and 6(5) is that the documents be arguably relevant to a fact, issue or form of relief sought, or identified by other parties.

e. *Seeley v. CNR,* 2013 CHRT 18 (*Seeley*), at para. 6, is authority for the principle that for a document to be arguably relevant, there must be a rational connection or nexus between the document and a fact, issue or form of relief sought, or identified by other parties.

f. *Gaucher v. Canadian Armed Forces*, 2005 CHRT 42 (*Gaucher*), at para 11, is authority for the proposition that the threshold for arguable relevance is "…low and the tendency is now towards more, not less disclosure".

g. Requests for disclosure must not be "…speculative or amount to a fishing expedition" (*Guay v. Royal Canadian Mounted Police*, 2004 CHRT 34 (*Guay*), at para.43.

h. The Un-redacted D-II Assessment Reports of the Complainant's classmates are arguably relevant because:

(1) the previously disclosed redacted D-II Assessment Reports of the Complainant's classmates set out whether the recruit obtained a mark of "met" or "not met" for each Competency assessed during the Simulations,

and also include feedback for each recruit, under the headings “summary of strong points” and “summary of areas for development”;

(2) their disclosure is necessary for the Complainant to demonstrate that the Respondent has established a discriminatory practice or policies;

(3) they relate to the Complainant’s allegations that the Respondent held him to a higher standard on the basis of his race, colour, and national or ethnic origin. The argument of higher standard necessarily relies on making comparisons between the Complainant and his classmates.

(4) The comparison cannot be made without knowing which Assessment Report refers to which classmate.

(5) The Tribunal has held in cases pertaining to age discrimination that documents used to assess the merit of all persons against whom a complainant was rated are “…clearly relevant” (*Gaucher, supra,* at para. 22, quoting *Morris v. Canada (Canadian Armed Forces)* [2001] C.H.R.D. No.41 (*Morris*), at para. 129, affirmed 2005 FCA 154. Although *Morris, supra,* involved age discrimination, the same is true for the discrimination the Complainant alleges. These types of documents are usually used to establish a prima facie case of discrimination (*Gaucher, ibid*).

(6) On August 14, 2017, at the hearing, the Respondent consented to the disclosure of the Un-redacted D-II Assessment Reports of trainees A and M in the Complainant’s class, provided the Tribunal issue an order for the disclosure, within the meaning of subsection 8(2)c) of the *Privacy Act,* R.S.C. 1985, P-21 (*Privacy Act*). The Tribunal issued an oral order to that effect. The *Privacy Act* does not prohibit the disclosure of the Un-redacted D-II Assessment Reports of the Complainant’s classmates.

The Respondent’s Submissions

[27] In its Response, the Respondent consented to disclose its document retention policy, but objected to the rest of the Complainant’s requests for disclosure.

[28] The Respondent’s objections to the rest of the Complainant’s disclosure requests can be summarized as follows.

a. Tribunal inquiries are meant to be informal and expeditious, in accordance with Tribunal Rule 1(1). It is in both the Respondent’s and the public’s interests that the hearing resume quickly. The Federal Court of Appeal has criticized the “…lengthy delays …all too often seen in human rights adjudication” (*Canada* (*Human Rights Commission) v. Canada (Attorney General),* 2016 FCA 200, at

para 103, aff'd *Canada (CHRTC) v. Canada (Attorney General)*, 2018 SCC 31 (CanLII).

b. The Respondent had previously disclosed the entire contents of the D-II Assessment Reports for the Complainant's classmates, with the exception of the names, which were redacted on the basis that their names are personal information within the meaning of section 3 of the *Privacy Act*. The Respondent had redacted the names because subsection 8(1) of the *Privacy Act* requires that personal information under the control of government institutions not be disclosed without the consent of the individual to whom it relates.

c. Although subsection 8(2)(b) of the *Privacy Act* permits a governmental authority to disclose personal information if a body like the Tribunal orders it to do so, the Federal Court has held that this exemption should not be construed liberally (*Canada (Minister of Public Safety and Emergency Preparedness v. Kahlon*, 2005 FC 1000 (*Kahlon*), at para 36. "Rather, personal information which has no apparent relevance to the [underlying issue(s)] ought not to be readily disclosed." (*ibid*).

d. The Complainant's classmates are third parties who are not before the Tribunal. They cannot make submissions on the Complainant's request for their confidential personal information. The Tribunal must be mindful of their privacy interests.

e. The Respondent's disclosure of the Complainant's classmates' D-II Assessment Reports, except for their names, strikes the appropriate balance between third party privacy interests and the Complainant's procedural fairness interests.

f. The existing delay in the resumption of the hearing has already prejudiced the Respondent.

g. The responsibility for the delay is the Complainant's. He had closed his case and then, on August 21, 2017, when the Respondent was in the middle of its case, the Complainant requested an adjournment so he could obtain new representation.

h. On August 28, 2017, the Complainant retained as his representative a non-licensee of any provincial bar, who had been disbarred as a lawyer and refused licensing as a paralegal. The Complainant "insisted" that the Respondent disclose to that representative the documents the Confidentiality Orders designated as confidential. This necessitated the Respondent's motion seeking to refuse that disclosure. The motion was to be heard June 4 and 5, 2018, but the Complainant's representative advised on April 28, 2018 that he no longer represented the Complainant. Therefore, all the time and effort for the motion was thrown away.

i. The Respondent is being further prejudiced by the Complainant's present request for disclosure of documents dealing with destroyed D-II Assessment

Forms**,** the search for which will constitute a prejudicial delay of the Respondent's case, which outweighs the documents' probative value for the Complainant's case.

j. The Tribunal may refuse to order further disclosure where the prejudicial effect of such order on the proceedings would outweigh the probative value of the evidence sought, as in *Brickner v. Canada (RCMP*), 2017 CHRT 28 (*Brickner*), at para. 8.

k. The Complainant seeks this disclosure more than a year after he closed his case, demonstrating that the probative value of what the Complainant seeks is minimal, and is outweighed by the prejudice to the Respondent in further delaying the resumption of the hearing. The Respondent questions the utility of disclosing the documents the Complainant seeks at this stage of the hearing, given the fact that the Complainant has already closed his case.

l. The Tribunal Rules limit parties' disclosure obligations to "…documents in their possession…" which relate to facts, issues and forms of relief sought or identified by either party as set out in Tribunal Rule 6(1)(d) and 6(1)(e).

m. The Complainant's requests for dates and a list of individuals who reviewed the documents before they were destroyed would require the Respondent to make inquiries and create new documents containing the answers to the Complainant's requests. In *Gaucher v. Canadian Armed Forces*, 2006 CHRT 42 (*Gaucher*)*,* the Tribunal decided that the Tribunal Rules do not require parties to create documents for disclosure (at para 17).

n. If the Tribunal does order disclosure of the Complainant's classmates' Un-redacted D-II Assessment Reports, the Tribunal must extend the Confidentiality Orders to cover them.

Complainant's Reply

[29] The following is a summary of the Complainant's Reply.

a. The Respondent has not provided any authority indicating that a complainant cannot seek disclosure after he closes his case.

b. The Complainant agrees that the Tribunal Rules limit disclosure to documents in a party's possession, and he submits that he has identified the documents sought with as much specificity as possible, considering he does not know which documents the Respondent has.

c. The Respondent has not indicated that it does not have the documents about the destruction of the Assessment Forms, nor has it indicated that they are not arguably relevant.

d. The Complainant denies that the responsibility for any delay is his alone. The Respondent also delayed. With respect to the Respondent's allegation of delay on account of the Complainant's previous choice of representative, the Complainant was and is entitled to have the representative of his choice. Further, a non-lawyer is entitled to represent a party before the Tribunal.

VII. Analysis
Statute law, case law and Tribunal Rules

[30] Subsection 48.9(1) of the *Act* states that proceedings before the Tribunal "…shall be conducted as informally and expeditiously as the requirements of natural justice and the rules of procedure allow."

[31] Subsection 50(1) of the *Act* provides that the Tribunal:

> "…shall give all parties to whom notice [of the inquiry] has been given a full and ample opportunity, in person or through counsel, to appear at the inquiry, present evidence and make representations" – in other words, a full and ample opportunity to present their case."

[32] Tribunal Rule 6(1) states, in part:

> "Within the time fixed by the Panel, each party shall serve and file a Statement of Particulars setting out,
>
> the material facts that the party seeks to prove in support of its case;
>
> its position on the legal issues raised by the case;
>
> the relief that it seeks;
>
> 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;"

[33] Tribunal Rule 6(5) states:

> "A party shall provide such additional disclosure and production as is necessary
>
> (a) where new facts, issues or forms of relief are raised by another party's Statement of Particulars or Reply; or

(b) where the party discovers that its compliance with 6(1)(d), 6(1)(e), 6(1)(f), 6(3) or 6(4) is inaccurate or incomplete."

[34] The standard of disclosure of a document pursuant to Rule 6 is that the document be arguably relevant to a fact, issue or form of relief sought in the case, or identified by any party under the Rule (*First Confidentiality Order*, *supra,* at para. 24). For a document to be arguably relevant, there must be a nexus between it and the issues in dispute (*Seeley v. Canadian National Railway*, 2013 CHRT 18 (CanLII) (*Seeley*), at para 6. In this inquiry, the parties have agreed to bifurcate the hearing, with the present hearing only to decide liability. Therefore, the connection of a document to a remedy sought does not apply to the present motion.

[35] The Tribunal has held that "…[t]he threshold for arguable relevance is low and the tendency is now towards more, not less disclosure…" (*Gaucher, supra*, at para. 11). However, a disclosure request must not be speculative or amount to a "fishing expedition" (*Guay v. Royal Canadian Mounted Police*, 2004 CHRT 34 (*Guay*), at para 43. The Tribunal is also entitled to deny disclosure if the "…probative value of such evidence would not outweigh its prejudicial effects on the proceedings" (*Brickner*, *supra*, at para 8.)

[36] The Tribunal in *Brickner* stated "…in the search for truth and despite the arguable relevance of evidence, the Tribunal may exercise its discretion to deny a motion for disclosure, so long as the requirements of natural justice and the Rules are respected, in order to ensure the informal and expeditious conduct of the inquiry" (*Brickner*, *supra*, at para 7).

The Complainant's classmates Un-redacted D-II Assessment Reports

[37] The Complainant wishes to have disclosure of the Un-redacted D-II Assessment Reports of his classmates in order to cross-examine the Respondent's witnesses thereon. He submits that the names are necessary in order to compare how the Respondent assessed those of the Complainant's classmates who did not share his attributes of race, colour and national or ethnic origin, with how the Respondent

assessed the Complainant. In this way, he plans to establish that the Respondent assessed the Complainant at a higher standard based on discriminatory grounds.

[38] On August 17, 2017, at the hearing, the Complainant's representative advised the Tribunal and the Respondent that the Complainant was deleting paragraph 28 from his Statement of Particulars (SOP). That paragraph stated that the Respondent's assessment of trainee A in D-II relative to its assessment of the Complainant in D-II was an example of the higher standard to which the Respondent held the Complainant, based on discriminatory grounds. On August 17, 2017, the Complainant also advised that trainee A would not be testifying.

[39] The Complainant's representative confirmed, however, that the Complainant had not withdrawn his allegation in paragraph 27 of his SOP that overall, the CBSA held him to a higher standard than the other candidates in his class who did not have his racial, national or ethnic origin.

[40] One of the allegations in the Complaint and also appearing in the Complainant's SOP, at paragraphs 27, 29-33 and at paragraph 57, is that the CBSA held the Complainant to a higher standard, marking him more severely in D-II Simulations 4, 5 and 6, than it did the Complainant's classmates, and that it did so on the basis of race, colour and national or ethnic origin, thus discriminating against him.

[41] At paragraphs 54 and 55 of his SOP, the Complainant states that the Competencies on which the POERT recruits must obtain a mark of "met", "…including…Dealing with Difficult Situations, Effective Interactive Communication, and Self-confidence…" are themselves discriminatory because they are "…highly subjective and adversely impacted…" the evaluations of Mr. Itty's performance because his race, color, national or ethnic origin played a significant factor in his evaluations." He alleges that the Competencies are therefore discriminatory policies and that the POERT program itself is discriminatory and contrary to section 10 of the *Act*. Further, he alleges that CBSA's application of the Competencies constitutes a discriminatory practice, contrary to section 10 of the *Act*.

[42] I find, expressed in broad strokes, that what the Complainant wishes to establish, based on his Complaint, his SOP and his opening statement at the hearing, is that the Respondent held him to a higher standard than his classmates when it assessed him in the D-II Simulations, and that it did so on the prohibited grounds of race, colour, and national or ethnic origin. As a consequence, the Complainant asserts the Respondent differentiated adversely against him on those prohibited grounds, within the meaning of section 7 of the *Act*.[1]

[43] I also find, again in broad strokes, based on his Complaint, his SOP and his opening statement at the hearing, that the Complainant wishes to establish that the Competencies criteria on which the Assessors evaluated his performance in the Simulations, particularly those Competencies he failed, "…are extremely subjective and therefore vulnerable to prejudice and discrimination" (Complainant's SOP, at para 3. These criteria are therefore alleged to be discriminatory policies or practices within the meaning of section 10 of the *Act.*

[44] The Complainant submitted that in order to demonstrate that the Respondent held the Complainant to a higher standard, he must be able to compare the Complainant's D-II Assessment Reports to those of his classmates, and the comparison cannot be made unless the documents show which D-II Assessment Report relates to which trainee. The Complainant also submitted that the names were arguably relevant to the Complainant's allegation of systemic discrimination. Further, the Complainant submitted that he can utilize the Un-redacted D-II Assessment Reports to cross-examine the Respondent's witnesses.

[45] The Respondent submits that its prior disclosure of the D-II Assessment Reports relating to the Respondent's classmates, minus their names, strikes the appropriate balance between the privacy interests of these third parties who are not before the

[1] On August 14, 2017, before the parties' opening statements, when the Tribunal asked the Complainant's representative whether it was subsection 7(a) or subsection 7(b) which applied to this Complaint, he stated that the Complainant wished to leave the issue open, to be dealt with in closing arguments, and that the Complainant may contend that both subsections applied. The Respondent's counsel stated that the Respondent thought that subsection 7(a) applied because the Complainant was not the Respondent's employee, but that the Complainant could make his submissions in closing arguments. Presumably, both parties will make further submissions at that time.

Tribunal and the Complainant's procedural fairness interests. Assuming that such a balancing exercise is necessary, I believe that a more appropriate balance can be struck. I take into account that the parties agree that the Confidentiality Orders cover the Un-redacted D-II Assessment Reports as well as their agreement during the November 26, 2018 CMCC that the Tribunal issue two versions of its Decision – one for the parties containing confidential information, and one for the public containing only generic references to confidential information. I find that the foregoing measures will adequately protect the privacy of these individuals if the Tribunal orders disclosure of the Complainant's classmates' Un-redacted D-II Assessment Reports.

[46] Furthermore, I must I also take subsection 50(1) of the *Act* into account in that balancing. That subsection provides that the Tribunal is required to give all parties who have received notice of the inquiry "…a full and ample opportunity… to present evidence and make representations". Disclosure of the Un-redacted D-II Assessment Reports will enhance the Complainant's opportunity to present his case.

[47] I conclude that based on the low threshold required to find a document arguably relevant for the purpose of disclosure, there is a rational connection or nexus between the names of the Complainant's classmates which would be disclosed in their Un-redacted D-II Assessment Reports and the issues in this Complaint – namely, whether the Respondent held the Complainant to a higher standard during the D-II Simulations than it did his classmates who did not share his attributes of race, colour or national or ethnic origin; and whether the Competencies criteria which the Respondent's Assessors applied during the D-II Simulations are themselves subjective and capable of being applied in a discriminatory manner.

[48] For the reasons set out above, I find that the Un-redacted D-II Assessment Reports of the Complainant's classmates are arguably relevant, and the Respondent must disclose these Reports in unredacted form.

[49] I note that on August 14, 2017, the Complainant's representative told the Tribunal that he had just been informed that the Un-redacted D-II Assessment Reports of the Complainant's classmates were in the Respondent's possession. The

Respondent consented to the disclosure of the D-II Assessment Reports of trainees A and M, two of the Complainant's classmates. I therefore find that it is reasonable to assume that the rest of the Complainant's classmates Un-redacted D-II Assessment Reports are similarly in the Respondent's possession. Therefore, with respect to the issue of delay in these circumstances, I infer that the Respondent should be able to disclose those documents reasonably quickly and that such disclosure would not cause an unreasonable delay in the resumption of the hearing.

[50] As described in paragraph 21 of the within Ruling, Item 10 in the Schedule "A" Documents consists of the D-II Assessment Reports of the Complainant's classmates, with their names redacted.

[51] I draw the parties' attention to paragraph 31 of the First Confidentiality Order which specifically addresses items 10 and 12 in the Schedule "A" Documents:

> "[31] The parties shall comply with the following conditions with respect to items 10 and 12 of the Schedule "A" Documents:
>
> (a) the Complainant shall only disclose each of item 10 and 12 to the witness to whom the item pertains and to no other witness;
>
> (b) before the Complainant discloses item 10 and 12 or either of them to the witness to whom the item pertains, the Complainant shall obtain and provide to the Respondent the witness' written consent for the Respondent to disclose to the Complainant and his representative which documents pertain to the witness;
>
> (c) upon receipt of the witness' written consent, the Respondent will disclose to the Complainant which documents pertain to which witness;
>
> (d) the Complainant shall only permit the applicable witness to view the documents in question either at the office of the Complainant's representative or during the hearing before the Tribunal;
>
> (e) the Complainant and his representative, or either of them, shall not provide the witness with his or her own copy of the documents."

[52] The above order contemplates that any Un-redacted D-II Assessment Report in respect of a given trainee would only be used during the examination of that trainee, were he or she to be called as a witness. It does not contemplate the use of the Un-

redacted D-II Assessment Reports for the Complainant's classmates that is indicated in the present motion.

[53] The Complainant has consented to the Respondent's submission that if the Tribunal orders disclosure of the Un-redacted D-II Assessment Reports for the rest of the Complainant's classmates, the Tribunal should designate those Assessment Reports as confidential and extend the Confidentiality Orders to them. I am satisfied that it is appropriate for the Tribunal to issue a confidentiality order with respect to the Complainant's classmates' Un-redacted D-II Assessment Reports because they are third parties not before the Tribunal, who may not be aware that their personal information will be disclosed, and because they have not made submissions to the Tribunal with respect to such disclosure. The Tribunal designates these documents as confidential in accordance with s.52 of the *Act.* They shall not be disclosed to anyone other than the Complainant and his counsel without the Tribunal's prior permission, and subparagraphs 30(b) through 30(f) of the First Confidentiality Order shall apply to them *mutatis mutandis*.

[54] The Tribunal will require submissions from the parties on the issue of the conflict between parts of the First Confidentiality Order and the within order to disclose the Complainant's classmates' Un-redacted D-II Assessment Reports, and how this conflict can best be addressed. The Tribunal will arrange a CMCC shortly, during which these submissions can be made.

The destruction of the D-II Assessment Forms for Simulations 4, 5 and 6

[55] The Complainant's submissions in the Notice of Motion related to his request for disclosure pertaining to the destruction of the Complainant's classmates' D-II Assessment Forms can be summarized as follows.

a. According to the testimony of the Respondent's witness Dr. Francois Ducharme, at the end of D-II, the recruits are provided with "generic" comments on their performance. Assessors could cross-reference these "generic" comments to the Assessor's own notes, "…which [the witness] identified as the Assessment Forms for Simulation Exercises". The witness further testified that during the Simulations, the Assessors were to write these notes into pages 2 through 5 and

page 8 of the booklet they used to assess the recruits. The Assessors were to complete pages 6 and 7 of the booklet after the recruit had left the room.

b. In *Yaffa v. Air Canada,* 2016 CHRT 4 *(Yaffa),* at para 28*,* the Tribunal stated that if evidence at a hearing establishes a foundation for such a motion, a party may at that time make a motion for disclosure of documents.

c. The Complainant's classmates' D-II Assessment Forms were arguably relevant because they contained the Assessors' notes made in "real-time", as the Complainant's classmates were doing D-II Simulations 4, 5 and 6. These Assessment Forms would have allowed the Complainant to establish that the Respondent held the Complainant to a higher standard than it did his classmates. This would have been done by comparing the real-time notes made during the classmates' D-II Simulations to the real-time notes made during the Complainant's D-II Simulations.

d. The Respondent's October 31, 2018 letter stated that the Assessment Forms for the Complainant's classmates were "disposed of in accordance with the [CBSA's] standard document retention policy" and that the Respondent intended to call evidence thereon.

e. Therefore, because the destroyed Assessment Forms themselves were arguably relevant, the disclosure of documents setting out the information the Complainant seeks about their destruction is necessary for the Complainant to fully and amply present his case, which he is entitled to do pursuant to subsection 50(1) of the *Act*. That right includes the right to cross-examine the Respondent's witnesses on the subject of document destruction.

[56] I find that the following parts of Dr. Ducharme's testimony are relevant to this aspect of the Complainant's motion.

[57] According to this witness' testimony, the Assessors were given a separate booklet to use for the assessment of each trainee on their D-II Simulations. The Assessors were to make notes in the booklet's pages 2, 3, 4, 5 and 8, recording only what the trainees did and said as the Simulations unfolded. The Assessors were to make these notes while the trainees were performing the Simulations – in other words, in real time. The notes were only to include observations made during the Simulations about the interactions between the actor who was playing the role of the traveller and the trainee. The notes were not to include the Assessor's conclusions or any assumptions. The *verbatim* recording of the trainee's statements would be ideal.

[58] Dr. Ducharme testified in re-examination that the booklet's page 8 was to record the trainee's answers to printed questions on page 8, which the Assessor asked the trainee after the Simulations were over. The questions included why the trainee made the decisions he or she did during the Simulations. After the trainee answered the questions, he or she left the room.

[59] Dr. Ducharme testified he taught the Assessors not to put too much detail into their notes, to protect the confidentiality of the tests in documents which might be accessible to the public.

[60] The booklet's pages 6 and 7 were the ratings guide or Marking Sheet (Marking Sheet). After the trainee left the room, the Assessor was to go to a private space, consult the Marking Sheet and decide if the recruit had met or not met the Competencies, and record his or her decision.

[61] Once the trainees had completed all the D-II Simulations and their Assessors had filled out the booklet and its Marking Sheet for each trainee, the Assessors would meet in what is called an "Integration" meeting, to share and discuss the performance and marks they had given to each trainee and why they marked the trainee as they did. The concept behind the Integration meeting was that the three Assessors of the same trainee understand would understand each other's decisions and agree on whether the trainee had passed or not passed D-II.

[62] Dr. Ducharme testified that the Assessor could cross-reference his or her decision of "met" or "not met" on the Marking Sheet with the Assessor's notes he or she had recorded on the aforesaid other pages of the booklet.

[63] I find that the Assessment Forms of the Complainant's classmates in D-II for Simulations 5, 6 and 7 are made of pages 2, 3, 4, 5, 6, 7 and 8 of each booklet the Assessors used during and after those Simulations in which to make notes and mark whether each of the Complainant's classmates met" or did not meet the Competencies assessed in those Simulations constitute the documents whose destruction is the subject matter of this part of the present motion.

[64] The Complainant submitted in his opening statement at the hearing that it was important to note that to support his claim of discrimination, he required evidence of how other candidates performed, "…specifically in the D-II process, but those documents were subsequently destroyed".

[65] I find that Dr. Ducharme provided a description of what the Assessment Forms *should have contained*. On the low threshold for arguable relevance, it seems that the Assessment Forms would have been rationally connected to the Complainant's claim in his Complaint, SOP and opening statement that the Respondent held him to a higher standard than it did his classmates, who may not have shared his attributes of race, colour and national or ethnic origin. The Assessors' observational notes contained in the D-II Assessment Forms may have contained information revealing whether the Respondent did in fact hold the Complainant to a higher standard when compared to his classmates.

[66] There is no dispute that the Assessment Forms for the Complainant's classmates no longer exist – they were disposed of. There is also no dispute that the Respondent retained the Complainant's Assessment Forms. In his opening statement at the hearing and in his October 31, 2018 letter to the Tribunal and the parties, Respondent counsel stated that the Respondent would call a witness to testify that the Complainant's classmates' Assessment Forms were disposed of in accordance with the Respondent's document retention policies. In his letter, Respondent counsel also stated that he had advised the Complainant's previous representative that the Complainant's classmates' Assessment Forms "do not exist".

[67] What I find of significance is that the Respondent intends to call a witness to testify about the Respondent's disposal of the D-II Assessment Forms of the Complainant's classmates in accordance with its document retention policy. Therefore, I find that the Respondent has been aware of and has been prepared to address the issue of the destroyed Assessment Forms.

[68] I note that the Respondent has not asserted litigation privilege for documents showing when counsel requested the D-II Assessment Forms or when counsel

reviewed the D-II Assessment Forms before their disposal. Therefore, to the extent that litigation privilege could apply to such documents, I can only assume that the Respondent has waived it.

[69] I also note that evidence of document destruction is not necessarily evidence of discrimination. The Complainant has submitted he may ask the Tribunal to draw an adverse inference with respect to the destruction of the Assessment Forms. The Tribunal obviously cannot and does not draw such an inference in mid-hearing, not having heard all the evidence and arguments. However, I find that in the circumstances of this case, the Complainant's proposed use of the documents is sufficient to establish their arguable relevance.

[70] For the reasons set out above, I find that the Respondent's disposal of the D-II Assessment Forms for the Complainant's classmates has been and continues to be an issue in this inquiry, and therefore documents showing their date of destruction, documents identifying the individuals who reviewed them before their destruction, including counsel, and documents showing when counsel sought those Assessment Forms are arguably relevant to this issue, and should be disclosed. However, the Respondent is not required to make a "list" of such individuals.

[71] While not challenging the arguable relevance of the documents, the Respondent submitted that any probative value they may have is outweighed by the prejudice to the Respondent in the delay in the resumption of the hearing which would be caused by searching for these documents, as set out in *Brickner, supra*, at para. 8. It is to this subject that I now turn.

[72] Although the test for arguable relevance is a low threshold, in the particular circumstances of this inquiry, where we are in fact in mid-hearing, I find it is reasonable to give due consideration to the prejudice inherent in adding to the delay in the resumption of the hearing, which is in no one's interest. The Complainant has known about the destruction of his classmates' D-II Assessment Forms for quite a while and could have requested disclosure of documents related thereto in August 2017, thereby reducing the delay, but he did not do so. I find that the information that the Respondent

destroyed the Assessment Forms is not a surprise to the Complainant. To the extent the Complainant argues that he only learned about the significance of the destroyed documents during Dr. Ducharme's testimony, I find this witness merely served to confirm what the Complainant already ought to have known was contained in those Assessment Forms. The Tribunal must take this factor into account in its order that the Respondent disclose documents related to such destruction.

[73] Moreover, after the Complainant closed his case, and the Respondent had presented part of its case, the Complainant sought an adjournment to retain different representation. The Respondent contested the adjournment; the Tribunal heard the parties' submissions and granted the adjournment. However, I am mindful of the delay which ensued in the resumption of the hearing and the prejudice to the Respondent who opened its case 22 months ago but has still to call the majority of its witnesses to testify.

[74] Finally, I take into account that this is not an inquiry about the destruction of documents. It is an inquiry about allegations of discrimination.

[75] In view of all of the foregoing, the Tribunal is setting a limit in its order on the amount of time the Respondent must spend searching for and disclosing documents relating to the destruction of the Complainant's classmates' D-II Assessment Forms. In doing so, the Tribunal attempts to make the delay arising from such order as short as reasonably possible while allowing for a reasonable time for the disclosure process.

[76] I would add that the fact that the Tribunal orders a party to disclose a document does not mean that any such document is thereby admitted into evidence at the hearing or that significant weight will be afforded to it in the decision-making process (*T.E.A.M. v. M.T.S.,* 2007 CHRT 28, para.4). The admission into evidence of any document is decided at the hearing, based on a different test than the test for disclosure.

VIII. Orders

[77] If it has not already done so, the CBSA is ordered to disclose its document retention policy to the other parties.

[78] The Tribunal orders the Respondent to disclose to the Complainant the Un-redacted D-II Assessment Reports of the Complainant's classmates, with the names of the Complainant's classmates visible. For clarity, the official name for each D-II Assessment Report is "Simulation Exercise Recruit Assessment Report – D-II Series".

[79] The Tribunal hereby designates the Un-redacted D-II Assessment Reports of the Complainant's classmates as confidential, in accordance with section 52 of the *Act.* The Tribunal orders that these documents shall not be disclosed to anyone other than the Complainant and his counsel without the Tribunal's prior permission. The Tribunal further orders that they also be subject to subparagraphs 30(b) through 30(f) of the First Confidentiality Order, which apply with the necessary modifications to the Un-redacted D-II Assessment Reports of the Complainants classmates.

[80] The Tribunal orders the Respondent, during the 60 days following the date of this Ruling, to conduct a diligent search for:

a. documents in its possession which indicate the date of destruction of the Assessment Forms for the Complainant's classmates for Simulations 4, 5 and 6 in Determination Point II;

b. documents in its possession which indicate the names of anyone who reviewed the said Assessment Forms before their destruction, including counsel; and

c. documents in its possession indicating when counsel requested the said Assessment Forms.

[81] The Respondent shall forthwith disclose to the Complainant any documents it may locate which fall into any of the categories set out in paragraph 80.

[82] If, before the end of the 60-day period, the Respondent completes its search for all categories of documents set out in paragraph 80, it shall forthwith so inform the parties and the Tribunal in writing.

[83] If any document the Respondent discloses pursuant to paragraph 80 contains the name of one or more of the Complainant's classmates, the Tribunal designates the name as confidential in accordance with section 52 of the *Act*, and any such document shall be subject to subparagraphs 30(b) through 30(f) of the First Confidentiality Order.

[84] If the Respondent is unable to complete its search for one or more of the categories of documents in paragraphs 80 by September 16, 2019, the Respondent shall on that date advise the parties and the Tribunal, in writing, as to the efforts it has made thus far. The Tribunal will then determine what future action shall be taken in respect of this motion.

[85] In accordance with Rule 3(2)(d), the Tribunal hereby reserves jurisdiction to make such additional orders as are necessary in respect of this motion.

Signed by

Olga Luftig
Tribunal Member

Ottawa, Ontario
July 18, 2019

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1817/4712

Style of Cause: Geevarughese Johnson Itty v. Canada Border Services Agency

Ruling of the Tribunal Dated: July 18, 2019

Motion dealt with in writing without appearance of parties

Written representations by:

David Baker, for the Complainant

David Aaron, for the Respondent